UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES LEWIS,
Petitioner,

v

BONITA HOFFNER,
RESPONDENT.
_____/

CASE NO. 15-10766
JUDGE NANCY G. EDMUNDS
MAG. MONA K. MAJZOUB

MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b) FOR VOID JUDGMENT AND BRIEF IN SUPPORT

NOW COMES, the above named Petitioner Charles Lewis, by and through himself in Proper Personia and moves this Honorable Court to order the Petitioner's immediate release for the following reasons listed below:

1. The Petitioner is presently being held in prison without a conviction or sentence because of a complete breakdown in the trial court.

2. An evidentiary hearing is mandatory if three conditions are met (1) A Petitioner alleges facts that, if proved, entitle the party to relief (2) the Petitioner's factual allegations survive summary dismissal because they are not palpably incredible or patently frivolous or false; and (3) for reasons beyond the control of the petitioner and the petitioner's attorney (assuming the attorney rendered constitutionally satisfactory assistance), the factual issues were not previously the subject of a full and fair hearing in the state courts, or if a full and fair state court

hearing was held, the hearing did not result in factfindings that resolve all the controlling factual issues. In **Wainwright** v **Sykes**, 433 US 72 (1977) the Supreme Court ruled that "a petitioner is entitled to have the federal habeas corpus court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings."

||. The Petitioner's conviction should have automatically been vacated on September 22, 1980 pursuant to **People** v **Pearson**, 404 Mich 698 (1979). The Michigan Court of Appeals granted the Petitioner a Pearson evidentiary hearing on August 22, 1980. Pursuant to PEARSON, supra the prosecution had 30 days to conduct the evidentiary hearing or the conviction was automatically vacated. The prosecution held the evidentiary hearing on January 16 & 2||, 1980. It has always been the Petitioner's contention that there was no conviction to hold an evidentiary hearing on because the conviction should have been vacated on September 22, 1980.

||. The Honorable Gershwin A. Drain dismissed the conviction on April 3, 2000. The Petitioner also has a register of actions showing that the conviction was dismissed on April 3, 2000.

||. The Petitioner also states that the Wayne County Clerk's office intentionally destroyed all of the files and ||ecords in case number 76-0580. The files and records were destroyed to hide the fact that the Petitioner is presently being held in prison without a conviction. The Petitioner has a letter from the Clerk of the Michigan Supreme Court acknowledging the fact that the files and records in this case are lost, missing or have been destroyed.

FOR ALL THE ABOVE REASONS, the Petitioner moves this Honorable Court for IMMEDIATE RELEASE, or Release on Bond pending a hearing on this matter.

STATEMENT OF THE CASE

On July 31, 1976, sometime after midnight, Gerald Swpitkowski, an off-duty Detroit Police Officer was shot and killed on the corners of Harper and Barrett streets in Detroit.

Officer Dennis Van Fleteren, best friend and partner of the deceased was an eye witness to the murder of Gerald Swpitkowski. Jay Smith, a college student that was double parked on Harper street in his brown Ford LTD was also an eye-witness. Jay Smith testified that he saw the shooting in his rear view mirror. The second version was Jeffrey Mulligan (15), Ronald Pettway (16) and Mark Kennedy (16), all three testified against the Petitioner and they were released.

Four juveniles fifteen year old Jeffrey Mulligan, sixteen year old Ronald Pettway, Sixteen year old Mark Alonzo Kennedy, and seventeen year old Charles Lewis, were all accused of the attempted robbery and murder of off duty Detroit Police Officer, Gerald Swpitkowski.

Sixteen year old Mark Alonzo Kennedy brokered a deal through his paid attorney with the Wayne County Prosecutor's Office to testify against Charles Lewis in exchange all of the charges were dropped against him. Sixteen year old Ronald Pettway brokered a deal through his paid attorney with the Wayne County Prosecutor's Office to testify against Charles Lewis in exchange all of the charges were dropped against him. Fifteen year old Jeffrey Mulligan was arrested and initially charged with the Petitioner Charles Lewis. His paid attorney brokered a deal with the Wayne County Prosecutor's Office to testify against Charles Lewis in

exchange all of the charges against him were dropped.

The Petitioner Charles Lewis did not have a paid attorney. His attorney was appointed by the State to represent him as a result he was charged, tried and convicted of first degree murder and has been locked up for the past 39 years.

