No. 18-7829 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOE MARK - PETITIONER

VS.

AMY RABEAU - RESPONDENT
Goose Creek Correctional Center
at Wasilla, Alaska

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

Joe Mark
Prison No. 122322
Goose Creek Correctional Center
22301 West Alsop Road
Wasilla , Alaska 99623

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner Joe Mark's Fifth Amendment Rights were violated when Mr. Mark was subject to custodial interrogation without Miranda warning having been given. Mark was denied his right against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution through the Fourteenth Amendment of the United States Constitution when the trial court erred by failing to suppress the statements made in Mark's first police station interview during an in-custody interrogation with no Miranda warning. Whether Petitioner was provided with inadequate assistance of counsel where a counsel

failed to timely file an appeal,and ineffective assistance of counsel claim was not addressed by the district court.

TABLE OF CONTENTS

INDEX TO APPENDIXES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

PRAYER

Petitioner Joe Homer Mark,pro se,respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Petition Writ of Habeas Corpus Under 28 U.S.C. §2254 Case No. 3:13-cv-00207-TMB,Dkt. 1,Filed 10/24/2013 is attached as Appendix A. AMENDED §2254 PETITION,Case No. 3:13-cv-00207-TIMB-KFM,Dkt. 22,Filed 08/08/2014 is attached as Appendix B. INITIAL REPORT RECOMMENDING THAT MOTION TO DISMISS BE GRANTED,Case No. 3:13-cv-00207-TMB-KFM, Dkt. 39,Filed 05/01/2015 is attached as Appendix C. MOTION FOR CERTIFICATE OF APPEALABILITY,Case 3:13-cv-00207-TMBDkt. 79,Filed 06/20/2016 is attached as Appendix D. PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS,Case 3:13-cv-00207-TMB-KFM,Dkt. 55,Filed 09/16/2015 is attached as Appendix E. MOTION TO REINSTATE COURT OF APPEALS' CASE,Case No. 16-35600,D.C.No. 3:13-cv-00207-TMB,United States District Court for the District of Alaska, DktEntry 5-1,Filed 11/04/2016 is attached as Appendix F. MOTION TO ACCEPT LATE-FILED MOTION FOR CERTIFICATE OF APPEALABILITY AND UNDER-SIGNED COUNSEL'S CAUSE AS TO THE LATE-FILING OF SAID MOTION,Case 16-35600,DktEntry 5-2,Filed 11/04/2016 is attached as Appendix G. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,Case No. 18-35

821,D.C.No. 3:13-cv-00207-TMB,U.S.District Court for Alaska,Anchorage,MANDATE,Filed 11/13/2018 is attached as Appendix H. EVIDENTIARY HEARING BEFORE THE HONORABLE PETER A. MICHALSKI,Superior Court Judge Anchorage,Alaska,August 19,2009. Case Joe H. Mark v. State of Alaska, 3AN-03-09754CR,8/18/2009 is attached as Appendix I.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 11,2018. This Petition for Certiorari is filled within ninety days of that date. This jurisdiction of this Court is invoked Under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Consitution states: "No person shall be...deprived of life,liberty,or property,without due process of law"; and the Fourteenth Amendment states: "...nor shall any State deprive any person of life,liberty,or property,without due process of law..."

The Fifth Amendment to the United States Constitution provides: "No person...shall be compelled in any criminal case to be a witness against himself...."

The Sixth Amendment to the United States Constitution provides: "in all criminal prosecutions,the accused shall enjoy the right... to have the Assistance of Counsel for his defences.

STATEMENT OF THE CASE

On July 2,1998 an indictment was filed against Joe Mark charging nine counts,including murder,sexual assault and tampering with evidence. The trial against Mark commenced August 10,1999. The Jury

returned verdicts of guilty on all counnts (eight counts) on September 2,1999.

On February 28,2000 Mark was sentenced by Judge Milton Souter to a composite sentence of 129 years in prison.

