No. 18-7757

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM DAVENPORT — PETITIONER

Vs.

JOHN CHAPDELAINE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William Davenport
CDOC# 135683
Sterling Correctional Facility
12101 State Highway 61/ PO BOX 6000
Sterling, Colorado 80751

QUESTION(S) PRESENTED

I. Whether trial court erred in admitting evidence of DNA testing from mixed samples.

II. Whether trial courts abuse of discretion violated Applicant's right to a fair trial by admitting evidence it denominated as Res Gestae.

III. Whether trial courts failure to give requested instructions violated Applicant's right to fair trail and due process.

IV. Whether trail court erred in permitting a witness to make a first time identification of defendant at trial.

V. Whether trial attorney was ineffective for not employing an expert witness.

LIST OF PARTIES

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

[ ] 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:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____court appears at Appendix _____to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was June 22, 2018.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. 5:

"No person shall be...deprived of life, liberty, or property, without due process of law."

U.S. Const. Amend. 6:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury..."

U.S. Const. Amend. 6:

"In all criminal prosecutions the accused shall enjoy the right... to have the assistance of counsel for his defense."

U.S. Const. Amend. 14:

"No state... shall deprive any person of life, liberty, or property without due process of law..."

28 U.S.C. § 2254(d)(1):

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim... 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..."

STATEMENT OF THE CASE

On May 26, 2016 Applicant filed 28 U.S.C. §2254. Respondents submitted Pre-Answer Response on July 27, 2016. Applicant filed a reply on September 9, 2016. Respondents filed an order to dismiss in part and for answer April 12, 2017. Respondents filed order dismissing §2254 application on August 2, 2017. Applicant then filed Application for a Certificate of Appealability for Tenth Circuit on November 21, 2017. Respondents filed order denying Certificate of Appealability for Tenth Circuit on June 22, 2018.

REASONS FOR GRANTING THE PETITION

Argument 1.

Respondents claim Argument 1 was procedurally defaulted because his state court argument on this issue had been based entirely on state, not federal law and a brief citation to the Fifth and Fourteenth amendments at the conclusion was insufficient to put the state court on notice that Applicant was raising a federal constitutional claim. The court has erred in this regard and Applicant has shown throughout this process that he did in fact alert the court that he was alleging a violation of his constitutional rights. See Appendix J. Pg. 18 line 4 and 5. "Admission of then DNA violated Mr. Davenport's rights, because the science is not sufficiently developed to permit admission of DNA from a mixture." Pg. 20 line 9-17 "Evidence about DNA testing and population frequencies from a mixture is not reliable. Under Shreck, reliability is assessed by looking at the totality of circumstances, consistent with the purpose of Rule 702, and not by use of any specific list of factors. See Shreck, supra. Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (considering four general observations in determining reliability: falsifiability, peer review, known rate of error and control standards, and general acceptance). To be admissible at trial, DNA evidence must be accompanied by statistical probability evidence that is reliable and relevant." Pg. 23 line 10-12. "Because the expert testimony about DNA mixture evidence and frequency statistics was inadmissible under rule 702 and 403, Mr. Davenport's right to a fair trial was violated. U.S. Const. Amend V and XIV." It is also on the record that in Shreck, the defendant's motion at the trial level primarily challenged the DNA testing techniques themselves. There appears to have

been a Frye challenge (Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)) to the statistical evidence in the trial court.

Respondents claim Applicant did not alert state court of his constitutional violation but then states that a conclusory citation to a constitutional provision is insufficient to satisfy the "fair presentation" requirement. Fair presentation of a claim in a federal constitutional context requires a petitioner to apprise the state courts that a claim is a federal claim, not merely as an issue arising under state law. A Habeas petitioner need not cite book and verse on the federal constitution to apprise state courts that his claim is based on federal law. Blalock v. Wilson, 2005 U.S. Dist. Lexis 9418. If a petitioner cites to a specific provision of the U.S. Const. in his state court brief, the petitioner has fairly presented his constitutional claim to state court. Davis v. Strack, 270 F.3d 111.

In determining whether a petitioner has fairly presented federal constitutional claims to the courts, a habeas court must consider whether the petitioner relied upon state cases employing the federal constitution analysis in question. Supra Wilson. The substance of each state case law is what was relied upon. Applicant will demonstrate how each state case law employed the federal constitutional analysis in question.

1. People v. Quintana, 882 p.2d 1366, 1371. (Trial court abused its discretion and made an evidentiary ruling that is manifestly arbitrary, unreasonable, or unfair.)

   - Cre 404(b) prohibits the introduction of extrinsic act evidence when such evidence is offered solely to prove character. Huddleston v. United States, 485 U.S. 681, 687.

   - To also argue the introduction of evidence, People v. Quintana states: see 22

Charles A. Wright and Kenneth W. Graham Jr., Federal Practice and Procedure §5239, at 436. United States v. Aleman, 592 F.2d 881,885 (5th Cir. 1979); Cf. United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985).

- Evidence of an uncharged offense arising from the same series of transactions as that charged is not an extrinsic offense within Rule 404(b) United States v. Weeks, 716 F.2d 830, 832 (11th Cir. 1983).

