20-7810

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
APR 14 2021
OFFICE OF THE CLERK

ANTONIO PROPHET — PETITIONER

vs.

DONALD AMES, SUPERINTENDENT — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Antonio Prophet, *pro se*
Prisoner #3484869
Mount Olive Correctional Complex
One Mountainside Way
Mount Olive, West Virginia 25185

QUESTION(S) PRESENTED

1. Does a prosecutor's remarks made at trial asserting that a defendant used his governmentally-induced "two years" of post-*Miranda* silence to tailor his trial testimony to his "review of the discovery" evidence violate the U.S. Constitution (or is the claim at the very least deserving of a COA), especially when considering that the defendant's exculpatory story told at trial was first conveyed to others before his arrest and was then told to counsel immediately after his arrest and long before discovery evidence had been disclosed?

2. When a petitioner asserts a claim for habeas relief under AEDPA and cites the correct and controlling "clearly established" Supreme Court precedent in support thereof, does the lower court frustrate the efficacy and viability of the AEDPA as intended by Congress by refusing to apply said precedent when assessing the petitioner's claim?

3. Does a prosecutor's misconduct and closing remarks suggesting to a jury that if it acquits the defendant he will author and profit from the sell of a book written about the charged crimes, and does a trial court's misconduct and pretrial remark declaring a defendant "guilty," in any way violate the Constitution or infringe upon the presumption of innocence required of a fair trial under our nation's criminal jurisprudence; and should *Brecht footnote 9* apply to such misconduct?

4. Is the right to effective counsel violated when counsel, *inter alia*, fails to object at trial to a prosecutorial assertion that the defendant tailored his trial testimony to the discovery evidence, especially when the attorney knows such an assertion to be false because the defendant told the attorney the exact same version of events testified to at trial immediately after his arrest and long before discovery had been disclosed in the case?

5. Could reasonable jurists disagree with or find debatable the District Court's assessment and summary dismissal of Petitioner's § 2254 petition, and, if so, did the 4th Circuit Court of Appeals err in denying Petitioner a COA?

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:

TABLE OF CONTENTS

INDEX TO APPENDICES

APPENDIX A: Complete Copy of the **4th Circuit Court of Appeals'** *Per Curiam Opinion Denying Petitioner's Motion for a Certificate of Appealability.* Filed: October 15, 2020.

APPENDIX B: Complete Copy of the **Northern District Court of WV's** *Memorandum Opinion and Order Summarily Denying and Dismissing Petitioner's § 2254 Petition.* Filed: August 19, 2019.

APPENDIX C: Complete Copy of the **Magistrate Judge's** *Report and Recommendation.* Filed: February 21, 2019.

APPENDIX D: Complete Copy of the **4th Circuit Court of Appeals'** *Order Denying Petitioner's Petition for Rehearing* En Banc. Filed: November 24, 2020.

APPENDIX E: Complete Copy of the **West Virginia Supreme Court of Appeals'** *Opinion Affirming Petitioner's Convictions on Direct Appeal.* Filed: June 5, 2014.

APPENDIX F: Complete Copy of **Petitioner's** *Memorandum of Law in Response and Support of § 2254 Petition.* Filed: May 31, 2018.

APPENDIX G: Complete Copy of **Petitioner's** *Memorandum Request for a Certificate of Appealability* to the 4th Circuit Court of Appeals. Filed: September 30, 2020.

APPENDIX H: Relevant Portions of the ***Pre-Trial, Trial, and Post-Trial Transcripts*** Concerning Matters Addressed in this Petition.

(1) Partial **(Motion to Exclude)** Transcripts of **July 9, 2012**, pgs.1-23, 40-43.

(2) Partial **(Trial)** Transcripts of **July 11, 2012**, pgs. 1-112, 155-162, 219-242, 275-276.

(3) Partial **(Trial)** Transcripts of **July 12, 2012**, pgs. 1-6, 15-30, 63-142, 167-182, 215-328.

(4) Partial **(Trial)** Transcripts of **July 13, 2012**, pgs. 1-158, 167-182, 215-216.

(5) Partial **(Trial)** Transcripts of **July 16, 2012**, pgs. 1-6, 29-120.

(6) Partial **(Sentencing)** Transcripts of **September 12, 2012**, pgs.1-12, 43-44.

TABLE OF AUTHORITIES CITED

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

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

OPINIONS BELOW

☒ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix **A** to the petition and is

☒ is reported at *Prophet v. Terry, 825 Fed. Appx. 139; 2020 U.S. App. Lexis 32576 (2020).*

The opinion of the United States district court appears at Appendix **B** to the petition and is

☒ reported at *Prophet v. Terry, 2019 U.S. Dist. Lexis141054 (Feb. 21, 2019).*

JURISDICTION

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was [**October 15, 2020**].

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

☒ A timely petition for a rehearing was denied by the United States Court of Appeals on the following date: [**November 24, 2020**], and a copy of the Order denying rehearing appears at Appendix **D**.

Additionally, on March 19, 2020, this Court **Ordered** that "In light of the ongoing public health concerns relating to COVID-19 . . . the deadline to file any petition for a writ of certiorari . . . is extended [from 90 days] to 150 days from the date of the lower court judgement . . . or order denying a timely petition for rehearing." ***U.S. Supreme Court Order***, *2020 U.S. Lexis 1643, No. 589 (March 19, 2020).*

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the 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."

CONSTITUTION OF THE UNITED STATES, Amendment VI: "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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence."

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

STATEMENT OF THE CASE

This is a petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals from the denial of a Certificate of Appealability (*App. A*), followed by the denial of a timely filed Petition for Rehearing *En Banc* (*App. D*); which denials were entered on October 15, 2020 and November 24, 2020, respectively, and which affirmed the Northern District Court of West Virginia's summary denial and dismissal of Petitioner's § 2254 Petition for Habeas Corpus relief. [*App. B*].

Petitioner Antonio Prophet (hereinafter, Petitioner) was convicted by a Berkeley County, West Virginia, Grand Jury, on July 16, 2012, for two (2) counts of murder in the first degree, and one (1) count of arson in the first degree. Petitioner's convictions stem from acts of murder and arson that occurred in the early morning hours of June 6, 2010, in a two-story residential garage apartment in Berkeley County, West Virginia; acts which Petitioner Prophet vehemently denies committing.

A. Facts Agreed to by Both Parties

In mid- to late-May of 2010, Petitioner traveled from Washington, DC to Martinsburg, WV to visit childhood friend Joseph Medina ("Medina"), who'd recently moved to the area. [*App. H(3)* at 71-76]. Shortly after arriving in Martinsburg, Petitioner met one of the victims in this case, Angela K. Devonshire ("Angela"), in the Capital Heights neighborhood of Martinsburg, at which time the two began a brief courtship and exchanged phone numbers. Around the same time, Medina met Angela as well, at which time he sold or gave her some marijuana and was accompanied by "another guy" who he'd "met...in the neighborhood" who provided her with heroin. [*Id.* at 68-69].

Within a week of meeting, Petitioner and Angela, their relationship having advanced past the initial phone call stage, began spending time together at Angela's home—a two-bedroom garage apartment located on a sprawling multi-acre estate just outside of town. [*App. H(2)* at 7, 9-10, 13-14]. There, Petitioner met and interacted with Angela's father ("Mr. Devonshire"), mother, brother, and two young children (Andre and Daronte White); all of whom lived on the estate as well but in a separate residence ("the parent's residence") on an adjacent property less than "a quarter of a mile" up the private road from Angela's garage apartment. [*Id.* at 7, 9-10, 18]. Angela's children were

being kept under the primary care of Mr. and Mrs. Devonshire due to Angela's recent and pronounced struggles with drug abuse—her drug of choice being heroin. [*Id.* at 40-43, 67-68, 88-90].

On June 3, 2010, Petitioner and Medina entered into a dispute with one another, in which threats of violence were exchanged between the two. [*App. H(3)* at 75, 172-74]. The dispute escalated quickly, with Petitioner offering $300 for information on Medina's whereabouts (*Id.* at 173); and with Medina informing his girlfriend, Chareese Davis, that he knew where Angela Devonshire lived, knew the Petitioner frequented her residence, and indicated that he intended to go there to confront the Petitioner regarding their dispute. [*Id.* at 177-78, 180-81].

Two days later, on June 5, 2010, Petitioner was picked up late in the day and driven to the Devonshire family's estate by Mr. Devonshire. [*App. H(2)* at 12]. Once there, Mr. Devonshire proceeded into his home for the night with his wife and adult son; while Petitioner, Angela, and her two children proceeded down to Angela's neighboring garage apartment, where they'd planned to spend the remainder of the night. [*Id.* at 12-13, 15, 71-72].

Early the next morning, on June 6, 2010, Angela K. Devonshire and her three year old son, Andre White, Jr., were murdered and their garage apartment was intentionally set aflame. Petitioner and Daronte White (Angela's six week old child) were present during the murders and arson as well but escaped after Petitioner rescued Daronte from the blaze. Petitioner then carried Daronte up to the parent's residence, placed the child in a lawn chair on the back porch of the residence, and fled.

Eleven days after the crime (during which time Petitioner failed to relay any portions of his exculpatory version of events to anyone but his son's mother and the victim's father[1]), Petitioner was

[1] The day after the crime, Petitioner text messaged Angela's father, Mr. Devonshire, expressing his condolences to the Devonshire family and apologizing for having failed to protect Angela and Andre from "them." [*App. H(3)* at 323-24]. On the same day, Petitioner spoke by phone with his son's mother, Katie Draughon, who testified at trial that during their phone conversation Petitioner told her that during the incident in question he "had been attacked by his friends and robbed." [*App. H(2)* at 224]. (For the record, Petitioner contends that Ms. Draughon's actual testimony at trial was that Petitioner told her that he "had been attacked by *Joe's* friends and robbed." But the court reporter apparently heard something different; and, of course, the record is what it is.)

arrested in North Carolina and charged with the crimes at issue. At the time of his arrest Petitioner was *Mirandized* and a custodial interrogation was initiated; at which time Petitioner told detectives that he was at Angela's home on the night in question and that he would like to speak with them about what had transpired that night, but, mindful of the admonition that anything he said would be used against him in a court of law, he advised detectives that he would first like to exercise his right to remain silent in order to consult with an attorney before making a statement. [*App. H(4)* at 34:14-16]. At that point, detectives ended their interview of the Petitioner.

