2. Application For Leave To Appeal (2-17-12)

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No.

Plaintiff-Appellee,

Court of Appeals No. 305490

-v-

Circuit Court No. 06-002597-FC

JOEL NATHAN DUFRESNE,

HON. CHARLES W. JOHNSON

Defendant-Appellant.

_____/

EMMET COUNTY PROSECUTOR'S OFFICE

Attorney for Plaintiff-Appellee

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F. MARTIN TIEBER (P25485)

Attorney for Defendant-Appellant

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APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION & ORDER APPEALED FROM

Defendant-Appellant Joel Nathan Dufresne was convicted in the Emmet County Circuit Court, the Honorable Charles W. Johnson presiding, after jury trial, and a Judgment of Sentence was entered on September 22, 2006.

On direct appeal, Appellant's conviction and sentence were affirmed by the Michigan Court of Appeals, in a three-page unpublished per curiam opinion issued on October 14, 2008. *People v Dufresne,* unpublished opinion per curiam of the Michigan Court of Appeals, issued October 14, 2008 (Docket No. 273407); 2008 WL 5055959. On December 8, 2008, Appellant filed a timely application for leave to appeal in the Michigan Supreme Court, which was denied on April 28, 2009. *People v Dufresne*, 483 Mich 978; 764 NW2d 266 (2009). A timely motion for reconsideration in the Michigan Supreme Court was

filed on May 15, 2009, and denied on August 6, 2009. *People v Dufresne*, 484 Mich 873; 769 NW2d 678 (2009).

The present motion for relief from judgment is the first such motion filed by Appellant Dufresne. See MCR 6.502(G). Jurisdiction was proper in the trial court as the case was no longer subject to review under subchapters 7.200 or 7.300 of the Michigan Court Rules. See MCR 6.501. A timely application for leave was filed in the Michigan Court of Appeals under MCR 6.509 and was denied on December 27, 2011 (attached in Appendix G). This Court has jurisdiction to consider this application for leave to appeal from the Court of Appeals judgment issued on December 27, 2011 pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2)(a).

STATEMENT OF QUESTIONS PRESENTED

1. **WHETHER TRIAL DEFENSE COUNSEL, WITH NO STRATEGIC PURPOSE, FAILED TO INTERVIEW AND PRESENT**
    1. **WITNESSES, AND FAILED TO INVESTIGATE AND PRESENT FACTS, ALL OF WHICH WOULD HAVE SUPPORTED**
    2. **APPELLANT'S CLAIM THAT THE SEXUAL CONDUCT FOR WHICH HE HAS BEEN SENTENCED TO 50-75 YEARS IN**
    3. **PRISON WAS CONSENSUAL, AND THAT THE UNSUPPORTED AND UNCORROBORATED CLAIMS OF**
    4. **COMPLAINANT WERE LACKING IN CREDIBILITY. WHETHER, AS A RESULT OF THESE AND OTHER FAILURES,**
    5. **INCLUDING FAILURE TO INVESTIGATE AND PRESENT AT TRIAL CRITICAL IMPEACHING MATERIAL**
    6. **CONTAINED IN TAPED INTERVIEWS OF APPELLANT AND COMPLAINANT, APPELLANT DUFRESNE WAS**
    7. **DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE**

8. **CONSTITUTIONS (US CONST, AM VI; CONST 1963, ART 1, § 20).**

The trial court answers, “No.”

Defendant-Appellant answers, “Yes.”

1. **WHETHER APPELLANT WAS DENIED HIS FEDERAL AND STATE DUE PROCESS RIGHT TO PRESENT A DEFENSE,**
    1. **AND HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION (US CONST, AMS V, VI & XIV;**
    2. **CONST 1963, ART 1, §§ 17 & 20), WHEN WITNESS INTIMIDATION, AND RULINGS OF THE TRIAL COURT, ALONG**
    3. **WITH INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (ISSUE I, SUPRA), PROHIBITED EXPLORATION OF AREAS**
    4. **CRITICAL TO FACTUAL SUPPORT OF HIS DEFENSE THAT THE CHARGES IN THIS CASE RESULTED FROM**
    5. **A FALSE ALLEGATION.**

The trial court answers, “No.”

Defendant-Appellant answers, “Yes.”

1. **WHETHER APPELLANT DUFRESNE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY**
    1. **THE FEDERAL AND STATE CONSTITUTIONS (US CONST, AM VI; CONST 1963, ART 1, § 20) WHERE HIS**
    2. **APPELLATE COUNSEL, ON DIRECT APPEAL, NEGLECTED “DEAD BANG WINNERS.”**

The trial court answers, “No.”

Defendant-Appellant answers, “Yes.”

STATEMENT OF FACTS

A. Statement of the Case – Procedural History

After Joel Nathan Dufresne was charged with multiple counts, a jury trial took place in Emmet County Circuit Court before the Honorable Charles W. Johnson from August 16, 2006 through August 18, 2006. Mr. Dufresne was found not guilty of three counts of first degree criminal sexual conduct, though he was convicted of three counts of first degree criminal sexual conduct (MCL 750.520b(1)(f), using force or causing injury) and six counts of third degree criminal sexual conduct (MCL 750.520d(1)(f), using force or coercion). Mr. Dufresne was sentenced to 50-75 years in prison on the CSC 1 counts, and 25-50 years on the CSC 3 counts, by Judge Johnson on September 22, 2006.

Direct appeal was taken to the Michigan Court of Appeals. Appellant's convictions and sentences were affirmed by the Michigan Court of Appeals, in a 3-page unpublished per curiam opinion issued on October 14, 2008. *People v Dufresne,* unpublished opinion per curiam of the Michigan Court of Appeals, issued October 14, 2008 (Docket No. 273407); 2008 WL 5055959. On December 8, 2008, Appellant filed a timely application for leave to appeal in the Michigan Supreme Court, which was denied on April 28, 2009. *People v Dufresne*, 483 Mich 978; 764 NW2d 266 (2009). A timely motion for reconsideration in the Michigan Supreme Court was filed on May 15, 2009, and denied on August 6, 2009. *People v Dufresne*, 484 Mich 873; 769 NW2d 678 (2009).[1]

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1 Direct review ended 90 days after that date, on November 4, 2009, when the period within which Mr. Dufresne could have petitioned for a writ of certiorari to the United States Supreme Court expired. See *Clay v United States,* 537 US 522; 123 S Ct 1072; 155 L Ed 2d 88 (2003); *Bronaugh v Ohio,* 235 F3d 280, 283 (CA 6, 2000); *Abela v Martin*, 348 F3d 164 (CA 6, 2003); *Wyche v United States*, 317 F Supp 2d 1 (D DC, 2004). Mr. Dufresne thus has one year from that date, or until November 4, 2010, within which to file his federal habeas petition. The filing of this postconviction action on 10/1/2010 froze the federal clock, with one month and four days remaining on it, until after state postconviction litigation has concluded.

The current Motion for Relief from Judgment under MCR 6.500 was filed in the Emmet County Circuit Court on October 1, 2010. The trial court entered an Opinion and Order on July 15, 2011, denying all relief, including an evidentiary hearing (attached as Appendix F). The Michigan Court of Appeals denied leave to appeal in an order dated December 27, 2011 (Appendix G).

B. Initiation of Allegations

Appellant Joel Dufresne began dating complainant Angela W. in October-November of 2003 (T II 29). According to Angela she was subjected to physical abuse as early as September of 2004 (T I 202; T II 29). She claimed her relationship with Joel "pretty much stayed violent" after that point, especially after she had Hale (her child with Mr. Dufresne, born on December 2, 2004) (T I 206). Angela claimed that Joel treated her "like crap" after they moved into a trailer in February-March, 2005 (T I 211).

Angela claimed she did not like digital or anal sex and Joel Dufresne was a "sick bastard" for doing this to her (T I 237-238). Joel "degraded" her and "treated me like a toy, like a thing that he could do whatever he wanted sexually to, like his sickest most freakish desires that he could do to me" (T I 195). Angela was not into doing a "threesome" and did not want to masturbate in front of a camera while Joel Dufresne was in Florida (T I 241-242). She said that his request that she put things inside her was "disgusting" (T I 243). Sex talk she engaged for hours at Joel's instigation "disgusted me all to hell" (T I 243). She did not want to have anal sex with Joel Dufresne (T II 8, 15). She did not like using a part of a toy as a dildo and said this was forced on her (T II 13).

Angela W's claims of constant forced, non-consensual anal sex and constant forced insertion of objects and dildos into her anus, was not corroborated medically, despite her suggestion to the contrary at exam (PET 28). Doctor Samuel Minor stated that he conducted a rectal exam of Angela W on March 2, 2006 and the visual and digital components of the exam revealed nothing out of the ordinary (T II 60). The anascopy, with instruments, turned up a centimeter long linear healing abrasion of the rectal lining (*Id.*). His exam caused bleeding, which he felt was unusual (T II 61). The injury was consistent with something inserted in the rectum (T II 61-62). Joel Dufresne admitted web cam use of a toy for insertion by Angela, but claimed this activity, as well as frequent anal sex, was consensual on her part (T II 155, 165). A digital rectal exam of Angela W on January 16, 2006 at Minor's office was normal (T II 74-75). Such a finding would be inconsistent with assaultive activity (T II 75).

