IN THE UNITED STATES SUPREME COURT

October Term 2020

Case No. 19-7292

JERRY FRANKS,

Petitioner,

v.

EMMA COLLINS,

Respondent.

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

Jerry Franks #A 342-529
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Questions Presented for Review

First Question: Did *Montgomery v. Louisiana* **also** announce a new watershed rule of criminal procedure that applies retroactively when ruling the Supremacy Clause applies to state post-conviction/collateral review as defined by 28 U.S.C. § 2244(d)(1)(C)?

Second Question: Does *Montgomery v. Louisiana's* application of the Supremacy Clause bind *Trevino v. Thaler* retroactively to state post-conviction/collateral review as defined by 28 U.S.C. § 2244(d)(1)(C)?

Third Question: Does *Montgomery v. Louisiana's* application of the Supremacy Clause along with *Trevino v. Thaler's* procedural ruling announce a new retroactive right to post-conviction discovery procedures as defined by 28 U.S.C. § 2244(d)(1)(B)&(C)?

Fourth Question: Does a violation of *Brady v. Maryland* in the absence of state post-conviction discovery procedures constitute an "impediment" as defined by 28 U.S.C. § 2244(d)(1)(B)?

Fifth Question: Can the discovery procedures of Rule 6 of the Rules Governing 2254 Cases be invoked to remove an impediment as defined by 28 U.S.C. § 2244(d)(1)(B) when the state courts allow no post-conviction discovery procedures to vindicate a *Brady* violation?

Sixth Question: Does *Montgomery v. Louisiana's* application of the Supremacy Clause bind a retroactive application of *Crawford v. Washington* under 28 U.S.C. § 2244(d)(1)(B&(C) to allow impeachment of a co-defendant's statements relative to withheld *Brady* material?

Seventh Question: Does the equitable tolling/actual innocence gateway defined in *McQuiggin v. Perkins* apply to a lesser homicide offense when unjustly convicted of a greater homicide offense?

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To the Chief Justice and Associate Justices of the Supreme Court. This is a petition for a Writ of Certiorari brought by the afore-named petitioner to the United States Court of Appeals for the Sixth Circuit in the form prescribed by Rule 14 of the Rules of Practice for the Supreme Court of the United States as follows:

Basis for Jurisdiction

The decision of the United States Court of Appeals for the Sixth Circuit denying an application for a Certificate of Appealability (COA) and leave to proceed on appeal in forma pauperis, in which certiorari is sought was entered in this action on September 5th, 2019. Subject matter jurisdiction of this petition before this Honorable Court is established pursuant to Title 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

Article VI, Clause 2 of the United States Constitution (Supreme Law) states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 28 U.S.C. § 2244(d)(1)(B)-(C) and (d)(2) (Finality of Determination)states:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

* * *

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

* * *

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Rule 6 of the Rules Governing 2254 Cases (Discovery)states:

(a) Leave of court required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) Requesting discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

Ohio Rev. Code § 2953.23(A)(1)(a)&(b) (Time for filing petition; appeals) states:

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

List of all proceedings in state and federal trial and appellate courts:

1) *Franks v. Charles Bradley, Warden, Pickaway Correctional Institution*, Case No. 19-3408, United States Court of Appeals for the Sixth Circuit, denial of Certificate of Appealability (COA) and leave to proceed on appeal in forma pauperis, entered September 5th, 2019. **Appendix Exhibit "A" pp. 1a-5a, *infra*.** *Emma Collins, Warden, has succeeded Warden Bradley during the course of this case.

2) *Franks v. Charles Bradley, Warden, Pickaway Correctional Institution*, Case No. 5:18-CV 35, 2019 U.S. Dist. LEXIS 65745, 2019 WL 1670999, United States District Court for the Northern District of Ohio Eastern Division, Opinion and Order Adopting Magistrate's Report and Recommendation to dismiss federal habeas corpus petition as barred by statute of limitations and denial of COA, entered April 17th, 2019, entered (ECF Nos. 20). **Appendix Exhibit "B" pp. 6a-8a, *infra*.**

3) *Franks v. Charles Bradley, Warden, Pickaway Correctional Institution*, Case No. 5:18-CV 35, United States District Court for the Northern District of Ohio Eastern Division, denial of Fed. Civ. R. 59(e) Motion for Reconsideration and, alternatively, Fed Civ. R. 60(b)(1) &(6) Motion for Relief from Judgment from dismissal of federal habeas corpus relief, entered June 11th, 2019 (ECF No. 26). **Appendix Exhibit "C" p. 9a, *infra*.**

4) *Franks v. Charles Bradley, Warden, Pickaway Correctional Institution*, Case No. 5:18-CV 35, 2018 U.S. Dist. LEXIS 192209, United States District Court for the Northern District of Ohio Eastern Division, Magistrate Judge's Report and Recommendation (R&R) to dismiss federal habeas corpus petition as barred by statute of limitations, entered October 19th, 2018 (ECF No. 11). **Appendix Exhibit "D" pp. 10a-27a, *infra*.**

5) *State of Ohio v. Jerry Franks*, Case No. 2017-1228, 151 Ohio St. 3d 1458, 2017-Ohio-8842, 2017 Ohio LEXIS 2571, 87 N.E.3d 224, Supreme Court of Ohio, denial of discretionary appeal of second state petition for post-conviction relief, entered December 6th, 2017. **Appendix Exhibit "E" p. 28a, *infra*.**

6) *State of Ohio v. Jerry Franks*, Case No. 28533, 2017-Ohio-7045, 95 N.E.3d 773, 2017 Ohio App. LEXIS 3171, 2017 WL 3296720, Summit County, Ohio Court of Appeals for the Ninth Appellate District, affirming state trial court's denial of second state petition for post-conviction relief, entered August 2nd, 2017. **Appendix Exhibit "F" pp. 29a-36a, *infra*.**

7) *State of Ohio v. Jerry Franks*, Case No. CR 96 08 2041 (B), Summit County, Ohio Court of Common Pleas, entered January 20th, 2017denying second delayed petition for post-conviction relief, entered. **Appendix Exhibit "G" pp. 37a-43a, *infra*.**

