**No. 11-8360**

**In the Supreme Court of the United States**

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WILLIAM T. MONTGOMERY,

*Petitioner,*

v.

NORM ROBINSON, Warden,

*Respondent.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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**CAPITAL CASE—NO EXECUTION DATE SET**

## QUESTION PRESENTED

Whether the Sixth Circuit, sitting en banc, properly found that the Ohio courts did not contravene or unreasonably apply *Brady v. Maryland*, 373 U.S. 83 (1963), by concluding that a withheld police report was not material to either Montgomery's guilt or punishment.

Whether the Sixth Circuit, sitting en banc, properly found that the Ohio courts did not contravene or unreasonably apply clearly established federal law by rejecting Montgomery's claim that the trial court abused its discretion when it determined that a juror was competent and unbiased.

## LIST OF PARTIES

The Petitioner is William T. Montgomery, an inmate at the Chillicothe Correctional Institution.

The Respondent is Norm Robinson, the Warden of the Chillicothe Correctional Institution. Robinson is substituted for his predecessor, David Bobby. *See* Fed. R. Civ. P. 25(d).

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## INTRODUCTION

Petitioner William Montgomery seeks to vacate his conviction and death sentence for murdering two young female roommates. According to Montgomery, the prosecution withheld material exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Montgomery also claims that he was denied a fair, impartial jury because the trial judge did not dismiss a juror who had a dream about Montgomery's mitigation expert. Both of these claims are meritless and the en banc Sixth Circuit correctly rejected them. Montgomery's petition therefore offers no persuasive reason for the Court to grant certiorari.

Montgomery's *Brady* claim fails because he cannot demonstrate that he was prejudiced by the prosecution's failure to disclose a police report. The report is not material to either the question of guilt or Montgomery's death sentence. In fact, the report *undermines* Montgomery's sole defense at trial. Nor need the Court concern itself with Montgomery's eleventh-hour report by a non-examining coroner—which offers a different opinion than the 1986 coroner's report. That report is not "new" evidence and even if it were, this is not the proper forum to review that evidence for the first time.

Montgomery's juror performance claim also fails. During the sentencing phase of Montgomery's trial, one juror notified the trial judge that she had dreamed about the defense's mitigation expert. The judge questioned her ability to put aside the dream and fairly focus on the evidence of the case. After the juror confirmed that she could impartially decide Montgomery's sentence, the court decided to retain the juror. Montgomery offers no evidence illustrating the juror's bias at any

point during the trial. Every court to consider this claim correctly has consequently held that the trial court did not abuse its discretion by retaining the juror.

More important, Montgomery could not prevail even if this Court would have resolved Montgomery's claims differently in the first instance. The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), applies to both of Montgomery's claims, so federal habeas courts must afford great deference to the state courts' judgments. Montgomery would have to show both that the Ohio courts erred by rejecting his claims, and that the decisions were contrary to, or based on an unreasonable application of, this Court's clearly established law. He cannot meet this demanding standard.

Montgomery's case does not merit review and the Court should deny his petition.

## COUNTERSTATEMENT

### A. An Ohio jury convicted Montgomery of callously murdering two young women.

On the morning of March 8, 1986, Toledo police found Cynthia Tincher slumped over in her car, killed by a single gunshot to the head. *State v. Montgomery*, 1999 Ohio App. LEXIS 266, *5-6 (Ohio Ct. App. Feb. 5, 1999). At that time, her roommate, Debra Ogle, had been reported missing. *Id.* at *6. The next day, police found Ogle's car behind an abandoned house, but had no clues about Ogle's location. *Id.* On March 10, police received a tip that led their investigation to focus on Glover Heard. *Id.* at *6-7. Police took Heard into custody on March 11, and Heard provided police with Montgomery's name. *Id.* at *7.

On March 12, while officers were investigating the murders, Montgomery approached them and explained that he wanted to talk about the homicides. *Id.* During his police interview, Montgomery admitted that he had purchased a .380 semi-automatic pistol three weeks before the murders; that the pistol was the murder weapon; and that he and Heard were in Tincher and Ogle's apartment in the early morning of March 8. *Id.* at *5, *7; *Montgomery v. Bobby*, 654 F.3d 668, 671 (6th Cir. 2011) ("*En Banc Op.*"). Montgomery also told officers that, if they would allow him to recover the gun, they could confirm it was the murder weapon. *En Banc Op.*, 654 F.3d at 671. Montgomery continued to change his story about his own involvement in the homicides, but consistently told police that Heard was the triggerman for both killings. *Montgomery*, 1999 Ohio App. LEXIS 266 at *7.

