No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TYRUS D. COLEMAN – PETITIONER

VS.

RON NEAL – RESPONDENT

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner shot on his property in quick succession two armed and threatening trespassers, who were father and son. He shot the father when he marched up to within close range of him while holding a handgun. He then shot the son, who was already within close range of Petitioner, when he saw him draw his weapon and start to point it at Petitioner upon seeing Petitioner shoot his father. The first trespasser shot by Petitioner survived but the second died, and Petitioner was charged with attempted murder and murder. A jury acquitted him of the murder charge but hung on the attempted murder. A second jury at a retrial found him guilty of the attempted murder. The Indiana Court of Appeals held that the retrial and conviction for attempted murder was precluded by the Double Jeopardy Clause. A federal district court found the Indiana Supreme Court's subsequent decision affirming the conviction unreasonable for purposes of 28 U.S.C. 2254(d), on the ground that it addressed a "straw-man" argument instead of Petitioner's actual argument or the reasoning of the Court of Appeals, but nevertheless denied habeas relief on an alternate ground not argued or presented by the parties. The Seventh Circuit, in a Per Curiam opinion, did not mention the district court's alternate ground for denial, but knocked down the same "straw man" knocked down by the Indiana Supreme Court, and then in one sentence dismissed Petitioner's actual argument without explanation as "implausible," "based on state law," and "evidently found wanting" by the "state's highest court." The questions presented are:

1. Whether, even after *Wilson v. Sellers*, 584 U. S. ___, 138 S. Ct. 1188 (2018), when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion, but only gives reasons that knock down a "straw man" not briefed or argued by the prisoner, a federal habeas court must still defer to that state court's ultimate *ruling*, even though the last related state-court decision that *does* provide a relevant rationale ruled for the prisoner.

2. Whether the Seventh Circuit properly applied the issue-preclusive aspect of the Double Jeopardy Clause with the "realism and rationality" required by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), where the Seventh Circuit found the State of Indiana was not forbidden by the Double Jeopardy Clause from attempting to criminally convict Petitioner at a retrial for the first of two immediately connected shootings, even though a prior jury at an earlier trial had already acquitted Petitioner for the second shooting on the ground of self-defense, after being instructed that a person cannot have acted in self-defense if he provoked, instigated, or participated willingly in the violence.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Tyrus D. Coleman respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at 990 F.3d 1054. The opinions of the United States District Court appear at Appendices B and C to the petition and are unpublished. The order of the United States Court of Appeals denying rehearing appears at Appendix D to the petition and is unpublished. The opinion of the highest state court to review the merits appears at Appendix E to the petition and is reported at 946 N.E.2d 1160. The opinion of the Indiana Court of Appeals appears at Appendix F to the petition and is reported at 924 N.E.2d 659.

JURISDICTION

The date on which the United States Court of Appeals decided the petitioner's case was March 11, 2021. A timely petition for rehearing was denied by the United States Court of Appeals on April 23, 2021, and a copy of the order denying rehearing appears at Appendix D. As set forth in the Supreme Court's July 19, 2021 order rescinding its orders of March 19, 2020 and April 15, 2020 relating to COVID-19, the deadline to file a petition for a writ of certiorari remains extended to 150

days from the date of the order denying rehearing, to and including September 20, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a State criminal defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in relevant part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .

The Fourteenth Amendment provides in relevant part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves the application of 28 U.S.C. § 2254(d), which states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This case involves the application of two relatively recent decisions of this Court: *Yeager v. U.S.*, 557 U.S. 110 (2009) and *Wilson v. Sellers*, 584 U. S. ___, 138 S. Ct. 1188 (2018). *Yeager* holds that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause. *Wilson* holds that, when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion, a federal habeas court simply reviews the specific reasons given by the state court and "defers to those reasons if they are reasonable," but when the last state court to decide a prisoner's federal claim does not explain its decision on the merits in a reasoned opinion, a federal habeas court should "look through" that decision to the last related state-court decision that does provide a relevant rationale and presume that the unexplained decision adopted the same reasoning.

The Indiana Court of Appeals held that *Yeager* applied to bar Coleman's retrial for attempted murder and reversed his conviction. The Indiana Supreme Court then vacated the decision of the Indiana Court of Appeals and affirmed Coleman's conviction. On federal habeas review, the district court found that, while the Indiana Supreme Court's written opinion gave reasons for its decision, those reasons addressed a "straw man" rather than Coleman's actual argument and were therefore unreasonable. Nevertheless, the district court believed itself bound by this Court's precedents to defer to the Indiana Supreme Court's decision, and to look for

reasons that "could have supported" the decision. It did so and denied Coleman's habeas petition. The Seventh Circuit, on the other hand,

Although this Court in *Wilson* described the approach to be taken when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion as involving a "straightforward inquiry" that it had affirmed "time and again," since *Wilson* several Circuits have nevertheless expressed doubt and confusion on this point. And indeed, from the language this Court used in *Wilson*, it is not crystal clear whether this Court meant only to say that a federal habeas court should not defer to unreasonable *reasons*, which seems too obvious for words, or whether it meant also and primarily to say that a federal habeas court should not defer to state-court *decisions* that are based on unreasonable reasons.

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." However, most of this Court's decisions interpreting this provision have "found more guidance in the common-law ancestry of the Clause than in its brief text."

Collateral estoppel, or issue preclusion, had already been an established rule of federal criminal law for more than 50 years when this Court first determined and held, in *Ashe v. Swenson*, 397 U.S. 436 (1970), that this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy, and is therefore enforceable against the States through the Fourteenth Amendment. First developed even earlier in civil litigation, Mr. Justice Holmes explained its extension and application to criminal law in these terms: "It cannot be that the safeguards of

the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916).

This Court most recently has formulated the rule of *Ashe* as follows: "To say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, we must be able to say that 'it would have been *irrational* for the jury' in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second." *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018) (citation omitted).

