No. 04-3764

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Robert J. Smothers,

Petitioner-Appellee,

v.

Gary R. McCaughtry,

Respondent-Appellant.

On Appeal from a Judgment Granting a Petition for Writ of Habeas Corpus Entered in the United States District Court for the Eastern District of Wisconsin, the Honorable J. P. Stadtmueller, Presiding

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BRIEF AND APPENDIX OF PETITIONER-APPELLEE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: ___________________

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STATEMENT CONCERNING ORAL ARGUMENT

Given the constitutional issues at stake in this case, petitioner-appellee Robert J. Smothers requests oral argument and believes it would materially advance the decisional process in this Court's resolution of the issues on appeal.

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The appellant's appendix is cited as **App. #**.

The appendix to this brief is cited as **Smothers' App. #**.

Other record references are cited as **D#** where **#** is the docket entry number from the district court record. For example, **D7, Ex. M at 8** refers to page 8 of exhibit M to docket entry 7.

Docket entry 8 has an appendix. It is cited as **D8, App. at #**.

Docket entry 6 includes trial transcripts without exhibit numbers. Those transcripts are cited by date. For example, **D6, Tr. 9/11/96 at 2** refers to page 2 of the September 11, 1996 trial court transcript included with the materials in docket entry 6.

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BRIEF OF PETITIONER-APPELLEE

JURISDICTIONAL STATEMENT

The jurisdictional statement of respondent-appellant Gary R. McCaughtry (hereinafter, "the State") is complete and correct.

ISSUES PRESENTED

With a blood alcohol level of 0.23, Jay Meyer strangled petitioner-appellee Robert J. Smothers to the brink of unconsciousness, sat on his chest, and tried to crush his windpipe. After numerous defensive cuts and blows failed to stop the attack, Smothers fatally stabbed Meyer in the chest with a pocket knife. At his state trial, Smothers claimed self-defense. He was acquitted of first-degree

intentional homicide but convicted of second-degree intentional homicide.

On federal habeas review, the district court granted relief based on Smothers' claim of ineffective assistance of counsel. The State appealed.

The primary issue is whether Smothers received ineffective assistance of counsel because his attorney failed to object when the prosecution

(1) used Smothers' five months of post-arrest, post-*Miranda* silence to argue that Smothers fabricated his claim of self-defense;

(2) used Smothers' government-induced, pre-arrest invocation of his right to remain silent as substantive evidence of guilt; and

(3) obtained a compromise verdict by falsely implying that Smothers was just contesting the first-degree charge and would "jump for joy" at a second-degree conviction.

If Smothers received ineffective assistance of counsel for one or more of these reasons, the remaining issue is whether the state court of appeals' contrary decision was an unreasonable application of clearly established federal law as determined by the Supreme Court *or* based on an unreasonable determination of the facts. If so, this Court should affirm the district court's judgment.

STATEMENT OF THE CASE

Smothers was charged with first-degree intentional homicide for fatally stabbing his friend Jay Meyer. D4, Ex. M at 2. At trial, Smothers testified that he acted in self-defense because Meyer had him in a choke hold that caused him to fear for his life. *Id.*

The jury acquitted Smothers on the first-degree charge but convicted him

of the lesser-included offense of second-degree intentional homicide by use of a dangerous weapon (a pocket knife). *Id.*, Ex. A. The Wisconsin trial court entered judgment on that verdict and sentenced Smothers to 40 years in prison. *Id*. The state court of appeals affirmed, App. 165, and the Wisconsin Supreme Court denied review, D4, Ex. H.

Smothers filed a state habeas petition alleging ineffective assistance of appellate counsel, which the state court of appeals denied. *Id.*, Ex. M at 1.

Smothers then filed a habeas petition in the state trial court alleging that his trial counsel was ineffective for failing to object when the prosecution (1) impeached Smothers by reference to his post-arrest, post-*Miranda* silence, (2) used Smothers' government-induced, pre-arrest reliance on his right to remain silent to prove his guilt, and (3) obtained a compromise verdict by falsely claiming Smothers would "jump for joy" at a second-degree conviction. *Id.*, Ex. U at 2-8. The trial court denied the motion, and the state court of appeals affirmed. *Id.*, Ex. U. The Wisconsin Supreme Court denied review. *Id.*, Ex. X.

Having exhausted state post-conviction remedies, Smothers filed a habeas petition in federal district court that reiterated his ineffective assistance of trial counsel claim. D1. In a 56-page opinion, the district court held that the prosecution's use of Smothers' post-arrest, post-*Miranda* silence to impeach Smothers' trial testimony was unconstitutional under *Doyle v. Ohio*, 426 U.S. 610 (1976), and the failure to object by Smothers' counsel was deficient and prejudicial under *Strickland v. Washington,* 466 U.S. 668, 688-94 (1984). D17 at

24-27, 38, 44-49, 54-55. The district court held that the state court of appeals' rejection of Smothers' claim was contrary to clearly established federal law. *Id.* at 55-56. Judgment was entered, and the State appealed. App. 157; D28.

STATEMENT OF FACTS

On March 23, 1996, Smothers and his friend Meyer spent the day riding around in Meyer's pick-up truck drinking alcohol. D6, Tr. 9/11/96 at 31-36. Around 6:00 p.m., they stopped at a local tavern to drink some more. *Id.* at 36-37, 39; App. 102. The two planned to eat dinner at Meyer's home. D6, Tr. 9/11/16 at 27-28. After a couple hours, Smothers badgered Meyer to leave so they could go eat. *Id.* at 36-39.

They left the bar and got into Meyer's truck, but the badgering had angered Meyer because he had not been ready to go. *Id*. at 39. So rather than drive to Meyer's home for dinner, Meyer raced his truck out of the parking lot, spun his tires down the street, ran a red light and stop sign, and remained stone-cold silent as he drove Smothers home to drop him off without dinner. *Id.* at 39-40.

They arrived at Smothers' apartment and parked in the driveway. D6, Tr. 9/10/96 at 76, 78-79, 83, 102-03; D6, Tr. 9/11/96 at 40, 76-77. Before exiting the truck, they started arguing about the fact that Meyer was not bringing Smothers over for dinner. D6, Tr. 9/11/96 at 40-41. Smothers finally gave up and told Meyer to just "go home and beat your wife and kid." *Id.* at 41-42. Notably, Meyer earlier had confided that he recently had been violent toward his wife and

child. *Id*. at 23-25.

Meyer had a blood alcohol level of about 0.23 and was already angry. D6, Tr. 9/9/96 at 152. Smothers' statement sent him over the edge, and he lunged toward Smothers, grabbed him by the throat with both hands, and began strangling him. D6, Tr. 9/11/96 at 42.

They were not evenly matched. Meyer was 41, 190 pounds, nearly six feet tall, and in good enough shape to have lifted and carried a pool table to the other side of the bar that night. D6, Tr. 9/9/96 at 105, 137; D6, Tr. 9/10/96 at 75-76. Smothers was 36, 5'9" tall, obese and out of shape at 230 pounds, and was suffering from high blood pressure that required medication. D8 at 8; D6, Tr. 9/11/96 at 19, 53, 89, 91, 136-37.

As the two struggled in the truck, Meyer locked his arms straight out and climbed on top of Smothers so that Smothers' back was half-way on the seat and half-way against the door. D6, Tr. 9/11/96 at 42. All the while, Meyer kept his hands wrapped around Smothers' throat. *Id.* at 42-43. Although Smothers could not get Meyer off of him, Smothers refrained from using lethal defensive force. *Id.* Instead, he tried hitting Meyer in the head with his fist. *Id.* at 70.

That failed to abate the attack, so Smothers used his house-keys to scratch and jab at Meyer *Id.* at 43, 74-75. Smothers also tried to summon help by honking the truck's horn with his foot. *Id.* But Meyer would not release his grip on Smothers' throat. *Id.*

At that point, Smothers was running out of breath, his cheeks were going

cold, and his "eyes started getting dim, sort of like a television. It—that's what really scared me and made me pull the [pocket] knife out." *Id.* at 44-45.

By then, Smothers thought he was "[b]eing choked to death" and that he was "going to die," but he still did not resort to lethal force to stop Meyer's attack. *Id.* at 45-46, 70. Instead, he used his knife to jab and poke at Meyer. *Id.* In doing so, he cut Meyer's left hand and forearm. *Id.* at 46. But that did not deter Meyer. *Id.*

Smothers put the knife under Meyer's chin and cut harder. *Id.* at 45-46. This caused Meyer to change positions, and Smothers reached behind his back, grabbed the passenger door handle, and yanked it open. *Id.* at 46, 74.

Because Smothers' back was pressed against the door, it popped open and Smothers fell backwards out of the truck. *Id.* At first, Meyer kept hold of Smothers' throat as he fell with him onto the driveway. *Id.* at 46-47, 75. But Meyer lost his grip and Smothers got a brief moment of freedom. *Id.* at 46-47, 75. Smothers tried to retreat by getting up and running to the rear of the truck. *Id.* at 47, 75-76.

But Meyer was right on his heels, and he tackled Smothers into a fence near the passenger side of the truck. *Id.* at 47, 76. Although Smothers still had his knife, he did not use it. *Id.* at 47. Instead, he struggled free and tried to retreat a second time. *Id.* at 47-48. Because Smothers was overweight and slow, Meyer caught him at the rear of the truck. *Id.*

After Meyer grabbed Smothers, he pushed Smothers onto his knees, threw

him onto his back, climbed on top of him, and then sat directly on Smothers' chest. *Id.* Once again, Meyer began strangling Smothers. *Id.* at 48. Meyer then put his knee on top of Smothers' bicep so Smothers could not use the pocket knife. *Id*.

