No. 17-7688

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

RONNIE LEE BOWLING, Petitioner,

v.

RANDY WHITE (Warden), Respondent.

BOWLING'S REPLY TO BRIEF IN OPPOSITION

ADVERSELY AFFECTED "CAPITAL CASE"

Ronnie L. Bowling
MR. RONNIE LEE BOWLING
PRISON ID# 032861
DEATH ROW CELL 6-G-2
KENTUCKY STATE PENITENTIARY
266 WATER STREET
EDDYVILLE, KENTUCKY 42038-7737

Pro Se Petitioner

March 19, 2018

QUESTIONS PRESENTED

GRANT certiorari because compelling reasons do exist for the Court's discretionary jurisdiction. In the alternative, the Court should summarily reverse the decision of the Court below. This Court has not hesitated to reverse summarily where the decision below was inconstitent with the Court's precedents. See Grady v. North Carolina,135 S.Ct. 1368,1370,191 L.Ed. 459 (2015) (summarily reversing the lower court when decision was inconsistent with Fourth Amendment precedent). The 6th Circuit Court [majority], in Bowling v. White,No. 15-6318, 694 Fed.Appx. 1008 (6th Cir. 2007), has so far departed from the usual course of judicial proceedings. It threatens to erode federalism and do harm to prisoners, states and habeas corpus across the nation. It has singled Bowling out for disparate treatment allowing the majority's opinion to stand will open the door to individuals and agencies to take positions for the sake of litigation alone. It greatly conflicts with this Court's decision(s) & every U.S. Court of Appeals (included 6th Circuit until Bowling's case) in 33areas of well settled precedent: (1) A convenient litigating position (that is totally un-supported by one single case record) in violation of Bowen v. Georgetown Univ. Hosp.,488 U.S. 204,213 (1988) and others on point; (2) And that a U.S. Court of Appeals must give effect to both provisions which 6th Circuit majority never did and violates Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.,301 U.S. 1,30 (1992) and other cases on point. See Bowling's cert petition at pp. 28-36. (3) The lower court has departed from what the "core purpose" of habeas corpus is affecting all prisoners,states & habeas litigation.

The 6th Circuit Court held: ("Upon review,the Court **GRANTS** Bowling a COA for the following issues: whether Bowling was 'in custody' under 28 U.S.C. § 2254(a) at the time he filed his habeas petition, including whether the second exception under Lackawanna County District Attorney v. Coss,532

U.S. 394,405-06 (2001), applies to this case. The Court also **GRANTS** his IFP motion. ... Further, the Court directs the Clerk's office to appoint counsel to represent Bowling in this appeal.") See Bowling v. White,No. 15-6318,at Document: 13,at pp. 2-3.

Contrary to Respondent's Brief in Opposition that stated "Sixth Circuit Court granted Bowling a certificate of appealability on only the following specific questions...." That is not accurate. Had opposing counsel used the word "categories" instead of the word "questions" that would have been accurate. The two categories 6th Circuit granted COA on is:

I. Whether Bowling was "in custody" under 28 U.S.C. § 2254(a) when he filed his petition for writ of habeas corpus in 2012?

II. Whether the second exception in Lackawanna County District Attorney v. Coss,532 U.S. 394,405-406 (2001), applies to this case?

See Respondent's Brief, at i. The first category is in **general** for Bowling to show what is necessary that he is "in custody." That general category opened the door for Bowling's questions. The second category is **specific** that the Court wanted briefed about second exception to Lackawanna County.

I.] MAY BOWLING'S § 2254 PETITION, GAVE DEFERENCE TO WHICH PRO SE LITIGANTS ARE ENTITLED, HAINES V. KERNER,404 U.S. 519 (1972), BE CONTRUED AS ASSERTING A CHALLENGE TO THE 1992 [CAPITAL] LAUREL COUNTY CASE [CONVICTION & SENTENCE], HE IS CURRENTLY SERVING, AS BEING ADVERSELY & UNCONSTITUTIONALLY AFFECTED BY CONSTITUTIONALLY INVALID ROCKCASTLE COUNTY CASE [EVIDENCE] WHICH "HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT," BRECHT V. ABRAHAMSON,507 U.S. 619,623 (1993), SATISFY § 2254(a) "IN CUSTODY" REQUIREMENT, SEE, MALENG V. COOK,490 U.S. 488,493-494 (1989); LACKAWANNA COUNTY DIST. ATTORNEY V. COSS,532 U.S. 394 (2001); AND/OR, GARLOTTE V. FORDICE,515 U.S. 39 (1995)?

II.] IS IT POSSIBLE A PRO SE LITIGANT MAY BE GAVE DEFERENCE UNDER HAINES V. KERNER,404 U.S. 519 (1972), FOR NOT FILING SOONER WHEN THE TRIAL COURT FOR TEN (10) YEARS [NO MATTER HOW MANY REQUESTS WERE MADE FOR IT TO RULE] REFUSED WITHOUT JUSTIFICATION TO RULE ON HIS CONSTITUTIONAL CLAIMS, TO BE HELD "IN CUSTODY" UNDER § 2254(a), AS ASSERTING A CHALLENGE TO THE 1992 [CAPITAL] LAUREL COUNTY CASE

[CONVICTION & SENTENCE], HE IS CURRENTLY SERVING, AS BEING ADVERSELY & UNCONSTITUTIONALLY AFFECTED BY CONSTITUTIONALLY INVALID ROCKCASTLE COUNTY CASE [EVIDENCE] WHICH "HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT," BRECHT V. ABRAHAMSON, 507 U.S. 619,623 (1993), SATISFY § 2254(a) "IN CUSTODY" REQUIREMENT, SEE, MALENG V. COOK,490 U.S. 488,493-494 (1989); LACKAWANNA COUNTY DIST. ATTORNEY V. COSS,532 U.S. 394,405 (2001): AND/OR, GARLOTTE V. V. FORDICE,515 U.S. 39 (1995)?

