**CAPITAL CASE**

No. 20-507

---

IN THE
SUPREME COURT OF THE UNITED STATES

---

**TONY MAYS, WARDEN**,

Petitioner-Applicant

vs.

**ANTHONY DARRELL DUGARD HINES,**

Respondent

---

# BRIEF IN OPPOSITION

---


JAMES O. MARTIN, III
*Counsel of Record*
RICHARD L. TENNENT
FEDERAL PUBLIC DEFENDER
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

*Counsel for Respondent*

**CAPITAL CASE**

## QUESTION PRESENTED

Should this Court grant certiorari or summarily reverse a fact-bound application of the prejudice requirement from *Strickland v. Washington*, 466 U.S. 668 (1984) from an unpublished opinion in what is certainly a rare case where trial counsel placed the key eye-witness's interest in not having an elicit sexual affair exposed over his client's interest in a fair trial, and where trial counsel declined to investigate, or meaningful cross-examine this key witness, despite him being an obvious alternative suspect.

## TABLE OF CONTENTS

INTRODUCTION ........................................................................................ 1

COUNTER-STATEMENT ............................................................................. 1

REASONS FOR DENYING THE WRIT ..................................................... 6

I. REVIEW OF THE QUESTION PRESENTED IS NOT WARRANTED. ... 6

A. No traditional certiorari criteria are present .......................................... 6

B. Certiorari is inappropriate as the decision below was correct ............... 9

1. The Court of Appeals gave appropriate AEDPA deference ............. 11

2. Jones was a strong alternative suspect, and the evidence against him was sufficient to sustain a conviction ...................................... 14

3. The decision below was correct where, due only to trial counsels' failures, the prosecution was able to inflame the jury into both a conviction and sentence of death by fabricating the source of the twenty-dollar bill found under the victim's watchband .................. 17

C. Certiorari is inappropriate, as multiple alternative grounds justify the grant of habeas corpus relief. ......................................................... 20

1. The Court of appeals erred in concluding that (1) Mrs. Jenkins was not sexually assaulted, and (2) the presence of DNA from two unknown men on her underwear, coupled with the absence of any DNA or fingerprints from Mr. Hines, was not significant .............. 21

2. Relief is appropriate on Mr. Hines' *Brady* claim ............................ 24

3. Mr. Hines' ineffective assistance of counsel at sentencing claim was reviewed *de novo*, as the Tennessee Court of Criminal Appeals' decision was contrary to clearly established law ............................ 25

CONCLUSION ........................................................................................... 27

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Bell v. Cone*, 543 U.S. 447, 447-48 (2005) ....................9

*Bobby v. Dixon*, 565 U.S. 23, 24 (2011) ....................9

*Bobby v. Mitts*, 563 U.S. 395, 400 (2011) ....................9

*Bobby v. Van Hook*, 558 U.S. 4, 4-5 (2009) ....................9

*Bradshaw v. Richey*, 546 U.S. 74, 75, 79-80 (2005) ....................9

*Brady v. Maryland*, 373 U.S. 83, 87 (1963). ....................24, 25

*Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) ....................13

*Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973) ....................16

*Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) ....................20

*Harrington v. Richter*, 562 U.S. 86, 105 (2011) ....................13, 14, 17

*Holland v. Jackson*, 542 U.S. 649, 651-52 (2004) ....................9, 11

*House v. Bell*, 547 U.S. 518 (2006) ....................21, 22, 23

*Jenkins v. Hutton*, 137 S. Ct. 1769 (2019) ....................8

*Johnson v. Williams*, 568 U.S. 289, 303 (2013) ....................25

*Mitchell v. Esparza*, 540 U.S. 12, 13 (2003) ....................9

*Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 552 (2008) ....................20

*Panetti v. Quarterman,* 551 U.S. 930, 953 (2007) ....................26

*Parker v. Matthews*, 567 U.S. 37, 38 (2012) ....................8

*Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 536 (2002) ....................20

*Sears v. Upton*, 561 U.S. 945, 955–56 (2010) ....................27

*Shoop v. Hill*, 139 S. Ct. 504 (2019) ....................................................................8

*Sotka v. State*, 503 S.W.2d 212, 221 (Tenn. Crim. App. 1972).........................15

*State v. Coleman*, No. E2013-01208-CCA-R3CD, 2014 WL 6908409, at *10 (Tenn. Crim. App. Dec. 9, 2014).......................................................15

*State v. Hines*, 919 S.W.2d at 578 ........................................................................18

*State v. Lord*, No. 03C01-9312-CR-00391, 1995 WL 491015, at *7 (Tenn. Crim. App. Aug. 17, 1995)................................................................15

*State v. Sisk*, 343 S.W.3d 60 (Tenn. 2011) ..........................................14, 15, 17

*Strickland v. Washington*, 466 U.S. 668 (1984).......................................passim

*United States v. Bagley*, 473 U.S. 667, 682 (1985) ..........................................25

*White v. Wheeler*, 136 S.Ct. 456, 458 (2015) ........................................................8

*Williams v. Taylor*, 529 U.S. 362, 397–98 (2000) .............................................27

*Woods v. Donald*, 575 U.S. 312, 313 (2015) ........................................................8

*Woods v. Etherton*, 136 S.Ct. 1149, 51-52..............................................8, 10, 11

*Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ......................................................13


**Statues**


Tenn. Code Ann. 39-2-203(i)(2), (5), (7) (1982) .................................................19

Tenn. Code Ann. § 39-13-203(i)(5)..................................................................19

28 U.S.C. § 2254(d)(1))..........................................................................passim


**Rules**


U.S. Sup.Ct. Rule 10, 28 U.S.C.A..........................................................................7


**Other Authorities**


Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)..........7, 8, 12

## INTRODUCTION

This case is not worthy of certiorari review, let alone summary reversal. The considerations of Rule 10 do not warrant this court's involvement. The facts underlying the Court of Appeals' decision are profoundly complex. The errors committed by trial counsel are extreme. That protecting the reputation of an adulterous philanderer was more important to defense counsel than protecting Mr. Hines' liberty and life is a unique act of legal deficiency unlikely to recur.

