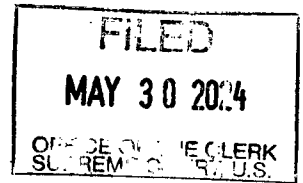


23-7699  
No. \_\_\_\_\_

ORIGINAL



\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

LEVOYD A. JONES — PETITIONER  
(Your Name)

vs.

ANGELA HUNSINGER-STUFF — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NO PRIOR COURTS ADDRESSED THE MERITS OF THE CLAIMS  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

LEVOYD A. JONES  
(Your Name)

2338 North West St.  
(Address)

Lima, OH 45801  
(City, State, Zip Code)

(419) 224-8000  
(Phone Number)

## QUESTIONS PRESENTED

- I. Whether evidence of an uncharged crime that occurred two years after the time-frame of the indictment can be used as direct evidence linking the defendant to the charged offense.
- II. Whether there is sufficient evidence of intercourse where the evidence shows, at the most, the defendant made "contact" with the outside of the buttocks.
- III. Whether trial counsel's failure to object to the testimony alleging an uncharged act of intercourse or whether trial counsel's failure to impeach the state's witnesses with their prior inconsistent descriptions was strategic or a violation of the 6th Amendment.
- IV. Whether redacting the description of the alleged crime describing the incident in question was permissible or a Brady violation when the redacted description contradicts the trial testimony.

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

White v. McAninch, 1998 U.S. Dist. LEXIS 23117  
Ex parte Bain, 121 U.S. 1 (1887)  
State v. Wells, 91 Ohio St.3d 32  
Strickland v. Washington, 466 U.S. 6 (1984)  
Brady v. Maryland, 373 U.S. 83 (1963)

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☒ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at \_\_\_\_\_; or,  
☒ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 25, 2024.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 5, 2024, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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## STATEMENT OF THE CASE

In 2009, a jury convicted Petitioner Jones on two counts of two counts of rape. The state court sentenced Jones to two consecutive life sentences. Jones timely filed an appeal of his conviction and sentence. (PageID#360) Through new counsel, Jones asserted five assignments of error. (PageID#370) On May 6, 2011, the state Appellate Court affirmed Jones's convictions and sentence. (PAGEID #509) On June 16, 2011, Jones appealed to the Supreme Court. On October 5, 2011, the Ohio Supreme Court declined to exercise jurisdiction over Jones's appeal. (PAGEID#569)

While his direct appeal was pending, Jones filed a pro se motion for a new trial. (PAGEID#624) In support of this motion, Jones presented multiple documents that impeached the state's witnesses to support his claim of actual innocence and wrongful conviction. The state court denied the motion without conducting an evidentiary hearing on the newly presented evidence. (PAGEID#629) Over the next two and a half years, Jones filed more motions for new trials offering evidence not in the state record as support of his claims. (PageID#570-82; 631-33) All motions were denied without an evidentiary hearing on the evidence dehors the state record.

On October 6, 2020, Jones moved to vacate his conviction and sentence. (PAGEID# 664-81) Jones also filed for appointment of counsel and a motion for expert assistance on the same day. The next day October 7, 2020, the state trial court denied Jones's request for counsel and expert aide. (PAGEID#730,732) On December 17, 2020, the trial court denied Jones's Postconviction petition without an evidentiary hearing because Jones was untimely. (PAGEID#734-43)



Jones filed a timely notice of appeal but he mailed it to the Appellate Court instead of the district court. (PAGEID#744) The appellate court was somehow without a clerk so the notice was not docketed until Jones filed the notice with the correct court March 9, 2021 (PAGEID#760). The state appellate court denied Jones's notice of appeal as untimely on April 9, 2021. (PAGEID#769-71) Jones appealed this decision to the Ohio Supreme court on April 30, 2021. The Supreme court declined to exercise jurisdiction on June 22, 2021 (PAGEID#809) Jones did not petition for certiorari to this court.

