

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD L. KISSNER — PETITIONER
(Your Name)

vs.

STATE OF MICHIGAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Michigan Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Donald L. Kissner #38356

(Your Name)

E. C. Brooks corr/Fac

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(Address)

Muskegon Heights, MI 49444

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether the Petitioner has a due process right to effective assistance of trial counsel during a guilty plea pursuant to *Lee vs. United States*, 583 U.S. ___, 137 S.Ct. 1958 (2017).

Whether the Petitioner has a due process right to have the Michigan courts fully and fairly review the whole of an ineffective assistance of trial counsel claim

LIST OF PARTIES

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

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the Michigan Court of Appeals court appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was July 27, 2018
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution.

The Fourteenth Amendment of the U.S. Constitution.

Michigan Constitution, Art 1, section 17 of 1963.

Michigan Constitution, Art 1, section 20 of 1963.

STATEMENT OF THE CASE

In early 2001 Mr. Kissner was charged with Home Invasion 2d degree in the Shiawassee county circuit court Case No. 01-6092-FH after months of court dates the Prosecution moved for Nolle prosequi dated July 13, 2001. The charges were reinstated as Home Invasion 1st degree, felony firearm, unlawfully driving away an automobile and Breaking and Entering with Intent, Shiawassee county circuit court Case No. 01-7381-FH.

The Prosecution again nolle prosequi charges of Home Invasion 1st degree, felony firearm and unlawfully driving away an automobile.

On January 4, 2002, Mr. Kissner was sentenced to seven months in jail and 18 months of probation. He subsequently pled guilty to violating probation by using marijuana, and on August 9, 2002, the trial court revoked his probation, and sentenced him to 40 to 120 months in prison.

In neither sentencing did the 35th Judicial Circuit court judge advise Mr. Kissner of his right to file an appeal by leave or the right to the appointment of appellate counsel. After several years of post-conviction challenges that Mr. Kissner litigated in pro se, The Michigan Supreme Court eventually issued an order remanding the matter to the trial court to advise Mr. Kissner of his appellate rights and for appointment of appellate counsel if Mr. Kissner requested. See *People vs. Kissner*, 497 Mich 873 (2014) (App. F).

Through Appointed appellate counsel Michael Mittlestat of the Michigan State Appellate Defenders Office filed a motion to withdraw Mr. Kissner's guilty plea as it was unknowingly and involuntary made via ineffective assistance of trial counsel who failed to investigate the charges and defenses.

Mr. Mittlestat filed a motion to withdraw as appointed appellate counsel on May 16, 2016 because of a prior claim of ineffective assistance of appellate counsel in a unrelated case in which appointed appellate counsel was from the State Appellate Defenders Office.

Through newly appointed appellate counsel Roman J. Tyszkiewicz moved to withdraw Mr. Kissner's guilty plea. Oral arguments for the motion to withdraw plea were held on October 11, 2016, and Judge Stewart denied the motion with his order on October 28, 2016 (App. G). During the October 11, 2016 hearing counsel for Mr. Kissner requested an evidentiary hearing to establish the ineffective assistance of trial counsel claim on the record. Appellate counsel argued that the record should be developed, including the trial attorney's discussions with Mr. Kissner regarding his possible defenses to the charges.

Mr. Kissner's affidavit asserts that his trial attorney informed him that he borrowing a shotgun without intending to permanently deprive the owner of the gun, was not a defense to the charge of Home Invasion in the 1st and Breaking & Entering with Intent. Mr. Kissner relied on this advise in entering a guilty plea on November 20, 2001.

Judge Stewart denied Mr. Kissner's request for an

evidentiary hearing and concluded that Mr. Kissner's affidavit did not comply with the court rules and did not support his ineffective assistance of trial counsel claim. The court of Appeals disagreed and remanded Mr. Kissner's case to the circuit court for an evidentiary hearing regarding his claim of ineffective assistance of his trial attorney, Mr. Douglas E. Corwin Junior. The evidentiary hearing was held on January 17, 2017 before Judge Stewart and the following witnesses testified: Mr. Corwin, Mr. Kissner, and Mrs. Lise Marie Kissner.

Mr. Corwin testified that he could not remember specific facts on the case however he did recall, *sue sponte*, that Mr. Kissner admitted to him that he stole the shotgun. Mr. Corwin's recollections of this case conflicted with 1, the billing statement he submitted to the court, 2, Mr. Kissner plea and evidentiary hearing testimony, 3, the preliminary examination transcripts, 4, the police reports, and 5, the pre-sentence investigation report.

Mr. Corwin ignored appellate counsel's request for a copy of Mr. Kissner's file and for information regarding the case. Appellate Counsel served a subpoena on Mr. Corwin's to appear at the evidentiary hearing and produce a copy of the client file, however, Mr. Corwin did not accept the subpoena or respond to appellate counsel's request and it was unclear if Mr. Corwin would testify at the evidentiary hearing. On the morning of January 17, 2017 evidentiary hearing, appellate counsel met with Mr. Corwin and the prosecuting attorney. During that meeting appellate counsel discovered that Mr. Corwin had contacted the Prosecutor to discuss his testimony. Mr. Corwin disclosed what he believed to be confidential client information to the Prosecutor and admitted that he could not locate Mr. Kissner's client file.

A. Testimony of Douglas E. Corwin, Jr.,

Mr. Corwin made several inconsistent statements during the evidentiary hearing. Mr. Corwin testified that he visited Mr. Kissner multiple times during the course of his representation, including after his initial appointment, and prior to all the District Court hearings. However, when confronted with his billing statement, Mr. Corwin conceded he only met with Mr. Kissner's on the day of the scheduled court hearings and could not recall the exact time of his meetings. Mr. Corwin confirmed that he provided the police reports and charging documents to Mr. Kissner, but never sent correspondences regarding the status of the case, or correspondences detailing Mr. Kissner's legal defenses or risk of proceeding to trial.

The only investigation conducted by Mr. Corwin was speaking with Mr. Kissner and his mother, reviewing the police report, and speaking with the Prosecutor. Mr. Corwin did not interview the complainant, Mr. Kanthe, and could not remember if he reviewed the preliminary examination transcripts.

