

IN THE
SUPREME COURT OF THE UNITED STATES

JULY TERM 2018

NO.

Damon John White Bird Solgado,

Pro Se Petitioner,

- against -

Colby Braun, Warden, NDSP,

Respondent

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

P.O. Box 5521

Bismarck, ND 58506-5521

Questions Presented

Whether a violation of Petitioner's 4th Amendment Constitutional Right to Privacy occurred when Police illegally searched and seized Petitioner's bank records, 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 trial court deprived Petitioner of his 6th Amendment Constitutional Right to trial counsel; when trial court refused to appoint new counsel for Petitioner and forced Petitioner to choose either (1) self-representation, or (2) accept deficient-performing trial counsel as representation, before proceeding to jury trial?

Whether trial court deprived Petitioner of his 6th Amendment Constitutional Right to Compulsory Process, when trial court denied Petitioner access to a subpoenaed defense witness whose testimony would have been favorable to the defense had she been allowed to testify at trial?

Whether insufficient evidence to sustain Petitioner's convictions has been proven but ignored in the lower courts, entitling Petitioner to a full judgment of acquittal on all counts from this court?

Whether a violation of Petitioner's 6th Amendment Constitutional Right to effective assistance of appellate counsel occurred, when appellate counsel filed a meritless direct appeal?

Whether State District Court deprived Petitioner of his 14th Amendment Constitutional Right to equal Protection of laws (and due process of law), when State District court denied Petitioner the Post-conviction relief he was entitled to?

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 Brown, Warden at North Dakota State Penitentiary.

11

Table Of Contents

Questions Presented _____

Parties _____

Table Of Authorities _____

Statute Authorities _____

Decisions Below _____

11/20/20

Jurisdiction _____

Constitutionality And Statutory Provisions
Involved _____

Statement of The Case _____

Basis for Federal Jurisdiction _____

Reasons for Granting The Writ

1178

A. Conflicts with decisions of other courts

B. Importance of the Questions Presented

Conflicts with Decisions of
Other Courts

Importance of the Questions Presented

Conclusion

Appendix

1180

Decision of the United States Court of Appeals: White Bird

LeSogado v. Colby Brown, 17-3617

Order of the United States Court of Appeals
Denying Rehearing

Order of the United States District Court

1181

1182

Table of Authorities

Blackburn v. Foltz, 828 F.2d 1177 (CA 6 1987)

Celaya v. Stewart, 691 F.Supp.2d 1046 (D. Ariz. 2010)

Cappalan v. Riley, 975 F.2d 67, 70 (2d Cir. 1992)

Cunningham v. LeFevre, 130 A.D.2d 809, 514 N.Y.S.2d 833
(N.Y. App. Div. 1987)

Daniels v. Woodford, 428 F.3d 1181 (CA9 2005)
Ferensic v. Birkett, 451 F.Supp.2d 874 [E.D. Mich. 2006]
Grant v. LeFevre, 135 Misc.2d 476, 515 N.Y.S.2d 960 (N.Y. Supp. 1987)
Greene v. Palakovich, 606 F.3d 85, 93 n.3 (3rd cir. 2010)
Hamdi Ali Osman v. Heather Weyker, No. 16cv908 [JNE/T.NL]
August 9th 2017
Hayes v. Thompson, 637 F.2d at 493
Hayes v. Thompson, 637 F.2d 483, 493 (7th cir. 1980); see
Morgan v. Ellerthorpe, 785 F. Supp. 295, 303 (D.R.I. 1992)
Hohn v. United States, 524 U.S. 236, 248 (1998)
Hrbek v. State, 478 N.W.2d 617, 619 [Iowa 1991]
Jones v. Walker, 469 F.3d 1216 (CA11 2007) p 1228
Joshua v. DeWitt, 341 F.3d 430 (6th cir. 2003)
Kenny v. Commissioner of Corrections, 393 Mass. 28, 468
N.E.2d 616, 621 (Mass. 1984)
Machacek v. Halbauer, 213 F.3d 947, 952 (6th cir. 2000)
McDaniels v. Warden Cambridge Springs SCI 070617 FED3,
14-3485
McKenzie v. Smith, 326 F.3d 721, 728 (6th cir. 2003)
Martin v. Rose, 744 F.2d 1245, 1250 (6th cir. 1984)
Napue v. Illinois, 360 US 264 (1959)
Olmstead v. United States, 277 U.S. 438, at 48 S. Ct.
564, at 572 L. Ed. 944
Palmer v. Clarke, 408 F.3d 423, 437 (8th cir. 2005)
Pazden v. Muader, 424 F.3d 303 (CA 3 2005)
Pino v. Dalsheim, 605 F.Supp. 1305, 1319-20 (S.D. N.Y.
1985)
State v. Bender, 1998 ND 72, 576 N.W.2d 210 (1998)
State v. Jackson, 321 N.J. Super. 365, 379-80, 729 A.2d
55 (1999)
State v. Keller, 57 N.D. 645, N.W. 698 (1929)

State v. Mathers, 165 Ariz. 64, 796 P.2d 866, 673 (1990)
(In Banc)

State v. Neely, 236 Neb. 527, 462 N.W.2d 105, 112
(Neb. 1990) See also, Willis v. Arduz, 301 F.3d 65, 69 (2d
Cir. 2002)

Thompson v. Dept of The Treasure, Bureau of Alcohol, Tob-
acco, and Firearms, 557 F.Supp. 158 (D.Utah. 1982)

Torres v. Coughlin, 166 A.D.2d 793, 563 N.Y.S.2d 152, 153
(N.Y. App. Div. 1990)

United States Supreme Court - U.S., [2013] 133 S.Ct.
1069 Evans v. Michigan No. 11-13-17

United States v. Alan McSurely, United States v. Margaret
McSurely, 473 F.2d 1178 (D.C. Cir. 1972)

United States v. Vasquez, 74 F.Supp.2d 964 (S.D. Cal. 1999)

United States v. Ward, 703 F.2d 1058 (8th Cir. 1983)

U.S. v. Buchannen, 485, F.3d 274, 282 (5th Cir. 2007)

2) ~~US 2014 Foster~~, 68 F.3d 86 (4th Cir. 1995)

