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CASE NO. 20-3943

IN THE SUPREME COURT OF THE UNITED STATES

21-5860

DEATH PENALTY CASE

ANTONIO S. FRANKLIN
PETITIONER-APPELLANT

VS.

TIM SHOOP
RESPONDENT-APPELLEE

ON PETITION FOR WRIT OF CERTIORARI *TO THE* **SIXTH CIRCUIT** OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

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PETITIONER, *PRO SE*

[illegible]

[illegible]

THIS IS A CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Though completely forsaken by the protections of the Sixth Amendment by the time state appellate inmates arrive at the federal appellate courts, does either the Eighth or the Fourteenth Amendments "protect" said inmates from being subjected to an apparently faulty appellate process due (in part) to ultra-egregious, ineffective counselors?

2. Is it cruel and unusual punishment to have a magistrate judge "exercising 'plenary' power" render absurd, yet binding oxymoronic decisions (that undoubtedly impedes a petitioner's path towards justice) to which the Sixth Circuit refuses to acknowledge and/or overturn?

3. Are *"continual,"* blatant violations against an appellant's Eight and Fourteenth Amendment Constitutional Rights severe enough violations to justify deviation from the "final judgment rule" of 28 U.S.C. §1291 in the Federal Courts?

4. Are the Eight Amendment Rights (against cruel and unusual punishment) and the Fourteenth Amendment Rights (for due process and equal protection) constitutionally sound enough to guard against an indigent inmate having the entirety of his federal appellate process rendered useless – notwithstanding the fact that said indigent inmate had vigorously endeavored to avoid such a dire predicament?

5. If it's proven beyond a reason of a doubt that assigned counsel is derelict; the magistrate judge "exercising plenary power," and as such having "final authority" in his case, has been grossly "judicial derelict" throughout the handling of Petitioner's appellate process; and the two entities (whether working together or not) had a synergistic, yet detrimental effect on Petitioner's entire federal appeals to the result of "an aborted appellate process"; yet, the Sixth Circuit observed "all," but did "nothing" to effect justice and provide balance and equity; does these violations of Petitioner's Eighth and Fourteenth Amendment Rights entitle him to appeals anew?

LIST OF ALL PARTIES

[X] All parties appear in the caption of the case cover.

TABLE OF CONTENTS

Questions Presented....................i

List of Parties....................ii

Table of Contents....................ii & *

Index to Appendices....................iii

Table of Authorities Cited....................iii-iv

Statutes and Rules....................iv

Opinions Below....................1

Jurisdiction....................1

Constitutional and Statutory Provisions Involved....................1-2

Statement of the Case....................2-5

Reasons for Granting the Writ....................5-40

Conclusion......38-40

INDEX TO APPENDICES

APPENDIX "A"	Decision of the United States Court of Appeals for the Sixth Circuit
APPENDIX "B"	Decision of the District Court striking Motion for Reconsideration
APPENDIX "C"	Decision of the United States District Court for the Southern District of Ohio
APPENDIX "D"	Letter from Petitioner's Lead Attorney, Ms. Adele Shank, (dated June 5, 2009) REFUSING Petitioner's "request to file for Certificate of Appealabilities (COAs)" when he requested them to
APPENDIX "E"	Consent to Magistrate Judge Jurisdiction (signed ONLY by Ms. Adele Shank)
APPENDIX "F"	Letter to the Sixth Circuit Requesting a "Change of Counsel"

TABLE OF AUTHORITIES CITED

CASES:

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541......34

Deshaney v. Winnebago County Dep't of Social Services, 489 U.S. 189......22

Estelle v. Gamble, 429 U.S. 97......7

Evitts v. Lucey, 469 U.S. 387......35

Franklin v. Bradshaw, 2009 U.S. Dist. LEXIS 23715....................................8-14, 24, 26

Franklin v. Robinson, 2013 U.S. Dist. LEXIS 27532..18

Franklin v. Warden, Chillicothe Corr. Inst., 2016 U.S. Dist. LEXIS 40391 18

Holland v. Florida, 560 U.S. 631...34-36

Martel v. Clair, 565 U.S. 648..31

Mickens v Taylor, 535 U.S. 162...30, 31

NLRB v. Talsol Corp., 155 F.3d 785...15, 23

Rhodes v. Chapman,452 U.S. 337......................................6, 7, 22, 23, 34

Ross v. Moffitt, 417 U.S. 600..6, 34

State v. Murnahan, 63 Ohio St. 3d 60..18

Wilson v. Seiter, 501 U.S 294......................................7, 16, 22, 23, 34

Whitley v. Albers, 475 U.S. 312..7

United States v. Iles, 906 F.2d 1122...32

United States v. Taylor, 487 U.S. 326...32

STATUTES AND RULES

28 U.S.C. § 1254

18 U.S.C. §3599

Table of Contents

OPINIONS BELOW ... 1

JURISDICTION ... 1

JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. § 1254(1) ... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ... 1-2

1. STATEMENT OF THE CASE ... 2-5

2. REASONS FOR GRANTING THE PETITION ... 5-38

3. The Due Process Clause, Equal Protection Clause, And The Right To Be Free From Inflection Of Cruel And Unusual Punishment During The Appellate Process: ... 6

4. The Eighth Amendment And Its Protections From Cruel & Unusual Punishment: ... 7-22

5. Petitioner's "Current" Motion to Discharge Counsel: ... 22-29

At Least Two Claims of Tremendous Merit That Were Denied on a "Mistaken Basis": ... 24-29

I-A-C – Failure to Present Evidence to Jurors to Question Defendant's Sanity: ... 24-26

6. The Three Heads of Cruel and Unusual Punishment: ... 29-34

7. Remand Pursuant to Holland v. Florida and the Principles Contained Therein: ... 34-38

Conclusion ... 38-39

BOTTOM LINE: ... 39-40

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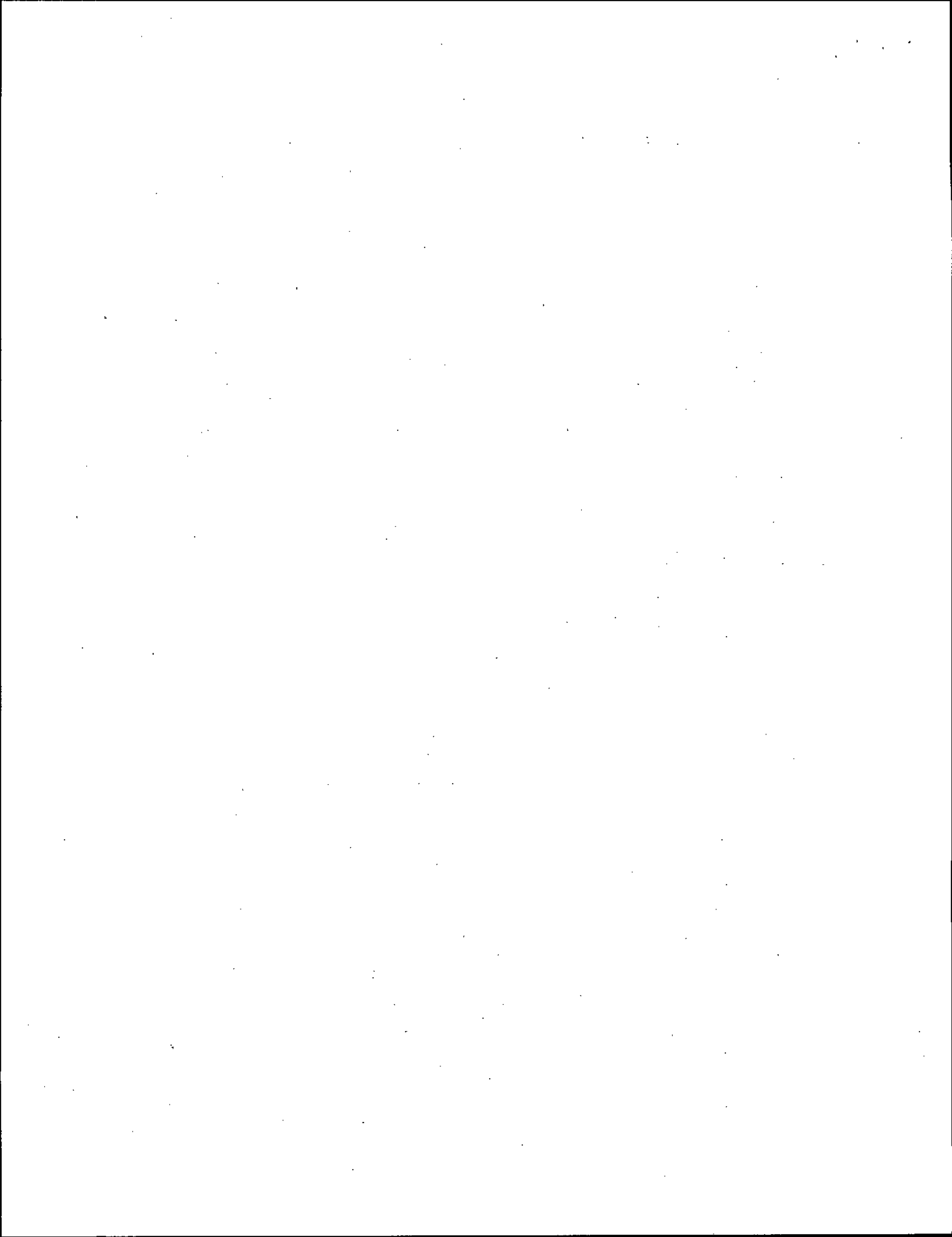

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts:**

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

The opinion of the United States District Court appears at Appendix "B" to the petition and is UNPUBLISHED.

JURISDICTION

[X] For cases from **federal courts:**

The date to which the United States Court of Appeals decided Petitioner's case was March 30, 2021.

[X] No petition for rehearing was timely filed in my case.

*****JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. § 1254(1)*****

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT (Due Process Clause):

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.