8) *State of Ohio v. Jerry Franks*, Appeal Case No. 18767, 1998 Ohio App. LEXIS 4756, 1998 WL 696777, Summit County, Ohio Court of Appeals for the Ninth Appellate District, decision on direct appeal affirming judgment of the state trial court with regard to the dual plea offer and Defendant's conviction for aggravated murder. Reversing the judgment of the state trial court with regard to the aggravating circumstance specification with remand for re-sentencing, entered October 7th, 1998. **Appendix Exhibit "H" pp. 44a-56a, *infra*.**

9) *State of Ohio v. Toby D. Brown*, Appeal Case No. 18766, 1998 Ohio App. LEXIS 4757, 1998 WL 696770, (Frank's co-defendant), Summit County, Ohio Court of Appeals for the Ninth Appellate District, decision on direct appeal affirming judgment of the state trial court with regard to the dual plea offer and Defendant's conviction for aggravated murder. Reversing the judgment of the state trial court with regard to the aggravating circumstance specification with remand for re-sentencing, entered October 7th, 1998. **Appendix Exhibit "I" pp. 57a-69a, *infra*.**

Statement of the Case

State trial court and direct appeal and post-conviction proceedings.

On July 5th, 1996, Petitioner, Jerry Franks ("Franks"), and his co-defendant Toby Brown ("Brown"), went armed with two pistols into a residence in Akron, Ohio to rob a drug dealer. Once in the residence, Brown was in the kitchen with the victim, Julius Norman ("Norman") demanding illegal drugs and the money. Franks was in the hallway of the residence covering the other victims. According to the trial record, Norman went for

Brown's gun and a struggle ensued. During the struggle, Brown's pistol discharged twice while Franks' was in the hallway. Franks', after hearing those shots, went into the kitchen to get Brown so they could immediately flee the scene, fired his weapon, and Frank's himself was shot in the left hand while that struggle between the Norman and Brown was still occurring. *Ohio v. Franks*, 9th Dist. Appeal Case No. 18767, 1998 Ohio App. LEXIS 4756 (Summit, 10\07\98) at [*1-*4]; *Ohio v. Brown*, 9th Dist. Appeal Case No.18766, 1998 Ohio App. LEXIS 4757 (Summit, 10\07\98) at [*1-*4]; (ECF No. 7, PageID#'s 30-40). (**Appx. Ex.'s "H" & "I" pp. 44a-69a**, *infra.*).

Norman was hit four times. Three of the wounds were non-fatal, if treated, but the fourth ruptured his aorta causing mass bleeding, an immediate fatal injury; however, according to the trial record, Norman died in "minutes" after being shot—not immediately. *Franks*,1998 Ohio App. LEXIS 4756 at [*17-*18]; (ECF No. 7, PageID #'s 30-40). (**Appx. Ex. "H" p. 50a**, *infra.*).

While in police custody, Brown made several self-serving statement that his bullets did not hit the victim; essentially blaming everything on Franks concerning the death of Norman. Copies of these statements by Brown were affixed to the second petition for post-conviction relief and Habeas Respondent's Motion to Dismiss Habeas Petition (ECF No. 7). See *Ohio v. Franks*, 9th Dist. Appeal Case No. 28533, 2017-Ohio-7045, 2017 Ohio App. LEXIS 3171, 95 N.E.3d 773 (Summit County, 02\02\17); Discretionary appeal not allowed by *Ohio v. Franks*, 151 Ohio St. 3d. 1458, 2017-Ohio-8842, 2017 Ohio LEXIS 2571, 87

N.E.3d 224 (Dec. 6th ,2017); (ECF No. 7-1, PageID#'s 328-334). (**Appx. Ex.'s "E" & "F" pp. 28a-36a**, *infra.*).

On August 29th, 1996, Brown and Franks were indicted for (1) one count of aggravated murder, Ohio Rev. Code ("ORC") § 2903.01(B), an unclassified felony with a firearm specification, ORC § 2941.145, and aggravated circumstance specification, ORC § 2929.04(A)(7); (2) two counts of aggravated robbery, ORC § 2911.01(A)(1), with firearm specifications, a felony of the first degree; (3) one count of aggravated burglary, ORC § 2911.11(A), with a firearm specification, a felony of the first degree; (4) one count of tampering with evidence, ORC § 2921.12 (A); and (5) one count of failure to comply with an order or signal of a police officer, ORC § 2921.331, felonies of the third degree. *Franks*, 1998 Ohio App. LEXIS 4756 at [*1-*5]; (ECF No. 7, PageID#'s 30-40). (**Appx. Ex. "H" p. 51a**, *infra.*).

On July 11th, 1996, following a jury trial, Brown and Franks were convicted of aggravated murder, aggravated robbery, aggravated burglary, and tampering with evidence. The jury found that all of the charged specifications were applicable. The jury found both Brown and Franks the "principal offender" in the aggravated murder under ORC § 2929. 04(A)(7), and the case continued for a mitigation hearing on the death penalty specification. On July 21st ,1996, the jury found that the aggravated factors did not outweigh mitigating factor and declined to recommend the death penalty. On September 8th,1996, Franks was sentence to life imprisonment with parole eligibility after thirty years

for aggravated murder, plus three years served consecutively for possession of a firearm. Franks received two ten-year sentences for aggravated robbery and one five-year sentence each for aggravated burglary and tampering with evidence, all to be served concurrently with the 23-years to life sentence. *Franks*, 1998 Ohio App. LEXIS 4756 at [*5-*6]; (ECF No. 7, PageID#'s 30-40). (**Appx. Ex. "H" p. 51a**, *infra.*).

Franks appealed his conviction and sentence to the Summit County, Ohio Court of Appeals for the Ninth Appellate District. The Ohio Court of Appeals found that:

> "The State of Ohio had not argued on appeal that Franks committed aggravated murder with prior calculation and design, but that both Brown and Franks were principal offenders for the purpose of the offender under ORC § 2903.01(B) and (D) for aiding and abetting another in the commission of an enumerated offense, *this is insufficient to support a finding that he or she was the principal offender for the purpose of an aggravated circumstances specification under ORC § 2929.04(A)(7). * * * For the purposes of R.C 2929. 04 (A)(7), the principal offender is the 'actual killer.'''* *Franks*, 1998 Ohio App. LEXIS 4756 at [*15]. (**Appx. Ex. "H" p. 54a**, *infra.*).

