No. 25-24-7385

ORIGINAL

In The
SUPREME COURT OF THE UNITED STATES

LUSTER PERNELL BURNS, JR.,
Petitioner,

v.

JEFF TANNER, Warden
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Luster Pernell Burns, Jr., #334598
Petitioner, *in pro per*[*]
Macomb Correctional Facility
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[*] This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

QUESTIONS PRESENTED

I. **DID THE PROSECUTOR ENGAGED IN INTENTIONAL MISCONDUCT IN A PREVIOUS TRIAL WHICH GOATED THE DEFENSE INTO MOVING FOR A MISTRIAL, WHICH BARRED RETRIAL IN THIS CASE PURSUANT TO DOUBLE JEOPARDY?** US CONST, AMS V, XIV; MICH. CONST, 1963, ART 1, §§ 15, 17, 20.

II. **WAS PETITIONER DENIED A FAIR TRIAL ON THE GROUND OF JUROR MISCONDUCT, WHERE A DELIBERATING JUROR WAS EXPOSED TO EXTRANEOUS INFLUENCES, WHICH CREATED A SUBSTANTIAL PROBABILITY THAT IT COULD HAVE AFFECTED THE JURY'S VERDICT, AND THE JUDGE ABUSED HER DISCRETION BY ALLOWING THE JUROR TO CONTINUE TO DELIBERATE WITH THE OTHER JURORS WITHOUT HOLDING A HEARING PURSUANT TO *REMMER V UNITED STATES*, 347 U.S. 227 (1954)?** US CONST, AMS V, VI, XIV; CONST, 1963, ART. 1, §§ 17, 20?

III. **WAS PETITIONER DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED ON THE BASIS OF INSUFFICIENT EVIDENCE?** US CONST, AMS V, XIV; CONST, 1963, ART. 1, §§ 17, 20?

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

ISSUES PRESENTED BY PETITIONER IN HIS STATE AND FEDERAL BRIEFS

PETITION APPENDIX INDEX

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutions

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Luster Pernell Burns, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The final order of the United States Court of Appeals, 6th Circuit, denying a rehearing (May 7, 2025), appears at APPENDIX A to the petition and is reported at *Burns v Tanner*, 2025 U.S. App. LEXIS 11117, (6th Cir., Case No. 25-1119). The final order of the United States Court of Appeals, 6th Circuit, dismissing the appeal (March 21, 2025), appears at APPENDIX B to the petition and is reported at *Burns v Tanner*, 2025 U.S. App. LEXIS 6703, (6th Cir., Case No. 25-1119). The final opinion and order of the United States District Court - E.D. Mich., denying the motion for an extension of time to file a notice of appeal appears as APPENDIX C to the petition and is reported at *Burns v Tanner*, 2025 U.S. Dist. LEXIS 22818, 2025 WL 795777, Case No. 4:23-cv-13223, (E.D. Mich., Feb. 7, 2025). The final opinion and order of the United States District Court - E.D. Mich., denying the petition for writ of habeas corpus and declining to issue a certificate of appealability, and granting leave to appeal *in forma pauperis* appears as APPENDIX D to the petition and is reported at *Burns v Tanner*, 2024 U.S. Dist. LEXIS 208328, 2024 WL 4806808, Case No. 4:23-cv-13223, (E.D. Mich., Nov. 15, 2024). The final order from the Michigan Supreme Court denying Leave to Appeal appears at APPENDIX E and is published at *People v Burns*, 2022 Mich. LEXIS 433, 509 Mich. 866, 970

N.W.2d. 332, (Mich. Sup. Ct. No. 163604). The final opinion of the Michigan Court of Appeals affirming Petitioner's convictions, but vacating his sentences and remanded for resentencing appears at APPENDIX F and is published at *People v Burns*, 2021 Mich. App. LEXIS 4993, (Mich. Ct. App., No. 349102, Aug. 19, 2021). (See Appendix, filed under separate cover).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its final order on May 7, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. XIV: 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.

28 U.S.C. 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree.

28 U.S.C. 1915(a)(1): Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

STATEMENT OF THE CASE

PROCEDURAL HISTORY AND STATEMENT OF FACTS

SUMMARY

Petitioner Luster Pernell Burns, Jr. (hereinafter "Petitioner") commenced this action as a State prisoner in the District Court pursuant to 28 U.S.C. § 2254, by filing a petition for A Writ of Habeas Corpus on December 2, 2023. On November 15, 2024, District Court Judge F. Kay Behm entered an Opinion and Order denying the Petition for a Writ of Habeas Corpus with prejudice, declining to issue a Certificate of Appealability, and granting Leave to Appeal *In Forma Pauperis* (**See APP. C, Opinion and Order**). Judgment was entered on the same date.

The final order of the United States Court of Appeals, 6th Circuit, denying a rehearing was issued on May 7, 2025. (**See APP. A, Order**). The final order of the United States Court of Appeals, 6th Circuit, dismissing the appeal was issued on March 21, 2025. (**See APP. B, Order and Judgment**). Judgment was entered on the same date.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Petitioner Luster Pernell Burns (hereinafter "Mr. Burns") was convicted, following a jury trial, on one count each of: first-degree criminal sexual conduct (multiple variables), M.C.L. 750.520b, and tampering with evidence, M.C.L. 750.483A6B (criminal case punishable by more than 10 years). [1]

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[1] Mr. Burns was acquitted of felonious assault, M.C.L. 750.82, and felony firearm, M.C.L. 750.227b. A separate count of felon in possession of a firearm, M.C.L. 750.227f, was dismissed by the Court.

Mr. Burns was sentenced to a term of 15 to 60 years for first-degree criminal sexual conduct, along with a consecutive 10 years for tampering with evidence (S, p. 39). A motion for new trial was denied (Resent/New Trial, Vol I, pp. 5-13), and the 10-year term for tampering with evidence was later amended to a 6-10 years term for tampering with evidence to comply with the indeterminate sentencing scheme (Resent/New Trial, Vol I, p. 4; Resent/New Trial, Vol II, pp. 16-17).

