No. 20-19-7795

In The
SUPREME COURT OF THE UNITED STATES

ROBERT ALAN FOSTER,
Petitioner,

v.

WILLIS CHAPMAN, Warden
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Robert Alan Foster, #297674
Petitioner, *in pro per*[*]
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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

Was Mr. Foster denied a fair trial due to prosecutorial misconduct where the assistant prosecutor intentionally provided an erroneous definition for unlawful imprisonment to the jury thereby creating confusion and an unreliable verdict?

Was Mr. Foster's Sixth Amendment right to the effective assistance of counsel was violated by trial counsel's failure to object to the assistant prosecutor's misconduct in providing an erroneous definition for the offense of unlawful imprisonment to the jury?

Was Did trial counsel provide ineffective assistance of trial counsel for failure to investigate exculpatory evidence?

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PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Alan Foster 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6th Circuit, denying a certificate of appealability (November 15, 2019), appears at APPENDIX A to the petition and is unpublished.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 Alan Foster v Willie Smith, 2019 U.S. Dist. LEXIS 93017, Dk. No. 4:16-cv-11898, (E.D. Mich., June 04, 2019).The final order from the Michigan Supreme Court is published at 501 Mich. 945, 904 N.W.2d. 602 (Dec. 27, 2017). The final opinion of the Michigan Court of Appeals is unpublished (Mich. Ct. App., Dk. No. 334826, February 08, 2017). (See Appendix, filed under separate cover).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its final order on November 15, 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

Petitioner was charged in a criminal information in the Wayne County Circuit Court, Criminal Division with (1) Unlawful Imprisonment, contrary to *Mich. Comp. Laws 750.349(b);* for this offense. Petitioner was also put on notice that, if convicted, he would be required to register under the Sex Offender Registry Act; (2) Assault with Intent to Do Great Bodily Harm Less Than Murder, contrary to *Mich. Comp. Laws 750.84;* (3) Assault with A Dangerous Weapon, contrary to *Mich. Comp. Laws 750.82;* and (4) Domestic Violence, contrary to *Mich. Comp. Laws 750.81(2).*

Petitioner was also put on notice that, upon conviction, the Wayne County Prosecutor's Office would seek an enhanced sentence against him as a habitual fourth offender, pursuant to *Mich. Comp. Laws 769.12.*

On January 17th 2014 Following a trial by jury, Petitioner was found guilty as charged. Petitioner was sentenced by the court on February 4th, 2014 to the custody of the Michigan Department of Corrections for a minimum term of 19 years and a maximum term of 40 years for the offense of Unlawful Imprisonment; a minimum term of 10 years and a maximum term of 40 years for the offense of Assault With Intent To Do Great Bodily Harm Less Than Murder: a minimum term of 5 years and a maximum term of 15 years for the offense of Assault With A Dangerous Weapon and 93 days in the county jail for the offense of Domestic Violence.

B. FACTS:

In this case it is alleged that there was once a domestic relationship between the Petitioner and the complaining witness, Melissa Carr. Ms. Carr alleges that on

or about June 22.201[redacted], Petitioner became angry because a flat screen television that he had ordered from a catalog had not been delivered to their home and he blamed Ms. Carr. As a result, it is alleged that Ms. Carr was beaten by Petitioner over a few days and was deprived her liberty to leave their apartment.

Ms. Carr testified that she and Petitioner were boyfriend and girlfriend for the past 4 years. (IT 1/16/2014 p 12)[1] Ms. Carr testified that on June 9th, 2012, she resided at 3038 Rochester Street in the City of Detroit. (TT 1/16/2014 p 5). On that day, Petitioner became angry because a flat screen television he purchased from a catalog in April, 2012, had not been delivered yet. Petitioner ultimately found out that the seller verified that the television had been delivered to his address. Petitioner became angry and blamed Ms. Carr for the television's disappearance. As a result, Petitioner believed that Ms. Carr was indebted to him for $1,500.00. (TT 1/16/2014 p 68). Ms. Carr testified that Petitioner became so angry over the disappearance of his television that be began beating her with various objects. Since Petitioner was demanding repayment for the television, Ms. Carr began calling her relatives for donations to help pay the debt to Petitioner. Several relatives promised to send money, but only one person actually mailed a check to them. Ms. Carr testified that Petitioner became frustrated and began beating her with the broken handle of a shovel about her head and body. (TT 1/16/2014 p 15). Ms. Carr testified that she didn't leave the residence because she was afraid he would become angrier, follow her and continue beating her. (TT 1/16/2014 p 16). At one point she testified that Petitioner told her she could not leave the house. Ms.

[1] TT will be known as Trial Transcripts followed by the date then the page location, indicated with a 'p'

Carr testified that this scenario went on for 3 or 4 days during which time he beat her with a bat, a plunger handle, and a curtain rod. (TT 1/16/2014 p 17). Ms. Carr testified that Petitioner also poured bleach. gasoline, alcohol and peroxide on her threatening to set her, on fire. At one point she testified that he (Petitioner) actually made her get into the bathtub, poured gasoline on her and beat her. (TT 1/16/2014 p 18). Ms. Carr testified that although Petitioner left the residence for several hours on numerous occasions to help his mother move her residence, she was afraid to leave the house. (TT 1/16/2014 p 20). As a result of the beating, Ms. Carr testified that she sustained a broken right tibia, the lower part of her right leg. (TT 1/16/2014 p 21). She also testified to her head being split open. As a result of her injuries, Ms. Carr testified that she remained in the hospital for 1 1/2 months and then another 1 1/2 months in rehabilitation. (TT 1/16/2014 pp 22, 23).

On cross-examination, Ms. Carr testified that she was placed on probation for the offense of uttering and publishing and there is currently a warrant for her arrest for violation of probation. (TT 1/16/)014 p 32). Ms. Carr admitted that she accused her neighbor, Lashan Walker and her son of taking the television set after it was delivered to the apartment building. Ms. Carr testified that Lashan Walker is not really a friend but an acquaintance who lives in the building. (TT 1/16/2014 p 33). Ms. Carr admitted to speaking to Ms. Walker about her testimony in court. (TT 1/16/2014 p 35). Ms. Carr further testified that in May of 2012, approximately a month after Petitioner had ordered this television, she had been living in a shelter, but decided to come back home to Petitioner because she wanted to be with him. (TT 1/16/2014 pp 36, 37). Following her return, she testified that they did not argue about the television for the rest of May or June, until June 22, 2012. It is common

