No. 18-9754

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Daniel Teitelbaum - PETITIONER

vs.

Warden Neil Turner - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Daniel Teitelbaum, #699663
(Your Name)

Po Box 1812
(Address)

Marion, OH 43301
(City, State, Zip Code)

QUESTIONS PRESENTED

1. **DNA, NEW EVIDENCE**
    a. Did flaws in the FBI's CODIS DNA database prejudice the defendant and lead to a guilty verdict?
    b. Is the discovery of flaws in the database "new" evidence that could not have been raised on direct appeal?
    c. Are the federal district court and appellate court permitted to deny a petitioner's claims without giving any justification as to why?
    d. Is it acceptable to deny a petitioner's claim, without assessing the strength of that claim, by focusing on "other evidence" of guilt?
    e. Should an evidentiary hearing have been ordered?
2. **JURY VERDICT NOT UNANIMOUS**
    a. Was defendant denied his right to a unanimous verdict as guaranteed by Ohio rule and the United States Constitution?
    b. Is it cruel and unusual punishment to sentence a defendant to life in prison with deciding whether he was or was not the principal offender in the murder?
    c. Was defendant's trial counsel ineffective for failing to object to the contradictory verdict?
3. **COLLUSION, CONSPIRACY AND FRAUD**
    a. Petitioner has unrefuted proof of deliberate, malicious collusion between defense counsel and prosecution. Should this result in a void trial?
    b. Does this qualify as a manifest miscarriage of justice?
    c. Can counsel's collusion this be used as evidence of innocence?
    d. Did the state of Ohio and defense counsel violate the attorney-client privilege?
4. **INEFFECTIVE ASSISTANCE OF COUNSEL, TIME OF DEATH**
    a. Does the time-of-death evidence prove that the defendant could not have committed the murder?
    b. Was defense counsel ineffective for failing to present the time of death evidence?
5. **IMPROPERLY ADMITTED E-MAIL**
    a. Was the state's failure to provide original e-mail printouts a violation of Brady v. Maryland?
    b. Did this violate defendant's constitutional right to due process which is not satisfied where a conviction is obtained by the presentation of evidence known to the prosecuting authorities to be inauthentic.
    c. What guidelines help judges determine whether e-mail printouts are authentic? Many judges are not particularly tech-savvy and can not distinguish between what is real and what is fake. The Supreme Court needs to offer guidance.
    d. Did the trial judge abuse his judicial discretion when he ruled the e-mail printouts inadmissible and later changed his ruling in order to avoid a mistrial?
6. **ALTERNATE JUROR IN DELIBERATIONS**

a. Does the presence and participation of an alternate juror in jury deliberations void the trial result?
b. Is the presence and participation of alternate jurors in deliberations and error that can be cured with an instruction, or is a new trial automatically required?
c. Was the curative instruction given to the jury a sufficient remedy?

7. INADEQUATE STATE REMEDY, PAGE LIMITS ON APPEAL BRIEFS

a. Under what circumstances is an appellant entitled to a longer brief?
b. When an appellant is denied his request for a longer brief in state court, can that excuse procedural defaults in federal habeas corpus?
c. What constitutes a "full and fair" opportunity for an appellant to present his issues?

LIST OF PARTIES

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

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

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting Writ 6

1) New Evidence, FBI DNA Database 6

2) Jury Verdict Was Not Unanimous 11

3) Collusion, Conspiracy, Fraud. 15

4) Ineffective Assistance of Counsel: Time of Death 22

5) Improperly Admitted E-Mail 27

6) Alternate Juror In Deliberations 32

7) Inadequate State Remedy: Page Limits on Appeal Briefs 38

Conclusion 40

INDEX TO APPENDICES

Appendix A — Decision of the Sixth Circuit Appellate Court

Appendix B — Decision of the Sixth Circuit District Court

Appendix C — Findings of the Magistrate Judge

Appendix D — Decision of the State Court of Appeals

Appendix E — *Washington Post* May 31, 2015

Appendix F — Decision of Trial Court Denying Motion for New Trial

TABLE OF AUTHORITIES CITED

CASES

Apodaca v. Oregon, 406 U.S. 404 13

Banks v. Dretke 540 US 668 124 S. Ct. 1256 157 L Ed 2d 1166 (2004) . 21

Brady v. Maryland 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) . 32

Commonwealth v. Smith, 403 Mass. 489 (1988) 38

Duncan v. Louisiana, 391 U.S. 145 13

Helton v. Singletary, 85 F. Supp. 2d 1323 26

House v. Bell 547 U.S. 518, 126 S. Ct. 2064, 165 L Ed 2d 1 . . 10

Kirkpatrick v. Blackburn 777 F 2d 272 (1985) . . . 22

Lisenba v. California, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. (1941) . 21

Lockhart v. Fretwell 506 U.S. 365, 113 S. Ct. 838, 122 L Ed 2d 180 (1943) 10

Manning v. Huffman, 269 F.3d 720 6th Circuit 2001 . . . 37

Maupin v. Smith 785 F 2d 135 (6th Cir. 1986) 14

Mooney v. Holohan, 294 U.S. 103 30

Moreland v. Bradshaw 699 F 3d 908 32

Norwood v. McDonald 52 NE 2d 67 21

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 40

Schad v. Arizona (1991) 501 U.S. 624; 111 S. Ct. 2491; 115 L. Ed 2d 555 . 14

State v. Bindyke, 288 N.C. (1975) 38

State v. Teitelbaum 2016-Ohio-3524 1

Sullivan v. Louisiana 508 U.S. 275, 124 L Ed 2d 182. . . . 10

Townsend v. Sain 372 U.S. 293 11

United States v. Olano, 507 U.S. 725 . . . 37

United States v. Schwimmer 924 F 2d 443, 2d Cir. (1997) . . . 20

STATUTES

O.R.C. 2911.11 4

O.R.C. 2903.01 4

O.R.C. 2929.04 4

OTHER AUTHORITIES

Attorney's Dictionary of Medicine (Mathew Bender & Company, Inc. 2014) . 23

Journal of Forensic Science in 2015 . . . . Appendix E

Washington Post May 31, 2015 . . . . Appendix E

RULES

Ohio R. Crim. P. 31(A). 13

Ohio R. Civ. P. 60(B) 21

Ohio Rules of Professional Conduct for Lawyers 1.6(a) 19

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix ___A_____to
The petition and is:
[ ] reported at _____; or,

[X] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____B_____to
The petition and is
[X] reported at ___*Teitelbaum v. Turner*, 2018 U.S. Dist. LEXIS 152130___; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at
Appendix ____C_____to the petition and is
:
[X] reported at *State v. Teitelbaum*, 2016-Ohio 3524, 67 N.E.3d 85, 95 (Ohio Ct. App. 2016); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court
appears at Appendix _B_____to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case

Was Feb. 13, 2019.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of

Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date)

In Application No. A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[ ] For cases from **state courts:**

The date on which the United States Court of Appeals decided my case

Was Jun. 21, 2016.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of

Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date)

In Application No. A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment Four

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment Five

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment Six

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution Amendment Eight

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

United States Constitution Amendment Fourteen

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

STATEMENT OF THE CASE

On December 12, 2011, the Franklin County grand jury indicted appellant Daniel Teitelbaum on four counts: (1) aggravated burglary (O.R.C. 2911.11); (2 and 3) aggravated murder with capital specifications (O.R.C. 2903.01); and tampering with evidence (O.R.C. 2929.04). Count two alleged that the aggravated murder was committed during the course of the aggravated robbery. Count three alleged that the aggravated murder was committed with prior calculation and design.

Trial began on February 25, 2014. On March 14, the jury returned guilty verdicts on all counts and specifications. On March 17, defense counsel filed a motion for a mistrial. On April 4, 2014, the court issued a decision and entry denying the motion for a new trial.

Sentencing took place on March 31, 2014. The court imposed a sentence of life without the possibility of parole on the aggravated murder charges, a concurrent sentence of six years for the aggravated burglary, twelve months for tampering with evidence, and two, consecutive three-year firearms specifications alleged in counts one and two.

Statement of the Facts

In the early morning hours of March 11, 2011, Dennis Hopkins called 9-1-1 and claimed that he found Paul Horn dead on the floor of Mr. Horn's apartment (Tr. 1804). Hopkins claimed that he had gotten home an hour before calling 911, but decided to hide a bunch of his handguns and rifles before calling the police (Tr. 1809).

Medical examiner Gary Wilgus arrived at the scene at about 8:45 a.m. on March 12. Wilgus examined Horn's body and found that the blood was still wet in places and there were no signs of *rigor mortis* or bloating, but said that he could not pinpoint the time of death. Wilgus said that he could not rule out the time that Hopkins called 9-1-1 as a possible time of death.

Hopkins later tested positive for gunshot residue (GSR), admitted to having a nine-millimeter handgun (the same caliber as the bullets found at the scene), and Hopkins' DNA was found on the doorknob of the apartment.

Two of Horn's neighbors at Gateway Lakes Apartments, Missy Tucker and Roger Borrayo, both testified that they heard the gunshots between 11 p.m. and 2 a.m.