- Other act evidence does not fall within the proscription of Rule 404(b) United States v. Daly, 974 F.2d 1215, 1217 (9th Cir.).

2. People v. Stewart, 55 P.3d 107, 122 (The courts admission of DNA evidence was manifestly arbitrary, unreasonable or unfair and an abuse of discretion.)

- The Fourteenth Amendment to the United States Constitution provides in part that no state shall deny to any person within its jurisdiction the equal protection of laws.

- United States v. Batchelder, 442 U.S. 114. The Supreme Court has held that equal protection is not offended when statues proscribed identical conduct but authorize different penalties.

-The application of Rule 701 Cf. United States v. Novaton, 271 F.3d 468, 1008 (11th Cir. 2001) emphasizing that a witness does not fall outside of Rule 701 simple because his or her rational... perception is based in part on the witness's past experience. (quoting, United States v. Myers, 972 F.2d 1566, 1577.)

- United States v. Peoples, 250 F.3d 630, 641; United States v. Figueroa-Lopez, 125 F.3d 1241, 1244-46. Officer testimony becomes objectionable when what is essentially expert testimony is improperly admitted under the guise of lay opinions. As the Peoples court observed, "such a substitution subverts the disclosure and discovery requirements of federal Rules of Criminal Procedures 26 and 16 and the reliability requirements for expert testimony" 250 F.3d at 641; See also Figueroa-Lopez, 125 F.3d at 1246 (making the same point); George P. Joseph "Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedures, 164 F.R.D. 97, 108 (Urging courts to be "vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process").

- United States v. Cano, 289 F.3d 1354 (11th Cir. 2002). Concluding that deciphering did not constitute expert testimony.

3. People v. Wilkerson, 114 P. 3d 874 (The court concluded that the analysis under CRE 702 and 403 are nearly identical. The court had to determine whether the probative value was not substantially outweighed by unfair prejudice.)

   - Frye v. United States, 54 App. D.C. 46, 293 F.1013. Arguing that the general acceptance test of Frye, superseded by statue/rule, was explicitly disapproved of in Shreck because it "restricts the admissibility of reliable evidence that may not yet qualify as generally accepted.

4. People v. Soto, 981 P.2d 958 (Cal. 1999).

   - California v. Brown 479 U.S. 538. The scientific technique on which evidence is

being offered must have gained general acceptance in the particular field to which it belongs. Revd. On other grounds sub nom.

- People v. Soto is a California case that argues DNA analysis and methods used to obtain DNA profiles that are similar state wide. Stating cases from multiple states. Ex. Maryland, Armstead v. State 342 Md. 38 (673 A.2d 221,237); Minnesota, State v. Bloom 516 N.W. 2d. 159, 162-63; Colorado, Lindsey v. People 892 P.2d 281, 294[citing FBI Rep.]; Washington, State v. Copeland 130 Wn. 2d 244 [922 P.2d 1304, 1319].

- People v. Soto also references about An Introduction to the Symposium on the 1996 NCR Report on Forensic DNA Evidence, an introduction to the Symposium on the 1996 NCR Report composed of six articles was published in 37 Jurimetrics J. 395 (1997).

- A majority of jurisdictions have acknowledged these developments which include the 1993 FBI Report (a worldwide population study), the Lander and Budowle article and most significant, the 1996 NCR Report and have concluded that the controversy over population substructuring and use of the unmodified product rule has been sufficiently resolved. (See, e.g., Com v. Blasioli, 552 Pa. 149 (Pennsylvania); State v. Freeman 253 Neb. 385 (Nebraska); State v. Copeland 922 P. 2d 1304 (Washington); People v. Miller 173 Ill. 2d 167; State v. Marcus 294 N.J. Super. 267 [683 A. 2d. 221](New Jersey); State v. Morel, 676 A.2d 1347 (Rhode Island); State v. Dinkins 319 S.C. 415 (South Carolina); State v. Weeks 270 Mont. 63 (Montana); State v. Anderson 118 N.M. 284 (New

Mexico); State v. Futrell, 112 N.C. App. 651 (North Carolina); People v. Chandler, 211 Mich. App. 604 (Michigan); Taylor v. State 889. P.2d 319 (Oklahoma).

5. People v. Lindsey, 892 P.2d 281, 288-95

- Prior to admitting DNA evidence, the trial court conducted proceedings to determine its admissibility under Frye v. United States, 54 App D.C. 46, 293 F. 1013.

- Since our decision in Fishback the United States Supreme Court has rejected Frye as the standard for admissibility of scientific evidence in favor of what has been characterized as a more lenient relevancy standard under FRE 702. Daubert v. Merrell Dow Pharmaceuticals, Inc, 125 L. Ed. 2d 469, 113 S.Ct. 2786.

- Lindsey also uses multiple case laws from various states to include that it's not just a Colorado issue. People v. Watson, 257 Ill. App 3d. 915; People v.Wesley, 83 N.Y. 2d. 417; Commonwealth v. Devlin, 365 Mass. 149, 310 N.E. 2d 353.