The Ohio Court Appeals further found that:

> "In this situation, only one wound was fatal: therefore, *the fatal injury was only caused by one bullet from one gun. It was not possible to determine which gun fired the fatal bullet. Ballistics evidence was inconclusive.* ***Bullet casings*** *recovered from the scene indicated that seven shots were fired.* An eighth bullet was ejected from one of the guns. Two bullets were fired from co-defendant Brown's gun, and the remaining five from Defendant Franks' gun. Of these five, one was recovered from the victim's body...." *Franks*, 1998 Ohio App. LEXIS 4756 at [*17-*18]. (**Appx. Ex. "H" p. 55a**, *infra.*).

The Ohio Court of Appeals continued finding:

> "* * * *only one of the defendants in the instant case could have fired the bullet that caused the death of Julius Ricky Norman. Only one defendant can be the "actual killer," and therefore only one can be the principal offender for the purposes of* R.C. 2929.04(A)(7). Accordingly, we find that the instruction given to the jury was erroneous. In so holding, we emphasize that this decision turns on the very unique facts of this case. We reach this decision because (1) only one injury was potentially fatal and (2) it is impossible to determine which defendant inflicted the fatal wound. *Franks*, 1998 Ohio App. LEXIS 4756 at [*18-*19]. (**Appx. Ex. "H" p. 56a**, *infra.*).

The Ohio Court of Appeals affirmed in part, reversed in part, and remanded the case for resentencing. On January 29th, 1999, Franks was resentenced from 30-years to life with a gun specification to 20-years to life with gun specification, served concurrently with the remaining sentences for an aggregate sentence of 23-years to life (Respondent's Habeas Ex.11, ECF. 7-1 at PageID # 173). (**Appx. Ex. "H" p. 56a**, *infra.*). The Ohio Court of Appeals' found that it was *impossible* to determine whether it was Brown or Franks that inflicted the fatal wound because of inconclusive ballistic evidence; however, Franks later discovered, after-the-fact, that finding is incorrect.

Reviewing *Brown*, 1998 Ohio App. LEXIS 4757, at [*14], (**Appx. Ex. "I" p. 67a**, *infra.*), the court found that:

> Tests performed by the Bureau of Criminal Investigation showed that the guns used in the robbery were operable, ***that only two of the bullets recovered from the Garfield Street residence were fired from Brown's gun***, and that at least six of the bullets recovered were fired from Franks' gun. One "live round" was also ejected

> from one of the guns, but it could not be positively connected with either gun, although Nancy Bulger, a ballistics and firearms expert employed by the Ohio Attorney General's Office, testified that the live round "probably" came from the Cobray. The number of bullets recovered was consistent with the number of bullets left in each of the guns. One bullet was recovered from Norman's leg and created only an entrance wound. This bullet came from Franks' gun. Two spent nine millimeter brass shell casings recovered from the Garfield Street residence had been fired from Brown's gun. One "slug" recovered from the residence was too beat up to determine rifling characteristics. Neither of the bullets fired from Brown's gun were found in Norman's body nor was there evidence that these bullets travelled through the body.

Nancy Bulger, a ballistics and firearms expert employed by the Ohio Attorney General's office, did not testify in Franks' trial. Bulger only testified in Brown's trial. The Ohio Court of Appeals in *Franks*, 1998 Ohio App. LEXIS 4756 at [*18-*19], (**Appx. Ex. "H" pp. 55a-56a**, *infra.*), acknowledging that Brown's gun discharged twice, only referenced the recovery of bullet "casing", not the "bullets" fired from Brown's gun. Yet, when reviewing the Ohio Court of Appeals' decision regarding Nancy Bulger's testimony, *Brown*, 1998 Ohio App. LEXIS 4757 at [*14], (**Appx. Ex. "I" p. 55a-56a**, *infra.*), it is irrefutable that Bulger testified that the two "bullets" fired from Brown's gun were ***recovered*** from the scene. Therefore, it could have been possible to determine which bullet delivered the fatal shot had such been provided to Franks in discovery and tested for DNA evidence as to finding with certainty who the "actual killer" really was.

Reviewing the incomplete ballistics report provided to Franks' defense counsel, (Respondent's Motion to Dismiss Habeas Petition, ECF No. 7-1, PageDI #'s 335-339),

nothing in that ballistics report makes any reference or disclosure concerning the two bullets recovered from the scene discharged from Brown's gun, as testified to at Brown's trial by expert Nancy Bulger. Franks believes the prosecution deliberately withheld that exculpatory ballistics evidence; which is still being withheld to this date, in order to seek the death penalty against them and deny him a lesser homicide defense. Franks believes had that exculpatory ballistics evidence been disclosed—aside from defense counsel's prejudicially deficient performance in failing to investigate this fact—Franks could have impeached Brown's self-serving statements, proving Brown was the actual killer, allowing for a lesser homicide offense defense by moving for such type of jury instruction had that exculpatory ballistics evidence been disclosed. Also, Franks could have impeached Brown's and Nancy Bulger's testimony of the same self-serving nature that Brown's bullets did not hit the victim, leaving open the possibility Bulger was suborned into perjury. There is no evidence supporting those self-serving statements that Brown's bullets did not hit and kill the victim—just words.

Franks, after having discovering that the prosecution withheld exculpatory ballistics evidence, also recognized he faced a serious ***impediment*** in seeking redress and vindication for the prosecutorial misconduct claim. Neither federal or state law recognized any rights in state post-conviction or collateral relief; especially that Ohio recognizes "no" post-conviction "discovery" procedural rights for those, like Franks, who are indigent and cannot afford lawyers and investigators to obtain such withheld evidence. Franks needs

actual possession of those withheld bullets to prove the victim's DNA "blood" was on one of Brown's recovered bullets.

Franks also discovered this Court recognized a new federal or state right that applies retroactively to Franks' situation, and the state collateral petition under ORC §2953.23 (A)(1)(a)&(b) asserted a claim based on that right, via the retroactive application of the Supremacy Clause to state collateral proceedings; being also a new "watershed rule" procedural ruling announced in *Montgomery v. Louisiana*, _____ U.S. ____, 136 S. Ct. 718, 731-732, 193 L. Ed. 2d 599 (2016), for the first time in our nation's history.