U.S. v. Franklin-El, 555 F.3d 1115, 1124 (10th Cir. 2009)

U.S. v. Kapelioujnyu, 547, F.3d 149, 151 (2d Cir. 2008)

U.S. v. Law, 524 F.3d 888, 896-97 (D.C. Cir. 2008) (Per

~~Curiam)~~ ~~et al A v. 1990~~ ~~2014~~ ~~21~~ ~~2014~~

U.S. v. McFall, 558 F.3d 951, 958 (4th Cir. 2009)

U.S. v. Medina, 485 F.3d 1291, 1300-01 (11th Cir. 2007)

U.S. v. Mitchell, 518 F.3d 230, 236 (4th Cir. 2008)

US v. Morrison, 449 US 361, 66 L Ed 2d 564, 101 S Ct
665, (1991)

U.S. v. Oz Celik, 527 F.3d 88, 101 (3rd Cir. 2008)

U.S. v. Reese, 797 F.Supp. 843, 846 (D.Colo. 1992)

U.S. v. Seofield, 433 F.3d 580, 586-87. (8th Cir. 2006)

U.S. v. Thornton, 539 F.3d 341 750-51 (7th Cir. 2008)

White Bird Solgado v. Colby Brown, 17-3617 (8th Cir. 2018)

Willet v. Lockhart, 37 F.3d 1265, 1271-72 (8th Cir. 1994)

Williams v. Guzzardi, (1989, CA 3 Pa) 875 F.2d 46)

Winship, 397 U.S. at 363, see e.g., U.S. v. Godwin,
534 F.3d 51, 62 (1st Cir. 2008)

Statute Authority

6th Amendment Article 3 Section 2 U.S. Constitution: Individual Rights

All Writs Act 28 U.S.C. § 1615(a)

N.D.C.C. 32-22-05

N.D.C.C. 32-22-16

N.D.C.C. 32-22-17

N.D.C.C. 32-22-32

N.D.C.C. 32-33-01

Decisions Below

The decision of the United States Court has been reported. It is cited in the Table at White Bird Solgado v. Colby Braun 17-3617 (8th Cir. 2018) (herein after WBS v. CB 17-3617 (8th Cir. 2018)), and a copy is not attached as Petitioner no longer has a copy available.

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. § 1254 (1), and N.D.C.C.

(NPP/32-233-01, 51-1551, 2051 66.7 78, 7701301, 11 791111)

(111 66.7 218 509 8 AD P8112) 11703501 v 21111111

Constitutionality And Statutory Provisions Involved

This case involves Amendments IV, VI, XIV, and IX 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 state 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.

This case involves Statute 32-33-01 to the North Dakota Century Code, which provides:

Writ of Certiorari shall be granted by the Supreme Court or District Court when an officer, board, tribunal, or inferior court has exceeded the jurisdiction of such officer, board, tribunal, or inferior court, as the case may be, and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and also when, in the judgment of the court, it is determined / deemed necessary to prevent miscarriage of justice.

Statement Of The Case

The Petitioner's Complaint asserts that on April 2, 2013, a Search Warrant was issued for Petitioner's apartment. The contents of that Search Warrant clearly specified with particularity the items to be searched for and seized, if found, were (1) Indicia of residency, (2) cash, and (3) weapons to include but not limited to (but with nails sticking out of it, a table leg with a bolt at the end of it, knives, and/or a machete).

On April 3, 2013, members of the Fargo Police Department carried out the Search Warrant and found Indicia of

residency for petitioner when Fargo P.D. Detective Mark Voigtschild was photographed breaking the seal on an Official letter (listing the same address as that mentioned in the Search Warrant) addressed to petitioner which contained petitioner's Social Security Card.

The violation of Petitioner's Fourth Amendment Constitutional Right to Privacy (and to be secure in his papers from unreasonable searches and seizures) occurred when members of the Fargo P.D. proceeded the search, found Petitioner's Wells Fargo Bank Records and then seized those Bank Records without a warrant authorizing that particular search and seizure. Indicia of residency for Petitioner was already established when Fargo P.D. Detective Mark Voigtschild broke the seal on that official letter containing Petitioner's Social Security card and address. Petitioner's bank records were not in plain, direct, nor open-view of any of the officers and detectives when the search warrant commenced, nor did any of the officers or detectives obtain implied, oral, or written consent from Petitioner approving or inviting that illegal search and seizure of his bank records.

Following his criminal charging, on April 5, 2013, Petitioner applied for and received court appointed Public Defender Charles S. Sheeley. Between April 13, 2013, and April 26, 2013, Charles S. Sheeley secretly handed over Petitioner's case to Fargo Attorney Steven D. Mottinger without notifying Petitioner he was doing so. Petitioner fired his court appointed attorney Steven D. Mottinger approximately two weeks prior to trial because of attorney Steven D. Mottinger's deficient-performance regarding Petitioner's case.

During the course of his representation of Petitioner and this case, Attorney Steven D. Mottinger's deficient-performance as trial counsel was corroborated by the Prosecution. A Pretrial hearing

was held in Cass County State District Court July 29, 2013, with Ex-Judge Wickham Corwin Presiding. At that hearing, the prosecution informed the trial court that "Mr. Mottinger hasn't brought any issues on or at least didn't bring any motions" [Motion Hearing Trans. pge 50], and continued that the prosecution understood "why Mr. Mottinger didn't bring any motions when he was counsel" [Motion Hearing Trans. pge 51].

Prior to the final Pretrial hearing July 29, 2013, Petitioner informed the trial court at two prior Pretrial hearings (July 19, 2013, and July 26, 2013) that Petitioner "could not work with his attorney Steven D. Mottinger" and that Petitioner "can't trust him because he hasn't done anything for me and he only came to the jail twice to visit me for a period of about 15-minutes". At those two Pretrial hearings the trial court did not resolve this constitutional issue. Instead, the trial court was set on convincing Petitioner that he needed this deficient-performing counsel to represent him at trial. When both Pretrial hearings were adjourned, Petitioner's Sixth Amendment Constitutional Claim was still unresolved.

