APPENDIXES

EXHIBIT A

No. 19-2099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: LEE BRADFORD,	)	
	)	ORDER
Movant.	)	

Before: SUHRHEINRICH, GIBBONS, and KETHLEDGE, Circuit Judges.

Lee Bradford, a Michigan prisoner proceeding pro se, moves this court for an order authorizing the district court to consider a second or successive 28 U.S.C. § 2254 habeas corpus petition. *See* 28 U.S.C. § 2244(b). The State has declined to file a response.

On December 1, 2001, an armed robber wearing a hooded sweatshirt, a black knit ski mask, sunglasses, and gloves, stole $15,100 from the North Adams Branch of the Southern Michigan Bank and Trust. Bradford was not identified by a witness as the perpetrator, but other evidence connected Bradford to the crime, leading to his arrest. A jury convicted Bradford of armed robbery, possession of a firearm during the commission of a felony, and possession of a firearm by a felon. He was sentenced to thirty-seven to sixty years of imprisonment for the armed-robbery charge, two years of imprisonment for the felony-firearm charge, and six years and four months to twenty years of imprisonment for the felon-in-possession charge. Bradford's conviction was affirmed on direct appeal. *People v. Bradford*, No. 242339, 2003 WL 22495579, at *1 (Mich. Ct. App. Nov. 4, 2003), and the Michigan Supreme Court denied Bradford leave to appeal, *People v. Bradford*, 679 N.W.2d 73 (Mich. 2004) (table).

In his first § 2254 petition, Bradford argued that (1) the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose any DNA test results concerning the ski mask worn by the perpetrator; (2) the prosecution's use of biblical references in its closing

argument constituted prosecutorial misconduct; (3) his trial counsel was ineffective for adopting a trial strategy focusing on the lack of DNA test results concerning the ski mask and for failing to object to the prosecution's use of biblical references in its closing argument; and (4) his appellate counsel was ineffective for failing to raise the DNA and prosecutorial-misconduct issues on appeal. With respect to the *Brady* claim, the district court explained that, at trial, there was testimony that the ski mask had been sent to the Michigan State Crime Laboratory for analysis, but the mask was contaminated with dog hair and no human hair was discovered. Detective William Kanouse informed the trial court that no DNA testing had been requested because there was nothing found in the mask that could be tested. After the verdict and before sentencing, however, the Michigan State Police issued a report indicating that cellular material found around the nose and mouth area of the ski mask had been removed and turned over to the state laboratory's Biology Subunit for DNA analysis on June 5, 2001. Another memorandum from the crime lab explained that the analysis could not be completed before trial due to the move of the East Lansing Laboratory to a new facility in April/May 2001. The district court concluded that the Michigan Court of Appeals reasonably rejected Bradford's *Brady* claim because there was no indication that any delay in DNA testing was caused by the prosecution and Bradford's claim that further DNA testing would have uncovered exculpatory evidence was entirely speculative and conclusory. The district court rejected Bradford's remaining claims and denied his petition. We declined to issue a certificate of appealability. *See Bradford v. Romanowski*, No. 12-1299 (6th Cir. Nov. 8, 2012) (order).

In November 2013, Bradford filed a motion for relief from judgment in the district court, pursuant to Federal Rule of Civil Procedure 60(b)(3). He argued that the prosecution perpetrated a fraud on the court when it presented the false testimony of Detective Kanouse that no DNA evidence had been found on the ski mask "knowing full well that the test had been done on the ski mask and that the results were pending." Finding that Bradford's claim of fraud amounted to an attack on his judgment of conviction, the court transferred the motion to this court for consideration as a motion for an order authorizing the filing of a second or successive § 2254 petition. In this

court, Bradford filed a corrected motion for an order authorizing the district court to consider a second or successive § 2254 petition, but he later moved for voluntary dismissal of the motion, which we granted. *In re Bradford*, No. 13-2644 (6th Cir. June 23, 2014) (order).

In February 2019, Bradford, through new counsel, filed another motion for relief from judgment in the district court. This time, he proceeded under subsection (d)(3) of Rule 60 and again asserted that the prosecutor and the Michigan State Police committed a fraud on the court when they concealed the existence of DNA evidence that had been recovered from the ski mask. Bradford included documents that he had received in response to his mother's 2016 Freedom of Information Act request to the Michigan State Police. These documents included (1) an October 31, 2011, laboratory report done for "General Assistance/Confirmation of CODIS Database DNA Profile," indicating "an association between convicted offender sample MI11-016288 [associated with Bradford] and Michigan State Police Laboratory specimen number 1876-01A" and confirming the DNA profile on record for Bradford; (2) pages two and three of a DNA profile report completed by Forensic Scientist Kathy A. Kuebler for "evidentiary sample 1876.01A (ski mask)," concluding that the sample "is from an unidentified donor(s)" and noting that comparisons had not been made to DNA profiles cataloged in CODIS; and (3) one page of a laboratory report, indicating that, on June 5, 2001, Kathy Kuebler of the Forensic Science Division of the state police laboratory received specimen 1876.01A—an envelope containing "one (1) piece of woven material and one (1) paper fold containing one (1) particle all identified as 'ski mask area around nose/mouth area possible tissue (1 WFPC w/particle).'" Documents (2) and (3) may be from a single report, but it is not clear. Bradford argued that the State had a duty to disclose the testing to the defense and to correct the record in the habeas proceeding and that its failure to do so constituted a fraud upon the state court and the district court. Again, the district court concluded that Bradford's motion constituted a second or successive § 2254 petition and transferred it to this court, pursuant to *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

In this court, Bradford's attorney filed a motion to withdraw, which this court granted, and Bradford filed a pro se corrected motion for an order authorizing the filing of a second or

successive § 2254 petition. Based on the laboratory documents received in 2016, Bradford proposes to assert in a new petition that he was denied a fair trial and a fair habeas proceeding by the State's suppression of DNA sample 1876.01A and the exculpatory results of the testing of that sample, in violation of *Brady*.

When presented with a transfer order stemming from a Rule 60(b) motion in a § 2254 proceeding, we must first determine whether the transfer was appropriate. *See Howard v. United States*, 533 F.3d 472, 474 (6th Cir. 2008). A Rule 60(b) motion must be treated as a second or successive habeas petition if it "attacks the federal court's previous resolution of a claim on the merits," asserts that there has been a change in substantive law governing a claim, or "seeks to add a new ground for relief." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (emphasis omitted). If a Rule 60(b) motion asserts, or reasserts, claims of error in the underlying state conviction, it must be treated as a second or successive petition. *See id.* at 538. A Rule 60(b) motion is not considered a second or successive habeas petition where the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4. However, even if an attack purportedly challenges the integrity of the proceeding, if it "in effect asks for a second chance to have the merits determined favorably," it should be characterized as a second or successive habeas petition. *Id.* at 532 n.5.

Although Bradford moved under subsection (d) of Rule 60 rather than subsection (b), nothing in the language of *Gonzalez* limits its holding to subsection (b). Nonetheless, Bradford's attempt to bring his fraud claim within the ambit of Rule 60(d) by asserting that the State committed fraud upon the court during his habeas corpus proceeding is unavailing. The district court correctly found that Bradford's allegations of fraud relate to his underlying criminal proceeding rather than his habeas corpus proceeding. Bradford claims that the prosecutor relied the false testimony of Detective Kanouse and concealed the existence of the DNA testing on the ski mask and that this "fraud" carried over into his federal habeas corpus proceeding. This constitutes a "claim," i.e., an attack on the validity of his state conviction. *See Gonzalez*, 545 U.S.

at 531–32. Bradford must therefore satisfy the gate-keeping requirements that apply to second or successive habeas corpus petitions. *See id.*

Before a prisoner may file a second or successive § 2254 petition in the district court, he must make a prima facie showing that the motion relies on either: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;" or (2) new facts that could not have been discovered earlier through the exercise of reasonable diligence and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C).

Bradford's motion fails to meet these statutory requirements. Even if the documents obtained in 2016 can be considered new, they do not establish that, but for constitutional error, a reasonable factfinder could not have found Bradford guilty in light of all of the evidence presented at trial. *See Bradford*, 2003 WL 22495579, at *6–7 (detailing the evidence presented at Bradford's trial and holding that Bradford's convictions were supported by sufficient evidence). None of the documents submitted by Bradford exclude him as the perpetrator. The DNA analysis, which appears to be from an incomplete report, states that the DNA profile developed from the ski mask sample is from "an unidentified donor(s)" and that "[u]pon submission of a reference sample(s), comparisons can be made in order to determine the possible source of the DNA profile." The report reveals only that DNA testing on the mask was conducted in June and July of 2001—a fact that Bradford has known since before he was sentenced. There is no indication that the profile was compared to Bradford's DNA or that he was ever excluded as the source of the DNA. Furthermore, contrary to Bradford's assertion that these documents are exculpatory, the 2011 laboratory report indicates "an association" between the DNA profile on record for Bradford and "specimen number 1876-01A," or the ski mask. Bradford believes that this shows that the state crime lab tested the ski mask evidence in 2011 and that the prosecutor therefore lied when, in 2007, he told defense counsel that the physical evidence from the case had been destroyed in 2002. The

report does not state that the physical evidence was tested in 2011, however. It states that "[a] search of the Michigan State DNA Index System (SDIS) database developed an association between" Bradford's DNA profile and the ski mask specimen. Indeed, the 2001 DNA profile report for the ski-mask sample stated that the profile identified from the sample would be "entered into the casework database of the Combined DNA Index System (CODIS)." Though Bradford has not provided any expert interpretation of the 2011 report, it appears to suggest that Bradford may be the source of the DNA obtained from the ski mask.

Bradford has failed to meet his burden under § 2244(b). Accordingly, his motion for an order authorizing the district court to consider a second or successive § 2254 petition is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE CHARLES BRADFORD,

Petitioner,

Case Number: 2:05-72889
HONORABLE MARIANNE O. BATTANI

v.

KENNETH ROMANOWSKI,

Respondent.

_____/

ORDER TRANSFERRING MOTION FOR RELIEF FROM JUDGMENT (DKT. # 43) TO SIXTH CIRCUIT COURT OF APPEALS

On February 10, 2012, the Court denied Petitioner Lee Charles Bradford's petition for habeas corpus relief and declined to issue a certificate of appealability. See Bradford v. Romanowski, 2012 WL 441140 (E.D. Mich. Feb. 10, 2012). The Sixth Circuit Court of Appeals denied a certificate of appealability. Bradford v. Romanowski, No. 12-1299 (6th Cir. Nov. 8, 2012). Now before the Court is Petitioner's motion for relief from judgment, filed through counsel.

In November 2013, Petitioner filed a motion for relief from judgment on the ground that a fraud was committed on this Court when Detective Kanouse testified falsely at the state court trial that no hairs or human DNA were recovered form a mask used and discarded by the person who committed the armed robbery for which Petitioner was convicted. Petitioner

states that, through a Freedom of Information Act request, he learned in 2016 that DNA evidence had in fact been found on the mask, the evidence had been tested, and the result was favorable to the defense. Petitioner argues that the investigating officers had a duty to disclose the testing to the prosecution and that the prosecution, in turn, had a duty to disclose the testing to Petitioner. He maintains that the prosecution's failure to do so and the State's failure in the habeas proceeding to correct the record, constitute a continuing fraud upon the state court and this Court.

Before adjudicating petitioner's Rule 60(d) motion, the Court must first determine whether it has jurisdiction to consider the motion. A habeas petitioner may not file a second or successive habeas petition in a federal district court, in the absence of an order from the appropriate court of appeals authorizing the district court to consider the successive petition. See 28 U.S.C. § 2244(b)(3)(A). Unless a petitioner receives prior authorization from the Sixth Circuit Court of Appeals, a district court must transfer a second or successive petition or motion to the Sixth Circuit Court of Appeals regardless of how meritorious the district court believes the claim to be. See In Re Sims, 111 F. 3d 45, 47 (6 Cir. 1997).

In Gonzalez v. Crosby, 545 U.S. 524 (2005), the Supreme Court held that a Rule 60 motion for independent action must be treated as a second or successive petition when it attacks the state court's judgment of conviction or brings a new claim, such as a new ground for relief or an attack on the federal court's previous resolution of the claim on the merits. Id.

at 532. Petitioner claims that he is challenging a fraud on this Court, but his motion is, in substance, a successive petition. Petitioner challenges his underlying judgment of conviction, rather than alleging a "defect in the integrity of the federal habeas proceedings." Id. To the extent that Petitioner argues that the Attorney General's failure to disclose the DNA-related evidence constituted a fraud upon this Court, the Court finds that the argument remains one directed at conduct of state actors in the criminal state proceedings, not in the federal habeas proceeding. Therefore, under Gonzalez, Petitioner's attack on the state court proceedings is a successive habeas petition. See Thompkins v. Berghuis, 509 Fed. App'x 517, 520 (6th Cir. 2013) (rejecting argument that false testimony in state court constituted a fraud upon the federal court in a habeas proceeding for purposes of Rule 60 motion, and construing the argument as "nothing more than an attack on the state court's judgment of conviction and [finding it] should properly be considered a second or successive habeas petition."); Carter v. Anderson, 585 F.3d 1007, 1011 (6th Cir. 2009) (noting that fraud on the court requires proof that fraudulent conduct was willfully "directed to" the court that was deceived).

Petitioner has not obtained prior authorization from the Sixth Circuit Court of Appeals to file a successive petition as required by 28 U.S.C. § 2244(b)(3)(A). Accordingly, the Court ORDERS the Clerk of the Court to transfer the Motion for Relief From Judgment (Dkt. # 43) to the United States Court of Appeals for the Sixth Circuit.

SO ORDERED.

Marianne O. Battani

MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

Dated: 9/23/19

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE CHARLES BRADFORD,

Petitioner,

Case Number: 2:05-72889
HONORABLE MARIANNE O. BATTANI

v.

KENNETH ROMANOWSKI,

Respondent.
_____/

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION (ECF NO. 45)

On February 10, 2012, the Court denied Petitioner Lee Charles Bradford's petition for habeas corpus relief and declined to issue a certificate of appealability. See Bradford v. Romanowski, 2012 WL 441140 (E.D. Mich. Feb. 10, 2012). The Sixth Circuit Court of Appeals denied a certificate of appealability. Bradford v. Romanowski, No. 12-1299 (6th Cir. Nov. 8, 2012). On February 4, 2019, Petitioner filed a motion for relief from judgment. (ECF No. 43.) The Court concluded that the motion constituted a second or successive § 2254 petition and transferred it to the Sixth Circuit Court of Appeals. (ECF No. 44.) Now before the Court is Petitioner's motion for reconsideration of the order transferring the petition. (ECF No. 45.)

A district court loses jurisdiction over a state prisoner's habeas petition when the court transfers it to the court of appeals as a second or successive petition. Jackson v. Sloan, 800 F. 3d 260, 261 (6th Cir. 2015). Thus, this Court lacks jurisdiction to consider

Petitioner's motion. *Id.* at 261-262.

Petitioner's motion for reconsideration (ECF No. 45) is DENIED WITHOUT PREJUDICE.

SO ORDERED.

Date: July 31, 2020

s/Marianne O. Battani
MARIANNE O. BATTANI
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
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Filed: September 25, 2019

Mr. Matthew S. Kolodziejski
200 E. Big Beaver Road
Troy, MI 48083

NOTICE

Re: Case No. 19-2099, *In re: Lee Bradford*
Originating Case No. 2:05-cv-72889

Dear Counsel:

The district court has transferred this case for this court to determine whether to grant Mr. Bradford permission to file a second or successive habeas petition or motion to vacate. In order for the Court to consider his case, he will need to satisfy certain obligations under Sixth Circuit Rule 22.

You must complete and return to the Clerk's office the attached application form by **October 25, 2019**; instructions are contained in the form. If you do not return the form or attach the documents required, this proceeding may be dismissed. The form will be deemed filed once it has been electronically filed on this court's docket.

Sincerely yours,

s/Monica M. Page
Case Manager
Direct Dial No. 513-564-7021

cc: Ms. Andrea M. Christensen-Brown

Enclosure – Application for Second or Successive Petition under 28 U.S.C. § 2254

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE CHARLES BRADFORD,

Petitioner,

v.

Case No. 2:05-CV-72889
Honorable Marianne O. Battani

KENNETH ROMANOWSKI,

Respondent.
_____/

OPINION AND ORDER (1) GRANTING PETITIONER'S MOTION FOR RECONSIDERATION, (2) GRANTING PETITIONER'S REQUEST FOR STAY, AND (3) CLOSING CASE FOR ADMINISTRATIVE PURPOSES

I. Introduction

Petitioner Lee Charles Bradford, a Michigan prisoner, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his convictions for armed robbery, possession of a firearm during the commission of a felony, and felony firearm, which were imposed following a jury trial in the Hillsdale County, Michigan, Circuit Court. Petitioner was sentenced to 37 ½ years to 60 years imprisonment on the armed robbery conviction, six years and four months to twenty years imprisonment for the felon in possession conviction, and a mandatory consecutive term of two years imprisonment on the felony firearm conviction.

