No. 22-5605

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

Jeffrey Ricardo Wimberly — PETITIONER
(Your Name)

vs.

Michigan — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Michigan Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeffrey Ricardo Wimberly #428466
(Your Name)

G. Robert Cotton Corr. Fac. 3500 N. Elm Rd.
(Address)

Jackson, Michigan 49201
(City, State, Zip Code)

(Phone Number)

QUESTIONS(S) PRESENTED

WHETHER A (15) FIFTEEN YEAR PREARREST DELAY WHERE THE PROSECUTOR COULD NOT GIVE A SUFFICEINT REASON FOR THE DELAY TO JUSTIFY THE PREJUDICE TO THE PETITIONER WAS A DENIAL OF DUE PROCESS AND WAS THE PETITIONER EGREGIOUSLY DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND APPELLATE COUNSEL WHEN THEY FAILED TO ARGUE SUBSTANTIAL AND ACTUAL PREJUDICE AND CONCEDED THAT THE STATE DID NOT INTEND TO GAIN A TACTICAL ADVANTAGE BY THE DELAY. US CONST. AM V, VI, XIV: CONST. 1963 ART. 1 §§17, 20.

TABLE OF CONTENTS

INDEX TO APENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

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 judgement below.

REFERENCE TO OPINIONS BELOW

The November 24, 2020, opinion of the Michigan Court of Appeals appears at Appendix A. This is the highest state court to review the merits and the opinion is unpublished.

The April 15, 2022, Michigan Supreme Court order denying Leave to Appeal, appears at Appendix C.

A timely petition for reconsideration was denied on June 28, 2022, and a copy of the motion and order denying reconsideration appears at Appendix D.

STATEMENT OF JURISDICTION

Petitoner seeks review of the November 24, 2020, opinion of the Michigan Court of Appeals decision, People v Jeffrey Ricardo Wimberly, Unpublished Opinion, #342751.

On June 28, 2022, the Michigan Supreme Court issued an order denying Petitioner's motion for reconsideration of that opinion. People v Jeffrey Ricardo Wimberly, Order, #163097(142).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const Am. IV, 1791: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.....21

US Const Am. V, 1791: No person shall be held to answer for a capital, or, otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy without due process of law; nor shall private property be taken for public use, without just compensation.....12,18

US Const Am. VI, 1791: 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 natural 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.....14

US Const Am. XIV, §1, 1886: 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.....14

Const 1963 Art. 1, §17: No persons shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations for fair and just investigations and hearings shall not be infringed.....22

Const 1963 Art. 1, §20: In every criminal prosecution, the accused shall have the right to a speedy an public trial by an impartial jury, which may consisit of les than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as of a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.....15

STATEMENT OF THE CASE

The case at bar was brought in 2016, after Michigan's Attorney General, Bill Schuette, ordered 1800 untested rape kits across Michigan to be tested. This was seemingly in response to the political pressure of the nationwide, "Me Too Movement." 300 of those 1800 untested kits were in Battle Creek, Petitioner's home town. Labeled a "special project", as this 15 year old accusation was not a cold case, it would be headed by Special Assistant Attorney General, Michelle L. Richardson. Of the 300, Petitioner and coDefendant would be the first to be tried. Petitioner was a prisoner in the Michigan Department of Corrections for weapons charges, his mugshot would be printed and flashed across all local media outlets. (See https://battlecreekenquirer.com/story/news/2017/05/11/pair-ordered-to-trial; 2018/04/19/old-rape-cases; See also 2020/11/30/appeals-court-upholds-convictions-orders-resentencing).

DUE PROCESS VIOLATION IN DELAY IN ARREST AND TRIAL

On June 5, 2017, a hearing on Petitioner's Motion to Dismiss based on Due Process Violations and Delay in Arrest and Speedy Trial violation was held in the Calhoun County Circuit Court. (Apx. B).

The trial court's official docket entries for June 5, 2017, reflect the denial of the motion to dismiss:

MOTION BY DEF ATTY TO DISMISS
FOR DUE PROCESS VIOLATION IN DELAY IN ARREST AND TRIAL (Apx. E).

