No. 22-6403

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Marco D. Martin — PETITIONER
(Your Name)

vs.

State Of Michigan — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Marco D. Martin
(Your Name)

320 N. Hubbard St.
(Address)

St. Louis, MI 48880
(City, State, Zip Code)

989-681-6668
(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court denied Petitioner his Fifth, Sixth, and Fourteenth Amendment rights, where the state injected issues broader than the Petitioner's guilt or innocence and by infringing on the Petitioner's right to have guilt proven beyond a reasonable doubt.

II. Was defendant denied his Sixth Amendment right to effective assistance of counsel during the pretrial stage of the proceedings where counsel's deficient performance and affirmative erroneous advice caused Petitioner to miss out on a favorable plea-offer.

III. Whether Petitioner was ordered to be subject to lifetime electronic monitoring in error by the trial court due to the state's failure to give notice of penalty throughout the entire proceedings and in violation of the ex-post facto clauses of the Constitution.

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

☒ For cases from **federal courts:**

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

☒ reported at Martin v. Artis,2022 US App Lexis20382; 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[ ] is unpublished.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 C to the petition and is

☒ reported at Martin v. Jackson,2021 US Dist. Lexis 221546; 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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.

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(T.O.C.)cont..

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APPENDIX

LIST OF PARTIES

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

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

JURISDICTION

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 7/22/2022.

☒ No petition for rehearing was timely filed in my case.

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

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

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

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

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

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

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

Table of Authorities

Cases

Statues, Rules, and Clauses

Constitutional Provisions Involved

U.S. Const. Art.1,§ 9,Cl.3 (Ex Post Facto Clause)

No Bill of Attainder or Ex Post Facto Law shall be passed.

U.S. Const. Art.1,§ 10,Cl.1 (State Prohibition Provisions):

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

STATEMENT OF THE CASE

Petitioner Marco Martin was tried in the Third Circuit Court of Michigan, on six counts of first degree criminal sexual conduct. During the pretrial stage of the proceedings, the state failed to give two week notice of its intent to introduce "other acts" evidence, in the form of uncharged, speculative criminal activity, as required by law (MRE 404(b)(2)). This failure constitutes the state committing plain error and calls for the exclusion of such evidence. Petitioner Martin was denied his right to a fair trial and due process when the trial court abdicated its duty to intervene and make a determination on if the evidence was more probative than prejudicial. Or even require the state to present good cause for its failure to give trial court notice, and at the very least issue a limiting instruction. Defense counsel was highly ineffective when he failed to object to the introduction of such evidence, nor ask the court to relevancy or rationale, or request the court give a limiting instruction.

At the final pretrial conference that was held on Feb. 24,2012, the prosecution stated on record:

"I made Mr. Woodards (Pet. Aty.) an offer that's well below defendant's minimum guidelines." (Apx. at X).

Petitioner's attorney however, convinced him to proceed to trial, without informing petitioner of the state's offer, nor his sentencing guidelines. Also, without first consulting with Petitioner, defense counsel completely abandoned plea negotiations with the state. Even though the trial court was aware of the state's intent to offer a plea, due to the lack of procedural safeguards in Michigan law, it did nothing to ensure Petitioner's right to effective assistance of counsel, during this critical stage of the proceedings. Also the court, the state, nor the

petitioner's attorney, ever gave petitioner notice, throughout the entire proceedings, that he would be subject to the additional punishment of lifetime electronic monitoring, if convicted. Petitioner first received notice of the penalty after he was sentenced and in prison.

During closing arguments, the prosecution shifted the burden of proof to petitioner, when it told the jury that; "If you just want to find him not guilty, you'll be able to concoct a reason to do that."
(Apx. at XX).

