23-6695

No: 23-5371
Originating Case No: 3:20-cv-00559

ORIGINAL

IN THE UNITED STATES SUPREME COURT

Douglas Curtis
Petitioner }

V }

Brian Eller
Warden }

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

PETITION FOR WRIT OF CERTIORARI

Douglas Curtis
Northeast Correctional Complex
5249 Hwy 67 W
Mountain city, TN 37683-5000

Pro Se Applicant

*i QUESTIONS PRESENTED

1) Whether Petitioner was denied his Fourteenth Amendment right to the Due Process of Law when the Sixth Circuit Appellate Court denied relief without having the Record on Appeal before it to review the District Court's clearly erroneous determinations for "clear error."

2) Whether the Sixth Circuit Court of Appeals reached a decision that was contrary to existing U.S. Supreme Court precedent, and directly conflicted with findings of its sister circuits in similar cases on the issue of "novel" state procedural default determinations, and the relevant standard of review?

3) Whether Petitioner was denied his Fourteenth Amendment right to the Due Process of Law, and the AEDPA sanctioned "one bite of the apple" when the Sixth Circuit applied deference to a constitutional claim supplanted by the state appeals court, who then adjudicated their own supplanted claim rather than the actual claim properly presented to them concerning the rejection of a plea-offer?

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*iii INDEX TO APPENDICES

There are three parts to the Appendices presented to this court in support of his petition for a Writ of Certiorari. Each part is color coded and numerically identified by page number in the bottom right hand corner as required by Rule 14(i).

Part A, contains the Orders and Memorandums of the State and Federal Courts which has denied relief, with **(8)** eight sub-parts.

Part B, contains relevant pages from the State and Federal Court filings of petitioner through his appellate process, with **(8)** eight sub-parts.

Part C, contains relevant pages from the State Court pre-trial hearings, with **(4)** four sub-parts.

Each Appendix is divided into sub-parts, based on the specific portions of the record, listing the date and content of each sub-part.

Petitioner will point to the facts supported by the State and Federal Court Record, and reproduced for this court in the following fashion:

(App. A. Part A:2, page A-20), i.e., this citation is found in **Appendix A, Sub-Part A:2,** located at the handwritten number shown in the bottom right hand corner **A-20.** Each fact relevant to petitioner's argument in the Writ of Certiorari is referred to in this manner.

Part A:2= September 18, 2019, State's Response to Post-Conviction Appeal (ECF 13-26, Pg ID# 2704-2767) **(APP. A. Part A:2, Pgs A 17-34)**

Part A:3= January 30, 2020, State Court of Criminal Appeals Denial of Post-Conviction Relief, , M2018-01712-CCA-R3-PC, Reported, **(APP. A, Part A:3, Pgs A 35-60)**

Part A:4= February 5, 2021, Warden's Answer to Writ of Habeas Corpus Petition. (Doc. 28, Pg ID# 3101-3152) **(APP. A, Part A:4, Pgs A 61-112)**

Part A:5= March 29, 2023, Federal District Court, Middle Division at Nashville, Tennessee, Denial of habeas Corpus Relief, Reported at *2023 WL 2699973* (Doc 58, Pg ID# 4394-4488) **(APP. A, Part A:5, Pgs A 113-207)**

Part A:6= September 14, 2023, Sixth Circuit Court of Appeals Denial of Certificate of Appealability. **(APP.A, Part A:6, Pgs A 208-217)**

Part A:7= October 24, 2023, Sixth Circuit Court of Appeals Denial of Panel Rehearing **(APP.A, Part A:7, Pgs 218)**

Part A:8 = November 9, 2023, Sixth Circuit Court of Appeals Denial of rehearing En Banc **(APP. A, Part A:8, Pgs A 219-220)**

Part A:9= August 3, 2021, Order from District Court (Doc. 45) that Petitioner must request permission to exceed page limits on Reply to Warden's Response (Doc. 41). **(APP. A, Part A:9, Pgs A-221-222)**

Part A:10= January 24, 2022, Order from District Court (Doc. 47) granting permission to exceed page limit and accepting the 215 page Reply Brief as submitted. **(App. A, Part A:10, Pgs A 223-224**

Part A:11= January 24. 2023, Docket Sheet from District Court **(Doc. 1-57)**

(APP A, Part A:11, Pgs A 225-233)

APPENDIX B: (Purple Cover)
MOTIONS, BRIEFS AND PETITIONS FILED BY PETITIONER

Part B:1= February 2, 2017, Original Post-Conviction Petition filed in Lewis County Tennessee Circuit Court.
(ECF 13-17, Pg ID# 1758-1962)
(APP. B. Part B:1, Pgs B 1-10)

Part B:2= June 24, 2019, Post-Conviction Appellate Brief filed Tennessee Court of Criminal Appeals, Middle Division. (ECF 13-25- Pg ID# 2640-2703)
(APP. B, Part B:2, Pgs B 11-26)

Part B:3= November 1, 2019, Reply Brief filed with the Tennessee Court of Criminal Appeals, Middle Div., Nashville, TN, objecting to erroneous facts in State's Response Brief. (ECF 13-27, Pg ID# 2771-2797)
(APP. B, Part B:3, Pgs B 27-40)

Part B:4= July 1, 2021, Reply to Warden's Response to Writ of Habeas Corpus in the U.S. District Court, Middle Division, Nashville, Tennessee.
(Doc. 41, Pg ID# i-203)
(APP. B, Part B:4, Pgs B 41-92)

Part B:5= October 24, 2022, Motion to request the U.S. District Court, Middle Division, Nashville, Tennessee to Rehear/Reconsider Denial of Request for Discovery. (Doc. 55, Pg ID# 1-36) **(APP. B. Part B:5, Pgs B 93-106)**

Part B:6= January 9, 2013, Audio Forensic Analysis submitted to the Circuit Court of Lewis County at Hohenwald, Tennessee, by defense audio expert, Thomas J. Owen. (ECF 13-1, Pg ID# 316-324)
(APP. B, Part B:6, Pgs B 107-118)

Part B:7= May 11, 2018, Affidavit of audio defense expert, Mr. Thomas J. Owen, explaining the facts associated with trial counsel's failure to inform him of a new trial date and how that caused him not to be at the trial of petitioner although paid in full to be there. (ECF 13-24, Pg ID# 2574-75)
(APP. B, Part B:7, Pgs B 119-120)

Part B:8= August 18, 2014, Order, Circuit Court of Lewis County Hohenwald, TN, ordering trial counsel and the State prosecutor to send the relevant and material recorder device to the defense expert for forensic analysis. (ECF 13-2, Pg ID# 447)
(APP. B. Part B:8, Pgs B 121)

Part B:9= July 1, 2021, Reply to Warden's Response to Writ of Habeas Corpus in the U.S. District Court, Middle Division, Nashville, Tennessee. (Doc. 41, Pg ID# i-203)
(APP. B, Part B:4, Pgs B 122-152)

APPENDIX C: (Yellow Cover)
Pre-Trial and Post-Trial Hearings

Part C:1= August 4, 2014, Offer-of proof/Daubert Hearing Circuit Court for Lewis County at Hohenwald, Tennessee, where defense expert Thomas J. Owen, was examined and cross-examined concerning his expected testimony at the trial of petitioner. (ECF 13-17, Pg ID# 1848-1915)
(APP. C, Part C:1, Pgs C 1-58)

Part C:2= August 6, 2014, Last pre-trial hearing in the State Circuit Court in Lewis County, at Hohenwald, Tennessee, where counsel verbally requested a continuance and public funds to ensure the presence of the defense expert at the trial of petitioner. A plea-offer was made at this hearing which was rejected by petitioner due to counsel's promises to obey **Court Ordered** forensic testing of relevant and material evidence prior to any trial in this case. (ECF 13-7, Pg ID# 926-959)
(APP. C, Part C:2, Pgs C 59-70)

Part C:3= May 22, 2018, Transcripts of the post-conviction evidentiary hearing held in the State Circuit Court in Lewis County, at Hohenwald, Tennessee. (ECF 13:19-22, Pg ID# 2127-2493)
(APP. C, Part C:3, Pgs C 71-121)

Part C:4 July 22, 2014, Part One of Bifurcated Offer-of-Proof/Daubert Hearing held in the State Circuit Court in Lewis County, at Hohenwald, Tennessee. (ECF 13-3, Pg ID#586-678)
(APP. C, Part C:4, Pgs C 122-135)

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STATUTES AND RULES:

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The denial of relief for the Federal District Court, Middle Division, Nashville, Tennessee, is found at **(App. A, Part A:5, Pg A 113-207)**, and reported at ***2023 WL 2699973***. United States Court of Appeals for the Sixth Circuit denial of COA unpublished opinion, is found at **(App. A, Part A:6, Pg A 208-217)**, ***2023 WL 7189309***. The denial of relief for the Tennessee Court of Criminal Appeals is found at **(APP. A, Part A:3, Pg A 35-60, Curtis v State,** not reported, **2020 WL 4544697**

JURISDICTION

The Sixth Circuit Court of Appeals denied a COA on September 14, 2023 a timely Motion for Panel Rehearing and Rehearing En Banc, which was denied on October 24, 2023, unpublished is found at **(App. A. Part A:7, Page A 218)**. A timely rehearing en banc was filed and the Sixth Circuit Court of Appeals, denied rehearing on November 9, 2023, unpublished is found at **(APP. A, Part A:8, Page A 219-220)**. The jurisdiction of the court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the, **Sixth Amendment**, which provides in relevant part:

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

Fourteenth Amendment, which provides in relevant part:

Nor shall any State deprive any person of life, liberty, or property, without the due process of law.

28 U.S.C. § 2106 which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or Order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appro- private judgment, decree, or Order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

In 2011, this court ruled in ***Lee v Kemna, 534 U.S. at 382, 122 S. Ct. 877 (2002)***, "an ordinarily adequate procedural rule may nevertheless be inadequate in

"exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of the federal question." While application of the state procedural bar has been fairly consistent, how the Circuits apply federal review to constitutional claims when the state procedural rule was found to be inadequate has split the circuits down the middle. This case invites this country's highest court to determine whether the federal appellate courts will separately control the ultimate conclusions that determine whether a deferential or de novo review apply to constitutional claims when those courts determine the state procedural rule was inadequate or too "novel" to bar federal appellate review.

Also, Petitioner is asking this court to determine, whether a federal constitutional claim, of mixed law and fact, is "adjudicated on the merits," when the state court ***supplants*** a properly presented and valid constitutional claim with one of their own choosing, which lowers their burden of review to deny relief on the issue, denies Petitioner his constitutional right to a full and fair review, and whether deferential review should have been applied in this situation?

