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STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR Jr., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

vs.

STATE OF MICHIGAN and JENNIFER M. GRANHOLM, Governor of the State of Michigan, sued in her official capacity,

Defendants-Appellants.

SC No: 139345-7

COA: 278652, 278858, 278858

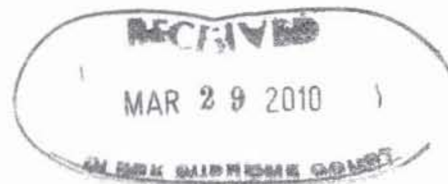
Ingham CC: 07-000242-CZ

SUPREME COURT
APR 2010
TERM

Ann Marie Uetz (P48922)
Jason D. Menges (P64228)
Erin L. Toomey (P67691)
Nicholas Ellis (P73174)
FOLEY & LARDNER LLP
One Detroit Center
500 Woodward Avenue, Suite 2700
Detroit, MI 48226-3489
(313) 234-7100
Attorneys for Proposed Amicus Curiae, University of Michigan Innocence Clinic

David A. Moran (P45353)
Bridget McCormack (P58537)
UNIVERSITY OF MICHIGAN LAW SCHOOL
625 S. State Street
Ann Arbor, MI 48109-1215
(734) 763-9353
Attorneys for Proposed Amicus Curiae, University of Michigan Innocence Clinic

BRIEF OF PROPOSED AMICUS CURIAE, UNIVERSITY OF MICHIGAN INNOCENCE CLINIC



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STATEMENT OF BASIS FOR JURISDICTION

The University of Michigan Innocence Clinic adopts the facts supporting jurisdiction as stated by the parties.

STATEMENT OF QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS PROPERLY CONCLUDE THAT PLAINTIFFS' CAUSE OF ACTION, WHICH IS BASED ON ALLEGED VIOLATIONS OF RIGHTS SECURED BY BOTH THE UNITED STATES AND MICHIGAN CONSTITUTIONS, IS NOT BARRED BY SEPARATION OF POWERS CONCERNS?

   Plaintiffs-Appellees say "Yes."

   Defendants-Appellants say "No."

   University of Michigan Innocence Clinic says "Yes."

2. DID THE CIRCUIT COURT AND THE COURT OF APPEALS PROPERLY CONCLUDE THAT PLAINTIFF'S CLAIMS ARE JUSTICIABLE; THAT PLAINTIFFS HAVE STANDING TO RAISE THE FEDERAL AND STATE CONSTITUTIONAL CLAIMS PRESENTED IN THIS CASE AND THAT THESE CLAIMS ARE RIPE?

   Plaintiffs-Appellees say "Yes."

   Defendants-Appellants say "No."

   University of Michigan Innocence Clinic says "Yes.

3. DID THE CIRCUIT COURT PROPERLY EXERCISE ITS DISCRETION IN CONCLUDING THAT THIS CASE MET ALL OF THE REQUIREMENTS FOR A CLASS ACTION AS SET OUT IN MCR 3.501(A)(1)?

   Plaintiffs-Appellees say "Yes."

   Defendants-Appellants say "No."

   University of Michigan Innocence Clinic says "Yes.

I. INTRODUCTION

The University of Michigan Innocence Clinic ("Innocence Clinic") was launched in January 2009 by Professors David Moran and Bridget McCormack. The mission of the Innocence Clinic is straight-forward and fundamental: to seek the release of wrongfully-convicted, innocent persons in the State of Michigan. As a condition for acceptance by the Innocence Clinic, an applicant must complete a detailed questionnaire that sets forth the basis for his or her conviction, the procedural history of the case, and any new evidence that demonstrates the applicant to be actually innocent of the crimes for which he or she was convicted. The Innocence Clinic conducts a detailed review of each application, and accepts only those applicants who present compelling cases of actual innocence.

The Innocence Clinic has a strong and compelling interest in the issues presented in this case, because the systemic failure by the State of Michigan to provide competent representation for indigent defendants is a primary cause of the wrongful convictions that underlie virtually all Innocence Clinic cases. Unfortunately, by the time a particular case comes before the Innocence Clinic for review, the record already has been established, the defendant already has been convicted, and the only remedies available to the wrongfully-convicted defendant are the limited post-conviction remedies available under Michigan law. However, as demonstrated through the exemplar cases described below, the current system for indigent defense representation in Michigan is highly flawed, and the best mechanism for correcting the system is by ensuring that the constitutional rights of indigent defendants are satisfied *pre*-conviction – not *post*-conviction. Judicial review is not only necessary, it is *essential* to ensure that one of the most fundamental and essential constitutional rights – the right to effective assistance of counsel – is not violated. For that reason, the Innocence Clinic fully supports the relief requested by Plaintiffs-Appellees in this case.

II. STATEMENT OF FACTS

Since its inception in 2009, the Innocence Clinic has discovered and litigated wrongful convictions in the State of Michigan.[1] The cases accepted by the Innocence Clinic provide compelling evidence that the current system of indigent defense is flawed and should be reviewed to ensure its constitutionality. The participants of the Innocence Clinic have witnessed firsthand – and its clients have experienced firsthand – how constitutionally inadequate representation of indigent criminal defendants results in wrongful convictions.

The Innocence Clinic accepts cases based on two important criteria: (1) there must exist evidence of actual innocence; and (2) there must exist a procedural avenue to pursue a remedy on behalf of the wrongfully convicted person. Thus far, the Innocence Clinic (which has operated for just over one year) has received 4,000 queries from prisoners; received 2,600 questionnaires completed by prisoners; reviewed 1,200 of those questionnaires; and further investigated seventy cases based on the questionnaires. The Innocence Clinic has accepted twelve cases to pursue remedies for wrongfully convicted people. Of these, three wrongfully convicted prisoners have been released and fully exonerated (that is, all charges have been dismissed), while two have been granted new trials and have been released from prison while the prosecution appeals those new trial grants. Each of these cases involve compelling new evidence of innocence, including evidence that was never found by trial counsel due to either an ineffective investigation, or no investigation at all.

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[1] We note that the exemplar cases described in this brief are not from the same counties at issue in the current lawsuit. However, based on the experience of the Innocence Clinic, we believe that they are representative samples of the constitutionally inadequate representation of indigent defendants that is occurring on a daily basis throughout virtually every county in the State of Michigan, and will continue to occur unless and until the current system is overhauled.

The common thread in all cases undertaken by the Innocence Clinic, as well as the two Michigan cases described herein that were undertaken by the Innocence Project associated with the Cardozo School of Law, is constitutionally inadequate counsel in the extreme. Without an appropriate mechanism to review whether the current system of indigent defense representation in Michigan satisfies constitutional muster pre-conviction, the remedies available to indigent defendants across the State of Michigan would be limited to the extremely restricted post-conviction remedies available under Michigan law. These cases are illustrative of the serious flaws in the State of Michigan's current public defender system.

A. Karl Vinson

On May 14, 1986, Karl Vinson was convicted in Wayne County of criminal sexual conduct and breaking and entering with intent to commit a felony for allegedly breaking into the bedroom window of nine-year-old Camille Wilson and raping her. (Am. Mot. For Relief From J. ¶ 1, *People v Vinson*, Wayne County No 86-000214 (Sept. 14, 2009), attached as Exhibit A.) He was sentenced to concurrent sentences of 10-50 years and 5-15 years. (*Id.*) The latter sentence was discharged on November 19, 1998. (*Id.*) Mr. Vinson is currently serving the remainder of his sentence at G. Robert Cotton Correctional Facility in Jackson, Michigan.

Mr. Vinson's case was accepted by the Innocence Clinic after a thorough investigation of his claim of innocence (including biological testing), and its participants are currently working to exonerate him. As with the two exemplar cases detailed below, evidence of constitutionally inadequate court-appointed counsel permeates Mr. Vinson's wrongful conviction.

Early on the morning of January 3, 1986, nine-year old Camille Wilson was sleeping in the bedroom that she shared with her younger sister when a man broke in through her window and raped her. (Mem. In Supp. Of Am. Mot. For Relief From J at 8, *People v Vinson*, Wayne County No 86-000214 (Sept. 14, 2009), attached as Exhibit B.) Camille said that she had seen

and heard the man before, but could not remember his name when talking with her mother or the police. (*Id.*) Something Camille had said made her mother, Brenda Wilson, think of Mr. Vinson, and Camille's mother first suggested Mr. Vinson's name to the police. Karl Vinson's former wife, Phyllis, babysat the Wilson children three years before the rape, when Camille was approximately six years old, but Camille had not seen Mr. Vinson for three years at the time of the rape. (*Id.*) Based on Camille Wilson's identification of Mr. Vinson, on the afternoon of January 3, 1986, Detroit Police Officer Glen Sangmeister went to 20189 Hawthorne St. in Detroit and arrested Karl Vinson. (*Id.*)

At trial, Camille identified Mr. Vinson as the man who attacked her. On cross-examination, however, Camille could not even remember the names or faces of other people she had seen on a regular basis but had not seen recently, including her first grade teacher or her Sunday school teacher. (*Id.*) In his defense, Mr. Vinson presented multiple witnesses who testified that he was at his mother's home at the time of the crime. (*Id.*)

A mixed blood and semen stain was found at the crime scene on Camille's bed sheet and sent to Paula Lytle, a police forensic examiner, for blood type testing, the most common serology test used before DNA testing became widely available. Ms. Lytle tested Camille and found her to be blood type O. (*Id.* at 9.) Ms. Lytle also tested Camille's saliva for secretor status and found her to be a secretor. Ms. Lytle explained that a secretor demonstrates his or her blood type in other bodily fluids, including saliva, vaginal secretion, and seminal fluid. Ms. Lytle tested the sheet stain and only found blood type O. (*Id.*)

Ms. Lytle testified that she tested Mr. Vinson and found that he is an AB non-secretor, meaning his blood type is not present in bodily fluids other than his blood. Based on her non-

secretor test, Ms. Lytle testified that the forensic evidence could not exclude Mr. Vinson. (*Id.* at 8.)

Officer Robert Lloyd, another police forensic examiner, testified that fingerprints were not found at the scene. He also testified that a "non-secretor" is less likely to leave fingerprints because he perspires less. (*Id.* at 9-10.) However, Officer Lloyd was not asked, and did not clarify, that by "non-secretor" he meant a person who exudes little or no oils on his or her skin and that such a non-secretor was not in any way related to the non-secretor test performed by Ms. Lytle. (*Id.* at 10.)

The purported fact that the forensic evidence entered at trial could not exclude Mr. Vinson, and, according to the prosecution, also narrowed the pool of potential suspects to a small portion of the population, was an essential element in the overall evidence "against" Mr. Vinson. As a result, in closing argument, the prosecutor repeatedly returned to the forensic testimony and argued that it supported Camille's shaky identification. (*Id.* at 9-10.) The jury even requested to review the forensic evidence during its deliberations because it was so important to the prosecution's case. (*Id.* at 10).

Following his conviction, Mr. Vinson repeatedly requested DNA testing on the forensic evidence, but these requests were denied. At some point in time, the Detroit Police Department destroyed the samples. (*Id.* at 10.)

New test results prove that Mr. Vinson is innocent. Dr. Judith Westrick, a chemistry professor at Lake Superior State University, obtained blood and saliva samples from Mr. Vinson for testing. In a report dated February 25, 2009, Dr. Westrick concluded that, contrary to the tests performed by Ms. Lytle, Mr. Vinson is an AB secretor. (*Id.* at 17-18.) The Michigan Innocence Clinic accepted Mr. Vinson's case in February 2009, after being presented with Dr.

Westrick's lab results. To confirm Dr. Westrick's results, additional semen and saliva samples were collected from Mr. Vinson on June 3, 2009. These samples were sent for testing to Arthur Young, a forensic biologist with NMS labs in Willow Grove, Pennsylvania. Mr. Young's tests on both semen and saliva samples confirmed that Mr. Vinson is an AB secretor. (*Id.* at 18.) Both Mr. Young and Ms. Lytle have confirmed by affidavit that Mr. Vinson being an AB secretor means that A and B blood antigens should have been found in the semen stain at the scene of the crime, and because they were not Mr. Vinson could not have been responsible for this crime. (*Id.* at 30.)

Additionally, expert analysis of the results of the 2009 testing exposed that the original forensic evidence itself exonerates Mr. Vinson. The new evidence indicates that the original forensic evidence contained blood type O semen, which could not have been contributed by Mr. Vinson, who is blood type AB. (*Id.*) Therefore, even with the false non-secretor result, the original forensic evidence should have exonerated Mr. Vinson.

In the case of Mr. Vinson, his court-appointed counsel utterly failed to investigate the forensic evidence. His trial counsel failed to seek independent testing of the forensic evidence, and therefore did not discover this new evidence which establishes that Mr. Vinson could not have been responsible for the semen left at the scene of the crime. (*Id.* at 32.) In addition, Mr. Vinson's counsel failed to rebut the prosecution's expert testimony. Trial counsel was ineffective in her cross-examination of expert witnesses, failing to establish that the forensic evidence available at the time of trial should have exculpated Mr. Vinson. (*Id.* at 33.)

Trial counsel should have investigated whether the forensic evidence in fact implicated him as a suspect. Trial counsel did not arrange to have Mr. Vinson's secretor status determined by its own scientific expert, which would have shown that the result found by Ms. Lytle was

incorrect and that the prosecution's interpretation of the evidence was false. (*Id*. at 32.) Additionally, the rape kit, which was not collected from the hospital to be tested by the police, would have given counsel an additional opportunity to test the evidence against Mr. Vinson, but trial counsel did not make any attempt to obtain the sample or to have any independent testing performed. (*Id.*)

Mr. Vinson's motion to vacate his conviction is currently pending in the Wayne County Circuit Court.

B. Walter Swift

Walter Swift was wrongfully convicted in Wayne County of a rape in 1982 and spent twenty-six years in prison before he was exonerated and released from Michigan's prison system. (Joint Mot. For Relief From J. ¶ 1, *People v Swift*, Wayne County No 82-05965 (May 14, 2008), attached as Exhibit C; Order Granting Relief From J., *People v Swift*, Wayne County No 82-05965 (May 21, 2008), attached as Exhibit D.) His court-appointed lawyer – who was suspended from practicing law several times in just the last decade based on misconduct and inadequate representation in other cases – failed to pursue and present evidence regarding flawed witness identification and exculpatory forensic evidence. Mr. Swift's case well highlights the problems endemic to Michigan's system for indigent defense counsel.

