No.

18-6571

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

MARK M. JERVIS -- PETITIONER

VS.

RICHARD BROWN-- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

SEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Mark M. Jervis, #952861

Wabash Valley Correctional Facility

P.O. BOX 1111

Carlisle, Indiana 47838

812-398-5050

QUESTION PRESENTED

I. The District Court mandates that all prisoner communications to and from the court be transmitted via the E-Filing system. Per policy, prisoners cannot mail letters to the District Court, and the prison's legal librarian will not check the docket. Due to no fault of his own, Jervis did not receive the judgment denying his Petition for a Writ of *Habeas Corpus*. The District recalled and reissued the order, which was deemed ineffectual, and the appeal was dismissed. Does the District Court have the inherent power to rectify its own mistakes after creating a system that makes it nearly impossible for prisoners to check the status of their cases?

II. Trial counsel was ineffective in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

III. Appellate counsel was ineffective in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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The opinion of the Seventh Circuit Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the District Court appears at Appendix B to the petition and is unpublished.

The opinion of the Indiana Court of Appeals appears at Appendix C to the petition and is unpublished.

The opinion of the Indiana Supreme Court appears at Appendix D to the petition and is published.at *Jervis v. State*, 679 N.E.2d 975 (Ind. 1997)

JURISDICTION

The date on which the highest state court decided my case was August 27, 2018. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution reads, in pertinent part, that "[n]o person shall be deprived of life, liberty or property without due process of law...."

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . 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."

STATEMENT OF THE CASE

The facts detailed by the Indiana Supreme Court in *Jervis v. State*, 679 N.E.2d 975 (Ind. 1997), and adopted by the Indiana Court of Appeals in Cause No. 87A05-1404-PC-171, are quoted below:

> On August 14, 1993, Terri Boyer went on a drinking spree with her husband, her brother and the brother's girlfriend. The four began in the early afternoon in Hatfield, their home town, and took the brother's truck to visit several bars, the last in Newburgh. In Newburgh, Boyer and her husband got into an argument that resulted in Boyer leaving the truck. The other three drove back to Hatfield, leaving an intoxicated Boyer to fend for herself. Just before 10 p.m. Boyer found her way Frenchie's, a tavern in Newburgh, where she asked several patrons to give her a ride back to Hatfield. All refused. At some point, defendant Jervis entered the bar, met Boyer, and offered to take her to Hatfield. The two had no prior acquaintance.
>
> Jervis and Boyer were seen leaving the bar together some time around midnight, but no one actually saw them drive away in Jervis's car. Witness Terry Timberlake testified that he saw a car resembling Jervis's station wagon pull into the Newburgh Cinema parking lot around 11:30 p.m. Timberlake stated that two people, one male and one female, appeared to be in the car, but he could not positively identify them as Jervis and Boyer. Approximately thirty minutes later, Timberlake saw the station wagon leave the Cinema parking lot and park in an adjacent lot of daycare center where it remained for about ten minutes. It then returned tot eh cinema parking lot, and finally drove away. Jervis returned to Frenchie's alone around 12:30 to 1:30 a.m. the same night, telling those present that he was unable to take Boyer to Hatfield because his car had broken down. Jervis went home a half hour later. At approximately 12:30 p.m. the next day, the owner of Newburgh Cinema found Boyer's body on a grass strip next to the Cinema parking lot. Boyer was nude below her waist and her bra and shirt were pushed up to her shoulders. An autopsy concluded that Boyer had been strangled and had died around midnight.

> On September 5, 1993, Jervis was charged with Boyer's murder. The State's case against Jervis was largely circumstantial and included the following evidence: (1) an envelope, pencil and pen Boyer had been carrying in her purse were found in Jervis's trash can outside his apartment; (2) Boyer's driver's license and her daughter's library card were found in Jervis's car; and (3) DNA evidence established a strong likelihood that a blood stain on Jervis's shirt and a pubic hair found on his pants were Boyer's. Several witnesses also testified as to Jervis's whereabouts on the night in question. The jury was unable to reach a verdict in Jervis's first trial in 1994. The State retried Jervis in 1995 and a second jury convicted him.

