

20-5129
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2020

DAVID AZIEL SHEER,

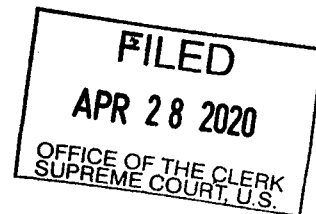
Petitioner,

vs.

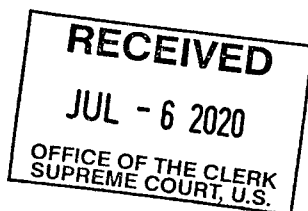
PATRICK WARREN,

Respondent.

ORIGINAL



PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT



David A. Sheer

PETITIONER

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Adrian, MI 49221

ISSUE PRESENTED

I.

WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI IN ORDER TO CORRECT THE SIXTH CIRCUITS DECISION IN DENYING PETITIONER A CERTIFICATE OF APPEALABILITY AS ITS DECISION CONFLICTS WITH DECISION OF THIS COURT ON IMPORTANT MATTER OF FEDERAL LAW AS MR. SHEER HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF CONSTITUTIONAL RIGHT?

II.

WHETHER DAVID SHEER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION UNDER THE UNITED STATES CONSTITUTIONAL WHERE THE TRIAL COURT FAILED TO ADMINISTERED THE OATH TO MISTY JUSTICE PRIOR TO TESTIFYING UNDER MICH. COMP. LAW §600.1432?

III.

WHETHER DAVID SHEER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO ASSERT A TIMELY OBJECTION CHALLENGING THE CONFRONTATION CLAUSE VIOLATION OF MISTY JUSTICE NOT ADMINISTERED A OATH PRIOR TO TESTIFYING?

IV.

WHETHER DAVID SHEER WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BY PROSECUTING ATTORNEY PROVIDING FALSE TESTIMONY THAT MISTY JUSTICE AND DAVID SHEER RESIDED TOGETHER AT THE TIME OF THE ROBBERY OF INTIMATE IDEA STORE?

V.

WHETHER DAVID SHEER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS APPELLATE COUNSEL FAILED TO INVESTIGATE AND RAISE THE PROSECUTION DENIED HIM HIS FOURTEENTH AMENDMENT RIGHT TO FAIR TRIAL BY PRESENTING FALSE TESTIMONY TO THE JURY?

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PETITION FOR WRIT OF CERTIORARI TO THE
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The Petitioner, David Aziel Sheer, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 2019 denying a certificate of appealability.

OPINION BELOW

On May 8th, 2019, United states District Court Judge George C. Steeh issued a Order denying Petitioner's application for a Writ of habeas Corpus, and a Certificate of Appealability under 28 U.S.C. § 2254. A copy of the Order is appended hereto, as Appendix D. On September 30, 2019, the Sixth Circuit Court of Appeals issued a Order denying a certificate of appealability. A copy of that Order & Opinion is appended hereto, as Appendix C. On February 7, 2020,

the Sixth Circuit Issued an Order referring the petitioner's, petition for a rehearing en banc. A copy of that Order is appended hereto, as Appendix B. On February 24th, 2020, the Sixth Circuit Court of Appeals issued an Order denying his petition for rehearing en banc. A copy of that Order is appended hereto, as Appendix A.

JURISDICTION

The order issued of the United States Court of Appeals for the Sixth Circuit was entered on February 24, 2020. This Petitioner is filed within ninety (90) days of that date, as required by Rule 13.3 of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). See *Hohn v United States*, 524 U.S. 236, 118 S.Ct 1969 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment Six of the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

title 28 United States Code, Section 2253(c) provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the Court of Appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28 United States Code, Section 2254(a) provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

FACTS

Petitioner David Sheer received a prison term of 18 to 40 years, as a fourth habitual felony offender. Mr. Sheer was convicted by a jury of armed robbery. Mr. Sheer's trial was held November 29, 30, and December 1, 2010, with the Honorable Rudy J. Nichols, Oakland County Circuit Judge, presiding. It was alleged that on November 10, 2009, Mr. Sheer committed a larceny of money and/or adult DVDs from the Intimate Idea store in Commerce Township and while committing the larceny, used forces or violence and/or assault or put a person present--employee Mary Kidd--at fear.

At approximately 10:30 p.m. on November 10, 2009, Kidd was working alone when a person entered the store. She did not hear the person enter because she was vacuuming. The person was male and was wearing a hood, something wrapped around his face, sunglasses, gloves, and he possessed a utility knife. The man pointed the knife and told her to open the cash register and not to push any buttons before getting to the register. When Ms. Kidd was shown the knife, she did not recognize or could be positive its the knife used in the robbery. After opening opining the cash register, the man told Kidd to stand on the other side of the counter. She put her hand up in the air to show that she was not being

defensive and asked him please not hurt her because she was a single parent of a small child. The man ordered Kidd to lock herself in one of the back rooms. She closed the back room.

Kidd described his voice as very stern, "very full of cussing and derogatory comments toward [her]. personally." Deputy Hein arrived at the store. Sometime later, a voice line-up was conducted and Kidd immediately picked out a voice she recognized as the person who robbed the store. On cross-examination, Kidd did not recall telling Hein that the robber spoke of an "obvious fake, deep voice". She explained that she was in a panic at the time she answered Hein's question and was not sure if the robber was disguising his voice.

Tim Hein, a Deputy Sheriff with the Oakland County Sheriff's Department, was working on November 10, 2009, as a patrol officer assigned to the midnight shift at the Commerce Township sub-station. At approximately 11:00 p.m., Hein was dispatched to the Intimate Idea Store on the Union Lake Road for a reported armed robbery. Kidd let Hein enter the store. Kidd was the only person working there at the time. Because Kidd appeared to be very distraught, Hein called medical personnel to take a look at her. Hein reviewed the surveillance video and also spoke with the owner of the store. A canine unit was called to attempt to trial the robber, but the dog was unable to make a trial. Deputy Hein, indicated that Kidd told him the robber's voice was very deep and obviously fake.

When the prosecutor called Misty Justice to the stand. A juror interrupted by asking the trial court if the video had been admitted into evidence. After a few more juror questions, the People began questioning Justice without her

actually being sworn on the record. Neither party objected. As neither the trial court, nor the prosecutor, nor trial counsel was aware that the witness's testimony was unsworn due to the interruption. Justice identified Mr. Sheer in court as a former boyfriend who she lived with from January to November of 2009. When Sheer left the mobile home at approximately 10:00 p.m., taking Justice vehicle. Justice fell asleep on the couch and defendant returned at approximately 4:30 a.m.. Justice was upset with defendant for taking he car without asking and he told her not to worry about it and that he had money to pay the rent. Justice was not aware of Mr. Sheer leaving the mobile home that night with any money, but sometime latter, Justice noticed Sheer was counting money and some rolled coins. He gave her four hundred dollars for the rent. Mr. Sheer and Justice purchased crack cocaine with the rest of the money. Mr. Sheer also had several pornographic DVDs that looked familiar to Justice because of the numbers and casings. The DVDs appeared to be from Intimate Ideas. When Justice asked Mr. Sheer where he got the DVDs, he replied that it was none of her business.