knowledge that there are two doors to the apartment and she could have left many times. but was afraid Petitioner would follow her and bring her back. (TT 1/16/2014 p 41). Ms. Carr further acknowledged that there were numerous occasions when Petitioner left the home for several hours. but she decided not to leave (TT 1/16/2014 p 48). Ms. Carr also acknowledged that after being beaten the first day, they eventually slept together in the same bed. (TT 1/16/2014 p 53). The next day, a check arrived in the mail from her aunt to help pay her debt to Petitioner. The two of them left the apartment to cash it. (TT 1/16/2014 p 54). Then they returned home and it was uneventful for the rest of the day. (TT 1/16/2014 p 55). Ms. Carr further acknowledged that at the preliminary exam, she was untruthful about whether she had ever left the apartment with Petitioner. (TT 1/16/2014 p 58). The following day, June 24th they argued but there were no assaults. (TT 1/16/2014 p 60). Petitioner left the apartment for an extended period of time to help his mother move. On June 25th the beating continued, however. Ms. Carr acknowledged that this trial testimony was the first time she ever stated that she was beaten on June 25th. (TT 1/16/2014 p 63). That night, they also slept as a couple. On June 26th Petitioner left the apartment again for several hours to help his mother. Then Ms. Carr was shown her preliminary exam testimony where she admitted lying at the preliminary examination as to whether Petitioner had ever left the apartment. She answered "no" to that question. (TT 1/16/2014 pp 65, 66). Ms. Carr also admitted to lying about whether she remembered Petitioner leaving the apartment. (TT 1/16/2014 p 68). Ms. Carr also admitted that she lied at the preliminary examination as to whether Petitioner locked her in the apartment. Her trial testimony was that she could have left at any time by merely unlocking the doors

from the inside. (TT 1/16/2014 pp 69, 70). Ms. Carr testified that finally on June 26th Petitioner asked her if she wanted to leave, she said "yes" and he opened the door and told her to get out. (TT 1/16/2014 p 72).

Lashan Walker testified that on June 22, 2012, she resided at 3038 Rochester, which she described as an apartment building. (TT 1/16/2014 p 82). She testified that there had been a lot of fighting between Robert and Melissa. She identified Petitioner as Robert. Ms. Walker testified that she had seen Petitioner who informed her that they had been fighting over the loss of the package. (TT 1/16/2014 p 84). Petitioner had come to her to ask if her son had taken it. Petitioner told Ms. Walker that Melissa had seen the UPS driver bring the package to the door, but did not go down to retrieve it. (IT 1/16/2014 p 85). Ms. Walker testified that as a result, Petitioner was very angry at Melissa for not picking up the package. (TT 1/16/2014 p 88). Ms. Walker told Petitioner that she wanted to speak to Melissa and he said "no". (TT 1/16/2014 p 89). Ms. Walker went upstairs anyway and saw Melissa sitting on the couch. Ms. Walker testified that at first she was angry at Melissa for accusing her, but when she saw Melissa's condition, she stopped being angry and asked Melissa whether she was o.k. (TT 1/16/2014 p 91). Ms. Walker testified that it appeared that Melissa's hair had been cut, she had a black eye and bruises all over her body and she looked scared. (TT 1/16/2014 p 92). A few days later, Ms. Walker testified she saw Petitioner on the porch and asked him why he was treating Melissa that way. She testified that Petitioner replied 'Fuck that bitch, she's going to pay for my mother fucking package". (TT 1/16/2014 p 92). Ms. Walker also testified that Petitioner told her that Melissa "ain't going anywhere until she pays him his money". (TT 1/16/2014 p 94). Ms. Walker indicated

that the fighting between Robert and Melissa went on for a couple of weeks. (TT 1/16/2014 p 95).

Indecently on cross-examination, Officer Donegan testified in response to defense counsel's questioning that Petitioner was eluding capture because he had a home invasion warrant. (TT 1/16/2014 p 158). Defense counsel objected to the officer's response and requested a mistrial. The court instructed the jury to disregard the testimony of Officer Donegan and struck the statement. The court did not rule on defense counsel's request for a mistrial. (TT 1/16/2014 p 159).

C. INVESTIGATION:

Police Officer Ramon Garcia testified that on June 22, 2012, he worked for the Detroit Police Department as a uniformed patrol officer. Then he was dispatched to 3038 Rochester Street with his partner. Jonathon Williams. (TT 1/16/2014 p 135). They were directed to Petitioner's apartment. but there was no one at home. They were flagged down by citizens who stated that someone was hurt in the foyer of the church about half a block away. (TT 1/16/2014 p 136). Upon their arrival, they saw the victim, Melissa Carr, lying on the ground talking to the pastor. who had called 911. Emergency Medical Services eventually arrived to treat Ms. Carr. (TT 1/16/2014 p 137). Officer Garcia testified to observing a female with multiple injuries, several cuts on her head, dried blood, scalp exposed with a 3" gash. (TT 1/16/2014 p 137). A lot of bruising, eyes swollen and blackened, she couldn't walk. (TT 1/16/2014 p 138). Officer Garcia testified that she also had what appeared to be 2 to 3 stab wounds. (TT 1/16/2014 p 139). Officer Garcia asked Ms. Carr who did this to her and she said her boyfriend, Robert Foster. (TT 1/16/2014 p 142). Emergency Medical Services took her to the hospital. Officer Garcia returned

to the station to file his report. (TT 1/16/2014 p 143).

REASONS FOR GRANTING THE PETITION

CLAIM I

MR. FOSTER WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT WHERE THE ASSISTANT PROSECUTOR INTENTIONALLY PROVIDED AN ERRONEOUS DEFINITION FOR UNLAWFUL IMPRISONMENT TO THE JURY THEREBY CREATING CONFUSION AND AN UNRELIABLE VERDICT

A. CLAIM PRESERVATION:

This issue was not preserved by defense counsel during trial, therefore Petitioner was also the victim of ineffective assistance of counsel. Petitioner has properly exhausted this claim in the Michigan Court of Appeals and the Michigan Supreme Court.

B. ARGUMENT:

Petitioner has a constitutional due process right to a fair trial. This right is implicated when the prosecutor employs unfair tactics to gain an advantage. *U.S. Const. Am XIV; Mich. Const. 1963, Art. I, § 17; Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974). As quasi-judicial officers, prosecutors have the solemn duty to ensure defendants are afforded a fair trial and protect the interests of the people as well as the criminal justice system. *People v. Burrell*, 127 Mich. App. 721, 726 (1983). The United States Supreme Court has recognized that a prosecutor owes allegiance, not only to the government, but to the accused and to society at large. *Berger v United States*, 295 US 78, 88 (1935). This duty prohibits the prosecutor from using improper tactics to win convictions. The *Berger* court stated:

> "The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

> therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is an a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so, but while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful convictions as it is to use every legitimate means to bring about a just one." *Berger,* 295 U.S. at 88.

