

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY L. COLEMAN, Petitioner,

vs.

**MARGARET BRADSHAW, WARDEN,
CHILLICOTHE CORR. INST., Respondent.**

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

PETITION FOR A WRIT OF CERTIORARI

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

John P. Parker (OH 0041243)
MEMBER OF THE BAR OF THIS COURT
Attorney at Law
988 East 185th Street
Cleveland, Ohio 44119
Phone: (216) 881-0900
Email: advocateparker@gmail.com

*COUNSEL OF RECORD

Counsel for Petitioner Timothy L. Coleman

CAPITAL CASE: NO CURRENT EXECUTION DATE

QUESTIONS PRESENTED

Petitioner was sentenced to death in 1997 after a penalty phase in which his trial counsel's performance was prejudicially ineffective. The evidence presented in mitigation consisted of *one witness*, who was asked *one substantive question*, and that witness's *entire appearance* comprised slightly more than *three pages* of transcript. What's more, another person—a convicted murderer—has since confessed to this murder too in a sworn affidavit which Petitioner presented to the state courts. Petitioner has always zealously maintained his innocence and does so to this day.

Nonetheless, no state or federal court has allowed Petitioner a hearing to hear from the confessed murderer or even to hear from and about all the other witnesses and evidence that were available and should have been presented in the grossly deficient one-question penalty phase.

After the federal district court “reluctantly” denied habeas relief because it did not see prejudice from the deficient penalty-phase performance, and granted a certificate of appealability, the Sixth Circuit *sua sponte* refused to *even consider*, and thus did not address, certain of Petitioner's arguments and authorities presented to that court in further support of trial counsel's prejudicially ineffective penalty-phase performance. The Sixth Circuit did so on its own, without notice to Petitioner (until the opinion was issued), without any request to do so by the Warden, and when doing so disregarded Petitioner's clear right to present such additional arguments and authorities in support of his properly-presented federal constitutional claim.

Three questions are presented:

1. Does a federal appellate court violate a capital habeas petitioner's rights to a meaningful appeal and habeas review of a federal constitutional claim, certified for appeal, that the petitioner's trial counsel had rendered prejudicially ineffective performance, when that court refuses to even consider, as purportedly forfeited and/or waived, additional arguments and authorities in support of the prejudice resulting from trial counsel's deficient performance, in circumstances where *both* the party-presentation principle precludes such refusal *and* this Court's precedent firmly permits appellate presentation of such additional arguments and authorities in

support of a properly-presented federal constitutional claim?

2. Is trial counsel prejudicially ineffective in the penalty phase of a capital case, in violation of the capital defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, by presenting only one witness (Petitioner's father) and asking only one substantive question, when there was much more compelling mitigation evidence to present, including expert testimony about Petitioner's mental health, testimony from Petitioner's mother and sister and the mothers of his children, testimony about his employment and his good behavior in jail, and testimony and argument about the "strong provocation" entailed by the victim's disloyal acts of snitching against her own friends and lovers including Petitioner to help send them to prison in order to spare herself that same fate?

3. Does it violate the Eighth and/or Fourteenth Amendments and the right to due process, and unreasonably apply federal law and/or unreasonably determine the facts, when both state and federal courts refuse to conduct an evidentiary hearing concerning an affidavit presented in state court in which a convicted murderer confessed to committing the murder for which Petitioner is sentenced to death, and the evidence in support of Petitioner's guilt is weak and consists primarily of "snitch" testimony and testimony of other biased witnesses, and thereby entitling Petitioner to a hearing in federal court on his claim under *Brady v. Maryland*?

DIRECTLY RELATED CASES

1. *Coleman v. Bradshaw*, Case No. 15-3442 (U.S. Court of Appeals for the Sixth Circuit), opinion and judgment entered September 4, 2020 & rehearing denied October 21, 2020
2. *Coleman v. Bradshaw*, Case No. 3:03-CV-299 (U.S. District Court, S.D. Ohio), judgment and opinion adopting Maj. Judge's Report & Recommendation (R&R) and denying habeas petition entered Mar. 30, 2015 (and underlying R&R of Nov. 28, 2012 and Supplemental R&R of July 5, 2013)
3. *State v. Coleman*, Case No. 2005-1677 (Supreme Court of Ohio), order of denial of discretionary appeal entered on December 28, 2005
4. *State v. Coleman*, Case No. 2004-CA-43 and -44 (Ohio Court of Appeals, 2nd App. Dist.), judgment and opinion affirming denial of amended post-conviction and related motions entered July 29, 2005
5. *State v. Coleman*, Case No. 2002-2005 (Supreme Court of Ohio), order of denial of discretionary appeal entered on March 12, 2003
6. *State v. Coleman*, Case No. 2001-CA-42 (Ohio Court of Appeals, 2nd App. Dist.), judgment and opinion affirming denial of post-conviction entered October 4, 2002
7. *Coleman v. Ohio*, Case No. 99-5779 (U.S. Supreme Court), certiorari denied on October 18, 1999
8. *State v. Coleman*, No. 1997-0737 (Supreme Court of Ohio), judgment and opinion affirming conviction and death sentence entered March 31, 1999
9. *State v. Coleman*, Case No. 96-CR-0142 (Court of Common Pleas, Clark County, Ohio), judgment of death sentence & sentencing opinion entered March 3, 1997, judgment of denial of post-conviction petition entered on June 1, 2001, and judgment of denial of amended post-conviction petition and related motions entered on July 21, 2004

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
DIRECTLY RELATED CASES	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vii
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	3
A. Summary of the charges and the weak trial evidence against Petitioner.	4
B. The mitigation presentation was one witness and no experts, resulting in a death sentence.	8
C. Sapp admitted to these crimes in his August 2001 affidavit, but no court has conducted a hearing.	12
D. The state courts denied any relief on Petitioner’s federal constitutional claims under Brady and Strickland.	12
E. The federal habeas court denied relief too; in doing so, the Sixth Circuit misapplied the law on deference and it sua sponte refused to even consider some of Petitioner’s arguments and authorities even though the Warden made no such contention.....	14
REASONS FOR GRANTING THE WRIT.....	16
I. The federal appellate court below violated Petitioner’s rights to a meaningful appeal, and to the habeas review to which he is entitled on a federal constitutional claim certified for appeal, when that court refused to even consider, as purportedly forfeited and/or waived, additional arguments and authorities in support of the prejudice resulting from trial counsel’s deficient performance, in circumstances where <i>both</i> the party-presentation principle precludes such refusal <i>and</i> this Court’s precedent firmly permits appellate presentation of such additional arguments and authorities in support of a properly-presented federal constitutional claim.....	16

II. Petitioner is entitled to habeas relief on his IAC-mitigation claim because his trial counsel was prejudicially ineffective, in violation of Petitioner’s rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and this Court’s capital-punishment precedent, in presenting a mitigation case comprised of only one substantive question and in failing to develop and present other available and compelling mitigation evidence.	25
A. No AEDPA deference is owed to the state courts’ determination of the prejudice issue.....	26
B. Trial counsel conducted virtually no investigation and their performance was prejudicially deficient, under any standard, in presenting only one witness who was asked only one substantive question.	27
C. The state courts and the Sixth Circuit panel have erroneously disregarded the importance of the testimony of Petitioner’s mother and other loved ones and friends.	29
D. The state courts and the Sixth Circuit panel have erroneously disregarded the importance of the mental health evidence and argument.....	31
E. The prejudice to Petitioner is even more apparent when the arguments and authorities which the Sixth Circuit erroneously refused to consider are added into the consideration of the prejudicial impact of trial counsel’s deficient penalty-phase performance.	32
III. Petitioner is entitled to at least a hearing on his Brady claim because no court has yet to conduct a hearing to hear from the witnesses and, therefore, the determination of the facts against Petitioner to reject his claim is unreasonable, denies due process, and is not entitled to any deference in habeas.	33
CONCLUSION.....	39

APPENDIX CONTENTS

APPENDIX A

Coleman v. Bradshaw, Case No. 15-3442, 974 F.3d 710 (6th Cir. 2020) APPX-0001

APPENDIX B

Coleman v. Bradshaw, Case No. 15-3442, 2020 U.S. App. LEXIS 33253
(6th Cir. Oct. 21, 2020) APPX-0020

APPENDIX C

Coleman v. Bradshaw, No. 3:03-CV-299, 2015 U.S. Dist. LEXIS 41324
(S.D. Ohio Mar. 30, 2015) APPX-0021

APPENDIX D

Coleman v. Bradshaw, No. 3:03-cv-299, 2013 U.S. Dist. LEXIS 94269
(S.D. Ohio July 5, 2013) (Supp. R&R).....APPX-0027

APPENDIX E

Coleman v. Bradshaw, No. 3:03-cv-299, 2012 U.S. Dist. LEXIS 170609
(S.D. Ohio Nov. 28, 2012) (R&R).....APPX-0042

APPENDIX F

State v. Coleman, 2004-CA-43 and -44, 2005-Ohio-3874, 2005 Ohio App.
LEXIS 3583 (Ohio App. 2nd Dist. July 29, 2005)APPX-0111

APPENDIX G

State v. Coleman, No. 2001-CA-42, 2002-Ohio-5377, 2002 Ohio App.
LEXIS 5396 (Ohio App. 2nd Dist. Oct. 4, 2002)APPX-0119

APPENDIX H

State v. Coleman, No. 1997-0737, 85 Ohio St. 3d 129,
707 N.E.2d 476 (1999).....APPX-0134

APPENDIX I

State v. Coleman, Case No. 96-CR-0142 (Court of Common Pleas,
Clark County, Ohio), judgment and entry denying second post-conviction
petition and related motions, July 21, 2004APPX-0149

APPENDIX J

State v. Coleman, Case No. 96-CR-0142 (Court of Common Pleas,
Clark County, Ohio), judgment and entry denying post-conviction
petition, June 1, 2001APPX-0160

APPENDIX K

State v. Coleman, Case No. 96-CR-0142 (Court of Common Pleas,
Clark County, Ohio), judgment of death sentence & sentencing opinion,
March 3, 1997APPX-0176

APPENDIX L

Transcript of Mitigation Hearing in *State v. Coleman*, Case No. 96-CR-0142
(Court of Common Pleas, Clark County, Ohio), February 20, 1997APPX-0190

