No. _____

In The

Supreme Court of the United States

William T. Montgomery,

Petitioner,

v.

David Bobby, Warden,

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

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the State's failure to provide the defense with information in its possession undermining (a) the prosecution's theory of the case, (b) the credibility of the single witness against the defendant and (c) the factors relied upon by the jury to levy a death sentence constituted a material Brady violation as found recently in this Court's decision in Smith v. Cain?

2. Whether the State trial court's dogmatic refusal to consider the removal of a juror who advised the court that she was in psychiatric care during the trial and that twenty years earlier she had seen the defense's mitigation expert looking like Satan in a dream while she was undergoing shock therapy, and its failure even to question the juror about her mental competence, deprived the defendant of his constitutional right to a jury trial?

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BASIS FOR JURISDICTION

On October 29, 2009, a panel of the Sixth Circuit Court of Appeals, affirmed the federal district court's granting of Petitioner's writ of habeas corpus, and consequent vacating of Petitioner's conviction and death sentence. The case against Petitioner was then remanded for a new trial, but rehearing en banc was granted. On August 22, 2011, a bitterly divided en banc Court, by a vote of 10-5, reversed the panel decision and thus the district court decision in Petitioner's favor. On November 18, 2011, Justice Kagan granted an extension of time "to and including January 19, 2012" to file a petition for writ of certiorari in this case. This Court therefore has jurisdiction pursuant to 28 U.S.C. §2254 (1) to review the decision on a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution:

> 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.

Sixth Amendment to the Constitution:

> 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 defense.

Fourteenth Amendment to the Constitution:

> **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

This Petition arises from William T. Montgomery's conviction and death sentence for two murders committed over twenty-five years ago in Toledo, Ohio. It is a troubling case, with a tortured history. As detailed below, with the aid of cooperating witness Glover Heard, the State convinced a jury that - as Heard declared - Montgomery shot and killed Debra Ogle and Cynthia Tincher on March 8, 1986. The State also convinced the jury to impose the death penalty on Montgomery because - as the State and Heard maintained - the two killings were accomplished as part of a single criminal episode and the second killing was committed to silence Tincher as a witness to having seen Ogle shot during a robbery. Remarkably, at the time the State made such presentations to the jury it had in its possession a police report containing witness statements indicating that Debra Ogle had been seen alive in the early morning hours of March 12. Yet these exculpatory witness statements were not provided to the defense.

FACTS

Between 7:00 a.m. and 7:30 a.m. on March 8, 1986, Cynthia Tincher was found dead of a gunshot wound. She was in a car located near an intersection in Toledo, Ohio. That same morning her roommate, Debra Ogle, did not show up for work and was declared missing. Four days later on March 12, 1986, Ms. Ogle's body was found in a wooded area in Toledo, Ohio. Petitioner was charged with two counts of aggravated murder with capital specifications for these killings.

The theory of the State was that Montgomery murdered Ogle while committing a robbery or using a deadly weapon and then in one continuous enterprise, murdered Tincher because she was the only person who could place Montgomery with Ogle that morning.

The evidence of the State was that Montgomery always had money and was employed on March 7th. As to the weapon, Montgomery and Glover Heard, his co-defendant,

were both in the kitchen where witnesses testified the pistol identified as the murder weapon was located. Then when the police went to Heard's residence they found Debra Ogle's car less than a block away. Police searched Heard's room and found Debra Ogle's wallet.

Missing from the evidence was any reason for Mr. Montgomery to have killed either of the girls, much less both of them. The State suggested robbery as a motive but Mr. Montgomery got nothing from either murder. The unchallenged testimony that Petitioner was the one who paid not only for his own evening out, but also paid the admission and drink charges for three other people who were with him. It was Heard who had no money and it was Heard who wound up with the car and wallet of Debra Ogle.

There was no hint, much less evidence, as to why Mr. Montgomery would ask Ms. Ogle for a ride, get into her car with a witness (Heard) then stop without discussion, lead her out into a field early on a cold March morning, shoot her in the head, then drive back to the same apartment where Mr. Montgomery would have no expectation that Ms. Tincher would let him in, much less agree to drive him anywhere.

It is significant that the individual reported by the State's witnesses as leaving Tincher's car that morning was wearing a hooded sweatshirt. Yet witnesses who saw Montgomery that day, including Heard, described him as wearing a suit coat, not a hoodie. No explanation was given as to how he got the sweatshirt, put it on or disposed of it.

For the State to prove its case, it was necessary that Ogle have been killed first, thus forcing the subsequent killing of Tincher to eliminate a witness. This theory provided no motive for the first killing, but at least provided one for the second. This meant that, according to the State's theory, Ms. Ogle was necessarily killed on the morning of March 8th before Tincher's body was discovered. However, Ogle's body was not found until March 12th.

Under the State's theory, Ms. Ogle's body supposedly lay exposed to the elements for four days. At that time, the weather reports indicated that the temperatures ranged, as they typically did in Northwest Ohio, from a little below freezing to well above it. The median temperature for those days was always above freezing. Yet the testimony of the pathologist who performed the autopsy on Ms. Ogle made absolutely no mention of any decay or degradation of her body. This is no indication that it had been exposed to the elements for any length of time. The State's theory was contrary to science. Within three days there would have been substantial changes in a corpse, much less a corpse left in a field. There would have been changes in the color of the skin, and attacks by wildlife would have marked the corpse. None of these observations were reported by the pathologist.

Ogle's autopsy also indicated "there is moderate posterior fixed lividity and slight fixed lividity of the left anterior surface of the body." (Autopsy of Debra Ogle, p. 1.) The officer who found Ms. Ogle's body testified that she was lying face down. (T., p. 1606.) The picture of Debra Ogle entered into evidence shows that she was moved by officers at the crime scene – that is rolled onto her left side. (See Trial Exhibits, State's Exhibit 32.)

Lividity refers to an unnatural color of the skin. Lividity can be a useful reaction in determining the position of a body at the time of death and whether a body was moved within the first few hours after death. Lividity typically appears as patches or blotches that coalesce over time to produce a generalized area of discoloration. After about 12 hours, the lividity becomes fixed. Then, even if the body is shifted, the pattern of discoloration will remain the same. "Lividity", World of Forensic Science, Ed. Apr. 2010.