Mr. Corwin testified that Mr. Kissner never informed him that he borrowed the shotgun from the complainant many times in the past. Mr. Corwin could not remember seeing in either the police report or the presentence investigation report that the complainant admitted that Mr. Kissner borrowed his shotgun many times for hunting. The complainant's statement's on page 2 of the presentence investigation report, which is extracted from the police report, provides that Mr. Kissner used the shotgun many times and knew where to find it.

Mr. Corwin could not remember if he advised Mr. Kissner that intent to steal was relevant or a potential defense to the charge.

Initially Mr. Corwin indicated he may have informed Mr. Kissner that the jury could find him not guilty if they believed he borrowed the gun. Upon further questioning Mr. Corwin could not specifically recall if he detailed a defense strategy to Mr. Kissner and testified that, "I remember having a conversation with him, explaining what his trial rights were, and what he wanted to do. I explained to him what the plea offer was, And I will tell you, he jumped on it." Mr. Corwin could recall that Mr. Kissner informed him, "That he did take the gun - he needed money, or something."

Mr. Corwin denied ever threatening to withdraw as Mr. Kissner's attorney because of a conflict of interest in representing another individual on a unauthorized driving away an automobile (UDAA) case. It was later discovered and brought to Judge Stewart's attention during the evidentiary hearing that Mr. Corwin represented James Newell on a UDAA case during the pendency of Mr. Kissner's case.

Mr. Corwin further testified that he represented Mr. Kissner on 3 separate occasions and confirmed that Mr. Kissner previously raised the issue of ineffective assistance of counsel. Mr. Corwin indicated that he testified against Mr. Kissner in a 2009 case involving tampering with evidence and obstruct of justice. Mr. Corwin testified that Mr. Kissner confided to him that he intended to steal the shotgun and his statements to the police that he borrowed the gun to go hunting wasn't true. Although Mr. Corwin believe Mr. Kissner was not being truthful during the November 20, 2001 plea hearing regarding his intent to use the shotgun for hunting, he did not correct the record at that time.

Mr. Corwin could not articulate if specific intent to steal the shotgun could be used as a valid defense in Mr. Kissner's home

invasion and breaking & entering case. During cross-examination Mr. Corwin testified as follows:

(Mr. Tyszkiewicz) Q. Yeah. I'm not saying what the jury would've done, but if they did, if they believed Mr. Kissner, if they believed that he did not intend to steal the gun, but only borrowed it for hunting, would he have been found not guilty - if the jury believed it?

(Mr. Corwin) A. In defending him I would have tweaked that a heck of a lot, because just that statement, in and of itself, shows that he went into the house, without permission, and took something. So, I would have had him testify or tweak, or review with him at depth to: was this a standard relationship you had with him? was this ongoing? And what was your intent? And, things like that. So, there would have been a lot more involved than what you're placing on the record right now.

Q. Do you think if he testified - and I'm trying to find out your understanding of his charges. If he testified he took it, but did not intend to steal it, would that - would he have been convicted of home invasion -- I -- in your legal opinion?

Judge Stewart did not allow appellate counsel to question Mr. Corwin further regarding his legal opinion on valid defenses. of home invasion and concluded, "I think everybody understands that if a jury believes that Mr. Kissner did not intend to permanently deprive Mr. Kanthe of his weapon, then he would be not guilty of home invasion. I think everybody understands that.

B. Testimony of Donald Lee Kissner.

Mr. Kissner testified that in 2001 he suffered from a wide range of mental illness including bipolar disorder, borderline personality disorder, schizoaffective traits, and suicidal tendencies. Mr. Kissner was treated with medication including, but not limited to, Prozac, Zyprexa, antipsychotic medication, Depakote, Vraylar, and Caripazine. Mr. Kissner indicated that during the pendency of the home invasion 1st charges, while he was in jail, he did not receive treatment or medication for his mental illness. Mr. Kissner testified that he could not post bond and remained in jail during the pendency of this case.

Mr. Kissner testified that Mr. Corwin was appointed to represent him after his home invasion 2nd charge was dismissed and the home invasion charge was issued. Mr. Kissner confirmed Mr. Corwin only met with him on the day of his court hearings usually a few minutes prior to the scheduled hearing. Mr. Kissner testified that Mr. Corwin never sent him correspondences, or interviewed any witnesses regarding his case.

Mr. Kissner testified that he specifically informed Mr. Corwin that he only borrowed the shotgun from the complainant for hunting and did not intend to keep the shotgun. Mr. Kissner testified that Mr. Corwin explained to him that his intent to borrow the shotgun was not enough, and he needed something more to convince a jury.

Mr. Kissner testified that Mr. Corwin informed him that he would withdraw from this case if he did not enter a guilty plea, since he represented James Newell in a UDAA case. Mr. Kissner indicated that his mother was a witness to the conversation.

Mr. Kissner testified that he entered his guilty plea before Judge Clarkson on the date scheduled for his preliminary examination. Mr. Kissner testified that he met with Mr. Corwin in the courtroom right before the scheduled preliminary examination, where Mr. Corwin detailed the plea agreement. Mr. Kissner later requested that Mr. Corwin withdraw his plea via a letter, however Mr. Corwin never responded to the letter.

During cross-examination the Prosecution attempted to impeach the credibility of Mr. Kissner with hearsay statements and prior conviction. Appellate Counsel objected to the use of Mr. Kissner's prior conviction and hearsay statements but was overruled by Judge Stewart.

C. Testimony of Lisa Marie Kissner.

Mr. Kissner's mother, Lisa Marie Kissner, testified that she heard Mr. Corwin tell her son that he could not represent him because of another case, and that Mr. Kissner needed to enter a plea so Mr. Corwin could continue to represent him.

D. Judge Stewart's findings of fact on the record.

Judge Stewart ruled that because Mr. Kissner admitted at the plea hearing that he entered the house to look for something to steal that it undermines his claim that he had a valid defense. Judge Stewart concluded that since Mr. Kissner allegedly admitted to his trial attorney that he intended to steal the shotgun, he could have only testified in the narrative at trial and that the court could not speculate to what the result would have been. Judge

Steward concluded that Mr. Kissner's credibility was suspect since he raised the claim of ineffective assistance of counsel against Mr. Corwin after Mr. Corwin testified against him on a different case. Judge Steward opined that Mr. Corwin's performance was constitutionally effective and did not deprive Mr. Kissner of his constitutional right to counsel.

