

18-7798

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

ORIGINAL

Supreme Court, U.S.  
FILED

JAN 23 2019

OFFICE OF THE CLERK

STEVEN FLOYD VOSS, — PETITIONER  
(Your Name)

vs.

THE STATE OF NEVADA, RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE COURT OF APPEALS OF THE STATE OF NEVADA

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

PETITION FOR WRIT OF CERTIORARI

STEVEN FLOYD VOSS #52094  
(Your Name)

NNCC, Post Office Box # 7000  
(Address)

Carson City, Nevada 89702-7000  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

1. Does the state Trial Court have jurisdiction to conduct Resentencing Proceedings and to enter an Amended Judgment of Conviction, subsequent to the Petitioner's completion of and discharge from the sentences imposed by the original Judgment of Conviction, where, the state Court of Appeals had found the original Judgment of Conviction to be invalid subsequent to the Petitioner's completion of and discharge from the sentences imposed pursuant to said original Judgment of Conviction; and

2. Would an action by the state Trial Court to conduct Resentencing Proceedings and to enter an Amended Judgment of Conviction, subsequent to the Petitioner's completion of and discharge from the sentences imposed by the original and subsequently invalidated Judgment of Conviction violate the constitutional principles of Double Jeopardy and Speedy Trial, and deprive the Petitioner of Due Process and Equal Protection of Law, guaranteed under the Fifth, Sixth and Fourteenth Amendments; and

3. Is it contingent upon the state Court to vacate with prejudice its November 27, 1996 original Judgment of Conviction, which has been found by the state Court to be constitutionally disproportionate and invalid, and to enter a Judgment of Acquittal; thereby allowing the Petitioner to avail himself to a plea of former jeopardy should the need to do so ever arise, where, the state

Trial Court is precluded from entering an Amended Judgment of Conviction to cure fatal defects within the original Judgment of Conviction and to afford the Petitioner the actual benefits awarded him via the State Court's August 9, 2001 Writ of Habeas Corpus, due to the Petitioner's completion of and discharge from each of the six (6) decidedly "onerous" and disproportionate sentences imposed upon him via said original November 27, 1996 Judgment of Conviction.

## LIST OF PARTIES

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

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

The Court of Appeals of The State of Nevada  
Justice, \_\_\_\_\_ Silver,  
Justice, \_\_\_\_\_ Tao, and  
Justice, \_\_\_\_\_ Gibbons.  
201 South Carson Street  
Carson City, Nevada 89701-4702

The Second Judicial District Court of The  
State of Nevada, In And For The County  
of Washoe,  
District Judge, Kathleen Drakulich,  
75 Court Street  
Reno, Nevada 89501-

Attorney General State of Nevada  
100 North Carson Street  
Carson City Nevada 89701-4717

CHRISTOPHER P. HICKS  
Washoe County District Attorney  
Post Office Box # 11130  
Reno, Nevada 89520-0027

# TABLE OF AUTHORITIES CITED

## FEDERAL CASES:

## PAGE NUMBER

|  |    |
|--|----|
| <u>Abney v. United States</u> , 431 U.S. 651 (1977) . . . . .            | 17 |
| <u>Barker v. Wingo</u> , 407 U.S. 514 ( ) . . . . .                      | 19 |
| <u>Burkett v. Fulcomer</u> , 951 F.2d 1431 ( Cir. 1991) . . . . .        | 19 |
| <u>Garrett v. United States</u> , 471 U.S. 773 (1985) . . . . .          | 18 |
| <u>Hakeem v. Beyer</u> , 990 F.2d 750 ( Cir. ) . . . . .                 | 21 |
| <u>McNeely v. Blanas</u> , 336 F.3d 822 (9th Cir. 2003) . . . . .        | 22 |
| <u>Ohio v. Johnson</u> , 467 U.S. 443 (1984) . . . . .                   | 18 |
| <u>Pollard v. United States</u> , 352 U.S. 345 (1957) . . . . .          | 19 |
| <u>United States v. Di Francisco</u> , 499 U.S. 117 (1980) . . . . .     | 18 |
| <u>United States v. Murillo</u> , 288 F.3d 1126 (9th Cir 2002) . . . . . | 21 |