SUMMARY OF THE ARGUMENTS

Following jury selection, the first witness was Brandi Young, who lives in Grand Rapids and was introduced to Mr. Burns (known to her as "Fresh") by Jeffrey Combs (T, Vol III, pp. 116-1 17).[2] She indicated that in May of 2013, Mr. Burns invited her to his house in Detroit for her birthday, and that he picked her up at the bus station with his friend (T, Vol III, pp. 120-123). They purchased liquor from a nearby store, and she later refused to drink the liquor because the liquid appeared to be black in color, while his drink was brown (T, Vol III, pp. 130-133). After Mr. Burns offered to buy another bottle, she, an unknown male, a Caucasian female and another female went back to the store and bought more liquor (T, Vol Ill, pp. 136-137).

[2] Vol I and Il refer to jury selection conducted on January 22, 2019 and January 23, 2019; Vol Ill refers to jury selection and testimony taken on January 24, 2019; Vol IV refers to testimony taken on January 28, 2019; Vol V refers to testimony taken on January 29, 2019; Vol VI refers to testimony taken on February 1, 2019; Vol VII refers to proceedings conducted on February 4, 2019; and S refers to the initial Sentencing Hearing conducted on February 26, 2019, and Resent/New Trial, Vol I and Il refer to Resentencing and New Trial Hearings conducted on May 16, 2019 and May 17, 2019.

They drove around before returning home and Ms. Young drank a "couple of shots", threw the rest of the drinks out the window, and was in control of the bottle the rest of the night (T, Vol III, pp. 138; 153). After returning, the unknown man and Caucasian female went upstairs to a room, while she went upstairs and laid on a small couch (T, Vol III, p. 140). She indicated that Mr. Burns came in and she stated he could sleep in the room while she stayed on the couch (T, Vol III, p. 143). At that point, she heard the "cocking" of a gun and purportedly observed Mr. Burns holding a black handgun (T, Vol III, p. 144). He indicated that he wasn't playing, and he purportedly ordered her to remove her underwear and get on the bed (T, Vol III, p. 145). She claimed that he put his penis in her vagina at that point (T, Vol III, p. 147). She stayed in the bed until the next morning, and she retrieved her phone and sent a text to a family member, saying she wished to return to Grand Rapids (T, Vol III, p. 148).

She never relayed information about being raped, she did not contact 911 to report a crime, and she did not try to leave the apartment, despite passing the front door (T, Vol IV, pp. 77-80). She claimed that Mr. Burns told her to take a bath, and that she went into the tub but avoided washing her bottom area (T, Vol III, pp. 150-154). She also indicated that Mr. Burns took her to the bus station at her request, and purchased her a ticket (T, Vol III, pp. 155-156). After Mr. Burns left, Ms. Young approached the ticket lady and asked if the security cameras were working, and she called 911 after a security guard noticed she was crying (T, Vol III, pp. 150-158). Two officers arrived and she led them to the house (T, Vol III, pp. 159-160). After they apparently made contact with Mr. Burns, the officers took her to the hospital and a rape kit was performed (T, Vol III, pp. 159-166). An officer also recorded her

statement (T, Vol III, p. 166). Ms. Young returned to Grand Rapids and was contacted four years later by Detective Pat Mough (T, Vol III, pp. 168-169). She went to the police station, identified "Fresh" in a lineup, and gave another written statement (T, Vol III, pp. 169-173).

By the time of the third trial in this matter, Ms. Young had given statements to the first responders, medical personnel, a sexual assault unit, and had testified at two trials and preliminary examinations (T, Vol III, pp. 237-238). The facts as related by Ms. Young varied each time she retold the series of events. In a statement she stated she was living with her friend Markita Martin, but testified she lived with a sister (T, Vol III, p. 176; Vol IV, p. 32). She indicated in a statement that the unknown male was named "Jay", but testified that she did not know his name (T, Vol III, p. 182). In a statement to the sexual assault unit, Ms. Young indicated she came to Detroit to visit Mr. Burns on four occasions, but one time was with friends before Mr. Combs was released from prison (T, Vol. IV, pp. 21-23; 27). She told police she had on red pajama pants and a shirt, but testified this referred to what she was wearing after the incident insisting that she didn't know what she wore during the incident (T, Vol. IV, pp. 42-47). She testified she wore a green dress throughout the rape, and she later posted a picture of herself smiling while wearing the dress on Facebook (T, Vol IV, pp 48-50).

She never mentioned being raped in the posting, despite being active on social media and posting her activities almost every day (T, Vol. IV, p. 50). She also indicated that she was never alone in the house, and while she claimed that she became friendly with the female who was in the house, she never gave the contact number for her to police, despite claiming that they exchanged numbers (T, Vol. IV,

pp. 41-46). She told police that Mr. Burns said, "Brandi go in my room because Jay is 'bout to have company", but testified that that never happened (T, Vol. IV, pp. 64-65). She denied telling the nurse the name of the street Burns lived on, because she didn't know it; and denied telling the nurse she tried to grab the gun (T, Vol. IV, pp. 66-67; 102).

She also denied telling the nurse that Burns made her "get on top" and that he licked her private parts insisting that she signed her statement without actually reading it (T, Vol. IV, pp. 68; 138). She insisted in her testimony that she never "got on top", that nobody licked her, and that she never attempted to grab the gun (T, Vol. IV, pp. 71-73; 105-106). She further insisted that her niece was calling her during the incident, which indicated that she had her phone during the incident (T, Vol. IV, p. 77). She told the police in her statement that she went to sleep after the incident, but insisted that never happened (T, Vol. IV, p. 82). She chose to spend her 21st Birthday with Mr. Burns instead of friends or family, but insisted they were not in a relationship (T, Vol. IV, p. 89); and further testified that there were things in the nurse' s statement that were not true (T, Vol. IV, pp. 98; 140).

The parties stipulated to the lab reports (T, Vol. IV, p. 164).

John Johnson of the Michigan State Police Lansing Forensic Laboratory was qualified as an expert in body fluid identification and forensic DNA, and testified that vaginal swabs were positive for male DNA and matched to Mr. Burns; but indicated that DNA didn't necessarily have to come from sperm, and that it could have come from other contact (T, Vol. IV, pp. 183; 186-190). He also indicated that anal swabs were positive for DNA, but could have been the result of seeping back

from vagina to anus, and also could have been the result of consensual sex (T, Vol. IV, p. 192).

