

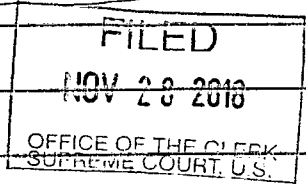
No. 18-7513

In The
Supreme Court of The United States

Nelson Cobas - Petitioner

V.S.

Kevin Lindsey - Respondent, Warden



Petitioner Nelson Cobas, respectfully asks this Court by Writ of Certiorari to decide his actual innocence / Miscarriage of Justice, and ineffectiveness assistance of both Counsels Claims, to: Correct Standard of review, and state and federal courts Rules of Evidence 403-04, and "brief and unexplained" orders, appeal by right, and post conviction proceedings according with the United States Constitution Due Process of Law 6, 14; Ams, and 28 U.S.C. sections 2254; 2244, statute of limitations, Habeas Corpus Rules, and unjust incarceration as the interest of Justice demand it, whether procedurally or merits-based.

Question Presented:

Under Which Standard of Review This Case Shall Be Determined Actual Innocence, Ineffective Assistance of Counsel, The AEDPA 28 U.S.C. §§ 2254; 2244 Statute-of-Limitations, or After Guilmette's Decision on The Merits or Procedurally-Based-MCR 6.508(D)?

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Opinions Below

State trial Court had an Impoundment Hearing. October 21, 1991. Hearing Transcripts Pages attached. Case No. 91-106067-FC.

Michigan Court of Appeals Affirmed Cobas's Appeal by Right and Sentence. December 15, 1994. See attached. Case No. 147350 (Trial Counsel Claim was not reached on the merits). *People v Pickens*, 446 Mich. 298, 521 NW2d 797 (1994).

Michigan Supreme Court denied Cobas's Application for Leave To Appeal. Sept. 13, 1995. (Brief and Unexplained Order) *People v Cobas*, 450 Mich. 862; 539 NW2d 375 (1995). Case No. 102104. attached.

State trial Court denied Cobas's Motion For Relief From Judgment. Sept. 15, 1997, under MCR 6.508(D) Brief and unexplained order, but it did not address his ineffective appellate Counsel Claim on the merits, or "Separate" from the rest of the DNA issues raised. See Order attached. Case No. 91-106067-FC.

Both Federal District and Circuit Courts denied Cobas's Writ of Habeas Corpus as "untimely filed" under the AEDPA's statute of limitations enacted on April 24, 1996. District Court Case No. 00-CV-74647-DPH: (Jan. 31, 2002): § 2244(d)(1) - § 2244(d)(2); Court of Appeals's decision *Cobas v Burgess*, 306 F.3d. 441 (6th Cir 2002). Also the United States Supreme Court denied Cobas writ of certiorari on April 21, 2003. *Cobas v Burgess*, 538 U.S. 984 (2003).

On June 12, 2017, Cobas filed two (2) Motions for relief from the previous Judgment. Fed. R. Civ. P. 60(B); Gonzalez v. Grosby, 545 U.S. 524, 528 (2005) in the United States District Court. The district Court denied "on the merits" both motions. But reasoned one year time requirement for filing such a motion had expired. Fed. R. Civ. P. 60(C)(1), and declined to grant Certificate of Appealability C.O.A. 28 U.S.C. § 2253(C)(2), Case No. 2:00-CV-74647-DPH. See Order and Opinion attached.

The United States Court of Appeals for the Sixth Circuit denied Cobas C.O.A. on July 13, 2018. Case No. 18-1320. On Rehearing Cobas raised two (2) 'new' Claims, "Actual Innocence" and "Ineffective Assistance of Appellate Counsel" which were denied but not on the merits. Fed. R. App. P. 40(a)(2). Oct. 16, 2018. See Order attached. Case No. 18-1320.

Petitioner respectfully prays that a writ of certiorari issue to review the State and Federal Courts Judgment, Opinions, and orders applied to his Case which are attached to the Index of Appendices.

Jurisdiction

This Court has jurisdiction to review and decide this case pursuant to Fed. R. Civ. P. 60(b); Gonzalez v Crosby, 545 US ____ (2005); Ylst v Nimmermaker, 501 US 797, 804, 111 S. Ct. 2590, 2595, 115 L Ed 2d 706 (1991); 2254@; and judicial review provisions of the Court.

Reason For Granting The Writ

Petitioner's constitutional claims presented in this writ require this Court exercise of judicial discretion in the interest of justice to determine actual innocence of one who is actual innocent under actual innocence standard of review, or likely behavior of the trier of fact.