E. Michigan Court of Appeals opinion and order.

The Court of Appeals in *People vs. Kissner*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2018 (Docket No. 335602), 2018 Mich App Lexis 354 concluded that the trial court did not err by denying Mr. Kissner's claim that counsel was ineffective and did not abuse its discretion by denying defendant's motion to withdraw his plea. The Court of Appeals refused to consider Mr. Kissner's claim that trial counsel failed to investigate and threatened to withdraw as defendant's attorney because these issues were not initially raised in Mr. Kissner's application for leave and supporting brief. *Id.* at 3. The Court of Appeals concluded that Mr. Kissner's acknowledgment at the plea hearing that he entered the home in order to find something to steal undermined his claim that he had a valid defense. *Id.* at 4. The Court of Appeals affirmed the trial court's determination that Mr. Kissner's credibility was suspect because he raised this issue only after counsel testified against him on charges of obstruction of justice. *Id.* at 4. The Court of Appeals also affirmed the trial court's finding that Mr. Kissner was not credible because he told trial counsel that he intended to steal the shotgun. *Id.* at 5. The Court of Appeals opined that since Mr. Kissner admitted that the witness previously testified that he did not have permission to take the shotgun in

September 2000, he did not have a valid defense by merely showing, "defendant had borrowed the shotgun on other occasions". *Id* at 5. The Court of Appeals concluded that since trial counsel "testified that he believed that he would have informed defendant that he had the option to go to trial and, if the jury believed that he intended only to borrow the shotgun, than he could be acquitted of the charges. Accordingly, trial counsel understood that lack of intent to steal was a valid defense and had he provided competent advice." *Id* at 5.

F. The Michigan supreme court's order.

The Michigan supreme court in *People vs. Kissner*, Case No. 157550, —Mich—; 2018 Mich Lexis 1483 denied to grant leave to appeal and stated it was not persuaded by the question presented.

REASONS FOR GRANTING THE PETITION

I. The Michigan Trial court, Court of Appeals And Supreme Courts decision are contrary to *Lee vs. United States*, 583 U.S. —; 137 S.Ct 1958 (2017); *Strickland vs. Washington*, 466 U.S 668 (1984) where this Court recognized and held the constitutional rights to the effective assistance of trial counsel during Plea's.

Petitioner asserts that he is entitled to the effective assistance of counsel during his criminal cases. *Strickland vs. Washington*, 466 U.S 668 (1984). See *McGoy vs. Louisiana*, 138 S.Ct 1500, 1503-1504 (2018); *Lee vs. United States*, 583 U.S. —; 137 S.Ct 1958 (2017); *Porter vs. McCollum*, 558 U.S 30 (2009); *McMann vs. Richardson*, 397 U.S 759 (1970); U.S Const. Am's VI, XIV; Mich. Const. 1963, Art 1, §§ 17, 20.

II. The Michigan courts have failed to Grasp between the difference of constitutionally effective assistance of trial counsel during a guilty pleas and constitutionally ineffective assistance of trial counsel during guilty pleas.

A. Should Petitioner be permitted to withdraw his plea because his plea was not knowingly entered since he did not receive effective assistance of counsel in entering the Plea; the record shows the Petitioner's trial Attorney was ineffective because he did not properly investigate the case or inform the Petitioner that he had a valid defense to the charge, and then coerced the Petitioner into accepting the plea because he threatened to withdraw from the case if Petitioner did not plea guilty.

The Petitioner seeks to withdraw his plea as it was not knowingly entered, due to incomplete or inaccurate advise from his attorney and because his attorney did not properly investigate the case or inform him of a valid defense and then coerced him into pleading guilty ⁿ¹. The sixth Amendment guarantees the right to the effective assistance of counsel during both the plea and sentencing proceedings. see generally Strickland vs. Washington, 466 U.S 668 (1984); U.S Const. Am's VI, XIV; Mich. Const. 1963, Art 1, §§ 17, 20.

FOOTNOTE

n1. The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendant's cannot be presumed to make critical decisions without counsel's advice. Lee vs. United States, 583 U.S —, —; 137 S.Ct 1958, 1961-1962, 1964-1969 (2017); Leatherman vs. Palmer, 583 F. Supp. 2d 849, 853, 860, 863 (W.D. Mich. 2008).

END FOOTNOTE

To establish ineffective assistance of counsel, defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that but for his attorney's error or errors, a different outcome reasonably would have resulted. *Strickland vs. Washington*, 466 U.S. 668 (1984). In other words, defendant seeking plea withdrawal must show that there is a reasonable probability that but for the errors defendant would not have pled. *Hill vs. Lockhart*, 474 U.S. 52 (1985). Prejudice is established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*, only when the defendant understands the consequences of the plea, can the plea be considered voluntary. *Brady vs. United States*, 397 U.S. 742 (1970) **n2**.

FOOTNOTE

n2. Michigan courts have long stressed the importance of a knowing and voluntary plea and the role that competent counsel plays in the validity of pleas. *People vs. Merhige*, 212 Mich 601, 609 (1920); *In re Valle*, 364 Mich 471 (1961) where the court stated:

"In order to be accepted, a plea of guilty in a criminal case must be entirely voluntary, by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance. *Id* at 477.

See further *Lee vs. United States*, 583 U.S. —, —; 137 S.Ct 1958, 1961-1962, 1964-1969 (2017); *In re Hemingway*, 97 A.3d 896, 901-902 (2014); *In re Quinn*, 816 A.2d 425, 427-429 (2002).

END FOOTNOTE

Ineffective assistance of trial counsel may may render a guilty plea involuntary and unintelligent, where counsel renders deficient performance in giving improper advice or failing to raise an

issue **n3**, and there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted instead on going to trial. *Hill vs. Lockhart*, 474 U.S. at 58-59; *Lee vs. United States*, 583 U.S. —, —; 137 S. Ct 1958; *Padilla vs. Kentucky*, 559 U.S. 356 (2010); *People vs. Spencer*, 192 Mich App 146, 151-152 (1991) "Guilty pleas have been found to be involuntary or unknowing on the basis of ineffective assistance of counsel where the defense counsel has failed to explain to his client the nature of the charges or to discuss possible defenses to the charges to which he is pleading guilty." *People vs. Thew*, 201 Mich App 78, 91-92 (1993), citing Adequacy of defense counsel's representation of criminal client regarding guilty pleas, 10 A.L.R. 4th 8 (originally published in 1981), §§ 25-26, pp. 130-151.

