

IN THE
SUPREME COURT OF THE UNITED STATES

Office of The Clerk
Washington, D.C. 20543-0001

Damon John White Bird Solgado,

Case No. 17-3617

Pro Se Petitioner,

v.

MOTION DIRECTING CLERK OF COURT
TO FILE PETITION FOR REHEARING AS
OUT-OF-TIME

Colby Braun, NDSP Warden,

Respondent.

.....

Comes now, Damon John White Bird Solgado, *pro se* petitioner, hereby moves the Clerk of this Court to file his **Petition for ReHearing** as out-of-time.

On May 28, 2019, the Clerk of this Court sent an official letter to petitioner stating "if petitioner wishes, he can resubmit his petition for rehearing, along with a motion directing the Clerk of this court to file it as out-of-time". On or about June 5, 2019, petitioner received that letter from the Clerk of this Court at NDSP when NDSP Personnel handed out evening mail.

Respectfully submitted,

Damon John White Bird Solgado, *Pro Se* Petitioner

June, , 2019

NDSP

3100 Railroad Ave

P.O. Box 5521

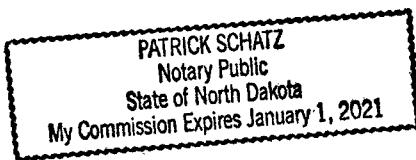
Bismarck, N.D. 58506-5521

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IN THE
SUPREME COURT OF THE UNITED STATES
JUNE TERM 2019
NO.

Damon John White Bird Solgado,

Pro Se Petitioner,

- against -

Colby Braun, Warden, NDSP.,

Respondent

Petition For Rehearing

on Petition for a Writ of Certiorari

To the United States Court of Appeals

For The Eighth Circuit

Damon John White Bird Solgado

NDSP

3100 Railroad Ave

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Bismarck, ND 58506-5521

QUESTIONS PRESENTED

Whether a violation of petitioner's 4th Amendment Constitutional right to privacy occurred when bank records belonging to petitioner were illegally seized by police, in the absence of a search warrant?

Whether petitioner suffered total deprivation of his 6th Amendment Constitutional right to effective assistance of trial counsel when trial counsel hadn't brought any issues on or didn't bring any motions when he was counsel?

Whether petitioner suffered ineffective assistance of appellate counsel, when appellate counsel filed a meritless direct appeal?

Whether insufficient evidence to sustain petitioner's convictions has been proven in the lower court's, entitling petitioner to a full judgment of acquittal on all counts?

PARTIES

The Petitioner is Damon John White Bird Solgado, a state prisoner at North Dakota State Penitentiary in Bismarck North Dakota. The Respondent is Colby Braun, the warden at North Dakota State Penitentiary.

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TABLE OF AUTHORITIES

Fed. Rule 60 (b) (6)	9.
United States v. Alan McSurely, United States v. Margaret McSurely, 473 F.2d 1178 (D.C. Cir. 1972).	8.
Ayala v. C.M.S., 2008 WL 2676602,*3 (D.N.J., July 2, 2008)	9.
Blackburn v. Foltz, 828 F.2d 1177 (CA 6 1987)	9.
Williams v. Guzzardi , [1989, CA 3 Pa] 875 F.2d 46)	9.
Napue v. Illinois, 360 US 264 (1959)	9.
569 U.S. 5 [133 S.Ct. 1414] 569 U.S. 1104, 132 S.Ct. 995, 181 L.Ed.2d 726 (2012) Florida v. Jardines.	9.
State v. Keller, 57 N.D. 645, N.W. 698 [1929]	8.
Connor v. Martinez, 2006 WL 2668977,*2 (D.Ariz., Sept. 14, 2006)	9.
United States Supreme Court _ U.S._ (2013) 133 S.Ct. 1069 Evans v. Michigan No. 11-13-27	9.
US v. Morrison, 449 US 361, 66 L Ed 2d 564, 101 S Ct 665 [1981].	9.
Maine v. Moulton, 474 U.S. 159 [1985].	8.
State v. Neely, 236 Neb. 527, 462 N.W.2d 105, 112 (Neb. 1990) see also, Willis v. Artuz, 301 F.3d 65, 69 (2d Cir. 2002); U.S. v. Reece, 797 F. Supp. 843, 846 (D.Colo.1992); State v. Jackson, 321 N.J.Super. 365, 379-80, 729 A.2d 55 (1999)	8.
Greene v. Palakovich, 606 F.3d 85, 93 n.3 (3rd Cir. 2010)	9.
Martin v. Rose, 744 F.2d 1245, 1250 (6th Cir. 1984)	8. 9.

