IN THE UNITED STATES SUPREME COURT

WASHINGTON D.C.

PETITION FOR A WRIT OF CERTIORARI

FROM THE NINTH CIRCUIT

USCA 17-35518

UNITED STATES DISRTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT TACOMA

Coxe v. Glebe, 3:16-cv-05450-BHS

Terry Alfred Coxe, DOC # 328971

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PRO SE REPRESENTATION

(I) THE QUESTIONS PRESENTED FOR REVIEW

(a)
WHETHER THE LOWER COURTS RULINGS' DIRECTLY CONFLICT WITH THE HOLDINGS IN (1) McQUIGGIN V. PERKINS; (2) CRONIC V. UNITED STATES, AND (3) CUYLER V. SULLIVAN IN THAT THE COURTS HAVE TIME BARRED A CLAIM OF INTERNTIONAL COUNSEL ABANDONMENT, WITHOUT A RULING ON THE MERITS, ON THE SOLE GROUND THAT THIS PRO SE LITIGANT DISCOVERED THE BASIS OF THE ISSUE TOO LATE TO AVAIL HIMSELF BY HABEAS CORPUS?

(b)
WHETHER THE SIXTH AMENDMENT'S MANDATE FOR "ASSISTANCE" BY COUNSEL "FOR THE DEFENCE" OF THE ACCUSED SPEAKS TO THE COURT'S JURISDICTION TO ENTER A VALID JUDGMENT, AND WHETHER SUCH "ASSISTANCE" IS SUFFICIENTLY FUNDAMENTAL AND ESSENTIAL TO SECURING A FAIR TRIAL, THAT A SIGNIFICANT DEPRIVATION OF THIS RIGHT WOULD CONSTITUTE A UNIQUE TYPE OF HABEAS CLAIM EXEMPT FROM THE AEDPA's STATUTE OF LIMITATIONS?

(c)
WHETHER THE AEDPA's TIME LIMITATION DISPROPORTIONATELY AFFECTS A PROTECTED CLASS OF INMATES UNABLE TO HIRE POST CONVICTION COUNSEL, AND WHETHER ENFORCING THE LIMITATIONS UPON THE UNDEREDUCATED PRO SE LITIGANT BECAUSE OF HIS COGNITIVE RESTRICTIONS CONSTITUES AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS?

(d)
WHETHER MR. COXE IS ENTITLED TO EQUITABLE TOLLING ON THE GROUNDS OF HIS DILIGENT EFFORTS TO ESTABLISH HIS INNOCENCE WITHOUT ACCESS TO THE DISCOVERY, AND AFTER HAVING BEEN DEFRAUDED FOR HIS LIFE SAVINGS BY A LAWYER WORKING IN COLLUSION WITH AN OVER-ZEALOUS PROSECUTOR?

(2) A List of All Parties to the Proceedings

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(6) A CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

Mr. Coxe State prisoner, filed this Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in the Western District of Washington, at Tacoma. Coxe v. Glebe, 3:16-cv-05450-BHS. (DK 3). The petition was docketed on 06-08-2016. (Id.) The Magistrate Judge recommended dismissal of the petition on 3-23-2017. (DK 24). The district court adopted the Magistrate's recommendation, over objections, on 5-23-2017. (DK 26).

On 6-22-2017 Mr. Coxe timely notified the district court of his intentions to take an appeal to the Ninth Circuit, and filed a motion for Certificate of Appealability. (DK 28). The Ninth Circuit assigned the following number to the appeal: USCA 17-35518. (DK 29). On 11-07-2017, the Ninth Circuit declined to issue the COA. (DK 30).

Mr. Coxe petitioned this Court for a writ of certiorari, which he deposited in the institution's mail box before February 5, 2018, but the Court returned the petition to Mr. Coxe requesting compliance with court rules by April 14, 2018. Those changes being made, the Petition for Certiorari having now been refiled, it is timely before this Court.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 ("The courts of appeals...shall have jurisdiction of appeals from all final decisions of the district courts of the United States..."); and, 28 U.S. Code § 2253 (c)(1) only if a COA issues. However, this Court has original jurisdiction under Article III of the Constitution, Section 2d. See, Martin v. Hunter's Lessee, 14 U.S. 1 Wheat. 304, 328 (1816) ("The judicial power shall extend to all cases in law or equity, arising under this Constitution, the laws of the United States...between a State or the citizens thereof...in all cases...in which a State shall be a party, the Supreme Court shall have original jurisdiction."). Page 14 U. S. 328.

(7) THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The Right To Counsel Is Fundamental And Essential To A Fair Trial

The right of an indigent defendant to have the assistance of counsel is a fundamental right essential to a fair trial, and therefore applicable to the States by reason of the Fourteenth Amendment. Gideon v. Wainwright, 372 U. 335 (1963); Custis v. United States, 511 U.S. 485 (1994) ("There is thus a historical basis in our jurisprudence of collateral attacks for treating the right to have counsel appointed as unique, perhaps because of our oftstated view that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."). Cronic v. United States, 466 U.S. 648 (1984)("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.).

The right to counsel is guaranteed at suppression hearings. See, United States v. Hamilton, 391 F.3d 1066 (9th Cir. 2004)("It is quite clear that a pretrial motion to suppress evidence is a critical stage of the prosecution requiring the presence of counsel for the accused."); Waller v. Georgia, 467 U.S. 39, 46-47 (1984)("Suppression hearings often are as important as the trial itself...in...many cases, the suppression hearing [is] the only trial, because the defendants thereafter plead guilty pursuant to a plea bargain.").

Criminal defendants have a constitutional right, implicit in the Sixth Amendment, to present a defense; this right is "a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). See also, Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'") "[A]n essential

component of procedural fairness is an opportunity to be heard." Crane, 476 U.S. at 690, citing In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948). Meaningful adversarial testing is required. See, Crane, 476 U.S. 690.

A criminal defendant's Sixth Amendment right to counsel also includes the right to be represented by an attorney with undivided loyalty. See, Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); In order to show a Sixth Amendment violation based on an alleged conflict, a habeas petitioner must show that an actual conflict of interest adversely affected the attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980); U.S. v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991)("A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, 'represents the defendant only through a tenuous and unacceptable legal fiction.'").

Holloway v. Arkansas, 435 U.S. 475, 489-90, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) ("... in a case of joint representation of conflicting interests, the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but...it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client...an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.").

The Constitution "mandates that the State bear the risk of constitutionally deficient assistance of counsel." Kimmelman v. Morrison, 477 U.S. 365, 379, 106 S.Ct. 2574, 91 L.Ed.2d

305 (1986). The Court bears an affirmative duty under the Sixth Amendment to protect the right to counsel. See, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) ("The trial court should protect the right of an accused to have the assistance of counsel.").

(7)(b) The Counsel Mandate Is Jurisdictional In Nature

Writing for the Court, in Johnson v. Zerbst, 304 U.S. 458, 468 (1938), MR. JUSTICE BLACK understood the Sixth Amendment's counsel mandate to be jurisdictional:

> "If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States -- to 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." Id. at 468.

