No. ______________________

IN THE

SUPREME COURT OF THE UNITED STATES

Christopher Counts — PETITIONER
(Your Name)

vs.

Eddie Wilson et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Christopher Counts #1203354
(Your Name)

24414 Musselwhite Dr (Sussex 1 State Prison)
(Address)

Waverly, VA 23891
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does Federal Court deference to an <u>ex parte</u> Judicial Order, adopted from the Respondents Consolidated Motion for Summary Judgment, result in claims that were not decided on the merits in violation of AEDPA and or the Due Process Clause?

2. In July, 2013 the Wyoming Legislature enacted House Bill 0023, which amended several State Statutes to come into compliance with United States Supreme Court decisions pertaining to unconstitutional sentences for juvenile offenders. This Act encompassed State Statute WS § 6-10-201(b)(ii) of Wyomings Habitual Criminal Act. Was it determined by the States Legislature when it made a "moral judgment" to amend the Habitual Criminal Act that they determined it was cruel and unusual and therefor unconstitutional to even consider a felony committed as a juvenile when deciding to give someone a mandatory "life" sentence under that Act?

3. Does a substantive rule change of a state statute apply retroactively to qualified persons whos conduct falls within the Amended statutory law?

4. Were the issues of Prosecutorial Misconduct, presented in the United States District Court, new issues presented for the first time in Federal Court, or were these issues properly raised in the State District Court?

5. Mr. Counts presented 23 issues of Prosecutorial Misconduct in his State Post-Conviction Relief Petition, more than 13 of these issues were undisputed by the Respondent. Should the United States District Court have considered these undisputed issues, or granted the Writ based on a non-challenge?

6. Should the United States District Court and the Tenth Circuit Court of Appeals used the standard of review for claims not decided on the merits when reviewing the claims raised from Mr. Counts State Post-Conviction Relief Petition?

7. The Wyoming Supreme Court decided that it was error to deny Mr. Counts the right to cross-examine and impeach the witness against him, but was it harmless beyond a reasonable doubt to deny Mr. Counts entire defense to show material bias of the victims testimony that changed after she was employed by the State as a confidential informant, when his entire defense rest on a showing of bias?

8. Should Mr. Counts have been given counsel under Martinez v Ryan to properly develope his Ineffective Assistance of Counsel (IAC) issues?

9. Should Mr. Counts have received a full and fair hearing on his 4th Amendment issues directly creating 6th Amendment issues of IAC?

10. Did the United States Supreme Court abuse its discretion by not appointing counsel to Mr Counts under the Criminal Justice Act of 1964, 18 USC § 3006A?

11. Did the Tenth Circuit Court of Appeals abuse its discretion by not even responding to Mr. Counts' Motion for Appointment of Counsel filed on Feberuary 2 2017?

12. Has Mr. Counts right to Access of Courts been denied by being shipped from Wyoming to Virginia in the middle of his active criminal appeal, where he is unable to access the appropriate books and locate cases cited by the Respondent and Court in the Virginia Prison Law Library?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Eddie Wilson, Warden Wyoming State Penitentiary

Wyoming Attorney General

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at 17-8003; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at DC No 2:16-CV-00070-NDF; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[ ] reported at S-16-0023; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Wyoming State District/Trial court appears at Appendix E to the petition and is

[ ] reported at ______; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 20, 2017.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 17, 2017, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including December 14, 2017 (date) on October, 12 2017 (date) in Application No. 17 A 402.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was March 1, 2016. A copy of that decision appears at Appendix D.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______ (date) on ______ (date) in Application No. ___A______.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified in relevant part at 28 U.S.C. § 2254(d), provides:

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

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

— The Fourth Amendment of the U.S. Constitution provides in part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...

— The Fifth Amendment of the US Constitution provides in part:

No person shall be held to answer for a... infamous crime... nor be deprived of life, liberty, or property, without due process of law...

— The Sixth Amendment of the US Constitution provides in part:

In all criminal prosecutions, the accused shall enjoy the right to a... public trial, by an impartial jury...to be confronted with the witnesses against him... and to have the Assistance of Counsel for his defense.

— The Eighth Amendment of the US Constitution provides in part:

...nor cruel and unusual punishments inflicted.

— The Fourteenth Amendment to the US Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the priveluges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

— Article VI clause 2: of the US Constitution provides:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

= Wyoming State Habitual Criminal Statute WS § 6-10-201 (b)(ii) with Amendment:
(b) An habitual criminal shall be punished by imprisonment for:
(ii) Life, if he has three (3) or more previous convictions (for offenses committed after the person reached the age of eighteen (18) years of age.)
**(Amendment is underlined section in parenthesis)

Statement of the Case

This case has to do with Mr. Counts who at the time of the incident was a 25 year old man from Casper Wyoming. He was convicted of being a Habitual Criminal for having committed his fourth felony. One year and about one month one week after his conviction became final the Wyoming Legislature Amended the habitual Criminal Act as read above, and Mr Counts no longer met the requirements under the law to be given a mandatory "life" sentence, because one of his previous convictions was for a felony he committed when he was 16 years old.

