No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CURTIS DEE PACKARD — PETITIONER
(Your Name)

vs.

UNITED STATES COURT OF APPEALS
FOR THE 10TH CIRCUIT, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Curtis Dee Packard #158629
(Your Name)
c/o:Bent County Correctional Facility
11560 Road FF.75
(Address)

Las Animas, Colorado 81054
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I) Whether both the trial court and the State's Public Defender's Office invited error and erroneously denied the Petitioner his 6th Amendment rights to assistance of counsel; after the State Pubic Defender's Office confirmed that the Petitioner had properly filled out his application for assistance of counsel and qualified for assistance at state expense and after the trial court had ratified the entry of appearance, in permitting the Public Defender's Office to withdraw its representation of the Petitioner after the Public Defender's Office later alleged that the application for assistance of counsel was incomplete?

II) Whether; when the Petitioner's choice, intentional and/or implied, to represent himself and proceed without the assistance of counsel completely breaks down, countervailing considerations mandate that a trial court appoint, sua sponte, the appointment of counsel to protect the rights of an accused?

III) Whether an objection; made by the Petitioner who was proceeding in a pro se capacity in a criminal trial, in regards to the complete failure of the prosecution to establish the unavailability of a witness whose deposed testimony was later introduced at trial, can be reasonably construed to be an objection as to a violation of the Petitioner's 6th Amendment rights to Confrontation whose provisions, by themselves, does not permit the admittance of such testimony absent an affirmative showing of a firmly rooted exception?

LIST OF PARTIES

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

[*] 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:

The United States District Court for the District of Colorado
901 - 19th Street
Denver, Colorado 80294

Colorado Court of Appeals
2 East 14th Avenue
Denver, Colorado 80203

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED:

TABLE OF AUTHORITIES CITED (continued)

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 E to the petition and is

[ ] reported at _____; 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 A-B to the petition and is

[ ] reported at _____; 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 H to the petition and is

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

The opinion of the Colorado Court of Appeals court appears at Appendix G to the petition and is

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

PROCEEDINGS BELOW:

COLORADO COURT OF APPEALS:

Ensuing his conviction in State court the Petitioner moved the Colorado Court of Appeals (COA), by and through Esteban A. Martinez, on direct appeal in the matter of The People of the State of Colorado, Plaintiff vs. Curtis Dee Packard, Defendant 14CA0067, to Reverse and Vacate his Judgment of Conviction and Sentence and Remand the matter back to the trial court. On appeal the Petitioner contended: 1) That the trial court violated his right to counsel by allowing the PD's Office to withdraw its representation after they invited the error that led to the PD's Office entering an appearance as his counsel; 2) That the trial court erred by not appointing counsel to represent him sua sponte when he did nothing to represent himself in any of the stages of the criminal proceedings that were conducted against him; and, 3) That the trial court violated his Right to Confrontation by allowing the Prosecution to depose an expert witness whose unavailability had not been established and later by allowing this deposed testimony to be used during trial after the Prosection had just admitted that the witness was available.

On October 29th, 2015, DIVISION V of the COA (Furman, Hawthorne and Richman, JJ.) AFFIRMED the Petitioner's Judgment of Conviction. In their Opinion the Court reasoned: 1) That although they found that the trial court did not rule on the fact that the Petitioner was not indigent that it gave the Petitioner a number of opportunities to fill out an Application for assistance of counsel which the Petitioner declined. This declining was taken as an

implied waiver of the Right to assistance of counsel; 2) That, under Colorado law, when a defendant chooses to proceed pro se, he has no right to stand by counsel or the appointment of counsel sua sponte even when the representation is nonexistent; and, 3) That the Petitioner did not challenge the expert's unavailability as it related to to his absence at trial, but only as it related to the motion to depose him although the objection was made at trial. In summary the COA did not equate the Petitioner's objection as a specific objection under the rule of unavailability.

COLORADO SUPREME COURT:

On Decem. 8th, 2015, a Petition For Writ of Certiorari was filed in the Colorado Supreme Court. Upon consideration of the Petitioner's Writ the Court determined, En Banc, that the same should be DENIED.

FEDERAL COURT PROCEEDINGS:

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO:

On April 4th, 2017, the Petitioner, acting pro se, moved the United States District Court For The District Of Colorado for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the matter of Curtis Dee Packard, Applicant, vs. Barry Goodrich and The Attorney General of the State of Colorado, Respondents, Civil Action No. 17-cv-00835-RBJ. In his Writ the Petitioner asserted three claims of relief: 1) That his Sixth Amendment Right to counsel was violated when the trial court permitted counsel to withdraw without it ever making specific findings to support the withdrawal. The Petitioner also incorporated the fact that the appointment was invited error and that the PD's Office and the trial court could not complain of the error that they invited;

2) That his Constitutional Rights were violated when the trial court failed to appoint counsel sua sponte when it observed a complete lack of participation from the Petitioner in all of the proceedings held against him; and, 3) That his Constitutuional Right to Confrontation was violated when the trial court permitted the Prosecution to introduce the deposed testimony of an available witness.

On April 5th, 2017, Magistrate Judge Gordon P. Gallagher Ordered the parties to file a Pre-Answer Response addressing timeliness and exhaustion of state court remedies. On April 28th, 2017, the Respondents filed their Pre-Answer response alleging that: 1) The Petitioner's Writ was timely filed; 2) That his claims regarding the denial of assistance of counsel was unexhausted in relation to the federal nature of the claim; and, 3) That his claim as to Confrontation was not fairly presented to the state court because the Petitioner specifically ignored federal constitutional grounds when the issue first arose at trial and because the Colorado COA determined that the claim was procedurally barred on direct appeal on an independent and adequate state law ground because the Petitioner did not object under the rule of unavailability.

On May 15th, 2017, the Petitioner filed his Pre-Answer Response alleging that he fairly presented his claims in regards to the denial of assistance of counsel pursuant to Howell v. Mississippi, 543 U.S. 440 (2005); and, that the court was obligated to liberally construe in a broad and remedial manner the Petitioner's alleged flawed objection as an objection bringing the court's attention to

the question of unavailability and admissibility of the deposed testimony. That objection, the Petitioner held, should have been construed pursuant to the mandates of Haines v. Kerner, 404 U.S. 519 (1972).

