No. 20-5866

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Shawn Dicken — PETITIONER
(Your Name)

vs.

Shawn Brewer — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S..Court of Appeals For the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Shawn Dicken
(Your Name)

3201 Bemis Rd.
(Address)

Ypsilanti, MI 48197
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

I. WAS PETITIONER DENIED DISCOVERY PURSUANT TO BRADY v. MARYLAND 373 U.S. 83 VIOLATING HER V, VI AND XIV CONST. AMENDS.?

II. WAS IMPROPER EXPERT OPINION TO LEGAL CONCLUSIONS A VIOLATION OF FEDERAL STATUTES AND REGULATIONS, VIOLATING PETITIONERS V, VI AND XIV CONST. AMENDS.?

III. WAS THE TRIAL COURTS DENIAL OF EXCULPATORY EVIDENCE A VIOLATION OF PETITIONERS V, VI AND XIV CONST. AMENDS.?

IV. DID PROSECUTION COMMIT REVERSIBLE ERROR DURING HIS ARGUMENT ABOUT MS. HARRY'S POWER OF ATTORNEY VIOLATING PETITIONERS V, VI AND XIV CONST. AMENDS.?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4-9

REASONS FOR GRANTING THE WRIT 10-22

CONCLUSION 23

PROOF OF SERVICE 24

INDEX TO APPENDICES

APPENDIX A U.S. Court of Appeals for the Sixth Circuit

APPENDIX B Eastern District of Michigan

APPENDIX C Michigan Supreme Court

APPENDIX D Michigan Court of Appeals

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

SEE ATTACHED

STATUTES AND RULES

OTHER

TABLE OF AUTHORITIES CITED

CASES PAGE #

Barton v. Warden 786 F3d 450 14
Berger v. U.S. 295 US 78 21
Brady v. Maryland 373 U.S. 83 .....11, 12
California v. Trombetta 467 US 479 18
Chambers v. Mississippi 410 US 284 19
Chapman v. California 382 US 18 .....14, 19
Davis v. Alaska 415 US 316 19
Dawson v. Delaware 503 US 159 22
Donnelly v. DeChristoforo 416 US 637 21
Guam v. Innacio 10 F3d 608 22
Hennon v. Cooper 109 F3d 330 21
Jefferson v. U.S. 730 F3d 537 14
Lenoir v. U.S. 90 F2d 329 20
Robinson v. Mills 592 F3d 730 14
Rock v. Arkansas 483 US 484 19
Sizemoor v. Fletcher 921 F2d 667 .....14, 19
U.S. v. Bagley 473 U.S. 667 12
U.S. v. Bencs 28 F3d 555 12
U.S. v. Ganier 468 F3d 92U 17
U.S. v. Parks 668 F3d 295 21
U.S. v. White 492 F3d 380 16
Washington v. Texas 388 US 14 18
Wearry v. Cain 136 S. Ct. 1008 14

TABLE OF AUTHORITIES CITED

STATUTES AND RULES — PAGE #

MCL 400.11 20
MCL 400.703 20
MCL 750.145 .....20, 22
MCL 750.159 5
MCL 750.174 .....5, 19
MCL 750.218 5
MCR 6.201 16
U.S.C.S. Fed. R. Evid 702 17
U.S.C.S. Fed. R. Evid 703 17
U.S.C.S. Fed. R. Evid 705 17
U.S.C.S. Fed. R. Crim. Proc. 16 17

U.S. Constitutional Amendments

V.....13,14,17,19,22
VI 13, 14, 17, 19, 22
XIV 13, 14, 17, 18, 19, 20, 22

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2020 U.S. App. LEXIS 17882; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[X] reported at 2019 U.S. Dist. LEXIS 211211; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

[X] reported at 501 Mich 904; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[X] reported at 2016 Mich App LEXIS 20, also 2018 Mich App LEXIS 207; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was June 5, 2020.

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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

The date on which the highest state court decided my case was October 31, 2017. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US V CONSTITUTIONAL AMENDMENT

...Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty,or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US VI CONSTITUTIONAL AMENDMENT

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

US XIV CONSTITUTIONAL AMENDMENT

.....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.

