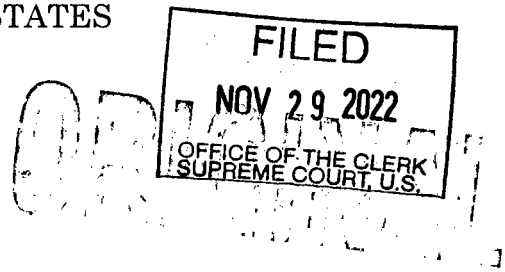
22 No. 6498

IN THE

SUPREME COURT OF THE UNITED STATES



Joeseph Shine-Johnson,
Petitioner,

v.

STATE OF OHIO,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JOESEPH SHINE-JOHNSON
Pro se,
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QUESTIONS PRESENTED

1. Whether due process extends to the State government opting to assign an indigent petitioner appointed counsel on discretionary Review and if due process requires the government appointed counsel conduct to meet the sixth amendment standard on discretionary review or at a minimum laws of agency?
2. Did the United States Court of Appeals for the Sixth Circuit impose an improper and unduly burdensome certificate of Appealibilty (COA) standard that contravenes this courts precedent and deepens a three circuit split when it denied Shine-Johnson COA to review his 2254 Habeas petition?
3. When, or Whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases pending on direct review or Collateral Review?
4. When the federal appellate courts fail to apply the proper standard of review, pursuant to clearly established United State supreme court law as set forth in *Bradshaw v. Richey*, 546 U.S. 74, Is the petitioner denied federal due process where the federal court's decision is in conflict with the state's highest court?

LIST OF PARTIES

[x] ALL PARTIES APPEAR ON THE CAPTION OF THE CASE

LIST OF PROCEEDINGS

1. The Ohio Court of Common Pleas, C.P.C. No. 15CR-4596.
2. *State v. Shine-Johnson*, 2018-Ohio-3347, 117 N.E.3d 986
3. *State v. Shine-Johnson*, 155 Ohio St. 3d 1439, 2019-Ohio-1536, 2019 Ohio LEXIS 828, 121 N.E.3d 410, 2019 WL 1931712 (May 1, 2019)
4. *State v. Shine-Johnson*, 2019-Ohio-1707, 2019 Ohio LEXIS 934, 122 N.E.3d 207, 2019 WL 2017515 (Ohio, May 8, 2019)
5. *State v. Shine-Johnson*, 156 Ohio St. 3d 1456, 2019-Ohio-2780, 2019 Ohio LEXIS 1376, 125 N.E.3d 946, 2019 WL 2997988 (July 10, 2019)
6. *State v. Shine-Johnson*, 2019 Ohio LEXIS 1614, *1, 156 Ohio St. 3d 1476, 2019-Ohio-3148, 128 N.E.3d 238, 2019 WL 3558844 (Ohio August 6, 2019)
7. *State v. Shine-Johnson*, 157 Ohio St. 3d 1443, 2019-Ohio-4211, 2019 Ohio LEXIS 2103, 132 N.E.3d 711, 2019 WL 5151783 (Oct. 15, 2019)
8. *State v. Shine-Johnson,* 2020-Ohio-4711, 2020 Ohio App. LEXIS 3563 (Ohio Ct. App., Franklin County, Sept. 30, 2020)
9. *State v. Shine-Johnson,* 2020 Ohio LEXIS 2775, *1, 160 Ohio St. 3d 1498, 2020-Ohio-5634, 159 N.E.3d 289, 2020 WL 7348903 (Ohio December 15, 2020)
10. *State v. Shine-Johnson*, 165 Ohio St. 3d 1477, 2021-Ohio-4289, 2021 Ohio LEXIS 2447, 177 N.E.3d 990, 2021 WL 5895849 (Dec. 14, 2021)
11., *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 124984, *1, 2021 WL 2800708 (S.D. Ohio July 6, 2021)

12. S*hine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 221609 (S.D. Ohio, Nov. 17, 2021)

13., *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 17736 (6th Cir., June 27, 2022)

14. *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 27526, (6th Cir. September 30, 2022).

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APPENDIX B: The Opinion of the U.S. District Court Southern District of Ohio. appears at **appendix B** to this petition. The court's opinion is *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 124984, (S.D. Ohio July 6, 2021)

APPENDIX C: The Opinion of the U.S. Sixth Circuit Court of Appeal appears En Banc Rehearing at **Appendix C** to this petition *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 27526, (6th Cir. September 30, 2022).

APPENDIX D: The Opinion of the Tenth Appellate District Court Direct Appeal Decision and Dissent at **Appendix D** to this petition. The opinion is reported at *State v. Shine-Johnson*, 2018-Ohio-3347, 2018 Ohio App. LEXIS 3621, 117 N.E.3d 986, 2018 WL 4006358 (Ohio Ct. App., Franklin County, Aug. 21, 2018)

APPENDIX E: The Opinion of the Tenth Appellate District Court 26(B) decision at **Appendix E** to this petition. This Opinion is Unreported.

APPENDIX F: The Opinion of the Tenth Appellate District Court decision on State Post-Conviction at **Appendix F.** to this petition. The Opinion is reported at *State v. Shine-Johnson*, 2020-Ohio-4711, 2020 Ohio App. LEXIS 3563 (Ohio Ct. App., Franklin County, Sept. 30, 2020)

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No._____

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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 issues to review the judgements below.

OPINION BELOW

1. The Opinion of the Sixth Circuit Court of Appeal C.O.A. denial appears at **Appendix A** to this petition The court's opinion is reported at LEXIS 17736.
2. The Opinion of the U.S. District Court Southern District of Ohio appears at **Appendix B** to this petition. The court's opinion is reported at LEXIS 124984.
3. The Opinion of the Sixth Circuit Court of Appeal appears *En Banc* denial at **Appendix C** to this petition. The court's opinion is reported at LEXIS 27526.
4. The Opinion of the Tenth Appellate District Court Direct Appeal Decision **Appendix D** to this petition. The opinion is reported at LEXIS 3621.
5. The Opinion of the Tenth Appellate District Court 26(B) decision at **Appendix E** to this petition. This Opinion is Unreported
6. The Opinion of the Tenth Appellate District Court State Post-Conviction decision at **Appendix F.** to this petition. This Opinion is reported at LEXIS 3563.

JURISDICTION

The Sixth Circuit Court of Appeals entered final judgment on the appeal on June 27, 2022. A copy is attached at appendix A. A timely petition for rehearing was denied September 30, 2022. A copy of the judgment is attached at appendix C. The jurisdiction of this court is invoked under 28 U.S.C. §1254(a).

CONSTITUTIONAL PROVISIONS

This case involves a state criminal defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments. See, Appendix G. The Fifth Amendment provides in relevant part:

> No person shall be... be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense.

The Fourteenth amendment provides in relevant parts:

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

This case also involves the applications of 28 U.S.C. §2253(c), which states:

1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
    a. The final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a state court;
2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Introduction

By any measure, Joeseph Shine-Johnson's case is extraordinary where the right to fair trial and due process have been completely abrogated. It raises a national concern that threatens the doctrine of stare decisis and raises a question does upholding an inconsistent application of federalism and comity outweigh upholding the constitution in this country? It gives the appearance that pro se, indigent litigants have no right to have their obvious wrongful convictions fairly reviewed, usurping due process and equal protections of the law trapping them unlawfully. The prosecutor went above and beyond the law to thwart the obvious claim of self-defense. At trial during voir dire after impaneling the jury the prosecutor the prosecutor conceded to the jury that Shine-Johnson would "meet the first two elements but he has to get all three." The prosecutor made reference to these arguments in closing arguments. The first two elements allow him to use deadly force in self-defense, essentially conceding Shine-Johnson had the right to act in self-defense. The State then tricked the jury into believing Shine-Johnson still had to prove he did not violate a duty to retreat without correction.

