Case No.

21-5887

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Miguel E. Neil – PETITIONER

vs.

State of Ohio, Franklin County, Prosecutors Office and Attorney General – RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO:

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

PETITION FOR WRIT OF CERTIORARI

Miguel E. Neil #: 710-531
Noble Correctional Institution
15708 McConnelsville Rd.
Caldwell, Ohio 43724

QUESTIONS PRESENTED

Question One: Whether a lower federal court violates due process when it *ignores* a petitioner's appropriately cited case law in support that appellate counsel was ineffective for failing to raise issues that were clearly stronger than those presented on direct appeal to overcome procedural default?
Page 10.

Question Two: Whether a prosecutor's conduct and utterances are always reviewable, at the very least, when a court proceeds on the assumption that perjury was committed which precludes the development of true facts and results in the admission of false ones, to overcome procedural default?
Page 12.

Question Three: Whether joinder, for the purpose of establishing identity through *modus operandi*, rises to a level of a constitutional violation resulting in prejudice so great as to deny a defendant his right to a fair trial when a prosecutor presents falsehoods about material evidence to support it?
Page 14.

Question Four: Whether law enforcements opinion testimony of guilt, where the officer has no familiarity with the accused, prejudicially lends credibility to the state's case in violation of Evidence Rule 701 where the courts acknowledge "the high regard in which law enforcement officials are held." Walker v. Morrow, 458 F. Appx. 475, 492 (6th Cir. 2012).
Page 16.

Question Five: Whether victim and community impact testimony is prejudicial where the only fact issue is identity, and to settle the conflict in how much victim-impact testimony is enough to violate a defendant's due process rights rendering the trial fundamentally unfair?
Page 18.

Question Six: Whether a lower court violates due process and abuses its discretion when it unreasonably "makes" a petitioner fit the factual findings for the purpose of identity despite no witness described or identified the petitioner as the suspect after providing in-detail facial features and complexion differences at the State court proceeding, and even after petitioner has disputed the factual findings by clear and convincing evidence?
Page 21.

Question Seven: Whether the Court will settle the conflict between the circuit courts concerning what is or is not a common/generic characteristic carried out in robberies for the purpose of identity in 404(b)?
Page 26.

Question Eight: Whether barring review of issues that have some merit in state post-conviction proceeding where no counsel was assigned, is in conflict with Sixth Circuit/Supreme Court precedence?
Page 29.

Question Nine: Whether the Court in *Schlup* only meant newly discovered evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder during trial, as sufficient for the gateway claim of actual innocence? I thus ask the Court to settle this conflict within the Sixth Circuit, and between other circuits.
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LIST OF PARTIES

The Franklin County Prosecutors Office at 373 South High Street Columbus, Ohio 43215.

Respondent: The Attorney General Criminal Justice Section at 150 East Gay Street, 16th Floor Columbus, Ohio 43215.

RELATED CASES

Neil v. Forshey, 2020 U.S. App. LEXIS 34461 (6th Cir. Oct. 30, 2020); Denial of Rule 40 by the 6th Circuit Court of Appeals (March 30, 2021); Neil v. Warden, 2020 U.S. Dist. LEXIS 73335 (April 27, 2020); Neil v. Warden, Noble Corr. Inst., 2020 U.S. Dist. LEXIS 15359 (Jan. 20, 2020); State v. Neil, 2016-Ohio-4762 (June 30, 2016); State v. Neil, 147 Ohio St. 3d 1506, 2017-Ohio-261 (Jan. 25, 2017); State v. Neil, denial of Application for Reopening 26(B) (February 2, 2017); State v. Neil, 151 Ohio St. 3d 1476, 2017-Ohio-9111 (Dec. 20, 2017); State v. Neil, 2016 Ohio Misc. LEXIS 2706 (October 31, 2016); State v. Neil, 2019-Ohio-2529 (June 25, 2019); State v. Neil, 157 Ohio St. 3d 1442 (October 15, 2019).

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Appendix P: Photo of my gloves from BMV crime scene with "E" and "Easton" on the wrist strap. "Defendant's Motion Exhibit W" (PAGEID #: 1033).

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Appendix 3: State's Exhibit 4-I (PAGEID #: 991); Bodybuilding photos of tattoo and scar (PAGEID #: 994-997); Affidavit from friend who brought photos to trial counsel prior to trial. (PAGEID #: 998).

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STATUES:

RULES:

REVISED CODES:

IN THE
SUPREME COURT OF THE UNITED STATES

Petition for writ of certiorari

Petitioner respectfully prays that a writ of certiorari is issued to review the judgments below.

OPINIONS BELOW

FOR CASES FROM FEDERAL COURTS: Neil v. Forshey, 2020 U.S. App. LEXIS 34461 (6th Cir. Oct. 30, 2020) (Appendix A); Denial of Rule 40 by United States Court of Appeals (March 30, 2021) (Appendix B); Neil v. Warden, 2020 U.S. Dist. LEXIS 73335 (April 27, 2020) (Appendix C); Neil v. Warden, Noble Corr. Inst., 2020 U.S. Dist. LEXIS 15359 (Jan. 20, 2020) (Appendix D).

FOR CASES FROM STATE COURTS: State v. Neil, 2016-Ohio-4762 (June 30, 2016) (Appendix E); State v. Neil, 147 Ohio St. 3d 1506, 2017-Ohio-261 (Jan. 25, 2017) (Appendix F); State v. Neil, denial of Application for Reopening 26(B) (February 2, 2017) (Appendix G); State v. Neil, 151 Ohio St. 3d 1476, 2017-Ohio-9111 (Dec. 20, 2017) (Appendix H); State v. Neil, 2016 Ohio Misc. LEXIS 2706 (October 31, 2016) (Appendix I); State v. Neil, 2019-Ohio-2529 (June 25, 2019) (Appendix J); State v. Neil, 157 Ohio St. 3d 1442 (October 15, 2019) (Appendix K).

JURISDICTION

In each of the state proceedings, except for the state post-conviction petition upon which cause was provided to overcome the procedural default pursuant to *Martinez v. Ryan*, petitioner timely appealed all state proceedings to the highest state court, and timely appealed all proceedings in federal court.

The date on which the United States Court of Appeals decided my case was October 30, 2020. A timely Rule 40 was denied on March 30, 2021.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner was denied his rights to a fair trial, to the effective assistance of counsel, to present exculpatory witnesses and evidence in his favor, and the due process of law under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Fifth Amendment: No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendments: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

The charges against me arose from a series of robberies that occurred in 2011, and two robberies that occurred in 2012. On November 15, 2012, I was arrested for the robbery of a BMV and was additionally indicted with a robbery that occurred on November 8, 2012, Case No. 12CR-5963, 4 counts of robbery and 6 counts of kidnapping. Because I decided not to take a deal for robberies that I did not commit, I was indicted nine months later, Case No. 13CR-4174, with 26 counts of robbery and 1 count of kidnapping arising from 13 separate robberies from 2011. Pursuant to a motion filed by the State of Ohio, the trial court joined the indictments for trial. Counsel moved to sever the indictments but the trial court denied the motion. Counsel also moved to suppress certain evidence but the trial court denied that motion. The charges were tried to a jury during a six-day trial beginning September 24, 2014.

Due to the lack of physical evidence, and the fact that witness's descriptions did not match me, the State attempted to establish a *modus operandi* by falsely alleging in opening and closing statements that I was apprehended/caught red-handed wearing the same outfit in the November 15, 2012 robbery that the suspect wore in all of the previous robberies. The State then offered that the other robberies were similar in nature even though the evidence indicated that the known robbery committed by me was admittedly dissimilar in many respects to the 2011 robberies. The state also made and introduced improper and prejudicial opinion statements of guilt from detectives stating that they "knew" it was me, and improper and prejudicial victim impact testimony during the guilt-phase of the trial to innately arouse the jurors' sympathetic emotions to convict despite that the only fact issue in the case was identity.

These actions by the prosecutor, trial counsel, and the trial courts abuse of discretion, deprived me of my right to a fair trial and due process of law, "seriously affecting the fairness, integrity, or public reputation of the judicial proceedings." United States v. Henry, 545 F.3d 367, 384 (6th Cir. 2008).

REASONS FOR GRANTING THE WRIT

CLAIM EIGHTEEN: Prosecutorial Misconduct.

This Court in Jacobs v. Scott, 513 U.S. 1067, 1069 (1995) reemphasized that:

> Almost sixty years ago, we recognized that a prosecutor's knowing presentation of *false testimony is "inconsistent with the rudimentary demands of justice*." Mooney v. Holohan, 294 U.S. 103, 112 (1935). We have refined this principle over the years, finding a due process violation when a prosecutor fails to correct testimony he knows to be false, Alcorta v. Texas, 355 U.S. 28 (1957), even when the falsehood in the testimony goes only to the witness's credibility, Napue v. Illinois, 360 U.S. 264 (1959). See also Giglio. United States, 405 U.S. 150 (1972) (new trial required when government witness testified falsely on matters relating to credibility and the prosecutor who served as trial counsel *should have been aware of the falsehood*).
>
> The Sixth Circuit in Stermer v. Warren, 959 F.3d 704, 725 (6th Cir. 2020) also reemphasized that:
>
> The requirement that a prosecutor's arguments be rooted in the evidence also means that the evidence *must* be *accurately described*. "*Misrepresenting facts in evidence* can amount to *substantial error* because doing so 'may *profoundly impress a jury* and may have *a significant impact on the jury's deliberations*.'" Washington v. Hofbauer, 228 F.3d 689, 700 (6th Cir. 2000) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 646, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). "For similar reasons, *asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way*." Id. (citing *Berger*, 295 U.S. at 84).

The prosecutor's falsehoods about the clothing:

(1). In opening statements, the prosecutor falsely stated that on November 15, 2012, I was wearing a "hood" (Tr. PAGEID #: 1923); and that police officers "collected . . . the *pants*, the *hoodie*, the *mask* that he was wearing *through all* of these incidents, *apprehended*." (Tr. PAGEID #: 1924). **(2).** In closing arguments, as proof that the false statements were not isolated, he stated, "And *repeating myself*. He was *caught red-handed wearing the same outfit*" (Tr. PAGEID #: 2858); **(3).** and twice more repeated that I was wearing "the stocking or *hoodie*, *gator mask* covering up his face, only showing that much, knit cap on top of it, *hoodie* on top of that." (Tr. PAGEID #: 2863, 2915). **(4).** During trial the prosecutor made sure *every* witness and police officer described the "*hooded sweatshirt*," the "mask, dark shoes, and dark gloves with white markings or letters," worn throughout the previous robberies. See State v. Neil, 2016-Ohio-4762, ¶4-16. He then permitted, without correction, a witness from the November 15, 2012 robbery that I admit committing, to falsely testify that I also was wearing a "*sweatshirt*" with a "*hood*." (Tr. PAGEID #: 2456); see also State v. Neil, 2016-Ohio-4762, ¶22 where the appellate court also believed this uncorrected falsehood holding that I was "dressed in black clothing, *including a hood*." Id.

The prosecutor's falsehoods about the cell cite location information (CSLI):

> The court in Hayes v. Brown, 399 F.3d 972, 981, hn.5 (9th Cir. 2005) explained that:

the United States Supreme Court itself discussed the use of "false evidence, including false testimony. . . ." Id. There is nothing in *Napue*, its predecessors, or its progeny, to suggest that the Constitution protects defendants *only* against the knowing use of perjured testimony. Due process protects defendants against the knowing use of *any false evidence by the State*, whether it be by document, testimony, *or any other form of admissible evidence*. See Phillips v. Woodford, 267 F.3d 966, 984-85 (9th Cir. 2001) ("It is well settled that the presentation of false evidence violates due process.") *Napue*, 360 U.S. at 269.

The Court in *Hayes* reiterated that "[i]ndeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is '*virtually automatic*.'" Id., at 978, hn.3.

The "other form" of evidence was the interrogation video to get in the detective's falsehoods about my CSLI as follows: **(5).** The detective falsely stated, "Are you familiar with the – with phone records and tower pings? Because based on that, we can put you in the area." (Tr. PAGEID #: 2611); **(6).** that the CSLI "flat out nails you." (Tr. PAGEID #: 2630); **(7).** how "It's amazing how many times your phone shows up in the area of the robbery, absolutely amazing, amazing. . . . But what I'm telling you is, your tower pings around these robberies. We took your phone, we took all the tower pings matching around the date and time of the robberies that we suspected you committed, and lo and behold, there it is." (Tr. PAGEID #: 2650-51); and **(8).** that me and my cousin's phones "were pinging off the same tower, which was very close to where that – those pictures were taken." (Tr. PAGEID #: 2625). i.e., at the September 11, 2011 robbery of Tim Hortons at 8333 N. High. But, "tower 126, located at 1309 Brice Road" (Tr. PAGEID #: 2774), is 19.9 miles from Tim Hortons. Google Maps does not lie. See Map in (Appendix L).

The detective then untruthfully testified that I identified a photo of my minivan from the Tim Hortons "drive-thru security camera." (M. PAGEID #: 1809, 1811); (M. Joint Exhibit 2); (Tr. PAGEID #: 2581-82). However, the photo could not be seen in the interrogation video, and was actually a photo from "surveillance" of my vehicle at my home. (M. PAGEID #: 1694-95). See photo in (Appendix M).

He also admitted that I "did not sign that picture," that he "didn't sign it" (M. PAGEID #: 1811), something police always do where photo identification is involved, and that it was in "black and white" with no "automobile insignia visible" to determine if it was my vehicle. (M. PAGEID #: 1812).

