No. 17 A 1392

IN THE

SUPREME COURT OF THE UNITED STATES

2018

VIRGINIA S. CAUDILL, PETITIONER

v.

JANET CONOVER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THIS IS A CAPITAL CASE

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August 30, 2018

CAPITAL CASE

QUESTIONS PRESENTED

Virginia Caudill stands convicted of capital murder. The U.S. District Court for the Eastern District of Kentucky dismissed her Petition for Habeas Corpus and decided that no certificate of Appealability ("COA") would issue. The Sixth Circuit Court of Appeals granted Caudill's request for a COA on two issues, but ultimately affirmed the decision of the District Court. In this Petition, Caudill seeks review of the two issues considered by the Sixth Circuit, and of the denial of a COA on a separate issue.

I. In *Batson v. Kentucky*, 476 U.S. 79, 93 (1986), this Court held that in deciding whether the State has purposely discriminated in selecting jurors, the trial court "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." The question presented is whether the state court ruled contrary to or unreasonably applied *Batson* where, after Petitioner challenged the striking of eight white male jurors, the trial court expressed disbelief that white males are a "protected class" and immediately denied the challenges without conducting any inquiry into the credibility of the prosecutor's reasons for the strikes.

II. Where a habeas petitioner shows that trial counsel met with critical mitigation witnesses for the first time on the day of their testimony, spent only minutes to prepare them to testify, and did not meet with or even speak to an expert witness whose testimony trial counsel decided not to offer, were counsel's decisions to limit the mitigation investigation supported by reasonable professional judgments as required under *Strickland v. Washington?*

III. Whether the Sixth Circuit erred in denying Caudill a certificate of appealability on her claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the terms of a plea deal for an important witness.

LIST OF PARTIES

1. Virginia Caudill, Inmate Number 144124, K.C.I.W., P.O. Box 337, PeWee Valley, KY 40056-0337. Represented by Dennis J. Burke, 2202 Commerce Pkwy., Suite D, LaGrange, Kentucky 40031, and J. Robert Linneman, Santen & Hughes, LPA, 600 Vine St., Suite 2700, Cincinnati, Ohio 45202.

2. Commonwealth of Kentucky, Respondent. Represented by Hon. Matthew R. Krygiel, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

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The Decision of the United States Court of Appeals for the Sixth Circuit affirming the dismissal of Caudill's Petition for Habeas Corpus is reported at *Caudill v. Conover*, 881 F.3d 454 (6th Cir. 2018), and appended at Appendix A. The Order of the Sixth Circuit granting, in part, and denying, in part, Caudill's Application for a Certificate of Appealability is attached hereto as Appendix B.

The Decision of the United States District Court for the Eastern District of Kentucky dismissing Caudill's petition is set forth at Appendix C. The Opinion of the Supreme Court of Kentucky affirming Caudill's conviction on direct appeal is appended hereto at Appendix D. The Decision of the Kentucky Supreme Court affirming the denial of post-conviction relief under Ky. C.R. 11.42 is appended hereto as Appendix E.

The Sixth Circuit's order denying Caudill's Petition for Rehearing en Banc is set forth in Appendix F. The District Court's Order denying Caudill's Motion to Alter or Amend the Judgment is attached hereto as Appendix G.

JURISDICTION

On February 2, 2018, the Sixth Circuit Court of Appeals affirmed the dismissal of Caudill's Petition for Habeas Corpus *See* Appendix A. On April 2, 2018, Caudill's Petition for Rehearing *en Banc* was denied. See Appendix F. On June 21, 2018, Caudill's Application for Extension of Time to file an Application for Writ of Certiorari was granted by Justice Kagan pursuant to S. Ct. R. 13.5. That order extended the

time for filing until August 30, 2018. This Petition is filed in compliance with this Court's order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Sixth, Eighth, and Fourteenth Amendment of the Constitution of the United States, and 28 U.S.C. 2254(d).

The 6th Amendment to the United States Constitution provides, in pertinent part, as follows:

> **AMENDMENT VI**
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The 8th Amendment to the United States Constitution provides as follows:

> **AMENDMENT VIII**
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The 14th Amendment to the United States Constitution provides, in pertinent part, as follows:

> **AMENDMENT XIV**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves interpretation of **28 U.S.C. 2254(d)**, which provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (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.

STATEMENT OF THE CASE

A. Procedural History

Ms. Caudill's case comes before this Court after the dismissal of her Petition for habeas corpus by the District Court for the Eastern District of Kentucky, and the affirmance of the dismissal by the Sixth Circuit Court of appeals. The facts of Caudill's conviction were summarized by the Kentucky Supreme Court in Caudill's direct appeal as follows:

> Lonetta White, age 73, was bludgeoned to death in her home in Lexington, Kentucky, during the early morning hours of March 15, 1998. Her body was found in the trunk of her burning automobile in a field several miles away. Her home was ransacked and numerous items of personal property, including two guns, jewelry, and a mink coat were stolen. Appellants Caudill and Goforth admitted they were present at the commission of all of these crimes. Each, however, accused the other of murdering and robbing the victim and of setting fire to the automobile.

Caudill v. Kentucky, 120 S.W.3d 635, 648 (Ky. 2003)("Caudill I") (App. D).

Caudill and Jonathan Goforth were tried together. Goforth's account changed in at least one significant way during the course of the investigation. Initially, he claimed that an unidentified African-American man had assisted Caudill in the crime. *Caudill I*, 120 S.W.3d at 650. He admitted at trial that this claim was entirely fabricated. *Id.*

Ms. Caudill was convicted of murder, burglary in the first degree, robbery in the first degree, arson in the second degree, and tampering with physical evidence. TR 197-201. However, the jury made no finding as to which of the two defendants

actually committed the killing; both Ms. Caudill and Johnathon Goforth were convicted of "Murder--Principal or Accomplice." *Caudill I* at p. 666

Ms. Caudill was sentenced to death and was given the maximum sentences for the other convictions. TR 212-221. Her co-defendant, Johnathan Wayne Goforth, received the same sentences. *Caudill v. Commonwealth*, 120 S.W.3d 635, 648 (Ky. 2003) (App. D).