Jurisdictional claims can never be waived or forfeited. United States v. Cotton, 535 U.S. 625 (2002) ("Bain's elastic concept of jurisdiction is not what the term "jurisdiction" means today, i. e., "the courts' statutory or constitutional power to adjudicate the case." This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); Cf. Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981) (double jeopardy claim not waived even though it had not been raised until federal habeas corpus proceedings were filed at the conclusion of all appeals); Menna v. New York, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975) (double jeopardy claim upheld where defendant asserted claim after pleading guilty to the second charge); Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974) (no waiver of double jeopardy claim where claim was asserted by petition for habeas corpus after defendant pleaded guilty to the second charges).

Importantly, the AEDPA's time limitations do not create a jurisdictional barrier, "an inflexible rule requiring dismissal" whenever its "clock has run." Day v. McDonough, 547 U.S.

198, 205 (2006). Neither can the privilege of the Writ be suspended:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Cont. Art 1, Sec 9.

The Court in Bousley v. United States, 523 U.S. 614, 620 (1998), noted "one of the two principle functions of habeas corpus was to assure that no man has been incarcerated under a procedure which creates an impermissible large risk that the innocent will be convicted."

(7)(c) A Constructive Denial Of Counsel Is A Structural Error Claim

A constructive denial of the right to counsel has been determined to be "structural error" under Arizona v. Fulminante, 499 U.S. 279 (1991), not subject to harmless error analysis. Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993); Strickland v. Washington, 466 U.S. 668, 692 (1984)("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); Cronic, supra, 466 U.S. at 653-55 ("if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable").

Under common law standards, Mr. Coxe can establish the prejudice necessary to overcome procedural default if the error of which he complains "infect[ed] his entire trial with error of constitutional dimensions." Murray v. Carrier, 477 U.S. 478, 494 (1986). Indeed, implicit in the recognition that the counsel mandate is fundamental and essential to a fair trial, is that a deprivation of that right would unequivocally be a structural error that "affects the framework in which the trial proceeds." Fulminante, supra, 499 U.S. at 310; Neder v. U. S., 527 U.S. 1 (1999)("A limited class of fundamental constitutional errors is so intrinsically harmful as to require automatic reversal without regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair.").

When a habeas petitioner demonstrates a "structural defect[] in the constitution of the trial mechanism," such as denial of a right to counsel, the court is required to reverse without regard to the evidence in the particular case. Sullivan v. Louisiana, 508 U. S. 275, 282 (1993)("structural defects" in state trial not subject to harmless error analysis upon habeas review."); Rose v. Clark, 478 U.S. 570, 577 (1986)("complete denial of right to counsel among constitutional errors that require reversal on habeas review without regard to the evidence in the particular case.").

(7)(d) The Sixth Amendment's Right To Counsel Of Choice Clause

The Sixth Amendment violation is not subject to harmless-error analysis. See, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) ("Erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' " Sullivan, supra, 508 U. S. at 282. It "def[ies] analysis by 'harmless error' standards" because it "affec[ts] the framework within which the trial proceeds" and is not "simply an error in the trial process itself." Fulminante, supra, 499 U. S. at 309–310. Different attorneys will pursue different strategies with regard to myriad trial matters, and the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides to go to trial. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.").

(7)(e) The State's Knowing Use Of Perjured Testimony By The Lead Detective

"A state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected." See, Giglio v. United States,

405 U.S. 150, 154 (1972); Mooney v. Holohan, 294 U.S. 103, 112 (1935)("A conviction obtained through deliberate deception of court and jury...is...inconsistent with the rudimentary demands of justice."). A conviction will be reversed if three conditions are met: (1) the testimony was false, (2) the state knew it was false, and (3) the testimony was material and could have affected the judgment of the jury. United States v. Agurs, 427 U.S. 97, 103 (1976).

(7)(f) The Sixth Amendment's Confrontation Clause

The Sixth Amendment's confrontation clause provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." Likewise, Washington State's Const. Art. 1, 22 (amend. 10) provides: "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ."

The Supreme Court in, OHIO v. ROBERTS, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), held that "[1] The general approach employed by the Supreme Court to test hearsay admissions against confrontation rights requires: (1) Either the production of the out-of-court declarant or a demonstration of unavailability, and (2) assurances of reliability of the statement. ROBERTS, at 66. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." ROBERTS, at 66.

Hearsay statements of child victims of sexual abuse are conditionally admissible in Washington State criminal trials under RCW 9A.44.120, which reads in relevant part:

> "A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act." (Id.),

The requirements for admission under RCW 9A.44.120 comport with the general approach utilized to test hearsay against confrontation guaranties. The statute requires a preliminary determination "that the time, content, and circumstances of the statement provide sufficient indicia of reliability . . ."

A child witness's lack of memory can support unavailability. STATE v. RYAN, 103 Wn.2d 165 (1984)("Unavailability means that the proponent is not presently able to obtain a confrontable witness' testimony. It is usually based on the physical absence of the witness, but may also arise when the witness has asserted a privilege, refuses to testify, or claims a lack of memory. SEE ER 804(a); 5A K. Tegland, Wash. Prac., EVIDENCE 393 (2d ed. 1982)).

The Court in State v. Parris, 98 Wn.2d 140 (1982), considers five factors in determining the reliability of a child's out-of-court hearsay statements: (1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statement; (4) whether the statements were made spontaneously, and (5) the timing of the declaration and the relationship between the declarant and the witness.

(7)(g) The Actual Innocence Gateway

This Court in McQuiggin v. Perkins, 569 U.S. ___, 133 S.Ct. 1924, 1936 (2013), held "that untimeliness, although not an unyielding ground for dismissal of a petition, does bear on

the credibility of evidence proffered to show actual innocence." The Perkins Court also "stress[ed] once again that the Schlup standard is demanding. The gateway should open only when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error."). Perkins, supra, 133 S.Ct. at 1936.

(8) A CONCISE STATEMENT OF MATERIAL FACTS

(a) State Court Proceedings

In May of 2006, Terry Coxe (DOB 06-04-45) was accused of bad touching his step granddaughter ("BK") (DOB: 04-25-98), in the same week as the child's safe touch class in school. (RP 3-17-09, 163)(DK 3, #2). He vehemently denied the touch occurred. (Appendix V a, 46-48). Mr. Coxe was not prosecuted for two years until May of 2008, after BK turned ten years old. In the interim, BK accused Jimmy Loucks of similarly bad touching her on October 19th 2007, under identical conditions as that of her accusations against Grandpa. He was convicted after a jury trial in January of 2008. (State v. Loucks, Lewis County Superior Court 07-1-00742-8; COA No. 37582-6-II; filed, 04-10-08).

Detective Matthew Wallace appeared at the Coxe residence on July 5, 2006, requesting to talk to him "privately" and away from his wife "regarding an investigation." (Appendix V c, 46-48)(DK 3, #2). After he was separated from his wife and escorted from his property to the inside of the officer's car, he was interrogated for 45 minutes without a tape recorder, and without Miranda warnings. (Id.) The officer also accused him of "raping" BK's mother, Eden Kelly, in the same small house he shares with his wife Myrna, three children and one house guest. (Id.)

At the end of a grueling 45 minute interrogation Wallace did not ask for a signed confession, he required a taped summary of information from that dialog, which took only 13 minutes to complete. (Appendix V c)(DK 3, #2). Wallace had the recorder with him the whole time. He demanded a follow-up polygraph test "to clear his name," which was conducted on July 11, 2006. (Id.) Wallace did not ask for a polygraph test "to support his confession", it was to confirm his denials. (Id.)