Petitioner went to trial on Apr. 4,2012 and on Apr. 9,2012, the jury returned a verdict of guilty on all charges. On Apr. 25,2012, petitioner was sentenced to six concurrent terms of 15-60 yrs. in prison. Petitioner appealed as of right to the Michigan Court of Appeals, raising the following issues:(1) Did the Cumulative Effect of the Prosecutor's Misconduct Deny Defendant a Fair Trial?, (2) Did Trial Court Error Infringe on Defendant's Due Process Rights to a Fair Trial?, (3) Did Ineffective Assistance of Counsel Deny Defendant a Fair Trial?, (4) Does the Cumulative Effect of Error Require That Appellant Be Granted a New Trial? On July 18, 2013, the Michigan C.O.A. in an unpublished (per curiam) opinion denied his appeal as to all issues, People v. Martin, No. 310635, 2013 WL 3771210 (Apx. at J). Petitioner raised the same claims in an application for leave to appeal in the Michigan Supreme Court, on Dec. 23, 2013, the Michigan Supreme Court denied leave to appeal "because it was not persuaded to review the issues." People v. Martin, 495 Mich, 915; 840 N.W. 2d 369 (2013)(table decision). (Apx. at I). In March of 2015, Petitioner raised 4 new issues in a motion for relief of judgement. While that motion was pending in the state trial court, Petitioner filed a federal habeas petition, and a motion for a stay of the federal proceeding while he pursued state remedies. On Apr. 21,2015, that motion was granted, so Petitioner could pursue

post-conviction remedies for his unexhausted claims in state court. Which consisted of: (1) trial counsel performed ineffectively by failing to objuct to a scoring error in the sentencing guidelines; (2) trial counsel performed ineffectively by offering erroneous advice that prevented Petitoner from taking advantage of a favorable plea offer and by failing to explain to Petitioner his sentencing exposure if he went to trial; (3) appellate counsel was ineffective for failing to (a) master the record. (b) investigate, and (c) raise significant and meritorious issues; and (4) the trial court sentenced petitioner in error to lifetime electronic monitoring and in doing so violated state and federal ex-post facto laws by not presenting proof that petitioner committed the crimes after the statue was enacted.

On August 5,2015, the state trial court denied Petitioner's motion for relief from judgement. People v. Martin, No. 11-012737-01 (Wayne County Cir. Ct.8-5-15) (unpublished) (Apx. at G). Petitioner appealed the trial court's decision without success. The Michigan Court of Appeals denied leave to appeal because Petitioner failed to establish that the trial court erred in denying his motion for relief from judgement. People v. Martin, No. 331011 (Mich. Ct. App. Apr. 28,2016) (unpublished) (Apx. at F).

On September 12,2017, the Michigan Supreme Court directed the prosecuting attorney to answer the application for leave to appeal on the Apr. 28,2016, order of the Court of Appeals. On March 5,2018 the Michigan Supreme Court denied leave to appeal because Petitioner failed to establish entitlement to relief under Michigan Court Rule. 6.508(D). People v. Martin, 501 Mich. 980; 907 N.W. 2d 540 (2018) (table decision). (Apx. at E). Petitioner moved for reconsideration, but the Court denied his motion on May 29,2018, because it did not appear to the court that its previous order was entered erroneously. People v. Martin, 501 Mich. 1084; 911 N.W. 2d 686 (2018) (table decision). (Apx. at D).

On August 16,2018, Petitioner filed a motion to lift the stay in this case

and an amended habeas corpus petition. On Nov. 16,2021, the United States District Court, Eastern District of Michigan, Southern Division, issued an opinion and order denying Petitioner's amended habeas corpus petition, declining to issue a certificate of appealability, and granting leave to appeal in forma pauperis. Martin v. Jackson, 2021 U.S. Dist. Lexis 221546 (E.D. Nov. 16, 2021)(Apx.atC)

In the aforementioned opinion the Court makes reference to several conflicting statements, as it relates to Petitioner's issue regarding his attorney's failure to engage in plea negotiations:

"Two weeks later, on Friday, February 24, 2012, Petitioner still had not taken a polygraph test, but the prosecutor stated that she had made an offer ' under the bottom of the guidelines'."

"Defense counsel then asked the court for a special pretrial in one week. The court agreed to schedule the special pretrial on the following Friday, but the court stated that after the next pretrial, there would be no reconsideration, and they would go to trial. There is no record of a subsequent special pretrial, and the trial commenced on Wednesday, April 4,2012, without any mention of a polygraph examination or **any plea negotiations.**"

"Petitioner was released on bond before trial, and it appears that he was present as the pretrial conference on February 24,2012, when the prosecutor stated that **she had offered a sentence below the minimum guidelines.** There is no indication in the record that the prosecutor made a formal plea offer that included any additional concessions."