Jervis, 679 N.E.2d at 876-877; *Jervis v. State*, Cause No. 87A05-1404-PC-171, slip op. at pp.2-3

Issue I

Mark Jervis is currently incarcerated at the Wabash Valley Correctional Facility in Carlisle, Indiana. Following proper exhaustion of his issues, Jervis filed a Petition for a Writ of *Habeas Corpus,* which was denied in June 13, 2017. On May 29, 2018, the District Court, *sua sponte*, recalled and reissued the Order denying the Petition. Jervis attempted to appeal.

Pursuant to an order issued by the District Court, Jervis was required to submit all communications to the District Court via the E-File system. The prison's legal librarians function as the gatekeepers to the E-File system. Thus, the prison's legal librarians are simultaneously an agent of the Court and an agent of the adverse party, i.e., the Warden. The prison will not mail any letters or parcels to a District Court. If submitted to the mailroom for mailing, the prison returns the letter/parcel with a note stating that the correspondence must be E-Filed. Thus, prisoners have no means of communicating with the Court except through the adverse party. The Respondent is still required to serve prisoners via the United States Mail; however, court orders are sent via the E-File system.

In this case, Jervis's petition was denied in June 2017. Despite diligent efforts to check the status of his case through the appropriate legal librarian, Jervis did not receive the ORDER denying his

Petition for a Writ of *Habeas Corpus,* and the legal librarian refused to even check the docket for him until he had learned of the denial through his daughter.[1] After complaining to the legal librarian, Jervis was told that there was no record of a denial for him. A short time later, the District Court, *sua sponte*, corrected the ministerial error by recalling and reissuing the order. Jervis filed a Notice of Appeal and related documents, including a request for a certificate of appealability to the Seventh Circuit Court of Appeals.

Upon docketing the appeal, the Seventh Circuit Court of Appeals ordered the parties to file jurisdictional memoranda. Jervis submitted his jurisdictional memorandum, explaining why the appeal should not be dismissed, via the United States Mail.[2] The Respondent failed to timely file a jurisdictional memorandum and complied only after the Seventh Circuit Court of Appeals threatened to take disciplinary action against the Respondent. The appeal was dismissed for a lack of jurisdiction. The Seventh Circuit Court of appeals indicated that the District Court's attempt to correct its own mistakes were ineffectual.

Issue II

On September 5, 1993, the State filed an information, charging Jervis with murder, a felony. (App. 17).[3] On April 11, 1994, a jury trial was commenced, ending in a mistrial on May 3, 1994. (App. 19). Between March 16, 1995 and March 31, 1995, a second jury trial was held. (App. 19, Ex. 1). On April 3, 1995, the jury found Jervis guilty as charged. (App. 19, Ex. 1). On April 26, 1995, Jervis was sentenced to 60 years incarceration. (App. 19, Ex. 1).

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[1] This is a common occurrence. Whenever offenders attempt to litigate anything in the District Court from this facility, the adverse party has control of all communications with the Court and actively frustrates prisoners attempts to meet deadlines, communicate with the court, or receive copies of orders and filings. The District Court has seriously erred in giving such absolute control to the adverse party.

[2] The Seventh Circuit Court of Appeals is not included in the District Court's mandate to use the E-File system.

[3] "App" refers to the appendix from cause number 87A05-1404-PC-171, "PC" refers to the transcript from the evidentiary hearing and "R" refers to the trial record.

Jervis directly appealed his murder conviction and on May 12, 1997, the Supreme Court of Indiana affirmed his sentence. *See Jervis v. State*, 679 N.E.2d 975 (Ind. 1997).