Franks believed as a result of *Montgomery's* groundbreaking decision to apply an article of Confederation of the United States Constitution, Article VI, Clause 2 (Supremacy Clause), to state collateral relief where no constitutional rights existed before, that a right to such relief then attached, leaving open the question of "what process is due" to ensure enforcement of the Supremacy Clause in those state collateral proceeding, i.e., *a new right to post-conviction discovery procedures to seek redress and vindication of constitutional violations that occurred outside the record,* as protected by this Court 's precedents, i.e., *Brady* violations and *Strickland* ineffective assistance of counsel claims for counsel failing to investigate and discover such evidentiary violations by the prosecution, as to a means of enforcement of those substantive and procedural decisions, including those decisions such as *Crawford* and *Trevino*, being relevant and applicable to the outside the record impeachment evidence that supports the *Brady* and *Strickland* claims.

The Second Delayed State Post-Conviction Proceedings.

On October 25th,2016 Franks filed his second delayed petition for post-conviction relief under ORC § 2953.23 (A)(1)(a) &(b) in the Court of Common Pleas for Summit County, Ohio, being similar to 28 U.S.C. § 2244(d)(1)(B)&(C). To support the "jurisdictional" requirements of ORC § 2953.23(A)(1)(a) &(b), Franks argued he was unavoidably prevented from obtaining the withheld exculpatory ballistics evidence needed to support that petition. And, that *Montgomery* **also** recognized new "procedural" rights in state post-conviction proceedings—asides from *Montgomery's* findings of a new retroactive "substantive" rule—when applying the Supreme Clause to state collateral relief, believing such is also a new "watershed rule of criminal procedure" allowing for the new right to post-conviction discovery procedures to enforce such new procedural rights. (ECF No. 7, PageID# 35; ECF No. 7-1, Ex. 15, Habeas Petition).

Franks argued *Montgomery's* procedural ruling applying the Supremacy Clause established a need for post-conviction discovery procedures as a component to the new retroactive watershed procedural rule of criminal procedure. That is because discovery procedures are needed in order to enforce all the decisions of this Court, past, present and future in those state collateral proceedings; especially when the evidence **outside the record** (withheld *Brady* material) is needed to support the collateral petition and vindicate the federal constitutional violation. (ECF No. 7, PageID# 35; ECF 7-1, Ex. 15, Habeas Petition).

In that second state post-conviction petition, Franks also argued that the lack of post-conviction and post-conviction discovery rights; especially when indigent, constituted an "impediment", within the meaning of 28 U.S.C. § 2244(d)(1)(B), and that allowing post-conviction discovery procedures was the only way to lift or remove that impediment. (ECF No. 7, PageID# 35; ECF 7-1, Ex.15, Petition).

On January 20th, 2017 the state trial court denied that petition without a hearing, and denied Franks request for post-conviction discovery procedures. (ECF No. 7, PageID#35; ECF No. 7-1, Ex. 18 "Order".). Appx. **Ex. "G" pp. 37a-43a,** *infra*. On February 17th, 2017, Franks appealed that decision to the Summit County, Ohio Court of Appeals for the Ninth Appellate District. (ECF No. 7, PageID #35). On August 2nd, 2017 the Ohio Court of Appeals affirmed the judgement of the trial court, ruling in relevant part at *Franks*, 2017-Ohio-7045 at [*P20], in relevant part that:

* * *

> ***This Court has long held that there is no right to discovery in a post-conviction proceeding.*** *State v. Smith*, 9th Dist. Summit No. 24382, 2009-Ohio-1497, ¶ 18. An action for post-conviction relief is a civil action. *State v. Milanovich*, 42 Ohio St. (2d) 46,49, 325 N.E. (2d) 540 (1975). R.C. 2953.21 sets forth the procedures applicable to post-conviction relief actions. *State v. Hiltbrand*, 9th, Dist. Summit No.11550, 1984 Ohio App. LEXIS 9936, 1984 WL 6171, *1 (May 16, 1984). That section does not provide for discovery. See, e.g., *State v. Craig*, 9th Dist. Summit No. 24580, 2010-Ohio-1169, ¶ 6 (collecting cases). (ECF No. 7, PageID# 37; ECF No. & 7-1 Ex. 22, Opinion). Appx. **Ex. "F" pp. 34a,** *infra*.

Franks filed a timely discretionary appeal to the Supreme Court of Ohio following that aforementioned decision by the Ohio Court of Appeals. (ECF No. 7, PageID# 37; ECF No. 7-1, Exhibits 23-25). On December 6th, 2017, the Supreme Court of Ohio declined jurisdiction of that appeal (ECF No. 7, PageID # 37; ECF No. 7-1, Ex. 31). *Franks*, 151 Ohio St. 3d 1458, 2017-Ohio-8842, 2017 Ohio LEXIS 2571, 87 N.E.3d 224. Appx. **Ex. "E" p. 28a,** *infra.*

Federal Habeas Corpus Proceedings.

On December 27th, 2017, Franks filed his federal petition for writ of habeas corpus. Franks raised three grounds for relief:

> **GROUND ONE**: Petitioner was denied due process of law and a fair trial under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1983), because the prosecution withheld exculpatory ballistics evidence and ballistics reports and findings; which later became manifest at his co-defendant's trial, yet remains withheld from him to this date.
>
> **GROUND TWO**: Petitioner was denied the effective assistance of counsel when counsel failed to properly investigate his case and subject it to meaningful adversarial testing to his prejudice, because such deficient performance allowed the prosecution to withhold favorable material and impeachment evidence that inhibited an ability to prove the existence of reasonable doubt in favor or a conviction to a lesser included offense.
>
> **GROUND THREE**: Petitioner was denied a fair trial, confrontation and due process of law under a retroactive application of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008), when denied the right to impeach his co-defendant's

grossly inconsistent statements to police and testimony at his own trial.(ECF. 1 PageID #s 8-13, Habeas Petition).