Julie Groat, a Certified Sexual Assault Nurse Examiner, an expert in the area of sexual assault nurse examination, testified that Ms. Young claimed the perpetrator made her "ride on top of him", licked her vagina, and that she attempted to grab the gun (T, Vol. V, pp. 17-18). She also indicated that Ms. Young was calm and soft spoken throughout the exam and interview, the vaginal injury was consistent with consensual sex, and there were no other injuries (T, Vol. V, pp. 22-57). Ms. Groat was careful when writing down what Ms. Young told her, and that noting was added or deleted (T, Vol. V, pp. 41-42). She insisted that Ms. Young told her that she straddled the perpetrator, tried to grab the gun, and bit the lip of the perpetrator (T, Vol. V, pp. 43-44; 55). She did not give the name "Fresh" as the perpetrator's; rather, she gave the name "Lavelle" (T, Vol. V, pp. 55-56).

Police Officer Lisa Bryson and her partner responded to the call at the Greyhound bus station on May 11, 2013, and she spoke to Ms. Young, who gave information that led to a second location on Woodhall Street (T, Vol. V, pp. 62-68). Ms. Young indicated that she had been at a party with a person named "Lavelle" or "Fresh", whom she described as 6' 2", 180 pounds, medium complexion, low haircut, with white t-shirt and red pants (T, Vol. V, pp. 69-77). After their search failed to turn up the perpetrator, weapon, or the car described by Ms. Young, the officers returned to their precinct and prepared a report (T, Vol. V, pp. 74-78).

Detroit Sgt. Jonanne Wright of the Sex Crimes Unit took a statement from Ms. Young at the hospital (T, Vol. V, pp. 84-85). Ms. Young indicated that she lived with Makia Martin, that she was sexually assaulted by a perpetrator with a gun,

who put his penis in her vagina and performed oral sex on her (T, Vol. V, pp. 87-93). Ms. Young recalled her niece was calling her during the assault (T, Vol. V, p. 100). She also indicated that the only people present in the house during the assault were herself, "Jay", and the perpetrator (T, Vol. V, pp. 102-103). She mentioned the streets Woodhall and Warren, and stated that she had been drinking and smoking weed that day (T, Vol. V, p. 106). She also mentioned that she was wearing a green dress during the incident, and that he made her get on top of him (T, Vol. V, pp. 107; 114). She also stated that after the incident, she went to sleep, and that she later sat on a couch in another room while the perpetrator slept (T, Vol. V, p. 116).

William Brewster, the officer in charge of the case in 2013, testified that he had an extremely heavy caseload in 2013, that he contacted potential witness Danielle Witherspoon by phone, and called Mr. Burns' phone number but did not receive a return call (T, Vol. V, pp. 122-134). He also indicated that he did not seek a search warrant for the house in question, and he did not try to contact Ms. Young (T, Vol. V, p. 136). He did not investigate information about the perpetrator's vehicle or the security cameras in the area, claiming that he did not have the time due to his heavy work caseload (T, Vol. V, pp. 134-138).

Melissa DeWolf testified that she met Ms. Young though hanging out with Fresh and his cousin Jimmy, whom she was dating (T, Vol. V, pp. 163-165). Ms. DeWolf arrived at the Woodhall house after dark, and Fresh and Ms. Young were standing in the driveway (T, Vol. V, p. 167). Nobody said anything about drinks being "spiked" (T, Vol. V, p. 180). They all went to the store, and Fresh and Jimmy went inside and purchased Hennessy (T, Vol. V, pp. 170-173). She did not remember Ms. Young having her own bottle, but did remember that she and Ms. Young were

drinking and smoking marijuana (T, Vol. V, p. 175). After they returned to the house, they hung out in the living room, and she and Jimmy went to his bedroom, which had a door (T, Vol. V, pp. 176-177). The next morning, she invited Ms. Young to shower at her nearby house because the tub at the Woodhall house did not have a shower head (T, Vol. V, pp. 178; 183-185). After she dropped Ms. Young off at the Woodhall house, they exchanged numbers (T, Vol. V, p. 185). Ms. Young never stated she was mad at Fresh, did not seem distressed, and she never heard from her again after that day (T, Vol. V, pp. 190-194). She further indicated that Ms. Young and fresh were romantic and friendly that night, and that she observed them hugging and kissing, implying they were together (T, Vol. V, pp. 198-200).

Patrick Moug, Wayne County Deputy assigned to the Sexual Assault Task Force, testified that he was assigned to the case in August of 2017, and that he contacted Ms. Young, who indicated that she wanted to pursue the matter (T, Vol. V, pp. 205-206; 212-213). Ms. Young agreed to be re-interviewed, which was reduced to a written summary, but Ms. Young was not given the summary to review (T, Vol. V, pp. 218-219). She also identified Mr. Burns in a photo line-up (T, Vol. V, p. 224).

Mr. Moug located Ms. DeWolf, but not the other two males that may have been at the house (T, Vol. VI, pp. 7-8). He took a buccal swab from Mr. Burns for DNA testing, and indicated that Ms. Young's phone records were no longer available due to the passage of time (T, Vol. VI, pp. 17, 24).

REASONS FOR GRANTING THE PETITION

I. THE PROSECUTOR ENGAGED IN INTENTIONAL MISCONDUCT IN A PREVIOUS TRIAL WHICH GOADED THE DEFENSE INTO MOVING FOR A MISTRIAL, WHICH BARRED RETRIAL IN THIS CASE PURSUANT TO DOUBLE JEOPARDY. U.S. CONST. AMS. V, XIV; CONST, 1963, ART 1, §§ 15, 17, 20.