## COUNTER-STATEMENT

Catherine Jenkins was murdered on March 3, 1985 in Room 21 of the CeBon Motel in Kingston Springs, Tennessee. App. 2-3. The jury was told that only one person was present, and only one person could possibly have committed the crime: Anthony Hines. This was not true.

At 9:30 a.m. on the day of her murder, Mrs. Jenkins was left in charge of the CeBon Motel. App. 3. At 12:40 p.m., her Volvo was seen being driven away from the Motel. App. 5. At 2:36 p.m., the police received a call that a woman had been stabbed to death at the motel. App. 76-77. This timing suggests that Mrs. Jenkins was murdered sometime after 9:30 a.m., and probably (albeit not necessarily) prior to the 12:40 p.m. departure of her Volvo.

Evidence that has been discussed in the Petitioner's Application circumstantially pointed to Mr. Hines as a suspect in the murder and established he had driven Mrs. Jenkins' Volvo. Pet. 5-9. However, no forensic evidence,

fingerprints or DNA linked him to the crime. App. 12, 16. No witness testified that Mr. Hines was seen with Mrs. Jenkins or seen in Room 21. App. 2-7 (describing evidence at trial). The prosecution failed to suggest a motive for Mr. Hines to have committed this murder. App. 87.

The jury was told that Mrs. Jenkins' body was discovered by Kenneth Jones, a man who needed to use a restroom and inadvertently grabbed the key to the very locked motel room where her body was wrapped in a bedspread. App. 83. This accidental discovery of her body, according to Jones, occurred at approximately 1:20 p.m. *Id.* The prosecution argued that Mrs. Jones had died prior to the departure of her Volvo:

> The *only* person at that motel that had registered in that night before that had not checked out according to *uncontroverted proof that the State has given you*, the *only* person left at that motel at that time was the defendant. *The only one*. The defendant.

(Trial Tr., R 173-6, PageID# 4373) (emphasis added). That the proof at trial was uncontroverted by defense counsel is true. The reason it was uncontroverted is that trial counsel were constitutionally deficient.

Subsequent post-conviction proceedings revealed that Mr. Jones had been present at the CeBon Motel as early as 9:00 a.m., according to his mistress, Veredith White. App. 155, 208. Mr. Jones remembered arriving at the CeBon for his regular Sunday extramarital tryst sometime between 10:00 a.m. and 11:00 a.m., and not at 1:00 p.m., as he had testified to at trial. App. 78, 85-86. Thus, he was present hours before Mrs. Jenkins' Volvo was seen driving away and during the

window of time when Mrs. Jenkins' was likely killed.

However, the Sheriff charged with investigating Mrs. Jenkins' murder told defense counsel that Mr. Jones "was married and that he was meeting there for the purpose of having an affair *and had been there just a very short period of time* and he didn't want his wife to find out." App. 80-81 (emphasis added). Defense counsel honored the Sheriff's request and did not interview or investigate Mr. Jones. App. 80-82. Defense counsel made no effort to identify, find, or interview Mr. Jones' companion, Ms. White. App. 81. Instead, counsel took the Sheriff's factually false statement that Mr. Jones had only been at the scene "a brief period of time" as true. App. 82. Defense counsel testified at post-conviction hearing: "[The Sheriff] say's [sic] this [man] hadn't got a dog in the hunt, don't embarrass the man. I wasn't going to embarrass the man." *Id.*

Defense counsel's agreement not to embarrass Mr. Jones allowed the prosecution to present a false story to the jury. Defense counsel's agreement kept the jury from hearing significant evidence that would have shown Mr. Jones had opportunity and motive to kill Mrs. Jenkins. Defense counsel's agreement allowed the prosecution to make a factually false argument for the sentence of death. The Tennessee Court of Criminal Appeals, however, concluded that none of this caused Mr. Hines prejudice, as, they concluded, the idea that Kenneth Jones could be viewed as an alternative suspect was "farfetched." App. 436-37.

Some of the more pertinent facts that were either misstated at trial, or not developed by defense counsel out of ignorance include: (1) the unexplained hours

that Mr. Jones spent at the hotel before calling the police; (2) Mr. Jones' unusual ability to tell that a woman had been stabbed, when, by his account, all he had seen for "a second" was a form wrapped in a bedspread; (3) the reality of Mr. Jones' relationship with Mrs. Jenkins; and (4) the origin of a $20 bill found under Mrs. Jenkins' watch band, a piece of evidence that the prosecution argued demonstrated Mr. Hines' "depravity of mind."

Jones testified at trial that he could not tell whether the body was male or female, as he only looked for "but a second." App. 78. But, the 2:36 p.m. call to the police not only identified the victim as female, but also claimed she had been stabbed. App. 83. When the police arrived, they only determined that the victim had been stabbed after they unwrapped her from the bedspread that covered her body. App. 87. Jones' story that he had only been in the room for a second and had only seen a wrapped form is belied by his knowledge of the victim's gender and manner of death.

