NO. 20-6544

IN THE

SUPREME COURT OF THE UNITED STATES

RANDALL SCOTT OVERTON - PRO SE PETITIONER

vs.

MATT MACAULEY, WARDEN - RESPONDENT

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

PRO SE PETITION FOR WRIT OF CERTIORARI

Randall Scott Overton #807506
BELLAMY CREEK CORRECTIONAL FACILITY
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Ionia, Michigan
48846

Pro se Prisoner Petitioner

QUESTION(S) PRESENTED

I. Whether the United States Court of Appeals for the Sixth Circuit, in denying **Petitioner**'s appeal, resulted in a decision of an important federal question in a way that conflicts with this Court's decisions in **Winship** and **Jackson**, where **Petitioner**'s State-court conviction of criminal sexual conduct -first-degree was obtained in violation of the Due Process Clause, where the state prosecution failed to meet its constitutional burden of proving beyond a reasonable doubt every element of the offense with which **Petitioner** was charged?

II. Whether the United States Court of Appeals for the Sixth Circuit, in denying **Petitioner**'s appeal, resulted in a decision of an important federal question in a way that conflicts with this Court's decisions in **Bouie** and **Lanier**, where the state trial court and the Michigan Court of Appeals, in violation of the Due Process Clause, applied a novel construction of a criminal statute that expanded the statutes narrow and precise language to include "self-penetration" to the statute's definition of "sexual penetration" that was unexpected and indefensible and then applied the novel construction retroactively, and in doing so, deprived Petitioner of the "fair warning" required by the Due Process Clause that, under the criminal statute, **Petitioner**'s alleged conduct was criminalized?

LIST OF PARTIES

Pursuant to S.Ct.R. 14.1(b), a list of the parties involved in the court whose judgement is sought to be reviewed are:

Dana Nessel
Michigan Attorney General
Criminal Appellate Division
P.O. Box 30217
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48909

-and-

Kym L. Worthy
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Pro se Petitioner, **Randall Scott Overton** ("**Petitioner**"), respectfully requests that this Honorable Court issue a Writ of Certiorari to review the judgement(s) presented below, as both the United States Court of Appeals for the Sixth Circuit and the Michigan Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court, and has decided an important question of federal law that has not been, but should be, settled by this Court.

OPINIONS BELOW

Opinions/Orders of the Sixth Circuit Court of Appeals

In **Overton v. Macauley**, United States Court of Appeals for the Sixth Circuit ("**Sixth Circuit Court of Appeals**"), **Case No. 19-1736**, the **July 31, 2020**, Opinion/Order denying **Petitioner**'s appeal on the **June 4, 2019**, decision of the United States District Court for the Eastern District of Michigan ("**U.S. District Court**"), denying **Petitioner**'s Petition for Writ of Habeas Corpus, under **28 U.S.C. § 2254**. The **July 31, 2020**, Opinion/Order of the Sixth Circuit Court of Appeals, appears at **Appendix-A** to the petition and is unpublished. **App. A.**

In **Overton v. Macauley**, Sixth Circuit Court of Appeals, **Case No. 19-1736**, the **November 19, 2019**, Order denying **Petitioner**'s **August 20, 2019**, Motion to Expand Certificate of Appealability. The **November 19, 2019**, Order of the Sixth Circuit Court of Appeals, appears at **Appendix B** to the petition and is unpublished.

App. B.

Order of the U.S. District Court

In **Overton v. Trierweiler [Macauley]**, U.S. District Court, **Case No. 2:17-cv-**

10892, Order denying Petitioner's Petition for Writ of Habeas Corpus, under 28 U.S.C. § 2254, but Granting Certificate of Appealability ("COA") with respect to Petitioner's lack-of-notice claim. The June 4, 2019, Order of the U.S. District Court, appears at Appendix C to the petition and is unpublished. App. C.

Opinions/Orders of Michigan State Courts

In People v. Overton, Michigan Court of Appeals ("MCOA"), Docket No. 308999, the October 31, 2013, Per Curiam Opinion affirming Petitioner's convictions and sentences on appeal as of right (direct appeal) from the Judgement of Sentence that was entered against Petitioner on June 21, 2011, in the Wayne County Circuit Court, Case No. 11-002103-FC. The October 31, 2013, Per Curiam Opinion of the MCOA, appears at Appendix D to the petition and is unpublished. App. D.

In People v. Overton, Michigan Supreme Court ("MSC"), Case No. 148347, the June 13, 2014, Order scheduling oral argument on whether to grant the application for discretionary review of the October 31, 2013, decision of the MCOA with respect as to whether the evidence was sufficient to show that Petitioner engaged in the "intrusion, however slight, or any part of a person's body or any object into the genital or anal openings of another person's body," as required under MCL 750.520a(r), to sustain his conviction of first-degree sexual conduct under MCL 750.520b(1)(a). The June 13, 2014, Order of the MSC, appears at Appendix E to the petition and is published at 496 Mich 853 (2014). App. E.

In People v. Overton, MSC, Case No. 148347, the December 29, 2014, Order, following oral arguments on the application for leave to appeal the October 31, 2013, decision of the MCOA, denying Petitioner's application. The December 29, 2014, Order of the MSC, appears at Appendix F to the petition and is published at 497 Mich 941 (2014). App. F.

Opinions/Orders of Michigan State Courts Post Conviction Remedies

In People v. Overton, MSC, Case No. 153943, the December 28, 2016, Order denying Petitioner's application for leave to appeal the April 28, 2016, Order of

the MCOA denying **Petitioner**'s application for leave to appeal the Wayne County Circuit Court's decision denying **Petitioner**'s Motion for Relief from Judgement under **MCR 6.500 et seq.** The **December 28, 2016,** Order of the MSC, appears at **Appendix G** to the petition and is published at **500 Mich** 922 **(2016).** **App. G.**

In **People v. Overton,** MCOA, **Case No. 330875,** the **April 28, 2016** Order denying **Petitioner**'s delayed application for leave to appeal the **October 5, 2015,** Order of the Wayne County Circuit Court denying **Petitioner's** Motion for Relief from Judgement under **MCR 6.500 et seq.** The **April 28, 2016** Order of the MCOA, appears at **Appendix H** to the petition and is unpublished. **App. H.**

In **People v. Overton,** Wayne County Circuit Court, **Case No. 11-002103-FC,** the **October 5, 2015,** Order denying **Petitioner**'s Motion for Relief from Judgement under **MCR 6.500 et seq.** The **October 5, 2015,** Order of the Wayne County Circuit Court, appears at **Appendix I** to the petition and is unpublished. **App. I.**

In **People v. Overton,** Wayne County Circuit Court, **Case No. 11-002103-FC,** the **January 30, 2012,** Order denying **Petitoner**'s Motion for a New Trial. The **January 30, 2012,** Order of the Wayne County Circuit Court, appears at **Appendix J** to the petition and is unpublished. **App. J.**

STATEMENT OF JURISDICTION

This petition for a writ of certiorari involves the July 31, 2020, decision of the United States Court of Appeals for the Sixth Circuit that conflicts with relevant decisions of this Court. S.Ct.R. 10(c). Because this petition is timely, S.Ct.R. 13(1), jurisdiction to hear and decide this petition lies with this Honorable Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article I, § 10, Cl. 1, of the United States Constitution provides:

> No State shall enter into any Treaty, Alliance, or Confederation, grant letters of Marque and Reprisal; coin Money; admit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The **Sixth Amendment** to the United States Constitution 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 accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The **Eighth Amendment** to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The **Fourteenth Amendment** to the United States Constitution provides:

> § 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Michigan

Mich Const of 1963, art I, § 16, provides:

> Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.

Mich Const of 1963, art I, § 17, provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

Mich Const of 1963, art I, § 20, provides:

> In every criminal prosecution, the accused shall have the right to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Michigan Compiled Laws ("MCL")

MCL § 8.3a (Construing Statutes), provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

MCL § 750.520b(1)(a), provides:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

MCL 750.520a(q), provides:

> "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's intimate parts, if that intentional touching can reasonable be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) revenge; (ii) to inflict humiliation; or (iii) out of anger.

MCL 750.520a(r), provides:

> "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

MCL 750.520b(2)(b), provides:

> (2) Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

MCL 750.520b(2)(d), provides:

(2) Criminal sexual conduct in the first degree is a felony punishable as follows:

(d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.

MCL 750.520n(1), provides:

(1) A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285.

MCL 791.285(1)(a), provides:

(1) The lifetime electronic monitoring program is established in the department. The lifetime electronic monitoring program shall implement a system of monitoring individuals released from parole, prison, or both parole and prison who are sentenced by the court to lifetime electronic monitoring. The lifetime electronic monitoring program shall accomplish all of the following:

(a) By electronic means, track the movement and location of each individual from the time the individual is released on parole or from prison until the time of the individual's death.

STATEMENT OF THE CASE

This case is before this Honorable Court in a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. **Petitioner** was charged with, and convicted of, **inter alia**, Criminal Sexual Conduct - First-Degree, **MCL § 750.520b(1)(a)**, by a jury in a Michigan trial court. **Petitioner**'s conviction was based on **Complainant**'s allegation that her mother and **Petitioner** would subject her to "virginity" checks after **Complainant** was found by her mother masturbating with a back-massager. Believing that her daughter may have injured herself, **Complainant**'s mother and **Petitioner** took **Complainant** to a doctor. No injury or signs of sexual abuse were noted by the attending doctor.