In his habeas pleadings, Petitioner raises in issues I and IV, violations of *Brady v. Maryland*, 373 U.S. 668 (1963), and in issue III, violations of *Jackson v. Virginia*, 443 U.S. 307

the defense, have merit, and that the one-year limitations period applicable to habeas actions could pose a problem for Petitioner, if this Court were to dismiss the petition to allow for further exhaustion of state remedies. *See* 28 U.S.C. § 2244(d)(1). The Michigan Supreme Court denied Petitioner's application for leave to appeal on April 30, 2004. Petitioner then had ninety (90) days in which to seek a writ of certiorari with the United States Supreme Court. *See* Rule 13(1), Supreme Court Rules. With regard to the statute of limitations, therefore, his convictions became final on or about July 31, 2005–ninety (90) days after the Michigan Supreme Court denied leave to appeal. Petitioner signed the instant petition on July 15, 2005, and it was filed by the Clerk's Office on July 22, 2005. Thus, he has approximately nine days remaining on the one-year limitations period, assuming that the Court equitably tolls the time in which his current petition has been pending. *Cf. Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (holding that a federal habeas petition is not an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2) so as to statutorily toll the limitations period).

After reviewing the record, the prosecutorial misconduct claim regarding the failure of the prosecutor to DNA test the ski mask, as requested, does not appear to be "plainly meritless." Furthermore, there is no indication of intentional delay by Petitioner. Accordingly, the Court concludes that it has discretion to stay this case pending Petitioner's return to the state courts to fully exhaust his habeas claims.

IV. Conclusion

Accordingly, for the reasons stated, the Court **GRANTS** Petitioner's motion for reconsideration, and **GRANTS** Petitioner's request for a **STAY**. Petitioner may return to the trial court to fully exhaust his claim. The stay is conditioned on Petitioner presenting his claim

to the state courts within ninety (90) days of the filing date of this order – if he has not already done so. *See Hill v. Anderson*, 300 F.3d 679, 683 (6th Cir. 2002). The stay is further conditioned on Petitioner's return to this Court with an amended petition, using the same caption and case number, within thirty (30) days of exhausting state remedies. *See Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002) (adopting approach taken in *Zarvela v. Artuz*, 254 F.3d 374, 381 (2nd Cir. 2001)). Should Petitioner fail to comply with these conditions, his case may be subject to dismissal.

Lastly, this case is **CLOSED for Administrative Purposes** pending compliance with these conditions.

IT IS SO ORDERED.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

DATED: July 2, 2007

CERTIFICATE OF SERVICE

I certify that on the above date a copy of this order was served upon Lee Charles Bradford and Raina Korbakis via ordinary mail and/or electronic filing.

s/Bernadette M. Thebolt
Case Manager

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE CHARLES BRADFORD,

Petitioner,

-vs.-

KENNETH ROMANOWSKI, Warden,

Respondent.

_____/

Michigan Attorney General
Attorney for Respondent

Laura Kathleen Sutton (P40775)
Attorney for Petitioner Bradford

_____/

Civil Action No. 2:05-CV-72889

Hon. Marianne O. Battani
United States District Judge

Hon. Donald A. Scheer
United States Magistrate Judge

PS 25

AMENDMENT TO THE BRIEF IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS FILED JULY 22, 2005

PROOF OF SERVICE

BY:

LAURA KATHLEEN SUTTON (P40775)
Attorney for Petitioner Lee Charles Bradford
P.O. Box 388
Manchester, Michigan 48158
(734) 428-7445

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(A) Michigan State Police Report

(B) Michigan State Police Report

(C) Hillsdale Circuit Court Order, dated October 1, 2007

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(E) Michigan Court of Appeals Order, dated October 24, 2008

(F) Michigan Supreme Court Order, dated August 6, 2009

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money" in which the bank had recorded the serial numbers of the bills. (R.E. #13 T.T. 5/15/2001 p.p. 168, 171).

That morning, Ms. Baker observed a "dark shadow go by the back window". It appeared to be a four-wheeler. She continued: "And the next thing I knew there was somebody standing in the lobby with a gun and I just hit the floor". (R.E. #13 T.T. 5/15/2001 p. 179). The gun appeared to be pointing "out in front of him, maybe". The gun was not pointed at her. The barrel of the gun looked black. The robber was waiving it around. (R.E. #13 T.T. 5/15/2001 p.p. 183-184).

The robber wore a "Carhart" jacket. The robber yelled, "Get on the floor", and "don't push buttons". As he left, he stated, "Have a nice day". The robber had a "southern accent or Texan accent". (R.E. #13 T.T. 5/15/2001 pp 185, 187-188). The robbery lasted less than one minute. She then got up and saw an ATV, "all-terrain vehicle" or "three-wheeler", driving away. (R. E. #13 T.T. 5/15/2001 p.p. 189-190).

The robber wore a black-knit ski mask consistent with People's Exhibit Eight. He appeared to be wearing wire-rimmed sunglasses consistent with Exhibit Seven. He wore black knit gloves not consistent with People's Exhibit Nine. Exhibit Eighteen was a plastic bag containing money. The notations and serial numbers indicated that this money derived from this teller's window. Bank teller Baker did not know Mr. Bradford and did not recognize him. She testified that the bank had lost $15,100 during the robbery. (R.E. #13 T.T. 5/15/2001 pp 194-202).

Teller Leonce Towers described the same robbery. The robber was only in the bank for 40 seconds. Towers described the sunglasses exhibit as consistent with what she observed on the robber. Towers testified that the robber yelled and waived a gun around. (R.E. #13 T.T.

5/15/2001 pp 207-212). The gun was a black revolver with a "long slender barrel", appearing to her as a .22 caliber. The gun was never pointed at her. The robber wore a camouflage-hooded jacket, which covered his head. (R.E. T.T. 5/15/2001 p.p. 213-216).

Shelly Reed was a third teller. She saw an olive/green ATV drive by the bank's window. The robber wore light blue pants, jeans, and dark shoes. After the robber left, she saw the same ATV drive by in the other direction. People's Exhibit 24 was consistent with the ATV she observed. (R.E. #13 T.T. 5/15/2001 p.p. 251-253, 256).

Items Found on Roadway: Levi Stoll was a local farmer. That morning, he was working a combine with his brother, David. (R.E. #13 T.T. 5/15/2001 p.p. 278-279). On the shoulder of the road, he found a black ski mask consistent with Exhibit Eight. David had noticed a midsize red car with two white male occupants drive by him rapidly. He did not see the two men throw anything out from the vehicle. (R.E. #13 T.T. 5/15/2001 p. 276).

Also that morning, at about 9:00 a.m., Max Hoover was at his residence cutting lumber with an employee. He heard an unusually loud noise, which caused him to look upon a nearby road. There he saw a person in a fast moving green of olive ATV. People's Exhibits 23, 24, 25 were photographs consistent with the observed ATV. (R.E. #13 T.T. 5/15/2001 p.p. 228-230). Later that night, when he went to a hardware store, about a half mile north of his house, he found a pair of discarded sunglasses laying three feet from the edge of the road. People's Exhibit Seven was consistent with the sunglasses he found. (R.E. #13 T.T. 5/15/2001 p.p. 232-234).

That morning, Mrs. Hoover twice saw an ATV moving at a high rate of speed toward the direction of the bank. The driver appeared "really bundled up". She then saw him, five minutes later, as he headed south. On the second occasion, she told police, a second person was in the vehicle. At trial she was uncertain. (R.E. #13 T.T. 5/15/2001 p.p. 241-244, 245-246).

On the same morning, at about 9:00 a.m., Gordon Bigelow Jr., was in North Adams. He observed an ATV, traveling five miles per hour on a sidewalk, about 100 yards from the bank. The driver of the ATV was wearing brown Carhart's and a black ski mask. Exhibits 23, 24, and 25 were consistent with the ATV he observed. (R.E. #13 T.T. 5/15/2001 p.p. 263-266).

Petitioner's Financial Circumstances: In October of 2000, Richard Reiger sold real property by land contract to Mr. Bradford. (R.E. #13 T.T. 5/15/2001 p.p. 287-288). By November 30, 2000, the Bradford's owed $2,250.00. They had made "last minute" payments for October, November, and December. (R.E. #13 T.T. 5/15/2001 p.p. 290-293). Mr. Bradford told Reiger that his financial situation was poor. On December 1, 2000, at 8:00 p.m., Reiger received a $2,250.00 cashiers check from Mr. Bradford. (R.E. #13 T.T. 5/15/2001 p.p. 294-295). The Bradfords had to be in default for 30 days before Reiger "could do anything". The Bradfords owned a retail store, so their income was known to "ebb and flow". (R.E. #13 T.T. 5/15/2001 p.p. 299, 300).

The All Terrain Vehicle: Charles Boothe was a resident of Onsted Michigan and the owner of a 1995 Honda four-wheeler (ATV), olive-green in color. It had a platform on its front and a gun rack. People's Exhibits 23, 24, and 25 were consistent. (R.E. #13 T.T. 5/16/2001 p.p. 322-324). During deer season of 2000, he left the ATV with his nephew, Ricky Sawdey. During December of 2000, he reported to police that the ATV was missing. During February 2001, police found the ATV. (T.T. 5/16/2001 p.p. 329-331). Joseph Boothe, brother of Charles, testified that the ATV was left at Ricky Sawdey's house with the keys in it. (R.E. #13 T.T. 5/16/2001 p.p. 333-335).

Ricky Sawdey testified that he took custody of the ATV. (R.E. #13 T.T. 5/16/2001 p.p. 345-346). He did not know Mr. Bradford. In cross, he testified that he told the police that he

was 99.9% certain that the ATV was on his property on December 1. Now he says he was not certain of the exact days. (R.E. #13 T.T. 5/16/2001 p.p. 351, 353).

Acquaintances of Petitioner: Teddy Yates had known Mr. Bradford for ten years. On December 1, 2000, Mr. Bradford called him. Bradford said he had a house payment due that day and his money was tied up. He offered to do work for Yates in exchange for an advance of $2,350.00. He offered as "collateral", an ATV. (R.E. #13 T.T. 5/16/2001 p.p. 358-363). When Yates brought a check to Bradford, he learned there was no ATV. Bradford still took the check. Yates did get the ATV several weeks later, in December. (R.E. #13 T.T. 5/16/2001 p.p. 364, 376-378). Yates testified that he did not know that the ATV was stolen. People's Exhibit 23 looked like the ATV in question. Police visited Yates in Ohio and took the ATV. Yates had loaned money to Bradford before, as prepayment on jobs, and Bradford performed the work. He understood Bradford's financial condition at the time to be good, but that his money was tied up. Bradford's store was in the process of closing as Bradford prepared to do jail time for a child support matter. (R.E. #13 T.T. 5/16/2001 p.p. 366-370).

Michelle Sanford knew Bradford through her boyfriend, Harry Briskey. She had worked at Bradford's store and had babysat for the Bradfords. According to Michelle Sanford, during mid-November, Bradford began to talk about stealing an ATV. He wanted Briskey to help him, and he would get upset when Briskey refused. On cross, she conceded that she was telling this for the first time at trial. (R.E. #13 T.T. 5/16/2001 p.p. 405-409, 412-413).

Harry Briskey was an inmate of the Michigan Department of Corrections. On December 31, 2000, he confessed to a series of crimes, some of which involved the case sub judice. Briskey testified that, on November 30/December 1, 2000, he saw Bradford with an ATV which matched People's Exhibit 23. He and Bradford stole the ATV from what might have been the

Sawdey residence. Bradford said he was stealing it in order to make a house payment. The next day, Bradford offered Briskey $600 back on a loan. (R.E. #14 T.T. 5/16/2001 p.p. 418-426, 428-429).

Briskey testified that, in 1989, Bradford stated that he was going to rob a bank or go bankrupt. He had shown Briskey the route he would take if he ever did rob a bank. He stated that he would use an ATV to do it. He said it would be easy. Finally, Briskey disclosed that Bradford sometimes wore sunglasses. Bradford wore a black or dark blue ski mask when he drove the ATV back to his house. People's Exhibit Eight was consistent with this testimony. Briskey had seen Bradford in a Carhart type jacket on a couple occasions. (R.E. #14 T.T. 5/16/2001 p.p. 429-434).

Birden Boon knew Bradford as a friend and employer. He was involved in remodeling and construction work. He handled bill-payments for Bradford's store, always in cash. Bradford sometimes had trouble paying store bills. Nonetheless, he had kept the store open. (R.E. #14 T.T. 5/16/2001 p.p. 429-433).

On November 30, 2000, Boon was at the Bradford residence. After Bradford's family went to bed, Boon, Bradford, and Briskey discussed the whereabouts of the ATV was that Briskey promised Bradford. About 30-45 minutes later, Briskey and Bradford returned with an ATV. Boon testified that he may have heard something about using the ATV to rob a bank. He also testified that he never saw any ATV. (R.E. #14 T.T. 5/16/2001 p.p. 478-483).

Boon spent the night. He testified that he awoke, at around 9:00 or 10:00 a.m., and saw loose money on a couch, some of it in paper bands. Bradford was putting it into some kind of bag. (R.E. #14 T.T. 5/16/2001 p.p. 458-487). Eventually the two men went to Bradford's store. (Id. at 493). On the way, Bradford threw his hat out the window, onto the road near a passing

combine machine. People's Eight was consistent with said hat. He had seen Bradford wearing sunglasses. However, according to Boon, People's Exhibit Seven was not Bradford's style. (R.E. #14 T.T. 5/16/2001 p.p. 495-498).

Boon testified that once at the store, Bradford went into a back room with the bag. He returned without it. (R.E. #14 T.T. 5/16/2001 p.p. 500-502). That day, Bradford paid several people money he owed them. Bradford told Boon that he hid the remaining money because his wife would spend it. Boon denied telling police that Bradford told him the money was hidden in the walls. Boon testified that he never asked Bradford from where he got the money. However, he claimed that Bradford may have described robbing a bank. (R.E. #14 T.T. 5/16/2001 p. 505).

On cross, Boon admitted that he had read the Hillsdale newspapers in the weeks following the subject robbery, and that they contained details about the case. Also, the police made threats to him about violating his probation. During his police interviews, he never mentioned the bag of money. (R.E. #14 T.T. 5/16/2001 p.p. 515-519). Further, this was not the only occasion in which Bradford had gone to his back room with money. He had done this many times before. On cross, he conceded that he was not even sure that anything was said about a robbery. (R.E. #14 T.T. 5/16/2001 p.p. 525, 527).

The Parole Officer: Joseph Keween was a parole officer with the State of Ohio - Adult Parole. Bradford was under his supervision on two counts of felony non-support. He reported for incarceration on December 2, 2000. He had work release privileges. He was behind at least 26 weeks in child support. (R.E. #14 T.T. 5/16/2001 p.p. 542-545).

The Police Investigation: Detective Kanouse became involved in this case on the morning of the robbery. He testified People's Exhibit 25 was a photograph of an ATV recovered in Ohio. It had been stolen from Mr. Boothe. It was found at the home of Mr. Yates' sister. The

tread on this ATV was consistent with tread marks he found the morning of the robbery out on Reed Road. (R.E. #14 T.T. 5/16/2001 p.p. 549, 557-558, 560).

On December 14, 2000, Bradford's residence was searched. Kanouse found ATV tracks on his property. (R.E. #14 T.T. 5/16/2001 p.p. 565-566). On December 19, 2000, gloves were confiscated from the rear floorboard of a Geo Tracker at the Bradford residence. (R.E. #13 T.T. 5/15/2001 p.p. 222-223). On December 15, 2000, Bradford's store was searched. (R.E. #14 T.T. 5/16/2001 p. 568). In the attic, police found a large quantity of bundled U.S. currency lying at the bottom of a cavity in a wall. (R.E. #14 T.T. 5/16/2001 p.p. 576, 588-590).

In the attic, behind a stairwell, police found additional bundles of currency in bank wrappers. (R.E. #14 T.T. 5/16/2001 p.p. 578-580). They took possession of a crumpled paper sack located up against an outer wall. (R.E. #14 T.T. 5/16/2001 p.p. 580-581). On the floor, they found bank wrappers inscribed, "Southern Michigan Bank and Trust, North Adams Michigan, I NA, November 6, 2000". (R.E. #14 T.T. 5/16/2001 p.p. 583-584). No prints were found on any of the items. On the first floor, police confiscated more money. They also found a Jackson Citizen Patriot newspaper dated December 1, 2000. (R.E. #14 T.T. 5/16/2001 p.p. 580-590, 595).

On January 22, 2001, police executed a second search warrant on the Bradford residence. They found a piece of plywood buried under snow in a barn. (R.E. #14 T.T. 5/16/2001 p.p. 593-599). According to Detective Kanouse, Briskey never described Mr. Bradford ever detailing a route he would take to rob a bank. Briskey did tell Kanouse that Bradford had described coming into enough money to do a house project in Detroit. (R.E. #14 T.T. 5/16/2001 p. 604). On cross, Detective Kanouse testified that the black ski mask was sent to the Crime Lab for analysis. The

lab found dog hairs on the mask. A dog-handler had contaminated the item by placing it into a contaminated bag. (R.E. #14 T.T. 5/16/2001 p.p. 619-621).

Petitioner's Defense: Kevin Troy Forbes was a resident of North Adams. On December 1, 2000, at 9:25 a.m., he was coming home from working a third shift. As he approached Reed Road, he saw a person on an ATV sitting at a stop sign. The ATV crossed the road in front of him and headed up the sidewalk into town. People's Exhibits 23, 24, and 25, were consistent with the ATV he observed. (R.E. #14 T.T. 5/16/2001 p.p. 315-318).

Lisa Bradford was Defendant's wife. During October/December of 2000, they owned a party store. At the end of each business day, Mr. Bradford put money into an empty videocassette box or paper sack. Sometimes he brought it home. In the morning, he returned the money to the store. On December 1, 2000, she testified, they had no financial problems. (R.E. #15 T.T. 5/17/2001 p.p. 656-658). When the store closed, they owed the phone company a substantial sum of money. (R.E. #15 T.T. 5/17/2001 p.p. 676-677).

