No. 1998-1983

Death Penalty Case

IN THE SUPREME COURT OF OHIO

RESPONSE OF DEFENDANT KEITH LAMAR TO MOTION TO SET EXECUTION DATE

Appeal from
the Court of Appeals for Lawrence County, Ohio
Case No. 95-CA-31

STATE OF OHIO,

Plaintiff,

v.

KEITH LAMAR,

Defendant.

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Defendant Keith LaMar, pursuant to Supreme Court Rule of Practice 4.01(B)(1), respectfully files with this Court his response in opposition to the Motion to Set Execution Date filed by the State of Ohio on September 17, 2018. An execution date should not be scheduled because Mr. LaMar's death sentence is precisely the sort identified as inappropriate by the Joint Task Force to Review the Administration of Ohio's Death Penalty. Mr. LaMar's conviction rests on prisoner testimony which is not independently corroborated; there is no physical or video evidence linking him to the crimes and he has always maintained his innocence. Evidence supporting Mr. LaMar's innocence is slowly coming to light after dogged efforts to unearth such proof following years of suppression.

Ten years after LaMar was convicted and sentenced to death, the American Bar Association House of Delegates adopted a resolution urging all jurisdictions which impose the death penalty "to reduce the risk of convicting the innocent while increasing the likelihood of convicting the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony."[1] In 2007, a study by the American Bar Association concluded that Ohio was failing to meet 93% of ABA standards for a fair and accurate death penalty system.[2] In response this Court, along with the Ohio State Bar Association, created a Joint Task Force to review Ohio's death penalty practice.[3] After six years of study, in April 2014, the Task Force published its report and recommendations. Only a few of the recommendations have been enacted by the Ohio legislature. Taken together, the ABA Ohio Assessment and the Task Force Report offer a working definition of Ohio's failure to keep pace with "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

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[1] Am. Bar Ass'n Section of Criminal Justice, Midyear Meeting 2005, 108B, Report to the House of Delegates (Feb. 2005), *available at* https://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting.html (adopted by the House of Delegates Feb. 14, 2005, https://www.americanbar.org/content/dam/aba/directories/policy/2005_my_108b.authcheckdam.pdf).

[2] *Joint Task Force Report to Review the Administration of Ohio's Death Penalty, Final Report & Recommendations* 2 (April 2014) ("*Task Force Report*"), *available at*, http://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf. *See also id.* at Appendix A (Ohio Death Penalty Assessment Report Recommendations, 2007).

[3] *Id.* at p.2. The Task Force was composed of "judges, prosecutors, defense attorneys and academics."

The state's motion to set an execution date should be denied because Ohio's death penalty system—as applied to Keith LaMar—failed to meet standards of constitutional adequacy in the following ways.

I. The Only Evidence Against Mr. Lamar Comes from Testifying Inmates, Without Corroboration.

Because death, in its finality, is qualitatively different than any other criminal punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.). Consistent with that well-settled principle, all members of the Death Penalty Task Force expressed concern over wrongful convictions and agreed there should be enhanced reliability of the evidence presented in a death penalty case.[4] Task Force members unanimously determined that a death sentence is impermissible when based on jailhouse informant testimony that is not independently corroborated.[5] A majority recommended legislation that prohibits a death sentence without evidence of guilt that consists of biological evidence, video evidence, a confession or other like factors.[6]

The state's motion to set an execution date reproduces a lengthy summary of inmate testimony from LaMar's direct appeal opinion, but, according to the *Task Force Report*, that is not a sufficient basis to justify a death sentence. Many prisoners housed at the Southern Ohio Correctional Facility (SOCF) at the time of riot became informants after being threatened with

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[4] *Task Force Report*, *supra*, at 10. At the time of the Report, 143 people had been exonerated from a capital conviction and death sentence. *Id.* Today, the number has grown to 163. *See* https://deathpenaltyinfo.org/innocence-list-those-freed-death-row.

[5] *Id.* at 10, Recommendation #18.

[6] *Id.*, Recommendation #17.

capital indictments and offered consideration in the form of reduced charges and concurrent sentences.[7] Some prisoners were housed together in a separate facility where they received preferential treatment and rehearsed their testimony.[8]

The first 16 paragraphs of the summary in the state's motion describe the prosecution's case which rests on prisoner testimony, uncorroborated by objective and reliable evidence.[9] At LaMar's trial, defense counsel argued that the prosecution had presented "not one shred, not one piece of physical evidence to support their case."[10]

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[7] *See e.g.*, Staughton Lynd, *Napue Nightmares: Perjured Testimony in Trials Following the 1993 Lucasville, Ohio, Prison Uprising*, 36 Cap. U. L. Rev. 559, 575-83 (2008) (detailing how prisoner-witnesses were coerced or received benefits from testifying for the prosecution); *see also id.* at 579 n.98 (Anthony Walker, who testified against LaMar, was part of the "snitch academy"); *id.* at 583 (same regarding Thomas "Tony" Taylor); *id.* at 596, 598, 599, 605 (same regarding Stacey Gordon).