III.] DOES SHOWING THE FACTUAL PREDICATE FOR 16 OUT OF 30 OF BOWLING'S HABEAS CLAIMS [IN ROCKCASTLE COUNTY CASE] COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE; AND THE FACTS UNDERLYING THESE 16 CLAIMS, IF PROVEN AND VIEWED IN LIGHT OF THE EVIDENCE AS A WHOLE, WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT, BUT FOR CONSTITUTIONAL ERRORS, NO REASONABLE FACTFINDER WOULD HAVE FOUND BOWLING GUILTY AND/OR CASE AGAINST HIM WOULD HAVE BEEN DISMISSED WITH PREJUDICE [CLEARING BOWLING OF ANY WRONGDOING IN ROCKCASTLE CASE] - ESTABLISHING KRE 404(b) WOULD NOT AUTHORIZE USE OF ROCKCASTLE CASE [EVIDENCE] BEING INTRODUCED BY PROSECUTION INTO [CAPITAL] LAUREL COUNTY TRIAL - ESTABLISHING USE OF SAID EVIDENCE "HAD A SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT," BRECHT V. ABRHAMASON,507 U.S. 618,623 (1993), SATISFY § 2254(a) "IN CUSTODY" REQUIREMENT, SEE, MALENG V. COOK,490 U.S. 488,493-494 (1989); LACKAWANNA COUNTY DIST. ATTORNEY V. COSS,532 U.S. 394,405 (2001); AND/OR, GARLOTTE V. FORDICE, 515 U.S. 39 (1995) - WHICH ESTABLISHES A NEW TRIAL WOULD HAVE TO BE GRANTED IN THE CAPITAL CASE?

IV.] DOES FOURTEENTH AMENDMENT'S DUE PROCESS & EQUAL PROTECTION APPLY TO 6TH CIRCUIT COURT MAJORITY DECISION, BOWLING V. WHITE,NO. 15-6318 (6TH CIR.,JUNE 8,2017), REGARDING ITS' § 2254(a) "IN CUSTODY" DETERMINATION & DECISION TO AFFIRM U.S. DISTRICT COURT, WHICH HAS UNCONSTITUTIONALLY SINGLED BOWLING OUT FOR DISPARATE TREATMENT & HAS SET A REALLY BAD STANDARD FOR ALL PRISONERS, STATES & HABEAS PETITIONERS, BECAUSE IT CONTRAVENES SETTLED PRECEDENT IN TWO AREAS: FIRST, BY GIVING "GREAT WEIGHT," ID. SLIP OP. 8,TO WARDEN'S "CONVENIENT LITIGATING POSITION" [WHICH HAS ZERO (0) SUPPORT FROM ANY CASE RECORD, CLAIMS: (A.) KDOC "RECALCULATED" ROCKCASTLE SENTENCE AWARDING IT THE 1,378 PRETRIAL CREDIT DAYS; (B.) KDOC HAS LISTED ROCKCASTLE SENTENCE START DATE AS 1989; (C.) KDOC HAS ROCKCASTLE SENTENCE LISTED "SERVED OUT"] & SECOND, FUNDAMENTALLY MISAPPREHENDS KENTUCKY LAW?

V.] DOES 6TH CIRCUIT COURT MAJORITY DECISION, BOWLING V. WHITE,15-6318 (6TH CIR.,JUNE 8,2017), WHICH GAVE "GREAT WEIGHT," ID. SLIP OP. 8, TO WARDEN'S LITIGATING POSITION, WHICH HAS CEMENTED THAT KDOC [THROUGH WARDEN RANDY WHITE'S LITIGATION POSITION] HAS MADE THE ROCKCASTLE SENTENCE "LONGEST UNEXPIRED TIME," KRS 532.120(1)(a), OVER LAUREL SENTENCES, UNDER KRS 532.120(4), IN ORDER TO TAKE THE LAUREL CASE TIME AND "RECALCULATE" IT TO THE ROCKCASTLE SENTENCE, MEAN BOWLING MUST NOW BE RELEASED IN THE [CAPITAL] LAUREL COUNTY CASE THAT KENTUCKY HAS LOST ITS' JURISDICTION AND RIGHT TO FURTHER HOLD BOWLING IN PRISON?

VI.] DOES A SUSPENDED OR STAYED SENTENCE SATISFY §2254(a) "IN CUSTODY" REQUIREMENT?

These questions/arguments now before this Court have been fairly presented to 6th Circuit Court. The 6th Circuit Court granted COA based on Bowling's pro se document entitled,"BOWLING'S APPLICATION FOR CERTIFICATE OF APPEALABILITY," in Bowling v. White,No. 15-6318,at Doc: 12. It also saw what Bowling filed in District Court pro se document entitled,"PETITIONER'S PRO SE MOTION FOR THE COURT TO RECONSIDER ITS' ORDER & JUDGMENT AND GRANT CERTIFICATE OF APPEALABILITY IN THIS CASE," mailed on December 17,2015 (That COA request in District Court Bowling attached seven (7) things: (1) CPP 17.4; (2) CPP 28-01-08; (3) DOC response dated 7-7-2014; (4) DOC response dated 5-23-2014; (5) DOC response dated 3-20-2012; (6) DOC response dated 2-14-2012; (7) Bowling's 2011 Resident Record Card), in Bowling v. White,No. 6:12-cv-00189-ART-HAI (U.S. Dist. Ct.). The 6th Circuit Court knew based on the case and these documents the necessity in GRANTING a Certificate of Appealability (COA) in the manner it did - First part (general way) to raise whatever is necessary to show "in custody" and second part (specific way) to litigate second exception to Lackawanna County does apply to Bowling's case.