"The prosecutor apparently indicated on the trial file that she had received **authorization to offer a plea of '8-10' yrs.,** but it is not known whether the prosecutor extended such an offer to defense counsel. In fact, the trial prosecutor recalled that **she did not engage in plea negotiations with defense counsel** because Petitioner was unwilling to enter a plea."
(Apx. G. at p.27,28,29).

Also, in another portion of its opinion in regards to the Petitioner's issue of being sentenced to L.E.M (lifetime electronic monitoring, the court stated:

"The **state trial court erred** when it determined that Michigan's L.E.M statues applied to Petitioner because he was convicted after the statue became effective. The Supreme Court's precedents make clear that the **controlling date is the date of the crime.** Nevertheless, as the following discussion demonstrates, some crimes were committed after the L.E.M statues were enacted."
(Apx. C at p.37).

After Petitioner's amended habeas petition was denied, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit and submitted a motion for certificate of appealability on his first, **sixth**, and eighth habeas claims. On April, 15,2022, the United States Dist. Ct. E.D. of MI, S.D., issued an opinion and order denying Petitioner's motion for certificate of appealability. Martin v. Jackson, 2022 U.S. Dist. Lexis 70043 (E.D. Mich, Apr. 15,2022) (Apx. at B). In its denial the Court, in regards to Petitioner L.E.M issue stated"

"Judge Tarnow did conclude that the **controlling** date for ex post facto purposes was the date the offenses were **committed** rather than the date of conviction. But Tarnow nevertheless concluded that Petitioner was not entitled to relief on his **claim** because at the trial the complainant **Implied** that some of the criminal sexual conduct-the offense committed-occurred after the L.E.M statue became effective.

Petitioner asserts in his pending motion that the of the alleged crime was **January 1,2006**, which was before the L.E.M became effective. This allegation is based on the state's trial court's register of actions, **which lists January 1, 2006, as the date of the crime."**
(Apx. at B p.9).

Petitioner next moved for a motion for certificate of appealability in the United States Court of Appeals for the **Sixth Circuit**. On July, 22,2022 that court issued an order denying Petitioner's motion. Martin v. Artis, 2022 U.S. App. Lexis 20382 (6th Cir. Ct. of App. July 22,2022). (Apx. at A).

In that order the court in regards to Petitioner's **issue** that his attorney was ineffective during plea negotiations, it stated:

"The prosecutor stated at a pretrial conference that she 'made [Martin] an offer under the bottom of the guidelines,' but the record is otherwise wanting in information about the parties' plea negotiations or trial counsel's consultations with Martin."
(Apx. at A p.5).

On Petitioner's issue of the L.E.M sentencing error the Court of Appeals stated:

"As Martin points out in his C.O.A application, the prosecutor asked the victim at trial whether his last contact with Martin was before November 28th of the year 2006, and the victim responded, "I believe so'. Martin notes that the register of actions lists dates **January 1,2006 for all six counts.** Martin further argues that neither the judge nor jury made an affirmative determination that the abuse occurred after the enactment of the lifetime electronic monitoring provisions."
(Apx. at A p.6).

As to the statement of the case Petitioner now presents the following argument:

ARGUMENT

I. The trial court denied Petitioner his Fifth, Sixth, and Fourteenth Amendment rights, where the state injected issues broader than the Petitioner's guilt or innocence and by infringing on the Petitioner's right to have guilt proven beyond a reasonable doubt.

The Sixth Amendment of the United States Constitution, guarantees the criminally accused, a right to a speedy and public trial, by an impartial jury (U.S. Const. VI Amend.) The Fifth and Fourteenth Amendments also guarantees defendants in criminal cases, equal protection and due process of the laws. (U.S. Const. V,XIV Amends.) The Michigan Constitution mirrors those same rights. (Mich. Const., 1963, Art.I § 2, § 17, § 20).