Nick Enright, close friend and associate of Mr. Teitelbaum, also lived in Gateway Lakes Apartments, approximately 300 meters from Horn's apartment. Enright was in Gateway Lakes between 12:00 and 1:00 a.m. that evening. Enright, who had recently had a fistfight with Mr. Horn, tested positive for GSR and nine millimeter ammunition was found in his apartment.

Mr. Teitelbaum, who lived in New Jersey, was in Grove City that night to attend a deposition at his lawyer's office the following morning. GPS tracking evidence and video footage showed that he was in Gateway Lakes between 8:05 p.m. and 9:15 p.m. on March 10th.

Teitelbaum's clothes and car tested negative for GSR. DNA evidence was inconclusive. DNA forensic specialist Emily Draper testified about DNA samples obtained from the scene. With respect to samples obtained from the exterior doorknob, she testified, "I cannot say if Daniel Teitelbaum's DNA is there or not. There is not enough information, based on his DNA type and the mixture that I'm seeing on the doorknob, for me to say he is definitely here. I can't say that. I can not say he's definitely not here. I can't say anything." (Tr. 1785-86) With respect to her examination of the swabs from the interior doorknob, she stated that her results showed a mixture consistent with contributions from Horn, Hopkins, and Teitelbaum (Tr. 1884), and she could not rule them out as contributors (Tr. 1885). She stated that based on the national FBI DNA database, the proportion of the population that can not be excluded as a possible contributor to this mixture is approximately one in 669 unrelated individuals (Tr. 1786).

Faced with inconclusive forensic evidence and no direct evidence, the state tried to build a circumstantial case based upon information obtained from GPS and cell-site location information (CSLI) which did not place Teitelbaum at the scene at the time of the shooting.

The state's most incriminating pieces of evidence were printouts of two alleged e-mails, one from Colin Reedy to Teitelbaum, and one from Teitelbaum to Reedy. These printouts arrived anonymously by U.S. mail to the Grove City Police The state searched both Reedy's and Teitelbaum's e-mail accounts, but were unable to find e-mails matching either printout. The

defendant's ex-wife, Deborah Davis, later claimed that she sent the printouts anonymously to the GCPD. She claimed that she tampered with the printouts, removing dates and other information that could give away information about her computer or printer. Mr. Reedy, who was the recipient of one e-mail and the sender of another, claimed the e-mails were authentic.

REASONS FOR GRANTING THE PETITION

1) New Evidence, DNA Database. Plaintiff's 5th and 14th Amendment rights were violated by federal court's repeated refusal to consider newly discovered DNA evidence.

The state claimed that the defendant's DNA matched a mixed-DNA profile taken from a swab of the interior doorknob of the victim's apartment. This supposed "match" was an important factor in the trial because it was the only piece of evidence that even suggested that defendant Teitelbaum was inside the victim's apartment that night. No witnesses saw defendant in the apartment. Defendant's fingerprints were not found in the apartment.

Count one, aggravated burglary – which was the factor used to elevate the murder to a capital offense - required proof that the defendant trespassed in the victim's residence. Also, of course, the DNA was used as evidence that the defendant was at the crime scene to commit the aggravated murder.

The state relied upon the DNA evidence, stressing its importance during opening statements, closing arguments, and throughout the trial, especially during the testimony of Ohio Bureau of Criminal Investigations DNA Analyst Emily Draper. During closing arguments, the state said (Tr. 1035-36):

> MS. SOLOVE: The DNA expert will tell you that if DNA has a single source, it can be matched with a very high degree of certainty to either rule in or rule out someone in a crime. In this case, the DNA was a mixture, not from a single source, or several individuals. So the degree of certainty drops but the finding is still significant.

Ms. Solove misrepresented what the state's DNA expert, Ms. Draper, later said, which was that the primary reason for the low degree of certainty was that there was very little DNA to work with. The fact that it was a mixture was secondary (Tr. 1723):

> MS. DRAPER: But touch DNA, again, being minute quality and minute quantity of DNA that's left behind. So, because I'm not getting those full DNA profiles, that's why we typically don't see these large numbers.

While being examined by the state, Ms. Draper testified about the probability of falsely identifying a non-contributor to give the jury an understanding of the accuracy of the DNA test.

> MS. DRAPER: I can not exclude Daniel Teitelbaum as being a possible contributor to this .... (Tr. 1706)

> [A]nd based on the national database provided by the FBI, the proportion of the population that can not be excluded as a possible contributor is approximately one in 668 unrelated individuals.

Ms. Draper went on to say that she could assert that Teitelbaum could not be excluded as a possible contributor with a "reasonable degree of scientific certainty." (Tr. 1716) It is not clear what "a reasonable degree of scientific certainty" means. It was never defined for the jury. Nor was it ever meaningfully compared to reasonable doubt, or any other legal term of art. But it is safe to assume that the jury took it to mean "complete" certainty. The following quote from the state's closing arguments supports this interpretation:

> MS. FARBACHER: Now you heard testimony about DNA and why the numbers are low ... [B]ut his DNA was there. And it shouldn't have been. (Tr. 3350)

The first two sentences of the preceding excerpt are mutually contradictory: "... the numbers are low" means that you can not be sure of the conclusions. The "numbers" are the confidence; and low numbers means low confidence. "But his DNA was there," is a definitive statement. She is saying she is certain that the defendant's DNA was there. "Low numbers" and certainty are contradictory. Regardless, the state is basically telling the jury that they can be certain that Teitelbaum's DNA was found at the crime scene.

Defense Counsel Nemann's characterization of the DNA evidence was even more damning and prejudicial than the state's:

> MR. NEMANN: DNA has become so sensitive that we now can detect some DNA profiles off mere sweat glands. And they're not like the five trillion to one ration that we hear about. DNA means guilty. DNA at the

> crime scene; therefore he's guilty. You're going to hear the odds of this. And I'll let you decide whether or not it's compelling. (Tr. 1081)

Given the way DNA evidence was characterized by both the state and by the defense, we can make a fairly accurate guess as to how the jury interpreted the phrase "a reasonable degree of scientific certainty." They took it to mean total certainty, as did the prosecutors and the defense.

Then in 2015, a full year after the trial, the FBI announced that there were serious flaws in its DNA database and that these flaws affected the match probabilities of every case since 1999 that used the FBI's national database. These problems were reported in the *Journal of Forensic Science* in 2015 (See Appendix E), and in the May 31, 2015 issue of the *Washington Post* (See Appendix E).

> The FBI has notified crime labs across the country that it has discovered errors in data used by forensic scientists in thousands of cases to calculate the chances that DNA found at a crime scene matches a particular person...
>
> ... the FBI said the problem stemmed from clerical mistakes in transcriptions of the genotypes and to limitations of the old technology and software.

The FBI reported that the discrepancies in profile probabilities were assessed to be a factor of two for full DNA profiles. But, as the DNA expert Ms. Draper testified, the probability used in this case was derived from an incomplete profile, so the discrepancy is likely to be even larger. And, not surprisingly, these discrepancies are all biased in the prosecution's favor.

The proportion of the population that can not be excluded as a contributor to the mixture is not one in 668 unrelated individuals as Ms. Draper testified; it is at least twice that likely. The jury was misled and based its findings of guilt on erroneous information that was biased in favor of the prosecution. It can not be denied that this was unfair to this petitioner.

Furthermore, Ms. Draper testified that her opinions were all given "to a reasonable degree of scientific certainty." These newly discovered flaws in the FBI database show that Ms. Draper's claim was false. Ms. Draper did not consider the possibility that the FBI database might be wrong. She likely never examined the FBI database at all. She took the correctness of

the FBI database for granted when she asserted scientific certainty. But these newly discovered flaws show that her presumption of correctness of the database was false.

So, the jury was misled twice: first, as to the accuracy of the match-probability; and second, as to the confidence that the witness placed in that probability. In addition, the state and the defense made claims about the DNA evidence during opening and closing arguments that were egregiously overconfident. All of this came to light because of newly discovered evidence about flaws in the FBI DNA database that were not available in 2014. These flaws make defendant's innocence much more likely than it was understood to be at the time of trial.

Petitioner has claimed throughout trial, state appeals, and federal habeas corpus petitions that he is innocent. These newly discovered flaws in the DNA evidence have resulted in a manifest miscarriage of justice.

Habeas Review

Magistrate Judge Jolsen, in recommending a denial of Petitioner's claim of actual innocence, wrote: (PageID# 5392-5393)

> In claims One and 40, Petitioner asserts that he is actually innocent and that newly discovered flaws in the FBI's DNA database render the testimony of the prosecution's DNA expert unreliable, resulting in a manifest miscarriage of justice.

Other than that brief mention, the magistrate never addressed petitioner's argument at all. She never disputed that the FBI DNA database was riddled with flaws. She never assessed the damage that this caused petitioner at trial. She quietly avoided the issue altogether, making vague references to a "high standard" (PageID# 5394) and a collection of circumstantial evidence. (PageID# 5395), including the following quote:

> DNA testing indicated that DNA found inside the doorknob (*sic*) of Horn's apartment was consistent with Teitelbaum, even though it was not as precise of a match as is sometimes possible with DNA testing." (PageID# 5394-95)

This means that in her rejection of petitioner's claim about the unreliability of the DNA evidence, the magistrate relied on the very same unreliable evidence that petitioner was challenging. This is a logical fallacy. Unreliable evidence can't be used to prove itself reliable.