In Ohio, a person who violates a duty to retreat loses his right to employ deadly force as a means of self-defense unless he retreats first. A jury's findings on parts (1) and (2) of the self-defense instruction will determine the applicability of the defense. The way the pattern instruction is worded, *there never will be a duty to retreat.* The instruction was wrong and resulted in circular reasoning. *State v. Dale,* 2013-Ohio-

2229 (Justice Hall Concurring). This directly affected the burden of proof of both the State and the petitioner. The state court(s) unconstitutionally applied the self-defense standard in this case imposing a duty to retreat that does not exist based on the particular facts, circumstances and evidence presented at trial. At trial, the court invaded the realm of the jury. Shine-Johnson was already retreating when he was attacked. This case essentially held Shine-Johnson had to be clairvoyant, retreat from his home, and use "detached reflection[1]" while under the imminence of attack and retreat because he is not within the confines of his home but in his yard[2]. (Appendix H) The state courts committed obvious subterfuge(s) of state law to evade federal consideration of constitutional issues denying him due process, a fair trial and denied a fair trial, effective and adequate appellate review.

The intermediate appellate court created a new law on appeal setting a new precedent in Shine-Johnsons case. After Shine-Johnsons conviction the legislature made two rare amendments within two years of each other to the Self-defense standard. Under these new amendment Shine-Johnson would be acquitted of murder. It calls into the question of the accuracy of the guilty verdict in this case. The combined effect of the changes in laws on the self-defense under H.B. 228 and S.B. 175, are a "jurisprudential upheaval that addresses a basic unfairness in the system. governor Mike DeWine's statement on signing SB 175 into law repealing the prior duty to retreat law governing this case, due to the *ambiguity* in the law. Governor

[1] *Brown v. United States*, 256 U. S. 335, 343 (detached reflection in the presence of deadly force is an unreasonable demand)
[2] *Beard* v. *United States*, 158 U.S. 550

Mike DeWine states that "Senate Bill 175 accomplishes removing the ambiguity from the self-defense law." Rep. Kyle Koehler of the General assembly called the measure a" simple fix to existing law." The unfairness is so fundamental that it undermines confidence in the validity of final cases and outweighs the finality in Shine-Johnson's case and raises a national question of great importance when the supremacy clause takes effect.

B. Trial Proceedings

In 2015 Shine-Johnson was charged with aggravated murder, murder and tampering with evidence for the shooting death of his father in Columbus, Ohio. Shine-Johnson was summoned home by his father who was waiting for him to come home while wielding a loaded, operable 20-gauge shotgun. Throughout trial the prosecutor argued that Shine-Johnson had a duty to retreat before facing imminent danger and under the particular facts and circumstances that Shine-Johnson presented pervasively misstating the law. (See Appendix H) Shine-Johnson was acquitted of aggravated murder and found guilty by a jury of Murder and tampering w/evidence each with a gun specification.

C. Appellate Proceedings

The Tenth Appellate District Court concluded both the State and the trial court were both correct in the application and argument of the self-defense law, when the duty to retreat applies, even where the trial and state both reached completely opposite and irreconcilable rationales on the exact same point of law. *State v. Shine-Johnson*, 2018-Ohio-3347, 117 N.E.3d 986. The Tenth appellate district court decided

by a *divided* panel to affirmed the conviction. Judge Tyack dissents from the Majority. Explaining the majority made an unconstitutional application of the self-defense statute to Shine-Johnson's particular facts and circumstances and the court committed obvious subterfuge(s) of state law to evade federal consideration of constitutional issues. (Dissenting Opinion, Doc No. 45 PAGEID 3676-3677) (See Appendix H). The court made an extremely rare decision opting to grant counsel for a discretionary review. The Supreme Court denied review by a *divided* panel. *State v. Shine-Johnson*, 2019-Ohio-1707, 2019 Ohio LEXIS 934. Shine-Johnson filed a delayed appeal because his counsel refused his instructions to raise more than one proposition law. It was denied by a divided panel. *State v. Shine-Johnson,* 156 Ohio St. 3d 1476.

Shine-Johnson filed a pro se motion for ineffective assistance of counsel 26(B) because the State policed altered evidence significant to his defense when it broke the chain of custody, admitted that they purposely took apart his father bloody and operable loaded Shotgun multiple times. (Tr. Doc No. 45-2 PAGEID 5022-26) The firing pin at some point was removed rendering the operable shotgun inoperable. The Shotgun only after the alteration was tested for operability and found to be inoperable due to the missing firing pin. (See Appendix K). Before trial the State prosecutors failed to disclose the police conduct in discovery and the operability report is false and unreliable. The shotgun was presented at trial to the jury completely disassembled and the test results of the operability report were used against Shine-Johnson to undermine his Claim of self-Defense. The 26(B) which was denied and challenged to

the supreme court of Ohio which was denied review by *divided* panels. *State v. Shine-Johnson*, 155 Ohio St. 3d 1439, 2019-Ohio-1536, 2019 Ohio LEXIS 828.

D. State Post-Conviction

The H.B. 228 amendments to R.C. 2901.05 Burden of proof statute that became effective March, 28, 2019 while Shine-Johnson's case was pending on direct review. This bill was proposed only months after Shine-Johnson's controversial case on the duty to retreat May 16, 2017. Shine-Johnson filed a post-conviction to apply the new interpretation of R.C. 2901.05 burden of Proof statute to be applied to his case. In Shine-Johnson's case the burden of proof was directly affected by the unconstitutionally broad application of the duty to avoid which was objected to, central and a disputed issue at trial and is an integral part of the burden of proof. The post-conviction was dismissed due to lack of jurisdiction. *See, State v. Shine-Johnson*, 2020-Ohio-4711, 2020 Ohio App. LEXIS 3563. The Supreme court of Ohio Denied jurisdiction. *State v. Shine-Johnson*, 160 Ohio St. 3d 1498, 2020-Ohio-5634.

E. Habeas proceedings

During Shine-Johnson's habeas proceeding he was granted a stay to exhaust his state post-conviction. In his petition he raised seven grounds to grant relief for prosecutorial misconduct, ineffective trial counsel, denial of the "No duty to retreat" jury instructions on self-defense, application of new interpretation of state law retroactively and Ineffectiveness of appellate counsel. (Petition, Doc No. 3, PAGEID 48-81) The Respondent argued that Shine-Johnson procedurally defaulted all of his grounds in the petition. (ROW, ECF No. 46) Shine-Johnson argued no procedural

default occurred Counsel told the petitioner his various claims from his direct appeal were fairly represented under one proposition of law. (Letter, Doc No. 45 PAGEID 3712) and that he met cause and prejudice for any perceived procedural default. A testifying witness wrote an affidavit affirming to facts not presented at trial which also highlighted the states misconduct and use of false evidence, undue influence, and was presented to overcome a miscarriage of justice. (ECF No. 81, PAGEID 6306-11). See (Appendix H)

The Southern district court of Ohio found grounds one through five were procedurally defaulted and not fairly presented, and because Shine-Johnson was not entitled to effective counsel on discretionary review, his counsel did not have follow his clear and reasonable instruction to preserve all of his claims from direct appeal for Habeas review, therefore he did not show cause or meet the actual Innocence standard. (See Appendix I) The court found that Shine-Johnson had met the cause and prejudice standard on grounds six and seven (See Appendix J, K) and that all claims were meritless and frivolous and that a certificate of appealability should not issue and the habeas petition was denied with prejudice. *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 124984. Shine-Johnson filed a 59(e) he was denied. U.S. District Court Southern District of Ohio. *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 221609. (See Appendix H) Shine-Johnson timely sought a certificate of appealability to the Sixth Circuit court of Appeal on all seven grounds on his petition. He also sought a C.O.A. on the court's decision to deny his discovery of the trial voir dire transcripts. The C.O.A. on all grounds was denied. U.S. Sixth Circuit Court of

Appeal. *Shine-Johnson v. Gray*, 2022 U.S. App. LEXIS 17736. The Petitioner the sought *En Banc* Rehearing and was denied.