On July 31, 1976, sometime after midnight, Gerald Swpitkowski, an off duty Detroit Police Officer, was shot and killed on the corner of Harper and Barrett street in Detroit, Michigan.

The second trial in this matter began on July 5, 1977. Prior to the commencement of the second trial the Petitioner wrote the trial judge and requested that he remove his attorney. Dennis Van Fleteren, a Detroit Police Officer, best friend and partner of Gerald Swpitkowski, was an eye witness to the murder. (TT Pg. 84-89).

At the trial of the Defendant, Mr. Van Fleteren testified that on the night of July 30, 1976, he met the deceased, Gerald Swpitkowski at T.C. Kennels. From there the two went to James Lemeaus' home. (TT PG. 69) After staying a short time at Mr. Lemeaus's home, Van Fleteren and the deceased left and went to Dennis Van Demere's home. From there the deceased, Van Fleteren and Arthur Juliani went to the Hollywood Bar, where they stayed a short time. They left Hollywood's Bar and went to Ody's Saloon. (TT Pg. 71) Shortly after they arrived at Ody's Saloon, Gerald Swpitkowski, got up and left the bar. Van Fleteren followed Gerald Swpitkowski out of the bar. (TT Pg. 73) Van Fleteren came outside the bar and asked Gerald Swpitkowski if he wanted a ride to his car at T.C. Kennels, if he waited a few minutes. Gerald

Swpitkowski declined the offer of a ride to his car and said that he would walk.

Van Fleteren stepped back inside of the bar for a minute then turned around and walked back outside to get some air. When he stepped outside the bar the second time, he again called to his partner and asked him if he wanted a ride, and he heard a shotgun blast and saw a flash of light in the middle of the street east of Barrett on Harper. He testified that the shot gun blast came from the driver's side of a white Mark IV. He simultaneously saw the flash from the shot gun blast and the deceased Gerald Swpitkowski fall to the street. Van Fleteren also testified that the only car that he saw in the street was a white Mark IV. Van Fleteren was a trained Detroit Police Officer, and the former partner of Gerald Swpitkowski. He observed the situation and concluded that the shot that knocked Gerald Swpitkowski to the street had been fired from the driver's side of a white Mark IV. Van Fleteren and William Eichman both ran into the street after the shot had been fired and attempted to stop the white Mark IV by waiving their hands. Both Van Fleteren and William Eichman were nearly ran down by the white Mark IV that they attempted to stop. Both narrowly escaped death by jumping to the side of the road out of the pathway of the white Mark IV. (TT Pg. 75)

Van Fleteren also testified that he ran up to his partner and saw that he was suffering from a massive shot gun wound to the head. Van Fleteren testified that he attempted to speak to his dying partner, then took off his shirt and rolled it up and placed it up under his head. The testimony of Dennis Van Fleteren was

very compelling and standing alone was enough to exonerate the Petitioner.

The testimony of Lorraine Williams was the turning point in the second trial. Her testimony was as follows:

DIRECT EXAMINATION OF LORRAINE WILLIAMS (TT PG 228-242)

Q. And when you say working a patrol car does that mean that you were patrolling in a marked police vehicle in uniform?

A. Yes.

Q. With a partner?

A. Yes.

Q. And who was your partner?

A. Joseph Grayer.

Q. Did there come a time when you went to the vicinity of Harper and Barrett in the City of Detroit?

A. Yes.

Q. And, why did you go there?

A. Well, we had another run on another street but it was about only two blocks from Harper and Barrett and we got information from a person from a CB radio that a police officer had been shot in the area of Harper and Barrett. So, we went over there to see what the situation was.

Q. Okay. What if anything did you observe when you arrived?

A. When we arrived I noticed the officer laying in the street and he did have a gunshot wound to his head with injuries.

Q. And, were there any other people out there?

A. Yes there were quite a few people.

Q. Okay. Was there any confusion oout there?

A. Yes. Quite a bit of confusion out there.

Q. Now did you speak to anyone incidentally?

A. Yes.

Q. Did you speak to a gentleman or was it a lady?

A. No, I spoke with both gentlemen and ladies.

Q. Okay. Did you speak to any police officers-- any other persons who identified themselves as police officers who were not wearing uniforms?

