Supreme Court, U.S.
FILED
JUN 2 8 2022
OFFICE OF THE CLERK

NO. 22-5802

IN THE SUPREME COURT PF THE UNITED STATES

MICHAEL FETHEROLF,PRO SE, PETITIONER

V.

TIM SHOOP, WARDEN CHILLICOTHE,
CORRECTIONAL INST. RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

Michael Fetherolf
CCI # 724453
P.O.BOX 5500
Chillicothe,Ohio 45601
Pro se, Petitioner

ORIGINAL

Tim Shoop, Warden Chillicothe Corr Inst.
Counsel of records William Lamb
441 Vine Street
1600 Carew Tower
Cincinnati Ohio 45202
Respondent

QUESTIONS FOR REVIEW

QUESTION # ONE: The sixth circuit is in direct conflict with martinez V RYAN 566 U.S.413 and TREVINO V THALER 569 U.S.1. Is a petioner Precluded from relying on MArtinez/ryan to show cause for his procedurally defaulted IATC claim if he filed an "initial" petition for post conviction relief, pro se, and did not appeal even thoug the relevant IATC claim was first raised in a motion for leave to file a new trial motion two years later and fully exhausted?

QUESTION # TWO: Did the Sixth circuit determination conflict with BUCK V DAVIS,137 S.Ct.759 (2017) when it skipped the four prongs of martinez and although incorrectly, prematurely proceeded to decide the exhaustion issue, and then applied an erroneous harmless error review to it's consideration for COA.

QUESTION # THREE: Does the sixth circiut erroneous determination that Fetherolf failed to exhaust the IATC claim conflict with O'Sullivan V Boerckel 526 U.S. 838 (1999) when it is clear that Fetherolf raised his IATC claim with evidence, citation to constitutional authority and federal authority and factual allegations in State appellate courts.

[ ] ALL PARTIES APPEAR IN THE CAPTION OF THE COVER PAGE.

LIST OF ALL PROCEEDINGS IN STATE AND FEDERAL TRIAL, AND APPELLATE COURTS INCLUDING THIS COURT DIRECTLY RELATED TO THIS CASE

Fetherolf V Shoop 2022 U.S.App.Lexis 12443,6th cir court of Appeals denied certificate of appealability on 5-06-2022;

Fetherolf V Warden 2021 U.S.Dist.Lexis.220689 U.S. District court rendered Judgmeat denying certificate of Appealability on 11-16-2021;

State V Fetherolf 164 St.3d 1448 Ohio Supreme Court declined Jurisdiction on 9-28-2021;

Fetherolf V Warden CCI 2021 U.S. Dist Lexis.182825 denied 60 (b) motion for relief from Judgment on 9-24-2021;

CONTINUIED ON NEXT PAGE

Fetherolf V Shoop 2021 U.S. App.Lexis 22759; Sixth circuit court of Appeals. Judgment rendered July 30 2021. Rehearing denied.

Fetherolf V Shoop 2021 U.S. App.Lexis 17952.; Sixth Circuit court of Appeals. Judgment rendered June 15 2021. COA denied.

Fetherolf V Shoop 141 Supreme Court 1711.; United States Supreme court. Judgment rendered March 22 2021. Certiorari denied.

State Ex Rel Fetherolf V Third district court of Appeals. 161 Ohio St.3d 1477; Judgment entered March 17 2021. Ohio Supreme court. Writ of prohibition dismissed.

Fetherolf V Warden 2020 U.S. District.Lexis.230480 U.S. District court for the southern district of Ohio.; Judgment rendered December 08 2020. Motion for relief from Judgment. (60(b)).

Fetherolf V Warden Chilicothe Correctional Institution. 2020 U.S. App.Lexis.35816; Sixth Circuit court of Appeals; Judgment rendered November 13 2020. Rehearing denied.

Fetherolf V Warden Chilicothe Correctional Institution.; U.S. district court for the southern district of Ohio; Judgment rendered October 01 2020, denied (60(b)).

Fetherolf V Warden Chillicothe Correctional Institution; Sixth curcuit court of Appeals; Judgment rendered September 17 2020; denied COA.

Fetherolf V Warden Chilicothe Correctional Institution 2020 U.S. Dist.Lexis.70787; U.S. court of Appeals southern district of Ohio; Judgment rendered April 22 2020; Dismissing Habeas Corpus.

Fetherolf V Warden Chillicothe Correctional Institution. 2020 U.S. Dist.Lexis. 21315; U.S.Court of Appeals for the Sopthern district of Ohio; Judgment rendered Febuary 7 2020; Magistrate recomend di dismissal of Habeas corpus.

State V Fetherolf 2020 Ohio Lexis 135; Ohio Supreme Court; Judgment rendered January 21 2020; Appeal not accepted for review; Prior history ; Third district court of Appeals case Number 14-19-23.

Fetherolf V Shoop 2019 U.S. Dist.Lexis.172003; U.S. District court for the southern district of Ohio; Judgment rendered October 3 2019; Magistrate order denying motions to expand the record; discovery; and counsel.

State V Fetherolf 151 Ohio St.3d 1529; Ohio Supreme Court; Judgment rendered Febuary 14 2018.denied reconsideration.

State V Fetherolf 151 Ohio St.3d 1528; Ohio Supreme Court; Judgment rendered Febuary 14 2018; denied reconsideration.

State V Fetherolf 151 Ohio St.3d 1458; Ohio Supreme Court; Judgment rendered December 6 2017; Decline Jurisdiction.

State V Fetherolf 151 Ohio St.3d 1455; Ohio Supreme Court; Judgment rendered December 6 2017; declined jurisdiction.

State V Fetherolf 2017 Ohio Lexis.1465; Ohio Supreme Court; Judgment rendered July 26 2017; Granted delayed Appeal.

State V Fetherolf 2017-Ohio-1316' Third district court of Appeals; Judgment rendered April 10 2017; Affirmed. (direct Apepal).

TABLE OF CONTENT

INDEX OF OPINION

APPENDIX A; Sixth circuit court of appeals denial of COA on 5-6-2022 reported at Fetherolf V Shoop 2022 U.S.App.Lexis 12443

Appendix D; District courts denial of COA on 11-16-2021 reported at Fetherolf V Warden 2021 U.S. Dict.Lexis.220689

Appendix F; District courts denial of 60(b) motion reported at Fetherolf V Warden 2021 U.S. Dist.Lexis.182825. on 9-24-2021.

TABLE OF AUTHORITIES PAGE#

Michael Fetherolf Hereby petitions this court for a writ of certiorari to review the judgment of the United States court of Appeals for the sixth circuit.