Bowling was allowed to file pro se brief at 6th Circuit Court entitled, "BRIEF FOR PETITIONER-APPELLANT," in Bowling v. White,No. 15-6318, at Doc: 14,filed May 12,2016. Bowling attached the whole brief to his certiorari petition now before this Court. See Bowling's cert petition, Appendix at M1-M128. There are things present in it not raised in attorneys brief.

Bowling was appointed counsel at 6th Circuit Court. They filed a brief entitled,"BRIEF FOR PETITIONER-APPELLANT RONNIE BOWLING," on August 19,2016.

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INTRODUCTION

Contrary to respondent's brief in opposition, this is an important case about administration of criminal justice affecting [all] prisoners,Department of Correction(s),Federal Bureau of Prison(s), States, 42 U.S.C. § 1983 actions, and 28 U.S.C. § 2254 habeas corpus. It is about fundamental Constitutional law,well-settled Supreme Court cases that [all] U.S. Court of Appeals are in harmony with [included 6th Circuit until Bowling's case]. Sixth Circuit [majority] has so far departed from the usual course of judicial proceedings it threatens to erode federalism and do substantially prejudicial harm across the Nation. It has singled Bowling out for disparate treatment allowing the opinion to stand shall open the door to individuals & agencies to take positions for sake of litigation alone. It greatly conflicts with this Court & every U.S. Court of Appeals: (1) Gave "great weight" to "convenient litigating position" of Warden's lawyers (respondent) which has zero (0) support from any case record that in fact [all] records strongly proves the complete opposite; (2) It failed to give effect to both provisions of KRS 532.120(3) & "administrative remedies" Bowling fully exhausted under Kentucky Department of Corrections Policy & Procedure (CPP) 17.4 & CPP 28-01-08(II) which is authorized under KRS 532.120(9), Winstead v. Com.,327 S.W.3d 479,483,489-491 (Ky. 2010) and other law; (3) It has failed to recognize the "core purpose" of habeas corpus is a successful challenge to Rockcastle case in habeas would establish Bowling is ACTUALLY INNOCENT of any wrongdoing in Rockcastle County case,as well as, ACTUALLY INNOCENT of any wrongdoing in (capital) Laurel County case. That a successful challenge would prove prosecution's star witness (Ricky Smith) lied, set up the scene, [p l a c e d] his pistol [same one alleged was used in Laurel case], lead police straight to it. This evidence would be foreclosed from use in capital case establishing a reasonable jury would conclude Ricky Smith lied & that was Ricky Smith's roadside pistol.

There are places in respondent's statement of the case that is not accurate and misquotes and mischaracterizes things happened in lower courts.

ARGUMENT

I. CONTRARY TO RESPONDENT'S BRIEF IN OPPOSITION CLAIMING THIS CASE DOES NOT INVOLVE A "CAPITAL CASE." THAT IS NOT ACCURATE. THIS IS CORRECTLY LISTED AS "ADVERSELY AFFECTED 'CAPITAL CASE'."

The "Rockcastle County case" from 6th Circuit, Bowling v. White,No. 15-6318 (6th Cir. June 8,2017), originating case Bowling v. White,6:12-cv-189 (U.S. Dist.), Bowling's Pro Se §2254 petition,gave deference which Pro Se litigants are entitled,Haines v. Kerner,404 U.S. 519 (1972) is asserting a challenge to "(capital) Laurel County case" [conviction & sentence] currently pending in Sixth Circuit,Bowling v. White,No. 12-6301 & 12-6403,originated Bowling v. Haeberlin, 6:03-cv-28 (U.S. Dist.), that has been adversely & unconstitutionally affected by constitutionally invalid Rockcastle case [evidence]. It unconstitutionally "enhanced" [made greater] prosecution's case/evidence having substantial and injurious effect or influence in determining the jury's verdict [and sentence] in (capital) Laurel case. See Maleng v. Cook,490 U.S. 488,493-494 (1989). In Lackawanna County Dist. Attorney v. Coss,532 U.S. 394,405 (2001) the Court held: ("Whatever such a petitioner must show to be elgibile for review, the challenged prior conviction must have adversely affected the sentence that is the subject of the habeas petition.") From this perspective Bowling states a successful challenge to the Rockcastle case habeas petition would establish ACTUAL INNOCENCE of any wrongdoing in Rockcastle case, as well as, ACTUAL INNOCENCE in the (capital) Laurel case. It would bar further prosecution because no reasonable prosecutor would seek re-trial after it has been proven Bowling did not have a gun, that in fact the prosecution's star witness (Ricky Smith) possessed and [p l a c e d] his pistol with serial numbers **C 8 7 9 5 6** onto the roadside. The same pistol which was said to of been "ballistically" linked to the (capital) Laurel County case but that the bullets were (alleged) been too destroyed in Rockcastle case to be.

