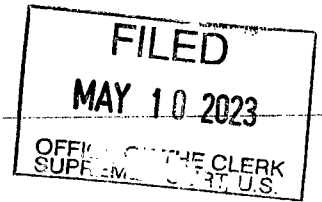


No. 22-7573

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

DONALD L. KISSNER — PETITIONER
(Your Name)

vs.

MATT MACAULEY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

6th Cir. Kissner vs. Macauley No. 22-1987 (4-4-23) en banc
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Donald L. Kissner

(Your Name)

MACOMB COURT / FAC
34625 26 Mile Rd

(Address)

Lenox Twp, MI 48048

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

DID THE DISTRICT ABUSE ITS DISCRETION IN CHANGING THE CITED RULE 60(B)(6) AND 60(D)(1) TO 60(B)(1) AND DENYING RELIEF AS UNTIMELY.

DID THE DISTRICT ABUSE ITS DISCRETION; ABUSE ITS DISCRETION IN PROCEDURALLY DEFAULTING AN ACTUAL INNOCENCES CLAIM.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING AN EVIDENTIARY HEARING PURSUANT TO TOWNSEND VS. SAIN, 372 U.S. 293 (1963) (HOLDINGS); HARRIS VS. NELSON, 394 U.S. 286, 300 (1969); SCHRIRO VS. LANDRIGAN, 550 U.S. 465, 474 (2007) WHERE THE TRIAL COURTS FAILED TO GIVE NOTICE OF ORDERING AN EVIDENTIARY HEARING, DID NOT ALLOW TO QUESTION TRIAL COUNSEL, APPELLATE COUNSEL, DID ALLOW TO CALL ANY WITNESSES, OR DOCTOR TO WHOM I WAS AT AN APPOINTMENT AT THE TIME OF THE CRIME MAKING ME ACTUALLY INNOCENT OF THE CRIME.

LIST OF PARTIES

☒ 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:

RELATED CASES

People vs. Kissner, 2005 Mich App Lexis 3209

People vs. Kissner, 2007 Mich App Lexis 2165 after Remand.

People vs. Kissner, 480 Mich 1011 (2008)

People vs. Kissner, 2009 Mich App Lexis 2921

~~*People vs. Kissner, 488 Mich 852 (2010)*~~

Kissner vs. Berghuis, No. 4:10-CV-14759 (E.D. Mich. Dec. 1, 2010)

Kissner vs. Berghuis, 2013 U.S. Dist. Lexis 91688

Kissner vs. Berghuis, 2013 U.S. Dist. Lexis 116774

People vs. Kissner, No. 04-993-FH

People vs. Kissner, 2014 Mich App Lexis 2812

People vs. Kissner, 497 Mich 906 (2014)

CONTINUED RELATED CASES

People vs. Kissner, 497 Mich 985 (2013) Rehearing den.

Kissner vs. Palmer, 2015 U.S. Dist. Lexis 194859

Kissner vs. Palmer, 2016 U.S. Dist. Lexis 22775

Kissner vs. Palmer, 826 F.3d 898 (6th Cir. 2016) (en banc den).

Kissner vs. Harry, 580 U.S. 1125 (2017)

Kissner vs. Harry, 581 U.S. 967 (2017) (Reh. den).

Kissner vs. Palmer, 2017 U.S. Dist. Lexis 127501

Kissner vs. Palmer, 2017 U.S. Dist. Lexis 224378

Kissner vs. Winn, 2017 U.S. App. Lexis 20004 (6th Cir. Oct. 12, 2017)

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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, B to the petition and is

☐ reported at ~~Risser v. Macaulay~~; 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 _____; 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.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was FEB 11, 2023 en banc APRIL 4, 2023

☐ 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: APRIL 4, 2023, and a copy of the order denying rehearing appears at Appendix A.

☐ 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).

