NO.: 20-5802

IN THE

SUPREME COURT OF THE UNITED STATES

Harold Warren - Petitioner;

v.

State of Indiana - Respondent;

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

Harold Warren #104516
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4490 West Reformatory Road
Pendleton, IN 46064-9001

Petitioner / *pro se*

QUESTIONS PRESENTED

Whether the Indiana Court of Appeals' precedent published in *Warren v. State*, 2020 Ind. App. LEXIS 143 (Ind. Ct. App. 2020) addressing Warren's Ineffective Assistance of Counsel Claim has set the bar for the *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) Sixth Amendment's prejudice prong much too high when it employed the rationale that Warren's evidence did not exonerate him but merely implicated other potential suspects. The applicable standard is not whether there was sufficient evidence to affirm a conviction on appeal but whether a jury could reasonably have reached a different outcome but for counsel's unprofessional mistakes, and that standard only requires a reasonable doubt. The Indiana Court of Appeals belittles the Sixth Amendment and undermines the Bill of Rights guarantee that all citizens shall have the right to a fair trial. This right to a fair trial is sacrosanct regardless of whether the Court of Appeals thinks Warren committed this crime; whether or not he committed the crime is immaterial. What matters here is whether there is a reasonable probability a jury of his peers could have reached a different outcome. Warren's trial was unfair due to his counsel's decidedly unprofessional mistakes found to be deficient and unprofessional, and the published opinion sets a dangerous precedent and created a new hurdle that contradicts well-established and longstanding stare decisis.

LIST OF PARTIES

☒ **All parties appear in the caption of the case on the cover page.**

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

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TABLE OF AUTHORITIES CITED

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**: **N/A**

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is-

☐ reported at _____or,

☐ has been designated for publication but is not yet reporter; or,

☐ is unpublished.

☒ **For cases from state courts:**

The opinion of the highest state court to review the merits appears at **Appendix A** to the petition and is-

☒ reported at *Warren v. State, 2020 Ind. Lexis 586*; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

The opinion of the Indiana Court of Appeals appears at **Appendix B** to the petition and is-

☒ reported at *Warren v. State*, 2020 Ind. App. LEXIS 143 (Ind. Ct. App. 2020); or,

☐ has been designated for publication but is not yet reporter; or,

☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**: **N/A**

The date on which the United States court of appeals decided my case was _____.
A copy of that decision appears at Appendix ____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States court of appeals on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

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

☒ **For cases from state courts**:

The date on which the highest state court decided my case was July 23, 2020.
A copy of that decision appears at **Appendix A**.

☒ No petition for rehearing was timely filed in my case. Indiana Court Rules prohibit a Petition for Rehearing in the Indiana Supreme Court for denying a Petition to Transfer.

☐ A timely petition for rehearing was denied on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 5

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

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14

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

STATEMENT OF THE CASE

Jack Dorfman, an Indianapolis shopkeeper whose store was located on East Washington Street in Irvington, was murdered in the backroom of his store. Mr. Dorfman purchased jewelry and precious metals, which he melted down to sell. He also cashed checks for patrons of a nearby plasma center, the Plasma Alliance. On January 7, 1999, Mr. Dorfman opened his shop around 9:00 AM as was his routine. Steve Jordan, the proprietor of a nearby business, PIP Printing, told law enforcement investigators that Mr. Dorfman parked in the PIP parking lot that morning due to snow. Mr. Jordan told investigators that Mr. Dorfman was carrying a bag of doughnuts, a bundle of cash, and his morning newspaper.

Approximately a half hour after Mr. Dorfman left PIP printing, Mr. Jordan noticed a black pick-up truck pull in to the parking lot, and a person. Mr. Jordan could only see the black truck's user from the back, which was walking west towards Mr. Dorfman's shop. About 11:00 AM, a customer arrived at Mr. Dorfman's shop and found him dead on the floor in the backroom. The patron ran to the shop across the street where he asked the owners to call the police. Police received the call at approximately 11:10 AM and arrived a few minutes later.

