No. 21-7551 ORIGINAL

FILED
DEC 27 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

In re: Mark Jendrzejewski — PETITIONER
(Your Name)

vs.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF HABEAS CORPUS

32nd Judicial Circuit Court for the County of Gogebic, Michigan
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF HABEAS CORPUS

Mark Jendrzejewski 232454
(Your Name)

Carson City Corr. Fac., 10274 Boyer Rd.
(Address)

Carson City, MI 48811-9746
(City, State, Zip Code)

989 584 3941
(Phone Number)

QUESTION(S) PRESENTED

ONE

IS FOURTEENTH AMENDMENT DUE PROCESS VIOLATED WHEN PROSECUTOR WITHHOLDS BIOLOGICAL AND RELATED EVIDENCE LAYING IN WAIT UNTIL PETITIONER MOVES HABEAS COURT FOR WRIT, CONTINUES TO FIGHT TESTING OF WITHHELD EVIDENCE AND WHEN **ORDERED** TO TEST WITHHELD EVIDENCE, THEN AND ONLY THEN CONCEDES SOLE STAR WITNESS' TESTIMONY WAS FALSE?

PETITIONER SAYS: YES

RESPONDENT SAYS: NO

LOWER COURT SAYS: NO

TWO

IS SIXTH AND FOURTEENTH AMENDMENTS OFFENDED WHEN ATTORNEY FAILS TO ASSIST DEFENDANT, JOINS AND SUPPLEMENTS STATE'S CASE TO OBTAIN A CONVICTION?

PETITIONER SAYS: YES

RESPONDENT SAYS NO:

LOWER COURT SAYS: NO

LIST OF PARTIES

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

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

RANDEE REWERTS, WARDEN

RELATED CASES

People v. Jendrzejewski, No. 168041, Michigan Court of Appeals. Judgment entered April 6, 1995.

People v. Jendrzejewski, No. 103374, Michigan Supreme Court. Judgment entered July 23, 1996.

People v. Jendrzejewski, 455 Mich. 495 (1997). Judgment entered July 29, 1997.

People v. Jendrzejewski, No. 206465, Michigan Court of Appeals. Judgment entered December 30, 1997.

People v. Jendrzejewski, No. 111894, Michigan Supreme Court. Judgment entered October 26, 1998.

Jendrzejewski v. Michigan, 97-7205, United States Supreme Court, Certiorari denied January 26, 1998.

People v. Jendrzejewski, No. 223397, Michigan Court of Appeals. Judgment entered June 8, 2000.

People v. Jendrzejewski, No. 117166. Michigan Supreme Court. Judgment entered September 26, 2000.

RELATED CASES CONTINUED

Jendrzejewski v. LaVigne, No. 2:00-cv-230, U.S. District Court for the Western District of Michigan, Northern Division. Judgment entered on April 15, 2003.

Jendrzejewski v. LaVigne, No. 03-1622, U.S. Court of Appeals for the Sixth Circuit. Judgment entered October 10, 2003.

Jendrzejewski v. LaVigne, No. 04-6288, United States Supreme Court, Certiorari denied November 8, 2004.

People v. Jendrzejewski, No. 263878, Michigan Court of Appeals. Judgment entered July 15, 2005.

People v. Jendrzejewski, No. 130174, Michigan Supreme Court. Judgment entered April 28, 2006.

People v. Jendrzejewski, No. 280066, Michigan Court of Appeals. Judgment entered March 10, 2008.

People v. Jendrzejewski, No. 136585, Michigan Supreme Court. Judgment entered October 27, 2008.

People v. Jendrzejewski, No. G-92-229-FH, Gogebic County Circuit Court. Judgment entered July 1, 2019.

People v. Jendrzejewski, No. 349885, Michigan Court of Appeals. Judgment entered November 19, 2019.

People v. Jendrzejewski, No. 160804, Michigan Supreme Court. Judgment entered September 29, 2020.

In re: MARK JENDRZEJEWSKI, No. 21-1205, U.S. Court of Appeals for the Sixth Circuit. Judgment entered September 23, 2021.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

[x] reported at 2021 U.S. App. LEXIS 28966; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to issue a writ of habeas corpus where Petitioner is unlawfully in custody in violation of the Constitution of the United States of America. Jurisdiction is codified in the provision of 28 U.S.C. §2241(a) that "[w]rits of habeas corpus may be granted by the Supreme Court, ..." 28 U.S.C. §1651(a) provides jurisdiction because this case is unlike any ever seen by this Honorable Court, the exceptional extraordinary circumstances warrant the exercise of the Court's powers.

This Honorable Court has jurisdiction because reviewing the merits of this most unusual and extraordinary matter will aid in the Court's appellate jurisdiction because Petitioner has nowhere else to go until this Court overrules the Sixth Circuit's clearly erroneous ruling as the APPENDICES establish.

Moreover, possibly most importantly, this matter falls under Stewart v Martinez-Villareal, 523 U.S. 637, 645; 118 S.Ct. 1618; 140 L.Ed.2d 849 (1998); Panetti v. Quarterman, 551 U.S. 930; 118 S.Ct. 1618; 140 L.Ed.2d 849 (2007) Petitioner's claim was NOT RIPE until Petitioner could obtain the footprint cast / photo (Appendix I). Petitioner filed a habeas petition in 2000, Petitioner could not obtain the cast / photo until 2018 post DNA testing, concession of false testimony made in 2006.

In addition, Petitioner's claim shares a "common core of operative facts" with the original petition, they "relate back" to the timely petition. Petitioner is an innocent pro se Petitioner praying for a fair trial, not a perfect one, where constitutional violation(s) resulted in a miscarriage of justice requests to be heard. Mayle v. Felix, 545 U.S. 644, 658; 125 S.Ct. 2562; 162 L.Ed.2d 582 (2005). This Honorable Court has jurisdiction to issue a writ of habeas corpus.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI, United States Constitution

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

Amendment XIV, United States Constitution

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

STATEMENT OF THE CASE

Petitioner Mark Jendrzejewski was convicted by a jury on July 2, 1993 in Gogebic County of 2 counts of first degree murder, MCL 750.316, and possession of firearm during the commission of a felony, MCL 750.227b, regarding the 1992 shooting deaths of Bette Vernetti and Jeff Chlebowski. Mark was sentenced on Aug. 5, 1993 by Judge Garfield Hood to mandatory life, plus two years.

On appeal of right, a SADO attorney raised two issues: (1) ERRONEOUS DENIAL OF CHANGE OF VENUE; (2) ERRONEOUS ADMISSION OF TAPE RECORDINGS. In a supplemental pleading, Mark raised: (A) IMPROPER SEARCH AND SEIZURE; (B) SUBSEQUENT SEARCHES TAINTED BY IMPROPER SEARCH; (C) DUE PROCESS VIOLATION BY FORCED INGESTION OF PSYCHOTROPIC DRUGS; (D) INEFFECTIVE ASSISTANCE OF COUNSEL; (E) ERRONEOUS ENDORSEMENT OF EXPERT WITNESS OF SHOE PRINTS AND TOOL MARK EVIDENCE.

The Mich. Court of Appeals reversed for a new trial holding the change of venue request should have been granted. Unpublished CoA No. 168041. The Mich. Supreme Court reversed the Court of Appeals decision and remanded for consideration of other issues raised. People v. Jendrzejewski, 455 Mich. 495 (1997). The Mich. Court of Appeals affirmed the conviction on Dec. 30, 1997, 1997 WL 33330614 and leave was denied, 587 N.W.2d 285 (1998).

1999 Mark filed a MCR 6.500 Motion, raising the following: (A) INEFFECTIVE ASSISTANCE OF COUNSEL: (B) DENIAL OF DUE PROCESS BY INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC DRUGS: (C) INTRODUCTION OF FALSE TESTIMONY: (D) INADMISSIBLE MRE 404 EVIDENCE OF PRIOR BAD ACTS: and, (E) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. The trial court denied relief, the Court of Appeals denied leave and motion to remand on June 8, 2000, CoA No. 223397. The Mich. Supreme Court denied leave on Oct. 26, 2000, MSC No. 117166.

A Writ of Habeas corpus was sought and denied by the Western District of Michigan on April 15, 2003, Jendrzejewski v. LaVigne, No. 2:00-cv-230. The 6th

Circuit denied a Certificate of Appealability on October 10, 2003, No. 03-1622. This Court denied a writ of certiorari, Case No. 04-6288.

Mark filed motions for Nunc Pro Tunc Walker and Competency Hearings. The court identified the issues as: (A) TRIAL COUNSEL DID NOT ADVISE OF RIGHT TO TESTIFY AT WALKER HEARING: (B) NEWLY DISCOVERED EVIDENCE OF IMPROPER / WRONG MEDICATION BEING ADMINISTERED AND REQUESTING COMPETENCY HEARING. The trial court denied relief on May 23, 2005. The Michigan Court of Appeals denied leave, CoA No. 263878; Michigan Supreme Court denied leave, MSC No. 130174.

Mark filed a MOTION FOR DNA TESTING under MCL 770.16. The trial court GRANTED, ORDERED DNA testing and **when DNA results arrived** the prosecutor **changed his allegations to conform to the DNA results.**

Mark immediately filed: (A) Motion for Order to Produce Brady Evidence; (B) Motion for Stay/continuance of Proceedings; (C) Motion for Reconsideration of Denial of Hearing; (D) Motion to Dismiss of Show Cause. On August 29, 2006 the trial court denied the motions. Mark filed a **Demand for Jury Trial** on the new allegations that "blood splatter from Bette Vernetti [] was carried outside by the defendant as he fled the scene" which was **not the allegation**, theory, nor testimony given at trial. The jury demand was never disposed of.