Smothers then reached over and got the knife with his other hand. *Id.* at 49. He then used it against Meyer with more force. *Id.* He jabbed Meyer's abdomen, as well as Meyer's back and legs. *Id.* at 49-50. Rather than deter, this enraged Meyer more, and he intensified his choke-hold. *Id.* at 49.

At this point, Smothers was still pinned down with Meyer sitting on his chest. *Id*. Meyer then began pushing his thumbs into Smothers' Adam's apple. Smothers knew this could kill him, *id*. at 90-91, and he reacted with a stab toward Meyer's chest. *Id*. at 49-50, 66-67. That stab hit Meyer in the heart, D6, Tr. 9/9/96 at 142-43, 150, and turned out to be fatal, although it was the one action that stopped the attack. D8 at 4.

Meyer got off of Smothers, walked back to the truck's cab, opened the driver's door, got in, and sat down. D6, Tr. 9/11/96 at 50.

Smothers scrambled up, ran to the cab, yelled at Meyer not to go anywhere in his condition because he would call an ambulance, then pulled the keys out of the ignition to make sure Meyer stayed there. *Id*. Smothers ran into his apartment building and yelled for his neighbor Ms. Cook to call 911 because he had stabbed someone. *Id.* at 51. Because Smothers' throat was hurting and he was worried about his blood pressure, Smothers went to his apartment, got a

drink of water, and took his blood pressure medicine. *Id*.

Ms. Cook called 911, told the 911 dispatcher that Smothers had stabbed someone but was in the driveway "checking over" Meyer, and then gave the dispatcher the needed rescue information. *Id.* at 26; D8, App. at 14. The 911 dispatcher – a state agent – asked to speak with Smothers. D6, Tr. 9/11/96 at 52; D8, App. at 15; D8 at 10. Ms. Cook handed Smothers the phone, and the dispatcher asked Smothers what happened. D8, App. at 15; D6, Tr. 9/10/11 at 27. Smothers said someone had been stabbed and to send an ambulance. D8, App. at 15. The dispatcher then asked ***who*** stabbed Meyer. *Id*. Smothers refused to answer:

> 911: Okay. Okay. Bob, who stabbed him? Do you know who stabbed him?
>
> S: Well, I'm not ready to make no statement.
>
> 911: Okay. Okay. . . .

Id. The police arrived while Smothers was on the phone. *Id.*; D8 at 5. They found Meyer in the truck and arrested Smothers without incident. D6, Tr. 9/10/96 at 4-5, 7. The police later read Smothers his *Miranda* rights.[1] D8 at 5.

At trial, the only direct evidence of what had occurred came from Smothers' testimony because there were no other eyewitnesses. D6, Tr. 9/9/96 at 163. There was no dispute that Meyer made a serious attempt to strangle Smothers. Photographs revealed that Meyer had choked Smothers so hard that

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Meyer's finger impressions outlined Smothers' neck with abrasions. D6, Tr. 9/10/96 at 108-09; D6, Tr. 9/9/96 at 104 (prosecutor's concession that Smothers had "what appeared to be choke marks around his neck"). The evidence also confirmed that Smothers had suffered abrasions to both knees and his lower back. D6, Tr. 9/10/96 at 108.

Other physical evidence was consistent with Smothers' testimony that he did not use lethal force until his fist, keys, and twenty-two lesser knife blows failed to stop Meyer's attack. Specifically, the medical examiner found 23 wounds on Meyer. D6, Tr. 9/9/96 at 140-43. Eighteen were superficial cuts, scrapes, and abrasions, while four were more substantial but non-life-threatening wounds to Meyer's abdomen, back, and legs. *Id*. According to the medical examiner, the only fatal wound was the one to the chest. *Id.* at 142-43.

The physical evidence at the scene corroborated Smothers' testimony that the lethal wound was inflicted as a last resort only after Meyer sat on him at the rear of the truck and strangled him. *See* D6, Tr. 9/10/96 at 6-7, 18-19 (pool of blood found at rear of truck, small drops and smears elsewhere).

Finally, the fact that Meyer was in stronger physical shape – and likely feeling no pain given his 0.23 blood alcohol level – made it probable that Meyer's unremitting attack threatened Smothers with imminent death or great bodily harm unless extraordinary force was used to stop it. D6, Tr. 9/9/96 at 137, 151, 155-56; Tr. 9/11/96 at 44-45.

Thus, it is unsurprising that the prosecution wanted to impeach Smothers'

credibility and make the jury think his use of lethal force was unreasonable based on the notion that Smothers had exaggerated the seriousness of the attack. To do that, the State used Smothers' government-induced, pre-arrest reliance on his right to remain silent as evidence of his consciousness of guilt, and then used Smothers' five months of post-arrest, post-*Miranda* silence to argue that Smothers had fabricated his claim of self-defense after the fact.

Specifically, in its case-in-chief, the prosecution played a tape of the 911 conversation quoted above. This was no surprise to Smothers' counsel, as the prosecution had warned in advance of its plan to do just that. D8, App. at 12. The jury thus heard Smothers' own voice tell the State's 911 dispatcher that he did not want "to make no statement" after the dispatcher asked an incriminating question. D6, Tr. 9/10/96 at 32; D8, App. at 15; D8 at 10. In addition, the prosecution replayed the tape during cross-examination and sarcastically asked if Smothers knew who stabbed Meyer. 6 CR, Tr. 9/11/96 at 81-82.

Then, in closing argument, the prosecutor hammered home two facts: (1) that Smothers invoked his right to remain silent prior to arrest and (2) that Smothers waited five months after arrest before first voicing ***any*** claim of self-defense.

As to (1), the prosecutor argued:

- "The 911 call. That shows a lot. That 911 call, that perhaps 30 second, 45 seconds where you hear Mr. Smothers on the call, tells you volumes. Tells you volumes about the state of mind of Mr. Smothers and what happened that night."

- “The dispatcher talks to him a little bit later, and he says, well, I’m not ready to make no statement.”

- “That point he says I’m not ready to make no statement.”

- “Already Mr. Smothers in his own way is starting to think how he’s going to extricate himself from this situation, a very difficult situation.”

- “He’s got a dead body out in his driveway. There’s blood all over the place. He can’t move that body. He can’t move himself. He can’t get rid of all the blood over himself.”

- “He’s already – his mind is working a little bit saying I’m not ready to make no statement.”

- “That’s March 23rd.”

As to (2), the prosecutor argued:

- “Yesterday, September 11th, a long time has passed since March 23rd . . . .”

- “[S]ince then Mr. Smothers has been charged.”

- “He’s become represented by Mr. Rose.”

- “He’s had an opportunity to get and review the police reports, the witness statements, and now he’s ready to make a statement. I was in danger of being killed. I believed my life was in danger.”

- “That is his statement September 11th of 1996.”

- “Mr. Smothers knows when he’s testifying that the only other person who was involved in this incident is not going to contradict him.”

- “He knows after five months, five-plus months that he can give a statement now, he can talk about that incident, and he knows that James Meyer is not going to stand up and say, wait a minute, ladies and gentlemen, it didn’t happen that way. It didn’t happen that way at all.”

- “[Smothers] has carte blanche. He has carte blanche to say whatever

> puts himself in the best position legally. The best position legally is that I was fighting for my life. I had nothing I could do. It was kill or be killed, and I got these scratches on my neck because I was being choked to death and I killed him because I had to, my last absolute resort."

D6, Tr. 9/12/96 at 43-46.

The jury convicted Smothers of second-degree homicide. D4, Ex. A. As the State acknowledges, the only way the jury could have reached that verdict was to find that Smothers' use of lethal force was not objectively reasonable under the circumstances, either because he was not objectively in danger of imminent death or great bodily harm or because he did not objectively need to use lethal force to stop the attack. State's Brief 39. Thus, as explained in more detail herein, the jury necessarily decided that the struggle had not really escalated into a true "kill or be killed" scenario, contrary to Smothers' testimony. *See infra* Part I.C.2.

In rendering this verdict, the jury played straight into the prosecutor's final impermissible argument, a calculated effort to secure a conviction on some offense, if not first-degree homicide. Specifically, the prosecutor insinuated that Smothers really was just contesting the first-degree charge and secretly hoped for a conviction on the lesser second-degree offense:

> This is first degree intentional homicide. We're not going to give you [the jury] a pass in that regard. It's very easy and the defense could jump for joy if you come back and say he's guilty of a lesser included offense. This is reckless. This is just too much self-defense. They would jump for joy at that result, at that outcome; and it would send the wrong message, the implication

> would be wrong for the community, because this was first degree intentional homicide.

D6, Tr. 9/12/96 at 73-74. This argument was false because Smothers maintained that he should be acquitted on all offenses. *Id*. at 67. The prosecutor knew this – even before trial – as Smothers had rejected a plea-bargain offer from the prosecution "without hesitation or any reservation." D8 at 41, 43.

After receiving the verdict, the trial court imposed a 40-year prison sentence, despite a lack of prior violence in Smothers' background. D4, Ex. A; D8 at i.