FOOTNOTE

n3. See *Lee vs. United States*, 583 U.S. —, —; 137 S. Ct 1958, 1961-1962, 1964-1969 (2017). See further *McCoy vs. Louisiana*, 138 S. Ct 1500, 1503-1504 (2018); *Missouri vs. Frye*, 566 U.S. 133; 132 S. Ct 1399, 1402-1406 (2012); *Lafley vs. Cooper*, 566 U.S. 156; 132 S. Ct 1376, 1385 (2012); *Leatherman vs. Palmer*, 583 F. Supp. 2d 849, 853, 863 (W.D. Mich. 2008); *People vs. Douglas*, 496 Mich 587, 593-595 (2014); *People vs. Johnson*, 386 Mich 305, 308-316 (1971). also see 46 Geo. L. J. Ann. Rev. Crim. Proc. 571, 593-604 (2017).

END FOOTNOTE

under *Strickland*, supra deficient performance is performance that is objectively unreasonable in light of professional norms. *Strickland*, 466 U.S. at 687-688; *Rickman vs. Bell*, 131 F.3d 1150, 1154-1155 (6th. Cir. 1997). under these rules, proper advice regarding a plea offer must include an accurate description of the risks and hazards of trial, including possible pretrial motions and defenses. In the context of investigations, review of trial counsel's conduct of pretrial investigations must consider not only the quantum of evidence already known to

counsel, but also whether the known evidence would lead a reasonable lawyer to investigate further. *Padilla vs. Kentucky*, 559 U.S. at 391 n4. *Rompilla vs. Beard*, 545 U.S. 374, 383 (2005).

FOOTNOTE

n4. See *People vs. Lance*, 500 Mich 885 (2016); *Brizendine vs. Parker*, 644 Fed. Appx 588, 592-594 (6th. cir. 2016); *People vs. Ackley*, 497 Mich 381, 389-397 (2015) (citing *Hinton vs. Alabama*, 134 S.Ct 1081, 1088 (2014)); *Couch vs. Booker*, 650 F. Supp.2d 683, 695-696 (E.D. Mich. 2009), aff'd in 632 F.3d 241 (6th. cir. 2011); *Porter vs. McCollum*, 558 U.S. 30, 38-42 (2009); *Von Moltke vs. Gillies*, 332 U.S. 708, 711-719 (1947). See further 37 Ohio. N.U.L Rev 597 at n33 citing *Hargrave-Thomas vs. Yukins*, 236 F. Supp. 2d 750, 769 (E.D. Mich. 2002).

END FOOTNOTE

B. The Record Supports Petitioner's Claim that he unknowingly had a valid defense to the Charges.

Here, both the home invasion charge that was dismissed and the Breaking and Entering charge which the petitioner pled guilty to, both required proof of entry with intent to commit or actually Commission of a Crime, in this case larceny n5. MCL 750.110; MCL 750.110 a. Larceny is a specific intent crime that requires that the Petitioner took property with intent to permanently deprive the owner of it. *People vs. Ainsworth*, 197 Mich App 321, 324 (1992); *People vs. Kyllonen*, 402 Mich 135, 148 n14 (1978) n6. Petitioner testified he pled based on a mistaken belief that he had no defense to the breaking and entering (or home invasion) Charges.

FOOTNOTE

n5. Larceny is an element of the crime which must be proving.

see *People vs. Brownfield*, 216 Mich App 429, 431, 434 (1996); *People vs. Frost*, 148 Mich App 773, 776 (1985); *People vs. Coleman*, 130 Mich App 639 (1983) also see *Dabney vs. State*, 858 A.2d 1084, 1089, 1093 (Maryland, 2004); *Hucks vs. Commonwealth*, 531 S.E.2d 658, 660-662 (Virginia, 2000); *State vs. Allen*, 25 N.E.3d 427, 429-431 (2014) (Ohio); *State vs. Chambers*, 716 S.E.2d 876 (N. Carolina, 2011).

n6. see further *People vs. March*, 499 Mich 389, 401-416 (2016).

END FOOTNOTE

At the conclusion of the evidentiary hearing Judge Steward did not believe that Petitioner intended to borrow the shotgun and concluded that his statement during the plea hearing, "undermines his claim that he had a valid defense". The court of Appeals agreed with the trial court and concluded:

"Moreover, the trial court's findings are not clearly erroneous because defendant acknowledged at the plea hearing that he entered the home in order to find something to steal. Although he subsequently stated that he was going to use the gun for hunting, this statement explaining his purpose for the use of the gun did not negate his admission that he stole the shotgun. *Kissner*, unpub. op. at 4". See (App. A).

Judge Steward's belief regarding Petitioner guilty or innocence is irrelevant to Petitioner's claim of ineffective assistance of Counsel n7.

FOOTNOTE

n7. The trial Judge's conclusion is contrary to clearly established federal law as determined by this Court. See *Williams vs. Taylor*, 529 U.S 362, 405-406, 409, 410-411 (2000); *Mitchell vs. Mason (on Remand)*, 325 F. 3d 732, 738, 740 (6th. cir. 2003).

END FOOTNOTE

The Court of Appeals in Thew concluded that the issue is not whether the trial court believes that the defendant guilty or innocent of the charges, but whether defendant had a valid defense to the charges:

Although defendant claimed, and continues to claim, that he is innocent of felony murder, the trial court did not believe him. Here we note the issue of innocence is whether defendant is innocent of the offense of which he pleaded guilty to. In other words, the issue is not whether the trial court believes him but whether defendant has a valid defense to the charge of felony murder, even if he might be guilty of other offenses, such as second-degree murder and first-degree criminal sexual conduct. On the existing record, we believe that there is a basis for defendant's claim of innocence of the specific offense to which he entered a plea of guilty insofar as there is a possible defense to the charge of felony murder. First, defendant's testimony at the plea hearing leaves open the question whether there was evidence beyond a reasonable doubt that he killed the victim, not because she would tell other's, but because he was angry with her. Thew, 201 Mich App at 96 (emphasis supplied).

