

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM JAMES HASTINGS, Petitioner

vs.

CONNIE HORTON, Warden, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WILLIAM JAMES HASTINGS IS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE INCARCERATING AN INDIVIDUAL FOR A CRIME OF WHICH HE IS INNOCENT IN A TRIAL FRAUGHT WITH CONSTITUTIONAL ERROR VIOLATES THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION AND PROVIDES A "GATEWAY FOR FEDERAL COURT REVIEW OF HIS CLAIMS

II. WILLIAM JAMES HASTINGS IS ENTITLED TO HABEAS RELIEF BECAUSE HIS CONSTITUTIONAL RIGHTS UNDER NAPUE vs. ILLINOIS, 360 U.S. 264 (1950) AND BRADY vs. MARYLAND, 371 U.S. 83 (1963) WERE VIOLATED

III. WILLIAM JAMES HASTINGS IS ENTITLED TO HABEAS RELIEF ON THE BASIS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

IV. WILLIAM JAMES HASTINGS IS ENTITLED TO HABEAS RELIEF BECAUSE HE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

LIST OF PARTIES

All parties appear in the caption of the case on the cover page and consist of: WILLIAM JAMES HASTINGS, Petitioner and CONNIE HORTON, Warden, Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals for the Sixth Circuit appears at Appendix "A" to the petition and is an unpublished case dated May, 9, 2017 under Case No. 16-2666.

Petitioner then filed a Motion for Rehearing with the United States court of appeals for the Sixth Circuit and that opinion/order appears at Appendix "B" to this petition and is an unpublished case dated August 30, 2017, under Case No. 16-2666.

The opinion of the United States district court for the Eastern District of Michigan appears at Appendix "C" to the petition and is an unpublished case dated November 21, 2016, under Case No. 14-cv-12010.

☒ For cases from state courts:

The opinion of the highest state court, Michigan Supreme Court, to review the merits appears at Appendix "D" to the petition and is an unpublished case dated June 22, 2007, under Case No. 133095.

The opinion of the Michigan Court of Appeals appears at Appendix "E" to the petition and is an unpublished cases dated November 16, 2006.

A Motion for Relief from Judgment was filed in the Jackson County circuit court on December 23, 2009 pursuant to Michigan Court Rules (MCR) 6.502 and was denied by Opinion and Order dated August 11, 2010 and appears at Appendix

"F" to the petition and is an unpublished case under Case No. 04-0690-FC.

On September 1, 2010 Petitioner filed an application seeking leave to appeal, which was granted by the Court of Appeals in an Order dated November 19, 2010, *People v. William James Hastings*, C.O.A. file No. 299960. The Court of Appeals affirmed the conviction in an unpublished opinion per curium issued November 29, 2011 (Docket No. 299960), and appears at Appendix "G" to the petition. The Michigan Supreme Court held the appeal in abeyance by order dated March 29, 2013, M.S.Ct. file No. 144479. Subsequently, on February 28, 2014, the Michigan Supreme Court denied leave to appeal under the same case number, and appears at Appendix "H".

JURISDICTION

The final decision of the United States Court of Appeals for the Sixth Circuit was entered on August 30, 2017. This Court therefore has jurisdiction under 28 U.S.C. §2254. and 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS

28 U.S.C. §2254

28 U.S.C. §1254(1)

28 U.S.C. §2254(d)(1)(2)

28 U.S.C. §2254(e)(1)

STATEMENT OF THE CASE

This case is about Mr. Hastings' factual innocence and of how, through federal constitutional violations, he was wrongfully convicted. This Court held in *Harrington v. Richter*, 562 U.S. 86 (2011) that habeas review by federal courts serves a crucial role in "guarding against extreme malfunctions in the state criminal justice system." Convicting a factual innocent person through federal constitutional violations, such in the case of Mr. Hastings, is an extreme malfunction in the state criminal justice system.