TABLE OF AUTHORITIES

Cases

<i>Abdul-Salaam v. Sec’y of Pa. DOC</i> , 895 F.3d 254 (3d Cir. 2018)	27
<i>AFGE Local 3599 v. EEOC</i> , 920 F.3d 794 (Fed. Cir. 2019)	19
<i>Anderson v. City of Bessemer</i> , 470 U.S. 564 (1985)	37
<i>Andrus v. Texas</i> , 140 S. Ct. 1875 (2020)	27, 30, 31
<i>Baxter v. Conway</i> , 2011 U.S. Dist. LEXIS 138014 (S.D.N.Y. July 26, 2011)	8
<i>Benefield v. McDowall</i> , 241 F.3d 1267 (10th Cir. 2001)	23
<i>Bolin v. State</i> , 184 So. 3d 492 (Fla. 2015)	8
<i>Bourtzakis v. United States AG</i> , 940 F.3d 616 (11th Cir. 2019)	21
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	3, passim
<i>Burns v. Martuscello</i> , 890 F.3d 77 (2d Cir. 2018)	23
<i>Campbell v. Reardon</i> , 780 F.3d 752 (7th Cir. 2015)	37
<i>Cauthern v. Colson</i> , 736 F.3d 465 (6th Cir. 2013)	37
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010)	20, 21
<i>Coleman v. Bradshaw</i> , 2020 U.S. App. LEXIS 33253 (6th Cir. Oct. 21, 2020)	1
<i>Coleman v. Bradshaw</i> , 974 F.3d 710 (6th Cir. 2020)	1, 15, 17, 33, 34, 35
<i>Coleman v. Bradshaw</i> , 2013 U.S. Dist. LEXIS 94269 (S.D. Ohio July 5, 2013)	1
<i>Coleman v. Bradshaw</i> , 2015 U.S. Dist. LEXIS 41324 (S.D. Ohio Mar. 30, 2015)	1
<i>Cone v. Bell</i> , 556 U.S. 449 (2009)	27
<i>Cook v. Rockwell Int’l Corp.</i> , 618 F.3d 1127 (10th Cir. 2010)	19
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	37
<i>Day v. McDonough</i> , 547 U.S. 198 (2006)	18, 19
<i>Everytown for Gun Safety Support Fund v. BATFE</i> , 984 F.3d 30 (2d Cir. 2020)	22

<i>Fields v. Wharrie</i> , 672 F.3d 505 (7th Cir. 2012)	34
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008).....	18
<i>Hernandez v. Cowan</i> , 200 F.3d 995 (7th Cir. 2000).....	19
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006)	37
<i>Hugueley v. Mays</i> , 964 F.3d 489 (6th Cir. 2020).....	22
<i>In re Bolin</i> , 811 F.3d 403 (11th Cir. 2016)	8
<i>In re Harman Int’l Indus., Inc. Sec. Litig.</i> , 791 F.3d 90 (D.C. Cir. 2015)	21
<i>Irving v. Dormire</i> , 519 F.3d 441 (8th Cir. 2008)	23
<i>Koch v. Cox</i> , 489 F.3d 384 (D.C. Cir. 2007)	21
<i>Lawson v. Sun Microsystems, Inc.</i> , 791 F.3d 754 (7th Cir. 2015)	21
<i>Mendiola v. Schomig</i> , 224 F.3d 589 (7th Cir. 2000).....	38
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	17
<i>Norwood v. Vance</i> , 591 F.3d 1062 (9th Cir. 2010).....	19
<i>Palmer v. Ashe</i> , 342 U.S. 134 (1951)	37
<i>Pennsylvania ex rel Herman v. Claudy</i> , 350 U.S. 116 (1956).....	37
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39 (1987)	34
<i>Porter v. McCollum</i> , 558 U.S. 30 (2009).....	29, 31
<i>Sears v. Upton</i> , 561 U.S. 945 (2010)	32
<i>Sec’y, United States DOL v. Preston</i> , 873 F.3d 877 (11th Cir. 2017)	21
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	17
<i>Smith v. Aldridge</i> , 904 F.3d 874 (10th Cir. 2018).....	36
<i>Smith v. Roberts</i> , 115 F.3d 818 (10th Cir. 1997)	34
<i>State v. Coleman</i> , 107 Ohio St. 3d 1697, 840 N.E.2d 203 (Dec. 28, 2015)	2

<i>State v. Coleman</i> , 2005-Ohio-3874, 2005 Ohio App. LEXIS 3583 (Ohio App. 2nd Dist. July 29, 2005).....	1, 13, 35, 36
<i>State v. Coleman</i> , 85 Ohio St. 3d 129, 707 N.E.2d 476 (1999)	2, 11
<i>State v. Coleman</i> , 98 Ohio St. 3d 1478, 784 N.E.2d 711 (March 12, 2003).....	2, 14
<i>State v. Coleman</i> , 2002-Ohio-5377, 2002 Ohio App. LEXIS 5396 (Ohio App. 2nd Dist. Oct. 4, 2002).....	1, 14, 26
<i>State v. Sapp</i> , 105 Ohio St. 3d 104 (2004).....	4
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	3, 12, 13, 14, 16, 26-30, 32
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	33
<i>Sumner v. Mata</i> , 449 U.S. 539 (1981)	15, 33, 34
<i>Taylor v. Maddox</i> , 366 F.3d 992 (9th Cir. 2004).....	36
<i>Teva Pharm., USA, Inc. v. Leavitt</i> , 548 F.3d 103 (2008).....	22
<i>Thomas v. Arn</i> , 474 U.S. 140 (1985)	27
<i>United States v. Beckham</i> , 968 F.2d 47 (D.C. Cir. 1992)	19
<i>United States v. Boudreau</i> , 564 F.3d 431 (6th Cir. 2009)	19
<i>United States v. Mancillas</i> , 183 F.3d 682 (7th Cir. 1999)	37
<i>United States v. Sainz</i> , 933 F.3d 1080 (9th Cir. 2019).....	19
<i>United States v. Sineneng-Smith</i> , 140 S. Ct. 1575 (2020).....	18
<i>Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.</i> , 386 F.3d 581 (4th Cir. 2004)	22
<i>Watson v. McGinnis</i> , 964 F. Supp. 127 (S.D.N.Y. 1997).....	23
<i>Whitely v. Ercole</i> , 725 F. Supp 2d 398, 427 (S.D.N.Y. 2010), rev'd on other grounds, 642 F.3d 278 (2d Cir. 2011).....	39
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	3, 16, 26, 30
<i>Williams v. Anderson</i> , 460 F.3d 789 (6th Cir. 2006)	27
<i>Wood v. Milyard</i> , 566 U.S. 463 (2012).....	18, 19

<i>Woodson v. N. Carolina</i> , 428 U.S. 280 (1976)	32
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992)	20, 21, 22, 24

Constitutional Provisions, Rules and Statutes

U.S. Constitution, Fifth Amendment	2, 25
U.S. Constitution, Sixth Amendment	2, 16, 25
U.S. Constitution, Eighth Amendment	3, 23, 25
U.S. Constitution, Fourteenth Amendment	3, 25
Fed. R. Civ. P. 72(b)	28
28 U.S.C. 636(b)(1)	28
28 U.S.C. 2253(c)	16
28 U.S.C. 2254(d)	15, 16, 33, 34, 36
28 U.S.C. 2254 (1966 version)	15, 34
R.C. § 2929.04(A)(8)	5
R.C. 2929.04(B)(2)	5, 11, 17, 21

Other Authorities

Bret D. Asbury, <i>Anti-Snitching Norms and Community Loyalty</i> , 89 Or. L. Rev. 1257 (2011)	23
D. Baird, “Man Convicted in Slaying Recants Earlier Confession,” COLUMBUS DISPATCH (December 15, 1999)	8
Richard C. Donnelly, <i>Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs</i> , 60 YALE L.J. 1091 (1951)	6
John Ford, THE INFORMER (1935)	6, 33
Macrotrends, Springfield, Ohio, Murder/Homicide Rate 1999-2018	13
Alexandra Natapoff, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (NYU Press 2009)	6

Liam O’Flaherty, <i>THE INFORMER</i> (1925).....	6
Michael A. Simons, <i>Retribution for Rats: Cooperation, Punishment, and Atonement</i> , 56 VAND. L. REV. 1 (2003).	6, 22, 23

PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Coleman (“Petitioner”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, dated September 4, 2020, in *Coleman v. Bradshaw*, 974 F.3d 710 (6th Cir. 2020).

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 *Coleman v. Bradshaw*, 974 F.3d 710 (6th Cir. 2020) (*Appx*-0001). The Sixth Circuit’s order of October 21, 2021, denying Petitioner’s timely petition for rehearing and rehearing *en banc*, is reported at *Coleman v. Bradshaw*, 2020 U.S. App. LEXIS 33253 (6th Cir. Oct. 21, 2020) (*Appx*-0020).

The opinion of the U.S. District Court for the Southern District of Ohio, which adopted the Report and Recommendation (“R&R”) and Supplemental Report and Recommendation (“Supp. R&R”) of the U.S. Magistrate Judge, and denied Petitioner’s petition for a writ of habeas corpus, is reported at *Coleman v. Bradshaw*, No. 3:03-CV-299, 2015 U.S. Dist. LEXIS 41324 (S.D. Ohio Mar. 30, 2015) (*Appx*-0021).

The Report and Recommendation and Supplemental Report and Recommendation of the Magistrate Judge, recommending denial of Petitioner’s petition for a writ of habeas corpus, are reported, respectively, at *Coleman v. Bradshaw*, No. 3:03-cv-299, 2012 U.S. Dist. LEXIS 170609 (S.D. Ohio Nov. 28, 2012) (R&R) (*Appx*-0042) and *Coleman v. Bradshaw*, No. 3:03-cv-299, 2013 U.S. Dist. LEXIS 94269 (S.D. Ohio July 5, 2013) (Supp. R&R) (*Appx*-0027).

The decisions of the Ohio Court of Appeals, Second Appellate District, affirming denial of Petitioner’s claims for post-conviction relief, are reported at, respectively, *State v. Coleman*, 2004-CA-43/44, 2005-Ohio-3874, 2005 Ohio App. LEXIS 3583 (Ohio App. 2nd Dist. July 29, 2005) (*Appx*-0111), and *State v. Coleman*, No. 2001-CA-42, 2002-Ohio-5377, 2002 Ohio App. LEXIS

5396 (Ohio App. 2nd Dist. Oct. 4, 2002) (*Appx*-0119).

The orders of the Supreme Court of Ohio, denying discretionary review of the foregoing post-conviction decisions of the Ohio Court of Appeals, Second Appellate District, are reported at, respectively *State v. Coleman*, 107 Ohio St. 3d 1697, 840 N.E.2d 203 (Dec. 28, 2015), and *State v. Coleman*, 98 Ohio St. 3d 1478, 784 N.E.2d 711 (March 12, 2003).

The two decisions of the Ohio Court of Common Pleas, Clark County, Ohio, dated June 1, 2001 and July 21, 2004, denying Petitioner's claims for post-conviction relief, are unreported, *State v. Coleman*, Case No. 96-CR-0142 (Court of Common Pleas, Clark County, Ohio) (*Appx*-0161, -0149).

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. Coleman*, 85 Ohio St. 3d 129, 707 N.E.2d 476 (1999) (*Appx*-0134).

JURISDICTION

The Sixth Circuit issued its opinion and judgment on September 4, 2020. (*Appx*-0001.) On October 21, 2020, the Sixth Circuit denied Petitioner's timely petition for rehearing and rehearing *en banc*. (*Appx*-0020.) This Court has jurisdiction over this cause under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, which provides in part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

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.