The security video from Intimate Idea was played for the jury. Justice became aware of the robbery at Intimate Idea within two week after it took place when someone asked her if she seen the video. Justice viewed the video on the Oakland Press website. Justice conceded that she could not say for certain that Mr. Sheer was the person in the robbery vedeo.

Mr. Sheer chose not to testify. The defense rested. After closing argument and jury instruction, the jury convicted Sheer as charged--one count of armed robbery. Attorney Neil J. Leithauser of Troy, Michigan was appointed by the Court represent Mr. Sheer on his direct appeal to the Michigan Court of Appeals.

Attorney Leithauser appealed the jury verdict to the Michigan Court of

Appeals. Relief was denied because:

There can be not dispute that the trial court's failure to require Justice to swear under oath or make an affirmation was a plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Nevertheless, Sheer fails to show "that the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. The trial court proceeding as if Justice's testimony was sworn, and the record does not indicate that Justice testified differently because she was not under oath. Moreover,, the prosecution presented ample evidence of Sheer's guilt other then Justice's unsworn testimony. When the police searched, Sheer's trailer, they found 38 DVDs that were stolen during the robbery. The police also found a utility knife in Justice's vehicle, which the store's employee identified as the knife used by the robbery. The employee also listened to a police voice line-up and identified Sheer's voice as that of the robber. In light of the foregoing evidence, Sheer failed to establish that the trial court's plain error affected the outcome of his trial. While we acknowledge that defense counsel possessed "wide discretion in matter of trial strategy[.]" *People v Odom*, 276 Mich App 407, 415: 740 NW2d 557 (2007), we find there was no arguable trial strategy to justify allowing an adverse witness to testify outside the penalties of perjury. *People v Ramos*, 430 Mich 544, 548: 424 NW2d 509 (1988). Accordingly, we find that defense counsel's performance fell below an objective standard of reasonableness where counsel failed to object to Justice unsworn testimony. However, to establish this claim of ineffective assistance of counsel, Sheer must also demonstrate that, but for counsel error, the outcome of trial would have been different and that the error rendered the proceedings "fundamentally unfair or unreliable." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). As discussed above, the trial proceedings as if Justice's testimony was sworn, and the record doe not indicate that Justice testified differently because she was not under oath. Thus Sheer fails to establish that defense counsel's failure to object to Justice unsworn testimony prejudice Sheer by affecting the outcome of his trial.

People v Sheer, Mich COA No. 302109, Opinion, p. 2-4. Petitioner Sheer's subsequent application for leave to appeal to the Michigan Supreme Court was denied.

Following the denial of his direct appeal Petitioner Sheer filed, pro se, a motion for relief from judgment pursuant to Michigan Court Rule 6.500. In that motion he argued that he was denied due process by prosecutor providing false testimony by Misty Justice lived with Mr. Sheer at the time of the robbery. The state trial court denied the motion finding that the allegation could have been

raised in sheer's direct appeal and that therefore he failed to comply with MCR 6.508(D). his subsequent appeal to the Michigan Court of Appeals and Michigan Supreme Court was denied for failure to establish entitlement to relief under MCR 6.508(D).

On November 1, 2016, Petitioner filed Petition for Writ of Habeas Corpus seeking to have his conviction vacated based on his Sixth Amendment right to confrontation, and being denied effective assistance of counsel, and the prosecutor violated his Due Process rights by allowing a witness to provide false testimony. He alleged that by the witness Misty Justice not taking a oath, as a matter of law, therefore, provided no competent evidence. She did not, legitimately contribute to the guilty verdict, through competent sworn testimony, but instead, her unsworn 'testimony' irreparably contaminated the proceeding and denied Mr. sheer of a fair and just verdict, as well as his ability to effectively confront the evidence, as guaranteed him through the Sixth Amendment. That his Sixth Amendment rights to effective assistance of counsel was denied where his appellate counsel failed to argue the prosecutor violated his due process right to fair trial by provided false testimony to the jury.

On May 8, 2019, the district court issued its Opinion and Order denying the Petition for a writ of Habeas Corpus and issuing a Certificate of Appealability in this matter. The district court denied the certificate of appealability stating that. "upon review ... the Court concludes that petitioner had failed to make a substantial showing of the denial of a federal constitutional right or reasonable jurists would find the court's rejection of these claims debatable or wrong." On June 8, 2019, Petitioner filed a Motion in support of a Certificate of Appealability. On September 30. 2019, the sixth circuit issued an order denying a certificate of appealability, petitioner then filed a Motion

for Rehearing en banc of this Court's order entered on September 30, 2019, denying his application for certificate of appealability. After review of the petitioner, by the full panel of the Sixth Circuit, it issued its order announcing its conclusion that the original application was properly denied.

Petitioner not seeks a Writ of Certiorari to the Sixth Circuit granting him a certificate of appealability.

ARGUMENT

I.

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI IN ORDER TO CORRECT THE SIXTH CIRCUITS DECISION IN DENYING PETITIONER S CERTIFICATE OF APPEALABILITY AS ITS DECISION CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT MATTER OF FEDERAL LAW AS MR. SHEER HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

A Certificate of Appealability must issue whenever, reasonable jurist would find the district Court's conclusion with regard to a habeas petition debatable or wrong. *Slack v McDaniel*, 529 U.S. 437, 485; 120 S.Ct 1595, 1604 (2000). The issuance of a certificate of appealability does not require a showing that the appeal will succeed and should not be denied because a Court does not believe that after review of the merits, "the applicant will not demonstrate entitlement to relief." *Cockrell v Miller-El*, 537 U.S. 322, 337; 123 S.Ct 1029, 1039 (2003). In this case, because the Michigan Court of Appeals, found that trial counsel performed deficiently by failing to object to Justice's unsworn testimony, the only issue before the U.S. District Court was whether Petitioner could established that he was prejudice by his trial counsel's failure to object. If he was prejudice, he would have established the second part of Strickland test for ineffective assistance of trial counsel and would have been entitled to relief.

