No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN STOJETZ,
PETITIONER,

V.

TIM SHOOP, WARDEN
RESPONDENT.

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

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QUESTIONS PRESENTED FOR REVIEW

I. Has the Constitutional right to due process of law been violated where a prosecutor withholds prison medical records that substantiate a capital defendant's claims of prison assaults and his later diagnosis of PTSD, and then impeaches his mitigation expert and argues for the death penalty claiming that no medical records support the defendant's claimed assaults?

II. Does counsel render ineffective assistance of counsel in failing to inquire into racial bias in a racially charged capital trial?

LIST OF PARTIES

Petitioner John Stojetz is currently housed at Ohio's death row located at the Chillicothe Correctional Institution.

The Warden of that institution is Respondent Tim Shoop. At the time of initiating the ligation the Warden of that institution holding Mr. Stojetz was Todd Ishee.

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On September 24, 2014, the district court denied Stojetz's Petition. *Stojetz v. Ishee*, Case No. 3:05-cv-1290, 2014 U.S. Dist. Lexis 137501 (S.D. Ohio, September 24, 2014). (Appendix C). The district court permitted limited discovery but did not hold any hearings.

On June 5, 2018, the United States Court of Appeals for the Sixth Circuit issued its opinion in this matter. *Stojetz v. Ishee*, 892 F.3d 175 (6th Cir. 2018). (Appendix A). On August 17, 2018, the Sixth Circuit denied Stojetz's Petition for Review *En Banc*. *Stojetz v. Ishee*, 2018 U.S. App. Lexis 23072 (6th Cir. August 17, 2018). (Appendix B).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §§ 1257 and 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... .

United States Constitution, Amendment VIII, provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

John Stojetz is under a sentence of death in the State of Ohio. There is currently no execution date scheduled.

Mr. Stojetz was indicted for the aggravated murder of Damico Watkins. Attorneys Jon Doughty and James Doughty were appointed to represent Mr. Stojetz. James Doughty is the father of Jon Doughty.

From October 17, 1996, the arraignment, until April 1, 1997, the start of jury selection, there were no pretrial hearings, no status conferences or other hearings or court appearances.

Jury selection lasted less than two days and the jury was sworn on April 2, 1997. Trial began on April 3, 1997. The state presented thirty-nine witnesses in its case in chief. The entire trial lasted less than four days.

The penalty phase began on April 16, 1997. The defense presented testimony from four lay witnesses and testimony from a psychologist. Mr. Stojetz also made an unsworn statement. Mitigation presentation was completed before the end of the day.

Mr. Stojetz pursued a direct appeal as of right to the Ohio Supreme Court. The court denied relief on all claims. *State v. Stojetz*, 84 Ohio St.3d 452, 705 N.E.2d 452 (1999). Mr. Stojetz raised nineteen separate claims in his appeal. Mr. Stojetz was represented by the Office of the Ohio Public Defender.

State Post-Conviction

Mr. Stojetz filed a timely petition for post-conviction relief with the trial court. Ultimately this petition was amended five times. During state post-conviction Mr. Stojetz was represented by John Gideon and Cordelia Glenn. These attorneys represented him through a contract with the Office of the Ohio Public Defender.

The post-conviction court conducted an evidentiary hearing on August 10-12, 1999. Additional evidence related to Stojetz's post-conviction claims was adduced via depositions.

On September 14, 2000, the trial court denied Stojetz's petition.

John Gideon, on behalf of Mr. Stojetz, timely filed a notice of appeal in the Twelfth District Court of Appeals on October 13, 2000. Gideon continued to represent Mr. Stojetz through a contract with the Office of the Ohio Public Defender.

Gideon requested two extensions of time to file Stojetz's brief. On June 11, 2001, the day after Mr. Stojetz's brief was due, Gideon requested a page extension. Three months later, no brief was filed and the court issued an order to show cause why Mr. Stojetz's appeal should not be dismissed. The court granted another extension of time until October 15, 2001. Mr. Stojetz's brief was never filed and the court dismissed his post-conviction appeal on January 10, 2002. Gideon never advised Mr. Stojetz of the status of the appeal, the extensions of time, the missed deadlines, the show cause order, or the failure to file a brief whatsoever.

In September, 2001, Mr. Stojetz contacted Joseph Wilhelm, the Assistant State Public Defender who represented him on direct appeal, asking for help tracking Gideon down and finding out the status of the appeal. Initially, Wilhelm was unable to locate Gideon. Ultimately, contact was made and Gideon advised Wilhelm that the case was fine and that he was waiting for an order regarding page limits before filing the brief. This was an outright lie.

The Office of the Ohio Public Defender learned of the court's January 10, 2002 order dismissing the appeal and on January 23, 2002 filed a motion to re-open Mr. Stojetz's appeal and substitute it as counsel for Mr. Stojetz. The state specifically did not oppose these requests.