- Lindsey relies on the articles listed above and cases in which courts have rejected probability evidence. See State v. Bible, 175 Ariz. 549, 858 P.2d 1152.

- Nor are we of the view that general acceptance requires the trial court to "count scientific noses," an often voiced criticism of Frye. See United States v. Downing, 753 F.2d 1224, 1238.

- Pg.19 of Direct Appeal [8]In Shreck, the defendant's motion at the trial level primarily challenged the DNA testing techniques themselves. Applicant has argued that this issue is not merely an issue arising under state law in his direct

appeal and during trial. See Appendix J. Pg. 19 line 7-13.

6. People v. Fishback, 851 P.2d 884

- Quoting Frye for the standard of admissibility.

- By requiring the general acceptance of noval scientific evidence within the relevant scientific community, the Frye court sought to ensure that only reliable evidence was admitted. United States v. Jakobetz, 955 F.2d 786, 794.

- Admissibility of DNA evidence presents the very kind if issue which the language from Frye was designed to address. United States v. porter, 618 A. 2d 629, 633.

- Because the focus is different than in the diagnostic setting, problems may exist that are unique to forensic DNA test... Such problems, however concern the reliability of the particular test performed in a particular case. State v. Ford, 301 S.C. 485; State v. Vandebogart, 136 N.H. 365, 616.

- Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. Hawkins v. United States, 358 U.S. 74, 81.

- Many Federal courts have agreed with this position rejecting Frye rule in favor of a relevancy test balancing probativeness against prejudice in cases involving scientific test and principles other than those concerning DNA. United States v. Kelly, 420 F.2d 26; United States v. Downing, 753 F. 2d 1224; United States v. Williams, 583 F. 2d 1194; United States v. Baller, 519 F.2d 463; United States v. Stifel, 433 F. 2d 431. Etc.

7. People v. D.F., 933 P.2d 9, 13 (Trial court must make sufficient findings of fact and conclusions of law so that the appellate court can conduct a meaningful review of that court's decision.)

- In Shreck the defendant's motion at the trial level primarily challenged the DNA testing techniques themselves. There appears to have been a Frye challenge Frye v. United States, 293 F.1013, 1014 (D.C. Cir. 1923) to the statistical evidence in the trial court. Applicant has argued that this issue is not merely an issue arising under state law in his direct appeal and during trial. See Appendix J Pg.19 line 7-13. Pg.20 Evidence about DNA testing and population frequencies from a mixture is not reliable. Cf. Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579. Defendant's use here of federal case laws to reiterate not just state but federal violations as well. Applicant has shown this argument to be more than just a state law argument. It's not just a state issue but a federal issue being argued state wide and Applicant argues this throughout his direct appeal. Multiple cases throughout the United States were quoted. See Appendix J Pg.23 Roberts v. U.S. 916 A.2d 922 (D.C. 2007); People v. Smith, 132 Cal. Rptr. 2d 230 (Cal. App. 2 Dist. 2003); State v. Hannon 703 N.W. 2d 498 (Minn. 2005).

The federal habeas forum must emphasize substance over form by scrutinizing the essence of the legal theory previously presented to the state court. The basis of the argument presented for a violation of Applicants right to a fair trial was that the expert's testimony about DNA mixture evidence and frequency statistics was inadmissible. Examples were given.

- After testing the glove the People's expert concluded that there was a mixture of DNA on the glove of a minimum of four people and that Mr. Davenport was a possible contributor of DNA to the glove and that the odds of an individual unrelated to Mr. Davenport being a contributor were 1 in 28 for the outside of the glove and 1 in 50 for the inside of the glove. Stated another way 3.6% of the United States population (approximately 1,000,000 people) were possible contributors of the DNA found on the outside of the glove. 2% of the U.S. population (approximately 600,000 people) were possible contributors of the DNA found on the inside of the glove. Pg.13 line 8 thru Pg.14 line 2 Appendix J.
- Meaning that it was at least 4 contributors and up to 36 contributors. Pg.15 line 10, 11 Appendix J.
- The mixture DNA evidence was not resolvable, meaning the expert could not conclude with any degree of scientific certainty that a particular individual actually contributed the DNA to the mixture. Pg.16 line 1-3 Appendix J.
- Because the suspects DNA was masked, it is not possible to give a population frequency statistic comparable with that given in cases were only one person contributed DNA to the sample being tested. Pg.18 line 10-12 Appendix J.
- The worth of DNA testing comes in the ability to ascertain how many people in the general population, or what percentage of the general population could have contributed the DNA that is being examined. Population frequency calculations are typically used to compete and express the rarity of a particular sample. In a mixture, the population frequency of the major component (but not the minor one)

can be calculated. When CBI test a mixture it does not usually calculate the population frequencies unless asked to do so and then CBI calculates the frequency of the major component. Here, CBI was unable to determine major and minor components.