STATEMENT OF THE CASE

A. Factual Background

Sometime in November 2006, Anthony Dye ("Dye") was robbed by Omar Sharpe ("Sharpe") and another man. During the robbery, the men took money and Dye's gold chain. Because Dye knew that the two men were associated with a recording studio owned by Coleman, he went to Coleman's studio, armed with a handgun for protection, to talk to Coleman about the robbery. Although Coleman did not know about the robbery, he apologized to Dye and offered to find out what he could. Coleman was able to recover Dye's gold chain from Sharpe and called to arrange a time to return it in December. At some point after retrieving the gold chain from Coleman, Dye found out that Coleman had bonded Sharpe out of jail. Dye called Coleman to express his displeasure with this and to tell him that if Dye found out

that Coleman had anything to do with the robbery, "there would be problems for [Coleman]," which Coleman understood as a threat to his life. App. F.[1]

In February 2007, Dye's son, Jermaine Jackson ("Jermaine"), heard about the robbery and called Dye to inquire as to why Dye had not told him about it. Dye told Jermaine that he had not mentioned it because he did not want Jermaine to get in any trouble. On March 18, 2007, Dye received a call from Jermaine, who told Dye that Sharpe was located at an apartment complex in Elkhart. Dye told Jermaine, "Don't do nothing. I'm on my way." When Dye was on his way to the apartment complex, Jermaine called back to let Dye know that Sharpe had already left. After going to the shooting range with a friend, Jermaine had the friend drive him to Coleman's recording studio because he said he had "to do something for his dad." When they arrived at the studio, Jermaine saw another friend and asked this friend to go get Sharpe. The friend went inside the studio and told Sharpe that Jermaine wanted to see him. During this time, Jermaine had walked around to the entrance of the studio. *Id.*

Coleman stepped outside and asked Jermaine what was going on, to which Jermaine replied, "You already know." While Coleman was talking to Jermaine, Sharpe walked outside to see what Jermaine wanted. Within seconds, Jermaine

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[1] The Petitioner's Appendices are cited herein as "App. ___." For items not included in the Appendices, "Dkt. No. ___" refers to the district court docket number at which the item appears, and "App. Dkt. No. ___" refers to the docket number in the Seventh Circuit at which the item appears. A copy of the record from the state court was filed in the district court under docket entry 19. For ease of reference, this Petition cites to the transcript from Mr. Coleman's 2008 trial as "Tr. 1" and the transcript from Coleman's 2009 trial as "Tr. 2."

pulled a handgun out of his waistband and pointed it at Sharpe, who ran back into the studio. Jermaine chased Sharpe and a struggle occurred between Jermaine, who was trying to push the studio door open, Sharpe, who was closing the door to prevent Jermaine from entering, and Coleman, who was trying to keep Jermaine from raising the gun at anyone. Eventually, Sharpe and Coleman were able to get the studio closed, leaving Jermaine and Coleman outside. Jermaine returned the handgun to the waistband of his pants. *Id.*

Coleman continued to attempt to calm Jermaine down and to ask him to leave. Jermaine then began calling people on his cell phone and asking them to come to the studio, despite Coleman's requests not to do so. Jermaine called Dye, who was riding around with his girlfriend, and told Dye to come over to the studio immediately. Although Jermaine did not tell him so, Dye had a "gut feeling" that Sharpe was at the studio. Dye retrieved a handgun from the engine of his car, where he stored it, and had his girlfriend drive him over to Coleman's recording studio. At some point during this time, Coleman retrieved a handgun from inside of the studio, which he held in his hand for the remainder of the confrontation. Coleman also called Jermaine's cousin and friend, Otis Jackson ("Otis"), and asked him to come over to try to calm Jermaine down. *Id.*

During this time, Coleman's son had been playing basketball in the front of the house. Coleman told his son to go inside of the studio. The son attempted to leave the studio, and Coleman, motioning with his handgun, ordered the boy back in the studio. When Otis arrived, he tried to get Jermaine to calm down by telling him it

"wasn't worth it," that there were kids around, and that he should just leave. Coleman also stated that his son was inside of the studio and that Jermaine should respect that. Jermaine replied, "F**k that. [Sharpe] didn't think about that sh*t when he did this sh*t to my Daddy." Jermaine also stated that he was going to "beat [Sharpe's] ass" and "pop him." *Id.*

Shortly thereafter, Dye arrived and entered the backyard area near the studio. Dye held a handgun in his right hand, down at his side, and pointed at the ground. Otis testified that Dye appeared "pretty aggressive" when he walked into the backyard and looked "like he was there to take care of some business." When Dye walked toward Jermaine, he saw that Coleman had a gun in his hand and was standing near the studio door. Dye then stated, "F**k all that sh*t. Where the n**ger at," referring to Sharpe. As Dye came within feet of him, Coleman raised his gun and shot Dye twice. Jermaine then pulled out his handgun and began shooting at Coleman; Coleman turned and shot at Jermaine. The entire exchange of gunfire lasted three seconds. Jermaine died as a result of his injuries, but Dye survived. *Id.*

B. Proceedings Below

The State charged Coleman with murder for killing Jermaine and attempted murder, a Class A felony, for shooting Dye, who survived his injuries. On February 11-13, 2008, a jury trial was held, at which Coleman argued that he acted in self-defense when he shot Jermaine and Dye. App. F at 5.

The entire confrontation outside Coleman's studio between Coleman, Jermaine and Dye was captured on video by a surveillance camera. This video was shown to

the jury. The video shows that, after Coleman raised his gun and pointed it at Dye, Dye ducked (while raising his own gun and pointing it at Coleman) and fell forward to the ground and landed on his stomach, after which he apparently lost consciousness and did not move. The forensic evidence presented at trial showed that Dye had been shot twice – once in the head area and once in the upper torso. It also contradicted the clearly erroneous findings by both the Indiana Supreme Court and the Seventh Circuit that Coleman had shot Dye after he was on the ground. App. G; Tr. 1 at 89; Tr. 2 at 189-90, 548.

The jury was instructed as follows as to the justification of self-defense:

> It is an issue whether the Defendant acted in self-defense.
>
> A person may use reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of unlawful force.
>
> A person is justified in using deadly force, and does not have a duty to retreat, only if he reasonably believes that deadly force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony.
>
> However, a person may not use force if:
>
> He is committing a crime that is directly and immediately connected to the confrontation;
>
> He provokes a fight with another person with intent to cause bodily injury to that person; or
>
> He has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight.
>
> The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

App. F 8.

