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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HAROLD GRIST — PETITIONER

(Your Name)

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vs.

TEREMA CARLIN and
KEITH YORDY

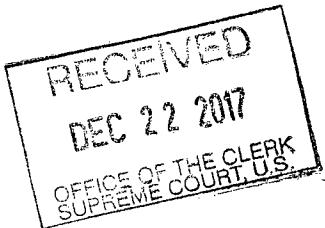
— RESPONDENT(S)

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U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

NINTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)



PETITION FOR WRIT OF CERTIORARI

Harold Grist # 83420

(Your Name)

ISCI; Unit 11

Box 14

(Address)

Boise, Idaho 83707

(City, State, Zip Code)

(Phone Number)

Q U E S T I O N S P R E S E N T E D

QUESTION ONE

Whether the Petitioner had a constitutional right to confront his accusers at trial and impeach them before a jury to challenge their credibility and truthfulness ?

QUESTION TWO

Whether Petitioner was denied effective assistance of in all state court proceedings when the district court inferred such ?

QUESTION THREE

Whether juror misconduct and introducing extrinsic evidence in jury deliberations violated Petitioner's rights ?

QUESTION FOUR

Whether Petitioner was forced to incriminate himself after his constitutional right ?

QUESTION FIVE

Whether the Ninth Circuit Court of Appeals denied a Certificate of Appealability in direct conflict with the U.S. Supreme Court's mandates governing such ?

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DECISIONS BELOW

The decisions of the United States Court of Appeals for the Ninth Circuit is unreported. Copies of the decisions are attached as **APPENDIX "A"** to this petition. The order of the United States District Court for Idaho is not reported. A copy is attached as **APPENDIX "B"** to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered September 7, 2017. An order denying a motion for reconsideration was entered November 8, 2017. Copies of the orders are attached as **APPENDIX "A"** to this petition. Jurisdiction is conferred on the Supreme Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

AMENDMENT V
RIGHTS IN CRIMINAL CASES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when actual service in time of War

or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI
RIGHT TO A FAIR TRIAL

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

AMENDMENT XIV
CIVIL RIGHTS

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

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

This case also involves Idaho Code §§ 18-1304 and Idaho Code §§ 19-2125 which provides:

IDAHO CODE §§ 18-1304
ATTEMPT TO INFLUENCE JURORS AND ARBITRATORS

Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator or umpire, or appointed as a referee in respect to his verdict in, or decision of, any cause pending, or about to be brought before him either;

1. By means of any communication, oral or written, had with him, except in the regular course or proceedings;
2. By mean of any book, paper, or instrument exhibited, otherwise than in the regular court proceedingss;
3. By mean of any threat, intimidation, persuasion or entreaty; or,
4. By means of any promise or assurance of any pecuniary or other advantage; is guilty of a felony.

IDAHO CODE §§ 19-2125
DISCLOSURE OF FACTS KNOWN BY JUROR

If a juror has a personal knowledge respecting a fact in controversy in cause, he must declare the same in open court during the trial. If, during retirement of the jury, a juror declares a fact which could be evidence in the cause, as of his own knowledge, the jury may return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties.

STATEMENT OF THE CASE

Petitioner was convicted of seven counts of lewd conduct with

a minor, two counts of sexual battery of a minor, and one count of sexual abuse of a minor after jury trial in the Second Judicial District Court in Nez Perce County, Idaho. Petitioner's convictions from the first trial were vacated and overturned on direct appeal, State v. Grist, 147 Idaho 49, 205 P.3d 1185 (2009).

Petitioner testified at his first trial but invoked his right to remain silent at his second trial. Petitioner was convicted a second time in his second trial.

Petitioner filed his direct appeal after being convicted in his second trial where his aggregate determinate sentences of twenty-five (25) years to fifteen (15) years were modified consistent with the sentencing of the first trial. Petitioner had the same trial judge in both state trials. The Idaho Appellate Court in State v. Grist, 152 Idaho 786, 275 P.3d 12 (Ct.App. 2012) noted that the state court judge had been vindictive towards the Petitioner.

Notably, both Magistrate Dale and Judge Winmill also noted that the state trial judge was vindictive towards Petitioner in both trials. See: APPENDIX "B" attached to this petition.

Petitioner filed an unsuccessful pro se post conviction action that was denied by a different judge than from the previous two (2) trials. Petitioner then filed an unsuccessful appeal due in part to the continual changing of attorneys by the court, refusal of the attorneys to present viable claims petitioner sought to have presented. Grist v. State, No. 41409 WL 738124 (Id.Ct.App. 2015).