Petitioner raised 13 constitutional claims in his habeas corpus petition. The state court erroneously claimed that 10 of those claims were procedurally defaulted, citing a Tennessee case that had never been used in the context to which it was applied here. He then objected in his argument to the federal district court that he was not procedurally defaulted, showing them, how he presented the claims at the proper time, in the proper court, in the proper way, and the state court was using the procedural rule, only, for the purpose of frustrating federal review of his properly presented federal claims. "Whether a state court rested its holding on procedural default so as to bar federal habeas review is a question of law we review de novo." ***Couch v Jabe, 951 F. 2d 94, 96 (6th Cir. 1991)***. The district court found, without conducting a *de novo* review of the federal question of law, that the procedural rule was regularly followed and denied relief.

1. **In closer detail**, Petitioner was accused of molesting his oldest daughter from the age of eleven or twelve, through the age of twenty-two. A state grand jury

indicted him on four counts of child rape based on an alleged recorded phone conversation. Petitioner immediately hired an audio forensic expert to analyze the recording because he claims he did not have this conversation with his daughter. The recording was forensically determined to be tampered with.

2. The state then hired their own audio forensic expert, who was given access to the recorder device used to record the alleged recording. He found that the original recording had been erased from the device, yet ruled the recorded conversation was authentic. When the defense expert requested access to this same evidence he was told that the recorder device was unavailable, and he was never given the opportunity to forensically examine the recorder device.
3. On August 4, 2014, an offer-of-proof/***Daubert*** hearing was held two weeks before trial. When the trial judge learned of the recorder device discrepancy, he ordered both counsel's to send the recorder device to Petitioner's expert for forensic analysis, because the forensic services had been pre-paid in full for this exact examination of the evidence to be completed before trial. The trial judge went on to rule, "Until the defense expert has the same opportunity to forensically examine the recorder device that the state expert did, **There is not a level playing field in this trial**." (APP. C, Part C:1 Pgs C 47). Also, "So my ruling right now is subject to revisiting this issue at a later date based upon the examination of the recording device by Mr. Owen and then the potential for Mr. Owen and Mr. Lacey to talk with one another, is that both of these witnesses will be allowed to testify and relate to the jury their conclusions concerning the authenticity of this recording. My holding and ruling might **change** after the recording device is examined by Mr. Owen and after Mr. Owen and Mr. Lacey confer." **(APP. C, Part C:1, Pg C 53-56)**
4. At this same hearing, trial counsel informed the Petitioner and the trial court that he was not prepared for a trial on August 18, 2014, concerning the use of the contested recording. The judge went on to rule that the trial on August 18, 2014, would be on Counts 5 and 6 of the severed indictment and the trial on

Counts 1-4, where the expert would be needed would be held after a decision came back on the trial of Counts 5-6. **(APP. C, Part C:1, Pg C 48 and C 57),** The trial judge also ruled that the prosecutor and defense counsel needed to get the recorder to the defense expert as soon as possible to conduct the forensic analysis on that materially relevant device. The judge went as far as to make a formal order from the bench demanding the recorder device be sent to the defense expert. **(APP. B, Part B:8, Pgs B 121)**.

5. On August 6, 2014, an additional pre-trial hearing was held. At that hearing, trial counsel informed Petitioner and the court that he was going to ensure the court ordered testing of the recorder device was completed before any trial. The prosecutor verified that she and trial counsel had agreed on the arrangements to have the recorder device sent to the defense expert. Counsel then had the Petitioner found to be indigent by the court, verbally requested a continuance to apply to the AOC for public funds to reimburse the defense expert for funds he lost on reservations for his flight, hotel, car rental, when he was paid in full the previous year (2013) to be at Petitioner's trial, which was continued and counsel failed to inform the expert until August 5, 2014. **(APP. C, Part C:3, Pgs C 97, Line 4-20)**

   While counsel erroneously claims Mr. Owen (defense expert) told him that he got most of his money back. Petitioner has provided both the state and federal courts with a Notarized Sworn Affidavit from the defense audio expert denying such, **(APP. B, Part B:7, Pgs 119-120) Affidavit of Defense Expert, Tom Owen.** A plea-offer from the state was then presented to petitioner, to which he informed his attorney he did not want to take any plea-offer until the court ordered testing was completed, his attorney wrote his own version of Petitioner's denial on a blank piece of paper. When Petitioner refused to sign it, he was taken before the trial judge where he objected to what his counsel had written as the reason for rejection, and the trial judge made him sign it against his voluntary and free will. **(APP. C, Part C:2, Pgs C 62, L 17-25)** to

which he testified to at the PCR evidentiary hearing, **(Id. at Part C:3, Pg C 119 L 22-25,** and **Pg C 120 L 1-25)** and the judge ordered him to sign it anyway. **(Id. at Pgs C 98, L 10-17)** Petitioner explained why he did not take the offer at **(Id. at Pgs C 116, L 6-25, and Pg C 117, L 1-25, and Pg C 118 L 1-23).** Counsel verifies at **(Id. Pgs C 95, L 2-4)** "the court made him sign it."

6. A trial was held on Counts 1-4 on August 18, 2014, where petitioner was found guilty of Four Counts of Child Rape. The state concedes a reasonable probability the outcome of the proceeding would have been different, "If he had known Mr. Owen was not going to testify, the Petitioner would had accepted the plea-offer." **(APP. A, Part A:3, Pg A 55 Para. 2, & Id. Part A:4 Pg 161)**
7. On appeal to the state appellate court, the state answered the appellate brief claiming that Petitioner had defaulted (10) ten of his constitutional claims, citing the Tennessee case of ***Walsh v State,*** **166 S.W. 3d 641(2005)**, **(APP. A, Part A:2, Pg A 35-60)**. Petitioner then replied arguing that the state was the one in default because Petitioner presented all of his claims in the original and amended post-conviction petitions, was allowed to testify to those claims at the evidentiary hearing without objection, added them to his appellate brief as required by state procedural law, and the state was now claiming default for the first time on appeal. **(App. B, Part B:3, Pg B 35).**

   Just as in **Lee v Kemna, supra**, the Tennessee Court of Appeals on their own initiative sua sponte changed the default case from ***Walsh, Id.*** to ***Cauthern, 145, S.W. 3d at 599*** **(APP. A, Part A:3, Pgs, A 53, A 54, A 56, A 60.** The case of ***Cauthern*** is not adequate or regularly followed in the context in which it was applied in this case and Petitioner's claims have never been properly adjudicated on the merits with a full and fair review in the state court.
8. Petitioner filed a timely habeas corpus petition with all claims presented. The District Court accepted the state's procedural default rule without conducting the required de novo review under ***Maupin v Smith, 785 F. 2d 135 (6th Cir.)*** to ensure it was adequate and regularly followed, which is the appropriate

standard in this circuit. The court then claimed that Petitioner did not argue cause and prejudice; however, Petitioner filed a 215-page reply brief (**Doc. 41**) **(APP. B, Part B:4, Pgs B 41-92 and B 122-152).** with the approval of the District Court Judge, the honorable Eli Richardson, **(APP. B. Part B:9-10, Pg B221-224)**, where he proved that he presented each claim as required by Tennessee Procedural Law, with constitutional arguments, and the district court ignored it. As witnessed by the District court Memorandum, where in 93-pages, (**Doc.41**) is not mentioned even one time. **(Id. Part A:4, Pgs A 113-207)**

9. Petitioner filed a timely Notice of Appeal to the Sixth Circuit Court of Appeals and simultaneously requested the District Court to transmit the record to the appellate court on his behalf. The District Court clerk informed Petitioner that it was his responsibility to ensure the record gets to the Circuit Court, that he had 4,498 pages that he would send for .50 cents a page; however, the circuit court denied the COA prior to receiving that correspondence. Petitioner could in no way afford to purchase the record, but he began preparing those relevant parts he had in his possession to submit to the court and requested a panel and en banc rehearing. He also motioned the court to hold those proceedings in abeyance to allow him to get the record before them; however, they again denied the rehearing requests and denied as moot his request to file the record. **(APP A, Part A:8, Pg A 220)**

10. Petitioner requests that this honorable court review this case because no state or federal court has ever actually reviewed his objections and arguments. The state court simply pushed them aside and erroneously applied a default defense. The state argues, "None of these issues were included in the petitioner's final summation, and the post-conviction court did not render a ruling on them in its order denying relief." The court then references ***Cauthern, supra***, to apply the procedural default defense, **(APP. B. Part B:4, ECF 13-28 Pg ID# 2844)**. Petitioner has shown the procedural default rule relied on by the state was not adequate or regularly followed.

SUMMARY OF ARGUMENT

The Sixth Circuit's denial of federal habeas corpus relief should be reversed for the following reasons:

1) The State Court record was not transmitted to the appellate court prior to them reaching a decision to deny a Certificate of Appealability; and,
2) The reviewing appellate judge ignored Petitioner's procedural default argument as being "novel" and not adequate or regularly followed. He then proceeded to decide the case on the merits, based on alleged factual findings of the state appellate court, even though, the appellate court explicitly held that the trial court made no rulings on the issues because of the alleged procedural default. **The circuits are in conflict on this issue, and it should be reviewed to ensure the uniformity of decision.**
3) The state court "supplanted" a valid ineffective assistance of counsel claim properly presented by Petitioner with one of their own choosing. The appellate court then adjudicated the supplanted claim, which lowered their burden of proof to establish whether counsel's assistance was ineffective.. The district court and the Sixth Circuit court unreasonably applied deference to the supplanted claim over the objection and record proof provided by the Petitioner.

It was objectively unreasonable for the Sixth Circuit to deny Petitioner's request to submit the record on appeal and make critical determinations on the merits without considering whether he met the gateway standards of 28 U.S.C. § 2254(d)(2), based on the clear and convincing evidence provided to them that proved the record did not support the "erroneous" findings of the state court. Therefore, deference should not have been applied in this instance under the standards set forth under AEDPA.

REASONS FOR GRANTING THE PETITION

This court's mixed question standard of review jurisprudence for the last (20) twenty years, has rendered a series of decisions on the proper standards for review

for mixed questions of law and fact. The court has identified factors that counsel ***de novo*** review, and others that suggest deferential review. These cases provide the framework for the questions here.

De Novo review usually follows in these circumstances: **1)** When the decision does not hinge on credibility determinations; and, **2)** when the relevant legal principle acquires meaning only through application to particular facts; and, **3)** when deferential review would lead to inconsistent results; and **4)** when there is a particular need for appellate courts to maintain control of and to clarify legal principles; and, **5)** when there is a strong need to provide a defined set of rules for actors whom the legal standards affect.

