No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Tommy W. Brotherton — PETITIONER
(Your Name)

vs.

Cindy Griffith (warden) — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Tommy Wayne Brotherton
(Your Name)

Jefferson City Correctional Center
6A-204, 8200 No More Victims Road
(Address)

Jefferson City, Missouri 65101
(City, State, Zip Code)

NA
(Phone Number) XiV

# QUESTION(S) PRESENTED

1. Whether (for any one and or all reasons stated herein) petitioner was denied his rights to due process and a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States, when after holding a pre-trial Suppression Hearing (in petitioner's absence), the state Trial Court overruled petitioner's "motion to suppress defendant's statements". Thus, allowing (after a renewed objection at trial) for petitioner's videotaped statements to be played for the jury?

2. Whether (for any one and or all reasons stated herein) petitioner was denied his rights to due process and a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States, when the state presented (videotape and trial testimonial hearsay) and allowed these hearsays to go to the jury as evidence of an injury sustained by the accuser due to petitioner committing the accused act. Thus, proving the charged act and an injury sustained by the accuser due to petitioner committing the accused act?

3. Whether (for any one and or all of the reasons stated herein) counsel's performance fell below and objective standard of reasonableness and, if so; whether petitioner was prejudiced by trial counsel's deficient performance thereby depriving petitioner of his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to The United States Constitution?

4. Whether (for any one and or all of the reasons stated herein) petitioner was deprived of his right to the effective assistance of counsel, due process rights and right to a fair trial, when petitioner was forced to go throu-

gh several key court proceedings, without being awarded the counsel he requested, for a period of 13 months?

5. whether the District Court should have held an evidentiary hearing to determine any one and or all of the above questions?

6. whether, given the circumstances explained herein, petitioner's federal Ineffective Assistance of counsel (failed to adduce evidence of mental incompetency) due process claim was procedurally defaulted for failing to meet the pleading requirements of 29.15, that were adequate to support the denial of relief, and if so; whether he has shown "cause" and "prejudice" to excuse the default?

7. Whether, (if after determining the above question 6.) The Court answers no to all, that one aspect of petitioner's I.A.C. claims to be barred for a pleading requirements failure, causes all of petitioner's I.A.C. claims to be barred for a pleading requirements failure?

8. Whether (given the circumstances explained herein) petitioner's (any one and or all of petitioner's) federal [Miranda, Miranda/Brady (audiotape destruction), Brady (suppression and or prosecutorial misconduct), and Ineffective Assistance of Counsel] due process claims were procedurally defaulted for failing to raise them in the State Courts that were adequate to deny relief, and if; so; whether he has shown good "cause" and "prejudice" to excuse the default?

## 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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## App 5 - Case Law Citings

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# TABLE OF AUTHORITIES CITED

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CASES: These are where petitioner cited and quoted the case law in his arguments section:



STATUTES AND RULES

Petitioner refers to Mo. Sup. Ct. Rule 29.15 in:



Other: In the Statement of Exhibits of the (Respondent's Response) to petitioner's Habe (No. 4:12-CV-02233-NAB / Brotherton v. Cassady) The State has Exh #1 (petitioner's Legal File - will refer to as LF - herein) and Exh 8 (petitioner's pre-trial, trial, and sentencing transcripts - will call Tr herein).

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

[X] reported at 2017 U.S. App. LEXIS 24845 (8th Cir. Mo., June 7, 2017); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

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

[X] reported at 2016 U.S. Dist. LEXIS 43267 (E.D. Mo., Mar. 31, 2016); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts:**

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

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished. Note: Petitioner never actually received a merits review in the state courts.

The opinion of the Lincoln County, Missouri Circuit court appears at Appendix D to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

## JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was June 07, 2017.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 15, 2017, and a copy of the order denying rehearing appears at Appendix E.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including January 12, 2018 (date) on November 22, 2017 (date) in Application No. 17A572.

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

[X] For cases from **state courts:**

The date on which the highest state court decided my case was January 10th, 2012. A copy of that decision appears at Appendix C.

[ ] 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

The Fifth, Sixth, and Fourteenth Amendments and Due Process Clause of the United States Constitution. This case also involves 28 U.S.C. §2254(d)(2), (e)(1), (e)(2). Article I, Sections 10, 18a, and 19 of the Missouri Constitution. Mo. Sup. Ct. Rule 29.15 (2000), and Missouri Statutes Sections 566.062 and 566.067 Rs Mo (2000).

Statement of the case Petitioner will give the main facts affecting his case (briefly). Note: to stay within the page limit - he must use very short language, leave out many good arguments, and [put nearly all of his case citings in his appendix (Example - will cite cases in argument by pointing to case in appendix S, by saying - see 77a #1]. He apologizes for inconveniences and prays The Court won't hold this against him. He must do this.

Detectives showed up to arrest him from a locked-down mental facility. They lied to the charge nurse about having a warrant, lied two more times about having warrant faxed. Then left and returned later with warrant. Arrested and transported him to the station. They interrogated him and he made an "unknowing" and "involuntary" confession, that was videotaped and later played for jury at trial. On videotape was hearsay by Det. Bartlett, that "an exam was done on R.B. and they found 'a tear in her rectum'". This hearsay was preceded by Bartlett's testimonial hearsay at trial, of "an exam was done on R.B. and Bartlett was aware that there was "a tear" but couldn't say where the tear was." This didn't rule out "the tear" being "in her rectum" as far as the jury was concerned. Counsel later objected and even though sustained, it was untimely. Thus, both above "hearsays" went to the jury along with the "context" of "the exam that resulted in this finding of 'a tear', was done in response to R.B. accusing petitioner of "anal penetration." The "hearsays" and the "context" combined and became "one evidence" (An injury of "a tear" proving the accused act of "anal penetration). And even though manufactured. This false evidence went to the jury as the only physical evidence in the entire case. This "perjured scenario" was the same

**As if the expert who did the exam on R.B. was brought to trial and testified "There was a tear in R.B.'s rectum, that was certainly the result of "anal penetration". The suppression of this expert and their exam report allowed the use of this improperly admitted false evidence, which tainted and enflamed the jury. The audiotape[ that recorded the disputed car ride conversations (concerning Miranda)] was destroyed. Thus, no way to resolve disputes. So, trial court Ruled "valid Miranda waiver". which allowed videotape confession to be played at trial. Trial Counsel was ineffective in remedying all the above (Miranda, Brady (audiotape destruction), and "hearsays" and "hearsays in the context") violations. Therefore, the jury had the "confession" and evidence of an "injury" caused while in the commission of the accused act of "anal penetration" to take to the deliberation room. Thus, the resulting convictions and Life and 15yr. sentences.

Then as Dist. Ct. states (App B) petitioner had his Dir. App., p.c.r. and p.c.r. App. State Court proceedings (Main points covered in arguments and appendix). And now we're at the Fed. Ct. proceedings (Habeas Corpus and C.O.A.). App A, B, E

*Basis For Federal Jurisdiction This case raises a question of the interpretation of the Fifth, Sixth, and Fourteenth Amendments and of the Due Process Clause to the United States Constitution. The District Court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. §1331. Wherein, The Dist. Ct. and The Eighth Cir. Ct. of Appeals (respectfully) have erred in Ruling against petitioner on his claims of Constitutional violations (In his Habe and App. For C.O.A.)

*Arguments - Reasons For Granting The Writ - Petitioner asks The Court "in the interest of justice" and "fundamental fairness", that It will review his claims herein and award counsel to properly amend and litigate them on his behalf? As The Court can see from petitioner's previous filings - this would be his only real "bite of the apple". And he begs The Court: Please? Do not allow his unintentional, ignorant, and honest mistakes to deafen The Court's Ears to Hearing the intentional acts and violations by those who do know better?

Claim One: Miranda Violations: The trial court erred in overruling "motion to suppress" (See App B pg. 6) Respectfully, the Dist. Ct. is wrong. Petitioner's not in default of this claim. **He's raised it in (2 motions to suppress, the suppression hearing, the renewed objection to the videotape being played at trial, the Judgment of Acquittal, and indirectly several times in his pro se 29.15). He's met the exhaustion reqs. (See 79a #5). The Seventh Cir. considers Wysinger to have exhausted his Miranda claim. [See LF 18-25, 60-63 and (Tr 30-100 supp. hrg.) and Tr 283]. The renewed objection was same Miranda claim raised "to prove waiver was invalid, due to "unknowing and involutary" confession (so videotape shouldn't play)." Thus, Miranda claim is "ripe" for Federal Review. Mirandas violated in several ways. (See LF pg. 18 pts. 1-3) A. Mirandas not read to him at anytime by anyone. B. He asserted Rights to counsel and silence in car ride to station (LF pg. 19 pt. 4) C. Assertion threatened (LF 19 pts. 5, 8). Assertion made per mother's instructions prior to arrest and not in response to any type of advisement. There was none. If proven, above violations would mean "invalid waiver", due to "unknowing and involuntary". see Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) at 471. D. He was heavily medicated and sukidal (no capacity for self-determination and judgment clouded). Will was easily overborn and he was easily coerced. Detectives took advantage of this. By above acts and their continued (post assertion and threat) questioning, after car ride (LF pg. 19 pts. 6, 8). (See 79a - 80a #'s 6-7). E. No signed (by petitioner) Miranda waiver form. Goes to proving all of the above and to disproving detective's (Rights read + understood, no threats or coercion, confession voluntary) testimonies. (Tr 51). Nothing to prove petitioner was Mirandized. But is overwhelming record proof and support (even some of det.'s testimonies to support claims of Miranda violations). To a point that fulfills 28 U.S.C. §2254(d)(2) and (e)(2)'s reqs. and make clear - trial court should've Ruled "Invalid Miranda Waiver" and suppressed confession. (See 80a #8 except for the "even if advised of rights" part - this is very applicable here.)

Claim Two: (Miranda/Brady) violations - audiotape destruction. Trial Court erred in overruling "motion to suppress", Previous Miranda claim and this current claim are "joined at the hip". Some aspects of Miranda are independent. But if there was no Miranda violations - there'd be no need to make this Brady (audiotape destruction claim). It wouldn't have been destroyed. This claim is also exhausted and "ripe" for Federal Review, for same reasons as in claim one (see pg. 5 **). Except it wasn't raised in 1st "motion to suppress" (LF 18). Because destruction wasn't known of yet. So, even though not given Brady title - the audiotape contained "exculpatory" content, "material" to Miranda on it. To the point of being 100% dispositive to invalid waiver. From defense standpoint (playing audiotape at supp. hrg. would mean no videotape playing at trial). Thus, renewed objection to videotape playing at trial, was also renewed audiotape destruction claim. The same as it was a renewed Miranda violation claim. Counsel's best evidence claim (Tr 92) further proves this. It was counsel's next best argument, if the trial court won't award (destruction and rights not read and assertion made) claims. Thus, even though not called Brady, Brady encompasses the "audiotape destruction claim", that counsel raised four times to the trial court and the trial court addressed and Ruled against (in error) three times. Thus, Brady is controlling in such cases and this Miranda/Brady (audiotape destruction) claim is "ripe" for federal review.