The magistrate's recommendation was both logically and legally flawed. She did not address the flaws in the DNA database at all, focusing instead on other evidence of guilt. This violates *Lockhart v. Fretwell* 506 U.S. 365, 113 S. Ct. 838, 122 L Ed 2d 180 (1943):

> [a]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.

The magistrate's recommendation violates *House v. Bell* 547 U.S. 518, 126 S. Ct. 2064, 165 L Ed 2d 1. There, the Supreme Court held:

> [t]he central forensic proof connecting House to the crime – the blood and the semen – had been called into question and House has put forward substantial evidence pointing to a different suspect.

The magistrate's recommendation also violates *Sullivan v. Louisiana* 508 U.S. 275, 124 L Ed 2d 182. There, the Supreme Court held:

> The inquiry, in other words, is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to this error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered, no matter how inescapable the findings to support that verdict might be, would violate the jury-trial guarantee.

The district court judge, in his "Opinion and Order," wrote only, "Petitioner's argument about alleged flaws in the FBI's DNA database does not assist him." (Doc # 26, PageID # 5470). No reason was given why the argument about the flaws did not assist him. No further mention was made of it.

The clerk of the sixth circuit court of appeals wrote, in denying Petitioner's application for a Certificate of Appealability (No. 1803936, Pg. 4):

> Teitelbaum also claimed that he was actually innocent and, relatedly that the DNA evidence presented against him was unreliable. ...

> The district court determined that Teitelbaum failed to make that showing, especially considering the evidence of his guilt, including his preoccupation with the victim, forensic evidence showing the victim died from shots fired by the type of gun supplied to Teitelbaum by another, and location data connecting Teitelbaum to the crime, among other things.
>
> For all the reasons identified above, reasonable jurists would not debate the district court's conclusion...

Again, the magistrate judge, the sixth circuit district court, and the sixth circuit court of appeals never addressed the issue of whether the DNA evidence was or was not reliable, choosing instead to focus on other evidence of guilt. Nobody has addressed the issue head on. This is a violation of petitioner's 5th and 14th Amendment rights to due process. Surely, more process is due than simply saying "No, we think you're still guilty." The purpose of habeas corpus is not to determine whether a person is guilty of the offense charged, but only to ascertain whether he has been imprisoned by due process of law.

The district court should have ordered an evidentiary hearing to assess the impact of the newly presented evidence of errors in the DNA database; failure to do so was a violation of *Townsend v. Sain* 372 U.S. 293 where the Supreme Court wrote:

> [w]hen the facts of a state prisoner's claim are in dispute, a federal court must hold an evidentiary hearing if the prisoner did not receive a full and fair evidentiary hearing at some point in the state court proceedings.

Petitioner has presented new, reliable, exculpatory evidence that was not available at trial. No court has given this any consideration, or addressed the new evidence at all, choosing instead to focus entirely on old evidence. This is fundamentally unfair and a denial of due process. DNA evidence is too powerful to allow it to be misused in this way. The United States Supreme Court should step in to correct this injustice.

2) Jury Verdict Was Not Unanimous

The Jury instructions in *State v. Teitelbaum* (*supra*) contained the following words:

> Before you can find the defendant guilty as alleged in count two, you must find beyond a reasonable doubt that on or about the 10th day of

> March, 2011, in Franklin County, Ohio, the defendant purposely and with prior calculation and design caused the death of Paul Horn. (Tr. 3445)

If the jury found the defendant guilty of count two, the jury was instructed to decide some additional specifications:

> Before you can find the defendant guilty of specification number one, you must find that the defendant purposely caused the death of Paul Horn while committing or attempting to commit aggravated burglary, and the defendant personally committed each act which constituted the aggravated murder including firing the shots that caused the death of Paul Horn, or if not the principal offender committed the aggravated murder with prior calculation and design. (Tr. 3446-47)

The verdict forms for both counts two and three instruct the jury to decide whether:

> Defendant ____ DID (or) ____ DID NOT personally commit each act which constituted the aggravated murder, including firing the shots that caused the death of Paul Horn or find that if not the principal offender Defendant ____ DID (or) ____ DID NOT commit the aggravated murder with prior calculation and design.

The completed verdict forms for both counts two and three make clear that the jury chose BOTH principal offender AND NOT principal offender. There is a check-mark next to both choices. This violated both the jury instructions and the verdict form instructions. The check marks appear to have been drawn by only one person, but the form was signed by all twelve jurors. It is not possible to tell which jurors meant to choose "principal offender," which meant to choose "not the principal offender" plus "prior calculation and design," and which jurors meant to choose both. The issue here is not the jury instructions, either at trial or on the verdict forms. In both cases, the instructions direct the jury to determine whether Teitelbaum was or was not the principal offender. There is no reason why trial counsel should have objected to these instructions. While reading the instructions to the jury, the court said the following:

> THE COURT: However, you need not be unanimous as to which alternative is established beyond a reasonable doubt. However, for specification on to counts two and three, before you can find the defendant guilty of the specification, you must be unanimous as to whether the defendant personally committed each act which constituted the aggravated murder including firing the shots that killed Paul Horn,

> or committing or committed the aggravated murder with prior calculation and design. (Tr. 3452-53)

Here, the court specifically instructed the jury that they must be unanimous as to which of the two choices they were selecting. But the jury did not follow the instructions. The jury selected two mutually exclusive choices. This is not surprising given that the state suggested to the jury multiple times that Teitelbaum was working with an accomplice (Tr. 809, Tr. 3365). As a result, it is impossible to tell if the jury agreed unanimously that Teitelbaum was or was not the principal offender. All we can say for certain is that the jury did not understand the instructions it was given. Any attempt to ascertain what each member of the jury thought the instruction intended, or what the check-marks on the verdict forms that they signed signified, would be pure speculation.

In Ohio, the right to a unanimous verdict is required by Ohio R. Crim. P. 31(A). The U.S. Constitution's 14th Amendment guarantee of due process also guarantees this right to defendants in Ohio. The 5th Amendment guarantees due process to anyone charged with a capital crime, which defendant in this case was. The 6th Amendment guarantee of a jury trial requires a unanimous verdict in a criminal trial. All of these rights were violated by petitioner's verdict. In *Apodaca v. Oregon*, 406 U.S. 404, Justice Stewart wrote in dissent:

> In *Duncan v. Louisiana*, 391 U.S. 145, the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless Duncan is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly "yes," as my Brother POWELL has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication.

Finally, a man charged with a capital crime and sentenced to life in prison has a right to know and understand what he has been convicted of. The ambiguity of the jury's decision and the mutually-exclusive choices the jury selected on the verdict forms leave the defendant in a state of limbo. This is cruel and unusual punishment in violation of the 8th Amendment.

Appellate Review

The appellate court claimed that a unanimous verdict was not required because jury unanimity is required only in cases of alternate acts, not in cases of alternate means. But the distinction between principal offender and not principal offender is a difference of acts, not of means. Being the principal offender is a different *actus rea* than not being principal offender. So, the appellate court mischaracterized the facts of the case and then misapplied the Supreme Court's ruling in *Schad v. Arizona* (1991) 501 U.S. 624; 111 S. Ct. 2491; 115 L. Ed 2d 555:

> Based on that understanding, we have permitted juries to consider alternative theories in determining whether there is sufficient evidence of the mens rea element for murder without requiring unanimous agreement on one particular theory.

Had the appellate court properly characterized the distinction between principal offender and not principal offender as a difference of acts, not a difference of means, the appellate court would have realized that appellant was, in fact, denied a unanimous jury verdict. The U.S. Supreme Court should overturn the Ohio appellate court's ruling.

Habeas Review

The magistrate judge, in recommending denial, wrote:

> Petitioner's claims regarding the alternate jurors (claims 6 and 27) were procedurally defaulted by his failure to make a contemporaneous objection at the trial-court level. (PageID#5389)

This petitioner does not see how it would have been possible to have made a contemporaneous objection to an error that the jurors made while sequestered in the jury-deliberation room. The error was made by the jury. They committed the error while filling out their verdict forms. The contemporaneous-objection rule does not apply to jury-errors of this type. As a result, the court's dismissal of claims 6 and 27 fails the first prong of the *Maupin* test: a determination that the state procedural rule is applicable to the petitioner's claim. *Maupin v. Smith* 785 F 2d 135 (6th Cir. 1986)

The "contemporaneous objection" rule is Ohio R. Crim. P 30(A):

> On appeal, a party may not assign as error the giving or failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The rule says very specifically that it applies to the "giving or the failure to give" instructions before the jury "retires to consider its verdict." But petitioner's claims of error 6 and 27 do not pertain to jury instructions. Claim 6 complains about an error made by the jury, not about an instruction given to the jury. The jury returned contradictory verdicts, claiming that defendant both was and was not the principal offender. Trial counsel needed time to view the completed verdict forms before he could recognize that an error had been made. This error could not have been identified and objected to contemporaneously; and certainly could not have been made before the jury retired to consider its verdict since the error occurred as the verdict was read in open court. Ohio R. Crim. P. 30 (A) is not applicable.

