AUGUST 3, 2021

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1. BRIEF: 64 PAGES
2. PETITION: 12 PAGES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL HICKS,

Petitioner,

v.

DENNIS M. STRAUB,

Respondent.
_____/

MAGISTRATE JUDGE SCHEER

District Court No.

01-70954

ARTHUR J. [illegible]

PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES Petitioner, MICHAEL HICKS, #234494, and pursuant to 28 USC §2254, by and through his attorney, CAROLE M. STANYAR, and respectfully petitions this Court to issue a Writ of Habeas Corpus. In support of his Petition, Mr. Hicks states as follows:

1. Petitioner is unlawfully confined at the G. Robert Cotton Correctional Facility. Petitioner was charged in Calhoun County Circuit Court, No 93-2188FC, in the original information with one count of open murder pursuant to MCL 750.316, and one count of felony firearm pursuant to MCL 750.227b.

2. In November, 1993, following a jury trial before the Honorable James C. Kingsley, Michael Hicks was convicted of one count of first degree murder, MCL 750.316, and one count of felony firearm, MCL 750.227b.

3. On December 3, 1993, Michael Hicks was sentenced to the mandatory, consecutive prison terms of life imprisonment without parole and two years for the respective counts of murder and felony firearm. Mr. Hicks was represented throughout the trial and

sentence by Attorney Eusebio Solis, Jr.

4. Petitioner is at present unconstitutionally detained and imprisoned at the G. Robert Cotton Correctional Facility in Jackson, Michigan under the jurisdiction of the Michigan Department of Corrections.

5. This petition was filed previously and was placed on the docket of the Honorable Victoria A. Roberts. By stipulation of the parties, this matter was dismissed without prejudice so that Mr. Hicks could raise his unexhausted claims in state court. The parties further agreed that the "refiled petition shall not constitution a 'successive petition' pursuant to 28 USC §2244(b)(2)", and that the "one-year limitations period set forth in 28 USC §2244(d)(1) shall be tolled for the period that this action has been pending." See Stipulation appended to Petition.

4. Petitioner has exhausted all state remedies available to him at the time of this Petition as to the issues raised herein by taking the following steps:

A. Petitioner appealed his conviction and sentence as of right (an appeal which raised the argument set forth at ¶ 5C below), and on November 6, 1996, the Michigan Court of Appeals, in an unpublished per curiam opinion, affirmed his conviction, No. 1711833. He was represented on appeal by P.E. Bennett.

B. Petitioner raised the same argument, set forth at ¶5 C, in the Michigan Supreme Court, and his timely application for leave to appeal to the Michigan Supreme Court was denied on November 7, 1997.

C. Following the stipulated dismissal of his §2254 petition, Mr. Hicks raised his unexhausted claims (the subject of this petition, ¶¶ 5A and 5B detailed below) in the state trial court. On January 29, 1999, Petitioner filed his timely motion for relief from judgment pursuant to MCR 6.500 before the Honorable James C. Kingsley in Calhoun County Circuit Court. The written order denying Mr. Hicks' motion for relief from judgment was entered on March 16, 2000. Mr. Hicks was represented throughout the appeal of the 6.500 motion by undersigned counsel.

D. On August 11, 2000, Mr. Hick's timely application for leave to appeal the denial of his motion for relief from judgment was denied by the Michigan Court of Appeals.

E. On February 26, 2001, Mr. Hick's timely application for leave to appeal from the (second) decision of the Court of Appeals was denied by the Michigan Supreme Court.

5. Petitioner raises the following meritorious grounds which merit this Court's grant of a writ of habeas.

> A. PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE PROSECUTOR ADVISED THE JURY DURING OPENING STATEMENT THAT PETITIONER HAD CONFESSED TO THE MURDER, WHERE THE PROSECUTOR WITHOUT EVEN THE PRETENSE OF DUE DILIGENCE FAILED THEREAFTER TO PRODUCE THE WITNESS TO THE ALLEGED CONFESSION, WHERE DEFENSE COUNSEL NEVER RESPONDED TO THE ISSUE OF THE "CONFESSION" IN ANY WAY, AND WHERE THE COURT'S INSTRUCTIONS FAILED UTTERLY TO REMEDY THE ENORMOUS PREJUDICE TO THE PETITIONER.
>
> B. PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT OR MOVE FOR MISTRIAL BASED UPON AN OBVIOUS DEPRIVATION OF THE RIGHT TO CONFRONT WITNESSES FOLLOWING THE PROSECUTOR'S

UNSUPPORTED STATEMENT TO THE JURY THAT THE PETITIONER HAD CONFESSED, AND WHERE APPELLATE COUNSEL FAILED TO FRAME THIS ISSUE PROPERLY AS THE DEPRIVATION OF THE RIGHT TO CONFRONT WITNESSES IN VIOLATION OF THE SIXTH AMENDMENT.

C. PETITIONER WAS DENIED DUE PROCESS AND WAS DEPRIVED OF THE OPPORTUNITY TO CONDUCT A WADE HEARING WHERE AN IDENTIFYING WITNESS WAS SUBJECTED TO A BLATENTLY SUGGESTIVE COURTROOM IDENTIFICATION "PROCEDURE", WHERE THE FACTS OF RECORD ESTABLISH CONVINCINGLY THAT THE WITNESS HAD FAILED TO IDENTIFY THE DEFENDANT BEFORE, AND HAD NO INDEPENDANT BASIS TO ATTEMPT AN IDENTIFICATION AT TRIAL, AND WHERE DEFENSE COUNSEL WAS INEFFECTIVE VARIOUSLY BY FAILING TO IMPEACH THE WITNESS BASED UPON HER PRIOR FAILURE TO IDENTIFY, BY FAILING TO ASK FOR A WADE HEARING DURING TRIAL, OR BY FAILING TO ASK FOR A MISTRIAL TO CURE THE ERROR.

6. Throughout his direct appeal, Petitioner asked for a remand to the trial court to litigate his right to a Wade hearing, and to litigate his trial counsel's ineffectiveness pursuant to People v Ginther, 390 Mich 436 (1973). That request was denied by the Court of Appeals and by the Supreme Court. Thus both the Wade issue and his Ginther issue have been fully exhausted in Michigan State Courts, and counsel's ineffectiveness satisfies "good cause" requirements of 28 USC §2254.

7. The one-sentence ruling of the Michigan Supreme Court, that the application for leave to appeal was denied because Mr. Hicks had "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)", is clearly erroneous.

(A) Mr. Hicks did establish an adequate "cause" for his failure to raise Arguments I and II (¶ 5A) during his direct appeal, to wit, the ineffectiveness of his trial and appellate counsel. MCR 6.508(D)(3)(a). Under Michigan law, if the failure

to raise a legitimate appellate claim during an initial appeal of right is due to counsel's ineffectiveness, no waiver has occurred and the reviewing court (in this instance, this Michigan Supreme Court), may consider the claim as if on direct review. People v Wolfe, 156 Mich App 225 (1986); See also Banks v Reynolds, 54 F3d 1508 (10th Cir 1995)(ineffectiveness on appeal in the failure to raise a significant defense).

(B) The confrontation clause argument was not raised and "decided against the defendant", as suggested by the Calhoun County prosecutor in the state appeal of these issues. MCR 6.508(D)(2). The stipulated dismissal in this case by Petitioner and the Michigan Attorney General's Office confirms the parties' agreement that the confrontation clause issue is distinct from the general prosecutorial misconduct claim that was brought on Mr. Hicks' direct appeal. It was precisely for that reason that the instant petition had to be dismissed and delayed. Therefore the Michigan Supreme Court was erroneous to the extent that it barred the claim because it had been raised and decided against the defendant before.

(C) The ground for relief discussed in Argument III (the Wade claim described at ¶ 5C) was raised previously, primarily by the Defendant litigating this question in the Michigan Supreme Court "pro se", however, under the unique circumstances in this case, there was no procedural bar under Michigan law. MCR 6.508((D)(3). Argument III was raised again, in complete form, in the motion under MCR 6:500 for the reason that Mr. Hicks had not

adequately or effectively represented when it was raised at the last minute by this unrepresented defendant, and because newly discovered additional crucial information has come to light which further bolstered this claim -- information which was not available when Defendant's appellate pleadings were filed. This explanation was ignored completely by the Michigan appellate courts.

(D) Mr. Hicks clearly demonstrates "actual prejudice": jurors were informed by the prosecutor that he had "confessed" to the crime -- a statement that Mr. Hicks was never able to confront. See MCR 6.508(D)(3)(b). For obvious reasons, the erroneous admission of (or the deprivation of an opportunity to confront) a confession has long been considered to constitute "actual prejudice" to the defendant in a criminal case. "Actual prejudice" as to Petitioner's Wade claim is likewise abundantly clear. The witness was permitted, impermissibly, to testify that Mr. Hicks was the shooter.

8. As to the claims raised in this petition, Petitioner has met the requirements set forth in 28 USC §2254(d) in the following manner:

> a) The decision rendered by each of the Michigan courts, both trial and appellate, was "contrary to [and] involved an unreasonable application of Federal law, as determined by the Supreme Court of the United States", to wit, Bruton v United States, 391 US 123 (1968) and Gray v Maryland, 523 US 185, 140 LEd2d 294, 303; 118 SCt 1151 (1998), as to the issue set forth at ¶ 5A (confrontation error); and to wit, Strickland v Washington, 466 US 668 (1984), as to the issue set forth in ¶5B and 5C (ineffectiveness as to Wade and Gray issues); and to wit, United States v Wade, 388 US 218, 87 SCt

1926, 18 LEd2d 1149 (1967) as to the issue set forth in ¶5C. 28 USC 2254(d)(1); and

b) There was "an unreasonable determination of the facts in light of the evidence presented in the State court proceedings". 28 USC §2254(d)(2).

8. This petition is timely: it was originally filed within one year from the "completion" of Petitioner's direct appeal, and it is being refiled pursuant to the previously-entered stipulation of the parties. See Stipulation attached.

9. Petitioner is restrained and imprisoned pursuant to a conviction that violates the Constitution of the United States, and pursuant to a sentence that is illegal and void. Petitioner is restrained and imprisoned pursuant to a sentence that is illegal and void for the reasons set forth in the above and his Brief in Support of Petition for Habeas Corpus, which is attached hereto and incorporated by reference.

WHEREFORE, Petitioner prays:

A. That this Court grant this Petition;

B. That this Court grant oral argument;

C. That this Court order a hearing pursuant to United States v Wade, 388 US 218, 87 SCt 1926, 18 LEd2d 1149 (1967), and pursuant to People v Ginther, 390 Mich 436 (1973);

D. That this Court reverse his conviction;

E. That this Court order such other relief as the Court may deem just and proper under the circumstances.

Respectfully submitted,

Carole M. Stanyar

CAROLE M. STANYAR P34830
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(313) 963-7222

Dated: March 9, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL HICKS,

Petitioner,

v.

DENNIS M. STRAUB,

Respondent.
_____/

No. 99CV-70299-DT
HONORABLE VICTORIA A. ROBERTS

STIPULATION TO DISMISS PETITION WITHOUT PREJUDICE

NOW COME the above parties, by their respective counsel, and stipulate to a dismissal of the instant action without prejudice for the following reasons:

1. The instant petition raises both exhausted and unexhausted claims as defined in 28 USC §2254, and Rose v Lundy, 455 US 509, 522 (1982).

2. This petitioner is presently seeking further collateral review in state court in order to fully exhaust Issues I, II and III on the instant petition, and in order to raise other claims based, inter alia, on a deprivation of the right of confrontation as to a crucial witness (to an alleged "confession") who was discussed in opening statement by the prosecutor and then never called, and based upon ineffective assistance of counsel, in a case captioned People v Hicks, Calhoun County Circuit Court No. 93-2188FC.

3. With the advent of the one-year deadline included in the Antiterrorism and Effective Death Penalty Act, 28 USC §2244 (d)(1), there has been considerable uncertainty as to how a federal habeas petitioner should handle the "hybrid" petition situation which includes both exhausted and unexhausted claims, and consequently this Petitioner, like many others, opted to file what ordinarily

would be considered a "hasty petition" for fear of having his exhausted claims time-barred. See discussion in Martin v Jones, 969 FSupp 1058 (MD Tenn 1997).

4. Based upon the foregoing dilemma, and based upon the state habeas petition now pending, the parties agree that this action should be dismissed without prejudice. See Martin v Jones, 969 FSupp 1058 (MD Tenn 1997); Garfinkle v Huff, 110 F3d 63 (Table), 1997 WL 144212 (6th Cir March 27, 1997)(unpublished and appended).

5. The parties further agree that in the event Petitioner later refiles the claims dismissed herein, the refiled petition shall not constitute a "successive petition" pursuant to 28 USC §2244(b)(2). See Martin v Jones, 969 FSupp 1058 (MD Tenn 1997); In re Gasery, 116 F3d 1051 (5th Cir 1997).

