No. 22-5066 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

John Cody a.k.a. Bobby Thompson - Petitioner

vs.

Tim McConahay, Warden – Respondent

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

PETITION FOR WRIT OF CERTIORARI

John Cody
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Petitioner, pro se

QUESTIONS

QUESTIONS (1) - (5) THE EXTRAORDINARY PUSHBACK CONTRA THE DEBATABILITY REVIEW STANDARDS OF MILLER-EL AT THE CIRCUIT COURT LEVEL

In the context of the 6th circuit court of appeals 28 U.S.C. §2254 certificate of appealability case, ***Cody v. McConahay***, 2022 U.S. App. LEXIS 579 (App. A; "***Cody***" or the "Order), and its decision upon debatability review of petitioner's showings made pursuant to 28 U.S.C. §2253(c)(2) on, as a primary matter, his constitutional claims of the denial of his 6th Amendment right to access counsel of choice and his claim of "procedural" actual innocence; and, secondarily, on his other habeas claims:

(1) **Does a certificate of appealability ("COA") debatability review pursuant to 28 U.S.C. §2253(c)(2) mean that the COA panel may deny debatability of a constitutional claim, or of any of its dispositive parts exists, where the panel for and in such a review ignores valid showings the petitioner made on the facts, on the law, and on mixed questions; merely repeats the likewise one-sided 28 U.S.C. §2254(d) – suitable-only conclusions by the district court on the same; and conflates "reasonable jurists would not disagree," "...could not disagree," and "...would not debate" standards with a "...could debate" or "...could disagree" standard, and still be said to be following the framework approach mandate of *Buck v. Davis,* 137 S.Ct. 759, 774, that a COA panel should "...[A]sk only if the ... decision was debatable"?**

(2) **Did *Cody* do any or all of the above, deciding implicitly the important federal question of what §2253(c)(2) means, in a way or ways which conflict with the framework approach mandate of *Miller-El v. Cockrell,* 537 U.S. 322 (2003) and *Buck* or related relevant decisions of this Court?**

The following questions (3), (4) and (5) have as an underlying query, based upon a No answer to (1) and a Yes answer to (2), whether ***Cody*** went further than merely making an isolated erroneous decision on what a COA debatability review is and must be, under federal law, implicating other problems of national importance relating to the constitutional right of habeas corpus and to disparate treatment of similarly situated petitioners in violation of the Equal Protection Clause, which require the Court's attention instantly:

(3) **Is *Cody*'s decision illustrative of continuing post-*Buck* decisions of other U.S. circuit court COA panel decisions on debatability in conflict with *Miller-El* and *Buck* or related relevant decisions of this Court?**

(4) **Does *Cody* conflict with decisions of other courts of appeal COA decisions not in conflict with *Miller-El* and *Buck* on the same matter?**

(5) **Do other circuit court COA panel decisions conflict with each other, intra-circuit or inter-circuit, on the same matter?**

The following questions (6) and (7) are queries about ***Cody***'s rulings on ultimate statements of law on important federal questions pertaining to the meaningfulness of the 10th Amendment right of the states and their people to make their own procedural default rules and the 6th Amendment right of the accused to access counsel, outside of, and irrespective of, ***Cody***'s purported debatability errors:

QUESTION 6: RES JUDICATA RULINGS CONTRA THE STATE'S RIGHT TO SET ITS OWN RULES

(6) **Did *Cody*'s denial order (App. A, *8 -*10) decide the important federal question of what the 10th Amendment, or U.S. Supreme Court rulings motivated in whole or in part thereby, mean, as to when, or even if, a federal court can pronounce a statement on what a state rule holds (instantly, on a judicially created *res judicata* claim preclusion procedural bar), without citation to a relevant or applicable state statute or rule of court, and without clear and firmly established approval by the state supreme court, by pronouncing such a statement (App. A, *9, *17), in conflict with the relevant decisions of this Court in *Johnson v. Lee,* 578 U.S. 605, 136 S. Ct. at 1804-05 (2016) and *Walker v. Martin,* 562 U.S. 307, 316,317 (2011) ?**

QUESTION 7: OVERRULING CAPLIN'S ESTABLISHED 6TH AMENDMENT RIGHT OF ACCESS TO COUNSEL OF CHOICE

(7) **Did *Cody*'s denial order (App. A, *18) decide the important federal law question of what the 6th Amendment right to access counsel of choice means by ruling (App. A, *18) petitioner did not have a meritorious claim of the right because his "indigency" barred such access, in conflict with the concept of "indigency" referenced in *Caplin & Drysdale v. U.S.*, 491 U.S. 617 (1989)?**

List of Parties

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

Related Cases

State v. Cody, No. 12-565050 A, Cuyahoga County, Ohio Common Pleas Court. Judgment entered December 16, 2013. (Criminal Trial Case).

State v. Cody, No. 100797, 8th District, Ohio Court of Appeals. Judgment entered June 11, 2015. (Direct Appeal).

State v. Cody, No. 100797, 8th District, Ohio Court of Appeals, Judgment entered April 21, 2017 (O. App. R. 26(B) application).

State v. Cody, No. 102213, 8th District, Ohio Court of Appeals. Judgment entered July 9, 2015 (O. Postconviction Relief Petition Denial Appeal).

State v. Cody, Consolidated Nos. 107595, 107607, 107664, 8th District, Ohio Court of Appeals. Judgment entered July 11, 2019 (O. Postconviction Relief Petition Denial Appeal).

Cody v. Sheldon, No. 1:18 CV 1787, U.S. District Court for the Northern District of Ohio. Judgment entered April 16, 2021. (§ 2254 Habeas Corpus Petition).

Cody v. Sheldon, No. 1:18 CV 1787, U.S. Magistrate Court for the Northern District of Ohio. Report and Recommendations on § 2254 Habeas Corpus Petition entered March 24, 2020.

Cody v. McConahay, No. 21-3462, U.S. Court of Appeals for the Sixth Circuit (COA panel). Judgment entered January 7, 2022. (COA application) (Subject of petition for certiorari).

Cody v. McConahay, No. 21-3462. U.S. Court of Appeals for the Sixth Circuit. Judgment entered

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Petitioner's District Court Traverse (serving as his presentation of facts and law on his habeas claims by order of the magistrate judge [No. 1:18 CV 1787, Doc. 18] showing petitioner's debatability fact-based argument on what his testimony would have been had he testified, on the issue of outcome-determinativeness for his denial of his right to testify claim, and to his procedural actual innocence claim, and his argument on law and outcome determinativeness as applied to those facts. (pp. 31-54).

Appendix J

Petitioner's Objections to Magistrate Judge's report and recommendations referenced in App. A decision of United States Court of Appeals. Appended merely to evidence petitioner's substantial showing of debatability pursuant to 28 U.S.C. § 2253 (c)(2).

Appendix K

Petitioner's United States Court of Appeals Invited (FRAP Form 4) In Forma Pauperis Affidavit Statement of "Issues Which Petitioner Wishes to Raise on Appeal." Appended merely to evidence petitioner's substantial showing of debatability pursuant to 28 U.S.C. § 2253 (c)(2).

Appendix L

An Analysis of the 5th Circuit's Refusal to Adopt the Supreme Court's COA Standard in Capital Cases, 48 Am. J. Crim. L. 1 (2020).

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Appendix N-1

Copy of 7/26/2013 Defendant Cody's "Objection Motion" Defendant's Continuing to Retain of Record to Opportunity Outside Counsel/ Related Motion" As Received from the Clerk of the Cuyahoga City, Common Pleas Court, Showing Filed Stamp and Case Document No. 80440720. On date 7/26/2013, Trial Case was Captioned "State v. Bobby Thompson." Cody signed his pleadings accordingly.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of Appeals appears at Appendix A to the petition and is reported at 2022 U.S. App. LEXIS 579 (6th Cir., decided January 7, 2022).

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 7, 2022.

The Court had jurisdiction to consider my certificate of appealability application in this 28 U.S.C. §2254 case pursuant to 28 U.S.C. §2253.

A timely petition for rehearing was denied by the United States Court of Appeals on March 24, 2022, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Appendix M.

STATEMENT OF THE CASE

Cody (App. A) purports to accomplish, claim by claim, a more or less extended, more or less brief, COA review of "debatability" on a number of dispositive procedural and substantive issues of fact and law covering petitioner Cody's four discrete constitutional claims from his habeas corpus petition:

(1) Ineffective Assistance of (Direct Appeal) Appellate Counsel ("IAAC") for Failure to Raise on Direct Appeal a Claim of Denial of Cody's Right to Testify at Trial, including but not limited to trial counsel's participation in the alleged denial, it being separately at issue whether the right to testify claim should be considered separately from, and independently of, the IAAC claim;

(2) Ineffective Assistance of (Direct Appeal) Appellate Counsel ("IAAC") for Failure to Raise on Direct Appeal a Claim of Denial of Cody's Right to Access Prospective Retained Counsel of Choice, it being separately at issue whether the right to access should be considered separately from, and independently of, the IAAC claim;

(3) Ineffective Assistance of Trial Counsel ("IATC") for Failure to Investigate, Develop or Present at Trial Cody's Insisted – Upon-to-Counsel Defense of the Negation of the Specific Intent Requirement for the Crimes because of His Only Intent as a Patriotic Covert CIA Officer; and

(4) Procedural Actual Innocence to Open a Gateway for Excusing Procedural Default and Effectuating Relaxed Examination of the Other Three Claims.

Cody's debatability showings on these claims and their dispositive issues were made in his habeas petitional traverse (App. I),[1] in his objections (App. J) to the district court magistrate's recommendations (App. B-2; see, also, ***Cody***$_2$ at *7) and, at the invitation of the circuit court on its FRAP Form 4, in unmentioned –by-***Cody***, Cody's Affidavit in Support of Motion for Pauper Status Section "Issues Which Petitioner Wishes to Raise on Appeal" (App. K, pp. 8-80), all attached merely to show Cody did make a substantial §2253(c)(2) showing on debatability. ***Cody*** decided all those issues unfavorably to petitioner, and denied Cody's COA application.

[1]Pursuant to the magistrate judge's order (habeas proceeding, Doc. 18: 1381,1383; Order [non-document] 9/12/2019), Cody's "petition" was limited to a bare-bones statement of each claim, the order promising he would be given 'ample opportunity' in his "traverse"" to provide facts and argument in support of his claims.

The allegation of the petition is that that denial decision was effectuated in conflict with the debatability framework announced, mandated and explicated in ***Miller-El v. Cockrell,*** 537 U.S. 322(2003) (***"Miller-El"***) and ***Buck v. Davis,*** 580U.S. 100 (2017) ***("Buck").***

Cody's COA application arose from a decision of the district court denying in part and dismissing in part his application for a writ of habeas corpus taken pursuant to 28 U.S.C. §2254. The district court opinion, ***Cody v. Sheldon ("Sheldon")*** (App. B), made dispositive rulings on both procedural and substantive issues, but all rulings were taken pursuant to §2254 standards for review.

John Cody (petitioner's birth name) proceeded originally, from arraignment through sentencing in CR 12-565050A, under the case caption ***"State v. Bobby Thompson."*** He signed his own trial court pleadings accordingly. See, App. N-1). Cody had filed in CR 12-565050A, a notice of defenses in which, inter alia, he alleged that "Bobby Charles Thompson" was, not just a name, but a personal cover identity lawfully assigned him by the United States Central Intelligence Agency ("CIA"), as a covert, non-official cover ("NOC") Deputy Directorate of Operations (now the National Clandestine Service) full-time, contract officer; and that, if the State went to trial, as it did, on an identity fraud count or counts, it was their burden, not the defendant's, to prove required matters of identity. To avoid further confusion, Cody also entitled the caption of his habeas case "*John Cody, a.k.a. Bobby Thompson v. Ed Sheldon"* (originally named as *Dave Marquis*), a caption followed on appeal (with amended change of O.D.R.C. Warden Respondent name (See, App. A) *Tim McConahay*).

In the original Ohio common pleas court jury trial case, ***State v. Cody,*** originally ***Thompson***, Cuyahoga Cnty. Common Pleas No. CR-12-565050A, Cody stood convicted, after remand on direct appeal, ***State v. Cody,*** 34 N.E. 3d 189 (Oh. Ct. App., 2015) (App. E), of one count of Corrupt Activity (Ohio's mini-RICO statute) predicated upon two other indictment conviction counts (excluding identity fraud), one count of aggravated theft/complicity; three counts of tampering with state charitable registration records; six counts of money laundering/complicity; and one count of identity fraud. He was sentenced to 27 years non-parolable imprisonment, convictions on the first two counts accounting for 20 of those years.

Fundamentally this petition, like the petitions in ***Miller-El*** and ***Buck***, is about the procedural error of the disregard for the COA debatability framework 28 U.S.C. §2253(c)(2)'s intent requires, and that intent's underpinnings in preserving the constitutional right of the habeas corpus mandate, as announced and explicated in those two landmark decisions, as opposed to the error of the COA panel's judgment substantively deciding the merits of the alleged underlying constitutional or habeas law claim, or one or more oftentimes complex sub-issues affecting disposition, incorrectly, or incorrectly as a matter of debatability.

Nevertheless, it is *sans* mentality, simply impossible, to suggest the debatability can be analyzed without any reference to the merits, and, indeed, ***Miller-El*** and ***Buck*** do both, with, petitioner notes, focus on only one major underlying constitutional merits issue and related claim, state action introducing an element of racial prejudice into the trial or sentencing proceedings affecting outcome, an issue clearly of national magnitude. Petitioner also notes, as the guidelines of the clerk and the rules of this Court reference, a petitional requirement of conciseness, as much as possible.

Based on this brief analysis above, petitioner will limit this petition's presentation as follows:

1. He will present, at the last part of Section II on ***Cody***'s errors, and in Section III on national magnitude of the problem, a showing of how ***Cody***, and a trend in other in other post-***Buck*** COA panel decisions are undermining, through their use of mined language and misconceptualizations, the spirit of framework approach to COA decision-making the two landmarks mandate.
2. In Section II he will only briefly summarize ***Cody***'s failure of any true debatability review on the merits of the underlying claims 4 and 16/17.
3. He will concentrate in Section II, instead, on the details of ***Cody's*** debatability failure, including ignoring the details of petitioner's showings on debatability, on the merits of both the overlying claim of IAAC, and the underlying claim 6 of denial of Cody's right to access prospective retained counsel of choice, Cody's only claim which purportedly involves a denial of a constitutional right of fundamental proportions involving a structural error violation requiring reversal without more prejudice being shown.