On September 13, 2021, Jones filed a petition for a Writ of Habeas Corpus, asserting six grounds for relief. (PAGEID#5-13, 128-36) Respondent filed a response on February 28, 2022 arguing that Jones's petition as a whole was untimely. Replies and objections were filed and the end result was that the District Judge adopted the R&R of the Magistrate Judge and held that Jones's petition was time barred and the courts could not reach the merits. (Appendix A)

Since the Magistrate Judge did not say that they considered a COA, Jones filed both an application for a COA and a notice of appeal. The Court of Appeals erroneously used the notice of appeal as an application for a COA even though an actual application was available. The District court failed to consider a COA so Jones was unsure which to file. Since the district court failed to deny a COA, then the Court of Appeals erred when they denied a COA. Jones raised this issue in his objections but on 1/25/2024 the Appellate Court declined to issue a COA. Jones then filed a petition for rehearing with a suggestion for rehearing en banc. On March 21, 2024, the court of appeals declined to hear the matter and on April 2, 2024 the active member did not vote to rehear the case.

## REASONS FOR GRANTING THE PETITION

A federal court may not entertain a habeas claim unless the petitioner has first exhausted his state remedies. (§2254(b)(1)(A)) Jones has exhausted all of his state remedies. The state courts found that Jones was time-barred and that they could not consider the merit of his claim because Judge made doctrine prohibited them from doing so. In order for Jones to overcome the time bar, he must show "cause and prejudice" or that failing to consider the claims will result in a fundamental "miscarriage of justice". Since Jones filed a late petition, the state never considered the merits of the individual claims so it is impossible for Jones to show cause, prejudice or a miscarriage of justice will occur. In order to show a fundamental miscarriage of justice, Jones must show actual innocence. In order to show actual innocence, Jones must support his claim with new evidence that establishes that in light of the new evidence, no reasonable juror would have voted to convict. The lower courts have held that AEDPA restricts the ability for Habeas courts to develop and consider new evidence. (§2254(e)(2)) Because the habeas court cannot consider the evidence or the merit of an untimely petition, Jones cannot establish the necessary requirements to overcome the procedural defaults in any lower court.

Jones is petitioning this court to exercise jurisdiction pursuant to Supreme Court Rule 20(4)(a) which holds : "in order to justify the granting of a Writ of Habeas Corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." When, as here,

the district court denies relief on procedural grounds, a COA should issue because no courts adjudicated the claims on the merits. A petitioner seeking a COA must show both 1) that a jurist of reason would find it debatable whether the petitioner states a valid claim of the denial of a Constitutional right and 2) that a jurist of reason would find it debatable whether the district court was correct in its procedural ruling. (see Slack v. McDaniels, 529 U.S. 473,484(2000))

Since the federal district court held that Jones's petition was time-barred, they never considered if Jones stated a valid claim because they never reached the claims since the petition as a whole was time barred. Instead the Court ruled that a reasonable jurist would not debate that Jones filed his petition late. That decision violates 'Slack'. If Jones can prove that his Constitutional rights were violated, he is entitled to Habeas relief. If a procedural issue stops a court from considering the merits then Jones is without a meaningful opportunity to get the merits review he needs to establish that he can overcome the procedural default defense raised by the state. Certiorari should be granted pursuant to Rule 20(4)(a) because adequate relief cannot be obtained by any other form or by any lower Court because a procedural doctrine stops them from doing so.

There are ways to overcome a procedural default and one of those ways is proof of actual innocence. Another is by proving that a failure to consider the claims will result in a manifest miscarriage of justice. Jones is asking this court to consider four important question to determine if he is eligible for the exception to a time bar and is eligible for a merits review :

Question #1: Whether evidence of an uncharged crime that occurred two years after the time-frame of the indictment can be used as direct evidence linking the defendant to the charged offense or if that testimony is a fatal variance from the indictment that satisfies the fundamental miscarriage of justice and actual innocence exception to the procedural default.

In Ground#2(A) of the Habeas Corpus Petition (HCP), Jones raised the issue that no evidence supported the jury's verdict for both counts. The indictment for count#1 was from the time period of 4/26/06 - 4/25/07. The time frame for count#2 was 2/8/07 - 2/7/08. (PAGEID#350-52) For count#2, A.T alleged that abuse occurred but the time of abuse was unclear. Her mother was allowed to testify that A.T told her that she was five years old when she was abused. The incident allegedly occurred when they lived on Elm. That alleged incident was outside of the scope of the indictment. That testimony created a fatal variance.