On July 9, 1997, Jervis filed a *pro se* petition for post-conviction relief. (App. 1, 18). On September 26, 1997, the State filed its answer. (App. 2). Final amendments to the petition were made on September 14, 2012. (App. 10, 18, 22). On October 1, 2013, an evidentiary hearing was held. (App. 14, 18). On March 25, 2014, Jervis's petition for post-conviction relief was denied. (App. 16, 17).

At some point prior to, during, or immediately following Jervis's first trial, the State offered Jervis a plea bargain, which would require Jervis to serve a 40-year sentence. The State conceded this fact during the post-conviction proceedings. (App. 47). Charles Martin, trial/appellate counsel, testified at the post-conviction hearing that he informed Jervis of the plea offer. (PC 17). However, Mr. Martin admitted that he did not provide Jervis with any legal advice regarding the plea. (PC 17, 29). Mr. Martin partially corroborated Jervis's allegations that Mr. Martin informed Jervis that he would be acquitted at the second trial. (PC 29).

Blood spots and hair were found on clothing belonging to Jervis. According to the expert testimony at the first trial, there were possibilities of approximately nine to one that the blood and hair belonged to the victim and that the blood could not be further analyzed. (R. 3349, 3353). Additionally, DNA experts in the first trial testified than an oral swab taken from the victim's mouth contained sperm cells. (R. 3399, 3455, 3459).

At the second trial in 1995, Jervis proved that he had undergone a vasectomy in 1990 (R. 3746-3749). Jervis had attempted, in the first trial, to present evidence as to said vasectomy but was prevented from doing so, upon the prosecutor's objection, because the vasectomy evidence

had not been previously disclosed. However, detective Marvin Heilman had been informed prior to the first trial that Jervis had a vasectomy in 1990.

Evidence found in the victim's mouth was discarded without being tested or analyzed in any way. None of this evidence was made available to Jervis for independent testing during the first trail, allegedly because there weren't sufficient samples to conduct further testing. However, further tests were, in fact, conducted by the State in preparation for the second trial. At the second trial, the prosecutor presented evidence that further analysis on Jervis's shirt disclosed that there was approximately a 2,500 to one probability that the blood belonged to the victim. (R. 3356, 3369). Experts further testified that the cells found in the oral swab were not sperm cells but yeast cells. (R. 3379).

Toward the end of the second trial, a juror, James Childers, told the bailiff that he had heard that "if the verdict wasn't favorable, there would the problems for the jury." (R. 3624). Childers was questioned outside he presence of the other jurors. He said that he had recently talked with his mother who told him that his sister had heard that this was the rumor "in town." He said that it did have any effect on him, but he had some concern for his wife's safety. He said that he had not told any other jurors about this matter, but said some of them overheard his conversation with the bailiff. (R. 3624, 3632). Childers said that he thought Sharon miller overheard his conversation with the bailiff because she asked him if that's what he said. (R. 3629). Childers thought two other jurors might have overheard his conversation with the bailiff. (R. 3631-3632). After questioning Childers, he was sent back to the jury room with the other members of the jury. (R. 3632). The court then brought in the jurors and alternates, one at a time, to ask whether they had overheard any of Childers's conversation with the bailiff, and they all said they had not.(R. 3633-3649). The Court then replaced Childers with an alternate. (R. 3633-

3655). Childers was never instructed – and counsel never requested that he be instructed – not to discuss anything with any of the jurors. Childers was never questioned again as to whether he had discussed the reason one juror at a time as being called out and questioned by the Court. One can only speculate about the conversations taking place between the jurors from the time that Childers was questioned and returned to the jury room until the replacement with an alternate.