Contrary to the Court of Appeals assertion, Petitioner never testified that he entered the house to specifically steal the shotgun. At the Plea hearing, Petitioner reluctantly admitted to the trial Court's questioning that he entered the complainant's home "to look for something to steal":

The Court: What was your purpose for going into his house?

The Defendant: I can't tell you.

The Court: Was your purpose to look for something to steal?

The Defendant: Yeah, yes.

The Court: It was your purpose when you entered the house to look for something to steal?

The Defendant: Yes.

However Petitioner never testified that he intended to keep the shotgun. The record shows that after he entered the house he took a shotgun that he knew was placed behind the front door of the house. The record shows that he went home with the gun and was planning on using it for hunting, as "opening day" was approaching. Although Petitioner admitted to the trial court that he was looking for something to steal, there is no evidence that Petitioner actual stole the Shotgun since he contends he intended only to borrow the Shotgun then return it after hunting. According to Petitioner he had repeatedly borrowed the Complainant's gun as an ongoing practice, and routinely used it and then returned it. See Presentence investigation Report (PSIR), Agent's Description, Page 2 ("Petitioner stated that he had the .410 Shotgun but the complainant let him borrow it.... He stated he just borrowed it for deer hunting."); The statements of the Complainant supports this history. See PSIR page 2, Agent's Description. (Donny Kissner used the shotgun on many occasions and knew where to find the gun.).

Given that, there was more than sufficient evidence from which the fact finder could conclude there was no intent to deprive, and thus no felonious intent in entering the residence. If a defendant in good faith believed that he had the right or permission to take an item of property, he could not be guilty of larceny in taking because there would be no felonious intent. *People vs. Holcomb*, 395 Mich 326 (1975); *People vs. Hillhouse*, 80 Mich 580 (1890); *People vs. Cain*, 238 Mich App 95 (1999). This is so even if the defendant's belief is mistaken. *Cain*, supra. Given the history and pattern found in the record of the loaning and use of the gun, the lack of felonious intent is highly plausible.

Mr. Corwin did not believe that Petitioner's intent to steal the Shotgun was relevant to his guilty or innocence. During the evidentiary hearing Mr. Corwin was asked if the jury believed Petitioner did not intend to steal the gun, but only only borrowed the gun, could he have been convicted of the charge. Mr. Corwin testified that, "in defending him I would have tweaked that a heck of a lot, because just that statement, in and of itself, shows that he went into the House without permission, and took something". Mr. Corwin mistakenly believed that the charge of home invasion did not require the intent to commit a crime, in this case larceny **n8**.

FOOTNOTE

n8. The elements of the crime of breaking and entering a building with intent to commit larceny (or home invasion) are: (1) the breaking and entering of, (2) a building or occupied dwelling with, (3) felonious intent. *People vs. Frost*, 148 Mich App 773, 776 (1985); *People vs. Brownfield*, 216 Mich App 429, 431, 434 (1996). The court should not there failure to provide one or more of the elements in a criminal case is a substantial and/or valid defense to the charge. *People vs. Agar*, 314 Mich App 636, 646 (2016); *Leatherman vs. Pulmer*, 583 F.supp.2d 849, 853, 863 (W. D. Mich. 2008); *Barnes vs. Elo*, 231 F.3d 1025, 1029 (6th.cir. 2000); *Rickman vs. Bell*, 131 F.3d 1150, 1154-1160 (6th.cir. 1997).

END FOOTNOTE

Mr. Corwin mistaken belief regarding the elements of breaking and entering is corroborated by Petitioner's testimony. Petitioner testified that he told Mr. Corwin that he only borrowed the Shotgun for hunting from the complainant and he did not intend to keep the Shotgun. Petitioner testified that Mr. Corwin responded that his intent to borrow the Shotgun was not enough and he needed something more to convince a jury. Petitioner, did not realize that a good faith belief that he had permission to use the Shotgun would negate the breaking and entering charge. Nor was he aware that if he

intended only to borrow the gun thinking he had ongoing or implied permission to use it, he could not be guilty of larceny. He was not made aware of this lawyer and he pled thinking that "stealing" meant any "taking" regardless of the intent or belief of the taker. Had he known this, he would have refused the plea offer and opted to go to trial so that he could present evidence and testimony that showed he lacked the requisite specific intent.

The Court of Appeals concluded, without citation to the record, that the, "trial counsel testified that he believed that he would have informed defendant that he had the option to go to trial and, if the jury believed that he intended only to borrow the shotgun, then he could be acquitted of the charges. According, trial counsel understood that lack of intent to steal was a valid defense and he provided competent advice." Kissner, unpub. op at 5, see (App. A). It seems the Court of Appeals relied on the following testimony from the evidentiary hearing:

Q. Did you advise Mr. Kissner that - did you ever tell Mr. Kissner that he could be found not guilty of the charges if the jury believed that he did not intend to steal the gun?

A. I believe I would have phrased it very similar to that. I would have explained to him - if you want me to continue? That he has a - there's a couple of ways to handle these cases. Very rare does the does the prosecution ever, just on their own whim, dismiss them. But, I'd say: Your options are we go to trial, explain to him it's a jury of twelve (12) people, that if they believe that his intent was to borrow the gun - or, as he had indicated, I remember in the police report that he said, told the police that it was intent to borrow the gun - that could be acquitted of the charges. We could have a hung jury if one person believes; if not, it goes on from there

Q. Do you definitely remember having this conversation with Mr. Kissner back in.

A. I remember -- well, I remember having a conversation with him,

explained to him what the plea offer was. And I will tell you, he jumped on it. He said: I want to do that. He also told me that he did take the gun- he needed money, or something.

Mr. Corwin believed he would have advised Petitioner if he had a valid defense but could not state that he actually advised Petitioner of a defense in this particular case *19*.

FOOTNOTE

19. Petitioner's case was not shipwrecked by bad seamanship, it was launched. *Jones vs. Cunningham*, 313 F.2d 347, 353 (4th Cir. 1963). See further *People vs. McFall*, 309 Mich App 377, 383 (2015); *Nelson vs. Smith*, 504 F. Supp. 1139, 1145 (E.D. NY. 1981) ("[5]... Timely appointment becomes a cruel joke when the Petitioner officially has a lawyer, but is actually being ignored."), same in *Holloway vs. Arkansas*, 435 U.S. 475, 490 (1978); *Beasley vs. United States*, 491 F.2d 687, 692 (6th Cir. 1974); *Avery vs. Alabama*, 308 U.S. 444, 446 (1940), also see *Hargrave - Thomas vs. Yukins*, 236 F. Supp. 2d 750, 769 (E.D. Mich. 2002).