The indictment for count#1 was from the time frame of 4/26/06 through 4/25/07 when T.T was Five years old. The only evidence came from the mouth of T.T as a testimony. The jury heard her describe the incident as occurring between 4/1/08 - 4/25/08 when she was six years old and in the first grade after she lived with Jones. (trial transcript page# 245-46; 254-55 hereafter TR#) T.T's testimony created a fatal variance. No other evidence corroborates her testimony of an uncharged crime. No physical evidence exists that can overcome the fatal variance in her trial testimony from the charge in the indictment. The jury was allowed to hear testimony from both girls of an uncharged crime and those uncharged crimes were

then used to convict Jones of the charged offenses.

Initially, claims challenging the sufficiency of evidence raised no federal question and could not be considered in a HCP. Only where the charge against the prisoner was totally devoid of evidentiary support was a conviction unconstitutional under the Due Process Clause of the 14th amendment. Consequently, as long as a reasonable doubt instruction was given at trial, federal habeas relief under §2254 was available to a state prisoner on the ground of insufficiency of evidence only if there was no evidence whatsoever supporting the conviction. It is clear and undisputed by any lower court that Jones has proven that his 14th amendment right was violated, the other courts **only** said he was late in raising the claim.

This Court in Jackson v. Virginia, 443 U.S. 307, 324 (1979) held at 324 that a §2254 "applicant is entitled to Habeas relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Ex parte Bain, 121 U.S. 1 (1887) may best be understood in terms of two distinct propositions. 1st, Bain stands for the proposition that : a conviction cannot stand if based on an offense that is different from that alleged in the indictment. And 2nd, Bain can support the proposition that : the striking out of parts of an indictment invalidates the whole of the indictment. The latter does not apply, Jones is relying on the 1st proposition. The U.S. Constitution Amendment V, also known as the Grand Jury Clause reads: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of the Grand Jury. The Bain court's goal was to uphold the Constitution.

□ A 'fatal variance' occurs when the essential elements of the

offense set forth in the indictment are left unaltered but the evidence offered at trial proves facts materially different from the charge in the indictment. When, as in this case, an indictment alleges that an offense occurred "on or about" a specified date or period of time, the state does not have to prove the exact date as long as it proves that the offense occurred **within** the specified time period. The specified time period for count#1 was 4/26/06 - 4/25/07. The specified time period for count#2 was 2/8/07-2/7/08. A review of the trial transcript reveals that the prosecutors narrowed their case to two single incidents, one occurring when T.T was five years old and in kindergarten and the other when A.T was four years old. (PAGEID#1084-85) Thus, any incident occurring after 4/25/07 for count#1 and after 2/7/08 for count#2 or anytime after T.T turned 6 years old and A.T turned 5 years old were beyond the scope of the indictment.

The lower courts erred when they did not issue a COA or grant habeas relief for this claim because this issue is a clear violation of Due Process of the 14th Amendment, the Grand Jury Clause of the 5th amendment and also the Supreme Court's ruling in Bain. The Sixth circuit also contradicted it's previous holding in White v. McAninch, 235 F.3d 988. In that court, the Sixth circuit was faced with an identical case as Jones's. The Court of appeals ruled that the petitioner's trial counsel's errors with respect to admission into evidence of an uncharged act of sexual intercourse were so egregious as to undermine the Court's confidence that petitioner's trial produced a just result. The outcome was that habeas relief was warranted. Habeas relief should also be warranted in this case because Jones has established that his counsel was ineffe-

ctive when his trial counsel failed to object to the admission into evidence of an uncharged crime. Habeas relief should also be granted because the district and the appeals court's decision to deny relief conflicts with its prior ruling in White v. McAninch and it conflicts with the Supreme Courts holding in Bain. This issue also raises an important question for future defendants: whether testimony from the key witness alleging a crime occurred after the relevant time period of the indictment can be used as direct evidence to prove the charged offense. The answer should be NO.

Since no overwhelming evidence can be used to defeat the fatal variances in this case, and based on the foregoing and arguments and authorities, it is respectfully requested that Certiorari be granted for this issue.