A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. *United States v. Jackson*, 473 F.3d 660, 670-71 (6th Cir. 2007) (alteration original) (quoting *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996)). We thus " to a prosecutor afford wide latitude during closing argument, analyzing disputed comments in the context of the trial as a whole and recognizing that inappropriate comments alone do not justify reversal where the proceedings were 'otherwise fair.'" *United States v. Henry*, 545 F.3d 367, 377 (6th Cir. 2008) (citing *United States v. Young*, 470 U.S. 1, 11; 105 S.Ct. 1038; 84 L.Ed.2d 1 (1985)); *see also Parker v. Matthews*, 567 U.S. 37, 45; 132 S.Ct. 2148; 183 L.Ed.2d 32 (2012).

In a two-part test for determining whether prosecutorial misconduct warrants reversal, its examined (1) whether the prosecutor's remarks were indeed improper and, if so, (2) whether they were flagrant. *United States v. Eaton*, 784 F.3d 298, 309 (6th Cir. 2015). In Considering, there's four factors in determining whether a statement was flagrant: (1) whether the prosecutor's remarks or conduct tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were accidentally or

deliberately made; and (4) the overall strength of the evidence against the accused. *Henry*, 545 F.3d at 376.

C. THE ERRONEOUS DEFINITION OF UNLAWFUL IMPRISONMENT.

In the beginning of his closing argument, the assistant prosecutor made the following statement to the jury:

> "If you restrain a person for one moment and tell a person they don't have a right to leave. they don't have a right to control their body, that's an unlawful imprisonment. One moment".

This is not a correct definition of unlawful imprisonment, further this comment was an ill intention misconduct by the assistant prosecutor. Further, this erroneous definition had the effect of confusing the jury, especially after being provided the jury instructions by the court, thereby making the jury's verdict unreliable.

Mich. Comp. Laws § 750.349 b (l) states:

> (1) a person commits a crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances;
> (a) the person is restrained by means of a weapon or dangerous instrument.
> (b) the restrained person was secretly confined.
> (c) the person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

In this case, it was the prosecution's theory that Petitioner violated the first circumstance, specifically that the complaining witness was restrained by means of a weapon or dangerous instrument. Petitioner is cognizant that restraint need only be temporary. *People v. Railer*, 288 Mich. App. 213, 218-219; 792 N.W.2d 776 (2010). However, the prosecutions assertion in this case that restraint may only be for "a moment" is erroneous. That is not the law.

The law is clear as it states:

- The restraint does not have to exist for any particular length of time.
- The prosecutorial misconduct requires reversal.

In this case the prosecutorial misconduct requires reversal under plain error review, as the error was outcome determinative. *People .v Carines* 460 Mich. 750 (1999). Petitioner respectfully submits that this misconduct was outcome determinative and fairness and integrity of this trial was significantly undermined, therefore reversal is required.

D. MICHIGAN COURT OF APPEALS DETERMINATION:

Defendant's Attorney failed to contemporaneously object to the alleged prosecutorial error and failed to request any curative instruction. Accordingly, this claim of error is unpreserved. *People v. Bennett*, 290 Mich. App. 465, 475; 802 N.W.2d 627 (2010) (citing *People v. Unger*, 278 Mich. App. 210, 235; 749 N.W.2d 272 (2008)). Unpreserved claims of prosecutorial error are reviewed for plain error affecting substantial rights, with reversal "warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." Bennett, 290 Mich App at 475-476 (quotation marks and citations omitted). This Court considers allegations of prosecutorial misconduct on a case-by-case basis, reviewing prosecutorial comments in their proper context. Id. at 475 (citing *People .v Akins*, 259 Mich. App. 545, 562; 675 N.W.2d 863 (2003)). Although a clear misstatement of law by the prosecution, left uncorrected, can deprive a criminal defendant of the right to a fair trial, see, e.g., *People v. Grayer*, 252 Mich. App. 349, 357; 651 N.W.2d 818 (2002), the prosecution did not clearly misstate the law. Defendant argues that no legal authority supports the prosecution's assertion during closing arguments

that "one moment of restraint" is sufficient to satisfy the restraint element for unlawful imprisonment. But that statement is directly supported by this Court's opinion in *People v. Chelmicki*, 305 Mich. App. 58, 69' 850 N.W.2d 612 (2014) (holding that restraint need not last "for any particular length of time," and unlawful imprisonment "can occur when the victim is held for even a moment"). Thus, the prosecution did not misstate the law.

E. CONCLUSION:

The law is clear and states in relevant part that there is no length in time for the statute to be satisfied per the charge. The prosecutor's statements may fit some previous case decisions but the statue clearly states the restraint does not have to exist for any particular length of time. The "even a moment" comment placed confusion onto the jury resulting in a conviction per a statute that was not evident in the instance.

CLAIM II

MR. FOSTER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY TRIAL COUNSEL'S FAILURE TO OBJECT TO THE ASSISTANT PROSECUTOR'S MISCONDUCT IN PROVIDING AN ERRONEOUS DEFINITION FOR THE OFFENSE OF UNLAWFUL IMPRISONMENT TO THE JURY

A. CLAIM PRESERVATION:

This issue was raised in the Michigan Court of Appeals and the Michigan Supreme court. It's the Petitioners position this claim was preserved when the trial counsel failed his client allowing the prosecutor to provide an erroneous definition to the jury.

B. ARGUMENT:

In *Strickland v. Washington*, 466 U.S. 668, 687-88; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the Petitioner must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. A court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. Id. (citing *Michel v. Louisiana*, 350 U.S. 91, 101; 76 S.Ct. 158; 100 L.Ed 83 (1955)); see also *Nagi v. United States*, 90 F.3d 130, 135 (6th Cir. 1996) (holding that counsel's strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. Id. at 691. Notably, the decision whether to object "in a particular instance is made in the strategic context of the entire trial, [and] any single failure to object does not constitute error unless the information introduced 'is so prejudicial to a client that failure to object essentially defaults the case to the state.'" *Hodge v. Haeberlin*, 579 F.3d 627, 649 (6th Cir. 2009) (quoting *Lundgren v. Mitchell*, 440 F.3d 754, 774 (6th

Cir. 2006)). In addition, "experienced trial counsel learns that objections to each potentially objectionable event could actually act to their party's detriment," which is why counsel often use objections in a strategic manner. *Lundgren*, 440 F.3d at 774. Ultimately, an attorney "must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice." *Id.* at 774-75.