END FOOTNOTE

Mr. Corwin also testified that if the jury believed that Petitioner's intent was to borrow the shotgun, he could be acquitted of the charges. Mr. Corwin equivocated on what the jury must do if they believed Petitioner did not intend to steal the shotgun. Mr. Corwin believed in error that the jury had options if they concluded Petitioner did not intend to steal the shotgun. However the only option is a finding of not guilty if the jury believed Petitioner did not intend to steal the shotgun.

Moreover the Prosecution objected to appellate counsel's questioning of Mr. Corwin's understanding of the elements of breaking and entering and home invasion. Judge Steward sustain the objection and ruled that, "I think everybody understands that if a jury believes that Petitioner did not intend

to permanently deprive Mr. Kanthe of his weapon, then he would be not guilty of home invasion. I think everybody understands that. Although Judge Steward understood that intent to deprive was required for a conviction, Mr. Corwin did not. Judge Steward's ruling is clear error since Mr. Corwin's testimony shows he did not understand that lack of intent to commit a larceny was a valid defense to the charge.

Furthermore Mr. Corwin disclosure that Petitioner allegedly admitted to him that he intended to steal the Shotgun is irrelevant to the issue regarding whether Petitioner had a valid defense to the charges. The admission of stealing the shotgun is irrelevant to the issue regarding whether Petitioner had a valid defense to the charges. The admission of stealing the shotgun, which Petitioner strongly denies, does not leave him without a valid defense.

~~There is no record or claim by Mr. Corwin that Petitioner intended to~~ testify falsely at trial which would have implicated Michigan Rules of Professional conduct 3.3 and the variety of options detailed in the comment section and the American Bar Association interpretation of this rule. If Petitioner told Mr. Corwin he intended to lie at trial, Mr. Corwin could have requested to withdraw from the case or only asked the Petitioner testify about things he believed to be true at trialⁿ¹⁰. Mr. Corwin could not refer to any false facts testified to by his client during closing arguments.

FOOTNOTE

n10. See Nix vs. Whiteside, 475 U.S. 157 (1986). See further McCoy vs. Louisiana, 138 S.Ct 1500, 1503-1504 (2018).

END FOOTNOTE

However, Mr. Corwin's allegation regarding Petitioner's confession is suspicious since Mr. Corwin did not alert the trial court at the November 20, 2001 plea hearing that Petitioner hunting claim was untrue. Mr. Corwin's testimony that Petitioner "jumped" on the plea offer ignores the fact that Petitioner vigorously contested these charges and a

preliminary examination hearing was conducted before the charges were initially dismissed. *Rompilla vs. Beard*, 545 U.S. at 383.

In any event, Mr. Corwin could have presented a valid defense without Petitioner's testimony. Mr. Corwin could have cross-examined the complainant regarding Petitioner's history of borrowing the shotgun and produced other witnesses that showed Petitioner had borrowed the shotgun multiple times in the past. Since Petitioner, entered his plea unaware that he had a colorable if not a valid defense to the breaking and entering and home invasion charges due to his counsel's complete failure to discuss the matter with him, the plea was not known and voluntary *n11*. *Thew*, 201 Mich App at 90-92. He is therefore entitled to a plea withdrawal.

FOOTNOTE

n11. Before a criminal defendant waives a right, It must be based knowingly and intelligently waived. see *People vs. Merhige*, 212 Mich 601, 611-613 (1920). see further *Carnley vs. Cochran*, 369 U.S 506, 513 (1962); *Lee vs. United States*, 583 U.S —, —; 137 S.Ct 1958, 1961-1962; 1964-1969 (2017); *In re Hemingway*, 97 A.3d 896, 901-902 (2014).

END FOOTNOTE

Mr. Corwin admitted that he did not interview any witnesses, and only met with Petitioner at the days of his scheduled court hearings, usually right before the start of the hearing. Mr. Corwin was not aware that the complainant's statements to the police corroborated petitioner's claim that he had borrowed the shotgun in the past. Mr. Corwin failed to review the preliminary examination transcripts which contain inconsistent statements by the complainant when compared to his previous statements to the police *n12*.

FOOTNOTE

012. Effective assistance includes investigative and asserting all substantial defenses. *Gersten vs. Senkowski*, 426 F.3d 588, 614 (2d. Cir. 2005); *Kimmelman vs. Morrison*, 477 U.S. 365 (1986); *Beasley vs. United States*, 491 F.2d 687, 696 (6th Cir. 1974). Strategic choices made after thorough investigation of law and fact relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation In other words, "counsel has a duty to make reasonable investigations or to make a decision that makes particular investigations unnecessary". *Strickland*, 466 U.S. at 691; *Wiggins vs. Smith*, 539 U.S. 510, 527 (2003). A failure to investigate claim can certainly constitute ineffective assistance. *Washington vs. Smith*, 219 F.3d 620, 630 (7th Cir. 2000); *Rompilla vs. Beard*, 545 U.S. at 383-393.

END FOOTNOTE

Defense counsel has a duty to investigate all potentially viable defenses and to present all substantial defenses. *People vs. Shahideh*, 277 Mich App 111, 118 (2007), rev'd on other grounds 482 Mich 1156 (2008). see further *Strickland*, 466 U.S. at 691; *Wiggins*, 539 U.S. at 525. Defense counsel can be ineffective if he settles on a defense strategy without any prior investigation of the case. *People vs. Trakhtenberg*, 493 Mich 38, 43 (2012), see further *Plumlee vs. Sue Del Papa*, 426 F.3d 1095, 1106-1107 (9th Cir. 2005). Ineffective assistance of counsel can take the form of a failure to investigate and present a particular defense if the defendant made a good-faith effort to avail himself of a substantial defense. *People vs. Kelly*, 186 Mich App 524, 526 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial". *Id.* see further *People vs. Payne*, 285 Mich App 181, 190 (2009); *People vs. Hoyt*, 185 Mich App 531, 537-538 (1990).