A. I did.

Q. Okay. Do you recall who you spoke to?

A. To Dennis Van Fleteren.

Q. Okay. At the time did you know who he was?

A. No, I didn't.

Q. You do now since then?

A. I sure do.

Q. In fact, when you spoke with this person you asked him questions; how did he appear to you at that time?

A. **Very, very irrational. Very intoxicated: he was unbelievable**.

Q. **He was irrational and intoxicated?**

A. Yes.

CROSS EXAMINATION BY DEFENSE COUNSEL

Q. Did Mr. Van Fleteren go to the hospital with you?

A. He did.

Q. In your car?

A. He did.

Q. Did he create a scene in the car as he was going to St. Johns Hospital?

A. He did.

Q. He did?

A. Uh-huh.

Q. What was he doing?

A. He tripped my partner.

Q. He did what?

A. Tripped my partner.

Q. Tripped your partner?

A. Tripped me.

The above testimony was given on both cross examination and direct examination. The prosecution used the testimony of Lorraine Williams to discredit what he called "the Mark IV witnesses." Lorraine Williams was one of six officers that arrived on the scene after the murder. However, she was the only witness called by the prosecution.

The officers that testified at the Evidentiary hearing gave a different account of what happened.

William Eichman testified that on July 11, 1976, that he was employed at Oty's Saloon. He also testified that Oty's Saloon was a bar that sat off the corner of Harper and Barrett. (TT Pg. 111) William Eichman testified that he followed Van Fleteren and Swpitkowski out of the bar and had a conversation with Dennis Van Fleteren. He testified further that shortly after hearing a shot gun blast he turned seconds later and saw a white Mark IV on Harper with the headlights off. (TT Pg. 113-115) Eichman went on to testify that he ran into the street along with Van Fleteren and tried to get the driver of the white Mark IV to stop by waiving

their hands. The Mark IV accelerated at a high rate of speed and almost ran him down.

Jay Smith testified that he was double parked on Harper in his brown Ford with three friends, Gloria Ratachek, Kim Divine, and Donald DeMarc. Jay Smith testified that he saw a flash in his side view mirror and heard a shot gun blast come from a white Mark IV. (TT Pg. 135, 137, 142).

Gloria Ratachek, Kim Divine and Donald DeMarc, all testified that they turned, seconds after hearing a shot gun blast, and saw a white Mark IV almost run down two men, as it sped away from the murder. See, (Ratachek TT Pg. 159, 161-162, 163; Kim Divine TT. Pg. 156-158; DeMarc TT Pg. 128-129)

Jay Smith went on to testify that he made a U-turn on Harper and began chasing the Mark IV. (TT Pg. 128, 132). Jay Smith testified that he gave up the chase when he realized the dangers involved and stopped at a phone booth and called the police. (TT Pg. 132).

Six uniformed Detroit Police Officers responded to the scene of the murder, Lorraine Williams, Joseph Grayer, Michael Kudla, Andrew Kuklock, Michael Yanklin and Gerald O'Connor.

Shortly after the above officers arrived an argument ensued between Lorraine Williams and Dennis Van Fleteren as to whether or not Van Fleteren was going to ride in the Police wagon to the hospital. Lorraine Williams was a black female officer. She testified that Dennis Van Fleteren called her a black bitch and snatched her out of the wagon. Lorraine Williams also testified that eventually, Joseph Grayer, Lorraine Williams and Dennis Van

Fleteren conveyed the deceased to St. John's hospital. The remaining officers secured the scene of the crime and questioned witnesses. Hours after the murder was committred, on a police lead supplied by Detroit Police Officer, Dennis Van Fleteren, **LESLIE NATHANIAL** was arrested and his car, a white Lincoln Mark IV, was confiscated.

LESLIE NATHANIAL, made an extremely incriminating statement to the police placing himself and his white Lincoln Mark IV at the scene of the murder of Gerald Swpitkowski.

LESLIE NATHANIAL, testified that on Friday, July 30, 1976, or early Saturday morning on July 31, 1976 that he was driving his white Lincoln Mark IV down Harper avenue, after midnight. (TT Pg 400) **LESLIE NATHANIAL**, testified that he was traveling down Harper street with his wife, Shirley and his nephew Eric. (TT Pg. 401)

Leslie Nathanial testified that he saw two guy running across the street and both men attempted to open the doors of his car. He further testified that he almost ran both men down as he sped away from the murder. (TT Pg. 402-40ll) Leslie Nathanial testified that his white Lincoln Mark IV was completely destroyed by the Detroit Police Department while at the Seventh Precinct. (TT Pg. 405) The white Lincoln Mark IV that all of the witnesses saw at the scene of the crime was totaled by the police. The windows of the white Mark IV were busted out, the seats were ripped apart, sugar was in the gas tank, and the car was set on fire. Leslie Nathanial testified that he was released shortly after his arrest. (TT Pg. ll12)

Jeffrey Mulligan, Ronald Pettway and Mark Kennedy were all

granted immunity to testify against the defendant. However, the terms of the grant of immunity were never disclosed to the defendant or the court. Jeffrey Mulligan was 15 years old, Ronald Pettway was sixteen and Mark Kennedy was sixteen years old.

