18-8788 ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT L. MOORE — PETITIONER
(Your Name)

vs.

NOAH NAGY, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert L. Moore #203977
(Your Name) LAKELAND CORRECTIONAL FACILITY
141 FIRST ST.
(Address)

COLDWATER, MICHIGAN 49036
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

I.

WHERE A STATE COURT DENIES A PERSON THE OPPORTUNITY TO ESTABLISH THE NECESSARY FACTUAL RECORD TO SUPPORT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL. IS THE STATE COURT DECISION STILL CONSIDERED AN ADJUDICATION ON THE MERITS? IF NOT, IS THE FEDERAL REVIEW DE NOVO?

II.

WHERE A STATE COURT ADDRESSES A CONSTITUTIONAL CLAIM ON THE MERITS, BUT UNREASONABLY DETERMINES THE FACTS. IS IT NECESSARY TO SHOW BY CLEAR AND CONVINCING EVIDENCE UNDER 28 U.S.C. §2254 (e)(1) REQUIREMENTS, PRIOR TO RELIEF BEING GRANTED UNDER 28 U.S.C. §2254 (d)(2)?

LIST OF PARTIES

[x] 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:

TABLE OF AUTHORITIES

TABLE OF CONTENTS

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

[X] 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 _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[X] For cases from **state courts**:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was November 20, 2018.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 7, 2019, and a copy of the order denying rehearing appears at Appendix D.

[ ] 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 _____. A copy of that decision appears at Appendix _____.

[ ] 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

United States Constitution Sixth Amendment:

> 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 defence 17,22,25

United States Constitution Fourteenth Amendment:

> 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 to any person within its jurisdiction the equal protection of the laws 22,25

Title 28 U.S.C. §2254 (d)(1) 16,18

Title 28 U.S.C. §2254 (d)(2) 17,18,26,27

STATEMENT OF THE CASE

Petitioner Robert L. Moore stood trial in Kalamazoo Circuit Court, Judge J. Richardson Johnson, presiding, on the charges of Armed Robbery, contrary to Mich. Comp. Laws §750.529, and Felony Firearm, contrary to Mich. Comp. Laws §750.227b. After a jury convicted him of both charges, Judge Johnson sentenced Petitioner to serve sixteen-to-thirty years prison term for the Armed Robbery conviction consecutive to the mandatory two year term for the firearm conviction.

FACTS:

The Prosecution Case:

On September 28, 2008, Kassie Pillars was watching TV in her second floor Oshtemo Township apartment, when she heard a "loud boom." T2 324-25.[1] A second later, she heard a voice calling to her, "Kassie, call the cops. Kassie, call the cops." T2 325.

Her friend John Allegretti (the Complainant in this case) lived in the apartment directly above her. T2 324-25. Cross-examination revealed Ms. Pillars did not hear anyone yelling at Mr. Allegretti for money or for him to shut up bitch, or I'm going to shoot you. T2 347.

---

1. References to the trial transcript are denoted "T" [Page #]." T1 (7/20/2010); T2 (7/21/2010) and T3 (7/22/2010).

Cross-examination also revealed Ms. Pillars never heard another voice upstairs. T2 342.

Ms. Pillars grabbed her phone and dialed 911 while walking toward her front door. T2 325-26. She heard another "boom," like somebody coming through the screen on a slider door. T2 326. She opened her front door, as she thought maybe Allegretti was "freaking out," because his dog was loose, and intended to shoo the dog into her apartment. T2 330. That she then saw a dark-clothed man holding a two-and-half foot long gun with both hands coming down the stairs toward her. T2 326. She quickly closed the door Id. The man with the gun kicked at the bottom of the door and yelled at her to open it. She held it shut and told the 911 operator to "come now, there's a guy with a gun." Id. Having secured the door and ended the 911 call, Ms. Pillars ran toward the back of her apartment. Id. She heard another boom, the sound of something hitting the wooden platform of her balcony (T2 337) and then saw Mr. Allegretti walk into her apartment, blood all over his face and clothes. Ms. Pillars testified that Allegretti never told her what had happened. T2 331. Allegretti: asked if she'd called the cops. She said yes, and that they were on the way. T2 326.

