No. 18-6727

In the Supreme Court of the United States

JOHN C. STOJETZ,

Petitioner,

v.

TIM SHOOP, WARDEN

Respondent.

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

BRIEF IN OPPOSITION

DAVE YOST
Ohio Attorney General

MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor
**Counsel of Record*
HANNAH C. WILSON
JASON D. MANION
Deputy Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
michael.hendershot
@ohioattorneygeneral.gov

Counsel for Respondent
Tim Shoop, Warden

CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. At John Stojetz's sentencing hearing, a psychologist testified that he suffered from Post-Traumatic Stress Disorder ("PTSD") as a result of several violent experiences, including a prison fight in which his throat had been slashed. During cross-examination, the prosecutor questioned the psychologist's failure to verify these incidents. In affirming the sentence, the Ohio Supreme Court accepted the PTSD diagnosis, but found that it carried little mitigating weight. Years later, Stojetz obtained a copy of his prison medical records documenting the serious nature of his throat injury. He asserted that the failure to turn over these records earlier violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that the prosecutor's cross-examination and closing violated *Napue v. Illinois*, 360 U.S. 264 (1959). While the Sixth Circuit found these claims defaulted, Stojetz's first question presented is:

Does a due process violation occur under *Brady* and *Napue* when the allegedly suppressed and/or misrepresented evidence lends only cumulative support to a mitigation theory that carries little to no mitigating weight?

2. Stojetz was accused of killing an African-American juvenile inmate and being a leader of the Aryan Brotherhood. Stojetz claimed, however, that the killing was not racially motivated. During voir dire, his counsel chose not to ask prospective jurors about their views on race. The second question presented is:

Did the Ohio Supreme Court reasonably hold that trial counsel were not constitutionally ineffective by strategically deciding to downplay racial issues?

LIST OF PARTIES

The Petitioner is John C. Stojetz, an inmate at the Chillicothe Correctional Institution in Chillicothe, Ohio.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

INTRODUCTION

In 1996, Petitioner John Stojetz, known as a leader of the Aryan Brotherhood prison gang, stormed the juvenile unit of a prison with several other adult inmates. Ultimately, Stojetz stabbed Damico Watkins, a 17-year-old black inmate, to death as Watkins pleaded for his life. Stojetz was charged with aggravated murder. At trial, the State introduced evidence of the racial motivations for Watkins's death. Stojetz, however, downplayed the role of race in the killing and portrayed the incident as "some corrective action" that "got out of hand." The jury convicted Stojetz, and the case proceeded to a mitigation hearing.

In mitigation, a psychologist diagnosed Stojetz as suffering from Post-Traumatic Stress Disorder ("PTSD") as a result of violent experiences in his past. One such experience was a 1987 prison assault in which Stojetz's throat had been cut. On cross-examination, the prosecutor questioned the psychologist about his failure to secure independent verification of this and other incidents. The jury recommended a sentence of death, which the trial court imposed. The Ohio Supreme Court independently reweighed the evidence, and affirmed that sentence. It concluded that Stojetz's PTSD diagnosis was entitled to little, if any, weight.

After years of collateral litigation, Stojetz now presents two questions for review. The Court should decline both. Stojetz's first question arises from his later discovery of prison medical records documenting the 1987 knife assault that supported his PTSD diagnosis. In a second state post-conviction petition, Stojetz claimed that the State suppressed these records in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that the State's cross-examination and closing drew out

false testimony in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). The state courts, however, held that these claims were time-barred under state law, and that his *Brady* claim was meritless and so could not provide an excuse for failing to present these claims earlier. The district court held that the claims were procedurally defaulted under state law, fell outside the one-year limitations period under federal law, and were meritless in any event. The Sixth Circuit affirmed on procedural-default grounds.

The Court should deny review of this question because it suffers from many vehicle flaws. Before the Court could reach the merits, it would have to confront all of the issues tackled by the lower courts—including procedural default and the federal law's statute of limitations. And if the Court did reach the merits of the *Brady* claim, the deferential standards in the Antiterrorism and Effective Death Penalty Act ("AEDPA") would likely apply. Regardless, both claims involve a fact-specific application of the established materiality standards from *Brady* and *Napue*.

Stojetz's second question presented is a run-of-the-mill ineffective-assistance claim under *Strickland v. Washington*, 466 U.S. 668 (1984). It too suffers from vehicle problems. Stojetz invites the Court to second-guess the counsels' judgment without mentioning that AEDPA applies. AEDPA's deferential standards curtail any potential for breaking new ground on the issues Stojetz raises. And the Sixth Circuit correctly noted that Stojetz presented no evidence to overcome the presumption of effective assistance, or to show that any juror was biased against him. The Court should deny review.

OPINIONS BELOW

The Sixth Circuit's denial of rehearing en banc is available at 2018 U.S. App. LEXIS 23072. The Sixth Circuit's opinion affirming the denial of habeas relief is reproduced at 892 F.3d 175. The district court's opinion denying habeas relief is available at 2014 U.S. Dist. LEXIS 137501.

The Ohio Supreme Court's opinion affirming Stojetz's conviction and sentence is reproduced at 705 N.E.2d 329. The Ohio Court of Appeals' decision affirming the denial of Stojetz's second petition for post-conviction relief is available at 2010 Ohio App. LEXIS 2068. The decision of the Madison County Court of Common Pleas that denied that petition is available at R.132-3, PageID#6375-85.

JURISDICTION

The Sixth Circuit entered its judgment on June 5, 2018. The Court denied Stojetz's petition for rehearing en banc on August 17, 2018. Stojetz timely filed his petition for a writ of certiorari on November 14, 2018. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

AEDPA contains a one-year limitations period that provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court; if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

AEDPA further provides:

> 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.