EIGHTH AMENDMENT:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

NINTH AMENDMENT:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT (Equal Protection and Due Process Clauses):

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.

1. STATEMENT OF THE CASE

(A) Petitioner has an execution date for January 12, 2023. And though he has issues (of tremendous merit) that can win him a new trial, he's being "unreasonably" thwarted by (1) the district court (2) the Sixth Circuit, and (3) his own counsel from having a "meaningful adjudication" on the merits of these issues in question. That is, Petitioner is currently engaged in a fight to overturn his unjust conviction against the prosecution, the federal courts, and his

own counselors. All in violation of his Eight and Fourteenth Amendment Constitutional Rights.

Petitioner invites the Court to view ALL of his *pro se* filings in the federal courts (so as to get an adequate picture beyond what's contained herein) . . . his *pro se* case in these courts is EXTENSIVE.

(B) History of Petitioner's Case

Petitioner's currently appointed counselors are remiss, feckless and engage in misconduct so serious and egregious that it has to border (if not outright be) conduct unbecoming of an attorney and/or dereliction of duty. And Petitioner strongly suspects that a conflict of interest exists between them and himself. But, moreover, Petitioner has been (and is still) seeking to have these counselors removed from his case since they first started representing him in the federal court[1] so that he can have a "meaningful opportunity" to present his issues of "tremendous merit" to the courts and receive *"proper"* adjudication.[2] But no matter how much or how hard Petitioner tries to have these gross underperforming counselors removed from his case – and no matter how egregious and shiftless Petitioner proves

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[1] See Dist. Ct. Case No. 3:04-cv-187 at Docs. 23; 121; 143; 152; 155; 163 (at § II (1), pp 2-6); 165; 233 (at next to last ¶); and his two speeches that he gave at his evidentiary hearing (at Evid. Hrg. Tr. 143 and 324); as with the motion for the appointment of counsel that Petitioner lodged in the Ohio Supreme Court on September 11, 2017; see, also, Petitioner's motions to have counsel replaced in the Sixth Circuit at Docs. 17 and 23 of Case No. 09-3389; (the letter that he wrote the Sixth Circuit, to which it received on October 12, 2012, but never placed on its docket); as with his motion for certificate of appealability to the Sixth Circuit that he lodged with said court at Case No. 18-3368.

[2] EVERY ISSUE, as presented by Petitioner's federal counselors, was denied by the federal courts (NOT on their merits, but) due to some major flaw and/or deficiency due to counsel's inclination for being remiss and shiftless.

them to be – the lower federal courts are unwilling to grant him a change of counsel, or allow him to self-represent independent from them and their tutelage.[3] And it is only because these feckless, remiss counselors were permitted to remain on Petitioner's case that his federal appeals were "extinguished" – all of them save for the motions that he "now" intends to file with the courts.

(C) Most Recently:

Petitioner filed a renewed motion with the district court requesting that the court discharge his current counselors (see Docs. 250 and 258) so that he may have success in his future legal endeavor to have his unjust conviction overturned via a Fed. R. Civ. P. 60 (d) motion, and/or a petition for actual innocence. The magistrate judge – after having been made aware of Petitioner's counselors penchant for deceit, the telling of lies, and perpetration of fraud upon (both Petitioner and) the court – unreasonably decided against Petitioner and his well-founded motion to discharge counsel, in favor of a most "nonsensical" situation retaining current counsel at the helm to lodge his 60(d) motion.[4] Though the magistrate judge did permit that if Petitioner's current counsel "refuses to file his motion" he could then take it upon himself to petition the court for permission to lodge said motion himself (though without

[3] The singular time in which the magistrate judge was willing to allow Petitioner a departure from his remiss counsel, he infused his NOTICE TO PETITIONER with "threats" aimed at intimidating Petitioner from his position of wanting to discharge counsel. And upon such threats, Petitioner "withdrew" his motion to discharge counsel, BUT conveyed unto the court that his reasoning for withdrawing his motion was, in part, due to the intimidation employed by the court to "force" him to retain his counselors…inasmuch as the court had declared that it would NEVER appoint new counsel for Petitioner in any of his future endeavors – clemency included. See Docs. 166 and 175.

[4] Keep in mind that current counsel and their "serious misconduct" and "gross negligence" are, in fact, the cause for which a 60("d") motion INSTEAD of a 60(b) motion is even needed.

benefit of any counsel whatsoever independent of his current counselors, Next of Friends included). However, it must be noted (as it pertains to Petitioner's ability to represent himself) that the magistrate judge, at the insistence of Petitioner's deceitful and dishonest counsel, all but labeled Petitioner an imbecile too incompetent to undergo the process of self-representation. See Doc. 262 at pp. 1 and 6, respectively.

Sensing that the magistrate judge was being unreasonable and had abused its discretion, Petitioner lodged an appeal on the matter in the form of a Motion For Reconsideration and therein "disproved" all of the magistrate judge's *alleged bases* for having denied Petitioner's motion to discharge counsel, but the magistrate judge further abused its discretion and struck said motion. (See Docs. 263 and 264). Petitioner then lodged a motion for Certificate of Appealabilities (COA) in the Sixth Circuit. (See Petitioner's Docket in the Sixth Circuit at Case No. 20-3943). But Petitioner received no *understanding* nor any *equity* while appealing to that court, though Petitioner's situation be of the sort that cries out "loudly" for understanding and *equity*. Indeed, the Sixth Circuit saw fit to dismiss his appeal, concluding that Petitioner's situation isn't "sufficiently strong [enough] to overcome the usual *benefits* of deferring appeal until litigation concludes." See Doc. 8-1 at p.4.

2. REASONS FOR GRANTING THE PETITION

Considerations Governing Review on Certiorari:

Due to the following circumstances and facts, Petitioner invokes this Honorable Court's judicial discretion:

1. Multiple decisions have been entered in Petitioner's case that so far depart from the accepted and usual course of judicial proceedings that this Honorable Court's exercise of its "Supervisory Power" is much needed.
2. In violation of his Eighth and Fourteenth Amendments to the United States Constitution, Petitioner is made to suffer through an "apparently" *grotesque*, yet *faulty* appellate process, thereby causing him untold mental anguish, and if left unchecked, will inevitably result in his untimely, unjust death via execution.
3. Petitioner is (and has been for some years) engaged in a fight, not just against the prosecution, but also against his own counsel, his magistrate judge, and the Sixth Circuit, and if this Honorable Court doesn't intervene in Petitioner's case, he will find himself permanently prohibited from seeking "*meaningful adjudication*" on his remaining issues of *tremendous* merit.
4. Petitioner proffers questions of exceptional importance as it pertains to the likes of the appellate process of 28 U.S.C. § 2254 that this Honorable Court may wish to address.

3. The Due Process Clause, Equal Protection Clause, And The Right To Be Free From Inflection Of Cruel And Unusual Punishment During The Appellate Process:

"'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." **Ross v. Moffitt**, 417 U.S. 600, 609. "'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." Id. And pursuant to **Rhodes v. Chapman**:

> "The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be 'cruel and unusual.' [This] Court has interpreted these words 'in a flexible and dynamic manner,' . . . and has extended the Amendment's reach beyond the barbarous physical punishments at issue in the Court's earliest cases. . . Today the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the *unnecessary* and *wanton* infliction of pain,' . . . or are grossly disproportionate to the severity of the crime[.] . . Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'"

452 U.S. 337, 345-46. (citations omitted)(emphasis added).

Furthermore, the Eight and Fourteenth Amendments operates hand-in-hand to protect citizens from the horrors of cruel and unusual punishment.

4. **The Eighth Amendment And Its Protections From Cruel & Unusual Punishment:**

When Petitioner was accused of the crimes to which landed him on Ohio's Death Row, he was tried, found guilty, and sentenced to "death." However, in addition to "this death sentence," Petitioner has also been unjustly subjected to a most *grotesque* and *faulty* appellate process. The ramifications thereof being highly inconsistent with the principles of "equity," as with being a clear violation of his Eighth and Fourteenth Amendments to the United States Constitution. And as such, and if left "unchecked," Petitioner will undoubtedly remain firmly grounded within the Catch-22 of a situation that he finds himself "inescapably" trapped.

This Court, in **Wilson v. Seiter**, 501 U.S 294, 309-10, citing it's take on **Whitley v. Albers**, 475 U.S. 312 held:

> "An express intent to inflict unnecessary pain is not required, **Estelle v. Gamble**, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976) ('deliberate indifference' to a prisoner's serious [appellate conditions and] needs is cruel and unusual punishment), and harsh 'conditions of [his appellate process]' may constitute cruel and unusual punishment unless such conditions 'are part of the penalty that criminal offenders pay for their offenses against society.' **Rhodes v. Chapman**, 452 U.S. 337, 347, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981)." 475 U.S. at 319 (emphasis added).

Indeed, and as just mentioned, Petitioner was sentenced to death . . . NOT to be subjected to the faulty appellate process in which he is currently undergoing. Petitioner's magistrate judge is determined to make faulty rulings in his case that serve to deprive him of his opportunity to have a "meaningful adjudication" of his appellate issues. And when Petitioner brings said *unreasonable rulings* to the courts' attention, no one seems to care: be it magistrate judge who issued the ruling, or the federal court of appeals (when Petitioner seeks

remedy from them). The Sixth Circuit has been, and continues to remain "indifferent," as the Court will see.