Discussion:

The Michigan Constitution and the Fifth Amendment of the United States Constitution protect a criminal defendant from being placed twice in jeopardy for a single offense. See, U.S. Const., Ams. V, XIV; Mich. Const. 1963, art 1, 15. Michigan's double jeopardy provision was intended to be "construed consistently with Michigan precedent and the Fifth Amendment." *People v Szalma*, 487 Mich. 708, 715-716 (2010). The constitutional prohibition against double jeopardy bars retrial, or a second prosecution, after acquittal or conviction. *People v Smith*, 478 Mich. 292, 299 (2007). The Double Jeopardy Clause protects a person from the state making repeated attempts at obtaining a conviction for an alleged crime. *People v Aceval*, 282 Mich. App. 379, 390 (2009).

It is established Michigan law, in the context of a mistrial, that double jeopardy is not a bar to a second trial if the mistrial is declared at the behest of the defendant. *Oregon v Kennedy*, 456 U.S. 677, 672 (1982); *People v Lett*, 466 Mich. 206, 215 (2002). However, when the prosecutor and/or the police act in a manner intended to goad the defendant into moving for a mistrial, double jeopardy will bar a second prosecution. *Oregon v Kennedy*, 456 U.S. at 673-679. The misconduct must be intentional and egregious so that the double jeopardy bar outweighs the public

interest in allowing retrial. *People v Dawson*, 431 Mich. 234, 256 (1988). The purpose of the exception is to prevent the prosecution from gaining a second chance at obtaining a conviction when if not for the intentional misconduct the defendant may have succeeded in obtaining an acquittal. *Dawson, supra* at 258-259. While Michigan has not yet addressed whether this exception extends to bar retrial in a case when a defendant secures a reversal due to prosecutorial misconduct intended to prevent an acquittal that the prosecutor believes likely in the absence of the misconduct; it is logical to do so. Aceval, 282 Mich. App. at 302-303 (Murphy, J., concurring). In both the mistrial and reversal on appeal context, the prosecutor gains a second chance at convicting the defendant.

In this case, after the investigation was done into the allegations in 2017 and charges were filed, a jury trial was held against Mr. Burns in April of 2018. During the prosecutor's questioning of Patrick Moug, the officer-in charge, the following took place:

> Q. Okay. Did she tell you anything about her level of fear at that point?
>
> A. Yes. She said that she was afraid of the gun, plus also things that she had heard from the defendant before.
>
> Q. What did she tell you she had heard from the defendant before?
>
> MS. MARABLE: Your Honor, can we approach?
>
> THE COURT: You may approach. (Sidebar at the bench at 3:26 p.m.) (Back on the record at 3:28 p.m.)
>
> THE COURT: You may continue.
>
> MS. BROOKINS: Thank you, Judge.
>
> DIRECT EXAMINATION (cont.) BY MS. BROOKNS:

Q. I can't remember the exact question I asked you. She had told you information about why she was fearful of him?

Q. What did he say to her in the past that caused her to be fearful?

A. He made reference to somebody that had snitched at court, and that in quotation, this was her words, that he said, "I put the niggah in the trunk."

(Jury Trial, 4/27/18, pp 172-173).

Defense counsel again asked to approach, and this time put her objection to this line of questioning on the record, outside the presence of the jury:

MS. MARABLE: Your Honor, I would, at this time, like to do an oral motion for a mistrial.

When the officer-in-charge took the stand and this question came up, I asked to approach. I came to your Honor and said that I believe that she' s going to ask him questions about something dealing with a murder that she cannot ask. You asked her "Are you?" And the prosecutor said, "No. I think I know what the answer should be". You also asked, at that point, "Are you sure"? She said, "Yes. We're all professionals". We went back.

That question she asked the question and that was the answer. It is no way my client can have a fair trial after hearing that. We humbly ask, your Honor, for a mistrial.

THE COURT: Response.

MS. MARABLE: ***For prosecutorial misconduct. Because you asked her, "Does she know what it is?" She said, I'm sure.***

THE COURT: well, 1 asked her did she need to talk to her client her officer is what I said, and you said, "I think I know what he's going to say". I said, "Are you sure?"

MS. BROOKINS: Yes, Judge.

So I agree with counsel that when we were at sidebar we discussed whether or not an old homicide charge was what I was going into. I informed the Court it was not, and I informed the Court that my officer was well aware of that charge, and of

> the fact that it was not something that would be admissible and what we were going into.
>
> The question that the officer was asked was what the defendant had previously said to the victim to cause her fear. He answered the question about what the defendant said. He also included a contextual statement to put what the defendant said in context.
>
> The jury did not hear anything about the murder case. I was not expecting the contextual addition to put the answer in context.

(Jury Trial, 4/27/18, pp. 175-176) (emphasis added).

The parties continued to place their respective positions on the record, and the Court stated the motion would be held in abeyance pending a formal ruling (Jury Trial, 4/27/18, pp 176-180). On the following Monday, the Court ruled that it had no choice but to grant a mistrial based on the circumstances of the information that had been introduced as a result of the prosecutor' s questioning of her witness (Jury Trial, 4/30/18, pp. 13-15). When defense counsel asked for clarification, the Court clearly stated that it was prosecutorial misconduct that prompted the grant of the mistrial:

> MS. MARABLE: Your Honor, are you going to find prosecutorial misconduct as the underlining [basis] for the mistrial?
>
> THE COURT: ***It is the prosecutor's misconduct in this one.***

(Jury Trial, 4/30/18, p 15) (emphasis added).

However, the Court later reversed itself and stated that the mistrial was based on manifest necessity not prosecutorial misconduct and that Mr. Burns could be retried (Jury Trial, 4/30/18, pp 17-19). Defense counsel placed her objections on the record (Jury Trial, 4/30/18, pp 17-18). Based on the facts of this case and the Court's own initial ruling, defense counsel's request for a mistrial was based on

intentional prosecutorial misconduct, and as a result, the retrial that led to the convictions in this case was barred by double jeopardy.