Mark appealed the denial of motions, on March 10, 2008 the Michigan Court of Appeals denied leave, CoA no. 280066. The Michigan Supreme Court denied leave on Oct. 27, 2008, MSC no. 136585.

On or about March 23, 2018, for the first time Mark was able to see the footwear cast previously withheld. A Motion for Relief from Judgment was filed on October 19, 2018 for the **Brady** violation in suppressing lab reports, false testimony, newly discovered evidence establishing innocence and ineffective assistance of counsel. The court ordered the prosecutor to respond, denying the motion on July 1, 2019 (App. **A**, Gogebic Circuit Court ORDER). Appeal

was applied for and the Michigan Court of Appeals dismissed the application on November 19, 2019, CoA No. 349885 (App. **B**, Mich. CoA ORDER). The Michigan Supreme Court denied leave on September 29, 2020 (App. **C**, Mich. S.Ct. ORDER). A Petition for Permission to File a Second or Successive Habeas was filed in the 6th Cir. Court of Appeals on March 4, 2021, and denied on September 23, 2021 (App. **D**, 6th Cir. ORDER).

STATEMENT OF FACTS: The State's case rested on the testimony of a sole star witness Rachel Jezek, who was the downstairs tenant of the apartment house Bette Vernetti rented, claimed to be awake or awaken by noises at 0400. She claimed to look out her window to see a person walk down the sidewalk, out to the street, down the street to a truck, turn all the way around to face her while placing a rifle in the back of the truck at which time she claimed to recognize Mark and could see his face 40 yards away as well as she could see attorney's face 8 feet away in courtroom.

The record is incomplete because assigned attorney held a bias and conflict of interest against Mark. He treated Mark with disdain, yelling at Mark whenever Mark asked a question thwarting Mark's efforts to obtain defense evidence and forced Mark to sign a waiver of patient-psychiatric privilege, waived Mark's Fifth Amendment right to silence and **Miranda** rights without Mark's consent or knowledge. He failed to completely subject the State's case to adversarial testing and in fact the record shows he joined the State to obtain a conviction. Inter alia, presenting a "homicidal" "expert" opinion to a 45 day old court ordered recording. After removal from Mellaril Mark has diligently sought to assert his rights.

REASONS FOR GRANTING THE WRIT: 1.) The GRANT of a Writ will be in aid of the Court's appellate jurisdiction to clarify for lower courts and parties whether **Brady/Napue** & related IAC claims where critical evidence is concealed, that were NOT previously RIPE for review are subject to 2244(b)'s requirements

or exempt according to Panetti v. Quarterman, 551 U.S. 930 (2007) because of a conflict between the Circuits where the 4th and 11th Circuits held that **Congress didn't intend to subject** previously unavailable **Brady** claims to §2244(b) requirements. Long v. Hooks, 972 F.3d 422, 486-88 (4th Cir. 2020); Scott v. United States, 890 F.3d 1239, 1256-58 (11th Cir. 2018). The 6th Circuit continues to subject **Brady** claims to §2244(b) requirements, In re Jackson, 12 F.4th 604, 616 (6th Cir. 2021); In re Jendrzejewski, 2021 U.S. App. Lexis 28966 (Sept. 23, 2021) as it appears there is a conflict within the 6th Circuit because of the court's decision in In re Wogenstahl, 902 F.3d 621 (6th Cir. 2018) see In re Jackson, supra. Begging the **QUESTION: DID CONGRESS INTEND BRADY/NAPUE & RELATED IAC CLAIMS PREVIOUSLY UNRIPE TO BE SUBJECTED TO 2244(b)?**

2.) Exceptional circumstances warrant the exercise of the Court's discretionary powers where: **a.** The prosecutor conceded sole star witness' testimony at trial was false after Mark's habeas petition. DNA of victim Bette Vernetti, footprint, concession collectively establish that Mark is innocent and trial court's decision is contrary to, an unreasonable application of federal precedent, and an objectively unreasonable determination of the facts in light of the evidence presented in the State court proceeding;

b. The DNA of victim Bette Vernetti, concession of false testimony, dissimilar footprint cast not only establish Mark's innocence but combined with record and non-record evidence establishes trial counsel conspired to convict his own client by presenting a homicidal opinion to 45 day old recording, completely failing to subject State's case to adversarial testing; attorney committed contempt of court by entering in evidence, tape suppressed by trial court, inter alia; trial court's decision is an unreasonable application of federal precedent and an objectively unreasonable determination of the facts in light of the evidence presented in the State court proceeding;

3.) Adequate relief cannot be obtained in any other form or from any

other court because: **(i)** 28 U.S.C. §2244(b)(3)(E) states:

> The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(ii) the Sixth Circuit Court of Appeals has held that:

> a holding of a published panel opinion binds later panels **unless the decision is overruled** en banc or **by the Supreme Court.** Freed v. Thomas, 976 F.3d 729, 738 (6th Cir. 2020)

The Order of the court of appeals should be overruled so that Mark can file the **Brady/Napue** and related IAC claim in the respective Federal District Court as **Petitioner in pro se has** made "sufficient allegations of fact together with some documentation that would 'warrant a fuller exploration in the district court'" which would have been done but for COVID and ineffective assistance of counsel. PLEASE SEE **4.)a. - d.**, infra.

4.) An application to the district court of the district in which Petitioner is held was not made because:

a. Attorney Sheldon Halpern insisted that "permission" must be first sought in the Court of Appeals;

b. Apparently attorney Halpern did not appraise himself of Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998) and Panetti v. Quarterman, 551 U.S. 930 (2007) when a claim is NOT RIPE at the time of the filing a first petition, the subsequent petition is not a second or successive petition;

c. Petitioner suffered a **COVID-19** related stroke and lost the use of one eye (App. **E**, Covid + and Eye Exam) while on COVID + deathbed, Mark could not check the attorney's actions who was entrusted with duty to attach necessary supporting documents, and did not (App. **F**, Affidavit);

d. In addition, correctional facilities law libraries were closed due to COVID and Mark could not "research" the applicable law (even if he could

have) to learn of Panetti, supra, and to move OR direct attorney to move in the respective Federal District Court (App. G, NOTICE OF CLOSURES).

5.) This case presents extraordinary, novel, unusual circumstances where the prosecutor laid in wait until after Mark's first habeas petition to concede sole star witness' testimony was false; the State prosecutor and attorney **together insured** that Mark did not have access to any defense evidence whatsoever and the record establishes the attorney joined the State to obtain the conviction of an innocent U.S. citizen, the newly discovered evidence establishes the verdict is unreliable and Mark is truly innocent based on concession of State prosecutor, DNA and dissimilar evidence previously concealed. This Court has never seen a criminal matter as repugnant to the Constitution as this. This is not a second or successive petition because Mark's claims were unripe at the time of the earlier habeas petition, Panetti, supra, and the court of appeals ruling that "Jendrzejewski has failed to meet his burden under 2244(b)" (Appendix D, ORDER pg. 4, ¶2) should be overruled because "cause" has been established why documents weren't attached to establish need further exploration by district court, i.e. COVID and ineffective assistance.

Claims were previously NOT RIPE: **a.** Habeas petition was filed Dec. 14, 2000 (App. H, W.D.M. RoA); **b.** DNA obtained August 8, 2006 (App. I, DNA Result), Mark with exercise of due diligence couldn't make Michigan Legislature enact MCL 770.16; **c.** Letter changing theory to conform to DNA, conceding false testimony of sole star witness (App. J, Aug. 8, 2006 letter), Mark with exercise of due diligence could not make prosecutor **oppose record**; **d.** Dissimilar footprint cast concealed until May 2018 (App. F, Affidavit in Support of Motion to Amend; **App. K**, Affidavit in Support of **Brady Motion**), Mark w/exercise of due diligence, $46,000 ± expended by friends, photo of cast was finally obtained.

6.) Mark is actually innocent, has never had a full & fair hearing due

to assigned attorney held a bias & a conflict of intertest against Mark, he joined the State to convict, prevented Mark from having **any** favorable evidence, and created a record to prejudice and prevent Mark from ever having full & fair post conviction hearings. I, Mark Jendrzejewski swear that I didn't kill Bette and Jeff, the DNA results, concession of false testimony, dissimilar footwear cast shouldn't be ignored in this claim of innocence. Schlup v. Delo, 513 U.S. 298 (1995); Murray v. Carrier, 477 U.S. 478 (1986).

7.) To correct a miscarriage of justice and tell prosecutors & attorneys Nationwide they cannot collude to deprive a U.S. citizen of constitutional rights and every piece of favorable evidence to mount a defense because 6th & 14th Amendments forbid it. Mark prays for review on the merits so the collusion is NOTICED, the parties corrupt acts exposed and reprimanded accordingly.

ISSUE I

WHEN PROSECUTOR LAYS IN WAIT UNTIL AFTER PETITIONER'S FEDERAL HABEAS FILING TO CONCEDE FALSE TESTIMONY OF SOLE STAR WITNESS 14TH AMENDMENT IS VIOLATED AND STATE COURT'S DECISION IS (A) "CONTRARY TO", (B) AN UNREASONABLE APPLICATION OF FEDERAL PRECEDENT" AND (C) AN "OBJECTIVELY UNRESAONABLE DETERMINATION OF THE FACTS" SOME FORM OF RELIEF SHOULD BE GRANTED.