Although Montgomery initially insisted that he did not know where Ogle's body was, he offered later that day to help police find her. *Id.* Officers took Montgomery in a squad car, and in short order found Ogle's body. *Id.* at *7-8. She had been shot three times, including once with the pistol pressed to her head. *Id.* at *4. That evening, police met with Montgomery's mother to obtain Montgomery's semi-automatic pistol. *En Banc Op.*, 654 F.3d at 671. Ballistics testing confirmed that this was the murder weapon. *Id.* at 673.

During their investigation, police learned that Montgomery was wearing a blue pinstriped suit jacket on the morning of the murders. *Montgomery*, 1999 Ohio App. LEXIS 266 at *4. Montgomery took the jacket to be dry-cleaned later that day,

and dry-cleaning employees remembered the jacket was "soaking wet" and made a "'brownish dripping mess on the floor.'" *Id.* at *6.

At trial, Heard agreed to testify against Montgomery in exchange for the State dropping two aggravated murder charges and a charge of gross sexual imposition. *En Banc Op.*, 654 F.3d at 673-74. (Heard pled guilty to complicity to commit Ogle's murder. *Id.* at 673.) Heard told the jury that, on March 8, Montgomery asked Ogle to give them a ride home and then shot and killed her in the woods. *Id.* at 672-73. Heard explained how he and Montgomery drove Ogle's car back to her apartment, where Montgomery took his gun, got out of the car, and told Heard to leave with the car. *Id.* at 673. Heard drove away from the apartment, took Ogle's wallet, and abandoned the car. *Id.*

The jury convicted Montgomery for the aggravated murder of Ogle, with the capital specifications that the murder involved the purposeful killing of two or more people and that Montgomery was the principal offender while attempting to commit aggravated robbery. *Montgomery*, 1999 Ohio App. Lexis 266 at *8. The jury also convicted Montgomery for Tincher's murder. *Id.*

**B. The jury recommended, and the trial court imposed, a death sentence for Montgomery.**

During the jury's deliberation at the penalty phase of the trial, Juror Georgia Lukasiewicz sent a note to the trial judge inquiring whether she could remain on the jury since twenty years before, when she was a psychiatric patient, she "saw [defense mitigation expert] Dr. Briskin in a dream . . . [and] thought he looked like Satan." *State v. Montgomery*, 575 N.E.2d 167, 174 (Ohio 1991). The trial court voir

dired Lukasiewicz about the note, asking whether "the matter that [she had] reported" would "affect [her] consideration of the case in such a way . . . that [she] could not be fair and impartial." *En Banc Op.*, 654 F.3d at 684. The juror said that her dream would not affect her ability to be impartial or her consideration of Montgomery's sentence. *Id.*

The jury finished deliberating and recommended a capital sentence for Ogle's aggravated murder. *Montgomery*, 1999 Ohio App. Lexis 266 at *8. The trial court agreed with the jury's recommendation and sentenced Montgomery to death for Ogle's murder and to fifteen years to life in prison for Tincher's murder. *Id.*

### C. The Ohio courts affirmed Montgomery's conviction and sentence and denied post-conviction relief.

On direct appeal, an Ohio court of appeals and the Ohio Supreme Court affirmed Montgomery's conviction and sentence. See *State v. Montgomery*, 1988 Ohio App. LEXIS 3297 (Ohio Ct. App. Aug. 12, 1988), *aff'd*, 575 N.E.2d 167 (Ohio 1991). Both courts found that the trial court did not abuse its discretion in retaining Juror Lukasiewicz after she assured that she could remain impartial. *Montgomery*, 1988 Ohio App. LEXIS 3297 at *25; *Montgomery*, 575 N.E.2d at 174. The Ohio courts also denied Montgomery's application for re-opening his direct appeal under *State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992). See *State v. Montgomery*, 1993 Ohio App. LEXIS 1294 (Ohio Ct. App. Mar. 3, 1993), *aff'd*, 621 N.E.2d 407 (Ohio 1993). This Court denied certiorari as to Montgomery's direct appeal and his application to re-open his direct appeal. *Montgomery v. Ohio*, 502

U.S. 1111 (1992) (direct appeal); 511 U.S. 1078 (1994) (application to re-open direct appeal).