[8] *Id.*

[9] Before LaMar's conviction became final, witnesses began coming forward with information that undermined the credibility of the prisoner witness testimony presented by the prosecution. *See State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶84.

Prosecutorial standards established by the American Bar Association state:

> In deciding whether to offer a cooperator significant benefits, including a limit on criminal liability, immunity, or a recommendation for reduction of sentence, the prosecutor should consider whether:
>
> . . .
>
> (iii) the cooperator has biases or personal motives that might result in false, incomplete, or misleading information;
>
> . . .
>
> (vi) information that has been provided ... has been corroborated or can otherwise shown to be accurate[.]

Am. Bar Ass'n Prosecutorial Investigation Standards, Standard 26-2.5, *available at* https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate.html#2.5

[10] Apx.191-92, *State v. LaMar*, Lawrence C.P. No. 94CR-136, LaMar Test., Trial Tr., Vol. 14, at 3707. LaMar testified in his own defense. Six inmates testified consistently with LaMar's testimony.

> All those bats, those shovels, everything over there, all this stuff in front of you, all those pictures that you'll be taking back into that jury room show nothing, prove nothing against Keith LaMar. All they have is the testimony of the inmates.

In the next capital case among the Lucasville cases, the lead investigator, Sgt. Howard Hudson, conceded the point. He explained that "due to contamination of the crime scene" there was "no physical evidence" linking "any suspect to any victim, or any victim to any weapon, or any suspect to any weapon. It was to[o] contaminated."[11]

During cross examination in another case, the following was asked and answered:

Q: . . . basically you found no physical evidence to tie anybody to anything?

A. Not that could be tied to any suspect or any victim.[12]

Again, the lead investigator explained that "because of the contamination of the crime scene and because of the deterioration of the tissues and the samples, we were not able to match any victim to any suspect, any victim to any weapon or any weapon to any suspect."[13]

The prosecution's failure to support prisoner testimony with reliable evidence is contrary to Task Force Recommendation 18. Moreover, the absence of biological or video evidence of guilt or a confession of guilt would have precluded the death penalty as an option under Task Force Recommendation #17. The evidence of LaMar's guilt does not possess qualities indicative of enhanced reliability, therefore, an execution date should not be set.[14]

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[11] Apx.002, *State v. Were I*, Hamilton C.P. No. B-9508499, Sgt. Hudson Test., Trial Tr. Vol. 10, at 984.

[12] Apx.004-05, *State v. Sanders*, Hamilton C.P. Nos. B-953105 and C-960253, Sgt. Hudson Test., Trial Tr. Vol. 15, at 3191-92.

[13] Apx .007, *State v. Were II*, Hamilton C.P. No. B-9508499, Sgt. Hudson Test., Trial Tr. Vol. 17, at 1514.

[14] A study of 173 men on Ohio's Death Row in 2003 found that 75 of the cases relied in some part on the testimony of in-custody informants, eyewitnesses, and accomplices, and in 43 of these cases defendants maintain their innocence. Ohio Death Row Research Group, The Center for Law and Justice, *Death Row in Ohio, 2003: The Case for a Study Commission*, 72 U. Cin. L.

II. The Death Sentence is Infected by A Death Specification that Fails to Narrow Application of the Death Penalty to the Worst Offenders and, Instead, Disproportionately Includes Minorities.

"[I]t is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (plurality opinion), *see also id*. at 186 (noting with approval the efforts of legislatures to "define those crimes and those criminals for which capital punishment is most probably an effective deterrent."). Accordingly, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The felony-murder specification does not perform its intended narrowing function and, in LaMar's case, its inclusion skewed the jury's weighing process which resulted in a decision to impose the death penalty.

Task Force Recommendation #33 calls for the elimination of the felony-murder specification, including for death occurring during the commission of a kidnapping, which was used to sentence LaMar to death.[15] Data demonstrates this factor does not identify the worst of

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Rev. 223, 238-42 (2003). "[T]he Ohio Case Study illustrates that the death penalty in Ohio contains a likelihood of executing the innocent, a high rate of reversible error, and an arbitrariness in the application of the death penalty." *Id.* at 244. Eyewitness testimony has been shown to be responsible for more cases of wrongful conviction in Ohio than all other causes combined. *Id.* at 241 *See also Eyewitness Misidentification*, The Innocence Project, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php ("Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing.").