This case presents a great deal of ambiguities, mixed question of law and facts, substantial and procedural, legal grounds that must be resolved by application of the plain statement standard. Thus 2244(d)-(1) does not prevent a habeas petitioner seeking relief from state Court procedural default rule.

Statement of The Case

Aproximately three (3) days before the trial started the trial Judge Conducted an impoundment Hearing and determined whether defendant's Warrantless impounded Cadillac was seized as incident to the arrest or not. The Court ruled that the vehicle is not part of the arrest, nor related to the murder case, and not even part of the criminal investigation. H.T. p. 46-49, 51-53; Kalamazoo County Policy Re Vehicles Id. at H.T. p. 39-40; Kalamazoo Police Report by Sergeant Paul Marlett arresting officer on 12/13/90. attached.

After defendant was arrested and lodged in the Kalamazoo County Jail because his car was parked in violation of City Ordinance "seized and searched", the trial Judge adduced a blood-stained blue jeans with victim's blood on it obtained from inside of the trunk of the car as evidence of proof of guilt into trial. H.T. p. 53, 55-58. attached. The crime of murder occurred in Novi County on Nov. 9, 1990. See Criminal Complaint.

On October 31, 1991, petitioner was found guilty by Jury of first degree murder and sentenced to life in prison without parole. MCL 750, 316 statutes. Oakland County Circuit Court Judge Gene Schnelz presided. Case No. 91-106067-FC.

On Appeal by right, Appellate Counsel Paul Stoychoff timely filed an Appellant Brief in the Michigan Court of Appeals and raised only one issue challenging Kalamazoo

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Police Department right to impound a vehicle illegally parked. Therefore Cobas in pro-se filed a Supplemental Brief and raised ineffective assistance of Counsel claim. On Dec. 15, 1994, the Court of appeals denied both briefs. Case No. 147350. and cited People v Toohy, 438 Mich. 265; 475 NW2d 16 (1991). The ineffective Counsel claim was never addressed by the appellate Court because Cobas did not establish prejudice regarding DNA issues raised, and cited People v Pickens, 446 Mich. 298; 521 NW2d 797 (1994). See Court of appeals Order attached. On Sept. 13, 1995, the Michigan Supreme Court denied leave to appeal in a "brief and unexplained" order. People v Cobas, 450 Mich. 862; 539 NW2d 375 (1995). See order attached. Case No. 102104.

On April 10, 1997, Cobas filed in the trial Court a motion for evidentiary hearing and raised both trial and appellate Counsels Claims. The trial Court on Sept. 15, 1997, denied his motion. MCR 6.508(D) ("brief and unexplained order") and, reached not the merits of ineffective appellate Counsel claim, "separate". See Order attached. Petitioner did not appeal the trial Court's decision.

On October 3, 2000, Cobas filed a habeas corpus in the District Court of Michigan, Judge Denise Page Hood denied "with prejudice" his 2254 petition as time barred by the one-year statute of limitations set forth in the Anti-terrorism and Effective Death Penalty Act of April 24, 1996 (AEDPA). 28 U.S.C. § 2244(d); See also 2244(d)(2) which tolled the time period by MCR 6.500 "properly

filed application" of April 1997. District Court Case No. 00-CV-74647. Jan. 31, 2002. The United States Court of Appeals for the Sixth Circuit affirmed. See Cobas v Burgess, 306 F.3d. 441 (6th Cir. 2002). The United States Supreme Court on April 21, 2003, denied Cobas's petition for a writ of Certiorari. See Cobas v Burgess, 538 U.S. 984 (2003).

On June 12, 2017, Cobas filed in the Federal District Court a Motion to set aside previous Judgment under 2244 statute of limitations, and a Motion for relief from Judgment pursuant to Fed. Rule Cv. Proc. 60(b); Gonzalez v Crosby, 545 U.S. 524, 528 (2005). On Feb. 27, 2018, the Court denied both motions "on the merits", but cited Fed. R. Cv. P. 60(C)(1) because the "reasonable time" one year for filing a motion had expired. And it declined to grant Certificate of Appealability (C.O.A.). 28 USC § 2253(C)(2). See order and Opinion attached. Case No. 2:00-CV-74647. DPH.

On March 14, 2018, Cobas filed Notice of Appeals and a Request for Certificate of Appealability in the United States Court of Appeals for the Sixth Circuit. On July 13, 2018, the Court of Appeals denied C.O.A. Case No. 18-1320. Therefore on July 26, 2018, Cobas timely filed a Motion for Rehearing and raised "Actual Innocence" and "Ineffective Assistance of Counsels" Claims. On October 16, 2018, the Court found no point of law or fact was overlooked or misapprehended under Fed. R. App. P. 40(a)(2), and denied C.O.A., but it did not address the new Claims on the merits. See Order attached. Case No. 18-1320. Therefore this Writ shall issue.