Question#2: Whether there is sufficient evidence of intercourse where the evidence shows, at the most that the defendant had contact with the outside of the buttocks or if a COA should have issued or habeas relief granted.

In Ground#2(B), Jones raised that evidence was insufficient to convict him because A.T testified that she was not penetrated by him. (TR#262-64) The issue before this Court first requires an interpretation of R.C. 2907.01(A) which states that "penetration, however slight, is sufficient to complete ... anal intercourse." The term 'sexual conduct' is defined as: vaginal intercourse, anal intercourse, fellatio, and cunnilingus between persons regardless of sex and insertion, however slight, of any body part into the vaginal or anal cavity. (see R.C.2907.01(A)) The common, everyday meaning of "cavity" is: a natural hollow place within the body. It wo-

uld necessarily follow that the term "anal cavity" in R.C. 2907.01(A) makes reference to the lower portion of the alimentary canal and not the buttocks, which is not "within the body". Further, the term "intercourse" is defined as "sexual joining of two individuals" therefore, when the phrase "anal intercourse" and "anal cavity" are read together in 2907.01(A), it is apparent that penetration or joining with the anal cavity occurs when some part of the body or any other item is inserted into the anus.

Sexual "contact" means "any touching of the errogenous zone of another, including the thigh, genitals or buttocks, for the purpose of sexually gratifying either person." (see R.C.2907.01(B)) The General Assembly has already made provisions for an instance where an offender makes contact with the buttocks. To define the phrase "anal cavity" to include the buttocks would subject a defendant accused of committing one criminal act to prosecution under two different criminal provisions, one a 1st degree felony and the other a 3rd degree felony or 1st degree misdemeanor. A.T testified that Jones only made "contact" with the "outside of her buttocks". (TR#262-64) Trial evidence could support a 3rd degree felony or even attempted rape but ~~not~~ the charge in the indictment. Allowing Jones to be convicted of a crime without sufficient proof of guilt violates the Grand Jury Clause of the 5th Amendment and also this Court's holding in 'Jackson v. Virginia'.

The Jackson Court held that "the critical inquiry on review of sufficiency of evidence to support a criminal conviction must... determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Jackson, 443 U.S. at 318)



In this case, the jury could only speculate. The same evidence the state used to support the charges could also be used to support the opposite inference that Jones was not guilty of the charged offense. Mere speculation and suspicion cannot support logical inferences. Only 1) circumstantial evidence and 2) reasonable inferences drawn from that evidence may be sufficient to sustain a conviction. (see U.S. v. Algee, F.3d 506,512(6th cir,2010) Therefore, where a verdict relies solely on circumstantial evidence, the question this Court must answer is whether "each link in the chain of inferences" the jury constructed is "sufficiently strong to avoid a lapse in speculation." (quoting U.S. v. Moore, 572 F.3d 334, 337 (7th cir.2009))

Under 'Jackson' the only question is whether the jury's finding "was so unsupportable as to fall below the threshold of bare rationality." (quoting Coleman v. Johnson, 132 S.Ct. 2060,2065' (2012)) A Court must grant relief if "the evidence of innocence, or lack of evidence of guilt, is such that all rational fact-finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt." (Jackson 443 U. S. at 319) Because the sole question is whether "any" rational trier of fact could have made the finding, this standard imposes a heavy burden on petitioner Jones, but by no means is it an unobtainable challenge. After construing the evidence in favor of the government, the "evidence may be insufficient to establish every element of the crime" such as in this case where the verdict was based entirely on speculation and an uncharged crime instead of reasonable inferences, or where there was a "total failure of [a] requisite element". (quoting U.S. v. Nevils, 598 F.3d 1158,

Consider the decision of the Ohio Supreme Court in State v. Wells, 91 Ohio St.3d 32. The 'Wells' court held that, "there is sufficient evidence of anal intercourse, for the purpose of the crime of anal rape under 2907.01 where the trier of fact finds that the defendant penetrated, however slight, the victim's anus" A.T testified that Jones did not go "inside" of her buttocks and only had contact with the "outside" of her buttocks. (TR#262-64) The 'Wells' court further held that, "if the evidence shows that the defendant made contact only with the buttocks, there is not sufficient evidence to prove the defendant guilty of anal rape, even if the evidence proves the defendant attempted to penetrate the anal cavity, it is still not sufficient to prove the defendant guilty of the crime of rape." (quoting State v. Wells, 91 Ohio St.3d 32,35))

