19-6207

No._____

IN THE SUPREME COURT OF THE UNITED STATES

* * * * * * * * * * * * * * *

KEVIN HENDERSON,

Petitioner

v.

DON BOTTOM,

Respondent

* * * * * * * * * * * * * * * *

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

PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

KEVIN HENDERSON
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Mr. Kevin Henderson pro se

ORIGINAL

QUESTIONS PRESENTED

Mr. Henderson has a conflict among the federal courts of appeals when deciding issues in cases like his. It is a clear conflict between decisions between the Sixth Circuit and this United States Supreme Court these subsequent decisions and even the reliance upon decisions that have been discredited or has lost-weight as authority due to these intervening circumstances. Mr. Henderson has very serious and very important constitutional questions.

Did the Sixth Circuit err when reaching conclusions arguably in conflict and inconsistent with this Supreme Courts decisions? Mr. Henderson seeks a grant of vacate/remand a favorable action due to the Court has ruled on related cases. In fact, requesting for some discussion of the merits of the issues presented in his petition. Clear conflicts on the merits presented in his petition. Clear conflicts on the merits presented in favor of issues this COURT made correct and which these issues effect the outcome. This certiorari adds a additional consideration of importance 18-5747, 19-5179, 19-5611, 19-5127 in the Sixth Circuit and in federal district court 3:16-cv-00567 these decisions was based on a flagrant misreading of the record.

The Court of Appeals for the Sixth Circuit made several rulings these are in the Appendix and this Court has jurisdiction under 28 U.S.C. 1254(1).

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

The Petitioner Kevin Henderson, respectfully prays that a Writ of Certiorari is issued to review the judgments and opinions of the Sixth Circuit Court of Appeals rendered these proceedings.

OPINION BELOW

The Sixth Circuit Court of Appeals affirmed Petitioners conviction in its case 18-5747, 19-5179, 19-5611 and 19-5127. The opinion is unpublished and is in the appendix to this request. Also the orders of the Sixth Circuit Court of Appeals denying rehearings are also included.

The original opinion was rendered June 28, 2019 a timely motion was filed for a rehearing was overruled on August 26, 2019.

The jurisdiction of this Court is involved under 28 U.S.C. 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial public trial, by a 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 VIII

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

UNITED STATES CONSTITUTION, AMENDMENT XIV

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

UNITED STATES CONSTITUTIONAL AMENDMENT V

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 milia, 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 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.

28 U.S.C.A. 2254(d)(1)

resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

The Supreme Court, a Justice thereof, a circuit judge, or a district shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is custody in violation of the Constitution or laws or treaties of the United States.

(b)(1)(A) the applicant has exhausted the remedies available in the courts of the states; or

(B)(i) there is an absence of available State corrective process

or

(ii) circumstances exists that render such process ineffective to protect the rights of the applicant.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has

the right under the law of the state to raise, by any available procedure the question presented.

(d)(2) These adjudications of claims resulted in decisions that are based on unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

(e)(2)(B) the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

This request is for the Supreme Court to review the denial of the certificate of appealability. Also the denial of Motion for Relief from Judgment FED.R. CIV. P. 60(b)(4)(6) any other factor rendering the judgment void; and "any other reason justifying relief from the operation of the judgment."

STATEMENT OF THE CASE

Mr. Henderson and co-defendants Cedric O'Neal were convicted in Jefferson Circuit Court of first degree robbery and wanton murder of Mr. Quintin Hammond. Mr. Henderson received a life sentence for wanton murder conviction and a concurrent 20 year sentence fro first degree robbery. The prosecutions theory at trial was that Mr. Henderson gave a handgun to O'Neal who shot Mr. Hammond in order to take his shoes. Mr. Henderson was found not guilty of providing a handgun to Mr. O'Neal. In the penalty phase of the trial the jury found Mr. Henderson beyond a reasonable doubt did not shoot Mr. Hammond. The Kentucky Supreme Court affirmed on direct appeal. **Henderson v. Commonwealth 1998-SC-0624-MR (Dec. 2001)** Mr. Henderson then filed a motion for relief from judgment pursuant to Kentucky Rule of Civil procedure 60.02 which the trial court denied. The Kentucky Court of Appeals affirmed **Henderson v. Commonwealth 2004-CA-001988 MR-, 2006 WL 1046316 (Mar. 31, 2006).** The Kentucky supreme court denied discretionary review. While pending Mr. Henderson filed a motion vacate pursuant to Kentucky Rule of Criminal procedure 11.42, which the trial court denied. The Kentucky Court of Appeals affirmed **Henderson v. Commonwealth 2010-CA-002295-MR (Oct. 26, 2012)** and the Kentucky supreme court denied discretionary review. While that motion was pending Mr. Henderson filed a motion for relief and a motion to vacate his conviction NUNC PRO TUNC. The state trial court construed the motion as a Rule 60.02 motion and denied both motions. The Kentucky Court of Appeals affirmed **Henderson v. Commonwealth 2014-CA-001059-MR (Mar. 27, 2015)** and the Kentucky supreme court denied the motion for discretionary review.

In 2016 Mr. Henderson filed a 2254 petition, where the magistrate judge construed as raising only ten (10) claims for relief it was more. Then the magistrate recommended that the petition be denied on the grounds of claims were procedurally defaulted, were adjudicated on the merits by the state court or lacked merit.

The district court overruled Mr. Hendersons objections to the report and recommendation, denied the petition, and declined to issue a COA. Thereafter, the district court denied a motion to alter or amend the judgment, filed pursuant to FED. CIV. P. 59(e) and declined a COA under 28 U.S.C. 2253 (c)(2). On July 6, 2018 when district court, issued an order overruling Mr. Hendersons objections approving and adapting the R&R, denying and dismissing

the 2254 habeas petition with prejudice and denying a certificate of appealability. On July 18, 2018 a notice of appeal to the Sixth Circuit and July 20, 2018 filed a Rule (b)(6) motion. July 23, 2018 the Sixth Circuit docketed Mr. Henderson's case number 18-5747 and held his appeal in abeyance pursuant to Federal Rule of Appellate procedure 4(a)(4) pending resolution of Rule 59(e) and Rule 60(b)(6) motions. On November 1, 2018 Mr. Henderson filed a motion for adjudication (d)(1) and 18 U.S.C. 242.