After timely filing state and federal appeals. On June 20,2016, CJA attorney Danee L. Pontious filed an untimely Motion for Certificate of Appealability Pursuant to 28 U.S.C. §2253(c) from an order entered by the District Court of Alaska on April 25,2016. Dkt. 78 denying Mark's application for post-conviction relief pursuant to U.S.C. §2254,Dkt. 79.

On August 11,2016 Attorney Pontious filed Motion To Accept Late-Filed Motion For COA And Undersigned Counsel's Cause As To The Late-Filing Of Said Motion. Undersigned counsel moves this District Court to accept the untimely motion for COA. See Appendix G.

On November 8,2017,the District Court of Alaska dismissed for lack of jurisdiction. DktEntry No. 5 is denied. Filed November 8,2017.

On August 2,2017,petitioner Joe Mark,pro se,filed Motion For COA and Notice of Appeal to Reconsider Dismissed Petition to District Court of Alaska. Dkt. 86,86-1. On November 8,2017 United States Court of Appeals For The Ninth Circuit, No. 17-35647,D.C.No. 3:13-cv-00207-TMB,district of Alaska,Anchorage,ORDER. DktEntry No. 2 is dismissed because it is duplicate of appeal No. 16-35600. DISMISSED.

On January 24,2018 petitioner Mark,pro se,filed Petition For A Writ of Habeas Corpus Under 28 U.S.C. §2241,Case 3:13-cv-00022-TMB, Dkt. 1. Also filed a Memorandum in Support of Writ of Habeas Corpus under 28 U.S.C. ²²41,Dkt. 2,which seeks a COA from the Court's April 25,2016 order at Dkt. 78 in 3:13-cv-00207-TMB,Dkt. 6.

On April 18,2018 United States District Court For The District of

Alaska,Case 3:13-cv-00022-TMB,Dkt. 5,Order Referring Petition To Ninth Circuit & Staying Case. Refers it to the Ninth Circuit For authorization to go forward. The Clerk of Court is directed to provide a copy of the Ninth Circuit's Form 12,entitled "Application for Leave to File Second or Successive Petition Under U.S.C. $2254. or ..." Mark is encouraged to complete & file Form 12...the ensuing Ninth Circuit case,Dkt. 18-71183.

On May 2,2018 Appellant Mark,pro se,filed Form 12 Application for Leave to File Second or Successive Petition Under 28 U.S.C. §2254 or ...Entered. 05/08/2018. Also filed addendum,dated 05/08/2018. Entered 05/16/2018.

On August 27,2018 United States Court of Appeals For The Ninth Circuit,No. 18-71183,D.C.No. 3:13-cv-00022-TMB,District of Alaska, Anchorage,Filed Order Before: FARRIS,MYBEE & N.R.SMITH,Circuit Judges DENIED.

On October 15,2018,petitioner Joe Mark,pro se,filed Petition For Certiorari: In The Supreme Court of the United States,October 26, 2018. Received,Office of the Clerk. RE: Mark v. Rabeau,USCA#9 18-71183. Failed to comply with Rules of this Court.

On November 13,2018,United States Court of Appeals For The Ninth Circuit,No. 18-35821,D.C.No. 3:13-cv-00207-TMB,U.S.District Court for Alaska,Anchorage,MANDATE,The judgment of this Court,entered October 19,2018,takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

REASONS FOR GRANTING THE PETITION

Petitioner Joe Mark was denied his right against self-incimination as guaranteed by the Fifth and Fourteenth Amendment to the United

States Constitution when the trial court erred by failing to suppress the statements made in Mr. Mark's first police station interview during an in-custody interrogation with no Miranda warning. The Questions Presented For Review are so closely related that these should be discussed together. See Henry v. Kernan,197 F.3d 1021,1999 U.S.App.LEXIS 26773. AND Alvarado v. Hickman,316 F.3d 841,2002 U.S.App.LEXIS 26131.

In Henry,to prevail on his Fifth Amendment claim,Joe Mark must demonstrate that: (1) his statements were obtained by the police in violation of Miranda; (2) the state court committed error in permiting the prosecution to use these improper statements; & (3) the error had a substantial & harmful influence on the jury's determination of its verdict; under the Fourteenth Amendment,a confession if involuntary only if the police use coercive means to under mine the suspect's ability to exercise his free will. Citing Henry.

