No. ______________________

____

IN THE

SUPREME COURT OF THE UNITED STATES

____

In re

EVAN P. GALVAN

ON PETITION FOR WRIT OF MANDAMUS TO

THE UNITED STATES DISTRICT COURT FOR CENTERAL DIVISION
OR TO THE UNITED STATES COURT OF APPEAL'S FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

EVAN P. GALVAN
Pelican Bay State Prison C-11-220
P.O. BOX 7500
Cresent City, CA 95532

QUESTION(S) PRESENTED

1) When petitioner appeared in Court for initial arraignment without Counsel. Whether the State Court is/was required by the U.S. Constitution 6th and 14th Amendments to advise petitioner of his right to Counsel; to initiate an inquiry into petitioner's desire for the aid of Counsel, to inquire into the ability of petitioner to procure Counsel, or inquire if petitioner would accept a Court appointed attorney as his representative before appointing Counsel to represent petitioner?

If so, 2) Whether the failure of the State Court to do so was a violation of petitioner's sixth amendment secured autonomy constituting a structural error which requires a new trial?

3.) When the state Court appointed an attorney to represent petitioner without first advising petitioner of his rights to Counsel, inquiring into petitioner's desire for the aid of Counsel, inquiring into the ability of petitioner to procure Counsel, or inquiring if petitioner accepts the appointment of Counsel as his representive, whether the appointment of said Counsel violated petitioner's sixth amendment right to Counsel and/or the 14th Amendment, due process of law, to the U.S. Constitution of:

-) Right to obtain Counsel of own Choosing, and/or,
-) Right to Self-Representation and/or,
-) Right to present a defense and/or,
-) To not have a lawyer thrust upon?

4.) Whether the failure of a State Court to advise petitioner of the 6th Amendment right to Counsel presents a substantial violation of a Constitutional right in respects to 28 U.S.C. Section 2253(c)(2)

LIST OF PARTIES

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

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

1) U.S. District Judge George M. Wu of the Centeral District of California

2). U.S Circuit Judge Paul J. Watford of the Ninth Circuit Court of Appeals

3) U.S. Circuit Judge Barry G. Silverman of the Ninth Circuit Court of Appeals.

4) Solicitor General of the United States

5.) California Attorney General

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PETITION FOR WRIT OF MANDAMUS

Petitioner EVAN P. GALVAN respectfully petitions for a Writ of Mandamus directed at the United States District Court for the Centeral District of California's Honorable Judge George H. Wu, or directed at the United States Court of Appeals for the Ninth Circuit, Circuit Judges B. B. Silverman and P.J. Watford.

OPINIONS BELOW

The following opinions and orders are pertinent here, all of which are unpublished: [1] Opinion on direct appeal by the California Court of Appeal, Fourth Appellate District, affirming Petitioner's Coviction and Sentence (1/14/15); [2] Order (4/11/15) by the California Supreme Court denying Petition For Review; [3] Order (10/11/16) and Judgment (10/11/16) by U.S. District Court for the Centeral District of California (Hon Geogre H. Wu), denying petition for writ of federal habeas Corpus (10/11/16); [4] District Court Order denying Request for Certificate of Appealability (10/11/16); [5] Order by the Ninth Circuit Court of Appeals Denying Request for Certificate of Appealability (6/9/17); [6] Order by Ninth Circuit Court of Appeals denying Petition for Review en banc (8/18/17) (See Appendix for Copies.)

STATEMENT OF JURISDICTION

The District Court denied Petitioner's federal habeas Corpus petition and request for Certificate of Appealability, ~~and the Court of Appeals for the Ninth Circuit~~ denied Petitioner's Subsequent request for Certificate of Appealability and Petition For Review. Petitioner having no other legal means for redress seeks this Writ in aid of this Courts appellate jurisdiction pursuant to U.S. Supreme Court Rule 20.1, 28 U.S.C 1651 (a), and Section 262 of the Judicial Code. See Whitney V. Dick, 202 U.S. 132; McClellan V. Carland, 217 U.S 268, and Cases Cited; Ex Parte Peru, 318 U.S. 578; and Cases Cited; and House V. Mayo, 324 U.S. 42 and Cases Cited.

STATUTORY PROVISIONS INVOLVED

The right of a state prisoner to seek federal habeas Corpus relief is guaranteed in 28 USC Section 2254. The standard for relief under "AEDPA" is set forth in 28 USC Section 2254 (d)(2) which states:

> (d) A application for Writ of habeas Corpus on behalf of a Person in Custody pursuant to the Judgment of the state Court shall not be granted with respect to any Claim that was adjudicated on the Merits in State Court proceedings unless the the adjudication of the claim
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State Court proceeding[s].

Subsection (e) provides:

> In a proceeding instituted by application for Writ of habeas Corpus by a person in Custody pursuant to the Judgement of a State Court, a determination of factual issue made by a state Court shall be presumed Correct. The applicant shall have the borden of rebutting the presumtion of Correctness by Clear and Convencing evidenc.

When a District Court denies a Writ of habeas Corpus there is no automatic right to appeal, instead a petitioner must obtain a Certificate of Appealability first from the District Court, and if denied therein, a petitioner may apply for a Certificate of Appealability from the Court of appeals. 28 U.S.C Section 2253(c). See also United States v. Asrar (9th Cir. 1997) 116 F.3d 1268; Grant-Chase v. Commissioner (1st Cir. 1998) 145 F.3d 431, 435.

In Miller-El v. Cockrell, 537 U.S. 332, 123 S.Ct. 1029 (2003), this Court Clarified the Standard for issuance of a Certificate of Appealability:

> ... A prisoner seeking a Certificate of Appealability need only demonstrate a "Substantial showing of the denial of a Constitutional right." A petitioner satisfies this standard by demonstrating that Jurist of reason Could disagree with the district Court's resolution of his Constitutional Claims or that Jurists Could Conclude the issues presented are adequate to deserve encouragement to proceed further... We do not require petitioner to prove, before the issuance of a Certificate of Appealability, that some Jurists of reason might agree, after the Certificate of Appealability has been granted and the Case has received full Consideration, that petitioner will not prevail.

Id., 123 S.Ct. at 1034, Citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)

STANDARD OF REVIEW:
ISSUANCE OF WRIT OF MANDAMUS

It is Well Settled that a Writ of Mandamus will issue to Correct the non-discretionary duties of subordinate or inferior Courts or Judicial officers. See Marbury v. Madison, 5 U.C. (1 Cranch) 137, 168-69 2 L.Ed. 60 (1803)

"It issues", Says Blackstone, "to the Judges of any inferior Court, Commanding them to do Justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to Superintend all inferior tribunals, and therein to enforce the due exercise of those Judicial or ministerial powers with which the Crown or the legislature have invested them; and this not only by restraining their excesses [of Jurisdiction] but also by quickening their negligence and obviating the denial of Justice." 3 Bl. Com. 110

Mandamus relief is avaibable only to compel a government officer to perform a duty that is "Ministerial, Clearly defined, and peremptory" as opposed to duties within the officers discretion. Carpet, Linoleum & Resilient Tile Layers, Local Union NO. 419 v. Brown, 656 F.2d 564, 566 (10th Cir. 1981) (qouting Schulke v. United

States, 544 F.2d 453, 455 (10th Cir. 1976). But the fact that an officials duty entails some discretion does not necessarily sheild him from mandamus As Chief Justice Taft explaind in Work V. United States ex rel Rives, 267 U.S. 175, 177,

> Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has.

Mandamus provides a "drastic remedy that a court should grant only in etraordinary circumstances in response to an act amounting to a judicial usurpation of power," Hahnemann Univ. Hosp. V. Edgar, 74 F.3d 456, 461 (3d. Cir. 1996) and in the exercise of sound discretion. Miller V. French, 530 U.S. 327, 339, 120 S.Ct. 2246, 147 L.Ed. 2d 326 (2000).

To obtain mandamus relief, a petitioner must satisfy three elements: (1) Petitioner must have a clear and certain claim; (2) respondent must have a non-discretionary, ministerial duty, except as provided above, which is so plain as to be free from doubt; and (3) there must be not other adequate remedy available. Johnson V. Reilly, 349 F.3d. 1149, 1154 (9th Cir. 2003.).

STATEMENT OF THE CASE

Petitioner was convicted by a California Jury of one count of 2nd Robbery and one count of Possession of Controlled Substance (Cal. Pen. Code. Section 212 and Heath and Safety Code Section 11377(a)). A couple of enhancements were also found true to be. Petitioner was sentenced to a totall of 11 years. Petitioner's conviction and sentence was upheld upon direct appeal and the California Supreme Court denied petition for review. Petitioner sought federal habeas corpus within the U.S. District Court for the Centeral District of California which was denied with preducice. Petitioner's COA was also denied by the district court and by the U.S. Court of Appeals for the Ninth Circuit. Petitioner sought Petition for Review from the Ninth Circuit which was denied.

STATEMENT OF PERTINENT FACTS

I. Arrest History

On September 7, 2013 while sitting outside his place of residence petitioner was arrested for possession of controlled substance in violation of Heath and Safety Code Section 11377(a). While awaiting processing of the controlled substance charge at the Sheriff's Station, it was discovered that a probable cause statement was issued for the arrest of Petitioner for his alleged involvement in a September 5, 2013 robbery that occurred at a 7-11 convenience store in Coachella California. [See Deputy Alonzo's Report attached in appendix-P]

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//

I. The Failure To Advise Petitioner of His Rights To Counsel

On September 11, 2013 petitioner proceeded to an intial arraignment within the meanin of California Penal Code (Cal. Pen. Code) Section 858. However, at no point in time had the Magistrate advised petitioner of his right to Counsel, initiated an inquiry into petitioner's desire for the aid of Counsel, nor inquire if petitioner would accept a Court appointed attorney. The Magistrate simply called petitioner's case, appointed Counsel and scheduled a preliminary date. [See Court Reporters Transcripts attached in appendix-J]

On September 24, 2013 petitioner proceeded to a preliminary examination within the Meaning of Cal. Pen. Code. Sec. 872. Petitioner was not abvised of his rights to Counsel, inquired of his desire for Counsel, or accepts the appointment of Counsel. Petitioner proceeded with the preliminary hearing with the previous appointed counsel. Petitioner was subsequently held to answer within the superior Court for violations of Cal. Pen. Code Sec 211, Robbery, and Health and Safety Code 11377 (a). [See Report Transcripts attached in appendix-NN]

On Octorber 8, 2013 petitioner was arraigned within the Superior Court within the Superior Court within the meaning of Cal. Pen. Code. Sec 987. However, the Court did not advise petitioner of his right to Counsel, inquire of petitioner's desire for the aid of Counsel, or if petitione accepts the appointment of Counsel. The Court simply calls petitioner's case in which the previous appointed Counsel stipulated to the reading of rights and the Court set trial dates. [See Reporters Transcripts attached in appendix-K