No Miranda warnings were given before the polygraph test, nor during either of the interrogations. Before conducting the second interview, Wallace convinced Mr. Coxe that he had failed the polygraph test and further interrogation was necessary, not to support his confession but his denials. The State has refused to produce that test result upon requests for public disclosures.

In May of 2008, Mr. Coxe hired Attorney Dana Williams of Chehalis, Washington to represent him for the trial and paid him $36,000. (DK 3, #2)(Appendix V a, 4). Mr. Williams raised a defense at trial that conflicted with the defense his client wanted to raise, and he deceived his client as to the actual defense he did raise at trial. (Appendix V a, 15) Counsel refused to allow his client to testify at the suppression hearing, and again at the trial. (Appendix V a, 13, 32). Counsel did not inquire of his client regarding the meaning of his statements to police, nor regarding the circumstances surrounding those statements. (Appendix V a, 9,11,28).

This demonstrates counsel was representing his client under the influence of legal error, or representing conflicting interests early during the investigative stage of the proceedings. There is no third possibility available in reason, as counsel's legal error is clearly

demonstrable. Had counsel sought a basis for suppression, he would have learned Mr. Coxe, "specifically did not feel free to go nor to resist [police] questions." (Appendix V a, 9, 11).

Look, instead of investigating the basis for suppression, Williams developed a "legal" defense to the charge, which was fundamentally tethered to a legal error. Counsel with his legal defense pretended to be unaware of the application of the laws of inferences to this fact scenario, and pretended to be unaware of the court's jury instruction on circumstantial evidence. The very structure of counsel's defense and his cross examinations falsely conceded that the touch did occur, but he argued incorrectly that this minor touch was not an illegal touch under state statutory and case law.

At the beginning of his closing comments, Mr. Williams argued as follows:

> "All [Detective Wallace] was doing was fishing for...basically an admission or a confession. And he didn't really get that because four different times we're shown that my client said he didn't do it. What he said was, "I touched her but I didn't do it for that purpose...the touching's not a crime." (RP 3-18-09, 235)(Appendix V f).

But counsel had prepared no evidentiary basis to overcome the inference of sexual gratification. It's horrifying what this attorney did to Mr. Coxe. This admission is essentially a plea of guilty.

Counsel systematically rejected each of Mr. Coxe's avenues of defense, failed to investigate them or raise them as "unnecessary" to his legal defense. At the combined CrR 3.5 suppression and child hearsay hearing, counsel withdrew the suppression motion at the end of the hearing, and provided incomprehensible reasoning for this "about-face" in defense action:

> "I suppose that if there were an admission, which there have not been, we would have some problem with the statements made to the officer coming in, and there is no admission of any act of wrong doing whatsoever." And I would take the scope of the statements sought to be admitted by the State on Mr. Coxe as being basically he admits to being in the computer room with the child. He likewise admits that he may have touched her, and it was done in play, but he doesn't admit to – he may have even touched her under her clothes, but it was inadvertent with no sexual motivation...So I

don't think we have an objection to those statements coming in. Any objection would not go to their admissibility any way. It would go to the weight to be given them, and that's the way I would read that one." (RP 9-30-08, 77-78)(DK 3, #2).

Here counsel withdraws the motion pretending to be unaware that he could principally continue with the present challenge at today's hearing, and challenge the weight alternatively at trial if necessary. Counsel also pretends to misapprehend the incriminating nature of these statements, but his assessment stretches credulity too thin. Counsel literally gifted the State with a conviction and relieved It of Its burden of proof.

This Court has recognized generally that criminal defendants are entitled to expect that their counsel understand applicable constitutional law. See, e.g., Connick v. Thompson, 563 U.S. 51, 131 S.Ct. 1350 (2011). It follows that failure to pursue meritorious claims and defenses, owing not to strategic considerations, but to a misapprehension of controlling law or relevant facts generally, will be found deficient. See e.g., Morrison, supra, 477 U.S. at 385.

Counsel also withheld arguments under the Confrontation Clause regarding BK's hearsay statements to Ms. Kelly and the school counselor, Sharon Hedlund. BK testified at the Loucks trial on 12-14-07, that when she reported that bad touch to Ms. Hedlund, she "knew she would report it to the police," (Appendix V e), making her statements likely testimonial under Dutton v. Evans, 400 U.S. 74 (1970). And in this case, because BK could not remember in its entirety the alleged basis of Count One, and 17 other details concerning Count Two, she was "unavailable" as a witness for confrontation purposes. (RP 03-30-08, 27-32). Moreover, her only recorded statement to police contains 64 "inaudible answers." (Appendix V p).

Consequently, the State could not get her statements admitted under RCW 9A.44.120(2)(b), at least concerning Count One, unless the "act" was (1) corroborated with the

defendant's alleged confession to Wallace; (2) that confession was admissible; and, (3) Mr. Williams fails to prove a "motive to lie" under Parris, supra, 98 Wn.2d at 140. Predictably, counsel failed to a raise the confrontation issue--his ineptness on full display as he confused BK's "faulty memory", which is a witness unavailability issue under Ryan, supra, 103 Wn.2d at 165; and, ER 804(a), with "inconsistent" statements, a credibility issue under ER 801(d)(1)(i):

> "...the statements of the child aren't consistent with anything. I guess she knows—she doesn't remember, doesn't know 25 times, but she does remember the times (sic) up in the computer room. (RP 09-30-08, 76-78)(DK 3, #2).

Watch, counsel had already drawn the Court's attention to discovery page 134, where he perjured himself by eliciting testimony from Wallace that Mr. Coxe allegedly had admitted to a "bare skin touch" and that he touched BK while "tickling" before asking this question:

> "And the only time he admitted that he may have touched her would have been up in the computer room; isn't that right?" (RP 09-30-08, 44-46).

This was counsel's opening line of questioning at the suppression hearing! It was designed to assist the prosecutor in his quest to have the hearsay admitted! It provides the necessary corroboration of the "act" required by RCW 9A.44.120(2)(b). But this alleged statement cannot be found in the transcript of Mr. Coxe's statements to police. (Appendix V d).

Mr. Coxe does not have a higher education, and had never before May of 2006, experienced any type of encounter with police, nor with the civil/criminal justice system. He expressed concerns that, 1) he would lose his job; 2) go to jail; and, 3) was worried about Media reports. Id. He was shaking in his boots and absolutely felt compelled to answer questions "to clear his name."

At the beginning of the taped summary, Mr. Coxe was overwhelmed when Wallace asked Mr. Coxe to "describe to me what kind of contact you have had with BK?" To which

Grandpa replied, "Yeah, I rub her on her tummies, and uh, on - on her back, um while she's sitting on my lap." (Appendix V d). He explained that this same incident was a singular "tickling" incident on the couch involving BK and her younger brother, Alex. (Id.) The "rubbing" accusation first appears in the discovery in Ms. Kelly's statements as hearsay from BK (Appendix V g), and was used interchangeably by the officer during his interrogations.

His grandkids were crawling all over him, and he conceded during uncounseled interrogations without even a whisper of Miranda warnings that,

> "I've never touched her bottom, especially underneath her clothes. Now I have touched her bottom accidentally during wrestling/tickling each other...**uh no**, I don't remember ever doing that in the green chair, and if it was in the green chair, her mother was around [in the living room], her grandmother was around, other people were around. It's not like we're the only people in the [crowded] house." (Appendix V d, 122-23) (Emphasis goes to the perjury issue).