In Alvarado,Joe Mark's Fifth Amendment rights were violated because he incriminated himself without ever being informed of his constitutional rights under Miranda. Citing Alvarado. Mr. Mark asserts that he easily passes the Supreme Court's test for a custody determination under the totality of the circumstances in these two cases.

Whether Petitioner was provided with inadequate assistance of counsel where a counsel failed to timely file an appeal,& ineffective assistance of counsel claim was not addressed by the disrtict court. The Questions Presented For Review are so closely related that these should be discussed together. See Evitts v. Lucey,469 U.S. 387,105 S.Ct. 830 (1985); Strickland v. Washington,466 U.S. 668,104 S.Ct. 2062,2066 (1984); and in part,U.S. v. White,640 F.2d 970,1981 U.S. App.LEXIS 19977.

In Strickland,Joe Mark must establish that counsel's assistance

was unreasonable by identifying counsel's specific acts or omissions that failed to meet the provailing professional norms of a defense counsel. See Appendix F & G.

In Evitts,the Supreme Court held that the Strickland Standard of ineffective assistance of counsel also applies to appellate counsel.

In Wilcox,in part,appellees' claim of ineffective assistance of counsel argument does raise a violation of the Sixth Amendment. The district court did not,however,pass upon that claim. See Appendix H.

A. PETITIONER MARK'S FIFTH AND FOURTEENTH AMENDMENT RIGHT'S WERE VIOLATED WHEN MARK WAS SUBJECT TO CUSTODIAL INTERROGATION WITHOUT A MIRANDA WARNING HAVING BEEN GIVEN.

The district court's decision to grant or deny a §2254 habeas petition is reviewed de novo. See Estaminia v. White,136 F.3d 1234, 1236 (9thCir. 1998). Findings of fact relevant to the district court's decision are reviewed for clear error. See Moran v. McDaniel,80 F.3d 1261,1268 (9thcir. 1996). State Court factual determinations are entitled to a presumption of correctness under 28 U.S.C. §2254(d). See Villafuerte v. Stewart,111 F.3d 616,626 (9thCir. 1997),cert. denied,522 U.S. 1079,118 S.Ct. 860 (1998); Collazo v. Estelle,940 F.2d 411,416 (9thCir. 1991)(en banc).

A denial of a writ of habeas corpus presents a question of law that is reviewed de novo,though factual findings will be reviewed for clear error. See Hartman v. Summers,120 F.3d 157,160-61 (9thCir.1997); Perez v. Marshall,119 F.3d 1422,1425-26 (9thCir. 1997). A determination whether an individual is "in custody" for the purposes of Miranda warning is really a mixed question of law and fact,which is subject to de novo review by appellate court's; the "state trial court's answer to the 'scene & action-setting question',the underlying factual

questions still are entitled to a presumption of corrections." Bains v. Cambra,204 F.3d 964,972 (9thCir. 2000). Citing Thompson v. Keohane, 516 U.S. 99,111-12.

To prevail on his Fifth Amendment claim,Mr. Mark must demonstrate that: (1) his statements were obtained by the police in violation of Miranda; (2) the state court committed error in permitting the prosecution to use these improper statements; and (3) the error had a substantial and harmful influence on the jury's determination of its verdict. See Pope v. Zenon,69 F.3d 1018,1020 (9thCir. 1996). In Mark's case all these happened to him. See Dkt. 22 at 14,Dkt. 55 at 6-9.

Under the Fourteenth Amendment,a confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will. See Colorado v. Connelly,479 U.S. 157,167,93 L.Ed.2d 473,107 S.Ct. 515 (1986).