The Court of Appeals disagreed, and held as follows:

> Burns argues that the prosecutor' s intentional misconduct led to the request for a mistrial. The trial court, however, did not find prosecutorial misconduct to be the basis for its grant of a mistrial. The court's finding in that regard is not clearly erroneous. The prosecutor asserted that she did not intend to elicit improper testimony. Instead, she told the trial court that the purpose of her question was to corroborate BY's testimony that she was afraid of Burns because of something she heard him say previously. The record reflects that during redirect examination, BY testified that Burns said that in Detroit, "they be throwing younger girls in the trunk of cars and burning them up." She testified that made her fearful because she was thinking that "he might be the one" who would do something like that. On re-cross-examination, the defense asked BY to explain when she had heard Burns make that statement, when it made her fearful, and where she was when she heard it. The defense lawyer then stated, "you didn't put that in your [written] statement," but BY testified that she "told that to the detectives." The prosecutor's question to the officer was "What did [Burns] say to [BY] in the past that caused her to be fearful." In light of BY's testimony, the prosecutor's question is not facially improper. And, although the officer's response to that question included a statement that Burns told BY that he "put that niggah in the trunk," there is nothing on the record to suggest that when the prosecutor asked the question, that was the answer that she was attempting to elicit.
>
> The court recognized this in its ruling. In response to the prosecutor's argument regarding the purpose of the question, the court stated, "I know where you're going and what you're trying to do is to corroborate her comment about the fear, but it did cross the line." Later, the court clarified that the prosecutor was "trying to corroborate why she was fearful, but [the officer] made a specific statement of what the defendant said." The court held that the officer's testimony crossed the line. Although the court went on to recite that it had warned the prosecutor that she was "getting very close to the line" with her questions and that it asked if she wanted to speak with the officer before continuing, there is nothing in the court's holding indicating that it found that the prosecutor deliberately disregarded its warning and intentionally elicited inadmissible testimony so as to goad the defense into moving for a mistrial. Instead, after Burns moved for a mistrial, the prosecutor vigorously opposed

> the motion and defended her questioning of the witness, which suggests that not only was she not trying to provoke Burns into moving for a mistrial, but she also did not want one to be granted.
>
> In sum, the prosecutor's question was proper—even if the response to the question was not. Further, contrary to Burns' argument on appeal, the record indicates that rather than goading him to move for a mistrial, the prosecutor opposed his motion. Finally, Burns moved for a mistrial and consented to it being granted. Under these circumstances, the double-jeopardy provision did not bar retrial.

(*People v Burns*, Michigan Court of Appeals No. 349102, Slip Op at 3-4).

"Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar." *Dawson, supra* at 257. Retrial is only barred if, based on the objective facts and circumstances, the trial court finds that "the prosecutor intended to goad defendant into moving for a mistrial." *Id.*

This is a case where the mistrial was provoked a due process violation that bars retrial. While the Court of Appeals seems to conclude that the prosecutor had no knowledge that her questioning would produce the answers in question, and essentially stated that, "there is nothing on the record to suggest that when the prosecutor asked the question, that was the answer that she was attempting to elicit[,][3] this does not somehow insulate the prosecutor from the intentional misconduct of its own police officer witness. It is well established that any misconduct of the police is charged to the prosecution. See, *People v Morris*, 77 Mich. App. 561, 563 (1977). As recognized by this Court, "[t]he 'goad the defendant into moving for a mistrial' standard 'calls for a finding of fact by the court . . . , an inquiry

[3] (Slip Op at 4).

for which the trial court is best suited.'" *Dawson, supra* at 258 n. 57, quoting *United States v Posner*, 764 F.2d 1535, 1539 (CA 11, 1985). While prosecutorial misconduct standing alone is insufficient to trigger double jeopardy protections; the prosecutor and the police officer witness here pushed defense counsel (and the defendant) into a corner leaving mistrial as the only escape. See, *Oregon v Kennedy*, 456 U.S. 667 (1982).

In determining the prosecution's intent, the trial court should rely on "the objective facts and circumstances of the particular case." *Dawson, supra* at 257. In this case, subsequent to the trial court' s grant of a mistrial, defense counsel argued (and the trial court initially agreed) that retrial was barred by the prosecutorial misconduct.

The trial court explained that the mistrial was caused by the prosecutor's ***intentional*** misconduct. While specifically addressing the prosecutor and her counterargument, the trial court stated as follows:

> THE COURT: ***This Court believes that the statement made by the prosecutor's witness, specifically the OIC in this case***, that the defendant and the quote being that he said to the victim "I put the niggah in the trunk" rises to a prior bad act. That it ***went beyond corroborating what the victim said because the victim never said the defendant did the act, but in fact knew of girls being put in trunks and things like that.***
>
> * * *
>
> ***That this Court, in fact, did warn that you were getting very close to the line at the bench at the request of the Defense counsel, Attorney Marable, said that you were so close to a — I want a mistrial. I said, "You're very close. Do you want to talk to your client (sic)?" Don't cross that line. And your reply was, "No". And you went right back on the record, and he made that specific statement of what the defendant did.***

(Jury Trial, 4/30/18, p 14) (emphasis added).

It was ludicrous for the Court of Appeals to hold that the prosecutor properly believed the witness' statements were going to be within the scope of admissible evidence (Slip Op at 4). As noted by the Court of Appeals, the trial court was deeply concerned by the manner in which the OIC was testifying. However, the Court of Appeals' conclusion that, "there is nothing in the court's holding indicating that it found that the prosecutor deliberately disregarded its warning and intentionally elicited inadmissible testimony so as to goad the defense into moving for a mistrial" is contradicted by the existing record. The fact that the prosecutor flat out refused to clarify her own witness' proposed testimony while outside the presence of the jury shows that her conduct was more than mere negligence; rather, the prosecutor knew all along that the inflammatory testimony would only be useful if it came out in front of the jury.

The Court of Appeals' observation that, "Burns moved for a mistrial and consented to it being granted[,]"[4] does not mean that Mr. Burns somehow waived appellate review on this issue. While it is true that "[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error", *People v Carter*, 462 Mich. 206, 215 (2000), the waiver does not apply in this case. This is not a situation where a parties to a suit "knowingly and voluntarily" waived constitutional rights that the parties knew they had. See, *United States v Agett*, 327 F. Supp. 2d 899, 903 n. 2 (ED Tenn, 2004) (noting that defendant couldn't have waived rights he never knew he had); *United States v Pree*, 408 F.3d 855, 874 (CA7, 2005) (same).

