No. 19-7012

In The
SUPREME COURT OF THE UNITED STATES

ROBERT EUGENE HARDESTY,
Petitioner,

v.

WILLIS CHAPMAN, Warden
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Robert Eugene Hardesty, #924009
Petitioner, *in pro per*[*]
Macomb Correctional Facility
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[*] This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

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QUESTIONS PRESENTED

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Where The Petitioner's Convictions For CSC 1 And 2 Where Obtained On The Basis Of Legally Insufficient Evidence, Does Due Process Require Reversal, Pursuant To U.S Const., Ams., V, VI, XIV; Mich. Const. 1963, Art. 1, § 17 And 20?

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PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Eugene Hardesty respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The final order of the United States Court of Appeals, 6th Circuit, denying a certificate of appealability (September 12, 2019), appears at APPENDIX A to the petition and is unpublished. The final opinion and order of the United States District Court - E.D. Mich., denying the petition for writ of habeas corpus and declining to issue a certificate of appealability appears as APPENDIX B to the petition and is reported at Robert Eugene Hardesty v Randall Haas, 2019 U.S. Dist. LEXIS 85968, 2019 WL 2208158, Dk. No. 4:16-cv-13633, (E.D. Mich., May 22, 2019).The final order from the Michigan Supreme Court is published at 499 Mich. 869, 875 N.W.2d. 217. The final opinion of the Michigan Court of Appeals is published at 2015 Mich. App. LEXIS 1193, (Mich. Ct. App., June 11, 2015). (See Appendix, filed under separate cover).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its final order on September 12, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. IV: 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.

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant 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.

U.S. CONST. AMEND. XIV: 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. The Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense." "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470

Mich 634, 641; 638 NW2d 597 (2004) (citing *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963)).

28 U.S.C. 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree.

28 U.S.C. 1915(a)(1): Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

STATEMENT OF THE CASE

A. Factual background and trial court proceedings

Mr. Hardesty was convicted of one count each of Child Abuse (3rd Degree), Alcohol-Selling/Furnishing to a Minor, two counts of Distributing Obscene Material to a Minor and CSC 2nd Degree (Person under 13, Defendant over 17) and three counts of Criminal Sexual Conduct 1st Degree, in a five (5) day bench trial before the Honorable Qiana Lillard, in the Wayne County Circuit Court. Mr. Hardesty was thereafter sentenced to a term of imprisonment of three to five years on the Child Abuse (3rd Degree) conviction, one to two years on the Alcohol-Selling/Furnishing to a Minor and Distributing Obscene Material to a Minor convictions, one to fifteen years on one of the counts of CSC 2nd Degree (Person under 13, Defendant over 17), with another eighteen to forty years on the second CSC 2nd Degree (Person under 13, Defendant over 17) conviction, in addition to two eighteen to forty year sentences on two of the CSC 1st Degree and twenty five to forty years on the third CSC 1st Degree conviction, all to be served concurrently.

Petitioner is currently incarcerated at the Macomb Correctional Facility (Mr. Willis Chapman, Warden), at 34625 26 Mile Road, Lenox Township, Michigan 48048, under the jurisdiction of the Michigan Department of Corrections.

REASONS FOR GRANTING THE PETITION

I. The Admittance of Irrelevant and Prejudicial Bad Acts Evidence Under the Guise of Michigan Rule of Evidence 404(B) is a deprivation of Due Process and A Fair Trial Pursuant to The U.S. Const. Ams. V, XIV; Mich. Const. 1963, Art. 1, §17.

Due process requires fundamental fairness in the use of evidence against a criminal defendant. Lisenba v California, 413 U.S. 219, 236 (1941); U.S. Const. Ams. V, XIV; Mich Const. 1963, art. 1, § 17. A defendant's due process right to a fair trial is violated when there is a reasonable possibility that inadmissible evidence may have contributed to the conviction. Fahy v Connecticut, 375 U.S. 85, 87-88 (1963).

Under Michigan Rule of Evidence (MRE) 404(b) "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." People v Crawford, 458 Mich. 376, 383 (1998). Rather, such evidence may only be offered for non-propensity purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident". MRE 404(b).