6. The parties further agree that the one-year limitations period set forth in 28 USC §2244 (d)(1) shall be tolled for the period that this action has been pending. See 28 USC §2244(d)(2).

IT IS SO STIPULATED.

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Assistant Attorney General
Habeas Corpus Division
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Dated: 7/16/99

Carole M. Stanyar

CAROLE M. STANYAR P34830
Attorney for Petitioner
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One Kennedy Square, Ste. 1938
Detroit, MI 48226

Dated: 7/16/99

ORDER

For the reasons set forth in the above Stipulation, this matter shall be dismissed without prejudice.

IT IS SO ORDERED.

Dated: SEP 29 1999

~~HONORABLE VICTORIA A. ROBERTS~~
United States District Judge

Citation
110 F.3d 63 (Table)
Unpublished Disposition
(Cite as: 110 F.3d 63, 1997 WL 144212 (6th Cir.(Ky.)))

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NOTICE: Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Benjamin GARFINKLE, Petitioner-Appellant,
v.
Warden HUFF; Commonwealth of Kentucky, Respondents-Appellees.
No. 96-5671.
United States Court of Appeals, Sixth Circuit.
March 27, 1997.

W.D.Ky., No. 95-00170; Joseph H. McKinley, Judge.
W.D.Ky.
VACATED.

Before: KENNEDY, KRUPANSKY, and NORRIS, Circuit Judges.

ORDER

**1 Benjamin Garfinkle, a Kentucky prisoner proceeding pro se, appeals a district court order dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. s 2254. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

Garfinkle was sentenced on May 20, 1991, to ten years in prison following his guilty plea to two counts of first degree burglary, four counts of third degree burglary, and nine counts of theft by unlawful taking over $100. He did not file a direct appeal. However, his motions for alteration of sentence and for modification of sentence were denied by the trial court. Garfinkle's appeal of the latter motion was pending before the Kentucky Court of Appeals at the time he filed his federal petition.

In his federal habeas corpus petition, Garfinkle complained that the prosecutor reneged on an agreement made to resentence him to three consecutive six-month terms of home incarceration upon Garfinkle's payment of restitution to one of the victims and the return of stolen property. A magistrate judge recommended that Garfinkle's petition be dismissed with prejudice for failure to exhaust state court remedies. The district court overruled Garfinkle's objections, adopted the magistrate judge's findings and conclusions, and dismissed the petition with prejudice in an order entered on April 10, 1996.

On appeal, Garfinkle argues that he cannot receive satisfaction at the state level and requests that his case be considered on the merits. He requests the appointment of counsel on appeal.

With a number of exceptions not applicable in this case, state prisoners must first exhaust their available state court remedies before seeking federal habeas corpus relief. See 28 U.S.C.A. s 2254(b)(1) (West 1996); Hannah

v. Conley, 49 F.3d 1193, 1196 (6th Cir.1995) (per curiam). The exhaustion requirement is normally satisfied after the petitioner fairly presents all his claims to the highest court in the state in which the petitioner was convicted, thus giving it a full and fair opportunity to rule on his claims before seeking relief in federal court. Rust v. Zent, 17 F.3d 155, 160 (6th Cir.1994).

Garfinkle does not dispute the fact that he has not exhausted his available state court remedies; indeed, he acknowledges that he has an appeal pending before the Kentucky Court of Appeals. He only argues that the delay in the state court's ruling makes it impossible to obtain "satisfaction" from the state courts and that, therefore, the federal courts should excuse him from the exhaustion requirement and consider the merits of his petition.

The district court did not err in finding this argument to be unpersuasive. However, because the dismissal was not on the merits, it should have specified that it was "without prejudice" to Garfinkle's ability to refile his petition once he has satisfied the exhaustion requirement.

**2 Upon review, we vacate the district court's order because the order dismissing this case should have specified that the dismissal was without prejudice rather than with prejudice.

Accordingly, Garfinkle's request for the appointment of counsel is denied. The district court's order, entered on April 10, 1996, is vacated and the case is remanded for entry of a new order dismissing Garfinkle's petition without prejudice. Rule 9(b)(3), Rules of the Sixth Circuit.

ND OF DOCUMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

01-70951

MICHAEL HICKS,

Petitioner,

v.

DENNIS M. STRAUB,

Respondent.
_____/

District Court No.

MAGISTRATE JUDGE SCHEER

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF FACTS:

Case Background:

The prosecution claimed that Michael Hicks was responsible for the shooting death of Shawn Stalworth in Battle Creek, Michigan at about noon on Sunday, July 25, 1993. Witnesses gave various, sometimes conflicting, descriptions of a black male who exited a "sport truck" or "Bronco" and hid in an area of trees and shrubs near the intersection of Champion and Kendall. When Mr. Stalworth came out of his house, the suspect ran up to him, shot him twice, then ran back to his truck and drove away.

Shortly thereafter, two and a half miles away from the intersection of Kendall and Champion, police began following Mr. Hicks' vehicle, primarily because he is a black male and he was driving Ford Bronco. Mr. Hicks continued a short distance and then pulled the Bronco into a driveway. He had a rock of cocaine in the vehicle, and was driving with a suspended license. He had been arrested and incarcerated in the past for driving without a valid license. According to witnesses, when Mr. Hicks parked the Bronco in the driveway and exited his vehicle, a Battle Creek Police Officer blocked the driveway with his scout car, jumped from his vehicle and shouted at Michael Hicks. When Mr. Hicks jumped from his vehicle and began to exit the vicinity, the officer yelled "Stop or I'll shoot you". Other officers drew their weapons in pursuit. Mr. Hicks fled on foot and was apprehended a short time later approximately 500 yards from his vehicle. He was arrested and charged in connection with the murder of Shawn Stalworth.

In November, 1993, following a jury trial before the Honorable

James C. Kingsley in Calhoun County Circuit Court, Michael Hicks was convicted of one count of first degree murder, MCL 750.316, and one count of felony firearm, MCL 750.227b.

On December 3, 1993, Michael Hicks was sentenced to the mandatory, consecutive prison terms of life imprisonment without parole and two years for the respective counts of murder and felony firearm.

Defendant filed his timely appeal of right in the Michigan Court of Appeals. His appeal was denied and his conviction was affirmed in an unpublished opinion entered on November 6, 1996. His timely application for leave to appeal to the Michigan Supreme Court on November 7, 1997.

Throughout his direct appeal, Defendant asked for a remand to the trial court to litigate his right to a Wade hearing, and to litigate his trial counsel's ineffectiveness pursuant to People v Ginther, 390 Mich 436 (1973). That request was denied by the Michigan Court of Appeals and by the Michigan Supreme Court. Thus both the Wade issue and his Ginther issue have been fully exhausted in Michigan State Courts.

Following the completion of his direct appeal, Defendant filed contemporaneously a motion in state court under MCR 6.500, and a petition in federal court under 28 USC §2254. This petition, filed previously on January 26, 1999, was placed on the docket of the Honorable Victoria ~~Robert~~ Roberts. By stipulation of the parties, this matter was dismissed without prejudice so that Mr. Hicks could raise his unexhausted claims in state court. The parties further

agreed that the "refiled petition shall not constitution a 'successive petition' pursuant to 28 USC §2244(b)(2)", and that the "one-year limitations period set forth in 28 USC §2244(d)(1) shall be tolled for the period that this action has been pending." See Stipulation appended to Petition.

Following the stipulated dismissal of his §2254 petition, Mr. Hicks litigated his unexhausted claims (the same subject matter raised in this petition), in the state trial court. On January 29, 1999, Petitioner filed his timely motion for relief from judgment pursuant to MCR 6.500 before the Honorable James C. Kingsley in Calhoun County Circuit Court. The written order denying Mr. Hicks' motion for relief from judgment was entered on March 16, 2000. On August 11, 2000, Mr. Hick's timely application for leave to appeal the denial of his motion for relief from judgment was denied by the Michigan Court of Appeals. On February 26, 2001, Mr. Hick's timely application for leave to appeal from the (second) decision of the Court of Appeals was denied by the Michigan Supreme Court.[1]

Remaining facts will be included within the argument sections to which they pertain.

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[1] This petition is timely in light of the parties' stipulation as to "tolling" and as to refiling, and it is being filed within one year of the completion of the period for Defendant's direct appeal, which includes a 90-day additional period within which a defendant can petition for a writ of certiorari in the United States Supreme Court. See United States v DeTella, 6 FSupp 2d 780 (ND Ill 1998); Cox v Angelone, 997 FSupp 740, 742 (ED Va 1998); Alexander v Keane, 991 FSupp 329, 334, n2 (SDNY 1998).

SUMMARY OF ARGUMENT

The Defendant Michael Hicks was denied his constitutional right to confront witnesses when the prosecutor, during opening statement, advised jurors that Mr. Hicks had confessed to this murder to a person name Lorenzo Brand while he was in a police lockup. Thereafter, the prosecutor not only did not produce Mr. Brand at trial, but additionally, he did not demonstrate even the pretense of due diligence in attempting to secure Brand's presence as a witness. The so-called curative instruction regarding Mr. Brand did nothing to correct this outrageous error because the language of the instruction did not even refer to the statement made by the prosecutor during opening statement. Objecting to this confrontation error was not realistically feasible because the statement was made long before its impact was known. Moreover, any objection or curative instruction would be futile given the gravity of the error. Finally, it was trial or appellate counsel's omission (not Mr. Hicks') in failing to object or in failing to frame the issue properly at trial or on the Defendant's direct appeal, an omission that constituted ineffective assistance.

The trial court was also clearly erroneous in failing to permit a Wade or a Ginther hearing. The sole identifying witness in this murder trial was subjected to a grossly suggestive pretrial identification procedure, she clearly did not have a basis independent of the suggestive influence to identify, and neither trial nor appellate counsel afforded the Defendant the effective assistance of counsel in preserving this issue.

ARGUMENTS

I.

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE PROSECUTOR ADVISED THE JURY DURING OPENING STATEMENT THAT DEFENDANT HAD CONFESSED TO THE MURDER, WHERE THE PROSECUTOR WITHOUT EVEN THE PRETENSE OF DUE DILIGENCE FAILED THEREAFTER TO PRODUCE THE WITNESS TO THE ALLEGED CONFESSION, WHERE DEFENSE COUNSEL NEVER RESPONDED TO THE ISSUE OF THE "CONFESSION" IN ANY WAY, AND WHERE THE COURT'S INSTRUCTIONS FAILED UTTERLY TO REMEDY THE ENORMOUS PREJUDICE TO THE DEFENDANT.

Introduction

At the outset of this trial, the prosecutor promised the jury that it would produce a witness who would recount the Defendant "confessing" to the murder charged in this case. Defense counsel waived opening statement until after the People's proofs, and thereafter never defended against and never responded to the "confession" claim ever again during this trial. The witness was not thereafter produced, and the proverbial "elephant in the middle of the room" was never mentioned again.

The circumstances surrounding the purported declaration of guilt by the Defendant were incredibly suspect: a statement allegedly made to a witness who was and is a complete stranger to the Defendant, a witness who was a jailed felon currying favor with the prosecutor, and a purported "confession" murmured in ambiguous language while both men were positioned under a jailhouse sign that said all conversations were being monitored. Unfortunately, jurors had the benefit of none of this powerful impeaching material. Finally, the Court's "curative" instruction, wholly ambiguous, did

not link the name of the witness to the issue of the "confession" in any way. Even worse, the "res gestae" instruction was positioned (albeit unwittingly) just before another jury instruction which informed jurors of the method by which they could consider the "statement" of the Defendant -- suggesting to them, implicitly and erroneously, that the "confession" could be considered by them.

Then end result was the most egregious example of a deprivation of the constitutional right to confront witnesses, as to the most powerful piece of evidence imaginable in any trial -- a confession to a murder.

A. Case facts regarding "confession" to Lorenzo Brand:

In his opening statement, the prosecutor advised the jury that on the same day as the homicide while Michael Hicks was in custody in a Battle Creek Jail, a fellow prisoner asked Mr. Hicks if he had killed the victim. Mimicking the Defendant's answer, the prosecutor stated, "Yep, yep." (Prosecutor's Opening Statement, 11/16/93, Vol I, 20).

> PROSECUTOR BUSCHER: Defendant was arrested. He was charged. He was arraigned. He was taken to the City of Battle Creek lockup pending transfer, moving him over here. While he was there, there was another person in the lockup. He goes, "hey, my mom just saw you on a videotape."
>
> ... He said "my mom told me she just saw a person and they accused him of homicide. You kill that man?" What did he say? [Quoting the Defendant], "Yep, yep."

Thereafter, Defense counsel reserved his opening statement. The witness to the "confession" never appeared and this "evidence"

therefore was never produced at trial. This issue was never dealt with by defense counsel in any way. After blurting out the confession in opening statement, the prosecutor conceded that he had done next to nothing to secure the witness's appearance at trial (Trial, 11/17/93, Vol II, 293).

