QUESTIONS PRESENTED

This case deals with the majority ruling of the Sixth Circuit Court of Appeals that appellate counsel for Respondent, who had been convicted in a Michigan state court, committed ineffective assistance of counsel by failing to raise certain important issues on appeal, and the action of the Court of Appeals in granting the limited remedy of requiring the state to allow a new appeal with the omitted issues included.

The question as stated by Petitioner is:

QUESTION 1: WHETHER THE COURT OF APPEALS FAILED TO APPLY EITHER LAYER OF THE DOUBLE DEFERENCE DUE ON FEDERAL HABEAS REVIEW WHEN A STATE COURT'S *STRICKLAND* ANALYSIS IS REVIEWED THROUGH AEDPA'S LENS.

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TIMOTHY ETHERTON, Respondent, by and through his attorney, James S. Lawrence, moves this Court to deny a Writ of Certiorari to review the ruling of the Sixth Circuit Court of Appeals panel granting a Petition for Habeas Corpus with the remedy of a new state court appeal.

OPINIONS BELOW

Petitioner has properly cited the opinions below.

STATEMENT OF JURISDICTION.

Respondent concedes jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has properly cited U.S. Const., Amend. VI, and 28 U.S.C. § 2254.

INTRODUCTION

This case involves the question of whether it is possible for an appellate counsel to file a brief and still commit ineffective assistance of appellate counsel, as the Sixth Circuit ruled, or whether, as the state argues, the "double deference" standard means that any errors or oversights by appellate counsel are barred from Habeas Corpus review.

The issue on which habeas relief was granted was NOT found by the Sixth Circuit Court of Appeals to have been procedurally defaulted. Rather, the Sixth Circuit found that the first 3 issues, out of the 4 issues raised, were procedurally defaulted because not raised in the appeal of right. It is inherent in the issue of ineffective assistance of appellate counsel that the appeal attorney does not criticize herself for any failures in performance. It is therefore impossible for the appeal attorney to procedurally default a claim of ineffective assistance of appellate counsel against herself. See the following language from the Court of Appeals ruling, page 11:

> "we find that the state courts enforced their procedural default rule as to Etherton's first three claims.
> …
> Because the Michigan courts ruled on the merits of Etherton's ineffective assistance of appellate counsel claim (see R. 5-12 at PageID 988), Etherton is only entitled to relief if he can demonstrate that the ruling was either: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). At issue in this case is whether the Michigan

> court's ruling was "an unreasonable application" of clearly established Federal law. "

It was Mr. Etherton's position throughout the state and federal court proceedings that to have officers testify to an anonymous tip that involved Respondent in the crime was a clear violation of the right of confrontation. It was the subject of belated objection at trial. Given the extreme importance of the hearsay testimony that gave Respondent a role in the crime, given Etherton's defense that main prosecution witness Pollie put the drugs in the car without Respondent's knowledge, and given the clear objections on the record by trial defense counsel, it was unreasonable for the state courts to reject the issue of ineffective assistance of appellate counsel. The Sixth Circuit panel agreed. The state did not bother to request rehearing, perhaps feeling that they would not get it, so they went directly to the United States Supreme Court, hoping that they would find a sympathetic ear for their assertions that procedural technicalities should be used to prevent a convicted person from having review of his legal claims, even when the claims involve a clear, direct and prejudicial violation of the confrontation clause.

The disagreement of one judge of the Sixth Circuit as to whether the state court action denying

this issue was "reasonable" does not mean that the legal standards announced by the United States Supreme Court were not followed, as the State claims. In fact, the Sixth Circuit did follow the standards announced by this Court. Respondent wishes this Court to create a new rule to make it impossible for any federal court to find ineffective assistance of appellate counsel. We submit this Court should reject that wish, and instead follow the rules this Court has already announced. Because the Sixth Circuit already did so, there is no reason to grant certiorari.

STATEMENT OF THE CASE

Statement of Proceedings

Respondent accepts Petitioner's factual account of the historical proceedings in this case.