Before the decision was rendered by the trial court, trial counsel, Mr. Pichlik, Petitioner, and Special Assistant Attorney General, Ms. Richardson, provided the following arguments:

> **Trial Counsel, Mr. Pichlik:** In essence, this is a 15-year old offense. Were here 15 years later, not because, suddenly, we had a CODIS DNA hit that matched this defendant to -- led the complainant [**Anastassia Perkins**] in this matter... This is not new information. The complainant in

this case knew, from her own admissions and her own testimony, who her alleged assailants were back in 2002. She failed to reveal that information. Only when confronted by authorities with the fact that there was a DNA hit 15 years later did she decide to cooperate in this prosecution... we have a res gestae witness, somebody that the complainant had contact with almost immediately after this alleged incident took place who is dead... Ms. Gonzales... The Father, I would submit, probably is not a res gestae witness... a witness that there was statements made to, including a letter that the complainant states that she wrote some two to three weeks after her initial report. He is dead... The letter cannot be found, and we don't have the contents of that.(Apx. B, p4-5)(emphasis added).

Petitioner: ...The facts show that at the time of this alleged rape, Ms. Perkins identified me and my co-Defendant by name and descriptions. Furthermore, her mother recontacted the police and followed up with the fact that her mother -- that her daughter wasn't entirely truthful, but still provided the same identities. Both instances can be found in complaint number 02-25030, filed by the responding policeman, Officer Pelfrey... And I'm asking that during this hearing it is decided when did the prosecution learn of my identity. Was it in 2002 when Ms. Perkins and her mother initially provided it, or was it after DNA testing 15 years later? (Apx. B p8;10)(emphasis added).

Special Assistant Attorney General, Ms. Richardson: Thank you. Well, Your Honor, I would like state that I agree With Mr. Wimberly that the information regarding Mr. Wimberly's identity, as well as his co-Defendant -- mentioned only as "Larry", but is actually Larry Martin, Jr. -- that information was provided by the victim to her mother, and the mother reporting it to the Battle Creek Police within four days of the initial reported assault. What happened after that I do not know. The case was not reviewed for a warrant until the case was reviewed under a special project that the Calhoun County Sexual Assault Kit Investigation Team began to undertake in December. (Apx. B, p11)(emphasis added).

Trial Counsel Pichlik: I would submit the Defendant's ability to effectively represent himsely has been denied... and irreparably so, because he does not have the ability to produce the father... We only have the complainant's statements as to what she told him... And a review of the transcript would demonstrate that her memory as to the details... they're incredibly vague... Most of her information when she testified during cross-examination was met with answers, "This was 15 years ago"... The failure to properly investigate and complete a report and submit for charges, whether it happens at the hands of the complainant directly, which she bears some responsibility for, the

> conduct of the police also falls on the State's. (Apx. B, p14-15)(emphasis added).

After hearing the foregoing arguments, the trial court ruled:

> THE COURT: The law seems quite clear in this area that there is a need for the defense to show actual and substantial prejudice that may affect the outcome of trial. It must meaningfully impair the ability to to proceed and prepare an effective defense... there are two witnesses who are no longer living, who may or may not have provided information helpful to the defense -- trying to determine in any way what they would have testified to is clearly speculative... Neither one of them were actual witnesses to the offense itself, but, rather, people who were given information by the plaintiff -- or the -- victim in this case. Therefore, I don't find that there has been a showing by the defense of actual and substantial prejudice in this case. I would further indicate that the -- much of the pertinent case law also requires that the delay be on part of the prosecution, not just because they were continuing to investigate the case, not because they didn't submit a CSC kit for testing, but specifically to gain a tactical advantage. There has been no indication that was the case either. Therefore, defendant's Motion to Dismiss for Due Process Violations is denied. (Apx. A, p17).

Petitioner went to trial and was convicted of two counts of CSC I and sentenced consecutively to 80-160 years. After 2 years in custody without the ability to post bond, and after 2 suicide attempts, Petitioner's codefendant had a mental breakdown during his own trial and a mistrial was declared. During or after a psych eval he was released on probation via a no contest plea. See Marion, 404 US, supra at 320,(quoting Klopfer v North Carolina, 386 US 213, 221-226 (1967)(Where an undue and oppressive incarceration prior to trial interferes with the defendant's liberty... disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends, impairing the ability for him to defend himself). (See https://battlecreekenquirer.com/story/news/2020/11/30/mistrial-declared-defendant-diagnosed-with-psychosis).