In order to succeed in showing prejudice on a claim of ineffective

assistance of counsel based on counsel's failure to object, to prejudicial evidence, the Petitioner must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different. *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052L 80 L.Ed.2d 674(1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. A Certificate of Appealability must issue if reasonable jurist could differ regarding the district court's determination of the amount of prejudice he suffered at trial.

Her, the district court has two principal reasons for denying Mr. Sheer's a certificate on the issue of Misty Justice not being administered oath prior to testifying under Mich. Comp. Law §600.1432: (1) Petitioner counsel failed to follow the States contemporaneous objections rule rendering his confrontation claim procedural bared; and (2) The prosecutor presented amply evidence of Sheer's guilt other then Justice unsworn testimony. Both of these conclusion are, at best, debatable and thus a Certificate of Appealability should issue.

The district court dismisses the prime purpose of the cause predict limitation is not to protect a State's interest in finality, it is to ensure, that the Petitioner tries to raise an issue at the first available opportunity. As Justice Kennedy writing to for the court observed in *Moleskey v Zant*, 499 U.S. 478, 490 (1991). Following the district court's logic, a habeas petitioner could never get relief from a jury verdict by counsel's failure to object on a objective external factor of a unsworn witness because states's interest in finality would always prevent a finding of good cause and thus making *Amadeo v Zant*, 486 U.S. 2014 (1988), an empty doctrine. Because this Court has recognized that a objective external factor which interfered with counsel's ability to make a timely contemporaneous objection. The district court's

reasoning that Petitioner's Sixth Amendment Confrontation Clause is bard as cause was not shown is wrong or debatable among reasonable jurists.

The district court's second reason for denying his application for Certificate of Appealability the prosecutor presented ample evidence of Sheer's guilt other them Justice unsworn testimony. First, the testimony was characterized as overwhelming by the prosecuting attorney. However, given his failure to ensure his key witness be administered the oath prior to testifying at the end resulting in Mr. Sheer's Sixth Amendment rights being violated his assessment suspect. When characterizing the evidence as overwhelming the court failed to consider a number of factors. That as brought out at trial. That, is at approximately 10:30 p.m., on November 10, 2019 Kidd was working alone when a person entered the Intimate Idea Store, in Commerce Township. She did not hear the person enter because she was vacuuming. The person was wearing a hood, something wrapped around his face, sunglasses, gloves and he possessed a utility knife, a knife she did not recognize at trial. At the time of the robbery she was in a panic mode at this time. Deputy Hein testimony shows "that Mrs. Kidd told him the robbers voice was very deep and obviously fact. Because the Court failed to consider these factors, its finding that the evidence was overwhelming other then Justice unsworn testimony could be found to wrong or debatable by other reasonable jurist.

The district Court's finding that there was sufficient evidence to support Mr. sheer's conviction has already been found to be wrong by reasonable jurist. In People v Hampton, 407 Mich 354, 372 (1979), cert den 449 U.S. 885 (1980), the Michigan Supreme Court rejected the rule that as long as there is "some evidence" a conviction may be sustained. This logic, is expressed by the Sixth

Circuit in *United States v. Quinn*, 901 F.2d 522 (6th Cir.1990), the untainted evidence introduced by the government does not necessarily reflect all other liable evidence of petitioner's involvement. *Id.* at 531-532.

Finally, the district Court's opinion failed to consider evidence which supports petitioner's prejudice claim. See *Oppion*, p. 9 ("beyond adopting the self-serving opinion, the prosecution presented ample evidence of Sheer's guilt other than Justice's unsworn testimony.") The District Court's opinion ignores the fact that on July 13, 2012, the regional voice President of Sherwood Village Manufactured Home Community, conformed that Mr. Sheer was not listed as applicant or on a lease in November 2009. The record only indicated, that sheer was listed as an emergency contact. The district court also ignored the fact Sheer was recently paroled on January 3, 2007, from the Michigan Department of Corrections on the charge of fleeing and alluding. As a condition of his parole, he was paroled to 41879, Lafles. St., City of Novi, Michigan in Oakland County. Furthermore, his only child was enrolled in Meadowbrooks Elementary School in Novi, Michigan, in Oakland County. A reasonable jurist who considered the information which supports prejudice prong of *Strickland*, *supra*, could find the district court's conclusion was wrong or debatable.

This evidence might serve as corroboration of Kidd's testimony, but standing alone, it could not support a guilty verdict. sheer's girlfriend, Misty Justice put Sheer at the robbery by speculation, but she did not see Sheer rob the intimate Idea Store with a knife that night, must ~~leg~~ see him enter the store. on top of these deficiencies in the prosecutions case, no physical evidence linked sheer to the crime. As indicated above, every conclusion drawn by the district court is support of its decision not to credit this vital evidence is at least debatable. In such an instance a certificate of Appealability should issue.

II.

DAVID SHEER WAS DENIED HIS SIXTH AMENDMENT RIGHTS TO CONFRONTATION UNDER THE UNITED STATES CONSTITUTION WHERE THE TRIAL COURT FAILED TO ADMINISTERED THE OATH TO MISTY JUSTICE PRIOR TO TESTIFYING UNDER MICH. COMP. LAW §600.1432.

The trial court not administering the oath to Misty Justice prior to testifying at his trial, after instructing the jury, "evidence is, the testimony of witnesses under Oath". Misty as a matter of law, therefore, provided no competent evidence nor legitimately contributed to the guilty verdict.

The right to a jury trial in a criminal felony prosecution is fundamental, and is secured to a person though both the state and federal constitutions. *Duncan v Louisiana*, 391 U.S. 145, 149; 88 S Ct 1444, 20 L Ed 2d 491 (1968); US Confs., Am. VI; Const. 1963, art 1, §20. The Confrontation Clause of the Sixth Amendment States that "[i]n all criminal prosecution, the accused shall enjoy the right ...to confronted with the witnesses against him".

The statute, MCL §600.1432, mandates that a witness be properly sworn, or affirmed as a permissible exception. See Eg. *People v Knox*, 115 Mich App 508, 511; 321 NW2d 713 (1982) ("The Judicature Act of 1961 mandates that witness in court proceeding take an oath or make an affirmation that their testimony well be true"). MRE 603, similarly mandates that a witness be sworn before testifying.

According to the Supreme Court, "the central concern of the Confrontation Clause is to insure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trial of fact". *Maryland v Craig*, 497 U.S. 836, 845 (1990). The Confrontation Clause "is a procedural rather than a substantive guarantee. it commands, not that evidence be reliable, but that reliability be

assesses in a particular manner; by testing in the crucible of cross-examination". Crawford v Washington, 541 U.S. 36, 62 (2004).