Statement of Facts

Respondent Timothy Etherton was jury-tried in the Ionia County Circuit Court in 2007 before the Hon. David Hoort, and was convicted of possession with intent to deliver cocaine 50-449 grams, receiving a sentence of 20-40 years in prison. The

cocaine was in a car in which he rode with Ryan Pollie. Each of them blamed the other for the cocaine. Pollie appeared as a prosecution witness, reducing his sentence to only 9 months by blaming Respondent for the cocaine (T 150).

Trooper Trevin Antcliff testified that he was informed of an anonymous tip that a white Audi with two white males would be traveling from Detroit to Grand Rapids carrying cocaine. They stopped Petitioner's car. Although the trained drug-detecting dog did not find any drugs, Off. Mercer found cocaine in the car. He had been advised of an anonymous tip that a white Audi with two white males would be returning to Grand Rapids with cocaine. (Docket #5, T 77, 82; ID 316, 321).

Det. Adam Mercer testified that police received a tip about a white Audi traveling from Detroit to Grand Rapids with cocaine. (T 105-106; ID 344-345). The enforcement team stopped "dozens and dozens" of vehicles that day, including a different Audi. After Petitioner's car was stopped, he found a baggie containing cocaine in a map compartment in the driver's door, under an empty bag of potato chips. The amount involved was 124.3 grams. Petitioner's fingerprints were not found on the baggie. (T 107-109, 113, 121, 128-129; ID 346-348, 352, 360, 367-368).

Keith Szyniszewski of the State Police crime lab testified to his lab analysis showing there was 125.2

grams of a substance containing cocaine. (T 132-137; ID 371-376).

Det. Sgt. Charlie Noll testified that Petitioner said he traveled to the Detroit area to see relatives, and rode with Ryan Pollie. Petitioner told him he knew nothing about the drugs in the vehicle. (T 141-142; ID 380-381).

Ryan Pollie testified that he had a deal to plead to possession of cocaine under 25 grams with a sentence of 9 months. He testified Petitioner dropped him off in the Detroit area, then returned after 30 to 45 minutes. He testified that Petitioner showed him the cocaine, and that he (Ryan) held the baggie but gave it back. (T 149-152; ID 388-391).

Sgt. Joel Abendroth testified about the tip, which was made in an anonymous call to some other invididual, identifying two white males in a white Audi and their route of travel on I-96. (T 188; ID 427). An objection was made, but never ruled upon. (T 188; ID 427). He testified that the amount was more than for personal use. He testified that plastic baggies are comprised of a porous material that does not hold fingerprints well, and that out of approximately 1600 investigations prints were found in fewer than 5. (T 188-190, 196-197; ID 427-429, 435-436).

Respondent objects to the Petitioner's practice of declaring that something is a "fact" instead of declaring that a named witness testified to it. (See

Pt. 5). In this way, anything said in the bought-and-paid-for testimony of Ryan Pollie is declared to be a "fact," rather than testimony. By declaring the testimony of Pollie to be factual, petitioner suggests that no error boosting Pollie's credibility could have any bearing on the case.

This action is similar to the action of the trial prosecutor in repeatedly vouching to the jury for the credibility of witness Pollie, and explaining why he gave the deal to Pollie instead of Etherton. (T 216-218). These statements by the prosecutor were not found in the testimony of any witness, but were new testimony given by the prosecutor not subject to cross-examination, clear confrontation violations. But for the lack of objection by trial counsel, and the omission of the issue by appellate counsel, there would have already been a reversal on that ground.

PETITIONER'S CLAIMED REASONS FOR GRANTING THE WRIT

1. CLAIM THAT THE SIXTH CIRCUIT RULING FAILED TO APPLY THE AEDPA STANDARDS.

The dissent of Judge Kethledge states that the majority "nowhere explains why their application of *Strickland* was unreasonable rather than merely (in the majority's view) incorrect." (Opinion, 24). We submit this mischaracterized the majority ruling.

The majority stated the requirement that the state court ruling must be unreasonable, either in its application of federal law, or its determination of facts. They then stated that "At issue in this case is whether the Michigan court's ruling was "an unreasonable application" of clearly established Federal law." (Opinion, 11).