Petitioner appealed as of right to the Michigan Court of Appeals

(MCOA). The heading of Petitioner's primary argument on appeal was:

> **THE DEFENDANT WAS DENIED DUE PROCESS BECAUSE THE TRIAL COURT DENIED THE DEFENDANT'S MOTION TO DISMISS BECAUSE OF PREARREST DELAY.**

Before his appeal was heard by the MCOA, Petitioner requested that his first appellate counsel withdraw for conceding on the issue of prearrest delay, for failing to thoroughly argue substantial and actual prejudice caused by the delay, and for pointedly doubting Petitioner's actual innocence and veracity. Infra.

THE MICHIGAN COURT OF APPEALS OPINION

The MCOA, ultimately affirmed Petitioner's convictions, issuing an unpublished opinion. People v Jeffrey Ricardo Wimberly, MCOA Unpub. Opinion, #324751, Nov. 24 2020. (Apx. A).

The Court of Appeals explained:

> "Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the the prosecution to gain tactical advantage." People v Patton, 285 Mich App 229, 237; 775 NW2d 391 (2009)(quotation marks and citations omitted; emphasis added); see also United States v Marion, 404 US 307, 324; 92 S Ct 455; 30 L Ed 2d 468 (1971)("Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the preindictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee's right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."); People v Woolfolk, 304 Mich App 450, 454; 848 NW2d 169 (2014)("A prearrest delay that causes substantial prejudice to a defendant's right to a fair trial and that was used to gain a tactical advantage violates the constitutional right to due process.") People v White, 208 Mich App 126, 134; 527 NW2d 34 (1994). A defendant "must present evidence of actual and substantial prejudice, not mere speculation." Woolfolk, 304 Mich App at 454. "A defendant cannot merely speculate generally that any delay resulted in lost memories, witnesses, and evidence, even if the delay was an especially long one[.]" Id. (citations omitted). Mere delay between the time that an offense is committed and the time of arrest does not constitute a denial of due process because there is no constitutional right to be arrested. Patton, 285 Mich App at 236.

The MCOA reasoned further that:

> "First, Wimberly effectively concedes that there was no intent by the state to gain a tactical advantage by delaying his arrest, and there is nothing in the record to show or suggest such an intent or effort. if anything, it appears that it was simply police negligence that led to the delay. For this reason alone, Wimberly's argument fails...(Apx. A, p2)(Emp added).

THE MICHIGAN SUPREME COURT ORDER(S)

The Michigan Supreme Court issued a standard order of denial in Petitioner's case. Petitioner submitted a motion to reconsider and it too received the same standard order of denial. (Apx. C, D).

PETITIONER'S ARGUMENT IN THE UNITED STATES SUPREME COURT

> A (15) FIFTEEN YEAR PREARREST DELAY WHERE THE PROSECUTOR COULD NOT GIVE A SUFFICIENT REASON FOR THE DELAY TO JUSTIFY THE PREJUDICE TO THE PETITIONER WAS A DENIAL OF DUE PROCESS AND PETITIONER WAS EGREGIOUSLY DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND APPELLATE COUNSEL WHEN THEY FAILED TO ARGUE SUBSTANTIAL AND ACTUAL PREJUDICE AND CONCEDED THAT STATE DID NOT INTEND TO GAIN A TACTICAL ADVANTAGE BY THE DELAY. US CONST. AM V, VI, XIV; CONST 1963 ART. 1 §§17, 20.

The first part of the issue presents a basic problem underlying much of this Court's Prearrest Delay due process jurisprudence: a defendant having to show prejudice and tactical advantage from the state's unexplained delay. The trial court and the MCOA both relied heavily on Patton/Woolfolk/White, and Marion, sidestepping Michigan's own three part inquiry as enunciated in Hernandez, and rounded out in Bisard, making it Petitioner's burden to show that the prosecutor intended to gain a tactical advantage by the delay, in the face of overwhelming prejudice.

In People v Bisard, 114 Mich App 784, 319 NW2d 670 (1982), this Court reevaluated the tripartite test of prejudicial delay originally set forth in People v Hernandez,15 Mich App 141, 170 NW2d 851 (1968), in light of post-Hernandez developments in due process jurisprudence. The Bisard Court, supra at 788, 319 NW2d 670, noted:

> Two United States Supreme Court cases decided after 1968 have addressed the problem of preindictment delay. In United States v Marion, 404, US 307, 92 S Ct 455, 30 L Ed 2d 468 (1971) the Court recognized that the Due Process Clause afforded only "limited" protection to those persons who have not been arrested but observed that such person's primary protection was in the applicable statutes of limitation. The Court explained this decision further in United States v Lovasco, 431 US 783, 97 S Ct 2044, 52 L Ed 2d 752 (1977), when it established a two part test to be used in the due process inquiry. First, the Court observed that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 US 783, 790, 97 S Ct 2044, 52 L Ed 2d 752. Second, the Court held that, in addition to the consideration of prejudice, a court was to explore the reason for the delay.