Mr. Counts Appellate Counsel for his direct appeal failed to raise issues of Prosecutorial Misconduct and Ineffective Assistance of Counsel which he requested. So Mr. Counts raised these issues Pro-se in State Post-conviction Relief Petition. (PCR) Before this, The habitual criminal act was amended and Mr. Counts father got an Attorney to initially file his State PCR, he filed an illegal sentence motion which the lawyer failed to use the Teague Analysis for retroactive effect to a new substantive rule even though Mr. Counts made ~~several~~ requests. His attorney even argued against it after the State prosecutor Mr. Itzen brought up Teague v. Lane in his Reply to Mr. Counts Illegal Sentence Motion.

After several months Mr. Counts attorney couldn't get help to present any of the issues he wanted to raise pertaining to mental health and refused to present the issues he was hired to. He filed about 3-4 motions to withdraw as counsel and was finally allowed to do so Because of this Mr. Counts was able to present his issues pro-se with the State Court.

Mr. Counts filed his State PCR, the State filed leave to file an Consolidated Motion consisting of a Motion to Dismiss Claims 1 and 4-6 and Summary Judgment on claims 2-3. The Judge granted this request and set a motion schedule allowing for the filing and subsequent responses. This is where everything takes a turn for the worse. The State filed their Consolidated Motion then the Judge filed her order, the order was the "Finding of Fact, Conclusions of laws and Order granting the States Consolidated Motion" not only was this almost a complete adoption of the States Consolidated motion, 99% identical, but it was filed without allowing Mr. Counts to respond or dispute summary judgment and Mr. Counts wasn't even given notice that it was filed until 4 1/2 months later. It was filed July 11, 2015 Mr. Counts only received it January 25, 2016 because he filed an Objection, request for Summary Judgment and request for hearing. The Judge sent a copy of the September 11 order whith the Jan 21st order denying Mr. Counts Motion. To this day the factual findings in this case are based on the "Respondents Consolidated Motion Regarding Amended Post-Conviction Relief Petition."

There are several reasons to grant certiorari, but the most important reason is because the US District Court and the Tenth Circuit violated due process and seperation of powers and misapplied AEDPA by deferring to the Wyoming Attorney Generals Office on findings of fact and conclusions of law. This case presents this Court with the opportunity to rectify the problem of sham judicial Orders creating a fundamental miscarriage of justice. This court should decide whether AEDPA requires, or due process allows, federal Court deference to state courts ex parte ghostwritten orders.

Statement of the Facts

Mr Counts was charged in state court with 3 felonies; aggravated assault, aggravated burglary, and kidnapping. A jury convicted him of aggravated burglary for the felony of kidnapping, and kidnapping for intent to terrorize, he was acquitted of intent to inflict bodily injury under the kidnapping charge and acquited of aggravated assault. There was then a second phase of trial to determine if Mr. Counts was a Habitual Criminal per Wyoming Statute. The jury decided he had 3 previous convictions and the mandatory life sentence did apply. As a result, the state district court sentenced him to two concurrent life sentences. The Wyoming Supreme Court affirmed his conviction on direct appeal. Counts v. State 277 P3d 94 (Wyo 2012). His requests for Post-Conviction relief were denied in State district court and on appeal.

The evidence at trial showed that Mr. Counts went to the house where the victim, his girlfriend, lived. He began pounding on one of the windows calling bucdly for her to let him in to charge his phone. When she didn't respond, he went around the house to the back door.

The house's occupants heard a crash at the back door, and ~~[illegible]~~ One of the male occupants said he heard the sound of breaking glass which was not corroborated by any other evidence. Mr. Counts entered the back door, the victim ran out the front. There was testimony that Counts was carrying a knife, one of the male occupants said Mr. Counts said "I warned you once, bitch." The other male occupant testified Mr. Counts didn't say anything.

The victim ran towards a neighbor's house and tried to hide under a parked truck. Mr. Counts ran after her. He grabbed her and forcefully walked with her back to the house, there are several witnesses outside and each discription of their traverse back to the house is different. One witness said the victim was screaming for help while others say they were both yelling at eachother and still another said it was just Mr. Counts yelling at the victim.

Once back inside the house Mr. Counts told the two men to leave and they did, he slammed the door as they departed. According to the victim Mr. Counts forced her downstairs into her room, threw her on the bed, threw objects at her (but couldn't recall what any of the objects were), and called her names. She said he locked the door to the room and stood in front of it to prevent her from leaving. She testified that he never told her she couldn't leave. Eventually, he calmed down.

By this time the police had arrived. They called into the house several times and spoke to the victim, they both left the house and surrendered to police. They found a knife in his pocket. The police took a statement from the victim, who later made several more statements, recanted statements or added significant information that she had not told the police on the day of the incident, mostly her story was no longer exculpatory to Mr. Counts and changed the most drastically after she began working for the State as a Confidential Informant just weeks before trial. The prosecution learned that despite a No Contact Order the victim and Mr. Counts had been communicating and Mr. Counts was trying to get her to "tell the truth". This evidence was obtained without a warrent and used as "Consciousness of guilt" evidence.

Reasons for Granting the Writ of Certiorari

I AEDPA does not require, and the constitution does not permit Federal Courts to defer to the Factual Findings and Legal Conclusions of a State Attorney Generals Office.