The Sixth Circuit went on to say "Accordingly, we consider whether the Michigan court "unreasonably applied that principle to the facts of the case before it." " (Opinion 13). They go on to apply the reasonableness standard again and again, in some cases rejecting Etherton's claim that the state acted unreasonably. (Opinion, 20-21). There is page after page of explanation of why they found the specified state court rulings unreasonable, and once

found unreasonable, that excuses the failure to abide by the state court ruling.

2. CLAIM THAT THE MAJORITY DID NOT GIVE ANY DEFERENCE TO THE MICHIGAN COURT'S RULING.

Petitioner's position is that if the federal court finds a state court ruling to be unreasonable, that is a failure to apply deference to the state court ruling. Under that new standard, Habeas Corpus can never be granted, because to overturn a state court ruling is to fail to defer to that ruling.

We submit that deference does not mean total submission to whatever the state courts have ruled. It means that the Habeas Corpus court should defer to state court rulings unless they are unreasonable. The majority found those rulings were unreasonable. Therefore, the majority applied the appropriate legal standard.

3. CLAIM THAT ANONYMOUS TIPS TO POLICE ARE NOT TESTIMONIAL AND THEREFORE ARE NOT BARRED FROM BEING INTRODUCED AT TRIAL.

Clear precedent based on the U.S. Constitution, announced by the United States Supreme Court, holds that allowing "testimonial" hearsay statements in trial against a criminal defendant violates the

confrontation clause.

U.S. Const., Amend. VI provides:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him"

The right of a defendant to cross-examine the witnesses against him is recognized under the U.S. Constitution as being the most fundamental of rights. *Crawford v. Washington,* 541 U.S. 36; 124 S.Ct. 1354 (2004); *Davis v. Alaska*, 415 U.S. 308; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974); *Lee v. Illinois*, 476 U.S. 530; 106 S.Ct. 2056; 90 L.Ed.2d 514 (1986). In *Crawford*, supra, the United States Supreme Court strongly upheld a criminal Defendant's right to be confronted with the witnesses against him:

> "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

The "reliability" of the anonymous tip, blaming both men in the Audi for the cocaine, was not tested in the crucible of cross-examination.

The Court in *Crawford* employed a strict

approach:

> "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the Petitioner has had a prior opportunity to cross-examine."

Here, there was no prior opportunity to cross-examine the anonymous tipster. As the Court held in *Crawford*, referring to the prosecution of Sir Walter Raleigh, where abuses of allowing hearsay led to the adoption in this country of the confrontation clause:

> "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court."

Indeed, Respondent had the opportunity to cross-examine Off. Antcliff and Off. Abendroth when they announced to the jury what the anonymous informant said. That is the same situation as in *Crawford*, in *Lilly v. Virginia*, 527 U.S. 116 (1999) and in the *Walter Raleigh* case, and is neither just nor constitutional.

Because the statements in question were made

to investigating police officers, they form the core of what qualifies as testimonial statements covered by the confrontation clause. As the Court held in *Crawford v. Washington*:

> "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."

In rejecting the prior rule of *Ohio v. Roberts*, 448 U.S. 56 (1980), the *Crawford* court said, regarding the rule in that case:

> "This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.
> …
> Dispensing with confrontation because testimony is obviously reliable is akin to

> dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

Crawford directly holds that "we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine--thus eliminating the excessive narrowness referred to above."

This rule of *Crawford* was explained in cases such as *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004). Although *Cromer* was a federal prosecution, the rulings were made on federal constitutional grounds that apply equally to state court prosecutions. In *Cromer* the officer was permitted to give testimony that she received information that caused them to look at a particular home on Buchanan Street, the nickname of the person allegedly dealing drugs from that location, and his description, all of which arguably pointed to the defendant. The Sixth Circuit found this testimony to violate the constitutional right of confrontation, and reversed even though there was no objection.

They expressly held that the statements to police are testimonial in nature: "A statement made knowingly to the authorities that describes criminal activity is almost always testimonial." They also described the actual test to be used, that is, whether

the statements made to police were "made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime."