Jones also lied about the extent of his relationship with Mrs. Jenkins. Post-conviction proceedings revealed that, in fact, he saw her most Sundays and had a standing arrangement to pay her twenty dollars for a short-term rental of a room. App. 86, 91. A $20 bill was found under Mrs. Jenkins' watchband. App. 86. At re-sentencing the prosecution argued that this $20 bill established the most important aggravating factor, that the murder was "heinous, atrocious, and cruel" because it involved "depravity of mind." (Re-sentencing Tr., 173-11, Page ID #5026-29). The prosecution argued:

> Exhibit No. 21 which may very well be *the most graphic exhibit that relates to this defendant*, a twenty dollar bill placed under her watchband. Now, if that doesn't show you *a deranged individual*, somebody that has *a depraved, manic mind*, I don't know what does. These stab wounds are terrible - - she endured pain, suffering, and torture - - they're extremely cruel. But, I'm not sure that that twenty dollar bill - - again, Exhibit 25 which was introduced as the twenty dollar bill - - I'm not sure that's not *the most graphic illustration of this defendant that could be introduced*. You talk about adding insult to injury, ladies and gentlemen, that's the ultimate. That's the ultimate. Placing a twenty dollar bill under this lady's watchband, you know - - why would somebody do that?

(*Id.* at 5028-29) (emphasis added). The prosecution also placed great significance on the presence of the twenty-dollar bill under Mrs. Jenkins watchband during both their closing and rebuttal argument at the guilt-phase of Mr. Hines' first trial. (Trial Tr., R. 173-6, Page ID #4378, 4411, 4421). Yet it was only through the ineffective assistance of trial counsel that the State was even able to attribute the presence of the twenty-dollar bill to Mr. Hines. A modicum of pre-trial investigation and/or examination of Jones or Mrs. White would have revealed that Mr. Jones was a much more likely source of the money. App. 80-86**.** Moreover, that Mrs. Jenkins had Mr. Jones' normal payment under her watch band, coupled with the many hours Jones was present at the motel, strongly suggest that — contrary to his trial testimony — Jones had been with Mrs. Jenkins prior to her death.

The above facts were developed in yet greater detail in the Court of Appeals' decision and led that court to conclude that "Jones's motive and opportunity to commit the crime are at least as compelling as that offered by the prosecution for Hines, if not more compelling." App. 87. The Court granted habeas relief because,

"Only by ignoring this evidence did the state court conclude that pointing to Jones as an alternative suspect would have been 'farfetched.' For the state court's analysis to have ignored this evidence was objectively unreasonable." App. 91.

## REASONS FOR DENYING THE WRIT

### I. REVIEW OF THE QUESTION PRESENTED IS NOT WARRANTED.

#### A. No traditional certiorari criteria are present.

As provided in the Rules of the Court, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> **(a)** a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> **(b)** a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;
>
> **(c)** a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S.Sup.Ct. Rule 10, 28 U.S.C.A.

None of the traditional certiorari criteria is present in this case and, in fact, Petitioner does not address any of these criteria. Instead, Petitioner asks the Court to summarily reverse the Sixth Circuit on the ground that its decision showed inadequate deference to the state courts under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Neither certiorari nor the extraordinary relief of summary reversal is appropriate here. The Sixth Circuit's unreported, fact-bound application of the prejudice requirement from *Strickland v. Washington*, 466 U.S. 668 (1984), resulted from what is certainly a unique case and is simply not the type of decision that will determine the outcome of future cases. In fact, as already outlined above, the petition makes not a single mention of how the prosecution took a $20 bill under a watch band and created a story around it to inflame the jury towards both convicting Mr. Hines of a capital offense and sentencing him to death. The State was only able to spin this story as a result of Hines' counsels' agreement with the Sheriff to ignore a key witness and allow that witness to perjure himself. Petitioner does not attempt to demonstrate that fact patterns like this one are common or recurring.

Most importantly, Petitioner makes no effort to show that there is a disagreement among the courts of appeals as to the existence of prejudice in the rare case where defense counsel agrees with the local Sheriff to not interview a key witness prior to trial and to allow him to present perjured testimony. This omission

by Petitioner is important for two reasons. First, it counsels strongly against a grant of certiorari, because a disagreement among the circuits is the principal justification for granting plenary review in this Court. *See* Sup. Ct. R. 10(a). In addition, it counsels strongly against summary reversal, because it demonstrates that the Sixth Circuit's decision does not flout and is not contrary to this Court's AEDPA precedents.

Petitioner's attempt to put this case in line with thirteen other cases, decided over the last two decades, where this court has summarily reversed, falls flat. A cursory examination of the thirteen cases, spanning nearly two decades, demonstrates that not a single one is factually similar to this case. None of the cases cited by Petitioner suggest that the Court of Appeals *alleged* error is a recurring problem, demanding extraordinary intervention. *See Shoop v. Hill*, 139 S. Ct. 504 (2019) (reversed Sixth Circuit grant of relief based on *Moore v. Texas* as *Moore* was not clearly established law at time of state court decision); (*Jenkins v. Hutton*, 137 S. Ct. 1769 (2019) (reversed erroneous application of miscarriage of justice exception to procedural default); *Woods v. Etherton*, 136 S.Ct. 1149, 51-52 (2016) (reversed finding that appellate counsel was ineffective for failure to challenge a single "tip" under the confrontation clause, where tip was consistent with theory of the defense); *White v. Wheeler*, 136 S.Ct. 456, 458 (2015) (jury selection issue); *Woods v. Donald*, 575 U.S. 312, 313 (2015) (reversed deficiency holding, when defense counsel had been absent from courtroom during proof regarding co-defendant)); *Parker v. Matthews*, 567 U.S. 37, 38 (2012) (Sixth Circuit