OPINION BELOW

The sixth circuit opinion denying COA on 5-6-2022 is reported at Fetherolf V Shoop,2022 U.S. APP.LEXIS.12443 and is attached as Appendix A; The letter from the clerk returning the petition for rehearing with suggestion for rehearing en banc is attached as Appendix B, and Fetherolfs letter in return is attached as Appendix C; The district courts opinion denying COA on 11-16-2021 is reported at Fetherolf V Warden 2021 U.S. DIST.LEXIS 220689 and is attached as appendix D; The district courts decision denying 60 (b)(1) relief is reported at Fetherolf V Warden 2021 U.S. DIstrict Lexis and is attached as Appendix E;

OTHER MATERIAL BELIEVED TO BE ESSENTIAL TO UNDERSTANDING THIS PETITION

The district courts order denying the motion to amend but permitting Fetherolf to verify his claim in the treverse is not reported and is attached as Appendix F; The Treverse is attchaed as Appendix G; The Ohio Supreme courts decision declining jurisdiction from the third district court of appeals denyial in case number 14-19-23 om 1-21-2020 is reported at STATE V FETHEROLF 2020 Ohio Lexis 135 and is attached as Appendix H; Fetherolfs momorandum in support of jurisdiction is attached as Appendix I; The decision of the third district court of appeals in case number 14-19-23 is unreported and is attached as Appendix J; Fetherolfs briefs in case number 14-19-23

is attached as Appendix K; The decision of the Union county court of common please denying motion for leave to file a new trial motion is attached as Appendix L; The motion for leave to file a new trial motion is attached as Appendix M; The opinion of Dr.Theodore Kessis related to the motion for nerw trial is attached as Appendix N; The union county court of common please decision denying Post conviction relieve petition is attached as Appendix O and the petition for relieve to the union county court of common please is attached as Appendix P;

JURISDICTIONAL STATEMENT

Review is sought of the United States court of appeals for the sixth circuits denial of COA on 5-6-2022. This petition is being filed timely within 90 days of judgment and this court has jurisdiction under 28 USC 2254.

STATUTORY AND CONSTITIUTIONAL PROVISIONS

United States Constitution Amendments 5,6, and 14

28 USC §2254

28 USC§2253

Federal Civil Rule Proc.R.60 (b).

CASE AND FACTS

Fethecolf was convictet before a jury of One count rape. one count gross sexual imposition, and one count intimidation of an attorne witness or victim. The GSI count merged with the rape for sentencing.

After an unsuccessful direct appeal Fetherolf filed a State post conviction petition (PCR petition) (filed 4-25-2017).
The PCR petition raised three claims of Ineffective assistance of trial counsel claims (IATC) (ECF # 13 Pg ID 1184-1206).
The underlying claims # 14 only alleged that counsel failed to investigate, There was no allegation to indicate what counsel was ineffective for not investigating, and there was no citation to any authority or constitution to support the claim. The trial court denied the petition on 6-7-2017 (Pg.ID#1201-1206) holding that the only possible off the record issue was #14, "counsel failed to investigate" The court noted taht Fetherolf did not support the claim with any off the record evidence, and commented "WHAT INVESTIGATION". (Fetherolf did not appeal).

In January 2019 Fetherolf filed a Federal Habeas Petition, Amended on 2-16-2019 (ECF # 7) raising a claim that his counsel failed to investigate an expert witness,
On 9-6-2019 Fetherolf filed a motion to Amend his petition or to clerify his arguments. The district court denied the motion however, permitted Fetherolf to make the necessary changes or clerifications in his Treverse, stating;

"If he needs to further verify the basis of his claims he may do so through the filing of his response for trevers to the return of writ on or before October 13 2020."

On 11-22-2019 (ECF # 54) The respondant filed a motion to expand the record to include the opinion of the 3rd district court of Appeals and the memorandum in support of jurisdiction to the Ohio Supreme Court, regarding the IATC claim at issue.

On 1-21-2020 (ECF # 66) Fetherolf filed a notice of State court exhaustion.

On 11-26-2019 Fetherolf filed a second motion to Amend (ECF#53) to include the IATC claim envolving Dr.Kessis's opinion, Alleging that trial counsel was ineffective for not investigating the DNA evidence, and for not putting on a defense.

On 11-27-2019 Respondent opposed Fetherolf's motion to Amend, however he was not completely in opposition. He had stated that the Motion to to Amend;(ECF.No.55)

"Should be denied unless Fetherolf can clearly identify just what is new in the amended petition in relation to the current petition that cannot be effectively covered in a treverse."

Fetherolf responded on 12-02-2019 (ECF.No.56) and identified AS REQUESTED BY THE RESPONDENT what claim he was assurting new. The respondent also said it could be assurted in the treverse.

On 12-11-2019 (ECF#57) Fetherolf filed his treverse. In the treverse he verified the IATC claim as was permitted by the magistrate judge when denying the motion to Amend or clerify at ECF#41.

On 2-7-2020 The Magistrate denied Fetherolfs motion to amend and stay, holding that the motion to stay was moot because fetherolf had exhausted his IATC claim. and denied the motion to Amend because the IATC claim was defaulted. SEE FETHEROLF V WARDEN Chillicothe Corr. Inst.2020 U.S. Dist.Lexis.21315 at *20-28. The district court adopted the magistrates recomendation at FETHEROLF V WARDEN Chillicothe Corr Inst. 2020 U.S. Dist Lexis 70787 at *24-26. The Judge also determined that the 2019 NT motion was irrelevant because the State court had defaulted the NT motion as untimely see Fetherolf 70787 at *10-11, and dismissed the petition. (ECF #68). SEE ECF # 71,72,and 73 for Fetherolfs objections to the magistrates decsion, and ECF.No.75 and 76 for the district courts decision

The Sixth circuit court of Apepals denied Fetherolf a certificate of Appealability on 9-17-2020, in Fetherolf V Warden Chillicothe Corr Inst. 2020 U.S. App.Lexis.29845, and Denied petition for rehearing on November 13 2020 in FETHEROLF V WARDEN Chillicothe Corr Inst.2020 U.S. App.Lexis 35816. This court denied Certiorari on 3-22-2021 at Fetherolf V Shoop,141 U.S.S.Ct.1711.
In January 2021 (ECF No.98) Fetherolf filed a motion to set aside judgment pursuant to Civ.R.60(b)(1). The district court denied the motion on 9-24-2021 (ECF No.102). Fetherolf filed an application for certificate of appealability (COA) to the district court and the district court denied it on 11-16-2022 (ECF.No.106).