Argument

Under Which Standard of Review This Case Shall Be Determined Actual Innocence, Ineffective Assistance of Counsels, The AEDPA 28 U.S.C. §§ 2254; 2244 Statute-of-Limitations, or After Guilmette's Decision On The Merits or Procedurally-Based-MCR 6.508(D)?
Actual Innocence, Miscarriage of Justice

Petitioner first claims that he is "actually innocent" of the facts adduced into trial, laws and evidential ruling applied to his case. See Exhibits A-F.

The United States Supreme Court in Murray v Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649-50, 91 L. Ed. 2d. 434 (1986) cautioned and instructed that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ, even in the absence of a showing of cause for the procedural default". The Court is not bound by the rules of admissibility that would govern at trial. Schlup v Delo, 513 U.S. 298, 130 L. Ed. 2d. 808, 115 S. Ct. 851 (1995) (the procedural bar is not applicable to a colorable claim of innocence). Id.

In this case at bar, before trial commenced the trial judge determined that the "warrantless" vehicle impounded for City Violation after Cobas was arrested and lodged in Kalamazoo County Jail is "not incident to the arrest", nor related to the murder case and it was excluded from the criminal trial. H.T. pages 46-49, 51-53, but adduced a blood-stained blue jeans with victim's DNA on it as DNA identification evidence into trial. H.T. pag. 53, 55-58. The trial Court did not

state a Rule of Evidence for its adducing. See H.T. pages 55-58; MRE 403-04 identical to FRE 403-04.

According to the United States Supreme Court, a defendant may have an otherwise barred constitutional claim arising from his or her trial heard on the merits in a federal habeas action if the defendant can make a "gateway" showing of actual innocence. Schlup v Delo, 513 US at 314-315. This "actual innocence" exception is required by the "ends of justice" or, stated differently, to prevent a "miscarriage of justice". Schlup, 513 US at 319-320; Sawyer v Whitley, 505 US 303, 339; 112 S. Ct. 2514; 120 L Ed 2d 269 (1992).

Engle v Isaac, 456 US 107, 135; 102 S. Ct. 1558; 71 L Ed 2d 783 (1982) stated that "in appropriate cases those principles [cause and prejudice] must yield to the imperative of correcting a fundamentally unjust incarceration, but not providing any support or reasoning for the statement." In this case at bar it is clear from reading the Hearing Transcripts that the trial Judge deliverably adduced evidence of guilt (blood-stained jeans) into trial, and was more likely than not to have led the jury find Cobas guilty beyond a reasonable doubt. H.T. pag. 53, 55-58, and Experts Opinion. T.T. 401.

Petitioner represents that because "the trial Judge ruled out the 'Warrantless Cadillac's impoundment' from the criminal trial, he is actually innocent of his conviction". Id. The Carrier Standard is intended to focus the inquiry on actual innocence and likely behavior of the trier of fact. Delo, *supra*. "Actual Innocence" means "factual innocence", not mere legal insufficiency. Bousley v United States, 523 US — 140 L Ed 2d. 828, 118 S. Ct. (1998).

The habeas Courts made not its determination concerning Cobas's innocence in light of the evidence that had been illegally adduced into trial. Instead relied on the Antiterrorism and Effective Death Penalty Act (AEDPA) statutes of limitations, Fed. R. C.V.P. 60 C(1), and Federal R. App. P. 40(a)(2) and denied Cobas Certificate of Appealability. 28 USC § 2253 (C)(2) because the one-year reasonable time requirement for filing an application or motion had expired. 28 USC § 2244(d)(1), and § 2244(d)(2) which tolled the limitation period in this case at bar.

The doctrine of procedural default provide that:

In all cases in which a state prisoner has defaulted his federal claims in state Court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v Thompson, 501 US 722, 750, 111 S. CT. 2546, 2565, 115 LEd2d 640 (1991). When determining whether a state Court's judgment rested on an independent and adequate state procedural rule, the Court must "look through" unexplained orders to the last reasoned decision. Ylst v Nummemaker, 501 US 797, 804, 111 S. CT. 2590, 2595, 115 LEd2d 706 (1991).

The last state court to render a reasoned decision on Cobas's habeas claims was the trial Court when it ruled on Cobas's motion for relief from judgment on Sept. 15, 1997. The entire decision reads as follow:

Defendant has filed a motion seeking post-conviction relief. The Court has reviewed his pleadings and the applicable law.