I argued in the original writ, "[i]n fact, the defendant's vehicle had a single chrome wheel on the driver's side rear. The vehicle in the video did not." See (Page 12 of original writ for habeas corpus).

But the prosecutor concealed this fact by showing only three sides of my vehicle at trial. See (State's Exhibit 15-DD-12) the front "license plate"; (State's Exhibit 15-DD-13) the passenger "side"; and

(State's Exhibit 15-DD-15) "the rear of the van." (Tr. PAGEID #: 845). **(9).** The prosecutor then *vouched* for the detective's falsehoods about the CSLI in closing arguments by pointing at me and stating, "this man's phone is pinging off of the tower at the 8500 number, roughly 200 numbers north of Tim Hortons" (Tr. PAGEID #: 2927), *despite* Agent Brennaman testifying that it did not; that my phone pinged on "tower 431 at 5892 Roche Drive, which would be basically directly north of Mr. Neil's residence." (Tr. PAGEID #: 2777). My address was 5584 Crawford Drive Columbus, Ohio, 5.7 miles from the Tim Hortons, and the tower on Roche Drive is 0.7 miles from my home which scientifically supports I was home. See Google Maps (PAGEID #: 3592, 3594) in (Appendix N). See Walker v. Morrow, 458 F. Appx. 475, 492 (6th Cir. 2012) (acknowledging "the high regard in which law enforcement officials are held" at trial).

Moreover, Agent Brennaman testified that "each of those towers has a *one- to two-mile radius*." (Tr. PAGEID #: 2786). See State v. Saleh, 10th Dist. 2009-Ohio-1542, ¶15 ("the *maximum* range for a cell tower in Franklin County is *1.5 to two miles*."); Carpenter v. United States, 138 S. Ct. 2206, 2225 (2018) ("The FBI agent who offered expert testimony . . . testified that a cell site in a city reaches between *a half mile and two miles* in all directions."). This scientifically supports that the towers were miles away from the robberies making the allegations that my CSLI placed me near the robberies indisputably false.

The Sixth Circuit in Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998) holds that:

> The standard for claims such as this is as follows: The knowing use of false or perjured testimony constitutes a denial of due process if there is *any reasonable likelihood that the false testimony could have affected the judgment of the jury*. In order to establish prosecutorial misconduct or denial of due process, the defendants must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.

(1). The statements were actually false: During the suppression hearing, Detective Cress testified that "the gloves were *distinctive*," and when asked, "did you find those gloves," he replied "No." (M. PAGEID #:1685). The prosecutor also stated at trial that the gloves were "*distinct gloves*" and "*very distinct gloves*." (Tr. PAGEID #: 1916, 1920). The gloves worn by the suspect in the previous robberies were "distinct" because they had "the word, MECHANIX" across the back. (M. PAGEID #: 1813). Detectives described them in *Emails* as "mechanic's gloves" (PAGEID #: 1028); witnesses in *Police Reports* as "mechanics gloves" (PAGEID #: 1029); in their *Search Warrants* as "dark gloves with

wording, possibly MECHANIX, across the top of the gloves" (PAGEID #: 1030); and could be seen in still *Photos* from videos. (PAGEID #: 1031, 1032). See all documents in (Appendix O). Witnesses at trial also described them as "mechanic-type gloves." (Tr. PAGEID #: 2319).

At the suppression hearing counsel verified my gloves were *uniquely distinct* by having the word "Easton" on them, by presenting a color photo of them taken at the scene of the November 15, 2012 robbery. "Defendant's Motion Exhibit W." (M. PAGEID #: 1814). See Photo (PAGEID #: 1033 & 1034, 1035) in (Appendix P). Appellate counsel argued that I was wearing "gloves with Easton emblazoned on them and with a prominent "E" emblem surrounded with a border." Direct Appeal Brief (PAGEID #: 544-45). But to uphold the convictions, the district court *untruthfully* held I argued that my gloves *merely* "had white markings on them." Neil v. Warden, Noble Corr. Inst., 2020 U.S. Dist. LEXIS 15359, fn.5.

I specifically argued in all proceedings that my clothing in (State's Exhibit 15-F-1), supports that I was arrested wearing a hoodless nylon zip-up Pittsburgh Steelers jacket with no capability of adding a hood, opposed to the "*hoodie*" "*hooded sweatshirt*" worn "*through all of these incidents.*" That I was arrested wearing black athletic Nike pants with a white Nike swoosh emblem on the left pant leg (knee area), opposed to the dark colored pants with white zippers along the sides at the bottom of both pant legs worn "*through all of these incidents.*" I was arrested wearing a knit hat on my head, with another knit hat torn open, worn to cover the lower portion of my face, opposed to the "*gator mask*" described by the prosecutor worn "*through all of these incidents.*" And I was arrested wearing solid black *patent leather* Air Jordan's (which detectives described as "shiny tennis shoes" *Neil*, 2016-Ohio-4762, ¶23), opposed to the black and silver Nikes with the Nike swoosh emblem on the sides worn "*through all of these incidents.*" See also Direct Appeal Brief (PAGEID #: 544-45). Nothing was the same or similar.

I implored the lower courts, as I do this Court, to view the videos and photos to compare my clothing, gloves, and shoes in (State's Exhibit 15-F-1) with that worn in the previous robberies. But even in the interest of justice, they did not. As for the false allegations concerning my CSLI, Google Maps "were never admitted into evidence" *Stermer*, *supra*, to support the allegations because they were false.

Thus, it was *unreasonable* to hold that, "[i]n light of this evidence, *reasonable* jurists would agree that it was *reasonable* for the state court to conclude that a rational trier of fact could convict Neil of

robbery and kidnapping" *Neil v. Forshey*, at *10, knowing that "[m]isrepresenting facts in evidence can amount to substantial error because doing so 'may profoundly impress a jury and may have a significant impact on the jury's deliberations.'" *Stermer*, *supra*, quoting *DeChristoforo*, 416 U.S., at 646.

(2). The statements were material: The falsehoods about the clothing was material because such proof would be akin to having the proverbial "smoking gun" were I actually arrested in the same clothing.

Proof the falsehoods about the CSLI was material, and is used to place suspects at crime scenes, is on page 4 of the December 1, 2011 Order stating that "the records and information sought are *relevant and material* to an ongoing investigation." (Appendix Q). See Carpenter v. United States, 138 S. Ct. 2206; 2213 (2018) (acknowledging "In the Government's view, the *location records clinched the case*.").

This Court in United States v. Young, 470 U.S. 1 (1985) held that:

> As the Court itself recognizes, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." Ante, at 18. Thus "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. at 88. . . . [at 29].
>
> In closing argument to the jury the lawyer may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw. [at hn.7]

This holding in *Young* applies with even more force where the prosecutor's statements were not mere "opinions," "improper suggestions," or "insinuations," but instead were *indisputable* falsehoods.

(3). The prosecution knew it was false: Proof the prosecution knew their statements about the clothing was false is the fact that they had the videos and photos from each of the prior robberies for almost two years to compare to my clothing in (State's Exhibit 15-F-1). The same prosecutors and judge heard the detective testify at the suppression hearing that "those really distinct gloves weren't found," nor the clothing, or "ski masks," after search of my home. (M. PAGEID #: 1697-98).

Concerning the false allegations about the CSLI, they had my CSLI records since subpoenaed on December 1, 2011, received on December 5, 2011, giving them almost three years prior to trial in 2014 to Google-Map the distances. The same prosecutors and judge heard the detective admit at the suppression hearing that the CSLI was not "an *implication* by [him] that these cell towers were in the area of the robbery sites," that it was "just information for the judge" in the search warrant. (M. PAGEID#: 1633-34). The prosecutor, judge, and my attorney allowed all this to go uncorrected at trial.

Prosecutor Vouching for witnesses:

I also argued that the prosecutor vouched for the statements and testimony of detectives and witnesses. The prosecutor vouched for the testimony of the Detective Franken by repeating, "Detective Franken said that during the course of his investigation, no information that he obtained would have excluded Miguel Neil as a suspect" (Tr. PAGEID #: 2858), despite Franken previously admitting he had "maybe a dozen" other suspects (Tr. PAGEID #: 2679), the falsehoods about the clothing and CSLI, and witness' description of the suspect that did not match me.

As stated above, the prosecutor vouched for the detective's falsehood where the detective untruthfully stated that me and my cousin's phones "were pinging off the same tower, which was very close to where that – those pictures was taken" (Tr. PAGEID #: 2625), i.e., the Tim Hortons, by pointing at me and saying, "this man's phone is pinging off of the tower at the 8500 number, roughly 200 numbers north of Tim Hortons" (Tr. PAGEID #: 2927), *despite* Agent Brennaman previously testifying that it last pinged on "tower 431 at 5892 Roche Drive, which would be basically directly north of Mr. Neil's residence." (Tr. PAGEID #: 2777), which is 0.7 miles from my home. See Google Map in (Appendix N).

The jury also listened to the detective state that "a ton of people from 2011 [] got terrorized" by me. (Tr. PAGEID #: 2635-36). The prosecutor vouched for this by twice repeating, "He terrorized central Ohio". (Tr. PAGEID #: 2847, 2863). The prosecutor also vouched for witnesses by telling the jury in closing, "He committed these robberies. You heard from the victims." (Tr. PAGEID #: 2863), despite the *fact* that not one witness described or identified me as the suspect. See Claim Five below.

In support, I argued Walker v. Morrow, 458 F. Appx. 475, 492 (6th Cir. 2012) holding that:

> Also significant in our flagrancy inquiry is the fact that the prosecutor's comments bolstered and vouched for the testimony and investigation of a *law enforcement official* rather than a lay witness. We have not hesitated to reverse convictions in which a prosecutor has vouched for or bolstered the testimony of a lay witness. See, e.g., Francis, 170 F.3d at 551; United States v. Carroll, 26 F.3d 1380, 1389 (6th Cir. 1994). We find it *more damaging* that the assisting prosecutor here bolstered and vouched for a police investigator. If it poisons an entire trial for a prosecutor to vouch for the truthfulness of a government witness testifying pursuant to a plea agreement, see Francis, 170 F.3d at 550, then it must be the case that comments vouching for the investigation and testimony of a law enforcement official does the same. Thus, the comments likely misled the jury, resting as they did on the assumption that jurors should trust a law enforcement official irrespective of the evidence before them. All told, no reasonable jurist could disagree with the conclusion that counsel's comments so poisoned Walker's trial as to deprive him of due process of law. . . . the prosecutors appealing to the *high regard* in which law enforcement officials are held, . . .

Prosecutor's personal opinion of guilt:

The prosecutor also provided his personal opinion in closing arguments by telling the jury the "State of Ohio has found Miguel Neil guilty of all of the counts in the indictment beyond a reasonable doubt." (Tr. PAGEID #: 2863); and "He's a robbery machine; meaning, he does a whole bunch of robberies." (Tr. PAGEID #: 2911). These comments construed the prosecutor's personal belief that I was guilty.

They were thus, improper and flagrant because they "infringed upon the jury's role as fact finder and determiner of guilt or innocence." United States v. Carroll, 26 F.3d 1380, 1384-85 (1994) citing United States v. Bess, 593 F.2d 749, 753-57 (6th Cir. 1979) ("The threshold determination should be whether counsel's comments can be reasonably construed to be based on personal belief.").

It was plain error for trial counsel's failure to object. The court in *Carroll* explained that where there was no objection, "we review only for plain error." Id. at 1383, citing *Bess* where the prosecutor stated:

> "I believe beyond a reasonable doubt that the defendant" was guilty. Id. The court once again included in its analysis the passage from *Berger* quoted above. It found the prosecutor's remarks "astonishing," "egregious," and "doubly inexcusable" insofar as they were made by a prosecutor whose obligation is to be impartial and whose interest should be in justice rather than winning. Id. at 753-54 (citing *Berger*, 295 U.S. at 88). The statements violated "the established rule that the personal opinion of counsel has no place at trial." Id. at 754. The court reviewed some of the reasons for this rule: that statements of personal belief on the part of a prosecutor may have a "devastating impact" on a jury; that these statements may infringe upon the jury's role as factfinder and determiner of guilt or innocence; that they amount to inadmissible and highly prejudicial evidence that is not presented under oath and is not subject to cross-examination; and that permitting such statements would improperly favor better-known or unscrupulous lawyers, and would disfavor counsel who omitted such positive assertions. Id.

In granting a new trial, the court in *Carroll* concluded that "[a]lthough the prosecutor's remarks were not flagrant, the remarks were improper. In view of the quality of the evidence presented at trial, the improper remarks may have affected the outcome of the trial and thus were *not* harmless." Id.

Appellate counsel assured me he appropriately raised the misconduct and I believed him. He argued "[t]hey could not find one piece of clothing, one pair of shoes, one pair of gloves, or anything, including the toy guns which could be linked to any of the video or photographic images of the robberies in the second indictment." (PAGEID #: 484); that I "was wearing *identifiable and unique clothing when arrested* and it was *different* from any of that *worn by the suspects* in the second indictment." (PAGEID #: 544-45); that the "phone records failed to provide police with much help in this regard and in some instances even tended to be *exculpatory*." (PAGEID #: 486), but nothing about the prosecutor's falsehoods.

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT:

In addition to citing *Carroll*, I argued Walker v. Morrow, 458 Fed. Appx. 475, 490-92:

> **a prosecutor's act of misrepresenting facts in evidence is improper, since doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations**." *Washington*, 228 F.3d at 700 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 646, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). . . . Petitioner's **trial counsel could not have had a strategic basis for failing to object to the prosecutors' offending statements**. . . . **Defense counsel should have objected to the prosecutors' remarks**. For the reasons stated above, the state court *unreasonably* applied federal law in concluding that counsel's failure to object to these comments did not constitute ineffective assistance.