PETITION FOR REHEARING WITH SITH SUGGESTION FOR REHEARING EN BANC. Fetherolf filed a petition for rehearing pursuant to App.R.35 and 40; I, Fetherolf will first note that if you look at the sixth circuit docket in Case No.21-3985 you will see letters sent to be placed on the record because the institution has been tampering with my mail by not sending it out and not giving it to me. The first COA was sent out and never mailed by the mailroom. Fetherolf had to have his family call the case worker at the sixth circuit and he even sent letters explaining the issue and providing the numbers of kites and grievances regarding the issue. The case worker gave him more time and he had to re file it.

After the sixth circuit denied COA Fetherolf sent in a motion for an extention of time to file a petition for rehearing. The sixth circuit denied that on 5-17-2022, However Fetherolf had already sent out his petition on 5-16-2022. The clerk recieved the petition on 5-23-2022 and sent it back to Fetherolf as being untimely on 5-24-2022. However the petition should have been filed and dated for 5-23-2022. Appeal rule 25(A)(iii) says when an inmate mails in a document to be filed it is considered filed when the time stamp is on the postage of the envelope, However there was no time or date on the envelope. That it inconsistant with normal procedures and unexplainable, however there was a stamp on the envelop of the letter that was filed after that. and even without the time stamp USCS FED RULES APP PROC R 26(c) provides an extra 3 days when a party must act within a a specified time after being served and the paper is not served electronically on the party or delivered to the partyu on the date stated in the proof of service and USCS FED RULES APP PROC R 35 and 40 require petitions for rehearing and

en banc petitions to be filed 14 days after the judgment rendered, which means the petition was due on 5-20-2022 but when you add 3 days pursuant to Rule 26 (c) the date becomes 5-23-2022. The records shows that the clerk recieved the petition on 5-23-2022 therefore it should have been filed on that day not held antill the 24th and mailed back. Fetherolf now submits this certiorari to this court.

REASONS FOR GRANTING THE WRIT

REASON # ONE:

The sixth circuits decision is in direct conflict with Martinez V Ryan 566 U.S.413 :/. Trevino V THaler 569 U.S. 1; I s a petitioner precluded from relying on Martinez and trevino to show cause for his procedurally defaulted IATC claim if he filed an "initial" petition for post relief control, pro se and did not appeal even though the relevant IATC claim was first raised in a motion for leave to file a new trial motion two tears later and fully exhausted?

"A finding that a defendant's state law "procedural default" rests on "an independant and adequate state ground" ordinarily prevents a federal habeas court from considering the defendants federal constitutional claim. COLEMAN V THOMPSON 501 U.S. 722,729-730,111 S.Ct.2546 115 L.Ed.2d 640. However a "prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law" MARTINEZ,SUPRA,at 10.132 S.Ct.1309 182 L.Ed.2d 272 283. In MArtinez the court recognized a "Narrow exception" to COLEMAN's statement "that an attorney's ignorance or inadvertance in a post conviction proceeding does not qualify as cause to excuse a procedural default" 566 U.S. at 9 132 S.Ct. 1309 182 L.Ed.2d 272 278 282/ That exception allows a federal habeas court to find "cause" to excuse such default where (1) the ineffective assistance of counsel claim was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding ; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective assistance of trial counsel claim" : and (4) State law requires that the claim "be raised

in an initial review collateral proceeding" id at 14 17 132 S.Ct. 1309 182 L.Ed.2d 272 288 Pp 421-423 185 L.Ed.2d at 1051-1053" SEE TREVINO 569 U.S. at 414.

Martinez and Trevino apply in this case because; Ohio Law requires petitioners to raise off the record IATC claims in a state collateral proceeding. SEE WHITE V WARDEN ROSS CORR Inst.940 F.3d 270 *277-278 (6th cir 2019).

Fetherolf filed his "initial" post conviction petition in April of 2017 (see APPendix P) and fetherolf filed that petition PRO SE because he did not have counsel to assist him in obtaining meaningful review.

The initial pro se petition alleged that trial counsel was ineffetive for multiple reasons, however the only claim that could possibly be considered off the record was the one line sentence "counsel failed to conduct an investigation" (Appendix P) The trial court denied relief stating "WHAT INVESTIGATION?" (see Appendix O). The one line statement is not supported with any constitutional citation, is not supported with state or federal authority and is not even supported with an argument to indicate what trial counsel is alleged to have failed to investigated.

At the end of 2018 Fetherolf's mother was in contact with Dr.Theodore Kessis.(DNA ANALYST). In Febuary 2019 Fetherolf recieved an opinion from Kessis that contradicted the States experts testimony. (SEE APPENDIX N), It stated that BCI's serology evidence failed to identify any biological source (blood, semen, saliva, etc). He said

the evidence reported a "VERY SMALL" amount of DNA, and that the DNA could have been transfered via "CASUAL or INNOCENT" transfer event. The report by Kessis directly contradicted the testimoy of the Sttes expert witness Hallie Garofalo, stating that based on "HOW MUCH" DNA she detected the transferwas not from "CASUAL" touch. Through questioning she said it would take either a body fluid or more skin cells that from casually touching some item.(ID#2163-2164). Fetherolf filed a motion for leave to file a nbew trial motion based on Dr,Kessis opinion that clearly rebutted and contradicted that testimony by the states expert.(SEE APPENDIX M). arguing that his trial counsel was ineffective for not investigating the DNA evidence and presenting a defense against it. This was supported with citation to federal authority, constitutional law, and a very concise argument. The trial court denied it (APPENDIX L) and Fetherolf appealed to the third district court of Appeals. (APPENDIX K). The third district court of Apepals affirmed the trial courts denial of the motion as untimely and res judicata, (APPENDIX J). Fetherolf then sought review of the Ohio Supreme court (APPENDIX I) and they declined to accept jurisdiction.(APPENDIX H).

It is clear that Fetherolf has satisfied three of the prongs that are required for showing cause under MARTINEZ AND TREVINO, because he did not have counsel at his "INITIAL" post conviction filing, and Ohio requires IATC claims to be raised in "INITIAL" post conviction proceedings, and the default occured at the "INITIAL" post conviction proceeding. FETHEROLF has also satisfied the fourth prong because the IATC claim that he presents is a "SUBSTANTIAL" claim, for the following reasons;

Petitioners Ineffective Assistance of Trial counsel claim "has some merit" as required by Martinez and Trevino, and it satisfies the prejudice prong of Strickland V Washington.466 U.S. 668 (1984);

Petitioners counsel failed to investigate the States DNA evidence, corrospond with or call an expert on petitioners behalf, and as a result of his deficient representation in failing to investigate a defense he was not knowledgable emough to address any areas of contraversy, such as Methodology, human errors, contamination, lack of expertise, or bias. There was an unquestionable breakdown in the adversarial testing process, and counsel was unable to counter any of the States testimony without the knowledge an expert would have provided and he simply accepted what the state expert witnesses said without question.