Similarly, petitioner's ground 27 did not claim that there was an error in the jury instructions. Rather, the claim was: petitioner's right to a fair trial was violated by the presence and participation of the alternate jurors during deliberations. The jury instructions clearly said that alternate jurors were not allowed to participate in deliberations. The alternates did participate in deliberations, thereby violating their instructions. Ohio R. Crim. P. 30 (A) is not applicable here, either.

3) Collusion, Conspiracy, Fraud.

At trial, the State of Ohio used an expert in geo-location and GPS data named Detective Robert Moledor to try to determine the locations of the victim, Paul Horn, and the defendant, Daniel Teitelbaum, on the night of the murder. Det. Moledor measured cell-phone data at the parking lot of a gym in Grove City, Ohio called "PowerShack Gym," as the following quote from the trial transcript demonstrates:

> DET. MOLEDOR: When I went out and spot-checked this area I found that when I was here at this location, which is PowerShack Gym on Parkmead Drive in Grove City, I found that my phone, if parked on the west side of the building was selecting this tower. But as I moved to the

north and south end of this parking lot, my phone reselected to this tower over here. (Tr. 3156-57)

After measuring cell-phone frequencies in the gym's parking lot, Det. Moledor measured the time to drive from PowerShack Gym to Horn's apartment:

MS. FARBACHER: Did you drive from there back to the victim's apartment? (Tr. 3168)

DET. MOLEDOR: I did.

MS. FARBACHER: How long did it take you?

DET. MOLEDOR: I had times anywhere from just over seven minutes, three seconds, to just around four forty-five, four minutes forty-five seconds. (Tr. 3168)

At trial, nobody testified that either Horn or Teitelbaum had been to PowerShack Gym that evening. Nobody testified that Horn went to PowerShack Gym at all. Nobody's GPS or geo-location data indicated that anybody went to PowerShack Gym. There was a tremendous amount of evidence and discovery in this case, including transcriptions of police interviews with all the witnesses. Nowhere in any of it can you find the name "PowerShack." So why did Det. Moledor decide to go there?

Petitioner, Teitelbaum, knows exactly why. Because just as the jury-trial was getting underway, Teitelbaum asked one of his lawyers to go there. At this point, some backstory is necessary.

Teitelbaum knew that the victim, Paul Horn, often went to work-out at a gym after leaving work. Teitelbaum had been to Horn's gym on at least one occasion in 2009. While sitting in Franklin County jail awaiting trial, Teitelbaum decided it might be worthwhile to pay a visit to Horn's gym and check the sign-in sheet for the night of March 10th, 2011, to see if Horn had gone there that night. Teitelbaum figured that if he could find evidence that Horn was at the gym at the supposed time of the murder, it would be strongly exculpatory.

Unfortunately, even though Teitelbaum had been to the gym before, he could not remember its name or location. So, Teitelbaum searched through all the evidence and discovery

to see if he could find some mention of Horn's gym. Teitelbaum pored through all the evidence multiple times, but there was no mention of Horn's gym.

Then, in 2014, as the trial date grew near, two law students joined Teitelbaum's defense team as volunteers/interns. They received law-school credits for their work. One of the interns, Keith Dyer, was very familiar with Grove City and knew all the gyms in the area. Teitelbaum was able to describe to Dyer what the gym looked like. Dyer recognized the description and knew the gym was called "PowerShack." Dyer then went there and checked the log-book for March 10th, 2011 and reported back to Teitelbaum that he could find no evidence Horn had gone to PowerShack on the night of his death.

Dyer's visit to PowerShack occurred after Teitelbaum's trial had already commenced – possibly during *voir dire*. Immediately after Dyer visited the gym, the state prosecutor called Detective Moledor and instructed him to go take measurements from the gym. As the following excerpt from the trial transcript demonstrates, the prosecution had never investigated PowerShack prior to Teitelbaum telling Dyer about it.

> MS. MCCAUGHAN: And when did you do these drive tests? Recently? (Tr. 3242)
>
> DET. MOLEDOR: Yes, ma'am. I did them just this past weekend.

"Just this past weekend," Moledor answers. So a few days after Dyer and Teitelbaum came up with the name of Horn's gym, Det. Moledor goes there and takes a bunch of new measurements. Since only Dyer and Teitelbaum knew the name of the gym, and immediately after they figured it out, Det. Moledor knew it also, we can be quite certain that somebody on the defense leaked this information to the prosecution. This is clear evidence of collusion between state prosecutors and the defense against the defendant, Teitelbaum. The defense leaked information that should have been privileged to the State of Ohio, and the State of Ohio used that information to bolster its prosecution of the defendant. It may seem hard to believe, but defense counsel Mr. Nemann was so dismayed by how blatantly the state abused the information that the

defense had leaked to them that he complained about it specifically during the defense's closing arguments.

> MR. NEMANN: And Mr. Moledor testified. And I don't know what happens behind the scene. But he went out to the scene. But he went out to the scene again to take more measurements the night before he testified, three years later. Why was that? Was it because the State of Ohio had realized that they can't put Paul Horn at his home address at the time that they say Dan Teitelbaum was there? (Tr. 3380)

It requires only a tiny bit of reading between the lines to see that Mr. Nemann knows *exactly* "what happens behind the scene." What happened behind the scene is that Det. Moledor was quickly summoned by the prosecutors to do a little more work using the newly obtained information. There is no other way that the State of Ohio could have become aware of PowerShack Gym. The fact that it all happened immediately after Teitelbaum and Dyer determined the name of the gym makes it even more clear and undeniable.

Mr. Nemann's habit when he does something treacherous is to put forward some half-baked pseudo-explanation designed to distance himself from the misdeed and camouflage his involvement. It is what poker players call a "tell." In this instance, Mr. Nemann asks the rhetorical question, "Was it because the State of Ohio had realized that they can't put Paul Horn at his home address at the time that they say Dan Teitelbaum was there." Unfortunately for Mr. Nemann, while the inability of the State of Ohio to put Mr. Horn at his home address could, conceivably, explain why Det. Moledor was dispatched at the last minute to take new measurements, it can not explain how it was that he made a beeline straight to PowerShack Gym. That can only be explained one way. Because nowhere in all the evidence or all the testimony will you find any mention of PowerShack Gym. That information must have come from Teitelbaum. Teitelbaum gave it to Dyer and nobody else. The defense leaked the information to the state. The state then used the information in its prosecution of Teitelbaum, the defendant. This is not only unfair, it is illegal. It is fraud and collusion by both the state prosecutors and defense counsel. It is implicit within the meaning of the 6th Amendment that attorney-client

communications are supposed to be privileged and confidential. It is also a clear violation of the Ohio Rules of Professional Conduct for Lawyers 1.6(a):

> a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent.

These allegations of fraud and collusion are not based upon speculation; they are based on logical deduction. Consider and example with three people A, B, and C. If A is the only person who knows the secret location where the treasure is buried, and A tells that secret location only to B, THEN IF C shows up at the secret location with a shovel in his hand, THEN A can deduce that B did not keep his secret. B must have told somebody, otherwise there would have been no way for C to have known the secret location.

This was not the only instance of defense leaking confidential information to the prosecution. There are several others. But the evidence of the other leaks is not quite as dramatic as this one where we have proof that the information came from the defendant, we know precisely when it happened, and we have clear evidence of defense counsel trying to cover up his own involvement.

If all of this weren't bad enough, the Ohio Appellate Court used this same purloined information to deny Teitelbaum's direct appeal. The Appellate Court wrote (PageID#1194):

> Detective Moledor testified that cell tower data for Horn's phone showed that at the time of the last phone call from Horn's phone at 8:58 p.m. on March 10, 2011, Horn was not yet back to his apartment but was very close, about four to seven minutes away.

Notice that "four to seven minutes" is exactly the duration of Det. Moledor's drives from PowerShack Gym to Horn's apartment. This mans that the Appellate Court used the information that was found by Teitelbaum and Dyer in its denial of Teitelbaum's appeal. What is even more ironic than that, however, is that Det. Moledor never actually claims that Horn went to PowerShack Gym on the night in question. Moledor just showed up there and started taking measurements without ever giving a reason why. Nobody at trial ever claimed that Horn visited

PowerShack Gym. And Keith Dyer, who went to the gym and checked the log-book, found that there was no evidence that Horn had been there that night. But the appellate court wrongly inferred that Horn must have gone there that night and then used that false inference in order to deny Teitelbaum's appeal.

This shows that the deliberate leaking of information by the defense to the prosecution was not harmless. (Note also that the extent of the harm was not apparent to the petitioner while the direct appeal was being written. The full extent of the harm only became apparent when petitioner read the appellate court's ruling.)

In *United States v. Schwimmer* 924 F 2d 443, 2d Cir. 1997, the Court wrote:

> Intentional intrusion into attorney-client relationship warrants careful scrutiny but does not require automatic reversal unless the conduct of the government was manifestly and avowedly corrupt.