During one of the "virginity" checks, **Complainant**, alleges that **Petitioner** had her lie on the bed and remove her clothing. According to **Complainant**, **Petitioner**, informed her that her vaginal opening appeared bigger, and that she informed **Petitioner** that it appeared bigger because she had begun using tampons. **Trial Trans. 6/2/11, at p.64. Complainant** further alleged that she believed she had put a tampon in the wrong hole. **Id., at p.66. Complainant** claimed that at that time, **Petitioner**, held a full-length mirror in front of her legs, **id.**, and that she inserted her own finger into her vagina, allegedly at **Petitioner**'s request to confirm where the tampon goes. **Id., at pp.65-66.**

Despite the lack of any allegation that **Petitioner** had penetrated **Complainant** in any manner, which, under Michigan law, was required to sustain a conviction of CSC-I under **MCL § 750.520b(1)(a)**, the trial court and the Michigan Court of Appeals engaged in a novel construction of the statutory definition of "sexual penetration" contained under **MCL § 750.520a(r)**, to include, as an element, "self-penetration." Prior to **Petitioner**'s conviction, **MCL § 750.520a(r)**, as written, regard the sexual penetration of one person by another. In applying a novel construction to the criminal statute, the Michigan Court of Appeal expanded the narrow and precise language of the statute to include "self-penetration", in violation of the Due Process Clause because **Petitioner** did not receive "fair warning" that his conduct was criminal under the statute, which resulted in an amendment to a criminal statute that was neither foreseeable or defensible. **Petitioner**, also argued that his conviction of CSC-I was obtained in violation of the Due Process Clause where the prosecution failed to prove beyond a reasonable doubt each element of the offense with which **Petitioner** was charged, in particular, sexual penetration of one person by another person. The U.S. District Court and the Sixth Circuit Appeals Court has rejected **Petitioner**'s arguments for reasons discussed in this petition.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Sixth Circuit has Decided an Important Federal Question Regarding the Due Process Clause of the Fourteenth Amendment to the United States Constitution in a Way that Conflicts with Relevant Decisions of this Honorable Court.

Governing Standard of Review

28 U.S.C. § 2254

Pursuant to 28 U.S.C. § 2254(d)(1)-(2), An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Wiggins v. Smith, 539 U.S. 510, 520 (2003)(citation omitted).

In **Williams v. Taylor, 529 U.S. 362, 413 (2000)**, this Honorable Court made clear that the "unreasonable application" prong of **§ 2254(d)(1)**, permits a federal habeas court to "grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts" of petitioner's case. **Wiggins, 539 U.S., at 520** (citation omitted). In order for a federal court to find a state court's application of [this Court's] precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. **Id.** (citation omitted). The state court's application must have been "objectively unreasonable." **Id., at 520-521** (citing **Williams, 529 U.S., at 409**).

Correct Governing Legal Principle

The Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, in relevant part, provides that:

> "No State shall ... deprive any person of life, liberty, or property, without due process of law[.]..."

U.S.Const.Amend.XIV. (ellipses and alteration added); see also **Mich Const 1963, art I, § 17.**

Insufficient Evidence to Support Petitioner's Conviction of CSC-I

The gravamen of **Petitioner**'s claim is that the record of evidence that was adduced in the state-trial court's proceedings is constitutionally insufficient to sustain his conviction of Criminal Sexual Conduct - First-Degree ("CSC-I") under, **MCL § 750.520b(1)(a)**, in that, the prosecution failed to meet its federal and state constitutional duty of proving "beyond a reasonable doubt" each element of the offense with which **Petitioner** was charged. **Petitioner**'s conviction of CSC-I is premised entirely upon **Complainant**'s conflicting testimony as there was no other evidence involved.

During trial, **Complainant**, testified that her mother made her take her pants and underwear off, open her legs, and inspected her "private areas." **Trial Trans. 6/2/11, at p.41, p.45.** Her mother inspected her vagina and called **Petitioner** into the room to check her vagina as well. **Id., at p.43. Complainant** testified that **Petitioner** nor her mother, touched her. **Complainant**'s mother and **Petitioner**, later took her to a doctor to be checked. **Id., at p.44.** The alleged "virginity checks" began when **Complainant** was 11 years old and her mother had walked in on her masturbating with a back massager. **Complainant**'s mother was worried that **Complainant** may have injured herself. **Id. Dr. Sara Moussa**, testified that she had examined **Complainant**, and that, the exam results were normal and that she did not observe any signs of physical or sexual abuse. **Id., at pp.132-135.**

Complainant went on to testify that on one occasion, during a "virginity check," **Petitioner** allegedly informed **Complainant** that her vaginal opening

appeared bigger, and that she informed **Petitioner** that it appeared bigger because she had begun using tampons. **Trial Trans. 6/2/11, at p.64. Complainant** also told **Petitioner** that she believed she had put a tampon in the wrong hole. **Id., at p.66.** According to the **Complainant**, at that time, **Petitioner**, held a full-length mirror in front of her legs, **id.**, and that **she inserted her own finger in her vagina,** allegedly, at **Petitioner**'s request to confirm "where the tampon goes." **Id., at pp.65-66. Complainant** testified that **Petitioner** did not touch her or penetrate her with his finger. **Id., at p.115.** Prosecution witness, **Det. Scott Galeski**, of the Wyandotte Police Department, testified during the preliminary examination, that during his interview with **Complainant, Complainant** informed him that she was the one who went to **Petitioner** and asked him how to put in a tampon. **Prelim. Exam. 2/25/11, at p.100.**

Despite of the fact that there was no allegations by **Complainant** that **Petitioner** engaged in sexual penetration with her, based on the testimony above, **Petitioner** was convicted of CSC-I under **MCL § 750.520b(1)(a).** As demonstrated herein below, **Petitioner**'s conviction of CSC-I under, **MCL § 750.520b(1)(a)**, was obtained in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. **U.S.Const.Amend.XIV.**

"Clearly Established" Federal Law

At the time of the state court's decision in this case, this Honorable Court, first, in **In re Winship, 397 U.S. 358 (1970)**, and reaffirmed in **Jackson v. Virginia, 443 U.S. 307 (1979)**, "clearly established" the legal principles that govern claims of insufficient evidence to support a criminal conviction. In **Winship**, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction **"except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Jackson, 443 U.S., at 315** (citing **Winship, 397 U.S., at 364**)(emphasis added). **Winship**, said this Court in **Jackson**,

presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. **Jackson, 443 U.S., at 316.** In the instant case, even "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime [of CSC-I] beyond a reasonable doubt." Id., at 319 (alteration added).

CSC-I Under MCL § 750.520b

The statute under which **Petitioner** was convicted of CSC-I, states as follows:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

MCL § 750.520b(1)(a). In turn, "sexual penetration" is parsed as follows:

> sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

MCL § 750.520a(r).

When a defendant pleads not guilty to charges, all elements of the criminal offense are "in issue." **People v. Phelps, 288 Mich App 123 (2010)**(citing **Crawford v. Washington, 541 U.S. 36 (2004)**); see also **Apprendi v. New Jersey, 530 U.S. 466, 478 (2000).** The statutory language of **MCL § 750.520b(1)(a)** and **MCL § 750.520a(r)**, is clear and unambiguous, and when construed according to its plain and ordinary language, **People v. Stone, 463 Mich 558, 563 (2001)**(citing **Smith v. United States, 508 U.S. 223, 227 (1993)**), and when read **in pari materia**, to sustain **Petitioner**'s conviction of CSC-I under, **MCL § 750.520b(1)(a)**, the prosecution was required by the Due Process Clause of the Fourteenth Amendment, **U.S.Const.Amend.XIV.**, to prove the following elements beyond a reasonable doubt:

(1) that the **Petitioner** engaged in sexual penetration with another person (2) who was under 13 years of age. **MCL § 750.520b(1)(a)**; see also **Michigan Criminal Jury Instructions** ("**Mich. Crim. J.I.**") **20.1(2)(d)**(providing that, in order to convict a person of CSC-I under, **MCL § 750.520b(1)(a)**, the prosecution must prove that, "[t]he defendant engaged in a sexual act that involved entry by any part of one person's body or some object into the genital opening of another person's body")(alteration added). There was a complete lack of any evidence to support the requisite elements of "sexual penetration" with "another person," both of which are required to support **Petitioner**'s conviction of CSC-I under, **MCL § 750.520b(1)(a)**. Because the prosecution did not sustain its burden of proving the essential and necessary elements of "sexual penetration" with "another person," beyond a reasonable doubt, **id.**, **Petitioner**'s conviction of CSC-I under, **MCL § 750.520b(1)(a)**, cannot be said to have been obtained in accordance with this Court's governing due process legal principles that were "clearly established" in **Winship** and **Jackson**, at the time of the state court's decision.

As set forth herein above, because there was **no evidence** in this case, it would be impossible for a rational trier of fact to conclude that the elements of **"sexual penetration"** with **"another person"** were met beyond a reasonable doubt as required by the Due Process Clause of the Fourteenth Amendment under, **Winship** and **Jackson**.

In the case at hand, **Petitioner**'s conviction of CSC-I under, **MCL § 750.520b(1)(a)**, was obtained by the prosecution on the basis of an erroneous instruction that the state trial court gave to the jury that essentially reduced the quantum of evidence:

> "To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the Defendant Overton, engaged in a sexual act that involved entry into [D.P.]'s genital opening, **by [D.P.]'s finger.** Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed, or if semen was ejaculated."

Trial Trans. 6/7/11, at pp.5-11; Mich. Crim. J.I. 20.1(2)(d). Under the trial court's erroneous instruction to the jury, **Petitioner** was convicted of CSC-I under **MCL § 750.520b(1)(a)**, with less evidence than was required.

On Direct Appeal in the Michigan Court of Appeals

On direct appeal as of right to the Michigan Court of Appeals ("MCOA"), **Mich Const 1963, art I, § 20, in Docket No. 308999**, with respect to his conviction of CSC-I under, **MCL § 750.520b(1)(a), Petitioner**, argued that he could not be convicted of CSC-I under, **MCL § 750.520b(1)(a)**, where the evidence adduced at trial disclosed only that **Complainant** used her own finger to digitally penetrate her vagina, allegedly at the request of **Petitioner. Petitioner**, went on to argue that such conduct does not meet the element of "sexual penetration," as defined under, **MCL § 750.520a(r)**.