In the instant case since the body was found face down, lividity would not have fixed on the left side after four days. The only explanation is that lividity was not fixed when she was found. This had to occur within as little as six but no more than 12 hours of her death. If

she had lain face down more than 12 hours, lividity would have fixed on the front of her body and would not have been changed when her body was turned. Therefore, it is scientifically impossible that she died on March 8, 1986 as the prosecution claimed.

What makes this even more significant is that during the subsequent post-conviction proceedings, public record requests uncovered a police report previously withheld from defense counsel. The report indicated that one David Ingram and several friends, all of whom knew Debra Ogle well, had seen her alive in the parking lot of her apartment complex at approximately 1:30 a.m. on March 12, 1986. These eyewitnesses were so certain of their observation that they not only identified Ms. Ogle but described the person driving the car in which she was riding as being a "white male with long sideburns." They went on to observe that "she did not appear distressed." They said the car was a "Blue Ford Escort." That report was not easy to make. Mr. Ingram had to drive to his mother's house, call the police, then drive back to the apartment complex to meet with the officer who completed the report.

This report refutes the contention that Ms. Ogle had been killed on March 8th. The testimony it reported was entirely consistent with the observations of the coroner that showed no indication that Ms. Ogle had been dead for any length of time when she was found later on March 12th. No explanation was ever given for the withholding of this report from defense counsel.

The Coroner's observations were entirely consistent with the *Brady* materials withheld by the State. Testimony about Ms. Ogle having been seen by friends on the night of the 12th is consistent with her having been killed after she was seen in the early morning hours on that day. This material was critical to the defense and the conduct of the State in withholding it violated the Constitution.

PROCEDURAL HISTORY

Trial Proceedings

On March 25, 1986, William T. Montgomery, Petitioner herein, was indicted by the Lucas County Grand Jury in Case No. CR865450 for two counts of aggravated murder with three (3) specifications, namely, that the murder was committed for the purpose of escaping detection, apprehension, trial or punishment; was a part of a course of conduct involving purposeful killing of two or more persons; and was committed while attempting to commit aggravated robbery.

On September 29, 1986, Montgomery, proceeded to trial before Judge Charles D. Abood and a panel of twelve (12) jurors. With the aid of cooperating witness Glover Heard, the State presented a case to the jury that - as Heard declared - Montgomery shot and killed Debra Ogle and Cynthia Tincher on March 8, 1986. The State also argued for the jury to impose the death penalty on Montgomery because - as the State and Heard maintained - the two killings were accomplished as part of a single criminal episode and the second killing was committed to silence Tincher as a witness to having seen Ogle shot during a robbery The guilt phase of the trial concluded on October 8, 1986 and Montgomery was found guilty of aggravated murder in Count One (as well as two of the three attached specifications) and of the lesser offense of murder in Count Two on October 9, 1986.

The sentencing phase of Montgomery's trial began on October 10, 1986. During the jury's sentencing deliberations, an incredible development occurred. Shortly after the jurors left the Courtroom to begin their deliberations to see if they would recommend the death penalty, a note from one of the jurors was sent to the Judge. From Juror Gloria Lukasiewicz, the note read as follows:

Dear Judge Abood,

> After I saw Dr. Briskin [Montgomery's mitigation psychiatric expert] on the stand, I decided I should ask you if I'm allowed to be a juror because I am a psychiatric patient and early in 1964 I had a dream after shock treatments. I saw Dr. Briskin in a dream. He was fat, carried a briefcase and a clock. I thought he looked like Satan. I never recall having seen this man in person.

The judge interviewed the woman and concluded that, notwithstanding the bizarre nature of the note, she could be fair and should continue as a part of the jury.[1] Whereupon the jury resumed its deliberations which ended on October 11, 1986 when the jury recommended that Montgomery be sentenced to death. On November 7, 1986, the judge accepted the jury's recommendation and sentenced Montgomery to death. He filed his opinion pursuant to Ohio Rev. Code Ann. §2929.03(F) on November 21, 1986.

Post-Conviction Proceedings

Montgomery filed his timely Notice of Appeal in the Sixth District Court of Appeals. On August 12, 1988, the Sixth District Court of Appeals affirmed Montgomery's conviction and death sentence. *State v. Montgomery*, No. L86395 (Lucas Ct. App. Aug. 12, 1988).

Montgomery then appealed to the Supreme Court of Ohio. On August 14, 1991, the Supreme Court of Ohio affirmed Montgomery's conviction and death sentence. *State v. Montgomery*, 61 Ohio St. 3d 410, 575 N.E.2d 167 (1991). Montgomery filed a Motion for Rehearing which was denied on September 25, 1991. *State v. Montgomery,* 62 Ohio St. 3d 1419, 577 N.E.2d 663 (1991).

[1] Dr. Briskin was the only psychiatrist called to testify on behalf of the defendant in his counsel's effort to mitigate the possible death sentence.

Montgomery filed a timely Petition for Writ of Certiorari with the United States Supreme Court, and on February 24, 1992, that court denied Certiorari. *Montgomery v. Ohio.* 502 U.S. 111. 112 S.Ct. 121 5 (1992).

An Application for Delayed Reconsideration pursuant to *State v. Mumahan, supra.* Sup. Ct. Prac. R. XI Sec. B, and Ohio Rev. Code §2929.05, was filed in the Supreme Court of Ohio. The court denied the application on October 27. 1993. *State v. Montgomery*, 67 Ohio St.3d 1187, 621 N.E. 2d 409 (1993). A Petition for Writ of Certiorari was denied on May 2, 1996. *Montgomery v. Ohio*, 511 U.S. 1078 (1994).