erred in using its own precedents as "clearly established law"); *Bobby v. Dixon*, 565 U.S. 23, 24 (2011) (Sixth Circuit granted relief under *Miranda*, reversed as defendant was not in custody and *Miranda* did not apply); *Bobby v. Mitts*, 563 U.S. 395, 400 (2011) (penalty phase jury instruction issue involving the "contrary to" clause); *Bobby v. Van Hook*, 558 U.S. 4, 4-5 (2009) (not AEDPA, involving deficiency of trial counsel); *Bradshaw v. Richey*, 546 U.S. 74, 75, 79-80 (2005) (reversing grant of *Strickland* relief, where Sixth Circuit had relied on evidence outside the state court record); *Bell v. Cone*, 543 U.S. 447, 447-48 (2005) (a jury instruction case decided under "contrary to" clause); *Holland v. Jackson*, 542 U.S. 649, 651-52 (2004) (reversed, as court had relied on evidence that was not before the state court); *Mitchell v. Esparza*, 540 U.S. 12, 13 (2003) (jury instruction and 8th Amendment narrowing case, where court failed to cite or apply 28 U.S.C. § 2254(d)(1)).

Clearly none of these cases have anything other than the most tangential similarity to Mr. Hines case. Other than this ineffectual attempt to disguise Mr. Hines' case as resembling others where the Court has summarily reversed, Petitioner's argument for reversal is essentially limited to gratuitously pointing out that AEDPA sets a high bar—a bar which, as outlined below, was met in this case. Petitioner does not provide this court with any of the traditional reasons for granting review. Therefore, his petition should be denied.

### B. Certiorari is inappropriate as the decision below was correct.

The Sixth Circuit did not err in finding that the only reasonable conclusion in

this case was that *Strickland*'s prejudice standard had been met and that the Tennessee Court of Appeals' conclusion that Kenneth Jones was not a viable alternative suspect was unreasonable. Petitioner's arguments for reversal rely on random citations to this Court's decisions discussing application of *Strickland* in the AEDPA context. Nearly all involve only the question of whether a habeas Petitioner's counsel was *deficient*—an issue that is not even disputed here. On the other hand, none of the cases Petitioner cites remotely suggests that the state courts' application of *Strickland*'s standard regarding *prejudice* was reasonable here. Of particular note, Petitioner argues:

> The Court has previously used summary reversal to correct the *precise* error the Sixth Circuit committed in this case. On at least three occasions, the Court has summarily reversed lower courts for failing to defer under AEDPA to a state court's ruling on *Strickland* prejudice. *Etherton*, 136 S. Ct. at 1152 (reversing the Sixth Circuit); *Jackson*, 542 U.S. at 654-55 (reversing the Sixth Circuit); *Woodford v .Visciotti*, 537 U.S. 19, 22-27 (2002) (per curiam) (reversing the Ninth Circuit).

(Petition, at 27) (emphasis added).

The three cases cited do not involve the "*precise* error" allegedly committed here. In *Woods v. Etherton*, 136 S. Ct. 1149 (2016), a defendant was found with 125 grams of cocaine; he was originally stopped based on "an anonymous tip that two white males were traveling on I–96 between Detroit and Grand Rapids in a white Audi, possibly carrying cocaine." *Id.* at 1150. The state court concluded that the introduction of this tip (and appellate counsel's failure to challenge it) was not deficient, as it was consistent with the defense theory, and even if deficient, there was no prejudice. *Id.* at 1150-51. Regarding prejudice, this Court held: "It is also

not beyond the realm of possibility that a fairminded jurist could conclude that Etherton was not prejudiced when the tip and Pollie's testimony corresponded on uncontested facts." *Id.* at 1152. Here, of course, the facts are profoundly contested, and Mr. Jones' unchallenged perjury kept the jury from learning that Jones had a "motive and opportunity to commit the crime [that was] at least as compelling as that offered by the prosecution for Mr. Hines, if not more compelling." App. 87. In *Holland v. Jackson*, 542 U.S. 649, 652 (2004), this Court held that "[t]he Sixth Circuit erred in finding the state court's application of *Strickland* unreasonable on the basis of evidence not properly before the state court." 542 U.S. at 652. In *Woodford*, this Court found that an "unreasonable application" holding was contrary to the facts where the Ninth Circuit had held that the state courts had "failed to take into account" mitigating evidence. 537 U.S. at 25. This Court held that the state court clearly had considered the mitigating evidence. *Id.*

No doubt, all three cases relied upon by Petitioner involved the "unreasonable application" prong of § 2254(d)(1), but that is where all similarities end. Petitioner makes no effort (presumably because he cannot) to identify a single Court of Appeals that has reached a different result on a similar fact pattern as exists here, nor does he present any on-point, contrary precedent of this Court that would approach a basis for summary reversal.

### 1. The Court of Appeals gave appropriate AEDPA deference.

To begin, Petitioner's repeated argument (*see* Pet. 3, 16, 19) that the Court of

Appeals failed to accord deferential review to the state courts' determination is without merit. The Court of Appeals recognized, at the outset of its opinion, that its review of all of Mr. Hines' claims – including the single one on which they granted relief – was constrained by AEDPA. App. 9-10. Moreover, the Court of Appeals cited the deference it owed under AEDPA in denying relief on numerous of Mr. Hines' claims. As to Mr. Hines' claim that his counsel were ineffective for failure to challenge the underrepresentation of women on jury venires in the trial court. App. 22:

> We cannot say that the Tennessee court's conclusion was an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d).