Defendant's motion is denied for failure to persuade the Court that he is entitled to relief under MCR 6.508(D). See Exhibit C.

Because Cobas did not appeal the trial court order in the state courts, the procedural bar imposed by the Michigan Federal District Court which was also affirmed by the United States Court of Appeals for the Sixth Circuit, requires this Court to determine whether the trial court's failure to address Cobas federal constitutional ineffective assistance of both trial and appellate counsels claim should have been decided on the merits or procedurally-based, after *Guilmette v Howes*, 624 F.3d 286 (2010), by "Separate" statement rule, or, MCR 6.508(D).

First, the *Guilmette* Court of Appeals Granted en banc review and determined that Mich. CT. R. 6.508(D) has "both" a procedural and a substantive component, and citations to a defendant's failure to meet the burden of establishing entitlement to relief can refer to a defendant's failure to meet that burden on the merits. *Id.* at 287. And Brief orders citing Mich. CT. R. 6.508(D) are not explained orders invoking a procedural bar. *Id.* at 286-287. And procedural-default rule stated by Mich. CT. R. 6.508(D)(3) applies only to claims that could have been brought on direct appeal, and thus - by necessity - it does not apply to claims of ineffective assistance of appellate counsel. *Id.* at 287. Summary orders can refer to the petitioner's failure to establish entitlement to relief either on the merits or procedurally, and such "ambiguity" demands a determination

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that the orders are not explained. Id. at 287.

After an unsuccessful direct appeal, Guilmette argued for the first time in state post-conviction review that his appellate counsel had been ineffective for failing to argue ineffective assistance of trial counsel. The state trial court denied these claims "on the merits". Guilmette timely filed for habeas relief based on the two ineffective-assistance of counsel claims that he raised on state courts. The district court granted a conditional habeas writ. Id. at 288-289, finding that Guilmette's trial counsel were constitutional ineffective. Id. Because the state did not appeal the district court's judgment the Court of Appeals did not reach the merits of petitioner claim of ineffective assistance of counsel and affirmed the judgment of the district court. Id. at 286.

In this case at bar both state and federal courts failed to rule on Cobas's ineffective-assistance of trial and appellate counsels claim. See Mich. Court of App. decision; trial court order, the district and circuit courts decision attached.

Because the trial judge reversibly erred by adducing into trial "excluded evidence" obtained from inside of petitioner's trunk of his car. Cobas was denied his rights to a fair trial, effective counsel, and due process of law under Strickland v Washington, 466 US 668, 694; 104 S. Ct. 2052; 80 LEd2d 674 (1984); Evitt v Lucey, 469 US 387, 396, 105 S. Ct. 830, 83, LEd2d 821 (1985); United States v Cronis, 466 US 648, 658; 104 S. Ct. 2039; 80 LEd2d 657 (1984); US Const. Ams. 5, 6, and 14.

In Michigan v Long, 463 US 1032 103 S. Ct. 3469 (1983) the Court laid down a rule to avoid the difficulties associated with such ambiguity. Under Long if "it fairly appears

that the state court rested its decision primarily on federal law, this Court may reach the federal question on review unless the state court's opinion contains a "Plain Statement" that its decision rest upon adequate and independent state grounds. The "Plain Statement" rule applies regardless of whether the disputed state law ground is substantive or procedural. Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent the United States Supreme Court from reaching the federal claim. Long, supra. Furthermore, ambiguities in that regard must be resolved by application of the "plain statement standard". See Harris v Reed, 489 US 255, 103 LEd2d 308, 109 S.Ct. 1038 (1989).

Under Wainwright v Sykes, 433 US 72, 53 LEd2d 594, 97 S.Ct. 2497 (1977) the Court made clear that the adequate and independent state ground doctrine applies on federal habeas. 433 US at 81, 87. Under Sykes and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "Cause" for the default and "Prejudice" attributable thereto. Murray v Carrier, supra at 485 (1986); or demonstrate that failure to consider the federal claim will result in a "fundamental miscarriage of justice". Id. at 495 quoting Engle v Isaac, at 135 (1982).

A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rest on a state procedural bar. Long, supra, at 1041. Therefore Cobas cannot be "procedural barred" and "time barred" at the same time. MCR 6.508(D) and 2244(d)(1).

The Supreme Court addressed the issue of statutory tolling of § 2244(d)'s one year limitation period in *Artuz v Bennett*, 513 US 4, 148 L Ed 2d 213, 121 S. Ct. 361 (2000), and held that under 2244(d)(2), an application to a state court for post-conviction relief tolls the limitations period in § 2244(d)(1), even if the application contains procedurally barred claims.