He will also discuss in full in Section II no true debatability analysis being made in ***Cody***'s §2254(d) pronouncement of state-based procedural default of a standalone habeas review of the underlying claim 6 [2] (also applicable in ***Cody*** to the underlying claim 4) independent of the overlying IAAC claim. ***Sheldon*** and ***Cody*** claim there is an "Ohio" procedural bar in an Ohio App. R. 26(B) proceeding to standalone consideration of a meritorious underlying claim raised in an Ohio App. R. 26(B) proceeding. In other words, the two cases, id., are not procedurally barring the overlying claim of IAAC **based solely on AC's failure to raise** in the direct appeal. They are barring, instead, based on their asserted existence of an "Ohio" *res judicata* claim preclusion rule (that the underlying claim was not raised by AC in the direct appeal when it could have been), only, a standalone consideration of the underlying claim itself, the merits of which are alleged by the petitioner as the sole basis of the IAAC. Such a procedural default rule has neither been so announced or applied, or announced as applying in an Ohio App.R. 26(B) proceeding, by the Ohio supreme court

[2] This issue, state-based *res judicata* claim preclusion, upon failure to bring a claim on direct appeal, has been at least earmarked by this Court in ***Johnson v. Lee***, infra, relating to the California supreme court's ***Dixon*** decision, as one of national importance.

or any Ohio court of appeals in a published decision. The Ohio supreme court, if anything, is moving firmly to correct any misperception (from which these fictional existences are simply deduced) that the Ohio App. R. 26(B) proceeding is "just another Ohio post-conviction relief action." "[An App.R. 26(B) proceeding] involve[s] a **special type** of postconviction relief...." [Emphasis added]. ***State v. Bethel***, 2022-Ohio-783, at *P48 (Ohio S.Ct., decided March 22, 2022).

REASONS FOR GRANTING THE PETITION

I. Introduction

What ***Cody*** did in error, and what other circuit court COA panels, both inside and outside the 6th circuit, are doing in error, in an increasing number of post-***Buck*** cases, is mining for veins of carefully selected words and phrases actually in conflict with the soul and spirit of the law which actuates the latter two landmark decisions. Depending on the panel, these words and phrases are actually taken from ***Slack v. McDaniel,***529 U.S.473, 484 (2000), ***Miller-El*** or even ***Buck,*** for use as a cited standard for approach in these COA evaluations and determinations, reinforcing these panel decisions' mere recitation, emphasis and focus upon, exactly as panels were doing pre-***Miller-El,*** the §2254(d)-based, one-sided district court findings of fact and rulings of law, as in ***Cody***:

"[W]hen AEDPA deference applies, the court, in the COA context, must evaluate the district court's application of §2254(d) to determine whether the resolution was debatable among jurists of reason. ***Miller-El,*** 537 U.S. at 336." ***Cody,*** App. A at *7.

It is fairly clear to certain COA panels, infra, Section III, that this Court intended its debatability standard announced to be applicable to any determination, AEDPA deference or otherwise, made on the facts, the clear and convincing burden of §2254(e)(1) not meant to also morph into proof of a §2254(d) "unreasonable" determination reserved for a final appellate decision. See, ***Tharpe,*** infra. ***Buck,*** 137 S.Ct.at 775, in any event, makes clear "was debatable" should be more definitively restated as "could be debatable." Such mining of ***Miller-El*** noted by ***Cody,*** above, is only the proverbial tip of the iceberg. See, *infra*, Section II, Part B and Section III cases.

These decisions make, to be sure, from time-to-time, on one or more dispositive issues, the panel's own more or less shortened, but still one-sided, findings and rulings, but conduct no real or thorough debatability analysis of what the petitioner may have shown on debatability under §2253(c)(2). This metastasizing number of panels then merely conclude, using words with no

meaning or substance behind them, and sometimes without any analysis whatsoever behind them, or with an erroneous standard behind them, that their resolution was not debatable. This is not a COA debatability review as envisaged by ***Miller-El*** or ***Buck.***

Buck, infrequently cited in these decisions, clarified ***Miller-El*** in this regard: the COA panel focus, as a fundamental matter of what a COA review is, is to be upon debatability, not on the §2254(d) standards to be used by the district court or in a final decision by the circuit court.

Cody, which serves as a model, cited or uncited, for a metastasizing number of these decisions, is, and all are, in conflict with what ***Miller-El*** and ***Buck*** teach about the very concept of what a COA decision is. They make meaningless the heart of what ***Miller-El*** disapproves, no true and thorough debatability analysis, the definitional substance of debatability, while paying lip service to §2253(c)(2) by sometimes quoting it, and *faux homage* to that concept by quoting mined sentences from ***Miller-El*** and its precedent ***Slack,*** *supra,* as standards, and by the use or misuse of linguistics evading the distinctions between "would be debatable" (certainty of outcome) and "could be debatable" concepts (possibility of outcome) as COA decision-making standards.

"We conclude, on **our review** of the accord at this stage, that the District Court **did not give full consideration** to the substantial evidence petitioner put **forth in support of [his]** ***prima facie*** **case [on debatability** on the facts]. Instead, it accepted without question the state court's evaluation of the [factual issues]. The Court of Appeals evaluated *Miller-El*'s application for a COA in the same way." [Emphasis added]. ***Miller-El,*** 537 U.S. at 341.

This is precisely what happened in ***Cody*** on both Cody's factual and legal issues.

"Court of Appeals...have denied applications for a COA...without even **analyzing** whether the applicant had made a substantial showing [of debatability] .... The Court today ***[in Miller-El]*** disapproves this approach." [Emphasis added]. ***Miller-El*** (Scalia, J. concurring), 537 at 349.

Justice Scalia's judgment on what ***Miller-El*** requires is identical to petitioner's, a robust and rigorous debatability analysis based upon what the petitioner showed, or attempted to show. To let the courts of appeal slip back into the old ways of doing business, which is happening post-***Buck*** (*infra,* Section III) is to let the same threats to the legislative intent in §2253(c)(2), and to the constitutional right to habeas corpus, re-emerge.

II. The Ways the Decision in *Cody* Was Erroneous

Part A- Error Concerning Questions of Law, of Fact, and Mixed Questions Undermining *Miller-El* and *Buck*

Any state law res judicata-based procedural default declared by *Sheldon* and *Cody*, of the underlying Claim 6 – the denial of Cody's right to access counsel of choice, for standalone consideration by the state courts, was questionable, and clearly debatable.

As this Court has shown us in ***Miller-El*** and ***Buck***, a §2253(c)(2) case taken under certiorari review has two parts; in the chronological order used

in both decisions, a review of used COA panel standards, as to how they paint a picture with language, of the concept of the COA envisaged by the circuit court, and, second, a review of actual debatability on one or more dispositive issues.

But this application is not a certiorari decision; it is a certiorari petition, and the magnitude of the conflict with those two decisions created by ***Cody***'s framework of COA approach [as well as the magnitude of the national post-***Buck*** COA decisional framework problems of which ***Cody*** is now a vanguard case] appearing greater to petitioner than the debatability on dispositive issues on dispositive issues ignored by ***Cody***, although the two are certainly intertwined and, at least debatably, equal, the two parts will be presented here in reverse order from that used in those two decisional landmarks, with the petition's Section III on the national problem following part B of Section II dealing with ***Cody***'s procedural framework issues.

Regardless of the overlying procedural issue in ***Miller-El*** and ***Buck***, the underlying issues of merit upon which national significance in each case possibly, and may have probably,[1] turned was, in ***Miller-El***, the state challenging venire members on racial grounds; and, in ***Buck***, defense counsel at sentencing calling an expert witness whose testimony indicated a connection between race and the likelihood of violence; in other words, race was an underlying issue of national import in both cases. Racial prejudice or discrimination is not alleged, or present, in ***Cody.***

But, as it is reprehensibly egregious for state action in a judicial proceeding to apply discriminatory practices against defendants because of their race different from those applied to defendants of another race, so too is it, using our same concepts of equal protection of our laws, at least as egregious to have different COA circuit panels applying disparate outcome-determinative standards to their COA decisions dependent on who the judges are, or in what circuit the defendant found himself in. There is only one standard under §2253(c)(2), as part of the constitutional right to habeas corpus, and it applies to every habeas petitioner, everywhere.

Cody referenced his habeas record on each dispositive fact-based issue cited in ***Cody***, and that record of facts coupled with his arguments on that showing (App. J, Petitioner's Objections to Magistrate Judge's Report & Recommendation; App. K, Cody's IFP FRAP Form 4 Affidavit statement of issues, answering the circuit court's invitation to explain "Issues [Petitioner] Wishes the Court to Consider on Appeal," pp. 8-80; and Cody's App. I, petitional Traverse[2]), provided an articulated non-frivolous, existing indication of debatability not based merely on a petitioner's subjective, good faith but imaginary belief on or in the same. See, §2253(c)(2); ***Buck***, at 773.

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[1] Everything which is probable is by definition also possible, whereas one may have possibility without probability or certainty.

[2] See n. 1, supra.

On issues at law, the petitioner referenced, as his showing of debatability, on each dispositive at-law, identified, and cited-by-***Cody*** issue, authoritative statements of law made by reasonable jurists disagreeing with, and a far cry from, the statement(s) of law put forward by ***Cody***'s panel as §2254(d)- unquestionably established.

Cody's Claim 4 (denial of right to testify (App. A, *8-*16)) and Claim 6 (denial of right to access prospective counsel of choice, labelled by ***Cody,*** App. A, *16, as "Claim 6 – "Trial Court's No Contact Order") arose in and from Cody's Ohio Appellate Rule 26(B) application and proceeding, ***State v. Cody***, 2017-Ohio-1543 (8th Dist. Ct. App.) (App. F-1), discretionary appeal denied without comment, 2017-Ohio-6964. See, also, ***State v. Mockbee,*** infra.

Pursuant to App. R. 26(B) (App. M-2), each applicant's claim is actually two analytically distinct- in- part and conjoined –in-part claims: an underlying denial of a constitutional right[or violation of law], and an overlying claim of IAAC for failure to raise the underlying claim on direct appeal, conjoined because almost universally the defendant is claiming, as Cody did, the IAAC was the failure to raise an underlying meritorious claim, specifically a denial of an alleged constitutional right of some magnitude requiring new trial or dismissal. See, ***State v. Reed,*** 74 Ohio St. 3d 534, 535 (1996). Without the actual merits of such an underlying claim, it is difficult to see how an IAAC claim would ever meet the test of IAAC outcome-determinativeness; in other words, how such a latter IAAC claim would be anything but shallow:

> "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction…based on a claim of ineffective assistance of appellate counsel." App.R.26(B)(1). (App. M-2).
>
> "An application for reopening shall contain…:
>
> One or more assignments of error or arguments in support of assignments of error that **previously were not considered on the merits** in the case by **any** appellate court …." [Emphasis added]. App.R.26(B)(2)(c). (App. M-2).

It is equally clear this language denies the existence of an App. R. 26(B) case res judicata claims preclusion ("claim could have been brought previously") rule, and establishes, if anything, only an issues preclusion ("claim was actually considered") rule. Procedural default, moreover, does not exist for any reason covered in or by ***Johnson v. Lee,*** 578 U.S. 605 (2016), at least debatably, contra the points made with respect to both ***Sheldon*** (App. B-1) and ***Cody*** straining to cite to an "Ohio rule" of procedural default, both ignoring Cody's points made, infra. No published decision, by any Ohio court, cited or uncited by any district court, or the 6th circuit court of appeals in an Ohio-law based case, has clearly applied, to an independent-of-the-IAAC-overlying-claim merits review of the direct-appeal-not-brought underlying constitutional claim, Ohio's res judicata bar, in holding on point in an App. R. 26(B) proceeding, to

default the petitioner's underlying constitutional claim because it was not brought on direct appeal and it **could have been**. This lack of any such clearly applicable rule was pronounced in ***State v. Moore***, 93 Ohio St. 3d 649 (2001), Cook, Lindberg-Stratton, JJ., concurring, at 651-52, stating this Ohio supreme court decision does not state, or hold, that Ohio res judicata claim preclusion applies in an App. R.26(B) proceeding to bar an independent of IAAC review of the underlying constitutional claim because it was not brought on direct appeal and could have been, and there is no subsequent Ohio appellate decision changing that conclusion. This Court has only considered judicially created rules crafted by a state's highest court to be a firmly or clearly established rule. ***Walker v. Martin***, 562 U.S. 307, 316, 317 (2011); ***Johnson v. Lee***, 136 S.Ct. 1802, 1804-05 (2016) (per curiam).

Moore, id., is the last reasoned decision (of the Ohio supreme court) in the App. R. 26 (B) proceedings which form the procedural history for the habeas decision in ***Moore v. Mitchell,*** 708 F. 3d 760 (6th Cir., 2013), cited by ***Cody***, one-sidedly, in its merits determination of this procedural issue. Moreover, less than six years ago, ***State v. Mockbee,*** 2015-Ohio-3469, at *P24-26 (Oh. Ct. App.) held that Ohio state –based res judicata does not apply to bar a court of appeals from addressing a timely filed App. R. 26(B) application by an appellant failing to raise the underlying claim in the direct appeal, the court saying this result was because a claim for IAAC for failure to raise an underlying claim arises first in the appellate court App. R. 26(B) case; and such application of claim preclusion would foreclose a substantive App. R. 26(B) review, unconnected to the IAAC, of the underlying claim, and thus a defendant would never have an opportunity to fully present his independent underlying claim case to any court; and that result would run counter to the recognition of effective appellate counsel as a constitutional right guaranteed to all defendants.

Neither the R&R (App. B-2, *54, *76) nor ***Sheldon*** cites to any state court decision or other authority establishing such a res judicata rule. Id., **59-60, *78-*79 (same reasoning, same language, defaulting both claims 4 and 6). And ***Cody*** cites, for the first time in these proceedings (*9, HN 5 on the right to testify claim; and *17, on the right to access counsel of choice claim) only to ***State v. Spaulding,*** 2018-Ohio-3663, 119 N.E. 3d 859, 868 (Ohio Ct. App.), a state court of appeals case, with its holding limited on point expressly only to the facts of its case dealing with a state court O.R.C. §2953.21 post -conviction relief petition (App.M- 4) with its own statutory res judicata rule found in §2953.23, fundamentally different from App. R. 26(B). The Ohio supreme court has made this distinction between res judicata rules to be applied in 2953.21 cases and App. R. 26(B) cases well-defined: "[***Morgan v. Eads,*** 104 Ohio St. 3d 142 (2004)] involved **a special type** of postconviction relief [App. R. 26(B)] that does not fall under R.C. 2953.21." [Emphasis added]. ***State v. Bethel,*** 2022-Ohio-783, at *P48 (Oh. S. Ct., decided March 22, 2022). ***Morgan***, in 2004, id., is cited accurately by many as the Ohio case which announced that the App. R. 26(B) proceeding was a postconviction relief action,

a civil proceeding separate from the direct appeal. It is **wrongly** cited, since it does not reference the issue, for the proposition there is an Ohio res judicata claim preclusion rule saying an underlying App. R. 26(B) constitutional claim is procedurally defaulted for standalone consideration in an App. R. 26(B) proceeding because it was not brought on direct appeal and "could have been."