This case involves the discovery of the body of Vicki Lynn Cook, a local prostitute and drug addict found in a marshland in southwestern Jackson County, Michigan in 2002. The case against Mr. Hastings was not overwhelming. This assessment is not the unsupported statement of a petitioner, but rather an assessment of the case by the original trial judge following a post-conviction hearing in 2005:

The case against William Hastings was largely circumstantial, based on witnesses whose credibility can easily be questioned.

The key evidence against Mr. Hastings was the bargained for and uncorroborated testimony of an ex-girlfriend, Teresa Merrifield, who claimed Mr. Hastings had admitted to the killing of Vicki Cook. Ms. Merrifield had been given a plea deal in exchange for her testimony, but that fact was not disclosed to the jury. Another fact not disclosed to the jury was that a third party confession to the killing had been made by one Mr. Thomas Mowrer. Mr. Mowrer confessed to relatives, law enforcement officers and prosecutors, and at videotaped interview with a Jackson City police detective.

The presiding trial judge made the following determination in this case regarding Mr. Mowrer's confession and its impact upon reasonable doubt:

[T]here is no question that this evidence would make a different result probable on retrial. That

is, if either Mr. Mowrer testifies, which is unlikely, or Deputy Kuhl's video is played to the jury, I expect at least one juror will have a reasonable doubt as to Mr. Hastings' guilt.

The uncertainty as to Mr. Hastings' guilt was expressed by Michigan Supreme Court Justice Markman, joined by Justice Kelly:

I do not know whether Vicki Cook was murdered by the defendant or Thomas Mowrer, but I know that she was murdered by only one of them. Both have confessed to her murder, yet neither one knows the other. If it is defendant who committed this murder, justice is being done for he is serving a sentence of imprisonment without parole. If, however, it is Mowrer who committed this murder, a double injustice is being done for an innocent man is serving life imprisonment without parole, while a guilty man escapes punishment.

In *Schlup v. Delo*, 513 U.S. 298, 315 (1995), this Court held that a credible claim of actual innocence will permit a petitioner to have his constitutional claims reviewed by a habeas court, notwithstanding procedural bars that ordinarily bar such review.

This is a case where a factual innocent petitioner was found guilty by way of a criminal prosecution fraught with federal constitutional violations. This is not a freestanding claim of innocence. This is that rare case where "an innocent man is serving life in prison without parole, while a guilty man escapes punishment" and where a state court judicial system was unable to formulate judicial guidance to the lower courts on the interaction between factual innocence and procedural bars.

This case is a textbook example of "extreme malfunctions in the state criminal justice system" which only this Court can remand to the lower federal court to correct on full habeas review.

TRIAL TRANSCRIPT RECORD

On August 2, 2002, the badly decomposed body of a nude female was discovered in an undeveloped marshland off McCain Road in southwestern Jackson

County by the landowner James Prettenhofer and Wade Adamcheck as they were preparing to clear brush and overgrowth from the site. Mr. Prettenhofer immediately contacted law enforcement and the Jackson County Medical Examiner's Office sent a representative to the scene . The body was found about fifteen to twenty feet from a two-track drive, or path, in a swampy area hard to access. (T.T. I, 3/7/2005 pp 69; 172). The body was face-down, and the right hand appeared to be clenching some reeds or a branch. (T.T. I, 3/7/2005, pp 172-73; 180). Due to the advanced state of decomposition, the body was transported to the Oakland County morgue for autopsy. Approximately one week later, the body was identified through dental records, evidence of former trauma to the brain and injuries to the pelvic area as well as a distinctive tattoo as that of Vicki Lynn Cook, a local prostitute and drug addict, who had not been seen on the streets of Jackson since late July. (T.T. II, 3/8/2005 pp 257-260).

Forensic scientists from the Michigan State Police Crime Lab were also assembled to process the scene and uncovered a lone sock and a denim shirt with a Looney Tunes logo. (T.T. III, 3/10/2005 p 495).