## STATE CASES:

|  |    |
|--|----|
| <u>Furbay v. State</u> , 998 P.2d 553 (2000) . . . . .             | 20 |
| <u>Graves v. State</u> , 917 P.2d 234 (1996) . . . . .             | 20 |
| <u>Leonard v. State</u> , 17 P.3d 397 (2001) . . . . .             | 19 |
| <u>Loveless v. State</u> , 136 P.2d 236 (1943) . . . . .           | 22 |
| <u>Middleton v. State</u> , 968 P.2d 296 ( ) . . . . .             | 20 |
| <u>Miller v. Hayes</u> , 95 Nev. 927 604 P.2d 117 (1979) . . . . . | 4  |

## TABLE OF CONTENTS

|  |    |
|--|----|
| OPINIONS BELOW .....                                   | 1  |
| JURISDICTION .....                                     | 2  |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... | 3  |
| STATEMENT OF THE CASE .....                            | 4  |
| REASONS FOR GRANTING THE WRIT .....                    | 12 |
| CONCLUSION .....                                       |    |

## INDEX TO APPENDICES

|            |   |
|------------|---|
| APPENDIX A | <u>ORDER GRANTING PETITION</u> , Nevada Court of Appeals, Case No. 74227, filed August 15, 2018                                 |
| APPENDIX B | <u>ORDER DENYING REHEARING</u> , Nevada Court of Appeals, Case No. 74227, filed October 22, 2018.                               |
| APPENDIX C | <u>ORDER DENYING PETITION FOR REVIEW</u> , Nevada Supreme Court, Case No. 74227, filed December 21, 2018.                       |
| APPENDIX D | <u>WRIT OF MANDAMUS</u> , Nevada Court of Appeals, Case No. 74227, filed August 15, 2018.                                       |
| APPENDIX E | <u>JUDGMENT OF CONVICTION</u> , Nevada District Court, Case No. CR96-1581, filed November 27, 1996.                             |
| APPENDIX F | <u>ORDER DISMISSING APPEAL</u> , Nevada Supreme Court, Case No. 29373, filed March 11, 1999.                                    |
| APPENDIX G | <u>FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT</u> , Nevada District Court, Case No. CR96-P-1581, entered August 9, 2001. |
| APPENDIX H | <u>ORDER OF AFFIRMANCE</u> , Nevada Supreme Court, Case No. 38373, filed January 17, 2002.                                      |
| APPENDIX I | <u>Nevada Department of Corrections INMATE REQUEST FORM</u> , Dated March 27, 2018.   |

## INDEX OF APPENDICES (Continued)

APPENDIX J: ORDER DENYING MOTION FOR BAIL, Second Judicial District Court of the State of Nevada, Case No. CR97-2077. Filed February 11, 2014.

APPENDIX K: LETTER, from STEVEN FLOYD VOSS to Scott W. Edwards, Esq. Dated August 31, 2001

APPENDIX L: LETTER, from Scott W. Edwards Esq. to Steven Floyd Voss, Dated September 7, 2001.

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**

☐ For cases from **federal courts**:

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

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

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

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☒ For cases from **state courts**:

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

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

- ☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.



## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was August 15, 2018.  
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: October 22, 2018, and a copy of the order denying rehearing appears at Appendix B.

☐ 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

(1) The Fifth Amendment to the United States Constitution, (Double Jeopardy Clause):  
"... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

(2) The Sixth Amendment to the United States Constitution, (Speedy Trial Clause):  
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."