Angela stated she was beaten by Joel on several occasions, but each time she told medical and police personnel that someone else had hurt her (T I 217; T II 34 – falsely claiming she was beaten by a pregnant girl; T I 234-235; T II 29-30 – falsely claiming she was beaten by her "ex" Leon Cabruski [sic]). She admitted to attacking Mr. Dufresne with a plastic wooden spoon and a board during these episodes (T I 215, 230).[1] During the second episode, in Cadillac on June 25, 2005, Angela did not feel intoxicated (T I 231). A blood draw at 6:10 a.m. the morning after the fight, however, showed a BAC of .139, nearly twice the legal limit.

Joel Dufresne took his and Angela's son Hale to Florida (Joel's mother and his sisters lived in Florida), on two occasions, both before and after Hale's first birthday, in November and December of 2005 (T I 237-240). The second trip was close to the holidays. When it appeared that Joel was not coming back from Florida, where he had taken their son Hale, apparently after a third trip to Florida in February of 2006, Angela called her probation officer, who in turn told her he would "call somebody and to come in and help me" (T I 248).

Angela was contacted by Michigan State Police detective Gwen White-Erickson. Angela told White-Erickson Joel "had took off with our son…and that I didn't okay him to do that" (T I 249). Angela asked detective White-Erickson "how to get my son back" (T II 53). At some point Angela's father was given the number of an attorney to contact (*Id.*). This led to a PPO drafted by the lawyer against Mr. Dufresne (T II 54-55).[2] After Angela told the detective that "I didn't know what to do about Hale," questioning surfaced the criminal sexual conduct charges that were brought against Mr. Dufresne (T I 251).

At exam, Angela stated that detective White-Erickson initiated the discussion of possible violence in the relationship (PET 8, 42). At trial, White-Erickson stated that when she first spoke to Angela on February 14, 2006, she asked "general" questions about custody issues, and the Angela "started to just spill out" information regarding physical assaults and "several sexual things that had happened to her since [the Cadillac incident, June 25, 2005]" (T II 97-98). On February 15, 2006, White-Erickson fileda police report titled: POSSIBLE PARENTAL KIDNAPPING/DOMESTIC ASSAULT. Several pages of this six-page report are blanked out. On February 15, 2006, White-Erickson met with the CAPA Eric Kaiser regarding parental kidnapping and "advised him of the birth certificate and gave him a copy of the affidavit of parentage to review." Kaiser "advised no criminal charges could [sic] authorized regarding parental kidnapping" (see MSP supp report 2/15/06, p. 5, attached in Appendix B).

The next day, White-Erickson filed a report in which she "reopened" on "assault and battery/domestic violence." Much of this three-page report is blanked out as well. A "detailed account" by Angela W was attached. See MSP supp report 2/16/06, attached in Appendix B.

Long before she contacted Angela in early 2006, Detective White-Erickson was aware of Joel Dufresne. In a police report dated March 4, 2005, White-Erickson detailed her efforts in locating Joel Dufresne for the FBI in connection with the murder of the family of Illinois federal district court judge Joan Lefkow. (See MSP report, 3/4/05, attached in Appendix B).[3] Indeed, White-Erickson connected Joel Dufresne directly to the murder of the judge's family in her testimony to the jury in this case (T II 106). In his five-page cross of White-Erickson, trial defense counsel failed to correct this linkage, and failed to in any way tell the jury that it had been determined that Mr. Dufresne, and the creativity movement to which he had been connected, had nothing to do with the death of the judge's family (T II 116-120).

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1 That the relationship was tempestuous was clear. On March 1, 2005 Appellant Dufresne reported to police that Angela assaulted him in front of the Harbor Hall Outpatient Treatment Center in Petoskey. See report of Schultz, D.T., attached in Appendix B.

2 At exam, Ms. W. testified she filled out forms with her lawyer to obtain custody of Hale, apparently through a PPO filed against Appellant Dufresne and probate court custody paperwork. When trial defense counsel tried to establish that this paperwork said nothing about any sexual assaults, the prosecution objected and the court sustained (PET 40-42).

3 Less than a week later, on March 10, 2005, police and the FBI were aware that the white supremacist organization to which Appellant Dufresne belonged had nothing to do with the murder of Lefkow's family. An electrician, Bart Ross, a plaintiff in a med-mal case that Lefkow had dismissed, confessed to the murders prior to killing himself. Physical evidence clearly tied him to the crime. See

http://en.wikipedia.org/wiki/Joan_Lefkow. Despite this, Detective White-Erickson continued to work with the FBI in relation to Appellant Dufresne, through the end of 2005, under the claim of "assist FBI hate crimes/intimidation." See supplemental police report of White-Erickson dated 12/2/05, attached in Appendix B.

C. Pretrial Limitation of Defense and Witness Intimidation

A week prior to trial, on August 9, 2006, the prosecutor filed a motion in limine seeking to exclude the defense from "raising the following issues":

- Complainant's prior sexual conduct with Mr. Dufresne or anyone else.
- Allegations that complainant had accused others of criminal sexual conduct against her.
- Complainant's mental health or her psychological or psychiatric care, including self-inflicted injury.
- Prior record of Complainant.
- Prior drug use of complainant.

At the same time, the prosecutor filed a notice of intent to admit a multitude of uncharged alleged misconduct of Mr. Dufresne. The defense filed a response to the motion in limine on August 11, 2006, and the Court heard and granted the prosecutor's motion in full on August 11, 2006:

The Court will grant the motion in limine as to the matters that are uncontested. The Court will likewise grant the motion as to the contested items but with the understanding that a ruling in limine always is subject to being revisited at the time of trial. [HT 8/11/06 5].

The record does not reflect any attempt to revisit this ruling at trial. The prosecutor's original motion and the defense response, along with the prosecutor's notice of intent to admit "evidence of other acts," are attached in Appendix E.

On May 16, 2006, trial defense counsel filed a "witness and exhibit list" with approximately 20 entries under witnesses, and 9 entries listed under exhibits. This list is also attached in Appendix E. With the exception of Mr. Dufresne, no witnesses were called by the defense at trial.

During the summer of 2010, after completion of direct review, postconviction investigation was engaged by present counsel through licensed investigator Julianne Cuneo. Her affidavit is attached in Appendix A. Ms. Cuneo notes that several of the witnesses she spoke to, some of whom were listed in the May, 2006 defense witness list, indicated concerns regarding coming forward with information that might have been beneficial to Mr. Dufresne. These witnesses were approached by representatives of law enforcement and "warned off." Indeed, Ms. Cuneo herself was contacted by law enforcement, and subjected to an interrogation that she felt was unusual. Finally, a former foster parent of Joel Dufresne who had custody of him at a young age and who

recently discovered he was in prison, was subjected to an intrusive interrogation by law enforcement after it was discovered that she was assisting Mr. Dufresne with his current legal matters (affidavit of L P, attached in Appendix A).

D. Information Surfaced in Postconviction Investigation

Postconviction investigation by current counsel and licensed investigator Julianne Cuneo has resulted in the discovery of pertinent documents and witnesses, none of which were brought forward at trial:

Pertinent Documents

1. In 2000, Angela W, then age 21, sought a PPO against another man who had fathered children with her, Leon K, claiming that she was beaten by him (PPO documents attached in Appendix C). K's sister told investigator Cuneo that Angela W. was violent toward K, and indicated that Angela W. was entertaining a male friend of K. at the residence she shared with Kerberskey while Kerberskey was at work (affidavit of investigator Cuneo, Appendix A). K. has not yet been located in the current investigation. He did tell police prior to trial that Angela was psychotic, and that she was violent toward him when she got angry. He told police that others would support this claim. K. told police that Angela had told him that she had been raped by a previous boyfriend (report of Trooper James Armstrong, March 27, 2006, attached in Appendix C).
2. A three page ICHAT report shows convictions of Angela W. for drunk driving, originally charged as a drug offense, OUIL causing serious injury, and third degree retail fraud. Attached in Appendix C.
3. A report dated 10/24/01 by Emmet County Sheriff's Department recounts yet another arrest for open intox and violation of restricted driver's license. The officer narrative suggests that Angela was not truthful during the interrogation after the stop. Attached in Appendix C.
4. An incident investigation report by the Emmet County Sheriff's Department, Officer Erickson, dated 5/2/05, describes a 4/13/05 theft by Angela. The officer narrative indicates that Angela W. initially lied to the investigating officer who told her that her statement "did not make any sense." Attached in Appendix C.
5. Another Incident Report by the Emmet County Sheriff's Department, Officer Jenkins, notes an Obstructing Justice charge against Angela W. This report is dated 6/3/05. Attached in Appendix C.

Witnesses

1. J M G discussed Angela W's theft from Glenn's Market and noted that Angela was sexually experimental and it showed in the way she talked and acted. Affidavit of investigator Cuneo, Appendix A.

2. E W(P) was close to Angela W through August of 2005, and was at her home often. She noted that Joel Dufresne and Angela would argue, but she never observed any violence. Wood said that Angela was not afraid of Joel, and Angela was an assertive person who knew how to stand up for herself. Angela never told E W that Joel was brutal or abusive in any way. E W and Angela often engaged in "girl talk," which included candid conversations about sex. E W knew that Angela and Joel had an active sex life that included a lot of variety and experimentation. Angela never told E W she was forced to do any sex acts, and she seemed to be a willing partner in the various and experimental sexual situations between her and Joel. Angela seemed to enjoy the "wild and unusual" sex life with Joel Dufresne. Trial defense counsel never contacted her. Affidavit of E M W, Appendix A.[1]

3. A R was never contacted by trial defense counsel. A R stated that Angela W. came on to her sexually at one time. Affidavit of investigator Cuneo, Appendix A.