A lengthy investigation ensued which culminated in the arrest of William James Hastings on May 27, 2004 in Vero Beach Florida where Mr. Hastings had been working for several months. Investigators had focused on Mr. Hastings in 2002 when he was identified as one of the last people to be seen with Ms. Cook before she disappeared but did not have sufficient evidence to charge him with the homicide. (T.T. III, 3/10/2005, pp 556-566) Jackson County Sheriff Department Investigator Robert Cole built his case against Mr. Hastings by taking statements from acquaintances of the deceased and by re-contacting these witnesses once they came into contact with area law enforcement. An arrest warrant was finally obtained following a prison interview with Morris McBride in Adrian, Michigan, an Investigative Subpoena Hearing involving witnesses

Brian Milligan on March 12, 2004 and subsequent interviews with Michael Cole and Teresa Merrifield. (T.T. III, 3/10/2005 pp 571-586)

Mr. Hastings was tried for the homicide of Vicki Lynn Cook in March 2005. In addition to the testimony surrounding the discovery and identification of Ms. Cook's body and the medical examiner's testimony concerning cause of death, the prosecution's case was highly circumstantial and consisted primarily of testimony from former friends and acquaintances of the Petitioner and the deceased--none of whom witnessed the homicide. Witnesses Mr. Milligan and Ms. Merrifield testified regarding Mr. Hastings' temperament and related incidents of violent behavior. (T.T. I, 3/7/2005 pp 238-39; T.T. II, 3/8/2005 pp 332, 350, 358-359) Ms. Merrifield also testified that Mr. Hastings had admitted to killing Ms. Cook when she stayed with him in Myrtle Beach South Carolina in August/September 2002. (T.T. II, 3/08/2005 pp 353-57). Most of the prosecution's lay witnesses had been offered plea bargains or charge reductions in pending cases. Witness Merrifield denied receiving any deals but admitted her pending cases had been adjourned multiple times. (T.T. II, 3/8/2005 pp 380-82). The Assistant Prosecutor denied any knowledge of any deals and asserted that because Witness Merrifield was working with JNET [Jackson Narcotics Enforcement Team] she should not be questioned further about her pending case. (T.T. II, 3/8/2005 pp 474-76; 480-486). Mr. Hastings' jury was not instructed to consider whether Witness Ms. Merrifield's pending charges had any influence upon her testimony.

On March 11, 2005, Mr. Hastings was convicted of first-degree premeditated murder. He was sentenced tot he mandatory term of life in prison on April 20, 2005.

Additional facts appear in the arguments herein.

REASONS FOR GRANTING THE PETITION

In Petitioner's first claim he clearly informed the habeas court and the United States Court of Appeals for the Sixth Circuit that he was raising a claim of actual innocence and that this claim is not a freestanding claim of innocence but that his conviction was brought through federal constitutional violations during his trial.

The Sixth Circuit mischaracterized Petitioner's claim from that of an actual innocence claim that is the result of a violation of his federal constitutional rights to that of a freestanding actual innocence claim. Petitioner reiterates, this is NOT a freestanding actual innocence claim and the Sixth Circuit applied the wrong standard of review in denying Petitioner relief. The Sixth Circuit applied the standard enunciated in *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993). The correct standard that should have been applied in reviewing Petitioner's claim is that enunciated in *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Petitioner's actual innocence claim rests with the confession of Mr. Mowrer, as well as with appellate counsel's failure to raise a significant and obvious claim of ineffective assistance of trial counsel. Petitioner was denied his right to the effective assistance of counsel guaranteed him under the Sixth Amendment to the federal constitution.

Trial counsel was aware of the existence of a person claiming to have been the murderer of Ms. Cook. Trial counsel was given funds for the purpose of pursuing information that another person was the murderer. A Private Investigator determined that a man who [u]ses meth, coke and pills whenever he can get them" had confessed to the murder. The name given to the Investigator was uncertain as to spelling, but was thought to be a 25-year old man named "Mauer." Evidently the Investigator found a criminal history

record for a "suspect" with the correct spelling, i.e., "Mowrer." (Petitioner attached the Investigator's Report to his state appellate pleadings, i.e., Dalman Investigations Report). Unable to locate Thomas Mowrer, trial counsel gave the information to the police who encountered Mowrer and interviewed him. Mowrer initially denied involvement in the crime.