Lisa Bradford further testified that, on December 1, 2000, she saw Mr. Bradford between 1:00 and 3:00 p.m. He drove the family car, a red Grand Am. Together they went to temporarily shut down their store. They made several trips between the store and their home. (R.E. #15 T.T. 5/17/2001 p.p. 642-650).

Boon and Briskey came to the store. She went with Bradford to Reiger's, to make a house payment. The next day, Bradford went to jail on the support matter. A week later, he came home. Ted Yates was with him, and then Briskey with an ATV. Business deals between the three were not unusual. (R.E. #15 T.T. 5/17/2001 p.p. 651-656).

Mark Lynn Payne was a jail inmate awaiting sentencing. He had been in prison four times, and jail on other occasions. He knew Briskey from prison and from a holding cell of the

county jail. (R.E. #15 T.T. 5/17/2001 p.p. 687-688). According to Payne, Briskey talked about a robbery in Hillsdale. He never mentioned the name "Bradford". He said he was going to court on another case involving somebody named "Lee". Mr. Briskey, stated that he "got out of a lot trouble by telling on someone". Briskey told the police "of a bank robbery, mentioning a guy named 'Lee', but that 'Lee' didn't do the robbery, but he had to tell the police someone". Briskey thought the matter was funny. (R.E. #15 T.T. 5/17/2001 p.p. 689-691, 698).

Petitioner Bradford took the stand. He was 31 years of age. He had acquired his party store during June/July of 2000. He and Mr. Boon ran the store. He described his financial situation leading up to December 1, 2000, as "struggling but surviving". He explained that the phone bill problem was due to a billing error. (R.E. #15 T.T. 5/17/2001 p.p. 700-706). On December 1, 2000, they shut the store down for what they anticipated would be two weeks, because he was going to jail.

Bradford testified that he had spoken to Michelle Sanford about buying an ATV. This subject originated out of conversations he was having with Briskey. He and Briskey had discussed building a starter-house in Detroit. Bradford denied ever borrowing money from Briskey. (R.E. #15 T.T. 5/17/2001 p.p. 710-713). On November 30, 2000, Boon and Briskey were at his home. The conversation again turned to an ATV. Bradford was upset because Briskey did not bring an ATV with him as agreed on November 30, 2000. There was no robbery of any ATVon November 30th. (R.E. #15 T.T. 5/17/2001 p.p. 715-717).

Bradford testified that he arose the next morning at around 7:30 a.m. When he awoke Mr. Boon, he was counting the store proceeds from the previous week. He had not been to a bank. He had several thousand dollars on him. This was not unusual. He never finished counting the money. He decided to count it at the store. It was put into a brown paper bag.

(T.T. 5/17/2001 p.p. 718-722). He and Boon went to the store. He denied tossing anything onto the road. They opened the store between 9:30 and 10:00 a.m. He first took the money in his possession to a back room and counted it. None of this money was taken upstairs. (R.E. #15 T.T. 5/17/2001 p.p. 722-724).

Bradford testified that he called Mr. Yates that morning, in order to borrow additional money, having learned that Briskey did not come through. Yates brought him a cashier's check. Bradford was to do work for Yates, though Yates was unhappy to learn that Bradford did not have an ATV to post as collateral. Then, surprisingly, Briskey brought a check for $3,300.00 to be used on the Detroit project. Bradford paid Reiger that night. (R.E. #15 T.T. 5/17/2001 p.p. 726-731).

Bradford denied ever talking to Briskey about a would-be robbery route. The only comments he ever made about robbing a bank were made in jest, and two years ago. (R.E. #15 T.T. 5/17/2001 p. 743). In fact, Bradford testified that it was Briskey who, on December 1, 2000, bragged that he was involved in a bank robbery. He testified that he did not rob the bank, and he did not know who did. (R.E. #15 T.T. 5/17/2001 p.p. 745, 749).

State's Rebuttal: In rebuttal, the prosecution called Shawn Jacob Ort. He was a current inmate of the Hillsdale County Jail under Trustee status. He had the opportunity to speak with Mr. Payne one week earlier. According to Ort, Payne would request that he get things from Bradford for him, things from the commissary. This occurred two to three times per day over the course of four days.

Ort claimed that Payne told him that Bradford admitted to going to a bank on an ATV and holding up a bank teller with a gun but became confused over the time sequence, as Payne indicated that this conversation occurred the day before the robbery. (R.E. #15 T.T. 5/17/2001

p.p. 772-776). Mr. Dunham objected because Bradford wasn't arrested until December 19, 2000.

Detective Kanouse was recalled. He testified that he collected news stories about the robbery as part of his investigation. He was himself involved in preparing press releases as part of his investigation. According to the Detective, no news story contained information about the robber saying "have a good day ladies". That detail was not released to the public. (R.E. #15 T.T. 5/17/2001 p.p. 780-781).

Other facts and details will be added as necessary, infra.

Habeas Standards and the AEDPA

Under rules set down in the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEPDA"), a federal court must grant a writ of habeas corpus to a petitioner in state custody with respect to any claim adjudicated on the merits in state court if (1) the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. §2254 (d)(1)(2). In Williams v. Taylor, 529 U.S. 362, 412 (2000), the Supreme Court explained that "clearly established Federal law, as determined by the Supreme Court" means Supreme Court decisions. See: Brumley v. Wingard, 269 F.3d 629 (6th Cir. 2001).

At the same time, "clearly established law" under the AEDPA includes legal principles and standard enunciated in Supreme Court decisions. As the United State Supreme Court stated, a state court decision makes "an unreasonable application of this Court's precedence" when the court "unreasonably extends a legal principle from our precedent to a new context where is should not apply . . ." but, it is important to emphasize, the Court said at the same time that a

lower court also errs when it "*unreasonably refuses to extend that principle to a new context where is should apply.*" Williams, 529 U.S. at 407.

The Court also explained that a state court decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts. 529 U.S. 405-406. An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of the prisoner's case." Id. at 409.

Federal courts must presume the correctness of state court factual findings. 28 U.S.C. §2254(e)(1). This presumption of correctness is not an insurmountable barrier and a court may set aside deference to those findings if clearly erroneous. See Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995). The AEDPA by its own terms is applicable only to habeas claims that were 'adjudicated on the merits in State Court . . ." 28 U.S.C. §2254 (d). Where the state court does not assess the merits of the claim raised in a habeas petition, the deference due under AEDPA does not apply. Wiggins v. Smith, 539 U.S. 510; 123 S. Ct. 2527 (2003); Williams v. Coyle, 260 F.3d 684, 706 (6th Cir. 2001).

Thus, while the hurdles are considerable, this Court not only retains the authority to correct convictions obtained in violation of federal constitutional rights, it has a duty to do so when the violation has a substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 637-638 (1993). This test does not say *only* errors that turn into convictions are harmful. A Brecht analysis is different than simply measuring the sufficiency of the evidence, it asks, "what effect the error had or reasonably may be taken to have had upon the jury's decision." Kyger v. Carlton, 146 F.3d 374, 382 (6th Cir. 1998). Stated

otherwise, if this Court harbors "grave doubt" as to whether the error impacted the fairness of the petitioner's trial the writ of habeas corpus should be granted. O'Neal v. McAninch, 513 F.3d 432, 435 (1995).

Applying the above principles to the issues infra, Petitioner Lee Charles Bradford submits that this Court will find that it is compelled to grant a writ of habeas corpus in order to effectuate constitutional rights.

I. A CRIMINAL DEFENDANT HAS A CONSTITUTIONAL RIGHT TO EXCLUPATORY EVIDENCE THAT IS IN THE POSSESSION OF THE STATE DURING THE PROSECUTION PROCESS. IN THIS CASE A PORTION OF A SKI MASK, A KEY PIECE OF EVIDENCE AT TRIAL AND ALLEGED TO HAVE BEEN WORN BY THE BANK ROBBER, WAS SUBMITTED FOR DNA TESTING BY THE STATE POLICE CRIME LABORATORY AND ITS RESULTS WERE NOT DISCLOSED TO THE DEFENSE DURING PROSECUTION, THUS DENYING FEDERAL CONSTITUTIONAL RIGHTS.

The Issue Involves Clearly Established Federal Law

There can be no dispute as to the constitutionally of this claim. In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that the failure of the State to provide a criminal defendant with exculpatory evidence in its possession violates due process. Brady v. Maryland applies to evidence in the hands of the police, whether the prosecutor knows about it or not, whether they suppressed it or not, and whether the accused asked for it or not. Strickler v. Greene, 527 U.S. 263, 280 (1999); accord United States v. Agurs 427 U.S. 97, 107 (1976).

Under the AEDPA, this Court must grant relief where a petitioner's state court "adjudication . . . was contrary to, or . . . an unreasonable application of, clearly established Federal [Supreme Court] law." 28 U.S.C. §2254(d)(1). Federal courts must presume the correctness of state court factual findings. 28 U.S.C. §2254(e)(1). "Where the state court disposes of a Federal constitutional claim with little-to-no articulated analysis of the constitutional issue" a modified form of AEDPA deference applies. Hawkins v. Coyle, 547 F.3d 540, 546 (6th Cir. 2008); Vasquez v. Jones, 496 F.3d 564, 570 (6th Cir. 2007).

The Constitutional Violation

In District Attorney's Office v. Osborne, 557 U.S. ____ (June 18, 2009), Justice Roberts aptly noted:

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> DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices.[2] Id.

In this case the state has within its possession such evidence as referenced by Justice Roberts, evidence which had the "*ability to both exonerate the wrongly convicted and to identify the guilty.*" Yet the state has refused to divulge the results of DNA testing. The state has failed to produce the evidence *at* trial, *at* sentencing, and *again* on Petitioner's post-conviction appeal.

Brady v. Maryland, 373 U.S. 83 (1963) stands for the proposition "that suppression of evidence favorable to an accused upon request violates due process". To establish a Brady violation the evidence at issue (1) must be favorable to the defense, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the state either willfully or inadvertently; and (3) and prejudice must have resulted. Owens v. Guida, 549 F.3d 399, 415 (6th Cir. 2008). An accused is prejudiced when the evidentiary suppression "undermines confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. 429, 434 (1995); United States v. Bagley, 473 U.S. 667, 678 (1985).

On Friday, December 1, 2000, an armed robber came into the North Adams Branch of the Southern Michigan Bank and Trust and robbed the bank of $15,100. The robber's identify was concealed by the wearing of a Carhart-type of coat, a black knitted ski mask, and knitted gloves. (R.E. #13 T.T. 5/15/2001 p.p. 159, 185, 194-196). The robbery itself was described at trial as lasting between 40 seconds to one minute. (R.E. #13 TT 5/15/2001 pp 189-190, 210).

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[2] In District Attorney's Office v. Osborne, Justice Roberts, while recognizing the importance of DNA testing to the criminal prosecuting process, writing for the majority found that there was no post-conviction right under the federal constitution to DNA testing. Justice Roberts did note that "Brady does not control this case" and that Mr. Osborne did not claim Brady violations. Instead, Mr. Osborne claimed a new federal due process right to test evidence after conviction. Unlike Mr. Osborne, Petitioner Bradford did request DNA testing at trial and was told no such evidence was available, thus the claim here is premised upon rights within the ambit of Brady v. Maryland.

There was no firm identification made of Petitioner Bradford as the robber by the bank tellers nor was Petitioner Bradford identified as the robber by video tape recordings.

It was the prosecution's theory that Petitioner Bradford was the robber who wore the black knitted mask during the robbery. In support of this theory, the prosecution submitted a black knitted ski type mask found along side the road on the alleged escape route. (Trial Exhibit #8). Witness Levi Stoll testified as to finding the knitted mask along side the road. (R.E. #13 T.T. 5/15/2001 p.p. 281-282). Gordon Bigelow, Jr., told the jury that he saw two men traveling away from the bank wearing black knitted ski masks. (R.E. #13 T.T. 5/15/2001 p.p. 262-266).

At trial it was the testimony of the police that exhibit #8, the black knitted ski mask alleged to have been worn by the robber was sent to the Michigan State Crime Laboratory for analysis, but was contaminated with extraneous material (dog hair) supposedly inadvertently placed on the ski mask by a police dog handler. (R.E. #14 T.T. 5/16/2001 p.p. 619-621). As told to the Court during trial, there was nothing to test:

D/SGT. Kanouse: That's all. There was no human hair discovered within the mask.

THE COURT: All right.

D/SGT. Kanouse: I did not request any kind of DNA testing.

THE COURT: All right. Well, you have to have something to test, right?

D/SGT. Kanouse: Right. We didn't have anything else.

THE COURT: You found no human hair or anything else?

D/SGT. Kanouse: Right. (R.E. #14 T.T. II 5/16/2001 p.p. 308-309).

The above statements by Detective Kanouse are materially **untrue**.

This trial concluded with a guilty verdict on May 17, 2001 (R.E. #15 T.T. 5/17/2001 p.p. 859-864) and sentence was imposed on July 2, 2001 (R.E. #16 S.T. 7/2/2001 pp 18-20). On May

31, 2001, after conviction but prior to sentencing, the Michigan State Police ("M.S.P."), Forensic Science Division, issued a report, which stated:

> Three fiber fragments were removed from the eye glasses and placed between glass slides. A number of hairs and fibers were removed from the black knit hat (Item #6) and placed between glass slides. The area inside the black knit cap around the nose and mouth areas appeared to have cellular material present and was removed for possible future analysis.
>
> The section of the knit hat removed from the mouth and nose area were turned over to the Biology Subunit for DNA analysis on 6/5/01.[3]

In a memorandum directed to the prosecutor, acting supervisor of the M.S.P. Lansing Laboratory Christopher Bommarito apologized for the testing delay and stated as to the black knit hat:

> F/S Bard-Curtis did not complete this analysis in time for trial. The East Lansing Laboratory was due to move to our new facility in Lansing in late December. Much of the laboratory equipment needed for analysis was packed away for the move. An ice storm shortly before the move delayed the move until April/May 2001. Many cases could not be completed during the period 12/00-5/01, due to the laboratory move.
>
> The evidence was returned on 5/14/01 with no report issued. A report was issued by F/S Bard-Curtis on 5/31/02. F/S Bard-Curtis turned over a section of the mask around the nose and mouth to the biology subunit for DNA testing 6/5/01.[4]

As a threshold matter, the criminal prosecuting process is not over until the conviction becomes final. "A final judgment is reached when the court pronounces a sentence, leaving nothing to be done but enforcement." People v. Martinez, 193 Mich. App. 377 N.W.2d 124 (1992). "Final judgment in a criminal case means sentence." Korematsu v United States, 319 U.S. 432, 435 n. 3 (1943); also see Miller v. Aderhold, 288 U.S. 206 (1933).

As stated a Brady claim requires a showing of suppressed material evidence, regardless of good faith or bad by the prosecution, that results in prejudice. There is not much to say about

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2 This document is found at Appendix A

3 This document is found at Appendix B.

the first two requirements. The state court record shows that the testimony of no DNA evidence available was untrue prior to the conviction becoming final and was known to the state prior to the conviction becoming final. Notwithstanding ice storms, incompetent police evidence gathering techniques, or laggard state police testing capabilities, Petitioner Bradford possessed a Fourteenth Amendment right under Brady to material exculpatory evidence and the good or bad faith of the prosecutor is irrelevant. As to materiality, at a state court hearing regarding the effectiveness of counsel with respect to the black knitted ski mask, the state court trial judge stated that "it was clear that the black mask was used in the robbery" and "it was a material piece of evidence in the course of the trial." (R.E. #10 H.T. 3/19/2002 p. 61).

Thus, as to the state's knowledge of evidence not disclosed and its materiality the record is clear. As to the state court finding that the evidence was actually used by the bank robber and its importance to Petitioner Bradford's trial, those factual findings are to be presumed correct by this Court in conducting its habeas review. 28 U.S.C. §2254(e)(1). Petitioner Bradford satisfies the first two elements of a Brady claim. As to the state courts' findings as to the third element, the prejudice test, the state courts never specifically addressed this element of the Brady test. The state trial court simply denied that motion without discussing its merits and without imposing any procedural hurdles to further appeal.[5] On reconsideration the trial court again refused to discuss any aspects of the claim.[6] On appeal both the Michigan Court of Appeals and the Michigan Supreme Court issued standard orders denying relief "under M.C.R. 6.508(D)".[7] These orders do not address the prejudice elements of a Brady claim at all.

There is a reference to a challenge of the prosecution's handling of the ski mask evidence. On the direct appeal the Court of Appeals framed the issue before them: "Defendant

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5 This Order is found at Appendix C.

6 This Order is found at Appendix D.

7 These Orders are found at Appendices E & F.

next contends that the prosecution committed misconduct with respect to its handling of the ski mask evidence." People v. Lee Charles Bradford, C.O.A. No. 242339, p. 5 (11/4/2003). In denying relief on this claim the Court of Appeals found as a factual matter:

> [* * *] Detective Kanouse informed the trial court that the ski mask was sent to the trace evidence unit for testing, at which time dog hair was found in the ski mask. Kanouse explained that no human hair was discovered in the ski mask, and that no DNA testing was requested on the mask because there was nothing found in the ski mask that could be tested. Id.

