NO.______________________________

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS GARCIA--PETITIONER

VS.

S.L. BURT---RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

CARLOS GARCIA # 185607
Petitioner In Pro Se
Muskegon Correctional Facility
2400 S. Sheridan Dr.
Muskegon, MI 49442

QUESTIONS PRESENTED

Mr. Garcia alleged that the prosecution in his case committed various acts of misconduct during the course of his trial that were both highly prejudicial and violative of his constitutional rights under the United States Constitutions Fifth, Sixth, and Fourteenth Amendments. Mr Garcia was convicted of crimes never committed, based primarily on nothing more than word of mouth, the presentation by the prosecution of facts not in evidence, the presentation of false and misleading arguments, and the improper vouching for the credibility of those witnesses by putting into the mouths of those witnesses, things which they had not said. And, finally,, in a case that was weak from the start, and one that presenteed no physical, medical, DNA, or eyewitness evidence, the prosecution willfully suppressed exculpatory evidence that was both favorable, and material to Mr. Garcia's theory of fabrication and claim of actual innocence. In finding no prejudice, the Sixth Circuit relied on the state courts record on direct appeal and collatteral attack, but significantly misstated even those slanted and misleading versions of the facts.

Mr. Garcia also alleged that the prosecutions expert witness, Amy Allen, improperly bolstered the credibility of the alleged victim when she testified falsely before the jury that the allegations had been **substantiated.** When in fsct, no such substantiation had been made by any other court or governmental agency. This testimony, which was highly prejudicial in a case that presented no evidence that any crime had been committed, removed from the jury thier duty to weigh the testimony, evidence, and or the credibility of the witnesses presented. And in essence, was yet one more example of the prosecutions vouching for the alleged victim through the mouth of this witness, and in her artful questioning of that witness to disguise what she could not directly do herself, and again places before the jury misleading facts, prejudicial to Mr, Garcia that were not in evidence, or factually true.

Mr. Garcia also alleged that his trial counsel was ineffective in various ways when she failed to call witnesses favorable to his defense, theory of fabrication, and actual innocence. Though the Sixth Circuit, and lower state courts continue to falsely allege that Mr. Garcia's theory of fabrication is predicated on the assumption that he has at any time alleged the "complainant" was the creator of this fabrication, this is ill placed. As it has always been Mr. Garcia's contention that this fabrication was the creation of the complainant's "mother" and was only later supported by the alleged complainant. Counsel's failure to call witnesses denied Mr. Garcia the opportunity to present his defense. As the ommitted witnesses, in particular, Mr. Garcia's mother, would have testified that the complainant's mother had all but admitted to Mr. Garcia's mother during a phone call just weeks before the trail the seh (i.e., the complainant's mother Jennifer Hart) was the only one who could "save him." Thhus supporting the claim that she in fact, had created the fabrication.

The Sixth Circuit, as did the District Court, continue to point to **testimony not** presented at trial, or addressed by Mr. Garcia to erroneously justify the continued constitutional blindness of the Michigan State courts. It was the testimony of Mr. Garcia's mother given "outside" the presence of the jury that he contends counsel failed to place before the jury that constituted ineffective assistance of counsel. Counsel further failed to object to the multiple misstatements of fact argued by the prosecution as discussed above, and the bolstering of the prosecutions witness, Amy Allen. Mr. Garcia also made allegations concerning trial counsels complete and total lack of any investigation, failure to interview witnesses, and failure to admitt into evidence favorable documentary evidence (i.e., letters written by the alleged complainant, medical reports of the alleged complainant showing no history of sexual intercourse, and vouluminious documents from Civil proceedings pending in the family court that would have revealed multiple other false allegations against Mr. Garcia, and the complainant's biological father made by both the alleged complainat and her mother), and failure to call Mr. Garcia to testify on his own behalf. Neither the Sixth Circuit, or the District Court addressed any of these claims, and seemed to have addressed only those glimpsed in it's peripheral as it drove right over the issues of true constitutional consequesnce.

Mr. Garcia further alleged that his appellate counsel had performed ineffectively when he abandoned him on appeal without notice, and failed to advocate his case on appeal as the Sixth Amendment so requires and guarentees. And as this esteemed Court also requires of those who represent those confronted with either criminal or civil matters in these United States.

The Sixth Circuit appears to have limited it's review to any procedural defaults Mr. Garcia argued that the Court may have found to existed on this issue and that he believed could have been reviewed under this Court's past precedence and took that opportunity to, as stated above, drive right over those constitutional claims raised in the state courts, the United States District Court, and again in the Sixth Circuit where he argued that counsel's abandonment denied him his right to counsel, and his right to present a defense. Appellate counsel failed to prepare and investigate Mr. Garcia's case, failed to interview witnesses, failed to identify issues on appeal, never even attempted to retrieve Mr. Garcia's case file from trial counsel, and refused to meet with Mr. Garcia. And while appellate counsel filed his brief in the Michigan Court of Appeals on behalf of Mr. Garcia, he did so without the consent of Mr. Garcia and presented two "DEAD BANG LOSER" issues that were both legally infirm, and not relevant to any issues related to Mr. Garcia's case. When Mr. Garcia attempted to communicate his dissatisfaction with appellate counsel, all correspondence was ceased, and all of his letters marked "Return to Sender." Counsel took no calls from Mr. Garcia, or from his friends and family who also attempted to contact counsel on Mr.Garcia's behalf.

As to his additional claim of his actual innocence. This was addressed in the state court on collateral proceedings based on newly discovered evidence, and since those pleadings, Mr. Garcia has discovered additional evidence which he presented to the state court in a successive Motion for Relief from Judgment (currently in the state courts), and addressed his Motion in his Motion to Hold Petition for Writ of Habeas Corpus in Abeyance to properly exhaust and present those issues in the District Court. This new evidence, as presented in his Motion before the state, and lower federal courts would have been subjected to state procedural rules as well as exhaustion rules of rules for §2254 cases. The Sixth Circuit held that this additional evidence (i.e., a 2007 undisclosed Police Report) did not help Mr. Garcia's case as the allegations alleged were consistant with predatory behavior, but failed to show in the record or where in the evidence proposed that the investigator or the contents of the report Mr. Garcia was found to have exhibited any type of preditory behavior or even a dispositon for such behavior. Or that the report showed that Mr. Garcia, as alleged by the complainant in this investigation (i.e., Holly Wrathell, the mother of states witness Marissa Latimer), had ever called her daughter "sexy." Or that he had made any attempts to "befriend" her for **any** purposes, right, wrong, or otherwise. And such conclusions, as those made by the Sixth Circuit should have been made by a **Jury**, who did not have this information at the time of trial, which Mr. Garcia argues was "suppressed" and not by a revieing Court who failed to hold an evidentiary hearing on this matter in assessing the weight it may have had in the minds of the jury where ther ecisted no evidence of guilt other than bald faced allegations only weakly supported by circumstantial evidence, misrepresentation of facts, perjured testimony, suppressed evidence, and hearsay testimony of evidence and witnesses that either did not exist, or were never presented at trial.

As sated above, in finding no prejudice, the Sixth Circuit relied on the state courts misstatement of the facts on direct and collateral appeal, but signifiacantly misstated even that slanted version of the facts. This case, thus presents the following questions:

I. DID THE SIXTH CIRCUIT ERR IN DEFFERING TO THE STATE COURTS ERRONEOUS FINDINGS THAT THE PROSECUTION HAD NOT COMMITTED VARIOUS ACTS OF MISCONDUCT PREJUDICIAL TO MR. GARCIA' AND VIOLATIVE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF THE LAW AND THE EQUAL PROTECTIONS THEREIN WHEN THE SIXTH CIRCUITS DISCISION WAS BASED ON A FLAGRANT MISREADING OF THE TRIAL RECORD AND STATE COURT HOLDINGS?

PETITIONER ANSWERS: "YES"

II. DID THE SIXTH CIRCUIT ERR IN DETERMINING THAT THE TESTIMONY PROVIDED BY STATES EXPERT WITNESS HAD NOT DEPRIVED MR. GARCIA OF HIS FUNDAMENTAL RIGHT TO DUE PROCESS WHEN SHE PROVIDED KNOWN FALSE "SUBSTANTIATION" TESTIMONY BEFORE THE JURY?

PETITIONER ANSWERS: "YES"

III. DID THE SIXTH CIRCUIT AND DISTRICT COURT ERR IN DEFFERING TO THE STATE COURT FINDINGS THAT MR. GARCIA HAD NOT BEEN DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, WHERE COUNSEL FAILED TO CONDUCT ANY INDEPENDANT INVESTIGATION INTO READILY AVAILABLE INFORMATION, CALL WITNESSES, AND ENTER INTO EVIDENCE EVIDENCE IN SUPPORT OF HIS ACTUAL INNOCENCE AND THEORY OF FABRICATION?

PETITIONER ANSWERS: "YES"

IV. DID THE SIXTH CIRCUIT ERR IN DEFFERING TO THE STATE COURT FINDINGS THAT MR. GARCIA HAD NOT BEEN DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE COUNSEL HAD EFFECTIVELY ABANDONED HIM, FAILED TO INVESTIGATE HIS CASE, FAILED TO CONSULT OR MEET WITH HIM, AND FAILED TO RAISE MERITORIOUS ISSUES DIRECTLY RELATED TO HIS ACTUALL INNOCENCE AND THEORY OF FABRICATION?