Trial counsel's investigation was incomplete and denied Mr. Hastings a substantial defense. "Counsel must make an independent examination of the facts, circumstances, pleadings and laws involved. . " Von Moltke v. Gillis, 332 U.S. 708, 721 (1948). The duty to investigate and make an independent examination of facts, circumstances, and law is the duty of counsel. Anderson v. Johnson, 338 F.3d 382, 392 (5th Cir. 2003), (unreasonable for criminal defense lawyer to forgo investigation based on "the investigative work of the State.")

At no time did trial counsel speak with Thomas Mowrer. It is not a defense attorney's role to forgo investigation and determine his client's guilt based on a police rejection that another did not commit the crime. If it is not the role of a trial judge to make credibility determinations, Ramonez v. Berghuis, 490 F.3d 482, 490 (6th Cir. 2007), certainly an attorney may not leave credibility determinations of defense witnesses to the police. It is not as if Mr. Mowrer would not have admitted to the crime under questioning of an attorney. That is established. It is not that Mr. Mowrer was not willing to wilt and admit to the crime under serious questioning from family members and law enforcement. That fact is established. Mr. Mowrer did in fact confess to his mother and step-father, to Detective Kuhl, Attorney Varga and her paralegal, and he confessed as well to Investigator Hartman of the Jackson County Prosecutor's office - the very person to whom he had originally denied committing the offense.

This claim must be evaluated under the innocence standards set forth in *Schlup v. Delo*, *supra*.

This Court should further grant this Petition based on ineffective assistance of appellate counsel.

This Court held over 30-years ago that "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney," *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Indeed, *Evitts v. Lucey* was decided upon the intersection of the Due Process Clause found in the Fourteenth Amendment and the Sixth Amendment's right to the effective counsel. 105 S Ct 830, 835-36 (1985). It is hard to imagine two more "bedrock principles" in our criminal justice system that Due Process and the Right to Counsel. Surely the legal parameter, to say nothing of desideratum that we do not convict a man without due process of law is a bedrock principle in a America. Second, seeing as ineffective assistance of appellate counsel is cause to excuse a procedural default and seeing as it is literally impossible to raise this issue in the first instance. The only way to raise ineffective assistance of appellate counsel in Michigan is pursuant to Michigan Court Rule 6.500, Motion for Relief from Judgment and Motion to Remand for a Ginther hearing. If not raised, than quite literally, no court would ever be able to review even the most powerful ineffective assistance of counsel claim when not raised in MCR 6.500. Even though in *Martinez v. Ryan*, 132 S Ct 1309 (2012) and *Trevino v. Thaler*, 133 S Ct 1911, (2013), relate to state habeas counsel's failure to raise the claim, the rational behind these two decisions should be applied in this case to find cause and prejudice.

A SIGNIFICANT SPLIT IN THE FEDERAL COURTS: A federal Circuit Court Appeals split has arisen. Following *Martinez*, the circuit courts have split on the

extension of Martinez and Trevino to defaulted ineffective assistance of appellate counsel claims. The Fifth, Sixth, Seventh, Eighth, and the Tenth Circuits held that Martinez cannot be used to excuse ineffective assistance of appellate counsel claims in addition to ineffective trial counsel claims. *Long v. Butler*, 809 F.3d 299, 315 (7th Cir. 2015); *Reed v. Stephens*, 739 F.3d 753, 778 n. 116 (5th Cir. 2014); *Hodges v. Colson*, 727 F.3d 517, 530-31 (6th Cir. 2013); *Banta v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012) rev'd on other grounds, 133 S Ct 2767 (2013).