MRE 404(b)(1) codified the prohibition against character evidence deeply rooted in Michigan jurisprudence. The rule reflects and gives meaning to the fundamental precept of the criminal justice system – the presumption of innocence. Crawford, supra at 384. "Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged." Id. at 384, citing People v Zackowitz, 254 NY 192, 197;

172 NE 466 (1930). Evidence of extrinsic bad acts thus carries the risk of prejudice, for it negates the concept that "a defendant starts his life afresh when he stands before a jury ..." *Id.*

The primary danger of prior misconduct evidence is that it tends to be overvalued by the Trier of fact, denying the accused a fair opportunity to defend against the charged crime. *People v Allen*, 429 Mich 558 (1988). Notwithstanding this strong tradition against the use of propensity evidence, the Michigan Legislature enacted MCL § 768.27a, which provides in pertinent part:

> Notwithstanding [MCL § 768.27] in a criminal case in which the defendant is accused of committing a listed offense against a minor (as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL § 28.722), evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

> MCL 768.27 provides:
> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

Our Supreme Court has held that MCL § 768.27a provides a limited exception to the general bar against admission of prior bad acts evidence for propensity uses in prosecutions for certain sex offenses committed against a minor. The Defendant understands that the 404b evidence used in court was not dealing with any of the sexual offenses charged, but contends that the analysis used in *Watkins* is analogous to the facts in the present matter. The Court found that MCL § 768.27a supersedes MRE 404b. *People v Watkins,* 491 Mich 450, 471, 476-477 (2012). The Court in *Watkins*

made it clear, however, that "This does not mean, however, that other-acts evidence admissible under MCL § 768.27a may never be excluded under MRE 403 as overly prejudicial." *Watkins, supra*, at 487. The Court noted the following list of "several considerations that may lead a court to exclude such evidence":

> These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and defendant's testimony. *Id.* at 487-488.

The Court further noted that this list of considerations "is meant to be illustrative rather than exhaustive." *Id.*, at 488. Under *Watkins*, then, a careful weighing of the relevance of the prior bad acts evidence to show propensity against its danger for unfair prejudice must be conducted, and if the evidence does not survive the MRE 403 scrutiny, it must be excluded. *Id.* at 487-490.

MRE 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In the context of other bad acts, that danger is prevalent. When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe." *Crawford, supra* at 398. For these and various additional reasons arising out of the the general preference against admitting prior misconduct evidence, this Court has made it clear that weighing the probative value of such evidence against its prejudicial effect

under MCL § 768.27a should not be taken lightly: "we caution trial courts to take seriously their responsibility to weigh the probative value of the evidence against its under prejudicial effect in each case before admitting evidence." *People v Pattison*, 276 Mich App 613, 621 (2007).

In *People v VanderVliet*, 444 Mich 52, 73-75; 508 NW2d 114 (1993), our Supreme Court held:

> In place of the four-pronged test of *Golochowicz* [*People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982)], we direct the bench and bar to employ the evidentiary safeguards already present in the Rules of Evidence ... The evidence must be relevant to an issue other than propensity under Rule 404(b) [MRE 404(b)], to "protect [] against the introduction of extrinsic act evidence when that evidence is offered solely to prove character." *Id.* [*Huddleston v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988)] at 687. (Emphasis Added.) Stated otherwise, the prosecutor must offer the other acts evidence under something other thatn a character to conduct theory.
>
> Second, as previously noted, the evidence must be relevant under Rule 402 [MRE 402], as enforced through Rule 104(b) [MRE 104(b)], to an issue or fact of consequence at trial. 2 Weinstein & Berger, Evidence, § 404[08], p 404-449.
>
> Third, the trial judge should employ the balancing process under Rule 403 [MRE 403]. Other acts evidence is not admissible simply because it does not violate Rule 404(b) [MRE 404(b)]. Rather, a "determination must be mad whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision o this kind under Rule 403." 28 USCA, p 196, advisory committee notes to FRE 404(b).
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> Finally, the trial court, upon request, may provide a limiting instruction under Rule 105 [MRE 105].

Under *Vanderliet*, a prosecutor may not indiscriminately introduce evidence of prior bad acts in order to attack a defendant's character.

In *People v McCartney*, 46 Mich App 691; 208 NW2d 547 (1973), this Court reversed a defendant's entering without breaking and larceny convictions where the prosecutor called a fingerprint expert who testified to having taken the defendant's

fingerprints two years earlier, concluding: "There is no question that the references by the witness were improper and prejudicial ... It is questionable whether the continued reference to the defendant's prior criminal involvement could be cured by any instruction" *Id.*, at 693-694.