PETITIONER ANSWERS: "YES"

V. DID THE SIXTH CIRCUIT CAUSE MR. GARCIA TO SUFFER A MISCARRIAGE OF JUSTICE WHEN IT FAILED TO PROPERLY ASSESS HIS CLAIM OF ACTUAL INNOCENCE BASED ON NEWLY DISCOVERED EVIDENCE "MATERIAL" TO MATTERS OF CONSEQUENCE AND SUPPRESSED BY THE PROSECUTION AND WHERE STATE

AND DISTRICT COURT MISAPPREHAENDED THE FACTS AND ERRONEOUSLY CONSTRUED HIS EVIDENCE AS EVIDENCE PREVIOUSLY PRESENTED WHEN IN FACT, IT HAD NOT BEEN?

PETITIONER ANSWERS: "YES"

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES
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Petitoner respectfully Prays that a wrot of certiorari issue to review the judgment below of the Sixth Circuit Court of Appeals and thier judgment rendered in these proceedings on February 5, 2018.

OPINIONS BELOW

1) The Opinion of the United States Court of Appealsfor the Sixth Circuit in it's cause No. 17-1951 appears at **Appendix A.** The Opinion of February 5, 2018 is Unpüblished.

2) The Opinion of the United States District Court for the Eastern District of Michigan (Southern Division) in it's Cause No. 2:15-cv-14018 appears at **Appendix B.** The Opinion of August 1, 2017 is Unpublished.

3) Oakland County Trial Court (i.e., Michigan) denied Pro Per Motion for New Trail in it's original cause No. 08-221344-FC on November 13, 2008 and appears at **Appendix C**

4) Michigan Court of Appeals denied Appeal of Right in Cause No. 289432 on June 17, 2010 in an Unpublished Opinion, and appears at **Appendix D**

5) Michigan Supreme Court Denied Application for Leave to Appeal in cause No. 141584 on November 22, 2010 reported at 488 Mich. 949; 790 N.W.2d 399 (2010). Motion for Reconsideration was denied at 489 Mich. 862; 795 N.W.2d 142 (Dec. 13, 2010) And appears at **Appendix E**

6) Oakland County Trial Court (i.e., Michigan) denied Pro Per Motion for Relief from Judgment on collateral review in original cause No. 08-221344-FC on December 14, 2011 and appears at **Appendix F**

7) Michigan Court of Appeals Granted Leave to Appeal on November 26, 2012 in the above cause No. 309081 and appears at **Appendix G**

8) Michigan Court of Appeals on March 27, 2014 denied Application in the above cause No. 309081 and Appears at **Appendix H.** This is an Unpublished Opinion

9) Michigan Supreme Court denied Application for Leave to Appeal on October 28, 2014 in an Unpublished Opinion Cause No.149340 at 497 Mich. 888; 854 N.W.2d 738 (2014): Motion for Reconsideration was denied on March 31, 2015 and is listed at 497 Mich. 985; 861 N.W.2d 21 (2015) Cause No. 140340(108) and appears at **Appendix I**

10) Order of Oakland County Circuit Court (Mi.) on successive Motion for Relief from Judgment in original cause No. 08-221344-FC **Appendix L**

STATEMENT UNDER RULE 29,6

Petitioner, In Pro Se hereby discloses and notes that there is no parent or publicly held company owning 10% or more of any corporation's stock involved in this matter.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONST. 5th AMEND:

> "No person shall be held to answer for a capital, or otherwis infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the malitia, when in actual service in the time of war or public danger; nor shall any person be subject to the same offence to be twice put in jeapordy 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 shal private property be taken for public use, without just compensation.

UNITED STATES CONST. 6th AMEND:

"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 commited, 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 witnesses against him; to have compusory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONST. 14th AMEND.

"Section 1. 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 ot the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within it's jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. Garcia was accused, tried by a jury, and convicted of multiple counts of first and second degree criminal sexual misconduct (MCL 750.520b(1)(c); MCL 750.520c(1)(a)) alleged to have been committed against his step-daughter when she was betwee the ages of 11-13. And was sentenced to a term of 23 years 9 months to 50 years in the Michigan Department of Corrections in Case No. 08-221344-FC.

Mr. Garcia's trial consisted of no physical, medical DNA, or eyewitness evidence that would support the allegations against him. The states case rested entirely on circumstantial evidence, hearsay testimony, perjured testimony, and the prosecutions artful misrepresentation of the facts, suppression of evidence, creating facts not in evidence and as stated above, the presentation of known false testimony. The prosecution called Four witnesses, the alleged complainant, a friend of the complainant, the complainant's mother, and an expert in the field of why children delay disclosure.

The prosecutions theroy was that Mr. Garcia had taken advantage of his position and the complainant's trust and love for him to sexually abuse her while her mother worked. And that the alleged crimes were nothing more than crimes of opportunity. While at the same time advising the jury that there was "no physical evidence" to show a crime had been committed.

The states first witness was a childhood aquaintance, **Marissa Latimer,** who testified that her only alleged knowledge of the allegations against Mr. Garcia came in the form of a letter she had found taped to the complainant's school locker some years prior to the actual trial. **(TT Vol. I p. 253-55)** The letter, as she testified, was a communication that she says made allegations of something sexual had allegedly taken place between Mr. Garcia and the alleged complainant. **(Id at 253-255)** There was conflicting testimony as to how this note came to the attention of Mr. Garcia. However, witness Latimer testified that she had taken this letter to her mother, **(Id at 254)** who in turn gave this note to Mr. Garcia as a result of her allegedly calling him to discuss the contents of this note **(Id at 254)**. Latimer's mother was never called or questioned on this matter.

Latimer testified that she had suspected a mutual friend may have participated in the writing of this note. However, no questions were asked to identify this person, or who these people may have been. Latimer also testified that some years earlier to trial, and during a sleep over she had at the complainant's home, that Mr. Garcia had made inappropriate comments about his genitals. **(Id at 257-59)**.

The prosecutions next witness was **Jennifer Hart,** (Complainant's mother) who testified to the closeness of the complainant and Mr. Garcia **(TT Vol. II p. 9-10, 30-31)**, and that she (Hart) had dated Mr. Garcia in highschool and had not reconnected with him until years later, and that they had married in 2004. **(Id at p. 6-8).** Hart testified that her and Mr.Garcia had a child together in 2005 (D.O.B. 5-13-2005) **(Id at p. 6)** Hart testified that the complainant had been jealous of her half-sister.

Hart testified that it was Mr. Garcia who had brought the "letter" and it's disturbing nature to her attention, and that she had advised him to take it to the parent of the child they beleived had written or taken part in the writing of the letter. **(Id at p. 12-14, 34)** Hart, herself did not speak to the parent (Latimer's mother) **(Id at p. 13-14)** But testified that because of the disturbing nature of the note, that she had saved it so that she could "possibly" present it to authorities in the future. However, at the time of trail she testified that she could not find the letter. That it had come up missing.. **(Id at 14-15)** Hart Never testified that the note mentioned Mr. Garcia by name or title, (step-father).

Hart testified that the complainant had not mentioned the allegations until after Mr. garcia had left the home in 2007 **(Id at p. 15)**. However, also providing testimony that prior to the complainant's alleged disclosure, she had confronted the complainant, and had asked on multilpe occsassions if anything had taken place between her and Mr. Garcia, To which the complainant had answered "NO" on multiple occassions **(Id at p. 15-16)**. Yet, the following day she alleges that ther complainant conceaded to the allegations, but decided not to report them, and this was to respect her minor daughters "privacey." **(Id at p. 16-18)**.

Hart later testified that she reported the allegations to her Court Ordered therapist in November of 2007, but that nothing ever came of it. **(Id at p. 19, 37-38)**. It wasn't until March of 2008 when Hart informed complainant's biological father, who was in California, of theses allegations. Though there exists no testimony as to why she decided to disclose to the father rather than to authorities. **(Id at p. 6, 31)**. Hart then testified falsely that the complainant and her sister were removed from her care and custody **after** she was forensically interviewed at the Care House, and that her parental rights were terminated. **(Id at p. 21-23, 45)**.

Hart testified that "it was the strangest thing" that while she sat in her home in Walled Lake Michigan, Mr. Garcia at some unknown location, and the complainant's father in California, she picked up the receiver to her telephone in her home, and somehow, she heard the voice of Mr. Garcia, and of the complainant's father having a conversation saying uncomplimentiary things about her. Which she then put on speaker phone for the complainant to hear. Which upset the complainant. **(Id at p. 39-43)**.

Several allegations arose, which undermined Hart's testimony. First, Hart took complainant to the Doctor in July of 2007 for a physical. At the appointment, and in his/her official report, (which was documented), the physician noted that the complainant had "No History of Sexual Intercourse." **(Id at p. 48-49)**. Second, Biological father had heard Hart telling the complainat to recant, that they needed to end the joke, and that if the investigation continued, to plea the Fifth. And had threatened the biological father that she and the children would flee to Canada, **(Id at p. 45)** Which was in fact, the REAL reason that the children were removed from the home. HArt also palced a call to Mr. Garcia's mother just days before the trail began, informing her that Mr. Garcia needed to contact her and that she "was the only one who could save him." Hart, however, testified that she "Did not recall" ever making that statement. **(Id at p. 46, 52)**.