Neither ***Spaulding,*** supra, (holding its res judicata ruling limited to the state's 2953.21 et seq. "postconviction relief petition" ("PCRP") unique statutory provision) (see, ***Bethel***, supra), the 2953. 21 et seq. statute itself (App. M-4), nor ***Landrum v. Mitchell,*** 625 F.3d 905, 919 (6th Cir. 2010), holding (1)App. R. 26(B)'s beyond-90-days-untimely-filing provision is expressly established under ***Coleman v. Thompson***, supra, and finding that provision's invocation was expressly cited in the pertinent App. R. 26(B) state court decision, and thusly defaulting the claim, and **also** defaulting IAAC as "cause," with prejudice not established) (because it was mere speculation by petitioner as to what the uncalled witness would have testified; and also holding (2) petitioner raising an exhausted IATC claim on one set of facts in his state court proceedings, and an IATC claim on a different set of facts in his habeas petition did not constitute exhaustion of the habeas claim) has anything to do with ***Cody***'s championed res judicata rule, as ***Cody*** applies its proclaimed rule to petitioner's claims 4 and 6.

The 6th Circuit Court could not have been clearer when it pronounced:

"...[The] proceedings envisioned by Rule 26(B) [are] not post-conviction proceedings [A 26(B) proceeding application is] a continuation of activities related to the direct appeal itself."

Abreu v. Hoffman, 27 Fed. Appx. 500, at **9 (6th Cir., 2001), overruled, sub silentio, ***Moore v. Mitchell,*** 708 F. 3d 760 (6th Cir., 2013).

Regardless of what an App. R. 26(B) proceeding is, or is not, petitioner's point remains, no Ohio court has explicitly held res judicata claim preclusion applies to the underlying constitutional claim for standalone consideration, because it was not brought by AC in the direct appeal; and Ohio appellate courts, e.g. ***Mockbee***, supra, continue to hold the precise opposite, certainly creating at least debatability on the issue.

If the existence of an Ohio procedural default claim preclusion rule for App. R. 26(B) proceedings, claimed to apply to a detached review of an omitted from direct appeal underlying constitutional claim of some magnitude ("something" which was dispositive in the court's assessment of the constitutional claim(***Miller-El***, at 338)) is debatable, then so was debatable (under ***Mockbee***'s "first opportunity" doctrine, supra, that Cody's first opportunity to bring either the IAAC claim or the underlying constitutional claim (based upon on record evidence), since they IAAC and the underlying claim or claims are intertwined, and even though they may be capable of logical division, was the App. R. 26(B)), the COA panel's conclusion that that "first proceeding" was elsewhere than

the App. R. 26(B) proceeding, and, based upon the App. R. 26(B) case's subsequent history of this fully repeated App. R. 26(B) claim in the Ohio supreme court, making any claim of failure to exhaust based thereupon also debatable.

...

Moreover, ***Johnson v. Lee*** surely cannot be imposing a national res judicata rule on each state by condemning "outliers." Nor can a federal court make up a specific res judicata rule for a state by saying it is well-established under general principles of res judicata, e.g., that such general principles establish claim preclusion for all claims that could have been brought in their direct appeal proceedings but were not, applying it thereupon to an App. R. 26(B)-type proceeding uniquely drawn up state-by-state. Indeed, ***State v. Cole***, 2 Ohio St. 3d 112 (1982), Ohio's equivalent of California's ***Dixon*** decision cited in ***Johnson,*** first announcing Ohio's present res judicata claim preclusion rule (id., at 113) eleven years before Ohio's App. R. 26(B) was enacted, pronounces immediately that there are, and will be, exceptions for postconviction proceedings where ineffective assistance of counsel is claimed. Id.

To simply disregard, or minimalize "outlying," unique procedural default rules of a state, or states, would be to overrule sub silentio the principle of this Court's pre-eminent line of very clear decisions applying to state-law-based habeas cases, on state law, holding, in order to be validly and clearly applicable, procedural default rules have to be "adequate" on a case-by-case decisional basis, in the first instance, before the habeas court is required to reach a "cause and prejudice" analysis for an excuse to the bar. ***Williams v. Georgia,*** 349 U.S. 375, 389 (1955); ***Sullivan v. Little Hunting Park***, 396 U.S. 229, 233-34 (1969); ***Michigan v. Long***, 463 U.S. 1032 (1983); ***Harris v. Reed***, 489 U.S. 255, 261-62 (1989), followed ***Lovins v. Parker***, 712 F. 3d 283, 296 (6th Cir. 2013); ***Coleman v. Thompson***, 501 U.S. 722, 750 (1991); ***Y 1st v. Nunnemaker,*** 501 U.S. 797, 803-04 (1991), in support, ***Monzo v. Edwards***, 281 F. 3d 568, 576 (6th Cir. 2002), ***Abela v. Martin,*** 380 F. 3d 915, 924 (6th Cir. 2004), ***Smith v. Warden,*** 780 Fed. Appx. 208, 223-25 (6th Cir., 2019).

Indeed, ***Johnson v. Lee***, supra, relies on a clearly established California state supreme court opinion, ***In re Dixon,*** 41 Cal. 2d 756, 759 (1956) 'warning defendants in plain terms that state court habeas proceedings will not be permitted where the claims could have been brought on direct appeal.' ***Johnson,*** supra, 136 S. Ct. at 1805; whereas ***State v. Moore***, supra, 93 Ohio St. 3d at 651-52, tells us there is no Ohio supreme court claim preclusion "could have been brought" res judicata rule barring the underlying constitutional claim from an independent-of-the- overlying-IAAC claim merits consideration; and ***Johnson,*** supra, relies on the well-established rule of this Court for consideration of judicially-created rules crafted by a state's supreme court to be the only ones clearly and firmly established. Id., 136 S. Ct. at 1804-05; see, also, ***Walker v. Martin,*** 562 U.S. 307, 316, 317 (2011). Likewise, petitioner's own state court, the Ohio 8th district appellate court did not, explicitly or implicitly reference res judicata or any other type of procedural default in Cody's denial decision (App. F-1; discretionary review by Ohio supreme court declined without comment) in its independent-

of-the–IAAC merits review of Cody's claim 4 or 6. Cf. ***Rosa v. Gelb***, infra. Cody's App. R. 26(B) court does not describe any reasoning process, unlike the state court in ***Rosa***, which could even arguably be labelled a "procedural default." It only makes merits considerations, seriatim, of Cody's underlying claims. App. F-1.

Moreover, Cody's App. R. 26(B) court's ***State v. Perry*** decision, infra, following petitioner's reasons cited, supra, from the language of App. R. 26(B) itself, limited application of an App. R. 26(B) res judicata rule to claims **actually** brought in the direct appeal. ***State v. Perry,*** 2009-Ohio-2245, at *P12. This Ohio Cuyahoga County appellate court is not unknowledgeable about App. R. 26(B) issues, nor is it reluctant, as ***Perry, supra,*** itself shows, to bar App. R. 26(B) underlying-to-IAAC claims where they are actually procedurally defaulted under Ohio law, nor did they merely "forget" to mention, or overlook, because 'the court could have gone straight to a merits determination' bypassing procedural default, res judicata or procedural default in these merits reviews of Cody's habeas claims 4 and 6.

The states still have a sovereign right under the Constitution to their own laws not in conflict with the Constitution, and res judicata, correctly identified by ***Cody***, at *9, HN 5 as the rule in issue, is a state-originated evidentiary rule. ***Monzo v. Edwards***, 281 F. 3d 568, at **13 (6th Cir., 2002).

In one fashion or another, Cody argued all the points, supra, in these quasi-notational sub-contentions in the above area of dispute related to the holdings in ***Johnson***, supra, on debatability on procedural default of standalone merits review of his underlying constitutional claim of denial of his right to testify, in his petitional traverse (see, n. 1 supra) (App. I, pp. 2-3,6), in his R&R Objections (App. J, pp. 1-3) and in his COA "Issues on Appeal" (App. K, pp. 16-18, 28-35); and, on debatability on procedural default of standalone merits review of his underlying claim 6 of denial of his right to access prospective retained counsel of choice, in his petitional traverse (App. I, pp. 2-3, 16-17, in his R&R Objections (App. J, pp. 7-8, 12-14) and in his COA "Issues" (App. K, pp. 36-40, 45).

...

Assuming procedural default[3] does apply to Cody's underlying Claim 4 (denial of defendant's right to testify) and Claim 6 (denial of defendant's right to access prospective counsel of choice), excusing the default required Cody to show cause and prejudice on claim 4 (App. A at *11(HN 6); App. B-1 at *59); if claim 4 or 6 required prejudice, Cody offered on debatable prejudice his

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[3] "Debatability" is the federal question, on anything dispositive in a COA decision. ***Miller-El***, at 338. Procedural default is dispositive because it permits the court not to reach a merits determination. By definition, procedural default in a §2254 habeas corpus case arises from state law. Debatability as a federal law question in a §2254 case, on a state law question does, and must, involve the federal court delving into the issue of what the state law is, and says.

actual innocence showing, infra, as to what his testimony at trial, and the CIA's refusal to confirm or deny his employment on the Navy association project, would have shown, the former ignored by both opinions; however, only cause would have been required on claim 6, since the underlying claim of access, if meritorious, constituted a fundamental right violation involving structural error, infra. ***Cody*** does not proffer a requirement of prejudice on claim 6, straightforwardly going to a §2254(d) merits analysis of the underlying claim, correctly pointing out that ***Sheldon***'s "ultimate" determination, which is merely repeated as ***Cody***'s one-sided merits/" debatability" review, was based upon ***Sheldon'***s own merits review, based upon the state court record's facts related to the underlying claim. Id. *17-*19. See, infra, Section II, on ***Sheldon***'s de novo review of this claim in the absence of any state appellate court review, "Claim 6 – The denial by reason of the trial court's of record No Contact Order (App. N) of the petitioner's right to access prospective counsel of choice."

Both underlying claims 4 and 6were of much more than the magnitude of the direct appeal claims AC did bring on direct appeal. There AC raised a non-constitutional claim resulting only in an elimination of a 1-day-a-year solitary confinement (which could have been brought at any time, without a charge of res judicata, in a motion to correct sentence pursuant to Ohio law announced in ***State v. Fischer***, 128 Ohio St. 3d 92, 102 (2010), and a claim, non-federal constitutional as presented, designed to, and which did, eliminate only one year of Cody's original 28-year sentence, in an argument, lack of subject-matter (territorial) jurisdiction, which could have been stated in one paragraph, exactly as Cody related to AC, demanding at the same time the more substantial claims for denial of right to testify and denial of right to access counsel of choice be made. Cody's App. R. 26(B) application, App. F-2, habeas p. I.D. 2811; ***State v. Cody,*** 34 N.E. 3d 189 (Oh. Ct. App., 2015) (App. E).

The conclusion, and the facts, for state-law-based res judicata creating the procedural default for standalone review of the underlying claim, made by ***Cody***, without any debatability analysis of the showings by petitioner, or at all, was the same for both claims 4 and 6 (App. A, *9, *17).

Claim 6 – The denial by reason of the trial court's of record No Contact Order (App. N) of the petitioner's right to access prospective counsel of choice:

Assuming, procedural default applies to a standalone review of the underlying claim 6 of denial of right to access counsel of choice independent of consideration of the overlying IAAC claim for failure to raise, ***Cody***, *17-*19, correctly presumes that ***Sheldon***

correctly conflates the excuse of the IAAC for the procedural default (based upon cause)[4] with the merits of the IAAC claim itself, turning both (again, correctly) on, exclusively, the merits of the underlying claim for denial of access. No challenge was raised in ***Cody*** that petitioner did not raise the same plainly worded claim on right to access throughout the state court exhaustion process (App. R. 26(B) application; state supreme court discretionary appeal memorandum). ***Sheldon***'s argument Cody's statement of claim in his App. R. 26(B) application was too concise was dropped by ***Cody***, after Cody referenced in his "Issues on Appeal," App. K, pp. 35-40, the off habeas record facts of the fullness of the stated claim, as permitted, in the 26(B) application. Thus, in ***Cody,*** we should be turning to a ***Miller-El*** debatability analysis based on Cody's showings. Instead, ***Cody*** presents a three paragraph long reiteration of the district court's §2254(d)-based, one-sided presentation of the merits, making, first, a ruling at law, id., at *18, that ***Caplin & Drysdale v. U.S.,*** 491 U. S. 617, 624 (1989), through its explanation that the 6th Amendment guarantees an indigent defendant only "adequate representation," holds that poor defendants are not entitled to access prospective private (non-appointed, non-state compensated or reimbursed) counsel of choice.

> "The [Sixth] Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint [to have their counsel of choice paid by the state] so long as they are adequately represented by attorneys appointed by the courts." **Caplin**, at 624, HN 4.

Cody mines the vein of this language to imply the Court means "no cognizable complaint" as to anything. The context of this quotation, and of the ***Caplin*** decision is, instead, that of a defendant, where the money in his possession has been seized by the State as fruits of the crime, who wants his own counsel of choice, the Caplin law firm (***Caplin***, at ****8), and who wants, as does the law firm, since the Court finds the seized money as lawfully seized (id., at ****9) that counsel be paid out of the seized funds, i.e., by the state. The "complaint" HN 4 speaks to is, therefore, limited to an indigent defendant (or his lawyer) asserting the government must pay for his attorney-of-choice, a complaint which is not, and never was, a part of Cody's claim 6; and has nothing to do with the assertion made conclusorily, without any debatability analyses, §2254(d)-style, by ***Sheldon*** and ***Cody*** that ***Caplin***, by this quote, is approving the Sixth Amendment, as the claim is raised in Cody, as permitting the denial by state action of an indigent defendant of his right to simply access prospective counsel of choice, for purposes of determining what means, if any, are required for retention, with a view toward retention with resources the defendant may have or can obtain, or because counsel will agree to represent him even though he is without funds. Likewise, petitioner's instant

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[4] The issue is whether the petitioner showed "reasonable jurists would find **anything** dispositive in the district court's assessment of a constitutional claim debatable...." [Emphasis added]. *Miller-El*, 537 U.S. at 338.

factual posture is distinct from cases where the indigent defendant, retaining his claimed indigency, wants to substitute his own "adequate" counsel of choice for his court-appointed lawyer, and demands the state pay for his counsel-of-choice. See ***U.S. v. Gonzalez-Lopez,*** 548 U.S. 140, 151 (2006). ***Cody*** is focusing on concepts of indigency in the context of allegations of indigency being used by state actors to bar a defendant access to prospective "retained" counsel, and ***Caplin*** **is** imparting, in that context, "retained" does not necessarily mean a lawyer who wants payment in cash, now, and that we cannot bar a defendant from finding out what means are required for retention.