Had it not been for Constitutional errors "rising to the level of jurisdictional defect, which therefore warrants special treatment among

alleged constitutional violations," Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001), at *395. In Bowling's habeas petition raised 30 claims. Claims 16 & 17 is about Bowling's pro se 8-page motion to remove his trial counsel, appoint another lawyer, or let Bowling be his own counsel under Faretta v. California,422 U.S. 806 (1975). Trial counsel & Bowling had a major conflict that further widened when he told Bowling he was recording their calls for the prosecutor. Trial counsel failed to do anything about Bowling's motion and the trial court refused to take him off the case or hold a Faretta hearing. This is a jurisdictional defect that would require a new trial. However a reasonable probability exists there would be no trial that no reasonable prosecutor in light of the evidence now [that was not turned over by prosecutor nor located by trial counsel] proves Bowling is ACTUALLY INNOCENT, proves Ricky Smith lied, over reacted and shot an unarmed Ronnie Bowling, then out of concern for being prosecuted, sets the station to make it appear shots were exchanged, then [p l a c e s] his pistol on roadside, leading police straight to where he put it. This establishes ACTUAL INNOCENCE in (capital) Laurel County case.

It would bar further prosecution because Bowling did NOT have a gun and did NOT shoot at Ricky Smith [alleged Rockcastle case victim]. That police/lab reports [not turned over by prosecution or located by trial counsel] proves the gun had zero (0) scratches on it. It is physically impossible to been going speeds (alleged) over 100 mph and [t h r o w] a pistol onto the roadside and it not get at least one scratch. It would have bounced,rolled,scooted,and slid before coming to a stop. These reports proves Bowling's defense - that Ricky Smith [p l a c e d] his pistol onto the roadside before [or soon after] he called in the alleged incident. A [p l a c e d] pistol would not have scratches where a [t h r o w n] pistol would have scratches. See Bowling's pro se habeas petition,No. 6:12-cv-189,at R.1,its' Attach. 3 (this lab report,in part,states: "After a visual

examination of the weapon, I could not see any friction skin detail on it." Otherwords, NO scratches). Physics proves MASS (pistol) times SPEED (alleged speeds over 100 mph) = **A reasonable probability that a thrown weapon at that speed would get at least one scratch.** See,Bowling's habeas (Brady/Strickland claims).

Smith has a criminal record,Commonwealth v. Ricky K. Smith,No. 93-M-00347 (Ky.,Rockcastle Dist. Ct.)(convicted of: carrying concealed deadly weapon,drug paraphernalia,possession of marijuna). The pistol Smith had concealed from police had serial numbers **J 9 3 3 0 9 2.** It is the identical twin pistol to Smith's roadside pistol with serial numbers **C 8 7 9 5 6.** Both pistols: (1) were .38 caliber; (2) were Smith & Wesson; (3) were revolvers; (4) were manufactured in 1983; (5) had same "blue" finish on each. These are indisputable FACTS from Clerk's office. See FRE 201(b)(2); FRE 201(d),(e),(f). [None of this information was turned over by prosecution or located by trial counsel]. It is Ricky Smith that needs to explain how he came to be in possession of the pistol used in capital case that he [p l a c e d] on the roadside. It is common especially back in 1989 (time of alleged incident) especially in Eastern,Kentucky,for people to stop at gas stations (even outside of courthouses) and trade guns,knives,dogs and all kinds of things. Bowling use to see old men sitting outside the courthouse when he was a boy whittling on wood with their knives,trading and swapping stories doing that very thing. It is possible somebody stopped at Ricky Smith's station that possessed the .38-caliber pistol (alleged to been used in Laurel County case) and traded or sold it to Ricky Smith. Smith did testify in Laurel County case trial in 1992 that he is fond of .38 pistols. It is possible that a person sold Smith an identical twin pair of .38 caliber pistols. Or that Smith already had the one and just had to have the other to go with it. In Bowling's Rockcastle RCr 11.42 proceedings, he pointed out that Smith did not just own the .38 Colt pistol but this other .38 pistol serial number J933092. See,Habeas Claim 13.

Many other police records and documents not gave in discovery or located by counsel proves the alleged roadside gun first found had serial numbers **1 0 3 7 5 6.** See Bowling v. White,No. 6:12-cv-189,R.1,at Attach. 2 [This case at Dist. Ct. Bowling's pro se habeas petition, attached a report signed in black inkpen the full name of Kentucky State Police Staff Sgt. Milton Baker who was in charge of evidence storage]. Sgt. Milton's report shows the weapon gave to him to be stored had serial number 103756. This set of serial numbers was reported by Sgt. David Biggerstaff & Det. Larry Lewis in two seperate reports. No evidence by prosecution [or anyone] has ever been produced to allege the pistol with serial numbers 103756 was ever used in any crime including Laurel & Rockcastle Counties cases. At Bowling's trial in Rockcastle case in 1996 a defense witness testified that him and another person were returning from Richmond,Kentucky,with a load of alcohol. The other person in the truck with the defense witness (who was deceased at time of this trial) owned that pistol with serial number 103756 and was a convicted felon. They saw several police cars and decided to throw the gun out. That gun (serial number 103756) was found and documented by three (3) seperate police personnel: (A.) Det. Larry Lewis; (B.) Sgt. David Biggerstaff; and (C.) Staff Sgt. Milton Baker. See Respondent's brief,at pp. 3-4 (discusses Rockcastle case "direct appeal" and this defense witness testimony). See, Habeas Claim 4.

When police interview Smith at Kentucky State Police Post (Laurel County,KY) on February 25,1989,at 8:50 a.m.,less than three hours after the 6:00 a.m. incident. Police ask Smith,"did you see the gun he had? Could you tell what kind of gun it was?" Smith replied,"No sir." See Bowling's Laurel case postconviction proceedings, Petition for Rehearing filed June 21,2002, Appendix at 47. See also Rockcastle RCr 11.42 motion at 5-6,16-18 and Appendix at 25. In the interview, Smith did tell police,"uh,if you don't find his weapon,it's a good possibility that he could've throwed it up there behind the station when he got in his car,

or it could be down the roadway there, down below the station. I'll look when I get back if you all, you know if don't, you know, if you don't find his weapon...." Id. Laurel case, at 47. See also Rockcastle RCr 11.42 motion at 22-24,Appendix at 25.