As explained herein, the prosecution used three unconstitutional tactics to obtain Smothers' conviction and the failure by Smothers' attorney to object, seek a mistrial, request a curative instruction, or even rebut those tactics was ineffective assistance of counsel. Because the state court of appeals' contrary determination was unreasonable, this Court should affirm the district court's judgment.

STANDARD OF REVIEW

This Court reviews a district court's findings of fact for clear error and its determination that habeas relief is warranted on those facts *de novo*. *See Foster v. Schomig*, 223 F.3d 626, 634 n.4 (7th Cir. 2000). Because the district court resolved Smothers' petition without an evidentiary hearing, the district court and this Court must take as true the facts outlined above, as alleged in Smothers' petition and memorandum of facts. D1; D8; *see United States ex rel.*

Mazenis v. McBee, 435 F.2d 18, 19 (7th Cir. 1970) (per curiam).

Smothers' petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), because his petition was filed after AEDPA's effective date. *Lindh v. Murphy*, 521 U.S. 320, 322-23 (1997). Under AEDPA, a federal court must grant a state inmate's habeas petition if the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States," so long as the relevant state court decision rejecting the petitioner's claim (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(a), (d) (1994 & Supp. 2004).

A state petitioner's claims are thus analyzed in a two-step process. First, the federal court determines whether the petitioner is entitled to relief on the merits because he is in custody in violation of federal law. If so, the court then determines whether relief may be granted under § 2254(d), given the contrary state court decision. *See Weeks v. Angelone*, 528 U.S. 225 (2000) (illustrating two-step process).

SUMMARY OF THE ARGUMENT

Because Smothers was the only surviving eyewitness, his claim of self-defense at trial hinged on the credibility of his testimony that the struggle escalated into a true "kill or be killed" situation. Recognizing this, the

prosecution implored the jury to infer that Smothers had exaggerated the circumstances of the struggle to make it seem worse than it was and expressly asked the jury to infer that Smothers was lying because he waited "five plus months" after arrest to voice any claim of self-defense. Because this was a bald-faced comment on Smothers' post-arrest, post-*Miranda* silence, it facially violated his due process rights under *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).

In an attempt to escape this conclusion, the State insinuates that *Doyle* does not apply because Smothers was never *Mirandized*. But in fact, Smothers was *Mirandized* right after arrest. The State then tries to distinguish *Doyle* on several bases that have nothing to do with the only relevant fact: that the prosecution unconstitutionally impeached Smothers by reference to his post-arrest, post-*Miranda* silence.

Given this clear-cut *Doyle* violation, the failure to object by Smothers' counsel makes this a textbook case of deficient performance under *Strickland*, and the district court's grant of relief was correct because the state court of appeals' rejection of Smothers' *Strickland* claim was based on the objectively unreasonable premise that it is entirely permissible for the prosecution to impeach a defendant in just that way.

The State claims that counsel's performance did not prejudice Smothers, but the State forfeited that argument by failing to raise it in the district court prior to judgment. In any event, as the district court correctly found, prejudice is clear. The prosecution's argument gave the jury a commonsense – albeit

unconstitutional – basis for discounting Smothers' credibility, and the jury's verdict demonstrates that it discounted his credibility precisely as requested. Specifically, the jury convicted Smothers of second-degree homicide, which meant it believed the prosecutor's argument that Smothers had exaggerated the "life or death" nature of the struggle. Moreover, because the jury otherwise believed Smothers' testimony (and acquitted him on the first-degree charge), a "reasonable probability" exists that the jury would have acquitted him on both offenses if his counsel had kept the prosecution from impeaching his credibility on the very point that allowed his conviction.

Although the above argument is sufficient to affirm the district court's judgment, this Court may also consider the following two arguments as additional or alternative grounds in support of that judgment:

First, the prosecution separately violated Smothers' state and federal right to remain silent by playing the 911 call in its case-in-chief and by arguing that Smothers' tape-recorded invocation of his right to remain silent reflected Smothers' consciousness of his own guilt. Smothers' counsel was deficient in failing to object because such tactics were barred under state and federal law based on controlling precedent from the United States and Wisconsin Supreme Courts and because he had advance warning that the prosecution planned to use the 911 call in this fashion. Counsel's failure was prejudicial because the State's evidence and argument compounded the prejudicial effect of its *Doyle* violations and made it more likely that the jury would find Smothers guilty, as it did.

Relief should be granted because the state court decision rejecting this claim (1) unreasonably failed to apply principles of state and federal law under controlling Wisconsin and Supreme Court precedent and (2) unreasonably determined that the prosecution never used Smothers' government-induced invocation of his right to remain silent as evidence of guilt.

Second, the prosecution argued that Smothers would "jump for joy" if convicted of second-degree homicide, thus implying that Smothers really was just contesting the first-degree charge because even he knew he was guilty of some offense, as "reflected" by his pre-arrest invocation of his right to remain silent. The prosecution knew its "jump for joy" argument was false, and this violated due process under clearly established law of the Supreme Court. Smothers' counsel rendered deficient performance by failing to object, and this prejudiced Smothers because the prosecution's argument reinforced the other improper tactics it had used to suggest guilt and deception. In addition, it is likely that the jury acted on this impermissible argument because the jury acquitted Smothers on the first-degree charge while convicting him on the lesser one. This Court should grant relief on this claim because the state court of appeals (1) unreasonably failed to identify or apply the controlling legal principle that was clearly established by Supreme Court precedent and (2) unreasonably determined that the prosecutor never suggested that Smothers was just contesting guilt on the first-degree charge.

ARGUMENT

I. Smothers' counsel was ineffective in failing to object to the use of Smothers' post-arrest, post-*Miranda* silence to impeach his testimony.

A. The prosecution violated Smothers' due process rights by using his post-arrest, post-*Miranda* silence to discredit his claim of self-defense.

It is unconstitutional for the prosecution to comment on a defendant's post-arrest, post-*Miranda* silence to impeach the defendant's testimony. *See Doyle*, 426 U.S. at 619. In *Doyle*, the prosecution impeached two defendants at trial by using their post-arrest silence to discredit their testimony. The prosecution did this by cross-examination and closing argument. *See id.* at 613-14 & n.5. The Supreme Court held that such silence had little probative value because it was "insolubly ambiguous" and may reflect "nothing more" than the exercise of *Miranda* rights. *Id*. at 618. The Court also held that using such silence against a defendant violated principles of fundamental fairness:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 618. The Court thus concluded that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id*. at 619.

Here, the prosecution violated Smothers' due process rights by using his post-arrest, post-*Miranda* silence to discredit his claim of self-defense. At trial, Smothers was the only eyewitness to the underlying events. D6, Tr. 9/9/96 at 163. Thus, his claim of self-defense hinged on the credibility of his testimony that the struggle escalated into a true "kill or be killed" situation. This is because the jury could not convict Smothers of either first- or second-degree intentional homicide unless the prosecution proved beyond a reasonable doubt that Smothers "did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself." D6, Tr. 9/12/96 at 13.

Recognizing this, the prosecution implored the jury to infer that Smothers had exaggerated the circumstances of the struggle to make it *seem* like a "kill or be killed" situation when it really was not. The prosecution did this by making the jury painfully aware that Smothers waited five months after arrest before voicing ***any*** claim of self-defense.

The prosecution first highlighted the fact that Smothers decided to invoke his right to remain silent on the night of the struggle and his arrest:

- "[Smothers said] I'm not ready to make no statement. **That's March 23rd.**"

D6, Tr. 9/12/96 at 44 (emphasis added).

The prosecution then focused on the five-month period between the night of Smothers' arrest and the first time he ever voiced a claim of self-defense: *i.e.*, his trial testimony on September 11, 1996:

- “Yesterday, September 11th, **a long time has passed** since March 23rd.”

- “[His claim of self-defense] is **his statement September 11th of 1996**.”

- “[Smothers] knows after **five months**, **five-plus months** that he can **give a statement now** . . . .”

Id. at 44-45 (emphasis added).

Next, the prosecution told the jury that the reason Smothers had not voiced any claim of self-defense earlier was because he needed time to obtain the tools and information to fabricate an exculpatory story for trial:

- “[Since March 23, 1996] He’s become represented by [counsel].”[2]

- “He’s had an opportunity to get and review the police reports, the witness statements . . . .”

Id.

Throughout this process, the prosecution hammered home the notion that Smothers must have contrived his story over the past five months because he never voiced that story before:

- “[Smothers] knows after five months, five-plus months that he can give a statement **now**, he can **talk** about that incident . . . .”

- “. . . **now** he’s **ready** to make a statement. I was in danger of being killed. I believed my life was in danger.”

Id. at 45 (emphasis added).

[2] This negative comment on Smothers’ retention of counsel independently violated *Doyle* because *Miranda* warnings inform of the right to counsel as well as the right to remain silent. *See United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995).

The State claims that the above argument merely commented on Smothers' "opportunity to tailor his statement based on the government's witnesses' statements." State's Brief 14. But that aspect of the prosecutor's argument simply reinforced the primary message that Smothers failed to voice any claim of self-defense for the "five plus months" between arrest and trial because he was too busy concocting a false story. Thus, the State is mistaken to compare this case to those where the prosecution never invited the jury to draw any impermissible inference from a defendant's silence. *E.g.*, *Bieghler v. McBride*, 389 F.3d 701, 705 (7th Cir. 2004).