Mr. Corwin's failed in his duty to obtain a basic understanding of the facts in this case, including his client's relationship with the complainant, and the complainant's statement to the police and preliminary examination testimony. The fact that Petitioner had vigorously defended the charges in the past should have alerted Mr. Corwin that he had a valid defense. Also Mr. Corwin request to have Petitioner competency evaluated should also have

raised a red flag that Petitioner may have trouble understanding the charges against him and his possible defenses. Mr. Corwin's complete failure to investigate and present any defense was ineffective assistance of counsel.

D. Mr. Kissner was coerced into accepting the Plea agreement.

Both Petitioner and his mother testified that Mr. Corwin indicated he would withdraw his representation if Petitioner did not accept the Plea agreement. Mr. Corwin denied having the conversation and indicated that there was no conflict, however he cited to another defendant by the name of Lucas O'Flynn. The record demonstrates that Mr. Corwin represented James Newell in an unrelated UDAA case throughout Petitioner's case.

Petitioner was also charged with an unrelated UDAA which was subsequently dismissed after he entered his guilty plea.

Mrs. Kissner confirmed that Mr. Corwin threatened to withdraw as her son's attorney because of a conflict of interest. Mrs. Kissner's testimony was not discredited and her credibility was not challenged. Although Mr. Newell was not a co-defendant in Petitioner's UDAA case, Mr. Corwin's intent to withdraw from the case suggests that he did not realize that the UDAA cases were separate. In any event, Petitioner believed that he would lose his attorney regardless if there was a actual conflict, if he did not accept the plea agreement.

Furthermore at the November 20, 2001 plea hearing the District Court Judge asked Petitioner if anyone made promises for him as to how he would be sentenced if the Plea was accepted and if anyone promised that the court would be easy on him, simply place him on probation. The District Court also asked Petitioner if anyone promised

him anything besides the plea bargain to get him to plead guilty. The District court did not inquire if he was satisfied by his attorney representation, or if he needed to retain another attorney if he proceeded to trial.

Judge Steward made no finding of fact regarding if Mr. Corwin threatened to withdraw as petitioner's attorney if he did not plead guilty.

E. Mr. Corwin's disclosure of what he believed to be confidential client information casts doubt on his credibility as a witness.

~~The Court of Appeals ignored whether Mr. Corwin disclosed~~ what he believed to be confidential client communication to a 3rd party, the prosecuting attorney, prior to the evidentiary hearing. Although Petitioner strongly denies that he told Mr. Corwin he stole the shotgun for money, Mr. Corwin believes this to be true and, therefore, it is confidential client information. The Michigan Rules of Professional responsibility require that even after the representation has ended, that the duty of confidentiality continues. see Michigan Rules of Professional Conduct 1.6 (confidentiality of information). see further People vs. Van Alstine, 57 Mich 69 (1885); Alderman vs. People, 4 Mich 414 (1857). And it goes without saying that trial counsel should not go out of his way to purposely harm his former client; Related points to keep in mind from this example are that the clients file should be promptly turned over to successor counsel upon request. M.R.P.C 1.16(d). Mr. Corwin ignored appellate counsel's request for Petitioner's file, and did not respond to a request for information regarding the case.

Appellate counsel forwarded a subpoena to Mr. Corwin seven days

prior to the evidentiary hearing requesting Petitioner's client file and information on the case and Mr. Corwin ignored appellate counsel's request although he testified he received the subpoena. Instead of responding to the subpoena and request for information, Mr. Corwin contacted the prosecuting attorney before the evidentiary hearing to discuss what he believed to be confidential client information. American Bar Association (ABA) Ethics opinion 10-456 provides that the ABA Model Rule allows disclosure of confidential communications to the extent the lawyer reasonably believes necessary to respond to allegations in any proceeding concerning the lawyer's representation of his client, and that the lawyer may act in self-defense only to defend against charges that imminently threaten the lawyer with serious consequences. The ABA opinion addressed the possible disclosure to the prosecution, outside the courtroom, and stated that such disclosure, unsupervised by the court, would risk disclosure of information that could not ultimately be disclosed in the adjudicative proceeding. Accordingly, the ABA opinion stated that "it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

During the evidentiary hearing Mr. Corwin, sua sponte, disclosed what he believed to be confidential client communication. Mr. Corwin did not assert the attorney-client privilege ¹¹³ prior to his disclosure, did not wait for the trial court to make a ruling before he disclosed this information.

FOOTNOTE

¹¹³. See Alderman vs. People, 4 Mich 414 (1857); People vs. Van Alstine, 57 Mich 69 (1885); In re Lott, 424 F.3d 446, 448-454 (6th Cir. 2005).

END FOOTNOTE

However, Mr. Corwin's assertion that Petitioner told him that he took the shotgun for money, is contradicted by the fact that Mr. Corwin did not inform the District court when Petitioner testified under oath

at the November 20, 2001 plea hearing that he took the gun for hunting was a lie. If Mr. Corwin believed Petitioner was perjuring himself before the District Court, he should have corrected the record at the time, not 16 years later.

In any event, Petitioner's purported statement to his attorney that he stole the gun may have been related to his confusion, mental illness, or lack of treatment at the time of the plea. Mr. Corwin testified that requested Petitioner be evaluated for competency at least three (3) times. Mr. Corwin cannot deny that Petitioner suffers from a serious mental health issues during the period of his representation which may have affected Petitioner's understanding of the charges and recollection of the facts.

F. Judge Steward's findings of facts regarding Petitioner's credibility was clear error.

Judge Steward concluded that Petitioner's credibility was an issue since he previously raised ineffective assistance of counsel claims against Mr. Corwin, and Mr. Corwin previously testified against him at trial. Although appellate counsel objected to the use of Petitioner's prior convictions and attack on character pursuant to MRE 404 and MRE 609 M11. Judge Steward overruled the objections and allowed evidence of Petitioner's prior convictions to be used to establish his motive and credibility during the evidentiary hearing. Judge Steward failed to determine if Mr. Corwin testimony was credible or if it was motivated by Petitioner's previous ineffective assistance of counsel claims against him. Judge Steward ignored the testimony of Mrs. Kissner whose credibility or veracity was not disputed. Judge Steward also ignored the plea hearing transcripts and the PSIR which supported

Petitioner's claims that he intended to borrow the shotgun. Judge Steward's findings that Petitioner was not credible was clear error.