B. Pertinent Pre-Trial Facts

Within days of his arrest, Petitioner met with his court-appointed counsel and relayed to them his exculpatory version of events regarding the crime in question. (It must be noted here that Petitioner's version of events conveyed to counsel at that time was the exact same version of events Petitioner testified to at his trial more than two years later.) During this meeting, Petitioner also informed counsel that he wished to meet with State agents in order to relay to them his version of events regarding the crime in question, as he was eager to be released from State custody and to have the charges against him dropped. Counsel advised against this, however, expressing the belief that not only would Petitioner's relaying of his version of events to State agents likely *not* succeed in getting him released from custody and the charges against him dropped, but also that his version of events was self-incriminating in certain ways—as his version of events placed him at the scene of the crime during its commission. It was therefore decided that Petitioner would forgo meeting with State agents regarding his version of events and that counsel would instead conduct their own independent investigation of the crime, and, guided by the rule of law and Petitioner's firsthand version of events, would legally submit Petitioner's defense to an impaneled jury of his peers at any subsequent trial that might be had against him. (See *App. H(1)* at 20:15-24: wherein Petitioner's counsel—at a pre-trial hearing in this matter, and after being critiqued by the court for having failed to disclose Petitioner's version of events to the State prior to that point—advised the court that counsel had made the decision not to relay Petitioner's exculpatory version of events to the State

because it was "determined at some point that that was not an alibi defense," and, therefore, that "it was a defense that could be brought at trial." *Id.*)

C. Facts at Trial

At trial, which began on July 10, 2012, the State presented its case-in-chief against the Petitioner. The pertinent portions of which are as follows: Petitioner had been at the Devonshire family's property on the night before the crime, and, accompanied by Angela and her two children, had been witnessed entering the garage apartment where the crime took place just hours before its commission. [*App. H(2)* at 11-12, 15, 62, 65, 71-72]. The next morning, at 4:36 a.m., a passing motorist called 911 to report the existence of a large fire visible in the area. Within minutes, police, fire, and other emergency personnel and vehicles responded to the Devonshire estate where, after extinguishing the fire that had fully engulfed Angela's two-story garage apartment, they discovered the bodies of Angela and Andre in the fire damaged remains. [*Id.* at 106-08]. Infant Daronte was found unharmed on the back porch of the parent's residence; his baby T-shirt was dotted with someone's blood. [*Id.* at 79, 102]. Petitioner was missing and nowhere to be found, as he had apparently fled the scene; he then fled the State with the help of numerous strangers with whom he shared no knowledge of the crime. [*Id.* at 110].

Angela was subsequently determined to have died as a result of "bleeding out" from a large cut to the front of her neck. [*Id.* at 98]. Andre's cause of death could not be ascertained. [*Id.* at 94]. Both died before the fire. [*Id.* at 94, 96]. The blood on infant Daronte's T-shirt was determined to be the Petitioner's. [*App. H(3)* at 22-23]. Eleven days after the crime, Petitioner was arrested in North Carolina, where he'd fled to and received medical treatment for several sharp force trauma wounds on his hands and arms. [*App. H(2)* at 157-60, 231]. Lastly, State witness Joseph Medina testified that Petitioner had confessed a role in the crime to him. [*App. H(3)* at 89, 95].

Petitioner took the stand in his own defense and testified that: Shortly after arriving in Martinsburg to visit Joseph Medina (*Id.* at 221-22)—and after having met Angela, visited and stayed the night at her home on several occasions, and met and interacted with her family (*Id.* at 223-27)—a

dispute arose between he and Medina over the theft of Medina's girlfriend's (Chareese Davis) laptop computer from her home on the morning of June 3, 2010.[2] As a result of this dispute, the former friends began issuing threats of violence to one another. [*Id.* at 238-43]. For example: Petitioner told Medina that when he saw him he "was going to smack him" (*Id.* at 241-42); Medina told Petitioner that he would come to Angela's home and "kill you, that pill-popping [girl] of yours and anybody else" there. [*Id.* at 246]. As a result of this specific threat, Petitioner called the police. [*Id.* at 247-63].

Beginning at 12:57 p.m., Petitioner called in rapid succession, first, 911, and then two other local law enforcement agencies to report Medina's threat. [*Id.*]. Remaining anonymous, Petitioner advised these agencies that Joseph Medina was threatening to go to someone's home and kill everyone there, including two children. [*Id.* at 262-63]. Petitioner also provided authorities a detailed description of Medina and informed them of his hangouts. [*Id.* at 250, 262-64]. Petitioner's cell phone records, a police audio recording of a portion of one of his calls, and a police generated CAD sheet describing his complaint were presented to the jury in support of his testimony. [*Id.* at 247-63].

Between the 3rd and 4th of June, Petitioner, in an attempt to locate Medina, offered $300 for information on Medina's whereabouts. [*App. H(4)* at 144-45]. Unable to locate Medina, and anxious about he and Medina's ongoing feud, Petitioner attempted to reconcile with his former friend, reaching out to him via text, relaying to him the sentiment: "let's let this [beef] go, we're good." [*Id.* at 66-67]. Medina responded with a similar sentiment, texting Petitioner: "You are fam." [*Id.*].

The next day, on June 5, 2010, Petitioner went to Angela's home to celebrate his birthday. [*App. H(3)* at 265-67]. At about 12:30 a.m., two men unexpectedly showed up at Angela's home claiming Angela owed them money for drugs. [*Id.* at 269-73]. After the men left, Angela informed Petitioner that she met the two men through Joseph Medina on the day she was in Capital Heights looking for heroin. [*Id.* at 275]. Angela further informed Petitioner that the two men had never been to her home before and that she had no idea how they knew where she lived. [*Id.* at 284].

---

[2] Testimony at trial conflicted as to who actually stole the laptop (Petitioner or Medina), but, ultimately, Petitioner wound up in sole possession of the pilfered item.

On hearing this, Petitioner concluded that Medina had shown or told these men where Angela lived, and he immediately began calling and texting Medina, to which he got no response. [*Id.* at 282-84]. About an hour later, the same two men came back to Angela's home, this time brandishing weapons; at which time they attacked and terrorized the occupants of the home, which included assaulting the Petitioner with their fists, a knife, and a gun; robbing the Petitioner of his money[3]; attacking and killing Angela and Andre; and sending the Petitioner scrambling for his life, injured and bleeding, into the dense woods behind Angela's home. [*Id.* at 285-302]. Hiding in the woods for several minutes, Petitioner heard a nearby car engine turn over, several car doors slam shut, and a car accelerate away. [*Id.* at 304]. On exiting the woods, Petitioner re-entered Angela's apartment, saw that fires had been set in the bathroom and atop the dead bodies of both Angela and Andre, and, after removing Daronte (who'd been left in the apartment unharmed) from the home, attempted to salvage the bodies of Angela and Andre from the rapidly spreading fire. [*Id.* at 305-06]. Unable to safely do so, Petitioner exited the apartment, carried Daronte up the private road/driveway to the parent's residence and beat on two sets of doors there in an effort to awaken someone inside. [*Id.* at 307-08]. Getting no response, and growing extremely anxious—and after succumbing to the fear of "the magnitude of the situation"—Petitioner placed Daronte on a lawn chair on the back porch of the parent's residence and fled. [*Id.* at 308-09]. Petitioner ultimately made his way to North Carolina where he received medical attention for his injuries suffered on the night of the attack. Medical records, pictures of Petitioner's injuries, and expert testimony indicating that Petitioner's injuries were consistent with injuries sustained while in a defensive stance or posture were presented in support of Petitioner's testimony. [*Id.* at 310-20; and *App. H(4)* at 169-70, 177].

During his flight from the area, Petitioner made phone contact with Medina and confronted him about his suspected role in the incident. Medina denied a role in the incident but acknowledged that he was aware that the assailants "were already coming over there but they said you got smart

---

[3] Petitioner testified that during this robbery, one of the assailants specifically referred to Ms. Davis's stolen laptop, saying to the Petitioner: "I want that laptop too."

with them so they decided to rob you too." [*App. H(3)* at 313-15]. Medina later indicated that the only thing he'd gotten "out of the situation" was Angela's large flat screen television. [*Id.* at 325].

Lastly, a record of Petitioner's text sent to Mr. Devonshire on June 7, 2010, was presented to the jury, which read: "My condolences to your family. I'm truly sorry for your loss. I tried to stop it. I tried to protect Angie and the baby from them. I wasn't able to. I'm sorry." [*Id.* at 323-24]. Petitioner testified that he sent this text message to Mr. Devonshire because he "felt terrible for the family," "felt terrible for fleeing the scene without telling them anything," and "felt partially at fault because if not for [his] beef with Medina...Angela and Andre would still be alive." [*Id.* at 324].[4]

During cross-examination, and over defense counsel's objection, the prosecutor first questioned Petitioner about a violent fictional novel he'd authored over ten years previously. [*App. H(4)* at 14-32]. Immediately thereafter, the prosecutor asked Petitioner:

> **Q.** And you told us today that you wrote this work of fiction and you've told us this story that you've told us about what happened on the night of the events and that particular story was never told to anyone of law enforcement – [*App. H(4)* at 32:17-21]

---

[4] The State's case-in-chief presented other facts and circumstances which tended to corroborate the defense theory of the case as well, namely: (1) Mr. And Mrs. Devonshire testified that Angela had such a serious drug problem that her newborn child, Daronte, had been born addicted to heroin; and that Angela had recently begun committing crimes in an effort to support her drug habit. [*App. H(2)* at 40-43, 67-68, 88-90]. (This testimony tended to support the defense theory that Angela had an outstanding drug debt due to her addiction.) (2) On the morning of the crime, no one in the parent's residence heard or saw the multiple emergency vehicles that had sped onto their property, right past their bedroom window, to the roaring fire at the end of their private road/driveway; no one in the parent's residence heard or saw the numerous emergency personnel members milling about their property and banging on their door in an attempt to awaken them for upwards of 15 to 30 minutes after arriving on the property. [*Id.* at 16, 50-51, 75]. (This evidence tended to support the defense theory that foreign persons and vehicles could very well have entered the Devonshire property that morning without the parents being aware of it.) (3) State witness Candace Fisher testified that she was with Medina in the hours just before the crime, and that Medina had an unknown number of his "friends or crew" on stand-by near his hotel room to have sex with her that night. [*Id.* at 237-40]. (This testimony tended to support the defense theory that Medina had any number of friends or associates around him in the hours just before the crime; men who he could have sent or escorted to Angela's home just a few short hours later.) And (4) State witness Katie Draughon testified that the day after the crime, Petitioner contacted her by phone and told her that at the time of the incident he "had been attacked by his friends and robbed." [*Id.* at 224]. (This testimony tended to support the defense theory that Petitioner not only believed that Joseph Medina (Petitioner's former friend) had played an integral role in the crime at issue, but also that Petitioner had expressed that belief to someone immediately after the crime.)