(3) The Fourteenth Amendment to the United States Constitution, (Due Process And Equal Protection of Law Clause):  
"... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

In October of 1996 a Jury Trial was held in the Second Judicial District Court of The State of Nevada, In And For The County of Washoe, relative to Case No. CR96-1581. Wherein, the Jury returned Guilty Verdicts relative to each of the six (6) counts charged.

On November 27, 1996 Sentencing Proceedings were conducted relative to Case No. CR96-1581, and a written Judgment of Conviction was entered on that same date. Constituting the formal imposition of sentence and the commencement of sentence relative to Case No. CR96-1581, as a matter of Nevada State law. See, Miller v. Hayes, 95 Nev. 927, 604 P.2d 117 (1979) ("Only after a judgment of conviction is signed by the judge and entered by the clerk as provided by this section [NRS 176.105] does it become final and does the defendant begin to serve a sentence of imprisonment").

On December 24, 1996 the Petitioner had filed a Notice of Appeal from his conviction and sentences to the Nevada Supreme Court, Case No. 29783. Said Court

on March 11, 1999, had entered an Order Dismissing Appeal (attached Appendix #F). Wherein, said Court had affirmed in whole the November 27, 1996 Judgment of the Trial Court.

On March 9, 2000 the Petitioner filed a Post-Conviction Petition For Writ of Habeas Corpus, in the State District Court.

Wherein, Ground Six of said Petition. the Petitioner had raised a claim that the Trial Court had based his sentences, at least in part, upon the uncharged criminal conduct of the kidnapping and Murder of Beverly Ann Baxter (who was alleged to be the victim of the property crimes for which the Petitioner was found guilty by the jury in Case No. CR96-1581).

An evidentiary hearing was ordered, and it was held on July 8, 2001. In the context of said proceeding the Court, from the bench, had granted a Writ of Habeas Corpus, and had ordered that Findings of Fact, conclusions of Law, And Judgment be prepared. Such document (attached Appendix #G) was entered on August 9, 2001, where, in pertinent part, the Post-conviction Court had ruled that:

" Voss's claim that his sentence was based, at least in part, on Judge Stone's belief that Voss caused the murder or disappearance of Beverly Baxter, has merit. It is supported by the record. Even though Voss has not been charged for the murder of Ms. Baxter, Judge Stone made reference in his rendition of sentence, to his belief that she would not be found alive. He then imposed the maximum sentence on Voss, a sentence clearly outside the heartland of sentences for a person with Voss's criminal record being sentenced for forgery offenses...

Because Judge Stone based Voss's onerous sentence, at least in part, on the suspect and palpable ground that Voss had murdered Ms. Baxter, Voss is entitled to a new sentencing hearing.

It is hereby the judgment and order of this Court that Voss's Petition For Writ of Habeas Corpus (Post-Conviction) is granted...

The Petitioner filed a timely Notice of Appeal to the Nevada Supreme Court, Case No. 38373, from the state District Court's partial denial of his aforementioned Post-Conviction Petition in Case No. CR96-P-1581. On January 17, 2002 the Nevada Supreme Court entered an Order of Affirmance (attached Appendix # H), which had affirmed in whole the Judgment of the state District Court entered in Case No. CR96-P-1581.

However, the Resentencing Hearing ordered pursuant to the Writ of Habeas Corpus entered in Case No. CR96-P-1581 was not conducted, and no Amended Judgment of Conviction was entered in Case No. CR96-1581 to reflect proportionate sentences contemplated by the state Post-Conviction Court.

Therefore, on 201, the Petitioner filed a Petition For Extraordinary Relief Writ in the Nevada Supreme Court, wherein, the Petitioner alleged that due to the passage of time and the substantial delay in conducting the Resentencing Hearing ordered by the 2001 Post-Conviction

Court, that the remedy of proportionate sentences contemplated by said Post-Conviction Court was no longer available. Thus, the Petitioner requested that the November 27, 1996 Judgment of Conviction entered in Case No. C296-1581, which had been vitiated and rendered void by the August 9, 2001 Writ of Habeas Corpus, be formally vacated with prejudice; and that a Judgment of Acquittal be entered in equity in said case.