The courts claim that errors of state law do not automatically become violations of due process. The Due Process Clause, our decisions instruct, safeguard not the meticulous observance of state procedural prescriptions. It's not just the error of state law that violates applicants due process but the misrepresentation of inconclusive non-facts the state used to mislead the jury. The court with blatant disregard has ignored the fact that Applicant presented the state court with a claim whose substance alerted the state court to its federal claim. The substance of this argument is one that has never been fully explored. The rarity of this issue is so, that procedures for DNA mixtures have not been sufficiently developed and used in criminal proceedings or trials because the science is not known. The courts in this case used the science and methodology of what is known for single DNA situations in comparison with this mixture DNA in this case. This is two completely different issues that can't be in comparison. The results were not 100% and inconclusive. The states expert concluded that a minimum of 4 to as many as 36 possible contributors were included in this DNA. For purposes of 28 U.S.C.S. §2254(d) a decision is contrary to clearly established federal law if it reaches a conclusion opposite to that reached by United States Supreme Court holdings on a question of law or if it faces a set of facts materially indistinguishable from relevant Supreme Court precedent and still arrives at an opposite result. A state court decision will certainly be contrary to

our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Blalock v. Wilson, 2005 U.S. Dist. Lexis 9418.

The court has erred by dismissing the claim by procedural default. The error of this issue is magnified by the guilty verdict that should not have been. If this issue had been fairly presented it is more than likely than not that no reasonable juror would have convicted the Applicant. The fundamental elements of fairness were disregarded in this trial. It was error for courts to dismiss this claim by procedural default when general citation to a state decision whose holding is prominently predicated on federal precedent is sufficient. If a petitioner fails to demonstrate cause and prejudice for the default, the federal habeas court may still review an otherwise procedural default claim upon a showing that failure to review the federal habeas claim will result in a "Miscarriage of Justice." Porter v. Horn, 276 F. Supp. 2d. 278. The procedural default doctrine self-evidently is limited to cases in which a default actually occurred. If Applicant essentially complies with the state rule in question or made a reasonable and good faith effort to do so, there is no justification for federal abstention and most or this federal court will not find a default. The procedural default doctrine thus does not apply if Applicant effectively complied with state rule which has been done.

Applicant has not failed to exhaust state court remedies for claim one. Applicant has not procedurally defaulted this claim either. Applicant has shown that this argument was not just based entirely on state law and that it was based on both state and federal law with multiple examples given. Applicant has shown that the state court fact findings are not sufficiently apparent or definite. The state court fact findings are not factual because

the methodology and science is not sufficiently developed to permit admission of DNA from mixtures. Thus rendering these state court fact findings incomplete. These fact findings were also not made following an evidentiary hearing. They were not made in a fair manner. Applicant has demonstrated cause and prejudice for the default. The denial of this issue has resulted in a miscarriage of justice. This court should deem presumption rebutted because Applicant has shown by clear and convincing evidence that state courts fact findings are erroneous. This conviction should be reversed and the case remanded for a new trial.

Argument 2.

Respondent's claim Argument 2 was procedurally defaulted because his state-court argument on this issue had been based entirely on state law, not federal law and a brief citation to the Fifth and Fourteenth Amendments at the conclusion was insufficient to put the state court on notice that Applicant was raising a federal constitutional claim.

In determining whether a petitioner has fairly presented federal constitutional claims to the courts, a habeas court must consider whether the petitioner relied upon state cases employing the federal constitutional analysis in question. Blalock v. Wilson, 2005 U.S. Dist. Lexis 9418. Applicant has alleged facts well within the mainstream of the pertinent constitutional law. Blackmon v. Booker, 394 F. 3d 399. Once again Applicant will demonstrate how he relied upon state cases employing the federal constitutional analysis in question.

1. People v. Quintana, 882 P.2d 1366, 1371 (Stating federal case laws)

- Huddleston v. United States, 485 U.S. 681, 687 CRE 404(b) prohibits the

introduction of extrinsic act evidence.

2. Dandridge v. Williams, 397 U.S. 471, 475

- Further on appeal a party may defend the judgment of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court.

- To also argue the introduction of evidence People v. Quintana states: See 22 Charles A. Wright and Kenneth W. Graham Jr., Federal Practice and Procedure §5239, at 436. United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979); Cf. United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985)

3. People v. Stewart, 55 P.3d 107, 122

- The Fourteenth Amendment to the United States Constitution provides in part that no state shall deny to any person within its jurisdiction the equal protection of laws. United States v. Batchelder, 442 U.S. 114

4. People v. Martinez, 74 P.3d 316

- The admissibility of evidence must be evaluated in light of its offered purpose. In re Poali R.R. Yard PCB Litigation, 35 F.3d 717, 743

Applicant did cite a constitutional provision. Pg.26 line 1-3 "The prejudicial impact of the evidence is apparent and denied Mr. Davenport his constitutional right to a fair trial. U.S. Const. Amend. V and XIV." Applicant also cites case law with the argument of why the theory of res gestae should be rejected. (Pg.26 of Direct Appeal Appendix J). Cassidy v. State, 74 Md. App. 1, 536 A.2d 666. 670; United States v. Matot, 146 F.2d