By contrast, as previously noted, the Ninth Circuit held that Martinez can be used to excuse the default of ineffective assistance of appellate counsel claims. *Nguyen v. Curry*, 736 F.3d 1287, 1289-90 (9th Cir. 2013). It should also be noted that this Court denied certiorari to address the Ninth Circuit's extension of Martinez. *Hurles v. Ryan*, 135 S Ct 710 (2014).

This Court should grant Mr. Hastings petition for certiorari because the Sixth Circuit's decision is "in conflict with the decisions of another United States court of appeals" on the same issue. Sup. Ct. R. 10(a). The question of whether or not properly raising ineffective assistance of appellate counsel claim in a post-conviction proceeding, i.e., MCR 6.500, can be seen as cause to overcome the procedural default of a substantial ineffective assistance of appellate counsel claim is also "an important question of federal law that has not been, but should be settled by this Court." Sup. Ct. R. 10(c). Indeed, without this Court's guidance petitioners in the Sixth Circuit who were denied effective representation on direct appeal and raised during their post-conviction proceedings will literally have no forum to raise a substantial claim of ineffective assistance of appellate counsel.

This Court should therefore grant certiorari to resolve this claim, or

remand to the Sixth Circuit to address the ineffective assistance of appellate counsel claim on its merits and to appoint counsel to further develop the claim for the court's review.

CONSTITUTIONAL VIOLATION Under *Napue v. Illinois*, 360 U.S. 264 (1950), and *Brady v. Maryland*, 371 U.S. 83 (1963): The Sixth Circuit upheld the federal district's ruling that this claim was harmless because it would have had no effect on the outcome of the case in light of the inculpatory statements that Mr. Hastings made to other individuals.

In the instant case it is important to place the nature of the perjured testimony in context. An alleged confession is universally treated as damning and compelling evidence of guilt. It is likely to dominate all other case evidence and lead a trier of fact to convict. As characterized by the Supreme Court

A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. *Arizona v. Fulminate*, 499 U.S. 279, 296 (1991).

It is also important to place the character of this perjuring witness in context vis-a-vis her evidence of a confession. Ms. Merrifield was a drug addict. As a drug-addict witness the jury was first told they could convict on addict-testimony, but that among the factors they should look for in examining her testimony closely:

Does the witness expect a reward or some special treatment or have they been offered a reward or been promised anything that might lead them to give false testimony? Have the witness's been promised that they will not be prosecuted for any charge or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced their testimony? (T.T. IV, pp 812-14).

Thus, the nature of the false evidence which is, according to the Supreme

Court, "the most damaging evidence that can be admitted" against a defendant and the loss to Mr. Hastings of any benefit of the special cautionary instruction as to the this witness, both dispute any suggestion of harmlessness, especially in such a weak case.

Mr. Hastings recognizes that his Brady, supra and Naupe, supra, claims must be viewed through the prism of the AEDPA. That is, he must show that the state court treatment of his claim resulted in a decision that was (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. §2254(d)(1)(2). Furthermore, state court findings of fact are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

The state appellate court opinion on this issue gave three reasons for not granting Mr. Hastings' a new trial on the basis of perjured testimony:

1. "First the only significant testimony she presented was that he told her that he killed Cook, which Defendant himself testified he had told Merrifield."

This is a clear violation of 28 U.S.C. §2254(d)(2). Mr. Hastings did NOT testify at trial. In addition, a confession is not merely "significant testimony," it is the most damaging evidence that can be admitted against a defendant. Arizona v. Fulminate, supra, and assessing prejudice to a lesser standard is arguably an unreasonable application of clear federal law. 28 U.S.C. §2254(2)(1)

2. "Second, defendant's trial attorney testified that he probably would not have cross-examined Merrifield on the matter even if he had known about the deal."