(a) One example is when the magistrate judge issued his Decision and Order denying Petitioner's federal habeas petition (see Doc. 104), he illuminated the glaring fact that Petitioner's current counselors' performance suffered from a multitude of **inadequacies** **and** **shortcomings** – most of which being of a serious nature – as nearly every claim was flawed in one manner or another, *and* "procedurally defaulted" due to their ineffectual litigation. And these "inadequacies and shortcomings" include, but are not limited to the following magistrate quotes (most are preceded by a brief description from Petitioner, then the "quote" from the magistrate judge):

1. They failed to offer evidence of Petitioner's incompetence to assist his attorneys on post-conviction at his Evidentiary Hearing and didn't even attempt to address the state court's reason for denying his claim: "Franklin called Dr. Pearson to testify at the evidentiary hearing in these proceedings . . . but no evidence of Franklin's incompetence at the time of his post-conviction proceedings was presented beyond what was available to the state courts through Dr. Pearson's affidavit. Indeed, Dr. Pearson's evidentiary hearing testimony focused primarily on Franklin's competence at trial, and only slight mention was made of the state of his competence during the state post-conviction proceedings . . ." and "Franklin never addresses the state court's reason for denying his claim, and his argument in support here is convoluted." See **Franklin v. Bradshaw**, 2009 U.S. Dist. LEXIS 23715 at [*54-55]. (emphasis added).

2. They omitted citations to the record that would show that the lower court ignored evidence it had before it: "Franklin urges this Court to assume that the Ohio Supreme Court 'failed' to note his objection and 'ignored' subsequent attempts to obtain a new trial based on nothing more than his word. . . He points to nothing in the record that would cause this Court to believe that the state court ignored any of the evidence before it, including the objections Franklin raised the day after the offending remarks were made by the prosecutor. Id. at [*71]. (emphasis added).

3. They failed to provide cause for Petitioner's default: "The state court considered Franklin's claim of error waived and conducted a plain error review. It found none, which results in a procedural default of Franklin's claim *unless he can demonstrate cause and prejudice to excuse the default.* Franklin does not contend his counsel's ineffectiveness or any other circumstance provides cause for his default, however . . . so his first prosecutorial misconduct sub-claim is procedurally defaulted and denied." Id. at [*72]. (emphasis added).

4. They completely ignored the Ohio Supreme Court's discussion of a claim: "In his argument, Franklin relies entirely on the trial court's response to a defense objection to the prosecutor's characterization of arson expert Yeazell as a liar, and completely ignores the Ohio Supreme Court's discussion of the claim. . ." Id. at [*73]. (emphasis added).

5. They failed to satisfy a key requirement of AEDPA: "Even if he had preserved the claim for habeas review, however, it would fail. Franklin has not *claimed, demonstrated, argued,* or *otherwise explained how* the Ohio Supreme Court's decision was contrary to or an unreasonable application of Supreme Court law, nor has he contended it was based upon an unreasonable determination of the facts based on the evidence presented in the state courts. . . Under the AEDPA, therefore, Franklin has not carried his burden." Id. at [*74]. (emphasis added).

6. They offered only unsupported conclusions as it pertains to the improper arguments concerning Petitioner's tattoos and alleged that his constitutional right were somehow violated: "*Franklin has offered only unsupported conclusions* that the introduction of an argument about his tattoos violated the federal constitution *in some way*. He has demonstrated no basis upon which this Court might grant the writ of habeas corpus on this basis, and it is accordingly denied." Id. at [*79]. (emphasis added).

7. They omitted citations to the comments the prosecution made about Petitioner's tattoos, and failed to meet the AEDPA standards: "Franklin contends the prosecutor's comments about Franklin's tattoos were improper. . . *He fails to point to anywhere in the record where the comments are made,* and does not claim that the state court's decision on the matter was contrary to or an objectively unreasonable application of federal law." Id. at [*78-79]. (emphasis added).

8. They failed to specify just what evidence was irrelevant, inflammatory, and prejudicial as it pertains to Petitioner's thirteenth ground for relief: "Franklin's claim that his counsel were ineffective for failing to contemporaneously object to *unspecified*[,] 'irrelevant, inflammatory [sic], and prejudicial evidence,' asserted as his thirteenth ground for relief fails." Id. at [*80]. (emphasis added).

9. They failed to demonstrate prejudice from Petitioner's trial counsel's failure to object to the prosecutor's comments about his tattoos: "Nor has Franklin demonstrated prejudice *from his attorney's failure to object to the admission of the tattoo evidence or the prosecutor's comments about the tattoos.*" Id. at [*80]. (emphasis added).

10. They failed to identify any specific testimony the court might consider, didn't refer to the state court record, didn't satisfy the AEDPA standard, and never sought permission to present evidence that would bolster his claim at the Evidentiary Hearing: "He claims improper victim impact testimony was elicited by the prosecutor, but fails to identify any specific testimony that this Court might consider, does not refer to the state court record, and has not satisfied his burden under the AEDPA standard applicable in these proceedings. . . *Franklin never sought or received permission to present evidence at his evidentiary hearing that might have supported this claim.*" Id. at [*81]. (emphasis added).

11. They alleged that remarks made by the prosecution improperly characterized Petitioner, but failed to reveal just what they characterized him as: "Franklin contends the prosecutor made remarks improperly characterizing him; *as what*, he does not reveal. . ." Id. at [*82]. (emphasis added).

12. They failed to request an Evidentiary Hearing to present evidence to support their allegations: "Franklin neither requested nor received permission to present evidence to support his allegations at the evidentiary hearing in these proceedings." Id. at [*83]. (emphasis added).

13. They provided no specificity in their pleadings, didn't make citations to the state court records, and failed to satisfy requirements of the AEDPA: "He provides no *specificity* in his pleading, no *citations* to the state court record, and no claim that the state court's decision on the issues presented was contrary to or an objectively unreasonable application of federal law, or that it was based upon an unreasonable determination of the facts as presented at trial. . . As such, *Franklin has failed to substantiate his allegations and consequently to satisfy his burden under the AEDPA.*" Id. at [*83]. (emphasis added).

14. They failed to litigate the sixth and seventh sub-claims in the traverse: "Franklin does not argue the sixth or seventh sub-claims in his Traverse." Id. at [*84].

15. They failed to identify the prosecution's offending comments, or where they might be found in the record, thereby prompting the court to inform his counsel that it (the district court) isn't required to search the record in order to find support for Petitioner's claims:

". . . he does not identify 'with specificity' *what* the prosecutor's comments were, or *where* the offending comments might be found in the record. . . This Court is not required to

search the record in order to find support for a habeas petitioner's claims." Id. at [*84]. (emphasis added).

16. They omitted cause for default and incurred prejudice: "Franklin has not suggested any cause for his default, nor has he demonstrated prejudice therefrom." Id. at [*85]. (emphasis added).

17. They failed to seek permission to present evidence at his Evidentiary Hearing: "He did not seek to present evidence relating to this ground for relief in his request for an evidentiary hearing in this Court." Id. at [*86].

18. They compelled the court to inform the defense that its tenth ground for relief doesn't conform to Rule 2 (c) (2), as they failed to state facts to which would support this particular claim: "the Court is compelled to note that Franklin's pleading of his tenth ground for relief does not conform to Rule 2 (c) of the Rules governing Section 2254 Cases in the United States District Courts. That rule requires that the petition must 'state the facts supporting each ground [for relief].'" Id. at [106-07].

19. They didn't come nowhere near meeting the burden imposed upon a petitioner by the federal habeas statutes and rules, as they utilized a faulty method of incorporating "by reference" Petitioner's other federal habeas claims, as with claims raised in the state courts:

"Franklin's method of incorporating by reference his other habeas claims, and even more so his claims raised in the state courts, *is ill advised* and the validity of this maneuver is doubtful. . . *The arguments a petitioner may have made 'in the state court,' therefore, do not adequately address the question this Court must answer in a habeas petition,* and merely 'parroting,' or even worse, *attempting to incorporate the state arguments* ***by reference*** comes nowhere near meeting the burden imposed on a petitioner by the federal habeas statutes and rules." Id. at [107-08]. (emphasis added).

20. They compelled the court to state that it wasn't inclined to supply a reason of its own making as to how this particular claim is related to Petitioner's ineffective assistance of counsel claim: "Franklin does not provide an explanation as to how that claim is related to his ineffective assistance of counsel claim here and the Court is not inclined to supply one of its own making." Id. at [*110].

21. "In this ground for relief, Franklin provides *so little* substantive 'specificity' and 'argument' that it is extremely difficult to determine whether the claim is preserved for habeas review. He sets forth his claim, such as it is, in *one sentence* in his habeas petition containing no citation to the record or federal law . . . and merely defends against Respondent's assertion of procedural default in *three sentences* in his Traverse. . . Apparently, Franklin intends to

incorporate by reference the substance of his state claims, a technique questioned by this Court above." Id. at [*116-17]. (emphasis added).

22. In Petitioner's opinion, they failed to take the opportunity to mesh TWO of his *pro se*, vior dire claims with his (Second) Eleventh Ground for Relief regarding his trial attorney's "inability to question potential jurors about their views on the various aspects of 'insanity,' Petitioner's SOLE defense"; and "trial attorney's failure to question potential jurors about their knowledge of an alleged incident (reported on the local news) about 'Petitioner having tried to kill an inmate that he was celled with' while already awaiting trial for the killing of his uncle and grandparents," as both *pro se* claims would have dovetailed perfectly with "this" ground for relief. [See *124-39].

23. "Franklin makes no argument as to *why* or *how* the state court's application of the law was unreasonable or erroneous and he presented no evidence relating to this sub-claim at his evidentiary hearing." Id. at [126]. (emphasis added).

24. They omitted pretrial publicity and the effect that it had on Petitioner's community: "Franklin does not suggest that the pretrial publicity in his case had such an effect on the community in and around Dayton, Ohio, where the murders occurred." Id. at [*132].

25. "Franklin failed to demonstrate that his counsel provided substandard representation by not objecting to the trial court's comment, and he did not explain *how* he was prejudiced by his counsel's failure." Id. at [*136-37]. (emphasis added).

26. They failed to address Respondent's argument in Traverse: "Franklin does not address Respondent's argument in his Traverse, but [rather] only acknowledges that Respondent 'did not advance a procedural default defense'. . ." Id. at [146]. (emphasis added).

