

Supreme Court, U.S.
FILED

JUN 20 2018

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE DANNY W. HOWELL -- PETITIONER

V.S.

RICHARD BROWN, WARDEN -- RESPONDENT
ON A PETITION FOR AN EXTRAORDINARY WRIT TO

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR AN EXTRAORDINARY WRIT

DANNY W. HOWELL

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QUESTION(S) PRESENTED

- I. "DOES A COURT OF APPEALS ABUSE ITS DISCRETION IN REFUSING TO PERMIT CONSIDERATION OF A VITAL INTERVENING LEGAL DEVELOPMENT WHEN FAILURE TO DO SO PRECLUDES HABEAS PETITIONER FROM EVER RECEIVING ANY ADJUDICATION OF HIS CLAIMS ON THE MERITS?"
- II. "DOES ADVERSE CONSEQUENCES EXIST FROM THE CONVICTION SUFFICIENT TO SATISFY THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III?"

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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: PCR MEMORANDUM DECISION, NO. 90A02-0809-PC-B29 (Ind. Ct. App. FEB. 17, 2009)

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

Petitioner respectfully prays ~~the EXTRAORDINARY WRIT~~ 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 A to the petition and is

☒ reported at NO. 9:17-1558, 11-3453, 10-2502 (7th Cir.); 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☐ is unpublished.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 B to the petition and is

☒ reported at MADEIRA CORPUS DECISIONS, NO. 1:09-CV-168; 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☐ is unpublished.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 D to the petition and is

☒ reported at COURT OF APPEALS DECISIONS, NO. 9:02-0849-AC-829; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the INDIANA COURT OF APPEALS AND SUPREME court appears at Appendix D to the petition and is

☒ reported at COURT OF APPEALS DECISIONS, NO. 9:02-0407-CR-571; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

1.
JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was JULY 11, 2017 AND FEB. 11, 2011.

☐ 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: FEBRUARY 11, 2011, and a copy of the order denying rehearing appears at Appendix A.

☐ 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). **ALSO INVOKING THE COURT'S ORIGINAL JURISDICTION UNDER ARTICLE III, § 2, CL. 3 OF THE CONSTITUTION OF THE UNITED STATES ON PETITION FOR AN EXTRAORDINARY WRIT AUTHORIZED BY 28 U.S.C. § 1651 (a), IN AID OF THE COURT'S APPELLATE JURISDICTION, EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THE COURT'S DISCRETIONARY POWERS UNDER SUPREME COURT RULE 10 (a), AND ADEQUATE RELIEF COULD NOT BE OBTAINED IN ANY OTHER FORM OR FROM ANY OTHER COURT UNDER 28 U.S.C. § 2254 (b) (1) (B) (i) OR (ii).**

☒ For cases from state courts:

The date on which the highest state court decided my case was FEBRUARY 17, 2009. A copy of that decision appears at Appendix D.

☒ A timely petition for rehearing was thereafter denied on the following date: APRIL 2, 2009, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). **ALSO INVOKING THE COURT'S ORIGINAL JURISDICTION SEEKING A WRIT AUTHORIZED BY § 2254 (a), 28 U.S.C. § 2403 (a). MAY APPLY, A COURT HAS NOT CERTIFIED TO THE ATTORNEY GENERAL THE FACT THAT THE CONSTITUTIONALITY OF AN ACT OF CONGRESS WAS DRAWN INTO QUESTION, SEE SUPREME COURT RULE 29.4 (b).**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PAGE NO.

U.S. CONST. ART. I, § 9, cl. 2 PROVIDES: THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS SHALL NOT BE SUSPENDED, UNLESS WHEN IN CASES OF REBELLION OR INVASION THE PUBLIC SAFETY MAY REQUIRE IT. _____

18, 26

U.S. CONST. ART. III, § 2, cl. 3 PROVIDES: IN ALL CASES AFFECTING AMBASSADORS, OTHER PUBLIC MINISTERS AND CONSULS, AND THOSE IN WHICH A STATE SHALL BE PARTY, THE SUPREME COURT SHALL HAVE ORIGINAL JURISDICTION. IN ALL THE OTHER CASES BEFORE MENTIONED, THE SUPREME COURT SHALL HAVE APPELLATE JURISDICTION, BOTH AS TO LAW AND FACT, WITH SUCH EXCEPTIONS, AND UNDER SUCH REGULATIONS AS THE CONGRESS _____ SHALL MAKE.

2, 18, 26

U.S. CONST. FOURTH AMENDMENT PROVIDES: THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED. _____

23

U.S. CONST. FIFTH AMENDMENT PROVIDES: NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION. _____

23, 26

U.S. CONST. SIXTH AMENDMENT PROVIDES: IN ALL CRIMINAL PROSECUTIONS,
THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN
IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN
COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW,
AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE
CONFRONTED WITH THE WITNESSES AGAINST HIM, TO HAVE COMPULSORY PROCESS
FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF
COUNSEL FOR HIS DEFENSE. _____ 12, 18, 23

U.S. CONST. EIGHTH AMENDMENT PROVIDES: EXCESSIVE BAIL SHOULD NOT BE REQUIRED,
NOR EXCESSIVE FINES IMPOSED, NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED. _____ 18, 26

U.S. CONST. FOURTEENTH AMENDMENT PROVIDES IN SECTION 1: ALL PERSONS BORN OR
NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF,
ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO
STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR
IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE
ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR
DENY ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS. _____ 12, 18, 26

28 U.S.C. SECTION 1254 (1) _____ 2

28 U.S.C. SECTION 1257 (a) _____ 2

28 U.S.C. SECTION 1651 (a) _____ 2, 18, 26

28 U.S.C. SECTION 2241 ☐ POWER TO GRANT WRIT ☐

(a) WRITS OF HABEAS CORPUS MAY BE GRANTED BY THE SUPREME COURT, ANY JUSTICE
THEREOF, THE DISTRICT COURTS AND ANY CIRCUIT JUDGE WITHIN THEIR RESPECTIVE JURIS-
DICTIONS. THE ORDER OF A CIRCUIT JUDGE SHALL BE ENTERED IN THE RECORDS OF THE
DISTRICT COURT OF THE DISTRICT WHEREIN THE RESTRAINT COMPLAINED OF IS HAD. _____ 18

(C) THE WRIT OF HABEAS CORPUS SHALL NOT EXTEND TO A PRISONER UNLESS-- 18

(3) HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES. 18

(d) WHERE AN APPLICATION FOR A WRIT OF HABEAS CORPUS IS MADE BY A PERSON IN CUSTODY UNDER THE JUDGMENT AND SENTENCE OF A STATE COURT OF A STATE WHICH CONTAINS TWO OR MORE FEDERAL JUDICIAL DISTRICTS, THE APPLICATION MAY BE FILED IN THE DISTRICT COURT FOR THE DISTRICT WHEREIN SUCH PERSON IS IN CUSTODY OR IN THE DISTRICT COURT FOR THE DISTRICT WITHIN WHICH THE STATE COURT WAS HELD WHICH CONVICTED AND SENTENCED HIM AND EACH OF SUCH DISTRICT COURTS SHALL HAVE CONCURRENT JURISDICTION TO ENTERTAIN THE APPLICATION. THE DISTRICT COURT FOR THE DISTRICT WHEREIN SUCH AN APPLICATION IS FILED IN THE EXERCISE OF ITS DISCRETION AND IN FURTHERANCE OF JUSTICE MAY TRANSFER THE APPLICATION TO THE OTHER DISTRICT COURT FOR HEARING AND DETERMINATION. 18

28 U.S.C. SECTION 2253 (C): A PETITIONER WISHING TO APPEAL FROM A FINAL ORDER DENYING HABEAS RELIEF MUST APPLY FOR A CERTIFICATE OF APPEALABILITY FROM THE DISTRICT COURT JUDGE WHO RENDERED THE DECISION OR FROM CIRCUIT JUDGE, THE PETITIONER MUST COMPLY WITH THE THIRTY-DAY DEADLINE AND OTHER PROCEDURES GOVERNING THE FILINGS OF APPEALS. A DISTRICT OR CIRCUIT COURT JUDGE MAY ISSUE A CERTIFICATE OF APPEALABILITY ONLY IF PETITIONER HAS MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT,

(1) UNLESS A CIRCUIT JUSTICE OR JUDGE ISSUES A CERTIFICATE OF APPEALABILITY, AN APPEAL MAY NOT BE TAKEN TO THE COURT OF APPEALS FROM--

(2) A CERTIFICATE OF APPEALABILITY MAY ISSUE UNDER PARAGRAPH (1) ONLY IF APPLICANT HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT. 17, 18

28 U.S.C. SECTION 2254: STATE CUSTODY: REMEDIES IN FEDERAL COURTS

(a) THE SUPREME COURT, A JUSTICE THEREOF, A CIRCUIT JUDGE, OR A DISTRICT COURT SHALL ENTERTAIN AN APPLICATION FOR A WRIT OF HABEAS CORPUS IN BEHALF OF A PERSON

IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT ONLY ON THE GROUND
THAT HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES
OF THE UNITED STATES. _____ 2, 16, 26

(b) (i) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON
IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT SHALL NOT BE GRANTED
UNLESS IT APPEARS THAT-- _____ 2, 16, 18, 24, 26

(ii) THERE IS AN ABSENCE OF AVAILABLE STATE CORRECTIVE PROCESS; OR 2, 16, 18, 24, 26
(ii) CIRCUMSTANCES EXIST THAT RENDER SUCH PROCESS INEFFECTIVE TO
PROTECT THE RIGHTS OF THE APPLICANT. _____ 2, 16, 18, 24, 26

(d) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN
CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT SHALL NOT BE GRANTED WITH
RESPECT TO ANY CLAIM THAT WAS ADJUDICATED ON THE MERITS IN STATE COURT PRO-
CEEDINGS UNLESS THE ADJUDICATION OF THE CLAIM-- _____ 7, 16, 18, 19, 21, 24, 25