On June 1st, 2018, Respondent filed a "Motion to Dismiss" arguing that the Habeas Petition must be dismissed as time-barred under 28 U.S.C. § 2244 (d)(1)(A), or alternatively under 28 U.S.C. § 2244(d)(1)(D). (ECF No. 7, at 12). On July 23rd, 2018, Franks filed a "Reply" in opposition to such arguing that the Petition is not time barred under 28 U.S.C. § 2244 (d)(1)(A), "invoking the exemptions of Title 28 U.S.C. § 2244 (d)(1)(B) -(D) and (2). (ECF No. 10, at 1). On October 19th, 2018, the Magistrate submitted entered a Report & Recommendation ("R&R") that the Petition be dismissed as time-barred 28 U.S.C. § 2244 (d)(1)(A), and finding the exemptions of 28 U.S.C. § 2244 (d)(1)(B-(D) were not met (ECF No. 11). The Magistrate, in that R&R, acknowledge Respondent failed to address Franks' *Brady* claim (ECF No.11, PageID #558); *Franks v. Bradley*, Case No. 5:18 CV 35,2018 U.S. Dist. LEXIS 192209 (N.D. Ohio E.D.) at [*18]. **Appx. Ex. "D" pp. 10a-27a, *infra*.**

On January 14th, 2019, Franks filed Objections to that R&R. (ECF No.19). Franks also filed a Motion to Conduct Discovery under Rule 6 of the Rules Governing 2254 Cases. Franks raised five Objections to that R&R. Id.

On April 17th, 2019, the District Judge adopted the Magistrate's R&R in its entirety, denied that Petition as untimely, denied Franks' Motion to Conduct Discovery under Rule 6 of the Rules Governing 2254 Cases, and denied Franks' a COA (ECF Nos. 20& 21);

Franks v. Bradley, Case No. 5:18 CV 35, 2019 U.S. Dist. LEXIS 65745 (N.D. Ohio E.D.). **Appx. Ex. "B" pp. 6a-8a,** *infra.*

Following that aforementioned judgment, Franks filed a timely Motion for reconsideration and Relief from Judgment, pursuant to Fed. Civ. R. 59(e) and 60(b)(1) & (6) (ECFNo.23). Franks raised five grounds for relief to support that Motion.

Respondent filed an opposition to Franks' Motions for Reconsideration and Relief from Judgment (ECF No. 24); to which Franks filed a Reply (ECF No. 25), arguing the existence of a Circuit split among the U.S. Court of Appeals on the impediment issue under 28 U.S.C. § 2244(d)(1)(B), as to whether a *Brady* claim can constitute an impediment under that provision. On June 11th, 2019, the District judge denied the Motion for Reconsideration/Relief from Judgement (ECF No. 26). **Appx. Ex. "C" p. 9a**, *infra.*

Appeal to the United States Court of Appeals for the Sixth Circuit.

Following the District Court's Judgment, Franks filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit. Franks also requested leave to proceed in forma pauperis on appeal, and filed an application for a COA, raising four issues for review, as follows:

> First Issue: *Montgomery v. Louisiana*, ____ U.S. ____, 136 S. Ct. 718, 731-732 (2016), also announced a "**new watershed ruled of criminal procedure**" under the second exception of *Teague v. Lane*, 489U.S. 288, 311 (1989), implicating the fundamental fairness and accuracy of the criminal proceeding

by extending the Supremacy Clause to state collateral relief for first time in our nation's history of jurisprudence, in ground breaking fashion, and extending a new right to post-conviction discovery procedures within the definition of 28 U.S.C. §2244(d)(1)(C), thus tolling the limitation period.

Second Issue: The groundbreaking application of the Supremacy Clause to collateral relief in the procedural ruling of *Montgomery v. Louisiana*, ____ U.S. ____, 136 S. Ct. 718, 731, 731-732 (2016), makes *Trevino v. Thaler*, 569 U.S. 413, 429 (2013), and the request for post-conviction discovery procedures binding upon the state collateral proceeding in order to answer the question left open by this Court in *Onunwor v. Moore*, 655 Fed. Appx. 369,375 fn. 6 (6th Cir. 2016), and within the definition of 28 U.S.C. § 2244 (d)(1)(C), thus tolling the limitations period.

Third Issue: A due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), constitutes an "**impediment**" within the meaning 28 U.S.C. §2244(d)(1)(B), extending the one-year statute of limitations period set forth in 28 U.S.C. §2244(d)(1)(A), being "stayed", not expired, not to restart until the "**impediment**" is removed through post-conviction discovery procedures or via the discovery procedures set forth in Rules 6 of the Rules Governing 2254 Cases.

Fourth Issue: The manifest miscarriage of justice standard and equitable tolling principles of *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 1931 (2013), and *Holland v. Florida*, 560 U.S. 631, 645 (2010), should also apply to those convicted of more serious crimes than they are guilty of, being guilty only of lesser offenses and\or lesser included offenses.

On September 5th, 2019, the United States Court of Appeals for the Sixth Circuit denied Franks a COA and leave to proceed in forma pauperis in the case of *Franks v. Collins*, 6th Cir. Case No. 19-3408. **Appx. Ex. "A" pp. 1a-5a**, *infra*.

The Sixth Circuit determined that because the *Brady* violation was contained in Franks' co-defendant's (Brown's) unpublished public record appellate decision for over twenty years, regardless of when Franks' actually discovered it since it was not part of his appellate record, that the diligence provision of 28 U.S.C. §2244(d)(1)(D) applied over the application of the impediment provision of 28 U.S.C. §2244(d)(1)(B), regardless of a lack of state post-conviction procedures that are quintessential to the vindication of the *Brady* and *Strickland* claims central to that still withheld evidence outside the state trial record; including the need for that withheld impeachment evidence under a retroactive application of *Crawford* and *Danforth*. **Appx. Ex. "A" p. 3a**, *infra*.

Additionally, concerning the application of 28 U.S.C. §2244(d)(1)(C), the Sixth Circuit only addressed *Montgomery's* "substantive" ruling over Franks' argument involving *Montgomery's* "procedural" ruling let open by this Court, as it pertains to the procedural impact *Montgomery's* first-time application of the Supremacy Clause has on those state post-conviction/collateral procedures. **Appx. Ex. "A" pp. 4a-5a**, *infra*.

Lastly, the Sixth Circuit failed to address Frank's equitable tolling and actual innocence "manifest miscarriage of justice" argument as it pertains to lesser homicide or lesser included offenses defenses when unjustly convicted of the greater due to an ongoing *Brady* violation. Id.