[4] (Slip Op at 4).

For a waiver to be valid, the record must show that: (1) the party had specific knowledge of the right and (2) the party made an intentional and voluntary decision to abandon the protection of that right. *People v Grimmett*, 388 Mich. 590, 598 (1972), overruled on other grounds, 390 Mich. 245 (1973). Under this standard, a knowing and intelligent waiver of an issue on appeal must be done with the requisite knowledge of the legal rights waived. Although Mr. Burns initially expressed his agreement to a mistrial in this case (Jury Trial, 4/30/18, p. 15), this was done during the time when the trial court had based the mistrial on intentional prosecutorial misconduct, which would have barred a retrial.

When the trial court later "clarified" its mistrial declaration, no inquiry was made as to whether Mr. Burns was consenting to the mistrial on this basis.

Mr. Burns' initial agreement to a mistrial did not affirmatively waive any double-jeopardy arguments against retrial. The trial court clearly found that the prosecutor's conduct was way beyond being "negligent", stating that the situation was deeply disturbing and prejudicial to Mr. Burns' case and his own decision as to whether he would testify in this case (Jury Trial, 4/30/18, p. 12). Therefore, defense counsel was coerced into making the mistrial request. Defense counsel had no other choice given the conduct in this case, because the prosecutor's conduct was not negligent, but rather intentional. As a result, the retrial and resulting convictions are a violation of Mr. Burns' constitutional rights and are barred by the Double Jeopardy Clause. See, *Lett, supra* at 215-217. Because retrial of this case should have been barred by double jeopardy, this Court must vacate the convictions and sentences in this case, and dismiss the charges with prejudice.

II. **MR. BURNS WAS DENIED A FAIR TRIAL ON THE GROUND OF JUROR MISCONDUCT, ONE OF THE JURORS WAS EXPOSED TO EXTRANEOUS INFLUENCES, WHICH CREATED A SUBSTANTIAL PROBABILITY THAT THE JUROR'S EXTRANEOUS INFLUENCES COULD HAVE AFFECTED THE JURY'S VERDICT, AND THE JUDGE ABUSED HER DISCRETION BY ALLOWING THE JUROR TO CONTINUE TO DELIBERATE WITH THE OTHER JURORS WITHOUT HOLDING A HEARING PURSUANT TO *REMMER V UNITED STATES*, 347 US 227 (1954). US CONST, AMS V, VI, XIV; CONST, 1963, ART 1, §§ 17, 20.**

Discussion:

The During deliberations, jurors may only consider the evidence that is presented to them in open court. *United States v Navarro-Garcia*, 926 F.2d 818, 820 (CA9, 1991). Where one or more of the jurors considers extraneous facts not introduced in evidence, a defendant is deprived of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment. *Hughes v Borg*, 898 F.2d 695, 700 (CA9, 1990). Mr. Burns maintains that, because the jurors in this case were potentially exposed to extraneous influences, he is entitled to a new trial, or at least a proper hearing to determine the impact of the extraneous influences on the jurors. *Smith v Phillips*, 455 U.S. 209 (1982); *Remmer v United States*, 347 U.S. 227 (1954).

In this case, after the jury had sent out a note declaring that they were deadlocked, another note was sent by the jury the following morning declaring that they had been informed that one of the jurors had discussed the case with a family member over the weekend, and that the juror "can't make a rational decision" (T, Vol. VII, p. 3). Without determining whether the entire jury had been tainted, the lone juror was merely questioned about whether he could still engage in

deliberations notwithstanding his extraneous communications with his family member (T, Vol. VII, pp. 4-8). This was error was preserved in a motion for new trial (Resent./New Trial, Vol. I, pp. 5-13), but to the extent defense counsel failed to object at trial, Mr. Burns was denied effective assistance of counsel.

In rejecting this issue, the Michigan Court of Appeals held, "[h]ere, the information provided to the trial court indicated that a juror had discussed the case with his sister and was unable to make a rational decision. To the extent that the juror's discussion of the case with his sister qualifies as an extraneous influence, the record does not demonstrate a real and substantial possibility that the discussion affected the jury's verdict." (Slip Op at 5). This ruling by the Michigan Court of Appeals is clearly erroneous. While the single juror was questioned, it was also necessary to determine whether this extraneous information was known by any of the other jurors during their deliberations. Since a full proper hearing was not conducted, the Court of Appeals erred in concluding that "***the record*** does not demonstrate a real and substantial possibility that the discussion affected the jury' s verdict." (Slip Op at 5) (emphasis added).

Because the external discussions conducted by the juror constituted extraneous information, the proper hearing was necessary in order to determine whether the information obtained "[was] substantially related to a material aspect of the case and that there [was] a direct connection between the extrinsic material and the adverse verdict." *People v Budzyn*, 456 Mich. 77, 89 (1997). As stated by this Court, the focus is on "the extent to which the jurors saw or discussed the extrinsic evidence." *Budzyn, supra* at 91.

While it appears that the jury was exposed to extraneous influences, the question is whether or not these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. *United States v Bagnariol*, 665 F.2d 877, 885 (CA9, 1981). If the Petitioner establishes this second point, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. The controlling case in this area of the law is *Remmer v United States*. In *Remmer*, the petitioner discovered after the jury had returned a guilty verdict that an unnamed person had communicated with a juror during the trial and had "remarked to him that he could profit by bringing in a verdict favorable to the petitioner." *Remmer v United States*, 347 U.S. at 227. The juror who had been contacted by this third party eventually became the jury foreman. After the juror reported the incident to the judge, the judge informed the prosecutor and the Federal Bureau of Investigation (FBI). The FBI investigated the incident and delivered its report to the judge. Neither the petitioner nor his attorney were informed of the incident. They learned of it only through newspaper accounts published after the jury' s verdict had been returned. **The U.S. Supreme Court remanded the case "to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after [a] hearing it is found to have been harmful, to grant a new trial."** *Remmer v United States*, 347 U.S. at 230.