Ms. Caudill sought post-conviction relief in the trial court which was denied on all claims. The Kentucky Supreme Court affirmed. *Caudill v. Commonwealth*, No. 2006-SC-000457-MR, 2009 WL 1110398 (Ky. Oct. 29, 2009) ("Caudill II"), (App. E).

Caudill then sought habeas relief in the U.S. District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. § 2254, asserting eighteen grounds for relief. No. 5:10-cv-84, ECF #1. The District Court dismissed Caudill's petition and denied a certificate of appealability. Id., ECF #34.

Caudill filed her Application for Certificate of Appealability in the Sixth Circuit Court of Appeals, and that Court granted a COA on two issues. No. 14-5418, ECF #24-2. The Sixth Circuit affirmed the District Court's dismissal of the petition. *Caudill v. Conover*, 881 F.3d 454 (6th Cir. 2018) (App. A) and denied rehearing on April 2, 2018 (App. F).

B. Jury Voir Dire

Caudill's claim arose when her trial attorney raised a *Batson* challenge to the prosecution's use of eight out of nine peremptory strikes to remove white male venire members. The prosecutor argued that a *Batson* challenge was inapplicable to white

males. The trial judge similarly expressed his surprise at the challenge. In the Opinion at p. 3, the Panel cited the record of this colloquy as follows:

[Prosecutor]:	Are you saying men are a protected class? Is that what you're saying?
[Defense]:	Yes.
[The Court]:	White males?
[Defense]:	Well, I don't know if they're…
[Prosecutor]:	That's news to the rest of us.
[Defense]:	Well, we would just…
[The Court]:	Never had men. The only people excluded were white males.
[Defense]:	Look, well, we just for the record make that motion.
[The Court]:	I understand.

R. (DVD A-4 at 09:12:33 through 09:13:23).[1]

When the Prosecutor asked if he should respond, the trial judge responded, "[i]f you want to…. " The trial judge noted that the Prosecutor's response to the challenge was "just for the record." R.E. 47-5, Page ID# 734, ln. 22-26. The prosecutor then attempted to justify the eight peremptory strikes. When the prosecutor concluded, the trial judge spoke his ruling from the bench on all eight challenges at once, approximately three seconds after the prosecutor finished:

> If the appellate courts, for whatever magical reason, perceive white males to be a protected class, I think these are non-discriminatory reasons that would allow them to be struck. R. (DVD A-4 at 09:16:54 through 09:17:15).

[1] The above colloquy is excerpted from the Sixth Circuit's Opinion (at p. 3), but the precise wording, and even the speakers of the above dialogue are not clear from the record. The Sixth Circuit apparently interpreted the video recording in order to obtain the above version. Yet, in the written transcript, the comment that "[t]hat's news to the rest of us" is attributed to the Trial Judge. TE, RE 47-5, Page ID# 734, ln. 14.

The Sixth Circuit likewise questioned whether *Batson* is applicable to white defendants and to white male jurors[2]. At oral argument, the first question from the Panel challenged whether a white defendant or white juror had a clearly established right under *Batson*. Court audio at 2:30. Counsel for the Commonwealth also argued this point: "[T]here's no clearly established case that says that this would be a *Batson* issue. We've got a white defendant, we've got a white juror." Court audio, 32:55-33:13.

C. Caudill's *Brady* claim.

At trial, the Commonwealth relied heavily upon the testimony of jailhouse informants. The prosecution offered the testimony of Cynthia Ellis, who purported to repeat for the jury incriminating hearsay statements in which she claimed that Caudill admitted to the crimes. Ellis had been incarcerated in the same facility as Caudill, and Ellis claimed that Caudill made a detailed confession to her. Trial Tape 6, 2/14/00, 11:52:20. The prosecution later recalled Ellis as a rebuttal witness and on rebuttal she was given extended leeway to testify in further detail. Ellis was a critical witness for the prosecution. Tape 8; 2/15/00; 13:06:00 et seq.

On cross-examination, Ellis was asked if she had received any benefit from the prosecution in exchange for her testimony, and she responded that she had not.

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[2] That equal protection in jury selection extends to Ms. Caudill and the jurors was clearly established long before her trial. *Powers v. Ohio*, holds "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." 499 U.S. 400, 401 (1991). Furthermore, in *JEB v. Alabama*, 511 U.S. 127 (1994), in which intentional discrimination based upon gender was declared unconstitutional, both the challenged jurors and the plaintiff were male.

Tape 6; 2/14/00; 12:01:30. She went so far as to claim that at the time she initially spoke to the police about Caudill, her pending criminal charges had already been resolved. *Id.* But Ellis' testimony concerning what she got in exchange for her testimony was blatantly false.

Although there is no recitation of any consideration for cooperation in any plea agreement between the Commonwealth and Ellis, upon review of the video of her sentencing hearing on theft charges, Caudill's post-conviction attorneys learned that the Commonwealth had made a promise to Ellis that the prosecutor would inform the judge in her case that she had cooperated as a witness. With the prosecutor's advice to the sentencing judge about her cooperation, Ellis received a sentence of probation, despite the fact that she was a repeat felony offender with a criminal history spanning decades.

The prosecution did not disclose the existence of the oral promises described by the prosecutor in Ellis' case, and the prosecutors at Caudill's trial did nothing to correct the record after Ellis testified falsely as to the consideration received.

D. Counsel's efforts at mitigation.

During the penalty phase, Ms. Caudill's attorneys presented six lay witnesses, including Virginia's mother, Mary Caudill; sister, Rhonda Caudill; brother Craig Caudill; daughter Nicole Caudill; cousin John Moncreif; and a jail minister, Caroline Worley. But the testimony of Rhonda Caudill, Craig Caudill, Nicole Caudill, John Moncreif, and Caroline Worely lasted only a few minutes each.

Each takes up less than 2 pages in the transcript. Moncrief's testimony is just one page. *See* Trial Tr., Video tape #9, pp. 46-47, 49-50, 52-54, 87, 56-57.