4. B D stated her mother, who witnessed the Harbor Hall fight between Joel Dufresne and Angela W, was threatened by police and told to stay out of the case. B D perceived that as a threat against her as well. As a former girlfriend of Joel Dufresne she states that he was not violent toward her in any way. B D saw marks on Joel that she believes were inflicted by Angie. B D feared Angie due to information she had that Angie was violent. B D never spoke to trial defense counsel. Affidavit of investigator Cuneo, Appendix A.

5. A F stated Joel might have hit Angie but only if she hit him first. A F indicated that Joel is not violent in relationships, and she knew this as Joel had a relationship with a friend of hers. A F noted that Angie demonstrated ungrounded jealousy in relation to Joel. Affidavit of investigator Cuneo, Appendix A.

6. M P is Leon K's sister. Leon K told her about violence demonstrated by Angie toward K. M Ph lived near Angie and K. She said she knew that Angie was entertaining one of K's male friends while living with K while K was at work. Affidavit of investigator Cuneo, Appendix A.

7. Adam Paskle stated that Angela W. left the scene of her (Angela's) brother's death because she was on probation and had been drinking. Affidavit of investigator Cuneo, Appendix A.

8. R P stated that he was good, close friends with Angela W. and Joel Dufresne for several years prior to Joel's arrest. He spent two weekends per month living with them, and moved in permanently weeks before Joel Dufresne went to Florida. He indicated Joel and Angie would get drunk and beat each other, but not viciously. He did not see any severe physical or sexual abuse in the household, and if it had happened he would have known about it. He believes the charges against Joel are exaggerated, as Angie

> tends to exaggerate, and he has known her to do so on many occasions. Angela was on “a lot of psych medications” and was getting “a lot of counseling the whole time I knew her.” Angela did drugs, popped pills and drank. He denies witnessing a major battle between Angela and Joel, and never tried to stop Joel from beating Angela. Angela was not forced to write letters to prisoners. Joel did not hate Angela’s oldest child. R P was told by the prosecutor and the “lady sheriff” that he testimony was not needed and that he should not be at the courthouse until sentencing. Joel’s attorney never attempted to contact Poppel. Affidavit of R P, Appendix A.

Additional facts will be noted as needed in the issue discussions.

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1 All original signed affidavits discussed herein were filed in the Emmet County Circuit Court during the course of postconviction litigation in that court.

STANDARD OF REVIEW

Mr. Dufresne understands and accepts the heavy burden placed on a defendant before he can prevail in post-conviction proceedings under MCR 6.500. He must and will demonstrate that outcome-determinative error (prejudice) occurred and that he had good reasons (cause) for failing to raise the issues on direct appeal.

The substantial prejudice of the errors complained of herein will be discussed with respect to each issue individually, *infra.* As to cause, generally, courts look to the overall course of litigation to ensure that a defendant has tried to raise matters at the first available opportunity. *McCleskey v Zant,* 499 US 467, 490-93; 111 S Ct 1454; 113 L Ed 2d 517 (1991). Delay is not an issue here, as Mr. Dufresne is filing his state post-conviction attack within the one year time limit from end of direct review essential to preserve his federal habeas options.

MCR 6.508(D) sets out the rocks upon which most defendants’ hopes are dashed. With respect to the issues raised herein, MCR 6.508(D)(3) is applicable, and must be analyzed by this Court. Mr. Dufresne must show cause for his failure to raise the issues

complained of herein on direct appeal, and he must prove that, but for the errors complained of, he would have had a reasonably likely chance of a different result. See *People v Kimble,* 470 Mich 305; 684 NW2d 669 (2004).

Cause is generally defined as an objective, external factor that prevented a defendant from raising the claim(s) earlier, or the denial of the effective assistance of counsel on appeal. *People v Jackson,* 465 Mich 390; 633 NW2d 825 (2001); *People v Reed,* 449 Mich 375; 535 NW2d 496 (1995). See also *McMeans v Brigano,* 228 F3d 674 (CA 6, 2000); *Coddington v Langley,* 202 F Supp 2d 687 (ED Mich, 2002). In this case cause is established through ineffective assistance of appellate counsel on direct appeal. See, generally, Issue III, *infra; Mapes v Coyle,* 171 F3d 408, 427-28 (CA 6, 1999); *Mapes v Tate,* 388 F 3d 187 (CA 6, 2004).

As previously noted, prejudice with respect to the issues raised herein will be discussed separately within each individual issue, *infra.* The prosecution's case was far from ironclad. This was essentially a one-on-one credibility contest. Considering the proofs here, the errors complained of must be considered critical and outcome-determinative. But for the errors complained of herein, considered individually or collectively, Mr. Dufresne would have had a reasonably likely chance of acquittal.

SUMMARY OF ARGUMENT AND REASONS TO GRANT LEAVE

This is a case which presents issues of compelling significance to the jurisprudence of this state and therefore, under MCR 7.302(B)(3), this Court should grant leave to appeal. The decision of the Michigan Court of Appeals on important issues is clearly erroneous, and will continue to cause material injustice under MCR 7.302(B)(5).

Appellant Joel Dufresne and Complainant Angela W. had a tempestuous relationship. Both Joel and Angela had serious problems when they met, decided to live together, and had a child. Angela was beset by substance abuse (drugs and alcohol) and psychiatric problems. She had substantial issues with theft and dishonesty. She seriously injured another person in an alcohol fueled driving incident, and fled from the

area during an incident in which her brother died because she was drinking and was on probation. She was assaultive toward others, and had accused another father of one of her children of assault in the past. She was known to be sexually adventurous and experimental, despite testifying at trial that unusual sexual acts were abhorrent to her.

Very little of this information, however, was in the hands of the jury that convicted Appellant Dufresne of an offense which resulted in a sentence of death in prison (50-75 years). The jury was deprived of this information because the trial court granted an omnibus prosecution motion in limine, because trial defense counsel failed to properly investigate the case, and as a result of witness intimidation.

Mr. Dufresne had been looked at by the Michigan State Police in conjunction with the death of the family of an Illinois federal district court judge nearly a year before the allegations in this case surfaced. Despite the fact that it immediately became clear that the judge's family was killed by someone with a grudge about a case decision, someone who had nothing to do with Mr. Dufresne or any group he belonged to, he was kept under review by the MSP. At some point in early 2006, Mr. Dufresne's repeated trips to Florida to visit family with the son he had with the complainant, caused the complainant to seek assistance with getting her son back through her probation officer. She was put in touch with the state police detective already monitoring Mr. Dufresne. When it became clear that there were no offenses being committed, the allegations of unwanted and forced sex arose.

This case was a very triable credibility contest. A substantial number of witnesses, many of whom were on a defense witness list filed prior to trial, could have testified in favor of Mr. Dufresene's position that Angela W. made up the claims of forced and non-consensual sex in order to obtain custody of their son, abetted by law enforcement personnel with a severe dislike of Mr. Dufresne and a white supremacy group he was involved with. However, trial defense counsel failed to investigate and presented NO witnesses save Mr. Dufresne, who was woefully unprepared to take the stand. The result was a free pass for the complainant and death in prison for Mr. Dufresne. Direct appeal counsel's failure to unearth these federal constitutional issues constitutes another investigatory failure in violation of the federal constitution.

ANALYSIS OF TRIAL COURT'S OPINION DENYING RELIEF

After hearing argument of counsel on April 21, 2011, the trial court, on July 15, 2011, issued an order denying all relief, accompanied by an 11-page Opinion (attached as Appendix F). At pp. 3-4 of the opinion the trial court conflates innocence with the cause/prejudice analysis, and inexplicably focuses on an assaultive situation out of another county that was never charged. There was never any denial that the relationship between Joel Dufresne and complainant Angela W. was tempestuous and mutually assaultive, as outlined in these pleadings and in the appendices. The Cadillac assault incident was never prosecuted, probably because Angela W. told police she had been assaulted by someone other than Joel Dufresne. Assuming Dufresne did the assault, a sentence after a conviction of assault, or even assault with intent to do great bodily harm, would not be inappropriate. However, that is not the issue here. The issue here is whether the unusual sex acts engaged in by Dufresne and W. were consensual or forced, or whether they even occurred in the manner testified to by the complainant. In these constitutionally flawed proceedings the jury found they were forced, and Mr. Dufresne is serving 50-75 years for this, not for any alleged assault.

The trial court's assessment of Mr. Dufresne's sexual practices and his behavior on the witness stand attest to the fact that Mr. Dufresne made a very bad impression on the trial court. Indeed, much of this has to be laid at the doorstep of trial defense counsel, who clearly failed to prepare his client to testify. However, disdain for a criminal defendant does not justify depriving him or her of federal constitutional rights. Defendant's "seething anger" on the stand, and his "unapologetic admissions of beatings he administered" (trial court opinion, Appendix F, at p. 5), where no assault was charged, have nothing to do with whether the charged sex acts ever occurred, or whether W. consented to the sex acts described by her and made the basis for a sentence which will surely cause Dufresne to die in prison.