The police arrived in five or ten minutes. T2 326. Allegretti told them that three men had attacked him. He couldn't identify two of the men, but one of them he knew: Defendant-Appellant Moore. T2 244.

250. Allegretti approached Petitioner, struggled with him, and tried to hold him for the police. Id. however, hospital security guards would not help him, and Petitioner got away. T2 251-52. Detective Jako testified that he did not recall looking for Petitioner's last known address. In fact, Detective Jako said he would normally leave it up to the warrant division to contact people whom they are looking for. Detective Jako went on to say Allegretti never contacted him saying he saw Petitioner at a hospital in the summer of 2009. That he heard of this only a few days before the trial began. T2 419-420, 421-422.

The Defense Case:

Petitioner's defense was alibi. A former girlfriend, Earlinia Moore, testified that on the date and at the time in question, Petitioner was with her.

Before the commencement of the trial, Petitioner requested of defense counsel to request an adjournment to allow him an opportunity to obtain witnesses for his defense. T1 3-4; T1 6-7. Petitioner did motion the Court to substitute his trial counsel, for a number of reasons. Petitioner contended his attorney made an agreement with the prosecutor that would deny key defense witnesses, and this agreement was without his consent. T1 4; T1 6-8. Petitioner is on record requesting new counsel. T1 18-19. Trial counsel denied any agreement was reached between her and the prosecutor. However, the prosecutor did state for the record that she did make an agreement with defense counsel to waive certain

said "give up the Guap," (t2 238), Allegretti understood "Guap" to mean money. T2 238. Allegretti asked Petitioner what he was doing. The second of the other men, who held a rifle, told Allegretti to "shut up, Bitch," and hit Allegretti in the face with the rifle's butt end. T2 238-39.

Allegretti fell to the floor. He heard Moore tell the others to "check his pockets. The money's in his pockets." T2 240. Allegretti jumped to his feet and ran toward the balcony, which was only four or five steps away. As he ran, he yelled to his downstairs neighbor, Pillars, to call the police. The man with the pistol chased him. T2 240.

He knocked the balcony's screen door off its tracks, (T2 241), and jumped up over the balcony's rail T2 240. As he did so, the man with the pistol pointed it in his face and threatened to shoot. But, Allegretti dropped on to the balcony below, unharmed. T2 240.

After Allegretti waited for the police, after his attackers fled, he called Petitioner and told him, "you're going to prison for this one." T2 242. Petitioner answered , "I'll put you out there in the streets if... you tell on me." T2 242. Allegretti interpreted this as a threat that Petitioner would tell people Allegretti was a snitch. T2 243. Defense counsel impeached Allegretti on a lot of this testimony. T2 279-80,281, 283-84; T2 371-372, 374. However, according to Pillars testimony, Allegretti just stood in her apartment and never said anything to her or on a phone. T2 231.

Allegretti told police nothing was taken. T2 245,372. Later, he said he realized three items of jewelry were missing: his wedding band, another ring and a chain. T2 246. He usually wore them. but on that night he had taken them off before showering, and left them on the kitchen table. T2 245-46. He didn't notice they were gone until after the police left. He told a detective the next day. T2 246. This testimony was contradicted by Detective Runcie who testified Allegretti told him that nothing was taken. T2 372. Actually, Detective Jako testified it was days later before Allegretti claimed he was missing some jewelry. T2 386-87.

Allegretti did not at first tell the police about his phone conversation with Petitioner while waiting for the police to arrive T2 367. Nor did Allegretti mention that the rifle-bearer said "Shut up, Bitch," or that Petitioner said "Give up the Guap" or "Check his pockets." T2 371-72.