<u>Ludy v. Sherman</u> , 2007 WL 320831,*7 (W.D.Pa., Jan. 30, 2007)	7.
<u>Olmstead v. United States</u> , 277 U.S. 438, at 48 S. Ct. 564, at 572 L. Ed. 944.	8.
<u>Katz v. United States</u> , 389 U.S. at 357 (footnotes omitted)	8.
<u>Bond v. United States</u> , 529 U.S. at 338 (internal alterations omitted) (quoting <i>Smith v. Maryland</i> , 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L.Ed.2d 220 (1979)).	8.
<u>United States v. Ward</u> , 703 F.2d 1058 (8th Cir. 1983)	9.
<u>McDaniels v. Warden Cambridge Springs SCI 070617 FED3</u> , 14.3485	9.
<u>Martin v. Westchester County Dep't of Corrections</u> , 2008 WL 144827,*2 (S.D.N.Y., Jan. 15, 2008)	9.
<u>State v. Whiteman</u> , 67 N.W.2d 599, 1954 ND LEXIS 118 (N.D. 1954)	8.
See <i>Winship</i> , 397 U.S. at 363, see, e.g., <i>U.S. v. Godin</i> , 534 F.3d 51, 62 (1st Cir. 2008), <i>U.S. v. Kapelioujnyu</i> , 547 F.3d 149, 151 (2d Cir. 2008), <i>U.S. v. Oz celik</i> , 527 F.3d 88, 101 (3d Cir. 2008), <i>U.S. v. Mitchell</i> , 518 F.3d 230, 236 (4th Cir. 2008), <i>U.S. v. Buchannan</i> , 485, F.3d 274, 282 (5th Cir. 2007) <i>McKenzie v. Smith</i> , 326 F.3d 721, 728 (6th Cir. 2003) <i>U.S. v. Thornton</i> , 539 F.3d 741 750-51 (7th Cir. 2008), <i>U.S. v. Scofield</i> , 433 F.3d 580, 586-87 (8th Cir. 2006), <i>U.S. v. McFall</i> , 558 F.3d 951, 958 (9th Cir. 2009), <i>U.S. v. Franklin-El</i> , 555 F.3d 1115, 1124 (10th Cir. 2009), <i>U.S. v. Medina</i> , 485 F.3d 1291, 1300-01 (11th Cir. 2007), <i>U.S. v. Law</i> , 528 F.3d 888, 896-97 (D.C. Cir. 2008) (Per Curiam).	9.

DECISIONS BELOW:

The decision of the United States Court of Appeals is reported. It is cited in the Table at 3. (8th Cir.2018) and a copy is attached as Appendix A to this petition (A.1). The order of the United States District Court for the North West District of North Dakota is unreported. A copy is attached as Appendix B to this petition (A.11).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 13, 2018. An Order denying a petition for rehearing was entered on May 22, 2018, and a copy of that Order is attached as Appendix B to this petition (A.10). Jurisdiction is conferred by 28 U.S.C. § 1247 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments IV, VI, XIV and 9 to the United States Constitution, which provides:

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, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the statute wherein they reside no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States., **nor shall any State deprive any person of life, liberty, or property, without due process of law., nor deny to any person within its jurisdiction the equal protection of the laws.**

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner, in such courts, and in such cases, as the legislative assembly, may, by law, direct.

STATEMENT OF THE CASE

On 4/3/2013, a search warrant was issued for petitioner's apartment at 66 ½ Broadway #217 Fargo, ND 58102. **The search warrant specifically described that (1) Indicia of residency, (2) cash., (3) a bat with nails sticking out of it., (4) a machete., (5) a table leg with a bolt at the end of it., or (6) a short sword** were the items to be searched for and seized if found at petitioner's residence. During the search warrants execution, members of the Fargo Police Department exceeded the scope of the search warrant when they illegally seized petitioner's bank records without a warrant, thus violating petitioner's Fourth Amendment U.S. Constitutional Right to **(1) be secure in his person, house, papers, and effects, against unreasonable searches and seizures, and (2) reasonable expectation of privacy.** [See ¶4, pages #2-#3 of Petition For Rehearing] [Exhibit # 1].

On or about April 12, 2013, Special Contractor Steven D. Mottinger was assigned as legal counsel to represent petitioner in this case. During the course of Mottinger's representation of petitioner and this case, Mottinger **(1) filed no briefs related to witness statements made to police, witness interviews with police, the statements and interview with white bird by police when no legal counsel was present, and the illegal seizure of white birds bank records by police during the search warrants execution.** Mottinger also **(2) brought no motions regarding the issue of lack of sufficient evidence in the States case.** [See ¶5, pages #4-#5 of Petition For Rehearing] [Exhibit # 1].