A. (See 80a - 82a #'s 9-11) The "timing" of "filing" of first "motion to suppress" = "evidentiary key" to everything in this case! It's in the record evidence that is the "some other evidence" that Dist. Ct. was in want of (App B pg. 16)! 1. Was given police reports on 9-11-08 (Tr 29-30) (See App H - memo showing same) then (App I - reports). 2. On 11-12-08 petitioner files "motion to suppress" (LF 18-21). Filed in order to dispute police reports given 2 months prior (specifically App I pgs. 1 and 5) where both dets. say Bartlett read rights and where Bartlett stated "Tommy verbally stated... statement." He was disputing above in light of (prior to alleged rights read - digital recorder turned on and was recording conversation) and petitioner was counting on "recording shall be downloaded and entered into evidence. Thus, he was aware when he filed his

"motion to suppress" on 11-12-08, that there was an audiotape that would resolve this (police report vs. "motion to suppress") dispute. In his favor of course, but he's not asking that he be believed on his word only. He's inviting The Court to believe the record ("At the time he filed his "motion to suppress", creating this dispute for the audiotape to resolve. He wasn't aware of its destruction.") The record shows 7-1-09 (LF pg. 22 pt. 2) is when defense is for sure told of destruction. Then (see App J) where the counsel (Mark Evans) asks (in response to petitioner informing him of audio's importance) "Do we have audiotape" on 3-12-09. So, this is earliest anyone from defense possibly knew of destruction (still 4 months after 11-12-08's "motion" was filed). Adding even more weight - that 11-12-08 date was for sure going to be trial (Tr 25:15-16, 29:12-13) and he wasn't going to be awarded counsel (Tr 27:19-21). So, here he was! The day of trial! Inviting the audiotape to be played and resolve its disputed contents. That same day he filed his "motion to suppress" (at trial)! He'll either begin his trial as a liar about an issue he could've left alone, if he was lying. Or begin with a credibility boost and knowing the videotaped confession won't be played for the jury. Thus, the record shows 1. audiotape wasn't in petitioner's possession, 2. He didn't know of destruction at time of "motions filing", 3. At that time he knew audio would resolve (pol. rept. vs. "mot. to supp."). As a result the record shows "timing evidence vouches for contents of 11-12-08's "motion to suppress" (Filing created factual dispute. Timing of filing is record evidence that resolves that dispute in "motions" favor!) In dispute of what audiotape's contents were, record says "believe 'motion's' account!". State enjoys no record support. Word only. Can't say "don't believe us, believe the record." It's record stating that audiotape was "exculpatory" (Mirandas weren't read, Rights Assertion made and threatened. That's very "material" to question of valid/invalid waiver. This question is petitioner's trial. Answer is more to verdicts (of guilty on Counts I, II and resulting Life plus 15yrs. sentences) than all state's properly admitted evidences and arguments all put together.

B. Out of context statements (Tr 57, 83) "If there's a lawyer here, how would that hinder

you?" This question's out of context. Suggests prior conversation about counsel that's not on videotape. And he's concerned about hindering police!? "Motion to suppress" mentions rights assertion and threat made? Question though: if did make rights assertion in car, why not correct Bartlett in video, such as ("You didn't honor my assertions in car earlier"), when Bartlett said in interrogation - he'd stop talking after assertion? Answer: Threat had already been made. So, when question "if lawyer here..." answered with what both know is lie - earlier threat's reiterated. Correcting him would bring on carrying out of threat. So, they put him in tough guy part of jail and tell charges. He gets beat and tortured. That's why after threat, he told about broken neck (Tr 44). After threat, conversation in car went to small talk and he told about broken neck - hoping to deter them from having him beat and tortured. Broken neck makes death more possible, if beat and tortured. Plus broken neck is also real fear for him in physical confrontations. He has a hangman's fracture. Very similar to Christopher Reeve's (Superman's) injury. Saw X-rays and only difference between the two, is one of bone fragments (of crushed vertebrae) put scratch on "Superman's" spinal cord but petitioner's cord not injured. So, it was "just keep being nice and friendly, don't make trouble, and hopefully they'll return the favor. You don't want to see what they do if you hinder them and how they'll back up their threat of making things hard for you." After the threat, all the ways they could back it were possible. (See 82a #12). Thus, [never arrested or interrogated before, suffering nicotine withdrawals, stress of life torn apart so abruptly, (family, job, house, vehicles, boat, his whole way of life - gone in one day! No matter what the legal outcome). Worried what future does hold, medicated (judgment clouded) and suicidal (no capacity for self-determination), having assertion ignored and threatened, fearing official power to back threat, along with physical condition. And being in unwarned custody], he was very easy to coerce (See 82a #13). (Tr 57) other out of context statement. Fits talk about case and suicide. Not on videotape either. Both out of context statements leave record saying "audiotape is source of". There's two versions here. One is wrong and one is right. It's not a case of two acceptable versions (See 82a #14).

C. Lie about warrant (Helpful if App's I, L and Tr 37, 38, 51, 52 and 64 are all in view at once). Bowen's report states (when first met Nurse Shea - conversation was all about "wanted" then later a "warrant"). But (see App L) Nurse Shea states in pg. 3 that it was first about a "warrant", then "wanted", then "warrant" again. So, there's no room to say "it's a misunderstanding". Shea shows that she was not confused between the two. Conclusion is one of them's lying - Who? (Tr 37, 38) Bartlett says "Tr 37:11-12". Then see Bowen's report. Right off "Mrs. Shea informed us Tommy Brotherton was being held at the facility..." Then Bartlett "Tr 37:24-25". Then [App L, wasn't Shea they dealt with when they got back. It was Blackburne.] Then Bartlett (Tr 38:1-4) lawyer contacted after they returned with warrant. Bowen and Exh A (App L) say before. [Bowen's report and Shea both talk of fax problems (with warrant). The suspect is either the detectives or a computer?] Next Bartlett agrees with Exh A (Tr 52) after (Tr 37) and looking at Exh A (Tr 51). So, they lied about having a warrant and lied twice about having one faxed. The computer's no longer a suspect. Thanks to Nurse Shea testing the detective's words. But, the same drive that caused them to lie to the Nurse, drove to questioning against their own better judgment (Tr 44-46). See similarity [Nurse stood in way of arrest (to delay it). So, they lied to her. Disregarding her responsibility to protect petitioner's rights. Or the consequences if she failed to. Compare to: their own judgment stood in way of questioning. So, they lowered their standards (lied to themselves). Disregarding their own responsibility to protect petitioner's rights.] Bartlett came to conclusion "that's just how he is" in order to be able to lower his standards (Tr 46). Bartlett wasn't qualified or being truthful, and the record's clear on the conflict they had on, whether to question him or not. Their objective overruled their consciences (Tr 43:21-22). In lying to the Nurse - goal was to succeed at arrest w/o warrant. Could succeed if 1. Nurse was ignorant of warrant requirement or 2. she'd be complicit and share their disregard. Either could put her job in jeopardy. But their objective didn't care. Anyone or anything (person, laws, or ethics) will be disregarded. The same as they took advantage of petit-

ioner's ignorance (no Mirandas read) or by coercing him to be complicit: either by willingly giving up his rights or by him not resisting their attempt to take them away, enough. They knew he wasn't in any condition to stand against them (83a #15) and took advantage of him, as their objective mandated: "overcome his resistance and get him on the videotape" saying what he needs to say" (Tr 43). Confessing. If they could get that (and they did), then the resistance that he did put up (audiotape) can be easily dealt with, and concealed (By getting rid of the audiotape and playing the videotape). Remember the things done and their disregard for the nurse's duty and their own ethics. Their m.o. of blaming the fax machine (computer). And this was just to have a chance to possibly be able to get a confession on videotape. This objective then much more mandates "they're going to do whatever it takes to keep that video-tape confession. The Nurse did the only thing that can be done to thwart that objective. Stand up to it. Test it. But, the trial court and counsel didn't do that.
In the record, petitioner tested them on their word and the evidence (audiotape) disappeared. They dealt with disappearance with their word only. In the record, no signed Miranda waiver form tested their word, but the trial court allowed their word (only) to override that evidence. In the record, if the Nurse would've taken them at their word only (as the trial court did) they'd have succeeded in their lie to her (as they did their lies to the trial court) and making the arrest without a warrant (as they did in violating petitioner's Miranda rights and destroying the audiotape). The record shows - their word - if tested - is no good. Which leads into the next point.
D. Contradictory police testimony: Why so contradictory? To avoid seeming rehearsed, so factfinder can take their pick? If intentional - shouldn't manipulate trial court that way. If not intentional - it's beyond scale of acceptable contradiction for a reason (false testimony). (see App I pg. 5), Bowen states: "Brotherton was advised... (the charge - this was talk about case) then (Tr 65:22-66:2, 15-16, 67:14-18) making conversation, but not about case (Tr 42:9-18 Bartlett) Three diff. versions about key element of case. (Tr 41:21-24 and 74:7-8, 75:11) Rights read when Bowen outside and inside car. (Tr