27. "Franklin has provided this Court no citation to *any example* of any of the failures of his counsel he alleges in his claim. As has been noted above, Habeas Rule (2) requires a petitioner to state the facts supporting each ground for relief. Instead, Franklin has merely made *bare conclusory accusations* without citing any support in law or fact. Neither has Franklin explained how the Ohio Supreme Court's decision was contrary to or an unreasonable application of Supreme Court law. In such a vacuum, this Court is unable to grant habeas corpus relief. Even if the claim were properly presented, *Franklin has not shown how he was 'prejudiced'* by the errors he attributes to his trial counsel. Consequently, he has failed to demonstrate entitlement to a writ of habeas corpus, and his thirteenth ground for relief is denied." Id. at [*147]. (emphasis added).

28. They failed to set forth specifics in Petitioner's Traverse: "This Court, however, is not inclined to identify where each was testified to by mitigation witnesses or which consist of hearsay or which lacked any mitigatory value, especially since the Court is unaware of *precisely*

which of the allegations made in the state court Franklin intends this Court to address, given his failure to set forth *specifics* in his Petition or Traverse. The Court has performed a full review of Franklin's claim, and uses the examples above to illustrate its reasoning." Id. at [*153-54]. (emphasis added).

29. They failed to render citations to the record: "Respondent argues the claim is procedurally defaulted . . . but Franklin contends, without citation to the record, that the claim was preserved for habeas review via a *pro se* application to reopen his direct appeal filed in the state court . . ." Id. at [*155-56]. (emphasis added).

30. They offered no basis upon which Petitioner may be forgiven for his procedural default: "Franklin's claim is procedurally defaulted. Ohio law provides that claims of ineffective assistance of appellate counsel may be raised, indeed may *only* be raised, in an application to reopen an appellant's direct appeal. . . Franklin contends his ineffective assistance of *trial* counsel claim was preserved because he identified it as an assignment of error his appellate counsel should have raised on direct appeal, the failure of which constituted ineffective assistance of *appellate* counsel. Because claims of ineffective assistance of appellate counsel are based on a different legal theory from the underlying claims, the Sixth Circuit has expressly held that an application to reopen a direct appeal does not preserve the underlying claims from default. . . Franklin's contention that he presented the underlying ineffective assistance of trial counsel claim in the state courts is therefore unavailing. As Franklin has offered *no other basis* upon which the Court might excuse his default, his seventeenth ground for relief is procedurally defaulted and accordingly denied." Id. at [*156]. (emphasis added).

31. They stated that the Ohio Supreme Court's decision was unreasonable without supporting argument, or citation of law: "Franklin states, without supporting argument or citation to law, that the Ohio Supreme Court's decision is unreasonable * * * Franklin states the Ohio Supreme Court's decision is unreasonable, but does not explain *why* or *what federal law* it contradicts, *other than to cite unspecified 'existing precedent.'*" Id. at [*158-59]. (emphasis added).

32. "Franklin alleges the Ohio court's findings are unreasonable, but provides no citation to *any authority* that might provide this Court with a basis upon which to make that determination. Even if Franklin had shown the guilt-phase evidence should not have been admitted in the mitigation phase, however, he has not demonstrated prejudice from admission of the evidence or his attorney's failure to object to the same. Under Strickland, Franklin is required to *demonstrate error* on his attorneys' part *and prejudice* caused by the error. As he has done neither, he is not entitled to habeas corpus relief, and his nineteenth ground for relief is denied." Id. at [*160-61]. (emphasis added).

33. They didn't even attempt to show or demonstrate that the Ohio Supreme Court's summary rejection on the merits of Petitioner's Application to Reopen his Direct Appeal was contrary to, or an unreasonable application of federal law: "Franklin has not *demonstrated* that the Ohio Supreme Court's summary rejection on the merits of his application to reopen his direct appeal was contrary to or an unreasonable application of federal law. Accordingly, his forty-seventh ground for relief is denied." Id. at [*276-77]. (emphasis added).

HOWEVER, when Petitioner was served with a copy of the magistrate judge's ruling (a ruling that is binding and unappealable, except to the Sixth Circuit inasmuch as the magistrate judge has *"final authority"* over Petitioner's case),[5] he instantly knew that it would be *impossible* for him to receive a "fair merits ruling" with his federally appointed counsel (because of their remiss and feckless nature), and as such filed a motion for substitution of counsel (Doc. 121) citing the aforementioned inadequacies as "justification for a change of counsel." The magistrate *unreasonably* denied his motion (Doc. 122) stating that "[t]he same observations made [when the court denied Petitioner's motion for substitution of counsel back in 2004] remain true [now]" in that " . . . the Court believes Petitioner can trust counsel to act in his best interests in this case." (See Doc. 122 citing Doc. 24 at p3.)(emphasis added). The magistrate judge further on went to state:

[5] The magistrate judge exercises "plenary power" in Petitioner's case inasmuch as one of his counselors, unbeknownst to him, filed a "Consent to Magistrate Judge Jurisdiction" motion, thus forfeiting his Constitutional Right to an Article III Judge. And as such this magistrate judge has "final authority" without having to answer to a judge above him. See Appendix "E" (signed ONLY by counselor, Ms. Adele Shank). But the thing about this motion and the "timing of its filing" is that his attorney lodged this motion around (if not before) the same time Petitioner lodged his motion for a substitution of counsel, because of his attorneys' refusal to communicate with him and discuss legal strategy, etc. And as such, confidence was virtually nonexistence in them. So, just when did Petitioner have time to discuss and "weigh" the option of allowing a magistrate judge have "final authority" over his case? See. Docs. 23, (the date of its certificate of service).

"[Petitioner] has been appointed not one, but two attorneys, *both of whom are skilled in criminal defense.* Ms. Shank had extensive capital habeas corpus experience when appointed and has since served on the American Bar Association's task *force to review the Ohio death penalty*. Mr. Fleisher is a very experienced criminal defense attorney, current President of the Dayton Chapter of the Federal Bar Association. . . *Both are members of the Criminal Justice Act Plan special panel for death penalty cases.* The fact that they have not achieved the result for which Petitioner hoped does not mean that they have failed to provide *thoroughly* **professional and zealous** representation in this case."[6] (Doc. 122 at pp. 2-3)(emphasis added).

The fact that the magistrate now sees fit to perform a one-eighty, and shower Petitioner's counselors with praise, and issue rulings contrary to its own findings is a blatant abuse of its discretion and is, furthermore, a dead on oxymoron. (See **NLRB v. Talsol Corp**., 155 F.3d 785, 795 ("In the first sentence of the second paragraph, **Talsol** expressly acknowledged that the . . . **status quo** was to review employees for wage increases in June. In the very next sentence, however, **Talsol** states that it believes *it should not do so that year because of* its legal obligation to maintain the **status quo.**"))(emphasis added). How can a petitioner *possibly* achieve justice when he's subjected to rulings like this from a judge exercising "plenary power," AND the

[6] These are the comments the magistrate judge made in response to later motions to have his current feckless counsel removed from his case:

"[Franklin's] current counsel have **vigorously** and **professionally** litigated this matter from its inception in this Court. Both have extensive experience in other capital habeas corpus litigation and can be trusted by both Petitioner and the Court to advocate **zealously** on his behalf." (Doc. 156)(emphasis added). "[S]o far as the Court can ascertain, these counsel [sic] have represented Franklin '**zealously** and **competently**' throughout this case. The Court would advise Franklin, as it has before, to **trust** appointed counsel." (Doc. 166 at p6)(emphasis added). He's "refused [Franklin's] requests to replace his current counsel because [he'd] found *no fault* with their performance." (Doc. 234). "[Franklin] has been represented throughout the course of these proceedings by **highly qualified counsel.**" (Doc. 240)(emphasis added).

counsel that's supposed to protect him from abuses such as these, is the "cause for these decisions," and besides that are opposed to him and his quest to overturn his unjust conviction?

You'd think that the Sixth Circuit would (upon proper motion) step in and relieve Petitioner of his suffering, but they've declined. (See Docs. 17, 23, and 30 in the Sixth Circuit at Case No. 09-3389; see, also, Docs. 76 and 80). In violation of Petitioner's Eight Amendment Right to be free of cruel and unusual punishment, that court was indifferent to the serious circumstances that Petitioner's case exhibited. See **Wilson**, supra. And that court is still indifferent until this very day and still refuses to apply "equity" to Petitioner's case so as to relieve him of his unwarranted hardships.

(b) Another example is when counsel perpetrated **FRAUD** upon the Court by putting forth **"bad faith"** requests to have his case held in abeyance stating the following:

> **I.** "[Franklin's] successor state post-conviction petition raises several federal issues. Habeas counsel anticipate raising several of those issues in Mr. Franklin's habeas petition, assuming he does not obtain relief through the successor state post-conviction proceedings." (Doc. 25 at pp. 8-9)(emphasis added).
>
> **II.** "Mr. Franklin's Petition for Writ of Habeas Corpus raises the same claims and/or claims based on the same matters as those pending before the state courts in Mr. Franklin's successor petition for post-conviction relief and his application for reopening his appeal. Presenting a habeas petition with only exhausted claims is not a viable option at this time." (Doc. 25 at p 10).
>
> **III.** "Filing additional pleadings based on new rulings from the currently pending state court proceedings could cause reviewing courts to attempt to hold the matters not addressed in the first round of litigation in federal court to be defaulted. Petitioner could be confronted with attempts to characterize subsequently raised issues as an effort to present a successor habeas petition. . . . Furthermore, it could result in ***substantial unfairness*** to Mr. Franklin when *confronted with claims of waiver,*

default, or other procedural hurdles should he need to file subsequent pleadings based on the now pending state court proceedings." (Doc. 28 at p 2)(emphasis added).

IV. "Furthermore, proceeding at this point may result in future allegations of waiver or default as well as claims that any issues which emerge and are presented later 'are attempts to file a successor habeas petition.'" (Doc. 28 at p 4)(emphasis added).