In rejecting **Petitioner**'s argument and affirming his convictions, the MCOA opined as follows:

> In this case, the evidentiary basis for [**Petitioner**'s] conviction was the victim's testimony that she inserted her finger inside of her vagina because [**Petitioner**] instructed her to do so under the pretext of teaching her how to use a tampon. A rational trier of fact could find on the basis of this evidence that the prosecution proved beyond a reasonable doubt that [**Petitioner**] engaged in sexual penetration with the victim. The fact that the victim's vagina was penetrated by her own finger, instead of one of [**Petitioners**] body parts, does not mean that the act did not constitute sexual penetration under **MCL 750.520a(r)**. Sexual penetration under **MCL 750.520a(r)** includes an "intrusion ... of any part of a person's body ... into the genital ... opening[] of another person's body ...." The use of the words "any part of a person's body" is another way of saying "any human body part." Thus, sexual penetration under **MCL 750.520a(r)** includes an intrusion of any human body part into the genital opening of another person. Here, [**Petitioner**] was engaged in the intrusion of a human body part - a finger - into the genital opening of another person's body - the victim's vagina - when the victim obeyed [**Petitioner**'s] instruction to digitally penetrate herself under the pretext of teaching her how to use a tampon.

App. D., at p.4 (empnasis and alteration added)(ellipses in original).

Here, the distorted construction of **MCL § 750.520a(r)**, essentially amounts to a judicial amendment to **MCL § 750.520a(r)**, by the MCOA to encompass the conduct

with which **Petitioner** was charged.

Discretionary Review in the Michigan Supreme Court

Petitioner, next sought discretionary review of the **October 31, 2013** decision of the MCOA affirming his convictions and sentences, **App. D.**, in an application for leave to appeal to the Michigan Supreme Court ("MSC"), in **Case No. 148347. App. E.** On **June 13, 2014**, in an Order, the MSC directed its clerk to:

> schedule oral argument on whether to grant the application or to take other action ... The parties shall submit supplemental briefs ... addressing whether the evidence was sufficient to show that the defendant engaged in the "intrusion, however slight, or any part of a person's body or of any object into the genital or anal openings of another person's body," MCL 750.520a(r), such that his conviction of first-degree criminal sexual conduct under MCL 750.520b can be sustained....

App. E. (emphasis and ellipses added). Following supplemental briefing and oral arguments having been heard, the MSC denied **Petitioner**'s application for leave to appeal in an Order dated, **December 29, 2014**, citing, "because we are not persuaded that the questions presented should be reviewed by this Court." **App. E.**

Two Justices of the MSC, **Justice McCormack** and **Justice Cavanagh**, filed dissenting opinions, in which both wrote that they would have vacated **Petitioner**'s conviction of CSC-I. Specifically, **Justice McCormack**, opined that:

> "As charged against the defendant, CSC-I requires 'engag[ing] in sexual penetration with another person' under the age of 13. MCL 750.520b(1)(a)...."
>
> * * * * *
>
> "The Court of Appeals was satisfied that the defendant "was engaged in the intrusion of a human body part - a finger - into the genital opening of another person's body - the victim's vagina when the victim obeyed [the defendant's] instruction to digitally penetrate herself under the pretext of teaching her how to use a tampon.'" "In other words, the panel found that the defendant had engaged in sexual penetration because he was responsible for the victim's **self**-penetration. The Court of Appeals ignored the plain language of the statute, however, which requires the intrusion of 'any part of a person's body' or 'any object' into '**another** person's body.' MCL 750.520a(r)."
>
> * * * * *
>
> "'Another' is not defined in the statute but "'[c]ourts are

to accord statutory words their ordinary and generally accepted meaning.' **Turner v. Auto Club Ins Ass'n, 448 Mich 22, 27 (1995).** The ordinary meaning of 'another' is, of course, someone else. In addition, the article 'a' in the phrase 'any body part of a person's body' underscores the statute's distinction between the person performing the penetration, on the one hand, and the person being penetrated, on the other. The Court of Appeals missed this distinction."

* * * * *

"Nor can the victim's finger constitute an '"object"' for the purposes of **MCL 750.520a(r).** While '"object"' is not defined within the statute, the ordinary meaning does not include body parts. And it is reasonable to infer that the Legislature did not view body parts as encompassed within the term '"object"' since **MCL 750.520a(r)** specifically refers to them as a '"part of a person's body"' and as separate from an '"object."' If body parts could be counted as objects, there would have been no need to separately include '"any part of a person's body"' in the statute; '"object"' could have done the work. Indeed, there is no authority construing the victim's own finger as an object for the purposes of **MCL 750.520a(r).**"

* * * * *

"Finally, the application of the CSC-I statute to the defendant's conduct here is in conflict with the pattern of the activities that are explicitly referred to in **MCL 750.520a(r)** ...."

* * * * *

"But the question is whether the defendant's instruction to the victim and her action in response was actually an intrusion "of any part of a person's body or of any '"object"' into '"another person's body"' so that his 25-to 40-year sentence for CSC-I has support under the statute. The plain language of **MCL 750.520b(1)(a)** simply does not encompass the defendant's specific conduct here. Accordingly, I would vacate the defendant's CSC-I conviction."

App. E. (emphasis and single quotation marks added)(alteration in original).

In turn, **Justice Cavanagh,** wrote:

"Call me a '"textualist"' or a '"strict constructionist"' if you must, but I agree with Justice McCormack's conclusion that defendant's conviction for first-degree criminal sexual conduct should be vacated because, on the basis of the plain language of **MCL 750.520a(r),** there was insufficient evidence to establish that defendant engaged in the '"intrusion, however slight, **of any part of a person's body or object into** the genital or anal openings of **another person's body**...."' (Emphasis added). Specifically, I agree that, under the plain language of the statute, a finger cannot also constitute an '"object"' because to hold otherwise

> would render surplusage the phrase '"part of a person's body,"' contrary to the rules of statutory interpretation. **In re MCI Telecom Complaint, 460 Mich 396, 414 (1999)**("[A] court should avoid construction that would render any part of the statute surplusage or nugatory.")...."
>
> * * * * *
>
> I agree with Justice McCormack that the text of the statute unambiguously supports defendant and, as a result, it is up to the Legislature to amend the statutory provision, and thus provide adequate notice, if it wishes to clarify that the statute's plain language is inconsistent with its true intent. See **People v. Turmon, 417 Mich 638, 655 (1983)**(explaining the indisputable proposition that due process requires that citizens "be apprised of conduct which a criminal statute prohibits"). Accordingly, I respectfully dissent."

App. E. (emphasis and ellipses in original).

This Court, in **Fiore v. White**, held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. 531 U.S. 225, 229-230 (2001)(citing **Jackson**, 443 U.S., at 316; **Winship**, 397 U.S., at 358). Because the statutory language of MCL § 750.520a(r) is clear and unambiguous, and when construing every word according to its plain and ordinary meaning, taking into account the context in which the words are used, **People v. Hack, 219 Mich App 299, 305(1996)**(citing MCL § 8.3a), **Petitioner**'s alleged conduct of directing **Complainant** to insert her finger into her vagina is simply not proscribed under MCL § 750.520a(r). Here, the Michigan Courts' construction of MCL § 750.520a(r) to encompass **Petitioner**'s alleged conduct was so clearly at variance with the statutory language, [and because it] ha[d] not the slightest support in prior Michigan decisions, the state court's retroactive application of the new interpretation cannot stand. See **Bouie v. City of Columbia, 378 U.S. 347, 356 (1967)**(alteration added). In addition, under the plain language of MCL § 750.520a(r), a "finger" cannot constitute an "object" because to hold otherwise would render surplusage the phrase "part of a person's body," contrary to the rules of statutory interpretation. **In re MCI Telecom Complaint, 460 Mich, at 414.**

Petition for Writ of Habeas Corpus

Following the exhaustion of his state-court remedies with respect to his claim of insufficient evidence to support his conviction of CSC-I under, **MCL 750.520b(1)(a)**, **Petitioner**, pursued federal review of his convictions in a petition for a writ of habeas corpus, pursuant to **28 U.S.C. § 2254**, in the United States District Court - Eastern District of Michigan (**"District Court"**), in **Case No. 2:17-cv-10892**, the **Hon. Judge Nancy G. Edmunds** presiding.

In rejecting **Petitioner**'s claim of insufficient evidence, the District Court concluded, in relevant part, that:

> **"Petitioner**'s sufficiency-of-the-evidence claim is a non-starter because it is based on a premise of state law rejected by the state courts ... [w]hat is essential to establish an element of a crime, like the question whether a given element is necessary, is a question of state law, of which federal habeas review is not available...."

District Court's Opinion and Order, PageID.1851-1852.

Under **28 U.S.C. § 2254**, a federal court must entertain a claim by a state prisoner that he or she is being held in "custody in violation of the Constitution or laws or treaties of the United States." **Jackson, 443 U.S., at 320-321.** Due to the deference that is owed to state court decisions in habeas corpus cases brought pursuant to **28 U.S.C. § 2254**, there is always a danger that federal courts will simply parrot the conclusions of the state courts, and, if there is any support for those conclusions, find the conclusions reasonable and not reviewable in habeas corpus proceedings. See **28 U.S.C. § 2254(e)(1).** It is easy, however, to forget that federal review of state court decisions, although deferential, involves a **determination by the federal court** whether the state court reached a decision that was contrary to, **or involved an unreasonable application of**, clearly established federal law, or **resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence. Williams, 529 U.S., at 412-413** (emphasis added); **Maples v. Stegall, 340 F.3d 433, 436 (6th Cir.2003); 28 U.S.C. § 2254(d)(1)-(2).**

Under this Court's decision in **Winship**, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim. **Jackson, 443 U.S., at 321.** The **Jackson** "standard must be applied with explicit reference to the substantive elements of a criminal offense as defined by state law." **Id., at 324, n.16.**

Although the **Jackson** "standard must be applied with explicit reference to the substantive elements of a criminal offense as defined by state law," **Jackson 443 U.S., at 324, n.16,** the MCOA judicial amendment of **MCL § 750.520a(r)**, to encompass **Petitioner**'s alleged conduct of directing **Complainant** to self-penetrate her vagina under the definition of "sexual penetration" is a matter of first impression in Michigan law and, is not, under the doctrine of **stare decisis**, a legally-binding definition of "sexual penetration" as the judicial amendment to the statute is contained in an unpublished per curiam opinion. **App. D.**

In support of **Petitioner**'s position that a victim's self-penetration does not fit within the statute's [MCL § 750.520a(r)] definition of "sexual penetration," **Petitioner** looks to a decision from a Supreme Court of another state. In **State v. Bryant, 670 A.2d 776 (1996)**, defendant was charged with first-degree molestation sexual assault under **Rhode Island General Laws** ("R.I. Gen. Laws") § 11-37-8.1, in which it was alleged that defendant directed a 5 year old child to assert her own finger into her vaginal orifice. **Bryant, 670 A.2d, at 779.** The Rhode Island statutes under which defendant was charged are virtually identical to **MCL § 750.520a(r)** and **MCL 750.520b(1)(a)**. There are two essential elements to first-degree molestation sexual assault under **R.I. Gen. Laws. § 11-37-8.1.** First, the defendant must **engage in sexual penetration of the victim.** Second, the victim is age 13 or younger. **State v. Girouard, 561 A.2d 882 (R.I. 1989).** "'Sexual Penetration' is defined as:

> Sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person's body or by any object into the **genital** or anal **openings** of **another person's body**, but emission of semen is not required."