41:4 and 68:23-25) Directly After alleged rights reading, they both also remember being the one who drove? (Tr 41) Bartlett remembers reading rights, then getting into driver's seat directly after. (Tr 68) Bowen says this memory Bartlett has is wrong. Puts both testimonies in doubt, as to Miranda, same as it does "who drove". One could think "they contradict on everything but Miranda read, so, Miranda must be true." But not in this case. Because, contradiction within same memory stream (i.e. directly after) outweighs their agreement on Mirandas read. It certainly casts doubt that prevents state from meeting burden of proving Mirandas were even read. Also don't meet understood burden. Please see State v. Sparkling, 363 S.W. 3d 46 (Mo. App. 2011) The entire case is very similar and relavent to petitioner's but see *48-*52 mainly. Notice how similar. Except Sparkling was handled correctly and constitutionally. This clearly shows the understood issue is clearly debatable among reasonable jurists. (Tr 41:13-20 "not thinking any further of it..." petitioner said nothing here) (Tr 42:22-25 "said nothing") (Tr 58:24-59:1 what's he basing this on?) (Tr 67, 68 talks about rights read but not any response) (Tr 69:6-10 good chance to elaborate what's said or done to show he understood - but nothing.) (Tr 69-:11 I think...appeared that he understood, :14 I felt like he understood, :21 I believe,... under the impression. Seven different times, in their spontaneous supp. hrg. testimonies, if there was a response to make (or made), no mention of petitioner responding in any way to an alleged rights reading (except silence). It's unreasonable (on this point alone - let alone all the other explained circumstances of this case) to accept the one led supp. hrg. testimony (Tr 77:2-4) over (Tr 41, 42, 58-59, 67-69, 74's spontaneous testimony) [redacted]. And over (no waiver form, "timing", out of context statements, lies about warrant, contradicting on all aspects of Miranda, questioning under questionable circumstances, and audio's dest.). (Tr 272:25-273:6) was at trial after supp. hrg. testimony. [Except the led (Tr 77). See (App. I pg. 1) ".verbally...statement." Contradicts all supp. hrg. testimony]. But, these two testimonies do "eliminate the possibility of any kind of gesture being made in affirmation of alleged rights reading to show he understood. The

factfinder's only left to consider "did he say he understood or not?". There's an issue with "wanted to make statement part" that sheds light on both things that petitioner allegedly "verbally" stated. See (Tr 42:22-25 again petitioner says nothing, see pg. 11 again etc.) Then (Tr 43:15, 19 wanted to wait until... all be on tape). [Tr 46:3-12 made arrangements prior, if... any conversation (audiotape was arrangement alluded to)]. So, "preference is video, but prepared with audio. In case petitioner "wanted to make a statement" ??" But, Bartlett said he did want to make a statement. Then (At what was the time of the audio)?? what does Bartlett say he did to dissuade him from this desire to make a statement?? what shines through (no matter any set of facts) is Bartlett's confidence in his coercion. Because he reflects on the videotape confession as it was then a given?? How's he know he'll have that option later?? what if all he says is true, but they get to the station and petitioner changes his mind (from his alleged previous desire to make a statement)?? Now Bartlett has nothing. Mostly, why not have both ?? Common sense says "get the audio and the video". There are no limits to make believe, however. Bartlett insults the trial court's intelligence.

There's alot of medication related testimony (Tr 43-6, 52-3, 58-60, 71-2, 276-77, and 286). A summation would be "he was lethargic, seemed under the influence of something, or had a mental deficiency. They wouldn't interrogate someone who's intoxicated. Would put it off (Tr 45, 59). [But, didn't have time to look at property to resolve concerns (Tr 58)?? Only real interest in knowing what prescribed or taking was to assist station's nurse, next a.m. (Tr 58)?? Elusive and contradictory to (Tr 45)'s said concern]?? (Tr 53:4-6, 71:23-72:8) compare to (Tr 277:18-22, 288:4-6). Lying and suppressing evidence. "I don't believe so" or "Yes". So, here they give this reason why they wouldn't interrogate someone (Tr 45). But then elude, contradict, lie, and suppress evidence that questions whether they adhered to that principle. (Tr 75) Request for counsel was another reason they said they wouldn't interrogate?? Another thing to remember, they didn't even mention (meds, lethargic, mental deficit, or under the influence) concerns in their reports. Not until "motion to suppress" tested them on it. See also pgs. 7-8 herein.

E. Audiotape's Destruction - Brady (Due Process Violation) See (App I pg. 1) top left Date: 11-14-06, then just below Date: 10-11-06. This report was made 34 days after the audiotape was downloaded to Bartlett's computer (Tr 273: 23-25). No mention of a crash as of 11-14-06. See (Tr 48-50, 72-3, 273-75). He then says he sent this file to captain's computer Nov. or Dec. 06' (Tr 49: 19-20). Says "normal protocol" (Tr 49: 21). Not protocol to do 34 days or more after you created file on your computer and have erased audiotape. Then still lax after 34 day alert (Tr 275: 2-7). Look at last pg. of his report (App I). Video went straight to evidence. But audio [that would secure video's use (if their version's true),] was carelessly neglected for month or two?? So, not a case where "it was just as important to them to preserve it". Actions show otherwise. Didn't do same with contents disputed evidence as they did evidence that is known to be in their favor. See (Tr 73: 5-6) Bowen "can't answer". But it's a "yes he did burn it to a disk, that's why we have it." or "No he didn't, that's why we don't have it." If account's true - he could simply answer "No, no he didn't." So, 34 to 81 days after it was made, file was sent to Captain's computer and captain was out of office or didn't realize audio's importance?! To where it again sat for awhile. And Bartlett still failed to follow-up on it. He says "it was my mistake. I didn't follow-up.." (Tr 274-75). But state convinces court with (Tr 89-: 16-17 "there's no countability to the detectives" :19-21 "If that was the case ... not a reason to keep this confession out.") First, yes it is, irregardless of good or bad faith (see 83a #'s 16, 17). Second, Bartlett claims accountability. Third, letting file sit so long and being so direlect in his duty. Even if was a crash, confession still should've been suppressed (see 84a #18). Sometime in Nov. or Dec. 2006 a crash happens. Couldn't retrieve data (I.T. guy out sick). Other people's info. lost also. Went to new operating system. This is all just words! No proof of crash account offered, at all! The audio's destruction is only proof of a "failure to preserve" not of crash. Judge's personal knowledge of station's computer problems (Tr 89: 9-13) is just that. Not of a crash. 1. No Date of Crash [a. to see how long "material" to Miranda evidence was neglected before crash? b. when defense should've been told? Could've had own I.T. person retrieve data. State didn't give chance. c. a date to

compare to I.T. guy's attendance records or testimony (was he actually out sick that day)? 2. No proof of crash [a. No Captain (firsthand knowledge) to testify: to crash or why he didn't make disk? b. No I.T. guy to testify: to certify there was crash? To answer why he didn't have Bartlett and captain's computers aside, until he got back? Or why he didn't recommend retrieval be contracted? Or to testify data was irretrievable? If went to new system - why not have that IT person retrieve data? where was proof of other files lost (Tr 274:15-18)? Where was any expert at all to certify crash? If even was one? 3. No Attempt to retrieve Data at all [a. where was any I.T. person to testify that data not retrievable? Under circumstances (Bartlett's computer not destroyed) data file still there. And depending on what Captain did with data, possibly still on his computer too. No I.T. person would testify to data being irretrievable. See (Tr 50) Bartlett's aware of data in need of retrieval. Made conscious decision "since hamstrung" not going to try to retrieve. Again this "conscious decision" made on heels of [ sat 34 days, reminded of, neglected again. Did this knowing station had computer problems and that audio was only means (if his Miranda account true) of securing video (that supports State and was immediately put into evidence). There'd be no such negligence if that audiotape was in his account's favor. Plus, if audio did back them, they knew it'd be leaned on heavily by them (no waiver form or advisement on videotape. Videotape's out of context statements). They knew a dispute was going to arise, that only the audiotape could resolve. Thus, their "failure to preserve" it, questions "whose favor was it in, then?" So, if there was crash, their actions say "let it sit there until there's a crash." But, it's hard to believe State would not happily bring proof of a crash if there was one. Then didn't tell defense for 2½ yrs (and one day before supp. hrg.)?? See App P + Q (discoveries). No mention of destruction. None of above speaks to good faith. Was either destroyed or destruction willingly allowed in bad faith. By "failing to preserve" it and making no attempt at all to retrieve the data.
(See App B pg. 8) Here Dist. Ct. uses Arizona v. Youngblood. But, in Youngblood, Trombetta, and the like, the destruction prevented further tests from being done. In petitioner's case, the destruction prevented the tests results (audio's contents) from being known. Imagine in

Youngblood, "The State's expert's tests exonerate Youngblood. But as soon as expert is aware of this, lab accident destroys all. State still insists "results inculpated Youngblood". But, Their expert (the record in petitioner's case), won't go along with it. He becomes defense witness. He doesn't have the proof he did have. But, he is the evidentiary key!" Something like that would make Youngblood more similar to this case. The question's not usefulness. Audio would be 100% dispositive to question of invalid waiver. Even though State and petitioner know audio's contents, the Court is deprived of them. To aid the Court the State says "Take our word for it. Just believe us. It was in our favor." Petitioner says "Believe what the record says. Take the record's word for it." Thus far, even with petitioner and the record inculpating them, the spoliators have been taken at Their word about the destruction and what the test results were. (See 85a #21) Justice Blackmun's resolution in His Dissent here, could be key "existence of other evidence going to point of contention" Id. also at *69 [There's enormous amount of record evidence, as to audio's destruction and proof that it was "exculpatory" (which is the point of contention). And then there's the lack thereof on State's behalf]. See (84a #19 last 4 lines) Exactly on point here. Thus, his is one of cases The Court's Opinion talks about (See 84a #20) first 4 lines. Except for the "could form" part. [See 85a #22 1. in petitioner's case, officers didn't act in good faith or in accord with normal practice (see pg. 14 pt. 3 herein again) 2. record evidence (points A. - F. herein) all says audio was "exculpatory". Thus, 100% dispositive and "material" to question of invalid Miranda waiver. 3. Audio was only means of proving invalid waiver. But, State still made use of audio (even though They destroyed it) in case in chief. In supp. hrg. (saying if still existed - would be witness to valid waiver). In which that unsubstantiated claim and the audio's destruction allowed for Ruling of valid Miranda waiver, which allowed for videotape confession's use at trial. And was the reason for his conviction. The Dist. Ct. disagrees (App B pg. 17 bottom). But (same pg. 17 middle) "namely, his confession". Also, State and petitioner agree (audio was important to confession and video confession is State's case in chief (Tr 89-90 mainly 90:3-4 "consider what the result of suppression would be". Then

line 2 above that" extreme because of the nature of this case. "The State's admitting "No videotape confession, no case." Then went on to use confession in 36 trial transcript pgs., 3 of 5 pgs. of Its opening, all 11 pgs. of Its closing, and 38 min. video itself was played for jury. If audio wasn't destroyed and would've actually been played at the supp. hrg. - it would've resulted in no video playing at trial. Thus, the audio's destruction was used in State's case in chief. Because Audiotape playing = no videotape playing. Videotape's admission was not harmless. Petitioner prejudiced, audio's suppression (destruction) allowed video confession to play at trial and be referred to again and again. Thus, the resulting Guilty of Counts I, II and max sentences. (See 85a #23)

Petitioner's "timing" or bad faith destruction arguments, are in the record proofs that the audiotape was "exculpatory". Thus, the record proves the audiotape's destruction (suppression) a Brady violation. And even if not bad faith destruction, still Brady 1. state admits to destruction of audio. Good or Bad Faith doesn't matter. 2. Record proves audio "exculpatory" 3. Audio was "material" to question of valid or invalid waiver. Thus, ultimately the verdict and max sentences. If its contents would have been revealed, the record shows "the audio certainly would undermine the verdicts of valid Miranda waiver, guilty on Counts I, II and max sentences. The audiotape's destruction was a Brady (Due Process violation). See 87a #27. Also on this claim two see pgs (all herein) 18-20, 35 for more on "involuntary" confession and 34-35 for more on improper supp. hrg. See LF 29. The only thing that possibly supports this Ruling is police testimony. Petitioner asserts not even that. But, in order to make this factual determination (that police testimony proves Its findings) trial court had to determine [1. audio in State's favor. Couldn't have thought "audio was in petitioner's favor and Ruled valid waiver. And couldn't make Ruling by acting like audio never existed and then see who to believe. Brady doesn't allow this. 2. audio not destroyed in bad faith. 3. Police testimony proves valid waiver. 4. "Motion to Suppress" not proven.] Petitioner has rebutted (herein) the presumption (that the above findings by the trial court are correct) with clear and convincing evidence (28 U.S.C. §2254(e)(1)). And he has

shown that trial court's decision (of valid waiver), involves an unreasonable determination of the facts (that police testimony proves valid waiver) in light of the evidence presented at supp. hrg., 28 U.S.C. §2254(d)(2), "only if it is shown that the state Court's presumptively correct factual findings do not enjoy support in the record." Evanstad v. Carlson, 470 F.3d 777, 782 (8th Cir. 2006).