Exhaustion of Remedies, Prerequisite

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition. The exhaustion doctrine is codified at 28 USC § 2254(b)(1).

Under Applicable Legal Standard, the statute provides that "an applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented" § 2254(c).

The exhaustion requirement is satisfied when the federal habeas claim is fully presented to the highest State Court in a procedurally proper manner. *O'Sullivan v Boerckel*, 526 US 838, 845, 119 S. Ct. 1728, 144 L Ed 2d 1 (1999). If a petitioner presents claims in federal court that have not yet been exhausted, a federal court generally must dismiss the petition. *Rose v Lundy*, 455 US 509, 510, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); See also *Duncan v Walker*, 533 US 167, 178-79, 121 S. Ct. 2120, 150 L Ed 2d 251 (2001). The exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity fully to consider federal

law challenges to a custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment).

In this case at bar Cobas's 6.500 motion was "properly filed" in the trial court. *Antuz v Bennett*, supra; 2244 (P). The time during which a properly filed application for State post-conviction review with respect to the pertinent "judgment or claim" is pending shall not be counted toward any period of limitation under this subsection. § 2244(d)(2). The post conviction motion was denied on Sept. 15, 1997, MCR 6.508(D), procedural-default rule. Cobas claims were barred from review whether a habeas petition could have been timely filed or not in the Federal District Court. Id. See *Bennett v Antuz*, 119 F.3d. 116, *Rose v Lundy*, supra.

A habeas petitioner procedurally defaults a claim if: (1) the petitioner fails to comply with a state procedural rule; (2) the courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default. *Guilmette*, supra at 287 Emphasis in original.

The second part of this rule requires federal courts to determine the basis on which state courts rejected a given claim. Id. at 287. Even if the district court could have assumed that Cobas's failure to seek discretionary review procedurally defaulted his claims, the court never enforced that procedural rule in its order of "dismissal with prejudice" (Jan. 31, 2002), 6.508(D), and it failed to recognize the appellate counsel ineffective claim. Id.

When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court. Wainwright v Sykes, *supra* at 87-88; Murray v Carrier, *supra* at 485-492.

The Supreme Court held that in applying the Carrier standard in the context of the inmate's claim the district court should have focused on the likely behavior of the trier of fact and should have assessed the probative force of the inmate's claims in connection with the evidence of guilt adduced at trial. DeLo, *supra*. Id.

A prisoner retains an overriding interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. Where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default. DeLo, *supra*. The principle of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration. DeLo, *supra*. Carrier standard ensures and provides the petitioner a meaningful avenue by which to avoid a manifest injustice. Id.

The Supreme Court has applied the "plain statement rule" of Michigan v Long to the determination of whether a state court actually enforced a procedural rule on post-conviction review. Thus, a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a procedural bar. (The state court must explicitly invoke a state procedural

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bar rule as a "separate basis" for decision). Stokes v Scutt, 821 F. Supp. 2d 898.

The AEDPA's statute read in relevant part as follow:

2254(a) The Supreme Court, a Justice thereof, a Circuit Judge, or a district court shall entertain an application for a writ of habeas Corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas Corpus... pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has "exhausted" the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

In this case at bar Cobas did not seek an appeal of the trial court's order in the state courts. MCR 7.205; MCR 7.302. Nor exhausted his claims. Id. (including Ineffective assistance of both trial and appellate counsels). Therefore this Court may consider Cobas Constitutional claims were barred based on State procedural rules, and evidence of his actual innocence was sufficient to except his claim from procedural bar.. Schlup v Delo; *supra*, and House v Bell, 547 US 518, 536-537; 126, S.Ct. 2064; 165 LEd2d 1(2006) under circumstances of this case.

Also, the new AEDPA's statute of limitations provides:

2244(d)(1)(B) The date on which the impediment to filing an application created by State action in violation of the

Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;...

X X X X X

Therefore petitioner contends based on the trial court's failure to address Constitutional claim of appellate counsel on post-conviction review has caused impediment to file an appeal in State or Federal Courts. 2244(d)(1)(B). And unless such impediment be removed Cobas is deprived of his constitutional right to file a writ of habeas corpus, and he is incarcerated in violation of the laws and Constitution of the United States. 2254(a); 2254(b)(3); 2244(d)(1)(B). See also U.S. Const. Am. I. (abridging petition the Government for a redress of grievances); U.S. Const. Art. 1 § 9, cl. 2 (the Privilege of the Writ of Habeas Corpus Shall not Be Suspended, unless when in cases of Rebellion or Invasion the Public Safety may require it).