FOOTNOTE

n14. See *People vs. Ghandler*, 2018 Mich Lexis 1163; *United States vs. Gurley*, 639 F.3d 50, 59-63 (2d. cir. 2011); *People vs. Philip Drake*, 142 Mich App 357 (1985).

END FOOTNOTE

The Court of Appeals cited to the fact that Petitioner raised the issue of ineffective assistance of counsel after his trial counsel testified against him in another case, but fails to realize that Petitioner was not able to perfect his appeal in this case until 2014 when the Michigan Supreme Court remanded his case to the trial court because of that court's failure to advise him of his appellate rights at his sentencing hearings. *Kissner*, unpub. op at 5 n15.

FOOTNOTE

n15. See *People vs. Hogans*, 499 Mich 877 (2016); *People vs. Atwood*, 499 Mich 865 (2016); *People vs. Evans*, 497 Mich 1008 (2015); *People vs. White*, 497 Mich 927 (2014); *People vs. Goree*, 497 Mich 926 (2014); *People vs. Kissner*, 497 Mich 873 (2014); *People Gilliard*, 496 Mich 856 (2014); *People vs. White*, 478 Mich 862 (2007); *Rodriguez vs. United State*, 395 U.S 327, 330 (1969).

END FOOTNOTE

II. The Michigan Court of Appeals erred in concluding whether the trial attorney properly investigating the case or coerced petitioner into accepting the plea.

The Michigan Court of Appeals would not consider whether the trial counsel was ineffective for failing to investigate and then threatening to withdraw as petitioner's attorney. KISSNER, unpub. op at 3. The Michigan Court of Appeals opined that in petitioner's application for leave to appeal and supporting brief he only asserted that trial counsel was ineffective based on his failure to inform him that he had a valid defense to the charges n16. The statement of questions presented by petitioner in the application for leave to appeal was as follows:

Should Mr. KISSNER be allowed to withdraw his plea because his plea was not knowingly entered and furthermore Mr. KISSNER did not receive the effective assistance of counsel in entering the plea?

The issue addressed was whether petitioner received ineffective assistance of counsel n17. The application and supporting brief requested an evidentiary hearing and the court of Appeals remanded the matter, "for an evidentiary hearing on defendant's claim of ineffective assistance of counsel. See also People vs. GINTHER, 390 Mich 436 (1973). Although it is true the application focused on whether petitioner trial counsel informed him if he had valid defense it was impossible to know if the trial counsel properly investigating the case until he could be questioned at the evidentiary hearing. The court of Appeals does not cite any case law narrowing the scope of a GINTHER hearing n18.

FOOTNOTE

n16. see *Taylor vs. United States*, 822 F.3d 84 (2d. cir. 2016); *Washington vs. Smith*, 219 F.3d 620 (7th. cir. 2000). see further *Lee vs. United States*, 583 U.S. —, —; 137 S. Ct 1958, 1961-1962, 1964-1969 (2017); *Leatherman vs. Palmer*, 583 F. Supp. 2d 849, 853, 863 (W. D. Mich. 2008).

n17. see *Kissner vs. Palmer*, 826 F.3d 898, 902-903 (6th. cir. 2016); *Davis vs. Rapelje*, 33 F. Supp. 3d 849 (E. D. Mich. 2014).

n18. The Michigan court of Appeals refused to hear elements of the ineffective assistance of trial counsel claims. Because it was not in the original filing to the court. "Issues outside the scope of a remand order will not be considered on appeal following remand". *People vs. Burks*, 128 Mich App 255, 257 (1983) cited in *People vs. Notyce*, 328 P.3d 302, 303 (Colo. Ct. App. (2014)). The scope of the remand was ineffective assistance of trial counsel. Thus; additional information of ineffective assistance of trial counsel would relate back to the original filing. *Mayle vs. Felix*, 545 U.S. 644 (2005) (holding); *Braden vs. United States*, 817 F.3d 926, 930-931 (6th. cir. 2016); MCL 600.2301. In *People vs. Notyce*, "The defendant attempted to raise an ineffective assistance of counsel claim after remand as to his sentencing issue, thus, outside the scope of the remand order."

END FOOTNOTE

The evidentiary hearing regarding the claim for ineffective assistance of counsel was held on January 17, 2017 and neither the trial counsel nor prosecutor ruled or requested that the hearing was focused only on whether Mr. Corwin failed to inform petitioner of a valid defense. As argued above, during that hearing it was discovered that petitioner's attorney failed to interview any witnesses, was not aware that the complainant's statements to the police corroborated petitioner's claim that he had borrowed the shotgun in the past and failed to review the preliminary examination. Subsequently petitioner filed his brief on appeal arguing that his trial attorney was ineffective for not informing him of a valid defense, failing to investigate the

claim, and coercing him to plea. The statement of question presented to the Court of Appeals in the brief of appeal provided:

"Should Mr. Kissner be allowed to withdraw his Plea because his plea was not knowingly entered since Mr. Kissner did not receive the effective assistance of counsel in entering the plea if the record shows Mr. Kissner's trial attorney did not properly investigate the case, informing Mr. Kissner that he had a valid defense to the charges, and then coerced Mr. Kissner into accepting the plea because he threatened to withdraw from the case if Mr. Kissner did not plea guilty?"

Therefore, Petitioner raised the issue regarding ineffective assistance of counsel in the statement of questions presented in both his application and brief on appeal. MCR 7.212(c)(5); also see *People vs. Brown*, 239 Mich App 735, 748 (2000).

Furthermore the testimony produced at the evidentiary hearing that Petitioner's trial attorney failed to investigate the claim and attempted to coerce Petitioner into accepting the plea is directly related to and stems from the trial attorney's failure to inform Petitioner that he had a valid defense to the charge. It is hard to imagine how the issue regarding Petitioner's trial counsel's failure to investigate the claim and subsequent attempt to coerce Petitioner into accepting the plea is not directly related to that attorney's failure to inform Petitioner of a valid defense. See *Mayle vs. Felix*, 545 U.S. 644 (2005) (related back).

Petitioner respectfully request that court review the matter

pursuant to *Lee vs. United States*, 583 U.S. ___, 137 S.Ct. 1958 (2017), and remand the case back to the state courts so that it can review and make a determination whether petitioner trial counsel failed to investigate the case and attempted to coerce him into accepting the plea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Donald G. Kimm

Date: Sept. 12, 2018