1. The proceeding (supp. hrg.) in which trial court gathered facts for its determination, "that police testimony proves valid Miranda waiver, was an improper hearing. See pgs. 34-35 herein.

2. Excluding above point 1. and Ruling is still unsupported factually, by record: [i. No valid waiver: a. no signed waiver form, b. "timing" evidence, c. out of context statements, d. lies about warrant and faxes, e. contradictory police testimonies (as to rights read and understood) detracts record support in this case, f. Brady (audiotape destruction) 34 days unattended, reminded of by making report, then still neglected, no attempt to retrieve data, didn't tell defense for 2½ yrs., no proof of crash, g. still made use of idea of audiotape as silent witness to their account, because h. had no proof of any account of (rights read or understood, no rights asserted, or no threat) i. If none of a.-h. above considered. They still questioned suicidal and medicated person (no capacity for self-determination and clouded judgement). Proving confession still "involuntary". Thus, it's unreasonable to determine that the detective's testimonies prove valid waiver. No record support and mountain of record evidence (including some of their own testimony) disproving their testimony. Thus, any factual determination based on their testimony, enjoys no record support either. And the trial court's factual determinations (LF29) couldn't have been based on anything else but their testimonies. Because nothing else in the record says "Mirandas read, no rights assertion or threat made". In fact, everything else in the record (even some of their testimony) proves if we had the audiotape to listen to: We wouldn't hear Miranda warnings given. We would hear petitioner asserting his constitutional rights to counsel and to not incriminate himself. And we'd hear a threat against that assertion,

coercing him into an "involuntary", unwarned, and "unknowing" confession. Invalid Miranda Waiver! The trial court erred in overruling "motion to suppress" (See 85a - 87a #'s 24-25). It's understandable that detective's jobs can lead them to do constitutionally violative things. And that - that's why The Court's are there "to keep them in check". And counsel's to bring them to the Court's attentions. But in this case, this hasn't been done. And it's gone too far. This Honorable Court must Act! Petitioner Thanks The Court! For next point C Please see App B pg. 11 - 2nd para., App C pg. 7, App G pgs. G2, 3, 11 mainly) then G2 bottom * "The witness...", then G3 top "listing relative witnesses..." Then down to 2.9A: Section II - pts. 2-2c. this coincides with G11's 9A: Section II pts. 2-2c. Back to G3 notice "I reserve the right for future counsel..." Procedural Bars - Point One: Not a pleading requirements failure. From the above, there's no doubt he's counting on p.c.r. counsel's investigating and amending his motion. Please see (App L). This is Defense's Supp. Hrg. Exh. A, Admitted into evidence (Tr 55), used and referred to many times at supp. hrg. (Tr 51, 52, 54, 55, 71, 73, 78). In comparing Exh A with the above 29.15 points, clearly Exh A is 29.15's source. Exh A is the proper Doctor's release papers with Dr.'s signature on it (mentioned in 29.15). Exh A fufills 29.15's witness names (proper staff person(s) from St. Joseph's hospital - Beverly Shea, Mary Blackburne, and Dr. Khojasteh). So, in 29.15 (Exh A's witness names) were by position at St. Joe's hospital, which covers their addresses also. Then in 29.15, their testimonies (of meds and dosages, and suicidal and mental state) is Exh A pg. 1 (meds and dosages) and pgs. 3-4 (Shea and Blackburne could testify to taking meds and mental state). Then 29.15's phsychiatrist that could testify to (meds effects and suicide, etc.) is Exh A's Dr. Khojasteh (pg 2 Exh A). Then in 29.15 (warrant and legal document about the arrest) is from Exh A pg. 3 (talking about lies about the warrant). So again, (2.9A: Section II of 29.15)'s source is clearly Exh A. which questions, "Why he didn't just state this or list any of Exh A's names in his pro se 29.15 motion?" That pro se would probably be the reason in reality. However, some other factors also led to him drafting his 29.15 in the way he did. First, he wasn't aware of the (pld. reqs. of

29.15). Yes (bot. pg2 of form 40) leads in right direction. But, he was also aware that p.c.r. counsel was going to amend. Another factor is counsel's last minute notice of the supp. hrg. (see App B pg. 15 2nd para.) prevented petitioner from having any "foreknowledge" of the supp. hrg. So, he had to get witnesses that counsel could've called (to prove confession "involuntary") from the record (when he got transcripts - many months later). His point was "witnesses in (Exh A) would have been more effective in person (concerning meds and suicidal state, and lies about warrant) than on paper (Exh A)." Then he was showing prejudiced by counsel's failure to call them [1. missed on benefits from testimonies, 2. had they testified to Exh A's contents at the least, then (Tr 96, 86) State wouldn't have been able to cast doubt on "them" (medicated and mental state). 3. Defense could've benefitted from expert's further insight on these issues.] Thus, their presences and testimonies (at supp. hrg.) at least to Exh A's contents, would've caused trial court to Rule invalid waiver, due to "involuntary" confession. So, counsel was I.A.C. for not calling them (See 99a #'s 59-60, 103a - 104a #80). But due to lack of "foreknowledge", he couldn't be as concrete as he would have been able to be, if he would have personally knew about Exh A's witnesses (as counsel did) before the supp. hrg. This is seen on pg. 11 of 29.15 "a physchiatrist or other relative specialists" or "proper staff person(s)". Leaving it open for p.c.r. counsel. Due to trial counsel's violation (preventing petitioner and witnesses from supp. hrg.) petitioner had to lean on p.c.r. counsel's investigation and amending more heavily than a normal petitioner. He didn't know if p.c.r. counsel would use those specific people in Exh A or others at St. Joe, who took care of petitioner. Preferrably those in Exh A (by far). But, he feared he'd limit counsel's options by locking him into their names or into Exh A. So, he used Exh A to lay the foundations for p.c.r. counsel without limiting him in some way. Why he thought he'd limit counsel's options "Who knows - those pro se petitioners?" But, it's a moot point. Because p.c.r. counsel was going to amend. Or, had he been told by the p.c.r. court or counsel (his error could've been easily corrected). But, and this is the point, the correction still wouldn't have made a difference. Because, the "availability" aspect of the pld. reqs.: [1. are not able to be fulfilled by petitioner. He can't say he knew

they were available for a proceeding (he himself didn't know about, until the last minute - which is part of the I.A.C. claim). Fulfilled by counsel, when he got Exh A admitted into evidence. Because, question pld. reqs. want answered before moving on, is "was everything in counsel's hands?" If it was, then on to, "Why? Did counsel do what he did?" (strategy or some other reason?) So, Exh A's admittance showed counsel had all required "information in his hands" and chose not to inquire about availabilities.] Should've then been asked, "Why didn't you inquire about Khojasteh, Shea, or Blackburne or other's at St. Joe about testifying to Exh A's contents at the least. There's enough in record to warrant asking him that question. So, in this case, pld. reqs. were just formality. He shouldn't be punished so harshly for not knowing to tell them that. Especially when those trained in the law could tell all of this from the context of (last minute notice) see pg. 10 of 29.15. Thus, it could be construed that this was not a pld. reqs. failure (see pgs. 104a - 106a #'s 82 - 89). Point Two The State Law Ground is not "independent" of the Federal Question. The pld. reqs. of 29.15 are the merits (in this case)! [The pld. reqs. say, "You can't claim (I.A.C.) because you can't fulfill us. You can't fulfill us because you can't prove witnesses were available." But his (I.A.C.) claim says, "I.A.C. is the reason he can't prove availability".] It's a perpetual loop. Thus, if held to absolute standard of fulfillment, which is what per App. Ct. held him to (see App C pg. C7) "or state whether any witness was available to testify". Only 45 mins. notice makes this impossible. Since this was counsel's doings, it's then the I.A.C. claim. And if impossible to fulfill pld. reqs. - how close he came to fulfilling them doesn't matter. For the pld. reqs. to be considered "independent" in this case, would be allowing counsel to secure himself from an I.A.C. claim by purposely committing violations of his client's constitutional rights (see 78a #4 then 77a - 78a #3). If told of error and allowed to meet some sort of lowered pld. req. standard - instead of "absolute" one above - he could've easily corrected it, with Exh A's information. The "I reserve" statement in his pro se 29.15, clearly shows he wasn't trying to conceal anything beyond an amended motion, and he's explained why he'd done his 29.15 in that manner. Point Three - Pld. Reqs. Bar "inadequate" and, or "exhorbitantly" used in this case. See (App B pgs. 3, 4, and 11) Then, "Adequacy is Federal Question" (see 101a #67 then 101a #68 - 102a #

73). Mitchell didn't even request remand for findings and conclusions, in his brief, as petitioner did. Barry raised other issues, but they weren't heard, due to p.c.r. court's (29.15(j)) failure. In Voegtlin: 4 pts. raised and p.c.r. court addressed three. App. Ct. still remanded for (finds and conc) on that one not addressed. Wouldn't reach other issues until 29.15(j) fulfilled. (See App F pgs. 35a - 36a a, h, j, K). Case law, and 29.15(j), (K) show that App. Ct. is wrong place and wrong time (in the absence of finds and conc). In Clayton, the (finds and conc) issue was dispositive, so didn't reach other claim. The opposite was done in petitioner's case. Enormous amount of Mo. cases support that p.c.r. App. Ct., by precedent, practice and Rule 29.15(j) and (K) regularly remands for (finds and conc), if p.c.r. court fails to issue them. And will not address any other claims until p.c.r. court completes that task (finds and conc) on remand. See Barry, 850 S.W. 2d 348 at 3 (blanket statement in dismissing by p.c.r. court unacceptable), but thus far, acceptable in this case? A main component in determining the "adequacy" of procedural bars, is the "regularity" in which the Rule is followed (see 103a #'s 75-76). He has shown well "what" the p.c.r. App. Ct. "regularly" does in cases such as his (remands for (finds and conc) and doesn't reach any other claims). But, It didn't in this case. Even under comparatively more prejudice (was petitioner's case) than in those cases.