Petitioner then sought Writ of Habeas Corpus in the United States District Court of Idaho. Magistrate Candy Dale was originally assigned to preside over the case but, for some reason unknown and never requested, Judge Winmill took the case from Magistrate Dale and presided over the case when all parties had consented to a Magistrate presiding over the matter. See: APPENDIX "B" attached to this petition.

Eventually the petition for habeas corpus was denied with Judge Winmill stating he did not believe the appeal was appropriate. Petitioner immediately filed a Petition for Certificate of Probable Cause and Memorandum with the United States Court of Appeals for the Ninth Circuit on April 25, 2017. See: APPENDIX "C" attached to this petition. The petition was denied by the United States Court of Appeals for the Ninth Circuit on September 7, 2017. See: APPENDIX "A" attached to this petition.

Petitioner next filed his Petition for En Banc hearing with the United States Court of Appeals for the Ninth Circuit on September 19, 2017. See: APPENDIX "D" attached to this petition. The United States Court of Appeals for the Ninth Circuit denied his petition for an en banc hearing on November 8, 2017. See: APPENDIX "A" attached to this petition.

BASIS FOR FEDERAL JURISDICTION

This case raises questions of interpretation of the Confrontation PETITION FOR WRIT OF CERTIORARAI. . . Page 7

Clause of the Sixth Amendment of the U.S. Constitution.

This case raises questions of interpretation of the right to "effective" assistance of counsel of the Sixth Amendment of the U.S. Constitution.

This case raises questions of interpretation of the Due Process Clause and the Equal Protection of the Law Clause of the Fourteenth Amendment.

The United States District Court had jurisdiction to determine federal questions of law conferred by 28 U.S. U.S.C. § 2254.

REASONS FOR GRANT THE WRIT

The denial of the Writ of Habeas Corpus and denying Petitioner an opportunity to appeal the decision of the United States District Court is in direct conflict with previous decisions of this Court, the Ninth Circuit and contrary to controlling law.

IMPORTANCE OF QUESTION ONE PRESENTED

This case presents a fundamental question on interpretation of this Court's interpretation of the Sixth Amendment and the Confrontation Clause of being able to not only confront one's accusers but being able to impeach them for truthfulness and to challenge their credibility.

The question presented to this Court is of great public importance because it affects all citizens and their secured rights to not only face their accusers but to impeach their accusers and challenge their credibility to ensure a fair and impartial trial.

The very same trial judge presided at both state trials and

refused to allow the Petitioner the right to impeach his accusers or challenge their credibility through impeachment. A different judge presided over the Petitioner's post conviction that was also denied.

Petitioner submits that his right to confront his accusers was denied him in direct violation of the Confrontation Clause of the Sixth Amendment and the district court erred in not granting Petitioner Writ of Habeas Corpus.

IMPORTANCE OF QUESTION TWO PRESENTED

Petitioner alleged that he was denied effective assistance of counsel in both state trials, on appeal and in all stages of his post conviction action in state proceedings.

Petitioner's court appointed attorney in state trials failed to raise Petitioner's right to impeach his accusers nor objected to preserve such issues for appeal. Petitioner's court appointed attorneys in the second state trial failed and refused to act as an advocate for Petitioner and object to the introduction of his psychosexual evaluation that was used in the first trial which was overturned and reversed that was sent back to the state court for a second new trial.

The U.S. District Court in its' Memorandum Decision and Order, pages 8-9, "Procedural Default Issues" inferred Petitioner had been denied effective assistance of counsel. See: APPENDIX "B" attached to this petition.

Notably the district court noted that Petitioner never really

had solid representation and his meritorious claims and his desire to have certain issues presented in which to exhaust them at state level to preserve for a federal habeas action to prevent procedural default never happened because Petitioner's court appointed attorney refused to do so.

Petitioner requests this Court take **JUDICIAL NOTICE** that the district court's findings infer both incompetence and ineffective assistance of counsel by court appointed attorneys as Petitioner was "represented by **MUTIPLE ATTORNEYS** and each in a distinct and new proceeding. The district court found in pertinent part that:

"As a result of this "changing of the guard", the claims seem to have gone through a metamorphosis during the state court action depending on how the attorney interpreted and how the attorney strategically reacted to each court's ruling." (emphasis added).

See: APPENDIX "B", page 9.

Nonetheless, the district court held that such claims were procedurally defaulted.