These factors apply to deciding whether an inadequate state procedural rule erroneously applied to properly presented federal constitutional claims, should receive deference to alleged merits determinations not made by the trial court, or *de novo* review to facts proven by clear and convincing evidence not to be supported by the record. Also, whether this same question applies to misconstrued or supplanted claims that were adjudicated on the wrong properly presented constitutional question concerning the voluntariness of the rejection of a plea-offer.

Mixed issues that do not turn on credibility determinations usually warrant *de novo* review. Under **28 U.S.C. § 2254(d)**, on collateral review courts presumed correct a state court's findings of fact unless the record as a whole left the factual conclusions unsupported. This court held, "The ultimate question of voluntariness is legal and deserves independent federal determination," ***Miller v Fenton, 474 U.S. 104 at 112 (1985)***.

This ruling applies to this instant case on the question of voluntariness, when Petitioner was informed by the court and his attorney that the investigation was incomplete and due process required those investigations to be completed before there was "***a level playing field***" in the upcoming trial. Petitioner was then, as the record proves, and the Warden concedes, forced to sign a refusal of the plea-offer based on a derogatory comment submitted by his trial counsel against his free and voluntary will.

It is "objectively unreasonable" for the state court to claim that Petitioner's signature on a document he did not author is factual proof of his voluntary rejection of the plea-offer. **(APP. A, Part A:3, Pg A 54 *D).** Then in the same breath concede that he was forced to sign the document against his voluntary will. **(Id. at Pg A 55, Para. 2)**

Likewise, in ***Thompson v Keohane, 516 U.S. 99 (1995)***, also concerning the **§ 2254(d)** presumption of correctness. The court again examined a mixed question of law and fact subject to ***de novo*** review. ***516 U.S. at 106*** First, what were the circumstances of the investigation; and Second, given the circumstances would a reasonable person have felt free to leave. The first inquiry is factual and under AEDPA receives a presumption of correctness. The second inquiry, however, is a mixed question of law and fact on which the trial court has no advantage over the reviewing court. ***Id. at 112-113***. This applies in this instant case as to whether a reasonable person would have expected his attorney and the court to follow through on the rulings and orders of the court, or whether he should have expected a breakdown in the judicial process and taken the plea-offer. A reasonable person would not have felt free to disobey the judge's order, as did Petitioner. In ***United States v Bajakajian, 524 U.S. 321, 336 (1998)***, this court again declared ***de novo*** review on a mixed question of law and fact. Applying the dual inquiry format of ***Thompson*** and ***Ornelas***, this court said that an appellate court must accept a district court's factual findings unless clearly erroneous. This case applies to Petitioner's because the alleged facts relied on by the district court and then the appellate court were not factual determinations of the trial court, but were excerpts from either prosecutor misstatements of the facts in response briefs, or testimony from a trial attorney trying to erroneously excuse his unprofessional conduct. The Tennessee Court of Appeals even implicitly stated, that because, "Petitioner is procedurally defaulted and the issue was not properly before the court, no ruling was made on the issue. Issues raised for the first time on appeal are waived." Petitioner has shown over and over again how the record clearly and convincingly proves his constitutional claims were properly presented in the state court, and impeaches the

unreasonable facts relied on to deny relief. Therefore, the gateway to § 2254(d)(2) has been met and de novo review is warranted here as well.

In ***Lilly v Virginia, 527 U.S. 116, 136-37 (1999)***. The two-step analysis was again favored and ***de novo*** review was warranted because a Sixth Amendment determination does not turn on a declarant's in-court demeanor, or any other factor uniquely suited to the trial court. ***Id.*** This holding again applies to this instant case, because the one question concerning the rejection of the plea-offer is an ineffective assistance claim, a mixed question of law and fact, and the alleged defaulted claims are also mixed questions, that have been conceded by the State and the Warden to have not been adjudicated by the trial court. This argument is continued below in Supporting Argument to Question 2, showing the circuits are split on whether deferential or *de novo* review applies in these situations.

Lastly and most recently, this court ruled in ***Cruz v Arizona, 598 U.S. 17, 143 S. Ct. 650(2022)***, "In particular, this case implicates this Court's rule, reserved for the rarest of situations, that an 'unforseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this court's review of a federal question.' " ***Bouie v City of Columbia, 378 U.S. 347, 354, 84 S. Ct. 1687 (1964)***. "Novelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." This court has applied this principle for over a century, see ***Enterprise Irrigation Dist. V Farmers Mut. Canal Co., 243 U.S. 157, 165, 37 S. Ct. 318 (1917)***, "A state ground is inadequate where it is without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the [other] federal grounds of the judgment." We have continued to reaffirm this important rule in ***Walker v Martin, 562 U.S. 307, 320, 131 S. Ct. 1120 (2011)***.

The court went on to say that "defendants are constitutionally entitled to at least one 'full and fair' opportunity to raise constitutional claims." ***Friendly supra at 160, 162***. "The discriminatory treatment advances no perceivable state interest, so this

court reviews state-court decisions for evidence of a purpose or pattern to evade constitutional guarantees." ***Walker at 321***.

Determining whether cases have been adjudicated or purposely denied on "novel" procedural rules to evade constitutional guarantees, like analyzing voluntariness and probable cause, does not require a credibility determination. An appellate court should first review the district court's historical fact findings for clear error in this setting, with no record it was impossible for the district court to do this. Petitioner provided clear and convincing proof in the record that the facts relied on were not supported by the record. **(Doc. 41)** Therefore, this case lends itself to *de novo* review. Similarly, what review should be applied to cases that the court has implicitly denied relief on a procedural rule, that was found to be inadequate, and also reviewed statements from the prosecutor and counsel made in the process of trial and appeal, erroneously misconstruing those comments made in passing as alleged adjudication by the trial judge. Also, when the court has adjudicated an ineffective assistance claim in a manner that was not presented, but instead, was supplanted with a claim of the state's own choosing to deny relief. Petitioner asserts that both of these situations invites itself to a constitutional need for *de novo* review by the appellate court because they are mixed questions of law and fact and affect due process rights.

De novo review also applies when deferential review would lead to intolerably inconsistent results. This court raised this concern in ***Ornelas, supra***, where it warned that deferential review of reasonable suspicion and probable cause would lead to uneven constitutional standards throughout the nation. "A policy of seeping deference would permit different trial judges to draw general conclusions on facts that are sufficient, as well as, insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law. Petitioner shows this court the divisions that exist on these questions in his Argument in Support of Question Two and Three below.

De novo review is proper when courts should provide a defined set of rules for the actors affected by the legal standards. ***Thompson v Keohane, supra***, said that

"independent review would unify precedent and stabilize the law. Here too, the actors whom these questions most affect-defendant's, and judges on both sides would benefit from a defined set of standards governing this important split. The appellate courts define standards best.

This court has often considered the appropriate standard of review for mixed questions of law and fact. When the courts of appeals have disagreed on the proper standard of review for a particular mixed question, this court has provided the final answer. Because the situation presented here concerning "novel" procedural rules is "rare" this court has not been confronted with the question of proper review. However, the court has established that these are "exceptional cases" ***Lee v Kemna, 534 U.S. at 382, 122 S. Ct. 877 (2002)***. "One of the factors the court found relevant to its determination that the factual situation at issue was such an **'exceptional case'** was that 'no published state decision directs flawless compliance with the [procedural rule] in the unique circumstances this case presents..." Therefore, Petitioner requests this court to answer the question of when and how a defendant receives a constitutionally protected "full and fair" opportunity for the federal court to review state-court decisions for evidence of a purpose or pattern to evade constitutional guarantees. ***Walker at 321***.

Several of the appellate courts acknowledge, that the circuits are split on this issue, see Memorandum in Support of Question Two below. Prior to this case the appellate decisions addressing the standard of review in this setting provided almost no helpful reasoning or guidance. The courts that adopted a *de novo* review offered little to no analysis, so too the courts that have adopted the deferential standard. By comparison to the standards shown above the Sixth Circuit Court of Appeals opinion did not reflect the hues of this court's past standard of review decisions.

In conclusion, the Sixth Circuit, as well as, its sister circuits set a clear-error standard for fact findings in this context. "We review the District Court's factual findings for clear error and questions of law de novo." Petitioner is not seeking de

novo review of pure facts. Surely, too, the 'due deference standard does not compel deferential review for mixed questions of law and fact. Petitioner asks *de novo* review of his constitutional claims, including whether the rejection of his plea-offer was voluntary, and whether the inadequate "novel" procedural rule, and subsequent partial merits determinations, not made by a trial court or appellate judge, requires *de novo* review.

In this regard, the court of appeals overlooked previous decisions of this court and even some of its own mixed question decisions that teach the importance of distinguishing historical facts, reviewed deferentially, from the ultimate conclusion on a mixed question that may (or may not) merit *de novo* determination. What started as a ruling that "novel" state procedural rules do not bar federal or habeas relief, and was defined differently by different circuits, has now extended to an equal split among the circuits. This is precisely the kind of situation this honorable court prefers to consider under **Supreme Court Rule 10**. Most important, the questions presented are jurisprudentially significant and will affect not just these proceedings but outcomes in hundreds if not thousands of cases. The Supreme Court's immediate review and resolution of these conflicts is necessary. Certiorari is warranted.

I. ARGUMENT CONCERNING QUESTION ONE

Upon requesting a COA from the Sixth Circuit Court of Appeals Petitioner also requested that the Record be transmitted from the district to the appellate court. Petitioner then received notification from the District Court Clerk that it was the Appellant's responsibility to forward the record to the appellate court; however, he had 4498 pages of record transcripts available for (.50) cents per page. Unfortunately, the Sixth Circuit had already denied the COA before that correspondence arrived in his hands.

Petitioner could not afford to purchase the record from the District Court and immediately motioned the Sixth Circuit Court of Appeals to hold his request for a rehearing in abeyance while he prepared and submitted the parts of the record available to him. The appellate court denied the request for rehearing and denied as

"moot" his request to submit the record. **(APP. A, Part A:8, Pgs A 219-220)**

Petitioner argues that his Fourteenth Amendment Due Process rights were violated when the District Court failed to transmit the record on appeal, and the Sixth Circuit Court of Appeals failed to inform him that the record had not been received before ruling on his Request for a Certificate of Appealability. **Federal Rule of Appellate Procedure, Rule 10(b)(1)**, states, "Within 14 days after filing notice of appeal the appellant must, **A)** Order the record from the reporter; or, **B)** file a certificate stating that no transcript will be ordered. **F.R.A.P. Rule 11** states, "An appellant filing a notice of appeal must comply with **Rule 10(b)** and do whatever else is necessary to enable the clerk to assemble and forward the record."