In 1982, a pregnant white woman was the victim of a home invasion rape-robbery in the City of Detroit. Despite a wide range of evidence indicating that Mr. Swift did not commit the crime – including a complete alibi accounting for his whereabouts at the time of the crime, information concerning a flawed and unreliable witness identification (never presented at trial), and forensic evidence which would have supported Mr. Swift's claim of innocence (never presented at trial) – Mr. Swift was convicted of the crimes and served twenty-six years in prison before being exonerated in 2008. (*Id.*)

The victim in the case provided a description of her attacker to police, and selected from hundreds of photos provided to her by police the photos of eight men. The police officer investigating the case arbitrarily decided that the eighth person she identified would be included in a live lineup for her view – that person was Mr. Swift. Mr. Swift was added to the lineup notwithstanding that he did not match the victim's previous description of her attacker. Unlike her described attacker, Mr. Swift had an obvious black eye at the time of the crime (this was not mentioned in her description), closely cropped hair (as opposed to the unusual braids and "poofs of hair" on his head that she had described), and was several years older than her described attacker. (*Id.* at ¶ 5.) Nonetheless, he was brought in for a lineup after police told her that the eighth man she had selected would be included in the lineup. Against this backdrop, she identified him as her attacker. (*Id.*) Even the police officer handling the lineup believed that her identification was not reliable, but the jury never heard this evidence. Instead, the jury heard only that she had identified him from photos and that she identified him in a lineup. (*Id.*)

In addition, certain forensic evidence would have supported Mr. Swift's claim of innocence at trial if it had ever been presented to the jury – which it was not. Among other things, an analyst who tested the semen from the attacker determined that Mr. Swift could not have been the attacker based on his blood type, assuming the sample tested was predominantly from the attacker, which was likely.

Mr. Swift's case was accepted by the Innocence Project associated with the Cardozo School of Law. Although it was impossible to conduct DNA testing on the crime scene evidence, the Innocence Project participants began to uncover information which demonstrated that he had received inadequate defense counsel at trial, including the witness identification procedure and the exculpatory forensic evidence, which never was presented at trial. (*Id.*) The

original prosecuting attorney, police investigator and forensic lab analyst all came forward in support of Mr. Swift's innocence. (*See* Joint Mot. For Relief From J., *People v Swift*, Wayne County No 82-05965, attached as Exhibit C.) Based on this new evidence, Mr. Swift ultimately was exonerated in 2008. (Order Granting Relief From J., *People v Swift*, Wayne County No 82-05965, attached as Exhibit D.)

C. Eddie Joe Lloyd

Eddie Joe Lloyd was wrongly convicted in Wayne County of murder, in connection with a rape, and served seventeen years in prison before he was exonerated and released from Michigan's prison system in 2002. (Joint Mot. For Relief From J. ¶ 1, *People v Eddie Joe Lloyd*, Wayne County No 85-0376 (Aug. 16, 2002), attached as Exhibit E; Order Granting Relief From J., *People v Eddie Joe Lloyd*, Wayne County No 85-0376 (Aug. 26, 2002), attached as Exhibit F). Mr. Lloyd was a mental patient who was persuaded by the police to confess to the crime in order to "smoke out the real killer." Mr. Lloyd's court-appointed lawyer withdrew from the case eight days before trial. (Joint Mot. For Relief From J. ¶ 3, *People v Eddie Joe Lloyd*, Wayne County No 85-0376, attached as App. E.) He received $150 for pretrial preparation and investigation, but performed no investigation (he paid a convicted felon $50 to conduct the investigation, which was never actually performed). Mr. Lloyd's replacement court-appointed lawyer never met with his prior lawyer and his trial commenced without delay. (*Id.*) Mr. Lloyd's trial lawyer did not cross-examine the police officer who was most involved in obtaining the confession which Mr. Lloyd claimed had been coerced. He called no defense witnesses at all. He gave a five-minute closing argument. The jury convicted his client of felony first degree murder in fewer than sixty minutes.

The attorney appointed to represent Mr. Lloyd on the appeal of his conviction never met with him and did not raise any claim of ineffective assistance of trial counsel. All of Lloyd's

appeals failed. Ultimately, the Innocence Project (associated with the Cardozo School of Law) accepted his case and worked to prove his innocence. DNA testing confirmed his innocence, and he was exonerated and released on August 26, 2002, after serving seventeen years in prison for a crime he did not commit. (Joint Mot. For Relief From J. ¶ 7-10, *People v Eddie Joe Lloyd*, Wayne County No 85-0376, attached as Exhibit E; Order Granting Relief From J., *People v Eddie Joe Lloyd*, Wayne County No 85-0376, attached as Exhibit F.) Two years later, Mr. Lloyd died.

III. ARGUMENT

The stories of Mr. Vinson, Mr. Swift, and Mr. Lloyd are not outliers in the State of Michigan's system for indigent defendants. The State of Michigan's system for indigent representation is an ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing. The State of Michigan does not provide sufficient funding, standards and training, or fiscal and administrative oversight of Michigan's county-based public defense system. Because of this inadequate funding and oversight, the experience of the Innocence Clinic is consistent with the allegation of Plaintiffs-Appellees that:

> indigent defense counsel do not meet with clients prior to critical stages in their criminal proceedings; investigate adequately the charges against their clients or hire investigators who can assist with case preparation and testify at trial; file necessary pre-trial motions; prepare properly for court appearances; provide meaningful representation at sentencings; or employ and consult with experts when necessary. (Complaint at ¶ 8).

Because of these structural defects, indigent defendants across the State of Michigan face a severe and unacceptable risk of not receiving meaningful and effective assistance of counsel. When counsel is constitutionally inadequate, overzealous prosecution and law enforcement officials are left free to over-charge defendants and the errors of those state officials who are

dishonest, corrupt, or mistaken go unchecked. Without question, this systemic constitutionally inadequate representation raises the specter of wrongful convictions.

The right to effective assistance of counsel is one of the most basic and fundamental constitutional rights afforded to our citizens. The Sixth Amendment to the United States Constitution states that, "in all criminal prosecutions the accused shall enjoy the right to . . . have the assistance of counsel for his defense." In *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932), the United States Supreme Court held that the defendants' Fourteenth Amendment rights to due process under the law had been violated where they "were not accorded the right to counsel in any substantial sense." The Supreme Court recognized the importance of the pretrial work of counsel, holding that, in *Powell*, "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense." *Id*. at 58.

Some thirty years later, in *Gideon v Wainright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) the Supreme Court held for the first time that the Sixth Amendment provision for the effective assistance of counsel is a fundamental and essential right made obligatory upon states by virtue of the Fourteen Amendment due process of law clause. Justice Hugo Black, writing for the majority, called it "an obvious truth" that lawyers in criminal cases are "necessities not luxuries." Justice Black further concluded:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man

charged with crime has to face his accusers without a lawyer to assist him. *Id.* at 344.

The right to effective assistance of counsel has been extended to appellate cases (*see Douglas v California*, 372 US 353, 83 S Ct 814; 9 L Ed 2d 811 (1963)), and more recently, in *Halbert v Michigan*, 546 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), the Supreme Court held that a state may not deny counsel to a defendant who seeks to appeal following entry of a guilty plea. Finally, the Supreme Court has required that states provide access to experts – such as psychiatrists – to an indigent defendant who makes a preliminary showing that his sanity will be an issue at trial. *Ake v Oklahoma*, 470 US 68; 87 S Ct 1087; 84 L Ed 2d 53 (1985). Since *Ake,* other courts have invoked the holding in that case to require expert and non-expert assistance in meaningful representation for indigent defendants. *See, e.g.*, *Powell v Collins*, 332 F 3d 376 (CA 6, 2003).

Criminal defendants are also granted the same fundamental right to effective assistance of counsel under the Michigan Constitution. The language of the Michigan Constitution is virtually identical to that of the Sixth Amendment, providing that, "[i]n every criminal prosecution, the accused shall have the right… to have the assistance of counsel for his or her defense[.]" Mich Const 1963 Art. 20 § 1. Accordingly, the Michigan Supreme Court has interpreted this provision as having the same meaning, and imposing the same standard of review, as the Sixth Amendment. *See People v Pickens*, 446 Mich 298, 317-27; 521 NW2d 797 (1994).

Despite the looming possibility of wrongful convictions as a result of Michigan's inadequate system for indigent representation, the Defendants-Appellants argue that the Plaintiffs-Appellees in this case are not entitled to pre-conviction, systemic relief. Part of the Defendants-Appellants' argument rests on the conclusion that the post-conviction remedy afforded by *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), means

the consequences of inadequate representation at the trial level would nonetheless be addressed later.

This exclusive reliance on *Strickland* is misplaced. *Strickland* dealt solely with the post-conviction review of a defendant's conviction. *Id*. at 684 (discussing how the issue for review was "standards by which…the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."). *Strickland's* instructions, then, are limited by its terms to the post-conviction setting: *Strickland* is concerned with retrospective relief, based on a specific record, and operating under the government interest in finality. *See, e.g.*, 466 US at 697 (holding that finality concerns are a variable in the final prejudice standard outlined in *Strickland*). *Strickland* has little to do with the prospective relief sought here, when the accused, who are presumed to be innocent, are often hauled into court having had little contact with counsel, who are unable or unwilling to vigilantly defend their clients. As a result of their constitutionally inadequate counsel, indigent defendants in Michigan suffer gross constitutional harms throughout the criminal process, including excessive bail determinations, prolonged pre-trial detention, and uncounseled waiver of pretrial hearing rights: none of these harms is remediable in post-conviction review.

Post-conviction review is insufficient to remedy the widespread and systemic violations of the right to counsel before conviction because those who are wrongly convicted as a result of counsel's ineffectiveness often find themselves beyond *Strickland*'s reach. First, the wrongly-convicted defendant must overcome a strong presumption that his trial attorney was either engaged in sound trial strategy or that his trial attorney may have been imperfect, but was not ineffective. *Strickland*, 466 US at 691; *People v Mitchell*, 454 Mich 145, 156; 450 NW2d 600 (1997). But this is a presumption that may be at odds with Michigan's system for indigent

defense, in which many attorneys for the indigent are over-worked, under-funded, and rarely subject to appropriate standards for their misconduct. Second, the wrongly-convicted defendant must establish prejudice – that is, he must show that his attorney's errors contributed to his conviction. *Strickland,* 466 US at 687; *Pickens*, 446 Mich at 314. But the very incompetence that a defendant complains about may also hamper that defendant's ability to show prejudice. Exculpatory evidence that an effective attorney may have found by the time of trial, may well disappear when a trial is over: witnesses are lost or become forgetful, evidence degrades, and avenues of investigation dry up. An attorney's ineffective decision not to present exculpatory evidence at trial may also be called 'trial strategy' on appeal. *See e.g., People v Rockey*, 273 Mich App 74, 76-78; 601 NW2d 887 (1999). Finally, by the time a defendant gets a chance to have effectiveness of his counsel reviewed on appeal, he has lost the presumption of innocence. Appellate courts are often weary of considering an attorney's mishandling and misrepresentation of evidence at trial – even though an ineffective attorney can so mangle a client's case at trial that the jury will discount the exculpatory evidence presented by the defense.

In the short time since its inception, the Innocence Clinic has already seen how bad or incompetent lawyers can cause an innocent person to lose months, years, and sometimes decades of their lives to prison, just like Mr. Vinson. It is critical that the courts be permitted to protect the essential constitutional rights of our citizens. As the Court of Appeals stated in its opinion,

> We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. If not by the courts, then by whom? *Duncan v State*, 284 Mich App 246, 256; 774 NW2d 89 (2009).

The Innocence Clinic has a strong and continuing interest in ensuring wrongful convictions are prevented before they occur. As part of that interest, the Innocence Clinic is greatly interested in ensuring that indigent defendants receive their constitutionally mandated access to effective representation at trial.

IV. CONCLUSION

As the preceding demonstrates, Michigan's system for indigent defense does not guarantee that Michigan's poor will receive the full scope of their right to effective assistance of counsel. Concurrent with its interest in preventing wrongful convictions, the Innocence Clinic believes that the current system for indigent defense in Michigan should be subject to systemic reform by the courts, both to ensure the constitutional rights of all criminal defendants and to minimize the risk that innocent defendants are convicted for crimes they did not commit.

Respectfully submitted,

By:

Ann Marie Uetz (P48922)
Jason D. Menges (P64228)
Erin L. Toomey (P67691)
Nicholas Ellis (P73174)
FOLEY & LARDNER LLP
One Detroit Center
500 Woodward Avenue, Suite 2700
Detroit, MI 48226-3489
(313) 234-7100

David A. Moran (P45353)
Bridget McCormack (P58537)
UNIVERSITY OF MICHIGAN LAW SCHOOL
625 S. State Street
Ann Arbor, MI 48109-1215
(734) 763-9353

Attorneys for Proposed Amicus Curiae,
University of Michigan Innocence Clinic

Dated: March 29, 2010

EXHIBIT A

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT CRIMINAL DIVISION

COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 86-000214
Hon. Vera Massey Jones

vs.

KARL VINSON,

Defendant.