In the Instant case not only was counsel's decisions to not challenge the prosecutors closing remarks, but did not even make an attempted to object to the more serious infraction of allowing the jury to hear an ill shaped example of the charged statute. This clear contemptuous misjudgment was profound and clearly underlines factual questions on how counsel performed his strategy.

C. MICHIGAN COURT OF APPEALS DETERMINATION:

Petitioner's claim of ineffective assistance necessarily fails because, as already discussed, the prosecution did not misstate the law regarding the restraint element for unlawful imprisonment. Defense counsel's failure to make a futile objection to the prosecution's proper statement of the law during closing arguments does not constitute ineffective assistance. See, e.g., *People v. Matuszak*, 263 Mich. App. 42, 58; 687 N.W.2d 342 (2004). Furthermore, since the prosecution's description of the law was accurate, defendant has failed to demonstrate any prejudice from his counsel's allegedly defective performance. Likewise, "'declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy.'" *People .v Eliason*, 300 Mich. App. 293, 303; 833 N.W.2d 357 (2013) (quoting *Unger*, 278 Mich. App. at 242). For instance, where a trial court will subsequently instruct the jury regarding the law, counsel may reasonably conclude

that an objection to prosecutorial statements would "be superfluous." *Matuszak*, 263 Mich. App. at 58. This is particularly true because the jury is presumed to follow the trial court's instructions. Id. (citing *People v. Graves*, 458 Mich. 476, 486; 581 N.W.2d 229 (1998)). Since it is presumed that counsel's trial strategy was effective, *People v. Payne*, 285 Mich. App. 181, 190; 774 N.W.2d 714 (2009) (citing *People v. Ackerman*, 257 Mich. App. 434, 455; 669 N.W.2d 818 (2003)), defendant's claim of ineffective assistance of counsel fails; he has cited no record evidence to rebut the presumption that his counsel's trial strategy was effective.

D. CONCLUSION:

Regardless whether defense counsel's motives for failing his client were strategy or collusive, the prosecutors ill stated example of the statute was unpreserved at trial. Defense counsel has a profound duty to preserve any issue with merit for appellate review. Because this issue super- exceeds Michigan State Legislation and is more of a constitutional dimension, it's worth a closer look. The real question on point was the jury at all confused about the prosecutor's explanation of the statue and would there be a need for a curative instruction.

CLAIM III

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO INVESTIGATE EXCULPATORY EVIDENCE.

A. CLAIM PRESERVATION:

Petitioners position is that this Claim was properly preserved when defense counsel failed to investigate possible exculpatory discovery evidence before trial. Petitioner has properly exhausted this claim in the Michigan Appellate court and Michigan Supreme Court.

B. ARGUMENT

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that it prejudiced him. This standard has two prongs: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Effective assistance of counsel, tests for ineffective assistance of counsel with respect to the first *Strickland* prong, the court's scrutiny of defense counsel's performance must be highly deferential. Because of the difficulties inherent in making the evaluation, the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. As for the second prong, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

Additionally, because Petitioner's trial defense attorney failed to investigate exculpatory evidence, this action has been known in all jurisdictional courts as a *Brady* violation.

Petitioner contends that his Trial defense counsel Sharon Clark Woodside failed to investigate possible Exculpatory Discovery Evidence to which violated Petitioners sixth and fourteenth constitutional rights. Ms. Woodside failed to uphold an adversary role against Assistant Wayne County prosecutor.

On November 15th, 2012 during a preliminary examination its apparent Petitioner priory confronted his attorney Ms. Woodside he had been taken to the Detroit Receiving Hospital following the instant incident. The Trial Transcripts indicate MS. Woodside requested the transportation Records from the prosecutor during these proceedings. (PT pg. 44-45 L 25-1) Furthermore, the prosecutor instructed MS. Woodside that she had the same subpoena powers as the Prosecution Office and that she should subpoena for the information. In that regard, MS. Woodside concluded that the Transportation Record in question were supposed to be part of the discovery from the Detroit Police Department, already requested prior to the Preliminary examination. The Court asked both parties if the information was part of the discovery, MS. Woodside confirmed it had not been entered. Ms. Woodside concluded there was a form the Detroit Police department completes when a prisoner is transported to a hospital and it's this form MS. Woodside was looking for. The court confirmed the form was what MS. Woodside was looking for but asked that:

THE COURT: So you want the form?
MS. WOODSIDE: Yes, your Honor.

THE COURT: You want the Detroit Police form, and You don't want to subpoena it yourself?

MS. WOODSIDE: Well?

The prosecutor interjected by saying if Ms. Woodside were to serve them with subpoena and if they don't cooperate, he would be glad to help Ms. Woodside. (PT pg. 45).

It's the Petitioner's position the subpoena was never served and therefor his discovery information was incomplete rendering trial counsel ineffective. More so,

the prosecutor is required to turnover any evidence that is both favorable or material to the defendant. The suppression by the prosecutor in this instance was a violation of Petitioner's due process rights because the evidence was material for discovery.

Its Petitioner's position the transportation and medical records were suppressed by the prosecutor and Detroit Police Department to which resulted into the hindsight of prosecutorial and police misconduct.

Evidence is material under *Brady* where there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Strickler v. Greene*, 527 U.S. 263 (1999). See e.g., *O'Hara v. Brigano*, 499 F. 3d 492 (6th Cir. 2007)

Because the Petitioner's medical and Transportation under custody record's, where Petitioner was assaulted by the Detroit Police Department were never presented, this material evidence rendered the reasonable probability the trial would have had a different outcome.

C. MICHIGAN COURT OF APPEALS DETERMINATION:

Neither the trial court, Court of Appeals or the Michigan Supreme Court gave a determination upon the merits of the claims presented. See *Guilmette v. Howes*, 624 F.3d 286 (6th Cir. 2010) (en banc), where the Court determined that a systematic denial using *Mich. Ct. R. 6.508(D)* was to ambiguous to determine whether the denial was upon the merits of the claim or a procedural default, thus such orders are unexplained. Furthermore, it is well settled the Sixth Circuit Court may review de novo an exhausted federal claim that was not adjudicated on the merits in state court.' *Rice v. White*, 660 F.3d 242, 252 (6th Cir. 2011). While

Harrington requires the presumption "'the state court adjudicated the claim on the merits,' that presumption holds only 'in the absence of any indication . . . to the contrary.'" *Id.* 562 U.S. at 784-85; *Fleming v. Metrish*, 556 F.3d 520, 532 (6th Cir. 2009) (suggesting that AEDPA deference would not apply 'where the state court simply assumed, without deciding, that there was a constitutional error').