Standard of Review: For a habeas petition is set forth in 28 U.S.C. §2254(d), which provides the writ may be granted if the state appeal:

> (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 unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

DISCUSSION: Brady v. Maryland, 373 U.S. 83 (1963) established that:

> the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87

In Strickler v. Greene, 527 U.S. 263, 281-82 (1999) The Court articulated:

> The evidence at issue must be favorable to the accused, either

> because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Relying on Murray, supra, 477 U.S. at 488, "some interference by officials made compliance impracticable" new trials were ordered where "officials" said evidence was of "no value" or "destroyed" - respectively, United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986); Parkus v. Delo, 33 F.3d 933 (8th Cir. 1994) was "some interference" that provided "cause". Mark's circumstances are the same, Mark was led to believe the evidence **did not exist** and also Mark's efforts to obtain evidence he was aware of was thwarted by attorney.

The Court also held in Kyles v. Whitley, 514 U.S. 419, 437 (1995) that actions by the police are imputed to the prosecutor; and in United States v. Bagley, 473 U.S. 667, 676 (1985) that impeachment evidence falls within the **Brady** rule because, "if disclosed and used effectively, such evidence, 'may make the difference between conviction and acquittal.'"

ARGUMENT: A. EVIDENCE WAS REQUESTED AND WITHHELD - A BRADY MOTION (App. **L**, MOTION) was filed and evidence requested; the prosecutor claimed: "we have provided Mr. McKenzie with all of - - all of the information that we have in our posession." (App. **M**,[1] T 64, ln 1 - 3).

The withheld evidence turned out to be Bette Vernetti's DNA (App. **I**, DNA result; App. **J**, Aug. 8 letter); and a dissimilar footwear cast (App. **N**, Cast Photo). The State's position was the footwear cast was "similar pattern" - now that the cast photo is compared to Sorel cast (App. **O**, Sorel photo) is false testimony, Napue v. Illinois, 360 U.S. 264 (1959) - as footprints under cut utility lines (T 1435), but "poor quality" (T 1468). Trooper Wardman sent the evidence for testing, but was not aware of results (T 1469). The attorney said in closing: "**we have no scientific test results** (T 2098). The State retorted:

[1] **Appendix M**, Transcripts chronologically and numerically arranged.

"the State is not going to send every bit of evidence [for testing]" (T 2144-45). While the prosecutor may not have personally been aware of the lab results, it was his duty to learn of it Kyles v. Whitley, 514 U.S. at 437.

B. STATE COURT'S DECISION REGARDING "CAUSE" is **(i)** "CONTRARY TO" FEDERAL PRECEDENT, **(ii)** AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, **(iii)** AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS.

Mark is entitled to a Writ of Habeas Corpus as the following meets the requirements of 28 U.S.C. §2254(d). The State court held:

> Defendant claims "cause" exists because the evidence (the 11-24-92 lab report identifying human blood in the footprints and a cast of one of those footprints) was not available at the time of his prior motions. To the contrary, defendant knew before his convictions that the footprints contained human blood and a cast had been made of one of the bloody footprints. During trial, MSP Trooper Greg Wardman testified repeatedly to the presence of blood residue, blood, red blood, or body residue visible in footwear impressions discovered days after the crime, at the crime scene. He also testified to the taking of three samples of the blood and a cast of the best footwear impression. Additionally, defendant had an 11-25-92 laboratory report, authored by MSP Dennis L. Mapes, which disclosed the existence of "3-test tubes which contained red-brown fluid". The last page of that report documents that photographs of defendant's vehicle were taken by Detective Sergeant David Johnston. In cross examining Det. Sgt. Johnston at trial on June 23, 1993, defense counsel asked: "I note that from the report that you took some pictures from the pick-up truck". (Trial transcript page 1137, lines 24-25.) The question represents a tacit admission of possessing the Mapes report. At the latest, Defendant's alleged new evidence was available during trial." (App. A, Circuit Court Op. at pg. 3, ¶ 5).

(i) THE DECISION IS CONTRARY TO FEDERAL PRECEDENT

The 2006 DNA results (App. I, DNA report), concession (App. J, 08-08-06 letter) were completely ignored by the State court that focused exclusively on the "human blood" lab report obtained by Petitioner on April 23, 2004. In Strickler v. Greene, 527 U.S. at 283-84, The Court relied on past precedent of "cause" that "some objective factor . . . impeded [] efforts" "the factual or legal basis for a claim was not reasonably available" or "some interference by officials" "made compliance impracticable" - "would constitute cause".

Here, officials interfered by **(a)** forcing Mark to consume Mellaril and Xanax (App. P, Drug Doses) prior to and during trial rendering Mark unable to

understand proceedings; while (b)depriving Mark of sleep (App. Q, Affidavit pg. 5, ¶ 1:47(c)); officials claimed: (c)"we have provided . . . all of the information that we have in our possession." (App. M, T pg 64, ln 1 - 3); (d)"I [Wardman] don't know anything about the [3 vials of blood] test results" (T 1469), (e)the footprints were "older than other prints" (T 1470) and/or (f)"out of position" (T 1470); (g)the footwear cast and blood was "disregarded" (T 2098); (h)and retorts "the State is not going to send [the blood for testing]" (T 2144-45); (i)officials **attempt to block testing** of blood samples (App. R, Plaintiff's Opposition to DNA test).

In Williams v. Taylor, 529 U.S. 362, 406 (2000) The Court held a state court decision is "contrary to" U.S. Supreme Court precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent" and such a decision of the state court is due no deference.

The State court DECISION is **contrary to** Banks v. Dretke, 540 U.S. 668, 701 (2004) where evidence of false testimony was withheld until after habeas filing and was ruled to be newly discovered establishing **cause**, the same circumstances here. Mark filed his Petition for Habeas Corpus on Dec. 14, 2000 (App. H, W.D.M. RoA); the evidence establishing false testimony was not available until Aug. 8, 2006 (App. I & J, DNA Results & Aug. 8, 2006 letter concession) and **cast photo obtained** May 2018 (App. N, Cast photo; App. F, Affidavit). According to Banks, Mark did establish cause and the State court decision is contrary to U.S. Supreme Court precedent. 28 U.S.C. §2254(d)(1).

(ii) THE DECISION IS AN UNREASONABLE APPLICATION OF FEDERAL PRECEDENT

In Williams v. Taylor, supra, The Court explained:

> a state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involv[ing]

an unreasonable application of . . . clearly established Federal law.'" 529 U.S. at 407-08.

The State court **DECISION** is an unreasonable application of Brady, supra, and Kyles v. Whitley, 514 U.S. 419, 436 (1995) because the State court **ignores** the DNA results (App. **I**, DNA) and concession (App. **J**, Aug. 8, 2006 letter) in the analysis of "cause" by focusing solely on the "human blood lab report".

Ignoring the DNA results and concession in the "cause" analysis renders the trial court's decision flawed because Mark could not "with exercise of reasonable diligence" make the Legislature enact MCL 770.16. Moreover, Mark could not make the prosecutor concede Rachel Jezek's testimony was false by changing theory to conform to DNA - both obtained in 2006, six (6) years after habeas was filed. **App. I & J**, DNA results and Aug. 8, 2006 letter concession should have been considered "collectively" and ignoring both is an unreasonable application of Brady and Kyles. 28 U.S.C. §2254(d)(1).

(iii) THE STATE COURT DECISION IS AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING

(a.) Re: no showing of "cause" - possession of "human blood" lab report (App. **A**, Op. at 3, ¶ 5), is objectively unreasonable and severely flawed because the court **ignored the DNA results of 2006 (App. I, DNA)** in its "cause" analysis and the DECISION is belied by the record because the court **confused two different and distinct MSP preports:** [1](App. **S**, Lab. No. 51050-92) the attorney referred to (T 1137) is a seven (7) page document with a "cd 1-13" which relates to all the evidence collected by the MSP crime scene unit re: "photos of truck" with "no blood stains found" was confused with: [2](App. **T**, Lab. No. 51050-92 **Supp.**) which **was not provided** with a "cd 11-24" which is a separate serological exam report of "human blood" test results.

The **record belies the finding** that "Defendant had the "human blood" lab report." It is **important to remember** [1] Mr. Mapes testified there were "No

serological evidence, blood typing" (T 1147); (2) the attorney proclaimed "**we have no scientific test results.**" (T 2098) and (3) the prosecutor retorted:

> Why don't we have any information about the blood found in the footprint? . . ., the State is **not going to send every bit of evidence** [for testing] that turns out to be no leads. (T 2144-45)

By finding "defense possession" of the "human blood" report to deny existence of "cause" the State court **is** intimating (1)Mr. Mapes testified falsely; (2)the attorney & (3)State committed fraud on the court. Clearly, Mr. Mapes, Mr. Whitley and the prosecutor **knew of** the lab report, See **App. T**, Lab Report, authored by Mapes, signed by Whitley, the defense and jury did not and that is withholding of evidence, a **Brady** violation.

(b.) Re: no showing of "cause" - Wardman testified repeatedly (App. A, Op. at 3, ¶ 5), is objectively unreasonable and belied by the record because such mention was merely tangential (T 1468, 1469). A finding of "repeatedly" is an oxymoron considering how many times Mark's post-Miranda **silence** was brought up (T 1489-90, 1513-14, 1528, 1597, 1599-1600, 1608); or prior conviction / jail was brought up (T 1565, 1567, 1576, 1581, 1590, 1807, 1809, 1811, 1818, 1848-50, 1866-68). "[R]epeatedly" compared to a mere mention (T 1468, 1469) makes the State court decision itself is a misrepresentation of record.