In Martinez v. Ryan, 132 S.Ct. 1309 (2012) this Court established a limited exception to procedural default under the Coleman rule, id. at 1319. In Marinez, the Court held that inadequate assistance of counsel "at the initial-review collateral review proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." id. at 1315. The Martinez Court explained that the limited exception was created "as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure the proper consideration was

given to a substantial claim. id. at 1318.

In McMann v. Richardson, 397 U.S. 759, 771 (1970) Justice White stated ". . . persons accused of a crime are 'entitled to the effective assistance of. . .counsel' acting 'within the range of competence demanded of attorneys in criminal cases'". Mere mistakes do not rise to an ineffective assistance claim. However, defense counsel's errors or omissions which reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent criminal defense attorney and conscientious advocate would rise to the level of ineffective assistance of counsel. This is the constitutional standard. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978).

An attorney's errors that rise to the level of a violation of the Sixth Amendment right to effective assistance of counsel may, under certain circumstances, serve as a cause to excuse procedural default of other claims. Murray v. Carrier, 477 U.S. 478, 488 (1986).

The Supreme Court has long held that the deprivation of the constitutionally-required assistance of counsel can never be treated as harmless error because of the importance of the rights involved. The Supreme Court held that automatic reversal was required without a showing of prejudice. Glasser v. United States, 315 U.S. 60 (1942). "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its' denial." id at 76.

See also: Chapman v. California, 386 U.S. 18 (1967).

The right to competent counsel is also based on consideration of procedural fairness that apply regardless of the strength of the case against the accused. "The guilty as well as the innocent are entitled to a fair trial, and '[t]he assistance of trial counsel, is often requisite to the very existence of a fair trial." Arersinger v. Hamlin, 407 U.S. 25, 31 (1972). Likewise, when the representation afforded a defendant is not constitutionally adequate, "[a] conviction must be reversed. . . even if no particular prejudice is shown and even if the defendant was clearly guilty." Chapman v. California, 386 U.S. 18, 43 (1967)(Stewart, J. concurring); Holloway v. Arkansas, 435 at 489 (1978).

Petitioner respectfully submits that the United States District Court's findings were in direct conflict with controlling cases of this Court and Writ of Certiorarai should be granted in the interests of justice.

IMPORTANCE OF QUESTION THREE PRESENTED

During the course of the second state trial extrinsic evidence was introduce by at least two (2) of the jurors to the other jurors during deliberations concerning knowing the alleged victim's Mother and the Petitioner. Both stated they believed that such knowledge would prevent them from sitting on the jury. This information never came to light until after the second trial. The Petitioner's court appointed attorney told him, "don't worry about it as you can always bring it up on a post conviction if you lose."

The district court's Memorandum Decision is in direct conflict with the mandates of Dickson v. Sullivan, 849 F.2d 403, 405-06 (9th Cir. 1988) which instructs court that a review of extrinsic evidence "is an independent one, and the Court must consider the whole record. . .". As evidenced from APPENDIX "B" attached to this petition the whole record was not reviewed by the district court.

Those jurors who introduced extrinsic evidence became unsworn witnesses in direct violation of the Confrontation Clause of the Sixth Amendment of the Constitution. See: U.S. Keating, 147 F.3d 895, 899-900 (9th Cir. 1998); Jeffries v. Wood, 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc); Idaho Code §§ 18-1304 and §§ 19-2125.

Notably, the district court in its' Memorandum Decision, page 37 acknowledged that Petitioner's post conviction attorney failed to present evidence, APPENDIX "B" attached to this petition. With such finding Petitioner submits that a full and independent review of the record should have been done by the district court.

Petitioner submits that the district court's findings were in direct conflict with this Court's controlling law and that the Petitioner should have been allowed to appeal the decision of the district court to the United States Court of Appeals of the Ninth Circuit.

IMPORTANCE OF QUESTION FOUR PRESENTED

The district court erred in not performing an independent review of Petitioner's claim of self-incrimination by the use of a psychosexual evaluation that was done to be used in the first

The record is clear that petitioner did consent to the use of a psychosexual evaluation in his first trial and did consent to such use in the first trial. As the district court noted in its' memorandum Decision, Page 38, second paragraph it held in pertinent part that:". . .The evaluation was used again, in part, because Petitioner REFUSED to be evaluated a second time after the second guilty verdict, APPENDIX "B" attached to this petition.