As shown by the appended documents this finding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. §2254 (d)(2). To the extent that the Michigan Court of Appeals addressed the Brady claim, its findings that the prosecution did not possesses evidence favorable to the defense, as the "only evidence found on the ski mask was dog hair" again is an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. §2254 (d)(2). Moreover, the appellate court's decision fails apply federal law to the prejudice element by holding that "defendant's failure to identify the suppression of any evidence, defendant has failed to demonstrate that a reasonable probability exists that the outcome of the proceedings would have been different". Bradford, supra, at p. 7. Only by ignoring the evidence of the M.S.P. Laboratory provided after trial, but before sentencing, can it be said that the mask contained only dog hairs and no testable DNA. Indeed, no where in the opinion doe the state appellate court even acknowledge that testing was actually ordered by the M.S.P. Laboratory.

The undisclosed evidence was prejudicial to the defense. At trial it was the defense claim that two key state witnesses (Harry Briskey and Birdon Boon) had equal access to all of the circumstantial evidence used by the prosecution to implicate Petitioner Bradford in the bank robbery. One of these two witnesses (Briskey) placed a black knitted ski mask on Petitioner

Bradford's head. (R.E. #14 T.T. 5/16/2001 p.p. 433-434). The other (Boon) claimed to have seen Petitioner toss such a hat away on the alleged escape route. (R.E. #14 T.T. 5/16/2001 p.p. 495-498). Again, while analysis of this issue by the state courts was slight, the historical record shows the mask was key to the state's case and the inability of Petitioner Bradford to connect the biological evidence to another left him with no evidence but his own denial of robbing the bank to present to the jury.

Where the state courts do not articulate a constitutional analysis of a claim, a modified standard of deference is applied under the AEDPA. This modification calls for an independent and careful review of the record and applicable law to determine if the state court decision was contrary to or an unreasonable application of federal law. Maldonado v. Wilson, 416 F.3d 470, 476 (6th Cir. 2005). Petitioner Bradford submits that upon appropriate review this Court will find that Petitioner was denied his rights under federal law to due process as set forth by Brady v. Maryland supra.

Anticipating the Respondent's answer, Petitioner will briefly address the claim of procedural default. M.C.R. 6.508(D) contains sections which deny relief for lack of merit or on procedural grounds. The orders of the appellate courts in this case do not declare whether or not the imposition of M.C.R. 6.508(D) is a reference to availability of other appellate recourses, lack of merit, lack of prejudice, or a procedural bar, the orders are all encompassing in their brevity. In Abela v. Martin, 380 F.3d 915, 923-924 (6th Cir. 2004), the Sixth Circuit recognized that orders such as this may demonstrate the state court's imposition of an "independent and adequate state procedural rule" when there are other "clarifying factors". In this case there are no "clarifying factors", such as a lower court ruling invoking MCR 6.508(D)(3), which the state appellate courts implicitly adopted in their orders denying leave to appeal.

Petitioner Bradford has shown a violation of federal law which has undermined confidence in the trial. It is his request that this Honorable Court order the state to do what it has to date refused to do, reveal the results of any and all DNA testing. It is his further request that this Court fashion a remedy to restore the prejudice suffered, that is allow Petitioner Bradford to conduct independent testing of the biological materials as he sought to test at trial, in order to show that the mask alleged to have been worn by the bank robber was in fact worn by a prosecution witness.

This Court is requested to provide the relief sought above, or in the alternative, order the State to provide a new trial within a reasonable amount of time.

EXHIBIT D

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
JONESVILLE POST

COL. PETER C. MUNOZ
DIRECTOR

October 29, 2007

Mr. Neal A. Brady
Prosecuting Attorney
61 McCollum Street
Hillsdale, Michigan 49242

RE: People v Lee Charles Bradford

Dear Mr. Brady:

In response to your request of October 25, 2007 to preserve all evidence associated with the above captioned matter bearing complaint #19-3439-00, please be advised that the complaint was closed on August 27, 2002 and the last piece of property was disposed of on August 26, 2002.

If I can be of further assistance in this matter please contact me at the Jonesville Post.

Sincerely,

F/Lt. William B Kanouse

WILLIAM B. KANOUSE, F/LT.
Commanding Officer
Michigan State Police Jonesville Post

WBK:pb

EXHIBIT E

Exh E

LEE CHARLES BRADFORD, Petitioner, v. KENNETH ROMANOWSKI, Respondent.

Case Number: 2:05-cv-72889

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2012 U.S. Dist. LEXIS 16665

February 10, 2012, Decided
February 10, 2012, Filed

PRIOR HISTORY: People v. Bradford, 2003 Mich. App. LEXIS 2813 (Mich. Ct. App., Nov. 4, 2003)

CORE TERMS: ski mask, prosecutor's, testing, mask, prosecutorial misconduct, ineffective, robbery, favorable, appealability, certificate, suppressed, trial counsel, exculpatory evidence, hair, habeas petition, prisoner, teller, robber, jurists, citations omitted, test results, state-court, discovery, biblical, driving, atonement, habeas corpus, direct appeal, failed to demonstrate, federal habeas

COUNSEL: **[*1]** For Lee Bradford, Petitioner: Laura K. Sutton, Manchester, MI.

For Kenneth Romanowski, Warden, Respondent: David H. Goodkin, LEAD ATTORNEY, Michigan Attorney General, Lansing, MI.

JUDGES: Honorable MARIANNE O. BATTANI, UNITED STATES DISTRICT JUDGE.

OPINION BY: MARIANNE O. BATTANI

OPINION

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

I. INTRODUCTION

This is a habeas case filed by a Michigan state prisoner under 28 U.S.C. § 2254. Petitioner Lee Charles Bradford is incarcerated by the Michigan Department of Corrections, currently at the Alger Correctional Facility in Munising, Michigan. On July 22, 2005, he filed this Habeas Petition, challenging his 2000 jury convictions for one count of armed robbery, one count of felon in possession of a firearm, and one count of felony firearm, which occurred in Hillsdale County Circuit Court. On July 2, 2001, Petitioner was sentenced, as an habitual offender, to concurrent prison terms of thirty-seven to sixty years for the armed-robbery conviction, six years, four months to twenty years for the felon-in-possession conviction, to be served consecutively to Michigan's mandatory two-year prison term for the felony-firearm **[*2]** conviction.

In his Habeas Petition, Petitioner raises claims concerning a *Brady v. Maryland* [1] violation, prosecutorial misconduct, and the effectiveness of trial and appellate counsel. Respondent filed an Answer to the Petition, alleging that it should be denied because Petitioner's claims are procedurally defaulted.

FOOTNOTES

1 *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

For the reasons stated below, the Court will deny the Petition. The Court also will decline to issue Petitioner a Certificate of Appealability.

II. BACKGROUND

This case arises because of a bank robbery that occurred at the North Adams Branch of the Southern Michigan Bank and Trust in Adams Township in Hillsdale County, Michigan on December 1, 2000, where $15,100 was stolen. A gunman, wearing a ski mask, entered the bank alone, waved a gun around, and ordered the tellers not to hit their alarm buttons and to get down on the floor. Afterward, as the gunman was leaving the bank, he said, "Have a nice day." The robbery lasted less than one minute. As the tellers got up off the floor, two of them noticed an all-terrain vehicle (ATV) driving away from the scene. They could not identify the gunman.

The prosecution's theory was that Petitioner **[*3]** was in financial difficulty and, after stealing an ATV, armed himself with a pistol and robbed the bank. After robbing the bank, Petitioner tossed away a pair of sunglasses and a black knitted cap, worn during the robbery, on a side road while making his escape. Marked money taken from the bank was found hidden in Petitioner's store in Jackson, Michigan, and proved involvement.

The defense conceded that a robbery occurred and the robber's use of a knitted cap or ski mask. However, the defense argued that other people, including the prosecution's witness Harry Briskey, had access to Petitioner's store as well as to the ATV and that Petitioner had nothing to do with the robbery.

The Michigan Court of Appeals summarized the underlying facts of this case, when addressing Petitioner's insufficient evidence claim, which are presumed correct on habeas review. *See Monroe v. Smith*, 197 F.Supp.2d 753, 758 (E.D. Mich. 2001), *aff'd*, 41 F.App'x 730 (6th Cir. 2002) (citations omitted).

> Regarding his claim that there was insufficient evidence to support his convictions, defendant does not contest that an armed robbery took place or that a firearm was utilized during the commission of such. Rather, defendant's **[*4]** arguments center on the lack of a connection between defendant and the charged crimes.
>
> We find that there was sufficient evidence to connect defendant to the offenses in this case. Trial testimony demonstrated that [Bank Teller Rhonda Sue] Baker noticed a four-wheeler drive past the bank, and approximately five minutes later, the robber entered the bank. The robber was described as a man wearing a black knit ski mask, gold wire or dark sunglasses, a camouflage hooded sweatshirt, and black knit gloves. Baker testified that $15,100 was taken from the bank on December 1, 2000, including three twenty dollar bills, which were used as bait money. As the robber was leaving, he told the tellers to have a nice or good day. After the robber left, Baker saw the four-wheeler drive past the bank again, and [Shelly] Reed [, another bank teller,] indicated that the four-wheeler drove off to the east.
>
> At approximately 9:30 a.m. on the same day, David Stoll [, a local farmer,] was driving his combine to his field when he saw a red, mid-sized car drive past him at a fast rate of speed, almost driving into the ditch in an effort to pass the combine. David noticed no objects in the road while he was driving. **[*5]** Approximately thirty minutes later, David's brother, Levi Stoll, drove to the combine location and discovered a black ski mask lying on the shoulder bank of the road. Birden Boone [Petitioner's friend] testified that as he and defendant were driving in a red Grand

> Am, he saw defendant throw a black hat out of the car window while they drove past a combine.
>
> Harry Briskey [an inmate at the Michigan Department of Corrections] testified that he and defendant went to steal a motorcycle the night before the robbery, but that they actually stole a four-wheeler. Boone heard defendant and Briskey talk about getting the four-wheeler. Briskey indicated that defendant wore a dark blue or black ski mask when they stole the four-wheeler. There was also evidence that defendant removed some plywood from the front of the four-wheeler after stealing it and upon his return to his house. [Detective William] Kanouse located a piece of plywood with gun racks from the rear of a red barn on defendant's property. The owner of the four-wheeler, Charles Boothe, testified that he had a platform and a gun rack installed on the front of the four-wheeler for hunting purposes. Finally, the stolen four-wheeler was **[*6]** located in Teddy Yates'[s] sister's garage, after which the police discovered that Yates obtained the stolen four-wheeler from defendant.
>
> There was also evidence that defendant informed Briskey that he would have to either declare bankruptcy or rob a bank, and that defendant showed Briskey the route he would take to rob the bank. On the day of the robbery, Boone saw defendant placing money in a bag, and heard defendant state that he "did it," which led Boone to believe that defendant robbed the bank. Defendant also informed Boone of specific details of the robbery, such as the fact that certain drawers were locked and that defendant told the bank tellers to have a nice day. Defendant also informed Boone that he dropped some of the money in the wall of defendant's convenience store, which was later retrieved by Kanouse. Also found in defendant's store were the three twenty dollar bills in bait money along with several wrappers from the North Adams branch of the Southern Michigan Bank and Trust that were marked with a stamp similar to that of money wrappers typically contained within Baker's drawer.

People v. Bradford, No. 242339, 2003 Mich. App. LEXIS 2813, 2003 WL 22495579, at *6-7 (Mich.Ct.App. Nov. 4, 2003) (footnote **[*7]** and citation omitted).

Additional trial testimony revealed the following.

Richard Reiger testified that, in October 200, he sold property to Petitioner and his wife by land contract for $170,000. Reiger testified that he received $5000.00 as a down payment over a three—month period. By November 30, 2000, Petitioner owed $2,250. Reiger said Petitioner made last-minute payments. Petitioner told him that his financial situation was poor. On December 1, at about 8:00 p.m., Reiger received a $2,250 cashiers check from Petitioner.

Charles Boothe was the owner of an ATV. He testified that, in December 2000, he reported to the police that the ATV was missing. The police found it in February 2001.

Teddy Yates, Petitioner's friend, testified that Petitioner called him on December 1, 2000, and told him that he had a house payment due that day and that his money was tied up. He offered to do work for Yates in exchange for an advance of $2350, and offered an ATV as collateral. Yates took a check to Petitioner but he did not receive an ATV as collateral. Rather, Petitioner took the check. Yates got the ATV several weeks later in December 2000. Yates did not know that the ATV was stolen.

Petitioner testified. **[*8]** He said he had a party store that he ran with Boone. He said his financial situation leading up to December 1, 2000 was "struggling but surviving." He testified that he spoke with someone regarding buying an ATV. He was at his house on November 30, 2000, with Boone and Briskey, and they were discussing an ATV. He was angry with Briskey because he did not bring an ATV with him, as previously agreed upon.

Petitioner testified that he awoke the next morning at around 7:30 a.m. He said he was counting the store's proceeds from the previous week. He did not go to a bank. He had several thousand

dollars on him, which was not unusual. He said he never finished counting the money and decided to count it at the store. He went to the store with Boone.

Petitioner denied ever talking to Briskey about a would-be robbery route. He testified that he did not rob the bank and did not know who did.

After a three-day trial, the jury convicted Petitioner. He was sentenced as described.

Following his sentencing, Petitioner filed a Motion for a *Ginther* [2] Hearing and for Resentencing with the trial court. On March 9, 2002, a hearing was held where Petitioner's trial counsel, Roderick Dunham, and others were **[*9]** called to testify. Following the hearing, the trial court denied Petitioner's Motion.

FOOTNOTES

2 *People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922 (1973).

Petitioner then filed his direct appeal with the Michigan Court of Appeals, raising claims concerning his sentencing, the effectiveness of trial counsel, prosecutorial misconduct with respect to the handling of the ski mask, and trial court error in binding him over because the evidence presented at the preliminary-examination hearing was insufficient. The Court of Appeals affirmed Petitioner's convictions and sentences. *Bradford*, 2003 Mich. App. LEXIS 2813, 2003 WL 22495579, at *8.

Petitioner subsequently filed an Application for Leave to Appeal the Court of Appeals's decision with the Michigan Supreme Court, raising the same claims raised in the Court of Appeals, except for the sentencing claim. The Application was denied on April 30, 2004. *People v. Bradford*, 470 Mich. 860, 679 N.W.2d 73 (2004) (Table).

Petitioner did not filed a Petition for Writ of Certiorari with the United States Supreme Court. Rather, on July 22, 2005, he filed this Habeas Petition, raising claims concerning prosecutorial misconduct, the effectiveness of trial counsel, and trial court error. The Petition **[*10]** was signed and dated July 15, 2005.

On May 22, 2007, Petitioner retained counsel and counsel filed a Motion to Stay the proceedings. On July 7, 2007, the Court granted Petitioner's request to stay his habeas proceedings in order for him to return to state court to exhaust his state-court remedies with respect to his claim regarding the failure of the prosecutor to DNA test the ski mask, which was linked to the crime.

Petitioner returned to the trial court and filed a Motion for Relief from Judgment, in which he argued he should be permitted to conduct independent DNA testing of a portion of the knitted mask alleged to have been worn by the actual bank robber and taken by the Michigan State Police for DNA testing. He also requested that all documents generated by the State Police in the course of its forensic testing be provided. The trial court denied the Motion on October 1, 2007. *People v. Bradford*, No. 2001-259131-FH (Hillsdale Cnty. Cir. Ct. Oct. 1, 2007). The Court of Appeals and the Michigan Supreme Court denied his Applications for Leave to Appeal "because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Bradford*, No. 288004 (Mich.Ct.App. Oct. 24, 2008) **[*11]** ; *People v. Bradford*, 484 Mich. 865, 769 N.W.2d 664 (2009) (Table).

Subsequently, on September 7, 2009, Petitioner returned to this Court and filed a Motion to Lift the Stay, along with an Amended Habeas Petition, which the Court granted on September 14, 2009. In his Amended Habeas Petition, Petitioner raises claims concerning a *Brady* violation, prosecutorial misconduct, and the effectiveness of trial and appellate counsel.

III. STANDARD OF REVIEW

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment 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 **[*12]** evidence presented in the State court proceeding.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

The Supreme Court has explained that "[A] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). The "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,'and 'demands that state-court decisions be given the benefit of the doubt.'" **[*13]** *Renico v. Lett*, U.S. , , 130 S. Ct. 1855, 1862, 176 L. Ed. 2d 678 (2010) ((quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam)). "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, U.S. , , 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).

Furthermore, pursuant to § 2254(d), "a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Id.* "[I]f this standard is difficult to meet, that is because it was meant to be." *Harrington*, U.S. , 131 S.Ct. at 786. Although 28 U.S.C. § 2254(d), as **[*14]** amended by the AEDPA, does not completely bar federal courts from relitigating claims that have previously been rejected in the state courts, it preserves the authority for a federal court to grant habeas relief only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" the Supreme Court's precedents. *Id.* "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 332 n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)) (Stevens, J., concurring in judgment)).

Indeed, a "readiness to attribute error [to a state court] is inconsistent with the presumption that state courts know and follow the law." *Woodford*, 537 U.S. at 24. Thus, in order to obtain habeas relief in federal court, a prisoner is required to show that the state court's rejection of his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, U.S. , 131 S.Ct. at 786-87.

IV. DISCUSSION

A. Procedural [*15] Default

As an initial matter, Respondent argues that Petitioner's claims are barred by procedural default because his claims were not raised in Petitioner's direct appeal. Rather, they were first presented to the state trial court in his Motion for Relief from Judgment. As a result, Respondent argues that review of the claims are procedurally barred. Respondent is correct.

However, "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)). "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Lambrix*, 520 U.S. at 525. In this case, to the extent that any of Petitioner's claims are procedurally defaulted, the Court finds that the interests of judicial economy are best served by addressing the merits of the procedurally-defaulted claims.