The cause of Mr. Dorfman's death was a single gunshot wound which entered the left side of his head behind his ear. The State's firearms expert testified the fragmented bullet recovered was "consistent with a twenty-two caliber lead bullet." The expert could not link the bullet with a particular gun. *Warren v. State*, 757 N.E.2d 995, 997 (Ind.2001). State's witness Paul Fancher testified to purchasing a .22 caliber revolver from Warren's brother, Ron Warren, three days after Mr. Dorfman's murder. *Id.*

Trial Counsel, Carl Epstein, moved for a mistrial after Mr. Fancher provided prejudicial testimony and impermissible evidence. The trial Court denied the mistrial motion, ordered the

jury to disregard Fancher's testimony, and ordered the testimony stricken from the Record. *Id.* at pp. 997 98. Warren's appellate Counsel, Brent Westerfeld, raised the denial of the mistrial on direct appeal.[1] The Indiana Supreme Court considered this issue and determined Fancher's testimony was "not so prejudicial and inflammatory as to place the defendant in a position of grave peril to which he should not have been subjected . . . ." *Id.* at p. 998.

The evidence most damaging to Warren at trial was: (a) his admission to police that he was in Mr. Dorfman's shop the day of the murder; (b) that his alleged partial fingerprint was found on a pawn ticket found on the countertop at Mr. Dorfman's shop; and (c) that he had Mr. Dorfman's credit cards and used them to purchase or attempt to purchase items at various locations. *Id* at 999. The Indiana Supreme Court specifically cited the strength of this evidence against Warren when it rejected his argument regarding the mistrial. *Id.*

Warren's July 13, 2017 post conviction petition alleged that Mr. Epstein was ineffective when he failed to: (1) present crucial evidence about an alternative suspect, in particular testimony from Appellant's brother, Larry Warren (hereafter "Larry") and Larry's then—girlfriend, Dana Roberson; (2) present expert testimony regarding the fingerprint analysis; and (3) subpoena defense witnesses, specifically Larry and Ms. Roberson. App. Vol. II at pp. 11 -18.

On March 30, 2018, Warren moved to amend his petition to add the claim that Mr. Epstein failed to offer evidence that another person's fingerprint was found on cellophane in the backroom of the shop, the room where Mr. Dorfman's body was found. During the April 24, 2018 evidentiary hearing, Post Conviction Counsel moved to correct the mistaken allegation that a "latent print" was found on the pawn ticket, when in fact only a partial "inked print" was

[1] Warren's direct appeal was perfected in 2001, before the appellate rules changed. Thus, the direct appeal was to the Indiana Supreme Court.

found. (PCR Tr. at p. 14 - Appendix K). The probable cause affidavit indicates a latent print was found on the pawn ticket. During the post conviction hearing, Mr. Epstein testified the fingerprint evidence was "inconclusive." (PCR Tr. at p. 30 - Appendix K). Initially, the fingerprint examiner determined Warren's fingerprint did not match the recovered fingerprints.

During trial, the fingerprint examiner, Michael Knapp, testified the inked fingerprint he found on the pawn ticket (State's Ex. 29) was partially smudged but that it did identify to Warren. Mr. Knapp reported he made this positive identification after again taking Warren's fingerprints about 15 minutes before trial. When asked if any other prints located at the scene matched to other persons, at trial the evidence technician, Michael Estep, testified:"No we did not get anything back on those."

Mr. Epstein testified at Warren's PCR hearing. (PCR Tr. at pp. 14 – 46 - Appendix K). When asked about his theory of the case, Mr. Epstein replied, "there were alternative possibilities subject—wise — I tried to pursue that as part of my defense." (PCR Tr. at p. 15 - Appendix K). Mr. Epstein also testified that Warren's brother, Larry, paid his retainer fee on behalf of Warren. *Id.* When asked about Warren's character, Mr. Epstein testified that he "didn't think of him from having known him as an individual who was going to shoot somebody — especially an elderly man in the back but I knew that he was — my — my thought process was that he was kind of caught up in a circle of people who were not beyond that capability." (PCR Tr. at pp. 15 – 16 - Appendix K). When asked:"Okay. But you thought it was outside his character to do something like that?"; Mr. Epstein testified, "That would be correct." (PCR Tr. at p. 16 - Appendix K). Mr. Epstein also testified to his belief that Dana Roberson" was an alternative suspect." (PCR Tr. at p. 22 - Appendix K). Mr. Epstein remembered a trial witness testified to having seen a "smaller person in a leather jacket with a black truck" who might have

