No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

Davel Chinn,

Applicant-Petitioner,

v.

Warden, Chillicothe Correctional Institution,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled.

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CAPITAL CASE

QUESTIONS PRESENTED

As this Court has repeatedly and clearly held, to prevail on a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), a defendant "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted." *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (quoting *Smith v. Cain*, 565 U.S. 73, 75 (2012)). Despite this, in assessing Davel Chinn's *Brady* claim, the United State Court of Appeals for the Sixth Circuit required Chinn to prove that "it is more probable than not that the withheld evidence would have created a different result."

The questions presented are:

1. Whether a petitioner who raises a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), must establish that they were more likely than not prejudiced by the government's suppression of favorable evidence.
2. Whether the judgment of the Sixth Circuit requiring the petitioner in this case to establish that he was more likely than not prejudiced by the government's suppression of favorable evidence should be summarily reversed.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Davel Chinn respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the denial of Chinn's habeas petition is published as *Chinn v. Warden*, 24 F.4th 1096, 1103 (6th Cir. 2022), and is reproduced as Appendix A at A-1. The decision of the District Court denying Chinn's motion to alter or amend judgment is unpublished and is reproduced as Appendix B at A-8. The decision of the District Court denying Chinn's petition for writ of habeas corpus is unpublished and available at *Chinn v. Warden*, No. 3:02-cv-512, 2020 WL 2781522 (S.D. Ohio May 29, 2020), and is reproduced as Appendix D at A-20.

The decision of the Ohio Supreme Court affirming Chinn's convictions and death sentence on direct review is reported as *State v. Chinn*, 709 N.E.2d 1166 (1999), and is reproduced as Appendix H at A-209. The decision of the Montgomery County Court of Common Pleas denying Chinn's petition for post-conviction relief is unreported and available as *State v. Chinn*, No. 18535, 2001 WL 788402 (Ohio App. 2nd Dist. Jul. 13, 2001), and is reproduced as Appendix G at A-199.

JURISDICTIONAL STATEMENT

In this petition, Davel Chinn seeks review of the decision in which the United States Court of Appeals for the Sixth Circuit affirmed the denial of his habeas corpus petition on

February 4, 2022. The time for filing Chinn's petition for certiorari was extended by 60 days by Justice Kavanaugh on May 4, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence 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; nor shall private property be taken for public use, without just compensation

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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 defence.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> 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.

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

> merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Shortly after Davel Chinn was convicted and sentenced to death for the murder of Brian Jones, an Ohio court reviewing his case remarked on "the substantial amount of residual doubt" about Chinn's culpability. *State v. Chinn*, No. 11835, 1991 WL 289178, at *20 (Ohio Ct. App. Dec. 27, 1991). (Since that time, residual doubt is no longer a viable mitigating factor in Ohio.) Chinn was convicted despite the fact that three separate witnesses described a shooter significantly taller than Chinn, and three other people provided an alibi, testifying they saw Chinn elsewhere during the time of the crime. Not only that, the State had no physical evidence implicating Chinn, despite searching the victim's car and Chinn's home. And Chinn was excluded as the source of the fingerprints lifted from the stolen vehicle.

As the Supreme Court of Ohio later determined, Chinn's conviction "hinged" on the testimony of Marvin Washington, the State's star witness and accomplice to the crimes. *State v. Chinn*, 709 N.E.2d 1166, 1178 (Ohio 1999). "If the jury accepted Washington's testimony, the jury was certain to convict [Chinn], but if the jury did not believe Washington, it was certain to acquit appellant of all charges." *Id*. But unbeknownst to Chinn's defense team, the State possessed, but did not provide, evidence that severely undermined Washington's credibility.

Suppressed juvenile court records documented that Washington's IQ was just 48 points, situating him among the lowest one tenth of one percent (0.1%) of the population. Not only did he function far below his age of 15 years, he suffered from substantial memory problems: he both struggled to acquire and encode new information, and had trouble distinguishing between his remembered reality and information from outside sources, or even things he imagined to be true. Like many intellectually disabled people, Washington was eager to please authority figures, and would change his responses to fit the answer he thought a questioner desired. On top of all that, Washington had poor vision.