On February 4, 2002, Mr. Stojetz filed a Motion to File Brief Instanter and a Merit Brief on the denial of the post-conviction petition. The court denied Mr. Stojetz's request to re-open his appeal on February 8, 2002.

Mr. Stojetz, represented by the Office of the Ohio Public Defender, sought leave to appeal the denial of his motion to re-open his appeal to the Ohio Supreme Court. That court refused to

hear the appeal. *State v. Stojetz*, 95 Ohio St.3d 1458, 767 N.E.2d 1177 (2002). Justice Pfeifer dissented.

Motion for a New Trial

On April 12, 2000, Mr. Stojetz filed a motion for a new trial. Mr. Stojetz was represented by John Gideon. Gideon represented Mr. Stojetz through a contract with the Office of the Ohio Public Defender. The trial court denied Stojetz's motion on March 22, 2002.

Mr. Stojetz appealed the denial of his new trial motion. The Court of Appeals denied Stojetz's appeal on December 2, 2002. *State v. Stojetz*, unreported, Case No. CA2002-04-006, 2002 WL 31682231 (12th Dist. Dec. 2, 2002). Mr. Stojetz was represented by the Office of the Ohio Public Defender on appeal.

Mr. Stojetz sought leave to appeal to the Ohio Supreme Court. The court refused to hear the appeal. *State v. Stojetz*, 98 Ohio St.3d 1514, 786 N.E.2d 63 (2003).

Murnahan Application

On May 18, 1999, Mr. Stojetz filed an application to reopen his direct appeal under Rule XI, Section 5 of the Rules of Practice of the Supreme Court and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). John Gideon again represented Mr. Stojetz through a contract with the Office of the Ohio Public Defender.

The Ohio Supreme Court denied the application without opinion. *State v. Stojetz*, 86 Ohio St.3d 1454, 714 N.E.2d 932 (1999).

Mr. Stojetz timely filed a Habeas Corpus Petition (R. 14) under 28 U.S.C. § 2254, which was properly Amended. R. 130 (Amended Habeas). 28 U.S.C. § 2241 provided jurisdiction to the district court.

On September 24, 2014, the district court denied habeas relief in the entirety granting a COA on many habeas claims. R. 139 PageID#8896-9127. The district court journalized its judgment entry that same day. R. 140 PageID#9128-9129. Stojetz timely filed a Rule 59 Motion. R. 141 PageID#9130-9146. The district court denied this motion. R. 148 PageID#9180-9185. On February 10, 2015, Appellant timely filed a notice of appeal. R. 149 PageID#9186-9187.

The Sixth Circuit expanded the COA. On June 5, 2018, after briefing and argument, the Sixth Circuit denied Mr. Stojetz's appeal.

REASONS FOR GRANTING REVIEW

I. WHERE A PROSECUTOR WITHHOLDS PRISON MEDICAL RECORDS THAT SUBSTANTIATE A CAPITAL DEFENDANT'S CLAIMS OF PRISON ASSAULTS AND HIS LATER DIAGNOSIS OF PTSD, AND THEN IMPEACHES HIS MITIGATION EXPERT AND ARGUES FOR THE DEATH PENALTY CLAIMING THAT NO MEDICAL RECORDS EXIST IN SUPPORT OF THE DEFENDANT'S CLAIMED ASSAULTS THEN LATER IMPLIES THAT HE HAS SEEN THE RECORDS AND THAT THEY DO NOT SUPPORT THE DEFENDANT'S CLAIMS, THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW HAS BEEN VIOLATED.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the State violates due process when it suppresses evidence favorable to an accused that is material either to guilt or punishment. Under *Napue v. Illinois*, 360 U.S. 246 (1959), and its progeny, the State violates due process where it presents, or fails to correct, evidence at trial that it knows to be false.

1. Brady Violation

The Constitution of the United States imposes an affirmative duty on the prosecution to disclose to criminal defendants all material exculpatory, impeachment or mitigating evidence. *Brady*, 373 U.S. 83. This duty applies equally to trial and sentencing phases of capital cases and, requires an assessment of materiality, not just as to an individual's culpability, but also as to the

appropriate sentence. *See Banks v. Dretke*, 540 U.S 668 (2004) (granting relief pursuant to Brady as to sentence). The following facts are not in dispute.

First, prior to trial, Stojetz filed motions for discovery and related impeaching information requesting access to all of the information to which he was entitled under Ohio's discovery rules and *Brady* in the possession of the State of Ohio. R. 131-1 p. 20 (discovery demand) Page ID#2696; *Id.* pp. 30-34 (motion for impeaching information) PageID#2706-10. The materials requested would have included Ohio Department of Rehabilitation and Corrections records of assaults on Stojetz.