App. 30. And regarding his trial counsel's failures at his resentencing hearing:

> Regarding Hines's challenge to his 1989 resentencing jury, AEDPA also bars Hines's relief because the Tennessee Court of Criminal Appeals reasonably determined that Hines "failed to show that he was prejudiced" by 1989 counsel's decision not to challenge the venire. […]. The Tennessee court's decision was not an unreasonable application of *Strickland*.

App. 31 (cleaned up).

Petitioner also alleges that the Court of Appeals erred where it failed to give "double deference." (Pet. 18). Yet that argument fails as a reason to grant the petition, because double deference is not required where the Court of Appeals' decision was limited to a determination on Strickland's *prejudice* prong. Petitioner fails to recognize that the reason for "double" deference in the *Strickland* context comes from *Strickland*'s first prong, which asks whether counsel's representation

was *deficient*. In that context, federal courts exercising AEDPA review layer their deference to state courts on top of *Strickland*'s deference *to the original attorney*, given the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see also Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (citing this "strong presumption" as reason for "doubly deferential" standard when AEDPA deference also applies); *see also Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("When [28 U.S.C.] §2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that *counsel satisfied Strickland*'s deferential standard.") (emphasis added); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) ("*Strickland* evaluates the attorney's *conduct* deferentially—giving the "defense attorney the benefit of the doubt"—and then AEDPA does the same for the state court's judgment about whether that conduct was *deficient*.). Here, however, there is only one decision maker to defer to because the issue presented is whether trial counsels' deficient agreement to protect Mr. Jones from embarrassment *caused prejudice*, and there is only one decision maker that receives deferential review on that question—the state courts.

Ultimately, the Court of Appeals' determination was a correct and thoughtful application of AEDPA deference that in no way warrants a grant of certiorari, much less the extraordinary relief of summary reversal.

### 2. Jones was a strong alternative suspect, and the evidence against him was sufficient to sustain a conviction.

The Sixth Circuit's decision was correct because the Tennessee Court of Criminal Appeals' characterization of Ken Jones as a viable suspect as "farfetched" was unreasonable and ignored the evidence developed in post-conviction proceedings. App. 91, 437. *Harrington*, 562 U.S. at 101. The state court's characterization of Jones as a "farfetched" suspect ignores state law regarding the sufficiency of evidence. Under Tennessee law, a sufficiency of the evidence challenge requires a reviewing court to grant the State the "strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Sisk*, 343 S.W.3d 60 (Tenn. 2011).

Analyzing the evidence that Mr. Jones was the true perpetrator of this murder under that legal standard, the pertinent facts are: (1) he arrived at the motel at 9:00 a.m.; (2) he was there with his mistress; (3) he regularly paid Mrs. Jenkins $20 for a room; (4) he was so concerned about his affair becoming known that he asked the Sheriff to keep it a secret and then lied about it under oath; (5) at 12:40 p.m., Mrs. Jenkins' car was driven from the hotel; (6) at 1:20 p.m., Mr. Jones claimed that, of all the rooms in the motel, he procured a key for Room 21, the very room where Mrs. Jenkins' body was found; (7) despite Mrs. Jenkins' being wrapped in a bed spread, Mr. Jones knew to tell the police that she was a woman, and had been stabbed – facts the police could only determine after unwrapping her; (8) despite finding Mrs. Jenkins at 1:20 p.m., Mr. Jones' call was not placed for over an

hour, at 2:36 p.m.; (9) Mrs. Jenkins had the $20 that Mr. Jones regularly paid her under her watch band; and (10) despite all of the evidence that Mr. Jones was at the motel for hours and paid Mrs. Jenkins, he denied ever having seen her on the day of her murder. App. 84-88, 155.

Mr. Jones' repeated lies about the day of Mrs. Jenkins' murder and his suspicious delay in reporting her body, are clear evidence of guilt under Tennessee law. *E.g. State v. Coleman*, No. E2013-01208-CCA-R3CD, 2014 WL 6908409, at *10 (Tenn. Crim. App. Dec. 9, 2014) ("The jury can accept as evidence of Defendant's guilt her flight from the crime scene and the attempt to establish a false alibi."); *State v. Lord*, No. 03C01-9312-CR-00391, 1995 WL 491015, at *7 (Tenn. Crim. App. Aug. 17, 1995) ("As a matter of common sense, a defendant's false statements and attempts to destroy or hide evidence may be viewed inferentially as evidence of guilt."); *Sotka v. State*, 503 S.W.2d 212, 221 (Tenn. Crim. App. 1972) ("[T]he jury was entitled to consider the defendant's admitted and repeated fabrications attempting to explain the absence of his deceased wife and step-daughter by spreading false and conflicting reports that they had gone to Kentucky.").

As an illustration of how Mr. Jones could easily have been convicted, and that it is far from a "farfetched" to consider him an alternative suspect, we can examine the Tennessee Supreme Court's decision in *Sisk*, 343 S.W.3d at 60. The only proof that Sisk had entered his neighbor's home was a single cigarette butt with his DNA—nothing more. *Id.* at 63. No fingerprints were matched to Sisk, and no

stolen property was recovered from him; no witnesses placed him at the scene. *Id.* at 61-63. In finding one piece of incriminating evidence sufficient, the Tennessee Supreme Court reiterated that, "[a] criminal offense may, of course, be established exclusively by circumstantial evidence." *Id.* at 65 (citing *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973)). The court then held:

> [We have] adopted the federal standard in Tennessee and eschewed any distinction between the standard of proof required in cases based solely upon circumstantial evidence and that in cases where direct evidence of guilt is presented by the State.