B. Petitioner's Claims

1. *Brady* violation

In his first habeas claim, Petitioner alleges that the prosecutor committed **[*16]** misconduct with respect to the handling of the ski mask; that a *Brady* violation occurred. Additionally, Petitioner argues that he is entitled to independent DNA testing of the mask in order to demonstrate that he was not the perpetrator of the crime.

First, to the extent that Petitioner is claiming that the prosecutor violated state discovery rules, he would not be entitled to habeas relief. "It is well settled that there is no general constitutional right to discovery in a criminal case." *Stadler v. Curtin*, 682 F.Supp.2d 807, 818 (E.D. Mich. 2010) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988)). A claim that a prosecutor violated state discovery rules is not cognizable in federal habeas review, because it is not a constitutional violation. *See Lorraine v. Coyle*, 291 F.3d 416, 441 (6th Cir. 2002). A federal habeas court may only grant habeas relief to a petitioner "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254 (a). Therefore, habeas relief may not be based upon perceived error of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Second, **[*17]** regarding Petitioner's *Brady* claim, the Supreme Court has held that the prosecutor's failure to disclose evidence favorable to the defense constitutes a denial of due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In other words, to find a *Brady* violation, not only must the evidence be suppressed, but the suppressed evidence must be material and favorable to the accused. *Elmore v. Foltz*, 768 F.2d 773, 777 (6th Cir. 1985).

Favorable evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 432-36, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Material evidence is that which is "so clearly supportive of a claim of innocence that it gives the prosecution notice of

a duty to produce." *United States v. Clark*, 988 F.2d 1459, 1467 (6th Cir. 1993). The duty to disclose favorable evidence includes the duty to disclose impeachment evidence. *Bagley*, 473 U.S. at 682; *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

The *Brady* **[*18]** rule only applies to "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *see also United States v. Mullins*, 22 F.3d 1365, 1370-71 (6th Cir. 1994) (same). Moreover, a *Brady* violation does not occur if previously undisclosed evidence is disclosed during trial unless the defendant is prejudiced by its prior non-disclosure. *See United States v. Word*, 806 F.2d 658, 665 (6th Cir. 1986). Thus, in order to establish a *Brady* violation, a petitioner must show that: (1) evidence was suppressed by the prosecution in that it was not known to the petitioner and not available from another source; (2) the evidence was favorable or exculpatory; and (3) the evidence was material to the question of the petitioner's guilt. *See Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000); *see also Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (same). The petitioner bears the burden of establishing a *Brady* violation. *Carter*, 218 F.3d at 601.

At trial, there was testimony that the ski mask was sent to the Michigan State Crime Laboratory for analysis but it was contaminated with extraneous material (dog hair). **[*19]** The sergeant testified that no human hair was discovered within the mask. However, after Petitioner was convicted but before he was sentenced, the Michigan State Police issued a report stating:

> The area inside the black knit cap around the nose and mouth areas appeared to have cellular material present and was removed for possible future analysis.
>
> The section of the knit hat removed from the mouth and nose area were turned over to the Biology Subunit for DNA analysis on 6/5/01.

Another memorandum directed to the prosecutor stated:

> F/S Bard-Curtis did not complete this analysis in time for trial. The East Lansing Laboratory was due to move to our new facility in Lansing in late December. Much of the laboratory equipment needed for analysis was packed away for the move. An ice storm shortly before the move delayed the moved until April/May 2001. Many cases could not be completed during the period 12/00-5/01, due to the laboratory move.
>
> The evidence was returned on 5/14/01 with no report issued. A report was issued by F/S/ bard-Curtis on 5/31/02. F/S/ Bard-Curtis turned over a section of the mask around the nose and mouth to the biology subunit for DNA testing on 6/5/01.

In this case, prior **[*20]** to trial, Petitioner moved to dismiss the case based on the prosecutor not reporting the DNA test results to him until the Friday before trial. The Court of Appeals, in a reference to a challenge of the prosecution's handling of the ski mask, stated:

> Defendant's prosecutorial misconduct argument centers on defendant's motion to dismiss the case based on the DNA results obtained from the ski mask. Defendant contended that the prosecution did not report the test results to defendant until the Friday before trial. The trial court inquired of defendant whether he requested that certain tests be performed, to which defendant responded that he wanted the results from all tests performed.
>
> Following defendant's motion, Detective William Kanouse informed the trial court

> that the ski mask was sent to the trace evidence unit for testing, at which time dog hair was found in the ski mask. Kanouse explained that no human hair was discovered in the ski mask, and that no DNA testing was requested on the mask because there was nothing found in the ski mask that could be tested. The trial court denied defendant's motion to dismiss, indicating that although there was a delay in getting the report to defendant **[*21]** by the Michigan State Police, there were no results to report.
>
> We find that defendant has failed to demonstrate that the prosecutor committed misconduct with regard to the ski mask test results. There is no indication from the transcripts or from defendant's brief on appeal that the delay in the DNA examination or the DNA report was caused by the prosecution. In fact, defendant fails to connect his argument regarding his motion to dismiss with any specific prosecutorial act whatsoever. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" Accordingly, defendant has failed to substantiate his claim of prosecutorial misconduct.

Bradford, 2003 Mich. App. LEXIS 2813, 2003 WL 22495579, at *4-5 (citation omitted).

The Court of Appeals further stated:

> We find that defendant has failed to demonstrate that the prosecution committed a *Brady* violation in this case. First, there was no indication that the prosecution possessed evidence favorable to defendant. As previously stated, the analysis of the ski mask revealed that no results were obtained from the ski mask. Even if viewed as favorable evidence, defendant has failed to demonstrate that the prosecution suppressed **[*22]** any evidence, and fails to identify any evidence that was allegedly suppressed at trial. At trial, Kanouse informed the court that the mask had been sent for analysis, but that no analysis or results had been obtained, and that the only evidence found on the ski mask was dog hair. Based on defendant's failure to identify the suppression of any evidence, defendant has failed to demonstrate that a reasonable probability exists that the outcome of the proceedings would have been different if the alleged "evidence" had been disclosed to defendant. Defendant's argument merely reflects that disclosure of the absence of test results was allegedly untimely, and does not indicate that there was a suppression of any evidence. Thus, defendant's argument that the prosecution committed a *Brady* violation fails.

Bradford, 2003 Mich. App. LEXIS 2813, 2003 WL 22495579, at *6.

Petitioner was able to contest the prosecution's evidence at trial and testify that he did not commit the charged offenses. The jury apparently did not believe Petitioner. Petitioner's claim that further DNA testing would have uncovered exculpatory evidence is entirely speculative and conclusory. Petitioner bears the burden to establish entitlement to habeas **[*23]** relief. He has not offered exculpatory evidence in support of his assertions. Moreover, the Court notes that a prosecutor has no obligation to investigate or discover exculpatory evidence or conduct additional scientific testing that might lead to exculpatory evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 59, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

The Court finds that the Court of Appeals correctly noted that "there is no indication from the transcripts or from defendant's brief on appeal that the delay in the DNA examination or the DNA report was caused by the prosecution" and that Petitioner failed "to connect his argument regarding his motion to dismiss with any specific prosecutorial act whatsoever." *Bradford*, 2003 Mich. App. LEXIS 2813, 2003 WL 22495579, at *5.

Therefore, for the reasons noted by the Court of Appeals, Petitioner's *Brady* claim is without merit. The record supports the Court of Appeals's decision with respect to this claim. That decision is not contrary to, or an unreasonable application of, clearly established Supreme Court

precedent. Habeas relief is not warranted.

Finally, Petitioner argues that he is entitled to DNA testing of the mask in order to establish that he was not the perpetrator of the crime. The Supreme Court **[*24]** of the United States has never held that the Constitution guarantees a right of post-trial discovery to a state criminal defendant. Indeed, to the extent that the Supreme Court has opined in this area, its decisions point in the opposite direction. *See District Attorney's Office v. Osborne*, 557 U.S. 52, 79, 129 S.Ct. 2308, 2326, 174 L. Ed. 2d 38 (no due process right to post-conviction DNA testing). To the extent Petitioner argues that DNA testing would reveal exculpatory evidence: "Any convicted person, no matter how compelling the evidence against him or her, could argue that DNA testing is necessary to rule out the unsubstantiated possibility that someone else committed the crime." *Karr v. Lafler*, No. 10-CV-14957, 2011 U.S. Dist. LEXIS 129046, 2011 WL 5405818, at *3 (E.D. Mich. Nov. 8, 2011) (citing *Bible v. Schriro*, 651 F.3d 1060, 1065-66 (9th Cir. 2011); *accord Campbell v. Warden of Lieber Corr. Inst.*, No. 0:10-671-JFAPJG, 2010 U.S. Dist. LEXIS 122634, 2010 WL 4668324, *5 (D.S.C. Aug. 23, 2010) (holding that speculative claims that DNA evidence will reveal actual innocence too speculative and without more are insufficient to demonstrate actual innocence).

Furthermore, prior to trial, Petitioner filed a Motion to Dismiss with the trial court based on the **[*25]** prosecutor not reporting the DNA test results to Petitioner until the Friday before trial, which was denied. However, following the Motion, the trial court asked Petitioner's counsel if he wanted to exclude the ski mask from evidence. The trial judge told Petitioner to discuss it with his attorney because it was a matter of trial strategy. Petitioner responded that he would bring the issue back before the court later that day. Later, Petitioner and defense counsel stated that they decided not to exclude the mask from evidence.

At the *Ginther* hearing, Petitioner's counsel indicated that he and Petitioner had a disagreement regarding the ski-mask evidence. Petitioner thought the mask should be suppressed and defense counsel believed it should come in as evidence because it was damaging to the prosecution's case since there was no human DNA to link the mask to Petitioner. Counsel believed the delay in the results was favorable to Petitioner. He explained that if there were no DNA results, then he would be able to blame the prosecution and the police for that, that if the results were favorable, then it would come in as proper exculpatory evidence, or that if the results were unfavorable **[*26]** to defendant, then he would argue to suppress the results based on unfair surprise.

The Court finds that Petitioner cannot satisfy his burden. From the record, there is no indication that the prosecution intentionally or otherwise suppressed the DNA evidence. Furthermore, testimony from the detective indicated that he informed the trial court that the ski mask was sent to the trace evidence unit for testing, at which time dog hair was found in the ski mask. He explained that no human hair was discovered in the ski mask, and that no DNA testing was requested on the mask because there was nothing found in the ski mask that could be tested. [3] The trial court then found that, although there was a delay in getting the report to defendant by the Michigan State Police, there were no results to report.

FOOTNOTES

[3] The Court notes that a letter sent by Detective Kanouse to the prosecutor, dated October 29, 2007, indicates, "In response to your request of October 25, 2007 to preserve all evidence associated with the above[-]captioned matter bearing complaint [], please be advised that the complaint was closed on August 27, 2002 and the last piece of property was disposed of on August 26, 2002." Letter attached **[*27]** to Petitioner's Brief to the Michigan Supreme Court regarding the trial court's denial of his Motion for Relief from Judgment.

With that, the Court concludes that Petitioner is not entitled to habeas relief with respect to his first habeas claim.

2. Prosecutorial Misconduct

In his second habeas claim, Petitioner alleges that the prosecutor committed misconduct when he defined his case in biblical terms in closing argument:

> What he has in his favor is his mouth, his testimony, the testimony that he has been thinking about for a long time. There isn't any physical evidence. Anything other than his conjectures and the diversions that he wants you to follow. There is one thing that he can't controvert. Truth. That's a goat. In the old days of the Old Testament the Hebrews once a year on the Day of Atonement would, during a ritualistic ceremony, place their wrongs and their sins upon a goat, which they would then let go. That was their way of releasing their wrongs and their sins, that one day a year, on the Day of Atonement.
>
> Mr. Bradford wants someone else to be his scapegoat. Today is the date of Atonement, ladies and gentlemen. Mr. Bradford is ducking and weaving and he wants to look past **[*28]** the truth through a small hole that he has tried to create in the wall of truth. * * * And today, his day of atonement * * * This — this is his day of atonement * * * Don't let this goat get away. Remember the truth and convict the defendant of armed robbery and the other two counts.

Trial Tr. vol. III, 836-38 May 17, 2001.

The United States Supreme Court has stated that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). To prevail on a prosecutorial misconduct claim, a habeas petitioner must demonstrate that the prosecutor's remarks or conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

The United States Court of Appeals for the Sixth Circuit has adopted a two-part test for determining whether prosecutorial misconduct violates a defendant's due process rights. *See Macias v. Makowski*, 291 F.3d 447, 452 (6th Cir. 2002) (citing cases). First, the court must determine whether the challenged statements were indeed improper. *Id.* at 452. Upon a finding of impropriety, the court must decide whether **[*29]** the statements were flagrant. *Id.* Flagrancy is determined by an examination of four factors: (1) whether the statements tended to mislead the jury or prejudice the accused; (2) whether the statements were isolated or among a series of improper statements; (3) whether the statements were deliberately or accidentally before the jury; and (4) the total strength of the evidence against the accused. *Id .; see also Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) (citing *United States v. Francis*, 170 F.3d 546, 549-50 (6th Cir. 1999)). "[T]o constitute the denial of a fair trial, prosecutorial misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial,' or 'so gross as probably to prejudice the defendant.'" *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997) (citations omitted).

Petitioner claims that the foregoing comments by the prosecutor were improper religious references which may have prejudiced the jury. It is well-settled that a prosecutor may not make remarks "calculated to incite the passions and prejudices of the jurors." *United States v. Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991). A prosecutor improperly invokes the passions and **[*30]** prejudices of the jury when he or she "calls on the jury's emotions and fears—rather than the evidence—to decide the case." *Johnson v. Bell*, 525 F.3d 466, 484 (6th Cir. 2008). Additionally, "[c]ourts universally condemn" the injection of religion into legal proceedings. *See Hicks v. Collins*, 384 F.3d 204, 223 (6th Cir. 2004).

In this case, the Court finds that the prosecutor's remarks, however, were not an attempt to improperly appeal to the jurors' religious beliefs. The reference was in regard to Petitioner wanting someone else to be his scapegoat. The prosecutor was telling a story, though the Court

believes that he should not have told a biblical story. Nevertheless, it was a story. The prosecutor did not argue that the jury should consider religious beliefs or base its decision upon religion or any other impermissible factor.

Even if the prosecutor's references were improper, they were not so flagrant as to deprive Petitioner of a fair trial. *See United States v. Roach*, 502 F.3d 425, 436 (6th Cir. 2007) (finding that the prosecutor's reference to the Ten Commandments during closing arguments did not warrant reversal on direct appeal); *Williams v. McKee*, No. 04-73326, 2007 U.S. Dist. LEXIS 59236, 2007 WL 2324953, *6 (E.D. Mich. Aug. 14, 2007) **[*31]** (denying habeas relief on prosecutorial misconduct claim involving biblical passage on flight); *Hobbs v. Lafler*, No. 05-CV-73907-DT, 2007 U.S. Dist. LEXIS 27033, 2007 WL 1098540, *5-6 (E.D. Mich. Apr. 12, 2007) (denying habeas relief on prosecutorial misconduct claim involving prosecutor's reference to "casting lots"). The prosecutor's remarks, while deliberate, were isolated, were not misleading or prejudicial, and were not an overt appeal to religious convictions.

Moreover, there was significant evidence of Petitioner's guilt presented at trial. The prosecution presented twenty-one witnesses and over fifty pieces of documented evidence. Therefore, habeas relief is not warranted on this claim.

3. Ineffective Assistance of Trial Counsel

In his third habeas claim, Petitioner asserts that his trial counsel was ineffective for his strategy as to the black knitted mask; it was counsel's position that there was no DNA evidence associated with the mask. Petitioner also claims that defense counsel was ineffective for failing to object to the biblical metaphors.

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court set forth a two-prong test for determining whether a habeas petitioner has received **[*32]** the ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. That requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Second, the petitioner must establish that counsel's deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id.*

With respect to the performance prong, a petitioner must identify acts that were "outside the wide range of professionally competent assistance" in order to prove deficient performance. *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. The petitioner bears the burden of overcoming the presumption that the challenged actions were sound trial strategy. *Id.* at 689.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is a reasonable probability that, but for **[*33]** counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Id.* at 686.

In *Harrington*, the Supreme Court confirmed that a federal court's consideration of ineffective assistance of counsel claims arising from state criminal proceedings is quite limited on habeas review due to the deference accorded trial attorneys and state appellate courts reviewing their performance. "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 131 S.Ct. at 788 (internal and end citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel

satisfied *Strickland's* deferential standard. *Id.* at 788.

With regard **[*34]** to the defense strategy of no DNA evidence, as discussed, *see* section IV, B, 1, *supra*, at the *Ginther* hearing, counsel testified that he and Petitioner had a disagreement regarding the ski-mask evidence. It was Petitioner's position that the ski mask should be suppressed, and counsel thought the mask should come in as evidence because it was damaging to the prosecution's case, since no human DNA linked the mask to Petitioner. Defense counsel also believed that the delay in the results was favorable to Petitioner no matter what happened. He explained that if there were no DNA results, he would be able to blame the prosecution and the police for that, that if the results were favorable to Petitioner, such would come in as proper exculpatory evidence, or that if the results were unfavorable to Petitioner, then he would argue to suppress the results based on unfair surprise.

As noted, decisions as to what evidence to present and whether to call certain witnesses are presumed to be a matter of trial strategy, and the failure to call witnesses or present evidence constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *See Chegwidden v. Kapture*, 92 F.App'x 309, 311 (6th Cir. 2004); **[*35]** *Hutchison v. Bell*, 303 F.3d 720, 749 (6 Cir. 2002). The fact that trial counsel's strategy was ultimately unsuccessful does not mean that he was ineffective. *See Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002) ("an ineffective-assistance-of-counsel claim cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken").

