AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District Eastern District of Michigan	
Name DR. JACK KEVORKIAN	Prisoner No. 284797	Case No.

Place of Confinement

Egeler Correctional Facility, Jackson, Michigan

02-72927

Name of Petitioner (include name under which convicted)

DR. JACK KEVORKIAN

v.

Name of Respondent (authorized person having custody of petitioner)

WARDEN HENRY GRAYSON

The Attorney General of the State of: Michigan

PETITION MAGISTRATE JUDGE MORG...

1. Name and location of court which entered the judgment of conviction under attack

   Oakland County Circuit Court, Pontiac, Michigan

2. Date of judgment of conviction April 13, 1999

3. Length of sentence 10-25 years

4. Nature of offense involved (all counts) (1) Murder (Second Degree); and (2) Delivery of a controlled substance

5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court Michigan Court of Appeals

(b) Result Jury verdict affirmed.

(c) Date of result and citation, if known November 20, 2001, 248 Mich.App. 373; 639 N.W.2d 291 (2001)

(d) Grounds raised (1) ineffective assistance of counsel in violation of Sixth Amendment; (2) serious mistake of counsel; (3) violation of Fifth Amendment right against self-incrimination; (4) violation of Ninth and Fourteenth Amendments; (5) erroneous refusal to allow testimony of *res gestae* witnesses; and (6) numerous other instances of of plain error

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court Michigan Supreme Court

(2) Result Application for Leave to Appeal Denied

(3) Date of result and citation, if known April 9, 2002, Michigan Supreme Court Docket No. 120561

(4) Grounds raised (1) ineffective assistance of counsel in violation of Sixth Amendment; (2) serious mistake of counsel; (3) violation of Fifth Amendment right against self-incrimination; (4) violation of Ninth and Fourteenth Amendments; (5) erroneous refusal to allow testimony of *res gestae* witnesses; and (6) numerous other instances of of plain error

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court United States Supreme Court

(2) Result Petition for Writ of Certiorari Pending

(3) Date of result and citation, if known See (2), above

(d) Grounds raised (1) violation of the Ninth and Fourteenth Amendments; (2) ineffective assistance of counsel in violation of the Sixth Amendment; and (3) violation of the Fifth Amendment right against self-incrimination.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court Oakland County Circuit Court, Pontiac, Michigan

(2) Nature of proceeding Motion for New Trial

(3) Grounds raised Dr. Kevorkian is entitled to a new trial due to ineffective assistance of counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Denied.

(6) Date of result July 15, 1999

(b) As to any second petition, application or motion give the same information:

(1) Name of court Oakland County Circuit Court, Pontiac, Michigan

(2) Name of proceeding Motion for Personal Bond Pending Appeal; Motion for Bond Pending Appeal Based Upon Whatever Conditions the Court Deemed Appropriate; Motion for Bond Pending Appeal Due to Change in Circumstances

(3) Grounds raised Dr. Kevorkian is entitled to bond pending appeal because he has met all the criteria therefor under the laws of the State of Michigan and bond pending appeal can not be arbitrarily denied pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Dr. Kevorkian's motions for bond were denied without opinion by the Michigan Court of Appeals; Dr. Kevorkian's Application for leave to appeal the most recent order was denied by the Michigan Supreme Court.

(6) Date of result January 13, 2000; March 17, 2000; October 16, 2000; December 12, 2000 (Michigan Supreme Court's denial of application for leave to appeal)
Please see Exhibit A, attached hereto.

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☒ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Violation of Ninth and Fourteenth Amendments to the United States Constitution

Supporting FACTS (state *briefly* without citing cases or law): Dr. Kevorkian is being held in violation of the Ninth and Fourteenth Amendments to the Unites States Constitution inasmuch as there is a Constitutional right to be free from unbearable pain and suffering which can not be relieved by palliative care. Dr. Kevorkian, in his role as physician to a patient suffering from unbearable pain which could not be relieved through palliative care, provided the only medical treatment available to such patient. As a result, Dr. Kevorkian was tried and convicted of second degree murder and delivery of a controlled substance for administering this medical care, which the patient had a Constitutional right to receive, and Dr. Kevorkian had Constitutional right to provide.

B. Ground two: Violation of the Fifth Amendment to the United States Constitution

Supporting FACTS (state *briefly* without citing cases or law): At trial, the Prosecutor made numerous clear and unequivocal references to Dr. Kevorkian's right not to testify pursuant to the Fifth Amendment of the United States Constitution, which references are prohibited by the clear precedent of the United States Supreme Court.

C. Ground three: Violation of the Sixth Amendment to the United States Constitution

Supporting FACTS (state *briefly* without citing cases or law): At trial, Dr. Kevorkian had requested "hybrid representation," whereby he would have attorneys available to guide and assist him. Although the Trial Court purportedly denied this request, the Trial Court nonetheless required that Dr. Kevorkian have attorneys available to assist him throughout trial. Inasmuch as the lead attorney utterly failed to provide any effective assistance whatsoever to Dr. Kevorkian before and during trial, Dr. Kevorkian was deprived of the effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution.

D. Ground four:

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☒ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing David Gorosh, 29100 Northwestern Highway, Suite 310, Southfield, Michigan 48034

(b) At arraignment and plea David Gorosh, 29100 Northwestern Highway, Suite 310, Southfield, Michigan 48034

EXHIBIT A TO DR. JACK KEVORKIAN'S PETITION FOR WRIT OF HABEAS CORPUS

As to any subsequent petition, application or motion give the same information:

(1) Name of court: Michigan Court of Appeals

(2) Name of proceeding: Motion for Personal Bond Pending Appeal; Motion for Bond Pending Appeal Based Upon Conditions the Court Deemed Appropriate; Motion for Bond Pending Appeal Due to Change in Circumstances

(3) Grounds raised: Dr. Kevorkian is entitled to bond pending appeal because he has met all the criteria therefor under the laws of the State of Michigan and bond pending appeal can not be arbitrarily denied pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution.

(4) Did you receive an evidentiary hearing on your petition, application or motion? No

(5) Result: Denied.

(6) Date of result: April 13, 1999; February 16, 2000; August 24, 2000

On December 23, 2000, Dr. Kevorkian petitioned this Court for Writ of Habeas Corpus solely with respect to the Michigan Courts' denials without reason of his requests for bond pending appeal. This Court held oral argument with respect to such petition on June 14, 2001. This Court denied the petition on June 22, 2001.

This Court issued a certificate of appealability of its decision on July 30, 2001. Dr. Kevorkian has appealed this Court's denial of his petition for writ of habeas corpus with respect to the bond issue only to the Sixth Circuit Court of Appeals, and is currently awaiting a date for oral argument of said appeal before the Sixth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DR. JACK KEVORKIAN,

Petitioner,

vs.

WARDEN HENRY GRAYSON,

Respondent.

_____/

Case No. 02-CV-
Hon.