At the Preliminary Examination, Allegretti had described the rifle as a shotgun. At trial, he claimed not to know the difference between a shotgun and a rifle" "I mean define a shotgun. It's [2] rifle, right" It's a long gun... that's what I meant." T2 303. Yet Allegretti was familiar enough with firearms to have told police that the long gun was an "SKS-Type Rifle." T2 369. A Deputy said Allegretti supplied the name "SKS." T2 369-70.

Petitioner remained at large for a time sometime in 2009, Allegretti testified he saw Petitioner standing outside a hospital. T2

250. Allegretti approached Petitioner, struggled with him, and tried to hold him for the police. Id. however, hospital security guards would not help him, and Petitioner got away. T2 251-52. Detective Jako testified that he did not recall looking for Petitioner's last known address. In fact, Detective Jako said he would normally leave it up to the warrant division to contact people whom they are looking for. Detective Jako went on to say Allegretti never contacted him saying he saw Petitioner at a hospital in the summer of 2009. That he heard of this only a few days before the trial began. T2 419-420, 421-422.

The Defense Case:

Petitioner's defense was alibi. A former girlfriend, Earlinia Moore, testified that on the date and at the time in question, Petitioner was with her.

Before the commencement of the trial, Petitioner requested of defense counsel to request an adjournment to allow him an opportunity to obtain witnesses for his defense. T1 3-4; T1 6-7. Petitioner did motion the Court to substitute his trial counsel, for a number of reasons. Petitioner contended his attorney made an agreement with the prosecutor that would deny key defense witnesses, and this agreement was without his consent. T1 4; T1 6-8. Petitioner is on record requesting new counsel. T1 18-19. Trial counsel denied any agreement was reached between her and the prosecutor. However, the prosecutor did state for the record that she did make an agreement with defense counsel to waive certain

witnesses. T1 5. Petitioner learned later through appellate counsel that trial counsel admitted she did make such an agreement and that she didn't like working for someone who didn't like her work.

Earlinia Moore testified she had known Petitioner for ten years. T3 445. Together, they had a five-year-old son. T3 446. Though their romance had ended, they remained friends.

On September 28, 2008, Petitioner called her to say that he'd had a dispute with his current girlfriend, Keitha, and that because of that the police were after him. T3 447. Before the jury heard Ms. Moore's testimony, the prosecutor took calculated steps to undermine her testimony. During direct examination, the prosecutor asked Detective Jako whether alibi witness Moore had a warrant for her arrest. This stemmed from a traffic violation which did not end in a conviction her record. T2 394. The prosecutor also took steps to weaken Petitioner's defense by questioning Detective Jako about disputes between Petitioner and his girlfriend Keitha. Both the traffic violation and disputes involving Petitioner and Keitha ended without conviction or fine. The prosecutor even struck a foul blow by referring to Petitioner's dispute, as an assault while cross-examining Ms. Moore. T3 468.

On the day in question, Ms. Moore testified that Petitioner arrived between 5:00 to 5:30 that evening to her house. T3 449. That Petitioner did spend the night there. T3 450. And, that he did not go out. T3 451. That she was positive about the day, because

the children were getting off the church bus when Petitioner called and asked her if he could come over. T3 446-451. The Court asked the prosecutor if they had any rebuttal evidence, the prosecutor responded "we do not." T3 470.

Challenge To Jury:

Defense counsel challenged that the jury was an under representation of African-Americans, due to a systematic exclusion. T1 56. This challenge was based upon only "one" African-American in the entire panel. T1 56-61. However, the Court later goes on the record about the jury box, not the panel T3 471-72.

The Jury Deliberations:

The jury left the courtroom to begin deliberations at 2:21 p.m. on Thursday, July 22, 2010. T3 545. It deliberated until 5:00 o'clock that afternoon, and resumed deliberations at 9:00 the next morning. T3 552.