The right guaranteed by the Confrontation Clause includes not only a personal examination, but also, to insure that the witness will give his statement under Oath-thus impressing him with seriousness of the matter and guarding against the lie by the possibility of a penalty of perjury. Craig, 497 U.S. at 845-46 (quoting California v Green, 399 U.S. 149, 158 (1970) (alteration in original) (internal quotations marks and citations omitted)). Federal Rules of Evidence 603, provides that every witness before testifying; "shall be required to declare that they will testify truthfully, by Oath of Affirmation administered. While the Supreme Court has recognized Confrontation clause of the Sixth Amendment, "is a procedural rather than a substantive guarantee. This court has repeatedly stated that, "the primary interest secured by the Confrontation Clause is a Oath, is a necessary ingredient of the right to cross-examination, that test the witnesses testimony. See Doe v Hermamos, 15 U.S. 76 (1817).

In Ellicott v Pearl, 35 U.S. 412 (1836), this Supreme Court affirmed a lower Court's judgment, based on facts very similar to Sheer's case. A mere declaration of facts, is not evidence in the eye of the court. In Pearl, at trial of Writ in the Circuit Court of Kentucky, a witness was offered to prove that Moore, who was dead, and whose name was put down as one of the Chain-carriers in making the original survey, and who was subsequently present when the lines were run on the same land, had declared that certain corner was the corner made by the surveyor, Kincaid. Ellicott v Pearl, 35 U.S. at 433. To further support its claim, Ellicott, introduced evidence from Ramey's original survey to prove what Moore had said to other relative to the boundary of Ramey's Patent, and the making of the original survey, since the settlement and

possession on Pearl, on the land in controversy. Id. at 434. The Kentucky, Circuit Court after being objected to, was rejected by the court. Id. at 434. As it was merely hearsay, but not hearsay to matter of general reputation or common trust among many, but to specific parts. viz. the manner and place of running the boundary lines of Ramey's patent. ibid. The Supreme Court was of opinion that the evidence was properly rejected. Id. Because its opinion of this Court, the general rule is, "that evidence", to be admissible should be given under the sanction of Oath, legally administered, and in a Judicial Proceeding. Ellicott, 35 U.S. supra., at 434.

In Petitioner Sheer's case, the key substance of Ms. Justice's testimony, that is, the highly prejudicial content, ranged from allegations that Mr. Sheer was involved in drug abuse, threatening and abusive behavior, and other unrelated criminal activity. Ms. Kidd, the actual complaining witness, testified at trial; the transcripts of her testimony extends across about 33 pages (TT, 11/29/2010, 82-115). In contrast, the testimony of Ms. Justice extends across 86 pages, and longer than any other witness in the case (TT, 11/30/2010, 47-133). Essentially, Ms. Justice provided more prejudicial and incriminating evidence against Mr. Sheer than anyone else at trial; ultimately, Ms. Justice evidence either directly led to the guilty verdict, or played an enormously crucial role in the final verdict being guilty. Problematically, however, is the fact that Ms. Justice was never sworn as a witness; that is, she took not Oath and, as a matter of law, therefore, provided no competent no evidence. She did not legitimately contribute to the guilty verdict through competent sworn testimony, but instead, her unsworn 'testimony' irreparably contaminated the proceedings and denied Mr. Sheer of a fair trial and just verdict, as well as his ability to effectively confront the evidence, as

guaranteed him through the Sixth Amendment, because the witness, the person must be placed under Oath, or affirm to tell the truth. If did not happen hear.

The Confrontation Clause secures the right of cross-examination. *Davis v Alaska*, 415 U.S. 308, 315 (1974); see also *Pointer v Texas*, 380 U.S. 400, 406-07 (1965). The Confrontation Clause, however, "guarantees only 'an opportunity for effective cross examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *United States v Owens*, 484 U.S. 554, 559 (1988)(quoting *Kentucky v Stincer*, 482 U.S. 730, 379 (1979)).

While its, true here trial counsel had opportunity for cross-examination, to challenge Justice testimony at trial. In fact, trial counsel extensively cross-examined Justice for some forty-eight pages of trial transcripts (11/30/10 Tr. at 70-118) and then re-cross-examined Justice for another nearly seven pages of trial transcript. (*Id.* at 126-133). Nevertheless, Sheer was denied his constitutional right to confront an adverse witness by allowing Justice's unsworn testimony into evidence. *Ellicott v Pearl*, 35 U.S. 412, 439 (1836), testimony under Oath is better evidence then his confirmatory declaration not under Oath. And the repetition of his assertions does not carry his credibility further, if so as his oath. *Id.*

According to the Supreme Court the Confrontation Clause clearly requires that a witness testify under oath: as criminal defendant's constitutional "right of confrontation insures that the witness testify under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness. *Crawford v Washington*, 541 U.S. 36, 62 (2004); See also *People v Wastson*, 245 Mich App 572, 584; 629 NW2d 411 (2011), quoting *People v Frazier*, (After Remand), 446 Mich 539, 543; 521 NW2d 291 (1994)(Brickely, J.).

To hold, so long as Petitioner had ample opportunity to cross-examin, the

adverse witness Misty Justice's, it is not unconstitutional to receive unsworn testimony into evidence. Petitioner Sheer emphatically disagrees. It is simple as this. Materiality is testimony in nature, and constitutes evidence, as result, it should be verified by Oath or Affirmation. See *United States v Valezuela-Berbai*, 458 U.S. 858, 872 (1982). Therefore, there can be no dispute that the trial Court's failure to require Misty Justice to swear under Oath or make a affirmation was a constitutional violation of Confrontation Clause of the Sixth Amendment of the U.S. Constitution. U.S. Const. Am VI, this Court should find that the Confrontation clause was violated. Because Petitioner Sheer has established the Confrontation Clause of the Sixth Amendment was clearly violated by the admission of this highly prejudicial testimony not given under oath as required by *Crawford v Washington*, supra. And that the evidence provided by Musty Justice throughout, the 86 pages, was not evidence under *Ellicott v Pearl*, supra, the Court should grant the petition based on Sheer's Confrontation rights were violated under the U.S. Constitution.

III.

DAVID SHEER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO ASSERT A TIMELY OBJECTION CHALLENGING THE CONFRONTATION CLAUSE VIOLATION OF MISTY JUSTICE NOT ADMINISTERED A OATH PRIOR TO TESTIFYING.

Attorney Michael J. McCarthy rendered ineffective assistance when he failed to assert a timely objection to the testimony of Misty Justice, who's testimony was submitted to the jury without being administered the oath as required by state and Federal Law.