Rather, as this Court has explained, "[p]rosecutors who invite the jury's attention to a defendant's silence walk a narrow path from which it is easy to fall. ***Any hint*** that the silence is inconsistent with later statements produces the inference forbidden by *Doyle* and imperils the verdict." *Splunge v. Parke*, 160 F.3d 369, 373 (7th Cir. 1998). Far more than a "hint" occurred here. Instead, the prosecutor gave a compelling account of why Smothers' failure to voice any claim of self-defense for "five plus months" meant he fabricated his testimony. This violated Smothers' due process rights under *Doyle*.

B. The State's counter-arguments cannot escape the fact that Smothers was impeached by his post-*Miranda* silence.

The State suggests that *Doyle* is not implicated because Smothers was never *Mirandized*, which is false. It then unsuccessfully tries to distinguish *Doyle* on bases that have nothing to do with the only relevant question: whether

the prosecution impeached Smothers' credibility by reference to his post-arrest, post-*Miranda* silence. This Court should reject the State's incorrect and irrelevant arguments.

***1. Contrary to the State's insinuations, Smothers was* Mirandized.**

The State claims this case is like *Fletcher v. Weir*, 455 U.S. 603 (1982). State's Brief 28. Because the defendant was not *Mirandized* in *Weir*, the Supreme Court held that *Doyle* was not implicated because the State never made any promises about the defendant's silence. *See Weir*, 455 U.S. at 606. The State paints a false picture by comparing this case to *Weir* because Smothers was *Mirandized* after arrest.

First, Smothers' federal petition and memorandum of facts alleged this crucial point. D1 at 5, 8; D8 at 5. These allegations must be taken as true because the district court did not hold an evidentiary hearing. *See supra* at 13.

Second, the State has never previously disputed that Smothers was *Mirandized* after arrest and thus has forfeited any ability to challenge that for the first time here. *United States ex rel. Shiflet v. Lane*, 815 F.2d 457, 464 (7th Cir. 1987) ("In general, litigants must present their arguments before the district court or else they are waived.").

Finally, Smothers' *Miranda* allegations are **true**. As explained by his memorandum of facts in the district court, the transcripts of two pre-trial state court hearings reflect that the police *Mirandized* Smothers after arrest. D8 at 5;

D8, App. at 2. To be clear, the state transcripts themselves were not before the federal district court, but that is because the State failed to provide them even though the district court granted Smothers' *pro se* motion for the State to supply the "State trial court transcript record." D5 at 2-3. In any event, because those transcripts are from a related state court proceeding, this Court may take judicial notice of them. *See Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir. 1983) ("[A]n appellate court may take judicial notice of . . . proceedings in other courts, both within and outside of the federal judicial system, if the proceedings have a direct relation to matters at issue."). For that reason, one of those transcripts has been included in the appendix to this brief. It confirms that Smothers was *Mirandized* after arrest. Smothers' App. 5.

2. *The fact that the jury did not hear about Smothers'* **Miranda** *warnings only makes the due process violation more egregious.*

The State also argues that *Doyle* is not implicated because the prosecution "did not introduce any affirmative testimony establishing when Smothers was arrested and when or if *Miranda* warnings were given." State's Brief 28. The first half of this is incorrect because there was evidence of Smothers' arrest at trial.[3] As to the second half, no reported case provides any basis to think a jury has to hear about a defendant's *Miranda* warnings in order for the prosecution to be able to violate *Doyle*. The only relevant fact is ***whether*** the defendant was

[3] Police went to Smothers' address, found Meyer and Smothers, and ordered Smothers to the ground, where he was "handcuffed" and "secured." D6, Tr. 9/10/96 at 3-6.

Mirandized, not whether the jury heard about it.

The reason this is the only relevant fact is because a *Doyle* violation occurs solely by virtue of the State breaking its promise not make adverse use of a defendant's post-*Miranda* silence. *Weir*, 455 U.S. at 605-06. The State breaks that promise simply by impeaching a defendant by reference to that silence. The ensuing harm thus is felt whether the jury knows the defendant was *Mirandized* or not. If anything, the fact that a jury does ***not*** hear about those warnings only makes an impeaching argument that much more egregious. For example, if the jury had heard that Smothers had been *Mirandized*, at least it would have had some basis to discount the prosecutor's theory of fabrication if only because those warnings begin "You have the <u>right</u> to remain silent."

3. The fact that Smothers did not get to explain his silence to the jury also makes the due process violation more – not less – egregious.

The State also tries to distinguish *Doyle* on the ground that the prosecutor's unconstitutional comments were made in argument rather than cross-examination. State's Brief 10, 26-27. But that also has no bearing on whether the prosecution used Smothers' post-arrest, post-*Miranda* silence to impeach his credibility. The holding of *Doyle* is not limited to cross-examination. Rather, "[t]he holding of *Doyle* is that the Due Process Clause bars 'the use for **impeachment** purposes' of a defendant's postarrest silence." *Greer v. Miller*, 483 U.S. 756, 763 (1987) (emphasis added). And "impeachment" covers more than cross-examination: it covers any attempt to "discredit[] the veracity of a

witness." BLACKS LAW DICTIONARY 768 (8th ed. 2004).

Indeed, the Supreme Court has made clear that *Doyle* is implicated regardless of whether the prosecution impeaches by questioning or argument:

> It is significant that in each of the cases in which this Court has applied *Doyle*, the trial court has permitted specific inquiry ***or argument*** respecting the defendant's post-*Miranda* silence.

Greer, 483 U.S. at 764 (emphasis added). Consistently, the Supreme Court has found a *Doyle* violation based on impeaching argument, even where the defendant was never cross-examined. *See Wainwright v. Greenfield*, 474 U.S. 284, 287 (1986).[4]

Wainwright also reveals that *Doyle* broadly covers all situations where the State tries to secure a conviction by use of the defendant's post-*Miranda* silence, as when a State tries to use it to defeat a claim of insanity:

> The point of . . . *Doyle* . . . is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction.

Wainwright, 474 U.S. at 292. This analogical reasoning shows that *Doyle* cannot

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[4] *See also Neely v. Wisconsin*, 272 N.W.2d 381, 385-87 (Wis. App. 1978), *aff'd*, 292 N.W.2d 859 (Wis. 1980) (*Doyle* violation through closing argument).

be distinguished into nonexistence based on arguments like the State's. Rather, *Doyle* covers **all** situations where a State breaks a promise not to use a defendant's silence to help obtain a conviction. *See Wainwright*, 474 U.S. at 295 ("In *Doyle*, we held that *Miranda* warnings contain an implied promise, rooted in the Constitution, that silence will carry no penalty." (internal quotation marks omitted)).

The State's effort to limit *Doyle* to cross-examination also makes no sense because it depends on the flawed notion that successful impeachment can occur only by cross-examination. But just the opposite is often true. For example, the prosecutor's argument here was more powerful than cross-examining Smothers as to *why* he remained silent. Had Smothers been given a chance to explain himself, the jury at least could have considered the commonsense explanation he had given police: that "he watched a lot of cop shows and was afraid to say anything." D8 at 21. But the jury did not hear that; it just heard the prosecution's unrebutted claim of fabrication. Thus, the prosecution got more mileage from its impermissible impeachment by reserving it for closing argument where it stood unrebutted.

4. The prosecution's argument impeached Smothers regardless of whether his silence was "in evidence."

The State next tries to distinguish Doyle on the basis that Smothers' post-arrest, post-*Miranda* silence was not "in evidence." State's Brief 23, 27. But at most, that would only affect the *persuasiveness* of an argument referencing that

silence; it would not change the fact that it was an attempt to impeach by impermissible means. And in the present case, of course, the prosecutor's argument could not have been more persuasive: it was unrebutted, and Smothers' post-*Miranda* silence was both undisputed and indisputable.

Apparently, the State thinks it can make otherwise unconstitutional arguments so long as it is careful not to put threshold undisputed facts into evidence. But that would stand *Doyle* on its head, and no court has ever accepted such "reasoning." Indeed, in a Tenth Circuit case, the court found "plain, fundamental [*Doyle*] error" where the prosecutor had argued in front of a jury that "I think it's relevant that if he was so innocent why did he not tell the agents that evening that he was innocent." *United States v. Remigio*, 767 F.2d 730, 735 (10th Cir. 1985). That court found that such argument was "undeniably calculated" to impeach, even though no substantive evidence of silence had been admitted. *Id.*

If anything, the State's argument just demonstrates that in addition to the prosecutor's violations of *Doyle*, he ***also*** may have violated other law by arguing outside the record.[5] Two wrongs, however, don't make a right.

Finally, the State's argument is immaterial because there was evidence of Smothers' post-arrest silence in this case. Specifically, by playing the 911 tape in its case-in-chief, the prosecution showed that on the night of his arrest,

[5] *See United States v. LeFevre*, 483 F.2d 477, 479 (3d Cir. 1973); *Wisconsin v. Draize*, 276 N.W.2d 784, 789 (Wis. 1979).

Smothers did not discuss the details of the struggle in the face of interrogation by a state agent. The jury thus had an evidentiary basis to at least infer that Smothers' maintained that posture until trial, especially absent evidence that he ever told police that he acted in self-defense. *See Seymour v. Walker*, 224 F.3d 542, 560 (6th Cir. 2000) (finding that impeachment had occurred even though prosecutor only argued that defendant had been silent based on an absence of evidence to the contrary).