On November 27, 2013 the People amended the information in which petitioner was rearraigned persuant to Cal. Pen. Code. Sec. 969(a). However, the Court did not advise petitioner of his right to Counsel, initiate an inquiry of petitioner's desire for the assistance of Counsel or if petitioner accepted the appointment of Counsel [See Reporter Transcripts attached in appendix-L]

II. Petitioner's Request To Relieve The Court Appointed Attorney

On December 10, 2013, during trial proceedings, petitioner requested to relieve the court appointed. [See Reporter's Transcript attached in appendix-M pp 39-46]

In support of the request petitioner stated he was never advised of his rights to Counsel of his own choosing or the right to be self-represented. [Id at 41]. Petitioner stated that upon attending the institutional law library he discovered these rights. [Id at 44]. Despite petitioner's continuous contentions that he was never, essentially, given the opportunity to employ his own counsel or to be a self-represented defendant and despite the fact that the Court did not obtain the reporters transcripts of the arraignment proceedings to determine whether or not petitioner was advised of those rights, the Court denied petitioner's request by stating "... I disbelieve [petitioner] largely because [petitioner] has had previous experience as a defendant. I know the practice of the Court in vertical calendars as far as arraignment and ... [advising] people if they would like a public defender to be appointed ... [I.d. at 44-45]

IV. Petitioner's State Post-Conviction Remedies

On April 25, 2014 petitioner filed a timely direct appeal. However, petitioners appointed attorney notified petitioner that no appealible issue were found and that a Wende/Anders brief has been filed Setting forth that no potential arguable issues were discovered and therefore it was requested the appeals Court Undertake a review of the entire record to determine any potential arguable issues. The Counsel also advised petitioner that he may file a Supplemental brief raising any issue's he wished the appeals Court to Consider.

On November 17, 2014 petitioner filed a Supplemental brief Contending, in relevant part, that he was not advised of his rights to Counsel. Petitioner Contended that because he was not advised of his rights to hired Counsel or that he may be a self-represented defendant he was denied those rights under the U.S. and State Constitutions [See Petitioner's Supplemental brief attached in appendix-Q]

On January 14, 2015 the California Court of Appeal denied petitioner's appeal by stating, in relevant part, "The record belies [Petitioner's] Claim. The Minute Order for defendant's arraignment On September 11, 2013 states... Counsel stipulates to advisement of rights". "Defendants Claim on [the] issues are meritless. After a full examination of the entire record, we discern no arguable issues on appeal. Judgement affirmed. [See Opinion of the Court of Appeal attached in appendix-H and See Court Minute Order of arraignment attached in appendix-MM]

On Febuary 26, 2015 petitioner filed a petition for review within the California Supreme Court. Petitioner Contended that the appeals Court errored by basing its decision upon the Court Minute Order because the Court Reporder's transcripts does not indicate petitioner was advised of his right to Counsel and when a Conflict exists between the Court Minute Order and between the Court Reporter's Transcript the latter is to be deemed determinative of the issue. [See Petitioner's Petition For Review attached in appendix-R]

On April 1, 2015 the California Supreme Court denied petitioner's Petition For Review by way of order simply stating "The Petition for Review is denied." [See California Supreme Court's Order attached in appendix-I]

V. Petitioners Federal Post-Conviction Remedies

On August 31, 2015 petitioner filed a timely habeas Corpus petition within the U.S. District Court. Petitioner's Claim was essentially the same as that within the state Court, that is that petitioner was denied the opportunity to hire his own Counsel and to be self-represented when the Court failed to advise him of his right to Counsel. Petitioner Contended that if he was advised of the right to Counsel he would have insisted of hired Counsel or at the very least to be Self-represented. [See Petitioner's Habeas Corpus attached in appendix-S]

On November 24, 2015 the Respondent filed an Answer to the Petition Contending that the state Court was Correct in rejecting petitioner's claims because the record demonstrates that petitioner was advised of his Constitutional rights. The Respondent further stated that petitioner has not provided nothing to refute the state Courts determination. [See Answer to the Petition attached in appendix-T]

On February 1, 2016 petitioner filed a Traverse Contending that from the outset of the State post-Conviction remedies he has incessantly referred to the Reporter's transcripts of September 11, 2013, October 8, 2013 and November 24, 2013 arraignment proceedings which donot indicate that petitioner was advised of any right whatsoever. Petitioner also referred the District Court's attention to those records attached to the habeas corpus petition. [see Petitioner's Traverse attached in appendix-U]

On March 2, 2016 the Magistrate filed a Report and Recommendations. The Magistrate requested petitioner's petition be denied due to the fact the record demonstrates petitioner's Counsel stipulated to the reading of rights. The Magistrate stated that although petitioner did not personally waive the reading of the rights, petitioner is bound by his Counsel's decision to do so. The Magistrate also stated that in any event the trial Court found petitioner less than Credible insofar as petitioner alleged to be unaware of his right to self-representation or to obtain Counsel of his own choosing. Therefore, the Magistrate found that the Court of appeals rejection of petitioner's Claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. [see Magistrate's Report and Recommendation Report attached in appendix-B]

On March 28, 2016 petitioner filed an Objection to the Magistrate's Report and Recommendations Contending that the Magistrate errored in its findings because first, Counsel may not waive a defendant's fundamental right without the consent of the defendant. Secondly, petitioner Contended that he was never advised of the right to Counsel and thus never expressed the desire to be represented by Counsel nor did he accept the assistance of counsel. lastly, petitioner Contended that the advisement of Counsel was never predicated upon the defendants past experience as a defendant [see Petitioner's Objection to Magistrate's Report and Recommendations attached in appendix-V]

Also on March 28, 2016 persuant to newly-revised Rule 11 of the Rules governing Section 2254 Cases, petitioner filed a Certificate of Appealability (COA) within the District Court. Because this rule essentially requires petitioner to foretell what the District Judge will base his decision on and because petitioner is not a fortune-teller, petitioner assumed the district Judge will dismiss petitioner's petition on the ground that petitioner has not Supported his claim beyound Clear and Convincing evidence and there fore Contended that an evidentary hearing is necessary to settle the Conflict between the Court Minute Order, which provides petitioner's Counsel stipulates to reading of rights, and the Court Reporters Transcripts which does not indicate petitioner was advised of his rights to Counsel and thus determine if petitioner was afforded an opportunity to hire his own Counsel or to be a Self represented defendant. [See Petitioner's Certificate of Appealability attached in appendix-W]

On October 11, 2016 the district Court issued an order accepting the Magistrate's Report and Recommendations and denied Petitioner's petition [See District Courts Order and Judgement attached in appendix-A]

Also On October 11, 2016 the district Court denied petitioner's COA by stating Petitioner did not show a substantial denial of Constitutional right. 28 USC 2254 (c) (2). [see District Courts Denial of Petitioner's Certificate of Appealability attached in appendix-D]

On Octorber 25, 2016 petitione filed a COA within the U.S. Court of Appeals for the Ninth Circuit. Petitioner Contended that the district Judge errored in accepting the Magistrate's Report and Recommendations because law requires that a defendant in a criminal proceeding must specifically be made aware of the right to Counsel, rights to be a self-represented defendant, right to Counsel of own choosing. Petitioner further contended that the Magistrate errored because petitioner cannot be bound to a Court appointed attorney's decision to stipulate to the reading of rights to Counsel because the right to Counsel is fundamental which Cannot be waived without the petitioners Consent. Petitioner lastly Contended that he Can only be bound by a Counsels decision regarding his Case when petitioner has explicity accepts the Counsel as his representative because other wise the representation is not the representation guaranteed him by the U.S. Constitution [See Petitioner's COA to the 9th Circuit Court of Appeal's attached in appendix-W]

On June 9, 2017 petitioner's COA was denied by way of order stating that petitioner has not made a substantial showing of the denial of a Constitutional right persuant to <u>28 USC Section 2253(c)(3)</u> [See Ninth Circuit Court of Appeals Order attached in appendix-E]

In the Month of July 2017 petitioner filed a timely Petition for Review within the U.S. Court of Appeals for the Ninth Circuit. Petitioner Contended that an adequate advisement of rights to Counsel presents an exceptional important issue and that the reviewing Courts decisions are in Conflict with existing U.S. Supreme Court and Circuit precedents. Petitioner Contended that precedents provide for an individual advisement of the right to Counsel, an inquiry, by the presiding Judge, of a defendant's desire for Counsel, an inquiry if defendant accepts an appointment of Counsel. [See Petitioner's Petition for Review to the Ninth Circuit Court of Appeal's attached in appendix-Y]

On August 18, 2017 petitioner's petition for Review was denied by way of Order simply stating denied [See Ninth Circuit Court of Appeal's Order of Denial attached in appendix-F]

VI. <u>Appointed Counsel's Meritless Trial Strategy</u>

The evidence in petitioner's case, in relevant part, Consisted of 1) Mrs. Ramirez's (victim) identification of petitioner upon the 6 pack photo line-up procedure [See Reporter Transcripts of Trial Proceedings attached in appendix-G pp 35, 51-62; see also Police Report attached in appendix-N] 2) The video Surveillance footage [Reporter's Transcript's pp 29-34 attached in appendix-G; See also Police Report attached in appendix-O] and 3) Deputy Alonzo's accounts of petitioner's (alleged) statements regarding petitioner's involvement in the robbery. [Reporter's Transcripts pp 29-34 attached in appendix-G; See also Deputy Alonzo's Police Report attached in appendix-P]

However, the appointed Counsel made no attempt to investigate into these matters. [See Reporter's Transcripts pg 43 attached in appendix-M]

Rather, Counsel simply Conceded to Mrs. Ramirez's identification and persued <u>a defense</u> of how much force is necessary to substantiate a robbery Conviction. [I.d. at pg 43; see also Reporter's Transcriptss attached in appendix-G pp 114-115]

Any amount of force is sufficient to substantiate a robbery Conviction, at least in California. [See Id. at 110-111 and Reporter's Transcripts pp 32-33 attached in appendix-NN]

From the outset of petitioner's Case the appointed Counsel knew or should have known that there was ample evidence to substantiate a finding of guilt for violation of Cal. Pen. Code. Section 211, Robbery. First, Deputy Munoz's Report indicates Mrs Ramirez stated that the Suspect elbowed her and pushed her back in an effort to get away. [See Deputy Munoz's Report attached in appendix-O] Secondly, the video surveillance footage displays the suspect pushing Mrs. Ramirez repeatedly in efforts to get away. [See Reporters Transcripts pg 34 attached in appendix-G] lastly, Mrs. Ramirez testified at the preliminary hearing that she was pushed repeatedly by the suspect in order for the suspect to get away. [See Reporter's Transcripts pp 6-9; 11-12, attached in appendix-NN]

Therefore, the appointed Counsel's trial strategy was Meritless.