28 U.S.C. § 2254(d).

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

COUNTERSTATEMENT

A. While Incarcerated, Stojetz Murdered 17-Year-Old Damico Watkins Because Of Watkins's Race

On April 25, 1996, John Stojetz and five other adult inmates stormed the unit of the Madison County Correctional Institution that housed juveniles who had been tried as adults. *State v. Stojetz*, 705 N.E.2d 329, 333-34 (Ohio 1999). Once inside, the group surrounded the control desk and Stojetz held a shank to the on-duty officer's throat. *Id.* at 334. He demanded that the officer give him the keys that opened the cell doors inside the juvenile unit; the officer threw the keys down and fled. *Id.* Other corrections officers wielding pepper mace attempted to enter, but the adult inmates used their shanks to keep them out. *Id.*

Stojetz and his accomplices moved to the cell of Damico Watkins, an African-American juvenile inmate. *Id.* They unlocked his cell door, entered the cell, and attacked Watkins. *Id.* Watkins initially escaped, but Stojetz and the other inmates chased him throughout the complex. *Id.* "Watkins was able to escape his attackers several times only to be again cornered and subjected to repeated stabbings." *Id.* Stojetz finally caught Watkins for good. *Id.* "As Watkins pleaded for his life," Stojetz and another inmate "repeatedly stabbed Watkins and left him for dead." *Id.*

During the attack, several of the adult inmates communicated with a corrections officer outside the unit. *Id.* One inmate told the officer that the attacking inmates "'would not cell with black inmates.'" *Id.* He also stated that they "'took care of things because you [prison officials] wouldn't.'" *Id.* When the

attack was over, the adult inmates passed their shanks through a window and surrendered to the prison authorities. *Id.*

B. A Jury Convicted Stojetz Of Murder With A Death-Penalty Specification, And The Ohio Supreme Court Affirmed On Direct Appeal

1. A grand jury indicted Stojetz for purposefully killing Watkins with prior calculation or design in violation of Ohio Rev. Code § 2903.01(A). *Id.* The indictment included one death-penalty specification for committing aggravated murder while imprisoned in a detention facility, per Ohio Rev. Code § 2929.04(A)(4). *Id.* Stojetz pleaded not guilty, and the case proceeded to trial. *Id.*

The State's evidence at trial revealed that Watkins's murder "took place in a detention facility amidst an atmosphere full of racial animosity." *Id.* at 345. Stojetz "was known to be the head of the 'Aryan Brotherhood' gang" in the prison. *Id.* at 334. Members of that gang "did not want to be housed in the same cells as black inmates," and some believed that their attack on the juvenile unit would lead to a transfer to different prisons. *Id.* A search of Stojetz's cell following Watkins's death showed that Stojetz had packed his belongings before the attack, in anticipation of a transfer. *Id.* Stojetz's counsel, by contrast, attempted to downplay the significance of race in this deadly attack. *See Stojetz v. Ishee*, 892 F.3d 175, 194 n.1 (6th Cir. 2018). In the defense's telling, the attack on Watkins had merely been intended to answer Watkins's own threats against Stojetz and other inmates, but "'things got out of control.'" *Stojetz*, 705 N.E.2d at 345. The jury convicted Stojetz of the indictment's charge and death-penalty specification. *Id.* at 334.

The case proceeded to a mitigation hearing. *Id.* "[T]he essence of [Stojetz's] mitigation defense" was that he suffered from Post-Traumatic Stress Disorder (PTSD) "as the result of several assaults he suffered in prison—including a life-threatening slashing of his throat." *Stojetz v. Ishee*, No. 2:04-cv-263, 2014 U.S. Dist. LEXIS 137501, at *322 (S.D. Ohio Sept. 24, 2014); Trial Tr., R.133-7, PageID#7847-7977. Stojetz contended that Watkins had threatened him and thus "caused him to be under duress." *Stojetz*, 705 N.E.2d at 346. In a lengthy unsworn statement, "he chronicled his life history both in and out of prison." *Id.* at 345. Several of Stojetz's family members testified, and a clinical psychologist, Dr. Eberhard Eimer, told the jury that he diagnosed Stojetz as suffering from PTSD. *Id.* at 344-45. The jury recommended a sentence of death, and the court imposed that sentence. *Id.* at 334.

The Ohio Supreme Court affirmed Stojetz's conviction and sentence in 1999, rejecting each of his 19 propositions of law. *See id.* at 335-44. As relevant here, Stojetz raised a claim of ineffective assistance of counsel. *See Stojetz*, 892 F.3d at 184. He contended that his trial counsel provided ineffective assistance by failing to question prospective jurors about their views on race. *See id.* at 184, 194. The Ohio Supreme Court rejected this claim on the merits. *Id.*; *see Stojetz*, 705 N.E.2d at 337.

The Ohio Supreme Court also affirmed Stojetz's death sentence after conducting an independent review of the aggravating circumstance and mitigating factors. *Id.* at 344-47. When reviewing the mitigation evidence, the court accepted Stojetz's PTSD diagnosis. *Id.* at 346. It found, however, that the diagnosis compelled "very little weight," no weight, or "only modest mitigating weight" under

the various statutory mitigation factors. *Id.* The court rejected the idea that PTSD or a threat made by Watkins had played a role in Watkins's murder. *Id.* It found "that this incident was merely an excuse used by [Stojetz] to achieve other ends," and that "the murder of Watkins was . . . intended to send a message to the black juvenile inmates . . . that the Aryan Brotherhood would not be intimidated." *Id.*

Watkins filed a petition for a writ of certiorari, but this Court denied review. *Stojetz v. Ohio*, 528 U.S. 999 (1999).