Second, while the prosecutor indicated it would liberally comply with *Brady* (*see Id.* p. 232 (State's Response) Page ID#2908), the records in question were not turned over in response to Stojetz's request. In addition, the state represented that the requested records did not exist.

Third, during cross-examination of Stojetz's expert mitigation witness, the prosecutor emphasized that his opinion was based on what Stojetz had related about assaults on his person while incarcerated and, without documented evidence of those assaults, the expert's opinion of PTSD was potentially invalid.

And, fourth, in closing arguments in the sentencing phase, the prosecutor implied that he had seen Stojetz's correctional department medical records and that they did not show that Stojetz had broken his ankles or that he had been hung. R. 133-7 pp. 148, 187-188 (Trial Tr.) PageID#7931, 7970-71. Thus, the prosecutor withheld critical evidence and undermined Stojetz's expert's opinion, and then misrepresented the content of Stojetz's institutional records without having produced them for use by the defense.

Throughout the trial, discovery was handled informally between the attorneys. However, counsel did file two motions for discovery directly addressing the State's obligations under *Brady*.

Motion for Disclosure of Impeaching Information, Doc. 131-1, PAGEID# 2706; Motion to Compel, Doc. 131-1, PAGEID# 2729. The State's three sentence reply was "It is the intention of the State to fully and liberally comply with all appropriate rules and cases. The Defendant shall receive all information to which he is lawfully entitled." State's Response to Defendant's Motion to Compel Disclosure of and Specific Requests for Exculpatory Evidence, Doc. 131-1, PAGEID# 2908. It is clear that the State failed to abide by this representation. It is equally clear that the State had Mr. Stojetz's prison medical records. Doc. 133-7, PAGEID# 7931 ("Doctor, if in fact you had checked prison medical records, would it surprise you that at no point was I able to find a reference to the defendant being hung?")

Evidence of the violent attacks suffered by Stojetz, as detailed in the suppressed records, was directly relevant to both his defense at trial and at sentencing. The essence of the defense presentation was that the attack on Watkins was a response, thru the lens of PTSD, to a threat made against Stojetz. During the mitigation phase, defense counsel presented testimony from Dr. Eimer, who supported this contention testifying about Stojetz's history and his mental condition. Eimer found that Stojetz was highly suspicious of others. *Id.* p. 118 PageID#7901. Stojetz "was provoked easily and he is constantly worried and this is probably the major feature that comes up in this is that he is worried all the time, he is scared for his life, he is intensely fearful and on guard. He's experiencing normal recall, he is in a depressed mood, and not just situation of depression. This is a long term situation." *Id.* Eimer continued, "Mr. Stojetz views his world as a threatening place in which there's no place to hide or find safety. His pronounced fearfulness appears to be a controlling part of his life and dominates his thought patterns and over shadows any other feelings." *Id.* Dr. Eimer diagnosed Stojetz with PTSD. *Id.*, at 127 Page ID#7910. Stojetz's PTSD is attributable to

his near death experiences (*Id.*, at 122 PageID#7905), including a prison incident where Stojetz's "throat was cut from one side to the other with a straight edged razor including the jugular." *Id.*

The state, by its actions in withholding the evidence to which Stojetz was entitled, neutralized this compelling testimony by suggesting on cross-examination of Dr. Eimer that his testimony and the evidence upon which he relied was not corroborated and not accurate. *See, e.g.*, R. 133-7 pp. 131-132, 146, 149 (Trial Tr.) PageID#7914-7915, 7929 7932. Dr. Eimer did not have the benefit of reviewing Stojetz's prison records. As to the attack on Stojetz, the State referred to it as an "allegation," which Dr. Eimer could not know "whether in fact those experiences ever took place." *Id.* p. 146-147 PageID#7929-30. The State pressed on, and Eimer was forced to agree, absent proof of prior serious trauma (as contained in the withheld documents), that "it might have just been a scratch on the skin." *Id.* p. 147 PageID#7930.

The suppressed records corroborated Stojetz's claims of having been attacked in prison and Dr. Eimer's testimony about those attacks, refuting the state's arguments to the contrary. *See* R. 132-3 (ODRC Records), Page ID#6307-6332. More egregious is the fact that the state had the records, failed to turn them over defense counsel (as evidenced by the fact that Dr. Eimer never saw them), and then argued that the violent and vicious attack on Stojetz that resulted in a "5 to 6 inch gaping wound" might have been "a scratch," or that Stojetz had simply lied to Eimer about the incident. R. 133-7 p. 146-47, 187-88, Page ID#7929- 30, 7970-71.