The very last comment Mr. Coxe made in response to interrogation, which occurs on page 134 of the discovery, also refers to this same, singular tickling incident:

> "Wallace: Okay, okay. Um can you think of any reason, why [BK] would say you had done that to her? Mr. Coxe: Her mother told her to say that? ...**You know** I touched her on her skin, on her belly, and her back--I've never touched her on her bottom and don't know why she'd even say that." (Appendix V d, 134)(Emphasis supplied to underscore the summary nature of the taped portion of the interview).

In response to interrogations, Mr. Coxe admitted to smoking marijuana with Ms. Kelly and to having had a sexual relationship with her. (Id.) He also admitted, that one time when hugging his granddaughter, BK's older sister Alissa that "maybe" his hand went a little too low:

> Wallace: "little lower than it should've...where you realize[d] that happened, and she instantly pulled away, and you realized, 'oh that was too far', is that correct? Mr. Coxe: that's correct?" (Appendix V d, 130).

Mr. Coxe also informed Wallace that Ms. Kelly has, "made these [types of] claims [before against] Alissa's father," (Appendix V d), and her biological father. (RP 03-17-09, 13).

Ms. Kelly's mother was to testify that "every time she gets turned down for something, somebody sexually abused her or somebody else. (Id. at 11). Counsel utilized none of these facts to defend Mr. Coxe at the suppression hearing nor at the trial.

Detective Lackey, whom conducted the interview of BK, was fired for a "pattern of dishonesty" relating to this child interview. (Appendix V h). A counselor connected to this case testified falsely concerning her qualifications. (Appendix V i). Mr. Williams refused to give Mr. Coxe a copy of the discovery, and destroyed it on about 07-04-2012. (Appendix V j). Superior Court rules disallow the production of discovery to the accused whom is represented by counsel. CrR 4.7E(1). Appellant Counsel, Ms. Backlund, misled Mr. Coxe about the strength of Mr. Williams' legal issue, abandoned him at the Supreme Court stage, and then also failed to give him a copy of the discovery while advising him he must proceed pro se. (Appendix V K, l). The prosecutor destroyed all taped interviews on 12-13-11, just two weeks after Mr. Coxe filed the first PrP, and during the litigation. (Appendix V m).

Ms. Kelly is accused of having a motive to prompt the child to lie. (RP 3-17-09, 12-13) She also had every opportunity to do so. She admitted the school had informed her about the safe touch class--had been questioning BK for "three" weeks believing something was wrong or someone had hurt her in school. (RP 3-17-09, 125, 127). "In the weeks prior to May '06," BK begun on a "more frequent basis" bed wetting and "thumb sucking", to which Ms. Kelly amazingly attributed to child molestation. (DK 3, #2)(RP 3-17-09, 124). She became "sassy" and "argumentative." (RP 3-17-09, 126). Ms. Hedlund testified that "regression usually happens with kids when something traumatic or upsetting has happened and they regress back to old safety kind of behaviors...like thumb sucking...bed wetting." (RP 3-17-09, 50-51).

Mr. Williams (1) failed to secure a defense expert to investigate Ms. Kelly's medical assessment; but did (2) object to her qualifications at trial; although, (3) he elicited from Ms. Kelly a list of non-testifying witnesses: "Well, we see Dr. Cooper, Dr. Elizaga...nurse practitioner Elena Walker...Dr. Hansen...We saw all of them." (RP 3-17-09, 156).

Mrs. Myrna Coxe testified that in April of '06 Ms. Kelly was given an ultimatum, "get a job, go to school, or find someplace else to live." (RP 3-17-09, 180). Then Ms. Kelly attempted to cause her mother to divorce Mr. Coxe by accusing him of "two scandals" (1) raping his daughter-in-law [herself]; and (2) having a consensual affair with her. (Appendix V, 18). One week after the safe touch class, BK accused her grandpa of the third scandal. (RP 3-17-09, 163). Mr. Williams utilized none of these circumstances at the child hearsay hearing.

In July of 2006, she took the kids to "Deana's" farm and were riding horses and mending fences, when BK informed Kelly that grandpa bad touched her. (RP 3-17-09, 129). Ms. Kelly had BK repeat the accusation to Deana and Jimmy Loucks, and was able to move out of grandpa's house and into Loucks', because of it. (RP 3-17-09, 134-35). Ms. Kelly testified at the Loucks trial as to how she had bribed BK to accuse her grandfather back in 2006:

> EDEN KELLY: "Yes. We were actually over at Deana's house. **We had gone horseback riding all day** and she told me that that evening before we were going -- before we were getting ready to go home. [Did she seem like she wanted to talk about it?] No. no. She said, "mom, I need to talk to you," and took me into the bathroom, and then was quiet. And I said, "well, honey, we're in here. What did you want to talk about?" And she just looked down at the floor and she started scaring me. And I just told her, you know, "you can tell me whatever you need to tell me, honey." And she said, "**well, I don't want to go home**." And I said, "Why not?" And she said, "Because of Grandpa." And I said, why because of Grandpa?" And she said, "well you know how Sharon's been teaching us about the bad touching?" And I said, "Yeah. She sent home a notice and Mommy had to sign it." And my heart fell in my stomach and she said, "Because Grandpa had bad touched." And I said, "Okay. Where and"----" (State v. Loucks, RP 1-7-08, 73-74)(Emphasis added)(DK 3, #8).

In May of 2008, while the Loucks case was pending direct review, Mr. Coxe was charged and subsequently found guilty of two counts of child molestation in the first degree after a jury trial on 30-18-09, three years after the original accusation. He was sentenced on 07-14-09, to a minimum term of 67 months and a maximum term of life on each count, to run consecutive. He appealed arguing ineffective assistance of counsel (IAC) and insufficiency of evidence. The Court rejected that claim on the merits, issuing the Mandate on 01-06-11.

He then filed a timely pro se personal restraint petition (PrP) on 11-30-11, without access to the discovery, arguing IAC for failure to call certain defense witnesses to the stand, believing counsel should have presented the jury the defense his client wanted to raise. The Court rejected that claim on the merits on 05-22-13. (DK 21, Ex 10). The second pro se PrP, filed on 07-17-13, also argued IAC and concerned trial error. (DK 21, Ex 14). The Court summarily dismissed the petition on 06-18-14, not as frivolous but a mixed petition. (DK 21, Ex 15).

A third pro se PrP was filed on 08-15-14, but this time an assisting inmate and Mr. Coxe advanced a claim of intentional counsel abandonment, in violation of Gideon, supra,, 372 U.S. at 335; Cronic, supra, 466 U.S. at 653-55 ("If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated."); and, Sullivan, supra, 446 U.S. at 348 ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."). The Petition sought access to the discovery, and was based on Mr. Coxe's affidavit and the records of proceedings. (DK 21, EX 17).

But the lower courts, in addition to (and before) establishing the structural defect, have required of Mr. Coxe tangible evidence of his actual innocence under the standards of

Perkins, supra, 113 S.Ct. at 1924 ("A credible claim of actual innocence constitutes an equitable exception to AEDPA's limitations period."). Mr. Coxe argues an intentional structural defect under Sullivan involving a violation of Gideon and Cronic is functionally the equivalent and has made a prima facie showing that trial counsel colluded with the prosecutor, sabotaged his trial defense, and elicited perjured testimony for the State -- all because he was conflicted and prejudiced against accused sex offenders.