Caudill's post-conviction counsel later learned that trial counsel met with Mary Caudill, Rhonda Caudill, and Craig Caudill for the first time on the day that they testified. *See* R. Cr. 11.42 petition, App. Vol 6, Ex. II, Ex. KK, Ex. LL. These meetings lasted only a few minutes. In Mary's case, (Ms. Caudill's mother), trial counsel spoke with her for fifteen minutes during a recess. The time spent with the witnesses on the day of their testimony represents all of the preparation that they received. *Id.*

Caudill's trial counsel offered expert testimony from forensic psychologist Dr. Peter Schilling. Trial Tr., Video tape #9, p. 92. Dr. Schilling was retained as a medical expert, but he was not provided with the medical records that counsel had in their possession. Documents CD, Vol. 6 of 7, R.CR 11.42 Ex. GG, p. 675. Although defense counsel employed a mitigation specialist, counsel did not see fit to provide Dr. Schilling with a copy of the specialist's report detailing her investigation. R. Cr 11.42 App. (Vol. 6, Ex. GG, p. 675). It was only after the conclusion of the trial that he reviewed the records, and based upon that review, he expressed his concern that he had offered an incorrect diagnosis. (Documents CD, Vol. 6 of 7, R.CR 11.42 Ex. GG, pp. 674-677, ¶¶ 1-15).

At Dr. Schilling's suggestion, defense counsel also engaged Dr. C. Christopher Allen. Dr. Allen's credentials as a neuropsychologist qualified him to opine on matters beyond the scope of Dr. Schilling's expertise, and Allen's testimony was

meant to dovetail and expand upon Schilling's testimony. Vol. 6, R.Cr. 11.42, Exs. HH, II, pp. 680-691. Dr. Schilling arranged for Dr. Allen to conduct an interview with Caudill, at which time he also performed neurological testing. *Id.* Dr. Allen's testing revealed brain damage, similar to that caused by a stroke, which limits Caudill's ability to reason. *Id.* Dr. Allen furnished a report detailing his findings. *Id.* But counsel never even spoke with Dr. Allen nor met with him. R. Cr 11.42 App. (Vol. 6, Ex. HH, p. 681). Also, although Dr. Allen had been engaged at Dr. Schilling's suggestion in order to complement Dr. Schilling's testimony, defense counsel did not furnish Dr. Allen's report to Dr. Schilling before trial. R. Cr 11.42 App. (Vol. 6, Ex. HH, p. 680-82). Without having spoken to Dr. Allen at all, and without the benefit of Dr. Schilling's review of Allen's findings, counsel took no further action to secure Dr. Allen's testimony at trial.

Caudill's trial counsel engaged a mitigation specialist, Susan Snyder. However, when she wrote to counsel less than two months before trial, she stated that "we need help, A.S.A.P." and that she was in "the frantic stage." R. CR. 11.42 App. (Vol. 5, Ex. S, p. 584). Snyder warned that she found it impossible to prepare a tight mitigation plan because of the lack of information. Snyder ended the correspondence with a desperate plea to counsel: "Help! Please!" *Id.*

Had counsel investigated further there was important mitigating evidence to be discovered. Indeed, Mary Caudill, Rhonda Caudill, and Craig Caudill all later informed Caudill's post-conviction counsel that they had many detailed and informative recollections that they would have offered to the jury if only they had

been prepared and informed prior to the day of their testimony as to the purpose and strategy of mitigation. *See* R. Cr. 11.42 petition, App. Vol 6, Ex. II, Ex. KK, Ex. LL.

Furthermore, if the defense team had investigated more thoroughly it would have easily uncovered compelling mitigation through other witnesses who were close to Caudill, and who were willing and available to testify. Caudill's grandmother, Vina Caudill, "would have testified but no one ever asked [her] to testify." *Id.* (Vol. 5, Ex. V, p. 592). Had she been called to testify, she would have testified that Caudill's father "would get drunk every weekend or so and would slap and hit Mary [Caudill's mother] in front of the children," that Caudill "was very afraid of her father and once I crawled in bed with her because she was a nervous wreck and shaking uncontrollably," and "[s]ometime[s] the children would pull [Caudill's father] off Mary and prevent him from hurting her." *Id.*

Caudill's next-door neighbor from childhood, Ruth Brown, "love[s]"Caudill, "ha[s] never seen [her] violent," and "would have gladly testified at the first trial, but . . . was not asked to." *Id.* (Vol. 5, Ex. W, p. 595). Had Brown been called to testify, she would have testified to the domestic violence prevalent during Ms. Caudill's childhood. "Mary never talked about Kirby [Ms. Caudill's father] abusing Mary," but Ms. Brown knew that he had. Once she witnessed a drunken Kirby chase Caudill's mother, gun in hand down a set of rail road tracks near their home. *Id.*

Caudill's second cousin, Barbara Watson, "was never interviewed" by Caudill's mitigation team, had she been interviewed trial counsel would have known that

Caudill's father "liked to pull a gun out when he drank," including at "family functions." When Caudill was a child, Watson witnessed her father pointing a shotgun in Caudill's direction while both were in a car, demanding that Caudill tell him where her mother was. *Id.*

Several ex-boyfriends of Caudill's, including one who admittedly abused her, were not interviewed and would have testified to Virginia's nonviolent character and history as a victim of domestic abuse. *See id.* (Vol. 5, Ex. Z, pp. 608–10) (Ray Towery, discussing abuse Caudill suffered at the hands of another ex-boyfriend who beat her and "encouraged [her] to begin prostituting"); *id.* (Vol. 5, Ex. AA, pp. 611–13) (Mike Sipple, discussing Caudill's reports that "her life was filled with alcoholic and abusive men"); *id.* (Vol. 5, Ex. BB, pp. 614–17) (Ronnie Ray Hopkins, admitting to knocking Caudill unconscious and playing a role in her becoming addicted to crack cocaine). Ms. Caudill had once sought the help of a domestic-abuse counselor. She was never interviewed by the defense team but she could have testified further to Ms. Caudill's history as a victim of domestic violence and what studies show about the effects of domestic violence on children who witness it. *Id.* (Vol. 5, Ex. CC, pp. 618, 620–24); *see also id.* (Vol. 6, Exs. DD–FF, pp. 625–73) (health records detailing history of domestic abuse suffered).