When the state of Michigan establishes laws, procedures, rules, and state Supreme Court precedents to ensure those rights to its citizens, it creates an obligation for its trial courts to abide by and enforce the process it has put in place to protect those (said) rights. "Trial courts are under an obligation to guard and enforce the personal rights secured by the state and federal constitutions." People v. Ligget, 378 Mich. 706, 148 N.W. 2d 784 (1967). In the case against the Petitioner, the prosecutor committed a plethora of misconduct, thus denying Petitioner his right to a fair trial, by an impartial jury, guaranteed by the due process clauses in the United States and Michigan Constitutions. U.S. Const, Ams V, XIV; Mich. Const 1963, art 1, §17; Donnelly v. DeChristoforo, 416 US 637, 639; 94 S. Ct. 1868; 40 L Ed 2d 431 (1974). Due process violations involving misconduct by the prosecutor, the guiding principle focuses on fundamental fairness. "The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L.Ed. 2d 78 (1982). To constitute a denial of due process, the complained of conduct must be "so pronounced and persistent that it premeates the entire atmosphere of the trial." Prichett v. Pitcher, 117 F.. 3d 959, 964(6th Cir. 1997)(quotation omitted). As it relates to the case against the Petitioner, the state was allowed by the trial court and defense counsel, to ignore the law and its own court precedents, and introduce whatever uncharged and unproven character evidence it desired. MRE 404(b)(2) **requires** the prosecution to give "reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale...for admitting the evidence." Absent proper notice such evidence should be excluded. People v. Ullah, 216 Mich App 669, 672-675; 550 N.W. 2d 568 (1996). If such evidence enters a trial without notice both the Michigan S.Ct. and the Michigan C.O.A

have ruled the prosecutor commits plain error. "[F]ailure to give notice [of prior bad-acts evidence] is plain error because the court rule unambiguosly requires notice to the defendant at sometime before the prosecutor introduces [it]." People v. Hawkins,245 Mich App at 453(1997). People v. Knox,469 Mich 502(2003), reversed and remanded 469 Mich 502(2004). Without the prosecution be required to adhere to the notice requirement, present a proper foundation or the rationale for the admission of "other acts" evidence, coupled with the trial court not making a ruling on its relevancy, or determining its probative versus its prejudicial effect, and defense counsel failing to object or present any challenge to the evidence, **the jury was free to view that evidence in anyway they saw fit, and to draw any inferences that they wanted from it.**

Here are a just a few examples of the prosecutor improperly soliciting "other acts" evidence from its witnesses. The prosecutor questioned the complainant as follows:

> Q:"Was there violence going on between your mother and defendant?"
> A:"Yes"

(T, 197; 4/4/12)

Pounding on this theme the prosecutor elicited the following testimony from the complainant's mother:

> Q:"Well, how would you characterize your relationship in your words with the defendant?"
> A:"It was abusive. It was very violent. He used to hit me a lot.

(T, 30; 4/5/12).

Q:"Okay. How many times did the two of you break up and get back together during the course of your relationship?"
A:"Many, many times."
Q:"Was it you that let him-that continued this relationship with him?"
A:"Yeah, because a lot of times I was scared of him, and it was easier to be with him than to be trying not to be with him.

(T,33;4/5/12).

In addition, the complainant's mother unresponsively testified to other instances concerning Petitioner's prior bad acts. She said he had stalked her and "hit me so hard, he sent my tooth through my lip. and stole my car." Further that she had filed for a restraining order against him and that family members did not come around often because they "didn't like him." (T,30,37,46,56;4/5/12).

Even though the state ruled that this tremendous amount of "other acts" evidence was relevant to show why complainant did not resist (Apx. at J p.3). it is obvious why that ruling is fatally flawed. First, no justification of any of that evidence was ever given to the jury. Also, resistance, consent, or time is not an issue or element that was needed to prove the crime Petitioner was charged with. According to the instructions given to the jury (CJI2d 20.1). It is clear that without the jury being instructed on the intent of the "other acts" evidence, the Petitioner was automatically put at a significant disadvantage. Especially, when the trial court, prosecutor, and defense counsel failed to follow the law regarding its admission.

The United States Supreme Court does not agree with the altering of evidentiary rules, in order to obtain a certain result, "this Court cannot alter evidentiary rules merely because litigants might prefer different results in a particular class of cases." United States v. Salerno,505 U.S 317,322,120 L.Ed.2d 255,112 S.Ct.2503 (1992).

The prosecutor's smear campaign was not isolated to Petitioner's alleged propensity to violent behavior. The prosecutor also tried to portray Petitioner as a lazy, non provider, through the following testimony elicited from complainant:

> Q:"Okay. Now, you mentioned that your mother was working outside of the home at that time. Was the defendant working outside of the home at that time?"
> A:"No."