C. The Ohio State Courts Continued To Affirm Stojetz's Conviction And Sentence After Repeated Challenges

In the decades following Stojetz's conviction, he "has filed numerous appeals and motions, changed attorneys on multiple occasions, and raised an extraordinary number of claims." *Stojetz*, 892 F.3d at 184. Apart from his direct appeal, those state-court challenges have included an application to reopen his direct appeal, two motions for a new trial, two petitions for post-conviction relief, and a motion for discovery. *See id.* at 184-89 (recounting procedural history). His second post-conviction proceeding is relevant to this petition for certiorari.

In 2009, Stojetz raised various prosecutorial-misconduct claims in a second petition for post-conviction relief and an application to file a motion for a new trial. *Id.* at 188. His first claim alleged that the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and his second claim alleged that the State allowed false evidence in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *11. Both of these claims relied on prison medical records that Stojetz had obtained through his federal habeas proceedings. These

records described a 1987 knife assault that Stojetz suffered in prison. *Id.* Several witnesses, including Stojetz himself, discussed this knife injury to bolster his PTSD defense at the mitigation hearing. Trial Tr., R.133-7, PageID#7877 (sister), 7905 (Dr. Eimer), 7954-56 (Stojetz). During cross-examination of Dr. Eimer and in closing arguments, the prosecutor questioned the doctor's failure to verify Stojetz's account of this assault (and of other claimed incidents) with independent evidence. *Id.*, PageID#7927-32, 7970-71. Stojetz brought his *Brady* and *Napue* claims because he believed that these medical records "would have undermined the prosecution's attempt . . . to minimize or trivialize the seriousness of that assault and severity of the resulting wound." *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *11.

The state trial court concluded that Stojetz could not meet the exception for filing an out-of-time post-conviction petition and dismissed this petition as time-barred under Ohio Rev. Code §§ 2953.21(A)(2) and 2953.23(A). Entry, R.132-3, PageID#6375-79. It recognized that Ohio law allows a state court to consider an untimely petition if a petitioner shows, among other things, that "the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief." Ohio Rev. Code § 2953.23(A)(1)(a); *see* Entry, R.132-3, PageID#6376-77. Stojetz claimed that he could meet this standard because of the alleged *Brady* violation in failing to turn over his medical records. Entry, R.132-3, PageID#6377. After recognizing that Stojetz "circuitous[ly]" sought to use his *Brady* claim as establishing the excuse for his delay in presenting the same *Brady* claim, the court rejected this claim on the merits. *Id.*, PageID#6377-79. It

noted, among other things, that these medical records were not material because the Ohio Supreme Court had fully accepted his theory that he had PTSD "and yet determined that it carried little to no weight under the statutory mitigating factor analysis." *Id.*, PageID#6378. After "find[ing] no violation of the *Brady* standard," the court held that "Stojetz has failed to establish that he was unavoidably prevented from discovering the facts" upon which he relied. *Id.*, PageID#6379. The court also denied Stojetz's application to file a motion for a new trial, again in part on the ground that his *Brady* claim lacked merit. *Id.*, PageID#6379-85.

The Ohio Court of Appeals affirmed. *State v. Stojetz*, 2010 Ohio App. LEXIS 2068 (Ohio Ct. App. 2010). It, too, recognized that a state court could consider an untimely petition if the petitioner could not have previously discovered the facts on which the late claim rests. *Id.* at *4-5. But it held that res judicata barred Stojetz's *Brady* claim because he was "certainly aware of the facts underlying this claim, as they existed since September 1987," and he could have raised his claim on direct appeal. *Id.* at *6. "While [Stojetz] arguably might not have been aware of records documenting the prior prison attacks," the court held, he "failed to demonstrate how he was prevented from obtaining them." *Id.* Moreover, the court found Stojetz's *Brady* arguments "disingenuous." *Id.* at *7. Stojetz had not disclosed Dr. Eimer's report, which included his PTSD theory, until just before the mitigation hearing. *Id.* Having "fail[ed] to notify the state that it planned to use Dr. Eimer's opinions regarding the 'near death experiences,'" Stojetz could not years "later argue that the state violated *Brady* by purposely withholding reports of . . . incidents" that it did

not know were relevant until that hearing. *Id.* The court concluded by noting—on the merits—that, "[r]egardless, [Stojetz] ha[d] failed to demonstrate the state withheld the reports or that the reports [were] material to its mitigation attempts given [his] knowledge of the incidents." *Id.* at *7-8.

The appellate court next ruled that res judicata barred Stojetz's *Napue* claim. *Id.* at *8-11. The court examined the State's cross-examination of Dr. Eimer, and determined that Stojetz "could have raised this issue in his direct appeal as the prior incidents were known to [him] well in advance of his trial." *Id.* at *11.

Both the Ohio Supreme Court and this Court denied requests for review. *State v. Stojetz*, 981 N.E.2d 884 (Ohio 2013); *Stojetz v. Ohio*, 571 U.S. 992 (2013).

D. The District Court And The Sixth Circuit Denied Habeas Relief

1. Stojetz filed a federal habeas petition in April 2004. *Stojetz*, 892 F.3d at 189. In 2005 and 2006, the district court dismissed many of his claims as procedurally defaulted. *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *1-2. In 2014, it issued an exhaustive opinion resolving Stojetz's remaining claims and dismissing the petition with prejudice. *See id.* at *381.

As relevant here, the district court rejected on the merits one claim that Stojetz presents in his petition for certiorari—that his trial counsel was constitutionally ineffective for choosing not to question prospective jurors about their views on race. *Id.* at *191-96. Because the Ohio Supreme Court had also rejected this claim on the merits, the court held that AEDPA's standards applied. *See id.* at *194. And it concluded that Stojetz had failed to satisfy either prong of *Strickland v. Washington*, 466 U.S. 668 (1984). *See id.* at *194-96.