Similarly, in *People v Wallen,* 47 Mich App 612; 209 NW2d 608 (1973), this Court ordered a new trial on charges of forgery and uttering and publishing, where the prosecutor elicited from a defense witness on cross-examination the fact that the witness had met the defendant while both were in jail. This Court granted relief even in the absence of a timely defense objection. See also, *People v McCarver (On Remand),* 87 Mich App 12; 273 NW2d 570 (1978) (Federal agent improperly testified to executing search warrant to locate firearms illegally possessed by defendant due to prior felony conviction).

In *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996), the defendant was charged with a criminal sexual assault on the defendant's estranged wife. Defense counsel failed to object to evidence that the defendant had previously beaten up the defendant's wife, where the beatings did not involve sexual assaults. This Court found trial counsel to be ineffective, and granted a new trial. See also, *Wynn v State*, 718 A2d 588 (Md, 1998) (holding in prosecution for housebreaking and theft that trial court improperly admitted evidence of prior housebreaking and theft to show absence of mistake, where defendant claimed to have purchased stolen property at a flea market and did not claim to have mistakenly entered the residence).

In *Crawford, supra*, our Supreme Court held in a prosecution for possession with intent to deliver cocaine hidden in the dashboard of a car that the trial court improperly admitted evidence of a prior conviction of delivering cocaine to show the defendant's

knowledge that the cocaine was in the car. The Supreme Court concluded that the fact of the prior conviction did not prove knowledge and amounted to improper character evidence. More recently, in *People v Knox*, 469 Mich 502; 674 NW2d 366 (2004), our Supreme Court held in a felony murder case with first degree child abuse as the predicate felony, that the trial court improperly admitted evidence that the defendant also assaulted the child's mother. The Supreme Court concluded that the error was not harmless "given the absence of any direct evidence that defendant committed the acts that resulted in [the child's] death." *Id.*, at 515.

Before the trail in the instant case, the prosecution filed a Notice of Intent to Rely on Evidence of Other Crimes, Wrongs or Acts Pursuant to MRE 404(b) and MCL § 768.27b. Defense counsel objected and the court heard the motion on January 10, 2014 and granted it the same day. The court found that the other acts evidence was admissible pursuant to MCL § 768.27b, and that the probative value was not substantially outweighed by the danger of unfair prejudice because the evidence was to be used to explain the delay in disclosure by the two female complaining witnesses. (Motion Hearing, 1/10/2014, pg. 18). Having this knowledge, Defense Counsel still encouraged the Defendant to waive his Consitutional right to a jury trial, and in the process gave up the opportunity to object to the enormous amount of alleged incidents brought up by the Prosecutor and presented to the Trier of Fact. This constituted Ineffective Assistance of Counsel, which will be discussed in Issue III, *infra*.

It is the contention of the Defendant that the trial court abused its discretion in allowing this evidence into the record. The evidence did not meet the factors set forth in *VanderVilet*, especially since the information was used for purposes outside of the stated reason upon which the Trial Court granted it. Furthermore, it is evident that the

prejudicial nature (especially in light of the court's comments regarding the evidence in her finding of fact) far outweighed the probative value of the information, thereby violating MRE 403. Moreover, the Court in *Watkins* made it clear that it was providing a list of "several considerations that may lead a court to exclude such evidence", and that this list of considerations "is meant to be illustrative rather than exhaustive." *Id.*, at 488.

Applying *Watkins* here reveals the testimony cannot survive the scrutiny of MRE 403, and therefore should have been excluded. The allegations of domestic violence and anger by the Defendant towards the complaining witnesses (specifically the two female complaining witnesses), and the amount of testimony dedicated to showing that, went beyond the notion of only explaining the delay in disclosure. This is never more evident than in the Trial Court's finding of fact, in which she specifically stated "I do find that the evidence convinces me, beyond a reasonable doubt, that the defendant is guilty of child abuse in the third degree for Kevin Werstein, and **honestly, if the People had moved to amend the information to add additional counts for physical abuse for Dallas and Larissa I would have found him guilty of that too.**" (V. 89)(Emphasis added). The Prosecutors stance was that the evidence was just to show why there was a delay in reporting by Dallas and Larissa, but it is evident that it was used by the Court for far more than that. It is quite clear that this evidence was used to show that the Defendant has anger management issues and the he had a propensity for violence.