At the conclusion of the trial, the jury found Coleman not guilty as to murder but was unable to reach a verdict as to attempted murder. The trial court set Coleman's attempted murder charge for another trial. On November 10, 2008, Coleman filed a motion to dismiss the attempted murder charge by reason of collateral estoppel. After a hearing, the trial court denied the motion. Coleman was retried on the attempted murder charge on March 16-18, 2009, and the jury found him guilty. He was sentenced to an aggregate sentence of forty-five years.

In reversing Coleman's conviction based on the doctrines of double jeopardy and collateral estoppel and holding that Coleman's motion to dismiss should have been granted, the Indiana Court of Appeals reasoned that, since the jury in the first trial must have determined that Coleman acted in self-defense when he shot Jermaine in order to find him not guilty as to the murder of Jermaine, the jury also necessarily decided, based on instructions given to them reflecting the principle that a person cannot have acted in self-defense if he provoked, instigated, or participated willingly in the violence, that Coleman's use of force against Dye was also not a crime. App. F 7-8.[2]

[2] This principle existed in the case law prior to the enactment of any self-defense statute. *Banks v. State*, 276 N.E.2d 155, 158 (Ind. 1971); *Runyan v. State*, 57 Ind. 80, 84 (1877) (citing Wharton on Criminal Law for the proposition that the right of self-defense "is founded on the law of nature; and is not, nor can be, superseded by any law of society").

The Indiana Supreme Court granted transfer, thereby vacating the opinion of the Court of Appeals, and then affirmed Coleman's conviction in its own written opinion issued on May 18, 2011. App. E. But, as the federal district court recognized, the Indiana Supreme Court in its written opinion "wholly misconstrued" Coleman's actual argument on the collateral estoppel issue and ignored the reasoning of the Court of Appeals. Furthermore, the Indiana Supreme Court's description of the facts varied materially from that of the Court of Appeals and was contrary to the evidence presented at trial. Most significantly, the Indiana Supreme Court falsely implied that Coleman shot Dye after he had already fallen to the ground and was no longer a threat: "As Dye stepped in front of Coleman, Coleman raised his gun and fired at Dye, who immediately fell to the ground. Coleman then shot Dye a second time." But the testimony of Dr. David VanRyn (misspelled VanRyan in the transcript of the first trial) at both trials had clearly established that the shot to the head area had entered Dye's body from the front and exited the back, and that, although the path of the shot to the upper torso seemed to Dr. VanRyn "less obvious" than the shot to the head area, the wound on the chest appeared more uniform and more regular than the wound on the back, which suggested to Dr. VanRyn that the entrance wound was on the chest and the exit wound was on the back. App. G; Tr. 1 at 89; Tr. 2 at 189-90, 548.

After the Indiana Supreme Court's decision affirming Coleman's conviction, Coleman filed a petition for post-conviction relief in State court, alleging ineffective assistance of trial counsel. Although Coleman's lead counsel testified at the post-

conviction hearing that his trial counsel had performed deficiently, the trial court denied his post-conviction claims, the Indiana Court of Appeals affirmed, and the Indiana Supreme Court denied transfer.

Coleman then filed pro se a habeas corpus petition in federal district court, raising as Ground One the claim that his conviction for Attempted Murder violates the doctrine of issue preclusion embodied in the Fifth Amendment guarantee against double jeopardy, and as Ground Two the claim that he was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution. Dkt. No. 1 at 3.

The federal district court denied the habeas corpus petition, and initially denied a certificate of appealability pursuant to Section 2254 Habeas Corpus Rule 11, but after considering the arguments presented by Coleman, now represented by pro bono counsel, in a Rule 59(e) motion to alter or amend the judgment, granted a certificate of appealability "on the issues of the proper standard of review for the issue preclusion claim and whether, under that standard, the issue preclusion claim entitles Coleman to habeas relief." App. C at 8.

The federal district court, as noted above, found:

> Significantly, the Indiana Supreme Court's reasoning, though internally sound, wholly misconstrues Coleman's argument and omits any mention of the reasoning of the Court of Appeals of Indiana. Indeed, Coleman's argument regarding issue preclusion remained consistent at each relevant stage of litigation from his motion to dismiss to the instant habeas petition, and there is no apparent explanation as to why the Indiana Supreme Court declined to address it. This discrepancy raises the question of which standard of review I should apply to the Indiana Supreme Court's decision.

App. B at 9.

Based on *Harrington v. Richter*, 562 U.S. 86, 98 (2011), *Johnson v. Williams*, 568 U.S. 289, 293 (2013), *Brady v. Pfister*, 711 F.3d 818, 826 (7th Cir. 2013), and *Whatley v. Zatecky*, 833 F.3d 762, 775 (7th Cir. 2016), the district court concluded that it must apply the deferential standard of review described in *Harrington*, rather than de novo review, to the judgment of the Indiana Supreme Court, even though the opinion of the Indiana Supreme Court did not address the substance of Coleman's argument. That is, the district court concluded that, since the Indiana Supreme Court's decision, although purporting to give reasons for its decision, was in fact "unaccompanied by an explanation," it must ask not only what arguments or theories in fact supported the state court's decision, but also what arguments or theories "could have supported" the state court's decision. *Id.* at 9-10. Applying this standard of review from *Harrington*, the district court further concluded that an argument that the jury in the first trial could have based its acquittal not on self-defense but on a lack of proof beyond a reasonable doubt that Coleman acted "knowingly" when he shot Jermaine "could have supported" the Indiana Supreme Court's decision, *id.* at 12, even though (1) the Indiana Supreme Court's decision was not in fact based on this argument or theory, (2) the State had not made this argument either on appeal in the State courts or in its response to Coleman's habeas corpus petition in federal court, (3) the State had expressly conceded at oral argument before the Indiana Supreme Court that the jury could not have rationally based its acquittal on any ground other than self-defense.