197,198; Stephens v. Miller.13 F.3d 998; Miller v. Keating, 745 F.2d 507, 509; Hilyer v. Howat Concrete Co., 578 F.2d 422; State v. Williams, 673 S.W. 2d 32,34; People v. Giles, 635 N.E. 2d 969,975; People v. Hill, 663 N.E. 2d. 503, 506; Kansas v. Gunby, 144 P.3d 647 (KS 2006); Bynote v. National Super Markets, Inc., 891 S.W. 2d 117,121 (MO 1995); State v. Long, 801 A.2d 221. Opinions of Kansas Supreme Court. See Dennis D. Prater & Virginia M. Klemme, Res Gestae Raises Its Ugly Head, 65 J. Kan. B.A. 24 Oct 1992. See also Chris Blair, Let's Say Goodbye to Res Gestae, 33 Tulsa L.J. 349, 354-55 (1997). See Lawrence M. Zavadil, "Res Gestae Evidence," 24 Colo. Law.

Respondent is in error to say that Applicant did not present this claim as a violation of federal constitution. It was not just a conclusory citation at the end of a state argument. It was an argument that res gestae should be rejected. Applicant states in his direct appeal how federal courts have abandoned the res gestae concept. The Seventh Circuit described res gestae as "essentially obsolete." Stephens v. Miller. According to the Sixth Circuit res gestae is a term to describe background evidence or prior acts that are not otherwise admissible under Federal Rules of Evidence. United States v. Lawson 81 Fed. R. Evid. Serv. (Callaghan) 324. The Sixth Circuit explicitly rejected the use of res gestae in Higgins. Warden, 715 F.2d 1050. In that case the Sixth Cir. Refused to extend res gestae to include an exception to hearsay rule. Res Gestae should not be a theory of admissibility in Colorado, especially not for the type of acts at issue in this case. Not only is res gestae dead in the minds of learned judges and federal courts, a commentator has declared it dead in Colorado civil cases as well. See Lawrence M. Zavadit, "Res Gestae Evidence," 24 Colo. Law 1567 (July 1995). A member of the court of appeals suggested

that the better course of action would be to require "that all evidence of other acts including intrinsic res gestae evidence as well as other extrinsic evidence, be subjected to the requirement of CRE 404(b)." People v. Agado, 964 P.2d 565,570.

Applicant also argues that denominating an act "res gestae" does not make the act automatically admissible. The evidence must be linked in time and circumstance to the charged crime, must form an integral and natural part of the crime. The evidence must be integral to the criminal episode or transaction. It should also provide necessary background for the charged offense. The probative value must not be substantially outweighed by the danger of unfair prejudice. The evidence must be so closely connected to the main fact that it comprises a part of the transaction and the knowledge of which must be necessary to a full understanding of the main fact. The evidence must be relevant and here it was not. Mr. Zimmer did not identify Applicant as the individual who made either statement. At most he testified that two individuals unknown to him, who he was never asked to identify made certain statements and therefore the evidence was not relevant as it did not make the existence of any fact of consequence more or less probable. If Statements made are not in their nature a part of the occurrence, they do not constitute a part of res gestae and are inadmissible. Whetherbee v. Safety Casualty Co. 219 F.2d 274.

The Colorado Supreme Court has recently clarified its rejection of the application of evidentiary principles which have been rejected or not codified within the Colorado Rules of Evidence ("C.R.E."). See e.g. People v. Flippo, 159 P.3d 100, 106 (Colo. 2007); People v. Ramirez, 155 P. 3d 371 (Colo. 2007). The res gestae doctrine is exemplary of a

doctrine that has been excluded from the C.R.E. Evidentiary questions in Colorado should be determined pursuant to the C.R.E. even where there are pre-existing common law doctrines on related evidentiary issues. This Court should reject the admission of any evidence pursuant to the res gestae doctrine in light of its unworkability, and its tendency towards an arbitrary and capricious application.

As in Argument 1, Respondent is in error to state that a conclusory citation to constitutional provision is insufficient. If a petitioner cites to a specific provision of the U.S. Const. in his state court brief, the petitioner has fairly presented his constitutional claim to state court. Davis v. Strack, 270 F.3d 111. Applicant has continued to show that this claim was presented as a federal constitutional violation.

In a criminal trial, a mandatory presumption violates due process because it relieves the prosecution from proving the inferred fact beyond a reasonable doubt. Jolly v. People, 742 P.2d 891; Francis v. Franklin, 471 U.S. 307, 105 S.CF. 1965; Sandstorm v. Montana, 442 U.S. 510, 99 S.Ct. 2450. It is unconstitutional because it shifts the burden of persuasion from the prosecution to the defendant on an essential element of the offense. Carella v. California, 491 U.S. 263, 109 S.Ct. 2419. A jury may be instructed on a presumption only if the instruction is phrased as a "permissible inference." In contrast to the permissible inferences are those presumptions that shifts the burden of proof onto the defendant, thereby violating due process. Sandstorm, supra. Any instruction that shifts onto the defendant the burden of proving a critical fact in an issue is constitutionally impermissible. Mr. Zimmer's hearsay statements lead to an inconclusive presumption. The fact that the prosecution did not give the jury a permissible inference instruction after

or before allowing Mr. Zimmer to testify to his statements was a clear violation of due process and a right to a fair trial.