The Petitioners Petition For Extraordinary Relief Writ was subsequently transferred to the Nevada Court of Appeals, Case No. 74227. On August 15, 2018 said Court had entered an Order Granting Petition (attached Appendix #A), and a Writ of Mandamus (attached Appendix #D). Within said Order Granting Petition the Nevada Court of Appeals had recognized the propriety of the Petition and had considered the merits of the discretionary Petition. The Court finding that no valid Judgment of Conviction exists relative

to case No. CR96-1581. However, the Court rejected the Petitioner's contentions that a Judgment of Acquittal should be entered. The Court instead finding that the Resentencing Hearing previously ordered by the Post-Conviction Court's August 9, 2001 Writ of Habeas Corpus, and the entry of an Amended Judgment of Conviction remained the proper remedy, and that a Writ of Mandamus to the State District Court, which mandates that a Resentencing Hearing be conducted and that an Amended Judgment of Conviction be entered, should be issued. However, the State Court failed to recognize two critical factors when rendering its decision. First, that the remedy of proportionate sentences was no longer available due to the passage of time where the Petitioner had already served to completion and discharge all six (6) sentences imposed upon him via the November 27, 1996 Judgment of Conviction. Where, such Judgment of Conviction though



vitiating by the August 9, 2001 Writ of Habeas Corpus, was never formally vacated and the process of commitment issued thereupon was never recalled prior to the Petitioner's completion of and discharge from the November 27, 1996 sentences. Second, the Court failed to recognize the jurisdictional implications of the Petitioner's completion and discharge of such sentences. Specifically, that due to such completion and discharge of the six (6) decidedly "onerous" sentences imposed via the November 27, 1996 Judgment of Conviction, that the Trial Court has been divested of jurisdiction to conduct a Resentencing Hearing and to enter an Amended Judgment of Conviction, and to do so would violate the constitutional principles of Due Process and Equal Protection of Law, as well as Double Jeopardy and Speedy Trial, guaranteed under the Fifth, Sixth and Fourteenth Amendments.

Therefore, on August 23, 2018 the

Petitioner filed a Petition For Rehearing in the Nevada Court of Appeals, Case No. 75227. On October 22, 2018 said Court entered an Order Denying Rehearing (attached Appendix # B). Thus, the Petitioner filed a Petition For Review in the Nevada Supreme Court, Case No. 75227. However, said Court entered an Order Denying Petition For Review (attached Appendix # C), on December 21, 2018. Thus, Resentencing Proceedings are presently pending in the State Trial Court pursuant to the Writ of Mandamus (attached Appendix # D) entered by the Nevada Court of Appeals on August 15, 2018.

Now comes the instant Petition For A Writ of Certiorari, to this Court.

## REASONS FOR GRANTING THE PETITION

The instant Petition raises questions of National importance, and questions of importance to other similarly situated persons.

The questions raised in the instant Petition involve important constitutional principles guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The state Court decision at the heart of the instant Petition is in conflict with numerous prior decisions of the United States Supreme Court and United States Court of Appeals for numerous Circuits, as well as the Appellate and Supreme Courts of numerous states, relative to the recognized constitutional principles of Double Jeopardy, Speedy Trial, Due Process of Law, and Equal Protection of Law. As well as significant questions regarding divestment of jurisdiction of the subject-matter and of the person, and limits upon a Court's original jurisdiction and a Court's power to modify its prior Judgments once such Judgments

have been satisfied (sentences served to completion and discharge) by a criminal defendant.