An Application for Delayed Reconsideration, pursuant to *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E. 2d 1204 (1992), Ohio R. App. P. 26(B) and Ohio R. App. P. 14, was filed in the Sixth District Court of Appeals. The application was dismissed by the court of appeals on March 3, 1993. *State v. Montgomery*, No. L85395, 1993 WL 110901 (Lucas Ct. App. Mar. 3, 1993) and by the Supreme Court of Ohio on October 27, 1993. *State v. Montgomery*, 67 Ohio St. 3d 1485, 621 N.E.2d 407 (1993). Rehearing was denied on December 15, 1993. *State v. Montgomery*, 68 Ohio St. 3d 1412, 623 N.E. 2d 568 (1993). A timely petition for writ of certiorari was filed and certiorari was denied on June 27, 1994. *Montgomery v. Ohio*, 512 U.S. 1246 (1994).

On March 7, 1996, Montgomery filed a petition for post conviction relief pursuant to Ohio Rev. Code Ann. §2953.21 in the Lucas County Court of Common Pleas. The petition was dismissed, without a hearing, on August 23, 1996. An appeal from the dismissal as filed with the Sixth District Court of Appeals on September 22, 1996.

On October 24, 1997, the Court of Appeals reversed the Trial Court's denial of Post-Conviction Relief as to Issue 2 and remanded the case to allow a response to the State's Motion for Summary Judgment. The Petition was then dismissed on December 31, 1997 where

an appeal was taken. The Court of Appeals affirmed the dismissal on February 5, 1999. The Ohio Supreme Court dismissed Montgomery's appeal on June 16, 1999.

On June 13, 2000, the Petition for Writ of Habeas Corpus was filed in the District Court. The district court found that Montgomery's claim of prosecutorial misconduct based on the State's failure to provide the defense with this exculpatory evidence ON ITS OWN was a violation of Montgomery's Fourteenth Amendment right to due process as articulated in *Brady v. Maryland,* 373 U.S. 83 (1963). The court specifically found that the State's case was not "airtight" and that the problems with the State's case lay directly on its reliance on the testimony of Heard. Heard gave at least four separate versions of the facts and therefore there was sufficient weakness in Heard's testimony that the State's case would have been undermined by the testimony that could have been developed based on the withheld police reports. (R.95, Memorandum of Opinion & Order, p. 83-85; Apx. p. 360-362).

The Memorandum of Opinion issued by the District Court on March 31, 2007 denied all but one of the claims for relief that Petitioner raised in his Petition for Writ of Habeas Corpus. That Court and the original panel of the Court of Appeals found that the claim for relief in which Montgomery alleged prosecutorial misconduct based on the State's failure to provide the defense with exculpatory evidence was a violation of Montgomery's Fourteenth Amendment right to due process as articulated in *Brady v. Maryland,* 373 U.S. 83 (1963).

The court held that the prosecution's failure to provide Montgomery's counsel with a police report which indicated that several witnesses had seen one of the victims, Debra Ogle, alive four days after the state claimed Montgomery had killed her undermined the State's theory of the murders and was therefore prejudicial to the outcome of the trial. Accordingly, the court vacated Montgomery's convictions and sentence of death. On March 31, 2007, a Judgment granting the Petition and issuing a Writ of Habeas Corpus was entered by the Trial Court.

A Motion for Reconsideration was filed by Petitioner on April 3, 2007. On April 13, 2007, a Motion to Alter/Amend Judgment was filed by Respondent. On June 4, 2007, an Order to Amend the Judgment granting Montgomery's Motion for Reconsideration was entered. On July 3, 2007, a Notice of Appeal was filed for from the Amended Judgment of June 4, 2007 and the Judgment entered on March 31, 2007. On July 11, 2007, a Notice of Cross Appeal was filed as to the March 31, 2007 Judgment and the Amended Judgment of June 4, 2007.

On July 30, 2007, an Order was entered denying Respondent's Motion to Alter/Amend Judgment and on August 6, 2007, an Amended Notice of Appeal was filed by Respondent directed to the July 30, 2007 Order and the earlier entries as well. On February 13, 2008, Petitioner sought an expanded Certificate of Appealability to include sub-claim 15(m). The State did not oppose this Motion.

On September 29, 2009 the panel of judges hearing the appeal in this case affirmed the decision of the district judge granting Petitioner a writ of habeas corpus because of the Brady violation.

Subsequently, rehearing en banc was granted and on August 22, 2011 a divided Court reversed the decision of the original panel and denied Petitioner his writ. On November 18, 2011 an extension of time was granted to and including January 19, 2012 to file a Petition for Writ of Certiorari.

I

REASONS FOR GRANTING THE WRIT

This capital case presents in stark relief two issues of the most fundamental importance to the constitutional administration of the criminal justice system. The first issue parallels that recently decided by this Court in Smith v. Cain concerning the materiality of a Brady nondisclosure which went to the core of the prosecution's case in both the liability and

penalty phases of Petitioner's trial. Contrary to Smith's teaching, the en banc majority in the Sixth Circuit focused on what the trial "would" have done with the withheld evidence rather than what it "could" have done with such evidence. The second issue concerns the mental competence of a juror who was undergoing psychiatric treatment at the time of trial and whose note to the trial judge revealed a bizarre dream concerning a key defense witness which raised obvious psychiatric red flags. Yet contrary to reams of case law developed to protect a defendant's right to a fair jury trial, the trial judge refused to consider removal of the juror, declined to question her concerning her mental condition and refused to allow defense counsel to question her either. Both of these decisions are severely out of step with this Court's constitutional jurisprudence and guidance.

I. The State's Failure To Disclose To Montgomery Exculpatory Evidence Which Undercut The Credibility Of The State's Single Eyewitness, The Prosecution's Theory Of The Case And The State's Grounds For Seeking The Death Penalty Constituted A Material Brady Violation In All Respects

A defendant's due process rights are violated if the government suppresses favorable evidence that is material to guilt or punishment. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Strickler v. Greene*, 527 U.S. 263, 280(1999). To succeed on a *Brady* claim, Petitioner bears the burden of showing that [1] the prosecutor suppressed evidence; [2] that such evidence was favorable to the defense; and [3] that the suppressed evidence was material. See *Moore v. Illinois*, 408 U.S. 786, 794-95(1972); accord, *Strickler*, 572 U.S. at 281-82. All of the federal judges who considered this case have concluded that the first two prongs of a *Brady* violation have been met. It is only as to the third prong, materiality, that differences exist.