While it is not immediately apparent from the record whether either party requested a res gestae instruction, an instruction was given sua sponte by the trial court, however, it referenced not the "confession", but rather the person named Lorenzo Brand, a name that the jury had never even heard during the trial. There was simply no connection made between the instruction and the evidentiary problem it was intended to cure (Trial, 11/17/93, Vol II, 293; 11/18/93, Vol III, 449). This pointless instruction read as follows:

> Lorenzo Brand is a missing witness whose appearance was the responsibility of the prosecution. You may infer that the witness' testimony would not have been favorable to the Prosecution's case.

(Trial, 11/18/93, Vol III, 449). There was no contemporaneous context offered to the jury for this instruction. Even worse, immediately thereafter, the trial court gave an instruction[2]

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[2] First, you must decide if the Defendant actually made the statement as it was given to you. If you find the Defendant did not make the statement at all, you should not consider it. **If you find that he made part of the statement, you may consider that part as evidence.**

Second, if you find that the Defendant did not make the statement, you must decide whether the whole statement or part of it is true. When you think about whether the statement is true, you should consider how and when the statement was made as well as all the other evidence in the case. **You may give the statement whatever importance you think it deserves. You may decide it was very important** or not very important at all. I deciding this you should once again think about how and when the statement was made and about all the other evidence in the case. (Trial, 11/18/93, Vol III, 449-450)(emphasis supplied).

(quoted in footnote) which, to the untrained and sometimes-inattentive juror, could easily have related to the "elephant-in-the-room" confession they heard about during opening statement. While these two instructions may have been designed to protect a Defendant against the dangers of a juror misconstruing evidence, the impact on this Defendant of these two instructions juxtaposed was clearly prejudicial.

What is most unfortunate about this situation is that had this witness actually been produced by the prosecution, he would have been subjected to a searing cross-examination by even the most inexperienced defense attorney. The impeachment ammunition was bountiful, as is fully demonstrated by his testimony at preliminary examination. The basic circumstances surrounding Mr. Brand's version of events strains credulity, and even then, the statement attributed to Michael Hicks was itself little more than an ambiguous grunt. Lorenzo Brand and Michael Hicks had never met before they were housed in diagonal holding cells following Mr. Hicks' arrest on July 23, 1993. A complete stranger to Mr. Hicks, Brand claims that he decided on the following conversation-starter, "I asked him did he kill anybody", to which Michael Hicks replied "Uh-huh". (Preliminary Examination, 8/13/93, 59-61). Mr. Brand insists that this "confession" was uttered within feet of a large sign in the lockup area which warns "everything's being recorded". (Preliminary Examination, 8/13/93, 62). Brand acknowledged that moments before he testified at preliminary examination, he had told his friends "I don't know anything about Mr. Hicks". (Preliminary

Examination, 8/13/93, 63). While denying that he had any sort of firm "deal" for his testimony against Mr. Hicks, Mr. Brand acknowledged that he anticipated that the prosecutor "might" help him out with the charges he was facing at the time. (Preliminary Examination, 8/13/93, 63). Apparently when the anticipated help was not forthcoming, Mr. Brand declined the invitation to appear at the Defendant's trial, which enabled the "confession" to be uttered, untested in the crucible of the adversarial process, in a far more dramatic and persuasive fashion -- by an officer of the court. (Prosecutor's Opening Statement, 11/16/93, Vol I, 20).

B. Law regarding deprivation of right to confront a "confession":

In People v Ellison, 133 Mich App 814, 820 (1984), the Michigan Court of Appeals observed as follows in an analogous setting.

> Testimony given by a ... prosecutor is impermissible because it defeats a defendant's right to cross-examine witnesses presented against him or her, thus violating the defendant's right to confront witnesses against him or her. US Const, Ams VI and XIV; Mich Const 1963, art 1, §20. See also In re Murchison, 349 US 133; 75 SCt 623; 99 LEd 942 (1955). Denial of the right of effective cross-examination is a constitutional error of the first magnitude and no amount of showing of want of prejudice can cure it. Davis v Alaska, 415 US 308, 318; 94 SCt 1105; 39 LEd2d 347 (1974); Smith v Illinois, 390 Us 129, 131; 88 SCt 748; 19 LEd2d 956 (1968).

While a myriad of cases hold that a prosecutor may not make a statement of fact that is unsupported by trial evidence,[3] the error

[3] People v Quick, 58 Mich 321 (1885); People v Brocato, 17 Mich App 277 (1969); People v McGee, 66 Mich App 164 (1975); People v Viaene, 119 Mich App 690, 696-697 (1982); People v Bairefoot, 117 Mich App 225, 231 (1982) People v Partee,

which occurred here is far more substantial. This prosecutor told the jury that Michael Hicks had confessed to this murder. It is hard to fathom a more prejudicial communication to a jury, particularly since this statement was never confronted, or even dealt with by either party or by the judge during the trial.

Perhaps the most fitting analogy to the error which occurred here is where the statement of a non-testifying codefendant is introduced during a joint trial. The United States Supreme Court has consistently held and has recently reaffirmed that the "out-of-court accusation" carries with it a "powerfully incriminating" effect, which creates a "special, and vital, need for cross-examination -- a need that would be immediately obvious had the codefendant pointed directly to the defendant in the courtroom itself." Gray v Maryland, 523 US 185, 140 LEd2d 294, 303; 118 SCt 1151 (1998), quoting from Bruton v United States, 391 US 123, 138; 20 LEd2d 476; 88 SCt 1620 (1968) (Stewart, J., concurring).

In Bruton v United States, 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620 (1968), the United States Supreme Court held that at a joint trial, the admission into evidence of a nontestifying codefendant's confession, which confession inculpated the other codefendant being jointly tried with the declarant, violated the other codefendant's Sixth Amendment right to confront witnesses against him. Ironically, the Bruton case, as here, involved an alleged "jailhouse confession" which the defendant had no opportunity to

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410 Mich 871 (1980); People v Dane, 59 Mich 550, 552 (1886); People v Knolton, 86 Mich App 424, 428 (1978); People v McCain, 84 Mich App 210, 215 (1978); People v Jones, 130 Mich App 676 (1983).

challenge. Mr. Bruton had been jointly tried with a codefendant named Evans and had been convicted of the crime of armed postal robbery. A postal inspector had testified at their joint trial that Mr. Evans had orally confessed to him that he and Bruton had committed the armed robbery. The confession had been obtained while Evans was being held at the city jail on state criminal charges, and its introduction, according to the Supreme Court, added "substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand." The Court in Bruton found that Evan's confession constituted just such a "powerfully incriminating extrajudicial statement[]," and that its introduction into evidence, insulated from cross-examination, violated Mr. Bruton's Sixth Amendment rights. 391 US at 135.

Whether in the context of a Bruton situation, or as here even worse, in the context of a prosecutor's opening remarks, the focus is on whether the declarant's statement is "directly accusatory", or "incriminating on its face." Gray v Maryland, 523 US 185, ___; 140 LEd2d 294, 303; 118 SCt 1151 (1998). In Mr. Hicks' case, there is little question that the out-of-court statement is incriminating on its face and accusatory. The defendant was allegedly asked whether he murdered the deceased, and according to Mr. Brand, the defendant said yes.

The Tenth Circuit applied the holding of Bruton recently in a case that mirrors all significant aspects of Mr. Hicks' situation. United States v Katrice Glass and Larry Burnett, 128 F3d 1398 (10th

Cir 1997). Ms. Glass and Mr. Burnett were accused of distributing cocaine and were tried jointly. Early in the trial, the first witness, Detective Leach, volunteered, in the presence of the jury: "As I was saying, yes, it did come to light by Ms. Glass that she knew Larry Burnett--a/k/a Chris Simms, Chris Simmons, Larry Miller -- **that she had knowingly transported the narcotics along with him to Oklahoma City.**" 128 F3d at 1402 (emphasis in original). Mr. Burnett's conviction was overturned based upon the introduction of this statement that he could not confront. The Court held,

> [h]ere, it is undisputed a Bruton violation occurred. Ms. Glass' statement, as recounted by the testifying officer, directly inculpated Mr. Burnett. Ms. Glass never took the stand to testify; therefore, Mr. Burnett never had the opportunity to cross-examine the declarant of that statement.

Glass, 128 F3d at 1403, citing Schneble v Florida, 405 US 427, 430; 92 SCt 1056, 1059; 31 LEd2d 340 (1972).

With Bruton-type errors, the only genuine debate is whether **any** jury instruction can cure such a horrendous constitutional error. In Nash v United States, 54 F2d 1006 (2d Cir 1932), Judge Learned Hand commented on the likelihood that a jury would actually heed a trial court's admonition to disregard a codefendant's interlocking confession as against the defendant on trial. Such an admonition was, according to Judge Hand, a requirement of "a mental gymnastic which is beyond, not only their powers, but everybody else's." Thirty-six years later, in Bruton, Justice Stewart echoed that sentiment.

> A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of

> hearsay... are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give.

Bruton, 391 U S 138, 88 S Ct 1629 (Stewart, J. concurring).

Similarly, a majority of the Supreme Court held,

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where a powerfully incriminating extrajudicial statement of a codefendant [is presented to the jury].

Bruton, 391 US at 135-136. Consequently the Court questioned whether such an error could ever be cured, even with a curative instruction. "The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction." Bruton, 20 LEd2d at 481, quoting from Krulewitch v United States, 336 US 440, 453; 93 LEd 790, 799; 69 SCt 716 ( )(Jackson, J., concurring). The Court held that since Evans had not testified in Mr. Bruton's trial and since his confession had added substantial weight to the government's case in a form not subject to cross-examination, Mr. Bruton's Sixth Amendment right to confront witnesses against him had been violated and that the violation could not be cured by instructions given to the jury to disregard the confession as to Bruton.

In so holding the Supreme Court has recognized that additional problems are inherent in the "jailhouse confession". The misplaced comfort of knowing that a defendant has confessed to some

one, even a felon, overwhelms a jury's capacity to analyze the statement critically.

> Not only are the incriminations devastating to the defendant, but their credibility is inevitably suspect ... The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

Bruton, 391 US at 135-136.[4]

All of these same problems, and more, were implicated in the prosecutor's statement at Mr. Hicks' trial that he had confessed to the very murder charged in this case. As in Gray, this statement occurred very early in the trial when jurors would be formulating their initial, and perhaps immutable, impressions of Mr. Hicks. The statement was voiced by the prosecutor -- a credible officer of the court -- rather than through the actual declarant, who would have carried with him much felon-like baggage. Not only was this alleged statement of Mr. Brand concerning the Hicks confession never subjected to cross-examination, it was never dealt with in any way by defense counsel who reserved his opening statement until late in this trial, and then never mentioned Lorenzo Brand and did not deny that the "confession" had occurred. The temptation for jurors to consider an admission of guilt by this defendant was irresistible. It provided a safety net for any juror otherwise reluctant to convict a man of a capital offense based upon what

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[4] Any retort by the prosecution -- that Bruton has never been applied in this particular context -- can be explained by the fact that prosecutor's don't ordinarily tell juries that a defendant has confessed if they don't plan on producing the witness. Moreover, it is irrelevant in this case that the failure to produce Lorenzo Brand was not intentional. The impact on the defendant is the same regardless of the good or bad will of the prosecutor.

otherwise was a circumstantial case.

Bruton and its progeny reaffirm that curative or limiting instructions will rarely be effective in remedying an error of this type and magnitude. The curative instruction given here, patterned after Michigan Standard Criminal Jury Instruction 5.12, while well-intentioned, could not even remotely have cured the confrontation violation in this case. That instruction was read to the jury as follows:

> Lorenzo Brand is a missing witness whose appearance was the responsibility of the prosecution. You may infer that the witness' testimony would not have been favorable to the Prosecution's case.

(Trial, 11/18/93, Vol III, 449). Any thinking juror hearing this instruction would have asked the obvious: "Who is Lorenzo Brand?" Brand's name was not mentioned in connection with the confession, and this instruction doesn't advise the jury in any way that they should not consider the alleged confession.[5]

Any jurors seeking guidance on how to deal with the fact that the prosecutor told them that Mr. Hicks had admitted to the crime may have resorted to the very next instruction on a defendant's statement (included verbatim at footnote 1, supra), which allows the juror to consider such a statement if they follow the other rules relating to such evidence. That instruction permits rather than forbids a juror from considering such information. Far from a "limiting" or "curative" instruction, it compounded the potential

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[5] Defendant does not mean to imply that an instruction to the jury to disregard the statement about the confession would avoid reversible error. This was a bell that could not be unrung.

error.

As Bruton counsels, it is a "naive" to assume that jurors will ignore something as powerful as a defendant's confession -- the proverbial "elephant-in-the-room" which is heard but never discussed.

C. The availability of habeas relief:

The Antiterrorism and Effective Death Penalty Act of 1996 now provides that a state court conviction may be reviewed in a federal habeas corpus proceeding and a writ may be granted where the state court's adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; 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 proceeding.