Most importantly, the lack of need for evidence beyond the complainant's and the defendant's testimony is more than troubling and should have been the trial court's paramount concern. There is no doubt that Kevin Werstein was disciplined by the Defendant, and that the discipline might have gone too far, as was admitted by the Defendant in his own statement to the River Rouge Police Department. Moreover the

photographic evidence of Kevin's injuries was enough to substantiate a guilty verdict on that charge. As such, there was no need for additional evidence. There was sufficient evidence to submit to the finder of fact and allowing the prosecution to bolster its case allowed them to fill in inconsistencies in their case that they otherwise could not do. This was highly improper and prejudicial.

Admitting the marginally relevant and highly prejudicial bad acts evidence requires reversal because it is more likely than not that the evidence was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496 (1999). In determining whether error in admitting this bad act evidence is harmless, the court must focus on the nature of the error and assess its effect in light of the weight and sufficiency of the untainted evidence. *Crawford, supra* at 399-400.

Here, the Trier of fact heard highly prejudicial propensity evidence in a case that hinged on the credibility of the complaining witnesses, as there was very little direct evidence, especially as it related to the criminal sexual assault charges levied against the Defendant. Admitting the prejudicial bad acts evidence no doubt convinced the Trier of Fact that the Defendant was a bad person who needed to be locked up regardless of whether the evidence proved his guilt or not. The error was thus not harmless and the Defendant should be given a new trial.

Remedy

The inclusion of this evidence and testimony (alleged similar acts), under the theory that it would explain the delay in reporting an sexual abuse by the Defendant, was erroneous, and constituted an abuse of discretion by the Trial Court in allowing its admittance into evidence, especially when the Judge was the Trier of Fact in a Bench Trial. The information was used to show that Defendant's propensity for violence and to

portray him as a bad man. As such, the Court erred in allowing this testimony into the record, and such error denied the Defendant his due process right to a fair trial and requires reversal. The Trial Court should not have accepted the Defendant's waiver of his right to a jury trial after she heard the Prosecutor's motion pursuant to MRE 404(B), which she granted. The Trial Court should not have been the Trier of Fact and Defense Counsel was ineffective (as will be discussed further in Issue III, *infra*) for allowing his client to waive his right to a jury trial. The Defendant would therefore respectfully request that this Honorable Court reverse the Defendant's conviction and grant the Defendant a new trial.

II. The Petitioner's Convictions For CSC 1 And 2 Where Obtained On The Basis Of Legally Insufficient Evidence, Due Process Require Reversal, Pursuant To U.S Const., Ams., V, VI, XIV; Mich. Const. 1963, Art. 1, § 17 And 20.

Federal and state rights to due process require that a defendant may only be convicted upon the introduction of sufficient evidence that could justify the jury in reasonably concluding that a defendant is guilty beyond a reasonable doubt. U.S. Const., Ams. V, VI, XIV; Mich. Const.. 1963, art 1, § 17, 20; *Jackson v Virginia*, supra; Hampton, supra. In a criminal prosecution, due process requires proof beyond a reasonable doubt as to each element of the alleged crime. U.S. Const. Ams., V and XIV; Mich. Const. 1963, art 1, § 17; *In re Winship, supra.* Basing its holding on *Jackson, supra*, the Michigan Supreme Court, in *Hampton, supra*, articulated the proper standard for determining whether a conviction is based on sufficient evidence. The Court in *Hampton* rejected, as inconsistent with due process, the rule that as long as there is "some evidence" from which to infer guilt, a conviction may be sustained.

> "[A reviewing court] must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational Trier of Fact in finding guilt beyond a reasonable doubt."
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> "The fact that some evidence is introduced does not necessarily mean that the evidence is sufficient to raise a jury issue. Because there is no requirement that the evidence be sufficient to support a conviction to admissible, it does not necessarily follow that merely because some evidence is admitted, the evidence is sufficient to raise a jury issue. In quantitative terms, the fact that a piece of evidence has some tendency to make a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of the fact beyond a reasonable doubt." *Id.*

charged." *In reWinship*, 397 US 358, 364 (1970). Moreover, this court does not apply a heightened standard to determine whether sufficient evidence existed to support a conviction in a bench trial. *Petrella, supra* at 268-270; *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

Discussion

Federal and state rights to due process require that a defendant may only be convicted upon the introduction of sufficient evidence that could justify the jury in reasonably concluding that a defendant is guilty beyond a reasonable doubt. US Const, Ams V, VI, XIV; Const 1963, art 1, sec. 17, 20; *Jackson v Virginia, supra; Hampton, supra*. In a criminal prosecution, due process requires proof beyond a reasonable doubt as to each element of the alleged crime. US Const AMs V and XIV; Const 1963, art 1, § 17; *In re Winship, supra*. Basing its holding on *Jackson, supra* the Michigan Supreme Court, in *Hampton, supra* articulated the proper standard for determining whether a conviction is based on sufficient evidence. The Court in *Hampton* rejected, as inconsistent with due process, the rule that as long as there is "some evidence" from which to infer guilt, a conviction may be sustained.