And whether Mr. Dufresne's demeanor, language, and appearance while on the stand were up to par (*Id.* at p. 6) does nothing to detract from the serious errors on the part of trial defense counsel, not the least of which was the complete failure to impeach the complainant with a series of substantial inconsistencies, fully outlined in Issue I, *infra*, regarding the sex acts charged here, inconsistencies which would surely, if brought to the attention of the jury, within a reasonable probability, result in a different outcome. Indeed, the trial court's opinion does not even discuss the failure of trial defense counsel to find and use this critical impeachment material.

At p. 8 of its opinion, the trial court states that the assertion that critical impeaching material was suppressed due to its pre-trial ruling is "plainly false," and supports that conclusion with the notion that the ruling granting the prosecution's request to suppress as to all matters raised, including contested matters, could be revisited at trial. Any ruling can be revisited, and certainly defense counsel's failure to do so is part and parcel of the argument that he was constitutionally ineffective (Issue I, *infra*). This truism hardly turns a claim that the trial court grievously erred in ruling this evidence out in the first place into one that is "false."

The opinion bounces from one irrelevant diatribe against Appellant Dufresne to another, never quite focusing on the actual issues raised. Again, the substantial and precise errors on the part of trial defense counsel outlined in these pleadings, and presented to the trial court, are simply not discussed. The opinion also contains unreasonable fact determinations as to the issues raised. For instance, in opining that direct appeal counsel was not ineffective, the court notes that Mr. Dufresne's affidavit, at Appendix A, states that he told trial defense counsel about a number of witnesses but the affidavit fails to state Dufresne told direct appeal counsel. The trial court simply ignores the fact that trial defense counsel outlined all of these witnesses in a defense witness list filed prior to trial, a document that direct appeal counsel would certainly be held to have seen, or, minimally, would have been obligated to review.

Finally, at pp. 10-11 of its opinion, the trial court denies a reasonably likely chance of acquittal by focusing on irrelevant matters (the assaultive behavior that was never charged) and by taking a series of items out of context. The trial court never deals with the substantial evidence never brought to bear on this one on one credibility contest, where the complainant's claims are uncorroborated, with respect to the precise point at issue here – whether the sex acts were consensual or forced and, indeed whether much of the charged sexual activity ever occurred in the manner testified to by the complainant. This evidence, including the substantial inconsistencies in the complainant's reporting of the alleged sexual violations, would undoubtedly have impacted the complainant's credibility here to the point where there was indeed a reasonable probability of a different result.

ARGUMENTS

1. **I. TRIAL DEFENSE COUNSEL, WITH NO STRATEGIC PURPOSE, FAILED TO INTERVIEW AND PRESENT**

1. **WITNESSES, AND FAILED TO INVESTIGATE AND PRESENT FACTS, ALL OF WHICH WOULD HAVE**
2. **SUPPORTED APPELLANT'S CLAIM THAT THE SEXUAL CONDUCT FOR WHICH HE HAS BEEN SENTENCED**
3. **TO 50-75 YEARS IN PRISON WAS CONSENSUAL, AND THAT THE UNSUPPORTED AND UNCORROBORATED**
4. **CLAIMS OF COMPLAINANT WERE LACKING IN CREDIBILITY. AS A RESULT OF THESE AND OTHER**
5. **FAILURES, including failure to investigate and present at trial critical impeaching material contained in**
6. **taped interviews of appellant and complainant, APPELLANT DuFRESNE WAS DENIED THE EFFECTIVE**
7. **ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS (US CONST, AM**
8. **VI; cONST 1963, ART 1, § 20).**

Standard of Review: Generally, the grant or denial of a motion for relief from judgment is evaluated by this Court under an abuse of discretion standard. *People v Reed,* 198 Mich App 639, 645, 499 NW2d 441 (1993), *aff'd* 449 Mich 375, 535 NW2d 496 (1995).

Preservation of Issue: The issue outlined here could not be preserved by trial objection (See Issue III, *infra,* ineffective assistance of trial counsel). By definition, under MCR 6.508(D)(2) this issue was not raised on direct appeal (if it were Appellant could **not** raise it here). Appellant asserts that he has established cause (ineffective assistance of appellate counsel, see Issue III, *infra*) and prejudice to allow consideration of this issue in postconviction.

In order to establish a claim of ineffective assistance of counsel, a defendant must show that the performance of his attorney fell below an objective standard of reasonableness, and the failed performance so prejudiced the defense that a fair trial was denied. In *People v Smith,* 456 Mich 543, 556; 581 NW2d 684 (1998), the Michigan Supreme Court held:

In *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994), this Court adopted the ineffective assistance of counsel standard articulated by *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove a claim of ineffective assistance of counsel under *Pickens* and *Strickland,* a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial.

See also *Wiggins v Smith,* 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

It is incumbent on a defendant, who bears the burden of proof on this issue, to make a testimonial record in the trial court if facts not on the record are required to establish

the claim. *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973); *People v Tranchida,* 131 Mich App 446; 346 NW2d 338 (1984).

Appellant Dufresne urges this Court to order a *Ginther* hearing in this case to explore trial counsel's failure to properly investigate and contest this case.[1] Mr. Dufresne now asserts that outcome-determinative failures on the part of trial counsel should be considered by this Court after a full *Ginther* hearing.[2]

Failure to Investigate Prior Statements of Appellant and Complainant and Failure to Introduce Critical Impeaching Material fromThese Statements

A review of the taped interview of Joel Dufresne in Florida by Trooper James Armstrong and MSP Detective Gwen White-Erickson, on March 9, 2006 (T II 176), reveals that Mr. Dufresne requested a lawyer repeatedly between the 23 and 25 minute mark on the tape. The improper, highly prejudicial, and unconstitutional use of this claimed act of "lawyering up" by the prosecution at trial in this case has already been preserved on direct review for later federal habeas litigation. The prejudice of this suggestion, and the implied suggestion that Mr. Dufresne was uncommunicative, hence uncooperative, from this point forward, was communicated to the jury at trial by Detective White-Erickson. After repeatedly emphasizing that Mr. Dufresene had requested a lawyer, White-Erickson clearly agreed that Mr. Dufresne was not "interviewed or interrogated anymore after that" (T II 102). Indeed, when asked whether Mr. Dufresne was in her presence after he exercised his right to counsel, she implied that any statements he made after this point in her presence occurred the next morning "when we picked Mr-the Defendant up from the Clay County Jail" (T II 102).

The problem with White-Erickson's testimony, and the implications flowing from it, is simple: it is blatantly false. The interview/interrogation of Mr. Dufresne by the trooper and the detective on March 9 proceeds for 3 hours, 14 minutes and 30 seconds, nearly 3 full hours **after** Mr. Dufresne twice exercised his right to counsel. During that period Mr. Dufresne continued to answer the questions of the detectives and, importantly, continued to profess his innocence of forcing non-consensual sex with the complainant. Had trial defense counsel reviewed the tape of the interview of Mr. Dufresne in Florida he would have understood this, and he would have been able to effectively impeach White-Erickson's suggestion at trial that the interview/interrogation ceased when Mr. Dufresne requested a lawyer. Trial defense counsel would have been able to counter the suggestion that Mr. Dufresne was uncooperative, and he would have been able to blunt the improper and unconstitutional suggestion that Mr. Dufresne "lawyered up" and stopped the interview. But most importantly, again, trial defense counsel would have been able to show that Mr. Dufresne was consistent and repetitive regarding his claim that there was no forced sexual activity. Trial defense counsel's failure to review the tape and utilize it for these purposes at trial is a highly prejudicial error that satisfies both prongs of the *Strickland* standard, a standard that is fully outlined in the original brief in support of Petitioner's request for relief from judgment.

It is also obvious that trial defense counsel failed to review and appropriately utilize the interview of complainant Angela W. by Detective Gwen White-Erickson, an interview

which took place on February 23, 2006, and which lasted 90 minutes.[3] During the interview, and at trial, Ms. W. described various assaults on her by Mr. Dufresne. There is no doubt that this was a tempestuous relationship and, indeed, Mr. Dufresne does not deny some of the assaultive behavior. He merely indicates the physically assaultive activity was mutual. However, Mr. Dufresne was not charged with assault, he was charged with multiple counts of first degree criminal sexual conduct, and he has always denied that he assaulted Ms. W. in relation to their sexual activity, or that he in any way forced her to engage in unusual sexual activity.[4] The only counter to his claim is Ms. W's testimony. Thus her credibility was of the utmost importance.

Indeed, Dr. Samuel Minor found nothing out of the ordinary when he conducted a digital rectal exam (T II 60). He did note a centimeter long healing abrasion of the rectal lining discovered with the use of instruments, and he stated his insertion of the instruments caused a re-bleed (T II 60-61). However, while he could say such an abrasion was consistent with something placed in the rectum, he could not state what was placed in the rectum, and he certainly could not tell whether such action, if it occurred, was consensual or forced. Cross examination of Dr. Minor revealed that an earlier examination, including a digital rectal exam, In January of 2006, during the period when the complainant testified she was being repeatedly sexually assaulted, was normal (T II 72-76).

In the face of this clear one on one credibility contest, trial defense counsel overlooked the opportunity to confront the complainant with obvious and telling discrepancies between her original statement to police and her later testimony at trial in this case. The critical nature of the inconsistencies suggests only one conclusion: trial defense counsel never bothered to analyze Ms. W's original 90 minute statement to police. Such a failure virtually automatically qualifies as performance below an objective standard of reasonableness in a case such as this, qualifying under *Strickland's* first prong, and the prejudice is overwhelming given the importance of Ms. W's credibility on the criminal sexual conduct claims – if she lied about some of this, the jury would very likely have concluded that she lied about it all.