Mark Kennedy testified that he went to Osborne High School, and that he was in the twelfth grade. (TT Pg. 242-243) he further testified that he met the Defendant, Ronald Pettway and Jeffrey Mulligan on the corner of Glenfield and Barrett and that the four discussed stealing a car. And further that the four had a discussion about committing a robbery. (TT Pg. 244-247). Mark Kennedy, testified that there was a discussion about robbing an Epps Sporting Goods Store on Seven Mile and Gratiot. Mark Kennedy went on to testify that the Defendant broke into and started a Maverick. (TT Pg. 249). Mark Kennedy testified that the four rode around in the Green Maverick and eventually stopped and Jeffrey Mulligan stole a yellow Grand Torino. Mark Kennedy was shown pictures of a yellow Gran Torino and asked if he could identify the car. He testified that it looked like the car. (TT Pg. 250-252). Mark Kennedy, further testified that the yellow Gran Torino that was occupied by Jeffrey Mulligan and Charles Lewis stopped on a side street, and that both Jeffrey and Chalres exited the yellow Gran Torino, and that he heard a shot a few second later. After hearing a shot he drove around the yellow Gran Torino and heard a man scream.

Jeffrey Mulligan, Ronald Pettway and Mark Kennedy testified that they attempted to rob Gerald Swpitkowski and that the Petitioner shot him from the back seat of a yellow Ford Grand

Torino because he would not give up his wallet.

Two different versions of how the deceased was killed were presented to the jury and the jury found the Petitioner guilty of first degree murder. The Petitioner was sentenced to die in prison without the benefit of a parole, probation or suspension of the sentenced. No consideration was given to the fact that Jeffrey Mulligan, Ronald Pettway and Mark Alonzo Kennedy, never served one day in prison. Thus far, Charles Lewis, has served 39 years and six months in prison.

Both versions of the murder of Gerald Swpitkowski were presented to the jury. The first trial in this matter began on March 9, 1977. On March 2[11], 1977, the first jury was dismissed (no reason was ever given for dismissing the first jury). Prior to the commencement of the second trial the Petitioner unsuccessively tried to have seventy year old, mob lawyer, M Arthur Arduin, removed from the case. The trial court refused to acknowledge the Petitioner's request for new counsel and the second trial began on July 5, 1977.

When the Petitioner walked into the courtroom on July 5, 1977, a jury had already been picked and was in place. During the second trial the prosecution excluded the testimony of half of the witnesses that testified at the first trial. The Petitioner objected to the exclusion of five police officers. Those officers would later testify that they transported several eye witnesses from the scene of the crime to homicide for questioning.

The Petitioner was found guilty of first degree murder on July 18, 1977. The Petitioner was found guilty because the trial judge

instructed the jury to find the Petitioner guilty, defense counsel argued that the petitioner was guilty and the prosecutor argued that the petitioner was guilty. Judge Maher's instruction was as follows:

JUDGE JOSEPH MAHER'S INSTRUCTION

> Now you have heard evidence tending to show that Defendant, Charles Lewis was **GUILTY** of another shooting in the course of an attempted robbery **FOR WHICH HE IS NOW ON TRIAL HERE**.

Defense opening closing argument never mentioned Dennis Van Fleteren, Jay Smith, Donald DeMarc, Kim Divine, Gloria Ratajac, or William Eichman. Defense counsel's opening argument was as follows:

DEFENSE COUNSEL

> Now, as you probably know at this time you know just about what this case is going to be. There's been a killing; there's been an attempted robbery; there's been an attempted robbery prior to this matter at issue today. Now we have here only one Defendant. But originally there were four young blacks. If they are part of a gang, I don't know. But lets assume they're part of a gang.
>
> We're going to prove by all the witnesses that are going to testify in this case, by all the witnesses I mean the People's witnesses, their own witnesses-and I may have a witness or two for the defense. **We're going to prove four lads who are part of a gang who are--who are expertise. Expertise,- they knew how to steal cars and God only knows if they knew how to rob. Now that's what we're going to prove. And they started out on this day, July 11, 1976, four of them-four of them--to steal a car and to go out and commit a robbery.**