1. 29.15(e) violation: a. pro se 29.15 filed, b. p.c.r. counsel chose not to amend (App. M. statement in Liue, App N pet. obj., App O "not impermissable"...) Counsel then doesn't inform of pld. reqs. failure. Neither does p.c.r. court (who deliberates on deficient motion) before or after summary dismissal. Then, per counsel's advice or on Its own:

2. 29.15(j) violation: p.c.r. court didn't issue findings of fact and conclusions of law, except for inconsequential claim (needing only to be factually dismissed by p.c.r. court saying practice was discontinued) b. no reason given for not issuing (finds and conc) c. Per 29.15(K): both of above, left p.c.r. App. Ct. with nothing to review and App. counsel with nothing to brief (Except for 29.15(j) violation). Any other briefing futile. Because of no (finds and conc) to brief or argue against. [29.15(K) requires Constitutional claims vs. 29.15(j) (finds and conc)]. Not claim of no finds and conc. vs. no finds and conc., as

what petitioner's p.c.r. App. brief was forced to be. Due to p.c.r. Court's 29.15(j) failure. 3. 29.15(K) violation; Per 29.15(K)[a. If no 29.15(j) then remand for 29.15(j) b. Do not address other claims in p.c.r. App. brief, if no 29.15(j)] c. But in this case, p.c.r. App. Ct. addressed an I.A.C. claim It shouldn't have (per 29.15(K)), and this caused It to address the pld. reqs. failure and not to address the 29.15(j) failure (that It should have - per 29.15(K)). Had App. Ct. remanded for 29.15(j) per 29.15(K), the p.c.r. Court would've had to address claims in pro se 29.15 or announce pld. reqs. failure and allowed correction. Or, p.c.r. or App. counsel could've explained what petitioner does now. Then p.c.r. App. Ct. wouldn't have erred in placing pld. reqs. bar, which then led to "failure to raise" bar, on the other (relative to his Habe) pro se 29.15 claims. Therefore, "exorbitant" use of pld. reqs. bar by p.c.r. App. Ct. (that resulted in "failure to raise" bar), is "inadequate" to bar federal habeas review (in this unique case) of his (relative to his Habe) pro se 29.15 claims. See Holloway v. State, 764 S.W.2d 163. Very similar to petitioner's case [at 164 1. counsel didn't amend, 2. affidavit for not amending, 3. stated client entitled to no relief, 4. counsel requested evidentiary hearing, 5. wasn't given one, 6. p.c.r. court dismissed pro se motion without addressing claim with (finds and conc), [at 165 7. Appealed no (finds and conc), 8. State argues need not reverse and remand for (finds and conc), citing Guyton v. State, 752 S.W. 2d 390, 392 (Mo. App. 1988). And in petitioner's State v. Viviano, 882 S.W. 2d 748, 754 (Mo. App. 1994). Though similar up to this point (very), this is where (Barry, Mitchell, Voegtlin, Henley, Clayton, Gaddis, etc., Rule 29.15(j), (K) and Holloway all part ways with petitioner. Holloway, "Remand for findings and conclusions". Many of those cases had amended motions, evidentiary hearings, and counsel's didn't suggest that the p.c.r. Court break the Rules of 29.15(j). So, even though Mo. courts do "regularly" use 29.15's pld. reqs. bar, They don't "regularly" (if at all - can find no cases) use pld. reqs. bar, to bar anyone under petitioner's set of explained "unique" circumstances. In fact, he's shown that it's highly irregular for It to act in this manner. See Voegtlin, 464 S.W. 3d 544 at 556 ftN8 (five exceptions to 29.15(j)). In reality, no exceptions apply here. But,

if one did - p.c.r. Court didn't state reason It believed this case fit one of those exceptions (See 103a #77,78). Lee is different setting. But, reasoning (as applied to the bar) still holds. P.c.r. court or State could've announced bar at p.c.r. stage. In Barnett, They informed counsel of pld. reqs. failure, before hrg. on amended motion at 10. It even states counsel could've re-amended deficient plds.? How much more would petitioner (being pro se), have benefitted from such notification? He'd never made it to federal court. But, he wasn't made aware until p.c.r. Appeal's gone and remedies exhausted. But barred for "failure to raise" his pro se 29.15 claims in his App. brief. Then, in Barnett, p.c.r. Court still issued (finds and conc) and placed pld. reqs. bar at initial review stage (not App. stage). Barnett's much more normal and procedural. Thanks to state and p.c.r. Court following Rules of 29.15(j). If no (finds and conc) p.c.r. App. counsel's left to guess, "why p.c.r. court denied?" P.c.r. Court must at least say "why", no (finds and conc). Or else the Appeal's a waste. It's like p.c.r. court gives the App. Ct. a blank to fill in "Failure For ____?" (After App. Counsel makes out brief). So, even if determined pld. reqs. failure - P.c.r. Appeal and App. Ct. are still wrong time and wrong place to find out. "Inadequate". Neither the "regular", nor the reasonable practice. "Exorbitant" in this "unique" situation. There are big procedural differences in other cases used against petitioner (Morrow, Jones, Flieger, etc.): amended motions, findings and conclusions, evidentiary hearings, counsel's don't make violative suggestions. They're inapplicable to his, concerning pld. reqs. bar. which further proves his "irregular" and "inadequate" arguments. If The Court agrees that pld. reqs. bar is either "not independent", "inadequate", or "exorbitantly" used in this case, It must also see that this misapplication led to p.c.r. appellate counsel's failure (inability) to raise the pro se 29.15 claims. Thus, petitioner would show this as cause for the "failure to raise" default on his (relative 29.15 claims) to his Habe. And they are ripe for federal review herein. See Lee v. Kemna, 534 U.S. 362 at 888-889 [1. Petitioner cannot comply with the requirement (last min. notice). 2. No published decision could direct flawless compliance with the pld. reqs., in unique circumstances this case presents. Their

application to the facts here was novel. 3. He adequately showed in his pro se 29.15 what trial counsel knew at the time that he decided not to call the witnesses, that he knew about (because counsel had to get Exh A from St. Joseph's hospital.) He told the importance of these hospital employees testimonies, in proving his waiver "involuntary". And he showed how counsel's decision not to do these things prejudiced him. By the State's arguments of no one to testify to meds and suicide. Which discredited defense's arguments of the same and led to determination of "valid Miranda waiver". Petitioner complied substantially with the pld. reqs. Rule. Because trial counsel fulfilled them as soon as he introduced Exh A into evidence, at the suppression hearing.] See (104a #81).

Point Four - Due Process Violation - to excuse procedural bars: Petitioner's right to due process was and is being violated. Not due to single instant, but in failure [of entire State Remedy System] to operate in a manner that complies with Due Process requirements of Fourteenth Amendment. See (103a #79). See also pgs. 21-22 herein. Those combined violations of 29.15 (e), (j), and (k) created that situation of p.c.r. Appeal being (claim of 29.15 (j) violation vs. the 29.15 (j) violation). Supposed to be (claims of constitutional violations vs. 29.15 (j) (finds and conc)). This shows a complete breakdown in the State Remedy System (failed to operate according to Due Process reqs. of Fourteenth Amendment). See (App B pg. 19). Dist. ct. states - federal courts aren't concerned with state court infirmities. But, he's not presenting an infirmity. He presents the complete breakdown of the Remedy System: [No 29.15 (e), or No 29.15 (j), or No 29.15 (k)] alone, are each an infirmity. The System can even survive (No 29.15 (e) but Yes 29.15 (j) and (k).) or even (No 29.15 (e), No 29.15 (j), but Yes 29.15 (k)). [But not No, No, No! A 29.15 (e) infirmity, (j) infirmity, and (k) infirmity.] The System can't operate with all of Its components infirmed. Thus, petitioner asserts that this Due Process violation should be seen as p.c.r. App. counsel's (and thereby petitioner's) cause for not being able to raise his (relative to his Habe) pro se 29.15 claims in his p.c.r. App. brief. And thereby, they're "ripe" for federal review herein.

Martinez (I.A.C.) p.c.r. counsel: There are many relative facts in other pages of

this petition. Petitioner will rely heavily on those page citings in this claim. In order to minimize repetition. See (App B pgs. 3, 4, 11, and 19). This claim was raised in Habe in a non-cognizable manner. But, in "response to respondent's response" he clarified that he was using p.c.r. counsel's ineffectiveness as cause. See (pg. 21 herein - I. 29.15(e) violation). Then see (App C pg. C7). The fact that p.c.r. App. Ct. Ruled "plds. insufficient" should be considered that p.c.r. counsel was (I.A.C.), due to his failure to amend the pro se 29.15 motion. If form was incorrect and pleadings deficient in pro se 29.15, [then p.c.r. counsel's "statement in lieu" (App M), and "petitioner's obj. to" (App N), prove "petitioner's obj.'s" to be correct.]. See App G pgs. 1-16. Petitioner's pro se 29.15 motion, was in need of and deserving of being amended by counsel. Petitioner knew nothing of pld. reqs. or bars. Just the form 40. But, he was aware (per Direct App. counsel), that p.c.r. counsel was going to amend. That's why (see pg. 19 all and last seven lines pg. 20, herein). Petitioner had evidence (Exh A). Wasn't needing evidentiary hrg. to develop. But, counsel's investigation into (Exh A) to determine how to use it. Is what was reserving for him ("I reserve"). Was 100% expecting p.c.r. counsel to amend, after investigating claims. Then prove at evidentiary hrg. Never dreamed pro se 29.15 motion would be what p.c.r. Court deliberated on. Yes, was aware of form 40's (list names, addresses, and what would testify to). But, was just as aware that 29.15 would be amended (with some things in witness list omitted, others further developed, and some totally new names (unknown to petitioner), that he laid the foundation for p.c.r. counsel to introduce. But counsel never amended (See 100a-101a #'s 61-65). And counsel never said "you're on your own now - better name your source as Exh A." Nor did p.c.r. Court inquire "Why?" or tell him of his error. He could've easily (answered or corrected) with "See Exh A. This is source for pgs. 3+11 of pro se 29.15. If it is determined that petitioner did fail or default on the pleading requirements of 29.15, then he prays his excuse for this failure (being the result of trial counsel's actions - last min. notice, p.c.r. counsel's inaction, and p.c.r. court's apathy) should be laid at p.c.r. counsel's feet, ultimately. As good cause