The federal district court erred when they failed to issue a COA or grant habeas relief for this issue because it is a clear violation of the Due process Clause of the 14th amendment and the Grand Jury Clause of the 5th amendment. This issue satisfies the actual innocence exception to the time-bar because Jones is actually innocent of the charged offense. If the complaining witness says she was not penetrated and her testimony was the only evidence, it violates the constitution to convict without proof of guilt. The Court of Appeals decision conflicts with the holdings in State v. Wells, which has an identical situation as Jones's and it also conflicts with this Court's ruling in 'Jackson v. Virginia'.

A reversal of this conviction and a grant of a COA and habeas relief is warranted because no sufficient evidence was offered during trial to support the conviction for count#2.

Based on the authorities and argument, it is respectfully requested that the Court grants Certiorari for this issue.

Question#3 : Whether trial counsel's failure to object to the testimony alleging an uncharged act of conduct or whether trial counsel's failure to impeach the states witnesses with their prior inconsistent descriptions was strategic or a violation of the 6th Amendment right to effective counsel satisfying the cause and prejudice exception to the time bar.

To simplify these allegations of Ineffective Assistance (IAC), Jones will make two supporting brief arguments:

1) FAILING TO OBJECT

No previous Court adjudicated the merits of Jones's IAC claim. (Ground#1) Jones alleged that his counsel was ineffective when he failed to impeach most of the state's witnesses with their prior inconsistent descriptions of the single incident. Attorney error that amounts to IAC can constitute "cause" under the cause and prejudice test. (see Gravelly v. Mills, 87 F.3d 779,785 (6th cir.))(holding that defendant's counsel's failure to object to very serious prosecutorial misconduct amounted to IAC, and that such ineffective assistance was "cause" for the defendant's failure to comply with rules preserving his claim.) In order to constitute sufficient cause to overcome the procedural default, a counsel's performance must be constitutionally deficient. In Strickland v. Washington, 466 U.S. 668 (1984), this Court set forth a 2-prong test for determining whether the performance of counsel is deficient. No prior court applied the Strickland prongs before denying the sought relief. The failure of Jones's counsel to object to T.T's testimony of an unc-

harged act of conduct rendered his defense- that he did not abuse T.T and that each time she told the details she could not tell a consistent description- meaningless. Jones's counsel's failure to raise the fatal variance argument during trial not only failed to preserve this issue for collateral attack, but it was sufficiently serious as to deprive Jones of the counsel guaranteed by the constitution.

No prior court disputed the fact that a fatal variance occurred, the lower courts only claimed that Jones was time barred from raising the claim and they could not consider the merits. If the jury believed the trial evidence for count#1, that Jones committed a crime in 2008, then that is proof that they did not base their verdict on the fact that they had to prove it occurred during the time period in the indictment. The exact date of the offense is not an "element" of the crime, as long as the defendant is given a time period in which to create a defense in the indictment. The time period for count#1 was 2006-07. Since the dates changed on the day of trial, Jones was subjected to surprise testimony and was unable to defend himself against the new allegations. His trial counsel abandoned the original strategy to create doubt and proved to be constitutionally deficient when he did not question T.T about the uncharged new crime or even ask the trial Judge for limiting instructions.

A similar situation occurred in White v. McAninch, 1998 U.S. Dist. LEXIS 23117. There the Court held that counsel rendered ineffective assistance when he failed to object or request a limiting instruction when the prosecutors elicited testimony regarding an

uncharged crime. Similar to McAninch, Jones's counsel rendered IAC when he did not object or request a limited instruction regarding T.T's testimony elicited by the prosecutors. The scope of the indictment was narrowed to a single incident that occurred when T.T was five years old and in kindergarten pursuant to the prosecutors opening and closing statements. (PAGEID# 1084-85) Dech Jr., counsel for Jones, did not object or request a limiting instruction to the jury. The incident for count#1 was described to the jury as occurring when T.T was 6 years old and in the 1st grade after she lived with Jones. That would mean the crime occurred between 4/1/08 and 4/25/08 according to the trial evidence. It should not be difficult for this court to conclude that Dech's performance was woefully inadequate both because he failed to object to the prosecutors eliciting testimony from T.T of an uncharged crime and for Dech's failure to request any kind of limiting instruction on the jury's consideration of that testimonial evidence.