In its Opinion and Order on Coleman's Rule 59(e) motion to alter or amend the judgment, it which it altered its judgment by granting a certificate of appealability on the issue preclusion claim, the district court reiterated that the Indiana Supreme Court's decision "did not meaningfully address Coleman's argument or the reasoning of the lower appellate court," and presented the district court with an "unusual straw-man situation." It reiterated its belief that the fact that the Indiana Supreme Court had shot down a straw-man instead of Coleman's actual argument, although making it a case in which "the last state court to render a decision offers a bad reason for its decision," nevertheless still required under Seventh Circuit precedent the highly-deferential standard of review from *Harrington*. App. C at 4. In response to Coleman's argument that that Seventh Circuit precedent was flawed and that the district court should have applied a de novo standard of review, the district court judge stated that even if he had applied the de novo standard of review he would not have granted habeas relief based on the issue preclusion claim, based on his belief that a rational jury could have reasonably doubted that Coleman "knowingly" shot Jermaine when he shot him, and could have based its acquittal on the "knowingly" element of Attempted Murder rather than self-defense. *Id.* at 5. But in addition, the district judge now added:

> Furthermore, the respondent suggested yet another alternative rationale for the acquittal of Coleman. Recall that Coleman's issue preclusion argument requires the assumption that the jury interpreted the self-defense instruction's reference to "the confrontation" as the shooting of Jackson separate and apart from the shooting of Dye. The respondent argued that the jury may have rationally interpreted "the confrontation" as encompassing the events from the time Jackson arrived at Coleman's recording studio until the shooting of Jackson. This would also include the shooting of Dye. Under this

> interpretation, the jury could have found that Coleman did not commit any crime that was "directly and immediately connected to the confrontation" without consideration of whether the shooting of Dye was a crime. Significantly, the jury was presented with a single self-defense instruction for both charges; the jury instructions did not define "confrontation"; and the two shootings occurred over the course of three seconds. Considering the foregoing, the jury could have rationally interpreted "the confrontation" as encompassing both shootings and then rationally acquitted Coleman based on this broader interpretation.

Id. at 6-7.

Coleman had refuted that argument, as well as the State's only other argument in the district court (which the district court apparently did not credit), in his traverse as follows:

> The entire substance of the Respondent's argument that Coleman's retrial did not violate double jeopardy protections is contained in this assertion on pages 12-13 of his Return: "To read the instruction as Coleman does requires two unsupported assumptions: that the 'crime' must only be the shooting of Dye, and that the 'confrontation' must only be Coleman's shooting of Jermaine." Everything else in the Respondent's argument is beside the point and obfuscation. But even this assertion, although finally "to the point," is, like the decision of the Indiana Supreme Court the Respondent tries to defend, completely unreasonable.
>
> Coleman does not assume that "the 'crime' must only be the shooting of Dye." Rather, the instruction obviously means a person may not legally use force if he is committing *any* "crime that is directly and immediately connected to the confrontation." The jury's determination that Coleman's use of force against Jermaine was justified therefore meant that the jury by its acquittal had necessarily decided that *nothing* Coleman had done that was directly and immediately connected to his confrontation with Jermaine was a crime, *including* (but not necessarily limited to) the shooting of Dye. Therefore, expanding what this word "crime" may refer to, as the Attorney General wishes to do, if anything serves only to expand, not diminish, the exculpatory implications of the jury's acquittal, in Coleman's favor.
>
> Nor does Coleman necessarily assume that "the 'confrontation' must only be Coleman's shooting of Jermaine," although this "assumption" appears to be the only intelligent way to understand this word in the context of the instruction. It is only natural to "assume" that the very use of force the

> defendant is seeking to justify on the grounds of self-defense constitutes one half of the "confrontation" referred to in the self-defense instruction, and that the very force or threat of force which the defendant argues put him in fear and justified his own use of force constitutes the other half of the "confrontation" referred to in the self-defense instruction. One could conceivably expand what the word "confrontation" may refer to, e.g., to encompass "the entire argument at Coleman's property," as the Respondent suggests, but again, if anything this would serve only to expand, not diminish, the exculpatory implications of the jury's acquittal, in Coleman's favor. It would be completely unreasonable to construe this expansive reading of "confrontation" as somehow hollowing out and removing from the jury's consideration the violent confrontation at the core of the expanded confrontation, when whether the defendant's half of the violent confrontation is legally justified is precisely what the jury instruction purports to help the jury decide.
>
> If this seems complicated, it is only because the Respondent is trying to make it complicated, and apparently hasn't thought things through. The reasoning of the Indiana Court of Appeals in determining that issue preclusion barred Coleman's retrial was simple and clear. It was not only logical, but was also in accordance with common sense, justice, and both the letter and the spirit of the law of double jeopardy, issue preclusion, and self-defense. Since then, neither the Indiana Supreme Court nor the Respondent has offered anything qualifying as "reason" to support their strange opposition to the reasoning and holding of the Indiana Court of Appeals.

Dkt. No. 10 at 10-12.

In the Seventh Circuit, Coleman filed a motion to expand the certificate of appealability to include his claim that he had been denied the effective assistance of trial counsel. The Seventh Circuit granted the motion more than a year later, finding that Coleman had made a substantial showing of the denial of a constitutional right for purposes of 28 U.S.C. § 2253(c)(2).

Nevertheless, after briefing and oral argument, a panel of the Seventh Circuit affirmed the district court in a Per Curiam opinion on March 11, 2021. App. A. Relying on the summary of the facts of the case in the Indiana Supreme Court's

opinion, because the district court had reviewed the surveillance video and "concluded that the Indiana Supreme Court had narrated the facts accurately," and in contrast to the Indiana Court of Appeals' statement of facts, the Per Curiam opinion of the Seventh Circuit falsely claims that "Coleman . . . shot Dye *twice*, including once after he was on the ground." (Emphasis in original.) *Id.* at 4. This is one of the "facts" the panel said it was "scarcely necessary to do more than reread" in order to conclude that the acquittal on the murder charge in the first trial did not establish that Coleman's shooting of Dye was not a crime. *Id.*

Although the federal district court had granted a certificate of appealability on the issue of the proper standard of review when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion but the specific reasons given by the state court are addressed not to the prisoner's actual argument but to a "straw-man," the Seventh Circuit panel concluded that they "need not resolve that debate, because it does not require even an ounce of deference to conclude that Coleman's acquittal on the murder charge does not establish that he acted in self-defense when shooting Dye." *Id.* at 3. But in explaining that conclusion, the Seventh Circuit again followed the Indiana Supreme Court by addressing not Coleman's actual argument or the reasoning of the Indiana Court of Appeals, but only the same "straw-man" addressed by the Indiana Supreme Court. In fact, the Seventh Circuit spent only the following single sentence of its opinion "addressing" – or rather dismissing out of hand – Coleman's actual argument: "Coleman tries to tease a form of retroactive self-defense toward Dye

from the jury instructions about crimes committed close in time, but we find the argument implausible—and it is at all events an argument based on state law that the state's highest court evidently found wanting." *Id.* at 4.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit has departed from the accepted and usual course of judicial proceedings by declining to give any reasons for its denial of habeas relief other than to call Coleman's argument "implausible."