Petitioner also asserts that defense counsel was ineffective for failing to object to the aforementioned alleged instances of prosecutorial misconduct; defense counsel's failure to object to the prosecutor's use of a biblical metaphor in closing argument. Given the Court's determination that Petitioner's prosecutorial-misconduct claim lacks merit, however, Petitioner cannot establish that defense counsel was ineffective for failing to object to such matters. *See* section IV, 2, *supra*. Habeas relief is not warranted on Petitioner's ineffective-assistance-of-counsel claims.

4. Ineffective Assistance of Appellate Counsel

Petitioner asserts that he is entitled to habeas relief because appellate counsel was ineffective for failing to raise the foregoing defaulted issues on direct appeal in the state courts. Petitioner, however, is **[*36]** not entitled to habeas relief on any independent claims challenging appellate counsel's conduct. As explained *supra*, the defaulted claims lack merit and Petitioner has not shown that appellate counsel was ineffective under the *Strickland* standard. Habeas relief is therefore not warranted on this claim.

C. Certificate of Appealability

"[A] prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, [the] petitioner must first seek and obtain a [certificate of appealability.]" *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. []. When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional **[*37]** claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

The Court concludes that reasonable jurists would not find its resolution of Petitioner's claims debatable. The Court therefore declines to issue Petitioner a Certificate of Appealability.

V. CONCLUSION

Petitioner has failed to establish that he is presently in custody in violation of the Constitution or laws of the United States.

Accordingly, **IT IS ORDERED** that Petitioner's Petition for Writ of Habeas Corpus [dkt. # 1] is **DENIED.**

IT IS FURTHER ORDERED that the Court declines to issue Petitioner a Certificate of Appealability.

/s/ Marianne O. Battani

MARIANNE O. BATTANI

UNITED STATES DISTRICT JUDGE

Dated: February 10, 2012

EXHIBIT F

Note: Pg. 1 of the Rule 60(d) Motion was lost during my transfer from level 4 to Level 2; however, the rest of the motion and the motion for reconsideration is included herein.

It has been corrected!

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE CHARLES BRADFORD

Petitioner,

Case No. 2:05-cv-72889

v.

Hon. Marianne O. Battani

KENNETH ROMANOWSKI,

Respondent.

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PETITIONER'S MOTION FOR RECONSIDERATION

NOW COMES the Petitioner, Lee Charles Bradford, by and through his attorney, Matthew S. Kolodziejski, and, pursuant to Local Rule 7.1(h),[1] respectfully moves this Honorable Court for reconsideration of its September 23, 2019 order transferring Petitioner's motion for relief from judgment to the Sixth Circuit Court of Appeals [ECF No. 44].

[1] Local Rule 7.1(h)(3) allows for the filing of a motion for reconsideration where a "palpable defect" in the proceedings can be shown.

Respectfully submitted,

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Dated: October 7, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE CHARLES BRADFORD

Petitioner,

Case No. 2:05-cv-72889

v.

Hon. Marianne O. Battani

KENNETH ROMANOWSKI,

Respondent.

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BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR RECONSIDERATION

On February 4, 2019 Petitioner filed a Rule 60(d) motion for relief from judgment arguing that the state committed a fraud upon the court through the deliberate concealment of DNA evidence. Petitioner presented evidence that the fraud was committed during the habeas proceeding before this Court, which was concluded in 2012. However, the fraud was not discovered until 2016 through a state Freedom of Information Act request when Petitioner learned that the state was in possession of, and had in fact tested, DNA evidence that was recovered

from a ski mask allegedly worn by the perpetrator of the crimes for which Petitioner was convicted. That purported lack of DNA evidence was relied upon by this Court in denying Petitioner's habeas petition in 2012.

On September 23, 2019 the Court issued an order transferring Petitioner's motion for relief from judgment to the Sixth Circuit Court of Appeals. [ECF No. 44]. The Court concluded that it lacked jurisdiction to decide the motion on the grounds that the motion was essentially a second or successive habeas petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005). The Court considered the motion to be an attack on the state court's judgment of conviction or a new claim.

Petitioner respectfully submits that his motion presents clear evidence of a fraud being committed upon this Court, and constitutes a "defect in the integrity of the habeas proceedings." Id. at 532. The fraudulent conduct alleged by Petitioner was willfully directed to this Court during the habeas proceedings when the state continued to deny the existence of any testable DNA samples. However, the laboratory reports from 2001 and 2011 that were attached as exhibits to Petitioner's motion for relief from judgment clearly prove that the state did in fact have DNA evidence that was tested. Rather than disclose the existence of the DNA evidence, the state instead continued to direct its fraud upon this Court by refusing to acknowledge the existence of any such evidence.

This Court clearly relied on the state's fraudulent representations regarding the purported lack of DNA evidence when it denied Petitioner's habeas petition on February 10, 2012, stating:

> The Court finds that Petitioner cannot satisfy his burden. *From the record, there is no indication that the prosecution intentionally or otherwise suppressed the DNA evidence.* Furthermore, testimony from the detective indicated that he informed the trial court that the ski mask was sent to the trace evidence unit for testing, at which time dog hair was found in the ski mask. He explained that no human hair was discovered in the ski mask, and that *no DNA testing was requested on the mask because there was nothing found in the ski mask that could be tested.* The trial court then found that, although there was a delay in getting the report to defendant by the Michigan State Police, there were no results to report.

[ECF No. 34, at pg. 17].

The Sixth Circuit recently dealt with a nearly identical scenario in the case of *In Re Marion*, No. 18-1673, which involved a determination that the district court improperly transferred a motion for relief from judgment to the Sixth Circuit as a successive habeas petition. The facts of that case were summarized by the district court on remand as follows:

> Petitioner filed a Rule 60(b) motion for relief from judgment. He alleged that the Michigan Assistant Attorney General committed fraud upon the court in the United States Court of Appeals for the Sixth Circuit during the habeas appeal. Petitioner alleged that the Assistant Attorney General misled the Sixth Circuit Court of Appeals: he concealed or withheld an affidavit that Petitioner supplied to this Court and to the state courts which supported his ineffective assistance of counsel claim. Petitioner argued that if this affidavit had not been concealed, the Sixth Circuit would have affirmed the decision to grant habeas relief.

> This Court transferred the motion to the Sixth Circuit, because Petitioner alleged that the fraud had been committed upon the Sixth Circuit.
>
> The Sixth Circuit ruled that this Court should not have transferred the Rule 60(b) motion to that court but should have addressed the motion itself, because Petitioner's motion alleged a defect in the integrity of the federal habeas petition and not merely a resolution of the claim on the merits. *In Re Marion*, No. 18-1673, * 2-3 (6th Cir. Sept. 26, 2018). The Sixth Circuit remanded the case to make the initial determination of whether respondent committed a fraud upon the court as alleged.

Marion v. Woods, No. 2:12-cv-13127, * 1-2 (E.D. Mich July 8, 2019)

The reasoning of the Sixth Circuit in finding that Marion's motion was not a successive habeas petition is instructive to the circumstances in this case:

> We find that the district court should not have transferred Marion's Rule 60(b) motion to this court. "When a Rule 60(b) motion 'seeks to add a new ground for relief,' whether akin to or different from the claims raised in the first petition, the courts generally treat it as a second or successive petition." *Brooks v. Bobby*, 660 F.3d 959, 962 (6th Cir. 2011) (quoting *Gonzalez*, 545 U.S. at 532). "That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," *Gonzalez*, 545 U.S. at 532, such as fraud on the federal habeas court, id. at 532 n.5.
>
> Here, Marion's Rule 60(b) motion raises a single issue: that the Michigan Assistant Attorney General committed a fraud upon the court by intentionally concealing an allegedly exculpatory affidavit from this court. He asserts that the affidavit supports his claims that his trial counsel failed to present known alibi witnesses and corroborate his alibi defense—i.e., the two ineffective-assistance claims on which the district court granted habeas relief, but which this court reversed—and that, because this court did not have the affidavit before it when it reversed the district court's order granting habeas relief, this court's decision is based on the Michigan Assistant

> Attorney General's fraud and, thus, is erroneous. Similarly, Marion asserts that, by intentionally concealing the affidavit from this court, the Michigan Assistant Attorney General "deceived" this court into believing that Marion never rebutted his trial counsel's affidavit (in which trial counsel challenged Marion's ineffective-assistance claims) when, in fact, he did. The issue and arguments raised in Marion's Rule 60(b) motion therefore necessarily claim that there was a "defect in the integrity of the federal habeas proceedings" before this court. Id. at 532; see also *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006) (explaining that "[i]f the alleged fraud on the court relates solely to fraud perpetrated on the federal habeas court, then the motion will be considered a true Rule 60(b) motion" and not a successive petition.).

In Re Marion, No. 18-1673, * 2-3 (6th Cir. Sept. 26, 2018) [Exhibit]

The argument made in this case by Petitioner is, in substance, no different. Only instead of an affidavit, he argues that during the habeas proceedings the state concealed allegedly exculpatory DNA evidence from this Court. Additionally, the state relied on, and failed to correct, the false testimony of Det. Kanouse that the police were not in possession of any testable DNA evidence. The state's use of Det. Kanouse's false testimony before this Court violated Petitioner's due process rights under the Fourteenth Amendment. *Napue v. Illinois*, 360 U.S. 264 (1959).

This evidence, at a very minimum, presents a cognizable claim that the state's conduct affected the integrity of the habeas proceeding before this Court, which is an argument that may be raised through a Rule 60(d) motion. *Gonzalez*, 545 U.S. at 532. Accordingly, the Court has jurisdiction to adjudicate Petitioner's motion for relief from judgment on the merits.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE the Petitioner, Lee Charles Bradford, by and through his attorney, Matthew S. Kolodziejski, asks this Honorable Court to reconsider its previous order [ECF No. 44], and grant him relief from the final judgment that was entered in this case on February 10, 2012. [ECF No. 35].

Respectfully submitted,

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Dated: October 7, 2019

CERTIFICATE OF SERVICE

I certify that on October 7, 2019 I filed the foregoing document with the Clerk of the Court using the ECF System, which will send electronic notification to all counsel of record.

/s/Matthew S. Kolodziejski

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE CHARLES BRADFORD

Petitioner,

v.

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Respondent.

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PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

NOW COMES the Petitioner, Lee Charles Bradford, by and through his attorney, Matthew S. Kolodziejski, and, pursuant to Fed. R. Civ. P. 60(d)(3), moves this Honorable Court to grant him relief from the final judgment that was entered by the Court in this case on February 10, 2012. [ECF No. 35].

The legal and factual grounds supporting the relief requested are presented in the accompanying brief.

Respectfully submitted,

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Dated: February 4, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE CHARLES BRADFORD

Petitioner,

v.

KENNETH ROMANOWSKI,

Respondent.

Case No. 2:05-cv-72889

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BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

JURISDICTION

The Court has jurisdiction over this motion pursuant to Fed. R. Civ. P. 60(d)(3), due to fraud committed on the Court through the concealment of material evidence. The fraud was committed by the Hillsdale County Prosecutor's Office and the Michigan State Police. It began prior to Petitioner's trial in 2001, and continued throughout the habeas proceeding before this Court. It was not

discovered until 2016 through a state Freedom of Information Act request when Petitioner learned that the prosecution and Michigan State Police were in possession of, and had tested, DNA evidence in his case. [Exhibit A]. Since the beginning of this case 2001, the prosecution and police had steadfastly denied the existence of any testable DNA evidence to Petitioner and the courts.

There is no time limit for moving for relief from judgment due to fraud on the Court. *Wood v. McEwen*, 644 F2d 797, 801 (9th Cir. 1981).

INTRODUCTION

This case presents a classic example of fraud directed upon the court, and fits squarely within the narrow category of cases that can remedy wrongs against the judicial institutions that are set up to protect the public. The fraud complained of here is not based upon a single misrepresentation committed at Petitioner's trial, but rather a perpetual and concerted effort to conceal DNA evidence and deny Petitioner of his fundamental right to due process of law.

For over fifteen years the prosecution and Michigan State Police concealed the existence of DNA evidence that was recovered from a ski mask allegedly worn by the perpetrator of the crimes for which Petitioner was convicted. Specifically, the responsible parties suppressed Michigan State Police DNA sample 1876.01A, which was biological material recovered from the ski mask, and then for years proceeded to deceive Petitioner and the judiciary regarding its existence. This

misrepresentation was material and egregious. The purported lack of DNA evidence was relied upon by the state courts, as well as this Court, in denying Petitioner relief from his convictions and sentence.

FACTS AND PROCEDURAL HISTORY[1]

Petitioner was charged with of one count of armed robbery, one count of felon in possession of a firearm, and one count of felony firearm. The case arose because of a bank robbery that occurred at the North Adams Branch of the Southern Michigan Bank and Trust in Adams Township in Hillsdale County, Michigan on December 1, 2000, where $15,100 was stolen.

Prior to trial on February 27, 2001 defense counsel requested discovery from the prosecution, including all "lab results of everything sent to the Michigan Crime Lab." [Exhibit B]. The prosecution denied the existence of any DNA evidence that could be tested. On May 15, 2001 during a hearing on Petitioner's motion to dismiss based upon the lack of DNA testing the prosecution called Michigan State Police Det./Sgt. Kanouse. He stated that dog hairs had contaminated the mask and there was nothing to test in the ski mask. Based upon this false testimony the trial court denied the motion to dismiss. [Exhibit C].

[1] Portions of the following information are taken from this Court's opinion and order denying Petitioner's habeas petition dated February 10, 2012 [ECF No. 34].

The case proceeded to trial where the evidence showed that a gunman, wearing a ski mask, entered the bank alone, waved a gun around, and ordered the tellers not to hit their alarm buttons and to get down on the floor. Afterward, as the gunman was leaving the bank, he said, "Have a nice day." The robbery lasted less than one minute. As the tellers got up off the floor, two of them noticed an all-terrain vehicle (ATV) driving away from the scene. They could not identify the gunman.

The prosecution's theory at trial was that Petitioner was in financial difficulty and, after stealing an ATV, armed himself with a pistol and robbed the bank. After robbing the bank, Petitioner tossed away a pair of sunglasses and a black knitted cap, worn during the robbery, on a side road while making his escape. Marked money taken from the bank was found hidden in Petitioner's store in Jackson, Michigan, and proved involvement.

The defense conceded that a robbery occurred and the robber's use of a knitted cap or ski mask. However, the defense argued that other people, including the prosecution's witness Harry Briskey, had access to Petitioner's store as well as to the ATV and that Petitioner had nothing to do with the robbery.

The Michigan Court of Appeals summarized the underlying facts of this case, when addressing Petitioner's insufficient evidence claim, which are presumed

correct on habeas review. *See Monroe v. Smith*, 197 F.Supp.2d 753, 758 (E.D. Mich. 2001), *aff'd*, 41 F.App'x 730 (6th Cir. 2002) (citations omitted).

> Regarding his claim that there was insufficient evidence to support his convictions, defendant does not contest that an armed robbery took place or that a firearm was utilized during the commission of such. Rather, defendant's arguments center on the lack of a connection between defendant and the charged crimes.
>
> We find that there was sufficient evidence to connect defendant to the offenses in this case. Trial testimony demonstrated that [Bank Teller Rhonda Sue] Baker noticed a four-wheeler drive past the bank, and approximately five minutes later, the robber entered the bank. The robber was described as a man wearing a black knit ski mask, gold wire or dark sunglasses, a camouflage hooded sweatshirt, and black knit gloves. Baker testified that $15,100 was taken from the bank on December 1, 2000, including three twenty dollar bills, which were used as bait money. As the robber was leaving, he told the tellers to have a nice or good day. After the robber left, Baker saw the four-wheeler drive past the bank again, and [Shelly] Reed [, another bank teller,] indicated that the four-wheeler drove off to the east.
>
> At approximately 9:30 a.m. on the same day, David Stoll [, a local farmer,] was driving his combine to his field when he saw a red, mid-sized car drive past him at a fast rate of speed, almost driving into the ditch in an effort to pass the combine. David noticed no objects in the road while he was driving. Approximately thirty minutes later, David's brother, Levi Stoll, drove to the combine location and discovered a black ski mask lying on the shoulder bank of the road. Birden Boone [Petitioner's friend] testified that as he and defendant were driving in a red Grand Am, he saw defendant throw a black hat out of the car window while they drove past a combine.
>
> Harry Briskey [an inmate at the Michigan Department of Corrections] testified that he and defendant went to steal a motorcycle the night before the robbery, but that they actually stole a four-wheeler. Boone heard defendant and Briskey talk about getting the four-wheeler. Briskey indicated that defendant wore a dark blue or black ski mask when they stole the four-wheeler. There was also

> evidence that defendant removed some plywood from the front of the four-wheeler after stealing it and upon his return to his house. [Detective William] Kanouse located a piece of plywood with gun racks from the rear of a red barn on defendant's property. The owner of the four-wheeler, Charles Boothe, testified that he had a platform and a gun rack installed on the front of the four-wheeler for hunting purposes. Finally, the stolen four-wheeler was located in Teddy Yates'[s] sister's garage, after which the police discovered that Yates obtained the stolen four-wheeler from defendant.
>
> There was also evidence that defendant informed Briskey that he would have to either declare bankruptcy or rob a bank, and that defendant showed Briskey the route he would take to rob the bank. On the day of the robbery, Boone saw defendant placing money in a bag, and heard defendant state that he "did it," which led Boone to believe that defendant robbed the bank. Defendant also informed Boone of specific details of the robbery, such as the fact that certain drawers were locked and that defendant told the bank tellers to have a nice day. Defendant also informed Boone that he dropped some of the money in the wall of defendant's convenience store, which was later retrieved by Kanouse. Also found in defendant's store were the three twenty dollar bills in bait money along with several wrappers from the North Adams branch of the Southern Michigan Bank and Trust that were marked with a stamp similar to that of money wrappers typically contained within Baker's drawer. *People v. Bradford*, No. 242339, 2003 WL 22495579, at *6-7 (Mich.Ct.App. Nov. 4, 2003) (footnote and citation omitted).