After the ***Caplin*** quote, supra, the COA panel misanalyses "[t]he Supreme Court has held that although the Sixth Amendment does not entitle an indigent criminal defendant to his counsel of choice, it does guarantee him a right to adequate representation" passage (***Cody,*** at *18), misdrawing its conclusion that this ***Caplin*** extract is addressing Cody's situation, facts or the right to access Cody asserts. ***Cody*** holds that this quotation holds that indigent defendants with appointed, adequate counsel (who also have a co-existing desire to access outside counsel they wish to retain without requesting state compensation or reimbursement) can be constitutionally barred from accessing that prospective counsel of choice, in direct conflict with the right ***Caplin*** actually sustains.

Caplin is not holding what ***Cody*** says it is, but is embracing the exact opposite, citing, as it does, the federal statute whose constitutionality is being questioned as not denying an indigent defendant access to or retention of, prospective private counsel of choice, as its most frequently cited issue decision in the case (ignored by ***Cody***), that an indigent defendant has the right to attempt to acquire a private, not-to-be-compensated- by- the- state attorney of choice. ***Caplin*** makes clear

> "The Sixth amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom the defendant can afford to hire; **or who is willing to represent the defendant even though he is without funds.**" [Emphasis added]. ***Caplin***, id., 491 U.S. at 624-25.

It is without the benefit of logic to suggest this idiom was meant to cover a defendant other than one commonly labelled "indigent," (albeit it does cover only a special category of one commonly so labelled, infra), or only an "indigent" defendant who did not have appointed counsel.

Caplin's right here is well-established as fundamental, going back to ***Powell v. Alabama*** 287 U.S. 45, 53 (1932) ("[A] defendant should be afforded a fair opportunity to secure counsel of his own choice."). Although subsequent cases moved into conflating the right to access, or acquire counsel with the right to **have** counsel of one's own choice, ***U.S. v. Gonzalez-Lopez,*** 548 U.S. at 147-48, 150 (2006) cleared up that conflation, explaining, or at least debatably explaining, the right to access, and the right to have, were two separate fundamental rights, reiterating that a violation of either right constituted structural error requiring automatic reversal.

Mixed Factual/Legal Error On Cody's "Indigency" Established At Least Debatably by Cody's Showings Ignored by Sheldon and Cody:

Assuming, incorrectly, ***Caplin*** applies to forbid Cody access to prospective retained counsel of choice because "he is indigent,", ***Cody*** attempts to demonstrate Cody's indigency[5] by, in a "one-size-fits-all" §2254(d) merits/"debatability" statement, simply repeating the §2254 standard factual conclusions of the district court (1) that "Cody was deemed indigent throughout the criminal proceedings" (Id., *18 – correct except for the period he represented himself, the period during which he expressed his desire to retain private counsel (R&R Objections, App. J, p. 20, p. 22, last ¶; the period was February 2013 [Doc. 43-1:3673-3742] – August 26, 2013 (with the No Contact Order effective March 19))). ***Cody*** is ambiguous as to whether counsel, appointed only as advisory during this period, was providing "adequate" trial representation, ("Although there was a time that Cody was permitted to represent himself, he had court-appointed counsel at all times when he was represented." ***Cody,*** App. A, *18) but, using its ***Caplin*** quote as dispositive, supra, ***Cody*** implies it is this "adequacy of representation" which permits, according to ***Cody***, a denial of Cody's right to access prospective counsel of choice. Ignoring the debatability on this erroneously created doctrine of advisory counsel's "adequacy," created by ***Cody's*** ambiguity itself, ***Cody*** also fails to consider, at all, on debatability, Cody's point that counsel's position as merely "advisory," at least debatably, cannot be considered, and is not, per se, considered to be, adequate trial representation because it is deemed under the Constitution to be a nullity. ***King v. Bobby,*** 433 F. 3d 483, at **17-**18 (6th Cir. 2006); ***Daniels v. Lafler***, 501 F. 3d 735, at HN 4 (6th Cir. 2007); R&R Objections, App. J, p. 19); a showing given no consideration by either court, and (2) "in his Rule 26(B) application... Cody maintained that he was indigent." Id. Instead, in that application (Habeas record copy attached, App. F-2), the petitioner had simply related, in a section of his affidavit not dealing with his desire to retain counsel, not that he was claiming indigency" or that he was "indigent," but that all his personal monetary savings were seized by the state, leaving him with no "personal [monetary]resources" [as opposed to the monetary resources of family or friends] to mount a defense (see, ***Caplin,*** id., at 624-25), noting that the trial court had in fact "declared" him indigent (App. F-2: habeas record p. 2819 (10)). ***Cody*** and ***Sheldon*** both fail to consider, at all, on the facts, Cody was 'declared' indigent (and that is what was meant by Cody using the term "indigency of record" or at any other time he could be said to have referred to himself as "indigent;" and it is also what is meant in Cody's mandamus action before a different court when he says "I have been found indigent in [CR12-565050-A]." ***Sheldon***, App. B-1, *73); ***Sheldon*** also misapprehends the fact any affidavit of indigency which would have applied to this separate mandamus action in any event, was attached; no affidavit was attached to Doc. No. 1-14. See, "Issues on Appeal," App. K, p.42, n. 23).

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[5] See, n.6, supra.

Moreover, at no point in the trial court hearings on Jan. 14, Jan. 23, Jan. 30, Apr. 11 or Apr. 22 did Cody have any affirmative obligation or reason to tell the trial court he did not believe he was" indigent" under ***Caplin,*** or to start making arguments from ***Caplin*** at all. See ***Sheldon***, App. B-1, *73-*74. ***Sheldon***'s implication this absence on these dates is important to the issue of Cody's desire to access prospective counsel of choice is misplaced. Cody not explicitly referencing that desire which sprung in Cody's mind only sometime after the 3/19/2013 No Contact Order barred him as pro se counsel first, from any discovery or research for himself, the dawning of the consequences at trial for him coming only gradually. Indeed, it was only his dawning cognizance that any assistance he received was going to have to come from inside his solitary jail cell, and after he determined firmly that the trial court would deny him assisted hybrid counsel, a form of outside counsel with the clear ***Faretta***-based imposition on such counsel that the defendant was the master of his own defense and not, as Mr. Patituce (Cody's trial counsel) believed, that it was counsel who was that master, that Cody formed the desire to retain outside counsel. One §2254(d) style erroneous perception behind ***Sheldon*** and ***Cody*** on "desire for retained counsel" seems to be that the desire, to be valid, needs to be firmly established, and expressed, almost at the time of arrest or arraignment, and that any implicit conduct or non-conduct (outside a proper ***Faretta*** hearing and express waiver) indicating non-desire established non-desire, immutably and irrevocably, at the time that conduct or non-conduct occurred. Cody was declared indigent even before any personal appearance, in May, 2012 (Doc. 42-1, Ex. 5) in a case filed under an indictment twice removed from the one he was tried on ("Issues on Appeal," App. K, p. 42); no trial court hearing was ever held on his " indigency;" neither he nor his counsel ever told the trial court that Cody lacked the ability to retain outside counsel through family or friends, or that he lacked personal non-cash up-front resources with which to retain counsel; and that neither Cody nor counsel was ever asked by the trial court if Cody were "without means to hire" under ***Caplin***'s standards, or at all. No consideration was given by either court to Cody's showing that, if indigency meant through his contacts with others (including family, friends and counsel) he could not raise, lawfully, a legal defense fund for retained counsel wanting monetary consideration for trial representation (this is a defendant, we may recall, the state accused of fundraising $100 million from the public. App. F-2: habeas record p. 2819 (10)), then Cody was not indigent. Legal defense fund fundraising is a process used frequently and successfully in high-profile cases, especially politicized high profile cases such as Cody's, and appears to be a 1st Amendment right coupled to the 6th Amendment right to access counsel of choice. Cody was in a factual situation here before conviction; conviction altered the calculus of assessment of any counsel from likelihood of positive jury trial verdict to likelihood of appellate ruling for new trial or dismissal. Indeed, both ***Sheldon*** and ***Cody*** gave no consideration to Cody's showings of what debatability on this issue of what indigency might mean under ***Caplin***.

For determining indigency for representation at state expense at trial, Ohio statutes merely define an "indigent person" to be "an individual who at the time his need [for appointed trial counsel representation at the State's expense] is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation." R.C. 120.03 (A)(1). Cody's notations from the record at least debatably established that, from the time Cody first realized his need for retained counsel because of his inability to effectuate discovery for himself as pro se counsel shackled by a *vis compulsiva* No Contact Order (R&R Objections, App. J, pp. 17-18), and because of his appointed trial counsel, even prior to Cody's pro se appointment, refusing to pursue Cody's strategic posture that he was a CIA operative who had acquired his life savings by a lifetime of service to his country, the Army, and the Central Intelligence Agency, who had no mal-intent whatsoever, as required by the criminal statutes, to commit any of the crimes in the indictment, that a state could not use its criminal laws to nullify the lawfulness of the Agency acquiring and directing the use of false personal identity or operational cover for its agents under the circumstances under which those were acquired, and directed for use by, agent Cody; that no theft under Ohio law had occurred by funds raised because there was no "deprivation" of donated funds from donors intending to "help veterans" because there was no diversion of any of those funds for an unlawful purpose, all unaccounted- for funds raised going to Agency-directed cash payments to foreign allied leaders and influence agents to secure the substitution of their front-line armed forces for ours in the wars in Afghanistan and Iraq (petitional traverse (see, n. 1), App. I, p. 15, 31-54; R&R Objections, App. J, p. 28; "Issues on Appeal," App. K, pp. 62-69); he had a developing desire to acquire outside counsel, and not merely to substitute the person of the appointed counsel, that motion for substitution long before being decided by the trial court (petitional traverse (see, n. 1, supra), App. I, p. 15). That desire, and his prospective need for funds from family or friends for such retention, all thereupon first arose during that gradual realization, which was not an abrupt, isolated epiphany. Cody first noticed the trial court of his forming desire at the April 22, 2013 only-***Faretta***-compliant "waiver hearing," where Cody refused to sign the waiver form.

Again, ***Cody*** failed, and fails, to consider Cody's factual showings on debatability of the relevant issue of indigency, 'Was any such "deeming," or any declaration made by Cody, made pursuant to ***Caplin***'s reference to a concept of indigency as not being able to retain ("hire") prospective, outside non-appointed-at-state-expense counsel; and was it made before he was even given the opportunity of accessing counsel to see what they might want by way of compensation, or the opportunity of accessing family or friends to obtain their provision of resources for such compensation?' The fact the No Contact Order prohibited Cody from ever contacting these resource sources placed a chilling effect on Cody from even formulating a firm desire to obtain counsel of choice, making the Order per se violative of the 6th Amendment right ***Cody*** assumes required Cody to notice the trial court of such a desire. Traverse (see n.1, supra), App. I, pp. 13-17; R&R Objections, App. J, pp. 4-16, 18-23; "Issues on Appeal," App. K, pp. 39-45. ***Cody***

does not make a true debatability analysis of actual and repeated showings by Cody. It is not compliant with ***Miller-El*** or ***Buck.*** Its' methodology, instead, grossly undermines both those cases and their principles of what a true debatability decision should be. Cody's indigency, for purposes of ***Caplin***, does not exist; the opposite exists. And, if it did exist, the further formulation of ***Caplin*** dealing with obtaining counsel willing to represent the defendant without monetary compensation still would permit Cody the access to counsel he sought.

Caplin does not, of course, even use the word "indigent."

Neither decision, moreover, gives any consideration to the factual issue Cody showed, that he would be able to negotiate with counsel for retention based upon his own immediate non-monetary assets, and that he would be able to raise sufficient funds from family or friends "immediately," or within a reasonable period,[6] for retention (Traverse (see, n. 1, supra), App. I, p. 16(7); R&R Objections, App. J, p. 20; "Issues on Appeal," App. K, p. 42, n. 23), a showing unchallenged by Respondent. No consideration by either court was given either to Cody's point that the amount or nature of compensation prospective counsel might require, or even if he or she required monetary, or any, compensation at all, could not be determined if access to prospective counsel was blocked in the first instance, and access to family and friends was blocked, in the first instance, to make such an inquiry, a fundamental distinction only when we consider, as ***Gonzalez-Lopez***, supra, does, "access" to counsel as a separate right from "having." Counsel (R&R Objections, App. J, p. 20; "Issues on Appeal," App. K, p. 41, n. 22).

Cody raised these showings reprised above (and more) contra these determinations of ***Sheldon*** about his indigency; and about his "desires" (discussed infra, in the subsection on "waiver"), at his petitional traverse (see, n. 1, supra) (App. I, pp. 13, 14-16); R&R Objections (App. J, pp. 4-16, 18, 20-22); and "Issues on Appeal" (App. K, pp. 39-43); and there was no debatability analysis in ***Cody*** of Cody's factual or legal showings on the underlying merits (non-procedural) issues, at all, on these nationally important, dispositive and complex substantive turning points in the case on the claim of "indigency" under ***Caplin***'s right to access counsel doctrine, when we consider, as ***Gonzalez-Lopez***, supra, does, "access" to counsel as a separate right from "having." counsel (R&R Objections, App. J, p. 20; "Issues on Appeal," App. K, p. 41, n. 22).

[6] From the time Cody first noticed the trial court at the time he refused to waive counsel, at the waiver hearing, 4/22/2013, to the time of trial, was five months; and from the time of his last request to the trial court to be able to access counsel, 7/26/2013 (App. N-1) to the time of trial was two months.