After Ricky Smith returned from his interview. He did exactly that. He went to the roadside where he [p l a c e d] his weapon and saw they did not locate it. It was 12:15 p.m.,over six hours after the alleged incident, Smith showed them where the pistol was on roadside. It was a blue finished Smith and Wesson .38 caliber revolver, serial number **C 8 7 9 5 6.** See Laurel TE 19,2812,2825,2828, 2845,2852. **No police officer or anyone ever testified they saw Bowling throw a gun from his car.** See Laurel TE 19,2829,2839.

Police only testified they saw two brown objects [not thrown] but "ejected" from Bowling's car. After Bowling's arrest, at 8:00 a.m. they returned to that spot and found a pair of old jersey thick wool work gloves. See Laurel TR 1,18; TE 20,3053,3060. That was the only point in the beginning of following Bowling did any officer testify as seeing anything from Bowling's car. Those gloves were tested and there was no gun powder residue on them. See Bowling v. White,No. 6:12-cv-189,at R. 1, Attach. 4 (Rockcastle case, pro se §2254 petition District Court, lab report not turned over by prosecution or located by trial attorney reads: "Exhibit 1 [Pair of gloves] was examined microscopically and processed chemically for the presence of gunshot residue,**but none were found.**") (Emphasis added). On day of Bowling's arrest, he gave two statements. A written statement then a taped statement. In taped statement Bowling was asked about the gloves. He told them he worked for his Dad in his store ("Bowling's Used Appliances") dealing with washers, dryers, refrigerators,and stoves. Bowling helped to carry (by hand) those things in & out of the store. Anyone ever carried one knows the bottom side has a sharp metal edge and will cut into the hand and needs gloves. It was winter time and carrying those things in and out. Bowling always kept a couple pairs

of gloves in his car. One on dashboard above steering wheel, the other in the glovebox. Bowling did N O T throw anything from his vehicle. A chance those work gloves blew out his window. After Bowling got shot in head & hand by Smith. Bowling to avoid being shot more left the station as fast as he could [by pure instinct]. Down the road a little piece Bowling saw himself in the rearview mirror all the blood on his face, neck,hair,shirts,hands,and pants. He rolled down his window so that cold air could blow on him to slow his blood down so he could get home; that is all that would register in Bowling's mind. He was a 20-year-old kid with organic that was caused from a lifetime of traumatic brain injuries that begun as an infant of 9-months-old with a skull fracture. Then around toddler age-of-2, that continued right up to shortly before his arrest. It would take an expert in neuropsychology to explain this better than that. See, Habeas Claim 27.

The gloves actually exonerates Bowling. It is physically impossible to have a thick, wool pair of jersey work gloves on and even get the finger through the trigger guard of a pistol. If they claim Bowling had those on this exonerates him. The pistol Smith lead them to was located in entirely different area.

More evidence not turned over by prosecution or located by trial counsel was ten (10) photographs in color ("mug shots") taken of Bowling on the morning of his arrest. By the time photographs were took they had gave Bowling a papertowel to wipe away the blood. It shows blood and dried blood on his face, hair, shirts, pants, and hands. These photographs exonerate Bowling because being shot in the head and a second shot in the hand with that much blood it is physically impossible to have drove around 10 miles below the station and [t h r o w] that pistol out and it not get at least one drop of blood on it. See, Habeas Claims 21,24,25 & 27. Also see, Bowling's cert petition,its' Appendix at P1-P42 (16 Habeas Claims "Factual Predicate" Narrative Summary).

Smith was already on the edge due to recent events (2 gas station attendants in Laurel County case alleged killed/robbed). Smith was armed to the teeth with

guns and on look out for any suspicious person and any suspicious behavior. When in walks this 20-year-old kid who he had never met named Ronnie Bowling. Bowling's questions & behavior was not motivated by guilt but was ACTUALLY INNOCENT behavior for a kid with organic brain damage. But Smith did not know that. This lead to that critical moment as Bowling was leaving the station. Stopped a second to zip his jacket (it is February 25,1989,middle of Winter,in Eastern,Kentucky). Smith testified about this moment in the (capital) trial, saying that he **"could see something was f o r c i n g [Bowling] to do something he was t r y i n g t o h o l d b a c k from doing."** See Laurel TE 19,at 2774. Smith's motto, "shoot first and ask question later" is exactly what he did at that moment. Out of the corner of Bowling's eye he saw Smith (whom had kept his left hand in his green coverall pocket the whole time) within a flash pulled his left hand out with a gun then instantly switched to his right hand and blindly began shooting at Bowling while simultaneously jumping into a small joining room. Bowling got shot in head (and hand). See, Habeas Claim 27,also see, cert petition Arguments 1-3.

Smith testified when he heard Bowling's engine start, that he [Smith] "came out, running out of the station trying to get to him." See Laurel TE 19,2775. Smith further stated, Bowling "back out" of the driveway "as fast as he could possibly back the car and didn't even stop" at Highway 24 "to see if any traffic was coming." Id. That Smith came out of the station continuing to fire shots shots at Bowling. See Laurel 19,2775-76. This exonerates Bowling. No person intending on attempting to murder a person at a public place in high traffic area is going to pull their car straight into the station and turn the engine off. It would take far too much time to get away. If they alleged Bowling had just done two other crimes like that in Laurel County a person gets better with experience not worse. It proves no intent of murdering Smith. What if the car would not start? To start it up, put it in reverse, stop, put in drive to leave. An experienced person in crime would NOT do that.