Additional trial testimony revealed the following.

Richard Reiger testified that, in October 2000, he sold property to Petitioner and his wife by land contract for $170,000. Reiger testified that he received $5000.00 as a down payment over a three–month period. By November 30, 2000, Petitioner owed $2,250. Reiger said Petitioner made last-minute payments.

Petitioner told him that his financial situation was poor. On December 1, at about 8:00 p.m., Reiger received a $2,250 cashiers check from Petitioner.

Charles Boothe was the owner of an ATV. He testified that, in December 2000, he reported to the police that the ATV was missing. The police found it in February 2001.

Teddy Yates, Petitioner's friend, testified that Petitioner called him on December 1, 2000, and told him that he had a house payment due that day and that his money was tied up. He offered to do work for Yates in exchange for an advance of $2350, and offered an ATV as collateral. Yates took a check to Petitioner but he did not receive an ATV as collateral. Rather, Petitioner took the check. Yates got the ATV several weeks later in December 2000. Yates did not know that the ATV was stolen.

Petitioner testified. He said he had a party store that he ran with Boone. He said his financial situation leading up to December 1, 2000 was "struggling but surviving." He testified that he spoke with someone regarding buying an ATV. He was at his house on November 30, 2000, with Boone and Briskey, and they were discussing an ATV. He was angry with Briskey because he did not bring an ATV with him, as previously agreed upon.

Petitioner testified that he awoke the next morning at around 7:30 a.m. He said he was counting the store's proceeds from the previous week. He did not go to

a bank. He had several thousand dollars on him, which was not unusual. He said he never finished counting the money and decided to count it at the store. He went to the store with Boone.

Petitioner denied ever talking to Briskey about a would-be robbery route. He testified that he did not rob the bank and did not know who did.

After a three-day trial, the jury convicted Petitioner as charged. On July 2, 2001, Petitioner was sentenced, as an habitual offender, to concurrent prison terms of thirty-seven to sixty years for the armed robbery conviction, six years, four months to twenty years for the felon-in-possession conviction, to be served consecutively to Michigan's mandatory two-year prison term for the felony-firearm conviction.

Following his sentencing, Petitioner filed a Motion for a *Ginther* Hearing and for Resentencing with the trial court. On March 9, 2002, a hearing was held where Petitioner's trial counsel, Roderick Dunham, and others were called to testify. Trial counsel confirmed that the prosecution told him that there was nothing to test in the mask. Counsel acknowledged that if he knew there was DNA in the mask he would have represented Petitioner differently at trial. Trial counsel clearly relied on the prosecution's false information, to Petitioner's detriment, regarding the lack of DNA evidence in the mask. Following the hearing, the trial court denied Petitioner's Motion.

Following the *Ginther* hearing Petitioner filed a grievance against the prosecutor regarding the handling of the laboratory evidence. In response, the prosecutor requested a letter from the Michigan State Police lab regarding the forensic testing. [Exhibit D]. A lab supervisor responded to the request and acknowledged that evidence was submitted to the lab for DNA testing, and that a report was issued. [Exhibit E]. This response establishes that the prosecutor and Michigan State Police were aware of the existence of DNA evidence prior to the time that Petitioner's appeals were decided by the Michigan Court of Appeals and Supreme Court.

Petitioner filed his direct appeal with the Michigan Court of Appeals, raising claims concerning his sentencing, the effectiveness of trial counsel, prosecutorial misconduct with respect to the handling of the ski mask, and trial court error in binding him over because the evidence presented at the preliminary examination hearing was insufficient. The Court of Appeals affirmed Petitioner's convictions and sentences. *People v. Bradford*, 2003 WL 22495579, at *8.

The Court of Appeals, in a reference to a challenge of the prosecution's handling of the ski mask, stated:

> Defendant's prosecutorial misconduct argument centers on defendant's motion to dismiss the case based on the DNA results obtained from the ski mask. Defendant contended that the prosecution did not report the test results to defendant until the Friday before trial. The trial court inquired of defendant whether he requested that certain

tests be performed, to which defendant responded that he wanted the results from all tests performed.

Following defendant's motion, Detective William Kanouse informed the trial court that the ski mask was sent to the trace evidence unit for testing, at which time dog hair was found in the ski mask. Kanouse explained that no human hair was discovered in the ski mask, and that no DNA testing was requested on the mask because there was nothing found in the ski mask that could be tested. The trial court denied defendant's motion to dismiss, indicating that although there was a delay in getting the report to defendant by the Michigan State Police, there were no results to report.

We find that defendant has failed to demonstrate that the prosecutor committed misconduct with regard to the ski mask test results. There is no indication from the transcripts or from defendant's brief on appeal that the delay in the DNA examination or the DNA report was caused by the prosecution. In fact, defendant fails to connect his argument regarding his motion to dismiss with any specific prosecutorial act whatsoever. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" Accordingly, defendant has failed to substantiate his claim of prosecutorial misconduct.

Bradford, 2003 WL 22495579, at *4-5 (citation omitted).

The Court of Appeals further stated:

We find that defendant has failed to demonstrate that the prosecution committed a Brady violation in this case. First, there was no indication that the prosecution possessed evidence favorable to defendant. As previously stated, the analysis of the ski mask revealed that no results were obtained from the ski mask. Even if viewed as favorable evidence, defendant has failed to demonstrate that the prosecution suppressed any evidence, and fails to identify any evidence that was allegedly suppressed at trial. At trial, Kanouse informed the court that the mask had been sent for analysis, but that no analysis or results had been obtained, and that the only evidence found on the ski mask was dog hair. Based on defendant's failure to identify the suppression of any evidence, defendant has failed to demonstrate that a reasonable probability exists that the outcome of the proceedings would have been different if the alleged "evidence"

> had been disclosed to defendant. Defendant's argument merely reflects that disclosure of the absence of test results was allegedly untimely, and does not indicate that there was a suppression of any evidence. Thus, defendant's argument that the prosecution committed a Brady violation fails.

Bradford, 2003 WL 22495579, at *6.

Petitioner subsequently filed an Application for Leave to Appeal the Court of Appeals decision with the Michigan Supreme Court, raising the same claims raised in the Court of Appeals, except for the sentencing claim. The Application was denied on April 30, 2004. *People v. Bradford*, 470 Mich. 860, 679 N.W.2d 73 (2004) (Table).

Petitioner did not filed a Petition for Writ of Certiorari with the United States Supreme Court. Rather, on July 22, 2005, he filed this Habeas Petition, raising claims concerning prosecutorial misconduct, the effectiveness of trial counsel, and trial court error. The Petition was signed and dated July 15, 2005.

On May 22, 2007, Petitioner retained counsel and counsel filed a Motion to Stay the proceedings. On July 7, 2007, the Court granted Petitioner's request to stay his habeas proceedings in order for him to return to state court to exhaust his state-court remedies with respect to his claim regarding the failure of the prosecutor to DNA test the ski mask, which was linked to the crime.

Petitioner returned to the trial court and filed a Motion for Relief from Judgment, in which he argued he should be permitted to conduct independent DNA

testing of a portion of the knitted mask alleged to have been worn by the actual bank robber and taken by the Michigan State Police for DNA testing. He also requested that all documents generated by the State Police in the course of its forensic testing be provided. The trial court denied the Motion on October 1, 2007. *People v. Bradford*, No. 2001-259131-FH (Hillsdale Cnty. Cir. Ct. Oct. 1, 2007). The Court of Appeals and the Michigan Supreme Court denied his Applications for Leave to Appeal "because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Bradford*, No. 288004 (Mich.Ct.App. Oct. 24, 2008); *People v. Bradford*, 484 Mich. 865, 769 N.W.2d 664 (2009) (Table).

In 2007 Petitioner additionally requested the preservation of all physical and biological evidence by the prosecution for purposes of future testing. [Exhibit F]. The request was forwarded by the prosecution to Det. Kanouse of the Michigan State Police. [Exhibit G]. Det. Kanouse responded to the request on October 29, 2007 by stating that "the complaint was closed on August 27, 2002 and the last piece of property was disposed of on August 26, 2002." [Exhibit H]. Unbeknownst to Petitioner at the time, this statement by Det. Kanouse was untrue, as demonstrated by the now known fact that the Michigan State Police actually had a laboratory specimen from the ski mask that was tested and/or used for comparison purposes on October 31, 2011. [Exhibit A].

Subsequently, on September 7, 2009, Petitioner returned to this Court and filed a Motion to Lift the Stay, along with an Amended Habeas Petition, which the Court granted on September 14, 2009. In his Amended Habeas Petition, Petitioner raised claims concerning a *Brady* violation, prosecutorial misconduct, and the effectiveness of trial and appellate counsel. This Court denied Petitioner's habeas petition in an opinion dated February 10, 2012.

Petitioner then filed a motion in the trial requesting that it compel DNA testing of the ski mask pursuant to MCL 770.16 on July 29, 2014. That motion was denied by the trial court, and the Court of Appeals denied leave to appeal on April 4, 2015.

In 2016 Petitioner's mother, Sharon Bradford, submitted a Freedom of Information Act request to the Michigan State Police, which resulted in the disclosure of lab reports from 2001 and 2011. The response additionally disclosed the existence of DNA sample 1876.01A from the ski mask. [Exhibit A]. This was the first time that Petitioner was ever made aware of the existence of these lab reports and the testable DNA sample from the ski mask.

Armed with this new information Petitioner filed a motion for relief from judgment in the trial court. The trial court denied the motion, and the Court of Appeals and Supreme Court denied leave to appeal.

LAW AND ARGUMENT

The newly discovered evidence establishes that the Michigan State Police did collect biological evidence from the ski mask that was admitted into evidence at Petitioner's trial. DNA sample 1876.01A was in the state police lab's possession since before Petitioner's trial in 2001. This revelation clearly establishes that the prosecution and Det. Kanouse fraudulently misled the judiciary, including this Court, for years regarding the existence of biological evidence in this case.

The prosecution's theory of the case was that Petitioner wore the ski mask during the robbery. To support this theory the prosecution called numerous witnesses at trial that gave testimony regarding this mask. It was the cornerstone of the prosecution's case. DNA evidence from the mask was requested by Petitioner before and after trial, but was never provided. A new layer to the deception was uncovered when it became known that Det. Kanouse falsely informed the prosecution that all evidence had been destroyed in 2002. [Exhibit H]. Based upon the totality of the circumstances the Court can, and should in fact, infer the existence of intentional fraud by the police and prosecution relative to the DNA evidence in the ski mask.

Petitioner asserts that this fraud resulted in a defect in the procedural aspect of the habeas proceeding, and may be addressed via a Rule 60(d)(3) motion. *Gonzales v. Crosby*, 545 US 524, 532 (2005). *Gonzales* instructs that a district

court must not construe this type of motion as a successive habeas petition, as it does not seek to advance new claims, but instead seeks to address a defect in the integrity of the habeas proceedings.

> In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief, as in *Harris, supra,* will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings545

Gonzales, 545 US at 532.

Additionally, this Court has the power under Rule 60(d)(3) to correct fraud without reference to any time limitation. *King v. First American Investigations, Inc.*, 287 F3d 91, 35 (2nd Cir. 2002).

During the state court proceedings, and on habeas review before this Court, the prosecution has denied the existence of any testable DNA evidence. The officer in charge of the case, Det. Kanouse, flatly denied the existence of any such evidence to the trial court.

The trial court: All right, well you have to have something to test, right?

Det. Kanouse: Right, we didn't have anything.

The trial court: You found no hair **or anything else**?

Det. Kanouse: Right.

[Exhibit C]

Det. Kanouse knew this testimony to be untrue, and that biological evidence existed and had in fact been collected for testing. It is axiomatic that information known to the police is imputed to the prosecution. *Kyles v. Whitney*, 514 US 419, 428 (1995). Due to the lack of disclosure, Petitioner was unable to investigate the DNA evidence and use it in his defense at trial. Most importantly, the Laboratory Report No. 2404-00 Supp. indicated that a DNA profile was developed from the ski mask, and that "is from an unidentified donor." [Exhibit A]. Needless to say, this information would have been highly exculpatory if known to Petitioner and presented in his defense at trial.

It is also noteworthy that on the lab report sent to Det. Kanouse there is a paragraph which states:

> Public Act 35 of 1994 requires: "The investigating officer of each criminal case being adjudicated shall advise the prosecuting attorney if a forensic test has been conducted in the case."

[Exhibit A].

Det. Kanouse had the obligation to inform the prosecution of the lab testing, and the prosecution had the obligation to disclose that to Petitioner. The prosecution also had the obligation to correct the erroneous information regarding the purported lack of testing before the state appellate courts and this Court. The

courts reviewing this case have continually relied on the prosecution's representation that there was no DNA evidence in the ski mask to test.

For example, in denying Petitioner's habeas petition, this Court stated:

> The Court finds that Petitioner cannot satisfy his burden. From the record, there is no indication that the prosecution intentionally or otherwise suppressed the DNA evidence. Furthermore, testimony from the detective indicated that he informed the trial court that the ski mask was sent to the trace evidence unit for testing, at which time dog hair was found in the ski mask. He explained that no human hair was discovered in the ski mask, and that no DNA testing was requested on the mask because there was nothing found in the ski mask that could be tested. The trial court then found that, although there was a delay in getting the report to defendant by the Michigan State Police, there were no results to report.
>
> [ECF No. 34 at pg. 17].

However, there was testable DNA evidence in the ski mask that was not contaminated by dog hair, as stated by Det. Kanouse and the prosecution. That representation was improper and deceptive. "[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 US 78, 88 (1935). By presenting false evidence to the trial court, and then failing to correct that information to the courts reviewing this case in 2002, 2007, 2014, and 2017, the prosecution intentionally deprived Petitioner of his right to access material evidence and to due process of law.

One of the most ironic aspects of this situation is how quickly the prosecutor gained access to the information that was sought by Petitioner from the Michigan State Police lab when the prosecutor needed it to defend against a grievance that was submitted to the Michigan Attorney Grievance Commission. The prosecutor requested the information from the lab on May 21, 2002, and received a response only ten days later on May 31, 2002. He then proceeded to use evidence of the lab reports that he failed to disclose to Petitioner in order to defend against the grievance. [Exhibits D and E].

It was only by happenstance that this newly discovered evidence came to light in 2016 when Petitioner's mother submitted a Freedom of Information Act request for materials related to his case. It is patently unjust that it took a full fifteen years for Petitioner to be made aware that favorable DNA evidence existed in his case. The suppression of DNA evidence has provided the basis for a grant of habeas relief in this Circuit, and likewise warrants relief in this case as well. See *Sawyer v. Hofbouer*, 299 F.3d 606 (6th Cir. 2002).

The judiciary possesses the historic equitable power to set aside a fraudulently begotten judgment in order to maintain the integrity of the system for all litigants. Petitioner respectfully urges this Court to grant him relief from judgment based upon the evidence of fraud, to re-open his habeas case and proceed to adjudicate the matter in light of the aforementioned claims and evidence.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE the Petitioner, Lee Charles Bradford, by and through his attorney, Matthew S. Kolodziejski, asks this Honorable Court to grant him relief from the final judgment that was entered by the Court in this case on February 10, 2012. [ECF No. 35].

Respectfully submitted,

/s/Matthew S. Kolodziejski
Matthew S. Kolodziejski, PLLC
Attorney for Petitioner
200 E. Big Beaver Road
Troy, MI 48083
313-736-5060
mattkolo@comcast.net

Dated: February 4, 2019

CERTIFICATE OF SERVICE

I certify that on February 4, 2019 I filed the foregoing document with the Clerk of the Court using the ECF System, which will send electronic notification to all counsel of record.

/s/Matthew S. Kolodziejski

INDEX OF EXHIBITS

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR

COL. KRISTE KIBBEY
DIRECTOR

May 24, 2016

SHARON BRADFORD
11522 CO ROAD 171
PAULDING, OH 45879

Subject: CR-20018158

Dear SHARON BRADFORD:

The Michigan Department of State Police has received your request for public records and has processed it under the provisions of the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

Your request has been:

[X] Granted.

[ ] Granted in part and denied in part. Portions of your request are exempt from disclosure based on provisions set forth in the Act. (See comments on the back of this letter.) Under the FOIA, Section 10 (a copy of which is enclosed), you have the right to appeal to the head of this public body or to a judicial review of the denial.

[ ] Denied. (See comments on the back of this letter.) Under the FOIA, Section 10 (a copy of which is enclosed), you have the right to appeal to the head of this public body or to a judicial review of the denial.

[X] The documents you requested are enclosed. Please pay the amount of $1.22. Under the FOIA, Section 10a (a copy of which is enclosed), you have the right to appeal the fee to the head of this public body.

[ ] Please pay the amount of $-.-. Once payment is received the documents will be mailed to you. Under the FOIA, Section 10a (a copy of which is enclosed), you have the right to appeal the fee to the head of this public body.