343 S.W.3d at 66 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

Under Tennessee law, there was more than adequate circumstantial evidence to sustain a conviction of Mr. Jones for Mrs. Jenkins' murder. Indeed, but for (a) the Sheriff's willingness to protect a friend from embarrassment, and (b) the intervening arrest of Mr. Hines, Mr. Jones very well could have been prosecuted and convicted. The state court's holding that it was "farfetched" to even consider him as a suspect is patently absurd. Contrast the evidence demonstrating the true timing of Jones' presence at the motel and the evidence that he paid Mrs. Jenkins $20 that morning for a few hours with his mistress, with the unchallenged argument of the prosecution: "[A]ccording to uncontroverted proof that the State has given you, the *only* person left at that motel at that time was the defendant. *The only one*. The defendant." (Trial Tr., R. 173-6, PageID# 4373) (emphasis added). Had Mr. Hines not been arrested and had the truth about Mr. Jones conduct at the CeBon Motel been known, this argument would have applied to him.

Had trial counsel investigated Mr. Jones, they would not only have successfully rebutted this argument against their client, but also would have succeeded in holding Jones up as an alternative suspect. Granting the State the "strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom" *Sisk,* 343 S.W.3d at 65, it becomes clear that, had Mr. Hines not been found with Mrs. Jenkins' car, Jones would have been the primary suspect. Moreover, the evidence would have been more than sufficient to sustain a conviction of Jones. No fairminded jurist, applying Tennessee law to these peculiar facts, could conclude that it was "farfetched" to claim Jones as an alternative suspect. *Harrington*, 562 U.S. at 101; App. 91. The Sixth Circuit reached the correct result by its grant of habeas relief in this uniquely troubling case.

**3. The decision below was correct where, due only to trial counsels' failures, the prosecution was able to inflame the jury into both a conviction and sentence of death by fabricating the source of the twenty-dollar bill found under the victim's watchband.**

In its closing argument in the guilt-phase of his trial, the prosecution asserted – as though it were a proven fact – that Mr. Hines, in some act of depravity that was beyond comprehension, was the source of the twenty-dollar bill found under Mrs. Jenkins' watchband.

> She was already dead, tortured, but he didn't stop there, he went one step further to degraded Mrs. Jenkins, he put a twenty dollar bill under her watchband. You saw that in one of the photographs. Why? I can't answer that. But it was there. He did it.

(Trial Tr., R. 173-6 at 56, Page ID #4378).

Then, in rebuttal,

> "He had stuck $20 under Mrs. Jenkins' watchband - - it takes a sick and morbid mind to do that . . . ."

(Trial Tr., R. 173-6 at 89, Page ID #4411).

On direct appeal, Mr. Hines' conviction was sustained but his case remanded for re-sentencing. App. 2, 7. On remand but prior to the re-sentencing, the State and Mr. Hines reached an agreement to a life sentence. App. 72. The trial court rejected the proposed agreement reasoning that "the facts of the case, even when mitigating circumstances were considered, should be decided by a jury."[1] App. 72, *Hines*, 919 S.W.2d at 578. At re-sentencing, the prosecution returned, in its argument for a sentence of death, to the twenty-dollar bill under Mrs. Jenkins' watchband as "the most important and the most devastating" aggravating factor. (Re-Sentencing Tr., R. 173-11, PageID# 5026). The prosecution portrayed a picture of the $20 bill as "the most graphic exhibit that relates to this defendant," *id.* at 5028, and rhetorically asserted that, "if that doesn't show you *a deranged individual*, somebody that has *a depraved, manic mind*, I don't know what does." *Id.* (emphasis added)

In returning a sentence of death, the jury found three aggravating circumstances: (1) Mr. Hines was previously convicted of one or more felonies, other

---

[1] In his rejection of the plea agreement, the trial judge further observed, "I pretty much know the general social history and social strata from which most of the defendants come, and this defendant is no exception." (R. 173-8, PageID# 4463).

than the present charge, which involved the use or threat of violence to the person; (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while Mr. Hines was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, or larceny. *See* Tenn. Code Ann. 39-2-203(i)(2), (5), (7) (1982) (repealed). App. 2, 7. Only the second factor, including that the murder involved depravity of mind, requires a subjective determination and is thus subject to emotion. Only because of the ineffective assistance of Mr. Hines' trial counsel was the State able to stir the emotions of the jury by stressing, with impunity, that he had placed the twenty-dollar bill under Mrs. Jenkins' watchband as some final insult – the actions of a "depraved mind." R. 173-11 at 106-07.

Under Tennessee law, the second aggravating factor, that the killing was "heinous, atrocious, or cruel" is established by proof of either "torture" or "depravity of mind." Tenn. Code Ann. § 39-13-203(i)(5). The post-conviction court found that trial counsel had performed deficiently in examining the medical examiner and should have negated the "torture" element. App. 69. However, the court concluded that Mr. Hines did not suffer prejudice, as there was still sufficient evidence to conclude that he had a depraved mind. *Id.*

The prosecution's ability to attribute the twenty-dollar bill to Mr. Hines as proof of depravity of mind was entirely the product of trial counsel's deficiency. Absent counsel's willingness to protect Mr. Jones from embarrassment, there was a

reasonable probability of a different outcome at both guilt and penalty phase. The Court of Appeals was correct to grant relief on this issue, and the petition for certiorari should be denied.