The court rejected Stojetz's *Brady* and *Napue* claims both on procedural grounds and on the merits. *See id.* at *320-81. In 2010, Stojetz had amended his federal petition to add these claims after the district court had ordered the Warden to produce "certain medical and other prison documents." *Id.* at *321. Stojetz then returned to state court to exhaust them by filing his second petition for post-conviction relief. *Id.* at *322; *supra* at 8-11. After the state courts denied relief, the district court followed suit. Calling Stojetz's factual assertions "dubious," it concluded that the purportedly "withheld" documents—Stojetz's records—had been available to Stojetz at trial. *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *329. "Although [Stojetz] continues to intimate that he could not have discovered [them] earlier, he has not made any persuasive arguments demonstrating that fact." *Id.*

The court thus held that two procedural obstacles barred it from reaching the merits. To begin with, it found that AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d)(1), barred these new 2010 claims because they did "not relate back to his original" 2004 federal petition under Federal Rule of Civil Procedure 15(c)(1) and *Mayle v. Felix*, 545 U.S. 644" (2005). *Id.* at *335. In addition, the court held that Stojetz's claims were procedurally defaulted because they had not been timely filed under state law, as the state courts had concluded. *Id.* at *336-37.

"[I]n the alternative," the district court held that Stojetz's claims lacked merit. *See id.* at *338-81. It recognized that, when finding Stojetz's claims untimely, the state courts had considered the merits of his *Brady* claim, which might trigger AEDPA's standards. *Id.* at *348-68. Yet, whether considering

Stojetz's claims under AEDPA or as a de novo matter, the federal court did "not disagree with, much less find unreasonable, the state court decisions rejecting" them. *Id.* at *367-68. As for the *Brady* claim, the court held that the records were immaterial because they were merely duplicative of "graphic and powerful" testimony about the scope of the knife injury. *Id.* at *370-76. As for the *Napue* claim, the court again held, among other things, that Stojetz could not prove even *Napue*'s more-generous materiality element. *Id.* at *379-80.

The district court granted a certificate of appealability on six claims, and the Sixth Circuit expanded that list to include two others. *See Stojetz*, 892 F.3d at 189.

2. The Sixth Circuit unanimously affirmed. As relevant here, it held that the Ohio Supreme Court reasonably rejected Stojetz's ineffective-assistance claim. *See id.* at 194-95. Like the district court, it concluded that Stojetz failed to satisfy either part of the *Strickland* inquiry. *Id.* at 194. Stojetz had not offered evidence to rebut the presumption that counsel was pursuing a sound trial strategy in choosing not to question prospective jurors about their views on race, nor had he offered evidence to suggest that an impaneled juror was biased against him. *Id.* There was thus "no basis" for concluding that trial counsel was ineffective under de novo review, "let alone that the Supreme Court of Ohio's resolution of this matter was unreasonable" under AEDPA. *Id.*

The court next affirmed the district court's holding that Stojetz had procedurally defaulted his *Brady* and *Napue* claims. *Id.* at 204-06. It reasoned that the state courts had properly found that Stojetz's second post-conviction petition

was time-barred under Ohio law and that he failed to show that he was unavoidably prevented from discovering his records earlier. *Id.* at 205. These state procedural rules "constitute[d] independent and adequate bases for denying review of [his] federal constitutional claim." *Id.* The Sixth Circuit also rejected Stojetz's argument that the *Brady* violation itself provided cause and prejudice to excuse this default. *See id.* at 206. The court held that "a *Brady* violation does not occur when 'the defendant 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.'" *Id.* (citation omitted). Because "[t]here is no question" that "Stojetz knew that he had been injured and that he had received treatment for that injury at the prison," "no *Brady* violation occurred with respect to" his prison medical records. *Id.* at 205-06.

REASONS FOR DENYING THE WRIT

I. STOJETZ'S FIRST QUESTION PRESENTED SUFFERS FROM VEHICLE FLAWS AND SEEKS FACT-SPECIFIC APPLICATION OF ESTABLISHED LEGAL RULES

Stojetz's first question presented—which raises two distinct due-process claims—does not warrant review. Stojetz asserts one claim under *Brady v. Maryland*, 373 U.S. 83 (1963), and a separate one under *Napue v. Illinois*, 360 U.S. 264 (1959). Pet. i, 5-17. The Court should deny review because these claims suffer from many vehicle problems that would either prevent merits review or render it pointless. Regardless, the petition seeks fact-bound error correction over the established materiality standards from *Brady* and *Napue*, and the decision below reasonably comports with those cases.

A. This Case Is A Bad Vehicle To Resolve *Brady* Or *Napue* Issues

Stojetz's petition treats his *Brady* and *Napue* claims as if they would be subject to de novo review in this Court, Pet. 5-17, so he ignores the many procedural hurdles that would prevent this Court from engaging in that fresh review. First, his *Brady* claim has been procedurally defaulted and AEDPA's deferential standards would also apply to it. Second, Stojetz's *Napue* claim has likewise been procedurally defaulted, and it rests entirely on his defaulted *Brady* claim. Third, as the district court found, both claims are likely untimely under 28 U.S.C. § 2244(d).

1. Stojetz procedurally defaulted his *Brady* claim, and AEDPA applies to that claim because the state courts also rejected it on the merits

The Sixth Circuit correctly held that it could not reach the merits of Stojetz's *Brady* claim because it was procedurally defaulted. Stojetz does not seriously contest that procedural holding, alluding to it only in a footnote. Pet. 12 n.1. His petition perhaps challenges the Sixth Circuit's view that the alleged *Brady* violation could not serve as cause for the default of his *Brady* and *Napue* claims. *Stojetz*, 892 F.3d at 206. But the state courts also rejected Stojetz's *Brady* claim on the merits, and that merits rejection triggers AEDPA deference. For both reasons, Stojetz is wrong to suggest that this case provides the Court with an opportunity to cleanly consider the scope of *Brady*. It does not.

a. "Federal habeas courts reviewing convictions from state courts will not consider claims that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017); *see Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991). This "fundamental

tenet[] of federal review of state convictions," *Davila*, 137 S. Ct. at 2064, ensures that federal courts show the respect to "the States and the States' procedural rules" that our federalist system requires, *Coleman*, 501 U.S. at 726.