Applicant has continued to show that this claim was presented as a federal constitutional violation and not just a conclusory citation at the end of an argument. See Appendix J Pg. 26-29 The Theory of Res Gestae Should Be Rejected. Applicant has once again shown that the courts made a blatant abuse of discretion to allow these hearsay statements to be presented on trial as res gestae. This claim is not a procedural default. The procedural default doctrine self-evidently is limited to cases in which a default occurred. Applicant has essentially complied with the state rule in question and made a reasonable and good faith effort to do so. There is no justification for federal abstention and the courts should not find default. Like Applicant's direct appeal to the state court, his habeas petition pursuant to 28 U.S.C.S. §2254 set forth the substance of his federal claims. For the same reasons this language was sufficient to alert the Colorado state court, it was sufficient to fairly present the federal claim to the Federal District court pursuant to 28 U.S.C.S. §2254. The substance of the federal claim was set forth on the face of the petitions. Accordingly, the state courts were given a full and fair opportunity to resolve Applicant's constitutional claims in arguments 1 and 2 and these claims are therefore exhausted. See O'Sullivan, 526 U.S. at 845. The district court erred in concluding a procedural default as to claims 1 and 2 of habeas petition. Because claims 1 and 2 were exhausted in the state courts, the procedural bar applied by the district court is inapplicable to these claims and the claims must be addressed on the merits. Applicant has shown cause for and prejudice and failure to reach merits would

constitute a miscarriage of justice. A federal hearing is needed and the appropriate relief is required.

Argument 3a.

Courts claim that in rejecting Applicants tendered instruction on eyewitness identification, the court committed no error.

This particular instruction was tendered for a specific. To pinpoint and highlight specifics in the model instruction that were highly particular to the issues of this case. To also exclude the extraneous particular of the instruction not necessarily needed. Strategically implementing this tendered instruction was employed for strategic defensive purposes that were needed in this Defense of Misidentification by the Applicant. This was a blatant abuse of discretion by the court. Failure to give a particular charge as requested is reviewed for an abuse of discretion. United States v. Frost, 914 F.2d 756,764. It was a plain error to deny Applicant this tendered instruction, which consequently rendered this trial fundamentally unfair. Estell v. McGuire, 502 U.S. 62, 73. A defendant is entitled to an instruction as to any recognized defense for which there exist evidence sufficient for a reasonable jury to find in his favor. In the context of jury instructions, fundamentally fairness requires that a criminal defendant be provided a meaningful opportunity to present a complete defense. Incorrect jury instructions may divest a defendant of this opportunity. See Mathews v. United States, 484 U.S. 58, 63. Applicant was stripped of this opportunity to present a complete defense by denying jury instructions.

Respondent asserts that if the trial court committed constitutional error in omitting

a jury instruction, the federal habeas court must determine whether the error was harmless. Structural defects in the constitution of the trial mechanism, which defy analysis by "Harmless Error" standard, if exist requires automatic reversal of the conviction because they infect the entire trial process. Brecht v. Abrahamson, 507 U.S. 619, 638. The requirement that harmlessness of federal constitution error be clear beyond reasonable doubt embodies the standard requiring reversal if there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Yates v. Evatt, 500 U.S. 391. Applicant has continued to show that this error had a substantial and injurious effect on the jury's verdict.

This case was overwhelming with so many specifics in multiple areas. DNA issues, missing witnesses, GSR, expert witness testimony, etc. Failure by the courts and failure by Applicant's counsel formed a cumulative effect by not allowing Applicant a complete defense had a tremendous effect on the framework of this trial. More and different specifics were given in Applicant's first trial resulting in a hung jury. Applicant was stricken in this second trial by the courts denial of this tendered instruction which was part of his defense. Not allowing this tendered instruction to pinpoint and highlight specifics in the modeled instruction that were highly particular to the issues of this case, giving the jury a clear and cut understanding of what was required clearly had a substantial and injurious effect on the jury's unwarranted guilty verdict. Applicant maintains that courts dismissal of this issue was in error. The court's refusal to give an identity instruction when counsel specifically requested was erroneous and the refusal violated Applicant's right to a fair trial and due process of law as guaranteed by the U.S.

Const. Amend. V, XIV which requires reversal and a new trial.

Argument 3b.

Court claims that even if the failure to give the Applicant's missing witness instruction was constitutional error, the error was harmless.