[15] *Task Force Report, supra*, at 14. This is not the first time that a reviewing body concluded the felony-murder specification is so broad that it applies to most murders. The Ohio State Bar Association Criminal Justice Law Committee recommended in 1997 that the felony murder death penalty specification in O.R.C. 2929.04(A)(7) be eliminated. Ohio State Bar Ass'n Criminal Justice Law Comm., *Ohio's Death Penalty Processes Fail to Guarantee Reliable, Consistent, and Fair Capital Sentences. No Executions Should Take Place Until These Processes Are Corrected* 13 (June 5, 1997) ("Ohio has not adequately narrowed the class of offenders who are

the worst murders.[16] Furthermore, removal of this specification will reduce the race disparity of the death penalty.[17] The constitutional problems with this death penalty specification are well known and because it is a significant part of LaMar's death sentence, the state's motion to set an execution date should be denied.

III. Racial Discrimination Affected the Application of the Death Penalty in this Case.

Race is a predominate factor in determining the application of the death penalty,[18] and "[t]here is little dispute about the need to eliminate race as a factor[.]"[19] It should never be too late to do so.[20]

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eligible for death, but rather continually expands the situations in which death is a possible sentence."). The June 5, 1997 report was expanded and reviewed by the Committee on September 27, 1997, a summary of which was adopted by the OSBA Council of Delegates on November 8, 1997. Summary of the Ohio State Bar Association Report Calling for Review of Ohio's Death Penalty System in Order to Remedy Defects in the Existing Law that Undermine the Fairness and Reliability of Capital Prosecutions and Sentences in Ohio, Ohio St. B. Ass'n Crim. Just. L. Comm. (Nov. 8, 1997).

[16] *Id.*

[17] *See Task Force Report*, *supra*, Appx. D (Sentence Comparison looking at Defendant and Victim's Race & Specs Chart).

[18] *Racial Fairness Implementation Task Force*, Action Plan (2002) ("Racial Fairness Report") at 37, *available at*, http://www.sconet.state.oh.us/publications/fairness/Action-Plan-dev.pdf.

[19] Am. Bar Ass'n, *Ohio Death Penalty Assessment Report* (2007) ("Ohio Death Penalty Report") at 351, *available at*, https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/ohio_chapter12.authcheckdam.pdf. *See also id.* ("The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black."). Also available at *Task Force Report* Apendix A.

[20] *Task Force Report*, *supra*, at 36 (Appx. A, Recommendations #1, #4, #5).

Seven years after LaMar's trial, the Ohio Commission on Racial Fairness issued an Action Plan that included steps to address racial discrimination in the use of the death penalty.[21] At that time, 124 of 175 victims attributed to Ohio's death row inmates were white.[22] The Commission on Racial Fairness remarked on "this gross disparity[:]"

> The numbers speak for themselves. A perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black.[23]

Private studies quantified that likelihood and found that Ohio offenders facing a capital charge for killing white persons were 2 to 3.8 times more likely to be sentenced to death than if they had killed a black person.[24]

The Joint Death Penalty Task Force acknowledged that racial disparity in Ohio's death penalty system results in disparate application as "those who kill whites are 3.8 times more likely to receive a death sentence than those who kill blacks."[25] The Ohio Death Penalty Report recommended: "Where patterns of racial discrimination are found in any phase of the death penalty administration," there should be "effective remedial and prevention strategies to address

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[21] *Racial Fairness Report*, *supra* n.18. The Ohio Commission on Racial Fairness, established in 1993—two years before LaMar's trial—was a joint project of this Court and the Ohio Bar Association.

[22] *Id.* at 37-38.

[23] *Id.* The Commission observed: "Intended or not, disparate end results suggest that, when laws are drafted in such a way that they target certain minority communities for enforcement, and combine with arrest policies focusing on those same communities, and are then joined with sentencing guidelines, practices and policies that have devastating impacts on those exact same minority groups, a legitimate grievance is identified which demands redress, if fundamental fairness is to be obtained." *Id.* at 43-44.

[24] Andrew Welsh-Huggins, *Race, Geography Can Mean Difference Between Life, Death*, Associated Press (May 7, 2005); Ohio Death Penalty Report, *supra* n.20.