(c.) Re: no showing of "cause" - blood / footwear discovered "days after the crime" (App. A, Op. at 3, ¶ 5), the record belies the **days after** finding. The record clearly states Bette and Jeff were horrifically murdered on **November 22,** 1992 (T 801, 867, 987, 1000, 1094). Wardman testified:

> On the **23rd**, the same date at St. Vinny's DePaul I took one plaster cast at the crime scene . . . (T 1468)

It was the **very next day**, not days after. The officers **choose not to collect samples** and **footwear cast** on November 22nd because "the impressions [] weren't good enough to **match** with any other evidence [we] had" (T 1470-71).

Authorities intentionally ignored the blood trail and prints on Nov. 22,

1992 because they **"didn't match [Mark's boots]".**

(d.) Re: no showing of "cause" - "tacit admission" (App. **A**, Op. at 3, ¶ 5), is objectively unreasonable the record belies a "tacit admission" finding. The record clearly states: "**we have no scientific test results**" (T 2098) and the prosecutor said: "the blood found in the footprint. . ., the State is **not going to send every bit of evidence** [for testing]" thus the "tacit admission" finding is illusory and ignores the record.

C. THE STATE COURT'S DECISION ON "PREJUDICE" IS AN OBJECTIVELY UNREASONABLE APPLICATION OF FEDERAL PRECEDENT AND AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING

The DECISION on "the vast and insurmountable evidence of defendant's guilt" (Op. at 5, ¶ 1) was listed, relied on to deny relief, as being:

> ... [D]efendant left messages on Vernetti's answering machine, including one left the night of the killings about being "stood up". After hearing sounds "like boards cracking", an eyewit-ness, Rachel Jezek, who recognized defendant from his numerous prior visits to Vernetti's, identified defendant as the individual leaving Vernetti's apartment after the killings. She also testified he put a rifle into his pickup truck; Jezek was familiar with the truck from defendant's prior visits as well. Vernetti's telephone and cable lines had been cut, and defendant's truck contained wire cutters on the front seat of the same type used to cut the lines. Footprints at the scene matched a Sorel brand boot, size 10 or 11. At the time of his arrest, defendant wore a size 10 Sorel boot. Defendant testified to being within 2 blocks of Vernetti's apartment in the hours following the murders. When arrested shortly after the killings, defendant was discovered in the woods (where he had been for several hours). Defendant put his hands up and made a statement that he assumed law enforcement was looking for him. In close proximity to the killings, defendant made a tape and delivered it to his father, Paul Jendrzejewski. The content of the tape indicated that it was made to explain the events to his father. (Op. at 2, ¶ 1).

The above is an objectively unreasonable determination of the facts in light of the evidence presented in the State court proceeding and refuted:

(a.) Re: Phone Messages: There was **no message of being "stood up"**, the only message left on November 22, 1992 was informing Bette that the "truck broke down." (T 1726-27, 1834, 1852).

The other calls were made days, months earlier on Nov. 15th, 1992, messages 4, 5, & 6 (T 1801-1807, 1865-68); messages 7, 8, & 9 made Oct. 31st (T 1787-92, 1799-1800, 1857-1864); and message 10, made October 4th (T 1775-1787, 1853-55, 1870-71, 1911-13). The finding of a message of being "stood up" on the night of the deaths is a falsity that is refuted by the record.

(b.) Re: Jezek Identification: This finding is [1] an unreasonable application of Kyles, supra, "collectively" mandate because the court ignored that (App. J, **8-8-06 letter**) is a concession that Jezek testified falsely at trial and her claims are nugatory for any finding to deny relief.

(2) An unreasonable determination of the facts in light of the facts of the State court record, because: **ignored** by the court concerning Jezek's alleged identification is the great uncertainty she expressed concerning identification. Ms. Jezek's testimony claiming to see Mark was "I thought so" (T 809); "But on thinking it through" (T 813); "I think he ..." (T 814); "I didn't look especially at his face" (T 838): "I think I saw his face" (T 840).

Ms. Jezek described what she "thought" up. The record also shows that Ms. Jezek "wasn't home" (VD 184-85, ln 25 - 1). The record and **App. J, 8-8-06 concession** rebuts an "eyewitness" determination.

Whether Ms. Jezek saw a rifle placed in the truck, Jezek said: "I didn't think of that at the time" (T 843). Denying relief based on Ms. Jezek's tale, the court ignored that Jezek **did not see** the bright yellow snowmobile in back of the truck she assumed was Mark's (T 841), evidence at trial was consistent: Paul, Mr. Ramme, Sheriff Pezzetti, and Mark all testified Mark's truck had a very visible snowmobile in the back (T 178, 1017, 1037, 1662, 1696).

Had Mark been the killer and placed a "rifle" in the back of **his truck**, Sheriff and Lt. Hall would have found an impression in the snow in the bed and photographed / casted the same upon inspection (T 1037). There was no

impression, it wasn't Mark's truck Ms. Jezek claimed to see.

The prosecutor has conceded Ms. Jezek's testimony was false (App. J, Aug. 8, 2006 letter) makes it clear the person seen by Ms. Jezek was not Mark.

The court mischaracterizes Ms. Jezek's testimony as being impeached (Op. at 4, ¶ 2; Op. at 5, ¶ 1) by Trooper Wardman's brief mention (T 1469) of "blood in footprints crossing the front yard." (Op. at 2, ¶ 1; pg. 5, ¶ 1) is misleading. Harris v. New York, 401 U.S. 222, 226 (1971) makes clear impeachment is accomplished on cross-examination.

On June 22, 1993 Ms. Jezek gave her testimony (T 833), there was no mention of "blood trail". Dep. Smith, Mr. Vernetti, Dep. Benninghaus, Dep. Menghini, Dave Ramme, Sheriff Pezzetti testified after Jezek. On June 23, 1993 Neil Schroeter, David Johnston, Dennis Mapes, Theodore Finco, Martin Matthews and Sheriff Pezzetti testified. On June 24, 1993 Raymond Kenny testified. On June 28, 1993 Mr. Kenny testified, then Trooper Wardman before blood trail (T 1468) was mentioned. The court claiming Jezek was "impeached", 14 witnesses and 6 days later by a brief mention of some evidence never produced is a misrepresentation of fact and the record.

The court **ignored** that Ms. Jezek said she never saw Mark walk across the yard, but down the sidewalk, and Mark could not have made the boot print in the yard (T 833, 835, 837, 838). The same bloody prints the jury was told were out of "position" and "older" (T 1470) to be disregarded by the jury, were later claimed by prosecutor was most "likely blood splatter from Bette Vernetti that was carried outside by the defendant as he fled the scene." (App. J, 8-8-06 letter) concedes Jezek's testimony was false and the verdict unreliable. Ignoring the DNA results (App. I, DNA) and concession (App. J, 8-8-06 letter) makes the court's denial of relief skewed. Finding:

> Rachel Jezek, who recognized defendant from his numerous prior visits to Vernetti's, identified defendant as the individual leaving Vernetti's apartment after the killings. She also testified he put a

> rifle into his pickup truck; Jezek was familiar with the truck from defendant's prior visits as well" (Op. at 2, ¶ 1)

is not a reliable depiction of the record and is rebutted by the State's own concession the above was false testimony because "defendant ran through the yard depositing Bette's blood as he fled" (App. J, 8-8-06 letter).

(c.) Re: Mark testified to being within 2 blocks of crime scene in the hours after the murders (Op. at 2, ¶ 1), **is contradicted by the record.** The time of death was listed as 0400 (T 1105); Ms. Jezek said it was 0406 (T 812) the perp exited the house.

Mark left Citgo at 0325 (T 224, 1837-38) and was on his way to his father's house at 0345 (T 165, 191-92, 216-18, 224, 1729-1733, 1739). Mark took his flashlight and left to track a wounded deer and got lost (T 1735-1745). There is no basis in the record that Mark was within 2 blocks of the crime scene after 0400, in fact the record confutes such claim.

(d.) Re: Surrender to police: The court found incriminating, that when police found Mark deep in the woods that Mark assumed police were looking for him. (Op. at 2, ¶ 1). Mark got lost (T 1742) he didn't return to his father's; when police walked up to the location, they ordered Mark to raise his hands, guns drawn (T 1752), Mark thought his father reported him missing (T 1890).

Being lost and found by a "search and rescue unit" is NOT tantamount to incrimination or a confession, to use it as such is not accurate, the record refutes such finding and same is an illusory accusation of evidence of guilt that Petitioner strongly denies such claim.

(e.) Re: Tape delivered to father finding. The court incorrectly assumes the dictating machine tape was an explanation of what transpired on Nov. 22, 1992 and erroneously found the tape to be incriminating.

The tape clearly **does not have any** incriminating nature or information on it (App. U, Tape transcript). The tape was made on Oct. 4, 1992 (T 1775-77,

1780-86, 1855, 1871-73, 1880, 1890, 1910-13) the contents indicate it was based around the CPS incident and "Jessica" and the CPS "system" (App. U, Tape transcript page 1 & 2 & 3). Finding the dictating tape was "[made i]n close proximity to the killings" (Op. @ 2, ¶ 1) is belied by the record and the tape itself, it was almost 2 months old (T 1870) and that's why it didn't work (T 163, 1031, 1048, 1262) because it sat unused for 2 months. The "close proximity" finding is rebutted and indeed belied by the facts of the record.

Also the court said "[tape was] made to explain the events to his father" is utterly incorrect and not supported by the record. The tape "explains how I feel" (T 1733, 1880, 1890) and made at direction of Mr. Malloy to "diary" (T 1577) (App. Q, Affidavit / Nunc Pro Tunc Walker Hearing, ¶ 1:47(e); ¶¶ 2:1 - 2:50; App. V. Affidavit Explaining contents) by court ORDER (App. W, Judgment of Sentence). Finding the tape "explain[s a murder] to [my] father" (Op. at 2, ¶ 1) is absurd, the tape expresses the thoughts of Mark's mind and feelings of his heart. It was confidential, it should've never made it in evidence but for counsel with a bias and conflict of interest, it did.