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STATEMENT OF THE CASE

The charge arose from an April 9, 2002 fire at a building in OWOSSO, Michigan. One of the Business's was Michigan State Police Post

#15. The Prosecutor's theories was that the Petitioner set the building on fire for revenge for mistreatment by the state Police and also to destroy evidence from a drug raid.^①

I was found guilty on August 12, 2004. In which I appealed. In that appeal, I requested one that "I be given substitution of appellate counsel, This request was sent to the attorney herself, 35th Judicial circuit court. see APPENDIX-D. This was also sent to the Michigan Court of Appeals. This being because she refused to look into the claims of Trooper Todd Cardoza. see APPENDIX-X. She refused to send me a copy of transcripts and other documents requested. She through a legal student would only file a sentencing issue on direct appeal. see APPENDIX-D. I was remanded in *People vs. Kissner*, 2005 Mich App Lexis 3209. The 35th Judicial circuit court resentence me to a term of 11 to 20 years which is only a year less then the original sentence. which was affirmed in *People vs. Kissner*, 2007 Mich App

Footnote. 1. The state Police was not involved in the drug raid, nor did they have anything to do with evidence from that. That was OWOSSO Police Department and Shiawassee County Sheriff's Department. This theory was false and the jury was lied to.

Lexis 2165, IV. denied 480 Mich 1011 (2008).

I then filed a motion for relief from judgment, motion for an evidentiary hearing, motion for appointment of counsel in Docket No. 2004-993-FH. In August of 2008. On August 15, 2008 Judge Lostracco ordered an evidentiary hearing be held on October 6, 2008. I however was not given notice of said hearing being ordered, I was not given counsel to assistance as required by Mich. Ct. R 6.505(A). I was called out of my person call at court time and told I had a Phone call. "I took the telephone from staff and asked but did not know who it was at that time². Judge Lostracco answered and stated that this was the Date and time scheduled for the evidentiary hearing".

I began objecting to Judge Lostracco not given me counsel. Twice if not three times. I objected to the evidentiary hearing being held via telephone call. I started with objections and note being notified and having any witness's or other evidence prepared for the hearing. I was not able to question my trial or appellate about their performance. Moreover, That I was not able to have the Doctor testify to me being at the office and that I didn't commit the crime because I was at an appointment at the time. This was highly documented in my

footnote. 2. I believed that it was an emergency phone that someone was hurt or possibly dead.

brief's in the state and federal courts which has been overlooked.

There was other witnesses as well. Jeff L. Space, Ellen Wilson, Gena Kissner^③, Doctor. Judge Lostracco denied over objection's to appoint counsel and to hold the evidentiary hearing with witness's. I then filed for reconsideration pursuant to Mich. Ct. R 2.119(F), which Judge Lostracco denied as a second or successive motion for relief from judgment pursuant to Mich. Ct. R 6.502(G)(2). I then filed leave to appeal challenging the Judge's decision which was denied in *People vs. Kissner*, 2009 Mich App Lexis 2921, IV, denied 488 Mich 852 (2010). APPENDIX - H, and I.

On December 1, 2010 I filed my Petition for writ of habeas corpus *Kissner vs. Berghuis*, No 4:10-CV-14759. See APPENDIX - E. I then moved for an evidentiary hearing and amend habeas corpus *Kissner vs. Berghuis*, 2013 U.S Dist. Lexis 91688. This request was denied. I then filed for stay and abeyance. *Kissner vs. Berghuis*, 2013 U.S Dist. Lexis 116774.

I then filed my second motion for relief from judgment pursuant to Mich. Ct. R 6.500 et seq. This was pursuant to "Newly discovered evidence / wrongfully withheld evidence". See *Kissner vs. Palmer*, 2016 U.S Dist. Lexis 22775 * 4-7, APPENDIX - G. Judge Lostracco heard one issue.

Footnote. 3. Gena Kissner and Ellen Wilson both passed away before a correct evidentiary hearing. I don't know were the Doctor is at at this time. Believe the name is "vanderwall".

raised. This was denied under the wrong standards as seen in *People vs. Swain*, 499 Mich 920 (2016). See *People vs. Kissner*, No. 04-993-FH (Shiawassee County Circuit Court Jan. 17, 2014), leave to appeal denied *People vs. Kissner*, 2014 Mich App Lexis 2812, lv. denied 497 Mich 906 (2014), rec. denied 497 Mich 985 (2015).