STATEMENT OF THE CASE

Petitioner's case involves serious constitutional errors which impact the underlying conviction *and* the death sentence. It presents important issues under *Brady v. Maryland*, 373 U.S. 83 (1963), and of ineffective assistance of trial counsel during the penalty phase under *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), and their progeny ("IAC-mitigation claim"). Compounding these errors is that the federal appellate court below, on habeas review, and with no prior notice to Petitioner (until the opinion), erroneously declined to even consider arguments and authorities in further support of Petitioner's constitutional claim that he was prejudiced by trial counsel's dismal penalty-phase performance.

Another person, William Sapp, admitted committing the subject murder in August 2001; yet, for the past 20 years, no state or federal court has deigned to conduct a hearing on Sapp's sworn statement of admission. Information of Sapp's confession was known to the local police since April 1997 (Sapp claims he told them), but it was never provided to Petitioner at the relevant time, violating the requirements of *Brady v. Maryland*.

But, even aside from the flawed conviction, the performance of Petitioner's trial counsel during the *penalty phase* was a textbook of ineptitude, with his trial counsel disregarding the most

basic duties for penalty-phase performance as established by this Court's death-penalty precedent. There was barely any "investigation," no experts, and only one witness who was asked essentially *one substantive question*. Readily-apparent and much better mitigation evidence was available than the lame "mitigation" case Petitioner's trial counsel stumbled through.

And these fundamental errors present themselves in one of the weakest-supported death penalty cases this Court will see. The sole victim, Melinda Stevens, was a local police informant who was ratting out to local police many of her drug-trafficking friends, including Petitioner, her former lover, so that she could avoid prison for her own drug trafficking crimes. She was shot to death on January 2, 1996, and her body found in an alley amidst the drug houses of Springfield, Ohio's drug scene. By that time her snitching was widely suspected among her many cohorts. Anyone could have killed her. Many had a motive to do so.

Petitioner has zealously maintained his innocence, and that continues to this day. The "evidence" against Petitioner is singularly of the type which predominates in cases of wrongful convictions. Underscoring the paltry case against Petitioner is that Sapp—who really is a killer, and has killed at least three women/girls in that same small Ohio county, *State v. Sapp*, 105 Ohio St. 3d 104 (2004)—confessed to this killing too in his August 2001 affidavit. Yet, no court has been willing to credit Sapp's testimony, even though the pitifully weak record of Petitioner's "guilt" is overwhelmed with State-presented witnesses with the same supposed "credibility" issues as Sapp.

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

A. Summary of the charges and the weak trial evidence against Petitioner.

Petitioner's case involves the murder on January 2, 1996, of a woman who was snitching to local police against her own friends and lovers whom, like herself, were heavily involved in Springfield's local street-drug trade. The victim was shot twice in the back of the head, and her

body left in an alley near some of the local drug houses. No one witnessed the murder, which evidently happened in the early evening. The autopsy showed cocaine in her system. The two bullets recovered from the body were identified as .380 caliber, but supposedly there was nothing of evidentiary value found at the scene, and, initially and for two more weeks, no shell casings were found there either. The murder weapon was never found.

Petitioner was charged with the murder because the police found some local drug users and jail-house snitches who claimed Petitioner supposedly told them he wanted to, or did, kill the victim. The *capital specification* for this garden-variety drug-trade violence—all too common in impoverished urban communities, like this one, where illegal drugs are rampant—is that Petitioner supposedly shot the victim because she was the snitch who had busted him to local police, and he supposedly killed her to prevent her testimony. The victim was thus alleged to be—in the words of the death-penalty specification on which local prosecutors relied to elevate this common urban crime to a *death-penalty* crime—a “witness to an offense” and was allegedly “purposely killed to prevent her testimony.” R.C. § 2929.04(A)(8). Of course, the “confidential informant,” as she was politely labeled by police, was not a mere “witness to an offense”; she was, instead, an active and repeated *participant* in these local drug trafficking offenses, who had secretly chosen to betray her friends in order to help police send *them* away to prison to spare *herself* that same fate for the same crimes.

In fact, the victim to this murder was then facing three drug trafficking charges of her own. Her corrupt deal with local police was that they wouldn’t prosecute her *only* if she was successful in setting up her friends and cohorts for prosecution (TD at 168 (PageID 2830)); she was snitching against at least 8 others. If she was able to produce cases against them, as one of the local police officers explained, “she wouldn’t be prosecuted” on her aggravated trafficking charges. (TD at

111 (PageID 2773).) But, if she wasn't able to come through for police on those drug deals, "[s]he would be looking at possible prison time, yes, sir." (TD at 244 (PageID 2906).)

As over-hyped as these charges are in cobbling up a *death-penalty* case, Petitioner has always maintained his innocence, and does to this day. When police told him during an interview, the day after the murder, that some people were pointing the finger at him, he responded that any such accusations were lies: "Mother f***ers always talking around here, but, it ain't me." (TAM at 983 & State Exh. S at 4 (PageID 8821, 7980).) He acknowledged seeing the victim that evening and buying her food, but insisted they went their separate ways, and he had nothing to do with her murder.

There are so many others who might have killed her, including any of the other 8 people she was snitching against, or their friends and families, and not even counting *Sapp* who admitted to this crime in 1997 and in an affidavit in 2001. Springfield is exactly like other places in the world, where, as everyone knows, confidential criminal informants—"rats" or "snitches"—are "almost universally reviled [as] disloyal, deceitful, greedy, selfish, and weak,"¹ and are viewed with "aversion and nauseous disdain."² See also Alexandra Natapoff, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (NYU Press 2009); Liam O'Flaherty, *THE INFORMER* (1925) (made into a classic film by John Ford, *The Informer* (1935)). They are loathed even by the police employing them.³ Their strongly provocative acts of selfish disloyalty expose them to grave risk of violence, even death.

¹ Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 Vand. L. Rev. 1, 2 (2003).

² Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 Yale L.J. 1091, 1093 (1951).

³ Simons, *Retribution for Rats*, 56 Vand. L. Rev. at 2.

Aside from a big universe of other possible culprits, the evidence against Petitioner is paltry; it is of the type and poor-quality which predominates in cases of wrongful conviction. There is no physical evidence that ties Petitioner to the crime scene, the bullets used, or the murder. Indeed, there was suspicion that the victim had been shot in a vehicle and her body dumped in the alley, which explains why there were no shell casings found there at the time. But no one had claimed to see *Petitioner* with a car near the scene; he said he had walked to the area to buy food for the victim. So, after police obtained statements from unreliable jailhouse snitches who claimed Petitioner had told them *he* was going to kill the victim because she was informing against him, police went back to the scene *15 days* after the murder and, *voila*, they supposedly miraculously “found” two shell casings for .380 caliber bullets lying some 2-3 feet from where the body was discovered; these are casings which they had supposedly overlooked in the weeks before, even though police had allegedly undertaken “long and tedious” searches on “hands and knees,” and even after they had searched with metal detectors. (TAM at 20-23, 832-33, 878-79, 891-92, 900-01 (PageID 7755-58, 8669-70, 8715-16, 8728-29, 8737-38).)

And then these miraculously-discovered shell casings were never tested by police; thus nothing from the casings linked Petitioner to the crime either. Indeed, police had Petitioner in custody for his interview on January 3, 1996, within hours of the murder, and yet he wasn’t tested for gunshot residue. (R 231-10, 3A PCR1, Exh. 12 (Coleman Aff.) (PageID 4925).)

Lacking any physical or forensic evidence, the State relied at trial exclusively on an assortment of nine persons who were themselves snitches, drug addicts, friends/relatives of other possible suspects, and otherwise biased and/or vulnerable witnesses. They were all grievously flawed in many ways and for many reasons, and none had been at the scene when the murders occurred. For example, four of the “witnesses” were the mother, sister, niece, and a “very, very close” long family friend, respectively, *of another suspect*, James Strodes; so, after delaying a

month or longer before coming forward to police with their stories, these aligned four women all blamed *Petitioner* by attributing incriminating words to him, which he denies ever making.

But Steve L. Kasler is most emblematic of the rot in the State's grievously weak case. (R. 231-11, 3A PCR1, Exh. 47 (PageID 5091-5102).) He incredibly claimed that he encountered *Petitioner* while both men were cellmates, for a mere 24 hours, at the corrections reception center, awaiting prison assignments. According to Kasler, *Petitioner* spent their single day together by baring his soul to the stranger Kasler and telling him every detail about the crime and how *Petitioner* supposedly committed it. (TAM 1100-15 (PageID 8938-53).)

Years later in 2015, Kasler committed suicide in prison. But he did so only after he had tried to scam authorities in Ohio and other states that he was a "serial killer" of some 34 victims, including in Ohio, a scam he later said he pulled to avoid being extradited to Louisiana for sex crimes.⁴ His scam against *Petitioner* was small potatoes for Kasler.

B. The mitigation presentation was one witness and no experts, resulting in a death sentence.

So what does an innocent person do when he believes people are lying about him in court for benefits such as lesser prison terms or to protect others or because they're skilled scam artists? And when the *only evidence* against him are words he supposedly said to these other people? And when the jury and courts are willing to overlook all those flawed witnesses and allow such a weak case to actually move forward to a penalty phase where death is possible for that person for such garden-variety drug-trade violence? The *theory* of the law is that *effective* defense counsel, and the

⁴ See, e.g., *Bolin v. State*, 184 So. 3d 492 (Fla. 2015); *In re Bolin*, 811 F.3d 403, 407-09 (11th Cir. 2016); *Baxter v. Conway*, 2011 U.S. Dist. LEXIS 138014, at *53-54 (S.D.N.Y. July 26, 2011); D. Baird, "Man Convicted in Slaying Recants Earlier Confession," COLUMBUS DISPATCH (December 15, 1999) ("Steven L. Kasler went from 34 homicides to zero homicides yesterday in recanting his earlier stories about a past as a serial killer who roamed from state to state preying on women.").

State's beyond-a-reasonable doubt burden, will enable fairness to prevail, and that an innocent man will not be convicted much less sent to death row. That theory was inoperable in this case because the performance of Petitioner's trial counsel was singularly inept.

And that ineptitude was in plain view during the penalty phase in Petitioner's case. The entire penalty-phase transcript of evidence and argument is in the appendix. (*Appx-0190*.) The Court will read it and see for itself.

Only Petitioner's father, Willie Coleman, testified in the mitigation phase. He was asked only nine questions (three of which were "yes" or "no") over *3.5 pages*, but the presentation boiled down to one substantive question:

Q. Now, I want you to tell me about how your son has been since he's been a small boy. If you would walk me through his life pattern as you observed him, just tell the jury what kind of young man he was and how he comported himself, what his behavioral habits were, could you do that for me please?

(TAM at 1291 (PageID 9145) (*Appx-0195*.)