for the default [failing to amend pro se 29.15 motion - in order to correct pld. reqs. failure and any other deficiencies, not informing petitioner of failure, suggesting to p.c.r. court "it would not be impermissable to dismiss the case without following the Rules of 29.15 (j)" (Likely responsible for p.c.r. Court's apathy)]. Thus, p.c.r. counsel's ineffectiveness prejudiced petitioner, by causing that claim of I.A.C. trial counsel to go unaddressed and unremedied. App. Ct. placed bar on pro se 29.15 (I.A.C.) trial counsel claim via p.c.r. App. brief claim of (I.A.C.) trial counsel claim. So, p.c.r. counsel's failure not p.c.r. App. counsel's failure. What's more, still being prejudiced (see pg. 24 herein) p.c.r. counsel's part in complete breakdown of State Remedy System. Please (see 101a #66). Thus, this (I.A.C.) p.c.r. counsel claim is predicated on whether (I.A.C.) trial counsel claim has merit. So, please (see pgs. 33-37 herein.). Then see Strickland (pg. 77a #1). Any p.c.r. counsel wishing to represent his client to a competent standard would have reasonably amended his client's pro se 29.15 motion, to make sure the claims of constitutional violations were in proper form and contained the proper pleadings. Or, most importantly - explained why the unique circumstances of the case, don't allow complete fulfillment of pld. reqs. Or, he would've at least informed his client of his error. Ultimately, petitioner was prejudiced with, prolonged incarceration and the barring of all his claims in federal courts. Not only did he fail in performing at an objectively reasonable standard. But joined and encouraged further violation of the Rules (by other components) of the State Remedy System (App ), that prevented proper adjudication of claims in State Courts! For all above reasons, he should be considered (I.A.C.) p.c.r. counsel. And (I.A.C.) trial counsel claims herein, should be considered "ripe" for federal review! End Procedural Bar Arguments. Petitioner Thanks The Court!

Claim Three: Brady Due Process Violation (Suppression of Material Evidence and prosecutorial misconduct, use of false evidence). * "An exam was done on R.B. in response to her accusing petitioner of "anally penetrating" her. The finding of this exam was that there was "a tear in her rectum"." This scenario went to the jury as physical evidence that automatically proved the charged act of "anal penetration". The

only thing left to decide was identity. In order to determine whether petitioner was guilty or not guilty of (placing his penis in the anus of R.B. - will refer to as "anal penetration" herein). See (App 87a #26) Brady. A. This scenario [brought about by ("hearsay" viewed in the "context") of the accused and charged act] could be presented to any juror and it'd guarantee both guilty and max sentence votes. A1. The (Brady) suppression [of the expert (who performed the exam on R.B.) and their report - will refer to both as "exam report" herein], is what allowed the above (scenario *) to go to the jury. Were this "exam report" not suppressed, we wouldn't be here now. Because, it would have neutralized the "deadly effects" of the ("hearsay in context") evidentiary combination, that unremedied - infected his jury, and eliminated any chance he had, of receiving a fair trial. B. See (App B pg. 8 - last para.) will rely on Dist. Ct.'s facts, except last sentence. Because videotape confession was played after this (Tr 283). B1. Also, he respectfully disagrees with the Dist. Ct.'s interpretation (as to the impact of those facts). For example, that mention in last line (of there being no more mention of a tear or the medical exam). The exam and tear go to charged act. As an "injury" caused, while in commission of accused and charged act of "anal penetration". Therefore, "it" is incorporated into and permeates entire case. It's even retroactive to R.B.'s testimony and C.A.C. interview. So, it doesn't need to be mentioned (specifically), over and over again, in order to dominate the record and tower over all the other evidence. The Dist. Ct. must be failing to see how "hearsay" of "a tear", is so "deadly", when "it's" allowed to be viewed in the "context" of "anal penetration". Some "poisons" are fatal in small doses. And this is one of those "poisons". B2. It's possible Dist. Ct. doesn't see how the "videotape hearsay" and the "trial hearsay" are nearly identical ("a rectal tear" vs. "a tear"). First, the "hearsay" testimony doesn't even rule out, that "the tear was in her rectum". It only shows that Bartlett's interrogation tactic, was to act as if he did know where "the tear" was, when he didn't actually know. The jury was still absolutely free to determine that "the tear" was "in her rectum". Look at his "tactic" also: He thought it'd be most effective, by fill-in the blank with "in her rectum," because that location fit best with what he was told (accusation of "anal penetration", exam done, "a tear" found). What then was the jury told?

The same exact thing. Thus, viewed in the context of "the exam that found 'this tear' was done in response to accusation of "anal penetration." There's virtually no difference in the videotape and trial "hearsays". The "context" provides tear's location. What area's examined when accusation is "anal penetration"? The anal area. So, if tear's found while examining anal area - where's the tear? There was "a tear" in the "anal area" (rectum).

Cl. Furthering A1. above - "exam report's absence from trial, first allowed presentation of "trial hearsay". In that, this presentation (seems??) to be state's attempt to remedy the "videotape hearsay". But, if "exam report" produced, would've been no need. No need for state's (destructive) failed attempt to remedy "fatal taint", that state knew'd be coming, as soon as videotape confession's played and jury hears (exam done - found a tear in her rectum) and puts that in context of R.B. accusing defendant of "anal penetration". But, state's idea of (using "hearsay" to remedy "hearsay") I.e. the trial "hearsay" [as vie- in the "context" (an exam was done, I was aware that there was "a tear" - the exam was done in response to R.B. accusing petitioner of "anal penetration")]. Does absolutely nothing to remedy the "videotape hearsay" (a tear in her rectum). The "trial hearsay" just bolstered the "videotape" hearsay, viewed in the "context". There's no difference (because "in her rectum" wasn't ruled out, and the "context says, it was in her rectum"). Will refer to either ("hearsays as viewed in the context") as just "hearsay" herein. And ask that entire meaning be implied. The above actually went to proof of injury (a tear), caused while in the commission of the accused act ("anal penetration"). Thus, "the tear" automatically proves "anal penetration", when in the "context" of "anal penetration" (guilty of Count I)! But then, "it" also proves that the act was very violent, enough to cause "a tear", deserving of a Life sentence. Therefore, it was more essential that the "hearsay" be remedied with the "exam report" than it was to even disprove (Count I)! That's "material" at its utmost! See (87a-88a #'s 27-31). Cl. So, before trial, state knew It needed to at least look as if wanted to remedy "videotape hearsay". But, ~~some reason~~ some reason, didn't want to produce "remedy" ("exam report"). If state could've remedied "hearsay" problem in Its favor, It would've (by producing "it" to prove same thing "hearsay" evidence

proved above). But It didn't, because It couldn't. By this, the State shows "exam report" would disprove "hearsay" situation's conclusion: That petitioner caused "a tear" while in the commission of the accused act "of anal penetration". This resolves dispute with Dist. Ct., as to (App B pg. 17 - there's no indication in record that medical exam would've been "exculpatory"). See (88a #32). C2. State knew: counsel's discovery request, general rules of discovery, and "exam report's" evidentiary nature (as to remedy the "hearsay"). Thus, state knew of need and responsibility to produce "it". In order for State or defense to be equipped with remedy to "hearsay" situation. See (89a #'s 33-34). C3. See (App B pg. 9). The Dist. Ct's. previously shown failures (B1. and B2. herein) are likely responsible for Its failure to see this Brady (due process violation) in this case: State knew "exam report" would remedy "hearsay" by "neutralizing" "its" effects. This "poison" was going to be a factor at trial (i.e. video's playing). But, "exam report" would've been "material anecdote" to "poison". Would've allowed for not guilty verdict. Or, verdict based on properly admitted evidence and fair trial. "Exam report would accomplish above, because ["it" was "exculpatory". In that, "it" would say "the tear was not caused by any act of "anal penetration".] Then "it" would be "impeaching" [to what the "hearsay" viewed in the "context" says, in conclusion ("That petitioner caused a tear in R.B.'s rectum, while anally penetrating her"). Then there'd be no need for the "trial hearsay" (that was viewed in the "context")."] The way "it" would impeach the (videotape "hearsay" viewed in the context) would be by filling in the above "exculpatory" information, that was missing from his trial. The reason for not contesting "the tear" is because, in his case, whether was 'a tear' or not, we know "exam report" would say "it" wasn't caused by "anal penetration" (previous pt. C1. herein). It's not whether Bartlett's lying or not. It's what happened when Bartlett testified about (what he knew to be true) "an exam and tear" and that was then viewed in the "conext" (of that exam being done in response to the accusation of "anal penetration"). [Just as if the expert who did the exam on R.B. were there testifying, that "there was 'a tear' 'in R.B.'s rectum', and 'that tear' was the result of and caused by 'anal penetration'."] Leave out (in R.B.'s rectum) and it's not diminished in the least, if (expert) says "I did this exam in response to accusation of "anal penetration".

We know "exam report" would have remedied above's "false evidentiary situation". (again pt. C1 herein) And that situation that was created, was for sure a lie. Just as if Bartlett were lying, whether he was or not. This was all brought about by the State's suppression. Not whether Bartlett's lying or not. But, if "exam report" produced and hearsay remedied, there'd be only R.B.'s testimony. And because "hearsay" bolstered R.B.'s testimony, in that it was the only physical evidence of "anal penetration". Confidence in the verdict is undermined. Because, the "hearsay" permeated the whole case. Then, "hearsay" along with state's closing - eliminates any resistance to R.B.'s testimony and accusation of "anal penetration". Such as: counsel's opening (Tr 227), R.B.'s testimony - that it didn't actually enter her rectum (Tr 252), or petitioner's denial (Tr 227). These offer no resistance to the "hearsay" ["An exam was done in response to R.B. accusing petitioner of "anal penetration" and the finding was 'a tear'."], combined with state's closing arguments (Tr 302:7-9 It doesn't hurt if it just goes in a little. It hurts because it goes in period, and it happened. Tr 309: 14-15 when this happened, she told Mindy it hurt. Why would it hurt? Tr 309:25 - 310:1 Maybe R.B. thinks it didn't go in all of the way. I don't know. She was a kid. She just knows it hurt...). See (89a - 90a #'s 35-38). Of course state wouldn't conclude arguments with something like, "Besides 'the tear' makes it obvious, he got in all the way. Certainly enough to cause 'a tear'." It knew better than that. But mostly, It didn't need to. Jury's already "infected". The foundation (allowing "hearsay" to permeate entire case) successfully laid. See (90a-91a #'s 39-40). So, this isn't a case where you can just remove improperly admitted evidence and then determine if the verdict would still stand. Because, once introduced and unremedied, the "hearsay spread like a cancer, into every aspect of the case (due to "it" fitting perfectly into the "context" of "anal penetration". ["Hearsay" = cancer. "Exam report" = oncologist. "Verdict" = (jury's body)] The "verdict" (jury's body) was plagued with "hearsay" (cancer). Without the "exam report" (oncologist) saying, "hearsay" (cancer) is gone from "verdict" (jury's body). How confident can we be, that all "hearsay" (cancer) is gone from the "verdict" (jury's body)? What if we thought we got it all but didn't? See (App B pg. 17 last line to pg. 18 first line). The Mo. Ct. of App. (thanks to Direct App. counsel) wasn't presented with