Petitioner's counsel objected. At sidebar, though failing to sustain counsel's objection, the court did rule that Petitioner's "pre-arrest silence is allowed in[,] [his] [p]ost-arrest silence isn't." [*Id.* at 34].

Just seconds after the sidebar had ended, the prosecutor asked Petitioner the following:

> **Q.** You did not tell anyone the story you told us yesterday prior to taking the stand; is that correct? [*Id.* at 35:13-15]

Petitioner's counsel objected to this question as well, and moved to strike, stating:

> **[Petitioner's Counsel]**: Objection. Move to strike based on the ruling. Unless I totally misunderstood what the Court –
>
> **The Court**: Well, no. What I said – I'm going to allow that and leave it at that. I will overrule the objection based on that. [*Id.* at 35]

After this objection was overruled, the prosecutor immediately segued into questioning Petitioner about his pre-arrest failure to fully reveal to Mr. Devonshire the version of events he'd testified to at trial. [*Id.* at 35-36]. During the remainder of cross and recross, the prosecutor lawfully referenced Petitioner's eleven days of pre-arrest silence in other ways as well. [*Id.* at 61, 65, 76-77, 117-18, 120, 128, 132]. Then, in ending her examination, the prosecutor once again focused the jury's attention on the two years of silence that came after Petitioner's assertion of *Miranda* and before his trial with:

> **Q.** And in this instance, you've had two years to make up this story?
>
> **A.** I didn't make up any story, ma'am.
>
> **Q.** And you've had two years to review all of the discovery, all of the pieces, all of the elements –
>
> **A.** I didn't –
>
> **Q.** – before you came here to testify?
>
> **A.** I didn't make up any story ma'am.
>
> **Q.** But you've had two years to review absolutely every detail of this case?
>
> **A.** If you want to look at it like that, yes, ma'am. [*Id.* at 156]

During summation, the prosecutor argued:

> "He studied the records. In every criminal case in West Virginia the State must hand to the defendant everything we know about this case. He has had two years to go through each and

every record in this case, each and every phone record, each and every cell record, each and every statement. Everything we have he's had the opportunity to do it." [*App. H(5)* at 40]

"He never tells a living soul his story until he takes that stand." [*Id.* at 53]

"Remember that? He's got two years to craft his story." [*Id.* at 54]

"He waits to be on the stand to craft his story. All of his pieces fit. They fit because you can look at every piece of evidence and go oh, this must be what happened. This must be what happened. This may be what happened." [*Id.* at 63-64]

"He's crafted his story. He sat there slick and polished after two years and wrote his story because if he fails in this story he goes to prison for the rest of his life so connect all the little dots." [*Id.* at 106]

"It's a story. He wrote a tale and he sat upon the witness stand and he told you that tale after he looked at every sheet of paper that he went over it mile after mile, and he weaved and crafted it into a fine story." [*Id.* at 107]

Petitioner's counsel failed to object to any part of the prosecutor's summation; and on July 16, 2012, Petitioner was convicted of the crimes at issue. [*Id.* at 113-16].

D. Post-Trial Facts

Petitioner filed post trial motions, which were denied by the trial court on September 10, 2012. [*App. H(6)* at 1-13]. At that time, the court acknowledged that Petitioner's post-arrest silence had been attacked at trial, but stated that the prosecutor's attacks were proper because the remarks weren't "in the traditional sense where you improperly comment upon well, 'if he hadn't done it why didn't he tell the cops he didn't do it,' along those lines. Here it was more, 'he's saying he is a victim, why didn't he tell the police he was a victim.'" [*Id.* at 8].

Petitioner filed a direct appeal of his convictions to the WV Supreme Court ("WVSC"), which affirmed Petitioner's convictions on June 5, 2014. *State v. Prophet, 234 W.Va. 33, 762 S.E. 2d 602 (2014)*. In passing on the merits of Petitioner's claims, and in addressing only the first 2 of the 12 total post-*Miranda*-silence remarks challenged by the Petitioner, the WVSC concluded that the 2 questions it had analyzed were "ambiguous and isolated" and were not "pursued improperly into the realm of post-arrest silence." [*App. E* at 18]. The WVSC failed to rule on the many post-

Miranda-silence remarks made by the prosecutor during recross and summation, in which the prosecutor suggested that Petitioner's two years of silence after arrest and before trial was indicative of guilt, indicative of perjury, and indicative of her assertion that the only reason his testimony was so believable was because he took a two year post-*Miranda* opportunity to study the discovery.

After the WVSC's ruling affirming his convictions, Petitioner timely filed a *pro se* Petition for a Writ of Certiorari to the United States Supreme Court on September 8, 2014; which was denied on November 17, 2014. *Prophet v. West Virginia, 135 S.Ct. 683, 684, 190 L.Ed. 2d 396 (2014).*

Petitioner then submitted a habeas petition to the Circuit Court of Berkeley County; which, without the benefit of an omnibus evidentiary hearing, was denied on October 28, 2015. The WVSC affirmed said denial in an *Opinion* dated June 21, 2016. *Prophet v. Ballard, W.Va. Lexis 566 (2016).*

After the Supreme Court denied Petitioner a second timely filed Writ of Certiorari, Petitioner filed a § 2254 petition, and subsequent Memorandum of Law in support thereof (*App. F*), to the District Court of WV; which was summarily denied and dismissed on August 19, 2019. [*App. B*]. Petitioner then timely filed a Motion for a COA to the 4th Circuit Court of Appeals (*App. G*); which was denied on October 15, 2020. [*App. A*]. Lastly, Petitioner timely filed a Petition for Rehearing *En Banc* to the 4th Circuit Court of Appeals; which was denied on November 24, 2020. [*App. D*].

Hence, having received no justice in the State and lower Federal courts, Petitioner now prays that this Honorable Court grants him a Writ of Certiorari in order to uphold his Constitutional rights and to authoritatively settle some very troubling aspects of the State and lower courts' handling of his federal habeas corpus claims for relief.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

In the underlying criminal matter at bar, Petitioner was charged with and arrested for the crime at issue. After his arrest, Petitioner clearly had a story to tell regarding the crime—as he had already relayed significant portions of it, pre-arrest, to not only his son's mother, Katie Draughon, but to the victim's father, Mr. Devonshire, as well—and likely would have told it to the authorities

upon arrest if not for his having been governmentally-induced to silence with *Miranda* warnings assuring him that not only would anything he said be used to convict him of a crime later, but also that he had the Constitutional right to remain silent and speak to a lawyer for legal advice before submitting to an interview—and that the exercise of said rights would not be held against him. Based on these assurances, Petitioner asserted his right to remain silent, requested an attorney, and was subsequently appointed counsel by the State. Upon their initial meeting, Petitioner informed counsel of his exculpatory version of events, advised the same that he wished to relay his version of events to the State, and was advised by counsel not to speak to the State because elements of his story were self-incriminating. Petitioner was then forced to trial by the State, and, in full accordance with the law, presented his defense, publicly, before an impaneled jury of his peers. Upon taking the stand, Petitioner was then attacked and impeached with the very post-*Miranda* silence the government had previously assured him he had the lawful and unpunishable right to maintain after arrest. At no point before, during, or after this unlawful post-*Miranda* silence attack was the jury ever instructed that it is the Constitutional right of every American citizen to remain silent upon arrest and that no inference of guilt can lawfully be drawn against one for having exercised said right. (This issue provides the Court the opportunity to revisit *Miranda* and *Doyle* in order to either reaffirm or overrule the States' federal obligation to advise its criminally accused of their rights to silence and an attorney upon arrest—advice which, of course, could unduly compel one to silence.)

Additionally, the prosecutor repeatedly asserted through questioning and argument that Petitioner's due process-mandated entitlement to discovery evidence aided him in his alleged deception of the jury, and that the only reason his testimony was so believable was because he tailored his testimony to the discovery evidence. Petitioner contends that this prosecutorial assertion was a violation of several of his Constitutional rights, went to the very heart of his defense, had a direct and substantial impact on his trial, and can in no way be reasonably viewed as harmless. (This issue appears to be one of first impression with the Court, and provides the Court the important opportunity to definitively determine whether the U.S. Constitution is offended when a State

impeaches a testifying defendant's credibility with an assertion that he used due process-mandated discovery evidence to tailor his testimony—especially when the record demonstrates that all of the evidence beneficial to the defendant's case was known by him long before discovery was disclosed.)

Petitioner's trial was further rendered unfair when the trial court and prosecutor engaged in manifold forms of misconduct. (This issue provides the Court the opportunity to determine whether a trial court's pretrial declaration that a defendant is "guilty" violates the Constitution and the presumption of innocence established as the foundation of our criminal jurisprudence; and whether *Brecht footnote 9* should apply to the forms of misconduct that occurred at Petitioner's trial.)

Finally, the lower federal courts' rulings in this matter have undermined the efficacy of the AEDPA as intended by Congress, as the lower federal courts refused to assess Petitioner's § 2254 Federal Habeas Corpus claims utilizing the correct and controlling "clearly established" U.S. Supreme Court precedents, as is required by law and the functional intent of the AEDPA. (This issue provides the Court the opportunity to provide the lower courts further guidance on this issue.)