Another ruling on point is *United States v. Powers*, 500 F.3d 500 (6th Cir. 2007), where the Court held that "The allowance of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause."

In *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010), the statement made in a suicide note was held to be testimonial because "a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." In this case, it is hard to imagine any other purpose for calling the police about a white Audi carrying cocaine up I-96 towards Grand Rapids, other than to cause officials to take action against the people in that car.

See also *United States v. Silva*, 380 F.3d 1018 (6th Cir 2004), holding that allowing such testimony would eviscerate the right to cross-examine one's accusers:

> "Under the prosecution's theory, every time a person says to the police "X committed the crime," the statement (including all corroborating details) would

> be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers. See *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)."

In order to rule the prosecutor's way, this Court would have to impose new and significant limitations on the ruling of *Crawford v. Washington*, and outright reverse *United States v. Cromer*, *United States v. Powers*, *Miller v. Stovall* (a 2254 Habeas Corpus case), *United States v. Silva*, and a host of other cases. As the Court held in *United States v. Cromer*, citing directly to *Crawford*:

> "In light of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), decided after the briefing in this case was complete, the Court holds that statements of a confidential informant are testimonial in nature and therefore may not be offered by the government to establish the guilt of an accused absent an opportunity for the accused to cross-examine the informant. The government in this case did offer certain statements made by a CI for the purpose of establishing the truth of the matter asserted. The admission of these statements amounted to plain error, so Cromer's conviction must be reversed."

The Court in *Cromer* went on to say: "we are forced to conclude that the purpose of this testimony was to establish the truth of the matter asserted: to prove that Cromer was, indeed, involved in the illegal activity, as stated by the CI. Because there was a testimonial, out-of-court statement, offered to establish the truth of the matter asserted, and Cromer was provided no opportunity to cross-examine the CI, Cromer's Sixth Amendment confrontation right was violated by the introduction of this second set of testimony." It is hard to see how this case can be distinguished from that.

Petitioner cites *Davis v. Washington*, 547 U.S. 813 (2006) as overturning or limiting the rule of *Crawford* which Respondent and the Sixth Circuit relied on. However, the exception made by this Court in *Davis* does not apply here: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." There was no emergency here as there was in *Davis*, where there was an ongoing assault. The *Davis* court distinguished *Crawford* as follows:

> "any reasonable listener would recognize that McCottry (unlike Sylvia

> Crawford) was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against a bona fide physical threat."

Here, there was no ongoing physical threat to distinguish the case from the rule of *Crawford*.

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of a defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-473; 85 S.Ct. 546; 13 L.Ed.2d 424 (1965).

The state court ruing was unreasonable because it does not comply with federal court decisions, or even conform to state law decisions. Statements by the unproduced informant, made out of court and not subject to cross-examination, were used to lend evidentiary support to the central points that were under consideration by the jury, that both people were involved with the cocaine, and that this was a planned action.

Moreover, there was no legitimate purpose for the testimony, given that Michigan law holds that the statement of the anonymous person was

inadmissible for the purported purpose of showing why the officer acted as he did. In *People v. Wilkins*, 408 Mich. 69 (1980), the Court held that the reasons why police take certain action are not "a fact of any consequence to the determination of the action," and are therefore not a fact that can be proved by out of court statements. Proof of what the police were thinking about when they focused on Petitioner was not admissible. *People v. Harris*, 41 Mich. App. 389 (1972); *People v. Wilkins*, supra. In accord see *People v. Eady*, 409 Mich. 356 (1980) [Court held inadmissible testimony that an officer was told over the police radio that a citizen had called the station and reported someone screaming and a horn honking].

Petitioner cites *Parker v. Matthews*, 132 S.Ct. 2148 (2012), claiming that this, and presumably any, grant of Habeas Corpus relief constitutes "second-guessing" the state courts. However, a careful examination of the ruling in that case shows that in that case, there was no issue about admission of evidence in violation of the confrontation clause, an issue directly addressed by *Crawford*. Instead, there was a claimed error as to insufficient evidence, and the Supreme Court found that correct instructions were given to the jury and the jury could reasonably find that the defendant had not met his burden of proof of extreme emotional disturbance. The Supreme Court also found that the 6th Circuit

finding of prosecutor misconduct in closing argument was unjustified. That distinguishes this case from *Parker v. Matthews*.