On 02-19-15 and 01-02-16, the State appellate (46658-9-II) and supreme courts (91434-6), summarily dismissed the 3rd PrP as untimely under RCW 10.73090(1), without conducting a fact hearing, and refusing to grant pro se discovery requests while simultaneously faulting the PrP for not having already proven his innocence separately, or in addition to, the underlying perjury claim. ("He presents no independent evidence indicating that he may actually be innocent.") (DK 21, Ex 18, 20)(Appendix I, II).

After the Court denied the 3rd PrP, the State finally provided Mr. Coxe the redacted discovery in March of 2016, (the transcripts of Mr. Coxe's statements to police unequivocally proves, as originally alleged by the 3rd PrP (2014), Mr. Williams joined the State in eliciting perjured testimony from the lead detective regarding his client's statements to police because, inter alia, he did not intervene during cross-examination). (Appendix V d). The perjured testimony of the lead detective obviously affected the jury verdict and violated due process.

(8)(b) Federal Proceedings

Mr. Coxe then filed this petition (3:16-CV-05450-BHS-JRC) in federal court on 06-06-16, pursuant to 28 U.S.C. § 2254. (DK 3). Specifically, Mr. Coxe alleged that Mr. Williams had only masqueraded as defense counsel, pretending to be oblivious of (or immune to) the application

of the laws of inference to this fact scenario, and that knowledge of circumstantial evidence is too elementary to form a belief this was a good-faith misunderstanding.

The petition argued the constitutional mandate of "assistance" "for the defence" in a criminal trial, is a demanding standard which will not tolerate counsel's legal error of this magnitude, regardless of whether it was the product of intentional bad faith, as is alleged here, or whether by stunningly incompetent defense strategy. Cf. Hinton v. Alabama, 134 S. Ct. 1081, 571 US. __, 188 L. Ed. 2d 1 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.").

The Petition also argued that had appointed appellate counsel, Ms. Becklund, herself argued IAC with this underlying error, the case would have been reversed under Hinton's principles in 2010. Instead, she joined the ranks and adopted as her own Mr. Williams' legal error, which denied Mr. Coxe his right to counsel for direct review. (Her brief literally misquotes applicable case law, and builds an argument on the intended legal misunderstanding, deceitfully claiming that Mr. Williams should have argued the inference was impermissible in the case of "brief" bare skin touches.)(DK 21, EX 2, 10-11.).

The Attorney General's Response in the district court, merely pointed to the historical fact that counsel was present at hearings and trial, and had obviously participated by examining witnesses concerning his purposefully flawed defense theory. (DK 20, 8). The Response did not address Mr. Coxe's claim, which should now be "accepted as true" under 28 U.S.C. § 2248. (Id.). The AG also failed to support the State's Response with Mr. Williams' affidavit denying or affirming these serious accusations, suggesting an unwillingness or inability to do so.

Nevertheless, without conducting an evidence hearing required by Section 2254, and without ruling on the merits, the district court time-barred the claim under AEDPA, 28 U.S.C. S 2244(d)(1), and declined to issue a certificate of appealability on the question of whether a structural error claim supersedes the AEDPA's limitation in light of the decision in Tiffin v. Hartley, 2011 WL 2580344, at *3 (C.D. Cal. May 19, 2011), report adopted, 2011 WL 2565573 (C.D. Cal. June 28, 2011).

(9) A DIRECT, CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED UPON

(a) THE JURISDICTIONAL NATURE OF THE COUNSEL CLAUSE RENDERS THIS CLAIM EXEMPT FROM THE AEDPA's TIME LIMITATIONS

The concerns that the Zerbst Court faced in 1938 reoccur today if the district court's time bar of a structural defect claim is allowed to stand:

> "Petitioner, convicted and sentenced without the assistance of counsel, contends that he was ignorant of his right to counsel, and incapable of preserving his legal and constitutional rights during trial. Urging that -- after conviction -- he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both, and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was -- as a practical matter--impossible to obtain relief by appeal." Id 304 U. S. at 464.

The fact that Mr. Coxe was unable to discover the basis of this structural defect without anyone's assistance or experience with judicial process, without a college education or formal law school, without access to the discovery, and with 365 days of impossibly restricted access to a prison law library, (four hours per week), should not be the sole basis of the rejection of his federal claim without a ruling on the merits. That is unconstitutional and will absolutely destroy public confidence in the criminal process and the result of trials.

Think of it, defense counsel is accused by a pro se litigant of colluding with the

prosecutor and the lead detective to, inter alia, perjuriously misrepresent his client's statements to police to form a confession in order to obtain a conviction! That is unconscionable, if true, considering (1) the court officers accused of misconduct have not submitted affidavits defending their integrity; (2) neither has any attorney in these state or federal proceedings defended the actions of either court officer so accused; and, (3) there has been no ruling on the merits in state or federal court.

These circumstances suggest the pro se claims have merit and are adequately supported by the record. Notwithstanding this inference, the Magistrate Judge determined Mr. Coxe's claim is "insufficient to satisfy Schulp's exacting 'actual innocence' standard," (DK 24)(Appendix III), but did not identify the insufficiency. The District Court determined that the "prejudice" flowing from this particular structural error, "does not establish actual innocence," (DK 26)(Appendix IV), but did not clarify the distinction It found.

Mr. Coxe submits the state and federal courts below have misapplied the proviso issued by the Perkins majority regarding the actual innocence gateway:

> "The gateway should open **only** when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial **unless** the court is also satisfied that the trial was free of nonharmless constitutional error." Perkins, supra, 113 S.Ct. at 1936. (Emphasis supplied).

Mr. Coxe submits that a meritorious structural defect claim of the magnitude and type argued herein, should always open the gateway because if there has been "a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable" Strickland, supra, 466 U.S. at 654-55, and if "structural defects" in state trials are truly "not subject to harmless error analysis upon habeas review," Sullivan, supra, 508 U. S. at 282, then how can the lower courts ever truly be "satisfied that the trial was free of nonharmless constitutional error"

while also having "confidence in the outcome," Perkins, supra, 113 S.Ct. at 1936, if the Court is faced with a meritorious structural defect claim?

It appears the Perkins majority anticipated that the door would be opened with the presumption of prejudice flowing from a structural defect claim. As this Court also observed in Perkins, AEDPA does not seek to undermine basic habeas corpus principles:

> "AEDPA seeks to eliminate delays in the federal habeas review process. But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law . . . . When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights." Id., at ___ (slip op., at 16) (citations and internal quotation marks omitted). Perkins, supra, 113 S.Ct. at 1936, citing, Holland, infra, 130 S.Ct. at 2562.

Look, under the Schlup standard, "the District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." Schlup, supra, 513 U.S. at 331-32. This standard appears inapplicable in structural defect cases which defy harmless error standards. Cf. Sullivan, supra, 508 U. S. at 282 ("structural defects" in state trial not subject to harmless error analysis upon habeas review."); Clark, supra, 478 U.S. at 577 ("complete denial of right to counsel among constitutional errors that require reversal on habeas review without regard to the evidence in the particular case."); Cronic, supra, 466 U.S. at 653-55 ("if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."); Gonzalez-Lopez, supra, 548 U.S. at 140 ("deprivation of the right to counsel of choice is complete when defendant is erroneously prevented from being represented by the lawyer he wants.").