The reasons the instant Petition should be granted include:

(A) Because, despite the judicial fact that the State Post-Conviction Court in the context of Case No. CR96-P-1581, had granted the Petitioner a Writ of Habeas Corpus (see, Findings of Fact, Conclusions of Law, And Judgment attached Appendix # G). Which had granted the Petitioner a Resentencing Hearing to correct the six (6) decidedly "onerous" and disproportionate sentences imposed via the State Trial Court's November 27, 1996 Judgment of Conviction. The Court ordered Resentencing Hearing was not conducted as ordered, and no Amended Judgment of Conviction was entered to impose proportionate sentences upon the Petitioner. Therefore, because of unreasonable and presumptively prejudicial delay in effectuating the Resentencing Proceedings and the entry of an Amended Judgment of Conviction which reflects proportionate

sentences; and the fact that the Petitioner has served to completion and to discharge each of the decidedly "onerous" and disproportionate sentences imposed pursuant to the original November 27, 1996 Judgment of Conviction. The remedy of the imposition of proportionate sentences contemplated and anticipated by the 2001 Post-Conviction Court are no longer available. See, NDOC Inmate Request Form (attached Appendix # I). Such document which functions to demonstrate the Petitioner's completion of and discharge from each of the six (6) sentences imposed pursuant to the November 27, 1996 Judgment of Conviction, as of March 4, 2018. Therefore, due to such clearly demonstratable fact, the remedy of an Amended Judgment of Conviction which memorializes fair and proportionate sentences is simply not available. Further, even if such an Amended Judgment of Conviction could be entered at this juncture, which reflects sentences that are proportionate to the charged crimes and the

Petitioner's criminal history, as was contemplated and anticipated by the 2001 Post-Conviction Court, such remedy cannot at this juncture provide the Petitioner any meaningful relief from his decidedly "onerous" and disproportionate sentences. Thus, such a remedy would clearly be inequitable and palpable.

(B) Because, despite the issuance of a writ of Mandamus (attached Appendix # D) by the Nevada Court of Appeals, directing the Trial Court to conduct Resentencing Proceedings pursuant to the 2001 writ of Habeas Corpus (attached Appendix # G), and to enter an Amended Judgment of Conviction, relative to Case No. CR96-1581. Said writ of Mandamus was issued more than six (6) months subsequent to the Petitioner's completion of and discharge from the six (6) decidedly "onerous" sentences imposed via the November 27, 1996 Judgment of Conviction, such occurrence which had clearly functioned to divest the Trial Court of jurisdiction to conduct Resentencing Proceedings or to amend and

and impose a new Judgment and sentence upon the Petitioner.

Therefore, the issuance of the Writ of Mandamus (attached Appendix 1-D), is clearly erroneous, and constitutes an ultra vires act by said Court. Thus, said Writ of Mandamus is *ceram non* Judice and void. Nonetheless, such a Writ of Mandamus is in and of itself ineffective to vest jurisdiction upon the Trial Court to conduct, *ex post facto*, Resentencing Proceedings; or to enter, *ex post facto*, an Amended Judgment of Conviction. That is, no action of the Appellate Court can suffice to vest jurisdiction on the Trial Court where no jurisdiction otherwise exists. Clearly, the jurisdiction of the State District Court (Trial Court) to conduct trial, and to impose Judgment and sentence in a case of felony or Gross Misdemeanor is a matter of original jurisdiction conferred under Article 6§6 of the Nevada State Constitution. Such jurisdiction cannot be extended absent legislative action. Quite simply, there exists absolutely no state of Nevada Constitutional or statutory provision

which allows the State Trial Court to conduct Resentencing Proceedings and to enter an Amended Judgment of Conviction in a case, when the Defendant has previously served to completion and discharge the sentences imposed via the original written Judgment of Conviction. Clearly, in such a case, as in the instant case, the original Judgment of Conviction cannot be amended, or the original sentences imposed thereby be modified, following the Defendants completion of and discharge from the sentences originally imposed. It is axiomatic that such judicial action would not merely be ex post facto, and an ultra vires action by the Court, but such action would violate the constitutional principle of Double Jeopardy, guaranteed under the Fifth Amendment to the United States Constitution. Whereas, the Fifth Amendments Double Jeopardy Clause functions to protect a criminal defendant from even the risk that he will be punished twice for the same offense. See, Abney v. United States, 431 U.S. 651, 661 (1977). Also see,