STATEMENT OF THE CASE

On March 13, 2014, a state court jury found Petitioner guilty of seven counts of making or using false pretenses to obtain money from a person with the intent to defraud or cheat, a felony, in violation of MCL 750.218 (4)(a), one count of felony embezzlement in violation of MCL 750.174a (6)(a), and one count of conducting a criminal enterprise by obtaining money by false pretenses, a felony, in violation of MCL 750.159: (1). On July 31, 2014, Petitioner was sentenced to 140 months to 20 years in prison.

Between January 2011 and November 2012, Petitioner was employed as a registered financial representative for the Diversified Group; allegedly Petitioner solicited investors, mostly senoir citizens to invest in Diversified; she made material misrepresentations regarding the investment, stating that the investment was without risk, was completely liquid, and featured a guaranteed rate of return of between 9.5% and 10.44%; she failed to disclose the risks that this was a highly leveraged real estate investment that could result in the loss of all their money. Based on these allegations Ms. Dicken obtained over $1.5 million from investors. In actuality these funds were found to be invested in a Ponzi scheme ran by owner Joel Wilson.

Petitioner maintains she offered an in investment product to some of her clients which involved them investing in real estate projects. The terms of the investment required the

investors to provide money to the Diversified Group which was funneled to one or more LLCs in exchange for short-term partnership interests in the LLCs. The LLCs would then purchase and renovate distressed real properties and then rent the properties to third-party tenents with ultimate goal to sell the properties outright and repay the investors in full while making interest payments to the investors along the way. Ms. Dicken invested almost $78,000 of her own money to this product. The real estate properties did not sell as quickly as predicted and eventually the company responsible for the product defaulted on interest payments to the investors. Ms. Dicken became suspicias of the product and began asking questions which quicklt resulted in her termination of the company.

Petitioner continues to maintain that she fully disclpsed all the risks to the clients and that the brochures and other printed materials given to her clients stated that there was risk and that you could risk all of your investment with the particular product. Defense councel during the trial informed the jury that the properties were real and many of them were being rented out or being sold on land contract at the time of the trial.

On March 9, 2014, the Petitioner filed a written motion for a mistrial based on the witholding of exculpatory testimony. The motion focused on the testimony of Special Agent Pete Ackerly. During the course of testimony of Ackerly, he acknowledged that he interviewed witness Jessica Burch and produced a statement

which had never been turned over to the defense, despite three requests from the defense for the evidence. This statement made it clear that Scott Bartlett digitally placed forged signatures on various subscription agreements, not Ms. Dicken. The witness also made it clear that Mr. Bartlett was acting under the direction of Joel Wilson, the owner of Diversified, at the time. Mr. Bartlett also acknowledged later in that day that he in fact applied the signatures including the complaintant Beverly Harry's documents. During the trial the state implied Petitioner applied the forged signatures while suppressing evidence that Scott Bartlett took responsibility for the signatures. Petitioner also moved for a directed verdict on the criminal enterprise conviction on the grounds that there could not be a one person criminal enterprise and because Beverly Harry was not vulnerable withib the meaning of the statue. The State Court denied the motions holding that while the evidence was relevant, the defendent could have obtained the evidence on her own. Petitioner had filed numerous pretrial motions and/or discovery demands, starting with counsels initial appearance, councel demanded production of all documents.

During trial, Debra Kazee, a Diversified employee testified that she handled the payrolls at Diversified, including commisions; she was ultimately fired by Joel Wilson. After being fired she discovered that the 401(k) was not funded and lost money as a result of her dealing with Joel Wilson. Ms. Kazee further stated the only account Petitioner had control over was a Frankenmuth Credit Union. This was <u>not</u> the account where the Beverly Harry

money had been deposited.

Michael Kazee, who was part owner of Diversified until April 2012, testified that Petitioner invested between $75,000 and $78,000 of her own money in the American Reality Fund. This money came from Petitioner liquidating her IRA, and at the time of trial she was the fifth or sixth largest shareholder in the fund.