(T,200;4/4/12)

During closing argument, the prosecutor highlighted this theme, by stating:

> "And so while Ms. Provost[the complainant's mother]is not minding the store, the defendant is in her house...She's the sole source of income in this house. She's working." (T,13;4/9/12).

Petitioner's employment status had nothing to do with guilt or innocence of the crimes charged. That evidence was inadmissible and irrelevant. Evidence must relate to a material fact. United States v. Dunn, 805 F2d 1275,1281(6th C.O.A 1986).

The state also blatantly infringed on Petitioner's state and federal constitutional rights to a fair trial, to have guilt proven beyond a reasonable doubt, by arguing that "if you just want to find him not guilty you'll be able to concoct a reason to do that." In re Winship, 397 U.S 358,364; 90 S.Ct. 1068; 25 L.Ed. 2d 368(1970)(U.S. Const. VI Amend. MI Const. 1963, Art.I§20).

This statement did not ask the jury to carefully view the evidence or or encourage jurors to have reason for their verdict, as determined by the U.S. Sixth Circuit Court of Appeals:

> "Martin explains in his COA application that this statement, combined with jury instructions that the jurors should rely on their own common sense, could have resulted in a juror concluding that he must find a reason to justify having doubts about Martin's guilt. The Michigan Court of Appeals determined that this statement did not shift the burden of proof, but merely asked the jury to carefully review the evidence." (Apx. at A p.4).

That conclusion is not true to the meaning/definition of the statement and why it was made. The word "concoct", as defined by the Merriam-Websters dictionary, means to "invent", or to "fabricate" something. Clearly that statement did not ask the jury to carefully view the evidence. That statement told the jury that the Petitioner's right to have guilt proved beyond a reasonable doubt, was unnecessary in this case because they would have to "invent", make-up, or "fabricate" a reason for them to return a verdict of not guilty. In other words, the jury would simply presume the Petitioner's guilt before they even review the evidence and deliberate. That statement alone had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619,622(1993); Holland v. Rivard, 800 F.3d 224,243(6th Cir. 2015).

A. National Importance of Question I.

The issues presented in Question I. is of national significance. First, the United States Supreme Court has yet to set precedent regarding a state violating a defendant's due process rights, by allowing propensity evidence, of other bad acts. "There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." Bugh v. Mitchell, 329 F.3d 496,512-13(6th Cir. 2003). Without a guiding precedent from this court, federal appellate and district courts, as well state appellate courts, issue many differing opinions, on other bad acts evidence. This issue has continued over decades. See United States v. Diaz, 585 F.2d 116 (5th Cir. COA 1978), Rhodes v. Dittman, 903 F.3d 646(7th Cir. COA 2018), Kontakis v. Beyer, 19 F.3d 110(3rd Cir. COA 1994), Mackey v. Russell, 148 Fed.Appx. 355 (6th Cir. 2005), Snyder v. State, 893 So. 2d 482,2001 Ala. Lexis 454(2001), People

v. Crawford, 458 Mich. 376,387,582 N.W. 2d 785(1998), Hopkinson v. Shillinger, 866 F.2d 1185,1197(10th Cir. 1989), Hoffman v. Wood, 1994 U.S. Dist. Lexis 21862 (E.D. Wash. 1994). Disagreements even exist within a circuit because of the lack of a U.S. Supreme Court precedent on if other bad acts evidence can violate a right to a fair trial. In Blackmon v. Booker, 312 F. Supp. 2d 874(E.D. Mich (2004). The district court in that case held, "the trial court's admission of gang related testimony and the prosecution's statements before the jury about defendant's gang membership deprived him of a fair trial." That ruling was later overturned because it was determined that there was no "unreasonable application" of clearly established federal law. Blackmon v. Booker, ,696 F.3d 536(6th Cir. 2012). Yet in Ege v. Yunkins, 485 F.3d 364 (6th Cir. 2007) the Sixth Circuit C.O.A, overturned Ege's conviction because unfair prejudicial "other acts" evidence, holding that "trial errors cannot defeat the ends of justice" or "otherwise deprive a defendant of her right to a fair trial." Federal and state appellate court's also have differed on if and when limiting instructions are needed when other bad act's evidence is admitted. This court has stated, "a defendant's rights are deemed protected by limiting instructions." Spencer v. Texas, 385 U.S. 554,87 S.Ct. 648, 17 L.Ed. 2d 606(1967). The Sixth Circuit C.O.A have found plain error under F.R. Crim. Pro. 52(b) for failure to give a limiting instruction. See United States v. Ailstock, 546 F.2d 1285(6th Cir. 1976). In Ailstock that court stated that, "the failure of the (district) court to issue a cautionary instruction, either immediately or in the general charge, constituted prejudicial error." 546 F.2d at 1291(emphasis added). Also, in United States v. Sims, 430 F.2d 1089,1092 (6th Cir. 1970), that court said, "to avoid any prejudicial effect it is important for the district court to caution the jury regarding the limited reasons for its admission." Furthermore, "limiting instructions serve an important purpose of