Alarmingly, the trial prosecutor specifically implied to Dr. Eimer and then to the jury that he had Stojetz's ODRC medical records and that, based on his implied review of the records, no such attack occurred. *See id.* p. 148 PageID#7931 ("Doctor if in fact you had checked the prison medical record, would it surprise you that at no point was I able to find a reference to the defendant being hung? .... Would it surprise you if at no point was there a reference to the ankles being

broken?"); *id.* pp. 187-188 PageID#7970-71 ("The doctor took the word of the defendant. He indicated that the defendant may by lying. He doesn't know because he didn't bother to verify any of the facts. Didn't check with the prosecutor's office. Hey can you ship me his records?"). Then in closing, the prosecutor argued that the PTSD diagnosis, premised upon uncorroborated evidence, was "invalid." R. 133-7 pp. 187-88 (Trial Tr.) PageID#7970-71. An argument, which was particularly effective because, as noted by the trial court, the jury "rejected" Stojetz's mitigation. R. 132-3 p. 98 (Tr. Ct. Entry), Page ID #6378.

The PTSD diagnosis provided a critical nexus which could have been argued by the Petitioner had the ODRC records been produced. While a nexus is not required for constitutional purposes (*see Smith v. Texas,* 543 U.S. 37, 45 (2004)), the attack on Stojetz in prison provided a vibrant mitigation nexus between the basis of the PTSD, and the circumstances leading up to Stojetz entering the Madison Correctional Institution Juvenile Unit, where Watkins was assaulted and killed. The fact that these records established a nexus also supported their materiality to Stojetz's case and should have been available as evidence of a valid mitigating factor.

The Sixth Circuit Court of Appeals ignored the significance of the withheld evidence, the use of the evidence by the State, the jury's verdict of death, and Stojetz's trial attorney's errors in their reliance on the State's representations. Rather, the court of appeals emphasized that, because Stojetz knew he had been assaulted, and that he himself told the jury about the assault during the mitigation phrase of his trial, no *Brady* violation occurred.

Stojetz's awareness of having been assaulted has never been the issue. Rather, the issue is the documentation that supported Dr. Eimer's findings and diagnosis. The records would have prevented the State from making its false and misleading cross-examination of Dr. Eimer and its arguments to the jury that Stojetz misled Dr. Eimer and that Stojetz had suffered a "mere scratch"

in the throat-slashing incident. In concluding that no *Brady* violation occurred because Stojetz "knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source." *Stojetz v. Ishee*, 892 F.3d at 206, quoting *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2002), the court ignored the issue—the existence of the records, the misrepresentations of the State as to their non-existence and its disingenuous use to its advantage.

But what is more, the court of appeals imposed a requirement that Stojetz should have secured the records independently, regardless of their suppression, even in the face of a misrepresentation by the State that the records did not exist. This gives short-shrift to the Constitutional obligation that requires disclosure regardless of a request from defense counsel. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), *citing to United States v. Bagley*, 473 U.S. 667, 682 (1985). Indeed, in order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437.

In addition, once the state affirmatively stated to Stojetz that it would liberally provide exculpatory evidence, defense counsel reasonably could "assume from the nondisclosure that the evidence [did] not exist, and [] make pretrial and trial decisions on the basis of this assumption." *Bagley*, at 683; *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002) (After affirmatively representing that no favorable evidence existed "Ohio cannot now argue that it was unreasonable for defense counsel not to have caught it suppressing evidence."). The Court in *Banks*, 540 U.S. at 696, found detestable the notion that "the prosecution can lie and conceal and the prisoner still has the burden to...discover the evidence, so long as the 'potential existence' of a prosecutorial

misconduct claim might have been detected." The sad reality is that prosecutors continue to avoid and evade their Constitutional obligations with impunity.

Aside from the fact that the district court and court of appeals' findings are contrary to and/or an unreasonable application of Supreme Court authority, the imposition of such a lax standard would render the government's duty to disclose impeachment evidence meaningless. *Kyles*, 514 U.S. at 439-440. It is either a self-evident truth or at least a theoretical possibility that the defense is always able to uncover possible *Brady* evidence. However, "a rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.' Ordinarily, we presume that public officials have properly discharged their official duties.'" *Banks*, 540 U.S. at 696. "Defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.'" *Id.* at 695-696, *citing Strickler v. Greene,* 527 U.S. 263, 286-87 (1999). Otherwise, as the Court warned in *Kyles*, the adversary system descends into "a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth." *Kyles,* 514 U.S. at 439.

Brady's requirements of disclosure apply to "impeachment evidence as well as exculpatory evidence," apply even if the accused does not ask for the evidence, and apply regardless of the good faith of or even knowledge of the prosecution that police have the evidence. *Strickler,* 527 U.S. at 280-81. In *Strickler,* the Court held that the habeas petitioner had shown cause to excuse procedural default of his *Brady* claim, where he had no reason to believe at the time of trial that

the state had withheld *Brady* evidence, and, thus, the petitioner was entitled to rely on the state's duty to disclose. *Id.* at 287.[1]

Stojetz has satisfied the *Brady* materiality standard. The duty of disclosure is not limited to evidence in the actual possession of the prosecutor. Rather, it extends to evidence in the possession of each and every member of the prosecution team, which includes investigative and other government agencies. *Kyles,* 514 U.S. 419; *see also Strickler,* 527 U.S. at 275 n. 12.