Issue III

Relying upon *Chambers v. Mississippi*, 410 U.S. 284 (1973), Mr. .Jervis argued on direct appeal that the trial court violated his right to due process and to present a defense that somebody else committed the crime. Appellate counsel presented the following:

> After the State had rested on the 14th day of this trial the defendant presented his first witness being Marilyn Molinet who testified outside the presence of the jury that on August 16, 1993, the day after the homicide of Terri Jolene Boyer on August 15, 1993, she had been told by Tony Floyd who is now dead and obviously unavailable as a witness that on the night of August 14-August 15, 1993 he, Tony Floyd, had picked up a female at Frenchie's Tavern, Newburgh, Indiana and had dropped her off at the Newburgh Cinema and further had told her that you could strangle someone if you knew how to do it. (TR. Vol. 15, p. 3616 11.1 to 4). The trial court did not permit this evidence to be presented to the trial jury even though the defendant had given the State adequate notice of its intent to present this evidence and no objections because of lack of notice were registered by the State. The Court did not permit this evidence because of the State's objection that this was not a confession. The State had previously presented evidence of a confession by one David Brugger and then presented evidence that the state contended showed the Brugger's confession was not valid.

Additional facts will be supplied as needed.

REASONS FOR GRANTING THE PETITION

Issue I

Despotism has infiltrated the American judicial system, as judicial officers turn a deaf ear to the voice of Justice. Fundamental Fairness is decried by the tyrannical application of procedural regulations, which substantially impacts a prisoner's right to access to the courts and meaningful review. When honorable judges attempt to place Fundamental Fairness at the forefront, as in this case, the light of hope is immediately snuffed-out. The Seventh Circuit Court of Appeals has sent a clear and unequivocal message: The First Amendment is meaningless, and the supremacy of the court is unmatched. Jervis has "Petitioned for Redress in the most humble terms: [His] repeated Petitions have been answered only by repeated injury."[4] Therefore, Jervis asks this Court to carve out an exception, in extraordinary and justified circumstances, such as those found in this particular case.

The District Court for the Southern District of Indiana has issued an order, mandating that all prisoners at the prison where Jervis is incarcerated use the E-Filing system. *See* General Order 2013-1, 1:13-mc-0056 RLY. In response to General Order 2013-1, the Wabash Valley Correctional Facility prohibits prisoners from mailing anything to the District Court via the United States Mail. Prison officials refuse to check on the status of cases. (Ex. E). As a result of these mandates, Mr. Jervis did not receive a copy of the order denying his Petition for a Writ of *Habeas Corpus.*

The District Court acted in conformity with Fed. R. Civ. P. 36 and 60 when it vacated the order and reissued it. Fed. R. Civ. P. 36 provides, in pertinent part, that "the court may... correct

[4] *See* the Declaration of Independence

an error in the record arising from oversight or omission. Fed. R. Civ. P. 60(A), states the following:

> The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order or other part of the record. The court may do so on motion or on its own with or without notice. But, after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

In this case, the District Court acted on its own motion when it discovered that Jervis did not receive a copy of the judgment and lacked any way to ascertain the status of his case. The District Court was keenly aware that it had created a situation by which prisoners had no means of checking the status of their cases. The District Court was also aware that, through no fault of his own, Jervis did not have the opportunity to pursue an appeal in this case because of the District Court's E-File mandate and the policies implemented at the prison as a result. Because the District Court, intentionally or unintentionally, had prevented Jervis from pursuing an appeal, it vacated the order and reissued it in order to provide this opportunity to Jervis. The Seventh Circuit dismissed the appeal, claiming that such an action was ineffectual.

Jervis does not understand how such action cannot be taken. Both Fed. R. Civ. P. 36 and 60 provide specific authority, allowing the District Court to correct mistakes resulting from omission or oversight. Moreover, this Court has carved out exceptions to rules that create fundamental unfair processes. For instance, this Court created a Cause and Prejudice exception to procedural bars, which "shows due regard for States' finality and comity interests while ensuring that fundamental fairness [remains] the central concern of the writ of habeas corpus." *Maples v. Thomas*, 565 U.S. 266, 181 L.Ed. 2d 807, 827 (2013), *quoting Dreke v. Haley*, 541 U.S. 3863, 393 (2004) (internal quotations omitted, brackets in original). Such decisions comport with fundamental due process principles.