been the culprit. (PCR Tr. at p. 24 - Appendix K). On reflection, he testified that"[p]erhaps I hadn't done a good enough job in terms of investigating Ms. Roberson." (PCR Tr. at p. 25 - Appendix K). Mr. Epstein explained he had reason to believe Dana Roberson was what is colloquially known as a "fence" , i.e. a person who is known to exchange illicitly obtained or stolen property for money. (PCR Tr. at p. 43 - Appendix K). The facts suggested to Mr. Epstein that she might have had something to do with this crime. (PCR Tr. at p. 43 - Appendix K). Additionally, Mr. Epstein knew the Victim, Mr. Dorfman, was "known to purchase items of unknown origin." (PCR Tr. at p. 46 - Appendix K).

Forensic fingerprint evidence, specifically several fingerprints recovered from a cellophane bag in Mr. Dorfman's backroom near his body, point to another suspect, who police identified as Aaron Gill. (PCR Tr. at pp. 35 -36; 65 - Appendix K) (Post conviction testimony of Carl Epstein and Michael Knapp). Mr. Epstein did not utilize this exculpatory evidence. When confronted with his failure at the PCR hearing, Mr. Epstein testified: "Aaron Gill I might have suggested as an alternative suspect and I might have requested more specific discovery pertaining to his whereabouts on the occasion and any number of other things that suggested somebody other than Mr. Warren shot Mr. Dorfman." (PCR Tr. at p. 36 - Appendix K). Mr. Epstein testified in addition to Ms. Roberson and the IMPD fingerprint expert, he also should have questioned Larry. (PCR Tr. at p. 38 - Appendix K). The relevance of this foregone investigation will be explored in the argument section of the brief. Larry testified that Ms. Roberson and he were business partners who lived together at the time of Mr. Dorfman's murder. Larry testified at the PCR hearing that he awoke the morning of January 7, 1999 to find Dana Roberson gone from the couple's bed. (PCR Tr. at p. 71 - Appendix K). Further, Larry testified that Ms. Roberson owned a black truck at the time of the

murder which she had repainted to gray shortly after thereafter. (PCR Tr. at pp. 78 – 79 - Appendix K). Larry reported that Ms. Roberson and he enjoyed a vacation to Key West shortly after Mr. Dorfman's murder, staying several weeks. Ms. Roberson reportedly "had an enormous amount of cash with her at the time . . . enough to pay for an RV. . . ." (PCR Tr. at p.79 - Appendix K).

Although properly subpoenaed, Ms. Roberson failed to appear for the April 24, 2018 and July 31, 2018 PCR hearings. (PCR Tr. at pp. 83 – 85 - Appendix K). Ms. Roberson finally answers the subpoena for the November 13, 2018 hearing. (PCR Tr. at pp. 82- 84, 93 - Appendix K). Ms. Roberson confirmed Larry and she were romantically involved, as well as business partners. (PCR Tr. at p. 97 - Appendix K). Without Ms. Roberson invoking her Fifth Amendment right against self- incrimination, the Post Conviction Court appointed Counsel and delayed the proceedings. (PCR Tr. at p. 101 - Appendix K).

On December 18, 2018, Court reconvened for the final evidentiary hearing. Warren again called Ms. Roberson as a witness. (PCR Tr. at p. 108 - Appendix K). Attorney T.R. Fox was on call to advise Ms. Roberson. Without advance notice to Appellant's Counsel, Ms. Roberson did in fact invoke her Fifth Amendment right against self-incrimination. (PCR Tr. at p. 109 - Appendix K). Petitioner testified briefly on his own behalf at the PCR hearing about his belief that Mr. Epstein "didn't do nothin[g]" after Mr. Epstein failed to investigate and subpoena crucial witnesses, in particular Larry and Ms. Roberson. (PCR Tr. at pp. 111-112 - Appendix K). Warren also testified he got the stolen credit cards from Ms. Roberson. (PCR Tr. at p. 12 - Appendix K).