Claims of IAC must be judged against the standard set forth in Strickland. Jones asks this Court to consider this question: whether the fact that the prosecutors were permitted, without objection, to elicit testimony regarding uncharged crimes amount to constitutionally ineffective assistance of counsel.

## 2) FAILED TO IMPEACH

The previous courts have held that Jones should have raised his IAC claims sooner, but the fact remains that Jones is alleging that his counsel was ineffective when he was constitutionally required to have effective counsel, the trial itself. The procedural default for Jones's IAC claim should properly be imputed to the state. (see Murray v. Carrier, 477 U.S. 478,488(1986)) This is not

because a constitutional error is so bad that the lawyer ceases to be an agent of the prisoner, but rather because a violation of the right to counsel must be seen as an external factor to the prisoner's defense. (see Coleman v. Thompson, 501 U.S. 722,754(1991))

It is not difficult to conclude that Mr. Dech's actions were not within the wide range of professional competence. He was faced with crucial discrepancies between what the state witnesses told the police, detective, S.A.N.E. nurse, and each other, Dech failed to follow up on his cross-examination by confronting them with their prior inconsistent descriptions of the single incident. All prior descriptions differed from the trial testimonies. Dech's failure to adequately cross examine the state's key witnesses sacrificed an opportunity to greatly weaken the complaining witnesses testimony. For example: A.T told the police she was a victim of sexual contact when Jones put his penis "on" her vagina. Later that day she told the S.A.N.E nurse Jones put his "leg on" her butt. 3 Months later she allegedly told Dr.S, the state's hired witness, she was vaginally raped. However, all of those stories were different from her trial testimony of "outside" of her buttocks. If she was the only witness to make prior inconsistent descriptions, it's possible other circumstances could sway a jury to convict. That is not the case in this case, T.T also made multiple prior inconsistent descriptions. If a rational person heard me tell them that I threw a baseball 3,000 miles an hour, no rational person could believe me because it is physically impossible to occur the way I described it. During trial, T.T described the incident as occurring, through multiple choice leading questions, when she was "sitting" on the couch and Jones was "standing" on the back of the couch. Th-

at story is impossible to believe, if she is sitting on her butt, how can Jones penetrate it if he is standing on the back of the couch? This is the evidence convicting Jones, he some how penetrated T.T while she was sitting on the couch and he was standing on the back of the couch and it occurred when she was 6 years old and in the first grade. (TR#251,254-55) Is this enough evidence to prove guilt beyond a reasonable doubt?

Furthermore, Dr.S testified that T.T told him that she was penetrated by Jones, but his report, which is heavily redacted, proves otherwise. The section that is unredacted shows that T.T told him that Jones only had "contact" with her buttocks when she was 5 years old. The prior inconsistent descriptions of the alleged single incident could have been admitted not merely for impeachment purposes, but as substantive evidence. Jones does not have to prove which prior inconsistent description is false because logic tells a rational person that all of them cannot be true so falsity is present. If the jury had saw the original prior inconsistent descriptions, then the verdict could have been different especially since the jury asked to see those documents during their deliberations. (TR#564) Unsurprisingly, Dech was the one to tell them no and to rely on the trial evidence. Dech can offer no reasonable excuse for failing to impeach the state's witnesses or letting the jury see the documents they asked for. However, he should have been given an opportunity to try to do so.

Considering the importance of the state witnesses testimony and the lack of physical evidence in this case, it is not unreasonable to conclude that there is a reasonable probability that the results would have been different had trial counsel properly impe-

ached the state's witnesses credibility, since the entire case was hinged on the credibility of T.T, A.T, and Dr.S. A.T and T.T were the only "eyewitnesses" to the alleged crime. What they said occurred is the only direct evidence so if you prove they lied or are at the least unbelievable, no juror could convict beyond a reasonable doubt.