Mottinger conducted no defense investigation following post-arrest, nor was a defense investigation done prior to the preliminary hearing pretrial stages either, thus violating petitioner's Sixth Amendment U.S. Constitutional Right to have the assistance of counsel for his defense. [See ¶5, pages #4-#5 of Petition For Rehearing] [Exhibit # 1].

On July 19, 26 and 29, 2013, three (3) pretrial hearings were held in Cass County State District Court to address the issue of whether or not Mottinger was providing ineffective assistance of counsel to petitioner in this case. Petitioner testified during those pretrial hearings that "he doesn't trust his attorney" and that "he could not work with him". On July 29, 2013 for the pretrial hearing record the Prosecution stated "Theres one thing I want to bring up. Mr. Mottinger hasn't brought any issues on or at least didn't bring any motions.". The prosecution continued saying " I understand why Mr. Mottinger didn't bring any motions when he was counsel, but I just wanted to put that on the record.", thereby providing further merit to petitioner's Sixth Amendment claim of ineffective assistance/total deprivation of counsel. [See ¶ 5, pages #4-#5 of Petition For Rehearing] [Exhibit # 1].

In the month of December 2013, Fargo Public Defender Monty G. Mertz was appointed as appellate counsel for petitioner in this case. On December 20, 2013, appellate counsel filed a meritless appeal on petitioner's behalf to the North Dakota State Supreme Court. In that appeal appellate counsel argued (1) white bird was not competent to waive his right to counsel; (2) white bird did not receive a fair trial because the state district court did not limit the evidence he introduced at trial; and (3) there was insufficient evidence to sustain his convictions. *State v. White Bird*, 2015 ND 41, 858 N.W.2d 642.

The direct appeal filed by appellate counsel, never addressed the Fourth and Sixth U.S. Constitutional Amendment violations that were evident from the trial record. Appellate counsel's failure to brief the Fourth and Sixth Amendment violations in this case prejudiced petitioner's appeal because that failure (1) undermines the confidence in the fairness of the appellate process; and (2) undermines the outcome of being able to sustain a conviction in this case. Furthermore, appellate counsel's willful and knowing failure to brief the merits of the sufficiency of evidence issue prejudiced petitioner's direct appeal in that it forfeited a true judgment of acquittal for petitioner when that appellate judgment could have been won for petitioner. To support this claim, petitioner directs this Court to paragraphs # 41,#47,#62-#63 from the December 18, 2015 evidentiary hearing record pertaining to appellate counsels admitted ineffectiveness regarding this specific issue:

MR. WHITE BIRD: Your honor, Mr. Mertz should have, could have, and knowingly chose not to argue insufficiency of evidence. [Evid. Hearing Trans. #41].

MONTY MERTZ

Called as a witness, being first duly sworn, is examined and testifies as follows:

A. I think the trial was a travesty of justice. I still think that. The supreme court disagrees with me. I think they should have reversed your trial -- your conviction, but they disagreed with me. I gave it my best shot. [Evid. Hearing Trans. #47].

I think your case -- I think your trial was a travesty. It was an embarrassment to the court system. [Evid. Hearing Trans. #47].

Q. So would you say a frivolous motion was my rule 29 motion of acquittal based on insufficiency of evidence when the prosecution, through State's Exhibits 189 and 190, which was just a picture of fake dollar bills, you will say that that was a frivolous motion? [Evid. Hearing Trans. #62].

A. No. Your Rule 29 motion was not a pretrial motion. It was to properly preserve the issue. [Evid. Hearing Trans. #62].

Q. Was it a frivolous motion? [Evid. Hearing. Trans. #62].

A. No. [Evid. Hearing Trans. #62].

Q. (MR. WHITE BIRD CONTINUING) You testified before this court today that my rule 29 motion to acquit based on insufficiency of evidence, was not frivolous? [Evid. Hearing Trans. #63].

A. It wasn't frivolous. [Evid. Hearing Trans. #63].

Q. (MR. WHIITE BIRD CONTINUING) One of the issues you argued on your appeal brief was insufficiency of evidence. Correct? [Evid. Hearing Trans. #67].

A. No. I just told you what the issues were. [Evid. Hearing Trans. #67].

Had these claims not been forfeited on direct appeal by appellate counsel, proper judicial relief would have been won for petitioner when the North Dakota State Supreme Court reviewed the case on appeal. See ¶9, pages #8-#14., and ¶10, pages #13-#14 of Petition For Rehearing] [Exhibit #1].