I then returned and filed to lift stay and abeyance in *Kissner vs. Palmer*, 2015 U.S. Dist. Lexis 194859 which also had another motion for an evidentiary hearing and motion for appointment of counsel these were denied. APPENDIX-E. On Feb. 25 2016 the Eastern District of Michigan - Judge Mark A. Goldsmith denied writ of habeas corpus. *Kissner vs. Palmer*, 2016 U.S. Dist. Lexis 22775, APPENDIX-G, COA denied at *Kissner vs. Palmer*, 826 F.3d 898 (6th. cir. 2016) en banc. denied No. 16-1320 (6th. cir. Sept. 13, 2016), cert. denied sub nom *Kissner vs. Harry*, 580 U.S. 1125 (2017), reh. denied 581 U.S. 967 (2017).

In 2017 I filed a 60(b) motion.^④ See *Kissner vs. Palmer*, 2017 U.S. Dist. Lexis 127501, COA denied *Kissner vs. Haas*, 2018 U.S. App Lexis 35728 (6th. cir. Feb. 8, 2018). In this motion for relief from Judgment "Two Affidavits" were filed one by April Louise Teremi and Joan L. Kinney. In which both state that "State Trooper Det/sgt Mark Pendergraff" and "Timothy Coolidge Det/sgt"^⑤ that they both attempted to get April

Footnote. 4. Fed. R. Civ. P. 60(B).

Footnote. 5. Both Det/sgt Pendergraff and Coolidge are State Police officers investigating the arson at Post 15.

to say that the Petitioner committed the crime and attempted Joan her mother to get her to say it to. See APPENDIX-E; Kissner vs. Palmer, 2017 U.S Dist. Lexis 127501 * 2-4. I have since then filed three more motions for relief. That bring to the denial here and denial of COA and en bang. Kissner vs. Macauley, No. 22-1987 (6th Cir. Feb. 14, 2023, and April. 4, 2023). The District Court Judge Mark A. Goldsmith ruled on the Motion for relief from Judgment. See APPENDIX-E; Kissner vs. Palmer, 2022 U.S Dist. Lexis 187421.

I filed this motion for relief from Judgment pursuant to Fed. R. Civ. P 60(B)(6) and 60(D)(1). Judge Mark A. Goldsmith heard the Motion and denied the motion under rule Fed. R. Civ. P. 60(B), (1). "which may not be filed more than an year after entry of the judgment, or order, or the date of proceeding," not the grounds of "for any other reason that justifies relief -- extraordinary circumstances" as stated in Buck vs. Davis, 580 U.S 100 (2017); Gonzalez vs. Crosby, 545 U.S 524 (2005). See Kissner vs. Palmer, 2022 U.S Dist. Lexis 187421, aff'd in Kissner vs. Macauley, 2023 U.S App. 3526 * 2-5, COA denied, en bang. denied at 2023 U.S App. Lexis 8001.

The District Court Judge Goldsmith on his own construing of the Motion under Fed. R. Civ. P 60(B)(1). which mandated filing within one year. Thus, Judge Goldsmith was "clearly erroneous and abused his discretion in his above ruling". See cf. Buck, supra; Gonzalez, supra.

In this motion for relief from Judgment pursuant to Fed. R. Civ. P 60(B)(6), and 60(D)(1). I asked the court to review its prior

denial of writ of habeas corpus as it was based on a misapplication and misconstrued fact of law. Thus, its denial of habeas corpus was clearly erroneous and abuse of discretion.

In this 60(B)(6) and 60(B)(1). I argued that: "The Judge cannot Procedural default a claim of actual innocent and Abused its Discretion in denying motion's for an evidentiary hearing" ©

The District court denied writ of habeas corpus based only on the defective denial of evidentiary hearing in the state court to to which was erroneously held and denied.

The District court used the wrong view as well during the view of habeas corpus as it used "Post-Antiterrorism and Effective Death Penalty Act" (AEDPA) when it should have used "Pre-Antiterrorism and Effective Death Penalty Act" (AEDPA) which would be under the review of de novo as the state Trial did not correctly review the "merits of the federal constitutional claims" when it defectively heard the issues and denied the issues without any -witnesses questions asked of them as to the issues and negated to review

Footnote. 6. This being because the state trial court ordered an Evidentiary hearing to be held on Oct. 6, 2008 but ~~the~~ failure to notify, denied witnesses, question trial and Appellate counsel. Furthermore, To correctly review ~~the~~ documents that I was at a doctor's appointment at the time the crime happened.

the medical records as to the Doctor appointment to which I was at, at the same time the crime was committed which by law makes me "factual-actual-innocent" of the crime and not merely "legal-actual-innocent" as the District Judge ruled.