The Complainant who was 15 at the time of the trail testified that she and Mr. Garcia had a normal father/daughter relationship **(Id at p. 71)**, but taht it had changed before she entered the 6th grade, that he ahd put his hand down her pants while they watched TV. **(Id at p. 73-75)** Also during the same year that the letter was found taped to her locker indicationg that her and her "dad" had a sexual relationship, which SHE took home and gave to Mr. Garcia. The letter did not specifically name Mr. Garcia, but rather referenced her "dad". Complainat believed that witness Latimer had written the letter. **(Id at p. 112-113).**

According to the complainat, this activity escalated into oral sex and intercourse **(Id at p. 93-94)** and Mr. Garcia would place his fingers into her vagina, and that he had made inappropriate comments in her presence and in the presence of witness Latimer. **(Id at p. 99).**

Complainant testified the alleged sexual contact continued until around Christmas of 2005, and as a result of a "Dr. Phil" show that she had watched during a Court Ordered visitation with her father. **(Id at p. 102).** Complainat did not disclos alleged abuses to her mother until she was in eighth grade and after she was repeatedly questioned by her mother, who had woike her up in the middle of the night. And after having initially denied any such activity, later conceaded that it had happened. **(Id at p. 105).**

Complainat testified to never having been forced or threatened by Mr. Garcia, and that she had been untruthfull to her mother, and the Care House interviewer, but that she was being truthfull at trial **(Id at p. 136-137).** Complainat testified that she had over heard the conversation between her father and Mr. Garcia where they were talking about helping him get custody of the complainant. She also testified that this call took place "**Before**" she had disclosed the alleged abuse to her mother or the authorities. **(Id at p. 109),** That she felt betrayed by Mr. Garcia **(Id at p. 148),**and that she did not like her father and did not want to live with him. **(Id at p. 138).**

The states final witness, **Amy Allen**, a social worker at carehouse, testified as a forensic interviewer of children and in charicteristics of children who report abuse **(Id at p. 171, 180).** Allen testified falsely that cases of this nature would be refered to her by carehouse once the allegations **had been substantiated** for sexual abuse. Intimating that she had only gotten involved in the case against Mr. Garcia because Carehouse/CPS **Had Substantiated** that the complainat **Had Been Abused.** When asked by the prosecution what she meant she answered "**meaning they had at least substantiated that the child had been sexually abused. (Id at p. 208-209).** The witness did not testify as to how this alleged substantiation was made.

For the Defense, Mr. Garcia's coulsel called one witness, who testified outside the presence of the jury. **Sudie Super.** Mrs Super testified that witness Hart had called her prior to the trial asking that she have Mr. Garcia call her (i.e., Hart) because she **was the only one who could save him. (Id at p. 221).** Yet, while armed with this testimony, favorable to Mr. Garcia's theory that witness Hart had in fact fabricated the allegations against him, Mrs. Super was never called to testify before the jury. In fact, counsel called no witnesses, even though Mr. Garcia had provided several witnesses he wished to be called, and were present and available to do so. Most notably was Mr. Thomas Jaworski, a former paramour of Hart, whom she had also previously accused of rape and would have raised serious issues regarding Hart's credibility and motive to fabricate the allegations against Mr. Garcia. Moreover, trial counsel did not call Mr. Garcia to testify at his trial dispite his overwhelming desire to do so. Nor did counsel consult with or call an expert witness to rebutt the testimony of the prosecutions expert.

Again, this was a case riddled with misrepresentations of the evidence, the creation of evidence and testimony that simply did not exist. Hearsay testimony of non-existant evidence at trial used to corroborate that evidence, though never having been seen by the jury or presented in any court room prior to trial, known false testimony of witnesses and even the solicitation of known false testimony of witnesses (i.e., the states own expert), as well as suppressed evidence favorable to Mr. Garcia in support of his actual innocence and theory of fabrication. There was NO physical evidence, NO medical evidence, NO DNA, and NO eyewitnesses to this alleged crime that would even remotely have linked Mr. Garcia to the crimes alleged. And an overwhelming abundance of evidence to support his innocence never presented. And there could have been no evidence of guilt as there was NO CRIME COMMITTED.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT ERRED IN DEFFERING TO THE STATE COURTS ERRONEOUS FINDINGS THAT THE PROSECUTION HAD NOT COMMITTED VARIOUS ACTS OF MISCONDUCT PREJUDICIAL TO MR. GARCIA AND VIOLATIVE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF THE LAW AND THE EQUAL PROTECTIONS THEREIN WHERE THE SIXTH CIRCUIT COURTS DECISION WAS BASED ON A FLAGRANT MISREADING OF THE TRIAL COURT RECORD AND STATE COURT HOLDINGS. AND AN UNREASONABLE APPLICATION, AND CONTRARY TO CLEARLY ESTABLISHED SUPREME COURT LAW.

In this case, Mr. Garcia argued before the state courts, and federal court's below, that he had been denied his right to a fair trial, and his right to Due Process of the Law as guarenteed by the United States Constitution's Sixth Amendment, and Fourteenth Amendment by way of various acts of prosecutor misconduct. The various acts alleged, and supported by a complete reading of the record below, consist of; 1). the prosecutions improper and prejudicial bolstering of witness credibility; 2) the withholding and deliberate suppression of exculpatory evidence; 3) the artful arguing of facts not on the record, or in evidence; 4) the presentation of known false testimony; 5) prejudicially misrepresenting the facts that were in evidence, and; 6) becoming an unsworn witness against Mr. Garcia by placing into the mouths of witnesses things they had not said.

In determining whether certain offensive comment which are made during the course of the prosecutors closing argument rendered a trial fundamentally unfair, the relevant question for the court is "whether those comments so infected the trial with unfairness as to make the resulting conviction a denial of Due Process." **Donnely v. DeChristofono,** 416 U.S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow on of due process, and not the broad exercise of superviosory power." **Id at 642.**

The Court in **Berger v. United States,** 295 U.S. 78,88 (1935) stated:

> "The United States Attorney is the represenitive not of an ordinary party to a controversy, but of a soverignity whose obligation to govern impartially is as compelling as it's obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that Justice shall be done. As such, he is in a particular and very definate sense the servant of the law, the two-fold aim of which is that the guilty shall not escape or innocence suffer. He may prosecute with earnest and vigor--indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to useevery legitimate means to bring about a just one."

Though the prosecution in this case is a state official, this court must still deal with the aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the states are bound. **Chambers v. Mississippi,** 410 U.S. 284 ( ). The state court's and the lower federal courts, on this matter in reviewing Mr. Garcia's claims seem to have, and without the benefit of an evidentiary hearing, and what appears to be only a partial reading of the record with seemingly no reading of the pleadings filed and placed before the court by Mr. Garcia,centered around "one part" of Mr. Garcia's argumnet having to do with the prosecutions vouching for the alleged victrims credibility, and discounting all other comments made before the jury that either bolstered credibility, vouched for witnesses,or placed words into the mouths of witnesses things they had not said, created evidence that did not exist, and grossly misrepresented the facts that had been presented. It wasn't simply the prosecutors comments at closing; "She must tell the truth when I ask it." That Mr. Garcia believed was an improper suggestion to the jury that she believed the complainant **HAD** told the truth. It went much deeper than that. The prosecution argued falsely to the jury that Mr. Garcia, when addressing the letter alleged to have been found on the complainant's school locker, and the presentation of the false testimony concerning it's contents which was alleged to have said that "something sexual" had taken place between Mr. Garcia and the complainant that he "laughed and joked" about it. **(TT Vol. III p. 25)** This testimony did not exist. And she in essessence asked the jury, by way of reference to this created testimony and evidence to believe, that in fact, Mr. Garcia, because of his reaction (alleged) was some how presenting a consciousness of guilt, and that they should beleive he had commited the crime because of it. And there was nothing in the content of the testimony presented at trial that even remotely suggested that Mr. Garcia had not taken the contents of this letter seriously. In fact, testimony supports that Mr. Garcia in his concern, actually confronted the parent of the child beleived to have been involved in the creation of this letter. As well as his contacting school officials to address what he believed was an escalating feud between the complainant and witness Latimer. And Mr. Garcia would ask this court as the prosecution did the jury, "Does this speak to his mindset?" He would suggest that it certainly does not infer or point to someone who is guilty of such horrible allegations, that he would bring attention to himself by confronting the parent of the person who is alleged to have found the letter and then to communicate this information to school authorities to prevent further escalation. And it should be noted, that this alleged letter was a communication between multiple parties. Something the prosecution failed to address, and it was intended to hurt or humilliate the complainant. As the note stated specifically:

"Mariah told me that she made out with her "dad"...and she said he video taped it, and she liked it."

This note was testified to having been kept by the complainant's mother yet was never presented in court. And none of the possible authors of this note, which was testified to by witness Latimer to have known or suspected who had written it. **(TT Vol. I p. 246).** The state court's, however, assumed the authors of this note wished to remain anonymous. And the prosecutions unsubstantiated claims and manipulation of this evidence, which was more than merely disturbing, if true, is likely to have had an important effect on the jurys determination, as it was the only link that might possibly connect Mr. Garcia to the allegations against him. See **Miller v. Pate,** 386 U.S. 1 (1967); where in that case, the prosecution had falsely described a paint stained pair of underwaer as being covered in blood.