Smith testified he saw blood were Bowling stood, blood trailing onto the sidewalk, and hair and skin on the ceiling. See Laurel TE 19,at 2776. Smith soon realizes he has probably just killed or seriously wounded and unarmed person. Out of concern for being prosecuted himself, sets up the station to make it appear shots were exchanged, drive down road about 10 miles [p l a c e s] his pistol onto the roadside. That was a BIG mistake on Smith's part by [p l a c i n g] the weapon. A placed weapon would not get scratches were a thrown weapon would get scratches. MASS (pistol) times SPEED (alleged thrown from car while going speeds over 100 mph) = A reasonable probability exists that pistol would have got at least one scratch.

Ricky Smith lied. He is totally discredited. See, Habeas Claim 6 & 21. He gave four (4) substantially inconsistent stories: (1st) on day of Bowling's arrest [2/25/89] when ask about gun identification directly by police if he could identify it. He said no; (2nd) on very next day [2/26/89] they called him again asking about gun identification. This time he said Bowling kept his hands in his pockets and could not see it. That was a lie. It was Smith that kept his left hand in his green coverall pocket; (3rd) at Bowling's Laurel case trial in 1992, he testified he saw "about half" of a gun "or less." See Laurel 19,2786,2812, 2825,2828,2842,2852. Notice how Smith went from zero gun identifiction to now a partial identification. Then in his (4th) story at this Rockcastle trial in 1996. He said the gun on the roadside looks like the gun. All lies by Smith.

Bowling is ACTUALLY INNOCENT in Rockcastle & Laurel cases. Habeas relief successful in Rockcastle case would establish prosecutor's star witness (Ricky Smith) lied, over reacted shooting unarmed Ronnie Bowling, concerned about being prosecuted, sets up the scene to appear like shots exchanged, [p l a c e s] his pistol [serial no. C87956 that is said to been used in Laurel case] on roadside, leads police straight to it. Bowling is "in custody" under Maleng v. Cook,490 U.S. 488,493-494 (1989) & Lackawanna County Dist. Attorney v. Coss,532 U.S. 394 (2001). KRE 404(b) must yield to Dowling v. United States,493 U.S. 342,n.5 (Jan.

10,1990), Bowling has shown (Ricky Smith testimony & Ricky Smith's roadside pistol would be foreclosed from being used in (capital) Laurel County case. That use of that evidence "had a substantial and injurious effect or influence in determining the jury's verdict," Brecht v. Abrahamson,507 U.S. 619,623 (1993). A reasonable jury would conclude Ricky Smith lied,set up the scene and [p l a c e d] his pistol. This would bar prosecution because no reasonable prosecutor would seek to re-try this case when Bowling has proven ACTUAL INNOCENCE.[fn1]

II. RESPONDENT HAS CONCEDED THAT IT WOULD BE OPEN TO ACCEPTING KENTUCKY DEPARTMENT OF CORRECTIONS (DOC) POSITION ON BOWLING'S ROCKCASTLE COUNTY SENTENCE POST KENTUCKY SURPEME COURT ANSWERING THE QUESTION OF LAW IN BOWLING V. WHITE,NO. 2014-SC-235, 480 S.W.3d 911 (KY. SEPT. 24,2015, REH. DEN. FEB. 18,2016). BOWLING DID THAT VERY THING.

"Administrative remedies" to Kentucky prisoners authorized by KRS 532.120(9) that allows under Kentucky Correctional Policy & Procedure (CPP) 17.4 & CPP 28-01-08(II)(A)(2),(6). These policies are by reference in Kentucky Administrative Regulations and treated as such. 501 KAR 6:020. See Bowling's cert petition,at its' Appendix M39-M45. Those are KY DOC responses post decision by Ky. S.Ct. Which lead to KY DOC responses dated April 19,2016 & April 4,2016. See, Bowling's Reply Brief,at Appendix A1, B1 (those 2 DOC letters).

In records dating back before Bowling filed habeas petition,after District Court dismissed petition for lack of jurisdiction, including post decision by Ky. S.Ct. the DOC has consistently asserted, based based on full authority gave

Footnote 1 - Bowling v. White,No. 15-6318 (6th Cir,June 8,2017),Doc: 38-2/Slip Op. 14, the Court held: ("Moreover, because Bowling currently has a seperate § 2254 habeas petition pending before this court in which he explicitly challenges the constitutional defects in his Laurel County conviction, interpreting his petition in this manner is duplicative and would require dismissal under 28 U.S.C. § 2244."). The 6th Circuit has misunderstood § 2244. This would not be duplicative because it does not raise the same "constitutional defects" as raised in (capital) Laurel County case. Bowling v. Haeberlin,6:03-cv-28 (Dist. Ct.) (Laurel habeas raised 68 claims). Out of 68 claims none except 4 [Claims 3,22,59 & 64] mention the Rockcastle case. None of these 4 claims argues that proving ACTUAL INNOCENCE proving Ricky Smith lied, set up the scene and [p l a c e d] his pistol on roadside leading police straight to it would foreclose under Dowling the use of Ricky Smith testimony & Ricky Smith's roadside pistol in the trial. That prosecution would be barred [because no reasonable prosecutor would seek to re try the case] after ACTUAL INNOCENCE has been proven in this manner.