On May 23rd, 2017, Judge R. Brook Jackson issued an Order Dismissing in Part setting forth that the Petitioner's Writ was timely; that he exhausted and fairly presented his assistant of counsel claims to the state; and, that the Petitioner failed to either demonstrate actual prejudice and/or a fundamental miscarriage of justice that would excuse the procedural default.

On June 5th, 2017, the Petitioner objected to the court's Order setting forth that the court was impermissibly relieving both the state and the prosecution of their obligations under the Confrontation Clause to establish unavailability before permitting deposed testimony to be heard before jurors and by placing all of the blame for the violation squarely on the Petitioner's shoulders in spite of the objection he made and in spite of there being a strong presumption against a waiver of a fundamental Right. Additionally, the Petitioner set forth that the deposed testimony was only admissible, under enumerated state law exceptions, which were never established as existing.

On September 1st, 2017, Judge R. Brooke Jackson concluded in a Final Judgment Denying the Petitioner's Habeas that: 1) The Petitioner failed to demonstrate that the state court's determination in regards to the issue of the denial of assistance of counsel was contrary to clearly established federal laws or that it was an unreasonable standard in light of the facts and

evidence presented. This was after the court found that the Petitioner did not fail to submit an Application but that he just refused to submit multiple Applications and after it had determined that the trial court did not reach a determination on the issue of indigency although the trial court said that it was finding that the Petitioner was not eligible for assistance of counsel; and, 2) That as a result of the absence of clearly established law that the court was precluded from further inquiry as it related to the appointment of counsel sua sponte because, under Colorado law, when a defendant waives his rights to counsel that waiver is carried over to the appointment of stand-by counsel. In concluding his Order Judge Jackson overruled the Petitioner's objections and set forth that a Certificate of Appealability would not issue.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT:

In the matter of Curtis Dee Packard, Petitioner, vs. Barry Goodrich and the Attorney General for the State of Colorado, Respondents, Civil Action No. 17-1349 (D. Colo.), the Court (Briscoe, Hartz and McHugh) Denied the Petitioner's Petition for a Certificate of Appealability setting forth on May 7th, 2018, that no reasonable jurist would find the district court's determination debatable and that the Petitioner had failed to show a fundamental miscarriage of justice or prejudice.

Petition for Rehearing was Denied on June 19th, 2018.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was May 7th, 2018.

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

[*] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 19th, 2018, and a copy of the order denying rehearing appears at Appendix F.

[ ] 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. § 1254(1).

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

The date on which the highest state court decided my case was April 18, 2016. A copy of that decision appears at Appendix H.

[*] 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:

* V Amendment, United States Constitution: "No person shall... be deprived of life, liberty,... without due process of law..."

* VI Amendment, United States Constitution: "In all criminal prosecutions, the accused shall enjoy... to be confronted with the witnesses against him and to have the assistance of counsel for his defense."

* XIV Amendment, §1, United States Constitution: "All persons born or naturalized in the United States... no State shall... deprive any person of life, liberty,... without due process of law."

* Article II, §16, Colorado Constitution: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel... to meet witnesses against him face to face..."

* Article II, §25, Colorado Constitution: "No person shall be deprived of life, liberty,...without due process of law."

* Chief Justice Directive 04-04 (Colorado): This Directive compels Colorado courts to appoint counsel after an inability to secure counsel arises and indigency has been determined. The entire text is quite wordy and is attached as Appendix I.

* §21-1-101 through 103, Colorado Revised Statutes: This statute describes, in great detail, what the duties of the state public defender is and who they must represent. The entire text is quite wordy and is attached as Appendix J.

STATEMENT OF THE CASE

On December 10th, 2010, a Grand Jury returned a True Bill Indictment for 7 criminal Counts against the Petitioner for Theft and Securities Fraud. Important to note here is that the Indictment alleged that the Petitioner had solicited approximately 8 million dollars to invest in various real estate projects, that he never invested the money solicited, that he had recklessly spent the money he was given and that he was unable to pay the victim back.

On December 14th, 2010, the Petitioner was arrested and bond was set. On December 15th, 2010, J. Linden Hagans entered in his appearance as the Petitioner's counsel. On February 4th, 2011, several events took place: 1) J. Linden Hagans moved to withdraw due to the Petitioner's inability to pay the retainer's fee; 2) Before withdrawing Mr. Hagans argued for a reduction in the bond. At that time the Prosecution argued against the bond being reduced setting forth that their discovery and investigation had revealed that the Petitioner had no assets, that he was currently unemployed, that he was bankrupt and for those reasons they did not think that the Petitioner would return to court owing what he owed; and, 3) Jonathan Ores entered in his appearance as the Petitioner's new counsel.

On July 18th, 2011, citing a breakdown in communication; which was really the Petitioner's inability to pay yet another retainer's fee, Mr. Ores moved the trial court to withdraw his representation. The same was Granted on July 19th, 2011, and all matters were Ordered continued until the Petitioner could find replacement counsel. On September 1st, 2011, after unsuccessfully attempting

to obtain private counsel, the Petitioner moved the trial court for assistance of counsel with the State Public Defender (PD). Upon completion of the Application for PD assistance, Ms. Richmond, an attorney from the PD's Office entered her appearance as the Petitioner's attorney. Ms. Richmond stated, "Yes, your Honor, Mr. Packard did complete an Application. He was advised yesterday that he needed to just get a letter. He indicates that he didn't have time yesterday afternoon to get the letter by this morning... but I will go ahead and enter my appearance at this time." In response the trial court stated, "I'll have you back here on Tuesday, September 6th, and we'll see if there's a letter. I'm not going to have this delay where the letter doesn't arrive or it doesn't say what you think it's going to say. We're going to find out on Tuesday if Mr. Packard is fully qualified to have an attorney and we'll deal with it then... So, it's for appearance of counsel for real on next Tuesday..."

On September 6th, 2011, Ben Iddings, from the PD's Office appeared and unambiguously stated, "Your Honor, we did confirm with the Office that we have received the faxed information, and Mr. Packard does qualify for PD assistance, so, I would ask to enter on his behalf at this time." In response the trial court stated, "the Court will confirm then the entry of the PD's Office as counsel for Mr. Packard." Mr. Iddings then moved the trial court to set the matter for an October 11th, Dispositional Hearing. On October 11th, 2011, Mr. Iddings moved the trial court for a continuance to further review discovery. Prior to their next

court appearance the Petitioner was requested to come in to the PD's Office and fill out another Application because he was informed that he was not permitted to claim the 4 dependents that he was claiming. In response the Petitioner filled out another Application with the assistance of an Office employee and was assured that such Application was acceptable in every respect to achieving assistance of counsel.