And upon receipt of these dishonest **"bad faith"** requests from counsel, the Court indeed held Petitioner's case in abeyance for the purpose of exhaustion and "inclusion" (Doc. 29). However, upon exhaustion of his state remedies, Petitioner's counselors **"refused"** to amend their petition to the inclusion of his newly exhausted claims. And when Petitioner sought to bring some of said **"intentional omissions"** to the court's attention (Doc. 45) in hopes of having said court **insist** that counsel – as they'd **promised** Petitioner and the court to do – incorporate the newly exhausted claims within their petition, said court declined to hold his counselors' feet to the fire and instead admonished "Petitioner" against filing papers in its court *pro se* whilst retaining counsel (Doc. 46); thereby effectively *binding his hands behind his back* and precluding these issues in question from ever being presented in his habeas petition – of which Petitioner will undoubtedly face a "procedural default" if he should so seek to have these claims of merit that were "promised to be litigated" (but weren't) adjudicated. But at the time the Magistrate Judge saw absolutely nothing wrong with this "perpetration of *fraud* upon the court."[7]

[7] This same Magistrate Judge, however, would later inform Petitioner that some of the issues in which Petitioner had litigated within the confines of his *pro se* 60 (b) (6) motion (some of which being the very issues in question that were **promised** to be litigated by counsel, but never

(c) Now, admittedly, some things are lost upon Petitioner, and as such, he just doesn't comprehend just how the district court can rest assured upon its assertion that counsel are professional and zealous in their representation of Petitioner when counsel has failed their client in a multitude of ways. Aside from them being directly responsible for him having become the not-so-proud recipient of an execution date,[8] counsel has also failed their client in the following ways:

I. Counsel filed a motion for discovery, the warden opposed said motion, and counsel, on February 19, 2013, allowed "[Mr. Franklin's] time to file a reply in support expire[] . . . without any reply being filed." See **Franklin v. Robinson**, 2013 U.S. Dist. LEXIS 27532 at *1.

II. Counsel, on December 26, 2013, permitted their client's "time to file a reply to the Return of Writ in [his] case expire[]. . ." without having filed a reply, prompting the Court to have counsel "advise the Court forthwith whether [counsel] intended to file a reply and why it was not filed within the time allowed by the Order for Answer." *Id.* at *3. (Emphasis added).

III. Upon having his case transferred to the Sixth Circuit for a determination as to whether or not Mr. Franklin could file a second petition pursuant to 28 U.S.C. §2244(b)(2), counsel's "negligence" was the causation for the Sixth Circuit "dismissing . . . [Mr. Franklin's] action 'for want of prosecution,' as [counsel] failed to cure identified defaults, despite being given notice and time to do so." See **Franklin v. Warden, Chillicothe Corr. Inst.**, 2016 U.S. Dist. LEXIS 40391 at *1-2, (citing *In re Franklin*, 2016 U.S. app. LEXIS 6315) (Emphasis added).

Counsel's performance reeks of laxness, ineffectualness, and, understandably, inspires naught in the way of confidence, so far as Petitioner is concerned. And this is only the latest of their crusades to preserve Petitioner's unjust conviction. Yet, the magistrate judge

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were) were "successive" in nature inasmuch as they had **never** been litigated in that court before Petitioner had sought to litigate them in that court *pro se.* (See Docs. 158-1 and 183).

[8] See Petitioner's latest (**State v.) Murnahan** filed in the Ohio Supreme Court, denied September 26, 2018. 63 Ohio St. 3d 60.

adamantly insists that current "counsel have [sic] **vigorously** and **professionally** [represented Petitioner]."

(d) Also notable, is the fact that once Petitioner chose to "fire" his counselors (see Docs. 143, 148, and 152) the magistrate judge suddenly felt compelled to grant Petitioner something which, in the past, it insisted that he could "never" enjoy, nor benefit from: hybrid representation. (See Doc. 153; then see Docs. 121, 45 46, 122, 136, and 137). However, Petitioner, in no uncertain terms, made the court aware that he wanted absolutely NOTHING to do with his current counselors and lodged with the court Doc. 155.[9] But *somehow* the magistrate judge still managed to thrust this hybrid-representation situation upon Petitioner; ultimately to his detriment, as said counselors would be a "factoring cause" in him filing a late notice of appeal, and subsequently having his pro se filed 60 (b) motion (not adjudicated on the merits, but rather) extinguished.

It would seem that somewhere after the process of the court mandating that *Petitioner lodge papers in court, himself, pro se*, that that very court would later cease to provide *its rulings to Petitioner*. Why it would do as much, the Court would never explain. In any instance, and unbeknownst to Petitioner, he was to rely upon the kindness of his untrustworthy counsel for

[9] This, too (counsel's misrepresentation that Petitioner only required new counsel for the purpose of "responding to the prosecution," and/or he was willing to allow present counsel to continue on his case in a hybrid capacity), was an instant of "fraud upon the court," for Petitioner unequivocally expressed his desire to sever relations with his current counsel in Doc. 152. Then the court was "apparently" presented with patent misrepresentations from Petitioner's counsel during phone conferences between counsel and the court on 07/23/2013, 08/19/2013, 08/20/2013, and 09/25/2013; of which, said conferences were unquestionably fraud-laden if they were effective enough to cause the court to deem Petitioner's motion to discharge counsel "withdrawn" after having been petitioned by Petitioner with the likes of Docs. 143, 152, and later 155. Furthermore, Petitioner would have this Court visit n. 3, at Doc. 250.

copies of decisions from the court. The first time in which Petitioner was made reliant upon said counsel in this manner, he received Doc. 183 – the court's decision denying his pro se 60 (b) motion for relief – with half of his time to prepare and lodge an appeal *erased.* (See Doc. 191).[10] Totally unware to the fact that the court had determined to desist in serving him, Petitioner filed Doc. 191 with the court in hopes that said "complaint" would put the court on notice, and ultimately prompt the court to correct its oversight in failing to serve him in its future decision makings, especially as it pertained to Petitioner's pro se filings. The magistrate judge never responded, nor acknowledged said complaint and persisted to – unbeknownst to Petitioner – force him to rely upon his attorneys for copies of the court's decisions.

Then came the court's decision in Doc. 200: denying Petitioner's motion for reconsideration. The court, again, neglected to serve Petitioner (though he was a **forced** litigant); and counsel, faced with the same exact circumstances as were they when the Court denied Petitioner's 60 (b) motion, inexplicably **failed to** dispatch their client a copy of the court's decision; late or otherwise. Never mind the court record, again, reflected no mentioning of having served Petitioner, and Petitioner had just lodged a complaint with the court complaining about having not been served by the court, AND being served by his counsel *late.* Counsel in question didn't serve him whatsoever. And by the time Petitioner finally ascertained that his motion for reconsideration had been denied – via footnote contained in Doc. 202 (the court's decision denying "counseled" motion for reconsideration), of which counsel did dispatch to Petitioner – it was well too late to lodge a *timely* notice of appeal, as

[10] Counsel reasoned that inasmuch as the record wasn't clear as to whether or not the Court had dispatched Petitioner a copy of its decision, they decided it best to forward him a copy of the decision. Never mind said copy was dispatched rather late.

more than 45 days had lapsed. And to add insult to injury, when Petitioner attempted to rely on counsel – as the court had insisted he should, should he need guidance – and ask if there was anything he could do to "remedy the situation" in which he found himself thrust (though, mind you, through no fault of his own) counsel in question "didn't know." Turns out, Petitioner could have sought a motion for an extension of time to file his notice of appeal. And counsel "knew" as much, but withheld said vital information from their client.[11] And as such, and for all of the aforementioned reasons, Petitioner's counsel is untrustworthy . . . though the magistrate judge defiantly insists that they are professional and zealous in their representation.

Indeed, counsel (in conjunction with the magistrate judge) ruined Petitioner's ability to have the issues contained within his 60 (b) motion properly adjudicated. And when Petitioner went to the Sixth Circuit on appeal – and though he explained "why" he was forced to file his notice of appeal "late"[12] – the court was unimpressed, indifferent and dismissed his appeal inasmuch as Petitioner had lodged his notice of appeal late. Surely, such a situation

[11] It must further be noted that counsel in question had motivation for ensuring that their client's endeavor failed, inasmuch as Petitioner had filed a grievance with the disciplinary council against them, and said council had informed him, in denying his grievance, that, "[o]nce [he] receive[s] a judgment from a court indicating that ineffective assistance of counsel has occurred in [his] case, [he] may send [the Council] a certified copy of that judgment." And if Petitioner were to have any success on appeal of the issues in which he put forth in his 60 (b) motion, counsel in question could have, in fact, faced some punishment of sorts.

[12] It also must be established that after it had dawned on Petitioner that he might not have needed to file his "notice of appeal" independently from his attorneys' inasmuch as he was currently engaged in a "hybrid-situation," Petitioner had sought confirmation from the magistrate judge (the architect of the "hybrid-situation") via a motion for clarification. But the magistrate *unreasonably* suggested that "any clarification of the sort sought in the motion must be obtained from the Court of Appeals." (Doc. 222). How can a court, having absolutely nothing to do with the current proposed arrangement, know what another court was thinking when it instituted this arrangement? Please see Doc. 221.

calls for "equity" and is in violation of Petitioner's right to remain free from cruel and unusual punishment. See ***Wilson***, supra.

(e) Indeed, none of the abovementioned instances contained in §§4(a)-(d) "are part of the 'penalty' that [Petitioner is to] pay for [his alleged] offenses against society." And as such, should be rightfully deemed cruel and unusual punishment. Id. And both the district court and the ensuing court of appeals have been and remain "deliberately indifferent" to Petitioner's plight. Despite the fact that their decisions are the direct causation of his plight. Petitioner is currently undergoing the "unnecessary and wanton inflection of pain," to which is disproportionate to the severity of his alleged crime and is "without penological justification." See **Rhodes**, supra.