Montgomery then sought state post-conviction relief. *En Banc Op.*, 654 F.3d at 674-75. He raised many claims that involved documents he obtained from a 1992 public records request to the Toledo Division of Police, including a claim that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* at 675. Specifically, Montgomery alleged that the prosecution withheld a pretrial police report from March 12, 1986, noting that a witness reported seeing "'a Blue Ford Escort with Debbie Ogle driving around [Ogle's apartment] complex'" and later "'saw her as a passenger in the same auto . . . with [a] white male with long side burns.'" *Id.* The report was made four days after Ogle had been reported missing. *Montgomery v. Bagley*, 482 F. Supp. 2d 919, 971, 975-79 (N.D. Ohio 2007) ("*Dist. Ct. Op.*").

After considering this report, the trial court granted the State's motion to dismiss Montgomery's post-conviction petition. *Id.* at 925-26. The appeals court affirmed, finding the evidence of Montgomery's guilt so overwhelming that the report did not undermine confidence in the trial outcome. *Montgomery*, 1999 Ohio App. LEXIS 266 at *21. The Ohio Supreme Court denied discretionary review. *State v. Montgomery*, 711 N.E.2d 231 (Ohio 1999).

### D. Montgomery petitioned for federal habeas relief, and the Sixth Circuit ultimately denied his petition.

Montgomery then sought federal habeas relief. He raised forty-eight claims in district court, again arguing that the trial court violated his right to a fair trial by

retaining a "biased and incompetent juror," and that the prosecution "withheld evidence favorable to the petitioner on the issue of guilt" in violation of *Brady*. *Montgomery*, 482 F. Supp. 2d at 940. Montgomery never separately argued that the prosecution also withheld favorable evidence on the issue of punishment. *Id.* at 939-43. The district court granted habeas relief on Montgomery's claim that the prosecution violated *Brady* by failing to disclose the two-page police report indicating that a witness saw Ogle alive on March 12. *Id.* at 971, 975-79. The court did not hold an evidentiary hearing, and Montgomery never presented additional evidence to support the reported victim sighting.

The Warden moved to alter or amend the district court's judgment, seeking leave to submit attached affidavits from the witnesses who saw Ogle on March 12. *En Banc Op.*, 654 F.3d at 676. These affidavits indicated that, shortly after contacting the police, the witnesses realized they had actually seen Ogle's sister, not Ogle. *Id.* The Warden also submitted an affidavit from Ogle's sister explaining that she had driven a Ford Escort through Ogle's apartment complex on March 12, and people often mistook her for Ogle. Sixth Cir. Joint Appx. ("J.A.") 4640. The district court denied the motion. *Id.*

The Warden appealed the district court's decision on the *Brady* claim, and Montgomery cross-appealed on three grounds, including the juror performance claim. *Montgomery v. Bagley*, 581 F.3d 440 (6th Cir. 2009) ("*Panel Op.*"). A divided Sixth Circuit panel affirmed the district court's relief for the *Brady* claim and its

denial of the Warden's motion to submit new affidavits. *Id.* at 443. The court did not consider any of the claims raised in Montgomery's cross-appeal. *Id.* at 453.

The Sixth Circuit granted the Warden's motion for rehearing *en banc* and the parties filed supplemental briefs. Sixth Cir. Dkt., Case Nos. 07-3882 & 07-3893, Supp. Br. (Feb. 25, 2010); Supp. Br. (Apr. 9, 2010). Before oral argument, Montgomery submitted the 1986 coroner's report, which recorded March 12 as Ogle's date of death, as supplemental evidence. Sixth Cir. Dkt., Supp. Records (June 7, 2010). The en banc court reversed the district court, denying habeas relief on any ground. *En Banc Op.*, 654 F.3d at 685. The majority held that Montgomery did not suffer prejudice under *Brady* because he could not establish that the withheld "evidence would have created a reasonable probability of a different result at either the guilt phase of trial or at sentencing." *Id.* at 683. The court also affirmed the denial of Montgomery's "biased juror" claim because he did not offer any "clear and convincing evidence that the juror could not or did not remain impartial." *Id.* at 684.