this issue. So, Its decision wasn't well informed. There can't be confidence in verdict without "exam report" removing "hearsay" from it. Only way to do that now is "new trial". Thanks to State's suppression and use of false evidentiary scenario created by "hearsay in the context" that "exam report's" absence allowed. See (91a #'s 42-43). Then see (App B pg17 mid page) Even if to concede on doubt issue, it'd only be to say jury's still strongly "tainted" in ultimate verdict: Such as one of jurors speaking in favor of the verdict says, "forget it. We don't need the C.A.C. video. Why've we been ignoring obvious 'tear'? Bartlett's tactic was in saying he did know where it was, when he didn't. That doesn't mean 'it wasn't there'. Look at where they examined her. What, just because his lawyer said it was a lie? The only thing I question is her saying it didn't enter her rectum when he did it. But, like the State said, 'Maybe she thinks he didn't get in all the way. She's just a kid'. So, what we have is: there's 'a tear' and she said it hurt when he 'anally penetrated' her. There's nothing saying 'it' wasn't in her rectum. It all fits. He's just trying to save himself. He did it. 100% guilty! And a Life sentence for him! Not saying and we can't say, this is what went on. But, even if there was some doubt by the jury, the "hearsay" eventually kicked in and erased all doubt. "Exam report" would've prevented such a scenario from happening. Thus, the jury doubting, would only show that evidence contrary to verdict, held more sway with at least one of jurors, than it seems it should've, when up against the "hearsay". It takes nothing away from "hearsay's" potency, nor "exam report's" "materiality". We know what jury was presented with and we're to assume it weighed that evidence in favor of the verdict. It would take an "against the verdict assumption" to conclude, that the jury didn't weigh the "hearsay in the context") evidence and concluded (that petitioner "anally penetrated" R.B. and the physical proof is "the tear"). Because, "the tear" suggests a causative relation to the charge of "anal penetration" and accusations of harm, whether supported by reliable evidence or not, tend to carry great authority. Thus, viewing the "hearsay" evidence in favor of the verdict makes the "exam report" highly "material" in undermining confidence in the verdict. Flenoid v. Koster, 2013 U.S. Dist. LEXIS 179801 at *49 "The Court must presume that the trier of fact resolved all conflicting inferences in the record in favor of the State, and

the Court must defer to that resolution. Whitehead v. Dormire, 340 F.3d 532, 536 (8th Cir. 2003)
D. Bartlett saying he didn't know 'tear's location' doesn't obsolve state of suppressing "exam report" or of presenting and making use of "hearsay". Intentional or not. Or good or bad intention. Whether use of "trial hearsay" was planned or not. If plan was to call it a tactic, State knew It needed "exam report", due to uncertainty of Its plan working. But, regardless, as soon as State saw Its plan backfire, It should've halted the proceeding, produced "exam report". See (91a #41). At this point it doesn't matter if the State didn't know if there was an exam or not. Which is against all logic. But, the State knew at this point if there was an "exam report". It needed to produce "it". If there wasn't, this needed to be told to the jury. "There was no exam. There was "no tear". Bartlett lied to petitioner and you all!"
D1. Wouldn't matter if State and counsel had agreement (counsel calls it a lie and state calls it a tactic). State reneged (It renewed and bolstered "the tear") at trial, with more "hearsay". To where, "It wasn't a police tactic tear. But, an anal penetration tear." Needed "exam report". There's no mention of any exam done on R.B. in discovery. See (App. Q and R.).
D2. Counsel's objection untimely (Tr 282). Jury must disregard last question (Tr 220:10-11). So, even though sustained (Tr 282), objection was ineffective as to (Tr 281's) proceedings. Only remedy was production of "exam report" or mistrial. When he filed his Habe, he ignorantly thought instruction would do. But, it wouldn't. Counsel knew he needed to bring "exam report" to trial to cure the "videotape hearsay". And because he was going to call Bartlett a liar in opening, he needed to prove what he's saying. D3. Seems?? (from previous point C, herein). Several things cause questions as to State's motive (See 92a #44). First If didn't intend use of "hearsay", then: why not produce "exam report"? Second, why didn't It seek to correct "hearsay" evidence problem, when It saw Its failure? When situation got out of It's hands, State knew "fatal taint" of that "hearsay" unremedied. Why not halt proceedings and produce "exam report"? Third, why not in Limine "it"? Neither State or counsel sought to do this??? Hard not to believe that this wasn't intentional (bad faith) suppression and prosecutorial misconduct (use of false evidence), in order to reap benefits of an "injury in the commission." D4. Petitioner should not have to bear this burden, in his

conviction of Count I (sodomy) or in the maximum sentence of Life. Due to this Brady (Constitutional Due Process violation) suppression of the "exam report" and, or the knowing use of false evidence, due to the "hearsay in the context". The Court must allow petitioner a fair trial (free of this "hearsay"). Petitioner Thanks The Court!

Claim Four: Ineffective Assistance of Trial Counsel See (77a - 78a #'s 1-3).

I. Counsel was ineffective at supp. hrg.: failed to remedy Miranda and Brady (audiotape destruction) violations (See claims 1 and 2 herein). He took case 7-1-09 (LF8). Did "motion to suppress" same day (LF22). Had to have done this "motion" by going off 11-12-08's (LF18) "motion" (but with added revelation of audio's destruction). Because never consulted petitioner about anything. He then agreed to move up supp. hrg. to very next day (7-2-09) (Tr 32)? This was conscious decision not to do the things he needed to (and could and should've done), in order to prevail at remedying the above constitutional violations. (Claims 1 and 2 herein's) arguments were available for him to make at supp. hrg. (had he wanted to and taken the time to do the following: 1. Look at court history leading up to supp. hrg. and then get his account of all the (non-videotape) goings ons. (See 77a #3). He'd have heard actual verbal account and not just the brief "motion to suppress" account (of no rights read, rights assertion made, and threatened), and about why he filed his 11-12-08 "motion to suppress". Then, being a professional, counsel would have seen how substantial the "timing" evidence was (way before petitioner did) and pointed it out at supp. hrg. (See point A. pg. 6 herein). He'd have prevailed on this alone. See (App B pgs. 16-18) pg. 16 - Again - "it's that something more!" Then, at bot. of pg. 16 (there appear to be few discrepencies in the officer's testimony). He strongly disagrees and has proven Dist. Ct's. observation here incorrect (see pgs. 9-12 herein). The "timing" issue would've also given counsel hope that all wasn't lost on audio's destruction. Knowing he could prove audio was "exculpatory" would've made him investigate "it's" destruction: getting detective's accounts before the hrg., then getting station's and I.T. guy's records, the Captain's and I.T. guy's accounts of and the date of alleged crash. With there being so many questionables about their destruction account, and the record showing that when tested on their word, it turns out to be untrustworthy, counsel would've found even more proof that the detectives weren't truthful. Then he has I.T. person testify that data was

see herein pgs. 13-14 point E.

retrievable, in spite of crash (if was one). Further proof of bad faith destruction (due to audio being "exculpatory" and "material" to Miranda claims). Then (for argument's sake) they are found to be truthful, could again get I.T. person to say data was retrievable even if crash. But, if Bartlett's computer still around, I.T. person could retrieve data. Regardless, he could argue "they made no attempt to retrieve the data and could have. And that's why we don't have audio. Not because of a crash (even if was one)." Thus, showing they just took advantage of crash to destroy "exculpatory" audiotape. Counsel shows his suspicions about audio's destruction (because it was "exculpatory") (Tr 49, 53, 57, 58, 226). [A]sking about "out of context" statements on videotape. Being upset about audio's destruction (Tr 49) and using "They say - They say" in his opening at trial. How much would the above (consult with petitioner, revelation of "timing" evidence, investigation into crash account, and use of a defense I.T. expert), have confirmed those suspicions and aided him in the arguments he would've made as a result of doing the norm for counsel? This supp. hrg. was petitioner's trial. And valid or invalid Miranda waiver, was guilty or not guilty. The audio was most "material" evidence (in case) to proving this. Thus, proving audio "exculpatory", was counsel's number one job. Due to what's known by petitioner and shown by the record - counsel would've easily prevailed (For any one or all of these reasons). Had he not so recklessly limited himself on time and done what counsels are supposed to do. See (92a #'s 46-47). He may have felt petitioner didn't have much of a defense, but state's case also weak. But he aided them in making Theirs stronger. Through his and their violative acts. See (Tr 32-33) and (App B. pg. 15, 2nd para.) With counsel's 2. Last minute notice of supp. hrg., he deliberately forced petitioner's absence (45 mins. notice - 4½ hrs. away). For the record, he didn't know what they were doing there, but regardless, he had no chance to be there, to know what they were doing. Petitioner did not waive his right to be present at his suppression hearing. See (93a - 96a #'s 48-53). This was not a proper hearing (Due to counsel's actions above - first). The trial court's determination of the factual issues and resulting Ruling (of valid Miranda waiver) are not owed the presumption of correctness and should be considered an unreasonable determination of the facts presented (in that, and due to that improper proceeding).

Dist. Ct. states (Grunick's "motion to suppress" reflects Brotherton's version of events (App B pg. 15) then pg. 6 bottom thru to pg. 7 top (Brotherton's assertion notwithstanding[4]) Then go to that FN4 below. The fact that the Dist. Ct. doesn't trust in a statement, (that his "motion to suppress reflects and the context fits) only because petitioner wasn't at the hrg. to make that statement, proves that his in person account, would've meant alot more (to the trial court) than just what the "motion to suppress" reflected of it. There's either a difference between an in person account and the "motion to suppress". Or when repeating what the "motion" says, it's not to be considered self-serving. But, if he'd been able to give his car ride account at supp. hrg. - it wouldn't be considered self-serving now. The main reason deference is given to the trial court is their firsthand observations. To say the lack thereof doesn't make a difference is a double standard. The trial court was in want of petitioner's car ride account and his account on the medicated and suicidal issue (the one counsel most argued). And it was in want of the expert's and the nurse's accounts (see pgs. 18-20 herein - point one). Imagine petitioner gives his account and then Dr. Khojasteh says for instance "Yes, this is how being in that state affects someone. This is how petitioner was. This is why. This is what we observe. This is what they go through. This is why their will is easily overborne and they've no capacity for self-determination. This is how the meds (in those doses) he was taking, affected him. Clouded judgment, etc. Just putting everything into perspective, for the trial court's understanding.