On July 29, 2013, a final Pretrial hearing was held in Cass County State District Court to decide whether Petitioner would represent himself at trial or Attorney Steven D. Mottinger would continue as court appointed trial Counsel. At that hearing, the trial judge informed Petitioner that he had two options. The court instructed Petitioner "the first option is to represent yourself and to act as your own attorney" the court continued "option two is to allow (counsel) to proceed as your attorney and to do all of those things on your behalf as a team." Petitioner realized that the trial court was not going to safeguard his Sixth Amendment Constitutional right to having effective assistance of counsel for his defense, and proceeded to inform

the Presiding Judge he understood those two options and "choose number one".

Jury trial for this case began July 30, 2013, and ended August 5, 2013. Between the dates August 1, 2013, and August 4, 2013, Petitioner's Subpoenaed defense witness Audr'e Fischer (Petitioner's Personal banker and Wells Fargo Representative) appeared at trial ready to testify. The trial court conducted inquiry into the relevance of her testimony and why Petitioner wanted her to testify:

THE COURT: And, Mr. White Bird, try to explain to me why you think Ms. Fisher (SP?) should testify and what she would talk about. [Trial Trans. Pgs 381].

THE DEFENDANT: Well, she's already seen some of my work that I came back from Buffalo Wild Wings, All my checks and everything. She helped me deposit \$311.00. And my bank records would indicate that as well. Being that you only signed a search warrant for indicia or records or the indicia of residence. They knowingly seized my account records without a warrant, and she can testify to that also I've seen that in the photographs that they have they did take copies -- I mean they did take pictures of my Social Security card which has my name on it which would be indicia of residence. [Trial Trans. Pgs 381 and 382].

THE COURT: That's what I'm asking you to explain. What's the relevance between your bank records and the issue of guilty or not guilty? [Trial Trans. Pgs 382].

THE DEFENDANT: My bank records were seized, were illegally seized. She can testify that the Fargo P.D. never came to Wells Fargo with the search warrant indicating the search

and seizure of my bank records. [Trial Trans. Page 382]

When the trial court learned that Audre Fischer's testimony would be used to further establish a violation of Petitioner's Fourth Amendment Constitutional Right (to Privacy and to be Secure in his Papers from unreasonable Searches and Seizures) the trial court granted the Prosecution's request that she be released from her subpoena, and dismissed her from testifying for the defense at trial (despite very strong and clear objections from Petitioner that she be allowed to stay and testify):

THE COURT: Mr. Van de Streek? [Trial Trans. Page 382]

MR. VAN de STREEK: I can't see how that's relevant. I think that she should be released from her subpoena. [Trial Trans. Page 383]

THE DEFENDANT: I object to that. If this is going to be a fair trial, unbiased, unprejudiced -- [Trial Trans. Page 383]

THE COURT: Does the State intend to offer and -- I think not, you're only offering photographs. [Trial Trans. Page 383]

MR. VAN de STREEK: Right. There's no issue of the Defendant's residence. We're not going to get into his bank records or anything like that. I cannot see how it's relevant. [Trial Trans. Page 383]

THE DEFENDANT: Your Honor, if I may so request right now that Mr. Van de Streek give me a photograph indicating that he has of my Social Security Card with my address on it. Because they could have gotten my, oh -- [Trial Trans. Page 383]

THE COURT: Mr. White Bird, listen to me. [Trial Trans. Page 383]

THE DEFENDANT: I have it right here, too, a bill from MSUM stating my -- stating my indicia of residence. They could have taken (S.P.?) this, too. [Trial Trans. Page 383]

THE COURT: Sir, listen to me. [Trial Trans. Page 383]

THE DEFENDANT: That's illegal search and seizure of my bank records. That's federal law. [Trial Trans. Page 383]

THE COURT: Your bank records are not relevant, are not material to the issue of -- [Trial Trans. Page 384]

THE DEFENDANT: Yes, they are, Your Honor, because in Ystebor's report by Shirley Edwards three different times says that she thinks I get people up to my apartment ²⁰⁹ drunk and takes their money. That's the only reason why they did that, to try and make a connection. And I ask that she be present here. Because that's the only reason why Detective Ystebor took my bank records was to try and make a connection. [Trial Trans. Page 384]

THE COURT: The State has indicated that your bank records are not going to be offered. [Trial Trans. Page 384]

THE DEFENDANT: Well, then I ask that the indicia of residence be offered that they have in the photographs stating -- stating from my Social Security Number. [Trial Trans. Page 384]

THE COURT: Is there any dispute about where you lived at the time? [Trial Trans. Page 384]

THE DEFENDANT: No, there is not. [Trial Trans. Page 384]

THE COURT: Okay. [Trial Trans. pge 384]

THE DEFENDANT: But they never took anything, anything from my house except for my account records. That's it. [Trial Trans. pge 384]

THE DEFENDANT: They illegally did that. [Trial Trans. pge 385]

THE COURT: And whether they -- [Trial Trans. pge 385]

THE DEFENDANT: What do you mean whether they did or not. No one is above the law. [Trial Trans. pge 385]

THE COURT: We need to focus on the issue and not non issues. [Trial Trans. pge 385]

THE DEFENDANT: Non issues. [Trial Trans. pge 385]

THE COURT: Based on your offer of proof I am satisfied that there is no possible relevance to any testimony that could be provided by Ms. Fisher (sp?) or by Wells Fargo Bank. The fact that she has already been required to respond once, to the subpoena has been an imposition. I am not going to continue that imposition or make that imposition worse. So, Ms. Fisher (sp?), you are hereby released from the subpoena. [Trial Trans. pge 385]

THE COURT: Go back to work. [Trial Trans. pge 385]

When jury trial for this case commenced, three members of the Fargo P.D. (Detective Mark Veightschild, Detective Matt Ystebor, and Sergeant Shawn Gamrath) testified that (1) not only was evidence tampered with by police in this case, but (2) evidence (belonging to different cases which had no

relevancy to petitioner's) was fabricated in this case by Police.

When Fargo P.D. Detective Mark Voigtschild was cross-examined by petitioner at trial regarding the fabricated evidence and the form identifying the evidence fabricated, Det. Voigtschild testified "That would be items being checked out" ¹¹pieces of evidence" [Trial Trans. pge 804]. When petitioner further asked "so items being checked out?" Det. Voigtschild testified "correct". [Trial Trans. pge 804].