"The [Due Process] Clause is phrased as a limitation on the State's power to act. . .[i]t forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law.'" **Deshaney v. Winnebago County Dep't of Social Services**, 489 U.S. 189, 195. And "[l]ike its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" Id. at 196. (citations omitted). Thereby, "[i]ts purpose was to '*protect the people from the State*' . . ." Id. (emphasis added). Clearly, Petitioner, in violation of his Eight and Fourteenth Amendments to the Constitution, is not being protected from the federal courts . . . to the grave detriment of the inevitable loss of his "life and liberty."

5. Petitioner's "Current" Motion to Discharge Counsel:

A. As the Court has just seen, via §§4(a)-(d), Petitioner's counsel is untrustworthy; his magistrate judge makes rulings that are wholly unreasonable, oxymoronic, and he clearly abuses his discretion while he does as much; and the Sixth Circuit is uncaring and unwilling to provide "equity" unto Petitioner and/or correct the lower court's blatant abuses.

If only the courts would allow Petitioner to shed counsel, he would (at a minimum) have access to Next Friends. Not to mention that he could "possibly" acquire effective, reputable counsel willing to take his case pro bono and/or simply advise him (see footnote 19 at the last sentence).

B. The district court, in response to Petitioner requesting that his counsel be discharged, decided that, "no," counsel will not be discharged from his case; and that counsel will file any and all motions that Petitioner thinks appropriate. But in the off chance that they refuse to do so, Petitioner can (at that point) represent himself – **even though the court literally <u>just</u> labeled him "incompetent to self-represent."** (See Doc. 262 at pp. 1 and 6, respectively). So, "how is it that someone that's just been deemed <u>incompetent to self-represent</u> supposed to be competent enough to represent themselves WITHOUT the assistance or guidance from ***<u>any</u>*** professional counsel whatsoever?" No Next of Friends. No talking to other counselors that may desire to assist him. None of that. And the magistrate judge and the Sixth Circuit see absolutely nothing wrong with this. Again, this is an oxymoron, as with a violation of Petitioner's right to remain free from cruel and unusual punishment. See **<u>NLRB v. Talsol Corp</u>.**, supra, and **<u>Wilson</u>**, supra, respectively. See, also, **<u>Rhodes</u>**, supra. Furthermore, and as in the case of **<u>NLRB v. Talsol Corp</u>**., none of the "oxymoronic decisions" made by the magistrate judge can be reconciled. And to think that this magistrate has "final say-so" in Petitioner's case, <u>and</u> the next court hasn't any compassion, nor understanding whatsoever.

This situation is in violation of Petitioner's Due Process Rights, as it not only fosters and perpetuates the "unfairness" as experienced by Petitioner at the hands of the government (which includes his counsel, magistrate judge, and the court of appeals), it actually holds him captive – powerless to wiggle free on his own accord – and if left unchecked, will undoubtedly result in his unjust and untimely death. Indeed, the Fourteenth and Eighth Amendments are supposed to stave off nightmarish situations like this. And, indeed, they would . . . if anyone, or court actually took the time to "apply" them.

C. At Least Two Claims of Tremendous Merit That Were Denied on a "Mistaken Basis":

(i). I-A-C – Failure to Present Evidence to Jurors to Question Defendant's Sanity:

As it pertains to this issue in question, Petitioner's exact quote was: "Defendant had on him, at the time of his arrest, hours after the crime, a great deal of possessions ([State] [E]xhibit[s] 28; 30; 135; 137) and in addition to that he was wearing a winter coat in warm weather ([Supp. H.] Tr. 51-53 (James Sullivan))."

In denying this claim, the magistrate judge claimed (1) that Petitioner failed to reference any evidence "other than his coat," and (2) that the coat was "physically" unavailable, and as such, trial counsel couldn't present something that they had no access to. See **Franklin**, supra, at [*270-73] and n.23. This decision was made on a "mistaken basis," and as such, deprived Petitioner of his chance to have his unjust conviction overturned

One, Petitioner DID reference his "other evidence." While he didn't list what "this other evidence" was, he certainly made reference to "[State] [E]xhibit[s] 28; 30; 135; [and] 137." And being that the court "ignored" evidence that Petitioner used to support his claim,

the court in fact made a ruling without taking into account "all of the evidence" as presented by Petitioner.

Two, though the coat was, itself, "physically unavailable," the fact that Petitioner was wearing it in "really warm weather" **IS** available. Petitioner even cited transcript records stating as much. See Supp. H. Tr. 51-53. HOWEVER, it must further be noted that the jury **remains totally unaware** to the <u>fact</u> that Petitioner was observed wearing a winter coat & layered clothing in ***"really warm weather,"*** as this peculiar fact came to light only once during Petitioner's capital proceedings – *at his suppression hearing* **BEFORE** a jury was even empaneled. Not sure why the magistrate judge is under the "<u>mistaken" belief</u> that there had to be a "physical" coat present to inform the jury that Petitioner was wearing a winter coat in really warm weather when he was apprehended. Especially considering that one of the arresting officers had previously testified to it (outside of the jury's presence), and if pressed would have had to attest to it again. Indeed, this claim was denied on a "mistaken basis" and in as much deprived Petitioner of an opportunity to have his unjust conviction overturned.

O.k., to recap, when Petitioner was arrested he was observed to be wearing – **in really warm weather** – a pair of black shorts; a pair of gray sweat pants; and a pair of black pants worn atop of the shorts <u>and</u> sweat pants; a blue polo-type shirt; and a **winter coat.** But not just that, as odd as that was, he was also observed to have on his person (1) .38 caliber revolver; (1) gold necklace; (1) lady's gold watch; (1) gold Nike ring; (1) wedding ring; (1) non-working cell phone; (6) sets of keys {encompassing over 30 keys}; (1) empty key fob; (1) pair of dice; (1) hair brush & comb {look at his mug shot photo – what was he going to brush or comb?}; (1) ruler {yeah, he couldn't wait to get to his destination so that he could draw lots of straight

lines}; and (2) cassette tapes;[13] plus other items that were lost or thrown away – such as his coat – while he was in custody in Nashville.

Bizarre, right? The jewelry and gun, not so much. But everything else was definitely bizarre. And believe it or not, as bizarre as that was, Petitioner's trial attorneys **NEVER** attempted to use <u>any</u> of these oddities to question his sanity at trial. Like, how many "sane" people do you know that walk around in **"really warm weather"** while wearing a winter coat <u>and</u> layered clothing, while carrying around purposeless, senseless items?

(ii). Bad Faith – Intentionally Eliciting Inadmissible, Hearsay Testimony:

As it pertains to this particular claim, the district court clearly misplaces the crux of Petitioner's argument. The court was under the "mistaken" belief that Petitioner was under the impression that "the prosecution was acting in 'bad faith' by objecting to defense counsel's questioning of Dr. Martin, and Dr. Stookey's direct testimony based upon her review of another doctor's report." See **<u>Franklin</u>**, Id. at [*276]. This is simply not the case. Petitioner outlined a clear instance of "bad faith" on behalf of the prosecution for "eliciting inadmissible, hearsay testimony." Not sure how the court totally "ignored" Petitioner's references to the phrase "elicited hearsay testimony," but it did. And in doing so, it denied Petitioner's issue of tremendous merit on a "mistaken basis" and denied him his opportunity to overturn his unjust conviction.

[13] These herein listed items (everything except for the coat) make up State Exhibits 28, 30, 135, and 137. Furthermore, most of these items have a "delusion-based value" only.

Now, as it were, the prosecution vigorously objected to Petitioner's trial attorney's attempts to extract testimony from the prosecution's expert witness, Dr. Martin, as it relates to the information that he relied on to complete his analysis of Petitioner {see Tr. 1288-91 [emphasis added to page 1290], and Tr. 1307-10}; thereby establishing his awareness to the fact that an expert witness may not testify to the contents of reports that are the basis of his opinion, but were not prepared by him because it would be ***"hearsay testimony"*** and is not allowed in a court of law.

Prosecutor Franceschelli's statements during objections (as it pertains to his intimate knowledge of "hearsay testimony" and its ***inadmissibility***):

1. "Not getting into what Dr. Stukey [sic] observed . . . it may not even be subject to Cross Examination. Are you calling her?" (Tr. 1289)
2. ". . . [Dr. Martin] **can't** testify to Dr. Stukey's [sic] report." (Tr. 1290)
3. ". . . if you want to have Stukey [sic] here, that's fine." (Tr. 1290)
4. ". . . but here's the problem. . . what he's trying to do is obtain **hearsay**." (Tr. 1307)
5. ". . . he's trying now to [learn] from [Dr. Martin] what others . . . told Miss Stukey [sic]. That's **hearsay**." (Tr. 1307)
6. "Now the issue I have with that is . . . that you can't Cross Examine it." (Tr. 1308)
7. "Now, if you wanted to ask Stukey [sic] that, he could do that, but not [Dr. Martin]." (Tr. 1308)

But then the prosecution, having just successfully prevented the defense from extracting hearsay testimony from Dr. Martin, turned around and – that very day, ***only minutes later*** – knowingly, yet purposefully extracted "hearsay testimony" from their other doctor, Dr. Stookey.

The thing about Dr. Stookey is that she wasn't able to form an opinion about Petitioner's sanity during the commission of the crime because he wouldn't talk to her about

having allegedly committed the crime. But after reading **other doctors' reports**, she soon became very opinionated about his sanity and gave her opinion "under direct questioning from the prosecution" – which she is NOT permitted to do. So after *numerous* sustained *objections (more than 10)*, the trial judge FINALLY struck her opinion from the record and *supposedly* the juror's minds – but only after she had given her opinion in its "entirety."

