No. 23-6345

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFERY M. SPRING JR.,--PETITIONER,

VS.

WARDEN DAVID W. GRAY,--RESPONDENT,

PETITION FOR WRIT OF CERTIORARI

SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1: Is it a violation of substantive and procedural due process for the Ohio Courts to deny the defendant in this matter an evidentiary hearing and allow him to further develop the state record with newly discovered evidence supporting a valid defense not pursued at trial by trial counsel? Violating the defendants constitutional rights to substantive and procedural due process under the 5th, 6th and 14th Amendments to the U.S. Constitution.

2: Was it ineffective assistance of trial counsel to fail to investigate an accident defense. In violation of the Sixth Amendment of the U.S. Constitution

TABLE OF AUTHORITIES

State Constitutional Provisions, Rules, Statutes and Decisional Law

U.S. Constitution

Federal Statutes, Rules and Decisional Law

Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013)

Davila v. Davis, 137 S. Ct. 2058, 2063, 198 L. Ed. 2d 603 (2017)

Tyler v. Mitchell, 416 F.3d 500, 504 (6th Cir. 2005)

Murphy v. Ohio, 551 F.3d 485, 502 (6th Cir. 2009)

28 U.S.C. § 2253

Slack v. McDaniel, 529 U.S. 473,484, quoting Barefoot v. Estelle, 463 U.S. 880,893

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

Rhoades v. Davis, 852 F.3d 422

Frost v. Gilbert, 835 F.3d 883, 888–89 (9th Cir. 2016)

Miller-El v. Cockrell, 537 U.S. 322,337

Engle v. Isaac, 456 U.S. at 135, 71 L Ed 2d 783.

Slagle v. Bagley, 457 F.3d 501(2006) citing Baze v. Parker, 371 F.3d 310,320.

Coleman v. Thompson, 501 U.S. 722, 750

Osborne v. Ohio, 495 U.S. 103, 123–25.

Murray v. Carrier, 477 U.S. 478, 485, at 488

Picard v. Connor, 404 U.S. 270,277 (1971); Humphrey v. Cady, 405 U.S. 504, 516 n.18 (1972)

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)

Pope v. Netherland, 113 F.3d 1364, 1368 (4th Cir.), cert. denied, 521 U.S. 1140 (1997)

Franklin, 811 F.2d at 326 quoting Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982) (en banc)

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

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)

Rittenhouse v. Battles, 263 F.3d 689,696 (7th Cir. 2001)

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)

Wilson v. Sellers, 138 S. Ct. 1188,1192

Baldwin v. Reese, 541 U.S. 27

James v. Kentucky, 466 U.S. at 351

Douglas v. Alabama, 380 U.S. 415, 422

Bonilla v. Hurley, 370 F.3d 494,497 (6th Cir.)

Greene v. Fisher, 565 U.S. 34, 40

Clemmons v. Delo, 124 F.3d 944,948

Tharpe v. Sellers, 138 S. Ct. 545, 546–47 (2018)

Davis v. Strack, 270 F.3d 111 (2nd Cir. 2001)

House v. Bell, 547 U.S. 518,537

Schlup v. Delo, 513 U.S. 298,327-328

Strickland v. Washington, 466 U.S. 668

California v. Trombetta, 467 U.S. 479,485

Bradshaw v. Richey, 546 U.S. 74

Keeney v. Tamayo-Reyes, 504 U.S.1,at 11

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Petitioner respectfully prays that a writ of certiorari issues to review the judgements below.

OPINIONS BELOW

1. Direct Appeal Decision, Court of Appeals of Ohio, Seventh Appellate District, Jefferson County

Decided March 3, 2017, CASE NO. 15 JE 0019 (State v. Spring, 2017-Ohio-768)

2. Motion to Reopen Direct Appeal Court of Appeals of Ohio, Seventh Appellate District, Jefferson County Decided June 29, 2017, CASE NO. 15 JE 0019 (State v. Spring, 2017 Ohio App. LEXIS 2740)

3. Discretionary Appeal Not Allowed, Supreme Court of Ohio, Decided July 26, 2017, Case No.2017-0519. (State v. Spring, 2017 Ohio LEXIS 1565)