United States v. Carter, 236 F.3d 777, 783-84 (6th Cir. 2001):

> because counsel made no objection to the prosecutor's statements at trial, this court will review for plain error only. Collins, 78 F.3d at 1039. As this court has previously recognized, "**prosecutorial misconduct may be so exceptionally flagrant that it constitutes plain error,** and is grounds for reversal even if the defendant did not object to it." *Carroll*, 26 F.3d at 1385 n.6. . . . We conclude that the prosecutor's conduct during closing arguments not only constituted error but also was plain error. The law is clear that, while counsel has the freedom at trial to argue reasonable inferences from the evidence, counsel cannot misstate evidence . . . See *Young*, 470 U.S. at 9 & n.7.

The falsities about the clothing was the only *physical evidence* that could have linked me to the crimes, and a foundation cannot be laid upon falsehoods. See Ege v. Tukins, 485 F.3d 364, 379, hn.12 (6th Cir. 2007) ("where, as in the instant case, physical evidence is presented linking a defendant to the crime scene, and it is the only *physical evidence* showing such a link, then defense counsel must object to its admission if no proper foundation has been laid by the presenter. Anything else is objectively unreasonable.").

Thus, because "trial counsel could not have had a strategic basis for failing to object to the prosecutors' [false and] offending statements" *Walker*, *supra*, it "was plain error." *Carter*, citing *Carroll*.

CAUSE FOR PROCEDURAL DEFAULT OF CLAIM EIGHTEEN:

Question One: Whether a lower federal court violates due process when it *ignores* a petitioner's appropriately cited case law in support that appellate counsel was ineffective for failing to raise issues that were clearly stronger than those presented on direct appeal to overcome procedural default?

I concede Prosecutorial Misconduct was not argued on direct appeal after **assurance** it would. See E.A.C.A v. Rosen, 985 F.3d 499, 509 (6th Cir. 2021) ("we have stated a prima facie showing of eligibility for relief is required in motions to reopen."). I prima facie argued in my Rule 26(B) at (PAGEID #: 984):

> Defendant's clothing and gloves, while dark, was distinguishably unique from that worn by the suspect or suspects in 2011. . . . The suspects or suspects in the 2011 robberies wore the same clothing and gloves in all of the robberies where defendant's did not merely have "white markings or lettering" Id. Neil, ¶101, **as the state untruthfully implied**, and this Court unknowingly accepted as truth **due to trial and appellate counsels deficiency**.

I understand that an IAAC claim used to establish cause to excuse procedural default, however, must itself have been properly presented to the state courts—*or* there must be cause and prejudice to excuse the failure to do so, and that "a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself." Edwards v. Carpenter, 529 U.S. 446, 450-51 (2000). I also understand "[i]t is also common ground that 'an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claim.'" Gunner v. Welch, 749 F.3d 511, 516 (6th Cir. 2014) (quoting *Martinez v. Ryan*).

I have not found one case holding that trial counsel's failure to object to false and flagrant remarks, and appellate counsel's failure to raise such misconduct, is "professional conduct." See In re Cook, 551 F.3d 542, at hn.10 (6th Cir. 2009) (Ohio "Rule 8.4(c) states that it is professional misconduct for an attorney to 'engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.'").

For "cause" I argued, in particular, the third factor in Mapes v. Coyle, 171 F.3d 408, 428 (6th Cir. 1999) which asks "were the omitted issues clearly stronger than those presented" in my Motion to Amend at (PAGEID #: 214); in my Traverse at (PAGEID #: 3310); in my Objection to the R&R at (PAGEID #: 3514-15, 3569); and in my COA to the Sixth Circuit on page 15 arguing that:

> Because of the materiality of the falsehoods presented and personally made by the prosecutor and police officers, claims which were "**clearly stronger than some of those presented**" on direct appeal, ***Mapes, supra***, as well as the other flagrant remarks, there is "a reasonable likelihood that the false testimony could have affected the judgment of the jury" Giglio, supra, especially because it came from a prosecutor and police officer's.

Mapes holds that "[t]he cases decided by this court on the issue of ineffective assistance of appellate counsel suggest the following considerations that ought to be taken into account in determining whether an attorney on direct appeal performed reasonably competently," and that "[m]anifestly, this list is not exhaustive, and neither must it produce a correct "score"; we offer these inquiries merely as matters to be considered." Id., at 427-28. This third factor in *Mapes* is identical to that in Smith v. Robbins, 528 U.S. 259, 288 (2000) ("only when *ignored* issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.").

But the magistrate in the R&R *ignored* that I argued *Mapes* to overcome the procedural default. See *Neil v. Warden*, LEXIS 15359, at *64. As did the judge holding that, "[a]ccording to the Petitioner, the application of res judicata should not serve to bar claims of prosecutorial misconduct based on the alleged misrepresentation or introduction of false evidence. (Objection, ECF No. 35, PAGEID # 3513.)" Neil v. Warden, 2020 U.S. Dist. LEXIS 73335, at *3, when I merely quoted the Ohio Supreme Court in State ex rel. Commt. for the Referendum of Lorain Ordinance, 96 Ohio St.3d 308, at ¶41 on the issue.

I argued *Mapes* in my COA as "cause" but the court *ignored* it holding because I did not present "the prosecutor committed misconduct . . . in his Rule 26(B) . . . he has procedurally defaulted this claim. See Pudelski v. Wilson, 576 F.3d 595, 605 (6th Cir. 2009)." *Neil v. Forshey*, at *14. But the court in *Pudelski* held that "exhaustion and procedural default are not jurisdictional limitations, and in this instance we elect to excuse the apparent default." Id. But see "prima facia showing" in my R. 26(B) above on page10.

I premised my "clearly stronger" argument, *Mapes*, *supra*, on this Court's *historical* holding in *Giglio*, at 153, ("[a]s long ago as Mooney v. Holohan, 294 U.S. 103, 112 (1935), this Court made clear that *deliberate deception* of a court and jurors by *the presentation of known false evidence is incompatible with rudimentary demands of justice*. This was reaffirmed in Pyle v. Kansas, 317 U.S. 213 (1942)); Mesarosh v. United States, 352 U.S. 1, 9-14 (1956) ("The dignity of the United States Government will not permit the conviction of any person on tainted testimony. . . . The *untainted* administration of justice is certainly *one of the most cherished aspects* of our institutions. . . . The *interests of justice* call for a reversal of the judgments below with direction to grant the petitioners a new trial."); and *Young*, 470 U.S., at 9 concerning such misconduct ("The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded").

As stated above, **appellate counsel assured me it was appropriately raised, why would I not believe him?** "The court [should be] perplexed as to why the state [and court of appeals] is satisfied to have the conviction stand under such circumstances." State v. DeFronzo (1978), 59 Ohio Misc. 113, 122-23.

Thus, because "cause and prejudice" was established to excuse the default, it seems clear that "it will be necessary on remand to clarify just how strong these . . . issues are." *Smith*, 528 U.S., at 285.

Question Two: Whether a prosecutor's conduct and utterances are always reviewable, at the very least, when a court proceeds on the assumption that perjury was committed which precludes the development of true facts and results in the admission of false ones, to overcome procedural default?

I additionally argued in my Objection and COA for "cause," that the miscarriage of justice exception is rooted in an even more basic principle, which Justice Kennedy described in another context: "Our law must not become so caught up in *procedural niceties* that it *fails* to sort out simple instances of *right from wrong* and give some redress for the latter. *At the very least, when we proceed on the assumption that perjury was committed,* the Government ought not to suggest, as it seemed to do here, that one who violates his testimonial oath is no worse than the student who claims the dog ate his homework." ABF Freight System v. NLRB, 510 U.S. 317, 325 (1994).

This Court in *ABF*, at 323, also held that:

> False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truth-seeking function of adversary proceedings. (citations omitted). If knowingly exploited by a criminal prosecutor, such wrongdoing is so "inconsistent with the rudimentary demands of justice" that it can vitiate a judgment even after it has become final. Mooney v. Holohan, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935). In any proceeding, whether judicial or administrative, deliberate falsehoods "well may affect the dearest concerns of the parties before a tribunal," United States v. Norris, 300 U.S. 564, 574, 81 L. Ed. 808, 57 S. Ct. 535 (1937), and may put the factfinder and parties "to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means." Ibid. Perjury should be severely sanctioned in appropriate cases.

I also argued Smith v. Murray, 477 U.S. 527, at Syllabus (b), 538 (1986) holding that:

> It is clear on the record that application of the cause and prejudice test will not result in a "fundamental miscarriage of justice," where the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, the psychiatrist's testimony should not have been presented to the jury, its admission did not pervert the jury's deliberations . . . Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice. [Id., at 538]

Contrapuntally, *Smith v. Murray* holds that "application of the cause and prejudice test [*will*] result in a fundamental miscarriage of justice where the alleged constitutional error precluded the development of true facts [or] resulted in the admission of false ones" as claim eighteen alleges and supports.

This Court in *Young*, 470 U.S. 1, hn.5, also held that "when defense counsel employs tactics which would be reversible error if used by a prosecutor, the result may be an unreviewable acquittal. The prosecutor's conduct and utterances, *however*, are ALWAYS reviewable on appeal, for he is 'both an administrator of justice and an advocate.' ABA Standard for Criminal Justice 3-1.1(b) (2d ed. 1980); cf. Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)." Id.

These three cases read separately, or together, support "cause" to excuse the procedural default because such misconduct "inconsistent with the rudimentary demands of justice." *ABF, Mooney, supra.*

Where the "core responsibility of all prosecutors—whose professional interest and obligation is not to win cases but to ensure justice is done" Turner v. United States, 137 S. Ct. 1885, 1897 (2017); Berger v. United States, 295 U.S. 78, 88 (1935), the encouragement of not entertaining a prosecutor-misstating-the-evidence-claim on federal habeas review will license an accused to be convicted upon a prosecutor's deliberate deception of a court and jury, which would seriously affect the fairness, integrity, and public reputation of judicial proceedings in the nation.

This Court in Slack v. McDaniel, 529 U.S. 473, 478, 484, (2000) held that "when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

The habeas petition herein was denied on procedural grounds without reaching the underlying constitutional issues in claim eighteen, and I supported that I argued *Mapes* demonstrating that the issues in claim eighteen were "clearly stronger than those that appellate counsel did present." *Mapes*, *Smith*.

If *not* ignored, my argument "shows, *at least*, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" in defaulting claim eighteen. *Slack*, *supra*.

If reviewing courts are permitted to simply ignore this Courts, or their own identical case law, to overcome procedural default, the "cause and prejudice" analysis would be rendered meaningless.

CLAIM ONE: Joinder was extremely prejudicial to the defendant.

Question Three: Whether joinder, for the purpose of establishing identity through *modus operandi*, rises to a level of a constitutional violation resulting in prejudice so great as to deny a defendant his right to a fair trial when a prosecutor presents falsehoods about material evidence to support it?

I *specifically* argued in the Objection at (PAGEID # 3569-70) that, because the prosecutorial falsehood claims in Claim Eighteen were clearly part of the trial record, stronger than some of those presented on direct appeal, and met several of the other factors in Mapes v. Coyle, 171 F.3d 408, 428-29 (6th Cir. 1999) providing cause and prejudice for appellate counsel's failure to raise the claim, the Court can now decide if prejudice arose from the prosecutors falsehoods citing Johnson v. Bagley, 2006 U.S. Dist. LEXIS 97378, 32-33 (S.D. Ohio E.D. Apr. 24, 2006) which explained that:

> Denial of a motion for severance is a matter of state law and does not serve as grounds for federal relief unless the joinder was so prejudicial that the trial was rendered fundamentally unfair. Corbett v. Bordenkircher, 615 F.2d 722, 724-26 (6th Cir. 1980). An improper joinder of offenses in the state court is not sufficient in itself to provide a basis for relief in habeas proceedings. See *United States v. Lane, 474 U.S. 438, 446 n. 8, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986)* ("Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to a level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."); Herring v. Meachum, 11 F.3d 374, 377 (2d Cir. 1993) ("Joinder of offenses rises to the level of a constitutional violation only if it 'actually render[s] petitioner's state trial fundamentally unfair and hence, violative of due process.'") (quoting Tribbitt v. Wainwright, 540 F.2d 840, 841 (5th Cir. 1976)).
>
> To obtain federal habeas relief, petitioner must establish not merely that the joinder of the offenses in a single trial was an abuse of the trial court's discretion, but that the joinder violated his federal constitutional rights. Lucero v. Kerby, 133 F.3d 1299, 1313 (10th Cir. 1998). Petitioner must go beyond the potential for prejudice and prove that *actual prejudice resulted from the events as they unfolded during the joint trial*. *Herring*, 11 F.3d at 378.

From opening statements, "actual prejudice resulted" when the prosecutor falsely told jurors I was arrested in the same clothing/hooded sweatshirt the suspect wore "through all of these incidents" (Tr. PAGEID #: 1924); permitted a witness from the November 15, 2012 robbery that I admit committing, to falsely testify that I also was wearing a hooded sweatshirt without correction (Tr. PAGEID #: 2456); and reiterated multiple times in closing by stating, "And *repeating myself*. He was caught red-handed wearing the same outfit" (Tr. PAGEID #: 2858); (Tr. PAGEID #: 2863, 2915), which caused "unfair prejudice, . . . misleading the jury" Rule 403(A), and "to maintain falsehood rather than truth." California v. Green, 399 U. S. 149, 159 (1970).