Reviewing the denial by the district court, the Sixth Circuit Court of Appeals found Mr. Hendersons claims were procedurally defaulted, were reasonably adjudicated on the merits by the state courts, or lacked merit. Which is not true Mr. Henderson is actually innocent of wanton murder and robbery in the first degree stated his constitutional violations does not deserve encouragement to proceed further. Also stated his evidence did not prove he is actually innocent of providing a handgun, shooting Mr. Hammond arrange or participated in the shooting. With stating reasonable jurist could not debate the district court's conclusions which is not correct. Mr. Henderson prays that this Court view this certiorari and petition, and shows the compelling reasons the erroneous factual findings and misapplication of properly stated rules of law. The conflicts among the federal courts of appeals on issues like these. Conflicts between decisions of a federal court of appeals and the highest court of a state within the Sixth Circuit and other jurisdictions. The reliance upon a decision that has been discredited or lost weight as authority due to intervening circumstances. The important and recurring constitutional questional questions, in addition Mr. Henderson prays this Court grants the certiorari, summarily vacate the judgment of the Sixth Circuit and remand for further proceedings consistent with the Courts recent decisions. GVRILO respectfully and please!

REASONS FOR GRANTING THE WRIT

The Sixth Circuits misapplication of denial of separate trials. And the denial of Due Process and prejudice arose through the improper introduction of lies through Mr. O'Neal.

It is very clear that a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by this COURT. And decisions that is based on an unreasonable determination of the facts in light of evidence presented in the state court proceeding. 28 U.S.C. 2254(d) **Harrington v. Richter 562 U.S. 86, 100 (2011)**

The state supreme court denied a clear Federal and U.S. Supreme Court holding **Miller v. Straub 299 F.3d 570 (6th Cir. 2002)** holding that 2254(d) prohibits reliance on lower court decisions. The Sixth Circuit ignored **Wheat v. U.S. 108 S.Ct. 1692, 1699 (1988)** and **U.S. v. Ashworth 836 F.3d 260, 266 (6th Cir. 1988) U.S. v. Breing 70 F.3d 850 (1995).** When stating and reliance on this state supreme court opinion, which also declined to address the third argument with claims of failed to raise prior to trial which is clear abuse of 2254(d). It is decisions declared the law and by this Supreme Court which precedents are authoritative in themselves. Henderson when found beyond a reasonable doubt was not the shooter is innocent of all elements of wanton murder and robbery in the first degree. The Sixth Circuit quotes **Zafiro v. United States 506 U.S. 534, 537** in regards to the joint trials for defendants, however ignores **Roberts v. Russell 392 U.S. 293 (1968)** and **Brution v. United States 391 U.S. 123 (1968).** Mr. O'Neal through the prosecution.in this case clearly is and was to "show Mr. Henderson's alleged involvement" as evidenced by the Grand Jury testimony Oct. 2, 1997 and the motion to exclude the death penalty by the trial judge (May 8, 1998). The prosecution was to deliver these statements but did not, the Sixth Circuit ignored its own prejudical standards held in **Glinsey v. Parker 491 F.2d 337 (6th Cir. 1974) United States v. Crane 499 F.2d 1385 (6th Cir. 1974).** If the third claim is present then why has the Sixth Circuit not allow Henderson to return to the state forum to present this alleged unexhausted claims? **Rose v. Lundy 455 U.S. 509 (1982)** these allegations of the procedurally defaulted, were reasonably adjudicated on the merits by the states courts, or lacked merit is not true. When requesting for a COA that jurist of reason would find debatable "whether the petition states a valid claim of the denial of s constitutional right." Or that jurist "would find find it debatable whether the district court was correct in its procedural ruling." There is Supreme Court precedent on this issue it was IGNORED. Stating no due process violation stating Henderson can be convicted of felony murder, however there is no felony murder in Kentucky. **Schad v. Arizona 501 U.S. 624 (1991).**

The Sixth Circuits misapplication of prior bad acts and the denial of Due Process and lies through Mr. O'Neal.

The Sixth Circuit stated there is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence cited. **Bugh v. Mitchell 329 F.3d 496, 512 (6th Cir. 2003)**

More important that these lies could not be contrary to federal law as determined by this Court 2254(d)(1).

Mr. O'Neal defense that he was under (duress) or influence of Mr. Henderson is pure lies! Even Mr. O'Neal admits these are lies, however to make-up "prior acts" evidence and the trial admit these lies to the jury as evidence is pernicious by itself.

First the jury must be able to reasonably conclude the act occurred and Mr. Henderson was the actor. **Huddleston v. U.S. 485 U.S 681, 690 (1988).** Then while these lies don't show intent, motive guilty knowledge, a plan or scheme, a pattern or inextricably interwoven with the principle offense cause these are lies. **Spencer v. Texas 385 U.S. 554 (1967) United States v. Scheffer 523 U.S. 303, 315 (1998) Payne v. Tennessee 501 U.S. 808, 825 (1991)** and **Chambers v. Mississippi 410 U.S. 284 (1973)** there was no truth here just a egregious allegation of false crimes and lies. With no precedent or jurist of reason to debate rejection of this claim is in violation of constitutional magnitude.

> The Sixth Circuits misapplication of both miscarriage of justice standard and actual innocence. The concepts of cause and prejudice therefore correcting a fundamentally unjust incarceration.

Stating claims were procedurally defaulted, were reasonably adjudicated on the merits by the state courts, or lacked merit is a reason to obtain federal review. Due to these constitutional claims the "cause" and "prejudice" the courts had a duty to make "an independant determination" they did not. **Johnson v. Mississippi 486 U.S. 578, 587 (1988) Murray v. Carrier 477 U.S. 478, 485-86 (1986).** Henderson showed factual questions relating to "cause" and "prejudice" which includes the competence of counsel, and how the state impeded Henderson and how the most issues were raised pro se. **Wainwright v. Sykes 433 U.S. 72, 95-96 (1977).** Miscarriage of justice exceptions extend beyond situations of "actual innocence" **Saywer v. Whitley supra 505 U.S. at 361.** Bottom line Henderson did not shoot or participate in a robbery there is no collusion with Mr. O'Neal **Schlup v. Delo supra 513 U.S. at 321-22** the rejection of these facts and the miscarriage of justice all these standards the insufficient evidence, probable innocence and actual innocence is and has a substantial, showing in this case. While Henderson is not on death row the "manifest miscarriage" standard for claims challenging the constitutionally of his sentence is sufficient. Under a proper application of any of these standards Henderson's showing of innocence is not insufficient solely because state trial record

did not contain sufficient evidence to support the jury's very verdict. No jury would have convicted Henderson with Mr. O'Neal explaining he did and laceration evidence presented. **Kyles v. Whitley 514 U.S. 419, 434 (1995)**

The Sixth Circuit misapplied the false testimony evidence does not make sense by no standard.