28 USC §2254(d). The United States Supreme Court has continued to address Sixth Amendment claims raised by state prisoners in habeas proceedings. Cahill v Rushen, 501 FSupp 1219, 1222 (ED Cal 1980). See also United States v Tanner, 24 F3d 252, 1994 WL 161952 (9th Cir 1994).

A Sixth Amendment challenge based upon a Bruton-Gray violation is cognizable as a federal habeas claim under 28 USC §2254(d)(1). McGhee v Yukins, 229 F3d 506 (6th Cir 2000); Platt v State of Maine, 201 F3d 428 (1st Cir 1999). In McGhee, the Sixth Circuit considered a Sixth Amendment claim under the Confrontation Clause where the jury was advised of the partially redacted confession of

Mr. McGhee's codefendants. Mr. McGhee also argued that the prosecutor's statements during closing arguments exacerbated the Bruton-Gray error. In McGhee, the Court held that while the introduction of the offending confession did not violate the Supreme Court precedent extant at the time of the challenge, the prosecutor's conduct during argument catapulted the evidence into a Bruton-Gray violation. The Court in McGhee agreed with the finding of the Michigan Supreme Court that the prosecutor's statements, in light of the evidence, were improper.[6] The prosecutor's argument urged jurors improperly to consider the redacted statements as a whole notwithstanding the trial court's earlier cautionary instruction to consider each statement only against the defendant who made it. McGhee, 229 F3d at 512-513. Interpreting §2254(d)(1), the Court held that "[a] state court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision involv[ing] an unreasonable application of clearly established Federal law." McGhee, 229 F3d at 510. The Court held further that the application must be unreasonable in light of the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision. In the context of this case, the question turns on the existence and application of

[6] The Court ultimately found, however, that the petitioner had not established "actual prejudice", defined as a "a substantial and injurious effect or influence in determining the jury's verdict", no doubt because the other evidence against the defendant, including his own confession, was overwhelming. McGhee, 229 F3d at 513.

clearly established Supreme Court precedent as of the year 2001, the date upon which the Michigan Supreme Court in this case finally adjudicated Mr. Hicks' Bruton-Gray Confrontation Clause challenge, and denied Petitioner's application for leave to appeal.

In Sinnott v Duval, 139 F3d 12, 14 (1st Cir 1998), the Court found that the admission of an incriminating statement (an out-of-court confession by a codefendant implicating the petitioner) violated the Confrontation Clause of the Sixth Amendment because the petitioner was deprived of the opportunity of cross-examination.,

In the instant claim, Mr. Hicks contends that the failure to afford a new trial based upon prosecutorial misconduct, based upon the confrontation clause violation, and based upon ineffective assistance of counsel warrants relief based upon three separate clauses of §2254: (a) it was a decision that was "contrary to" Supreme Court authority in the Bruton, Gray and Strickland decisions; (b) it was a decision that was based on an "unreasonable application of" those decisions; and (c) it was a decision that was based on an unreasonable determination of the facts in light of the evidence presented.

D. Deprivation of the right to an evidentiary hearing despite Petitioner's diligence throughout these proceedings:

Significantly in this case, Mr. Hicks was deprived during two full trips through the Michigan state court system of any opportunity to litigate the significant claims raised in this petition in an evidentiary hearing. In the recent United States Supreme Court case of Williams v Taylor,120 SCt 1479 (2000), the

Court considered the issue of a habeas prisoner who "fails" in his efforts to convince a state court to allow an evidentiary hearing on his non-frivolous claims. Analyzing various provisions of the Antiterrorism and Effective Death Penalty Act, the Court concluded that a "failure" to develop a factual basis, as that phrase appears in 28 USC §2254(e), cannot be read to bar a habeas petitioner unless there is a lack of diligence or some greater fault **attributable to the prisoner.**

> [The prosecution] misconceives the inquiry mandated by the opening clause of §2254(e)(2). The question is not whether the facts could have been discovered but instead whether the **prisoner** was diligent in his efforts."

Williams, 120 SCt at 1490. This holding of the United States Supreme Court has significance for both of the substantive claims raised in this petition: the Bruton-Gray confrontation challenge, and the Wade identification challenge. This petitioner has been extraordinarily diligent in investigating and pursuing these claims, at times **pro se**, and in two complete trips through the Michigan state court system. If this Court is not able to identify counsel's ineffectiveness from the face of the record, either as to the confrontation clause or the Wade challenge, the Williams cases appears to dictate that an evidentiary hearing is mandated.

E. Confrontation error regarding the Defendant's alleged "confession" was not harmless:

1) Harmless error standard:

In United States v Glass, 128 F3d 1398 (10th Cir 1997), the reviewing court reiterated the heavy burden imposed upon the prosecutor in demonstrating harmless error in the face of an error

of "constitutional dimension". As discussed above, early in the trial in Glass and Burnett (consolidated appeal), a testifying Detective created a Bruton error when he blurted out Ms. Glass's statement which incriminated Mr. Burnett. In reversing Burnett's conviction, the Court set forth the following principles which outline the analytical framework for the instant case.

First, in order to hold an error of constitutional dimension harmless, the reviewing court must conclude that "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." Glass, 128 F3d at 1403, quoting from Schneble v Florida, 405 US 427, 430; 92 SCt 1056, 1059; 31 LEd2d 340 (1972).

Second, the appellate court must review the record de novo, United States v Perdue, 8 F3d 1455, 1469 (10th Cir 1993), and the controlling factors include "the context in which the statement was admitted," and "how it was used at trial".

> [U]se of the confession in argument is also to be considered in judging the effect of the confession and whether its admission could be held harmless error.

Glass, 128 F3d at 1403, quoting from Bond v Oklahoma, 546 F2d 1369, 1376 (10th Cir 1976).

Third, when the prosecution's case relies primarily on circumstantial evidence, trial errors tend to acquire greater significance. "It takes less to tip the scales." Glass, 128 F3d at 1403, quoting from United States v Detrich, 865 F2d 17, 22 (2d Cir

1988).

Mr. Hicks is mindful that the federal habeas standard for harmless error is distinct from that applicable on direct review. The question is whether the error had "a substantial and injurious effect or influence in determining the jury's verdict." Sinnott, 139 F3d at 15, quoting from Kotteakos v United States, 328 US 750, 776; 66 SCt 1239, 1253; 90 LEd 1557 (1946) and Brecht v Abrahamson, 507 US 619, 631-637; 113 SCt 1710, 1718-1722; 123 LEd2d 353 (1993). In Brecht, the Supreme Court also recognized that habeas relief should not be denied simply because a reviewing court felt that a petitioner "would have been convicted even if the constitutional error had not taken place." Brecht, 507 US at 642; 113 SCt at 1724 (concurring opinion of Justice Stephens, who cast the deciding vote). The First Circuit noted as follows:

> We ... must consider -- to restate the Brecht standard -- whether the error was of such magnitude that it actually casts doubt on the integrity of the verdict. This is the difference between a possibility and a probability. Moreover, our review is plenary and the burden of establishing harmlessness is on the prosecution.

Sinnott, 139 F3d at 15, quoting from Gilday v Callahan, 59 F3d 257, 269 (1st Cir 1995), and from O'Neal v McAninch, 513 US 432, 436; 115 SCt 992, 994-95; 130 LEd2d 947 (1995). Under this standard, the reviewing court "must have the conviction ... that the error did not influence the jury, or had but very slight effect..." Kotteakos, 328 US at 764; 66 SCt at 1247-48.

Consequently, the question in this context is whether the prosecutor's conduct in informing the jury of Mr. Hicks' alleged

"confession" to Lorenzo Brand, admitting sole responsibility for the homicide in this case, had such a "substantial and injurious effect or influence" such that it "casts doubt on the integrity of the verdict". Sinnott, 139 F3d at 15.

In Levasseur v Pepe, 70 F3d 187, 193 (1st Cir 1995), the Court identified three factors which are relevant in determining if the jury was "substantially swayed" by the offending information:

> (1) the extent to which the error permeated the proceeding,
>
> (2) the centrality of the issue affected by the error to the case as actually tried, and
>
> (3) the relative strength of the properly admitted evidence of guilt.

In rejecting petitioner's argument, the Court in Sinnott, 139 F3d at 20, noted that the "evidence was far from being in equipoise, but rather was impressively cogent on the part of the prosecution."

Mr. Hicks is also mindful that amendments to the Antiterrorism and Effective Death Penalty Act and recent authority in this Circuit have limited habeas relief under the "unreasonable application" prong of §2254(d). Nevers v Killinger, 169 F3d 352, 360, cert denied, 119 SCt 2340 (1999); AEDPA, Pub L No 104-132, 110 Stat 1214. In this Circuit, habeas relief may be afforded and a writ granted if "the unreasonableness of the state court's application of clearly established precedent is not debatable among reasonable jurists." In an alternative formulation of that standard, a writ may issued based upon a state court decision if "it is so offensive to the precedent, so devoid of record support, or so arbitrary as to indicate that it is outside the universe of

plausible, credible outcomes." Nevers 169 F3d at 361-362; See also Tucker v Prelesnik, 181 F3d 747, 753 (6th Cir 1999).

The Nevers case which begat the standard underscores that while the "no reasonable jurist" test is daunting for the habeas petitioner, it is hardly insurmountable. In Nevers, federal habeas relief was ordered despite the fact that all fifteen jurists in the Michigan appellate system presented with his jury taint issue declined to afford relief. Nevers' conviction was reversed and a new trial was ordered.[7]

2) The weakness of circumstantial evidence:

Viewed in retrospect, the magistrate presiding over the preliminary examination in this case provided this Court with a helpful and impartial factual overview of the People's case against Michael Hicks -- that without Lorenzo Brand's testimony regarding this so-called "confession", the case against the defendant was completely "circumstantial". (Preliminary Examination, 8/13/98, Tr 114). With respect to the former evidence, the magistrate noted that "the most definitive statement directly connecting the defendant to the homicide was the statement of Lorenzo Brand." The latter, the circumstantial evidence, when analyzed carefully is incredibly suspect. Much of the circumstantial facts used by the

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[7] In the Nevers case, prior to the end of the trial in Detroit Recorders Court, Judges Crockett and Roberson disqualified themselves from deciding the issue, and Judge Jones heard the argument but declined to render a decision. Post-trial, Judge Crockett "re"-qualified himself, reached and rejected the issue on the merits. In the appellate courts, Judge Wahls, Judge Cavanaugh and visiting Judge Lambros rejected the argument in the Court of Appeals, and Justices Boyle, Weaver, Reilly, Cavanaugh, Mallett and Brickley rejected the argument in the Supreme Court. Justice Kelly did not take part in the decision. Despite this line-up, Judge Zatkoff in federal district court, applying the federal standard, apparently decided that none of the able judges cited above fell into the "reasonable jurist" category.

magistrate at the bindover (and by the jury at trial) as evidence of identification, were in fact provided to the witnesses by police following the arrest of the defendant.

Close examination of witness's early descriptions and statements about the shooter in this case reveal as follows. First, no witness could positively identify Michael Hicks as the person seen shooting Shawn Stalworth. Second, the original descriptions of the shooter were vague and general, primarily describing a body-build range, a race, and a red colored shirt. In other instances, descriptions of the shooter's clothing did not match that of Mr. Hicks shortly after the shooting. Third, witness descriptions of the shooter's vehicle were variously incomplete, and in some aspects were contrary to the actual features of Mr. Hicks' vehicle and license plate.

The next thing is readily apparent when one undertakes a careful and sequential reading of this entire record, is that as to each significant witness who either attempted an identification or who provided material information corroborating identification, the witness has either been fed the corroborating information, or worse, (in the case of Witness Norma Lewis) the witness has been presented with the defendant prior to her identification.[8] Record facts, beginning from preliminary examination through the subsequent appellate history in this case, demonstrate that the

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[8] The "identification" made by Ms. Lewis, "That looks to be the man", was characterized by the trial court as mainly an identification of the "eyes", and not a positive identification. Nevertheless, Ms. Lewis's testimony is the subject of a further challenge as the product of constitutionally suggestive influences. See Argument III, infra.

testimony of each witness is "evolving" to a disturbing degree. What follows is a sequential summary of identification testimony, and an evaluation of the remainder of the trial evidence (contrasted with other "record" facts) -- all of which demonstrates that the confrontation error, discussed above was not harmless as that term is defined in the case law.

Several prosecution witnesses testified either that they lived near the shooting scene or that they were passing through the area at the time of the shooting. The shooting occurred at about noon on Sunday, July 25, 1993, near the intersection of Champion and Kendall Streets in Battle Creek. (Trial, 11/16/93, Vol I, 52-53, 81-82, 88-92; Vol II, 192-196, 270-271).