11-2-12
When asked if "these are separate case numbers" Det. Voigtschild testified "Yup". [Trial Trans. pge 804]. When asked to identify the separate case numbers as "52305 all the way to 1663412" Det. Voigtschild testified "those are different case numbers, correct." [Trial Trans. pge 805]. When asked "What do the dates signify? 8/28/2012, 8/30/2012, 3/7/2013, 3/26/2013" Det. Voigtschild testified "Well, it looks like it says dates received. And I would imagine that's when those items were logged into evidence." [Trial Trans. pge 805]. When asked "So these were logged into evidence then. So the buccal swab, black knife, red black handle, biohazard blood, all of these right here except for the ones on the bottom?" 80509 All of those right there were the ones that were logged in on those days, correct?" [Trial Trans. pge 805]. Det. Voigtschild testified "That's my understanding." [Trial Trans. pge 805].

27 March 2014 PM 1
When facts of evidence fabrication came to light, the trial court asked "Mr. White Bird, why are we talking about evidence logged in other cases?" Petitioner responded "Because it was included in mine." "He just admitted that, there was - that these were - that this is a form when it was evidence taken out. Fabrication of evidence, therefore it establishes a fact." [Trial Trans. 806].

When Fargo P.D. Detective Matt Ystebor was cross-examined by Petitioner regarding the fabricated evidence and the form used identifying that evidence, Prosecutor Van de Streek objected and testified "the Fargo P.D. Prints off a log of evidence that's taken in and out of the evidence room and it's inclusive of other cases. It's only relevant with respect to his case. We'll stipulate -- [Trial Trans. pge 844].

When Det. Ystebor was asked "on 4/19/2013, Wednesday, at 1503, 3:00 O'clock P.M., which was when this was printed and dated, is it true that you went and repacked the evidence?" Det. Ystebor testified "Yes. I'm not sure if that was the exact time but I know we did have to repack certain items that were taken." [Trial Trans. pge 846]. When further asked "And why did you repack certain items? Why did you touch the evidence in this case?" [Trial Trans. pge 846 and 847], Ystebor responded "We were directed to." [Trial Trans. pge 847]. When asked for the name of the person, Ystebor testified "I'm not sure if it was our evidence manager or my Sergeant. But we logged a bag of clothes and other various items all together on one to keep them together and we needed to separate those items into -- to create multiple bags." [Trial Trans. pge 847].

When Det. Ystebor was asked about why Petitioner's conduct of having "cleaned up the mess in my house?" [Trial Trans. pge 847] amounted to a tampering with physical evidence charge, "why is that tampering with physical evidence when you yourself repacked evidence?" [Trial Trans. pge 847], Det. Ystebor had "(No response)" [Trial Trans. pge 847].

When Fargo Police Sergeant Shawn Gamradt was cross-examined at trial by Petitioner, regarding the fabricated evidence and

was asked "Can you explain to me then, explain to all the jury, why items by check out date Fargo Police Department include a buccal swab from Jennie Jenkins (sic), a black knife with a red and black handle, a curved blade, one red, one blue handled throwing knife, biohazard blood, green substance believed to be marijuana, and a bottle of distilled water washed through hypodermic needles. Can you explain to us why and how these -- why and how these ~~come~~ come to the scene bring that they all come from different case number?" [Trial Trans. pgs 622], Sergeant Gamradt testified "I will not be able to answer that question. ~~It wasn't~~ It wasn't involved in that portion of it." [Trial Trans. pgs 622 and 623].

Numerous Witnesses testified through out the course of the trial including all three victims (David Oliver, Randy LaFontaine, and The Petitioner, Damon White Bird Solgado). The testimony provided by witnesses David Oliver, Kenneth Chasinghawk, Sidney Monette, and Randy LaFontaine, regarding the alleged assaults that occurred at Petitioner's apartment on April 2, 2013, contradict and conflict each other's. Most importantly the testimony provided by these witnesses (including the July 26, 2013, added on witness Nicole Koehler) contradict what the State claimed it would prove to the jury in its opening argument. The State claimed White Bird "invited these people up to his apartment", and that White Bird "hung out with the homeless population". The State also claimed White Bird "locks the door before he takes that wooden table leg with two hands and beats David Oliver over the head." The State continued "Now, when he finally unlocks his apartment, shoos David Oliver and Ken Chasinghawk out the door, one of his neighbors hears the commotion, she walks outside." "She inquires about what's going on, and with a wry smile on his face the defendant says "I have a blood lust." " That's his explanation for what happened here. That

bloodlust, ladies and gentlemen, led to the stabbing of Randy Lafontaine and the beating of David Oliver."

Direct and Cross examination of Randy Lafontaine at trial revealed Randy and Petitioner met on April 2nd 2013 because Randy went to a party with John Left Bear, Randy did not know anyone at the party, and no one else invited Randy to this alleged party at all except for John Left Bear. Further cross examination of Randy Lafontaine revealed that after his stabbing he immediately went back to drinking in the same apartment where the stabbing occurred and proceeded to pass out. Cross examination continued revealing that when Randy woke up he simply "walked" out of the apartment because the door was "open".

Direct and Cross examination of Kenneth Chasinghawk at trial revealed he and Petitioner did not know each other in any way shape or form before the events took place, Ken does not even know how him and David Oliver got up to Petitioner's apartment, and Ken does not know who invited him and David Oliver up to Petitioner's apartment. Further cross examination of Chasinghawk revealed that the assault on David Oliver did not occur because Petitioner needed money (as the state had claimed), Petitioner was the only one sober, the door was locked, but quickly recanted and said he did not know for sure that the door was locked because no one made the attempt to check, he and David were able to walk out on their own free will, none of Petitioner's neighbors came to Petitioner's door when the events were taking place and none came to Petitioner's door or to investigate what happened after the events happened, but again recanted quickly and said the neighbors did show and prevented David from getting "thrown down the stairs".

Cross examination continued revealing that David Oliver gets

violent with Ken chasing hawk when Oliver's drinking and that Oliver was violating his Parole/Probation for aggravated assault (involving chasing hawk) at the time these events occurred.