A failure on the part of the government to disclose favorable evidence requires a new trial, and a new sentencing hearing, if disclosure of the evidence creates a reasonable probability of a different result. As the Court instructed in *Kyles*, "the adjective is important," and "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles,* 514 U.S. at 434.

Further, as previously noted, the trial prosecutor went to great lengths at the penalty phase where he described Eimer's testimony and diagnosis as "invalid." This Court should grant *certiorari* to give effect to its requirement that, in determining materiality, courts must "tak[e] the word of the prosecutor" at trial concerning how important a witness's testimony is to the case.

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[1] The Sixth Circuit Court of Appeals also found that because Stojetz raised the issue of the withheld records for the first time in his second state post-conviction petition and motion for a new trial, filed ten years after his conviction, the state court findings that the claims were untimely and defaulted were based on independent and adequate state grounds. Stojetz, 892 F.3d at 204-05. Again, the court missed the mark. The issue is not that Stojetz filed his petition when he did, but, rather, when the withheld records that are the basis for the *Brady* violation were discovered and available. *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

Kyles, 514 U.S. at 444. Thus, a prosecutor who emphasizes or relies upon the false testimony in argument to the jury, by that, act provides compelling proof of its materiality.

2. Napue Violation

The government is obligated to correct any evidence introduced at trial that it knows to be false, regardless of whether or not the evidence was solicited by it. *See Napue*, 360 U.S. at 269; *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942). *Napue* prohibits the government from knowingly using false evidence to obtain a criminal conviction, while *Alcorta* and *Pyle* obligate the government to correct false evidence thus presented. These duties provide fundamental protections that are vital to the successful operation of an adversarial system of criminal justice; they embody the state's obligation not to obtain the accused's conviction at all costs, but rather to do justice by furthering the truth-finding function of the court and jury.

The test for materiality under *Napue* is distinct from that under *Brady*: a *Napue* violation is material when there is "any reasonable likelihood that the false testimony *could* have affected the judgment of the jury," *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added); in contrast, a *Brady* violation is material to a jury's verdict when "there is a reasonable probability that . . . the result of the proceeding *would* have been different" but for the violation. *Bagley*, 473 U.S. at 682 (emphasis added). The reason for this distinction is clear: claims based on false testimony elicited and exploited by prosecutors "involve a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104.

A critical error was made by the state court in considering Stojetz's petition for post-conviction relief where it found "Nor is there any evidence that the State was in possession of these documents and relied upon them to present evidence they knew to be false." R. 132-3 p. 10 (Trial Court Order) PageID#63843. This simply is not true. During the prosecutor's cross examination

and his closing argument, he said that the records did not support Stojetz's claims of assaults, an admission that he was, at the least, aware of their existence. R. 133-7 pp. 148, 187-88 (Trial Tr.), Page ID #7931, 7970-71.

As brazen a misrepresentation as that was, more importantly, the evidence upon which Dr. Eimer relied upon as provided by Stojetz, was, long after his trial and sentence, discovered to have been absolutely true. It was documented by state agents and in the records of the state, but denied to Stojetz to support his own witnesses' testimony. The state's arguments and insinuations at trial amounted to the knowing presentation of false evidence. This was accomplished in several ways. First, the prosecutor's questioning and argument unfairly suggested that Stojetz had lied to Dr. Eimer, the very person he called to testify about the mental impact upon him from having been assaulted in prison and which formed the basis of Eimer's diagnosis of PTSD and his "fight or flight" mentality at the time of the Watkins murder. The use of this evidence was denied to Stojetz, and his jury was charged with the responsibility of determining if he should live or die, having never heard it.

Second, by his questioning, the prosecutor neutralized a powerful case for mitigation and a life sentence. The result was that the state's misconduct deprived Stojetz of his substantive due process right to a fair sentencing proceeding and individual sentencing. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974) (citing *Griffin v. California*, 380 U.S. 609 (1965)) (footnote omitted). It also rendered Stojetz's sentencing proceedings fundamentally unfair. *See Berger v. United States*, 295 U.S. 78 (1935); *Gravley v. Mills*, 87 F.3d 779, 786 (6th Cir. 1996).