The Ninth Circuit case law has further elaborated the "totality of circumstances" inquiry by identifying several factors that are relevant to the "in custody" determination. "No de novo reviewed"

Pertinent areas of inquiry include: (1) the language used by the officers to summon the individual,(2) the extent to which he is confronted with evidence of guilt,(3) the physical surroundings of the interrogation,(4) the duration of the detention and (5) the degree of pressure applied to detain the individual. In Mark's case all these happened to him. See Dkt. 22 at 14,Dkt. 55 at 6-9. Based upon a review of all the pertinent facts,the court must determine whether a reasonable innocent person in such circumstances would conclude that breif questioning he would not be free to leave. See U.S. v. Booth, 669 F.2d 1234,1235 (9thCir. 1981); accord U.S. v.Butler,249 F.3d 1094, 1099 (9thCir. 2001); U.S. v. Gregory,891 F.2d 732,735 n.3 (9thCir.

1989). "Evidentiary hearing requested"

The Supreme Court's test for a custody determination is under the totality of circumstances,"a reasonable person would have felt he was not at liberty to terminate the interrogation and leave." Thompson v. Keohane,516 U.S. 99,112; See also Berkemer v. McCarty,468 U.S. 420, 442 (1984)(holding that "only relevant inquiry to determine whether a suspect was "in custody" is how a reasonable man in the suspect's position would have understood his situation."

Under the specific facts of this case,Mark presents a compelling argument,because his Fifth & Fourteenth Amendment rights were violated because he incriminated himself without ever being informed of his rights under Miranda. 384 U.S. at 444.

The facts: Detective Jessen: Mr. Mark,I think you need to come down to the station with us & talk to us alittle bet. See Dkt. 55 at 5,and once at the police station Mark was,again,not told he was free to go. Dkt. 55 at 6,& Dkt. 22 at 14. However,everything that had been communicated to Mark through the actions of the police officers directly contradicted Det. Baker's leading questions regarding whether Mark knew that he didnt' have to be there. Mark was not free to leave. Det. Baker's short prophylactic speech contained leading questions,questions which,by their nature,inferred the answers Det. Baker wanted to hear. As such,this initial exchange did not overcome the strong indicia of custody communicated to Mark leading up to it. Based on these facts, any reasonable person's in Mark's case would have believed themselves in custody. Dkt. 55 at 24,and Dkt. 22 at 14.

The petitioner argued that the totality of the circumstances surrounding Mark's interrogation indicated that a reasonable person in Mark's position would not have felt be was not at liberty to terminate

this interrogation and leave. The record supports that Mark was in custody when he made incriminating statements as argued in the Petitioner's Opening and Reply Briefs. The State court's decision to the contrary was unreasonable. See Lambert v. Bloodgett,393 F.3d 943.

The Magistrate court found that the State court's decision was reasonable and that fair-minded jurists could disagree on the correctness of the state court's decision under Yarborough v. Alvarado,541 U.S. 652,664 (2004). However,as the Magistrate Court pointed out, there are a number of factors indicative of custodial interrogation in Mark's case. Whether Mark was in custody and under interrogation for the purpose of his Fifth Amendment claim is thus debatable. Based on the standard under Slack v. McDaniel,529 U.S. 473,484 (2001) for denials of constitutional claims on the merits. Mr. Mark has established a denial of a substantial federal right necessitating a Certificate of Appealability. See Dkt. 82 at 2,Appendix C.

The Ninth Circuit did not consider the constitutionality of Joe Mark's appeal on the merits. See Dkt's 5,& 5-1,Untimely filing. See Lawson v. Gregg,140 F.Supp.3d 873; Barefoot v. Estelle,463 U.S. 880, 890,afforded an opportunity to address the merits. Where the district court has rejected the constitutional claim on the merits,the showing required to satisfy 28 U.S.C. §2253(c) is straight forward. Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Slack v. McDaniel,529 U.S. 473. Mr. Mark asserts that he has done just that above.

For these reasons,it is respectfully submitted that the Petition for a Writ of Certiorari be granted.

B. WHETHER PETITIONER WAS PROVIDED WITH INADEQUATE ASSISTANCE OF COUNSEL WHERE A COUNSEL FAILED TO TIMELY FILE AN APPEAL,AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS NOT ADDRESSED BY THE DISTRICT COURT.

The Sixth Amendment to the united States Constitution provides: "In all criminal prosecutions,the accused shall enjoy the right... to have the assistance of counsel for his defense.