**REASONS FOR DENYING THE WRIT**

The Court should decline review for three reasons. First, Montgomery does not identify any unresolved constitutional question or circuit split as to the resolution of his *Brady* and juror bias claims. His petition instead focuses on fact-specific issues. Second, on the merits, these claims fail. Third, even if this Court agreed with Montgomery on the merits, the Sixth Circuit properly deferred to the Ohio courts' resolution of these claims.

Montgomery's *Brady* claim fails because he cannot show how the undisclosed police report is material. The report does nothing to exculpate Montgomery and offers no useful impeachment evidence. To the contrary, the report *undermines* Montgomery's sole trial defense. Further, in spite of Montgomery's effort to bolster this claim by introducing a new expert report, the withheld report would not have led the defense to discover other admissible, material evidence. Accordingly, the Ohio courts did not contravene or unreasonably apply clearly established federal law in denying Montgomery's *Brady* claim.

Nor did the Sixth Circuit err in deferring to the state courts with respect to Montgomery's juror performance claim. When a question arose about a juror's ability to perform competently and without bias—based on a dream she said she had twenty years earlier—the judge openly questioned her. When the juror confirmed that she could impartially decide Montgomery's sentence, the trial judge acted within his discretion by deciding to retain the juror. The Ohio courts denied relief on this claim, and Montgomery does not identify any clearly established federal law to prove that the state courts erred. Like every other state and federal court before it, the Sixth Circuit properly deferred to the state courts' resolution of Montgomery's juror bias claim and denied relief. Montgomery offers no new arguments that merit this Court's attention.

### A. Montgomery's *Brady* claim fails on the merits, and the Sixth Circuit properly deferred to the Ohio courts' reasonable resolution of that claim.

Montgomery claims that the prosecution violated *Brady* by withholding a police report indicating that witnesses saw Ogle alive on March 12, 1986, four days

after the State alleged that Montgomery killed her. Although the report should have been disclosed to the defense, it was neither material and nor would have led to the discovery of admissible material evidence. Accordingly, the Ohio courts did not act "contrary to" or "unreasonabl[y] appl[y]" this Court's precedent when they rejected Montgomery's *Brady* claim, and therefore habeas relief is unwarranted under AEDPA. 28 U.S.C. § 2254(d)(1).

**1. The undisclosed police report was not material.**

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. Montgomery's claim turns on *Brady*'s third factor, materiality, which requires a defendant to show that the nondisclosure of evidence is so serious that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[1] *Cone v. Bell*, 556 U.S. 449, 129 S. Ct. 1769, 1783 (2009). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The question of materiality, then, 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." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Materiality "is not a sufficiency of evidence test. A defendant need not demonstrate that after

[1] Montgomery's claim that federal law clearly establishes different standards for materiality at the guilt and sentencing phases of a capital trial is inaccurate, and Montgomery cites no authority for that proposition.

discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35. Thus, Montgomery cannot prevail by demonstrating a "reasonable probability" that the undisclosed evidence "might have changed the outcome of the trial." *Strickler v. Greene*, 527 U.S. 263, 289, 291 (1999). Instead he must show that the suppressed "favorable evidence could reasonably be taken to put the *whole case* in such a different light as to undermine confidence in the verdict." *Kyles*, 513 U.S. at 435 (emphasis added).

Here, the undisclosed police report fails to undermine confidence in the outcome of Montgomery's guilty verdict or sentence when compared to the whole case at trial. Most important, that report, if true, *undermined* the only defense Montgomery has ever presented—that Glover Heard shot both Ogle and Tincher. From Montgomery's initial meeting with police, he maintained that Heard shot Ogle. *En Banc Op.*, 654 F.3d at 671, 674. But if the withheld report were true—if Ogle really was seen alive on March 12—then, as the Sixth Circuit rightly noted, "the report exonerates Heard as Ogle's shooter because he was imprisoned by the time of the alleged sighting on March 12." *Id.* at 686.