Both courts, **moreover,** refused to consider that, in the most important passage in ***Caplin*** (omitted of mention by ***Cody*** in its chosen quotation, supra), even an indigent defendant had the right to access **"an attorney willing to represent the defendant even though he is without funds."**

And no consideration was given by either court that, in that passage of import, this Court references the right of access, with instant application, to two types of lawyers. The first is one who will represent the defendant with non-monetary "funds;" but who might, instead, be willing to receive in exchange for his services as compensation, specific intellectual property rights, such as book or motion picture rights (effectuated by a simple; intelligent and knowing waiver of attorney-client privileged communications) potentially translatable, as an I.O.U. would also be, into monetary value in the future (Cody's professional training as a covert intelligence officer teaches him to disdain publicity and notoriety. Nevertheless it is appropriate for him to notice this Court, in this regard, two books have been published about him so far, "*Master of Deceit,*" self-published, 2020, by Jodi Andes, and "*Call Me Commander,*" 2021, Potomac Books (University of Nebraska Press); as well as a series of fictionalized accounts about Cody's covert activities of a para-military nature, now offered by Amazon online, the "*Cody's Army*" series, which first appeared in the 1990's while Cody was still serving under non-official cover with the Central Intelligence Agency. His case was also featured at least three times on the Fox-TV weekly hit show, "*America's Most Wanted,*" with John Walsh). The second type is the true pro bono attorney who does his or her work because he or she believes charity is its own reward, that reputational goodwill for pro bono representation of a high profile defendant among persons who may one day find themselves criminal defendants, is an immeasurable reservoir which may produce an unforeseen reward at some subsequent date now unknown. The fact this Court, in its phrase, "willing to represent a defendant who is without funds," concisely covered both types of lawyers available to an indigent defendant, if anything, highlights the importance this Court placed on the existence of this right of this type of access; and is far removed from the judgment that no such right exists. Cody showed at Traverse (see, n. 1, supra), App. I, pp. 13-17, citing a plethora of federal and state cases supplementing ***Caplin***'s explicit and important words, at 624-25 (see, also R&R Objections, App. J, pp. 19-23; and "Issues on Appeal," App. K, pp. 41,44-45) that debatability existed prima facie on this dispositive issue at law. This showing was not considered at all, no less fully considered, by either ***Sheldon*** or ***Cody*** or the R&R, in direct conflict with ***Miller-El,*** 537 U.S. at 341, 349. On this subject ***Cody*** bypassed the sanctioned COA process entirely with a regression into a §2254(d) conclusory analysis instead.

Moreover, neither ***Spaulding,*** supra, (holding its res judicata ruling was limited to the state's 2953.21 et seq. "postconviction relief petition" ("PCRP")'s unique statutory provision (see, also, ***Bethel***, supra)); the ORC 2953. 21 et seq. statute itself (App. M- 4) nor ***Landrum v. Mitchell***, 625 F.3d 905, 919 (6th Cir. 2010) (which only held (1) App. R. 26(B)'s beyond-90-days-untimely-filing provision is expressly established under ***Coleman v. Thompson***, supra, and its invocation was expressly cited in the App. R. 26(B) state court decision, and defaulted the claim, and **also** defaulted IAAC as "cause," and holding prejudice was not established) (mere speculation by petitioner as to what uncalled witness would have testified; and (2) petitioner raising an exhausted IATC claim on one set of facts in his state court proceedings, and an IATC claim on a different set of facts in his habeas petition did not constitute exhaustion of the habeas claim) has anything to do with ***Cody***'s asserted res judicata rule, as ***Cody*** applies its asserted rule to petitioner's claims 4 and 6). Neither ***Spaulding*** nor ***Landrum*** holds, says or implies that matters off record cannot be raised in an App. R. 26(B) application (which would directly conflict with R. 26(B)(2)(c) (App. M-2)); or that claims which could have been brought in an earlier PCRP cannot be raised in a subsequent, otherwise timely and validly made App. R. 26(B) application [the reason there is no such rule being the 2953.21 PCRP process emphasizes and focuses upon a claim based upon off-record evidence, but may reference or implicate on-record evidence, and the App. R. 26(B) process emphasizes and focuses upon on-record evidence but may reference or implicate off-record evidence, but neither operates so as to bar the other upon claim preclusion], ***Cody*** suggesting, but not explicitly stating the opposite on both points, at *10, *17.

As one will observe, infra, in the "Ignoring the Facts' subsection of the Waiver Argument, Cody's primary notice to the trial court of his desire to retain private counsel occurred in App. N-1. In addition to citing this noticing record to the App. R. 26(B) court, infra, it is also noted Cody first noticed the habeas court of the content of this 7/26/2013 motion in his petitional traverse (see, n. 1, supra) (App. I, p. 27 and n. 70, 71), quoting also from the U.S. Marshall's Quality Assurance Review on the Cuyahoga County Correctional Center noting Cuyahoga county common pleas No Contact Orders denying access to mail, telephones or general population were violations per se of the "Federal Performance-based Detention Standards for Non-Federal Detention Facilities." When coupled with the proscription of ***Brotherhood of R.R. Trainmen v. Virginia***, infra, and the presumption against waiver in ***Brewer***, infra, it is at least debatable whether "waiver" by Cody's erroneously alleged non-action on notice was required at law, or, if required, that the presumption was overcome by anything dispositive ***Sheldon*** or ***Cody*** propounded.

The "Waiver" Argument: Cody Showed, At Least Debatably, He Did Alert the Trial Court He Wanted to Retain Counsel and There Was No Debatability Analysis of His Showings by Either Court

Sheldon made a §2254(d) determination, and ***Cody*** merely repeated that determination exactly like the ***Miller-El*** and ***Buck*** panels did, merely recapping (regardless of length) the district court's analysis, without any analysis of whether petitioner's showing, on the specific dispositive "anything" (***Miller-El***, at 338), raised debatability as to those conclusions. ***Sheldon*** called its determination an AEDPA deference to the App. R. 26(B) decision. Id., App. B-1, *72. After the circuit court received Cody's "Issues on Appeal" (app. K, pp. 36-40 (¶10), pointing out, inter alia, the state court made no adjudication specifically addressing claim 6's IAAC based upon failure to raise Cody's denial of access (see, ***Sheldon,*** App. B-1, *69-70: "...The Court agrees with Cody that the state appellate court did not directly address his specific claim [of]... denial of right to access counsel of his choice...."), ***Cody*** changed the labelling of ***Sheldon***'s determination to that of a "de novo" review. ***Cody***, App. A, *17. "The [district] court...**ultimately** determined...even under a de novo standard...Cody failed to establish...[AC] was ineffective. Reasonable jurists **would not disagree**." [Emphasis added]. ***Cody,*** *17. ***Cody*** then repeated the district court's legal and factual determinations,[7] prefacing them with the words, "As the district court detailed in its order...." Cody, *18-19, pointing out the district court's de novo factual conclusions were made from the state court record. ***Cody*** made this repetition explicitly assuming Cody's "indigency" did not bar him from such access, turning the entire disposition of the claim under such an assumption, on that purported factual lack of notice "of record," the merits of the facts determining both the merits of the underlying claim of denial of right of such access, and the merits of the overlying IAAC claim for failure to raise, and the merits of "cause" of IAAC excusing procedural default (assuming it existed) of a claim not requiring further prejudice because the underlying violation of right of access was of a fundamental constitutional right whose violation was structural error.

Cody concluded, id., "reasonable jurists could not disagree with the district court's conclusion that Cody[ ]... could not overcome the procedural default of ...claim [6] ...."

The ultimate standard on debatability on an AEDPA-deference determination on a factual issue for ***Cody*** to address at the COA stage would have been whether reasonable jurists could possibly disagree with a **state court's** dispositive application of law (§2254(d)(1)) or factual determination (§2254(d)(2)) as unreasonable. However, where there was no state-court AEDPA deference adjudication on the facts, and the district court makes its own de novo factual determination, there is no deference, on COA or final determination;

[7] The primary factual one being "...Cody **never** indicated that he wanted to attempt to retain private counsel or that he was prevented from doing so by...the 'no contact order'" [Emphasis added]. ***Sheldon,*** App. B-1, *77; ***Cody***, App. A, *19.

there is no final clear and convincing burden for the defendant, on COA or final determination, and there is no standard or test of "unreasonability," on COA or final determination. The debatability standard would have been, instead, whether reasonable jurists could disagree whether or not the petitioner showed that the factual determination was erroneous, not whether reasonable jurists could disagree that the determination was unreasonable. §2254(d)(2), §2254(e)(1); ***Tharpe v. Sellers***, 138 S. Ct. 545, 546 (2018) (per curiam); ***Buck***, 137 S. Ct. 759, 777 (2017); ***Holmes v. McKune,*** 59 Fed Appx 239, 248 (10th Cir. 2003); ***James v. Schriro***, 659 F. 3d 859 (9th Cir. 2011).

Sheldon and ***Cody*** make two mixed legal/factual de novo conclusions: first, Cody was indigent pursuant to and subject to ***Caplin***'s alleged holdings, and that that indigency barred him from access to counsel of choice, addressed in this petition, supra, pp. 14 -21 (***Cody***, App. A, at HN 8); and that, second, if "indigency" did not bar Cody from that access (***Sheldon***, App. B-1, *76-*77), then, on a mixed legal/factual question implicating whether there was an implicit waiver, by Cody's alleged non-action of record, of the right of access (heightened against waiver by ***Brewer v. Williams'***, 430 U.S. 387, 404 (1977) presumption against implicit waiver of the rights to counsel), by Cody allegedly "never" noticing the trial court he desired such access. To these de novo factual determinations, including ***Cody*** merely repeating ***Sheldon***'s factual determinations, ***Cody*** applied the following debatability standard: "The [district] court...**ultimately** determined...even under a de novo standard...Cody failed to establish...[AC] was ineffective. **Reasonable jurists would not disagree**." [Emphasis added]. ***Cody,*** *17. But Cody merely repeated ***Sheldon***'s de novo factual findings based solely on the state court record, creating AEDPA deference for the district court's finding without legal justification. "Factual findings [of the district court] based solely on the state court record are subject to de novo review [by the appellate court]." ***Stermer v. Warren,*** 959 F. 3d 704, 720 (6th Cir. 2020). The "clear and convincing" standards of §2253(e)(1) are also based upon AEDPA deference, but only to "state court" factual findings. ***Fontenot v. Crow,*** 4 F. 4th 982 (10th Cir. 2021). "AEDPA in general and 2254(e)(1) in particular were designed to further the principles of comity, finality and federalism." ***Grant v. Royal,*** 886 F. 3d 874, 913 & *67 (10th Cir. 2018), citing ***Thompson v. Keohane***, 516 U.S. 99, 108 (1995), ***Michael Williams***, 529 U.S. 420, 436 (2000). It is well-established that AEDPA's presumption of correctness and deference which may be found in §2254(d) and §2254(e)(1) (the rebuttal only by "clear and convincing" standard to overcome "unreasonability" as to factual rulings) was meant by Congress to defer to the states, to actual specific-on-the-facts state court determinations, not to federal courts making state court determinations of fact because the state court did not do so. The intent of deference is a special respect to the states afforded by Congress as a quasi-political matter in our federal system, not meant to apply in those circumstances when a federal determination de novo on the facts is made only by the federal court upon a review of the state court record in a habeas proceeding. "Where the district court's factual findings are based

solely upon a review of the state court record...they are subject to the federal court's independent review." ***Holmes v. McKune,*** 59 Fed Appx 239, 348 (10th Cir. 2003).

...

A quasi-notational but dispositive sub-contention in the above area of dispute on the issue of waiver by Cody, appropriate for discourse here, plays into another factual portion of claim 6, dealing with the actions of jail authorities, as supplementary participating actors in denying Cody his right of access, acting pursuant to the 3/19/2013 No Contact Order (App. R. 26(B) application (App. F-2, habeas record p. 2807 (IV), 2827 (3)); petitional traverse (see, n. 1, supra) (App. I, p. 13); R&R Objections (App. J, pp. 14-15), including the citation, in addition to those from ***Powell*** and ***Gonzalez-Lopez*** Cody had previously included, barring any state action denying a defendant the opportunity of access to counsel of choice, from ***Brotherhood of R.R. Trainmen v. Virginia***, 377 U.S. 1, 7 (1964), the definitive proscription, "...[a] state [can]not infringe **in any way** the right of individuals...to be fairly represented in lawsuits...." [Emphasis added]; and "Issues on Appeal," App. K, p. 35. (***Sheldon*** erroneously ignored entirely (id., *62) Cody's jail guards' separate factual presentation in the App. R. 26(B) application, supra). This claim 6 supplementary portion of the claim, sworn to as evidence before the App. R. 26(B) state court, was that jail guards, pursuant to the court-ordered "no contact" confinement, seized a note Cody addressed to prospective counsel saying Cody desired retained representation, and punished Cody for attempting to smuggle it outside the jail to counsel. See, App. N-1.

Cody's showings on this issue having been disregarded in any analysis of the facts in ***Sheldon***, ***Cody*** takes up this factual claim about the jail authorities, making its own de novo, §2254(d) conclusion "as to the facts," that, instead of the claim being denied factually, another asserted proposition of state propounded procedural default law is dispositive, that because this portion of claim 6 about the jail authorities is based on off-record evidence, it had to be brought, if at all, in an O.R.C. 2953.21 petition for postconviction relief. Id., *17. To reach this solitary conclusion (the App. R. 26(B) court, nor any other state court, ever clearly expressed it, or expressed it at all), ***Cody*** cites, solely, to the res judicata/exclusive remedy provision in the **2953.21 statute** (App. M-4), dealing, according to ***Cody***, so as to bar off-record evidence posed by the applicant in part as supplementing an on-record evidence claim, **in an App. R. 26(B) proceeding.** First, 2953.21 and 2953.23's provisions deal only with what 2953.21 original and successive petitions may and may not allege jurisdictionally. "The application process under App. R. 26(B) requires that an appellant submit additional matter **not**

in the record of the trial to support claims that appellate counsel was ineffective." [Emphasis added]. ***Morgan v. Eads***, 104 Ohio St. 3d 142, 144 (2004). See, also, App. R. 26(B)(2)(d), App. M-2. The "jail guards" factual portion of the claim supplemented the

No Contact Order claim inasmuch as Cody's App. R. 26(B) sworn statement was that the guards were acting to enforce the Order (App. F-2, habeas record p. 2827 (3)); see, also "jail guard" statements, App. N-1).

Petitioner has dealt, supra, in general with the subjects of the debatability of whether there was a clearly applicable Ohio-based procedural default imposed upon (an independent-of-the –IAAC) merits review of the underlying constitutional claims 4 and 6 as standalone. ***Cody***, at *17, is incorrect in stating, by raising for the first time in the COA adjudication its own §2254(d) merits determination, that, because, as ***Cody*** alleges, the evidence is off-record, that Cody evidencing his desire to access prospective retained counsel, by describing how jail guards punished him for violating the No Contact Order by his attempting to access outside counsel by smuggling a note to prospective retained counsel, cannot be considered. The facts also concern, in part, procedural default of the underlying claim, and therefore, for that reason alone, under ***Pinholster,*** 563 U.S. 170, 181-82,185 (2011), in support, ***Garner v. Lee***, 908 F. 3d845, 860 (2d Cir. 2018, ***Harris v. Haeberlin,*** 752 F. 3d 1054, 1057 (6th Cir, 2014), ***Love v. Cate***, 449 Fed. Appx. 570, 572 (9th Cir. 2011), can be considered.