Petitioner tries to convert a holding about the substantive law in *Parker* into a holding that nothing the state does can ever be overturned.

In *Davis*, the Supreme Court found that there was no clearly established federal law supporting the Court of Appeals finding. In this case, *Crawford v. Washington* is directly on point to support the Sixth Circuit finding. That distinguishes this case from *Davis*.

In the petitioner's cited case of *Renico v. Lett*, 559 U.S. 766 (2010), the Court of Appeals had issued Habeas Corpus relief even though "under our decision in *United States v. Perez*, 9 Wheat. 579 (1824), a defendant may be retried following the discharge of a deadlocked jury, even if the discharge occurs without the defendant's consent."

These three cases cited by Petitioner have no bearing on this case at all, other than Petitioner's attempt to convert the holdings into holdings that prisoners seeking Habeas Corpus relief must always lose. The Sixth Circuit in *Renico v. Lett* did not follow the ruling in *United States v. Perez*. The Sixth Circuit in this case did follow the ruling in *Crawford v. Washington*. That distinguishes this case from *Renico v. Lett*.

4. CLAIM THAT ANONYMOUS TIP WAS NOT ADMITTED FOR THE TRUTH OF THE MATTER ASSERTED.

This is perhaps the most ridiculous and unfair of the Petitioner's assertions. The defense was that prosecution witness Pollie was solely responsible for the drugs in the car driven by Respondent Etherton in which Pollie was a passenger. The tip assigns responsibility to both occupants of the car. In other words, it was the key evidence on the most important factual issue for the jury. It supported the testimony of Pollie that the driver of the car was responsible.

As the Sixth Circuit correctly pointed out:

> "the tip's reference to two white men could very well have indicated that both were involved with the possession with intent to deliver the cocaine—an inference that could have been thoroughly examined given the opportunity for cross-examination, which was lacking at trial. "

This testimony about the two men transporting drugs would certainly bear directly on the central question for the jury, who among the people in the car was to blame. In the abstract, it is certainly possible that only one of the men in the car knew of and knowingly possessed the drugs, and even possible, under some circumstances, that neither of

the men would know. Obviously, a statement that a witness told them that two men in the white Audi heading west to Grand Rapids were coming with cocaine would be reasonably likely to cause jurors to believe that the two men in the car were guilty. Given the nature of the defense in the case, that the drugs were Pollie's and Petitioner did not know of them, it was prejudicial. And, as the Court held in *Crawford v. Washington*, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."

The Sixth Circuit found several reasons why a juror might choose not to believe prosecution witness Pollie, [1] and found that "Because much of Pollie's

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[1] "Absent the tip that may have bolstered Pollie's testimony, there were at least eight significant reasons that the jury had to doubt Pollie. First, Pollie acknowledged that he had received a plea deal to plead to possession of cocaine and serve nine months in jail in exchange for his testimony. (R. 5-4 at PageID 389.) Second, Pollie admitted that he had initially lied to the police and only changed his story when, facing "a lengthy incarceration term," he agreed to a plea deal. (R. 5-4 at PageID 416–17, 419–20.) Third, Pollie stated that he had spent some time in the car on his own while Etherton went into Meijer to cash a check, indicating that Pollie had an opportunity to hide evidence on the driver's side of the car. (R. 5-4 at PageID 403.) Fourth, Pollie

testimony was reflected in the content of the tip that was put before the jury, the jury could have improperly concluded that Pollie was thereby testifying truthfully—that it was unlikely for it to be a coincidence for his testimony to line up so well with the anonymous accusation."