WAYNE COUNTY PROSECUTOR'S OFFICE
By: Kym L. Worthy (P38875)
Wayne County Prosecutor
1441 Saint Antoine St
Frank Murphy Hall of Justice
Detroit, MI 48226
(313) 224-5777

MICHIGAN INNOCENCE CLINIC
University of Michigan Law School
By: Bridget McCormack (P58537)
David A. Moran (P45353)
Solana Flora, Student Attorney
Jacqueline Harrington, Student Attorney
Frances Kim, Student Attorney
Frances Lewis, Student Attorney
Erin Opperman, Student Attorney
Chad Ray, Student Attorney
Attorneys for the Defendant
1029 Legal Research Building
625 S. State Street
Ann Arbor, MI 48109-1215
(734) 763-9353

AMENDED MOTION FOR RELIEF FROM JUDGMENT

Karl Vinson, by his attorneys, Bridget McCormack and David A. Moran of the Michigan Innocence Clinic at the University of Michigan Law School, hereby requests that this court

relieve Karl Vinson from his judgment of conviction and sentence in this case for the following reasons pursuant to MCR 6.500 et seq.:[1]

1. On May 14, 1986, Karl Vinson was convicted at a jury trial in the third judicial circuit court presided over by Hon. Vera Massey Jones. Mr. Vinson was convicted of criminal sexual conduct (CSC 1) and breaking & entering with intent to commit a felony (B&E) for allegedly breaking into the bedroom window of nine-year-old Camille Wilson and raping her. On May 29, 1986, Mr. Vinson was sentenced to concurrent sentences of 10-50 years and 5-15 years. The latter sentence was discharged on November 19, 1998. Mr. Vinson is currently serving the remainder of his sentence at G. Robert Cotton Correctional Facility in Jackson, Michigan.

2. Mr. Vinson, through his appellate counsel, appealed his conviction as of right to the Michigan Court of Appeals, raising a claim of prosecutorial misconduct. The Michigan Court of Appeals affirmed Mr. Vinson's conviction on October 25, 1988 (Appeals Case Number: 00-006682-AP). On June 27, 1989, the Michigan Supreme Court denied Mr. Vinson's request for leave to appeal (Michigan Supreme Court Case Number: 84710). On October 10, 2000, Mr. Vinson filed, in pro per, a Motion for Relief from Judgment raising claims of ineffective assistance of trial and appellate counsel. This motion was denied on March 5, 2001 (Case Number: 86-000214). Mr. Vinson again filed a Motion for Relief from Judgment in 2006, but was again denied on January 23, 2006 (Case Number: 86-0214). Mr. Vinson did not appeal these adverse rulings. On February 11, 2006, Mr. Vinson filed a petition for a writ of habeas corpus in the United States District

[1] Defendant does not request appointment of counsel.

Court for the Eastern District of Michigan raising claims of ineffective assistance of trial and appellate counsel, among others (Case Number: 06-10850-BC). The court granted a motion for summary judgment seeking dismissal because the motion was filed outside of the one-year limitations period and Mr. Vinson had not established an entitlement to equitable tolling of that period. Mr. Vinson did not appeal.

3. Josephine Chapman represented Mr. Vinson during his trial and sentencing. Gerald M. Lorence represented Mr. Vinson for his direct appeal. Mr. Vinson filed the application for leave to appeal to the Michigan Supreme Court, the Motion for Relief from Judgment, and the federal habeas corpus petition in pro per. The Cooley Law School Innocence Project worked with Mr. Vinson beginning in 2001 in order to help locate samples for forensic testing, but was unable to locate any remaining forensic evidence.

4. Mr. Vinson has maintained his innocence since his arrest. Since his conviction, he has repeatedly tried to locate the forensic evidence collected by the police in order to have DNA testing done. The Michigan Innocence Clinic accepted Mr. Vinson's case in February 2009 as one of the Clinic's first cases after a thorough investigation of Mr. Vinson's claim of innocence, including biological testing.

5. New testing performed in 2009 reveals that the original forensic test result conducted by the Detroit Police Crime Lab in 1986 indicating that Mr. Vinson was a non-secretor was incorrect and that he is, in fact, a secretor. The new test results prove that it is scientifically impossible for Mr. Vinson to have been responsible for this crime.

6. The newly discovered forensic evidence that Mr. Vinson is a blood type AB secretor has not been previously presented to this court because the collection and laboratory analysis

of Mr. Vinson's bodily fluids only occurred in February and June of this year, 2009, and the results were only recently obtained by Mr. Vinson's new counsel. This evidence was not previously discoverable. As a result, Mr. Vinson's successive Motion for Relief from Judgment is proper under MCR 6.502(G)(2). Mr. Vinson's successive Motion for Relief from Judgment is also proper under MCR 6.508(D) because this new evidence proves that Mr. Vinson is innocent of this crime. As a result of this new evidence, Mr. Vinson requests relief from his judgment of conviction or a hearing to evaluate the issues raised in this motion.

7. In addition, analysis of the results of the 2009 testing exposed that the original forensic evidence itself also exonerates Mr. Vinson. The new evidence indicates that the original forensic evidence contained blood type O semen, which could not have been contributed by Mr. Vinson, who is blood type AB. This evidence has not been presented to this court because this evidence was only discovered when independent experts tested Mr. Vinson's secretor status. The collection and laboratory analysis of Mr. Vinson's bodily fluids only occurred in February and June of this year, 2009, and the results were only recently obtained by Mr. Vinson's new counsel. This new evidence was only discovered during the analysis of the results from this independent testing, and therefore was not previously discoverable. As a result, Mr. Vinson's successive motion for relief from judgment is proper under MCR 6.502(G)(2). Mr. Vinson's successive Motion for Relief from Judgment is also proper under MCR 6.508(D) because this new evidence shows that Mr. Vinson is innocent of this crime. As a result of this new evidence, Mr. Vinson requests relief from his judgment of conviction or a hearing to evaluate the issues raised in this motion.

8. Mr. Vinson also requests relief based on two claims of ineffective assistance of counsel. First, both his trial and appellate counsel failed to seek independent testing of the forensic evidence, and therefore did not discover this new evidence which establishes that Mr. Vinson could not have been responsible for the semen left at the scene of the crime. Second, trial counsel was ineffective in her cross examination of expert witnesses which would have shown that the forensic evidence available at the time of trial should have exculpated Mr. Vinson. Appellate counsel was ineffective for failing to litigate this ineffective assistance of trial counsel.

9. Mr. Vinson also requests relief based on prosecutorial misconduct. The prosecutor strongly relied on forensic evidence at trial. First, the prosecutor falsely claimed that the original forensic evidence supported Mr. Vinson's guilt, when the evidence should have cleared Mr. Vinson of involvement. Second, to bolster the case against Mr. Vinson, the prosecutor misrepresented the forensic evidence to falsely include Mr. Vinson in a small class of individuals who could have committed the crime. Third, the prosecutor improperly linked the forensic evidence of Mr. Vinson's secretor status to the lack of forensic fingerprint evidence, claiming that the lack of fingerprint evidence further supported Mr. Vinson's guilt. The prosecutor's misrepresentation of forensic evidence compromised the fairness of Mr. Vinson's trial, violating Mr. Vinson's constitutional right to due process and thus requiring relief from judgment of conviction.

10. None of these issues have been raised before because trial and appellate counsel were ineffective. As a result of the ineffectiveness of both trial and appellate counsel, Mr. Vinson has been unable to present the newly discovered evidence that conclusively rebuts

the prosecution's link between Mr. Vinson and the forensic evidence collected at the crime scene.

Wherefore, this Court should relieve Karl Vinson from his judgment of conviction, or hold a hearing to evaluate the issues raised in this motion.

Dated: September 14, 2009

Respectfully Submitted,

MICHIGAN INNOCENCE CLINIC

David A. Moran (P45353)
Attorney for Defendant

Bridget McCormack (P58537)
Attorney for Defendant

Solana Flora
Student Attorney for Defendant

Jacqueline Harrington
Student Attorney for Defendant

Frances Kim
Student Attorney for Defendant

Frances Lewis
Student Attorney for Defendant

Erin Opperman
Student Attorney for Defendant

Chad Ray
Student Attorney for Defendant

EXHIBIT B

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT CRIMINAL DIVISION

COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 86-000214
Hon. Vera Massey Jones

vs.

Karl Vinson,

Defendant.

WAYNE COUNTY PROSECUTOR'S OFFICE
By: Kym L. Worthy (P38875)
Wayne County Prosecutor
1441 Saint Antoine St
Frank Murphy Hall of Justice
Detroit, MI 48226
(313) 224-5777

MICHIGAN INNOCENCE CLINIC
University of Michigan Law School
By: Bridget McCormack (P58537)
David A. Moran (P45353)
Solana Flora, Student Attorney
Jacqueline Harrington, Student Attorney
Frances Kim, Student Attorney
Frances Lewis, Student Attorney
Erin Opperman, Student Attorney
Chad Ray, Student Attorney
Attorneys for the Defendant
1029 Legal Research Building
625 S. State Street
Ann Arbor, MI 48109-1215
(734) 763-9353

MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR RELIEF FROM JUDGMENT

Karl Vinson has already served 23 years for a rape that he did not commit. Now there is conclusive, scientific evidence of his innocence that requires relief from his judgment of

conviction. At trial, the prosecution presented two pieces of evidence linking Mr. Vinson to the crime. First, the prosecution presented the eyewitness testimony of the nine-year old victim, who could not identify Mr. Vinson until her mother suggested his name to her. The victim's testimony further contradicted several alibi witnesses for Mr. Vinson. Second, the prosecutor heavily relied on forensic evidence "against" Mr. Vinson based on a mixed blood and semen stain left on the victim's sheet by her attacker. It has now been demonstrated that the forensic testing of Mr. Vinson was false, and that the original forensic evidence should have eliminated Mr. Vinson as a suspect even with the false result. Because Mr. Vinson does not match the forensic evidence left at the scene of the crime, he could not have been responsible for this crime.

I. Facts and Procedural History

Early on the morning of January 3, 1986, nine-year old Camille Wilson was sleeping in her bedroom that she shared with her younger sister at Goddard Rd. in Detroit when a man broke in through her window and raped her. (Trial Tr. Vol. 2, 18:4-25, 25:6-24, May 13, 1986; Trial Tr. Vol. 1, 218:1-18, May 12, 1986.) On the afternoon of January 3, 1986, Detroit Police Officer Glen Sangmeister went to 20189 Hawthorne St. in Detroit and arrested Karl Vinson. (Trial Tr. Vol. 2, 42:9-20.)

At that time, Camille said that she had seen and heard the man before, but could not remember his name when talking with her mother or the police. (Trial Tr. Vol. 2, 36:8-13.) Something Camille said made her mother, Brenda Wilson, think of Mr. Vinson, and Camille's mother first suggested Mr. Vinson's name to the police. (Trial Tr. Vol. 2, 227:12-25; Trial Tr. Vol. 2, 237:25-238:4.) Karl Vinson's former wife, Phyllis, babysat the Wilson children three years before the rape, when Camille was approximately six years old, (Trial Tr. Vol. 2, 220:24-

221:6), but Camille had not seen Mr. Vinson for three years at the time of the rape (Trial Tr. Vol. 1, 233:4-6).

At trial, Camille identified Mr. Vinson as the man who attacked her. (Trial Tr. Vol. 2, 28:2-13.) On cross-examination, Camille could not remember the names or faces of other people she had seen on a regular basis but had not seen recently, including her first grade teacher or her Sunday school teacher. (Trial Tr. Vol. 2, 31:14-25, 32:6-24, 33:1-3.) In his defense, Mr. Vinson presented multiple witnesses who testified that he was at his mother's home at the time of the crime. (Trial Tr. Vol. 2, 93:1-3, 109:11-15.)

A mixed blood and semen stain was found at the crime scene on Camille's bed sheet and sent to Paula Lytle, a police forensic examiner, for blood type testing, the most common serology test used before DNA testing became widely available. (Trial Tr. Vol. 2, 68:16-25.) Ms. Lytle tested Camille and found her to be blood type O. (Trial Tr. Vol. 2, 75:23-25.) Ms. Lytle also tested Camille's saliva for secretor status and found her to be a secretor. (Trial Tr. Vol. 2, 75:25, 76:8-9.) Ms. Lytle explained that a secretor demonstrates his or her blood type in other bodily fluids, including saliva, vaginal secretion, and seminal fluid. (Trial Tr. Vol. 2, 76:3-16.) Ms. Lytle tested the sheet stain and only found blood type O. (Trial Tr. Vol. 2, 78:4-13.)

Ms. Lytle testified that she tested Mr. Vinson and found that he is an AB non-secretor, meaning his blood type is not present in bodily fluids other than his blood. (*See* Exhibit A, Lytle & Badaczewski Laboratory Analysis, indicating result that Mr. Vinson is an AB non-secretor; Trial Tr. Vol. 2, 77:2-24.) Based on her non-secretor test, Ms. Lytle testified that the forensic evidence could not exclude Mr. Vinson. (Trial Tr. Vol. 2, 78:14-24.)

Officer Robert Lloyd, another police forensic examiner, testified that fingerprints were not found at the scene. (Trial Tr. Vol. 2, 62:8-63:4.) He also testified that a "non-secretor" is less

likely to leave fingerprints because he perspires less. (Trial Tr. Vol. 2, 63:20-64:4.) However, Officer Lloyd was not asked, and did not clarify, that by "non-secretor" he meant a person who exudes little or no oils on his or her skin and that such a non-secretor was not in any way related to the non-secretor test performed by Ms. Lytle.

The purported fact that the forensic evidence entered at trial could not exclude Mr. Vinson, and, according to the prosecution, also narrowed the pool of potential suspects to a small portion of the population, was an essential element in the overall evidence "against" Mr. Vinson. As a result, in closing argument, the prosecutor repeatedly returned to the forensic testimony and argued that it supported Camille's shaky identification. (Trial Tr. Vol. 3, 17:4-6, 13-17, 20-21, May 14, 1986.) The jury even requested to review the forensic evidence during its deliberations because it was so important to the prosecution's case. (Trial Tr. Vol. 3, 62:24-63:25.)

Following his conviction, Mr. Vinson repeatedly requested DNA testing on the forensic evidence, but these requests were denied, and at some point the Detroit Police Department destroyed the samples. (*See* Exhibit B, Mr. Vinson's Letter to the Detroit Police Department, Sept. 24, 1991; Detroit Police Department Response to Mr. Vinson, Nov. 22, 1991; Mr. Vinson's Letter to Hon. Vera Massey Jones, Mar. 1, 1993; Hon. Vera Massey Jones Response to Mr. Vinson, Mar. 4, 1993; Mr. Vinson's Letter to Hon. Dalton Roberson, Apr. 29, 1993; Detroit Police Department Response to Mr. Vinson, May 20, 1993; Detroit Police Department Response to Mr. Vinson, June 1, 1993; Detroit Police Department Response to Mr. Vinson, Aug. 26, 2006.)