[25] *Task Force Report*, at 14.

the discrimination."[26] Specifically, "no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victims."[27]

Race is an impermissible factor leading to LaMar's death sentence. During the prison uprising, ten people were killed: one corrections officer and seven inmates were white, there was one American Indian and one African American inmate.[28] For the death of the African American inmate, the prosecution failed to secure convictions: two suspects were acquitted and two were not indicted. The circumstances in this case fit the pattern of racial discrimination plaguing Ohio's death penalty because the victims were mostly white, and the death penalty was not imposed for the one black victim. This Court should remedy the racial discrimination by denying the state's motion to set an execution date.

IV. Proof of Mr. Lamar's Innocence has Been Withheld

Task Force Recommendations #28 and ##37-39 illuminate how the failure of prosecutors to reveal exculpatory evidence detracts from the reliability of criminal trials. A significant number of wrongful death penalty convictions are caused by police or prosecutorial misconduct

[26] *Task Force Report*, at 36 (Appx, A, Recommendation #4).

[27] *Id.* at Recommendation #5. Furthermore, an inmate should be permitted "to raise directly claims of racial discrimination in the imposition of [a] death sentence[] at any stage of judicial proceedings, notwithstanding a procedural rule that otherwise might bar such claims[.]" *Id.* at Recommendation #10; *see also id.* at Recommendation #22 ("a properly presented motion must be accepted for filing for a ruling by the court in a death penalty case.").

[28] LaMar raised a selective prosecution claim on direct appeal based on the fact that he was the only inmate charged with capital murder for killing other inmates, whereas the other capital defendants also killed a corrections officer. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶¶42-47 (Ohio 2002). He also contested the prosecutor's use of peremptory challenges to strike the only two black jurors from sitting on the jury, where the prosecutor did not strike similarly-situated white jurors. *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970, ¶9 (Ohio 2004) (denying motion to reopen the direct appeal as untimely).

including the improper withholding of favorable evidence.[29] Between 1984 and 2004, a time period encompassing LaMar's trial, there were 150 capital cases in which a defendant alleged prosecutorial misconduct in the State of Ohio.[30] This Court found prosecutorial misconduct in 116 of these cases, but reversed a conviction or sentence in only four cases.[31] The Task Force unanimously determined that a defendant's attorney in death penalty cases should have full and complete access to all documents and material in possession of the state, any agent of the state, and any police agency involved in the case.[32]

The state's motion to set an execution date does not discuss the established fact that favorable evidence has been withheld from LaMar, and that such withholding infected LaMar's trial and the proceedings which have followed. There are about as many witnesses that exculpate LaMar as inculpate him; the difference is that the inmates who testified against LaMar had incentives that were never revealed during the trial.[33] Witnesses whose testimony is exculpatory have no such incentives.

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[29] *Task Force Report*, Appx. A at 37.

[30] Ohio Death Penalty Report, *supra* n.19, at p.160.

[31] *Id.* & n.248.

[32] *Task Force Report* at 15 (Recommendation #37). To assure implementation of this rule, pre-trial conferences on discovery must be conducted and the State must declare their compliance. *Id.* at 16 (Recommendation #39). In addition, the Grand Jury must be presented with exculpatory evidence of which the prosecutor is aware. *Id.* (Recommendation #38). *See also id.* at Appendix A, p. 35 (Recommendation #2) ("The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.").

[33] Inmates, such as Louis Jones, admitted participation in the killings but subsequently claimed LaMar (who had only been housed at SOCF a few months and had no authority within the prison hierarchy) told him and others to do so.

A. The prosecution used an improperly narrow *Brady* standard in response to LaMar's requests for exculpatory or impeaching evidence.[34]

The Ohio State Highway Patrol investigated the prison uprising and obtained thousands of statements from hundreds of prisoners. The prosecution withheld most of those statements from LaMar, including statements that identified others (not LaMar) for engaging in the conduct that LaMar has been convicted for. Eleven years after LaMar's trial, the prosecutor in this case, Special Prosecutor Mark Piepmeier, "testified that the State utilized a narrow *Brady* standard."[35] He testified, as an example, that because so many assaults during the riot were committed by more than one person, the fact that a witness testified that "inmate X" committed an assault for which "inmate Y" was charged was not considered to be exculpatory as to "inmate Y" unless the witness specifically excluded "inmate Y" as an assailant.[36]

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[34] The Rules of Professional Conduct require that a prosecutor make "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]" Ohio Rules of Prof. Conduct R. 3.8(d), *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf

[35] *Hasan v. Ishee*, No. 1:03-cv-288, Doc. 139, at 7-8 (S.D. Ohio Nov. 17, 2011) (describing the prosecutor's deposition testimony in *Lamar v. Ishee*, No. 1:04-cv-541, Doc. 117-1 (S.D. Ohio July 1, 2006)), Apx. 8-10. Others imprisoned on death row for committing murder during the riot, citing the prosecutor's narrow definition of *Brady*, have been granted broad access to the investigatory records pertaining to the murder of the corrections officer. *Id*. Management of discovery in the cases of Jason Robb, James Were, and Carlos Sanders is consolidated in *Robb v. Ishee*, No. 2:02-cv-535, Doc. 140 (S.D. Ohio Mar. 26, 2012), Apx.11-13. The four now have access to the Ohio State Highway Patrol database, interviews, interview summaries and transcripts, copies of video depositions and transcripts, and other discovery. But when counsel for LaMar sought comparable discovery, he was granted only access to what counsel for Robb, Hasan, Were, and had already obtained, effectively denying LaMar access to discovery pertaining to the murders for which he was convicted (deaths of inmates in L6 that occurred on the first day of the riot and two days later on K-side). *Robb v. Ishee*, No. 2:02-cv-535, Doc. 211 (S.D. Ohio June 26, 2017) ("The Court will not entertain or authorize any request by LaMar's counsel for any discovery above and beyond whatever counsel for Robb, and/or Were, and/or Hasan choose to share with LaMar's counsel. Nor will the Court order counsel for Respondent [the State of Ohio] to do anything in the way of furnishing or facilitating any discovery[.]"), Apx. 14-15.

[36] *LaMar v. Ishee*, *supra* n.35.

In addition to defining *Brady* material as only statements that inculpated one inmate as well as exculpated LaMar, the prosecutor refused to disclose the identity of any person who made a statement that did fit his view of *Brady*. At a pretrial hearing, the prosecutor gave the trial judge summaries of four statements he thought may be exculpatory, along with a list of inmate names. The trial judge refused to provide the summaries or the inmate names to defense counsel, and instead, read the summaries aloud. The following day, the prosecutor provided defense counsel 43 names of inmates housed at facilities across the state.[37] LaMar's attorney was unable to identify the sources of information that would help the defense. Persons who made the exculpatory statements that were read by the judge remained unidentified.

B. The prosecution withheld material evidence.

According to the prosecution's theory of the case, in the early hours of the uprising, certain prisoners believed to be snitches were killed or severely wounded by other prisoners; the group of perpetrators were labeled a "death squad." Keith LaMar was accused of leading the squad.

From the beginning of the prisoner takeover, the L-6 corridor of the institution fell under the strict control of its practicing Muslim population, referred to by the prosecution as "the Muslims," and they decided who was allowed to enter L-6 and who was allowed to leave. The prosecution alleged the Muslims locked certain prisoners who were "snitches" in cells in L-6 for their own protection. The prosecutor claimed the squad, armed and in some cases masked, entered L-6 and proceeded from cell to cell, yelling to an inmate (inmate Grinnell or Girdy) to unlock the cell doors from a main console, and then they attacked the inmates inside. Although

[37] *See* Apx. 16. The list did not include the names of prisoners who became prosecution witnesses at LaMar's trial.

Keith LaMar was not a member of the Muslim population, the prosecution, nonetheless, claimed that he formed and led this squad to kill the inmates who were all allegedly under the Muslims' protection.

The prosecution's case is not supported by any physical evidence. There was no DNA or serological evidence from Clothing of the victims and alleged perpetrators and an array of weapons. There were no photographs of bodily injuries that would have been incurred by LaMar had he engaged in the acts for which he was convicted. There were no disciplinary records indicating pre-existing problems or rivalries between LaMar and the L-6 victims. Instead, the prosecutor presented testimony from other prisoners whose stories fit the prosecution theory of the case.[38] There was no testimony that LaMar was in any sort of danger at the start of the uprising that would motivate him to commit such acts.

Unknown to LaMar or his jury, other men told different accounts. Some of those accounts came out in the trial of other defendants charged with committing crimes during the uprising (some crimes were the same as those levied against LaMar). Other versions of what happened surfaced after LaMar's conviction became final. Some witness statements remain unrevealed.

The inquiry as to who killed and wounded the prisoners on L-6 begins with the questions: Who were the members of the death squad? Who commanded them? Who, seated at the "console" that opened and closed the cell doors, operated the console that afternoon? And who directed the console operator? The most relevant witnesses appear to be two men who operated

[38] Eric Girdy states he was coerced by an investigator and prosecutor to make statements "against supposedly riot leader," Keith LaMar. Eric Girdy affidavit ¶3, Apx. 14, 17. Another prisoner, Jeffrey Mack, refused to identify LaMar as the person who ordered the death of Dennis Weaver. Apx. 18-29. Mack was told if he testified for LaMar he would be charged with a crime or denied parole.

the console, Timothy Grinnell and Eric Girdy, and two other prisoners who witnessed what was happening, Prentice Jackson and Leroy Elmore. None of these men testified at LaMar's trial.