REASON FOR GRANTING THE WRIT

The Sixth Circuit's decision not to provide a C.O.A. in this case has so far departed from the accepted and usual course of judicial proceedings on a preclusion of federal Habeas 2254 review, adjudication and application of procedural defaults, and a petitioner's requirements on cause and prejudice, actual innocence and fair presentation to the state courts, and the application of AEDPA has sanctioned such a departure by the lower courts, as to call for an exercise of this Court's supervisory power. The Sixth Circuit court(s) decisions in this case contravened several of this courts precedent(s) and has deepened a 9 circuit split on its application of fair presentation, the procedural default doctrine, cause and prejudice and actual innocence. This case set a national precedential standard that the lower courts are not bound by this court's decisions and threatens the doctrine of stare decisis.

This case is extraordinary and of national importance. It calls in into question the uniform application of the fair presentation and procedural default doctrine under *Coleman v. Thompson,* in light of *O'Sullivan v. Boerckel.* Shine-Johnson did everything he could possibly do to comply with the 2254 habeas procedural requirements including giving clear and unambiguous instructions to preserve his federal arguments from direct appeal on discretionary review. As a contingency filed a delayed appeal. The Sixth Circuit has decided this important federal question in a way that disregards the decisions of this Court holdings in *James v.*

Kentucky, *Douglas v. Alabama*, regarding good faith effort to comply with procedural rules. Sixth Circuit has sanctioned such a departure by the lower courts, as to call for an exercise of this Court's supervisory power.

This in turn raises another issue of national significance: On whether due process extends to the State government opting to assign an indigent petitioner appointed counsel on discretionary review, and if due process requires the government appointed counsel conduct to meet the sixth amendment standard on discretionary review or at a minimum laws of agency.

This sixth circuit decision creates a precedential legal loop hole that allows for any state government to seeking to withhold constitutional protections from pro se indigents appellants, to simply opt into a field with discretionary elements where it has no obligation to appoint counsel, and appoint counsel on discretionary review, who does not have to comply with their client's legal objectives or meet at a minimum the professional competent and effective standards that agency law or professional rules of conduct and agency requires. This creates a mechanism to abuse the process and procedurally sabotage a pros se, indigent petitioner's federal review of their wrongful convictions, effectively eliminating the federal habeas 2254 review process of state petitioners. The question remains what standard is government appointed counsel held to on discretionary review? Can the government appoint ineffective counsel?

The Sixth Circuit has also decided a matter law not yet settled that should be settled by this court raising a national significance: Whether a new interpretation of

state statutes apply retroactively to cases pending on direct review or collateral review as a matter of due process.

The new interpretation of R.C. 2901.05 amended the burden of proof requiring the state to prove beyond a reasonable doubt that the defendant who at trial presented evidence to support self-defense, did not use the force in his/her defense. This amendment occurred after the petitioner's trial and direct appeal, but while his case was still pending on direct review to the Ohio Supreme Court. The lower courts have argued they do not apply retroactively to his case. This case is extraordinary because the Ohio courts held a divided panel on his direct appeal. The majority in case committed a subterfuge to evade a federal consideration of a constitutional issue of prosecutorial misconduct that exposes a critical fundamental defect in the law coupled with the State's unconstitutional application of the Self-defense law, directly affecting the burden of proof for both parties. Coupled with the courts approval of the misstatements of the law created a presumption that the elements of murder are presumed shifting the burden to the petitioner to disprove murder, directly affecting the truth-finding function and raises serious questions of due process and the accuracy of the guilty verdict under the prior law in this case makes this case extraordinary and ripe for review.

Further, this case is unique. This court has not encountered a similar set of facts and circumstances. The State police collected the decedents bloody 20-Gauge shotgun loaded with a live round, that was found at the scene near the decedent. The Police disassembled this weapon, removed the firing pin before the gun was tested for

operability and presented the tainted operability test results to the jury to undermine the claim of Self-defense by arguing the gun was inoperable. The sixth circuit stated the evidence was only exculpatory when placed in the decedents hands and that Shine-Johnson could not prove bad faith. The Sixth circuit has never articulated a standard of review to determine whether evidence is apparently exculpatory. The Sixth circuit sanctioned the lower court's misapplication of the 26(b) standard of review and is in conflict with Ohio Supreme Courts and violates law as set forth in *Bradshaw v. Richey*, 546 U.S. 74. For the above stated reason(s) this court should grant the writ. See also (Appendix H, I, J)

I.

Whether due process extends to the State government opting to assign an indigent petitioner appointed counsel on discretionary Review and if due process requires the government appointed counsel conduct to meet the sixth amendment standard on discretionary review or at a minimum laws of agency?

Sixth Circuits courts decided an important question of federal law that has not been, but should be, "Clearly" settled by this Court, and/or has decided an important federal question in a way that conflicts with relevant decisions of this Court that should be answered. In this extraordinary case, this court should grant review to clarify *Evitts* v. *Lucey*, 469 U.S. 387, 401, and clearly settle, although there is no right to have an attorney appointed past the first appeal of right, if and when a State opts to appoint counsel to indigent appellant on "discretionary review" where its action

has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and due process must appoint competent and effective counsel? Also, decide can cause and prejudice be shown for the appointed attorney's deliberate actions to ignore his client's instructions and legal objectives, therefore not acting as his agent in regards to the default?

The Sixth Circuit court(s) relied on an overly broad interpretation of this court's decision in *Pa. v. Finley*, 481 U.S. 551,557, to deny Shine-Johnson federal review of his claims. *Finley* is clearly distinguishable from this case. The *Finely* court clearly addressed the specific argument in regards to whether appointed counsel on discretionary review had to comply the "*Anders*" procedural requirements on discretionary review. This Court has long held "[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." *Evitts, supra,* at 401, 105 S. Ct. 830, 83 L. Ed. 2d 821. The Sixth Circuit has well recognized the same in *Rodriguez-Penton v. United States*, 905 F.3d 481; *Turner v. United States*, 885 F.3d 949; The decision in this case sets a precedent that the State Government can appoint ineffective counsel just because the petitioner is indigent and has no right to counsel and opens the door for any unscrupulous actor to adeptly sabotage a pro se litigant appeal.

Therefore, Shine-Johnson request this honorable court to grant review to re-visit *Evitts* v. *Lucey*, 469 U.S. 387, 401. 1) To clarify and settle even though the State government need not grant a prisoner access to counsel on discretionary review, once it has done so, does the Due Process Clause of the Fourteenth Amendment require

that counsel's actions to be professionally competent and effective? 2) deciding if the denial of COA on this issue was improper and unduly burdensome to keep uniformity amongst the lower courts with this court's ruling.

II.

Did the United States Court of Appeals for the Sixth Circuit impose an improper and unduly burdensome certificate of Appealability standard that contravenes this courts precedent and deepens a four circuit split when it denied Shine-Johnson COA to review his 2254 Habeas petition?

The lower courts departed from the accepted and usual course of judicial proceedings on fair presentation, and the Sixth Circuit Court of Appeals sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, especially where the sixth circuit court of appeals has entered a decision in conflict with the decision of at least 9 United States court of appeals on the same important matters below. This courts precedent is clear: a COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473,484, *quoting Barefoot v. Estelle*, 463 U.S. 880,893.