The witnesses said that they saw a car with a black man and a white or light-complexioned woman park a "sport truck" on Champion Street. (Trial, 11/16/93, Vol I, 54, 59, 78, 85, 97). The man got out and walked through an empty lot, where he crouched in the weeds. Several minutes later, witnesses both heard and saw shots being fired. (Trial, 11/16/93, Vol I, 54-63, 91-95).

a) Witness Leland Ellis:

When his testimony at trial and preliminary examination is viewed more critically, it becomes apparent that Witness Leland Ellis' provided minimal corroborating detail, mainly concerning details that had little to do with the shooter's physical characteristics. More significantly, key details of his description of the shooter and his vehicle were supplied by police (through his daughter who was utilizing a police scanner as police

were apprehending Mr. Hicks). Other details provided by Ellis actually excluded Michael Hicks as the shooter.

Mr. Ellis testified that at about noon on July 25, 1993, he was sitting on his porch reading the Sunday paper. Despite the prosecutor's shamelessly leading questions suggesting to Mr. Ellis, at least eight times, that the shooter's vehicle was a "black Ford Bronco", Mr. Ellis acknowledged ultimately that he did not know what kind of vehicle it was or what color either. (Preliminary Examination, 38-41, Trial, 11/16/93, Vol I, 51, 54;). His actual description was of a "sports truck" which could have been "black, blue, white or brown". (Preliminary Examination, 51; Trial, 11/16/93, Vol I, 54, 76).

The evolution of Ellis's descriptions, and the unusual nature of his contact with police, raise questions about his ability to supply reliable identifying details. Despite allegedly witnessing the shooting, Ellis did not approach officers as they gathered around the deceased and cordoned off the area. Instead, Ellis watched TV for approximately two and a half hours before finally approaching to tell them, "you're wasting your time" looking for a gun, because the shooter took it with him. (Trial, 11/16/93, Vol I, 63, 66). In the intervening hours between the shooting and Ellis's first discussion with police, he had discussions with his son, who had talked to Ellis's daughter, who was relaying information she was hearing on a police scanner, information which would have included police officers' descriptions of events leading up to the arrest of Michael Hicks and the seizing of his Ford Bronco. (Trial,

11/16/93, Vol I, 77). Battle Creek Police Officer Michael Crawford confirmed that when he began pursuing Michael Hicks 2.7 miles away from the crime scene, he would have broadcast the license plate number over the police radio. (Trial, 11/17/93, Vol II, 156). Ellis acknowledged that later, the first officer or detective interviewing him may have also supplied the description, "black Bronco". (Preliminary Examination, 52).

At trial, he testified that he knew the first letter of the license plate was F, but he was not sure about the others. (Trial, 11/16/93, Vol I, 56, 64-65, 79). During the preliminary examination, however, Mr. Ellis testified that he had told the first interviewing detective that the letters of the shooter's license plate were "FVY" or "FVV" (Preliminary Examination, 56). The last two letters of this description do not match those of Michael Hicks' license plate. (Preliminary Examination 56; Trial, 11/16/93, Vol I, 56, 65, 79). Although this information was available, defense counsel failed to raise the non-matching license letters when the case was tried. At trial, all that was relayed to the jury was that Ellis told the police that the license plate of the perpetrator's vehicle started with the letter F. (Trial, 11/16/93, Vol I, 56). Counsel's failure to elicit this information in cross-examining Mr. Ellis at trial left the jury with the impression that Ellis's memory of the plate pointed to Michael Hicks, failing to allow for the possibility, based upon the non-matching letters, that someone other Hicks, driving a sport truck, was actually the shooter. (Trial, 11/16/93, Vol I, 63).

Mr. Ellis stated that the assailant was wearing a black jacket over a red shirt. Ellis was "sure" that the shooter was wearing full-length dark pants, not shorts, and either a cap or a hood. Ellis described the passenger of the sport truck as a "white" female. (Preliminary Examination, 48; Trial 11/16/93, Vol I, 59-60, 68-69). As indicated, Ellis told officers that the shooter left with the pistol. When apprehended, Michael Hicks was wearing a red shirt, but he wasn't wearing a jacket and none was found in his vehicle. No gun was found on Hicks or in his vehicle or anywhere en route the chase. Mr. Hicks was wearing shorts. Katrina Porter is an African-American. (Trial, 11/17/93, Vol II, 129, 134, 153, 158-159, 174, 288-289).

Ellis acknowledged that he never got a look at the shooter's face and that he could not identify him. (Trial, 11/16/93, Vol I, 62-63). He acknowledged further that the whole incident, from the first point he saw the vehicle to when the man drove away, was no more than a "minute to a minute and twenty seconds" (Preliminary Examination, 46).

b) Witness Lewis Croslin:

Lewis Croslin, one of the neighbors who was watching from his porch, saw the man shoot Shawn Stalworth after Stalworth walked out the front door at 66 North Kendall. Croslin never got a good look at the shooter, and recalled only a "bright red sweater" or t-shirt. Croslin thought that the vehicle was a dark-colored Bronco, but he did not remember it to be two-toned, and he could not specify a particular color. (Trial, 11/16/93, Vol I, 91, 93, 96-

99). Croslin confirmed Ellis's testimony that the shooter left the scene with the gun. (Trial, 11/16/93, Vol I, 101).

The record does not reveal what if any information was supplied to Croslin by police.

c) Witness Norma Lewis:

Perhaps the most crucial witness against Mr. Hicks was Ms. Norma Lewis. The circumstances surrounding her "identification" of the defendant were enormously suspect. Ms. Lewis told attorneys at preliminary examination that she could not identify the shooter and she was sent home. All of the circumstances surrounding Ms. Lewis's observations and descriptions of the shooter suggest that she was telling the truth when she made that first declaration. Her later statement -- "He looks to be the man" -- was the obvious byproduct of the most suggestive encounter possible: under pressure, in front of a jury, viewing a single African-American defendant seated at counsel table next to his attorney.

Norma Lewis was driving by on her way to church when she saw a man shoot Shawn Stalworth on the street near the intersection of Kendall and Champion. (Trial, 11/16/93, Vol I, 82). Ms. Lewis said the shooter had on a red shirt and some kind of hat. (Trial 11/16/93, Vol I, 83, 93). She said that the one feature that stuck in her mind was "his eyes." She focussed specifically on his eyes "because I didn't want him to really come to his mind that I was looking at him...." (Trial, 11/16/93, Vol I, 86). However, Ms. Lewis's testimony was inconsistent with what she told Officer Barbara Walters after the shooting. She "made no mention of the

eyes of the suspect" when she was interviewed by Officer Walters. (Trial, 11/18/93, Vol III, 337-338).

More significantly, Norma Lewis, pressed to make a positive identification of Mr. Hicks in the courtroom, responded that Michael Hicks "similar" and "looks to be the man" she saw shoot Shawn Stalworth. (Trial, 11/16/93, Vol I, 86). In fact, this testimony was directly contrary to her statement prior to the preliminary examination that she could not identify the shooter. Unfortunately, the jury never got to hear about her failure to identify Michael Hicks on the earlier occasion.

The record proof that Norma Lewis failed to identify Mr. Hicks at preliminary examination, and that both defense counsel and the prosecutor were aware of that fact, is set forth infra at Argument III.[9] Moreover, defense counsel's personal knowledge of Lewis's failure to identify is corroborated by his colloquy with the trial court. (Trial, 11/17/93, Vol II, 123). Despite having Lewis's failed identification in his impeachment arsenal, Mr. Solis made no mention of what had occurred prior to the first hearing. His complete cross-examination of this crucial witness takes up one page of typed transcript. (Trial, 11/16/93, Vol I, 86-87).

Ms. Lewis made her observation of the shooter (primarily of

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[9] Following both the trial and the filing of defendant's appeal to the Michigan Court of Appeals, Defense Counsel Eusebio Solis acknowledged in court records that he had direct personal knowledge that Norma Lewis appeared at preliminary examination and that she was sent home by prosecutors because she could not identify Michael Hicks. After his conviction, Michael Hicks filed a grievance against Mr. Solis. The above statement and the facts underlying Ms. Lewis's failure to identify Michael Hicks were contained in Mr. Hicks's grievance pleadings and were confirmed in Mr. Solis's formal response to the Michigan State Attorney Grievance Commission on that complaint, filed on October 13, 1994.

his "eyes") from a distance of fifty yards away. (Trial, Lewis, Vol I, 11/16/93, 85; Colston, Vol III, 11/18/93, 305).[10] There was no indication that she slowed or stopped her vehicle during her momentary observation of this incident, and logic dictates would not have done so. She acknowledges being frightened during this incident, especially when she looked into the eyes of the shooter. Like any sensible person, she drove off quickly after watching this homicide. (Trial, 11/16/93, Vol I, 84). Describing her thoughts and fears at the time of the incident, Lewis stated variously as follows:

> [I]t dawned on me I was witnessing this man being shot ... I said I've got to get away from here...
>
> [T]he man that ... did the shooting, he looked up at me. It was if he was surprised that someone was there. [I saw] his eyes ...
>
> I was looking at his eyes because I didn't want him to really come to his mind that I was looking at him that I was sitting in the middle of this intersection seeing this and that he would come to, for instance, and say maybe I better shoot her, get rid of her ...

(Trial, 11/16/93, Vol I, 82-86).

The trial judge, viewing her demeanor and hearing Lewis first-hand, characterized her testimony as follows:

> ... [Y]esterday, the emphasis was on the eyes and there was not a positive identification of the Defendant, but the witness certainly testified as it related to [sic] it could be him and the eyes certainly were similar ...

(Trial, 11/17/93, Vol II, 123).

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[10] See also Mr. Solis's formal response to the Michigan State Attorney Grievance Commission on that complaint, filed on October 13, 1994, appended.

No pre-trial lineup or photo showup was ever conducted wherein Ms. Lewis would have been asked to identify Michael Hicks from a group of similar-looking black males. Consequently, at trial, her first opportunity to view Michael Hicks was while he sat in the courtroom, the lone black male, seated next to his attorney at counsel table. As to Mr. Hicks's precarious position,

> ... [T]his is a highly susceptible atmosphere when one young black male is seated here in the well for her to look around and pick out that person.

(Trial, 11/17/93, Vol II, 124). Apparently looking on the bright side, the prosecutor offered that at least [h]e's not in chains... Where is the taint[?]". (Trial, 11/16/93, Vol I, 124).

(i) Case law on improper suggestive identification influences, as it relates to the harmless error analysis in Argument I:

Both the United States and Michigan Supreme Courts have long recognized the inherent limitations and unreliability of eyewitness identification testimony. Defendant offers the following scientific and judicial authority to assist this Court in its assessment of the "weight" of the identification testimony in this case for purpose of the harmless error analysis.[11]

"'The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken

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[11] Infra at Argument III, the Defendant claims error based upon ineffective assistance of counsel, specifically, that counsel did not insist on a Wade hearing to determine whether Ms. Lewis had an independent basis for making her identification, failing which her identification should have been suppressed from evidence, even retroactively. The instant discussion focusses separately on the reasons why the identification testimony was especially weak assessed by scientifically and judicially-recognized standards. This discussion is offered to rebut any suggestion of harmless error on the confrontation claims.

identification.'" People v Anderson, 389 Mich 155, 178 (1973), quoting from Stovall v Denno, 388 US 293, 87 SCt 1967, 18 LEd2d 1199 (1967), and United States v Wade, 388 US 218, 87 SCt 1926, 18 LEd2d 1149 (1967). In Stovall, the United States Supreme Court noted, "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Id, 388 US at 302. Furthermore, Michigan Supreme Court Justice Brennan has observed:

> Indeed, if there is any identification procedure which is suggestive, it is that which is used daily in open court. With the defendant sitting at the table, next to his lawyer, and the lawyer being clearly recognizable from his participation in the lawsuit, only the most imperceptive witness would be unable to identify the person whom the police and the prosecutor have accused.

People v Hallaway, 389 Mich 265, 283 (1973). Consequently, Michigan Courts have repeatedly held that an in-court identification is a confrontation that may be unreasonably and impermissibly suggestive. People v Solomon, 391 Mich 767 (1974), adopting dissent of Chief Judge Lesinski, People v Solomon, 47 Mich App 208, 216 (1973). See also Moore v Illinois, 434 US 220; 98 SCt 458; 54 LEd2d 424 (1977); People v Woodard, 419 Mich 866 (1984), reversing, 125 Mich App 492 (1983); People v Lyles, 100 Mich App 232, 245-247 (1980)(identification at preliminary examinations). Here, Norma Lewis was aware not only that Michael Hicks was the defendant charged in the shooting of the victim, but additionally that the prosecution had sufficient evidence to bring him to trial.