In addition to questions this information raised as to Washington's reliability in general, the suppressed records also revealed statements that conflicted with his trial testimony, including ones that called into question his testimony that, on the night of the crime he had consumed just one beer. The records instead showed he may have suffered from "chemically induced amnesia" that evening and had episodes of blacking out.

With the suppression not in doubt, the question before the United State Court of Appeals for the Sixth Circuit was whether Chinn had shown sufficient prejudice based on his inability to impeach Washington with the evidence concealed in the withheld records. Imposing a standard that this Court has never endorsed, and indeed, has specifically rejected, the Sixth Circuit denied Chinn's *Brady* claim. This Court should summarily reverse the decision of the Sixth Circuit because it held Chinn to a "more probable than not" standard in direct contradiction with this Court's precedents.

A. Trial Evidence

Late in the evening of January 30, 1989, acquaintances Gary Welborn and Brian Jones saw each other while driving in downtown Dayton. Trial Tr., R. 132-4, PageID 8809–11. They drove to a parking lot at the corner of Court and Ludlow Streets and parked beside each other to

talk. *Id.* at PageID 8811. This parking lot was located near an adult bookstore. *Id.* at PageID 8770. As Jones and Welborn talked, Welborn noticed three men standing on the corner. *Id.* at PageID 8813. The men yelled something to Jones and Welborn, who ignored them. *Id.*

Welborn testified that two of the men approached them. *Id.* at PageID 8815. Welborn later identified one of the men as Marvin Washington, a juvenile. *Id.* at PageID 8818. Welborn told the police that Washington was about 5'6" tall, and that the second man was about 5'9". *Id.* at PageID 8829.

According to Welborn, Jones asked the men to leave them alone, but Washington walked behind Jones and the other man held a gun to Welborn's head and asked for money. *Id.* at PageID 8815–19. After Welborn and Jones had surrendered their wallets, Washington and the other man discussed which car they should steal. *Id.* at PageID 8820. They decided to steal both. *Id.* at PageID 8821. Jones gave his keys to Washington, who got into Jones's car. *Id.* The man with the gun then walked around behind Welborn's car to the passenger's side. Before he could get in, Welborn sped away to the nearby police headquarters. *Id.* at PageID 8822-23.

State's witness Stacy Ann Dyer testified that she was in her driveway at 5500 Germantown Pike when she saw a car pull over at about 11:30 P.M. *Id.* at PageID 8779-81. Dyer saw a man get out of the driver's side of the car and walk to the passenger side where another man got out. *Id.* at PageID 8782. The two men went to the back of the car. *Id.* at PageID 8782–83. Dyer heard a shot and a scream and saw one man run across the yard and fall. *Id.* at PageID 8783. This man was later identified as Brian Jones. *Id.* at PageID 8766. The car then drove off. *Id.* at PageID 8783. Dyer was not able to identify or describe either man. *Id.* at PageID 8783, 8787. She said there was no noticeable difference in height between the shooter and the victim (Jones). *Id.* at PageID 8793.

At trial, the primary witness for the State was Marvin Washington. Washington was only fifteen years old at the time of the crime. R. 132-5, PageID 8925. He admitted his involvement in the shooting after he was turned in by an acquaintance. *Id.* at PageID 8946, 8989. Washington told the police that his accomplice was named "Tony." He did not know "Tony's" last name. *Id.* at PageID 8960. He told the police that "Tony" was taller than him. *Id.* at PageID 8967.

Washington said that he and Tony met downtown on the evening of January 30, 1989. *Id.* at PageID 8926–27. In his original statement to the police, Washington said he met Tony by chance, after he caught the bus downtown between 6:00 and 7:00 P.M. *Id.* at PageID 8963–64. He indicated that he had met Tony only once before, about a year before the murder. *Id.* at PageID 8926–27. Washington said that Tony suggested they commit a robbery. *Id.* at PageID 8932. They walked to Ludlow Street and approached the two parked cars. *Id.* at PageID 8933–35.