It also determined that "[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of

the parties." *Remmer v United States*, 347 U.S. at 229. However, the principal case upon which a *Remmer* hearing is required in a case like this one is *Nevers v Killinger*, 169 F.3d 352 (CA6, 1999). In *Nevers*, the defendants were two white Detroit police officers convicted of beating an African-American suspect to death. *Nevers v Killinger*, 169 F.3d at 354-355. The case received heavy media coverage, similar to the Rodney King beating in Los Angeles. *Nevers v Killinger*, 169 F.3d at 356. After the guilty verdict was returned, several affidavits from jurors were presented, contending that other extraneous information had reached the jury during the trial and deliberations, including the allegation that the defendants had been involved in an undercover unit with a reputation for harassing young black men. *Nevers v Killinger*, 169 F.3d at 357. A member of the jury had further learned from news reports that the city was preparing for a potential riot in the event of an acquittal. *Nevers v Killinger*, 169 F 3d at 369. This court held that Nevers and his codefendant were entitled to an evidentiary hearing to have an opportunity to demonstrate "with specificity" that the jury was impermissibly tainted. *Nevers v Killinger*, 169 F 3d at 374. "When a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury." *Nevers v Killinger*, 169 F.3d at 373.

In the instant case, the outside information garnered by one of the jurors came from an outside source: **his family member**.

The information obtained from this outside source was brought into the jury room without the parties' knowledge, which is evidenced by the jurors' note alerting

the trial court to the situation. As stated above, the. Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v Phillips*, 455 U.S. at 215. See also, *United States v Walker*, 1 F.3d 423 (CA6, 1993); *United States v Hernden*, 156 F.3d 629 (CA6, 1999) (a party claiming that an improperly influenced jury returned a verdict against him must be given an opportunity to prove that claim).

Lengthy deliberations by a jury preceding the jury misconduct and a relatively quick verdict following the misconduct strongly suggests prejudice. See, *Sassounian v Roe*, 230 F.3d 1097, 1 110 (CA9, 2000). See also, *United States v Perkins*, 748 F.2d 1519, 1534 (CAI 1, 1984) (convicted defendant was entitled to new trial on grounds of juror misconduct, where one juror had injected extrinsic evidence into deadlocked jury's deliberations involving his knowledge of defendant and disputing defendant's testimony). In addition, prior to the juror being exposed to extraneous influences, the jury sent out a note indicating they were deadlocked (T, Vol. VI, pp. 127-128). A jury's difficulty in reaching a verdict, evidenced by the length of deliberations and the jury's indication to the trial judge that it was deadlocked provides a "powerful indication" that the trial error was not harmless. See, *United States v Harber*, 53 F.3d 236, 243 (CA9, 1995). See also, *Ayers v Hudson*, 623 F.3d 301, 317, n. 12 (CA6, 2010) ("[W]e note that in light of the initial deadlock by the jury, it would have been problematic for the State to assert that the constitutional error was harmless beyond a reasonable doubt."). The extraneous evidence may well have prompted the jury to convict Mr. Burns, thus depriving him of due process and a fair trial. U.S. Const. Ams. V, VI, XIV; Mich.

Const. 1963, art. I, §17. Looking at all the facts in the full context of this case, this Court must, therefore, grant a new trial or remand the matter to conduct a proper *Remmer* hearing.

In the alternative, Mr. Burns was denied his right to effective assistance of counsel by his trial attorney's failure to object to manner in which the trial court handled the situation with a proper hearing. To make a successful claim of ineffective assistance, the defendant must overcome the presumption that counsel's actions were based on reasonable trial strategy. However, counsel's behavior cannot be considered objectively reasonable if this strategy is predicated on ignorance of the law, inadequate preparation, or a misreading of the plain language of controlling legal authority.

Anderson v Johnson, 338 F.3d 382 (CA 5, 2003); *Blackburn v Foltz*, 828 F. 2d 1177, 1187 (CA6, 1987). A knowledge of the law applicable to the defendant's case is of course essential to a rendering such assistance. *People v Carrick*, 220 Mich. 17, 22 (1996). Contrary to the Michigan Court of Appeals' holding on this issue (Slip Op at 6), competent counsel would have known that the entire jury panel need to be questioned since they were aware of the extraneous influence, and would have objected to the trial court's procedure.

As argued above, the error was outcome-determinative as the jury found Mr. Burns guilty almost two hours later. Mr. Burns must be granted a new trial.

III. MR. BURNS WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED ON THE BASIS OF INSUFFICIENT EVIDENCE. US CONST, AMS V, XIV; CONST, 1963, ART 1, §§ 17, 20.

Discussion:

Federal and state rights to due process require that a defendant may only be convicted upon the introduction of sufficient evidence that could justify the jury in reasonably concluding that a defendant is guilty beyond a reasonable doubt. U.S. Const., Ams. V, VI, XIV; Mich. Const. 1963, art 1, § 17, 20; *Jackson v Virginia*, supra; Hampton, supra. In a criminal prosecution, due process requires proof beyond a reasonable doubt as to each element of the alleged crime. U.S. Const. Ams. V and XIV; Mich. Const. 1963, art 1, § 17; *In re Winship*, 397 U.S. 358 (1970).

The crimes in this case was alleged to have taken place after Mr. Burns took Ms. Brandi Young to his house after a night of partying and drinking with another couple. According to the sole witness —Ms. Young— she indicated that Mr. Burns sexually assaulted her in a bedroom of the house while armed, and that he forced her to bathe afterward.

These allegations were contradicted by several statements and prior testimony of Ms. Young, as well as the physical evidence and another witness who was present. While the DNA evidence and medical testimony supported the inference that Mr. Burns and Ms. Young may have engaged in sexual activity, the only evidence elevating the crime to first degree criminal sexual conduct was Ms. Young's own "questionable" testimony. No principle is more firmly rooted in our country's constitution than an accused's due process right to remain free from conviction unless the prosecutor proves each element of the charged offense beyond a reasonable doubt. U.S. Const. Ams. V, XIV; Mich. Const. 1963, art 1, §17; *In re*

Winship, 397 U.S. 358, 364 (1970). If the prosecution fails to present sufficient evidence of guilt, a judgment of acquittal must be entered. *People v Hampton*, 407 Mich. 354, 368 (1979), cert. den. 449 U.S. 885 (1980). The "reasonable doubt" standard provides "concrete substance for the presumption of innocence" and was developed to safeguard Americans from "dubious and unjust convictions resulting in forfeitures of life, liberty and property." *In re Winship*, *supra* at 362-363.