In Anderson, 389 Mich at 172, the Michigan Supreme Court declared as a "scientifically and judicially recognized fact that there are serious limitations on the reliability of eyewitness identification of defendants." Thereafter in People v Kachar, 400 Mich 78 (1977), the Court specified the following criteria for assessing whether a witness has a basis, independent of improper suggestive influence, to make an identification. Among the Kachar factors pertinent to Ms. Lewis's identification of Mr. Hicks,

> 1. Prior relationship with or knowledge of the defendant.
>
> 2. The opportunity to observe the offense. They included such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.
>
> 3. Length of time between the offense and the disputed identification.
>
> 4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
>
> 5. Any previous proper identification or failure to identify the defendant.
>
> ...
>
> 7. ... [T]he [violent or disturbing] nature of the alleged offense and the physical and psychological state of the victim. ...
>
> 8. Any idiosyncratic or special features of defendant.

Kachar, 400 Mich at 95-96.

Applying the Kachar factors to Ms. Lewis's testimony reveals that her identification is far more likely the product of the improper courtroom identification "procedure" than any actual

Jackson v Fogg, 589 F2d 108, 111 (2d Cir 1978). As to Lewis's fleeting opportunity to observe, the court in Jackson held that a stranger viewing the perpetrator for up to a minute was insufficient to establish an independent basis for identification. Jackson, 589 F2d at 111.

The Kachar factor analysis should be applied not only to the testimony of Witness Norma Lewis, but also to the testimony of other witnesses who provided details purporting to corroborate identification. For example, Kachar's idiosyncratic physical features factor emphasizes descriptions of immutable physical characteristics, particularly facial features, over items of clothing or weapons, and in fact excessive attention to such extraneous items may detract from the reliability of the identification. U.S. ex rel Kosik v Napoli, 814 F2d 1151 (7th Cir 1987). In Swicegood, 577 F2d at 1326, the reviewing court found a found a description of "white male, 5'8", 160 pounds" to be "very general", and held that the inability of police to secure a more detailed initial description from a witness inures against a finding of reliability in the identification. Id 1328.

Here, no witness, including Norma Lewis, gave any description of the shooter's face. Only the broadest descriptions were offered as to other immutable physical characteristics: black male, in the vicinity of 200 pounds and six feet. The most consistent description offered by witnesses was as to a factor considered to be the least important by the authorities cited above: a red shirt. Even as to the red shirt, one witness described just a red shirt,

ability she had to identify a perpetrator here. There was no prior relationship with or knowledge of the suspect by Norma Lewis. She was a substantial distance from the shooter (50 yards) when she was observing the shooter's features and he was a man she had never seen before. The in-court identification occurred in November, four months after the shooting, which occurred in July. There was no pre-trial lineup or showup wherein Ms. Lewis was asked to select a perpetrator from a group of persons who looked similar to Mr. Hicks. She did not offer any physical description of Mr. Hicks other than a general build and a red shirt. While she claims they were memorable, Ms. Lewis never described or even mentioned the shooter's eyes. Moreover, her most prominent recollection of his eyes was that they were directed at her. No idiosyncratic features of the eyes were offered. Lewis acknowledged her terror upon realizing that she was witnessing a possible murder, that she was being observed by the shooter, and that her life was in danger. She also stated that at the time of the shooting, she did not stop her car to get a better look at the perpetrator and she drove quickly from the crime scene. (Trial, 11/16/93, Vol I, 82-86).

As to the latter factor, scientific and judicial authorities have universally acknowledged the inhibiting effect that extreme fear has on the ability to perceive and recall details from an encounter. See materials noted in Anderson, 389 Mich at 211, n24. Given the danger of being punished or even killed for looking gives such witnesses "little motivation" to study the facial features of their attackers. State v Gordon, 441 A2d 119, 126 (Ct 1981);

while another recalled a dark jacket with a red shirt only partially visible at the front.

Finally, and most significantly, Norma Lewis failed to identify Mr. Hicks as the shooter on a prior occasion -- a crucial Kachar factor, and a fact that this jury never got to hear.

d) Flight by the defendant:

(i) Case facts regarding "flight":

Based on a vehicle description derived from a 911 call, shortly after the killing the police pursued a black Bronco driven by Michael Hicks and in which Katrina Porter was a passenger. (Trial, 11/17/93, Vol II, 148-153). The first police surveillance of Michael Hicks began approximately 2.7 miles from where Shawn Stalworth was shot at 66 North Kendall. (Trial, 11/17/93, Vol II, 132, 285). As such, this was not a connected chase, with continuous "flight" or "chasing" from the scene of the crime to the first sighting of Michael Hicks by police: Michael Hicks was separated from the crime scene both geographically and temporally. When Officer Michael Crawford began following Mr. Hicks's Bronco, he did not see the occupants make any furtive gestures or throw anything from the Bronco. (Trial, 11/17/93, Vol II, 155-156). After Officer Crawford scout car began following Hicks's Bronco in his scout car, Katrina Porter heard Michael Hicks say "something about his license." (Trial, 11/17/93, Vol II, 209, 223). Mr. Hicks explained that he had a suspended license, and that he knew that fact would come to light if he was stopped by police, and he was concerned that he would be arrested. According to police, he

also had a rock of cocaine in the car. (Trial, 11/17/93, Vol II, 167; 11/18/93, Vol III, 348-350, 386). Defendant's driving record was admitted into evidence, which confirmed that he had several suspensions of his license. (Trial, 11/18/93, Vol III, 432). His driving record also reveals that he has fled in the past when confronted with mere traffic offenses.

Mr. Hicks parked his Bronco in the driveway at a house on Golden Avenue, and Officer Crawford pursued, blocking Hicks's Bronco in the driveway with his scout car. Hicks jumped from his Bronco and began to depart from the vicinity with Officer Crawford yelling, "Stop or I'll shoot you". Hicks disappeared into the backyard of the home, jumped down a ravine and proceeded into a swampy area, with more officers, weapons drawn, in pursuit. (Trial, 11/16/93, Vol I, 109; 11/17/93, Vol II, 127-130, 134, 145, 150-153; 209-210).

After a brief chase through the swamp, Michael Hicks was arrested. No one saw Mr. Hicks with a weapon, and no one saw him throw a weapon away. (Trial, 11/17/93, Vol II, 143). No weapon was found in Hicks's Bronco. (Trial, 11/17/93, Vol II, 158-159). There was also no sign of a dark jacket.

(ii) Case law concerning the evidentiary value of flight:

Over a hundred years ago, the United States Supreme Court recognized "... it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an

accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'" Alberty v United States, 162 US 499, 511 (1896).

An additional factor relied upon by the prosecution in this case was Michael Hicks' flight following contact with police. As to this factor, cases are legion which hold that while flight from a police officer provides a "heightened general suspicion", flight generally cannot establish even the lesser constitutional standards of reasonable suspicion or probable cause, let alone guilt beyond a reasonable doubt. Flight is not "a reliable indicator of guilt" without other circumstances which are specific to the person fleeing "to make its import less ambiguous." Hinton v United States, 424 F2d 876, 879 (DC Cir 1969); See also People v Shabaz, 424 Mich 42 (1985);; 2 W.R. LaFave, Search and Seizure, § 3.5(e), p. 64; In re D.J., 42 CrL Rptr 2009 (DC App 1987); People v Howard, 50 NY2d 583, 430 NYS 2d 578, 408 NE2d 908 (1980); People v Thomas, 660 P2d 1272 (Colo 1983); Commonwealth v Thibeau, 429 NE2d 1009 (Mass 1981); State v Saia, 302 So2d 869 (La 1974). "Consciousness of guilt" is not the only meaning to be assigned to flight, even where flight is from an identifiable police officer.

Several studies of police chases have demonstrated the impulsive, irrational nature of the individual's decision to flee. For example, a high percentage of fleeing suspects risked dangerous, high speed vehicular chases rather than stopping to accept tickets for minor traffic offenses. See Department of California Highway Patrol, Pursuit Study, Sacramento, California

(June, 1983), and related studies discussed in Erik Beckman, "Identifying Issues in Police Pursuits: The First Research Findings." The Police Chief, p59 (July, 1987). In these studies, two clear findings emerged which demonstrate that flight is not reliably probative of criminal activity.

> (i) Police officers generally believe that when a suspect flees from an identifiable officer after a minor traffic offense, his decision to flee is likely prompted by his involvement in a more serious crime.
>
> (ii) The majority of the individuals in this category (suspects fleeing from a minor traffic offense) were not in fact guilty of a more serious crime.
>
> An individual may be motivated to avoid the police by a natural fear or dislike of authority, a distaste for police officers based upon past experience, an exaggerated fear of police brutality or harassment, a fear of being apprehended as the guilty party, or other legitimate personal reasons.

In Re D.J., 42 CrLRptr at 2100, n4 (citations omitted); Wong Sun, 371 US at 483, n10. Moreover, these subjective beliefs may well be well-founded. Court's have long recognized the problem of chronic police-community tension in black and other minority communities. Terry v Ohio, 392 US at 14, n 11; see also United States Commission on Civil Rights, Who is Guarding the Guardians?, p6 (1981). Thus flight is considered ambiguous even if it appears to be in response to the presence of authorities.

> 'It is only when a person's effort to avoid police contact is coupled with an officer's specific knowledge connecting that person to some other action or circumstance indicative of criminal conduct that the evasive action, whether running or otherwise, takes on sufficiently suspicious character to justify a

stop.

People v Thomas, 660 P2d at 1275-1276 (citations omitted). See e.g. Peters v New York, 392 US 40, 66-67 (1968).

Here, Michael Hicks, an African American from the City of Detroit, was being pulled over by a white police officer in Battle Creek, Michigan. Mr. Hicks was driving on a suspended license, and he had been arrested in the past for committing that traffic offense. Police officers testified that he had cocaine in his car. He and Katrina Porter were in possession of a large amount of cash that represented the proceeds from a recent marihuana sale. Even more significant, Michael Hicks had fled in the past for mere traffic offenses, a factor which further minimizes the evidentiary significance of flight in this case. (Trial, 11/17/93, Vol II, 154).

e) Remaining evidence:

Both Michael Hicks and Katrina Porter both testified, and both denied being at Kendall and Champion at the time of the shooting. The prosecutor's impeachment of Mr. Hicks centered primarily on his bad character: his lack of gainful employment, his marihuana sales and his receipt of $1200 as a result of those sales, his possession of crack cocaine in the Bronco, his prior traffic offenses including driving with a suspended license, and a spent .380 shell in his car[12] -- all facts that shed no light whatsoever on the

[12] In contrast, two nine-millimeter casings were recovered at the scene of the shooting, and Shawn Stalworth was shot two times. (Trial, 11/16/93, Vol I, 34, 43, 107; 11/17/93, Vol II, 271). There was no evidence which linked the shooting with a gun which fired .380 shells.

central question in this trial -- identification. (Trial, 11/17/93, Vol II, Porter, 212, 232-233; Hicks, 11/18/93, Vol III, 353-354, 359-372, 377-382, 390).

3) The prosecutor's burden of proving harmless error, manifest injustice, and excusing the failure to object:

Defendant contends based upon all the foregoing, that the enormous prejudice caused by the Prosecutor's statement to the jury that Mr. Hicks, a statement which he was effectively denied any opportunity to confront, cannot be considered harmless error.

In at least three cases where comparable errors have occurred, reviewing courts have held that the prosecution has an extremely heavy burden in establishing that the remaining evidence in the trial is overwhelming enough to excuse the confrontation error.

Mr. Hicks has already discussed the application of this standard supra at page 14,[13] however, a review of two Michigan cases applying this standard is instructive. In People v Ellison, 133 Mich App 814 (1984), the confrontation error involved a prosecutor's statement in closing argument in a sexual assault case which went beyond the findings in a fingerprint lab report, to "testify" (without producing a witness) to a fact which might have been important to the jury. As here, the Court's instruction did not cure the error. The Michigan Court of Appeals observed as follows:

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[13] Where a jury hears an incriminating statement of the defendant, without effective confrontation by the defendant, reversal is required unless the remaining proof is so overwhelming, and the prejudicial effect of the admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error. Glass, 128 F3d at 1403; Schneble v Florida, 405 US 427, 430; 92 SCt 1056, 1059; 31 LEd2d 340 (1972).

> Denial of the right of effective cross-examination is a constitutional error of the first magnitude and no amount of showing of want of prejudice can cure it.

Ellison, 133 Mich App at 820 (citations omitted). The Court declined to find harmless error and reversed the conviction despite the fact that the sexual assault witness testified and provided direct evidence of the crime. Moreover, as here, defense counsel failed to object.[14]

> [T]he prosecutor argues that, by failing to object ... defendant waived his right to cross-examine. We disagree. Defendant did not intentionally relinquish or abandon a known constitutional right ....

Ellison, 133 Mich App at 820-821, citing Johnson v Zerbst, 304 US 458, 82 LEd2d 1461, 58 SCt 1019 (1938). As to this latter issue, neither Mr. Hicks nor his counsel would have understood the impact of the prosecutor's statements on his right of confrontation at the time those statements were made, and therefore Mr. Hicks, like Mr. Ellison, did not intentionally relinquish or abandon a known constitutional right, and the failure to object is excused.[15]

Similarly, in People v McCain, 84 Mich App 210, 215 (1978), in another case which involved direct testimony from a sexual assault victim, the prosecutor volunteered and emphasized "evidence" -- a third phone call between the defendant and a third party which

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[14] See also People v Cotton, 38 Mich App 763, 767 (1972), where the Court held that appellate review is not precluded, even in the absence of a trial objection, where the error results in a manifest injustice.