Direct and Cross examination of Sidney Monette at trial revealed Sidney and Petitioner first met when Sidney was attempting to Parahandle change from Petitioner, Petitioner looked out for Sidney providing him with a place to stay clothes and shoes and food and a key on a gold beaded chain to Petitioner's apartment, in the days leading up to the events.

Further Cross examination of Monette revealed that when the events occurred inside Petitioner's apartment involving David Oliver and Randy LaFontaine Monette was "just coming out of a black out drunk" David swung on Petitioner First after being confronted by Petitioner for hitting Ken chasing hawk, Monette did not see Randy LaFontaine getting stabbed because Monette was "Passed out" at the time, Monette "had his hands covering his face not watching anything that happened to Oliver", but quickly recanted and said "he saw Petitioner grab that table leg, hit Oliver, then he pulled his hood up and put some ear buds on."

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Cross examination continued revealing that Monette remembered the door being locked when David was hit in the head with the table leg, but quickly recanted and said "no" when asked "did anyone try in any way, shake, or form, during the incident with Oliver and LaFontaine, to try and open the door.", Monette further testified he can't remember specific details about everything before, during, and after the incident because he was "still drinking and edge of a black out After heavily intoxicated put it that way." Monette further testifies that after the incident with David occurred he stayed at Petitioner's apartment for "about a half hour, 45 minutes", but a few questions later Monette

recants and says "Well, we stayed there for about 15 minutes, then he unlocks it and David and Kendra leave and then me and Merinda go down."

Direct and Cross examination of David Oliver at trial revealed that Oliver's Testimony was coached regarding the incident he was involved in at Petitioner's apartment. Shortly after Direct examination of Oliver began, Petitioner objected on ground that "this witness does not remember anything". Although the objection was based on fact Petitioner was overruled. Oliver testified that "he knew Petitioner from encounters at the Salvation Army" yet no proof (video, or witness testimony) was offered into evidence that would corroborate Oliver's statement. Oliver later recants this statement and says he met Petitioner on April 2nd 2013 the day of the incident.

Further cross examination of Oliver revealed that he was beat up by Petitioner because Petitioner wanted his money. That statement was never corroborated by the evidence received at trial nor was it corroborated by numerous witnesses who testified. The testimony provided by those witnesses are consistent in that Petitioner was rarely at his apartment leading up to the incidents, these assaults did not occur because Petitioner wanted Oliver and La Fontaine's "money" because neither had none, and Petitioner did not supply any alcohol nor invite anyone up to his apartment except Sidney Monette whom he gave a key to.

Cross examination continued and Oliver stated "you invited me" but immediately recants three times and says "If it wasn't you it was some one else," and "you didn't invite us but you let us into the building", "I don't know who invited us or who let us in".

Further cross examination of Oliver revealed that "he does not remember if any of Petitioner's neighbors came to the door at all when these incidents occurred."

Direct examination of Nicole Koehler revealed that the State could not get her to corroborate its outlandish opening argument claim that "the defendant says "I have a bloodlust"". When the state asked Nicole "And what did Damon - What did the Defendant say to him" Nicole responded "I have no idea. I don't remember what he said to him." The state continues to apply pressure and asks Nicole "What did you tell Police?" Nicole responds "I don't -- I don't remember either." The state bullies her and asks "Okay. We need you to tell everything you told Police." but again Nicole is persistent in her testimony saying "He took me back into his -- I turned back into his apartment and tried to calm him down. He was kind of adrenalin and he said something that sounds bad. But I don't know if -- he said he had bloodlust. And I was like, Damon, settle down. You just got in a fight, I don't know what happened". [Trial Trans. Pgs 687, 688 and 689].

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Cross examination of Nicole Koehler revealed that her reasons for why she didn't come forward with information besides the fact that she was supposedly scared were "I just didn't want to get involved. I don't know what happened. I mean I heard a lot of rumors. A lot of rumors. I don't know." [Trial Trans. Pgs 695 and 696]. Further cross examination of Nicole revealed that she "didn't want to testify falsely against her neighbor".

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During the middle of trial following the testimony of these witnesses, Petitioner moved the court for a judgment of acquittal citing insufficient evidence. The Court erroneously denied Petitioner a judgment of acquittal.

On August 5, 2013, Jury trial ended and the state made direct reference to Promises made in its opening arguments that it did not deliver at trial in its closing. The state claimed the defendant brought these people up to his apartment, got them drunk, beat them and took their money. The state further claimed that the defendant had a bloodlust and is preying upon the vulnerable in the community, and its upon these so called 15-Points the state gave the jury that it should find the defendant guilty.

Petitioner made his closing argument and the state rebutted. When the state made its rebuttal the state made direct reference to the merits of Petitioner's fabrication of evidence claim. Mr. Youngren for the state made rebuttal and stated "Well folks, it sure is interesting to watch the defendant get up here and ask you to pay attention to him as he's giving his closing argument." [Trial Trans. Lines 14-16, Page 1059], "What he can't do thank fully is fabricate evidence." [Trial Trans. Line 21, Page 1059], Exhibit 1.

After rebuttal, the jury deliberated for about 2 1/2 hours, and returned with a verdict of guilty on all counts, to the charges of Attempted murder, two counts of felonious restraint, tampering with physical evidence, aggravated assault, and assault with a deadly weapon (the lesser of count one).

On December 20, 2013, Petitioner's appellate counsel (Monty Grant Metz) knowingly filed a meritless direct appeal to the North Dakota Supreme Court. In that direct appeal appellate counsel raised the issues that (1) White Bird was not competent to waive his right to counsel, (2) White Bird did not receive a fair trial because the district court did not limit the evidence he introduced at trial, and (3) there was insufficient

evidence to sustain his convictions.

Appellate counsel argued "White Bird asserts that while he was found competent to stand trial, his evaluation did not address whether he could represent himself at trial" in support of issue one raised in that direct appeal. State v. White Bird 858 N.W.2d 647 (97.133, (N.D. 2015)). Appellate counsel argued "White Bird takes issue with a wide range of alleged errors he committed while representing himself at trial. White Bird asserts he did virtually nothing to establish his self-defense theory, he had no concept of presenting evidence or subpoenaing witnesses, and he essentially stipulated to introduce everything." He also asserts that he elicited a lot of hearsay testimony, which he argues ~~would not have been~~ heard by the jury had he been represented by counsel and that his representation at trial was "self-destructive." in support of issue two raised in that direct appeal. State v. White Bird 858 N.W.2d 647 (97.143 (N.D. 2015)). Appellate counsel finally argued "A "large volume" of otherwise inadmissible, extraneous, and prejudicial evidence was "allowed" into evidence at trial. In representing himself, White Bird's strategy at trial was apparently that he wanted the jury to "hear and see everything." in support of issue three raised in that direct appeal. State v. White Bird 858 N.W.2d 647 (97.143 (N.D. 2015)).