The District Court Judge Goldsmith and Sixth circuit court of Appeals were "clearly erroneous and clearly abused its discretion" when denying writ of habeas corpus and COA in the first place but more so when it changed my "for any other reason for relief -- extraordinary circumstances", pursuant to Fed. R. Civ. P. 60(B)(6); Buck, supra; Gonzalez, supra, to the rule pursuant to Fed. R. Civ. P. 60(B)(1) which mandates to be filed within one year. There is no law to which the Petitioner can file on this fact that the District Court Judge can change the relief in which I file under when it comes to the Fed. R. Civ. P. Thus, can only be seen as "abuse of discretion, and clearly erroneous."

REASONS FOR GRANTING THE PETITION

1. Because of the "manifest injustice, fundamental miscarriage of justice the abuse of discretion by the District Court Judge made in it's clearly erroneous review of the writ of habeas corpus and in the 60(B)(6) motion.

Black's Law Dictionary defines the "Manifest Injustice" to Mean: "An error in the trial court that is direct, obvious, observable". BLACK'S LAW DICTIONARY p.982 (8th. Ed. 2004).

The failure to grant relief in Petitioner's case did result in the suspension of the writ, in clear violation of the United States Constitution Article I, section 9, clause 2: (The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require it). See United States vs. Hayman, 342 U.S. 205, 223 (1952).

In Shinn vs. Ramirez, 142 S.Ct 1718, 1734 (2022), this court ruled:

"under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise ~~not~~ consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."

This court has also held that a prisoner who "negligently failed" to develop the state-court record must satisfy Coleman's "cause-and-prejudice standard" before a federal court can

hold an evidentiary hearing. *Keeney vs. Tamayo-Reyes*, 504 U.S. 1, 9 (1992). See also *Williams vs. Taylor*, 529 U.S. 362, 395-397 (2000); *Holland vs. Jackson*, 542 U.S. 649, 650-651 (2004) (per curiam).

In *Harris vs. Nelson*, 394 U.S. 286, 291 (1969), this Court stated:

"It is now established beyond the reach of reasonable dispute that the Federal Court's not only may grant an evidentiary hearing to applicants, but must do so upon an appropriate showing. *Townsend vs. Sain*, 372 U.S. 293, 313 (1963); *Brown vs. Allen*, 344 U.S. 443, 464 n.19 (1953). And this court has emphasized, taking into account the office of the writ and the fact that the Petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his Petition, that a habeas corpus proceeding must not be allowed to founder in a 'procedural morass'. *Price vs. Johnston*, 334 U.S. 266, 269 (1948).

In *Frank vs. Mangum*, 237 U.S. 309, 346 (1915) (Hughes, J., dissenting), stated:

"Habeas corpus cuts through all forms and goes to the very tissue of the statute. It comes in from the outside... and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a

person in custody changes that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This court has insistently said that the power of the federal court to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves; "The language of Congress, the history of the writ, the decisions of this court, all made it clear that the power of inquiry of federal habeas corpus is plenary." *Harris, supra* at 292 (quoting *Townsend vs. Sain*, 372 U.S. 293, 312 (1963)).

Now as seen in APPENDIX - D. "I filed a motion for relief from Judgment, motion for an evidentiary hearing, and motion for appointment of counsel." This was Docketed on August 15, 2008, "and on the very sameday", the State trial court - Judge Lostracco ordered that an evidentiary be held on October 6, 2008. ^⑦

without given any notice to me of said order see APPENDIX-AA. I was unable to prepare for the evidentiary hearing, i.e., "Question either Trial or Appellate counsel as to their performance in my

Footnote. 7. Mich. ct. R 6.508(C) "Govern's motion for an evidentiary hearing". Mich. ct. R 6.505(A) "Govern's appointment of counsel, 'In part states [counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held]'"

case, I could not prepare any motions to produce witnesses at that hearing such as Doctor Vanderwell as to the medical records which shows me in an appointment with him at the time of the crime, Jeff L. Space, who at that time would take me to my appointments, was unable to call Ellen Wilson as to Trooper Todd E. Cardoza being a part of the team in the search warrants who found evidence used at trial. See APPENDIX-X.