Dr. Stookey:

1. ". . . he went about and . . . collected the **valuables** out of the home." (Tr. 1350)
2. "He took **valuables.**" (Tr. 1351)
3. "He didn't go about just picking up random things." (Tr. 1351)
4. "He didn't pick up . . . all the **breakfast cereal** . . . or that sort of thing." (Tr. 1351)
5. ". . . after he collected the **valuables** . . . sets a fire in the house." (Tr. 1351)
6. "He then **leaves** . . . he's aware of what he's doing." (Tr. 1352)
7. ". . . leaving the scene suggests to me . . . that he understood . . . he had to get out of there." (Tr. 1352-53)
8. "He did something **wrong** and now he has to get away." (Tr. 1353)

Both of these claims that were "denied on a mistaken basis" have tremendous merit and definitely have the potential to secure a new trial for Petitioner. But, these are claims that counsel bluntly "refused" to litigate (see Appendix "D"), even after Petitioner filed Doc. 136: alerting the court to the fact that it had denied some of his issues on a "mistaken basis." It was at that time that a 60(b) motion should have been filed by counsel. But now, in part, due to counsel's gross negligence, Petitioner is in a position wherein he needs to file a 60(d) motion while using as qualifying factors (1) counsel's "refusal" to litigate these issues (2) their extreme gross negligence, (3) the fact that the magistrate judge denied Petitioner's *"justifiable"* motion to grant Petitioner a change of counsel when requested {see Doc. 121(filed on 06/05/09)}, (4) the magistrate judge didn't instruct counsel to file a 60(b) on these issues after Petitioner's

filing of Doc. 136; and (5) the fact that the magistrate wouldn't allow Petitioner to file pro se his motion for COA (see Doc. 137)). So, if this is the ONLY way that Petitioner can possibly qualify for 60(d) relief, how is it remotely not judicial misconduct for the magistrate judge to force Petitioner to retain the very counsel who are responsible for him needing the extreme measure of a 60(d) motion?

Furthermore, courts aren't accepting of an attorney filing against their own person, claiming incompetence and/or ineffectiveness. Such an argument simply won't be well taken by a court. And it is thereby that Petitioner should either be granted a change of counsel, or granted a much needed separation and allowed to undergo the process quite independent of his current counsel, but with the assistance of Next Friends to provide him tutelage during his presentation of constitutional violations of a conviction spoiling magnitude (suffered by him at the trial level).

6. The Three Heads of Cruel and Unusual Punishment:

(i). Dereliction of Duty:

Counsel is supposed to be in position to "protect" their client from potential abuses from the court; upend their client's conviction, if at all possible; defend him from the prosecution and its attempts at the shadings of truths and/or case law. But this counsel not only failed to protect Petitioner from abuses, it subjected him to abuses – and still continues to do so now (after having completely ruined all of his appeals) by (1) *intentionally* presenting his issues in a way that they'd NEVER garner any success whatsoever (2) refusing to resign from his case {as Petitioner has told the court on several occasions, no attorney will talk to

him while he has counsel assigned to his case}; (3) telling fabrications in an attempt to remain on his case {though, for what, who knows, as they do absolutely nothing for the advancement of his case and/or issues}; (4) *attempting* to litigate issues that it formerly, yet unequivocally "refused" to {when the issues in question were "ripe,"} all the while KNOWING that "this" method will fail because they are the reason why these issues ***weren't** litigated* when they ***should have been*** {back in 2009}; and (5) allowing the magistrate judge to abuse their client with absurd rulings.

(ii). Judicial Dereliction:

The judge is supposed to be in position to ensure that the petitioner is treated fairly; justice is done in his court; and if a problem should arise between a petitioner and his counsel, to settle it in a manner that best facilitates justice. He also has a duty to remove himself – sua sponte or upon proper motion – if cause arises, or already exists and comes to light. And dissimilar to the case of **Mickens v Taylor,** 535 U.S. 162, Petitioner doesn't assert a Sixth Amendment violation (but rather an Eighth and Fourteenth violations), and nor is he unable to show prejudice. The prejudice is quite apparent; and as such, a fresh appeal should be allowed by Petitioner, very much independent of his feckless counsel and his magistrate judge.[14] ... If only because Petitioner has been clearly attempting to rid his counselors for nearly a decade, but has been thwarted by the magistrate judge at every attempt. Furthermore, and because the magistrate judge "did nothing to discharge [his] constitutional duty of care . . the ensuing [decisions] of [denial] must be reversed and the defendant afforded

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[14] The magistrate judge in question is indeed careless, partial, and "resolutely obdurate," however. See **Mickens** at [*173].

a new [appeal]." See **Mickens** at [*190] JUSTICE SOUTER, dissenting. And even though this is not an "on point" case, the fact remains that the magistrate judge never questioned Petitioner about his desire to fire/change counsel (pursuant to **Martel v. Clair**, 565 U.S. 648, or whatever prevailing authority before that case). He KNEW that counsel was grossly ineffective in their handling of Petitioner's case, but even still, was unwilling (or unable) to admit that counsel nonetheless "ruined" Petitioner's appeal in his court. And as such, this is an egregious instance of judicial misconduct because the judge is basing his rulings (to keep current counsel on Petitioner's case) off of counsel's "status"[15] instead of their "representation of him and his case in his court." Because of Petitioner's current counselor's "qualifications," the magistrate judge firmly clings to the belief that counsel in question can do no wrong. Never mind that the magistrate's *own ruling* betrays otherwise: See §4(a) of this petition. Clearly, the magistrate judge in question either has a bias "for" Petitioner's current counselors, and/or a bias "against" Petitioner – perhaps both. Either of which being wrong. Not to mention that the magistrate judge is of the *identical*, yet *flawed* and *erroneous* mindset as was the State in the case of **Martel** when it presumed that "a court may not change counsel under §3599 even if the attorney-client relationship has broken down, so long as the lawyer has the *required qualifications* and is "act[ing] as an advocate." **Martel** at 660-61. (emphasis added).

And let's not forget that "[i]t is hornbook law that '[w]hen an indigent defendant makes a timely and 'good faith' motion requesting that appointed counsel be discharged and

[15] Ms. Shank being on the "American Bar Association's task force *to review the Ohio death penalty*"; Mr. Fleisher being "President of the Dayton Chapter of the Federal Bar Association"; and both counselors being *members* of the "Criminal Justice Act Plan special panel ***for death penalty cases***" (see Doc. 122 at p.2)).

new counsel appointed, the trial court clearly has a responsibility to determine the reasons for defendant's dissatisfaction . . .'" And "Moreover, an on-the-record inquiry into the defendant's allegations 'permit[s] meaningful appellate review' of a trial court's exercise of discretion." Id. at 664 (citing United States v. Iles, 906 F.2d 1122, 1130 (CA6 1990), and United States v. Taylor, 487 U.S. 326, 336-337).

(iii). Indifference by the Court of Appeals:

The appellate court – being the ONLY place that Petitioner can seek adjudication for gross abuses of discretion, inasmuch as Petitioner's magistrate judge has "final say-so" in his case[16] – REFUSES to correct injustices done unto Petitioner and/or simply "uphold" his *statutory* right to counsel (see Docs. 17, 23, 30, 76 and 80 of Case No. 09-3389). It's indifferent to the fact that Petitioner was **forced** to file papers pro se, against his will, and retain counselors that (that court KNEW) he'd wished to have discharged and replaced due to their serious fecklessness[17] {see letter to court at

[16] So, Petitioner can't appeal the magistrate's absurd decisions to a higher judge in the same court . . . and this Court only accepts about 1% of its cases.

[17] After the 6th Circuit again refused to remove Petitioner's feckless attorneys from his case, Petitioner was forced into a situation wherein the attorneys in question directly, and in conjunction with the magistrate judge, destroyed another round of appeals by causing him to file his "notice of appeal" late. And though the situation be precarious and outside of his control {the magistrate judge **forcing** him to file issues in his court "himself" against his will all the while ***forcing*** him to retain feckless attorneys, who would later withhold the court's decision from him that he needed to file a "timely" notice of appeal} the 6th Circuit was unmoved by the *faulty* process that Petitioner was forced to undergo {see Case No. 15-3236 at Docs. 17 and 18}. And when Petitioner had brought it to their attention that the magistrate judge had **forced** him to file papers in his court by himself without having given him a Faretta warning – and though this be a MAJOR violation – they didn't acknowledge said violation and further victimized him by condoning the misconduct and abuse that Petitioner suffered at the hands of his attorneys & the magistrate judge. To be certain, Petitioner filed a "Petition

Appendix "F," see, also, Petitioner's Docket for case No. 15-3236}. And now the Sixth Circuit – while expressing "no opinion on the question whether a petitioner *with appointed counsel* may take an appeal pro se . . ."[18] and having been confronted with "facts" to the tune that (1) his attorneys are grossly feckless, (2) they tell fabrications, (3) they perpetrated fraud upon the court, (4) they absolutely cannot have anything to do with the filing of Petitioner's proposed motions because they had ample opportunity to do so long ago but declined, (5) the magistrate judge grossly abuses its discretion by forcing Petitioner upon the likes of known feckless, untruthful counselors, AND denying Petitioner his ability to obtain "other, competent counsel" and/or Next Friends – insists that, **even though Petitioner doesn't have *"anything"* pending whatsoever in the way of petition/motion/or-the-like seeking "actual" relief,** Petitioner has to wait until his case has been completely decided before he can appeal. This is most certainly an unfair and callous decision that emphasizes anything but "fairness

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For Rehearing En Banc" pointing out the facts of his horrid situation, including the fact that he was due a Faretta warning but was deprived of it and that a depravation of this magnitude absolves him from any mistake that he may have made while being **forced** to file documents in the courts on his own. But the 6th Circuit wasn't moved or even concerned by the injustices that had just taken place. Instead, it was content to add insult to injury by denying Petitioner's appeals to its court all the while knowing that his unique situation was in fact deserving of relief. {See Petitioner's Petition For Rehearing En Banc under Case No. 15-3236 – sorry, but I don't have a document number for this document}.