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Reviewing the substance of the case presented is not tantamount to second guessing the Trier of Fact, since the reviewing court must view the evidence "in the light most favorable to the prosecution." *People v Vail*, 393 Mich 460, 463 (1975). The Trier of Fact may draw reasonable inferences from facts in the record; however, a court cannot indulge in speculation or inferences completely unsupported by evidence either direct or circumstantial. *Petrella, supra* at 275.

Both federal and state law indicates that a conviction can be based on circumstantial evidence. Michigan courts have held that circumstantial evidence has a probative value equal to direct evince and may alone form the basis of a criminal conviction. *People v Jolly*, 442 Mich 458, 466 (1993). The prosecution is not required to negate every reasonable theory consistent with a defendant's innocence, but it is required to present evidence, whether direct or circumstantial, that establishes the elements of a crime beyond a reasonable doubt and the guilt of the accused. *People v Kramer*, 108 Mich App 240, 250 (1981). The fact-finder is permitted to make multiple inferences from circumstantial evidence, and a number of inferences may be combined to determine guilt. However, each inference must be supported independently by established fact. *Hardiman, supra* at 423-424. This Court, on review, must consider the facts in conjunction with one another, "draw all reasonable inferences, and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400, 404 (2000).

To prove that the Defendant committed first-degree criminal sexual conduct, the prosecutor must demonstrate that the accused engaged in "sexual penetration" with another person. MCL § 750.520b(1). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight,

of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL § 750.520a(1).

Moreover, to find a defendant guilty of Criminal Sexual Conduct II, pursuant to MCL § 750.520c, it must be shown that sexual contact occurred and that the victim is under 13 years of age or that the victim is at least 13 but less than 16 years of age and any of the following: The actor is a member of the same household as the victim; The actor is related by blood or affinity to the fourth degree to the victim or that the action is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

In the present situation, the prosecution could prove that certain instances of the alleged criminal sexual conduct occurred when the complaining witness was under the age of thirteen. Moreover, the complaining witnesses were the granddaughters of the Defendant's former fiancée, with whom he lived, who had legal guardianship of them. The Defendant concedes to such facts. However, beyond allegations made by the complaining witnesses, there was absolutely no other corroboration, which would show that the Defendant ever touched the complaining witness in an inappropriate manner, let alone that the Defendant had sexual intercourse with her. There were no specific dates given as to when the alleged sexual acts occurred, rather only general time frames. Nor was there any medical evidence that would support that there was sexual activity between the Defendant and the complaining witness, which one would expect with the prolonged time frame of which the Complaining witness alleged the sexual assaults were occurring. This is shocking, given the extensive medical testing Larissa went through, yet no medical records or testimony concerning injuries conducive with sexual activity was presented. Moreover, if this was actually happening with the propensity the

complaining witness stated, wouldn't she be concerned with catching HIV, since the Defendant has been positive for over 20 years, and maybe some mention to nurses or doctors who performed prior medical tests. But there was never anything of the sort. The evidence in this matter is circumstantial at best and therefore does not prove beyond a reasonable doubt that the Defendant committed the crime of either CSC I or CSC II.

Furthermore, the only evidence in this case against the Defendant is the testimony of the complaining witnesses, whose testimony was incredulous, at best and very often contradicted by what each other had said. It cannot be overlooked that there was testimony to show that they both disliked the Defendant and wanted him out of the house. Nor can this court overlook the fact that Larissa had been molested before, *People v Werstein*, 2009 Mich App LEXIS 2583, and both her and Dallas were well aware of how Child Protective Services worked, and how an allegation like the ones they made against the Defendant could play out of for the Defendant. Both complaining witnesses were aware that "**no proof is required**" in a CSC case, "**testimony**" is all that is needed. This court should take notice of the holdings in *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995) and *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). In *Minor*, this court held that "A witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influence the witness' testimony." *Minor, supra* at 685. Similarly, in *Coleman*, this court held that the credibility of a witness is always relevant, and evidence demonstrating a witness' "bias or interest in a case is highly relevant to credibility." *Coleman, supra* at 8.