If the tip was not used for the truth of the matter asserted, then what was it used for? Michigan law provides no other purpose for its use. In *People v. Wilkins*, 408 Mich. 69 (1980), the Court held that the reasons why police take certain action are not "a fact of any consequence to the determination of the action," and are therefore not a

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admitted that he had eaten chips on the day of the arrest, which demonstrated that the bag on top of the cocaine might have been Pollie's. (Id.) Fifth, Pollie acknowledged that he had handled the bag of cocaine and expected his fingerprints to be found on it. (Id.) Sixth, although Pollie initially denied driving on the day of the arrest because he did not have a license, he admitted that he had in fact driven a different vehicle earlier that day. (R. 5-4 at PageID 420– 21.) Seventh, Pollie acknowledged that he had both used and dealt cocaine in the past. (R. 5-4 at PageID 406.) Finally, Pollie disclosed that he had read the police reports concerning both his and Etherton's arrests, indicating an opportunity to fabricate testimony in order to conform to the expected testimony of other witnesses for the prosecution. (R. 5-4 at PageID 416.)

fact that can be proved by out of court statements. Proof of what the police were thinking about when they focused on a suspect was not admissible. *People v. Harris*, 41 Mich. App. 389 (1972); *People v. Wilkins*, supra. In accord see *People v. Eady*, 409 Mich. 356 (1980) [Court held inadmissible testimony that an officer was told over the police radio that a citizen had called the station and reported someone screaming and a horn honking].

Because the reasons for the police action of stopping and searching the car formed no basis of what the jury was to decide, the judge should not have allowed the jury to ever hear the tip, and certainly should not have allowed the details of the tip before the jury. Having made the error of doing so, the trial judge should have told the jury to disregard the information provided in the tip, in its entirety. By failing to do that, the judge gave the green light to the jury to consider the tip for other reasons, such as whether the jurors should find a reasonable doubt, or whether they should reject the claim that there was a reasonable doubt.

The baggie with cocaine was in the car, but was not visible, and the officer had to search to find it. It did not smell, as even the trained police dog could not find it. Petitioner's fingerprints were not on the baggie. (T 107-109, 113, 121, 128-129; ID 346-348, 352, 360, 367-368). There is therefore no physical evidence that Pollie did not put the drugs in the car,

and no physical evidence that defendant Etherton put it there or knew it was there.

Det. Sgt. Charlie Noll testified that Respondent said he traveled to the Detroit area to see relatives, and rode with Ryan Pollie there and back. Respondent told him he knew nothing about the drugs in the vehicle. (T 141-142; ID 380-381). In other words, there was no confession. Given that his fingerprints were not on the baggie, and the baggie was not visible in the car, a jury might well have accepted Respondent's version that he did not know the drugs were there, if it were not for the jurors hearing many pages of testimony about the tip about two men engaged in drug trafficking and transporting drugs in that car.

It is true that codefendant Ryan Pollie made a plea bargain deal to testify that the drugs belonged to Etherton and not to Pollie. (T 149-152; ID 388-391). That is hardly the strongest case a prosecutor could hope for, because (1) Pollie received a benefit for the testimony, (2) Pollie had a personal interest in shifting the blame from himself, and (3) there is zero corroborating evidence that the cocaine was possessed by Etherton, other than the tip. Therefore, far from being an unimportant piece of evidence in the case, the tip was the **most important** evidence in the case, the only piece of evidence to support Ryan Pollie's bought-and-paid-for testimony that Respondent Etherton personally put the drugs in the

car and knew they were there. A reasonable juror might have cause to doubt the testimony of Pollie because of his self-interest, but with the anonymous tip backing up Pollie, that would tend to resolve the factual issue for many jurors.

Therefore, the Sixth Circuit correctly found that it would be unreasonable to find the out of court statement blaming both occupants of the car was not used for the truth of the matter asserted. As they correctly stated, "The prosecutor's repeated references both to the existence and the details of the content of the tip went far beyond what was necessary for background—thereby indicating the content of the tip was admitted for its truth."

5. CLAIM THAT SIXTH CIRCUIT DID NOT CONSIDER ARGUMENTS ABOUT HARMLESS ERROR AND PLAIN ERROR.

The Sixth Circuit ruled in this case:

> "The entire case from opening statement to return of the verdict was less than a day. The proof presented lasted a mere four hours and nineteen minutes. In that time, the prosecution relied on the tip as a critical piece of evidence to support and corroborate the otherwise unsupported testimony of a cooperating co-defendant who admitted to having lied to the police—

> and to having the opportunity and motive to fabricate. Under the circumstances of this case, it is apparent that the admission of the anonymous tip was prejudicial."