The owner of Diversified, Joel Wilson, who was actually running this Ponzi scheme and forging paper work and Income tax returns for his employees, with the help pf his mother fled to Germany at the time of Petitioners arrest. He was eventually arrested and held by Interpol. Due to Mr. Wilson not being extradited to Michigan to face charges when Petitioner's trial was active the court did not allow the defense to present evidence that Mr. Wilson was the actual beneficiary of this scheme. Mr. Wilson went as far as to having his mother Madlon Bosquet, fraudulently put on Jessica'Burch's Tax Return in 2011 that she was the sole Proprietor of Diversified, which shows premeditated intent in 2011 that Mr. Wilson was putting his "ducks in row" before his Ponzi scheme was brought to light.

Petitioner Dicken, while employed at Diversified did not know Joel Wilson was running a Ponzi scheme. Petitioner did not receive any monies from her investors. Some of these investors were friends and family of hers that she had previously worked with. Petitioner even invested almost $78,000 of her own money. If she had known this was a Ponzi scheme, would she have done that? Petitioner Dicken was a Patsy in Joel Wilson's scheme,

as well as a victim like the complaining investors.

Petitioner has exhausted all the questions presented in the State Courts and Federal Courts, as seen in Appendies. The Sixth Circuit denied Petitioner a Certificate of Appealability on June 5, 2020. Petitioner now presents this Petition of Certiorari.

REASONS FOR GRANTING THE PETITION

REASON FOR GRANTING PETITION

Petitioner Shawn Dicken, in pro per, presents this Writ maintaining the Sixth Circuit's denial of Certificate of Appeal is a manifest error.

Petitioner Dicken was a Licensed Registered Representative, who was employed by Diversified Group, owned and operated by Joel Wilson. In the Circuits denial, (Appendix A pg. 1, para. 2) the court held that Ms. Dicken forged her client signature's. This is incorrect. In the discovery requested numerous times, was an investigative report by Agent Ackerly, in which during an interview with Diversified employee Scott Bartlett, Bartlett admits he forged the signatures as directed by owner Joel Wilson, (Appendix A pg. 4, para. 1), on all documents. Petitioner maintains she was denied fundamentally fair discovery of the investigation of the business entities and police interviews with other Diversified employees, thereby, denying her right to discovery Brady v. Maryland 373 U.S. 83 (1963). The requested discovery was exculpatory; evidence that would have shown the jury that Petitioner was a mere Patsy in Diversified Owner, Joel Wilson, embezzlement scheme. It is a proven fact that Petitioner became suspicious of Diversified and only when she began to question the Groups actions, she was fired. Before investigations and warrants were issued Ms. Dicken interviewed with SEC, which was transcribed and found to be not guilty of any wrong doing. This interview was not made available as seen by motions to compel discovery. Petitioner through her attorney filed numerous pretrial motions

for discovery. In the motion filed on December 19, 2013, defense maintained States Attorney selectively edited the investigative file to only provide evidence focusing on this Petitioner and not the owner or other employees or contractors for the Diversified Group. In the five motions Petitioners councel filed, including the request for In-camera review of Discoverable materials filed on January 9, 2014, councel identified various documents not in the discovery including but not limited to the SEC testimony of Michael Kazee, and the missing statements of David Dishaw.

Erroneously, the State Appeals Courts held no Brady violation occured. The Courts also held that defense did not request an in-camera inspection of the requested materials. This is incorrect and Petitioner did provide as attached a copy of this motion and the judges decision in which he agreed to the in-camera review, but then found the evidence to be irrelevant and declined an in-camera review. The items requested are pertinent to the Petitioners guilt or innocence, and her punishment Brady @87.Id. There also stands a strong reasonable probability that the items requested would have resulted in a different verdict if disclosed to the jury, a reasonable probability sufficient to undermine confidence in the outcome, U.S. v. Bagley 473 U.S.667, 683 (1985).

Ms. Dicken is not relying on "mere speculation" as held by the State Courts. This Supreme Court has rejected the claim that the duty to disclose hinges on the <u>usefulness</u> of the material to pretrial preparation, US v. Bencs 28F 3d 555, holding "such a standard would nessarily encompass incriminating evidence as well

as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense" Bencs @560, Id.