Under Kentucky law, one is guilty of wanton murder when "he wantonly engages in conduct which creates a gave risk of death to another person and thereby causes the death of another person" Ky. Rev. Stat. 507.020(1)(b). And guilty of first-degree robbery when "in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with the intent to accomplish the theft" and when he either "causes physical injury to any person who is not a participant in the crime," "is armed with a deadly weapon" or "uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime" Ky. Rev. Stat. 515.020.

Henderson never caused the death or threatened or was presented a deadly weapon never provided anything or instrument. Mr. O'Neal is the actual shooter and principle in this case, to deny Henderson was lied on at trial before the jury. This Supreme Court held that, as an essential of the due process guaranteed by the Fourteenth Amendment, no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof. Defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. To constitute the crimes of KRS 507.020(1)(b) 515.020 with which he is charged. **In re Winship 397 U.S. 358,(1970) Pilon v. Bordenkitcher 444 U.S. 1 (1979)** this was challenged in a federal habeas corpus proceeding. Found not guilty of providing a handgun deemed the non-shooter and Mr. O'neal explained he lied about Henderson's involvement. Lest, there remain any doubt about the constitutional stature of the reasonable doubt standard the Due process standard protects this.

The Sixth Circuit's misapplication of bail pending appeal

While there is no constitutional right to bail pending appeal in Kentucky those with life sentences or death can not have bail Rcr. 12.78. Although practice is not explicity authorized by statute or rule "there is abundant authority that federal judges district court in habeas corpus can admit applicant to bail pending the decision of their cases" FED.R. APP. P. 23(c) in 28 U.S.C. 2243 district court can dispose of the matter as law and justice require.

Can provide immediate release because Henderson is innocent, Henderson applied for release in the first instance **Hilton v. Braunskill** 481 U.S. 770, 773 (1987) **Aronson v. May** 85 S.Ct. 3,4 (1964) but since district court either did not know or just did not want to no fact-finding on release related issues such as the "likelihood of flight" or "risk to the community" did not take place FED. R. APP. P. 48 this applies to habeas corpus it was never reviewed.
An adverse ruling on the merits of the appeal does not release moot as long as Henderson intends to pursue rehearing proceedings and certiorari **Hilton v. Braunskill, supra** 481 U.S. at 776-79 understanding Henderson could have filed a mandamus under All Writs Act 28 U.S.C. 1651(a) issues of bail is not just applicable to federal prisoners. No "presumption of correctness" of initial decision regarding bail or release was conducted.

Sixth Circuit misapplication of the ineffective assistance and absence of counsel both in trial and appeal.

The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions the accused shall enjoy the right...to have assistance of counsel for his defense." Even in state section 11 of the Ky. Const. provides "in all criminal prosecutions the accused has the right to be heard by himself and counsel. This is NOT Sixth Amendment, however was not followed in this case. **Gideon v. Wainwright** 372 U.S. 335 (1963) **Kitchens v. Smith** 401 U.S. 847 (1971) **Pickelsimer v. Wainwright** 375 U.S. 2, (1964). Specifically Henderson has many claims of counsels ineffective performance. **Powell v. Alabama** 287 U.S. 45, 71-72 (1932) circumstances as to preclude the giving of effective aid in the pretion and trial of the case is missing here completely. With no hearing, Henderson could have revealed exculpatory information and specific through a hearing which would have shown that the result of trial would have been different.
A hearing with Det. Eastham **Argersinger v. Hamlin** 407 U.S. 25, 23 (1972) there is no way possible for a re-indictment of these charges if effective counsel investigates **Strickland v. Washington** 466 U.S. 668, 685-86 (1984) Henderson was asleep during this incident with a laceration injury to his right leg that prevented running (7) seven blocks to and from the scene. **Kimmelman v. Morrison** 477 U.S. 365, 378 (1986)

Circuits split on evidentiary hearing whether cognizable on habeas review.

Cuyler v. Sullivan 446 U.S. 335, 343 (1980) a serious risk of injustice infected the trial itself. The ends of justice decision in **Kuhlmann v. Wilson** 477 U.S. 436, 445 (1986) and **McCleskey v. Zant** 499 U.S. 467, 495 (1991). In **Keeney v. Tamayo-Reyes** 504 U.S 1, 24 (1992) explains a position to right in habeas corpus proceedings. Henderson had no forum in state or federal courts. **Townsend v. Sain** 372 U.S. 293 (1963) and **Smith v. Yeager** 393 U.S. 122, 125 (1968) here the "cause" and "innocence" standards are fully present. Since as the Sixth Circuit stated that Hendersons issues and claims were procedurally defaulted were reasonably adjudicated on the merits by state courts or lacked merit is impossible. Requesting to follow **Hill v. Lockhart** 474 U.S. 52, 60 (1985) **Blackledge v. Allison** 431 U.S. 63, 82-83 (1977) the three conditions and precedent. Petitioner alleged facts that, if proved entitle relief, the fact-based claims the petition showed factual allegations that are not "palpably incredible" or patently frivolous or false, for reasons beyond the control of Henderson or attorney the factual claims were not previously the subject of a full and fair hearing. Circuits are split as to what mandatory hearings available on factual issues raised by the state as bases for avoiding relief. This is even on presented exceptions to the states procedural defense and claims. No full and fair hearing then claims of waivers and procedural defaults this does not make sense.
Schlup v. Delo 513 U.S. 851, 308-12 (1995)

The alleged procedural default

The jury instructions are erroneous, however district court determined a alleged procedural default. If Henderson failed to comply with a state procedural rule when presenting federal constitutional claims he also requested the courts to follow **United States v. Olano** 507 U.S. 725, 733-34 (1993) **Johnson v. Zerbst** 304 U.S. 458, 464 (1938). As **Coleman v. Thompson** 501 U.S. 722, 750 (1991) is used a procedural default doctrine does not come into play unless a default cognizable in federal court has occurred. **Amadeo v. Zant** 486 U.S. 214, 228 (1988) this is jurisdictional 28 U.S.C. 2254(a) 1257 in both contexts no procedural default exists. Regardless of what is misconstrued and incorrect, with no counsel or hearing even after the state supreme court charged Henderson's attorney with bar sanctions that were severe. If claims were, could have been, or should have been raised on direct appeal or other proceedings who is at fault? Henderson has never waived no right, nor has defaulted any rule he has tried to

comply and exhaust every issue as in **James v. Kentucky 466 U.S. 341, 342-52 (1984) Michel v. Louisiana 350 U.S. 91, 93 (1955).** District court and the Sixth Circuit explained that ineffectiveness of post-conviction counsel can not constitute "cause" to overcome an alleged so-called procedural default.