The state's disingenuousness is evident where the prosecutor implied that he had reviewed Stojetz's prison medical records (R. 133-7 p. 148 (Trial Tr.), Page ID #7931), while simultaneously asking questions about Stojetz exaggerating what was only a "cut" or "superficial" injury. *See Id.*

p. 147 PageID#7930. The clear inference was that the records the trial prosecutors had seen demonstrated that Stojetz had suffered a mere "cut" or "superficial" injury, a representation the records now clearly demonstrate to be false. The state's representations to the Petitioner and the trial court that it had no ODRC records was false, not only as to its possession of the evidence, but, also, as to the content of the records. As to the all-important question for the jury, as asked by the trial prosecutor, "if we're dealing with something as a potentially traumatic episode which contributes or is the foundation of the post-traumatic stress disorder, *don't you agree we have to have originally a traumatic experience*?" *Id.* p. 146, Page ID #7929 (emphasis added). The state then repeated this misrepresentation in its closing argument indicating that, in relation to Dr. Eimer, his testimony and report were "invalid" "because he didn't bother to verify any of the facts" "didn't check with the prosecutor's office," in short "he made a diagnostic report based solely upon what the defendant and a few family members said and didn't bother to verify the facts." *Id.* pp. 187-88, Page ID #7970-71. Understandably, the trial court in state post-conviction found Stojetz's jury "rejected" this PTSD mitigation, R. 132-3 p. 98 (Tr. Ct. Entry), Page ID #6378, because the ODRC records were never offered by his attorneys as evidence during trial. Instead, the prosecutors, knowing that the records existed, hid them from Stojetz, his attorneys, the trial court, and, most importantly, his jury. If provided with the records, a different verdict would have been returned.

Stojetz has satisfied the applicable *Napue* standard. The *Napue* violation was material to the jury's death sentence. Indeed, it prevented the consideration of a valid and powerful mitigating factor, PTSD, as recognized by the Supreme Court. *Porter v. McCollum,* 558 U.S. 30 (2009). The fact that the prosecutor was able to minimize powerful mitigation evidence of PTSD and declare it "invalid" in argument, establishes that there is a reasonable likelihood that the false testimony, at a minimum, affected the judgment of the jury. Indeed, the Ohio Supreme Court was similarly

duped by the false impression, and the trial court found that the jury "rejected" this mitigating factor.

In *LaCaze v. Warden of Louisiana Correction Institute for Women*, 645 F.3d 728 (5th Cir. 2011), *amended by*, 647 F.3d 1175 (5th Cir. 2011), for example, the Fifth Circuit held that uncorrected false testimony was material, based in part on the fact that "the State here 'capitalized on this misrepresentation in [its] closing argument' by repeatedly arguing that [the witness] had not received a deal that would give him a reason to lie." 645 F.3d at 737 n.1 (quoting *Tassin v. Cain*, 517 F.3d 770, 779 (5th Cir. 2008)). The court held that the prosecutor's reliance upon the testimony "itself shows the materiality of the undisclosed deal." *Id.*; *see also Kyles*, 514 U.S. at 444.

The fact that the prosecutor's *Napue* violation took mitigation off the table demonstrates that the death verdict and sentence were affected by their false representations. Indeed, as in *Napue*, "when reliability of a given witness may well be determinative" of Stojetz's sentence, there is a prejudicial due process violation. Dr. Eimer's testimony was thoroughly impeached by the prosecutor's misrepresentations of the non-existence of the ODRC records. Thus, the resulting verdict was the product of that falsehood, in violation of the Due Process Clause of the Fifth Amendment.

Stojetz's case is similar to *Miller v. Pate*, 386 U.S. 1 (1967). *Miller* involved a knowing misrepresentation of evidence by the state. In *Miller*, the prosecutor represented to the jury, through the testimony of an expert witness, that blood stains matching the victim's blood type were found on an item of clothing recovered a mile from the crime scene. *Miller*, 386 U.S. at 3-4. As was later discovered, however, the prosecution was aware at the time of Miller's trial that the stains were remnants of paint, not blood. *Id*. at 5-6. Holding that due process principles will not

"tolerate a state criminal conviction obtained by the knowing use of false evidence," the Court reversed the lower court's denial of a writ of habeas corpus. *Id*. at 7.

The prosecutor in Stojetz's proceedings was guilty of the same type of malfeasance, making the argument that nothing supported the mitigating factor involved, and thus, it was "invalid," which led the jury to reject this mitigation evidence and recommend a sentence of death.

Therefore, the Writ should issue.

II. DOES COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO INQUIRE INTO RACIAL BIAS IN A RACIALLY CHARGED CAPITAL TRIAL?

Mr. Stojetz's case was racially charged from the very beginning, a sad but very real reflection of life inside prisons in the United States. A reality of prison life is the very real threat to anyone without the protection of a group. In order to offer group protection, gangs form, mostly along racial lines. While race is a condition of admission to a gang, the gangs are not necessarily driven by racial animus. Rather, prison gangs are driven by a need for mutual and individual protection of members against other inmates or gangs.