Further, Cody actually made the facts part of the trial record by relating them explicitly in his 7/26/2013 motion (App. N-1), and repeating them in his App. R. 26(B) application. And, on such off-record evidence, an "evidentiary hearing may be conducted by the [App. R. 26(B)] court...." ***Morgan,*** id. ***Morgan,*** moreover, was a case of direct certified question on what App. R. 26(B) was, from the 6th Circuit Court of Appeals. The Ohio supreme court has, additionally, made it clear there are fundamental distinctions between res judicata rules to be applied in 2953.21 cases, and App. R. 26(B) cases. ***State v. Bethel,*** 2022-Ohio-783, at *P48, supra. The "exclusive remedy" provision of the 2953.21 statute involving a "collateral challenge" to conviction or sentence applies only to a challenge made under 2953.21. ***Bethel,*** id., *P43, *P44. The 2953.21-based bar does not apply to bar, in another proceeding, where the claim was presumably made, that proceeding, on the grounds the claim involves a challenge which could have been made in another proceeding. Id., *P48.

A COA panel going outside the district court opinion to make never-before-in-the-case-heard argument on a dispositive, brand new issue of state law would seem flagrantly in conflict with ***Miller-El***'s notion that the COA review is solely one of debatability as to conclusions of law and findings of fact found in the district court decision, and seems at best appropriate only to a §2254(d) final appellate ruling. However, ***Cody***'s newly made "exclusive remedy" proposition is clearly debatable; and its error established by ***Cole***, ***Murnahan*** *(App. M-2, staff comments),* ***Morgan*** and ***Bethel,*** supra. Cody clearly made an exhausted claim showing of a jail

guard infringement of his right of access, unrefuted and unrebutted by anyone on the facts, in violation of the holdings of ***Gonzalez-Lopez*** and ***R.R. Trainmen,*** supra.

...

Cody clearly established debatability as to any conclusions: (1) that the App. R. 26(B) is not a special proceeding re-opening the direct appeal to argue for the first time on the merits a constitutional claim of magnitude (including a claim or claims or sub-claims made, in whole or in part based upon off-record evidence) omitted from the direct appeal, from the naked strength of which AC's omission qualifies as IAAC; (2) that the App. R. 26(B) application is not petitioner's first opportunity to raise the independent-of-the-IAAC underlying claim under ***Mockbee***, 2015-Ohio-3469, at *P24-26); or (3) that Ohio res judicata claim preclusion applies to bar such a merits claim because it "could have been brought" in the direct appeal, or in some other proceeding initiated before the App. R. 26(B) application.

Ignoring the Facts of Cody's Informing the Trial Court of His "Desire" to Retain Private Counsel

Starting with Cody's petitional traverse (see, n. 1, supra) addressing this specific point of notice, App. I, p.16, petitioner specifically referenced the of-habeas-record-state criminal trial case CR-12-565050A pre-trial docket entry (Doc.42-4: 3554, journal entry 7/26/2013, App. N) entitled (sic) "Defendant's Continuing Objections of Record to Retain Outside Counsel." (The "continuing objections" to which petitioner was referring in his 7/26/2013 motion (App. N-1) were the continuing-for-the-duration aspects of the 3/19/2013 No Contact Order depriving Cody of specific things Cody wanted: Cleveland newspaper or internet yellow pages , unlimited collect phone calls to "private practice Cleveland attorneys," "mail" and "physical" contact with family and friends "for the purpose" of having them "contact an attorney concerning private retention for the defendant," and mail and physical contact with such attorneys, Cody explicitly relating the facts of the seizure by jail guards of his passed note to such an attorney and the jail guards' punishment of him for a violation of the 3/19/2013 No Contact Order, making that a matter itself placed on the trial court record, by means of the 7/26/2013 motion). Cody's 7/26/2013 motion, clearly part of the CR-12-565050A record, is attached in App. N-1. The motion proper was not included in the habeas record by the Respondent, although it was clearly relevant, based upon the dispositive conclusions ***Sheldon*** and ***Cody*** reached on Cody not presenting "on-record" evidence of an expressed desire to retain private counsel, supra. When petitioner discovered, in approximately 5,000 doubled sided pages of habeas record Respondent did submit, averaging 1,000 words per page, the absence of this motion, he filed a number of motions with the magistrate court requesting expansion of the record to include it, and other missing documents, all denied by the magistrate court [2018 CV 1787, [non-document] 9/12/2019; R&R, App. B-1, p. 4, n.3 ("Respondent discussed only relevant [trial court] filings")]. The magistrate

court's denial, as well as the district court's affirming it in its preliminary decision [Id., Doc. 64], were objected to by petitioner (R&R Objections, App. J, p. 18) telling the habeas court, again, as he had in his petitional traverse, supra, and as he told the state courts in his App. R. 26(B) application (App. F-2, habeas record pp. 2806, 2827, 2828 (5)), of his 7/26/2013 App. N-1 motion, and in his App. R. 26(B) denial supreme court discretionary appeal application (App. F-3, habeas record pp. 2967, 2989), of the blocking of his desired access by the 3/19/2013 No Contact Order. The journal entry 7/26/2013 title in the docket sheet part of the habeas record, (App. N), above, established clearly and convincingly, and certainly at least debatably, Cody timely brought his plans and desire to access retained counsel to the attention of the trial court, the dispositive factual issue decided by ***Sheldon*** de novo. Moreover, Cody told the habeas courts, explicitly, he explicitly noticed the trial court of his desire, referencing App. N-1, to obtain counsel of choice, and that the No Contact Order had blocked him from such access. Petitional traverse (see, n. 1), App. I, p.16 (8), p. 27 & n. 70, 71; R&R Objections, App. J, p. 18; "Issues on Appeal," App. K, p. 43, n. 24 (where Cody specifically appealed not just the ignoring of his notice to the trial court in the 7/26/2013 motion of his desire to access counsel of choice by the courts below[8], but also the refusal of the habeas courts to include the content of his 7/26/2013 motion in the habeas record. What occurred here, rather than it being simply a garden-variety factual error, related to the ignoring of this basic fact of notice, makes this case extraordinary, and even more so when petitioner identifies such evidence in the trial record specifically and requests, not that an evidentiary hearing be held, but that the evidence simply be included in the habeas record.[9] Ignoring key dispositive evidence is a substantial violation of the debatability review requirement. ***Miller-El,*** supra.

The disregarding, under the factual circumstances of the case history of petitioner's explicit objections, to Respondent's suppression from the habeas record of underlying relevant-to-a-dispositive issue trial court record, of petitioner's explicitly made factual showings of clear, of-record notice to the trial court of his "desire" to obtain counsel of choice, as blocked by the No Contact Order, on Cody's 7/26/2013 motion, is no more, or less egregious than the ignoring of petitioner's factual showings cited as the tipping point in ***Miller-El,*** 537 U.S. at 344, 346, 347. The well-established holding of this Court on the requirement of due process of law in all judicial proceedings stands, and will stand, the test of time: judicial decisionmaking requires that "...all of the relevant facts

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[8] See, n. 6, supra.

[9] Cody's substantial debatability showings above reprised on the merits of his right to access prospective retained counsel of choice were made at:

On Factual Issues	**On Legal Issues**
Traverse (App. I), pp. 13,14-16, 27, n. 71 R&R Objections (App. J), pp. 4-16, 18, 20-22 "Issues on Appeal" (App. K), pp. 39-43	Traverse (App. I), pp. 13-14, 16-17, 27, n. 71 R&R Objections (App. J), pp. 10,11, 13-16, 18-23 "Issues on Appeal" (App. K), pp. 40-42, 44, 45

[be] contained in the record before us...." ***U.S. v. Sioux Nation,*** 448 U.S. 371, 432 (1980).

...

In making ultimate conclusions of law on important federal questions outside the parameters, and irrespective of, Cody's purported debatability errors:

- ***Cody*** also decided (App. A, *8-10) what the 10th Amendment and ***Johnson v. Lee,*** 578 U.S. 605, 136 S. Ct. at 1804-05 (2016) and ***Walker v. Martin***, 562 U.S. 307, 316, 317 (2011)'s rules of deference to the state supreme court made in respect thereof, meant, that federal courts may pronounce statements on what a state rule holds (instantly, on a judicially created res judicata claim preclusion procedural bar) without citation to a relevant or applicable state statute or rule of court, and without clear and firmly established approval by the state supreme court, in conflict with ***Johnson*** and ***Walker.***
- ***Cody*** also decided what the 6th Amendment right to access counsel of choice meant by ruling (App. A, *18) a defendant did not have a meritorious claim of denial of this right because his "indigency" barred such access, in conflict with the concept of "indigency" referenced, for purposes of the exercise of the right, in ***Caplin & Drysdale v. U.S.,*** 491, U.S. 617.

The tension between the realistic desire of jurists for the mental ease and efficiency of the processes of the courts, more eloquently described by Justice Thomas in his dissent in ***Buck,*** 137 U.S. at 781, and the idealistic desire for a thorough analysis of whether violations of constitutional rights of defendants or members of the public, are debatable, is probably immutable. This tension generates the type of substantial conflict evident between ***Cody***'s "strip-mining" approach to ***Caplin***, and what ***Caplin*** really holds. This conflict affects not just the defendant, but millions of Americans who are friends of, or family to, the incarcerated petitioner, who are willing and able to defray all or part of the expenses of the defendant's representation from the private defense bar, if notified of the need, and asked. It is out of that tension between the hard reality of efficiency, on the one hand, and idealism on the other, that the necessity of progress beckons the Court to certiorari instantly on both the specific facts, and the conflict at law with ***Caplin,*** on the issues of right to counsel of choice.

...

In sum, on the Section II, Part A Reasons, a COA debatability review made pursuant to 28 U.S.C. §2253(c)(2) and the requirements of ***Miller-El*** and ***Buck*** does not mean that the COA panel may deny debatability of a constitutional claim or any of its dispositive parts exists where the panel, as ***Cody***'s did on all counts, ignores valid showings the petitioner made on the facts, on the law, and on

mixed questions; merely repeats the likewise one-sided 28 U.S. C. §2254(d)-suitable-only conclusions by the district court on the same; and conflates the certainty standard on debatability with the required possibility standard (see, infra, Section II, Part B) by both misuse of language and a mental framework approach prohibited by the two landmark decisions.

II. The Ways the Decision in *Cody* Was Erroneous

Part B- Error in the Misuse of Language and Conflating Standards on Debatability Undermining *Miller-El* and *Buck*

This leaves us with the problem of language and standards the COA panel itself uses. Language is important because it shows us how the speakers or writers are thinking, and what they think about underlying ideas. Language, and the parsing of language, is important in the law, and is important in ***Cody,*** and in the current trend of COA precedent cited in Section III, infra, to show us whether standards used in those decisions really are, intentionally or simply by consequence, creating, or have created, a fundamental conflict with the intent and spirit of ***Miller-El*** and ***Buck*** as to what a COA review really is, and should be.

"Could," as a word at the heart of the standard endorsed by ***Miller-El*** and ***Buck***, has a fundamentally distinct meaning from the verb "would." "Could" is the past tense verb of "can," which indicates mental or physical "ability" or "possibility," whereas "would" is the past tense verb of "will," which indicates "likelihood" or "certainty." *Webster's New Riverside Dictionary* (Rev. 1996).

The problem with what ***Cody*** does, and a metastasizing number of post-***Buck*** COA decisions are currently doing, infra, Section III, with the consequential changing of the concept of a COA review backwards into either a rubber-stamp of the §2254(d)-based district court petition denial, and into a (regardless of length) full-blown §2254(d) final decision on appeal, nulling the legislatively intended COA stage in the process, relates in part to their misuse of the "would" and "could" words and concepts. That nulling has both a legal, and a linguistic dimension.

First, as a legal matter, ***Slack v. McDaniel's***, 529 U.S. 473, 484 (2000), language, explicitly used by and in ***Cody***, as its COA review standard, that

> "...[J]urists of reason **would** find it debatable whether [the COA applicant stated a valid constitutional violation and whether the district court correctly made its procedural rulings]" [Emphasis added],

was, for purposes of adding clarity to the COA concept, in effect overruled by ***Miller-El's*** holding, instead, the COA controlling standard is that

"...a petitioner must show that reasonable jurists **could debate** whether (or [even further] ...agree that) the petition should have been resolved in a different manner, or that the issues present were adequate to deserve encouragement to proceed further." [Emphasis added]. 537 U.S. at 336.

Even as a legal matter, we cannot escape the linguistics. ***Slack***'s language, "would find" expresses a certainty of outcome; ***Miller-El***'s and ***Buck***'s COA concept, as in "could debate," expresses only the possibility of a mental and verbal process which may or may not lead to an outcome.

But ***Slack***'s "would find" language was not explicitly overruled. Post-***Miller-El*** COA problems ensued. ***Buck*** followed in 2017, explicitly rejecting the ***Slack*** standard, supra, stepping up the pace by a move in language strongly clarifying the effectual overruling of ***Slack***'s "would"-based language's concept of what a COA review was, and should be, by holding:

> "At the COA stage, the **only** question is whether the applicant has shown that jurists of reason **could disagree** with the district court's resolutions of his constitutional claims **or** that jurists **could conclude** the issues presented are adequate to deserve encouragement to proceed further." [Emphasis added]. ***Buck***, 137 S. Ct. at 773; and

> "[The substantive (merits) issues standard is] whether reasonable jurists **could debate** the conclusion that [petitioner] was not denied his [substantive] right...and [the procedural issue's standard is] whether reasonable jurists could debate the ...procedural holding ...." [Emphasis added]. Id., at 775.

Linguists might easily agree that the "could debate" standard is actually a part of the "could conclude" concept, i.e., the "could conclude" phrase encompasses ***Buck***'s "could debate" concept because the "concluding" referenced is only to a debate process, not to an actual outcome, and the debate process, if found to be possible, is, by reason of §2253(c)(2), the reason to proceed further to final appeal. Thus, the "could conclude" phrase eliminates the concepts of "agreement" or "disagreement" with an outcome. By using the word "or," the opinion shows its intent to separate the "agreement/disagreement' concepts from the debatability concepts. See, the dissenting opinion in ***Vang v. Hammer,*** 673 Fed. Appx. 596 (8th Cir.), discussed infra, Section III.