The United States Supreme Court has established the legal principles that governs claims of ineffective assistance of counsel. See, *Wiggins v Smith*, 439 U.S. 510 (2003), quoting *Strickland v Washington*, 466 U.S. 668 (1980). The

to counsel guaranteed by the United States, U.S. Const. Am VI, is the right to effective assistance of counsel. An ineffective assistance of counsel claim has two components. A Petitioner must show that Counsel's performance was deficient, and that, the deficiency prejudice the defense. Id. at 687. 80 L Ed 2d 674, 104 S.Ct 2052. To establish deficient performance, a Petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id. at 688, 80 L Ed 2d 674, 104 S.Ct 2052. This Court has declined to articulate specific guidelines for appropriate attorney conduct, and instead have emphasized that "the proper measure of attorney performance remains simply reasonableness under the prevailing professional norms". Ibid.

In Petitioner case, the Michigan Court of Appeals ruled attorney McCarthy assistance at Mr. Sheer's trial was deficient, by failing to object to Misty Justice unsworn testimony. While the court acknowledge that defense counsel actions "fell below prevailing professional norms". Id. The Michigan Court of Appeals affirmed Sheer's conviction in an unpublished per curiam opinion. Sheer, 2012 WL 470194, at *1-2.

There can be no dispute that the trial court's failure to require Justice to swear to answer under oath or make an affirmation was plain error. Nevertheless, sheer fails to show "that the error effected the outcome of the lower court proceedings." Carines, 460 Mich at 763. The trial proceeded as if Justice's testimony was sworn, and the record does not indicate that Justice testified differently because she was not under oath. Moreover, the prosecution presented ample evidence of Sheer's guilt other then Justice unsworn testimony. When the police searched Sheer's trailer, they found 38 DVDs that were stolen during the robbery. The police also found a utility knife in Justice vehicle, which the store employee identified as the knife used by the robber. The employee also listened to a police voice line-up and identified Sheer's voice as that of the robber. In light of the foregoing evidence, Sheer fails to establish that the trial court's plain error affected the outcome of his trial.

Sheer, 2012 WL 470194, at *2. (Internal citations omitted).

On May 8th, 2019, the district court adopted the Michigan Court of Appeals unpublished per curiam opinion verbatim the evidence presented by the prosecution without Justice testimony was ample enough to convict him of armed robbery. See opinion at *8-9. (appended hereto, as Appendix D).

The U.S. District Court's Judge George C. Steeh, conclusion that Petitioner's Sheer was not prejudice by trial counsel's failure to object to the unsworn testimony as the prosecutor presented ample evidence of Mr. Sheer's guilt other than Justice unsworn testimony, precluded an finding of ineffective assistance of counsel was a unreasonable one. Compare *Hendrix v Palmer*, 893 F.3d 906, 923, 929 (65h Cir.2018)(Murder defendant was prejudiced by defense counsel's failure to raise timely objection to admission of Petitioner statement, as meritorious nature of a motion to suppress was clear, not filing a motion to suppress had no conceivable strategic benefit for defendant, lack of timely challenge to admission of defendant's statement identified defendant as the shooter, and the evidence was sufficient without that statement, to support conviction). More directly controlling here was the observation of Chief Justice Rehnquist in *Lockhart*, following an analysis of *Burks v United States*, 437 U.S. 1; 57 L Ed 2d 1; 98 S.Ct 2141 (1978).

Burks was careful to point out that a reversal based solely on evidentiary insufficiency has fundamentally different implication for double jeopardy purposes, than a reversal based on such ordinary "trial errors: as the "incorrect receipt of rejection of evidence". 437 U.S. at 14-16, 98 S.Ct at 2148-2150. While the former is in effect a finding "that government has failed to prove its case" against the defendant, "the latter" implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [he] has been convicted through a Judicial process which is defective in some fundamental respect". Id. at 15, 98 S.Ct at 2149. (emphasis added)[*Lockhart*, 109 S.Ct at 290].

The logic employed by the Chief Justice in *Lockhart* was foreshadowed by that

which the Sixth Circuit in *United States v Quinn*, 901 F.2d 522 (6th Cir. 1990) (per curiam). In *Quinn*, the government failed to lay a proper foundation for admission of an allegedly unavailable witness' testimony. *Id.* at 528. That such violation, violated defendant's right under the Confrontation Clause of U.S. Const. amend VI. *Ibid.* Because witness was not "unavailable" for purpose of the exception to the confrontation clause, because the government's late subpoena notice and subsequent effort failed to constitute a good-faith effort to obtain her presence at trial. *Id.* The most important aspect of *Quinn*, *supra*, is the fact, the Sixth Circuit concluded that there was sufficient evidence to support his conviction in light most favorable to the prosecution. *Id.* at 529. But, however, ruled sufficient evidence to convict, of course, does not excuse the constitutional violation, as the proceedings had been tainted by violation of the Confrontation Clause. *Quinn*, 901 F.2d at 531.

As this Court has noticed in the past admission of unconstitutional obtained evidence at a defendant's trial is prejudicial, nor is the error to be treated as harmless. *Id.* *Fahy v Connecticut*, 375 U.S. 85, 86 n.2; 84 S.Ct 229, 111 L Ed 2d 171 (1963), as the essence of a provision forbidding the acquisition of evidence in a certain way is not merely evidence, so acquired shall not be used before a Court, but that it shall not be used at all. *Hawkins v United States*, 358 U.S. 74; 79 S.Ct 136, 3 L Ed 2d 125 (1958).

There were significant question about Ms. Kidd's credibility. For example, at approximately 10:30 p.m. on November 10, 2009, Kidd was working alone when a person entered the store. (TII, 84, 86). she did not hear the person enter because she was vacuuming. The person was male and was wearing a hood, something wrapped around his face, sunglasses, gloves. and he possessed a utility knife. (TII, 86-87). The man pointed knife at Kidd and told her to

open the cash register and not to push any buttons before getting to the register. (TII, 91-92). Kidd was scared. Notably, as the fact, Ms. Kidd said, although the People's Exhibit #1 looked like the utility knife used by the robber. Ms. Kidd was surprised to see that it had a different style blade with a hook. (Id. at 88-89, 90, 110-111, 113). Sometime later, a voice line-up was conducted and Kidd immediately picked out a voice she recognized as the person who robbed the store. (TII, 98). To the officer, however, she described the intruder's voice to be very deep and obviously fake. (Id. at 121, 122). According to Detective Campbell (id. at 165), Mr. Sheer had a lower, gravelly voice. By inference, of course, Mr. Sheer's naturally lower voice would not be lowered through obvious fakery. The state will undoubtedly argue that Petitioner's voice is sufficient to support his conviction. The Sixth Circuit has suggested in dicta that a state court decision allowing the introduction of voice identification evidence that is impermissibly suggestive could represent the unreasonable application of Supreme Court cases addressing identification procedures in general. See *Clifford v Chandler*, 333 F.3d 724 (2003).