This Petitioner maintains that if the following discovery had been disclosed to the jury she would not have been found guilty, and her V, VI and XIV Const. Amends. would not have been violated:

1) FINRA Transcripts,
2) SEC Transcripts,
3) OFIR Transcripts,
4) Diversified Group Federal Receivership records,
5) Power of Attorney for Beverly Harry,
6) Copy of cashed checks from Beverly Harry,
7) Victim's statements from IRA Services,
8) Transcripts of Steven Monoghan dated June 14, 2011, which was not disclosed until October 23, 2015, during Petitioner's restitution hearing, in which Attorney King requested an evidentriary hearing and request was denied,
9) Police report of interview of Jeremy Dicken by Agent Ackerly, and
10) Any and all victim impact statements collected by Prosecution prior to trial.

These documents prove Petitioner was not the individual embezzling monies and conducting a criminal enterprise. All of these requested documents would have complied plenty of exculpatory evidence to establish reasonable doubt to the triers of fact, to render this Petitioner not guilty. The duty to disclose could encompass inadmissible information where that information appears

likely to lead the defense to the discovery of admissible evidence Barton v. Warden 786 F3d 450 (6th Cir. 2015). In Barton the court stated that Brady requires all exculpatory and impeachment evidence discovered to the defense, not just "some evidence on the assumption that defense councel will find the cookie from a trail of crumbs."

Here, the many requests and hearings for discovery is reasonable diligence to discover the factual predicate underlying the claims. Here the prosecutor failed to disclose the information despite ongoing notice that the defense sought the very information suppressed. Jefferson v. U.S. 730 F3d 537 (6th Cir. 2013). When the State fails to turn over numerous pieces of favorable evidence, the proper focus of the materiality inquiry is on the cumulative effect of the suppressed evidence rather than an analysis of each piece of evidence. Wearry v. Cain 577 U.S. no # Available (2016) 136 S. Ct 1008, Harmless error is absent. It cannot be said beyond a reasonable doubt that the exclusion of this constitutionally protected evidence was harmless beyond a reasonable doubt, U.S. Const. Amends. V, VI and XIV; Chapmen v. California 382 US 18 (1967); Sizemoor v. Fletcher, 921 F2d 667 (6th Cir. 1990).

To establish a Brady Violation, the Petitioner must demonstrate that: (1) the evidence in question is favorable: (2) the prosecutor suppressed the evidence; and (3) there is reasonable probability that the result of her trial would have been different had the evidence been disclosed to the defense, Robinson v. Mills

592 F3d 730. This Petitioner maintains that the interviews requested are favorable to her defense, the prosecutor suppressed them for that very reason and had the jury heard these interviews they would have seen the actual perpetrator of this embezzlement scheme was Joel Wilson, the owner of Diversified, who fled the country after Ms. Dicken's interview with FINRA. The end result, after Mr. Wilson was returned to the U.S., was Ms. Dicken was sentenced to 3 1/2 years more time in prison than Joel Wilson. The Sixth Circuits conclusion is an unreasonable determination of the facts, therefore a new trial is required and the writ must issue.

Secondly, Joseph Spiegel, the states expert witness who testified is an attorney who practices security and transactional law. Defense Councel repeatedly demanded a summary of the proposed testimony of Joseph Spiegel. Eventually the prosecutor provided a 1 and 1/4 page letter which included the curriculum vitae of Joseph Spiegel. The three paragraphs of the letter that responded to the defense inquiry stated that Joseph Spiegel will educate the jury about securities and how they are regulated, the types of licenses issued to investment advisors and the duties owed by the advisors to the clients and the reason underlying the same. Mr. Spiegel wove his arguments about duties from a variety of sources including federal security laws from which this transaction was likely exempt. Trial councel heard for the first time an opinion called from/based on a huge number of sources with effectively no advance notice of the content of

the opinion. The prosecutor's generic catch-all letter was an attempt to completely circumvent the rule.

MCR 6.201 (A) (iii) makes it mandatory that the State provide the curriculum vitae and either the written report of the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion. The letter which was submitted does not comply with the spirit of the rule. The defense responded to the letter that the underlying data had not been disclosed and that language such as "she breached a material duty" of candor to her investors without providing the documents, manuals, books, or other data that Joseph Spiegel was predicating his opinion on was a violation of MCR 6.201 (A) (iii). The trial court correctly noted, the defense objection was not the expert's reliance on the preliminary examination of the complainants testimony but on the application of unknown standards of care to the testimony. The prosecutor represented to the court that the standards came from Federal Statutes and regulations. Ultimately the trial court denied the defenses motion to exclude the testimony. At the beginning of the trial there was a long collquy regarding the lack of notice of expert testimony and the prosecutor's failure to disclose the substance of the testimony. The prosecutor's manipulation of the expert witness discovery process is a violation of MCR 6.201 (B).