This Court's decision in Sullivan is instructive. There a distinction was made between

a trial error claim and a structural defect claim for the purposes of applying a nonharmless constitutional error review. The Court found "harmless error review looks...to the basis on which the jury actually rested its verdict," Sullivan, 508 U.S. at. 280, and then reasoned that,

> "Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. Sullivan, supra, 508 U.S. at 280.

The same is true in the case of intentional abandonment. There is no valid judgment for the district court to rest the denial on--the original trial judge lacking jurisdiction to enter judgment.

Apparently the lower courts completely avoid the Schlup analysis altogether by strangely claiming Mr. Coxe presents "no" evidence of innocence, or "no new" evidence of innocence. (DK 21-Ex 18 & 20; 24, 26). With this extraordinary finding the lower courts have determined Mr. Coxe's issue right out of existence, to the extent the Court no longer had a purpose to perform any inquiry under any standard at all. However, Mr. Coxe submitted with his petition a detailed Memorandum replete with citations to the record of original proceedings and the discovery relied upon. (DK 3). In addition, he filed a supporting Appendix in five parts (because of its size), and then a subsequent, supplemental appendix in three parts (because of its size). (DK 3).

This finding also fails to acknowledge that Mr. Coxe was until recently denied access to the discovery, a possible Brady issue, and that the withheld exculpatory material establishes counsel acted intentionally--he had the ability and material to correct the perjury but chose not to. This demonstrates a malicious, adverse effect on counsel's performance that requires a

presumption of prejudice under controlling standards.

The reason he was not charged until two years later, is because Wallace had woven into his original report a personal belief that Mr. Coxe did not make a confession, and that he failed to give Miranda warnings. (Appendix V c). His report from 2006 differs substantively from his testimony at the suppression hearing in 2008, and again, that testimony differs substantively from his trial testimony in March of 2009. In closing the State argued as follows:

> MR. HAYES: "Now all the evidence we've heard in this case supports what Breanna's told us. Let's talk about what the defendant admitted himself...He admitted that yeah, there was one time when I was up in the computer room with Breanna, she was laying in my lap, I was rubbing her back and her stomach. Other parts of the conversation he said, yeah, I was rubbing underneath the shirt. He even said yeah, what I did was inappropriate." (RP 3-18-09, 97).

This is an outright lie and the record submitted in the district court will bear that out! Mr. Coxe talked of only two incidents in his statements to police--the computer room incident and the "tickling" incident on the couch. (Appendix V d). He did admit to a third incident with BK's 15-year-old sister Alyssa. (Id). BK talked of two incidents as well--the computer room and the green chair, (but her recorded statement contains 64 "inaudible" answers!). (Appendix V o). Wallace, Hayes and Williams each twisted Mr. Coxe's statements from their proper context, and heaped them all into the computer room in order to form that closing statement.

Wallace testified at the 3.5 hearing that Mr. Coxe denied doing anything in the green chair, (RP 9-30-08, 40), but admitted that he "may" have accidentally touched BK during "play, wrestling, tickling." (RP 9-30-09, 35-36). But at trial, he testified that "the back rubs, belly rubs were on bare skin" and that, "giving a belly rub one time he thought that it was inappropriate and so he ended that and then stopped doing that activity with her." (RP 3-17-09, 92-94). The tickling has been replaced with back and stomach rubs, for which BK

did not even allege. And the "inappropriateness" concerned Alyssa not BK. (Appendix V d).

Finally, Wallace testified at trial (1) that the "tummy rubs" occurred while BK was sitting on his lap in the computer room, and (2) that he admitted she sat in his lap in the green chair also. (RP 03-17-09, 167-68). These are outright lies provable with the transcript of the taped interview. (Appendix V d). The fact that Mr. Williams did not cross-examine Wallace with the actual transcript, combined with the fact that he refused to allow his client to testify proves he acted intentionally in permitting the perjury. His client's testimony was the only way to prove the touch, if it occurred, was innocuous. But counsel's questioning of Wallace intentionally admits guilt on behalf of his client:

> "And, in fact, there has been no item of physical evidence discovered by you in your investigation to indicate that there was anything that happened beyond a hand being put on someone's buttocks." (RP 3-17-09, 202).

Mr. Williams' alleged "legal defense", he claims, rendered all other avenues of defense pointless. But because of his legal error, the alleged conduct counsel's argument admits is actually a crime "without" more misconduct. Counsel is fundamentally incorrect. Washington case law is very clear regarding the elementary laws of inferences:

> "Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification," although we require additional proof of sexual purpose when clothes cover the intimate part touched." State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992).

Notwithstanding the clarity of this decade-old ruling, Mr. Williams argued no inference of sexual gratification could legally attain from a "bare skin" touch alone, while appellate counsel argued Mr. Williams should have argued "No inference flows from a "brief bare skin touch." (DK 21, Ex2, 10-11) Whether he intended to cause his client harm or not, he did

craft his entire defense under the influence of legal error--all his trial decisions and tactics.

For instance, under the circumstances of this case, counsel had a meritorious, constitutional suppression claim under, State v. Moreno, 21 Wn.App. 430, 434 (1978) ("Officer cannot proceed with specific questions designed to elicit incriminating statements without being adjudged to have made formal arrest"), but deemed it "unnecessary" to his legal defense. (Appendix V a, 11). No reasonable defense attorney would bet the entire farm on the legal issue without investigating the basis for suppression (when admittedly Miranda warnings were not given), because he may spare his client the trial.

But this lawyer was like a superman lawyer with his legal defense, nothing could hurt his client, so he willingly allowed this type of incriminating evidence to pour into the trial by withdrawing the defense motion to suppress. This Court has determined "A defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." Fulminante, supra, 499 U.S. at 296. But counsel is shown here to be a complete fraud as he failed to investigate the basis of the motion before he withdrew the motion, which suggests the filing of the motion was done to appease his client and defraud him for $36,000.

He would later argue a motion in limine to exclude these statements from the trial for their "prejudicial effect." (RP 3-17-09, 15-16). Why would counsel allow them to come into the trial in the first place, if he understood them to be prejudicial statements? When did counsel understand them to be prejudicial? Before or after he withdrew the motion? It's a problem either way. The Court knew they were prejudicial and readily took advantage of them to defeat counsel's fake motion for a directed verdict:

> "And again, taking all the evidence in the light most favorable to the State, there's testimony that indicated he had a problem with Sexual addiction, he indicated -- he

> acknowledged that some of his touching was inappropriate, he acknowledged that it could have happened and that he just -- but he just blacked out -- or blocked that out. So there is ample evidence here to get past this stage and to take it to the jury. The arguments ... the defense makes are appropriate for closing argument and can be brought up there. So the motion is denied. (RP 3-18-09, 173-174).

There is more misconduct occurring here than what meets the eye, as Mr. Williams is working hand-in-glove with the prosecutor. The State argued at the child hearsay hearing to admit statements BK made to Ms. Kelly and Ms. Hedlund that the defendant's statements corroborates the accusations BK made at age seven. (RP 9-30-08, 79). Mr. Williams (1) forgoes his confrontation argument; (2) withdrew the motion that raised the Miranda violation; (3) refused to raise the issue of Ms. Kelly "having a motive to prompt the child to lie"; and, (4) outright commits perjury. This facilitated the admission of the hearsay statements otherwise not admissible without the corroboration required by RCW 9A.44.120.