The petitioner need only show that the petition contains an issue (1) that is "debatable among jurists of reason"; (2) "that a court could resolve in a different manner"; (3) that is "adequate to deserve encouragement to proceed further" or (4) that is not "squarely foreclosed by statute, rule, or authoritative court decision, or that is not lacking any factual basis in the record." *Id.* at 893 n.3 and 894 (internal quotations and citations omitted). *See also, Slack v. McDaniel*, 529 U.S. 473.

The Sixth Circuit Court(s) opinions that a COA would not be taken in good faith was highly debateable. The Tenth District Appellate Court were divided on the petitioner's direct appeal. The dissenting justice found a subterfuge of state law and a constitutional error of prosecutorial misconduct, cited in his habeas petition integral to ground(s) One, two, three, and four. This creates a conflict with the seventh circuit *See, Jones v. Basinger*, 635 F.3d 1030; *Jordan v. Fisher*, 576 U.S. 1071(Dissenting opinion); *Williams v. Baumer*, 2011 U.S. Dist. LEXIS 11160. The lower court(s) decision also creates a conflict with the fifth circuit see, *Rhoades v. Davis*, 852 F.3d 422 ("When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.") A district court could deny a certificate of appealability on the issue that divided the state court *only* in the unlikely event that the views of the dissenting judge(s) are erroneous beyond any reasonable debate. *See, Slack*, 529 U.S. at 484. The lower courts failed to show the findings of the dissenting judge were erroneous.

This raises a significant national issue and the need for this court to clarify for the various circuits: Whether a lower court can withhold issuing a C.O.A. When a state

appellate court is divided on the merits of the constitutional question, where the lower court has failed to show that the views of the dissenting judge(s) are erroneous beyond any reasonable debate?

The standard for granting a certificate of appealability is *low*. *Frost v. Gilbert*, 835 F.3d 883, 888–89 (9th Cir. 2016). This court has cautioned against undue limitations on the issuance of certificates of appealability. It is unnecessary for a "petitioner to prove, before the issuance of a COA, that some jurist would have granted the petition for habeas corpus.' *Miller-El v. Cockrell*, 537 U.S. 322,337. Indeed, "a claim can be debatable even though every jurist of reason might agree, after a COA has been granted and the case received full consideration, that [the] petitioner will not prevail." *Miller-El* 537 U.S.at 338. (*quoting Barefoot*, 463 U.S. at 893), *See also id.* at 342. This court has also held if the petition was denied on procedural grounds, the petitioner must show "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable and the district court was incorrect in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473.

The rare circumstance presented here the court "must yield to the imperative of correcting a fundamentally unjust incarceration. *Engle v. Isaac*, 456 U.S. at 135, 71 L Ed 2d 783. (A federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.). A dissenting appellate judge is a reasonable jurist. Therefore, a reasonable jurist could find it debatable that Shine-Johnson is not precluded from federal review and that no procedural default actually

occurred. He fairly presented his claims to the state's highest court and/or he met the cause and prejudice and actual innocence standard(s).

State Respondent Waived Its Procedural Defense.

It is debateable that Shine-Johnson fairly presented his prosecutorial misconduct claims to the Supreme Court of Ohio in his leave for jurisdiction and the respondent failed to sufficiently raise a procedural defense on grounds one through five of the petition and waived its procedural defense because he did not identify the adequate and independent state procedural rule Shine-Johnson violated. The respondent failed to identified with specificity which of the multiple instances of prosecutorial misconduct were not fairly presented to the Ohio Supreme Court. The prosecutorial misconduct claim is integral to grounds one through five. Procedural default does not preclude review of Shine-Johnson's claims for prosecutorial misconduct. *See, Slagle v. Bagley,* 457 F.3d 501(2006) *citing Baze v. Parker*, 371 F.3d 310,320.

A. Conflated the independent and adequate state ground doctrine to a federal procedural rule.

The Sixth circuit held that Shine-Johnson case is barred by *Coleman v. Thompson*, 501 U.S. 722, 750. The State of Ohio did not rely on any procedural defaults in denying his prosecutorial misconduct claim. This court held *Coleman* applies to the procedural default doctrine and is a specific application of the general adequate and independent state grounds doctrine. *Id.* 111 S. Ct. at 2553-54. The lower court has not identified any independent state procedural rule that Shine-Johnson has failed to follow on discretionary review. see, *Maupin v. Smith*, 785 F.2d 135,138 (6th Cir.

1986). The fact that state law allows discretionary appeals does not automatically mean that the failure to pursue such an appeal qualifies as a federally cognizable procedural default. *O'Sullivan*, 526 U.S. at 844–45. The state rules of the Supreme Court of Ohio and seeking leave for jurisdiction is at issue, under the facts of the case are distinguishable, and did not constitute as an adequate and independent state ground, adequate to bar federal habeas review in this case. The State does not clearly give any notice to petitioners that all federal habeas claims it must be challenged on discretionary appeal to preserve them. In *O'Sullivan*, 526 U.S. at 843 the court based its decision on the Supreme Court of Illinois Rule 315. This court found that based solely on the narrow interpretation of Illinois' rules, that the Illinois Supreme Court is free to take cases that do not fall easily within the descriptions listed in the Rule. *O'Sullivan v. Boerckel*, 526 U.S. 838, 846. The Ohio court rules completely differ on the discretion the court has to review cases and does not improvidently accept case outside of the description listed in rule S.Ct.Prac.R. 5.02. See S.Ct. Prac.R. 7.10.

In exercising the discretion, the Supreme Court of Ohio considers "whether the case involves a matter of great public importance, complex issues of law or fact, a substantial constitutional issue, or a conflict among courts of appeals." *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 111 Ohio St.3d 118, 2006 Ohio 5339, 855 N.E.2d 444, ¶ 15; Ohio Const. Article IV, Section 2(B)(2)(e); S.Ct.Prac.R. 5.02; S.Ct. Prac.R. 7.10. If a party believes his cause to be one of public or great general interest, he may seek leave to hear his cause. *Williamson v. Rubich*, 171 Ohio St. 253, 254 (whether the cause presents a question or questions of public or great general interest as

distinguished from questions of interest primarily to the parties. Whether the question or questions argued are in fact ones of public or great general interest rests within the discretion of the court.). Anything that does not fit in these categories will be deem improvidently accepted. This raises a national concern of the lower courts over broadly applying the ruling in *O'Sullivan* as a procedural trap when it does not take into consideration of the rules of each State courts.

Thus, this rule forces Ohioans seek a futile attempt on discretionary review to have their cases improvidently accepted before a habeas court can review their state convictions and serves no perceivable state interest. *See, e.g. Osborne v. Ohio*, 495 U.S. 103, 123–25. *O'Sullivan*, is a federally created judicial ruling not an adequate and independent State procedural rule. This court should clarify how *Coleman* precludes habeas review in light of *O'Sullivan.*

B. A reasonable Jurist Could debate that Shine-Johnson's is not barred from federal review.

Agency

The District Court held the petitioner could only excuse his appointed attorney's conduct under ineffective of assistance of counsel which contravened *Murray v. Carrier*, 477 U.S. 478, 485, at 488. (a petitioner need not allege a constitutional violation in order to establish cause for a procedural default). Shine-Johnson argued that he and the court appointed attorney on discretionary review had a conflict of interest. Shine-Johnson and counsel both knew that the Ohio Supreme court accepting jurisdiction is extremely rare unless you can show a great public or general

interest. Because of this knowledge and the divide panel on appeal. Shine-Johnson reasonably wanted to preserve his federal claims for federal review. Clearly the petitioner is arguing that [he] may assert as cause and prejudice for any perceived procedural default, due to the actions of his attorney which, even though may not be constitutionally defective, were not attributable to him because they were both unauthorized and tainted by a conflict of interest. *Manning v. Foster*, 224 F.3d 1129,1135 (9th Cir. 2000)