by KRS 532.120(3);KRS 532.120(9);501 KAR 6:020; CPP 17.4;CPP 28-01-08(II)(A)(2),(6); Winstead v. Com.,327 S.W.3d 479,489-491 (Ky. 2010) and 14th Amend.,U.S. Const'n, have held: **(A.)** Bowling got pretrial credit 1,378 days in Laurel County case & zero (0) in Rockcastle case; **(B.)** The Rockcastle sentence concurrent to Laurel sentence although final judgment entered May 7,1996 in Rockcastle case its' start point would be Dec. 9,1992, when final judgment was entered in Laurel case. KRS 197.035; KRS 500.110(2); KRS 532.120(1); And, **(C.)** Rockcastle sentence "will be be satisfied upon completion of your Death sentence." KRS 532.120(1)(a),(b). All DOC responses [in essence] say these same things (shown in (A),(B) & (C) above). The FACT warden's lawyer now has conceded the 6th Circuit Court should have accepted these 2 DOC letters[post Kentucky Supreme Court answer] when moved to do so. The 6th Ciruit held the April 19,2016 letter "indicat[ed] that,pursuant to KDOC policies, Bowling was awarded pre-trial custody credit on only his Laurel County sentences because it was the indictment sentenced first," and that this letter was Bowling's "strongest piece of evidence." Slip Op. 8 n.2. Nevertheless, the panel rejected Bowling's request to supplement record to include it, because was not in District Court record [because it was issued by DOC after District Court issued its decision] and because majority said the letter would not be "dispositive," rather "further[] the ambiguity in the record." Id. That is just wrong. Nothing in record is inconsistent with April 19 letter. Only supposedly contradictory document panel cites is March 2012 letter the majority mischaracterized as stating Bowling's Rockcastle sentence has been listed by DOC as "served out." Slip Op. 8. That is not what the letter said. It was referring to KRS 532.120(4) that if Bowling's Laurel conviction were vacated,Rockcastle sentence would be recalculated and would, upon recalculation, be deemed served out. Rather than contradict April 19 letter (and April 4 letter) it would have "establish[ed] beyond any doubt the proper resolution" of the issue, the panel erred in declining to supplement the record to include it. Inland Bulk Transfer Co. v. Cummins Engine Co.,332 F.3d 1007,1013 (6th Cir. 2003). Tolan v. Cotton,134 S.Ct. 1861,1867-1868 (2014)(per curiam)(It "failed properly

to acknowledge key evidence offered"....).

Based on respondent's brief, at p. 11, where the opposing party to this case concedes to DOC positions post Ky. S.Ct. decision, that is strong evidence that 6th Circuit should have acknowledged key evidence offered by Bowling (2 DOC respones).

III. UNDER KENTUCKY LAW KRS 197.035,KRS 500.110(2),KRS 532.120(1),BROCK V. SOWDERS,610 S.W.2d 591,592 (Ky. 1980),"WHEN SENTENCES ARE TO RUN CONCURRENTLY - - WHEN DO THEY START AND WHEN DO THEY END?" THE ROCKCASTLE 20-YEAR-SENTENCE ALTHOUGH FINAL JUDGMENT WAS NOT ENTERED UNTIL MAY 7,1996, IT WOULD RELATE BACK IN TIME TO WHEN FINAL JUDGMENT WAS ENTERED IN LAUREL CASE WHICH WAS DEC. 9,1992, AS START DATE, MEANING WHEN BOWLING FILED HIS PETITION SEPT. 6,2012, HE WAS "IN CUSTODY" UNDER MALENG V. COOK,490 U.S. 488 (1989).

Bowling's Resident Record Card,see, his cert petition,at Appendix M65-M68 showing "Sentence Start Date: 12/09/1992" [not back in 1989]. Straight up Bowling is "in custody" and the 6th Circuit panel majority should be summarily reversed. Grady v. North Carolina,135 S.Ct. 1368,1370 (2015)(summarily reversing lower court decision was inconsistent with Fourth Amendment precedent). Dillingham v. United States,423 U.S. 64,65 (1975)(per curiam)(finding 5th Circuit's reading of United States v. Marion,404 U.S. 307 (1971). The Court has a duty to intervene to prevent this erosion of precedent. See,e.g.,Bristol-Myers Squibb Co. v. Superior Court of California,137 S.Ct. 1773,1781 (2017)(finding "difficult" to square with [its] precedents" a California Supreme Court decision that held plaintiff could obain personal jurisdiction over business entity despite no connection between underlying controversey and the forum state). Tolan v. Cotton,134 S.Ct. 1861,1867-1868 (2014) (per curiam).

IV. PERMITTING THE DECISION BELOW TO STAND WOULD ALLOW STATES TO EFFECTIVELY STRIP FEDERAL COURTS OF JURISDICTION TO HEAR FEDERAL HABEAS PETITIONS.

In favoring the litigating position advanced by Warden's lawyers over the position actually held by DOC itself, the panel effectively allowed Commonwealth of Kentucky to strip federal courts of jurisdiction to hear Bowling's federal constitutional claims. If the majority's decision is allowed to stand,that would

permit state agencies to immunize themselves from federal judicial oversight by strategically shifting their litigating postures.

The question of whether a person is "in custody" is ultimately a question of federal court jurisdiction. See,e.g.,Maleng v. Cook,490 U.S. 488,490-91 (1989). Federal courts must independently assert their jurisdiction,or lack thereof,absent any urging of the parties. Mitchell v. Maurer,293 U.S. 237,244 (1934)("An appellate federal court must satisfy itself ... of its own jurisdiction."). For this reason, questions of whether a person is "in custody" or not have long been determined by the federal courts,not by the states. See,e.g.,Hensley v. Municipal Court,411 U.S. 345,351 (1973)(holding that petitioner was in custody for purposes of the habeas corpus statute despite being released on his own recognizance pending execution of his sentence); Justices of Boston Municipal Court v. Lydon,466 U.S. 294,300-01 (1984)(holding person in custody for purpose of habeas statute even though conviction vacated and release on personal recognizance). The record in this case leaves no doubt warden's lawyer position was adopted solely for litigation purposes. CPP 28-01-08 states,"any applicable credit **shall be applied to the indictment which is sentenced first.**" CPP 28-01-08(II)(A)(2) (emphasis added). When felony detainments overlap, **"one indictment shall receive credit while the other indictment shall have fewer or zero (0) days credit.**" CPP 28-01-08(II)(A)(6) (emphasis added). Bowling was sentenced first in Laurel County--thus all pretrial credit was appropriately applied to that indictment.