D. CONCLUSION:

Wherefore, because of the forgoing arguments, this Court should grant the petition for a writ of certiorari.

CLAIM IV

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. CLAIM PRESERVATION:

Petitioner position is that this Claim was properly preserved when appellate counsel filed a supplemental brief on behalf of Petitioner accruing an eighty-four-day deadline for Petitioner's standard 4 brief. During this time Petitioner had not had his proceeding's transcript produced nor distributed. This claim was properly exhausted within the Michigan Appellate court and Michigan supreme court.

B. ARGUMENT:

In *Chapman v. California*, 386 U.S. 18. 25; 87 S.Ct 824; 17 L.Ed.2d 705 (1967). In Chapman Its acknowledged that certain constitutional rights are so basic to a fair trial that their infraction can never be treated as minor infractions or as harmless. The sixth amendment right to assistance of counsel is the just standard because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by

an attorney whether retained or appointed who plays the role necessary to ensure that the trial and procedures are fair.

On February 20, 2014 Petitioner was appointed Appellate Attorney, Nicholas Vendittelli. On March 19, 2014, Mr. Vendittelli informed Petitioner he would support Petitioner's possible legal strategy's that were introduced and procured by Petitioner submitted to Mr. Vendittelli through written correspondence. Vendittelli encouraged Petitioner that he would produce any issue that had legal merit. Although, this never transpired.

On March 19, 2014, Petitioner received a conformation letter from Mr. Vendittelli confirming the requested proposed additional issues that Petitioner intended on raising for his appellate filings.[2] During these correspondences Petitioner had been requesting his proceedings transcripts to no avail. The correspondence from Mr. Vendittelli stated that he would inform Petitioner on when he would return the transcripts to the trial court. In relation to why the appellate attorney would do this, Mr. Vendittelli stated "this is how I get Paid."[3]

On August 8th, 2014, Petitioner received notice from Mr. Vendittelli stating the trial transcripts were returned back to the trial court[4]. Subsequently, on September 10th, 2014 Mr. Vendittelli sent notice to Petitioner stating he had filed a supplemental Brief in Petitioner's behalf dating September 8th, 2014. Additionally, Mr. Vendittelli gave Petitioner notice to file an Administrative Order 2004-6, Standard 4 brief within eighty-four (84) days. During this time Petitioner had not been provided with a copy of his proceedings transcripts. In *Draper v. Washington*,

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[2] Letter from Appellate Attorney Nicholas Vendittelli Dated March 19, 2014 (Exhibit A)
[3] Letter from Appellate Attorney Nicholas Vendittelli Dated April 15, 2014 (Exhibit B)
[4] Letter from Appellate Attorney Nicholas Vendittelli Dated August 8, 2014 (Exhibit C)

272 U.S. 487; 82 S.Ct. 774; 9 L.Ed.2d 899 (1963), the Court found that a *pro per* defendant has a Fourteenth Amendment right to transcripts. Also see, *Griffin v. Illinois*, 351 U.S. 12, 19; 76 S.Ct. 585; 100 L.Ed 891 (1956), where it was found that the state has an obligation to provide trial transcripts, to appellants who are unable to pay for them. As stated above, Petitioner had his transcripts transcribed then sent to his appellate attorney in turn sent them back to the trial court in order to get paid for services.[5] This act rendered Appellate counsel ineffective for failing to properly prepare his client for procuring a defense Standard 4.

C. MICHIGAN COURT OF APPEALS DETERMINATION:

Neither the trial court, Court of Appeals or the Michigan Supreme Court gave a determination upon the merits of the claims presented. See *Guilmette v. Howes*, 624 F.3d 286 (6th Cir. 2010) (En banc), where the Court determined that a systematic denial using *Mich. Ct. R. 6.508(D)* was to ambiguous to determine whether the denial was upon the merits of the claim or a procedural default, thus such orders are unexplained. Furthermore, it is well settled the Sixth Circuit Court may review *de novo* an exhausted federal claim that was not adjudicated on the merits in state court. *Rice*, 660 F.3d at 252. While *Harrington* requires the presumption 'the state court adjudicated the claim on the merits,' that presumption holds only 'in the absence of any indication . . . to the contrary.' *Id.* 562 U.S. at 784-85. . . . *Fleming*, 556 F.3d at 532 (suggesting that AEDPA deference would not apply 'where the state court simply assumed, without deciding, that there was a constitutional error').

D. CONCLUSION:

[5] Letter from Appellate Attorney Nicholas Vendittelli Dated September 22, 2014 (Exhibit D)

Wherefore, because of the forgoing arguments, this Court should grant the petition for a writ of certiorari.

CLAIM V

PROSECUTOR MISCONDUCT FOR VIOLATION OF DISCOVERY RULES BY FAILURE TO PRODUCE REQUESTED POLICE RECORD.

A. CLAIM PRESERVATION:

This claim was preserved when Petitioner raised the argument upon his Motion for Relief from Judgment application in the Wayne County Circuit Court. This claim was appealed in the Michigan Appellate court and Michigan Supreme court.

B. ARGUMENT:

The prosecutor demonstrated a misconduct by the suppression of material exculpatory evidence that denied the Petitioner Due Process to a fair trial guaranteed by the Sixth and Fourteenth Amendments of our federal constitution. See *Brady v. Maryland*, 373 U.S. 83 (1963).

Mich. Ct. R. 6.201 Discovery:

> a) Mandatory Disclosure: In addition to disclosure required by provisions of law other than MCL 767.94(a). A party upon request must provide all other parties: (1) The names and addresses of all lay and expert witnesses whom the party may call at trial. In the alternative, a party providing the names of witness's available to the other party for interviewing the witness list may be amended without leave of the court no later than 28 days before trial. (2) Any written record statement including electronically recorded statements pertaining to the case by lay witness whom the party may call at trial except that a defendant is not obliged to provide the defendants own statements ect....
> (b) Discovery of Information Known to the Prosecuting Attorney. Upon request, the
> prosecuting attorney must provide each defendant: (1) any exculpatory information or evidence known to the prosecuting attorney; (2) any police

> report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation; (3) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial; (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

As noted above in Petitioner's ineffective assistance of trial counsel claim, the prosecutor failed to provide all discovery material to the defense during preliminary proceedings held on November 13, 2012. The court record clearly shows the prosecutor informing the court of the said discovery material, the court asked the defense if counsel wished to obtain the material from the prosecution because defense counsel did not subpoena for the Police Transportation records. The prosecution stated he would help provide the material if he defenses fell into a pit fall and could not obtain the records. Contrarily, the prosecution had a duty to turn over the material as noted in *Mich. Ct. R. 6.201* Mandatory Disclosure.