The conflict arose because counsel felt he did not have to comply with his client's instructions based on 1) Shine-Johnson not having a right to counsel to purse discretionary review and 2) the State appellate court appointing him and did not mandate him to preserve Shine-Johnson's claims for federal review. 3) Counsel misled lied to Shine-Johnson that his various claims from his direct appeal were fairly represented under one proposition of law. (Letter, Doc No. 45 PAGEID 3712). Therefore, the right to counsel and the instruction of the appellate courts mandate of the court overruled Shine-Johnson's legal objectives. The Sixth Circuit held that the agency laws do not apply to appointed counsel's actions on discretionary review, and that Shine-Johnson had to bear the risk of his appointed attorney and could not meet cause and prejudice, and essentially appointed counsel did not have to follow Shine-Johnson's instruction to preserve his claims for federal review, and counsel did all that he was supposed to do. This creates a national importance in light of *O'Sullivan.*

The Sixth Circuit Courts decision in this case that Shine-Johnson had to bear the risk of his attorney, where the attorney's actions deliberately breached well settled

agency law is in direct conflict with *Maples v. Thomas*, 565 U.S. at 282–84, 287–88. (if the default occurred at a state post-conviction proceeding (discretionary review). The ineffective assistance rationale is applicable only in limited circumstances; the agency law rationale is *not* subject to similar limitations.) It is well established that an attorney owes a duty of loyalty to his client. This duty encompasses an obligation to defer to the clients wishes on major litigation decisions. *Divine Tower Int'l Corp. v. Kegler, Brown, Hill & Ritter Co., L.P.A.*, 2007 U.S. Dist. LEXIS 65078; *Coleman* established this court may consider *any* "objective factor" that is "external" to the petitioner and that "cannot fairly be attributed to him" as cause. *Coleman*, 501 U.S. at 753. The deliberate act not to follow Shine-Johnson's clear, reasonable and lawful instructions can be considered an objective factor and the courts mandate and the fact that is no right to appointed counsel on discretionary appeal can be considered external factors.

This court has already addressed the ratification of principal's unauthorized act and when the client does not have to bear the risk of the principal. *See, Bennecke v. Ins. Co.*, 105 U.S. 355, 360. (If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud.) Shine-Johnson was not aware the attorney did not and would not follow his clear instructions to raise all his direct appeal assignments of error. Counsel never made him aware he would raise only one proposition of law. Once Shine-Johnson found out he questioned him about his unauthorized actions. (Letter, Doc No. 45 PAGEID 3712) then Shine-Johnson then filed a delayed appeal.

This court in *Maples Supra,* along with other federal appellate circuits has held a conflict of interest meets the standard of cause see, e.g. *Jamison v. Lockhart,* 975 F.2d 1377, 1380 (CA8 1992); *Jennings v. Purkett,* 7 F.3d 779,782 (8th Cir. 1993) (divided loyalties of petitioner's counsel can supply cause for procedural default); *Deutscher v. Angelone,* 16 F.3d 981, 984 (9th Cir. 1994). Where the government appointed counsel deliberately refused to follow Shine-Johnson's instruction and further his client's objectives, counsel acted in a manner that was completely averse to the petitioner's interest to raise all his claims to preserve his last chance at having his wrongful conviction overturned. *See, Holland v. Florida,* 560 U.S. 631,659; *Baldayaque v. United States*, 338 F.3d 145 (Jacobs, J., concurring) ("When an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with the agent's misdeeds'"); *Nat'l Union Fire Ins. Co. v. Bonnanzio*, 91 F.3d 296, 303 (2d Cir. 1996)

Fairly Presented

The Sixth circuit's decision in this case contravenes *Picard v. Connor*, 404 U.S. 270,277 (1971); *Humphrey v. Cady*, 405 U.S. 504, 516 n.18 (1972). Shine-Johnson at least fairly presented the substance of the prosecutorial misconduct claim to the Ohio Supreme court in his memorandum in support of jurisdiction. Counsel alerted the Supreme court that the State appellate court's decision eliminates the right to self-Defense[3]. (ROW, Doc No. 45 Page ID 3624-3638). The lower federal courts improperly withheld a C.O.A. where it is at least debateable that the State court was fairly

[3] *Taylor v. Withrow*, 288 F.3d 846 (the right to claim self-defense is a fundamental right)

alerted that the proposition of law engendered claims under due process and fair trial. Although petitioner's claim was presented in somewhat different terms in state supreme court, the prosecutorial misconduct claim was adequately preserved under state law because brief was sufficient "to put the Ohio Supreme Court on notice" of central legal and factual elements of claim. *Wells v. Maass*, 28 F.3d 1005,1008–09 & n.1 (9th Cir. 1994); *Kelly v. Small*, 315 F.3d 1063, 1067 (9th Cir.), *cert. denied*, 538 U.S. 1042 (2003);(although prisoner presented only "summary treatment" of claims to state supreme court, claims nonetheless were adequately exhausted because they were raised in intermediate appellate court, which "addressed the questions in its decision in a manner sufficient to put a reviewing court on notice of the specific federal claims"); *Pope v. Netherland,* 113 F.3d 1364, 1368 (4th Cir.), *cert. denied*, 521 U.S. 1140 (1997) ("[I]t is not necessary to cite 'book and verse on the federal constitution' so long as the constitutional substance of the claim is evident.");

Shine-Johnson presented the substance of at least his prosecutorial misconduct claim by citing the factual allegations of the multiple instances of prosecutorial misconduct also informing the court that the petitioner specifically raised the legal basis under prosecutorial misconduct on direct appeal. *See, Franklin*, 811 F.2d at 326 quoting *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (en banc). Based upon all the facts in the memorandum the Ohio Supreme Court was fairly presented the proper analysis to view his memorandum. (Row, Doc No. 45 Page ID 3631-3633); As the Sixth Circuit has held that a prosecutorial misconduct claim is in the mainstream of fair trial and due process claim. *West v. Bell*, 550 F.3d 542 (6th Cir. 2008); *Fulcher*

v. Motley, 444 F.3d 791, 798 (6th Cir. 2006); *Houston v. Waller,* 420 Fed. Appx 501. The court ignored its own circuit rulings and the second circuit.

Further the court's decision conflicts with multiple federal appellate circuits that have held the petitioner only has to present the substance of his claim. *Robinson v. Schriro*, 595 F.3d 1086,1102–03 (9th Cir.), *cert. denied*, 562 U.S. 1037 (2010); *Guinan v. Armontrout*, 909 F.2d 1224, 1227 (8th Cir. 1990), cert. denied, 498 U.S. 1074 (1991); *Sweeney v. Carter*, 361 F.3d 327, 332–33 (7th Cir.), *cert. denied*, 543 U.S. 1020 (2004) (petitioner may reformulate her claims so long as the substance of the claim remains the same); *Rittenhouse v. Battles*, 263 F.3d 689,696 (7th Cir. 2001) (Did not refer to a single federal or state case addressing a criminal defendant's due process rights). The Ninth Circuit has continuously established that presentation of an issue in an appendix is sufficient to present the issue in a full and fair manner to the state courts. *See. Insyxiengmay v. Morgan*, 403 F.3d 657 at 668; " *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009); *Gallegos v. Ryan*, 820 F.3d 1013,1026 n.15 (9th Cir.), *amended*, 842 F.3d 1123 (9th Cir. 2016).