TERESA WARNIMONT;

Warnimont is the s.a.n.e nurse that was working the dayna.c. was taken to nationwide hospital on September 24 2013.

Warnimont collected evidence, she said that meant that "We do a--collect a bunch of swabs looking for DNA fluids, anything that would not--that would not be the childs that we would find on his or her body," (ID1995). Warnimont's testimony is very limmitted regarding the swabs she collected, however what she did collect was sent to BCI for testing. Warnimonts questioning by the State is sixteen (16) pages in the transcripts about the DNA (ID2005-2021). Warnimont is a NURSE, not a DNA analyst, however a large portion of her testimony was about slides, or swabs, most of which were created by David Ross from BCI.

Warnimont was questioned extensively about the underwear,(ID2005-2007)

however she did not conduct any type of testing on the underwear, her job was to put them in a bag. Thats it. Nothing more was required. she was extensively questioned about Ross's work product, and she testified "WE" collect swabs looking for fluids. (ID1995). She did not look for anything. She further testified;

A; These are swabs that we would do in any area where we were told that the alleged perpetrator kissed or licked or had some sort of contact with. In the absence of specific disclosure of having licked or kissed we automatically would swab the bilateral inner thigh.
Q= And when your then talking about things like looking for like saliva?
A; Correct.
Q;Okay,Amylase?
A;Correct.
Q; And you did that in this instance,correct?
A; Yes, I did the inside of her thigh.
Q; However, that type of transfer is the result of what type of contact?
A;Some sort of contact.
Q;By the mouth?
A; Could be someone licked a finger and touched there, could be someone kissed there, could be lots of different--
Q; To transfer that?
A;--To transfer that material, correct.

Warnimont is NOT a BCI analyst, "WE: did not test for anything, her job is to collect swabs, place them in a bag and leave it to be picked up. Her testimony implies that she done testing that she did not do, nor was she in a position to do any such testing.

Through questioning the State and his witness made it sound as though the evidence colected was "saliva" that it transfered "by the mouth", by someone who "kissed or licked" there, despite the fact that all testing for any type of bodily fluid was negative, and there were absolutly no accusations of any of that.

The questioning by petitioners counsel only covered about Five (5) pages of the transcripts (ID2021-2025). and that was void of any meaningful adversarial testing due to his lack of knowledge in the area of DNA, becouse he never investigated an expert.

David Ross (BCI analyst) testified thah he recieved the "Rape kit" (item 1) (ID2131). Ross testified that after cleaning his are he would begin "testing for body fluids such as semen and salive"(ID2132). Ross says he looks over the item with an "alternative light source" which basically highlights any kind of staining. Biological fluid staining on the item. He said when looking for semen, he conducts a three (3) part test. The first, is a color change test. Ross says "I lay a sheet of paper down, a moist sheet of paper on the item and then I apply a reagent, a chemical to it that, if I observe a color change,from colorless to kind of a purple-pink color, that indicates semen may be present, It's not-- it's not specific to smen but it's very sensitive to a component of semen."

If Ross idebtifies a color change he will take a small sample from that area and will make a slide to view under the microscope for the presence of semen. If that is negative, then the third test, called prostate-specific antigen, or PSA, and if two lines appear it's negative. (ID2133-2134).

Ross conducted this manner of testing on the vaginal swabs, no semen

identified, The anal swabs, no smen idetnified, The oral swabs No semen identified, and the underwear, No smen identified.
Ross said nest he took a swab of the underwear that would be sent forward for further DNA testing. He said No smen or salive was id identified on the swabs from the inner thighs, (ID 2134-2135).
Ross had cut the underwear in half so it would lay flat, then he used a black magic marker to0 dot areas where he saw staining under his alternative light source, so he could identify the area later without the light, and there was a cut out in the crotch of the underwear where he had cut out a piece to do the second part of his testing. (ID 2138)
Ross took pictures of the underwear before and after his testing, The following testimony occured;
A; This is the photo that I generated of BCI'a item number 1.7 thhe underwear found in the rape kit.
Q; On it, there are some items. On the right side of this photograph, is that the picture of the underwear after you had cut them?
A; Yes, it is.
Q; Below it there appears to be an intact pair of underwear. Are those the underweare before you cut them?
A; Yes.
Q; Now, on examination if we start at the top of this photo, what appears to be--what portion of the underwear would be at this top?
A; That would be the interior of the front panel that your observing.
Q; Then it appears on those underwear there's like a seperate typ pad of material that's in what would be the critch area?
A; Yes
(ID2139-2140)

Ross then further discussed the cut-out he took from the crotch area of the underwear, and the testing for semen. He clerify's that he "moistened" the sheet of paper then places it on the item (underwear) then removes it with any potitial traces of semen, then places the color changing die on the paper and if it changes color then he has found semen. In this case he did not. (ID2140-2142). However the point is the moistened the item by putting that paper on it, which is by itself a forieghn object causing contamination.

Ross says After the semen testing came back negative, "I collected two swabbings fron the underwear" The first swabbing from the interior of the crotch and front panel of the underwear.

The two swabs were item 1.7.1. A;crotch and fron panel, and item 1.7.1. B, the waistband of the underwear.

The State questioned Ross for 19 pages in the transcripts.

Petitioners counsel only questioned Ross for two (2) pages of the transcripts.

Petitioners counsel was simply not knowledgable of the evidence becouse he never conducted any type of investigation into it, and he never spoke with any type of expert on petitioners behalf.

Ross cross-contaminated the evidence when doing his testing. First ross made it very clear that he uses a "moist" piece of paper to rub on the item, (ID 2134) and (ID2135). Ross says "AFTER" doing that test he took swabs of the crotch and front panel which were forwarded for further testing, (ID2142). Ross not only cut pieces out of the item, but he dotted a bunch of dots on the item with a black magic marker and contaminated the item with a "reagent" by placing a most piece of paper on the item, and then on top of all that he uses only

one swab to collect evidence from both the crotch and the front panel despite having already told the Staet that the front panel and the crotch of the underwear were TWO SEPERATE areas of the underwear. (ID 2139-2140).

Petitioners counsel was completely ignorant of this evidence and he failed to engage in adequate adversarial testing. In fact he left the Staets testimony unquestioned and uncontested. Rather than investigate and angage in adversarial testing he accepted the staes witness testimony as accurate and trua.