Finally, Appellant presented a copy of Ms. Roberson's criminal history that included impeachable offenses, i.e. crimes of deception that Mr. Epstein failed to utilize during pre-trial and trial proceedings.

As cited above, Harold Warren was convicted of murder when he was found to have used the victim's credit cards shortly after the murder. (Appendix D - Brief of Appellant at 4, 7). The murder victim was Indianapolis pawnbroker Jack Dorfman who kept shop in Irvington on East Washington Street and was found shot to death in that shop with a single bullet to the head. (Appendix D - Brief of Appellant at 5 – 6). There is no question that Warren used Dorfman's credit cards, and it is undisputed that Warren sometimes did business with Dorfman and was seen in the shop a day or so prior to the murder. (Appendix D - Brief of Appellant at7). Police gleaned evidence concerning Warren's whereabouts after the murder from Dana Roberson, who was Warren's estranged brother Larry's live-in girlfriend. (Appendix D - Brief of Appellant at 19 - 21). The morning of Dorfman's murder on January 7, 1999, Larry awoke to find Roberson inexplicably gone from their bed. (Appendix B - COA op. at 6). Roberson was a known fence, and Dorfman sometimes purchased items of unknown origin. (Appendix D - Brief of Appellant at 10; Appendix B - COA op. at 11 12).

Warren's trial counsel, Carl Epstein, failed to interview Larry and Roberson and failed to uncover and present exculpatory fingerprint evidence on his client's behalf. (Appendix B - COA op. at 11 - 18). The evidence included the following: Roberson could not account for her whereabouts on the morning of January '7, 1999; Roberson mysteriously came up with a large amount of money (enough to pay cash for an RV and take a trip to Key West with Larry) shortly after Dorfman's murder; Roberson had her truck repainted from black to gray shortly after the murder and after the Victim's friend spotted a black truck in the Vicinity the morning of the

murder; and the forensic analyst identified a complete one-handed set of five fingerprints, recovered from the crime scene, that matched a different suspect, Aaron Gill. A friend of Dorfman's and neighboring business owner saw a person from the back entering a black truck but did identify that person as a man and testified in a pretrial hearing the person did not fit Warren's description. (Appendix D - Brief of Appellant at 2 – 3).

Trial Counsel testified at Warren's PCR hearing and admitted he failed to uncover and present this evidence and that there was no strategic reason for his unprofessional mistakes. (Appendix D - Brief of Appellant at 5). Larry testified at the PCR hearing. (Appendix D - Brief of Appellant at. at 6 - 7). Roberson was called to testify and after failing to appear upon service of a properly served subpoena, finally appeared at the last hearing and exercised the Fifth Amendment right to remain silent. (Appendix D - Brief of Appellant at 7). The post-conviction court denied relief. The post-conviction court did not discredit the testimony of Larry and Epstein but rather determined that the mistakes did not constitute ineffective assistance of counsel and that it was not necessary for counsel to investigate these facts. (Appendix D - Brief of Appellant at 7 - 8).

On February 3, 2020, the Court of Appeals conducted an oral argument at the University of Southern Indiana in Evansville. On April 8, 2020, the Court of Appeals issued its opinion affirming the denial of post-conviction relief. The Court of Appeals determined Trial Counsel's performance was deficient and unprofessional. However, the opinion affirmed the denial of post-conviction relief based upon the determination no prejudice resulted because the evidence did not "exonerate Warren" and that he "has failed to show a reasonable likelihood the result of his trial would have been different." (Appendix D - Brief of Appellant at 17). In deciding a reasonable likelihood the result of Warren's trial wouldn't have been different, Warren now

argues the Indiana Court of Appeals invaded the province of the jury and has raised the *Strickland* standard for ineffective assistance of counsel established by this Court stating he must "exonerate" himself to receive relief for his Trial Counsel's performance determined to be deficient and unprofessional.