You may pay the amount due online at www.michigan.gov/mspfoiapayments using a credit card or check. You will need to provide your name and the reference number listed above. Please note, there is a $2.00 processing fee for using this service. If you prefer, you can submit a check or money order made payable to the STATE OF MICHIGAN and mail to P.O. Box 30266, Lansing, MI 48909. To ensure proper credit, please enclose a copy of this letter with your payment.

If you have any questions concerning this matter, please feel free to contact our office at 517-241-1934 or email MSP-FOI@michigan.gov. You may also write to us at the address listed below and enclose a copy of this letter.

To review a copy of the Department's written public summary, procedures, and guidelines, go to www.michigan.gov/msp.

Sincerely,

BETHANY GOODWIN

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
FORENSIC SCIENCE DIVISION
Lansing Laboratory
7320 N. Canal Rd
Lansing, MI 48913
(517) 322-6600
FAX (517) 322-5508

LABORATORY REPORT

Laboratory No.	:	2404-00	Record No.	:	7
Investigating Ofcr.	:	Nibedita Mahanti	Date Received	:	October 31, 2011
Agency	:	MSP CODIS	Time Received	:	4:05 p.m.
Agency No.	:	MI11-016288	Date Completed	:	October 31, 2011

Nature of Offense:

General Assistance / Confirmation of CODIS Database DNA Profile

CODIS High Stringency Association:

A search of the Michigan State DNA Index System (SDIS) database developed an association between convicted offender sample MI11-016288 and Michigan State Police Lansing Laboratory specimen number 1876-01A.

Results:

The DNA profile on record with the Michigan State Police CODIS Unit for database sample MI11-016288, associated with LEE CHARLES BRADFORD, SID #2127310T, was confirmed by reanalysis using the Polymerase Chain Reaction (PCR) and the Promega PowerPlex® 16 genetic typing system. Validation of the associated thumbprint from database sample MI11-016288 also was performed.

Remarks:

The Michigan CODIS database quality control and quality assurance criteria for final confirmation of associations requires that a new biological sample be obtained from the alleged suspect to confirm the reported association. This is to be deemed investigative information only.

Relevant Supporting Data:

Electropherograms
Relevant supporting data is case specific and not all of the above may be applicable in every case.

Aaron Berenter
Forensic Scientist
CODIS Unit

October 31, 2011

cc: Nicole Graham, Amber Smith

Results:

Deoxyribonucleic acid (DNA) recovered from the sample listed below was processed for short tandem repeat (STR) loci using the polymerase chain reaction (PCR) and AmpFlSTR™ Profiler Plus and COfiler typing systems.

The DNA typing results are as follows:

Sample	1876.01A (ski mask)
D3S1358	17
vWA	16,17
FGA	21,22
Amelogenin (gender)	X,Y
D8S1179	13
D21S11	29,32.2
D18S51	14,18
D5S818	12
D13S317	8,12
D7S820	10,12
TH01	6,9.3
TPOX	8,11
CSF1PO	11
D16S539	11,13

(continued)

Public Act 35 of 1994 requires: "The investigating officer of each criminal case being adjudicated shall advise the prosecuting attorney if a forensic test has been conducted in the case."

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
FORENSIC SCIENCE DIVISION

LANSING LABORATORY
7320 North Canal Road
LANSING, MICHIGAN 48913
(517)322-6600
FAX (517)322-5508

REVIEWED

LABORATORY REPORT

Laboratory No.: 2404-00 Supp.
Received By : DNA REFRIGERATOR
Delivered By : F/S MARIE BARD-CURTIS
Agency : Jonesville Police Dept.
Agency No. : 19-3353-00

Record No. : 0101876
Date Received : 06-05-01
Time Received : 1:50 PM
File Class : 1200-0
Date Completed: 07-26-01

Nature of Offense:

Robbery

Victim(s):

LEONCE TOWERS
RHONDA BAKER
SHELLEY REED

Evidence Received:

(Evidence was removed from DNA refrigerator on 6-5-01 at 3:10 PM by F/S Kathy Kuebler.)

Stapled to paperwork:

1876.01A One (1) secured manila coin envelope containing one (1) piece of woven material and one (1) paper fold containing one (1) particle all identified as "ski mask inside area around nose/mouth area possible tissue (1 WFPC w/particle)".

(continued)

Conclusions:

1) The DNA profile developed from the genetic loci Listed previously (chart), from evidentiary sample 1876.01A (ski mask), is from an unidentified donor(s).

Remarks:

1) The DNA profile identified from sample 1876.01A (ski mask) will be entered into the casework database of the Combined DNA Index System (CODIS).

2) Upon submission of a reference sample(s), comparisons can be made in order to determine the possible source of the DNA profile identified in evidentiary sample 1876.01A (ski mask).

Disposition of evidence:

DNA evidence will be maintained in the laboratory and is available upon request.

Kathy A. Kuebler

Kathy A. Kuebler
Forensic Scientist
Biology/DNA Unit

Public Act 35 of 1994 requires: "The investigating officer of each criminal case being adjudicated shall advise the prosecuting attorney if a forensic test has been conducted in the case."

DUNHAM & GRASSI, P.C.
ATTORNEYS AND COUNSELLORS AT LAW

32 SOUTH BROAD STREET
HILLSDALE, MICHIGAN 49242

RODERICK R. DUNHAM
DAVID F. GRASSI

TELEPHONE (517) 437-7380
FAX (517) 437-0442

February 27, 2001

NEAL A. BRADY
PROSECUTING ATTORNEY
61 MCCOLLUM STREET
HILLSDALE MICHIGAN 49242

Re: State of Michigan vs. Lee Charles Bradford
Request for Discovery

Dear Mr. Brady:

I am requesting from your office discovery of the following:

1. I would like to view the bank video tape and the still pictures taken from that tape.
2. I would like to know all lab results of everything sent to the Michigan Crime Lab. including whether or not their were finger prints found on any of the money found at Bradford's store.
3. A list of all bills stolen from the bank, including their denomination and identification numbers if they were "bait money".
4. A list of all witnesses you have endorsed, as I can not find any documents in my file which list your witnesses.

Thank you for your anticipated cooperation in this matter. Let me know if any of the above is a problem.

Sincerely,

Roderick R. Dunham

Roderick R. Dunham
Attorney at Law

RRD/bcl

MR. DUNHAM: No, we have not gotten them.

THE COURT: The results, are there are -- there were no tests done; is that right?

MR. DUNHAM: I guess. That's the result we have from Mr. Brady, yes.

THE COURT: Is that correct, Mr. Brady?

MR. BRADY: That's correct, your Honor.

THE COURT: Is there any reason -- I mean, from your standpoint, Mr. Brady, testing on this mask, was there any testing done? If so, what were the results? If not, why not? I mean, do you or your investigating officer know why no tests were done.

MR. BRADY: I believe that D/Sgt. Kanouse has talked to people at the lab and he can explain better than I could.

THE COURT: Detective, do you have any idea why the tests were not done?

D/SGT. KANOUSE: Your Honor, that mask was sent to the trace evidence unit at the lab to be tested for hair, to see if there was any hair in it. The lab person up there, this Marie Bard-Curtis, who is in charge of that unit, contacted me on -- it was probably a month after that mask was up there. Told me that she was still working on that, doing the testing of the mask. That the -- she had did -- she had found what she thought was

dog hair in the mask. I explained to her that that was -- the mask was packaged in a plastic bag by the county dog handler that the dog's vest was in. I told her to retest it to see if she would find any human hair. We didn't get that mask back until the day before this trial began.

The Michigan State Police Crime Lab in Lansing, they built a new building, they were in the process of moving from one building to another building and everything was packaged up. Then the ice storm hit in Lansing and destroyed part of the building. So there's been a big delay. We did get a handwritten lab report that came back with the mask when we received it. And the only thing that that states is that they found different colored fibers within the mask.

THE COURT: That's all?

D/SGT. KANOUSE: That's all. There was no human hair discovered within the mask.

THE COURT: All right.

D/SGT. KANOUSE: I did not request any kind of DNA testing of that mask.

THE COURT: All right. Well, you have to have something to test, right?

D/SGT. KANOUSE: Right. We didn't have anything.

THE COURT: You found no hair or anything else?

D/SGT. KANOUSE: Right.

THE COURT: Mr. Brady, Mr. Dunham, if you wish to -- Mr. Dunham, if you wish to simply have a stipulation to that effect, if you want me to instruct the jury that the mask was searched, no hairs were found to connect it to anybody, I certainly would tell the jury to consider that as evidence, if that's what you wish, and in light of the fact that we do not have a lab report.

But based on what Mr. Kanouse has said, apparently testing was done, there were no hairs found, so can't do DNA on fibers because it's nonhuman. If there's nothing there to test, there's nothing there to test. So if you would like that instruction.

MR. DUNHAM: I am -- I'm sure we'd like --

THE COURT: I'd be happy to do that.

Anything else you want to say, Mr. Bradford?

DEFENDANT BRADFORD: It would have been nice to have a written report that there was no hair found in this mask.

THE COURT: Well, gentlemen, I agree with you.

DEFENDANT BRADFORD: Thank you.

THE COURT: I agree with you wholeheartedly.

DEFENDANT BRADFORD: And for a hundred and eighty days -- days of them having this, I think that was plenty of time, even though there was a storm.

THE COURT: I understand. I agree with you. I agree with you. That's why I'm offering you to simply -- I know there's a stipulation you two have entered into regarding the felony-firearm or the felon in possession of a firearm, and I have instructed the jury that they are to take the evidence from the witness stand, exhibits that may be entered, and anything else I tell them to consider as evidence. I will simply tell them to consider as evidence that there were no human hairs found in the mask to connect to anyone. If you would like that, I'll give it.

MR. DUNHAM: Is that what that says?

D/SGT. KANOUSE: Right. All this is, it was examined.

THE COURT: Why don't you share that with Mr. Dunham.

MR. DUNHAM: I saw it but I don't --

D/SGT. KANOUSE: It was examined for fiber/hair from hat.

Unaided appear black, flattened in some areas with stereo. Black background fiber appears, alternating black and white. On white background fibers appear continuously black.

That's all this states.

MR. DUNHAM: It doesn't say anything about hair, but

I guess I would like to also just be able to question Detective Kanouse when he's up there about --

THE COURT: Sure.

MR. DUNHAM: -- that and be able to argue it and at the end perhaps some instruction.

THE COURT: You can argue evidence, you can argue lack of evidence, that's why I instruct the jury at the end anyways, so.

I'm going to deny your motion, Mr. Bradford. There's no basis in which to dismiss the case simply because there is nothing there. They're untimely in getting the report to you, but apparently they don't even have a report. It doesn't excuse the delay by the Michigan State Police. They should have it done by now. I agree with you. But I know of no basis in which to dismiss the entire charges.

If you want me to throw out the hat, we can try -- you know, I'll consider throwing out the hat, but that cuts two ways, that could hurt you as much as, again, help you. It's a matter of trial strategy. I think that's something you better discuss with your attorney before you request the relief. If you want a few moments or you want to think about it and bring this back up later in the day. What do you want to do?

DEFENDANT BRADFORD: We'd like to bring it back

OFFICE OF PROSECUTING ATTORNEY
HILLSDALE COUNTY

NEAL A. BRADY
PROSECUTING ATTORNEY

VALERIE R. WHITE
CHIEF ASSISTANT

61 McCOLLUM STREET
HILLSDALE, MICHIGAN 49242

TELEPHONE (517) 439-1419
FACSIMILE (517) 439-5141

May 21, 2002

Marie Bard-Curtis
Forensic Scientist
East Lansing Lab
714 S. Harrison Road
East Lansing, MI 48823-5143

Re: Report no. 2404-00
Agency no. 19-3353-00

Dear Ms. Bard-Curtis:

A convicted armed robber, Lee Charles Bradford, has filed a grievance against me through the Attorney Grievance Commission. His claim is that I along with Michigan State Police Det/Sgt. Bill Kanouse (Jonesville Post) conspired to withhold laboratory evidence from the defense prior to trial. Specifically, he claims that I had hair folical evidence taken from a black ski mask which we withheld from the defense.

You may recall this case or at least the time period. The mask was received by the lab on 12-06-00; I believe the request was for any evidence which may link the defendant to the mask. Due to the Lab's relocation, and an ice storm, analysis was not done and the mask was returned for trial on May 14, 2001. Along with the mask was handwritten notes on a Laboratory Worksheet, no report as such.

The trial was held on May 15-17, 2001 and the defendant was convicted. The mask was entered into evidence as a mask found on the road, but without the aid of its analysis. As stated, defendant claims such analysis would have proven his innocence and that the results of such analysis were available to me prior to trial.

Could you provide me with a letter to the Attorney Grievance Commission stating otherwise? I would note that Michigan State Police, Jonesville, received a full report on 06-03-01. The date of completion was 05-31-01, two weeks after the trial. An explanation as to the cause of the delay and the timing of the completed analysis would be helpful as well.

My response is due by June 3, 2002. Could you please fax your short letter to me at 517/439-5141?

Thank you for your assistance. I am sorry for the inconvenience.

Sincerely,

Neal A. Brady
Prosecuting Attorney

NAB/ry

UD-40 (2/90)
MEMORANDUM

STATE OF MICHIGAN

DEPARTMENT OF STATE POLICE

FYI

DATE: May 31, 2002

TO: Neil Brady
Hillsdale County Prosecutors Office

FROM: Christopher Bommarito, Acting Supervisor,
Lansing Laboratory

SUBJECT: 2404-01 Analysis

On 12/16/00, a black ski mask and a pair of eyeglasses were submitted to the MicroChemistry unit at the East Lansing Laboratory for the analysis of trace evidence. The evidence was received by the MicroChemistry unit supervisor, Marie Bard-Curtis, who also performed the analysis.

Because of an extremely large backlog in our unit typical turn-around time on cases is approximately six months. Analysts will expedite cases by request. A request from Sgt. Kanause was received by F/S Bard-Curtis on 2/21/01 for an expedited analysis with a given trial date of 5/15/02.

F/S Bard-Curtis did not complete this analysis in time for trial. The East Lansing Laboratory was due to move to our new facility in Lansing in late December. Much of the laboratory equipment needed for analysis was packed away for the move. An ice storm shortly before the move delayed the move until April/May 2001. Many cases could not be completed during the period 12/00-5/01, due to the laboratory move.

The evidence was returned on 5/14/01 with no report issued. A report was issued by F/S Bard-Curtis on 5/31/02. F/S Bard-Curtis turned over a section of the mask around the nose and mouth to the biology subunit for DNA testing on 6/5/01.

I am sincerely sorry for the delay of analysis of this evidence by our laboratory and the unavailability of the report prior to trial. If you have any further questions regarding this matter, please direct them to F/S Marie Bard-Curtis at 517-322-6563.

Laura Kathleen Sutton
Attorney at Law

PO Box 388, Manchester, Michigan 48158
(734) 428-7445
FAX: (734) 428-3783
E-Mail: LKSappeals2@aol.com

October 22, 2007

Exh 4

Neil A. Brady
Hillsdale County Prosecutor
61 McCollum Street
Hillsdale, Michigan 49242

RE: People v Lee Charles Bradford
Case No. 2002-25-9131
Request to Preserve Evidence

Dear Mr. Brady:

This letter is written in response to Judge Smith's Order dated October 16, 2007 and received by my office on October 19, 2007.

I am hereby requesting that all physical and biological evidence in the possession of your office in the above-captioned case be preserved. I am also requesting that you mandate that any physical and/or biological evidence in the possession of the Michigan State Police, the Michigan State Police Crime Lab or in the possession of the Hillsdale County Sheriff's Department or municipal police departments be preserved as well. If any case materials have been destroyed, please provide the date and manner of destruction of such materials.

In addition, I am requesting a written response indicating compliance or non-compliance with these requests.

Thank you for your cooperation.

Sincerely,

L Kathleen Sutton

Laura Kathleen Sutton

Xc: File

OFFICE OF PROSECUTING ATTORNEY
HILLSDALE COUNTY

NEAL A. BRADY
PROSECUTING ATTORNEY

VALERIE R. WHITE
CHIEF ASSISTANT

61 McCOLLUM STREET
HILLSDALE, MICHIGAN 49242

TELEPHONE (517) 439-1419
FACSIMILE (517) 439-5141

October 25, 2007

P/Lt. William Kanouse
Michigan State Police
476 East Chicago Street
Jonesville, MI 49250

RE: People v Lee Charles Bradford

Dear Lt. Kanouse:

Pursuant to the attached Court Order and request by appellate counsel, would you please make an effort to preserve all available evidence associated with the above captioned mater bearing your complaint #19-3439-00.

Thank you for your assistance in this matter.

Sincerely,

Neal A. Brady
Prosecuting Attorney

NAB/km

Enclosures

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
JONESVILLE POST

COL. PETER C. MUNOZ
DIRECTOR

Exh. 3F

October 29, 2007

Mr. Neal A. Brady
Prosecuting Attorney
61 McCollum Street
Hillsdale, Michigan 49242

RE: People v Lee Charles Bradford

Dear Mr. Brady:

In response to your request of October 25, 2007 to preserve all evidence associated with the above captioned matter bearing complaint #19-3439-00, please be advised that the complaint was closed on August 27, 2002 and the last piece of property was disposed of on August 26, 2002.

If I can be of further assistance in this matter please contact me at the Jonesville Post.

Sincerely,

F/Lt. William B Kanouse

WILLIAM B. KANOUSE, F/LT.
Commanding Officer
Michigan State Police Jonesville Post

WBK:pb

RECEIVED
OCT 31 2007
HILLSDALE COUNTY
PROSECUTING ATTORNEY

I