REASONS FOR GRANTING THE PETITION

Question 1. Does a prosecutor's remarks made at trial asserting that a defendant used his governmentally-induced "two years" of post-*Miranda* silence to tailor his trial testimony to his "review of the discovery" evidence violate the U.S. Constitution (or is the claim at the very least deserving of a COA), especially when considering that the defendant's exculpatory story told at trial was first conveyed to others before his arrest and was then told to counsel immediately after his arrest and long before discovery evidence had been disclosed?

A. The State Court's Decision Conflicts with Controlling Decisions of the Supreme Court

The State's questions and remarks made regarding Petitioner's "two years" of silence after arrest and after having explicitly received and asserted his *Miranda* rights was a violation of this Court's express holdings in *Doyle* and its progeny, which hold: A prosecutor may not impeach a defendant's testimony with his silence after he has been advised of and invoked his right to remain silent under *Miranda v. Arizona, 384 U.S. 436, 444 (1966). Doyle v. Ohio, 426 U.S. 610, 611 (1976).* "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that

his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." *Wainwright v. Greenfield, 474 U.S. 284, 290-95 (1986).* A *Doyle* violation occurs when: (1) the prosecutor makes use of a defendant's post-*Miranda* silence at trial through questioning or during argument; and (2) the trial court permits such use by overruling defense counsel's legitimate objection. *Greer v. Miller, 483 U.S. 746, 764-65 (1987).*

During cross-examination, the prosecutor first asked Petitioner the following:

> **Q.** And you told us today that you wrote this work of fiction and you've told us this story that you've told us about what happened on the night of the events and that particular story was never told to anyone of law enforcement – [*App. H(4)* at 32:17-21]

Petitioner contends that this was an implicit comment on his post-*Miranda* silence, as the word "***never***" used in the context of the question clearly implicates both pre- *and* post-*Miranda* silence. After Petitioner's counsel objected, the following discussion took place at sidebar:

> **[Petitioner's Counsel]**: I could be wrong but isn't that commenting on prior statements? She's trying to say you didn't tell anybody that. That's his right until he comes to court.
>
> **The Court**: He can say why he didn't do it, but I think she's entitled to say this is the first time it has come up, yeah.
>
> **[Petitioner's Counsel]**: So I'm not arguing again, but I had this in another case in Morgan County where the prosecutor made a reference to the Defendant never . . .
>
> **The Court**: Exercising his right to silence to the police officer. She can't say you never told it to the police or anything like that. Did you ever tell it to anyone. You can't say when the police got you[,] you didn't tell them that, did you. This is one of those cases where there could be an exception because he did make contact after the event to Mr. Devonshire and she could say why didn't you tell him[,] but you can't – pre-arrest silence is not the same as post-arrest. It's statements to law enforcement that is exercising your right to silence so you can't ask him about anything about law enforcement. . . . But you can say he contacted Mr. Devonshire after and you didn't tell him things like that because that's not exercising your right to silence.
>
> - - - -
>
> **The Court**: Pre-arrest. Pre-arrest silence is allowed in. Post-arrest silence isn't.
>
> **[Petitioner's Counsel]**: After he was arrested he did – [Lt.] Harmison did try to interview him and he asserted his Fifth Amendment right.

The Court: All of that stays out. It has to be pre-arrest.

[Petitioner's Counsel]: That was two years ago, right. Your Honor, just so we have a time, pre-arrest silence was two years ago.

The Court: Unless he made a statement to someone – I mean, if it's – if it's non law-enforcement he made a statement.

[Petitioner's Counsel]: Some snitch in the jail, sure. [*Id.* at 33-35]

Despite the court's seeming ambivalence on the matter and failure to sustain defense counsel's legitimate objection to the prosecutor's improper question informing the jury that Petitioner's "story was never told to anyone of law enforcement"—(even though the court had just acknowledged that such a question was unlawful when it said, "She can't say you never told it to the police or anything like that")—still, this sidebar discussion did establish that: (1) Petitioner had received and asserted his 5th Amendment rights after his arrest and during an attempted custodial interrogation; (2) Petitioner's "pre-arrest silence is allowed in," his "[p]ost-arrest silence isn't"; and (3) Petitioner's pre-arrest silence had ended (and his post-*Miranda* silence had begun) "two years ago" upon his receipt and assertion of his 5th Amendment privilege.

Additionally, it must be noted here that throughout this case's long post-conviction journey, the State and lower Federal courts have consistently placed special significance on the fact that during the above-described sidebar, the trial court "instructed the prosecutor" not to comment on Petitioner's "post-arrest silence" (see *App. B* at 21; and *App. E* at 17); thereby implying that this instruction was not only undoubtedly followed by the prosecutor, but also that it somehow cured the prosecutor's previously asked improper post-*Miranda* silence question informing the jury that Petitioner's "story was never told to anyone of law enforcement." However, this notion seemingly wholeheartedly embraced by both the State and lower Federal courts finds absolutely no support anywhere in the trial record, and actually conflicts with the obvious fact of the matter, which is: The

jury was not privy to the sidebar discussion between the trial court and the lawyers, and was therefore wholly unaware of the court's instruction to the prosecutor regarding the impropriety and inadmissibility of her remark on Petitioner's post-arrest silence. (In fact, the only thing the jury was aware of in regard to the prosecutor's improper question which did in fact infuse into the proceedings Petitioner's post-arrest silence, was the remark itself and defense counsel's subsequent objection thereto—which objection led to no in-court action perceivable to the jury, as the court never sustained, either at sidebar or in open court, defense counsel's objection to the prosecutor's improper question; the court never condemned, either at sidebar or in open court, the prosecutor's improper question; the court never struck from the record the prosecutor's improper question; and the court never issued a cautionary or curative instruction to the jury regarding the prosecutor's improper question. These conspicuous failures on the part of the court no doubt left the jury with the distinct impression that the prosecutorial post-*Miranda* silence question announcing that Petitioner's "story was never told to anyone of law enforcement" was not only a proper and admissible one, but was also one well within their rights as jurors to consider later on when deliberating on Petitioner's culpability in the crimes at issue.) Therefore, with the jury having never been made aware of the impropriety of the prosecutor's above-quoted post-*Miranda* silence question—and though the State and lower Federal courts have hung their hats on this faulty premise for so long—the trial court's sidebar instruction to the prosecutor to not comment on Petitioner's post-arrest silence served no practical purpose whatsoever (other than perhaps to confuse and distract the good reasoning of the State and lower Federal courts). And this conclusion is proven especially true when considering the fact that the prosecutor failed to for even a moment follow the trial court's instruction not to comment on Petitioner's post-arrest silence, because just seconds after the sidebar had ended, the prosecutor's very next question to Petitioner was:

> **Q.** You did not tell anyone the story you told us yesterday prior to taking the stand; is that correct? [*App. H(4)* at 35:13-15]

Petitioner contends that this question, too, just like the one before it, was a comment on his post-*Miranda* silence, as the words "***prior to taking the stand***" clearly refer to anytime prior to trial, which would include **post**-*Miranda*. Petitioner further contends that this language was intentionally used by the prosecutor to piggy-back on her first post-*Miranda* silence question above, in order to unlawfully inform the jury that Petitioner had stood on his Constitutional right to silence after arrest and "prior to taking the stand," and that his trial testimony was the first time law-enforcement was hearing his version of events. Therefore, and contrary to the State court's unreasonable determination on the matter, this question was clearly not about Petitioner's pre-arrest silence, which was two years ago and in the distant past, but was obviously about his post-*Miranda* silence which had ended just "prior to [him] taking the stand"; and the jury would have naturally construed it as such.

Petitioner's counsel objected to this question as well, and moved to strike, stating:

> **[Petitioner's Counsel]**: Objection. Move to strike based on the ruling. Unless I totally misunderstood what the Court –
>
> **The Court**: Well, no. What I said – I'm going to allow that and leave it at that. I will overrule the objection based on that. [*Id.* at 35]

The court, astonishingly, overruled this well founded objection, thereby not only permitting the prosecutor to successfully make use of Petitioner's post-*Miranda* silence at that particular time, but also implicitly permitting her to further pursue this post-*Miranda* silence line of questioning and argument later if she so chose, which she in fact soon did. As a result, and with just these first 2 prosecutorial post-*Miranda* silence remarks alone—both of which were objected to by counsel and overruled by the court—a due process violation under *Doyle* had already occurred. (See the two-part *Doyle*-violation test set forth in *Greer*.) And, thus, the prosecutor's numerous post-*Miranda* silence attacks launched against Petitioner's testimony later, though remarkably extensive and egregious, was just the proverbial icing on the already baked post-*Miranda* silence cake.

During recross-examination, the prosecutor reinitiated and successfully concluded her post-

Miranda silence questioning of Petitioner with:

> **Q.** And in this instance, you've had two years to make up this story?
>
> **Q.** And you've had two years to review all of the discovery, all of the pieces, all of the elements . . . before you came here to testify?
>
> **Q.** But you've had two years to review absolutely every detail of this case? [*Id.* at 156]

Petitioner contends that this particular line of questioning was a clear and flagrant attack on his post-*Miranda* silence as well, as his post-*Miranda* silence had already been established as having begun "two years ago," and as Petitioner's counsel specifically made this point clear earlier when he said, "That was two years ago, right. Your Honor, just so we have a time, pre-arrest silence was two years ago." [*Id.* at 34:19-21]. Additionally, discovery evidence isn't provided to a defendant until after arrest, and, in this case, until after Petitioner had received and asserted his *Miranda* rights, so there is no question that the prosecutor's above questions regarding Petitioner's "two years to review all of the discovery" and "make up a story" consistent with the "detail[s] of th[e] case" falls within the Constitutionally-protected two year time frame of silence that came *after* Petitioner received and asserted *Miranda* and *before* he was brought to trial, which is exactly what the many post-*Miranda* Constitutional-safeguards prohibit the state from attacking at trial. (See Doyle v. Ohio, supra., *at 618: "it would be fundamentally unfair and a deprivation of due process to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial after he had been impliedly assured by the Miranda warnings that silence would carry no penalty."*)