Following the meritless direct appeal filed by appellate counsel, Petitioner filed a supplemental brief raising and arguing the merits herein to the North Dakota Supreme Court. The Supreme Court denied Petitioner appellate relief ruling "We have considered White Bird's remaining arguments and issues and conclude they are either unnecessary or our analysis or without merit. The criminal judgment is affirmed." 858 N.W.2d 642 (N.D. 2015) State v. White Bird.

[redacted]

Towards the end of 2015, Petitioner began the Post-conviction process in State District Court. Petitioner received 3 separate orders from State District Court each setting a date and time for an evidentiary hearing. Although the State District Court denied Petitioner's Post-conviction application, it did vacate its order only after the State moved for reconsideration as to the issue of whether White Bird received ineffective assistance of appellate counsel.

An evidentiary hearing was held in Cass County State District Court on December 18, 2015. At that hearing, White Bird's appellate counsel (Monty G. Mertz) testified that "White Bird's case and trial was a travesty of justice." and that "it was an embarrassment to the court system." [Evid. Hearing Trans. Lines 1-4, and 16-17 pgs 47]. Appellate counsel went on to further testify 3 times that White Bird's Rule 29 motion for acquittal "was not frivolous." [Evid. Hearing Trans. Lines 13-21 pgs 62, 18+21 pgs 63]. Exhibit 2.

When appellate counsel was asked by petitioner "one of the issues you argued on your appeal brief was insufficiency of evidence. correct?" Appellate counsel replied "No." [Evid. Hearing Trans. Lines 13-18, pgs 67]. Appellate counsel further testified he did not raise the issues of (1) ineffective assistance/deficient performance of trial counsel; (2) the 4th Amendment (unconstitutional search and seizure) claim; (3) the 6th Amendment (denial of compulsory process/access to subpoenaed witness for defense) claim; (4) erroneous dismissal of White Bird's Rule 29 motion for acquittal (why it should have been granted). Exhibit 2.

After the evidentiary hearing was adjourned, the State District Court misapplied the Strickland analysis to the facts of Petitioner's case and erroneously issued its order denying Petitioner's application for Post-conviction relief on December 18, 2015, when it determined that appellate counsel's performance was not

ineffective and that White Bird did not suffer prejudice as a result."

201 Through out the historical litigation of his case at the state level, Petitioner has continued to make countless good faith attempts to present the claims (and their merits) contained herein this writ of certiorari, to the state district court, the state supreme court and the lower U.S. District courts, with no success.

Petitioner filed his Pro Se §2254 Habeas Corpus Petition in U.S. District Court in a timely fashion. In his habeas Petition, petitioner raised and briefed the merits of his 4th Amendment claim, his three 6th Amendment claims (ineffective assistance of trial and appellate counsel, and compulsory Process), his 14th Amendment claim of due process, and equal protection of laws claim, and his judgment of acquittal claim (insufficient evidence to sustain his convictions). On April 11, 2017, the habeas court issued its order "directing the Respondent Colby Brown, Warden, to file an answer or otherwise respond to the Petitioner's claims for relief without passing on its merits.", WBS v. CB 17-3617 (8th Cir. 2017).

Brown responded in a timely fashion and argued inference upon inference (having no basis in fact) that would support a judgment of why Petitioner is not entitled to relief, on his §2254 Habeas Petition. Brown's arguments were (1) White Bird failed to establish the trial court denied him his right to counsel; (2) White Bird was not denied his right to a fair trial; (3) White Bird waived any argument about effective assistance of trial counsel; (4) the state did not use the evidence of his bank records nor did the state use such evidence at trial; (5) White Bird's 4th amendment claim is non-relevant; (6) because White Bird admitted at trial there was no issue about his address, there can be no 4th amendment violation; (7) White Bird's alleged unexhausted claims are procedurally defaulted from the district courts review; (8) because the state

court made factual determinations, those determinations are entitled to deference; (9) the supreme court found that contradictory and conflicting evidence was enough to support White Bird's convictions; (10) White Bird presents a confusing collection of matters; (11) White Bird rises to new levels of mystification; (12) all White Bird did in support of these grounds was to place transcript portions in his petition with some in bold font; and (13) White Bird asserts no federal cases that support his bare notations.

On November 30, 2017, the habeas court issued its order dismissing White Bird's § 2254 Habeas Corpus Petition, completely undermining the importance of the constitutional issues with its catch-all phrase "White Bird alleges" and ignored the merits of those constitutional issues that are still unresolved.

On December 4, 2017, The U.S. District Court for The Eighth Circuit received Petitioner's Notice of Appeal and Petitioner's Petition for a Certificate of Appealability. na. 11/28/17

On December 6, 2017, The U.S. District Court of Appeals for The Eighth Circuit (St. Louis, MO) received Petitioner's Notice of Appeal and Petitioner's Petition for a certificate of Appealability. In that COA application, petitioner raised and briefed the merits of the constitutional issues presented herein.