A little before 11:14 a.m. on July 23, the jury sent the Judge a note that read as follows: "We are at a point where a unanimous decision seems unlikely." T3 552. Without objection, the Judge read the jury the standard deadlocked-Jury Instruction. T3 553-55.

The jury again resumed deliberations. At some point that day, it requested a copy of the written instructions. With the parties' agreement, the Judge complied. T3 556.

Later that Friday afternoon, the jury sent another note declaring itself deadlocked: "We have all agreed that we are at an

impasse to make a decision of guilty, not guilty, in spite of numerous efforts to make a unanimous decision." T3 556. The Judge, with no objection by either party, decided to send the jury home for the weekend, with deliberations to resume the following Tuesday. T3 556-58. One of the jurors noted that she was scheduled to attend a work meeting on Tuesday. T3 560. The Judge refused her permission to attend the meeting. T3 560.

The jury resumed deliberations at approximately 9:00 a.m. on Tuesday, July 27, and at approximately 11:00 a.m. notified the Bailiff it had reached a verdict. T3 564.

Other facts pertinent to the issues raised are described in the Introductions to the Arguments that follow.

REASON FOR GRANTING THE PETITION

I. THE STATE COURT DENIED PETITIONER THE OPPORTUNITY TO ESTABLISH THE NECESSARY FACTUAL RECORD TO SUPPORT HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL. THEREFORE, THE STATE COURT RULING IS NOT AN ADJUDICATION ON THE MERITS AND REVIEW IS DE NOVO.

During Petitioner's state appeal of right proceeding, he raised an independent claim that trial counsel was ineffective for numerous reasons. Petitioner submitted through appellate counsel a motion to remand to establish a factual record in support of the claim that trial counsel was ineffective. The Michigan Court of Appeals denied the Motion To Remand For An Evidentiary Hearing to establish the necessary record and limited its review to mistakes apparent on the record. See Appendix P.

Petitioner asserts when a state court fails to allow a record to be developed to support an ineffective assistance of counsel claim, and limits its review to the record, the federal courts review should be de novo with no deference to the state court decision. As clearly established in **Strickland v Washington, 466 U.S. 668 (1984)**, a challenge that a defendant received ineffective assistance of counsel, is a mixed question of law and fact. Petitioner finds guidance in **Brown v Smith, 551 F.3d 424 (6th Cir. 2008)**, where the court took notice of the Michigan Court of Appeals failure to grant a remand for a Ginther Hearing to establish the necessary record to

support Brown's claim of ineffective assistance of counsel. The Brown Court stated he argued, and they agreed, that his ineffective assistance of counsel claim had not been "adjudicated on the "merits" because the counseling notes that form the basis of the claim were not in the record before the Michigan Court of Appeals, and that Court explicitly acknowledged that its review was "limited to mistakes apparent on the record." id., at **428-429**. The Court noted the Michigan Appeals Court never considered significant evidence that supported Brown's claim. id., at **436**.

Likewise, in Petitioner's case, facts which would have supported his ineffective assistance of counsel claim were never considered by the Michigan Court of Appeals Panel. Actually, the Michigan Court of Appeals panel did, in part, use this as the basis to deny several claims that trial counsel was ineffective. In assessing whether Petitioner's trial counsel was ineffective for failing to discover and utilize Allegretti's criminal record, the Michigan Court of Appeals stated "...Allegretti's criminal history is not contained in the lower court record," therefore, the record does not establish that evidence of Allegretti's criminal past was admissible... Accordingly, Defendant fails to establish that counsel's failure to question Allegretti about his criminal record fell below an objective standard of reasonableness."Op. id. The Michigan Court of Appeals failed to take notice the record fails to reveal his criminal history could not be admitted.