Petitioner's mother, Eula Coleman, did not testify; she was overwhelmed with emotion that day including because she had never been properly prepared by the inattentive trial counsel. Her testimony would have been critical, as she is "very, very close" to her son (TAM at 1293), much more so than Mr. Coleman was. (R. 231-10, Exh. 40 (Dr. Eimer Report) at 4 (PageID 5046).) She would have testified that Petitioner is a loving son, that he had suffered from dyslexia as a child, which in turn affected his academics, that he was closer emotionally to her than to his dad, among other important and humanizing testimony. (R. 231-10, Exh. 22 (PageID 4962-64).)

Petitioner's sister did not testify either nor did the mothers of Petitioner's children. All would have provided favorable testimony. Having love for the convicted defendant is compelling mitigation; hearing such testimony from *many witnesses* and especially the mom would be very important to the jury, certainly as or more important than hearing tales from all the snitches and

biased witnesses aligned with their fiction about Petitioner's alleged "admissions" to this crime. Yet, that latter cumulative "evidence" of words allegedly uttered by Petitioner and *denied by him* is said to be "overwhelming," while it is supposedly somehow not "prejudicial" for counsel to omit all of the former when the client's life is on the line.

The defense had retained a psychologist, Dr. Erhard O. Eimer. (R. 231-10, Exh. 40 (Dr. Eimer Aff.) (PageID 5042-54).) But his important testimony and report—to his surprise—were not presented to the jury either, an inexcusable abdication of advocacy when Dr. Eimer could have highlighted Petitioner's "fascinating" psychological picture of perplexing anomalies and contradictions. (*Id.* at 4 (PageID 5046).) Dr. Eimer would have described Petitioner, on the one hand, as "overly sensitive to criticism," "rigid and moralistic," "highly suspicious of other people and constantly on guard to prevent being taken advantage of," often willing to blame others or rationalize his faults rather than assume responsibility, and likely to react with "self-righteous indignation" when he feels threatened" (*id.* at 2 (PageID 5044)); on the other hand, he would also have described Petitioner as overly concerned about the "effect of his actions on others, and [about] their reactions to him," and "extremely eager to please, with the ultimate objective of being accepted, respected and liked." (*Id.*)

Dr. Eimer diagnosed Petitioner with Compulsive Personality Disorder. (*Id.* at 5 (PageID 5047).) He concluded that Petitioner does not have any other personality disorder, particularly those associated with a tendency to engage in violent crimes, and that "[Petitioner] does not have a propensity toward violent crime." (*Id.*) Dr. Eimer explained that Petitioner's disorder is characterized "by an anxious conformity to the expectations of others," which is accompanied by "marked feelings of personal inadequacy and insecurity." Petitioner's major defense to these feeling of inadequacy and insecurity is "excessive conformity. . . . [He] maintains a rigid

behavioral pattern in which his impulses toward autonomy and independence are restrained and his conformity to the rules of others is emphasized.” (*Id.*, Exh. 40 at 3 (PageID 5045).)

Defense counsel made *no effort* to humanize Petitioner or to provide the jury with any context as to why Petitioner was involved with drugs or, because the jury believed he killed the victim, why someone with his background and mental-health profile, *if* he was the culprit, might have reacted to such a serious betrayal by a former lover. Counsel also failed to present a cultural expert, *i.e.*, someone who would testify about the challenges and pressures facing young African-American males in urban environments (Petitioner was in his 20’s then), the prevalence and acceptance of drugs in their communities, and the strong disdain for “snitching.”

Along with the evidence of Petitioner’s psychological conditions, such evidence—or at least argument—would have been especially pertinent to the statutory mitigating factor relied upon by trial counsel, *i.e.*, it is “unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.” R.C. 2929.04(B)(2). (TAM at 1302, 1312, 1327 (PageID 9156, 9166, 9181); *State v. Coleman*, 85 Ohio St. 3d at 144-45 (*Appx*-0145-46).) If the betrayal committed by snitching against her own friends, to send *them* to prison instead of her, wouldn’t be “strong provocation” to whomever killed the informant, then nothing is. And, *if* Petitioner *was* the killer the jury believed he was, *his* supposed resort to violence would itself be further proof of how “strongly provocative” a snitch’s betrayal can be when considered in light of Dr. Eimer’s conclusion that Petitioner *lacked* a propensity to violence.

But Petitioner’s trial counsel failed to do *any* of these easy and obvious things. Their lame mitigation case was essentially *one question* to Petitioner’s dad. Having thus given the jury very little to place on the mitigation side of the scales, the jury predictably selected death and the trial court imposed it.

C. Sapp admitted to these crimes in his August 2001 affidavit, but no court has conducted a hearing.

What is an innocent man to do when—after being convicted and sentenced to death on such shoddy evidence and the conviction and death sentence upheld by courts in disregard of its gross weakness—another person’s sworn confession to the murder is then roundly renounced by those same courts for allegedly lacking “credibility”? Yet, the weak snitch-laden testimonial evidence on which Petitioner’s capital murder *conviction* is solely based suffers from those same perceived credibility problems. *That* weak evidence is branded as “overwhelming” because there are several incredible witnesses; the Sapp evidence is branded as “unreliable.” But no court bothered to hear from Sapp.

There are two items of *Brady* evidence associated with the Sapp confession. The first is Sapp’s statement in the August 2001 affidavit that he told the Springfield police detectives in *April of 1997* that he is the person who killed the victim and not Petitioner. April of 1997 is only two months after Petitioner’s conviction and very early in the pendency of his direct appeal. The second item is a letter Sapp wrote to Uma Timmons in 1998, wherein he also confessed to the Stevens murder. Timmons had been a victim of Sapp in a different case who survived his attack and testified against him. The letter from Sapp was a not-so-subtle threat against Timmons reminding her of what he did to the victim in this case “off of Pleasant.” Melinda Stevens, the victim in Petitioner’s case, was likewise killed off of Pleasant Street in Springfield, Ohio.

D. The state courts denied any relief on Petitioner’s federal constitutional claims under *Brady* and *Strickland*.

Petitioner properly and timely presented his *Brady* and IAC-mitigation claims to the state courts in the post-conviction phase, but he got no relief. He didn’t even get an evidentiary hearing, *on anything*; thus, as to Sapp’s confession, no state court ever heard from Sapp or evaluated his credibility.

In denying relief on the *Brady* claim, the state trial court said “[t]here is no evidentiary support for [Petitioner’s] allegation that in the reference to ‘your friend over off of Pleasant’, Sapp meant Melinda Stevens.” *State v. Coleman*, Entry of July 21, 2004 at 5 (*Appx*-0153). And, although the court acknowledged that Melinda Stevens was killed off of Pleasant Street, it also said that “Pleasant Street is a main thoroughfare in Springfield [and so] a reference to a spot ‘off of Pleasant’ would encompass a substantial portion of town, as opposed to a unique and singular locale.” *Id.* at 5-6 (*Appx*-0154). Maybe so. But Springfield is a relatively small city with a population in the range of 60,000 to 70,000 in 1996. With a murder rate of, for example, 6.08 per 100,000 in 1999, the number of homicides is tiny enough—single digits in many years—to make Sapp’s description of the Pleasant Street locale *extremely significant* and neither vague nor indefinite insofar as a reference to the Stevens murder is concerned.⁵ No court bothered to hear from Sapp.

The state trial court was likewise dismissive of Sapp’s confession because the court instead chose to credit the affidavit of one of the police detectives (Moody) to whom Sapp said he admitted in 1997 to having killed Stevens. According to Moody’s affidavit, Sapp backed off those allegations, and was perceived as having “recanted” the confession, when Moody interviewed Sapp about the confession at the prison in 2002. *Id.* at 5-6 (*Appx*-0153-54). Without conducting a hearing, or allowing Sapp and Moody to be examined and cross-examined under oath in a courtroom, the court determined that Sapp was not credible and his affidavit “lacks reliability.” *Id.* at 8 (*Appx*-0156).

The Ohio appellate court affirmed on the same basis. *State v. Coleman*, 2005-Ohio-3874 (*Appx*-0111). The appellate court upheld the trial court’s “credibility” determinations of Sapp and Moody on the paper record and likewise rejected the *Brady* claim in part on the court’s perception—

⁵ Macrotrends, Springfield, Ohio, Murder/Homicide Rate 1999-2018 (available at <https://www.macrotrends.net/cities/us/oh/springfield/murder-homicide-rate-statistics>).

—grievously flawed in Petitioner’s view—that the reference to Pleasant Street in the Timmons letter was supposedly “vague and indefinite” and that there was supposedly “overwhelming evidence” of Petitioner’s guilt. *Id.* at ¶¶ 31, 34-36 (*Appx*-0116-17).

As to the IAC-mitigation claim, the state trial court likewise denied relief without conducting a hearing. *State v. Coleman*, Entry of May 31, 2001 (*Appx*-0160). And it did so despite Petitioner’s presentation of at least 12 affidavits of witnesses whose testimony was not presented during the penalty phase and/or who provided evidence of trial counsel’s alleged expressions of racial disdain for Petitioner and/or of counsel’s lack of any effort or preparation. The state trial court inexplicably found the minimal “investigation” to be sufficient, and, reviewing each claimed deficiency largely in isolation, also concluded that none would have mattered to the ultimate sentence. *Id.* at 10-14 (*Appx*-0169-73).

The state appellate court affirmed in all respects on the IAC-mitigation claim. That court likewise found trial counsel’s investigation to be sufficient and, likewise viewing each sub-claim in isolation, found little probability of a different result if the proffered omitted evidence and argument had been presented. *State v. Coleman*, 2002-Ohio-5377 at ¶¶ 40-71 (*Appx*-0119, 0125-29). In evaluating “prejudice,” however, the appellate court focused on whether the entire jury would be “swayed” to impose a life sentence. *Id.* at ¶ 44 (*Appx*-0125-26). But that is not the correct standard under *Strickland*: in a weighing state, like Ohio, all that is required is proof that at least one juror—not the entire jury—would be persuaded to impose a life sentence.

E. The federal habeas court denied relief too; in doing so, the Sixth Circuit misapplied the law on deference and it *sua sponte* refused to even consider some of Petitioner’s arguments and authorities even though the Warden made no such contention.

The district court denied habeas relief on both claims. On the *Brady* claim, that court adopted the R&R and Supplemental R&R which failed to credit Petitioner’s arguments that the

factual findings by the state court—made without a hearing at which Sapp and Moody testified—were an unreasonable determination of the facts and an unreasonable application of well-established federal law. *See* 28 U.S.C. § 2254 (d)(2) & (d)(1). The court instead deferred to the state court’s determination under AEDPA and rejected the *Brady* claim. (R&R at *62-64 (*Appx*-0064-65); Supp. R&R at *8-12 (*Appx*-0030-31).)