Here, both state prosecutors' and defense counsel's conduct was manifestly and avowedly corrupt. Defense counsel deliberately leaked important, privileged information to the state and then tried to cover it up. State prosecutors received purloined information and then immediately called Det. Moledor to use that information to help them convict Teitelbaum. Prosecutorial misconduct, defense counsel misconduct, fraud, collusion and conspiracy are all manifest in their actions.

In addition, it should be noted that nobody has denied that the collusion happened. The state prosecutor, the federal prosecutors, the federal magistrate judge, the federal district court judge, none of them have said that collusion did not happen. None of them have offered any evidence that collusion did not happen. None of them have been able to explain how detective Moledor learned about PowerShack gym. None of them have contradicted petitioner's claim that defense counsel tried to conceal his involvement by making false statements to the jury during closing arguments. They have either ignored the issue or tried to sidestep the issue by presenting evidence of petitioner's guilt. Much of that evidence was obtained surreptitiously through the very collusion and fraud about which petitioner now complains. It is all fruit of a poisonous tree.

Habeas Review

In Ohio, a final judgment rendered upon the merits is conclusive of rights only if that judgment was rendered without fraud or collusion. (See *Norwood v. McDonald* 52 NE 2d 67). In the instant case, there was both fraud and collusion by state prosecutors and defense counsel. Therefore, the judgment is void (see *Lisenba v. California*, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 1941) and the doctrine of *res judicata* should not apply. (See staff note to Ohio R. Civ. P. 60(B)(1970) "any court has inherent power to vacate a void judgment without the vacation being subject to a time limitation.")

The magistrate judge, the district court judge, and the appellate court judge all said that this claim was waived because it was not presented in state court. They are, in essence, rewarding trial counsel for concealing his crime so thoroughly and effectively. They are saying, "You hid your crime so well that it forced petitioner to take an extra-long time to uncover it. So much so that his state appeal was already complete by the time he was able to solve the crime and prove your treachery. Congratulations! You are free to go forth and perpetrate similar crimes against your unsuspecting clients in the future." This is obviously extremely unfair; and anyone who values truth and justice should not want to see defense counsel get away with it.

In *Banks v. Dretke* 540 US 668 124 S. Ct. 1256 157 L Ed 2d 1166 (2004) The Supreme Court held:

> A petitioner shows cause when the reason for his failure to develop the facts in state-court proceedings was the state's suppression of relevant evidence.

In the instant case, it is the defense covering up the collusion, but the basic argument is the same. Defense counsel's concealment of collusion is cause for failure to develop facts in state court. The cause is external to this petitioner. Petitioner had no idea that his own attorney was sabotaging his case and colluding with the prosecution at the time that the trial was taking place. And, the prejudice is manifest and obvious. Defense counsel did more damage to his

client's case than the prosecution did. Petitioner provided many examples of how his attorney sabotaged him in his petitioner for habeas corpus. There is no space to recapitulate them here.

In *Kirkpatrick v. Blackburn* 777 F 2d 272 (1985) the court wrote:

> The test applied to determine whether a trial error makes a trial fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted.

There is a reasonable probability that the verdict in this trial might have been different if defense counsel had not been colluding with prosecutors. In fact, active collusion between prosecution and defense against defendant should be considered strong evidence of innocence since it is highly unlikely that they would pull a stunt like this against a defendant whose guilt they were confident they could prove. This trial was fundamentally unfair.

4) Ineffective Assistance of Counsel: Time of Death

The victim, Paul Horn, was found shot to death in his Gateway Lakes apartment in Grove City, Ohio. It is not disputed that the killing occurred inside the apartment. Petitioner Teitelbaum will prove that he was not, and could not have been, in the vicinity of the apartment when the shooting occurred. Petitioner will also show that Horn could not have been in the apartment at the same time as Teitelbaum. Since Teitelbaum and Horn were not – and could not have been – in the same place at the same time that evening, we can be certain beyond a reasonable doubt that Teitelbaum did not kill Horn.

All the evidence presented at trial showed that the defendant left the vicinity of Gateway Lakes Apartment Complex by no later than 9:15 p.m., March 10th, and never returned there. All circumstantial and all direct evidence showed conclusively that the murder occurred after midnight on the morning of March 11th. Since defendant was not in the area when the murder was committed, defendant could not have committed the murder. Also, the evidence presented at trial showed that Horn was likely miles away from the apartment complex when Teitelbaum was in the vicinity.

The state presented GPS evidence (Tr. 1051-52; Tr. 3135) and video records showing that Teitelbaum left Gateway Lakes Apartments at approximately 9:15 p.m. Two ear-witnesses, downstairs neighbor Missy Tucker (Tr. 3236), and upstairs neighbor Roger Borrayo (Tr. 3317), both testified that they heard the gunshots that killed Horn and both testified that the gunshots occurred after midnight. Borrayo and Tucker did not know each other, did not know Horn, did not know Teitelbaum, and had no reason to lie.

BCI Medical Examiner Gary Wilgus arrived at the crime scene at 8:45 a.m., March 11th, 11.5 hours after Teitelbaum had left the vicinity. Wilgus testified that when he arrived, the victim's blood was still wet (Tr. 1195). Since it is not possible that the blood could have remained wet in that apartment for 11.5 hours, the murder must have occurred significantly later than 9:15 p.m. Wilgus also testified that he saw no signs of *rigor mortis* or bloating in the body. (Tr. 1929) According to the *Attorney's Dictionary of Medicine* (Mathew Bender & Company, Inc. 2014), *rigor mortis* begins to set in between one and seven hours after death. *Rigor mortis* reaches its peak at 8 to 12 hours after death.

All the evidence that the state presented showed that Teitelbaum left the area by 9:15 p.m. No evidence whatsoever was presented that Teitelbaum was in the area after 9:15 p.m. All direct evidence (testimony of two ear-witnesses) supports a time of death after midnight. All circumstantial evidence (wetness of blood around the body and lack of *rigor mortis*) also supports a time of death after midnight.

No circumstantial or direct evidence was presented that is consistent with a time of death earlier than 9:15 p.m. All of these forms of evidence are independent of each other. The two ear-witnesses did not know each other. Their testimonies were each independent of the medical examiner's testimony. The blood was still wet; and that is independent of the fact that there were no signs of *rigor mortis*.

Each of these standing by itself is proof of actual innocence. But the fact that these four, independent pieces of evidence each prove that Horn was killed several hours after Teitelbaum left the vicinity should give all rational jurors reasonable doubt that Teitelbaum killed Horn.

In addition, cell phone records presented at trial showed that Horn made a phone call that lasted from 8:58 p.m. until 9:05 p.m., March 10th, 2011 (Tr. 3146). The phone call was between Horn and William Newman. We know, based on this call, that Paul Horn must have been alive at 9:05 p.m., March 10th. We know also, based on testimony of Detective Robert Moledor (Tr. 3148-49) that geo-location data showed that Horn was still alive at 9:05 p.m. and he was stationary and he was not at his apartment for the entire duration of the phone call and he was pinging from a cell tower more than ten minutes away from his apartment.

Since Teitelbaum left the area at 9:15, and Horn was alive and not at home at 9:05, and his cell phone was not even pinging off the cell tower nearest to his apartment, we can deduce that it would have been impossible for him to drive home, park his car, walk up the stairs to his apartment, take off his coat and shoes and shirt and then get shot all within that ten-minute time window. This time window was never presented to the jury at trial. Neither the state nor the defense ever presented any timeline or asserted a time of death. The following is an excerpt from defense counsel's closing arguments:

> MR. NEMANN: I've got some notes that I have prepared. But, quite frankly, I've noticed a lot of you taking notes during the trial. I'm not going to reiterate everything that I noticed you thought was important and added to your notes. I know you're going to refer to those. I may glance to them from time to time. But I would most really appreciate you allowing me to share my feelings about the evidence that I heard in this case and the evidence that I didn't hear. (Tr. 3380)

With that, defense counsel announced his intention to forego presenting the time-of-death evidence; and instead he would "share his feelings about the evidence." This was strictly contrary to the strategy that counsel and defendant had agreed upon. The change of strategy came as a complete surprise – an ambushing – since counsel announced it in front of the jury during closing arguments and never previously mentioned it to the defendant. Mr. Nemann's habit when he does something deceitful or untoward is to put forward some half-baked pseudo-explanation designed to camouflage his misdeed. It is what poker players call a "tell." In this

case, he claims to base his last-minute strategy change on the notion that the jurors were taking notes. This was not what the defendant wanted, but defendant's will was subverted by counsel.

And what were defense counsel's "feelings" about the evidence?