[15] As to defense counsel's failure to characterize this error at trial and on appeal correctly as a confrontation error, Defendant claims infra at Argument II that this could be viewed as ineffective assistance of counsel. However, under no circumstances was it the fault of, or should the omission be chargeable to, Michael Hicks.

supplied a "missing link" in the prosecutor's case -- without producing the witness. Again, excusing defense counsel's failure to object, the Court reversed finding that the prosecutor's unsupported statement resulted in a miscarriage of justice.

> On the record before us, we find that the prosecutor's argument so tainted the jury deliberations that we cannot say that defendant was given a just and fair trial.
>
> ... Where the issue of identification hinges on the relative credibilities of witness testimony, any improper factor can significantly tip the scales used by the jury to weigh the testimony.
>
> ... In the case at bar, the prosecutor's final argument concerning the third telephone call may have had a powerful impact on the jury. It is not inconceivable that one or more jurors finally resolved the conflicting testimony by answering the prosecutor's question of how the complainant could have known of the third call unless it was actually made in her presence. The mere consideration of the question improperly prejudiced the deliberations.

McCain, 84 Mich App at 216.

In the case at bar, hearing that the Defendant "confessed" to someone is certainly no less prejudicial than the facts presented in McCain: it provided a measure of comfort, albeit misplaced, to any juror otherwise reluctant to convict a man of Michigan's most serious crime based upon what otherwise was a circumstantial case. As the Supreme Court observed in Bruton, it is "naive" to assume that such a powerful piece of information can ever be ignored by a jury.

Based upon the foregoing claim of error, Defendant prays for relief from judgment, and for a new trial.

II.

DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT OR MOVE FOR MISTRIAL BASED UPON AN OBVIOUS DEPRIVATION OF THE RIGHT TO CONFRONT WITNESSES FOLLOWING THE PROSECUTOR'S UNSUPPORTED STATEMENT TO THE JURY THAT THE DEFENDANT HAD CONFESSED, AND WHERE APPELLATE COUNSEL FAILED TO FRAME THIS ISSUE PROPERLY AS THE DEPRIVATION OF THE RIGHT TO CONFRONT WITNESSES IN VIOLATION OF THE SIXTH AMENDMENT.

At the close of trial, when it became apparent to all that the prosecutor would fail to produce Lorenzo Brand as promised, trial counsel did nothing to remedy the fact that the jury had already been told by the prosecutor that Mr. Hicks had confessed. Even worse, neither trial counsel nor appellate counsel recognized this to be a blatant violation of the Defendant's Sixth Amendment right to confront witnesses against him. Mr. Hicks incorporates by reference the extensive discussion, supra at Argument I, and contends further that the failure to properly preserve and litigate this error as a constitutional confrontation error deprived Mr. Hicks of the effective assistance of trial and appellate counsel.

The failure of Mr. Hick's attorney to move for a mistrial when the prosecutor failed to produce this witness, or at a minimum to articulate this horrendous error as a deprivation of the right to confront witnesses, amounted to ineffective assistance of counsel depriving defendant of a fair trial under both the Michigan and United States Constitutions. The same is true of appellate counsel. Ineffective assistance can be established **inter alia** by a failure or omission that "deprives the defendant of a substantial defense". People v Lavearn, 201 Mich App 679 (1993)(failure to

present intoxication defense). "Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner." People v Strodder, 393 Mich 193, 214 (1975)(Williams, J, concurring), quoting from Beasley v United States, 491 F2d 687, 696 (6th Cir 1974).

Here, the confrontation challenge set forth in Argument I should have resulted in the reversal of Defendant's conviction. "Good cause" for the failure to raise this issue, pursuant to MCR 6.508(D)(3)(a), is established by the Defendant's demonstration of the ineffective assistance of his counsel. Ineffective assistance of counsel excuses a procedural default in raising this issue, both at trial and on appeal. See Banks v Reynolds, 54 F3d 1508 (10th Cir 1995)(ineffectiveness on appeal in the failure to raise a significant defense).

For all the foregoing reasons, Mr. Hicks requests relief from judgment, for an evidentiary hearing to support his contentions and an order granting him a new trial.

III.

DEFENDANT WAS DENIED DUE PROCESS AND WAS DEPRIVED OF THE OPPORTUNITY TO CONDUCT A WADE HEARING WHERE AN IDENTIFYING WITNESS WAS SUBJECTED TO A BLATANTLY SUGGESTIVE COURTROOM IDENTIFICATION "PROCEDURE", WHERE THE FACTS OF RECORD ESTABLISH CONVINCINGLY THAT THE WITNESS HAD FAILED TO IDENTIFY THE DEFENDANT BEFORE, AND HAD NO INDEPENDENT BASIS TO ATTEMPT AN IDENTIFICATION AT TRIAL, AND WHERE DEFENSE COUNSEL WAS INEFFECTIVE VARIOUSLY BY FAILING TO IMPEACH THE WITNESS BASED UPON HER PRIOR FAILURE TO IDENTIFY, BY FAILING TO ASK FOR A WADE HEARING DURING TRIAL, OR BY FAILING TO ASK FOR A MISTRIAL TO CURE THE ERROR.

Witness Norma Lewis testified that Michael Hicks "looks to be the man" that shot Shawn Stalworth. It is amply apparent from the facts of record that prior to making that statement, she had been subjected to the most powerful suggestive influence imaginable: viewing a single defendant seated at counsel table next to his attorney, the only black person in the courtroom, with a prosecutor and an attentive jury poised on her every word. It is also amply apparent from the facts of record, that prior to the suggestive influence, all circumstances demonstrate that Norma Lewis had no independent basis to make that identification.

Despite its arguable tentative nature (according to the trial judge an identification of the "eyes" primarily), there is no question but that this identification was cast as a positive identification by the prosecutor during his closing argument.

No pretrial lineup of any kind was ever conducted, and no Wade hearing was ever undertaken to evaluate, even in retrospect, whether Ms. Lewis had an independent basis to attempt an identification. The reasoning of the prosecutor, the trial court,

the appellate courts, and even Mr. Hicks' own counsel, is maddeningly circular:

> A) No Wade hearing is necessary because Ms. Lewis was unable to make an identification when presented with the Defendant before trial, and
>
> B) No further remedy is needed because in the view of the trial judge, the identification did not seem "positive" and was primarily "of the eyes": **despite** what the witness testified to, **despite** what the prosecutor says, and **despite** what the jury believes!

It is precisely the shaky identification that demonstrates and underscores the need for Wade's "independent basis" analysis. Once there has been a suggestive identification procedure (in this instance, the in-court identification), then an analysis **must** be undertaken to determine if the witness has an independent basis for making an identification. If not, no identification should be permitted. If such testimony has already been presented to a jury, suppression and a mistrial is the only effective remedy.

Within the "harmless error" section of Argument I, supra at pages 14-29, Defendant has already discussed Wade and its progeny, the facts surrounding Ms. Lewis's courtroom identification, and the application of the Kachar factors to her testimony. That discussion is incorporated by reference into the present challenge. The remainder of this Argument section addresses Wade's requirement of a hearing outside the jury's presence; trial counsel's numerous failures (specifically pertinent to the Wade error) which amounted to the ineffective assistance of counsel, and the availability of appellate review despite an objection based upon a manifest

injustice to the Defendant.

* * *

Due process requires that an in-court identification cannot be admitted to support a conviction an any case where identity is contested, where there has been a suggestive influence on the identifying witness or where the accused has not been previously identified before an in-court identification is attempted, and where no independent basis for identification is established by a totality of the circumstances. Stovall v Denno, 388 US 293, 87 SCt 1967, 18 LEd2d 1199 (1967) United States v Wade, 388 US 218, 87 SCt 1926, 18 LEd2d 1149 (1967); People v Anderson, 389 Mich 155, 178 (1973). Accordingly, in Stovall, the United States Supreme Court held that a defendant could challenge his conviction where the identification procedure is "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." Stovall, 388 US at 302. In each of the decisions cited above, the reviewing court was presented, as here, with a post-conviction challenge to identification in cases where no pretrial Wade hearing was held. In Anderson, the Michigan Supreme Court held that if requested by the defendant, a trial court does not have discretion, and an evidentiary hearing **must** be held in any case where a colorable suggestiveness claim is made. The only thing that prevented that hearing from taking place in the trial court was counsel's ineffectiveness. Due process compels that Wade's analysis be applied now and a hearing ordered.

Regarding trial counsel's omissions, the right to counsel at an identification procedure attaches when the accused is in custody. People v Harrison, 138 Mich App 74, 76-77 (1984). The right to counsel presumes counsel that is constitutionally "effective". Here, while counsel was physically present at a pretrial confrontation "procedure", he did nothing whatsoever to protect his client's rights at any time thereafter. Counsel was fully aware that Norma Lewis failed to identify Michael Hicks on the date of the preliminary examination and that consequently she was sent home by the prosecutor without being called by a witness.[16] Still, and inexplicably, counsel did not even attempt to impeach the witness with this most powerful potential evidence. Even if undertaking this impeachment would have ultimately resulted in his disqualification or his withdrawal as Mr. Hicks' counsel, Mr. Solis had an obligation to go forward and cross-examine this witness using all available impeaching information.[17] To fail even to ask the question cannot be excused under any scenario, or under any conceivable claim of trial strategy.

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[16] Following both the trial and the filing of defendant's appeal to the Michigan Court of Appeals, Defense Counsel Eusebio Solis acknowledged in court records that he had direct personal knowledge that Norma Lewis appeared at preliminary examination and that she was sent home by prosecutors because she could not identify Michael Hicks. After his conviction, Michael Hicks filed a grievance against Mr. Solis. The above statement and the facts underlying Ms. Lewis's failure to identify Michael Hicks were contained in Mr. Hicks's grievance pleadings and were confirmed in Mr. Solis's formal response to the Michigan State Attorney Grievance Commission on that complaint, filed on October 13, 1994. Moreover, Solis's knowledge of Lewis's failure to identify is corroborated by his colloquy with the trial judge. (Trial, 11/17/93, Vol II, 123). Despite having Lewis's failed identification in his impeachment arsenal, Mr. Solis made no mention of what had occurred prior to the first hearing. His complete cross-examination of this crucial witness takes up one page of typed transcript. (Trial, 11/16/93, Vol I, 86-87).

[17] See Michigan Rule of Professional Conduct 3.7, governing the "lawyer as witness" situation.

Additionally, despite the myriad of cases which suggest that a Wade hearing can be ordered, or the analysis undertaken, after the testimony of the witness, counsel never asked for this alternative remedy. Consequently, the failure to preserve the Wade challenge is not the fault of this defendant, but of his trial counsel. The failure to protect Mr. Hicks' rights under Wade, either by moving for a Wade hearing, moving for the suppression of Lewis's testimony, or for a mistrial constituted ineffective assistance of counsel. People v Means, 97 Mich App 641 (1980); People v Garcia, 398 Mich 250 (1976).

During his direct appeal, Defendant's appellate counsel in the Michigan Court of Appeals may have failed to litigate Mr. Hicks's right to a hearing under Wade (based upon the suggestiveness of the in-court identification) or under People v Ginther, 390 Mich 436 (1973) (based generally on the ineffective assistance of his trial counsel). "In Pro Per" in the Michigan Supreme Court, Mr. Hicks asked for a remand to the trial court on both issues and was denied.[18] Thus both the Wade issue and his Ginther issue have been fully preserved and exhausted in Michigan judicial system.

Alternatively, there is no waiver of the right to challenge the Wade error, because this deprivation resulted in manifest injustice to the defendant. Because this issue involves a significant constitutional question, appellate review is not

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[18] In pro per, Mr. Hicks likewise preserved the issue of appellate counsel's failure to move for a remand in the Michigan Supreme Court. See People v Hernandez, 442 Mich 1 (1993); Murray v Carrier, 477 US 478 (1986); Kimmelman v Morrison, 477 US 365 (1986).

precluded. See e.g. People v Cotton, 38 Mich App 763, 767 (1972).

* * *

Accordingly, based upon all of the foregoing, the in-court identification by Norma Lewis violated the Defendant's state and federal constitutional rights to due process. US Const, Ams V, VI, XIV; Mich Const (1963), art 1, §§17, 20. In addition, trial and appellate counsel were ineffective under both the state and federal constitutions. Const Ams V, VI, XIV; Mich Const 1963, art 1, §§17, 20; Strickland v Washington, 466 US 668; 104 SCt 2052; 80 LEd2d 674 (1984); People v Pickens, 446 Mich 298 (1994); People v Ginther, 390 Mich 436 (1973).