MAYER MORGANROTH (P17966)
JEFFREY B. MORGANROTH (P41670)
JASON R. HIRSCH (P58034)
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_____/

PETITIONER, DR. JACK KEVORKIAN'S, MEMORANDUM OF LAW IN SUPPORT OF HIS APPLICATION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

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Statutes and Court Rules:

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant application pursuant to 28 U.S.C. § 2241(d) and § 2254(a) inasmuch as Dr. Kevorkian was convicted and sentenced by the Oakland County Circuit Court for the State of Michigan which is located in the Eastern District of Michigan.

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STATEMENT OF ISSUES PRESENTED

I. WHETHER THIS COURT SHOULD GRANT DR. KEVORKIAN'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE MICHIGAN COURTS' REFUSAL TO OVERTURN DR. KEVORKIAN'S CONVICTION WHERE THE PROSECUTOR IMPERMISSIBLY COMMENTED UPON DR. KEVORKIAN'S FIFTH AMENDMENT RIGHT NOT TO TESTIFY WAS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT?

II. WHETHER THIS COURT SHOULD GRANT DR. KEVORKIAN'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE MICHIGAN COURTS' REFUSAL TO APPLY THE STANDARD OF REVIEW MANDATED BY THE UNITED STATES SUPREME COURT TO DR. KEVORKIAN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT?

III. WHETHER THIS COURT SHOULD GRANT DR. KEVORKIAN'S PETITION FOR WRIT OF HABEAS CORPUS BECAUSE THE MICHIGAN COURTS' REFUSAL TO DISMISS THE CHARGES AGAINST DR. KEVORKIAN IS CONTRARY TO FEDERAL LAW INASMUCH AS SUCH CHARGES VIOLATE THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In or around the fall of 1998, upon learning that he would be charged with a crime by the State of Michigan for committing an act protected by the Ninth and Fourteenth Amendments to the United States Constitution, Dr. Kevorkian retained attorney David Gorosh ("Gorosh") to serve as his lead defense trial counsel in connection with his impending prosecution by the State of Michigan for first degree murder, delivery of a controlled substance and assisting a suicide with respect to the death of Thomas Youk ("Youk"). Exh. A (Affidavit of Lisa Dwyer, Esq.) at 1.

Lisa Dwyer, Esq. ("Dwyer"), a member of the State Bar of Michigan for approximately five years at the time, was asked by Gorosh to serve as co-counsel. Id. at 1. At the time, Gorosh had only three years of legal experience, and his trial experience was extremely limited. Exh. B (Affidavit of Michael Schwartz, Esq.) at 1-2, 4-5. Gorosh had never defended a felony, much less a murder case. Id. at 1. Gorosh's former employer and supervisor, Michael Schwartz, Esq. ("Schwartz"), states, based on his previous experience working with Gorosh, that, when faced with a situation where Gorosh was required to subordinate his own interests to that of his client, Gorosh was either unwilling or unable to do so. Id. at 3, 5. Gorosh was ill-equipped to serve as lead counsel in a murder case, given his lack of experience, his inability to grasp important strategic considerations and his inability to consider the best interests of the client as noted in affidavits submitted by Gorosh's colleagues and co-counsel. Exhs. A at 2, B at 2-5.

On December 9, 1998, Dr. Kevorkian was bound over on the three counts charged in the information: Count I - first degree murder, Count II - delivery of a controlled substance and Count III - assisting suicide. Exhs. C at 119-124, 142, D.

These charges were brought against Dr. Kevorkian based upon a videotape that was aired on the television program "60 Minutes," which subsequently was admitted as an exhibit at the trial. Exh. E at 8-9. The videotape revealed that: (1) Youk suffered from ALS, a degenerative disease that caused him unbearable pain and suffering; (2) Youk had no control of his muscles and was terrified of choking; (3) Youk was close to death when he sought the aid of Dr. Kevorkian to alleviate his unbearable pain and suffering; and (4) in order to relieve Youk's unbearable pain and suffering, Dr. Kevorkian administered an injection to Youk, even though such injection could hasten the time of death. Id. The Prosecution alleged that this act

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constituted murder in violation of MCL 750.316, possession of a controlled substance in violation of MCL 333.7401(2)(b) and criminal assistance to suicide in violation of MCL 750.329a. Exh. D.

During the initial stages of the co-representation, Dwyer felt she would have input regarding defense strategies. Exh. A at 1. However, by the time of Dr. Kevorkian's preliminary hearing on December 16, 1998, Dwyer realized her recommendations would have no effect on Gorosh's decisions. Id.

The relationship between Dwyer and Gorosh deteriorated rapidly, and, by January 1999, Dwyer discussed the possibility of withdrawing as co-counsel. Id. at 3. Gorosh persuaded Dwyer to stay on because he felt Dwyer had developed a good working relationship with Dr. Kevorkian, a relationship Gorosh himself lacked. Id. at 1. Nevertheless, Gorosh's control over all aspects of the case remained unyielding. Id. at 1-2. Gorosh withheld vital information from Dwyer. Id. Gorosh made public comments without consulting Dwyer, and made comments to the media against the express wishes of his client, Dr. Kevorkian. Id.; Exh. F (Affidavit of Dr. Kevorkian) at 1. Besides ignoring the advice and input of co-counsel, Gorosh also ignored the input and wishes of his client, Dr. Kevorkian. Id.

Gorosh obstinately insisted on proceeding with a pre-trial motion to quash the assisted suicide count, with the full knowledge that this could prevent his client from calling favorable witnesses at trial. Exh. A at 1-2. Gorosh proceeded with this motion against the advice of co-counsel, Dwyer, as well as several experienced attorneys, and against the express wishes of his client, Dr. Kevorkian. Exhs. A at 1-2, B at 3-4, F at 1. Schwartz and Geoffrey Fieger, Esq. ("Fieger")[1], experienced criminal attorneys and Gorosh's former employers, strongly advised Gorosh not to seek dismissal of the assisted suicide charge. Exh. B at 1-4.

Despite the admonitions of Dwyer, Schwartz and Fieger, Gorosh did seek to dismiss the assisted suicide count. Exhs. A at 2, B at 3-4. At the motion hearing held on March 3, 1999, even Judge Jessica Cooper was baffled by Gorosh's decision. Exh. G at 12 (Court). The Court asked Gorosh four times if he was certain this was how he wanted to proceed. Id. at 12-13. The Court stated on the record, "Let me see if I've got this straight. You want this court to dismiss the four-year felony [i.e., the assisted suicide charge] and let him go to trial on murder in the first degree?" Id. at 12 (Court). The Court then questioned Gorosh

1/ Fieger and Schwartz had previously successfully defended Dr. Kevorkian against similar charges on a number of occasions.