After Welborn sped away, Washington drove out to Germantown Road with Jones and Tony in the car. *Id.* at PageID 8936–39. Washington pulled over to the side of the road, where Tony and Jones got out. *Id.* at PageID 8939–41. Tony shot Jones. *Id.* at PageID 8941. Washington and Tony then drove to a house and a man named Christopher Ward came outside. *Id.* at PageID 8943–45. Washington and Tony eventually left, but Washington later returned and spent the night with Ward and told him about the shooting. *Id.* at PageID 8946.

Washington failed to identify Chinn during a police lineup. *Id.* at PageID 9100–01. Detective Lantz testified, however, that Washington identified Chinn *after* the lineup (purportedly without any prompting from the police) because Washington had been too afraid to

finger Chinn during the lineup, despite the fact that he was to make the identification by simply writing down a number. *Id.* at PageID 9101–02.

The victim who escaped, Gary Welborn, also viewed this lineup, and he was unable to make any visual identification. *Id.* at PageID 9098. Based on the sound of the suspect's voice, Welborn identified someone other than Chinn as the man who had robbed him. *Id.* at PageID 9099.

Two other witnesses, Jack Couch and Ward, saw Washington and Tony on the night of the murder. Couch testified that he saw the two men together just before he entered the adult bookstore where he worked. R. 132-4, PageID 8772–73. Although he could not identify the person Washington was with, he testified that man was taller than Washington. *Id.* at PageID 8777-78.

Ward confirmed that Washington and Tony came to his place around 12:30 A.M. Ward identified Chinn as the man who sat next to Washington in the stolen car. *Id.* at PageID 8857–58. But he also stated that he viewed the passenger only while he had been standing on the driver's side of the car, talking to Washington, and that he never went around to the passenger side. *Id.* at PageID 8870–71.

Defense counsel attempted to question Ward about a prior statement he made to the police indicating that he had not paid any attention to the other man in the car. The prosecutor's objection to the question was sustained, however. *Id.* at PageID 8877, 8885. The defense did elicit testimony from Ward that he discussed with the detective a possibility of a reward for identifying the person who committed the homicide. *Id.* at PageID 8883–84.

The victim's car was recovered and thoroughly examined, but no evidence linked Chinn to the stolen car. Trial Tr., R. 132-5, PageID 8895–8906. Chinn was excluded as the source of

latent prints recovered from the vehicle. *Id.* at PageID 8897, 8902. Likewise, a search of Chinn's home failed to produce any evidence related to the crime. Trial Tr., R. 132-6, PageID 9118.

Although witnesses estimated the killer to be as tall as 5'9 or 5'10", Chinn stood only 5'5½". *See* Trial Tr., R. 132-4, PageID 8793, 8777–78; and R. 132-7, PageID 9405. Jones, on the other hand, whom Dyer testified was the same height as his shooter, was 5'10" tall. Trial Tr., R. 132-4, PageID 8726. And Washington, who, consistent with Couch, testified he was shorter than the shooter, was between 5'5" and 5'6" inches tall. Trial Tr., R. 132-5, PageID 8957.

Chinn presented an alibi. Chinn attended classes at Cambridge Technical Institution on the evening of the murder. Both a classmate and an instructor testified, establishing that Chinn was present for a midterm exam, and rode home on the bus with the classmate, Sandra Taste. R. 132-6, PageID 9143–9206. Chinn's alibi covered the time during which Washington said that he met up with Tony. Chinn's mother also testified that she saw him at home at 9:30 P.M., and that he was home all evening. *Id.* at PageID 9203.

During the mitigation phase, Chinn gave an unsworn statement to the jury in which he maintained his innocence. Trial Tr., R. 132-7, PageID 9408.