It is extremely debatable whether the appointed Counsel actually persued the meritless defense in good faith rathan than an intentional and willful act done to deliberately deprive petitioner of his right to subject the prosecutions case to a meaningful adversarial testing and thereby making the adversarial process itself uterly unreliable.

First, the appointed Counsel argued "his" defense at the Conclusion of the preliminary hearing. However, the Magistrate disagreed with the Counsel's Contentions by stating:

> "... to Commit a robbery, it's force or fear. And it can be any amount of force to facilitate taking of the property so the Court is satisfied that the evidence is sufficient for holding order as to [the charge of robbery.]"

[see Reporter's Transcripts pp 32-33 attached in appendix-NN]

Secondly, despite all the evidence and forewarning that the Conduct of the Suspect Constituted a robbery, the appointed Counsel vigorosly persued and argued the Meritless defense at trial. The following is an excerpt from Closing arguement;

> "... Now, when we cut to the robbery, the key one as I see it is that the defendant used force... to take property ... Nowhere in the instructions is force defined. How much force is force? Is touching enough? Counsel says he put his hands on her and thats what counts.
>
> The law doesn't say that. You weren't told as a matter of law putting hands on someone else is force. How much force is needed to commit robbery?
>
> The only question for you to decide is is there enough force to commit a robbery? And I submit to you because the nature of the force is not defined as a matter of law you have to use your common sense.
>
> If you conclude by the law that force wasn't sufficient, then of course we have the lesser count, which is petty theft -- the shoplift -- where someone goes in and takes something and leaves without confronting them.
>
> I submit to you based upon the facts in this case, even with the tape, the issue is is the force sufficient? And I say to you the force is not sufficient to elevate this to a robbery you must find this is nothing more than petty theft which is a lesser included account."

[See Reporter's Transcripts pp 114-115 attached in appendix-G]

lastly, Counsel essentially admitted that he knew the conduct of the suspect constituted a robbery when Counsel stated the following in an attempt to minimize the the sentence at the sentencing hearing;

> "... if you look at the crime itself and whats been

Charged -- the Court saw the video presentation that was taken at the store. It's obviously, in essence, robbery -- from the people charging him with just the robbery and not a burglary, that this arose when his companion didn't have enough money to pay for a beer that he had taken. And then [Petitioner], for reasons known only to himself, decided to take the beer. While this is essencially, a robbery, the amount of touching and pushing was rather minimal. He just pushed the clerk away. There was something at the front door that apparently involved the other man too..."

[see Reporter's Transcripts pg 156 attached in appendix - G]

VII. Petitioner's Initiation of His Rights To Self-Representation And/or To Conduct His Own Defense

The following instances either individually and/or collectively provide that petitioner desired to conduct his own defense and therefore essentially be self-represented or at the very least to persue his own defense.

A. Petitioner Requested Discovery From Counsel

On the day of the September 24, 2013 preliminary hearing petitioner requested from the appointed counsel all discovery relative to his case [5].

Because the request was **not** made in open Court the account is not part of the record per se. However, the inferrance can be deduced from the trial and sentencing proceedings that such an account had transpired.

First, on the December 10, 2013 hearing of petitioner's request to relieve the appointed counsel, petitioner contended, in relevant part and in summary, essentially that he wished to relieve the appointed counsel because the counsel refussed to make a motion for Mistrial following the testimony of Ms Ramirez's identification of petitioner upon a 6-Pack Photo line-up proceeding. Petitioner contended that the Motion for Mistrial was predicated upon the prosecutions failure to provide him with a copy of the 6-Pack photo line up discovery. In support thereof petitioner stated:

"there has been [a] failure to request Brady discovery from the prosecution. I ... [attempted] to receive Brady discovery from my attorney and [what] he gave to me [was] just... a couple of sheets of paper which [didn't] really provide much evidence. He now did disclose that [the prosecution] had [an] interview with [a] witness indicating that [there] had [been a] prior identification [upon] a six pack [Photo-line-up]. I was never given that packet of ... information."

[see Reporter's Transcripts pg 40 attached in appendix - M]

Petitioner also made the following statement regarding the request for Discovery from the prosecution.

"... I asked [the appointed Counsel if what he provided] was what the [prosecution] gave [him and] ... was [it] all she had in her possession and [counsel] had told me that was all that she had in her possession."

[Id]

Secondly, On the January 10, 2014 Sentencing hearing the Court heard two of petitioner's personally hand written motions regarding petitioner's request for a new trial. Both motions were based upon the fact that petitioner [himself] was not provided with a full and Complete Copy of the prosecutions discovery relative to his Case[s]. After the prosecution provided the Court with a list of discoveries that have been relinquished to the appointed Counsel and the dates that each were provided, petitioner stated the following as basis for the motion:

> "Well, the reason why I made this motion was because I specifically asked Mr. lieman to -- if I Could have a Copy of all discoveries; and he provided just a Couple pieces of paper pertaining to the narcotic charge. And I had asked him if this was all that he had in his property and all that the D.A. has provided him, and he told me "Yes" numerous times. And throughout the trial I had constantly asked him if that was all that the district attorney had provided him and [in turn] he had provided [to Me].

[See Reporter's Transcripts pg 140 attached in appendix-G]

B. Petitioner's Utilization of The Law Library

While incarcerated within the Riverside County Jail proceeding with the Criminal prosecution within the Case relevant to this writ petitioner was attending the institutional law library to investigate into relevant law regarding the allegations against him and to investigate into defense predicated upon the evidence. Although petitioner has not supported this Contention with any record, e.g. County law library log sheets, petitioner submits that the fact Can be inferred from the December 10, 2013 hearing of petitioner's request to relieve the the appointed Counsel when petitioner made the following statement:

> " . . . And just recently I went to the law library and found out I Could represent myself and should be able to hire my own Counsel."

[See Reporter's Transcripts pg 44 attached in appendix- M]

Although this statement was inregards to petitioner's contention that he had not been made aware that he may be Self-represented and/or that he may obtain his own lawyer. Petitioner submits that the discovery into the Subject of representation was predicated on an investigation into facts and law regarding his Case.

C. Petitioner's Request To Make Mrs. Ramirez's Identification[s] Inadmissible

On December 6, 2013, during a trial readines Conference, petitioner "personally" requested, after a disagreement with the appointed Counsel regarding said request, that Mrs. Ramirez's preliminary hearing identification, and any future anticipated identification, of petitioner be made inadmissible due to the fact that there had been no pre-trial identification of petitioner, e.g. show-up, 6-Pack photo-line-up, line-up etc.

Petitioner Contended that the preliminary hearing identification was tainted because petitioner was the only person in Jail attire, in restraints, and on the defense side of the Court room and therefore in a position of guilt. Petitioner Contended that any future identification would relate back to the preliminary hearing identification in which petitioner was in a position of guilt.

This motion was ultimately denied because the prosecution had stated that it had in its possession a witness identification of petitioner upon a 6 pack photo line-up and that it had not been produced at preliminary examination because it was just abundant or extra evidence that was not needed for the standard, and it would produce it at trial if needed.

[See Court Reporter's Transcripts pp 9-11 attached in appendix - G]

However, this Motion was predicated upon the fact that petitioner requested all discoveries relative to his case from his Counsel, which upon the relinquishment of said discoveries the 6 Pack Photo line-up reports were not amongst the discoveries. The reference to this instance is merely supportive for petitioner's assertment that he wished to make his defense.

D. Petitioner's Discovery Upon Viewing The Video Surveillance Evidence

On December 10, 2013 during trial proceedings the prosecution displayed the video surveillance footage, as well as still photographs derived thereof, of the robbery to the Jury. Subsequent these displays petitioner passed a note to the appointed Counsel requesting that the attorney bring to the Jury's attention the fact that the suspect upon one of the two still photographs does not depict a large tattoo upon his chest area as petitioner does. Due to the fact that the appointed Counsel ignored petitioner's request, petitioner requested to relieve the appointed Counsel. Petitioner Contended, in relevant part, at the hearing that he has been requesting the attorney demonstrate to the Jury that the suspect upon the video surveillance footage does not depict the same tattoo upon his chest area as petitioner. [See Reporter's Transcripts pp 54, 45-46 attached in appendix-M]

However, the motion was ultimately denied due to the fact, in relevant part, that the Court Misinterpreted petitioner's statement that he is not disputing the identification but Brady discovery in general. [Id. 54] to mean that petitioner admitted it was him upon the video surveillance footage. [Id. 46]

It is imperative petitioner explaine the extent of petitioner's response of "not the identification, but Brady discovery in general. [Id. 54] to the Court's inquiry of "do you dispute the identification" [Id.].

First, it should be presumed that the appointed Counsel did not relinquish the 6-pack photo line up discoveries or display the video surveillance footage, and its still photographs, to petitioner. This can be made apperant from the records of the proceedings of 1) December 6, 2013 petitioner's motion to exclude Mrs. Ramirez's identification [See Reporter's Transcripts pp 9-11] 2) December 10, 2013 hearing of petitioner's request to relieve the appointed Counsel as his representative [See Reporter's Transcripts pp 39-46 attached in appendix-M] and 3) January 10, 2014 petitioner's motions for Mistrial and new trial [See Reporter's Transcripts pp. 134-142 attached in appendix-G] Specifically, the extent of these Motions was predicated upon petitioner's proclaimation that he, through the appointed Counsel, had not been provided with the 6-Pack Photo line up discovery although petitioner incessantly requested said discoveries from the Counsel. Despite petitioner's explicit allegations against the Counsel, the attorney never not once attempted to vindicate himself of petitioner's accusations. For example, Counsel never once provided that he had in fact provided petitioner with the 6-pack photo line up discovery or at the very least had reviewed the discoveries with petitioner. [Id. 9-11, 134-142 and Reporter's Transcripts pp 39-46 attached in appendix-M]

Thus that having been said, petitioner never having reviewed the 6 pack photo line up discoveries or the video surveillance footage and the still photographs derived thereof, petitioner had absolutely no knowledge of the extent of the evidence. i.e if the identification was reliable. For all petitioner knew, Mrs. Ramirez may have truely believed that petitioner was the suspect who committed the crime. Therefore petitioner could have no means of disproving Mrs. Ramirez's identification without first determining the extent of the identification, i.e. what was the basis for the identification, did the photograph upon the 6-pack resemble the suspect upon video surveillance footage, was the photograph a recent photograph of petitioner or an older mug shot, was the identification based upon resemblance or was the identification 100% etc.

Thus, petitioner's true meaning of his statement to the Court of "not the identification but Brady discovery in general" was not intended to convey petitioner's admittance to the suspect upon the video surveillance footage being him but was intended to convey the fact that petitioner was denied an opportunity to investigate into the identification by Mrs. Ramirez as a result of the failure of the prosecution, or as latter determined, by counsel's failure to relinquish the 6 pack photo line up evidence to petitioner.