> MR. NEMANN: We don't know when Paul Horn was killed. We don't know when forensically he was killed. (Tr. 3381)

> MR. NEMANN: We've heard some lay testimony and some expert testimony about the drying of blood and things of that nature. Nothing was tested. We didn't hear anything about body temperature. We didn't hear anything about any specifics on lividity and how the body may have been laying to determine that. (Tr. 3381-82)

Defense counsel never mentions the lack of *rigor mortis* at all. He never asserts that the wet blood is inconsistent with a time of death of 9 p.m. the previous night. Rather, he tries to impeach the very time-of-death evidence that proves his client is innocent. Defense counsel impeached the testimony of the two witnesses who heard the gunshots and testified to a time-of-death much later than 9 p.m. For example:

> MR. NEMANN: It took us to try to track down witnesses, one from California, one another Missy Tucker that was very difficult to track down, who came in and testified under oath. We don't always get nuns and priests to come in here. But they were honest. I think that was clear that they were honest about what they thought they heard. (Tr. 3382)

Defense counsel denigrates the character of the witnesses saying "we don't always get nuns and priests." Defense counsel also disparages their testimony by saying "what they thought they heard" instead of saying "what they heard." Defense counsel was not present at the crime scene; he has no right to suggest that these witnesses only thought they heard gunshots. The witnesses testified to what they heard, not what they thought they heard. These were witnesses called by the defense, not the state. Defense counsel impeached the testimony of his own witnesses. By doing so, he is acting more like a second prosecutor than as defense counsel. This was entirely gratuitous and prejudicial to the defendant. It caused the jury to discount the testimony of these two witnesses.

The defense's failure to present any evidence at all related to time of death would be inexplicable were it not for the fact that defense counsel was colluding and conspiring with the prosecution against the defendant, as was proven in claim number three, above.

All of the above are the reasons why, throughout the course of the trial, from *voir dire* through opening statements through closing arguments and jury instructions, the state maintained two alternative theories of the case: that Teitelbaum was the principal offender and that he was not the principal offender.

The verdict forms require that the jury make a choice: did the defendant

> [p]ersonally commit each act which constituted the aggravated murder, including firing the shots that caused the death of Paul Horn or find that if not the principal offender Defendant _____ DID ____ or DID NOT commit the aggravated murder with prior calculation and design.

Again, the state had not determined whether Teitelbaum was or was not the principal offender and was asking the jury to make that determination. In addition, the state made several suggestions to the jury that Teitelbaum may not have been acting alone. For example, during closing arguments, they referred to a mysterious "guy" who was collaborating with Teitelbaum.

> MS. FARBACHER: And it's corroborated because he even said there's a guy in the club that's giving him the information.
>
> MS. FARBACHER: Perhaps the guy in the club let him know when Paul Horn left at 7:46. (Tr. 3365)

All of this is *prime facie* evidence that the state did not believe beyond a reasonable doubt that Teitelbaum was the killer. The defendant was denied his right to a fair trial as guaranteed to him by the 6th Amendment to the U.S. Constitution and his 5th and 14th Amendment rights to due process.

In *Helton v. Singletary*, 85 F. Supp. 2d 1323, the court found that council was ineffective for failing to present a time-of-death argument to the jury in circumstances that were nearly identical to the instant case:

> The petition for habeas corpus relief was granted because a reasonably competent defense attorney would have pursued the time-of-death

> argument based on the gastric evidence because it interposed reasonable doubt, and but for counsel's decision not to employ the defense, there was a reasonable probability that the result would have been different

Lawyers have a duty to deduce and argue reasonable conclusions, based on evidence, which are favorable to their client. Mr. Nemann was derelict in this duty, prejudicing his client, and losing a case that he should have won. Defendant Teitelbaum was denied his right to effective assistance of counsel at trial as guaranteed to him by the 6th Amendment.

5) Improperly Admitted E-Mail

A prosecutors opening statement should be an objective summary of the evidence reasonably expected to be produced; and a prosecutor should not use opening statements as an opportunity to poison the jury's mind or cite items of highly questionable evidence. In the instant case, the admissibility of three emails (state's exhibits 15.1 and 15.2) was sufficiently questionable that it was unreasonable for the state to have referred to them prior to receiving a favorable ruling on admissibility from the trial court.

On November 11, 2013, the defense filed a motion to compel the state to provide the original printouts of these e-mails. The following is the discussion that took place prior to opening statements (Tr. 996):

> THE COURT: Motion to compel, what evidence hasn't been provided?
>
> MS. MCCAUGHAN: Well, I guess, your Honor, we feel there were two quote, unquote, anonymous e-mails, There was a proffer on that they had had for two years but maintain that they were anonymous. So at the time this was filed, we did not have that. We still have not seen the original print-out of the e-mails even though we requested it.
>
> So, when this was filed, there was a real problem. We have since received the proffer. But the question is do we still – we haven't seen the original printouts.
>
> THE COURT: Do we have the original printout?
>
> MS. MCCAUGHAN: So, we still haven't seen the original printouts of the e-mails.

> MS. FARBACHER: The defense never contacted us to come see – there's boxes of evidence. (Tr. 999)

Here, the state prosecutor equivocates; she does not give a straight answer. She has trouble completing a sentence. She consciously avoids using the term "original printout." This is because she is lying. First, the defense did contact the state asking to see the original printouts of the e-mails in questions, multiple times over a span of almost a year. Second, the defense filed a motion to compel the state to produce the original printouts of the e-mails, which the state ignored. Ms. Farbacher is lying because the state can not produce the original printouts. Rather than admit this, she says the defense never contacted her.

The discussion then continued (Tr. 999):

> THE COURT: Can you make the original available to them before you call that witness?
>
> MS. FARBACHER: Absolutely. All the evidence is available.
>
> THE COURT: They're only requesting this one original printout of the e-mail. Please make that available to the defense before you call that witness. (Tr. 1000)

During the state's opening arguments, they talked extensively about these two e-mails:

> MS. SOLOVE: His involvement came to light a couple of weeks after the murder when Grove City investigators received an envelope in the mail containing printouts from two e-mails from Colin Reedy to defendant Teitelbaum. The envelope had no return address and no fingerprints or DNA. From the postmark it was determined that it was sent from Philadelphia.
>
> I will refer to these two e-mails as murder-for-hire e-mails. One is undated and the other is dated November 12, 2010. In the undated one Reedy talked about Teitelbaum's plans for something that Reedy would be willing to do for the right amount of money. (Tr. 1045-46)

The admissibility of these e-mails had not yet been ruled upon. Reedy had not authenticated the e-mails. Reedy never actually does authenticate the e-mails. These two e-mails are the two most incriminating pieces of evidence in the entire trial. The state told the jury

that they have "murder-for-hire" e-mails. This poisoned the jury's mind by citing these highly questionable and highly prejudicial pieces of evidence. Returning to the transcript (Tr. 1048):

> MS. SOLOVE: Going back to the e-mails, the investigators got a search warrant for Teitelbaum's and Reedy's e-mail accounts. But those two murder-for-hire e-mails were not there. You will learn in Yahoo when someone deletes an e-mail it is not kept by them.

All of this was inappropriate. The State is taking the admissibility of these e-mails for granted. The State has not yet produced the original printouts of the e-mails that defense requested. The State will not ever produce the original printout and the Court will later rule these e-mails inadmissible. All of this occurred during opening statements. So, the jury heard it all, which is a violation of Ohio Evid R. 103 (c):

> In jury cases, proceedings shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

After the state's opening arguments, the defense tried to get the court to rule on the admissibility of the e-mails:

> MS. MCCAUGHAN: And now they want her to testify about the proffer and the e-mails. This is huge.
>
> THE COURT: The proffer's not – I mean, do these e-mails not exist any more?
>
> MS. SOLOVE: She sent them to the Grove City Police Department, and they have those e-mails. So, yes. The e-mails that she mailed to them exist. (Tr. 1884-85)

The state is lying. They know that the GCPD never received the original e-mails. The GCPD never received actual e-mails at all. They received photocopies of printouts of edited e-mails. Ms. Solove is playing dumb and acting as if she thought all along that what the defense wanted were those photocopies that were mailed to the GCPD. What the defense wants, and has clearly requested, is the "original printout," not a photocopy. The state will go on to use these non-original e-mail printouts at trial, falsely presenting them as original. This violates

defendant's constitutional right to due process which is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured. (See *Mooney v. Holohan*, 294 U.S. 103)

> MS. MCCAUGHAN: Okay. I just want to make clear. Do because Mr. Colin Reedy is one party. Mr. Teitelbaum's the other party. [Deborah Davis] is hacking in. And we've never seen the original printouts. Ever. (Tr. 1885-86)
>
> THE COURT: I thought we had this issue resolved a week ago.
>
> MS. MCCAUGHAN: We tried. But, Your Honor, the original e-mail communications do not exist. They're nowhere. (Tr. 1886)
>
> ...
>
> THE COURT: Objection's noted. Come get these exhibits back. Show me the e-mails before you show them to her. This is kind of like finding a letter on somebody's desk. (Tr. 1887)

The court has obviously not yet read the motion *in limine* that the defense submitted. Later, in another sidebar (Tr. 1917):