Hailie Garofalo;

Garofalo conducted the testing on the swabs that were collected by Ross and forwarded. Garofalo testified there were four swabs of items including the vaginal swab, item 1.2; the anal swab, item 1.4; the swab from the crotch and front panel, item 1.7.1 A; aNd swabs from the waistband item 1.7.1.B; (ID 2154).

Garofalo testified that she done conventional DNA testing which came back consistant with a.c. only (ID 2155-2156).

Garofalo testified that she identified four additional peaks on the waistband but due to insufficient data, no conclusions could be made regarding the source of those peaks.(ID 2156).

She then talks about Y-STR testing and how it is used to identify male Chromosomes which are only found in males, and how this type of testing identifies Y-chromosomes when there is a mix between male and female DNA. (ID 2156-2157).

Garofalo compared swabs taken from petitioner with a "partial Y-chromosome DNA profile" with the swab used on the crotch and front panel. Garofalo said it came back consistant with petitioner.(ID2161)

Garofalo testified that the numbers at this time were roughly 1 in 4,167 male individuals, she said the number is contengient on how many sample they are comparing in the data base, (ID 2162-2163).

The follwoing testimony was had;

Q;What are the advantages of Y-STR testing?

A;The advantages are being able to detect male DNA when, in other NDA that could be masking or hiding any male contributors.

Q; And in this instance this type of a result, would be consistant with touch transfer?

A; In my expert opinion based on how much DNA I detected, that's not typical of just casual touch from here's a pair of underwear I'm handing you and leaving DNA behind. I did detect close to a full profile, a significant amout of male DNA.

Q; In order to do that or to have that what would be required --.

A; Either a body fluid or more skin cells than just say from casually touching some item.

Q; And the fact that these swabs were taken from the rim of the underwear and the crotch area, does that have a bearing?

A; It was specifically on the crotch and front panel that I detected the male DNA profile in this case.

Q; Would that be consistant with skin transfer?

A; It's --

Q; In that area?

A; That's possible, yes.

(ID 2163-2164).

The Judge ordered the witness be asked if in her expert opinion based on a scientific degree of certainty what caused the Y-STR to be there. The prosecutor, tip toed around asking that question and chose to ask

her if in her experience and qualifications the Y-chromosome taken from the panel and the rim of the underwear was consistant with that of the petitioner. (ID 2167). He further asked if it was consistant with somebody who had put their hand into that area of the child with those undewear on. to which she confirmed. (ID 2168).
The prosecution says "So the point is tou have a considerable amount of Y-chromosome evidence in that location, and that being there is not "As you, I believe indicated" is not from casual contact." Garofalo answered that by saying "It's possible, I cannot say how that DNA got there, I cannot say when that DNA got there" (ID 2168). However the witness had already said that it was from more than casually touching some item, likely a bodily fluid. Therefore based on her latter statement her prior statement was improper, and when petitioners counsel asked her to review Ross's report she refused to relay it accurately, as follows;

Q;I'm handing you what has previously been marked State's exhibit 18 for identification purposes. Would you take a moment please, take a look at that document. Have you had a opportunity to review the document?

A;Yes.

Q;And would that be the same report of David ross generated in the a.c. matter?

A;Yes.

Q;And you would have had an opportunity to review that prior to performing your examination, is that correct?

A;Yes.

Q;And you see on there where Mr.Ross had tested for the vaginal swabs and found no semen, is that right?

A;correct.

Q;Anal swabs, no semen identified, correct?

A;Correct.

Q;Underwear, no semen, correct?

A;Correct.

Q;And finally, skin swabs of bilateral inner thighs no semen?

A;Correct.

Q;And no amylase, correct?

A;Correct.

Q;So would this seem to indicate that no amylase was found in the underwear sample that was provided, is that correct?

A;It doesn't look like the undewear was tested for amylase.

Q;Well, so would it be fair to say that there was no amylase in the underwear?

A; No it would not, if it wasn't tested for, we can't testify to that.

Q;But, if it was present it would be or it would have been -- if it were tested for and present it would be in the report, correct?

A; it should be, I didn't perform this testing though so I can't testify to that.

A; I guess my point is, you said there's -- for Y strand DNA, there are two methods by which it can be placed?

A;There are multiple methods by which it can be placed, you can deposit a body fluid, you can leave skin cells behind.

Q; so it could be placed by saliva?

A;it's possible.

(ID2173-2174).

Petitioners counsel was not educated at all in this type of evidence, he should have atleast known the different type of possibilities how it could get transfered, and he should have never intertained the idea that it could be deposited through saliva. Especially when you consider that this case had absolutly nothing envolved that would indicate that and the report generated by David Ross said all such testing was negdtive.

The prosecutions witness testified that the Y-STRwas more than what you would find from just casually touching some item, However when asked by counsel to look at Ross's report and relay the findings accurately which is that there was no findings of saliva, regardless to whether or not it was tested for, she refused to say that, despite the fact that she already did for the state in a false and misleading manner. Therefore based on her latter testimony her former testimony was false and improper, And petitioners counsel was unable to engage in any meaningful adversarial testing becouse he accepted what thhe States expert said without question, and he had not investigated the evidence at all which lead to a complete breakdaown of the adversarial testing process. Petitioners counsel was completely ignorant of this evidence, and his very minimal questioning only relayed what the prior testimony had been.

In Strickland V Washington 466 U.S. 668.687-88 104 S.Ct.2052.80 L.Ed.2d 674 (1984) The Supreme court established a two prong test by which to evaluate claims of Ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel the petitioner must prove; (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsels

deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. It is well established that "counsel has a duty to make reasonable investigation of to make a reasonable decision that make's particular investigation unecessary" see STrickland 446 U.S. at 691. The duty to investigate derives from counselssbasic functions which is "to make the adversarial testing process work in the particular case" LIMMELAM V MORRISON,477 US 365 384 106 S.Ct. 2574 91 L.Ed.2d 305 (1986) (quoting strickland 466 U.S. at 690).This duty includes the obligation to investigate all witnesses whoimay have information concerning his or her clients guilt or innocence" TOWNS V SMITH 395 F.3d 251 258 (6th cir 2005). "In any ineffectiveness case a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsels judgment" STRICKLAND, 466 U.S. at 691. "The relevant question is not whether counsels choices were stratigic. bat whether they were reasonable" ROE V FLORES, ORTEGA. 528 U.S. 470 481 120 S.Ct. 1029 145 L.Ed.2d 985 (2000); accourd CLINKSCALE V CARTER, 375 F.3d 430 443 (6th cir 2004).