5. *The State has no "need" to comment on a defendant's post-arrest, post-*Miranda *silence to make otherwise permissible arguments.*

The State asks, "How can a prosecutor compare a pre-*Miranda* statement to trial testimony without at least an inference of silence between the pre-*Miranda* statement and the trial testimony?" State's Brief 31. But this misstates the problem. The problem is not with arguments that may give rise to some inference that post-*Miranda* silence ***exists***. The problem is when the prosecution goes further and exploits that silence to ***impeach***.

Put another way, the State is free to conduct otherwise permissible impeachment that contrasts pre-*Miranda* statements with trial testimony. It just cannot go further and cross the "*Doyle* line" by drawing any attention to a period of post-*Miranda* silence in order to impeach. Here, for example, the prosecutor could have asked Smothers whether he told Ms. Cook that he acted in self-defense as he was running to get his blood pressure medicine.[6]

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[6] In theory, the prosecution also could have cross-examined Smothers on whether he told

Of course, the State's real complaint is that such cross-examination would have been ineffective here, as even the prosecutor conceded that Ms. Cook only had "brief contact" with Smothers "before the police arrived." D6, Tr. 9/12/96 at 43. In contrast, it is much more effective – but impermissible – to argue that a defendant spent "five plus months" fabricating his testimony before voicing any claim of self-defense.

And even if the State could concoct some situation where it would be impossible to impeach on a permissible basis without simultaneously making an impermissible comment on the defendant's silence, the only reasonable way to deal with that is to hold that the impermissible impeachment remains impermissible. *See United States ex rel. Allen v. Franzen*, 659 F.2d 745, 748 (7th Cir. 1981) (fact that prosecutor's impeaching remarks simultaneously referenced periods of pre- and post-*Miranda* silence "[did] not alter the conclusion" that the post-*Miranda* references were unconstitutional); *Neely v. Wisconsin*, 272 N.W.2d 381, 387 (Wis. App. 1978), *aff'd*, 292 N.W.2d 859 (Wis. 1980) (same).

C. Smothers' counsel was ineffective in failing to prevent or cure the prosecution's due process violations.

Sixth Amendment ineffective assistance of counsel claims are governed by a two-part test. "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. "The proper measure of attorney performance remains simply reasonableness under prevailing professional

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the 911 dispatcher that he acted in self-defense, but this is academic because the prosecution had already violated Smothers' constitutional rights by using that call in its case-in-chief. *See infra* Part II.

norms." *Id*. at 688. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. Specifically, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

1. Smothers' counsel was deficient because he had an ironclad basis to object to the prosecution's use of Smothers' post-*Miranda *silence, and he had reason to know the prosecution would do so.

The State does not dispute that Smothers' counsel would be deficient for failing to object to a *Doyle* violation, and as just shown, Smothers' counsel had an ironclad basis to make that objection. Nor can there be any reasonable "strategy" in failing to object to unconstitutional argument that is prejudicial. *See Freeman v. Class*, 95 F.3d 639, 644 (8th Cir. 1996) (no "reasonable tactical basis" for failure to object to comments on defendant's post-arrest, post-*Miranda* silence).

In addition, Smothers' counsel had advance warning that the prosecution planned to use Smothers' silence. First, the prosecution informed Smothers' counsel that it planned to use the tape of the 911 call containing Smothers' government-induced reliance on his right to remain silent. D8, App. at 12. Second, the prosecution informed Smothers' counsel of its concern that Smothers would tailor his defense to fit the available evidentiary reports and statements

"regardless of the truth" because Smothers had not provided the prosecution with "any information about the facts of the case or his intent at the time of the event." *Id.* at 16.

Under such circumstances, Smothers' counsel could have filed a pretrial motion to prevent improper use of Smothers' post-*Miranda* silence at trial, but he did not. Then, in the face of the prosecution's actual *Doyle* violations, Smothers' counsel did not object, request a mistrial, seek a curative instruction, or make any attempt to otherwise rebut the prosecution's unconstitutional arguments in his own closing. Counsel's performance thus fell below any reasonable professional standard.

2. Smothers was prejudiced because the prosecution's due process violation undermined the crux of his defense: the "kill or be killed" nature of the struggle.

In the district court, the State did not contest prejudice until after the district court rendered judgment in Smothers' favor. The State then argued "lack of prejudice" in a post-judgment motion. The district court denied the motion because that argument "could have and should have been advanced prior to the court's June 20, 2004 order." App. 161-62. In its opening brief on appeal, the State does not claim the district court abused its discretion in denying that post-judgment motion. The State has thus forfeited any ability to dispute prejudice here.[7]

[7] *Armstead v. Frank*, 383 F.3d 630, 633 (7th Cir. 2004) (petitioner waived appellate argument by failing to raise it below until after district court entered judgment); *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) ("Procedural rules apply to the government as

In any event, counsel's deficient performance prejudiced Smothers because there is a "reasonable probability" that the result at trial would have been different if Smothers' counsel had prevented or cured the prosecution's improper argument. *Strickland*, 466 U.S. at 687, 694.

First, *Doyle* violations are a recognized source of harm and prejudice, even when a defendant's testimony is "transparently frivolous." *See United States v. Shue*, 766 F.2d 1122, 1132 (7th Cir. 1985) ("[P]ost-arrest silence due process violations often have been held reversible error . . . ."); *Chapman v. United States*, 547 F.2d 1240, 1249 (5th Cir. 1977) ("transparently frivolous" standard).

Second, this was not a case where the prosecution had "overwhelming" evidence. *See Strickland*, 466 U.S. at 696 ("[A] verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); *Shue*, 766 F.2d at 1132-33 (*Doyle* violation harmful where evidence of guilt not overwhelming). Indeed, the state court of appeals previously held the evidence was merely "sufficient" to support the verdict. D8, App. at 11.

Third, counsel's deficient performance concerned a core factor in the case – Smothers' credibility. *See Shue*, 766 F.2d at 1132-33 (finding harm where credibility was important). Specifically, the prosecution gave the jury a common sense, albeit unconstitutional, reason for discounting Smothers' credibility on the ***most critical issue***: whether the struggle had escalated to a true "kill or be

well as to defendants.").

killed" situation. Even the State recognizes the futility of arguing that Smothers would not have been prejudiced by a successful attack on his credibility. Instead, the State's primary argument is that there was no prejudice because the jury believed that Smothers acted in self-defense. State's Brief 39-40. But the State's argument is only half right, and the half that is wrong is fatal to its argument.

On the one hand, the jury's verdict of acquittal on the first-degree charge reflected the following:

> (1) Smothers reasonably believed he was preventing or terminating an unlawful interference with his person, and
>
> (2) Smothers actually believed the force used was necessary to prevent imminent death or great bodily harm to himself.

See D6, Tr. 9/12/96 at 9.[8] The jury thus believed Smothers had acted in "imperfect" self-defense. *See Wisconsin v. Camacho*, 501 N.W.2d 380, 383 (Wis. 1993).

On the other hand, Smothers' conviction for second-degree intentional homicide meant the jury decided that

> (3) Smothers did not reasonably believe the force used was necessary to prevent imminent death or great bodily harm to himself.

See D6, Tr. 9/12/96 at 9.

Conversely, if the jury had believed that Smothers' use of lethal force had

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[8] The prosecution had to disprove (1) ***or*** (2) to get a first-degree conviction; Smothers' acquittal thus means the jury believed (1) ***and*** (2) because the prosecution failed to disprove either one. *See* D6, Tr. 9/12/96 at 9 (jury charge).

been objectively reasonable under the circumstances, the jury would have acquitted him of second-degree intentional homicide based on the existence of "perfect" self-defense. *Id*. at 6; *Camacho*, 501 N.W.2d at 383.

In sum, the jury ***accepted*** Smothers' claim of imperfect self-defense but ***rejected*** his claim of perfect self-defense. Thus, the jury did not believe ***all*** of his testimony. Rather, the jury disbelieved that portion which demonstrated that the struggle escalated to a point where it was objectively reasonable for Smothers to use lethal force to prevent imminent death or great bodily harm. As to that, Smothers testified that

- Meyer strangled him to the brink of unconsciousness, and continued to choke Smothers throughout the struggle.
- Smothers tried to stop Meyer with three forms of non-lethal force, including his keys, his fists, and twenty-two non-lethal knife jabs.
- During the struggle, Smothers made two attempts to retreat and tried to summon help.
- Meyer pinned Smothers flat on his back by sitting on his chest and placing his knee over Smothers' arm.
- Meyer then intensified his strangulation efforts by pushing his thumbs into Smothers' throat, thereby threatening death or great bodily harm.

See supra at 5-8.

If the above had been believed, it was reasonable beyond question for Smothers to use lethal force to stop Meyer's attack since nothing less had worked. Because the jury convicted Smothers of second-degree intentional homicide, the jury necessarily believed Smothers made up or at least

exaggerated some of these details.

The State may try to argue that Smothers' testimony, even if believed, did not support a claim of perfect self-defense under state law. Given Smothers' testimony, this argument is invalid on the merits. Moreover, the trial court proceedings refute this notion as well. Under state law, a defendant is entitled to an instruction on perfect self-defense only if there is evidence that his use of force was objectively reasonable. *See Wisconsin v. Head*, 648 N.W.2d 413, 438 (Wis. 2002).[9] The trial court submitted that instruction to the jury, and the prosecution did not object. D6, Tr. 9/12/96 at 6-7, 13-14. Rather, the prosecutor admitted "I think it is an issue for the jury whether or not [Smothers'] acts were reasonable." D6, Tr. 9/11/96 at 148. The State thus has no basis to ask a federal court to second-guess this state evidentiary determination that it previously agreed with.