That being said, the fact that petitioner desired his counsel to persue the issue of the suspect not having the same tattoo as petitioner is merely intended to convey to this Court petitioner's desire or attempts for a defense other than the chosen strategy of counsel's meritless defense.

E. Petitioner's Request to Be Excluded From Trial Proceedings

On December 10, 2013 petitioner requested that he wished to waive his right to be present for the remainder of the trial proceedings. Petitioner stated that the reason to absent himself from the proceedings was due to his dissatisfication with the appointed counsel's representation. [See Reporter's Transcripts pp 76-77 attached in appendix-G]

Petitioner made this request due to the general stratergy of the appointed counsel i.e. consent to the identification and persuance of how much force is necessary to substantiate a robbery conviction rather than proving petitioner's innocence.

From the outset of the prosecution to the filing of this writ petitioner maintains that the suspect upon the video surveillance footage is not him.

VIII Petitioner's Post Trial Discoveries

Subsequent numerous requests to the appointed counsel for a full and complete copy of petitioner's clients papers and properties and subsequent to a filling of a complaint with the State Bar of California regarding the appointed counsel's refusal to adhere to Rule of professional Conduct 3-700 (D)-(1) and provide petitioner with a copy of his clients papers and property, to which the State Bar requested the attorney issue petitioner with said documents, the appointed counsel relinquished to petitioner, some, of his papers and properties relating to his case. [See The State Bar of California response attached in appendix-OO]

Upon said documents that were relinquished to petitioner were, in relevant part, were 1) Deputy Munoz's Report 2) Deputy Quesada's Report and 3) the 6 Pack Photo line up photographs. However petitioner was not provided an array of other documents including the video surveillance footage.

A. The 6 Pack Photo Line up Evidence

Upon reviewing the 6 Pack photo line up photographs it was discovered that petitioner's photopragh as well as others were extremly unclear and therefore petitioner could not make any relevant arguement, i.e. a suggestive photo line-up, whether the photo graph was a resent photograph of petitioner or an old mug shot, whether the petitioner's photograph resembled the suspect upon the video surveillance footage etc. [See 6 Pack Photo Line UP Photographs attached in appendix-OO]

B. Deputy Munoz's Report

Upon reviewing Deputy Munoz's report petitioner discovered that upon the initial investigation into the September 5, 2013 robbery, Mrs. Ramirez disclosed to Deputy Munoz that she recognized the suspect because he stole beer in the past while threating he had a gun. [See Deputy Munoz's Report attached in in appendix-P]

Petitioner submits that this was the sole basis for Mrs. Ramirez's September 6, 2016 identification of petitioner.

In fact this can be affirmed by Mrs. Ramirez's testimony upon preliminary examination to which she testified that she asked petitioner to leave because he had stolen beer in the past. [See Reporter's Transcripts pg 5 attached in appendix-NN]

However, Mrs Ramirez's trial testimony was deferential towards her statements upon the initial investigation report and preliminary hearing testimony. Specifically, Mrs. Ramirez testified that she seen petitioner in the store two to three times in the past thereby insinuating that she recognized petitioner because he was a customer to the store on two or three occasions. [See Reporter's Transcripts pp 23; 48 and 50 attached in appendix G]

In fact the prosecution argued this exact theory at closing arguement [See Reporter's Transcripts pg 119 attached in appendix-G]

Mrs Ramirez was the sole witness to the incident who also provided the only identification of petitioner. Petitioner submits that the credibility was or should have been at issue. Mrs Ramirez should have been impeached by her previous statement to the investigating officer and with her prior testimony upon preliminary examination. This would have proven to the Jury that:

1) Mrs Ramirez lied as to her testimony that petitioner visited the store two to three times and thus insinuating basis for identification.

2) Would have discredited the identification of petitioner because although Mrs Ramirez initially stated she recognized the suspect because he stolen beer in the past while threatening he had a gun there is absolutly no evidence to support this allegation. For instance, there are no police reports of the incident, no video surviliance footage although the store is sufficiently equipped with such, nor was there any reports to the supervising employees. The fact that someone stole beer while threating he had a gun is a serious offense one not to be taken lightly by an store maner as Mrs Ramirez is. It would be expected as Mrs Ramirez's duties to report to the authorities such an incident.

Perhaps such an incident had occurred and perhaps such evidence exists. However, if so it is evident that petitioner would not be the subject for if the suspect upon the video surveillance was petitioner, petitioner would have most certainly been charged with the additional robbery but that fact that petitioner wasn't charged with an additional robbery indicates that either there was no evidence of that the suspect upon such an incident is not petitioner. Either way, the simple fact is that if petitioner had been provided this evidence prior to trial he would have insisted on presenting these fact to the Jury and coupled with the fact that the suspect had not depicted the same large tattoo upon his chest as petitioner does petitioner would have sought a misidentification defense.

EXTRAORDINAY CIRCUMSTANCES BEYOUND PETITIONER'S CONTROL PROHIBITED THE FILING OF A WRIT OF CERTORARI AND PETITIONER WAS DILIGENT IN SEEKING MANDAMUS

Subsequent the August 18, 2017 denial of petitioner's Petition For Review petitioner promptly acquired access to the Pelican Bay State Prison (P.B.S.P) law library to research the legal and context requirements of a Writ of Certorari.

It is imperative petitioner note the fact that he has been proceeding as a self-represented defendant since May, 2016 in a criminal prosecution, unreleative to this Writ. [See Superior Court Minute Order attached in appendix-Z]. Thus, petitioner's law library time had to be divided between the two cases!

On September 12, 2017, persuant to U.S. Supreme Court Rule 13.5, petitioner placed into the P.B.S.P's legal Mail system an application for extensison of time to file a writ of Cetorari addressed to the U.S. Supreme Court. In support of the application petitioner declared that he is a layman to the law and More time would be needed to file a procedurally Correct writ of Certorari [See Petitioner's Application attached in appendix-AA]

Due to a Court hearing within the Kern County Supperior Court regarding petitioner's Criminal Case, On September 21, 2017 petitioner's personal property was inventoried and Stored[2] pending the September 28, 2017 transfere to Kern Valley State Prison (K.V.S.P).[3] [See CDCR Bed Movement Sheet regarding transfer attached in appendix-BB][4]

On September 29, 2017 petitioner arraived at K.V.S.P [Id.] and was shortly thereafter issued his property.

Petitioner then initiated the Compiling of his Writ of Certorari.

However, having obtained a Continuance within his Criminal Case, On Octorber 18, 2017 petitioner's Property Was again inventoried and Stored pending his Octorber 24, 2017 transfer back to P.B.S.P.[5] [I.d.]

On Octorber 25, 2017 petitioner arraived at P.B.S.P [I.d]

Being at the moment petitioner was within 30 days of the November 16, 2017 due date to file his Writ of Certorari[6], persuant to the 90 day time limitation of U.S. Supreme Court Rule 13(1), On Octorber 31, 2017 petitioner Submitted a priorty Legal User Request to the P.B.S.P facility law library[7] and also requested his personal property[8]

On Octorber 31, 2017 petitioner was granted priorty legal user status and was advised by the Senior law library staff D. Rusk that the property officer's were Contacted regarding the issuance of petitioner's personal property and that the officer's advised her that petitioner would receive his property shortly. [See Priorty Legal User Request attached in appendix-CC]

On or about November 7, 2017, having not yet received his personal property, petitioner Submitted a CDCR 22, Inmate Request for Interview, Form to the P.B.S.P facility law library stating that he had be granted priorty Legal User status and was assured that he would be issued his personal property which he has yet to be issued and that it is necessary that he receive said property to Meet a November 16, 2017 due date to file a Writ of Certorari. (See CDCR 602 in appendix QQ")

On the Same day of November 7, 2017 P.B.S.P Law Library officer Lyon responded to petitioner's CDCR 22 Form and Stated he, Lyon, Contacted the property office and was assured by the officers petitioner would receive his property shortly (See CDCR 602 attached in appendix-QQ)

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1) Persuant to California Code of Regulations Title 15 (C.C.R. Title 15), which govern the California Department of Corrections and Rehabilitations (CDCR), Section 3123(b) petitioner is limited to 2-4 hours a week law library access time.

2) Persuant to CDCR's policy and procedures upon transfere, inmates personal property will be inventoried and Stored One week prior to transferring.

3) Because petitioner's Criminal Case is held within the Kern County Superior Court petitioner will be transferred to the closest prison which in petitioner's Case is (KVSP).

4) CDCR Bed Movement Sheet indicates an inmates departure from One prison and and the arraival at another.

5.) Persuant to Policy and Procedure upon Completion of Court proceedings an inmate will be transferred back to his original place of housing which in petitioner's Case petitioner was transferred back to P.B.S.P

Having yet to receive a response from the U.S. Supreme Court regarding his September 12, 2017 application for Extension of Time to File a Writ of Certorari; On November 11, 2017 petitioner inquired of P.B.S.P's law library Staff if they May determine if any rulings have been renderred within the U.S. Supreme Court in a Case entitled EVAN P. GALVAN V. M.D. BITTER or EVAN P. GALVAN V. C.E. DUCART. Due to the fact that petitioner has not been provided his property, petitioner Could not provide any further information regarding the application.

On November 13, 2017 the P.B.S.P's Senior law librarian D. Rusk responded to petitioner's request and Stated that no information was located at the USSC Web Site or from the Court links. [See Request and Response attached in appendix-DD]

On the Same day of November 13, 2017 petitioner inquired of P.B.S.P's law library Clerk D. Kolman if petitioner may receive a Copy of the law library Mail log book for the date of September 12, 2017 to inquire if petitioner's application for Extension of Time to file a writ of Certorari was mailed to the U.S. Supreme Court. D. Kolman provided petitioner with Said Copy which indicated petitioner's application for extension of Time was mailed to both the U.S. Supreme Court and to the California Attorney General's office, to which petitioner served, On September 12, 2017. [See P.B.S.P's Law Library Legal Mail Log entry of September 12, 2017 attached in appendix-EE; See also CDCR'S Outgoing Mail log entry attached in appendix-FF)

Due to the fact that petitioner had not received his personal property and thus Could not attempt to finish the Compilation of his writ of Cetorari, and due to the fact that the U.S. Supreme Court had not responded to petitioner's September 12, 2017 application For extension of time to file a Writ of Certorari, and due to the fact that petitioner due date to file the Writ of Certorari was November 16, 2017, In a final attempt to litigate his term of Conviction by way of Certorari, On November 16, 2017 petitioner submitted an additional application for Extension of Time to File a Writ of Cetorari to the U.S. Supreme Court. Petitioner declared that extraordinary Circumstances beyound petitioner's Control prohibited the filing of a timely writ of Certorari. [See Petitioner's Application attached in appendix-GG See also P.B.S.P's law library Mail Log which indicates petitioner's application was Mailed out also attached in appendix-GG]

On November 17, 2017 petition was finally issued his personal property [See CDCR 1083, Inmate Property Inventory Sheet, attached in appendix-KK]

On November 27, 2017 petitioner submitted a CDCR 22 Form to the P.B.S.P's facility law library inquiring if the U.S. Supreme Court has made a ruling upon the November 16, 2017 application for Extension of Time to file a Writ of Certorari

On November 28, 2017 PBSP's Senior Law Librarian D. Rusk responded to

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6) Petitioner had yet to receive any response from the U.S. Supreme Court regarding his September 12, 2017 application for Extension of Time to File a Writ of Certorari.