In US v. White and Suhadolnik, 492 F.3d 380 (6th Cir. 2007), the court noted the importance of full disclosure where the

"government failed to comply with minimal notice requirement regarding the witnesses qualifications and summary of their expected testimony." In U.S. v. Ganier 468 F3d 920 (6th Cir 2006) the court noted that the prosecutor failed to provide a written summary of the expert witness findings as requested by the Federal rule. Here the manipulation of the rule foreclosed an opportunity to prepare for this wide ranging testimony and denied defendant a fundamentally fair trial, U.S. Const. Amends. V, VI and XIV. U.S.C.S. Fed. R. Crim. Proc.16(G) governs expert witnesses. At defense's request the government must give to the defense a written summary of any testimonies that they intend to use under rules, 702, 703, or 705 Fed. R. Evid. Thereby, Joseph Spiegel's testimony, as seen by the record violated Petitioner's Constitutional Amendment Rights and her conviction should not stand.

Petitioner next maintains that even though she testified at trial, the defense sought evidence of her testimony before the FINRA state agency. FINRA is the Michigan State Agency that investigated Diversified. This is direct evidence of her relationship to the investigation of Diversified where Shawn Dicken was employed at the time of the charges.

Petitioner's defense was that she was not involved in a criminal conspiracy with other individuals at Diversified. She believed she was involved in the lawful sale of a legitimate limited partnership product and only when she became suspicious and began to question the goings on, she was fired. Evidence

that Petitioner came willingly forward and fully provided all the information to government investigators is directly relevant to negating intent. Evidence negating Petitioner's criminal intent is relevant. At trial, defense councel sought to have a tape recording of Shawn Dicken's FINRA testimony played for the jury in support of the defense that she was not involved in a criminal conspiracy and had no intent to defraud. The testimony portrays Ms. Dicken's relationship to Diversified, Triton and to the investigation of those entities. The testimony is detailed and forthcoming to Ms. Dicken's demeanor in the course of the FINRA agency investigation of Diversified is direct evidence of her lack of intent to defraud.

The effect of the evidence would have been graphic in showing to the jury Shawn Dicken's relationship to the investigation in her work for Diversified. The trial Courts exclusion of this evidence violated Ms. Dicken's constitutional right to present a defense.

It is the jury's role to evaluate the evidence. The U.S. Constitution guarantees the right of a "meaningful opportunity" to present a complete defense California v. Trombetta, 467 US 479, 485 (1984). As applied to the states by the due process clause of the xiv Amendment, the accused has the right at trial to present testimony that is "relevant," material," and "vital to the defense." Washington v. Texas 388 US 14, 16 (1967), the unavoidable conclusion to be drawn from the Supreme Court's cases is that the right to present evidence to establish a defense is clearly

established as a fundamental element of due process of law, Rock v. Arkansas, 483 US 484 (1987), Chambers v. Mississippi 410 US 284 (1973). Due process of law requires that the defendent is allowed to place the evidence in the context of her circumstances and her setting, U.S. Const. Amends. V, VI and XIV, see Davis v. Alaska 415 US 316 (1974). Harmless error is absent. Proof of guilt in this case was strongly contested. It cannot be said beyond a reasonable doubt that the exclusion of this constitutionally protected evidence was harmless beyond a reasonable doubt, U.S. Const. Amends. V, VI and XIV; Chapmen v. California 386 US 97 (1967); Sizemour v. Fletcher, 921 F2d 667 (6th Cir. 1990).

Defense Councel tried to present significant evidence undercutting the State's case. The FINRA Interview could have been the proverbial straw which broke the back of certainty of the jury. The trial courts ruling to exclude the recording was objectively unreasonable and violates this Petitioner's Constitutional Right to a fair trial. The Circuit Courts denial should be reversed.