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about the prudence of this purported strategy, asking "What if they decide not to participate on assisted suicide at all and they just go for murder." Id. at 13. Gorosh replies, "What do you mean?" Id. (Gorosh). The Court continues, "What if they decide ... that they're going to nolle pros the assisted suicide?" Id. (Court). The Court further questions Gorosh, "And you want them to go forward on murder in the first degree without having assisted suicide as one of those charges?" Id. Despite the clear suggestions by the Court, Gorosh pressed ahead with his argument to quash the assisted suicide count. Id. at 13-14 (Gorosh).

On March 12, 1999, the Prosecution did *nolle prosequi* the assisted suicide charge, as the Court had warned during the March 3, 1999 hearing. Exh. H at 3 (Skrzynski).

As the trial approached, Dr. Kevorkian wished to proceed with a hybrid defense, i.e., Dr. Kevorkian wanted to have Gorosh and Dwyer serve as advocates regarding certain matters, and as advisors regarding other matters. Exh. A at 2. Despite this understanding, Gorosh never discussed with Dr. Kevorkian the precise duties each party would have at trial. Id. At a March 19, 1999 hearing in chambers, Judge Cooper indicated that she would not permit a hybrid defense. Id.; Exh. I at 12-14 (Court). According to Judge Cooper, Dr. Kevorkian could either represent himself at trial, or be represented by counsel, but not both. Id. At this point, Dr. Kevorkian agreed to allow Gorosh and Dwyer to conduct the trial. Exhs. A at 2, J (Affidavit of Ruth Holmes, CDE) at 2-3.

Gorosh then decided he would essentially conduct all aspects of the trial, including the examination of all witnesses, except the medical examiner. Exh. A at 2.

On the weekend immediately preceding Dr. Kevorkian's trial, Gorosh did little to prepare. Id. at 2-3. On Saturday, March 20th, Gorosh did not make any substantive preparations for trial. Id. Gorosh spent most of the day arguing with a young attorney who barely had a working relationship with Dr. Kevorkian. Id. Dr. Kevorkian explicitly indicated that he did not want the young attorney involved with the trial. Id.; Exh. F at 1. On Sunday, March 21st, Gorosh and Dwyer were to meet with Dr. Kevorkian. Exh. A at 3. At about 10:30 a.m., Gorosh and the other young attorney arrived. Id. at 3. Dr. Kevorkian immediately became distressed that this young attorney was present, because he had explicitly instructed Gorosh not to bring him. Id.; Exhs. C at 2, F at 1. An hour-long argument ensued wherein Dr. Kevorkian informed Gorosh that he no longer trusted him. Exhs. A at 3, C at 2-3, F at 1.

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Dr. Kevorkian told Gorosh that he would represent himself unless Dwyer could represent him at trial. Exhs. A at 3, C at 2-3. Gorosh was adamant that Dwyer could not do so. Exh. A at 3. Dwyer discussed this matter with Gorosh, and Gorosh reiterated that she could not conduct the trial because he was lead counsel, and it would damage his reputation if Dwyer replaced him. Id. For the same reason, Gorosh refused Dwyer's suggestion that she conduct the substantive aspects of the trial in the beginning, with the hope that the relationship between Gorosh and Dr. Kevorkian would improve once trial commenced. Id.

Because Gorosh stated that he would not permit Dwyer to act as trial counsel, Dwyer expressed reservations when Dr. Kevorkian again asked her to represent him at trial. Id. Dwyer indicated she was concerned about conducting the trial alone because terminating Gorosh would cause a great deal of publicity. Id. In addition, Dwyer indicated that she felt awkward because Gorosh had asked her to assist as co-counsel. Id. Despite knowing that representing himself could be detrimental to his case, Dr. Kevorkian decided he would rather represent himself than be represented by Gorosh, whom he did not trust. Id.

Dwyer discussed the breakdown of the attorney-client relationship with Gorosh on the way to Court on March 22, 1999, the day of trial. Id. Dwyer suggested that Gorosh discuss the situation with Judge Cooper, but Gorosh refused. Id.

Although the Trial Court purportedly denied any form of hybrid representation, the Trial Court insisted that Gorosh stay on to provide advice and consultation to Dr. Kevorkian, and Dr. Kevorkian agreed to this arrangement. Exhs. E at 95-96, 101, 135, 137, 145 (Court), K at 10-12, L at 13, 25-26 (Court). In addition to his actions as advocate before trial, Gorosh continued to act as an advocate at times, as well as an advisor, for Dr. Kevorkian during trial. Exhs. A at 2, E at 95-96, 98 (Court).

Throughout the trial, Gorosh and Dwyer sat at the counsel table with Dr. Kevorkian. Exhs. A at 4, K at 10-11, 247. Dr. Kevorkian was under the impression that he was represented by counsel throughout the trial. Exh. K at 268. Dr. Kevorkian understood his role to be that of a mouthpiece to present information prepared by his attorneys. Exhs. E at 137, L at 12-13, 25-26.

After it became clear to Gorosh that he would not be conducting the trial, he became distant and at times withheld legal advice, in an attempt to frustrate Dr. Kevorkian so that he would turn over all aspects of the case to Gorosh out of frustration and desperation. Exh. J at 3-4. As the trial progressed, Gorosh

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became far more interested in making comments to the media than in defending his client. Exhs. A at 1-4, F at 1, J at 4. Gorosh's priorities became distorted, detrimentally affecting Dr. Kevorkian's defense and best interests. Exhs. F at 1, J at 4.

Furthermore, during the trial, Gorosh openly displayed contempt and ridicule for Dr. Kevorkian, and the defense Dr. Kevorkian was attempting to present. Exhs. A at 4, J at 3-4. Throughout the trial, Gorosh made comments under his breath, rolled his eyes, sighed deeply, put his head in his hands, smirked and appeared to share the Trial Court's discomfort during difficult points, rather than assisting and supporting his client, Dr. Kevorkian. Exh. A at 4. Gorosh sat between Dwyer and Dr. Kevorkian, making it impossible for Dwyer to consult with Dr. Kevorkian during trial even though Dr. Kevorkian so desired. Id.; Exh. F at 1. Ruth Holmes, CDE ("Holmes"), a jury consultant and handwriting and document examiner versed in evaluating body language, was retained by Dr. Kevorkian as a jury consultant to aid in his defense. Exh. J at 1. Holmes advised Gorosh that his behavior during trial would have a negative effect on the presentation of Dr. Kevorkian's defense. Id. at 4.

During the times that Gorosh acted as an advocate, as well as the times he acted as an advisor, Gorosh provided very little substantive advice or consultation to Dr. Kevorkian with respect to trial preparation, and virtually no advice during the actual trial proceedings themselves, although Dr. Kevorkian sought and needed such advice. Id.; Exh. F at 1. Gorosh did not respond to Dr. Kevorkian's requests for information, despite Dr. Kevorkian's repeated inquiries. Exh. F at 1. Gorosh rarely returned Dr. Kevorkian's telephone calls regarding the case, and never did so in a timely manner. Id. As the trial progressed, Dr. Kevorkian developed further distrust of Gorosh, and began to feel that Gorosh was incapable of providing adequate counsel. Id. Dr. Kevorkian became shocked at Gorosh's unscrupulous and insolent behavior. Id.