1. On 7-13-15 the State through James Michael Causey, Senior Assistant Attorney General, from the Wyoming Attorney Generals Office filed in the Court "Respondents Motion for leave to File Consolidated Motion Regarding Amended Post-Conviction Relief Petition" (here after "leave to File C.M.") (Appendix U)
2. On 7-14-15 the State District Court filed it's "Order Granting Respondents Motion for leave to file Consolidated Motion Regarding Amended Post-Conviction Relief Petition and Setting motion scheadule" (here after "July 14 Order") (Appendix V)
3. The motion scheadule of the July 14 Order was set as follows, verbatim.
   1. The consolidated motion shall be filed with this Court within thirty days of the date of this Order;
   2. Mr. Counts shall file his response, if any, to the State's motion within thirty days of the filing of that motion with this Court; and
   3. The State may reply to any responce filed by Mr. Counts within fifteen days of the filing of Counts's response.
4. The State filed their "Respondents Consolidated Motion Regarding Amended Post-Conviction Relief Petition" (hereafter "Consolidated Motion") on 8-13-15, timely filed. (Appendix F)
5. 26 days later ~~August~~ Sept. 8, 2015 the Court wrote the Order which was filed ~~August~~ Sept. 11 2015, 29 days after the Respondents Consolidated Motion was filed. Soliciting the findings <u>ex parte</u>.
6. In Contempt of a Court Order, by the Court, the "Findings of Fact, Conclusions of Law, and Order Granting Respondents Consolidated Motion Regarding Amended Post-Conviction Relief Petition" (here after "Sept. 11 Order") was filed and is almost identical to the States Consolidated Motion. (Appendix E)
7. The Court adopted the States Consolidated Motion almost entirely, after taking out the places the State used to refer to the record (exa Pet. at 17, Tr. of Trial, Vol. IV, at 1061 etc) the Court only made small alterations to the Consolidated Motion. In 33 pgs 11,354 words the Court altered/added/changed 113 words, that is only 0.99524397%, less than a 1% differencc. Several of these alterations were insignificant, where the State wrote "he" and "Counts" the Court reversed the order, wher the State wrote "trial Judge" the Court wrote "Court".

8. Mr. Counts wants to point out that the States Consolidated Motion was a motion requesting dismissal of Counts 1 and 4-6 and Summary Judgment on claims 2 and 3 of his "Amended Post-Conviction Relief Pro-se Petition" (hereafter "PCR")

9. He raises this point for 2 specific reasons, A. On a motion for Summary Judgment the Facts and inferences derived therefrom are to be seen in a light most favorable to the non-moving party (which in this instance is Mr. Counts) and B. In a Motion for Summary Judgment is filed it is only fair to allow the non-moving party an opportunity to respond. In this case that was not allowed or possible as the Sept. 11 Order was filed before the July 14 Order was complied with.

10. Because the States Consolidated Motion was adopted by the Court it is clear that the Facts and inferences were seen in the light most favorable to the State (moving party) and that the Court abdicated its role of independently evaluating the facts to the State. This creats a Fundamental Miscarriage of Justice

11. Mr. Counts didn't get the Courts Sept 11 Order until Januar, 25 2016, 4 1/2 months after it was filed. The only reason he received it at all is because he filed 2 motions to Object, Requesting Summary Judgment and Requesting a Hearing on the fact that the States leave to file C.M. was untimely filed. On Jan. 21 2016 the Court filed an Order denying Mr Counts above stated motions and sent a copy of the Sept. 11 Order with it. If Mr. Counts would have never filed these motions he would have never received the Counts proposed <u>ex parte</u> findings. (Appendix W)

12. This Court is capable of withholding AEDPA deference either on statutory or constitutional grounds when the State Court fails to meaningfully determine the facts and the law, and instead conduct these critical inquires <u>de novo</u>.

13. Its hard to say that a claim can be decided on the merits, if the Court doesn't allow the Appellant to respond to Summary Judgment or comply with the July 14 Order of the Court. <u>Johnson v. Williams</u> 568 U.S ___, 133 S.ct. 1088, 1097 (2013) (noting that "[a] judgment is normally said to have been rendered 'on the merits' <u>only</u> if it was 'delivered <u>after</u> the court... heard and evaluated the evidence <u>and</u> the parties substantive arguments'" (emphasis added)

14. This Courts recent decision in <u>Brumfield v. Cain</u> 135 S.Ct. 2269 (2015) recognizes that the ultimate correctness of State Court judicial findings is not the sole issue in the analysis under 28 U.S.C. § 2254(d)(2) for determining whether State Court

decisions are entitled to deference. see Trevino v. Thaler 133 S.Ct 1911, 1921 (2013), the statutory text of AEDPA cannot be read to foreclose federal Courts from their duty to provide independent review of these claims if the State Court will not.

15. § 2254(d)(2) states that if the state court decision is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" (emphasis added), the federal court is no longer bound to defer and instead reviews the claims under § 2254(a) alone (de novo review) see e.g. Panetti v. Quarterman, 551 U.S. 930, 953 (2007)

16. accord Samuel R Wiseman, Habeas After Pinholster, 53 B.C.L. Rev. 953, 984-86 (2012) (noting that flawed factual finding processes should result in failure to accord deference under § 2254(d)(2)). Failure to accord an evidentiary hearing in cases with genuine issues of material fact leads to an unreliable and unreasonable factual determination. Even if the findings in this case may be deemed ultimately to be correct - although to be clear, Mr. Counts seriously disputes the factual findings - his claims must be scrutinized without the deference the lower courts have applied under AEDPA due to the broken and unreasonable state court fact-finding process.