This determination of "materiality" must be made "in the context of the entire record," United States v. Agurs, 427 U.S. 97, 112 (1976), considering "the cumulative effect of

all such evidence suppressed by the Government." Kyles, at 421. It is to that determination that we now turn.

A. This Petition Is Controlled By This Court's Decision In Smith v. Cain

At bottom, this case presents the same question as that before the Court in Smith v. Cain, No. 10-8145: "whether the failure to disclose [*Brady*] evidence was prejudicial: i.e., whether the withheld evidence was 'material to [the defendant's] guilt or punishment.'" Brief for the Petitioner at 30 (quoting Cone v. Bell, 129 S.Ct. 1769, 1782 (2009)). As in Smith v. Cain, there is no dispute here that "the first two requirements of Brady" are satisfied. Id. Thus, both cases turn on the proper application of the materiality test to critical evidence wrongfully withheld from the defense at the time of trial.

In Smith v. Cain, as here, the "essence of the State's case" at trial (Kyles, 514 U.S. at 441) against the defendant rested almost exclusively on the testimony of a single Government eyewitness. See, e.g., Reply Brief for the Petitioner at 1. Also in Smith v. Cain, as here, the State withheld evidence from the defense which directly undermined the testimony of that "crucial" Government witness. Banks, 540 U.S. at 700; see id. Additionally, in Smith v. Cain, as here, the withheld evidence also "thoroughly undercut the prosecution's theory of the case, and . . . 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Brief for Petitioner at 40 (quoting Kyles, 514 U.S. at 435). Finally, in Smith v. Cain, as here, the State posited - and the lower court accepted - that accurate disclosure of the withheld evidence "wouldn't have mattered to the jury." Reply Brief To State's Opposition To Petition For Writ Of Certiorari at 8.[2]

[2] The only significant difference between Smith v. Cain and this case is that here Montgomery has been sentenced to death, whereas Smith was not. The presence of the death penalty warrants even greater scrutiny of the Brady issues herein.

On January 10th, this Court issued its decision in Smith v. Cain. As Chief Justice Roberts' opinion for the eight member majority put it:

> The State and the dissent advance various reasons why the jury might have discounted Boatner's undisclosed statements. They stress, for example, that Boatner made other remarks on the night of the murder indicating that he could identify the first gunman to enter the house, but not the others. That merely leaves us to speculate about which of Boatner's contradictory declarations the jury would have believed. The State also contends that Boatner's statements made five days after the crime can be explained by fear of retaliation. Smith responds that the record contains no evidence of any such fear. Again, the State's argument offers a reason that the jury *could* have disbelieved Boatner's undisclosed statements, but gives us no confidence that it *would* have done so.

Slip op. at 3. The same analysis applies just as fully to Montgomery's case.

Like the state courts in Smith v. Cain, the majority of the en banc Sixth Circuit in ruling against Montgomery 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.[3] The difference between these two possibilities should be as outcome determinative here as in Smith v. Cain.

Because Smith v. Cain and this case present essentially identical Brady issues, the Court should now grant this petition, vacate the Sixth Circuit's en banc decision and remand this case to that Court for reconsideration in light of Smith v. Cain. There can be no doubt that this Court's decision in Smith v. Cain provides the most current and definitive articulation of how the lower courts are supposed to test the materiality of this type of withheld Brady evidence. Given the bitter dispute below between the majority and the dissenting judges of the en banc Sixth Circuit about precisely this issue, following that articulation will be dispositive in this case. With Mr. Montgomery's life on the line in this capital case, surely the opportunity for additional consideration by the Court below in light of this Court's new guidance is warranted.

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[3] See Smith v. Cain, slip op. at 3 ("The State and the dissent advance various reasons why the jury might have discounted [the] undisclosed statements.").

In the event this Court does not vacate and remand this case in light of Smith v. Cain, then it should grant this petition to resolve the questions raised below.

B. The Brady Violation Was Clearly Material As To Guilt Or Innocence

1. The Overview

The district court granted a writ of habeas corpus to Montgomery on the ground that the Brady violation at issue herein constituted a material violation of Montgomery's due process rights. A split panel of the United States Court of Appeals for the Sixth Circuit subsequently affirmed the district court's materiality finding - and, thus, its issuance of the writ - by a vote of 2-1. Subsequently, the en banc Sixth Circuit reversed the panel's decision - and, thus, the district court's issuance of the writ - by a vote of 10-5. The en banc majority judges concluded that the evidence withheld from Montgomery "wouldn't have mattered" to his trial jury. The en banc dissenting judges vigorously disagreed with that conclusion.

The opinions below amply address the pros and cons of how the withheld evidence might and might not have been considered and used by Montgomery's trial jury in assessing the State's case against him. We will not belabor this petition with a repetition of those points herein. Suffice it to say, for present purposes, that there are pros and cons aplenty on each side of that debate. But without being too glib, isn't that precisely the point for jury - rather than judicial - consideration? When there are many possible ways a jury could consider such evidence, then the Sixth Amendment consigns to the jury - and the jury alone - determination of how it would appraise that evidence. See Smith v. Cain, supra.[4]

Using the en banc Sixth Circuit as a proxy for a hypothetical jury, we would have 10 judge/jurors voting for the prosecution and 5 judge/jurors voting for the defense over this

[4] See also Napue v. Illinois, 360 U.S. at 269 ("[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence").

evidence. Nothing more should be required for relief to be granted to Petitioner. A criminal trial is not a game in which the majority rules. Instead, unanimity is required. If a single juror's decision may have been influenced by the withheld evidence, then that is enough to "undermine confidence in the outcome of the trial." Kyles, 514 U.S. at 434.

At bottom, although the majority judges on the en banc Sixth Circuit extensively analyzed what they thought the undisclosed evidence meant, they did so through the wrong prism. The correct prism is framed by the constitutionally required interplay between the need for unanimity and the reasonable doubt standard. It only takes one juror with a single reasonable doubt to prevent a criminal conviction at trial. As a result, it is only a search for evidence that could potentially create a single reasonable doubt in the mind of one such juror that is necessary to establish the materiality of such evidence. When a federal district court and a panel of the circuit court rule in a defendant's favor, and when that defendant gains the votes of five judges on an en banc court in his favor, it should be beyond peradventure that one juror could find that the same evidence considered by those courts and judges might create a single reasonable doubt in his mind.