New test results prove that Mr. Vinson is innocent. Dr. Judith Westrick, a chemistry professor at Lake Superior State University, obtained blood and saliva samples from Mr. Vinson for testing. In a report dated February 25, 2009, Dr. Westrick concluded that Mr. Vinson is an

AB secretor. (*See* Exhibit C, Dr. Judith Westrick Lab Report, Feb. 5, 2009.) The Michigan Innocence Clinic accepted Mr. Vinson's case in February 2009, after being presented with Dr. Westrick's lab results indicating that Mr. Vinson is a blood type AB secretor. To confirm Dr. Westrick's results, semen and saliva samples were collected from Mr. Vinson on June 3, 2009. These samples were sent for testing to Arthur Young, a forensic biologist with NMS labs in Willow Grove, Pennsylvania. Mr. Young's tests on both semen and saliva samples confirmed that Mr. Vinson is an AB secretor. (*See* Exhibit D, NMS Labs Forensic Biology Laboratory Report by Arthur Young, June 12, 2009; Hanna-Weir Aff., June 5, 2009; Dr. Ray Aff., June 5, 2009.) Both Mr. Young and Ms. Lytle have confirmed by affidavit that Mr. Vinson being an AB secretor means that A and B blood antigens should have been found in the semen stain at the scene of the crime, and because they were not Mr. Vinson could not have been responsible for this crime. (*See* Exhibit E, Lytle Aff., 2 ¶ 9, Apr. 15, 2009; Exhibit F, Young Aff, 3 ¶9, June 17, 2009.)

Additionally, expert analysis of the results of the 2009 testing exposed that the original forensic evidence itself exonerates Mr. Vinson. The new evidence indicates that the original forensic evidence contained blood type O semen, which could not have been contributed by Mr. Vinson, who is blood type AB. Therefore, even with the false non-secretor result, the original forensic evidence should have exonerated Mr. Vinson.

On May 14, 1986, Mr. Vinson was convicted of criminal sexual conduct (CSC 1) and breaking & entering with intent to commit a felony (B&E). On May 29, 1986, Mr. Vinson was sentenced to concurrent sentences of 10-50 years and 5-15 years. The latter sentence was discharged on November 19, 1998. Mr. Vinson is currently serving the remainder of his sentence at G. Robert Cotton Correctional Facility in Jackson, Michigan.

Mr. Vinson, through his appellate counsel, appealed his conviction as of right to the Michigan Court of Appeals, which affirmed his conviction on October 25, 1988 (Appeals Case Number: 00-006682-AP). Mr. Vinson's appeal only covered the issue of prosecutorial misconduct, claiming that the prosecutor introduced evidence in his closing argument that was previously excluded by this Court. (*See* Exhibit G, Direct Appeal cured brief filed Jan. 22, 1987); *People v. Vinson*, No. 94565 (Oct. 25, 1988) (opinion affirming conviction). Mr. Vinson then filed, in pro per, a letter request in the Michigan Supreme Court for leave to appeal. On June 27, 1989, the Michigan Supreme Court denied Mr. Vinson's letter request for leave. *People v. Vinson*, No. 84710 (June 27, 1989). On October 10, 2000, Mr. Vinson filed, in pro per, a motion for relief from judgment raising ineffective assistance of trial and appellate counsel. This motion was denied on March 5, 2001 (Case Number: 86-000214). Mr. Vinson tried again in 2006, but was again denied on January 23, 2006 (Case Number: 86-0214). (*See* Exhibit H, Motion for Relief from Judgment, filed Oct. 10, 2000; Denial of Motion in Full, Mar. 5, 2001; Denial of Motion in Full, Jan. 23, 2006.) Mr. Vinson did not appeal these adverse rulings. On February 11, 2006, Mr. Vinson filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, Northern Division (Case Number: 06-10850-BC). The court granted a motion for summary judgment seeking dismissal because the motion was filed outside the one-year limitations period and Mr. Vinson had not established an entitlement to equitable tolling of that period. *See* Exhibit I, *Vinson v. Vasbinder*, No. 06-10850-BC (Dec. 7, 2006). Mr. Vinson did not appeal.

In July 2001, Mr. Vinson contacted the then-new Cooley Law School Innocence Project, which agreed to look for Camille Wilson's rape kit in the hope that DNA testing could be done on the kit. (*See* Exhibit J, Fleener Jr. Aff., June 10, 2009.) After years of searching, the Cooley

Innocence Project confirmed that Camille's stained sheet and panties from the night of the attack were destroyed by the Detroit Police Department. (*See* Exhibit J, ¶¶ 14-15.) The Cooley Innocence Project also found that the rape kit could not be located. (*See* Exhibit J, ¶¶ 16-19.) After undersigned counsel consulted with the prosecution in June 2009, a pathology slide with biological material collected from the victim was located at Children's Hospital. The slide was sent to the Michigan State Police Crime Lab, where an initial examination determined that the slide was intact and could be tested. The slide was then forwarded to NMS labs for DNA testing. Unfortunately, DNA tests on the slide were unable to identify a male DNA profile from the biological material on the slide. (*See* Exhibit Z, Young Aff., ¶¶ 8-9, Sept. 9, 2009.)

II. The Current Claims

Mr. Vinson now seeks relief from judgment under five claims; each merits the relief he seeks of its own accord. First, Mr. Vinson seeks relief for the newly discovered evidence that he is an AB secretor. At trial, the prosecutor presented testimony that Mr. Vinson was an AB non-secretor, and used this evidence to link Mr. Vinson to the crime. The new evidence that Mr. Vinson is an AB secretor conclusively proves that Mr. Vinson could not have contributed the semen found at the scene and therefore conclusively proves that Mr. Vinson is innocent.

Second, Mr. Vinson seeks relief for the newly discovered evidence that, even with the false non-secretor test result, the sheet stain almost certainly contained blood type O semen which Mr. Vinson could not have contributed because he is blood type AB. The new evidence indicates that Mr. Vinson is innocent because he could not have contributed the semen found at the scene of the crime based on the original forensic evidence presented against him at trial.

Third, Mr. Vinson seeks relief for ineffective assistance of counsel for failure to investigate the forensic evidence. Both his trial and appellate counsel failed to seek independent testing of

the forensic evidence, and therefore did not discover this new evidence which establishes that Mr. Vinson could not have been responsible for the semen left at the scene of the crime.

Fourth, Mr. Vinson seeks relief for ineffective assistance of counsel for failure to rebut the prosecution's expert testimony. Trial counsel was ineffective in her cross-examination of expert witnesses, failing to establish that the forensic evidence available at the time of trial should have exculpated Mr. Vinson. Appellate counsel was ineffective for failing to litigate this ineffective assistance of trial counsel.

Fifth, Mr. Vinson requests relief for prosecutorial misconduct. The prosecutor strongly relied on the forensic evidence at trial. First, the prosecutor falsely claimed that the original forensic evidence supported Mr. Vinson's guilt, when the evidence should have cleared Mr. Vinson of involvement. Second, to bolster the case against Mr. Vinson, the prosecutor misrepresented the forensic evidence to falsely include Mr. Vinson in a small class of individuals who could have committed the crime. Third, the prosecutor improperly linked the forensic evidence of Mr. Vinson's secretor status to the lack of forensic fingerprint evidence, claiming that the lack of fingerprint evidence further supported Mr. Vinson's guilt. The prosecutor's misrepresentations of the forensic evidence compromised the fairness of Mr. Vinson's trial, violating Mr. Vinson's constitutional right to due process and thus requiring relief from judgment of conviction.

III. Successive Motion for Relief From Judgment under MCR 6.500

Mr. Vinson properly brings this successive Motion for Relief from Judgment under the exception noted in MCR 6.502(G)(2), as he is alleging newly discovered evidence of innocence. This newly discovered evidence fits the four conditions required by the rule – that (1) "the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered

evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial." *People v. Johnson*, 451 Mich. 115, 118 n.6, 545 N.W.2d 637 (1996); MCR 6.508(D). Each of these five claims was only recently discoverable because the results of the new biological testing were only available in February of 2009 and confirmed in June of 2009. Only during this time was Mr. Vinson able to have his case reviewed by scientific experts, who analyzed the results of the tests on Mr. Vinson's bodily fluids. The new evidence was undiscoverable before because Mr. Vinson was ineffectively represented by counsel and then proceeded pro per, during which time he was unable to arrange biological testing himself or to afford the scientific experts needed until undersigned counsel took his case in February 2009.

Mr. Vinson's successive Motion for Relief from Judgment is also proper under MCR 6.508(D) because this newly discovered evidence not only shows the required "significant possibility that [Mr. Vinson] is innocent of the crime" but conclusively proves that Mr. Vinson is innocent. MCR 6.508(D).

Argument

I. KARL VINSON IS ENTITLED TO RELIEF FROM JUDGMENT DUE TO NEWLY DISCOVERED EVIDENCE CONTRADICTING THE FORENSIC EVIDENCE USED AGAINST HIM AT TRIAL.

Recently discovered new evidence of actual innocence conclusively rebuts any forensic possibility that Mr. Vinson raped Camille Wilson, contrary to the prosecution's presentation to the jury. The newly discovered forensic evidence that Mr. Vinson is a blood type AB secretor has not been previously presented to this court because the collection and laboratory analysis of Mr. Vinson's bodily fluids only occurred in February and June of this year, 2009. The results

were only recently obtained by Mr. Vinson's new counsel, and were not previously discoverable. As a result, Mr. Vinson's successive motion for relief from judgment is proper under MCR 6.502(G)(2). Mr. Vinson's successive Motion for Relief from Judgment is also proper under MCR 6.508(D) because this new evidence proves that Mr. Vinson is innocent of this crime.

This newly discovered evidence fits the four conditions required by the rule – that "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial." *Johnson, supra* at 118 n.6; MCR 6.508(D). This evidence is newly discovered because it was only obtained in February of 2009 and confirmed in June of 2009. Mr. Vinson could not, using reasonable diligence, have discovered and produced the evidence at trial because he was ineffectively represented by counsel, as discussed *infra* in Parts III and IV, and then proceeded pro per, during which time he was unable to arrange biological testing himself or to afford the scientific experts needed until undersigned counsel took his case in February 2009. This evidence is not cumulative of any evidence available at trial.

A different result is not only probable on retrial but inevitable. The standard to judge this new evidence is whether "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(i). Ms. Lytle, who testified at trial that the forensic evidence did not exclude Mr. Vinson, would now testify that the forensic evidence exonerates Mr. Vinson because if Mr. Vinson was the rapist both A and B antigens would have been found in the semen stain, (Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9), but were not, (Exhibit C, 3 ¶ 1; *see* Exhibit D; Exhibit F, 3 ¶ 9). Additionally, the prosecutor could not have relied on the forensic evidence to support Mr. Vinson's guilt as he did in his closing arguments. (Trial Tr.

Vol. 3, 17:2-6, 14-17, 20-21); *see infra* Part V. Therefore, the new evidence that Mr. Vinson is an AB secretor would have made a conviction impossible, because Mr. Vinson could not have left the semen found at the scene. (Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9.)

A. <u>New forensic testing conclusively proves Karl Vinson's innocence.</u>

New forensic testing conclusively shows that Mr. Vinson is an AB secretor, contradicting prosecution witness testimony and evidence used against Mr. Vinson at trial. Mr. Vinson's secretor status establishes his innocence.

Paula Lytle tested Camille and found her to be blood type O. Ms. Lytle also tested Camille's saliva for blood type and found Camille to be a secretor. (Trial Tr. Vol. 2, 75:23-76:16, May 13, 1986.) A mixed blood and semen stain was found at the scene on Camille's bed sheet by Officer Badacewski and sent to Ms. Lytle for blood type testing. (Trial Tr. Vol. 2, 68:16-24.) Ms. Lytle tested the sheet stain and found only blood type O. (Trial Tr. Vol. 2, 78:4-13.) Ms. Lytle testified that she tested Mr. Vinson and found that he is an AB non-secretor, meaning his blood type is not present in bodily fluids other than his blood. (*See* Exhibit A; Trial Tr. Vol. 2, 77:2-24.) As an AB non-secretor, she testified at trial that Mr. Vinson was not excluded by the test results from the stain left on Camille's sheet. (Trial Tr. Vol. 2, 78:14-24.)

Recent tests on Mr. Vinson's blood, saliva, and semen prove that Mr. Vinson is an AB secretor. (Exhibit C, 3 ¶ 1; *see* Exhibit D; Exhibit F, 3 ¶ 9.) Separate and independent lab results by Dr. Judy Westrick and NMS Labs prove Mr. Vinson's AB secretor status. (*See* Exhibit C, 3 ¶ 1; Exhibit D.) Although unnecessary because saliva and semen tests are redundant, *see* Exhibit K, <u>Examination of the correlation of groupings in blood and semen</u>, 30 J. Forensic Sci. 103, 103-113 (1985), a semen test has also proven that Mr. Vinson is an AB secretor. (*See* Exhibit D; Exhibit F, 3 ¶ 9.) Both Paula Lytle, the original serologist for the Detroit Police Crime Lab who

conducted the original testing, and Arthur Young, an independent serologist with NMS Labs have sworn in affidavits that these new tests conclusively exonerate Mr. Vinson because if Mr. Vinson was the rapist, A and B antigens would have been found in the semen stain. (Exhibit E, 2 ¶ 9; and Exhibit F, 3 ¶ 9), but were not, (Exhibit C, 3 ¶ 1; Exhibit D; and Exhibit F, 3 ¶ 9.) Ms. Lytle and Mr. Young both agree that Mr. Vinson being an AB secretor conclusively proves that the semen sample could not have been left by Mr. Vinson. (Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9.) This newly discovered evidence of Mr. Vinson's true secretor status conclusively shows that he could not have committed this crime. (Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9.)

B. Ms. Lytle identified a failure of the original test protocol as a reasonably likely cause for the erroneous finding of non-secretor status..