Mark explained other aspects of the tape, the events of Oct. 4, 1992, why tape was made (T 1761-1784), statements on the tape (T 1785-86, 1872); (T 1817); (T 1873); (T 1874); (T 1914) and a finding the Oct. 4th tape as "incriminating" (Op. at 2, ¶ 1) is preposterous. The tape **only existed** because of court ORDER (App. W, Judgment of Sentence) prescription of Mr. Malloy to "diary your thoughts and feelings for in-session discussion" (T 1577).

The only reason the tape and player made way to Mark's father was Mark was moving property to Paul's house that evening (T 167-68, 1695-1704, 1714-15, 1733, 1760-86, 1853-55, 1871-72, 1890, 1911-14). The tape/player was placed in Mark's coveralls so it wouldn't get lost (T 1698) and placed on the cabinet at Paul's for safekeeping because Mark didn't want to take it into the

woods tracking a deer (T 1879). Sessions with Mr. Malloy were canceled for one reason or another (T 1591-93) and that's the only reason it didn't get to Mr. Malloy, along with 3 others. Finding the tape "incriminating" is why the trial was a farce, mockery, a sham and the DECISION to rely on it as "insurmountable evidence of guilt" (Op. at 2, ¶ 1) is flawed. The court also held:

> Even assuming the laboratory report and footprints cast were suppressed, they were not material. Bloody footprints at a crime scene speak for themselves, and definitive proof that they contain human blood does not add to their materiality. Trial testimony described the bloody footprints as containing blood residue, blood, red blood, and body fluids. That implies human blood and defense counsel could have explored same further during trial. Additionally, defense counsel knew of the blood samples from a police report and made no effort to compel testing or adjourn trial. Even so, the 11-24-92 laboratory report would not have been material if it was known at trial. The jury heard about bloody footprints crossing the yard near the crime scene. That evidence impeached the testimony of eyewitness Jezek and the People's forensic expert. "Human" bloody footprints would have made no additional impact. (Op. at 4, ¶ 2)

(1) Sec. B.(ii) **above is incorporated here by reference** the DECISION violates Kyles, "collectively" mandate. Moreover, the DECISION is also an unreasonable application of Bagley, **supra,** 473 U.S. at 682, where this Court established that "impeachment" evidence is "material" if "there is a reasonable probability ... the result of the proceeding would have been different." Here, there is a reasonable probability the verdict would have been different because the DNA (App. **I**, DNA) when used to impeach Jezek would've brought a concession of false testimony (App. **J**, Aug. 8, 2006 letter) **in 1993 rather than 2006** and given the jury reasonable doubt that the person who walked away was not Mark because the print left (App. **N**, Cast photo) didn't match Mark's boot.

(2) The DECISION is an objectively unreasonable determination of the facts in light of the evidence presented in the State court proceedings because: **(a.) Re: "materiality"** (Op. at 4, ¶ 2). The court's DECISION is belied by the fact that the DNA results (App. **I**, DNA) establishes the blood was Bette Vernetti's and thus material to the defense to impeach Jezek and

Mapes. Ignoring the DNA and focusing solely on the "human blood" lab report the court's DECISION is flawed, incomplete and unreasonable. The State argued:

> There's no blood on any of the defendant's clothing. . . ., the testimony of the expert is you had a contact wound. . . . That's why there's no blood or brain matter on that clothing. (T 2147-48).

It is important to remember, Bette's entire shoulder, neck and face was blown to pieces (T 1211, 1213), akin there was a trail of Bette's blood crossing the front yard (App. **X**, Wardman Report, pp. 7 & 8; App. **Y**, Diagram). The court's myopic view of the blood evidence as not material completely ignores the DNA result (App. **I**, DNA) which would have destroyed the credibility of Rachel Jezek, Det. Mapes and the State's one victim theory (T 2147-48). Without the lab report / DNA, the State's case **wasn't subject to adversarial testing** and withholding the evidence deprived Mark of the right to cross-examine Rachel Jezek, Det. Mapes and defend against the State's theory resulting in a fundamentally unfair trial and violation of Mark's 5th, 6th, 14th Amendment rights.

(b.) Re: "jury heard about bloody footprints" (Op. at 4, ¶ 2) places too much weight on a brief mention (TT 1469, lns 10-13; 1470, lns 7 -13) out of 5 days of testimony and a 3 day recess. Reliance on a tangential mention to deny prejudice, is prejudicial because it ignores that jury asked for "transcripts of testimony" on day 2 of deliberation (T 2187) which may have been what they were looking for, whether it was Mark's, Bette's, Jeff's, deer blood or some other substance. Due process requires that the jury see the actual evidence, denial of due process is the failure to observe fundamental fairness essential to the very concept of justice. Lisenba v. California, 314 U.S. 219 (1941). In Sawyer v. Hofbauer, 299 F.3d 605, 612 (6th. Cir. 2002). **Brady** was violated where the existence of a semen stain was disclosed to counsel before trial, **the lab report (as here)** was not provided. The court's decision is an objectively unreasonable determination of Kyles, supra, because "there is a

reasonable probability that, had the evidence been disclosed to the defense, the result ... would have been different." 514 U.S. at 433.

(c.) Re: "defense counsel failure to compel testing" (Op. at 4, ¶ 2) is belied by the record and ignores the facts that defense, as was the jury told there was "no serological evidence" (T 1147); the blood trail was "out of position" and "older" (T 1470). In Bagley, 473 U.S. at 682-83, the Court recognized a situation where an imcomplete response "has the effect of representing . . . the evidence does not exist.

It's **important to remember**, Mark was drugged (App. **P**, Drug doses) and couldn't function normally. A **Brady** Motion was filed (App. **L**, Motion) and the State claimed "we've given everything" (T 64); there's "no serological evidence" (T 1147); it was "out of position", "older" (T 1470) chilled pushing further for footprint / blood evidence. **Also**, the State told jury there's no test results (T 2144-45) so finding that "testing" could've been "compelled" or "trial adjourned" is contradiction of logic, reality and the facts.

(d.) Re: "Human bloody footprints" "no impact" (Op. at 4, ¶ 2). Ignores the DNA of Bette (App. I, DNA) and wholly dissimilar footprint (App. **N**, Photo) would've destroyed all credibility of Jezek's tale, the credibility of Mr. Mapes and the theory that only Jeff was tragically murdered (T 2147-48). Ignoring the DNA results (App. **I**, DNA) and concession (App. **J**, Aug. 8, 2006 letter) is an objectively unreasonable determination of the facts as merely mentioned bloody footprints certainly had no impact - but had the jury known it was "human DNA of Bette" been revealed with the dissimilar footwear cast (App. **O**, Cast photo) would have made a decisive impact on the jury and the verdict would have been different.

The court also incorrectly and objectively unreasonably determined:

> Defendant also argues that the cast of the bloody footprint was never made available to the defense. Defendant has not proven

> suppression of the cast by the State. First, defendant knew about the cast before trial. Second, the cast was discussed at trial. The jury saw photos of bloody footprints, including the footprint captured by the cast. More importantly, the cast was "poor quality" and had no evidentiary value. Defendant has not shown that the cast is favorable to him. . . . Also, defense counsel had a footprint expert and the court delayed the trial during the testimony of the People's forensic expert Raymond Kenny to allow time for the defense footprint expert to complete his analysis. Finally, the cast is not material. Law enforcement testified at trial that the cast lacked any distinguishing or identifying features. Even if the cast was determined to be dissimilar to defendant's boots, that would not reduce the impact of the scene footprints that were a perfect match to the defendant's boots. (Op. at 4, ¶ 3) (Cite to case omitted).

(a.) Re: suppression of cast not proven (Op. at 4, ¶ 3): Mark **did not know of the cast before trial.** Mark was drugged; and sleep deprived (App. P, Drug doses; App. Q, Affidavit **pg. 5, ¶ 1:47(c)**) rendering Mark unable to read, and virtually absent from proceedings. Secondly. even if the cast was discussed at trial, Mark had no knowledge of and was oblivious to the testimony, Mark had to learn everything from transcripts once freed from Mellaril. A **"discussion"** about something surely is **not production.**

A **Brady** violation occurs when a defendant is mislead to believe he should not further seek evidence even though initially informed of its existence. Parkus, Shaffer, Sawyer, **supra**, and that is also what happened here. The State did not want Mark to be able to defend himself. Even after trial the court denied Petitioner's **Brady Motion** (App. Z, 2006 Brady Motion) and the State did not oblige request. The State, the attorney, the judge **did not want Mark to have the cast**, they knew it was **dissimilar to Mark's boots** (T 1470-71), they knew the jury would have dismissed Jezek's tale and acquitted had they released the cast and the jury was able to see and weigh it. This violates Mark's right to present a defense, Davis v. Alaska, 415 U.S. 308 (1974) and constituted a violation of Mark's right to confrontation.

(b.) Re: photos of bloody casts seen by jury (Op. @ 4, ¶ 3). The record indicates **no photos were** identified, admitted, **nor mentioned** when

Wardman "discusses" collecting the footprints (T 1468-70). In fact, all Mr. Wardman did was "mark with an orange marker" where the tracks were on a diagram (T 1469, lines 19 - 25; 1470 lines 1 - 13). These tracks "traversed an angle" (App. X, Wardman Report, pg. 8, ¶ 1) See App. Y, Diagram.