B. Evidence discovered in post-conviction proceedings

It was evident from the trial that the State's pivotal witness, Marvin Washington, had credibility problems. As the state appellate court noted on direct appeal:

> Washington's testimony was crucial to Chinn's conviction, but given Washington's admitted culpability in the murder of Jones his testimony is inherently suspect. This suspicion is intensified by the fact that Washington testified that he had been introduced to "Tony" and his girlfriend Stephanie Woods by Henry Walker one year before the night of the murder. (T. 257). Detective Lantz testified that he had spoken to both Walker and Woods, and both claimed not to know anyone named "Tony", and neither could identify Chinn by his picture. (T. 412-413). Washington's friend,

> Ward, was also able to identify Chinn. However, Ward initially told police that did not get a clear look at "Tony," (T. 158), and before making the identification inquired into the availability of a reward, (T. 181).

State v. Chinn, No. 11835, 1991 WL 289178, at *20 (Ohio Ct. App. Dec. 27, 1991). Moreover, Washington's account of when he met up with Tony conflicted with Chinn's alibi evidence from multiple witnesses.

What was not known at the time of trial, however, was the extent and sources of more serious credibility issues regarding Washington. That information was discovered during post-conviction proceedings when an investigator with the Office of the Ohio Public Defender requested Washington's records from the juvenile court. R. 132-7, PageID 9464, 9466. Those records were provided to Chinn's counsel on May 17, 1993. *Id.* at 9466.

The records revealed that Washington had a full-scale IQ of 48, (Post-Conviction Ex. 6, R. 131-6, PageID 6458), and "function[ed] well below his chronological age," (Post-Conviction Ex. 8, *id.* at PageID 6465). They painted a picture of a boy with severe memory issues, an alarming ability to be swayed by external information, and a habit of conforming his answers to include that external information so as to give the "correct" response. The court psychologists described Washington as "very eager to please" and "easily swayed." Post-Conviction Ex. 6, *id*. at PageID 6458.

They described how Washington would confuse external information with his own, self-generated thoughts, and then would offer answers that he believed to be the correct response. They explained that his ability to "acquire new learning is easily interrupted or interfered with if there are distractions or other competing stimuli present during his attempts to acquire new information." Post-Conviction Ex. 7, *id*. at PageID 6462. And they noted that he "tends to distort or confuse the new (external) information he attempts to acquire with self-generated

messages" and "often offered semantically close self-generated answers in an attempt to give the correct response." *Id*.

The information Washington provided within those reports also contradicted his testimony at Chinn's trial. On the stand, Washington responded to questions concerning whether he had been under the influence by stating that he and "Tony" had only had one beer each and "[s]moked cigarettes. That's it." R. 132-5, PageID 8965, 8970. But by his own account in the court's Chemical Abuse Assessment, Washington was so chemically altered that night that he may have blacked out. Post-Conviction Ex. 6, R. 131-6, PageID 6466. Specifically addressing Washington's charges in this case, the author of the Chemical Abuse Assessment noted the following:

> The youth is currently before the Court on an aggravated murder, aggravated robbery, and kidnapping offense. . . . In discussing with the youth his previous court involvements, the youth indicated to this specialist that the only time he was under the influence of chemicals during any of the offenses was the night that the youth is currently before the court. Additionally, the youth indicated that he "forgot some of the night." This would indicate that the youth may possibly have experienced a black-out episode, (chemical induced amnesia).

Id.

In addition, Washington's records noted that he had "poor vision," and "require[d] corrective lenses" but refused to wear them. Post-Conviction Ex. 9, *id.* at PageID 6469.

Despite receiving an evidentiary hearing concerning this information, Chinn never got to question Washington about it. Washington was killed in an unrelated crime on December 26, 1992. *See State v. Keene*, 693 N.E.2d 246 (1998).

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case under Supreme Court Rule 10(c) because the United States Court of Appeals for the Sixth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Specifically, this is a capital case involving a blatant violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Sixth Circuit denied relief by imposing a prejudice standard that is in direct conflict with this Court's established precedent. This Court should grant certiorari and summarily reverse.