REASONS FOR GRANTING THE WRIT

Warren states the Sixth Amendment right to effective counsel requires proof (a) counsel's performance was deficient and (b) but for the deficient performance there is a reasonable probability of a different outcome. If there is a reasonable probability a jury would have reasonable doubt, then that is enough.

Finding Trial Counsel's performance deficient and unprofessional but nevertheless affirming the post-conviction court's denial of relief because the Petitioner failed to exonerate himself is unprecedented. The opinion concluded "While the evidence revealed at the post-conviction relief hearing potentially implicates other individuals, it does not exonerate Warren." (Appendix B - at COA op. at 17). That was the basis of the court's conclusion there was not "a reasonable likelihood the result of his trial would have been different." *Id.* Warren believes the opinion contradicts existing jurisprudence because the law does not require him to exonerate himself; *Strickland*'s prejudice prong only requires a reasonable likelihood of a different outcome but for Trial Counsel's deficient performance and unprofessional mistakes. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)).

This problematic Warren opinion may have resulted from a misappropriation of the sufficiency standard of review that would apply if this were a direct appeal. "[The] standard of review for sufficiency claims is well settled. Appeal courts do not reweigh evidence or assess the credibility of Witnesses; rather, they look to the evidence and reasonable inferences drawn

therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Houston v. State,* 730 N.E.2d 1247, 1248 (Ind. 2000). This is not a direct appeal. The sufficiency standard does not apply because, unlike in a direct appeal, here the jury had no opportunity to hear from and see the erroneously omitted Witnesses and gauge their credibility and demeanor. This is a totally different situation.

Warren had a right to have his case presented to the jury as well as the right to counsel. U.S. Const., Amend. VI. Trial Counsel failed to present that case. Appendix B - at COA op. at pp. 13 – 16); (Appendix D - Brief of Appellant at Brief at pp. 14 - 30; (Appendix G – Reply Reply Brief at pp. 5 – 14). Using a person's credit cards is not strong evidence of murder, just theft or receiving stolen property. (Appendix B - at COA op. at 16 - 17). Here, where the omitted evidence shows Roberson repainted her truck, was missing in action the morning of the murder, mysteriously came up with a large amount of cash, and left the state to go to Key West just after the murder, it is evident there was ample room for reasonable doubt concerning Warren's guilt. (Appendix D - Brief of Appellant at 11). The evidence also showed that Roberson was a fence. Appendix B - COA op. at p. 11 n.8). The jury should have heard from these witnesses. The Sixth Amendment right to counsel is rendered virtually meaningless if the only way to win is to prove one's innocence. Requiring Warren to show he would have been exonerated is not what *Strickland* holds necessary.

There are plenty of Indiana appellate cases where post-conviction relief has been granted with the evidence against the petitioner much stronger than was the evidence against Warren. For example: in *J.J. v. State*, 858 N.E.2d 244 (Ind. Ct. App. 2006), the Court of Appeals reversed the denial of post-conviction relief. In J.J., the State obtained convictions for burglary and theft

against a 15-year-old who stole $800 from his friend's parents' coffee can. *Id.* at 247. The case came up on appeal after the denial of post-conviction relief. The State urged the affirmation of the conviction based upon the strength of the evidence, arguing: (1) J.J. was present the day before the money came up missing and was shown the money; (2) J.J. was seen handling and counting the money; (3) J.J. was present the next day when he and his friend D.S. purchased a used car for $800 cash, the exact same amount of the missing money; (4) J.J.'s mother repaid the money to its rightful owner; and (5) J.J. denied his identity when confronted by police. *Id.* at 251. The State's argument there was "no reasonable jury would have exonerated [the Petitioner]" based upon the strength of the State's evidence against him. *Id.*

The Court of Appeals rejected that argument in J.J. as it should have likewise done here: "Although the circumstantial evidence would be sufficient to support a conviction, it is also open to evidence of non-guilt. Therefore, the credibility of [a co-conspirator] is of great consequence to a jury's consideration of the case." *Id.* at 252. The evidence against J.J. was far stronger than the evidence against Warren was here. As explained in the Reply Brief as well as the oral argument and the Reply Brief in Warren's direct appeal, the evidence against Warren was mostly circumstantial. See (Appendix G- Brief of Appellant at Reply Brief at pp. 13 – 14). Clearly Warren had the credit cards, but that in and of itself is not evidence of murder.