4. Discretionary appeal not allowed by State v. Spring, 151 Ohio St. 3d 1527, 2018-Ohio-557, 2018 Ohio LEXIS 363, 91 N.E.3d 758, 2018 WL 894326 (Feb. 14, 2018)
5. Post-conviction relief denied at State v. Spring, 2020-Ohio-4718, 2020 Ohio App. LEXIS 3636, 2020 WL 5846067 (Ohio Ct. App., Jefferson County, Sept. 29, 2020)
6. Habeas Corpus Decision: United States District Court for the Northern District of Ohio, Eastern Division March 23, 2022, Decided; March 23, 2022, Filed:CASE NO. 4:18-cv-2920. Spring v. Harris, 2022 U.S. Dist. LEXIS 52599
7. Certificate of appealability denied, Motion denied by, As moot Spring v. Gray, 2022 U.S. App. LEXIS 28412 (6th Cir., Oct. 12, 2022)
8. Rehearing denied by, Spring v. Gray, 2023 U.S. App. LEXIS 17577 (6th Cir., July 11, 2023)
9. Rehearing denied by, En banc Spring v. Gray, 2023 U.S. App. LEXIS 19182 (6th Cir., July 26, 2023)

JURISDICTION

The Sixth Circuit Court of Appeals entered final judgment on the appeal on Oct. 12, 2022. A copy is attached at **appendix A**. A timely petition for rehearing was denied July 11, 2023, **appendix B**. Rehearing En banc was denied on July 26, 2023 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. 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

Facts and Procedural History

Spring called 911 to report that he had killed Stephen Boyer; he had sustained two gunshot wounds and his body was found outside of Spring's home. Spring was indicted on one count of murder, R.C. 2903.02(A), an unclassified felony, with an attached firearm specification, R.C. 2941.145; and one count of tampering with evidence, R.C. 2921.12(A)(1). Spring made numerous inconsistent statements to police about the circumstances surrounding Boyer's death, regarding which defense counsel did not file a motion to suppress.

The following facts were adduced during Spring's jury trial. Both Spring and the victim had been drinking alcohol on the day Boyer was killed; Spring estimated that he had consumed fifteen beers and Boyer's blood alcohol content upon his autopsy was .292. On the 911 call, Spring claimed Boyer was trying to break into his home while brandishing a knife and seemed to indicate that there was more than one person in his home when this attempted break-in occurred.

When police arrived, they found Spring was the only one in the home. There was no sign of forced entry at his residence and no sign of a struggle inside of his home. Police located the victim's jacket and the victim's cell phone in Spring's living room.

They found Boyer dead, having sustained gunshot wounds to the head and chest. His body was lying in front of Spring's front door; however, there was a bloodstain several feet away—not near the front door—that appeared to have been swept up with a broom. A bloodstained push-broom was also found outside.

Officers placed Spring in the back seat of a cruiser and questioned him. After being provided with *Miranda* warnings, Spring stated: "I shot him once, went outside and shot him again in the head to make sure he was dead."

Officers observed the victim had a knife in his hand, but they also noticed that the placement of the knife seemed odd given the condition of the body and the gunshot wound suffered by the victim. The knife was recovered and sent to the BCI crime lab for processing. The only

DNA recovered from the handle and the blade of the knife belonged to Spring; there was no DNA from the victim on that knife.

Officers attempted to find the firearm used in the crime, a Smith and Wesson .38 revolver, and Spring made various claims as to where the weapon might be, first claiming it was in his bedroom, and later stating that it might have been in the couch. Officers later located the weapon during a search of the residence, inside of a concealed cabinet in the kitchen. The gun contained two spent shell casings and four live rounds.

An autopsy of the victim's body resulted in a bullet being recovered from the victim's abdomen. That bullet was a .38 caliber bullet and additional testing by the crime lab resulted in the conclusion that the bullet found inside Boyer's body was fired from the .38 Smith and Wesson revolver found in Spring's kitchen.

Approximately ten hours after he made the 911 call, Spring was interviewed by Sheriff Fred Abdalla while in sheriff's department custody; this interview was videotaped. Before questioning Spring, Abdalla provided him the *Miranda* warnings, and Spring indicated he understood his rights and wished to waive them.

Spring admitted to the sheriff that he first shot the victim in the abdomen and then shot him again in the head. He explained he inflicted the second shot because he did not want to see the victim suffer. This statement by Spring matched the conclusions of the medical examiner, who indicated that the victim was alive when the shot to the head was fired. Spring also admitted he attempted to clean up the blood outside with a broom, and that he placed the knife in the victim's hand after he shot him.