The original Detroit Crime Lab results finding Mr. Vinson to be a non-secretor were erroneous. The test to see if someone is a secretor or a non-secretor simply looks for blood type antigens – if blood type antigens are not found, the person is identified as a non-secretor to explain the absence of the blood type antigens. (Trial Tr. Vol. 2, 77:10-24, May 13, 1986.) In her 2009 affidavit, Ms. Lytle described the testing done in 1986 and further described how the error might have been made. Ms. Lytle explained that the erroneous determination that Mr. Vinson was a non-secretor could have resulted if the tested piece of the paper disk used to collect the saliva had not been fully soaked in saliva. (Exhibit E, 1 ¶¶ 3-4.) Under the testing protocol followed by the Detroit Crime Lab in 1986, a paper disk would be soaked with the subject's saliva. (Exhibit E, 1 ¶ 3.) The lab technician would let the paper disk dry and then cut a piece from it to create a sample to be tested. (Exhibit E, 1 ¶ 3.) When the technician allowed the disk to dry out, the portions of the disk that were saturated with saliva were indistinguishable from any portions of the disk that had not been saturated. (Exhibit E, 1 ¶ 4.) Therefore, a person who

was a secretor would have been "found" to be a non-secretor if the paper disk was not fully saturated with saliva and the technician tested a portion of the disk that had not been saturated. (Exhibit E, 1 ¶ 4.)

As designed, the test can give an accurate non-secretor result if the person is truly a non-secretor because the status of the semen donor would explain the absence of blood type antigens in the test result. (Exhibit E, 1 ¶ 3.) However, the test can also give an inaccurate non-secretor result if the part of the paper tested by the technician did not have sufficient saliva for the test because this also explains the absence of blood type antigens in the test result. (Exhibit E, 1 ¶ 4.) If this were the case, it was likely not obvious to the forensic technician doing the testing because saliva dries clear, (Exhibit E, 1 ¶ 4), unlike a blood or semen stain where the location of the bodily fluid would be obvious because of the color of the bodily fluid.

This simple explanation demonstrates that the secretor/non-secretor test used against Mr. Vinson was error prone. This error does not affect Ms. Lytle's other test results because blood type antigens were detected in each of the other blood type tests performed by Ms. Lytle. For example, the sheet stain test found blood type O antigens, indicating that the test worked because antigens were found, as compared to the error in Mr. Vinson's secretor/non-secretor test which falsely reported the absence of all blood type antigens.

II. KARL VINSON IS ENTITLED TO RELIEF FROM JUDGMENT DUE TO NEWLY DISCOVERED EVIDENCE THAT THE ORIGINAL FORENSIC EVIDENCE USED AGAINST HIM AT TRIAL ACTUALLY EXONERATES HIM.

Recently discovered new evidence of actual innocence shows that the original forensic testing in fact rebuts the forensic possibility that Mr. Vinson was the attacker of Camille Wilson, contrary to the prosecution's presentation to the jury. The original forensic testing shows that the

blood type O found on Camille Wilson's sheet almost certainly came from semen present, which does not match Mr. Vinson's AB blood type. This evidence has not been presented to this court because this evidence was only discovered when independent experts tested Mr. Vinson's secretor status and reviewed the forensic evidence used against him at trial. The collection and laboratory analysis of Mr. Vinson's bodily fluids only occurred in February and June of this year, 2009, with the results were only recently obtained by Mr. Vinson's new counsel, and therefore was not previously discoverable. As a result, Mr. Vinson's successive motion for relief from judgment is proper under MCR 6.502(G)(2). Mr. Vinson's successive Motion for Relief from Judgment is also proper under MCR 6.508(D) because this new evidence strongly suggests that Mr. Vinson is innocent of this crime.

This newly discovered evidence fits the four conditions required by the rule – that "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial." *Johnson, supra* at 118 n.6; MCR 6.508(D). This new evidence is newly discovered because it was only obtained as the results from the June 2009 were analyzed. Mr. Vinson could not, using reasonable diligence, have discovered and produced the evidence at trial because he was ineffectively represented by counsel and then proceeded pro per, during which time he was unable to arrange biological testing himself or to afford the scientific experts needed until undersigned counsel took his case in February 2009. This evidence is not cumulative of any evidence available at trial.

A different result is not only probable on retrial but inevitable. The standard to judge this new evidence is whether "but for the alleged error, the defendant would have had a reasonably

likely chance of acquittal." MCR 6.508(D)(3)(b)(i). Serological analysis of the original evidence strongly suggests that the blood type O found from the stain was from semen. Mr. Vinson could not have contributed blood type O semen. If Mr. Vinson had been responsible for the crime blood type AB would have been detected, (Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9). Instead blood type O was detected, (Exhibit C, 3 ¶ 1; Exhibit D; Exhibit F, 3 ¶ 9), strongly suggesting that even the original forensic evidence should have conclusively eliminated Mr. Vinson as a suspect in this crime, even with the erroneous non-secretor test result.

A. Camille Wilson most likely did not contribute the blood type O found by Ms. Lytle in the stain found at the crime scene, indicating that the blood type O found by Ms. Lytle was from the semen source, proving that Mr. Vinson who is blood type AB could not have been responsible for this crime.

The mixed blood and semen stain on Camille Wilson's sheet was found to be blood type O. (*See* Exhibit A.) Although Camille Wilson was found to be blood type O, no testing was conducted for the presence of vaginal fluid on the sheet. (*See* Exhibit A.) When blood is mixed with other bodily fluids, blood type antigens from blood are not detected when the mixture is tested for blood type antigens from the bodily fluid solely. (Exhibit F, 2 ¶ 6.) Therefore, this type of test, which is precisely the test conducted by the Detroit Crime Lab, can only determine the blood type of the semen in a mixture of blood and semen. (Exhibit F, 2 ¶ 6.) In the absence of vaginal fluid, the blood type O found would conclusively have come from the semen in the sheet stain. Even if vaginal fluid were present, the blood type O would most likely have come from the semen in the stain. It has never been disputed that Mr. Vinson is blood type AB. (*See* Exhibit A.) If Mr. Vinson was the rapist, A and B antigens would have been found in the semen stain, (Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9), but were not, (Exhibit C, 3 ¶ 1; Exhibit D; Exhibit F, 3 ¶ 9), proving that Mr. Vinson could not have been responsible for the semen found at the scene.

1) If Camille only donated blood to the mixed stain on her sheet, then the blood type found in the sheet could only have come from the semen of someone who was blood type O, which is inconsistent with Karl Vinson's blood type AB, proving that Karl Vinson could not have been responsible for this crime.

If Camille Wilson's only donation to the mixed stain was blood, then the blood type O antigens found by Ms. Lytle could only have come from the semen source. (Exhibit F, 2 ¶ 6.) Blood type antigens from blood are not detected during blood type determination from other bodily fluids. (Exhibit F, 2 ¶ 6.) If the blood type O antigens came from the semen source, then Mr. Vinson could not be the semen source because the forensic analysis would have detected the presence of A and B blood types, (Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9), but only found blood type O, (Exhibit C, 3 ¶ 1; Exhibit D; Exhibit F, 3 ¶ 9). Therefore, Mr. Vinson could not have been responsible for this crime because his blood type should have been detected in the sheet stain but was not detected.

2) If Camille donated both blood and vaginal fluid to the mixed stain on her sheet, the blood type O found in the sheet still very likely was only contributed by the semen source, which is inconsistent with Karl Vinson's blood type AB, proving that Karl Vinson could not have been responsible for this crime.

At trial, Ms. Lytle indicated that identifying Camille Wilson as the source of the blood type found on the sheet was improper. (Trial Tr. Vol. 2, 83:12-15.) Nonetheless, the prosecution argued that the blood type O present in the stain was from Camille Wilson, (Trial Tr. Vol. 3, 32:6-15, May 14, 1986), despite this expert testimony from Ms. Lytle, the prosecution's own witness. Although the point was not addressed further at trial, the review of the scientific literature that follows suggests that Ms. Lytle would have been unable to determine Camille Wilson's blood type from the sample unless she tested the blood in the sample. Blood type antigens from blood are undetectable in the test performed by Ms. Lytle because they are insoluble, (Exhibit F, 2 ¶ 6); therefore Camille Wilson's blood could not have contributed the

blood type O detected by Ms. Lytle in the testing that she conducted. If Camille Wilson contributed the blood type O detected by Ms. Lytle then it could only have come from Camille Wilson's vaginal fluid.

Semen contains high quantities of blood type antigens, while vaginal fluid does not. (Exhibit F, 3 ¶ 8.) The victim's "profuse[]" bleeding, (Trial Tr. Vol. 2, 9:7-22, May 13, 1986), confirmed by her mother, (Trial Tr. Vol. 1, 225:17-25, 236:12-19. May 12, 1986), strongly suggests that antigens from vaginal fluid would have been undetectable in the stain, indicating that the blood type O detected in the stain was not from Camille Wilson, but rather from her assailant, the only source other than Camille's vaginal fluid in the stain. This strongly suggests that the blood type O found in the stain was from the semen of a blood type O donor. Mr. Vinson was known at the time of trial to be blood type AB, (Trial Tr. Vol. 2, 76:19-77:5, May 13, 1986.) and therefore should have been exonerated by the original forensic evidence because he could not have contributed blood type O semen to the stain found at the scene.

The peer-reviewed scientific literature strongly indicates that blood type determination from vaginal fluid in a mixed sample is unlikely because the blood type antigens from the vaginal fluid would be too dilute to be detected in recognizable amounts. *See* Exhibit L, Akhiko Kimura et al., <u>ABO blood grouping of semen from mixed body fluids with monoclonal antibody to tissue specific epitopes on seminal ABO blood group substance</u>, 104 Int'l J Legal Med. 255, 255-58, 257 fig.5 (1991) . In each of the three specimens in this study, where undiluted vaginal extract was a part of the mixture, the blood type antigens from the vaginal fluid were either undetectable, (Exhibit L, 257 fig.5, Box 2 and 3), or, as seen only in specimen 4, only very weakly detectable, (Exhibit L, 257 fig.5, Box 4.) Specimen 1 in the study shows a mixed solution containing blood type A secretor semen diluted 500 times with blood type B secretor

saliva also diluted 500 times. Only blood type A was detected, indicating that semen contains far more blood type antigens than does saliva, and that saliva would not hinder the determination of blood type from semen even if present in equal amounts. (Exhibit L, 257 fig. 5, Box 1.) Specimen 2 shows a mixed solution of blood type B secretor semen diluted 500 times and blood type A secretor undiluted vaginal fluid extract. Blood type A from the vaginal fluid was undetectable in this mixture, but the blood type B from the semen was still detected even at 500 times dilution indicating that even extensively diluted semen has far more blood type antigens than an equivalent amount of undiluted vaginal fluid. (Exhibit L, 257 fig.5, Box 2.) Specimen 3 shows a mixed solution of blood type O secretor semen diluted 500 times and blood type A secretor vaginal fluid extract. Again, just as for Specimen 2, only the semen blood type is found in the blood type measurement with no indication of the vaginal fluid blood type. (Exhibit L, 257 fig.5, Box 3.) Specimen 4 shows a mixed solution of blood type O non-secretor semen with blood type A secretor vaginal fluid. Here the vaginal fluid blood type is found, but the measured intensity from the vaginal fluid blood type is still just above zero, (Exhibit L, 257 fig.5, Box 4), again indicating that blood type antigens are extremely dilute in vaginal fluid. Specimen 5 is particularly important. Specimen 5 shows AB secretor semen diluted 500 times. Both A and B blood types are shown strongly.

The above study demonstrates that if AB secretor semen was present in the sheet stain it would have been strongly detected. Ms. Lytle and Mr. Young confirm this finding. (Exhibit E, 2 ¶ 9; *see* Exhibit F, 3 ¶ 9.) This proves that Mr. Vinson, an AB secretor, (Exhibit C, 3 ¶ 1; Exhibit D; Exhibit F, 3 ¶ 9), could not have been responsible for this crime because only blood type O was found in the sheet stain. (*See* Exhibit A.)

Even if present, the amount of vaginal fluid was very likely too small to be detected by Ms. Lytle. The amount of lubrication produced by an adult vagina has been described as similar to a sweat film. *See* Exhibit M, William Masters & Virginia Johnson, Human Sexual Response 69 (1st ed., Little, Brown and Company 1966) (1966). Therefore, it is possible to estimate the amount of fluid necessary for proper lubrication by estimating the surface area of the vagina and comparing this with the thickness of a sweat film. The surface area of an adult vagina must be similar to the size of an adult penis because it is "potential rather than an actual space." (Exhibit M, 71.) The surface area requiring lubrication of an adult vagina is found to be ~170.6 cm^2 (using the surface area of a rod == $\pi * r^2 + 2 * \pi * r * h$). *See* Exhibit N, Hunter Wessells et al., Penile Length in the Flaccid and Erect States: Guidelines for Penile Augmentation, 156 J. Urology 995, 996 t.1 (1996). A sweat film thickness is found to be ~0.0059 cm thick, *see* Exhibit O, Enock Jonathan, In vivo sweat film layer thickness measured by Fourier-domain optical coherence tomography, Optics and Lasers in Eng., Jan. 24, 2008, at 3 t.1, indicating that an adult vagina produces approximately 1 ml of vaginal fluid during sexual arousal (170.6 cm^2 * 0.0056 cm ~= 1ml).

However, Camille Wilson was prepubescent at the time of the crime. (*See* Exhibit P, Progress Notes from Children's Hospital.) The vagina of a prepubescent girl is approximately 10 percent of the size of an adult vagina, *see* Exhibit Q, Edith Boyd, Origins of the Study of Human Growth 654 (Bhim Sen Savara & John Frederick Schilke eds., University of Oregon Health Sciences Center Foundation 1980), indicating that the amount of vaginal fluid produced during sexual arousal, all other things being equal, should also be approximately 10 percent of the amount from an adult vagina, or ~0.1 ml. When the developmental state of the vagina is considered, the amount of vaginal fluid produced should be even less. The prepubescent vagina

is described as "dry, thin, nonelastic, and nonrugated" and remains in this "quiescent state until the onset of puberty." *See* Exhibit R, Mary-Ann Shaffer & Anna-Barbara Moscicki, Rudolph's Pediatrics 238 (Colin D. Rudolph & Abraham M Rudolph eds., Mcgraw-Hill 2003) (1977). The tissue of the vagina develops during puberty becoming thicker, (*see* Exhibit R, 238), to accommodate the buildup of fluids in the vaginal tissue that allow the tissue to release vaginal fluid, (*see* Exhibit M, 70). This indicates that the amount of vaginal fluid produced by a prepubescent vagina must be quite small because the tissue has not yet developed to allow for an adult-like response, strongly suggesting that the estimate above of 0.1 ml for a smaller but fully developed vagina is an upper limit of the actual amount produced.