On April 13, 2018, the Eighth circuit court of Appeals issued its judgment stating "the court has carefully reviewed the original file of the district court, and the application for a certificate of Appealability is denied. The appeal is dismissed. Appellant's motion for leave to proceed in forma pauperis is denied as moot." (A.10)

On 4/27/2018 Petitioner Filed a Pro Se Petition for rehearing by

Panel with attachments to Petition for rehearing. In that Petition for rehearing by Panel, Petitioner submitted more documentary evidence in further support of his 6th amendment ~~(appellate)~~ counsel claim, showing that not only did his appellate counsel knowingly sabotage Petitioner's direct appeal but also his appellate counsel (Monty G. Mertz) has a proven history of obstructing his clients cases. See Disciplinary Board v. Mertz, No. 20050360. Despite this fact, on May 23, 2018, the Eighth Circuit court of appeals issued its order stating "the Petition for rehearing by Panel is denied as over-length." On May 27, 2018, Petitioner filed a Pro Se Petition for rehearing en banc. In that petition, Petitioner raised and briefed all constitutional issues (and their merits) contained herein. On May 30, 2018, the Eighth circuit court of Appeals issued its mandate stating "In accordance with the judgement of 4/13/2018, and pursuant to the provision of Federal Rules of Appellate Procedure 41(a), the formal mandate is hereby issued in the above styled manner." (A-20)

Basis for Federal Jurisdiction

Law

This case raises questions of interpretation of the right to Privacy clause, the right to effective assistance of counsel clause, the due process clause, the compulsory process clause, and the equal Protection of laws clause of the Fourth, Sixth, Fifth (and fourteenth), and Ninth 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

2. The holding of the courts below that Petitioner did not suffer any

Fourth Amendment violation, Petitioner needed to show his counsel's performance was defective. Second he needed to show his defense was prejudiced by the proven defects. He failed to establish either that his appellate counsel's representation was objectively unreasonable or defective and that the result of the appeal would have been different but for his counsel's performance, after the state indicated it would not offer the records the district court concluded the bank representative would not provide any relevant testimony. The court then released the bank representative from White Bird's subpoena. White Bird's fifth claim for relief is fundamentally flawed in that it does not present a cognizable claim for habeas relief. By alleging an equal protection violation during the state postconviction proceedings, White Bird does not attack the constitutionality of his current detention; viewing Bird's final ground for relief is rather convoluted. He begins by alleging the state engaged in prosecutorial misconduct at trial. Throughout the claim, White Bird alleges officers fabricated evidence used at trial or there were conflicting eye witness accounts of what occurred on the night of the alleged crimes. As is relevant to this claim, and as discussed above, habeas relief is only available when a conviction was obtained upon an unreasonable determination of the facts. Presented at the state court proceeding, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt, are directly contrary to the holding of numerous federal circuits.

("Review of Fourth Amendment claims in habeas petitions is undertaken ...: (a) if the state has provided no corrective procedures at all to redress the alleged Fourth Amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded."

from using that mechanism because of an unconscionable break down in the underlying process [5] *Cappellano v. Riley*, 2975 F.2d 67, 76 (2d Cir. 1992); (finding that if a state has adequate procedural mechanisms for reviewing illegally seized evidence, but if those mechanisms failed and the prisoner was prevented from litigating his, the federal court may review an illegal search and seizure claim.) This standard has been adopted in other circuits. See *Palmer v. Clarke*, 408 F.3d 423, 437 (8th Cir. 2005) (applying the *Cappellano* standard); *Willet v. Lockhart*, 37 F.3d 1265, 1271-72 (8th Cir. 1994) (adopting the standard in *Cappellano*); See also *Machacek v. Hofbauer*, 213 F.3d 947, 952, (6th Cir. 2000).

"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], failure to file requested appeal is per se ineffective assistance of counsel, irrespective of possibility of success on merits. *US v. Foster*, 68 F.3d 86 (4th Cir. 1995); Where petitioners efforts to call witnesses were denied, the writ of habeas corpus was granted. *Celaya v. Stewart*, 691 F.Supp.2d 1046 (D. Ariz. 2010); an unjustified refusal to permit live testimony of a defense witness... will warrant reversal. *Herbek v. State*, 478 N.W.2d 617, 619 [Iowa, 1991]; Where an application for post-conviction relief is not frivolous, it is improper for trial court to summarily deny the application before the defendant is afforded an opportunity to provide evidentiary support for the allegations in the application. *State v. Bender*, 1998 ND 72, 576 N.W. 2d 210 (1998). The "fourteenth Amendments guarantee of due process is violated by 'the manufacture of... false evidence' in order to 'falsely formulate a pretense of probable cause.'" The court noted that "the principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction [is] implicit

in any concept of ordered liberty. *Hamidi Ali Osman v. Heather Weyker*, No. 16-cv-908 [JNE/TNL] August 9th, 2017, 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.

Numerous Federal circuits have also held 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 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).

(Failed to litigate 4th Amendment issue, which reasonable trial attorney would have raised based on applicable law and facts of case) *Joshua v. DeWitt*, 341 F.3d 430 (6th Cir. 2003). 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], conviction expunged where inmate was denied witnesses, ability to prepare defense, and impartial fact-finder. *Pino v. Dalsheim*, 605 F. Supp. 1305, 1319-20 (S.D. N.Y. 1985).

The court ruled that James Mathers prevailed on direct appeal when the Arizona Supreme Court ruled that there was insufficient evidence

to support his conviction. *State v. Mathers*, 165 Ariz. 644, 798 P.2d 866, 873 (1990) (In Banc); Reversed mandated if prejudice is shown on attorney-client relationship. *US v. Morrison*, 449 US 361, 66 L

Ed. 2d 564, 481 S. Ct 665 [1987]; All criminals shall have the same privileges of witnesses as their prosecutors, ~~but Amendment~~ Article

3, Section 2 U.S. Constitution - Individual Rights; The court granted

a writ of habeas corpus "because Petitioner was deprived of a substantial defense by the exclusion of testimony from a

witness for the defense." *Perensic v. Birkett*, 451 F. Supp. 2d 874 (E.D. Mich. 2006); Expungement may be appropriate when

the prisoner was improperly denied witnesses. *Hayes v. Thompson*, 637 F.2d 483, 493 (7th Cir. 1980) cert. denied; *Morgan v. Ellerthorpe*,

785 F. Supp. 295, 303 (D.R.I. 1992); Denial of right to call witnesses required expungement. *Torres v. Coughlin*, 166 H.D. 2d

793, 563 N.Y.S. 2d 152, 153 (N.Y. App. Div. 1990); expungement ordered. *Hayes v. Thompson*, 637 F.2d at 493.

Expungement was proper where inmate had already served part of sentence. *Kenny v. Commissioner of Corrections*, 393 Mass. 28,

468 N.E. 2d 616, 621 (Mass. 1984); (a magistrate judge has the authority to expunge). *United States v. Vasquez*, 74 F. Supp.