This Court has written that "the fundamental fairness requirement of due process is the opportunity to be heard at a meaningful time and *in a meaningful manner*." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (emphasis added). This definition should be considered in the context of this Court's earlier ruling. In *Breithaupt v. Abram*, 352 U.S. 432 (1956), for example, Justice Clark endeavored to explain the labyrinth of the due process test as follows:

> [D]ue process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by the whole community sense of 'decency and fairness" that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this court has established the concept of due process.

The United States Supreme Court has also stated the following:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules, this court has said due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L.Ed. 2d 1230, 81 S.Ct. 1745. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due process Clause is therefore an uncertain enterprise, which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

The District Court's mandated use of the E-Filing system denies rather than promotes due process. No reasonable person can say that mandating the use of an E-Filing system and preventing prisoners from having any ability to check on the status of their cases comports with basic due process principles. The District Court's mandated use of E-Filing gives prison authorities complete control over a prisoner's ability to communicate with the courts. Prison officials are an adverse party to the vast majority of the filings in the District Court. Jervis notes that the Warden is the named Respondent in this action. Most civil matters filed in the District Court are also related to

the prisoners' conditions of confinement or incidents arising from their incarceration. Thus, prison officials have a direct, conflicting interest in promptly notifying prisoners of court rulings or facilitating filings to meet scheduled deadlines.

In this particular case, Jervis was prevented from seeking an appeal because he was never notified of the District Court's ruling. Jervis's failure to timely file a Notice of appeal was due to circumstances beyond his control and such extraordinary circumstances should allow Jervis's appeal to proceed. *See e.g., Maples v. Thomas*, 132 S.Ct. 912 (2012) (finding cause to excuse a missed notice of appeal deadline sufficient to overcome procedural default and to allow the claims to proceed). In fact, Jervis's failure to timely file a Notice of Appeal was based upon governmental interference, i.e., an agent of the court, who also serves as an agent of the adverse party, prevented Jervis from seeking updates on the status of his case. The prison's legal librarian would not provide them because she does not "provide this service to offenders". (Ex. E).

If this Court does not intervene regarding such practices, prison officials will garner unfettered control over a prisoner's access to the courts. Prison legal librarians are not neutral parties. They serve at the discretion of the Warden. They are loyal to the Warden because their livelihoods depend upon it. This conflict of interest presents a significant problem.

The adverse party has a vested interest in a prisoner's failing to meet deadlines. Failing to meet deadlines causes cases to be dismissed. Therefore, prisons across the United States can shield themselves from civil litigation and effectively prevent prisoners from seeking federal relief regarding their criminal cases simply by failing to notify prisoners of the Court's orders. This case proves just that.

Such unfettered control over a prisoner's access to the court's will undoubtedly cause prison conditions to regress to the time of intolerable and inhumane conditions, overcrowding, and a complete denial of human rights. After all, there can be no court interference if e-file

requests are not filled. There can be no court interference if cases are dismissed on technical grounds because prisoners were not notified of court orders and cannot access the docket. There can be no court interference when a prisoner cannot even send a letter to the court because all communication with the court must route through the E-File system, which can be screened to cover-up malfeasance.

Moreover, prisoners everywhere are in danger of losing all appellate rights, making the District Courts judgments beyond review. Any judge that does not wish the appellate court to scrutinize a decision need only fail to mail the order to the prisoner, who cannot check on the status of the case, and any attempt to obtain a Certificate of Appealabilty becomes barred.

Even if the E-File mandate is not rescinded by this Court, an exception should be carved out in exceptions such as this one. The fault for Jervis's failure to timely file his Notice of Appeal and Request for a Certificate of Appealabilty, the Court's failure to notify him of the order and his complete inability to check on the status of his case. It is fundamentally unfair and violates due process principles for a court to provide an impediment and then fault the prisoner. This Court should intervene before such practices become rampant across the U.S.