By finding that the constitutional error was prejudicial, the Court considered and rejected the claim that it was harmless error, as it should have. There was zero evidence in the case to corroborate Pollie's testimony that Etherton was involved, until the anonymous tip was introduced.

If the trial prosecutor did not think the anonymous tip would help his case, he would not have presented it. The jurors were not there to decide whether the officers had a legal basis to stop the car. The jurors were there to decide who was responsible for the cocaine, the very matter discussed in the anonymous tip.

Moreover, the panel held: "Because of the clear, consistent, and voluminous precedent indicating that the admission of the content of the tip violated Etherton's rights, we find that the error was plain." The assertion that claims of plain error and harmless error were not addressed is thus directly untrue.

6. CLAIM THAT TRIAL DEFENSE COUNSEL HAD A REASON NOT TO OBJECT.

Contrary to Petitioner's claim, trial counsel did

object. (T 188; ID 427). Trial counsel should have objected earlier. The testimony about the "two men" involved in the drug trafficking could not possibly help the defense, only the prosecution.

Petitioner claims, regarding the Sixth Circuit analysis: "Its crux was that, because Pollie's testimony agreed with the tip, it was the tip that established Pollie as credible." The actual crux of the argument was that Pollie claimed both men were involved, and so did the statement of the tipster. The statement provided direct evidence that both men were involved, the very thing at issue at trial.

Petitioner claims "There is no reason that the jury would view Pollie as any more credible as to the fact *at issue* in the case (i.e. whether Etherton knew about the cocaine) merely because his testimony matched the uncontested facts." It was uncontested that cocaine was in the car, and that both Etherton and Pollie were in the car. However, it most certainly was contested that both men were involved in the transportation of cocaine, the very thing that the officers testified they heard about from the tipster. However, the ability of the defense to contest that was severely impeded by presenting out of court statement of an unknown person who could not be cross-examined. Preventing conviction based on out of court statements is the very reason we have a confrontation clause.

Petitioner's claim that this involved "an

anonymous tip that contained only uncontested facts" (Pt. 22) is thus directly untrue and misleading.

7. CLAIM THAT SIXTH CIRCUIT DID NOT APPLY THE CORRECT STANDARD FOR DETERMINING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

A criminal defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). This includes a right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387; 105 S.Ct. 830; 83 L.Ed.2d 821 (1985); *Penson v. Ohio*, 488 U.S. 75; 109 S.Ct. 346; 102 L.Ed.2d 300 (1988); U.S. Const., Amend. VI.

Note that the only issue decided by the Sixth Circuit was whether it was reasonable or unreasonable for the appeal attorney to fail to raise the issue of the confrontation violations, and the issue of ineffective assistance of counsel by the delayed objection to the confrontation violations. Given that this was the only evidence in the case to corroborate Pollie's assignment of guilt to Etherton, it could not be reasonable to fail to mention it on appeal.

Petitioner claims that "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be

overcome." (Pt. 25). That is precisely the standard that the Sixth Circuit did apply in this case. They ruled: "The failure to include this compelling argument was therefore prejudicial and, in light of the less meritorious arguments raised on appeal, amounted to deficient performance of appellate counsel."

While raising an issue about the court's refusal to adjourn the trial date, appellate counsel added reasons for adjournment not presented by the trial counsel, which of course could not be considered by the Court of Appeals because they formed no role in the trial court's ruling. She based three of the issues on the need for an adjournment to present Danny Clayton as a witness, and Danny Clayton as newly discovered evidence, even though Clayton was in jail near the courthouse and easy to find. The Court of Appeals found that a sentencing guidelines issue regarding OV 15 was waived because not argued by counsel. That does not leave much.