REASONS FOR ALLOWANCE OF THE WRIT

I. The sixth circuit's affirmance of the district court's denial of habeas relief is based upon analysis that is in direct conflict with the holding of this court in *Batson v. Kentucky.*

In *Batson v. Kentucky*, 476 U.S. 79, 93 (1986), this Court held that in deciding whether the defendant has carried the burden of proving purposeful discrimination in jury selection, the trial court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." At Ms. Caudill's capital trial, the trial court denied eight *Batson* objections three seconds after the prosecutor completed offering its facially race and gender neutral reasons for the strikes. Nevertheless, the Sixth Circuit held that Ms. Caudill "makes too much of the "sensitive" inquiry language in *Batson*, at least in the context of a habeas claim." *Caudill v. Conover*, Opinion, App. A, at 4.

This Court should grant certiorari because the Sixth Circuit's decision reveals a fundamental misunderstanding of the trial court's role at the third step of the *Batson v. Kentucky* inquiry. By deciding that no reasonable jurist could disagree that the trial court's three-second consideration of Ms. Caudill's eight objections satisfied the third step of the *Batson* inquiry, the Sixth Circuit has supplanted the clearly established law as stated by this Court.

Batson v. Kentucky, 476 U.S. 79 (1986) established a three-step inquiry. First, the defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge in a discriminatory manner. *Batson*, 476 U.S. at 96-97. Second, if the prima facie showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation (and gender neutral explanation in light of *J.E.B. v. Alabama*, 511 U.S. 127 (1994) for striking the juror. *Batson*, 476 U.S. at 97-98. Third, the trial court has a duty to decide whether the defendant has carried her

burden of proving purposeful discrimination. *Batson*, 476 U.S. at 98. In determining if the defendant has met the burden of persuasion, the trial court must consult "[A]ll of the circumstances that bear upon the issue of racial animosity." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005). The "evaluation of a prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985).

The jurors in Ms. Caudill's trial were selected over a three-day period from February 7-9, 2000. At the conclusion of the voir dire, Ms. Caudill objected to the prosecution's exercise of eight of nine peremptory challenges to exclude white males. The trial court expressed skepticism that a *Batson* claim could occur from the exclusion of white men from the jury. ("It's news to us.") RE 47-5, Page ID 734. Then the trial court stated that the prosecutor's explanation of his reasons for the strikes would be "just for the record." *Id*. Three seconds after the prosecutor finished stating his purported reasons for removing the eight white male jurors the trial court denied the entire *Batson* claim: "If the appellate courts for whatever magical reason foresees white males to be a protected class, these are non-discriminatory reasons. I'll allow them to be struck." Trial Video A-4, 9:17:00.

On direct appeal, the Kentucky Supreme Court accepted the trial court's perfunctory ruling as satisfying step three of the *Batson* inquiry. "The trial judge found all of the [prosecutor's reasons for the strikes] to be race-neutral and we are

unable to conclude that his finding in that regard was clearly erroneous." *Caudill v. Commonwealth*, 120 S.W.3d 635, 657 (Ky. 2003), App. D.

Ms. Caudill asserted in her federal habeas petition that the Kentucky Supreme Court's decision "resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law as decided by the Supreme Court, (§2254(d)(1)); and, 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, (2254 (d)(2)). After the district court denied relief reasoning that this Court has not held that a trial court must conduct a hearing or make specific findings in step three of the Batson analysis, Caudill appealed. See District Court Order, App. C, RE 34; PageID #464.

The Sixth Circuit decided that the Kentucky Supreme Court's appellate ruling affirming the trial court did not apply *Batson* unreasonably without addressing Caudill's argument that the Kentucky Supreme Court's decision was "contrary to" the holding in Batson. Opinion, App. A at 4. The court rejected Ms. Caudill's claim, observing that this Court "has never directed trial courts to make detailed findings or to solicit the defense attorney's views before ruling on a *Batson* motion. *Batson* itself "decline[d] . . . to formulate particular procedures to be followed" beyond the three-step framework. 476 U.S. at 99." *Caudill* at 4.

However, Ms. Caudill's underlying constitutional claim is not that the trial court should have stated its reasons for denying her *Batson* objections. Rather, Ms. Caudill maintains that she was denied equal protection when, as is required under

Batson, 476 U.S. at 93, the trial court failed to undertake a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" before deciding she had not shown purposeful discrimination on any of her eight objections.

This Court should accept review because if, as the Sixth Circuit has held, a trial court's perfunctory rejection of a *Batson* objection satisfies the critical third step of *Batson,* then the entire inquiry, intended by this Court to protect against purposeful discrimination in jury selection, is nothing but a meaningless ritual.

The Sixth Circuit found it "is inaccurate and unfair to the state judge, to say that he thought about the *Batson* claim (involving all eight jurors) for just three seconds.'" Opinion, App. A at p. 5. In reaching its conclusion, the panel noted:

> The state court judge was there the entire time. He had ample opportunity to observe the demeanor of the jurors and hear their answers. He listened to the prosecutor's questions during *voir dire* and watched the strikes. By the time he entered Caudill's *Batson* challenge, he had plenty to go on in deciding how to respond.

Opinion, App. A at p. 5.