A purpertedly strategic decision is not objectively reasonable "When the attorney has failed to investigate his options and make a reasonable choice between them" HARTON V ZANI,941 F.2d 1449 1462 (11th cir 1991)(citying in COMBS V COYLE 205 F.3d 269 288 (6th cir 2000). "It is the duty of the lawyer to conduct a promp investigation of the circumstanses of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction) (Quoting 1 ABA standard

for criminal justice 4-4.1 (2d ed 1982 Supp)) SEE RICHEY V BRADSHAW 498 F.3d 344 363 (6th cir 2007) citing ROMPILLA V BEARD 545 U.S. 374,387 125 S.Ct.2456 162 L.Ed.2d 360 (2005). also see RICHEY at 363 citing WIGGINS V SMITH,539 U.S. at 527,123 S.Ct.2527 156 L.Ed.2d 471 (stating that "Strickland does not establish that a cursory investigation automatically justifies a tactical decision ; DRISCOLL V DELO, 71 F.3d 707 709 (8th cir 1995) (Holding that even where defende counsel elicited a concession from the states expert that whether a particular blood type was on a knife was entirely speculative, defense counsel was defective for having failed to take measure "to understand the laboratory tests performed and the inferences that one could logically draw from the results; DUGGS V COPLAIN,428 F.3d 317 328 (1st cir 2005) (holding that where defense counsel visiually inspected the fire scene himself, talked with the State's experts, did some limitted reading and talked with other defense attorney's he nonetheless failed to adequatley investigate an available defense.

The prosecutor relied heavily on this evidence, even when questioning the s.a.n.e.. Three quarters of her testimony was about the DNA, and the underwear which she had very little to do with, and a significant portion was in discussing David Ross's testing, which she knew nothing about. This questioning was lead by an overzealous motivation to mislead the jury to believe that the NDA was "saliva" that it transfered "by the mouth" possibly from somebody who "kissed or licked" that area. These statements have no place in this case. Petitioners counsel had no clue where to begin to counter any of this testimony and the prosecution relied on this even further

in his close relying on the manner of evidence collection to mislead the Jury on the location where the evidence was identified commenting;

"He did it by contact with that swab which is -- you'll -- I man, if you want to look at it, it's a cotton end and he rubbed it over that panel, the crotch panel of that childs underwear"(ID2250). (ID 2250).

""Now remember it's transfer, it's cotton. I know I have a number of ladies on this panel, you know what the crotch of this little childrens underwear are and I'm not talking about -- I'm not talking about a swab I'm talking about putting a pair of panties on and that child has warn them for how long and there's what, there's transfer?"(ID 2250).

"Now the child says her dad took her panties off, she was wearing the panties when she went to childrens, so you have continual contact and transfer, and you want to talk about the vagina and you want to talk about digital. Number one it's little, not a lot of surface area. Number two it's in an area which you heard the testimony that basically almost self (inaudible) you urinate. You go to the bathroom. You use toilet paper, your cleaning, so the fact that your not going to find something "in there" that's not unusual" (ID 2251).

"I heard talk on cross examination about that was -- could have been fluuids, sweat, well, your going to wipe your sweat with your childs underwear on that crotch, really reasonable, are you going to spit on it" (ID 2252).

The prosecution also mistates the testimony of the B.C.I. analysts to make it sound as though they said it was saliva and that it was on the childs skin and transfered to the crotch of the underwear;

"In states exhibit 18 are the little girls panties, the front is at the top, David Ross tells you how he did the rape kit, analsis, vaginal swabs, no semen identified, Not on oral swabs, no semen identified, DNA standard was taken for alyssa to check for figer nail scrapings, none was examined, had hair standard never were examined and then skin swabs, the inner thigh of alyssa that were taken by the s.a.n.e nurse Terri Warnimont, reason being if there was any other type of activity where there would have been skin contact on her thigh they look there to see is there is anything there, not just skin transfer but things like amylase or salive and he even talks about that in this instance and there wasn't any noted but he does talk about that underwear which states exhibit 12-Box and he also noted 12-B Which were drying stains, saliva stains" (EMPHESIS ADDED) (ID 2248-2249).

"I heard talk on cross examination about that it was -- could have been fluids, sweat, well, your going to wipe your sweat with your childs underwear on that crotch really reasonable, are you going to spit on it" (ID 2252).

"What is there is Y chromosome, what is there is consistant accourding to hailie with what could be transfered by hand touch and the fact this child is wearing the underwear, it's like putting it in a cup. She puts the underwear on and what else is there? The childs skin and the Y-Chromosome that on it, and it transfers" (ID 2253).

"You can take the panties out and look at them, if you want to, ther're here, He made notations on it, He cuut them apart, he took swabs and check at that front for possible DNA didn't note any which is later refered to by hailie Garofalo, but he also then took -- and I think this is very important He took swabs inside the blue area which is basigally the crotch area of those panties" (EMPHESIS ADDED) (ID 2249).

These comments by the prosecution falsly tell the jury that the experts said the DNA was "saliva" that it was on the childs skin, that it transfered to the crotch of her underwear, and that the only reason they did not find it "IN THERE" is becouse she washed it away by using the bathroom, etc. This evidence cannot be simply discarded as harmless.

The only other evidence presented by the prosecution was hearsay testimony from several people giving inconsistant statements.
Kara Tenihill, (ac.s aunt) testified that a.c. told her she was touched. (ID 1805). Nothing further was said about how when or where.
Kaitlynn Ruddy (Delaware conty Job and family services) testified that a.c. told her she was touched, (ID 1952) nothing was said about how when or where.
Laura Kato (social worker, nationwide hospital). Kato testified a.c. told her she was touched, and the touching was "Just the outside." (ID1898) This testimony gave some details of the allegations however much of what she relied on was disclosed by heather.(a.c.s mother).

The State also presented testimony from Heather cunningham (a.c.s mother) and Linda Tenihill (a.c.s grandmother). Heather and linda both testified a.c. told them he stuck a finger in her, (ID1767 and 1832) However both of them fail to say how, when or where this allegedly happened, and they do not evn say WHERE he allegedly stuck his finger.

A.C. testified in a deposition and never gave any account of any crime ever taking place, However she did acknowledge having spoke with her aunt Kara, and the medical staff. But when asked by the prosecution about speaking to her mother (heather) or her grandmother (linda) she shook her head in the negative indicating that she did not. (TWICE).