The evidence against him consisted, certainly, in part to Ms. Kidd's subsequent voice-identification, but, more likely though the diverse incriminating behavior, to his alleged drugs use, other criminal activity, his residing in the home, and his having unexplained cash and pornographic recordings on the day Intimate Ideas was robbed--of the previously-crack-cocaine-addicted Ms. Justice. It is significant that Ms. Justice admitted to taking and keeping what she thought were fruits of the robbery, including both cash (which she converted to cocaine and then smoked, and, likely, also payment of rent), and adult videos. She obviously had her own motive to lie, for, at a minimum, she was an accessory after the fact, and may have had a greater role--due to her earlier-gained knowledge of the business--in the formulation and

planing of the robbery. She may have been protecting herself, and/or her brother,. and/or, giving the prosecutor's theory credence for the sake of argument, Mr. Sheer. But she was free to pick and chose, without fear of any legal repercussion, what the say.

Although Ms. Justice was cross-examined at some length, the full of the Sixth Amendment right to confront the witnesses and evidence against him thus could not be realized by Mr. Sheer, because Ms. Justice was not under an obligation, promise, affirmation, or any possible penalty of perjury for false testimony. A witness' motive for testifying is always relevant. See for example Davis v Alaska, 415 US 308 (1974), and Delaware v Van Arsdall, 474 US 673 (1986).

Defense counsel failed to object (as did the prosecutor) to the trial court's failure to ensure the witness was properly sworn to given legitimate testimony. Because neither the trial court, nor the prosecutor, not trial counsel was aware of the witness's testimony was unsworn due to the interruption of jury member's. The trial court, the prosecutor, and defense counsel all failed in their respective obligations. Because the credibility of the witness prior testimony was highly suspect, and thus, the underlying importance of personal confrontation, before the jury. The jury should of been instruction upon this error, in order to uphold its legal obligation to return a just verdict on competent, and admissible obtained evidence. Defense counsel was obligated to render effective assistance to Mr. Sheer, effective assistance included protecting the defendant from inadmissible evidence. See,for example, combs v Coyle, 205 F.3d 269 (6th Cir.2000)(where counsel failure to assert objections and challenge to a Fifth amendment violation, among other error, was ineffective), and Washington b Hofbauer, 228 F.3d 689 (6th Cir.2000)(counsel's failure to object to obvious prosecutorial misconduct due to incompetence and

ignorance of the law, rather than a reasonable trial strategy defendant was prejudice).

According, to the Supreme Court a reviewing court "must judge the reasonableness of counsel's challenged conduct on the fact of the particular case, viewed as of the time of counsel's conduct," and "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions on the exercise of reasonable professional judgement." Strickland, supra, 466 US at 690. Also, "strategic choices made after through investigation of law and facts relevant to plausible options are virtually unchallengeable...." Id. However, the defense lawyer must adequately investigate, prepare a meritorious defense absent a legitimate reason. Strickland, supra, 466 US at 691. Counsel;s ineffectiveness need not be pervasive, and may stem from a "single, serious error." Kimmelman v Morrison, 477 US 365, 383; 106 S. Ct 2574; 91 L Ed 2d 305 (1986).

The error of having a key witness 'testifying' against Mr. sheer cannot be deemed harmless beyond a reasonable doubt. Fahy, supra, 375 US at 86; and Chapman v California, 386 US 18 (1967)(standard for reviewing constitutional error on direct appeal is harmless beyond a reasonable doubt). The jury was not instructed to view Ms. Justice's 'testimony' any differently then properly admitted evidence and sworn-to testimony. Ms. Justice contaminated the entire proceeding from and after she testified; taken with the prosecutor's opinion statement, anticipating Ms. Justice testimony, the entire trial was tainted. One cannot un-ring a bell once sounded. Because the state has offered no evidence to contradict his assertion, this Court should find that the prejudice prong of Strickland has been established. Because Petitioner Sheer has established both the deficient performance and prejudice prong required by

Strickland v Washington, supra, the Court should grant the petition based on ineffective assistance of trial counsel.

IV.

DAVID SHEER WAS DENIED HIS FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL NY PROSECUTING ATTORNEY PROVIDING FALSE TESTIMONY THAT MISTY JUSTICE'S AND DAVID SHEER RESIDED TOGETHER AT THE TIME OF THE ROBBERY OF INTIMATE IDEA STORE.

The Oakland County Prosecuting Attorney Gregory J. Townsend denied Sheer a fair trial when he introduced false testimony into the trial record, the prosecuting witness Misty Justice's, and Sheer resided at the same resident, at the time, of the robbery of Intimate Idea store. In reality, Petitioner Sheer actually resided in Novi, Michigan, upon his release on parole.

In Giglio v United States, 405 U.S. 150; 91 S.Ct 763 (1972), the Supreme Court outlined the test for prosecution misconduct claims relating to introduction of false testimony to jurors. The Supreme Court found that the three prong test of Napue v Illinois, 360 U.S. 264 (1959), applies to claims of presentation of false testimony. In the context of false testimony, the Supreme Court held that the three prongs is satisfied if the Petitioner can show that the testimony (or evidence) was actually false, the prosecutor knew or should have known that the testimony was actually false, and that the testimony was material. Napue v Illinois, 360 U.S. at 267-71; 79 S.Ct at 1177 (1959).

The Supreme Court has held that the Fourteenth Amendment cannot tolerate a State criminal conviction obtained by knowing use of false evidence under Napue. Donnelly v DeChristoford, 416 U.S. 637, 646; 96 S.Ct 1868 (1974). In United States v Willis, 257 F.3d 636 (6th Cir. 2001), the Sixth Circuit found a Due Process violation based on facts very similar to Petitioner Sheer's case.