Dwyer requested that Gorosh instruct Dr. Kevorkian to object to numerous inappropriate references made by the Prosecutor during his closing and rebuttal arguments, which references blatantly violated Dr. Kevorkian's Fifth Amendment right not to testify. Exh. A at 4-5. Nevertheless, Gorosh only advised Dr. Kevorkian to object on one occasion, involving an improper comment unrelated to Dr. Kevorkian's right not to testify. Id.; Exh. M at 65 (Dr. Kevorkian).

When the jury trial was concluded, Dr. Kevorkian was convicted of second degree murder and

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delivery of a controlled substance. The Michigan Department of Corrections ("MDC") recommended a downward departure from the Michigan Sentencing Guidelines in its April 8, 1999 Sentence Recommendation to the Trial Court (the "Sentencing Report"). Exh. N (filed under seal). The Sentencing Report indicates that the facts and circumstances of this case are unusual inasmuch as Youk was gravely ill and sought Dr. Kevorkian's assistance, among other mitigating circumstances. Id. at 2. The Sentencing Report further states that these facts may mitigate Dr. Kevorkian's culpability, and are not adequately taken into account by the sentencing guidelines. Id.

Despite the downward departure from the Michigan Sentencing Guidelines recommended by the MDC, the Trial Court did not deviate from the standard sentencing guidelines, and instead sentenced Dr. Kevorkian to ten to twenty-five years in prison on the second degree murder conviction, and three to seven years in prison for the delivery of a controlled substance. Exh. O at 38 (Court).

Dr. Kevorkian filed a timely Motion for a New Trial on May 21, 1999. The Motion for a New Trial was based on affidavits from, and conversations with, members of the defense team who explained the facts and circumstances of Gorosh's representation of Dr. Kevorkian. Exhs. A, B, F, L. The Trial Court summarily denied Dr. Kevorkian's Motion, as well as his request for an evidentiary hearing[2], without allowing argument, in an Opinion and Order dated July 15, 1999.

Dr. Kevorkian timely filed his Claim of Appeal in the Michigan Court of Appeals on August 23, 1999 raising several Constitutional issues. Dr. Kevorkian filed his Appellate Brief on November 11, 1999.

On November 20, 2001, the Court of Appeals rejected Dr. Kevorkian's request for reversal and/or a new trial based upon the Constitutional arguments he asserted. Exh. P.

Dr. Kevorkian made timely application for leave to appeal the erroneous November 20, 2001 Order of the Michigan Court of Appeals to the Michigan Supreme Court (the "Application"). On April 9, 2002, the Michigan Supreme Court denied Dr. Kevorkian's Application. Exh. Q.

On July 3, 2002, Dr. Kevorkian filed a Petition for Writ of Certiorari with the United States Supreme Court, which is currently pending.

2/ Michigan law requires an evidentiary hearing, known as a "Ginther hearing," where the effectiveness of counsel is called into question. See, People v. Ginther, 390 Mich. 436, 442-443; 212 N.W.2d 922 (1973).

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ARGUMENT

I. STANDARD OF REVIEW.

28 U.S.C. § 2254(a) states, "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The application shall not be granted unless the applicant has exhausted all remedies available in the State Courts. 28 U.S.C. § 2254(b)(1)(A). The application may be granted if the claim that was adjudicated in the State Court:

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

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding. 28 U.S.C. § 2254(d) (emphasis added).

II. THE INSTANT PETITION SHOULD BE GRANTED BECAUSE THE MICHIGAN COURTS' REFUSAL TO GRANT DR. KEVORKIAN A NEW TRIAL IN LIGHT OF THE PROSECUTOR'S IMPERMISSIBLE COMMENTS ABOUT DR. KEVORKIAN'S DECISION NOT TO TESTIFY WAS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT.

The Fifth Amendment to the Constitution states, "No person ... shall be compelled to be a witness against himself." U.S. Const. Am. V. This provision was made applicable to the states via the Fourteenth Amendment by the Supreme Court's decision in Malloy v. Hogan, 378 U.S. 1, 6 (1964).

In Griffin v. California, 380 U.S. 609, 614 n.5 (1965), the Supreme Court held that the prosecution may not comment on the accused's silence, expanding on the general rule set forth in Miranda v. Arizona, 384 U.S. 436 (1966), that the prosecution may not use at trial the fact that the accused claimed his privilege against self-incrimination in the face of accusation. Any comment by the prosecution on the refusal of the accused to testify is a remnant of the inquisitorial system of criminal justice, outlawed by the Fifth Amendment. Griffin, 380 U.S. at 614. Permitting such comment by the prosecution amounts to an impermissible penalty imposed by courts on the exercise of a Constitutional privilege. Id. Whether a jury may draw a negative inference on its own from the accused's failure to testify is vastly different than the

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court solemnizing such silence into evidence against the accused, and such court action is prohibited by the Constitution. Id.

The Supreme Court, in construing the right of a person to remain silent has stated flatly that a person may "suffer no penalty ... for such silence." Malloy, 378 U.S. at 8 (emphasis added). Accord, Spevack v. Klein, 385 U.S. 511, 514 (1966). A penalty for silence includes the "imposition of any sanction which makes assertion of the Fifth Amendment privilege costly." Spevack, 385 U.S. at 515 (citation omitted, emphasis added). The Supreme Court has cautioned that even the slightest encroachments on Constitutional rights are prohibited, and the privilege against self-incrimination is to be construed liberally. Id. at 515-516. See also, Coppola v. Powell, 878 F.2d 1562, 1566 (1st Cir. 1989) (the privilege against self-incrimination should be given liberal application); Spevack, 385 U.S. at 515 (Constitutional provisions for the security of person and property should be liberally construed). Thus, courts must guard against even the subtlest implications by the prosecution alluding to the accused's decision to exercise his absolute Fifth Amendment right. Id.

In accord with the Supreme Court's holding in Griffin, the Sixth Circuit has explained its criteria for examining indirect references by a prosecutor to a defendant's failure to testify. The reviewing court must examine four factors: (1) were the comments intended to reflect on the accused's silence or are they of such a character that the jury would naturally and necessarily take them as such; (2) were the remarks isolated or extensive; (3) was the evidence of guilt otherwise overwhelming; and (4) what curative instructions were given and when. Lent v. Wells, 861 F.2d 972, 975 (6th Cir. 1988). The statements must be viewed in context, "not singled out and standing alone," and in the aggregate. Id. at 976. Accord, Berryman v. Colbert, 387 F.Supp. 378, 380 (E.D. Mich. 1974).