Whereas the Petitioner in J.J. was seen handling the missing money and purchased a car with that exact same amount, here there was no eyewitness to the murder. There was no witness who saw or could say Warren had a large amount of cash. This is important because Steve Jordan testified Dorfman came into his shop that morning with a bundle of cash and his morning newspaper and doughnuts. (Appendix D - Brief of Appellant at 6). It was Roberson not Warren who came up with a large amount of cash. (Appendix D - Brief of Appellant at 11). And

Roberson was the person who drove a black truck which she had painted to gray shortly after the murder and after Jordan saw a black truck parked suspiciously in the vicinity of the crime scene prior to the murder. Unlike J.J., Warren did not deny his identity and did not purchase a vehicle shortly after the crime. Whereas Roberson purchased an RV and went to the Florida Keys with Warren's brother Larry.

In *Rowe v. State*, 704 N.E.2d 1104 (Ind. Ct. App. 1999), the Court of Appeals overturned the Vigo County Circuit Court's denial of post-conviction relief in a case where the trial evidence against the petitioner was very strong. The Petitioner in Rowe was convicted of murder and two counts of attempted murder after he shot his parents and sister, killing his mother. *Id.* at 1106. Rowe's own sister testified against him at trial and described how he looked before he shot her: "his eyes were glossy as glass, his cheekbones were clenched, he had a really weird expression on his face. His eyes were just like they're glaring. It didn't look like John." *Id.* The issue for post-conviction was whether the State's failure to provide discovery regarding Stefan Hodges, who was Rowe's lover and had a criminal history of theft and burglary convictions violated the Constitution.

The Petitioner in Rowe argued the State's failure to discover the witness's criminal history denied the defendant a fair trial because it prevented him from being able to properly confront the witness. *Id.* at 1107. The State conceded its error but countered the Petitioner's argument by urging "reversal is unwarranted" because " [']Hodges was not a critical witness, and [Petitioner] would have been found guilty without his testimony.['] " According to Rowe: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial

resulting in a verdict worthy of confidence." *Id.* at 1109 (citing *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481, 1985 U.S. LEXIS 130, 53 U.S.L.W. 5084)).

In Warren's case, there was no eyewitness, unlike in Rowe where the defendant's sister and father survived and lived to tell of the attack. Thus, the evidence in Rowe was markedly stronger. The similarity between Warren's situation and that of Rowe is the State failed to reveal Roberson's criminal history as it did with Hodges. Though the State did not utilize Roberson as a witness, the evidence indicates it is she who led investigators to Warren. (Appendix B - COA op. at 7, 11). Roberson was listed as a State's Witness, but there is a line drawn through her name.

Similar to the State's witness in Rowe, Roberson had a criminal history including theft that was not disclosed to the defense. Roberson, unlike the witness in Rowe, was an alternative suspect thus should be subject to a higher scrutiny. The Rowe court determined the discovery deficiencies there prevented a fair trial and undermined "confidence in the outcome" not because the missing evidence would have exonerated the defendant but because the verdict was not worthy of confidence. 704 N.E.2d at 1109.

Asking the Petitioner to exonerate himself or prove he would have been acquitted but for Trial Counsel's errors is not what the Constitution or *Strickland* requires. The *Warren* opinion (2020 Ind. App. LEXIS 143 (Ind. Ct. App. 2020) sets the bar much too high and enfeebles the Sixth Amendment right to counsel which is deeply rooted in this country's history and tradition and should be honored and enforced by this Court who establish the *Strickland* standard precedent concerning ineffective assistance of counsel claims.

This new precedent belittles the Sixth Amendment and undermines the Bill of Rights guarantee that all citizens shall have the right to a fair trial. The right to a fair trial is sacrosanct regardless of whether the Court of Appeals thinks Warren committed the crime; whether he committed the crime or not is immaterial.