Defense counsel's opening statement to the jury above did not mention the fact that a police officer, four college students, and a bouncer were all eye witnesses to the murder. Defense counsel told the jury to assume that the Petitioner was part of a gang, and that he was going to prove that the gang did not know how to

rob and steal. There was absolutely nothing that was adversarial about the second trial in this matter. Defense counsel argued to the jury that I was guilty. The prosecutor argued to the jury that I was guilty, and the Judge instructed the jury to find me guilty. How could the jury come back with any verdict other than guilty?

The Petitioner has maintained since his arrest that he was never in the company of Jeffrey Mulligan, Ronald Pettway and Mark Alonzo Kennedy on the night of the murder and further that he was at the Local 212 playing with the band Pure Pleasure at the time of the murder. The lawyers from Foley & Lardner hired a private investigator to find the alibi witnesses that everyone said did not exist. The Private Investigator found the witnesses and the lawyers refused to talk to any of them.

Raymond Miller was appointed to represent the Defendant on his appeal of right. Raymond Miller filed a 14 page brief citing thirteen issues, several of the issues were only a paragraph long. (It should be noted that the Detroit News in a survey of Michigan appeal attorneys, found Raymond Miller to be the absolute worst appellate lawyer practicing law). On December 8, 1978 the Michigan Court of Appeals affirmed the Defendant's conviction.

On January 19, 1979 the Court of Appeals remanded the case back to the trial court. At the time the defendant was not represented by counsel. And, he was never notified by the court, or Raymond Miller, appellate attorney that represented the defendant on appeal that an order had been entered and filed by Judge Thomas.

In June of 1979, the defendant filed for administrative review

in the Michigan Supreme Court. The Michigan Supreme Court denied leave to appeal in April of 1979.

In June of 1979, the defendant filed a Delayed Motion For New Trial in the trial court in front of Judge Edward M. Thomas. On November 15, 1979, the defendant was remanded back to the Wayne County jail, and attorney Rose Mary Robinson was appointed to represent the defendant. Attorney Rose Mary robinson filed several motions in the court. The motions that Rose Mary Robinson filed were as follows, a Motion For a Robinson Hearing to determine whether five non-produced witnesses were res gestae, and a Motion for discovery of all evidence, statements, fingerprints, test, police reports, et cetera. Judge Edward M. Thomas, in an order dated January 8, 1980, ruled that he did not have jurisdiction to entertain the motion.

Attorney Rose Mary Robinson proceeded to file for delayed leave to appeal in the Michigan Court of Appeals. Attorney Rose Mary Robinson cited two issues in her brief, "That upon denial of a delayed motion for new trial, application for delayed leave to appeal should be granted where the trial court failed to grant a "Robinson Hearing" on the issue of non-production of res gestae witnesses by the prosecution because defendant had exercised his right to appeal and the 'law of the case' controlled." And, "That Defendant's argument that he was denied effective assistance of counsel in the contravention of the Sixth Amendment based on appellate counsel was rejected by the trial court." On June 25, 2012, the US Supreme Court held in **Miller** v **Alabama**, 132 S.Ct 2455 (2012), that "mandatory life without parole for those under the

age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." Id. at 2460. In light of **Miller**, in August of 2012, Charles Lewis, filed a Motion To Resentence to A Sentence that Complies With Miller. The Motion was filed in the Third Judicial Circuit Court, Detroit, Michigan.

On October 17, 2012, Judge Edward Ewell, Jr, ruled that the Petitioner was entitled to a sentence that complies with Miller v Alabama. In January of 2013, attorney Adam Weinner from the firm Foley & Lardner went to the trial court to review the files and records. Adam Weinner told me that he could not understand what was in the file, so I asked him to request a copy of the file and ask the Clerk to make an itemized list of everything that was in the file. I asked Adam Weinner to review the file to see if an order dismissing my conviction, and a copy of the Pearson hearing transcripts were in the files and records.

I also talked to Heidi Haider, Judge James Chylinski's administrative assistant. She told me that she saw Judge Edward Ewell Jr., administrative assistant Joann Gaskins with the files and records and asked her how the case got removed from Judge Chylinski's docket.