The federal district court erred when they failed to issue a COA or habeas relief for this issue because it is a clear violation of the 6th Amendment right to effective assistance of counsel. The Court of Appeals refusal to issue a COA conflicts with this Courts ruling in 'Strickland'. No court applied Strickland before dismissing Jones's IAC claim as required by Strickland v. Washington. This issue also raises an important question: whether trial counsel who fails to impeach state witnesses with prior inconsistent descriptions of the crime is the effective assistance guaranteed by the 6th Amendment.

There is no overwhelming evidence in this case, only questionable testimony holds Jones in prison. It is fair to conclude that there is at least a reasonable probability that had the jury saw the prior descriptions that differed from the trial testimony, they would not have convicted Jones. Based on the authorities and argument, it is respectfully requested that Certiorari be granted for this issue.

Question#4: Whether redacting the description of the alleged crime describing the incident in question was permissible or a 'Brady' violation, and whether trial counsel was ineffective for stipulating to those redactions violating the Due Process clause of the



14th Amendment and the 6th amendment requiring a grant of a COA and habeas relief.

No lower court held an evidentiary hearing on the documents in support of Jones's petition. The prosecutors redacted what the alleged victim's said and that is illegal. The documents in question were asked to be seen by the jury and are not part of the state record. Improper redactions of medical reports and other reports is the same as withholding of various statements by the victims. That is prosecutorial misconduct defined as a 'Brady' violation. Dech allowed the prosecutors to give him an incomplete bill of particulars when they heavily redacted the medical and police reports. Places where the victims alleged only sexual "contact", the state redacted those statements. No competent trial counsel would stipulate to those redactions or bypass objecting to the redactions to the trial Judge. Had Jones had in his possession the unredacted reports, he could have created a strong defense that the girls could not consistently describe the details of the single incident proving they were either not believable or incompetent to testify. Those documents would have cast serious doubt on the state's case because the state's case hinged solely on the credibility of the girls. The redacted statements of sexual "contact" hindered Jones from defending himself against the "rape" allegations.

The unavailability of multiple inconsistent descriptions made by the state's key witnesses and the failure of the prosecutors to turn over the medical report from Toledo Hospital for T.T. denied Jones access to evidence that could have been used as ammunition during cross-examination which would have destroyed the witnesses

credibility. The documents could have been used to seriously undermine confidence in the outcome of the trial. (see Smith v. Cain, 565 U.S. 73,76(2012))(the suppression of a witnesses statements that contradicted his trial testimony, and the witness's testimony was the only evidence linking the defendant to the crime, undermines confidence in the conviction and constitutes a 'Brady' violation.)(see also U.S. v. Agurs, 427 U.S. 97,112(1976)(which held "if the omitted evidence creates a reasonable doubt that does not otherwise exist, constitutional error has been committed.") Because the state hid the statements made by the girls and doctor behind redactions and Dech failed to use, i.e willingly omitted, the prior inconsistent descriptions, had the jury saw the documents, there is a reasonable probability that they would not have decided to convict Jones. (TR#564)

Jones's situation raises the same question as in 'Smith v. Cain': whether the effect of the improperly redacted evidence and undisclosed evidence and the available evidence trial counsel failed to use during his cross examination " put the whole case in such a different light as to undermine confidence in the verdict." (see also Kyles v. Whitley, 514 U.S. 419,435) Fittingly, In Wearry v. Cain, 577 U.S. 385(2016) The Supreme Court overturned a 14 year conviction because the prosecutors failed to disclose material evidence which violated petitioner's Due Process right because "newly revealed evidence" sufficed to undermine confidence in the inmates conviction because the witness's credibility would have been diminished had jury learned about the evidence. There is no need for this court to over complicate Jones' case. The prosecutors hid

and failed to disclose medical reports and other reports for both of it's key witnesses. The redacted and withheld reports would have undermined the girls credibility had the jury been introduced to those reports mainly because the jury asked to see them. (TR#564)

Jones's counsel was constitutionally ineffective and not the guaranteed counsel of the 6th Amendment when he failed to uncover and use the potentially exculpatory medical reports as well as the other documents. The state and federal district court did not conduct an evidentiary hearing on the redacted and missing reports. The courts also did not conduct an independent investigation into Jones' claims and instead relied on an incomplete record offered at trial. Jones has proven that the answer to the question of whether the improper redactions was a 'Brady' violation should be Yes. The suppression by the government of evidence favorable to the accused upon request violates Due Process where the evidence is material of either guilt or punishment. (see Giglio v. U.S., 405 U.S. 150,152-54 (1972)(clarifying that the rule stated in Brady applies to evidence undermining witness credibility.)