On January 13th, 2012, Mr. Iddings filed a motion seeking to withdraw as the Petitioner's counsel. In that Motion Mr. Iddings alleged that the Petitioner did not complete his Application for the PD's Office and after reviewing discovery and because bond had been posted (Bond was posted 6 months prior to PD's entry of appearance) he did not believe that the Petitioner qualified for the assistance of the PD. On January 20th, 2012, the trial court addressed Mr. Iddings' Motion to Withdraw and, without making any further inquiries and without setting forth any specific findings of facts, the trial court stated, "I'm going to allow the PD to withdraw. I don't find that you do qualify for the PD." The Petitioner immediately set forth, "Okay, well I dispute the fact that he hasn't received proper documentation. And when you go back to the Septemeber 2nd, date you'll see that Judge Williams set it over to September 6th, to make sure that they got all of the documentation that they needed. We came back to the September 6th date, and he said, "Yes your Honor, we've received the documentation that we needed."" In spite of his objections the trial court went on to permit counsel to withdraw and then stated, "The alternate defense counsel may

be available to you if you are shown to be indigent. But I'm not hearing that there is evidence that shows that you are, in fact, indigent." The trial court then proceeded to arraign the Petitioner although it had just, mere moments earlier, allowed his attorney to withdraw. In an immediate response the Petitioner stated, "Your Honor, I'd like to invoke my Right to counsel. And there's no statements I've made or actions I've done that have waived that Right. "The trial court stated, "This case has been pending since December of 2010. The Court will take your plea today... If you are not entering a plea we will enter a plea... of NOT GUILTY on your behalf and set this case for trial. You will have the opportunity to bring in an attorney in the meantime."

After the trial court permitted the PD's Office to withdraw its representation the Petitioner refused, for the most part, to participate in any of the proceedings as a pro se representative from January 20th, 2012, until June 18th, 2012, in spite of repeated encouragement from the trial court for him to obtain counsel and/or reapply for PD assistance. The State tried the Petitioner's case to a jury from June 18th, 2012, through June 21st, 2012, although the Petitioner was still without representation and refused to participate in the proceedings. On June 21st, 2012, the jury found the Petitioner Guilty of all 7 Counts and on July 31st, 2012, the Petitoner, who was still without representation, was sentenced to 40 years imprisonment.

Also relevant here is on June 12th, 2012, the Prosecution moved the trial court to deposed an expert witness whom they believed would not be available for trial because of a scheduled

vacation. Despite an objection by the Petitioner that a planned vacation did not constitute unavailability under federal or state laws, the trial court permitted the expert to be deposed. On the first day of trial the Prosecution addressed the trial court informing it that there was a potential for the expert to be there and asked the trial court if it needed to make the arrangements to secure his presence. The trial court concluded that his presence was not necessary and permitted the deposed testimony to be played to the jury. The Petitioner objected setting forth that the introduction of the deposed testimony was inadmissible because the Prosecution still had not established unavailability either pursuant to state laws or federal laws. The trial court concluded that the deposed testimony was permissible and that the Petitioner's objection was to the expert being deposed as opposed to the deposed testimony being admitted at trial.

REASONS FOR GRANTING THE PETITION

I) The Trial Court Committed A Structural Error And Violated The Petitioner's Constitutional Rights To Assistance Of counsel When It Permitted Counsel, After It Had Ratified Counsel's Entry Of Appearance For Good Cause Shown, To Withdraw Based On Allegations That The Petitioner Was Never Permitted To Respond To And Without It Ever Making Any Specific Findings Of Facts Or Conclusions Of Law To Support Counsel's Withdrawal.

Several colloquies took place between the trial court and the Petitioner and in sum the Petitioner repeatedly pled with both the trial court and the PD's Office to show him what was wrong with his Application for Assistance of Counsel and to provide him with the information that allegedly showed that he did not qualify, financially, for assistance of counsel. In response the trial court insisted that the Petitioner fill out yet another Application so it could determine, for itself, whether or not the Petitioner qualified for assistance of counsel or whether he qualified for assistance of alternate defense cousnel. In response the Petitioner retorted that none of his information had changed and that he would not continue to fill out Applications if it was the Court's position that he did not qualify.

The Petitioner argues that his 6th Amendment Right to assistance of Counsel was violated [when] the trial court, [at] [arraignment], allowed then appointed counsel to withdraw [after] such representation was confirmed and then compelled the Petitioner to enter in a pro se plea without ever advising him [until trial] of the dangers of self-representation. The Petitioner argues not only that the ratification of the entry of appearance for good cause shown by the trial court prior to his arraignment constituted

'invited error' but that each subsequent appearance that the Petitioner made thereafter in the trial court up until and including sentencing, constituted a violation of his Sixth Amendment Right to Assistance of Counsel [at] every critical stage of the criminal proceedings. United States v. Cronic, 466 U.S. 648, 654 (1984).

The record conclusively establishes that the Petitioner filled out not one, but two requisite Applications for Assistance of counsel, that the PD then entered an appearance and, in Open Court, affirmatively vociferated that the Petitioner had satisfactorily completed his Application and that as a direct result thereof it had been found and deduced that he qualified for Assistance of Counsel and that the PD's Office was entering an appearance as his counsel, [and], that the trial court reviewed the Application; presumably pursuant to the mandates of Chief Justice Directive (CJD) 04-04 which mandates that trial courts make specific findings of the PD's analysis of indigency (it's important to note here that the CJD's are expressions of Judicial Branch policy in the State of Colorado and that they are to be given full effect. Hodges v. People, 158 P.3d 922, 926 (Colo. 2007)) before accepting and/or denying the appointment of counsel.

It is also important to note here that a defendant cannot waive his statutory right to have trial courts review the PD's determination of indigency in Colorado. Until that review is made, a court cannot accept an entry of appearance. Moreover, until that review is made, no court can possibly know whether a defendant's decision to waive counsel was truly voluntary or whether the court's failure to appoint counsel left the defendant

with no option but to proceed pro se. Thus, the issue is not whether the Petitioner knowingly waived his Right to counsel, but whether the Petitioner was denied his Right to court appointed counsel impermissibly. People v. Steinbeck, 186 P.3d 54, 56 (Colo. App. 2007). The question here then is how did the trial court confirm entry of appearance for it is presumed that the trial court reviewed the Petitioner's Application before confirming that entry. "Orderly criminal procedure is a desideratum and there must be sanctions for the flauting of such procedures." Fay v. Noia, 372 U.S. 391, 431 (1963).