When neither the record or the certificate was timely filed, the Sixth Circuit should have informed Petitioner of his responsibility prior to taking action on his case. Procedural due process requires the government to employ fair procedures when they deprive persons of a constitutionally protected interest in "life, liberty, or property. See ***Shoemaker v City of Howell, 795 F. 3d 553 (6th Cir. 2015)***, "To satisfy procedural due process, notice must be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections, and must afford a reasonable time for those interested to make their appearance." By neglecting to do so, Petitioner was unaware that his request was not timely received by the district court clerk and the Circuit Court was not able to review his case under its own standards. "Whether a state court rested its holding on procedural default so as to bar federal habeas review is a question of law we review *de novo*." ***Couch v Jabe, 951 F. 2d 94, 96 (6th Cir. 1991)***. "We review ineffective assistance of counsel claims de novo, as they present mixed questions of law and fact," ***U.S. v Munoz, 605 F. 3d 359. 366 (6th Cir. 2010)***. "The court must be able to determine that the ***Strickland*** test is met," ***U.S. v Logan,*** quoting ***Strickland, supra***. Petitioner respectively requests this court to reverse the ruling of the Sixth Circuit and remand for reconsideration upon receipt of the record in the interest of justice and the due process of law under the 14th Amendment.

Petitioner would also ask this court to reverse the denial of habeas relief on the fact that the record concerning his arguments concerning his federal constitutional claims was incomplete, which is proven by clear and convincing evidence provided to this court. Petitioner's Reply Brief **(Doc. 41)** to the Warden's response was 215-pages long due to the complexity of the issues, the novel procedural default rule, and the fact there were two experts with differing opinions on the evidence.

The honorable Eli Richardson, J., based on **Local Rule 7.01(a)**, Ordered him to request permission to file the Reply in excess of the page limitations **(App. A, Part A:9, Pg A 221-222)**. Petitioner then obeyed the court Order and permission was granted for **(Doc. 41)** to exceed the page limitation and be recognized by the court. **(App. A, part A:10, Pg S 223-224)**. However, The Order clearly shows a mistake was made as to which document was the Reply Brief used to review Petitioner's habeas petition. See **Id. at Pg A 223, Para. 2**, where Judge Richardson clarifies that the Reply Brief is **(Doc. 41)**, and verifies a motion was filed to exceed the pages limits of the Reply Brief, but references **(Doc No. 46 at 3), Id. at Pg A-224. Para2**. The Order goes on, under the specific circumstances presented here, Petitioner's request is **GRANTED**. The court accepts petitioner's Reply as submitted. Further, Petitioner is permitted to withdraw his Motion to Amend Reply Brief. **(Doc. 40)**

The docket sheet for this cause convincingly reflects the mistake that was made. At **(APP. A, Part A:11, Pg A 231)** it is shown the Reply Brief is **(Doc. 41)**. **Id.** at **(Doc. 45)** dated August 3, 2021, verifies the Motion was filed to amend/correct Reply Brief, again shown as **(Doc. 41)**. The mistake occurs at **Id. (Doc. 47)** and **(Id. Pg A 232)**, dated January 24, 2022, where the clerk states, "Next, Petitioner seeks to withdraw his Motion to Amend Reply Brief **(Doc. 40)** and requests permission to exceed the page limits of **Local Rule 7.01(a)(4)** with respect to his reply. **(Doc. 46 at 3)**. Under the specific circumstances presented here, Petitioner's request is **GRANTED**. The clerk was directed to refile Petitioner's Second Motion for Leave to Conduct Discovery **(Doc. 42)**, which permission to withdraw was GRANTED at **Id 47**, and is shown refiled as **(Doc. 48 per Order of 01/24/2022)**. The Memorandum

Order of the District Court is 93-pages, and refers only to **(Doc. 1)**, original habeas petition, **(Doc. 13)** (submission by the Tennessee Attorney General, and **(Doc. 48)**, Motion for Leave to Conduct Discovery, in all of their record citations denying relief. Not one time did the District Court acknowledge that they used **(Doc. 41)** to review Petitioner's constitutional claims, or that they even knew it existed. The denial of habeas relief should be reversed and Certiorari should be granted to allow the District and appellate courts to review petitioner's claims using (Doc. 41) which contains all of his arguments and proof of his illegal incarceration in violation of the Constitution or laws or treatises of the United states, to cure this manifest injustice.

II. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

The handling of this "**Exceptional Case**" is in conflict with other sister circuits who address the issue of "erroneous" or "novel" state procedural default determinations and whether *de novo* or deferential review applies:

2ND Cir.—*Sheldon v Leftenant, 2023 WL 8435888*, citing *Harris, 489 U.S. at 261-63, 265 n 12*, "To be independent, the state court must have actually relied on the procedural bar for its disposition of the case by 'clearly and expressly' stating that its judgment rests on that bar." Further, a state court's reliance on an independent and adequate procedural bar forecloses habeas review even if the state court also rejected the claim on the merits in the alternative. See e.g. *Id., at 264 n.10*)

Fama v Comm'r of Corr. Servs., 235 F. 3d 804, 810 n.4 (2nd Cir. 2000), "Where a state court says that a claim is 'not preserved for appellate review' and then ruled 'in any event' on the merits, such a claim is not preserved."; *Nowakowski, 2018 WL 642 1056 at *6*, "The bar applies even where the state court has also ruled in the alternative on the merits of a federal claim."

3rd Cir.—*Hill v Wetzel, 279 F. Supp. 3d 550, (2016)*, "I find that there is not an independent and adequate state ground barring federal review. Therefore I must give full *de novo* consideration to the arguments that Petitioner raised in state post-conviction proceedings. Under the AEDPA of 1996, a federal court must defer to state

court decisions on the merits of a federal habeas claim. No deference is owed, however, to state procedure based decisions like the state court decision in this case. For AEDPA deference purposes, a claim has been decided on the merits in state court only where the state courts, 'finally resolved the claim' and 'resolved that claim on the basis of its substance' rather than on a procedural or other ground." ***Shotts v Wetzel, 724 F. 3d 364, 375 (3rd Cir. 2013)***. "A lower court's decision on the merits is afforded no deference where a subsequent court has resolved the case on procedural grounds." ***Wilson v Beard, 426 F. 3d 653, 659 (3rd Cir. 2005)***.

4th Cir.—***Brown v Lee, 319 F. 3d 162, 170 (4th Cir. (2003)***, ***Reid v True, 349 F. 3d 788 (2003)***. When the court determines that a procedural rule is not adequate, "We are not at liberty to accept findings that patently conflict with the face of the record." This shows that a **de novo review** is necessary in the Fourth Circuit to make that determination.

7th Cir.—***Wilson v Cromwell, 69 F. 4th 410(7th Cir. 2023)***, see also ***Lee v Foster, 750 F. 3d 687, 694 (7th Cir. 2014)***, "When examining the adequacy of a state law procedural ground, our review is limited to whether the procedural ground is firmly established and regularly followed, not whether review by the state was proper on the merits. Because none of the claims were decided on their merits, we dispose of the matter as law and justice requires. We interpret this to require a de novo review.

9th Cir.— "The District Court's Orders should not be construed as holding that, because the state reached the merits of Apelt's claim, the federal court can ignore the procedural default. In ***Zapata v Vasquez, 788 F. 3d 1106, 1111 (9th Cir. 2015)***, we reiterated that, where a state court expressly invokes a procedural bar, the claim is defaulted, even though the state court goes on to discuss the merits of the claim." See also ***Harris v Reed, 489 U.S. 255, 264 n 10, 109 S. Ct. 1038 (1989)***, "Whether procedural rule is adequate to bar federal habeas review is a question of federal law. We review the District Court's factual findings for clear error and questions of law de novo. Therefore, when the procedural default rule was inadequate the court was required to look at Petitioner's federal constitutional claims **anew**."

U.S. SUPREME COURT—*Cruz v Arizona, 598 U.S. 17, 143 S. Ct. 650(2022)*, "In particular, this case implicates this Court's rule, reserved for the rarest of situations, that an 'unforseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this court's review of a federal question.' " ***Bouie v City of Columbia, 378 U.S. 347, 354, 84 S. Ct. 1687 (1964)***. "Novelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." This court has applied this principle for over a century, see ***Enterprise Irrigation Dist. V Farmers Mut. Canal Co., 243 U.S. 157, 165, 37 S. Ct. 318 (1917)***, "A state ground is inadequate where it is without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the [other] federal grounds of the judgment." We have continued to reaffirm this important rule in *Walker v Martin, 562 U.S. 307, 320, 131 S. Ct. 1120 (2011)*.

II.A 6th and 11th CIRCUITS AGREE THE CIRCUITS ARE SPLIT ON THE METHOD REVIEWING "NOVEL" STATE DEFAULT RULES

6th Cir.—*Bickham v Winn, 888 F. 3d 248 (2018)*, "A state ground, no doubt, may be found inadequate when discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law. The adequacy of state procedural bars to the assertion of federal questions is not within the state's prerogative finally to decide, because it is a federal question." Quoting *Douglas v Alabama, 380 U.S. 415, 422, 85 S. Ct. 1074 (1965)*.

"We note that our decision not to defer to the Ohio Supreme court's application of its procedural rule in this case creates some uncertainty as to the appropriate standard of review given the inconsistent cases from this circuit on the topic of review and AEDPA deference. Where a state court has not adjudicated a claim on the merits, the issue is reviewed *de novo* by a federal court." *Burton v Renico, 391 F. 3d 764, 770 (6th Cir. 2004)*." In *Benge v Johnson, 474 F. 3d 236 (6th Cir. 2007)*, "The court

declined to defer, because the state court did not provide a reasoned adjudication of the federal claim at issue." This is the exact circumstance of the instant case because the Tennessee Appellate Court, implicitly stated that no adjudication of the issue was made by the trial court because he was "procedurally defaulted." Because this circuit is split on how it handles deference in these situations, Petitioner should receive the benefit of the doubt because when the state erroneously applies an inadequate procedural rule, it should be presumed that any factual determinations on the constitutional claim are subject to **§ 2254(d)(2),** which requires *de novo* review of the arguments to determine if reasonable minds could debate whether the factual findings match up the facts presented at the state court proceeding.

11th Cir.—***Sealey v Warden, Georgia Diagnostic Prison, 954 F. 3d 1338 (2020)***, "We review de novo the determination of a district court that a habeas petitioner is procedurally barred from raising a claim in federal court. We review de novo whether a claim has been procedurally defaulted, as it is a mixed question of law and fact. We defer only to determinations actually made by the state court and otherwise conduct a de novo review. See ***Rompilla v Beard, 545 U.S. 374, 390, 125 S. Ct. 2456 (2005)*** (reviewing the prejudice prong de novo because the state court did not reach it).