A. The Sixth Circuit's formulation of the *Brady* materiality standard is in direct conflict with this Court's precedent.

As this Court has repeatedly explained, a petitioner who raises a *Brady* claim need only demonstrate that a "reasonable probability" of prejudice has resulted from the government's suppression of favorable evidence. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Smith v. Cain*, 565 U.S. 73, 75 (2012); *Cone v. Bell*, 556 U.S. 449, 469–70 (2009). In articulating the showing required to meet this standard, this Court has emphasized on multiple occasions that a petitioner need not establish that they were more likely than not prejudiced by the nondisclosure. For example:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Kyles, 514 U.S. at 434 (citation and internal quotation marks omitted). As this Court further explained, "[a] reasonable probability does *not* mean that the defendant '*would more likely than not* have received a different verdict with the evidence,' only that the likelihood of a different

result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" *Smith*, 565 U.S. at 75 (quoting *Kyles*) (emphasis added). And again:

> To prevail on his *Brady* claim, Wearry need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted.

Wearry v. Cain, 577 U.S. 385, 392 (2016) (quoting *Smith*).

Despite this Court's unambiguous instructions on this issue, the Sixth Circuit framed the *Brady* prejudice inquiry in Chinn's case in the following terms: "Thus, 'reasonable probability' for *Brady's* purposes is effectively the same as a more-probable-than-not standard. The *Brady* question now *is whether it is more probable than not that the withheld evidence would have created a different result*." *Chinn v. Warden*, 24 F.4th 1096, 1103 (6th Cir. 2022) (emphasis added). The Sixth Circuit's application of *Brady's* prejudice standard is in direct conflict with this Court's established precedent.

The Sixth Circuit attempted to justify this departure by relying on *Harrington v. Richter*, 562 U.S. 86 (2011), for the proposition that "the difference between" the "'reasonably likely' standard," *Strickland v. Washington*, 466 U.S. 668 (1984), and a "'more-probable-than-not standard is slight and matters only in the rarest case.'" *Chinn*, 24 F.4th at 1103 (quoting *Richter*, 562 U.S. at 111–12).[1] The Sixth Circuit accordingly found that it was free to employ a "more likely than not" standard in assessing prejudice with respect to Chinn's *Brady* claim, so long as it recognized that "[t]he caveat is that there is a 'slight' difference between more-probable-than-not and 'reasonable probability' and judges can decide for themselves how slight is 'slight' enough." *See Id*. at 1103.

[1] Although *Richter* dealt with a claim of ineffective assistance of counsel under *Strickland*, *Strickland* and claims involving the suppression of exculpatory evidence both employ the "reasonable probability" standard in determining prejudice. *Strickland*, 466 U.S. at 694.

The Sixth Circuit's formulation of *Brady's* materiality standard is indefensible and cannot be reconciled with this Court's precedent. However "slight" the distinction between "reasonable probability" and "more likely than not" may be, the distinction still exists and the Sixth Circuit was not free to simply disregard it so long as it held open the possibility that in an exceptionally rare case, a lesser showing might be sufficient to warrant relief. As already explained, this Court has repeatedly made clear that *Brady's* materiality standard *starts* from the proposition that a petitioner need not show that they were more likely than not prejudiced. *Kyles*, 514 U.S. at 434; *Smith*, 565 U.S. at 75; *Wearry*, 577 U.S. at 392. In contrast, the Sixth Circuit began with the proposition that Chinn *was required* to show that he was more likely than not prejudiced, while allowing for the possibility that if Chinn's case was among the "rarest," he might be able to obtain relief based on a lesser showing. This error was an egregious mis-formulation of *Brady's* materiality standard and summary reversal is warranted.

The severe nature of the Sixth Circuit's error in this case is exacerbated by the fact that this Court has recognized that if a *state court* committed a virtually identical error in its application of the "reasonable probability" standard, no deference would be warranted in subsequent federal habeas corpus proceedings under 28 U.S.C. § 2254(d). As explained in *Williams v. Taylor*:

> Take, for example, our decision in *Strickland v. Washington*, 466 U. S. 668 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence[2] that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character

[2] As this Court has recognized, "preponderance of the evidence" and "more likely than not" essentially mean the exact same thing. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328–29 (2007) ("At trial, she must then prove her case by a 'preponderance of the evidence.' Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter.") (emphasis in original).