There can be no doubt that Angela W's testimony on the sexual assaults alleged here was scripted. Indeed, at exam she used a "cheat sheet," a written guide designating the assaults as A through H (PET 11-32). Paragraph G at exam, also testified to at trial, involved a claim that Mr. Dufresne, while Angela was at home suffering from the flu, forced oral sex and forced anal sex while she was suffering from diarrhea (Pet 30-31; T II 23-24). The problem is that her stories about this sequence were widely divergent each time she told them. During her statement to police she claimed that the oral sex occurred on a Tuesday and the anal sex on a Thursday (Disk, Part II, tracks 6-7). Angela was very clear when making this statement that there was no oral sex preceding the anal sex during her bout of diarrhea. At exam, the incidents were now one day apart, and her children were "out there, he could hear them" (PET 30-31). At trial the children were now at her parents' home during this sequence, **and the forced anal sex during the bout of diarrhea came immediately after repeated bouts of forced oral sex** (T II 23-24).

The anal sex during a bout of diarrhea was a major theme. The detail was precise. Angela claimed to remember it well, and each time spoke about Joel's disgust with "poop all over his dick" (T II 24). Her problem was that each time she told the story the precise detail changed – a classic signal of prevarication. First her children were present, then they were not. More important, she was initially insistent, during her original statement to police, that there was no oral sex involved on the day Joel forced anal sex while she was suffering from diarrhea, an act which occurred two days after the forced oral sex. Then, at exam, these different sexual assaults occurred one day apart. Finally, at trial, repeated forced oral sex immediately preceded the forced anal sex during diarrhea. The failure of trial defense counsel to do the investigatory work necessary to catch these discrepancies surrounding a major theme of the complainant's allegations – again, a definitive "tell" of untruth – in this one on one credibility contest alone satisfies *Strickland's* review standard and demands the grant of a new trial. But there is much more.

Another major theme of Angela's allegations here, purportedly buttressed by Dr. Minor's testimony, and developed in substantial detail, was the claim of repeated forced anal insertion of a piece of a Fisher Price ring toss toy. Angela admitted that the first insertion of the Fisher Price toy occurred while she was in Michigan and Mr. Dufresne was in Florida. Subsequent forced insertions were done by Mr. Dufresne, according to Angela. These subsequent forced insertions were developed during her various statements in detail. Again, however, the detail is widely divergent, clearly unmasking a lie.

At exam, Angela was insistent that there were only two instances where Joel forced anal insertion of the Fisher Price toy. The first time this occurred in the bathroom while she was placed over the edge of the tub, and the second time came two days later in the bedroom where she was placed over the edge of the bed (PET 25-27). She testified consistently about this at trial (T II 10-15), again insisting that the first time Joel did this to her he did it in the bathroom. However, in her original statement to police (Disk, Part II, tracks 2-3), Angela insisted, in abundant detail as to location, that Joel inserted the ring toss toy piece into her anus on 5 different occasions. These five occasions occurred in the kids' room (specifically delineating that this was the room with the bunk beds and the act occurred on the floor), twice in the living room, and on two more occasions in the bedroom. Despite the fact that in her original statement to police this occurred on five different occasions, it did not happen once in the bathroom. At trial and at exam Angela was insistent that the first time this occurred was in the bathroom while she was bent over the tub, while in her original statement to police **she emphasized that the first time this occurred was in the living room at night**. At trial the first incident occurred in early January but in the original statement it happened 3 weeks after Joel returned home from Florida, placing this action in the latter part of January. At trial Angela further defined only two occasions of this insertion, insisting that she threw the Fisher Price toy away after the second incident (T II 14).[5]

Again, such major inconsistencies, accompanied by an abundance of detail, as to an incident which was a major theme of the complainant's allegations, would have made a huge difference in how the jury viewed Angela's credibility in this one on one credibility

contest. Failure of trial defense counsel to investigate and provide the jury with this information is a blatant violation of *Strickland* and constitutes constitutionally deficient performance.

The impact of these failures cannot be underestimated. This case was a straight-up credibility contest. The jury's verdict hinged on whether they believed Angela or not. Had Mr. Klawuhn done proper research on the facts of this case, he would have been able to question Angela on the crucial inconsistent statements outlined above. He could have chipped away at her credibility with each inconsistency. Given the lack of any evidence beyond Ms. W's claim that the sexual activity engaged in by her and Mr. Dufresne was not consensual, it is clear that the jury would surely have reached a different verdict had they been aware of the inconsistencies.

The inconsistent statements question the veracity of the allegations. It is a basic rule of evidence that a witness may be impeached with a prior inconsistent statement. This is a traditional and important truth-seeking device of the adversarial process. See *Harris v New York*, 401 US 222, 225; 91 S Ct 643; 28 L Ed 2d 1 (1971); MRE 613.

Numerous cases have found ineffectiveness for failure to impeach key witnesses, See, *e.g.*, *Driscoll v Delo*, 71 F3d 701, 710 (CA 8, 1996) (failure to question witness with prior inconsistent statement made to investigators constituted deficient performance); *Nixon v Newsome*, 888 F2d 112, 115-16 (CA 11, 1989) (failure to impeach with prior inconsistent testimony "sacrificed an opportunity to weaken the star witness' inculpatory testimony"); *Blackburn v Foltz*, 828 F2d 1177, 1183-84 (CA 6, 1987) (counsel deficient where he failed to impeach an eyewitness with previous inconsistent identification testimony when "weakening [the witness'] testimony was the only plausible hope [the defendant] had for acquittal"); *Sparman v Edwards*, 26 F Supp 2d 450, 454-55 (EDNY, 1997) (finding counsel ineffective when he failed to cross-examine child sexual abuse victims about inconsistent statements made to the police).

As recent as September 10, 2008, the Michigan Supreme Court remanded a case to circuit court for a *Ginther* hearing to determine if counsel was ineffective for "failing to cross-examine the complainant regarding inconsistencies in her trial testimony, and between her trial testimony, preliminary exam testimony, and what she claimed in the initial police report." *People v Brown*, 482 Mich 978; 775 NW2d 190 (2008).

While a decision not to impeach a witness, or to elicit their prior testimony, can be a matter of trial strategy, such strategy must be reasonable to defeat a claim of ineffective assistance. See *Harris v Artiz*, 288 F Supp 2d 247, 257-260 (EDNY, 2003) (finding counsel ineffective where he failed to impeach the credibility of witnesses with evidence that would have aided defense's theory of misidentification; this could not be dismissed as trial strategy, as there would have been no downside). See generally, *People v Dalessandro*, 165 Mich App 569, 578; 419 NW2d 609 (1988).

There was no reasonable trial strategy which would explain trial counsel's failure to impeach Angela W. with the critical, detailed, and very obvious inconsistent statements regarding the number of times, and the locations, of the claimed forced use of the Fisher Price toy, particularly in a case where the prosecution had to rely solely on the

complainant's testimony. Nor was there any reasonably strategy to explain trial defense counsel's failure to impeach Ms. W. with the abundance of discrepancies in her very detailed story regarding the forced sexual acts allegedly perpetrated while she was sick with the flu. The prior inconsistent stories told would have provided critical evidence that Angela was fabricating her claim of lack of consent.

Defendant meets the requisite standard of prejudice. It is likely that, had the jury been aware of the conflicting stories in this case, they would have reached a different conclusion. Mr. Klawuhn's failure to adequately cross-examine complainant Angela W. deprived the jury of the chance to hear critical evidence. A new trial is required.

Trial Defense Counsel's Failure to Investigate. Mr. Dufresne had a substantial defense if only trial defense counsel would have done his job by investigating and presenting it. In *Strickland*, the Court emphasized the importance of counsel's investigatory duties, and, though agreeing that strategic choices made "after thorough investigation of law and facts relevant to plausible options" are sacrosanct, "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* at 690-691. A decision not to investigate must be "directly assessed for reasonableness." *Id.* at 691. See also, *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004).

There is no failure of advocacy more basic, or damaging, than the failure to pursue and present a substantial defense. *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967); *Chambers v Mississippi*, 410 US 284, 294; 93 S Ct 1038; 35 L Ed 2d 297 (1973). In *Taylor v Illinois,* 484 US 400, 408-409; 108 S Ct 646; 98 L Ed 2d 798 (1988), the Court held that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive." The Michigan Supreme Court recognized, in *Pickens*, *supra* at 803, that "Michigan law has long required that defense counsel present a reasonable defense."

The necessity of pretrial investigation and preparation cannot be overstated, or even compensated for by skill and experience. *Strickland's* performance standard of reasonableness requires counsel to make pertinent factual and legal inquiries, and to allow adequate time for trial preparation and development of strategies and defenses. As the court put the matter in *United States v Barbour*, 259 US App DC 111, 113; 813 F2d 1232, (1987), quoting from *Crisp v Duckworth,* 743 F2d 580 (CA 7, 1984):

'Effective representation hinges on adequate investigation and pretrial preparation . . . [for] investigation may help an attorney develop or even discover a defense, locate a witness or unveil impeachment evidence.' *Id.* at 583 (citing *United States v. DeCoster*, [159 US App DC 326, 333;] 487 F.2d 1197, 1204 [1973])."