I also contacted Chief Judge Virgil Smith and talked to his administrative assistant Marsha Cusic regarding the order dismissing my conviction. Marsha Cusic requested the file on behalf of the Chief Judge. I also contacted Judge James Chylinski who agreed to remand the case for a hearing to correct the record. The Wayne County Clerks Office, blocked those attempts and

destroyed all of the files and records in this matter.

There are presently no files and records in this matter. This Court is presented with an issue of first impression. This is a case where there were files and records when the Petitioner was granted a resentencing and the files and records came up missing after the Petitioner was granted a resentencing. The files and records came up missing because the Petitioener questioned a Court Order that was removed from the file.

ARGUMENT I.

WHERE THE TRIAL COURT'S RECORDS ARE MISSING, LOST OR HAVE BEEN DESTROYED AND THE PETITIONER HAS AN ORDER DISMISSING HIS CONVICTION AND A REGISTER OF ACTIONS SHOWING THAT HIS CONVICTION HAS BEEN DISMISSED THIS COURT SHOULD ORDER THE PETITIONER'S IMMEDIATE RELEASE TO PREVENT A CONTINUED VIOLATION OF DUE PROCESS OF LAW, AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE. US CONST. AMEND'S VI AND XIV.

STANDARDS OF REVIEW: "MANIFEST INJUSTICE." In **Dobbs** v **Zant**, 506 US 1157 the United States Supreme Court ruled that the Court of Appeals erred with it refused to consider the full sentencing transcript. The United States Supreme Court deemed the failure to review the record a "MANIFEST INJUSTICE."

The failure or refusal of the Court to consider this claim will result in a fundamental miscarriage of justice. The Petitioner's present incarceration is fundamentally unjust because all of the trial court files and records in this case have been destroyed intentionally by the Wayne County Clerk's Office.

In its answer, the state must indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed, **Sizemore** v **District Ct**, 735 F.2d 204, 207 (6th Cir.1984). Respondent also must append to the answer copies of (1) all the portions of the transcripts of prior (pretrial, trial, appellate, postconviction, any brief submitted in an appellate court contesting the conviction. The obligation to come forward with the state court record is squarely on the respondent. See, **Bundy** v **Wainwright**, 808 F.2d 1410, **Russell** v **Jones**, 886 F.2d 149, 152-158 (8th Cir. 1989. See, **Dejanjuk** v

Petrovsky, 10 F.3d 838 (6th Cir.1993). In **Dejanjuk**, the Sixth Circuit ruled that "fraud perpetrated by officers of the Court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudjing cases that are presented for adjudication."

The files and records existed when the Petitioner was granted a resentencing on October 17, 2012. The files and records were partially reviewed by attorney Adam Weinner, of the law firm Foley & Lardner. The destruction of the transcripts and files has severely prejudiced the Petitioner and has made it impossible for the attorney's that were representing the Petitioner to effectively represent the Petitioner.

The Petitioner, Charles Lewis, is not a lawyer and has very limited legal knowledge and is presently being held in prison without a conviction or sentence because the files and records are missing. The Petitioner's present incarceration is in violation of both the State and Federal constitution. The Petitioner has carried his burden of proving that his conviction has been dismissed. The Petitioner sent the Court a copy of a court order dismissing his conviction and a copy of a Register of Actions showing that his conviction was dismissed and a copy of the State evidentiary hearing transcript which is the basis of the dismissal. See, **Machibroda** v **United States**, 368 US 487, 495 (1962).

The Petitioner's continued incarceration is in violation of the VI and XIV Amendments of the US Const. See, **Gillespie** v **Warden, London Correctional**, 771 F.3d 321, **D'Ambrosio** v **Bagley**, 656 F.3d

179, US v Ashraf, 628 F.3d 813, Gall v Scroggy, 603 F.3d 346, Johnson v Karnes, 198 F.3d 589, (6th Cir. 1999). Petitioner's first trial was improperly dismissed on March 24, 1977. See, Long v Humphrey, 184 F.3d 758 (8th Cir. 1999); Stow v Murashinge, 389 F.3d 880 (9th Cir.2004); Morris v Reynolds, 264 F.3d 38 (2nd Cir.2001); Harpster v Ohio, 128 F.3d 322 (6th Cir.1997), Weston v Kernan 50 F.3d 633 (9th Cir.1995), Malinovsky v Court of Common Pleas, 7 F.3d 1263 (6th Cir.1993)

In September of 2012 the Petitioner received an attorney visit from Jennifer Neumann and Brandy Walkowiac. The Petitioner gave the attorney's a copy of an order dismissing his conviction, signed by the Honorable Gershwin A. Drain, on April 3, 2000.