Put another way, what basis is there for concluding that the five dissenting judges on the en banc Sixth Circuit and the federal district judge were not acting reasonably in reaching the contrary conclusions that they did (in Montgomery's favor) concerning the potential effect of the withheld evidence? None, of course. Yet if those conclusions were reasonable for six federal judges to reach, then how can it be unreasonable to find that a single trial juror might reach the same conclusion? It cannot be. This is art, not science; probability, rather than certainty. Viewed through the proper prism, and under any reasonable analysis, there is no way to find that this Brady violation was anything but material on the question of Montgomery's guilt or innocence.

2. The Specifics

The District Court correctly found that the State Court of Appeals analysis of this claim was cursory and that the *Brady* claim warranted a detailed analysis. (R.95, Memorandum of Opinion & Order, p. 82; Apx. p. 359). On that basis, the District Court correctly conducted a *de novo* review of the claim. The District Court's lengthy opinion recites its careful analysis of the record in this regard and the many grounds for its conclusion that the withheld evidence was material to Montgomery's defense.

Further supporting the materiality of the unreported witness observations is the Coroner's report of the autopsy of Debra Ogle. The State's theory was that Ms. Ogle was killed first on the morning of March 8th and her body not found until the evening of March 12th. The testimony about the autopsy gives no indication at all of being of a body which had been killed five days earlier.

This issue was not explored fully by trial counsel because they were completely unaware that the witness statements existed, showing Ogle was alive on March 12, and therefore could not have died on March 8, as the prosecution proposed. Had this evidence been disclosed, along with all the other undisclosed evidence, there is no doubt that this issue would have been explored. Thereafter, in post-conviction proceedings, counsel attempted to raise the issue and obtain funds for discovery and experts, but the petition was dismissed without any discovery or expert funding. In these proceedings, counsel again requested but was denied funds for an expert in forensic pathology to develop this issue.

Habeas counsel, being court appointed, and without any funds for an expert, was only recently able to find someone to explore this issue. A motion has been filed in the Sixth Circuit to supplement the record with a copy of this new expert's report. That motion and the accompanying expert report are provided in the Appendix . This report makes clear that the

death of Debra Ogle could not have occurred on March 8 as the prosecution claimed. Given the condition of the body, it is clear that this was not the case.

Only recently has Montgomery been able to obtain an expert opinion which verifies the arguments made in the Court of Appeals. Independent Forensic Services through the work of S. Eikelenboom-Schiveid M.D. and John Nordby Ph.D., D-ABMDI established that by properly analyzing the body of Debra Ogle, it could be determined that she had been dead no more than 36 hours. This observation is based on the lividity observed in the body. Further, the absence of any animal activity, be it insects or rodents, made it also apparent that the body was not exposed in the field since March 8, as had been contended by the State.

These scientific observations are not speculation or supposition. They are fact, a fact that was not deemed relevant by defense counsel since they did not have the materials concerning the citing of Ms. Ogle alive on March 12th.

Had the witness statements been made available, trial counsel would have had the opportunity to explore the coroner reports fully, and would have produced the same results as those attached here, which would have undermined the State's entire theory of the case. This amply demonstrates how disclosure of the withheld police report could have been used to completely change the look of this case as it went to the jury.

In addition to considering the cumulative impact of the coroner's report and related expert witness potential in connection with evaluating the materiality of the withheld evidence in this case, there is other evidence that must be considered cumulatively with it as well. As noted above, it was Glover Heard's testimony that constituted the heart of the State's case and, therefore any evidence that would have undermined his testimony could have created reasonable doubt as to the guilt of Mr. Montgomery. The existence of Michael Clark's

testimony that Heard told him he saw two girls killed would have provided yet another piece of evidence that contradicted Heard. However, Clark's existence as a witness and the nature of his testimony was never disclosed to the defense either. So Michael Clark's potential contradictions of Heard must also be placed on the defendant's side of the materiality scale. See *Matthews vs. Ishee*, 486 F.3d 883 (2007).

Finally, the trial record also reveals that the State created the inference, through questioning of a dry cleaner's employees, that stains on the blue pin-striped jacket that Mr. Montgomery was seen wearing the night before the killings were blood stains, which the State thereafter used to theorize that Mr. Montgomery had the jacket cleaned to conceal evidence of the crime. When questioned by the Court, at defense counsel's urging, Prosecutor Yavorcik denied that the garment was ever tested for the presence of blood **T. Tr. 1600.** Yet in his post-conviction petition Montgomery attached evidence that this statement to the Court by the prosecutor was untrue. Instead, lab reports from tests conducted by the state prior to trial revealed that the coat had been tested and tested negative for the presence of blood. **Post-conviction Petition Exhibit TT at 2281 and 1148.** However, once again, this exculpatory information was never made available to the defense which instead was forced to try to counter at trial the State's affirmative misrepresentation that this evidence did not even exist and its resulting inference from the witnesses of the dry cleaning establishment that the stains on this jacket were blood. So this exculpatory evidence of the absence of blood on Montgomery's jacket must also be placed on the defendant's side of the materiality scale as well.

In sum, when the cumulative value of all exculpatory evidence not disclosed at the time of trial but subsequently discovered by the defense there can be no doubt that there is ample evidence to undermine confidence in the integrity of the guilty verdicts against Montgomery below.