LaMar was one of the first persons tried for the killings during the riot. Inmates Prentice Jackson and Leroy Elmore testified at the trial of Timothy Grinnell. Grinnell's trial took place just before the hearing on the motion for new trial in LaMar's case. Both men testified that Stacey Gordon, one of the leaders of the Muslim inmates, entered L6 with a group of prisoners and directed the prisoners operating the L6 console to open the doors of the cells where so-called "snitches" were confined. Jackson and Elmore never mentioned Keith LaMar.[39]

Prentice Jackson identified Stacey Gordon as the leader of the group who killed inmates on the first day.[40] He answered questions clearly and stood his ground under pressure. He testified that he celled in L-3 but went to L-6 after the uprising began to collect food for the insurgents. He saw Eric Girdy was operating the console. (Eric Girdy later admitted and pled guilty to killing William Svette, a crime for which LaMar has been convicted.[41]) Grinnell was close to the water fountain near the console. About two minutes later, Stacey Gordon and "a

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[39] Prentice Jackson was housed in L-3. Approximately one and one-half hours after the riot began, he was ordered by unidentified inmates to go to L-6 to get food. Shortly after he entered L-6, a group of men, including Gordon, came to the door and Jackson observed Grinnell tell the group they could not come in. Jackson testified that Grinnell was then threatened by Gordon who ordered Grinnell to man the console. *State v. Grinnell*, Franklin C.P. No. 94cr-11-6418, Test. Prentice Jackson, Trial Tr. Vol. 3 at 476-78, Apx. 035-037.

Leroy Elmore, who was not housed in the L-block, entered L-6 out of curiosity approximately twenty minutes after the riot began. When he looked into L-6, he saw Gordon ordering everybody out of the block and Girdy at the control panel. He also saw Gordon threaten Grinnell and tell him to work the control panel. He also observed masked people with weapons go to the top of the range. *State v. Grinnell*, Franklin C.P. No. 94cr-11-6418, Test. LeRoy Elmore Trial Tr. Vol. 3 at 521-23, Apx. 043-045.

[40] S*upra*, at n.39, *State v. Grinnell*, Jackson Test., Apx. 30-38.

[41] Plea Agreement in *State v. Girdy*, Scioto C.P. No. 94cr280, Apx. 56-57; Affidavit of Ronald Wilson with attached letter from Eric Girdy, Apx. 58-61; Affidavit of Eric Girdy, Apx. 62

bunch of guys come to the door [of L-6]" and Grinnell told them "you all can't come in here." Stacey Gordon told Grinnell: "you will do what we say do or we will deal with you, too." Then followed this exchange between prosecutor and defense witness:

Q. And so Stacey Gordon was leading that group?

A. Yes, sir.

Leroy Elmore also testified at Grinnell's trial.[42] Elmore celled on K-side but when they saw people running out of L-side bleeding "a lot of us . . . just being nosey, went into L side." Entering L-6, Elmore saw Stacey Gordon and Girdy at the control panel. "Stacey Gordon was ordering everybody out [of the] block, but before he did that, he went over to Grinnell and told him to work the control panel or you know what will happen to you." As he left L-6, Elmore could see people with weapons, going upstairs as if going to cells.

On cross examination, Elmore stated Grinnell's life had been threatened by Stacey Gordon. Elmore added he was inside L-6 for about fifteen minutes when Stacey Gordon told him to leave and ordered other men to stay, saying: "You know what you got to do, take care of your business[.]"[43]Another witness also saw Stacey Gordon leading the squad and ordering Eric Girdy to open cell doors.[44]

Even absent those witnesses to Gordon's primary role in the "death squad" murders, these witnesses did not identify LaMar as one of the squad and would have given any reasonable juror pause before convicting LaMar, and should give this Court pause before setting the date for LaMar's execution.

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[42] S*upra*, at n.39, *State v. Grinnell*, Jackson Test., Apx. 039-55.

[43],*Id*. at 537, 539, 541, Apx. 049, 051, 053.

[44] Apx. 63, Edward Julious declaration.