This rule applies here. The state courts explicitly refused to hear Stojetz's *Brady* claim based on an independent and adequate procedural ground. Stojetz first raised his *Brady* claim in a second post-conviction petition. The state courts held, however, that Stojetz filed this petition out of time under Ohio Rev. Code § 2953.21(A)(2), and that he did not meet any of the exceptions for filing belated petitions under Ohio Rev. Code § 2953.23(A). *Stojetz*, 2010 Ohio App. LEXIS 2068, at *3-8; Entry, R.132-3, PageID#6375-79. The federal courts rightly held that these procedural rules for state post-conviction petitions were "adequate and independent bases for denying" Stojetz relief on his *Brady* claim. *Stojetz*, 892 F.3d at 205; *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *336-37. Because Stojetz procedurally defaulted his *Brady* claim, this Court may not consider it as a de novo matter. That fact makes this case a poor vehicle to consider any broader *Brady* issues.

b. To be sure, "[a] state prisoner may be able to overcome this bar . . . if he can establish 'cause' to excuse the procedural default and demonstrate that he suffered actual prejudice from the alleged error." *Davila*, 137 S. Ct. at 2062. "[C]ause for a procedural default . . . ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Such barriers include "government interference or the reasonable unavailability of the factual basis for the claim." *McClesky v.*

Zant, 499 U.S. 467, 497 (1991). Thus, where a prisoner alleges a *Brady* violation as the basis to excuse the procedural default, "cause and prejudice parallel two of the three components of the alleged *Brady* violation itself." *Strickler v. Greene*, 527 U.S. 263, 282 (1999). The *Brady* "suppression" element turns on factors that are similar to the factors for the procedural-default "cause" requirement. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). And the *Brady* "materiality" element turns on factors that are similar to the factors for the procedural-default "prejudice" requirement. *See id.*

Here, however, the state courts asked similar questions when deciding whether Stojetz had been "unavoidably prevented from discovery of the facts upon which" his *Brady* claim relied under Ohio Rev. Code § 2953.23(A)(1)(a). When holding that Stojetz had *not* been unavoidably prevented from obtaining his medical records, the state courts rejected his *Brady* claim on the merits. The state trial court, in denying Stojetz's postconviction motion, held that the allegedly suppressed records were neither "'favorable to the accused' nor . . . 'material to guilt or punishment,'" and thus "[found] no violation of the *Brady* standard." Entry, R.132-3, PageID#6377-79. When denying Stojetz's application to file a motion for a new trial, the state trial court again rejected his *Brady* claim on the merits, in particular because the records "were not 'material' as required by *Brady*." *Id.*, PageID#6384. The state appellate court went further, finding Stojetz's arguments "disingenuous," and concluding that he "ha[d] failed to demonstrate the state withheld the reports or that the reports are material to its [sic] mitigation attempts given [Stojetz]'s knowledge of the incidents." *Stojetz*, 2010 Ohio App. LEXIS 2068, at *7-8.

Because these state opinions rejected Stojetz's *Brady* claim "on the merits," AEDPA deference would govern this Court's review of that claim. AEDPA applies to "any claim that was adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), and "[t]he language of the statute does not draw a distinction between cases involving alternative rulings" and cases involving a merits ruling only, *see Brooks v. Bagley*, 513 F.3d 618, 624 (6th Cir. 2008) (Sutton, J.). Although a state court need not address a claim on the merits once it identifies a procedural bar, "it surely ha[s] the authority to do so as an additional ground for decision—making this additional ground no less a 'claim that was adjudicated on the merits in State court proceedings' than if the case had not presented a procedural-bar issue at all." *Id.* (quoting 28 U.S.C. § 2254(d)). And "[a]ll of the circuit courts that have considered the question to [the Sixth Circuit's] knowledge have determined, albeit with little discussion, that an alternative procedural-bar ruling does not alter the applicability of AEDPA." *Id.* at 624-25 (collecting cases).

Even aside from Stojetz's procedural default, then, this Court could grant him relief only if the state courts' adjudication of his *Brady* claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). In fact, the district court recognized that the Ohio courts rejected Stojetz's *Brady* claim on the merits—multiple times, in fact—and that it could not ignore those merits rejections. *See Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *348 ("Although the state courts rejected [Stojetz]'s claims on state procedural grounds, in so doing, the state courts

made certain findings and conclusions that this Court is not free to ignore."); *id.* at *367-68 ("the Court does not disagree with, much less find unreasonable, the state court decisions rejecting [Stojetz]'s [*Brady* and *Napue*] claims"). The district court opted not to conclusively decide whether it must analyze the *Brady* claim "*de novo* or through the prism of [AEDPA]" because the claim failed either way. *Id.* at *368. Yet Stojetz has not attempted to show why AEDPA does not altogether prevent this Court from granting relief. *See* Pet. 5-17. He presents his *Brady* claim as if this Court could review it de novo. That is wrong. Because these merits rejections are entitled to AEDPA deference, this case is a bad vehicle to decide any *Brady* issue.

2. Stojetz procedurally defaulted his *Napue* claim, and it rests entirely on his defaulted, rejected *Brady* claim.

The Sixth Circuit correctly refused even to consider the merits of Stojetz's separate *Napue* claim because it too was procedurally defaulted. *Stojetz*, 892 F.3d at 204-06. To overcome that default, moreover, Stojetz would have to show cause and prejudice based on his separately defaulted and rejected *Brady* claim. For these reasons, this case is also a bad vehicle in which to decide any *Napue* question.