This Court has held that the effectiveness of counsel is "a mixed question of law and fact,reviewed DE NOVO," See U.S. v. Signori, 844 F.2d 635 (CA 9 1988).

The ultimate question in this appeal -- whether appellant's right to counsel was constructively denied -- is a mixed question of law and fact,subject to de novo. Cf. Strickland,466 U.S. at 698,104 S.Ct. 2070 (explaining that ineffectiveness of counsel is a mixed question of law and fact). See Childress v. Johnson,103 F.3d 1221 (CA 5 1997).

A claim for ineffective assistance of appellate counsel is evaluated upon the same standard as a claim of ineffective assistance of trial counsel. See Mayo v. Hederson,13 F.3d 528,533 (2ndCir. 1994).

The court in Gray v. Green,778 F.2d 350 (7thCir. 1985)(emphasis added). See also Griffin v. Aiken,775 F.2d 1226,1235-36 (4thCir. 1985),held the following: (1) "if appellate counsel has failed to raise a significant and obvious issue failure could be viewed as deficient performance",and (2) "if the issue not raised may have resulted in reversal of conviction,or an order for new trial,the failure was prejudicial.

The mandate of adequate representation on appeal in Anders v. California,386 U.S. 738,18 L.Ed.2d 493,87 S.Ct. 1396 (1967),with the extent of the duty of a court-appointed appellate counsel to prosecute

a first appeal from a criminal conviction,...at 1400. The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of her client,... Counsel should,and can with honor and without conflict,be of more assistance to her client and to the court. Her role as advocate requires that she support her client's appeal to the best of her ability. A copy of counsel's brief should be furnished to the indigent and time allowed to raise any points that he chooses; the court -- not counsel -- then proceeds,after a full examination of all the proceedings,to decide whether case is wholly... or proceed to a decision on the merits,if state law so requires. ... if it finds any legal points,arguable on the merits,afford indigent the assistance of counsel to argue the appeal.

In U.S. v. Wilcox,640 F.2d 970,1981 U.S.App.LEXIS 19977,the range of claims which may be raised in a §2254 motion is narrow. The statute enumerates a limited number of claims which are cognizable: (1) constitutional issues,(2) challenges to the district court's jurisdiction to impose the sentence,(3) challenges to the length of a sentence imposed in excess of the statutory maximum,and (4) claims that the sentence is otherwise to collateral attack. Where the moving party does not allege a lack of jurisdiction or constitutional error,there is no basis for collateral relief under §2254 unless the claimed error constituted a fundamental defect which inherently results in a "complete miscarriage of justice." See U.S. v. Addonizio,442 U.S. 178,185, 99 S.Ct. 2235,60 L.Ed.2d 805 (1979),quoting Hill v. U.S.,368 U.S. 424, 82 S.Ct. 468,7 L.Ed.2d 417 (1962); See also e.g.,Higdon v. U.S.,627 F.2d 893,897 (9thCir. 1980). While Mark's Rule 41(a) claim was not properly before the district court,his ineffective assistance of

counsel argument does raise a violation of the Sixth Amendment. The district court did not pass upon that claim. See Miller-El v. Cockrell, 537 U.S. 322,340.

In Strickland v. Washington,104 S.Ct. 2052,2066 (1984),a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are not to have been the result of reasonable professional judgement. See Dkt's 5,5-1 of CJA counsel Danee L. Pontious's acts or omissions. The Court must then determine whether,in light of all the circumstances,the identified acts or omissions were outside the wide range of professionally competent assistance. id.

In Earp v. Stokes,423 F.3d 1024,1032 (CA 9 2005),where petitioner establishes a colorable claim for relief and has never been afforded a state or federal hearing on this claim,we must remand to the district court for an evidentiary hearing. (Citing Standewitz v. Woodford,365 F.3d 706,708 (9thCir. 2004),Note 4: in showing a colorable claim,a petitioner is "required to allege facts which,if true,would entitle him to relief." Ortiz v. Stewart,149 F.3d 923,934 (9thCir. 1998). All though the state has stated I had a fulf and fair hearing,I Joe Mark assert I did not. See EVIDENTIARY HEARING BEFORE THE HONORABLE PETER A. MICHALSKI,Superior Court Judge,Anchorage,Alaska,August 19,2009. Case Joe H. Mark v. State of Alaska,3AN-03-09754 CI/98-05378 CR, 08/18/2009. See Appendix I.