(1) RESULTED IN A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE
APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME
COURT OF THE UNITED STATES; OR _____ 7, 16, 18, 19, 21, 24, 25

(2) RESULT IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION
OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING. _____ 25

(e) (i) IN A PROCEEDING INSTITUTED BY AN APPLICATION FOR A WRIT OF HABEAS
CORPUS BY A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT, A
DETERMINATION OF A FACTUAL ISSUE MADE BY A STATE COURT SHALL BE PRESUMED TO
BE CORRECT. THE APPLICANT SHALL HAVE THE BURDEN OF REBUTTING THE PRESUMP-
TION OF CORRECTNESS BY CLEAR AND CONVINCING EVIDENCE. _____ 15, 20, 22, 24, 25

28 U.S.C. SECTION 2255 _____ 15, 17, 18, 19

28 U.S.C. SECTION 2403 (a) _____ 2

INDIANA CODE SECTION 35-42-2-1, 5 _____ 8

INDIANA CODE SECTION 35-42-4-9 _____ 8

STATEMENT OF THE CASE

DEMONSTRATING THAT THE APPLICATION OF SECTION 2254 (d)(1)'S "UNREASONABLE APPLICATION" CLAUSE TO SITUATIONS IN WHICH A STATE COURT APPLIED A "GOVERNING LEGAL PRINCIPLE TO A SET OF FACTS DIFFERENT FROM THOSE OF THE CASE IN WHICH THE PRINCIPLE WAS ANNOUNCED" REQUIRES THAT THE REVIEWING FEDERAL COURT EVALUATE NOT ONLY THE REASONABLENESS OF THE STATE COURT'S OUTCOME BUT ALSO ALL ASPECTS OF THE STATE COURT'S LEGAL AND FACTUAL ANALYSIS, THE COURT (IN WILLIAMS V. TAYLOR, 529 U.S. 404-06) HAS FOUND "OBJECTIVE UNREASONABLENESS" WHEN A STATE COURT:

(1) ERRED IN ITS ANALYSIS OF THE FACTS BY, "MERELY ASSUMING" THAT CERTAIN FACTUAL CONCLUSIONS IS CORRECT RATHER THAN SYSTEMATICALLY SCRUTINIZING THE RELEVANT FACTS;

ON OCTOBER 5, 2002, DANNY HOWELL MARRIED LORINDA HOWELL (TR. 130-31, 139, 176-78, 269-70). LORINDA HAD HER THEN TWELVE YEAR OLD DAUGHTER B.S. AS A SINGLE PARENT AND RARELY DISCIPLINED HER (TR. 140-41, 290, 92). HOWELL DISCIPLINED B.S. BY YELLING AND SOMETIMES GROUNDING HER (TR. 291-94, 302).

IN THE OPINIONS OF LORINDA'S SYMPATHETIC FRIENDS, DEBRA EVANS, KIM ROBERTS, MARY SOUTHWORTH, AND TONY RHODES, B.S. WAS REQUIRED TO DO TOO MANY CHORES, AND HOWELL INAPPROPRIATELY DISCIPLINED B.S. BY YELLING AND GROUNDING HER (TR. 199, 212-13, 219-20, 224, 226-28, 233, 239). LORINDA TESTIFIED SHE DID NOT BELIEVE HOWELL INAPPROPRIATELY DISCIPLINED B.S. (TR. 294, 307). B.S. THOUGHT THE CHORES WERE UNFAIR AND WAS UNHAPPY (TR. 139, 141-46).

B.S. BECAME INCORRIGIBLE, ACTING OUT AT HOME AND SCHOOL, LYING ALOT, AND NOT TURNING IN OR DOING HER SCHOOL WORK. IN JANUARY 2003, B.S. ALLEGED HOWELL'S JUVENILE SON, B.H. MOLESTED HER SO THEY TOOK HER TO SEE SOCIAL WORKER TED RAMSBY AT HOWELL'S SUGGESTION. (PER. 17-19, 21-22). B.S. ADMITTED MAKING THE STATEMENT AND THAT SHE LIED ABOUT B.H. MOLESTING HER. THEY DISCUSSED HER SEXUAL MISCONDUCT WITH STEP-BROTHER, B.H.. COUNSELING ENDED MID MARCH 2003. (TR. 137, 245, 49, 294-95; APP. C, D).

"STATE PERSISTED IN HIDING [WITNESSES] TRUE ROLE IN THE INVESTIGATION AND TRIAL OF THE CASE." EVANS TESTIFIED THAT DURING HER FIVE VISITS TO HOWELL'S HOME, SHE WITNESSED

HOWELL TOUCHING B.S. INAPPROPRIATELY AND WHEN SHE GOT WHAT SHE BELIEVED WAS ENOUGH EVIDENCE AGAINST HOWELL, SHE WOULD TELL POLICE HOWELL WAS MOLESTING B.S. (TR. 193-98, 209) ON JULY 19, 2003, POLICE OFFICER, GREGG STBLE AND WENDY GARRETT OF THE WELLS COUNTY OFFICE OF FAMILY AND CHILDREN, ARRANGED TO HAVE B.S. PICKED UP FOR QUESTIONING. B.S. WAS INTERVIEWED FOR THE FIRST TIME THAT NIGHT AND SHE DID NOT TELL THEM ANYTHING (TR. 118-19, 124, 170). EVANS RETURNED SEVERAL DAYS LATER WITH FRIENDS, ROBERTS, SOUTHWORTH AND RHODES WHO ALSO TESTIFIED THAT ON EACH OF THEIR SEPARATE VISITS TO HOWELL'S HOME, THEY WITNESSED HOWELL INAPPROPRIATELY TOUCHING B.S. (TR. 196-98, 209, 213-14, 223, 234-37). B.S. WAS INTERVIEWED A SECOND AND THIRD TIME, SHE GAVE INFORMATION ONLY WHEN IT WAS RECORDED (TR. 106-07, 109-10, 117-19, 120-24, 160).

BASED ON THESE INTERVIEWS, ON OCTOBER 9, 2003, THE STATE CHARGED HOWELL WITH: COUNT I, CHILD MOLESTING, A CLASS A FELONY UNDER INDIANA CODE § 35-42-2-1.5, HOWELL PERFORMED OR SUBMITTED TO [SEXUAL INTERCOURSE] WITH B.S., A CHILD UNDER FOURTEEN, WHEN HE WAS AT LEAST TWENTY-ONE YEARS OLD; COUNT II, SEXUAL MISCONDUCT WITH A MINOR, A CLASS B FELONY UNDER I.C. § 35-42-4-9, HOWELL PERFORMED OR SUBMITTED TO [SEXUAL INTERCOURSE] WITH B.S., A CHILD WHO IS AT LEAST FOURTEEN, BUT NOT YET SIXTEEN YEARS OLD, WHEN HE WAS AT LEAST TWENTY-ONE YEARS OLD. (TR. 352-56).

THE STATE HIRED RAMSEY FOR A SUBSEQUENT EVALUATION OF B.S.. DURING THESE FIVE MEETINGS, B.S. CLAIMED THAT SHE WAS ALSO MOLESTED BY HOWELL'S SON, B.H. (TR. 245, 250, 253). B.H. WAS NEVER CHARGED. B.S. WAS NOT EXAMINED BY A DOCTOR (TR. 171). STATE ARGUES HOWELL DID NOT PRESENT ANY EVIDENCE ON HOW THE LACK OF AN OFFER OF PROOF PREJUDICED HIM BECAUSE RAMSEY HAD NO RECOLLECTION B.S. ALLEGED B.H. MOLESTED HER (BRIEF OF APPELLEE, PP. 6-7); APP. D.

(2) ERRED IN ITS APPLICATION OF THE LEGAL STANDARD TO THE FACTS BY, (a) FINDING A DOCTRINAL EXCEPTION TO BE APPLICABLE TO THE FACTS; AND (b) FAILING TO GIVE APPROPRIATE CONSIDERATION AND WEIGHT TO PERTINENT FACTS; ON DECEMBER 19, 2003, THE PROSECUTOR FILED A MOTION IN LIMINE SEEKING AN ORDER FROM THE COURT PROHIBITING HOWELL FROM IN ANYWAY BRINGING UP IN FRONT OF OR MENTIONING TO THE JURY, B.S.'S SEXUAL CONDUCT WITH ANYONE OTHER THAN HOWELL.

THERE WAS AN ABSENCE OF STATE RECORD BECAUSE OF 'GAPS IN THE [STATE COURT] RECORD PERTAINING TO . . . [A] CRITICAL PIECE OF MISSING INFORMATION'. IT WAS ERROR TO ADMIT RAMSEY'S "PARTIALLY ACCREDITING" TESTIMONY HERE BECAUSE THE JURY WASN'T INFORMED THAT THE ALLEGED VICTIM, B.S. HAD ALLEGED THAT SHE HAD ALSO BEEN MOLESTED BY HOWELL'S SON, B.H., WHICH MADE THE TESTIMONY IN THE FORM OFFERED BY THE STATE, MISLEADING AND SUBJECTED HOWELL TO GRAVE DANGER OF UNFAIR PREJUDICE.

FURTHER, CONTRARY TO THE STATE'S ARGUMENT, HOWELL'S FAILURE TO SEEK ADMISSION AT TRIAL OF EVIDENCE, WHICH WOULD HAVE INFORMED THE JURY OF B.S.'S ALLEGATIONS THAT HOWELL'S SON HAD MOLESTED HER, IS OF NO CONSEQUENCE TO WHETHER OR NOT IT WAS ERROR TO ADMIT RAMSEY'S TESTIMONY, IN WHICH HE DID TIMELY OBJECT TO AND PRESERVE AS AN ISSUE FOR APPEAL. (APPELLANT'S REPLY BRIEF, PP. 1-2) [APP. D; TR. 166, 247.