By ruling a Petitioner cannot prevail where he has not shown a jury would have exonerated him, the Court of Appeals has set a dangerous precedent. This right to a fair trial is sacrosanct regardless of whether Warren committed this crime; whether or not he committed the crime is immaterial. What matters here is whether there is a reasonable probability a jury of his peers could have reached a different outcome and whether the verdict was unreliable. Warren's trial was unfair due to his counsel's decidedly unprofessional mistakes, and the published opinion created a new hurdle that contradicts well-established and longstanding stare decisis.

When it substituted its judgment for what a jury would have concluded about reasonable doubt concerning evidence that was never presented, the Court of Appeals inappropriately invaded the province of the jury, a jury that never even had the opportunity to consider the evidence. Though there do not appear to be cases exactly on point, the Court could, conceivably, analogize this situation to the longstanding rule appellate courts should not reweigh evidence. This comes up more often in civil cases. See, e.g., *S.&S. Truck Repairs v. Mofield*, 556 N.E.2d 1313, 1314 (Ind. 1990) (noting rule: "Where reasonable minds could draw different inferences from the evidence submitted, it is for the jury to make the determination of proximate cause" and "It is improper for either this Court or the Court of Appeals to invade the province of the jury in weighing such evidence"); see also *Toledo, S. L. & W. R. Co. v. Home Ins. Co.*, 53 Ind. App. 459, 463, 101 N.E. 1035, 1913 Ind. App. LEXIS 213 (Ind. Ct. App. May 27, 1913) (explaining longstanding deferential rule regarding "such question [of fact] the Appellate Court will not substitute its judgment for that of the jury, where the evidence is of such a character, that fair minded men may honestly draw therefrom different conclusions."). A similar issue arises with jury instructions. See, e.g., *Board of Comm'rs v. Flowers*, 186 Ind. App. 597, 599, 201 N.E.2d 571, 1964 Ind. App. LEXIS 212 (Ind. Ct. App. October 14, 1964) (noting rule: "In such

instructions the court is limited in that the court must not invade the province of the jury with respect to any fact on which the jury is required to make a determination in arriving at its verdict. If the court invades the province of the jury and such invasion is prejudicial to either of the parties[,] then error results which cannot be cured by other or subsequent instructions.")

The Court may also wish to consider its own (fairly) recent U.S. Supreme Court precedent, *Weaver v. Massachusetts*, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017), when analyzing this issue. *Weaver* questioned the continued viability of the Strickland test's outcome determinative prejudice prong. *Weaver* indicated when a structural violation occurs, then a trial may be found fundamentally unfair and thus violate the Sixth Amendment right to effective counsel even when the defendant cannot or does not meet the outcome determinative requirements of the traditional Strickland prejudice prong, ie. a reasonable probability of a different outcome but for counsel's mistakes. *Weaver,* 137 S. Ct. at 1907 (indicating the doctrines of structural error and ineffective assistance of counsel are intertwined and may influence the proper standard used to evaluate ineffective assistance of counsel claims). Warren believes and has explained why and how the facts of his case met the standard imposed by a traditional application of Strickland's prejudice prong explained above. However, if for some reason the Court concludes that the facts here do not meet the traditional application of *Strickland*'s prejudice prong, then the Court should also consider Weaver's alternative parameters for prejudice, i.e. the demonstration of fundamental unfairness. The issue in Weaver was whether the closing of the courtroom during voir dire was a structural error which impacted the framework of the trial and rendered the process fundamentally unfair.

In *Weaver*, five justices assumed but did not explicitly determine there is another route to finding prejudice for purposes of Strickland's prejudice prong when a structural error occurs.