Although this Court only relatively rarely engages in "error correction," it should do so when a Circuit Court, following the issuance of a Certificate of Appealability, simply and utterly fails to provide a federal habeas petitioner with the meaningful and reasoned review to which he is entitled, especially after the last *reasonable* state court decision has determined that his constitutional rights have been violated. In Coleman's case, the Indiana Court of Appeals in March of 2010 determined that a jury "necessarily decided" in February of 2008 that Coleman is innocent of the charge for which he is serving a forty-five year prison sentence, and since then no federal or state court has provided him with a reasonable explanation for why he is still in prison, if indeed they deigned to provide him with an explanation at all. This Court is Coleman's last resort.

The Seventh Circuit decision was unreasonable in the same ways the Indiana Supreme Court decision was unreasonable. The Seventh Circuit said Coleman was not entitled to habeas relief even under de novo review, but then circularly used the fact that the Indiana Supreme Court had evidently found Coleman's argument "wanting" as its only "reason" for rejecting Coleman's argument.

A. The Seventh Circuit's departure can only be explained by a failure to understand *Yeager* or by its mistaken belief that Coleman shot Dye after he had fallen to the ground.

The fact that the Indiana Supreme Court "evidently found wanting" Coleman's issue preclusion argument, and that the Seventh Circuit found it "implausible," without either court bothering to provide any reasons whatsoever for these momentous conclusions, necessarily raises the suspicion that both of these courts simply didn't understand or didn't appreciate this Court's holdings in *Ashe* and especially *Yeager*. Indeed, at oral argument before the Indiana Supreme Court, the justice who would go on to write that Court's written opinion asked Coleman's appellate counsel:

> Doesn't *Yeager* tell us that the acquittal is a non-event for purposes of determining what the jury necessarily decided. I mean they said that, it seems to me, in no uncertain terms, that when you're analyzing this, the thing you don't look at is the acquittal. You look at only what the jury did decide, not what they did not.

The district judge asked, in response to Coleman's argument that the jury from the first trial acquitted him on the charge for the murder of Jackson based on the self-defense instruction, and that this means that this jury necessarily found that he did not commit a crime by shooting Dye, "why then did the jury not acquit him of the attempted murder?"

One important fact that could not be seen on the security footage, but which was established in Coleman's favor (at least by a preponderance of the evidence) by the testimony of the doctor who had treated Dye at the hospital – the fact that, although Coleman still had his gun pointed at Dye after he fell to the ground when

Jermaine redrew his own weapon, Coleman did *not* shoot Dye again after he fell to the ground – was inexplicably determined to be the opposite of what it was. This cast the whole complexion of Coleman's actions on the day in question in a false light, and may well explain the short shrift given to his case by the Seventh Circuit, which merely regurgitated the Indiana Supreme Court's misstatement of this fact. The Indiana Supreme Court's own misstatement of this fact is harder to explain, however. It apparently made it up out of thin air, as it was not to be found in the Indiana Court of Appeals' statement of facts, and *even the prosecution in its closing argument at the second trial* acknowledged that Coleman shot Dye the second time *as he fell*. 548.

B. *Yeager* has more support in the text of the Constitution than *Richardson.*

A plurality of this Court in *Currier* appeared to "question[] whether issue preclusion 'really ... exist[s] in criminal law,'" on textualist grounds. Petitioner would respectfully suggest that if this Court is indeed inclined to call into question *Ashe* and its progeny it should first revisit whether the text of the Double Jeopardy Clause as originally meant really allows a retrial after a hung jury, as this Court held it does in *Richardson v. United States*, 468 U.S. 317 (1984), despite the "textual appeal" of the argument that it does not recognized by the majority in *Yeager*. Justice Scalia also appeared to recognize the textual appeal of this argument in his dissent:

> As an historical matter, the common-law pleas could be invoked only once "there ha[d] been a conviction or an acquittal — after a complete trial." *Crist v. Bretz*, 437 U.S. 28, 33, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). This Court has extended the protections of the Double Jeopardy Clause by holding that

> jeopardy attaches earlier: at the time a jury is empanelled and sworn. *Id.,* at 38, 98 S.Ct. 2156. Although one might think that this early attachment would mean that any second trial with a new jury would constitute a second jeopardy, the Court amended its innovation by holding that discharge of a deadlocked jury does not "terminat[e] the original jeopardy," *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). Under this continuing-jeopardy principle, retrial after a jury has failed to reach a verdict is not a new trial but part of the same proceeding.

This Court explained in *Crist v. Bretz* the deep historic justification for what Justice Scalia called "its innovation" of attaching jeopardy at the time a jury is empanelled and sworn:

> The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. . . . It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict.

Justice Powell, in his dissenting opinion in *Crist*, described this common-law rule forbidding discharge of the jury until it had announced a unanimous verdict as "a rule that we well might have come to regard as an aspect of due process if it had not been absorbed in this country by the Double Jeopardy Clause."

> [T]he evidence from the colonies is that juries always did return a verdict. We know, for example, that no mistrials appeared in New Jersey criminal cases from 1749-57. This is not surprising because mistrials were not a recognized outcome in Blackstone' s Commentaries. If an eighteenth century English jury did not reach a unanimous verdict before the judge had to leave for the next town on his circuit, he could "carry them round the circuit from town to town in a cart." We suspect not many juries would refuse to reach a unanimous verdict if the alternative was to be kept together and transported by cart from town to town. Occasionally, as we will see, a brave jury would refuse to reach a verdict, but these were outliers in the common law system.
>
> The first report of a mistrial for failure to reach a verdict in an American court was 1807.