Willis was charged with drug sales. Narcotics untie of Cleveland police Department began conducting surveillance at 2667 East 83rd street, a two family

residence in Cleveland Ohio. Willis, 257 F.3d at 638. Upon searing the home, the officer discovered in the bathroom an electronic gram scale. Also, in a small, padlocked closet in the bathroom, a jacket containing seven bricks of heroin. Id. at 639. In addition to the items found in the bathroom, the officer retrieved many papers addressed to or intended for "Timonth Willis" in the residence's one bedroom. Id. The defense presented several witnesses. The Defendant's grandmother, Fetzgerald's testimony was that the defendant moved to the west side of Cleveland, although she did not know where, in August 1996 because "he was having problems". Id. at 640. In rebuttal according to Richard Warren the defendant lived at 2627 E. 83rd St. for as long, as long as Richard had known him, which, as Richard stated, was "all [his] life." Id. at 641. And that, he never known of defendant to have lived on the west side of Cleveland. Id. But only William had lived in the upstairs residence at 2667 E. 83rd St. Id. at 641. After his conviction Richard Warren recanted significant portions of his trial testimony. Id. 641. Namely, that Willis lives on East 83rd St. and the jack in question belonged to Willis, but that those statements were "complete lies".Ibid. The district court found this statement to be false, and vacated his conviction. Id. at 642. The Sixth Circuit found that because, "the court itself had concerns about the veracity of Warrens trial testimony", whereby, he openly voiced its concerns about Richard Warren having been "pickup by a police car. Further as it appears Warren was frightened that he would either be accused of the crime against Defendant or other crimes if he did not testify, the Sixth Circuit found that the granting of Willis's petition for writ of habeas corpus was proper. Id. at 649.

In Petitioner Sheer's case, Sergeant Dennis Servis with the Oakland County Sheriff's Office, received the complaint of the armed robbery at Intimate Idea. Tr. Jury Trial 11/30/2010 p. 137-142. Justice authorized the

police to search her vehicle. Servis performed the search of Justice's vehicle and located a box cutter type razor bald with a hooked razor and two yellow tabs on the passenger side floor board underneath miscellaneous papers. Servis also conducted a search of Justice's and defendant home on November 19, 2009. He found thirty-eight pornographic DVD's located in the bedroom. Servis took the DVD's into evidence. Defendant was arrested just prior to the home search. At Sheer's trial Justice identified defendant in court as a former boyfriend who she lived with from January to November of 2009. This can be verified by contacting the trailer park manger of Sheer being listed as the applicant on the lease in November of 2009. Justice testimony can only be considered deliberate deception of the court and jury under Nepue.

In *Mooney v Holohan*, 294 U.S. 103; 55 S.Ct 340 (1935), the Supreme Court determined that "[D]eliberate deception of Court and jury by the prosecution of testimony known to be perjury inconsistent with the rudimentary demand of Justice. In this case, it was attempted several time to receive an answer of his legal residence at mobile-home park in Canton Township, Michigan. After several attempts Jeanette Pajot, sister of Sheer contacted Sherwood Village for conformation of this. Sherwood refused to release the information.

After several attempts by both parties. On July 13, 2012, the Regional Vice President of the Sherwood Village Manufactured Home Community conformed that defendant Sheer was not list, as an, applicant or on a lease in November of 2009. In fact, the record clearly indicates that Defendant Sheer was listed as an emergency contact only on the application that was submitted to the manger in November of 2009.

(Emphasis added). At trial, the State relied in large part upon this evidence seized at 78 Essex Lane, in Canton, Michigan, coupled with Justice testimony that the defendant was living with her between the months of January to November of 2009. The prosecutor also presented to the jury. Ladies and

gentlemen: "Now you're gonna hear from a young lady by the name of 'Misty Justice' Who...lived with the Defendant in this case, and the evidence gonna show that person that had the box cutter as the person that walked into the store and threatened and robbed her indicated in the defendant right her, David Sheer. Tr. Jury Trial, 11/29/2010, p.70. In essence, turned out to be false testimony.

As the evidence shows, Mr. Sheer was recently paroled from the Michigan Department of Corrections prior to November 10, 2009 robbery of Intimate Idea Store. As precondition of his parole, he was paroled to 41879, Lafles, St. in City of Novi, Michigan, in Oakland, county.

Without this false testimony "the jury might have reached a different conclusion" if not for Misty Justice testimony, while the government had offered evidence of connecting sheer with the house at 78 Essex Lane, through a relationship it has presented no evidence other then Misty Justice's testimony connecting Sheer with Box cutter in the car at the home in which the thirty-eight pornographic DVD's were found. It had presented no evidence showing the recovery of the clothing or sunglasses used on the robbery, nor the money taken from Intimate Idea Store. In addition, no evidence was submitted at the time of his arrest the key's he possessed could be used to unlock the 78 Essex Lane, residence. While Misty Justice; claims they had a relationship for a year, "does not necessarily link him to the DVD's box cutter found in the house. United States v Willis, 257 F.3d at 648. Finally, no other witness identified Sheer to the jury as having been involved in the crime. The only witness in the store Marry Kid, to the Oakland County sheriff Detectives the asselant was a while male, with a slight stature in his 20's. sheer is 38 years old, and is 5'6", and weighs 190 pounds and biracial.

Here the governments cases depended almost entirely on Justice's

testimony; without it there could have been no indictment or arrest and no evidence to carry to the jury. Justice's credibility as a witness was therefore an important issue in the case, and any evidence of true understanding of Sheer's legal residents would be relevant to her credibility and the jury was entitled to know it. The fact that other evidence regarding the witness's credibility was introduced did not remove the taint of the false testimony. *Napue v Illinois*. *supra*, 130 U.S. at 271.

This Court has held a conviction must fall under the Fourteenth Amendment when a prosecution "although not soliciting false testimony, allows it to go uncorrected when it appear's" eventhough the testimony may be relevant on to the credibility of the witness. *Giles v Maryland*, 386 U.S. 66, 74; 87 S.Ct 745 (1967) citing with approval *Napue v Illinois*, *supra*., 360 U.S. at 269. Similarly, in the case of *Giglio v United States*, 405 U.S. 150; 92 S.Ct 763 (1972), the Supreme Court reversed and remanded because the prosecution's failure to disclose the promise of leniency to the witness was an issue affecting credibility, which was therefore material. *Id.* at 153. Defense counsel asked a witness on cross-examination if any promises of leniency had been made, and the witness falsely answered no. *Id.* at 153. Upon learning that promise not to prosecute the witness had in fact been made, defendant moved for a new trial based on newly discovered evidence. The appellate court affirmed the trial Court's denial of the Motion. *Giglio*, 405 U.S. at 153. The Supreme Court concluded the suppression of the this material evidence violated due process and warranted a new trial whether is resulted from prosecution negligence or deliberate deception. *Id.* at 154 Fn.3.

The prosecution in this case has denied Mr. Sheer his Due Process rights to fair trial, in the deliberate use of perjury testimony to obtain a

conviction. U.S. Const. Amend XIV. Because the State has offered no evidence to contradict his assertion, this Court should find that three prong of Napue, supra has been established. Because Petitioner Sheer has established both the evidence was false and testimony and meet the material prong required by Napue v Illinois, supra, the Court should grant the petition based on prosecutorial misconduct.