[18] If Petitioner falls for the okey-doke and *allows* his attorneys to file his 60(d) motion, and/or whatever else, the Sixth Circuit can simply choose to ignore his pleas once he arrives in that court on appeal . . . *inevitably* dissatisfied. This is, indeed, a Catch-22. For, he has to – pursuant to the Sixth Circuit – begrudgingly proceed with counsel whom all participants know to be shiftless; allow them to file an appeal (that **IS** winnable), but in their hands will fail for a multitude of reasons; and once he arrives in the court of appeals, grin and bear the news that, oh, "you can't appeal this decision 'yourself,' because you already have counsel." (See Doc. 8-1 at Case No. 20-3943).

between Petitioner and the State/government." See **Ross**, supra. It also demonstrates an "unnecessary and wanton inflection of pain" (see **Rhodes**, supra) because of said court's "deliberate indifference" toward Petitioner's *faulty* appellate process (see **Wilson**, supra), which has him securely situated in a quagmire of a situation – a Catch-22, if you will – with which he finds himself unable to escape and/or find remedy. Indeed, this Court's intervention is much needed. Especially considering that the Sixth Circuit *always* refuses to "exercise [its] equity powers . . . on a case-by-case basis, demonstrating 'flexibility' and avoiding 'mechanical rules[]' in order to 'relieve hardships . . . aris[ing] from a hard and fast adherence' to more absolute legal rules. See **Holland v. Florida**, 560 U.S. 631 at 632, §1(b) of Syllabus. (citations omitted).

7. Remand Pursuant to Holland v. Florida and the Principles Contained Therein:

Though Petitioner is wholly under the impression that he naturally qualifies for "immediate appeal" pursuant to the dictates of **Cohen v. Beneficial Indus. Loan Corp.**, 337 U.S. 541, 546, as:

> It (1) must be conclusive on the question it decides: "is Petitioner able to discharge his current counsel and proceed *entirely* pro se?", (2) resolves important questions separate from the merits: "can Petitioner represent himself independent of counsel, but with assistance from Next Friend and/or *other* 'competent counsel?'", and (3) is effectively unreviewable on appeal: "if forced to proceed with arrangements as they are, his attorneys will undoubtedly destroy his ability to garner *'relief'* with their remiss, shoddy workmanship and perform the same exact way once they arrive in the Sixth Circuit. . .grossly deficiently (and to Petitioner's dismay, he will be denied his ability to weigh in on the appeal to the Sixth Circuit because he has counsel currently appointed)."[19]

[19] Because of how Petitioner was mistreated when the magistrate judge **forced** him into a *faulty* hybrid-representation situation, he refuses to file *pro se* with his current counselors at the helm of his case. See §4(d) of this Petition. Furthermore, he refuses to file pro se WITHOUT the

Petitioner is nonetheless seeking "remand," but not just for the present instance of maltreatment by the lower federal courts and his counsel, but rather EVERY instant of judicial misconduct and maltreatment suffered by Petitioner at the hands of the aforementioned. Indeed, he'd like to utilize the "equitable ruling" of **Holland** (and other applicable "equitable," and/or "in the interests of justice" rulings) to reopen ***the entirety*** of his federal appeals.

A.

Though this Court viewed the Eleventh Circuit's *Standard* as being "too rigid," Petitioner can in fact satisfy this rigid standard. Not only has he proven his counselors' gross negligence to "rise to the level of egregious attorney misconduct," he offers "proof of bad faith, dishonesty, [and] divided loyalty . . ." And in addition to that, he's also able to show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance[,]" (his attorneys' fecklessness and the courts toleration thereof), "stood in his way" of him

assistance of professional counsel apart from his current counsel. That is, Petitioner "refuses" to forego his right to proper, professional guidance while operating in the pro se form. By the court's decree, he will indeed be doing without "counsel" . . . if forced to rely on counsel who have undoubtedly been proven to be feckless and untrustworthy. After all, "a party whose counsel is unable to provide effective representation [and/or guidance] is in no better position than one who has no counsel at all." **Evitts v. Lucey**, 469 U.S. 387, 396. And who knows, the guidance from Next Friends (or other professional counsel) just might be the "difference maker" in whether Petitioner is able to have success while presenting his *claims of tremendous merit* before the federal courts.

benefitting from a timely filed 60(b) motion, and that those same entities stood directly in the way of Petitioner being able to benefit from a *proper appellate process*. See **Holland** at 649.

(B) A Call for Equity:

"The 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord *all the relief necessary* to correct . . . particular injustices.'" Id. at 650.

"[C]ourts [of equity] exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." Id. at 650.

"Equitable tolling . . . asks whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules[.]" Id. at 650.

(C) Similarities to Holland:

Petitioner, just like Holland not only wrote his attorney numerous letters seeking crucial information and providing direction (see Docs. 23 and 45); he also repeatedly contacted the federal courts, their clerks, and other organizations[20] in an effort to have his counsel – the central impediment to the pursuit of his legal remedy – removed from his case. And once Petitioner had discovered that the district court had denied some of his pro se issues on a "mistaken basis," he first sought to have counsel replaced (Doc. 121), and then prepared his own "Supplemental Application for Leave to File an Application for Certificate of

[20] See Sixth Circuit Case No. 09-3389 at Doc. 23 (at Attachment "B").

Appealability" *pro se* and promptly filed it with the District Court. See Doc. 136. **Holland** at 653.

Also, as in the case of Holland, Petitioner "does not argue that his attorney's misconduct provides a substantive ground for relief . . . nor is this a case that asks whether AEDPA's statute of limitations should be recognized at all. . . Rather, this case asks how equity should be applied once the statute is recognized[,] and it's evinced that equity is in dire need to remedy the current situation." 650-51.

Petitioner's case "does not involve, and we are not considering, a 'garden variety claim' of attorney negligence. Rather, the facts of this case present far more serious instances of attorney misconduct." 652

A group of teachers of legal ethics tells us that these various failures violated fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client. 652-53. See, §§4(a)-(d).

And in this case, the failures seriously prejudiced a client who thereby lost what was likely his single "meaningful" opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence. Id. at 653. See, again, §§4(a)-(d). Though Petitioner's Petition was timely filed, it amounted to an "aborted effort," nonetheless. And as such – and inasmuch as the lower federal courts refused to replace these feckless counselors – Petitioner has, in fact, had his "single opportunity" for federal habeas review forfeited.

And because of all of the similarities to Holland, Petitioner hopes that this Honorable Court sees his need for the application of not only "equity," but also the principles and protections of the Eight and Fourteenth Amendments to the Constitution, and hereby applies them to the effect of "Petitioner being allowed to refile his Habeas Corpus Petition."

But if this Honorable Court doesn't feel as though Petitioner's case arises to the level of "complete remand," he then asks for remand so as the be able to present his issues of tremendous merit (within a 60(b) opposed to a 60(d) motion)[21] WITHOUT the impedances of the magistrate judge, his feckless counsel, and the "indifference" of the Sixth Circuit. Then, maybe Petitioner can actually garner the relief that his issues warrant.

Conclusion

Petitioner had an unfair trial, full of constitutional violations. And after his unjust conviction he was given multiple sets of ineffective counselors to overturn his unjust conviction. Though every set of counselors had ample ammunition (and opportunity) to overturn his faulty conviction, they failed to do so . . . miserably. And as such, Petitioner remains on death row facing execution for a crime that "legally" he's innocent of. And as it pertains to the subject matter of his "federally appointed counselors," it must be acknowledged that but for their misconduct, negligence, and dereliction of duty, it (firmly) stands to reason that Petitioner would have had a favorable outcome while presenting his issues of *"tremendous merit"* to the federal courts. And further *aiding* in the full assault on Petitioner's ability to have his unjust conviction overturned is the fact that the lower federal courts allowed these

[21] If nothing else, Petitioner has surely shown that he is deserving of being able to file his motion under the less stringent vehicle of 60 (b) instead of a 60(d) motion.

"proven" remiss, shiftless counselors to remain on his case (though Petitioner filed motion after motion to have them replaced and/or simply removed), thus resulting in Petitioner's constitutional violations that he suffered at his capital trial being *denied* a "meaningful adjudication on their *actual* merits."

BOTTOM LINE:

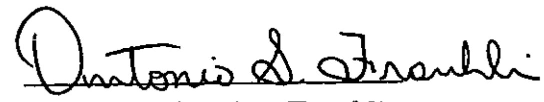
Petitioner is in a situation wherein he finds himself being the recipient of abusive, oxymoronic decisions from his magistrate judge. And on appeal to the Sixth Circuit, Petitioner is greeted by a panel that is "selfish" in the application of "equity" – though Petitioner's situation clearly needs it.

And as such, it's not even "seemingly" . . . Petitioner **IS** very much, indeed, engaged in a fight to overturn his unjust conviction against (1) the prosecution, (2) the federal courts, and (3) his own counselors. The prosecution, Petitioner understands. But to be stymied by both the federal courts AND his own counselors in his endeavor to overturn his unjust conviction is not only absurd, it's also a clear and demonstrable instance of cruel and unusual punishment, and reflects a clear violation of his Fourteenth Amendment Right to remain free against (1) having any State or court "mak[ing] or enforce[ing] any [case/statute] law which shall abridge [his] privileges or immunities," (2) the "depriv[ation] . . . of [his] life [or] liberty without due process of law," and (3) being "den[ied] . . . the equal protection of the laws."[22] And as such,

[22] It stands to reason that if Petitioner was affluent, he'd be better situated to simply discharge one set of counselors for another. Something to which Petitioner is disbarred from doing, no matter how shiftless his current counselors are proven to be. But, in any instance, Petitioner has shown that his treatment from the courts has been "consistently unfair," and not only

and in light of the aforementioned, Petitioner respectfully requests that this Honorable Court apply unto him and his situation the "protections" of the Eighth and Fourteenth Amendments to the United States Constitution and remand his case accordingly.

Respectfully Submitted,



Antonio Sanchez Franklin
Defendant, *Pro Se*

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violates his "equal protection" rights, but is in direct violation of the "due process clause" of the Fourteenth Amendment as well.