If the reviewing court determines that there was error, it must then determine if the error was harmless. Lent, 861 F.2d at 975. "Harmless error, in the context of the violation of a Constitutional Right of a defendant is an extremely narrow standard permitting the state to avoid retrial of a defendant only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant." Id. at 977, citing, Chapman v. California, 386 U.S. 18 (1967) (emphasis added). The Supreme Court has held that the reviewing court must make a determination whether, absent the prosecutor's

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allusion to the accused's failure to testify, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty. United States v. Hastings, 461 U.S. 499, 510-511 (1982). Indeed, in Lent, although the Sixth Circuit agreed the case was certainly strong enough to find the defendant guilty, it held that the state had still not demonstrated beyond a reasonable doubt that the Constitutional error was harmless, as required by the Supreme Court's holding in Hastings, *supra*. Lent, 861 F.2d at 977.

Although the Michigan Court of Appeals acknowledged the clear precedent affirming that no comment may be made with respect to a defendant's decision to assert his Constitutional right not to testify, it erroneously asserted, without support, that such precedent is inapplicable where a defendant proceeds *in propria persona*[3].

No decision of this Court, or any Circuit Court of Appeals, has held that the Fifth Amendment right against self-incrimination is in any way diminished when a defendant chooses to exercise his Constitutional right to represent himself, and thus the Michigan Courts' refusal to apply the clear precedent of the United States Supreme Court to this case is unreasonable.

The Michigan Court of Appeals relied upon an ill-conceived decision of the Michigan Supreme Court, People v. Marcus Jones, 442 Mich. 893; 499 N.W.2d 344 (1993), to support its erroneous assertion that a Prosecutor, in making objections, may comment upon the accused's right not to testify. In Marcus Jones, the Michigan Supreme Court refused to grant defendant a new trial where defendant was warned by the trial court to cease interrupting the prosecution's closing. The trial court warned defendant that he "had an opportunity to testify." Id. at 894. The Michigan Supreme Court determined that the trial court's response was a proper, though awkward, response to defendant's interruptions. Id.

In the case at bar, it was the Prosecutor who repeatedly interrupted Dr. Kevorkian. The Prosecutor, who is (or should be) well-versed with respect to a defendant's Fifth Amendment right, could have simply objected without explanation, or sought a bench conference out of the presence of the jury. Instead, on more than five occasions, the Prosecutor used his objections as an excuse to interject, in front of the jury, that Dr.

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3/ For the reasons fully set forth below, Dr. Kevorkian did not decide to proceed *in propria persona*. Nevertheless, even assuming *arguendo* that he had, this has no effect on the obligation of the Court to fully enforce his right against self-incrimination as guaranteed by the Fifth Amendment.

Kevorkian had chosen to exercise his Constitutional right not to testify.

In any event, even if Marcus Jones stands for the proposition asserted by the Michigan Court of Appeals, this holding would violate the United States Constitution and contradict previous holdings of the United States Supreme Court. Thus, any interpretation of the Marcus Jones decision that would permit an encroachment upon an accused's Fifth Amendment right not to testify, as suggested by the Michigan Court of Appeals, is invalid inasmuch as it would violate the Federal Constitution, and would be an unreasonable application of the precedent of the United States Supreme Court.

In fact, the Prosecution violated Dr. Kevorkian's Constitutional rights when the Prosecutor made comments during the trial which were clearly of such a character that the jury would naturally and reasonably take them as a reference to his Constitutionally protected decision not to testify. Whether the jury would naturally construe the comments to reflect on Dr. Kevorkian's failure to testify requires a probing analysis of the context of the comments, and the likely effects of any curative instruction given by the Trial Court, which probing analysis the Michigan Courts failed and refused to undertake. See, Lent, 861 F.2d at 977.

By closely examining the comments made by the Prosecutor, it is clear that the jury would understand that the Prosecutor was in fact repeatedly referring to Dr. Kevorkian's failure to testify. During Dr. Kevorkian's closing argument, the Prosecutor made at least four comments, in a very short period of time, referring to Dr. Kevorkian's failure to testify. The Prosecutor said, "He can't testify now. He can't tell the facts now." Exh. M at 50 (emphasis added). The Prosecutor objected again a short time later saying, "He cannot put facts before the jury which have not been proven before through testimony or other evidence. He cannot testify now." Id. at 53 (emphasis added). The Prosecutor continued to state "[the defendant] could have gotten on -- you know, he didn't." Id. at 54 (emphasis added). Although the Prosecutor did not use the word "stand" everyone in the courtroom, especially the jury, was able to fill in the blank with the word "stand" since that is the natural and expected finish of the Prosecutor's sentence. Any juror was able to extrapolate this especially in light of the clear context of the Prosecutor's comments that Dr. Kevorkian "cannot testify now," but "could have" and "didn't."

Finally, the Prosecutor went on to object saying, "He's now testifying. He's putting new facts before

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the jury. He can't do that." Id. (emphasis supplied). In addition to these inappropriate comments, the Prosecutor also pointed out during his closing that "[Dr. Kevorkian] turns the videotape off and he goes back to work apparently. We don't know exactly what he does. And why does he turn it off? Why doesn't he keep the whole thing on all the time?" Id. at 32. This too is an indirect but clear reference to the lack of answers due to Dr. Kevorkian's Constitutionally protected decision not to testify.

When viewed in context, the Prosecutor's remarks were extensive. The Prosecutor hammered the point home to the jurors that Dr. Kevorkian had not testified, although this is his Constitutional right. Because of the short period of time in which all the comments were made (between pages 32-33 and then between pages 50-54, attached hereto as Exhibit M), the message was crystal clear. Furthermore, these comments were made during closing argument, and were some of the last things jurors heard before retiring to deliberate. Simply put, it is reversible error to specifically refer to the failure of defendant to take the stand, and the precedent of the United States Supreme Court unequivocally recognizes this. Griffin, 380 U.S. at 614 n.5. The Michigan Courts' refusal to reverse Dr. Kevorkian's conviction on this ground is contrary to clearly established Federal law, and therefore the instant Petition should be granted.

III. THE INSTANT PETITION SHOULD BE GRANTED BECAUSE THE MICHIGAN COURTS' REFUSAL TO APPLY THE PROPER STANDARD OF REVIEW TO DR. KEVORKIAN'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT.

A. The Michigan Courts' Determination that Dr. Kevorkian Waived His Sixth Amendment Right to Counsel is Unreasonable in Light of Federal Precedent.