I objected several times during the "Telephone call evidentiary hearing" for violation of Mich. Ct. R 6.505(A), and (B). These objections were overruled by the state trial court - Judge Lostracco. This was a critical defect in taking any evidence into the record by Judge Lostracco and "therefore could not have been ruled on the merits". See APPENDIX-G.

I have attempted several times to correct that defective hearing in both the state courts and federal courts. See APPENDIXES-H, I, J, K, L, M, N, and O. I've filed three motions for an evidentiary hearing before the District court Judge Mark A. Goldsmith. All have been denied. See APPENDIX-E.

One of the main questions here is "does the Petitioner need to show cause and prejudice under the rule of Keeney vs. Tamayo-Reyes, 504 U.S. 1, 9 (1992) or is he entitled to an evidentiary hearing pursuant to Townsend vs. Sain, 372 U.S. 293, 312 (1963).

This court has reaffirmed time and again that "habeas corpus has traditionally been regarded as governed by equitable principles". Fay vs. Noia, 372 U.S. 391, 438 (1963) quoting United States vs. Balid,

344 U.S. 561, 573 (1953)).

The correct evidentiary hearing in this matter with witnesses and documents would show "material evidence that is critical to my innocence. See e.g., *Schlup vs. Delo*, 513 U.S. 298, 324, 328, 329, and 332 (1995); *Murray vs. Carrier*, 477 U.S. 478, 496 (1986). See also *Sawyer vs. Whitley*, 505 U.S. 333, 336 (1992). This being (a) "critical Brady-Napue material. Cf. *Brady vs. Maryland*, 373 U.S. 83, 87 (1963); *Napue vs. Illinois*, 360 U.S. 264, 269 (1959). See also *Smith vs. Cain*, 565 U.S. 73 (2012); *Strickler vs. Greene*, 527 U.S. 263 (1999); *Kyles vs. Whitley*, 514 U.S. 419, 421, 432, 434, 438, 444, and 449 (1995); *United States vs. Bagley*, 473 U.S. 667, 682 (1985); *People vs. Chenault*, 495 Mich 142 (2014); *People vs. Holly*, 129 Mich App 405, 415-416 (1983); *People vs. McCarver (on Remand)*, 87 Mich App 13, 15 (1978), see also *Canion vs. Cole*, 115 P.3d 1261, 1264 (Ariz. 2005); *Mooney vs. Holohan*, 294 U.S. 103, 112, 115 (1935). See further, *McGee vs. McFadden*, 139 S.Ct. 2608 (2019) (Sotomayer, J., dissenting); *Giglio vs. United States*, 405 U.S. 150, 153 (1972), and *Coe vs. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). This based on the withholding of the information of Trooper Todd E. Cardoza who was there at the Post the morning the fire started said several witnesses at trial but left after the fire broke out. Det/Sgt. Mark Pendergraff who investigated the arson of his very own state police post. "stated at trial that he investigated everyone in the post and none of would have reason to start the fire. But left any information as to Trooper Cardoza and him finding supposed evidence at the Petitioner's mother house over a year after the fire and after

the Petitioner was sent to prison on another matter for supposedly violating probation. This was later shown to be fake.

In *Brown vs. A.G of N.M.*, 2023 U.S Dist Lexis 25497 *10, the Court stated:

"I can hold an evidentiary hearing 28 U.S.C § 2254(d); *Townsend vs. Sain*, 372 U.S 293, 312 (1963). To warrant such a hearing, the Petitioner must show that the hearing held in state court was not fair and adequate."

The following circuits agree. *Teti vs. Bender*, 507 F.3d 50, 60-61 (1st. cir. 2007); *Nieblas vs. Smith*, 204 F.3d 29, 31-32 (2d. cir. 1999); *Palmer vs. Hendricks*, 592 F.3d 386, 392-393 (3d. cir. 2010); *Juniper vs. Zook*, 876 F.3d 551, 563-564 (4th. cir. 2017); *United States vs. Batamule*, 823 F.3d 237, 248-249 (5th. cir. 2016); *Kerr vs. Thurmer*, 639 F.3d 315, 331 (7th. cir. 2011); *Middleton vs. Roper*, 759 F.3d 831, 831-832 (8th. cir. 2014); *Jurado vs. Davis*, 12 F.4th 1084, 1102 (9th. cir. 2021).