The state courts explicitly refused to hear Stojetz's *Napue* claim based on an independent and adequate procedural ground. Stojetz first raised this claim in the same out-of-time post-conviction petition in which he first raised his *Brady* claim, and the state courts rejected it for the same reasons. *See Stojetz*, 2010 Ohio App. LEXIS 2068, at *3-8; Entry, R.132-3, PageID#6375-79. And the federal courts rightly recognized that this procedural default prevented them from considering

Stojetz's *Napue* claim, much less granting him relief on that basis. *See Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *336-37; *Stojetz*, 892 F.3d at 205-06.

Given this procedural default, any consideration of the *Napue* claim would amount to an improper "advisory opinion." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). That is because Stojetz's *Napue* claim would require him to prove his *Brady* claim to establish the cause and prejudice necessary for overcoming the default. His *Napue* claim thus rests *entirely* on the defaulted (and rejected) *Brady* claim. If the Court were to reject that *Brady* claim, Stojetz cannot show cause and prejudice (and so the Court cannot reach the merits of the *Napue* claim). If the Court were to accept that *Brady* claim, the Court has no need to reach the merits of the *Napue* claim. When discussing the merits of this claim, however, the petition does not even mention these procedural problems. Pet. 13-17. Those problems make this case an improper vehicle to resolve the scope of *Napue*.

3. Before the Court could consider these *Brady* and *Napue* claims, it would have to decide whether Stojetz timely filed them under 28 U.S.C. § 2244(d) and Rule 15.

If the Court were to grant review, it would have to confront the district court's holding that Stojetz's federal claims were untimely. *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *324-35. This issue provides yet another basis to decline review.

a. AEDPA imposes a one-year limitations period for federal habeas petitions. 28 U.S.C. § 2244(d)(1). As relevant here, that period runs from the later of either the date on which a state-court judgment becomes final on direct review, *id.* § 2244(d)(1)(A), or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," *id.*

§ 2244(d)(1)(D). The limitations period is tolled while a properly filed petition for post-conviction review is pending in the state courts. *Id.* § 2244(d)(2).

Separately from this one-year time period, if a petitioner attempts to amend an earlier, timely filed petition, Rule 15 of the Federal Rules of Civil Procedure governs whether the new claims properly relate back to the earlier pleading. *See Mayle*, 545 U.S. at 655. An amendment outside the statute of limitations "relates back to the date of the original pleading"—and will be considered timely—if it "ar[i]se[s] out of the conduct, transaction, or occurrence" at issue "in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). "An amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650.

Stojetz's one-year statute of limitations expired at the latest on April 2, 2004, one year after the Ohio Supreme Court declined to hear an appeal from his first motion for a new trial. *See State v. Stojetz*, 786 N.E.2d 63 (Ohio 2003); 28 U.S.C. § 2244(d)(2). Stojetz filed his original federal habeas petition on April 1, 2004. *See* Pet., R.14. That original petition included claims that the prosecutor had misrepresented the testimony of a trial witness, *see* Pet. Supp., R.14-11, and that the State withheld evidence related to Stojetz's motivation and role in the offense when it turned over an incomplete police investigative report, *see* Pet. Supp., R.14-12. Almost nine years later, Stojetz amended his petition to add the *Brady* and *Napue* claims at issue here related to his prison medical records. Am. Pet., R.130.

b. The Court should not grant review because that review would require it to confront the district court's fact-intensive holding that Stojetz's *Brady* and *Napue* claims were untimely. *See Stojetz*, 2014 U.S. Dist. LEXIS 137501 at *324-35. The Court would have to resolve whether Stojetz's amended claims "relate back" to the originally pleaded claims under Rule 15 and *Mayle*. That, in turn, would involve asking whether Stojetz's new *Brady* claim (about prison medical records of an unrelated 1987 assault) related to the same "core facts" as his original *Brady* claim (about an investigative report detailing interviews with inmate witnesses of the 1996 attack). *Mayle*, 545 U.S. at 657. The *Napue* claim would present similar fact-specific questions. Because these amendments do not relate back, Stojetz's claims is likely untimely under § 2244(d)(1)(A).

Separately, the Court would have to consider a related question: whether the later statute of limitations in § 2244(d)(1)(D) should nevertheless save these new claims. On that issue, the state trial court and district court found that Stojetz had not acted diligently in pursuing the *Brady* and *Napue* claims. In rejecting Stojetz's second post-conviction petition as untimely, the state court found that the predicate facts of these claims "were always available to" Stojetz, "and indeed were mentioned during the mitigation phase of trial." Entry, R.132-3, PageID#6377. The district court called Stojetz's telling of the facts "dubious" and "shaky," and concluded that Stojetz had not "made any persuasive arguments" to show that "he could not have discovered the records earlier." *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *328-29. It held that the state court's findings "constitute[d] a fatal blow to any

determination that [Stojetz] exercised due diligence with respect to the [prison] records and newly amended arguments." *Id.* at *331.

The Court should not get bogged down in this procedural morass—which is fatal to Stojetz's claims anyway—en route to the *Brady* and *Napue* issues.

B. The Petition Does Not Raise A Substantial Legal Question, And Instead Merely Asserts Fact-Specific Claims

Even aside from the procedural obstacles, Stojetz's *Brady* and *Napue* claims rest on the application of well-established materiality law to his case's unique facts.

1. Stojetz's *Brady* claim seeks fact-bound error correction of *Brady*'s materiality element

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281-82.

On the second "suppression" element, there is tension in the lower courts over whether, as the Sixth Circuit suggested, no *Brady* violation occurs "when 'the defendant 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*, 892 F.3d at 206 (citation omitted); *compare United States v. Pendleton*, 832 F.3d 934, 940 (8th Cir. 2016); *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006); *Allen v. Lee*, 366 F.3d 319, 324-25 (4th Cir. 2004) (en banc); *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001); *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997); *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986); *Lugo v. Munoz*, 682

F.2d 7, 9-10 (1st Cir. 1982), *with Dennis v. Sec'y, Pa. Dep't of Corrs.*, 834 F.3d 263, 291 (3d Cir. 2016) (en banc); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). And this Court has reserved how the *Brady* analysis should be affected by a showing that the defendant could have "reasonably discover[ed]" the *Brady* evidence that is in dispute. *Strickler*, 527 U.S. at 288 n.33.

