

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK K. GIBSON — PETITIONER
(Your Name)

vs.

RONALD HAYNES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NINTH CIRCUIT COURT OF APPEALS

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

PETITION FOR WRIT OF CERTIORARI

PATRICK K. GIBSON
(Your Name)
MONROE CORRECTIONAL COMPLEX - WSRU
P.O. BOX 777

(Address)
MONROE, WA 98272

(City, State, Zip Code)
NONE

(Phone Number)

QUESTION(S) PRESENTED

Did the Ninth Circuit Court of Appeals error in denying a Certificate of Appealability, where petitioner presented clear factual evidence, supported by the trial record, that his Sixth and Fourteenth Amendment Constitutional rights to a fair trial and due process were violated?

Did the Ninth Circuit depart so far from the accepted and usual course of judicial proceedings, by omitting consideration of evidence entitled to substantial or considerable weight, or sanction such a departure by lower Courts, failing to conduct a full and fair review of the application for a C.O.A., that it requires an exercise of this Court's supervisory powers, in the interests of justice, where the record before the Court shows clearly, manifest/plain errors exist, and that the errors were prejudicial to petitioner, affecting the verdict, rendering the trial fundamentally unfair?

Is it not the duty of the United States Supreme Court to make its aim independent examination of the record when federal constitutional deprivations alleged, the duty resting on the Court's responsibility for maintaining the constitution inviolate?

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ For cases from **federal courts**:

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

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☒ is unpublished.

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

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

☐ For cases from **state courts**:

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

☒ reported at 180 Wn.App. 1014 (2014); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the WA C.O.A. Direct Appeal court appears at Appendix E to the petition and is

☒ reported at 178 Wn.App. 1046 (2014); 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 June 11, 2018.

☐ 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: July 12, 2018, and a copy of the order denying rehearing appears at Appendix A.

☐ 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**:

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The date on which the highest state court decided my case was June 23, 2016 P-6.
A copy of that decision appears at Appendix H P-6.

~~☒~~ A timely petition for rehearing was thereafter denied on the following date: Sept. 28, 2016 P-6, and a copy of the order denying rehearing appears at Appendix H P-6.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)(1)&(2) and (e)(1)

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

merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to , or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Mr. Gibson was convicted at a bench trial of the murder of Brian Cole. Two robberies occurred on 11/07/92, one in Coeur d'Alene, Idaho, the second, Spokane, Washington. At the Idaho crime scene police recovered two sets of handcuffs, plastic flexcuffs, and hair like fibers caught in the links of the handcuffs. All of these evidence items belonged to the suspect. The Police recovered one fingerprint from the handcuffs that did not match any of the victims. Only the victims and the suspect handled the handcuffs before police took them into evidence. The print was sent to the Idaho State Crime Lab, where it was submitted to the national fingerprint databases, resulting in no known matches. Idaho authorities notified Spokane about the fingerprint results in December 1992. The Idaho case went unsolved.

At the Spokane crime scene, store owner, Brian Cole tried to overpower the robber, dislodging the suspect's hat, sunglasses, and a small portion of the fake beard the suspect wore as part of a disguise. The struggle caused the suspect's gun to discharge, causing Mr. Cole's death. Each of these items were taken into evidence. Police also extracted two white hairs strands from the hat, recovered a spent .22 caliber shell casing, indicating a .22 caliber weapon was used in the crime. Two brown hairs were recovered from the front of the victim's shirt, a liquid sample was recovered from the lens of the sunglasses, and five latent prints were lifted, with no matching results.

Between the two crime scenes, five eyewitnesses described the suspect as 5'8" to 5'9", with one witness going as high as

5'10", about 140-160 lbs., thin to medium build, about 30 years old, wearing a hat, sunglasses and fake beard at the Idaho robbery, and hat and fake beard at the Spokane robbery, but apparently carrying sunglasses on his person. Spokane and Idaho conferred, and concluded the same suspect committed both crimes based on M.O., suspect description, and disguise. Spokane Det. Mark Henderson made a verbal request to Idaho authorities to preserve all their evidence for the Spokane murder case, within three days of the two crimes occurrence. Even though Spokane made the request to preserve the Idaho evidence, Idaho destroyed all their evidence in 1998, when the statute of limitations ran out on their case, without checking with Spokane authorities to see if their preserve request would remain in effect.