Defendant therefore requests this Court for relief from judgment and for a reversal of his conviction. In the alternative Defendant requests this Court to remand this case for a Wade hearing to determine whether Norma Lewis's identification of the Defendant should have been permitted, and for a Ginther hearing to determine the issue of the effective assistance of both trial and appellate counsel.

Conclusion

In the complexity and dynamic of a lengthy murder trial, many details can be lost on a jury. Two "details" that would not be lost, forgotten or ignored: "That's the man that did it", and "He confessed to the crime". No honest analysis of the instant claims can ignore the undeniable impact of these two errors which, in combination, deprived Michael Hicks of a fair trial.

PRAYER FOR RELIEF

For the reasons set forth above, Petitioner Michael Hicks requests that this Court grant his writ of habeas corpus. Specifically, and in addition, for the reasons set forth in Argument I, he prays for relief from judgment and for a new trial. For the reasons set forth in Argument II, prays for relief from judgment and for a new trial, or in the alternative for a hearing pursuant to People v Ginther, 390 Mich 436 (1973). For the reasons set forth in Argument III, Defendant prays for relief from judgment and for a reversal of his conviction, or in the alternative, for a remand of this case for a Wade hearing to determine whether Norma Lewis's identification of the Defendant should have been permitted, and for a Ginther hearing to determine the issue of the effective assistance of counsel.

Respectfully submitted,

Carole M. Stanyar

CAROLE M. STANYAR P34830
Attorney for Petitioner
3060 Penobscot Building
645 Griswold Avenue
Detroit, Michigan 48226
(313) 963-7222

Dated: March 9, 2001

INDEX TO EXHIBITS

A. Copy of Request for Investigation filed by Michael Hicks in September, 1994, to Attorney Grievance Commission regarding Attorney Eusebio Solis, Jr.

B. Transmittal letter from Attorney Grievance Commission to Michael Hicks, dated October 14, 1994.

C. Excerpts from Answer to Request for Investigation filed by Attorney Eusebio Solis, Jr.

Exhibit A

STATE OF MICHIGAN
ATTORNEY GRIEVANCE COMMISSION

REQUEST FOR INVESTIGATION

TO THE ATTORNEY GRIEVANCE COMMISSION:

I, MR./MRS./MS. Michael D. Hicks-Prisoner No#234494
(Type or print full name of person making complaint)

(Address) Gus Harrison Correctional Fac.

P.O. Box 1888 -Adrian, MI 49221

(Telephone) _____

do hereby complain of the conduct of the following member of the State Bar of Michigan:

Eusebio Solis, Jr.
(Lawyers Name)

206 Superior Street
(Address—street and number)

Albion MICHIGAN 49224
(Address—city, town) (zip code)

(517) 629-9123
(Area code) (Telephone number)

INSTRUCTIONS

a. Please type or print all information except your signature

b. Under "Statement," state all circumstances as to the conduct of the attorney, in chronological order. Attach additional sheets if necessary.

c. Specify exactly what the attorney did which you believe to have been misconduct.

d. Make sure to sign your name in the space provided.

e. You must provide two (2) completed copies of this form and two (2) copies of all attachments to:

Attorney Grievance Commission
Suite 256
Marquette Bldg.
243 W. Congress
Detroit, MI. 48226

Said attorney has committed acts of professional misconduct as set forth in the Statement below, and I hereby request that an investigation into my allegations be conducted by the Attorney Grievance Commission.

Date: September __, 19 94. Michael D. Hicks
(Signature)

1. Have you previously made a complaint to this office against this attorney? NO

2. Date you retained lawyer Court Appointed- June 25, 1993

3. Type of case (e.g. divorce, criminal, probate, real estate, etc.) Criminal

Name of Court Calhoun County Circuit Court Case No. #93-2188

4. Have you reported the lawyer's conduct to any other agency? (e.g. Attorney General, Prosecuting Attorney etc.) NO If so, name of agency _____

5. Have you sued your lawyer or has he sued you resulting from his representation in the matter of which you complained? NO If so, give name of court and docket number _____

FAILURE TO COMPLETE THIS FORM IN ACCORDANCE WITH THE INSTRUCTIONS LISTED ABOVE, MAY RESULT IN DELAYS IN THE PROCESSING OF YOUR COMPLAINT.

PLEASE NOTE: YOU MUST PROVIDE TWO (2) COMPLETED COPIES OF THE REQUEST FOR INVESTIGATION FORM AND TWO (2) COPIES OF ANY ATTACHMENTS.

STATEMENT

STATEMENT

ISSUE: I. Failure To File Proper Pre-Trial Motion For Line-Up.

I requested of Mr. Solis, during the Pre-Examination to request that a line-up be held. My reason for this was that it was alleged that the person who committed this crime, did so by hiding behind a building in an area of some heavy brush, the police received a description of the perpetrator's vehicle, later a vehicle matching the perpetrator's vehicle was found in a driveway with this writer and a female sitting in it, the police approached the vehicle with guns drawn, this writer (according to police ran).

This writer was taken to the Battle Creek Police Station, no line-up was conducted. As stated above, I requested that Attorney Solis request a corporal line-up, his reply was that a line-up was not necessary because he had talked to the witnesses and none of them could identify the perpetrator, therefore a line-up was not necessary in my case. At trial I again asked Attorney Solis to request a line-up because the prosecution was going to have a witness (Ms. Norma Lewis) identify me at trial.

Ms. Lewis is the same witness who, it the pre-exam was sent home because she could not identify a suspect, this is the same witness whom Attorney Solis stated that he spoke to and was told that she could not identify anyone. However, at trial, the prosecution called Ms. Lewis and she identified me. I again asked Attorney Solis to move for a line-up, Attorney Solis informed me that the judge would not allow a line-up in the middle of trial, Mr. Solis only filed said motion after I was identified by Norma Lewis.

The next day after I had been identified by Ms. Lewis, the trial judge stated that due to the suggestive atmosphere, by this writer being the only black male in the court room for the witneses (not Ms. Lewis), to look around and point at, he told the prosecutor to ask the witness if she could identify the suspect, if the answer was "yes" then a line-up would be needed. The next witness, a Ms. Vikki Williams, told the prosecutor that she could not identify the suspect, the court stated that there was no need for a line-up since the latter witness could not identify me. I then asked Attorney Solis to place before the jury the fact that witness Williams could not identify the suspect, Attorney Solis stated that he would not sand bag the prosecutor like that.

In general, a pre-trial identification procedure used by law enforcement officials violates due process if the procedure is so

impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification Simmons v United States, 390 US 377 (1969). Ms. Lewis was unable to identify anyone prior to trial, there is a serious question as to how this witness received this newfound certainty. It may be true that a criminal defendant has no right to a line-up, however, he has a right to effective assistance of counsel. I submit, that the failure of Attorney Solis to (1) move to have a Wade hearing, United States v Wade, 388 US 218 (1967), concerning the lack of an independent basis for Ms. Lewis's in-court identification, and (2) Failure of Attorney Solis to move to have Ms. Lewis identification suppressed, constitutes ineffective assistance of counsel. People v Means, 97 Mich App 641, 296 NW.2d 14 (1980); People v Garcia, 398 Mich 250, 264; 247 NW.2d 547 (1976).

ISSUE: II. Failure To Move To Suppress Prejudicial Evidence.

Attorney Solis informed me that the police had found two 380 shells in my truck. The victim was shot with a 9mm and the shells were found at the crime scene. Attorney Solis was aware of this, I asked him to move to have the shells supressed because (1) the victim was shot with a 9mm; (2) that the 9mm shells were found at the scene; and (3) to allow the 380 shells to be placed before the jury would be prejudice to my case because the prejudicial effects would out weigh any probative value, I also told him that the 380 shells were not pertinent to the case. I asked Attorney Solis to move to suppress this evidence, he refused, I also asked him to object to the shells (380) being entered into evidence, again he refused. He told me that if the prosecutor asked me about the shells found in my truck, I was to state that I was target practicing.

B. Attorney Solis also told me that crack cocaine was found in my truck, again, I asked that he move to suppress and object to this evidence for the same reasons stated in issue II, Attorney Solis stated that there was nothing he could do and he stated that I should tell them that I smoked cocaine, the cocaine and 380 shells was submitted as evidence at trial.

ISSUE: III. Counsel Failed To Call Or Subpoena Alibi Witnesses.

Attorney Solis had received a statement from Norman Williams stating that I left his house that morning just before the homicide took place and that I did not have a gun, nor did I have on a black jacket or baseball cap. Norman Williams testimony would have supported mine and my girlfriends testimony as to when we arrived in Battle Creek, and the time we left his house on the morning of the homicide. I also informed Attorney Slois that I was at the home of a person named Ray during the actual time of the crime, Attorney Solis failed

to contact these witnesses, instead he had my mother hire a Detective to take pictures of my witnesses houses to show to the jury.

Failure to investigate alibi witnessses constitutes ineffective assistance of counsel. People v Byum, 64 Mich App ___, and People v Lewis, 64 Mich App __, (1975).

This writer request that this panel investigate the above named Attorney in this matter, it appears that counsel simply chose to sit idly by and watch the conviction of client, such conduct must not not be condone by this panel, to do so would be engaging in sheer folly of the most heinous nature.

Respectfully submitted,

Michael D. Hicks

Michael D. Hicks
Prisoner No#234494
Gus Harrison Corr. Fac.
P.O. Box 1888
Adrian, MI 49221

cc: file

Exhibit B

State of Michigan
Attorney Grievance Commission

SUITE 256, MARQUETTE BUILDING
243 WEST CONGRESS
DETROIT, MICHIGAN 48226
TELEPHONE (313) 961-6585
TELEFAX (313) 961-5819

October 14, 1994

PERSONAL AND CONFIDENTIAL

Michael D. Hicks #234494
P.O. Box 1888
Adrian, MI 49221

RE: Michael D. Hicks #234494 as to Eusebio Solis, Jr.
File No. 2719/94

Dear Mr. Hicks:

Enclosed herewith please find a copy of the above-named attorney's statement responding to your recent Request for Investigation.

If you have any comments with respect to the allegations contained in the attorney's answer, kindly submit them in writing to this office within ten (10) days of the date of this letter.

Your very truly,

Rhonda Spencer Pozehl

Rhonda Spencer Pozehl
Associate Counsel

Enclosure

Exhibit C

94 OCT 13 PM 2:37

ISSUE I.

A Pre-trial motion for a line-up was not filed because there were no witnesses who indicated that they could identify Mr. Hicks. At the preliminary examination Mr. Hicks was bound over to stand trial because:

1. he fit the general description of the perpetrator;
2. his vehicle (make, model & color) was identified;
3. a partial license plate number was given by a witness, and;
4. the perpetrator was seen with a "white female", Mr. Hicks' girlfriend was a very light skinned black female.

During trial I did not request a line-up due to the fact that Mrs. Lewis had in fact indicated at the preliminary examination that she could not identify the perpetrator. Her description of the perpetrator in the police report differed from her testimony at trial. In addition she testified that it was the individuals eyes that she recognized, despite the fact the evidence showed she was approximately fifty (50) yards away. I indicated to Mr. Hicks that I was concerned with having a line-up and her picking him out of a line-up because this could be used in front of the jury. It was my strategy to work on her inconsistencies which in my opinion were major.

In regards to the testimony of Ms. Vicki Williams she never identified defendant and in fact it was her testimony that provided the factual basis for the lesser offense instruction of manslaughter.

ISSUE II.

Mr. Hicks never requested of me to move that the .38 caliber spent shell casings or the rock of cocaine be suppressed. Nor did he request that I object at the time of there

JESIO SOLIS, JR.
TORNEY-AT-LAW
S. SUPERIOR ST.
BION, MI 49224

(517) 629-8123
(517) 629-5585
(517) 629-7295

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARTHUR J. TARNOW

MICHAEL HICKS,

Petitioner,

v.

DENNIS M. STRAUB,

Respondent.
_____/

District Court No.

01-70951

MAGISTRATE JUDGE SCHEER

PROOF OF SERVICE

I certify that on March 9, 2001, I mailed a copy of the MICHAEL HICKS' PETITION FOR WRIT OF HABEAS CORPUS, BRIEF IN SUPPORT, EX PARTE MOTION TO ALLOW FILING OF BRIEF IN EXCESS OF 20 PAGES, AND PROPOSED ORDER, and this PROOF OF SERVICE, postage prepaid by first class mail to: BRAD H. BEAVER, Assistant Attorney General, Habeas Corpus Division, P.O. Box 30212, Lansing, MI 48909.

Carole M. Stanyar
CAROLE M. STANYAR

Subscribed and sworn to before me
this 9th day of March, 2001

Dawn A Ralston

DAWN A. RALSTON
Notary Public, Macomb County, MI
My Commission Expires Apr. 20, 2003
Acting in Wayne County, MI

FILED
2001 MAR -9 P 12:59
U.S. DIST. COURT CLERK
EAST. DIST. MICHIGAN
DETROIT