The prosecution in the instant case, not only in it's misrepresentation of a never produced letter threw the presentation of false testimony of it's alleged contents by three witnesses, and also passed a family photo around the jury that was taken by the complainant's mother at a beach outing, presented it at closing argumnets as a photo of a boyfriend and girlfriend. In spite of testimony that clearly stated that the photo was an innocent family photo. **(TT Vol. III p.26).**

A long series of decisions by this court has established the proposition that the fourteenth Amendment "cannot tolorate a state criminal conviction obtained by the knowing use of fals evidence." **Miller 386 U.S. at 7.** It is one thing for the prosecutions witness to present false testimony, known or unknown to the prosecution. However, it is an entirely differnt thing when it is the prosecution itself who is the presentor, and creator of evidence it knows to be false. And then attempts to mislead the jury into believing it is anything other than what the testimony claimed it to be. Such improper suggestions, and insinuations with no evidentiary support are apt to carry much weight against an accused, when they should carry none. The prejudice created to the cuase of Mr. Garcia was so highly probable that this court, in reviewing the entire record could not be justified in assuming it's non-existance. See **Berger 295 U.S. at 88, 89.** "Such acts of the prosecution are wholly incompatible with his or her duty to refrain from improper methods calculated to produce a wrongful conviction, as it is to use every legitimate means to bring about a just one." **Id at 88** and is violative of Mr. Garcia's Constitutional right to Due Process and a fair trial as guarenteed by the Sixth and Fourteenth Amendments.

The prosecution, also argued falsely, that the complainant testified that she had waited until Mr. Garcia was "out ot the home" until, she "felt safe," before she decised to come forward **(TT Vol. III p. 18)**. This is a total misrepresentation of the facts and contrary to the testimony of the complainant and her mother. Complainant never testified to ever having felt unsafe around Mr. Garcia. Further , her testimony was no that she had gone to her mother, but that her mother had "come to her." She testified that she had woke her up in the middle of the night and questioned if anything had ever happened between her and Mr. Garcia. To which she repeatedly answered "NO." The complainat's mother testified that over th course of the relationship between her and Mr. Garcia, that he had been out of the home for days, weeks and months at a time. And notably, at no time during any of theses extended absences from the home did the complainant ever disclose to her mother, nor did her mother ever confront her on such matters, when there was more than ample opportunity on the part of both to do so.

The prosecution would then argue, "if she was lying, if this was all some plot scheme...why not say he abused Haley (his 2 yr. old daughter)." When in fact, the prosecution knew that she and her mother **HAD** accused him in Family court of not only assaulting his own daughter, but also his two adult sisters, and an unnamed cousin. The prosecution would also argue that the complainant "couldn't possibly be smart enough to come up with such a plan." But would infer that she wa somehow smart enough to know the law on this matter and that her mother could get in trouble for failing to disclose the allegations. When in fact, testimony was presented to the contrary. Testimony stated that thier reason for not disclosing was not because of any possible legal ramifications, but rather to "protect the privacy of the complainant. It should be further noted that at no time was Mr. Garcia's theory of fabrication attributed to the complainant. But that the mother was the "creator" of the scheme, plot and plan, and that it only came into existance afteMr. Garcia had threated to expose her criminal activities, drug and alcohol abuse, and the neglect of the children during the times that he wa not present in the home. And it was only after the complainant had heard a three-way phone conversation between her father and him and Mr. Garcia's willingness to aide him in his custody efforts and to expose her mothers activities that the complainat came forward in support of the allegations.

On more than one accession, the state court of appeals conceaded that Mr. garcia had substantiated that the prosecution had argued facts not in evidence. That he had proved witnesses had lied on the stand, and that perhaps the prosecution had even suppressed evidence favorable to his defense. Yet for reasons beyond Mr. Garcia's ability to comprehend, these blatant and continued acts were viewed by the state court and deffered to by the lower federal court as harmless, not material, or simply back ground noise of no consequence. However, these continued misstatement of facts, intended to manipulate and mislead the jury were far from ambigious, These remarks, misrepresentations, and the litteral creatation of evidence and placing into the mouths of witnesses things they had not said,..."I waited to disclose until I felt safe'...'He laughed and joked about the allegations'....'If this is all a lie, why not say he abused Haley'...'why not accuse her father?'...'This looks like a boy-friend/girlfriend photo to me" These and many more, were all lies, misrepresentations or absolute creations of the prosecutions imagination with no record support. The misconduct here was not slight or confined to a single instance, but rather was pronounced and persistant, with a probable and cumulative effect upon the jury which cannot be disregarded as inconsequential. **Berger 295 U.S. at 89.**

Finaly Mr. garcia argues that the prosecution violated his right to Due Process when it willfully suppressed eveidence that was both exculpatory and material in violation of this court's holdings in **Brady v. Maryland,** 373 U.S. 83 (1963). The evidence in question was that of the lead detective who had investigated the case against Mr. Garcia, and the doubts he had concerning the allegations and the credibility of his accusers. And then much later, as discovered by Mr. Garcia via Third Party F.O.I.A. resquest for information an investigation conducted in 2007 by the same lead detective that included allegations against Mr. Garcia concerning the states Star witness Marissa Latimer who had testified at trial to having been called sexy by Mr. Garcia. The investigation which is discussed later in more detailwas never made available to Mr. Garcia prior to or during trail. The Michigan Court of Appeals on the matter of the detectives doubts as to the allegations stated "Although the state could be said to have possed the evidence and the **evidence was favorable to the defendant**, defendant could have obtained the evidence with reasonable dilligence." A requirement in total contrast with this courts holdings in **Brady supra.** Something that even the michigan Supreme Court reiterated only eight days after teh Michigan Court of Appeals decision in Mr. Garcia's case in **People v. Chenault,** 495 Mich. 142, 152 (April 4, 2014). Yet that same court on Application for Leave to Appeal in Mr. Garcia's case did not even address the question presented by Mr. Garcia, and affirmed the Court of Appeals decision.

The Michigan Court of Appeals also found this evidence of the officers doubts were not admissible as it was the opinion of another witnesses credibility. It failed to even consider whether or not his doubts might have been based on the fact that he had conducted a prior investigation of a similar nature involving one of the states star witnesses and the evidence that did or did not exist in that investigation. This evedence was more than material to the defense as it wouod have further supported Mr. Garcia's theory of fabrication and the admission of the detective's doubts to the allegations may, and would have lead directly to admissible evidence. That is, the suppressed investi- gation of 2007. That include allegations that were later testified to falsely at trial, regarding the alleged inappropriate use of the internet, and his alleged calling witness latimer sexy. An investigation that found that no crime had existed, and at no time had Mr. Garcia referenced Latimer as sexy. And it is significant to note, that the evidence against Mr. Garcia as presented at trial was far less than overwhelming. In fact, there was no physical, medical, DNA, or eyewitness evidence presented to support that any crime had been committed at all. Let alone the crimes alleged.

As to matters concerning the withholding and willfull suppression of favorable evidence against Mr. Garcia, as well as that which was newly discovered, and proved perjury on thepart of all of the witnesses presented by the state, and known to be such by the prosecution, Mr. Garcia would point to this courts rulings in **Brady and** it's progeny, as well as this court's holdings in **Kyles v. Whitely,** 514 U.S. 419 (1995)(The prosecution in a criminal case shall make timely discloser to th defense of all evidence or information known to the to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.)And in **Napue v. Illinois,** 360 U.S. 264 (1995)("A conviction obtained through the use of false evidence, known to be such by the representives of the state, must fall under U.S. Const. Amend XIV, The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears."). As stated above, even the Michigan Court of Appeals acknowledged that at least one witness had lied, and rather than remanding, the court found the lie to be immaterial. A cliam that this court should find offensive in light of the fact that Mr. Garcia's assertion from the statrt was that it was the complainant's mother who had created this LIE for which he now stands wrongfully convicted of. As this Court found in **Napue supra,** (quoting **People v Savides,** 136 N.E. 2d 853, 8540855N.Y. 1956)) "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. **A lie is a lie,** no matter what it's subject, and if it is in any way relevant to the case, the prosecution has the responsibility and duty to correct what he knows to be false and ellicit the truth." The prosecution failed to do so here, and the court of appelas upon finding the witness to be lying failed to remand this case which is alleged by Mr. Garcia to have been based on lies. And his exposing of those lies, especially that of the one's he alleges created the lies would most definately have been relevant to Mr. Garcia's case.

For the reasons stated above, The Judgment of the Court of Appeals should be remanded for further proceedings consistant with the discussion above, and analysis as presented on Mr. Garcia's claims of prosecutor misconduct and the deprivation of his Sixth and Fourteenth Amendment rights to Due Process and a fair trial.

II. THE SIXTH CIRCUIT ERRED IN DEFFERING TO DISTRICT COURTS RULING AND DETERMINING THAT THE TESTIMONY PROVIDED BY STATES EXPERT WITNESS HAD NOT DEPRIVED MR. GARCIA OF HIS FUNDAMENTAL RIGHT TO DUE PROCESS WHEN SHE PROVIDED KNOWN FALSE "SUBSTANTIATION" TESTIMONY BEFORE THE JURY.

The Sixth Circuit on this matter, as did the District Court, simply missed the mark when both court's found Mr.Garcia's claim to be nothing more than an "evidentiary error. Mr. Garcia's clam was that the states expert hadn't just provided testimony that wa substantially unfair and prejudicial, but that it was alltogether "**FALSE**" and rising to the level of a Due Process violation where it "offend[s] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." **Seymour v Walker,** 224 F.3d 542, 552 (6th Cir. 2000)(quoting **Montana v. Egelhoff,** 518 U.S. 37, 43 (1996). Neither the Sixth Circuit or the District Court addressed the falsity of the testimony presented by Mr. Garcia. The District Court erroneously reasoned that "it would have been unsurprising to the jury that some govermental agency had **thought** the allegations had been **substantiated** enough to warrant criminal charges. (See **Appendix-B E.D.Mich. Opinion and Order, Garcia v Burt, 2:15-cv-14018 p.** 20). As argued by Mr. Garcia before the Sixth Circuit, the mere fact that he sat before the jury accused was more than sufficient to inform them that some governmental agency **thought** something existed that warranted criminal charges.