In **Johnson v. White, 2018 U.S. District LEXIS 40576** this same district court stated what the legal standards are. 28 U.S.C. 2254(a)(b)(1)& (c) **Baldwin v. Reese 541 U.S. 27, 29 (2004)** and **Woolbright v. Crews 791 F.3d 628, 631 (6th Cir. 2015) McMeans v. Brigano 226 F.3d 674, 680 (6th Cir. 2000)** that AEDPA requires a heighted respect for legal and factual determinations made by state courts. **Herbert v. Billy 160 F.3d 1131, 1134 (6th Cir. 1998).** As to jury instructions **Apprendi v. New Jersey 530 U.S. 466 (2000)** as applied in Kentucky Henderson cited **Thacker v. Commonwealth 194 S.W.3d 287 (2006)** Henderson showed in accordance how his instructions and this state court decision was contrary to, and a unreasonable application of, clearly established federal law. Regardless if it is misconstrued as a state CR 60.02 or 11.42(3) the "cause" and "prejudice" was and is shown the state supreme court in Kentucky deemed counsel ineffective in bar charges and conviction. **Jones v. Bell 801 F.3d 556 563 (6th Cir. 2015) Ambrose v. Booker 684 F.3d 638, 649 (6th Cir. 2012)** absent counsel's errors the outcome of the trial would have been different, without these errors it would not resulted in a conviction or misconstrued procedural default. Just as in Henderson's sentencing as pointed out in case as **Edmonds v. Smith 2017 Dist. LEXIS 126498 WL 3431970 Jamison v. Collins 291 F.3d 380, 386 (6th Cir. 2002)** district court did not follow these standards. The Sixth Circuit ignored **Douglas v. California 372 U.S. 353, 356 (1963) Evitts v. Lucey 469 U.S. 387 (1985)** the constitutional right to counsel, and concomitantly, to effective assistance of counsel, is not limited to just direct appeal. Counsel was ineffective in trial, direct and in collateral attacks as a result Henderson cited **Martinez v. Ryan 566 U.S. 1, (2012) Trevino v. Thaler 569 U.S. 413 (2013)** which is a matter of Due Process. Henderson's counsel was convicted of state supreme sanctions SCR 3.130-1.1 SCR 3.130-1.3 and other Rules of professional conduct in incompetent representation of Henderson. This is not like **Davila v. Davis 137 S.Ct. 2058 (2018)** this not an attempt to expand cases like **Martinez and Trevino** it is to show and explain how it applies to Kentucky and other defendants in this country. To exhaust 2254(b)(1)(A) **Rose v. Lundy 455 U.S. 509 (1982)** the state procedural framework by reason of its design and operation and so

much of a no meaningful opportunity to raise certain issues on direct appeal. Here counsel abandoned Henderson and was charged and convicted therefore Henderson acting pro se followed the exhaustion requirements. The Constitution applies to Henderson, how much more of this (cause and prejudice) is need when counsel is convicted in a bar conviction for being ineffective in a case? And issues at trial and on appeal is clear, the right to the effective assistance is a bedrock principle in our justice system. The Bar conviction does not expand **Martinez and Trevino** it proves the **fact** that counsel's performance was deficient, objectively unreasonable under prevailing professional norms. **Cornwell v. Bradshaw 559 F.3d 398, 405 (6th Cir. 2009)** **Strickland v. Washington 466 U.S. 668, 687-88 (1984)** failure to investigate, failure to object to erroneous jury instructions, raise issues on appeal, and in direct and collateral attacks. The cause-and-prejudice standard is present, the valid claim compondent of **Slack v. McDaniel 529 U.S. 473, 483 (2003)** for a COA the ineffective assistance of counsel decision is debatable. **Miller-El v. Cockrell 537 U.S. 322 (2003)** here are the substantial showings of denial of constitutional rights 28 U.S.C. 2253 (c)(2).

Jury instructions

In Kentucky, it is the duty of the trial judge to instruct the jury on the whole law of the case. It is the duty of the court to give instructions applicable to every state of the case deducible from, or supported by testimony state rule Rcr 9.54. This means that the court must give and instruction for every degree of the offense or offenses charged if there is any evidence presented at trial which, if believed, would be sufficient to sustain a conviction for a certain offense. The court can only give instructions on the offense charged and offenses which are lesser included offenses if the evidence warrants such a instruction. Rcr 9.86, the fatal variance between the indictment and the jury is factually present. Due Process guarantees a defendant notice of the charges brought against him and the opportunity to defend himself. **Combs v. Tennessee 530 F.2d 695, 698 (6th Cir. 1976).** For that reason, the government cannot charge one crime and later tell the jury to convict the defendant of a different uncharged crime. **United States v. Mize 814 F.3d 401, 409 (1999)** Henderson had to simply guess or predict what conviction he might face at trial. And forcing to guess the winning conviction especially when his liberty is at stake death penalty this does not comport with the Constitutions promise of due process. **United States v. Prince 214 F.3d 740, 757 (6th Cir.**

2000). In this case, the prosecutions theory at trial was that Henderson gave a handgun to Mr. O'Neal who then shot Mr. Hammond in order to take his shoes. **Lucas v. O'Dea 179 F.3d 412, 417 (1999)** constructive amendment the government charged Lucas with murder for shooting another another person. When the court instructed the jury, the court went a step further by stating if the jury could find Lucas guilty of wanton murder whether or not he actually shot another person.

That is, as long as the jury believed that he participated in a robbery that resulted in a death, the jury should find him guilty of wanton murder. In this case, giving a handgun to Mr. O'Neal to shoot someone Henderson can not participate in a robbery without providing a handgun the instructions constructively amended the indictment and broaden the charge in the indictment. Found not guilty of providing this handgun, Henderson can never be convicted or found guilty legally of murder of any form KRS 507.020. Either intentional or wanton this instruction that broadens with the words (voluntarily assisted or participated in a robbery) broadened the indictment which was (acting alone or in complicity) the is not the same conduct to cause a death to someone. Regardless as the Sixth Circuit contends that it is the same penalty the jury was instructed erroneously. There is no complicity instructions in this case, therefore if the theory is Henderson provided a handgun intentionally there is no way beyond a reasonable doubt he can be guilty of any form of murder or participate in any fashion of a robbery. This is a unreasonable determination of the facts in no way this can be justified as intentional or wanton murder. The penalty phase is after the guilt phase is established outside of not providing proper instructions and constructively amending the indictment through these instructions which resulted in a fatal variance and the whole law of the case was not instructed on. The Sixth Circuit ignored these facts, clearly this has the standard of "some merit" **Martinez 566 U.S. at 15.**