7.) Persuant to CCR Title 15 Section 3122 (b)-(b)(6) petitioner may request higher/priority access to the law library when an inmate has an established Court date within 30 days

8) Persuant to CCR Title 15 Section 3164 (c) petitioner may receive his personal property if he was engaged in a legal proceeding

9). These documents are not readily available due to fact they are attached to an administrative appeal regarding the CDCR's officials deliberate with holding of petitioner's property which resualted in the hinderance of petitioner filing a writ of Certorari. petitioner's appeal is within the third level review for Consideration and would be provided if need be as soon as the appeal is returned to him. (See appendix-QQ)

10) This document is not readily available due to the fact it was latter attached to CDCR 602 requesting petitioner be issued his personal property.

petitioner's CDCR 22 Form and stated that no information was found on the Court link or the USSC Web Site. [See CDCR 22 Form For petitioner's request and PBSP senior law librarian D. Rusk's Response attached in appendix-HH]

On December 1, 2017 petitioner's personal property was again inventoried and stored pending the December 7, 2017 transfer to KVSP for petitioner's Criminal proceedings. [See CDCR 1083, Inmate Inventory Sheet attached in appendix-II; see also CDCR Bed Movement sheet attached in appendix-BB]

On December 8, 2017 petitioner arrived at K.V.S.P [I.d.] and shortly after was is his property.

Upon the Completion of his Kern County Criminal Case, On December 26, 2017 petitioner's personal property was inventoried and stored pending the January 2, 2018 transfer back to P.B.S.P [I.d.]

On January 3, 2018 petitioner arrived at P.B.S.P [I.d.].

Shortly thereafter petitioner submitted a CDCR 22 Form request that he be provided his personal property.[10]

Having not received his personal property, and having not received any response from the U.S. Supreme Court regarding the application's for extension of Time to file a writ of Certorari, it became apperant that due to the strict timelimitations for the filing of a writ of Certorari persuant to <u>U.S. Supreme Court Rule 13(1) & (2)</u> and therefore petitioner promptly acquired access to the P.B.S.P's facility law library to research any other legal remedy that might exist to litigate the term of his Conviction, to which petitioner discovered the knowledge of extraordinary writ of Mandamus persuant to <u>U.S. Supreme Court Rule 20(1)</u> and <u>28 U.S.C section 1651(a)</u>.

Having not yet received his personal property, in the month of February petitioner submitted a CDCR 602, Inmate Appeal, requesting that he be issued his personal property.[11]

On April 26, 2018 petitioner's CDCR 602 was granted and it was discovered that that petitioner's personal property had not been transferred upon the January 2, 2018 transfer from K.V.S.P to PBSP and that it would be shipped via Fed-EX as soon as possible. [See CDCR 602 attached in appendix-LL][12]

On May 22, 2018 petitioner was issued his personal property. [See CDCR 1083, Inmate Property Inventory Sheet attached in appendix-JJ]

Petitioner then promptly Compiled this Writ of Mandamus.

NO OTHER ADEQUATE REMEDY SAVE WRIT OF MANDAMUS EXISTS

As provided within the "State of Pertinent Facts" section of this Writ, petitioner was convicted by a California Jury. California provides direct appeal review of Jury verdicts. <u>Cal. Pen. Code. 1237</u> and <u>Cal. Rules of Court Rule 8.304</u>. Petitioner's direct appeal was denied on January 14, 2015 [see Court of Appeal Denial attached in appendix-H].

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11) These documents are not readily available due to the fact they were submitted to the Third level appeal's for futher review petition would submit them if need be upon third levels appeal's completion

12) This appeal was an additional appeal directed at a different prison (K.V.S.P) However, the subject is the same and this appeal refers to the previous appeal's determination. Petitioner submits this CDCR 602 for facts due to the fact the previous 602 is pending within the third level review.

The California Supreme Court may review a decision of the Court of appeal either on a petition for review filed by a party or on its own motion. Cal. Const. art VI, Section 12; Cal. Rules of Court 8.500, 8.512(c). Review is discretionary. The Supreme Court may order review (Cal. Rules of Court 8.500(6)). Petitioner filed Petition for Review which was denied on April 1, 2015. [See Cal. Supreme Court denial Order attached in appendix-I]. Subsequent the denial of a states highest Court, the state defendant may either: (1) File a Writ of Certorari to the U.S. Supreme Court U.S. Suprme Court Rule 13; or (2) file a federal habeas Corpus within the U.S. District Courts. Due to the Strict 90 day time limitation for filing a writ of Cetorari (U.S. Court rule (13)), the Complexity of the filing requirement (U.S. Supreme Court Rule (14)), and Petitioner's lack of legal education, Petitioner opted to seek federal habeas Corpus persuant to 28 U.S.C 2241. Petitioner's habeas Corpus was denied on Octorbe 11, 2016 [See U.S. District Court order of denial attached in appendix-A]. A petitioner who wishes to review the denial of a habeas Corpus by the U.S. District Court must obtain a request for Certificate of Appealability first from the U.S. District Court, and if denied therein, request a Certificate of Appealability from the U.S. Court of Appeals. 28 U.S.C 2253(c). Petitioners Applications for Certificate of Appealability were denied by both th U.S District Court on Octorber 11, 2017 and by the U.S. Court of Appeals on June 9, 2017 [see U.S. District Court's denial of COA attached in appendix - D and U.S. Court of Appeals denial of COA attached in appendix-E]. A Petitioner who wishes to review a denial of a Certificate of Appealability may file a Petition for Review en banc to the relevant Court of Appeals. FRAR 22(d); Circuit Rule 27-10. Petitioner's Review was denied on August 18, 2017. A petitioner who wishes to further the review of a denial of a Certificate of Appealability may submit writ of Certorari pursuant to 28 U.S.C Section 1254(1) Hohn v. United States, 524 U.S. 236 (1998). As provided in the proceeding Section of this Writ entitled "Etraordinary Circumstances Beyound Petitioner's Control Prohibited The Filing of a Writ of Certorari and Petitioner was deligent in Seeking Mandamus" etraordinary Circumstances prohibited the filing of Writ of Certorari. Petitioner having exhausted all available remedies, Petitioner has no available remedies save this Writ of Mandamus.

REASONS FOR GRANTING MANDAMUS

Argument Summary

The following factors were all present in this case:

(1) Court Reporter's Transcripts specifically provide that the presiding Magistrates and/or presiding Judges never fulfilled their Constitutional duties in initiating an inquiry of Petitioner's rights to Counsel.

(2) The trial Judge failed to Conduct a proper inquiry into Petitioner's allegations upon the Marsden Motion, in regords the failure of the Court to advise Petitioner of his rights to Counsel, i.e. obtain Court Reports Transcripts,.

(3) Petitioner Consistently referred to the Court Reporters Transcripts and at-

tached them as supporting documents, of his claim that he had not been advised of his Constitutional rights to Counsel, Upon direct appeal, Petition for Review, Federal Habeas Corpus, COA to both U.S. District Court and Court of Appeals and Upon Petition for Review to the Court of Appeals.

(4) Because the trial Judge failed to acquire the Court Reporter's Transcripts to inquire whether or not Petitioner Was advised his rights to Counsel rather then assume that the Courts have fulfilled their Constitutional requirements (Upon the Marsden hearing) and because the Court of Appeals failed to take into Consideration the Court Reporter's Transcripts to determine whether or not the trial Court fulfilled their Constitutional requirements of advising Petitioner of the rights to Counsel, the determination of these two Courts was unreasonable in light of the evidence presented theirin and thus Meeting the standard for issuance of habeas Corpus. (28 USC 2254(d)(2).

(5) Because Petitioner Submitted the Court Reporter Transcripts as supportive of his Claim that he Was not advised of his right to Counsel upon federal habeas Corpus, Petitioner meet his burden of rebutting the presumption of Correctness, by the State Courts, by Clear and Convencing evidence (28 U.S.C 2253(e))

(6) Because Petition stated Upon his request for COA to the U.S. District Court that a conflict exists between the "Court Minute Order", which the district Court relies on, and the "Court Reporter's Transcripts", which Petitioner relies on, in regards to whether or not Petitioner Was informed of his rights to Counsel Petitioner Meet the Stanard for issuance of COA in that reasonable Jurist would both (1) disagree with the district Courts resolution of Petitioner's Constitutional Claim and (2) Conclude the issue presented is adequate to deserve encouargement to proceed further. (28 USC 2253(c))

(7) Because Petitioner Stated upon the COA to the Court of Appeals that when a conflict exists between the Court Minute Order, which the district Court relies on, and the Court Reporter's Transcript, which Petitioner relies on, regarding the failure of the Court to advise Petitioner of his rights to Counsel, the Court Reporter's Transcripts are deemed determinative of the issue and because Petitioner stated, in regards to the district Courts finding that Petitioner Waived the reading of right to Counsel because he Was bound by his appointed Counsel's decision to stipulate to the reading there of, that a defendant is only bound by his Counsels decisions only when the defendant Consents to the acceptance of appointed Counsel, Petitioner met the standard for issuance of COA in that reasonable Jurists would both (1) disagree with the district Courts resolution of Petitioner's Constitutional Claim and (2) Conclude the issue presented is adequate to deserve encouracgement to proceed further. (28 USC 2253(c))

Notwithstanding all of the above factors, the district Court found that the Court Minute order indicates Petitioner was advised of his right to Counsel and even if Petitioner argues he Was not personally advised of the right to Counsel Petitioner's Counsel stipulated to the advisement/reading of rights and therefor Petitioner is bound by the Counsel's decision to do SO. The district Court and Court of Appeals also denied Petitioner's COA by Stating Petitioner has not showed a Substantial showing of a Constitutional right.

Petitioner maintains that the actions of the U.S District and U.S. Appeals Courts have amounted to a Judicial usurpation of power because they have so far departed from the accepted and usual Course of Judicial proceedings and in turn have also Sanctioned such a departure by the state Court which calls for this Court's supervisory power. Consequently, and for all the reasons below, Petitioner respectfully maintains that this Court should issue this Writ of Mandamus and grant Petitioner's relief Sought herein.

A. The U.S. Constitution 6th and 14th Amendments Require a California Magistrate or Judge to 1) Advise a Criminal Defendant of the Right to Counsel 2) Initiate an Inquirey of the Defendant's Desire for the Aid of Counsel, and if Defendant so Desires Aid Thereof, 3) Allow the Defendant a Reasonable Amount of Time to Secure Counsel and 4) Appoint Counsel Upon an Indigent Defendant.