The notion that the police report could have allowed Montgomery to explore "additional potential defense theories" is nonsensical, at best. See *id.* at 681, n.5. If properly disclosed, defense counsel would have received the report in pretrial discovery. At that point, Montgomery had already admitted that he and Heard were in Ogle and Tincher's apartment on the morning of March 8 and that he owned the murder weapon. *Id.* at 671; *Montgomery*, 1999 Ohio App. LEXIS 266 at

*7. Montgomery had also led police to the precise location of Ogle's body midday March 12—mere hours after the witnesses in the undisclosed police report reported seeing Ogle. *Montgomery*, 1999 Ohio App. Lexis 266 at *7-8. Montgomery's admissions, coupled with his steadfast assertion that Heard was the shooter, mean that the police report would both have undercut Montgomery's sole defense and precluded any "additional potential defense theories."

The report also is not material for impeachment purposes. Although the report could have impeached Heard's testimony—by further undercutting his account of the murders—the impeachment effect would have gotten Montgomery nowhere, both because the report winds up *exculpating* Heard (and therefore further inculpating Montgomery) and because defense counsel effectively impeached Heard at trial anyway. During cross-examination, the jury learned that Heard was with Montgomery in the women's apartment on March 8; Ogle's wallet was found in Heard's apartment; and Heard was offered a plea deal to testify against Montgomery. *Dist. Ct. Op.*, 482 F. Supp. 2d at 929. Defense counsel also exposed the inconsistencies in Heard's version of the Ogle murder. *Id.* Nevertheless, the jury decided to convict Montgomery and sentence him to death. Because Heard's testimony had already been impeached, the police report would have been cumulative, not material impeachment evidence.

Further, even when undisclosed evidence could impeach eyewitness testimony, it "may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." *Smith v. Cain*, 132 S. Ct. 627, 629 (2012). Here,

as the Sixth Circuit correctly observed, there was "strong evidence that Montgomery shot Tincher and Ogle." *En Banc Op.*, 654 F.3d at 680. During the State's case-in-chief, the jury learned that Montgomery had purchased a .380-caliber handgun a few weeks before the shootings. *Montgomery*, 1999 Ohio App. Lexis 266 at *5. Montgomery's uncle, Randolph Randleman, testified that, just a few hours before Tincher was found dead and Ogle was reported missing, Montgomery was drunk and had the handgun with him. *Dist. Ct. Op.*, 482 F. Supp. 2d at 927. Randleman saw Montgomery wearing a dark blue pin-striped suit jacket at that time. *Id.* Dry-cleaning employees testified that a few hours after Tincher's body was found, Montgomery came into their store with a "soaking wet" suit jacket that made a "brownish dripping mess on the floor" and had to be cleaned three times to remove the stains. *En Banc Op.*, 654 F.3d at 673. Heard testified that he witnessed Montgomery shoot Ogle in a wooded area. *Id.* at 672-73. And Montgomery led police to the precise location of Ogle's body on March 12. *Montgomery*, 1999 Ohio App. LEXIS 266 at *7-8. After obtaining Montgomery's handgun from his mother, police confirmed that it was the murder weapon. See *En Banc Op.*, 654 F.3d at 673. In light of all of this evidence, the withheld report does nothing to undermine confidence in the guilty verdict.

Montgomery's habeas petition did not separately state a *Brady* claim based on the sentencing phase of his trial. See *Dist. Ct. Op.*, 482 F. Supp. 2d at 940 (arguing that the prosecution violated *Brady* by "withholding evidence favorable to the petitioner on the issue of *guilt*" (emphasis added)). Even if it had, though,

Montgomery could not establish that the report would have undermined confidence in his capital sentence. Montgomery's only defense at trial was that Heard was the triggerman, and the withheld report, along with Montgomery's admissions and his help locating Ogle, would have undercut that defense theory. In other words, the report would have *confirmed* that Montgomery was the principal offender of Ogle's robbery and aggravated murder.

Nor does the report undermine confidence in the jury's conclusion that Montgomery purposely killed two or more persons on March 8. Ogle was declared missing on the day police found Tincher dead. And the witnesses who reported seeing Ogle on March 12 have come forward to correct their mistake. Thus, the undisclosed report is not material to Montgomery's defense against the two capital specifications from his sentencing phase.