As to the IAC-mitigation claim, the lower federal court—both the magistrate judge and district judge—agreed that Petitioner’s trial counsel “was constitutionally deficient in the investigation and presentation of mitigating evidence” (District Court’s Opinion at *1 (*Appx*-0022)), thereby concluding that Petitioner satisfied *Strickland*’s “performance” prong as to at least those deficiencies. (*Id.* at *1-2, *5-8 (*Appx*-0022, 0023-24); Supp. R&R at *16 (*Appx*-0032); R&R at *156-58 (*Appx*-0095-96).) However, as to the “prejudice” prong, the lower federal court concluded that the Ohio state courts applied the correct legal standard, and that, with AEDPA deference thus owed to that state-court adjudication, Petitioner was not entitled to habeas relief in the penalty phase either. (District Court’s Opinion at *1, 11 (*Appx*-0022, 0025); Supp. R&R at *16-17 (*Appx*-0032-33); R&R at *158-74 (*Appx*-0096-101).)

The panel of the Sixth Circuit affirmed. On the *Brady* claim, the court applied AEDPA deference and agreed that the “state court reasonably rejected [Petitioner’s] *Brady* claim.” *Coleman v. Bradshaw*, 974 F.3d at 719 (*Appx*-0009). However, in rejecting Petitioner’s contention that the Ohio state court’s failure to conduct an evidentiary hearing concerning Sapp’s letter and affidavit resulted in an unreasonable determination of fact under 28 U.S.C. 2254(d)(2), the panel made a serious legal error by relying on 1981 case law—*Sumner v. Mata*, 449 U.S. 539, 547 (1981)—which applied the 1966 version of section 2254 and not the AEDPA version of 2254 which is applicable to Petitioner’s case. *Coleman v. Bradshaw*, 974 F.3d at 717 n.3 (*Appx*-0008).

On the IAC-mitigation claim, the panel addressed only the issue of prejudice and concluded that the state court had not unreasonably applied *Strickland*'s prejudice prong. *Id.* at 719-25 (*Appx*-0012-19). In addressing prejudice, however, the panel refused to even consider—as supposedly waived and/or forfeited because not presented to the district court—arguments and authorities about the universal disdain for snitching which Petitioner presented in further support of the prejudice resulting from trial counsel's deficient performance in failing to present both cultural and mental health experts and/or to effectively present the “duress and strong provocation” mitigation theory on which trial counsel chose to rely. *Id.* at 723-25 (*Appx*-0106-08). With no prior notice to Petitioner, the panel refused to consider these matters even though the Warden did not make *any* argument or contention that they should be ignored and even though they are squarely within the scope of Petitioner's claims in the district court and on which the district court ruled.

REASONS FOR GRANTING THE WRIT

I. The federal appellate court below violated Petitioner's rights to a meaningful appeal, and to the habeas review to which he is entitled on a federal constitutional claim certified for appeal, when that court refused to even consider, as purportedly forfeited and/or waived, additional arguments and authorities in support of the prejudice resulting from trial counsel's deficient performance, in circumstances where *both* the party-presentation principle precludes such refusal *and* this Court's precedent firmly permits appellate presentation of such additional arguments and authorities in support of a properly-presented federal constitutional claim.

Petitioner received a certificate of appealability from the district court so that he could appeal to the U.S. Court of Appeals his habeas claim that trial counsel rendered prejudicially ineffective assistance during the penalty phase in violation of *Strickland*, *Wiggins* and related Sixth Amendment cases. The issuance of that COA meant that Petitioner had “made a substantial showing of the denial of a constitutional right” on his IAC-mitigation claim, 28 U.S.C. § 2253(c), and that “reasonable jurists would find the district court's assessment of the *constitutional claims* debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis supplied); *see also*

Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). Petitioner made that showing in circumstances where the district court said it denied relief “*reluctantly*” on that IAC-mitigation claim. (Appx-0025 (“Reluctantly, this Court agrees that counsel was constitutionally deficient, but finds such error to be harmless.”).)

Yet, on appeal, the Sixth Circuit panel refused to *even consider* important arguments and authorities Petitioner presented to that court in further support of his IAC-mitigation claim (*Coleman*, 974 F.3d at 719-25 (Appx-0012-19)), thereby denying Petitioner a meaningful appeal of his constitutional claim and draining the COA of its vitality. The disregarded arguments and authorities were those concerning: (1) the culture’s (including the urban street’s) universal disdain for rats and snitches, (2) the grave risk of violence and even death to which snitches are exposed due to their strongly provocative acts of selfish betrayal *and* the relevance of such provocation to trial counsel’s *chosen* mitigation theory that the offender was under “duress [] or strong provocation” (R.C. 2929.04(B)(2)), and (3) Dr. Eimer’s unused report about Petitioner’s psychological profile and mental-health condition which made him vulnerable to the “strong provocation” entailed by a former lover’s betrayal to police. And the panel refused to consider these arguments and authorities—enforcing waiver and/or forfeiture, because supposedly they were not presented to the district court—even though the Warden herself *never* made any such argument (on waiver or any other grounds) and *never* asked the Sixth Circuit to disregard these arguments and authorities.

In *sua sponte* refusing to consider *any* of these arguments and authorities, the Sixth Circuit panel not only drained the COA of its vitality but it disregarded if not violated two different lines of clear authority from this Court: **(1)** the party presentation doctrine; and **(2)** the rule that once a federal constitutional claim is properly presented, a party can make any argument in support of that claim, and the party is not limited to the precise arguments they made in the court below.

The party presentation doctrine was most recently addressed by the Court in *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). *See also Greenlaw v. United States*, 554 U.S. 237 (2008). “In our adversarial system of adjudication, we follow the principle of party presentation.” *Sineneng-Smith*, 140 S. Ct. at 1579 (citation omitted). Thus, “in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” *Id.* (quotation omitted). Departures from this principle are usually only warranted in criminal cases when doing so would “protect a *pro se* litigant’s rights.” *Id.* (quotation omitted).

Even in habeas cases, the principle of party presentation applies. “[A] federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary system.” *Wood v. Milyard*, 566 U.S. 463, 472-73 (2012) (citing *Greenlaw*, 554 U.S. at 243-44). The party presentation principle likewise applies when the State has chosen to waive an issue in a habeas case. For example, a federal court “is not at liberty, we have cautioned, to bypass, override, or excuse a State’s deliberate waiver of a limitations defense.” *Id.* at 466 (citing *Day v. McDonough*, 547 U.S. 198, 202, 210 n.11 (2006)). *See also Day*, 547 U.S. at 210 n.11 (“should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice”).

The rationale for the party presentation principle is that courts are to be neutral arbiters of matters the *parties present* and they are to take a passive role in deciding the *parties’* dispute as the *parties* choose to frame it. The principle cautions that courts are *not* to become advocates for the government by *sua sponte* making, and then adjudicating against the other party, arguments which the government chose not to make.

That principle of allowing the parties to make their arguments *fully applies* when the government has chosen not to ask an appellate court to refuse consideration of an opponent’s

particular argument or authority on grounds the opponent supposedly failed to present it below. In such a situation, the government is said to have “waived” the alleged “waiver,” and, under the party presentation principle, it is not the proper role of the appellate court to disregard the government’s waiver by *itself* raising the waived “waiver” issue *for the government* and adjudicating that issue against the other party. There are many cases in which federal courts have recognized and applied, against the government, a “waiver” of the “waiver” as compelled by the party presentation principle and reaffirmed, for example, in *Day and Wood*. *See, e.g., United States v. Sainz*, 933 F.3d 1080, 1085-86 (9th Cir. 2019) (“when the government fails to raise waiver in the district court and chooses to litigate a § 3582(c)(2) motion on the merits, the district court abuses its discretion if it raises the defendant’s waiver *sua sponte*”); *Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2010) (“It is well-established that a party can waive waiver implicitly by failing to assert it.”); *United States v. Boudreau*, 564 F.3d 431, 435 (6th Cir. 2009); *Hernandez v. Cowan*, 200 F.3d 995, 997 (7th Cir. 2000) (“petitioner is arguing waiver of waiver, now a well-established doctrine”); *AFGE Local 3599 v. EEOC*, 920 F.3d 794, 798 n.2 (Fed. Cir. 2019); *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1138-39 (10th Cir. 2010); *United States v. Beckham*, 968 F.2d 47, 53-54 (D.C. Cir. 1992).

The Sixth Circuit panel violated the party presentation principle when it *sua sponte* raised, and adjudicated against Petitioner, a “waiver” or “forfeiture” argument which the Warden chose not to make. The Warden is represented by the Office of the Ohio Attorney General; and its office has many fine attorneys whose practice is all or mostly capital habeas litigation in the federal courts. If the Warden believed it had a meritorious argument that the appellate court should disregard arguments and authorities presented in Petitioner’s appellate briefs, her counsel was fully capable of making that argument, but did not. The Warden chose the litigation strategy she deemed best. The Sixth Circuit should not be substituting its judgment for that of the parties in shaping the

case and should not be making arguments on the Warden's behalf, especially in a capital case and on a constitutional claim for which a COA had been granted.

Not only did the Sixth Circuit violate the party presentation principle but its *sua sponte* invocation of waiver and/or forfeiture was also legally groundless because it disregarded this Court's well-settled rule that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). *See also Citizens United v. FEC*, 558 U.S. 310, 331 (2010) ("Citizens United's argument that *Austin* should be overruled is 'not a new claim.' Rather, it is—at most—'a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment.'" (citations omitted).

In disregard of *Yee* and similar authority, the Sixth Circuit erroneously failed to appreciate the distinction between, on the one hand, raising a *new claim* and, on the other, presenting additional *arguments and authorities* in support of an existing properly-presented constitutional claim. The latter is perfectly appropriate under *Yee*, and is even required and encouraged for successful appellate litigation; whereas only the *former* is generally not allowed because of rules against presenting a new claim for the first time on appeal. The Warden's choice to not raise any issue of an alleged failure of presentation below may, indeed, have been because she, too, perceived such a claim to be groundless and plainly foreclosed by *Yee*.

Petitioner did *not* present a new claim to the Sixth Circuit, nor did he even present a new variation of an existing claim. His claim is, and has always been for more than 20 years, that his trial counsel's penalty-phase performance was prejudicially ineffective including because he failed to present Dr. Eimer's psychological testimony, failed to present a cultural expert who could help educate the jury about the drug culture of the urban streets, and failed to develop and present *any*

persuasive evidence and argument in support of the *trial-counsel-chosen* mitigation theory that, even *if* Petitioner was the culprit, it is “unlikely [the victim’s murder] would have been committed, but for the fact that the offender was under *duress, coercion, or strong provocation*.” (R.C. 2929.04(B)(2) (emphasis supplied).)