reducing the danger that a jury, after hearing about a defendant's other crimes or bad acts","will impermissibly infer that he is a bad man likely to have committed the crime for which he is being tried." United States v. Benedetto, 571 F.2d 1246, 1249(2nd Cir. 1978). Now in contrast to those rulings, In a Ninth Circuit C.O.A case, that circuit ruled, "[t]he court in no wise held that a limiting instruction is always necessary to protect a defendant's due process rights." Busurto v. Luna, 291 F.App'x 41, 43(9th Cir. 2008). The Supreme Court of Ohio has previously expressed its reluctance to impose a duty on the trial court to sua sponte issue a limiting instruction in response to the admission of other acts evidence. State v. Schiam, 65, Ohio S. Ct. 3d 51, 61, 1992 Ohio 31, 600 N.E. 2d 661(1992). Michigan follows that approach and will only issue a limiting instruction if its requested. (MRE 105). Thus leaving very little recourse if a defendant's counsel is negligent in requesting one when needed. Court's can view that failure as a tactical one. Landers v. Robinson, 2018 U.S. Dist. Lexis 204676. In sum, this Court should act in order to bring some conformity in the federal and state appellate courts regarding the improper admission of other bad acts evidence. At the very least require the trial court's to place a defense counsel's decision regarding requesting limiting instructions to be put on record, in order to make sure defendant's are involved in that process. Which will help protect a defendant's right to a fair trial and eliminate situations similar to what happened to Petitioner. Where the state was allowed to openly violate every evidentiary rule in place related to other acts evidence. A trial court and a defense counsel who did nothing to stop it and an appeals court who justified it using the theory that it explained the "atmosphere" the crime was committed in. This Court should act to set precedent on the improper usage of other bad acts evidence. This case is ripe for it.

II. Was defendant denied his Sixth Amendment right to effective assistance of counsel during the pretrial stage of the proceedings where counsel's deficient performance and affirmative erroneous advice caused Petitioner to miss out on a favorable plea-offer.

The state on record told the trial court that it "had made" Petitioner "an offer under the bottom of the guidelines." (Apx. at X). Then in its arguments during Petitioner's appellate proceedings, they argued that no plea bargain was ever offered to Petitioner. Petitioner has argued that, the prosecutor's statement shows that; (1) an offer was presented to defense counsel, and (2) the specifics of that offer consisted of terms that were "under the bottom off [Petitioner's] guidelines." The state has also admitted that a plea of '8-10' years was authorized. See (Apx. at G p.29). The state attempts to characterize this statement by the prosecutor as not being a "formal offer", but an offer to negotiate." Petitioner maintains this characterization of the prosecutor's statements, does not alleviate Petitioner's Sixth Amendment right to effective assistance of counsel, as suggested by the state. In Padilla v. Kentucky, 130 S. Ct. 1423 (2012), the Supreme Court made clear that "the negotiation of a plea-bargain is a critical stage for ineffective assistance purposes," Id., at 1486. Also, criminal defendants require effective representation by legal counsel, at the only stage when legal aid and and advice would help him." Assiah, 377 U.S. at 204 (quoting Spano v. New York, 360 U.S. 315,326(1959)(Douglas, J., concurring). The Sixth Amendment right to counsel extends to the plea-bargaining process. Lafler v. Cooper, 566 U.S. 156,162(2012). Furthermore, counsel "has a clear obligation to fully inform [his] client of the available options." Smith v. United States, 348 F.2nd 545,552 (6th Cir. 2003). Here, the state has not provided any appellate with anything to refute Petitioner's claim that he did not receive effective assistance of counsel during the plea-bargaining process. The state's assertion that because Petitioner declared his