> THE COURT: I misunderstood where these e-mails are from.
>
> THE COURT: Mr. Teitelbaum never acknowledged and adopted as described this morning. I'm on now. Other than that, these are statements from a Colin Reedy. There's no evidence Mr. Teitelbaum adopted these or interacted with these. You can't go there.
>
> THE COURT: Colin Reedy can identify those e-mails if he sent them. You can not go into the e-mails with this witness.
>
> MS. MCCAUGHAN: The problem with Colin Reedy can't testify to receiving anything from Dan Teitelbaum.
>
> THE COURT: I am not dealing with Colin Reedy today. I'll deal with Colin's objections when Colin gets here.
>
> MS. MCCAUGHAN: It's a tangled web. And it's all from a poisonous tree. They can't happen. They don't exist. And they are not on a Yahoo search. (Tr. 1919-20)

The court still has not ruled whether these e-mails will or will not be admissible. The court even admits that it did not understand where these e-mails were from. And yet the state

talked extensively about these e-mails during opening arguments, which gravely prejudiced the defendant. Later, the court ruled the e-mails inadmissible (Tr. 1952):

> THE COURT: Thank you. The Court initially ruled that these e-mails would be admissible. Didn't take as good a look at it as I should have. I asked that the e-mails be given to me. After looking at them it became clear that these are e-mails from Mr. Reedy to Mr. Teitelbaum
>
> There's absolutely no evidence whatsoever that Mr. Teitelbaum initiated the conversation, that he adopted the statements in Mr. Reedy's communication.
>
> To try to use them to explain why the Grove City Police might have contacted Mr. Reedy, possible. But again the prejudicial nature of those e-mails even for that limited purpose would be impossible for me to instruct the jury to ignore that or to instruct the jury to accept that for a limited purpose. We do that often. But that's only my opinion when in cases where the content that you're asking them to ignore or accept for a limited purpose is not so prejudicial.
>
> The content of those e-mails would make that absolutely impossible. And when you compound it with this elaborate scheme the witness went through to mail it, makes it even worse. And then to testify about another e-mail that doesn't even exist about 'we got to get him comfortable' and then for the witness to say, 'I didn't think he'd do it.' This opens up a door that I can not close. And so I choose to deal with it by not opening it.

The Court said that it initially ruled these e-mails admissible. No it did not. All it did was postpone ruling. How could the court have ruled the e-mails admissible when it had never even looked at the e-mails? The Court said it became clear that these are e-mails from Mr. Reedy to Mr. Teitelbaum. No they are not. One e-mail shows Teitelbaum as the sender of the e-mail. At this point, the e-mails, which the state talked about extensively and explicitly during opening arguments had now been ruled inadmissible. The state has a very interesting response to this predicament.

> MS SOLOVE: Your Honor, there was a mention of those previously on the record. I just want to point that out. Agent Wilgus, Emily Draper was asked if she tested the DNA on the envelope. (Tr. 1954).

Ms. Solove mentions the fact that the DNA expert, Emily Draper, mentioned an envelope that she tested for DNA (the anonymous envelope received by the GCPD). But Ms. Solove fails to mention that she herself talked in graphic detail about the e-mails for twenty minutes in her opening statement.

The state, during opening arguments, described highly questionable e-mail evidence to the jury. These e-mails were so dubious, in fact, that the court later ruled them inadmissible and said explicitly that they were highly prejudicial.

Not only did the state present dubious e-mails, the state lied three times trying to cover up the authenticity of the e-mails. First, the state lied and said the original printouts were available for the defense to examine when they were not. Second, the state tried to change the meaning of the defense's request from "original printout" to whatever was received by the GCPD. Third, the state made an oblique reference to a mention of those e-mails made by DNA expert Emily Draper, but failed entirely to remind the court that the state had talked about those e-mails for 20 minutes during opening statements.

All of this constituted prosecutorial misconduct which was prejudicial to defendant-petitioner. The state's failure to provide original e-mail printouts was a violation of *Brady v. Maryland* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) Defendant was denied a fair trial as guaranteed to him by the 6th Amendment of the U.S. Constitution. Defendant was denied due process guaranteed to him by the 5th and 14th amendments to the U.S. Constitution. Petitioner asserts that the court's evidentiary ruling was so fundamentally unfair that it rises to the level of a due process violation: See *Moreland v. Bradshaw* 699 F 3d 908.

6) Alternate Juror In Deliberations Violated Petitioner's Right to a Fair Trial. Trial Counsel was Ineffective for Failing to Object. Federal Court Misapplied Maupin.

In the instant case, as the jury retired to deliberate upon its verdict, the two alternate jurors were instructed to retire to the jury room with the twelve regular jurors. The court read the following instruction to the panel.

> THE COURT: The alternate – when you retire to the jury room, the 12 regular jurors will select a foreperson. So the two alternates will not participate in that process. The alternates should listen to the deliberations but not participate in the deliberations unless, until, if ever they are called upon to serve as a regular juror.
>
> Alternate jurors were selected to serve in the event of any misfortune befalling a member of the panel. As yet that has fortunately not occurred. Nonetheless, your presence is still required while this jury is deliberating. (Tr. 3462-63)

This violates Ohio Crim R. 24(G), which reads, in part, "The court must ensure that a retained alternate does not discuss the case with anyone until the alternate replaces a juror or is discharged." The court, in its decision denying defendant's motion for a new trial, wrote:

> First, the court acknowledges that the decision to send the alternates back to the jury room was error. While others may have participated in and acquiesced to the decision, ultimately, the decision was the responsibility of the court. (Pg. 9)

The instruction was error and the court acknowledged that it was error. The jury deliberated for about an hour, and then the problems began.

> THE COURT: The second question, I have been advised by my bailiff and, Cheryl, if this is correct, this was handed to you by an individual juror? (Tr. 3466)
>
> THE BAILIFF: Yes.
>
> THE COURT: The question is: "Can a juror be removed for stating that he shouldn't have been picked and he has trouble and doesn't like considering circumstantial evidence?"
>
> I'm not positive but I believe this question may have been written about someone else. In any event, the answer's going to be: The court has received a question from an individual juror. The court may not answer questions like this in the future. What an individual may ask a question, it must come from the entire panel. (Tr. 3466-67)

An hour later, the court received another question from the jury:

> THE COURT: "Can Mr. Cliffed be accused" – I assume it means recused – "from the jury because its to hard for him to listen in without commenting or putting in his two sense." (*sic*)

> As a way of background, I believe this question is the result of the last question from the jury where I indicated – please be seated – where I said to the jury that the question had to come from the panel.
>
> Again for the record since that time, Mr. Clifford did approach my bailiff expressing his problem with sitting there not participating. (Tr. 3468069)
>
> So we're now back with that question. We do have a juror that's I think problematic. However, with the agreement of counsel, I will bring Mr. Clifford back in and express to him the importance of being an alternate, how important an alternate is to making sure that we have a full jury, how we he said he would follow the law, and see if we can't agree on to get him to participate by sitting there.
>
> Do you have any objections Ms. Farbacher? (Tr. 3469-70)
>
> MS. FARBACHER: No, Your Honor. (Tr. 3470)
>
> THE COURT: If I do that?
>
> MS. FARBACHER: No. I would prefer you do, because I'm worried about losing the alternates.
>
> THE COURT: I understand. I just want to make sure everybody's on the same page with what I'm about to do. Mr. Nemann?
>
> MR. NEMANN: No objection, Your Honor. (Tr. 3470)

Overnight, the state – not the defense – discovered that it was error to allow the alternate jurors to be present during deliberations. In the morning, the state alerted the court to this error. The court then tried to cure the error:

> THE COURT: Since that time, it's come to everyone's attention that I was right, that the alternates should not be back there.
>
> And that's not the issue; it's how to remedy the issue. The suggestion is that we bring the jury back, advise them that the alternates should not have been back, sequester the alternates separately, and tell the jury to continue deliberations; start their deliberations over with the same instructions.
>
> Does the state agree with that remedy? (Tr. 3478)
>
> MS. FARBACHER: Yes, Your Honor.

> THE COURT: Does the defense agree with that remedy?
>
> MR. NEMANN: Yes, Your Honor. (Tr. 3478)
>
> THE COURT: Mr. Nemann, we pulled you in rather quickly. You've not had an opportunity to discuss the court's remedy either with your client, so if you need a few minutes to do that...

It is evident from the court's last statement that the court and Ms. Farbacher were discussing the problem before Mr. Nemann joined the conversation and they pulled him in "rather quickly." Mr. Nemann did not author the flawed instruction, the state did. Mr. Nemann did not recognize the problem, the state did. Mr. Nemann did not propose the remedy. The entirety of Mr. Nemann's participation in the process was to say "Yes, Your Honor."

The remedy that was agreed upon was that the alternates would henceforth be sequestered separately from the regular jurors and the regular jurors would be told to start their deliberations over. The court gave the jury the following instruction:

> THE COURT: To the rest of you, you are to continue. Start your deliberations over subject to the same instructions that I gave you, okay, how long it takes to get back to where you are now but to refocus yourself and start over. With that instruction I apologize for any inconvenience.

The courts instructions are ungrammatical and nothing about them is clear. First, the court tells the jury to continue, which is the opposite of starting over. Then the court tells the jury to start over, but qualifies this command with the following clause, "subject to the same instructions that I gave you." To what instructions is the court referring? Nothing is clear.

Even if the court's instructions had been clear, they would still have been insufficient. The court never instructed the jury to set aside and disregard all past deliberations. Without this, the curative instruction fails to meet the minimal constitutional standard.