> This Court in United States v. Lane, 474 U.S. 438, 449 (1986) explained that:
>
> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, *even so*, whether the error itself *had substantial influence*. If so, or if one is left in grave doubt, the conviction cannot stand. Invoking the *Kotteakos* test, we hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in *determining the jury's verdict*.

Because this Court has historically held that "a new trial is required in a criminal case if false testimony introduced by the state, and allowed to go uncorrected when it appeared, could in *any* reasonable likelihood have affected the judgment of the jury" *Giglio*, *supra*, the falsehoods about the clothing, in an attempt to support identity through creating a false *modus operandi*, indisputably "r[o]se to a level of a constitutional violation resulting in prejudice so great as to deny [me my] Fifth Amendment

right to a fair trial," because like in *Giglio*, prosecutors who falsely allege they have material evidence that they do not, can have a "substantial and injurious effect or *influence* in *determining the jury's verdict*." *Lane*, *supra*. Moreover, such falsehoods are not, and would never be, admissible in a new trial.

See also Kennedy v. Coleman, 2016 U.S. Dist. LEXIS 179782, ¶30 (S.D. Ohio Dec. 29, 2016) acknowledging that "[t]he joining of offenses because they are of a same or similar character, however, *creates a greater risk of prejudice to a defendant*." Id.

Because the prosecutor created "actual prejudice" by falsely claiming to have material evidence that he did not have at trial, "the conviction cannot stand" in light of there being no overwhelming evidence and the possibility of a different outcome. *Lane*, *supra*.

CLAIM TWO: Improper police officer opinions of the defendant's guilt, and prejudicial and irrelevant victim impact evidence.

Question Four: Whether law enforcements opinion testimony of guilt, where the officer has no familiarity with the accused, prejudicially lends credibility to the state's case in violation of Evidence Rule 701 where the courts acknowledge "the high regard in which law enforcement officials are held." Walker v. Morrow, 458 F. Appx. 475, 492 (6th Cir. 2012).

The court in United States v. Rodríguez-Adorno, 695 F.3d 32, 40 (1st Cir. 2012) explained that:

> Testimony by a law enforcement officer identifying a defendant as the person depicted in a *video or photograph* may be admissible where "the witness possesses sufficiently relevant *familiarity* with the defendant that the jury cannot also possess, and when the [images] are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification." United States v. Jackman, 48 F.3d 1, 4-5 (1st Cir. 1995). However, *where the witness is in no better position than the jury to make an identification*, such testimony does not meet the requirements of Federal Rule of Evidence 701 and is *inadmissible*. See United States v. Jadlowe, 628 F.3d 1, 24 (1st Cir. 2010) (finding testimony of police officers inadmissible where jurors are equally capable of identifying defendant as person seen in video surveillance).

Trial counsel stated in opening statements that "[t]he videos are 20 feet away, sometimes grainy, sometimes not. You're not going to be able to see any details whatsoever. None of those videos can tell who the person is or anything like that." (Tr. PAGEID #: 1931).

Proof Detective Franken had no "familiarity" with me is when asked at the suppression hearing, "were you able to determine in general his physical appearance," he responds, "I don't believe I ever saw Mr. Neil." (M. PAGEID #: 1562).

Thus, because he was "in no better position than the jury to make an identification, such testimony does not meet the requirements of Federal Rule of Evidence 701 and is *inadmissible*." *Rodríguez-Adorno*, *supra*. See also United States v. Cobb, 397 Fed. Appx. 128, 134, hn.9 (6th Cir. 2010) ("In Cooper v.

Sowders, we stated that *permitting opinion testimony that directly influences a jury's consideration of guilt or innocence is constitutional error*. 837 F.2d 284, 287 (6th Cir. 1988)."); United States v. Harber, 53 F.3d 236, 241 (9th Cir. 1995) ("In reversing the conviction and remanding for a new trial, the court held that the intrusion of *the report containing the case agent's summary of his investigation and his opinion that defendant was guilty was inherently prejudicial*."); State v. Johnson, 10th Dist. Franklin No. 02AP-373, 2002-Ohio-6957, ¶43 ("we conclude that *the error affected the substantial rights of defendant*. As discussed above, the improper opinion testimony of the *officers* went to the heart of defendant's self-defense claim, and therefore *to the issue of his guilt*. The effect of the testimony was to *invade the province of the jury* and *lend credibility to the state's case*").

Improper opinions of the defendant's guilt:

I argued the following in my state brief, habeas corpus, travers, objection, and COA that:

When I denied committing any of the other robberies excluding the BMV, the detective stated "I'm 100 percent confident that that's not true." (Tr. PAGEID #: 2604) The detective also stated "You're not telling me where you were, you're lying to me. I know where you were." (Tr. PAGEID #: 2642) State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶ 122 ("A police officer's opinion that an accused is being untruthful is inadmissible."); State v. Potter, Cuyahoga App. No. 81037, 2003 Ohio 1338, ¶ 39 (officer's testimony that defendant's version of events was untruthful was improper).

Detective Franken and Farbacher continued with, "I know this wasn't your first time of doing this tonight. I know there are situations that you've been in . . ." (Tr. PAGEID #: 2574) "But I got to be honest with you, I think from the stuff we have here, (referencing the CSLI) I think you did more than one . . . I got to believe it's you, okay?" (Tr. PAGEID #: 2576) "I'm telling you, we have both been doing this a long time." (Tr. PAGEID #: 2578) "There is a long period where you had to do—you did nothing. You didn't do anything like we're accusing you of doing, . . .You did a bunch, then you stopped. And then last Thursday, and maybe before, what I'm aware of is last Thursday it started back up. And we knew it immediately, immediately when it happened, we knew it was you." (Tr. PAGEID #: 2691-20) "I've been working the robbery squad for 21 years. . . . And I can tell you *I have never arrested an innocent thief*. . . . we go overboard to make sure we got the right guy. And what's included in here, flat out nails you." (Tr. PAGEID #: 2629-30) "I'm telling you, there was a period after we focused on you and we figured out that you were the one responsible for the robberies in 2011. . . . After we figured out it was you, we did work on you, we followed you, we did all kinds of stuff. . . . Then something happened last Thursday and the first thing everybody said was, Miguel – Miguel's back. (Tr. PAGEID #: 2633) "What I'm stating is, there are a lot of people from 2011 that got terrorized by you that can't go to sleep at night because of what you did to them. And I would expect that a guy that sits here and talks about God and Jesus might have a little bit of remorse about what he's put these people through. That's what I'm saying. And I'm not seeing any remorse from you. What I'm seeing is complete denial about what you did. I would love to be able to tell these people that you had a story as to why you did this. And that you were sorry. But I can't do that, can I? Because you want to keep denying it. That's why I'm saying you have no remorse. I'm not seeing it. I'm not seeing it at all. You know what I've seen" I've seen

> a shitload of victims whose lives are altered forever because of what you did. People are out there working for minimum wage. (Tr. PAGEID #: 2635-36) "And then, somebody comes in and shatters their lives. Now I've got that somebody sitting right here. . . . I would love to hear him tell me why he did that. (Tr. PAGEID #: 2637)

Presenting the officers statement, "I have never arrested an innocent thief," is identical to United States v. Hill, 749 F.3d 1250, 1263 (10th Cir. 2014) (conviction reversed) "plain error" where prosecutor elicited expert's opinion that "Never in my career have I seen that with an innocent person." Id.

The prosecutor then personally stated in closing that the "State of Ohio has found Miguel Neil guilty of all of the counts in the indictment beyond a reasonable doubt," (Tr. PAGEID #: 2863), and vouched that "Detective Franken said that during the course of his investigation, no information that he obtained would have excluded Miguel Neil as a suspect" (Tr. PAGEID #: 2858), which is an inference that no one else could have committed the robberies but me, despite the detective's prior admission that he had "maybe a dozen" other suspects (Tr. PAGEID #: 2679), the falsehoods about the clothing and CSLI, and witness' description of the suspect that did not match me. See United States v. Fields, 763 F.3d 443, 466 (6th Cir. 2014) citing Cooper v. Sowders, 837 F.2d 284 (6th Cir. 1988), note that "Rule 704 was designed to prevent 'the admission of opinions which would merely tell the jury what result to reach.'" Id.

Thus, the court *unreasonably* held that "the trial testimony cited in appellant's brief *did not* involve the law enforcement officers offering opinions about appellant's guilt." *Neil*, 2016-Ohio-4762, ¶73.

If in any case there were opinions that "invaded the province of the jury" *State v. Johnson*, and "merely tell the jury what result to reach" *Fields*, *supra*, the *matter-of-fact* opinions made herein are it.

Prejudicial and irrelevant victim impact evidence:

Question Five: Whether victim and community impact testimony is prejudicial where the only fact issue is identity, and to settle the conflict in how much victim-impact testimony is enough to violate a defendant's due process rights rendering the trial fundamentally unfair?

The court in United States v. Lawrence, 735 F.3d 385, 405 (6th Cir. 2013) explained that "[t]he Supreme Court has sanctioned the use of victim-impact evidence in the sentencing phase of a capital trial." Id. The Sixth Circuit has sanctioned its use during the guilt phase of murder and robbery/murder trials, but I have not found a single case that supports its use in a robbery trial where there was no murder, and the only fact issues was identity. The court in *Lawrence* also explained that "victim-impact evidence can violate a defendant's due process rights if it is so unduly prejudicial that it renders the trial fundamentally unfair." (quoting Payne v. Tennessee, 501 U.S. 808, 825 (1991).

The testimony elicited from witnesses by the prosecutor from the November 15, 2012 robbery of the BMV that I admitted committing, was unnecessary and "unduly prejudicial," and is as follows:

> Burgundy Morris: "At the time I was pregnant. My first instinct was to run around the room and get on the floor. If anything happened, I wanted to be able to protect my child." (Tr. PAGEID #; 2422); Tracy Morris: "I immediately run to my daughter here because of her being five months pregnant. And the year before at this time she had lost a child. So we were very scared that she may lose this one at the time." Prosecutor: (Q). Is she upset? (A). She was very upset, very, very. . . . We're telling my daughter to sit down, take it easy, sit down because she's just crying because she knew this was a very volatile time in her life because just a year prior to this she had just lost a child. (Tr. PAGEID #: 2458-59); The Officer: "I felt awful at that point because he had made it inside that dance studio. Prosecutor: (Q). Why are you feeling awful at that point? (A). Because I should have stopped him. . . . we don't know what was going on, if he was going to take hostages because it was loaded with kids and people. (Tr. PAGEID #: 2524-25).

I argued that this testimony was "unduly prejudicial," and was elicited by the prosecutor only to enflame the jury to convict on the other charges, because trial counsel told the jury in opening statements, "my client on November 15, 2012, robbed the BMV in Franklin County." (Tr. PAGEID #: 1928).

I also argued that the detective's oration in the video was also "unduly prejudicial" where he stated:

> "a ton of people got terrorized by you that can't go to sleep at night because of what you did to them. . . . I'm not seeing any remorse from you. . . . Because you want to keep denying it. That's why I'm saying you have no remorse. I would love to see remorse out of you. I would love to see some humanity out of you. I'm not seeing it. I'm not seeing it at all. . . . I've seen a shit load of victims whose lives are altered forever because of what you did. People are out there working for minimum wage. . . . To support their families. . . . you shattered their lives." (PAGEID #: 2635-2637)
>
> Then stated, "I'm in it for the victims. I'm the one who shows up an hour later and sees them falling apart. I contact them months later and they tell me how they are still having problems." (PAGEID #: 2643) "what happened to these people was *horrendous* . . . *it's a step below murder*, and *it's a step below rape*, but other than that, it affects people forever." (PAGEID #: 2654-2655)
>
> The detective then used his experience of having "21 years of seeing victims of robberies and what it does to them," then asked me, "Did you ever seek forgiveness?" (PAGEID #: 2656) See also Direct Appeal Brief (PAGEID #: 513-521).

The state adjudication held that "[w]ith respect to the trial testimony cited by appellant, it seems clear that the testimony from employees of the various businesses that were robbed *was not directly relevant* to appellant's guilt or innocence and *there was some risk* that *this testimony would inflame the sympathies of the jury*" *Neil*, 2016-Ohio-4762, ¶80, but denied relief despite the fact that "[t]he statements were deliberately injected into the proceedings to inflame the jurors' emotions and fears,"

United States v. Solivan, 937 F.2d 1146, 1157 (6th Cir. 1991) (reversed for new trial), and "part of a calculated effort used to evoke strong sympathetic emotions" United States v. Payne, 2 F.3d 706, 710 (6th Cir. 1993) (reversed for new trial), to obtain conviction on the other charges.

Proof they were "deliberately injected" is the detective stating, "we'll let each one of the victims come in and tell their story and we'll let the jury see them breaking down and how it's affected them . . . and they're going to think you're a beast. Are you a beast? . . . Are you a demon?" When I stated "No," the detective retorted, "Are you sure about that?" (Tr. PAGEID #: 2654), and the prosecutor obliged. See United States v. Wettstain, 618 F.3d 577 (6th Cir. 2010) ("the prosecutor labeled [them] as "monsters." These statements appealed to jurors' fears, not to their reasoned judgment. For these reasons, we conclude that the prosecutor's remarks were improper."). The prosecutor also personally and improperly called me "a robbery machine; meaning, he does a whole bunch of robberies." (Tr. PAGEID #: 2911).

CLAIM THREE: Trial counsel was ineffective for failing to object to improper police officer and prosecutor opinions of guilt, as well as the prejudicial and irrelevant victim impact evidence.