However, that was not the testimony that was fraudulantly advanced by the expert. And at the instruction and urging of the prosecution, who knew this testimony to be false, as there had been no prior hearing or formal proceedings to make such determinations of fact.

Ms. Allen, the states expert testified that she had accepted refferals from Protective Services who had **substantiated** them for abuse. To be sure as to what Ms. Allen meant by this testimony, and to clarify any doubts the jury may have had concerning this testimony, the prosecution questioned Ms. Allen in the following manner;

> Q: **"When you say substantiate for sex abuse, what do you mean?"**
>
> A: **"Meaning they had at least substantiated that the child HAD BEEN SEXUALLY ABUSED."**

Thus removing any notion as to what any other governmental agency may have **Thought.** Which may be construed as to "what some other governmental agency may have "imagined." There is a huge gap in terms of definition as to what it means to have a **thought, and** what it means to **substantiate** something. **Thought** as defined by Webster's New World College Dictionary (Fourth Ed.) means;

> 1) The act or process of thinking; reflection; meditation; 2) Power of reasoning or conceiving ideas...imagination

To **substantiate** as defined by the same dictionary is defined as;

> 1) to show to be true or real by giving evidence, to prove, confirm.

And Ms. Allens testimony was clear and unambigious. It wasn't a matter of what she believed about children who claimed abuse. It was that she had testified to falsely, and with the knowledge of the prosecution. Nothing had been substantiated at that point. Nothing had been proved, or made real. And there was no evidence presented by the Protective Services on this alleged substantiation upon which the jury might weigh and determine the credibility of the testimony or the evidence for themselves.

This Court, again in **Napue supra,** held; "A conviction obtained through use of false evidence, known to be such by the representitives of the state must fall under the Fourteenth Amendment." See also **Mooney v. Holohan,** 294 U.S. 103 (1935); **Pyle v. Kansas,** 317 U.S. 213 "The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears." See **Alcorta v. Texas** 335 U.S. 28 (1957). However, in Mr. Garcia's case, and as addressed above, the prosecution clearly solicited what she had to know, or should have known to be false testimony. And neither the District courts finding that it would not have been surprising that some other goverment-al agency "thought" a crime had been committed, and the Sixth Circuit's misplaced holdings that Mr. Garcia had "not clearly identified how Child protective services determination alone proved to be "crucial, critical highly significant factor," removes the taint of this false testimony. The Court again misses the point, "Protective Services HAD NOT yet made any determinations to support the false and prejudicial testimony of the expert. See Napue supra at 264.

Further, it wasn't simply the alleged unsubstantiated "substantiation" testimony, or claim that Child protective services that Mr. Garcia was attacking. It was the false and highly prejudicial testimony of the states expert, and the state, that presented no such proof of this alleged "substantiation" by Protective Services, which was in fact, a crucial, crictical highly significant factor," in the guiltys determination of guilt. As Mr. Garcia has alleged from the beginning, he is Actually Innocent, and the allegations were a fabrication of the complainant's mother, and only later supported by the complainant.

The false testimony of the states expert gave the jury the false impression that the allegations had, in fact, already been proven to be true. And this is not in accord with the Due Process of the law and unfairly prejudiced Mr. Garcia and tended to refute his claims of innocence and fabrication before ever even being given the opportunity to present his defense. And further removed from the jury, thier duty to judge and weigh the evidence presented on thier own, and free of such cunclusive statements that had not been, in fact, substantiated by any one.

As such, the decision of the Court of Appeals should be reversed. The case should be remanded for development of the evidence and a determination of whether Mr. Garcia's Due Process rights were violated in the presentation of known false testimony. **Napue v. Illinois,** 360 U.S. 264 (1959), and should result in the reversal of his wrongfull conviction..

III. THE SIXTH CIRCUIT AND DISTRICT AND CIRCUIT COURT ERRED IN DEFFERING TO THE STATE COURT FINDINGS THAT MR. GARCIA HAD NOT BEEN DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHERE COUNSEL FAILED TO CONDUCT ANY INDEPENDENT INVESTIGATION INTO READILY AVALIABLE INFORMATION, CALL WITNESSES, OR ENTER INTO EVIDENCE EVIDENCE IN SUPPORT OF HIS ACTUAL INNOCENCE AND THEORY OF FABRICATION.

A claim of ineffective assistance of counsel is made when a defendant shows; (1) that he did not receive representation within the range of competence demanded of attorneys in criminal cases and (2) that counsels failing impaired the presentation of his defense without regard to whether the outcome would necessarily have been different. The Sixth Amendment is violated by representation that falls outside the range of competence demanded of attorneys in a criminal case.

In this case, trial counsel was ineffective for a multitude of reasons, and contrary to those rulings of the state and federal lower courts they were objectively unreasonable applications of **Strickland v. Washington,** 466 U.S. 668, 687 (1984). The Federal Constitution guarentees that "[I]n all criminal prosecutions the accused shall enjoy the right...to have the assistance of counsel for his defense." U.S.Const. Am. VI, XIV. The Court has frequently emphasized the "fundamental" nature of this Constitutional provision, **Gideon v. Wainwright,** 372 U.S. 335, 343-44 (1963). Since'[t]he assistance of counsel is often a requisite to the very existance of a fair trial." **Argersinger v. Hamlin,** 407 U.S. 25, 31 (1972) See e.g., **Cuyler v. Sullivan,** 446 U.S. 335, 344 (1980); **Johnson v. Zerbst,** 304 U.S. 458, 462 (1938); **Powell v. Alabama,** 387 U.S. 45,67 (1932).

The test established by this court for determining effective assistance is two fold; Whether "counsel's performace was deficient, "and if so" whether that deficient performance prejudiced the defense," **Strickland supra at 687.** Counsel's performance is deficient if it falls below an "objective standard of reasonableness" under "prevailing norms." **Id at 688.** The defendant is prejudiced where "there is a reasonable probility that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probablity is a probability sufficient to undermine confidence in the outcome." **Id at 694.** A single serious error by counsel is adequate grounds for an effective assistance of counsel claim. **Kimmelman v. Morrison,** 477 U.S. 356, 383 (1986).

First, in Mr. Garcia's case, the trail counsel was ineffective when she failed to call, or interview witnesses. Mr. Garcia had presented counsel with a list of ten (10) witnesses who would have attacked the credibility of the prosecutions witnesses and would have supported Mr. Garcia's claimof actual innocence, and theory of fabrication. These names were provided long before trial began. Trial counsel, however, in an attempt to give the "appearance" of effective representation, scheduled a "group" interview with at least seven of Mr. Garcia's witnesses. Prior to actually interviewing the witnesses, she was asked repaetedly if she planned to defend Mr. Garcia to the fullest, and advocate his innocece vigioriously. Trail counsel instantly took offence to theses questions and terminated the scheduled meeting. No other interviews, or attempts to conduct them individually was ever made. Mr. Garcia argues that this decision was "objectively unreasonable." As without ever having questioned any of his witnesses, or the detective in charge of the investigation, and failing at any time to even consult, or meet with any potential rebuttal experts in the field, or to investigate Mr. Garcia's claim of innocence and theory of fabrication. She had no way of knowing the value of these witnesses or what evidence such an investigation might uncover. Further, she made a determination as to what the jury might think of these potential witnesses. A duty that was not for her to decide. It would have been the province of the jury to determine the weight and credibilty of te evidence or testimony presented. Counsels duty was simply to "make resonable investigations, or to make reasonable decisions that make particular investigations unnecessary,"

Strickland supra at 690. Here, counsel made no investigation at all. Which cannot be deemed reasonable by any "normal standards" of that day or any day to follow. Especially in a case where the prosecution offered no physical, medical, DNA, or eyewitness testimony or evidence that a crime of any kind had been committed. Let alone a crime with such serious consequences., and where Mr. Garcia had provided counsel with an abundance of evidence consisting of alleged complainant's medical report from July of 2007 that showed NO HISTORY of SEXUAL INTERCOURSE. Tattoo and birth mark evidence, a letter written by the complainant to California courts making similar claims against her biological father of sexually inappropriate comments and acts, Family Court documents where complainant and her mother had made prior false allegations that Mr. Garcia had assaulted his Two year old daughter, two of his sisters, and an unknown cousin. As well as documentation that the alleged complainant's mother had attempted to recant allegations, and when confronted, threatened to flee the country, and that she would plea the fifth. And finally there was a phone call made to Mr. Garcia's mother only days before the trial where witness Hart (the mother of complainant) had asked Mr. Garcia's mother to have him call her (Hart) expalin his need to do so because she (Hart) was "The Only One who Could Save Him." Supporting Mr. Garcia's actual innocence, and thoery that it was in fact, the complainant's mother who had fabricated the allegations in responce to Mr. Garcia's threats to expose her criminal activities, neglect, and continued drug and alcohol abuse in violation of her court ordered probation in his own efforts to gain custody of his daughter.