R.I. Gen. Laws. § 11-37-1(8)(underlining in original)(emphasis added).

In reversing defendant's conviction of first-degree molestation sexual assault under, R.I. Gen. Laws § 11-37-8.1, the Rhode Island Supreme Court held that, under the state's rules of statutory interpretation, the state did not prove a violation of the conduct prohibited by § 11-37-8.1 as defined in § 11-37-1. Bryant, 670 A.2d, at 779. The Court in Bryant, went on to conclude that:

> The trial justice in effect amended this definition by including therein an interpretation that defendant engaged in sexual penetration **by directing the child to insert her own finger into her vaginal orifice.** Unfortunately, neither the trial justice nor this Court has any authority to supplement or to amend a statute enacted by the General Assembly.

Id. (emphasis added).

Under Michigan law, "[c]riminal statutes are to be **strictly construed,**" and cannot be extended beyond their clear and obvious language. **People v. Jahner, 433 Mich 490, 498 (1989).** As in **Bryant**, in the instant case, the state trial court and the MCOA in effect, amended the definition of "sexual penetration" under MCL § 750.520a(r), by including an interpretation that **Petitioner** engaged in "sexual penetration with another person" by directing **Complainant** to insert her own finger into her vagina. See **Bryant, 670 A.2d, at 779; App. D.** Furthermore, neither the state trial court nor the MCOA has any authority to supplement or to amend a statute enacted by the Michigan Legislature.

"When a statute includes an explicit definition, [a court] must follow that definition." **Bilski v. Kappos, 561 U.S. 593, 604 (2010)**(alteration added). To sustain a conviction of CSC-I under MCL § 750.520b(1)(a), requires the prosecution to prove beyond a reasonable doubt the essential elements of "sexual penetration" with "another person." Here, there was a complete lack of any evidence that

Petitioner engaged in "sexual intercourse ... or any other intrusion, however, slight, of any part of a person's body or of any object into the genital ... opening[] of another person's body...." **MCL 750.520a(r)**(alteration and ellipses added). Under the explicit definition of **MCL § 750.520a(r)**, there is no doubt that the prosecution was required to prove beyond a reasonable doubt that **Petitioner** engaged in sexual penetration with another person, or any other intrusion, however slight, of any part of a person's body or of any object into the genital opening of another person's body. See **Id.**

While the state courts identified the correct governing legal principle from this Court's decisions in **Jackson** and **Winship**, the state courts applied those principles to **Petitioner**'s case unreasonably, **28 U.S.C. § 2254(d)(1)**, and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. **28 U.S.C. § 2254(d)(2)**. Under **Jackson** and **Winship**, the Due Process Clause of the Fourteenth Amendment, **U.S.Const.Amend.XIV.**, requires the prosecution to prove beyond a reasonable doubt every element necessary to constitute the crime with which he is charged. **Jackson, 443 U.S., at 315.** Here, the prosecution failed to prove beyond a reasonable doubt the essential elements that **Petitioner** engaged in sexual penetration with another person as required under **MCL § 750.520a(r)** in order to support **Petitioner**'s conviction of CSC-I under **MCL § 750.520b(1)(a)**. As such, in convicting **Petitioner** of CSC-I without proving the essential elements of that crime beyond a reasonable doubt, not only resulted in an unreasonable application of **Jackson** and **Winship** to the facts of the case at hand, but, because of a complete lack of evidence of sexual penetration with another person, the state court's application of **Jackson** and **Winship** was "objectively unreasonable," in convicting **Petitioner** of CSC-I without evidence sufficient enough to sustain his conviction under the Due Process Clause. Even "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could

have found the essential elements of the crime [of CSC-I] beyond a reasonable doubt." **Jackson, 443 U.S., at 316** (alteration added). **Petitioner** is entitled to habeas corpus relief on his claim of insufficient evidence.

With respect to **Petitioner**'s insufficient evidence to support his conviction of CSC-I claim, reasonable jurists, including two Justices of the MSC, **App. F.**, would find the District Court's assessment of these claims debatable or wrong.

II. The United States Court of Appeals for the Sixth Circuit has Decided an Important Federal Question Regarding the Due Process Clause of the Fourteenth Amendment and the Assistance of Counsel Clause of the Sixth Amendment to the United States Constitution in a Way that Conflicts with Relevant Decisions of this Court.

Correct Governing Legal Principles

The Fourteenth and Sixth Amendments

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, in relevant part, provides that:

> "No State shall ... deprive any person of life, liberty, or property, without due process of law"[.]...

U.S.Const.Amend.XIV. (ellipses and alteration added); see also **Mich Const 1963, art I, § 17.** In turn, the Assistance of Counsel Clause of the Sixth Amendment to the United States Constitution, provides in part, that:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

U.S.Const.Amend.VI. (ellipses added); **Mich Const 1963, art I, § 20.**

Constitutionally Insufficient Notice

The gravamen of **Petitioner**'s claim is that he was provided constitutionally inadequate notice that his alleged conduct of instructing **Complainant**, to insert her finger into her vagina was proscribed by the statutory definition of "sexual penetration", **MCL § 750.520a(r)**, as held by the MCOA, for the first time, in an unpublished **per curiam** opinion. **App. D.**

"Clearly Established" Federal Law

At the time of the state court's decision in this case, this Honorable Court, in **Bouie v. City of Columbia, 378 U.S. 347 (1964)**, held that Due Process requires that a person accused of a crime must be given sufficient notice of his or her prohibited conduct. **U.S.Const.Amend.XIV. Id., at 352.** The Court's decision in **Bouie**, "clearly established" the legal principle that, "before a criminal liability may be imposed for violation of any penal law, due process requires "fair warning ... of what the law intends." **Id.** (citing **McBoyle v.United States, 283 U.S. 25, 27 (1931)**). The **Bouie** Court recognized that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." **378 U.S., at 353.** The Court went on to explain that an unforseeable judicial broadening of a statute is essentially an "ex post facto" violation because it criminalizes conduct that was not criminal prior to the court's new construction. **Id., 353.** Under **Bouie**, "[i]f a judicial construction of a criminal statute is an unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." **Id., at 354.**

More recently, this Court, in **Rogers v. Tennessee**, clarified **Bouie**, concluding that "judicial alteration of a common law doctrine of criminal law violates the principles of fair warning, and hence must not be given retroactive effect ..." **532 U.S. 451, 462 (2002)**. As demonstrated herein below, the state court's unexpected broadening of **MCL § 750.520a(r)** to reach the **Petitioner**'s alleged conduct did not provide fair warning as required by the Due Process Clause under **Bouie**. See also **Rabe v. Washington, 405 U.S. 313, 315 (1972)**.

Post-Conviction Motion for Relief from Judgement

After exhaustion of his state direct appeals, and prior to filing a petition for writ of habeas corpus under **28 U.S.C. § 2254**, **Petitioner** sought post-conviction relief in a motion for relief from judgement, pursuant to **MCR 6.500 et**

seq., in the state trial court, in Case No. 11-002103-FC. The procedure set forth under MCR 6.500 et seq. provides for review of judgements in criminal cases no longer subject to direct appeal to the Michigan Court of Appeals ("MSC") or the Michigan Supreme Court ("MSC"). **People v. Reed, 449 Mich 375, 407** (1995)(dissenting opinion).

The request for relief under MCR 6.500 et seq. must be in the form of a motion to set aside or modify the judgement. MCR 6.502(A). A defendant may file one and only one motion for relief from judgement filed with regard to a conviction. MCR 6.502(G)(1). A motion for relief from judgement is to be presented to the judge to whom the case was assigned at the time of the defendant's conviction. **People v. Swain, 288 Mich App 609, 629 (2010)**(citing MCR 6.504(A)).

Pursuant to MCR 6.508(D), the defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion,

> (1) seeks relief from the judgement of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> (b) actual prejudice from the alleged irregularities that support the claim for relief.

Swain, 288 Mich App, at 630; MCR 6.508(D)(1)-(3)(a)-(b). The "good cause" requirement of MCR 6.508(D)(3)(a), can be established by proving ineffective assistance of counsel. **Reed, 449 Mich, at 378; Swain, 288 Mich App, at 631** (citing **People v. Kimble, 470 Mich 305, 314 (2004)**). As used in MCR 6.508(D)(3)(b), "actual prejudice" means that, in a conviction following a trial, but for the

alleged error, the defendant would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(i). The court may waive the "good cause" requirement of MCR 6.508(D)(3)(a), if it concludes that there is a significant possibility that the defendant is innocent of the crime. Swain, 288 Mich App, at 630.

In his motion for relief from judgement, Petitioner, argued that he received constitutionally inadequate notice that his alleged conduct of instructing Complainant to insert her finger into her vagina was proscribed under MCL § 750.520a(r), and could constitute a conviction of Criminal Sexual Conduct - First-Degree ("CSC-I") under, MCL § 750.520b(1)(a). The trial court was not precluded from granting Petitioner the relief requested, in that, Petitioner's motion did not allege grounds for relief from his judgement of conviction and sentence that still is subject to challenge on appeal in the MCOA or MSC, MCR 6.508(D)(1); his motion does not allege grounds that were decided against him in a prior appeal or proceeding under MCR 6.500 et seq., MCR 6.508(D)(2); and though Petitioner does allege grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the judgement of conviction and sentence, MCR 6.508(D)(3), he has "good cause" for his failure to raise the ground on appeal, MCR 6.508(D)(3)(a), in the form of ineffective assistance of trial and appellate counsel, Reed, 449 Mich, at 378; Kimble, 470 Mich, at 314, as well as "actual prejudice" from the alleged irregularities that support his claim for relief, such that, in a conviction following his trial, but for the alleged error, Petitioner would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(i).