Next, the Michigan Court of Appeals did deny Petitioner's claim that trial counsel was ineffective for failing to call Donnie Williams, Matthew Justice, and Johnny West, as witnesses. The Michigan court of Appeals stated "However, there is nothing in the record to indicate what the testimony of these three men would have been had they been called as witnesses." Op. id. Had the Michigan Court of Appeals granted the remand motion, the factual record would have revealed Mr. Allegretti did confess to Donnie Williams he testified falsely against Petitioner in this case. Mr. Justice was present, as well as Mr. West when Mr. Williams told Petitioner that Mr. Allegretti admitted to him he lied on Petitioner.

Next the Michigan Court of Appeals assessed whether trial counsel was ineffective for failing to call as a witness, the emergency room doctor who treated Allegretti. Once again, the Michigan appellate Panel stated "...Again, however, there is nothing in the record to indicate the doctor's potential trial testimony. Op. id. The Michigan Court of Appeals Panel did address Petitioner's claim that trial counsel was ineffective for failing to call the medical records specialist as a witness. The panel concluded the failure of defense counsel to call the medical records specialist as a witness did not deprive Defendant of a substantial defense where Earlinia testified that Defendant was hospitalized in the month before the armed robbery.

One point Petitioner believes critical to this argument is the fact the Michigan Court of Appeals erroneously stated Petitioner "never moved for a Ginther Hearing." Op. id. Had the Michigan Court of Appeals granted Petitioner's remand motion, Petitioner would have established the necessary factual record to show Allegretti's injuries were not consistent with being hit by the butt of a rifle. Petitioner did raise a Sixth Amendment Claim his right to confrontation was violated as well. This was based upon the doctor's emergency room records were introduced and he was prevented from challenging said records. The Michigan Court of Appeals adjudication of this constitutional claim was "contrary to" and/or "an unreasonable application of clearly established federal law." 28 U.S.C. §2254 (d)(1).

In addition, Earlinia's testimony was attacked by the prosecutor and the jury shared this after the verdict was rendered. The medical specialist testimony would have strengthened the defense as his testimony would have revealed Petitioner was physically incapable of attending a nightclub party as testified to by Allegretti prior to the armed robbery.

Petitioner submits where a state court fails to permit a Defendant the opportunity to establish the necessary factual record to support a claim of ineffective assistance of counsel, the anti-terrorism and effective death penalty act of 1996 (AEDPA) is inapplicable to this claim. Thus, a federal court should review the

Sixth Amendment Claim de novo. Petitioner respectfully request of the court to grant Certiorari and clearly establish the federal standard for said matters.

II. WHEN A STATE COURT ADDRESSES A CONSTITUTIONAL CLAIM ON THE MERITS, BUT UNREASONABLY DETERMINES THE FACTS. PETITIONER HAS SATISFIED 28 U.S.C. §2254 (d)(2) FOR HABEAS CORPUS RELIEF, WHERE HE HAS SHOWN BY CLEAR AND CONVINCING EVIDENCE THE STATE FACTUAL GROUNDS WERE OBJECTIVELY UNREASONABLE.

During Petitioner's lower federal court proceedings, he sought Habeas Corpus Relief under **28 U.S.C §2254 (d)(2)**. Petitioner argued the state courts unreasonably determined the facts in light of the evidence presented during the state court proceeding. However, the lower federal courts failed to acknowledge clearly erroneous findings by the state courts. For starters, one critical error committed by the federal courts, is their refusal to take notice that during Petitioner's appeal of right proceeding, he submitted through appellate counsel a motion to remand to establish the necessary record to support his claim that trial counsel was ineffective.