When the State of Ohio began trying and sentencing more juveniles as adults, it had accommodate the growing population of juveniles entering the adult prison system. As a result, it created a juvenile unit at Madison Correctional Institute ("MCI"), an adult penal facility. At the time of the incident in question, this prison housed adult inmates as well as juvenile offenders bound over to the adult system. Over one hundred juveniles were housed in the Adams A unit.

The presence of juveniles created numerous problems for adult inmates and the institution. The juveniles at MCI tended to be rowdier and, for the most part, out of control. Because of their immaturity and age, the juveniles had difficulty adapting to prison life, caused problems because

of their lack of respect for other inmates and staff, and were more violent towards each other, the adult inmates and the staff.

In Adams A, the black juveniles from Cincinnati ran the unit as a gang, The Folks Nation. The Folks or Folks Nation is black prison gang. Damico Watkins was a leader of this group. The other juvenile inmates were afraid of severe beatings should they challenged the group. Even the guards were afraid of the group.

While Watkins and his group were not always officially referred to as a gang, Watkins's association with The Folks Nation surfaced after his death when other inmates identified him as a member. Prison officials then became aware that, prior to his incarceration, Watkins was a member of The Folks. Among Watkins's property in Adams A was a gang drawing referencing "BOS" (Brothers of the Struggle), a gang associated with The Folks Nation. Further, Watkins name was written on his cell door along with "Melville Player" which indicated gang affiliation.

John Stojetz was a member of the Aryan Brotherhood ("AB"). This a white prison gang. He was not the leader of the AB either at MCI or within the Ohio prison system.

On April 24, 1996, a white juvenile inmate named Doug Haggerty was attacked in Adams A. Doug Haggerty was not a random juvenile. Doug Haggerty was small, about five foot nine inches and 130 pounds. He was someone who needed protection in prison. Haggerty was not in the AB but he was the son of a former cellmate of John Stojetz. Haggerty's father asked Mr. Stojetz to look after Doug, to make sure no one would rape or hurt him. John Stojetz agreed to protect him.

Initially, the incident started out as a fight between Haggerty and one other inmate, Quincy Willingham, a black juvenile inmate from Cincinnati. Once it became apparent that Willingham

was losing the fight to Haggerty, Watkins and his gang jumped into the fight. Watkins attacked and blind-sided Haggerty.

The guard broke up the fight and Haggerty was sent to segregation. Watkins was not sent to the Hole.

After the attack on Haggerty, Watkins began to make threats directed at the Aryan Brotherhood and, specifically, John Stojetz. "They were going to kill Big John" and "they were going to get all the Aryan Nation." Doc. 133-6, PAGEID# 7776; Doc. 131-4, PAGEID# 3662.

The next day, the word began circulating across MCI that Watkins was organizing his group and recruiting others to attack the AB, including John Stojetz. A black juvenile inmate told Stojetz that Watkins had jumped Haggerty and beat him up. The juvenile went on to warn Stojetz to be careful because Watkins said they were going to get the AB before they get them because they jumped Haggerty. Doc. 131-4, PAGEID# 3662.

James Bowling, the leader of the AB at MCI, learned that Watkins intended to attack Bowling, Stojetz, and the other AB members right after lunch on April 25, 1996. Bowling decided to respond to Watkins's threats with a preemptive attack. Bowling gathered Stojetz and four other inmates together and outlined the plan for the attack. Bowling stated that the plan was for the six of them to enter Adams A and the group would stand guard while John Stojetz fought with Watkins and the members of his gang. The purpose of this attack was not to kill anyone but to exercise control over the juveniles and put them in their place. Doc. 131-4, PAGEID# 3663.

Bowling, Stojetz, and the others went to Adams A and found the exterior door propped open by a pop can. They entered Adams A and surrounded the only guard in the unit and then allowed him to leave. Watkins was then attacked. AB members William Vandersommen and Jerry Bishop later admitted to attacking Watkins with knives and killing him. Doc. 131-4, PAGE ID#

3672; Doc. 131-4, PAGEID# 3677. It is clear from the facts of this case, the nature of U.S. prisons, and the nature of race relations in this country that race was going to be a central issue in Stojetz's trial.

At trial, the state wasted no time in playing up the racial aspects of its case. The state repeatedly drew the word "nigger" from witnesses to emphasize the racial implications of the case. (Transcript of Trial, R. 133-5, PAGE ID #7411; R. 133-7, PAGE ID #7801). The State emphasized the fact that this was a crime involving the Aryan Brotherhood, a white prison gang, and The Folks Nation, a black prison gang. Defense counsel knew what the central issue was in the case and identified the racial aspects in his opening statement. (Transcript of Trial, R. 133-4, PAGEID #7257) Racial issues were so clear and apparent that the Ohio Supreme Court noted that this case "took place in a detention facility amidst an atmosphere full of racial animosity." *State v. Stojetz*, 84 Ohio St.3d 452, 471 (1999). And yet counsel asked no questions of any prospective juror about racial issues, attitudes, or biases or prejudices. In a case where race was so intertwined with both trial and sentencing issues, the failure of counsel to explore issues of race was both deficient performance and prejudicial.