But that issue does not matter for Stojetz's claim because he could not satisfy *Brady*'s materiality element. The "touchstone for materiality is *Kyles v. Whitley*," 514 U.S. 419 (1995), which instructs that "the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks*, 540 U.S. at 698 (quoting *Kyles*, 514 U.S. at 435).

Here, the district court correctly held that Stojetz could not meet that standard. *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *370-76. He argued then and now that the medical records would have bolstered his mitigation theory by allowing him to "defuse any suggestion by the prosecutors that [his] wound was less severe than it was." *Id.* at *372. But the district court found that this "fails to account for the impact of the evidence that was presented" about the knife assault—including the testimony of Stojetz's sister and Stojetz's own "graphic and powerful" statement. *Id.* at *372-74. The PTSD diagnosis was also supported by other incidents from Stojetz's past, one of which was witnessing his grandfather's suicide as a child. *See* Trial Tr., R.133-7, PageID#7904-05.

More importantly, the Ohio Supreme Court "accepted as true Dr. Eimer's PTSD diagnosis" even without the records, "but ultimately gave it little weight in determining that the aggravating circumstance outweighed the mitigating factors." *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *374; *Stojetz*, 705 N.E.2d at 346-47. Contrary to Stojetz's arguments (at 9), the records are important only insofar as they support Stojetz's PTSD diagnosis. That diagnosis, unquestioned by the Ohio Supreme Court, mattered little in the final sentencing determination. It follows that the absence of the records did not "g[i]ve rise to an unfair mitigation proceeding whose resulting sentence is unworthy of confidence." *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *374.

2. Stojetz's *Napue* Claim Likewise Seeks Fact-Specific Application Of The Established Materiality Standard

To succeed on his *Napue* claim, Stojetz would need to show that the prosecution knowingly presented or failed to correct false testimony and that there is a reasonable likelihood that the false testimony could have affected the judgment. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972). This rule seeks to prevent the prosecution's "deliberate deception of a court and jurors." *Id.* at 153. But where "there is no reasonable doubt about guilt," "there is no justification for a new trial." *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

Here, the district court, after citing these standards, correctly held that Stojetz had not "demonstrated a *Napue* violation." *Stojetz*, 2014 U.S. Dist. LEXIS 137501, at *377. As with his *Brady* claim, he did not establish that any violation was material. *Id.* at *379. The severity of the assault Stojetz suffered in prison in

1987 implicates only one of the incidents that Stojetz claims caused his PTSD. *See id.* at *262. And the Ohio Supreme Court, in independently reweighing Stojetz's mitigation case, accepted Stojetz's diagnosis, but still concluded that "[t]he fact that [Stojetz] apparently suffers from PTSD compels very little weight, if any, in mitigation." *Stojetz*, 705 N.E.2d at 346. In all events, the question whether Stojetz has met *Napue*'s materiality element raises a fact-specific application of well-established legal standards. It is not worthy of review.

II. THE SIXTH CIRCUIT FOLLOWED SETTLED LAW WHEN IT DENIED STOJETZ'S INEFFECTIVE-ASSISTANCE CLAIM UNDER AEDPA

Stojetz's second question presented, an ineffective-assistance-of-trial-counsel claim based on his counsel's choice not to question prospective jurors about their views on race, *see* Pet. 17-22, also does not warrant review. The Court should deny review, for two reasons. First, Stojetz seeks either fact-bound application of well-settled law, or an AEDPA-prohibited extension of this Court's ineffective-assistance cases. Second, and AEDPA aside, this case is a poor vehicle in which to consider a case-specific application of *Strickland v. Washington*, 466 U.S. 668 (1984), because Stojetz has failed to present any evidence to overcome the presumption that his counsel provided constitutionally adequate assistance.

A. The Well-Settled Law Governing Ineffective-Assistance Claims Under AEDPA Is Highly Deferential

There are two ways of reading Stojetz's arguments in support of his second question presented. He either seeks fact-bound error correction of the Sixth Circuit's rejection of his ineffective-assistance claim, or he seeks an AEDPA-

prohibited extension of this Court's ineffective-assistance cases. Either way, Stojetz's petition does not warrant this Court's review.

1. To the extent Stojetz argues that the Sixth Circuit misapplied *Strickland*, he seeks fact-bound error correction and ignores AEDPA's standards

The well-settled standards governing habeas review of ineffective-assistance claims are highly deferential. Those claims have two parts.

A defendant must first show deficient performance—"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In doing so, a defendant must "overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted). And, in particular, there is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

Even if a defendant can prove deficient performance, he must next prove prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687. The "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Notably, the defendant has the burden of proving both parts. So it "should go without saying that the absence of evidence" for either one "cannot overcome the 'strong presumption'" that counsel provided constitutionally adequate assistance.

Burt v. Titlow, 571 U.S. 12, 22 (2013) (citation omitted). Overall, this *Strickland* standard is "highly deferential." 466 U.S. at 689.

AEDPA's standard for ineffective-assistance claims is similarly well settled. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011). Habeas review of ineffective-assistance claims under AEDPA is"doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). To "[s]urmount[] *Strickland*'s high bar" when AEDPA applies, *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010), a petitioner must prove that there is no "reasonable argument that counsel satisfied *Strickland*'s deferential standard," *Harrington*, 562 U.S. at 105. This standard is intentionally difficult to meet. *Id.* at 102. After all, "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (citation omitted). The standard thus "respects the authority and ability of state courts and their dedication to the protection of constitutional rights." *Shoop v. Hill*, No. 18-56, 586 U.S. __, slip op. at 3 (U.S. Jan. 7, 2019).