The Petitioner also gave the attorney's a copy of a Register of Actions showing that his conviction had been dismissed on April 3, 2000. The Petitioner also explained to the attorney's that on August 22, 1980 the Michigan Court of Appeals granted the Petitioner a Pearson evidentiary hearing, Peopple v Pearson, 404 Mich 698 (1979). Pursuant to Pearson at 404 Mich 721-724 the Wayne County Prosecutor's Office had 30 days to conduct a Pearson evidentiary hearing or the conviction was automatically vacated. As of September 22, 1980 the Wayne County Prosecutor's Office had not proceeded to conduct a Pearson evidentiary hearing. Instead, a Pearson evidentiary hearing was held on January 16 & 21, 1981. After the unlawful Pearson evidentiary hearing, the transcript of the hearing came up missing. Hill v Lockhart, 474 US 52, 60 (1985); Blackledge v Allison, 431 US 63, 82-83 (1977):

> Where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle

> him to relief, the federal court to which the application is made has the power to receive evidence and to try the facts anew.

This Court has the power to review the State Pearson evidentiary hearing transcript and **People v Pearson**, 404 Mich 698 (1979) to determine whether or not the Petitioner has a valid conviction.

The Petitioner was given a copy of the State Pearson evidentiary hearing transcript ten years after the hearing at a Federal Evidentiary Hearing that was held on May 30, 1990. Though the Federal Court that conducted the federal evidentiary hearing on May 30, 1990, did not acknowledge the fact that the Petitioner did not have a lawful conviction, this Court does not have to follow their ruling. See, **Dobbs v Zant**, 506 US 357, there the US Supreme Court ruled: "a finding of manifest injustice requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong." Once this Court concludes that the previous rulings on this matter were obviously wrong this Court find a **"MANIFEST INJUSTICE**, exist that requires the Petitioner's immediate release.

After reading **Pearson** and the State Pearson evidentiary hearing transcript this Court should conclude that the Petitioner has been locked up since September 22, 1980 without a conviction. This Court should also conclude that all previous rulings on this matter were unreasonable and obviously wrong.

This Court has the power to do what the law in **Pearson**, supra demanded. **Pearson demanded that the case be dismissed if the prosecution failed to conduct a hearing within 30 days of an order to conduct a hearing.**

The order to conduct a **Pearson** hearing was issued on August 22, 1980. Pursuant to **Pearson**, the hearing should have been held by September 22, 1980. Pursuant to **Pearson**, after September 22, 1980, the Petitioner's conviction was automatically vacated.

In October of 1980 the trial court improperly and illegally removed defense counsel, Rose Mary Robinson without cause and without conducting a hearing.

An illegal Pearson evidentiary hearing was held on January 16, 1981. The Petitioner contends that the State never reinstated the automatically vacated conviction prior to the State Pearson evidentiary hearing.

Attorney Gerald Evelyn was appointed to represent the Petitioner at the Pearson evidentiary hearing on the day of the evidentiary hearing.

The Petitioner has always maintained that on the day of the Pearson evidentiary hearing, he did not have a conviction to hold an evidentiary hearing on. Unfortunately, the State Pearson evidentiary hearing transcript came up missing from the lower court files and records in the Wayne County Clerk's Office, after the Pearson evidentiary hearing. The issue of the missing Pearson evidentiary hearing transcript was not properly addressed by the Court. No lower court could properly address the issue of the conviction being automatically vacated because there was no transcript of the Pearson evidentiary hearing in the files, or lower courts records.

In 1999 after several appeals through both State and Federal Courts, the Petitioner filed a Motion For Relief From Judgment and

argued that his conviction should have been vacated on September 22, 1980 Pursuant to People v Pearson, supra. The motion was assigned to Third Judicial Circuit Court Judge, Gershwin A. Drain.

In January of 2000, Judge Drain ordered the Wayne county Prosecutor's Office to respond to the Motion. In January of 2000, Timothy Baughman filed a response and argued that the Petitioner was only entitled to a new trial and not a complete dismissal. On April 3, 2000 Judge Drain granted the Motion and dismissed the Petitioner's conviction. (The Petitioner did not receive a copy of the order dismissing his conviction until 2010).