C. MICHIGAN COURT OF APPEALS DETERMINATION:

Neither the trial court, Michigan Court of Appeals or the Michigan Supreme Court gave a determination upon the merits of the claims presented. See *Guilmette v. Howes*, 624 F.3d 286 (6th Cir. 2010) *(En banc)*, where the Court determined that a systematic denial using *Mich. Ct. R. 6.508(D)* was to ambiguous to determine whether the denial was upon the merits of the claim or a procedural default, thus such orders are unexplained. Furthermore, it is well settled the Sixth Circuit Court may review de novo an exhausted federal claim that was not adjudicated on the merits in state court.' *Rice v. White*, 660 F.3d at 252. While *Harrington*, requires the presumption 'the state court adjudicated the claim on the merits,' that presumption

holds only 'in the absence of any indication . . . to the contrary.' *Id.* 131 S.Ct. at 784-85; *Fleming*, 556 F.3d at 532 (suggesting that AEDPA deference would not apply 'where the state court simply assumed, without deciding, that there was a constitutional error').

D. CONCLUSION:

Wherefore, because of the forgoing arguments, the Petitioner's habeas should be granted his convictions and sentences dismissed and a new trial ordered.

CLAIM VI

PROSECUTOR DEMONSTRATED MISCONDUCT BY THE USE OF PERJURED TESTIMONY TO CAPITALIZE A CONVICTION.

A. CLAIM PRESERVATION:

This claim was preserved when Petitioner raised the argument upon his Motion for Relief from Judgment application in the Wayne County Circuit Court. This claim was appealed in the Michigan Appellate court and Michigan Supreme court.

B. ARGUMENT:

Due process requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *Napue v. Illinois,* 360 U.S. 264, 269; 79 S.Ct. 1173; 3 L.Ed.2d 1217 (1959); "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue, supra* at 269-270. The United States Supreme Court has clearly established that the Fourteenth Amendment Due Process Clause requires that a criminal defendant receive a new trial when his convictions are obtained through the use of material false and perjured testimony,

which the prosecutor knew or should have known was perjured. *Napue, supra; Brady v. Maryland,* 373 U.S. 83, 86-88; 83 S.Ct. 1194; 10 L.Ed.2d 215 (1963); *Giglio v. United States,* 405 U.S. 150, 153-154; 92 S.Ct. 763; 31 L.Ed.2d 104 (1972); *United States v Agurs,* 427 U.S. 97, 103-105; 96 S.Ct. 2392; 49 L.Ed.2d 342 (1976); *United States v Bagley,* 473 U.S. 667, 679 & n 8; 105 S.Ct. 3375; 87 L.Ed.2d 481 (1985).

The United States Supreme Court has made clear that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the 'rudimentary demands of justice.'" *Giglio*, 405 U.S. at 153. It is thus well-settled that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103 (footnote omitted); see also *Napue,*, 360 U.S. at 271; *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). A habeas petitioner bears the burden of proving that the disputed testimony constituted perjury. *Napue*, 360 U.S. at 270. To prevail on a claim that a conviction was obtained through the use of perjured testimony, a petitioner must show that the statements were actually false, that the statements were material, and that the prosecutor knew (or should have known) that the statements were false. *Coe*, 161 F.3d at 343.

To quote the Court in *Mesarosh v United States,* 352 U.S. 1, 14; 77 S.Ct. 1; 1 L.Ed.2d 1 (1956), "Mazzei, by his testimony has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity." Otherwise, to have a fair trial in compliance with the constitution, the Court would have to remand the case back for a new trial without the perjured testimony to protect a defendant's constitutional rights.

The instant case revealed several witnesses gave perjured testimony during trial by lying under oath to tell the truth. This is clear and true as the trial court record reflects witness impeachment by the defense.

The prosecution during the highly prejudicial statements made, did absolutely nothing to correct the false and often damaging statements.

During cross examination of complainant Ms. Carr, defense counsel correctly impeached the prosecution's chief witness in multiple instances. On January 16 ,2014 the trial testimony reflects the conversation as follows:

The defense asked Ms. Carr if on Tuesday, November 3rd, 2012 during the preliminary examination that at the entire time the alleged beatings Ms. Carr suffered was she able or did she ever leave the house where she was alleged to be held captive and against her will. Ms. Carr remembered what her answer was and that answer was "No." (TT. Pg. 56 L 4-11). Defense counsel asked Ms. Carr to refresh her memory with what Ms. Carr previously stated on how and when the alleged beatings took place on what dates to be specific.

Defense counsel referenced Page 19, line 23.

> "you were asked a question, and approximately and over what time frame, this started on June 22nd about five in the afternoon, when did this finally end. I'll have you take a look at your answer to that question on the top of page 20. Refresh your recollection."
>
> **DEFENSE ATTORNEY**: In fact, isn't it true that you said that it ended on June 22nd in the afternoon when he got home?
>
> **MS. CARR**: "Yes."
>
> **DEFENSE ATTORNEY**: When he got home, correct?
>
> **MS. CARR**: "Yes."
>
> **DEFENSE ATTORNEY**: "And then your answer to that question is, and

during that entire time did you ever leave the house, you said no, isn't that correct?"

MS. CARR: "Yes."

DEFENSE ATTORNEY: "So you were untruthful at this preliminary exam, is that correct?"

Prosecution interjected with a page reference discrepancy, defense counsel moved to correct by stating:

"Her answer to that question was it ended on June 26th in the afternoon when he got home. And then your answer to that question, and during that entire time did you ever leave the house, and your answer was no, isn't that correct?"

MS. CARR: Yes.

DEFENSE ATTORNEY: And that was untrue, correct?

MS. CARR: Yes.

DEFENSE ATTORNEY: So why should we believe you today?

MS. CARR: Because on the 26th I left. That's when I was able to leave was on the 26th.

DEFENSE ATTORNEY: What I'm saying, ma' am, is you testified just now, on the 23rd that you and him went off to the party store together to cash check, correct?

MS. CARR.: Yes.

DEFENSE ATTORNEY: Clearly you left the house, right?

MS. CARR: Yes.

DEFENSE ATTORNEY: But at this prior hearing you were asked the question specifically, did you ever leave the house during that entire time, to which you said no, correct?

MS. CARR: Yes.

DEFENSE ATTORNEY: And that's not true, right?

MS. CARR: That's true.

DEFENSE ATTORNEY: So why should we believe anything you say today, if you lied under oath then?

MS. CARR: Because there is a lot of things I couldn't remember after the incident happened.

DEFENSE ATTORNEY: You didn't remember leaving the house?

MS. CARR: No.