By combining the above upper limit for the amount of vaginal fluid with the detection limit of the blood type test used by Ms. Lytle, it is possible to estimate the amount of blood required to dilute the vaginal fluid beyond the detection limit of the technique. The concentration of blood type antigens in vaginal fluid is small; dilutions beyond 63:1 render these antigens undetectable. (Exhibit F, 3 ¶ 8.) Therefore, with 0.1 ml of vaginal fluid, a mere 6.3 ml of blood (just over 1 teaspoon) would be required to dilute the vaginal fluid beyond the detection limit of the technique used by Ms. Lytle (0.1 ml vaginal fluid * 63 ml blood/1 ml vaginal fluid = 6.3 ml of blood). The emergency room physician, Dr. Helene Tigchelaar, indicated that it was "hard to say" how much bleeding occurred when Camille's injury was first caused, but expected a wound such as Camille Wilson's would bleed "profusely," and indicated that the injury required surgery to correct. (Trial Tr. Vol. 2, 9:7-22, May 13, 1986.) Although "profuse" does not indicate the actual amount of blood loss, it certainly describes blood loss exceeding 6.3 ml (just over 1 teaspoon) when stated by an ER doctor who must see many severe injuries and has no reason to exaggerate the nature of the injuries when it would be clear because surgery was required to

repair the damage. This excessive bleeding was also confirmed by her mother, who noted that there was "blood all over the toilet seat" after Camille went to the bathroom after talking with the Sex Crimes Unit and who gave Camille sanitary pads to control the bleeding. (Trial Tr. Vol. 1, 225:17-25, 236:12-19, May 12, 1986.)

Given the small amount of blood required to dilute the vaginal fluid such that it would not be detected in the blood type analysis, and that blood is not detected by the test Ms. Lytle used, it is very unlikely that the blood type O detected from the stain by Ms. Lytle was contributed by Camille Wilson.

3) The victim's blood is very unlikely to have interfered with the blood type testing of the semen in the mixed stain on the sheet, which Ms. Lytle found to be blood type O, proving that Karl Vinson as an AB secretor could not have been responsible for this crime because blood type AB was not found in the stain on the sheet.

Blood and the blood type antigens in blood do not interfere with the analysis of blood type from other bodily fluids. (Exhibit F, 2 ¶ 6.) However, it may be suggested that blood could dilute the blood type antigens from the semen to such an extent that they were not detectable, but this is not possible in this case.

Far more blood would be necessary to dilute semen compared to vaginal fluid. First, semen contains high quantities of blood type antigens while vaginal fluid does not. (Exhibit F, 3 ¶ 8.) Second, the amount of semen was likely much higher than the amount of vaginal fluid. Analysis in Section II(A)(2) suggests that the maximum amount of vaginal fluid was 0.1 ml, far less than the average ejaculate size of 2.75 ml, *see* Exhibit S, Elisabeth Carlsen et al., <u>Evidence for decreasing quality of semen during past 50 years</u>, 305 BMJ 609,. 610 (1992). Third, independent experts confirm that even if the amount of semen in the sample tested was low, it is reasonable to expect a blood type determination of the semen's blood type to be possible and reliable. (Exhibit

F, 3 ¶ 8.) Therefore, it is expected that the amount of blood required to dilute the semen would have been extraordinarily high. Such a large amount of blood would have been noticed and mentioned by the emergency room doctor, the police officer who examined the scene, or Camille Wilson's mother, but none of these witnesses mentioned such extensive blood loss. (Trial Tr. Vol. 2, 6:22-24, 49:5-9; Trial Tr. Vol. 1, 236:16-19.)

For comparison, a similar analysis can be done for semen as was done in Section II(A)(2), *supra*, for vaginal fluid. The average volume of human ejaculate is 2.75 ml. *See* Exhibit S, 610. Because semen contains high quantities of blood type antigens, semen can be diluted up to 255 parts water to 1 part semen and still have a reliable blood type test of the semen. (Exhibit F, 3 ¶ 8.) Therefore, in order for the blood to have diluted an average-sized ejaculate down to undetectable limits Camille Wilson would have had to bleed at least 0.7 L (or approximately 3 cups) of blood onto the semen (2.75 ml semen * 255 parts water / 1 part semen == 701.25 ml ~= 0.7 L), a vastly higher quantity that the mere 6.3 ml of blood (just over 1 teaspoon) necessary to dilute vaginal fluid such that it would be undetectable. For comparison, a unit of blood for donation purposes is less than 0.5 L. *See* Exhibit T, Am. Ass'n of Blood Banks, Circular of Information for the Use of Human Blood and Blood Components 11, (2002). Normal children have ~80 ml of blood per kg of body weight. *See* Exhibit U, Dan C. Darrow et al., Blood volume in normal infants and children, 5 J. Clin. Invest. 243, 248 chart 1 (1928). At the time of the crime Camille Wilson weighed 56.7 kg, (Exhibit V, Camille Wilson Nurse's Assessment Form), and so she only had ~4.5 liters of blood (56.7 kg * 80 ml blood / kg of body weight == 4536 ml ~= 4.5 L of blood). This suggests that Camille Wilson would have had to lose ~15 percent of her blood in order to dilute the blood antigens from the semen down to undetectable levels.

Blood loss of this magnitude would have been detected and noted by the emergency room doctor, but was not. Although Dr. Tigchelaar indicated that it was "hard to say" how much bleeding occurred when Camille's injury was first caused, she did expect that such a wound would bleed "profusely," and indicated that the injury required surgery to correct. (Trial Tr. Vol. 2, 9:7-22.) Dr. Tigchelaar did not describe any actual "profuse" blood loss; she only found "bloody discharge" and some mucus. (Trial Tr. Vol. 2, 6:22-24.) If Camille Wilson lost enough blood to dilute the blood type antigens in the semen enough that they could not be detected, she would likely have had heart complications from the blood loss, *see* Exhibit W, Practice parameter for the use of red blood cell transfusions: Developed by the Red Blood Cell Administration Practice Guideline Development Task Force of the College of American Pathologists 3, http://findarticles.com/p/articles/mi_qa3725/is_199802/ai_n8803744/ (last visited June 27, 2009), and immediate corrective surgery may have been abnormally dangerous without a blood transfusion. *See* Exhibit X, Pierre Foëx, Unexplained preoperative tachycardia: is it an important issue? Editorial, 52 Can. J. Anesth. 789 (2005). Dr. Tigchelaar did not describe any symptoms that would have caused concern about the corrective surgery, though she took the time to fully describe the severity of the injuries, (Trial Tr. Vol. 2, 11:15-22), strongly suggesting that such symptoms from extensive blood loss were not present. Further, Officer Hankins only described the bloodstain as "red" and "kind of wet," (Trial Tr. Vol. 2, 49:5-9), and Camille's mother said the blood "wasn't gushing out, otherwise we would call the EMS," (Trial Tr. Vol. 1, 236:16-19.). These descriptions do not suggest that Camille lost the amount of blood necessary to dilute the semen enough for semen antigens to not be detected.

Clearly Camille Wilson did not lose enough blood to dilute the blood type antigens from the semen beyond the detection limit of the technique used by Ms. Lytle. Given the analysis in

Section II(A)(2) indicating that Camille Wilson likely did not contribute the blood type O detected in the stain by Ms. Lytle, whoever left the semen in the stain must have been blood type O. Because Mr. Vinson is blood type AB he is conclusively exonerated since he could not have left the semen found at the scene of the crime.

B. Even if the blood type O found in the stain by Ms. Lytle was contributed by Camille Wilson, her actual attacker still must have also been blood type O or a nonsecretor, proving that Karl Vinson as a blood type AB secretor could not have been responsible for this crime.

Even if Camille Wilson donated vaginal fluid to the stain, the forensic evidence is inconsistent with Mr. Vinson. If Camille donated vaginal fluid to the mixed stain, then blood type O could have been detected from her vaginal fluid. (Trial Tr. Vol. 2, 76:3-16.) However, semen contains high quantities of blood type antigens, while vaginal fluid does not. (Exhibit F, 3 ¶ 8.) Therefore even in the unlikely event that there was as much vaginal fluid present as semen, in this scenario the presence of blood type antigens from the vaginal fluid indicates that the blood type antigens from the semen should have been determinable as well. However, based on Ms. Lytle's testing only blood type O was present. (Trial Tr. Vol. 2, 68:16-24, 78:4-13.) Ms. Lytle's result from the stain is inconsistent with Mr. Vinson who is an AB secretor, (Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9), proving he could not have been responsible for this crime.

III. ALTERNATIVELY, KARL VINSON IS ENTITLED TO RELIEF FROM JUDGMENT DUE TO INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO INVESTIGATE

One of the most fundamental rights in the criminal justice system is the Sixth Amendment right to effective assistance of trial counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). If this court concludes that the new evidence of actual innocence discussed in Arguments I and II, *supra*, could have been discovered at the time of trial, then it follows that trial counsel's

performance in this case fell woefully below the minimum standard set forth in *Strickland*. To show that trial counsel was constitutionally ineffective, Mr. Vinson must first show that trial counsel's performance was so deficient that it "fell below an objective standard of reasonableness." *Id.* at 688. Second, Mr. Vinson must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of [his trial] would have been different." *Id.* at 694. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. This Sixth Amendment right also requires the effective assistance of appellate counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 395-97 (1985). When the failure is lack of investigation, *Wiggins v. Smith*, 539 U.S. 510 (2003), dictates that counsel has a duty to make reasonable investigations or to make reasonable decisions about what makes particular investigations unnecessary.

Mr. Vinson's trial counsel and appellate counsel were constitutionally ineffective for not investigating this evidence that would have established that Mr. Vinson could not have committed this crime. This ground for relief was not raised and could not have been raised by Mr. Vinson on appeal because both trial and appellate counsel failed to investigate the veracity of the forensic evidence. Mr. Vinson raised an ineffective assistance of trial and appellate counsel in his pro per Motion for Relief of Judgment. Mr. Vinson did not and could not have specifically raised counsels' failure to investigate the veracity of the forensic evidence because of his inability to independently investigate the veracity of the forensic evidence due to financial and practical constraints.

The prosecution relied heavily on forensic evidence to support Camille Wilson's testimony against Mr. Vinson. (Trial Tr. Vol. 3, 17:4-6, 13-17, 20-21, May 14, 1986.) However, the newly

discovered forensic evidence conclusively shows that Mr. Vinson could not have committed this crime. (Exhibit C, 3 ¶ 1; *see* Exhibit D; Exhibit E, 2 ¶ 9; Exhibit F, 3 ¶ 9.) Trial and appellate counsel should have investigated whether the forensic evidence in fact implicated him as a suspect. Neither counsel arranged to have Mr. Vinson's secretor status determined by their own scientific experts, which would have shown that the result found by Ms. Lytle was incorrect and that the prosecution's interpretation of the evidence was false. Additionally, the rape kit, which was not collected from the hospital to be tested by the police, would have given counsel an additional opportunity to test the evidence against Mr. Vinson, but neither counsel made any attempt to obtain the sample or to have any independent testing performed.

Nor did either counsel seek the advice of their own scientific experts to determine if the prosecutor's representations of the forensic evidence were correct. Trial and appellate counsel's representation was constitutionally ineffective for all of the above reasons and requires relief from judgment. MCR 6.500; *Evitts, supra* at 395-97; *Strickland, supra* at 687-88, 694; *see also Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007) (failure to investigate the conclusions of an expert witness was constitutionally ineffective assistance of counsel resulting in a grant of federal habeas petition); *People v. Caballero*, 459 N.W.2d 80 (Mich. App. 1990) (failure to investigate witnesses is ineffective if it results in counsel's ignorance of valuable evidence which would have substantially assisted the accused); *People v. Grant*, 470 Mich. 477, 487-88, 493 (2004) (ineffective assistance for failure to investigate is found where there is only the victim's statement and questionably corroborative medical testimony and defense counsel fails to investigate the medical testimony); *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) (holding that even where defense counsel elicited a concession from the state's expert that whether a particular blood type was on a knife was entirely speculative, defense counsel was defective for

having failed to take measures "to understand the laboratory tests performed and the inferences that one could logically draw from the results").

Though *Strickland* dictates that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," it also requires counsel to "make reasonable investigations." *Strickland, supra* at 690-91. Importantly, this standard governs both what appellate counsel failed to do and what he should have advocated in an argument of trial counsel's ineffectiveness due to lack of proper investigation. A strategic choice cannot be made where, as here, a "thorough investigation" was not undertaken. Therefore, trial and appellate counsel's representation was constitutionally ineffective and requires relief from judgment. MCR 6.500; *Evitts, supra* at 395-97; *Strickland, supra* at 687-688, 694.

IV. KARL VINSON IS ENTITLED TO RELIEF FROM JUDGMENT DUE TO INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR INEFFECTIVE CROSS EXAMINATION OF EXPERT TESTIMONY

Mr. Vinson's trial counsel was constitutionally ineffective for failure to effectively rebut the forensic evidence used against Mr. Vinson. Appellate counsel was constitutionally ineffective for failure to litigate the ineffectiveness of trial counsel. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice is required because the petitioner has been denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *United States v. Cronic*, 466 U.S. 648, 659 (1984). This ground for relief has not been raised before and could not have been raised before because Mr. Vinson was ineffectively assisted by appellate counsel.