17. This Court has long recognized that wholesale adoption of one side's factual findings and legal conclusions, even in ordinary civil litigation, raises due process concerns. See e.g. Anderson v. City of Bessemer, 470 US 564, (1985). And in the context of wholesale adoption of opinions under the pre-AEDPA standards, this Court already identified three factors that when present raised due process and fairness concerns -- specifically when "(1) a judge solicits proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting the judge may not have read them." Jefferson v Upton 560 U.S. 284, 294 (2010) (per curiam); see also id. at 291 (emphasizing that the sections of the pre-AEDPA version of 28 U.S.C. § 2254(d) that were involved included "that the applicant was otherwise denied due process of law in the State court proceeding" and "that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding")

18. In this case ~~the~~ judge did file the Findings ex parte and Mr Counts had no opportunity to contest the findings. This Court has therefore already recognized that where the Jefferson factors are present, there are grave due process concerns; concerns that should motivate a reading of AEDPA to allow challenges to procedures which are fundamentally unfair and contrary to basic notions of due process.

This court can also reach the same conclusion under the constitution directly.

Where a State Court violates the due process clause in its resolution of claims, federal Courts cannot be required to nonetheless recognize and defer to the defective process

19. Finally, Mr. Counts as a pro-se litigant filed a Writ of Review to the Wyoming Supreme Court within 15 days of receiving the September 11 2015 order. Since he didn't receive that ex parte order until January 25, 2016 he filed with the Writ a "Motion for Extension of Time" (Appendix X) dated February 4 2016 in compliance with the Wyoming Rules of Appellate Procedure (W.R.A.P.), the Court accepted his Writ of Review as timely filed. (Appendix Y)

20. Mr. Counts followed the specific rules outlined in the W.R.A.P. for filing a Writ of Review, Rule 13. The petition for a Writ of review.

Rule 13.04. Contents of petition for writ of review.

The petition shall be captioned in the reviewing court. It shall contain concise statements of the following:

(d) The principals of law upon which petitioner relies, with citation of authorities in support but without argument; (emphasis added)

Mr. Counts raises this becaush his Writ of Review was denied because "Petitioner has not provided cogent argument..." (Appendix D) It seems to go against everything Justice stands for to deny a pro-se Writ of Review, or any Writ for that matter, for following the rules set forth in the W.R.A.P. 13.04(d). As a pro-se litigant my filings are suppose to be construed liberally but I'm still required to follow the appropriate rules. Doing so this time actually prejudiced me. This Court should reverse and remand to allow Mr. Counts to respond to Summary Judgment to allow an independent evaluation of the facts and an impartial decision

II If the Habitual Criminal statute W.S § 6-10-201(b)(ii) was unconstitutional when Mr. Counts was sentenced there is no question of prospective or retroactive application of the Amended Statute

1. Mr. Counts was sentenced to two concurrent life terms as a habitual criminal, based upon having three prior felony convictions. The first prior conviction, Natrona County Wyoming Criminal Action No. 15247-B SS, was entered on November 27, 2001, and the crimes were committed when the defendant was 16 years old.

2. The Wyoming Supreme Court has stated "An offenders age is... relevant to the Eighth Amendment and so criminal procedure laws that fail to take the defendant's youthfulness into account at all would be flawed." "A sentencer [must] have the ability to consider the mitigating qualities of youth." Bear Cloud v State 294 P.3d 36 at 43 citing Miller v Alabama 567 US ___, 132 Sct 2455, 183 LEd2d 407 (2012) (Appendix AA)

3. In this case because of the mandatory nature of the statute the Court could not consider the mitigation of the crime that was committed when Mr. Counts was only 16 years old. The Wyoming legislature has recognized the constitutional infirmity and unfairness of such a sentence when it amended the habitual criminal act, W.S. §6-10-201(b)(ii) stating that a defendant can be sentenced to life only "if he has three (3) or more previous convictions for offenses committed after the person reached the age of eighteen (18) years of age." (emphasis added) Therefore, if the juvenile conviction is not considered, Mr. Counts could have been sentenced, not to life, but to not less than ten years nor more than fifty years under §6-10-201(b)(1).

4. Federal law has long distinguished juvenile adjudications from criminal convictions. In 1938, Congress passed the Federal Juvenile Delinquency Act (FJDA), ch. 486, 52 Stat 764, 766. Congress has Amended the Act since then, but its core distinction between juvenile adjudication and adult prosecution remains. The Act currently defines "juvenile delinquency" as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such person of [certain juvenile specific firearms offenses]." 18 U.S.C. § 5031. And though the juvenile's actions become part of his or her official record, the Act does not speak of the juvenile as being "convicted," but rather of his being "adjudicated delinquent." Id § 503. ~~[illegible]~~ c.

5. It has also been said "under the federal statutes a juvenile is not adjudicated to be guilty as a criminal; rather, he is adjudicated to be a juvenile delinquent" United States v. Juvenile L.W.O., 160 F3d 1179, 1182 n.4 (8th Cir 1998); but see United States v Juvenile P.W.M. 121 F.3d 382, 383 (8th Cir 1997) (using proper terminology); The Tenth Circuit has pointed out that "The purpose of the federal juvenile delinquency proceeding is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction." United States v. Brian N 900 F2d 218, 220 (10th Cir 1990).