As to counsel's investigatory duties, *Strickland* referenced the ABA Standards. In the ABA Standards, Criminal Justice Standards, The Defense Function, Part IV, Standard 4-4.1, the duty to investigate is laid out clearly:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the

penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

In this case trial defense counsel made critical investigatory errors. Despite filing a lengthy witness list (Appendix E) he appears not to have contacted any potential witnesses (see affidavits, Appendix A; offer of proof, F. Martin Tieber, Appendix D). If trial defense counsel had engaged minimal investigatory effort he would have come upon substantial impeaching evidence, and substantial evidence directly impacting the credibility of the complainant, Angela W. , whose uncorroborated testimony has resulted in a sentence of death in prison in this case. See Statement of Facts, *supra*, and Issue II, infra, for a detailed listing and analysis of the substantial proofs that were neglected by trial defense counsel's complete lack of investigatory effort.

A major investigatory failure also left the jury with the impression that Appellant Joel Dufresne was complicit in the death of the family of a federal judge in Illinois. A more prejudicial scenario cannot be contemplated. Minimal investigatory effort would have revealed that Mr. Dufresne was under the watch of the Michigan State Police for nearly a year prior to surfacing of the allegations in this case regarding the death of the federal district judge's family in Illinois, and that for most of that year it had been abundantly clear that Mr. Dufresne and the organization to which he belonged at that time were not responsible for the death of the judge's family. If trial defense counsel had done his job, he would have been able to tell the jury in this case, after the prosecution severely prejudiced Mr. Dufresne with this outlandish allegation, that the federal judge's family was murdered by an imbalanced electrician, acting alone, who was disturbed over the dismissal of a med-mal case by the judge. This man was not connected to Mr. Dufresne or the organization to which Mr. Dufresne belonged in any way.

These severe lapses clearly show that trial counsel's performance fell below an objective standard of reasonableness. In light of the uncorroborated evidence from Angela W, evidence with serious problems that are raised herein, these deficiencies must be considered outcome-determinative under *Strickland.* A new trial should be granted. Minimally this Court should order another *Ginther* hearing to explore this issue in detail and to make a record of the matters outlined in these pleadings.

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1 Appellant recognizes that a limited *Ginther* hearing has already been ordered by the Michigan Court of Appeals on direct appeal and was conducted by the state trial court on October 25, 2007. However, this hearing was sharply limited to the issue of trial defense counsel Klawuhn's failures with respect to the improper introduction of evidence that Appellant belonged to a white supremacy group, and his failure to object to the highly prejudicial prosecutorial misconduct in introducing flawed evidence that improperly and incorrectly suggested that the white supremacy group, and Mr. Dufresne, were involved in the murder of the family of a federal judge in Illinois. This issue has already been preserved for federal habeas review. Failure to cover Mr.

Klawuhn's failure to investigate and present a defense, and other failures raised herein, in this original *Ginther* hearing, was the fault of direct appeal counsel, and this aspect is covered in Issue III, *infra.*

2 The United States Supreme Court has outlined the critical need to develop a testimonial record post-conviction on the issue of ineffective assistance of trial counsel. In *Massaro v United States,* 538 US 500; 123 S Ct 1690; 155 L Ed 2d 714 (2003), the Court discussed the need to show "that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial." *Id.* at 1694. In other words, a hearing is necessary to show that the *Strickland* standards have been met. Federal courts have consistently held that it is error when a state court fails to allow a defendant, who has diligently sought a hearing, the opportunity to develop a factual base for issues he is attempting to raise on appeal. *Greer v Mitchell,* 264 F3d 663 (CA 6, 2001); *Smith v Stewart,* 241 F3d 1191 (CA 9, 2001); *Murphy v Johnson,* 205 F3d 809 (CA 5, 2000); *Barnes v Elo,* 231 F3d 1025 (CA 6, 2000); *Baja v Ducharme,* 187 F3d 1075 (CA 9, 1999).

3 The 90 minute interview was provided on two 45 minute disks, each of which contain a number of tracks (the first disk contains 9 tracks and the second contains 10). The disks will be referenced as Part I and Part II and the specific track within each part will be noted when citing to this material.

4 Mr. Dufresne does not deny that he and Ms. W. engaged in what might be considered unusual, or even "perverted" sexual activity, he simply and consistently states that she at all times engaged in such activity freely and consensually.

5 Inexplicably, during her original statement, Angela noted at one point, prior to repeatedly stating that the forced insertion occurred 4-5 times, that she threw the toy away "after the second time." This internal inconsistency in the original statement would explain why the scripted testimony at exam and at trial reverted to only two instances, though it certainly doesn't explain the blatant inconsistency as to location of the first event.

II. APPELLANT was denied his federal and state due process right to present a defense, and his state and federal

constitutional rights to confrontation (US Const, Ams V, VI & XIV; Const 1963, Art 1, §§ 17 & 20), when witness

intimidation, and rulings of the trial court, along with ineffective assistance of trial counsel (Issue I, *supra*), prohibited

exploration of areas critical to factual support of his defense that the charges in this case resulted from a false allegation.

Standard of Review: Generally, the grant or denial of a motion for relief from judgment is evaluated by this Court under an abuse of discretion standard. *People v Reed,* 198 Mich App 639, 645, 499 NW2d 441 (1993), *aff'd* 449 Mich 375, 535 NW2d 496 (1995).

Preservation of Issue: The issue outlined here was only partially preserved by trial objection (See Issue I, *supra,* ineffective assistance of trial counsel). By definition, under MCR 6.508(D)(2) this issue was not raised on direct appeal (if it were Appellant could **not** raise it here). Appellant asserts that he has established cause (ineffective assistance of trial and appellate counsel, see Issues I, *supra,* and III, *infra*) and prejudice to allow consideration of this issue in postconviction.

Whether rooted directly in the Fourteenth Amendment's Due Process Clause or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, there can be no doubt that the federal constitution provides the accused a meaningful opportunity to present a complete defense. *Washington v Texas*, *supra*; *Davis v Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974); *Crane v Kentucky*, 476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986). It is also clear that evidentiary error can deprive an accused of his rights to fundamental fairness and due process of law. *Walker v Engle*, 703 F 2d 959 (CA 6, 1983); cert den, *Marshall v Walker,* 464 US 951; 104 S Ct 367; 78 L Ed 2d 327 (1983); *People v Adamski*, 198 Mich App 133; 497 NW2d 546 (1993).

Twenty-six years ago, the United States Supreme Court recognized that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v Mississippi, supra*. Because the accused is entitled to defend himself against the state's accusations, "[f]ew rights are more fundamental than that of the accused to present [evidence] in his own defense." *Id.* at 294. Denial of the accused's right to present a defense "calls into question the ultimate integrity of the fact-finding process." *Id.* at 295.

The essence of the right to present a defense is the entitlement to present the "defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v Texas*, *supra* at 19. For this reason the trial judge impermissibly invades the province of the jury when defense evidence is prohibited. *People v Martin*, 100 Mich App 447; 298 NW2d 900 (1980). "[W]here constitutional rights directly affecting the ascertainment of truth are implicated [evidence rules] may not be applied mechanistically to defeat the ends of justice." *Chambers v Mississippi*, *supra* at 313.

Exclusion of evidence is unconstitutionally arbitrary where it infringes on a weighty interest of the defense – where it "significantly undermined fundamental elements of the defendant's defense." *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998).

The prosecution in this case was allowed tremendous latitude in presenting evidence, while the defense was blocked from repudiating the vast majority of that evidence. The defense was prevented from mounting a reasonable defense by the trial court's ruling granting the Prosecution's Motion in Limine to keep out crucial evidence.[1] This prohibited evidence was essential for Mr. Dufresne to present a defense, and his inability to do so substantially interfered with his constitutional rights. Appellant's due process right to present a defense was primarily infringed by mechanistic application of

state evidentiary rules in the face of a substantial and demonstrated need for introduction of critical and impeaching evidence.

The goal of the defense in this case was to challenge the prosecutor's assumption that Angela Wiertella's relationship with the Mr. Dufresne was replete with abuse solely attributable to Mr. Dufresne, while Ms. W. played absolutely no role in the destructiveness of the relationship. Further, the defense needed to develop the reality that Angela's mental problems, as well as her desire to exact revenge upon Mr. Dufresne for taking their son to Florida, and her desire to obtain full custody of their son, likely caused her to make a false allegation of sexual assault. The constant cancellation of Appellant's defense is detailed in the Statement of Facts, *supra*, and in the appendices to this brief, but the crucial facts that were never brought out at trial will be simply outlined here:

- Angela claimed that the Appellant consistently forced her to perform sex acts that she did not willingly wish to participate in, and that she found disgusting. In fact, evidence from her statements to others, shows that Angela was sexually experimental, had solicited another woman for sex, and engaged an active sex life that included a lot of variety and experimentation. One witness (E W (P)) states that her discussions with Angela convinced her that Angela "enjoyed their [Angela and Joel's] somewhat wild and unusual sex life." See affidavits of Investigator Cuneo and E W (P), Appendix A.
- Angela, according to various reports, had falsely accused her ex-boyfriend Leon K, of assault, a claim that appears to have been generated by custody issues (see PPO documents, attached in Appendix C). At T II 29, Angela admitted that she falsely told police she had been beaten up by Leon K. Police reports note that K. indicated that Angela was crazy, and he stated that Angela was violent toward him. K. stated that others would support this claim. He also told police that Angela had told him that she had been raped by a previous boyfriend (report of Trooper James Armstrong, March 27, 2006, attached in Appendix C).
- B D, a former girlfriend of Joel Dufresne, stated that Joel Dufresne was not violent, but that she had information indicating that Angela was violent, and Brandie feared Angela. B D saw marks on Joel that she believed were inflicted by Angela.
- Angela was caught stealing from Glenn's market. She was convicted of drunk driving, charged with a drug offense, OUIL causing serious injury, and third degree retail fraud. During another arrest for open intox and violation of restricted driver's license, the officer narrative suggests Angela was not truthful. While investigating a theft offense, another officer narrative suggests Angela initially lied to police and that her statement "did not make any sense." Angela was also charged at one point with Obstructing Justice. See affidavit of Investigator Cuneo, Appendix A; police reports, Appendix C.