Under the 6th Amendment to the U.S. Constitution a defendant in a Criminal prosecution has the right to the assistance of Counsel. Powell V. Alabama (1932) 287 U.S. 45, 77 L.Ed 158, 53 S.Ct. 55. Similarly, the California Constitution Art. 1, Section 15 affords a Criminal defendant the right to Counsel. People V. Douglas (1964) 61 Cal. 2d 430, 434 38 Cal. Rptr. 884, 392 P.2d 964. Nonetheless, the 6th Amendment right to Counsel was made applicable to State defendants through the due process Clause of the 14th Amendment of the U.S. Constitution. Gideon V. Wainwright (1963) 372 U.S. 335, 337, 343

Both the U.S and California Constitutional rights to Counsel afford a defendant to either (1) Appointment of Counsel to indigent defendants. Id; Tracy V. Municipal Court (1978) 22 C3d 760, 766, 150 CR 785 (2) Counsel of own choice. U.S. V. Gonzalez-Lopez (2006) 126 S.Ct. 2557; People V. Crovedi (1966) 65 Cal. 2d 199, 207, 53 Cal. Rptr. 284, 417 P.2d 868, or 3) Self Representation. Faretta V. California (1975) 422 U.S. 806, 835, 45 L.Ed 2d 562, 581, 95 S.Ct. 2525; People V. Mattson (Cal. 1959), 51 Cal. 2d 777, 336 P.2d 937, 1959 Cal. LEXIS 302, overruled in part as stated in People V. Taylor (Cal. Dec. 24, 2009), 47 Cal. 4th 850, 102 Cal. Rptr. 3d 852, 220 P.3d 872, 2009 Cal. LEXIS 13168.

These rights to Counsel are not absolute in that the prerequistes are as follows:

·) Appointment of Counsel to indigent defendants only arises when a Criminal defendant establishes his inability to pay for a lawyer to represent him. Gideon, 372 U.S. at 344; United States V. Baver, 956 F.2d 693, 695 n.2 (7th Cir. 1992); In re Johnson (Cal. App. 2d Dist. 1965), 237 Cal. App. 2d 463, 47 Cal. Rptr. 17, 1965 Cal. App. LEXIS 1275.

·) A defendant's right to Choose Counsel is only afforded to defendants who have the means to employ Counsel. Wheat V. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988); Powell, 287 U.S. at 53; People V. Crovedi, Supra,

·) The right to Self representation arises when the defendant makes an unequivocal request to represent himself and Knowingly, intelligently, and voluntary Waives the assistance of Counsel. Iowa v. Tovar (2004) 541 US 77, 81, 158 L.Ed 2d 209, 216, 124 S.Ct. 1379; People v. Nauton (1994) 29 CA4th 976, 34 CR2d 861.

Since the beginnings of our nation there has been statutory authority to enforce the rights recgonized in the Six Amendment. 28 U.S.C.A Section 1654, formerly Codified as Section 35 of the Judiciary Act of 1789; 1 stat, 73, 92, and later as 28 USCA 394, provides that:

> "In all of the Courts of the United States, the parties may plead and manage their own Cases personally or by the assistance of Such Counsel or attorneys at law — -"

Turner v. American Bar Ass'n (1975, D.C. Tex) 407 F. Supp 451

Similary, in 1872 California inacted California penal Code 686 which provides in relevant part:

> "In criminal action the defendant is entitled: . . . to be allowed Counsel as in Civil actions, or to appear and defend in person and with Counsel, . . ."

In United States v. Plattner, 330 F.2d 271, the Court of Appeals for the Second Circuit Concluded that the right of the assistance of Counsel was intended to Supplement the other rights of the defendant, and not to impair "the absolute and primary right to Conduct one's own defense in propria persona." I.d. at 274.

Thus, "the U.S. Constitution does not force a lawyer upon a defendant", as this Court held in Adams v. United States ex rel. McCann, 317 U.S. 269, 279, and Specifically forbids a State from also doing So. Faretta, Supra,. Therefore, the 6th Amendment right to counsel's assistance implicitly embodies a "Correlative right to dispense with a lawyer's help. Adams, Supra. See also People v. Thompson (Cal. App. Dep't Super. Ct Nov. 25, 1940), 41 Cal. App. 2d Supp. 965, 108 P.2d 105, 1940 Cal. App. LEXIS 344. (The right to be represented by Counsel is for a defendant to enjoy or waive, as he desires.)

Thereby recognizing the Sixth Amendment right to Counsel essentially Consists of three individual and independent rights, i.e. the right to appointed Counsel, the right to Counsel of own Choosing; and the right to be Self-represented, the Federal Rules of Criminal Procedure implemented Rule 44 to ensure the protections of those individial and independant rights.

Fed. R. Crim. Procd. Rule 44 provides:

> "If the defendant appears in Court without counsel, the Court shall advise him of his right to Counsel and assign Counsel to represent him at every stage of the proceeding unless he elects to proceed without Counsel or is able to obtain Counsel."

Similarly, California has even went as far as to make it a Constitutional requirement to advise a defendant of the right to Counsel. Specifically, Cal. Const. Art. 1, Section 14 provide:

> "A person charged with a felony by Complaint subscribed under penalty of perjury and on file a Court in the County where the felony is triable shall be taken without unnecessary delay before a magistrate of that Court. The Magistrate shall immediately give the defendant a Copy of the Complaint, inform the defendant of the defendant's right to Counsel, allow the defendant a reasonable time to send for Counsel". . . "On the defendants request the Magistrate shall require a peace officer to transmit within the County where the Courts is located a Message to Counsel named by defendant"

In implementing Cal. Const. Art. 1, section 13 California Penal Code Section 858 requires that "when the defendant is brought before the Magistrate upon an arrest, either with or without a warrant, on a charge of having Committed a public offense, the magistrate must immediately inform him of the Charges against him, and of his right to the aid of Counsel in every stage of the proceeding." Correlative to this duty to inform the defendant are the further requirements that the magistrate must thereupon" ask him if he desires the aid of Counsel, and allow him a reasonable time to send for Counsel" and " if the defendant desires and is unable to employ Counsel, the Court must assign Counsel to defend him." Cal Pen. Code Section 859. Again, if the defendant is without Counsel at the time for arraignment" he must be informed by the Court that it is his right to have Counsel before being arraigned, and must be asked if he desires the aid of Counsel. If he does desire and is unable to employ Counsel, the Court must assign Counsel to defend him." Cal. Pen. Code. Section 987.

"Each of these statutory requirements, Moreover, must be observed in such a manner as to promote rather than defeat the Constitutional intent, for the very purpose of the duty thus enjoined upon the Court to advise an accused is to preserve to him a right which the Constitution has Conferred upon him." In re Johnson (Cal. 1965); 62 Cal. 2d 325, 42 Cal. Rptr. 228, 398 P.2d 420, 1965 Cal. LEXIS 252 Citing In re Turrieta (1960) 54 Cal. 2d. 816, 820 8 Cal. Rptr. 737, 356 P.2d 681.

Thus, Criminal Court[s] are required to inform each defendant of his right to Counsel, inquire if defendant desires the assistance of Counsel, and appoint Counsel for any defendant who desires but is unable to employ Counsel. In re Lopez (Cal. Mar. 2, 1970), 2 Cal. 3d. 141, 84 Cal. Rptr. 361. 465 P.2d 257, 1970 LEXIS 262.

As far as petitioner is concerned, this Court has never settled the issue post Bute v. Illinois (1948) 333 U.S 640 in regards to whether or not the state Court are required by the 14th Amendment to specifically advise a Criminal defendant of his right to Counsel, initiate an inquiry into the desire of the defendant to be represented by Counsel, to inquire into the ability of the accused to procure Counsel or, in the event of the inability of the defendant to procure Counsel, to assign Competent Counsel to the defendant to conduct his defense.

In Bute the petitioner contended that very issue. However, Bute was decided upon principals that pre-date the holding in Gideon v. Wainwright Supra, 372 U.S 335. Specifically, the holdings of this Court at the time of Bute provide that the 14th Amendment does not incorporate, as such, the specific guarantees found in the 6th Amendment right to Counsel absent Certain Circumstances. Bute v. Illinosis Supra, 333 U.S 665, 656-657, 675-676. Therefore, this Court in Bute held that a State Court need not Conform to the precise procedures of the federal Courts (in regards to the advisement of the right to Counsel) even to the extent that the procedure of the federal Courts is prescribed by the Federal Constitution or Bill of Right Id at 656.

Because the principals and holdings relevant at the time in deciding Bute Called for an absolute right to Counsel upon Capital offenses only, this Court essentially left open the door that the holdings in Bute would be applicable to State Courts through the 14th Amendent if a state defendant had an absolute right to Counsel under the 6th Amendment.

> "The final question is therefore whether . . . the provisions requiring due process of law under the Fourteenth Amendment, in and by itself, required the Court in these Cases to intiate an inquiry into the desire of the accused to be represented by Counsel, to inquire into the ability of the accused to procure Counsel, to assign Competent Counsel to the accused to Conduct his defense. We recognize that, if these Charges had been Capital Charges, the Court would have been required, both by the State Statute and the decisions of this Court interpreting the Fourteenth Amendment, to take Some such steps.

Id. at 674.

Petitioner respectfully submits that because the holdings in Gideon v Wainwright, Supra, 372 U.S 343 made the 6th Amendment right to Counsel absolute to state defendants through the Fourteenth Amendment, and thus overruled any and all principals and holdings that the Court in Bute relied upon for its determination, that now the 14th Amendment reasoning and principals within Bute's holdings can now be made applicable to state courts.

Thus, petitioner has both a state and United States Constitutional right to be advised of counsel, to be inquired of his desire for counsel, to be inquired of the ability for him to obtain counsel or, in the event of the inability of him to procure counsel, and if he so desires the aid of counsel, advise him that one would be appointed to conduct his defense.

B. The State Court Determination Of Petitioner's Claims was Erroneous

The issue presented to the state court was whether the lower court adhered to the requirements upon Cal. Const. Art 1, Section 13, 14 and Cal. Pen. Code Sections 858, 859 and 987 regarding petitioner's right to counsel as, also, provided by 14th and 6th Amendments to the U.S. Constitution. [appendix-Q]

In California, the Superior Courts have two means of employing records of court proceedings. There are Court Clerk's Minute, also known as Court docket entries, which reflect the title of each action and all orders and proceedings in these actions. Government Code Section 69844. There is also the Official Court stenographer who routinely make a verbatim record of all oral proceedings in felony cases, including arraignment. California Code of Civil Procedure Section 269 Subd (a).