Issue II

The District Court erred in its determination of this issue. The Indiana Court of Appeals unreasonably applied *Strickland* in Jervis's case. "A state court unreasonably applies federal law if it identifies the correct legal principle but it unreasonably applies it to the facts of the case, or if it unreasonably refuses to extend a principle to a context in which it should apply." *Goudy v. Basinger*, 604 F.3d 394, 399 (7th Cir. 2010), *citing Williams v. Taylor,* 529 U.S. 362, 407 (2000). The term, "unreasonable," is defined as: (1) an act not in accordance with reason or good sense; or (2) the fact of going beyond what is reasonable or equitable." Garner, Bryan A. *A Dictionary*

of Modern Legal Usage, 2nd edition. © 1995. Oxford University Press: NY, NY. The state court's decision is undoubtedly "unreasonable" under either definition. The District Court, therefore, acted unreasonably by upholding the decision.

Failure to Advise Jervis about the State's Guilty Plea Offer

Initially, Jervis maintains that his trial attorney was ineffective for failing to advise him about the State's plea offer. During state court proceedings, Jervis relied upon *Hill v. Lockhart,* 474 U.S. 52, 57-59 (1985). The State court rejected Jervis's reliance on *Hill* and instead incorrectly determined that his claim should be determined under the standard set forth in *Lafler v. Cooper,* 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012). The state courts offered no rationale regarding the retroactive application of these cases.

The Sixth Amendment right to effective counsel is guaranteed at any critical stage of a criminal prosecution where counsel's absence "might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 228 (1967). *See also, Montejo v. Louisaina,* 129 U.S. 2079, 2086 (2009). There is no question that effective counsel is necessary to provide fairness to the defendant and reliability to the proceeding because the complex nature of criminal law demands an expertise and experience well beyond the untrained layperson. These complexities are inherent in the process of plea negotiations. "Plea bargains are the result of complex negotiating suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. *Premo v. Moore*, 131S.Ct. 733, 741 (2011). A layperson defendant "requires the guiding hand of counsel at *every* step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 53 (1935) (emphasis added).

The Respondent conceded that Jervis was entitled to effective counsel, but asserted that the state court opinion was not contrary to or an unreasonable application of United States

Supreme Court precedent. Trial counsel testified at the post-conviction hearing that he offered Jervis absolutely no advice regarding the State's offer. The Respondent correctly quoted counsel's testimony as "I didn't recommend that you take it, nor did I recommend that you reject it. I told you here's the offer, and you – you gave me the answer."

The Respondent argued that Jervis cannot demonstrate prejudice because he maintained his innocence. This is a disingenuous argument that should have no bearing on the issue. Every criminal defendant initially pleads not guilty, effectively maintaining their innocence in relation to the criminal wrongdoing with which they have been charged. In every case resolved by a plea agreement between the State and the defendant, the initial plea of not guilty is changed to a plea of guilty. This decision is reached after meaningful consultation with counsel regarding the possibilities emerging out of the facts of the particular case. Jervis never had that meaningful consultation with counsel. In fact, the Respondent concedes, through its admission of counsel's failure to advise Jervis regarding the plea offer, that Jervis was in no better position than if the State had made the offer directly to him rather than through his attorney.

The State court and the Respondent incorrectly relied upon the decisions in *Lafler v. Cooper,* 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012). *Lafler* and *Frye* were decided in 2012; therefore, the standard set forth in those cases does not retroactively apply to counsel's performance nearly 20 years earlier. According to this Court's standards, set forth in 466 U.S. 688 (1984), counsel's performance must be evaluated from counsel's perspective at the time and under the then prevailing law. Neither the state courts nor the Respondent argued that *Lafler and Frye* should be applied retroactively. Rather, they simply rely on these cases, giving them retroactive application. However, *Teague v. Lane*, 489 U.S. 288, 301 (1989) bars the application of "a new constitutional rule of criminal procedure" in *habeas* proceedings.