Defendant Joe Mark,through appellate counsel (Danee L. Pontious) filed an untimely Motion for COA pursuant to 28 U.S.C. §2253(c) from

an order entered by the District Court of Alaska on April 25,2016 at Dkt. 78 denying his application for post-conviction relief pursuant to 28 U.S.C. §2254.

A Certificate of Appealability will issue only if the petitioner presents an issue of substance or makes a substantial showing of a denial of federal right. Miller El v. Johnson,261 F.3d 445,449 (2001) (quoting 28 U.S.C. §2253(c)(2)). Where a district court has rejected the constitutional claims on the merits,the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Slack v. McDaniel,529 U.S. 473,484 (2000). The facts or merits surrounding Mark's custodial interrogation are thus have not been debated.

The District Court takes judicial notice that the claims in Mark's habeas petition at Dkt. 1 are the same as those in the habeas petition already adjudicated in 3:13-cv-00207-TMB. In that case,this court already considered and denied Mark's request,through counsel (Danee L. Pontious),for a COA. See Dkt's 5,5-1 for dismissed due to untimely filing. See Appendix F & G. See Dkt. 1 (Petition for Writ of Habeas Corpus); Dkt. 55 (Petitioner's Opening Brief in Support of Petition for Writ of Habeas Corpus); Dkt. 79 (Motion for COA); & Dkt. 84 (Order Denying Defendant's Motions at Dkts. 79 & 82 as Moot) in 3:13-cv-00207-TMB; Dkts. 1-10 & 1-11 (Motion for COA). Additionally,while Mark alleges that one claim was stayed in his previous habeas petition (claim 7),the court takes judicial notice of claim 7 his habeas petition on 3:13-cv-00207-TMB being denied on its merits. See Dkt. 78 (judment denying claim 7) & Dkt. 76 (Final Report & Recommendation judgment based on) of 3:13-cv-00207-TMB.

The Petition for Writ of Habeas Corpus must be granted with re-

gard to the Petitioner's claim that his statements were taken in violation of his Fifth & Fourteenth Amendment Right's and Due Process. Facts: Detective Jessen: Mr. Mark,I think you need to come down to the station with us and talk to us alittle bit. See Dkt. 55 at 5. Once at the police station Mark was,again ,not told he was free to go. Dkt. 55 at 6. However,everything that had been communicated to Mark through the action of the police officers directly contradicted Det. Baker's leading questions regarding whether Mark knew that he didn't have to be there. Mark was not free to leave. Det. Baker's short prophylactic speech leading questions,questions which by their nature,inferred the answers Det. Baker wanted to hear. As such,this initial exchanged did not ovecome the strong indicia of custody communicated to Mark leading up to it. Based on these facts, any such reasonable person in Mark's case would have believed themselves in custody. Dkt. 55 at 24.

The petitioner argued that the totality of the circumstances surrounding Mark's interrogation indicated that a reasonable person in Mark's position would not have felt he was not at liberty to terminate this interrogation and leave. The record supports that Mark was in custody when he made incriminating statements as argued in the Petitioner's Opening and Reply Brief. The State court's decision to the contrary was unreasonable.

The Magistrate Court found that the State court's decision was reasonable and that fair-minded jurists could disagree on the correctness of the state court's decision under Yarborough v. Alvarado,541 U.S. 652,664 (2004). However,as the Magistrate Court pointed out, there are a number of factors indicative of custodial interrogation in Mark's case. Whethe Mark was in custody and under interrogation

for the purpose of his Fifth Amendment claim is thus debatable. Based on the standard under Slack for denials of constitutional claims on the merits,Mark has established a denial of a substantial federal right necessitating a COA. See Dkt. 82 at 2. See Dkt. 78 (judgment denying claim 7) and Dkt. 76 (Final Report & Recommendation judgment based on) of 3:13-cv-00207-TMB. See Dkt. 5 at 2. The State & Federal dismissal and denial are based on late filing of Danee L. Pontious. Not on the merits as claimed. See Dkt. 5 at 2 & Dkt. 5-1.