- R P, who lived with Angela W. and Joel Dufresne off and on for years, indicated that Angela was prone to exaggeration. He insists her trial testimony was greatly exaggerated. Poppel noted that Angela was under psychiatric care and took psychiatric medications. See affidavit of R P, Appendix A.
- In addition to R P's claims regarding Angela's psychiatric problems, it is apparent that she was in rehab.

This, and other information outlined in police reports and witness statements in the appendices to this brief, contain an abundance of impeachment material and material of direct relevance to Angela W's credibility, evidence which should have been placed before the jury deciding Mr. Dufresne's fate.

The application of the rape shield statute to bar any evidence of Angela W's sexual proclivities, under these facts, was clear error. Admittedly, the United States Supreme Court has acknowledged that a legitimate state interest exists in protecting rape victims. *Michigan v Lucas*, 500 US 145; 111 S Ct 1743; 114 L Ed 2d 205 (1991). However, the Supreme Court in the same case acknowledged that the competing interests of (1) protecting a rape victim from harassment or invasion of privacy, for example, and (2) protecting a defendant's constitutional rights may require a resolution in favor of the defendant. Balancing must be performed. *Id.*

MRE 607 states, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." MRE 613(b) permits the examination of a witness about a prior inconsistent statement. Inconsistent out-of-court statements of a witness are admissible for impeachment purposes. *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1981). The Michigan Court of Appeals has made clear that "in order to avoid denying the defendant a fair trial, even hearsay is admissible when critical to a defense. In other words, [the defendant's] basic proposition – that a trial court may not completely eviscerate a defendant's attempt to cast doubt on the prosecutor's proofs simply because the evidence proposed is hearsay – is correct." *People v Herndon*, 246 Mich App 371, 401-402; 633 NW2d 376 (2001).

Here, the repeated evidence that Angela W. engaged a sex life that was unusual and experimental, and enjoyed it, directly impeaches her constant refrain that the unusual sex in this case was forced on her, and that she considered it abhorrent and repulsive. Indeed, Alechia Rocheleau told Investigator Cuneo that she was solicited by Angela for sex.

Even if it were held that Angela W's past statements to others in this area could not be introduced substantively, they clearly could be admitted as impeachment. *People v Brown*, 23 Mich App 369; 178 NW2d 547 (1970). And in light of their importance to Mr. Dufresne's due process right to present a defense, this evidence must come in under a constitutional theory even if it could be argued that no state evidentiary provisions would escort it. *Chambers v Mississippi, supra* at 313. See also, *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), where the Court made clear that state evidentiary rules must yield to a defendant's due process right to present a defense. This type of

testimony was critical to Mr. Dufresne's defense as it would have highlighted the fact that he and Angela's sex life was risqué, but that she consented to this behavior. The trial court's ruling that all of complainant's prior sexual conduct with Mr. Dufresne or anyone else was inadmissible was clear error on these facts.

The Sixth Circuit Court of Appeals recently decided a similar case involving Michigan's Rape Shield law, *Gagne v Booker*, 606 F3d 278 (CA 6, 2010)(en banc rehearing granted and panel opinion vacated 7/20/10, no. 07-1970, re-argued 3/2/11 and currently pending). In *Gagne*, the defendant was charged with three counts of criminal sexual conduct in the first-degree for forcibly engaging in sex with the complainant – his ex-girlfriend. The key issue at trial was consent, and Gagne was prevented from presenting crucial evidence to the jury that during previous occasions the complainant actively participated in similar sex acts. *Id*. The Sixth Circuit found that Mr. Gagne's right to present a defense was violated when he was not permitted to present this pertinent evidence, which goes to the issue of consent – especially because there was a lack of evidence in general in the case:

We cannot accurately portray the extent of Gagne's interest in presenting this evidence without reference to the lack of other evidence in this case. Other than the two defendants and the complainant, there were no eyewitnesses at all. Nor did the physical evidence tend to weigh in favor of one side or the other. In short, the excluded evidence was not just *relevant*to this case, it was in all likelihood the most relevant evidence regarding the sole contested issue at trial-an issue about which there was not much evidence in the first place. We believe it was indispensable to the defense's theory. [*Id*. at 287.][2]

In *Mathis v Berghuis*, 90 Fed Appx 101, 107 (CA 6, 2004), the Sixth Circuit stated that a defendant, "is not required to demonstrate that the admission of this evidence would have resulted in a different verdict, but only that there is a reasonable probability that, had he had this evidence, the result of the proceedings would have been different." There is no doubt here that if Mr. Dufresne had been able to present the evidence outlined above concerning Angela W's sexual proclivities despite her insistence that Dufresne forced unusual sex on her, there is a reasonable probability that the result would have been different.

The other critical area that was substantially neglected was Angela W's credibility. This should have been attacked in many different ways. Evidence of her prior theft offenses, and countless interactions with law enforcement where it was clear that she was not telling the truth, were very pertinent and admissible. The trial court erred in excluding the "prior record of Complainant" pursuant to the prosecution motion in limine.

MRE 608(b) reads as follows:

b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character

for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Under this rule, the trial court had discretion to permit the defense to ask Angela W. about other incidents of conduct which were relevant to her credibility and character for truthfulness. While the defense could not present extrinsic evidence of such conduct (such as testimony from victims of the thefts committed by Angela), these matters could have been inquired into during the cross-examination of the witness herself. See *People v Brownridge*, 225 Mich App 291; 570 NW2d 672 (1997), rev'd on other grds, 459 Mich 456 (1999).[3]

Evidence of the commission of larcenies is strongly probative of credibility and character for truthfulness. *People v Allen*, 429 Mich 558, 595; 420 NW2d 499 (1988). The Michigan Supreme Court, in adopting our code of evidence, chose to treat theft crimes as it did crimes involving dishonesty or false statement, thus indicating a belief that theft crimes are more probative of veracity than other crimes. *Id.*

Similarly, Judge Burger, in *Gordon v United States*, 383 F2d 936, 940 (1967), stated:

In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not.

Judge Burger's analysis and MRE 609, as originally adopted, suggest that crimes having an element of theft should be treated in the same manner as false statement crimes. Likewise, the other instances of untruthfulness on Angela W's part outlined in the police reports described in the Statement of Facts, *supra*, and attached in the appendices, are relevant and useful to impeach the complainant's credibility in this case. Angela W's credibility was a crucial issue for the jury. Indeed it was the only issue for the jury. Had the jury heard that Angela had committed theft crimes and other acts of dishonesty in the past, their view of her credibility would have been significantly different.

It was an abuse of discretion to bar all defense inquiry during the cross-examination of Angela into prior convictions and the failure to inquire into other areas of dishonesty deprived Appellant Dufresne of his constitutional right to present a defense, as well as his right to the effective assistance of counsel (Issue I, *supra*).

Finally, it is abundantly clear that Angela W. had substantial problems with drugs and alcohol and was in treatment, which included psychiatric medications. All of this would

have impacted her general credibility, and it was a violation of Mr. Dufresne's right to present a defense for the trial court to completely rule out "complainant's mental health or her psychological or psychiatric care, including self-inflicted injury" and "prior drug use of complainant" as outlined in the prosecution motion in limine (attached in Appendix E). There was evidence in this case that Angela W. lied, exaggerated, and brought false accusations against others to suit her interests. Her drug and alcohol abuse problems, and her issues with law enforcement, clearly demonstrate substantial credibility issues. Whether the trial court's preclusion pursuant to the prosecution motion in limine, or trial defense counsel's general investigatory inaction, precluded any examination of this area, the result is the same: Mr. Dufresne was deprived of his federal constitutional right to present a defense when he was prevented from exploring Angela W's litany of serious credibility problems in relation to the particular charges brought here, and presenting relevant information to his jury.

Police/Prosecution Intimidation

In this case there was substantial evidence that crucial witnesses were intimidated before and after trial. Investigator Cuneo notes that she ran into this problem during her recent investigation of the case (Cuneo affidavit, attached in Appendix A). Witness R P indicated he was told by the prosecutor and the "lady sheriff" to stay away from the trial. K M, B D's mother, who witnessed a physical altercation between Angela W. and Appellant Dufresne, was warned by police not to talk about this, and Brandie herself was intimidated by this warning as well. Recently, L.P, and investigator Cuneo herself, were subjected to unusual interviews by police (see affidavits, Appendix A). Several other witnesses, including key witness Leon K, are not responding to inquiries to date. See also, Statement of Facts, *supra*, at pp. 6-7, 9, 11.