2d 964 (S.D. Cal. 1999); "Gross Abuse" of rights supports expungement. *Grant v. Le Fevre*, 135 Misc.2d 476, 515 N.Y.S.

2d 960 (N.Y. Supp. 1987); Expungement proper where a new hearing would not be appropriate because of the passage of time.

Cunningham v. Le Fevre, 130 A.D. 2d 809, 514 N.Y.S. 2d 833

(N.Y. App. Div. 1987), Exemption of Felony charges.

Thompson v. The Dept. of The Treasury, Bureau of Alcohol, Tobacco, and Firearms, 557 F.Supp. 158 (D. Utah 1982).

The government's 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. Kapeliovich, 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. Buchannen, 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, 586-587 (8th cir. 2006), U.S. v. McFall, 558 F.3d 951, 958 (9th cir. 2009), U.S. v. Franklin-E1, 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 (3d cir. 2010); (Filed for habeas corpus petition pursuant to 28 U.S.C. § 2254. District Court granted ~~relief from~~ acquittal case). McDaniel v. Warden Cambridge Springs SCI 070617 FED3, 14-3485.

B. Importance of the Questions Presented

This case presents fundamental questions in the interpretation of this court's decisions in Olmstead v. United States, 277 U.S. 438, at 448 S. Ct. 564, at 572 L. Ed. 944.

The questions presented are of great public importance because they affect the operations of the public, including the prison systems in all 50 states, the District of Columbia, and hundreds of city and county jails. In view of the large amount of litigation over the protection of individual, and Constitutional rights, guidance on these questions are also of great importance to prisoners, because it affects their ability to receive fair decisions in court proceedings that may result in months or years of adverse or delayed action on the merits of the questions presented.

The importance of these issues are enhanced by the fact that the lower courts in this case have seriously misinterpreted the Constitutional merits of the Petitioner's case, particularly when dealing with the questions of (1) 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? and (2) whether trial court deprived Petitioner of his 6th Amendment Constitutional Right to trial counsel, when trial court refused to appoint new counsel for Petitioner and forced Petitioner to choose either (1) Self-Representation or (2) accept deficient-performing trial counsel as representation, before proceeding to jury trial?

In Jones v. Walker, 496 F.3d 1216 (CA 11, 2007) p. 1228 the habeas court reversed a lower court's decision and issued the Petitioner's writ for \$2254 habeas corpus relief, finding that the court erred when it told the Petitioner he had two options (1) he could have [Ms. Saari] or (2) he could "represent [him]self." "[If Petitioner]... convinces the court by a preponderance of the evidence that he either had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ." Pazden v. Mauder, 424 F.3d 303 (CA 3 2005), where a court "compels one charged with a grievous crime to undergo a trial with the assistance of an

attorney with whom he has become embroiled in an irreconcilable conflict [1] deprives him of the effective assistance of any counsel whatsoever." Daniels v. Woodford, 428 F.3d 1181 (CA9 2005).

This Court held in Hahn v. United States, 524 U.S. 236, 248 (1998) it has jurisdiction under § 1254 (1) to review denials of Applications for Certificates of Appealability by a circuit judge or a Court of Appeals Panel. Certificate Application is a "case in" the Court of Appeals under 1254 (1) because the word "case," as used in the statute, means a court proceeding, suit, or action. Blyew v. United States, 13 Wall. 581, 595, the dispute here is a proceeding seeking relief for an immediate and redress injury, i.e., wrongful detention, in violation of the constitution, and there is adversity as well as the other requisite,

524 U.S. 237

qualities of a "case."

Conflicts With Decisions of Other Courts

The Prior decisions of the lower courts clearly show that the State of North Dakota no longer has its appellate court system. In fact, the Petitioner's case is a perfect example of what happens in the North Dakota judicial system when the normal practice of law is conveyor belt justice. Through out the entire litigation of Petitioner's case, the lower courts have continuously shown that they were not going to address and resolve the merits of these constitutional issues.

At every level of the litigation process Petitioner raised and briefed the constitutional issues presented herein and provided

evidentiary support to these constitutional issues which would help aid the lower courts in making factual determinations and once those factual determinations were had, rendering a judgment favorable to Petitioner.

However, despite having received evidence supporting a favorable judgment to Petitioner, the lower courts have refused to follow established legal precedent and have rendered decisions that conflict with the decisions of other courts, including this court, regarding the questions presented.

Importance Of The Questions Presented

The importance of the questions presented are of Land Mark case proportions that (1) challenge the constitutionality of Petitioner's current detention, and (2) will set a new legal precedent for other cases where a conviction was obtained in violation of the laws and of the U.S. Constitution.

It is to this court that Petitioner (and every U.S. citizen) looks to for proper guidance on having these constitutional issues (and their merits) resolved in the manner according to established legal precedent and federal law. This court's decision will heavily impact the Publics, The Private Sectors, and the individuals faith in the protection of their Constitutional rights and in the fairness and integrity of its Judicial System.

Conclusion

Because of the ongoing travesty of justice that has occurred, Petitioner prays this court accept his case and upon a just finding of the facts (1) grant certiorari, (2) order Petitioner's immediate and speedy release from unconstitutional custody,

(3) order judgments of acquittal on counts, (4) order petitioner's prison file and convictions expunged and (5) any other relief for petitioner that this court finds necessary.

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INVESTMENT OF THE COURT

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Respectfully Submitted, 2018.1.25 July, 25, 2018

Damon J. White Bird Solgado #39544

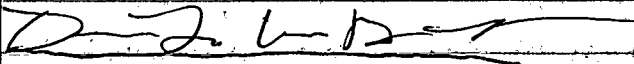
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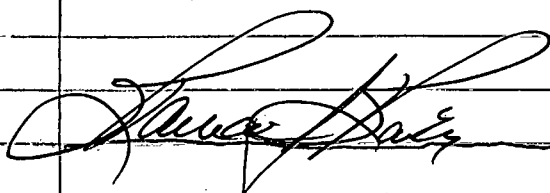
P.O. Box 5521

Bismarck, ND 58506-5521

Seal:



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7/25/2018

BARBARA J. BAILEY
Notary Public
State of North Dakota
My Commission Expires June 19, 2020

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