Whether a state court's decision concerning the ineffective assistance of counsel claim receives deference under **2254(d)** is an issue that has divided the courts. Compare ***Visciotti v Martel, 862 F. 3d 749, 768-69 (9th Cir. 2016)***, "Noting the disagreement among circuits and deciding to review the ineffective assistance claim within the procedural default context de novo," with ***Richardson v Lemke, 745 F. 3d 258, 273 (7th Cir. 2014)***, "In our circuit, when we review a state court's resolution of an ineffective assistance claim in the cause and prejudice context, we apply the same deferential standard as we would when reviewing the claim on its own merits."

As shown above, if petitioner would have been reviewed in the Third, Fourth, Seventh or Ninth Circuits, he would have received a de novo review of his constitutional claims after the Circuit Court of Appeals determined that he was not

procedurally defaulted; however, if his case was reviewed in other circuits, deference would have applied no matter what. This court has already considered the type of situation presented in this application concerning "novel" state procedural rules to be "exceptional cases;" however, they have never ruled on how a federal court should review the constitutional claims that were erroneously defaulted.

These cases illustrate the fact that the circuits are out of step with this court and each other in their application of which standard of review to apply in these "exceptional cases." Certiorari should be granted in this exceptional case.

II B. PETITIONER DENIED FULL AND FAIR REVIEW OF HIS FEDERAL CONTITUTIONAL CLAIMS IN HABEAS CORPUS PROCEEDINGS

As to **Question 2:** while the U.S. District Court concedes, "In Tennessee, a petitioner is deemed to have exhausted all available state remedies for a claim when it is presented to the TCCA." ***Adams v Holland, 330 F. 3d 398, 402 (6th Cir. 2003)*** **(APP. A, Part A:5, Page A-143)** The District Court also concedes, "On appeal, citing ***Cauthern v State, 145 S.W. 3d 571, 599 (Tenn. Crim. App. 2004)*** 'An issue raised for the first time on appeal is waived,' the TCCA determined that Petitioner waived review of this claim." **(APP A, Part A:5, Page A 172-173)** The district court erroneously agreed without determining whether Petitioner raised his claims prior to appeal in any prior proceedings, even after argument was presented in Reply Brief. On appeal, the United States Court of Appeals for the Sixth Circuit, determined that the state procedural rule was inadequate, without saying so, as witnessed by its comment that "Petitioner argued the procedural rule was inadequate, and in the interest of efficiency we will go straight to the merits of his claims." **(APP. A, Part A:6, Page A 209).** Some circuits conduct a *de novo* review of the Appellant's claims when the state procedural rule is found to be inadequate, while others apply a deferential standard of review. The circuit split on this important issue is what brings Petitioner before this court. Due to the state court's procedural default claim and failure to "make a ruling on the issues," and the Sixth Circuit's deferential application to findings of fact not made by the trial court and unsupported by the state court

record to deny relief. Appellant has never had at least one court to complete a full and fair review of his federal constitutional claims, and argues this violates his Fourteenth Amendment right to due process of law, as shown in Argument below.

The Post-Conviction courts opinion and denial of relief is found **at (App. A, Part A:1, Page A 1-16)**, The judge only ruled on (5) five issues and did not rule that Petitioner was procedurally defaulted on any of his claims properly presented in the Original or Amended post-conviction briefs. He also erroneously supplanted Petitioner's argument of ineffective assistance of counsel during the plea proceedings with one of his own, which was not argued or presented in the evidentiary hearing, and ignored the actual arguments made by Petitioner at the evidentiary hearing on why he rejected the plea-offer from the state. The District Court concedes, "Petitioner raised this claim in his post-conviction proceedings. Petitioner properly exhausted this claim by arguing the claims merits in his appellate brief filed in the TCCA." **(App. A, Part A:5, Page A-161)**. Petitioner has shown over and over that he raised all of his federal constitutional claims in the proper court at the proper time, yet the state courts, and now the federal courts are erroneously picking and choosing which claims it will review, when all of them were argued in the appellate brief to the TCCA. As to the **404(b)** argument the District Court claims "Petitioner's argument in **(Doc. 1 at Pg ID# 6 and Doc. 48 Pg ID# 4097)** fails the "cause and prejudice test." **(App. A, Part A:5, Page A 173)**; however, **(Doc. 1)** is the original habeas corpus petition where applicants are expressly forbidden to argue the case, they are instructed to simply tell the court what happened and what constitutional right was violated, and **(Doc. 48)**, is a Motion to Request Discovery. Additional arguments are ordered to be made at a later date in a memorandum of law or other Motion, which Petitioner did in his Reply to the Warden's Response **(Doc. 41, Claim 2: Failure to Object to Rule 404(b) Testimony, Pgs 31-57,** see **(APP. B, Part B:9. Pgs B 122-148)**, where Petitioner provides record support showing he was not defaulted, and the claim has never been adjudicated on the merits. The district court goes on to concede the trial court issued a Limiting Order that, "No witness, including the victim, could testify as

to what the victim saw, the identity of the younger daughter or the subsequent conversation with the minor child." **(App A, Part A:5, Page A 174-175)**

The District Court goes on to say that Petitioner provided no evidence that any witnesses violated this Order; however, the record clearly shows that he did in fact provide record support to his arguments in his reply brief, **(Doc. 41)** at **Claims 2 and 12 (APP. B, Part B:9, Pgs A122-148)** He also provided record support for other alleged defaulted constitutional claims at **(APP. B, Part B:4, Pgs B 64-92 and Id at Pgs 122-152)**, showing he did in fact raise his claims in the proper court at the proper time.

The Warden concedes in his response to the habeas corpus petition, that the TCCA is in the habit of "ducking and dodging" issues that are properly presented at the proper time to the proper court when they state, "The TCCA **again** ducked the issue by invoking the rule articulated in **Cauthern, 145 S.W. 3d at 599** (an issue raised for the first time on appeal is waived.) This rule constitutes an adequate and independent state law ground for procedural default purposes." **(APP. A, Part A:4, Pg A 85)** The record evidence shown above proves by clear and convincing evidence the District Court intentionally, or by some unforeseeable inadvertence, ignored Petitioner's constitutional arguments provided to it in his Reply Brief **(Doc. 41)**, using only his Motion for Discovery of the Recorder Device **(Doc. 40)**, and the initial habeas petition **(Doc. 1)**, as the basis for denying him relief. This injustice occurred even after he filed a Motion requesting permission to exceed the page limit on his Reply Brief to the Warden's Response by Order of the federal Judge **(APP. A, Part A:9, Pgs A 221-222),** due to the "complexity of the case, the constitutional issues raised, and the fact there was scientific evidence with experts on both sides with competing opinions on the evidence," shown in the Court Order of January 24, 2022, allowing Petitioner to file his Reply Brief **(Doc. 41)** in its 215-page entirety, **(Part A:10, Pgs A 223-224)**

III. FEDERAL COURTS APPLYING DEFERENCE TO A "SUPPLANTED" CLAIM DOES NOT PROMOTE COMITY, FINALITY OR FEDERALISM BECAUSE IT WAS NOT ADJUDICATED ON THE MERITS AND FURTHERS NO PERCEIVABLE STATE INTERES

An ineffective assistance of counsel claim is a mixed question of law and fact, ***Strickland, 466 U.S. at 698, 104 S. Ct. 2052***; therefore, Petitioner can only be granted relief if the state court's decision was an "unreasonable application of clearly established federal law," *if the claim was adjudicated on the merits*. ***Williams v Taylor, 529 U.S. 362, 409, 120 S. Ct. 1495(2000)*** (mixed questions are reviewed under **§ 2254(d)(1)**'s "unreasonable application" clause. A matter is "adjudicated on the merits" if there is a "decision finally resolving the parties claims, with res judicata effect, that is based on the subject of the claim advanced rather than on a procedural or other ground." The Seventh Circuit in ***Warren v Brennan, 712 F. 3d 1090 (7th Cir. 2013)***, held, "When a state court's opinions did not address the constitutional issue at stake. AEDPA deference does not apply and de novo review is proper." ***Id. at 1098***. The same is true for the Ninth Circuit in ***Dickens v Ryan, 740 F. 3d 1302, 1321 (9th Cir. 2014)***, holding, "If a claim is fundamentally altered from one previously decided, AEDPA deference is not applicable."

Even the Sixth Circuit in ***Torres v Baumann, 677 F. Appx 300 (6th Cir. 2017)***, after performing the required clear error review, held, "Torres argued, that his claim was never adjudicated on the merits by a state court as required for deference under 28 U.S.C. § 2254(d). The district court should not have applied deference to the state court decision." Petitioner informed the state court of the faulty adjudication in his post-conviction appellate brief at **(APP. B. Part B:2, Pg B 16-20).** He then informed the federal district court in his Reply Brief **(APP. B, Part B:4, Pg B 73-92).** After the Sixth Circuit denied his COA, Petitioner requested a rehearing and reiterated the fact that the state did not adjudicate the constitutional claim that was presented to them, therefore deference was not warranted in their review, and was denied **(APP A, Part A:7, Pg A 218).**

Because the ineffective assistance of counsel is a mixed question of law and fact and is reviewed under § 2254(d)'s "unreasonable application" standard. Even if *de novo* review would not be proper, relief would still be warranted on this question because, "A state decision involves an 'unreasonable application of' federal law if the

'state court decision 'identifies the correct governing principle' in existence at the time, 'but unreasonably applies that principle to the facts of Petitioner's case." ***Cullen v Pinholster, 563 U.S. 170, 182, 131 S. Ct. 1388 (2011)*** quoting ***Williams, 529 U.S. at 1413, 120 S. Ct. 1495***. The Sixth Circuit concedes, "On appeal from a district court's decision to deny a state prisoner's petition for habeas corpus relief, we review *de novo* the district court's legal conclusion's and mixed questions of law and fact, including the question whether the state court's adjudication was 'contrary to, or involved an unreasonable application of clearly established federal law. AEDPA deference applies only to claims that were adjudicated on the merits in State court proceedings." ***Moore v Mitchell, 708 F. 3d 760, 774 (6th Cir. 2013)***.