What the Sixth Circuit ignored was that regardless of the judge's presence, it did not begin to occur to him that *Batson* applied to Ms. Caudill, a white woman, and to the white males stricken from the jury. From the literal wording of the trial judge's ruling: "[I]f the appellate courts, for whatever magical reason, perceive white males to be a protected class, I think these are non-discriminatory reasons that would allow them to be struck," it is immediately apparent that the trial judge had not "thought about and gauge[d] this claim throughout the process." See *Caudill* at 5. Indeed, if the trial judge had, as the Sixth Circuit imagines, "thought about and gauge[d] this

claim throughout the process" then there would have been no need for a "magical reason" that an appellate court would "perceive white males to be a protected class." Furthermore, the Sixth Circuit's theory requires a trial court blessed with extraordinary recall of the three-day voir dire process. Yet, on the second day of the voir dire, (trial video 2/8/00 at 1:30 p.m.), the trial court was unable to recall the answers of just one juror who was questioned less than twenty-four hours earlier (trial video 2/7/00 at 1:30 p.m.). Thus, it was pure fantasy for the Sixth Circuit to find it plausible that the trial judge was silently tracking every qualified juror, and the attorneys for signs of discriminatory motives as three days of voir dire dragged on, and then able to instantly recall the questions, the answers, the juror demeanor, and the contents of the written juror questionnaires while instantly comparing that information to the race and gender neutral reasons provided by the prosecutor for striking eight jurors.[3]

Ms. Caudill understands that even a strong case for relief does not make the state court's contrary conclusion unreasonable. *Harrington v. Richter*, 562 U.S. 86,102 (2011). Still, this Court should grant review because in addition to minimizing the trial court's pivotal role in the *Batson* inquiry, the Sixth Circuit's extreme take on §2254(d) deference to state courts risks turning federal habeas review into a veritable rubber stamp of state court decisions.

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[3] No court reviewing this case has engaged in anything resembling the third-step inquiry demanded of the *trial court* in *Batson.* On appellate review in state court and in the federal habeas proceedings, review was limited (at most) to a search for clear error. *Hernandez v. New York*, 500 U.S. 352, 369 (1991).

II. Where a habeas petitioner shows that trial counsel met with critical mitigation witnesses for the first time on the day of their testimony, spent only minutes to prepare them to testify, and did not meet with or even speak to an expert witness whose testimony trial counsel decided not to offer, were counsel's decisions to limit the mitigation investigation supported by reasonable professional judgments as required under *Strickland v. Washington?*

This Court should grant review of the Sixth Circuit's finding that Caudill's trial counsel made professionally reasonable decisions to limit the scope of the mitigation investigation. A majority of the Sixth Circuit panel, with one judge dissenting, cited *Bobby v. Van Hook*, 558 U.S. 4 (2009), for the proposition that counsel satisfied their obligation to do a reasonable investigation by identifying Caudill's immediate family members and a forensic psychologist to serve as witnesses in mitigation. The majority held that under *Van Hook*, any additional evidence was likely to be cumulative. *Caudill*, App. A at 9-10.

Yet, Caudill's trial counsel had not even met with at least three of the six lay mitigation witnesses prior to the day they testified, and thus had no ability to evaluate the quality or character of the evidence that they would provide. The sole expert witness, a forensic psychologist, was not provided with Ms. Caudill's s medical records or the report prepared by the defense mitigation specialist before he diagnosed her and testified. The mitigation specialist had written to the trial attorney less than two months before trial "in the frantic stage," begging for help in completing the mitigation investigation. Similarly, Caudill's trial counsel decided to

forego offering testimony from a retained neuropsychologist without ever having spoken to or met with the expert.

The majority deemed these critical decisions by counsel to be unassailable matters of trial strategy. *Id.* But the evidence shows that the decisions about witness selection and subject matter were made without the benefit of a meaningful investigation. No reasonable professional judgment supported the decision to avoid useful areas of mitigation evidence.

This case offers this Court the opportunity to clarify the scope of counsel's duty under *Strickland* "to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. 668, 690-91 (1984).

The importance of the *Strickland* principles at issue in this case is seen in other decisions of this Court. In *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court found (under AEDPA deference) that counsel's investigation was unreasonably limited where counsel failed to review the public record of the defendants prior convictions after notice by the prosecution that the convictions would be presented as aggravating factors. In *Wiggins v. Smith*, 539 U.S. 51 (2003), this Court considered (under AEDPA deference) the reasonableness of counsel's investigation in a case in which trial counsel made an intentional strategic decision to forego mitigation evidence. The instant case involves a determination of reasonableness where both the state court, and the federal courts, have imputed to counsel strategic

or tactical motives in the absence of any evidence by counsel that such strategic decisions were in fact made.

A. There is no reasonable argument that defense counsel's deficient performance met the Strickland standard.

A review of the evidence presented by Caudill in her petition establishes that counsel performed deficiently. However, Caudill's IAC claim was rejected by the majority under AEDPA deference. The majority first held that "the state court did not unreasonably apply *Strickland's* deficiency prong." 70-1 at p. 11. In order to reach this conclusion, the majority distinguished Caudill's case by noting that "a complete failure to investigate is different from failing to 'dig deeper.'" *Id.* [70-1 at 11]. Even under the AEDPA standard, Caudill's case merits review by this Court.

The majority acknowledged, then discounted an obvious error by the Kentucky Supreme Court in which it mistakenly claimed that mitigation witnesses had testified about Caudill's experience of abusive relationships with men. *Id.* [70-1 at p. 11]. The majority deemed this clear misstatement by the state court to be of "little import." *Id.* [70-1 at p. 11]. On this point, the majority's decision was nothing short of capricious. The majority went to some length to claim that Caudill had **not** argued that the error by the Kentucky Supreme Court constituted "an unreasonable determination of the facts in light of the evidence" under § 2254(d)(2). But Caudill explicitly did so, with an argument tracking the words of the statute, presented under a heading containing the same words.[4]

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[4] Compare Petitioner's Merit Brief, ECF #45 at p. 59 [ECF p. 70]("The state court's assumption reflects 'an unreasonable determination of the facts in light of the evidence presented in the State

The majority dutifully reviewed the witnesses that defense counsel called during mitigation, and observed that counsel had in fact put some evidence before the jury during the sentencing phase. Defense counsel's presentation included information about Caudill's drug abuse and history of abusive relationships. Having satisfied itself that defense counsel had presented some quantum of mitigation evidence, the majority concluded that no ineffective assistance could be found.

Yet, while the majority recited the items on the evidence list, it ignored the facts that demonstrate counsel's deficient performance. Because while it is true that counsel did create a record of ostensible mitigation evidence, it is manifest from the transcript that the lack of investigation and preparation by counsel left the defense unable to usefully present a theory of mitigation. Although defense counsel called six fact witnesses in mitigation, five of them were on the stand for only a few minutes each. The totality of the testimony from Craig Caudill, Leslie Nicole Caudill, Rhonda Caudill, and Caroline Worley takes up only two pages each in the transcript (at twenty-six lines per page). The testimony of John Moncreif fits on a single page of the transcript. *See* Trial Tr., Video tape #9, pp. 46-47, 49-50, 52-54, 87, 56-57.