Petitioner Mark,by & through undersigned counsel (Danee L. Pontious) hereby moves this District Court to accept the untimely filed Motion for COA. On June 20,2016,the petitioner moved the court for a COA pursuant to 28 U.S.C. §2253(c) from an order entered by this court on April 25,2016 at Dkt. 78 denying his application for post-conviction relief pursuant to 28 U.S.C. §2254,the Motion for COA was filed 56 days after the denial of the petition. Motion to Accept Late-Filed Motion for COA And Undersigned Counsel's Cause As To The Late-Filing Of Said Motion. Dkt. 82. See Appendix F & G.

Mr. Mark should not be prejudiced by undersigned counsel's lack of experience in habeas practice. Mark presented an issue of substance & established a denial of a federal right in his original Motion for COA . Dkt. 79. Miller-El v. Johnson,261 F.3d 445,449 (2001)(quoting 28 U.S.C. §2253(c)(2)). Mark should be afforded the opportunity to demonstrate that reasonable jurists would find the district court's assessment (denied on the merits) of his Fifth Amendmet claim debatable or wrong. Slack v. McDaniel,529 U.S. 473,484 (2001). Dkt. 82 at 2. Mark should not be denied his opportunity to appeal the district court's denial of his Writ of Habeas Corpus based on counsel's lack of clarity on the issue. Dkt. 82. Therefore,Mark respectfully

requests that the court accept a late filing Motion for COA,"Certified Issue & Uncertified Issues" & that the court treat this motion as having addressed the issue of cause for deviating from the 30-day deadline. Dkt. 82 at 3.

Additionally,undersigned counsel filed a Motion to Accept Late-Filed Motion for COA & Cause as to Why Said Motion was Untimely on August 11,2016. Dkt. 82. However,counsel filed the motion in the district court case. The Court of Appeals dismissed the appellate case on October 25,2016,because it did not receive the Petitioner's motion requesting that the court accept the late-filed motion for COA. However,counsel did in fact respond to the Court of Appeals' order requesting that the Petitioner show cause as to why the Motion for COA was untimely,albeit in the improper form. Case: 16-35600 Dkt Entry: 5-1 at 2. As stated in the original Motion to Accept Late-Filed Motion for COA,the Petitioner had grounds to appeal the district court's order dismissing the habeas petition. Mark should not be prejudiced by counsel's lack of experience in dealing with habeas cases. Therefore,the petitioner seeks reinstatement of the Court of Appeals' case and files concomitantly herewith the Motion to Accept Late-Filed Motion for COA & Cause as to Why Said Filing was Untimely in the Court of Appeals' case. Order,the motion to reinstate the appeal Dkt.Entry No. 5 is denied.

The Ninth Circuit did not consider the constitutionality of Joe Mark's appeal on the merits. See Lawson v. Gregg,140 F.Supp.3d 873. See also Barefoot v. Estelle,463 U.S. 880,890,afforded an opportunity to address the merits. In Mark's case dismissed on late filing.

Established system of appeal requires counsel. A first appeal as of right...is not adjudicate in accord with due precess of law if

appellant does not have the effective assistance of counsel. See Evitts v. Lucey,469 U.S. 392,105 S.Ct. 830 (1985).

Attorney's failure to file notice of appeal,held deficient. Counsel Pontious has constitutionally impose duty to consult with Mark about his appeal,reason to think either (1) that I wanted to appeal or (2) that I demonstrated to counsel that I was interested in appealing in making determination,the courts must take into account all the information counsel knew or should have known. See Strickland,at 590. See Dkts. 86,86-1. There is reasonable probability that,but for counsel's deficient failure to consult with Mark about the appeal process,I would have timely appealed. See Roe v. Flores-Ortega,528 U.S. 470, (2000).