In 2010, the Petitioner went to a prison counselor Richard Forrester and told him that the County Jail credits on his 40 to 60 year sentence had been improperly calculated. The Petitioner explained that he was arrested on August 1, 1976 and arraigned on August 3, 1976 and that his time should have started on August 1, 1976 and not August 1, 1977.

The counselor went through the Petitioner's prison files and agreed with the Petitioner. The Counselor called Melissa Lewis, Records Office Supervisor and explained the situation to her and she refused to contact anyone. Richard Forrester thereafter called the Wayne County Clerk's Office and explained the situation to David Baxter. Mr. Baxter told the counselor that the file for case number 76-05925 was at the Michigan Court of Appeals. The Petitioner told the counselor that I had not filed anything on that case in twenty five years. Richard Forrester thereafter called the Michigan Court of Appeals and asked them if the file for case number 76-05925 was there and the clerk said that it was

and that they could not figure out why it was there. Richard forrester also asked the Clerk if there was an order in the file granting the Petitioner 458 days County jail credit. She said that she would not check but would send the file back to the Wayne County Clerk's Office.

A week later Richard Forrester called the Wayne County Clerk's Office and spoke to Jackie Walker and asked her if the file for case number 76-05925 had been returned and if so if there was an order in the file that granted Petitioner 458 days County Jail Credit. Wayne County Clerk, Jackie Walker said that she could not find an order granting 458 days County Jail credit, but she did find an order dismissing Petitioner's First Degree Murder conviction that had been placed in the wrong Court File.

Richard Forrester told the clerk to send a copy of the order to Records Office supervisor Melissa Lewis. Melissa Lewis got the order and refused to process the order because it came from the Wayne County Clerk's office and sent the order to Richard Forrester, who then gave the order to the Petitioner.

The Petitioner has presented the Register of Action's and the Court Order to Judge Drain, Chief Judge Virgil Smith, Chief Judge Timothy Kenny, Judge Edward Ewell Jr, Judge James Chylinski, attorney Jennifer Neumann, attorney Brandy Walkowiac, attorney Adam Weinner, Attorney Felicia O'Connor, and attorney Vanessa Miller. The Petitioner also presented a copy of the documents to the Deputy Clerk of the Michigan Supreme Court.

The Petitioner sent all of the relevant documents to Kimberely Reed Thompson, General counsel for the Third Judicial Circuit

Court, after that all of the files in both of the Petitioner's cases came up missing. The Petitioner filed a Motion To Correct The Record before the Honorable James Chylinski. Judge Chylinski's Administrative Assistant Heidi Haider was instructed by Judge Chylinski to set a hearing date for June 20, 2013. On June 17, 2013, Wayne County Deputy Clerk, David Baxter informed Heidi Haider that he was not going to file the writ because the case was not on Judge Chylinski's docket.

On June 20, 2013, the Petitioner's mother Rosie Lewis went to Judge Chylinski's courtroom to attend the hearing that had been cancelled. Heidi Haider informed the Petitioner's mother that David Baxter blocked the hearing and sent the case back to Judge Ewell. At that point Heidi Haider informed the Petitioner's mother that she was introduce her to Judge Ewell's clerk, Joann Gaskins. The Petitioner's mother Rosie Lewis, and Heidi Haider went to Judge Ewell's courtroom.

When Rosie Lewis and Heidi Haider got to judge Ewell's courtroom, Joann Gaskins had the Petitioner's files in three milk crates. When Heidi asked Joann Gaskins where the files for this case were at, she said that she had them in her hands. Joann Gaskins said that she was sending the files back to the Wayne County Clerks office because the Chief Judge, Virgil Smith requested the file. The files and records in this case did not come up missing until the Petitioner began filing Motions To Correct the Record.

At this point it is undisputed that there are no files and records in this case. It is the Petitioner's contention now that

the files and records came up missing because the Wayne County Clerks Office is responsible for the Petitioner's continued illegal incarceration.

REMEDY

This Court is authorized under 28 USC 2243 to dispose of this Habeas Petition as "law and justice require." See, **Hilton** v **Braunskill**, **481 US 77. Also, see** Gentry v Deuth, 456 F.IId 687. The above issue is an issue of first impression. There is no case that presents the legal twist and turns that this case presents.

For all of the above mentioned reasons this Court should either order the Petitioner's immediate release from prison, or release the Petitioner on bond until the Court can conduct a hearing on this matter. See, **Satterlee** v **Wolfenbarger**, 340 F.IId 773. This Court has the power and the authority to nullify an unlawful conviction and order the Petitioner's immediate release.