The Michigan Courts failed to apply the proper standard of review to Dr. Kevorkian's claim for ineffective assistance of counsel because the Michigan Courts erroneously determined that Dr. Kevorkian somehow waived his Sixth Amendment right to counsel. However, although the Michigan Court of Appeals' Opinion emphasized the fact that the Trial Court asked Dr. Kevorkian if he was certain he wanted to proceed *pro se*, and claims that Dr. Kevorkian knowingly and voluntarily waived his right to counsel, this simply can not be the case. At the very times that the Trial Court was asking Dr. Kevorkian if he was certain he wanted to waive his right to counsel, it was allowing and encouraging Dr. Kevorkian to consult with, and have the aid of, counsel in the courtroom at counsel table and on written briefs. Exhs. K at 8-15, L at 25-26, M at

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3. In fact, the record makes clear that it was Dr. Kevorkian's wish to use a system of hybrid representation, a plan the Trial Court refused to properly consider, although it permitted this approach in practice[4]. Exh. I at 12-14. The facts show that Dr. Kevorkian did not in fact, and never intended to, represent himself without relying upon assistance from counsel, and the Trial Court permitted and encouraged this arrangement.

Indeed, in Fowler v. Collins, 253 F.3d 244, 246-247 (6th Cir. 2001), the Sixth Circuit reviewed the defendant's application for habeas corpus relief on the basis that he had not given a knowing and intelligent waiver of his right to counsel. The Sixth Circuit granted the application finding that the Michigan Court's determination that defendant's waiver was knowing and intelligent was an unreasonable application of established precedent regarding knowing and intelligent waiver. Id. at 250. The Sixth Circuit noted that, in order "[t]o ensure that a defendant's waiver is made with eyes wide open, a judge must thoroughly investigate the circumstances under which the waiver is made." Id. at 249 (emphasis added). The Sixth Circuit further noted that "[t]he fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." Id. at 250 (emphasis added). The Sixth Circuit further stated that the failure of the Michigan trial court to have defendant sign a written waiver, as well as the trial court's apparent ignorance of defendant's expressed concerns regarding his lack of preparation for trial and defendant's statement that the indictment against him was complex, were factors which weighed against finding a knowing and intelligent waiver. Id.

In a recent unpublished opinion, the Michigan Court of Appeals itself addressed the issue of waiver of counsel in a case similar to the case at bar, and determined that a waiver of the right to counsel can not be unequivocal where standby counsel is present, relying in part upon the precedent of the United States Supreme Court. People v. Favors, Mich. Ct. of Appeals No. 215826 (August 28, 2001) (per curiam) (attached hereto as Exh. R). Thus, according to the Michigan Court of Appeals' own reasoning in Favors, *supra*, Dr. Kevorkian's purported waiver could not have been effective as to all aspects of representation,

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4/ The Trial Court misconstrued the applicable law, and determined that a court can not even consider a request for hybrid representation. But, under Michigan law, as well as Federal law, hybrid representation can be and has been allowed in appropriate situations. See, e.g., People v. Ramsey, 89 Mich. App. 22; 198 N.W.2d 811 (1972); People v. Griffen, 36 Mich. App. 368, 372; 194 N.W.2d 104 (1971); United States v. Hill, 526 F.2d 1019, 1024 (10th Cir. 1975); United States v. Tutino, 883 F.3d 60, 67 (2d Cir. 1989), cert. den., 493 U.S. 1081 (1990).

because, even as he supposedly waived his right to counsel, he continued to have counsel to assist him, with the Trial Court's approval. Id. Indeed, Dr. Kevorkian was under the impression that he was in fact represented by counsel throughout the trial, and that his role was to be that of a mouthpiece to present information prepared by his counsel. Exhs. E at 137, K at 268, L at 12-13, 25-26.

Furthermore, pursuant to Favors, the Michigan Court of Appeals' assertion that Dr. Kevorkian expressed satisfaction with his counsel holds no weight with respect to the Court's evaluation of whether Gorosh in fact provided effective assistance, and thus should have no bearing on this Court's assessment. In any event, although the Michigan Court of Appeals claims that Dr. Kevorkian "never brought any dissatisfaction with Gorosh to the trial court's attention," it nonetheless acknowledged that "[i]n response to the trial court's questioning, [Dr. Kevorkian] first stated that he was dissatisfied with [his attorneys]," before he reversed his position upon prompting from the Trial Court. Exh. P at 20, 26.

B. The Michigan Courts' Refusal to Review Gorosh's Conduct Under the *Strickland* Standard is Contrary to the Precedent of the United States Supreme Court.

Whatever role Gorosh played (and he undisputedly played some role), he did not provide the effective assistance of counsel to which Dr. Kevorkian is guaranteed by the United States Constitution. The Sixth Amendment guarantees an accused "the right ... to have the assistance of counsel for his defense." U.S. Const., Am. VI.

The United States Supreme Court has made clear that the right to counsel includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970). At issue here is not the denial of counsel, but the actual performance of counsel. See, People v. Mitchell, 454 Mich. 145, 156; 560 N.W.2d 600 (1997). The inquiry into the performance of counsel is particular, and the question is whether counsel's actual performance undermined confidence in the reliability of the result. Id.

As the Michigan Court of Appeals acknowledged, there is but a single standard for claims of ineffective assistance of counsel. The benchmark case in Michigan, People v. Pickens, 446 Mich. 298; 521 N.W.2d 797 (1994), adopted the federal test for reviewing claims of ineffective assistance of counsel set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Nonetheless, for the reasons set forth above, the Michigan Courts refused to apply the Strickland standard in this case.

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In order to ascertain whether counsel's assistance was ineffective, the reviewing court must determine: (1) whether counsel's performance was objectively unreasonable; and (2) if so, whether the defendant was so prejudiced by counsel's defective performance that he was deprived of a fair trial[5]. Id. at 309. The test requires the greatest level of factual inquiry into the conduct of the defense and its effect on the outcome of the trial. Mitchell, 454 Mich. at 155.

The Michigan Court of Appeals' refusal to apply the Strickland standard to Gorosh's performance during trial (or any standard of conduct at all), while providing no basis as to why this standard should not apply, is clearly an unreasonable application of the precedent of the United States Supreme Court.

Had the Michigan Courts reviewed Gorosh's performance at all, it would have been clear that Gorosh's assistance was inadequate under any conceivable meaningful standard of conduct, especially the standard of conduct required by the Supreme Court in Strickland, due to numerous errors, miscalculations and breaches of professional responsibility. The detailed information received from Dwyer, Holmes, Schwartz and Dr. Kevorkian himself, as well as the affidavits submitted in support of Defendant's Motion For a New Trial reveal what actually happened during the pre-trial and trial proceedings, and serve to explain why the defense presented on behalf of Dr. Kevorkian was so appallingly inadequate.

The Michigan Court of Appeals acknowledged that Gorosh acted as an advocate for Dr. Kevorkian in presenting various pre-trial motions. See, e.g., Exhs. K at 8, P at 24. It is further undisputed that Gorosh also acted as an advocate at times during the trial.