6. Here the Wyoming legislature has resolved the question about the constitutionality of the mandatory life sentence under the Habitual Criminal act at the time Mr. Counts was sentenced. House bill 0023 comprehensively amended the criminal statutes

to meet the challenges presented by the U.S. Supreme Court in Graham v Florida Miller v. Alabama. The Wyoming Legislature is the direct representative of the people of the State of Wyoming and is certainly qualified to make judgment about "the evolving standards of decency that mark the progress of a maturing society" and they made a "moral judgment" when they amended the habitual criminal act. to correct a 'manifest injustice'. 28 U.S.C. § 2403(b) may apply.

7. It seems that logically there is no other explanation for what the legislature did, they thought it unconstitutional to even consider a juvenile offense in order to enhance a sentence under the habitual criminal act and therefore they amended the unconstitutional statute. As Mr Counts's sentence was mandatory and was convicted under an unconstitutional statute, a conviction under an unconstitutional law "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." Ex parte Siebold 100 US 371, 376-77 (1880). Upon the foregoing reverse and resentence on all counts

III New Substantive Rules generally apply Retroactively

1. This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the constitution requires substantive rules to have retroactive effect regardless of when a conviction became final. A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. see Ex parte Siebold 100 US at 376.

2. The Wyoming Supreme Court decided for Mr. Counts S-14-0131 (Appendix Z) p 7[¶ 22] "the sentencing scheme found in § 6-10-201 is substantive, ..." (emphasis added) Siebold Id. It follows, as a general principal, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.

3. Under Teague v. Lane 489 US 288, at 311, 109 SCt 1060, 103 LEd 2d 334 (1989) A new rule applies retroactively in collateral proceeding only if (1) the rule is substantive or (2) the rule ... here we are only concerned with the substantive requirement. Substantive constitutional rules include "rules forbidding criminal punishment for a certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense,"

Penry v. Lynaugh 492 US 302, 330, 109 Sct 2934, 106 LEd2d 256 (1989)

4. "New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the states power to punish." Schriro v. Summerlin 542 US 348, 351-52, 124 Sct 2519, 159 LEd2d 442 (2004); see also Saffle v Parks 494 US 484, 495, 110 Sct 1257, 108 LEd2d 415 (1990) (noting that rules that "decriminalize a class of conduct [or] prohibit the imposition of [certain] punishment on a particular class of persons" are substantive in nature).

5. In this case a liberty interest is created as the law sets forth substantive predicates to govern official decision making and it contains explicitly mandatory language.

6. Montgomery v. Louisiana 577 US ___ (2016) made it a Constitutional requirement of a Federal Court to grant relief for the past violation of a newly announced substantive rule, it also obligates Federal and State Habeas Courts to ~~e~~ invokee the U.S. Supreme Courts Eighth Amendment "evolving standards of decency" jurisprudence to upset punishments that were constitutional when imposed but are "cruel and unusual" in our newly enlightened society. Says Scalia J dissenting. Reverse and Remand so Mr. Counts can show he belongs to the protected class

7. Yes it has been said that the "Habitual Criminal statute does not punish a defendant for his previous offense but for his persistance in crime" Urbigkit v. State 67 P3d 1207 (Wyo 2003). But, the previous offenses are a requirement to receive either of the two mandatory sentences §6-10-201(b)(i) or (ii). And in the instant case a felony charge committed when Mr. Counts was 16 is the only thing that gives him a mandatory "life" sentence because without considering that juvenile crime Mr. Counts doesn't have the required three offenses committed after the person reached the age of eighteen (18)... he only has 2 previous convictions, Mr. Counts does not meet the statutory requirements under the law to be serving the mandatory "life" sentence. Please Reverse and Remand to Resentence Mr. Counts under the law as it applies to him.

IV Undisputed issues in a State Court are not "New Issues" when presented in the Federal Courts.

1. The USDC of Wyoming in their "Order Granting Respondents Motion for Summary Judgment on Petition for Writ of Habeas Corpus" (hereafter Nov. 1 Order) Filed November 1, 2016 stated on p.27 (Appendix C)

"Although Counts refers to several statements made by the prosecutor in his petition, the Court will only review the statements presented to the State district court. Any additional arguments raised for the first time are procedurally barred. In his motion before the district court, Counts focused on the following allegations:"

2. Mr. Counts points this Court to his PCR (Appendix G) which is exactly what he presented to the State district Court. and refers this Court to p14-15 where he lists 23 issues of Prosecutorial Misconduct for the prosecuters statements made to the jury during closing arguments. Those are the exact statements spoken about in Mr. Counts Habeas Corpus §2254 filings (see Appendix H) p.7 #14. So though the Wyoming USDC referes to "only review the statements presented to the State district Court" they clearly failed to read or review Mr. Counts State PCR.

3. Mr. Counts raised the fact that more than 13 of the issues he presented in his State PCR were undisputed by the Respondent, and listed every issue. The Respondent during the Federal §2254 process didn't dispute or argue against Mr. Counts assertion that these issues were presented and undisputed in the State District Court.

4. Whereas, if the §2254 Court would have looked at p.14-15 in his State PCR and seen what was presented to the State District Court they would have seen that these issues were (1) raised, (2) undisputed by the respondent (3) not raised for the First time in Federal Court and therefore (4) Not "New Issues"

V Undisputed Issues are considered admitted by the undisputing party.