By answering a **different** question, as to whether reasonable jurists "could not disagree" or, even worse, "would not disagree," with the district court's §2254-based resolution of the claims, as ***Cody*** does on all dispositive procedural and merits issues on Cody's claim 4 - right to testify claim (***Cody***, App. A, at *8, *13, *15 and *16); as ***Cody*** does on all dispositive procedural and merits issues on Cody's claim 6 – right to access counsel of choice claim (***Cody,*** App. A, at *17, *19); as ***Cody*** does on all dispositive procedural and merits issues on Cody's claim 16/17 – IATC claim for failure to investigate, develop or present a defense case-in-chief at trial' evidence of Cody's CIA employment, i.e. evidence of no theft of donated funds because all "unaccounted for" monies were spent, as intended by the donors, to "help" U.S. Armed Forces personnel by making cash payments to foreign allied leaders to have them substitute their front-line troops for ours in Afghanistan and Iraq, and no specific mal-intent, as the criminal statute required; no money laundering because there was no movement for an unlawful

purpose, and no specific mal-intent, as the criminal statute required; no tampering with records for Cody signing his CIA-assigned (not true name) cover name because there was no specific mal-intent, as the criminal statute required; no identity fraud because there was only lawful purpose use of a CIA-assigned cover name /identity; and no corrupt activity because a conviction on that count was dependent upon conviction upon the theft count, the money laundering counts and/or the tampering counts (***Cody***, App. A, at *20); and as ***Cody*** does on all dispositive procedural and merits issues, on Cody's procedural actual innocence claim (***Cody***, App. A, at *20, *21), ***Cody*** shifts the proceeding framework from one of an analysis to robustly ascertain debatability to a focus on the §2254 framework of the district court decision in ***Sheldon.***

Effectual overrulings and clarifications, however, are not actual overrulings, and are not recognized in ***Cody***, supra, and in the growing number of post-***Buck*** circuit court decisions, infra, Section III. COA panels either do not understand ***Buck***'s clarification of ***Slack***'s "would be debatable"-based language, or ***Buck***'s insistence on a COA review based on a "could be" debatable concept, or they are seeking to evade all three.

Regardless which, the matter requires the Court's current attention if the ***Buck*** and ***Miller-El*** COA review concept is to survive, and, regardless which, lack of understanding or evasion, the word-use process these panels are using, mining Supreme Court precedent for words most favorable to a return to §2254-final decision focus for COA decisionmaking, also inherently involves their erroneous use of a technique illustrating the linguistic dimension of the problem. This is not just ***Cody***'s erroneous usage, but ***Cody*** serves as a paradigm for these other prime cases, infra. These cases are challenging ***Miller-El's*** and ***Buck***'s quasi-unequivocal, positive "could be debatable" standard, and its concept of possibility, and changing it into its negative form, as in "could not disagree" or "could not find the §2254 decision debatable," giving the faux appearance of following ***Buck***'s "could be" language's possibility standard.

But they are not following ***Buck***; they instead conflict with ***Buck.*** By taking the word "could" as ***Miller-El*** and ***Buck*** use it, as in "could disagree," connoting possibility, and making it into a negative verb, as ***Cody,*** supra, did, by changing it into "could not disagree" [e.g., with the district court's §2254-based disposition], one also changes the meaning, to an English speaker's ears, to the certainty concept, the same concept "would not disagree" connotes. "Could not disagree," and "would not disagree" connote a negative certainty; "would disagree" and "would debate" connote a positive certainty.

Moreover, ***Buck***'s language, and its holdings, should make it clear that the "could disagree" standard is clearly a debatability ("possibility") standard; and that the "would disagree" standard, as a conclusion, is a disapproved, clearly determinative ("certainty') standard, regardless whether the issue is a procedural or a substantive ("merits") one.

Cody's resolution of petitioner's debatability claims universally uses the "would not disagree" or the "could not disagree" standard, ignoring the crux of ***Miller-El***'s legislation-interpreting holding on debatability, that the standard for the COA grant is whether the petitioner showed,

on any dispositive issue raised, procedural or substantive, AEDPA deference or non-deference, debatability **"even though every jurist of reason might agree... that the petitioner will not prevail."** [Emphasis added]. 537 U.S. at 338.

Ignoring, supra, Cody's made showings of debatability, and referencing only one-sided district court §2254(d)-based shortened merits analysis, and adding a non-existent state-based procedural default of Cody's "jail guard" portion of his claim 6, supra, as a new issue, to those of the district court opinion in ***Sheldon***, the COA panel uses the "would" standard two times in denying the COA on claim 6: "Would agree[ ] was procedurally defaulted;" Id., at *17; "...[W]ould not disagree [the underlying claim was meritless];" Id., *17. ***Cody*** uses, on the other hand, a "could not disagree" standard once, to describe the district court's conclusion concerning Cody's procedural default of claim 6, claimed to exist by reason of the conclusory and debatable statements about a state res judicata claim preclusion App. R. 26(B) rule.

Even if a COA decision pays homage to ***Miller-El's*** and ***Buck***'s mandate of framework analysis, by repeating mere words, made meaningless by the process of determining debatability actually employed, the mandated framework approach itself is being undermined by a decision which, separately, ignores the showings made by the petitioner as to debatability or upon which he should be encouraged to proceed further, and/or merely repeats an also one-sided (petitioner showing ignored) §2254(d)-style conclusion of the district court.

In sum, on these Section II, Part B Reasons for Granting the Petition, a COA debatability review, made pursuant to §2253(c)(2) and the requirements of ***Miller-El*** and ***Buck***, does not mean that the COA panel may deny debatability of a constitutional claim, or any of its dispositive parts, exists where the panel, as ***Cody*** did on all counts, ignores valid showings the petitioner made on the facts (including the facts in the App. R. 26(B) record that Cody did bring to the attention of the trial court in the trial court record his desire to access private counsel of choice for the purpose of retention), on the law, and on mixed questions; merely repeats the likewise one-sided 28 U.S.C. §2254(d) conclusion by the district court on the same; and conflates a certainty standard on debatability with the possibility standard mandated by ***Miller-El*** and ***Buck***, by its misuse of language, including language taken from a decision of this Court, all reflecting an underlying and greater error, a mental framework approach prohibited by those two landmark decisions.

Although Cody's underlying state case is not, unlike ***Buck***, a murder case or a case involving racial prejudice at trial or sentencing, and, unlike ***Buck***, at this COA level, contained numerous dispositive issues on four separate habeas corpus constitutional or

federal law* claims, what ***Cody***'s COA panel did, and what ***Buck***'s panel did, falls into the same extremely pattered parameters this petition has identified, of non-recognition of what true debatability and debatability analysis means, rising to the level of undermining the law's intent in jurisdictionally and conceptually carving out a habeas COA review separate and distinct from what the district court does, and from the final appellate decision process in the circuit court. This problem is not limited to ***Cody*** and ***Buck***, but, instead, is growing among the circuits.

III. The Importance of Accepting Certiorari: The Gravity of the Continuing, and Currently Manifested Conflict with *Miller-El* and *Buck* in the Circuits; the Inter-Circuit Conflict; and the Importance of the *Cody* Decision to Others Similarly Situated

This brings us to the importance of the case to others similarly situated, and to the serious conflict between not just ***Cody***'s erroneous decision and the decisions of ***Miller-El*** and ***Buck*** but also to the inter-circuit (and intra-circuit) conflicts bringing erroneous no-debatability analysis circuit panels into conflict with ***Miller-El*** and ***Buck***, as well as with those panels having no routine or evident problems fathoming and following what ***Miller-El*** and ***Buck*** mean on debatability-based COA decisions.

This Court has considered the failure of COA panels to focus solely on debatability in their decisions, and the absence of a true and thorough debatability analysis by these circuit panels so serious, it has entertained certiorari on these errors twice in this century (2003, 2017, not counting the decision in ***Tharpe v. Sellers***, 138 S. Ct. 545 (2018)). The national importance of the issue, additional to the importance of not thwarting §2253(c)(2)'s intent in establishing COA review jurisdiction, is simply stated. The right of habeas corpus to this Nation, and the exercise of that right by its people, rank very high as to what makes us unique and exceptional as Americans, following the common and statutory laws of England related to accusations of crime, from the time, at least, of Magna Carta, in concepts brought to our original shores by our founders. It is important for this Court, therefore, not to approve sub-silentio or otherwise, lower courts making even procedural policies having the subtle or open consequence of diminishing or degrading that right outside the parameters of law, in this case, 28 U.S.C. §2253(c)(2).

In ***Miller-El***, the manifestation of the error this Court focused on was a COA decision turning on the panel's lengthy factual and/or legal analysis of a dispositive issue having all the earmarks of an analysis exclusively §2254-based-suitable-for-a-final-appellate-decision, one-

* ***Buck's*** COA issue, as cited by the COA panel, actually only turned on the meaning of "extraordinary circumstances" for purposes of Buck obtaining a F.R. Civ. P. 60(b) reopening of his habeas judgment in the district court. The panel's implicitly and conclusorily decided, without citation to any authority one way or the other, that the meaning did not cover Buck's circumstances. This was merely a recital, new iteration or reiteration, or regurgitation of the district court's thought processes and decision, devoid of the true, and real, debatability analysis ***Miller-El,*** 537 U.S. at 341 requires. See, ***Buck v. Stephens,*** 623 Fed. Appx. 668, 671-74 (5th Cir. 2015).

sided, not referencing "debatable" or "debatability" showings, and which added a standard for decision taken straight out of §2254 or §2254(d) doctrine.

We can see the actual beginnings of the subtle movement away from the blatant §2254-focus of the 5th circuit's ***Stephens v. Buck*** case ***Buck*** reversed, to the attempted pro forma compliance with ***Miller-El's*** shortened statements of fact and law, in some debatability analysis, e.g. choosing one or two of the petitioner's weakest debatability arguments as straw man knockdowns, while ignoring or minimalizing the more substantial ones, and ending with a pro forma pronouncement debatability did not exist.

Even if a COA decision pays homage in "mere" wording to ***Buck***'s "could disagree" or "debate" standard, that decision then makes the standard, and §2253(c)(2), meaningless when it ignores the showing made by the petitioner as to debatability on the issue, and merely repeats the also one-sided (petitioner showing ignored) §2254(d) style conclusion, as to dispositional fact or law, of the district court.

This Court's analysis in ***Miller-El*** was, in fact, a lengthy one, tending to a merits decision on racial prejudice in jury selection. Perhaps frustrated with continuing defiance of the spirit of ***Miller-El***, ***Buck*** went further, actually making the merits decision for the circuit court, determining COA error and ordering a grant of the petitioner's F.R.C.P. 60(b) motion, for "extraordinary" cause turning on prosecutorial promises of investigation into racial prejudice of a state's expert upon sentencing hearing issues. Not to stifle these again growing problems evident in ***Cody*** definitively, now, in a non-capital, non-racial prejudice case, or cases, is merely to see their growth again appear in capital, racial prejudice cases and as to cause panels animose to ***Buck*** to create disparate standards for COA cases, one for capital murder racial prejudice-evident cases, and another for those not.

But §2253(c)(2)'s intent does not change for type of case or issue.

A survey of the latest leading post-***Buck*** COA panel cases establishing guidance-setting precedence on debatability framework procedures authorized for use in their respective circuits, shows:

• The LEXIS-NEXIS Reporter lists no 1st circuit court of appeals case as having "followed" **any** holding of ***Buck,*** as of March 15, 2022; and provides data as of June 19, 2022 for the following calculation of the percentage of circuit court panel post-***Buck*** COA decisions, for the total of all cases where §2253(c)(2) debatability was at issue, as having "followed" ***Buck***'s "could disagree..." (id., at 773), "could debate..." (id., 775), "could conclude..."(id., 773) and "ask only..."(id., 774) requirements: **1st circuit** – 0%; 2d circuit – 0%; **4th circuit** – 0%; **5th circuit** – 27%; **6th circuit** – 3% (not including ***Cody, Loukas*** or ***Sarr,*** but including ***Banks***, infra); **8th circuit** – 100% (including ***Nelson,*** infra); **9thcircuit** – 25%; **11th circuit** – 4%; **D.C. circuit** – 0%. The remainder of COA application decisions in these cases were listed as having been "neutral," on these requirements, having "distinguished" these

holdings or having merely "cited" (without also following) these requirements. Reported post-***Buck*** cases in the 1st, 2d, 4th, 6th, 7th and D.C. circuits, combined capital and non-capital, show an overwhelming majority of COA denials, as of June 19, 2022.[10]

• Two circuit court panels, in the 10th and 3d circuit, have provided paradigms for the COA decision debatability framework, focus and analysis in consonance with ***Miller-El*** and ***Buck,*** showing an easy fathoming and following of those principles:

10th Circuit: ***Farris v. Allbaugh,*** 648 Fed. Appx 950, 956-58 (10th Cir. 2017) (relying on ***Miller-El,*** reviews analytically petitioner's showing of debatability as to factual matters, finds them debatable even if not true, granting the COA). But see, also, ***Farris v. Martin,*** 2021 U.S. App. LEXIS 37964 (10th Cir.), mentioning ***Buck***, but not on a COA standard; and then using a "certainty" standard no jurist "would hold otherwise" in denying the COA. The applicants in these two cases received widely disparate 'standards' treatment with widely disparate results.

3d Circuit:

Bracey v. Supt., Rockview SCI, 986 F. 3d 274, 283-84 (3d Cir. 2021) (explicitly demonstrates knowledgeability of both the letter and spirit of ***Miller-El***'s and ***Buck***'s instructions on debatability, supports a COA panel debatability analysis of an explicitly referenced argument on debatability with a brief merits analysis tied in, granting the COA.

Model procedural decisions from other circuits do not show the ease of fathoming or following ***Miller-El*** and ***Buck*** that ***Allbaugh*** and ***Bracey*** do. Applicants and their §2253(c)(2) showings in those panel cases were treated disparately from those cited in the 3d and 10th circuits: Certain circuits' COA panel decisions exemplify no merits review of any sort and no debatability review of any sort, with debatability, and the COA, simply decided summarily. See, ***Rosa v. Gelb***, 2021 U.S. App. LEXIS 34371 (1st Cir.), cert. den. 2022 U.S. LEXIS 260 (dec. January 10, 2022); ***Milton v. Lee***, 2019 U.S. App. LEXIS 35728 (2d Cir.) (with the 'certainly' "would not disagree" standard endorsed on a procedural issue); ***Watson v. Daniels,*** 852 Fed. Appx. 109, 110-11 (4th Cir., 2021) (but see ***U.S. v. Underwood***, 2022 U.S. App. LEXIS 1718 (4th Cir), citing to ***Buck***'s "could find debatable" standard, doing a very brief debatability review, denying the COA); ***Sadler v. Salmonsen***, 2021 U.S. App. LEXIS 37380 (9th Cir.) ("would not disagree" standard endorsed on both procedural and substantive ("merits") issues (but see, ***Noguera v. Smith,*** 756 Fed. Appx 685 (9th Cir. 2018), correctly citing to ***Buck***'s standard of "could disagree," but doing only a two-sentence debatability analysis, denying the COA).