The Supreme court of Ohio does not allow filing of a full brief *unless* jurisdiction is granted. *See,* S.Ct. Prac.R. 7.08. The Ohio Supreme Court under its own rules S.Ct. Prac.R. 7.01, S.Ct. Prac.R. 7.02 requires the appellants to attach the lower opinion as an attachment to the 15-page memorandum for jurisdiction in the appendix. In this case the state supreme court decision did not come accompanied with any reason why jurisdiction was not accepted. The federal court should "look through" the unexplained decision to the last related state-court decision that does provide a

relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. *Wilson v. Sellers*, 138 S. Ct. 1188,1192. Therefore, is his claims were fairly presented. The Ohio Supreme court held it will not ordinarily consider a claim of error which was not raised and was not considered or decided by the Appeals court. *State v. Price* (1979), 60 Ohio St. 2d 136, 398 N.E.2d 772. This court should clarify if the lower opinion attached in the appendix was sufficient to fairly present the court of its federal claims. This question is of great importance in light of *Baldwin v. Reese*, 541 U.S. 27.

Shine-Johnson did not purposely bypass a procedure but in good faith essentially complied with the state's unidentified alleged adequate and independent state procedural rule in question, or made a reasonable and good faith effort to do so, if the petitioner did not comply is due to a conflict of interest and counsel went against the petitioners known clear instructions. This court has made it clear procedural default doctrine thus does not apply if the petitioner made a good faith effort to comply with state rules. *See, e.g., James v. Kentucky*, 466 U.S. at 351 (direct review case); *Douglas v. Alabama*, 380 U.S. 415, 422. Shine-Johnson filed a delayed appeal and he did everything in his power to comply the state procedure and federal procedural rule.

The Sixth Circuit court of appeals did not articulate what else Shine-Johnson could have possibly done to preserve his claims but held the denial of a motion for a delayed appeal is a procedural ruling, not a ruling on the merits and does not fairly present his claims. *Bonilla v. Hurley*, 370 F.3d 494,497 (6th Cir.) The sixth circuit overlooks the application for "jurisdiction" is also not a ruling on the merits and the

petitioner does not brief the court until jurisdiction is accepted. *See,* S.Ct. Prac.R. 7.08. This case was not accepted. A decision by the state supreme court not to hear the appeal--that is, not to decide at all. *Greene v. Fisher*, 565 U.S. 34, 40. The decision conflicts with the Eighth Circuit in *Clemmons v. Delo*, 124 F.3d 944,948. (state post-conviction counsel's failure to raise *Brady* claim did not bar federal court consideration of claim because petitioner specifically requested that counsel raise claim and, after counsel refused to do so, petitioner filed *pro se* motion with omitted claim which state court denied without comment.) No default occurred.

Actual Innocence

The U.S. District court departed from the accepted and usual course of judicial proceedings on the Actual innocence. Sixth Circuit has sanctioned such a departure by the lower courts, as to call for an exercise of this Court's supervisory power to enforce the uniform application of the *Schlup* standard of review for Shine-Johnson's "Actual innocence" claim. (See also Appendix I) The "new evidence "of the sworn affidavit rebutted the state courts presumption of correctness. *See, Tharpe v. Sellers,* 138 S. Ct. 545, 546–47 (2018). The affidavit also challenged the veracity of the state's "key" witness. In light of that new evidence, Shine-Johnson's testimony is unrebutted, coupled with the jury finding in Shine-Johnson's favor on the question of aggravated murder shows that it generally accepted the truthfulness of Shine-Johnson 's testimony. *Davis v. Strack*, 270 F.3d 111 (2nd Cir. 2001). "More than likely" no reasonable juror would have found him guilty beyond a reasonable doubt. The District court and Sixth Circuit limited its analysis to the type of evidence presented by the

petitioner's new evidence creating an unduly burdensome standard of review. See, *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 59808, *27. (2021).

For purposes of this case several features of the *Schlup* standard bear emphasis. First, although "to be credible" a gateway claim requires "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial," *id.*, at 324, 115 S. Ct. 851, 130 L. Ed. 2d 808, the habeas court's analysis is *not limited* to such evidence. *House v. Bell*, 547 U.S. 518,537. At the same time, though, the *Schlup* standard does not require "absolute certainty" about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt. *House v. Bell*, 547 U.S. 518,538. The lowers courts held that the new evidence was not sufficient because it was "bad character" evidence, but overlooked the value and significance of the evidences as being impeaching, exposing, prosecutorial misconduct false evidence and/or Brady violations.

The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." *Schlup v. Delo*, 513 U.S. 298,327-328. With "'all the evidence' thus in mind, the court's final task is 'to assess the likely impact of the evidence on reasonable jurors'; it is not to work through an 'independent factual determination' to divine 'what likely

occurred.'" *Id.* (*quoting* House, 547 U.S. at 538); The lower court did not correctly apply this standard.

The jury during deliberations requested to have the original police statements of Alexis Quinn and Maureen Quinn which show that the inconsistencies between the two witness's trial testimony was important to their determination of the case on credibility and relevant evidence. (Tr. Doc No. 45-2 PAGEID 5685) Alexis in her affidavit elicits new facts not testified to at trial. It was not elicited at trial that [she] knew that Joe Bythewood was waiting for the petitioner to come home from work to confront him and that Bythewood was upset because the petitioner asked Maureen to repay the loan, and Bythewood was on edge waiting for the petitioner to arrive while having the shotgun out and Bythewood told Maureen not to talk to the petitioner several times. (ECF No. 81, PAGEID 6306-07) A reasonable jurist could find that the decedent waited with premeditation to attack Shine-Johnson and everyone in the home was aware that this was going to take place. Alexis in the affidavit stated had she knew the Bythewood's gun actually worked at the time she would have warned the appellant not to come home and called the police. (ECF No. 81, PAGEID 6310) Alexis in her affidavit states that she went back upstairs heard shuffling and fighting and running up and down stairs Then she heard Shine-Johnson holler out "are you going to shoot me?" Then Moments later she heard the backdoor open and Shots were fired. Then she heard her mom scream and Bythewood scream Alexis and her mom both went down stairs after the Shooting. (ECF No. 81, PAGEID 6307)

Alexis Quinn's affidavit presents an eyewitness account that challenges the veracity of the state's key witness. Evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. *United States v. Agurs,* 427 U.S. 97, and n. 21,112-113. That is not the case here. Maureen's testimony was the *only* evidence presented to convince the jury Bythewood the decedent was unarmed when Shine-Johnson shot in self-defense. Alexis undisclosed statements directly contradict Maureen's testimony. Maureen's testimony at best is false, inconsistent and self-contradicting. Maureen testified that she was down-stairs and witnessed Bythewood without a weapon when he was shot. Maureen testified she did not see a gun in the petitioner's hand or his father's hand. (Tr. Doc No. 45-2 PAGEID 4653-57) The record reflects Maureen admitted on cross examination that she told police she did not know when the petitioner had a gun because "the petitioner and his father went from downstairs to outside while she was upstairs, and she really did not see the petitioner. (Tr. Doc No. 45-2 PAGEID 4752-53). Alexis affidavit rebuts the state appellate court conclusion of the facts. *See, State v. Shine-Johnson,* 2018-Ohio-3347, ¶65, 117 N.E.3d 986, 1005, 2018 Ohio App. LEXIS 3621, *35-37.

Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. *See, ibid. If* new evidence so requires, this may include consideration of "the credibility of the witnesses presented at trial." *Ibid.; see* also *ibid.* (noting that "in such a case, the habeas court may have to make some

credibility assessments"). *House v. Bell*, 547 U.S. 518,538-539. The district court and sixth circuit court did not apply this standard of review imposing an over burdensome actual innocence standard. Therefore, this court should Grant Certiorari.

III.

When, or Whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases pending on direct review or Collateral Review?