Trial and appellate counsel should have investigated whether the prosecution's claims about the forensic evidence were factual and should have corrected the improper conclusions given to the jury. Ms. Lytle testified that 20 percent of the people on Earth are non-secretors, (Trial Tr. Vol. 2, 85:12-13), but did not link the population of non-secretors to the population of potential suspects. The defense failed to follow-up on this point with Ms. Lytle that in fact type O secretors could have produced the stain. (Trial Tr. Vol. 2, 85:14-17.) In closing arguments the prosecution turned Ms. Lytle's statistic into a conclusion, arguing that the forensic results "keep [Mr. Vinson] in there along with 20 percent of the population." (Trial Tr. Vol. 3, 17:14-17.) The prosecution again returned to the forensic evidence later in closing arguments to reiterate the point that "the blood tests keep [Mr. Vinson] in, they keep [Mr. Vinson] in." (Trial Tr. Vol. 3, 17:20-21.) However, the mixed blood and semen stain was determined to be blood type O. (Trial Tr. Vol. 2, 78:4-13.) Blood type O is the most common blood type and is shared by approximately 44 percent of the United States population. *See* Exhibit Y, Blood Types in the U.S., http://bloodcenter.stanford.edu/about_blood/blood_types.html (Last visited June 16, 2009). Therefore the analysis from Section II suggests that approximately 44 percent of the population could have been responsible for the stains test results of blood type O. If the analysis in Section II is ignored then both men who are non-secretors and men with blood type O could have been responsible for the stain's test result, a group of potential suspects that includes approximately 55 percent of the male population in the United States.

Instead of pointing out that the prosecution was using the wrong statistic to describe the percent of the population implicated by the forensic evidence, trial counsel in effect conceded that the finding that Mr. Vinson is a non-secretor was highly damaging when she argued that "[w]ell, another point is that Karl Vinson is a nonsecretor . . . it does not conclusively prove that

he is the one." (Trial Tr. Vol. 3, 29:6-12.) The prosecution followed up on this in rebuttal again reiterating that "the lab results do not say you are the person 100 percent because that's not the way it works. What it does say is that it realize (sic) that only 20 percent of the population are nonsecretors, one out of five. That's not a very large amount. And Camille Wilson tells us that the defendant is the man that raped her. It is no coincidence that he is a nonsecretor and out of those stains and from those tests that we are able to determine only her blood type and not determine his because he, being a nonsecretor." (Trial Tr. Vol. 3, 32: 6-15.) Trial counsel failed to rebut the prosecution's incorrect statistical claim, allowing the forensic evidence available at trial to be improperly used against him. Appellate counsel then failed to litigate this ineffective assistance by trial counsel.

In addition, Officer Robert Lloyd, another police forensic examiner, testified that fingerprints were not found at the scene. Officer Lloyd testified that a "non-secretor" is less likely to leave fingerprints because he perspires less. (Trial Tr. Vol. 2, 62:8-63:4,.) Officer Lloyd was not asked, and did not clarify, that by "non-secretor" he meant a person who exudes little or no oils on his or her skin and that such a non-secretor was not in any way related to the non-secretor test performed by Ms. Lytle. During closing arguments, the prosecution linked the "nonsecretor" term used by Officer Lloyd with the "nonsecretor" term used by Ms. Lytle, arguing that "it just so happens that the evidence technician told us that nonsecretors are less likely to leave fingerprints. Well, who happens to be a nonsecretor? [Mr. Vinson] does. There were (sic) some laboratory work done." (Trial Tr. Vol. 3, 14:24-15:3.) Trial and appellate counsel both failed to rebut the prosecution's incorrect link between separate forensic terminology, fingerprint non-secretor and blood type non-secretor.

Further, trial and appellate counsel both failed to investigate and cross examine the expert witnesses to determine if the prosecution's interpretation of the forensic evidence was correct. As recently discovered and described above in Section II, the original forensic evidence strongly suggests that the blood type O found in the stain resulted from blood type O semen, which could not have been contributed by Mr. Vinson. The prosecutor improperly linked the blood type O found from the stain to Camille Wilson, "out of those stains and from those tests that we are able to determine only her blood type and not determine his because he, being a nonsecretor," (Trial Tr. Vol. 3, 32:6-15), despite the fact that this statement contradicted the testimony of Ms. Lytle, who indicated that she could not determine the source of the blood type found on the sheet (Trial Tr. Vol. 2, 83:12-15). Trial and appellate counsel both failed to cross-examine the expert witnesses to determine the origin of the blood type O found in the sheet stain. This cross-examination would have demonstrated that Mr. Vinson's blood type was not consistent with the forensic evidence regardless of the original secretor/non-secretor test results because Mr. Vinson could not have produced the semen found at the scene.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). By failing to adequately cross examine the expert testimony of the prosecution defense "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" and thereby made "the adversary process [] presumptively unreliable" by denying Mr. Vinson the opportunity to confront the evidence against him. *Cronic, supra* at 659. Given the many misrepresentations of the forensic evidence by the prosecution, *see* Argument V, *infra*, the defense had adequate opportunity to rebut the prosecution's case but was constitutionally ineffective for failing to cross examine and thereby expose the true weakness of the prosecution's case. *See, e.g.*, *Martin v. Rose*, 744 F.2d

1245, 1250-51 (6th Cir. 1984) (holding that defense counsel's "total lack of participation deprived Martin of effective assistance of counsel at trial as thoroughly as if he had been absent," thereby violating Martin's Sixth Amendment rights "even without any showing of prejudice"). Trial and appellate counsel's representation was constitutionally ineffective for all of the above reasons and require relief from judgment. MCR 6.500; *Evitts*, *supra* at 395-97; *Strickland*, *supra* at 687-688, 694.

V. KARL VINSON IS ENTITLED TO RELIEF FROM JUDGMENT DUE TO PROSECUTORIAL MISCONDUCT FOR MISREPRESENTATION OF EXPERT TESTIMOMY.

The prosecutor's misconduct in misrepresenting the expert testimony used against Mr. Vinson also denied Mr. Vinson a fair and reliable trial. This ground for relief has not been raised before and could not have been raised before because Mr. Vinson was ineffectively assisted by both trial and appellate counsel.

The prosecution's claims about the forensic evidence were factually incorrect. These misrepresentations were outcome determinative for several independent reasons. First, the prosecutor misrepresented the original forensic evidence against Mr. Vinson which actually shows that Mr. Vinson could not have been involved in the crime. Second, the prosecutor relied heavily on misrepresentations of statistical testimony and conflation of independent forensic tests to support the testimony of the prosecution's single eye witness, the nine-year old victim who did not identify Mr. Vinson until given his name by her mother, (Trial Tr. Vol. 2, 36: 8-24; Trial Tr. Vol. 1, 237:25-238:17), testimony which was refuted by multiple defense witnesses who attested to Mr. Vinson's being elsewhere at the time of the crime. (Trial Tr. Vol. 2, 93:1-3 109:11-15.)

The prosecutor misrepresented the forensic evidence with misleading statistical testimony. Ms. Lytle testified that 20 percent of the population are non-secretors, (Trial Tr. Vol. 2, 85: 12-13), but did not link the population of non-secretors to the population of potential suspects. The prosecutor improperly turned Ms. Lytle's statistic into a conclusion during closing arguments, arguing that although the forensic technicians were "not able to determine a blood type that matched [Mr. Vinson's], . . . with a nonsecretor you do not expect to determine their blood type from something like seminal fluid, which is what they had." (Trial Tr. Vol. 3, 17:2-6, May 14, 1986.) The prosecutor continued by suggesting that the forensic results "keep [Mr. Vinson as a suspect] along with 20 percent of the population." (Trial Tr. Vol. 3, 17:14-17.) Later the prosecution returned to the forensic evidence to reiterate that "the blood tests keep [Mr. Vinson] in, they keep [Mr. Vinson] in." (Trial Tr. Vol. 3, 17:20-21.)

The prosecution followed up on this in rebuttal, again reiterating that "the lab results do not say you are the person 100 percent because that's not the way it works. What it does say is that it realize (sic) that only 20 percent of the population are nonsecretors, one out of five. That's not a very large amount . . . It is no coincidence that he is a nonsecretor and out of those stains and from those tests that we are able to determine only her blood type and not determine his because he, being a nonsecretor." (Trial Tr. Vol. 3, 32:6-15.) The prosecution, through this incorrect statistical claim, improperly used the forensic evidence as additional evidence of guilt instead of as excluding Mr. Vinson, indisputably compromising the fairness of his trial. The prosecutor's interpretation of Ms. Lytle's statistic was not established by testimony at trial and is false. The mixed blood and semen stain was determined to be blood type O. (Trial Tr. Vol. 2, 78:4-13.) Blood type O is the most common blood type and is shared by approximately 44 percent of the United States population. *See* Exhibit Y. Even if the other misrepresentations with the expert

testimony are ignored and the prosecutor's argument is taken on its face, both men who are non-secretors and men with blood type O could have been responsible for the stain's test result of blood type O. This combined group of potential semen donors includes approximately 55 percent of the male population in the United States, not the 20 percent claimed by the prosecutor. (Trial Tr. Vol. 3, 17:14-17.)

The prosecution continued misrepresenting expert testimony when it conflated the testimony by Ms. Lytle with the testimony by Officer Robert Lloyd, another police forensic examiner, regarding the lack of fingerprints at the scene. Officer Lloyd testified that a "non-secretor" is less likely to leave fingerprints because he perspires less. (Trial Tr. Vol. 2, 62: 863:4.) The prosecutor never clarified the record by asking Officer Lloyd to indicate that by "non-secretor" he meant a person who exudes little or no oils on his or her skin, a "non-secretor" term unrelated to the non-secretor test performed by Ms. Lytle. Instead, during closing arguments the prosecution linked the "nonsecretor" term used by Officer Lloyd with the "nonsecretor" term used by Ms. Lytle, arguing that "it just so happens that the evidence technician told us that nonsecretors are less likely to leave fingerprints. Well, who happens to be a nonsecretor? [Mr. Vinson] does. There were (sic) some laboratory work done." (Trial Tr. Vol. 3, 14:24-15:3.) However, no laboratory tests were ever performed or testified to showing that Mr. Vinson exudes little or no oils on his skin. There is no other coherent interpretation of the prosecution's argument other than the improper conflation of the non-secretor terms used by Ms. Lytle and Officer Lloyd. The prosecutor used this link to further support the misuse of statistics to indicate that Mr. Vinson was one of a small group who could have committed the crime based on the forensic evidence.

Going beyond the other misrepresentations, the prosecutor also claimed that the blood type O detected in the stain was from Camille Wilson, (Trial Tr. Vol. 3, 32:6-15), outright contradicting the testimony of its own expert, Ms. Lytle, who indicated that she could not determine the source of the blood type found on the sheet. (Trial Tr. Vol. 2, 83:12-15.) As discussed above in Section II, tests for blood type on the stain strongly suggest that the blood type O found in the stain resulted from blood type O semen, which could not have been contributed by Mr. Vinson. Instead of properly representing the source of the blood type O found in the forensic evidence, the prosecutor misinterpreted the forensic evidence for the jury and intentionally used the blood type evidence as additional evidence of guilt against Mr. Vinson, indisputably compromising the fairness of Mr. Vinson's trial.

The prosecutor emphasized all of these misrepresentations by devoting a significant portion of closing and rebuttal arguments to falsely repeating that the forensic evidence supported the case against Mr. Vinson. The jury was focused on the expert testimony that was misrepresented by the prosecutor, even asking for the expert testimony to be read back during deliberations. (Trial Tr. Vol. 3, 62:24-63:25.)

The "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial." *Smith v. Phillips,* 455 U.S. 209, 219 (1982); *see also People v. Bahoda*, 448 Mich. 261, 265-67 (1995). An error is outcome determinative if it undermines the reliability of the verdict. *People v. Whittaker*, 465 Mich. 422, 427 (2001). The prosecutor's misrepresentations of forensic evidence violated Mr. Vinson's constitutional right to due process because the misrepresentations plainly compromised the fairness of Mr. Vinson's trial and fatally undermined the reliability of the jury's verdict, thereby requiring relief from judgment of conviction.

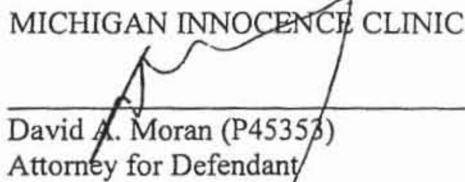
The prosecution has a constitutional duty, "derived from the prosecution's duty to represent the public interest, and to place the pursuit of truth and justice above the pursuit of conviction," *People v. Cassell*, 63 Mich. App. 226, 229 (1975), to not only report false testimony of its witnesses, but also to correct false evidence, *People v. Lester*, 232 Mich. App. 262, 276-77 (1998). A new trial is required where there is a reasonable likelihood that the false testimony could have affected the verdict. *People v. Herndon*, 246 Mich. App. 371, 417-18 (2001). The jury took the prosecution's misrepresentations about the forensic evidence seriously; it requested that the expert testimony be read back during deliberations. (Trial Tr. Vol. III, 62-63 ll. 24-25, 1-25, May 14, 1986.) This misconduct requires relief from judgment.

Wherefore, this Court should relieve Karl Vinson from his judgment of conviction, or hold a hearing to evaluate the issues raised in this motion.

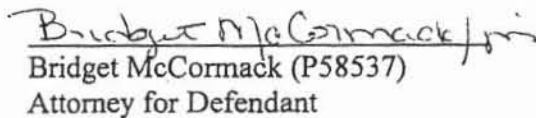
Dated: September 14, 2009

Respectfully Submitted,

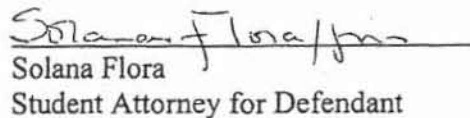
MICHIGAN INNOCENCE CLINIC



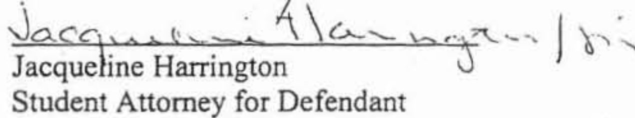
David A. Moran (P45353)
Attorney for Defendant



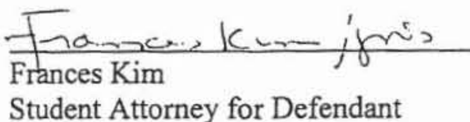
Bridget McCormack (P58537)
Attorney for Defendant



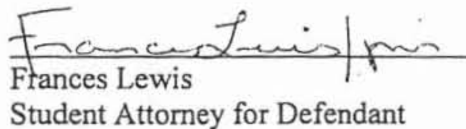
Solana Flora
Student Attorney for Defendant



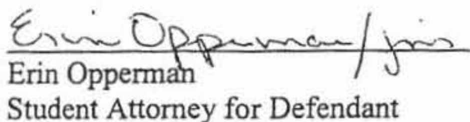
Jacqueline Harrington
Student Attorney for Defendant



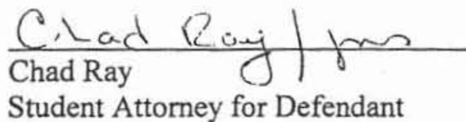
Frances Kim
Student Attorney for Defendant



Frances Lewis
Student Attorney for Defendant



Erin Opperman
Student Attorney for Defendant



Chad Ray
Student Attorney for Defendant

EXHIBIT C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs No. 82-05965

WALTER SWIFT,

Defendant.