Later on in the proceedings that PD's Office would allege that the Petitioner [never] completed his Application; an assertion that the Petitioner vehemently denied as incorrect as supported by the entry of appearance, and that they were withdrawing their representation. The trial court subsequently permitted the PD's Office to withdraw expressly finding that the Petitioner did not qualify for Assistance of Counsel. The trial court then immediately proceeded to arraign the Petitioner, over his objections, and entered a plea of Not Guilty for the Petitioner when he refused to enter in a plea himself without the assistance of counsel.

"[I]f the accused is not represented by counsel and has not competently and intelligently waived his Constitutional Rights, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty. A court's jurisdiction at the hearing of trial may be lost "in the course of the proceeding" due to failure to complete the

court - as the Sixth Amendment requires - by providing the accused with counsel who is unable to obtain counsel, who has not intelligently waived this Constitutional guaranty, for whose life and liberty is at stake. [I]f this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The Judgment of Conviction pronounced by the court without jurisdiction is void, and one imprisoned thereunder may obtain release by Habeas Corpus. A judge of the Untied States - whom a Petition for Habeas Corpus is addressed - should be alert to examine 'the facts for himself when, if true as alleged, they make the trial absolutely void.' Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

The district court, in its determination denying the Petitioner's Writ, focused primarily on what the Petitioner did and did not do and completely ignored what the State did and did not do. In spite of what the Petitioner may have failed to do [after] the appearance was made and ratified by the trial court, there remains a pivotal point which this entire matter rest upon - invited error. The Petitioner maintains that when the PD entered its appearance in Open Court and intimated to the trial court that the Petitioner had, in fact, completed his Application and that as a result of the same that they were entering an appearance on his behalf as his counsel and that when the trial court accepted such entry and ratified the same upon the representation that the Petitioner had completed his Application, that the same constituted invited error.

Invited error rests exclusively on the principle that a party

may not complain on appeal of an error that he has invited or injected into the case, he must abide by the consequences of his acts. United States v. Irvin, 654 F.2d 671 (10th Cir. 1981). The doctrine has been described as an application of the equitable doctrine of estoppel. It is a cardinal rule of appellate review applied to a wide range of conduct. The idea of invited error is to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. It precludes a party from taking a position inconsistent with a position previously taken. Thus, having induced error, a party may not, at a later stage of the proceedings, use the error to set aside its immediate and adverse consequences. Accordingly, being akin to estoppel and waived error, the doctrine operates to bar a disappointed party from later arguing that an adverse decision was the product of error when [that] party urged that result. In Grymes v. United States, 93 U.S. 55, 62 (1876), this Court announced, "He who approbates cannot reprobate. If someone approves, he [shall] do all in their power to confirm the instrument which was approved." This means that the PD's Office was confined to their initial confirmation and entry of appearance and that the trial court was confined to its ratification of the entry of appearance that was induced by the PD's Office. The PD's Office sought out and affirmatively confirmed what may have been an errant outcome but they sought it and they must abide by it by law. United States v. Wells, 519 U.S. 482 (1997).

Since the entire matter of allowing the PD's Office to with-

draw its representation was premised on the Petitioner allegedly not filling out his Application appropriately and the trial court finding that he did not qualify for assistance of counsel the trial court was under a duty to determine whether the Petitioner was in fact indigent. This determination of indigency, which was necessitated, had to be determined in accordance with the particular facts of the case. The determination of indigency for purposes of appointment of counsel had to be based on as thorough an examination of the Petitioner's total financial picture as is practical and not on a superficial examination of income and presumed ownership of alleged property. The [record] must show that the determination of indigency was premised on concrete facts and not speculations.

The Petitioner alleges that the confusion stems from him allegedly failing to provide [additional] financial information (what information that is has not been announced in Open Court nor revealed to the Petitioner) to the PD's Office not because the Petitioner failed to complete his Application. There was no need for the Petitioner to provide anybody any information when all of his financial information was made part of the Indictment and was in the discovery which set forth once more that the Petitioner was, "unemployed, he had no credit, he had no money that they were aware of to pay even a retainer's fee, he had no known assets, real property or other sureties that could be liquidated." Additionally, there was further information available that set forth a Schedule of Creditiors showing that the Petitioner owed more than 9 million dollars and a Schedule of Assets showing

that the Petitioner had approximately $50,000.00 which was paid to Creditors. This Alone was enough to conclude the Petitioner was, in fact, indigent. An accused need not be totally devoid of means to be entitled to counsel at state expense. The facts that a defendant may be employable, has previously retained private counsel, owns valuable property or has succeeded in obtaining release by making bail does not compel a conclusion that the defendant is not indigent. The [record] [must show] that the determination of the ability to pay includes a balancing of assets against liabilities and a consideration of the amount of an accused' [disposable] income or other resources reasonably available to the accused [after] the payment of fixed and/or certain obligations.

Pursuant to state law the trial court and the COA abused its discretion in accepting the PD's determination that the Petitioner was not indigent; where a discrepancy existed between the information given by the Petitioner himself and the information alleged by the PD's Office, for there was not, nor is there any evidence in the record to explain the discrepancy and neither the trial court nor the COA made [any] findings or further inquiries to support their conclusions. People v. Mullins, 532 P.2d 736, 739 (Colo. 1975). Before a court may require a defendant claiming indigency to go to trial without the benefit of counsel, a careful inquiry about the accused financial condition [must] be made under clearly established state laws. It is essential to fairness and to any meaningful form of appellate review that specific findings of facts be

entered to support the determination of nonindigency and the denial of appointed counsel. See King v. People, 728 P.2d 1264, 1270 (Colo. 1986). "A court need not review every aspect of the PD's analysis, but, it [must] ask sufficient questions to determine for [itself] the issue of indigency. See State v. Dean, 163 Wis.2d 503, 471 N.W.2d 310, 315 (Ct. App. 1991). See also Potter v. State, 547 A.2d 595, 600 (Del. 1988)("[I]t is essential to fairness and to any meaningful form of appellate review that specific findings of fact be entered to support the determination of nonindigency and the denial of appointed counsel.")