As this court is well aware, in a criminal sexual conduct case, a Trier of Fact has

the option to disregard the testimony of every other witness besides the complaining witness **if** the Trier of Fact believed the complaining witness. This instruction, however, does not limit it from considering other testimony. Clearly, the testimony of the complaining witness had inconsistencies throughout it, and those inconsistencies are sufficiently significant that other testimony is necessary to corroborate a guilty verdict. In this instance, however, the secondary testimony of the other witness is as weak as that of the complaining witness, as well as bordering on being irrelevant to the charges facing the Defendant. As such, the evidence in this matter is circumstantial at best and therefore does not prove beyond a reasonable doubt that the Defendant committed any of the offenses concerning criminal sexual conduct for which he was convicted.

"Innocent until **proven** guilty." No principle is more firmly rooted in our country's constitution than the accused's due process right to remain free from conviction unless the prosecutor proves each element of the charged offenses beyond a reasonable doubt. *In re Winship, supra.* If the prosecution fails to present sufficient evidence of the accused's guilt, a judgment of acquittal must be entered. *Hampton, supra* at 368. The Court in *Hampton* rejected, as inconsistent with due process, the notion that as long as there is "some evidence" from which to infer gilt, a conviction may be sustained: "[A reviewing court] must consider not whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational Trier of Fact in finding guilty beyond a reasonable doubt." *Id.* at 366

The prosecution's case was one based only on circumstantial evidence and speculation all heard by the Trial Court, as the Trier of Fact. No evidence or testimony could certifiably prove that the Defendant committed any criminal sexual acts upon the complaining witness. Therefore, it is impossible, even when looking at the evidence in a

light most favorable to the prosecution, to say that Defendant was guilty beyond a reasonable doubt of any of the crimes of Criminal Sexual Conduct for which he was convicted.

Remedy

The evidence presented at trial clearly did not prove beyond a reasonable doubt that the defendant was guilty of the crimes for which he was convicted. As such, Defendant therefore asks this Honorable Court for a reversal of his conviction and a new trial.

III. Petitioner Was Denied His Constitutional Right To The Effective Assistance Of Counsel Where A Multitude Of Inactions On The Part Of Trial Counsel, Denied Him A Fair Trial Proceeding, Pursuant To U.S. Const., Amends Vi, Xiv; Mich. Const. 1963, Art. 1, §20.

This Court has held that states may not disregard a controlling, constitutional command in their own courts. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 340–341, 344, 4 L.Ed. 97 (1816); see also *Yates v. Aiken*, 484 U.S. 211, 218, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). However, it appears that states may ignore the constitutional commands of the Sixth Amendment where, in the end, an uncounseled defendant is convicted beyond a reasonable doubt.

Effective assistance of counsel does not attach for the trial alone, but rather encompasses representation from the time defense counsel is hired, until the trial has concluded and/or sentencing has occurred. The actions of trial counsel before the trial begins are as important, if not more important, than their actions during the trial itself. In the present instance, trial counsel's failure to work with the Defendant to allow him to properly assist in his own defense is a clear sign of being denied effective assistance of counsel. Here, counsel ignored repeated requests from the Defendant for discovery, transcripts and relevant information that would have helped the Defendant to assist in his own defense, as well as potentially resulting in a different verdict that the one given

by the Court as the Trier of Fact.

A defendant has the right to the effective assistance of counsel. US Const Amends VI, XIV; Const 1963, art 1 § 20; *Strickland v Washington*, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Under the *Strickland* standard, a defendant must show (1) that the attorney's performance fell below an objective standard of reasonableness and (2) that this performance was prejudicial. *Strickland, supra* at 687-688; *Pickens, supra* at 309, 312-313.

To show that counsel's performance was deficient requires showing that the attorney made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland, supra* at 687. In so doing, a defendant must overcome a presumption that counsel's performance was based on sound trial stragety. *Id* at 689. To show that counsel's errors were prejudicial, there must be a reasonable probability that , for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

A deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra* at 694. A "reasonable probability" of difference does not mean "would have been different." A defendant need not prove prejudice by a preponderance of the evidence. *Id.* at 694. The *Strickland* Court explicitly rejected an "outcome determinative" test, e.g., "that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. The Court reasoned that the outcome of a case based on deficient performance is less entitled to a presumption of accuracy.