During the course of this cases' litigation, petitioner has labored extensively in goodfaith to bring the merits of these Constitutional claims to the courts' attention for proper redress of grievances as is allowed under the First Amendment to the U.S. Constitution. *However*, despite the goodfaith efforts of petitioner to have proper redress of grievances for the violations he has suffered to his Constitutional Rights, the lower courts have refused to properly rule on the merits of his claims. These rulings from the lower courts in this case are contrary to clearly established federal law because this Court (as well as other courts) has ruled differently in the past on cases involving these same Constitutional claims that White Bird Solgado presents. This Court needs to know that not only are the rulings from the lower courts in this case contrary to legal precedent set forth by this Court, but they're also contrary to their own legal precedents involving these same Constitutional claims that White Bird Solgado presents. 1. [See ¶6, page #5., ¶7, page #6-#7., ¶8, page #7-#8., ¶11, page #14-17., and ¶12, page #17-#18 of Petition For Rehearing] [Exhibit #1].

In their responses to petitioners Forth and Sixth Amendment Constitutional claims, both the State and Braun have succeeded in getting petitioners case dismissed by merely stating (without offering proof) that these claims are res judicata, barred by the Statute of limitations, a misuse of process, or that petitioner has failed to exhaust State remedies. Ludy v. Sherman, 2007 WL 320831,*7 (W.D.Pa., Jan. 30, 2007) (holding that court "is compelled to address the merits" of a claim as to which defendants disavowed an exhaustion defense).

1. Foot Note (¶6, is denial of counsel by trial court, ¶7 is denial of access to a subpoenaed defense witness/compulsory process, ¶8 is denial of right to fair jury trial, ¶11 is denial of equal protection of laws, and ¶12 is ineffective assistance of standby counsel)

Although these additional Constitutional claims have been litigated by petitioner at every level of the judicial process, the courts have yet to address their merits.

BASIS FOR FEDERAL JURISDICTION

This case raises questions of interpretation of the reasonable expectation of privacy clause, the right to effective assistance of counsel clause, and the due process clause of the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution. The District Court had jurisdiction under the general federal questions jurisdiction conferred by 28 U.S.C. §2254.

REASONS FOR GRANTING THE WRIT

A. Conflicts with Decisions of Other Courts

The holding of the Courts below that petitioner did not suffer any Fourth Amendment violation is directly contrary to the holding of numerous federal circuits: Warrantless search violated detainee's Fourth Amendment rights. State v. Neely, 236 Neb. 527, 462 N.W.2d 105, 112 (Neb. 1990) see also, Willis v. Artuz, 301 F.3d 65, 69 (2d Cir. 2002); U.S. v. Reece, 797 F. Supp. 843, 846 (D.Colo.1992); State v. Jackson, 321 N.J.Super. 365, 379-80, 729 A.2d 55 (1999); to protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. Olmstead v. United States, 277 U.S. 438, at 48 S. Ct. 564, at 572 L. Ed. 944.

The Supreme Court has stated in the law enforcement context that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - - subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. at 357 (footnotes omitted); a defendant a subjective expectation of privacy when the defendant "has shown that 'he sought to preserve something as private.'" Bond v. United States, 529 U.S. at 338 (internal alterations omitted) (quoting Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L.Ed.2d 220 (1979)). This Court at 569 U.S. 5 [133 S.Ct. 1414] granted Certiorari limited to the question whether the officer's behavior was a search within the meaning of the Fourth Amendment. 569 U.S. 1104, 132 S.Ct. 995, 181 L.Ed.2d 726 (2012) Florida v. Jardines. In addition, the United States Court of Appeals For The District Of Columbia Circuit, reversed the decision of the lower court and remanded the case with instructions to enter judgments of acquittal on the grounds of a Fourth Amendment violation (unconstitutional search and seizure). United States v. Alan McSurely, United States v. Margaret McSurely, 473 F.2d 1178 (D.C. Cir. 1972).

The holding of the Courts below that petitioner did not suffer ineffective assistance/total deprivation of counsel is contrary to the holdings of numerous federal circuits: "ineffective, incompetent, or inadequate representation is the same as no counsel at all, and as such, will equal a denial of due process." State v. Keller, 57 N.D. 645, N.W. 698 [1929]; a waiver of counsel based on conditions indicating fraud, duress, or coercion will be sufficient to set aside a judgment of conviction obtained thereon. State v. Whiteman, 67 N.W.2d 599, 1954 ND LEXIS 118 (N.D. 1954); Interference with the defendants right to effective assistance of counsel necessitates dismissal of the indictment. Maine v. Moulton, 474 U.S. 159 [1985]. In Blackburn v. Foltz, 828 F.2d 1177 (CA 6 1987) the court found for petitioner and granted petitioner's writ for habeas corpus relief stating that "we cannot escape the conclusion that counsel's errors, in combination, effectively deprived Blackburn of a meaningful defense. [...] Due to the combined errors of counsel, Blackburn was unable to subject the prosecution's case to " 'the crucible of meaningful adversarial testing. Martin v. Rose, 744 F.2d 1245, 1250 (6th Cir.