DEFENSE COUNSEL TRIED TO ESTABLISH A PROPER FOUNDATION IN EVIDENCE TO ADMIT PROOF REGARDING B.S.'S STATEMENT TO RAMSEY THAT B.H. HAD MOLESTED HER. HERE, THE TRIAL COURT EXCLUDED EVIDENCE B.S. HAD BEEN SEXUALLY ACTIVE WITH B.H. IN EARLY 2003 (PCR. EXHIBIT E, PP. 31-32) APP. C, WHICH WAS BEFORE SHE ALLEGED HOWELL MOLESTED HER (TR. 132; PCR. 19, 22) APP. C. . . SEE APP. F, PP. 31-32. PRE-TRIAL DEPOSITION OF B.S. (APP. C).

OBVIOUSLY, THE STATE COURT'S LEGAL ERROR INFECTED THE FACTFINDING PROCESS, HOWELL POINTS OUT CONTRARY TO: INDIANA EVIDENCE RULE 412, EVIDENCE OF PAST SEXUAL CONDUCT;

(1) IN A PROSECUTION FOR A SEX CRIME, EVIDENCE OF THE PAST SEXUAL CONDUCT OF A VICTIM OR WITNESS MAY NOT BE ADMITTED EXCEPT;

(2) EVIDENCE WHICH SHOWS THAT SOME PERSON OTHER THAN THE DEFENDANT COMMITTED THE ACT UPON WHICH THE PROSECUTION IS FOUNDED.

THE PROSECUTOR CIRCUMVENTED THE RULES OF EVIDENCE AND ARGUED IN STATE'S MOTION IN LIMINE:

MR. LAUTZENWEISER: "IF I MAY, YOUR HONOR. THE . . . I BELIEVE THEY ARE GOING TO ATTEMPT TO BRING UP AT SOME PORTION DURING TRIAL THE FACT THE VICTIM ACKNOWLEDGES THAT SHE HAD SEXUAL RELATIONSHIPS WITH THE SON OF THE DEFENDANT, ANOTHER JUVENILE THAT WAS LIVING IN THE HOME . . . I WOULD LIKE TO HAVE A MOTION IN LIMINE IN PLACE SO THAT THEY MAY NOT BRING UP THAT SHE HAD SEXUAL RELATIONSHIPS WITH THE DEFENDANT'S SON

BECAUSE THAT IS SIMPLY A MATTER THAT'S ATTEMPTED TO CIRCUMVENT THE RULES OF EVIDENCE AND WOULD ALLOW THEM TO PRESENT BIAS OR PREJUDICE TO THE JURY THAT IS NOT RELEVANT TO THIS CASE BECAUSE OF RAPE SHIELD LAW STATUTE.

[APRIL 14, 2004; MIL. TR. 7, 246-47]

NO FULL AND FAIR OPPORTUNITY TO LITIGATE EXCLUSIONARY RULE CLAIMS BECAUSE THE STATE PERSISTED IN HIDING [ACCREDITED EXPERT], RAMSEY'S RECORDS OF B.S.'S INITIAL AND SUBSEQUENT COUNSELING SESSIONS, THE OTHERWISE DEFAULTED CLAIM WAS REASONABLY UNKNOWN TO DEFENSE COUNSEL. STATE HAD RENDERED PROCEDURAL COMPLIANCE IMPRACTICABLE. TRIAL JUDGE RULED TO EXCLUDE [ALL EVIDENCE] OF B.S.'S PAST SEXUAL CONDUCT AND REPEATEDLY OVERRULED DEFENSE COUNSEL'S OBJECTIONS THAT RAMSEY'S TESTIMONY WAS MISLEADING AND WOULD ALLOW THE JURY TO DRAW UNRELIABLE INFERENCE BECAUSE OF B.S.'S CLAIMS THAT SHE HAD ALSO BEEN MOLESTED BY HOWELL'S SON, B.H. (TR. 246-47).

IN LIGHT OF THE FACTS OF RAMSEY'S INITIAL COUNSELING SESSIONS WITH B.S. WHERE SHE LIED AND ADMITTED HAVING SEXUAL RELATIONSHIPS WITH B.H., THEN SUBSEQUENT SESSIONS CLAIMED B.H. MOLESTED HER, IS SUBORNATION OF PERJURY BY B.S. AND ACCREDITED EXPERT RAMSEY. RAMSEY'S PERJURED TESTIMONY B.S. WAS NOT PRONE TO EXAGGERATE IN SEXUAL MATTERS, WE HAD NOT LEARNED ANYTHING INCONSISTENT WITH HER BEING A VICTIM OF SEXUAL ABUSE AND SHE REMAINED CONSISTENT IN HER VERSION OF EVENTS, IS IN FACT, CONTRARY TO, PROSECUTORS' CASE-IN-CHIEF, LAWRENCE V. STATE, 464 N.E.2d 923 (IND. 1984). (TR. 250, 252-53).

IF THE GOVERNMENT FAILS TO SUSTAIN ITS BURDEN OF PROOF ON ANY ELEMENT, THE DEFENDANT [MUST] BE ACQUITTED. SEE WINSHIP, 397 U.S. at 363; THE STATE CREATED THE IMPRESSION FOR THE JURY THAT WITNESSES' STATEMENTS LED THE POLICE TO FOCUS ON [HOWELL] AS THE SUSPECT, THEREBY PLAINLY IMPLYING THAT [HOWELL] MOLESTED B.S..

TAMMY AND JOE VAN HOOZIER, DIANNE HUGHLEN, AND LORINDA HOWELL TESTIFIED THEY NEVER SAW HOWELL TOUCH B.S. INAPPROPRIATELY (TR. 267, 273, 280, 307). B.S. TESTIFIED SHE TOLD HER MOTHER HOWELL WAS TOUCHING HER AND SHE DID NOT DO ANYTHING (TR. 136-37, 182-83). B.S. TESTIFIED THE SEXUAL ACTIVITY ONLY OCCURRED WHEN HOWELL CAME INTO HER BEDROOM AT NIGHT AFTER SHE WAS ASLEEP (TR. 132-34, 148, 152-54). SHE DID NOT TELL HER MOTHER ABOUT

THE ALLEGED SEXUAL INTERCOURSE (TR. 169). HER MOTHER TESTIFIED B.S. DID NOT TELL HER ANY SEXUAL CONTACT WITH HOWELL. (TR. 297-98, 302-03, 306).

ON APRIL 30, 2004, THE JURY FOUND HOWELL GUILTY ON BOTH COUNTS OF ALLEGED [SEXUAL INTERCOURSE] AS AN ELEMENT TO FIND GUILT FOR CHILD MOLESTING AND SEXUAL MISCONDUCT WITH A MINOR, CHARGED IN THE INFORMATION (TR. 352). HOWELL ACKNOWLEDGED HE WAS CHARGED AS AN HABITUAL OFFENDER BECAUSE OF TWO UNRELATED FELONIES, OVER TEN YEARS OLD, IN MICHIGAN (TR. 354-56). ON MAY 11, 2004, THE TRIAL COURT SENTENCE HOWELL TO SEVENTY YEARS. (APP. E; HOWELL V. STATE, NO. 90001-0310-FA-0005).

THE COURT OF APPEALS ON DIRECT APPEAL IN APPELLANT'S BRIEF, ARGUED "HOWELL'S RIGHT TO A FAIR TRIAL WAS DENIED WHEN THE COURT OVERRULED HIS OBJECTION AND ALLOWED THE STATE TO CORROBORATE THE ALLEGED VICTIM'S CLAIM OF MOLESTATION THROUGH EXPERT ACCREDITING TESTIMONY WHERE THE JURY WAS NOT INFORMED THAT THE ALLEGED VICTIM HAD ALLEGED SHE HAD ALSO BEEN MOLESTED BY ANOTHER PERSON, (APP. D; NO. 90A02-0407-CR-571).

THE STATE MAINTAINED AT TRIAL, AND ON APPEAL, THAT IT WASN'T ERROR FOR THE TRIAL COURT TO ALLOW THE JURY TO WRONGLY AND UNRELIABLY CONCLUDE FROM RAMSEY'S "PARTIALLY ACCREDITING" TESTIMONY THAT HOWELL WAS THE ONLY "POSSIBLE SOURCE" OR SOLE POSSIBLE PERPETRATOR. IN SUPPORT OF ITS ARGUMENT, THE STATE POINTS OUT THAT RAMSEY'S TESTIMONY WAS OF THE TYPE AND IN THE FORM OF "PARTIALLY ACCREDITING" EXPERT TESTIMONY GENERALLY PERMITTED IN INDIANA (APP. APPELLEE'S BRIEF, AT 5-7).

CONTRARY TO THE STATE'S ARGUMENTS, WHEN IN FACT, POLICE OR PROSECUTORS CONCEAL SIGNIFICANT EXCULPATORY OR IMPEACHING MATERIAL IN THE STATE'S POSSESSION AS HERE, IT IS PRIMARILY INCUMBENT ON THE STATE TO SET THE RECORD STRAIGHT. STATE COURT IDENTIFIED THE CORRECT GOVERNING LEGAL PRINCIPLE BUT UNREASONABLY APPLIED THE PRINCIPLES TO THE FACTS. (APP. E, M.I.L. TT. 7, 246-47). THE ISSUE HOWELL RAISED ON APPEAL IS THE COURT'S OVERRULING OF HIS OBJECTIONS THAT SOCIAL WORKER RAMSEY'S "PARTIALLY ACCREDITING" TESTIMONY WAS IMPROPER AND MISLEADING BECAUSE B.S. HAD CLAIMED HOWELL'S SON HAD ALSO MOLESTED HER (APP. D; APPELLANT'S BRIEF, AT 12). "CAUSE" EXIST WHEN THE REASON FOR HOWELL'S FAILURE TO DE-

VELOP FACTS IN TRIAL WAS STATES SUPPRESSION OF RAMSEY'S RECORDS OF B.S.'S INITIAL AND SUBSEQUENT COUNSELING SESSIONS, THE OTHERWISE DEFAULTED CLAIM WAS REASONABLY UNKNOWN TO DEFENSE COUNSEL AND DEFENSE COUNSEL MADE NO INTENTIONAL DECISION TO FOREGO CLAIM.