V.

DAVID SHEER WAS DENIED HIS SIXTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS APPELLATE COUNSEL FAILED TO INVESTIGATE AND RAISE THE PROSECUTION DENIED HIM HIS FOURTEENTH AMENDMENT RIGHTS TO FAIR TRIAL BY PRESENTING FALSE TESTIMONY TO THE JURY.

Appellant counsel was ineffective when he raised the issue of ineffective assistance of trial counsel, but failed to allege the prosecution presentation of false testimony violated Sheer's right to fair trial. Napue v Illinois, 360 U.S. 150, 267-71; 79 S.Ct at 1777 (1959). In order to prevail on a claim of ineffective assistance a petitioner must show post that his attorney's performance was objectively unreasonable and that he was prejudice by his performance. Strickland v Washington, 466 U.S. 668; 104 S.Ct 2052 (1984); Cf. also Smith v Robbins, 528 U.S. 259; 120 S.Ct 756 (2000). When examining claims relating to appellate counsel these two factors often collapse because the performance of counsels is measured by his failure to properly raise a meritorious claim which would have resulted in relief for the petitioner. Caver v Straub, 349 F.3d 340, 348 Fn., 5 (6th Cir.2003). If the Court finds petitioner Sheer's Fourteenth Amendment rights were violated by the admission of this false testimony it should then find appellate counsel was ineffective for failing to properly present that meritorious claim to the State court.

This Court reviews claims of ineffective assistance of counsel with a high

degree of deference to counsel's performance. *Strickland v Washington*, supra. This Court is required to make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time." *Id.* In this case, attorney Neil J. Leithauser was never asked to answer this question, behind his decision. Because the State refused to allow a evidentiary hearing, thus in order to obtain this most important vital fact.

In *Jones v Barnes*, 463 U.S. 754' 130 S.Ct 3308 (1983), the Supreme Court held a accused is entitled to the effective assistance of counsel, but counsel does not have constitutional duty to raise every nonfrivolous issue requested by the defendant. *Barnes*, 463 U.S. at 745' 103 S.Ct at 3314 (1983). However, an accused it entitled to have counsel make "an independent examination of the facts, circumstance, and law involved ..." *Von Moltkey v Gullis*, 332 U.S. 708, 721; 66 S.Ct 316 (1948). Accordingly, the attorney strategy, must be sound. *Kimmelman v Morrison*, 477 U.S. 365, 383; 106 S.Ct 2574).

In petitioner's case, appellate counsel representation was objectively unreasonable because "no sound strategy would have supported a decision not to have interjected this meritorious claim in his direct appeal. Because once it was noticed Misty Justice falsely testified defendant Sheer requested attorney McCarthy to follow up on this false testimony, but however refused. Then with appellate counsel Neil J. Leithauser, attorney Leithauser, responded that he was focusing not on the Fourteenth Amendment violation claim, but rather on Sixth Amendment claim of Misty Justice not being sworn. At the end of the day, they are both interlocked into each other, because without other-one both fail on there merit's. After this Jeanette Pajot, sister of Defendant Sheer, contacted Sherwood Village for conformation of this. Sherwood Village refused to release the info. Petitioner Sheer was sentenced on December 11, 2010.

After several (FOI) Freedom of Information Attempts, through Canton City Hall, who owned Sherwood Village. On July 13, 2012, the Regional Vice President of the Sherwood Village Manufactured Homes Community responded to Mr. Sheer (FOI) requests. That petitioner Sheer was not listed as an applicant or less holder in November of 2009, as testified to by Misty Justice. Tt. Jury Trial, 10/30/2010. p. 73. In fact, Regional Vice President refuted this claim, indicating that "Petitioner Sheer was only listed as an emergency contact on the application in case of a emergency only submitted by Misty Justice in November of 2009."

Given that the witness's testimony was the only evidence than available for Sheer's defense, and given that the testimony would be vulnerable, as the witness could of established that Sheer was not a legal resident at 78 Esset Lane, United States v Millis, supra., the lawyer's failure to do any further investigation to support this claim at that point remained unexplained, it not inexplicable, once appellate counsel learned of this witness, had he taken even minimal additional investigation steps, he would have uncovered the testimony given by Misty was false. Id.

There is no indication that Mr. Leithauser performed any further investigation after Sheer informed him of this vital information for his direct appeal. See People v Grant, 470 Mich 477; 684 NW2d 686 (2004). Michigan Supreme court recognize that failure to investigate and substantiate the primary defense is not a strategic decision, but rather a fundamental abdication of a duty to conduct a complete investigation. Thereby restricting his ability to make a reasonable professional judgement. Grant, 470 Mich at 484; 684 NN2d at 691. Quoting, Strickland v Washington, 466 U.S. 668; 104 S.Ct. 2052 (1984).

By omitting an issue under these circumstances, counsel performance is

objectively unreasonable under these circumstances, because the omitted issue is obvious from the record. See *United States v. Cook*, 45 F.3d 388 (10th Cir.1995). In *Martin v. Wainwright*, 811 F.2d 1430 (11th Cir.1987), this court ruled counsel failure to raise issue which was "obvious from the record" was deficient performance. *Wainwright*, supra. at 1438. Similarly, in *McClellan v. Rapelje*, 703 F.3d 344 (6th Cir.2013), the Sixth Circuit granted habeas relief for failing to adequately investigate claim of ineffective assistance of trial counsel. *Id.*

Counsel deficiency is obvious. he had the factual information to satisfy the required elements of this claim, he failed to attempt to investigate a obvious issue from the facts of the record. No strategic justification can exist for failing to investigation a Fourteenth Amendment violating of a witness given false testimony to a jury. Without this allegation, Petitioner Sheer could not prevail on his Sixth Amendment claim, as they interlock one-another. Because this underlying claim was meritorious, Petitioner Sheer was prejudice by this deficient performance under *Strickland v. Washington*, supra, the Court should grant the petition based on ineffective assistance of appellate counsel.

CONCLUSION

Petitioner has demonstrated that he was denied his Sixth and Fourteenth Amendment constitutional right confrontation of a witness and his counsel was ineffective on appeal. As such, the correctness of district court's conclusion to the contrary is at least debatable among jurists of reason. Therefore, this Court should grant a Writ of Certiorari and/or issue a certificate of appealability so that Petitioner may obtain appellate review of the district court's decision. Alternatively, Petitioner prays that this Court issue a Writ of Certiorari to resolve Mr. Sheer's claims, with raise important issues of

federal constitutional law, on the merits.

Respectfully submitted,

PETITIONER/APPELLANT

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