Both the Magistrate and the District Judge refused to acknowledge Petitioner's exhibited copy of the Michigan Court of Appeals Order denying Petitioner's request for an evidentiary hearing. See Appendix P. The Michigan Court of Appeals then unreasonably determined the facts from the limited record to

determine whether trial counsel was constitutionally deficient. As stated in **Wood v Allen, 558 U.S. 290 (2010)**, the question whether the state court reasonably determined that there was a strategic decision under **§2254 (d)(2)** is a different question from whether the strategic decision itself was a reasonable exercise of professional judgment under Strickland or whether the application of Strickland was reasonable under **§2254 (d)(1). id., at 304.**

In several cases this court has declined to decide the precise relationship between **28 U.S.C. §2254 (d)(2)** and **28 U.S.C. §2254 (e)(1)**. See **Brumfield v Cain, _____US____, 135 S. Ct. 2269, 2282 (2015); Burt v Titlow, 571 U.S. _____, 134 S. Ct. 10,15 (2013).**

Petitioner asserts that even according deference to the Michigan Court's finding as to whether trial counsel strategic decisions under **§2254 (d)(2)** were unreasonable, the court should conclude Petitioner has shown he is entitled to Habeas Corpus Relief.

Turning to Petitioner's claim that his appellate attorney rendered ineffective assistance of counsel during appeal of right proceeding, the state court's refused to allow Petitioner the opportunity to establish the necessary record as to why appellate counsel failed to investigate certain claims Petitioner brought to his attention. Especially when said claims were outlined by trial counsel in regards to errors she felt were committed during the trial. See Appendix_M_. All the state courts limited its review of appellate

counsel's strategies from the record and unreasonably determined the facts as whether his performance fell below an objective standard of reasonableness.

Petitioner advanced an argument that his appellate counsel was constitutionally deficient for failing to raise and argue multiple violations committed by trial counsel. Some trial counsel errors were admitted by Petitioner's trial counsel in the letter he provided to appellate counsel. Once Petitioner received a copy of appellate counsel's brief, he took notice of the lack of any of the issues he pressed upon appellate counsel to raise. Petitioner with his limited knowledge of the law and lack of funds to retain counsel, prepared the motion to remand and standard 4 brief with several constitutional errors. As previously stated, the Michigan Courts refused to allow Petitioner the opportunity to establish the factual record to support his Sixth Amendment Claim.

Petitioner was convicted of robbery armed and a weapon charge. During closing argument, the prosecutor made the following comments:

> [I]s she really torn between not wanting to come to court to commit perjury versus saving face with the father of her child? I mean that's what's going on here (T3, 480).
>
> [I] believe the evidence is clear that Miss Moore did not want to cooperate, did not want to come into court, because she didn't want to have to commit perjury, but she had to save face because this man's

> gonna be in her life because they have a five year old son together. That's what's happening (T3, 480-81).
>
> [S]he didn't want to come cause she didn't want to commit perjury, and now she was forced because a private detective served her with a subpoena, she couldn't run any further. And so she's faced with coming to court or not. And knowing what wrath would wait her because he's her baby's father. (T3, 519).

Ms. Moore was a key witness for the defense. She was an alibi witness. The prosecutor, as noted above, referred to Ms. Moore as a perjurer multiple times during her closing argument before the jury. In addition, the prosecutor referred to Petitioner as a person who commits violent assaults on women during examination (T2, 398-399) and closing argument (T3, 467-469).

Not one shred of evidence was introduced to show Ms. Moore ever committed perjury in a civil or criminal case. Or that Ms. Moore would commit perjury in Petitioner's case. Nor was any evidence introduced to show Petitioner committed domestic violence against any woman. The alleged assault charge was dismissed five months prior to the trial. See Appendix O. Defense counsel silently sat back and failed to object to highly damaging remarks by the prosecutor. The relevant clearly established federal law is **Donnelly v DeChristoforo, 416 U.S. 637 (1974)** and **Berger v United States, 295 U.S. 78 (1935)**. The Donnelly court clearly established a

prosecutor's comments can violate the accused right to a fair trial when the misconduct is so "fundamentally unfair as to deny due process." **id., at 645**.