United States v. DiFrancisco, 449 U.S. 117, 129 (1980) (the double jeopardy clause prohibits even the risk of an erroneous conviction or an impermissibly enhanced sentence). The Fifth Amendment's protection against cumulative punishments confines courts sentencing discretion to the legislative limits. See, Ohio v. Johnson, 467 U.S. 493, 498-499 (1984). This guarantee serves principally as a restraint on courts and prosecutors but not on legislatures. See, Garett v. United States, 471 U.S. 773, 793 (1985) (double jeopardy prevents a court from imposing greater sentence than the legislature intended). Clearly, the state legislature never intended for a defendant to be resentenced following his discharge of his previously imposed sentences for a crime.

Further, for the Trial Court to conduct a Resentencing Hearing and to enter an Amended Judgment of Conviction; now, more than some Eighteen(18) years subsequent to the Court's August 9, 2001 entry of a Writ of Habeas Corpus, contemplated to remedy the decidedly "onerous" and disproportionate sentences which had been imposed by the 1996 Judgment of Conviction,

clearly violates the constitutional principle and right to speedy trial. The United States Supreme Court in the case of Pollard v. United States, 352 U.S. 345, 361 (1957), had ruled that "a speedy imposition of sentence may be guaranteed by the Sixth Amendment right to speedy trial." "[A] lengthy delay in the imposition of sentence is unconstitutional and entitles a defendant to relief. Burkett v. Fulcomer, 951 F.2d 1431, 1446-1447 (Cir. 1991) citing Barker v. Wingo, 407 U.S. 514 ( ), (factors to weigh include length of delay, reasons for delay, defendant's assertion of the right, and prejudice which the delay causes the defendant). Nevada state law encompasses the Barker rule. See, Leonard v. State, Nev. , 17 P.3d 397 (2001):

"In considering a claim of violation of right to speedy trial, it is necessary to consider the following factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant."

Also see, Graves v. State, Nev., 912 P. 2d 234 (1996); and Furbay v. State, Nev., 998 P. 2d 553 (2000). Further, see, Middleton v. State, Nev., 968 P. 2d 296, citing Barker 407 U.S. 514, held that:

"[A] court must conduct a balancing test to determine if defendant's sixth Amendment right to speedy trial was violated... and unless the delay is long enough to be presumptively prejudicial, inquiry into other [Barker] factors is not necessary."

The Petitioner submits that where the delay has been sustained for a substantial duration of time, such as the seventeen plus year delay present here, the delay is presumptively prejudicial and inquiry into the other Barker factors is not merely necessary, but is compelled. Thus, by definition, a defendant cannot complain that he has been denied his sixth Amendment Speedy Trial right if the government has prosecuted the case with customary promptness, see, Barker at 530-531.

Thus, the delay of over seventeen (17) years since the state court's entry of its August 9, 2001 Writ of Habeas Corpus

(attached Appendix# ) is presumptively prejudicial under Barker and paralleling Nevada State Law. The delay is in fact, a textbook example of presumptively prejudicial delay. See, United States v. Murillo, 288 F.3d 1126, 1132 (9th Cir. 2002).

When analyzing the second Barker factor, The Reason For Delay, the ultimate responsibility for [delay] must rest on the state. Thus, the burden of explaining the reason for delay rests with the state. See, Hakeem v. - Beyer, 990 F.2d 750, 769 ( Cir. ) (interpreting Barker, to place burden of justifying delay on the state, and remanding for evidentiary hearing to determine the cause of delay).