This court held that a convicted defendant "must identify acts or ommissions of counsel that are alleged not to have been the result of reasonable professional judgment and then, the court must determine if **in light of ALL circumstances, the identified acts or omissions were outside the wide rang of professional** competent assistance." **Strickland supra at 466 U.S. 690.** Mr. Garcia argues tht though he is aware that the burden of proof is on the state in proving guilt, when counsel is armed with an arsenal of evidnence in support of his innocence, and evidence that rebutts the testimony of every one of the states witnesses and shows a history of past false allegations made by the complainant and her mother,n ot just against him, but others as well, and counsels failure to place this evidence before the jury or to call witnesses on his behalf, and then for the state and lower federal courts to find that these acts or omissions were within the "presumed" wide range of professiona competence, or that these decisions were somehow reasoanably "Stratigic," is a slap in the face to this courts previous rulings to the contrary in **Strickland,** and the multitude of decisions that followed. And such a finding further negates the United States Constitutions Sixth Amendment guarentee that "[i]n all criminal prosecutions the accused sahll enjoy the right...to have the assistance of counsel for his defense." Further, when this court makes it's determination on Mr. Garcia's claim of ineffective assistance, it must consider **the totality of the evidence before the jury.** "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." **Strickland 466 U.S. at 695-96.** At no time has any court held the evidence against Mr. Garcia to be overwhelming. In fact, there appears not to even exist a "sufficiency" determination. And as such, the testimony of witnesses not called and evidence not presented by counsel denied Mr. Garcia of the effective assistance of counsel and his right to a fair trial. See0 **Argersinger, Cuyler, Johnson, Powell supra.**

The state appellate court held thqt "failure to investigate witnesses does not hoever, establish inadequate preparation unless the defendant can show that the failure to investigate resulted in a failure to find valuable evidence that would have substantially benefited the defendant."

The District Court found that based on the **presumed**, detailed fact-sensitive analysis conducted by the state appellate court that thier findings did not constitute an objectively unreasonable application of **Strickland** standard. Mr. Garcia would argue that the state court's and lower federal court's have found erroenously, and contrary to those standards. As had counsel conducted **ANY** investigation, she would most likely have discovered and presented that those matters of great evidentiary value were highly favorable to Mr. Garcia's defense, as discussed above. Counsel may have also discovered that witness Hart had lied about disclosure of assaults to her alleged Court Ordered therapist, where in Michigan, the Law MANDATES that varoius professionals (i.e., therapists) must disclose such allegations, or face criminal charges of thier own. And assuming Ms. Hart made such a disclosure, and a report was in fact made as terstified to (TT. **Vol.** II **, p.** 193) counsel could have investigated the claim, or argued, (as Mr. Garcia believes to be the case) that this report does not exist, and Hart had told yet another lie. Or that the prosecution has continued a pattern of suppression in Mr.Garcia's case. Counsel may have also discovered that the lead detective in the current case, had also conducted a prior investigation relevant and material to testimony presented at trial by the alleged complainant and her mother concerning Mr. Garcia's alleged online activities and efforts to befriend complainant's minor friends for inappropriate purposes. And that this prior investigation was specific to the states witness Latimer. Latimer's trail testimony made no mention of nthis investigation which was conducted in 2007. Though that investigation stated that Mr. Garcia was alleged to have been attempting to befriend Latimer for "the wrong reasons" and that he had been calling her sexy online. The investigation, Unknown to Mr. Garcia at the time of trail, revealed no such attempts by Mr. Garcia and at no time during this communication did Mr. Garcia ever refer to Latimer as sexy. The sate court never addressed this suppressed investigation. Yet it did address a letter written to Mr.Garcia addressing his doubts as to the allegations against him and the credibility of the witnesses. The state court responded with, "although the state could be said to have possed the evidence and the **evidence was favorable to defendant,** defendant could have obtained it with reasonable diligence," (A requirement in clear opposition to **Brady** as discussed herein.

Counsel also failed to investigate or object to the presentation of testimony deemed to be hearsay, concerning a note found on the complainats school locker that made allegations that something of a sexual nature had taken place between the complainant and Mr.Garcia. This note was never presented at trial, and the contents of this note never verified beyond the inadmissible hearsay testimony of those who testified to its alleged contents. And counsel, at no time made any attempts to stop the presentation of this testimony or to seek a continuance in an effort to discover who the authors of this note may have been. To which, Mr. Garcia would argue in the face of the above actions, or inactions of counsel, he has more than satisfied the states requirement that he show counsels failure to investigate resulted in a failure to discover or admit valuable evidence that would have substantially benefitted his defense.

On matters concerning the calling of witnesses, the Sixth Circuit made a grossly unreasonable determination of the facts when it determined that counsels failure to call Mr. Garcia's mother and step-father, who Mr. Garcia stated would have testified that the complainant begged to stay wit Mr. Garcia after he thretened to move out because the complainant didn't want to live with her mother. That rather than helping, this testimony would have contradicted his theory of the case. This was not only untrue, but not consistant with the facts on the record. The testimony of complainant was that she did not disclose abuse to anyoneuntli AFTER she had heard the conversation between

Mr. Garcia and her father. **(TT Vol II p. 109)** Mr. Garcia left the home on March 22, 2007. And this call took place on or about March 27, 2007. The testimony that would have been offered by Mr. Garcia's parents would have been that on March 13, 2007 while his parents were in his home and he discussed moving out, is when the complainant begged his parents not to let him leave the home without ntaking her, and that she didn't want to be left alone with her drunken mother. So, contrary to the courts contention, and without the benefit of any evidentiary hearing or support, and an appearent failure to make a complete reading of the record, this would not have conflicted with his theory. And the complainant did not accuse Mr. Garcia on her own accord. Or without the influence of her mother. When put into the proper perspective, and context a reasonable jurist could, and would in fact, debate the District Courts decision was an unreasonable application of clearly established supreme court law and an unreasonable determination of the facts in light of the evidence presented. See 28 U.S.C. § 2254(d)

Mr. Garcia, in his Sixth Amendment claim directs this court to what he believes to be the principle inquiry now before it. Whether the actions or inactions of counsel in this particular case were that which a reasonably competent attorney, faced with similar circumstances, and the lack of any physical, medical, DNA or eyewitness evidence to support the allegations, and being armed with an arsenal of physical, medical, documentary evidence and a list of corroborating witnesses in support of Mr. Garcia's actual innocence and theory of fabrication, would have undertaken. See **Washington v. Watkins,** 655 F2d 1346, 1356 (5th Cir. 1981) The Sixth Amendment's guarentee requires counsel to discharge certain basic responsibilities in every criminal proceeding. And it's against these responsibilities that counsels competence and effectiveness must be measured. Counsel in Mr. Garcia's case failed on every level, and in essence was nothing more than a companion for a hapless lay person wandering through the intricacies of a criminal trial to a foreordained result. The Sixth Amendment embodies the protection "for the accused," not a communications privilege for the attorney or a shield to insulate from inquiry counsels decisions on behalf of the accused when they are challenged by the defendant. And this court has recognized that some degree of judicial supervision over the performance of attorneys is essential so that "defendant's cannot be left to the mercies of incompetent counsel. " **McMann v. Richardson,** 397 U.S. 759 771 (1970).

Trail counsel was unable to meet her Sixth Amendment duties because she lacked the factual ingreadients that an adequate investigation would have provided, and then failed to present those "factual ingredients" that she did have, that would have cast this case against Mr. Garcia in a completely different light.

In sum, Mr. Garcia has shown that he did not receive representation within the range of competence demanded of attorneys in criminal cases and that counsels ineffectiveness impaired the presentation of his defense at in a trial that resulted in the finding of guilt for crimes never committed.

For the reasons stated above, the judgment of the Court of Appeals should be reversed and the case should be remanded for further proceedings consistant with the analysis and discussion as presented by Mr. Garcia above. And his conviction should upon review be reversed.

IV. THE SIXTH CIRCUIT ERRED IN DEFFERING TO THE STATE COURT FINDINGS THAT MR. GARCIA HAD NOT BEEN DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHERE COUNSEL HAD EFFECTIVELY ABANDONED HIM, FAILED TO INVESTIGATE, FAILED TO CONSULT OR MEET WITH HIM, AND FAILED TO RAISE MERITORIOUS ISSUES DIRECTLY RELATED TO HIS ACTUAL INNOCENCE OR THEORY OF FABRICATION.

Under Michigan's Constitution 1963 Art. 1 § 20, Michigan Court Rule 7.203 (A)(1), and Code of Criminal Proceedure MCL 770.3(1) Mr. Garcia has an absolute right to direct appeal of his criminal conviction, and to the effective assistance of counsel on appeal. And thouh an appeal may not be considered a constitutional right, many courts consider a direct appeal of a conviction to be a critical stage of the criminal proceeding. And as such, a criminal defendant has a constitutionla right to an attorney on direct appeal.. And the appellate counsel, in this capacity serves two rolls. He not only serves his client by actively representing the critical issues, legal analysis, and reasoning urging reversal of the conviction, but also assist the court in reaching it's ultimate determination of the merits of the case. It's because of this inherent role in a direct appeal of a criminal conviction that the courts have unanimiously concluded that an attorney cannot abandon his client in the middle of an appeal. Both ethically and constitutionally, counsel on appeal must represent his client to the best of his ability. Such was not the case for Mr. Garcia, as he hopes this Honorable Court will also determine after a complete review of the record below, and the arguments presented herein.

Mr. Garcia's right to the effective assistance of counsel includes the right to the effective assistance of appellate counsel. U.S. COnst. Amend. VI; Mich. Const. 1963 Art 1 § 1;20; **Powell v. Alabama,** 287 U.S. 45 (1932). Under state and federal constitutions, a criminal defendant persuing a first appeal of right is guarenteed certain minimum safeguards necessary to make that appeal "adequate and effective." **Griffin v. Illinois,** 351 U.S. 12,20 (1956). Furthermore, if a state has granted appeals as of right to criminal defendant's seeking review of alleged trail court erros, the procedures used in deciding appeals must comport with demands of Due Process and the Equal Protections Clause of the constitution. **Griffin supra; Douglas v. California,** 372 U.S. 353 (1963). See also **Lucey v. Kavanaugh,** 724 F.2d 560 (6th Cir. 1984).