In light of the strong presumption against the waiver of a fundamental Constitutional Right, a court [must] make a careful inquiry of a defendant who, having previously indicated, time after time, a desire to retain counsel, stands before the court on the day of trial unrepresented. Ditariolomeo v. State, 450 So.2d 925 (per curiam)(Fla. App. 1984)(When a defendant failed to submit an indigency application as instructed by the trial court, the trial court could not compel the defendant to proceed to trial without first making an adequate inquiry into his financial circumstances and his ability and desire to make an intelligent decision to waive counsel.) This Court has clearly established that an indigent defendant [must] be provided with counsel at state expense. Argersinger v. Hamlin, 407 U.S. 25 (1972). This Court went on further to add in Zerbst, supra, that the Constitutional Right of an accused to be represented by counsel invokes, of itself, the protections of the trial court. 304 U.S. @ 465.

Taken as a whole, there must be a determination made by the trial court, under specific guidelines, as to whether or not an accused is indigent. If a trial court does not make specific findings as to nonindigency then it must be presumed that an accused is, in fact, indigent and is entitled to be provided counsel to represent him at state expense. Here, the trial court made no specific findings and as such there must be a presumption that the Petitioner was indigent and that the trial court abused its discretion in permitting counsel to withdraw due to the issue regarding indigency.

Finally, in reaching its determination on the Petitioner's Habeas, the United States District Court seemed to zero in on a statement made by the Petitioner in making its determination in regards to the Petitioner waiving his rights to representation and that particular statement was, " So far as I know, I don't qualify for any of that." That particular statement, made by the Petitioner; which has been taken out of context, was made in reference to the trial court explaining to the Petitioner that there was the option of the trial court appointing Alternate Defense Counsel [after] it had just informed him that [it found] that he did not qualify for either. In turn, the Petitioner, when asked to submit another Application, said that it was his understanding that he did not qualify for any of that as explained to him. The United States District Court took the Petitioner's response as him being obstinate and as him making an implied waiver instead of it taking that the Petitioner understanding the trial court's position on the subject.

II) When A Defendant's Choice, Whether Intentional Or Implied, To Represent Himself And Proceed Without The Assistance Of Counsel Completely Breaks Down, Countervailing Considerations Mandate A Sua Sponte Appointment Of Counsel By The Trial Court.

Consideration of this particular issue begins with the analysis of exactly what the standard is for when relief can be granted for claims adjudicated on the merits in state court. Relief should be granted when the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court..." This Court has held that §2254(d)(1)'s "contrary to" clause required the rejection of state court decisions which were "substantially different from the relevant precedent of the Court." Williams v. Taylor, 529 U.S. 362 (2000). The Court then went on to give an example of a misinterpretation of Strickland v. Washington, 466 U.S. 668, 694 (1984):

> "If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different", "opposite in character or nature" and "mutually opposed" to our clearly established precedents because we held in Strickland that the prisoner need only demonstrate a "reasonable probability that... the result of the proceeding would have been different." Williams, 529 U.S. @ 405-406.

The Court then considered the situation in which a state court correctly identifies the applicable Supreme Court precedent and the standards contained in that precedent, but applies them unreasonably to the facts of the case. The Court held that this situation requires relief under §2254(d)(1): "A state court decision

that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involving an unreasonable application of... clearly established Federal Law." Williams, 529 U.S. @ 407-408. The Court declined to decide how the "unreasonable application" clause applies when a state court decision either extends a legal principle from Supreme Court precedent to a new context or decline to do so.

The Court held in Willimas that an incorrect application of law is not the same as an unreasonable application of law. But the reasonableness of the state court decision is evaluated objectively (not that it cannot be evaluated at all as suggested by the federal courts) by the reviewing court, not by any sort of a "majority rule" analysis. The Court specifically rejected the standard of the Fourth Circuit, which had focused on whether "reasonable jurists" would find the state court decision to be reasonable. Id, 529 U.S. @ 409-410.

While Williams did not enunciate standards for the reasonableness determination, it did provide an illustration of the proper analysis when it applied the standard to the decision of the court in Mr. Williams' case, and found that the court's decision to be an unreasonable application of clearly established Federal Law. In Panetti v. Quaterman, 551 U.S. 930 (2007), This Court expanded its analysis of §2254(d) setting forth:

> "ADEPA doesn't "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." Carey v. Musladin, 549 U.S. 70 (2006). Nor does ADEPA prohibit a federal court from finding an application

> of a principle unreasonable when it involved a set of facts "different from those of a case in which the principle was announced." Lockyer v. Andrade, 538 U.S. 63, 76 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner."

Thus, the legal rule does not have to be 'expressly extended' by this Court to every particular context, however, it must be construed narrowly.

In addition to the situation where a state court decision is "contrary to" or "an unreasonable application of clearly established federal constitutional law", §2254(d)(2) provides that a state court decision [must be] reversed, and relief [must be] granted if the state court proceeding "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 application of this standard was discussed in Miller-El v. Cockrell, 537 U.S. 322 (2003):

> "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, §2254 (e)(1), and a decision adjudicated on the merits will not be overturned on factual grounds unless objectively unreasonable in light of the evidence. Even in the context of federal habeas corpus, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by ADEPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence."

Thus, ADEPA does not require the federal courts to turn a blind eye to the state court determination when giving deference. Even if this Court were to disagree with the state court's determi-

nation as to reasonableness, such disagreement would not be considered to be a substitute of the judgment, but an exercise of the discretionary powers granted pursuant to §2254, et seq.

Criminal defendants are constitutionally guaranteed the right to self-representation. Faretta v. California, 422 U.S. 806 (1975); People v. Romero, 694 P.2d 1256 (Colo. 1985). However, in order to assert that right, it has been uniformly agreed upon that a defendant must make an unequivocal request to waive counsel and proceed pro se. [I]f such a request is stated in uncertain terms, it cannot be considered a demand for self-representation, nor can it properly be considered to be a waiver of the Sixth Amendment Right to counsel. People v. Mogul, 812 P.2d 705 (Colo. App. 1991). When faced with determining whether a defendant intentionally relinquished and/or abandoned a known right and/or privilege, courts are to indulge [every] reasonable presumption [against] finding a waiver of the fundamental Right. United States v. Williamson, 806 F.2d 216 (10th Cir. 1986). "[A]ny doubts regarding the waiver must be resolved in favor of the defendant." Id. @ 220. Here, the trial court, the COA, the U.S. District Court and the 10th Circuit failed to indulge the presumptions against finding a waiver and the doubts regarding the waiver were resolved in favor of the State and against the Petitioner.