The States case is based intirely on hearsay, and the Rape count is based intirely on hearsay from two people who a.c. indicated she never spoke with, Furthermore a.c. told Kato the touching was "Just the outside". There is no way this error can be harmless,

Petitioner did contact an expert, becouse the State trial court madde it clear that they would not entertain a post conviction without the evidence, although they denied petitioners motion for such evidence at the same time, they still made that clear, they took advantage of petitioners lack of knowledge in the law and the fact that he had no counsel to represent him. However petitioners expert reviewed the States serology evidence and reported that.; "Given the small amount of DNA and the lack of a biological source, the DNA could have been transfered via casual or innocent transfer event.

Kessis opinion would have supported petitioners theory that the

DNA trebnsfered while folding laundry. Kessis opinion did not reflect his entire opnion, it was a brief look at what he had to testify about, however becouse there was never a hearing petitiner was unable to develop the record. However if petitioners counsel would have investigated and hired an expert to interview at the very least he could have been much more prepared to cross examine the witnesses, as it is he was not educated at all.

This evidence was significant to the States case, However due to the deficiencies of petitioners counsel there was a breakdown in the adversarial testing process. Petitioners counsel never conducted any investigation, and was therefore unable to counter any of the testimony regarding the Y-StR testing. Counsel chose to rely and accept everything presented by the prosecution without question. he failed to address any area of contraversy leaving uncontested the false testimony, and never even asking why the partial profile on the v waistband was never checked for Y-STR. Petitioners counsel naver questioned the metholodogy, never questioned why they cross-contaminated the evidence, or why there was so much testimony about saliva, or the crocth, or the general false and misleading manner or presenting the evidence.

Petitioners counsel at the very least could have called into question the reliability of the evidence and witnesses, and at a bare minimum could have called into question the methodology and credibility which may have been enough to sway the Jury to assign less weight to the DNA evidence.

There is a reasonable probability that had defense counsel offered any defense at all to the States DNA testimony and presentation the Jury would have found petitioner not Guilty.

In FIFIELD V SEC'Y Dept of Corr 2019 U.S. Dist.Lexis 117409 the U.S. district court of Apepals dismissed fifields habeas claim because it was unexhausted and procedurally defaulted. Fifield has filed a State post conviction petitio9 in the florida State court, it was ulkti ultimatly dismissed and fifield did not file an appeal. The 11th circuit in FIFIELD V SEC'Y 849 Appx.829 (11th cir 2021) determined that the default occured at the State post conviction level because fifield did not have counsel, see Fifield 849 Appx 829 at *832-833. however they denied because the calim was not substantial.
In MARTINEZ V RYAN 566 U.S. 1, after being convicted in State court Martinez was appointed counsel for direct appeal, while that was pending his attorney initiated the post conviction process, however later filed a motion similar to an anders brief. The State court gave Martinez 45 days to file a pro se petition. MArtinez did not respond and the petition was dismissed, MARTINEZ DID NOT FILE AN APPEAL FROM THE DISMISSAL OF HIS PETITIOIN., a year later Martimez obtained new counsel who filed a second IATC claim challenging the counsels ineffectiveness for not challenging the States DNA expert.
The U.S. Supreme court determined Martinez has shown cause for his procedural default of the first post conviction.

In the instant case Fetherolf filed an "initial" post conviction and raised an IATC claim but it did not alert the State court to any specific factual, or constitutional violation. The trial court actually said "WHAT INVESTIGATION". Fetherolf did not file an appeal. Fetherolf later (two years) filed a motion for leave to file a N.T. motion, based on the opinion of Dr.Kessis, and exhausted it through the States Apepal process.

If the jury would have heard testimony from Dr.Kessis stating that the DNA could have transfered via casual or innocent transfer event it would have rebutted the States experts testimony that it was not from casually touching the underwear. When the States expert testified that the DNA could not have been transferedby casually touching the item she effectively destroyed the most reasonable explanation for the Y-STR being there, so any consideration the jury might have had that the transfer was caused from folding laundry, washing clothes or doing routine care of the child was eliminated when Hallie told the jury it was not from casually touching the item.
Dr.Kessis's testimony would have shed nw light on that possibility and at the very least would have caused the jury to give less wieght to the DNA evdience.

The Sixth circuit court of Apepals determined that MArtinez and Trevino could not excuse Fetherolf's failure to Apepal the denial of his "initial" PCR petition, and that the failure to Appeal the PRR petition resulted in the procedural default being at the appellate level/ SEE FETHEROLF V SHOOP 2022 U.S. APP.12443 *8-11.(APPENDIX A). However that decision completely ignores the fact that the relevant IATC claim was raised in the 2019 motion for leave to file a new trial motion and exhausted through the State Appellate process,(SEE APPENDIX M,L,K,J,I,H,and N) also see FETHEROLF V WARDEN CCI 2020 U.S. DIST.LEXIS.21315 at *20-22. denying Fetherolfs motion to stay as moot because it does not appear there are any unexhausted claims and Fetherolf filed a notice of State court exhaustion. The sixth circuit seems to believe that a pro se petition in State court is a meaningfull opportunity and a petitioner is precluded from relying

relying on Martinez and Trevino for cause to excuse a procedural default if he fails to appeal the PCR petition, regardless to whether or not the relevant IATC claim was first raised and exhausted in a seperate state court proceeding.

The federal Habeas courts have ignored Fetherolf's exhausted 2019 N.T.Motion. SEE FETHEROLF 21315 at *17 and *23, Where the Magistrate determined that the IATC claim that was exhausted in State court was res judicata and procedurally defaulted. In Fetherolf 70787 at *10 the district court determined that the 2019 N.T. motion was "Irrelevant" because it is defaulted, and at *12 the district court held that petitioners are "required" to raise off the record IATC claims pursuant to Ohio R.C.2953.21 and In Fetherolf 29845 at *4-5 the Sixth circuit acknowledged the exhausted IATC claim in the 2019 N.T. motion however never actually considered the IATC claim itself. All three reviews in the Federal courts acknowledge the 2019 N.T. motion and the facts that it was exhausted, However when the district court considered the 60(b)(1) motion there was absolutely no mention by the justice of the 2019 N.T. motion and the Martinez/ trevino argument was rejected based on her previous habeas determination where she defaulted the IATC claim, However the question that the district court should have been answering was whether that default could been overcome through Martinez and trevino, NOT whether it was defaulted already.SEE Fetherolf 182825. The district court reaffirmed it's decision when deciding Fetherolf's application for COA holding that Fetherolf's IATC claim is not substantial because it was already defaulted. SEE FETHEROLF 220689 at *4.(Appendix D). The district court also points out at *5 that Fetherolf is only raising the same claim already raised and defaulted, and when the

Sixth circuit denied Fetherolfs COA application it overlooked the clearly erroneous interpretation of MArtinez and Trevino, and then it's self ignored the fact that the IATC claim was raised and exhausted in the 2019 N.T.proceedings. The Sixth circuits decision is in direct conflict with MArtinez and Trevino.