JOINT MOTION FOR RELIEF FROM JUDGMENT

KYM WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

JEFFREY CAMINSKY (P27258)
Principal Attorney, Appeals
1204 Frank Murphy Hall of Justice
Detroit, Michigan 48226
(313) 224-5846

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs No. 82-05965

WALTER SWIFT,

Defendant.

JOINT MOTION FOR RELIEF FROM JUDGMENT

NOW COME, the People of the State of Michigan, by and through ***KYM L. WORTHY***, *Prosecuting Attorney*, ***TIMOTHY A. BAUGHMAN***, *Chief of Research, Training, & Appeals*, and ***JEFFREY CAMINSKY***, *Principal Attorney, Appeals*, and Defendant, by and through ***BARRY C. SCHECK*** and ***OLGA AKSELROD***, of *The Innocence Project*, and ***RICHARD LUSTIG***, and under MCR 6.500 *et seq* hereby seek relief from the judgment of conviction entered in this matter for the following reasons:

1. On November 10, 1982, a jury of this Court convicted Defendant of armed robbery, breaking and entering, and two counts of first-degree criminal sexual conduct; on November 19, 1982, the trial judge, Hon. Leonard Townsend, sentenced Defendant to 20-to-40 years imprisonment for the criminal sexual conduct convictions, and 10-to-15 years imprisonment for the armed robbery. Judge Townsend dismissed the charge of Breaking and Entering with intent to commit CSC I on double jeopardy grounds. The Defendant is currently imprisoned at the Parnall Correctional Facility, with a maximum discharge date of July 20, 2011 for his criminal sexual conduct convictions.

2. On March 16, 1984 the Michigan Court of Appeals affirmed Defendant's conviction (COA #69039), and on April 6, 1984, the Michigan Supreme Court denied Defendant leave to appeal. (MSC #73947).

3. Defendant's attorney at trial was Lawrence Greene; Defendant was represented on appeal by Alvin C. Sallen.

4. Defendant had raised five issues on appeal, including challenges to the jury instructions on alibi, the admission of uncharged misconduct evidence, the admission of testimony to rebut the alibi defense, a claim that the identification procedures used were unduly suggestive, and a double jeopardy challenge to the second conviction for criminal sexual conduct.

5. As shown below, the instant Motion for Relief from Judgment alleges cause and prejudice establishing the following grounds for relief:

(a) At trial, the Victim, Suzanne Sizemore, positively identified Defendant as the perpetrator. Testimony at trial also established that the Victim selected Defendant's photo out of approximately 750 mug shot photos shown to her by police a week after the crime and subsequently identified him in a live lineup. The investigating officer admitted at trial that she informed the Victim that the person whose photo she selected from the stacks of mug shot photos would be in the live lineup. The Victim had described the perpetrator to police immediately after the crime as 15-to-18 years of age, approximately 5'10", with a thin to medium build, no facial hair, and with an unusual hair style of very small braids and "poofs of hair." At the time of his arrest and lineup, the Defendant was 21 years old, 5'9", 135 lbs, with a mature moustache and long sideburns, and shortly cropped hair. In the course of articulating why her testimony was believable, the prosecutor's closing argument noted that the Victim, Suzanne Sizemore, had picked Defendant out of hundreds of mug shots she had seen, and that she had made no other identifications. The Defendant presented a defense of mistaken identity and presented an alibi.

(b) In point of fact, unknown to the prosecutor, and undisclosed to the defense until its own investigation long after his conviction uncovered the evidence, the Victim had made preliminary identifications of seven other potential suspects during her viewing of the mug shot photos. The original investigating officer decided that the next person selected by the Victim would be brought in for an in-person lineup. Defendant was the next and eighth suspect selected. The Victim did not make a

definitive identification of the Defendant and did not place any additional emphasis on Defendant's photo versus the other seven she had selected. This evidence was potentially exculpatory evidence which, if known to the prosecution, the trial prosecutor would have been duty-bound to disclose to the defense. See, eg, *Brady v Maryland*, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963).

(c) The original investigating officer's misgivings about the ensuing identification led her to release the Defendant and schedule a polygraph examination; subsequently, this examination was cancelled, Defendant was rearrested, and the officer was removed from further responsibility for the case.

(d) Neither the investigating officer's misgivings, nor the cancellation of the polygraph, were disclosed to the trial prosecutor or to the defense.

(e) One additional witness testified that Defendant was seen in the area at the time of the crime, having made the identification at a lineup; no other witnesses were able to identify Defendant.

(f) As there was no physical evidence connecting Defendant to the crime, the prosecution's case depended entirely on the identification testimony of the victim and the additional witness.

(g) Given the lack of corroborating evidence it appears that the Defendant would have had a reasonably likely chance of acquittal had the evidence of previous identifications, and the random nature of the corporeal lineup producing the eyewitness identifications, been disclosed to the defense before trial.

(h) Accordingly, it appears that Defendant had "good cause" for failing to raise the point previously, and has suffered "actual prejudice" within the meaning of MCR 6.508(D)(3).

6. Accordingly, both parties believe that it would be in the interests of justice for this Court to grant Defendant relief from judgment.

RELIEF

WHEREFORE, this Court should grant Defendant relief from judgment.

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, & Appeals

***JEFFREY CAMINSKY** (P27258)*
Principal Attorney, Appeals
1116 Frank Murphy Hall of Justice
Detroit, Michigan 48226
Phone: 313-224-5846

RICHARD M. LUSTIG (P16868)
Attorney for Defendant
240 Daines Street
Birmingham, Michigan 48009
Phone: (248) 258-1600

BARRY C. SCHECK
OLGA AKSELROD
INNOCENCE PROJECT
Attorneys for Defendant
100 Fifth Avenue, 3rd Floor
New York, NY 10011

Dated: May 14, 2008

EXHIBIT D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs No. 82-05965

WALTER SWIFT,

Defendant.

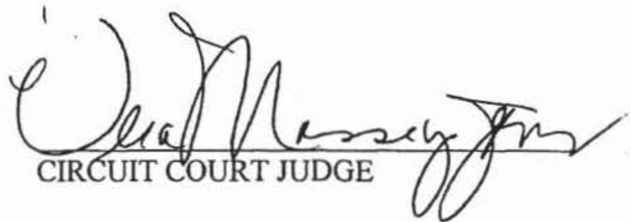
ORDER GRANTING RELIEF FROM JUDGMENT

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan on 5-21-08.

PRESENT: Hon. **HON. VERA MASSEY JONES**.

This cause having come to be heard by way of joint motion for relief from judgment; and it appearing to the Court that the Defendant has shown cause and prejudice, thereby establishing his entitlement to relief under MCR 6.508; and being fully advised in the premises:

IT IS THEREFORE ORDERED that the motion for relief from judgment be, and the same is hereby GRANTED, and that Defendant's convictions in this matter be set aside, and a new trial granted, for the reasons stated on the record.



CIRCUIT COURT JUDGE

Approved as to form:

EXHIBIT E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

Case No. 85-0376
Hon. Leonard Townsend

EDDIE JOE LLOYD,

Defendant.

JOINT MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO MCR 6.502 AND M.C.L. 770.16

The People of the State of Michigan and the Detroit Police Department (Chief Jerry Oliver) through Wayne County Prosecutor Michael E. Duggan, and defendant Eddie Joe Lloyd through his attorney Barry Scheck, hereby move pursuant to MCR 6.502 and M.C.L. 770.16 that defendant's judgment of conviction and sentence be vacated, and that this cause be dismissed without prejudice.

1. Defendant was tried by jury before this Honorable Court in case number 85-0376. Defendant was convicted of first-degree felony murder, and was sentenced on May 21, 1985 by this Court to mandatory life. He is currently confined at the Southern Michigan Correctional Facility in Jackson, Michigan.

2. Defendant appealed his conviction and sentence as of right to the Michigan Court of Appeals, file number 86045. The Court of Appeals affirmed

defendant's conviction and sentence on July 16, 1987. Defendant also requested review by the Michigan Supreme Court pursuant to a letter request for review under MCR 7.303 and a Delayed Application for Leave to Appeal, file number 81349. On January 29, 1988, defendant's letter was denied as moot, and his application for leave to appeal was denied because the Court was "not persuaded that the questions presented should be reviewed by the Court." Defendant's motion for reconsideration was also denied by the Court on March 28, 1988. Defendant then petitioned the U.S. District Court for the Eastern District of Michigan for a writ of habeas corpus, case number 88CV-73351-DT. Judge Julian A. Cook, Jr. dismissed defendant's petition on January 31, 1989.

3. Defendant has been represented by four attorneys: (A) from preliminary examination up to trial—Charles D. Lusby, 1575 E. Lafayette, Suite 205, Detroit, Michigan; (B) trial—Stanford M. Rubach (deceased), 49125 N. Territorial, Plymouth, Michigan; (C) direct appeal—Robert E. Slameka, 163 Madison, Suite 101, Detroit, Michigan; and (D) proceedings under M.C.L. 770.16 and motion for relief from judgment—Barry Scheck. Attorney Lusby suffered medical difficulties on the original trial date of April 22, 1985, and Attorney Rubach was appointed substitute counsel on April 24. Defendant's trial began on April 30 and concluded May 2.

4. The ground for relief contained in this pleading has not been raised before in any venue. Additionally, defendant does not request the appointment of counsel because he is currently represented.

5. The parties request that defendant's conviction and sentence be set aside, and that the charges against defendant be dismissed without prejudice.

6. The ground for this request is that newly discovered evidence raises a reasonable doubt whether defendant is guilty of the crime for which he was convicted and sentenced.

7. The facts supporting this ground for relief are as follows: On June 20, 2002, the People received from defendant's attorney a DNA-testing report from Forensic Science Associates excluding defendant as the source of spermatozoa on three pieces of physical evidence recovered from the scene of victim Michelle Jackson's rape and murder. These DNA results have since been independently confirmed by the Detroit Police Department and the Michigan State Police. This DNA analysis was technologically unavailable in 1985, and in light of the evidence at that time the People's theory at trial was that defendant was the sole perpetrator of this crime. His exclusion as the source of sperm on the victim's thermal underwear, on a green bottle recovered from her rectum, and on paper attached to the green bottle, conclusively refute the People's trial theory.

8. Only the perpetrator of the crime against Ms. Jackson could be the source of the biological evidence found on the thermal underwear, the bottle, and the paper.

9. The presence of another person's sperm on the underwear, bottle, and paper (and, as more recently discovered, in the victim's rectum)—coupled with the lack of proof of defendant's DNA on any other piece of crime-scene evidence—raises a reasonable doubt regarding defendant's guilt in this crime.

10. The parties agree that the underwear, bottle, paper, and anal slide were collected, handled, and preserved by procedures that prevented them from being contaminated or unduly degraded.

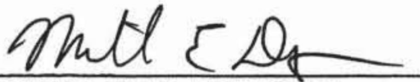
11. The parties also agree that this new evidence, balanced against the evidence introduced at trial, justifies the vacation of defendant's conviction and sentence and the dismissal of charges against him.

12. Finally, the parties agree that—due to the technological unavailability of this new evidence until the present day—good cause exists to excuse defendant from not raising this issue in his prior appeals and post-conviction proceedings.

RELIEF

WHEREFORE, the People, the Detroit Police Department, and defendant request that this Honorable Court vacate defendant's conviction and sentence, and dismiss this cause against him without prejudice.

Respectfully submitted,



MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne
1441 St. Antoine, 12th Floor
Detroit, MI 48226
(313) 224-5789

BARRY C. SCHECK
VANESSA POTKIN
Attorneys for Defendant
Innocence Project
Cardozo Law School
55 5th Avenue, 11th Floor
New York, NY 10003
(212) 790-0397

SAUL A. GREEN
Attorney for Defendant
Miller, Canfield, Paddock and Stone
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
(313) 963-6420

Dated: August 16 2002

EXHIBIT F

STATE OF MICHIGAN
THIRD CIRCUIT COURT
COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

vs.

Honorable Leonard Townsend
Case Number 85-0376

EDDIE JOE LLOYD,

Defendant.

______________________________/

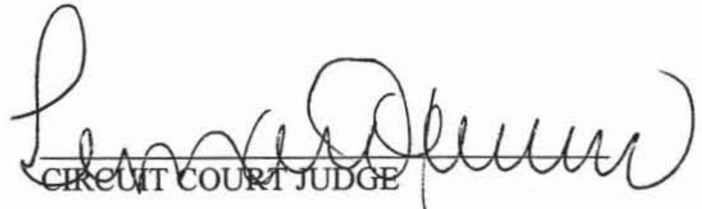
ORDER GRANTING MOTION FOR RELIEF FROM JUDGMENT

At a session of Court held in the City of Detroit, County of Wayne, State of Michigan on AUG 26 2002.

PRESENT: Hon. HON. LEONARD TOWNSEND.

After reviewing the parties' written pleading and after considering oral argument on the People's and Defendant's motion for relief from judgment pursuant to MCR 6.502 and M.C.L. 770.16, it is ordered that defendant's judgment of conviction and sentence be vacated, and that this cause be dismissed without prejudice.

THEREFORE, IT IS ORDERED that the People's and Defendant's motion for relief from judgment is hereby GRANTED.



CIRCUIT COURT JUDGE