THE COURT OF APPEALS ON DIRECT APPEAL IN A MEMORANDUM DECISION RULED RAMSEY DID NOT DIRECTLY VOUEA FOR B.S.'S CREDIBILITY, SLIP OP. 476. IT FOUND HOWELL WAIVED ANY ALLEGED ERROR IN ITS PRE-TRIAL EXCLUSION OF EVIDENCE THAT B.S. TOLD RAMSEY THAT B.H. HAD MOLESTED HER BECAUSE HE DID NOT OFFER THE EVIDENCE AT TRIAL OR MAKE AN OFFER OF PROOF, SLIP OP. 471. (APP. D). HOWELL V. STATE, NO. 90A02-0407-CR-571 (Ind. Ct. App. APRIL 13, 2005). "WAIVER WAS THE PRODUCT OF DECEPTION BECAUSE COURT WAS NOT FULLY INFORMED TO THE FACTS OF THIS CASE."

ON MAY 15, 2005, PETITIONER FILED A STATE WRIT OF HABEAS CORPUS, PRO 38, WHICH THE POSTCONVICTION COURT DEEMED TO BE A PETITION FOR POSTCONVICTION RELIEF ONE.

ON JUNE 21, 2006, POSTCONVICTION PUBLIC DEFENDER FILED AN AMENDED PETITION FOR POSTCONVICTION RELIEF ONE.

ON APRIL 15, 2008, THE POSTCONVICTION COURT HELD A HEARING ON HOWELL'S PETITION. HE ARGUED THAT HE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS FOR FAILURE TO OFFER PROOF THAT ALLEGED CHILD MOLEST VICTIM TOLD OTHER PEOPLE HER STEP-BROTHER PREVIOUSLY MOLESTED HER. THAT DETERMINATION WAS PROCEDURALLY UNREASONABLE BECAUSE THERE IS NO FACTUAL BASIS FOR A CONCLUSION THAT COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT. (APP. E; PETITION FOR POSTCONVICTION).

THAT HEARING WAS NOT "FULL AND FAIR", DEFENSE COUNSEL HAS NO PROCEDURAL OBLIGATION TO ASSERT CONSTITUTIONAL ERROR ON THE BASIS OF MERE SUSPICION THAT SOME PROSECUTORIAL MISSTEP MAY HAVE OCCURRED. THE COURT FAILED TO MAKE A FACTUAL DETERMINATION THAT SHOULD HAVE BEEN MADE. THE STATE COURTS' FAILURE TO DISCUSS OR EVEN MENTION KEY TESTIMONY SHOWS THAT STATE COURTS "FAILED TO CONSIDER KEY ASPECTS OF THE RECORD": "THE STATE COURTS MIGHT HAVE DISBELIEVED [WITNESSES], OR PERHAPS DISCOUNTED THEIR TESTIMONIES,

BUT THEY WERE NOT ENTITLED TO ACT AS IF IT DIDN'T EXIST." (APP. C; PCR, 17-19, 21-22; APP. D; APPELLEE'S BRIEF, 6-7). COURT MISSTATED THE RECORD AND OVERLOOKED EVIDENCE (APP. F; PP. 31-32). COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN MAKING THE FACTUAL DETERMINATION.

AFTER PARTIES SUBMITTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, ON AUGUST 29, 2008, THE COURT DENIED HOWELL'S PETITION. THE COURT RULED RAMSEY'S TESTIMONY DID NOT OPEN THE DOOR TO ALLEGED [CONSENSUAL SEXUAL ACTIVITY] BETWEEN B.S. AND B.H., TRIAL COUNSEL'S PERFORMANCE DID NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS, AND THE EVIDENCE WAS SO OVERWHELMING HOWELL WOULD HAVE BEEN CONVICTED EVEN IF RAMSEY DID NOT TESTIFY. (APP. D; MEMORANDUM DECISION, PP. 4-13); HOWELL V. STATE, NO. 90C01-0505-PC-0002.

COURT OF APPEALS MADE FINDINGS OF FACT BECAUSE STATE COURTS "MADE NO FINDING ON ISSUE": "B.S. TOLD RAMSEY IN A SUBSEQUENT EVALUATION OF B.S.'S PSYCHOLOGICAL CONDITION, THAT SHE WAS ALSO MOLESTED BY HOWELL'S SON, B.H. (TR. 245, 250, 253). HOWELL OBJECTED TO RAMSEY'S TESTIMONY (APPELLANT'S BRIEF, AT 12; APPELLANT'S REPLY BRIEF, AT 6). B.S.'S MOTHER AND HOWELL TESTIFIED AT THE PCR HEARING THAT B.S. TOLD THEM ABOUT B.H. MOLESTING HER PRIOR TO SPEAKING TO RAMSEY AND BEFORE SHE ACCUSED HOWELL OF MOLESTING HER (APP. C; PCR, 17-19, 21-22). THE STATE APPELLATE COURT "PROCEEDED FROM AN INCORRECT PREMISE" AND MISCONSTRUED IMPACT OF STATE POSTCONVICTION JUDGES' FACTUAL FINDING, THEREBY PRODUCING "AN OBJECTIVELY UNREASONABLE" DETERMINATION OF FACTS. IN LIGHT OF THE EVIDENCE THAT WAS PRESENTED AT THE STATE COURT EVIDENTIARY HEARING, APPELLATE COURT'S DETERMINATION THAT "THERE WAS 'OVERWHELMING EVIDENCE OF HOWELL'S GUILT' INDEPENDENT OF [FRAUDULENTLY ADMITTED EVIDENCE]" ALSO WAS CONTRARY TO, WEIGHT OF EVIDENCE IN LIGHT OF THE EVIDENCE PRESENTED AT HOWELL'S TRIAL". (APP. C; D; E).

ON FEBRUARY 17, 2009, THE STATE COURT OF APPEALS AFFIRMED THE DENIAL OF POSTCONVICTION PETITION IN A MEMORANDUM DECISION. THE COURT RULED RAMSEY'S TESTIMONY DID NOT OPEN THE DOOR TO TESTIMONY REGARDING A [SEXUAL RELATIONSHIP] BETWEEN B.S. AND B.H.; TRIAL COUNSEL THEREFORE WAS NOT INEFFECTIVE FOR NOT MAKING AN OFFER OF PROOF; THE POSTCONVICTION COURT'S RULING THE SUBSTANTIAL EVIDENCE AGAINST HOWELL WAS OVERWHELMING WAS NOT CLEARLY ERRONEOUS, AND HOWELL COULD NOT ESTABLISH PREJUD-

ICE ON HIS INEFFECTIVE ASSISTANCE CLAIM. SLIP. Op. at 12-13. (APP. D); HOWELL V. STATE, NO. 90A02-0809-PC-829 (Ind. Ct. App. FEBRUARY 17, 2009).

ON PETITION TO TRANSFER, HOWELL ARGUED, "THE SUPREME COURT IN, DELAWARE V. VAN ARSDALL, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed. 2d 674 (1986), STATING SEVERAL FACTORS TO CONSIDER IN EVALUATING WHETHER AN ERRONEOUS LIMITATION ON CROSS-EXAMINATION IS HARMLESS ERROR: 1) THE IMPORTANCE OF THE WITNESSES TESTIMONY IN THE PROSECUTION'S CASE; 2) WHETHER THE EXCLUDED TESTIMONY WAS CUMULATIVE; 3) THE PRESENCE OR ABSENCE OF EVIDENCE CORROBORATING OR CONTRADICTING THE WITNESS ON MATERIAL POINTS; 4) WHETHER CROSS-EXAMINATION WAS OTHERWISE PERMITTED; AND 5) THE OVERALL STRENGTH OF THE PROSECUTION'S CASE. THERE WAS "NO DE NOVO REVIEW ON MIXED QUESTIONS OF FACT AND LAW." (APP. D).

ON APRIL 2, 2009, THE INDIANA SUPREME COURT VOTED TO DENY HOWELL'S PETITION TO TRANSFER. (APP. D).

ON JUNE 19, 2009, PRO SE PETITIONER HOWELL FILED HIS 28 U.S.C. § 2254 APPLICATION FOR WRIT OF HABEAS CORPUS, NO. 1:09-CV-168, PRESENTING THE STATE COURTS WITH THE SAME [INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL] CLAIM HE URGES UPON THE FEDERAL COURTS. HOWELL CHALLENGED THE SUFFICIENCY OF THE EVIDENCE . . . TO SUPPORT THE STATE COURTS DETERMINATION OF A FACTUAL ISSUE AND BECAUSE OF INDIGENCY WAS UNABLE TO PRODUCE STATE RECORDS SEE 28 U.S.C. § 2254 (F). (APP. B; DE 1).

ON JULY 20, 2009, IN AN ORDER TO SHOW CAUSE, RESPONDENT WAS ORDERED BY JUDGE ROBERT L. MILLER, JR., TO SUBMIT PETITIONER'S FULL AND COMPLETE STATE COURT RECORDS. (APP. B; DE 5). SEE 28 U.S.C. § 2254 (F).

ON DECEMBER 11, 2009, IN A RESPONSE TO ORDER TO SHOW CAUSE, THERE IS AN ABSENCE OF STATE RECORDS PERTAINING TO . . . CRITICAL PIECES OF MISSING INFORMATION: NO TRIAL RECORD, NO APPELLANT REPLY BRIEF ON DIRECT, NO APPELLER BRIEFS, NO POSTCONVICTION RECORD OR HEARING, AND NO PRE-TRIAL DEPOSITION OF B.S., MATERIAL TO BRADY ERROR. (APP. B; DE 17).

ON APRIL 22, 2010, PETITIONER MOTIONED DISTRICT COURT FOR AN EVIDENTIARY HEARING AND APPOINTMENT OF COUNSEL REGARDING STATES VIOLATION OF EXCLUSIONARY RULE 412(a)(2)

OF THE INDIANA RULES OF EVIDENCE. THAT IT OBVIOUSLY, VIOLATED GOVERNING LEGAL RULE. SEE §2254 (c)(1). (APP. B; DE 22); WHICH WAS SUBSEQUENTLY IGNORED.