Stacey Gordon was not charged with the death of any inmate, although he admitted involvement in the death of an inmate on the last day of the uprising. Gordon was charged with assault on two corrections officers and pled guilty early on. He became a witness for the prosecution at LaMar's trial and gave a description of what LaMar supposedly did as leader of the "death squad". This testimony is directly contradicted by Gordon's testimony, a year earlier, at the entry of his guilty pleas. During the plea colloquy, the prosecutor asked Gordon: "Did you see Keith LaMar in the L-6 block in the early hours of the riot at Lucasville?" Gordon answered "No."[45] This testimony would have directly impeached Gordon's credibility but it was not provided to LaMar's trial counsel, and the prosecutor did not correct Gordon's false testimony against LaMar.

[45] Apx. 64-66, Stacey Gordon Plea Transcript, Sept. 8, 1994.

Several prisoners did not identify LaMar as the leader, or even a participant, of the group involved in the L-6 killings.[46] For example, James Edinbaugh said LaMar was not involved.[47] Before LaMar's trial, the prosecutor viewed Edinbaugh as a "possible defense witness" and requested that Edinbaugh be interviewed again. The interview summary states:

> AT THE REQUEST OF PROSECUTOR TEIGER [SIC] INMATE EDINBURGH [SIC] WAS INTERVIEWED AS A POSSIBLE DEFENSE WITNESS AT MANSFIELD CORRECTIONAL. EDINBURGH DOES NOT WANT TO GET INVOLVED. HOWEVER, IF HE IS FORCED TO TESTIFY, EDINBURGH WILL TESTIFY THAT LAMAR WAS PRESENT IN L-6 BUT EDINBURGH DID NOT SEE HIM DO ANYTHING.

This exculpatory evidence was not turned over to LaMar's trial attorney.

Prosecution witness Anthony Walker, when first interviewed by OSHP investigators, identified many people who beat and killed other inmates in L-6 but stated that LaMar was not

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[46] One prisoner testified in a different trial that he did not see Keith LaMar on L-6. Apx. 67-71, Test. Greg Vieira, *State v. Curry*, Scioto C.P. No. 94-cr-279, Trial Tr. Vol. 1. David Lomache identified several inmates, including Eric Girdy, and prosecution witness Stacey Gordon, but not LaMar. Apx. 72-73, David Lomache Interview #1243.

With respect to the death of Bruce Vitale, the prosecutor disclosed in another defendant's case the names of 11 inmates who did not identify LaMar. Apx. 88-90, *State v. Matthews*, No. 94-CR-742, witness disclosure (listing 11 inmates [including Anthony Walker and James Edinburgh-[sic]). Over ten different prisoners—other than LaMar—were identified in connection with the crime against Mr. Vitale.

Regarding the death of Darrell Depina, the prosecutor disclosed in a different defendant's case a list of 11 inmates, 8 of whom did not identify LaMar. Apx. 91-93, *State v. Cannon*, No.94-CR-112, witness disclosure (listing 8 out of 11 inmates [including Anthony Walker and James Edinburgh-[sic]). Over ten different prisoners—other than LaMar—were identified in connection with this crime.

Regarding the death of Albert Staiano, prosecution witness, Anthony Walker, was identified as the killer. Over ten different prisoners—other than LaMar—were identified in connection with this crime.

Concerning the death of William Svette, Eric Girdy confessed his guilt. At least six different people—other than LaMar—were identified in connection with this crime.

[47] Apx. 73, Edinbaugh Interview.

present.[48] Walker's first interview statement was not disclosed. At trial, LaMar's counsel attempted to impeach Walker with small inconsistencies contained in (what is now known to be) Walker's second statement.[49] Counsel would have impeached Walker with his first statement if it had been disclosed.

Prosecution witness Louis Jones admits he was part of the "death squad." After he agreed to be a prosecution witness, Jones was not indicted for any crime.[50] Jones changed his account of events during successive interviews with investigators. He reported in his first interview that he was "part of a group that went into the L-6 block 'to do' the snitches[,]" and he was involved in all the early attacks on prisoners in L-6.[51] Jones did not name LaMar as a participant or as the leader of the group. He said, "[o]ne of the black Muslims that was in this group told the black inmate to prove if he was with them or against them & told him he had to do the white dude in the next cell."[52] It is uncontested that LaMar was not part of the Muslim prison population. The prosecution did not disclose the inconsistent statements to LaMar's trial attorney so Jones' testimony was not impeached.

C. The crime in cell K-2.

On day two of the uprising, all prisoners who were in the yard were stripped naked, taken to K-side, and locked-in ten men to a cell. Accordingly, in cell K-2 with Keith LaMar and the

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[48] Anthony Walker Tape No. A-83, Apx.175-86.