In **Evitts v. Lucey,** 496 U.S. 387 (1985) This Court held that the Due Process Clause of the Fourteenth Amendment guarenteed a defendant the effective assistance of counsel on appeal. And noted that nominal representation of an appeal of right, like nominal representation at trail does not suffice to render the proceedings constitutionally adequate; A party whose counsel is unable to provide effective assistance and representation is no better than one who has no counsel at all. **Id.**

In Mr. Garcia's case, both the District Court and the Sixth Circuit held that he did not warrant relief on this claim. The courts held that because they had bypassed any procedural bars that may have existed, and because the state court had found his claims without merit that reasonable jurists would not debate that the state courts decision on this matter was neither an unreasonable application of clearly established law, nor an unreasonable determination of the facts in light of the evidence presented. citing **28 U.S.C. § 2254(d). The Sixth Circuit points to** Mr. Garcia's citing of **Maples v. Thomas,** 565 U.S. 266 (2012) in support of his claim that counsel had abandoned him on appeal. While Mr. Garcia did cite **Maples** in the context of excusing procedural defaults, he did so because the state court, in reviewing his collateral attack on this claim held that his claims of ineffective assistance of trial counsel had not been preserved. And Mr. Garcia's citing of **Maples** was inresponse to the states holdings. And though the lower federal courts may have found **Maples** to be inapplicable, "Abandonment is Abandonment," and as stated above, "It is perciesely because of the Due Process Clause that the court made it clear that an indigents appellate counsel cannot abandon his appeal in midstream." **Entsminger v. Iowa,** 386 U.S. 748, 752 (1967). ("Here there is no question but that petitioner was precluded from obtaining complete and effective appellate review of his conviction...") And in Mr. Garcia's case, it wasn't simply that counsels abandonment, which was established as fact by the Michigan Attorney Disciplinary Board (**Appendix-J**), had created procedural barriers that he was prevented from overcoming, but that counsels abandonment had "precluded him from obtaining complete and effective appellate review of his conviction. And notably, the topic of abandonment came up numberous times during the Attorney Disciplinary hearing on July24 2012. See **Appendix-J**.

The record ibn the instant case establishes that appellate counsels performance fell below an objective standard of reasonableness. Appellate counsel failed to prepare and investigate when he ignored correspondance from Mr. Garcia which identified issues and important witnesses in his case. Failed to interview witnesses, filed to identify relevant issues on appeal, and failed to request an evidentiary hearing to establish and clairify matters of factual dispute in the record, or to establish a testimonial record in support thereof. Apellate counsel in this case failed to even attempt to retrieve trial counsels file. Moreover, counsel failed to discuss the case with Mr. Garcia and would not meet with him. His only communication with him consisted of three 15 minute phoine calls from the prison yard on an unsecure phone thus preventing Mr. Garcia from discussing the sensitive nature of his case. These short comings translated into a deficient Appealate brief, that ultimately identified the wroing issues when arguing ineffective assistance of trial counsel.

After expressing what Mr. Garcia believed were legally infirm arguments and the presentation of "Dead Bang Losers," appellate counsel ceased ALL communications and without the knowledge of Mr. Garcia, filed a motion to withdraw. The motion was denied and provided to Mr. Garcia some time later. Not surprisingly, the Michigan Court of Appeals affirmed Mr. Garcia's convictions and finding as Mr. Garcia had pointed out to counsel, that the arguments presented were not properly presented under the correct rules of evidence and that they were not meritorious. **(See Appendix-D)**. Further, appellate counsel never even informed Mr. Garcia of the Courts decision, nor did he provide him with a mechanisim to appeal that ruling.

Appellate counsel's performance and failure to raise important issues cannot be shielded under the protection of "trail strategy". Although an appellate attorney my withhold issues, this decision must be done as part of an exercise of "sound professional judgment of counsel." **Haskins v. Lecreaux,** 1994 U.S. App. LEXIS 2693 (6th. Cir.). Failure to investigate, or to interview witnesses cannot be condoned under the guise of sound professional judgment, and counsels inaction deprived Mr. Garcia of his constitutional right to the effective assistance of counsel as guarenteed under the Sixth Amendment, and violated his right to Due Process and Equal Protections as guarenteed under the Fourteenth Amendment.

The same Michigan Court of Appeals held that because Mr. Garcia had not missed any deadlines and because a brief was filed by counsel, albeit without the consent or knowledge of Mr. Garcia, that he had not been denied the effective assistance of appellate counsel. Again, this decision was made without the benefit of an evidentiary hearing, and based on a severely anorexic trail and appellate record. Further, because Mr. Garcia filed his own Standard Four brief (In Pro Per) which is allowed under Michigan Court Rules, and because of Mr. Garcia's OWN DILIGENCE prevented him from missing any deadlines has absolutely no bearing on the constitutional depravations suffed by counsels abandonment and ineffectiveness. Nor is a defendant's diligence, or lack thereof, a matteer for this court's consideration when determining Mr. Garcia's claims of Sixth and Fourteenth Amendment violations.

The purpose of an appeal and the role of an appellate attorney are inhearantly intertwined, Without active assistance of counsel, a defendant's right to a direct appeal of his criminal conviction becomes a hollow gesture. The Court in **United States v. Cronic,** 466 U.S. 648, 658 (1984) Held; "Right to the effective assistance of counsel is recognized not for it's own sake, but because of the effect it has on the ability of the accused to receive a fair trail. Mr. Garcia argues that in light of those facts as presented by him in the state and lower federal courts, both the state and federal courts have unreasonably applied the standards established by the court on such matters, and contrary to the principles and guarentees implicated by the Sixth and Fourteenth Amendments of the Constitution. See also **Strickland and Cronic supra.**

Mr Garcia was abandoned by counsel, and did not have the benefit of being informed of this abandonment. Counsel simply ceased all communications leaving Mr. Garcia unsure of whether he had counsel or not. And but for the continued "return to Sender" of his correspondance, he would not have had any idea that counsel had ceased to act as counsel. Yet Mr. Garcia, with no leagal experience was left to navigate the appellate process on his own and submitt an inferior suplemental pro per brief on his own. And then forced to suffer the consequences of counsels actions. And in the face of overwhulming evidence to the contrary, the state and lower federal courts concluded that Mr. Garcia had received the effective assistance of counsel. He hopes this court will not find the same.

For the reasons delineated above, Mr. Garcia submits trhat he was denied the effective assistance of appellate counsel in **violation** of the Due Process Clause of the Fourteenth Amendment. Accordingly, and to prevent a gross miscarriage of justice, the opinion of the Sixth Circuit must be reversed.

V. THE SIXTH CIRCUIT CAUSED MR.GARCIA TO SUFFER A MISCARRIAGE OF JUSTICE WHEN IT FAILED TO PROPERLY ASSESS HIS CLAIM OF ACTUAL INNOCENCE BASED ON NEWLY DISCOVERED EVIDENCE MATERIAL TO MATTERS OF CONSEQUENCE AND SUPPRESSED BY THE PROSECUTION AND WHERE THE STATE AND DISTRICT COURT MISAPPREHENDED THE FACTS AND ERRONEOUSLY CONSTRUED HIS EVIDENCE AS EVIDENCE PREVIOUSLY PRESENTED, WHEN IN FACT IT HAD NOT BEEN.

Generally, most claims of actual innocence are reviewed under the statndards developed by the Supreme Court in **Schulp v. Delo,** 513 U.S. 298 (   ), which reviewed **Delo's** procedurally defaulted claims under the "miscarriage of justice" exception. However, Mr. Garcia's case is not one in which he is seeking excusal of a procedural error. It should however, be noted that because Mr. Garci's claim of actual innocence was further supported by the discovery of new evidence that had been willfully suppressed by the police or prosecution and that was favorable and material to his defense in violation of his right to Due Process, and those standards established by this Honorable Court in **Brady** and it's progeny, he requested and was denied his request for abeyance to present this new evidence to the state Court and for an evidentiary hearing on this matter to expand the record to include this meritorious claim in his petition for writ of habeas corpus.

A state court adjudicates a claim "on the merits" for purposes of §2254(d) when it decides the petitioner's right to relief on the basis of the substance of the federal claim advanced, rather than on procedural or other rule precluding state court merits review. **Wilson v. Workman,** 577 F.3d 1284, 1308 (10th Cir. 2009). The Sixth Circuit, on Mr. Garcia's claim did not make such a "substance" based analysis of his constitutional claim of Due Process violation where the prosecution has suppressed favorable and material evidence. The District court on this matter, which Mr. Garcia attempted to present concluded tht this was the same evidence he attempted to present in his first Motion for Relief, It WAS NOT. The evidence in his first motion for relief consisted of post-conviction discovery of a phone number request form that Mr. Garcia had submitted while he was incarcerated in the Michigan Department of Corrections for a 1986 conviction. Testimony at trial by witness Hart was that her and Mr. Garcia had been highschool sweethearts, and that she had had absolutely no contact with him until his release in 2002 **(TT Vol.II p. 6,8)**. This evidence showed that witness Hart had clearly lied, which was also found to be the case by the Michigan Court of Appeals in it's March 27, 2014 Opinion **Appendix-H),** where it stated; "First, there is **no question** that the phone records, which argues shows that the victim's mother was lyingwhen sh claimed not to have spoken to defendant until 2002..." However, the court held that this evidence not to concern a material matter.