ON APRIL 26, 2010, NORTHERN DISTRICT COURT ENTERED ITS OPINION AND ORDER DENYING HOWELL'S HABEAS CORPUS, "CONCLUDING THAT THE INDIANA COURTS HAD CORRECTLY APPLIED ESTABLISHED FEDERAL LAW IN ADJUDICATING HIS INEFFECTIVE OF COUNSEL CLAIMS, AND DID NOT MAKE AN UNREASONABLE DETERMINATION OF THE FACTS CONTAINED IN THE STATE RECORD." (APP. B; DE 23).

ON APRIL 30, 2010, PETITIONER FILED A TIMELY MOTION TO ALTER OR AMEND JUDGMENT, UNDER RULE 59 (c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHICH WAS ENTERED MAY 3, 2010. (APP. B; DE 25), HOWELL OBJECTED TO RULING, BECAUSE IT WAS A MISCARriage OF JUSTICE TO OVERLOOK STATES VIOLATION OF EXCLUSIONARY RULES AND TO NOT HAVE ANSWERED EVIDENTIARY HEARING MOTION. (APP. B; DE 25).

ON MAY 20, 2010, PETITIONER FILED: #1 NOTICE OF APPEAL (APP. B; DE 26), #2 DESIGNATION OF PLEADINGS ON APPEAL (APP. B; DE 27), #3 PETITION FOR CERTIFICATE OF APPEALABILITY (APP. B; DE 28), AND #4 DOCKETING STATEMENT SUBMITTING ENTRIES 26 THROUGH 28 (APP. B; DE 29).

ON JUNE 21, 2010, OPINION AND ORDER DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY SIGNED BY JUDGE RUDY LOZANO. (APP. B; DE 31).

ON JUNE 22, 2010, CASE OPENING IN THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, USCA CASE NUMBER 10-2502 (APP. A; DE 32), AND OPINION AND ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT SIGNED BY JUDGE RUDY LOZANO (APP. B; DE 33).

ON AUGUST 9, 2010, NOTICE OF DOCKETING RECORD ON APPEAL FROM USCA. (APP. A; DE 40).

ON FEBRUARY 11, 2011, MANDATE OF USCA (CERTIFIED COPY) AS TO NOTICE OF APPEAL. CERTIFICATE OF APPEALABILITY IS DENIED, AND MOTION TO PROCEED IN FORMA PAUPERIS IS DENIED. (APP. A; DE 41). PETITIONER'S PETITION FOR REHEARING REGARDING THE DENIAL OF COA IS DENIED. NO DISTRICT COURT RECORD TO BE RETURNED. (APP. A; DE 41).

ON OCTOBER 26, 2011, HOWELL FILED A SUBSEQUENT PETITION NOT TO BE CLASSIFIED AS A SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. § 2255 (h). NO. 11-3453 INVOLVED THE FUNDAMENTAL DEFECT WHICH RESULTED IN A COMPLETE MISCARriage OF JUSTICE. PROSECUTOR RELIED ON

THE SUPPRESSION OF PERJURED TESTIMONIES OF KEY WITNESSES AND ITS VIOLATION OF EXCLUSIONARY RULES TO IMPEDE THE FACTFINDING PROCESS." 28 U.S.C. § 2254 (d)(1) OF THE ABPPA DENIES HABEAS RELIEF UNLESS THE PROCEEDINGS IN STATE COURT INDEED, RESULTED IN A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES. 28 U.S.C. § 2254 (d)(1) (2000).

ON NOVEMBER 22, 2011, 7TH CIRCUIT COURT OF APPEALS ORDER, DENIED SUBSEQUENT § 2254 PETITION UNDER "LAW OF THE CASE" DOCTRINE, 28 U.S.C. § 2244 (b)(1), WHICH PROHIBITS AUTHORIZATION OF CLAIMS PREVIOUSLY PRESENTED TO A COURT. (APP. A; DE 42).

PETITIONER'S FACTUAL ALLEGATIONS PROVE THAT THE INDIANA COURTS ACTED CONTRARY TO, OR UNREASONABLY APPLIED, CLEARLY ESTABLISHED FEDERAL LAW WHEN IT REJECTED HIS DUE PROCESS CLAIM BASED ON THE EXCLUSION OF EVIDENCE THAT B.S. ALLEGED B.H. MOLESTED HER. SEE § 2254 (d)(1) AND § 2254 (b)(1)(B). THE ORDER DENYING HOWELL'S THIRD ATTEMPT IMPOSED A \$ 500 FINE AND A FILING BAR. ON FEBRUARY 28, 2013, INDIGENT PETITIONER'S FAMILY PAID THE FINE. (APP. A; DE 43).

COURT OF APPEALS REFUSAL TO PERMIT AN INTERVENING DECISION OF THE SUPREME COURT OF THE UNITED STATES COST HIM A \$1000 FINE AND FILING BAR ON HIS FORTH ATTEMPT, AGAIN FOCUSED ON THE SAME CLAIM. HOWELL'S FAMILY AGAIN, PAID HIS FINE AUGUST 7, 2015. (APP. A).

ON MARCH 5, 2013, MOTION FOR RELIEF FROM JUDGMENT OR ORDER WAS FILED UNDER RULE 60 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE INSTEAD OF AS A NON-AUTHORIZED 'SECOND OR SUCCESSIVE PETITION. HOWELL ARGUED THERE WAS FRAUD UPON THE FEDERAL COURT WHICH LED TO THE DENIAL OF THE HABEAS PETITION. THAT STATE OBTAINED THE JUDGMENT BY FRAUD RULE 60(b)(3) AND RULE 60(b)(6) WAS DESIGNED TO CURE THOSE VIOLATIONS OF FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (FHC PP), WITH ATTACHMENTS: #1-EXHIBITS - PART 1, #2-EXHIBITS - PART 2. (APP. B; DE 44).

ON MARCH 7, 2013, ORDER DENYING RULE 60 MOTION, FOR WANT OF JURISDICTION. (APP. B; DE 45).

ON JULY 30, 2015, MOTION FOR RELIEF FROM JUDGMENT OR ORDER SLIGHTLY AMENDED. (APP.

B; DE NOT AVAILABLE FOR BOTH ITS FILING OR DENIAL

ON MARCH 7, 2017, MOTION FOR RELIEF FROM JUDGMENT OR ORDER (APP. B; DE 47)

ON MARCH 8, 2017, ORDER DENYING RULE 60(b) MOTION, FOR WANT OF JURISDICTION.

HOWELL IS FINED \$5000. THE COURT DIRECTS THE CLERK OF COURT TO RETURN, UNPAID ANY PAPERS FILED IN ANY CASE BY OR ON BEHALF OF HOWELL (EXCEPT FOR A NOTICE OF APPEAL OR UNLESS FILED IN A CRIMINAL CASE OR A HABEAS CORPUS PROCEEDING CHALLENGING A NEW CONVICTION) UNTIL HE HAS PAID IN FULL ALL OUTSTANDING FEES AND SANCTIONS IN ALL CIVIL ACTIONS IN ANY FEDERAL COURT. THE COURT DIRECTS THE CLERK TO NOTE ON THE DOCKET OF THIS CASE ANY ATTEMPTED FILINGS IN VIOLATION OF THIS ORDER. SIGNED JUDGE RUDY LOZANO ON 3-8-17 -MODIFIED ENTRY TO 3-9-2017, (APP. B; DE 48). NO. 1:09-CV-168,

ON MARCH 15, 2017, HOWELL FILED HIS #1-NOTICE OF APPEAL (APP. B; DE 49), #2-PETITION FOR COA (APP. B; DE 50), #3-DOCKETING STATEMENT (APP. B; DE 51), AND #4-DESIGNATION OF READINGS ON APPEAL (APP. B; DE 52). HOWELL V. SUPERINTENDENT, NO. 1:09-CV-168.

ON JULY 11, 2017, IN ITS ORDER DENYING COA AND IN FORMA PAUPERIS, THE 7TH CIRCUIT COURT OF APPEALS, IN NO. 17-1558, FOUND NO SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT. SEE 28 U.S.C. § 2253 (c)(2). COURT RULED THAT HOWELL'S RULE 60(b)(6) MOTION IS AN UNAUTHORIZED SUCCESSIVE COLLATERAL ATTACK OVER WHICH THE DISTRICT COURT HAD NO JURISDICTION. 28 U.S.C. § 2255(h). THE COURT IMPOSED AN ADDITIONAL \$1,000 FINE AND FILING BAR. (APP. A; DE 66).

ON AUGUST 2, 2017, COURT OF APPEALS CERTIFIED AND ISSUED MANDATE IN, NO. 17-1558 (APP. A; DE 66).

REASONS FOR GRANTING THE PETITION

TO GRANT ISSUANCE OF AN EXTRAORDINARY WRIT AUTHORIZED BY 28 U.S.C. §1651 (a) AND VACATE ALL FINAL JUDGMENTS DENYING 28 U.S.C. §§ 2254 AND § 2255 RELIEF, IN LIGHT OF § 2254 (b) (1) (B) (i) OR (ii). PETITIONER IS CHALLENGING CONVICTION BY ALLEGING THAT DUE TO THE INTERVENING DECISIONS OF THE SUPREME COURT OF THE UNITED STATES [IN MURRAY V. CARRIER, 477 U.S. 478, 488, 496 (1986)], NO FULL AND FAIR OPPORTUNITY TO LITIGATE EXCLUSIONARY RULE VIOLATIONS OF THE FOURTH, FIFTH, OR SIXTH AMENDMENTS THAT IS APPLICABLE TO STATE OFFICIALS THROUGH THE DUE PROCESS CLAUSE OR THE FOURTEENTH AMENDMENT, WAS AVAILABLE. "CAUSE" EXIST FOR THE PROCEDURAL DEFAULTS WHEN, AS A RESULT OF GOVERNMENTAL INTERFERENCE RENDERING PROCEDURAL COMPLIANCE IMPRACTICABLE, THE OTHERWISE DEFAULTED CLAIM WAS REASONABLY UNKNOWN TO PETITIONER'S LAWYERS AND PETITIONER'S LAWYERS MADE NO INTENTIONAL DECISION TO FOREGO CLAIM. CARRIER, 477 U.S. at 488. SEE ALSO SUPREME COURT RULE 10 (a).