Standards to evaluating counsel's performance. A court deciding an actual ineffectiveness claim must judge the reasonableness of counse's challenged conduct on the facts of the particular case,viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged to have been the result of reasonable professional judgment. The court must then determine whether,in light of all the circumstances,the identified acts or omissions were outside the wide range of professionally competent assistance. See Strickland v. Washington,104 S.Ct. 2052 (1984).

Petitioner Mark asserts that he has shown that counsel Pontious was ineffective in representing him in the habeas corpus case as stated above. See Appendix G & H,also Dkts 86,86-1,or total circumstances of the case.

Pro se pleadings must be construed liberally. ...were proceeding pro se until appointed counsel by the district court. We must "con-

strue pro se habeas filing liberally." Allen v. Calderon,408 F.3d 1150,1153 (9thCir. 2005); ...we view the filings made sufficient allegations of liligence. See Balistreri v. Pacific Police Dept., 901 F.2d 696,699 (9thCir. 1990). This court recoginizes that it has a duty to ensure that pro se litigators do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements. Roy v. Lampert,465 F.3d 964 (CA 9 2009).

Pro se pleadings,alleged facts accopted as true. Where the petitioner established a colorable claim for relief & has never been afforded a state or federal hearing on this case,we must remand to the district court for an evidentiary hearing. Citing Standewitz v. Woodford,365 F.3d 706,708 (9thcir. 2004). In showing a colorable claim,a petitioner is "required to allege facts which,if true,would entitle him to relief." See Ortiz v. Stewart,149 F.3d 923,934 (9th Cir. 1998).

Petitioner Mark asserts that he has established ineffective assistance of counsel claim & a colorable relief for an evidentiary hearing base on the merits of Mark's Fifth & Fourteenth Amendment claims above.

Abandonment by counsel. Petitioner Mark asserts abandonment by counsel Pontious & this can toll the limitation period to file a motion to vacate. See Estremera v. U.S.,724 F.3d 666 (7thCir. 2013). See Dkts 86,86-1,5, & 5-1 Appendix G & H. The failure to consider the claims will result in a fundamental miscarriage of justice. See Coleman v. Thompson,501 U.S. 722,750,111 S.Ct. 2546,115 S.Ct. 640 (1991). The expansion of the record in a habeas proceeding is appropriate to determine whether an evidentiary hearing is proper. See McDonald v. Johnson,139 F.3d 1056,1060 (5thCir. 1999). See also Appendix H, appeal documents,Danee L. Pontious,listed as my CJA Attorney,letter

requesting affidavit statement,no response.

CONCLUSION

The aforementioned facts surrounging Mr. Mark's custodial interrogation on April 30,1998 were not debated by the Ninth Circuit. This Court is thus faced with determining whether the state court decision that these facts did not arise to custody was contrary to, or involved an unreasoable application of,clearly established Federal Law. After carefully weighing all the reasons for accepting a state & federal court's judgment,if this Court is convinced that Mark's interrogation violated Miranda that independent judgment should prevail. Therefore,this Court must find that any reasonable man in Mark's case would have believed himself under arrest & not free to leave such that his interrogation violated the United States Constitution & the Mandates of Miranda.

This Court must look at the totality of the circumstances surrounding Mark's interrogation & determining whether a reasonable person in Mark's position would have felt he was not at liberty to terminate this interrogation and leave. The overwhelming evidence supports that Mark was in custody when he made incriminating statements. The state courts decision to the contrary was unreasonable. Mr. Mark has established that he has not had a right to have the assistance of appellate counsel as a right and omissions by counsel. Therefore, based on the foregoing arguments and authorities. This Court should suppress Mark's April 30,1998 statements to Det. Baker. Because the admission of this evidence cannot be deemed harmless,a new trial must be ordered,or a hearing be done at the district court level. And a new CJA appointed to pursue further appeal process for Mark,and the Petition for Habeas Corpus must be granted. The Petition for a Writ

of Certiorari should be granted.

Respectfully submitted,

Date: 01/17/2019

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