George C. Thomas III and Mark Greenbaum, Justice Story Cuts the Gordian Knot of Hung Jury Instructions, 15 Wm. & Mary Bill Rts. J. 893, 897 (2007), https://scholarship.law.wm.edu/wmborj/vol15/iss3/5.

It appears, therefore, that the real judicial "innovation" in the law that occurred after the establishment of the Constitution was not in holding that jeopardy attached prior to the jury's verdict, but in relaxing the rule forbidding (as a matter of Due Process if not the Double Jeopardy Clause) the discharge of the jury until it reached a verdict. This innovation might very well have been required by the Due Process rights of the jurors themselves, but it nevertheless could not justify relaxing the requirements of the Double Jeopardy Clause, the text of which, as both the majority and Scalia's dissent in *Yeager* appear to acknowledge, seems to mean that "any second trial with a new jury would constitute a second jeopardy."

If this Court is not willing to reexamine *Richardson* despite its reliance on "its own sources and logic," and on Justice Holmes' aphorism that "a page of history is worth a volume of logic," rather than on the text of the Constitution, then to be consistent it should also at least continue to adhere to *Ashe*, and moreover take to heart *Yeager*'s dictum that, if the consideration of hung counts had any place in the issue-preclusion analysis, "the fact that petitioner has already survived one trial should be a factor cutting in favor of, rather than against, applying a double jeopardy bar."

II. Several Circuits, including the Seventh in Coleman's case, have called into question whether *Wilson* really means that they are not to give deference to unreasonable state court decisions.

This Court in *Wilson v. Sellers* seemed to make clear, as it had already held in earlier cases such as *Panetti v. Quarterman*, 551 U.S. 930 (2007), that if the specific reasons given by a state court for rejecting a state prisoner's federal claims are "unreasonable," then "A federal court must then resolve the claim without the deference AEDPA otherwise requires," that is, de novo. Nevertheless, "[i]n the wake of *Wilson,* courts have grappled with whether AEDPA deference extends only to the reasons given by a state court (when they exist), or instead applies to other reasons that support a state court's decision." *Thompson v. Skipper*, 981 F.3d 476 (6th Cir. 2020). The Fifth Circuit has "observe[d], without deciding, that it is far from certain that *Wilson* overruled *sub silentio* the position—held by most of the courts of appeals—that a habeas court must defer to a state court's ultimate *ruling* rather than to its specific *reasoning*." *Sheppard v. Davis*, 967 F.3d 458 (5th Cir. 2020). The Eleventh Circuit has issued conflicting opinions, while the Seventh Circuit has issued an opinion which conflicts with *itself*. *Compare Winfield v. Dorethy,* 956 F.3d 442, 454 (7th Cir. 2020) ("Having found the state court's `specific reasons' for denying relief, the next question is whether that explanation was reasonable thereby requiring our deference." (quoting *Wilson,* 138 S. Ct. at 1192)), *with Winfield*, 956 F.3d at 462 n.2 (citing Seventh Circuit precedent holding that a petitioner is not entitled to de novo review "simply because the state court's rationale is unsound," and that a federal habeas court must "defer to the state court's judgment (notwithstanding its reasons)", but not deciding "if or how this

standard might apply" to Winfield, since he was not entitled to relief "even under de novo review").

In its judgment below, the Seventh Circuit, as in *Winfield*, appears to treat as still open the question settled by *Wilson*, but ultimately, in effect if not expressly, it decides that question in a way that *conflicts* with Wilson, by giving as its only reason for rejecting Coleman's argument the fact that "the state's highest court evidently found [Coleman's argument] wanting," even though the specific "reasons" given by the state's highest court for rejecting Coleman's argument were, as the district court found, patently *unreasonable*.

The Ninth Circuit recognized back in *Frantz v. Hazey*, 533 F. 3d 724, 735 (9th Cir. 2008), that "it is now clear [from *Panetti,* 127 S. Ct. at 2858] both that we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised." It noted that "[t]he Supreme Court has not fully explained, however, why that is true," and went on to provide such an explanation, "as the underlying reasoning may prove useful to habeas courts applying these principles."

III. Petitioner's case presents an ideal vehicle for clarifying *Wilson* and enforcing *Yeager*.

A. The decision below is wrong and the Indiana Court of Appeals was right.

If *Ashe* and *Yeager* are respected and followed, it is clear that the Indiana Court of Appeals was correct in concluding that Coleman's retrial for attempted murder was precluded by his acquittal on the murder charge in the first trial. Indeed, it would seem that *Wilson*'s mandate to "look through" to the last reasoned state court

decision when the state's highest court has not given a reason for its decision, would warrant this Court in giving special deference to the reasoning and conclusion of the Indiana Court of Appeals, in what the federal district court called this "unusual straw-man situation" created by the Indiana Supreme Court.

The only actual reasons offered by any federal or state court below for rejecting Coleman's actual argument and the reasoning of the Indiana Court of Appeals were those offered by the federal district court: (1) maybe the jury believed that the State hadn't proved the "knowingly" element of murder beyond a reasonable doubt, or (2) maybe the jury thought that the word "confrontation" in its jury instructions referred *not* to the violent confrontation between Coleman and Jackson that immediately followed upon Coleman's shooting of Dye, but *instead* to the entire chain of events in Coleman's backyard from the time Jackson arrived at Coleman's recording studio through the shooting of Jackson. (The latter reason was only offered by the district court in its ruling on Coleman's motion to alter or amend the judgment.)[3]

[3] Judge Darden in his dissent from the majority opinion in the Court of Appeals stated that he was "of the opinion that the testimony at trial and the video evidence could support the reasonable inference that Coleman was not in fear for his life as Dye was walking past him, while also supporting the reasonable inference that Coleman was in fear for his life when facing Jermaine's drawn weapon." App. F at 10. However, this completely missed the point of the majority's analysis, in the same way that the Indiana Supreme Court would do: A rational jury could not have believed both of those things *and* still acquitted Coleman of the murder of Jermaine. If Coleman was not in fear for his life when he shot Dye, then pursuant to the jury instructions given at trial a rational jury would not have excused Coleman for the shooting of Jermaine, regardless of whether Coleman was in fear for his life when Jermaine drew his weapon upon seeing Coleman shoot Dye.