It is, therefore, essential that the "reasonable doubt" standard not be interpreted in a way which leaves citizens in doubt as to whether innocent men are being condemned. *In re Winship, supra* at 364. Basing its holding on *Jackson v Virginia*, 443 U.S. 307 (1979), the Court in Hampton rejected, as inconsistent with due process, the rule that as long as there is "**some evidence**" from which to infer guilt, a conviction may be sustained: **"[A reviewing court] must consider not whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt."** *Hampton, supra* at 366.

Reviewing the substance of the case is not tantamount to second guessing the trier of fact, since this Court must view the evidence "in the light most favorable to the prosecution" to determine whether a rational factfinder could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich. 508, 515 (1992), amended 441 Mich. 1201 (1992). The trier of fact may draw reasonable inferences from facts in the record; however, it cannot indulge in speculation or inferences completely unsupported by evidence either direct or circumstantial. *People v Petrella*, 424 Mich. 221, 275 (1985).

Notwithstanding the Court of Appeals' conclusion to the contrary (Slip Op at 7), Mr. Burns argues that this was insufficient evidence to convince a rational trier of fact beyond a reasonable doubt that he participated in the crimes charged. In this case, Ms. Young testified that Mr. Burns came into the bedroom and that he purportedly ordered her to remove her underwear and get on the bed while holding a black handgun (T, Vol. III, pp. 144-145). She claimed that he put his penis in her vagina (T, Vol. III, p. 147), and never relayed information about being raped, never contacted 911 to report a crime, and did not try to leave the apartment, despite passing the front door (T, Vol IV, pp 77-80). She also indicated that Mr. Burns himself took her to the bus station and purchased her a ticket (T, Vol. III, pp. 155-156).

This is contrasted with the fact that Ms. Young had given statements to the first responders, medical personnel, a sexual assault unit, had testified at two trials and preliminary examinations, and the facts as related by Ms. Young varied each time she re-told the series of events. She told police she had on red pajama pants and a shirt, but testified that she didn't know what she wore during the incident (T, Vol. IV, pp. 42-47). She told police that Mr. Burns said, "Brandi go in my room because Jay is 'bout to have company", but testified that that never happened (T, Vol. IV, pp. 64-65). She denied telling the nurse the name of the street Burns lived on, because she didn't know it; and denied telling the nurse she tried to grab the gun (T, Vol. IV, pp. 66-67; 102). She also denied telling the nurse that Burns made her "get on top" and that he licked her private parts — insisting that she signed her statement without actually reading it (T, Vol. IV, pp. 68; 138).

She insisted in her testimony that she never "got on top", that nobody licked her, and that she never attempted to grab the gun (T, Vol. IV, pp. 71-73; 105-106). All of this was contradicted by Julie Groat, the Certified Sexual Assault Nurse Examiner (T, Vol. V, pp. 17-18; 22-57). John Johnson of the Michigan State Police Lansing Forensic Laboratory testified that vaginal swabs matched to Mr. Burns' DNA; but indicated that it could have come from other contact, and could have been the result of consensual sex (T, Vol IV, pp 183; 186-192). Ms. Young's statement to Detroit Sgt. Jonanne Wright of the Sex Crimes Unit indicated that she sexually assaulted by a perpetrator who put his penis in her vagina and performed oral sex on her (T, Vol. V, pp. 87-93), and she also mentioned that she was wearing a green dress during the incident, and that he made her get on top of him (T, Vol. V, pp. 107; 114).

In addition, Melissa DeWolf testified that she met Ms. Young through hanging out with Fresh and his cousin Jimmy, whom she was dating, that they all went to the store, and after they returned to the house, they hung out in the living room, and she and Jimmy went to his bedroom, which had a door (T, Vol. V, pp. 176-177). She further indicated (contrary to Ms. Young's version of the events) that the next morning, she and Ms. Young showered at her nearby house because the tub at the Woodhall house did not have a shower head (T, Vol. V, pp. 178; 183-185). Ms. Young never seemed distressed, and she never heard from her again after that day (T, Vol. V, pp. 190-194). She also indicated that Ms. Young and Mr. Burns were romantic and friendly that night, and that she observed them hugging and kissing, implying they were together (T, Vol. V, pp. 198-200).

Viewing the evidence in a light most favorable to the prosecution, a reasonable juror could conclude that Mr. Burns was guilty of first-degree criminal sexual conduct. This evidence is not sufficient to convict Mr. Burns of actually committing these acts. While the prosecutor argued that there was "circumstantial" evidence to corroborate Ms. Young, such evidence was also lacking.

Circumstantial evidence can potentially have probative value equal to that of direct evidence, and ". . . inferences drawn from circumstantial evidence are reviewed in the same manner as those drawn from direct evidence." *Wolfe, supra* at 526.

But even if Mr. Burns was present engaged in sexual relations with Ms. Young, these facts do not constitute evidence tying Mr. Burns to criminal sexual conduct at all. The prosecution also failed to present any corroborating evidence. While the testimony of even a single witness may be sufficient, *People v Jelks*, 33 Mich. App. 425, 432 (1971); in this case, the lack of corroborating evidence, such other witness testimony and/or physical evidence, required an acquittal in this case.

Drawing all reasonable inferences consistent with the verdict, the evidence presented in this case simply does not establish guilt. Therefore, there was insufficient evidence to convince a rational trier of fact beyond a reasonable doubt, and reversal is required.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Petitioner, Luster Pernell Burns, Jr., submits that he has presented the Court with compelling reasons for consideration and ask that this Court grant the petition for a writ of certiorari, further Petitioner ask that the Court reverse his convictions and remand this matter to the State Circuit Court to conduct an evidentiary hearing on the issues presented in this petition, alternatively this Court should remand this matter to Sixth Circuit Court of Appeals for reconsideration of the issues raised.

Respectfully submitted,

/s/ Luster P. Burns, Jr.

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