C. The Brady Violation Was Clearly Material As To Punishment

The trial jury imposed the death penalty against Montgomery after accepting the prosecution's proof, through Heard's testimony, of the aggravating factors that both victims were

killed in a single criminal episode and that Tincher was killed because she had been a witness to Ogle's killing. The withheld evidence completely guts each of these aggravating factors. If Tincher was killed on March 8 and Ogle was killed on March 12, then they were obviously not both killed as part of a single criminal episode. Similarly, if Ogle was killed after Tincher, then Tincher could not possibly have been killed because she was a witness to Ogle's murder.[5]

Although this separate aspect of punishment-related materiality was put before the en banc court,[6] it was never passed upon by that Court. Instead, the en banc court addressed only the question of materiality as it applied to the question of Montgomery's guilt or innocence.[7] Perhaps the en banc majority simply assumed that the same analysis applied to the question of punishment as well. But the two analyses could not be more different. While the en banc majority found a way to reason itself to the liability view that Montgomery was responsible for Ogle's murder even if she was killed on March 12 as indicated by the withheld evidence, that same line of reasoning does nothing to rehabilitate the effect of the withheld evidence on the capital sentencing factors. To the contrary, the en banc majority's liability reasoning just as fully undermines the two factors the jury found to justify Montgomery's execution.

The record basis for this argument is so clear that this Court can pass upon it without a decision below by the en banc court. There is simply no analytical escape from its self-evident conclusion. Alternatively, this Court can grant this petition and remand the case to the Sixth Circuit for consideration of the materiality of the withheld evidence as to Montgomery's punishment at trial.

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[5] Under Ohio law, if only one juror rejects the death sentence, a life sentence would be imposed. Ohio Rev. Code Ann. Section 2929.03(D)(2).

[6] See Final Brief Of Petitioner-Appellee William T. Montgomery at 39 ("Montgomery claimed that the [undisclosed Police] Report was material because it contradicted the state's theory of the case that Ogle was murdered before Tincher on the morning of March 8, 1986; contradicted Heard's testimony; and disproved the capital specifications.")(emphasis added).

[7] See En Banc Majority Slip Op. at 31 (deciding only whether "the Ohio Court of Appeals unreasonably concluded that the withheld police report did not undermine confidence in the outcome of the trial").

D. The Dispute Between The Majority And Dissenting Judges on The En Banc Sixth Circuit Reveals Conflict And Confusion Over The Intersection Between The Brady And Strickland Tests For Relief

The Supreme Court has articulated the standard for when undisclosed evidence is material and therefore violates the *Brady* rule:

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . but whether in its absence [the defendant] received a "fair trial," understood as a trial resulting in a verdict worthy of confidence" *Kyles vs. Whitley*, 514 U.S. 419, 434(1995). The Petitioner must convince the court there is a reasonable probability that the result of the trial would have been different. *Strickler, 27 U.S. at 289-91.*

Despite the well-recognized articulation of this test, the majority and dissenting judges on the en banc Court below accused each other of misunderstanding and misapplying it. As Judge Merritt put it in dissent:

> "The majority in this case conflates the standard applicable for materiality in *Brady* claims with a standard for prejudice in *Strickland* claims, in order to import the prosecution-friendly presumptions of regularity applicable to the latter. In so doing, it guts the *Brady* rule of any practical deterrent effect in all but the most conscionably secure cases. It provides a disincentive for prosecutors to comply with the law. It has selected a particularly inappropriate case for this doctrinal shift because it should not agree with the State Court's view that it was reasonable for the prosecutor to conceal the Ogle facts 'in the face of overwhelming evidence presented at trial' that Montgomery killed Ogle on March 8, 1986. The evidence was not 'overwhelming,' and the concealment was not reasonable. There was no way to know what the outcome would have been had the Ogle report been turned over to the defense promptly during the defense investigation, rather than concealed."

Judge Clay's dissent below raised similar concerns as well: "The majority compounds its analytical problems, and wrongfully denies Petitioner a writ of habeas corpus, by

misconstruing the standard for Brady materiality and applying its skewed legal framework to its unsupportable version of the facts." Slip op. at 58.

This clear conflict between the en banc majority and dissent below over the nature of the standard to be applied to test Petitioner's Brady claim cries out for resolution by this Court. The Court's guidance in Smith v. Cain might be sufficient to resolve this conflict among the federal judges below; if not, then the Court should address the conflict anew herein. The conflict is too important to remain unresolved, as a man's life hangs in the balance.

The backdrop for this dispute between the judges below is the very different settings in which Brady and Strickland issues typically originate. Brady claims arise from the prosecution's unilateral failure to disclose exculpatory information within its possession and control. Strickland claims arise from some failure by defense counsel. The question becomes whether the same test for relief should apply to both types of claims given their different circumstances. As Judge Merritt explained below, there are substantial reasons to conclude that the answer to that question should be no.

The criminal justice system is run by the State. Defendants are largely at the mercy of the police with respect to crime scene investigation and witness interviews. By the time someone is charged with an offense, a lawyer appointed and arrangements made for an investigator (typically with but limited funding) is appointed, weeks have passed since the crime. Not only has the crime scene changed, but in the course of their investigation the police have taken away what they considered to be relevant evidence. The prosecution can use the Grand Jury to compel persons to testify. The defense has no similar tool.

Thus in defending a case the criminal defendant by and large has to deal with the evidence presented by the State. If the defendant is innocent, he or she must try to defend the case within the theories presented by the State and those theories are based on the evidence

produced at trial. If proper disclosures are made, then a proper defense can be presented. But when the State unilaterally decides to withhold exculpatory evidence from a defendant, then the defense presentation is necessarily skewed by the absence of that evidence. In such circumstances, the scope of the evidence presented at trial becomes - in effect - rigged by the State.

Given the prosecution's role as gatekeeper of the criminal justice system for the people, a heightened burden must be imposed on the State to play fair. As this Court recognized long ago, the State's "interest . . . in a criminal prosecution is not that it shall win a case but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1925). That is what the Brady doctrine is all about as it seeks to prevent "corruption [of] the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 104 (1976). There is no parallel to such a systemic obligation of fairness underlying Strickland claims. As a result, there is every reason for a more defendant-friendly test to be applied to Brady claims as a means of enforcing Brady's affirmative obligations on the prosecution. To use the demanding *Strickland* test as applied by the majority en banc herein to this *Brady* violation simply appears to reward the State for cheating.