1. Mr. Counts raised in his State PCR to the State District Court more than 23 issues of Prosecutorial Misconduct, the cumulative effect of each issue, and the fact that each met the 3 elements of the plain error standard, requiring reversal. He states "more than" 23 because of the 23 statements pointed to (p.14-15 of State PCR, Appendix G) several of them refer to more than 1 violation of the 1 ABA Standards for Criminal Justice 3-5.8 at 3.87 to 3.88 (2d ed 1980) Appendix J) for example "at page 1048-49, line 24 5, 1-5, 14-18, the Prosecutor violated section(s) (A) and (B) of the 1 A.B.A. Standards;" as stated

in his State PCR p.14 #24 Appendix G; and p.1 (Appendix K) (Issues of Prosecutorial misconduct) which gives citation to the comment of the Prosecuter during his (Closing Arguments (Appendix I), the issue, the violation and points in the trial record that show a "genuine dispute of material facts exhist. Especially when the Motion for Summary Judgment is before Any Court the evidence and inferences derived therefrom are suppose to be viewed "in the light most favorable to the non-moving party." Nelson v. Geringer 295 F.3d 1082, 1086 (10th Cir 2002). Which in the Instant case is Mr. Counts." The trial court record is clear on these issues raised by Mr. Counts in his State PCR (view Appendix L) comparing them to the issues Mr. Counts raised to the State District Court and with Appendixes I, J and K.

2. In Bland v. California Dept. of Corrections 20 F.3d 1469 (CA9 1994) "The State... argues that the district court erred in assuming the truth of the allegations contained in the declarations, because the state never had the opportunity to refute those factual allegations. In a habeas proceeding, the state responds by return to a habeas petitioner only after the Court issues an order to show cause. see In Re Sixto, 48 Cal.3d 1247, 259 Cal.Rptr 491, 492 774 P.2d 164, 165 (1989). The States return must allege facts tending to establish the legality of the petitioners detention. The petitioner then responds by filing a traverse Id. When the State's return fails to dispute the factual allegations contained in the petition and traverse, it essentially admits those allegations. Id 774 P.2d at 165-66. Id Bland at 1474

3. Though here, in the State district Court, Mr. Counts wasn't allowed to file a response to the Respondents consolidated motion or traverse, and in the §2254 Federal Habeas Court when these issues were raised, again, and again were undisputed, it seems the Habeas Court would rather say these issues are new and procedurally barred, on its own, with no suggestion of such from the State; than grant the relief warrented by law and requested by Mr. Counts. Undisputed issues are considered admitted by the undisputing party and since Mr. Counts properly raised the fact that alone and cumulatively each issue met the 3 elements of the plain error standard, and more than 13 of these raised issues were undisputed then logically the State admits those issues occurred, they admit those issues, either alone or cumulatively, meet the 3 elements of the Plain error standard and therefor reversal should be granted. Mr. Counts requests that this Court reverse on a non-challenge and view this under the fundamental Miscarriage of Justice standards.

III The § 2254(d) standard does not apply to issues not decided on the merits by the State Court

1. Both the USDC and the 10th Cir Court of Appeals viewed Mr. Counts issues "presum[ing] that the [previous] court was aware of the relevant law and applied it correctly..." State v. Moody, 208 Ariz. 424, ¶181, 94 P.3d 1119, 1144 (2004) even after Mr. Counts pointed to the record, filed sworn affidavits and did his best to properly develope the claims proving it was not applied correctly under the appropriate standard.
2. This court has already decided, noting that "[a] judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court ... heard and evaluated the evidence and the parties substantive arguments'" Johnson v. Williams 568 US ___, 133 S.Ct 1088, 1097 (2013). As Mr. Counts has tried to show because of the State District Court adopting the States Consolidated motion for Summary Judgment and rendered an ex parte decision without allowing Mr. Counts the opportunity to show that a genuine dispute of material facts existed, then there should not be any question that the Claims raised in Mr. Counts's State PCR were not rendered on the merits.
3. "The standard of review changes if there has been no state-court adjudication on the merits of the petitioners claims. In such situations, '§ 2254(d)'s deferential standards of review do not apply.' Selsor, 639 F.3d at 992; see also Welch v. Workman, 639 F.3d 980, 992 (10th Cir 2011) ('The § 2254(d) standard does not apply to issues not decided on the merits by the State Court.' (quoting Bland, 459 F.3d at 1010) (internal quotation marks omitted)) 'For those claims, we review the district courts legal conclusions de novo and its factual findings for clear error. However, if the district court based its factual findings entirely on the state court record, we review that record independantly.' Bland, 459 F.3d at 1010 (citation omitted) Byrd v. Workman 645 F.3d 1159, 1166-67 (10th Cir 2011)
4. The 10th Cir Court of Appeals didn't view any of Mr Counts Claims under this standard (see Appendix A) He raised that concern in his request for rehearing en banc (Appendix M) For this reason Mr. Counts asks that these claims be reversed and remanded so that the lower Courts will view his claims under the correct standard for claims not decided on the merits.