As I argued above, I understand that "a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself." Edwards v. Carpenter, 529 U.S. 446, 450-51 (2000).

It was ineffective, and thus plain error, for counsel's failure to object to the prosecutor's own, and presentation of the detectives, opinions of guilt, and elicitation of inflammatory victim impact testimony.

Appellate counsel specifically argued on direct appeal, (PAGEID #: 550-551), that:

> In *State v. Martin*, 37 Ohio App. 3d 213, 55 N.E.2d 521 (10th Dist. 1987), this Court held that the defendant was deprived of a fair trial and effective assistance of counsel because of counsel's failure to object to inadmissible evidence. See also, *State v. David*, 10th Dist. No. 92AP-99, (Sept. 15, 1992), (plain error requiring a reversal to admit improper opinion testimony since it affected a substantial right of the accused and defendant's attorney was ineffective for failing to object to this); *State v. Johnson*, 10th Dist. No. 02AP-373, 2002-Ohio-6957, 2002 WL 31819643, (introduction of police officer testimony, that goes directly to the ultimate issue of guilt, is so prejudiced that it constitutes plain error) For the reasons set forth in the previous assignments of error, counsel was ineffective for not objecting to the improper police officer opinion evidence of the defendant's guilt and the improper use of the victim impact evidence.

See also Hodge v. Hurley, 426 F.3d 368, 377-379 (6th Cir. 2005) explain that:

> Unfortunately, *when a prosecutor does act unfairly*, there is little a defendant can do other than *rely on his or her attorney* to lodge an *appropriate and timely objection*. A failure to make such an objection can have *devastating* consequences for an individual defendant. Accordingly, we have previously held that a failure to object to prosecutorial misconduct can amount to ineffective assistance of counsel.

As cited above, "such testimony does not meet the requirements of Federal Rule of Evidence 701 and is inadmissible" *Rodríguez-Adorno*, *supra*, and is "unduly prejudicial." *Lawrence*, *Payne*, *supra*.

CLAIM FIVE: Insufficient Evidence.

Question Six: Whether a lower court violates due process and abuses its discretion when it unreasonably "makes" a petitioner fit the factual findings for the purpose of identity despite no witness described or identified the petitioner as the suspect after providing in-detail facial features and complexion differences at the State court proceeding, and even after petitioner has disputed the factual findings by clear and convincing evidence?

The Sixth Circuit in McPherson v. Woods, 506 F. App'x 379, 387 (6th Cir. 2012) explained that, "[a]s to factual findings, a habeas petitioner bears the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings are correct. 28 U.S.C. § 2254(e)(1). Only factual determinations that are "'objectively unreasonable in light of the evidence presented in the state-court proceeding'" will be overturned. McKinney v. Ludwick, 649 F.3d 484, 488 (6th Cir. 2011) (quoting Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003))." Id.

"The relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The only "essential element" that needed proven herein was proof of *identity* "beyond a reasonable doubt."

(1). As demonstrated above, the state falsely told the jury multiple times in opening and closing arguments that police officers collected "the *pants*, the *hoodie*, the *mask* that *he was wearing through all of these incidents*," "And *repeating myself*. He was caught red-handed *wearing the same clothing*."

The clothing was heavily relied on and formed the basis for the factual finding that "Neil admitted to committing the Ohio Bureau of Motor Vehicles office robbery where he entered the office *wearing dark clothing, a mask, and dark gloves with white markings or letters*," and that the suspect from the previous robberies also "*wore dark clothing, a mask, and dark gloves with white markings or letters*." *Neil v. Forshey*, at *9. This is unreasonable because it is based on a "lie." *Napue*, *supra*.

See Reiner v. Woods, 955 F.3d 549, 557-58 (6th Cir. 2020) (denial of habeas reversed) hold that:

A prosecutor's heavy reliance on testimony during closing argument evidences its importance in the case. McCarley v. Kelly, 801 F.3d 652, 666 (6th Cir. 2015); see Madrigal v. Bagley, 413 F.3d 548, 552 (6th Cir. 2005) ("The prosecution in fact emphasized the importance [of] Cathcart's audiotaped statement by pointing out in its closing argument twenty things from Cathcart's statement . . . ." . . . .

The other evidence (or lack thereof) also shows the importance of Lewandowski's statements. '[T]he Supreme Court has recognized that *in the absence of any physical evidence*, '[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence.'" Blackston v. Rapelje, 780 F.3d 340, 355 (6th Cir. 2015) (second alteration in original) (quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). That's true here, where the prosecution's case relied almost entirely on circumstantial evidence.

Because of "the absence of any physical evidence," *Reiner, supra*, the prosecutor's falsehoods were made to misled the jury, and appellate courts, into believing the clothing was the same. See Peoples v. Lafler 734 F.3d 503, 516 (6th Cir. 2013) (reversed in part) ("We are rather *disturbed* by the prosecutor's use of false testimony"). This Court should also be "disturbed" and thus, should not view this factual finding "in the light most favorable to the prosecution," United States v. Suddarth, 795 Fed. Appx.377, 379 (6th Cir. 2019) (conviction reversed) (quoting Jackson v. Virginia, 443 U.S. 307 (1979)), because a factual finding based on falsehoods "results 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" 2254(d)(1), and "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 2254(d)(2).

(2). The district court also heavily relied on the state appellate court's factual finding that the suspect was "generally described as a *dark skinned black man*." *Neil v. Warden,* LEXIS 15359, at *109.

I agree that multiple witnesses from *separate* robberies testimony supports this factual finding. For example: The March 23, 2011, robbery "Dark-skinned – dark-skinned I want to say, African American male." (Tr. PAGEID #: 1946); June 28, 2011, "Dark skinned African American." (Tr. PAGEID #: 2054-55); Sept. 17, 2011, "could definitely see was from I think the cheeks to the top of the head . . . it was a male black, but a very dark-skinned male black." (Tr. PAGEID #: 2196-97); Oct. 10, 2011, "dark-skinned male black" - "the person was dark-skinned . . . dark-skinned black." (Tr. PAGEID #: 2208, 2220); Nov. 10, 2011, "could see the eye area . . . Darker skinned male black." (Tr. PAGEID #: 2335).

Even the detective's testimony supported that the witnesses were capable of distinguishing African Americans complexion differences: (Q). And you indicated that they could only see this area,

(indicating), correct? Area, for the record, being *around the eyes and below the eyes and above the eyes*? (A). Yes. . . . (Q). And you would agree that just that limited space and a short amount of time, you can tell if someone is *white* or *black*, correct? (A). *Yes*. (Q). You could tell if someone had *light-skin black* or very *dark-skin black*, correct? (A). You should be able to, *yes*. (Tr. PAGEID #: 2741-42).

The R&R acknowledged that employees could "see from the bridge of the robber's nose up because the lower portion of the robber's face was covered by the mask." *Neil v. Warden*, LEXIS 15359, at*3.

Even after seeing my complexion at trial, not one witness identified me, or my complexion, as the robber because I am *factually* not "dark skinned." There is *no better way* to dispute, by clear and convincing evidence, that I am not "a dark skinned black man" than with colored photos of my brown skin, compared to a friend's dark skin. (PAGEID #: 3596, 3597). Photos are Double sided (Appendix R).

Courts have historically acknowledged witness's ability to accurately identify the difference in African Americans complexions. See as early in Bennett v. Butterworth, 52 U.S. 669 (1851) ("Lindsey, a negro man, of *a dark complexion*, . . . Betsy, a mulatto woman, of *a light complexion*"); Bunkley v. City of Detroit, 902 F.3d 552, 556 (6th Cir. 2018) ("two black males . . . one *dark-skinned* . . . the other *light-skinned*"); Majid v. Noble, 751 F. App'x 735, 737 (6th Cir. 2018) ("Majid and his brother are *easily distinguishable*. While Majid has tattoos, *light brown skin*, . . . Parker is shorter with *darker skin*").

Witnesses from different incidents gave the same description of the suspect? See United States v. Crews, 445 U.S. 463, 466 (1980) ("All three described their assailant . . . with *a very dark complexion*").

If this factual finding cannot be disputed with colored photographs, which by clear and convincing evidence shows that I am not "a dark skinned black man," then no factual finding can ever be disputed.

The only way the courts could presume these factual findings to be correct to sustain the convictions would be to disregard the facts, and in an abuse of discretion, literally "*make*" me be "a dark skinned black man." And in doing so, "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." 2254(d)(2).

(3). The district court also heavily relied on the factual finding that "several of the witness' description of the robber's height and weight were consistent with appellant's height and weight" *Neil v. Warden*, LEXIS 15359, at *104, 106, and pointed out that "[t]he state also introduced evidence from appellant's driver's license indicating that he was 5' 9" tall and weighed 222 pounds" *Neil v. Warden*, LEXIS 15359, at *17, although "in 2011 he was about 235-240 pounds." (Tr. PAGEID #: 1935).

However, testimony from witnesses contradicts this factual finding "by clear and convincing evidence." For example: In the March 23, 2011 robbery: witness testified he is "six-one" and the suspect was "about [his] size, six-foot-one." (Tr. PAGEID #: 1954-55). Counsel asked, "could I have Mr. Neil stand up and show his size?" standing at 5'9", counsel asked, "[i]s it fair to say Mr. Neil is much shorter than six-one?" (Tr. PAGEID #: 1960-61). The officer testified the witness told him "the height of the suspect was six-one to six-two." (Tr. PAGEID #: 1975). I also argued my CSLI placed me 16.8 miles away. See (PAGEID #: 1359) and Google Map (Attachment 2) in (Appendix S); September 17, 2011 robbery: witness not only described the suspect as "very dark-skinned" at trial and in her written statement, but also "150 lbs." in the police report. (PAGEID #: 3600, 3601) (Appendix T); October 12, 2011 robbery: Angela Williams testified that she is "Five-six . . . That the suspect was about the same height as [her] . . . a weight of about 150-160 pounds" (Tr. PAGEID #: 2251-52), customer Rex Wolfe *corroborated* the suspect was "five-six approximately, 150 pounds." (M. PAGEID #: 1598); October 17, 2011 robbery: first witness stated the suspect was "five-feet-six inches to five-feet-eight inches, 180-190 pounds," the second, "five-feet-nine inches or taller, 170" (M. PAGEID #: 1601-02); November 1, 2011 robbery: witness testified suspect was "five-feet-seven inches, 180 pounds." (M. PAGEID #: 1604).

How coincidental is it for witnesses from separate robberies to *consistently* describe the suspect as "a dark skinned black man" at 150-180 lbs., while I am brown skinned at 222-235 lbs.? The testimonial facts support there is a "reasonable likelihood" *Giglio*, *supra*, that the jury believed the falsehoods about the clothing and CSLI because the descriptions did not match me. Thus, to hold that "the robber's height and weight were consistent with appellant's," is "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 2254(d)(2).

(4.) In the November 8, 2012 robbery: the state's only witness, an African American woman, testified that she "actually thought that he was *white*, and it's just from looking in his eyes around here." (Tr. PAGEID #: 2359). In support, officer Guglielmi testified at the suppression hearing that "there was a physical – one of the descriptions said it was a *white male*." (M. PAGEID #: 1779). But the appellate court *gratuitously* left this testimony out of its decision and only cited that "[t]he manager testified that the robber was approximately 5'7" and weighed about 200 pounds." *Neil*, 2016-Ohio-4762, ¶18.

The only witness of the get-a-way vehicle in this robbery testified that "it was a burgundy color" (Tr. PAGEID #: 2388), and in his written statement, "I wrote it was a color – was a shade of red." (Tr.

PAGEID #: 2389). When asked "you believe it was some type of burgundy or shade of red?" he uncontrovertibly stated, "Oh, I know it was," and when asked "you're positive about that," he stated "Yes." (Tr. PAGEID #: 2390).

See also the state appellate court, *Neil*, 2016-Ohio-4762, at ¶46, acknowledge that:

> a witness's handwritten statement, which was introduced into evidence at the suppression hearing indicated that the van was a mid-1990s Astro van and was *a shade of red*. Additionally, an informational summary completed by another *detective who interviewed the witness* stated that *the witness described the van* as *a red or maroon* mid-to-late 1990s Astro van.

Despite these facts, the district court held that "there was evidence from the police license plate reader that appellant's van was in the area near the robbery a few minutes after it occurred. This evidence, viewed in the light most favorable to the prosecution, would be sufficient to establish that appellant committed the robbery and kidnapping on November 8, 2012," *Neil v. Warden,* LEXIS 15359, at *103, ignoring the eyewitness' testimony, and that the police cruisers license plate reader scanned my "license plate number ERR6711 . . . 2.7 miles" away from the Wendy's (Tr. PAGEID #: 2409), amidst "40" other vehicles whose plates were also scanned. (M. PAGEID #: 1689-90). Printout (Motion Exhibit S).

Surveillance was conducted on my home that night and "plainclothes detectives" watched me pull up in my *Blue* vehicle, but did not arrest me. (M. PAGEID #: 1694-95). When the detective was asked why I was not arrested after being "satisfied that a dark van was involved in the robbery," he stated "[b]ecause we didn't have enough evidence at that time" nor "[p]robable cause." (M. PAGEID #: 1706).

My vehicle being "2.7 miles" away amidst "40" other vehicles is not "in the area," nor does it support guilt beyond a reasonable doubt. The distance actually *exculpates* me, as does my vehicle being a different make, model, and color Blue, not the "shade of red" described by the only eyewitness.