The state court in this case was aware that "The existence of a knowing and intelligent rejection of a plea offer depends on the particular facts and circumstances of a case," and then 'supplanted' Petitioner's actual claim with this principle in mind to lower their burden of review in denying relief, rather than reviewing the entire record de novo and addressing the unprofessional actions and inactions of counsel, which were necessary to achieve a reasonable determination of the facts and evidence presented to the post-conviction court. This instant case is synonymous to **Lafler v Cooper, 566 U.S. 156, 132 S. Ct. 1376**, in that both the Michigan and Tennessee appellate courts identified the Ineffective Assistance of Counsel claim but failed to apply Strickland to assess it. Rather than applying ***Strickland***, the state simply found the rejection of the Plea was knowing and voluntary. **(APP. A, Part A:3, Pg A 54-55)** This is not the correct means by which to address the Ineffective Assistance of Counsel claim raised, the state court's adjudication was "contrary to clearly established federal law," and this court is free to determine the principle necessary for relief. **Panetti v Quarterman, 551 U.S. 930, 948, 127 S. Ct. 2842**.

Under the "unreasonable application" prong of AEDPA, "A habeas court must determine what arguments or theories supported...the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the

Supreme Court. ***Harrington, 562 U.S. 86, 102, 131 S. Ct. 770 (2011)***. Applying this standard, the Sixth Circuit failed to ask whether petitioner's rejection of a plea-offer was knowing, voluntary and intelligent based on the evidence presented in the state court proceeding.

This is the basis of Petitioner's argument in this instant case, because the state court "supplanted" the actual constitutional ineffective assistance claim with one that lowered their burden of proof in order to deny relief, there has been no adjudication of the claim in the state court, and the federal review court's erred in applying AEDPA deference to the supplanted claim to deny habeas relief. Under the state's claim they only had to prove that counsel properly informed Petitioner of the state's plea-offer, and that it was voluntarily refused. However, the state court record, with the transcripts from the state evidentiary hearing, "clearly and convincingly" prove that the actual ineffectiveness claim presented to the state courts required the court to address the "unreasonable" actions of counsel prior to and after the initial plea-offer hearing, and whether those actions caused prejudice worthy of reversal of the conviction under this court's holding in ***Strickland***.

The Tennessee state court has determined that, "An ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v Burns, 6 S.W. 3d 453, 461 (Tenn. 1999)***. As a mixed question of law and fact the court's review of a petitioner's ineffective assistance of counsel claim is ***de novo*** with no presumption of correctness. ***Felts v State, 354 S.W. 3d at 276***. Appellate courts may not second-guess the tactical or strategic choices made by counsel, ***unless***, those choices were uninformed because of inadequate preparation." ***Alley v State, 958 S.W 2d 138, 149 (Tn. Crim. App. 1997).***

The District Court standard does not conflict with those of the state courts in this instance, "Federal courts must defer to state court factual findings, according them a presumption of correctness that the Petitioner may rebut only with "clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This presumption only applies to underlying basic, primary, or historical facts, and not to mixed questions of facts and

law. *Rickman v Bell, 131 F. 3d 1150, 1153 (6th Cir. 1997)*. Ineffective assistance of counsel in a petition for habeas corpus review presents a mixed question of law and fact. *West v Seabold, 73 F. 3d 81, at 84*).

Therefore, a state court's conclusion that counsel rendered effective assistance of counsel is ***not*** a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(e)(1). Ineffectiveness is a mixed question of law and fact, not a question of basic, primary or historical fact. State court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of 28 U.S.C. § 2254((e), however, the performance and prejudice components of the ineffectiveness inquiry, which are mixed questions of law and fact, are not entitled to deference. *Rickman, supra, at 1153-54*. A prisoner may thus, obtain relief if he can show the state court's adjudication involved an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court. 28 U.S.C. § 2254(d)(1). Which Petitioner has shown he did in **(Doc. 41)** only to be ignored.

The Sixth Circuit concedes these standards in its standing precedent and decisions on the issue of ineffectiveness claims. When a district court denies a state prisoner's petition for habeas corpus, we review the district court's legal conclusion's and answers to mixed questions of law and fact de novo. ***Pouncy v Palmer, 846 F. 3d 144, 158 (6th Cir. 2017)***. This court ***must*** make an independent judicial evaluation of counsel's performance, and determine whether counsel acted reasonably under all the circumstances. *McQueen, 99 F. 3d at 1311; O'hara, 24 E. 3d at 828; Ward v U.S., 995 F. 2d 1317-1321-2 (6th Cir. 1993)*. See also ***Austin v Bell, 126 F. 3d 843, 847 (6th Cir. 1997)***, "Reviewing courts focus on whether counsel's errors have undermined the reliability of and confidence that the trial was fair and just. We also determine whether counsel was constitutionally ineffective if his performance fell below professional standards which caused the defendant to lose what he otherwise probably would have won."

The First Circuit agrees with the review standards that apply in this instant case, "We review the district court's legal conclusions *de novo*; further, when the district

court undertakes no independent factfinding in a habeas case, we are effectively in the same position as the district court vis-à-vis the state court record, we review the district court's factual conclusions *de novo* as well. ***Pike v Guarino, 492 F.3d 61, 68.***

The Second Circuit is clear on this issue as well, "If a state court overlooks or otherwise fails to adjudicate a properly presented federal claim, a federal court must review that claim de novo, not using the deferential **28 U.S.C. § 2254 (d)** framework, ***Dolphy v Montello, 552, F. 3d 236, 238 (2nd Cir. 2009)***. "Parsing a state court order for signs that the state court overlooked a federal claim involves a complicated analysis, ***Miller v Warden, Sing sing Corr. Fac., 2018 WL 3518503 at *4***."

The Fourth Circuit agrees that an ineffective assistance claim should be reviewed de novo in ***Woodfolk v Maynard, 857 F. 3d 531 (2017)***, quoting ***Teleguz v Pearson, 689 F. 3d 322, 327 (4th Cir. 2012)***, "Whether the district court erred in denying Woodfolk's habeas petition of ineffective assistance due to a conflict of interest are issues that we assess and review *de novo*."

The Tenth Circuit in ***Wilson v Workman, 577 F. 3d 1284, 1293 (10th Cir. 2009)***, **(en banc)** also agree, "To dispose of a properly presented federal constitutional claim without considering the facts supporting it is not a decision on the merits." All of the arguments he made concerning the ineffective assistance he received during the plea-offer process in the proper court at the proper time, were shown **(APP. B, Part B:5, Pgs B 100-106)**, and has met the challenging bar to relief providing the court will review the state court record concerning his ineffectiveness claims. Comity, finality or federalism would not be offended if this court remands for further proceedings in this instance; however, the Sixth Amendment guarantee to the accused right to the effective assistance of counsel would be if this court ignores this important question.

III A. SUPPLANTED CLAIM ADJUDICATED BY THE STATE COURT

The last reasoned decision of the state court alleges that the argument advanced by the petitioner on the rejection of his plea-offer was, "The petitioner argues trial counsel was ineffective for failing to adequately advise him regarding a plea-offer. As to this issue the post-conviction court made the following findings:

"The court finds that trial counsel went to great lengths to preserve evidence of the state's plea offer. Counsel made sure that petitioner was aware of the offer and told him it was in his best interest to accept the offer. The petitioner expressly acknowledged his choice to reject the state's offer when he signed the August 6, 2014 document." **(APP. A, Part A:, Pg A 54)**

The record does not support the merits adjudication on the supplanted claim, as shown above in this instance. Over 50 Pages of the post-conviction evidentiary hearing transcripts are devoted to the question of counsel's actions, inactions and failed promises to investigate relevant material evidence ordered by the court, to follow through on his verbal requests for a continuance and public funds to ensure the defense expert was at the trial. as he promised the court and Petitioner he was going to do, and other missteps of counsel that caused Petitioner to refuse the state's plea-offer of 10-years, where he ended up with (8) eight times the amount of years of incarceration (80) eighty by going to trial. Petitioner shows by "clear and convincing evidence" in the state court record the actual claim that was presented, and has never been properly adjudicated by either the state or federal court to this very day.

III B. Actual Claim Presented to the State Court for Review

The claim that was presented and actually advanced in the state trial court, state appellate courts, federal district court, and the federal appellate court is that "Counsel was ineffective for not properly informing the Petitioner concerning his investigation into material evidence that was ordered to be forensically examined by the defense expert", who was already paid in full for the forensic services needed to offer a complete defense and inform the jury of the scientific forensic findings of the defense expert showing the case-in-chief evidence had been tampered with. The record supports Petitioner's argument showing he properly raised the unknowing and involuntariness, of the rejection of his plea-offer as follows:

1) **Original Post-Conviction Petition:**

   Ineffective Assistance of Counsel for Failure to Investigate Actual Innocence, Recorder: APP. B, Part B:1 Pg B 5-6), Citing to **Lord v Wood**

184 F. 3d 1083, "Counsel's failure to investigate clients factual innocence undermines confidence in the verdict and constitutes ineffective assistance." I go on to argue the importance of testing the recorder device and the judges order to do so, as well as, how it affected my ability to knowingly, intelligently and voluntarily accept or deny the plea.

2) **Post-Conviction Appeal Brief; Issue 2(D): (App. B, PartB:2, Pg B 16-20) Ineffective Assistance of Counsel, Mishandling Critical Plea-Bargain Stage of Trial:, Citing to Goosby v State, 917 S.W. 2d 700; U.S.C.A. 6; Lafler v Cooper, 566 U.S. 156, 132 S. Ct. 1376.**

3) **Reply Brief to State's Response;**

Petitioner argues all of the same ineffectiveness issues that caused him to reject the plea-offer, i.e., failure to investigate court ordered material evidence, failure to reduce oral continuance and public funds to a written form as ordered by the court, and promised to Petitioner; statements by trial court, prosecutor and counsel that the trial on August 18, 2014 would be on counts V-VI, not on Counts I-IV which would require the expert and the recorded evidence.

(APP. B, Part B:3, Pg B 29-35, and 40).

The last reasoned state court decision concerning Petitioner's refusal of the state's plea-offer is found in **(APP. A, Part A:3, Pg A 54-55)**, The state court decision was "contrary to" and "an unreasonable application" of existing U.S. Supreme Court precedent as shown in their denial opinion. The state appellate court opines only that "counsel went to great lengths to preserve evidence of the state's offer to Petitioner.....the court finds that trial counsel was not deficient in his explanation of the terms of the pea-agreement to petitioner. ***Nesbitt v State, 452 S.W. 3d 779, 800-01 (citing Lafler v Cooper, 132 S. Ct. 1376. 1385 (2012)***". While ***Nesbitt, Id.*** does mention ***Strickland*** and its relevance to determining whether a defendant received effective assistance of counsel during plea-negotiations, the state court did not reasonably adjudicate or apply the ***Strickland*** standards to the actual claim presented, which was that Petitioner's refusal of the state's plea-offer was due to the

actions of his counsel when he fell below the reasonable standard of performance guaranteed to defendant's by the Sixth Amendment to the U.S. Constitution.