Adopting this two-part test, the Bisard Court rejected an interpretation of Lovasco that would place an "extremely heavy burden" on a defendant by requiring that the defendant prove both actual prejudice and unexplainable delay. Id, at 789, 97 S Ct 2044. Bisard construed Lovasco differently:

> [W]e hold that, once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for the delay and which bears the responsibility for determining when an investigation should end. [Id. at 791, 97 S Ct 2044.]

See also United States v Mills, 641 F2d 785, 788 (CA 9, 1981), United States v Rogers, 639 F2d 438, 440 (Ca 8, 1981), United States v Durnin, 632 F.2d 1297, 1299 (CA 5, 1980), People v Small, 631 P2d 148, 157 (Colo, 1981), State v Baker, 614 SW2d 352, 354-355 (Tenn, 1981). Courts in other jurisdictions have suggested that Lovasco may not limit the due process protection so severly. See, for example, Commonwealth v Best, 411 NE2d 442, 451 (Mass, 1980). Illinois Supreme Court has held that Lovasco does not

alter the state's earlier rule that once a defendant has shown some actual and substantial prejudice, the burden shifts to the prosecution to show the reasonableness of the delay. The Illinois courts must then weight the reasons for the delay against the seriousness of the prejudice resulting from the delay. People v Lawson, 67 Ill 2d 449; 10 Ill Dec 478; 367 NE2d 1244 (1977). New York has continued to apply its former rule, based on a state statute, even in the wake of Lovasco, and now finds that a lengthy, unjustifiable delay may require dismissal even when the defendant does not show any actual prejudice. People v Singer, 44 NY2d 241, 254; 405 NYS2d 17; 376 NE2d 179 (1978).

Federal courts have held consistently that death of a witness alone is insufficient to establish actual and substantial prejudice. Even where a defendant specifies what a deceased witness's testimony would have been, actual prejudice is hard to prove. See United States v Rogers, 118 F.3d 466, 474-475 (CA 6, 1997). Although the following cases where death of witnesses or loss of tangible evidence was obvious prejudice. People v Nuss, 75 Mich App 346 (1997); People v Norma White, 38 Mich App 651 (1972). Substantial prejudice is that which meaningfully impairs the defendants ability to defend against the charges "in such a manner that the outcome of the proceedings will likely be affected," Id., e.g., the loss of exculpatory evidence that could not be obtained by other means. People v Adams, 232 Mich App 128; 591 NW2d 44 (1998).

People v Loyer, 169 Mich App 105, 120; 425 NW2d 714 (1988) held:

> ...the imperfections of a witnesses memory may be exposed to the trier of fact during direct or cross examination and may be emphasized to but butress or undermine credibility if such lengthy prearrest delay seriously impedes or significantly hinders a defendant in presenting his case, prejudice, of course would be shown, and the prosecution would be required to demonstrate how that prejudice was justified by the prearrest delay.

While loss of memory by a witness is not necessarily sufficient prejudice, loss of memory was considered to be a dispositive prejudice in Ross v United States, 349 F.2d 210 (DC Cir. 1965), which case is significant because Hernandez, supra was based on it. Hernandez relying upon Ross held:

> where some prejudice is shown, as it is in this case, it can be permitted and not be the basis for a finding of lack of due process only where the following elements are presented and shown clearly convincingly to the trier of fact: (1) When the delay is explainable, (2) when it is not deliberate, and (3) when no undue prejudice attached to the defendant.

Hernandez said the focus was not the delay per se, but rather the evidence of prejudice is what results in the violation of due process. In Ross there was a 7 month delay between the swearing out of a complaint. The conviction was reversed on the grounds of denial of due process. The next year, in discussing Ross, the District of Columbia Court of Appeals held that:

> ...Ross had looked towards two factors: (1) the prejudice to the defendant stemming from the method of investigation; and (2) the reasonableness of police conduct.

The record reflects that there was not an investigative delay, as was in the prearrest delay case of, People v Adams, supra. In Petitioner's case, Ms. Richardson admitted that she could not explain the reason for the delay during the hearing, and did not even attempt to offer one. Later, to forward the kit with the note attached as "perhaps" being the reason for the delay, shined a light, cleary and convincingly on a violation of due process.