In the April 18, 2011 robbery: the witness testified: (Q). And you met with the officers or the detective and gave some descriptions, Correct? (A). Yes. (Q). And the limited things *that you could see was right around the person's eyes*, you told Mr. Walton? (A). Yes (Q). I think you told the detective that you *recognized acne bumps underneath the eyes*, the suspect's eyes, correct? (A). Yes. (Q). And you also indicated that the person had *very thin eyebrows*? (A). Yes. (Tr. PAGEID #: 2014-15).

These physical characteristics did not match my own, and I provided a close-up colored photo of my face from 2011 supporting, by clear and convincing evidence, that I have never had "acne bumps underneath the eyes" or "very thin eyebrows." See Photo (PAGEID #: 3602) in (Appendix U).

The prosecutor asked every witness; (Q). That person that you described to the Columbus Division of Police, is the person we saw in State's Exhibit 2 and in the videos?" (A). Yes. (Q). Any doubt in your mind about that?" (A). No. (Tr. PAGEID #: 2012). Cf. Rosencrantz v. Lafler, 568 F.3d 577, 586 (6th Cir. 2009) (upholding conviction "when the prosecutor pressed Lasky with "[t]here's *no doubt in your mind* that [Rosencrantz] is the man that [assaulted] you?," she answered "yes."). (alteration in original).

Each witness was able to see the bridge of my nose, my complexion, and eyebrow area in the courtroom, and each witness testified that they could not identify me as the suspect nor his complexion.

See also Neil v. Biggers, 409 U. S. 188, 193 (1972) holding that:

> the identification of respondent was reliable . . . the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

(5). The *modus operandi* evidence was not unique, unusual, or distinct to establish a signature or identity.

Question Seven: Whether the Court will settle the conflict between the circuit courts concerning what is or is not a common/generic characteristic carried out in robberies for the purpose of identity in 404(b)?

The court in United States v. Woods, 613 F.2d 629, 635, 641 (6th Cir. 1980) explained that:

> Prior crimes evidence is admissible if there was a "plan" (an agreement to commit a series of crimes) or a "signature" (a device *so unusual or distinctive* as to be like a signature). F.R.Evid. 404(b). We find the circumstances of this case reveal a "signature" on the crimes insofar as each was an armed robbery by robbers wearing ski masks, goggles, and jumpsuits and using a stolen vehicle for a getaway car. . . .
>
> Except on the ski slopes, not many people walk around with goggles, a ski mask and a jumpsuit on. Although it is not unusual for a bank robber to attempt to conceal his identity by using a hood, bandana or ski mask, the combination of goggles, ski mask and jumpsuit is sufficiently distinctive and unusual to meet the "signature" requirement which this Court has adopted. United States v. Phillips, 599 F.2d 134, 136-37 (6th Cir. 1979).

The court in *Woods* further explained at 306 that:

> The facts of this case stand in sharp contrast to previous decisions upholding admission of prior-crime evidence for identity purposes. For example, in United States v. Mack, we affirmed the district court's admission of evidence of the defendant's participation in an unindicted bank robbery under Fed. R. Evid. 404(b), when the defendant was charged with six counts of unarmed bank robbery. 258 F.3d at 551. The district court found multiple factual similarities between the unindicted bank robbery and the charged bank robberies, including the following: the robber "use[d] [ ] a ski *mask* in conjunction with *a hooded sweatshirt*"; the bank robber *consistently* "burst into the bank and *leaped over the teller counter*"; the robberies occurred in the *same neighborhood*; the robber was "*always* reported as being a young, athletic black male somewhere around *six feet tall*, wearing bulky clothing"; the robber *used similar commands* and *collected the stolen money himself*; and the robber "*always* left through the back of the bank and appeared not to use a getaway car." Id. at 553-54.

The factual findings that unreasonably supported the *modus operandi* and thus, identity, were as follows: **[1]** The suspect was "generally described as a dark skinned black man." But photos supported, by clear and convincing evidence, that I am not a dark skinned black man; and **[2]** that I was not "caught red-handed wearing the same outfit" the suspect wore "through all these incidents" as falsely alleged.

More important, the detective testified at the suppression hearing that the "[b]lack . . . robbery uniform" was "not uncommon, it's not a signature." (M. PAGEID #: 1683-84). This all changed at trial and the robbery uniform became a signature because of the prosecutor's falsehood that it was the same.

See United States v. Luna, 21 F.3d 874, fn.5 (9th Cir. 1994) (reversing conviction) explain that:

> Perhaps if the robbers had used identical kinds of masks, gloves, and bags in every crime, the government would have come closer to proving a distinctive quality running through all four robberies. But as indicated above, there were important differences as to the kinds of masks, gloves, and bags which were used; similarly, although the robbers wore sweats in all cases, they did not wear the same color sweats. Given these differences, the common elements take on an even more generic quality: disguises for hands, face, and body; something to carry away the money in. These are elements that are *common* to most bank robberies; they are hardly distinctive.

[3] Although I held the gun in my left hand, the robber in the previous robberies did not always do so. In the June 28, 2011 robbery, when Detective Scott Davis asked "which hand was consistent as far as carrying the weapon," Davis stated, "In watching our video, predominately the *right hand*," (Tr. PAGEID #: 2093), as did the witness in the November 10, 2011 robbery when asked by the prosecutor, "[c]an you tell me which hand he was holding the gun in?" upon which he replied, "*I believe the right hand*" (Tr. PAGEID #: 2344-45), dispelling any *modus operandi* that the left hand was always used. **[4]** The "demand for money" is indisputably a ubiquitous request common in all robberies. **[5]** It held that "the suspect ordered the employees to get on the ground." *Neil*, 2016-Ohio-4762, ¶67. I ordered no such thing in the November 15, 2012 BMV robbery that I committed. **[6]** It held that in all of the previous robberies, the suspect always "used his right hand to reach into the cash register," *Neil*, 2016-Ohio-4762, ¶4-16, but admits that in the BMV robbery, "instead of reaching into cash registers, [I] took money directly from the employees who *handed* it to [me]." *Neil*, 2016-Ohio-4762, ¶22. **[7]** It held that in the previous robberies, "[t]he robber jumped over the counter." *Neil*, 2016-Ohio-4762, ¶5-16. But also held that in the "March 23, 2011 robbery, . . . [t]he robber *did not* jump over the counter or step into the area behind the counter." *Neil*, 2016-Ohio-4762, ¶4. Because the *modus operandi* was not the same, the only reason this robbery was charged has to be because the clothing was the same.

I did not jump the counter in the BMV. However, the court unreasonably lumps going "behind the counter" *in any kind of way*, "sufficiently distinct" to form a *modus operandi* by holding that "in all but the first robbery, the suspect *either* jumped over *or* walked behind the counter" *Neil*, 2016-Ohio-4762, ¶67, a common characteristic carried out in all robberies. Again, this "first robbery" was only charged because the clothing was the same as that worn by the suspect throughout all the previous robberies.

More important, when the prosecutor asked the detective, when a robber "goes from the public into – behind the counters, is that usually?" he replied, "Yes." (M. PAGEID #: 1649). Thus, not unusual.

See United States v. Carroll, 207 F.3d 465, 469 (8th Cir. 2000) explain that:

> First, the characteristics shared by the two robberies are *too common* to form a *modus operandi* that *uniquely* identifies Carroll as the perpetrator. All the United States can argue is that, in both crimes, the perpetrator wore a nylon stocking mask, carried a gun, and *vaulted over the counter* to put the bank's money in a bag. We must initially determine the frame of reference against which to measure the *uniqueness* of the crimes. . . . In the present case, we simply use a set of data readily before us. Based merely on the descriptions of bank robberies available in the published federal appellate reporters, which are incomplete in detail and refer only to a subset of all bank robberies committed, it is amply clear that the signature facts relied upon by the government in this case occur frequently, even in combination.

The court in *Luna*, 21 F.3d 874, at 881, in reversing the conviction explained that:

> A much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind. . . . [at hn.3] . . .The characteristics of the other crime or act must be sufficiently *distinctive* to warrant an inference that the person who commits the act also committed the offense at issue. Conversely, if the characteristics of both the prior offense and the charged offense are not in any way distinctive, *but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise*. . . . [at hn.4] . . . We must determine whether the common characteristics of the four robberies are "sufficiently distinctive to warrant an inference that the person who committed the [uncharged] acts also committed the offenses at issue," or whether those common features are so generic that such an inference cannot be drawn. We conclude that the common features in this case were largely generic.

[8] I did not use "profanity" or make threats to "kill" anyone. (Tr. PAGEID #: 2043, 2046, 2227, 2271). **[9]** I did not count down "seconds" for them to open the register. (Tr. PAGEID #: 2244, 2261, 2271, 2306). **[10]** I did not ask for the "safe" to be opened. (Tr. PAGEID #: 2005, 2008, 2214, 2028, 2043, 2055, 2215). **[11]** I did not touch or physically harm anyone. (Tr. PAGEID #: 2019, 2025, 2112, 2214, 2245). **[12]** Even the type of businesses robbed did not sufficiently form a *modus operandi* or pattern when compared to the robbery of the BMV I admit robbing. Of the 14 other robberies, nine (9) were fast food restaurants, three (3) were gas stations, one (1) was a video store, and one (1) a bank.

See also United States v. Hitesman, 2016 U.S. Dist. LEXIS 84775 (N.D. Cal. 2016), and other cases, explaining why the characteristics that ran throughout the previous robberies herein are not sufficiently unique, unusual, or distinctive to warrant an inference of identity under 404(B). (Appendix V).

Had I been in the Eighth or Ninth Circuit, the fact that my clothing was not the same, and my CSLI placed me nowhere near the robbery scenes, as falsely alleged, along with the state adjudication apparently *unintentionally* pointing out that I did not carry out many of the characteristics that ran throughout the previous robberies, there is a reasonable probability that I would have been granted severance, and the outcome of the trial would have been different. Cf. Loughrin v. United States, 573 U.S. 351, 353 (2014) ("*modus operandi* . . . (which, remarkably enough, happened time after time) . . .").

There simply was no evidence, or "overwhelming" evidence, of guilt other than what the prosecutor created through falsehood. I ask the Court to resolve the conflict between the circuit courts concerning what characteristics are common or not common in robberies, and supports or does not support identity.

CLAIM FIFTEEN: Ineffective Assistance of Trial Counsel for failing to present alibis witnesses, other witnesses in his favor, and exculpatory evidence at trial.

Question Eight: Whether barring review of issues that have some merit in state post-conviction proceeding where no counsel was assigned, is in conflict with Sixth Circuit/Supreme Court precedence?

CAUSE FOR PROCEDURAL DEFAULT:

The Opinion and Order in Neil v. Warden, 2020 U.S. Dist. LEXIS 73335, at *6, held that:

> In regard to the untimely filing of post-conviction proceedings, the record indicates that Petitioner knew, at the latest, on June 17, 2015, when he filed a motion for a delayed appeal, that his attorney had inadvertently failed to file a notice of appeal in Case No. 13CR-4174. (Motion for Delayed Appeal, ECF No. 21, PAGEID # 451.) He had approximately six months, until December 1, 2015, to file a timely post-conviction petition, but waited until February 3, 2016, to do so. See State v. Neil, No. 18AP-609, 18AP-610, 2019-Ohio-2529, 2019 WL 2602564, at *4 (Ohio Ct. App. June 25, 2019). Petitioner has failed to establish cause for this procedural default.

It is absolutely not true that I "knew" the deadline for the post-conviction petition and "waited until February 3, 2016, to do so." I argued that my first appellate attorney was the reason for my untimeliness because he refused to answer any questions about my direct appeal and post-conviction. I motioned for his removal and new counsel discovered he failed to file a notice of appeal in Case # 13CR-4174 and filed a motion for delayed appeal. In granting it, the appellate court held in a June 25, 2015, order that "the record reveals that appellant's failure to timely file a notice of appeal in this matter was due entirely to neglect on the part of his appointed counsel." Id. See Order (PAGEID #: 458-59) in (Appendix W).

I then wrote new appellate counsel in early September with some issues I wanted argued. In his response letter, dated September 24, 2015, he informed me that "the proper remedy for violations that require proof outside the record is post-conviction relief." He then ineffectively advised me that I was already "time-barred from seeking such relief now." He even wrote a second letter, dated November 4, 2015, but never changed his advice about me being "time-barred." See Letters in (Appendix X).

In taking appellate counsel at his word, how then would I have known that I had "until December 1, 2015, to file a timely post-conviction petition" when appellate counsel advised me in the September 24, 2015 letter that I was "time-barred from seeking such relief now"? I reargued in a Rule 40 that:

> Neil wrote new counsel for assistance filing his petition and asked when it was due. New counsel could not help but also never told Neil when it was due. See November 4, 2015 letter from counsel as proof. (PAGEID #: 1164). Neil has consistently argued to the state courts (PAGEID #: 1218, 1325), and federal court, "how would he" know any of this if not told by either counsel. (Traverse (PAGEID #: 3376-77). This Court in McClain v. Kelly, 631 F. Appx 422, 429 (6th Cir. 2015) explained that "in Gunner v. Welch, this court held that an Ohio habeas petitioner could assert as cause his direct-appeal appellate counsel's failure to advise him of the time limit for filing for post-conviction relief pursuant to Ohio Rev. Code § 2953.21. 749 F.3d at 515-16, 520." Id. See "narrow exception" in Martinez v. Ryan, 566 U.S. 1, (2012).
>
> See Gunner v. Welch, 749 F. 3d 511, 520 (6th Cir. 2014) specifically holding that:
>
> While petitioner did not file a post-conviction motion, it would have been futile to do so because the 180-day period in which to file such a petition had long since run as a direct consequence of the failure of his appellate counsel to provide him with relevant information. This failure amounted to ineffective assistance of appellate counsel and thus constitutes sufficient cause to excuse the procedural default that would otherwise subject the petition for habeas corpus to dismissal.
>
> See also White v. Warden, Ross Corr. Inst., 940 F.3d 270, 272 (6th Cir. 2019) explain that:
>
> because White did not have the aid of an attorney in his post-conviction proceedings, he had no meaningful opportunity to raise his ineffective-assistance claim. In light of the Supreme Court's decision in . . . Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), we find that White has cause to overcome his default.