II. There Is NO Way To Justify Mental Incompetence On A Jury

"Due process implies a tribunal both impartial and mentally competent to afford a hearing." Jordan v. Commonwealth of Massachusetts, 225 U.S. 167 (1912); accord, Tanner v. United States, 483 U.S. 107, 126-127 (1987). Or, as the Second Circuit has put it more directly, "[d]ue process requires that jurors be sane and competent during trial." Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980). As a result, a "jury's verdict must be set aside if the defendant

presents clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service." United States v. Hall, 989 F.2d 711 (4th Cir. 1993).

Under this Court's precedents, juror competence must be recognized as a "basic fair trial right[] that can never be treated as harmless." Gomez v. United States, 490 U.S. 858, 876 (1989).[8] Instead, such juror incompetence should be viewed as representing a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by harmless-error standards." Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991); cf. Tumey v. Ohio, 273 U.S. 510 (1927)("no matter what the evidence was against him, he had the right to have an impartial judge"). This is because the error associated with allowing an incompetent juror to sit in judgment is to a fundamental component of the trial architecture itself, rendering its effects "necessarily unquantifiable and indeterminate." Sullivan v. Louisiana, 508 U.S. 274, 275 (1993); accord, Summerlin v. Stewart, 267 F.3d 926, 955-956 (9th Cir. 2001); Johnson v. Armontrout, 961 F,2d 748, 754-56 (8th Cir. 1992).

As a result, it has long been recognized that a trial judge "may remove [a] juror when 'convinced that the juror's abilities to perform his duties [have] become impaired." United States v. Walsh, 73 F.3d 1, 5 (1st Cir. 1996)(quoting United States v. Huntress, 956 F.2d 1309, 1312 (5th Cir. 1992)); accord, United States v. Reese, 33 F.3d 166, 172-173 (2d Cir. 1994). Of course, the trial judge "has substantial discretion in exercising this responsibility." Id. "However, such discretionary choices are not left to a court's 'inclination, but its judgment, and its judgment is to be guided by sound legal principles.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975)(quoting United States v. Burr, 25 F.Cas. 30, 35 (CC Va 1807)(Marshall, C.J.)).

[8] See Peters v. Kiff, 407 U.S. 493, 501-502 (1972)(holding that due process requires that jurors be sane and competent in order to validate the fact-finding aspect of a trial).

The trial judge here completely abdicated proper discretion in dealing with the undeniably strange set of circumstances raised by this juror's note. The transcript reveals that the judge addressed the issue as follows:

> The Court: The counsel for both sides have read the note, and I'm now asking counsel if they wish to make a request to have this juror excused.
>
> Mr. Bates: Judge, could I suggest that we voir dire her?
>
> The Court: You can suggest whatever you want to suggest, and then I'll decide. Make your motions now or make your requests now, whatever it is.
>
> Mr. Wingate: Well, your Honor, on behalf of the defense, I would ask that they be removed on a two-prong basis. The first being, your Honor, in reading the statement and her analysis to Dr. Briskin appearing to be Satan, or resembling Satan, I think that that may tend to perhaps create a bias or prejudice as far as his testimony may be concerned, as far as the believability, as far as she is concerned, first.
>
> Second, I think that the letter, the way it is written may evince some type of abnormality with Miss Lukasiewicz herself, and I don't believe that it would be proper as deliberations for Mr. Montgomery in this particular matter.
>
> Since we are at this very sensitive stage, I do believe that she should be removed based upon that letter, the questionnaire or note that she did send to the Court.
>
> The Court: What is the prosecution's position.
>
> Mr. Bates: Your Honor, I would only indicate that the Court conduct some type of individual voir dire to make a determination whether she should be excused and whether that –the dream would interfere with her evaluation of the case, and then only if that determination is made, then excuse her.
>
> The Court: One alternative would be, obviously, to do nothing and return a communication to her from me which is simply, proceed.
>
> Another alternative would be for the bailiff to open the door, instruct them to stop their deliberations until instructed to resume, bring Mrs. Lukasiewicz back here, inform her that I've read the note, inquire of her, if she could, considering all the questions that have

been asked during jury selection, considering the evidence that has been presented throughout both trials, and the instructions of law that I have just given her, be fair and impartial in the considerations that are before the jury. If the answers are yes, take her back and instruct the jury to proceed with their deliberations.

Those are the two alternatives that I would consider at this point. That is, that of doing nothing. Obviously, if she answered she could not be fair and impartial, then I'd say she be substituted.

Considering everything, which do you prefer? Those are the two alternatives that I would consider.

Mr. Yavorcik: The one we suggested, voir dire her, I think.
The Court: Do you prefer that?
Mr. Bates: The State would, Your Honor.
The Court: What do you prefer?
Mr. Wingate: removal.
The Court: It's not an alternative.
Mr. Wingate: That is not the alternative. Voir Dire.
The Court: I will not do that.
Mr. Wingate: Okay, Voir Dire...
Mr. Bates: Counsel shouldn't ask any questions
The Court: That's right, there's only one question that's going to be asked and I'm going to ask it.

Transcript 2324-2327

The Court: And that question is considering as you will recall, all the questions that were asked during the jury selection process, and considering all of the evidence that you've heard over all of these days, during the first trial and during this hearing we've had today, and considering the instructions of law that I have just given to you and the rest of your fellow jurors, can you consider the case fairly—

Ms. Lukasiewicz: Well—

The Court:--and impartially?

Ms. Lukasiewicz: Well, the way—

The Court:--if you'll just answer the question yes or no?

Ms. Lukasiewicz: Yes, I can. I can consider it by weighing I believe . . .

The Court:--It Is important that you just think about my question.

> Ms. Lukasiewicz: Yes or no?
>
> The Court:--Can you consider the question that is before you and the rest of the jurors fairly and impartially in light of what you have told me here?
>
> Ms. Lukasiewicz: I don't know, I mean, I told you when I became—you know when you interviewed me the first time that I had been a psychiatric patient at one time. And that – that is why, I mean, I don't know the man. I've never seen him before
>
> The Court:--Would –
>
> Ms. Lukasiewicz: --I have nothing, I mean, you know, considering I've never seen this man before until I saw him there and then I remember him from a dream, because I have a report you know, that I **–I did have an appointment with my psychiatrist during the time that I've been here now, you know.**
>
> Tr. 2318-2321 (emphasis added).