It is true, there is a presumption that in preparing a docket entry (Court Minute order) official duty was regularly performed (Code. Civ. Pro. Setion 1938. subd. 15) and on collateral attack such an entry must ordinarily be deemed to speak the truth. In re Johnson Supra, 6 Cal. 2d at 329. However, when a court docket entry conflicts with the court stenographer's transcripts the court stenographer's/Reporter's transcripts are to be deemed determinative of the issue. In re Birch (1973) 10 C3d 314, 320, 110 CR 212.

In deciding cases were it is claimed that the defendant was not advised of his rights to counsel, the California Supreme Court held that in order "to avoid such incertainties we have made clear that to be adequate, 'docket entries [must] specifically [list] the rights of which the defendant is actually advised... No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. In re Birch, Supra, 110 Cal. Rptr. 216 Citing In re Smiley (1967) 66 Cal. 2d 606, 615 [58 Cal. Rptr. 579, 427 P.2d 179]

If the docket entries are unclear, a reviewing court will look to the entire record where a Constitutional right of a defendant are involved. In re Johnson, Supra, 6 Cal. 2d at 330-331.

However, a criminal judgment will be reversed and action remanded for further proceedings where the docket maintained by the judge in a Justice Court which tried the case establishes without conflict that defendant was not informed of his Civil right. People v. Garner (Cal. App. Dep't Super. Ct. Oct 23, 1953), 120 Cal. App. 2d. Supp. 923, 264 P 2d 672, 1953 Cal. App. LEXIS 2044.

Here in petitioner's Case the state Courts basis for denying petitioner's Claim was predicated on the Court Minute Order which Simply Stated "Counsel stipulates to advisement of rights". [appendix- H; See also Court Minute Order attached in appendix-MM]

Because the State Court does not provide any Supporting authority as basis for its decision and due to the fact that Cal. Pen Code. Sections 858, 859, 987 and Cal. Const. Art. 1 Section 14 provide for a Specific advisement of the right to Counsel, and an inquiry of the defendants desire for the aid of Counsel; it Can Only be presumed that the basis for the State Courts determination was predidicated upon the fact the petitioner had Counsel (this reasoning was also presumed latter upon the Federal habeas Corpus proceedings [appendix- B]). Assuming that this presumption is Correct, this presumption is erronouse for the following reasons;

First and foremost, the California Supreme Court has Consistently held that to implement the Constitutional guaranty of the assistance of Counsel at all stages of the proceedings, Criminal Courts are required to inform each defendant of his right to Counsel, inquire if defendant desires the assistance of Counsel, and appoint Counsel for any defendant who desires but is unable to employ Counsel. Bogart V. Superior Court (1963) 60 C2d 436, 440; In re Johnson (1965) 62 Cal 2d 325; In re Lopez (1970) 2 Cal. 3d. 141; In re Turrieta (1960) 54 Cal. 2d 816; In re Smiley (1967) 66 Cal. 2d 606; and In re Birch (1973) 10 C3d 314. The very purpose of the duty thus enjoined upon the Court to advise an accused is to preserve to him a right which the Constitution has Conferred upon him. In re Johnson Supra, 62 Cal 3d 330 Citing In re Turrieta, Supra, 54 Cal. 2d 820.

It is true in petitioner's Case that Counsel stipulated to the reading of the rights. However, the Counsel was Court appointed and who was appointed only after petitioner appeared for arraignment without Counsel. [appendix- MM and appendix-J]

Statutes (Cal. Pen Code Sections. 858, 859 and 987) were implemented to Supplemented the Cal. Const. Art. 1, 13; and 14 right to Counsel. In re Petition of Connor (Cal. 1940), 15 Cal. 2d 161, 99 P 2d 248, 1940 Cal. LEXIS 198. Vacated (U.S. Mar. 25, 1940), 309 U.S. 631, 60 S. Ct. 708, 84 L.Ed. 984, 1940 U.S. LEXIS 783, In re Johnson Supra, 62 Cal 3d 330. Collectively, these statutes Specifically provide that when a defendant appears for arraignment without Counsel the Magistrate shall advise the defendant of the right to Counsel, inquire into the defendants desire for the assistance of Counsel and appoint Counsel for any defendant who desires but is unable to employ Counsel. Each of these statutory requirements, Moreover, must be observed in such a manner as to promote rather then defeat the

Constitutional intent. In re Johnson, supra, 62 Cal. 3d 330. The Constitutional intent in those statutes, Cal. Pen. Code Sections 858, 859, and 987, is the right to Counsel. As provided within the "Reason for Granting Mandamus" section above, In California's Constitution Art. I. Section 13 and the U.S. Constitution 6th Amendment's right to Counsel are essentially Three separate and individually rights that are not absolute but are predicated upon three separate and individual prerequisites. (See; The U.S. Constitution 6th and 14th Amendments Require a California Magistrate or Judge to 1) Advise a Criminal Defendant of the Right to Couse 2) Initiate an Inquiry of the Defendant's Desire For the Aid of Counsel, and if the Defendants So Desires Aid Thereof, 3) Allow the Defendant Reasonable Amount of Time to Secure Counsel and 4) Appoint Counsel upon an Indigent Defendant, Section) Thus, the duty enjoined upon the Court to advise an accused of the right to Counsel is to protect each and everyone of those rights which are 1) Right to appointed Counsel for indigent defendants 2) Right to Counsel of own Choosing and 3) Right to Self-Representation.

Therefore, the appointment of Counsel by the Magistrate without first advising petitioner of his right to Counsel, initiating an inquiry of petitioner's desire for Counsel, and determining if petitioner was indigent thrust a lawyer upon defendant and denied petitioner his right to be a Self-Representation and/or to Counsel of own Choosing in violation of Cal. Const. Art. I, Section 13; 14 and the 6th and 14th Amendments to the U.S. Constition.

Secondly, It is true when a defendant chooses to have a lawyer manage and present his Case, law and tradition may allocate to the Counsel the power to make binding decisions of trial strategy in many areas. Cf Henry v. Mississippi, 379 U.S. 443, 451; Brookhart v. Janis, 384 U.S. 1, 7-8; Fay v. Noia, 372 U.S. 391, 439; People v. Materson (1994) 8 C4th 965, 35 CR2d 679; People v. Whittington (1977) 74 CA3d 806, 820, 141 CR 742. However, Counsel's Control, of Course, is not unlimited, and there are certain fundamental protections guaranteed an accused which Counsel may not waive without his Clients Concurrence. Townsend v. Superior Court (1975) 15 Cal. 3d 774, 781, 126 Cal. Rptr. 251, 543 P.2d 619; See also Brookhart v. Janis, Supra, 384 U.S. 1, 7. Although these Case's, and those Cases Cited therein, do not speak of the right to Counsel, the 6th Amendment right to Counsel of own Choosing is structural because it affects the Framework within which the trial proceeds United States v. Cuauhtemoc Gonzalez-Lopez, Supra, 548 U.S. 140 and the right to Self-representation also is structural that Cannot be denied. Mckaskle v. Wiggins (1984) 465 US 168. Most importantly the allocation of Counsel to make binding decisions can only be Justified, however, by the defendant's Consent, at the outset, to accept Counsel as his representative. An Unwanted Counsel represents the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense. Faretta v. California, Supra, 422 US 806, 820-821

In petitioner's case it can be made evident from the record that rather then persuing the appointed counsel's Meritless defense of how much force is necessary to substantiate a robbery conviction, petitioner wished to conduct his own defense or at the very least persue or establish his innocence. However, petitioner was prohibited from doing so by the obtrusive appointment of counsel and from the appointed counsel's blatant refusal to relinquish to petitioner the discovery in his case. Thus, the appointed counsel was trust upon petitioner and petitioner's defense was not his own in violation of the 14th and 6th Amendments to the US Constitution.

For the foregoing reasons the state court's determination of petitioner's claim was erroneous.

C. The U.S. District Court's Determination Of Petitioner's Habeas Corpus Was Erroneous

When the state court has addudicated a claim on the meritless, federal court review of the state court's findings of fact is limited to the question of whether the state court made an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C Section 2254(d)(2). "[A] federal court may not second-guess a state court's factual finding process unless, after review of the state court record it determines that the state court was not merely wrong, but actually unreasonable." Taylor v. Maddox (9th Cir. 2004) 366 F.3d 992, 999. The presumption that the state court's factual findings are correct may be rebutted only by clear and convincing evidence. 28 USC Section 2254(e)(1); Torres v. Prunty (9th. Cir. 2000) 223 F.3d 1103. The test is whether state court judgement can be reconciled with any reasonable application of controlling standard. Garrus v. Sec'y of p.a Dep't (2012, CA3Pa) 694 F.3d 394. Federal habeas corpus relief will not be granted for erroneous interpretation or application of state law. Estelle v. McGuire (1991) 502 US 62, 116 L.Ed. 2d 385, 112 S.Ct. 475; Engle v. Isaac (1982) 456 U.S. 107, 119 71 L.Ed. 2d 783, 795, 102 S.Ct. 1558; Hinman v. McCarthy (9th. Cir. 1982) 676 F.2d 343, 349 n.2. But if state law, whether statutory or decisional, creates a liberty interest protected by the federal due process clause, or if the errors in interpretation or application of state law is so egreoious as to offend federal due process standards, federal habeas corpus relief may be available. Carter v. Kentucky (1981) 450 U.S. 288, 67 L.Ed. 2d 241, 101 S.Ct 1112; Hicks v. Oklahoma (1980) 447 U.S. 343, 65 L.Ed 2d 175, 100 S.Ct. 2227; Ellard v. Alabama Bd. of Pardons & Paroles (11th Cir. 1987) 824 F.2d 937, 944 n7.

The federal court's determination of petitioner's claim was predicated on two state court factual findings:

The first that petitioner's attorney had waived the reading of the constitutional right to counsel. [see appendix - B]

Second, that the trial found petitioner less than credible insofar as petitioner's alleged to be unaware of his right to self representation and to counsel of his own choosing. [I.d]

Thus, petitioner would reiterate the entire arguement upon the "STATE COURTS DETERMINATION OF PETITIONER'S CLAIM WAS ERRONEOUS" Section of this Writ. [see pp 23-26 of this Writ of Mandamus.