Spring elected to testify in his own defense at trial, claiming that he shot the victim accidentally through his closed front door. Spring testified that he believed the victim had left the premises, and therefore did not think he would hit anyone when he fired his weapon through the door. Spring claimed that prior to the shooting there were only seven bullet holes in the front door, an assertion supported by the testimony of his son. After the shooting, investigators found there were nine bullet holes in the front door.

Spring admitted he lied when he reported the victim broke into his house and had a knife. Spring said he and the victim had been together

at his home for approximately 30 to 40 minutes, when the two began to argue. At some point, he became agitated after observing his prescription medication bottles were moved; he suspected the victim had attempted to steal from him. He then pushed the victim out of his house. Subsequently, he shot two times through the closed front door.

Spring said he discovered the victim's dead body outside when his dogs began to bark. Spring conceded he took the broom and was trying to sweep away the blood stains and that he also "got some disinfectant and sprayed it around" that area. Only after his attempt at cleaning up, did Spring call 911. As for the knife, Spring said he "subconsciously" planted it in the victim's hand. When asked by defense counsel whether he lied about the knife because he was afraid, Spring remarked:
"I wasn't. I wasn't afraid."

Upon cross-examination, Spring could not explain how the bullets would have taken a 90 degree turn once going through the door, to hit the victim where the bloodstain was found outside. Spring asserted that three separate law enforcement officers must have misheard him when they reported he said he shot Boyer once and then went out and shot

him again in the head to make sure that he was dead. Spring was unable to explain his recorded statement to the sheriff, wherein he admitted that he shot the victim in the head because he "didn't want to see him suffer."

Spring was found guilty by a jury on all counts and was sentenced to an aggregate prison term of 18-years to life.

A. Introduction

By any measure, Jeffery M. Spring Sr.'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.

Trial Proceedings

Mr. Spring was indicted on one count of murder, R.C. 2903.02(A), an unclassified felony, with an attached firearm specification, R.C. 2941.145; and one count of tampering with evidence, R.C. 2921.12(A)(1).

Appellate Proceedings

Mr. Spring filed a timely direct appeal and the appellate court Holdings were as follows: [1]-Defense counsel's failure to object to alleged prosecutorial misconduct during closing did not constitute ineffective assistance because the prosecutor's comment calling defendant a "snake" was a reasonable rebuttal to defense counsel's closing statement and did

not rise to the level of misconduct, and defendant could not demonstrate prejudice given the overwhelming evidence against him; [2]-Counsel's failure to object to the sheriff's opinion testimony did not constitute ineffective assistance because based upon the location of the urine and the location where the victim's body was found, the sheriff opined that the victim had gone outside to urinate when he was shot, and the opinion was rationally based upon the sheriff's perception and observation of the scene and was helpful testimony, Evid.R. 701.

State Post-Conviction

Mr. Spring filed a petition for post-conviction relief presenting new evidence from an expert witness indicating that the bullet evidence he examined from this case indicated that the bullets had traveled through the door before striking the victim, this was supported by the expert's report in affidavit form and photos submitted to the court showing the paint on at least one bullet, the trial court had refused the expert witness access to all of the bullet evidence. Ultimately the trial court applied the doctrine of res judicata claiming that this evidence could have been presented and issues raised at trial. This was proof of Mr. Spring's claim of ineffective assistance of trial counsel because Mr. Spring informed trial

counsel of this version of events and requested trial counsel to adequately prepare for and support his accident defense with expert testimony. Ineffective assistance of trial counsel was obvious from the face of the record and it was ineffective assistance of appellate counsel when appellate counsel did not raise this claim of ineffective assistance of trial counsel for failure to adequately prepare for and support his defense of accident.

B. Habeas proceedings

During Mr. Spring 's habeas proceeding he was granted a stay to exhaust his state post-conviction. In his petition he raised several grounds to grant relief namely prosecutorial misconduct, ineffective trial counsel, violation of his rights to due process and a fundamentally fair trial. The District Court denied the petition and the 6th Circuit declined to issue a Certificate of Appealability.

REASONS 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.* Mr. Spring has done 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.