Evidence qualifies as "material" when there is " a reasonable likelihood it could have affected the judgment of the jury" (Giglio supra at 154) The jury asked to see the documents in question in this case. Had the jury had their questioned answered and were introduced to the redacted documents or had counsel asked for them to see the unredacted documents, there is a reasonable probability that Jones would not have been convicted. Jones does not have to show that " more likely than not" he would have been acquitted had the newly presented evidence been admitted, (see Smith v. Cain, 565 U.S.

at 75) Petitioner Jones only has to show that the newly presented evidence is sufficient to "undermine confidence" in the verdict.

Beyond any doubt, the medical reports and improper redactions suffice to undermine confidence in the verdict for Jones. The state's case resembles a house of cards built on the jury crediting the girls were more believable in their allegations than Jones was in his denial of the allegations. Had the jury learned that the girls' original description of the incident changed from sexual "contact" to rape and that everytime the girls described the single incident, the details consistently changed, the structure the state's case was built on would have crumbled. (see A U.S. v. Agurs, U.S. 97,113(1976)(if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt.") Impeachment evidence as well as exculpatory evidence is "evidence favorable to an accused". (Brady, 373 U.S. at 87)

Had evidence been disclosed and used during cross examination, it would have made a difference between acquittal and conviction. No lower Court conducted an evidentiary hearing nor did they consider the merits of Jones' constitutional claims. Based on the foregoing authorities and argument, it is respectfully requested that this Court grants Certiorari for this issue.

#### AEDPA DEFERENCE WAS MISAPPLIED

No state court ever adjudicated Jones' constitutional claims on the "merits" as required for AEDPA deference. Since Jones filed his petition after April 24, 1996, the case in question is governed by AEDPA and the court must determine whether the state court adj-

udicated the petitioner's federal claim "on the merits" for the purpose of §2254(d). However, the state is said to adjudicate a claim "on the merit" when it decides the right to relief on the basis of the substance of the federal claim advanced, rather than on a procedural or other rule precluding state court review of the merits.

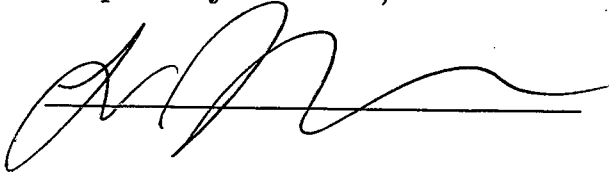
According to Federal Law, the restrictions imposed on Habeas petitioners by §2254(d) applies to any claim that the state court "adjudicated on the merit". The Supreme Court has stated that a "claim" is not the petition as a whole when they stated " a 'claim' ... is an asserted federal basis for relief from a state court's judgment of conviction." (see Vasquez v. Jones, 496 F.3d 564, 569-70 (6th cir. 2007)) A state court's adjudication of something other than the 'claim' is not entitled to deferential review under AEDPA. Only when a state court decides the petitioner's right to relief on the basis of the substance of the constitutional claim advanced, rather than on a procedural default precluding state review of the merits can it be said that the state court adjudicated a 'claim' on the merits. In the absence of a state court's adjudication of the merit, the federal claim is reviewed de novo by the federal court in habeas proceedings. (see McKenzie v. Smith, 326 F.3d 721, 727, 2003 Fed Appx. 0119P (6th cir. 2003))

The federal district court erred when they applied AEDPA deference to Jones's claim because the state court never reached the merit and instead invoked the procedural default defenses precluding themselves from adjudicating the claims on the merits. For that and the above mentioned reasons, it is respectfully requested that this Court grants Certiorari for the denial of the COA.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, consisting of a series of loops and flourishes, is written over a horizontal line.

Date: May 29<sup>th</sup>, 2024