1984) [Writ granted]. Reversal mandated if prejudice is proven on attorney-client relationship. US v. Morrison, 449 US 361, 66 L Ed 2d 564, 101 S Ct 665 [1981].

The holding of the Courts below that contradicting and conflicting evidence was sufficient to sustain the convictions, are contrary to the holdings of numerous federal circuits: Napue v. Illinois, 360 US 264 (1959); The governments failure to meet its burden of proof results in the defendants acquittal. See Winship, 397 U.S. at 363, see, e.g., U.S. v. Godin, 534 F.3d 51, 62 (1st Cir. 2008), U.S. v. Kapelioujnyu, 547 F.3d 149, 151 (2d Cir. 2008), U.S. v. Oz celik, 527 F.3d 88, 101 (3d Cir. 2008), U.S. v. Mitchell, 518 F.3d 230, 236 (4th Cir. 2008), U.S. v. Buchanan, 485, F.3d 274, 282 (5th Cir. 2007) McKenzie v. Smith, 326 F.3d 721, 728 (6th Cir. 2003) U.S. v. Thornton, 539 F.3d 741 750-51 (7th Cir. 2008), U.S. v. Scofield, 433 F.3d 580, 586-87 (8th Cir. 2006), U.S. v. McFall, 558 F.3d 951, 958 (9th Cir. 2009), U.S. v. Franklin-El, 555 F.3d 1115, 1124 (10th Cir. 2009), U.S. v. Medina, 485 F.3d 1291, 1300-01 (11th Cir. 2007), U.S. v. Law, 528 F.3d 888, 896-97 (D.C. Cir. 2008) (Per Curiam); where a judgment of acquittal was affirmed. United States v. Ward, 703 F.2d 1058 (8th Cir. 1983); (motion for acquittal granted habeas corpus) The court granted evans motion for a direct verdict of acquittal, concluding that the state had failed to prove its case. United States Supreme Court _ U.S._ (2013) 133 S.Ct. 1069 Evans v. Michigan No. 11-13-27; (acquittal granted on habeas corpus) Greene v. Palakovich, 606 F.3d 85, 93 n.3 (3rd Cir. 2010); (filed for habeas corpus petition pursuant to 28 U.S.C. §2254. District court granted relief. Acquittal case) McDaniels v. Warden Cambridge Springs SCI 070617 FED3, 14.3485; Court of appeals could consider sufficiency of evidence to support verdict. Petitioner fully briefed sufficiency of evidence issue which determined whether that motion should have been granted. Williams v. Guzzardi , [1989, CA 3 Pa] 875 F.2d 46).

The holdings of the Courts below that petitioner has failed to exhaust these claims, are contrary to the holdings of numerous federal circuits: Martin v. Westchester County Dep't of Corrections, 2008 WL 144827,*2 (S.D.N.Y., Jan. 15, 2008) (defendants who failed to identify available remedies or show that they were available to the plaintiff did not establish non-exhaustion); Connor v. Martinez, 2006 WL 2668977,*2 (D.Ariz., Sept. 14, 2006) ("Defendant bears the burden of specifying what remedies were 'available' to plaintiff"); Ayala v. C.M.S., 2008 WL 2676602,*3 (D.N.J., July 2, 2008) (defendants who failed to specify what procedures were available were not entitled to dismissal for non-exhaustion).

CONCLUSION

After its review of the record and evidence, this court should not be hesitant to find for white bird solgado. This court should either (1) grant the petition for rehearing, and/or(2) in the interest of preventing further injustice, issue orders granting the relief sought by white bird solgado on the merits of his petition for rehearing with instructions to enter a full judgment of acquittal on all counts, and order white bird solgados immediate and speedy release from unconstitutional and unlawful imprisonment. Fed. Rule 60 (b) (6) authorizes this Court to grant relief from judgment for "any other reason that justifies relief."

Respectfully Submitted,

Damon John White Bird Solgado, *Pro Se* Petitioner

June 26 2019

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Damon

White Bird

Solgo 6/26/19

PATRICK SCHATZ
Notary Public
State of North Dakota
My Commission Expires January 1, 2021

**Additional material
from this filing is
available in the
Clerk's Office.**