Consideration of innocence claim in this case at bar warrant despite procedural default because it was more likely than not that no reasonable juror could have found Cobas guilty beyond a reasonable doubt. House, supra. Because an actual innocence claim involves evidence the trial jury did not have before it, (Vehicle Knowledge, "evidence origin"), the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemental record. House, supra.

Petitioner asserts also that because the Standard is demanding and permits review only in extraordinary case he is entitled to relief. A willful failure to observe the law is not merely a decision in a good faith but in fact "Judicial Misconduct." A decision to willfully ignore the law reasonably implies that a Judge has knowledge of the law but refuses to acknowledge his duty or obligation to apply that law. The trial Judge

ruled in the impoundment Hearing that the "unrelated Cadillac and Cobas's arrest has nothing to do with the murder-case. Id. H.T. at 46, 53, 57. Because such refusal cannot be characterized as a decision in a good faith this Court shall recognize the trial court unconstitutional and unlawfully decision made under "Judicial Review Doctrine". See MCR 9.205(C)(2), (4).

Also MCR 6.508(D)(3)(b)(iii) provides:

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. Emphasis Added.

The trial Court "unreasonable determination" of the "false evidence induced into trial without a procedural Court rule stated, nor procedural due process of law its properly considered upon the principle of fundamental fairness rooted in the traditions and Conscience of the people. U.S. Const. Am. XIV. See In re - Winship, 397 US 358, 25 LEd 368, 90 S. Ct. 1068 (1970), (a person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt). Also, the District Court refused to recognize the State procedural bar rule invoked by the trial court. MCR 6.508(D).

Ineffective Assistance of Both Counsels

The United States Supreme Court has long been recognized that the right to counsel is the right to the effective assistance of counsel. McMann v Richardson, 397 US 759, 771, 90 S. Ct. 1441; 25 LEd2d 763 (1970). The right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a

fair trial, absent some effect of the challenged Conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. *United States v Cronin*, 466 US 648, 658; 104 S. CT. 2039; 80 LEd 2d 657 (1984).

The right to counsel guarantees a fair trial and a competent attorney. *Engle v Isaac*, *supra*, at 134. The cases interpreting the right to the meaningful assistance of counsel as it affects the right to a fair trial, present a continuum. *United States v DeCoster*, 199, US App DC 359, 364; 624 F. 2d 196 (1976).

Under *Cronin* a trial is unfair if the accused is denied Counsel at a critical stage of the trial. Equally obvious would be the case in which counsel is provided but does "nothing" for the accused's defence is provided, and counsel entirely fails to subject the prosecution's case to meaningful adversarial testing... *Cronin*. Id. at 654; 659. See also *Penson*, 488 US 75 (1988).

In this case at bar because the trial judge reversibly erred by adducing "excluded evidence" (without Court rule) into the trial as proof of guilt, and instructed the jury to find Cobas guilty on same evidence, by prosecutor's Experts Opinion and after has determined the "unrelated vehicle" was seized "not incident" to the arrest" denied Cobas's Constitutional rights to a fair trial, effective assistance of Counsel, and due process of law guarantee by the U.S. Const. Ams. 5, 6, and 14; *Cronin supra*. *Strickland, supra*. Id. See MCR 6.508(D)(3)(b)(iii). Id.

For obvious reasons the "actual prejudice" requirement is similar to the prejudice standard in an ineffective-assistance-of-Counsel Claim. The defendant must show that there is a reasonable probability that but for counsel's unprofessional

errors, the result of the proceeding would have been different. Strickland v Washington, 466 U.S. 668, 694; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984).

In this case at bar the trial court unjustified conduct led the entire trial process to "unfair prejudice", and the effect on the trial outcome excused this case under Cronic presumed prejudice standard. The record clearly shows that the trial was fundamentally unfair and unreliable, and trial judge's interference caused trial counsel to entirely fail to subject the prosecution's case to meaningful adversarial testing, and made the adversary process presumptively unreliable. Cronic, supra. Lambard v Lynaugh, 868 F.2d. 1475 (5th Cir. 1989); U.S. Const. Am. VI.

The effect of the evidence on the jury's mind concluded Cobas was guilty through the DNA identification evidence and through the Expert witnesses testimony. T.T. 401. In all criminal prosecution an accused has the constitutional right to be confronted with the witness against him, and right to have an effective cross-examination by an effective counsel. U.S.C.A. VI.