On prime example of the Defendant being denied the effective assistance of counsel, was defense counsel's failure to interview witnesses provided to him by the Defendant. The failure to investigate and present witnesses who could testify in a manner favorable to the defendant constitutes reversible error where there is a reasonable probability that the testimony would have changed the outcome of the case. *People v Johnson,* 451 Mich 115; 545 NW2d 637 (1996); *People v Bass*, 247 Mich App 385; 636 NW2d 781 (2001); *Workman v Tate,* 957 F2d 1339 (CA6, 1992). Attorneys also have a duty to conduct adequate pretrial preparation. ABA STDS. CRIM. JUST. 4.4.1; *People v Nickson*, 120 Mich App 681, 685; 327 NW2d 333 (1982).

In *Johnson,* the Michigan Supreme Court held that the defendant received ineffective assistance, where his trial counsel failed to offer testimony from six supporting witnesses. At least four were eyewitnesses who would have testified that the defendant did not shoot the victim. At the post-conviction evidentiary hearing, trial counsel testified that "he had spoken with two, or perhaps three, of the six witnesses, but had little or no recollection of what was said." *Johnson, supra* at 123. The Court found counsel's performance to be ineffective since "the exculpatory evidence not presented to the jury is so substantial that ... it could have changed the outcome of the trial" and there was "no sign that counsel made a strategic decision not to call the six witnesses". *Id* at 122, 124.

Similarly, in *Bass, supra* at 391-392, this Court reversed the defendant's convictions where trial counsel could offer no strategic reason for failing to call two witnesses known to her prior to trial, who would have clearly supported the defendant's own testimony that he was not involved in selling drugs at the date and time in question.

At the post-conviction evidentiary hearing, trial counsel testified that she could

not remember why the witnesses were not called or if she had an opportunity to interview them. *Id* at 388-389. The Court noted that "counsel's failure to call the two witnesses was prejudicial in that defendant was denied a fair trial where important corroborating testimony was not put forth to the jury." *Id.* at 392.

In *Workman*, the Sixth Circuit Court of Appeals reversed the defendant's convictions for felonious assault, where it found trial counsel was ineffective for failing to call or even contact two supporting witnesses. The *Workman* Court found that the defendant had informed counsel of the identity and location of two men who were with him outside of a bar when and where he was alleged to have assaulted police offices and that their testimony would have directly contradicted that of the police officer. Thus, counsel's failure undermined the reliability of the verdict.

In this instance, the Defendant provided counsel with a list of witnesses who he wanted to call at his trial. (See Defendant's Affidavit, attached hereto as Exhibit A). At no time did counsel ever make any effort to contact, interview or subpoena any of the witnesses the Defendant had provided him, who could have shed a different light on the facts presented to the Trier of Fact. As such, defense counsel was ineffective when he failed to interview or call these witnesses. *People v Simmons,* 140 Mich App 681 (1985); *People v Hoyt*, 185 Mich App 531 (1990); *People v Wilson,* 159 Mich App 345 (1987); *United States v Tucker* 716 F2d 576, at 581 (1983). Defense counsel cannot assert in this case that his choice to not even interview the Defendant's witnesses was a valid trial strategy. If counsel had interviewed the witnesses but found that their testimony would not be useful, or would be harmful, then he could say that his choice not to call them was a valid trial strategy. Where counsel never even tried to determine what these witnesses had to offer he was ineffective. "Though there may be instances where the

decision not to contact a potential witness is justified ... an attorney who fails to even interview a readily available witness whose non-cumulative testimony may potentially aid in the defense should not be allowed automatically to defend his omission by raising the shield of "trial strategy and tactics'." *Crisp v Duckworth*, 743 F2d 580, 584 (1984).

Another example of defense counsel's ineffectiveness was his failure to investigate/obtain two separate pieces of evidence that could have helped in the Defendant's defense. More specifically, the Defendant repeatedly asked defense counsel to obtain phone records for all the parties involved and for all CPS reports involving the complaining witness from 1998 to the time of the trial. Either one of these could have been helpful to the Defendants case, yet counsel, without any explanation or reason, refused to obtain either, thereby limiting the Defendant's ability to defend himself at trial. (See Defendant's Affidavit, attached hereto as Exhibit A).

While generally speaking the wisdom of the strategy employed by trial counsel is not the basis of a claim of ineffective assistance, that standard is not absolute, and does not cloak every failure to act with an impenetrable veil of protection. Courts have recognized that an unreasonable or harmful tactic is not protected solely because it is termed "strategy." See *People v Stubli*, 163 Mich App 376 (1987); *People v Dalessandro*, 165 Mich App 569, 577-588; 419 MW2d 609, 614 (1988)(holding that *Strickland* requires that counsel engage in "sound trial strategy"); *People v Tommolino,* 187 Mich App 14, 439 Mich 897 (1991); *Blackburn v Foltz*, 828 F2d 1177, 1187 (CA 6, 1987).