DEFENSE ATTORNEY: To go cash a check?

MS. CARR: No.

During this conversation the defense counsel clearly could provide the court with an accurate depiction on how the complainant made false statements in her testimony. This is very important to bring to light as the complainant stated she was held against her will, a determining factor in the defendant's sentence where he was charged with unlawful imprisonment. The next conversation shows the complainant not only had a hidden cell phone to call for help but the Petitioner was often gone from the home running errands. This gave the complainant ample opportunity to escape her so called captor but did not do so.

DEFENSE ATTORNEY: The 24th rolls around. What happened on the 24th?

MS. CARR: Basically we argue again. He has me call my grandma. That's the time I had called my grandma to try and get the money so I can pay him.

DEFENSE ATTORNEY: Okay. So no assaults happened on the 24th, right?

MS. CARR: No.

DEFENSE ATTORNEY: And he comes and goes during this period of time, doesn't he?

MS. CARR: he did, He was helping his mom move.

DEFENSE ATTORNEY: Exactly, so there are hours that he is not even in the house, right?

MS. CARR: Yes. And like I said before, I could not leave because I was terrified and I didn't want to leave the doors unlocked and him see that I was gone because he would come after me.

DEFENSE ATTORNEY: Okay. But he didn't come after you when you went off to the shelter, right?

MS. CARR: No.

The defense correctly impeached the complainant with unspoken allegations never said before trial. These allegations were hidden from the defense during all the discovery and preliminary proceedings.

DEFENSE ATTORNEY: Okay, you didn't say anything at the preliminary exam either about being assaulted on the 25th, did you?

MS. CARR: No.

DEFENSE ATTORNEY: You didn't say anything in that statement over there about any of it, did you?

MS. CARR: No.

DEFENSE ATTORNEY: This is the first time we're hearing about an assault on the 25th, right?

MS. CARR: Yes.

DEFENSE ATTORNEY: What happens at the end of the day on the 25th?

MS. CARR: Basically Nothing.

DEFENSE ATTORNEY: So you all go to sleep still a couple, is that Correct?

MS. CARR: Yes.

The clear fact the complainant was not held against her will as its explained Ms. Carr alleges she is beaten on the 25th but remained in the home alone on the 26th, is more than correctly explained in this part of the testimony. (TT. Pg. 63).

DEFENSE ATTORNEY: You wake up on the 26th. So what happens on the 26th?

MS. CARR: He goes to help his Mom pack up to get ready to move, and he wanted me to wait for the check.
DEFENSE ATTORNEY: Stop right there. He goes again on the 26th, right?
MS. CARR: yes.
DEFENSE ATTORNEY: He leaves the house again on the 26th?
MS. CARR: Yes.

Additionally, the defense points out there is no need to continue the alleged beating of Ms. Carr as there was Money arriving so this negates the need for the assault. (TT. Pg. 65) As the conversation continues the defense discovers additional untruths.

DEFENSE ATTORNEY: I'm confused, Ms. Carr. Help me out. Why is it that during that same preliminary exam you were asked during the day of the - on page 34, line 16, you were asking during the day of the 22nd of June to the 26th of June he never left the apartment. Do you recall being asked that question?

MS. CARR: Yes, Sir.

DEFENSE ATTORNEY: Do you recall what your answer was?

MS. CARR: Yes, Sir.

DEFENSE ATTORNEY: What was your answer?

MS. CARR: It was No.

DEFENSE ATTORNEY: Thank you, so you Lied Then Too, Correct?

MS. CARR: Yes.

The lies continue as noted here (TT. 1-16-14 Pg. 67- 70)

DEFENSE ATTORNEY: So we already established that you said the he Never left at all, is that correct?

MS. CARR: Yes.

DEFENSE ATTORNEY: And then you were asked the question between the 22nd and the 27th -- well the 26th then he never left at all. And wasn't your answer he did, to help his mom get ready to move?

MS. CARR: Yes

DEFENSE ATTORNEY: So you did remember it then, right?

MS. CARR: Yes.

DEFENSE ATTORNEY: So what you're saying today was that you could not remember then, That Was Not True Either, Right?

MS. CARR: No.

DEFENSE ATTORNEY: You were also Asked do you recall if he left on the 23rd and your answer was not that I know of, 'No', right?

MS. CARR: Yes.

DEFENSE ATTORNEY: That coincides with what you just said today, right?

MS. CARR: Yes.

DEFENSE ATTORNEY: Asked about the 24th. What about the 24th. Your answer was, yes, he did, correct?

MS. CARR. Yes.

DEFENSE ATTORNEY: So you remembered that in November of 2012, right?

MS. CARR: Yes.

DEFENSE ATTORNEY: So what you said a few minutes ago wasn't true either, right?

MS. CARR: Yes.

DEFENSE ATTORNEY: Let's move to, before we get on the 26th - you testified here today that it wasn't the fact that you couldn't leave physically, you were too scared to leave, right?

MS. CARR: Yes.

DEFENSE ATTORNEY: Because you didn't want to leave the house unlocked, correct?

MS. CARR: Yes, Sir.

DEFENSE ATTORNEY: But why did you tell the court on November 12th, I think it was, 2012 that you were locked in that apartment?

MS. CARR: I was.

DEFENSE ATTORNEY: How were you locked in the apartment?

MS. CARR: He locked me in, when he left he locked me in the apartment.

DEFENSE ATTORNEY: But you said that you didn't want to -- strike that. I asked you, you could get out of that apartment, right?

MS. CARR: If I wanted to, Yeah. But –

DEFENSE ATTORNEY: Stop right there. If you wanted to. Describe how you could get out of the apartment.

MS. CARR: All I would have to do is unlock it from the inside.

DEFENSE ATTORNEY: Oh, okay. So you weren't locked in, right?

MS. CARR: Basically, No. I could leave if I wanted to, but I didn't because I was afraid.

DEFENSE ATTORNEY: Okay, but that's not what you said to the court back in November of 2012, was it?

MS. CARR: No.

DEFENSE ATTORNEY: In fact, when you were asked the question on line 7, page 35, and you were not locked into the apartment to the extent that you couldn't get out of the apartment, your answer was yes, "I was". Isn't that correct?

MS. CARR: Yes.

DEFENSE ATTORNEY: So you lied then Too, right?

MS. CARR: Yes.

DEFENSE ATTORNEY: So again, why should we believe you today? Are you mocking me.

MS. CARR: No.

DEFENSE ATTORNEY: For the record, you're moving your mouth imitating what I'm doing while I'm asking you that question.

The defense continued questioning the witness as to the hidden cell phone she had in her possession by stating:

DEFENSE ATTORNEY: you testified here today that you did have a cell phone during that period, correct?