The Sixth Amendment guarantee the accused the effective assistance of counsel for his defence and was made obligatory on the States by the XIV Am. Gideon v Wainwright, 372 US 335, 334 (1963). The prosecution relied very heavily through the entire trial on the stained jeans / DNA evidence / and his experts opinion. Defense Counsel had no expert. Applying Strickland test, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance Id. at 689. The state interference undermined trial counsel's ability to protect a fair

trial. Cronic, at 649-650, and denied effective "cross-examination".

The state court's impediment prevented Cobas from receiving the benefits of the constitutional right to a fair trial. Cronic, *supra*, U.S.C.A. VI. Under Cronic - Penson standard the trial was fundamentally and prejudicially presumed unreliable, and Strickland requirement to show prejudice is not applicable to this case.

A claim of ineffective assistance of counsel is a "mixed question of law and fact". The right to counsel guaranteed by United States and Michigan Constitutions, US Const, Am VI; Const. 1963, art. 1, § 20; Cronic, *supra*, includes the effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. The jury instructions were constitutionally defective distinguished from evidentiary insufficiency because there was no evidence to connect the Cadillac with the crime, neither the stained jeans with the trial, nor the forensic evidence with Cobas's arrest. *Id.*

The trial judge's unconstitutional conduct provided "unfair prejudice" and led the jury to the guilty verdict. Even before the trial started Cobas was guilty in the sight of the judge. H.T. 46, 55-58. This external impediments made the trial counsel ineffective and unable to object to the evidence presented to the jury. *Id.* The trial court induced the jury to trust the government's argument rather than the jury own finding of Cobas's guilt. Cobas was found guilty accordingly. Contrary, Unreasonable Standard, Clearly Established Federal Law

Under the AEDPA of 1996, a Federal court can order habeas relief only if the state's adjudication of a claim: (1) resulted in a decision that

Was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 USC § 2254 (d).

In applying these standards, the habeas court examines the holdings of the Supreme Court as they existed at the time of the relevant state-court decision. Michigan v Long, supra. The habeas court can, however, look to decision of the courts to determine whether a legal principle had been clearly established by the Supreme Court. Hall v Vasbinder, 563 F.3d. 222, 236-37 (6TH Cir. 2009) (holding that even though a habeas petitioner normally must satisfy the heightened AEDPA standard with respect to an ineffective assistance claim, he need not do so when arguing ineffective)...
Id. ...

In this case the trial court relied solely on a state procedural bar rule 6.508(D) to deny relief. Cobas must establish "Cause" for his state procedural default and show that some objective factor external to the defense impeded him. Murray v Carrier, at 488. Absent appellate ineffective assistance of counsel claim. Guilmette v Howes, supra. An adequate and independent state procedural bar to the entertainment of constitutional claims must have been "firmly established and regularly followed". See Thompson v Elo, 919 F. Supp. 1077 (E.D. Mich. 1996). Therefore the district court erroneously contrary to clearly established law barred relief based on 2244(d)(1). Cobas never was subject to dismissal for failure to comply with statute of limitations. MCR 6.508(D)'s procedural bar rule.

Appellate Counsel Ineffectiveness

A defendant has the absolute right of appeal in every criminal case from all final judgments, orders and decisions. Mich. Const. 1963, Art. 1 § 20; MCR 7.203(A). See Fed. R. Crim. P. 44(a). The United States Constitution guarantee Criminal defendants an appeal by right and the right to appellate counsel. Am. VI; Evitt v Lucey, 469 US 387, 396, 105 S. Ct. 830, 83, LEd 2d 821 (1985); and Due process of law. XIV, Am.

Appellate Counsel Paul Stoychoff timely filed an Appellant Brief and raised only an issue challenging the right of Kalamazoo Police Department to impound a parked vehicle in violation of City Ordinance, which had nothing to do with the murder trial. H.T. pag. 46-49, 51-53, and not under Cronic - Lucey - Strickland established presumed standard provided unfair trial. Therefore Cobas in pro se filed a Supplemental Brief raising ineffective Counsel claim, and various other issues. See Exhibit E, and new MCR 6.428.

On Dec. 15, 1994, the Michigan Court of Appeals denied both brief on the merits, but because Cobas failed to establish prejudice on the DNA issue the trial Counsel claim was not addressed. Case No. 147350. Therefore Cobas raised both Counsels ineffectiveness claim in a 6.500 motion, April 10, 1997, which the trial Judge denied on procedural bar rule. 6.508(D) on Sept. 15, 1997. See Supreme Court of Michigan how denied leave in an "brief and unexplained" order. Case No. 102104, also procedural facts of this case and orders attached.