This transcript reveals that the trial judge refused even to consider the potential removal of the juror, refused to question the juror about her apparent disability and refused to allow defense counsel to ask any questions of this juror. The transcript also reveals that the judge was myopically focused on "only one question" that he intended to ask the juror, concerning her impartiality.

The trial judge's refusals and his mis-focus completely stifled any development of self-evident question of mental competence raised by the juror's note. "When the possibility of juror incompetence comes to the court's attention, but the juror's diability is not obvious, the court is obliged . . . to conduct some hearing or inquiry." Clemmons v. Sowders, 34 F.3d 352, 355 (6th Cir. 1994). When the disability is obvious, as here, then the need for such a "hearing or inquiry" should be even more manifest. Yet here there was none on point.

Moreover, from the limited interrogation that was done, the Judge and all counsel missed the fact that Ms. Lukasiewicz indicated she was receiving psychiatric care during the

trial. The statement in the note was not that she "had been a psychiatric patient" but that "I am a psychiatric patient," and during her interrogation by the judge she confirmed this point in the same words. (R.35, Vol. VI. p. 2324-2325; Apx. at 7015-16.) Yet no one even bothered to ask her the nature of her treatment at the time, whether she had missed the appointment she referenced during the trial (and, if so, how that might have affected her) and what she meant by her mysterious reference to having "a report."

In ruling on Montgomery's claim "that the trial judge erroneously failed to excuse this juror," Sixth Circuit Majority slip op. at 22, the Sixth Circuit's en banc majority concluded - based upon a scant excerpt of 11 lines of colloquy between the trial judge and the juror (see id. at 22-23) - "that the trial judge acted appropriately" because he "retained the juror only after she reassured him 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." Id. at 23. But there is in fact nothing in the colloquy quoted by the Sixth Circuit majority which even remotely constitutes any reassurance by this juror that she could distinguish between her dream and reality. That cited colloquy reads, in full, as follows:

> The Court: Okay. Just let me ask you, would . . . the matter that you have reported to me in the note . . . affect your consideration of the case in such a way . . . that you could not be fair and impartial?
>
> [Juror]: No, not when you use the word effect.
>
> The Court: Would it have any effect?
>
> [Juror]: No because . . . this is in the past, 20 years ago this [dream] happened.
>
> The Court: Okay. Then would . . . what you have reported to me in this note have any effect on your consideration of the matter that is before the jury now?
>
> [Juror]: No, no.

> The Court: Okay, very good. You'll be taken back to the jury room, then, and the jurors will be instructed to proceed with their deliberations.

Sixth Circuit En Banc slip op. at 22-23. Thus, the subject of this juror's ability to "distinguish between her dream and reality" was simply never even raised by the trial judge, and therein lies the real constitutional problem.

The judge could have asked these same questions and gotten these same answers after having received a note from the juror indicating that she believed the defense witness was in fact Satan based upon a dream. Yet in that scenario as well the colloquy would constitute an inquiry into partiality, but not an inquiry into competence. An insane juror can profess impartiality just as well as a sane one, but surely the underlying question of sanity must receive primacy in any inquiry of the juror. Here it did not, and as a result we have a record which reveals only this juror's bizarre note, it's unexplored implications and the very real possibility that a mentally incompetent juror voted to convict Petitioner and to sentence him to death. That is not good enough.

"One's legal conscience simply recoils at the shocking thought that the due process clause of the Fourteenth Amendment is satisfied by a [fact-finder] presiding over a criminal trial and making life or death sentencing decisions while . . . materially impaired." Summerlin v. Stewart, 267 F.3d 926, 950 (9th Cir. 2001). "Such proceedings before a mentally incompetent [fact-finder] would be so fundamentally unfair as to violate federal due process under the Constitution." Id.; accord, In re Murchison, 349 U.S. 133, 136 (1955)("a fair trial in a fair tribunal is a basic requirement of due process"). A criminal conviction in such circumstances cannot stand, and "[n]either should we put to death any prisoner so condemned by such a wayward [fact-finder]." Summerlin, 267 F.3d at 955.

This juror told the Trial Judge that she was able to recall a 20-year-old dream, no mean task on its own. The "dream" was so clear two decades later that it disturbed her. She claimed that she had seen in that dream a man she had never met before. But this same man had just taken the witness stand in an effort to save Petitioner's life. She said that that witness, the key to Petitioner's mitigation case, "looked like Satan." While the fact that she remembered him as carrying a briefcase and a clock is bizarre, the suggestion that the man trying to save Petitioner's life looked like Satan must tip the scale into clear and manifest error. If habeas corpus is a guard against "extreme malfunction of the State system," *Jackson v. Virginia*, 443 U.S. 307 (1979), and the interests of justice take precedence over procedure, *McCleskey v. Zant*, 49 U.S. 467 (1991), then state and federal court findings below on the supposed competence of Juror Lukasiewicz are unreasonable and unjust determinations of fact which ought to be reversed to correct the malfunctioning of the jury process at Petitioner's trial.

CONCLUSION

Montgomery was forced to defend himself at trial without key evidence withheld by the State, and he was forced to do so before a juror plagued by unaddressed mental issues. Nothing could be more unfair. Montgomery was constitutionally entitled to the benefit of the reasonable doubt standard through a competent jury's consideration of all relevant evidence. He received far less. If the rights to due process and a jury trial mean anything, they mean that Montgomery's conviction and death sentence cannot stand. Accordingly, the petition for writ of certiorari should plainly be granted.

Respectfully submitted,

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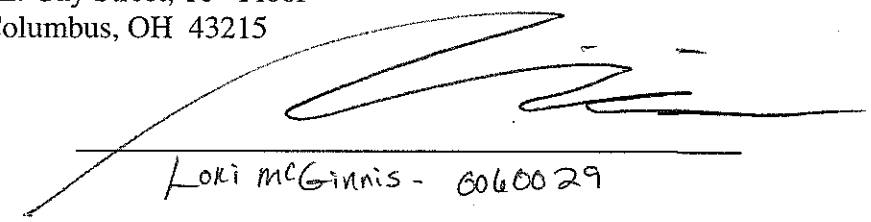

APPENDIX