The entire substance of the Respondent's argument that Coleman's retrial did not violate double jeopardy protections is contained in this assertion on pages 12-13 of his Return: "To read the instruction as Coleman does requires two unsupported assumptions: that the 'crime' must only be the shooting of Dye, and that the 'confrontation' must only be Coleman's shooting of Jermaine."

Although the Seventh Circuit said it agreed with the district judge's analysis of Coleman's claim that he was denied his constitutional right to the effective assistance of trial counsel, it did not say it agreed with the district judge's analysis of Coleman's Double Jeopardy claim. And indeed, the Seventh Circuit appeared to take for granted that the acquittal could only have been based on self-defense, as the State itself expressly admitted at oral argument before the Indiana Supreme Court, leaving by the wayside and unmentioned the district judge's hypothesis that a jury could have rationally doubted that Coleman was aware that he was shooting Jermaine six times and acquitted him on that basis.

The State conceded at oral argument before the Indiana Supreme Court on direct appeal that the acquittal at the first trial could only have been on the grounds of self-defense. See Oral Arguments Online, September 16, 2010, at 23:35, http://mycourts.in.gov/arguments/. Moreover, in the district court the Respondent acknowledged that the Indiana Supreme Court "accepted that the jury's acquittal of Coleman on the charge of murdering Jermaine during the first trial was based on the jury's belief that Coleman acted in self-defense with respect to Jermaine," Dkt.

No. 7 at 11, and nowhere in the district court argued that it could have been based on anything else.

In *Wilson v. Sellers*, 584 U. S. ___ (April 17, 2018), the dissent cited *Wood v. Milyard*, 566 U. S. 463, 471-73 (2012), for the proposition that a federal court is not required to "'imagine' its own arguments for denying habeas relief," which "neither the parties before it nor any lower court has presented." *Wood*, in turn, cited *Greenlaw v. United States*, 554 U. S. 237, 243-44 (2008), for the proposition that "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." And in *Greenlaw* this Court stated:

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights.

When the State conceded in its argument to the Indiana Supreme Court, and to the district court, that the jury could not have rationally based the acquittal on anything other than self-defense, it had available to it Coleman's original Motion to Dismiss By Reason of Collateral Estoppel, in which the notion that the acquittal could have been based on the "knowingly" element of murder was first entertained and rejected, the State's Response to the Motion, Coleman's Reply to the Response, the transcript of the hearing on the Motion, and Coleman's "additional authorities" letter filed a few days after the hearing on the Motion. This letter is reproduced in Appendix G to this Petition to show that the State's concession at oral argument in the Indiana Supreme Court was well-informed and well-advised. Having

presumably read and considered all of this, the State conceded in its argument to the Indiana Supreme Court that the jury could not have rationally based the acquittal on anything other than self-defense, and did not argue otherwise to the district court. The district court erred by veering from the principle of party presentation to find otherwise in its Opinion and Order.

The sound policy behind the principle of party presentation is evident in this case. If the State *had* made the argument in the district court, Coleman would have had the opportunity to respond to it by developing at length the arguments made in his "additional authorities" letter. The fact that the State did not make the argument, and conceded at oral argument before the Indiana Supreme Court that self-defense was the only rational basis for the acquittal, signifies that the State recognized that such an argument would have been meritless. The Seventh Circuit evidently didn't think much of it either.

That leaves the "confrontation" argument, as the only reason offered by any federal or state court, which the Seventh Circuit didn't bother to endorse either.

The Respondent also argued in the Seventh Circuit, as the State had argued on direct appeal in the Indiana courts, that the jury could have thought that, even if Coleman committed a crime by his shooting of Dye, Coleman was no longer "committing" that crime when he shot Jackson or could have thought that the crime was not "directly and immediately connected" to the confrontation with Jackson. App. Dkt. No. 25 at 23. Coleman preemptively refuted those arguments in the legal memorandum attached to his federal habeas corpus petition, and the Respondent

did not advance them in the district court. For that reason, this Court should not consider these arguments here either. But the fact that the Respondent did not advance them in the district court, and that the Seventh Circuit did not cite them as a basis for finding Coleman's argument "implausible," underscores their lack of merit.

It must also be noted that these are precisely the kind of "hypertechnical" arguments precluded by the "realism and rationality" demanded by *Ashe*. It is inconceivable, for example, that any defense attorney would be foolish enough and have the nerve to make the following argument to a judge or jury: "Yes, my client was attempting to rob the store and shot the clerk, but when the clerk's son then pulled a gun from behind the counter and pointed it at my client, my client was no longer 'committing' the robbery after he turned from the clerk and towards the son, even though my client still had his gun pointed at the clerk when the clerk's son pulled the weapon from behind the counter, and therefore it was self-defense when my client shot the son, and you should acquit him. Also, Jury, my client's robbery and shooting of the clerk was not 'directly and immediately connected to [my client's] confrontation' with the clerk's son."

No defense attorney, no matter how desperate, would ever make such a ludicrous argument for an acquittal to a judge or jury, and yet the Attorney General's only argument for avoiding the application of issue preclusion in Coleman's case was the suggestion that the jury might have been thinking along

just these lines when it acquitted Coleman of murder. That is not realism and rationality.

Yet even a "hypertechnical" analysis of the language of the jury instructions, though not appropriate under *Ashe*, if carefully followed to the bottom, shows that the jury at the first trial, by acquitting Coleman of the murder charge, necessarily decided that Coleman's shooting of Dye was also not a crime.

A rational juror would have understood that "the confrontation" at issue under the self-defense jury instruction is the confrontation comprising on one side the use of force the defendant contends was justified by self-defense and on the other side the threat the defendant contends caused him to fear for his life or the lives of others and justified his use of force. In this case, the "confrontation" at issue was Jermaine's drawing of his weapon and Coleman's use of force in response to that threat.

A rational juror in reading the self-defense jury instruction would have understood that this confrontation with Jermaine was "directly and immediately connected" to Coleman's shooting of Dye. Jermaine drew his weapon from his belt and started pointing it at Coleman *immediately* upon seeing Coleman shoot Dye, and had not pointed his gun at Coleman until he saw Coleman shoot Dye.