II. Counsel was ineffective (at trial): failing to remedy the videotape and trial "hearsay" viewed in the "context" evidence (see claim three pgs. 26-32 herein) and in not consulting with petitioner before deposing R.B. Counsel went to trial seven days after taking this case. Any counsel wishing to perform at an "objective standard of reasonableness" would not have done this. Were counsel to remedy the "hearsay", the State's case is very weak (see 96a #54). Then, he could've induced even more doubt into R.B.'s credibility and

had more material evidence proving petitioner not guilty in his closing arguments. Counsel would have prevailed on Counts I and II. But counsel chose not to.

A. Counsel deposed R.B. a week before petitioner even knew Grunick was his counsel. See (77a - 78a # 3). If counsel would've consulted with him before the deposition - he'd have told counsel to have R.B. (from her source of accusation) be exact about what was done in the accused act of sodomy. Grunick told her not to talk about details at deposition. The reason for the need for such exactness is, for someone who just wants to believe the accusation - there's enough of a description for their imagination to do the rest. But for anyone who must be convinced by the evidence - there's not enough in R.B.'s description of "anal penetration", to prove it. As described, the logistics don't fit. Petitioner 6' tall and R.B. the size she'd have been at accused time. There's just too many questions to be asked about logistics. Without exact description, can't be proven or disproven. R.B. says she was on hands and knees and he was behind her. But size difference would need to be made up, for that to happen. So more questions as to the setting. Then, was top of his penis touching under her vagina, is it underneath - in between her opened or closed legs, or was his penis vertical in between her butt cheeks. There's still a lot of questions that a detailed description could eliminate. But counsel could have taken the deposition description and then got an anatomy and sex expert to say at trial, "from petitioner's size and anatomy and R.B.'s size, the described act wouldn't be possible. And though it may not be completely exonerating, it would have helped to have this expert say R.B.'s description of petitioner's penis sticking straight out is impossible. Nor would a "slip" have been possible. It would've helped to have the "exam report" expert or the above expert say there are no signs of "anal penetration" at all on R.B. And it may be, that an expert knowing both petitioner's and R.B.'s anatomy, could say that even a "slip" isn't possible, or there would be signs. Thus, it would totally exonerate petitioner of Count I. See (96a - 99a # 55 - 58) And also, by having R.B. talk about the details of the accusation at the deposition, counsel may have uncovered the word "humping", that petitioner was supposed to have coined. He could've proved that R.B. learned that word from another family member. It was in reference to what dogs do. Petitioner, R.B., and many other family members were there to hear it. But, had this and other things, been bro-

ught out in the deposition as a result of counsel doing what he's supposed to do (consulting with petitioner before the deposition). Counsel could have then got those statements (as they would've been at the deposition) and then impeached them with the defense witnesses at trial. The statements and descriptions. This would've made a difference in this close case.

B. Had counsel wished to remedy the "hearsay" that petitioner discusses at length in (claim III pgs. 26-33 herein) why didn't counsel in limine "it"? He should have and was ineffective for not doing this alone. If counsel's reason for not in Limining the "videotape hearsay" (of there being an "exam" on R.B. and the finding was "a tear in her rectum"), was because counsel wanted the benefit of petitioner saying "that did not happen 100%"; then he knew the "hearsay evidence" would be much stronger than petitioner's denial. Thus, counsel would have brought the "exam report" with him to Court to remedy the destructive effects of the "fatal taint", that counsel knew the "videotape hearsay" viewed in the "context" would cause. Please (see pg. 32 point D2. herein again also). Counsel called Bartlett a liar in his opening statement (Tr 227). If that was his strategy - he would've wanted to bring in the exam report to prove it (See 99a - 100a #'s 59-60). He can't just accuse Bartlett of lying and then not offer up any proof of it. How did counsel know it was a lie? Let everyone else know - in order to keep the "hearsay" from being "viewed in the context." If he did know for sure the "exam and tear" were a lie - then all the more reason to halt the proceeding and call for a "mistrial" or cause the state to tell the jury, "It is all a flat out lie. No exam was done and no tear was found." Not just let it go to the jury (See pg. 32 point D. herein). Petitioner leans heavily on Claim III herein, for the facts of the prejudice that counsel's ineffective acts have caused petitioner, ultimately a conviction and Life sentence. Counsel's performance was below an objective standard of reasonableness. Had counsel done these things suggested herein, petitioner would not have been convicted and or given the resulting sentences. Therefore, trial counsel was ineffective assistance of counsel in violation of petitioner's constitutionally guaranteed Sixth Amendment Right to the effective assistance of counsel! Petitioner Thanks The Court!

Claim Five - Sixth Amendment Violation - Denial of Counsel From 10-2007 to 11-2008 petitioner was denied the right to counsel. During this 13 month period, he went through several "critical stages of trial" [arraignment, pre-leminary hrg. (was forced to waive, due to no counsel. Whereas his last paid counsel's parting advice was," whatever you do - don't waive your pre-lem again), the motion filing deadline date, and a 991 hrg.] Then on 11-12-08 (proceeding not in transcripts for some reason - was supposed to be a trial??) The trial court gave him a Waiver of Counsel Form to sign, but he didn't sign it. That's how he ended up with counsel on 11-12-08 (See App K). Again no proceeding in transcripts. But, petitioner asks the trial court if Bill can come forward and assist him, per (Tr 29). Bill is mentioned in (Tr 20, 21, 23, 26, 29) also. Anyway, the Court says," if he steps foot up here, I'll have him arrested for practicing law without a license." Petitioner has since learned Bill wasn't a paralegal. Just a jailhouse lawyer on the streets. But, this Bill guy is one example of prejudice of this Sixth Amendment violation, in this case. In that, Trial Counsel advises petitioner to sign the Jury Bifurcation for Sentencing, in order for the Judge to sentence him. Then Bill (the unlicensed individual) says ["Don't sign that. That Judge hasn't been fair to you this whole time. He made you go all that time without a lawyer. Didn't award your motions for change of Judge and venue. Made you do that 991 hrg. without counsel. Wanted you to make a deal with the prosecution. He's ruled against you on everything and the only reason he gave you a lawyer is because he had to. You sign that paper and he's gonna' rake you over the coals. (Some explatives we won't mention) And the only reason your lawyer wants you to sign it, is to make his job easier."] So, petitioner took the advice of the one (whom the Sixth Amendment violation forced him into the hands of. To the extent that even after he was awarded counsel, this individual still held more sway and trust with him than counsel did. The outcome of not signing that Bi-furcation was the difference of 18yrs. (the Judge would've given) as opposed to the Life sentence, the jury gave him. He can't prove this account, but personally knows it to be true. But, his point isn't the proof of the damages of this violation to him, as much as it is "this violation uncorrected, will set a precedent that will allow the violations of the right to counsel through

critical stages of Trial. And the fallout will be detrimental in many different ways." He gave one example of 18 yrs. vs. Life [he didn't sign based on bad advice (he trusted) and good advice (he didn't trust)] all due to the situation that the Sixth Amendment violation created. Because he does know this and many other things (detrimental to his defense) happened to him (due to this constitutional violation), he knows it'll happen to others. This is what he warns The Court of. Courts will be flooded with denial of counsel claims and the Attorney Client relationships will be dramatically affected by the denial of counsel and a year later awarding counsel. This will branch into pleas, Bi-furcations, evidence, strategies, trust, and basically every aspect will be affected negatively. But, the trial courts will be sent the message "it's okay, no matter what the fallout." [So long as the trial court takes advantage of an uncounselled individual at a financial status hrg. (Tr 11-18 then 22, 27 - The Court must understand that those who are ignorant of and inexperienced in the law and don't have counsel, are like a deer in the headlights, in such situations.) If he would've had counsel to argue his case for indigency, he would've been awarded counsel: Didn't have to pay bondsman up front $5,000 and property put up for $50,000 surety, wasn't worth that. It was all in deal his mother and bondsman made. Wouldn't have transferred into nearly amount paid counsel required. Then the $12/hr. that he'd previously offered that he was making - only lasted a few months, because he was highly allergic to chemicals he was using on that job (caused full body rash that turned into infection boils all over his body). State argued that he chose not to have paid counsel, in Its response to this claim in his Habe. It wasn't by choice. He had paid counsel and then state did drop and re-file. So paid counsel dropped him as a client. So, he turned himself in (due to drop and re-filing) issuing new warrant. Then, at his first appearance he requested counsel but denied, because previously had paid counsel. So, he asked for bond to be re-instated, so he could try to make money to hire counsel. Appx. 1½ months later, he was given that bond. However, was unerable to make enough money to afford counsel. But, denial of counsel was only reason he had to try to move the court to allow him bond to try to afford counsel. The main hinderance in making money was his charges being on case-

net. Before charges arose, employment history was strong. Had good reputation and was making $22/hr. at MEMC elect. mats. inc. in St. Peter's, Mo. (where he worked for 13 yrs. 93' to 06'). With exception of brief layoff (of to 02')(Went to truck driving school and got class A CDL with Hazmat, triples, and doubles endorsements. As a result, got a job with KNIGHT transportation - driving over the road.) Was then called back to MEMC in 02' and left KNIGHT in good standing. At MEMC from 02' until fired in 06' due to being in jail for current charges. He then used retirement savings plan and vacation pay money to pay paid counsel's retainer. This took all he did have and case.net took away ability to make more. At least not enough to hire paid counsel, after the drop and re-file. By the time the trial court awarded counsel a year later - the damage was done. Petitioner asserts (for reasons stated in this claim), this is why the denial of counsel doesn't even require a show of prejudice (For the lists of prejudices would be too endless and the remedy of just awarding counsel - way down the line - will be too late. Unless everything starts over and all critical stages re-instated. Or else, why do we have these proceedings at all? See (78a #4) and United States v. Cronic, 466 U.S. 648, 653, 657 n.20, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984). "An accused's right to be represented by counsel is a fundamental component of our criminal justice system". The denial of counsel was a violation of petitioner's ~~5th~~ Sixth Amendment Right!

**CONCLUSION** Petitioner has not liked disagreeing with the District Court so much herein. Because the District Court's thorough (albeit incorrect) examination and explaining of "what exactly is going on in petitioner's case", is what has allowed him to grow (tremendously in comparison) in his understanding of all aspects of his claims. Petitioner is thus grateful for the District Court's Memo and Order (App B)! But, he knows he's still nowhere near "up to snuff" herein, and asks for This Honorable Court's forgiveness for all his shortcomings herein (← not planned). Please - In order to protect Its precedents and put an end to this prolonged custody: In violation of the Laws and treaties of the United States Constitution. This Honorable Court Must Act! The petition for a writ of certiorari should be granted. Petitioner Thanks The Court!

Respectfully submitted, Tommy Brotherton Date: 5-10-18