Both Spokane and Idaho authorities knew that the handcuff fingerprint could only have belonged to the actual suspect, as only the victims and the suspect handled the handcuffs before they were taken into evidence, thus, they were fully aware of the apparent inculpatory/exculpatory value of the handcuff print evidence if they could identify a suspect.

Spokane authorities allowed the hat to be used in the re-enactment of the crime at the T.V. show "America's Most Wanted" in January 1993, which eventually showed the hat DNA was contaminated by Det. Henderson and actor Trevor St. John.

In December 1993, Spokane developed a suspect, Hugh Knuttgen. Michele Cole picked out Knuttgen's picture from a photo montage, and was 85-90% sure he was the man that shot her husband. Steve and Teresa Benner, owners of the Idaho store,

also tentatively identified Knuttgen. Police eventually eliminated Knuttgen as a suspect in either crime. Knuttgen's picture was the # 4 picture in the montage.

In 2006 the Washington State Crime Lab (WSCL) conducted DNA testing on the hat and sunglasses. The sunglasses contained a mixture of at least two DNA profiles that could not be deconvoluted, the hat sweatband (the only place tested for DNA) contained a mixture of at least three DNA profiles that could not be deconvoluted. The WSCL also discovered a white envelope marked two white hair strands extracted from hat, with the hat evidence. When it opened the envelope it discovered the evidence was missing, and noted it on its bench notes that were sent back to Spoken Det. Mark Henderson. In 2011 the WSCL conducted DNA testing on the victim's fingernail clippings/scrappings and the fake beard fibers. The fingernail clippings were contaminated in the lab by WSCL staff when processing the evidence, the fake beard returned a hit that matched Mr. Gibson.

Spokane authorities investigated Gibson, found he had a lengthy criminal record, including robbery and bank robbery. They put together a photo montage with Gibson's picture in the # 4 position, the same as Knuttgen's in 1993. Michele Cole asked what a mark was by the ear in picture # 4, Gibson's picture, Det. Johnston said it was nothing. Cole eliminated three pictures immediately, and as Johnston was putting away the montage, Mrs. Cole said, "I hate to accuse an innocent man (Knuttgen), but # 4 looks like the man." Steve Benner also tentatively identified Gibson's # 4 picture. Det. Johnston arrested Gibson for the

murder of Brian Cole on May 4, 2011. Mr. Gibson did not match the suspect description.

Mr. Gibson was 6'1", 195 lbs, and 40 years old at time of crimes, 4-5 inches taller than any eyewitness described the suspect as. None of the prints from the Spokane crime scene matched Mr. Gibson.

At a May 17, 2012 pre-trial hearing, the State tells the court and defense, that it has found additional evidence it was submitting for DNA testing, a liquid sample from the sunglasses, two white hairs extracted from the hat, and, two brown hairs found on the front of of the victim's shirt. Two minutes later, the State tells the court that a technician at the crime lab is saying the white hairs were analyzed and determined not to be suitable for DNA testing. This was a complete fabrication, the State never submitted the white hair evidence for testing at all. State witness WSCL scientist, James Currie, testified the white hair evidence was missing since 2006. In closing the State intentionally misrepresented to the court that the white hair evidence was "LINT". The court ignored that evidence completely in its fact findings, likely due to the prosecutor misconduct.

At this same pre-trial hearing, defense counsel, discussing "other suspect evidence", tells the court that a gun matching the murder weapon was recovered in a bank robbery case, Mr. Gibson and a Mr. Williamson committed that bank robbery, and Mr. Williamson was identified in that crime, all of this not true. The gun recovered in the bank case was a .380 caliber weapon, the gun used in this case was a .22 caliber weapon. A .380 cannot

fire a .22 caliber shell. No one was ever identified in the bank case, that case went unsolved. When the court asked counsel, "But the gun matches the description of the gun that was used in either one or both of the incidents we've talked about today?" Counsel answered "Correct". This seriously deficient performance by counsel likely convinced the bench trial court that Mr. Gibson committed this crime because of the false claim of weapon match. The discovery documents turned over by the State prove counsel's misrepresentation of weapon match, submitted to the State Court of Appeals in the Personal Restraint Petition, which the Court refused to address. All courts to date have refused to address this issued raised since collateral attack.