Even if Petitioner had committed domestic violence to Keitha Tigues, the prosecutor comments would be improper. The relevant clearly established federal law is found in **Huddleston v United States, 485 U.S. 681 (1988),** the Huddleston court explained the threshold inquiry a court must make before admitted similar acts evidence under **Rule 404(b)** is whether that evidence is probative of a material issue other than character. **id., at 686**. The Huddleston court stated **Rule 403** allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Id.

The Huddleston court listed four sources for whether a trial judge should allow evidence to be admitted: 1) Rule 404 (b) evidence be offered for a proper purpose; 2) relevancy requirement of Rule 402; 3) the assessment the trial court must make under Rule 403 to determine whether the probative value outweighed by its probative value of the similar acts evidence is substantially outweighed by its probative value; and 4) instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted **id., at 691**.

Applying the above factors as outlined in Huddleston to Petitioner's case, should have alerted trial counsel to object to the

prosecutor's remarks. The commission of domestic violence assaults, warrants on Petitioner's alibi witness and arguing his alibi witness would commit perjury (totally unrelated to the case) arecertainly something designed to inflame the passions of the jury. It is well known that a prosecutor should not argue facts not in evidence. Said improper arguments in Petitioner's case violated due process and the right to a fair trial. U.S. Const. Amendment XIV; Berger **supra; Donnelly supra**. The Huddleston court concluded that such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the Defendant committed the similar acts. No evidence can be found in the state court record to show Petitioner or his defense witness committed similar acts as argued by the prosecutor. This error should have leaped out upon a casual reading of the trial transcript.

Petitioner did point out this claim of error to appellate counsel. The clearly established federal law is **Evitts v Lucey, 469 U.S. 387 (1985)**. A reasonable examination of Petitioner's trial transcripts should have revealed the rules of evidence violations committed by the state trial judge and the prosecutor. Once appellate counsel noticed trial counsel's failure to object to such prejudicial error, he should have raised and argued a Sixth Amendment claim that trial counsel was ineffective. As stated by the Evitts court "counsel's failure to obey a simple court rule that could have such drastic consequences requires this finding." **id., at 394**.

Even if established by evidence, fundamental fairness prohibits "the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case, such as motive, opportunity or knowledge. **Huddleston supra.** Which in Petitioner's case, none of the prosecutor's comments bore any relation to motive, opportunity or knowledge of the criminal charge.

Petitioner finds guidance in **Kincade v Sparkman, 175 F.3d 444 (6th Cir. 1999)**, where the court reversed the decision of the District Court and remanded with instructions to grant the writ. The Kincade court found the state prosecutor misconduct violated due process to the degree it rendered Kincade's trial fundamentally unfair. **Id.** The Kincade court found the prosecutor's remarks were prejudicial because they told the jury that the Defendant had committed numerous other burglaries in the county. The prosecutor failed to introduce any evidence in support of this argument against Kincade.

Likewise, in Petitioner's case, as noted above, no evidence was introduced to show prior assaults, nor any evidence his alibi witness ever committed perjury. Where Petitioner was on trial for robbery, it is hard to imagine anything more prejudicial than having the state prosecutor, the representative of the government, saying that Petitioner and his defense witness have broken the law. The jury naturally would believe that if anyone knew about past crimes of

Petitioner and his alibi witness, it would be the prosecutor. Another key point is the fact that prior to the defense being presented, the prosecutor elicited on direct examination testimony from Detective Jako that Ms. Moore had an outstanding warrant. Contrary to the Michigan Court of Appeals decision, where the panel found no error by trial counsel for failing to call the medical records specialist (who's testimony could not be challenged) based upon Earlinia testifying Petitioner was hospitalized in the month before the robbery. After the verdict, the jury stated it came down to Allegretti's and Earlinia's testimony. With the attacks on her credibility, the prosecutor struck foul blows to deny Justice to Petitioner. **Berger supra**.