Montgomery attempts to overcome the flaws in his materiality argument by directing the Court's attention to *Smith v. Cain*, 132 S. Ct. 627 (2012). But *Smith* is easily distinguishable and provides no help here. First, *Smith* was not a federal habeas proceeding, so the Court was not constrained by AEDPA's deferential standard of review. *Id.* at 629-30. Second, in *Smith*, a single prosecution witness's "testimony was the *only* evidence linking Smith to the crime" and the *Brady* evidence was undisclosed statements from that *same witness* that "directly contradict[ed] his testimony." *Id.* at 630. By contrast, the prosecution called thirty-two witnesses at Montgomery's trial, and the undisclosed report did not include

statements from any of those witnesses, let alone statements directly contradicting their testimony at trial. See *En Banc Op.*, 654 F.3d at 672.

More important, Montgomery misstates *Smith*'s holding when he suggests that materiality is now about "possibilities" rather than "probabilities." See Pet. at 14 ("[T]he majority of the *en banc* Sixth Circuit . . . went too far in prognosticating what the trial jury 'would' have done with the new evidence rather than recognizing that the jury 'could' – or could not – have taken such an interpretive path."). The *Smith* Court had to decide whether undisclosed prior statements made by the key prosecution witness were material when those statements *directly contradicted* the witness's testimony at trial. Although the Court recognized that the jury *could* have disbelieved the prior contradictory statements, it was not confident that it would have ignored them. *Smith*, 132 S. Ct. at 630. Since the undisclosed evidence directly contradicted the testimony of the only evidence linking the defendant to the crime, the Court concluded that it was material. As this Court has explained, *Brady* materiality is not about "possibilities": "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). The Sixth Circuit did not go "too far in prognosticating," and *Smith* does not help Montgomery.

Similarly, Montgomery also errs in claiming that the Sixth Circuit improperly "conflated" *Brady*'s materiality standard with the presumption of reasonableness established in *Strickland v. Washington*, 466 U.S. 668 (1984).

Montgomery says the Sixth Circuit applied *Strickland* to presume that the police report was not material. Pet. at 21-23. In fact, the court followed this Court's clear guidance, explaining: "'[T]he appropriate test for [determining] prejudice [for ineffective assistance of counsel] finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution.'" *En Banc Op.*, 654 F.3d at 679, n. 4 (quoting *Strickland*, 466 U.S. at 694); see also *Kyles*, 514 U.S. at 436 (noting that the standard for determining materiality under *Brady* was "later adopted as the test for prejudice in *Strickland*"). The court did not *presume* that the undisclosed evidence was not material or "conflate" *Brady* materiality with *Strickland*'s reasonableness presumption. Instead, as explained above, the Sixth Circuit properly applied *Brady* and determined that the police report did not have a probability of undermining confidence in either phase of Montgomery's trial.

In short, Montgomery cannot establish that the undisclosed police report was material to his guilt or punishment.

**2. The undisclosed police report cannot be material under *Brady* because it neither would have been admissible at trial, nor would have led to evidence admissible at trial.**

The undisclosed police report is also not material under *Brady* because it would not have been admissible at trial. The report is "hearsay within hearsay," and Montgomery does not even assert that a hearsay exception applies. See Ohio R. Evid. 801, 802, and 805. When the undisclosed information at the root of a *Brady* claim would not have been admissible at trial, it "could have had no effect on the outcome of trial, because [the] respondent could have made no mention of [it] either

during argument or while questioning witnesses." *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995); see also *Hutchinson v. Bell*, 303 F.3d 720, 743 (6th Cir. 2002).

Nor would the undisclosed report have led the defense to other admissible material evidence. For example, the report would not have led Montgomery to any favorable witnesses because the witnesses who originally said they saw Ogle on March 12 all later recanted, explaining that they had mistaken Debra Ogle's sister for Ogle herself. *En Banc Op.*, 654 F.3d at 676.