The record does not support the state's claim that Petitioner ever claimed or argued that counsel was deficient in his performance by not informing him of the state's plea-offer. Petitioner argues the record supports his ineffective assistance claim and the state court analysis was based on an unreasonable application of not only the facts, but of existing U.S. Supreme Court precedent. At an August 4, 2014 pre-trial Daubert/offer-of-proof hearing the following evidence and testimony was provided by the defense expert, defense counsel, the prosecutor and the trial court that caused Petitioner to believe that there was additional investigation, collaboration, court rulings, which had to be dealt with prior to him having a fair trial on severed counts 1-4 of the 6-count indictment as follows:

Trial Counsel's Statements

1) Trial Counsel agreed to send the recorder that allegedly recorded the evidence-in-chief recording to the expert for forensic analysis to ensure a fair trial. **(APP. C, Part C:1, Pg C 46, L 1-25,** and **Pg C47 Line 10-22,** and **C 48, Line 22-25,** and **Pg C 49,** and **Pg C 50, Line 2-8)**; and,
2) Counsel testified he emailed the defense expert Mr. Owen **after** the Daubert hearing concerning what flight, hotel, etc. he would be on to testify at petitioner's trial **(APP C, Part C:3, Pg C 92, L 2-12)**; and,
3) Trial counsel admits the trial judge ordered him to send the recorder device to the defense expert, but he did not obey order, **(Id., Pg C 111, L 2-24)**; and,
4) Trial counsel informed the trial court that he thought he had more time to prepare his defense concerning the recorded evidence, and he thought it was not going to be used at Petitioner's trial on August 18, 2014. **(Id. at part C:3, Pg C 48, Line 3-25)**; and,
5) "I object to going through his direct testimony as it will be at trial to give the state a dress rehearsal for the trial of this cause." **(APP. C, Part C:1, Pg C 16 L 13-15)**

6) Counsel had asked for a continuance in the trial (**ECF 13-1, Pg ID# 303-04**) based on the favorable defense audio expert report submitted to the trial court (**APP. B, Part B:6,Pgs B 109-118B**), in that request for a continuance counsel explicitly told the court in argument to his request, "The defendant has a constitutional right to present a defense and call witnesses on his behalf. These constitutional rights weigh heavily in favor of a limited continuance of this trial so that Mr. Owen can testify for the defendant." Counsel reiterated this fact in his testimony at the PCR Evidentiary hearing (**APP C, Part C:3, Pg C 101, L 11-25**) to wit: "We need Mr. Owen and we have a right to present a defense under the constitution."

7) Counsel admitted he thought it was important that both experts examine the recorder device. (**APP C, Part C:3, Pg C 102, L 1-4**) PCR Counsel: "And was it important at that time that both experts have access to the same original recorder to make their analysis?" Mr. Colley: "We thought it was!"

8) Counsel admits it would have been beneficial for Mr. Owen to be able to examine the original recorder device. (**APP C, Part C:3, Pg C 105, L 1-17**) where counsel shows that Petitioner paid for all forensic testing and it was favorable to him; and (**APP C, Part C:3, Pg C 91, L 2-17**)

9) counsel admits the testing of the recorder device was part of the forensic examination that Petitioner had already paid in full out of his own pocket, to have that analysis completed, (**APP C, Part C:3, Pg C 109, L 16-25**)

10) Counsel admits that he made representations to the court, (and to petitioner) that he was going to try to get Mr. Owen more money to forensically examine the recorder device. (**APP C, Part C:3, Pg C 113, L 2-5**)

11) Counsel admitted he was going to send the recorder device to the defense expert as the court ordered, "We were. We were. When the court suggested I do something I normally try to do it." (**APP C, Part C:3, Pg C 112, L 6-17**)

12) Counsel admits he contacted Mr. Owen after the Daubert hearing in his PCR Evidentiary hearing testimony at "...what flight are you coming in, where are

you staying, that type of thing. And he emails me back words to the effect that, you know, you'll have to send me, I think it was another $6,000 if I remember correctly, for my plane, hotel room, rental car, my time." **(APP C, Part C:3, Pg C 92, L 2-12)**

FACTS CONCERNING TRIAL JUDGE ACTIONS AND STATEMENTS

The honorable James G. Martin III, J., made the following important and critical rulings and orders concerning the need for audio forensic expert testimony and the completion of forensic testing on critical, relevant and material evidence and were known to counsel prior to him making his unreasonable and uninformed decision not to call the audio forensic expert to testify on his client's behalf, which is what led to the rejection of the state's plea-offer by the Petitioner:

1) The "recorded evidence given at discovery was a "garbage copy" given to the prosecutor by ineffective investigators who did not properly preserve the recorded evidence which was unfair to the opposing party to have to attempt to authenticate a recording that could not be authenticated **APP. C, Part C:4, Pg C 128 L 20-25, Id. Pg C 129, L 1-25, and Id. Pg C 130, L 1-5)**
2) The trial judge confirmed Counts 5-6 would be tried on August 18, 2014, "the case would proceed on the severed offenses of counts V-VI on August 18, 2014, then after there was a verdict on those charges we would go to trial on counts I-IV." **(APP. C, Part C:1, Pg C 57, L 12-22)**; and,
3) The trial judge then made a formal request to the prosecutor and defense counsel to send the recorder device to the defense expert within two days **(Id. at (APP C, Part C:1, Pg C46, L 16-25 and Id. Pg C 47, L 1-14)**
4) The trial judge ordered both the defense expert and the state expert to share their information on how they reached their opinions by using trustworthy and reliable methodology and report back to him after they had a chance to confer. **(APP C, Part C:1, Pg C 37-44, L 16-25** and **Id. Pg C 50-52),** and
5) "So my ruling right now is subject to revisiting this issue at a later date based upon the examination of the recording device by Mr. Owen and then the

potential for Mr. Owen and Mr. Lacey to talk with one another, is that both of these witnesses will be allowed to testify and relate to the jury their conclusions concerning the authenticity of this recording." **(APP. C, Part C:1, Pg C 53 L 24-25, and Id. Pg C 56, L 1-8)**, "My holding and ruling might **change** after the recording device is examined by Mr. and Mr. Lacey confer."

6) The trial judge issued a formal order from the bench demanding the recorder device be sent to the defense expert as soon as possible for forensic analysis, **(APP B, Part B:8, Pg B 121)**, and,

7) The trial judge called the defense expert a **pioneer** in the field of audio forensics of audio recordings. **APP. C, Part C:1, Pg C 54 L 12-16)**; and,

8) The defense expert's "testimony would substantially assist the trier of fact to determine a fact in issue, that is ***material*** to this trial, and that is the authenticity of the recording." **APP. C, Part C:1, Pg C 53 L 11–23, and**

9) The trial judge says, "because this is a question of whether the recording itself represents the authentic communication between Mr. Curtis and one of his elder children, then the questions of authenticity are implicated and the expert testimony would go to that issue more importantly." **APP. C, Part C:4, Pg C 125, L 16-25, and Id. Pg C 126, L 1-4)**

10) "We've got two experts that are testifying to a 902 problem....and that's authenticity, and one of them has had the luxury of examining the recorder device that was used to create the telephone recording between Amanda Curtis and Mr. Doug Curtis and the other has not had that luxury, then we **don't have a level playing field**." **APP. C, Part C:2, Pg C 47 L 15-22)**; and,

11) "Mr. Owen has not been provided that recorder to use. Until that's done, then I don't have two experts that can really compare apples to apples. So I still believe that within the next two days the lawyers in this case need to make arrangements to get that recorder up to Mr. Owen so he can do the analysis." **(APP. C, Part C:, Pg C 50 L 1-8)**

Prosecutor's Statements

1) The prosecutor confirmed counts 5-6 would to be tried on August 18, 2014 at **APP. C, Part C:1, Pg C 48 L 13-14** "Counts I-IV are not set for trial yet"; and,
2) The prosecutor agreed to send the recorder that allegedly recorded the evidence-in-chief recording to the expert for forensic analysis to ensure a fair trial. **APP. C, Part C:1, Pg C 45 L 24-25,** and **Id. Pg C 46, L 1-25,** and **Id Pg C 47, Line 10-22**; and,
3) "Your Honor, I have no problem with Mr. Owen looking at the recorder device. The basis of my motion was that his examination was incomplete because he never looked at it. If you're saying he's being ordered to look at it, that may resolve the whole issue. It may change his conclusion and we may not have a problem" **(APP. C, Part C:1, Pg C 49 L 4-10)**
4) **(APP. C, Part C:1, Pg C 46, L 1-10)**, when the trial judge asks why the state expert had the luxury of examining the recorder device, "Whereas, the defense expert has not had that benefit." **Prosecutor responds**: "He's never received it. I've made it available. It's not been utilized. I told Mr. Colley that we have it and he could make arrangements with Mr. Owen to get it to him."
5) The prosecutor asked the state expert, who was allowed to examine the recorder device, if testing the recorder was significant in determining whether the audio recording had been altered, in this particular case, **(APP. C, Part C:4, Pg C 131, L 10-13.)** L The expert testified that "In this case it was in fact. I would consider the examination incomplete" **Id. Pg C 131, Line 13-172)** and,

Defense Experts Testimony

1) Mr. Tom Owen verifies he was paid in full and had favorable evidence on the behalf of Petitioner in an Affidavit submitted to the court. **(APP. A, Part A:8, Pg B 121-122)** The District Court judge state, "The Court therefore believes that the interests of justice require the court to consider the affidavit." **(APP. A, Part A:5, Pg CA 125)**

2) The defense expert testified the original recording had been deleted from the recorder device, **(APP. C, Part C:1, Pg C 26, L 3-19)**

3) Mr. Owen verified he had testified 375 times in 41 different states, and 9 foreign countries. **(Id. Pg C 3, line 4-10)**; and that his methodology had never been found to be unreliable in any of his papers or lectures he gave 150 of those times in the last year or so **(Id. Pg C 6, line 12-21)**; and,

4) The first CD-Rom recording given at discovery was tampered with **(APP. B, Part B:6, Pg B 118B**

5) The second CD-Rom recording was also tampered with **(APP C. Part C:1, Pg C 13, L 17-25,** and **(Id. Pg C 17, L 2-25**; and,

6) He began showing all parties at the hearing where the tampering had occurred, even stating, "There is a loud pop in this recording every time either party speaks, and we can all agree that is just not normal," **(APP C. Part C:1, Pg C 13, L 16-25,** and, also stating "At trial I will show the jury each and every anomaly and what they mean." (Id. Pg C 17, L 22-24,