In *Turner v. Murray*, 476 U.S. 28 (1986), the Court recognized that, especially in capital cases, the discretion vested with juries to make individualized sentencing decisions created an untenable possibility that racial prejudice might infect that sentencing decision. *Id.*, at 35. As such, the Court determined that, "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the impact of racial bias." *Id.*, at 36-37.

What the *Turner* Court did not address, because it was not before it, was whether counsel must conduct an inquiry into racial prejudice. The Court's only comment about the duty of defense

counsel was to note in Footnote 10 that, if defense counsel chose not to make such an inquiry, the trial court was under no obligation to *sua sponte* raise the issue. *Turner*, 476 U.S. at 37, n. 10. The lower courts have improperly interpreted Footnote 10 to mean that counsel is never ineffective for failing to inquire into racial bias, often citing, without identifying a "strategic" reason for not conducting the inquiry. *Henry v. Horn*, 218 F.Supp.2d 671, 697 (E.D. Pa. 2002); *Eason v. Everett Mu. Court*, 2007 U.S. Dist. Lexi 49232 (W.D. Wash, 2007); *Mitts v. Bagley*, 2005 U.S. Dist. Lexis 44018 (N.D. Ohio, 2005) ("Mitts has failed to overcome the strong presumption that counsel's decision not to question the jurors about racial prejudice was reasonable trial strategy.").

Turner did recognize that the burden was on defense counsel to request inquiry into the racial issues. *Turner*, 476 U.S. at 37. In capital cases in Ohio defense counsel is an active participant in *voir dire*. It falls to defense counsel, not the trial court, to explore the issues of racial animus from the defense perspective. It is widely recognized that a defendant is denied his right to the effective assistance of counsel if counsel fails to do things the Constitution provides to defendants. It is ineffective representation, for example, where counsel fails to seek expert services as guaranteed under *Ake v. Oklahoma*, 470 U.S. 68 (1985), *Dando v. Yukins*, 461 F.3d 791, 798-799 (6th Cir. 2006); or fails to seek suppression of evidence under the Fourth Amendment, *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

Nor could there be a strategic reason for counsel to avoid asking about racial issues. Even with the limited investigation and preparation counsel did, defense counsel knew that race was a central issue to the case. The jury was going to hear racially explosive language, hear the racial background of the crime, hear the racial beliefs of the Aryan Brotherhood, and otherwise be immersed in the racial tensions that are an unfortunate but real component of life inside an American prison. This is not a situation in which counsel could have hoped to hide the race issue

from the jury, or that counsel could hope to minimize the racial aspects of this case. Race was a critical and central theme of the state's case and counsel knew this.

Concerns about the impact of racial prejudice in the criminal justice system are rightfully reviewed by this Court. Since *Turner*, the Court has consistently relied on this concern when striving to protect the right to a fair and impartial jury. In *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), the Court recognized that the risk of taint by racial animus was significant enough that a defendant's Sixth Amendment right to inquire into racial bias trumped the state's evidentiary rule barring inquiry into jury deliberations. More recently, in *Tharpe v. Sellers*, 138 S.Ct. 545 (2018), the Court summarily vacated a court of appeals determination to deny a certificate of appealability relying on the affidavit of a juror that "'there are two types of black people: 1. Black folks and 2. Niggers'; that Tharpe, 'who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did'; that '[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason'; and that, '[a]fter studying the Bible, I have wondered if black people even have souls.'" *Id.*, at 546. In order to protect defendants' Sixth Amendment rights to a fair and impartial jury, and to ensure capital sentences are not imposed because of racial animus in violation of the Eight Amendment, this Court should grant the Writ and address the duties and obligations of defense counsel in racially charged cases.

Therefore, the Writ should issue.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the reasons stated herein, this Honorable Court should grant the Petition for Writ of Certiorari to the Sixth Circuit.

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COUNSEL FOR PETITIONER

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN STOJETZ,
PETITIONER,

V.

TIM SHOOP, WARDEN,
RESPONDENT.

CERTIFICATE OF SERVICE

I, Michael J. Benza, a member of the Bar of this Court, hereby certify that on this 14th day of November, 2018, copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS FOR THE SIXTH CIRCUIT COURT OF APPEALS and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS were served in compliance with Supreme Court Rule 29.3 by regular United States Mail, first-class postage prepaid, on Counsel for Respondent, Thomas Madden, Assistant Attorney General, Capital Crimes Unit, 150 East Gay Street, 16th Floor, Columbus, OH 43215-3428. All parties required to be served have been served.

Respectfully submitted,

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