The Sixth Circuit followed this law when it concluded that the Ohio Supreme Court reasonably rejected Stojetz's *Strickland* claim under AEDPA. Stojetz spends much of his argument recounting the alleged facts (with few record citations). Pet. 17-20. He only briefly argues that his counsels' "failure . . . to explore issues of race was both deficient performance and prejudicial," *id.* at 20, and that there could not "be a strategic reason for counsel to avoid asking about racial issues," *id.* at 21. Review of these factual questions would result in, at most, fact-bound error correction. The Ohio Supreme Court correctly cited and reasonably (if summarily)

applied *Strickland*. *Stojetz*, 705 N.E.2d at 337. And the Sixth Circuit correctly cited both *Strickland* and AEDPA, and concluded that "there is no basis for concluding that trial counsel w[as] ineffective in failing to question potential jurors regarding their views on race, let alone that the Supreme Court of Ohio's resolution of this matter was unreasonable." *Stojetz*, 892 F.3d at 194.

Notably, Stojetz's petition overlooks that AEDPA applies to this claim. He nowhere mentions—let alone challenges—the Sixth Circuit's application of the *Harrington* presumption to conclude that the Ohio Supreme Court's resolution of the claim was on the merits and was not unreasonable. *See* Pet. 17-22; *Stojetz*, 892 F.3d at 194.

2. To the extent that Stojetz suggests that the Court should broaden its test for evaluating ineffective-assistance claims, AEDPA bars the proposed extension in this case

This case's AEDPA context makes it a poor vehicle for this Court to, as Stojetz suggests, "address the duties and obligations of defense counsel in racially charged cases." Pet. 22. Under AEDPA, Stojetz may obtain relief only if the Ohio Supreme Court's resolution of his claim conflicted with the Court's cases in existence "*at the time of the adjudication*." *Hill*, No. 18-56, slip op. at 3 (emphasis added). This is because "[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014). Although the distinction between extending and applying precedent may not always be clear, a defendant asks a state court to *extend* (rather than *apply*) the Court's precedent on

a question if the only then-existing case expressly *declined* to decide it. *See id.* at 421-24. And, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *Id.* at 426 (citation omitted).

Stojetz does not argue that any of this Court's cases (let alone one decided before the Ohio Supreme Court's 1999 decision) had held that defense counsel are per se constitutionally ineffective when they choose not to question prospective jurors about their views on race. *See* Pet. 20-22; *Stojetz*, 705 N.E.2d 329. In fact, he concedes that *Turner v. Murray*, 476 U.S. 28 (1986)—the case on which he primarily relies—"did not address . . . whether counsel must conduct an inquiry into racial prejudice." Pet. 20. Even worse for Stojetz, *Turner* expressly declined to require defense counsel to question prospective jurors about their views on race. It indicated that such a strategy "is a decision we leave up to a capital defendant's counsel." *Turner*, 476 U.S. at 37 n.10. This express disclaimer, like the one in *White*, bars AEDPA relief predicated on *Turner*. *See* 572 U.S. at 424.

Nor did the Court create such a requirement in the two recent cases that Stojetz cites. While he claims that these cases exhibited "[c]oncerns about the impact of racial prejudice in the criminal justice system," neither involved ineffective-assistance claims. Pet. 22 (citing *Tharpe v. Sellers*, 138 S. Ct. 545 (2018), and *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)). Besides, both postdate the state-court decision affirming Stojetz's conviction by almost twenty years. *Cf. Hill*, No. 18-56, slip op. at 6-8. Thus, neither could have clearly established Stojetz's

preferred rule "at the time of the [Ohio Supreme Court's] adjudication." *Id.* at 3. AEDPA therefore bars the Court from granting Stojetz relief based on these cases.

B. Apart From AEDPA, This Case Is A Poor Vehicle In Which To Address The Ineffective-Assistance Framework Because Stojetz Has Presented No Evidence To Support His Claim

This case is a poor vehicle to decide any ineffective-assistance issues apart from AEDPA. On the performance prong, the Sixth Circuit correctly noted that Stojetz presented *no* evidence to overcome the presumption that his counsel's choice to avoid questioning prospective jurors about their views on race was a "strategic choice[]." *Strickland*, 466 U.S. at 689, 691 (citation omitted). In fact, the evidence points in the other direction. In state proceedings, Stojetz's counsel "testified that 'the defense theory was that Mr. Stojetz . . . went to [the juvenile unit] basically to do some corrective action and that it got out of hand.'" *Stojetz*, 892 F.3d at 194 n.1. This "theory had been adopted '[a]fter talking with [Stojetz] and look[ing] over the evidence that we had to deal with.'" *Id.* "Given this strategy, and given Stojetz's insistence that race had nothing to do with the incident, counsel may very well have thought it imprudent to draw attention to the issue of race." *Id.*

On the prejudice prong, the Sixth Circuit correctly noted that Stojetz "offer[ed] no evidence whatsoever to suggest that an impaneled juror was biased against those who belong to a race-based gang and have been charged with an inter-racial crime." *Id.* at 194. The Ohio Supreme Court cited this prejudice requirement when it denied Stojetz's claim: Even "[a]ssuming *arguendo* that defense counsel was ineffective," the Court noted that Stojetz would have to prove "'that there [wa]s a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different.'" *Stojetz*, 705 N.E.2d at 337 (citation omitted). The burden to "affirmatively prove prejudice" was Stojetz's, and he did not meet it. *Strickland,* 466 U.S. at 693.

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Michael J. Hendershot
MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor
**Counsel of Record*
HANNAH C. WILSON
JASON D. MANION
Deputy Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
michael.hendershot
@ohioattorneygeneral.gov

Counsel for Respondent
Tim Shoop, Warden