The record makes clear that defense counsel's failures to both obtain and investigate/look into either set of information the Defendnat requested, was objectively unreasonable and harmful to the Defendant. In both cases, the record shows counsel

did not even conduct a thorough evaluation of the Defendant's case, because if he had done so, it is more likely than not that he would have used those to combat the testimony of the complaining witnesses. For this reason alone, his actions speak to the ineffectiveness because he did not sufficiently investigate the defense in order to make reasonable decisions as to the viability of that defense. *See Johnson v Baldwin*, 114 F3d 835, 839-840 (CA 9, 1997); *Profitt v Waldron*, 831 F2d 1245 (CA 5, 1987).

Defense counsel must engage in a reasonable amount of pretrial investigation and "at a minimum ... interview potential witnesses and ... make an independent investigation of the facts and circumstances of the case." *Nealy v Cababa,* 764 F2d 1173, 1177 (CA 5, 1985). Trial counsel owed the Defendant the "duty to make a reasonable investigation or make a reasonable decision that makes particular investigation unnecessary." *Strickland, supra* at 691. "Failure to investigate can certainly constitute ineffective assistance." *Washington v Smith*, 219 F3d 620, 630 (CA 7, 2000). See generally *Clinkscale v Carter*, 375 F3d 430 (CA 6, 2004)(failure to file alibi notice and call witnesses); *Johnson, supra* (failure to call six witnesses in murre case to support defense that the decedent had been firing shots and was shot by someone other than defendant); *Bass, supra* (unexplained failure to call two witnesses known before trial who would have testified that defendant was not selling drugs). The responsibility to at least make reasonable efforts to investigate all aspects of a defense and the ramifications of using said defense is part of counsel's independent professional duty. Defense counsel did not live up to his duty, and the Defendant was denied his due process rights to a fair trial by the ineffective conduct of his attorney.

Lastly, the Defendant required on several occasions, for defense counsel to provide him copies of the discover in his case, as well as the preliminary exam

transcripts. Though repeatedly requested, defense counsel, at no time, ever fulfilled those requests and never provided copies of this information to the Defendant. Such a failure on defense counsels part is a prime example of his ineffectiveness. There is absolutely no reason for a criminal defendant to not be provided his own discovery, to assist in preparing a defense in his own trial. The same is true as it regards the preliminary exam. There is no justifiable reason or strategy for this to occur. Pursuant to *Strickland*, a defendant is denied the effective assistance of counsel when defense counsels actions fall below an objective standard of reasonableness and that this performance was prejudicial. *Strickland, supra* at 687-688; *Pickens, supra* at 309, 312-313. Not providing his own client discovery is not something a reasonable attorney would do, and would absolutely meet the first prong of *Strickland*. Moreover, the Defendant was prejudiced by not being able to properly assist in preparing his own defense. Had he been able to do so, there is a high probability that a more complete defense to the charges he was facing, would have been mounted, and therefore a great probability exists that the verdict in this case would have been completely different, i.e., not guilty to many, if not all of the felony charges.

While each of these instances on their own would qualify as ineffective assistance of counsel, they need to be looked at in their totality. When looking at these instances in combination with one another, there is no doubt that the Defendant was denied the effective assistance of counsel he is constitutionally guaranteed. Counsel's actions in every aspect of his representation fell below a standard of reasonableness and prejudiced the Defendant. This Court should have no other option but to find that the Defendant was effective assistance of counsel.

Remedy

Defense Counsel's repeated ignoring of the Defendant and his requests to assist in his own defense constituted ineffective assistance of counsel. Moreover, it was not sound trial strategy, as failing to allow the Defendant himself, to partake in his own trial preparation, was irresponsible and unconscionable. As such, the Defendant therefore asks this Honorable Court to remand this matter to the Trial Court for *Ginther* hearing and/or in the alternative grant a reversal of his conviction and remand to the Trial Court for a new trial.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Defendant-Petitioner submits that he has presented the Court with compelling reasons for consideration and ask that this Court grant the petition for a writ of certiorari, further Petitioner ask that the Court reverse his convictions and remand this matter to the state court with appropriate instructions.

Respectfully submitted,

/s/ Robert E. Hardesty

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