MIXED QUESTIONS OF LAW AND FACT ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS, REQUIRING de novo REVIEW. DISTRICT COURT ABANDONED OR ABANDONED JUDICIAL REVIEW UNDER § 2254 (d) (1) THAT RESULTED A FUNDAMENTAL MISCARriage OF JUSTICE. THE COURT IN "CARRIER" STATED THAT PROCEDURAL DEFAULT WOULD BE EXCLUDED, EVEN IN THE ABSENCE OF CAUSE, WHEN A "CONSTITUTIONAL VIOLATION HAS PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS 'ACTUALLY INNOCENT'." CARRIER, 477 U.S. at 496.

UNDER 28 U.S.C. § 2241 (a), AVAILABILITY OF THE WRIT UNDER THE NEW CONSTITUTION, SEE ARTICLE III, § 2, CL. 3, IS HOWELL'S BASIS FOR ARGUING THAT ADDITIONAL, EXPLICIT PROCEDURAL PROTECTIONS WOULD BE UNNECESSARY.

UNDER § 2241 (C) (3), HOWELL'S CUSTODY VIOLATES THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION OR LAWS

UNDER § 2241 (d) AND THE CONSTITUTION'S DUE PROCESS AND SUSPENSION CLAUSES. SEE AMDT. 5; ART. I, § 9, CL. 2, BOTH THE NORTHERN DISTRICT AND 7TH CIRCUIT COURT OF APPEALS HAVE BARRED ANY RELIEF IN ANY FORM OR FROM ANY OTHER COURT.

PETITIONER IS SEEKING A WRIT AUTHORIZED BY § 2254 (a), AND VACATE PRIOR JUDGMENTS.

ARGUMENT I.

STANDARD OF LAW REVIEW

CASTRO V. UNITED STATES, 124 S.Ct. 786, 793 (2003) (RULING IN FAVOR OF SECTION 2255 MOVANT OVER GOVERNMENTAL ARGUMENT BASED ON "LAW OF THE CASE" DOCTRINE AND EXPLAINING THAT DOCTRINE "CANNOT POSE AN INSURMOUNTABLE OBSTACLE" TO GRANTING RELIEF IN "AN APPROPRIATE CASE" BECAUSE DOCTRINE "SIMPLY EXPRESSES COMMON JUDICIAL PRACTICE" AND "DOES NOT LIMIT THE COURTS' POWER" (CITING MESSINGER V. ANDERSON, 225 U.S. 436, 444 (1912) (HOLMES, J.))).

RESTRICTIVE INTERPRETATION OF AEDPA PROVISION ADVANCED BY GOVERNMENT IS REJECTED BECAUSE, INTER ALIA, "IT CREATED PROCEDURAL ANOMALIES, ALLOWING REVIEW WHERE THE LOWER COURT DECISION DISFAVORS, BUT DENYING REVIEW WHERE IT FAVORS, THE GOVERNMENT" AND "IT CLOSED OUR DOORS TO A CLASS OF HABEAS PETITIONERS SEEKING REVIEW WITHOUT ANY CLEAR INDICATION THAT SUCH WAS CONGRESS' INTENT," CASTRO, 124 S.Ct. at 791.

UNDER AEDPA, 28 U.S.C. § 2254 (d)(1), HABEAS IS DENIED UNLESS THE PROCEEDINGS IN STATE COURT "RESULTED IN A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OR THE UNITED STATES, 28 U.S.C. § 2254 (d)(1) (2000). CONTRARY TO, 7TH CIRCUIT COURT OF APPEALS AND NORTHERN DISTRICT COURT'S DECISIONS AND ORDERS, IT IS ENTIRELY APPROPRIATE — EVEN NECESSARY — THAT FEDERAL COURTS ASK WHETHER THE STATE COURT APPLIED CORRECT LEGAL PRINCIPLES. . . . IN AN OBJECTIVELY UNREASONABLE WAY, AN INQUIRY THAT REQUIRED ANALYSIS OF THE STATE COURT'S [METHOD] AS WELL AS ITS RESULT." WILLIAMS V. TAYLOR, 529 U.S. 362, 404-06 (2000)

"ON HABEAS REVIEW, THE AEDPA REQUIRES US TO FOCUS OUR ATTENTION ON THE STATE COURT'S ANALYSIS. (SEE STATEMENT OF THE CASE). THE PETITIONER'S OBLIGATION IS NOT SIMPLY TO OFFER A PLAUSIBLE ARGUMENT FOR THE UNCONSTITUTIONALITY OF HIS CONVICTION, BUT RATHER TO IDENTIFY HOW THE STATE COURT'S ANALYTICAL PATH STRAYED BEYOND PERMISSIBLE BOUNDS." "AN ISSUE DOES NOT LOSE ITS FACTUAL CHARACTER MERELY BECAUSE ITS RESOLUTION IS DISPOSITIVE OF THE ULTIMATE CONSTITUTIONAL QUESTION." HOWEVER, ANY PRINCIPLE THAT CAN BE GIVEN MEANING ONLY THROUGH ITS APPLICATION TO THE FACTS OF THE CASE IS GENERALLY REGARDED AS A LEGAL QUESTION."

§ 2254 (c)(1) APPLIES TO STATE COURT FINDINGS ON "SCENE AND ACTION-SETTING QUESTIONS" AND OTHER "DISTINCTLY FACTUAL" INQUIRIES AS TO CIRCUMSTANCES SURROUNDING THE INTERROGATION, THE ULTIMATE "IN CUSTODY" CALLS FOR THE CONTROLLING LEGAL STANDARD TO THE HISTORICAL FACTS AND IS NOT ENTITLED TO THE PRESUMPTION OF CORRECTNESS. § 2254 (c)(1) (2000).

THE COURT IN MURPHY V. CARRIER, CORRECTLY FORMULATED THE LEGAL RULE THAT "CAUSE" EXIST FOR FOR A PROCEDURAL DEFAULT WHEN, AS A RESULT OF INTERFERENCE BY OFFICIALS, THE OTHERWISE DEFAULTED CLAIM WAS REASONABLY UNKNOWN TO PETITIONERS LAWYERS AND PETITIONERS LAWYERS MADE NO INTENTIONAL DECISION TO FOREGO THE CLAIM, 477 U.S. 478, 488 (1986).

HABEAS PETITIONER HAD "CAUSE FOR FAILING TO INVESTIGATE, IN STATE POSTCONVICTION PROCEEDINGS, [PROSECUTION WITNESSES] TRUE ROLES IN THE INVESTIGATION AND TRIAL OF THE CASE," FOR PURPOSES OF BRADY CLAIM "BECAUSE THE STATE PERSISTED IN HIDING [WITNESSES] STATUS AND MIS LEADINGLY REPRESENTED THAT IT HAD COMPLIED IN FULL WITH ITS BRADY DISCLOSURE OBLIGATIONS"; REJECTING STATES ARGUMENT THAT "CAUSE" WAS NOT PRESENT GIVEN "HOWELL'S" FAILURE, DURING STATE POSTCONVICTION PROCEEDINGS, TO ATTEMPT TO LOCATE [WITNESSES] AND ASCERTAIN [WITNESSES] STATUS": "THERE'S NO SUPPORT TO THE NOTION THAT DEFENDANTS MUST SCAVENGE FOR HINTS OF UNDISCLOSED BRADY MATERIAL WHEN THE PROSECUTOR REPRESENTS THAT ALL SUCH MATERIAL HAS BEEN DISCLOSED", AND DEFENSE COUNSEL HAS NO 'PROCEDURAL OBLIGATION TO ASSERT CONSTITUTIONAL ERROR ON THE BASIS OF MERE SUSPICION THAT SOME PROSECUTORIAL MISSTEP MAY HAVE OCCURRED"; "A RULE . . . DECLARING PROSECUTOR MAY HIDE, DEFENDANT MUST SEEK, IS NOT TENABLE IN A SYSTEM CONSTITUTIONALLY BOUND TO ACCORD DEFENDANTS DUE PROCESS".

PRIOR TO THE AEDPA, A FEDERAL HABEAS COURT INDEPENDENTLY REVIEWED THESE DETERMINATIONS. PRESUMPTION OF CORRECTNESS UNDER AEDPA'S § 2254 (c)(1) DID NOT APPLY TO STATE APPELLATE COURTS "PRONOUNCEMENT THAT THERE'S NO FACTUAL BASIS FOR A CONCLUSION THAT COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT . . . AS THIS STATEMENT ENCOMPASSES DISTRICT COURT'S DENIAL OF RELIEF BY MERELY 'ADOPTING THE REASONS GIVEN BY THE

STATES APPELLATE DIVISION IN AFFIRMING HOWELL'S CONVICTION AND THE REASONS GIVEN BY THE STATE IN OPPOSING THE PETITION "RESULTED IN "RECORD THAT" NO FINDING WAS MADE BY THE STATE COURT AT ALL.

PETITIONERS' FOURTEENTH AMENDMENT RIGHT OF DUE PROCESS IS TO BE SECURE. THE DUE PROCESS CLAUSE REQUIRED THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE CRIME WITH WHICH DEFENDANT IS CHARGED. SEE IN RE WINSHIP, 397 U.S. 358, 364 (1970). THE WINSHIP REASONABLE DOUBT STANDARD PROTECTS THREE INTERESTS. FIRST, IT PROTECTS THE DEFENDANT'S INTEREST IN BEING FREE FROM UNJUSTIFIED LOSS OF LIBERTY. 397 U.S. at 363. SECOND, IT PROTECTS THE DEFENDANT FROM THE STIGMATIZATION RESULTING FROM CONVICTION. SEE Id. THIRD, IT ENCOURAGES COMMUNITY CONFIDENCE IN THE CRIMINAL LAW BY GIVING "CONCRETE SUBSTANCE" TO THE PRESUMPTION OF INNOCENCE. Id. at 363-64.