> or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id*., at 694 . . . Accordingly . . . a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

Williams, 529 U.S. at 405–06.

Accordingly, the Sixth Circuit's opinion in this case represents an indefensible departure from this Court's established precedent, and no fairminded jurist could reach a conclusion to the contrary. A grant of certiorari and a summary reversal are warranted.

B. AEDPA poses no bar to relief.

In addition, although the Ohio Court of Appeals denied Chinn's claim on the merits, no deference is warranted under 28 U.S.C. § 2254(d), and as a result AEDPA poses no bar to relief. The state appellate court found that Chinn could not establish prejudice because Washington's identification testimony was not central to the prosecution's case. *State v. Chinn*, No. 18535, 2001 WL 788402, at *12. The Ohio Court of Appeals relied on the post-conviction hearing testimony of one of Chinn's trial lawyers in reaching this conclusion, *see Id*., but simultaneously disregarded the Ohio Supreme Court's earlier assessment of the prosecution's case on direct review. As the Ohio Supreme Court explained:

> The state's case against appellant hinged on the testimony of Marvin Washington. If the jury accepted Washington's testimony, the jury was certain to convict appellant, but if the jury did not believe Washington, it was certain to acquit appellant of all charges.

State v. Chinn, 709 N.E.2d 1166, 1178 (Ohio 1999).

Accordingly, no fairminded jurist could agree with the Ohio Court of Appeals' rejection of Chinn's claim. As the Ohio Supreme Court recognized, this entire case was about the credibility of Marvin Washington. Cherry-picking the post-conviction testimony of one of

Chinn's trial lawyers to reach a contrary conclusion was an unreasonable application of *Brady* to the facts of Chinn's case, and as a result no deference is warranted under § 2254(d).

The Ohio Court of Appeals further found that Chinn could not establish prejudice because "Chinn's own attorney, Monta, testified at the post-conviction relief hearing that had he had Washington's juvenile records prior to the trial, he 'may very well' have had an expert examine Washington to see if his testimony could be impeached. Monta did not say definitively that he would have consulted an expert had he had the records." *Chinn*, 2001 WL 788402, at *12. But the inquiry before the state appellate court was whether there was a reasonable probability that the disclosure of the records would have led to a more favorable result at trial. Conditioning Chinn's entitlement to relief on his trial lawyer affirmatively saying "definitively that he would have consulted an expert had he had the records" is obviously incompatible with this Court's precedents, whether viewed under the "contrary to" or "unreasonable application" clause of § 2254(d). *Cf. Lafler v. Cooper*, 566 U.S. 156, 173 (2012).

Finally, the Ohio Court of Appeals' finding that Chinn's post-conviction expert witness (who testified about the reliability of Washington's testimony in light of the suppressed evidence) had been contradicted by other witnesses, *Chinn*, 2001 WL 788402, at *12, unreasonably disregarded the fact that a *Brady* claim cannot be defeated merely by showing that other evidence contradicts the favorable evidence that would have been presented at trial absent the government's suppression. *See Kyles*, 514 U.S. at 434-35. Materiality "is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* Accordingly, because none of the state court's justifications for rejecting Chinn's claim are

entitled to deference, AEDPA poses no bar to relief. *See Lambert v. Wetzel*, 565 U.S. 520, 525 (2012).

C. Under the proper materiality standard, Chinn is entitled to relief on his *Brady* claim.

The State had no fingerprints, no blood, no hair, nor any other trace evidence to connect Chinn with the murder of Brian Jones. Indeed, Chinn was *excluded* from the only physical evidence found in the victim's car, fingerprints. Trial Tr., R. 132-5, PageID 8897, 8902. A thorough search of every room in Chinn's home also produced no evidence of Chinn's involvement. Trial Tr., R. 132-6, PageID 9117–18.