innocence, is not evidence or proof that he would not have pled guilty had he received effective assistance of counsel. The Sixth Circuit indicated that "it does not make any sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea." Griffin v. United States, 330 F.3d at 738(6th Cir. 2003). During that same final Pre-Trial Conference, when questioned by the trial court regarding if the case could be resolved by way of plea, if Petitioner were to fail the polygraph test, defense counsel responded to the court; "I can't make that decision just yet, your Honor. I would have to talk to him some more."(Apx. at XL). Therefore, in order for the state's argument to be truthful, defense counsel would have simply informed the court that his client maintains his innocence and wants his day in court. Petitioner contends that it was defense counsel's deficient performance regarding the plea in question, and his erroneous adivce that was transferred to him after the Final Pre-Trial Conference, that caused him to loose a favorable plea-bargain. The record clearly suggests that an offer was made to the defense, that both counsel and the prosecutor understood the terms of that deal, and the trial court was willing to accept that plea-offer. Petitioner through both affidavit and by way of argument has stated repeatedly that his defense counsel never proffered the plea given to him by the prosecution to Petitioner himself. Counsel simply told Petitioner that "the state's case is weak, and for him not to worry and let him [defense counsel] do his job." At that point, under the guise that his retained counsel was competent, Petitioner rested assured he had been properly in formed and advised by counsel.

Petitioner has never once uttered that he would not have entertained a plea offer from the prosecution. In fact he has consistently maintained that had he been given competent advise by counsel, he would have been willing to accept the state's offer.

There is ample record support that plea negotiations existed between the state and Petitioner's attorney. However, Petitioner has diligently sought an evidentiry hearing throughout his appellate proceedings, in order to expand the record in regards to this issue, but has been denied.

A. National Importance of Question II.

As the United States Supreme Court has noted, the "plea-bargaining process is so often in flux, with no clear standards or timelines, with no judicial supervision of the discussions between prosecution and defense." Missouri v. Frye, 566 U.S., 134,143,132 S. Ct. 1399, 182 L.Ed. 2d 379(2012). Also, "The prosecution and trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after trial leading to conviction with harsh consequences." Id at 1402. Michigan has yet to adopt any statutory procedures, court rules, or a process, to help ensure that criminal defendants receive effective assistance of counsel during plea negotiations as suggested by the United States Supreme Court. Criminal defendants who plead guilty are entitled to a hearing to ensure that they understand all the ramifications that come with that plea. Once plea negotiations have taken place it should be a record of those negotiations, before a trial is commenced to ensure that all parties are informed and that there constitutional rights to effective assistance of counsel are protected. "The constitutional rights of criminal defendants", the Court observed, "are granted to the innocent and guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or attaches to matters affecting the determination of actual guilt." "The fact that a defendant is guilty does not mean he was entitled by the Sixth Amendment to effective assistance or that he suffered

no prejudice from his attorney's deficient performance during plea bargaining." Hill v. Lockhart, 474 U.S. 52,106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). Both the innocent and guilty deserve equality regarding plea bargaining. Record evidence is the only solution, Justice Scalia in his dissent of Missori v. Frye, 132 S.Ct. 1399(2012) stated: "The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained." It is clear Petitioner from the record Petitioner was not afforded effective assistance of counsel during the plea-bargaining process and the state helped in this denial by not requiring a known plea negotiation to be made part of the court record. The Petitioner has shown reason why the Court should grant the writ on this issue.

III. Petitioner was ordered to be subject to lifetime electronic monitoring in error by the trial court due to the state's failure to give notice of penalty throughout the entire proceedings and in violation of the ex-post facto clauses of the Constitution.