Argument

Reviewing the District Court's April 17th, 2019 Order Adopting the R&R (ECF No. 20, PageID#624), **Appx. Ex. "B" p. 7a**, *infra*, held in relevant part:

* * *

> All but one of Franks' arguments rely on *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) (Doc. 19 at 3-6, 14, 17-18, 20-21, 25, 28, 30). In *Montgomery*, the Supreme Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 136 S. Ct. at 729. But Franks does not identify a new substantive rule of constitutional law. ***Rather, he insists Montgomery allows him to conduct discovery procedures that he believes would produce exonerating evidence*** (Doc. 19 at 21). ***Discovery rights are procedural, not substantive****....*

While the Sixth Circuit is correct in finding that Franks was not arguing for an application of *Montgomery's* retroactive "substantive" ruling concerning *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); rather, the Sixth Circuit failed to reach the merits of Franks' argument that *Montgomery* also announced a "**new watershed ruled of criminal procedure**" that applies to him retroactively through *Teague's* 489 U.S. at 311-312 second exception, when *Montgomery* extended the Supremacy Clause to apply to state post-conviction/collateral proceedings for the first time in our nation's history of jurisprudence. Id. 136 S. Ct., at 731-732.

A new rule is substantive if it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492U.S. 302,

330, * * * (1989), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304, * * * (2000). **A watershed ruled of criminal procedure is one that "requires the observance of 'those procedures that ... are implicit in the concept of ordered liberty."** *Teague*, 489, U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 693, * * * (1971) (Harlan, J., concurring in the judgment)). The watershed –rule exception is "extremely narrow." *Schriro v. Summerlin*, 542 U.S. 348, 352, * * * (2004). Indeed, the Supreme Court has never found a new procedural rule to be "watershed" despite the fact that it has considered the question fourteen times. See Jennifer H. Berman, Comment, Padilla v. Kentucky: Overcoming Teague's "Watershed" Exception to Non-Retroactivity,15 U. Pa. J. Const. L. 667, 685 (2012). The Court's statements that the right to counsel in felony prosecutions, guaranteed by *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), might qualify as a watershed rule revealing how rare watershed rules are. See, e.g., *Beard v. Banks*, 542 U.S. 406, 417, * * * (2004).

Before *Montgomery's* application of the Supremacy Clause of Article VI, Clause 2 of the United States Constitution to state post-conviction/collateral procedures, Id. 136 S. Ct. at 731-732, there have never been any constitutional rights associated with state post-conviction/collateral relief. See *Pennsylvania v. Finley*, 481 U.S. 551, 556-557 (1987); citing *Fay v. Noia*, 372 U.S. 391, 423-424 (1963), and *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion). See, also, *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion).

Teague,489 U.S. at 301, held in relevant part that:

> "In general, however, a case announces a new rule *when it breaks new ground or imposes a new obligation on the States or Federal Government*." See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 62 (1987); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) ... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. See general *Truesdale v. Aiken*, 480 U.S. 527, 528-529 (1987) (Powell, J., dissenting) ....

The new groundbreaking obligation imposed by *Montgomery's* procedural ruling on the state courts is the adherence to this Court's precedents in their state post-conviction/collateral proceedings, thus, leaving the open question as to what process is due during those procedures to guarantee such adherence?

Certainly, *Montgomery's* extension of the Supreme Clause through *Teague's* second exception to state post-conviction procedures for the first time where no constitutional rights existed before, qualifies as "groundbreaking and imposes a new obligation on the states in their post-conviction procedures," i.e., to provide post-conviction discovery procedures to vindicate those constitutional violations; especially when access to withheld evidence "**outside the record**" is need to prove the *Brady* and *Strickland* constitutional violations, including access to that same withheld "**impeachment**" ballistics evidence under *Crawford v. Washington*,541 U.S. 36 (2004), as made retroactive by *Danforth v. Minnesota*, 552 U.S. 264 (2008). All those aforementioned cases being under the protection of the Supremacy Clause, leaving open the question of adherence and a means of enforcement by the state courts in post-conviction.

Franks incorporated his *Crawford* claim with his *Brady* claim, because he needs the withheld bullets fired from his cop-defendant's gun to impeach his co-defendant's and ballistics expert's self-serving statements that those bullets did not hit and kill the victim during a struggle when Franks was in the hallway—not directly present when those shots were fired; especially when the determination of the "**actual killer**" was relevant in this case, and any potential DNA blood evidence that possibly could be contained on those bullets, if disclosed, could have opened the door for a lesser homicide culpability defense and requested lesser homicide offense jury instruction option had that evidence been properly disclosed.

Montgomery, 136, S. Ct., at 728-729, further held that:

> In addition, *amicus* directs us to *Danforth* v. *Minnesota*, 552 U.S. 264, * * * (2008), in which a majority of the Court held that *Teague* does not preclude state courts from giving retroactive effect to a broader set of new constitutional rules than *Teague* itself required. 552 U.S., at 266, ... The *Danforth* majority concluded that *Teague*'s general rule of nonretroactivity for new constitutional rules of criminal procedure "was an exercise of this Court's power to interpret the federal habeas statute." 552 U.S., at 278, . . . Since *Teague*'s retroactivity bar "limit[s] only the scope of *federal* habeas relief," the *Danforth* majority reasoned, States are free to make new procedural rules retroactive on state collateral review. 552 U.S., at 281-282....
>
> *Amicus*, however, reads too much into these statements. Neither *Teague* nor *Danforth* had reason to address whether Sates are required as a constitutional matter to give retroactive effect to new substantive ***or watershed procedural rules***. *Teague* originated in a federal, not state, habeas proceedings; so it had no particular reason to discuss whether any part of its

> holding was required by the Constitution in addition to the federal habeas statute. And *Danforth* held only that *Teague*'s general rule of nonretroactivity was an interpretation of the federal habeas statute and does not prevent States from providing greater relief in their own collateral review courts. The *Danforth* majority limited its analysis to *Teague*'s general retroactivity bar, ***leaving open the question whether Teague's two exceptions are binding on the States as a matter of constitutional law***. 552 U.S., at 278; see also *id.*, at 277, (The case before us now does not involve either of the '*Teague* exceptions'").
>
> In this case, the Court must address part of the question left open in *Danforth*. The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. ***This holding is limited to Teague's first exception for substantive rules; the constitutional status of Teague's exception for watershed rules of procedure need not be addressed here***. (Emphasis added).

Montgomery, while addressing only *Teague's* first exception, left open the procedural question of the application of *Teague's* second "***watershed rule***" exception to *Montgomery's* new groundbreaking application of the Supremacy Clause to state post-conviction proceedings, when answering the question left open in *Danforth*. *Montgomery* did not hold that *Teague's* second exception did not apply to the extension of the Supremacy Clause to state post-conviction procedures, only that *Teague's* second exception needed not be addressed at that time. Certainly, it is debatable whether *Montgomery* also announced a new retroactive watershed ruled of criminal procedure

under *Teague's* second exception within the definition of 28 U.S.C. § 2244(d)(1)(C), when extending the Supremacy Clause to state post-conviction procedures to, *de minimus*, warrant a **COA** under the standard of *Slack v. McDaniel*, 529 U.S. 473 (2000).