This is a clear violation of 28 U.S.C. §2254(d)(2) in light of the actual trial court record. At trial defense counsel extensively cross-examined Merrifield about the possibility of a deal, her expectations of a deal, pending charges vis-a-vis her testimony, asking the witness a total of 19 questions on the subject. (T.T. II, pp 380-81). It was objectively unreasonable to look to counsel's memory of the case and his ad hoc claim that he would "probably" not cross-examined Merrifield about the deal, when he had in fact extensively cross-examined Merrifield attempting to disclose the fact of her pending deal.

and 3. "But most significantly to us, after having had the benefit of an evidentiary hearing regarding defendant's motion for a new trial, specifically found credible the prosecution's claim that they had no actual knowledge of Merrifield's deal at the time of trial due to a coincidence and a paperwork mix-up."

This too is clear violation of 28 U.S.C. §2254(d)(1). Almost twenty years ago this stated that the Brady rule encompasses evidence "known only to police investigators and the not the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). More to the point, Brady applies "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

For purposes of this case, there is a subsidiary principle that is pertinent: **Innocence**. This Court should evaluate the prosecution's suppression of evidence "in the context of the entire record" - and, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to" satisfy the materiality standard. *United States v. Agurs*, 427 U.S. 97, 112-113 (1997). Here, the additional evidence was not minor and the verdict of guilt is highly questionable.

The standard of materiality is less demanding if the case involves false testimony. See *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008),

recognizing difference between materiality standard in false testimony cases and that in undisclosed evidence cases. *United States v. Duke*, 50 F.3d 571, 577-78 (8th Cir. 1995). Though it is alleged that the prosecutor failed to disclose the deal, he knew, or should have known, that the testimony of Merrifield was false with regards to a deal that was made for her testimony. Thus, false testimony is a Napue violation and requires that the conviction be set aside whenever there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005), see also *United States v. Arnold*, 117 F.3d 1308, 1315 (11th Cir. 1997) (stating "the standard of materiality is less stringent, however, when the prosecutor knowingly use perjured testimony or fails to correct testimony he or she knows to be false). It is undisputed that there was a Brady violation. And there can be little dispute that the suppression of Merrifield's pleas deal undermines confidence in the outcome of Mr. Hastings' trial. There is surely a reasonable probability that, if the information had been provided, the result of the trial would have been different. What took place in this case was a miscarriage of justice and contributed to the incarceration of an innocent man. Mr. Hastings was denied due process and a writ of certiorari should be granted and remand to the Sixth Circuit ordering the lower court to apply the correct standard.

HARMLESS ERROR: The Sixth Circuit relies on the state court's finding that the error of prosecutorial misconduct was harmless.

The test for harmless error in cases of constitutional error is more protective of the defendant and more exacting of the government. The government must convince the court beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24 (1967) Clearly, the opinions of the lower court's do not rest on a finding that

that the prosecutorial misconduct violation is harmless beyond a reasonable doubt.

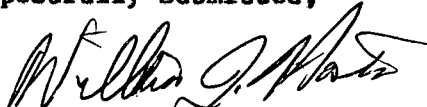
In Chapman, the Court recognized that the defendant complaining of the error, does not shoulder the burden of showing that the error was harmless. Chapman, 386 U.S. at 24. Instead, "before a federal constitutional error can be held harmless, the court must be able to declare belief that it was harmless beyond a reasonable doubt." United States v. Dominguez Benitez, 542 U.S. 74, 81, n 7 (2007).

In applying the harm assessment tests, a court cannot simply ask whether the prosecution introduced enough evidence to uphold the conviction but must assess with particularity the role the identified error played in the overall trial. See Strickler v. Greene, 527 U.S. 263, 290 (1999), United States v. Lane, 474 U.S. 438, 449 (1986).

In light of the record before this Court, it is clear that by not revealing the deal made with Ms. Merrifield for her damaging testimony, i.e., that Mr. Hastings confessed to her, testimony; the prosecutor did commit misconduct that resulted in the constitutionally infirm conviction.

WHEREFORE, for the above reasons, this Court can and should grant certiorari, or in the alternative remand to the lower court to address the actual innocence claim, ineffective assistance of trial counsel, ineffective assistance of appellate counsel claim, prosecutorial misconduct claim.

Respectfully submitted,



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DATED: 11/15/2017