Consequently, the only remaining issue is whether there is a "reasonable probability" that the jury disbelieved Smothers because of the prosecutor's unconstitutional arguments. Here, that is likely because the physical evidence corroborated Smothers' testimony. *See supra* at 9. Thus, the prosecution's "best" argument was the unconstitutional one: that Smothers waited "five plus months" to voice the one claim that "put[] himself in the best position legally":

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[9] The State is correct that *Head* changed Wisconsin law on self-defense. State's Brief 36. Specifically, *Head* lowered the objective prong of ***imperfect*** self-defense to a subjective standard. 648 N.W.2d at 438. But that change is irrelevant here since the jury found that Smothers satisfied that prong even under the higher standard. *See* State's Brief 37 (acknowledging that the jury's verdict meant that Smothers' "belief in the existence of an unlawful interference was reasonable"). *Head* otherwise did not change Wisconsin law.

- "I was fighting for my life."
- "I had nothing I could do."
- "It was kill or be killed, and I got these scratches on my neck because I was being choked to death and I killed him because I had to, my last absolute resort."

D6, Tr. 9/12/96 at 44-45.

Incredibly, the State claims that the prosecutor's argument "did not address the reasonableness of Smothers' belief that he was in danger of imminent death or great bodily harm or the reasonableness of Smothers' belief that the amount of force used was necessary." State's Brief 40. But the quoted argument specifically contends that Smothers fabricated his "kill or be killed" defense during his "five plus months" of silence. Notably, the State omits those bulleted remarks in its rendition of the prosecutor's argument. *Id.* at 11-12.

Finally, although the jury's conviction demonstrated that it discounted Smothers' credibility precisely as the prosecution directed, the jury's acquittal on the first-degree charge demonstrated its general willingness to otherwise believe Smothers' testimony. By itself, this is strong evidence that the outcome would have been different absent the constitutional violation. *See United States v. Kallin*, 50 F.3d 689, 695 (9th Cir. 1995) (finding *Doyle* violation harmful, despite curative instruction and district court finding of "overwhelming" evidence of guilt based on jury's split verdict, as that may have "indicate[d] that the jury was predisposed to acquit on all counts but was influenced to partially convict by the *Doyle* violation").

Importantly, *Strickland* does not demand that "counsel's conduct more likely than not altered the outcome of the case." 466 U.S. at 693. All that must be shown is a "reasonable probability," and that is just a "probability sufficient to undermine confidence in the outcome." *Id.* at 694. That standard is satisfied here because Smothers' counsel failed to object to the unconstitutional tactic that destroyed Smothers' credibility on the very point that allowed his conviction. The district court agreed:

> The evidence against Smothers was not overwhelming. There were no witnesses to the stabbing and Smothers' version of events was not implausible. In fact, the prosecution's case hinged almost entirely on the credibility of Smothers' trial testimony. In a case such as this one, there is a fair probability that the jury would have persuaded by the prosecutor's improper argument and believed [that] if Smothers had truly acted in self-defense he would have notified the authorities of this fact prior to trial. As such, the court is obliged to concluded that there is a fair probability that but for the prosecutor's improper argument, the outcome of Smothers' trial would have been different.

App. 148-49. The State is therefore far off the mark to claim that this Court "can have one hundred percent confidence" that the prosecutor's improper post-arrest, post-*Miranda* comments had no influence on the jury's verdict. State's Brief 38-40. Consequently, this Court should find that Smothers is in custody in violation of the Constitution. 28 U.S.C. § 2254(a) (1994).

D. This Court should grant relief because the state court of appeals rejected Smothers' *Strickland* claim on an objectively unreasonable basis: that prosecutors are free to impeach defendants by reference to post-*Miranda* silence.

Given the above, this Court may grant relief on Smothers' *Strickland* claim if the state court of appeals' rejection of that claim "involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (Supp. 2004).

Here, the state court decision acknowledged that the prosecution had impeached Smothers' credibility using his post-arrest, post-*Miranda* silence. But without citing any authority, the court held that to be perfectly legitimate:

> [T]he prosecutor did not . . . contend that Smothers' silence demonstrated his guilt. Instead he argued that Smothers' failure to assert that he was attacked and acting in self-defense until after reviewing discovery materials and going to trial permitted an inference that he fabricated the defense to fit the other evidence in the case. . . . This was a legitimate and permissible argument based upon the facts. Trial counsel was not deficient for failing to object to it.

D4, Ex. U at 6 (emphasis added).

The state court thus held that Smothers could be impeached based on his "failure to assert that he was . . . acting in self-defense until after . . . going to trial" because that "permitted an inference that he fabricated the defense." *Id.* Such "reasoning," however, is directly contrary to *Doyle*, which held the very opposite: namely, "that the Due Process Clause bars 'the use for impeachment purposes' of a defendant's postarrest silence." *Greer*, 483 U.S. at 763.

Because the state court decision turned on the application of a legal principle directly contrary to controlling Supreme Court authority, its decision "involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Otherwise, state courts could reject all *Strickland* claims based on counsel's failure to object to prosecutorial conduct that is unconstitutional under Supreme Court precedent.[10]

The State tries to escape this conclusion based on the fact that the standard for determining "unreasonableness" is different than the standard for finding "error" or "clear error." State's Brief 19. While that is true, it fails to explain the relevant difference in those standards, which is as follows:

When a federal court applies § 2254(d)(1), what matters most is not whether the state court's ultimate conclusion is erroneous. Rather, what matters is whether the *process* used to reach that conclusion was objectively reasonable. *See* FED. HABEAS CORPUS PRAC. AND PROC. § 32.3 text & nn.51-57 (4th ed. 2001) (explaining that the Supreme Court's decision in *Williams v. Taylor* demonstrated that the "unreasonable application" prong of § 2254(d)(1) demands "careful attention not only to the ultimate judgment of the state court

[10] The district court held that the state court decision was "contrary to" *Strickland*. App. 155-56. But the state court correctly identified *Strickland* as the standard for Sixth Amendment claims, so it is more accurate to say the state court decision was an "unreasonable application" of *Strickland* because it applied a principle contrary to *Doyle*. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.").

but also to the validity of the court's reasoning process" because the majority in *Williams* had rejected the notion that a state court decision could be reasonable just because its "bottom-line conclusion . . . was reasonable irrespective of the manner in which it was reached"); *see also Williams,* 529 U.S. at 397-98 (holding that state court decisional process involved unreasonable application of *Strickland*).

Focusing on the state-court reasoning process is relevant here because the state court's "reasoning," as quoted above, was the sole basis that court provided for rejecting Smothers' *Strickland* claim. So even if this Court decided that any of the State's purported distinctions of *Doyle* were somehow reasonable (albeit incorrect), that still would not salvage the state court decision because that court never reasoned that *Doyle* could be meaningfully distinguished on those bases.

To be sure, the state court did note in passing that "[n]o evidence was admitted at trial indicating that Smothers had invoked his right to counsel or his right to remain silent after being arrested and being informed of his *Miranda* rights." App. 169. But that court did not purport to rely on those facts in holding that it was somehow proper to impeach a defendant by reference to post-*Miranda* silence. The state court also found that the prosecutor had made some permissible arguments contrasting Smothers' trial testimony with his pre-*Miranda* statements, *id.*, but again, it did not reason that a "need" to conduct

permissible impeachment justifies impermissible impeachment,[11] as the State now argues in this appeal.

Instead, the only objective explanation for the state court's decision is that it simply failed to appreciate that Supreme Court precedent clearly prohibited the use of post-*Miranda* silence for impeachment. Because that is an objectively unreasonable basis to deny relief under *Strickland*, this Court should affirm the district court's judgment.[12]

* * *

Although the argument above is sufficient to affirm the district court's judgment, this Court may also consider the following two arguments as additional or alternative grounds for affirmance because Smothers presented them to the district court. D1 at 7-8; D8 at 10-25, 41-46; *see Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672 (7th Cir. 1992) (appellee may raise arguments presented below without a cross-appeal).

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[11] Nor could the state court legitimately apply such "reasoning" under controlling state precedent which had already rejected that argument. *See supra* at 29 (citing *Neely*, 272 N.W.2d at 387). *Neely* was from the Wisconsin court of appeals, and its holding was binding on all subsequent court of appeals' decisions. *See Cook v. Cook*, 560 N.W.2d 246, 256 (Wis. 1997).

[12] This Court does not need to determine whether the state court of appeals' decision was unreasonable on the prejudice issue because that court never addressed prejudice. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

II. Smothers' counsel was ineffective in failing to object to the use of Smothers' government-induced, pre-arrest reliance on his right to remain silent.

A. In violation of state and federal law, the prosecution used Smothers' government-induced, pre-arrest reliance on his right to remain silent as substantive evidence of his guilt.

During the 911 call with Smothers' neighbor, the 911 dispatcher asked to speak with Smothers. After asking Smothers some innocuous questions, the dispatcher asked him ***who*** stabbed Meyer. Smothers refused to answer, stating "Well, I'm not ready to make no statement." D8, App. at 15.