Rather than presenting a new claim, Petitioner presented the appellate court with at most additional arguments and authorities in further support of *that exact same IAC-mitigation claim* including its prejudice component, as its contours have come into sharper focus due to the district court’s ruling below. That approach is precisely what is required for effective appellate litigation of a constitutional claim which had been rejected in a lower court, and is squarely permitted under *Yee, Citizens United*, and other well-settled authority. *See, e.g., Bourtzakis v. United States AG*, 940 F.3d 616, 620-21 (11th Cir. 2019) (“This appeal presents one issue—whether Bourtzakis’s Washington drug conviction qualifies as an aggravated felony—and Bourtzakis squarely presented that issue to the district court. He can now ‘make any argument in support of’ the position that his conviction is not an aggravated felony; he is ‘not limited to the precise arguments [he] made below.’”); *In re Harman Int’l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 100 (D.C. Cir. 2015) (“On appeal, a party may refine and clarify its analysis in light of the district court’s ruling, including citing additional support.”); *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007) (a party may cite “additional support for his side of an issue upon which the district court did rule, much like citing a case for the first time on appeal.”); *Sec’y, United States DOL v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017) (“Parties can most assuredly waive positions and issues on appeal, but not individual arguments Offering a new argument or case citation in support of a position advanced in the district court is permissible—and often advisable.”); *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015) (“Sun’s argument about the proper interpretation of the plan is more elaborate on appeal than it was in the district court, but no rule prohibits appellate

amplification of a properly preserved issue.”); *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004) (“In assessing whether an issue was properly raised in the district court, we are obliged on appeal to consider any theory plainly encompassed by the submissions in the underlying litigation.”); *Teva Pharm., USA, Inc. v. Leavitt*, 548 F.3d 103, 105 (2008) (“FDA’s effort to refine and clarify its analysis in light of the district court’s ruling cannot be transmuted into a waiver of its arguments on appeal.”); *Everytown for Gun Safety Support Fund v. BATFE*, 984 F.3d 30, 38 (2d Cir. 2020) (“the ATF has maintained throughout this litigation that the data Everytown seeks are exempt from FOIA disclosure, and the ATF is ‘not confined here to the same arguments which were advanced in the courts below upon [the] federal question there discussed.’”) (citation omitted).

The Sixth Circuit itself, in a recent capital habeas case, recognized that *Yee* permits even a *new theory of relief* in support of an IAC claim despite that theory not having been raised before in the district court, because it is not a new *claim*. The court then considered that new theory and rejected it. *Hugueley v. Mays*, 964 F.3d 489, 501 & n.4 (6th Cir. 2020).

In full compliance with *Yee* and these other authorities, Petitioner presented the appellate court with at most some new arguments and authorities in support of what has been his *consistent claim*: that trial counsel was prejudicially ineffective in the penalty phase in certain specific, and unchanged, respects. This included additional arguments and authority to support how a cultural expert would have been helpful in describing the culture’s universal disdain for rats and snitches and the grave risk of violence and death to which snitches are exposed due to their strongly provocative acts of selfish disloyalty. “In movies, on television, in literature, the cooperator embodies all that society holds in contempt: [she] is disloyal, deceitful, greedy, selfish, and weak.” Simons, *supra* at p. 6 & n.1, 56 Vand. L. Rev. at 2.

The cooperator, on the other hand, is more like Benedict Arnold, betraying his

country for the promise of £ 20,000, or like Judas, betraying his Messiah for thirty silver pieces. That the cooperator is paid in leniency rather than money does not change the moral calculus. It is his selfishness - his willingness to betray others for personal gain - that accounts for the disdain in which he is held, even if the disdainers recognize that society benefits from his efforts.

Simons, *supra* at p. 6 & n.1, 56 Vand. L. Rev. at 28-29.

Where police make wide use of confidential informants in communities, they *destroy* community bonds and immerse that community in corrosive suspicion and fear by “promoting behavior that in other circumstances they and most others would deem reprehensible.” Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 Or. L. Rev. 1257, 1268-70 (2011). Here, the Springfield Police Department was guilty of that tactic and didn’t even care enough to protect their informant. The department didn’t even have a *picture* of Melinda Stevens: the crime scene photo of Stevens’ dead body is all they had. (TD at 81-83 (PageID 2743-45).)

The risk of violence to which informants are exposed is so *widely known and highly foreseeable* that, for example, federal courts have recognized protection under the First Amendment against compelling prisoners to serve as snitches and, under the Eighth Amendment, against publicly labeling prisoners as snitches.⁶ These decisions all result from awareness of what human nature plainly teaches: snitching strongly provokes violence against the snitcher by those snitched upon. It does not *condone* such violence for us to recognize that inherent aspect of our nature as imperfect human beings, but it does, indeed, make its occurrence more understandable—more uniquely human—and thus the core of mitigation in a capital case.

Petitioner also presented the appellate court with more sharply-refined arguments as to how the evidence and argument about universal revulsion toward snitches was highly relevant to trial

⁶ See, e.g., *Burns v. Martuscello*, 890 F.3d 77, 81 (2d Cir. 2018) (“We now hold that the First Amendment protects a prisoner’s right not to serve as an informant.”); *Irving v. Dormire*, 519 F.3d 441, 450-51 (8th Cir. 2008); *Benefield v. McDowall*, 241 F.3d 1267, 1270-71 (10th Cir. 2001); *Watson v. McGinnis*, 964 F. Supp. 127, 131 (S.D.N.Y. 1997).

counsel's *chosen* mitigation theory that the murder's commission was "unlikely" if the offender had *not* been under "duress [] or strong provocation," and would have greatly strengthened that mitigation factor. And it included additional argument as to why and how it was so prejudicial for trial counsel to omit any testimony from Dr. Eimer when, with the jury already having found that *Petitioner* committed the murder, Dr. Eimer's testimony about *Petitioner's* psychological profile and mental-health condition would have enabled persuasive arguments that their verdict *itself* illuminates just how strongly provocative it is for a snitch to selfishly betray a friend/lover in order to help send him to prison, when even a characteristically *non-violent person* such as *Petitioner* was found by them to have committed homicidal violence.

If it is not "strong provocation" for a former lover to betray her beloved in order to help send him to prison in order to spare herself that same fate, then nothing is. And, because the *only* "aggravation"—in the life-death weighing calculus in this case—is that the victim was a "witness" allegedly killed to prevent "testimony," *and* that "witness" was in fact a frequent active *participant* in the witnessed crimes, whose "witnessing" and "testimony" were both purchased by police to help send her friends to prison instead of her, the testimony of Dr. Eimer and a cultural expert would not only have established the mitigating factor of "strong provocation"; it also would have helped diminish the "weight" of the sole "witness" aggravator in these corrupt and seedy circumstances.

These arguments and authorities were all properly presented under *Yee*. There are no proper grounds for the Sixth Circuit panel to disregard and ignore them in adjudicating against *Petitioner* his appeal on the IAC-mitigation claim. By doing so, the Sixth Circuit panel denied *Petitioner* any meaningful appeal of his IAC-mitigation claim as certified for review by the certificate of appealability, and it wrongly disregarded arguments and authorities which further confirm his entitlement to habeas relief on that claim. At the very least, the Sixth Circuit's judgment must be

vacated and the case remanded for a full appellate disposition which considers all arguments and authorities presented by Petitioner in his appeal.

II. Petitioner is entitled to habeas relief on his IAC-mitigation claim because his trial counsel was prejudicially ineffective, in violation of Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and this Court's capital-punishment precedent, in presenting a mitigation case comprised of only one substantive question and in failing to develop and present other available and compelling mitigation evidence.

This should be an easy case for habeas relief on an IAC-mitigation claim. That is true with or without consideration of the arguments and authorities, addressed above, which the Sixth Circuit erroneously refused to address and consider. But Petitioner's entitlement to relief is even more apparent when the excluded arguments and authorities are considered.

No state or federal court conducted a hearing on Petitioner's IAC-mitigation claim; and the state courts which addressed the claim did so very perfunctorily and applied the wrong standard in assessing prejudice. The state court decision is thus entitled to no deference, and, contrary to the conclusion of the lower federal courts, habeas review is *de novo*. Compounding the errors is that the state and federal courts all treated the guilt-phase evidence as "overwhelming" when considering prejudice, but that is plainly wrong including because the evidence of Petitioner's guilt is paltry and is comprised almost entirely of words he supposedly said (which he denies) to persons who were seeking deals or were biased because they wanted to protect other suspects. The only aggravating circumstance—of the "witness" being killed to prevent "testimony"—is as weak as they come given that the "witness" was herself a criminal who routinely participated in the same drug crimes she'd be "witnessing" against and, facing her own long prison stint, willingly betrayed her own friends and lovers so they'd go to prison instead of her. Any case with the likes of Steven L. Kasler on the sorry roster of snitches and scammers providing the purported "overwhelming" evidence is, by definition, underwhelming.

A. No AEDPA deference is owed to the state courts' determination of the prejudice issue.

The Sixth Circuit panel applied AEDPA deference to the state post-conviction appellate court's adjudication of the prejudice issue and, doing so, denied the IAC-mitigation claim because the panel believed the state court's decision was not an unreasonable application of *Strickland*. (*Coleman*, 974 F.3d at 716, 719-20 (*Appx*-0006, 0011-12.)) That is an obvious error; no deference is owed to any state court decision on the issue.

The state courts reviewed each sub-claim of IAC-mitigation in isolation when assessing prejudice, thereby failing to consider the cumulative prejudicial impact of all of trial counsel's errors and omissions and all of the omitted evidence on the resulting sentence. The test is whether it is reasonably likely that the result of the proceeding would have been different but for counsel's "errors." *Strickland*, 466 U.S. at 694; *see also Wiggins*, 539 U.S. at 534 ("In assessing prejudice [under *Strickland*], we reweigh the evidence in aggravation against the *totality of available mitigating evidence*.").

The state courts also failed to apply the required objective test for prejudice, choosing instead to analyze only whether the entire jury would be "swayed" to impose life. *State v. Coleman*, 2002-Ohio-5377 at ¶ 44 (*Appx*-0125-26). *See Strickland*, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker"). Moreover, a proper objective inquiry required the Ohio post-conviction courts to consider the likelihood of a different result *not just with the jury* but also by an appellate court that "independently reweighs the evidence." *Id.* The Ohio courts erred by applying a subjective test of prejudice that failed to consider the probability of a different outcome in the Ohio Supreme Court.

Finally, in applying their deficient “swayed jury” standard, the Ohio state courts disregarded that the proper standard only requires a showing that at least *one juror*—not the entire jury—would be persuaded to impose life. *Williams v. Anderson*, 460 F.3d 789, 804 (6th Cir. 2006). And, the omitted mitigation evidence must be considered in the aggregate, not in isolation.

The decision by the state appellate court is thus contrary to and involves an unreasonable application of *Strickland* and/or is based on an unreasonable determination of the facts. The federal habeas court’s review is *de novo*. See, e.g., *Cone v. Bell*, 556 U.S. 449, 472 (2009).

B. Trial counsel conducted virtually no investigation and their performance was prejudicially deficient, under any standard, in presenting only one witness who was asked only one substantive question.