Montgomery also suggests that if he had seen the undisclosed report before trial, he "would have had the opportunity to explore the coroner reports fully," and would have uncovered additional evidence like the eleventh-hour report he asks this Court to review now for the first time.[2] Pet. at 18. This new report was written by an independent forensic coroner, more than twenty-five years after the murders, who reviewed the old evidence—photographs of Ogle's body and the 1986 coroner's report—and opined that Ogle could not have died on March 8. Pet. App. (Independent Forensic Services Report (Jan. 15, 2012)). In short, the new report is simply a new expert opinion, reached by examining evidence that was in Montgomery's possession before trial. Accordingly, defense counsel *did* have "the opportunity to explore the coroner reports fully." Pet. at 18. Indeed, because the original coroner's report lists March 12, 1986, as the significant date with respect to Ogle's death, *En Banc Op.*, 654 F.3d at 683, defense counsel had the opportunity at

[2] Montgomery also urges the Court to consider two additional *Brady* claims in conjunction with the new coroner's report, Pet. at 18-19, but neither is properly before the Court. *En Banc Op.*, 654 F.3d at 685. Even if they were properly before the Court, this additional *Brady* evidence is neither exculpatory nor effective impeachment evidence, and thus would not suffice to undermine confidence in the outcome of Montgomery's verdict or sentence. *Id.*

the time of trial to make the same lividity arguments he later raised before the en banc Sixth Circuit and seeks to make through a second expert opinion now.

In any event, this Court is not the proper place for Montgomery to introduce a new expert report, especially on habeas review. Montgomery never presented this evidence in the state courts, and he did not present it in federal habeas until *after* the en banc Sixth Circuit ruled. Sixth Cir. Dkt., Case Nos. 07-3882 & 07-3893, Motion to Supplement Record (Jan. 17, 2012). The Sixth Circuit properly denied Montgomery's motion to supplement the record. Sixth Cir. Dkt., Order (Jan. 26, 2012). If Montgomery wishes to pursue claims based on this new report, he can move the state trial court for a new trial based on new evidence. See Ohio R. Crim. P. 33(A)(6).

In short, the undisclosed police report is not material because it would not have been admissible at trial, nor would it have led to any admissible material evidence.

### 3. The Sixth Circuit properly deferred to the Ohio courts' reasonable resolution of Montgomery's *Brady* claim.

The Court should also deny certiorari because the Ohio courts' resolution of this *Brady* claim was not "contrary to," or based on "an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Even if the Ohio courts' decisions were wrong—though they were not—they plainly were not unreasonable. *Williams v. Taylor*, 529 U.S. 362, 410-11 (2000); see *En Banc Op.*, 654 F.3d at 676, 677 (applying AEDPA).

Montgomery now claims that the Court should not apply AEDPA's deferential standard because the Ohio courts gave his *Brady* claim only a "cursory" analysis. Pet. at 17. But as the Court recently held in *Harrington v. Richter*, 131 S. Ct. 770 (2011), however, even when a state court summarily denies a claim, a federal habeas court still must "presume[] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 784-85. Thus, the Court must uphold the Ohio court's decision unless it is contrary to or unreasonably applied *Brady*.

Montgomery also attempts to muddy the waters with references to reasonable doubt. He says that the Sixth Circuit analyzed the undisclosed report "through the wrong prism," and as with jurors finding guilt beyond a reasonable doubt, judges must unanimously agree that *Brady* evidence is immaterial. Pet. at 16. Because the Sixth Circuit split, with ten judges rejecting his *Brady* claim and five dissenting, Montgomery concludes that the undisclosed report must be material. *Id.* at 15-16. But a court does not replace the jury when it decides whether "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different," *Cone*, 129 S. Ct. at 1783, and the court need not unanimously reject a *Brady* claim. Reasonable doubt has no place in a *Brady* appeal, especially on habeas review.

As the Sixth Circuit held, the Ohio courts reasonably applied *Brady* when they denied Montgomery relief. The Ohio appeals court rejected Montgomery's claim, reasoning that the undisclosed police report contained "isolated information,

recorded in the course of an ongoing investigation when all of the facts were still being pieced together." *Montgomery*, 1999 Ohio App. LEXIS 266 at *21. Accordingly, "in the face of overwhelming evidence presented at trial . . . [the report] did not undermine confidence in the outcome of the trial." *Id.* The state courts reasonably—and correctly—determined that the undisclosed police report did not merit relief under *Brady*.