However ineloquent, Smothers' statement was sufficient to invoke his state and federal constitutional right to remain silent. *See Quinn v. United States*, 349 U.S. 155, 164 (1955) ("[T]he fact that a witness expresses his intention in vague terms is immaterial so long as the claim is sufficiently definite to apprise the [listener] of his intention. As everyone agrees, no ritualistic formula is necessary in order to invoke the privilege."). Moreover, Smothers was entitled to invoke this right because he was being interrogated by a state agent,[13] on an incriminating issue. *See Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (holding that the right to remain silent "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used").

At trial, however, the prosecution played a tape of that 911 call in its case-in-chief. D6, Tr. 9/10/96 at 32. It then argued in closing that Smothers'

[13] The State did not dispute below that the 911 dispatcher was a state agent. D8 at 10; D10 at 10.

invocation of his right to remain silent reflected consciousness of guilt:

- "The 911 call. That shows a lot. That 911 call, that perhaps 30 second, 45 seconds where you hear Mr. Smothers on the call, tells you volumes. Tells you volumes about the **state of mind** of Mr. Smothers and what happened that night."

- "The dispatcher talks to him a little bit later, and [Smothers] says, well, **I'm not ready to make no statement**."

- "That point he says **I'm not ready to make no statement**."

- "Already Mr. Smothers in his own way is starting to think how he's going to extricate himself from this situation, a very difficult situation."

- "He's got a dead body out in his driveway. There's blood all over the place. He can't move that body. He can't move himself. He can't get rid of all the blood over himself."

- "He's already – his mind is working a little bit saying **I'm not ready to make no statement**."

D6, Tr. 9/12/96 at 43-44 (emphasis added).

By playing the tape in 911 its case-in-chief and then repeatedly chanting Smothers' invocation of his right to remain silent as quoted above, the prosecution impermissibly used Smothers' government-induced reliance on that right as substantive evidence of guilt. This violated Smothers' state and federal constitutional rights under controlling precedent from the United States and Wisconsin Supreme Courts.

First, a criminal defendant has a federal constitutional right to remain silent during trial, and it is improper for a prosecutor to comment on that right. *Griffin v. California*, 380 U.S. 609, 615 (1965) ("The Fifth Amendment . . . forbids . . . comment by the prosecution on the accused's silence" as "evidence of

guilt.”).[14]

Second, the principle in *Griffin* simultaneously prohibits the use of a defendant’s government-induced, **pre-arrest** silence as evidence of guilt. *See United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987). In reaching this result, this Court found that it made no difference that “*Griffin* involved governmental use of the defendant’s silence at trial, rather than when initially questioned by police.” *Savory*, 832 F.2d at 1017.[15]

Third, the Supreme Court of Wisconsin reached the same conclusion as *Savory* as a matter of federal and state law. *See Wisconsin v. Fencl*, 325 N.W.2d 703, 710 (Wis. 1982) (“We hold that the protections of the Fifth Amendment do extend to pre-*Miranda*, prearrest silence.”); *id*. at 711 n.9 (“The same right is granted by the Wisconsin Constitution, Art. I, Sec. 8.”).[16]

These holdings are unsurprising because any contrary view would impermissibly burden a citizen’s right to remain silent by pressuring him to waive that right in the face of government interrogation or else risk that his silence will be used as evidence of guilt in a prosecution. *See Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000). The prosecution thus violated Smothers’

[14] The Supreme Court has made one exception to *Griffin* by letting prosecutors *impeach* defendants with silence *not* induced by the government. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980); *Weir*, 455 U.S. at 606-07. But the Court has never allowed or suggested that prosecutors may use *government-induced* silence as *substantive evidence* of guilt.

[15] *See also, e.g.*, *Combs v. Coyle*, 205 F.3d 269, 284 n.9 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1566 (1st Cir. 1989).

[16] Lower state courts must follow these holdings. *See Attorney Gen. ex rel. Cushing v. Lum*, 2 Wis. 507, 515 (1853); *Wisconsin v. Ward*, 604 N.W.2d 517 (Wis. 2000).

federal and state constitutional rights by playing the 911 tape in its case-in-chief and by making the arguments quoted above.

B. Because the prosecution introduced Smothers' invocation of his right to remain silent in its case-in-chief, the State cannot claim that such evidence – or related argument – was merely used to "impeach."

The State may claim that Smothers' tape-recorded invocation of his right to remain silent was never used as substantive evidence of guilt. But the prosecution's use of the 911 tape in its case-in-chief, along with its argument that Smothers was trying to "extricate himself from this situation," demonstrate that the prosecution's purpose was to show guilt as a matter of both state and federal law.

First, the use of the 911 tape in the prosecution's case-in-chief triggers an automatic conclusion that Smothers' right to remain silent was used as substantive evidence of guilt and not to impeach. *Wainwright*, 474 U.S. at 292 (evidence in case-in-chief is affirmative proof, not impeachment). And because the constitutional violation occurred in the prosecution's case-in-chief, it was not retroactively cured when Smothers later testified. *See Ouska v. Cahill-Masching*, 246 F.3d 1036, 1048-49 (7th Cir. 2001) (reference to defendant's pre-*Miranda* silence in case-in-chief is substantive evidence of guilt even if defendant testifies); *Mulkovich v. Wisconsin*, 243 N.W.2d 198, 202 (Wis. 1976) (evidence admitted before defendant testifies is substantive evidence, not impeachment).

Second, with respect to the prosecutor's closing argument, the State previously conceded in state court that the prosecutor had used Smothers' desire to "make no statement" to prove "consciousness of guilt for his own actions." D4, Ex. S at 11. A more on-point concession could not be imagined.

The district court agreed that it would have been improper to use Smothers' taped invocation of his right to remain silent as evidence of guilt, but the court failed to appreciate that the use of such evidence in a prosecution's case-in-chief is a substantive use as a matter of law.[17] App. 139, 141; *see Ouska*, 246 F.3d at 1048-49; *Mulkovich*, 243 N.W.2d at 202.

The district court also thought Smothers could not rely on his right to remain silent because he allegedly gave the 911 dispatcher an "exculpatory statement" when he first told the dispatcher that someone had been stabbed. App. 142. But Smothers' statement that someone was stabbed was neither inculpatory nor exculpatory. Instead, it was objectively neutral because Smothers did not say who had done the stabbing. *See Ouska*, 246 F.3d at 1049. In *Ouska*, the defendant had murdered someone and later told police (falsely) that she had been stabbed by an unknown individual in an effort to "shield herself from inquiry." *Id*. In the face of subsequent police questioning, she invoked her right to remain silent. *Id.* This Court held, however, that her prior statement was not sufficiently exculpatory to waive her right to remain silent.

[17] This may also explain why the district court misread the prosecution's related closing arguments as impeachment rather than as argument about substantive guilt.

Id. Clearly, the false and shielding statement in *Ouska* was more exculpatory than the neutral statement at issue here. The district court thus erred on this point below.

In sum, because the prosecution used substantive evidence of Smothers' invocation of the right to remain silent in its case-in-chief and argued to the jury that this reflected Smothers' consciousness of his own guilt, the prosecution violated Smothers' right to remain silent under state and federal law.

C. Smothers' counsel was ineffective in failing to prevent or cure these constitutional violations.

1. Smothers' counsel was deficient because he had state and federal bases to object to the substantive use of Smothers' reliance on his right to remain silent, and he knew in advance that the prosecution planned to do just that.

Smothers' counsel knew in advance that the prosecution planned to use the 911 call in its case-in-chief. *See supra* at 30-31. And as just explained, there was controlling authority under state and federal law to make an objection. *See Manson v. Hanks*, 97 F.3d 887, 892-93 (7th Cir. 1996) (courts must consider state and federal bases for objections when analyzing *Strickland* claims).[18] Even so, Smothers' counsel never filed a motion to redact the incriminating portion of the taped call. Nor did he object, move for a mistrial, or request a curative instruction when that tape was played or when the prosecution argued in closing that Smothers' taped statement was evidence of guilt.

[18] Even if the Supreme Court held that this Court's view of *Griffin* is incorrect or unreasonable, Smothers' state rights would remain intact unless and until changed by the Wisconsin Supreme Court.

Counsel also did not even try to rebut this improper evidence and argument based on the fact that Smothers previously had given an innocent and understandable explanation to the police regarding his wish to remain silent. D8 at 21. Instead, the jury heard only the prosecution's false and improper explanation: that Smothers was conscious of his own guilt and thus needed time to think of a way out. Because there can be no "strategy" in failing to object to such unconstitutional and prejudicial tactics, counsel's omissions were objectively deficient. *See Strickland*, 466 U.S. at 688.

2. The prosecution's use of Smothers' pre-arrest reliance on his right to remain silent compounded the prejudice inflicted by the prosecution's other improper tactics.

Although the prosecution did not stress Smothers' pre-arrest silence as much as it stressed his post-arrest silence, the relevant issue is additive, not comparative. *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984) ("Though we examine each example of incompetence individually, we must also consider their cumulative effect in light of the totality of circumstances."

Moreover, the improper use of Smothers' right to remain silent was more than simply additive. Rather, it **compounded** the prejudicial effect of the prosecution's other unconstitutional arguments by reinforcing the theme of fabrication. After all, who is more likely to make up a story of self-defense than one who is substantively guilty? In addition, because Smothers' counsel never had Smothers tell the jury why he chose to remain silent, there was nothing keeping the jury from following the prosecutor's lead and deciding that Smothers

was guilty because "even Smothers thought so." For these reasons, the failure by Smothers' counsel to prevent or cure the prosecution's impermissible tactics prejudiced Smothers.