Sufficiency of the Evidence

These erroneous jury instructions relieved the Commonwealth/prosecution of proving all the elements of the crimes charged. The Sixth Circuit contends the evidence is not overwhelming, when viewing it in light and other evidence most favoring to prosecution. **Jackson v. Virginia 443 U.S. 307, 319 (1979)** Stating that record shows that the evidence was sufficient to convict Henderson of these crimes, I don't think so. Also stated the Sixth Circuit there is no valid or meritorious claim that counsel should have challenged the sufficiency of

the evidence. **Greer v. Mitchell 264 F.3d 663, 676 (6th Cir. 2001)**

First, the constitutional basis for determining sufficiency of evidence has been clearly established by this Supreme Court. In **Jackson** as an essential of the due process guaranteed by the Fourteenth Amendment, no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.
To challenge the sufficiency of evidence is in **Pilon v. Bordenkircher 444 U.S. 1 (1979)**, in Kentucky, it is the standard of evidence as a whole **Rutland v. Commonwealth 590 S.W.2d 682 (1979)** the Sixth Circuit ignored **In re Winship 397 U.S. 358 (1970)** and **Carpenter v. Leibson 683 F.2d 169 (6th Cir. 1982).** Relately, a conviction for murder the elements can never be satisfied this is a clear unreasonable determination of the facts. **Thompson v. Keohane 516 U.S. 99, 111 (1995)** both the state court and federal court conclusions were incorrect. **Rice v. Collins 546 U.S. 333, 342 (2006)** There was no factual determination the Sixth Circuit relies on the lies that are in the state court record about Henderson being involved is just not true. The state-court alleged factual findings can not even be presumed to be correct with clear and convincing evidence due to it is not overwhelming meaning that the elements are not there. **Rice 546 U.S. at 338-39** it is clear to show this COURT that the elements are not present.

The fact the Sixth Circuit noted Mr. O'Neal also testified and implicated Henderson surely hold not a piece of sufficient proof the are lies. And even, with his lies no evidence of other facts and circumstances connecting Henderson to a crime of murder or robbery even exists. **McIntosh v. Commonwealth 582 S.W.2d 54 (1979)** this is debatable and incorrect that it is not meritorious or valid. **Slack v. McDaniel 529 U.S. 473, 484 (2000)** the assessment of constitutional or procedural claims are way off. These determinations were based entirely on incorrect state court law and lies which these results as an unreasonable determination about "what happened" **Thompson v. Keohane 516 U.S. 99, 111 (1995).** The Fourteenth Amendments provide in relevant part; nor shall any State...deny to any person within the jurisdiction equal protection of the laws.

QUESTION PRESENTED

This case raises several pressing issues of national importance is Innocence Irrelevant? Is cause and prejudice exception to the alleged procedural default doctrine? Does the ends of justice standard and principle warrant relitigation? Does the miscarriage of justice standard apply when the Sixth Circuit or other circuits impose a improper and burdensome Certificate of Appealability (COA) standard that contravences this COURTS precedent?
Did the Sixth Circuit impose an improper denial when his claims of ineffective assistance was violated with false testimony and Brady violations and actual/factual innocence was presented.

Ineffective Assistance- Actual Innocence

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In particular, the conviction of an innocent person would violate the Eighth Amendment, Fifth Amendment and the Fourteenth Amendment of the United States Constitution and and sections 1,17 of state Ky. Const. **Herrera v. Collins 506 U.S. 390, 417 (1999)** "a truly persuasive demonstration of actual innocence made after trial would render a conviction unconstitutional. In **King v. Commonwealth 2014 ky. App. Unpub. LEXIS 556 (2014)** the state court reversed and remanded after defendant plead guilty to a homicide related offense. And stated that a defendant that proceeds to trial has a right to appeal that decision, has a right to contest the sufficiency of the evidence, a right to complain of palpable errors, and the right to request a new trial. Not for Henderson, where it is constitutionally incumbent upon the state to provide a post-conviction procedure to vacate the judgment and grant a new trial. Mr. O'Neal's lies with reasonable certainty changed the verdict adn probably change the result if he had not told these lies.

Ineffective Assistance

The Sixth Circuit ignores the MAy 8, 1998 motion to exclude the death penalty present by the state trial judge. Specific the fact this judge stated that the prosecution advised himself and the court that Mr. O'Neal at trial for his defense was to introduce according to the prosecution evidence of Henderson's (involvement) as the shooter. No objection was made to reveal the basis of how the prosecution knew of this and why had not the prosecution revealed this. **Leland v. Oregon 343 U.S. 790 (1952) Williams v. Florida 399 U.S. 78 (1970)** evidence for and

against Henderson **United States v. Agurs 427 U.S. 97 (1976)** counsel has a duty to exhaust all reasonably available means to have this alleged "involvement" evidence presented. **Romans v. Commonwealth 547 S.W.2d 128 (1977)** the failure to disclose under state rule Rcr 7.24 is clear by the judge in this motion to exclude the death penalty. No form of hearing preliminary state rule Rcr 3.07 **Jett v. Commonwealth 436 S.W.2d 788 (1969) Coleman v. Alabama 399 U.S. 1 (1970)** counsel did none of these things about this so called evidence. Not even in the off the record ex parte hearing offered to him to prove that Mr. O'Neal was prejudicial to Henderson, the fact it was no evidence just lies.

Ineffective Assistance

As a general note there is nothing miscellaneous about actual innocence. This is the facts which can not be dismissed, miscast, minimized by stating they are miscellaneous like these issues were not properly exhausted and they were. These factual determinations underlying these conclusions are "objectively unreasonable" and unreasonably applied in **Strickland** denying these ineffective-assistance-of-counsel claims all together. This Micheal Brown, clearly lied about his alleged knowledge which he provided nothing other than what the media already explained to the public. The prosecutor after failing to prove beyond a reasonable doubt Henderson's involvement assisted Mr. O'Neals lies by presenting a man with drug and psychiatric issues. How can this be the evidence of involvement sufficient to prove murder and robbery. The laceration evidence was never before the jury this explains why Henderson was in bed and not in a struggle with Mr. Hammond running seven (7) blocks both to and from this was never presented. Trial counsel was ineffective for failing to request proper jury instructions **Davis v. Morgan 89 Fed. Appx. 932, 937 (6th Cir. 2003)** failing to investigate **Wiggins v. Smith 539 U.S. 510, 537 (2003)** to state these violations of discovery is not grounds for relief, the prosecution offered this so-called "witness" after his case-in-chief and after explaining to the judge Mr. O"neal had evidence on Henderson to keep the death penalty on the table. Which is all false counsel never asked, requested a recess to interview the other jailhouse inmates or sought a mistrial or request the hospital records about his client. To state miscellaneous is incorrect the "reasonable probability" that these actions would have made a difference all of which does establish prejudice under **Strickland.** Even when the court considers the "totality of the evidence" the jury did not know these were lies until 2003 or this man was a mental and

drug addict stealing from the Veterans hospital and more important Henderson was severely injured during the time this shooting took place. Counsel can not "thoroughly cross examine" anyone without even investigating facts surrounding his client. **Santosky v. Kramer** 455 U.S. 745 (1982) **Addington v. Texas** 441 U.S. 418 (1979) the prevailing norms of practice, reflected by the ABA standards and the likes. To conduct a prompt investigation and expose **ALL** avenues leading to **facts** relevant to the merits of a case and the penalty in the event of conviction.