What's more, curative instructions directing jurors to being anew usually occur when an alternate juror is replacing a regular juror. The instant case is qualitatively different: the court is instructing the same twelve jurors to go back and start over. Of course, the same twelve people are going to arrive at the exact same conclusion they reached the first time. And it is unlikely

that they ignored whatever communications they previously had with alternates. And why should they? They were never instructed to do so. We may not presume that the jury followed instructions that they were never given.

With that, the jury retired to "start over." After 25 minutes, the jury returned a guilty verdict. Twenty-five minutes is far too quick for the jury to have truly started its deliberations anew and reached a verdict.

In its decision and entry denying defendant's motion for a new trial filed March 17th, 2014, the court wrote, "Further, it is simple common sense that a group or an individual looking at a problem for a second time will not take as long as it did the first time." (pg. 17) To this plaintiff, the statement by the court seems tantamount to an admission that the court's curative instruction cured nothing.

In addition, it is important to remember that the jury broke rules and ignored instructions several times in this trial. The jury was instructed to choose whether the defendant was or was not the principal offender. The jury chose both, ignoring the jury instructions and the verdict forms. The jury was also instructed not to have any interaction with the alternate jurors during deliberations. Not only did the jury ignore this instruction, there were fights between alternate and regular jurors that prompted both the alternates and the regular jurors to pass notes to the bailiff asking to have each other removed from deliberations. The alternate's note to the bailiff alleged that one of the regular jurors was not examining the circumstantial evidence in the way that the jury had been instructed to, yet another rule violation.

Given the jury's flagrant disregard for several of their instructions in this case, we can no longer presume they followed the court's curative instruction. Juries are presumed to follow judges' instructions, but that presumption is not insurmountable. When a jury repeatedly ignores instructions, as this jury did, the presumption is no longer valid.

What happened here is that a judge, two prosecuting attorneys and two defense attorneys all did not know where alternate jurors going during deliberations. There was no gamesmanship,

just incompetence by all parties. When judges, prosecutors and defense attorneys all do not know the law, then there is nobody looking out for the interest of the defendant.

In *United States v. Olano*, 507 U.S. 725, the Supreme Court wrote:

> The question, then, is whether the instant violation of Rule 24(c) prejudiced respondents, either specifically or presumptively. In theory, the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: either because the alternates actually participated in the deliberations, verbally or through "body language"; or because the alternates' presence exerted a "chilling" effect on the regular jurors.

In the instant case, the defendant was denied a fair trial because his jury had been chilled and had received improper communications from someone who was not part of the panel. The 6th Amendment to the U.S. Constitution guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." Here, defendant's jury was not impartial. It had been chilled by improper communications from alternates. This was structural error undermining the integrity of the trial.

The instant case is nearly identical to *Manning v. Huffman*, 269 F.3d 720 6th Circuit 2001 in which the court ruled that Manning's claim was not procedurally defaulted for failure to object at trial, that Manning's trial counsel was ineffective for failing to object at trial, and that counsel's ineffectiveness was prejudicial:

> During petitioner's trial, instead of dismissing the alternate jurors as required by state law, the trial court told the alternate jurors to retire with the jury and specifically directed them to take part in the discussions and deliberations. Although neither of the alternate jurors replaced a regular juror, one of the alternate jurors actively participated in the deliberations. In his habeas petition, petitioner asserted that his trial lawyer's failure to object to the trial court's decision to allow alternate jurors to participate in jury deliberations was a violation of his right to effective assistance of counsel. The federal district court determined that petitioner had procedurally defaulted his claim and that petitioner failed to demonstrate prejudice. The federal appellate court determined that the ineffective assistance of counsel claim was not procedurally defaulted; the state appellate court directly addressed the claim and did not dispose of the issue on procedural grounds. The federal appellate court also determined that petitioner demonstrated prejudice based on the evidence that an alternate juror participated in jury deliberations.

Petitioner requests that the Supreme Court rule that petitioner's claim was not procedurally default and that petitioner's counsel was ineffective.

The Tenth Appellate court's decision conflicts with the decisions of courts in several other states. For example the North Carolina Supreme Court. In *State v. Bindyke*, 288 N.C. (1975), ruled that the instant alternates participate in deliberations, a new trial is required:

> It is quite possible that one or more jurors, including the alternate, had expressed an opinion as to defendant's guilt or innocence, or commented on the evidence. If so, as pointed out in *Adame, supra*, it cannot be assumed that observations and discussions which take place during the first few minutes after the jurors retire are less significant to the verdict than later deliberations.
>
> As much as we regret the necessity of imposing upon the State the penalty of a retrial of this case we are persuaded that higher considerations require it, and that the rule which we have adopted will, in the long run, create certainty and promote judicial economy. That rule, as previously stated is this: The presence of an alternate juror in the jury room at any time during the jury's deliberations will void the trial.

The decision also conflicts with *Commonwealth v. Smith*, 403 Mass. 489 (1988) where the Massachusetts Supreme Court wrote:

> We conclude that, in view of the vital importance of the right to trial by a jury that is free from outside influence, and the potential for interference with that right, a defendant is not barred from contending on appeal that the presence of alternate jurors in the jury room during deliberations was reversible error even though defense counsel had agreed to that procedure. We leave to another day the question whether an informed defendant who has personally agreed on the record to such a procedure may waive his right to raise such an issue on appeal, or be estopped from doing so.

Petitioner requests that the U.S. Supreme Court help resolve these conflicts by offering some guidance to the state and federal courts in Ohio.

6) Inadequate State Remedy: Page Limits on Appeal Briefs.

On July 16, 2015, appellate counsel David Strait filed a "Motion for Leave to File Long Brief," requesting that he be permitted to file a 75-page-long principal brief, instead of the

normal 60. On July 17, 2015, the tenth district appellate court allowed appellant to file a 65 page brief, ten pages fewer than he requested. As a result of this refusal by the appellate court to allow the requested long brief, appellant had to drop many meritorious claims and abridge many others, reducing their persuasiveness. The record in this case consists of more than 4000 pages of transcript, many boxes of physical exhibits, and many CDs of electronic information. There were many constitutional errors made in this case: by defense counsel, prosecution, and the court. The 65-page limit on the principal brief rendered the Ohio appellate process inadequate to deal with all the errors in this case. Plaintiff's habeas corpus petition raised fifty constitutional errors. It should be self-evident that a 65-page appeal brief page-limit is not sufficient for fifty constitutional errors.

Moreover, the length of the trial transcript was beyond plaintiff's control. At trial, the prosecution called approximately 40 witnesses. The Defense called only two. The length of the trial and therefore the length of the transcript were caused by the prosecution, not by the defense. The 65-page limit given to the appellant was insufficient to deal with a trial of this length.

Plaintiff raised this issue in his habeas corpus because an inadequate state remedy can be used as a rationale for excusing some procedural defaults. The magistrate recommended denial because "the record does not support" plaintiff's allegation:

> Further, the record does not support Petitioner's allegation that he could not raise his claims on direct appeal due to page limitations on the filing of his appellate brief. As this Court has previously held, there is a difference between not "fully briefing each assignment of error," and not mentioning it at all. See *Hill*, 2006 U.S. Dist. LEXIS 70528, 2006 WL 2807017, at *68. Consequently, the undersigned finds that Petitioner has failed to demonstrate cause for his procedural default. (PageID#5323)

Plaintiff did mention many of his assignments of error in his direct appeal brief. For example, in habeas ground seven, plaintiff complained about the jury's non-unanimous verdict in his original appeal brief (6th assignment of error). In plaintiff's habeas petition, he expanded that one assignment of error into two grounds for habeas relief (grounds six and seven). But clearly, plaintiff did mention this ground.

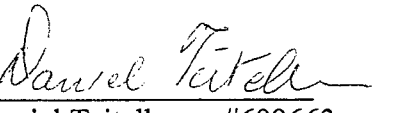
Also, how can the record show evidence of what was left out of the record? Was plaintiff supposed to include a list of all the errors he would have liked to have raised but could not at the end of his appeal brief? The magistrate's requirement that the record show evidence of the claims the petitioner could not raise is logically insurmountable and legally unfair. It is simply not possible to show evidence of that which has been deleted.

This ground raises equal protection concerns. Appellants who have long trials are being subjected to more draconian page limits than are appellants who have short trials. These arbitrarily short page limitations are a violation of plaintiff's 5th and 14th Amendment rights to equal protection under the law.

The rules of habeas corpus say that the state must get a "full and fair" opportunity to resolve constitutional claims before those claims may be presented to the federal courts. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) It seems only fair that the appellant should also have a full and fair opportunity to present his claims in state courts before they can be procedurally barred from habeas corpus for failure to exhaust state court remedies. Petitioner argues that in instances such as this one, where the trial was long, the constitutional errors were many, the appellant requested a page limit extension which was not granted, and the appellant used every page that he was allotted, the result is a denial of a full opportunity to present his claims and that this should excuse procedural default of his habeas claims due to lack of exhaustion.

CONCLUSION

The Writ of Certiorari should be granted.



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