NO:_____

IN THE SUPREME COURT OF THE UNITED STATES

JOEL ALEXZANDER GOMEZ,

Petitioner,

v

MARY BERGHUIS,

Respondent.

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

By:

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QUESTION PRESENTED FOR REVIEW

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN DENYING A CERTIFICATE OF APPEALABILITY?

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REFERENCE TO OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit denied Petitioner's Motion for Certificate of Appealability on February 21, 2018. (Gomez v Berghuis, U.S. Court of Appeals for the Sixth Circuit, case no: 17-2115, Feb. 21, 2018).

STATEMENT OF JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Sixth Circuit's decision denying a certificate of appealablity. This Court has jurisdiction under Hohn v United States, 524 US 236 (1998)(Supreme Court has jurisdiction, via certiorari, to review denials of applications for certificates of appealability).

CONSTITUTIONAL PROVISIONS

U.S. Const, AM V

No person 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;

U.S. Const, Am XIV §1

No State shall ... deprive any person of liberty, or property, without due process of law;

STATEMENT OF THE CASE

A jury found Petitioner guilty of domestic assault and ten counts of first-degree criminal sexual conduct. The state trial court sentenced Petitioner to a prison term of 25 to 40 years. The Michigan Court of Apeals affirmed the trial court's judgment. People v Gomez, no. 301706, 2012 WL 4210311 (Mich Ct App Sept 20, 2012). The Michigan Supreme Court denied leave to appeal. People v Gomez, 830 NW2d 137 (Mich 2013).

Petitioner filed a habeas petition arguing that the trial court violated his rights by admitting certain hearsay and opinion evidence, that there did not exist probable cause to initiate criminal proceedings against him, and that the prosecutor engaged in misconduct. The United States District Court for the Western District of Michigan denied the petition, and denied a certificate of appealability.

Petitioner presented only one issue for the Court of Appeals for the Sixth Circuit: Prosecutorial Misconduct. The Court of Appeals for the Sixth Circuit denied the certificate of appealability on February 21, 2018.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN DENYING A CERTIFICATE OF APPEALABILITY.

The standard for granting a certificate of appealability is set forth in 28 USC §2253(c): "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." The Court explained in Slack v McDaniel, 529 US 473, 484 (2000), that a certificate should issue if "justices of reason would find it debatable whether a petition states a valid claim of the denial of a constitutional right." The Court stressed that the standard for a certificate of appealability is much less stringent than the standard for success on the merits. Miller-El v Cockrell, 537 US 322 (2003). In Miller-El, the Court held that the lower court had applied too stringent a standard in denying a capital petitioner's certificate of appealability. The Court stressed that the petitioner need not show that he is liklely to succeed on appeal or even that any reasonable judge would, after hearing the appeal, rule in his favor. Instead, the Court reiterated the standard from Slack v McDaniel, that the petitioner need merely show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Claim IV: Prosecutorial Misconduct

The "touchstone of due process analysis ... is the fairness of the trial, not the culpability of the prosecutor." Smith v Phillips, 455 US 209, 219 (1982).

For prosecutorial misconduct to rise to the level of a constitutional violation cognizable on habeas review the misconduct must have so infected the trial with unfairness as to make the resulting conviction a denial of due process. Once the court finds that a statement was improper, four factors are considered in determining whether the impropriety was flagrant:

> "(1) the likelihood that the remarks misled the jury or prejudiced the accused; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally presented to the jury; and, (4) whether other evidence against the defendant was substantial." Bowling v Parker, 344 F3d 487, 512-513 (6th Cir 2003).

The improper comments are outlined below:

A. Opening statement and misleading the jury

The prosecutor made reference to the term "mixed stains" at trial during opening statements, during expert testimony, and during closing arguments. Ann Hunt, a DNA expert, testified that she could not determine whether mixed stains were deposited on the bed spread at the same time. Because there may have been two DNA donors to the mixed stain does not mean that the stains were deposited at the same time. The repeated use of the term "mixed stains" were misleading and not accurate.

B. Bolstering Witness's Testimony

During trial, the prosecutor was asking Dr. James Henry hypothetical questions regarding the facts of this case. The prosecution's attempt was to use the victim in this case in a hypothetical scenario to determine whether someone in the victim's situation could be believed. The prosecution's hypothetical was not asking a general question about the credibility of people in general. The

prosecution was asking Dr. Henry if the victim in this case could be believed to have told the truth about a recantation. The hypothetical question, asked another way, would be "can the recantation of this witness believed?" The Doctor answered "Absolutely" not. The prosecution was asking the Doctor to make a determination, as an expert, of whether this witness was telling the truth when she recanted her allegations against Petitioner. Improper vouching occurs when a jury could reasonably believe that a "prosecutor was indicating a personal belief in a witness' credibility." Taylor v United States, 985 F2d 844, 846 (6th Cir 1993). It is improper for a witness to provide an opinion on the credibility of another witness, as credibility is a question for the jury. People v Buckey, 424 Mich 1 (1985). As in this case, to allow an expert to give an opinion, even a hypothetical opinion, of whether a witness in a criminal sexual conduct case is telling the truth, amounts to an unwarranted reinforcement of the complaining witness's testimony and gave scientific legitimacy to the truth of the complaining witness's testimony. People v Izzo, 90 Mich App 727 (1979).

C. Arguing Facts Not In Evidence

For the same reasons as stated above, there was no evidence that the two DNA stains had been deposited at the same time, and from the same incident, on the bedding. It is just as likely that the two stains were deposited on the bedding at separate times. For the prosecutor to make comments about the mixed nature of the stains was misleading and denied Petitioner a fair trial. The prosecutorial misconduct so "infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v DeChristoforo, 416 US 637, 643 (1974).

The four factors in Bowling v Parker, has been satisfied in this case. There is a strong likelihood that the prosecutor's remarks about mixed stains, having the expert vouch for the lack of credibility of the complainant, the remarks were deliberately presented before the jury, and the evidence against Petitioner was not substantial. In fact, the only complaining witness had recanted her accusations against Petitioner.

WHEREFORE, for the above reasons, Petitioner moves this Court to find that the United States Court of Appeals for the Sixth Circuit erred in denying a certificate of appealability and grant the requested writ of certiorari.

I declare under penalty of perjury that the foregoing is true and correct. (28 USC §1746[2]). Executed on May 21, 2018.

Respectfully submitted,

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