In reaching this conclusion, the court did not do exactly what **Strickland** tasked to do: consider "the entire evidentiary picture" which would have made a difference. **Strickland 466 U.S. at 696.** And a fairminded jurist could agree with this given the holes in this case and it not being overwhelming in addition to trial counsel's non-valiant efforts to assist and bring to light the facts surrounding this case.

Brady violations

The Sixth Circuit in **Cleveland v. Bradshaw 693 F.3d 626 (6th Cir. 2012)** the court held that this was a "credible claim of actual innocence" the recantation of the only eye witness to the murder, and it was more than likely than no reasonable juror would have found the prisoner guilty beyond a reasonable doubt. It is crazy that Cleveland stated he was actually innocent of murder, due process rights were violated when the state presented testimony that it knew, or should have known, was false, that due process rights were violated when the state failed to disclose favorable evidence. His substantive and procedural due process rights to a fair trial were violated by the prosecutors misconduct and ineffectiveness of trial and appellate counsel.

The Sixth Circuit states Henderson does not identify what the suppressed evidence is, much less the exculpatory nature of the evidence. The affidavits recanting and the two (2) hearings in court the testimonies the same evidence that was supposed to be used for Henderson's alleged "involvement" which **Schlup** stated Henderson could rely on to proceed through the actual innocence gateway **513 U.S. at 324.** Cleveland had affidavits and was able to present his habeas issues on the merits. The prosecutor held information that Henderson was <u>not</u> involved and this was suppressed there is no procedural default here. The fact that Henderson is actually innocent is materially favorable **Moore v. Illinois 408 U.S. 786, 794-95 (1972) Weatherford v. Bursey 429 U.S. 545 (1977)** he withheld the fact Henderson was not present he knew due to he

was not going to get a death penalty conviction and tried to justify holding these facts by explaining to the trial judge that Mr. O'Neal had that burden of proof standard. Whereas, he knew or should have that Henderson was innocent. **U.S. v. Agurs 427 U.S. 97 (1976)** It is nothing to them but, exculpatory evidence exonerates Henderson, it relates directly and circumstantially to the substantive issues in the case. **U.S. v. Bagley 473 U.S. 667 (1985)** Mr. O'Neal is the only eyewitness he lied and the prosecutor knew of these lies he promoted and presented a "surprise witness" to the lies. **Kyles v. Whitley 514 U.S. 419 (1995) Napue v. Illinois 360 U.S. 264, 269 (1959)** At the time Mr. O'Neal had a serious motive to lie and provided false and perjured testimony. The prosecution suppressed this in favor of hopefully getting Henderson on death row. **Giles v. Maryland 386 U.S. 66 (1967)** his duty extends well beyond his actual knowledge. Even to the information "he should have known" **427 U.S. at 103 Agurs supra. Giglio v. U.S. 405 U.S. 150 (1972)** the prosecutor knew Mr. O'Neal was going to lie to the jury this violates **Brady** due to the fact he explained to the trial court Mr. O'Neal's intentions to seal and potentially get a death penalty conviction. The prosecutors failure to correct false testimony is clear, and also no corrective action by the prosecutor or defense counsel.

It is simple, since no disclosure or corrective action taken shows the violation of due process cause it was suppressed **373 U.S. 83, 87 (1963) Stricklker v. Greene 527 U.S. 263, 280-81 (1999)** stating Henderson is innocent not involved was not present is "reasonable probability" that "put the whole case in such a different light as to undermine confidence in the verdict" **Kyles v. Whitley 514 U.S. 419, 436** "collectively not item by item." There is no default here and prejudice exists **Banks v. Dretke 540 U.S. 668, 691 (2004)** Henderson's innocence stated by Mr. O'Neal holds more weight than his implication at trial. It "totally refutes the theory of the case" that Henderson gave a handgun to O'Neal who shot Mr. Hammond. Now its so-called unreliable and impeach with cumulative in nature when it doe not benefit the conviction. **Carter v. Mitchell 443 F.3d 517 (6th Cir. 2006)** In **Cleveland v. Bradshaw** he had flight records, Henderson has hospital records, he had the only eye witness to the murder, who is O'Neal? Avery Jr. is no different than Mr. O'Neal the Sixth Circuit knows this is critical and new. But Henderson's hospital records are not "scientific" O'Neal testified to these affidavits what reasonable juror would have found guilt? What more does or have to be shown, test the shoes and get a forensic scientist to state what the court already knows. Henderson is innocent the prosecutor suppressed knowledge of this fact, stating Mr. O'Neal has knowledge or evidence of

Henderson's involvement? How did or would the prosecution know without knowledge and did not disclose. Mr. O'Neal testified to these affidavits explained the lies and reasons and the reason the fact it is not labeled perjured testimony is due to the Commonwealth/prosecutor will not charge Mr. O'Neal even after years of criminal complaints. So the standard of clear showing of extraordinary and compelling equities is hindered. **Bisher v. Bishir 698 S.W.2d 823, 826 (1985)**

The Kentucky state court has a established two prong test: One that a criminal conviction based on perjured testimony has to be extraordinary nature justifying relief. And second, that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief. **Spaulding v. Commonwealth 991 S.W.2d 651 (1999)** CR 60.02(f). The issue is the perjured testimony the prosecution has to charge Mr. O'Neal which they have not. To mention the alleged opportunity by the inclusion in the Rule 60.02 proves the argument. The fact that, prosecutors presented and mentioned these lies for benefit and withheld the true facts (Henderson is innocent). There are no numerous witnesses to the shooting of Mr. Hammond just Mr. O'Neal who the prosecution depended on to secure conviction and indictment, a possible death execution. A **Brady** violation is clear the prejudicial effect is inextrically interwoven and these lies only serve to elicit strong emotional responses from the jury. Once again, there is no procedural default on this issue, and established actual innocence.