Basis of Petitioner's CSC-I Conviction

The instant case is a matter of first impression in Michigan jurisprudence. During the state-court trial, Complainant, testified that she was subjected to "virginity checks" by Petitioner. On one occasion in particular, Complainant, alleged that during one of the "virginity checks", Petitioner, allegedly told Complainant that her vaginal opening appeared bigger and that, she informed

Petitioner that it appeared bigger because she had begun using tampons. Trial Trans. 6/2/11, at p.64. She also told Petitioner that she believed she had put a tampon in the wrong hole. Id. According to Complainant, at that time, Petitioner, held a full-length mirror in front of her legs, id., and allegedly, instructed Complainant to insert her own finger into her vagina, to confirm "where the tampon goes." Id., at pp.65-66. At no time did Petitioner touch her or penetrate her with his finger. Id. It is this testimony upon which Petitioner's conviction of Criminal Sexual Conduct - First-Degree ("CSC-I") under, MCL § 750.520b(1)(a), rests.

After exhausting his state-court remedies on direct appeal with respect to his sufficiency-of-the-evidence claim, and having been denied relief, Petitioner pursued a post-conviction relief in the state courts in a motion for relief from judgement, pursuant to the procedure set forth in MCR 6.500 et seq. In his post-conviction motion, Petitioner, essentially argued that he was deprived of his constitutional right under the Due Process Clause of the Fourteenth Amendment, U.S.Const.Amend.XIV., of notice/fair warning that his alleged conduct of instructing Complainant to insert her own finger into her vagina, was criminal within the narrow and precise language of MCL §§ 750.520a(r) and 750.520b(1)(a). Petitioner asserted further that his trial counsel rendered him a constitutionally deficient performance, such that, counsel was not functioning as the "counsel" guaranteed to him by the Sixth Amendment, U.S.Const.Amend.VI., when trial counsel failed to move the trial court in a motion for dismissal or for a directed verdict on the grounds that, Petitioner's right to due process was violated for failing to received adequate notice that his alleged conduct was proscribed under MCL § 750.520b(1)(a), and that he also received ineffective assistance of appellate counsel when appellate counsel failed to raise the above-mentioned grounds on direct appeal.

On October 5, 2015, the trial court issued an order denying Petitioner's

post-conviction motion under MCR 6.500 et seq. App. I. In denying Petitioner's motion, the trial court, reasoned, in part, as follows:

> Significantly, the Court of Appeals did not broaden the definition as [Petitioner] suggests. Rather, the definition is simply broad enough to include self-penetration by coercion. In this regard, engaging in sexual penetration with the victim for purposes of the CSC-1 statute, **does not necessitate that [Petitioner], himself, must actually conduct the intrusion.** In other words, the fact that the victim's finger was not intruded into the body of another person, but rather, into her own, is not immaterial, since the **prohibited conduct does not require any part of [Petitioner's] body to be in contact with the victim;** coercing of self-penetration is an offense under the statute. Therefore, [Petitioner] had sufficient notice that is conduct was unlawful.

Trial Court Opinion of 10/5/15, at p.4 (emphasis and alteration added). Following the trial court's order, **Petitioner**, in an application for leave to appeal the trial court's decision, sought review of the trial court's decision in the MCOA, in **Docket No. 330875.** On **April 28, 2016,** the MCOA, in standard form, denied **Petitioner's** application on the premise that, "defendant failed to establish that the trial court erred in denying his motion for relief from judgement." **App. H.** Next, **Petitioner** approached the MSC in an application for leave to appeal the MCOA decision, in **Case No. 153943.** The MSC issued an order dated **December 28, 2016,** denying **Petitioner's** application, citing, "DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under **MCR 6.508(D).**" **People v. Overton, 500 Mich 922 (2016); App. G.** (uppercase letters in original).

On **March 21, 2017, Petitioner,** pursued federal review of his conviction through a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court - Eastern District of Michigan (**"District Court"**), in **Case No. 2:17-cv-10892.** In his petition, **Petitioner,** argued that his conviction of CSC-I under **MCL § 750.520b(1)(a),** is based on constitutionally insufficient evidence, in violation of the Due Process Clause of the Fourteenth Amendment, **U.S.Const.Amend.XIV.,** and that he was not afforded the notice required

by the Due Process Clause of the Fourteenth Amendment, id., that his alleged conduct was proscribed under MCL § 750.520b(1)(a), where the state trial court and the MCOA, in a manner inconsistent with the state's rules of statutory interpretation, MCL § 8.3a; Macomb Co. Prosecuting Atty, 464 Mich, at 158, judicially broadened the narrow and precise language of MCL § 750.520a(r), to include "self-penetration" to the statute's unambiguous definition of "sexual penetration". Id. For reasons discussed below, on June 4, 2019, the District Court entered an Order denying Petitioner's petition. App. C. The District Court, however, granted a Certificate of Appealability with respect to Petitioner's lack-of-notice claim. Id.

On June 28, 2019, Petitioner filed a timely Notice of Appeal in the District Court. Petitioner then sought to expand the Certificate of Appealability to include, inter alia, his sufficiency-of-the-evidence claim in a motion to the United States Appeals Court for the Sixth Circuit. On November 19, 2019, in Case No. 19-1736, the Sixth Circuit Court denied Petitioner's motion. App. B. In his appeals brief, Petitioner, argued that his right to due process was violated when the state failed to afford him constitutionally sufficient notice that his alleged conduct was proscribed under, MCL § 750.520a(r), where the state trial court and MCOA judicially broadened the statute's definition of "sexual penetration" to include "self-penetration".

On July 31, 2020, the Sixth Circuit Court denied Petitioner's appeal of the District Court's decision, essentially citing that, "[b]ecause other courts have understood near-identical statutes to cover coerced or directed self-penetration, [Petitioner] cannot show an error significant enough to warrant habeas relief. We AFFIRM." App. A. (alteration added)(uppercase letters in original). In affirming the District Court's decision, the Sixth Circuit Court, in part, concluded that:

> But even if Overton offers a plausible, perhaps even the best, reading of the statute, our analysis focuses on whether Overton had fair notice that Michigan courts could have found that his conduct violated the first-degree criminal sexual conduct

statue.

> Until Overton's case, Michigan courts had never decided whether coerced self-penetration fell under Michigan's sexual penetration statute. But other jurisdictions have interpreted similarly worded statutes to cover conduct nearly identical to Overton's. (emphasis added). For instance, the Ninth Circuit held that a defendant who caused "his victim to penetrate herself" committed sexual penetration under a Guam statute identical to Michigan's. **Guam v. Quidachay**, 374 F.3d 820, 822 (9th Cir.2004). There, the victim's "finger became an object operating at [the defendant's] command. [The defendant] successfully and criminally intruded with this object into a body which was not his .... He engaged in sexual penetration with the victim." **Id.** (emphasis added)(alteration and ellipses in original). Considering similarites between the conduct and the statute here and those in **Quidachay**, it seems unlikely that Overton's state criminal conviction and unsuccessful appeal were so unexpected and heterodox as to offend the Due Process Clause.

App. A.

The Sixth Circuit Court went on to opine that, other state courts have found that digital self-penetration at another's behest can amount to sexual penetration where the victim's finger acts as the defendant's "object," and cites decisions of other jurisdictions that include, **Kirby v. State**, 625 So.2d 51, 55 (Fla. Dist. Ct. App. 1993)(finding conduct identical to Overton's to constitute sexual penetration); **People v. Keeney**, 29 Cal Rptr.2d 451, 453 (Cal. Ct. App. 1994)(same). App. A. In the end, Overton needed only to know that his conduct was punishable under the statute, and not under the exact rationale the Michigan court would use. See **Kelsey v. Pope**, 809 F.3d 849, 866 (6th Cir.2016). Id. Both **Kirby** and **Keeney**, which held that forced self-penetration constituted sexual penetration under similar statutes as Michigan's, suggest that a state court could have found Overton's conduct criminalized by the Michigan statute. **Id.** (emphasis added).

Petitioner submits that the Sixth Circuit Court's reliance on **Quidachay**, **Kirby**, and **Keeney**, as involving conduct identical to **Petitioner**'s to constitute sexual penetration suggest that a Michigan court could have found **Petitioner**'s conduct criminalized under **MCL § 750.520a(r)**, is, at best, misplaced.

Michigan Rules of Statutory Interpretation

Under Michigan law, "[w]hen interpreting a statute, [the] primary goal is to ascertain and give effect to the Legislature's intent." **People v. Sharp, 502 Mich 313, 327 (2018)**(citation omitted)(alteration added). "If the statute's language is clear and unambiguous, [it is] assume[d] that the Legislature intended its plain meaning and [to] enforce the statute as written." **Id.** (alteration added). In doing so, we assign each word and phrase its plain and ordinary meaning within the context of the statute. **Id.** A court "must also avoid any construction that would render any part of a statute surplusage or nugatory, if possible." **Id.** "Criminal statutes are to be strictly construed," and cannot be extended beyond their clear and obvious language. **People v. Jahner, 433 Mich 490, 498 (1989).** Finally, "[i]f the language is unambiguous, judicial construction is precluded. **Macomb Co. Prosecuting Atty v. Murphy, 464 Mich 149, 158 (2001)**(internal citations omitted)(alteration added).

First-Degree Criminal Sexual Conduct Statute

As written and enacted by the Michigan Legislature, the Criminal Sexual Conduct Conduct - First Degree statute reads as follows:

> **(1)** A person is guilty of criminal sexual conduct in the first degree if **he** or she **engages in sexual penetration with another person** and if any of the following circumstance exists:
>
> **(a)** That **other person** is under 13 years of age.