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court proceeding.' 28 U.S.C. § 2254(d)(2)") with Decision, ECF #70-1 at p. 11 ("That presumably explains why Caudill does not argue that the court's decision was "based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2)"). *See also* Petitioner's Brief, heading II(B)(3), p. 52 [Page ID # 63]

These witnesses had very little to say because they and trial counsel were utterly unprepared. Rhonda Caudill, the defendant's sister, met with defense counsel only once a few minutes before she was to testify. (Vol. 6, Ex. LL, p. 702). Craig Caudill spoke with defense counsel for the first time on the day that he was to testify. (Vol. 6, Ex. KK, p. 698). Caudill's mother learned that she would testify only on the morning that she took the stand. (Vol. 6, Ex. II, p. 695). The totality of the preparation that she received from trial counsel was comprised of a 15 minute conversation during a recess. *Id*.

The majority also relied upon the fact that defense counsel had offered expert testimony from forensic psychologist Dr. Peter Schilling. Yet, Dr. Schilling's testimony further illustrates the deficiency of counsel's preparation. Although Dr. Schilling was retained as a medical expert, he was not provided with the medical records that counsel had in their possession. Although defense counsel employed a mitigation specialist, counsel did not see fit to provide Dr. Schilling with a copy of the specialist's report detailing her investigation. R. Cr 11.42 App. (Vol. 6, Ex. GG, p. 675). It was only after the conclusion of the trial that he reviewed the records, and based upon that review, he expressed his concern that he had offered an incorrect diagnosis. (Documents CD, Vol. 6 of 7, R.CR 11.42 Ex. GG, pp. 674-677, ¶¶ 1-15). Attorney incompetence is the only plausible explanation for why the medical records were not provided to Dr. Schilling, since defense counsel was in possession of voluminous records evidencing a long history of injuries that Caudill suffered at the hands of abusive partners. (R. Cr. 11.42 App., Vol. 6, Ex. DD-FF, pp.

625-73). The ability of the expert to provide helpful testimony naturally depends upon the baseline data furnished for review. In this regard also, counsel's investigation was unreasonable in that it deprived their own expert of the tools needed to evaluate the case.

Defense counsel's handling of a second expert in mitigation further illustrates the lack of basic organization and planning in counsel's representation. At Dr. Schilling's suggestion defense counsel also engaged Dr. C. Christopher Allen. Dr. Allen's credentials as a neuropsychologist qualified him to opine on matters beyond the scope of Dr. Schilling's expertise, and Allen's testimony was meant to dovetail and expand upon Schilling's testimony. Vol. 6, R.Cr. 11.42, Exs. HH, II, pp. 680-691. Dr. Schilling arranged for Dr. Allen to conduct an interview with Caudill, at which time he also performed neurological testing. *Id.* Dr. Allen's testing revealed brain damage, similar to that caused by a stroke, which limits Caudill's ability to reason. *Id.* Dr. Allen furnished a report detailing his findings. *Id.* But counsel never even spoke with Dr. Allen nor met with him. R. Cr 11.42 App. (Vol. 6, Ex. HH, p. 681). Although Dr. Allen had been engaged at Dr. Schilling's suggestion in order to complement Dr. Schilling's testimony, defense counsel did not furnish Dr. Allen's report to Dr. Schilling before trial. R. Cr 11.42 App. (Vol. 6, Ex. HH, p. 680-82). Without having spoken to Dr. Allen at all, and without the benefit of Dr. Schilling's review of Allen's findings, counsel took no further action to secure Dr. Allen's testimony at trial.

To search for a strategic rationale in this course of conduct is unavailing. Any strategic decision would have required at least a review of Dr. Allen's report by Dr. Schilling, who had initially sought it out. Since that never took place, attributing the omission to litigation tactics is pure fiction.

Perhaps the most salient assessment of the reasonableness of the investigation by counsel is the narration of the status of the investigation provided in real time by the mitigation specialist, Susan Snyder. When she wrote to counsel several weeks before trial, she stated that "we need help, A.S.A.P." and that she was in "the frantic stage." R. CR. 11.42 App. (Vol. 5, Ex. S, p. 584). Snyder warned that she found it impossible to prepare a tight mitigation plan because of the lack of information. Snyder ended the correspondence with a desperate plea to counsel: "Help! Please!" *Id.*

This Court's opinion in *Van Hook* provides a stark contrast that illustrates the issue presented by this case. In *Van Hook*, counsel "contacted lay witnesses early and often" including nine meetings with the defendant's mother, a meeting with both parents, two meetings with defendant's aunt, and three meetings with a friend. *Van Hook* at 9. Van Hook's counsel met frequently with the two experts that they retained. *Id.* *Van Hook* provides an example of legitimate preparation that may form the basis of a reasoned decision to consider the scope of an investigation complete. The evidence in the instant case is the precise opposite. Caudill's counsel made the decisions to rely upon certain family members as witnesses without meeting them. Caudill's counsel made the decision not to call Dr.

Allen as a witness without allowing Dr. Schilling, who had requested his consultation, to evaluate his report. There could have been no reasonable professional judgments to support these limitations on the mitigation because counsel simply lacked the underlying facts to make any such judgment.

The results were predictable. Unsurprisingly, Caudill's family members, with no clear guidance on their role, gave only bland answers to poorly phrased questions and were sent on their way after just a few minutes of testimony. At various points in Caudill's trial, the mitigation went squarely awry. Although counsel's mitigation narrative ostensibly centered on a history of abuse by Caudill's father, two of the poorly prepared witnesses ended up spending their short time on the stand telling the jury the story of how Caudill's father had reformed himself by quitting alcohol. R. Trial Tr., Videotape #9, at 34-36, Page ID # 2053-55 (Mary Caudill); *see also* Trial Tr., Videotape #9, at 34, Page ID #2065 (Craig Caudill). In another moment evidencing the lack of preparation, counsel elicited from Rhonda Caudill testimony establishing that Virginia Caudill was the only sibling or family member who had experienced drug problems. Trial Tr., Videotape #9 at 51, Page ID #2070. These results stem directly from counsel's failure to investigate the information that each of these witnesses possessed, and to prepare them to convey it.