Here, it is vital to rehearse some of the facts as they took place in the trial court: 1) The Petitioner repeatedly disputed the allegations that he did not fill out an Application for Assistance of Counsel properly; 2) The Petitioner repeatedly advised the trial court that he was not present in court to

represent himself in a pro se capacity; 3) That the trial court, on more than one instance, intimated to the Petitioner that he did not qualify for assistance of counsel at state expense; 4) That the Petitioner vociferated over and over, "I'm not waiving my Right to counsel"; 5) That the Petitioner, in Open Court, invoked his Right to counsel over and over; 6) That the Petitioner did not participate in discovery; 7) That the Petitioner did no participate in voir dire or in any of the jury selecting processes; 8) That the Petitioner made no Opening Statement at trial; 9) That the Petitioner did not cross-examine a single witness who testified against him; and, 10) That the Petitioner made no Closing Arguments.

Federal law, as defined by this Court, may be either a generalized standard enunciated in the Court's case law or a bright-line rule designed to effectuate such a standard in a particular context, Kennaugh v. Miller, 289 F.3d 36, 42 (2nd Cir. 2002). In Gilchrist v. O'Keefe, 260 F.3d 87 (2nd Cir. 2001) the state court refused to assign new counsel to a defendant who physically assaulted his court appointed attorney:

> "[W]e first noted that the Supreme Court has not spoken on the question of forefiture of the right to counsel, and, therefore, that the state court decision was not... contrary to a Supreme Court case that had dealt with "materially indistinguishable facts." We then recognized, however, that the court, through general precedents in cases such as Gideon v. Wainwright, had established that the right to cunsel is fundamental. The remaining question for the Gilchrist court was, therefore, whether the state court's failure to appoint new counsel was an unreasonable application of this more general precedent. Kennaugh, 289 F.3d @ 43.

Because this Court has neither directly considered the question of law at issue nor ruled on a case with materially indistinguishable facts, the question here is reduced to whether the state court's failure to appoint standby counsel to represent the Petitioner when he refused to participate in any of the pre-trial and ultimately the trial court proceedings in any manner as a pro se litigant and when he continued to intimate that he would like to invoke his Right to Assistance of Counsel was an objectively unreasonable application of, or a failure to extend, a legal principle clearly established by this Court in Illinois v. Allen, 397 U.S. 337 (1970); Faretta v. California, 422 U.S. 806 (1975); and, McKaskle v. Wiggins, 465 U.S. 168 (1984).

Allen, Faretta, and McKaskle all support and make it clear that a judge may use [willingness] and [ability] as prerequisites for accepting a waiver to self-representation, and may appoint counsel to represent a defendant who has forfeited his Right to proceed pro se. The clear implication then of Allen, Faretta, and McKaskle, is that if a defendant [is not] able and/or willing then he is not entitled to represent himself and must be represented by counsel who has been appointed.

The question then is can a defendant who clearly isn't willing nor able (the Petitioner had every bit of a 6th Grade education although he was quite the builder) to participate in his defense in a pro se capacity and who incessantly informs the trial court that he is invoking his Sixth amendment Right to Counsel - such as the Petitioner here - lose his Right to proceed pro se, and, if so, does such a loss constitutionally require the appointment

of counsel? Given that this Court has made it clear that courts must indulge every reasonable presumption against a defendant's waiver of a fundamental Right, an affirmative answer to this question finds a good deal of support in the aforementioned precedents.

In both the spirit and the logic of the Sixth Amendment is that every person accused of a crime shall receive the fullest possible defense. Essential fundamental fairness is lacking if an accused cannot put his case effectively before a jury in court. The government has an independent interest in ensuring that trials are fair and accurate. Wheat v. United States, 486 U.S. 153, 160 (1988). A trial could never be deemed to be fair where only one side put forth evidence and was present to argue their side of the controversy. Moreover, the judiciary itself has a vested interest in ensuring that all criminal proceedings appear fair to all who observe them. Both of these independent interest favored the trial court appointing replacement counsel to represent the Petitioner who absented himself and waived his Right to represent himself. If both the trial court and the COA could find and conclude that the Petitioner impliedly waived his Right to Assistance of Counsel then these same courts could have and should have found and concluded that the same Petitioner waived, through conspicuous acts, his Rights to self-representation when he failed to participate in any of the criminal proceedings in a pro se capacity. Where, as here, there was a sufficient amount of doubt cast on the fairness of the trial itself, the results must be vacated. Satterwhite v. Texas, 486 U.S. 249 (1988); Sanchez v. Mondragon, 858 F.2d 1462, 1568

(10th Cir. 1988).

Upon receiving notification from the Petitioner that he would not participate in the proceedings and observing the same, the trial court had a duty to appoint counsel to the Petitioner to ensure that the rigorous adversarial testing was maintained. Whether the trial court deprived the Petitioner of counsel or whether the Petitioner chose to represent himself, it remains true that a court must appoint counsel for an absented defendant. Davis v. Grant, 532 F.3d 132, 143 (2nd Cir. 2008). As this Court set forth, "The trial judge may terminate self-representation. A state may, even over the objection, appoint standby counsel in the event that termination of self-representation is necessary." Faretta, 422 U.S. @ 834.

In spite of alerting the State courts to the federal nature of this particular issue, the State courts based their holdings off of State laws which held that when the Petitioner waived his Right to counsel that it was presumed that he waived his Right to advisory counsel as well. Thus, a federal claim can never be adjudicated on the merits when it is adjudicated pursuant to state laws as opposed to clearly established federal laws. To add insult, the COA concluded that the issue was unpreserved because the Petitioner did not ask the trial court to appoint counsel sua sponte. It is an absurdity to hold the Petitioner at fault for not asking the trial court to appoint counsel [sua sponte]. The very term sua sponte means - on its own accord or without prompting or suggestion. Thus, there could never be a sua sponte appointment of counsel where a party moves the trial court for the appointment. The Colorado

Supreme Court has even held that even where a trial court has accepted a valid waiver of counsel that the trial court must continue to monitor the proceedings in order to ensure that they do not become so fundamentally unfair as to result in the denial of Due Process. This line of logic is consistent with Federal Law which holds that the fair conduct of a trial depends largely in part on the wisdom and the understanding of the trial judge. He knows the essentials of a fair trail. The primary duty falls on him to determine when to guide a defendant without a lawyer past the errors that make a trial unfair. The trial court in this instant had a duty to advise the Petitioner of the procedural grounds that he had to incorporate to ensure that any and all errors were preserved. The record is absolutely silent on the trial court offering the Petitioner any guidance and, as such, it must be presumed that the trial court offered none to the Petitioner who, on a number of occasions exhibited absolute difficulty in organizing and expressing his thoughts. See Gibbs v. United States, 337 U.S. 773 (1949).