MCL § 750.520b(1)(a)(emphasis and underlining added). In turn, the Michigan Legislature parses "sexual penetration" as:

> sexual intercourse, cunnilingus, fellatio, anal intercourse, or **any other intrusion**, however slight, **of any part of a person's body** or **any object into the genital** or anal openings **of another person's body**, but emission of semen is not required.

MCL § 750.520a(r)(emphasis and underlining added).

As mentioned above, under the Michigan rules of statutory interpretation, the primary goal is to ascertain and give effect to the Legislature's intent. See

Sharp, 502 Mich, at 327. Because the language of the criminal statute is clear and unambiguous, Michigan court are to assume that the Legislature intended its plain meaning and for the statute to by enforced as written. See **Id.** When assigning each word and phrase its plain and ordinary meaning within the context of the statute, it is obvious that, in defining the phrase "sexual penetration", the Legislature's intent is to **require one person to physically penetrate another person.** See **Id.**; see also **MCL § 750.520a(r).** A litany of Michigan judicial decisions confirms this requirement.

In confirming **Petitioner**'s conviction of CSC-I under, **MCL § 750.520b(1)(a)**, and rejecting his sufficiency-of-the-evidence claim that there was no evidence to prove the essential element of "sexual penetration" as defined under **MCL § 750.520a(r)**, the MCOA incorrectly concluded that:

> The use of the words "any part of a person's body" is another way of saying "any human body part." Thus, sexual penetration under MCL 750.520a(r) includes an intrusion of any human body part into the genital opening of another person. Here, Overton was engaged in the intrusion of a human body part - a finger - into the genital opening of another person's body - the victim's vagina - when the victim obeyed Overton's instruction to digitally penetrate herself....

MCOA Per Curiam Opinion (10/31/2013), Docket No. 308999, at p.4. In a bid to rationalize its expansion of the narrow and precise language of **MCL § 750.520a(r)** to include "self-penetration" to the statutory definition of "sexual penetration", the MCOA wrote in a footnote:

> Sexual penetration would still exist under MCL 750.520a(r) if either Overton, himself, digitally penetrated the victim's genital or anal openings, or Overton instructed the victim to digitally penetrate his own anal opening. In both scenarios, there is an intrusion of a human body part into the genital or anal openings of another person's body ... In contrast, if Overton had simply digitally penetrated himself in the victim's presence, he would not be engaged in sexual penetration under MCL 750.520a(r) because he would not be engaged in the intrusion of a human body part into the genital or anal opening of another person; rather, he would be engaged in the intrusion of a human body part into himself.

Id., at p.4, n.2.

In her dissenting opinion, Michigan Supreme Court ("MSC") Justice McCormack addressed the holding of the MCOA confirming **Petitioner**'s conviction of CSC-I under, **MCL § 750.520b(1)(a)**. In stating that she would reverse **Petitioner**'s conviction of CSC-I, Justice McCormack, concluded that, the MCOA, in finding that **Petitioner** has engaged in sexual penetration because he was responsible for the victim's **self**-penetration, the MCOA ignored the plain language of the statute, however, which requires the intrusion of "any part of a person's body" or "any object" into "**another** person's body." **People v. Overton, 497 Mich 941 (2014)**(emphasis in original); **App. F., at p.2.** Justice McCormack went on to opine that:

> "Another" is not defined in the statute but "[c]ourts are to accord statutory words their ordinary and generally accepted meaning." The ordinary meaning of "another" is, of course, someone else. In addition, the article "a" in the phrase "any body part of a person's body" underscores the statute's distinction between the person performing the penetration, on the one hand, and the person being penetrated, on the other. The Court of Appeals missed this distinction.
>
> Nor can the victim's finger constitute an "object" for the purposes of MCL 750.520a(r). While "object" is not defined within the statute, the ordinary meaning does not include body parts. And it is reasonable to infer that the Legislature did not view body parts as encompassed within the term "object" since MCL 750.520a(r) specifically refers to them as a "part of a person's body" and as separate from an "object." If body parts could be counted as objects, there would have been no need to separately include "any part of a person's body" in the statute; "object" could have done the work. Indeed, there is no authority construing the victim's own finger as an object for purposes of MCL 750.520a(r).
>
> Finally, the application of the CSC-I statute to the defendant's conduct here is in conflict with the pattern of the activities that are explicitly referred to in MCL 750.520a(r). As examples of "sexual penetration," the statute lists "sexual intercourse, cunnilingus, fellatio, anal intercourse." MCL 750.520a(r). The only acts enumerated are those requiring physical contact between two people. Under the doctrine of **ejusdem generis**, ... the intrusions targeted by the statute are restricted to those having the same character as the ones enumerated, i.e., acts involving physical conduct between two people.

Id. (emphasis in original)(ellipses added).

In a separate dissenting opinion, MSC Justice Cavanagh, reasoned that:

> Defendant's conviction for first-degree criminal sexual conduct should be vacated because, on the basis of the plain language of MCL 750.520a(r), there was insufficient evidence to establish that defendant engaged in "intrusion, however slight, **of any part of a person's body** or of any object **into** the genital or anal openings of **another person's body**...." Specifically, I agree that, under the plain language of the statute, a finger cannot also constitute an "object" because to hold otherwise would render surplusage the phrase "part of a person's body," contrary to the rules of statutory interpretation. I also agree that the phrase "a person's body" when juxtaposed against the phrase "another person's body" excludes the intrusion of an alleged victim's finger into his or her own genital or anal openings at a defendant's direction....
>
> [T]he text of the statute unambiguously supports defendant and, as a result, it is up to the Legislature to amend the statutory provisions, and thus provide adequate notice, if it wishes to clarify that the statute's plain language is inconsistent with its true intent....

People v. Overton, 497 Mich 941 (2014)(emphasis in original)(ellipses added)(citations omitted).

Due Process Requirement of Fair Warning/Adequate Notice"

Before criminal liability may be imposed for violation of any penal law, due process requires "fair warning ... of what the law intends." **McBoyle v. United States, 283 U.S. 25, 27 (1931)**(ellipses in original). It is necessary, at a minimum, that a statute gives fair notice that certain conduct is proscribed. **Rabe v. Washington, 405 U.S. 313, 315 (1972); People v. Turmon, 417 Mich 638, 655 (1983)**(explaining the indisputable proposition that due process requires that citizens "be apprised of conduct which a criminal statute prohibits"). In **United States v. Lanier,** this Honorable Court, explained that there are three related manifestations of the fair warning requirement:

> First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second, as a sort of "junior version of the vagueness doctrine," the cannon of strict construction of criminal statutes, or rule lenity, ensure fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the

> requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute, either standing alone or as construed made it reasonably clear at the relevant time that the defendant's conduct was criminal.

520 U.S. 259, 266-267 (1997)(alteration added). Constitutionally, said the **Lanier** Court, fair warning is given only if an ambiguity in a criminal statute is construed to apply to conduct that the statute clearly designates as criminal. **Id., at 266.**

Novel Construction of a Criminal Statute

Prior to **Petitioner**'s alleged conduct, to sustain a conviction of CSC-I under, **MCL § 750.520b(1)(a)**, as apparent in a long line of judicial decisions, Michigan courts have interpreted the statutory definition of "sexual penetration" as requiring the intrusion of "any part of a person's body" or "any object" into "**another** person's body," **MCL § 750.520a(r)**(emphasis added), or requiring **one person to physically penetrate another person**. See Id. (emphasis added).

For the first time in **Petitioner**'s case, however, the MCOA expanded the narrow and precise statutory language of **MCL § 750.520a(r)**, to encompass "self-penetration" based on the allegation that **Petitioner** instructed **Complainant** to insert her own finger into her vagina. In expanding the narrow and precise statutory language of **MCL § 750.520a(r)**, to include "self-penetration" to the statute's definition of "sexual penetration," the MCOA applied a novel construction of the statue that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, see **Lanier, 520 U.S., at 266-267**, and in doing so, violated the Due Process Clause of the Fourteenth Amendment. **U.S.Const.Amend.XIV.** Further, if the statute did forbid "self-penetration," which it does not, it does so in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. See **Lanier, 520**

U.S., at 266-267. Finally, MCL § 750.520a(r), either standing alone or as construed did not make it reasonably clear at the relevant time that Petitioner's conduct was criminal. See Id.

In affirming the District Court's decision, the Sixth Circuit Court found that, its analysis focuses on whether [Petitioner] had fair notice that Michigan courts could have found that his conduct violated the first-degree criminal sexual conduct statute. See App. A., p.10. In reaching the conclusion that Michigan courts could have found Petitioner's conduct criminal under, MCL § 750.520b(1)(a), as defined by the definition of "sexual penetration" under, MCL § 750.520a(r), the Sixth Circuit Court looked to judicial decisions of other states that have interpreted similar statutes that found "self-penetration" to be criminal, such as, the cases of Kirby v. State, 625 So.2d 51, 55 (Fla. Dist. Ct. App. 1993)(finding conduct identical to Petitioner's to constitute sexual penetration); and People v. Keeney, 29 Cal Rptr.2d 451, 453 (Cal. Ct. App. 1994)(same). App. A., at p.11. In addition to those cases, the Sixth Circuit Court points also to a federal case, Guam v. Quidachay, 374 F.3d 820, 822 (9th Cir.2004). While each of those cases do involve allegations of victim "self-penetration," they are clearly distinguishable from the case presently at bar, in that, Petitioner's alleged conduct does not involve force or coercion. For instance, in Quidachey, during an armed robbery, defendant, at gun point, instructed the victim to remove her clothes and to finger herself by inserting her finger in her vagina. See Id.

In denying Petitioner habeas relief, the District Court looked to People v. Hack, 219 Mich App 299 (1986), and held that "it was not unexpected or indefensible that the state court would read 'another person' as referring only to someone other than defendant...." PageID.1855. In Hack, the MCOA found that the definition of "sexual penetration with another" in the sexual conduct statute included an act where a defendant directed a person to engage in sexual penetration with another third person. Hack, 219 Mich App, at 303.