This court should grant leave to finally answer this reoccurring unsettled question that *Fiore v. White*, 531 U.S. 225,226 (2001) and *Bunkley v. Florida*, 538 U.S. 835 (2003) left open. This case is ripe to finally make that determination. The Ohio Supreme Court in *State v. Parker*, 157 Ohio St. 3d 460,470, by majority opinion gave this court the final authority to recognize new state rights under state law and determine the retroactivity of state law to cases pending on direct or collateral review.

This court has recognized the right of self-defense [is] guaranteed by the [Ohio] Constitution. *See, District of Columbia v. Heller,* 554 U.S. at 585. The H.B. 228 amendments to R.C. 2901.05 burden of proof statute that became effective March, 28, 2019 repealing the former statute correcting a longstanding fundamental defect in Ohio Law. This amended the burden of proof on Ohio's self-defense law now requires the State as an element of the crime to disprove beyond a reasonable doubt that the defendant did not use deadly force in self-defense once the defendant meets its burden of production at trial. This is a new rule for the conduct of criminal prosecutions of self-defense cases.

The lower court(s) agreed that federal law does not prohibit amendments R.C. 2901.05 from being applied retroactively. *See, Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 59808, *72. The lower courts held R.C. 1.48 prospective presumption is triggered and did not apply retroactively to deny the relief. The court states "Given the number of people serving long sentences for murder who claimed to have been acting in self-defense, this would involve a large number of new trials." *Shine-Johnson v. Warden*, 2021 U.S. Dist. LEXIS 221609,*19. The Supremacy Clause takes effect. The Federal Constitution and laws enacted under it prevail over conflicting laws of state. *Florida v Mellon*, 273 U.S. 12. Further, it is well settled when the governing law changes between a state court's ruling and the date on which a petitioner's conviction became final, a federal habeas court reviewing the state-court judgment must apply the law that controlled "at the time his state-court conviction became final. *Terry Williams*, 529 U.S. at 390. H.B. 228 was the governing law. Shine-Johnson case was pending and his circumstances are extraordinary and narrow and does not require to retrying everyone.

The original bill text OH 2017 H.B. 228 proposed on May 16th, 2017 to amend R.C. 2901.05 and 2901.09. The bill for political reasons was vetoed and was overridden one month after Shine-Johnson's direct appeal for reconsideration was decided. The bill was altered and removed the language to amend the duty retreat to ensure the bills survival. Then under 2019 Ohio SB 175 the general assembly accomplished what it originally set out to do under 2017 H.B. 228 to remove the ambiguity in the law Amending the castle doctrine R.C. 2901.09. The castle doctrine is not independent of

the affirmative defense of self-defense but an integral part of it. *Martin v. Warden, London Corr. Inst.*, 2020 U.S. Dist. LEXIS 59449, *3. The amended R.C. 2901.09(C) is a substantive change inasmuch as it pertains to an element of the offense and removes an element that the factfinder must consider. *State v. Duncan*, 2022-Ohio-3665, P27-P28, 2022 Ohio App. LEXIS 3458, *15. Governor Mike DeWine states that "Senate Bill 175 accomplishes removing the *ambiguity* from the self-defense law." Rep. Kyle Koehler of the General assembly called the measure a" simple fix to existing law." The prior duty to retreat instruction resulted in circular reasoning that affected the burden of proof causing a fundamental defect and created ambiguity in the law. *See, State v. Dale,* 2013-Ohio-2229. (Concurring opinion).

When the legislature makes changes to the law. "The legislature is presumed to have full knowledge of prior judicial decisions. *Wayt v. DHSC, L.L.C.*, 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92, ¶23. The 2017 H.B. 228 amendments were clearly created to overcome an aspect of a criminal trial that substantially impairs the truth-finding function on claims of self-defense under R.C. 2901.05 that had been taking place in Ohio for decades. This can be explicitly and/or implicitly shown in the historical view of the statute and by the intent of the General Assembly in enacting 2017 H.B.228 in regards to R.C. 2901.05 stated in section 9.86:

> "The general assembly also finds and declares that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others."

In *State v. Brooks*, 2022-Ohio-2478, P16, 2022 Ohio LEXIS 1466, *11-12 the court held: "H.B. 228 does not apply to cases in which a defendant's trial predates the

amendment." More importantly, the *Brooks Supra,* does not directly solve the question posed here today. *Brooks*, answered the certified-conflict question ("Does legislation that shifts the burden of proof on self-defense to the prosecution (2018 H.B. 228, eff. March 28, 2019) apply to all subsequent trials even when the alleged offenses occurred prior to the effective date of the act?") As the concurring opinion in *Brooks, Supra, Id.* at ¶26. (But the real question before this court has little to do with retroactivity.)

The *Brooks Supra,* held the new procedural rules (with substantive effects) applies to any proceedings conducted after the adoption of such laws." *State ex rel. Holdridge v. Indus. Comm.*, 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967). It is well settled, a new rule *of criminal procedure* applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1550, 209 L. Ed. 2d 651,655. A state court determining what law should have been applied on direct review may afford greater retroactivity than *Griffith* requires (or that *Teague* allows), but no less. *Danforth*, 552 U.S. at 288. As the *Brooks* court, relies on *State v. Humphries*, 51 Ohio St. 2d 95,98, *citing State* v. *Robinson*, 47 Ohio St. 2d 103 at page 110. The law has returned to its previous position as in *State* v. *Robinson supra,* and *State v. Humphries supra.* As the court explained the Burden of production requires that evidence adduced must raise a reasonable doubt as to guilt. The General Assembly's 1978 amendment of R.C. 2901.05 creating the additional burden by the preponderance of evidence but the general assembly never amended language of the "Burden of Production" that was applied to this case

codifying a fundamental defect in the law that was addressed in the *Robinson* and *Humphries* case regarding effect and operation.

However, the Ohio trial and appellate court unconstitutionally applied the self-defense law to the particular facts of this case that usurp due process and is the result of ambiguous construction of law, an obvious fundamental defect, and the state appellate court unconstitutionally broadening the burden of proof of self-defense applying the law in a new unforeseeable manner. *See, United States* v. *Lanier,* 520 U.S. 259,267-268, also n. 6. Shine-Johnson "at trial" presented sufficient evidence supporting self-defense raising a reasonable doubt as to guilt. The prosecutor told the jury you have to murder someone *before* you can have self-defense. (Tr. Doc No. 45-2 PAGEID 5589) The prosecutor further told the jury in closing in that "because the petitioner raised self-defense he was "admitting murder, his *burden of proof* was done," and that murder is *presumed*[4]. (Tr. Doc No. 45-2 PAGEID 5643-44). *See, State v. Poole,* 33 Ohio St. 2d 18, 19, 294 N.E.2d 888,889. The petitioner objected. The trial court refused to cure the error but stated at side bar "I can see your argument, you know, well it's a homicide, not a murder." (Tr. Doc No. 45-2 PAGEID 5650-53). The court approved of the state's comments to the jury that murder was presumed. *See, Bailey* v. *Alabama,* 219 U.S. 219, 239 (The power to create presumptions is not a means of escape from constitutional restrictions.) The application here violates the principles of *Mullaney* unconstitutionally shifting the burden to the petitioner of proving an essential element of the crime. See (Appendix J)

[4] *White v. Arn,* 788 F.2d 338(No elements of murder are "presumed" under Ohio law); *Francis v. Franklin,* 471 U.S. 307 at 322.