By contrast, in *Van Hook*, this Court observed that the jury had heard detailed descriptions of the suffering and anguish that the petitioner experienced in his childhood and adult life. *Van Hook*, 558 U.S. at 9.

If not for counsel's unreasonable decision to limit the mitigation investigation, counsel would have readily discovered important and relevant information to support a compelling mitigation theory. In her post-conviction proceedings, Caudill's new counsel presented evidence from Caudill's grandmother, her childhood neighbor, and her second cousin of incidents in which Caudill's father beat, shot at, or threatened her mother in front of her and her siblings. R.Cr. 11.42 App., Vol 5, Ex. V, W, X, p. 592 -598. If counsel had simply interviewed the witnesses that they put on the stand, they would have uncovered compelling evidence of violence by Caudill's father against Caudill and her siblings, and the terror that permeated Caudill's childhood. *Id.*, Vol. 6, Ex. II, KK, LL, p. 693-702. The lack of meaningful mitigation in this case resulted directly from the lack of investigation.

The facts of this case squarely present this Court with the question of what constitutes reasonableness of the professional judgments that may justify counsel's decision to limit investigation in mitigation. The instant case also presents a question identified, but left unanswered in *Van Hook* as to the importance of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). In *Van Hook*, this Court faulted the Sixth Circuit for holding counsel to the standard of the ABA Guidelines despite the fact that the guidelines had not yet been propounded at the time of the trial. The instant case presents an opportunity for this Court to affirm the relevance of the ABA

Guidelines as a standard for practitioners trying cases and courts reviewing IAC claims.

This Court should grant Certiorari and clarify that where counsel elects to put mitigation witnesses on the stand without meeting or interviewing them, and elects to forego expert testimony without speaking with the expert, that the decisions to limit mitigation falls short of professional norms in violation of the Sixth Amendment and *Strickland*. Even under AEDPA deference, there can be no reasonable argument that Caudill's counsel satisfied *Strickland*'s requirement that counsel base its decisions upon reasonable investigation. Counsel could not have reasonably decided that witnesses who they had not met and interviewed would provide satisfactory mitigation evidence. Counsel could not have considered that witnesses who had never been prepared were ready to testify.

B. Caudill has shown that she was prejudiced by counsel's deficient performance.

Caudill has established prejudice as required by *Strickland*. In this capital case, Caudill need only show "a reasonable probability that at least one juror would have struck a different balance" and voted against imposing death. *See Wiggins*, 539 U.S. at 537. Since the Kentucky Supreme Court made no finding on this element, reviewing courts consider the question *de novo*. *Wiggins* at 534.

Preliminarily, Caudill submits that the existence of a dissenting opinion below constitutes a showing of prejudice. If one judge was persuaded that the result

of the proceeding would have been different, then *a fortiori*, the evidence is sufficient to persuade one juror.

In any case, the evidence presented by Caudill "differs in a substantial way- in strength and subject matter- from the evidence presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) . As noted by the dissent, the additional evidence presented by Caudill in her 11.42 petition met this threshold in at least two respects.

First, Caudill presented independent witnesses and medical records that corroborated Caudill's history of abusive and dominating relationships with men. At sentencing, this evidence came in only through Dr. Schilling, who relied on Caudill herself as a source. Claims that may have been discounted as self-serving at sentencing became well established through Caudill's evidence had counsel properly presented it at trial. *See Skipper v. South Carolina,* 476 U.S. 1, 8 (1986).

Second, Caudill's additional evidence addresses a theme not addressed in mitigation: residual doubt. The evidence of Caudill's submissiveness and history of controlling male relationships offered grounds for a juror to find that Caudill was not the principal offender, but also that she bore limited culpability for her actions because of her background. *See* Garvey, Stephen P., *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1561–66 (1998).

The evidence was particularly relevant in sentencing because the jury in this case made no finding as to which of the two defendants actually committed the killing. The jury found both defendants guilty as either a principal or an

accomplice. While Caudill had no prior history to suggest that she was capable of violence, in her Petition, she has provided abundant evidence of her history of being controlled by dominating and violent men.

This is another respect in which this case is different from *Van Hook*, relied upon by the majority. In *Van Hook*, this Court found that the petitioner could not show prejudice because he could not overcome the overwhelming aggravating circumstances. Yet, in *Van Hook*, the defendant had confessed to the offense, in which he was the sole perpetrator, so his underlying guilt was not in question. *Van Hook*, 558 U.S. at 12-13. It was also proven that his crime had been just one occurrence in a long pattern of similar conduct. *Id*. In the instant case, the jury clearly had significant questions as to whether Caudill was in fact the one who struck the blow.

Therefore, the evidence that Caudill presented in her petition shows "a reasonable probability that at least one juror would have struck a different balance" if not for counsel's deficient performance. This Court should grant Certiorari.

III. This Court should grant Certiorari to determine if the Sixth Circuit erred in denying Caudill a certificate of appealability on her claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the terms of a plea deal for an important witness.

This Court should grant certiorari to determine if Caudill is entitled to a certificate of appealability on her claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose the fact that it gave

jailhouse informant witness Cynthia Ellis favorable treatment in exchange for her testimony at trial. The Sixth Circuit's denial of a certificate of appealability on this claim was incompatible with the certificate of appealability standard of § 2253(c) as interpreted by this Court's precedent. The Sixth Circuit granted a certificate of appealability on two issues, but declined Caudill's request to certify this claim. This failure was serious enough to invoke the "exercise of this Court's supervisory power," and certiorari is therefore warranted. *See* S.Ct.R. 10(a); *see also Tharpe v. Sellers*, 583 U. S. ___, No. 17–6075, 2018 WL 311568 (Jan. 8, 2018).