MS. CARR: Yes, it wasn't mine though.

Because the witness was presented to the court by the prosecution, the prosecutor had a duty to investigate the testimony that was to be given. In *Lachance v. Erickson*, 522 U.S. 262, 265; 118 S.Ct. 753; 139 L.Ed.2d 695 (1969) (citing *Bryson v. United States*, 396 U.S. 64; 90 S.Ct. 355; 24 L.Ed.2d 264 (1968)), where the court stated "Our legal system provides methods for challenging the Governments right to ask questions, lying is not one of them. A citizen may decline to answer the question or answer it honestly, but cannot with impunity knowingly and willfully answer with falsehood." *Id* at 72.

Furthermore, the Detroit Police Department documented using a witness statement form revealed Lashawn Walker falsely testified during the trial in stating she did not have a conversation or communication with prosecution witness Melissa Carr before trial. Defense Attorney Clifford Woodards sought to clear this up during direct examination:

DEFENSE ATTORNEY: when was the time you talked to her?

MS. WALKER: Maybe a week ago. I asked her when was trial.

DEFENSE ATTORNEY: How did you happen to talk to her then?

MS. WALKER: I called.

The conversation continued here:

DEFENSE ATTORNEY: Okay. And when you got down here, I'm sure you saw her, right?

MS. WALKER: Saw who?

DEFENSE ATTORNEY: Melissa

MS. WALKER: yes

DEFENSE ATTORNEY: All right. Where did you see her?

MS. WALKER: In the hallway

DEFENSE ATTORNEY: That's all?

MS. WALKER: Yes

DEFENSE ATTORNEY: Alright, I'm sure you talked about the case correct?

MS. WALKER: No.

DEFENSE ATTORNEY: You didn't talk to her about anything?

MS. WALKER: No

(TT 126-127).

Lashawn Walkers testimony is contrary to that of Melissa Carr's about prior conversations between the two witness's. Melissa Carr gave testimony for a conversation that transpired the morning of trial in the witness room.

DEFENSE ATTORNEY: So you talked to her this Morning, where this morning?

MS. CARR: In the witness Room

DEFENSE ATTORNEY: So did you discuss this Case?

MS. CARR: A little bit yes

DEFENSE ATTORNEY: What did you discuss? What did you say?

MS. CARR: Nothing much

DEFENSE ATTORNEY: What did you tell her about the case?

MS. CARR. Basically a little bit of what happened and that I should let it go.

I should not think about it anymore, put it in the past move on with my life.

DEFENSE ATTORNEY: You talked to her about what your testimony was going to be, right?

MS. CARR: Not really, No

DEFENSE ATTORNEY: Not really, No. Yes, or No. You talked to her about your upcoming testimony, didn't you?

MS. CARR: Yeah, A little bit.

(TT 34-35).

So to summarize, Lashawn Walker and Melissa Carr both lied while under oath during their testimony in open court. In *United States v. Allen*, 131 F. Supp. 323 (E.D. Mich. 1955), for perjury purposes actual effect of false testimony is not the determining factor, but rather it's capacity to affect or influence that trial judge in his judicial action on the issue before him.

Similarly, Police officer Bradly Donegan conferred with the prosecution in falsifying his testimony. Officer Donegan falsely testified that Petitioner had an active Warrant for his arrest for the crimes of Home Invasion. The defense Objected to the very prejudicial testimony and Moved the court for a Mistrial. Officer Donegan used this prejudicial testimony in the aid to place the prosecution before the defense. No curative instruction could remedy the intellectual damage the jury faced knowing the Petitioner was priory contacted by the law and charged for unrelated crimes. (TT pg. 159 Ln 10-13)

C. MICHIGAN COURT OF APPEALS DETERMINATION:

Neither the trial court, Court of Appeals or the Michigan Supreme Court gave a determination upon the merits of the claims presented. See *Guilmette v.*

Howes, 624 F.3d 286 (6th Cir. 2010) (En banc), where the Court determined that a systematic denial using *Mich. Ct. R. 6.508(D)* was to ambiguous to determine whether the denial was upon the merits of the claim or a procedural default, thus such orders are unexplained. Furthermore, it is well settled the Sixth Circuit Court may review *de novo* an exhausted federal claim that was not adjudicated on the merits in state court. *Rice*, 660 F.3d at 252. While *Harrington*, requires the presumption "the state court adjudicated the claim on the merits," that presumption holds only "in the absence of any indication . . . to the contrary." *Id.* 131 S.Ct. at 784-85; *Fleming*, 556 F.3d at 532.

D. CONCLUSION:

Wherefore, because of the forgoing arguments, this Court should grant the petition for a writ of certiorari.

CLAIM VII

INTERFERENCE BY PRISON OFFICIALS

A. CLAIM PRESERVATION:

This claim was preserved when Petitioner raised the argument upon his Motion for Relief from Judgment application in the Wayne County Circuit Court. This claim was appealed in the Michigan Appellate court and Michigan Supreme court.

B. ARGUMENT:

Petitioner raises the relevant issue of interference by Oaks Correctional Facility prison officials in violation of his *U.S. VI & XIV Amendment* rights. *Buffalo v. Sunn*, 854 F.2d 1158 (9th Cir. 1988).

The facts of this issue are as follows. Documentation officers depriving

Petitioner of legal materials that were necessary to perfect his appeal by right in the state courts, "good cause" is established by *Sunn, supra.*

Officers at Oaks Correctional Facility hindered Petitioner's appeal by physical abuse and depriving Petitioner with adequate access to legal materials. Petitioner will swear under oath he submitted a register of dates clarifying exactly the determent the officers at the Oaks Correctional Facility caused Petitioner during the perfection of his direct Appeal. The register of dates included a twenty-eight (28) page grievance documentation along with various reporting's of interference's by the prison officials. These records and reporting's included written statements to and from the Michigan supreme court.[6] This Documentation was lost but Petitioner is willing to swear to it as fact and lawful. Had this very apparent fact been brought to a much brighter light Petitioner may have had a more positive determination in the process leading to filing his habeas within this Honorable Court.

Clearly only informational, as a pleader unversed in the laws, statutes of this country. The Petitioner contests a reason at all to include an argument such as this, only to inform the great difficulties faced in the aid to seek duly needed justice not only during his trial, but post-trial.

C. CONCLUSION:

For this very reason and many others, Petitioner wishes this Honorable Court review all Petitioner's arguments including this one, with transparency, leniency, and understanding.

[6] Letter from the Michigan Supreme Court Dated October 29, 2015 (Exhibit E)

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/
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Dated: February 9, 2020