Thus, I am entitled to "cause" because appellate counsel ineffectively advised me "of the time limit for filing for post-conviction relief" pursuant to *McClain* citing *Gunner*, quoting *Martinez*, and because "in the initial-review collateral proceeding, there was no counsel" pursuant to *White* quoting *Martinez*.

I understand that "[t]o overcome the default, a prisoner must *also* demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has *some merit*." *Martinez*, 566 U.S. 1, at *14.

The alibi and exculpatory evidentiary claims below clearly have "some merit." See House v. Bell, 547 U.S. 518, 571 (2006) where Chief Justice Roberts, with whom Justice Scalia and Justice Thomas joined, explain that "*when identity is in question, alibi is key.*" Id.

See also Caldwell v. Lewis, 414 Fed. Appx. 809, 816-18 (6th Cir. 2011) explain that:

> "[A]n attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it." Pavel v. Hollins, 261 F.3d 210, 220 (2d Cir. 2001) . . . Trial counsel has been found ineffective when he or she fails to present exculpatory testimony. See Stewart, 468 F.3d at 355-61. In fact, this Court has recognized that when trial counsel fails to present an alibi witness, "[t]he difference between the case that was and the case that should have been is undeniable." Id. at 361. This Court has held that the failure to produce an alibi witness at trial was prejudicial under *Strickland*, even where the state postconviction court said the alibi witnesses would have been "unconvincing," and there were other alibi witnesses presented at trial. See Bigelow v. Haviland, 576 F.3d 284, 291 (6th Cir. 2009). This Court has also found a *Strickland* violation where counsel failed to present three favorable witnesses even though the state postconviction court said that one witness was "not particularly helpful" and another was "incredible." . . .

Clinkscale v. Carter, 375 F.3d 430, 443 (6th Cir. 2004) (conviction reversed) explain that:

> We note at the outset that a number of courts have found ineffective assistance of counsel in violation of the Sixth Amendment where, as in this case, a defendant's trial counsel fails to file a timely alibi notice and/or fails *adequately* to investigate potential alibi witnesses. . . . At least where - as here – alibi is a critical aspect of a defendant's defense, . . . In this case, there would have been nothing to lose, yet everything to gain, from filing the alibi notice in compliance with Rule 12.1. Such a course of action would have preserved Clinskcale's right to assert an alibi defense . . .

Harrison v. Cunningham, 512 F. Appx 40, 42 (2d Cir. 2013) explain that:

> reasonable attorneys understand the importance of potential alibi defenses and that criminal defendants suffer prejudice whenever their attorneys overlook or forfeit such a defense. See, e.g., Lindstadt v. Keane, 239 F.3d 191, 199-201 (2d Cir. 2001); see also Raygoza v. Hulick, 474 F.3d 958, 965 (7th Cir. 2007); cf. Clinkscale v. Carter, 375 F.3d 430, 443 (6th Cir. 2004).

This Court in Taylor v. Illinois, 484 U.S. 400, 408-12 (1988) holds that:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. . . . the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant.

The following was attached to the post-conviction petition 2953.21. **(1).** I informed retained counsel that I had an alibi for the robbery of McDonalds at 1300 Morse Rd. Columbus, Ohio, on Wednesday October 17, 2011 at 7:58 pm. I explained that I trained Carla Urse and her fiancé Charlie, every Monday and Wednesday from 7-8 pm. See Urse's notarized affidavit confirming. (PAGEID #: 1133). Retained counsel obtained my daily work planner with their names listed on the date in question in support.

(PAGEID #: 1134). From the search warrant, retained counsel Google Mapped the tower my phone pinged on at 7:15 pm, Cell Tower 321, at 10168 Sawmill Rd. Powell, Ohio. (PAGEID #: 1135). Retained counsel already had my Sprint cell phone records for that day showing who I was talking to while my clients trained, which was my wife. (PAGEID #: 1136). Google Maps shows Tower 321 is a mere 0.2 miles from my place of employment at Powell Fitness at 3967 Presidential Parkway Powell, Ohio (PAGEID #: 1137), and the tower is 13.5 miles from McDonalds. (PAGEID #: 3589). See all documents in (Appendix Y).

After retained counsel had a heart attack and withdrew, the evidence above was turned over to assigned counsel. Despite having it, new trial counsel *untruthfully* told the court that "after researching the alibis . . . we don't have any *corroborating* evidence," they were "not panning out," "witnesses indicate they have no recollection of that day," and that presenting them would "actually hurt his case." (Tr. PAGEID #: 1878-79). After speaking to Mrs. Urse, she stated that she never made such a statement and provided the notarized affidavit. There is nothing "reasonable" about counsel being untruthful.

First, Mrs. Urse's affidavit *corroborates* that she and her fiancé trained with me every Wednesday from 7-8pm; second, my daily planner filed in the notice of alibi *corroborates* the time and date was 7-8pm on Wednesday October 17, 2011 in Powell Ohio; and third, the search warrant containing the cell tower address that my phone pinged on at 7:15 pm, *scientifically corroborates* that I was training my clients at my place of employment on the date in question from 7-8 pm and thus, could not have been robbing the McDonalds at 7:58 pm, 13.5 miles away in Columbus Ohio. Google Maps does not lie.

This alibi is not like in Alvord v. Wainwright, 469 U.S. 956, 957 (1984) where counsel "permitted his client to rely on an *unsupported* alibi that all acknowledged to have been, at best, weak." Id. Nor like in other cases where the Supreme Court has held that counsel was *not* ineffective for failing to investigate if "*further investigation* would have been fruitless," Wiggins v. Smith, 539 U.S. 510, 525 (2003); where the additional "evidence would be of little help," *Strickland* 466 U.S. at 699; "can reasonably be expected to be only cumulative" Bobby v. Van Hook, 558 U.S. 4, 11 (2009); or as in Harrington v. Ritcher, 562 U.S. 86, 108 (2011), carried a "serious risk . . . Richter's story would be exposed as an invention." Id.

Because each of the documents corroborates the another, it was *impossible* for this alibi to have "hurt my case." If true, why file the notices at all on September 8th and 15th? Trail was September 24, 2014. See Case Docket Sheet (PAGEID #: 1130, 1131) in (Appendix Z). Clearly, trial counsel did not research this alibi and thus, made the above false allegations.

(2). I also argued that I had an alibi for the August 10, 2011, robbery of Subway located at 7558 Worthington-Galena Rd. at 9:39 pm. This included a statement from Lee Dumond, a Columbus Public School Elementary principle, stating that she was in attendance for my surprise birthday dinner at the Outback restaurant located at 6000 East Main Street from 7pm until after 9pm, set up by my wife.

Other family members were present but I decided not to use them because "by virtue of the relationship with the alibi witnesses being *family members* their testimony may be suspect based upon the relationship by and between them . . ." Stadler v. Berghuis, 483 F. App'x 173, 176 (6th Cir. 2012).

My daily work planner was filed in the notice of alibi noting "wife dinner 7:30 pm" on August 10, 2011. (PAGEID #: 1132). My birthday was August 11th, but she could not get a reservation for that many people on August 11th. Moreover, the locations are 19.7 miles apart. See Daily Work Planner and Google Map in (Appendix 1). I do not have Lee Dumond's written affidavit because appointed trial counsel still has it. Although I asked for a copy of it, he never sent it but he filed it in the notice of alibi.

(3). After assuring me he would, I argued that trial counsel was ineffective for failing to subpoena Reynoldsburg Detective Kevin McDonnell to testify to, and present his time-slotted Narrative Supplement Report, which narrated the suspect's actions in the robbery of the Tim Hortons on May 8, 2011. When describing the suspect, the detective stated, "[w]hile *viewing* the surveillance video it appears the suspect is a *male white*." (PAGEID #: 1011). Along with this report in discovery, was a mug shot of a "male white" suspect. (PAGEID #: 1012). See all documents in (Appendix 2).

I viewed the video with retained trial counsel who had to withdraw in affirmation, and apparently appellate counsel also viewed the video, because he argued on direct appeal at (PAGEID #: 546-47) that:

> In the Tim Horton robbery on May 8, 2011, the video had perhaps *the best facial view* of the suspect of any. The facial covering was below the suspect's nose and that portion of the suspect's *face did not appear to be the defendant*. . . . and the suspect was much lighter in complexion and *appeared to be white*, at least to the *detective* who viewed the video.

I asked, and ask this Court, why would McDonnell lie about what he observed concerning the ethnicity of the suspect? Despite McDonnell's observations, the district court held that "[a]n employee from the Tim Horton's described the armed gunman as an African-American man and the surveillance video of the robbery was played for the jury." *Neil*, 2020 U.S. Dist. LEXIS 73335, at fn.1.

However, I argued, and supported by way of the trial transcript, that the prosecutor *never* let the video play to the portion that the detective, myself with retained counsel, and my appellate counsel

apparently viewed, by deliberately "jumping forward," "stopping," "starting," and "going back" *only* to the portions of the video that he wanted the jury to see. See (Tr. PAGEID #: 2753, 55, 57, 58, 59, 60).

I also argued that the witness testified that he "didn't want to be here," that "[a]n officer had to bring [him] here," that he "can't say it was [me]." He then testified that when the suspect left, his co-worker gave him "a smirk" and "thought that was odd, seemed really odd." He also testified that his co-worker had been "acting really odd the whole shift," and "mentioned to the officer that [he] thought maybe [his co-worker] could have been involved in it somehow." (Tr. PAGEID #: 2760-63).

The police report stated that his co-worker refused to speak to them, and after convincing him to let them see his phone, realized he had erased all his calls and messages for that day. I argued that both of them "could have been involved" which was why he did not want to be in court. Detectives subpoenaed his co-workers phone records, and my number was not in it. I asked, and ask this Court, for an evidentiary hearing so that the video can be viewed in its entirety to see what the detective did as stated in his report.

It is well known that jurors give more credit to police officer testimony. See Harris v. Konteh, 198 F. Appx 448, 454-455 (6th Cir. 2006) ("indicated that she would give more weight to the testimony of police officers than to non-law enforcement witnesses."); State v. Davis, 2005-Ohio-121, ¶34, ¶57 (juror "would be more likely to believe a police officer"). Thus, failing to subpoena Dt. McDonnell for his exonerating testimony, his report, and playing the video in its entirety, cannot be strategic or reasonable. **(4).** Counsel also ineffectively failed to subpoena eye witness Joe McPeak, and present the Google Map in support that my phone did not ping on any towers near the September 11, 2011 robbery of Tim Hortons as falsely alleged by the prosecutor. See Google Maps (PAGEID #: 3592, 94) in (Appendix N). McPeak stated in the police report "that he was walking on the east side of North High Street and he observed a male, black matching the listed suspect's description . . . Stated as he walked past the male, black he observed him wearing black pants, a black hooded sweatshirt with the hood down. Witness stated the male black had [a] short afro and a fat nose." (M. PAGEID #: 1582). Of course, the state did not subpoena McPeak because his description did not match me, but counsel should have as requested in my defense. **(5).** I also argued in my post-conviction petition that trial counsel was ineffective for failing to present Google Maps to dispute the prosecutor and detective's falsehoods about how my CSLI placed me in the

area of robberies on the dates and times they were committed; and any inference that I could have made the drive to commit them knowing police *always* obtain your CSLI to place/prove you were in the area.

The inference is dispelled because of the single tower ping which scientifically supports that during these calls, I was stationary and *not in motion*. See United States v. Riley, 858 F. 3d 1012, 1024, fn. 1 (6th Cir. 2017) ("CSL data are generated when a cell phone connects with a cell tower in order to make or receive a call; a phone may connect to and disconnect from multiple towers during the course of a phone call *if, for example, the caller is in motion during the call.*"); In re Application for Telephone Information Needed for a Criminal Investigation, 119 F. Supp. 3d 1011, 1014-1015 (N.D. Cal. 2015) ("Whenever a cell phone makes or receives a call, sends or receives a text message, or otherwise sends or receives data, the phone connects via radio waves to an antenna on the closets cell tower, generating CSLI. The resulting CSLI includes the *precise location of the cell tower and cell site serving the subject cell phone* during each voice call, text message, or data connection. *Luna* ¶ 3A. *If a cell phone moves away from the cell tower with which it started a call and closer to another cell tower, the phone connects seamlessly to that next tower*."). The average distance between the robbery and tower locations was 5.9 to 16 miles, and the towers only have a range of "a half mile and two miles." *Carpenter*, *Saleh*, *supra*.

(6). Trial counsel failed to show a tattoo on my left leg/ankle area, along with photos in support that it was there prior to the robbery on June 28, 2011, to support my innocence after showing the jury (State's Exhibit 4-I), and questioned the witness as follows: (Q). And the officer asked, did you see any distinguishing characteristics, marks, tattoos or anything like that? (A). I didn't see anything on my end here besides the fact that when he lifted up, you could see his ankle. [Counsel then presented a still photo of the suspect coming over the counter, State's Exhibit 4-I]. (Q). Could you take a look at that? (A). Uh-huh. (Q). And tell the ladies and gentlemen of the jury what that is? (A). This is a still frame of the person that robbed us, was coming over the counter. You could see it's actually a frozen frame there where he has one leg [left leg] on the counter itself, the foot is over the counter, you can see up on his ankle, you know, four inches or so. . . . (Q). Mr. Judson, I think the prosecutor has a laser up there, if you hold it down the ankle area. So there is nothing that you saw there, no tattoo or anything on there, correct? (A). I don't see anything, no. (Tr. PAGEID #: 2056-58). The pant leg rose up even higher as the video played.