Petitioner contends that the prosecutor's three above-quoted questions were just a more artful way of again pointing out to the jury that not only had Petitioner stood on his Constitutional right to silence for the two year period after his arrest and before his trial—and that this was indicative of his guilt—but also that he had stood on his Constitutional right to silence during that particular two year period of time for the specific purpose of studying the discovery evidence so that he could fabricate his believable, yet wholly false, trial testimony. This prosecutorial assertion is probably the single most unduly prejudicial assertion a prosecutor can make against a testifying defendant in a

criminal trial; and it flies in the face of everything the 5th Amendment right to due process of law, *Miranda*, *Doyle*, *Hale*, and any other case dealing with this issue seeks to safeguard. (See *Doyle*, *at 616-17*: *"The State argued that the discrepancy between an exculpatory story at trial and silence at the time of arrest gives rise to an inference that the story was fabricated somewhere along the way, perhaps to fit within the seams of the State's case as it was developed at pretrial hearings... We have concluded that the Miranda decision compels rejection of the State's position."*)

Additionally, the prosecutor buttressed her foregoing attacks on Petitioner's post-*Miranda* silence by inundating the jury with assertions made in her closing argument that Petitioner's post-*Miranda* silence was indicative of guilt, indicative of perjury, and indicative of her assertion that the only reason his testimony was so believable was because he took a two-year post-*Miranda* opportunity to tailor his testimony to the discovery evidence. In fact, any ambiguity in the prosecutor's initial post-*Miranda* silence questions was made clear by her remarks made in summation, as said remarks were obviously designed to raise unlawful inferences to Petitioner's post-*Miranda* silence by suggesting that his exculpatory story was a post-*Miranda* fabrication: "He studied the records. In every criminal case in West Virginia the State must hand to the defendant everything we know about this case. He has had two years [of post-*Miranda* silence] to go through each and every record in this case, each and every phone record, each and every cell record, each and every statement. Everything we have he's had the opportunity to do it." [*App. H(5)* at 40]. "He never tells a living soul his story until he takes that stand." [*Id.* at 53]. "Remember that? He's got two years [of post-*Miranda* silence] to craft his story." [*Id.* at 54]. "He waits to be on the stand to craft his story." [*Id.* at 63-64]. "He's crafted his story. He sat there slick and polished after two years [of post-*Miranda* silence] and wrote his story." [*Id.* at 106]. "It's a story. He wrote a tale and he sat upon the witness stand and he told you that tale after he looked at every sheet of paper that he went over it mile after mile, and he weaved and crafted it into a fine story." [*Id.* at 107]. The prosecutor's argument essentially turned Petitioner's post-*Miranda* silence into a tacit admission of both guilt and perjury, thus standing the protections of *Miranda* on its head.

In all of the prior State court rulings regarding this matter, not once—NOT ONE TIME!—has any State court so much as acknowledged, let alone fully and fairly analyzed and ruled upon, all of the many glaring and egregious post-*Miranda*-silence remarks made by the prosecutor at Petitioner's trial;[5] and this despite Petitioner's repeated challenges to each of the above remarks in all of his post-conviction briefings to the State courts. Instead, the State courts repeatedly elected to analyze and rule upon only the first 2 prosecutorial questions asked of Petitioner during cross-exam, which the State courts then unreasonably determined to be "ambiguous and isolated" remarks that were construed by the jury as questions referring only to Petitioner's pre-arrest silence. [*App. E* at 16-18].

However, the State court's determination goes against all reason, because neither the prosecutor's first 2 questions at issue—nor her numerous other post-*Miranda* silence questions and remarks that came later—drew any pre-arrest time distinctions for the jury, and each contained wording specifically inclusive and encompassing of Petitioner's post-*Miranda* silence. In fact, the only clear time distinction set out in the prosecutor's challenged remarks for the jury to consider and deliberate on was the time distinction focusing the jury's attention on the "two years" of silence that came *after* Petitioner's arrest and assertion of his *Miranda* rights and *before* his trial.

Moreover, there were never any curative or limiting instructions given to assist the jury in recognizing or determining the distinction between the lawfully considered pre-arrest silence of the Petitioner and the unlawfully considered post-*Miranda* silence of the same. In fact, there were no cautionary, limiting, or curative instructions given to the jury on this issue at all; thus supporting the reasonable conclusion that the jury could have very well impermissibly convicted Petitioner solely on the basis of his post-*Miranda* silence, which, of course, is unconstitutional.

---

[5] The Petitioner contends that at least 5 of the 8 factors described in Sumner v. Mata, *455 U.S. 591, 592 n.1 (1982)*, which annul a State court's presumptive correctness, are present in this ground. Specifically, points 1 (merits not resolved), 2 (fact-finding procedure inadequate), 6 (failure of State court to provide full, fair, and adequate hearing), 7 (denial of due process in State court proceeding), and 8 (factual determinations not fairly supported by the record) of *Sumner* are all present in this ground, thereby nullifying 2254(d)'s presumption of correctness to state-court findings of facts.

Accordingly, the State court's decision on this matter was based on an unreasonable determination of the facts in light of the evidence and was contrary to the clearly established federal law of *Doyle* and its progeny. Thus, a Writ of Certiorari is prayed.

B. The Lower Federal Court's Decision Conflicts with Decisions of the Supreme Court

In Petitioner's *Doyle*-violation claim raised in his § 2254 habeas petition to the lower court, Petitioner alleged that at trial the State impeached him utilizing his post-*Miranda* silence, and that the State court's decision finding otherwise was: (1) based on an "unreasonable determination of the facts in light of the evidence," and (2) was "contrary to...clearly established federal law" as determined in *Doyle* and its progeny. Petitioner further asserted that the State court's application of *Jenkins v. Anderson, 477 U.S. 231 (1980)* to the facts of his case was a clear misidentification of the correct controlling authority from the Supreme Court's cases. [*App. F* at 4-14; and *App. G* at 3-8].

The District Court—having failed to assess Petitioner's claim under the strictures of *Doyle* and its progeny—disposed of Petitioner's claim in an Order for Summary Dismissal asserting that the State court recognized that the two prosecutorial questions it had analyzed and ruled upon "'potentially could have been construed as referring to Petitioner's post-arrest silence[,]'" but also could have been construed as questions referring to Petitioner's pre-arrest communication with the victim's father, Mr. Devonshire, and, therefore, "the state court's determination that they [were] pre-arrest was reasonable"; further, "even if the comments were post-arrest, they were ambiguous and isolated and did not infect the trial with unfairness as to violate due process." [*App. B* at 21-22].

The District Court failed to address the fact that the State court's determination of Petitioner's *Doyle*-violation claim omitted the acknowledgment and analysis of at least 10 prosecutorial post-*Miranda* silence remarks challenged by the Petitioner; and that the State court's failure to analyze and rule upon said remarks contributed to not only its unreasonable determination of the facts in light of the evidence, but also to its misidentification of *Jenkins* as the correct controlling authority from the Supreme Court's precedents.

In Petitioner's subsequent Motion for a COA to the 4th Circuit Court of Appeals, Petitioner

argued that reasonable jurists would find the District Court's assessment and summary dismissal of his *Doyle*-violation claim debatable or wrong because the Supreme Court has specifically addressed the *Doyle* issue in many of its cases and, in each and every instance, has found comments similar to and even much less severe than the ones presented here to be violative of due process. See *Greer v. Miller, 483 U.S. 756, 759-64 (1987) (where it was held that a prosecutor's single question to a defendant of "Why didn't you tell this story to anybody when you got arrested?" (at 759) is a post-Miranda silence inquiry which Doyle prohibits (at 764)).* And see *Brecht v. Abrahamson, 507 U.S. 619, 628-29 (1993) (where it was held that "the State's references to petitioner's...failure to come forward with his version of events at anytime before trial...crossed the Doyle line").*

Petitioner further argued that reasonable jurists would find debatable the District Court's concurrence with the State court determination that the prosecutorial remarks at issue were "ambiguous and isolated," as there was nothing "ambiguous" about the prosecutor's *Doyle*-violating assertion that: *Petitioner's "story was never told to anyone of law enforcement...prior to taking the stand" because he was using that "two year" period of silence "to review all of the discovery" and "weave and craft a fine story" consistent with the "details of the case." This proves he's guilty!*

Nor were these *Doyle*-violating remarks in any way "isolated," as the prosecutor repeatedly harped on Petitioner's post-*Miranda* silence as many as 12 different times—the remarks spanning from cross-examination, to recross, to closing arguments, and, finally, to rebuttal closing.

Petitioner further argued in his Motion for a COA that reasonable jurists would also find debatable the District Court's espousal of the State court's opinion that *Jenkins v. Anderson* permits the types of prosecutorial attacks on silence the Petitioner is challenging here, because, in analyzing *Jenkins*, the prosecutorial remarks challenged in that case were by all accounts **pre**-arrest silence remarks that did not encompass Jenkins' **post**-*Miranda* silence. *Jenkins, at 233-34.* Petitioner Jenkins went on to argue that the State's use of his **pre**-arrest silence was unconstitutional. The Supreme Court, however, disagreed, holding that the silence exploited by the prosecutor in that case had occurred before Jenkins had been taken into custody and given his *Miranda* warnings, and,

therefore, no governmental action had induced Jenkins to silence prior to his arrest; and, thus, the 5th Amendment did not prevent the use of his pre-arrest silence to impeach his credibility. *Id. at 240.*

Unlike petitioner Jenkins, Petitioner Prophet is not challenging the **pre**-arrest silence remarks made at his trial. (For instance: Petitioner has never challenged as unconstitutional the prosecutorial remarks made regarding his **pre**-arrest communication, or lack thereof, with the victim's father, Mr. Devonshire. So the State and District courts' persistent reliance on that prosecutorial **pre**-arrest silence remark to dispute Petitioner's **post**-*Miranda* silence claim is baffling. [*App. B* at 22].) The prosecutorial remarks challenged by the Petitioner specifically exploited the governmentally-induced silence that came *after* Petitioner's arrest and receipt of *Miranda* warnings, not before; and, therefore, the 5th Amendment *does* prevent the use of such silence to impeach his credibility. *Id.* In fact, from the very outset of his post conviction proceedings, Petitioner has been consistent in maintaining that **only** the prosecutorial questions and remarks inclusive and encompassing of his **post**-*Miranda* silence (which questions and remarks are quoted in their entirety above) were violative of *Doyle* and his right to due process. For example: When the prosecutor told the jury that Petitioner's "story was ***never*** told to anyone of law enforcement[,]" or that he "did not tell anyone [his] story...***prior to taking the stand***[,]" these remarks, though also encompassing Petitioner's **pre**-arrest silence (as words as broad as "***never***" and "***prior to taking the stand***" naturally would), are specifically inclusive and encompassing of his **post**-*Miranda* silence as well. Or, when the prosecutor told the jury that Petitioner "had two years to make up [his] story[,]" and that he "never tells a living soul his story until he takes that stand[,]" and that he "waits to be on the stand to craft his story," these comments, too, specifically identify and highlight **post**-*Miranda* silence time periods, and are thus clearly inclusive and encompassing of Petitioner's **post**-*Miranda* silence.