The court acknowledges a constitutional error but claims this error to be harmless. Where it appears that an error or omission in jury instructions is due to inadvertence or attorney incompetence, the reviewing court should apply the doctrine of plain error. Davis v. Wakelee, 156 U.S. 680, 689. The court in this case did not find beyond a reasonable doubt that the failure to give this instruction did not contribute to the jury's verdict. As stated earlier, the requirement that harmlessness of federal constitution error be clear beyond reasonable doubt embodies the standard requiring reversal if there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Yates v. Evatt, 500 U.S. 391. The court must ask what evidence the jury actually considered in reaching its verdict. In this trial the jury heard statements about defendant's brother, another suspect and a missing witness. Failure to give the jury a missing witness instruction as to why this was, left grave holes in this trial. Blanks in the minds of the jurors, unanswered questions about someone involved who was not at the trial. The courts abuse of discretion by not allowing this instruction striped the Applicant's right away to present a complete defense. A defendant is entitled to an instruction as to any recognized defense for which there exist evidence for a reasonable jury to find in his favor. Mathews v. United States, 485 U.S. 58. This was clearly evidence to be used in Applicant's favor. The absence of this missing witness was due solely to the actions of

the People as explained in Applicants §2254 Pg.11. Structural errors are structural defects in the constitution of the trial mechanism, therefore these errors defy analysis by harmless standard. Delgado v. Rice, 67 F. Supp. 2d 1148. The fundamental fairness of this trial has been abused. Refusal to instruct the jury that the identification must be proven beyond a reasonable doubt is unconstitutional as it lowers the People's burden of proof. The court's refusal to give the missing witness instruction when counsel specifically requested was erroneous and so infected the entire trial that the resulting conviction violated Applicant's right to a fair trial and due process of law as guaranteed by the U.S. Const. Amend. V and XIV. The court was in error in denying this claim and this court should apply the appropriate relief in this matter.

Argument 4.

The court has erred in denying relief for Applicants claim that he was denied his constitutional rights when prosecution allowed a witness to identify him for the first time at trial.

Prior to trial Applicant argued that Mr. Williamson should not be allowed to make an in-court identification. He was never shown a photo array. Never made any prior identification. If an in-court identification is based on an unnecessarily suggestive out of court identification so that the in-court identification is unreliable, a defendant is denied due process of law. Manson v. Brathwaite, 432 U.S. 98. The court refused to adapt a per se exclusionary rule when the identification is based upon a trial setting. The court relied on the fact that the witness volunteered the identification. The court failed to properly apply the law. If it had, it would not have allowed the first time in court identification. The

fact that the witness volunteered the information does nothing to overcome the inherent suggestiveness of the trial setting. Although this suggestiveness may not warrant a per se rule, it does require specific findings by the court to overcome the suggestiveness. The court erred in failing to fully apply the five factors set forth in People v. Monroe, 925 P.2d 767. Because the record is fully developed, the courts should have applied those factors and held that the trial court erred in allowing the in-court identification and by allowing the in-court identification, the trial court violated Applicant's right under U.S. Const. Amend. VI.

To state that Applicant's use of case law Neil/Brathwaite is inapposite in cases... in which the police engage in no improper conduct, and because Applicant does not assert that an eyewitness's identification was tainted by an allegedly unreliable police procedure, these cases are inapposite for purposes of review is in error. This does not allow the courts to excuse the prosecution for using an unduly suggestive first time identification at trial. Law enforcement officers engaged in improper conduct and unreliable police procedures when they failed to have a key witness make any pretrial identification or follow ups of any sort. This only magnifies fault by prosecution to continue to use this witness with this information already known. The principle that a state may not knowingly use false evidence, including false testimony to obtain a tainted conviction implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors as the possible interest of the

witness in testifying falsely that the defendant's life or liberty may depend. It is of no consequence that the falsehood may bear upon a witness credibility rather than directly upon a defendant's guilt. A lie is a lie, no matter what its subject and if it is in any way relevant to the case. The prosecution has the responsibility and duty to correct what he knows to be false and elicit the truth. A conviction obtained through use of false evidence, known to be such by representatives of the state must fall under U.S. Const. Amend. XIV. The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears. Napue v. Illinois, 360 U.S. 264.

The court cites Wood v. Donald, stating, where no Supreme Court addresses the specific question presented by a habeas claim the state court decision cannot have been contrary to any Supreme Court case. Applicant no only stated Neil/Brathwaite but cites Moore v. Illinois, 434 U.S. 20, arguing that the observation of Applicant at the first trial was akin to a one-on-one show up and was presumptively unduly suggestive. When the reliability of eyewitness identification testimony is usually an issue for jury determination, when the degree of unreliability leads to a very substantial likelihood of irreparable misidentification, the tainted testimony must be excluded to preserve the defendants due process rights. The Due process Clause protects accused individuals from the use against them of evidenced derived from impermissibly suggestive procedures. The graveman of the determination is fairness and reliability. The reliability of Mr. Williamson's testimony after two years and not having any prior identification is not reliable.

To state that prosecution presented substantial evidence of Applicant's guilt does not nullify that Applicant has presented substantial evidence of a trial infected by many

errors and violations of law and constitution. Applicant has shown and proved the substantial and injurious effect this error had on the verdict. The elements of fundamental fairness have been violated. The courts have erred by not applying the appropriate relief warranted. Failure to correct this error will constitute a Miscarriage of Justice. Applicant ask this court to apply the appropriate relief to reverse the court's decision and an evidentiary hearing as need be.

Argument 5.

Counsel was ineffective for failing to call an expert witness to undermine the reliability of eyewitness identification.