D. This Court should grant relief because the state court rejected Smothers' *Strickland* claim on a legally and factually unreasonable basis: that the prosecution did not use Smothers' reliance on his right to remain silent as evidence of guilt.

The state court of appeals did not reject Smothers' claim because it believed counsel could be effective while failing to object to a prosecutor's substantive use of a defendant's government-induced invocation of the right to remain silent. Nor did the state court reject Smothers' claim because it doubted that he had successfully invoked his right to remain silent. Rather, the court rejected the claim because it did not believe the prosecution had used Smothers' silence as substantive evidence of guilt:

> Nothing in the 911 tape or in the prosecutor's closing argument stated or implied that Smothers' invocation of his right to silence demonstrated that he was guilty of the charged offense. . . . Although the prosecutor referred to Smothers' words indicating that he was not ready to make a statement, the prosecutor did so in the context of arguing that Smothers was trying to figure out a way to extricate himself from the situation. This was . . . not a comment on Smothers' exercise of his right to remain silent.

App. 168-69. But by any objective measure – including the State's own concession – the prosecution's use of the 911 call in its case-in-chief, as well as its related argument that Smothers needed time to "extricate himself,'

constituted a uniform request to have the jury to infer that Smothers was guilty because he knew he was guilty. This Court therefore may grant relief because the state court decision rested on an unreasonable view of those facts (*i.e.*, the prosecutor's case-in-chief use of the 911 call and his related closing argument). *See* 28 U.S.C. § 2254(d)(2) (federal court may grant relief where state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").[19]

Alternatively, the state court's decision was an unreasonable application of *Strickland* because the prosecution's substantive use of the 911 call and related argument were unconstitutional under state and federal law based on controlling authority from the Wisconsin and United States Supreme Courts. 28 U.S.C. § 2254(d)(1); *see supra* Part II.A-B.

The State may argue that relief cannot be granted under AEDPA because of an absence of clearly established Supreme Court authority, but that argument should be rejected for four independent reasons.

First, the only relevant claim for purposes of AEDPA is Smothers' overarching Sixth Amendment claim, which ***is*** governed by clearly established Supreme Court precedent. *See Williams v. Taylor,* 529 U.S. 362, 390 (2000).

Second, as this Court has held, the underlying principle of *Griffin* bars the substantive use of a defendant's government-induced invocation of the right

[19] *See* D8 at 16 (arguing that state court decision "was based on unreasonable application of the law *in light of the actual procedural facts*" (emphasis added)).

silence without any need to extend *Griffin*. Thus, there is controlling Supreme Court authority on this subsidiary issue, regardless of whether it is needed.

Third, even if *Griffin* had to be extended to reach this issue, the failure to extend it would be unreasonable. *See Green v. French*, 143 F.3d 865, 869 (4th Cir. 1998) ("A lower court is said to have unreasonably applied a higher court's precedent when it . . . unreasonably . . . fails to extend a principle to a context to which the principle should be extended."), *cited by Williams*, 529 U.S. at 407 (noting *Green* standard but resolving related AEDPA issue on other grounds).

Finally, the Wisconsin Supreme Court had already ruled on the pre-arrest silence issue on both state and federal constitutional grounds. *Fencl*, 325 N.W.2d at 710, 711 n.9; *Mulkovich*, 243 N.W.2d at 202. Certainly, no state interest protected by AEDPA prevents the granting of relief when a state court fails to follow its own binding state precedent in violation of fundamental due process. *See* U.S. CONST. amend. XIV; *see also infra* note 22.

For these reasons, this Court can and should grant relief on this claim.[20]

III. Smothers' counsel was ineffective in failing to object when the prosecution claimed that Smothers would "jump for joy" at a second-degree conviction because there is a reasonable probability that the jury accepted this unrebutted suggestion that Smothers was only contesting his guilt on the greater first-degree charge.

At the close of evidence and outside the presence of the jury, the prosecution asked the trial court to submit to the jury the lesser-included offense

[20] This Court does not need to analyze prejudice under AEDPA. *See supra* note 12.

of second-degree intentional homicide. D6, Tr. 9/11/05 at 140. The prosecution apparently was worried about putting the jury to an all-or-nothing choice between first-degree intentional homicide and acquittal. In closing argument, however, the prosecutor put on a stronger face, making it appear that a conviction on the lesser-included offense was something only Smothers wanted:

> This is first degree intentional homicide. We're not going to give you [the jury] a pass in that regard. It's very easy and the defense could **jump for joy** if you come back and say he's guilty of a lesser included offense. This is reckless. This is just too much self-defense. They would **jump for joy** at that result, at that outcome; and it would send the wrong message, the implication would be wrong for the community, because was first degree intentional homicide.

D6, Tr. 9/12/96 at 73-74. The prosecutor made these remarks just moments before the jury retired to deliberate. *See id.* at 74.

These remarks were false because prior to the prosecutor's argument, Smothers maintained that he should be acquitted on all counts. *Id.* at 67. And the prosecutor knew this even before trial when Smothers rejected the prosecution's plea-bargain offer "without hesitation or any reservation." D8 at 41, 43.

The question then is whether the prosecution's knowingly false and unfair remarks violated the Constitution. The standard is whether they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (internal quotation marks omitted). To answer that, the Supreme Court has identified certain factors:

whether the statements were ambiguous, whether objections were made, and whether the trial court took "special pains" to correct any misimpression the jury received. *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974).[21]

Here, the prosecutor's remarks caused a denial of due process because they falsely suggested that Smothers really was just contesting guilt on the first-degree charge. Moreover, this suggestion was especially compelling given the prosecutor's improper argument that Smothers' invocation of his right to remain silent reflected consciousness of his own guilt.

In addition, by making such remarks just moments before the jury retired to deliberate, the prosecutor ensured that the vivid image of Smothers "jumping for joy" would linger with them.

Finally, because Smothers' counsel failed to object, seek a mistrial, ask for a curative instruction, or make any attempt to cure or rebut this false impression, the jury had no reason to doubt the prosecutor's claim.

Needless to say, when the jury convicted Smothers of second-degree homicide and he was sentenced to 40 years in prison, Smothers did not then, or ever, jump for joy.

In light of the other improper techniques employed by the prosecution to "prove" Smothers' guilt and impeach his claim of self-defense, these additional

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[21] *Romano* and *Donnelly* did not find due process violations, but they clearly establish the standard. *See Williams,* 529 U.S. at 390 (*Strickland* establishes standard for Sixth Amendment claims); *Strickland*, 466 U.S. at 670, 700 (finding no Sixth Amendment violation).

remarks added insult to injury, and the cumulative effect "infected the trial with unfairness as to make the resulting conviction a denial of due process." *Romano,* 512 U.S. at 12; *Crisp,* 743 F.2d at 583 (requiring consideration of cumulative prejudice on *Strickland* claims). The failure to prevent or cure these remarks was thus deficient performance of counsel that prejudiced Smothers.

This Court may grant relief because the state court of appeals' contrary determination, App. 171, was an unreasonable application of *Strickland* for two reasons: (1) the state court unreasonably viewed the prosecutor's comments as nothing more than an argument "that the evidence proved Smothers' guilt of first-degree intentional homicide" and (2) the state court unreasonably failed to apply or even identify the governing legal principle (that a prosecutor's knowingly false remarks violate due process if they make a trial unfair). *See* 28 U.S.C. § 2254(d)(1), (2); *see also supra* at 39-40.

CONCLUSION

In reliance on his state and federal constitutional rights, Smothers waited for trial to voice his claim of self-defense. The State then used his "five plus months" of reliance to prove his guilt and destroy his defense, effectively equating a citizen's reliance on constitutional rights with being both a liar and a criminal. Then, recognizing the weakness of its case, the prosecution falsely claimed that Smothers' would "jump for joy" if convicted on a lesser-included offense. Smothers' counsel was deficient for failing to make even one objection despite advance warning that such tactics would come into play. The

prosecution's improper acts prejudiced Smothers because they struck at the core issue that caused his conviction and because the case against him was otherwise weak. Because the state court of appeals' contrary determinations were objectively unreasonable, this Court should affirm the district court's grant of relief.[22]

Respectfully submitted,

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[22] If this Court decides that AEDPA prevents it from affirming, the result would violate Article III of the Constitution, the Supremacy Clause, and the Suspension Clause. U.S. CONST. art. III; *id*. art. I, § 9, cl. 2; *id*. art. VI, cl. 2; *cf.* FED. HABEAS CORPUS PRAC. AND PROC. § 32.4 & n.183 (4th ed. 2001).

CERTIFICATE OF COMPLIANCE

I certify that this brief meets the form and length requirements of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Circuit Rule 32.

The text is 12.5 point, the footnotes are 11 point, and the length is 13,994 words.

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Jeremy Gaston

CIRCUIT RULE 31(E) CERTIFICATION

The state court transcript contained in the appendix to this brief is not available in PDF format.

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Jeremy Gaston

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2005 copies of the foregoing **BRIEF AND APPENDIX OF PETITIONER-APPELLEE** were served on the following counsel of record by certified mail, return receipt requested:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Robert J. Smothers,

Petitioner-Appellee,

v.

Gary R. McCaughtry,

Respondent-Appellant.

On Appeal from a Judgment Granting a Petition for Writ of Habeas Corpus Entered in the United States District Court for the Eastern District of Wisconsin, the Honorable J. P. Stadtmueller, Presiding

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APPENDIX OF PETITIONER-APPELLEE

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