With that in mind, Petitioner fully agrees that if the challenged prosecutorial questions and remarks had referred only to his silence *prior* to receiving and asserting his *Miranda* rights, then *Jenkins* would control his claim and the lower Federal courts would be justified in concluding that no Constitutional violation under § 2254(d) had occurred. However, that is not the case here. Here,

the challenged prosecutorial remarks were, at their most benign, phrased broadly, encompassing both the **pre-** and **post-***Miranda* silence of the Petitioner; and, at their least benign, phrased narrowly, specifically identifying and highlighting Petitioner's "two years" of post-*Miranda* silence.

Therefore, *Jenkins* is not the correct governing legal rule for the facts of this case, because *Jenkins* pertains **only** to prosecutorial questions and remarks on **pre-***Miranda* silence, whereas the case at bar contains prosecutorial questions and remarks inclusive of and encompassing both **pre-** and **post-***Miranda* silence. Hence, the State and District courts' reliance on *Jenkins* to dispute Petitioner's *Doyle*-violation claim is painfully misguided, and, if applied to the facts of this case, would amount to an unreasonable application of federal law that only works to contradict the governing legal rule set forth in *Doyle* and its progeny, specifically Brecht v. Abrahamson, supra.

In *Brecht*, a case in which the Supreme Court confronted a set of facts wherein both the **pre-** and **post-***Miranda* silence of a defendant was attacked at trial, the Supreme Court held that the State's **pre-***Miranda* silence attacks in that case were "entirely proper[,]" but, that its **post-***Miranda* silence attacks "crossed the *Doyle* line." Brecht, *at 628-29.* Your Petitioner is making that exact same argument here. Here, the State's **pre-***Miranda* silence attacks on the Petitioner were entirely proper, however, its **post-***Miranda* silence attacks "crossed the *Doyle* line." [*Id.*] Therefore, the State court's apparent reading of the *Jenkins* decision to mean that: *If **pre**-arrest silence is mentioned alongside **post**-Miranda silence, then it is reasonable to conclude that the jury may have construed the post-Miranda silence remarks as pre-arrest silence remarks*, is contrary to the *Brecht* holding.

It's clear from an objective analysis of the record that the State court committed two foundational errors when deciding Petitioner's *Doyle*-violation claim. The State court erred, first, by misconstruing the nature of Petitioner's claim of *Doyle* error, characterizing it as being based only on the first 2 improper post-*Miranda* silence questions asked of him by the prosecutor during cross-examination, and then analyzing and ruling only upon those 2 questions (*App. E* at 16-18); when, in fact, Petitioner's claim of *Doyle* error was that the prosecutor committed said error multiple times throughout the course of the trial—the remarks coming at least 12 different times and spanning from

cross-examination, to recross, to closing arguments, to rebuttal closing.

The State court's second error came when it allowed its objectively unreasonable determination of facts lead it to its misidentification of *Jenkins* as the correct and controlling Supreme Court precedent to the facts of Petitioner's claim. [*Id.*].

Therefore, since the State court looked only to the first 2 prosecutorial cross-examination questions touching on Petitioner's post-*Miranda* silence without looking to the 10 other questions and remarks touching on Petitioner's post-*Miranda* silence as well—as it says it did, and as is reflected in the record[6]—then the State court clearly failed to fully address Petitioner's claim, and thereby undermined the validity of its determination of facts and ultimate adjudication of Petitioner's claim under the strictures of AEDPA. Consequently, these two State courts errors of both fact and law have necessarily triggered habeas corpus relief under the functional dictates of AEDPA.

Petitioner contends that reasonable jurists would agree with the analysis of fact and law articulated above, and would therefore find the District Court's assessment and summary dismissal of Petitioner's claim debatable or wrong. Thus, the 4th Circuit Court's decision denying Petitioner a COA for said claim is in direct conflict with relevant decisions of the Supreme Court and the governing standard for habeas relief under AEDPA. Accordingly, a Writ of Certiorari is prayed.

C. <u>This is a Question of Significant Importance that Should be Settled by the Court</u>

In addition to the above, this case also involves a question of exceptional importance because not only were the prosecutorial post-*Miranda* silence remarks in question a violation of due process under *Doyle* and its progeny, but also because impeachment of a defendant by a prosecutorial assertion that the defendant's receipt of "discovery evidence" was used by him to tailor his trial testimony is fundamentally unfair and a distinct and separate Constitutional violation that implicates

---

[6] <u>See</u> *App. E* at 18: Wherein the WVSC, in affirming Petitioner's convictions, never mentioned the prosecutor's post-arrest silence remarks made during closing arguments, and specifically held: "We find that the prosecutor did not improperly ***cross-examine*** the petitioner regarding his post-arrest silence"; and "As a result, we find that the prosecutor did not improperly ***cross-examine*** the petitioner concerning his post-arrest silence." *Id.*

a defendant's rights to exculpatory evidence, the effective assistance of counsel (which includes the legally sacred attorney-client privilege), and to testify in his own defense—because said prosecutorial assertion transforms a defendant's 5th and 6th Amendment rights into an automatic burden on his credibility. Additionally, to force a defendant to either speak to law enforcement prior to taking the stand or be accused of tailoring his testimony to the discovery evidence would be the equivalent of compelling him to give evidence against himself. Up to this point, no court has even attempted to reasonably address and adjudicate these glaring Constitutional implications.

Petitioner has scoured every legal book and utilized every legal search engine available to him in an effort to find any case, other than his own, where a prosecutor was permitted to invoke a defendant's Constitutional right to exculpatory evidence as a means to impeach the defendant's trial testimony, and, not surprisingly, Petitioner has failed to find one other case anywhere in the country. Because of this extensive search, Petitioner is confident that no such other case exists. And this is likely because of the fact that a prosecutorial attack invoking a defendant's right to discovery evidence is not only an inherent and obvious attack on a defendant's post-*Miranda* silence, in violation of *Doyle*, and an inherent and obvious attack on a defendant's attorney-client privilege, in violation of *Weatherford v. Bursey, 429 U.S. 545, 552-58 (1977)*, but also because it is transparently odious to the due process of law clauses of the 5th and 14th Amendments, which allow for the criminally accused to know of and have access to certain evidence against them in preparation for trial. *Brady, 373 U.S. 83 (1963)*. For a prosecutor to take this due process-mandated entitlement of providing known exculpatory evidence to criminal defendants, and fashion that entitlement into a weapon to then attack the defendant's testimony at trial, is the epitome of fundamental unfairness.

Further, for a prosecutor to stand before a jury and declare that the only reason a defendant's testimony is so believable is because he tailored his testimony to the discovery evidence prior to trial is a declaration that would certainly tend to persuade a jury to reject a defendant's exculpatory defense, no matter how true or compelling; and is an accusation that provides no distinction between the innocent and the guilty—as *all* defendants, innocent and guilty alike, are entitled to discovery

evidence. Thus, the innocent are tarnished by and just as vulnerable to this accusation as the guilty.

Additionally, the prosecutor's argument in this instance is that much more egregious simply because it is contradicted by the record evidence in such an obvious way, as all of the evidence beneficial to Petitioner's defense was known by him well before his arrest or the State's disclosure of discovery. For example: Petitioner's dispute with the actual orchestrator of this crime, Joseph Medina, was known by Petitioner well before his arrest or the State's disclosure of discovery (*App. H(3)* at 241-44); the threats made back-and-forth between Petitioner and Medina were known by Petitioner well before his arrest and the State's disclosure of discovery (*Id.* at 244-47); the calls to police reporting Medina's threats against the victims of this crime were known by Petitioner well before his arrest or the State's disclosure of discovery (*Id.* at 247-63); the text message to Mr. Devonshire sent by the Petitioner immediately after the crime—wherein Petitioner alluded to certain aspects of his version of events, acknowledging that he was at the scene of the crime when the crime took place and that he was sorry he was unable to protect the victims from "them" (the assailants)—was known by Petitioner well before his arrest or the State's disclosure of discovery (*Id.* at 323-24); and the list goes on and on. And again, it cannot be overstated that Petitioner advised his counsel immediately after his arrest of the *exact* same version of events he testified to at trial.

In closing, the State and 4th Circuit Federal Courts have set a dangerous, new precedent in this case, which, by their rulings, now allows prosecutors in those jurisdictions to invoke defendants' due process-mandated receipt of discovery as a means to impeach defendants' credibility at trial. Therefore, this question: "Whether a prosecutor's invocation of a defendant's receipt of discovery evidence as a means to impeach his trial testimony—especially when his story told at trial was first conveyed to his attorneys and others long before discovery had been disclosed in the case—offends the U.S. Constitution?" is of such exceptional importance a Writ of Certiorari is prayed.

D. The *Doyle* error was not harmless

In *Doyle*, this Court held: "A judgement of a State...court affirming a...conviction...will be reversed by the U.S. Supreme Court, where the State uses post arrest silence after receipt of *Miranda*

warnings and where the State has not claimed...harmless error[.]" *Doyle, at 619-20.*

As described above, the State clearly and repeatedly used Petitioner's post-arrest silence after his receipt and assertion of *Miranda*, the State used said silence extensively and prejudicially, and the State has never claimed that the use of such was harmless error. And though the burden is on the State to demonstrate harmlessness, nevertheless, Petitioner feels compelled to briefly demonstrate that the above-described *Doyle* error can in no way be reasonably viewed as harmless.