Witness intimidation implicates a defendant's rights to present a defense, to cumpulsory process, and to a fair trial. *Washington v Texas*, *supra*; *Webb v Texas*, 409 US 95, 98; 93 S Ct 351; 34 L Ed 330 (1972). Indeed, several courts have held that a witness may have to be immunized to protect a defendant's rights where prosecution intimidation has silenced the witness. *United States v Morrison*, 535 F2d 223, 228 (CA 3, 1976); *United States v Lord*, 711 F2d 887 (CA 9, 1983). See also, *United States v Smith*, 156 US App DC 66; 478 F2d 976, 979 (1973); *United States v MacCloskey*, 682 F2d 468, 479 (CA 4, 1982); *United States v Whittington*, 783 F2d 1210, 1219 (CA 5, 1986); *United States v Thomas*, 488 F2d 334 (CA 6, 1973).

While trial counsel's investigatory failure, and the trial court's suppression of key defense evidence at the prosecution's behest, are the main reasons why no defense was presented here, recent investigation discloses that witness intimidation may well have been a factor. This Court is urged to grant a hearing to, among other things, explore the possibility that witnesses for the defense were warned off, thereby contributing to Mr. Dufresne's loss of his federal constitutional right to present a defense.

Conclusion

Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See, generally, *People v Yost*, 278 Mich App 341; 749 NW2d 753 (2008).[4] MRE 401. All relevant evidence is normally admissible. MRE 402. The underlying assumption of the rules of evidence is that the reliability of the truth-finding process is enhanced by the admission of all probative evidence. *People v Dobben*, 440 Mich 679; 488 NW2d 726 (1992); see MRE 102.

Once a defendant puts forth some supporting evidence for a particular theory it is for the jury to determine its sufficiency. *Id*. See also, *People v Hoskins,* 403 Mich 95; 267 NW2d 417 (1978). The United States Supreme Court has consistently held that, under the due process clause of the federal constitution, state evidentiary rules must yield to a defendant's right to present a defense when evidence is important and critical to that defense.

In *Rock v Arkansas*, 483 US 44; 107 S Ct 2704; 97 L Ed2d 37 (1987), the Court held that a defendant's right to testify was violated by a state per se rule excluding hypnotically refreshed testimony. In *Crane v Kentucky, supra* at 684-686, the Court found that the state's exclusion of evidence surrounding the taking of a confession, after it was determined to be voluntary, deprived defendant of the right to a fair trial. And, in *Chambers v Mississippi, supra* at 289-290, the Court reversed a state court conviction where the state trial judge, as here, after a hearsay objection, excluded testimony the Supreme Court found to be critical to Chambers' defense (in that case testimony suggesting that someone else had committed the crime).

In Michigan, the prosecution is traditionally given wide berth in circumstantial cases, and the defense must be given the same leeway in developing their case. In *People v Fleish*, 321 Mich 443, 459; 32 NW2d 700 (1948), the Michigan Supreme Court stated:

In the reception of circumstantial evidence great latitude must be allowed. The jurors should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue and which will enable them to come to a satisfactory conclusion. Many facts of no consequence in isolation may be proved because of the persuasiveness of their united effect. [Citation omitted.]

These general concepts, and the constitutional pillars of confrontation and the due process right to present a defense, certainly serve to ground the conclusion that the trial court erred in granting a prosecution motion in limine that completely cut off the defense in this case. In the case at bar, Angela W's credibility was a crucial issue for the jury, and all of the excluded evidence would have shed light on that credibility in a highly relevant way. Whether through the trial court's grant of the prosecution's omnibus motion in limine, or through defense investigative failure, or through witness intimidation, Mr. Dufresne had no defense. This the constitution will not allow.

Because Appellant Joel Dufresne's state and federal constitutional rights have been implicated, the trial court's error in denying the right to present a defense, and the right to confront the witnesses against Appellant Dufresne, should be analyzed under a constitutional harmless error standard, i.e., whether the error was "harmless beyond a

reasonable doubt." *People v Mateo*, 453 Mich 203, 206; 551 NW2d 891 (1996); *People v Anderson* (After Remand), 446 Mich 392, 404-407; 521 NW2d 538 (1994); *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). Under this standard, the error in this case was not harmless beyond a reasonable doubt. This case was a straight credibility contest between Joel Dufresne and the complainant as to who to believe, with no corroboration and no determinative physical evidence. It was therefore extremely important for the jury to hear the critical evidence outlined above. The failure to allow this evidence demands reversal of Appellant Dufresne's convictions of criminal sexual conduct.

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1 The People's Motion in Limine was filed on August 9, 2006 and argued on August 11, 2006.

2 See also, *People v Hackett,* 421 Mich 338, 365 NW 2d 120, 124 (1984) (In some situations, evidence relating to the victim's sexual conduct "may be required to preserve a defendant's constitutional right to confrontation"); *People v Adair,* 452 Mich 473, 550 NW 2d 505, 511 (1996) (Rejecting a reading of Michigan's rape-shield statute that would have "run the risk of violating a defendant's Sixth Amendment constitutional right to confrontation").

3 The *Brownridge* opinion from the Court of Appeals held it reversible error, under MRE 608(b), for the trial court to preclude the defense from impeaching the credibility of a key prosecution witness on cross-examination with evidence of an allegedly false statement on an affidavit. The Michigan Supreme Court reversed that decision, on the basis of a factual finding that the statement in the affidavit was in fact accurate, but did not hold that impeachment under the rule of evidence would have been improper had the prior statement been false.

4 *Yost* is instructive because, in that case, the trial court, as did the trial court here, repeatedly excluded relevant evidence that was important for the defense based on rote evidentiary objections of the prosecutor. The Michigan Court of Appeals found several of these exclusions grounds for reversal of Donna Yost's murder conviction.

III. APPELLANT DuFRESNE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE

FEDERAL AND STATE CONSTITUTIONS (uS CONST, AM VI; CONST 1963, ART 1, § 20) WHERE His appellate counsel, on

direct appeal, neglected "dead bang winners."

Standard of Review: Generally, the grant or denial of a motion for relief from judgment is evaluated by this Court under an abuse of discretion standard. *People v Reed,* 198 Mich App 639, 645, 499 NW2d 441 (1993), *aff'd* 449 Mich 375, 535 NW2d 496 (1995).

Preservation of Issue: This issue is incapable of preservation prior to postconviction review. Appellant has raised the claim that direct appeal counsel was ineffective at the first available opportunity.

A criminal defendant has a right to the effective assistance of counsel in his appeal of right to the Michigan Court of Appeals. *Ross v Moffitt,* 417 US 600, 610; 94 S Ct 2437; 41 L Ed 2d 341 (1974); *Coleman v Thompson,* 501 US 722, 756; 111 S Ct 2546; 115 L Ed 2d 640 (1991); *Evitts v Lucey,* 469 US 387, 391-400; 105 S Ct 830; 83 L Ed 2d 821 (1984); *People v Reed,* 449 Mich 375; 535 NW2d 496 (1995).

The *Strickland* standard is generally utilized[1] and deference, though certainly not unlimited, is afforded to counsel's decisions. The Supreme Court has recognized that a criminal appellant does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *Jones v Barnes,* 463 US 745, 754; 103 S Ct 3308; 77 L Ed 2d 987 (1983). However, courts have routinely insisted that *Strickland* mandates appellate counsel to have sound strategic reasons for failing to raise important and obvious appellate issues, or "dead bang winners." *Smith v Murray,* 477 US 527, 536; 106 S Ct 2661; 91 L Ed 2d 434 (1986); *Manning v Huffman,* 669 F3d 720 (CA 6, 2001); *United States v Cook,* 45 F3d 388, 395 (CA 10, 1995); *Houston v Lockhart,* 982 F2d 1246 (CA 8, 1993); *Page v United States,* 884 F2d 300 (CA 7, 1989).

In *Mapes v Coyle, supra*, the court set out a variety of factors to be assessed in making the determination of whether appellate counsel rendered effective assistance. Key questions are whether the omitted issues were significant and obvious, whether the omitted issues were stronger than the issues presented, whether there were objections at trial to the omitted issues, and whether appellant and appellate counsel met to discuss possible issues. See also, *Mapes v Tate, supra*.

The key factor in this matter is the open and obvious nature of the errors that were missed by direct appeal counsel. The ineffective assistance of trial counsel, including the failure to impeach with critical material from the prior statements of Appellant and Complainant, and the denial of the right to present a defense, should have been obvious to direct appeal counsel simply by noting that, after an extensive defense witness list was filed, no witnesses were presented. A minimum of investigatory work would have immediately shown the worth of the issues, raised as Issues I and II, *supra*. These issues are longstanding and open and obvious issues under state and federal jurisprudence. In the context of this case, they were of substantial importance and must be considered outcome-determinative. Failure of appellate counsel to raise these issues constitutes cause under state and federal procedural default rules.

RELIEF REQUESTED

For the reasons stated, Appellant Joel Nathan Dufresne asks that this Court grant leave to appeal, grant his motion for relief from judgment, and order a new trial. Minimally, Appellant requests that this Court order an evidentiary hearing pursuant to MCR 6.508(C).

Respectfully submitted,

BY: _____

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Dated: February 17, 2012

1 A key concern in this context is whether counsel's errors "have undermined the reliability of and confidence in the result." *McQueen v Scroggy,* 99 F3d 1302, 1311 (CA 6, 1996).