Even assuming *arguendo* that Gorosh did not act as Dr. Kevorkian's advocate during the trial, which he did, it is undisputed that Gorosh at least acted as a counselor and advisor to Dr. Kevorkian. In fact, the Trial Court required Gorosh to sit at counsel table and directly instructed Dr. Kevorkian to seek advice from

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5/ The Supreme Court has held that, in some cases, Strickland's prejudice prong may be presumed based on the particular circumstances of the case. For example, "If the accused is denied counsel at a critical stage of his trial [or] . . . if 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." United States v. Cronic, 466 U.S. 648, 659 (1984). In such a case, it is not necessary to demonstrate actual prejudice. Rickman v. Bell, 131 F.3d 1150, 1155 (6th Cir. 1997). Moreover, a defendant may demonstrate the "constructive" denial of counsel when, although counsel is present, "'the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided.'" Cronic, 466 U.S. at 654 n.11, quoting, United States v. Decoster, 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring)).

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his attorneys on numerous occasions. Exhs. E at 95, 98, 101, 145, K at 10-11, 237, 247, 268, L at 25-27, N at 3. Dr. Kevorkian even indicated his intent to follow the advice of his advisers throughout the trial. Exh. L at 12-13. In that capacity, Gorosh was obligated to provide, and Dr. Kevorkian was entitled to receive, effective advice and consultation as to how to conduct his own defense in accord with the Constitutional guarantee of effective assistance of counsel. The Supreme Court has held that, "if 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." Cronic, 466 U.S. at 659 (emphasis added). Inasmuch as Gorosh failed to provide any meaningful advice to aid Dr. Kevorkian in connection with his defense, the prosecution's case was not subjected to any meaningful adversary testing.

IV. THE INSTANT PETITION SHOULD BE GRANTED BECAUSE THE MICHIGAN COURTS' REFUSAL TO DISMISS THE CHARGES AGAINST DR. KEVORKIAN IS CONTRARY TO FEDERAL LAW INASMUCH AS SUCH CHARGES VIOLATE THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Contrary to the Precedent of the United States Supreme Court, the Michigan Court of Appeals Erroneously Held that the Michigan Legislature Should Interpret and Enforce the United States Constitution Instead of the Courts.

The Michigan Court of Appeals erroneously ruled that it is not up to Courts, but up to the legislature, to determine whether there is a Constitutionally protected right to be free from unbearable pain and suffering, and thereby the Michigan Courts have abdicated their Constitutional duty to ensure that the United States Constitution is upheld. The decision of the Michigan Court of Appeals is clearly contrary to Federal law inasmuch as it fails to protect the Constitutional rights of Dr. Kevorkian by deferring to the legislature's interpretation of the Constitution. However, it is up to the Courts (and only the Courts) to interpret and enforce the Constitution, and to ensure that Constitutional rights are protected. Indeed, the United States Supreme Court, reaffirming its historic holding in Marbury v. Madison, 5 U.S. 137 (1803), made nearly two centuries ago, recently confirmed that "it is emphatically the province and duty of the judicial department to say what the law is." United States v. Morrison, 529 U.S. 598, 617 (2000) (citation omitted).

The Michigan Court of Appeals' assertion that the issue of whether there is a Constitutionally protected right to be free from unbearable pain and suffering should be left for the legislature is not only erroneous, but also merely begs the question. If there is such a Constitutionally protected right, there is no

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question for the legislature at all because the government can not abridge a Constitutionally protected right[6]. Thus, if there is such a right, it is the duty and obligation of the courts, including this Court, to ensure that Constitutionally protected rights are not inappropriately infringed upon by the government.

B. Because the Right to Be Free From Unbearable and Irremediable Pain and Suffering is Deeply Rooted in American Jurisprudence, it is Constitutionally Protected, and the Michigan Courts' Failure to Protect Such a Right is Contrary to Federal Precedent.

The right to be free from unbearable and irremediable pain and suffering is deeply rooted in this nation's history and in the United States Constitution itself, and therefore is a Constitutional right which should be protected.

First, the United States Constitution guarantees that a person shall not be deprived of liberty. U.S. Const., Am. XIV.

Second, the Fourteenth Amendment to the United States Constitution states, in pertinent part, "No state... shall deprive any person of life, liberty, or property, without due process of law." U.S. Const., Am. XIV.

Third, the Ninth Amendment to the United States Constitution states that certain unenumerated rights are reserved to the People, and are not to be abridged by the government. U.S. Const., Am. IX.

Fourth, traditional Constitutional interpretation requires that every word has its due force and meaning. Ogden v. Saunders, 25 U.S. (12 Wheat) 213 (1827).

Thus, logically, there must be some unenumerated rights protected by the Ninth Amendment to the Constitution in order that this Amendment is not mere surplusage. Whatever these unenumerated rights are, they are expressly reserved to the People and can not be abridged by the government. U.S. Const., Am. IX. Therefore, if the Ninth Amendment is to have any substantive meaning, as it must under well-recognized rules of Constitutional construction, Dr. Kevorkian asserts that a right to be free from inexorable pain and suffering must be among the unenumerated rights protected by the Ninth Amendment. Id. In order for such unenumerated rights to have any practical effect, they must first be recognized by the Courts. Thus, Dr. Kevorkian requested that the Michigan Courts address this issue.

6/ Of course, the legislature could regulate the assertion of the right within Constitutionally boundaries (i.e., certain legislative restrictions on free speech are permissible, while others are not).

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Similarly, and for the very same reasons, the right to be free from unbearable pain and suffering may also be encompassed in the "liberty" guaranteed by the Fourteenth Amendment. Indeed, the United States Supreme Court has broadly construed the right to liberty guaranteed by the Fourteenth Amendment to include various rights, including the right to obtain (or decline) certain medical procedures. For instance, the United States Supreme Court recognized that the right to privacy is part of the "liberty" protected by the Fourteenth Amendment. Roe v. Wade, 410 U.S. 113 (1973). In Roe, the right to privacy inherent in the "liberty" protected by the Fourteenth Amendment was held to guarantee a woman's right to obtain the medical procedure of abortion prior to viability[7].

Likewise, the Constitutional right at issue here is the intensely personal and private right of a patient to be free from intolerable and irremediable suffering due to a terminal medical condition. The United States Supreme Court, and almost every state, has implicitly acknowledged this right, supporting the view that the administration of aggressive pain-killing drugs is acceptable, even if this may hasten death, because no person can be made to suffer unbearably. See, e.g., Vacco v. Quill, 521 U.S. 793 (1997).

The necessary corollary of this position is that a person should not be forced to suffer unbearably, and such pain must be alleviated, even if such alleviation would hasten death. Id. In some cases, such as Vacco, this right was assured simply by means of a doctor providing sufficient pain medication, even though the administration of such pain medication could hasten death. Id. However, in other situations, such as the case at bar, the only medical method for ending the interminable suffering of patients such as Youk is to provide them with an injection to permanently end their suffering, though such injection will hasten death.