In determining harmlessness, this Court has handed down the following factors to be considered: (1) whether the comments were isolated or pervasive (*Donnelly, 416 U.S. at 646*); (2) whether they were deliberately or accidentally placed before the jury (*Id. at 647*); (3) the degree to which the remarks had a tendency to mislead and prejudice the defendant (*Darden, 477 U.S. at 182; Young, 470 U.S. at 12*); (4) whether the remarks manipulated or misstated the evidence or implicated other specific rights (*Darden, at 182*; *Berger v. United States, 295 U.S. 78, 84-85*); (5) the strength of the overall proof establishing guilt (*Darden, at 182*); (6) whether the remarks were objected to by counsel (*Darden, at 182-83 and n. 14; Young, 470 at 13*); and (7) whether a curative instruction was given by the court (*Darden, at 182; Greer, at 766 n. 8*; *Caldwell v. Mississippi, 472 U.S. 320, 339*).

First, as discussed at length above, the prosecutor's remarks were pervasive, continuous, and thoroughly developed, as the prosecutor repeatedly informed the jury of Petitioner's post-*Miranda* failure to inform law enforcement of his exculpatory version of events. The prosecutor's repeated allusion to this point assured that it could not have been lost on the jury.

Second, said remarks were deliberately placed before the jury, stressed an inference of guilt to the same, and were specifically designed to render Petitioner's version of events and evidence worthless. Also, the prosecutor was instructed by the court not to comment on Petitioner's post-arrest silence; nevertheless, the prosecutor persisted in her attacks on Petitioner's post-arrest silence.

Third, the prosecutor's remarks had significant potential to mislead the jury and prejudice the accused, as the prosecutorial remarks raised the pointed assertion that Petitioner "never tells a living soul his story until he takes that stand," which implied to the jury that Petitioner hadn't even

conveyed his version of events to his attorneys before taking the stand—which was an outrageous declaration and patently untrue; and the prosecutor knew very well her declaration was untrue, as she was present at the pretrial hearing when Petitioner's counsel proffered a partial explanation to the court regarding Petitioner's version of events well before Petitioner took the stand. [*App. H(1)* at 20-21]. Additionally, the prosecutor openly acknowledged that Petitioner's testimony was plausible and believable, but then sought to overcome the believability of said testimony by the unlawful and unsubstantiated accusation of tailoring and perjury, which prejudiced the Petitioner.

Fourth, the prosecutor's remarks manipulated and misstated the evidence and implicated other specific rights in many ways. For example, the prosecutor's remark that the Petitioner "had two years to go through each and every record in the case, each and every phone record, each and every cell record, each and every statement," was wildly misleading and unduly prejudicial, as the only statement of a trial witness Petitioner ever laid eyes on was that of Joseph Medina. Petitioner never read, heard, or discussed any other statement by any other witness who testified at his trial. Further, said remark also specifically implicated Petitioner's rights to silence, evidence, and counsel.

Fifth, as noted in the Statement of the Case above, the strength of proof establishing Petitioner's guilt was not overwhelming, as the State's case establishing Petitioner's guilt relied primarily on circumstantial evidence (which could be argued either way), and the testimony of Joseph Medina, whose testimony was questionable for several reasons, including: (1) Medina, a convicted but not yet sentenced felon in an unrelated case, had entered into a plea deal with the State to testify against the Petitioner for leniency. [*App. H(3)* at 122-28]. (2) Medina initially spoke to police about the crime two years before Petitioner's trial, and, though he clearly and repeatedly attempted to implicate Petitioner in the crime, he never once mentioned or alluded to a confession made by the Petitioner. [*Id.* at 91-92, 115-16]. (3) Medina's testimony that Petitioner confessed a role in this crime to him was incredible, as Petitioner had called the police on Medina only days before the crime, and, as such, there is no rational argument that can then be made to make sense of a claim that Petitioner would then confess to Medina the murders of the very people Petitioner had

reported Medina as having threatened. (5) And, lastly, from the very moment Medina took the stand he was contradicting himself and fumbling over his story. [*Id.* at 64-96]. He was then cross-examined and impeached on every primary type of impeachment evidence imaginable. [*Id.* at 96-138].

Additionally, while Medina testified that Petitioner had confessed a role in this crime to him, Petitioner testified that Medina was integrally involved in the crime and that Medina's testimony regarding a confession made by the Petitioner was false testimony specifically invented by Medina to ensnare the Petitioner for the crime Medina and his cohorts had committed. Only one of them (Petitioner or Medina) could've been telling the substantive truth. The one telling the truth would, therefore, likely be the innocent party; and the other the guilty party. Thus, their conflicting testimony essentially made the trial a credibility contest between the two, thereby making the prosecutor's unlawful post-*Miranda* silence attacks on Petitioner that much more prejudicial to him.

Sixth, counsel objected to the first two improper post-*Miranda* silence remarks, each of which were overruled by the trial court; thereby permitting the prosecutor to continue her post-*Miranda* silence line of questioning and argument.

Seventh, no curative instructions were given to the jury on this issue at all. The absence of a curative instruction likely left the jury with the false impression that the prosecutor's references to Petitioner's post-*Miranda* silence were proper, appropriate, and well within their rights as jurors to consider when convicting the Petitioner of the charged crimes.

In addition to all of the above, it's clear the prosecutor chose to focus her closing argument primarily on Petitioner's **post**-*Miranda* silence, rather than on his **pre**-arrest silence, because Petitioner's pre-arrest silence was not as damaging to his testimony as the prosecutor would have liked, as the Petitioner—though silent in regard to his exculpatory story amongst strangers—had in fact conveyed significant portions of his exculpatory story, pre-arrest, to two people who *were not* strangers to him: his son's mother, Katie Draughon, and the victim's father, Mr. Devonshire.

Lastly, because the crucial issue at trial was witness credibility, the *Doyle* violation cut to and contaminated the core of the truth seeking process. The evidence against Petitioner was not potent,

his story was not implausible, and the trial court's cautionary instruction was not existent. In short, if the jurors had credited Petitioner's testimony, they were duty-bound to acquit him. Thus, the State's improper use of Petitioner's post-*Miranda* silence to impeach him had "a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, supra.

– Summary of the reasons for granting the writ based on the above particular question: (1) The State and lower federal courts' decision on this matter conflicts with the controlling decisions of the U.S. Supreme Court and sets a dangerous new precedent that essentially strips from the citizens in those jurisdictions significant Constitutional rights. (2) This issue provides the Court the opportunity to revisit *Miranda* and *Doyle* in order to either reaffirm or overrule the States' federal obligation to advise its criminally accused of their rights to silence and an attorney upon arrest. (3) The issue of a State invoking due process-mandated "discovery" in an effort to impeach defendants' testimony appears to be one of first impression with the Court; it presents the Court with a question of significant importance; and it provides the Court the opportunity to definitively determine whether the U.S. Constitution is offended by such an invocation. Thus, a Writ of Certiorari is prayed.

Question 2. When a petitioner asserts a claim for habeas relief under AEDPA and cites the correct and controlling "clearly established" Supreme Court precedent in support thereof, does the lower court frustrate the efficacy and viability of the AEDPA as intended by Congress by refusing to apply said precedent when assessing the petitioner's claim?

In Petitioner's *Doyle*-violation claim raised in his federal habeas petition to the lower federal courts, Petitioner alleged that at trial the State impeached him utilizing his post-*Miranda* silence, and that the State court's decision finding otherwise was: (1) based on an "unreasonable determination of the facts in light of the evidence," (*§ 2254(d)(2)*) and (2) was "contrary to...clearly established federal law" (*§ 2254(d)(1)*) as determined by the Supreme Court in *Doyle*.

In *Lockyer v. Andrade, 538 U.S. 63 (2003)*, this Court held: "[T]he only question that matters under § 2254(d)(1) . . . [is] whether a state court decision is contrary to, or involved an unreasonable application of clearly established federal law." In deciding this question, the reviewing court "must first decide what constitutes such 'clearly established' law." *Id.* "Under § 2254(d)(1), 'clearly

established federal law' is the governing legal...principles set forth by [the Supreme] Court at the time a state court render[ed] its decision." *Id.*

At the time the State court rendered its decision in Petitioner's case, the Supreme Court's cases of *Doyle*, *Greer*, and *Brecht* were clearly established law and a model of clarity regarding what factors constitute a violation of due process when a State uses a defendant's post-*Miranda* silence at trial (see *Greer*, supra.); thereby "dictat[ing] that the [State] court apply...[those] test[s] at the time th[e] [State] court entertained [Petitioner's *Doyle*] claim." *Williams v. Taylor, 529 U.S. 362, 391 (2000).* Accordingly, in order to have obtained relief on his *Doyle* claim under *§ 2254(d)(1)*, Petitioner had to demonstrate to the federal court that the State court decision rejecting his claim either: (1) "applied a rule...contradict[ing] the governing law set forth in" *Doyle* and its progeny, or (2) "confront[ed] a set of facts that were materially indistinguishable from" *Doyle* and its progeny "and nevertheless arrive[d] at a result different from [those] precedent[s]." *Id. at 405-406.*

Petitioner contends he did just that when he demonstrated that the State court's application of *Jenkins* to the facts of his case "contradict[ed] the governing law set forth in" *Greer* and *Brecht* (see *App. G* at 6-7); and that the State court "confront[ed] a set of facts materially indistinguishable from" *Brecht*, but "nevertheless arrived at a result different" from that precedent. [*Id.*].[7]

The District Court, in assessing Petitioner's claim, failed to analyze Petitioner's claim under the strictures set out in *Doyle* and its progeny, even though Petitioner had clearly and repeatedly cited those Supreme Court precedents as controlling his claim. [*App. F* at 4-14]. Instead, the District Court arbitrarily chose to hang its legal determinations of Petitioner's *Doyle* claim on Federal law

---

[7] After determining in *Brecht* that the prosecutorial post-*Miranda* silence remarks made in that case—despite those remarks being sprinkled amongst properly raised **pre**-*Miranda* silence remarks—were in fact a due process violation under *Doyle*, the Supreme Court went on to conduct a harmless error analysis of the violation, and found the error harmless. The State and lower federal courts in the case at bar, however, by refusing to acknowledge the obvious *Doyle*-violation at Petitioner's trial, have thus "confront[ed] a set of facts...materially indistinguishable from a decision of [the Supreme Court]...[but have] nevertheless arrive[d] at a result different from [the Court's] precedent [in *Brecht*]." *Williams v. Taylor, 529 U.S. 362, 406 (2000).*

pertaining only to improper prosecutorial remarks and misconduct. [*App. B* at 13-26; and *App C* at 23-33]. And though a prosecutor's use of a defendant's post-*Miranda* silence at trial can also be raised as prosecutorial misconduct in a § 2254 petition, in this instance, however, and under the particular circumstances of this case, Petitioner's post-*Miranda*-silence claim is properly analyzed under the strictures of *Doyle*. See *Greer, at 764-65*.