### C. Certiorari is inappropriate, as multiple alternative grounds justify the grant of habeas corpus relief.

Mr. Hines raised multiple meritorious claims for habeas corpus relief, beyond ineffective assistance regarding Mr. Jones, including (1) ineffective assistance of trial counsel for failure to conduct forensic testing that would have revealed that the DNA of two different men was found on Mrs. Jenkins' underwear (while no DNA from Mr. Hines was recovered) and that would have established that multiple fingerprints were found at the murder scene, none of which matched Mr. Hines, App. 12-21; (2) suppression of exculpatory evidence regarding swabs that were taken from Mrs. Jenkins' body to be tested for semen, App. 32-40; and (3) ineffective assistance of trial counsel at the resentencing hearing, which the Court of Appeals reviewed *de novo*, as the underlying Tennessee decision was contrary to clearly established law. App. 40-74. Each of these three issues provides an alternative ground for upholding the Court of Appeals' grant of habeas relief. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 552 (2008); *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 536 (2002); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (requiring that alternative grounds for relief be set forth in the Brief in Opposition).

The Court of Appeals' adverse decision on these three grounds was in error,

as can be briefly addressed.

### 1. The Court of Appeals erred in concluding that (1) Mrs. Jenkins was not sexually assaulted, and (2) the presence of DNA from two unknown men on her underwear, coupled with the absence of any DNA or fingerprints from Mr. Hines, was not significant.

Mr. Hines contended that trial counsel had been ineffective for failing to conduct forensic testing which would have revealed DNA and fingerprint evidence of his innocence. App. 12. This claim had been procedurally defaulted, but pursuant to *House v. Bell*, 547 U.S. 518 (2006), Mr. Hines contended that the default should be excused to avoid a miscarriage of justice, and that he should be provided an evidentiary hearing to further establish his innocence. App. 13-15.

Mrs. Jenkins had DNA from two unknown men on her underwear. App. 13. Mr. Hines' DNA was not found on her underwear (or anywhere else). *Id.* Fingerprints at the crime scene did not match Mr. Hines. App. 17.

Mrs. Jenkins had been stabbed to death, with four lethal wounds to her chest, and a final wound going through her vagina and into her abdominal cavity. App. 3, 35. Mr. Hines characterized the crime as a "sexual assault," and argued that the new evidence demonstrated that men other than himself committed it. App. 14. The district court and Sixth Circuit disagreed, finding that "Jenkins' murder was not committed in the context of a sexual assault." App. 13. Rather, the Sixth Circuit found it significant that the prosecution had not argued that this was a sex crime, but rather had only claimed that the vaginal stabbing was "reprehensible," and was the "vile act" by a "depraved mind." App. 17.

Respectfully, the courts' logic fails: whether Mrs. Jenkins was stabbed through the vagina by a not-reprehensible-or-vile rapist, or by a reprehensible and vile, non-sexual murderer matters little – what matters is who did it and whether the killer(s) left their DNA and fingerprints behind.[2]

Moreover, as a legal matter, the Court of Appeals' effort to distinguish Mr. Hines' case from that of Paul House fails legally and factually. Here, the Sixth Circuit stressed that there was significant evidence that after the murder, Mr. Hines had Jenkins' car and told unusual stories about his doings on the day of her murder; he also had a dark stain on his pants, and he certainly possessed a knife. App. 17-19. The court concluded that the new evidence "does not undermine any of the evidence that the prosecution presented at trial." App. 17. Of course, in *House*, significant evidence of guilt remained, and was never undermined:

> This is not a case of conclusive exoneration. Some aspects of the State's evidence—Lora Muncey's memory of a deep voice, House's bizarre evening walk, his lie to law enforcement, his appearance near the body, and the blood on his pants—still support an inference of guilt.

*Id.* at 553-54.

In *House,* this Court did not impose a requirement that every specific piece of evidence indicative of guilt be "undermined." *Id.* Indeed, like here, and regarding the alternative suspect, the *House* Court observed:

---

[2] Under Tennessee law, rape may be committed by the use of an object, other than the perpetrator's genitals. Tenn. Code Ann. §§ 39-13-501, 502, 503; *see also State v. Phillips*, 924 S.W.2d 662 (Tenn. 1996) (rape committed with plastic object).

> The evidence pointing to Mr. Muncey is by no means conclusive. If considered in isolation, a reasonable jury might well disregard it. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt.

*Id.* at 552-53. It bears stressing that Mr. Hines, like House, (1) had no motive to kill, and (2) had no forensic evidence connecting him to the murder. App. 87-88.

Likely of greatest importance is the significance of Mr. Jones as an alternative suspect. It is logically irreconcilable for the Court of Appeals to conclude that Mr. Hines is entitled to relief on his ineffective assistance of counsel claim regarding Jones, but to reach a contrary conclusion regarding his ineffective assistance of counsel claim regarding the fingerprints and DNA. The Court of Appeals' reasoning as to the later claim demonstrates why the *House* actual innocence gateway was available to Mr. Hines on the former:

> There was no clear motive for Hines to have committed a murder so gruesome of a woman he had never met before […]
>
> Here there was ample room for defense counsel to point to Jones as an alternative murder suspect. There was no DNA or fingerprint evidence connecting Hines to Jenkins's murder—not on Jenkins's body, not in the room where the murder took place (Room 21), and not on Hines's clothing. In addition, no witness testified to seeing Hines near Room 21. In contrast, Jones was clearly in Room 21 on the day of the murder, had a plausible motive to kill Jenkins, and knew information about the circumstances of Jenkins's injuries that would not have been available to someone who just happened upon her wrapped body.