COA and Rule 59(e) 52 motions

A certificate may only issue if there is made a "substantial showing of the denial of a constitutional right by demonstrating that "reasonable jurist would find the district courts assessment" of the constitutional or procedural claims "debatable or wrong" **Slack v. McDaniel 529 U.S. 473, 484 (2000)** the ineffective assistance, insufficiency claims and procedurally defaulted alleged claims related to instructions and actual innocence when they was raised before the state courts.

The Rule 59(e)52 motion points to the clear error of law newly discovered evidence (laceration) an intervening change in controlling law and to prevent manifest injustice/ miscarriage of justice. The Sixth Circuit claimed this motion the claims were raised previously or could have been raised previously and insufficient.

Henderson filed the motion to allow the district court to correct its own errors in the period immediately following the judgment **White v. N.H. Dept. of Emp't Sec. 455 U.S. 445, 450 (1982)** this was not to rehash the same arguments and facts previously presented. Henderson has shown several manifest errors of law and fact, newly discovered evidence was presented. Henderson followed the rules of these motions and reasonable jurist could debate. As the Sixth Circuit did not agree, however Henderson followed **Browder v. Director 434 U.S. 257, 270-71 (1978)** when this Supreme Court precedent is not followed these are grounds for these motions. **Kuhlmann v. Wilson 477 U.S. 436, 455 (1986)** even if to respect state procedural rules CR 60.02(e)(f) Rcr 11.42 (10) and CR 15.03(1) relation back is a state rule the amendment relates to a factual situation which is the basis of the original controversy. These relate to Henderson outside his actual innocence **Miller-El v. Cockrell 537 U.S. 322 336 (2003)** (describing standard for COA to issue) this panel went through the factors one by one determined that each was insufficient. How not jurists of reason would not find it debatable whether the petition states valid claims of the denial of constitutional rights. It is debatable whether the district court was correct in its procedural ruling **Barefoot v. Estelle 463 U.S. 880, 893 (1983)** which is very foreclosed by clear, binding precedent that was not followed. 28 U.S.C. 2253(c)(2)

Other reasons for granting the Writ

Henderson filed a motion for relief from judgment pursuant to FED. R. CIV. 60(b)(6) and a "motion for adjudication" 28 U.S.C. 2254(d)(1) and 18 U.S.C. 242. The district court misconstrued the motions as second or successive 2254 petition and transfered them to the Sixth Circuit. The state court prevented Henderson from testing potentially exculpatory evidence this judgment is void. This 60(b) motion and 2254(d) adjudication is not functionally equivalent to a successive petition. Rule 60(b) motions are not constrained by successive petition rules **Calderon v. Thompson 118 S.Ct. 1489, 1496 (1988)** Henderson specifically explained to the Sixth Circuit and district court Rule 60(b)(6)(4) the postjudgment changes in law having retroactive applications constitute factors rendering the judgment void. Henderson has demonstrated ineffective assistance under **Strickland 466 U.S. at 694.** it is a reasonable probability that if counsel objected to the state failing to prove the essential elements of wanton murder and first-degree-robbery. Object to jury instructions were erroneous because they allowed conviction of wanton murder under alternative theories. Denied adequate notice of the wanton murder under

charge which deprived Henderson of reasonable time to prepare a defense. For due process denied when the state court sentenced on the wanton murder conviction under a theory of intent in a single course of conduct. Counsel was ineffective with no defense, and during sentencing.

Nor the district court or Sixth Circuit argued or state respondent mentioned **Teague v. Lane 489 U.S. 288 (1989)** in regards to **Coleman v. Thompson 501 U.S. 722 (1991)** but **Martinez** and **Trevino** does so denial of this Rule 60(b)(6) is inappropriate. This certiorari is to request this COURT to permit Henderson to litigate his claims on the merits. These factors constituted the "extraordinary circumstances" required to justify opening under the Rule. The Sixth Circuit decided the Rule 60(b)(6) like a successive petition and applied the wrong standard honestly. It only should ask if the district courts decision was debatable, instead under 28 2244(b)(2), (6)(3)(c).

But even with that standard is not correct in this case because **this res judicata** doctrine which logically sets an outer limit on relitigation restrictions applied in habeas corpus. **Sanders v. United States 373 U.S. 1, 8 (1963).** In other words, a state prisoner is not precluded from raising a federal claim on habeas that has already been rejected by the state courts. **Keeney v. Tamayo-Reyes 504 U.S. 1, 15 (1992)** Rule (9)(b) of the Rules governing 2254 **McCleskey v. Zant 499 U.S. 467, 480-84 (1991) Preiser v. Rodriguez 411 U.S. 464, 475 (1973) Kaufman v. United States 394 U.S. 217, 228 (1969) Smith v. Zeager 393 U.S. 122, 124-25 (1968)** Henderson is actually innocent not abused the writ, not to vex, harass or delay his sentence. Under this standard used which is not successive, Henderson contends just in **Montana v. United States 440 U.S. 147, 153-54 (1979).** Due Process limits res judicata, for instance, to preclude parties from contesting only matters that they had a full and fair opportunity to litigate. As this Court explained in **Taylor v. Sturgell 533 U.S. 880, 892-93 (2008)**

A person who was not a party to a suit generally has not had a "full and fair" opportunity to litigate the claims and issues settled in that suit. The application of claim and claim and issue preclusions to nonparties thus runs up against the "deep rooted" historic tradition that everyone should have his own day in court. **Richards v. Jefferson County 517 U.S. 793, 798 (1996).** This statutory criteria used is not correct when making a ruling on a motion for relief and judgment Rule 60(b) no competent defense attorney would allow such things used against his client the shoes was still on Mr. Hammonds feet. What happened to the "risk of

injustice to the parties" and "risk of undermining the public's confidence in the judicial process" **Liljberg v. Health Services Acquisition Corp. 486 U.S. 847, 863-864 (1988)** the procedural holdings were wrong. Under both standard Rule 60(b)(6) 2244(b)(2)(6)(3)(c) Henderson claims have more than "some merit" and a reasonable probability the respondents did not raise any **Teague v. Lane** issues. Therefore if so the district and Sixth Circuit can't raise it for them **Danforth v. Minnesota 552 U.S. 264, 289 (2008)** and **Schiro v. Farley 510 U.S. 222, 228-229 (1994).** Please grant this certiorari because this is incorrect and wrong. Ineffective assistance of counsel under **Strickland** and these wrong procedural holdings sre erred in denying the 2254, Rule 60(b) 59(e) the 2244(b)(2) and the motion for adjudication and 18 U.S.C. 242.