The court **confused the testimony of Mr. Kenny** with that of Mr. Wardman. Mr. Kenny testified and presented photos of footprints to the jury that went in a Northerly / westerly direction (T 1426-27) and not the tracks with blood. The court's finding of what the "jury saw" is a daze of the record.

The record belies the court's finding - the **only way** a photo of the cast came into existence is Mark's friends paid $40,000.00± for an attorney; another $6,000.00 for an investigator to go take a photo of the cast (App. P, Affidavit; App. AA, August 11, 2017 letter, "Retainer" check no. 386).

(c.) Re: cast "poor quality" "no evidentiary value" (Op. at 4, ¶ 3) **was only** because authorities were only looking at lack of likeness to Mark's boots. Mark was in custody at 1250 (T 1501), the crime lab arrived between 5:00 & 5:40 p.m. (T 1124, 1145); they had Mark's boots in their possession and were only focused on looking for evidence to match Mark's sole pattern "impressions you got weren't good enough to match with any other evidence you had (T 1470-71, ln 24 - 1). That's why they ignored the footwear trail.

The **cast** (App. N, Photo) **does not** have **any waffle pattern**, there is a **90° angle on the heel**, and **increased wear to one side of the heel**, the cast is exculpatory - **strong evidence that excludes Mark** as leaving the print.

The court's finding that the cast was "poor quality" "and had no evidentiary value" is flawed, just as was law enforcement's was, because they only sought a MATCH to obtain a conviction, rather than looking at it with detached - neutral eyes. The jury had a right to weigh the value of the cast.

(d.) Re: law enforcement opinion, lack of "features". (Op. at 4, ¶ 3). Ignores the question regarding a "match" (T 1470-71). This was "law

enforcements" opinion only because the footprint blood trail prints did not "match" Mark's boots. The finding that this "cast (App. N, Cast Photo) is not material" **ignores** that Bette's DNA was recovered from that footprint, **and that** the prosecutor claimed upon receiving DNA results "that's were defendant fled the crime scene" (App. J, Aug. 8, 2006 letter). (App. N, Cast Photo) from the blood trail is dissimilar to a Sorel pattern (App. O, Sorel photo) and **had it not been withheld**, it would have destroyed Mapes', Jezek's credibility and the prosecutor's case. Thus making a finding based on "law enforcements" opinion is biased, skewed, and objectively unreasonable because the officers didn't do a thorough investigation. They ignored evidence based on the evidence they already had, only looking for a "match", the court looked at the evidence with the same blinders on.

(e.) Re: "perfect match to defendant's boots" (Op. at 4, ¶ 3) is belied by the record. The testimony at trial was this: "three footprints were made by a **size 10 or a size 11** Sorel Tracker boot." (T 1356), and there were "**no** specific identifying indication on the impressions or on the boots that would say that those boots, PX No. 46, made those impressions" (T 1438-39). There is no proof whose boots made the prints, it was **not a perfect match**, at best, it was a similar pattern. The record shows that the impressions from St. Vincent DePaul, **which were Mark's** (T 1719) and the prints under the cut lines were different boots and size (T 1435).

The claim of a "perfect match" is **not supported at all** by the record. The casts and expert evidence demonstrated that the casts were made by a **very popular** brand of boot, from which it could only be determined that it could have been a size 10, 10½ or 11. The court also stated:

> Defendant cannot make the appropriate showing [of entitlement to relief] because of the following. The 11-24-92 laboratory report was cumulative. Defendant knew the blood test tubes existed and could have had them tested. A confirmation that it was human blood would

> have added nothing. The description of the bloody footprints, not their identification as "human" bloody footprints, impeached the eyewitness and refuted the forensics expert's blood trace opinion. The lab report and cast had no exculpatory or impeachment value. More importantly, they would not have made a different result probable on retrial given the vast in insurmountable evidence of defendant's guilt. (Op. at 5, ¶ 1).

The **DECISION** that "Defendant cannot make the appropriate showing because of the following ..." to deny relief is an objectively unreasonable determination of the facts because: **(a.) Re: 11-24-92 lab report was "cumulative"** (Op. at 5, ¶ 1). It was NOT cumulative and such ignores the DNA results of Bette's blood, concession, and dissimilar footprint. A "cumulative" finding is based on the court's own assumption it was "human blood", and a stacking of inferences. The testimony was "I don't know about test results" (T 1469). The jury was instructed - only consider the evidence, they didn't have the lab report, DNA, corrected testimony, dissimilar footprint cast; the jury was entitled to have it to make their decision of guilt or not. The State deprived the jury of doing their duty to weigh the evidence.

The "cumulative" finding is contradicted by clear and convincing evidence because the DNA results and concession, was not obtained until 2006 (App. I, DNA results), a record that has no mention of "human blood" is not cumulative. The court's "cumulative" finding is illusory and incorrect.

(b.) Re: what defendant knew about test tubes / could have done (Op. at 5, ¶ 1). Mark was drugged (App. P, Drug doses) and could not read (App. Q, Affidavit pg. 7, ¶ 2:16), **I did not have knowledge of blood test tubes** at trial. The attorney more likely than not knew of blood test tubes, however, Mark could not get him to get the evidence Mark did know of. See **ISSUE II.**

The court **ignored** that the prosecutor stated he was not going to permit testing of the blood (T 2144-45). The prosecutor continued to contest, **object and fight** Mark's efforts to test it under MCL 770.16 once enacted as law (App. R, Opposition to DNA Motion). **But for** the intervention of Judge

Schwedler, who **GRANTED** (App. **BB.**, ORDER) Mark's motion, no testing would have been obtained. The court finding is an objectively unreasonable **determination** because what the court is intimating is: "Mark was required to defend self, even though we drug you and fail to provide you assistance." Mark sought DNA testing (App. **I**, DNA) and the court **ignored** this result.

(c.) Re: 11-24-92 lab report - confirmation that it was human blood would have added nothing (Op. at 5, ¶ 1); **Ignored DNA results of Bette** (App. **I**, DNA), and concession of false testimony (App. **J**, 8-8-06 letter) and dissimilar footprint (App. **N**, Cast photo). **Sec. B(ii) above is incorporated here by reference.**

(d.) Re: description of footprints impeached / refuted. (Op. at 5, ¶ 1) **(i.) Sec. B(ii) above is incorporated here by reference;** **(ii.)** finding the evidence "impeached the eyewitness" was addressed above on pp. 17 - 18, and; **(iii.)** finding the evidence "refuted the forensics expert's blood trace opinion" is clearly objectively unreasonable determination because this finding also ignores the DNA, concession weren't available until 2006, the dissimilar cast until 2018. The "forensic expert" couldn't be disproved by evidence that wasn't obtained until years later.

(e.) Re: evidence / no exculpatory or impeachment value. (Op. at 5, ¶ 1) has been shown throughout to be both exculpatory and impeachment evidence. **Sec. B(ii) above is incorporated here by reference.**

(f.) Re: [evidence] no different result probable on retrial. (Op. at 5, ¶ 1). **(i)** vast and insurmountable evidence was shown to be an objectively unreasonable determination of the facts above, pp. 16 - 20, **incorporated here by reference;** **(ii.) Sec. B(ii) above is incorporated here by reference;** **(iii)** Mark contends that the DNA results and concession, now combined with the dissimilar print it is **very PROBABLE** a different result will result on retrial **because Rachel Jezek's** tale will not be believed and the prosecution's theory

of one victim bled (T 2147-48) no longer will be unchallengeable.

> [T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Donnelly v. DeChristoforo, 416 U.S. 637, 646 (1974).

The prosecutor laid in wait, got a conviction, fought DNA testing, only then, when DNA testing revealed the biological material was Bette's did he concede Jezek's testimony was false (App. J, letter). The withholding of the DNA (App. I, DNA) and footprint (App. N, Cast photo) prevented Mark from having evidence to effectively cross-examine Jezek and Mapes, this allowed the State to capitalize upon "this is why there is no blood on Mark's clothes" (T 2144-45) and gain an unjust conviction.

The confrontation clause of the 6th Amendment serves to ensure reliability of the evidence against a defendant by subjecting it to a rigorous testing in an adversarial proceeding. Maryland v. Craig, 497 U.S. 836, 845 (1990). **Here there was no adversarial proceeding.** The dignity of the U.S. Government will not permit the conviction of any person on tainted testimony" Mesareosh v. United States, 352 U.S. 1, 9 (1956). The societal interest in finality of convictions must yield to fundamental fairness in instances where there has been a miscarriage of justice, Coleman v. Thompson, 501 U.S. 722 (1991). In Wearry v. Cain, 577 U.S. 385, 393 (2016) this Court held:

> [I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Here, Petitioner considers the DNA of Bette, the concession that Jezek's testimony was false (App. J, letter), and the dissimilar footprint (App. N, Cast photo) significant evidence of importance that establishes Mark's innocence. The court considered it as worthless only because law enforcement determined it did not "match" Mark's footwear (T 1470-71, lines 24 - 1) and the three taken together are sufficient to create a reasonable doubt.

Mark has established that the court's decision (App. A, ORDER) is

"contrary to Federal law"; that it also is "an unreasonable application of Federal law" and, is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" as required by 28 U.S.C. §2254(d)(1) & (2) which entitles Mark to habeas relief.

ISSUE II

IF PROSECUTOR DID NOT WITHHOLD THE FAVORABLE DEFENSE EVIDENCE THE ASSIGNED ATTORNEY COMMITTED FRAUD ON THE COURT VIOLATING 6TH & 14TH AMENDMENTS AND STATE COURT DECISION IS AN UNREASONABLE APPLICATION OF FEDERAL PRECEDENT AS WELL AS AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS - SOME FORM OF RELIEF SHOULD BE GRANTED.