To properly review this claim, it is necessary to consider the merits of the issues raised in this motion before deficiency of appellate counsel's performance can be assessed. See *Willis v. Smith,* 351 F.3d 741 (6th Cir, 2003), ("Thus, in order to determine whether cause exists [because of ineffective assistance of appellate counsel]...we must, ironically, consider the merits" of the claims not raised on direct appeal.). See also *McFarland v.*

Yukins, 356 F.3d 688 (6th Cir. 2004), finding ineffective assistance of appellate counsel from the failure to raise ineffective assistance of trial counsel on appeal.

Of particular importance is *Mason v. Hanks*, 97 F.3d 887 (7th Cir. 1996), citing to *Gray v. Greer*, 800 F.2d 644 (7th Cir. 1986):

> "Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless."

In determining the reasonableness of appellate counsel's actions, it is perhaps worthy of note that of the issues raised by appellate counsel, NONE were found suitable to raise in the Petition for Habeas Corpus.

In rejecting this issue, the trial court simply applied a presumption that anything done or not done by appellate counsel was an intentional, competent decision that was part of sound strategy. This was clear error. We cited many cases where failure of appellate counsel to raise issues was held to be ineffective assistance of appellate counsel. Under the trial court's analysis, all of those cases are wrong, and there is no such thing as ineffective assistance of appellate counsel if the attorney files

anything.

It is reasonably probable that Defendant Etherton would have gotten a reversal on his appeal of right, but for the inaction of appellate counsel. See *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were "significant and obvious." See also *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004), finding ineffective assistance of appellate counsel from the failure to raise ineffective assistance of trial counsel on appeal:

> "Because we have already held that the ineffectiveness claim was meritorious and should have resulted in a reversal of McFarland's conviction, there is no question but that appellate counsel's errors were prejudicial. Consequently, McFarland has shown cause and prejudice excusing her failure to raise ineffective assistance of trial counsel on her direct appeal. Nothing, therefore, bars her from litigating this claim."

Ineffective assistance of appellate counsel is 'good cause' for failing to raise an issue in the appeal of right under state and federal law. *Edwards v. Carpenter*, 529 U.S. 446 120 S.Ct. 1587; 146 L.Ed.2d 518 (2000); *Murray v. Carrier*, 477 U.S. 478, 488; 106 S.Ct. 2639; 91 L.Ed.2d 397 (1986); M.C.R. 6.508(D);

People v. Carpentier, 446 Mich. 19 (1994).

If the issues had been raised, the result of the appeal would unquestionably have been different. In this case, the issues not raised in the earlier appeal are highly meritorious and will change the result, if they can get consideration on their merits.

As the Court held in *Mayo v. Henderson*, 13 F.3d 528 (CA 2, 1994):

> "a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."

In *Strickland v. Washington*, the Supreme Court held that prejudice is shown from ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 664.

It appears that the failure to raise on direct appeal the issues presented in the Motion for Relief from Judgment could not be legitimate strategy, and therefore must be attributed to the failure of the attorney to discover them.

As the Court held in *Kyles v. Whitley*, 514 U.S. 419; 115 S.Ct. 1555; 131 L.Ed.2d 490 (1995):

> "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial understood as a trial resulting in a verdict worthy of confidence."

We cannot have confidence in the result of the appeal where so much was left out of the appeal.

CONCLUSION

The grant of a new appeal to Respondent Etherton does not automatically set him free. It just gives him a chance to have his legal issues heard in the state courts, the issues that would have been heard in the first place if appellate counsel has acted diligently. The standards used by the Sixth Circuit in this case are precisely the standards announced by the United States Supreme Court. Petitioner's effort is based mainly on claims that the Sixth Circuit did not consider things that they clearly did consider. The panel used the right standard for confrontation clause violations, used the right standard for ineffective assistance of appellate counsel, and did address the questions of harmless error and plain error. The petition is thus full of misleading statements. The conviction was unconstitutional because the main evidence used to support the claims of witness Pollie was an out of

court statement made to the police about a crime. This Court should deny the writ of Certiorari.

Respectfully submitted,

JAMES S. LAWRENCE P33664
Attorney for Respondent Etherton
17520 W. 12 Mile Road, Suite 101
Southfield, MI 48076
(248) 395-2745
ynot@earthlink.net

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