VII The constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense

1. Mr. Counts wanted to question the witness against him the "victim" about her recently adopted status as a confidential informant paid by the state, and why her testimony changed just before trial and why that lines up with her most recent status as a paid informant.
2. The State district court said that this was error but they couldn't see how being denied the right to cross-examine and impeach the witness effected Mr. Counts defense.
3. Mr. Counts trial attorney tried to get this evidence admitted to the jury and to be allowed to probe and expose her testimonial infirmities by showing the victim had "motive to lie". (see Appendix N, sealed transcripts) Mr. Counts' attorney did everything to get this testimonial evidence presented so that they could show that the victim was bias.
4. There was obviously a motive as to why the victim changed her story and why that story changed when it changed, and Mr. Counts wasn't allowed to cross-examine the witness concerning this testimony, and wasn't afforded the opportunity to defend against this new testimony
5. Mr. Counts wanted to use the victims testimony taken outside the presence of the jury and present it to the jury to show bias; as the bias of a witness is subject to exploration at trial an is "always relevant as discrediting the witness and affecting the weight of his testimony." <u>Davis v. Alaska</u> 415 US 308, 316 (1974) Without this testimony (See Appendix N) compared with the victims testimony at Tr. p 588 and 600 (Appendix L) Mr. Counts wasn't able to defend against the victims new testimony and new statements.
6. The prosecution got to argue that the victims testimony was no longer exculpatory to Mr. Counts because she realizes that she is no longer in love with Mr. Counts, where Mr. Counts wanted to show bias and the fact that her status as a paid confidential Informant coincided with her testimonial infirmities, which the victims own testimony showed the connection, but Mr. Counts wasn't allowed to present that testimonial evidence to the jury effectively denying him his right to present a complete defense.
7. At trial Mr. Counts tried to get this testimony and cross-examination in front of the jury. The Court didn't allow the testimony, "The excluded testimony

was relevant because it provided background and contextual information that would have been useful in assessing the relative credability of [] [the victims] testimony. Cf Old Chief v. United States, 519 US ___, 172, 186-89, 117 S.Ct. 644, 136 LEd2d 574 (1997); [omitted]. Evidence is relevant so long as it has "any tendency,' however slight, 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Fed. R. Evid. 401[.] The threshold for relevence is 'quite minimal.' United States v. Guerrero-Cortez, 14 F.3d 1283, 1287 (8th Cir 1994) [omitted] All relevant evidence is admissible, except as otherwise provided by the Constitution, legislation, or applicable evidentiary rules, and conversely, all irrelevant evidence is inadmissible. See Fed. R. Evid. 402 {the testimony was relevant to Mr. Counts defense to show bias} 'The Constitution guarantees criminal defendant a meaningful opportunity to present a complete defense,' which includes the right to present testimony of witnesses that is materal and favorable to their defense and complies with the rules of evidence. see Crane v. Kentucky 476 US 683, 690, 106 Sct 2142, 90 LEd2d 636 (1986)" quoting US v. Holmes 413 F.3d 770, 773-74 (CA8 2005). This case is directly on point. The Court should reverse and remand so Mr. Counts can be allowed to present a complete defense.

VIII Ineffective Assistance of Counsel (IAC) Claims are better developed and should be raised by Counsel on Collateral Review (if raised for the first time)

1. Mr. Counts asserts that Counsel should have been provided to develope his IAC claims, he asked the Wyo. Public defenders office what their procedure was for filing IAC claims, the Chief Appellate Counsel Tina Olson said that they normally hire outside counsel so there wasn't a conflict of interest. Well they didn't hire outside counsel and they didn't raise the IAC claims Mr. Counts wanted raised. Because of this Mr. Counts was required to raise IAC claims on his Appellate Counsel for failure to raise IAC claims on his trial counsel, and further was required to develope and raise the IAC claims himself for the first time on colateral review.

2. The Tenth Circuit laid down a central principal in Beaulieu v United States 930 F2d 805, 808 (10 Cir 1991) (Ineffective assistance of Counsel claims should be brought in collateral proceedings, not on direct appeal. Such claims brought on direct appeal

are presumptively dismissable, and virtually all will be dismissed.)

3. It is important for counsel to develope and present these claims because "A petitioner's inability to present an ineffective-assistance claim is of particular concern because the right to effective trial counsel is a bedrock principal in this Nations justice system" Martinez v Ryan 132 S.Ct. 1309, 1312 (US 2012). Which also states "where the initial review collateral proceeding is the first [] proceeding for a prisoner to raise the ineffective-assistance claim, the collateral proceeding is the equivalent of a prisoners direct appeal as to that claim because the state habeas court decides the claims merits, no other court has addressed the claim, and defendants' are generally ill equipped to 'represent themselves' where they have no brief from counsel and no court opinion addressing their claim. Halbert v Michigan 545 US 605, 617, 125 S.Ct. 2582, 162 L.Ed.2d 552" quoting Martinez v Ryan at 1311-12. I ask this Court reverse and remand and appoint counsel under Martinez.

IX A full and fair hearing guarantees the right to present ones case with respect to the claim.

1. Though Mr. Counts has done everything to properly develope his claims from providing the record (or absence thereof) and filing sworn affidavits, to no avail. He's been requesting an evidentiary hearing since the state district court and hasn't been afforded one.
2. Mr Counts has alleged 4th Amendment violations which if proven would have entitled him to relief, he has shown through affidavits that motions to suppress were not filed, nor was an objection made and these items effect the charge and evidence used extensively through trial. To the illegal search and seizure of his personal property (A knife and $80) and the illegal seizure of his letters obtained without a warrent and used as "consciousness of guilt" evidence against him.
3. There are also 6th Amendment claims for failure to investigate a mental health defense, and failure to object to highly objectionable situations concerning Prosecutorial Misconduct and his comments predominently during closing arguments, where his attorney sat quietly during pivotal moments, and the failure to suppress illegally obtained evidence and failure to object to their use at trial.