In Washington v. Glucksberg, 521 U.S. 702 (1997), the United States Supreme Court held that there is no Constitutional right to physician-assisted suicide, but premised its holding on the fact that a patient is not restricted from receiving adequate pain medication to alleviate his/her suffering, even if the receipt of

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7/ It is worth noting that many of the same "slippery slope" fears posited by the Michigan Court of Appeals were (and still are) raised in opposition to the Supreme Court's Roe decision. Nonetheless, the Supreme Court recognized that certain intensely personal decisions, though possibly subject to abuse, are nonetheless Constitutionally protected because certain personal rights are simply not subject to government intrusion.

such medication hastens the patient's death[8].

The Michigan Court of Appeals misread the Supreme Court's opinion in Glucksberg, and the separate opinions of the Justices in connection therewith, and thus unreasonably applied Supreme Court precedent. Specifically, Justice O'Connor made clear that it was not necessary for the Court in Glucksberg to reach the question of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death." Id. at 737 (O'Connor, J., concurring) (emphasis added). Thus, the Supreme Court, in Glucksberg and Vacco, did not reach the question presented here, because, as the Michigan Court of Appeals recognized, it was clear that the dying patients in those cases, unlike Youk, had access to adequate medication sufficient to relieve their pain such that they did not suffer unbearably. Id. at 737-738 (O'Connor, J., concurring) (the "dying patients [involved in Glucksberg] can obtain palliative care, even when doing so would hasten their deaths.").

Similarly, Justice Stevens, in Glucksberg, indicated that, where palliative care was inadequate to eliminate pain and suffering, the state's interest in preventing potential abuse and mistake would be only minimally implicated, and he refused to "foreclose the possibility that an individual plaintiff seeking to hasten her own death, or a doctor whose assistance was sought, could prevail in a more particularized challenge." Glucksberg, 521 U.S. at 750 (Stevens, J., concurring) (emphasis added). Justice Stevens noted that state concerns against abuse will not always outweigh the individual liberty interests of a particular patient. Id. at 749-750. Justice Stevens further stated that, "avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly at the heart of the liberty ... to define one's own concept of existence." Id. at 745 (citation omitted, emphasis added). Justice Stevens unequivocally stated that "some intrusions [by the government] on the right to decide how death will be encountered are also intolerable." Id. (emphasis added). Justice Stevens finally stated that "a doctor who prescribes lethal medication does not necessarily intend the patient's death – rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes." Id. at 751 (emphasis added). Justice Stevens thus recognized that, in the case of a mentally competent person, it is a doctor's overriding duty to comply with

8/ In any event, in the case at bar, Dr. Kevorkian was not convicted of assisting a suicide, but was convicted of murder, even though the State failed to prove the requisite elements thereof beyond a reasonable doubt.

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that person's wishes, and an intent to ease unbearable suffering by the only medical means available is simply not the same as an intent to cause death, even though death might result.

Furthermore, Justice Souter, in Glucksberg, suggested that the Fourteenth Amendment's guarantee of liberty might be the "only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering." Glucksberg, 521 U.S. at 752 (Souter, J., concurring)[9].

Thus, the United States Supreme Court has interpreted the Fourteenth Amendment's guarantee of liberty to apply to various privacy rights, including those related to personal and private medical procedures, and Justices of the United States Supreme Court have indicated that the guarantee of liberty may very well apply to the right to be free from unbearable pain and suffering which can not be relieved by palliative care. See, e.g., Roe, *supra*. The holdings in Glucksberg and Vacco that the right of the terminally ill to hasten inevitable death was not a fundamental right for Constitutional purposes was predicated on the fact that the terminally ill person was being provided adequate pain medication and was not being forced to endure unbearable suffering. Under Glucksberg, a terminally ill person does have a Constitutional right to receive adequate pain medication, even if this has the effect of hastening their inevitable death.

Specifically, the right to be free from unbearable pain is deeply rooted in the text of the Constitution itself. The Eighth Amendment to the United States Constitution strictly prohibits cruel and unusual punishment. U.S. Const., Am. VIII. The United States Supreme Court has long recognized that the policy against cruel and unusual punishment embodied in the Eighth Amendment is firmly established in the Anglo-American tradition of criminal justice. Trop v. Dulles, 356 U.S. 86, 99-100 (1958).

Furthermore, the Eighth Amendment's prohibition against cruel and unusual punishment applies not only to the punishment of those convicted of a crime, but also to any governmental action that amounts to inhumane treatment. Id. at 100-101. Thus, the underlying values of the Eighth Amendment clearly represent a fundamental policy against forcing any citizen to endure unbearable pain for any reason. Id.

Tellingly, the Supreme Court has held that the Eighth Amendment does not prohibit the punishment

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9/ The Michigan Court of Appeals misconstrued Justice Souter's opinion as well, focusing on the issue of assisted suicide, which is not at issue here. Justice Souter clearly acknowledged that a patient had a right to "bodily integrity" and that a patient had a right to exercise his autonomy by choosing death over being drugged into a stupor or forced to suffer unbearable pain. Glucksberg, 521 U.S. at 778-779 (Souter, J., concurring)

of death, but does prohibit the imposition of death in any manner which causes unbearable suffering, such as burning at the stake, crucifixion or breaking on the wheel. In re Kemmler, 136 U.S. 436, 446 (1890). In Kemmler, the United States Supreme Court noted that the punishment of death is not in itself "cruel" within the meaning of the Eighth Amendment inasmuch as the prohibition against cruel and unusual punishment set forth in the Eighth Amendment "implies something more inhuman and barbarous, something more than the mere extinguishment of life." Id. Thus, this Court has recognized that there are worse fates than death, and, pursuant to the Eighth Amendment, the government can not in any way force citizens to suffer some of those fates (e.g., suffering unbearable and irremediable pain and suffering) under any circumstances. Id.

Therefore, while the Eighth Amendment's prohibition against cruel and unusual punishment applies only against the government's imposition of such punishment, the fundamental values embodied in the Eighth Amendment make it clear that the Constitution itself abhors the concept of citizens being subjected to unbearable pain and suffering for any reason[10]. Furthermore, the Eighth Amendment recognizes that unending, torturous pain and suffering is worse than death inasmuch as torture is prohibited, but the humane imposition of death is not. Kemmler, 136 U.S. at 446. The Michigan Court's refusal to recognize and apply these fundamental Constitutional values to this case amounts to an unreasonable application of Federal law, and thus the instant Petition should be granted.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Dr. Kevorkian respectfully requests this Honorable Court to grant the instant Petition for Writ of Habeas Corpus.

Respectfully submitted,

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10/ Specifically, "deliberate indifference to the serious medical needs of prisoners" has been held by this Court to be in violation of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-105 (1976). See also, Marinez v. Mancusi, 443 F.3d 921, 923 (2d Cir. 1970) (prisoner deprived of pain killers and forced by prison officials to stand, against doctor's orders, following a serious leg operation did raise colorable claim of violation of Eighth Amendment).

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EASTERN DISTRICT OF MICHIGAN

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