Contrary to the District Court's decision, the Michigan statute's clear and narrow definition of "sexual penetration" along with a litany of Michigan judicial decisions interpreting the statute's plain language, make it clear that "sexual penetration" **requires one person to physically penetrate another person.** Unlike **Hack**, where there was penetration by one of "another," it would be completely unexpected and indefensible for the clear language of **MCL § 750.520a(r)** to encompass the act of self-penetration. Each of the judicial decisions cited by the District Court and the Sixth Circuit Court held that self-penetration can satisfy the element of "sexual penetration" within that district.

In both the District Court and the Sixth Circuit Court, **Petitioner**, cited the case of **State v. Bryant, 670 A.2d 766 (R.I. Sup. Ct. 1996)**, which the Sixth Circuit Court acknowledged, but gave inadequate consideration despite being virtually indistinguishable from **Petitioner's** case. In **Bryant**, the Supreme Court of Rhode Island was tasked with addressing a statutory definition of "sexual penetration" that is identical to the one at issue here. There, defendant was charged with first-degree molestation sexual assault, pursuant to **Rhode Island General Laws ("R.I. Gen. Laws") § 11-37-8.1**, in which the defendant directed a 5 year old child to insert her own finger into her vaginal orifice. **Bryant, 670 A.2d, at 799.** The statute under which **Bryant** was charged requires the same two essential elements of **MCL § 750.520b(1)(a)**. Pursuant to **R.I. Gen. Laws § 11-37-8.1: (1)** the defendant must engage in sexual penetration of the victim and **(2)** the victim is age 13 or younger. **State v. Girauard, 561 A.2d 882 (R.I. 1989)**(citation omitted).

"Sexual Penetration" is statutorily defined as:

> "Sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, **by any part of a person's body** or **by any object** into the **genital** or anal **openings** of **another person's body**, but emission of semen is not required."

R.I. Gen. Laws § 11-37-1(8)(emphasis added); **MCL § 750.520a(r)**. Reversing **Bryant's**

conviction of first-degree molestation sexual assault under R.I. Gen. Laws § 11-37-8.1, the Supreme Court of Rhode Island, held that, under the state's rules of statutory interpretation, the state did not prove a violation of the conduct prohibited by § 11-37-8.1, as defined in § 11-37-1. Bryant, 670 A.2d, at 799. In reversing Bryant's conviction, the court reasoned that:

> The trial justice in effect amended this definition by including therein an interpretation that defendant engaged in sexual penetration by directing the child to insert her own finger into her vaginal orifice. Unfortunately, **neither the trial justice nor this Court has any authority to supplement or to amend a statute enacted by the General Assembly.**

Id. (emphasis added). As in Bryant, here, neither the state trial court or the MCOA had any authority to judicially enlarge or to amend by applying a novel construction of a criminal statute, MCL § 750.520a(r), to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. Lanier, 520 U.S., at 266 (citation omitted). In this instance, under Michigan law with respect to the rules of statutory interpretation, because MCL § 750.520a(r) is a criminal statute, the state courts were required to strictly construe the statute and to refrain from extending the statute beyond its clear and obvious language. See Jahner, 433 Mich, at 498. Moreover, because the criminal statute's language is unambiguous, not only was judicial construction precluded by the state courts, but the statute was required to be enforced as written. See Macomb Co. Prosecuting Atty, 464 Mich, at 158. Finally, in judicially expanding the scope of the criminal statute to include "self-penetration" to its definition of "sexual penetration," MCL § 750.520a(r), the state courts invaded the province of the Michigan Legislature. It is up to the Legislature to amend the statutory provision, and thus provide adequate notice, if it wishes to clarify that the statute's plain language is inconsistent with its true intent. See People v. Turmon, 417 Mich 638, 655 (1983).

Unforeseeable and Indefensible Judicial Expansion of a Criminal Statute and

Retroactive Application Thereof

The Ex Post Facto Clause of the United States Constitution, provides simply that, "No State shall ... pass any ... ex post facto Law[.]" **Rogers v. Tennessee, 532 U.S. 451, 456 (2001)**(citing **Art I, §10, Cl.1**); **Carmell v. Texas, 529 U.S. 513, 521 (2000)**(citation omitted); see also **Mich Const 1963, art I, § 10.** There are four types of laws to which the ex post facto clause extends:

> (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was, when committed; (3) every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and (4) every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. **Carmell, 529 U.S., at 522** (citing **Calder v. Bull, 3 U.S. 386 (1798)**(seriatim opinion of Chase, J.).

Rogers, 532 U.S., at 456 (citation omitted).

As the text of **Art I, §10, Cl.1**, makes clear, it "is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of Government. **Rogers, 532 U.S., at 456** (citation omitted). This Court, however, has observed that limitations on ex post facto judicial decision making are inherent in the notion of due process, **id.**, and that, challenges to retroactive applications of judicial decisions must proceed under the Due Process, not the Ex Post Facto Clause. See **Id., at 460-462.** "[C]ore due process concepts, said the Court, in **Rogers**, [include] notice, foreseeability, and, in particular, the right to fair warning[.]" **Id., at 459** (alteration added). Using these due process principles, the Court has held that retroactive application of judicial decisions that unforeseeably expand the scope of criminal liability can violate a defendant's due process rights. See e.g., **Marks v. United States, 430 U.S. 188, 190 (1977); Bouie v. City of Columbia, 378 U.S. 347, 351 (1964).**

"[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as **Art I, §10,**

Cl.1, of the Constitution forbids...." If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State supreme court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. **Marks**, 430 U.S., at 192 (citing **Bouie**, 378 U.S., at 353-354); **People v. Wilson**, 500 Mich 521, 531 (2017)(citation omitted). Here, **Petitioner**, was charged with a single count of CSC-I under, MCL § 750.520b(1)(a), on the basis of **Complainant**'s allegation that **Petitioner** instructed her to insert her own finger into her vagina. At the time **Petitioner** was charged with CSC-I under, MCL § 750.520b(1)(a), the prosecution was required to prove beyond a reasonable doubt that, **Petitioner** "engage[d] in sexual penetration **with** [**Complainant**] and [**Complainant**] is under 13 years of age." See MCL § 750.520b(1)(a)(emphasis and alteration added). As used in the statute, the phrase "sexual penetration" is statutorily defined, in relevant part, as: "any other intrusion, however slight, of any part of a person's body or any object into the genital ... opening[] of another person's body, but emission of semen is not required." MCL § 750.520a(r)(alteration added). Until **Petitioner**'s case, as evident in a long line of judicial decisions, Michigan courts have never decided whether instructed "self-penetration" fell under the criminal statute, and have interpreted its plain language as requiring sexual penetration of one person by another.

To ensure **Petitioner**'s conviction of CSC-I under, MCL § 750.520b(1)(a), on the allegation of **Petitioner** instructing **Complainant** to insert her own finger into her vagina, the state trial court, and later, the MCOA, engaged in an unforeseeable and indefensible judicial expansion of the statutory definition of "sexual penetration" to include "self-penetration," under MCL § 750.520a(r), and in doing so, deprived **Petitioner**'s due process right to fair warning/adequate notice of what the law intends. See **McBoyle v. United States**, 283 U.S. 25, 27 (1931).

Further, pursuant to the rules of statutory interpretation with respect to criminal statutes, both the state trial court and the MCOA were required to strictly construe, **Jahner, 433 Mich, at 498**, and enforce the statute as written. **Sharp, 502 Mich, at 327.** When interpreting a statute, the primary goal is to ascertain and give effect to the Legislature's intent. **Id.** When construed according to its plain and ordinary meaning within the context of the statute, its obvious that, in defining the phrase "sexual penetration," the Legislature's intent is to **require one person to physically penetrate another person. Id.; MCL § 750.520a(r).** Simply put, because the language of both **MCL §§ 750.520b(1)(a)** and **750.520a(r)**, is clear and unambiguous, judicial construction was precluded. **Macomb Co. Prosecuting Atty, 464 Mich, at 158.**

In **Bouie v. City of Columbia**, the Court considered the South Carolina Supreme Court's retroactive application of its construction of the State's criminal trespass statute to the petitioner's in that case. The Court went on to opine that:

> The statute prohibited "entry upon the land of another ... after notice from the owner or tenant prohibiting such entry...." The South Carolina court construed the statute to extend to patrons of a drug store who had received no notice prohibiting their entry into the store, but had refused to leave the store when asked. Prior to the court's decision, South Carolina cases construing the statute had uniformly held that conviction under the statute required proof of notice before entry. None of those cases, moreover, had given the "slightest indication that, that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave."

Rogers, 532 U.S., at 457 (citing **Bouie, 378 U.S., at 349 n.1**). The Court held that South Carolina court's retroactive application of its construction to the store patrons violated due process. Reviewing decisions which held criminal statutes "void for vagueness" under the Due Process Clause, we noted that this Court has often recognized the basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." **Id., at 457** (citing **Bouie, 378 U.S., at 350**).

Not unlike **Bouie**, here, the criminal statute prohibited the "engag[ing] is **sexual penetration with another person** ....," MCL § 750.520b(1)(a), "... or any other **intrusion**, however slight, or **any part of a person's body** or **any object into the genital** ... opening[] **of another person**...." MCL § 750.520a(r)(emphasis, ellipses, underlining and alteration added). The MCOA construed the statute to extend its definition of "sexual penetration" to include "self-penetration." See **Id.** Prior to the decision of the MCOA, Michigan cases construing the statute had uniformly held that conviction under MCL § 750.520b(1)(a), **required the physical penetration of one person by another person.** See **Id.** While the prosecutor, state courts, federal District Court, and the Sixth Circuit Court, allude to **People v. Hack, 219 Mich App 299 (1986)**, for the proposition that a Michigan court had previously addressed "self-penetration" as being criminal under **MCL § 750.520b(1)(a)** and **MCL § 750.520a(r)**, **Hack** involved the defendant directing a person to engage in sexual penetration with another third person, **id., at 303**, which is conduct clearly distinguishable from **Petitioner**'s alleged conduct in this case.