In essence by refusing to participate in an evaluation the Petitioner invoked his right under the Fifth Amendment of the Constitution from self-incrimination. The state trial judge's acts forced and compelled Petitioner against his will to incriminate himself after he declined to do so. The use of such psychosexual evaluation done and used in the first trial was barred in the second because the case was reversed and remanded for a second trial. The Court was not allowed to use the transcribed testimonies of the witnesses of the first trial or the same jurors. As such, he could not use the first psychosexual evaluation when Petitioner refused to submit to a second one. Petitioner's right to be free from self-incrimination under the Fifth Amendment was knowingly violated by the state trial judge and the district court's Memorandum Decision is in direct conflict with this Court's previous decisions concerning self-incrimination. See: Mitchell v. U.S., 526 U.S. 314, 326 (1999); Estelle v. Smith, 451 U.S. 454, 462 (1981).

In Remmer v. United States, 347 U.S. 227, 229 (1954) the U.S. Supreme Court held that " any [unapproved] private communication, contact, or tampering. . .[is] presumptively prejudicial."

See also: United States v. Monia, 317 U.S. 424, 427 (1943).

Notably, the district court's findings are in direct conflict with the law from the Fifth Circuit Court of Appeals. The Court of Appeals in Vanderbilt v. Collins, 994 F.2d 189 (5th Cir. 1993) granted a habeas action because there was improper introduction of uncounseled statements to a psychiatrist used at the sentencing after petitioner's second trial from statements made by the petitioner at the time of the first trial. The Fifth Circuit held the use of such was error and violated petitioner's rights.

As seen the district court's findings are in direct conflict with the Fifth Circuit Court of Appeals and also with controlling cases of this Court. Petitioner respectfully submits that Writ of Certiorari should be granted.

IMPORTANCE OF QUESTION FIVE PRESENTED

Petitioner submits that the district court erred and abused its' discretion in not allowing Petitioner to appeal its' Decision and the Ninth Circuit Court of Appeals erred by now granting the Petitioner a Certificate of Appealability as both are in direct conflict with 28 U.S.C. § 2253, Rule 22(b), Federal Rule of Appellate Procedure and in particular, the mandates of this Court of Barefoot v. Estelle, 463 U.S. 480, 893 n. 4 894 (1983).

Petitioner would submit that neither 28 U.S.C. § 2253 nor Rule 22(b), Fed.R.App. P., the sole two sources concerning a Certificate of Probable Cause requirement, offers no guidance on the standard a petitioner must meet in order to require the district

court or an appellate court to issue a Certificate of Probable Cause.

The District Court in it's Memorandum Decision, page 40 "ORDER" ¶ 6 stated: "The Court does not find its resolution of this habeas matter to be reasonably debatable and a certificate of appealability will not issue. . .".

This is in direct conflict with this Court's mandates of Barefoot v. Estelle, 463 U.S. 480, 893, n. 4 894 (1983). The Supreme Court admonished district courts that they may not deny application of probable cause certificates solely because they have already denied the petition on the merits: "[O]bviously the petition need not show that he should prevail on the merits. He has clearly failed in that endeavor. Rather a certificate of some substance, i.e., at least one issue (1) that is 'debatable among jurists of reason'; (2) 'that a court could resolve in a different manner'; (3) that is 'adequate to deserve encouragement to proceed further' or (4) that is not 'squarely foreclosed by statute, rule, or authoritative court decision, or. . .[that is not] lacking any factual basis in the record.'"

The district court only stated in its Order that it found that it was not reasonably "debatable" and then, the district court did not state between jurists. The findings of the district court does not meet the criteria set forth by this Court in Barefoot v. Estelle, 463 U.S. 480 (1983).

As seen the district court's findings are in direct conflict with the controlling law of this Court. Petitioner respectfully

ask this Court to grant Writ of Certiorarai to the Petitioner.

C O N C L U S I O N

WHEREFORE, based upon the foregoing Petitioner respectfully submits both the district court and Ninth Circuit Court of Appeals erred and should have allowed Petitioner to appeals his case.

Dated this 13 day of
December, 2017.

Respectfully Submitted


Harold Grist, Petitioner
IDOC # 83420
ISCI; Unit # 11
Box 14
Boise, Idaho 83707

C E R T I F I C A T E O F S E R V I C E

I HEREBY CERTIFY THAT, on this 13 day of December, 2017 I gave the foregoing Petition for Writ of Certiorari to the ISCI paralegal Alan Stewart to make appropriate copies and to mail by prepaid, first class postage, U.S. Mail too:

Lawrence Wasden
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83706