There is no question that *Lafler* and *Frye* were a departure from *Hill*. *Lafler,* 132 S.Ct. at 1385. This is the reason that the state courts explicitly rejected *hill* and adopted *Lafler* and *Frye.* As such, they are not allowed to be retroactively applied. The Respondent's failure to argue or provide analysis regarding the retroactive application of *Lafler* and *Frye* results in the waiver of the issue.

Moreover, the focus in this case should be on the fact that Jervis was denied counsel at a critical stage. Therefore, neither acceptance nor rejection of a plea can withstand constitutional scrutiny. It has long been established that "[a] plea that is induced by the misrepresentations of counsel is ineffective." *Tower v. Phillips*, 979 F.2d 807 (CA 2 1992). Thus, counsel's failure to advise Jervis regarding acceptance or rejection of the plea, coupled with his misleading comments about the possibilities of acquittal, render any decision by Jervis unknowing, unintelligent and involuntary. *See e.g., Boykin v. Alabama,* 395 U.S. 242 (1969). An attorney that extends a plea proffered by the state but does not advise his client regarding acceptance or rejection of the plea does not operate as the counsel contemplated by the Sixth Amendment. Thus, Jervis was denied counsel at a critical stage because he did not receive meaningful consultation and advice. With proper advice, Jervis would have accepted the plea, which would have resulted in 20 years less on his sentence.

Failure to Object to Evidence

Next, Jervis claims that his trial attorney was ineffective for failing to objet to the introduction of forensic evidence and that his appellate attorney should have raised the issue as fundamental error on direct appeal. Counsels' arguments against this evidence should have been based upon the destruction of evidence in bad faith. *See Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). During the trial the State presented testimony regarding blood, hair and an oral swab.

court took no steps to safeguard Mr. Jervis from proceeding with a possibly tainted jury. Although the jurors were questioned about whether or not they had overheard the conversation between Childers and the bailiff, the trial court did not confront Miller with Childers' accusation. According to Childers, Miller had specifically asked him to confirm whether the comment that he had made to the bailiff. [R. 3629]. Yet, Miller was permitted to remain on the jury despite Childers' assertions, based solely upon her denial.

This case is nearly identical to *United States v. Rogers*, 177 F.3d 352 (6th Cir. 1999). In *Rogers*, a juror sent a note to the judge after the close of evidence notifying him that he feared for his safety. *Id* at. 556. The juror was questioned more fully. *Id.* The juror revealed that other jurors empathized with him *Id.* the juror was discharged. The Sixth Circuit Court of Appeals reversed because the trial court did not hold a proper *Remmer* hearing. *Id.* The case was remanded for a proper *Remmer* hearing.

These facts parallel the facts of this case. Childers informed the baliff that he was afraid for his and his wife's safety. Sharon Miller overheard this conversation and two other jurors were aware that Childers was concerned for his wife's safety. Thus, it is apparent that the jury was aware of the possible threats made.

Childers's fear of retaliation was legitimized by his discharge. The other jurors, aware of the threats made, likely legitimized the threats. Childers's assertions of the threats were obviously believed and regarded as truthful. His claims that Sharon Miller had overheard his conversations should also have been regarded as truthful. Trial counsel should have questioned Miller and sought her dismissal from the jury.

The practical and human limitations of the jury system cannot be ignored. *Bruton v. United States*, 391 U.S. 123, 136 (1968). A jury placed in fear of retaliation and retribution could

not possibly be characterized as the impartial jury guaranteed to Mr. Jervis by the Sixth Amendment of the United States Constitution and Article One, Section Thirteen of the Indiana Constitution. Therefore, this Court should find that trail counsel was ineffective for failing to safeguard Jervis' right to a fair trial. Accordingly, this matter should be reversed and remanded for a new trial.