Applicant has defended this case from the beginning as one of mistaken identity. With no physical evidence definitively linking Applicant to the crime, the case turned on the reliability of the prosecutor's eyewitnesses. In the first trial Applicant's retained counsel Ms. Cynthia Sheehan and Mr. Richard Hostetler presented the testimony of Dr. Edith Greene, a professor of psychology at the University of Colorado, who has focused her career on evaluating the accuracy of eyewitness memory/identification. The jury that heard Dr. Greene's testimony was unable to convict Applicant on any charges.

On retrial Applicant was represented by two deputy state public defenders. They did not present expert testimony addressing the reliability issue of eyewitness identification and the jury convicted Applicant on all charges.

The primary focus of Applicant's issue here, is that given the evidence in this case, not calling or consulting a witness who is an expert in the reliability issue of eyewitness identification fell below a reasonable standard of care. In a habeas corpus

action, where the district court relied exclusively on the state court record and did not hold an evidentiary hearing, the appellate courts review is plenary. Hughes v. Beard, 2007 U.S. Dist. Lexis 71252. The denial of appellate court to reverse the decision is a violation of Applicant's constitutional right of the 14th Amendment of due process. If the court's decision is unreasonable in light of evidence presented in the state court proceeding, habeas relief is warranted. Hughes v. Beard, supra.

Applicant did fairly present courts with argument that counsel was ineffective for failing to call an expert witness. This failure fell below an objective standard of care. Applicant specifically alleges: 1. The file of the public defender reveals no strategic reason for the omission. 2. That under the facts of this case there could be no strategic reason for the omission. 3. That the public defender's file does not suggest any decision that was made was based on monetary, rather than sound trial strategy. 4. The failure to present such testimony prejudiced Applicant as is evidenced by the failure of the first jury to convict.

The district courts order finding trial counsel made a strategic decision in not presenting expert testimony is not supported by the record. 2nd prong of Strickland has been proven. Applicant has continued to show the courts specific facts to prove a reasonable probability, a probability sufficient to undermine confidence in the outcome, that but for counsel's deficient performance, the results of the trial would have been different. Petitioner can rebut "the presumption of correctness by clear and convincing evidence, 28 U.S.C.S. §2254(e)(1) by way of evidentiary hearing in federal court as long as he satisfies the necessary prerequisites Lambert v. Blackwell, 387 F.3d 210, 236. The

defensive strategy of misidentification was employed by both sets of attorneys for both trials, with basically no new evidence and the same witnesses being used. The exception being that in the first trial an I.D. Expert was employed with the results being a mistrial. During the second trial no I.D. Expert was employed and the result was a guilty verdict. This demonstration clearly shows that counsel was ineffective.

State rule is not adequate basis for denying federal relief. Federal courts should have deemed presumption rebutted because Applicant has shown by clear and convincing evidence that state court fact-findings are erroneous. Applicants due process right of the 14th Amendment have been violated.

CONCLUSION

When a federal district court reviews a state prisoners habeas petition pursuant to 28 U.S.C.S. §2254 it must decide whether the petitioner is in custody in violation of the Constitution or laws or treaties of the United States. The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter. Coleman v. Thompson, 501 U.S. 722.

The United States Supreme Court requires a prisoner who challenges (in a federal habeas court) a matter adjudicated on the merits in state court to show that the relevant state-court decision (1) was contrary to, or involve an unreasonable application of, clearly established federal law, or (2) was based on unreasonable determination of facts in light of the evidence presented in the state court proceeding. 28 U.S.C.S. §2254(d). Deciding whether a state courts decision involved an unreasonable application of federal law or was based on an unreasonable determination of facts

requires a federal habeas court to train its attention on the particular reasons, both legal and factual, why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision. Wilson v. Sellers, 138 S.Ct 1188

The law has long recognized that when there are many errors that, in and of themselves do not warrant relief, the cumulative impact of such errors can result in denial of the fundamental constitutional right to a fair trial. The guilt of the accused in no way lessons the duty to see that due process is afforded him in the course of his prosecution. Accord, Fisher, 282 F.3d at 1299. ("...cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense.") There can be no doubt that when considered cumulatively, these errors undermine confidence in the outcome of the trial and mandate vacating the conviction.

Applicant is asking this court to review these issues in the interest of justice in pursuit of relief upon which he is entitled based on the merits of his claims. The state courts have committed grave error in violating Applicant's Constitutional Rights. The failure of the Federal Courts to reach merits have constituted a miscarriage of justice. The failure of the Federal Courts to effectively expose the state's violations and errors qualify applicant's relief pursuant to a reversal of his conviction with prejudice and release from state custody. Appropriately this court must order an evidentiary hearing if need be which and through the assistance of court appointed counsel, Applicant mat be provided a sufficient opportunity to obtain full discovery and witness testimony relating to the facts on this action and the law. Counsel and assistance will be required to aid Applicant in the investigation and any amendment of these claims. The petition for a writ

of certiorari should be granted.

Respectfully submitted,

Date: 9-13-18

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