It also muddies the bright-line rule that "[d]eference to what appears to be nothing more than an agency's convenient litigating position [is] entirely inappropriate." Bowen v. Georgetown Univ. Hosp.,488 U.S. 204,213 (1988).

Also the 6th Circuit panel majority failed to give effect to KRS 532.120(3) & "administrative remedies" under KRS 532.120(9); CPP 17.4; CPP 28-01-08(II)(A)(2),(6),Winstead v. Com.,327 S.W.3d 479,483,489-491 (Ky. 2010). The policies do NOT conflict with statute but compliments it. Nat'l Labor Relatons Bd. v. Jones & Laughlin Steel Corp.,301 U.S. 1,30 (1992)-("[S]o long as there is 'no positive

repugnancy'" between the two provisions, "court(s) **must** give effect to both") (emphasis added). Sixth Circuit panel majority failed to do that.

Chief Judge Roberts in Jones v. Brock,127 S.Ct. 910 (2007) held:

> ("No action shall be brought with respect to prison condiction [42 U.S.C. § 1983], **or any other Federal law**, by a prisoner confined in any jail,prison, or other correctional facility until such **administrative remedies** as are exhausted." 42 U.S.C. § 1997(a)).

Bowling did that before filing habeas petition, another while it was pending, and after Kentucky Supreme Court's decision. [All] DOC responses strongly proves the opposite of warden's lawyer's "convenient litigating position."

The 6th Circuit panel majority decision has annnihilated prisoners' right to "administrative remedies" so that a single warden of one institution is no longer subject to the appeal process of administrative remedies. In this case Warden Randy White's boss is Central Office that speaks for all DOC and they state the complete opposite of warden's lawyer's convenient litigating position. This shall not only affect 28 U.S.C. § 2254 but also prisoners exhausting administrative remedies for a 28 U.S.C. § 1983. It has turned the appeal process upside down. Where no longer is the lower decision is subject to the higher appeal decision.

V. UNLIKE [ALL] THE "MERGER STATUTE" CASES CITED IN RESPONDENT'S BRIEF, AT P. 13, CITING CONCURRENT CASES WHICH HAD BEEN LISTED "SERVED OUT" BY THE STATE, BOWLING'S CASE IS UNDER BOTH "MERGER" & "AGGREGRATE" BY KRS 532.120(1)(a),(b), AND [ALL] DOC RESPONSES PROVES THAT BOWLING'S SENTENCE IS NOT "SERVED OUT" IT IS STAYED OR SUSPENDED UNTIL THE DEATH PENALTY IS RESOLVED. THE WAY A PROPERLY FILED STATE ACTION CAN "TOLL" ONE-YEAR LIMITATION ON FILING PETITION, A STAYED OR SUSPENDED SENTENCE SHOULD SATISFY THE § 2254(a) "IN CUSTODY" REQUIREMENT.

"You are serving an **aggregate** sentence of death to which your Rockcastle 89CR0027 is running concurrently and will be satisfied upon the completion of your death sentence." See,Bowling's cert appendix M57 (DOC response 7-7-14). "This mean that your Rockcaste sentence will not be satisfied until your death sentence is,...." See,Bowling cert appendix M59 (DOC response 5-23-14). Then DOC response cites KRS 532.120(2)(a) [concurrent merger statute], (b) [consecutive aggregate statute] and state: ("You now have an **aggregate** term Death.") See,Bowling's cert

appendix M63. **Unlike** [all] merger statute cases cited by respondent is Bowling's case: **(1)** Those cases were listed "served out" by DOC, Bowling's has not; **(2)**Those cases only dealt with concurrent merger sentences. DOC has Bowling listed under both sections,KRS 532.120(1)(a),(b); **(3)** Those states their DOC was not gave authority like KY DOC has by KRS 532.120(3) amended in 2011 replacing "by the court imposing the sentence" with "by the Department of Corrections." Winstead v. Com.,372 SW3d 479,483 (Ky. 2010),("The Executive Branch,in the form of the Department of Corrections --not the judicial branch--is ultimately responsible for determining when prisoners in its custody are eligible for release."); **(4)** Unlike those cases Bowling is sentenced to Death. These specific Kentucky law made DOC responses to Bowling law of the case. Just like a properly filed [state] action can "toll" § 2254 one-year clock,a stayed or suspended sentence should satisfy §2254(a) "in custody" requirement. Bowling is "in custody" under Maleng v. Cook,490 U.S. 488 (1989);Garlotte v. Fordice,515 U.S. 39 (1995); Lackawanna County Dist. Attorney v. Coss,532 U.S. 394 (2001); McVeigh v. Smith,872 F.2d 725,727 (6th Cir. 1989)-(A suspended or stayed sentence may satisfy the § 2254(a) "in custody" requirement).

C O N C L U S I O N

A successful challenge in habeas would establish ACTUAL INNOCENCE of any wrongdoing in Rockcastle case, as well as, ACTUAL INNOCENCE of any wrongdoing in (capital) Laurel case.

RESPECTFULLY SUBMITTED,

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Additional material from this filing is available in the Clerk's Office.