Other reasons for granting the writ

Both courts district and Sixth Circuit erred in denying relief for Henderson COA stating no substantial showing under 28 U.S.C.2253(c) **Slack v. McDaniel 529 U.S. at 473, 484 (2000) Miller-El 537 U.S. at 327 (2000)** not looking at the debatability of the underlying constitutional claim or procedural issue, not the resolution of that debate. These contrary was unreasonable failing to "give full consideration to the substantial evidence presented by this habeas petitioner." **Miller-El 537 U.S. at 341** all of the issues could be debated by reasonable jurists. All objections were correct due to where an interviewing change to controlling law.

The Rule (b)(6) has catch-all that was misconstrued as a second or successive 2254 petition and transferred incorrectly.

The sentencing phase and stage of a capital trial may give rise to a wide range of federal constitutional issues including those relating to the constitutionally of the state death penalty statute on its face as applied, the procedures for preparing and providing the (PSI) presentence report. And the resources needed to prepare adequately for sentence resources employed reaching the verdict and sufficiently of the verdict.

The Sixth Circuit stated erroneous Henderson only cites **Montgomery v. Louisiana 136 S.Ct. 718, 732 (2016)** in which this Court made the holding in **Miller v. Alabama 567 U.S. 460 (2012),** retroactive to case on collateral review. **Miller** held that mandatory sentences of life without parole for juvenile offenders violate the Eighth Amendment. And it is due to Henderson is not a juvenile or has life without parole.

However as for the issues concerning **Montgomery v. Louisiana** and **Miller v. Alabama** this sentence is illegal and can be corrected at anytime under this precedent. In **Montgomery** the court determined that the retroactivity of the ruling and **Miller** announced a substantive rule that is retroactive on collateral review. Whether Henderson is a juvenile was never the issue but deficient performance is **Phillips v. White 851 F.3d 567 (2017)** the unusual and exceptional circumstance under 28 U.S.C. 2254(b)(1)(B)(ii) **Strickland v. Washington 466 U.S 668 (1984)** under **United States v. Crane 466 U.S. 668 (1984)** in Henderson guilt phase counsel was ineffective and these claims had to be exhausted. **Gray v. Netherland 518 U.S. 152, 161 (1996)** as in **Florida v. Nixon 543 U.S. 175 (2004) Glover v. United States 531 U.S. 198 (2001)** Henderson cited **Montgomery and Miller** due to the retroactive rules of constitutional law standards. To transfer this issue was not correct **Butler v. McKeller 494 U.S. 407, 411-16 (1990)** the res judicata and collateral estoppel does not bar a habeas corpus. **Frank v. Mangum 237 U.S. 309, 334 (1915).** Issue with Henderson's (PSI) was incorrect and counsel was ineffective under the Sixth Amendment. The nonperformance at sentencing prejudiced Henderson with the jury being death qualifying offenders for the death penalty on the basis of "situs" with Henderson, the non-shooter this classification is arbitrary and in violation of this Court's interpretation of the Eighth Amendment protection against cruel and unusual punishment. **Furman v. Georgia 428 U.S. 238 (1972) Gregg v. Georgia 428 U.S. 153 (1976)** issues of the death eligible class was not presented at sentencing. The state case **Boulder v. Commonwealth 610 S.W.2d 625 (1980)** failing to object to findings in the PSI report, failure to provide assistance in and throughout sentencing. This was raised, the Sixth Amendment provides these facing the threat of incarceration with a right "at all critical stages of criminal process,"

The Sixth Circuit has cases on this **McPhearson v. United States 675 F.3d 553, 559 (6th Cir. 2012) Coleman v. Mitchell 268 F.3d 417, 452 (6th Cir. 2001)** the mitigation factors is the argument and key the court is required to ask the jury to consider. **Emerson v. Commonwealth 230 S.W.3d 563, 571 (2007).** There was no sentencing phase in this capital case therefore this requires a reversal KRS 532.055 532.025(2) **Mills v. Maryland 486 U.S. 367 (1988)**

No mitigating factors were presented or taking in account in deciding anything nothing correct as information. Henderson exhausted that actual/prejudice exist when mitigation evidence "might have influenced the sentences assessment of Henderson's "moral culpability" given the totality of the case. **Wiggins v. Smith 539 U.S. 510, 535-56, 538 (2003)** Circuits are split or the Sixth Circuit just did not want to comply. **Miller v. Martin 481 F.3d 468, 473 (7th Cir. 2007) Phillips v. Bradshaw 607 F.3d 199, 216 (6th Cir. 2010)** these circuit courts proceeded to find **Strickland** prejudice even after presuming it under **United States v. Cronic 466 U.S. 648, 658 (1984)**

The **Miller** citing is applicable due to the retroactive and mitigation evidence not presented in this capital sentencing. Henderson's record and (PSI) reflects that this guarantee of the Constitution for sentencer to not receive or characteristic of mitigation evidence **Glover v. United States 531 U.S. 198 (2001)** actual prejudice also exists when there is a reasonable probability that Henderson would have avoided even a "minimal amount of additional time in prison" were not for counsel's performance at sentencing. Under **Strickland** prejudice exists and exhausted with a transfer to the Sixth Circuit erroneously.

These decisions in state court, district court and the Sixth Circuit resulted in decisions that was contrary to, or involved an unreasonable application of this United States Supreme Court.

Praying that this certiorari does not be denied Henderson hopes this COURT sees the conflict among the federal court of appeals on these issues. Conflicts between decisions of the Sixth Circuit and the supreme court of Kentucky which this state is in this circuit. Henderson prays this COURT can see the conflicts between a decision of this Supreme Court and the subsequent decisions of the Sixth Circuit. It is a clear conflict among different panels of the Sixth Circuit as shown in this petition. The conflicts with or even reliance upon a decision or decisions that has been distracted or has lost weight as authority due to intervening circumstances. Henderson prays he has raised important and recurring constitutional questions.

Praying for relief in the form of GVRILO and the focus on the violation of the Constitution in this case. Acting as (pro se) in these proceedings with no help trying to protect rights and bring facts I know is the truth. Henderson contends that there is a reasonable probability that four (4) members of this COURT would consider the underlying issues sufficiently meritorious for the granting of this certiorari. A significant possibility of reversal of the

lower courts decision if heard. The likelihood Henderson could die in prison is at stake here this petition is presented in good faith and not for the delay.

In closing, what is requested is to vacate the state court decision and remand in light of this COURTS pronouncements. Henderson is a indigent habeas corpus litigant from the Commonwealth of Kentucky and requests counsel due to not "knowing it all" but trying to seek protection of rights that have been violated.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals and the state surpeme court of Kentucky.

Respectfully Sumbitted,

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