IF THE GOVERNMENT FAILS TO PRODUCE SUFFICIENT EVIDENCE FOR ANY ELEMENT, THEREBY NOT BRINGING THE FACT INTO ISSUE, THE JUDGE MAY DIRECT A VERDICT IN DEFENDANT'S FAVOR. SEE GENERALLY LA FAYE & SCOTT, CRIMINAL LAW §1.8 (2d ed. 1966); McDORMICK, EVIDENCE 33-336-337 (5th ed. 1999).

[PROSECUTION WITNESSES] VOUCHERED FOR THE TRUTHFULNESS OF ALLEGED VICTIM, B.S.'S ACCOUNT, BY TESTIFYING THAT HOWELL INAPPROPRIATELY TOUCHED B.S., WHICH WAS NEITHER ALLEGED IN THE CHARGING INFORMATION NOR FOUND BY A JURY BEYOND A REASONABLE DOUBT, AS THE REQUIRED BASIS TO JUSTIFY PROSECUTION'S BURDEN OF PROOF ON THE ELEMENT OF [SEXUAL INTERCOURSE] AND TO SUGGEST THAT EXCULPATORY AND IMPEACHING MATERIAL IN THE STATE'S POSSESSION BUT NOT PRESENTED TO THE JURY SUPPORTS HIS CASE-IN-CHIEF, LAWRENCE V. STATE, 464 N.E. 2d 923 (Ind. 1984), WAS INSUFFICIENT TO ESTABLISH, BEYOND A REASONABLE DOUBT, THAT "HOWELL" WAS THE PERPETRATOR OF THE SEXUAL ABUSE; INDIANA COURT OF APPEALS'S FINDING, THAT THE EVIDENCE [OF TOUCHING] WAS SUFFICIENT. . . . CONSTITUTES AND OBJECTIVELY UNREASONABLE APPLICATION UNDER §2254 (d)(1), OF THE PRINCIPLES SET FORTH. . . IN JACKSON V. VIRGINIA, 443 U.S. 307, 319 (1979) AND [IN RE] WINSHIP, 397 U.S. 358, 363-64 (1970). THE DEFENDANT MUST BE ACQUITTED. WINSHIP, 397 U.S. at 363.

THE STATE COURT OF APPEALS MADE FINDINGS OF FACT BECAUSE STATE COURT "MADE

NO FINDINGS ON ISSUES, NO PRESUMPTION OF CORRECTNESS ATTACHES. § 2254 (c)(1). TRIAL COUNSEL PRESENTED A FEDERAL CONSTITUTIONAL CLAIM TO THE STATE COURT IN THE MANNER PRESCRIBED BY THE STATE COURTS PROCEDURAL RULES BY MAKING CONTEMPORANEOUS OBJECTIONS TO STATE'S ACCREDITED EXPERT, RAMSEY'S TESTIMONY AS BEING INAPPROPRIATE BECAUSE B.J. CLAIMED SHE WAS MOLESTED BY HOWELL'S SON, B.H.. THOSE CERTAIN ISSUES WERE RAISED BY HOWELL ON DIRECT APPEAL (APP. D, APPELLANT'S BRIEF AT 12; APPELLANT'S REPLY BRIEF AT 1-E), IS CONTRARY TO, WELLMAN V. WILLIAMS, 16 Fed. Appx. 905, 912-13, 2001 U.S. App. LEXIS 17697, at *14-16 (10th Cir. Aug. 8, 2001); § 2254 (d)(1).

"ARDPA'S PRESUMPTION OF CORRECTNESS DOES NOT APPLY TO STATE COURT FINDINGS ARRIVED AT THROUGH THE USE OF ERRONEOUS LEGAL STANDARDS." "A CONSTITUTIONAL VIOLATION BY THE STATE HAS RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT." CARRIER, SUPRA, 477 U.S. at 496; GENZALEZ V. ABBOTT, 967 F.2d 1499, 1504 (11th Cir. 1992). INTEREST OF JUSTICE DICTATE, IMMEDIATE AND UNCONDITIONAL RELEASE. ROBINSON V. UNITED STATES, 196 F.3d 746, 754 (7th Cir. 1999), vac'd on other grounds, 531 U.S. 1108 (2001).

ARGUMENT II.

STANDARD OF FACT REVIEW

TAYLOR V. MADDOX, 366 F.3d 992, 1008-09 (9th Cir. 2004) (COURT OF APPEALS, AFTER CONCLUDING THAT DISTRICT COURT ERRED IN APPLYING PRESUMPTION OF CORRECTNESS TO STATE COURT FACT FINDINGS THAT SHOULD HAVE BEEN FOUND "UNREASONABLE" UNDER SECTION 2254 (d)(2), MAKES NEW FINDINGS ITSELF RATHER THAN REMANDING TO DISTRICT COURT BECAUSE "PETITIONER IS NOT SEEKING TO INTRODUCE NEW EVIDENCE. . . [AND] MERELY ASKS US TO MAKE FINDINGS . . . BASED ON EVIDENCE PRESENTED TO THE STATE COURTS" AND "IN SUCH CIRCUMSTANCES, WE ARE IN NO WORSE A POSITION THAN THE DISTRICT COURT TO MAKE THE FINDINGS" AND "GIVEN THAT PETITIONER HAS ALREADY SERVED OVER TEN YEARS OF HIS SENTENCE, WE SEE NO REASON FOR FURTHER DELAY").

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH TENNARD V. DRITKE, 124 S.Ct. 2562, 2569, 2573 (2004) ("A COA SHOULD

HAVE ISSUED, REASONABLE JURIST WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG"; COURT REVERSED 5TH CIRCUIT'S DENIAL OF COA, WHICH "PAID LIPSERVICE TO THE PRINCIPLES GUIDING ISSUANCE OF A COA", AND "HOLDS THAT REASONABLE JURIST WOULD FIND DEBATABLE OR WRONG THE DISTRICT COURT'S DISPOSITION OF TENNARD'S . . . CLAIM, AND THAT TENNARD IS THEREFORE ENTITLED TO A CERTIFICATE OF APPEALABILITY." PLAIN ERROR IS "PARTICULARLY EGREGIOUS" AND CONTRIBUTES TO THE "MISCHANCE OF JUSTICE". THE SUPREME COURT CHARACTERIZED THIS ERROR AS "CLEAR OR OBVIOUS, AND AFFECTS THE DEFENDANT (PETITIONER'S) SUBSTANTIAL RIGHTS. UNITED STATES V. CLARK, 227 F.3d 874, 884 (7th Cir. 2000). REJECTING STATE'S ARGUMENT THAT THE FOURTEENTH AMENDMENT VIOLATIONS WAS NOT PRESENT, WHEN THEY WERE, UNITED STATES V. WILSON, 962 F.2d 621, 627 (7th Cir. 1992). (APP'D; APPELLANT'S BRIEF AT 12; APPELLANT REPLY BRIEF, 1-8); (APP.A; DE 66, 41).

COURT OF APPEALS DEVIATED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. "COURT OF APPEALS . . . WAS INCORRECT FOR AN EVEN MORE FUNDAMENTAL REASON, NAMELY, THAT THE 7TH CIRCUIT HAD ELIDED TWO SEPARATE STAGES OF THE PROCESS, THAT INQUIRY INTO "FULL AND FAIR OPPORTUNITY TO LITIGATE" REQUIRES REVIEW OF WHETHER "THE STATE COURT HAS CAREFULLY AND THOROUGHLY ANALYZED THE FACTS AND . . . APPLIED THE PROPER CONSTITUTIONAL CASE LAW TO THE FACTS," IS CONTRARY TO, HAMPTON V. WYANT, 296 F.3d 560, 563 (7th Cir.), cert. denied, 537 U.S. 980 (2002) (QUOTING PIERSON V. O'LEARY, 959 F.2d 1385, 1391 (7th Cir.), cert. denied, 506 U.S. 857 (1992)). DO SO IN ORDER TO DENY RELIEF.

THERE IS "CLEAR AND OBVIOUS" PROOF THAT NO FINDING WAS MADE BY THE STATE COURT AT ALL . . . THAT GOVERNMENTAL INTERFERENCE RENDERED PROCEDURAL COMPLIANCE IMPRACTICABLE BY SUPPRESSING [PROSECUTION WITNESSES'] TRUE ROLES IN THE INVESTIGATION AND TRIAL OF THE CASE AND THE "FULL AND FAIR OPPORTUNITY TO LITIGATE" 4TH, 5TH OR 6TH AMENDMENT EXCLUSIONARY RULE VIOLATIONS. A "RED HERRING" WAS CREATED TO DIVERT THE COURT'S ATTENTION FROM THE ACTUAL ISSUE HOWELL RAISED ON APPEAL, WHICH WAS PRESERVED AT TRIAL WITH TIMELY CORRECTIONS (APP. B; TR. 186, 247-48; APP. D; APPELLANT'S BRIEF AT 12; APPELLANT'S REPLY BRIEF

1-E). THERE IS NO FACTUAL BASIS FOR A CONCLUSION THAT COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT. IN U.S. V. CLARK, "WE MUST LOOK AT RECORD AS A WHOLE TO DETERMINE WHETHER PROSECUTORIAL MISCONDUCT DENIED DEFENDANT A FAIR TRIAL," SUPRA, 227 F3d at 864. PLAIN ERROR REVEALS STATE COURT HAS NOT CONSIDERED A PROPERLY PRESERVED CLAIM ON ITS MERITS. § 2254 (b)(1)(B)(i) (APP. B; 47, 1); CLEAR AND CONVINCING TO THE CONTRARY, § 2254 (e)(1).

THE OTHERWISE DEFAULTED CLAIM WAS REASONABLY UNKNOWN TO PETITIONER'S LAWYERS AND PETITIONER'S LAWYERS MADE NO INTENTIONAL DECISION TO FORGO THE CLAIM. CARRIER, SUPRA, 477 U.S. at 439. § 2254 (b)(1)(B)(ii). "STATE COMMITTED FRAUD UPON THE FEDERAL COURT WHICH LED TO THE DENIAL OF THE HABEAS PETITION," IT WAS A MISCARriage OF JUSTICE TO TURN A BLIND EYE TO SUCH ABUSE OF THE JUDICIAL PROCESS. (APP. A; DE 66; B; DE 48).