App. 87-88.

Ultimately, this issue demonstrates why this case is particularly unsuited for

certiorari review. Contrary to the Warden's contentions, this is not a simple case, but it is one where the factual record is extraordinarily complex. Ultimately, remand for an evidentiary hearing would be required to correctly address Mr. Hines' actual innocence gateway and the underlying ineffective assistance claims. Contrary to the Warden's contentions, this is far from a case where the evidence was "overwhelming." Pet. 14.

### 2. Relief is appropriate on Mr. Hines' *Brady* claim.

Not only did trial counsel deficiently fail to seek forensic testing of the relevant evidence, but the prosecution also hid material and exculpatory documentation regarding this evidence. *See* App. 32-40. The Court of Appeals agreed that the prosecution failed to disclose laboratory reports regarding vaginal and rectal swabs taken from Mrs. Jenkins, swabs which possibly contained semen, but which had been "compromised by mold," so that they were not tested. App. 38. The court found that this evidence was not "material," as the swabs could not have been used by the defense to establish that "someone other than Darrell Hines left semen on the victim." *Id.* In reaching this conclusion, the court stressed that Dr. Harlan "found no evidence of semen upon a visual inspection." App. 38-39.

Factually, two significant problems are presented by the Court of Appeals' conclusion: (1) the part of Mrs. Jenkins' body where such semen would most likely have been deposited had been mutilated; and (2) we know that if counsel had been alerted to the possibility that semen was present, they would have requested independent testing and discovered the DNA from the two unknown men on Mrs.

Jenkins' underwear. Ultimately, the issue is not whether a person left semen, but whether a person left his DNA—whether in semen, saliva, or via other epithelial cells—at the scene of their crime. There is more than a "reasonable probability" that the result of these proceedings would have been different had the suppressed evidence been disclosed. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Further legal argument and briefing regarding the *Brady* claim would further complicate this case. Again, contrary to the Warden's contentions, this case is far from simple, and it is particularly unsuited to summary resolution.

### 3. Mr. Hines' ineffective assistance of counsel at sentencing claim was reviewed *de novo*, as the Tennessee Court of Criminal Appeals' decision was contrary to clearly established law.

The Tennessee Court of Criminal Appeals did not apply a "reasonable probability" prejudice standard to his claim of ineffective assistance at sentencing, and instead imposed a "would not have affected the jury's determination" standard. App. 42-43. Thus, the Court of Appeals reviewed Mr. Hines' ineffective assistance claim *de novo*, as the Tennessee standard was "contrary to clearly established law." 28 U.S.C. § 2254(d)(1); App. 43. In error, the Court of Appeals found that Mr. Hines failed to establish prejudice. App. 44-74. As the threshold of § 2254(d)(1) was satisfied, further review in this Court is *de novo*. *Johnson v. Williams*, 568 U.S. 289, 303 (2013) ("AEDPA permits *de novo* review in those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme

Court precedent) (citing *Panetti v. Quarterman,* 551 U.S. 930, 953 (2007)).

In this Brief in Opposition, it is not possible for counsel to set forth the voluminous evidence that Mr. Hines' jury did not hear regarding the extreme childhood physical and sexual abuse that he suffered and the profound brain damage he incurred. *See* App. 60-65 (summary of testimony of Dr. Kenner regarding abuse, and Dr. Rosby regarding brain injury). Importantly, the ineffective assistance of counsel at sentencing claim did not rely on that evidence alone, but also involved counsel's deficient failure to cross-examine the medical examiner about the time of Mrs. Jenkins' death *vis-à-vis* the vaginal stabbing. App. 65-72. Proper cross-examination would have revealed that Mrs. Jenkins was unconscious at the time this final wound was inflicted. *Id.* Finally, Mr. Hines raised a third ineffective assistance of counsel claim, regarding the prosecution's willingness to offer Mr. Hines a life sentence, an offer he accepted. App. 72-74.[3]

In granting relief on the closely related Jones cross-examination claim, the Court of Appeals found that, paradoxically, Mr. Hines was prejudiced at sentencing by counsel's failure to investigate Jones. App. 94. It is intellectually impossible to square this conclusion, that a single error (egregious as it was) warranted relief, while the other three errors, reviewed *de novo*, did not. Indeed, this Court's precedent makes clear that ALL errors of ineffective assistance at sentencing

---

[3] The trial court rejected this agreement, as the court was familiar with the "strata of society" that Mr. Hines came from. (R. 173-8, PageID# 4463).

should have been reviewed collectively, so that the totality of their impact could be assessed. *Sears v. Upton*, 561 U.S. 945, 955–56 (2010) ("[W]e consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation.") (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009)); *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)). The Sixth Circuit's failure to review the collective prejudicial impact of all of the sentencing errors was contrary to this Court's precedent and further justifies habeas relief.

## CONCLUSION

The question presented is not worthy of certification and certainly does not warrant summary reversal—the sole remedy Petitioner affirmatively seeks. The petition should be denied.

Respectfully Submitted,

/s/ James O. Martin, III
James O. Martin, III
Assistant Federal Public Defender
*Counsel of Record

Richard Lewis Tennent
Assistant Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047