[10] Double counting was eliminated from cases listed as "cited" and "followed", as were dissenting opinions eliminated, from the overall count.

5th Circuit:[11]

Perhaps under a chastening effect of ***Miller-El*** and ***Buck*** (both 5th circuit cases), the 5th circuit guiding decision, ***McFarland v. Davis***, 812 Fed Appx 249 (5th Cir. 2020) uses and endorses a shortened mental merits analysis merely and conclusorily proclaiming the prisoner made a "sufficient showing" that jurists "could debate" the district court's conclusions. But see ***U.S. v. Bracken,*** 2021 U.S. App. LEXIS 29700 (5th Cir.), the LEXIS-NEXIS Reporter's latest 5th circuit court of appeals case listed as "following" ***Buck*** (as of March 15, 2022), citing ***Buck***'s "could find debatable" standard, then doing no debatability review whatsoever, denying the COA summarily.

6th Circuit:

6th Circuit precedent is exemplified, in a majority of reported cases, post-Buck, combined capital and non-capital, by short-to-mid length merits reviews, routine actual applications of a 'reasonable jurists would not disagree issue was debatable,' or another 'certainty' standard; and no articulated analysis of petitioner-made debatability showings of fact or law contra to §2254(d)-based findings or conclusions, with debatability and COA denied. See ***Cody v. McConahay,*** 2022 U.S. App. LEXIS 579 (6th Cir., dec. January 7, 2022), the instant case; ***Loukas v. Schroeder***, 2022 U.S. App. LEXIS 2105, at *6-*8 (6th Cir, dec. January 24, 2022) (uses conclusory 'reasonable jurists would not find it debatable' standard; refuses any debatability analysis because petitioner made no debatability showing); ***Sarr v. Cook,*** 2022 U.S. App. LEXIS 2169, at *4-*6 (6th Cir., dec. January 25, 2022). But see ***Banks v. Kowalski,*** 2020 U.S. App. LEXIS 28837 (6th Cir.) correctly citing to ***Buck***'s "could disagree with the district court's resolution" as the standard, doing a debatability analysis, then switching to a used "certainty" standard of "could not disagree," denying the COA.

7th Circuit:

The 7th Circuit uniquely holds that for a debatability analysis by the COA panel of the prisoner's §2253(c)(2) showing, the prisoner must explicitly ask, separately, for a "showing" analysis of his specified debatability propositions in his COA application; and

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[11] Cf., the approach to ***Miller-El*** and ***Buck*** in Trahan, K., "An Analysis of the 5th Circuit's Refusal to Adopt the Supreme Court's COA Standard in Capital Cases," 48 Am. J. Crim. L. 1 (Dec. 21, 2020) (Appendix L), implying the holdings on COA debatability of these two landmark decisions are merely a cover for an attack by this Court on institutionalized racism within the panels of 5th circuit. In support of this theme minimalizing the debatability portion of the two decisions into meaningless ness, see, also, Leonetti, C., "Smoking Guns: The Supreme Court's Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias," 101 Marquette L. R. 205, 212-14 (2017) and Johnson, S.L., "***Buck v. Davis*** from the Left," 15 Ohio St. J. Crim. L. 247 (2017).
Mr. Trahan's article , supra, at 145, also presents a statistical survey of circuit court state **capital cases** from ***Buck*** through 2019 on the issue of the percentage of such total cases where final merits were disposed of by circuit court COA decisions in violation of the holdings of the two precedents, using standards (keywords) analysis established and measured by software algorithms, concluding 30% of 5th circuit COA's, 15.4% of 11th circuit COA's, 6.5% of 9th circuit COA's and 6.3% of 6th circuit COA's, for capital cases, fell into that category. Prior to ***Buck***, 5th Circuit panels were denying COA's in 58% of all capital cases. Merits Brief for Petitioner 1a-34a, ***Buck v. Davis*** (S. Ct. No. 15-8049). While a ratio of circuit court panel granted COAs to denied COAs is not an acid test of whether a particular circuit is following the debatability requirements of ***Miller-El*** and ***Buck***, such ratios have been found helpful to rule of thumb analysis of that issue by certain commentators.

explicitly supports the "would find debatable" standard on procedural issue review. ***Moreland v. Eplett,*** 2021 U.S. App. LEXIS 33797, at *14-*15 (7th Cir.).

8th Circuit:

The 8th circuit's leading precedent on COA decision format is still the pre-***Buck Vang v. Hammer,*** 673 Fed Appx 596 (8th Cir. 2016) decision, following ***Slack v. McDaniel,*** 529 U.S. 473, 484, using the "would disagree" standard for all issues, denying the COA.

Approving ***Vang,*** 8th circuit court of appeals panels routinely deny COA's summarily without any analysis whatsoever. See, ***Fay v. Walz,*** 2021U.S. App LEXIS 39058 (8th Cir., dec. January 13, 2022). But also see ***Nelson v. Lee,*** 868 F. 3d 636, 636 (8th Cir. 2017), the only LEXIS-NEXIS Reporter listed, as of June 19, 2022, 8th circuit appellate court COA decision as "following" ***Buck*** on the "could disagree" requirement. ***Nelson*** correctly cited to ***Buck***'s "could disagree" standard, then did no debatability analysis whatsoever, denying the COA; then, on reconsideration, summarily granted the COA on one issue.

11th Circuit:

The LEXIS-NEXIS Reporter's only 11th circuit court of appeals case listed as "following" ***Buck***, as of March 15, 2022, is ***Lambrix v. Sec'y***, 872 Fed Appx 1170, 1179 (11th Cir. 2017). ***Lambrix*** cites to ***Buck***, but then applies the "would disagree" standard, using a short, one-sided debatability analysis, denying the COA. See, also, ***Smith v. Bryson,*** 2019 U.S. App LEXIS 11172, at *3 (11th Cir.), applying its own bizarre "would not debate" standard, denying the COA; and ***Wright v. Sec'y***, DOC, 2021 U.S. App. LEXIS 3204 (11th Cir.), citing the correct ***Buck*** standard, providing no debatability analysis whatsoever, granting the COA. These are disparate, conflicting results for three totally disparately treated applicants, just within one circuit court of appeals.

...

Justice Thomas' ***Buck*** dissent, joined in by Justice Alito, is undoubtedly correct when it points out that it is mentally difficult for many reasonable jurists to resolve the COA request without going through a merits analysis of the petitioner's claim, at least in their heads, if not on paper. Indeed, ***Miller-El,*** **within the framework of debatability,** in its body, makes a very lengthy, detailed analysis of the possibilities of racial prejudice in jury selection trending to a merits conclusion such prejudice existed in the case. Nevertheless, it is apparent a debatability analysis is not, and cannot be, a "likelihood of success" analysis suitable for determination of a preliminary injunction.

But "would or would not debate," "would or would not find it debatable," "would or would not agree or disagree," and "could not agree or disagree" are not an allowable COA framework for analysis under §2253(c)(2), or ***Buck,*** because those standards express a

certainty of outcome or result, whereas "could agree or disagree" or "could debate" express only the existence of a possibility of an outcome based upon the possibility of a process ("debate") to reach such an outcome. That COA panels, with ***Cody*** serving as a paradigmatic example, are successfully mining for quotes from ***Slack, Miller-El*** and ***Buck*** impliedly indicating permission to engage in COA denial decisionmaking contrary to the clear intent of the latter two decisions to promote **only** a robust application of a concept of debatability as the core of COA evaluation, creates a demonstrable need for the Court's further certiorari review of this pattern of practice in the instant case.

Miller-El noticed manifestations of evasion of debatability in the nature of the COA panel obviously leapfrogging directly to an actual appeal end-outcome, and a lengthy §2254(d)-based final decision, manifestations distinguishable from the subtler evasions of ***Cody***, and the metastasizing number of post-***Buck*** cases noticed above. But all have the effect of nulling, by whatever means they use, the only jurisdictionally permissible task the COA panel has, debatability analysis and resolution of debatability. All the latter cases at the same time evade, avoid or defeat debatability, and that is the fundamental problem which needs the Court's further attention. ***Buck*** says as much:

> "Whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry [into debatability]." Id., at 774.

The error, and **the** threat to law, and to uniformity, is that COA panels are continuing to not "...ask **only** if the ...decision was debatable" [Emphasis added] (Id.). The exact procedure used to evade that question's directive is only the manifestation of the error. The use of the disallowed frameworks for decisionmaking, cited three paragraphs supra, in a COA proceeding, whether ***Buck***'s "could debate" standard is cited or not in the opinion, makes the proceeding, and its decision, co-extensive with the final decision on appeal in the federal courts, explicitly in conflict with ***Miller-El,*** and contrary to legislative intent on §2253(c)(2), in addition to philosophically undermining of the constitutional dimensions of habeas corpus itself. The evidenced turning of more and more of these COA proceedings into a summary final appeal is creating thousands (and perhaps more) of grossly disparate treatments annually between COA applicants drawing panels easily fathoming and following the only framework made permissible by ***Miller-El*** and ***Buck,*** and those still following the pre-***Miller-El*** §2254(d)-focused mental framework, a disparate consequence accruing both intra-circuit and inter-circuit.

Appellate courts have long known what a "debatability analysis" means, for the concept is not an especially hard one, and is commonly associated with a paragraph which usually begins with the words, "The defendant argues...," followed by an accurate

description of that party's position. Pleas of ignorance or difficulty of understanding should accordingly fall on deaf ears, in the face of a very strong inference the undermining of ***Miller-El*** at 338 reflected in the decisions from the circuits noted above in this Section appears calculated.

That that undermining and the consequential disparate treatments are taking place at all is serious enough. The fact the former also appears calculated creates a problem of even greater national magnitude, calling for this Court's intervention at this point to prevent ***Miller-El*** and ***Buck*** from erosion into meaningless ness.

While picking ***Cody*** apart for its error on standards may be a boring task more intricate than that required in ***Miller-El*** and ***Buck;*** and while ***Miller-El*** and ***Buck*** conflicting with the COA post-***Buck*** panels presented may only be identified in the subtleties in the procedures those panels used, ***Cody*** and those panel decisions may pose an even greater danger undermining those two landmark decisions made so **because** of those subtleties. The COA evaluation framework both ***Miller-El*** and ***Buck*** laid out is, bluntly, the only acceptable one under §2253(c)(2).

While the problems noted above in Section III are of such magnitude that certiorari is called for on a paradigm case, "new constitutional law" is not a necessity for cure. A meaningful clarification of the debatability holdings of ***Miller-El*** and ***Buck***, instead, is, a clarification which also definitively rebuts, probably by the content of the substantive issue(s) of the paradigm case itself, the notion openly being presented in law reviews around the country, that both ***Miller-El*** and ***Buck*** reflect a less than serious concern with §2253(c)(2) debatability failure per se, than with the Court's concern for the application of such failure as a merely fortuitously available tool to address the clear horror of the approval of substantive racial prejudice being introduced into the judicial processes of capital cases by one circuit court in particular.

IV. Conclusion

The proposition this petition puts forth is that "debatability" in a circuit court COA decision cannot and should not, under ***Miller-El*** and ***Buck***, be decided merely by the decision, whatever words it uses or whatever length of merits review the court panel produces, if any, concluding debatability did not exist without analysis of, or comment on, the petitioner's §2253(c)(2) debatability showing on the facts or law, with the focus on "debatability" as a possibility, and not something more than that. That "debatability," as the basis of the COA decision on dispositive fact or law can be, and is being evaded by COA panel cursory statements of no debatability, supplemented with the subtle use of pre-***Buck*** standards and language (e.g., the use of the "would not disagree" certainty concept for the "could disagree" possibility concept) and the rejection without analysis, or even mention, of a petitioner's showing's relevant facts, law or presentation on debatability, makes meaningless the two landmark decisions' framework concepts themselves. While the panels may or may not use

procedures or processes by which they first decide the merits of an appeal and then justify the denial of the COA based on that adjudication, all these procedures and processes are being employed in greater and greater numbers at the COA stage not consonant with the limited nature of the debatability inquiry and many times with no debatability inquiry at all, in conflict with the mandates of ***Miller-El*** and ***Buck.*** See ***Buck*** at 774-75.

These procedures, of which ***Cody*** serves as a paradigm, are illustrative of loopholes in ***Miller-El***, especially, which ***Buck***, in part, tried to close, and are causing growing applications of pre-***Miller-El*** philosophies of what COA proceedings are and extreme impediments for allowancesof a COA in many circuits. Those results indicate conflict with ***Miller-El*** and ***Buck***'s spirit, and letter, as to a correct interpretation of 28 U.S.C. §2253(c)(2) and of what a COA decision is; and cause unequal and disparate treatment for COA applicants in circuits, or conflicting panels within a circuit, so inclined versus circuits or circuit panels having no problem easily fathoming and following ***Miller-El*** and ***Buck***'s reasoning, spirit or letter, implicating a violation of equal treatment under law.

Only a few circuits can be said now to have truly definitive up-to-date precedential decisions following both the spirit and letter of ***Buck***, while there is dramatic, noticeable growth in other circuits of evasion of ***Miller-El*** and ***Buck***'s debatability paradigm by superficial, cursory, conclusory "answers" to ***Buck***'s "ask only" admonishment, id., at 774. It is dubious this Court intended only superficial "letter," but not "spirit of the law" compliance with the import of ***Miller-El*** and ***Buck*** as to what the fundamental concept of a debatability review was and should be.

A COA analysis can **only** be made ("...[A]sk **only** if the ...decision was debatable." [Emphasis added]. **Buck,** at 774) using the lodestar and exclusive framework of §2253(c)(2))-created debatability reflecting an analytical distinction between a COA proceeding and a final appellate merits proceeding on an issue, regardless whether that issue is procedural or substantive, regardless whether it is preliminarily predicate to a final issue or not, and regardless whether it is AEDPA deference or not. "Only" be made does not mean both an end-merits §2254(d)-focused analysis and conclusion on dispositive fact or law, on a procedural or substantive issue, on an issue preliminarily predicate to a final issue or not, or an issue on which there is AEDPA deference or not, and a debatability-based analysis or conclusion, can coextend or coexist in the same COA decision. ***Buck***, at 773. ***Cody,*** and these trending, troubling COA decisions cited, making or appearing to make, definitive "merits" determinations on any dispositive issue, and then summarily and conclusorily simply denying, per se, debatability exists, whatever talismanic words are used, critically undermine debatability itself, the core concept behind §2253(c)(2).

This problem is real, and it is growing.

For the above reasons, petitioner respectfully asks this Court to **grant certiorari** on the Questions presented.

Respectfully submitted,

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