[49] Anthony Walker was housed at Oakwood. In 2006, he testified that cooperating witnesses at Oakwood got all the cigarettes they wanted and their cell doors were never locked. Apx. 188-89. Anthony Walker deposition, *LaMar v. Ishee*, No. 1:04-cv-541 (S.D. Ohio) (Feb. 3, 2006).

[50] Jones was identified as a member of the "death squad" participating in the murders of Darrell Depina and Bruce Vitale. Apx. 75-78, Simmons Interview #873, pp. 3, 5.

[51] Apx. 79-85, Louis Jones Interview #687 at 8.

[52] Apx. 81, *Id*. at 3.

victim, Dennis Weaver, were eight other inmates. The inmate witnesses against LaMar agreed that he did not personally kill Mr. Weaver, but they said he forced other inmates to do so. To convict LaMar for Weaver's death, the jury had to believe LaMar (who was only 23 years old, had recently arrived at SOCF and was not affiliated with any group) had some sort of power or authority over the other eight men in the cell. The case against LaMar, therefore, relies heavily on the idea that he was leader of the L-6 crimes.

Three of the men locked in cell K-2 testified for the prosecution; one testified on behalf of LaMar. The prosecutor impeached LaMar's witness using the text of a previously suppressed interview. The prosecution also did not reveal that two, if not all three, of its witnesses were housed at Oakwood which later came to be known as the "snitch academy" where prosecutors, investigators and prisoners collaborated on testimony against certain defendants charged with crimes committed during the uprising.[53]

Three of the inmates in cell K-2—William Bowling, Ricky Rutherford, and Michael Childers—entered guilty pleas on the same day and all agreed to testify for the prosecution. The three were housed together when William Bowling confided in another inmate, Sean Davis, "that he had killed Weaver out of loyalty because Weaver (a non-Muslim) had threatened my [Sean Davis'] life."[54] Bowling also told Davis "that Keith LaMar was already being blamed as the ringleader for the L-6 inmate murders[,]" and asked Davis whether "he should go along with Childers and blame Keith LaMar for ordering Dennis Weaver's death."[55] Davis advised Bowling "that he should join with Childers and blame LaMar for the order."[56] Although Davis later

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[53] *See supra* n.7.

[54] Apx. 86-87, Affidavit of Abdul Muhammad Saadiq, a.k.a. Sean Davis affidavit ¶7.

[55] Apx. 87, *Id*. at ¶¶8, 10.

[56] Apx. 87, *Id.* at ¶10.

regretted dispersing this advice, "[a]t the time, [he] felt [his] advice was justified since LaMar was a non-Muslim and he was being seen as a ringleader for other inmate murders anyway."[57]

Another prisoner in cell K-2 reported that Bowling killed Mr. Weaver who "was supposed to have told something on uh, Bowling and the white dude [Michael Childers]."[58] No one forced the killing of Weaver.[59] The same prisoner also challenges the prosecution's theory that LaMar was in charge and in control of others in cell K-2. He confessed that he could have stopped the killing, and there was one guy who could have helped him "and that was LaMar" because LaMar knew how to box, but they didn't intervene. He also states some of the men in the cell, including LaMar, went without meals because sandwiches were handed into the cell through the door and "if you wasn't up there to get your food then you just missed out. That's how it was."[60] LaMar would not have gone hungry if he dominated the other men in the cell.

This information rebuts the notion that LaMar coerced others in cell K-2, and it contradicts testimony from prosecution witness Ricky Rutherford.[61]

All of this information undermines the reliability of LaMar's convictions and death sentences.

IV. Conclusion

For the reasons stated above, the state's motion to set an execution date should be denied.

Respectfully submitted,
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

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[57] Apx. 87, *Id.* at ¶¶10, 11.

[58] Apx. 26, Interview of Thomas Mack, June 7, 1993.

[59] Apx. 26, *Id.*

[60] Mack continued: "It was wrong. You know, the way … it was and we was all packed in there like that, it was wrong for them to get the food you know what I'm saying, and leave them guys like that. But you know, this is the penitentiary." Apx. 29.

[61] Apx. 26-27, 29.

s/Stephen A. Ferrell
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Defendant Keith LaMar's Response in Opposition to **Motion to Set Execution Date** was sent by U.S. Mail, First Class, postage prepaid, to Mark E. Piepmeier, Scioto County Special Prosecutor, Office of the Hamilton County Prosecutor, 230 E. Ninth Street, Suite 4000, Cincinnati, OH 45202, on the 27th day of September, 2018.

s/Stephen A. Ferrell
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