In closing counsel was unable to explain his client's alleged statements away, after having disallowed his client to testify, which makes no sense. Having his client testify was the best evidence with which to challenge the weight the State was attributing to the statements, and to deny the touch even occurred. In his affidavit submitted below, Mr. Coxe stated under oath that Mr. Williams claimed his testimony was not necessary because the State had not proven its case, "nothing more than a bare skin touch." (Appendix V a, 35).

Why did Williams promise at the suppression hearing an "objection" to the "weight" of those statements, if he did not intend to challenge the weight? It makes no sense and is wholly unreasonable from a defense prospect, unless counsel is faking his legal blunder and his verbal arguments before the Court are designed to appease his client.

Counsel only pretended to establish a motive for the mother to "prompt the child to

lie" at trial, but he did not do so argue under Parris, supra, at the child hearsay hearing:

> MR. WILLIAMS: "The motive is one of a get even motive by the mother against the stepfather because basically the bottom line here is that the granddaughter and the daughter were living in the home and Eden Kelly was asked to basically get a job or leave...Myrna Coxe (Petitioner's wife) would testify that this isn't anything new for Eden Kelly. Every time she gets turned down for something, somebody sexually abused her or somebody else. So she would be asked to testify about that." (RP 3-17-09, 12-13).

The Court reasoned with counsel whom changed his course midstride, changing the defense strategy and admitting he failed to investigate the claim and was not prepared for trial. (RP 3-17-09, 5-16). Previously counsel sought to postpone the 3.5 hearing for unpreparedness:

> "my time's been spent with real property, forfeitures. Unfortunately, I have four such cases going on because there's no bail out for people who's mortgages are being foreclosed on [Mr. Coxe is on bail during this time frame] and so I have had to spend time I should have spent on [Mr. Coxe's] brief dealing with that." (RP 9-25-08, 3-4).

This demonstrates the conflict from the record, duel representation of a kind, a preference for greed, and prejudices for accused sex offenders on bail. Counsel's confession also establishes the adverse effect in that counsel admits that he failed to study the legal issues in the case.

During the motion in limine, counsel also admitted that he had failed to investigate Ms. Kelly's multiple accusations of sexual misconduct and was unprepared to establish by extrinsic evidence the basis of this defense advanced by his client. (RP 3-17-09, 13-14).

Twice Mr. Williams attempted to waive Mr. Coxe's right to a jury trial advancing as a reason that Mr. Coxe had a "legal defense" to the charges and was concerned that the jury would disregard the law and infer guilt from the circumstances. (RP 1-16-09, 2-8)(RP 3-9-09, 2-4). This readily exposed counsel as a fraud during the trial when he pretended to be unaware of the laws of inference. It's all in then record! Mr. Williams argued two motions for a directed verdict when the parties each rested their cases, which concedes his client's guilt:

"My motion is to dismiss both counts. No. Statements were made as we understand the evidence, nothing more than putting the hand underneath allegedly the pants occurred...where do you find any evidence of sexual gratification...a quantum leap to infer it?" (RP 3-18-09, 31).

****

"There is no evidence there was any arousal ...stimulation...erection...forcible compulsion or otherwise up the ante that would lead one to infer...no evidence by anybody of any sexual arousal." (RP 3-18-09, 71).

The State ridiculed the defense theory with its response to these motions:

"These were not accidental touching here. It happened in the same manner three times. There is no need to be putting your hand down the back of the pants of a seven-year-old on bare skin. That just doesn't happen by accident, let alone three time...These were all done on purpose. And one can infer based on the circumstances why that was being done. There's no other reason to be doing that." (RP 3-18-09, 37).

Nowhere does Mr. Williams actually define his argument with greater specificity than this here, which was simply a question presented, "where do you find the evidence, an inference?"

He could not possibly have a good-faith belief in his own theory of defense, otherwise he follows proper procedure, sparing the trial. Cf. State v. Knapstad, 107 Wash.2d 346 (1986)("establishing a procedure under which a criminal defendant can, by way of pre-trial motion, challenge the sufficiency of the prosecution's evidence"). By arguing his legal theory verbally at trial where the evidence standard was prima facie, verses Knapstad and beyond a reasonable doubt standard, Mr. Williams obviously was avoiding the difficult task of articulating in a written brief a reply to the State's response and a legal objection to jury instruction #3:

"Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience..." (DK 3, #2)(RP 03-18-09, 208).

This instruction blows apart counsel's frivolous argument and grinds it to useless dust. Without question the adversarial process "lost its character as a confrontation between adversaries" and "the constitutional guarantee was violated." Cronic, supra. Counsel cannot

possibly subject the State's case to meaningful adversarial testing if he does not possess the correct understanding of the law in relation to the facts of the case.

The Court ordered an in chambers sidebar (RP 3-18-09, 76) after Mr. Williams indicated he intended to make his legal argument to the jury, wherein it is presumed counsel was scolded by the Court because he had nothing for closing except inflammatory remarks—no argument against the inference of sexual gratification stemming from the statements counsel allowed to pour into the trial misconstrued:

> "He wants you to think about, instead of evidence, these wolves in sheep's' clothing violating the trust of all the little kiddies." (DK 3, #2)(RP 3-18-09, 238)(Appendix V f);
>
> "...wouldn't you think they could come up with a better fiction than that one? A better fiction than that one is he reaches around the child and reaches down the front of her pants." (RP 3-18-09, 240) (Appendix V f);
>
> "...coincidentally only thing she can remember is the stuff that the State needs or say they need to convict my client." (RP 3-18-09, 240) (Appendix V f);
>
> "we got this little tiny child who is tinier than she was when she came in her and you have this big old man and you're supposed to forget about what happened because when the tiny, vulnerable, trust-ridden child said, hey stop or I'm uncomfortable he stopped." (RP 3-18-09, 248) (Appendix V f); and,
>
> "And as if the only person in the room that appeared has been bothered or hurt by this is the alleged victim. Okay. As if my client is not forever labeled as he is, as a sex offender." (RP 3-18-09, 236-248) (Appendix V f).

Clearly, these closing comments were made by a conflicted attorney seeking to inflame the passions of the jurors against his client. Mr. Coxe's case simply cannot be swept under the rug so easily without doing violence to the Constitution.

Under Rule 8.3 of the Model Rules of Professional Conduct, which is designed "to maintain the integrity of the profession", all attorneys are required to report the type of misconduct demonstrated by Mr. Coxe's petition. Similarly, both state and federal codes of

judicial conduct require judges to report such conduct as established by Mr. Coxe's petition. How then can it be squared one with the other, when the Death Penalty Act requires dismissal of Mr. Coxe's petition, but applicable ethical rules require appropriate attorney discipline proceedings at the same time?

Moreover, as this Court has recognized, "[t]he Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." Strickland, supra, 466 U.S. at 688. See also, Michel v. Louisiana, 350 U. S. 91, 350 U. S. 100-101 (1955). Surely Mr. Williams' performance falls far short of this presumption.

This is an injustice that will destroy public trust in the legal process and the result it produces--to fault Mr. Coxe for his apparent inability to learn fast enough to identify these legal errors before the clock expired. This would effectively divest the Sixth Amendment of meaning and purpose altogether, and exonerate Mr. Williams. The very purpose of the Sixth Amendment's counsel mandate "is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." Zerbst, supra, 304 U.S. at 465. The Cronic Court underscored the need to avoid "sham appointments":

> "If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." citing, Avery v. Alabama, 308 U. S. 444, 308 U. S. 446 (1940).