Every defendant is entitled to representation of counsel through appeal. Lucey, supra. A counsel unable to provide effective representation is in no better position than one who has no counsel at all. Lucey, supra.

An appeal is not adjudicated with Due Process of law if the appellant does not have the effective assistance of an attorney. Lucey, supra. Under Cronic, of all the rights that an accused person has, the right to be represented by Counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

In this case at bar the conduct of appellant Counsel was unreasonable, unjustified, and so prejudicial to defendant and pervasively defective because virtually took no action at all on his client's behalf despite the presence of nontrivial issues. See Appellant Brief. This Court cannot say with full confidence that had this issue been raised and properly argued by competent appellant Counsel that defendant would have been found guilty by a reasonable juror.

Cobas contends that his appellate Counsel was Constitutional ineffective for failing to argue ineffective assistance of trial Counsel provided by the trial court reversible error, and to establish entitlement to relief under Strickland, Lucey, Cronic, presumed standard. U.S. Const. Am. VI. An indigent accused's constitutional right to counsel on the first appeal from his conviction requires that court-appointed counsel support the appeal to the best of his ability. Penson, supra.

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client. Alder v California, 386 US 738 18 LEd 2d 493, 875 S. Ct. 1396 (1967). The Court has consistently held invalid those procedures on the first appeal of a conviction where the rich man who appeals as of right enjoys the full benefits of counsel while the indigent is forced to shift for himself. Douglas v California, 372 US 353 (1963).

Cobas could not have raised his claim of ineffective assistance of appellate counsel in an earlier proceeding. Guilmette, at 287, 290. This case is a "little different" than Guilmette because Guilmette did not raise trial counsel ineffective claim in his direct appeal, but raised for the first time both counsels claim on his 6.500 proceedings. The State trial denied these claims on the merits. Both Michigan Court of Appeals and Michigan Supreme Court denied leave to appeal, issuing substantively identical orders under MCR 6.508(D). The U.S. District Court of Michigan granted Guilmette a conditional writ of habeas corpus after determining that both attorneys were constitutionally ineffective. The Court of Appeals affirmed the district court's judgment in an en banc review. Id. at 286. And the State did not appeal.

In this case Cobas in pro se raised trial counsel claim in direct appeal, and Michigan Supreme Court denied in a Brief and unexplained order. Then Cobas raised both counsels ineffective claims in pro se in a 6.500 motion exclusive procedure. The trial court denied the motion. MCR. 6.508(D). Cobas did not appeal the trial court's decision.

Had the appellate counsel raised trial counsel claim based on trial court errors raised in this Writ of Certiorari in his Appellant Brief, the appellate court could have reversed, or remand for a new trial, or dismiss, or vacate the conviction. Therefore Cobas remain in unlawful confinement in violation of the laws and Constitution of the United States. Ams 5, 6, and 14 due process rights. IF true, that Cobas was deprived of legal representation of counsels, fair trial, and due process rights through this proceeding, the Court should find both counsels constitutionally ineffective, and order Cobas relief from custody immediately, according to the Law.

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Conclusion

Based on the face of the record, exhibits, and because the trial court expressly eliminated the car from any possible involvement in the crime, this Court in reviewing any relevant judicial provisions, State and Federal procedural-default rule, law, or grounds applied to the petitioner's constitutional claims shall consider the "actual prejudice" inflicted to petitioner, rights to due process, access to court, and "separate" under Long-Standard, and differently than Guilmette's decision.

Procedurally, before federal district Court ruled "dismissal with prejudice" Cobas habeas Corpus pursuant to the AEDPA of 1996, statute of limitations. 2244(b) based on State procedural bar rule 6.508(D), all habeas court applied according to the case the laws and provisions in the former statute. Therefore this Court shall solve federal Court's application of the highest AEDPA-standard to cases that had been procedurally-barred in State Court pursuant to the judgment, and not the date on which the judgment became final. 2244(d)-(1).

This Court shall recognize this writ under Gonzalez v Gossby, 545 US (2005); Fed. R. Civ. P. 60(b); or Certificate of Appealability is required for this appeal. 2253(c)(1).

Under Actual Innocence/Miscarriage of Justice/Ineffective Counsel Claims procedural default shall be excused, and petitioner shall be released from custody.

Relief Requested.

Petitioner respectfully asks this Honorable Court to grant this writ, or issue any appropriate relief from the judgment of conviction and sentence as the court deems appropriate.

Dated: November 28, 2018

Submitted by,

C.C. File: Att. Gen. Office 20 Nelson Cobas #186571