In Lovasco, supra at 795-796, 97 S Ct 2044, the United States Supreme Court opined that an investigative, as opposed to tactical, delay does not violate the Due process Clause of the Fifth Amendment.

The hearing transcript, trial court's docket entries, and events at trial that are reflected in Petitioner's MCOA Opinion:

SUBSTANTIAL AND ACTUAL PREJUDICE CAUSED BY THE DELAY:

A. Ms. Perkins testified at the preliminary exam that her entire statement were lies, gave a completely new narrative, then exhibited serious memory problems of events surrounding the crime at trial. See Lover, supra; Hernandez, supra; Ross, supra. (Apx. A, p3, 10; Apx. E, #7-11).

B. There was an alleged letter that Ms. Perkins had written to her now deceased father, speaking of the incident, which is now missing. The letter could possibly never have existed and the only one who could testify to it is dead. Nuss, supra; Norma White, supra; Adams, supra. (Apx. B, p4-5; Apx. E, #7-10)

C. The destruction of rape shield evidence, specifically Petitioner's and Ms. Perkins' prior documentation of the two as sexual partner's and being treated for the same STD's. The destruction of the evidence would not surface, via FOIA, until after the hearing on the motion to dismiss. Mr. Pichlik filed a notice to introduce the evidence, but its destruction, due to the health department's 7 year retention schedule policy, and 15 year prearrest delay, it led Pichlik away from introducing it. Petitioner was told not to mention it during testimony, that it would essentially be hearsay. In addition, the rape shield motion filed by Petitioner was acknowledged by the trial court during the hearing. Adams, supra. (See Apx. A, p10; Apx. F, Register of Actions, attachment B, n. 1;35).

THE MICHIGAN RAPE SHIELD STATUTE MCL 750.520j provides:

> 1. Evidence of specific instan''es of the victims sexual conduct, opinion evidence of the victims sexual conduct shall not be admitted under sections 520b and 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> a) Evidence of specific instances of sexual conduct with the actor
> b) Evidence of specific instances of sexual activity showing the source of origin of semen, pregnancy or disease.

> 2) If defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

This Court has recognized that the rape shield statute unquestionably implicates the 6th Amendment which without question would grant a Defendant the constitutional right to prove present consent. The 14th Amendment invokes Due Process and affords a defendant the opportunity to balance evidentiary considerations and the right to present a complete defense. Infra.

D.During trial, Ms. Richardson surprisingly introduced the rape kit with a big note across the front, affixed with packaging tape, and in black Sharpie marker, it read: "The Victim is Lying." This was big enough for everyone in the courtroom to see. Although, trial transcripts has it reading, "The victim on this case lied," that's not what it said. Ms. Richardson told the jury that they would not have an answer as to who placed it, and she did not know either, but "perhaps" it was the reason the case sat for 15 years. In closing she told the jury that the note was not connected to the case and it did not matter. (Apx. A, 12-13).

Important to note: Ms. Richardson suppressed the existence of this note at the hearing where prejudice and the intent to gain a tactical advantage could be shown. The defense did not receive discovery disclosure until two months after the hearing and there was no mention of a note being taped to the CSC kit as an exhibit to be introduced. Infra. (Apx. I). See MCR 6.201(J); ABA Model Rules 3.8(d) "The prosecutor in a criminal case shall...

make timely disclosure to the defense, of all evidence or information known to the prosecution that tends to negate the guilt of the accused or mitigates the offense." Kyles v Whitney, 514 US 419 (1995)(The prosecutor has a duty to learn of favorable evidence known to others who are acting on behalf of the government in the case).

E. Petitioner could not produce a police witness or uncover exonerating footage from a police station showing no car in front, concealing a rape because the station no longer exists. Ms. Perkins would give this third, and entirely new location, 15 years later, when approached by investigators, as to where the crime was to have happened directly in front of. Infra. (Apx. A, p2-3;10).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND THREE SEPERATELY APPOINTED APPELLATE COUNSEL

The right to the effective assistance of counsel is guaranteed by the United States and Michigan Constitutions. Under Strickland, a defendant must establish both that counsel was deficient, meaning that counsel made errors so serious that he or she was not performing as the "counsel" guaranteed by the Sixth Amendment, and that the errors so prejudiced the case that the accused was denied a fair trial, meaning one at which the result was reliable. Generally, the more difficult of these two factors to meet is the prejudice standard. Strickland v Washington, 466 US 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); People v Pickens, 466 Mich 298 (1994). See also Evitts v Lucey, 469 US 387; 105 S Ct 830; 83 L Ed 2d (1985)(The effective assistance of counsel of the Sixth Amendment extends into the first appeal as of right). US Const. Am VI, XIV; Const. 1963 Art 1 §20.