Moreover, four separate eyewitnesses gave descriptions *inconsistent* with Chinn's height. And two independent, disinterested witnesses confirmed he was taking an exam and riding a bus home at the time the State's star witness claimed he and Chinn were committing the crime. *See* Trial Tr., R. 132-6, PageID 9143-9206. Their testimony was consistent with testimony from Chinn's mother that he was at home after that for the rest of the evening. *Id.* at PageID 9204.

In light of this evidence to doubt Chinn's culpability, the State needed the jury to believe and rely on Marvin Washington's testimony to convict Chinn and to sentence him to death. The suppressed evidence was therefore crucially material to Chinn's defense.

Washington's IQ alone would have led to questions concerning his competency to even testify. A score just two standard deviations below the norm can exempt a defendant from execution for intellectual disability, *see, e.g.*, *Moore v. Texas*, ___U.S.___, 137 S.Ct. 1039, 1045 (2017); Washington's score of 48, which is *four* standard deviations below the norm, placed him in the lowest *one tenth of one percent* (0.1%) of the population.

Even more important, the records tell the story of a boy with severe memory issues, an alarming ability to be swayed by external information, and a habit of conforming his answers to

include that external information in his answers in order to give the "correct" response. The court psychologists described Washington as "very eager to please" and "easily swayed." Post-Conviction Ex. 6, R. 131-63, PageID 6458. They described how he would confuse external information with his own self-generated thoughts, and then would offer answers that he believed to be the correct response, but were, in fact, based on his own invented facts. They explained that his ability to "acquire new learning is easily interrupted or interfered with if there are distractions or other competing stimuli present during his attempts to acquire new information." Post-Conviction Ex. 7, *id.* at PageID 6462. Significantly, they also noted that he "tends to distort or confuse the new (external) information he attempts to acquire with self-generated messages" and that while he demonstrated motivation to learn, he had problems "with regard to accurate information acquisition." *Id*.

Moreover, the information Washington provided within those reports—again, suppressed from Chinn—contradicted what he testified to at Chinn's trial. At trial, Washington responded to questions concerning whether he had been under the influence, stating that he and "Tony" had only had one beer each and "[s]moked cigarettes. That's it." Trial Tr., R. 132-5, PageID 8965, 8970. But by his own account in the court's Chemical Abuse Assessment, Washington was so chemically altered that night *that he may have blacked out*. *See* Post-Conviction Ex. 8, R. 131-6, PageID 6466.

Had the jurors known that Washington had an extremely low IQ and severe memory issues—including confusing and conflating reality with imagined "memories"—but that he was also very eager to please and had an alarming ability to be swayed by external information—not to mention that he had poor vision but refused to wear his required corrective lenses—there can be little confidence they would have relied on his eyewitness account and memory to convict and

sentence a man to death. *See* Post-Conviction Exhibits, R.131-6, PageID 6456–79. Further, had the jurors known that Washington "forgot some of the night" due to chemical abuse and may have blacked out (despite his sworn testimony that he had only had one beer and cigarettes), *see* Post-Conviction Ex. 8, *id.* at PageID 6466, it unquestionably would have made a difference in the outcome of Chinn's case. Washington not only provided the key evidence to connect Chinn with the murder, but the prosecutor also highlighted his testimony in arguing that the jurors should sentence Chinn to death. *See, e.g.*, Trial Tr., R. 132-7, PageID 9431 ("And the Defendant asks for mercy, but yet, after it's all said and done, after he drove away, and after he gave Marvin Washington $5.00, his departing words to Marvin Washington were: Let's go do it again, Wednesday.") Without Marvin Washington, that State's evidence was not strong enough to sustain confidence in either Chinn's conviction or death sentenced.

CONCLUSION

For the foregoing reasons, Petitioner Chinn respectfully asks this Court to grant his petition for writ of certiorari and summarily reverse the Sixth Circuit.

Respectfully submitted,

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