Trial counsel barely did anything for the penalty phase. There was virtually no investigation. The federal district court was certainly correct in finding deficient performance under *Strickland*. (District Court Op. at *8 (“this Court agrees with the Magistrate Judge that defense counsel was deficient in the investigation of mitigation evidence”) (*Appx-0024*).) The Magistrate Judge aptly summarized some of the deficiencies of the “investigation”:

[Counsel] met with a small number of potential witnesses, specifically Petitioner’s father, however they failed to speak with other family members and close friends that would have been willing to testify on Coleman’s behalf. Furthermore, counsel failed to explain the mitigation process and prepare the one witness they did present. Additionally, counsel were deficient in their late hiring of an investigator. As a result of this delay, investigation did not begin until the day before the start of voir dire. The investigator did not have direction from counsel. . . . There is no evidence that counsel or the investigator looked into Coleman’s medical, educational, employment, or additional family and social history, or looked into his prior adult correctional experience, religious or cultural influences.

(R&R at *157 (*Appx-0195-96*).) See also *Andrus v. Texas*, 140 S. Ct. 1875, 1881-82 (2020); *Abdul-Salaam v. Sec’y of Pa. DOC*, 895 F.3d 254, 267-69 (3d Cir. 2018). The Warden never submitted any objections to the R&R on the adjudication against the Warden of the core issue of deficient performance; the Warden has accordingly waived any such objections. *Thomas v. Arn*, 474 U.S.

140, 155 (1985); Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

The deficient investigation yielded a grossly deficient mitigation performance. The proof of the absence of any mitigation advocacy is in the pudding of trial counsel's performance at trial: *one witness, 3.5 pages, minimally helpful testimony*. (TAM at 1290-94 (*Appx*-0194 to -0198).) There is only one substantive question about Petitioner; and the answer is very brief, unfocused, and largely ineffective. (*Id.* at 1291 (*Appx*-0195).)

Even as to the one witness which trial counsel chose to present, they failed to prepare him. Trial counsel did not tell Mr. Coleman that he would be called to testify for the sentencing phase until the guilt phase concluded. Consequently, Mr. Coleman only had one day's notice. (R. 231-10, Exh. 20 at ¶¶ 20-23 (PageID at 4958-59).) Further, counsel failed to go over specific questions that would be asked or to prepare Mr. Coleman for his testimony. Rather, counsel told Mr. Coleman that he would simply ask for a brief background on his son. (*Id.* at ¶ 21 (PageID 4959).) And that is all counsel got.

Trial counsel's performance was little better than doing nothing at all. The jury had just found Petitioner guilty of aggravated murder with the one aggravating circumstance; his trial counsel did virtually nothing to try to spare his life.

If *that* is not prejudicially ineffective, then *Strickland* has been sapped of any meaning in the real world of capital trials where juries can, indeed, be persuaded by effective advocacy for life, even in cases with multiple murders and crimes that are magnitudes worse than this one. When such advocacy is utterly lacking, as here, the result will be a death sentence every single time. Petitioner's IAC-mitigation claim—in this grossly weak case of garden-variety drug violence which never should have been a capital case, and where Petitioner may actually be innocent—should have prevailed *right here*, on the basis of the one-question mitigation, without any need to tally up all the rest of the obvious prejudice to Petitioner from his trial counsel's inept penalty-

phase performance.

C. The state courts and the Sixth Circuit panel have erroneously disregarded the importance of the testimony of Petitioner's mother and other loved ones and friends.

But that tally easily confirms that Petitioner was prejudiced, and that any contrary conclusion violates *Strickland* and/or unreasonably applies it (even *if* deference is due). Trial counsel's failure to present Petitioner's mother should, alone, be enough for him to prevail.

It is confounding that the courts, including the Sixth Circuit panel, were so dismissive of the omitted evidence of Petitioner's mother, and that of his sister and his friends. Such unreasonable discounting of core mitigation is the same mistake the Florida Supreme Court made in *Porter v. McCollum*, 558 U.S. 30 (2009), when it "did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Id.* at 42. The discounting of such evidence and argument also contradicts fundamental principles of capital litigation and the jury's central role. One of those principles is that a death sentence must reflect the reasoned moral judgment of a sentencer who has been able to fairly consider any evidence that may call for a sentence less than death.

Testimony from a mom that she loves her son and wants him to live, all by itself, can make the difference between life and death. There is little doubt that a well-prepared, thoughtful, and compassionate presentation by Mrs. Coleman about her son, his upbringing from her perspective, his flaws and how and when they developed, his good qualities, and her love for him despite everything, would have been very significant and helpful mitigation testimony. She was the closest to Petitioner, and him to her, making her testimony all the more important, and substantially different in strength, subject matter, perspective, and weight than the one measly question to Mr. Coleman.

The presentation of the mom's testimony alone, in such a weak case, was reasonably likely

to have persuaded at least one juror to spare Petitioner's life. *Andrus*, 140 S. Ct. at 1887 (prejudice exists under *Strickland* "at the very least" where "there is a reasonable probability that 'at least one juror would have struck a different balance'" (quoting *Wiggins*, 539 U.S. at 537). However, the perplexing response of the courts has essentially been: "That's insignificant *plus* she was out in the hall and too emotional to testify." Yet that only raises the obvious question: Why were trial counsel so utterly unprepared that one of their very best and most important mitigation witnesses wasn't ready to testify? That is only further proof of the ineptitude that characterized the performance. Competent counsel would have been aware of how emotional these circumstances were for Mrs. Coleman, would have explained to her long before trial the importance of her testimony, and would have spent the necessary time—even practice sessions—in the weeks before any mitigation hearing to help her overcome any fear. And, if there was any doubt of her ability to testify when the time came, a video deposition should have been obtained. Doing nothing and then, on the day of the hearing, learning that the key witnesses is "too emotional," is inexcusable neglect which prejudiced Petitioner.

Same with Petitioner's sister and the other women in Petitioner's life who love and care for him and/or are mothers of his children, even if he may not have married them. All of this omitted evidence starts to tally up to a substantially weightier mitigation case than the slight one-question put forth by trial counsel. It begins to paint a picture of a man for whom many people care a great deal, are fond of, even love, and want to see live despite his faults. The reviewing courts have essentially said: "That's cumulative, so it's not enough." But that is simply not correct and is an unreasonable determination of fact. When you start with virtually nothing, as here due to trial counsel's deficient performance, the evidence you add to the "M" side of the "A vs. M" scales is not "cumulative." Plus, these same courts have characterized the shoddy evidence against Petitioner as "overwhelming" because there are *multiple* snitches and other flawed and biased

witnesses who claim to have heard Petitioner say incriminating words he denies saying. By that standard of whelming, the *multiple* witnesses who love Petitioner and would have been ready and willing to tell that to the jury and help humanize him is hardly cumulative; it amounts to real weight which, in reasonable probability, would have made the difference between life and death for at least one juror. And that is the definition of prejudice. *Andrus*, 140 S. Ct. at 1887.

D. The state courts and the Sixth Circuit panel have erroneously disregarded the importance of the mental health evidence and argument.

The state and federal courts were also dismissive of the omitted mental health evidence and argument that Dr. Eimer was prepared to offer. That, again, is the same mistake as in *Porter v. McCollum*.

Evidence about a defendant's mental health has always been viewed as critical to the moral judgment the jury is asked to make. Dr. Eimer's comprehensive and detailed report provides numerous topics of mitigation evidence that would have been useful at trial in humanizing Petitioner and in helping the jury understand what happened with him such that he became involved in criminal activity and was found to have committed such a serious crime. (R. 231-10, Dr. Eimer Report (PageID 5042-54).) The jury may not have liked everything they learned about Petitioner, and may have concluded he was a flawed person in many ways. But, by providing the jury with a more complete understanding of his humanity—including the formative influences on him, his social history, his "fascinating" psychological profile which includes "chronic psychological maladjustment" and a diagnosed compulsive personality disorder, and the conflicting drives of being rigid and moralistic yet at the same time also being eager to please and craving acceptance—counsel would have enabled a case for life and would have provided more than sufficient evidence for one or more jurors to balance against, and outweigh, the relatively weak aggravation that exists in this case.

Mitigation, at its core, is a plea for human understanding, an urging to see a convicted murderer as a human being. That can only happen in a capital case by providing relevant information about that person, to help the jurors understand him and his situation in life. The one-question presentation by trial counsel with Mr. Coleman did not come close to achieving that purpose. Dr. Eimer's work—as supplemented with Mrs. Coleman, the other family members and friends, the employment information, a cultural expert, and some *Skipper* evidence of Petitioner's good behavior in jail—would have provided the essential information necessary to empower jurors to choose life. *See, e.g., Sears v. Upton*, 561 U.S. 945, 951 (2010) (“This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts--especially in light of his purportedly stable upbringing.”). This Court has long made clear that “fundamental respect for humanity . . . requires consideration of the character and record of the individual offender,” because therein may lie “compassionate or mitigating factors stemming from the diverse frailties of humankind.” *Woodson v. N. Carolina*, 428 U.S. 280, 304 (1976).

E. The prejudice to Petitioner is even more apparent when the arguments and authorities which the Sixth Circuit erroneously refused to consider are added into the consideration of the prejudicial impact of trial counsel's deficient penalty-phase performance.

Petitioner is entitled to relief on his IAC-mitigation claim even without considering the arguments and authorities which the Sixth Circuit erroneously refused to consider, as addressed above in Part I. But, when those are added to the mix, it makes Petitioner's entitlement to relief even more obvious, and any contrary conclusion still likewise an unreasonable application of *Strickland* (even if deference is due).

Trial counsel should have presented the psychological testimony, should have presented a cultural expert on the drug culture of the urban streets, and should have done a much better job

with the mitigation theory *they selected* that the murder was unlikely had Petitioner not been under duress or strong provocation. The additional arguments and authorities, such as about rats and snitches, and the universal revulsion toward them and how strongly provocative their seedy behavior is to those they betray (*see, e.g., The Informer*, the 1935 movie by John Ford with Victor McLaglen), provide further support for how woeful trial counsel's performance was and how prejudicial their failures were.

III. Petitioner is entitled to at least a hearing on his *Brady* claim because no court has yet to conduct a hearing to hear from the witnesses and, therefore, the determination of the facts against Petitioner to reject his claim is unreasonable, denies due process, and is not entitled to any deference in habeas.

There are two items of *Brady* material that when considered individually or together require a new trial or at the very least an evidentiary hearing. One item is the "Sapp letter" and the other is the "Sapp affidavit".

For a new trial under a *Brady* claim, there are three elements:

1. The evidence must be favorable because it is exculpatory or impeaching;
2. The evidence must have been suppressed by the State either willfully or inadvertently;
3. Prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

The state court's failure to conduct a hearing resulted in an unreasonable determination of the facts, thereby making federal review in habeas *de novo*, with no AEDPA deference owed. 28 U.S.C. 2254(d)(2).