TRIAL COUNSEL'S DEFICIENCIES AND PREJUDICIAL ERRORS

A. Petitioner's right to confront the author of the improperly admitted evidence of the written hearsay statement, affixed to the rape kit, which

the prosecutor alleged to have "perhaps" been the reason for the delay, was denied by trial counsel and appellate counsel failed to raise the issue. It was a testimonial statement, a solemn declaration or affirmation and not a casual remark from an acquaintance, but an assertion to establish a fact from one police official to others in the police department. Crawford bars the prosecution from introducing a testimonial statement from a non-testifying declarant. Crawford v Washington, 541 US 36, 51; 124 S Ct 1354; L Ed 2d 177 (2004); US Const Am. VI. See MRE, FRE 801(c). (Apx. A, p12-13; Apx. H).

B. Petitioner filed the written Michigan Rape Shield motion in compliance with statutory provisions to introduce evidence of prior consensual sexual conduct between himself and Ms. Perkins. Upon consenting to treatment it was required by the health department that a patient list his sexual partner's contact information, i.e., name, address, and phone number. The destruction of this relevant evidence, because of the unexplained 15 year delay, prejudiced Wimberly and he could not present a complete defense. Notably, Petitioner's ex-girlfriend, Heather Bell, friend of Ms. Perkins, and Ms. Perkins herself, testified to having a conversation the day following the alleged incident where Ms. Perkins apologized to Bell for having consensual sex with her boyfriend, Petitioner, and would not have done it if she knew the two were together. This revelation was not enough without the rape shield evidence.

"Relevant evidence" pursuant to Federal Rules of evidence 401, which is identical to Michigan Rule 401, states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Trial counsel filed a notice to introduce the evidence but decided

against it because of its destruction. Petitioner was told not to mention it during testimony, that it would essentially be hearsay. Concerning the admissibility of hearsay, regarding "Statements made for the purposes of medical treatment or medical diagnosis or treatment," the Federal Rules of Evidence 803(4), which is broader than Michigan Rules of Evidence, states:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

On the unreasonable advice of trial counsel, Petitioner did not mention the medical diagnosis where he and Ms. Perkins contracted STD's -specifically, chlamydia and gonnorrea - from prior consensual sexual contact. MRE 804(4) allowed for this testimony. Trial counsel's preclusion of introducing evidence of Petitioner's past conduct with Ms. Perkins, denied Petitioner his rights under the Sixth and Fourteenth Amendments. (Apx. F). Compare to Lucas v Michigan, 500 US 145, 111 S Ct 1743; 114 L Ed 2d 205 (1991), on certiorari.

POST TRIAL HEARING FOR ADJOURNMENT OF SENTENCING AND REQUEST FOR NEW COUNSEL

C. On January 19, 2018, a post trial hearing was held where Petitioner requested new counsel because trial counsel, Mr. Pichlik, would not motion the court for a new trial based on manifest injustice. Petitioner made a record of ineffective counsel claims, including the failure to challenge the introduction of the written testimonial statement on the kit, amongst other claims. The trial court acknowledged the erroneous admission of written statement and flippantly disregarded it as being addressed during the prosecutor's closing arguments. Counsel was given an opportunity to respond and his response was, "I leave it to the court's discretion." The trial

court said appellate counsel could file the motion for new trial. The trial court would not appoint counsel and sentencing ultimately resumed. (Apx. G, p4, 7) See Gideon v Wainwright, 372 US 335 (1942) on cert (This Court reversed where the state court erred and refused to appoint counsel to Petitioner violating his constitutional rights).

APPELLATE COUNSEL'S DEFICIENCIES AND PREJUDICIAL ERRORS

D. Before Petitioner's appeal was heard by the MCOA, Petitioner requested that his first appellate counsel withdraw for conceding on the issue of prearrest delay and for failing to thoroughly argue the prejudice caused by the delay. Appellate counsel also refused to motion for a new trial in the trial court before filing anything in the MCOA. (See Apx. H).