The evidentiary hearing held by state trial court - Judge Lastracco can not be seen fair and adequate by any means. The above laws are true and correct to this fact. The ordering of the evidentiary hearing on August 15, 2006 was defective and unfair from the start and that fact continued to October 6, 2008 when I started my objection to which no court to date has corrected.

In *Martinez vs. Ryan*, 566 U.S 1 (2012), this Court held:

"... The same would be true if the state did not appoint an attorney for the initial-review collateral proceeding." see also

Trevino vs. Thaler, 569 U.S. 413 (2013).

The trial court - Judge Lostracco ordered an evidentiary hearing pursuant to Mich. Ct. R 6.508(c), but abusively and erroneously denied to following Mich. Ct. R 6.505 (A), and (B). This furthermore over objections on the record. This therefore, violated the "equal protections of law", or "equal protection of the court rules". Now "it is well settled that the Fifth Amendment's Due process clause encompasses equal protection principles [of the Fourteenth Amendment]". *Mathew vs. De Castro*, 429 U.S. 181, 182 n.1 (1976). See also *Weinberger vs. Salfi*, 422 U.S. 749, 768-770 (1975). The essence of equal protection is that similarly situated persons be treated alike. *City of Cleburne vs. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Classification implicating a suspected class, such as race, or burdening a fundamental right are subject to a strict scrutiny analysis. *City of Cleburne*, supra at 440; see also *Clark vs. Jeter*, 486 U.S. 456, 461 (1988). Classifications which burden neither a fundamental right nor target a suspect class will be upheld so long as they bear a rational relationship to a legitimate objective. *Romer vs. Evans*, 517 U.S. 620, 631 (1996); *Heller vs. Doe*, 509 U.S. 312, 319-320 (1993). See also *Yick Wo vs. Hopkins*, 118 U.S. 356, 368-369, 373-374 (1886). "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection of the individual against arbitrary action of government". *Dent vs. West Virginia*, 129 U.S. 114, 123 (1889). The essence of due process is the opportunity to be heard. The Mich. Ct. R 6.505 (A) is a creation of the State Supreme Court and thus the liberty that it may

hold for one equally implies to all others. This means equally protected by law as seen in APPENDIXS - P, Q, R, S, T, U, V, and W. To which is state case law that mandates a remand for a new evidentiary hearing when a court violates Mich. Ct. R 6.505(A). However, In this case, that never happened. No court of the state of Michigan would correct the defective hearing that it has in other cases in which this violation has accord. In all it is clear I never received a full, fair, and adequate evidentiary hearing in the state courts as to the evidence that shows I could not be in two places at once "in the Doctor's office for an appointment and 20 to 30 minutes away starting a fire at the sametime", but also counsels failure to investigate the matter for possible substantial defenses or issues on appeal, I did not have the material evidence as to Trooper Cardoza and the testimony of Det/Sgt Pendergraff which would show reasonable doubt as to testimony at trial, Furthermore, The question of Det/Sgt Pendergraff being impartial in the investigation as he was out of the Post that burned down and his relationship with the officers-Troopers in that Post.

In Mich. comp. Law 750.483a(5)(a) states:

" A person shall not do any of the following... knowingly or Intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding.

The evidence of Trooper Todd E Cardoza was material evidence that was concealed from the jury and me at the hands

of Det/sgt Pendergraff more so he committed perjury to the fact no one else would have reason to start the fire. But the problem of Trooper Cardoza was known only to law enforcement - Det/sgt Pendergraff.

Furthermore, the question that needs to be answered the most is what all evidence and testimony was concealed by Judge Lostracco when conducting the defective evidentiary hearing on October 6, 2008 when Doctor Vanderwell, Jeff L. Space, Fayth E. Space, Gena Kissner, and Ellen Wilson was not called. No the following evidence came forward in the form of two affidavits one by April Teremi and the other Joan Kinney as to Det/sgt Pendergraff who was trying to make two people make false statements as to the Petitioner committed the crime. This raises the question of how many other witnesses that testified against Petitioner testified falsely at the hand of Det/sgt Pendergraff that the Petitioner committed the crime.

Based on all the material withheld from an adequate record shows by more than a guess that the Petitioner has produced all the evidence that shows he's actually innocent of this crime. The Doctor appointment records show that only.