Standard of review: Ineffective assistance claim is reviewed under de novo standard, Wiggins v. Smith, 539 U.S. 510, 534 (2003).

FACTS: The assigned attorney **held a bias and conflict of interest** against Mark, he **failed to subject the State's case to** any meaningful adversarial testing & **took actions against Mark's best interests:** attorney joined State to enter irrelevant & prejudicical evidence, inter alia, presenting damning testimony and **evidence to supplement** the State's case: **(a.)** Established unqualified foundation that phone messages made by Mark after being goaded by victim were "erased" to gain admittance of nine (9) irrelevant, weeks / months old messages (T 114); **(b.)** misinformed Mark that prior conviction would not be brought up after MRE 609 Motion GRANTED (MHT 21), but then elicited testimony of prior conviction (T, 1565, 1567, 1576, 1581, 1585, 1590, 1807, 1809, 1811, 1818, 1848, 1849, 1850, 1866, 1867, 1868); **(c.)** **waived** Mark's "right to remain silent" without consent, or a knowing, voluntary, intelligent waiver from Mark (T 1489-90, 1513-14, 1528, 1597, 1599, 1600, 1608); **(d.)** **waived** Mark's Miranda rights without consent, or a knowing, intelligent, voluntary waiver from Mark (T 1530-35) by entering in evidence tape suppressed (MH 146-48) in violation of Miranda (T 2034, DX 506); **(e.)** Presented **"homicidal"** opinion to 45 day old court ordered recorded "diary of thoughts and feelings" (T 1589); **(f.)** elicited

testimony from court ordered psych of "several incidences of violence" without explaining the violence was committed on Mark (T 1585); (g.) elicited testimony that Mark didn't have "resource on him to start fire" (T 1486, cf. T 1603); (h.) tried to paint Mark as "devoid of emotion" and "too calm" on October 4th, as if Mark was a stone-cold killer (T 1940); (i.) entered in evidence a map of area where Mark rested while lost tracking a wounded deer, started a fire, **labeled as "hiding place"** (T 1948, DX 511); (j.) elicited from victim's mother that the Vernetti's "weren't going to hold it against Paul for what Mark did" (T 1971), she "never had any use for Mark" (T 1973, 1982); (k.) concocted a motive and suborned perjury telling Mark "you have to say you were mad" then told jury: **"when I build a case it's my job in a circumstantial case to have a motive"** (T 2107-08); (l.) supplemented State's evidence **PX 23** (diagram of crime scene) with **DX 502** (same)(T 1424, 2009); (m.) supplemented State's evidence **PX 24** (crime scene photo) with **DX 503** (same)(T 1429, 2011); (n.) entered a map from town to Paul's house with time of 12-13½ minutes travel on dry summer road rather than ice/snow covered road (T 1490, 1492, 1993, DX 504); (o.) supplemented State's evidence **PX 37** (dictating machine tape) with **DX 507** (dictating machine transcript)(T 1041-43, 1574); (p.) entered "Booking Record" of Mark with prejudicial contents: (1) Note: INMATE FLAGGED AS SUICIDE RISK! (2) Y Bizarre behavior, (3) Y Non-Talkative, (4) Y Blank stare, (5) Y Depressed (T 1595, 1605, DX 508); (q.) entered police report of October 4, 1992, **used by State to impeach my incorrect date of Oct. 18th** when I thought dictating tape was made (T 1855) of DSS incident (T 1934, 1950, DX 510); (r.) encouraged jury to listen to court ordered, 45 day old (Oct. 4, 1992) confidential tape during deliberations (T 2132-34) waived Mark's right to a public trial; (s.) The **most clear example** of **collusion in this matter is:**

> So what's the big deal? Okay. **We've** got other evidence. **We've** got all kinds of evidence. You put it all together and it adds up to Mr. Jendrzejewski's guilty. (T 2096)

This is not a defense attorney, Mark was deprived of **an adversarial proceeding, by collusion.** Mark's conviction should be adjudged as void. United States v. Johnson, 319 U.S. 302 (1943); Lord v. Veazie, 49 U.S. 251 (1850) two parties shown to have the same objective. But yet, the court held:

> For at least the third time, defendant claims ineffective assistance of counsel. A defendant asserting that counsel was ineffective must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability, that but for counsel's error, the result of the proceedings would have been different; and (3) the resulting proceedings were fundamentally unfair or unreliable. [] A reviewing court should not second-guess counsel's trial strategy or assess his competence with the benefit of hindsight. [] (case citations omitted).
>
> Defendant has not demonstrated that his counsel was ineffective. The laboratory report and footprint cast would have added very little to the defense. More importantly, the evidence against the defendant was strong and any alleged mistake by defense counsel did not prejudice defendant, i.e. that there was a reasonable probability of defendant's acquittal. (Op. at 5, ¶¶ 2 & 3).

The court's DECISION: **(A.) Re: Weight of Evidence at Trial:** Finding that the evidence against Mark "was strong" is rebutted by the record: **(i)** State conceded case was based on circumstance (6-4-93, MH 38); **(ii)** State advised jury on circumstantial evidence (T 2056); **(iii)** circumstantial instructions were given (T 2163); **(iv)** the Michigan Supreme Court in People v. Jendrzejewski, 455 Mich. 495, 497 (1997) held: "there was substantial circumstantial" evidence: The doctrine of **stare decisis** prohibits an inferior court from overruling Michigan Supreme Court's determination of fact. Petitioner has presented clear and convincing evidence that the court's finding "the evidence was strong" is incorrect and rebutted by the record.

(B.) Re: BLOOD SAMPLES & HUMAN LAB REPORT: The court said:

> . . . defense counsel could have explored [the bloody footprints as containing blood residue, blood, red blood, and body fluids] further during trial. Additionally, defense counsel knew of the blood samples from a police report and made no effort to compel testing or adjourn trial. (Op. at 4, ¶ 2).

establishes and supports Mark's claim that counsel failed to subject the

State's case to testing, he **did not** make any investigation of the blood samples. **No assistance of counsel was provided**, United States v. Cronic, 466 U.S. 648 (1984). But for the court to end, by stating: "Defendant has not demonstrated that his counsel was ineffective" (Op. at 5, ¶ 3) is an unreasonable application of Cronic, and Strickland, 466 U.S. at 690 because "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary". The court contradicts its own ruling making the finding that counsel was not ineffective.

Reasonable assistance would have been to make a specific request for the blood samples and have them analyzed prior to trial for DNA. DNA test results brought a concession (App. J, 8-8-06 letter) in 2006, DNA tests more likely than not would've brought a concession that "down the sidewalk, street" was false testimony in 1993. Failing to investigate the blood samples prior to trial and have them tested **by any means**; just like failing to investigate and acknowledge the "lacerations" to Bette's knuckles were not reasonable strategic choices or "assistance" as envisioned by Strickland, and/or the Sixth Amendment. Bette had defensive lacerations to her knuckles:

> There is a very shallow laceration over the right dorsal carpal-metacarpal joint measuring 0.7 cm. in length and 0.1 cm. in diameter. This appears quite fresh. There is a similar slightly deeper laceration measuring 0.4 cm. in length and 0.1 cm. in diameter over the left fourth finger dorsally over the middle metacarpal bone. (App. **CC**, Autopsy **pg. 4, ¶ 2)**

Mark could not get assistence to investigate and present critical defense evidence that Petitioner did learn/know of (App. **DD**, Affidavit Adverse Actions - Inactions); i.e. lacerations, 6-volt flashlight, cigarette lighter, fire remanins. **How was Mark to get something he doesn't know of?**

Mark didn't have any signs of injury, and wasn't bleeding (T 1545). Mark wasn't in a fight with Bette (T 118), Bette was in a fight with **someone other than Mark** that night and the jury had a right to know. **Suppressio Veri** [Latin]

suppression of the truth: a type of fraud. Cf. Suggestio Falsi, **Black's, Ninth Ed.**, pg. 1578. Attorney also told the court: "**we have no scientific test results**" (T 2098). The court held:

> defendant knew before his convictions that the footprints contained human blood (Op. at 3, ¶ 5)

For the court to find that "Mark knew ... of human blood" and finding that the State didn't withhold the "human blood lab report", the court is stating the attorney committed fraud on the court when he stated: "**we have no . . . test results**" (T 2098). The finding that "Mark knew ..." is refuted by the record. **If counsel says he doesn't have something, how is Petitioner to know?**

In Strickland, **supra**, this Court held:

> strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . ., counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. 466 U.S. at 690-91.

Failing to investigate what turned out to be the DNA of Bette (App. **I, DNA**) in a dissimilar footprint (App. **N**, Cast photo) to impeach Jezek and Mapes cannot be considered a reasonable strategic choice; it would've brought a concession of false testimony at trial, rather than years later in 2006 (App. **J**, 8-8-08 letter). The court's finding the "the lab report and footprint cast would have added very little to the defense" (Op. at 5, ¶ 3) **is belied by** (App. **J**, 8-8-08 letter) DNA testing resulted in concession of false testimony - "human blood" lab report received April 23, 2004 led to DNA testing which led to the concession - IT MADE ALL THE DIFFERENCE and would've done the same at trial had it been available, and had Mark not been drugged.

This attorney failed to develop any defense whatsoever, even though he had a plethora of evidence of Mark's innocence right at his finger tips: **(a.)**(App. **EE**, Lab report of no blood on any of Mark's clothing); **(b.)**(App. **FF**, Lab report of no blood on Mark's boots); **(c.)**(App. **S**, Lab report of no

blood in Mark's truck; **(d.)** 6-Volt Ray-O-Vac flashlight (T 1483, 1486, 1735); **(e.)** (App. **GG**, Bic cigarette lighter) to support Mark's testimony (T 1749-51); he **DID NOT SUBMIT any of it as defense evidence.**

This attorney **did not want Mark to have any evidence to support his testimony**, nor any evidence for Mark's defense. This was the "sacrifice of [an] unarmed prisoner[] to gladiators" Cronic, supra, 466 U.S. at 657.