A rational juror would have understood that if Coleman's shooting of Dye was a crime, then he was "committing" that crime when Jermaine drew his weapon and when Coleman shot Jermaine. Jermaine started to draw his gun immediately upon seeing Coleman shoot Dye, even before Dye had fallen to the ground. Coleman was

still pointing his gun at Dye when Coleman saw Jermaine draw his gun and turned to face Jermaine. Only if Coleman had had the time before Jermaine drew his weapon to communicate to Jermaine his intent not to shoot Dye again and not to shoot Jermaine, and had in fact communicated that intent, could it rationally be said that Coleman was no longer "committing" the supposed "crime" when Jermaine drew his weapon. No rational juror would stretch the meaning of the "is committing" language in the self-defense jury instruction so as to excuse, in the absence of a communication by the defendant of an intent to withdraw, the killing of a man naturally provoked to immediate violence by the unjustified shooting of his father in his immediate presence.

Coleman's issue-preclusion argument does not depend only upon the sentence in the jury instruction which states that a person may not use force if he "is committing a crime that is directly and immediately connected to the confrontation." Equally important is the language in the jury instruction which states that a person may not use force if he "has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight."

Because Coleman was acquitted of the murder in spite of the undisputed fact that he knowingly caused the death of Jermaine, the jury necessarily decided that Coleman reasonably believed that shooting Jermaine was necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible

felony *and* that Coleman had *not,* prior to shooting Jermaine, started a fight with another person without withdrawing from the fight. Because Coleman was in a gunfight with Dye immediately prior to shooting Jermaine and had *not* withdrawn from the fight prior to shooting Jermaine (he had no chance and no time to do so, and in fact was still pointing his gun at Dye when Jermaine pulled out his gun), the jury by its acquittal necessarily decided that Coleman had not started the gunfight with Dye. If Coleman did not start the gunfight with Dye, his shooting of Dye was not a crime.

The "unless he withdraws from the fight" language in the jury instruction illuminates the "is committing" language. Until a person withdraws from the commission of a violent crime he "is committing" the crime. If a person has not withdrawn from a supposed crime and nevertheless uses deadly force to defend himself in a confrontation that is directly and immediately connected to the supposed crime, and if a jury nevertheless determines that his use of deadly force to defend himself was lawful, then the jury by its acquittal has necessarily decided that the supposed crime was not a crime.

It is unclear what the Seventh Circuit meant by observing that Coleman's issue preclusion argument is "based on state law," since it is hard to imagine an argument that a state court conviction violates the U.S. Constitution that is *not* based at least in part on state law. Although "Indiana appears to be unusual in purporting to deny self-defense to anyone committing a crime as opposed to those committing 'forcible felonies,'" *Mayes v. State*, 744 N.E.2d 390, 397 n.1 (Ind. 2001)

(Boehm, J., concurring in result), – a peculiarity which seems to have been recently mitigated somewhat by the Indiana Supreme Court in *Gammons v. State*, 148 N.E.3d 301, 304 (Ind. 2020) – there is nothing peculiar or unusual about the principle that a person cannot be justified by self-defense if he has provoked or instigated the violence by committing a forcible felony. That is the core principle at issue in this case, and it is quite certain that no State in the country endorses a contrary principle. This core principle is not really even an "exception" to the right of self-defense, but rather intrinsic to the very concept of self-*defense*, that a person is not legally justified in "defending" himself from force that he himself has provoked or instigated by the use of unjustified violence. If a person is the aggressor, he is not a defender.

B. Coleman himself is worthy of relief.

Coleman was on his own property, with his back to the door of a garage studio inside of which he had placed his young son for his safety, when he was faced by two armed, dangerous, and angry men. Jermaine was already within "close range" of Coleman when Dye, who Coleman knew to be a "serious violent felon," also marched up to within what the Indiana Supreme Court called "close range" while holding a gun in his right hand, even though he saw that Coleman also had a gun. At any instant, in a split second, Dye could have raised his gun and shot Coleman, before Coleman had an opportunity to react. Looking at the situation objectively, it is hard to imagine how that situation on Coleman's property, brought about by Dye and

Jermaine, was possibly going to somehow resolve itself peaceably. That was the situation Coleman faced.

With the facts mostly not in dispute, the question for the first jury – and to some extent for this Court – was whether Coleman's actions were justified by self-defense. *Yeager* tells us that "if it were relevant, the fact that petitioner has already survived one trial should be a factor cutting in favor of, rather than against, applying a double jeopardy bar." On the other hand, the sad fact that a second jury found Coleman's shooting of Dye to be unjustified, aside from being completely irrelevant to the issue preclusion analysis, can be explained in part by the ineffective assistance of Coleman's counsel at the second trial.

Similar situations, and even ones less dangerous, have been considered legally insufficient to sustain a conviction or even a prosecution. See, e.g., https://www.indystar.com/story/news/crime/2017/07/20/wounded-neighbor-charged-johnson-county-shootout/494768001/ (prosecutor declines to prosecute man who shot neighbor who was moving backward on riding lawn mower while holding gun pointed down at side); https://www.washingtontimes.com/news/2015/dec/28/prosecutors-comments-on-the-tamir-rice-police-shoo/ (prosecutor states at press conference: "Police are trained that it only takes a third of a second or less to draw and fire a weapon upon them, and therefore they must react quickly to any threat. . . . It would be (irresponsible) and unreasonable if the law required a police officer to wait and see if the gun was real."); *People v. LaVoie*, 395 P.2d 1001 (Colo. 1964) (affirming directed verdict of

not guilty on ground of self-defense), discussed by Orin Kerr, The Volokh Conspiracy, November 10, 2010, https://volokh.com/2010/11/10/people-v-la-voie-and-killing-in-self-defense/.

Finally, this Court should at least be aware, as was the trial court which sentenced Coleman to an aggravated sentence of forty-five years, that Coleman had rejected a plea offer from the State which would have allowed him to go home at the time of the first trial. App. G; Tr. 2 at 10. The State strenuously objected when Coleman's counsel mentioned this at the sentencing hearing, but this Court is the best judge of whether the fact that Coleman has paid with over a decade of his life, and stands to pay more than a decade more, because of his personal conviction that he had acted in legitimate self-defense and his corresponding decision to exercise his right to jury trial, should factor into its determination of whether Coleman's case is worthy of this Court's review. If there is such a thing as "consciousness of guilt," there is also consciousness of innocence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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