Mr Gracia argues to the contrary. His claim has been, and remains to be that the allegations against him were a fabrication of witness Hart whom Mr. Garcia had threatened to report for her criminal activities, neglect of the children, and continued drug and alcohol abuse in violation of her court ordered probation. All in effort to gain custody of his two yrea old daughter the two shared. As a result, witness Hart made threats of her own, stating that she would call the police herself and tell them that he had been sexually asaulting his daughter and hers, the alleged complainant. The Michigan Court of Appeals in holding this evidence, (i.e., the evidence of the phone request form, and Hart's lies) to not be of a "material matter," which flies in the face of this courts holdings in **Giglio v. United States,** 405 U.S. 150 (1972) where it held:

> **"When relaisbility of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the rule that suppression of material evidence justifies a new trial irrespective of good or bad faith of the prosecution.."**

Though it could be said that the testimony of witness Hart was not that of the kind suppressed by the prosecution, Mr. Garcia would argue that once the Michigan Court of Appeals acknowledged it's falsity and in a case that had no medical, Physical, DNA, or eyewitness evidence **EVERY WITNESS** became a "given witness" upon which thier reliability became determinative of guilt or innocence and was "material. And the Court's failur to remand for an evidentiary hearing becomes tantamount to the allowing the presentation of known false testimony to stand uncorrected when it appears. And rather than having been perpitrated by the prosecution this abuse was now being committed by the court itself and thus removed from the jury thier duty to weigh and determin the evidence for themselvs. Under the **Giglio** standard, and in most cases involving perjury or it's equalivent, the result will likely be the finding of constitutional error. **(See Rosencrantz v. Lafler,** 568 F. 3d 577 (CA. 6. 2009). Again, niether the District Court Sixth Circuit, or even the state courts subjected this claim to AEDPA merits revie, but rather it weighed this evidence, and each piece of evidence presented by Mr. Garcia individually rather than "collectively" as required by **Kyles v. Whitley,** 514 U.S. 419 (1995). And as argued above, When the Michigan Court of Appeals recognized the testimony of witness Hart to be a "clear lie" based on the newly discovered evidence presented by Mr, Garcia on collateral attack and then further recognized this evidecne as "favorable impeachment evidence" and failed to remand for at the very least, an evidentiary hearing, it became complicit in Mr. Garcia's Due Process violation committed by the prosecution. See **Napue v. Illinois,** 360 U.S. 264, 269-270 (1959). Mr. Garcia's next claim of new evidence also established that the complainant had lied when she testified falsely that it was her viewing of a Dr. Phil show that she watched while she was visiting her biological father in December of 2005. And that it was this show that convinced her that the alleged abuse must stop. Mr. Garcia diligently, and on his own, searched, found, and presented an online print out of the shows that had aired during the time period complainant had testified to having watched this show. He established thatno such show, of the nature testified to had in fact aired during this time period.

The Michigan Court of Appeals agreed, that he had presented evidence proving that that "there was no show, and that such evidence of it's non-existance "concerns a material matter." However, once again, they found, in place of the jury, that the evidence did not make a different result probable as the complainnt on retrial **could** claim that she was mistaken about the host of the show, or the date that it aired, and that her testimony would not be impeached to the extent that her credibility diminished. **(See Appendix-H p.10).** Mr. Garcia contends that such a holding without the benefit of an evidentiary hearing is obsurd. The complainat's testimony was very **"matter of fact,"** on this point this point. And though the court stated that "she could have testified differently," Had the jury heard this evidence, that no such show aired during the time testified to, coupled with the multiple other instances of perjured, or highly misleading testimony presented in Mr. Garcia's case that was not supported by the record or evidence, also conceaded to by the state court, there is more than a reasonable probibilty of a differnt outcome. Further, any credibility determinations of the evidence or the witnesses was to be made by the jury,not on an appellate court based on an ineufficient paper record.

In **Lavender Adm'r v. Kurn,** 327 U.S. 645, 653-66)(1946) This court went as far as to say that "When facts are in dispute or the evidecne is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to be the most reasonable inference. Such duty in a jury trial rests upon the jury and it is not incumbent upon the court to invade the provence of the jury in that respect, where there is conflicting evidence." As was the case in Mr. Garcia's case.

Mr. Garcia's final piece of evidence presented on his first motion for relief was a letter received by him from the lead detective in charge of investigating his case. Dective Robert McGhee advised mr. Garcia that he ahd proevided the prosecution with everything he had concernig the case against him but that he had doubted both the allegations and the credibility of his accusers. This information was never made known to Mr. Garcia prior to or during the course of his trial. Which Mr, Garcia argued as a **Brady** violation and violated his right to Due Process of the law and his right to a fair trial.

The Michigan Court of Appeals held that Mr. Garcia had failed to establish a **Brady viloation** and sated "Although the state could be said to have possed the evidence, and the **evidence was favorable** to the defendant, the defendant could have obtained the evidence with reasonable diligence. (See **Appendix-H p. 11**). Such a holding is both an "unreasonable application" and "contrary to" the standards this very court held in **Brady** where it established that "suppression by the prosecution of evidence favorablle to the accused upon request, violates due process where the evidence is material to guilt or punishment, irrespective of good or bad faith of the prosecution." **Brady 373 U.S. at 87 (1963)**.. Mr. Garcia, did in fact, make a pretrial request for all favorable evidence in the control of the prosecution. The prosecution failed to present this information.

The Court in **United States v. Bagley,** 437 U.S. 667 (1985) Held; "Impeeachment evidence, as well as exculpatory evidence, falls within the **Brady** rule." And "government failures to assist defense by disclosing information that **might** have been helpful in conducting cross-examination amounts to a constitutional violation only if it deprives defendant of a fair trial." Such was the case here. As has Mr. Garcia been aware of the lead detectives doubts, he most assuredly would have called him before the jury to question him as to the techniques he used in his investigation, and what it is that leads him to believe whether or not a crime had been committed, who may have committed the crime, and what it is he uses to determine whether or not witnesses are providing accurate information.

The Michigan Court of Appeals, then add insult to injury by placing upon Mr. Garcia, in the face of what it personally found to be favorable evidence, a diligence requirement to seek and find evidence thta had been suppressed by the state, ether willfully, or inadvertantly. A requirement that only eight days later, the Michigan Supreme Court in **People v. Chenault,** 495 Mich. 142 (2014) Held that a "diligence requirement was not consistant with, or even implied by United States Supreme Court presedence." Though imposing on Mr.Garcia such a requiremnet.

The final claim of newly discovered evidence argued recently by Mr. Garcia was that of the 2007 investigation spoken of above which consisted of a complaint filed by Holly Wrathell in April of 2007. Mrs. Wrathell is the mother of states witness Latimer in the 2008 trial. Her complaint alleged that Mr. Garcia had been contacting her daughter on "MySpace," an internet web cite and attempting to befriend her for "the wrong reasons, and calling her sexy." **(See Appendix K).** **Latimer** was crucial to the states case at trial in corroborating the complainant's allegations, and providing the only link to such allegations via her testimony. This investigation was never made know to the defendnat and is both material and relevant to testimony presented by the complainat, and hger mother regarding thier reasons for deciding to disclose when they did. They said it was to protect others, and they alleged that Mr, Garcia was using the internet to communicat with the complainant's minor friends in an attempt to befried them for inappropriate reasons. Though offering no proof in support. And at no time during the trial did Latimer ever testify to this online attempt or the prior investigation. And the prosecutio who could have been reasonably assumed to know of this investigation never mentioned or questioned any witnesses about it. And most certianly should have been aware of it since it made similar claims as those being presented at trial and involved Latimer. Yet this waas also suppressed. And revelations of it in court and it's favorable results to the defense would most definately have cast an unfavorable light on at least three of the four witnesses called by the state. The District Court on this matter, mistakenly held that this undisclosed report "substantiated that Mr. Garcia had in fact called Latimer sexy. Yet no where in the report was this substantiated. Nor did the Court point to where it had. Mr Garcia understands as explained by Judge Henry J. Friendly in his article "Is innocence Relevant?" 38 U.Chi,L.Rev (1970); "A prisoner does not make a colorable showing of innocence by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Rather,"the prisoner must show a fair probability that, in light of ALL the evidence, including that alleged to have been illegally admitted (but with due regard to any unavailability of it) and evidence tenably claimed to have been wrongfully excluded, or to have been available only after the trial, the trier of fact would have entertained a reasonable doubt of his guilt."**Ibid, (footnotes ommitted)** . Mr. Garcia argues that had ALL the evidence presented been considered COLLECTIVELY, and not item by item as this court required in **Kyles supra,** his claim of innocence and theory of fabrication creates more than a reasonable probability of a different result, and the governments suppression of evideence favorable to him "undermines the confidence in the outcome of the trial." **Bagley supra at 678. Mr.** Garcia would suffer a miscarrige of justice if this conviction is allowed to stand as he has clearly shown suppression on the part of the state in violation of his right to due process. And this court held in **Murray v. Carrier,** 477 U.S. 478, 495-96 (1986)(quoting **Engle v. Isacc,** 405 U.S. 107, 135 (1982) "principles of comity and finality...must yield to the imparitive of correcting a fundamentally unjust incarceration."

As such, the descision of the Court of Appeals should be reversed. The case should be remanded for developement of the evidence and a determination of whether a miscarriage of justice has occured here under the appropriate constitutional standard. **Kuhlman v. Wilson,**477 U.S. 436 (1986)

Respectfully submitted,

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