"JUST COULD CONCLUDE THE ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER." THE COURT SHOULD HAVE OVERTURNED HOWELL'S CASE ON FACTUAL GROUNDS BECAUSE IT WAS OBJECTIVELY UNREASONABLE IN LIGHT OF FEDERAL COURT'S INDEPENDENT REVIEW OF THE RECORD COURT HAD BEFORE IT, UNDER § 2254 (d)(1) AND (e)(1). THE STATE OBTAINED EVIDENCE THROUGH DIRECT OR INDIRECT VIOLATIONS OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS, WHICH WERE INTRODUCED BY PROSECUTION AT TRIAL, FOR THE PURPOSES OF PROVING HOWELL'S GUILT, CONTRARY TO, PATTERSON V. NEW YORK, 432 U.S. 197, 210 (1977).

IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE RECORD, THE PROPER CONSTITUTIONAL CASE LAW TO THE FACTS IS, . . . DILOSA V. CAIN, (PROSECUTOR ARGUED AT TRIAL THAT DEFENSE'S ATTRIBUTION OF CRIME TO OTHER PERPETRATOR WAS REFUTED BY ABSENCE OF PHYSICAL EVIDENCE, EVEN THOUGH PROSECUTION HAD WITHHELD DISCLOSURE OF PHYSICAL EVIDENCE THAT DIRECTLY SUPPORTED ACCUSED'S ACCOUNT OF EVENTS": "THE STATE THUS BASED ITS CASE ON THE NON-EXISTENCE OF EVIDENCE IT KNEW EXISTED," 279 F3d 259 (5th Cir. 2002)); IN LIGHT OF THE FACT, . . . OUR PROCESS WAS VIOLATED BECAUSE PROSECUTION WITHHELD EVIDENCE THAT COULD HAVE BEEN USED TO IMPEACH TESTIMONIES OF STATE'S KEY WITNESSES AND AFFECT CREDIBILITY. CRIVENS V. ROTH, 172 F3d 991, 999 (7th Cir. 1999).

"ARDPAS PRESUMPTION OF CORRECTNESS DOES NOT APPLY TO STATE COURT FINDINGS ARRIVED AT THROUGH THE USE OF ERRONEOUS LEGAL STANDARDS," GONZALEZ V. ABBOTT, SUPRA, 1504.

EVIDENCE IN TRIAL FOR SEXUAL ABUSE WAS INSUFFICIENT TO "ESTABLISH, BEYOND A REASONABLE DOUBT, THAT HOWELL WAS THE PERPETRATOR OF THE SEXUAL ABUSE." INDIANA COURT OF APPEALS FINDING THAT THE EVIDENCE [OF VOUCHING] WAS SUFFICIENT. . . CONSTITUTES AN OBJECTIVELY UNREASONABLE APPLICATION UNDER § 2254 (d)(1), CLEAR AND CONVINCING TO THE CONTRARY OF MELLUMS V. WILLIAMS, SUPRA, 16 Fed. Appx. 905, IN LIGHT OF THE FACTS PRESENTED IN THE STATE RECORD. § 2254 (d)(2) AND (e)(1).

APPELLATE COURT'S DETERMINATION THAT THERE WAS OVERWHELMING EVIDENCE OF HOWELL'S GUILT INDEPENDENT OF [IMPROPERLY ADMITTED EVIDENCE] ALSO WAS OBJECTIVELY UNREASONABLE IN LIGHT OF EVIDENCE PRESENTED AT HOWELL'S TRIAL UNDER § 2254 (d)(2) AND INDEED BY CLEAR AND CONVINCING EVIDENCE, CONTRARY TO, UNITED STATES V. WASHINGTON, VERDICT WAS AGAINST WEIGHT OF THE EVIDENCE BECAUSE LOWER COURT BASED VERDICT ON TESTIMONIES OF THE WITNESSES WHOSE CREDIBILITY COURT HAD QUESTIONED, 184 F.3d 653, 658-59 (7th Cir. 1999).

HOWELL HAS SHOWN CAUSE FOR FAILING TO PRESENT EVIDENCE IN TRIAL, ON APPEAL, AND IN STATE POSTCONVICTION PROCEEDINGS, CAPABLE OF SUBSTANTIATING HIS. . . BRADY CLAIM BECAUSE (1) "STATE PERSISTED IN HIDING [PROSECUTION WITNESSES] STATUS AND MISLEADINGLY REPRESENTED THAT IT HAD COMPLIED IN FULL WITH ITS BRADY DISCLOSURE OBLIGATIONS" AND (2) PROSECUTOR FAILED TO CORRECT WITNESSES' MISREPRESENTATIONS OF THEIR DEALINGS WITH POLICE IN TESTIMONIES AT TRIAL, AND JUST AS "IT WAS REASONABLE FOR HOWELL TO RELY ON THE PROSECUTION'S FULL DISCLOSURE REPRESENTATION," IT WAS ALSO APPROPRIATE FOR HOWELL TO ASSUME THAT HIS PROSECUTOR WOULD NOT STEEP TO ASSISTING WITNESSES TO COMMIT FRAUD ON THE COURT IN ORDER TO OBTAIN A CONVICTION". RULES OF PROFESSIONAL CONDUCT, RULES 1.2d, 3.3 (a), 8.4 (c), (f)

"COINCIDENT WITH THIRD BRADY COMPONENT (PREJUDICE), PREJUDICE WITHIN THE COMPASS OF THE CAUSE AND PREJUDICE REQUIREMENT EXIST WHEN THE SUPPRESSED EVIDENCE IS 'MATERIAL FOR BRADY PURPOSES'; STATES "SUPPRESSION OF [PROSECUTION WITNESSES] STATUS" WAS "MATERIAL" FOR PURPOSES OF BRADY DOCTRINE AND "PREJUDICIAL" FOR PURPOSES OF PROCEOURAL DEFAULT DOCTRINE BECAUSE "ONE CAN HARDLY BE CONFIDENT THAT HOWELL RECEIVED A FAIR TRIAL, GIVEN THE JURY'S IGNORANCE OF [WITNESSES] TRUE ROLES IN THE INVESTIGATION AND TRIAL OF THE CASE" AND "ONE COULD NOT PLAUSIBLY DENY THE EXISTENCE OF THE REQUISITE 'REASONABLE PROBABILITY OF A DIFFERENT RESULT'

HAD THE SUPPRESSED INFORMATION BEEN DISCLOSED TO THE DEFENSE," 373 U.S. 83 (1963)

IN *St. Cyr*, THE SUPREME COURT RECOGNIZED THAT THE SUSPENSION CLAUSE REQUIRES REVIEW OF CLAIMS BASED ON THE ERRONEOUS APPLICATION OF STATUTES. . . AND ACCORDINGLY, HOWELL'S ARGUMENT ON APPEAL CHALLENGING THE INDIANA COURT OF APPEALS APPLICATION OF THE PARTICULAR FACTS IN THIS CASE TO RELEVANT LAW FALLS WITHIN THE PERMISSIBLE SCOPE OF HABEAS REVIEW. HOWELL ALLEGES MISAPPLICATION OF A LEGAL PRINCIPLE TO UNDISPUTED FACTS OF RECORD.

THERE IS NO QUESTION IN THIS CASE THAT HOWELL IS PROPERLY BEFORE AN ARTICLE III COURT TO CHALLENGE HIS DETENTION UNDER § 2254. BECAUSE THE SUSPENSION CLAUSE ESTABLISHED THE AVAILABILITY OF FEDERAL HABEAS CORPUS REVIEW ABSENT SUSPENSION OF THE WRIT. IT REMAINS A CRITICAL CHECK ON THE EXECUTIVE, TO ENSURE THAT IT DOES NOT DETAIN INDIVIDUALS EXCEPT IN ACCORDANCE WITH LAW. SEE *INS V. ST. CYR*, 533 U.S. 269, 301 (2001).

JUSTICE STEVENS AND JUSTICE SCALIA DESCRIBED THE CLAUSES GUARANTEED:

TWO IDEAS CENTRAL TO BLACKSTONE'S UNDERSTANDING—DUE PROCESS AS A RIGHT SECURED, AND HABEAS CORPUS AS THE INSTRUMENT BY WHICH DUE PROCESS COULD BE INSISTED UPON BY A CITIZEN ILLEGALLY IMPRISONED—FOUND EXPRESSION IN THE CONSTITUTION'S DUE PROCESS AND SUSPENSION CLAUSES. SEE AMDT. 5; ART. I, § 9, CL. 2.

EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY POWERS UNDER § 1651 (a) AND S. CT. RULE 10 (a) THAT SO CONTRAVENED THIS COURT'S DECISIONS IN *MURRAY V. CARRIER*, 477 U.S. 476, 488, 496 (1986) THAT AN EXERCISE INVOKING THIS COURT'S ORIGINAL JURISDICTION UNDER ARTICLE III, § 2, CL. 3 OF THE CONSTITUTION OF THE UNITED STATES IS REQUIRED TO SUSTAIN THE PROTECTIONS AGAINST ARBITRARY FACTFINDING SET FORTH IN § 2254 (b) (i) (B) (i) OR (ii) AND PROTECT AGAINST THE PRACTICE OF ARBITRARY IMPRISONMENTS SET FORTH IN THE CONSTITUTIONS' ARTICLE I, § 9, CL. 2; FIFTH AMEND., EIGHTH AMEND. AND FOURTEENTH AMEND. *MURRAY V. CARRIER*, 477 U.S. 476, 488, 106 S. CT. 2639, 2695, 91 L. ED. 2D 397 (1986); 496, 106 S. CT. 2639, 2649-50, 91 L. ED. 2D 397, 414 (1986).

CONCLUSION

The petition for AN EXTRAORDINARY WRIT SHOULD BE GRANTED.

Respectfully submitted,

Danny W. Howell, #136701

Date: JUNE 15, 2018