QUESTION #TWO: Did the Sixth circuits determination conflict with BUCK V DAVIS 137 S.Ct.759 (2017) When it skipped the four prongs of Martinez and although incorrectly, prematurely proceeded to decide the exhaustion issue, and then applied an erroneous harmless error review to it's consideration for COA.

The only review that was required for this issue was (1) Whether Fetherolf had counsel during his initial State post conviction.(2) Whether the State of Ohio requires or permits IATC claims to be raised in State post convictions for initial review. (3) Whether the proceeding was the Initial State court proceeding, and (4) whether the IATC claim was substantial.

In BUCK V DAVIS 137 S,Ct.759 (2017) this court reversed and remanded the 5th circuit court of Appeals denial of COA because there decision exceeded the scope of review for deciding whether or not to issue a COA by deciding the merits of the IATC claim then denying COA based on that consideration.

In the instant case the sixth circuit held that Fetherolf's IATC claim was unexhausted, and therefore martinez and trevino did not apply. SEE FETHEROLF 12443. (Appendix A). However Nothing in the four prongs of Martinez require or permit the lower courts to base it's decision on whether or not an appeal was filed from the

initial State post conviction proceeding. The Sixth circuit has exceeded the scope of Martinez, the scope of COA review under 28 USC §2253 and is in conflict with BUCK v DAVIS, by failing to consider the four prongs and basing its decision on State appeals courts rather than considering the 2019 N.T. proceedings. The Sixth circuit determined the defaulkt occured when Fetherolf failed to appea the initail post conviction, However the default occured when Fetherolf filed pro se without counsel in the 2017 Post conviction motion.

The sixth circuit also exceeded the scope of COA in conflict with Buck v Davis 580 U.S. 100(2017) in it's alternative ruling, after erroneously atributing the facts of the IATC claim raised in the 2019 N.T. motion to the State post conviction petition, then applied an incomplete harmless error review, stating;
"Fetherolf did not make a substantial showing that he was prejudiced by counsel's alleged deficient performance in light of the overwhelming evidence of his guilt that was presented at trial."
The sixth circuit then cited testimony from Laura Kato regarding statements she obtained. However her statements did not amount to sexual conduct under State law RC.2907.01, and did not amount to Rape under 2907.02. Furthermore, the Sixth circuit left out the other statements that said any touching was "Just the outside" and effectively denied any rape accusation. She relied on testimony from the doctor saying she "BELIEVED" a.c. had been abused. That is the basis of another ground for relief and is not proper, however it is not overwhelming evidence, and lastly she relied on Hallie Garofalos testimony that the DNA was transfered by more than casually touching some item. THAT IS THE EXACT TESTIMONY IN QUESTION

regarding the IATC claim.The Sixth circuit then says Fetherolf failed to support his claim with an expert witness. SEE FETHEROLF 12443 at *10 (Appendix A). If the Sixth circuit would have taken the N.T. motion into consideration she would have seen that Fetherolf did support the claim with Dre.Kessis's opinion and that it was exhausted. That determination was not only an unreasonable determination of the facts and clearly erroneous, but it relied on an incomplete harmless error review which exceeds the scope for deciding a COA. and is in direct conflict with BUCK V DAVIS . In addition the determination regarding the expert (states) testimony actually substantiates Fetherolfs claim:

QUESTION # THREE; Does the Sixth circuit erroneous determination that Fetherolf failed to exhaust the IATC claim conflict with O'Sullivan V Boerckel, 526 U.S. 838 (1999), when it is clear that Fetherolf raised his IATC claim with evidence, citation to constitutional authority, and federal authority and facual allegaions.

In O'Sullivan 526 U.S. 838 this court determined that before a federaqql habeas petitioner may obtain review of his constitutional claim he must complete one full round of the State appeal process. The original IATC claim in his Federal habeas did not include Kessis's opinion However after filing a motion to amend (ECF No.3*0 The respondent argued that he should make the changes in his treverse (ECF.No.39) and the magistrate agreed (ECF.No.41) (Appendix F) which Fetherolf did (ECF.No.57)(Appendix G).

Under the requirements of O'Sullivan Fetherolfs IATC claim is fully exhausted and the sixth circuit decision is in direct conflict with O'Sulliva.

The IATC claim raised in the 2017 petition with no factual allegation no outside the record evidence, and no federal or even state authority (Appendix P) is not the same claim that was raised in the 2019 N.T. motion and later exhausted then filed in the habeas procedings.

Federal courts have consistantly held that;

"A petitioner must present enough information to allow the state courts to apply controlling legal principles to the facts bearing upon his constitutional calim" SEE WOODS V BOOKER 450 Fed.Appx 480 at *488.and IN FLIEGER V DELO 16 F.3d 878 (8th cir 1994) While his direct appeal was pending flieger filed a PCR petition which was denied and concolidated on apepal. The missouri court of appeals upheld both his conviction and the denial of his PCR petition *881-882, After the denial of fliegers federal habeas petition the district court granted flieger a certificate of probable cause. In the 8th circuit court of appeals flieger raised several IATC claims. . several of which were procedurally defaulted. Flieger argued that the claims were not defaulted bacause in State court he raised an IATC claim supported with several specific examples. The 8th circuit rejected that arguement stating "A petitioner must present "both the federal and legal premises" of his claims to the State courts in order to preserve them for federal habeas review" cciting COX V Lockhart 970 F.2d 448 454 (8th cir 1992) The 8th circuit held that a petitioner cannot braodly present a claim in State court and expect it to be fairly presented.

The sixth circuit court of apepals decision denying Fetherolfs

application for COA on 5-6-2022 is based on an incomplete determination in direct conflict with Martinez and trevino. The Sixth circuit also exceeded the scope of COA review by making determiations that should not have been made antill briefing subsequent to a COA being granted. and they make premature exhaustion and harmless error determinations.

Fetherolf hereby respectfully requests this court grant this petition for certiorari.

RESPECTFULLY SUBMITTED

9/24/22

Michael Fetherolf
CCI # 724453
P.O.BOX 5500
Chillicothe,Ohio 45601
PRO se.

CERTIFICATE OF SERVICE

I Michael Fetherolf Hereby certify that a true copy of this petition has been served upon counsel of records William Lamb, at 441 Vine street, 1600 Carew Tower, Cincinnati Ohio 45202, by regular U.S. Mail, on this 24 day of September 2022,

Michael Fetherolf
Prose, CCI # 724453
P.O.BOX 5500
Chillicothe,Ohio 45601