Failure to protect the Rights of the Petitioner here where he was clearly handicapped by his 6th Grade education and by his lack of counsel and competent assistance to such an extent that his Constitutional Rights to a fair trial was denied. This case is of the type referred to in Betts v. Brady, 316 U.S. 455, 473 (1942) as lacking fundamental fairness because neither counsel nor adequate judicial guidance was furnished for the Petitioner at trial. The record evinces that the Petitioner presented what arguments he had in a rambling and often incoherent manner and

and that evinces helplessness. Without counsel and without assist from the trial court in defending himself the Petitioner was denied a meaningful trial which suggests that counsel should have been appointed.

The fact of the matter is this - that it was an egregious error of a Constitutional magnitude, for the trial court not to indulge reasonable presumptions of a waived Right. Furthermore, it is very suspicious of the trial court to find, in the one hand, an implied waiver based upon the Petitoner's actions in not filling out a third Application, and, on the other hand, failing to find any waiver where the actions constituting the waiver was blatantly obvious. The logic in this respect was so fundamentally unfair that it resulted in a denial of Due Process and amounted to abusive discretion.

III) The Trial Court, In Permitting The Prosecution To Introduce, At Trial, The Deposed Testimony Of An Expert Witness Without Ever Establishing Unavailability, Violated The Petitioner's Rights To Confrontation, Preserved Or Not.

The Petitioner's Habeas was governed by §2254. When reviewing a Habeas Corpus, federal courts seldom review questions of federal law that were decided by a state court where the decision of that state court rested on a state law ground that was independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991).

In order to bar federal review, the state procedural rule must have been firmly established and regularly followed at the time of the purported procedural default. However, a state procedural rule may be inadequate to preclude federal review, if it frustrates

the exercise of a federal right. Hoffman v. Arave, 236 F.3d 523, 531 (9th Cir. 2001).

Where a habeas petitioner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, the federal court may not review the petition, unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal laws or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman, supra, 501 U.S. @ 750. To establish cause for a procedural default, a petitioner must show that the default was due to an objective factor that was external to him and could not fairly be attributed to him. Prejudice, on the other hand, is established by showing that the violation of the federal right works to the petitioner's actual and substantial disadvantage infecting the entire trial with error of a constitutional dimension. Moreover, this Court held in United States v. Olano, 507 U.S. 725, 733 (1993) that a [forfeited] error is distinguished from a [waived] error. The Court noted that a waived error occurs when a defendant specifically removes claims form the trial court's consideration by [intentionally] relinquishing or abandoning a known right noting that a waived claim of error presents nothing for an appellate court to review. On the other hand, a forfeited error, although presumably forfeited, does not extinguish the error. A court of appeals has very broad discretion under Rule 52(b) to correct "plain errors or defects affecting substantial rights" that were forfeited because they were not timely raised in the

trial court. This discretion to notice and correct the error should only be exercised where the error is plain and obvious and seriously affects the fairness, the integrity and/or the public reputation of the judicial proceeding. United States v. Atkinson, 297 U.S. 157, 160 (1936).

On June 12th, 2012, the Petitioner objected to the Prosecution deposing an expert witness who they alleged would be unavailable to testify at trial due to a planned vacation. The trial court, however, ruled that the taking of the deposition was appropriate but that a separate admissibility determination would have to be made at trial if the Prosecution sought to admit said deposition at trial. On June 18th, 2012, the Prosecution informed the trial court that it intended to play for the jury the witnesses' deposition. The Petitioner immediately objected setting forth that the Prosecution had not met its obligation of proving unavailability. Despite the Petitioner's objections the trial court permitted the Prosecution to play the deposition in spite of the fact that the Petitioner never cross-examined him during the deposition believing the same would not be allowed because a planned vacation did not constitute unavailability.

On appeal the Petitioner alerted the State courts that the United States Constitution guaranteed a right to confront witnesses against him citing Crawford v. Washington, 541 U.S. 36, 68 (2004). However, the State courts found and concluded that the objection made by the Petitioner in the trial court was not specific enough as to confrontation. The Petitioner argued that the federal courts have held over and over that motions filed by pro se

litigants without the assistance of reasonably competent counsel or legal expertise must be liberally construed in a broad and remedial manner to encompass [any and all] allegations stating relief. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). This same logic and principle must be accorded to those who proceed pro se in defense of themselves in state courts in criminal matters and to their objections however inartfully made. The Petitioner, who was compelled to proceed pro se, could not be expected to have known all of the legal theories on which he was required to make an objection. A court's imagination should be limited in scope [only] by the Petitioner's [complete] failure to make any objection, not by a general objections aimed at trying to preserve his constitutional rights.

There is a distinction, that this Court is compelled to make, between the Petitioner making a flawed effort to bring an objection to the trial court's attention to protect his rights and not making any objection at all. Therefore, any and all objections made by the Petitioner [must] be liberally construed to determine whether the objection sufficiently directed the trial court's attention to the errors and claims that the Petitioner was wishing to express. Haines v. Kerner, 404 U.S. 519, 520 (1972); Hudson v. Gammon, 46 F.3d 785, 786 (8th Cir. 1995); United States v. Johnson, 134 Fed.Appx. 990 (8th Cir. 2005). Further, the Court [must] strive to provide a de novo review of all of the issues that may be addressed by any objection made by the Petitioner whether general or specific.