Lastly, in count 9 of the information, Defendent is charged with obtaining money from a vulnerable adult, to-wit: Beverly Harry, contrary to MCL 750.174 (6) (a). Pursuant to MCL 750.174 (15) (c) (m), the term "vulnerable adult" is defined as 1 or more of the following: (1) an individual age 18 or older who, because of age, development disability, mental illness or physical disability requires supervision or personal care or lacks the

personal and social skills required to live independently; (ii) an adult as defined in section 3 (1) (b) of the Adult Foster Care Facility Licensing Act, MCL 400.703; and (iii) an adult as defined in Section 11 (b) of the Social Welfare Act, MCL 400.11, MCL 750.145 (m) (6).

Evidence regarding Ms. Harry's disability was provided by one witness: Richard Sova, who acted as the Power of Attorney for Ms. Harry. Aside from the testimony of Mr. Sova and the exhibits admitted during his testimony, no other evidence regarding Ms. Harry's alleged disability was introduced.

The Prosecutor presented improper false light and testimony that Richard Sova's Durable Power of Attorney was evidence of present, incompetency, vulnerability, or that it was illegal for Shawn Dicken to directly communicate with Beverly Harry due to Sova's Power of Attorney.

Ms. Harry was a disabled individual, only after having made her investment with Shawn Dicken. Ms. Harry had granted Richard Sova durable Power of Attorney years prior, while still managing her own affairs. After having been injured in a vehicle accident, Ms. Harry continued to make her own financial decisions, while allowing Mr. Sova to help manage her affairs. The Prosecutor repeatedly argued during the trial that Ms. Dicken's dealing with Ms. Harry directly was an exploitation of a vulnerable adult and that she should have dealt with the agent. A durable power of attorney is not a cessation of an individual's right to act on their own behalf and is not a guardianship, Lnoir v. US

90 F2d 329.

A durable Power of Attorney is not created nor approved by a probate court. Many individuals who are active and healthy, like Ms. Harry, give spouses or other trusted individuals power of attorney to act on their behalf. In fact, once the individual becomes incompetent, they can no longer grant a power of attorney.

The Prosecutor breached his duty to the jury and the public by making this argument and presenting testimony which advocated that a durable power of attorney was evidence of present incompetency, vulnerability, or that it was somehow unethical to directly communicate with an individual who has an appointed agent. An agent is not a lawyer and the argument was nothing more than an exploitation of confusion over the name "power of attorney." While a Prosecutor can use vigor to obtain convictions, he or she cannot use "vigor" to distort the truth, Berger v. U.S. 295 US 78, 55 S. Ct. 629. "The due process clause has been interpreted to forbid prosecutors from obtaining jury verdicts by means of statements that are seriously misleading or otherwise prevents the jury from deliberating rationally about a defendent's guilt." Hennon v. Cooper 109 F3d 330, quoting Donnelly v. DeChristoforo, 416 US 637.

Recently the U.S. Court of Appeals held that a Prosecutor's duty to present truthful evidence applies even when the basis of the prosecution's knowledge of the falsity of the evidence comes from outside the four corners of the record. U.S. v. Parks

668 F3d 295, Stated another way, even though the record might have supported the argument, the prosecutor's duty of candor prohibited him from making an argument which the prosecutor knew from outside the four corners of the jury trial was false.

It was clear fro evidence presented, and lack of evidence presented, that Ms. Harry was not a "vulnerable adult", no testimony was given regarding Ms. Harry being in an adult foster care program or meeting the criteria of the Social Welfare Act. It is therefore beyond dispute that prongs ii and iii of MCL 750.145 (m) (c) are inapplicable. Then question then remains whether Ms. Harry would meet the criteria of prong 1. She clearly does not. The evidence presented shows that Ms. Harry was capable of making her own financial decisions, and in fact did so, as she had done with her investments with Petitioner years before.

In a criminal case, it is not that a prosecutor shall win a case, but that justice be done, Berger, Supra.

It cannot be said that the prejudicial testimony due to consolidation of the cases failed to affect the jury. The effect of the ruling was to deny Petitioner her right to a fair trial and due process of law, U.S. Const. Amends. V, VI and XIV. Dawson v. Delaware 503 US 159 (1992); Guam v. Innacio 10 F3d 608 (9th Cir. 1993). Therefore the Circuit Court's denial of relief should be vacated and Petitioner remanded for a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shawn Dicken

Date: 8-19-2020