In the instant case the operative facts substantially demonstrate substantial inexcusable neglect, and a negligent lack of due diligence by the state. As announced within the Nevada Court of Appeal's Order Granting Petition (attached Appendix #A) The Court clearly found that: "it is the responsibility of the state, not the defendant, to ensure a defendant is legally convicted and sentenced." The Court

citing the case of Levelss v. State, 62 Nev. 17, 27, 136 P.2d 236, 239 (1943).

When analyzing the third Barber Factor, Defendant's invocation of the Speedy Trial right, the court must consider whether the defendant had asserted his speedy trial rights.

In the case of McNeely v. Blanas, 336 F.3d 822, 831 (9th Cir. 2003) the Court held that "repeated assertions of the speedy trial right by the defendant weigh heavily for the defendant." In the instant case the Petitioner has repeatedly and continuously asserted his speedy trial rights and his right to receive a prompt Resentencing Hearing. The Petitioner had as an example of such fact submitted as an exhibit in support of his Petition For Extraordinary Relief Writ, a copy of the State District Court's Order Denying Motion For Bail (attached Appendix # J) wherein the Court had acknowledged the Petitioner's invocation of his right to be resentenced. Also, see, written correspondence between the Petitioner and former Post-Conviction Counsel Scott W. Edwards (attached Appendix # K, and Appendix # L).

When analyzing the Fourth Barker factor, Prejudice to the Defendant caused by the delay, the Court must consider whether the Defendant was prejudiced by the delay, in light of the Defendant's interest which the speedy trial right was designed to protect (i.e., oppressive incarceration anxiety, concern, and imposition upon the defense). In this regard the Petitioner has already served a disproportionate and therefore "oppressive" term of incarceration pursuant to the original November 27, 1996 Judgment of Conviction. Based upon the August 9, 2001 findings of the Post-Conviction Court, memorialized within that Court's Findings of Fact, Conclusions of Law, And Judgment (attached Appendix #); further, the Petitioner has been wrought with overwhelming anxiety and concern regarding the inherent questions of: (1) exactly what sentence the Trial Court might impose; (2) whether or not the Court ordered Resentencing Hearing would ever be conducted, or if he would instead be forced to serve the decidedly "onerous", disproportionate, and therefore "oppressive" sentences to completion and discharge. Such concerns and fears

which have come to fruition in the instant case. Thus, the Petitioner asserts that such fears and concerns have resulted in substantial and overwhelming undue stress and anxiety on the Petitioner, effecting his health and well-being, effecting substantial punitive impact and imposing punitive sanctions not countenanced by the statutory law of the State of Nevada or the State and Federal Constitutions.

When analyzing the Fifth Barker factor, Imposition on The Defense, the Court must consider whether the delay had a substantial injurious effect or influence upon the Petitioner's defense.

In this regard the "presumptively prejudicial" delay in conducting the Resentencing Proceedings have had a profound effect of causing substantial imposition upon the Defense, which has unreasonably impacted the outcome of the Trial Proceedings by reducing the prospect of fair and proportionate sentencing to a farce and sham. Where, the outcome of a Resentencing Hearing contemplated and anticipated by the 2001 Post-Conviction Court, of the imposition of fair and proportionate

sentences cannot be achieved with any meaningful effect. Put plainly the Petitioner due to the untenable delay cannot receive the benefits which were contemplated by the Post-Conviction Court. But more importantly the Petitioner has been deprived of the Due Process of a meaningful Resentencing Proceeding. Whereas, the Petitioner can no longer present to the Court any mitigating evidence effective to assist the Court in developing the fullest understanding of the Petitioner's criminal and family history, and his character, necessary to determine a proper sentence. Because such evidence is now a day late and a dollar short so to speak. Where, no matter what sentence the Trial Court might seek to impose, the term of imprisonment already served by the Petitioner is decidedly "onerous" and disproportionate. Thus, an Amended Judgment of Conviction would at this juncture serve no legitimate purpose, because such a Judgment cannot erase the time already served to completion by the Petitioner.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "J. M. ...", written over a horizontal line.

Date: January 22, 2019