4. Stone v Powell 428 US 465, 49 LEd2d 1067, 96 Sct 3037 (1976) (In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment Claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.) Id. at 3052 "Fourth Amendment violations are generally not cognizable on federal habeas, but they are cognizable when the state has failed to provide the habeas petitioner 'an opportunity for full and fair litigation of a Fourth Amendment claim.'" Stone 428 US at 482 (quoting Wallace v. Kato 549 US 396, 166 LEd 2d 973, 127 Sct 1092, 1099 (2007)) Wherefor Mr. Counts requests this court grant the opportunity for a full and fair hearing and reverse and remand for such

X A pro-se litigant who is unable to obtain pertinent law books and cases cited by the respondent in the prison law library to fully respond to his adversary's motion, when seeking relief under § 2254, should be afforded counsel.

1. Mr. Counts is a pro-se inmate serving two concurrent life sentences for being found to be a habitual criminal out of Wyoming. While actively filing his appeal he was Interstate ~~[illegible]~~ Compact Corrections transfered to Virginia where he has no way of getting Wyoming legal books and his access to the Courts has been impeded and severely frustrated, this has prejudiced Mr Counts where his Appeals have been dismissed on Summary Judgment, where with counsel there is a high probability that he would have prevailed on his claims. Mr. Counts had absolutely zero access to Wyoming case laws and Minimal access to 10th Cir Federal caselaws quoted or used by the Respondent and Court.
2. Actual Injury has been found when a prisoner could not locate cases cited by the respondents in the prison law library, see Benjamin v. Kerik 102 F. Supp 2d 157 (S.D.N.Y. 2000), and because of this he could not fully respond to his adversary's motion. As was the case for Mr. Counts, who filed several Motions for Appointment of Counsel and a Motion for Injunctive Relief to be shipped back to Wyoming, which were denied by the §2254 Court.
3. Mr. Counts believes that as the Court knew of his situation and his inability

to get access to the legal materials and cases cited pertinent to his case he met the requirements for an attorney to be appointed under 18 USCA § 3006A (a). And because of this he asks this court to reverse and remand with a suggestion that Counsel represent Mr. Counts.

XI A Court abuses it's discretion if it fails to rule upon a Motion For Appointment of Counsel before granting dismissal of the case

1. On February 2nd 2017 Mr. Counts sent a "Motion for Appointment of Counsel" (Appendix O) with his "Combined Opening Brief and Application for Certificate of Appealability) (COA Appendix P)
2. On June 20 2017 Mr. Counts COA was denied but there was no mention of his Motion for Appointment of Counsel.
3. Mr. Counts wrote a letter concerning this motion and filed an objection (Appendix Q) which explains in full detail the entire situation. As well as a Writ of Mandamus (Appendix R) to this Court which explains that the Tenth Circuit Court of Appeals rendered a decision when it didn't even receive all the Attachments Mr. Counts sent with his COA, nor did the Court inform Mr. Counts that the Attachments were missing. The Clerk told Virgil Counts, Mr. Counts father that when they received the mail containing his COA w/ attachments the box was ripped open and documents were missing.
4. Mr Counts believes this is why they didn't respond to his Motion for Appointment of Counsel, and did everything in his ability to rectify this situation by sending a notarized letter with a copy of the motion and an Objection when the court refused to consider the filing. Federal Courts have ruled "a district court abuses its discretion if it fails to rule upon a motion for appointment of counsel before granting a motion of the defendant disposing of the case" Johnson v. US Dep't of Treasury 939 F2d 820, 824-25 (9th Cir 1991)

XII The Right to Access the Courts should be adequate, effective and meaningful

1. Mr. Counts is a Wyoming Inmate who while filing his pro se appeal of his concurrent life sentences for being a habitual Criminal was transfered to

Virginia and had no access to any Wyo Court Rules or legal books or pertinent case laws.

2. Mr Counts filed a Motion for Injunctive Relief during his §2254 filings and the Respondent answered saying that I can get "Wyoming specific legal materials: (1) by submitting a request through the Virginia Dept of Corrections, which will then forward it to the Wyo dept of corrections, or (2) by submitting a request directly to the Wyo Dept of Corrections.

3. Mr. Counts did both to no avail, he also filed a grievance through Wyo where the Wardens response said "the facility you currently reside in is responsible for providing you with materials in which to file your appeal." (Appendix S) and he wrote Virginia where he just got the runaround (Appendix T)

4. Mr. Counts was sent out of State from the 10th Circuit to the 4th Circuit where he has had no opportunity to receive legal materials until more than 19 months after his transfer before he received even 1 item that he requested, this was after his §2254 Habeas Corpus, Appeal to the 10th Cir and request for an En Banc Rehearing to the 10th Circuit was already dismissed. Mr. Counts requests that his case be reversed and remanded and that he either be appointed counsel or be returned to Wyoming so that he has adequate access to the Courts to properly file his appeal.

CONCLUSION

The petition for a write of certiorari should be granted.

Respectfully submitted,

Date: 12/12/17

MICHELLE WALKER
NOTARY PUBLIC
REG. #7636843
MY COMMISSION EXPIRES
COMMONWEALTH OF VIRGINIA

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