Additionally, the District Court also ignored the edicts of *§ 2254(d)(2)* when assessing Petitioner's claim, as the Magistrate Judge asserted in his *R&R* that "Petitioner...does [not] allege that the state court's adjudication [of his *Doyle*-violation claim] resulted in a decision based on an unreasonable determination of the facts." [*App. C* at 33]. Which was a flagrant inaccuracy, as Petitioner did in fact assert that the State court's adjudication of his *Doyle*-violation claim was based on an unreasonable determination of the facts in light of the evidence; and Petitioner did so not only once, but at least three different times in regard to that specific ground alone. [See *App. F* at 5, 13 (*n.4*), and 14]. Despite this inaccuracy, the District Court adopted said *R&R* and failed to address the fact that the State court's determination of facts omitted the acknowledgment and analysis of at least 10 prosecutorial post-*Miranda* silence remarks challenged by the Petitioner, and then proceeded to summarily deny and dismiss Petitioner's claim. [*App. B* at 13-26].

Petitioner contends the District Court could not possibly obey the prevailing law and edicts of *§ 2254(d)(1)* and determine whether or not the State court decision made regarding his *Doyle*-violation claim "was contrary to...clearly established federal law, as determined by the Supreme Court," when the District Court so blatantly refused to properly consider, or even recognize, the clearly established Supreme Court precedents controlling the *Doyle* issue. Nor could the District Court obey the edicts of *§ 2254(d)(2)* and properly adjudicate whether the State court's decision was an unreasonable determination of the facts in light of the evidence, when the District Court failed to address or even acknowledge that the State court had omitted from its consideration of Petitioner's *Doyle* claim at least 10 post-*Miranda* silence remarks that surely might have affected the State court's decision if considered. And the 4th Circuit Court of Appeals approved the District Court's

Wainwright, 477 U.S. 168 (1986) and *In re Murchison, 349 U.S. 133 (1955)*. [*App. F* at 22-43].

Additionally, in one particularly egregious instance of an improper prosecutorial remark made specifically to inflame, the prosecutor, during closing arguments, first informed the jury: "[A]nd oh, by the way, according to [the Petitioner's] last novel he's writing another book. What a perfect book." [*App. H(5)* at 60:11-13]. Thereby implying that Petitioner was currently writing a book about this crime. Then, shortly thereafter, the prosecutor told the jury: "And [the Petitioner] made this story up because he can sit there and tell the greatest story in the world because after all, if you convict him he goes to prison. If you buy his story, you buy his book." [*Id.* at 64:10-13]. This outrageous comment suggested to the jury that if they had a reasonable doubt as to Petitioner's guilt and acquitted him because of that doubt, Petitioner would gain some sort of financial windfall or literary success as a result thereof, and that he would capitalize off of a verdict of acquittal by taking the book that he was supposedly writing about this tragic crime and selling it to the public. This comment was clearly made only for the explicit purpose of inflaming the jury.

The District Court disposed of Petitioner's prosecutorial misconduct claim primarily by first disposing of his *Doyle*-violation claim. [*App. B* at 30-36]. In regard to the outrageous prosecutorial remark quoted above, the District Court, just like the State courts before it, completely failed to specifically address or even mention it. [*Id.*].

In his Motion for a COA to the 4th Circuit Court of Appeals, Petitioner argued that reasonable jurists would find the District Court's assessment of his prosecutorial misconduct claim debatable or wrong because, *inter alia*: (1) The prosecutor clearly and repeatedly attacked the Petitioner's post-*Miranda* silence at trial, in violation of *Doyle*; which, all by itself, is the sort of misconduct that would entitle a petitioner to relief. (2) Even if the challenged prosecutorial remarks didn't violate *Doyle*, they were clearly made in an attempt to violate *Doyle*, and, according to *Greer, at 765*, a prosecutor's attempt to violate *Doyle* is misconduct as well, and, if found to be sufficiently prejudicial, would still entitle the Petitioner to relief. And (3) The improper prosecutorial remark quoted above—in which the prosecutor invited the jury to find the Petitioner guilty in order to keep

him from attempting to capitalize financially from a verdict of acquittal—was so outrageous and unethical it absolutely screams out for redress. [*App. G* at 10-12].

The 4th Circuit Court of Appeals denied Petitioner a COA on this matter, apparently finding that reasonable jurists would not even find debatable the District Court's assessment and summary dismissal of Petitioner's prosecutorial misconduct claim. Petitioner disagrees with this finding and respectfully requests that this Court weigh in on the matter.

Second, and in line with the holdings of *Murchison*, Petitioner demonstrated that the trial court, *inter alia*: allowed the prosecutor, over defense objection, to attack Petitioner's post-*Miranda* silence, in violation of *Doyle*. [*App. F* at 31-43].

In one particularly egregious example of judicial bias, the trial court—during a pre-trial motions hearing, and while engaged in a discussion with the prosecutor and defense counsel regarding what the evidence at trial might demonstrate regarding Petitioner's defense—announced:

> **(The Court)**: What I'm saying is that [Mr. Prophet] knew [the crime] was going to happen two or three days beforehand and he called 911 to say Joseph Medina is going to commit this crime and then two or three days later he voluntarily went along with [Medina] to commit the crime that he had knowledge of two or three days in advance and he went along with him when the crime was committed. He's just as guilty. [*App. H(1)* at 17:17-24]

Petitioner contends that the above particular statement made by the trial court in the above particular context clearly demonstrates the court's bias formed against the Petitioner before trial. For a trial judge, on the precipice of a fully contested and media saturated murder trial, to unabashedly announce certain presumptions adverse to the Petitioner and his defense is a clear exhibition of actual bias. In fact, to the astonishment of the Petitioner—and under the hypothetical circumstances of a scenario the judge has created in his own mind—the judge actually declares in open court that the Petitioner is "just as guilty" as Joseph Medina in the commission of the murders for which Petitioner is set to go on trial for the very next day. This was an outrageous and clearly biased remark, and an unlawful presumption on the court's part, as the only presumption tolerated in our nation's system of criminal justice is the presumption of a man's innocence. See *Coffin v. United*

type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Id.* Petitioner contends that just such a pattern of misconduct as anticipated by *Brecht footnote 9* occurred in this case. (3) This issue provides the Court the opportunity to determine whether certain pretrial actions and declarations of a trial court undermine the presumption of innocence guaranteed by the Constitution, and whether *Brecht footnote 9* should apply to such misconduct. Thus, a Writ of Certiorari is prayed.

Question 4. Is the right to effective counsel violated when counsel, *inter alia*, fails to object at trial to a prosecutorial assertion that the defendant tailored his trial testimony to the discovery evidence, especially when the attorney knows such an assertion to be false because the defendant told the attorney the exact same version of events testified to at trial immediately after his arrest and long before discovery had been disclosed in the case?

In Petitioner's ineffective assistance of counsel claim raised in his § 2254 habeas petition, and in line with the holdings of *Strickland, 466 U.S. 668 (1984)*, Petitioner demonstrated that his trial counsel was ineffective for, *inter alia*, failing to **continuously** object to the prosecutor's *Doyle*-violating attacks on his post-*Miranda* silence. [*App. F* at 43-48].

And while the principle of "continuing objection" noted in *State v. Walker, 207 W.Va. 415, 533 S.E. 2d 48, 51-52 (2000)*, relieves counsel from the duty of repeatedly objecting to the same or similar objected to issues previously overruled by the court, Petitioner contends that the prosecutorial assertion that Petitioner "never tells a living soul his story until he takes th[e] stand" and that he was silent in regard to his exculpatory story for 2 years because he was tailoring his testimony to the evidence was so blatantly false and egregious, counsel had a duty to be persistent in their efforts to stop it. Further, said prosecutorial assertion was extremely prejudicial to Petitioner because it had the potential to induce the jury into believing that Petitioner really *hadn't* conveyed his exculpatory story to anyone prior to trial, including his attorneys, and that he really *had* spent the "two years" before trial tailoring his testimony to the discovery evidence. Defense counsel's silence on the matter

and failure to object to this false assertion likely caused the jury to infer that the prosecutor's assertion was not only proper and permissible, but was, in fact, true. The likelihood of such a sentiment amongst the jurors, no matter how slight, was extremely prejudicial to the Petitioner.

The District Court summarily disposed of Petitioner's ineffective assistance of counsel claim. [*App. B* at 54-60]. The 4th Circuit Court of Appeals then denied Petitioner a COA on the issue, apparently finding that reasonable jurists would not even find debatable the District Court's assessment and summary dismissal of the claim. Petitioner disagrees with this finding and respectfully requests that this Court weigh in on the matter. Thus, a Writ of Certiorari is prayed.

Question 5. Could reasonable jurists disagree with or find debatable the District Court's assessment and summary dismissal of Petitioner's § 2254 petition, and, if so, did the 4th Circuit Court of Appeals err in denying Petitioner a COA?

Petitioner contends that reasonable jurists would find debatable or wrong the District Court's assessment and summary dismissal of Petitioner's § 2254 petition; and, therefore, the 4th Circuit Court of Appeals' decision denying Petitioner a COA was error that conflicts with relevant decisions of this Court. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner respectfully requests that the Court review the trial record and briefs appended hereto, and, even if the Court finds Petitioner's *Questions* unworthy of a Writ of Certiorari, that the Court at the very least Orders the 4th Circuit Court of Appeals to grant Petitioner a COA.

CONCLUSION

For the foregoing reasons, and in the interests of justice, Petitioner prays that this Honorable Court, the United States Supreme Court, grants this petition for a writ of certiorari; or, in the alternative, orders that the 4th Circuit Court of Appeals grant Petitioner a COA.

Date: 4/14/2021

Respectfully submitted,

Antonio Prophet, *pro se*