E. The trial court subsequently appointed two seperate appellate attorneys whom also would not submit a more elucidating argument concerning prearrest delay and substantial and actual prejudice nor would they reargue prior counsel's concession on the issue.

F. Appellate attorney, Ann M. Prater, was third to be appointed with a 60 day stay and abeyance order imposed, a week before Covid-19 struck the world. Attorney Prater could not comply with the order, due to the state of emergency, and could not provide effective assistance of counsel. (Apx. D, motion for recosideration).

Recognizing Petitioner's right to effective assistance had been denied, attorney Prater, filed a motion for a mandatory withdrawal citing a violation of Model Rules of Professional Conduct. During the hearing, attorney Prater requested multiple times that substitute counsel be appointed as soon as possible, or that the Petitioner's judgement of sentence or the order appointing appellate counsel be reissued to allow for effective assistance on Petitioner's first appeal of right. (Apx. D, p1-9; attachments A-F).

On September 3, 2020, at the time of the hearing, this request was pursuant to Michigan Court Rule 6.428, "Reissuance of Judgment" (Restoration of Appellate Rights), which stated:

> If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right.

This rule was amended 4 months later, on January 1, 2021 to read:

> If the defendant, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant's prior attorney or the court, or other factors outside the defendant's control, the trial court shall issue an order restarting the time in which to file an appeal or request counsel.

IMPACTING PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. The trial court egregiously denied attorney Prater's request to withdraw, for the court to "immediately" appoint substitute counsel, or to reissue Petitioner's judgement of sentence, i.e., restore his Appeal of Right. This act of denial impacted Petitioner's 6th Amendment right to the effective assistance of counsel. (Apx. D, Atty Prater's motion requesting withdrawal or restoration of appeal, attachment D). See Gideon v Wainwright, supra.

B. Petitioner contacted the MCOA concerning the trial court's denial of appointment of substitute appellate counsel, informing the MCOA that his appeal should be stayed to allow for effective assistance, or it will be denied. Namely, because of prior appellate counsel's concession on the prearrest delay argument which denied Petitioner proper appellate review of the issue. The MCOA disregarded Petitioner's concern's, but placed the

letter in Petitioner's MCOA file. (Apx. D, p7).

The Equal Protection right to the effective Assistance of Counsel is the cornerstone of the United States judicial system. For an individual to be flagrantly denied the fundamental rights of procedural and substantive Due Process is grave Constitutional error. If a defendant is denied his right to the effective assistance of counsel on appeal, habeas relief is warranted and the remedy is the reinstatement of an appeal of right. Benoit v Bock, 237 F.Supp. 2d 804, 812 (E.D. Mich 2003). However, habeas relief can be unconditionally granted where affording a new appeal "would not vitiate the prejudice to the petitioner from the denial of direct appellate review. "Ward v Wolfenbarger, 340 F. Supp 2.d 773, 776 (E.D. Mich 2004)(quoting Hannon v Maschner, 981 F.2d 1142, 1144-45(10 Cir. 1992)).

REASONS FOR GRANTING THE WRIT

According to the state and the MCOA opinion, the police were told by Ms. Perkins' mother, - whom testified to giving Petitioner's legal identity to police following the alleged incident - that Anastassia Perkins lied to them to avoid prosecution for selling guns and because of threats made by Petitioner. (Although, there was no report of this narrative until December 2016). Armed with Petitioner's legal identity, coupled with an admission that undermined credibility of the accusation, this led an unnamed Battle Creek Police official to attach the note to the rape kit, reading that Ms. Perkins was lying. This directed the entire police department to disregard the spurious allegations for 15 years, only to revisit it as a "special project". This deliberate act questions the undifferentiated and absolute duty of police in the proper handling of this case.

Petitioner would advance that the state did intend to gain a tactical advantage due to police conduct, which is charged to the state. Police were

grant certiorari and reaffirm the binding principles of the Michigan and United States Constitutional rights to the effective assistance of counsel. Second, to create one concise jurisprudence concerning prearrest delay by resolving the split of authority and affirm the applicable standards set forth in Bisard and the concurring federal cases, specifically, Ross/Hernandez, but elaborating further to include the standard articulated in Singer. All of which cases are more precise when applied to Petitioner's case, than the cases cited in the MCOA opinion.

Respectfully submitted,

Jeffrey Ricardo Wimberly #428468
In propia persona

Dated: September 4, 2022