Petitioner submits that all evidence upon this Writ of Mandamus, concerning the relevant claim, was available to the state's Court either from petitioner's attached exhibits to the supplemental brief [appendix-Q] or from the trial Court's record for appeal, for petitioner's appeals Counsel motioned for the Court to make an independent review of the entire record to determine any viable arguements [see Appeal's Counsel's Brief attached to appendix-PP]. Thus, the State Court as well as the federal Courts had ample of evidence to draw there Conclusions on. Nonetheless, the State Court as well as the federal Court determined that petitioner was bound by his Counsel's decision to waive the reading of petitioner's Constitutional right to Counsel. [appendix-Q, A, & B]. Although the state Court does not cite any Supporting Controlling Standards, the federal Court Cited York v. Hill, 528 U.S. 110, 114-115, 120 S.Ct. 659, 145 L.Ed 2d 560 and Wilson v. Gray, 345 F.2d 282, 286 (9th Cir. 1965) [appendix-B]. However, these Case's hold that a criminal defendant is bound by his Counsel's decisions relating to the Conduct of trial. [I.d] This determination was erroneous for the following reasons. First, the right to Counsel of own Choosing is structural that affects the frame work of which the trial proceeds and is not releated to the trial process itself. [U.S. v. Gonzalez, Supra, 548 U.S. 140. Secondly, petitioner would only be bound to an attorney when after he has expressed a desire to be represented by Counsel accepts the appointment of Counsel. [Faretta v. California (1975) 422 U.S. 806, 45 L.Ed 2d 562, 95 S.Ct. 2525. Thirdly, the U.S. Constitution does not force a lawyer upon a defendant [Adams v. United States ex rel. Mc Cann, 317 US 269, 279 and prohibits the State from also doing so Faretta v. California supra, Thus. in petitioner's Case petitioner was not bound by the appointed Counsel's decision to waive the reading of his Constitutional right to Counsel because petitioner never expressed his desire to be represented by the appointed Counsel nor did petitioner Consent to the appointment of Counsel. These arguements were made know to the federal Court by way of petitioner's objection to the Magistrate's Report and Recommendation. [appendix-V]. For the above mentioned reasons the U.S. District Court's was erroneous. Petitioner has rebutted the State Court's finding of facts by Clear and Convincing evidence [28 USC 2254 (d)(2), (e)(1) and both the State and federal Courts decisions cannot be reconciled with any reasonable application of Controlling Standards. Garrus v. Sec'y of P.a. Dep't (2012, CA 3Pa) 694 F.3d 394.

D. The Denial of Petitioner's Certificate of Appealability Was Erroneous

To obtain a certificate of appealability, the petitioner must make a substantial showing of the denial of a Constitutional right, a showing that is very similar to the showing required for granting a Certificate of probable cause. 28 USC Section 2253(c)(2); Slack v. McDaniel (2000) 529 US 473, 483, 146 L.Ed. 2d 542, 554, 120 S.Ct. 1595 (COA requirements largely Codifies Standard set forth in Barefoot v. Estelle (1983) 463 US 880, 893, 77 L.Ed 2d 1090, 1104, 103

S.Ct 3383). A COA must issue if the petitioner is able to show that reasonable Jurist would find the district Court's assesment of all/any of the Constitutional claim[s] debatable or wrong. Tennard V. Dretke (2004) 542 US 274, 282; 159 L.Ed. 2d 384, 394. 124 S.Ct. 2562

In petitioner's COA to the U.S. Court of Appeals, petitioner contended that the state trial Court denied him the right to hire Counsel of his own choosing and/or the right to be a self-represented defendant when the Court failed to advise him of his rights to Counsel [appendix-X]

Nonetheless, the Court of Appeals denied petitioner's COA by stating petitioner has not deminstrated a substantial showing of a denial of a constitutional right within the meaning of 28 USC Section 2253 (c)(2) [appendix-E]

It is well settled that the right to Counsel of own choosing and the right to be a Self-represented defendant are protected by the 6th Amendment to the U.S. Constitution U.S. Gonzalez-Lopez, Supra, 548 U.S. 140 (right to Counsel of own choosing); Faretta V. California, Supra, 422 U.S. 806 (right to self-representation)

Petitioner contended that the U.S. District Court errored in determining that petitioner waived these rights when the appointed counsel stipulated to the reading of these rights because petitioner would be bound by Counsel's decisions to do so. Petitioner contended that in order for him to be bound by the Counsel, petitioner would have first needed to accept the Counsel as his representative. Petitioner maintained that his claim was supported by the Court Reporter's Transcripts and thus the federal Court should have granted relief on the habeas Corpus

Petitioner submits that he has provided sufficient allegations upon his COA for a denial of the 6th Amendment right to Counsel

PETITIONER'S MANDAMUS WILL BE IN AID OF THE COURT'S JURISDICTION

Statutory power of the United States Court to issue writs of prohibitation or Mandamus to federal district Courts could be Constitutionally exercised only insofar as such writs are in aid of its appellate Jurisdiction, and issuance of said writs in such cases usually would be refused unless question of public importance was involved. United States Alkali Exporte Ass'n United States (1945) 325 US 196, 89 L.Ed 1554, 65 S.Ct. 1120

The traditional use of the writ in aid of appellate Jurisdiction both at common law and in federal Courts has been to confine an inferior Court to a lawful exercise of its prescribed Jurisdiction or to compel it to exercise authority when it is duty to do so Roche v. Evaporated Milk Association 319 U.S. 21, 26 87 L.Ed 1185, 63 S.Ct. 938 (1943); Thermtron Products, Inc. V. Hermandorfer, 423 U.S. 336, 352, 96 S.Ct. 584, 46 L.Ed. 2d 542 (1976).

Here the District Court had a nondiscretional duty to issue a writ of habeas Corpus when a violation of a Constitutional right exists. 28 USC Sections 2241 (c) (3), 2254 (a); Estelle v. McGuire (1991) 502 US 62; 116 L.Ed. 2d 385; 112 S.Ct. 475

State prisoner's can win federal writ of habeas Corpus only upon showing that State participated in denial of fundamental right protected by Fourteenth Amendment Such as right to Counsel guaranteed by the Sixth Amendment. Cuyler V. Sullivan (1980) 446 US 335; 100 S.Ct. 1708; 64 L.Ed. 2d 333, on remand, remand on other grounds (1980, CA 3Pa) 631 F.2d 14 and (orld on other grounds as stated in United State V. Wilson (2005, DC Dist Col) 2005 US Dist LEXIS 18910).

The Court of Appeals also have a nondiscretional duty to issue a Certificate of Appealability when a petitioner demonstrates a substantial showing of the denial of a Constitutional right. 28 USC Section 2253 (c); Miller-El V. Cockrell, 537 US 332, 123 S.Ct. 1029 (2003); Slack V. McDaniel, 529 US 473, 484 (2000)

Petitioner maintains the failure of the State Court to advise him of the right to Counsel, initiate an inquiry into petitioner's desire to be represented by Counsel and to inquire into the ability of the accused to procure Counsel before appointing Counsel as his represetive deprived him of his right to obtain Counsel of his own choosing and to be a Self-Represented defendant in Violation of his Sixth Amendment to the U.S. Constitution. U.S. V. Gonzalez-Lopez, Supra 548 U.S. 140; Faretta V. California Supra 422 U.S. 806.

Petitioner further maintains that the questions raised within this Writ of Mandamus presents questions of public importance because the issue's have not been settled and because they are questions of structural procedures such the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his liberty. See Weaver V. Massachusetts, 582 U.S. —, —, 137 S.Ct. 1899, 198 L.Ed. 2d 240 (2017) (slip op., at 6) 2017) (Citing Faretta, 422 US at 834, 95 S.Ct. 2525, 45 L.Ed. 2d 562)

Thus, this writ would be in aid of the Courts appellate Jurisdiction in that it would Confine the inferior Courts to exercise its authority when its duty is to do so.

EXCEPTIONAL CIRCUMSTANCES WARRANT THE
EXERCISE OF THE COURT'S DISCRETIONARY POWERS

A. Federal Habeas Corpus Determination.

As provided within this writ the federal Court determined that petitioner waived his right to be made aware of his right to Counsel of own choosing or to be Self-Represented because petitioner's appointed Counsel stipulated to those rights and thus petitioner is bound by the appointed Counsel's decision to do so. [appendix-B]

In addition to those arguements upon the "Reasons For Granting Writ of Mandamus" section of this Writ. [writ Mandamus at pp 19-28], recently in May 18, 2018 this Court held that it is a violation of a defendant's 6th Amendment secured autonomy when the defendants Counsel admits guilt to a Jury over the defendants intransigent objection to that admission McCoy v. Louisiana (2018) 138 S.Ct. 1500. The basis for the holding was predicated upon the fact that a defendant has a right to make the fundamental choices about his own defense Id at 1511.

This is the case with petitioner. The Court did not advise petitioner of his right to Counsel, initiate an inquiry of petitioner's desire for the aid of Counsel, inquire of petitioner's ability to procure Counsel or if petitioner desired the aid of Counsel and Could not afford Counsel would petitioner accept the appointment of Counsel. Rather, Upon arraignment the Court simply appoints the public defenders office to represent petitioner. [appendix's J, K and L]

This action by the state Court denied petitioner the fundamental principle of making his own choices about the proper way to protect his own liberty, i.e. opportunity to obtain Counsel of own choosing. U.S. v. Gonzalez-Lopez, Supra, 548 US 140 to be Self-Represented Faretta v. California. Supra, 422 US 806 or to present a defense Boland v. Holder (2012, CA6 Ohio) 682 F.3d 531, 2012 FED App. 193P

B. Certificate of Appealability Determination

Petitioner submits that it is uncertain from the Court of Appeals one statement order of denial, stating that petitioner has not showed a substantial violation of a constitutional right, as to what exactly its order pretained to. [appendix-D]

Petitioner submits that the order can only be interpreted to pretain to petitioner's claim that the failure of the state Court to advise petitioner of the right to Counsel, initiate an inquiry to petitioner's desire for the aid of Counsel, inquire into petitioner's ability to procure Counsel or if petitioner would accept the appointment of Counsel did not present a substantial showing of a denial of a Constitutional right because petitioner was bound by his appointed Counsel's decision to stipulate to the reading of the right and thus petitioner waived the opportunity to obtain Counsel of his own Choosing or to be self-Represented.

Petitioner would reiterate his arguements upon the "Reasons For Granting Writ of Mandamus" Section of this Writ. [Writ of Mandamus at pp 19-28] as well as those arguements stated above in the "Federal Habeas Corpus Determination" Sub Section of this "EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THE COURT'S DISCRETIONARY POWERS" Section of this Writ. [Writ of Mandamus at pg 30].

REQUEST FOR RELIEF

WHEREFORE PETITIONER PRAYS THAT:

This Court issue a peremptory writ of mandamus in the first instance commanding respondents;

1) U.S. District Court Judge George H. Wu to vacate the order dismissing petitioner's federal writ of habeas Corpus in EVAN P. GALVAN V. M.D. BITTER Case Number ED-CV-15-1819 GW and enter an order directed at the Riverside County Superior Court of the State of California to vacate the judgement in People of the state of California V. EVAN P. GALVAN Case NO. INF1302353 or;

2) U.S. Circuit Judges Paul J. Watford and Barry G. Silverman of Ninth Circuit Court of Appeals to vacate its order denying petitioner's Certificate of Appealability and issue an order to grant a Certificate of Appealability within EVAN P. GALVAN V. M.D. BITTER NO 16-56582

Petitioner further prays this Court grant any legal relief deemed proper.

VERIFICATION

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

Date. September 1, 2018

EVAN P. GALVAN
Petitioner In Pro Per.