Both the District Court and the Sixth Circuit Court looked to judicial decisions of other state courts for the same proposition. See **Kirby v. State, 625 So.2d 51, 55 (Fla. Dist. Ct. App. 1993)**; **People v. Keeney, 29 Cal Rpter.2d 451, 453 (Cal. Ct. App. 1994)**; and **Guam v. Quidachey, 374 F.3d 820, 822 (9th Cir.2004)**. In those cases, unlike **Petitioner**'s, involve victims being forced to penetrate themselves at gunpoint or by force. In addition, **Petitioner** can not be required to know every holding in every jurisdiction before asserting a fair notice violation. See **Rogers, 532 U.S., at 464** ("Due process, of course, does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment"). After all, "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person "fair warning" that his own State's statute meant something quite different

from what its words said." **Bouie, 378 U.S., at 359-360.** Unlike **Hack**, where there was penetration by one of "another," it would be completely unexpected and indefensible for the clear language of **MCL § 750.520a(r)** to encompass the act of "self-penetration." Moreover, **Hack** is distinguishable from **Petitoner's** case because the court held forcing someone to penetrate **another (i.e.,** third person penetration) fits the definition of "sexual penetration" under, **MCL § 750.520a(r).** The key distinction is that there was penetration by **another**, which again is not the same as "self-penetration." Many statutes from other states with similar language to the Michigan statute, do include self-penetration as a prohibited conduct and clearly states so in the definition. For instance, in Rhode Island, "'[s]exual penetration' means sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person's body or by any object into the genital or anal openings of another person's body, **or the victim's own body upon the accused's instruction...." 11 R.I. Gen. Laws § 11-37-1** (emphasis added). Self-penetration was **only** criminalized after the statute was amended to include an intrusion of the victim's body upon the accused's instruction. See also **Va. Code Ann. § 18.2-67.2; Wis.Stat.Ann. § 940.225; Minn. Stat.Ann. § 609.341.**

In the instant case, the rulings of the state courts that self-penetration, where there is no contact with another person, is included within the statutory definition of sexual penetration, the state courts' adjudication of **Petitioner's** claim involved an objectively unreasonable application of, clearly established federal law, as determined by this Court in **Bouie**, because the adjudication impermissibly expanded the "narrow and precise statutory language" and amounted to a retroactive application of a new interpretation of a criminal statute, in violation of the Due Process Clause. The facts before the Court in this case operate as a bar for a conviction of criminal sexual conduct in the first degree under the Michigan statute because an essential element of the crime is missing -

penetration by one of another.

Procedural Default Under MCR 6.508(D)(3)(a)-(b)

Pursuant to MCR 6.508(D)(3), because Petitioner raised grounds in his post-conviction motion under MCR 6.500 et seq., that could have been raised on appeal from the conviction and sentence, in order to obtain relief, Petitioner, must demonstrate "good cause" for his failure to raise such grounds on appeal, MCR 6.508(D)(3)(a), and "actual prejudice" from the alleged irregularities that support his claim for relief, MCR 6.508(D)(3)(b). Actual prejudice means that, in a conviction following a trial, but for the alleged error, Petitioner, would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(i). People v. Swain, 288 Mich App 609, 630 (2010). The "good cause" requirement of MCR 6.508(D)(3)(a), can be established by proving ineffective assistance of counsel. People v. Reed, 449 Mich 375, 378 (1995). In addition, the trial court may waive the "good cause" requirement if it concludes that there is a significant possibility that Petitioner is innocent of the crime. MCR 6.508(D)(3)(b).

Ineffective Assistance of Trial and Appellate Counsel

The Counsel Clause of the Sixth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, U.S.Const.Amends.VI.;XIV., guarantees a criminal defendant the right to "Assistance of Counsel for his defense." Strickland v. Washington, 466 U.S. 668, 685 (1984). The right to counsel is the right to the effective assistance of counsel. Id., at 686 (citation omitted). Under Strickland, there are two components to prove a claim of ineffective assistance of counsel. First, the Petitioner must show that counsel's performance was deficient. Second, the Petitioner must show that the deficient performance prejudiced the defense. Id., at 687. In Evitts v. Lucey, 469 U.S. 387 (1985), this Court held that, the Due Process Clause guarantees criminal defendants the effective assistance of appellate counsel on an appeal as of right. Claims of ineffective assistance of appellate counsel are subject to the

Strickland standard as well. Evitts, 469 U.S., at 392 (citations omitted).

While it is true that Petitioner could have raised the issue of "fair warning/inadequate notice" on his appeal as of right in the MCOA, Petitioner, has "good cause" for his failure to do so in the form of ineffective assistance of trial and appellate counsel. Here, Petitioner's trial counsel rendered him a constitutionally deficient performance, such that, counsel was not functioning as the "counsel" guaranteed to Petitioner, when counsel failed to move the trial court in a motion for dismissal on the basis of a lack of "fair warning/inadequate notice." Petitioner, received no prior notice that his alleged conduct was criminal under MCL § 750.520b(1)(a); MCL 750.520a(r). Any reasonably competent trial attorney would have known Petitioner had a due process right that entitled him to "fair warning," and that the judicial amendment to the criminal statute to encompass his alleged conduct deprived him of that right. In addition, Petitioner, was deprived of his due process right to the effective assistance of appellate counsel on his appeal as of right when his appellate attorney failed to identify and raise on Petitioner's direct appeal Petitioner's ineffective assistance of trial counsel claim where trial counsel failed to file a motion for dismissal on the basis of inadequate notice. Strickland, 466 U.S., at 687; Evitts, 469 U.S., at 392. Any reasonably competent appellate attorney would have identified and raised the issue on direct appeal. Had trial counsel moved for dismissal on the basis of inadequate notice, it could have very well resulted in dismissal of the charge against him. Strickland, 466 U.S., at 688. Had appellate counsel raised the dead-bang winner on direct appeal, there is a substantial probability that his charge of CSC-I under MCL § 750.520b(1)(a); MCL § 750.520a(r), would have been vacated in the appellate court. Id. Petitioner's trial counsel's and appellate counsel's representation fell below an objective standard of reasonableness. Id., at 688-689.

Finally, Petitioner is innocent of the offense of CSC-I under MCL §

750.520b(1)(a), and would have been acquitted on the charge had it not been for the unconstitutional judicial amendment to MCL § 750.520a(r). In rejecting Petitioner's fair notice claim, the trial court essentially addressed the merits which constituted a decision, even though the state court found his case procedurally barred. See Gumm v. Mitchell, 775 F.3d 345, 362 (6th Cir.2014).

Conclusion

With respect to Petitioner's sufficiency-of-the-evidence claim under Jackson, "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime [of CSC-I] beyond a reasonable doubt, as required by the Due Process Clause. Id., at 319 (alteration added). As such, in sustaining Petitioner's conviction of CSC-I under, MCL § 750.520b(1)(a), the state court reached a decision that was contrary to, or involved an objectively unreasonable application of Jackson and Winship, which resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence. Williams v. Taylor, 529 U.S. 362, 412-413 (2003). Reasonable jurists, including two Justices of the MSC, App. F., would find the District Court and Sixth Circuit Court's assessment of the claim debatable or wrong.

With respect to Petitioner's "fair warning/inadequate notice" claim under Bouie, Petitioner's conviction of CSC-I under MCL § 750.520b(1)(a), based on a novel construction of MCL § 750.520a(r) by the state courts which broadened the narrow and precise language of the criminal statute to include "self-penetration" to the statutory definition of "sexual penetration." The Judicial construction of the criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to Petitioner's alleged conduct. The plain and ordinary language of the statute precluded the state court's judicial construction. The plain and ordinary language makes clear that the Legislature's intent was to require the sexual penetration of one person by "another" person. As

such, **Petitioner** did not receive the "fair warning" required by the Due Process Clause under **Bouie**, that his alleged conduct was prescribed by **MCL § 750.520a(r)**. Put differently, **Petitioner**, could not have had fair warning that the Michigan courts would expand the precise language of the statute to include self-penetration. Because of the plain and ordinary language of the criminal statute a Michigan court could have not reasonably interpreted **MCL § 750.520a(r)** as criminalizing "self-penetration." The state court's adjudication of **Petitioner's** "fair warning/inadequate notice" claim resulted in a decision that was contrary to and involved an objectively unreasonable application of **Bouie**. Again, any reasonable jurist, including two justices of the MSC, **App. F.**, would find the District Court and Sixth Circuit Court's assessment of the claim debatable or wrong. See **Williams, 529 U.S., at 412-413.** Based on **Petitioner's** constitutional violations, the Sixth Circuit Court concluded that it would have to speculate on where to draw the line between innocent and criminal conduct. Therefore, if the Court has to speculate than surely a person of ordinary intelligence would have to speculate by guessing if his contemplated conduct meant something different than the text of the statutory code. After all, "individuals rely on the laws until they are explicitly changed." **Carmell, 529 U.S., at 513.**

In this case, **Petitioner**, has been made to suffer the onus of a criminal conviction where the prosecution failed to meet its burden of proving beyond a reasonable doubt every element of the offense of CSC-I under **MCL § 750.520b(1)(a)**. **Petitioner**, has also been made to suffer a mandatory minimum sentence of **25 years'** imprisonment, MCL § 750.520b(2)(b), and mandatory lifetime electronic monitoring, **MCL § 750.520n(1)**, which entails having to don a tether from the day of his release from prison and until the day he dies. **MCL § 791.285(1)(a)**. A sentence that the trial court acknowledged was excessive given the facts of the case and **Petitioner's** lack of a criminal record.

RELIEF REQUESTED

WHEREFORE, the reasons stated above, **Petitioner** prays that this Honorable Court issues a Writ of Certiorari.

Most respectfully submitted,

Randall Overton — 10-22-20

RANDALL SCOTT OVERTON
Pro se Prisoner Petitioner
Bellamy Creek Correctional Facility
1727 West Bluewater Highway
Ionia, Michigan 48846

Date:

DECLARATION

I, **Randall Scott Overton**, declares, pursuant to **28 U.S.C. § 1746**, that the factual assertions contained in this petition are true and correct to the best of my information, knowledge, and belief.

Randall Overton — 10-22-20

Randall Scott Overton

Date: