CASE NO. _____ (CAPITAL CASE)

IN THE

Supreme Court of the United States

CLARENCE MACK, Petitioner,

v.

MARGARET BRADSHAW, Warden, Respondent.

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

PETITIONER'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

(CAPITAL CASE: NO EXECUTION DATE SET)

Timothy F. Sweeney (OH 0040027)*
MEMBER OF THE BAR OF THIS COURT
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, Ohio 44113-1800
(216) 241-5003
tim@timsweeneylaw.com
*COUNSEL OF RECORD

John B. Gibbons (OH 0027294)
Attorney at Law
55 Public Square, Suite 2100
Cleveland, Ohio 44114
(216) 363-6086
jgibbons4@sbcglobal.net

Counsel for Petitioner Clarence Mack

PETITIONER'S MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Clarence Mack, through his undersigned CJA-appointed counsel, respectfully requests leave to file his Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without the pre-payment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.1 of the Supreme Court Rules.

This is a death penalty case in which the Petitioner is seeking a writ of habeas corpus under 28 U.S.C. § 2254. By orders dated June 23, 2004 and August 13, 2004, the undersigned attorneys were appointed by the United States District Court for the Northern District of Ohio, under the Criminal Justice Act, 18 U.S.C. §3006A, to represent the indigent Petitioner in his habeas corpus proceedings. Counsels' appointment was continued in the U.S. Court of Appeals for the Sixth Circuit in the appeal below by order dated June 13, 2022. The undersigned counsel has so represented Petitioner throughout these proceedings, both before the district court and before the Sixth Circuit. Accordingly, pursuant to Rule 39.1 of this Court, an affidavit of the Petitioner's indigency is not required.

For all of these reasons, and in the interest of justice, Petitioner respectfully requests that his motion for leave to proceed *in forma pauperis* be granted.

Respectfully Submitted,

/s/ Timothy F. Sweeney

Timothy F. Sweeney (OH 0040027)*
MEMBER OF THE BAR OF THIS COURT
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.

Cleveland, Ohio 44113-1800
Phone: (216) 241-5003
Email: tim@timsweeneylaw.com

/s/ John B. Gibbons

John B. Gibbons (OH 0027294)
Attorney at Law
55 Public Square, Suite 2100
Cleveland, Ohio 44114
Phone: (216) 363-6086
Email: jgibbons4@sbcglobal.net

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PETITION FOR A WRIT OF CERTIORARI

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Timothy F. Sweeney (OH 0040027)*
MEMBER OF THE BAR OF THIS COURT
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, Ohio 44113-1800
(216) 241-5003
tim@timsweeneylaw.com
*COUNSEL OF RECORD

John B. Gibbons (OH 0027294)
Attorney at Law
55 Public Square, Suite 2100
Cleveland, Ohio 44114
(216) 363-6086
jgibbons4@sbcglobal.net

Counsel for Petitioner Clarence Mack

CAPITAL CASE: NO CURRENT EXECUTION DATE
QUESTIONS PRESENTED

Petitioner was tried in Ohio in 1991 for an aggravated murder committed during a carjacking allegedly perpetrated by two men. The State's entire case against Petitioner was based on testimony of an informant who was believed to have been involved in the crime and whose story against Petitioner evolved and expanded, to include new damaging claims, as the trial approached and after attending a private "trial preparation" session with the prosecutor. At the time the informant testified, he was himself facing his own felony prosecution by the same prosecutor's office; yet, in his trial testimony, he denied any deal or expectation of one in exchange for his testimony. The prosecutor likewise denied a deal and failed to disclose one.

Many years after Petitioner was convicted and sentenced to death on the informant's testimony, it was discovered in federal habeas that the prosecutor did indeed have at least an informal, tacit, or unspoken deal with the informant; the deal was evidenced in a "smoking gun" document which showed that, on *the very day* the trials of Petitioner and his co-defendant concluded, the prosecutor intervened in the informant's felony case to request it be "continued" for "further investigation"; the informant's case was later dismissed. Nonetheless, in denying Petitioner's *Brady/Napue* claims based in part on the undisclosed deal, the state courts in postconviction found that the deal had not been proven, and the federal habeas courts deferred under AEDPA to that unreasonable conclusion. Two questions are presented:

(1) When the existence of at least an informal, tacit, or unspoken deal between the prosecutor and his star informant-witness in a capital trial is self-evident from the postconviction record and is beyond any fairminded dispute, is the state court's rejection of a *Brady*/*Napue* claim, arising from the prosecutor's

undisputed failure to disclose that deal, based upon an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) when the rejection was premised on the state court's conclusion that the deal had not been sufficiently proven?

(2) When the evidence suppressed from Petitioner at his 1991 capital murder trial is found to also include the prosecutor's undisclosed deal with his star witness and the star witness' false denials of that deal, does the totality of the State's suppressions, considered cumulatively as required by this Court's precedent, entitle Petitioner to habeas relief on his *Brady*/*Napue* claim as to his conviction or, at the very least, his sentence of death?

DIRECTLY RELATED CASES

1. *Mack v. Bradshaw*, Case No. 22-3201 (U.S. Court of Appeals for the Sixth Circuit), opinion and judgment entered December 19, 2023 & rehearing denied February 15, 2024.

2. *Mack v. Bradshaw*, Case No. 1:04 CV 829 (U.S. District Court, N.D. Ohio), judgment and opinion of September 30, 2021, denying habeas petition in its entirety.

3. *State v. Mack*, Case No. 2018-0361 (Supreme Court of Ohio), order of denial of discretionary appeal entered on June 6, 2018.

4. *State v. Mack*, Case No. 101261 (Ohio Court of Appeals, 8th App. Dist.), opinion and judgment of November 2, 2017, and substituted opinion and judgment of January 25, 2018, affirming denial of second postconviction petition and related motions.

5. *State v. Mack*, Case No. 262888-A (Ohio Court of Common Pleas, Cuyahoga County), findings, conclusions, and journal entry of March 19, 2014, denying second postconviction petition and related motions.

6. *State v. Mack*, Case No. 2003-1162 (Supreme Court of Ohio), order of April 14, 2004, affirming denial of application to reopen direct appeal.

7. *State v. Mack*, Case No. 62366 (Ohio Court of Appeals, 8th App. Dist.), opinion and judgment of May 19, 2003, denying application to reopen direct appeal.

8. *Mack v. Ohio*, Case No. 00-10519 (U.S. Supreme Court), certiorari denied on October 1, 2001.

9. *State v. Mack*, Case No. 00-2204 (Supreme Court of Ohio), order of denial of discretionary appeal entered on March 7, 2001.

10. *State v. Mack*, Case No. 77459 (Ohio Court of Appeals, 8th App. Dist.), judgment and opinion of October 26, 2000, affirming denial of postconviction relief.

11. *Mack v. Ohio*, Case No. 95-6931 (U.S. Supreme Court), certiorari denied on January 22, 1996.

12. *State v. Mack*, No. 94-483 (Supreme Court of Ohio), judgment and opinion of August 30, 1995, affirming conviction and death sentence.

13. *State v. Mack*, No. 62366 (Ohio Court of Appeals, 8th App. Dist.), judgment and opinion of December 2, 1993, affirming conviction and death sentence.

14. *State v. Mack*, Case No. Case No. 262888-A (Ohio Court of Common Pleas, Cuyahoga County), judgment of death sentence & sentencing opinion issued on August 1, 1991, and filed August 5, 1991.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Clarence Mack ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, dated December 19, 2023, in *Mack v. Bradshaw*, 88 F.4th 1147 (6th Cir. 2023).

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit for which Petitioner seeks a writ of certiorari is reported at *Mack v. Bradshaw*, 88 F.4th 1147 (6th Cir. 2023) (*Appx*-0001). The Sixth Circuit's order of February 15, 2024, denying Petitioner's timely petition for rehearing and rehearing *en banc*, is reported at *Mack v. Bradshaw*, 2024 U.S. App. LEXIS 3679 (6th Cir., Feb. 15, 2024) (*Appx*-0020).

The opinion of the U.S. District Court for the Northern District of Ohio, which denied Petitioner's petition for a writ of habeas corpus on September 30, 2021, is reported at *Mack v. Bradshaw*, 2021 U.S. Dist. LEXIS 187656, 2021 WL 4477882 (N.D. Ohio, Sept. 30, 2021) (*Appx*-0021). The district court's denial, on February 23, 2022, of Mack's timely motion to alter or amend the district court's judgment under Rule 59(e) of the Federal Rules of Civil Procedure is reported at *Mack v. Bradshaw*, 2022 U.S. Dist. LEXIS 44379 (N.D. Ohio, Feb. 23, 2022). (*Appx*-0154).

The decisions of the Ohio Court of Appeals, Eighth Appellate District, affirming denials of Petitioner's claims for postconviction relief, are reported at, respectively, *State v. Mack*, Case No. 101261, 2018-Ohio-301 (Ohio App. 8th Dist. Jan.

25, 2018) (*Appx*-0157), and *State v. Mack*, Case No. 77459, 2000 Ohio App. LEXIS 4948, 2000 WL 1594117 (Ohio App. 8th Dist. October 26, 2000) (*Appx*-0188).

The orders of the Supreme Court of Ohio, denying discretionary review of the foregoing postconviction decisions of the Ohio Court of Appeals, Eighth Appellate District, are reported at, respectively *State v. Mack*, 152 Ohio St. 3d 1489, 99 N.E.3d 425 (2018), and *State v. Mack*, 91 Ohio St. 3d 1459, 743 N.E.2d 400 (2001).

The two decisions of the Ohio Court of Common Pleas, Cuyahoga County, Ohio, dated March 20, 2014 and January 25, 1999, respectively, denying Petitioner's claims for postconviction relief, are unreported, *State v. Mack*, Case No. 262888-A (Court of Common Pleas, Cuyahoga County, Ohio) (*Appx*-0248, -0258).

The underlying decision of the Supreme Court of Ohio in direct appeal, which affirmed Petitioner's conviction and death sentence, is reported at *State v. Mack*, 73 Ohio St. 3d 502, 653 N.E.2d 329 (1995) (*Appx*-0195).

JURISDICTION

The Sixth Circuit issued its opinion and judgment on December 19, 2023. (*Appx*-0001.) On February 15, 2024, the Sixth Circuit denied Petitioner's timely petition for rehearing and rehearing *en banc*. (*Appx*-0020.) The time for filing Petitioner's petition for a writ of certiorari was extended by the Honorable Brett Kavanaugh, Associate Justice of this Court and Circuit Justice for the Sixth Circuit, to June 14, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment, which provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, which provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 2254(d), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Petitioner's case involves serious constitutional errors which impact the underlying conviction *and* the death sentence. It presents an important issue under *Brady v. Maryland*, 373 U.S. 83 (1963), and about the application of 28 U.S.C. § 2254(d)(2).

The underlying crime is a garden-variety felony murder—a single victim—resulting from a carjacking in 1991 in Cleveland, Ohio. Petitioner Clarence Mack ("Mack"), if he was there at all, was not the principal offender and actual killer because, under the State's own informer-reliant evidence, Mack was on the passenger side of the victim's car and thus did not fire even one of the three fatal shots (all fired from the driver side, per the State's evidence, by co-defendant Thomas Sowell).

With there being no witnesses to the carjacking, and no forensic or any other evidence which placed Mack at that scene, the State's "evidence" against Mack truly was "snitch" evidence: It came from a single informant witness, Timothy Willis. Willis' testimony was virtually the State's entire case, a point which the two dissenting justices on the Supreme Court of Ohio—Justices J. Craig Wright and Deborah Cook—acknowledged back in 1995 when, in Mack's direct appeal, they would have ordered a new trial. *State v. Mack*, 73 Ohio St. 3d 502, 517 (1995) (dissent) (*Appx*-0206 to -0207).

With Willis being so critical to the State's case, and this being a capital case, it was of paramount importance for the prosecutor to comply with his *Brady* obligations to produce to Mack and his defense counsel, for Mack's 1991 trial, the information

and documents which would have enabled the defense to impeach Willis and expose his substantial biases. But the prosecutor failed to do so. Significant exculpatory and impeachment materials were withheld from the defense; these suppressions were not discovered by Mack until federal habeas in ***2010***. The *Brady* suppressions included such basic impeachment information as a secret tacit deal between the trial prosecutor and Willis under which that same prosecutor's office would back off its then-pending felony prosecution of Willis—for aggravated robbery and felonious assault against an 83-year-old victim, who knew Willis and picked him out of a lineup—so long as Willis helped score the convictions against Mack and Sowell. In refusing to grant Mack relief from his conviction, or at least his death sentence, for these *Brady* violations in a capital case, the state appellate court and the federal habeas courts have misapplied *Brady* and disregarded this Court's precedent. The federal habeas courts have also extended unwarranted deference, under 2254(d), to grossly unreasonable state court decisions.

Additional facts which are pertinent to the questions presented are summarized below.

A. Summary of the crime and charges.

On January 21, 1991, Peter Sanelli was shot three times during a carjacking, while seated in his car outside his place of business in Cleveland. The gunshots were fatal. His body was found outside the vehicle in a parking lot. His car was found one hour later, abandoned after striking a pole on Holton Avenue.

The *Cleveland Plain Dealer* reported that Mr. Sanelli was "a close friend" of

the Chief of the Cleveland Police Department ("CPD"), Edward Kovacic. The Chief instructed CPD's detectives to give him personal updates. (R.154-9, Federal Evidentiary Hearing ("FEH") Exh. 5, PageID 21279.)

Two days later, on January 23, 1991, Mack was arrested, along with Reginald Germany and Thomas Sowell, for Sanelli's murder. These January 23 arrests were orchestrated for CPD by Timothy Willis, a "friend" of Mack and Germany's, and, unbeknownst to them, a CPD "informant."

On February 5, 1991, Mack was indicted for two counts of aggravated murder and one count of aggravated robbery. The first count alleged the murder was committed with prior calculation and design. The second alleged felony murder, *i.e.*, the murder was committed while committing aggravated robbery. Each murder count included a capital specification that the homicide was committed during an aggravated robbery in violation of R.C. 2929.04(A)(7), and that either the defendant was the principal offender in the aggravated murder or, if not the principal offender, the aggravated murder was committed with prior calculation and design. (R. 149-1, Indictment, PageID 2834-37.)

B. 1991 Trial and Sentencing: Willis was the key witness.

Mack's trial began on July 1, 1991, and proceeded on counts 2 and 3, after count 1 (prior calculation and design) was dismissed. The State's case against Mack was based almost entirely on money-seeking Willis. But Willis was also deal-seeking too—for a pending aggravated robbery case, committed in April 1991 against an 83-year-old man (Robert Burgess), which was then being prosecuted against Willis by

the same prosecutor's office. That deal between Willis and the lead trial prosecutor, Richard Bombik, was hidden from the defense until federal habeas in 2010.

Willis testified that, on 1/21/91, at 5:30 p.m., he saw Mack driving a Monte Carlo with Reginald Germany and Thomas Sowell as passengers; they drove up to Willis' house. (T. 666-67, PageID 6189-90.) According to Willis, Sowell inquired about wanting to borrow a gun from Willis to use for stealing a car. Willis said he didn't have one, but then, per Willis, Germany allegedly shouted to Sowell: "Come on, Tom. We got to go. You can use my 9." And they left. (T. 670, PageID 6193.)

Willis testified that about an hour later that same 1/21/91 evening, at approximately 6:45 p.m., he encountered Sowell driving up to Willis in a silver station wagon with red plates, and Mack was the passenger. (T. 671-73, PageID 6194-96.) This encounter supposedly happened at the Fairfax Recreation Center, down the street from Willis' house. Willis told CPD in his statement on January 23 that the driver side window of the car was broken out, and that, when Sowell got out of the car at the Rec Center, Sowell was brushing off glass from his clothing. (R. 154-9, FEH Exh. 11, PageID 21296.) Willis claimed Sowell had a 9 mm gun and a pouch with binoculars. (T. 678, PageID 6201.)

Willis testified that he asked Sowell where they got the car, and Sowell allegedly responded they got it on Prospect Avenue. (*Id.* 676.) Willis said he then heard Mack ask Sowell: "why did he shoot the man?" (*Id.* 677.) Per Willis, Sowell allegedly responded to Mack: "I shot him because he didn't do what I say. I told him to get out the car, instead he got in and locked the door, so I shot the glass." (*Id.*) Per

Willis' 1/23/91 written statement, Sowell then said: "If he hadn't resisted he wouldn't have got shot." (FEH Exh. 11, PageID 21296; TSH at 156, PageID 9025.) Mack allegedly responded to Sowell, per Willis' testimony: "I shot because you shot." (T. 677.) (This alleged statement by Mack—"I shot because you shot"—was not claimed by Willis in any CPD interviews and was first concocted by Willis during a private meeting with Bombik in June 1991 and not disclosed until Willis testified at Mack's trial on July 8, 1991).

Willis testified that when he watched the news that night, he saw a story about a murder and recognized Sanelli's car as the one driven by Sowell. (T. 680, PageID 6203.) On January 22, 1991, the day after the murder, Willis said he called Mack who allegedly said they got the car downtown, and Mack laughed saying Sowell crashed it into a pole and injured his nose. (T. 681, PageID 6204.)

Later that night of January 22, after watching the news again, Willis called Crime Stoppers, a tip line that provides financial rewards for helping solve crimes. (T. 685-87, 727-28, PageID 6208-10, 6250-51.) Willis claimed he told the operator that Mack, Sowell, and Germany were responsible for killing Sanelli. (T. 685-86.) But, according to Willis, the operator told him he didn't have enough information. (T. 686-87, 728-29.)

On the morning of January 23, 1991, Willis said he went downtown and talked with members of the Sanelli family at their Sandglo Glass business. (T. 687-89, 730-39, PageID 6210-11, 6253-62.) During that meeting, Willis said he learned the Sanelli family, too, was offering a reward. He claimed he did not learn the amount at that

meeting, but later learned it was $10,000.00. (T. 699, 736-40, PageID 6222, 6259-63.) Willis testified that the Sanelli family "asked me all kind of questions" (T. 741, PageID 6264), and they gave him the number to call the police. (T. 741-42, PageID 6264-65.) (One of the people at that meeting—Mr. Sanelli's son-in-law Mike Barone––made contemporaneous handwritten notes. Those notes were in the prosecutor's file but were not disclosed until 2010 in habeas. They are part of the *Brady/Napue* claim.)

After leaving Sandglo, Willis said he began to collect information on Mack and Sowell. (T. 689-91, PageID 6212-14.) He then called CPD at about 3:00 p.m. on 1/23/91, to provide his allegations and give CPD details of the whereabouts of Mack and Sowell, and that they would have weapons on them. (T. 691-92, PageID 6214-15.) Later that afternoon—as Mack, Germany, and another man drove to Willis' house—CPD arrested them on Willis' tip. (T. 694-95, PageID 6217-18.) Sowell was also arrested that same day at his job.

Police found weapons on Mack and Germany, just as Willis had said they would. (Detective Mike O'Malley, one of CPD's detectives on the witness list for Mack's trial, testified in 1996 that he believed Willis supplied the weapons for Sanelli's murder but flipped, with a deal, to avoid prosecution. Willis' undisclosed deal is part of the *Brady/Napue* claim.)

The weapon allegedly recovered from Mack, on Willis' tip, was determined by CPD, later that evening of 1/23/91, to have fired shots which struck Sanelli. The weapon recovered from Germany was determined to have fired the shots from the passenger side, none of which struck Sanelli. (T. 508-10, 531-35, 623-63, PageID

6031-33, 6054-58, 6146-86.) But the fact that Mack was arrested with the supposed murder weapon on 1/23/91 does not mean Mack was in possession of that weapon on 1/21/91, or even present for the carjacking on 1/21/91. Mack's theory of defense was that he wasn't there and had an alibi, and that the only reason he was entangled is because Willis had set him up (including by selling Mack the gun the day after the murder). (T. 863-68, PageID 6392-97.) What is more, Willis' description of allegedly seeing Mack and Sowell in the stolen car together, on 1/21/91 at the Rec Center—with *Sowell in the passenger seat*, brushing off glass, and *Sowell* making admissions that he shot through the driver window when Sanelli refused to get out—make *Sowell* the killer and principal offender, from the driver side, and Mack, if he was there at all, a befuddled accomplice on the passenger side (from which no shots struck Sanelli) wondering why Sowell had shot the man.

In fact, the State's entire case was premised on Willis, as the two Justices of the Supreme Court of Ohio noted in dissenting from the affirmance of Mack's conviction and sentence. *State v. Mack*, 73 Ohio St. 3d 502, 517 (1995) (Wright, J., dissent) (*Appx*-0206). And Willis was an extremely flawed "witness." Two months before Mack's trial began on July 1, 1991, Willis was arrested, on April 30, 1991, for the 4/27/91 aggravated robbery of 83-year-old Mr. Burgess. The charges against Willis included aggravated burglary, aggravated robbery, and felonious assault. (R. 154-9, PageID 21600-37.) Among the charges was that Willis was wearing a ski mask when he committed those crimes. (Id., PageID 21610.) There was a spate of "ski mask robberies" in Cleveland at that time, some involving victims of Arab heritage. (R. 154-

9, PageID 21322-27.) Burgess was acquainted with Willis, he was able to pull up Willis' ski mask during the beating, and, 3 days later, Burgess picked Willis out of a lineup and made a written statement. (FEH Exh. 63, PageID 21628-29.)

During Willis' direct exam in Mack's trial, the prosecutor allowed Willis to insinuate that Mack may have been involved in some of these "ski-mask" robberies. Willis was permitted to testify that he supposedly heard Mack say at the Rec Center on 1/21/91, "I want to kill me an Arab any old way." (T. 678, PageID 6201.) However, when Mack's counsel tried to cross-examine Willis about the felony indictment Willis was facing, and Willis' own involvement in ski-mask robberies, the trial court barred the questioning. (T. 754, PageID 6277.) The defense was not even allowed to ask why Willis was in jail in May 1991. (T. 747, PageID 6270.)

During the trial, Mack's counsel tried to present evidence about an interview which one of them (Carole Mancino) had with Willis on May 2, 1991, when Willis was in jail on the Burgess case. But the court barred that testimony (T. 982-89, PageID 6511-18); the defense proffered it. Carole stated that Willis told her he did not see Mack or Germany on 1/21/91, he denied calling police, and he told Carole he couldn't believe Mack would kill anyone. (T. 983-84, PageID 6512-13.) Willis also told her, but the jury was barred from hearing: "I can make my statements fit into any story anyone wants to hear." (T. 985; FEH Exh. 42, PageID 21454-55.)

This was not the only piece of critical evidence which the trial court barred about Willis. A cousin of Mack's, Curtis Mack, testified for the defense that he saw numerous firearms at Willis' house and that Willis sold firearms. (T. 943-46, PageID

6472-75.) However, the court refused to allow Curtis to testify about a conversation he had with Willis the night after Mack's arrest. (T. 947-50, PageID 6476-79.) The defense proffered that Curtis would have testified that Willis said Mack had nothing to do with Sanelli's murder and that Willis admitted that he, Willis, was the one who murdered Sanelli. (T. 980-81, PageID 6509-10.) When Mack's case reached the Supreme Court of Ohio, the two dissenting Justices held that the trial court's refusal to permit the testimony of Curtis and Carole required a new trial. *Mack*, 73 Ohio St. 3d at 517 (Wright, J., dissent) (*Appx*-0206 to -207).

In part because of these improper rulings, the jury returned a verdict on July 11, 1991, finding Mack guilty of both counts and the capital specification. (T. 1193-96, PageID 6722-24.) After a penalty phase on July 17, 1991, the jury recommended death and the court imposed that sentence. (T. 1336-48, PageID 6871-83; R. 149-1, Opinion, PageID 2933-39, 2950.)

Meanwhile, Willis' case was set for trial on August 5, 1991, but was re-set to October 7, 1991. On that date, the State entered a *nolle prosequi*. (R. 154-9, FEH Exhs. 63, 73, 74, PageID 21602, 21873-84.) Of course, by then Mack and Sowell had been tried and convicted, in separate trials, at which Willis was the State's star witness.

C. The discovery of the suppressed *Brady* material and return to State court. The evidence of an undisclosed deal with Willis is overwhelming and undeniable.

After Mack's state appeals were unsuccessful, he filed a federal habeas petition in 2003. The federal court permitted Mack to conduct discovery which enabled Mack

to obtain the prosecutor's files of the Mack/Sowell/Germany prosecution and of Willis' prosecution for his felonious assault of Mr. Burgess. As a result, Mack discovered that the prosecutor had withheld police reports, notes, and other evidence that were required to be produced. These suppressed materials were the basis of Mack's claim under *Brady*/*Napue*. They include:

(1) Notes of prosecutor Bombik's private meeting, in early June 1991, with Willis—who was then, since May 1991, facing his own serious felony charges by that office, with a trial date on August 5, 1991. During that meeting, Willis first concocted the lie that Mack, on 1/21/91, had supposedly made the incriminating statement in Willis' presence, and in alleged response to Sowell's statement that Sowell shot Sanelli for not opening his car door: "I shot because you shot."

(2) The secret and undisclosed deal that was reached between Bombik and Willis, during their private June 1991 meeting, to back off of Willis' prosecution in the Burgess case in exchange for Willis' testimony against Mack and Sowell.

(3) The contemporaneous handwritten notes which the victim's family had made of their meeting with Willis on January 23, 1991, a mere 2-3 hours before Willis went to CPD with his tales about the murder.

(4) The CPD report which showed that one man was seen driving the victim's car within minutes of the 1/21/91 carjacking, that man crashed the car into a utility pole on Holton Avenue and was seen walking away from the car, in a Chicago Bulls jacket, rubbing his injured nose. (Sowell wore a Bulls jacket).

(5) The CPD report which showed that the victim's car, after it had been abandoned at the scene of the Holton crash, was shortly thereafter moved away from the pole by another man (not Mack) who then took the keys and left the scene.

Based on this discovery, the federal court, on March 31, 2010, granted Mack an evidentiary hearing which was conducted over four days in June/July 2010. (R. 99-102, TFEH, PageID 448-1224.)

The evidence of the undisclosed at-least tacit deal with Willis was a significant part of the presentation at the hearing. It was based on the facts and circumstances arising from the undisputed fact (unknown to Mack's counsel at the time of the July 1991 trial) that Bombik and Willis had their private "trial preparation" meeting in Bombik's office in early June 1991, a few weeks before Mack's trial was to begin on July 1, 1991, and shortly after Willis was released from pretrial confinement awaiting his *own trial*, *by Bombik's office*, for Willis' aggravated robbery and felonious assault of Mr. Burgess. Bombik knew that Willis was the State's entire case against Mack and Sowell. Bombik's boss, the infamous recidivist *Brady*-violator, Carmen Marino,[1] had warned Bombik in a written note that he "better make sure that T[im] Willis doesn't get scared off." (R. 154-9, FEH Exh. 34, PageID 21407.) That June 1991 meeting resulted in at least an informal, tacit, and/or unspoken, if not explicit, tit-for-tat agreement between Bombik and Willis, as the subsequent events amply proved. Bombik never disclosed the deal and he allowed Willis to falsely deny any deal in his trial testimony.

[1] Carmen Marino "has a shameful track record of breaking rules to win convictions." *In re Lott*, 366 F.3d 431, 433, n.1 (6th Cir. 2004) (noting that Lott has made "a prima facie showing that [Prosecutor Marino] has been guilty of similar misconduct in more than ten other cases," and citing numerous cases); *D'Ambrosio v. Bagley*, 2006 U.S. Dist. LEXIS 12794, *68 (N.D. Ohio 2006).

Prior to the Bombik-Willis meeting in June 1991, Willis had never claimed that Mack was one of the men who shot Sanelli on January 21, 1991, and never claimed that Mack admitted doing so. *Sowell* was the shooter in all Willis' prior tales: Sowell admitted to Willis that Sowell shot Sanelli when Sanelli locked the driver door and refused to exit the car as ordered by Sowell. Sowell said, per Willis, "If [Sanelli] hadn't resisted he wouldn't have got shot" (FEH Exh. 11, PageID 21296.) Sowell was the man Willis claimed he saw at the Rec Center both driving the stolen car and brushing off broken glass when he exited the car's driver seat to speak with Willis. Mack was at most a befuddled accomplice, in the passenger seat, who wondered why Sowell shot the man. (R. 154-9, FEH Exh. 8, 9, 11, PageID 21286-97.)

Willis' accusation of *Sowell* being the shooter and killer all changed when Willis and Bombik met at Bombik's office in early June 1991, to "prepare" for Mack's July 1 trial. (TFEH at 508-13, PageID 955-60.) They went over Willis' written statement to CPD and his expected trial testimony. They also discussed—per Bombik's own written notes (R. 154-9, FEH Exh. 35, PageID 21409-12)—Willis' current predicament with his aggravated robbery case involving Mr. Burgess, which had been filed against Willis by Bombik's office on May 15, after Willis' arrest on April 30, 1991. (FEH Exh. 63, PageID 21601-37.) Bombik's June 1991 notes—which were never disclosed until habeas—detail the names of Willis' trial judge and defense attorney and Willis' trial date of ***August 5, 1991***. (FEH Exh. 35; TFEH 509-11, 523-24, 538-40, PageID 956-987.) Indeed, Willis had been in jail on that felony case until his arraignment on June 5, 1991; and jail is where Willis was on May 2, the date

Carole Mancino spoke with Willis, and he told her he could make his story fit whatever was needed (this is the testimony, noted above, which Carole proffered at trial because the trial court barred it (T. 982-89; FEH Exh. 42, PageID 21454)).

Willis was doing exactly that—making his "story fit"—during this June 1991 meeting with Bombik. Bombik testified it was during this meeting when Bombik first "learned" of Willis' new claim that Mack allegedly responded to Sowell's statement at Fairfax Rec Center—that Sowell shot because the man wouldn't get out of the car—with the incriminating words: "I shot because you shot." (TFEH at 509-11, 656-59, PageID 956-58, 1103-06.) This manufactured new "evidence" conveniently enabled Bombik to argue, as required under Ohio law to make Mack eligible for a *death sentence*, that Mack was the actual killer and principal offender given that Mack had been arrested two days after his alleged "I shot" statement in possession of the weapon claimed to be the murder weapon.

Nonetheless, Bombik did not provide Mack's counsel with this critical impeachment information before or during trial. The first time Mack or his counsel heard this new allegation by Willis was when Willis testified against Mack on July 8, 1991. (T. 677, PageID 6200; TFEH at 405-08, PageID 852-55; TSH at 154-58, PageID 9023-27.) In fact, the prosecutor emphasized Willis' "I shot because you shot" lie—one of the fruits of the June 1991 deal—in the closing argument. (T. 1051, 1136-37, PageID 6580, 6665-66.)

Based only on Willis' testimony and Willis' other concoctions, Mack was convicted on July 11, 1991—a condition of the deal. Two weeks later, the

Bombik/Willis team reprised their performance in Sowell's trial. In trying to convict Sowell of murder too, Bombik admitted to that jury in closing that the evidence didn't show whether Mack had fired the fatal shots which killed Sanelli, and it could have been Sowell that did so: "Either Clarence Mack had his gun or Clarence Mack had Reginald Germany's gun. But it doesn't make much of a difference. . . . Tom Sowell and Clarence Mack are equally responsible. They are both principal offenders. You don't reward either one for being a bad shot." (R. 154-10, FEH Exh. 79-2, Sowell Transcript at 927-28, PageID 22882-83.) Sowell's case went to the jury on ***July 30, 1991***, and he was convicted of aggravated robbery the next day but acquitted of the murder. (R. 154-10, FEH Exh. 79-2 at 813, 971-74, PageID 22766, 22926-29.)

The very day Sowell's case went to the jury—July 30, 1991—Bombik had a phone call with the young line prosecutor handling Willis' felony case to inform that prosecutor that Bombik did not think Willis had committed the Burgess crime and Bombik thus wanted the case "continued for further investigation." (FEH Exh. 63, PageID 21602; TFEH at 549-54, PageID 996-1001; TSH at 71-72, PageID 8940-41.) Bombik made that request even though he admitted he had no knowledge of the State's case against Willis and, thus, no legitimate grounds for suggesting Willis had not done exactly what was described in Burgess' written statement. (TFEH at 662-68, PageID 1109-15; FEH Exh. 63, PageID 21628-29.) Burgess, indeed, was acquainted with Willis, he was able to pull up Willis' ski mask during the April 1991 beating which Willis inflicted on him, and, 3 days later, Burgess picked Willis out of a lineup and made his written statement. (FEH Exh. 63, PageID 21628-29.)

The young prosecutor, unbeknownst to Bombik, memorialized Bombik's unusual 7/30/91 request on the "green card" in the Willis/Burgess case file: ***"Talked to R. Bombik who used D[efendant] in murder case. Bombik believes D did not do this crime & wants case cont'd for further invest."*** (FEH Exh. 63, PageID 21602.) And, as instructed by Bombik—who was a "major trial" prosecutor and thus had a lofty stature in the prosecutor's office—the young line prosecutor "continued" the Willis/Burgess case that very day (July 30), and then later dismissed the case altogether.

Mack's *2010* discovery of that 7/30/91 handwritten note by the young line prosecutor, as a result of Mack's habeas discovery in federal court, was the "smoking gun" of the undisclosed deal. Yet, Bombik never provided Mack's trial counsel, before the 7/1/91 start of Mack's trial, or ever, with any information about Bombik and Willis' at-least tacit deal on the Burgess case. (TSH at 196-201, PageID 9065-70.) And Bombik let Willis lie about it at trial, by denying any deal or any expectation of one. (T. 753-54, PageID 6276-77.)

In further support of this obvious June 1991 deal, Mack presented at the federal court evidentiary hearing (and, later, at the state court evidentiary hearing) the testimony of CPD Detective Mike O'Malley, who was on the State's witness list for Mack's trial and had a role in the investigation of Sanelli's murder. Almost five years after Mack's conviction, O'Malley had testified in a 1996 federal detention hearing against *Willis* who was then facing federal firearms charges. In support of the government's effort to detain Willis in that 1996 case, O'Malley testified that the

evidence in the Sanelli case suggested that Willis "supplied the weapons to the defendants," but that Willis was never charged because he made a deal with the prosecutor. (FEH Exh. 81 at 17, PageID 22981; TFEH 738-40, PageID 1185-87.) In reference to the specific terms of the deal, O'Malley testified: "Q. Was there a specific deal made on behalf of Mr. Willis? A. Well, from the notes I read, there appeared to be, yes." (R. 154-11, FEH Exh. 81 at 41, PageID 23005.)

O'Malley testified *both* in Mack's federal hearing in 2010, and later in Mack's state hearing in 2013, that he stands by that testimony from the 1996 detention hearing. "I still stand by it today, yes." (TFEH at 744, PageID 1191; *see also* TSH at 61-63, PageID 8930-32.)

Based on this and other evidence at the hearing, the federal court denied the Warden's motion to dismiss Mack's *Brady* and other claims. (R. 115, Order, PageID 1423-75.) With respect to the *Brady* claims, the court allowed Mack to return to state court to exhaust those claims because some had "potential merit." (*Id.* at 30-39, 41-43, 45, PageID 1452-68.) The court stayed Mack's federal habeas proceedings in the meantime. (*Id.* at 52, PageID 1474.)

Back in state court, the state trial court in 2013 conducted its own evidentiary hearing on Mack's *Brady* claims as contained in his successor postconviction petition and motion for leave to file motion for new trial. (R. 151-9, Transcript State Hearing ("TSH") at 23-256, PageID 8892-9125.) In further support, Mack submitted all transcripts and exhibits from his federal hearing. (R. 151-1, PageID 6923-7009; R. 154-7 to -12, Appx. Vols. 1-12, PageID 19290-23844.)

On March 20, 2014, the state trial court denied Mack's petition/motion in a written opinion. (R. 151-2, PageID 7414-23 (*Appx*-0248).) That decision was ultimately affirmed by the intermediate Ohio court of appeals ("Ohio COA")—the last reasoned state court decision on the *Brady/Napue* claim—in an opinion dated January 25, 2018. *State v. Mack*, 2018-Ohio-301 (*Appx*-0157). The Ohio Supreme Court declined jurisdiction. *State v. Mack*, 152 Ohio St. 3d 1489, 99 N.E.3d 425 (2018).

In rejecting the *Brady/Napue* claim, the Ohio COA made an unreasonable determination of the facts and unreasonably applied this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985), and *Kyles v. Whitley*, 514 U.S. 419 (1995). Among other errors, the state court failed to recognize the existence of the obvious at least informal, tacit, and/or unspoken deal which Bombik had made, before trial, with his critical snitch/star witness Willis, and which Bombik failed to disclose to the defense and, indeed, allowed Willis to falsely deny in his trial testimony. In addition, the Ohio COA failed to assess the *sentencing-phase* impact of the *Brady/Napue* violations. It only considered the impact of the suppressions on Mack's "convictions." *Mack*, 2018-Ohio-301 at ¶¶ 30, 61 (*Appx*-0165 to -166, 0171). But *Brady* applies to both guilt/innocence and sentencing, and especially to a death sentence. *Cone v. Bell*, 556 U.S. 449, 473 (2009) ("Evidence that is material to guilt will often be material for sentencing purposes as well. . . .").

D. The federal habeas courts denied relief too; in doing so, those courts likewise misapplied the clearly established law.

With his state proceedings exhausted, Mack went back to federal court to reopen his habeas case (R. 143, PageID 2795); the federal court did so on September

4, 2018. On April 19, 2019, Mack filed his Supplemental Petition—in one document, to include claims from the initial petition. (R. 155, PageID 23845-24100.)

On September 30, 2021, the district court issued its opinion denying Mack's habeas petition in its entirety, including on the *Brady/Napue* claim (Ground 5). On the *Brady* claim, the district court agreed that the Ohio COA had failed to "adjudicate the issue of whether any alleged suppression of material evidence impacted Mack's sentencing." *Mack*, 2021 U.S. Dist. LEXIS 187656, *96 (*Appx*-0058 to -0059).) Nonetheless, the district court failed to conduct any more than a perfunctory review of the sentencing phase impact of the suppressions.

The panel of the Sixth Circuit affirmed and, in doing so, misapplied the controlling law and made many of the same mistakes as the previous courts. As with those courts, the panel failed to recognize the state court's grossly unreasonable factfinding in refusing to see the obvious undisclosed deal between Bombik and Willis for Willis' testimony against Mack and Sowell. The panel also failed to address the *Brady* suppressions with a clear-eyed appreciation of how critically important the testimony of Timothy Willis was to the State's entire case against Mack.

REASONS FOR GRANTING THE WRIT

I. When the existence of at least an informal, tacit, or unspoken deal between the prosecutor and his star informant-witness in a capital trial is self-evident from the postconviction record and is beyond any fairminded dispute, the state court's rejection of a *Brady*/*Napue* claim, arising from the prosecutor's undisputed failure to disclose that deal, is based upon an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) when the rejection is premised on the state court's conclusion that the deal was not sufficiently proven.

In reviewing state court decisions in habeas, even under the provisions of AEDPA,[2] federal habeas courts are not required to defer to factfinding which defies all known rules of how factual conclusions are reached from undisputed evidence. Yet that is what happened in Mack's case when the Ohio COA unreasonably and arbitrarily refused to find that Bombik and Willis made at least an informal, tacit, and/or unspoken deal, and when the federal habeas courts deferred to that unreasonable factual determination.

AEDPA places strict limitations on habeas review when a state court has addressed a constitutional claim. But those limits are not unbounded. A federal court "shall not" grant a writ of habeas corpus "unless the earlier state court decision took an 'unreasonable' view of the facts or law." *Mays v. Hines*, 592 U.S. 385, 391 (2021) (citing 28 U.S.C. § 2254(d)). As to factfinding by the state court, the habeas petition "shall not be granted with respect to any claim that was adjudicated on the merits" unless the adjudication of the claim "resulted in a decision that was based on an

[2] The Antiterrorism and Effective Death Penalty Act of 1996.

unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*, 2254(d)(2) (emphasis supplied).

This "standard is difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). And the "term 'unreasonable' refers not to 'ordinary error' or even to circumstances where the petitioner offers 'a strong case for relief,' but rather to "extreme malfunctions in the state criminal justice syste[m].'" *Mays v. Hines*, 592 U.S. at 391 (quoting *Richter*). With this Court stating the rule in terms which strive to be as daunting as possible, federal courts are only permitted to "intrude" on a state's sovereign power to punish offenders when "a decision 'was so lacking in justification . . . beyond any possibility for fairminded disagreement.'" *Mays*, 592 U.S. at 391 (quoting *Richter*, 562 U.S. at 103). It requires the state court in its factfinding to have "blunder[ed] so badly that every fairminded jurist would disagree." *Mays*, 592 U.S. at 392, citing *Knowles v. Mirzayance*, 556 U. S. 111, 123 (2009).

Nonetheless, the high standard set by the rule is *not* unattainable. It is *not*, or at least is not supposed to be, an asymptotic goal, one that might be approached but can never be achieved; it is not the "impossible dream." Because "[e]ven in the context of federal habeas, deference ***does not imply abandonment or abdication of judicial review***," and "does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U. S. 322, 340 (2003) (emphasis supplied). Congress stated in no uncertain terms that federal habeas relief remains available when a state court's holding is "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

In this case, the state court's denial of relief to Mack on his *Brady/Napue* claim

was based in large part on its factual finding that Mack "had not demonstrated that a deal was reached to secure Willis's testimony." *Mack*, 2018-Ohio-301, ¶ 55 (*Appx*-0170). But there is an avalanche of evidence demonstrating a deal and, more importantly, its existence is compelled by the classic representation of circumstantial proof which has been used with jurors in countless trials: the presence of snow on the ground in the morning, that wasn't there the night before, means its snowed during the night. Circumstantial evidence is often the *best proof* of a disputed fact, and, when those principles are applied here, the existence of the Bombik/Willis deal, as a matter *of fact*, is beyond fairminded disagreement.

Brady applies to informal, tacit, or unspoken agreements between a prosecutor and his star witness. *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008); *Akrawi v. Booker*, 572 F.3d 252, 262-63 (6th Cir. 2009); *see also United States v. Bagley*, 473 U.S. 667, 683 (1985) (noting that informal deals can qualify as *Brady* evidence). Agreements which are informal, tacit, or unspoken are especially corrosive "because witnesses have greater incentives to lie if the potential benefits are 'not guaranteed through a promise or binding contract.'" *Sivak v. Hardison*, 658 F.3d 898, 916 (9th Cir. 2011) (quoting *Bagley*, 473 U.S. at 683).

By their very nature, the proof of an informal, tacit, or unspoken deal is not what the two principals later say about it, *it is what they did*: their actions and conduct in the moment. And what Bombik and Willis did, their contemporaneous conduct, proves the deal beyond any shadow of doubt or fairminded disagreement. The "green card" in the Willis/Burgess case file (PageID 21602)—along with the June

1991 meeting between Bombik and Willis, during which Willis embellished his story after now being faced with his own imminent prosecution by Bombik's office—is proof beyond any reasonable doubt that there was at least an informal, tacit, or unspoken deal. Even more so when coupled with the written direction from Bombik's boss, Carmen Marino, to not let Willis get scared off, and the fact that the victim was the good friend of the Chief of the Cleveland Police Department who wanted regular updates.

Willis started to deliver on his side of Bombik/Willis deal during the June 1991 meeting with Bombik, by concocting his new "I shot because you shot" lie to make Mack a shooter too, and Willis then carried through on his bargain at trial by telling Mack's jury that same lie in order to help Bombik send Mack to death row, and he likewise lied about there being no expected deal. A couple weeks later, Willis helped Bombik convict Sowell too. Bombik, for his part—with knowledge from Willis that Willis' trial started on ***August 5, 1991***—waited until ***July 30, 1991***, the very day the Sowell case ended and went to the jury, to make his phone call to Willis' prosecutor to instruct him to put Willis' prosecution on hold "for further investigation," on the false pretext that Bombik supposedly didn't think Willis committed that crime. (FEH Exh. 63, PageID 21602.) That damning communication by Bombik—who admitted he had no knowledge about the State's case against Willis—is only explained by the fact that Bombik and Willis had at least an informal, tacit, or unspoken agreement. Bombik's actions prove the deal.

As Bombik directed in that July 30 phone call, the prosecution against Willis was indeed "continued." Yet, no further "investigation" of the Burgess crimes occurred, as that case file confirms (FEH Exh. 63, PageID 21602), further proving the deal. The case against Willis was dismissed outright in October 1991. (TFEH at 47-50, 58-65, PageID 494-97, 505-12; FEH Exh. 63, PageID 21602.) Willis was free as a bird. Mack's been on death row for 33 years.

The *fact* that this was a quid-pro-quo deal was, and still is, plain as day to anyone with any experience with the criminal justice system in Cuyahoga County in the early 1990's: Part of the play book, so to speak. That evidence, which Mack presented to the state court, further proves the deal. Det. O'Malley's testimony at Willis' federal detention hearing in 1996 is compelling proof of the deal. O'Malley's is the sworn testimony of an experienced homicide detective who was involved in the investigation of the Sanelli murder and the spate of "ski mask" robberies/homicides occurring at that same time; the Willis/Burgess case was a "ski mask" robbery by Willis. O'Malley's 1996 testimony that the existence of a deal is apparent from the record—testimony he provided long before Mack had filed a *Brady* claim based upon the State's failure to disclose that deal—is entitled to substantial weight. As mentioned above, O'Malley told both the federal and state courts in Mack's hearings that he stands by his 1996 testimony.

Also entitled to substantial weight, and further proving the deal, was the testimony of Mack's experienced trial counsel Paul Mancino. He recognized the unmistakable deal apparent in the "green card" from the Willis/Burgess case after he

was made aware of that undisclosed document during Mack's federal habeas proceedings below. (TSH at 196-201, 237-40, PageID 9065-70, 9106-09.)

What evidence is there to *reject* a deal? Nothing except the denials of Bombik and Willis, made decades later after Bombik was caught in these suppressions. (TFEH at 540-46, 561-63.) That they denied it, 20+ years later, when its proof was revealed by the contemporaneous notes and their unmistakable actions, is meaningless and should not have been credited by any court. What is more, there is no principle of *Brady*, or of reasonable factfinding, which allows the prosecutor who committed the *Brady* violation to serve as the arbiter of its commission. The prosecutor's refusal to admit his deception does not negate his violation of *Brady*.

That is especially true with *this* prosecutor and *this* prosecutor's office at that time in the early 1990's (*see supra* note 1). Bombik's understanding of his *Brady* obligations was troublingly deficient. He testified at the 2010 federal hearing that he believes *Brady* applies only to information within his own files or within his own knowledge and not to information in the custody or control of police officers working with his office. (TFEH at 485-87, PageID 932-34.) But that is directly at odds with *Kyles*, which provides that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437. *See also Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). With Bombik's casual disregard for his constitutional obligations, in a capital case no less, it is no wonder so much *Brady* material was suppressed, including the Bombik/Willis deal, the Sanelli notes, and the CPD's Holton Avenue

reports. *See Dennis v. Wetzel*, 834 F.3d 263, 289 (3d Cir. 2016) (en banc).

All other purported justifications for rejecting the only reasonable conclusion compelled by the evidence of a deal are similarly groundless. It makes no difference that Willis' victim Robert Burgess later died, in or after October 1991, and the prosecutor ultimately dismissed the case against Willis, purportedly on that basis. *Mack v. Bradshaw*, 88 F.3d at 1155 (*Appx*-0007). *Burgess was not dead in June 1991* when Willis and Bombik made their deal; the deal had to be disclosed then for proper use at Mack's *July 1991* trial. Burgess' October 1991 death made it easier to later close that case as per the deal, but Willis would have walked away regardless. Nor is it important that the lawyers representing and prosecuting Willis, respectively, for the Burgess case supposedly did not know about Bombik's deal with Willis. The testimony of those lawyers was that they did not "recall" any deal. *Mack*, 2021 U.S. Dist. LEXIS 187656, *122 (*Appx*-00067). Moreover, there is no reason why they would have known or needed to know; thus, their testimony does not weaken the compelling evidence of the deal.

So why didn't the Ohio COA see the unmistakable deal? Because that court, like the state trial court before it, made a grossly unreasonable determination of the facts in light of the evidence presented. It failed to draw the only reasonable inferences which were compelled by the evidence presented: It refused to conclude that it snowed despite waking up in the morning with fresh snow on the ground. It unreasonably allowed the prosecutor's own self-serving denial of any deal, despite all appearances to the contrary, to be the dispositive fact, even though that prosecutor

has no credibility due to his repeated violations of his *Brady* duties in this very case and his admitted lack of any proper understanding of what *Brady* required of him.

Mack sufficiently proved, under any applicable AEDPA standard, that Bombik had at least an informal, tacit, or unspoken deal with Willis and it was suppressed by Bombik, and he allowed Willis to lie about it at trial. The Ohio COA's decision is an unreasonable determination of the facts in light of the evidence presented. *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) ("Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.").

II. Petitioner is entitled to habeas relief on his *Brady*/*Napue* claim because the totality of the suppressed evidence, including the prosecutor's undisclosed deal with his star witness and the star witness' false denials of the deal, easily satisfies the materiality standards under this Court's case law.

With their unreasonable determination of the facts about the suppressed Bombik/Willis deal driving the state courts' rejection of Mack's *Brady*/*Napue* claim, the merits of those constitutional claims stand in a much starker light—and mandate habeas relief—when it is recognized that Bombik and Willis did, in fact, have at least an informal, tacit, or unspoken deal and that Bombik allowed Willis to lie about it at Mack's trial. When the state courts' unreasonable factual determination on that critical issue is rectified, Mack's entitlement to relief on the *Brady*/*Napue* claim is unmistakable and beyond any possibility for fairminded disagreement.

The suppressed materials, in those circumstances, thus consisted of *at least* that Bombik/Willis deal and the other suppressed items which the state and federal

courts agreed were not disclosed: **(1)** the Sanelli family's handwritten contemporaneous notes of Willis' very first contact, on 1/23/91, with them about the events which Willis claimed to have witnessed on 1/21/91; **(2)** the notes of the Willis/Bombik meeting in June 1991; and **(3)** the CPD reports about the victim's car being seen, shortly after the carjacking on 1/21/91, crashing into a utility pole on Holton Avenue, with one man (in the Bulls jacket) exiting and fleeing the scene, and another man (not Mack) stopping by moments later to back the car away from the pole and taking the keys and, perhaps, the 9 mm clip that Sowell had supposedly told Willis he had left behind.

Mack satisfies *Brady*'s materiality/prejudice standard based *only* on the undisclosed deal; the rest is gravy which seals his entitlement to relief. Suppression in violation of *Brady* is material if there is a reasonable probability that, had the evidence been disclosed, "the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "A 'reasonable probability' of a different result is . . . shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434. In judging materiality in a case with multiple *Brady* violations, as here, the effect of the violations must be "considered collectively, not item by item," *id.* at 436; that is, a court must consider the cumulative effect which all undisclosed evidence has on its confidence in the trial's outcome. *Id.* In a capital case, the outcome must be assessed for both the conviction and the death sentence. *Strickler*, 527 U.S. at 296.

Evidence that the prosecutor and his star witness had a deal for the

prosecutor's office to back off the star witness's own pending felony prosecution, in exchange for his assistance in Mack's case, would have thoroughly destroyed Willis' credibility. Timely pretrial disclosure of that agreement, and its circumstances of Willis' story against Mack becoming more incriminating during Willis' June 1991 private meeting with Bombik, would have yielded much more than the "incremental" hit to Willis' credibility which the district court unreasonably envisioned. *Mack*, 2021 U.S. Dist. LEXIS 187656, *161 (*Appx*-0080). To the contrary, Willis' willingness to lie under oath to keep his deal secret would cast doubt on his entire testimony, as would the fact that Willis manufactured Mack's incriminating admission—*i.e.*, that Mack shot too—only during Willis' meeting with Bombik after Willis had been indicted for the Burgess case. Exposing the crucial witness as a manipulative liar and conniver is much more prejudicial than the district court imagined, especially when the entire case against Mack was based upon Willis. Had Mack's jury been made aware that Willis had this additional incentive to testify, and that he lied about it, his credibility would have been in tatters. *See Sivak*, 658 F.3d at 915-16; *Jackson v. Brown*, 513 F.3d 1057, 1077 (9th Cir. 2008).

The existence of such a critical suppressed fact about the State's star witness, in a capital murder trial, is prejudicial under *Brady* (and, as to the State's presentation of that witness' knowing lies, under *Napue*), in a case which is so exclusively reliant on that star witness and is non-existent without him. Without Willis, the State had no evidence which placed Mack at or near the carjacking on January 21 and no incriminating admissions, all as the two dissenting Justices

acknowledged back in 1995: "Willis was a key witness for the state whose testimony was critical to the conviction of [Mack]. If his credibility would have been impugned, the issue of the [Mack's] guilt would have been a close call at best." *Mack*, 73 Ohio St. 3d at 517 (*Appx*-0026).