The attorney **played the role of a personal prosecutor**, he didn't assist Mark, he assisted the State to obtain a conviction. (App. **DD**, Affidavit Adverse Actions - Inaction). **ALSO SEE "FACTS," above.**

The court's finding that counsel was not deficient is an unreasonable application of Cronic and Strickland, **supra, adversarial testing requirement**; and that the DNA and cast would have made no difference is an objectively unreasonable determination of the facts when the DNA itself brought a concession of false testimony.

Re: Footwear Cast - Examiner. The court held:

> . . . Also, defense counsel had a footprint expert and the court delayed the trial during the testimony of the People's forensic expert Raymond Kenny to allow time for the defense footprint expert to complete his analysis. (Op. at 4, ¶ 3).

The State (by design with attorney) **waited until Mr. Kenny began testifying** re: footwear casts, **to hand the attorney the boot examination report** that Mr. Kenny? had held back until that morning (T 1357-1378). **To purport** representation, the attorney informed the court:

> For my personal perspective, I would hate to see us go through eight days of trial and have it reversed, if that's what eventually happens. (T 1370, lines 12 - 14).

Trial was stopped Thursday morning at 11:45, June 24, 1993 (T 1382) and delayed until Monday, June 28th (T 1384). When trial resumed, Mr. Kenny again testified that the footprints were made by a size 10 or 11, and size 12 could be excluded (T 1387-91). Mr. Thompson determined size 12 could not be

excluded (App. HH, Mr. Thompson's Report). However, the attorney never produced the examination report; when Mark asked "What were the results of the examiner?" the attorney replied "his findings were the same as the State's expert." (App. DD, Affidavit, pg. 3, ¶ 35). This is another prime example of lack of "assistance" and failure to "subject the [State's] case to meaningful adversarial testing. Cronic, supra, 466 U.S. at 659.

Failing to investigate the difference between the State's expert (T 1387-91) and Mr. Thompson's report (App. HH, Mr. Thompson Report), this attorney went on in closing argument:

> Those boot impressions. The boot impressions and the defendant's boots are similar in size. The defendant's boots are a 10, and those impressions are 10 or an 11 he says. And the impressions were made by Sorel boots. The defendant's boots are Sorel boots. That's good; that's extremely good. Detective Kenny is precise. (T 2097).

The "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. (a)Stopping the trial; (b)delaying the trial for 4 days; (c)getting an (independent examination, App. HH) that established a contrary result; (d)never producing it to challenge the State's expert; (e)but then, praising the work of the State's expert (T 2097), was not reasonable assistance, this action/inaction did not result in a "reliable adversarial testing process" Strickland, 466 at 688.

Reasonable assistance would've been to investigate differences between the examination reports; take notice of the value of the independent footwear examiner's findings, calling Richard Thompson as a witness, recalling Mr. Kenny and impeaching him with the independent report. The attorney's performance was not reasonable under prevailing professional norms.

Prejudice as defined in Strickland, is:

> . . . that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 466 U.S. at 694.

Reasonable probability of a different result: The jury was dismissed on Thursday, June 24, 1993 at 11:45 (T 1382) with testimony of Mr. Kenny regarding size 10 or 11 boot prints ringing in their ears (T 1356). On Monday, June 28, 1993 Mr. Kenny returned and reiterated his previous testimony (T 1384, 1389-90). The independent examination report rebuts Mr. Kenny's exclusion of a size 12. The attorney, failing to present the independent examiner's findings left Mark without a defense strategy, without defense evidence; another item **of the State** went to deliberations unchallenged.

The failure of the attorney to cross-examine and impeach, not only Ms. Jezek and Mapes with the DNA of Bette and unidentified footprint; but also Mr. Kenny's findings with the independent examiner's findings violated Mark's right to confrontation. Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987):

> Our cases establish, at a minimum, that criminal defendants have the right to . . . put before the jury evidence that might influence the determination of guilt.

There is no dispute that Mark is right handed, the utility lines were cut by a left-handed person (T 1431, 1435). It was paramount that the jury heard a different opinion regarding the footprints found under the severed utility lines. **Suppressio veri.** The inaction of the attorney deprived Mark of favorable defense evidence (App. **HH**, Mr. Thompson Report) that was critical evidence the jury needed to hear and see during deliberations. Not producing and impeaching Mr. Kenny with the independent examination report deprived Mark of a fundamentally fair trial; prejudice was multiplied by the attorney praising the precision of the State's expert (T 2097).

Also, there is no dispute the footwear impressions in St. Vincent Depaul parking lot were Mark's (T 1719), it was determined that those prints and the prints under the cut utility lines were different boots and different size (T 1435). The State knows full well that Mark didn't cut the lines, they never charged Mark with violation of MCL 750.540. The State's case was "purely

circumstance" (6-4-93, MH 38), he advised the jury on circumstantial evidence (T 2056) and "circumstantial instructions" were given (T 2163).

This was a "she said / he said" case. Jezek said: Mark was in town at 4:00, 4:06 (T 804-811). Jezek's uncorroborated testimony has since been conceded to be false (App, J, letter), and was contradicted by Wally Cook who was at the corner of Sophie St. just a few blocks away, waiting for a bus around 0400; Wally did not see or hear anything (T 992-93). Mark was at his father's at 3:45 (T 1729-31, 1739). Mark's wasn't in town after 3:29 is corroborated by Rick Reneker who said he never saw Mark after 3:25 (T 224). Paul said: Mark was at his house "around 3:45" (T 165, 192) making Mark's testimony corroborated by two people that Mark was not in town after 3:29. Mark was at his father's at 3:45 and did not go back to town; but to track a wounded deer (T 157, 1729-31, 1739). With the new evidence of Bette's DNA and a dissimilar footprint, there is a reasonable **PROBABILITY** the verdict will be different.

The only evidence the jury and post-conviction judge relied on was the weeks/month old, prejudicial / irrelevant phone messages, with **one (1)** relevant message from November 22, 1992 (T 1726-27, 1834, 1852) See pg. 16 **above**; and the irrelevant / confidential dictating tape of October 4, 1992, **above**, pg. **19 - 20 incorporated by reference.**

Had the attorney presented the dissimilar cast and DNA of Bette which the jury had a right to assess during deliberations, there is a reasonable probability the jury's verdict would have been different. As this Court stated:

> Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. 466 U.S. at 696.

Here, the matter was based on "circumstantial" theory (MH 38, T 2056, 2163, 2189) the presentation in evidence of Bette's DNA being in a dissimilar print, impeachment of and/or concession that Rachel Jezek was testifying falsely

would've destroyed the State's case and the verdict would've PROBABLY been different. The court's ruling that "any alleged mistake by counsel did not prejudice defendant" (Op. at 5, ¶ 3) is an unreasonable application of Cronic and Strickland, **adversarial testing requirement**; and is an objectively unreasonable determination of the facts because the record belies such conclusion.

D. **Re: EVIDENTIARY HEARING & DILIGENCE:** The court held:

> . . . no evidentiary hearing is required. . . . . Defendant fails to identify a sufficient factual basis warranting further development of the record. (Op. at 1, ¶ 2)

This is an unreasonable application of Williams v. Taylor, 529 U.S. 420 (2000). Mark has been "**diligent**" (App. **II**, Affidavit re: Diligence), as soon as Mark was **free from Mellaril** he made FOIA requests and sought assistance to get evidence of his innocence (App. **JJ**, FOIA's & Requests). **2005 Mark learned the State continued to interfere** by falsely telling people Mark "confessed" (App. **KK**, 6-28-02 letter) to which Mark immediately **DENIED** (App. **LL**, Affidavit). On **March 23, 2018** (App. **MM**, Mail Receipt) after $46,000.00 expended, Mark finally received the footwear cast photo (App. **N**, Cast Photo). Mark learned how to file pleadings and repeatedly sought an "evidentiary hearing" (App. **NN**, RoA No's. 272, 447, 487, 521, 783, 890; App. **OO, Standard 11 Request**; App. **PP**, MFRFJ **10-10-18 Request**) trying to create a record inter alia, of whether the State withheld the evidence or whether the attorney knew of it and withheld it and/or why neither of the parties protected Mark's constitutional rights. The Michigan Court system has consistently and repeatedly denied requests for Evidentiary Hearings. Mark has not "failed" to seek - the State has failed to afford an evidentiary hearing; Mark is entitled to one.

RELIEF REQUESTED

Petitioner, Mark Jendrzejewski prays this Honorable Court will:

A. Order the Respondent be required to appear and answer the claims of this Petition;

B. That after full consideration, GRANT this Petition and ORDER that Mark Jendrzejewski either be promptly retried or released from custody;

C. Order that the judgment is VOID as obtained by collusion;

D. Remand for an evidentiary hearing;

E. Order filing and determination by respective district court;

F. That the Court Grant such other, further, and different relief as the Court may deem just and proper under the circumstances.

Respectfully submitted,

Dated: 02/22/22

Mark Jendrzejewski

VERIFICATION

I, Mark Jendrzejewksi, swears and affirms under the pains and penalty of perjury that the facts stated herein are true and correct.

Mark Jendrzejewski

Subscribed and sworn to before me this 22nd day of February, 2022.

Notary Public

D. LEIK
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF IONIA
My Commission Expires 11/2025
Acting in the County of Montcalm