A. The standard for a certificate of appealability.

Miller-El v. Cockrell, 537 U.S. 322 (2003), established the showing a petitioner must make to obtain a certificate of appealability under 28 U.S.C. § 2253(c). As this Court explained:

> . . . a prisoner seeking a COA need only demonstrate a 'substantial showing of the denial of a constitutional right' . . . . A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.
>
> *Miller-El*, 537 U.S. at 327 (citations omitted).

This Court further explained that a petitioner seeking a certificate of appealability is not required to prove "that some jurists would grant the petition for habeas corpus." *Id.* at 338. "Indeed, a claim can be debatable even though every

jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

As the foregoing makes clear, the certificate of appealability standard is not difficult to satisfy. The requirements of § 2253(c) are "non-demanding." *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009). A certificate of appealability should be granted unless the claim presented is "utterly without merit." *Id.* (quoting *Jefferson v. Welborn,* 222 F.3d 286, 289 (7th Cir. 2000)). Furthermore, in cases where the death penalty is at issue, any doubts regarding the propriety of a certificate of appealability must be resolved in the petitioner's favor. *Skinner v. Quarterman,* 528 F.3d 336, 341 (5th Cir. 2008) (citations omitted). Caudill satisfies these standards, and this Court should grant certiorari and reverse.

At Ms. Caudill's trial, Ellis testified that while the two were incarcerated together, Caudill confessed to the crime. [Petition, p. 66; Tape 6; 2/14/00; 11:52:20]. On cross examination, Ellis denied that she had received any consideration for her testimony. [Petition, p. 66; Tape 6; 2/14/00; 12:01:30]. Yet, at Ellis' sentencing hearing, the prosecutor in that case told the judge that, as part of a plea deal, they had agreed to advise the judge of Ellis' cooperation in Caudill's case and another case. [Petition, p. 67; video exhibit, part 2, 8/16/99, 11:08:55]. The facts of Ellis' agreement with the prosecution were not contained in her plea agreement, in any other document on the docket, or revealed during her guilty plea colloquy with the court. In order to discover the agreement, Caudill's post-conviction counsel had to obtain and watch the video of Ellis' sentencing. With the promised advice from the

prosecutor, Ellis received a sentence of probation on a theft case, despite her lifetime history as a criminal, and persistent felony offender status. [Petition at p. 69] TR 522-525].

In its order denying relief, the District Court held as follows:

> The Supreme Court of Kentucky, adhering to its precedent in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002), held that *Brady* imposed no duty to disclose the plea agreements because they are matters of public record (and hence freely available to defense counsel) under Kentucky law. ECF # 34, at PageID # 446.
>
> The Supreme Court of Kentucky concluded that no such deprivation occurred here because information regarding any favorable treatment given to the testifying informants was public information available for review by counsel for the defense, and because counsel obtained information regarding the witnesses' interactions with the government and used it as the basis for an extensive attack on their credibility. This ruling was consistent with precedent from the Supreme Court and the Sixth Circuit. ECF # 34, at PageID # 447.(citations omitted).

The Court of Appeals found that "Jurists of reason would not debate the district court's conclusion…" [App. R.] ECF # 34, p. 6.

B. This Court should grant Certiorari to reject the Commonwealth's proposition that the prosecutor's obligation under *Brady* may be excused if they can show that the defense could have discovered exculpatory evidence through "diligence." Alternatively, although no jurist of reason could agree that such a rule exists, the Brady material in Caudill's case was not readily "publically available."

The Appellate Court's denial of a certificate of appealability on this ground was incorrect for two reasons. First, contrary to the assertion of the District Court, the ruling is not consistent with the precedent of this Court. This Court has rejected

the proposition that a prosecutor's obligation to disclose exculpatory evidence under *Brady* is somehow dependent upon whether there is "potential" that the claim may be discovered by the due diligence of the defense. *See Banks v. Dretke*, 540 U.S. 668, 697 (2004). The Sixth Circuit has characterized the District Court's rationale as the "defendant-due-diligence rule," and has explicitly rejected it. *See U.S. v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013). The District Court's confusion as to the sweep of *Brady* and the obligation of "diligence" upon a defense attorney in this case was manifested in the order denying habeas relief. District Court Order, App. C at 16. The court cited *Tavera*, for the proposition that *Brady i*s "inapplicable to evidence available through public records." Yet, T*avera*, unequivocally rejected the "diligence" rule, observing that "the client does not lose the benefit of *Brady* when the lawyer fails to 'detect' the favorable information." *Tavera* at 712, *citing Banks v. Dretke*, 540 U.S. 668 (2004).

At a bare minimum, whether a prosecutor's *Brady* obligation is dependent upon the due diligence of the defense is debatable among jurists of reason.

Second, regardless of whether a defendant-due-diligence rule exists within the holding of *Brady*, a COA should have issued because in this case the *Brady* material was not readily "publically available." The prosecution's promise to advise Ellis' trial judge of her service as a witness was not contained in her written plea agreement, or anywhere in the written record. The only reference to this explicit agreement was contained in the video of Ellis' sentencing. [Post-conviction video exhibit, 8/16/99 11:08:55 et. seq.] In this case, a publically available plea agreement

purports to contain the terms of the disposition of a criminal prosecution. Yet, a separate oral promise was made by the prosecutor to furnish favorable information at Ellis' sentencing, resulting in a favorable outcome for Ellis. Even if a defense diligence requirement exists under *Brady*, jurists of reason could disagree on whether Ms. Caudill met that requirement.

The treatment of this claim by the Sixth Circuit demonstrates the need for clarity, and it presents an issue on which jurists of reason could conclude is adequate to deserve encouragement to proceed further. Accordingly, this Court should issue a writ of Certiorari.

PRAYER FOR RELIEF

For the reasons stated above, Virginia S. Caudill prays that this Court grant her Petition and vacate her conviction and/or sentence. Alternatively, she prays this Court to vacate the Opinion of the Kentucky Supreme Court and remand this case to that court for appropriate proceedings.

Respectfully submitted,

_/s/ *Dennis J. Burke*__________________

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