Issue III

Jervis maintains that appellate counsel was ineffective for failing to adequately and properly raise the issue that Jervis was denied the opportunity to present a complete defense. A criminal defendant's constitutional right to present a defense must not be abridged by evidence rules that are arbitrary or disproportionate to the purposes they are designed to serve. *Holmes v. South Carolina*, 547 U.S. at 326. "Just because the prosecutor's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case." *Id.* at 330. But evidence rules may permit trial judges to exclude evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or the potential to mislead the jury. *Id.* at 326. None of these rationales justified the exclusion of Marilyn Molinet's testimony. As appellate counsel noted:

> In this case, the witness Marilyn Molinet would have testified that Tony Floyd, now deceased, had told her that he had been with a woman in Newburgh who he had picked up at Frenchie's Tavern and dropped off at the Newburgh Cinema at about 3:00 to 4:00 a.m. on August 15, 1993, had alluded to strangulation and had asked Marilyn Molinet to be on the lookout for suspicious looking cars around their work place in particular meaning cars that detectives might be in. It appears that Tony Floud may have regarded Marilyn Molinet who was his superior and co-worker as a confidant. Clearly, the statements made by Floyd may well had tended to subject him to criminal liability because he was telling his superior and co-worker about having been with a woman at the place where the victim's body was last seen alive

> (Frenchie's Tavern) and at the place where the victim's body was found between the times that the State of Indiana has contended that the defendant Mark Jervis murdered the victim Terri Boyer. This being told to a person who Tony Floyd may well have regarded as a confidant along with his asking her to warn him if any suspicious cars come around his work place would be statements that Tony Floyd would not have made unless he believed the same to be true. Accordingly, the defendant Mark Jervis was denied a fair trial by the exclusion of this evidence which constitutes reversible error.

Clearly, the evidence noted above was relevant and probative. The jury could have found that Tony Floyd, not Jervis committed the murder, based upon his statements against penal interest made to Molinet. At a minimum, this evidence cast reasonable doubt upon Jervis's guilt and would require the jury to acquit.

The defendant's constitutional right to present a defense must not be abridged by evidence rules that are arbitrary or disproportionate to the purposes they are designed to serve. *Holmes v. South Carolina*, 547 U.S. 319, 3.26 (2006). "Few rights are more fundamental than that of an acused to present witnesses in his own defense[.'" *Harris v. Thompson*, 698 F.3d 609, 626 (7th Cir. 2012), cert denied, 133 S.Ct. 2766, *quoting Taylor v. Illinois*, 484 U.S. 400, 408 (1988). The right to present witnesses is "a right Chief Justice Marshall described as 'sacred.'" *Id., quoting United States v. Burr*, 25 F. Cas. 30, 33 F. Cas. No 14692d (C.C.D. Va. 1807). "The compulsory process right is an essential attribute of the adversary system itself, and imperative to the function of the courts, which depend on full disclosure of all the facts, within the framework of the rules of evidence. *Id.* (internal quotations omitted); *Taylor*, 484 U.S. at 408, *United States v. Nixon*, 418 U.S. 683 (1974). A new trial is required to cure this Sixth Amendment violation.

CONCLUSION

This case presents issues of national importance, which are appropriately decided by this Court. Jervis implores this Court to grant *certiorari* and to set a clear and unequivocal precedent that prohibits the Circuit Courts from violating the axiomatic, bedrock principles of the American judicial system. Otherwise, a prisoner's fundamental right to seek redress of grievance through the court will erode beyond recognition. Left unchecked, the most basic rights of prisoners will disappear, and cruel and unusual punishment will, once again, become the norm. For the sake of judicial economy, Jervis also asks this Court to rule upon his ineffective assistance of counsel claims.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark M. Jervis

Mark Jervis

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