This Court has a duty to ensure that the Petitioner does not

lose his rights to any claim due to hypertechnical procedural grounds. Balistreri v. Pacifica, 901 F.2d 696, 699 (9th Cir. 1988). Pro se litigants are not to be prejudiced by their pro se status and inartfully made objections, they are to be accorded the benefits of any and all doubts relating to their objections. Brown v. Roe, 279 F.3d 742, 746 (9th Cir. 2002). Although the Petitioner's objection was to the admissibility of the deposition based on a lack of showing of unavailability of the declarant while testifying [at] trial offered into evidence to prove the truth of the matter asserted. Hearsay is not admissible [unless] it is offered pursuant to an exception. C.R.E. 802. Pursuant to C.R.E. 804(b)(3) hearsay may only be admitted in a criminal trial if it is made by a declarant who is unavailable to testify. The Petitioner maintains that [if] the Confrontation Clause by itself prohibits the introduction of testimonial statements absent unavailability that his objection as to unavailability must be construed as an objection alleging a violation of his rights to confrontation. Unavailability in the constitutional sense is established by the prosecution when good faith reasonable efforts have been made to produce the witness [without] success. A witness is not unavailable for Confrontation Clause purposes when the government fails to utilize the compulsory process to secure a witness's attendance at trial due to a witness's scheduled vacation. Earhart v. Konteh, 589 F.3d 337, 345 (6th Cir. 2009). See also People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983)(A witness's planned vacation does not establish unavailability; instead a vacation constitutes a mere inconvenience which does not rise to the level

of unavailability).

On June 18th, 2012, the first day of the Petitioner's trial, the Prosecution informed the trial court that it intended to introduce and play for the jury the deposition of the deposed witness at some pont on June 19th, 2012. The Prosecution then set forth as follows:

> "I guess our question is, the rule under section E states that the deposition may be used at trial. And the Court needs to make a ruling on that issue. I can tell the Court when I first filed the Motion for deposition, Mr. Rome simply indicated he was out of town... on a bike ride; that he's traveling throughout the State. Only after the deposition was completed... did he mention, by the way, I potentially have a day off, a rest day ... He initially indicated it was Wednesday now told us that it's Thursday. So there is potential for us to get him here in person. I can't guarantee that... I want to make sure that the Court is aware, we have looked into the possible options, and there is the possibility that we could potentially have someone drive him here or even fly him down here [again]... That's our position. We're asking the Court for a ruling so we know where we stand on the issue..."

The trial court then determined that it would allow the deposed testimony to be heard by the jury and the Petitioner objected citing that the Prosecution had not established unavailability and that a planned vacation does not constitute unavailability. That objection has been deemed insufficient to protect the Petitioner's Sixth Amendment Constitutional Rights to confrontation.

In Crawford v. Washington, 539 U.S. 982 (2003), this Court examined the long usage of Ohio v. Roberts, 448 U.S. 56 (1980) which allowed out-of-court statements at jury trial. This Court reasoned that the Constitution only admitted those exceptions

established at its founding. the point here is that the Sixth Amendment admits only those exceptions that were established at its founding. Going on a planned vacation was not within those established exceptions.

Thus far, the various courts that have entertained this matter has maintained that the Petitioner must turn square corners when making objections, however, the trial court and the Prosecution has not been held to this same rectangular rectitude when dealing with its very own obligations which arose far before any obligations that the Petitioner was compelled to carry out. What the Petitioner did and did not object to is argumentative but it permits the various courts to turn a blind eye to the miscarriages of the state and it impermissibly relieves both the trial court and the Prosecution of their Constitutional and statutory duties as it relates directly to establishing unavailability.

In truth, this matter does not pivot on what the Petitioner's objection meant, rather, this matter pivots exclusively on what the Confrontation Clause and what Colorado Rules of Evidence mandates. In Roberts, supra, the Court set forth "Because the Confrontation Clause itself reflects a preference for face to face accusation , a rule of necessity applies, placing a burden upon the prosecution to either produce or demonstrate unavailability." In other words, the Sixth Amendment's Confrontation Clause itself imposes a duty and burden upon both the prosecution to demonstrate unavailability and then upon the trial court to make a determination, pursuant to established guidelines, defining unavailability, to make a determiantion on unavailability. People v. Dement, 661 P.2d 675, 681 (Colo.).

... There is absolutely nothing in the Confrontation Clause that imposes a duty upon the Petitioner to make a specific objection because he did not receive its guarantees when unavailability, an established exception at the time when the Clause was founded, was not proven. The very Prosecution itself established availability - they just awaited instructions from the trial court to go get the witness.

It is contrary to the fundamental principles of constitutional law to hold that; because a defendant, who represnts himself, personally waived a fundamental right by and through an alleged failure to make a timely objection, he is subject to an irrebuttable presumption, because the irrebuttable presumption is firmly rooted in an independent state ground that operates to automatically waive a fundamental right without any voluntary, knowing and intentional act. This effectively eliminates the [only] basis, as it relates to this matter, upon which the Sixth Amendment's requirement that makes hearsay available - unavailability. An alleged failure of the Petitioner to make an alleged timely objection cannot be used to relieve the Prosecution and the trial court of their duties to establish unavailability. United States v. Augurs, 427 U.S. 97 (1976); United States v. Jackson, 579 F.2d 553 (10th Cir. 1978).

In sum, there is no way possible for the Petitioner to have waived, unintentionally, by an alleged faulty objection, a fundamental Constitutional Right that could only be waived intentionally, knowingly and intelligently. A reasonable jurist would find it debatable whether the Petitioner waived his Right

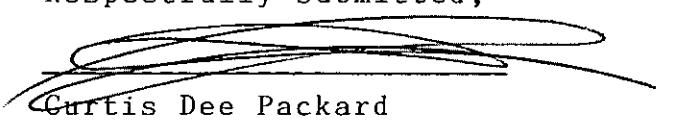
to confrontation and whether unavailability was ever established at any time in the proceedings held against the Petitioner.

CONCLUSION:

Premises considered and for Great Good cause shown, the Petitioner moves this Court to Grant his Writ of Certiorari.

Signed and Dated this 31 day of August, 2018.

Respectfully Submitted,



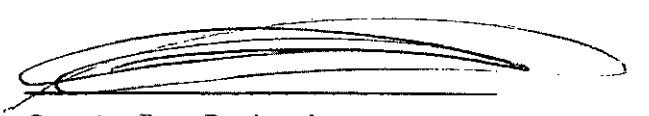
Curtis Dee Packard

PROOF OF SERVICE

I, the undersigned, hereby certify, under the penalties of perjury, that on this 31 of August, 2018, as required by Supreme Court Rule 29 that I placed a true and correct copy of the Motion to Proceed In Forma Pauperis and a Petition For Writ of Certiorari in the United States Mail, First Class Postage prepaid and attached thereto, properly addresses as follows:

Office of the Solicitor General of the United States
U.S. Dept. of Justice,, Room 5616
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Office of the Colorado Attorney General
1300 Broadway / 9th Floor
Denver, Colorado 80203



Curtis Dee Packard