7) "Right after he speaks there is a loud click. Okay. Did you hear that?" At which time counsel stops the demonstration by the defense expert stating, "I object to going through his direct testimony as it will be at trial to give the state a dress rehearsal for the trial of this cause." **(Id. Pg C 13, L 16-25,** and **Id. Pg C 16, L 13-21)**

8) The first recording given at discovery was in a format that no police agency he was aware of used to record phone calls and could not be authenticated, **(APP. B, Part B:6, Pg B 109 at Summary)**

9) "The opinion of the examiner is the evidence does not represent the event as it actually occurred, has been edited, and does not represent scientifically reliable evidence with regards to authenticity." **(APP. B, Part B:6. Pg B 118B)**

10) The tampering was done by a person using the pause button to stop and start recording, (APP. C, Part C:1, Pg C 17, L 5-12, and Id. Pg C 23, L 4-22)

11) He testified testing the recorder device would be very beneficial to his ability to determine authenticity and he would analyze the recorder device if it was made available to him, (APP. C, Part C:1, Pg C 21, L 10-22); and,

12) The defense expert asked for the recorder device to forensically analyze to establish whether that device actually recorded the perp-call evidence and was told that it was unavailable, (APP. C, Part C:1, Pg C 32, L 12, **and , Id. Pg C 20, L 1-10);**

13) He objected to the opinion of the state audio forensic expert and explained to the court what scientific and forensic examinations of recorded evidence are required to base an expert opinion upon to insure it is trustworthy and reliable, and that the state expert provided no proof that he had performed these critical examinations to determine the authenticity of the recorded evidence. (APP. C, Part C:1, Pg C 25-27, and, Id. Pg C 30-31);

14) Mr. Owen showed where he did indeed perform the required scientific testing to reach his opinion that the evidence was tampered with **(APP. C, Part C:1, Pg C 33, L 19-25, Id. Pg C 34, L 1-5);**

15) Even the state expert stated that the methodology of the defense expert was reliable and trustworthy and he had no objections to the defense expert's opinion so long as he examined both recordings, (APP. C, Part C:4, Pg C 133, L 1-22);

16) The defense expert showed he did in fact examine both recordings and they had both been tampered with, and that there were differences in the start time of the recordings, etc (APP. C, Part C:1, Pg C 6, L 22-25, and Id. Pg C 7, L 1-24));

August 6th Hearing Statements and Testimony

1) Counsel and the prosecutor again informed the trial court that they had made arrangements to obey the court order to send the recorder device to the defense expert for forensic testing, (APP. A. Part A:1, ECF 13-7, Pg ID#928, Line 11-25); and,

2) On August 6, 2014, trial counsel had Petitioner found indigent, **(APP. C, Part C:2, Pg C 65, Line 4-14)**,

3) Counsel verbally requested state funds to insure the presence of the defense expert at trial, **(Id. at Part C:2, L 9-10]** and also **(APP. C, Part C:3, Pg C 106, L 1-25, and Id. at Pg C 107, L 8-25)**

4) The trial judge ordered counsel to submit his requests in written form so he could rule on them. **(APP. C, Part C:2, Pg C 68, L 18-25, and Pg C 69, L 1-7)**

5) Petitioner was given a plea-offer, which he rejected, telling counsel he wanted to wait until the forensic testing shown above was completed. **(APP. C. Part C:3, Pg C 116, L 15-22)**

6) Counsel wrote his own version of the rejection on a blank piece of paper. **(APP.A, Part C:3, Pg C 114, L 15-25, and Id. Pg C 115, L 1-21)**

7) Petitioner objected to counsel's version to the trial judge, and the trial judge made him sign the piece of paper against his voluntary will. **(APP. C, Part C:2, Pg C 62, L 17-25)** to which he testified to at the PCR evidentiary hearing, **(APP. C, Part C:3, Pg C 119, 22-25, and Id. Pg C 120, L 1-25)** and the judge ordered him to sign it anyway. **(Id., Pg C 98, Line 15-23)**.

CONCLUSION

Petitioner has shown this honorable court that he is entitled to a reversal of the Sixth Circuit Court of Appeals order denying a Certificate of Appealability or habeas corpus relief for the following reasons:

1. Failure of the District Court to review the arguments of his federal constitutional claims that were properly presented by Order of the District Court judge, the honorable Eli Richardson, in his Reply Brief **(Doc. 41)**. The denial of Petitioner's Habeas Corpus petition is (93) ninety-three pages long and the only documents referred to by the District Court are **(Doc.1)** the original petition where applicants are told not to argue their claim or present case law, just tell the court what happened and what constitutional right was violated.

(Doc. 48) which was petitioner's Request for Discovery under Rule 6. That document did not argue any of his habeas corpus federal constitutional claims, conceded by the District court when they state that petitioner showed no cause or prejudice, or any argument whatsoever on the denied claims allegedly reviewed by the federal district court. **(Doc. 13)** which was a document filed by the Assistant Attorney General appointed to Petitioner's case to which he did not receive a copy. In the entire District Court Memorandum and Order, there is not a single reference to Petitioner's Reply Brief **(Doc. 41)** where all of his objections, arguments and actual record facts were presented to the court in his defense. Therefore, the proof is overwhelming that he did not receive a full and fair review of his constitutional claims in the federal court.

The Sixth Circuit's decisions in **Maples v Stegall, 340 F. 3d 433 (6th Cir. 2003)** and **Danner v Motley,** 448 F. 3d 372 (6th Cir. 2006) are instructive on this point. They followed the Supreme court's lead in **Wiggins v Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003)** to the extent that no state court decided the claim in question, the claim would be subject to de novo review. **Maples at 437.** We therefore review de novo Fleming's claim. See Danner v Motley, utilizing the de novo standard of review where the state court failed to consider the habeas petitioner's constitutional claim."

2. Failure to transmit the record on appeal adversely affected Petitioner's federal constitutional right to a full and fair review. The due process requirement of minimally adequate procedures dictates that at some point, either in federal or state court, a prisoner is entitled to the process necessary for a full and fair review of the claims presented. ***Pennsylvania v Finley, 481 U.S. 551 (1987)***; See also ***Panetti v Quarterman, 127 S. Ct. 2848 (2007)***, (recognizing the absence of constitutionally required procedures dictates that deference does not apply.)

The hallmark of due process is, as the term implies, procedural fairness. ***Mathews v Eldridge, 424 U.S. 319, 335 (1976)***, "At a minimum, persons

alleging federal challenges to their detentions are entitled to a full and fair review of those claims." See ***Wright v West, 505 U.S. 277, 299 (1992) (O'connor, J)*** (recognizing that the constitution requires additional, otherwise, discretionary federal procedures and review, when the state court process is not procedurally "adequate." This same court went on to recognize the "full and fair requirement as an analog to the notice and opportunity to be heard requirements, derived from the basic tenets of procedural due process. "The absence of a full and fair hearing in the state courts is itself a violation of the constitution." **505 U.S. at 298-299**. "Conversely, where the state process is patently unfair, due process requires a full and fair review by the federal court." **Id at 298**.

3. Petitioner's federal constitutional claims were not waived for failure to comply with a state procedural rule. The state appeals court claims the federal claims were waived for failing to add them to a summation after the post-conviction evidentiary hearing, and claims raised for the first time on appeal are waived as shown above. However, the record proved by clear and convincing evidence that Petitioner properly raised his federal constitutional claims at each step of the appellate process as required by state law. The record also proves that the state was the party that procedurally defaulted their argument for raising an objection to his constitutional claims for the first time on appeal under the regularly followed procedural default rule in ***Walsh v State, 166 S.W. 3d 641(2005)***.

   Three considerations, in combination, should lead this court to conclude that this case falls into the small category of cases in which the asserted state grounds are inadequate. **First**, the trial court judge never opined that any of the claims presented in the original petition were waived in his memorandum opinion denying relief, **(App. A. Part A:1, Pg A 1-16),** he simply failed to rule on them as required by Tennessee law in **Supreme Court Rules of Post-**

Conviction Procedure: Determination of Relief, § 9(A).... "The Order shall contain specific findings of facts on each issue presented."

Second, no published Tennessee decision directs a flawless compliance with submitting a summary of issues properly presented in the original and amended petitions, and after the testimony and argument of those issues at the post-conviction evidentiary hearing without objection from the state.

The case presented by the state to claim the affirmative defense of procedural default, **Walsh, Id.**, proved that the state was the one in default, so the **TCCA** changed the procedural default case to ***Cauthern, 145, S.W. 3d 571***, "An issue raised for the first time on appeal is waived," and refused to adjudicate the claim on the merits.

Third and most important, given the realities of the state court record, Petitioner has shown that he substantially complied with Tennessee's key rules. He raised all of his federal constitutional claims in his original and amended petitions for post-conviction relief. **(APP.C. Part C:3, Pg C 81, l 19-25, and Id. at Pg C 74, L 21-25, Pg C 75, Line 1-2).** He then testified to those issues at the state evidentiary hearing, **(App. B, Part B:5, Pg B 100-105).** He then properly presented them to the highest court necessary in the State of Tennessee, the TCCA, under **Tennessee Supreme Court Rule 39. Exhaustion of Remedies**, "In all appeals from criminal conviction or post-conviction relief matters, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appelas to be deemed to have properly exhausted all state remedies."

4. The state's supplanted claim dealing with his rejection of a plea-offer and counsel's ineffectiveness prior to, during, and after, the plea-offer proceeding was conceded as being preserved for appeal; however, the state supplanted his argument with one of their own choosing, lowering the burden of proof by allowing the appellate court to adjudicate only the evidence that Petitioner

was properly informed of the plea-offer. That being, "Petitioner argues that counsel did not properly inform him of the plea-offer." The state court then adjudicated that supplanted claim on the merits, which did not entail a full and fair review of the actual claim and evidence presented and argued at the state evidentiary hearing concerning counsel's failure to: **1)** call his expert witness to testify at trial, **2)** obey court orders to forensically examine materially relevant evidence, and **3)** submit verbal motions made to the court in paper form so they could properly be ruled upon as ordered by the trial judge, and **4)** telling the petitioner that he was going to call his expert, obey the court orders, and submit the continuance and public funds requests as ordered prior to trial, which he failed to do. These ineffective actions by counsel caused Petitioner to reject a favorable plea-offer, yet they were ignored by the state and federal courts in making their rulings to deny relief.

All premises considered, Petitioner respectfully requests this honorable court to reverse the Sixth Circuit's ruling in this matter, based on the above facts showing he was denied his Sixth and Fourteenth Amendment Constitutional Rights.

Respectfully Submitted,

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