### B. The Sixth Circuit denied Montgomery's juror performance claim, deferring to the Ohio courts' reasonable resolution of the issue.

Montgomery also claims that he was denied his right to a fair trial because the trial court did not dismiss juror Georgia Lukasiewicz after she sent the trial judge a note describing a past dream she supposedly had about the defense mitigation expert. *Montgomery*, 575 N.E.2d at 174. The Ohio courts reasonably rejected Montgomery's claim, and the Sixth Circuit properly deferred to their judgment under AEDPA.

A defendant has a due process right to a fair trial with an impartial jury, and juror impartiality is a factual determination made by the trial judge. See *Patton v. Young*, 467 U.S. 1025, 1037-38 (1984); *Rushen v. Spain*, 464 U.S. 114, 121 (1983). In a habeas proceeding, a trial court's finding of impartiality is presumed correct. 28 U.S.C. §2254(e)(1); *Patton*, 467 U.S. at 1031. Therefore, a federal habeas court "may only overturn [a] state court's findings of jury impartiality if those findings were manifestly erroneous." *DeLisle v. Rivers*, 161 F.3d 370, 382 (6th Cir. 1998) (citing *Mu'Min v. Virginia*, 500 U.S. 415, 428 (1991)).

Montgomery cannot demonstrate that the trial court committed manifest error by declining to dismiss Lukasiewicz. After Lukasiewicz informed the trial judge of her dream, the judge questioned her and decided she could remain impartial. The judge inquired whether Lukasiewicz's dream would "affect [her] consideration of the case in such a way . . . that [she] could not be fair and impartial." *Dist. Ct. Op.*, 482 F. Supp. 2d at 950. She explained that the dream was "in the past, [from] 20 years ago"; that she did not know the defense expert; and that she had "never seen him before." *Id.* She "reassured [the judge] that she could distinguish between her dream and reality, set aside her dream during deliberations, and determine the case solely based on the evidence at trial." *En Banc Op.*, 654 F.3d at 684. On this record, the Ohio courts reasonably deferred to the trial court's decision that Lukasiewicz could remain on the jury. *Montgomery*, 575 N.E.2d at 174 ("Nothing in the [trial] record affirmatively establishes that juror Lukasiewicz was biased" because she "adequately responded to th[e] questions and . . . indicate[d] her ability to distinguish between her dreams on the one hand and reality on the other hand."); see *En Banc Op.*, 654 F.3d at 684.

Moreover, Montgomery makes no attempt to supplement the record with evidence of Lukasiewicz's bias or incompetence either *before* or *after* the trial judge questioned her. He does suggest that Lukasiewicz should have been removed solely because she was a psychiatric patient. Pet. at 27-28. But Lukasiewicz had openly revealed her previous psychiatric care during the pretrial jury voir dire. See *Dist. Ct. Op.*, 482 F. Supp. 2d at 950; J.A. 4701-17. She did not display any sign of

incompetency or bias at that time, and defense counsel did not present a for-cause or peremptory challenge to her service as a juror. J.A. 4701-17. As the en banc Sixth Circuit concluded, Montgomery cannot show that the trial court manifestly erred by retaining Lukasiewicz.

In short, AEDPA means that Montgomery's claim still fails even if this Court disagrees with the trial court's decision. No court has ever granted relief on Montgomery's juror claim because the state courts' decision is neither contrary to nor an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254(d)(1). In fact, Montgomery identifies no clearly established law to support his argument. Instead, he cites general case law discussing a defendant's right to a fair trial and juror competence. See Pet. 23-24. He cites only one decision analyzing juror bias, and that opinion was subsequently vacated. See *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001), *vacated by* 281 F.3d 836 (9th Cir. 2002). The Warden is likewise unaware of any decision from this Court holding that participation in psychiatric treatment precludes service on a criminal jury.

The trial judge's decision to retain Lukasiewicz as a juror was not manifest error, and the Ohio Supreme Court's rejection of this claim did not contravene or unreasonably apply any clearly established federal law. See *Carey v. Musladin*, 549 U.S. 70, 77 (2006). Accordingly, the Sixth Circuit properly rejected Montgomery's juror performance claim.

## CONCLUSION

For the forgoing reasons, Montgomery's petition for writ of certiorari should be denied.

Respectfully submitted,

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