The Cronic Court went on to hold,

"The right to the effective assistance of counsel is thus the right of the accused to

require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." Id. 466 U. S. at 657-58.

This Court should determine based on the foregoing that a deprivation of counsel claim is a jurisdictional claim not subject to harmless error analysis nor forfeiture.

(9)(b) Mr. Coxe Is Entitled To Equitable tolling

In the alternative, under Holland v. Florida, 560 U.S. 631, 645-46 (2010), Mr. Coxe is entitled to equitable tolling if he (1) has diligently pursued his rights; and, (2) some extraordinary circumstance stood in his way preventing timely filing. It is evident that Mr. Coxe has made significant achievements in his quest to free himself from this unjust conviction without funds, through self-help study of criminal law. Advancing from no experience even with parking infractions, Mr. Coxe has learned how to research legal issues, and now understands the correct legal issues, and has located extremely favorable case law!

He has learned the procedures of the Public Disclosure Act (PDA), and with it has extracted smoking-gun, incontrovertible evidence of counsel's conflict and prejudices for accused sex offenders, and how those prejudices adversely affected counsel's performance. And, he persisted in his efforts to establish his innocence by filing one PrP after the next. How are these achievements obtained if it were not for his personal diligent effort?

Frustrated by the Court's rejection of his second PrP, and lost in the complex sea of habeas case-law, Mr. Coxe reached-out for help to a Christian pro se inmate on July 11, 2014, whom he just met in church and felt he could trust with the sensitive nature of the charges. Reasonable fear for personal safety had prevented such a venture in the past. Mr. Mulliken

had 20 years' experience with self-help study of law, and has been assisting Mr. Coxe from home since his release from prison in August of 2014. Mr. Coxe may never have discovered the legal basis of this claim without an assisting inmate, and without access to the discovery.

Mr. Coxe further contends that the orchestrated denial of access to the discovery amounts to a due process violation under the Fourteenth Amendment. Cf. Lott v. Mueller, 304 F.3d 918 (9th Cir 2002). The denial of access to legal files may in some cases constitute "the type of external impediment for which we [grant] equitable tolling," Chaffer v. Prosper, 592 F.3d 1046 (9th Cir. 2010), citing, Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1013 (9th Cir.2009)), although the Ninth Circuit has held that a "temporary deprivation of an inmate's legal materials does not, in all cases, rise to a constitutional deprivation." Vigliotto v. Terry, 873 F.2d 1201, 1202-03 (9th Cir.1989) (ruling that a "three day deprivation does not rise to constitutional proportions").

The purposeful withholding of the discovery by the court officers are extraordinary circumstances standing in Mr. Coxe way preventing prompt filings, or the equivalent, because it inhibits his efforts to identify the correct legal issues to present in his petition. Counsels' efforts to deceive Mr. Coxe should not be rewarded by the dismissal of his petition.

Moreover, the State Courts examined Mr. Coxe's case against IAC claims three times and found no Sixth Amendment violation. All-the-while, a meritorious structural error lurked beneath the surface. How is it that only Mr. Coxe is faulted for overlooking this issue? The discovery had been intentionally withheld from Mr. Coxe by his paid attorney in 2009, and court-appointed appellate attorney in 2010, and by the State until May of 2016. To Mr. Coxe this is newly discovered evidence, as before the State's eventual disclosure, it had been solely

in the hands of a conflicted attorney marshaling a sham "defence" for Mr. Coxe.

How can Mr. Coxe be denied the opportunity today to expand on his original IAC claim to include newly understood legal issues concerning both old evidence and new evidence, when clearly the AEDPA rules allow late petitions involving new evidence with old legal theories? 28 U.S.C. Section 2254(e)(2)(A)(ii). Old evidence with new legal theories is tantamount to old legal theories with new evidence. There is no legitimate State interest in the finality of void judgments, nor are there any interests in comity protected by a rule that treats these two circumstances differently, where the "Privilege of the Writ" is abolished under only one.

Mr. Coxe submits if he is not allowed to petition for relief, then the constitutionality of AEDPA is in question. In the past twenty years, the Court has heard two major cases concerning the Suspension Clause in the context of habeas corpus, Felker v. Turpin, 518 U.S. 651 (1996), and Boumediene v. Bush, 553 U.S. 723 (2008). The Boumediene Court observed the provisions at issue in Felker "did not constitute a substantial departure from common-law habeas procedures," as they "codified the longstanding abuse-of-the-writ doctrine."

Common law habeas, on the other hand, had no statute of limitations and creating one certainly restricted habeas rather than strengthening it. Therefore the reasoning of Boumediene strongly suggests that § 2244's statute of limitations is unconstitutional.

A final question for this Court to consider is that Mr. Coxe has alleged counsel abandonment at both the trial and appellate stages. If this claim is proven true, would not under the principles of Burgett v. Texas, 389 U.S. 109, 115 (1967) ("Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right."), it be a re-violation of the right to

counsel to require Mr. Coxe to proceed pro se in these proceedings? Rich inmates have the choice to hire post-conviction counsel to comply with AEDPA.

(9)(c) Request for Certificate of Appealability

The question of whether a Habeas claim concerning a violation of Gideon, should be exempt from the 1995 time limitations is novel in 2018,-- the Ninth Circuit and at least three other Circuit Courts have concluded that prejudice to overcome procedural default can be presumed where counsel's deficient performance results in a structural error. See, United States v. Withers, 618 F.3d 1008 (9th Cir. 2010)("If Withers establishes a violation of his right to a public trial, that structural error would likely satisfy the prejudice showing."); Johnson v. Sherry, 586 F.3d 439, 447 (6th Cir. 2009) ("Because the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would be presumed."); Owens v. U.S., 483 F.3d 48, 64-65 (1st Cir. 2007)(holding that, because it "is impossible to determine whether a structural error is prejudicial," prejudice can be presumed for purposes of the Strickland analysis where "counsel failed to object to a structural error"); McGurk v. Stenberg, 163 F.3d 470, 475 (8th Cir. 1998) (holding that "when counsel's deficient performance causes a structural error, we will presume prejudice under Strickland").

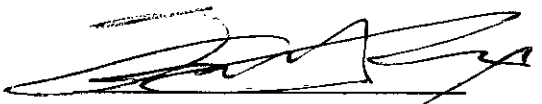
Although these decision do not involve a Gideon claim, truly without question they demonstrate that the broader question of whether a structural error in general can constitute an equitable exception to AEDPA default rules, is a question obviously debatable amongst jurists of reason and the certificate of appealability should have issued.

(9)(d) **Conclusion and prayer for relief**

To summarize, this claim is of a jurisdiction nature under Zerbst, it amounts to a constructive denial of counsel under Cronic, and requires automatic reversal under Sullivan. Counsel is shown to have a conflict and to have prejudices toward accused sex offenders that had an adverse effect on his performance. Counsel's legal error is undeniable. The standard of review stemming from the Perkins decision is inapplicable to structural defect cases, Sullivan and Cronic should control. The gateway should have opened for Mr. Coxe. And in the alternative, he is entitled to equitable tolling.

WHEREFORE, based on the foregoing Mr. Coxe respectfully seeks the appointment of counsel and a remand for an evidentiary hearing and a ruling on the merits of his counsel abandonment claim.

Respectfully submitted this the ___ day of April, 2018.



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