"When the courts interpret a court rule, the court apply the rule of statutory interpretation. *CAM Constr vs. Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553 (2002). Just as

in statutory interpretation, the goal is to give effect to the intent of the authors. *Wilcoxon vs. Wayne Co Neighborhood Legal Servs.*, 252 Mich App 549, 553 (2002). We begin with the language of the rule. *Id.* We begin with the language of the rule, If the language is clear and unambiguous there is no further interpretation is allowed. *CAM constr. supra* at 554.

Michigan court Rule 6.505(A) states clearly:

"Appointment of counsel'. If the defendant has requested appointment of counsel, and the court has determined that the 'defendant is indigent, the court may appoint counsel for the defendant at any time during the proceeding'. under this subchapter. [counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held']".

There is no doubt that the court ordered an evidentiary hearing be held on October 6, 2008. SEE APPENDIXS - D, G, M, N, O, and AA. See also *People vs. Kissner*, 292 Mich App 526, 542 n.5 (2011) (quoting Mich. ct. R 6.505(A)).

The District court Judge Goldsmith does not even deny that the state court conducted a defective evidentiary hearing. SEE APPENDIX - G.

The petitioner however, because the state court failed to follow the rule for an evidentiary hearing denied the Petitioner of equal protection of laws and due process of law when the court conducted an erroneous hearing and failed to hear any arguments.

But further denied the Petitioner to properly build up his case for proper relief in that court or others, i.e., failed to properly hear arguments, failed to properly review evidence submitted, failed to allow time to obtain witnesses to testify, it also denied me my right to properly present evidence as to my actual innocences in this matter.

Both Strickland and Brady claims use the same standard: "reasonable probability". Strickland vs. Washington, 466 U.S. 668, 693-694 (1984); Kyles, *supra* at 434. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. See e.g., Higgins vs. Renico, 470 F.3d 624, 634 (6th Cir. 2006).

"The very premise of our adversary system of criminal justice is 'that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free'". Herring vs. New York, 422 U.S. 853, 862 (1975).

Because of the defective evidentiary hearing in the state brings up the question of "Did the trial court actual adjudicate the habeas corpus claims on the merits"? See e.g., Stermer vs. Warren, 959 F.3d 704, 722 (6th Cir. 2020).

With the critical Brady material that was withheld with the lack of investigation by trial constitute constructive denial of trial counsel. United States vs. Cronk, 466 U.S. 648, 659 (1984). The failure to investigate and obtain critical information that the Petitioner was at a doctor's appointment divested the Petitioner of a alba to the crime or actually innocent. This is clearly ineffective assistance of trial counsel because it denied the

Petitioner of a substantial defense. see e.g., *Schlup, supra*; *Reed vs. Texas*, 140 S.Ct 686, 689-690 (2020); *House vs. Ball*, 547 U.S 518 (2006); *Dartke vs. Haley*, 541 U.S 386 (2004); *Bousley vs. United States*, 523 U.S 614 (1998); *Herrera vs. Collins*, 506 U.S 390 (1993); *Sawyer, supra*; *Murray, supra*; *Kuhlman vs. Wilson*, 477 U.S 436 (1986).

As this court has said "Indeed, concern about injustice that results from the conviction of an innocent person has long been the core of our criminal justice system; That concern is reflected, for example, in the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Schlup, supra* at 325 (quoting *In re Winship*, 397 U.S 358, 372 (1970)).

In *Marbury vs. Madison*, 5 U.S 137, 163-165 (1803), this court laid down some lofty language:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of law, whenever, he receives an injury. One of the ~~first~~ first duties of government is to afford that protection.... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right... can it be imagined that the law furnishes to the injured person no remedy? It is not believed that any person whatever would attempt to maintain such a proposition."

In *Reno vs. Flores*, 507 U.S. 292, 318-319 (1993) (O'Connor, J., concurring) stated:

" Tradition is of course one serious consideration in judging whether a challenged rule or practice, or the failure to provide a new one, should be seen as violating the guarantee of substantial due process as being arbitrary, or as falling wholly outside the realm of reasonable government action."

In *Poe vs. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) stated:

" We recognize the value and lessons of continuity with the past, but as Justice Harlan pointed out, society finds reasons to modify some of its traditional practices."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Danald E. Nivv

Date: *April 28, 2023*