Further, this case is unique. This court has not encountered a similar set of facts and circumstances. The State court applied the doctrine of res judicata related to evidence that Mr. Spring was unable to obtain due to the ineffectiveness of his trial counsel and appellate counsel. The Sixth Circuit found in short, that to the extent that Spring argues that, pursuant to *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), ineffective assistance of his post-conviction counsel excuses the default, reasonable jurists would agree that the argument fails. The alleged ineffectiveness of post-conviction counsel cannot constitute cause to overcome the procedural default of Spring's

ineffective-assistance-of-*appellate*-counsel claims because *Martinez* and *Trevino* can be invoked only to excuse ineffective-assistance-of-*trial*-counsel claims. *See* *Davila v. Davis*, 137 S. Ct. 2058, 2063, 198 L. Ed. 2d 603 (2017). and that Mr. Spring attempted **[*14]** to raise a third ground for relief: that the trial court deprived him of his due process rights by denying post-conviction relief because he had presented evidence that his trial counsel was ineffective for failing to investigate and present evidence related to the pills and bullets found at the crime scene. Reasonable jurists could not debate the court's decision not to consider this claim because claims presented for the first time in a reply are "not properly before the district court" and "the district court d[oes] not err in declining to address" them. *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005); *see also Murphy v. Ohio*, 551 F.3d 485, 502 (6th Cir. 2009) (providing that a court may decline to consider a claim raised for the first time in a reply).. The Sixth Circuit ignored the exception in the Martinez/Trevino framework of exceptions to procedural default that Mr. Spring had no counsel at all during his post-conviction proceedings and thusly could overcome the procedural default. The Sixth circuit through the adoption of the lower courts decisions have sanctioned the lower

court's misapplication of procedural default violating clearly established federal law as decided by this court.

Whether due process allows 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 Mr. Spring 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 Mr. Spring 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 debatable that Mr. Spring 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 Mr. Spring 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 for relief pursued. Procedural default does not preclude review of Mr. Spring '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 Mr. Spring's claims are 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 Mr. Spring 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 Mr. Spring 's claims are not barred from federal review.

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). Mr. Spring argued that it was Ineffective Assistance of Counsel when counsel failed to obtain a ballistics expert to examine the bullets recovered from the shooting. Mr. Spring and counsel both

knew that he had claimed to have fired the rounds through the door and thus had hit the victim accidentally. Because of this it was imperative for counsel to obtain the expert requested and present this evidence. The petitioner is arguing that [he] may assert as cause and prejudice for any perceived procedural default, due to the actions of his attorney.

Therefore, trial counsel overruled Mr. Spring 's legal objectives. Mr. Spring had to bear the risk of his appointed attorney and could meet cause and prejudice, appointed counsel did have a constitutional duty to do a reasonable investigation related to Mr. Spring 's claims that he fired through the door and could not have known that the victim would be hit by the bullets fired through the door.

When Mr. Spring brought his Ineffective Assistance of Counsel claim to the State courts he did not have counsel for his post-conviction petition proceedings and the court did not allow for and evidentiary hearing. *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.

This court in *Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044*, held that "Where a state procedural framework, by reason

of its design and operation, made it highly unlikely in a typical case that a defendant would have a meaningful opportunity to raise an IATC claim on direct appeal, a procedural default would not bar a federal habeas court from hearing a substantial IATC claim if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective". Relevant to this case would be the "no counsel" exception, Mr. Spring did not have any counsel during this initial review collateral proceeding.

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). Mr. Spring at least fairly presented the substance of the Ineffective Assistance of Counsel claim to the Ohio Supreme court in his memorandum in support of jurisdiction. The lower federal courts improperly withheld a C.O.A. where it is at least debatable that the State court was fairly 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.");

Mr. Spring 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.

Mr. Spring 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. Mr. Spring 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 Mr. Spring could have possibly done to preserve his claims but simply affirmed the lower courts procedural rulings, not a ruling on the merits or finding Mr. Spring had 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 Mr. Spring '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, Mr. Spring 's testimony is unrebutted. *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.

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.

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.

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.

Mr. Spring claimed that appellate counsel was ineffective for failing to raise the claim that trial counsel was ineffective for not challenging the police 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 Mr. Spring would have to be successful arguing *Trombetta* as his underlying issue... (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) Mr. Spring Only has to show a genuine issue exist and that the new evidence presented was not available at the time of trial or part of the record. A court's determination that a Post-conviction 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 and violates *Bradshaw v. Richey*, 546 U.S. 74.

Mr. Spring met the cause and prejudice standard. This claim was *not* subject 2254(d)(1) the state court did not conduct a hearing and Mr. Spring was not barred by (e)(2). *Keeney v. Tamayo-Reyes*, 504 U.S.1,at 11. The lower courts ignored Mr. Springs evidence of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. *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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