The federal district court committed reversible error in failing to conduct its own hearing on this issue and in denying habeas relief on the *Brady* claim based only on a cold paper record. The Sixth Circuit compounded the error when it relied on and applied *Sumner v. Mata*, 449 U.S.

539, 547 (1981). *See Coleman v. Bradshaw*, 974 F.3d at 717 n.3 (*Appx*-0008).

Sumner applied the 1966 version of 28 U.S.C. 2254 which has no application to this case. The version of 2254 that applies here is the 1996 version, signed into law by President Clinton and known as “AEDPA.” The 1966 version of 2254 is different than the 1996 statute.

It is only necessary to look at *Sumner* at page 546 where the Court quotes from the 1966 version of 2254: “Section 2254(d) applies to cases in which a state court of competent jurisdiction has made ‘a determination after a hearing on the merits of a factual issue.’” Congress eliminated this crucial provision for a hearing in the 1996 revision of 2254(d). Further, Congress added the current version of 2254(d)(2) in 1996 which Petitioner relies on and which did not exist when *Sumner* was decided in 1981.

It is legally incorrect to apply the AEDPA amendments in the context of *Sumner*, when there are two completely different versions of 28 U.S.C. 2254 at issue. No AEDPA deference is owed to any Ohio court on this issue. Contrary to the Sixth Circuit’s opinion, there is no AEDPA bar. *Coleman v. Bradshaw*, 974 F.3d at 718 (*Appx*-0009).

The facts are that inmate William Sapp gave an affidavit in state post-conviction that he told Springfield police in April of 1997 that he is the person who killed the victim and not Petitioner. Sapp’s affidavit is detailed and specific. It is an unambiguous admission of Sapp’s commission of the Stevens murder. (R. 231-16, Motion for New Trial, Exh. A (PageID 5995-96).) Even though Petitioner was convicted in February 1997, the State still had a duty to turn over to the defense this quintessential *Brady* material. *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); *Fields v. Wharrie*, 672 F.3d 505, 514-15 (7th Cir. 2012) (“a prosecutor’s *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial”). Petitioner’s direct appeal was not final until 1999.

A letter Sapp wrote to Uma Timmons in 1998, wherein he also confessed to the Stevens

murder, was likewise never disclosed by the State. Timmons had been a victim of Sapp in a different case who survived his attack and testified against him. The letter from Sapp was a not-so-subtle threat against Timmons reminding her of what he did to the victim in this case “off of Pleasant.” (R. 231-16, Motion for New Trial, Exhs. B, I (6013-15 (6045-47), 6026 (6048)).)

The Sixth Circuit’s decision that the “Sapp letter” is not material and thus not *Brady* material is incredulous. *Coleman v. Bradshaw*, 974 F.3d at 719 (*Appx*-0010).

The Ohio Court of Appeals in denying relief cited the sequence of events giving rise to the *Brady* claims at *State v. Coleman*, 2005-Ohio-3874, ¶¶ 18-24. (*Appx*-0114-15.) In short, Petitioner’s counsel in post-conviction were alerted by an attorney with clients on Ohio’s death row that an inmate wished to confess to the killing of the victim in this case. Counsel diligently pursued this information and Sapp gave an affidavit with some details of the killing of the victim. Sapp said he provided this same information to the police when being interviewed about another homicide. The State never disclosed Sapp’s confession to Petitioner’s counsel.

There was also a newspaper article about a letter Sapp wrote to Timmons which references a murder committed by Sapp “off of Pleasant” which fits the facts of the Stevens murder and its location. Timmons gave that letter to the police but it was never disclosed by the State to Petitioner’s counsel. His counsel only learned of the letter because of a newspaper article referencing the letter.

Sapp was confronted by Officer Moody in prison about his affidavit, in April and June 2002, and supposedly backed off his allegations and was perceived by Moody as having “recanted” the confession and as disputing the suggestion that his reference in the Timmons letter to a homicide “off Pleasant” was a reference to Stevens, claiming it was instead to another murder victim, Gloria White. (R. 231-17, Moody Aff. and Exhibits (PageID 6205-52).) But Sapp was never charged with that murder either. (R. 121-1, Moody Depo. at 19-20 (PageID 1112-13).)

The Ohio post-conviction trial court never conducted an evidentiary hearing to determine the truth when confronted with the Sapp affidavit, the Timmons letter, and Moody's unsworn interviews with Sapp. The state trial court made credibility determinations on the paper record. (Trial decision at 8-10 (*Appx*-0156-58); *Coleman*, 2005-Ohio-3874 at ¶¶ 24-35 (*Appx*-0115-17).) The Ohio Court of Appeals also rejected the claim based in part on "overwhelming evidence" of guilt. (*Id.* at ¶ 31 (*Appx*-0116).)

The federal district court failed to credit Petitioner's arguments that the findings of facts by the state court were an unreasonable determination of the facts and an unreasonable application of well-established federal law. *See* 28 U.S.C. § 2254 (d)(2) & (d)(1).

The process used by the Ohio post-conviction trial court to determine the facts surrounding the Sapp affidavit, the Timmons letter, and the Moody interviews is such that 2254(d)(2) has been violated. Once it is determined that 2254(d)(2) is violated, the federal habeas court can conduct its own evidentiary hearing and make its own factual findings, *de novo*, in resolving the *Brady* claim. The federal court may also consider, in addressing the claim *de novo*, the information in the expanded habeas record even though that information was not before the state court when it addressed the *Brady* claim. That includes, but is not limited to, the deposition testimony of Joseph Bodine as provided in habeas. Bodine is the attorney who obtained the confession/affidavit from Sapp in August 2001. It also includes Moody's deposition and the DNA test results.

Courts have held that when a state court makes evidentiary findings without holding a hearing then any findings from that process are unreasonable and 2254(d)(2) has been violated. *See, e.g., Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004); *Smith v. Aldridge*, 904 F.3d 874, 882 (10th Cir. 2018).

Did the Ohio court reasonably determine the disputed facts? Generally-accepted norms for the adjudication of federal constitutional questions require an evidentiary hearing. A well-pled

federal claim cannot be summarily dismissed even where the respondent “files an answer denying some or all of the allegations.” *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116, 119 (1956); *Palmer v. Ashe*, 342 U.S. 134 (1951). One cannot reject a well pled federal claim by resorting to “speculation or surmise.” *Palmer* at 137. A dispute over material facts “should be decided only after a hearing.” *Herman* at 121; *McNeal v. Culver*, 365 U.S. 109, 117 (1961). Well-pled allegations should be taken as true when determining how to proceed. *See Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011).

The Seventh Circuit remanded for an evidentiary hearing a case where the state court denied relief without a hearing on a claim of ineffective assistance of counsel. *Campbell v. Reardon*, 780 F.3d 752 (7th Cir. 2015).

It is ultimately up to a jury to determine the value of the evidence presented. The affidavit and letter from Sapp to Timmons deserve a hearing. Clearly, admissions by another person that he killed the victim are *Brady* material. Evidence of third-party guilt is admissible. *Holmes v. South Carolina*, 547 U.S. 319 (2006). Petitioner had a right to present a complete defense which included evidence that Sapp was the murderer. It is up to a jury to ultimately decide the value of the evidence against Sapp and to decide whether there is reasonable doubt that Petitioner committed the murder in light of the evidence against Sapp, including his sworn confession.

A reasonable jury or juror may have credited the admissions by Sapp, despite his later alleged backtracking when confronted by Moody at the prison. *Cauthern v. Colson*, 736 F.3d 465, 487 (6th Cir. 2013).

Ascertaining whether a witness is telling the truth—an entirely unscientific task—demands an opportunity for the factfinder to look him in the eye, observe his demeanor, note the dryness of his brow, hear the inflections in his voice, and in general to observe how he holds up on cross-examination. *See, e.g., Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985); *United States v.*

Mancillas, 183 F.3d 682, 701 n. 22 (7th Cir. 1999). Cold paper records supply none of that essential information. *See Mendiola v. Schomig*, 224 F.3d 589, 596 (7th Cir. 2000) (Rovner, J., dissenting).

No judge, state or federal, has ever heard Sapp testify in person about his admissions or his affidavit. It might be a different situation if a judge in post-conviction had to evaluate an affidavit from a witness that testified in his presence at trial and then later submitted an affidavit disclaiming his testimony. Perhaps then the judge would have a factual basis to determine the credibility of the affidavit in light of the testimony he personally observed. However, such a case is not this one. If Sapp is telling the truth that he killed Stevens, then his affidavit, letter to Timmons, and potential testimony would exonerate Petitioner.

A hearing is in order because the state court unreasonably determined the facts of the *Brady* claim. Had the Ohio court simply taken the time to hold a hearing and then made reasonable credibility determinations, Petitioner (assuming the findings were made against him) would have little to litigate in federal court on this issue.

A federal court is not required to “gloss over” the mistakes made by state courts. *Mendiola* at 601 (dissenting judge). It was unreasonable for the Ohio court to not conduct a hearing when presented with sworn testimony by another person confessing to the crime, and in a case where the evidence against Petitioner was already exceedingly weak for the reasons addressed throughout this Petition for Writ of Certiorari.

Contrary to the district court’s repetition of the Ohio court’s erroneous conclusion that the evidence of guilt was “overwhelming,” the evidence is *far* from overwhelming. It instead reeks of overreach and is laden with symptoms of wrongful conviction. Any finding of overwhelming guilt is contrary to 2254(d)(2).

An evidentiary hearing on the *Brady* claim may very well lead to a new trial for Petitioner and his acquittal or even another conviction; but “the value of a constitutionally valid trial is

fundamental to our way of life.” *Whitely v. Ercole*, 725 F. Supp 2d 398, 427 (S.D.N.Y. 2010), *rev’d on other grounds*, 642 F.3d 278 (2d Cir. 2011).

When one person is convicted of aggravated murder and is sentenced to death and a different person confesses to that same aggravated murder, then a judge somewhere, state or federal, must conduct a hearing to evaluate the credibility of the person now confessing. In this case, Petitioner has always vehemently maintained his innocence; after Petitioner’s verdict but before his case became final on direct review, another person (Sapp) confessed to the murder of which Petitioner stands convicted, and Sapp provided details of the murder that require an evidentiary hearing. Further, the police knew about Sapp’s confession but never disclosed it to Petitioner’s lawyers. Such a confession is *Brady* material and a new trial or at least an evidentiary hearing must be conducted.

CONCLUSION

The petition for a writ of certiorari should be granted. The decision of the Sixth Circuit should be vacated. Petitioner’s conviction and 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

/s/ John P. Parker

John P. Parker (OH 0041243)
MEMBER OF THE BAR OF THIS COURT
Attorney at Law

988 East 185th Street
Cleveland, Ohio 44119
Phone: (216) 881-0900
Email: advocateparker@gmail.com

*COUNSEL OF RECORD

Counsel for Petitioner Timothy L. Coleman