The *sole purpose* of trial counsel eliciting testimony about the tattoo was to prove my innocence or at minimum, provide serious reasonable doubt. All counsel had to do was show my tattoo in court, and present the bodybuilding photos of my left ankle/leg area to prove that the tattoo was there years prior to the robbery, but egregiously failed to do either against my request. See Hamilton v. Zant, 466 U.S. 989, 991 (1984) ("egregious was counsel's failure to develop possibly exculpatory evidence").

Had the tattoo been on the suspect, the prosecutor *surely* would have checked if I had one, then had me show it for the purpose of identity. No reasonably competent attorney would fail to do so.

But trial counsel argued with me that the state would just say I "got the tattoo *after* the robbery." I told him that a friend had printed off and brought colored photos from bodybuilding.com from 2007-08 showing the tattoo and an identifying scar. Only then did counsel assure me he would present the tattoo evidence, but even after questioning the witness, he failed to do so. See State's Exhibit 4-I (PAGEID #: 991); Photos of Tattoo and scar (PAGEID #: 994-997); Friends Notarized Affidavit stating she provided the photos to trial counsel. (PAGEID #: 998). See all documents in (Appendix 3).

This exact issue was presented in Wiggins v. Sec'y, Fla. Dep't of Corr., 766 F. App'x 817, 819 (11th Cir. Mar. 12, 2019) where "[a]fter being shown a picture of Petitioner's neck, the cashier identified the tattoos as those she had seen on the robber's neck" and Wiggins was found guilty. In affirming Wiggin's conviction, the court explained that "[t]he prosecutor responded in his rebuttal argument: '*Tattoos* on hands. You saw them. Do we know when he got those *tattoos*? It has been three years since the robbery,'" and upheld the state trial court's reason for denying the motion for mistrial "because it was entirely possible that Petitioner got his tattoos *after* the robbery, while he was imprisoned." Id., at 824.

The Respondent herein made the same argument by stating, "Neil could have logically gotten a tattoo at any time after the event described, and the tattoo's absence on a prior occasion is thus of minimal value as evidence." Respondents Answer (PAGEID #: 3185), despite I exhibited the photos from 2007-08.

But in my case, trial counsel had proof that my tattoo was there *years* before "the event described." i.e., the 2007-08 photos. Thus, no *competent* attorney would fail to present such exculpatory evidence.

Many defendants have been found guilty by identifying tattoos. See Rosencrantz v. Lafler, 568 F.3d 577, 586 (6th Cir. 2009) ("Lasky also confirmed that the tattoo on Rosencrantz's chest matched her assailant's tattoo."); State v. Whitt, 2000 Ohio App. LEXIS 4982, *5; State v. Bryson, 2013-Ohio-934, ¶6 (same); United States v. Gallegos, 553 F. App'x 527, 530 (6th Cir. 2014) (same). Thus, reasonable jurists would agree that if an identifying tattoo can support guilt, it can also support innocence.

Moreover, "there would have been nothing to lose, yet everything to gain," *Clinkscale*, *supra*, had counsel presented the evidence. See also Haliym v. Mitchell, 492 F.3d 680, 716 (6th Cir. 2007) (quoting Frazier v. Huffman, 343 F.3d 780, 796 (6th Cir. 2003) ("competent trial counsel for Frazier would have realized that their client had everything to gain and nothing to lose by introducing evidence"). The Sixth Circuit reversed denial of the writ of habeas' on this issue in *Caldwell*, *Clinkscale*, *Haliym*, and *Frazier*.

The above evidence and documents in support are *not* contained in the record. See State v. Ibrahim, 10th Dist. No. 13AP-4, 2014-Ohio-5307, ¶8 ("Postconviction relief is a means by which the petitioner may present constitutional issues to the court that would otherwise be impossible to review because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction.").

But in conflict with Ohio law, the Sixth Circuit *unreasonably* held, "[b]ecause Neil did not argue . . . that he received ineffective assistance of trial counsel when counsel failed to subpoena alibi witnesses, subpoena other defense witnesses, and present exculpatory evidence in his Rule 26(B) . . . he has procedurally defaulted this claim." *Neil v. Forshey*, at *14, despite knowing the evidence above was "not contained in the record" to support the issues *at all*, and thus, appropriately belonged in postconviction.

In addition, because "there was no counsel" *Martinez*, *supra*, the decision to default this claim "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." 2254(d)(1).

Counsel's failure to present the alibis, exculpatory tattoo, and other evidence such as the detective and his report, where no "cogent tactical or other consideration justified it" *Caldwell*, *supra*, would prejudice and cause a defendant to be convicted "on a partial or speculative presentation of the facts" *Taylor*, 484 U.S., at 409, as it did herein where the state argued that one person committed the robberies, and the Detective agreed that if I could "show that this person didn't do number six, therefore, I'm going to start with the premise that he didn't do any of the other 14 remaining ones." (Tr. PAGEID #: 2735).

Thus, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S., at 694.

ACTUAL INNOCENCE:

Question Nine: Whether the Court in *Schlup* only meant newly discovered evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder during trial, as sufficient for the gateway claim of actual innocence? I thus ask the Court to settle this conflict within the Sixth Circuit, and between other circuits.

I argued that because the evidence in my post-conviction petition in Claim Fifteen was never presented to the jury, it qualifies as "new reliable evidence." Schlup v. Delo, 513 U.S. 298, 324, (1995). See also House v. Bell, 547 U.S. 518, 538, hn.5 (2006) explaining that "[t]he habeas court must consider *all* the evidence, *old* and *new*, incriminating and *exculpatory*, *without regard* to whether it would necessarily be admitted under rules of admissibility that would govern at trial." Id.

The Sixth Circuit in Everson v. Larose, 2020, U.S. App. LEXIS 14290, at *9-11 explained that:

> Everson now contends that the district court applied the wrong standard in concluding that Valentin's evidence was not "new." He argues that, because the evidence contained in his affidavit was never presented to the jury, the affidavit qualifies as "new" evidence for purposes of the actual-innocence exception. As Everson points out, the Supreme Court, in Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), explained that a gateway claim of actual innocence requires "new reliable evidence . . . that was not presented at trial." This court has recognized that "[t]here is a circuit split about whether the 'new' evidence required under *Schlup* includes only newly discovered evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder during trial, i.e., newly presented evidence." **Cleveland v. Bradshaw, 693 F.3d 626, 633 (6th Cir. 2012)**; see Connolly v. Howes, 304 F. App'x 412, 418 (6th Cir. 2008). This court has not directly addressed the issue **but has suggested that "'newly presented' evidence [is] sufficient." *Cleveland*, 693 F.3d at 633 (citing Souter v. Jones, 395 F.3d at 577, 595 n.9 (6th Cir. 2005)). Under that standard, Valentin's affidavit would qualify as "new" evidence.**

To add more confusion and conflict, just recently in Lowery v. Parris, 819 Fed. Appx. 420, 421 (6th Cir. 2020), the Sixth Circuit remanded a district court's denial of a writ of habeas explaining that:

> Admittedly, courts have struggled to define what qualifies as new evidence. Some courts treat all evidence as new so long as it was not presented at trial. See, e.g., Gomez v. Jaimet, 350 F.3d 673, 679 (**7th Cir. 2003**). Other courts maintain that evidence is new only if it was unavailable at the time of the trial. See, e.g., Moore v. Quarterman, 534 F.3d 454, 465 (**5th Cir. 2008**). But whatever new evidence means, the district court erred by concluding that evidence presented to state courts categorically does not qualify. . . . That's not to say that the three affidavits do qualify as new evidence. Maybe they do, maybe they don't.

On remand, the district court in Lowery v. Parris, 2021 U.S. Dist. LEXIS 82372, at *17-18 concerning the affidavits held "that the evidence is "new" under governing standards, as it was not presented to the factfinder at trial. *Schlup*, 513 U.S. at 333-335; *Cleveland*, 693 F.3d at 633." Id.

See also Kidd v. Norman, 651 F.3d 947, 953 (8th Cir. 2011) explain that:

> *House* does not help resolve the current circuit split on the meaning of "new" evidence in cases where one or more of the procedurally defaulted claims are claims involving trial counsel's alleged ineffectiveness in failing to discover or present evidence of the petitioner's innocence.

Under *Everson* and *Lowery* following *Cleveland*, the "exculpatory scientific evidence" of the Google Maps; the "trustworthy eyewitness accounts" of Joe McPeak, Rex Wolfe, Detective Kevin McDonnell, and alibi affidavits; as well as the "critical physical evidence" of the tattoo, would qualify

as "new" evidence and should have been considered. But the district court herein held otherwise. See *Neil v. Warden*, LEXIS 15359, at *74-75.

Therefore, I ask this Court to settle the conflict within and between the circuits because many petitioners are discouraged from even arguing actual innocence because review depends solely upon what circuit the petitioner is in, and what evidence the judges therein believes qualifies as "new."

Thus, "to remove the double negative, [it is] more likely than not any reasonable juror would have reasonable doubt" had counsel presented the evidence in Claim Fifteen at trial. *House*, 547 U.S., at 538; Strickland v. Washington, 466 U.S. 668 (1984) ("there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.").

CONCLUSION

I have come to understand that this Court only grants approximately 1% of writs for certiorari, but "the Constitution entitles a criminal defendant to a fair trial." Ross v. Oklahoma, 487 U.S. 81, 91 (1988).

"Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives." United States v. Ashrafkhan, 964 F.3d 574, 578 (6th Cir. 2020). Thus, what reasonable minded person, or jurist, would still be convinced in their decision after learning their decision was based on multiple falsehoods which "prevented, as it did, a trial that could in any real sense be termed fair"? *Napue*, *supra*. Prosecutors misstate, and make false claims about having evidence, because there are no personal consequences.

By accepting certiorari, the Court will **(1)** reaffirm this Court's historical holding that "[f]alse testimony in a formal proceeding is *intolerable*. We *must neither reward or condone* such a 'flagrant affront' to the truth seeking function of adversary proceedings" *ABF*, *supra*; *Young*, *supra*, because such an affront "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" Dowling v. United States, 493 U.S. 342, 353 (1990) (quoting *Mooney*, 294 U.S. at 112). Such a conviction, "*must be set aside* if there is *any reasonable likelihood* that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976); **(2)** reaffirm that trial attorneys who fail to lodge timely objections to prosecutorial misconduct, appellate attorneys who fail to raise claims of such misconduct that are "clearly stronger than those presented," *Mapes*, *Smith* v. *Robbins*, *supra*, and trial attorneys who fail to present exculpatory and key alibi evidence, this Court will enforce that "a party whose counsel is unable to provide effective representation

is in no better position than one who has no counsel at all . . . by imposing sanctions against the attorney, rather than against the client. Such a course may well be more effective than the alternative of refusing to decide the merits of an appeal and will reduce the possibility that a defendant who was *powerless* to obey the rules will serve a term of years in jail on an unlawful conviction." Evitts v. Lucey, 469 U.S. 387, 397-99 (1985); which **(3)** supports that appellate courts cannot "refus[e] to decide the merits of an appeal" *Evitts*, *supra*, by ignoring cited case law that overcomes procedural default merely because it can.

To reinforce trial counsel's deficient performance, during the mitigation phase of sentencing, one victim from the BMV that I admit committing, stated that I was "forgiven." (Tr. PAGEID #: 1201). But defense counsel *unbelievably* told the judge, "I don't think that I could forgive him, Your Honor, the way she has in this courtroom." (Tr. PAGEID #: 1211). What competent attorney would say this?

It appears that because I am "too poor to hire a lawyer," Gideon v. Wainwright, 372 U.S. 335, 344 (1963), where witnesses provided in-detail descriptions of the suspect that did not match me, the prosecutor will get away with using falsehoods to obtain the convictions because counsel ineffectively failed to object, and failed to present alibi and other exculpatory evidence, depriving me of a fair trial upon which I was consequently given what amounts to a life sentence for crimes in which I did not commit, excluding the BMV on November 15, 2012, all because the lower courts refuse "to sort out simple instances of right from wrong and give some redress for the latter. At the very least, when [courts] proceed on the assumption that perjury was committed," *ABF*, *supra*, by ignoring the case law I argued in support of "cause" to overcome the procedural default of claims in which counsel failed to raise.

Permitting this to happen, because it obfuscates the truth, "would turn on its head what Justice Harlan termed the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Taylor*, 484 U.S., at 437, (quoting *Winship*, 397 U.S., at 372), and "[t]he court [should be] perplexed as to why the state is satisfied to have the conviction stand under such circumstances." State v. DeFronzo (1978), 59 Ohio Misc. 113, 122-23. See full case in (Appendix 4).

Thus, I beg the Court to review my petition "'however inartfully pleaded' . . . 'to less stringent standards than formal pleadings drafted by lawyers . . . .'" Hughes v. Rowe, 449 U. S. 5, at *9 (1980); Haines v. Kerner, 404 U.S. 519, 520 (1972); and in "the interests of justice," *Mesarosh*, *supra*, grant certiorari and remand the case for a new trial, or at minimum, issue a C.O.A. and/or evidentiary hearing.

Respectfully submitted,

Miguel Neil