Brady cases from this Court, and from lower federal habeas courts, have found the materiality requirement met based on suppressions which similarly impacted the credibility of such a critical witness in an otherwise relatively weak case of guilt. *See, e.g.*, W*earry v. Cain*, 577 U.S. 385, 392 (2016); *Smith v. Cain*, 565 U.S. 73, 75-76 (2012); *Banks v. Dretke*, 540 U.S. 668, 700-01 (2004); *Kyles*, 514 U.S. at 454; *Harris v. Lafler*, 553 F.3d 1028, 1033 (6th Cir. 2009); *Floyd v. Vannoy*, 894 F.3d 143, 167 (5th Cir. 2018); *Simmons v. Beard*, 590 F.3d 223, 239 (3d Cir. 2009).

Mack's is not a case where the *Brady* suppressions would have enabled the defense to only weakly undermine one witness in a case where there were many other witnesses/evidence on which that defendant's conviction was based. The State's case against Mack was all Willis. Mack's case is very much like *Wearry* in that respect, where "[t]he State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi." *Wearry*, 577 U.S. at 392-93. And, when a case is so singularly dependent on a single star prosecution witness, the prosecutor's suppression of critical impeachment evidence is material and prejudicial under *Brady* and its progeny because it is only *that witness* which stood between conviction and acquittal.

The existence of the suppressed Bombik/Wills deal also underscores the prejudice of the other suppressions, which were also damning of Willis' credibility. The suppressed Holton reports and the Sanelli notes, which fail to even mention Mack (and name only Sowell as a culprit), would have enabled Mack to undermine Willis' claim that there was any Rec Center encounter at all on 1/21/91, or at least to urge that any such encounter involved *only Sowell* and not Mack. That guts a key part of the State's case, and one which is solely dependent on whether Willis' story about seeing one or both of the men at the Rec Center is true. Because if Mack was supposedly with Sowell at the Rec Center—which occurred, per Willis, immediately after the carjacking—then why wasn't Mack also with Sowell a few minutes later when Sowell, all alone at that time, supposedly crashed that car into the utility pole on Holton? (FEH Exhs. 4, 6, PageID 21272-74, 21281-82.) The lower state and federal courts fail to appreciate that these events all happened within *minutes* of each other, with the carjacking occurring at close to 6:30 p.m. (the call to CPD about the dead body was made at 6:29 p.m. (R. 154-9, PageID 21270, 73)); the crash into the utility pole by Sowell, and the movement of the car by the unknown man, were shortly after 6:30 p.m. (as per the suppressed Holton reports); and it was 7:06 p.m. when the stolen car was recovered by police on Holton. (*Id.*) Willis told the jury it was about 6:45 p.m. when he supposedly saw Mack and Sowell in that stolen car at the Fairfax Rec Center (T. 677, PageID 6196)—which would obviously have been *before* Sowell was seen around that same time, all by himself in that car, crashing and abandoning it on Holton.

What if Willis' tales are an opportunistic lie, and Willis never saw Mack, or even Sowell, at the Rec Center? And Willis was simply doing what he does best, with a deal on the line: making his "statements fit into any story anyone wants to hear"? (T. 985.) The Holton report—that Sowell was by himself in the stolen car at or near the same time Sowell was supposedly at the Rec Center seeing Willis—certainly suggests it is a lie, as does the fact that another man, not Mack, moved that car and presumably recovered the left-behind 9 mm clip as identified in the Sanelli notes. Was it Willis who moved that car and recovered that clip?

Whereas the Sixth Circuit panel said that "Willis placed Sowell and Mack at the scene and said both of them shot at Sanelli" (*Appx*-0013), that conclusion disregards that the Sanelli notes and the Holton reports call all that into question. Willis' first report to CPD and to the Sanellis on 1/23/01 was that one "man," singular, shot Sanelli: Sowell! Mack was not identified as a shooter in Willis' initial reports, and Willis did not even know if Mack was at the carjacking at all but, per the initial CPD report, speculated that Mack and Germany were also "involved." (R. 154-9, FEH Exhs. 8-9, PageID 21286-88.)

Indeed, only after Willis has spent the evening of 1/23/91 with the CPD detectives—and they had showed him the recovered stolen car, and Willis would have learned that CPD had tested the weapons that evening to find that Mack was arrested with the believed "murder" weapon—did Willis only then allege, *voila*, that it was Mack whom he supposedly "saw" with Sowell at the Rec Center on 1/21/91. But, even then, Willis still made no claim that Mack had admitted to being a shooter. Willis' lie

that Mack made *that* alleged admission—"I shot because you shot"—did not manifest itself for more than ***three months***, not until the Bombik/Willis meeting in June 1991, a few weeks before Mack's trial, with Willis then facing his own impending trial date.

With these admitted suppressions, and adding to them the suppressed deal between Bombik and Willis, there is no possibility of fairminded disagreement that Mack was prejudiced by the *Brady* violations: there is a reasonable probability that, had the evidence been disclosed, the result of Mack's 1991 trial would have been different in that Mack would have been acquitted or, at the least, not sentenced to death. The conclusions by the Ohio COA and the lower federal courts to the contrary are all based upon their fundamental failures to view the suppressions, and the resulting prejudice, through the proper lens of Willis' singular importance to all the evidence against Mack.

To properly assess prejudice/materiality, when Willis' role was so central, there must also be strong consideration that Mack might actually be innocent of any killing, that Mack was not present at the carjacking, and that Mack was arrested with the alleged murder weapon either because Willis set him up and/or because the weapons were shared and handed around by the friends, in the loose manner exhibited by Willis' allegation that co-defendant Germany supposedly told Sowell that "you can use my nine." (R. 154-9, FEH Exh. 11 at 0135, PageID 21297.) But, when a clear-eyed assessment is made, it is manifest that Mack is entitled to habeas relief. The State's trial evidence against Mack was a house of cards, built on the jury crediting Willis' account. The "non-Willis" evidence—even if there is any actual non-Willis evidence

here, because it all swirls from and around Willis—is not nearly strong enough to sustain confidence in the verdict in the face of the suppressed evidence which would have enabled Willis to be discredited, exposed, and impeached.

Finally, as to Mack's death sentence, the suppressions' impact, considered collectively, unquestionably undermines confidence in that outcome too. "Evidence that is material to guilt will often be material for sentencing purposes as well." *Cone*, 556 U.S. at 473. Mitigation evidence includes anything that may call for a sentence less than death. It can include "any aspect of a defendant's character or record," in addition to "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *See also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (The decision to impose a death sentence must be "a reasoned moral response to the defendant's background, character, and crime."). What is more, in a weighing state like Ohio, Mack was only required to persuade one juror that aggravation did not outweigh mitigation, which, for success on his *Brady* claim, required Mack to show only "a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). That standard is much easier for success than that in the guilt/innocence phase.

Under that standard, Mack's *Brady*/*Napue* claim easily meets the materiality/prejudice requirement as applied to Mack's death sentence. The suppressed evidence would have enabled a compelling argument that, even if Mack had been present at the murder scene with Sowell, Mack was not the principal

offender or actual killer because he was on the other side of the car and none of the shots from that passenger side even struck Sanelli. If Mack was there at all, he was a befuddled companion to shooter Sowell, pleading with Sowell for a reason why he shot the man.

CONCLUSION

The petition for a writ of certiorari should be granted. The decision of the Sixth Circuit should be vacated. Petitioner's conviction and/or death sentence are unconstitutional. Habeas relief is appropriate.

Respectfully Submitted,

/s/ Timothy F. Sweeney

Timothy F. Sweeney (OH 0040027)*
MEMBER OF THE BAR OF THIS COURT
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
Phone: (216) 241-5003
Email: tim@timsweeneylaw.com

John B. Gibbons (OH 0027294)
Attorney at Law
55 Public Square, Suite 2100
Cleveland, Ohio 44114
Phone: (216) 363-6086
Email: jgibbons4@sbcglobal.net

*COUNSEL OF RECORD

Counsel for Petitioner Clarence Mack