The statements in this particular case on the burden of proof of self-defense went uncorrected directly affecting the truth-finding function of the jury and so raises serious questions about the accuracy of the guilty verdict especially where the evidence of self-defense can create a reasonable doubt as to guilt. The Ohio Supreme Court recently decided in *State v. Brooks*, 2022-Ohio-2478, P16, 2022 Ohio LEXIS 1466, *11-12:

> "The allocation of a burden of proof is generally a procedural matter with substantive effects. *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20-21, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000) ("Given its importance to the outcome of cases, we have long held the burden of proof to be a 'substantive' aspect of a claim"); *In re Joint Cty. Ditch No. 1*, 122 Ohio St. 226, 231-232, 171 N.E. 103 (1930) (noting that "the burden of proof is a procedural matter" but also that the "Legislature has made provision for the substantial constitutional right. If the imposition of the burden of proof upon [a defendant] is a substantial interference with the exercise of that right, it is a denial of a substantial right guaranteed by the Constitution"). As the allocation of the burden of proof is not easily categorized."

In *State v. Petway*, 2020-Ohio-3848 at *47-73, the court clearly explained the effect of the H.B. 228 amendments. The court explained the laws in Ohio have been inconsistent on the burden of proof of Self-Defense. The *Petway* case has pointed out the H.B. 228 amendment is not substantively different than the Supreme Court of Ohio's standard in *Melchior*. Therefore, in effect return the law to its previous position. As the *Petway supra, at* [*P71] [**478] , has also pointed out it the prior version of R.C 2901.05 created the possibility of confusion or a jury seeking to reconcile the parties' respective burdens. Therefore, H.B. 228 amendment returns the law to its prior position requiring the State to disprove the self-defense as the element of a crime. The *Humphries* court explains that the *Robinson* court under R.C. 2901.05 creates another element of the crime, which the prosecutor must prove beyond a

reasonable doubt. *State v. Humphries*, 51 Ohio St. 2d 95, 111, *28; *State v. Degahson*, 2022-Ohio-2972 (self-defense no longer an affirmative defense); *see*, *Isaac v. Engle*, 646 F.2d 1122,1124, *4-5:

> "The Constitution does not ordinarily require the retroactive application of a new interpretation of a statute. See, e. g., *Halliday v. United States*, 394 U.S. 831, 89 S. Ct. 1498, 23 L. Ed. 2d 16 (1969). On the other hand, where the statute pertains to an affirmative defense and the statute is construed to make the absence of the affirmative defense an element of proof of the crime itself a different result is mandated. In such a case, the constitutional doctrine announced in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), and in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), requiring the prosecution to prove every element of a crime beyond a reasonable doubt, has application. *Berrier v. Egeler*, 583 F.2d 515 (6th Cir.), cert. denied, 439 U.S. 955, 99 S. Ct. 354, 58 L. Ed. 2d 347 (1978), and the Due Process Clause requires that the new interpretation be applied retroactively. *Hankerson v. North Carolina*, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977)."

It is clearly established federal law, redefining the burden of proof placed upon a defendant, whether it be by a new constitutional rule or by a "new statutory interpretation" of constitutional dimension, has a substantial impact upon a criminal trial's truth-finding function. In such situations retroactive application is imperative. *Hankerson*, *supra*, at 432 U.S. at 241, quoting *Ivan V. v. City of New York,* 407 U.S. 203,204-05. *Winship* explained that the reasonable doubt standard is a constitutional dimension. This case raises a significant question about the changes in law that took place in light of *Montgomery v. Louisiana*, 577 U.S. 190, 200. It raise a question if the lower court(s) are in conflict with *Griffith v. Kentucky*, 479 U.S. 314, at 326 (The Court settled a long debate about retroactivity by holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.) It follows, as a general

principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. *Siebold,* 100 U.S. at 376, 25 L. Ed. 717.

Where states have the right to define and create their own laws, it raises a national question of: what obligation a state has to appellants/petitioners within their territory when it creates laws that are fundamentally defective, recognizes the laws are fundamentally defective, then amends the law to correct the fundamental error. What obligations does a state have to those adversely affected by these defective laws? This case is extraordinary, and this court should grant review.

IV.

This court should accept review to decide if the petitioner is denied federal due process where the federal court's decision is in conflict with the state's highest court.

Shine-Johnson claimed that appellate counsel was ineffective for failing to raise the claim that trial counsel was ineffective for not challenging the police altering the decedents operable "loaded" 20gauge shotgun, rendering it inoperable and then testing it for operability, and then using the operability report to undermine his defense theory. *Strickland v. Washington,* 466 U.S. 668. and was denied a meaningful opportunity to present a complete defense. *California v. Trombetta,* 467 U.S. 479,485. The lower court erroneously held Shine-Johnson would have to be successful arguing *Trombetta* as his underlying issue. *Shine-Johnson v. Warden,* 2021 U.S. Dist. LEXIS 124984, *20.(Because a *Trombetta* claim would likely have been unsuccessful in the

trial court and there is insufficient evidence in the record to support such a claim on direct appeal) Shine-Johnson Only has to show 1) a genuine issue exist. *State v. Leyh*, 166 Ohio St. 3d 365, 371-374. A court's determination that an App.R. 26(B) claim is colorable is not determinative of the ineffective assistance of appellate counsel. *Id, at* 375-376. The Sixth Circuit has decided an important federal question in a way that conflicts with the decision by a state court of last resort in *Leyh Supra,* and violates *Bradshaw v. Richey*, 546 U.S. 74.

The lower federal court(s) also held that counsel was not ineffective because the shotgun was not apparently exculpatory and he could not prove bad faith. Based on the factual allegations counsel could have been found ineffective for failing to raise *Trombetta, Brady, Napue,* spoliation, failing to move for dismissal or excluding the operability test results from the trial etc. The Sixth Circuit has never articulated a test for determining whether an item of evidence is apparently exculpatory or merely potentially exculpatory. *Elkins v. Summit County*, Ohio, 615 F.3d 671,677.

The police admitted to breaking the chain of custody and the conduct of disassembling the gun before testing. This court has never articulated a per se rule to prove bad faith. This court should create a standard of review to decide if evidence is exculpatory and/or if the factual allegations presented by Shine-Johnson can meet the bad faith standard and if he was denied a complete defense. (See Appendix K) The Police did not follow the normal practice in a homicide investigation or the procedures of handling evidence with blood as found under R.C. 2933.82. *See, Ariz. v. Youngblood*, 488 U.S. 51,56. The police did not treat each weapon equally and did not

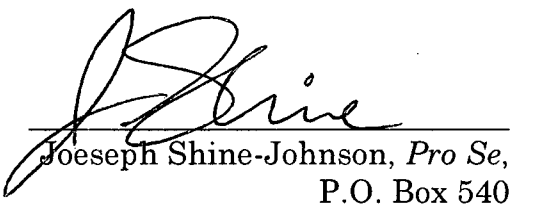
disassemble Shine-Johnson's weapon and this belies that the conduct is the normal operating procedures in a homicide investigation. The State never disclosed before trial the loaded Shotgun was disassembled by police and the firing pin was removed before conducting the operability test. The operability report is false evidence. *See, Mooney v. Holohan,* 294 U.S. 103. The *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley,* 473 U.S. 667,676. The decedent loading the gun with a live round is evidence that shows his knowledge of the operability of the gun and his intention to use it.

Shine-Johnson met the cause and prejudice standard. This claim was *not* subject 2254(d)(1) the state court did not conduct a hearing and Shine-Johnson was not barred by (e)(2). *Keeney v. Tamayo-Reyes,* 504 U.S.1,at 11. The petitioner testified the loaded 20-gauge shotgun was operable at the time of the incident and was not refuted. (Tr. Doc No. 45-2 PAGEID 5287-89). The lower courts ignored supporting circumstantial evidence improperly concluding the petitioner could not prove the gun loaded by his father with a live round was operable during the incident and contravenes. *Schriro,* 550 U.S.at 474. Is he entitled to an evidentiary hearing?

CONCLUSION

Therefore, for the above stated reasons this court should grant Certiorari.

Respectfully Submitted,



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