The Supremacy Clause is "not a source of any federal rights". *Dennis v. Higgins*, 498 U.S. 439, 450 (1991). Instead, the Supremacy Clause affords priority for federal rights created elsewhere over conflicting state laws. Id. The Sixth Circuit also failed to reach the merits of Franks' argument that through *Montgomery's* extension of the Supremacy Clause also made binding in the state post-conviction proceedings, this Court's procedural ruling in *Trevino v. Thaler*, 569 U.S. 413, 429 (2013), being applicable to Ohio Rev. Code § 2953.23 (A)(1)(a) &(b), thus requiring the Sixth Circuit to answer the question they left open in *Onunwor v.Moore*, 655 Fed. Appx. 369, 375 fn. 6 (6th Cir. 2016), in relevant part:

> For these reasons, we conclude that where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies....
>
> The Sixth Circuit has not yet ruled on whether *Trevino* applies in Ohio, but has indicated that it may apply to cases such as Onunwor's, where ineffective-assistance-of-counsel claims ***rely on evidence outside the record***, and therefore generally are not raised on direct review. *See McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 751-52 (6th Cir. 2013). However, the court need not decide this issue here.

The procedural framework of Ohio's post-conviction statutes is that when the federal constitutional *Brady* and *Strickland* claims rely upon withheld evidence outside the trial record, such cannot be raised on direct appeal. It must be raised in post-conviction. See, e.g., *State v. Cole*, 2 Ohio St. 3d. 112,114, 443, N.E.(2d) 169 (1982). *Cole* also requires, in support of state post-conviction relief, that the petitioner "proffer or provide" the evidence outside the record with the petition. Id. Franks therefore was faced with the problem of seeking access and possession of the still withheld exculpatory ballistics report; especially when Ohio recognizes no post-conviction discovery rights for those incarcerated and indigent, like Franks, who cannot afford attorneys and private investigators to obtain such. See *Franks*, 2017-Ohio-7045 at [*P20].

In the wake of *Montgomery's* extension of the Supremacy Clause to state collateral relief, and without state post-conviction discovery procedures, Franks has no procedural means to seek redress and vindication for the federal constitutional *Brady* and *Strickland* violations that must rely upon and "proffer" the withheld evidence outside the trial record. That is why Franks believes the Sixth Circuit erred to deny remand and to deny the discovery procedures under Rule 6 of the Rules Governing 2254 Cases.

Certainly, it is debatable whether *Montgomery's* retroactive procedural ruling of the extension of the Supremacy Clause to state post-conviction procedures, also made *Trevino* binding upon those state procedures as defined by 28 U.S.C. § 2244 (d)(1)(C), warranting

a COA under the standard of *Slack* to have the merits of this argument reached. This also includes a finding that the Sixth Circuit's and District Court's decision to deny discovery procedures under Rule 6 of the Rules Governing 2254 Cases debatable in this circumstance.

The Sixth Circuit also failed to reach the merits of Franks' Argument that the denial of state post-conviction discovery procedures in wake of *Montgomery's* procedural ruling constitutions an "impediment" under 28 U.S.C. § 2244 (d)(1)(B); including the fact they never reach the merit of Franks' argument that a *Brady* violation can constitute an impediment within the meaning of 28 U.S.C. § 2244 (d)(1)(B).

In *D'Ambrosio v. Bagley*, 527 F.3d 489, fn. 5 (6th Cir. 2008), the Sixth Circuit distinguished the difference between *Brady* violations versus the diligence provision applied to non-*Brady* newly discovered evidence claims as defined by 28 U.S.C. § 2244 (d)(1)(B). And despite the fact a *Brady* violation can also be predicated on newly discovered evidence in most circumstances. Franks believe a *Brady* violation should properly be classified as an "impediment" under 28 U.S.C. § 2244 (d)(1)(B), and not under the more stringent non-*Brady* newly discovery evidence "diligence" standard of 28 U.S.C. § 2244 (d)(1)(D), as *D'Ambrosio* so held, at least in plausible context. As fact, the Sixth Circuit, in *Gibbs v. Smith*, 2017 U.S. App. LEXIS 14968 (6th Cir. 03/17/17) at [*4]-[*5], adjudicated a *Brady* claim under the impediment standard of 28 U.S.C. § 2244 (d)(1)(B), even though *Gibb's* claim ultimately failed on the fact of that case, not the law.

Title 28 U.S.C. § 2244 (d)(1)(B), which directs that the one-year statute of limitation for filing habeas petitions begins to run from "the date on which the impediment to filing an application created by State action in violation of the Constitution or law of the United States ***is removed***, if the application was prevented from filing by state action." *Lloyd v. VanNatta*, 296 F 3d. 630,632, (7th Cir. 2002). ***This exception suspends the limitation period during the time when an impediment created by "State action in violation of the laws of the United States" prevents the petitioner from timely filing his habeas petition in federal court.*** *Maclin v. Robinson*, 74 fed. App'x 587, 589 (6th Cir. 2003); *Shelly v. Meko*, 2011U.S. Dist. LEXIS 118725 (E.D. Ky., 08/16/11) at [*5]- [*6].

To come within the 28 U.S.C. § 2244 (d)(1)(B) exception, "the prisoner must show that: (1) he was prevented from filing a petition; (2) by state action; (3) in violation of the Constitution or Federal law." *Roland v. Motley*, 2006 U.S. Dist. LEXIS 101747 (E.D. Ky. 08/09/06) at [*7] (citing *Egerton v. Cockrell*, 334 F.3d 433, 436 (5th Cir. 2003). ***The statue does not define what constitutes an 'impediment' "but the plain language of the statute makes clear that whatever constitutes an impediment must prevent a prisoner from filing his petition."*** Id.