Petitioner was sentenced to a mandatory penalty (LEM)(750.520(n)) without notice troughout the entire proceedings, that he would be subject to it, if he was convicted after trial. This violates Petitioner's Sixth Amendment right to be tried by an impartial jury. In Alleyne v. United States, 570 U.S. 99,103,133 S.Ct. 2151, 186 L.Ed. 2d 314(2013), This Court held that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." The Petitioner was not sentenced to it when the judge pronounced his sentence. Here, again, Michigan violates its own rules they have put in place to protect an accused state and federal constitutional rights. MCR 6.104(E)(1)-Arraignment On The Warrant Or Complaint, reads as follows: "Inform the accused of the nature of the offense

charged and its **maximum possible prison sentence and** <u>any mandatory minimum sentence required by law.</u> Also MCR 6.112(D)-The Information Or Indictment, states: "Information; nature and contents; attachments. The information must set forth the substance of the accusation against the defendant and the name, statutory citation, <u>and penalty of the offense</u> allegedly committed. Petitioner was not afforded any of these protections, and clear United States Supreme Court precedents were ignored. Petitioner was also given this mandatory penalty in violation of the United States Constitution's ex post facto clauses. See U.S. Const. Art. I, §9,cl.3 and U.S. Const. Art. I, §10,cl.1. There was no specific or definitive proof that Petitioner committed any offense he was charged with after the statue imposing the LEM penalty with into effect on Aug. 28, 2006. The jury was never asked to make a determination to that fact, nor did the judge ever conclude that fact. The trial court was under the impression that Petitioner was subject to that penalty regardless of the time the offenses are said to have been committed. (Apx. C at p.37). The has started to issue rulings that says that fact must be presented to a jury for determination. The Michigan C.O.A held that, **even though the complainant in that case testified some abuse occurred after LEM was in effect, no specific details were given so he could not become subject** to lifetime electronic monitoring." People v. Montez,2022 Mich. App. Lexis 1251(2022)(unpublished opinion). In fact, the judge in the case against the Petitioner, instructed the jury that **the prosecution does not have to prove the date or the time of the offense beyond a reasonable doubt,** (T.T. 4/9/12 p.59).

The adding on of the mandatory minimum penalty of LEM, was contrary to the decision set forth by the United States Supreme Court when it held, "that the Sixth Amendment requires that any fact that increases a defendant's mandatory minimum sentence be found by a jury, not a judge. Alleyne v. United States, 570 U.S. 99, 103,133 S.Ct. 2151, 186 L.Ed. 2d 314(2013).

A. Unreasonable Application of, Clearly Established Federal Law, as Determined by the Supreme Court of the United States.

In Alleyne, 570 U.S. at 112-13, as it relates to the Sixth Amendments states, "the core crime and the fact triggering the mandatory minimum sentence together constitute a new aggravated crime, each element of which must be submitted to the jury" Id. at 113. Importantly in terms of **notice**, the court stated that "[d]efining fact that increase a mandatory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of indictment[,]" and "preserves the historic role of the jury as an intermediary between the [s]tate and criminal defendants." Id. at 113-14. Also MCR 6.103 reads; A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived. The Sixth Circuit Court of Appeals, in Petitioner's case ruled; "Martin further argues that neither the judge **nor jury** made an affirmative determination the abuse occurred after the enactment of lifetime electronic monitoring provisions, but the burden is on Martin to make a substantial showing of the denial of a constitutional right." (Apx. at A p.7). However, in Petitioners application for a certificate of appealability, Petitioner argued that neither the trial court or his attorney ever explained that he was subject to LEM. And that even at sentencing it was never announced or explained and that fact alone constituted ineffective assistance of counsel. (U.S. Const. VI Amend.). That should have made **it clear that he was not** given the opportunity to present a complete defense. A defendant in a criminal prosecution is entitled to "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479,485, 104 S.Ct. 2528, 81 L.Ed. 2d 413(1984). The Sixth Circuit explained in Robinson v. Woods, 901 f.3d 710,716-18(6th Cir. 2018), "[A]t bottom, Michigan's sentencing regime violate Alleyne's prohibition on the use

of judge found facts to increase mandatory minimum sentences" Id. at 716. Petitioner has shown that he was sentenced to the mandatory minimum penalty of LEM in error. It violated the ex post facto clauses of the Constitution because no determination was ever made by a jury that he committed any crimes he was charged with, after the LEM statue went into effect. And this was also in violation of Alleyne. **Petitioner asks for this provision (LEM) to be removed.**

This Court, in regards to this argument should find that the state has rendered a decision that is contrary to, or is an, unreasonable application of clearly established United States Supreme Court precedents.

For these reasons, Petitioner Martin asks that this Honorable Court grant this Writ of Certiorari.

Respectfully submitted,

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