The *Weaver* majority quoted *Strickland*, noting it "cautioned that the prejudice inquiry is not meant to be applied in a [']mechanical[']fashion." *Weaver*, 137 S. Ct. at 1911 (quoting *Strickland v. Washington*, 466 U.S. at 696)). *Weaver* highlighted Strickland's emphasis upon fundamental fairness: "For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on the [']fundamental fairness of the proceeding.[']" *Id.*

Clearly, *Weaver* signals the high Court's recognition there are certain situations where the prejudice prong of *Strickland* in its typical application, that is the outcome determinative "reasonable likelihood the result of [the] trial would have been different," is amorphous and not particularly useful or practical. (Appendix B - COA op. at p. 17). The Indiana Court of Appeals attempted to establish some sort of bright line rule by imposing the additional hurdle of exoneration. However, an exoneration is different than an acquittal. See, e.g., *G.K. v. State*, 104 N.E.8d 598, 601- 02 (Ind. 2018) (explaining how an acquittal is not equivalent to an exoneration). An acquittal can take place when the jury believes the defendant may have committed the crime or probably committed the crime or quite possibly committed the crime and yet harbors doubts. That is what reasonable doubt means. The right to a fair trial in a criminal proceeding and counsel's adequate representation go hand-in-hand.

The next question is whether Trial Counsel's mistakes constituted a structural error such that they affected the framework of the trial. *Weaver* listed three broad categories of structural errors. First, there is the type of structural error which occurs when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908 (citing, e.g., the right to self—representation as explained in *Faretta v. California*, 422 U.S. 806, 834 (1975)). Second, there are some structural errors that

are deemed so simply because the "effects of the error are simply too hard to measure." *Weaver*, 137 S. Ct. at 1908 (citing, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 255 (1986) the high Court's denial of the San Quentin warden's request to "abandon the rule requiring reversal of the conviction of any defendant indicted by a grand jury from which members of his own race were systematically excluded") Finally, "an error has been deemed structural if the error always results in fundamental unfairness." *Weaver, 37* S. Ct. at 1908.

Weaver explained this third category: "For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. See *Gideon v. Wainwright*, 372 U. S. 335, 348-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to an attorney); *Sullivan v. Louisiana*, 5o8 U.S. 2'76, 279, 113 S. Ct. 2o78, 124 L. Ed. 2d 182 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness." *Id.*

Reasonable doubt is important. When a defense attorney fails to investigate, fails to procure, and fails to confront multiple witnesses who he believes have evidence that someone other than his client committed the crime, the entire framework of the trial is shaken. It stands to reason the traditional application of *Strickland*'s prejudice prong, whether there is a reasonable likelihood of a different result but for counsel's errors, is difficult to measure and quantify. The Indiana Court of Appeals attempted to measure this likelihood by placing itself in the shoes of the jury and determining they would not have exonerated Warren. However, that was not appropriate for multiple reasons. One reason is the accused has the right to a jury of his peers, a dozen of them. Second, the appellate courts do not reweigh evidence the jury actually had before it (see civil cases cited supra), so it is even more of a stretch for the appellate courts to weigh

evidence the jury did not have, especially in a criminal case where the State's burden of proof is much higher.

Thus, both the second and third categories of structural error apply here. As to the prejudice prong and whether the Court should employ a traditional outcome determinative application or should instead decide this case based upon fundamental unfairness an implication that is for the Court, not Warren, to decide. However, what is at stake here is not just Warren's freedom and his right to a fair trial, it is the continued viability of the Sixth Amendment itself and what that means for all persons who stand accused of crimes in Indiana. If the Sixth Amendment does not give the accused the right to have his attorney investigate and confront persons the attorney believes are alternative suspects, then what good does it do? This should not be deemed harmless error, and the Court should uphold and enforce the cherished and timeworn Bill of Rights guarantee of the right to counsel, a cornerstone of our Nation's liberty and justice, and not allow the Indiana Court of Appeals to establish a new and higher standard for ineffective assistance of counsel claims in Indiana beyond the standard established in this Court's precedent in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

CONCLUSION

Harold "Ray" Warren respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari, overturn the Indiana Court of Appeals' precedent published in *Warren v. State*, 2020 Ind. App. LEXIS 143 (Ind. Ct. App. 2020) setting the bar for the *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) Sixth Amendment's prejudice prong much too high when it employed the rationale that Warren's evidence did not exonerate him but merely implicated other potential suspects and remand the case with

instructions to grant post-conviction relief and schedule a new and fair trial with effective counsel as guaranteed under the Sixth Amendment to the United States Constitution.

Executed on: september 11th, 2020,

Respectfully submitted,

Harold Warren
Petitioner / *pro se*