A *Brady* violation can constitute an "**impediment**" under 28 U.S.C. § 2244 (d)(1)(B). See e.g., *Stickler v. Greene*, 527 U.S. 263, 287-288 (1999). "In the context of a *Brady* claim, a defendant cannot conduct the "reasonable and diligent investigation" mandated by *McCleskey v. Zant*, 499 U.S. 467 (1991), to preclude a finding of procedural

default (or statute of limitations bar) when the evidence is in the hands of the State." Id. (Emphasis added). Cf., *DA's Office v. Osborne*, 557 U.S. 52, 69, 129 S. Ct. 2308, 2320-2321, 174 L. Ed. 2d 38 (2009), in relevant part:

> Instead, the question is whether consideration of Osborne's claim within the framework of the State's procedures for post-conviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." *Medina* v. *California*, 505 U.S. 437, 446, 448, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (internal quotation marks omitted); see *Herrera [v. Collins*, 506 U.S. 390], 407-408, 113 S. Ct. 853, 122 L. Ed. 2d 203 [(1993)] (applying *Medina* to post-conviction relief for actual innocence); *Finley, supra*, at 556, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (post-conviction relief procedures are constitutional if they "compor[t] with fundamental fairness"). ***Federal courts may upset a State's post-conviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.***

There is no current U.S. Supreme Court precedent that addresses whether a *Brady* violation and the lack of state post-conviction discovery procedures constitutes an "**impediment**" under 28 U.S.C. § 2244 (d)(1)(B), which does not define impediments under the AEDPA. See, e.g., *Wood v. Spencer*, 487 F.3d 1, 6, (1st Cir 2007), "that "direct interference" argument cannot easily be dismissed. Still, the word "impediment" is not defined in the statute itself, nor is it self-elucidation. Id. See, *Moore v. Battablia* 476 F.3d 504, 506-507 (7th Cir. 2007). **Moreover, two of our sister circuits have entertained the possibility that section 2244 (d)(1)(B) might encompass *Brady* violations.** See *Williams v. Sims*,390 F.3d 958,960 (7th Cir. 2004); *Green v. Cain*, 254 F.3d 71, 2001 U.S. App. LEXIS 313228, 2001 WL 502806, at [*1] (5th Cir. 2001) ....

Unlike the situation in *Scott v. Hill*, 2013 U.S. Dist. LEXIS 144153 (N.D. Cal. 10/03/13) at [*13]- [*15], the exculpatory ballistic evidence in Franks' case "existed" before trial. And while that subject ballistics evidence was disclosed to his co-defendant, it was withheld from Franks, as has been proven through the litigation of this case and remains withheld to this date.

Scott v. Hill, supra, which addresses specifically withheld ballistics evidence, also makes it very plausible that a *Brady* violation can constitute an "impediment" under 28 U.S.C. § 2244 (d)(1)(B), since the withheld exculpatory ballistics evidence existed in Franks' case before trial. And unlike *Scott v. Hill*, at [*6], in relevant part: "* * * **Without the *Brady* violation, petitioner can point to no unconstitutional state action that prevented him from filing a petition** ...."

Franks has met his burden of establishing a valid *Brady* violation, unlike *Hill,* entitling Franks to the "impediment" exception set forth in 28 U.S.C. 2244 (d)(1)(B). Cf. *Barton v. Warden*, 786 F.3d 450,465 (6th Cir. 2015) (There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.").

Certainly, it is debatable amongst reasonable jurists whether a *Brady* violation can constitute an "impediment" under the exception of 28 U.S.C. § 2244 (d)(1)(B), as both the

Seventh and Fifth Circuits have found; including whether the Sixth Circuit and District Court was correct in their procedural ruling to deny Discovery procedures under Rule 6 of the Rules Governing 2254 Cases to have that impediment removed, and to restart the 28 U.S.C. § 2244 (d)(1)(A) and (d)(2) clock that the impediment has stayed, until finally removed, to render the habeas petition timely by law.

The last debatable matter to be addressed is whether being convicted of a greater offense than one is guilty of can constitute a "manifest miscarriage of justice" under the actual innocence standard to allow for equitable tolling of the statute of limitations under the "actual innocence" exception defined by *McQuiggin v. Perkins*, 569 U.S. 383 ,133 S. Ct. 1924, 1931 (2013), and *Holland v. Florida*, 560 U.S. 631, 645 (2010). Franks believes it should.

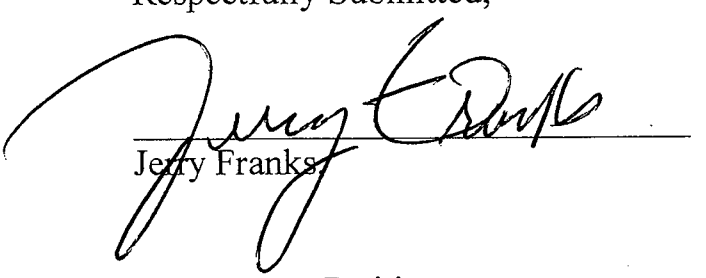
As argued, if the bullets fired from his co-defendant's gun during the struggle with the victim in the kitchen when Franks was in the hallway were disclosed as they should have been, Franks believes the victim's DNA blood evidence was on at least one of those bullets. And that such either proves, or provides reasonable doubt that he was not the actual killer—allowing Franks to impeach his co-defendant's self-serving statement to police, and allowing him the defense of a lesser homicide offense, or at least an instruction to the jury for a verdict to a lesser homicide charge.

The Supreme Court of Ohio has held that "mere presence of an accused at the scene of crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Widner*, 69 Ohio St. (2d) 267, 269,431 N.E. (2d) 1025 (1982); compare, *Smith v State*, 41 Ohio App. 64, 67-68, 11 Ohio Law Abs. 69 179 N.E. 696 (9th Dist. 1931). Nevertheless, evidence of aiding and abetting may be either direct or circumstantial; consequently, criminal intent may be inferred from "presence, companionship and conduct before and the offense is committed." *State v. Cartellone*, 3 Ohio App. 3d 145, 150, 3 Ohio B. 163, 444 N.E. (2d) 68 (8th Dist. 1981), quoting *State v. Pruett*, 28 Ohio App. (2d) 29, 34, 273 N.E. (2d) 884 (4th Dist. 1971).

Conclusion

WHEREFORE, based upon the foregoing, petitioner prays this Court will grant this petition for a writ of certiorari, appoint counsel and allow briefing upon the questions presented for review. Franks requests any additional relief this Court determines appropriate.

Respectfully Submitted,



Jerry Franks,

Petitioner, *pro se.*