As previously stated, there was no objection and the trial judge chose to ignore clearly established federal law as well. As stated by the Evitts court "an accused is entitled to be assisted by an attorney..." "Who plays the role necessary to ensure that the trial is fair." **Evitts, supra, 469 U.S. at 395**. The Evitts court, clearly established that the attorney must be available to assist in preparing and submitting a brief to the appellate court".."playing the role of an active advocate, rather than a friend of the court assisting in a detached evaluation of the appellate's claim." **id. at 394**. Petitioner's appellate attorney submitted his "pro per" supplemental brief with no citation to the trial court record (which Petitioner at the time did not have), which led to the Michigan Court of Appeals refusal to address several constitutional errors. See Appendix H. Petitioner's

appellate attorney's performance fell far below an objective standard of reasonableness and did prejudice Petitioner's appeal. Petitioner's "pro per" brief was unsuitable for appellate consideration on the merits. **Evitts, at 393**. The Evitts court did clearly establish that "a first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." **id., at 396**. Petitioner's appeal as of right was a meaningless ritual and the court should agree he was denied his Sixth Amendment right to effective assistance of counsel for his defence during his appeal. **U.S. Const. Amendments VI & XIV; Evitts, supra**. See **Wiggins v Smith, 539 U.S. 510, 524 (2003)**.

Additional clearly established federal law is found in **Smith v Robbins, 528 U.S. 259 (2000)**, where the court expressed views for applying Strickland's standards to a claim appellate counsel is ineffective. The Robbins court did note how appellate counsel neglected to file a merits brief. **id., at 285**. Had Petitioner's appellate attorney filed a proper "standard 4 brief," there exist a reasonable probability that the Michigan Court of Appeals would have addressed his constitutional claims and granted relief. Clearly the issues presented to appellate counsel were stronger than the two issues he raised during the appeal. **Evitts, supra, at 288; Robbins, supra**.

The Michigan Courts failure to allow Petitioner to develop the necessary record to support his claim that trial counsel was ineffective, (which would have showed appellate counsel's

ineffectiveness,) has resulted in an unreasonable determination of the facts in light of the evidence presented during the state court proceeding. **28 U.S.C. §2254 (d)(2); Brumfield, supra; Woods, supra; Burt, supra.**

Petitioner has shown by clear and convincing evidence that the state courts unreasonably determined the facts and he is entitled to the court granting Certiorari, vacating the Sixth Circuit Order and remanding to the federal District Court to address Petitioner's Sixth Amendment claims de novo. In the alternative, appoint Petitioner counsel to make oral argument before the court and submit a brief detailing whether **28 U.S.C. §2254 (e)(1)** is required to meet **28 U.S.C. §2254 (d)(2)** requirements.

SUPREME COURT RULE 10

Petitioner understands that Certiorari review includes questions of exceptional importance. Petitioner contends the Michigan Courts and the lower Federal Courts all erred by refusing to grant relief where Petitioner's appellate attorney failed to add transcript cites and case authority in support of the standard 4 brief submitted by appellate counsel during appeal of right proceeding. This petition involves questions of exceptional importance as to: 1) what standard should be used to determine constitutional errors reviewed under Strickland v Washington standards where the state court refuses to allow a person to establish the necessary factual record to support an ineffective of assistance of counsel claim; 2) what standard should be used to determine relief where a state court unreasonably determines the facts under **Title 28 U.S.C. §2254 (d)(2);** and 3) whether this courts precedents has clearly established that an appellate attorney is constitutionally deficient and prejudices a person's appeal by submitting a pleading that fails to adhere to pleading requirements by court rule. Petitioner submits these questions should compel the court to grant Certiorari and appoint him counsel to make oral argument before the court and submit a brief in support of Petitioner's constitutional arguments. Due to the state of Michigan's multiple constitutional violations and the infringement upon Petitioner's liberties, he asks of the Supreme

Court to exercise its discretionary powers and issue said writ as adequate relief cannot be obtained in any other form or from any other court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ralph L. Moore

Date: 4-4-2019