The State trial evidence consisted of three DNA profiles in the hat and sunglasses, whose sources are unknown, a suspect height that was as previously stated, with Heather Bender at first claiming the suspect she saw was 5'11" her height, but on cross exam, admitting she was 5'8" and the suspect was 5'8' to 5'10", and on re-direct, stating the suspect was not shorter than 5'5". The Bench Trial Court and Court of Appeal abused their discretion and cited the mis-stated 5'11" suspect height by Ms. Bender. State witness Michele Cole testified that she looked directly into the suspect's eyes, and his eyes were not brown, they were blue. Mr. Gibson has brown eyes. The State showed that Mr. Gibson's DNA was in the altered portion of the fake beard, and that the WSCL concluded that Mr. Gibson's DNA was also in the hat, once they were able to remove the DNA profiles of Det. Henderson and actor Trevor St. John, on paper, a conclusion

strongly contested by defense DNA expert, Dr. Ruth Ballard, which resulted in the trial court giving little if any weight to the DNA evidence in the hat, in its fact findings. Michele Cole, Steve and Teresa Benner, all identified Mr. Gibson at trial as the robber, almost 20 years after the two crimes occurred, when the suspect was wearing a disguise. Evidence was also presented that the fake beard fibers were altered by Det. Henderson, with an undocumented portion supposedly given to Idaho authorities for their case, a claim refuted by Idaho at trial.

At trial, the State allowed State eyewitnesses to give false or perjured testimony, unsolicited, knowing it was false/perjured testimony because the police reports with original statements, refute the false/perjured testimony, and failed to correct it as it appeared, in order to bolster the credibility of its witnesses. The State vouched for the false/perjured testimony in closing argument, misstated the evidence in closing, cited fabricated evidence not admitted at trial, and misstated trial testimony of State witnesses.

Defense counsel failed to impeach most of the false/perjured testimony as it appeared, failed to object to prosecutor misconduct in closing arguments, failed to do basic research on lost/destroyed/altered evidence, lying to Mr. Gibson that it goes only to the weight of the evidence, and failed to present evidence that Mr. Gibson's accomplices in the bank robberies match the exact physical description of the suspect in both crimes in this case, wearing the same type of disguise, fake beard, hat, sunglasses.

Mr. Gibson testified at trial that his DNA was likely in the fake beard because it was one of the disguises that he supplied to an accomplice in the bank robbery cases he was involved in at that time period, and that he purchased and practiced with all the disguises to see which would work best for himself, providing the others to the hired help. The State did not rebut this testimony because they had obtained over 3600 pages of FBI documents on the bank robbery cases that established the accomplices were an exact physical match to the suspect in this case, wearing the same type of disguise.

The bench trial court fabricated findings of facts, included false/perjured eyewitness testimony in its fact findings, omitted consideration of all exculpatory evidence presented at trial, all of it by the State and its witnesses, stated multiple times throughout trial that it was confused by the evidence, trial testimony, and arguments being presented at trial, included evidence not admitted at trial in its evidence rulings, (the John Walsh buccal swap), and made an unreasonable determination of facts, to find a verdict of guilty.. The Court ruled it had no doubt the same person committed both the Idaho robbery and the murder of Brian Cole, citing the eyewitness identification of Mr. Gibson by three witnesses, and the uncontroverted DNA in the fake beard fibers that matched Mr. Gibson.

The handcuff fingerprint, which meets the exact criteria for "materially exculpatory" evidence as determined by this Court in California v. Trombetta, 467 U.S.479 (1984) and Arizona v. Youngblood, 488 U.S. 51, 58 (1988), the three unknown DNA

profiles in the hat and sunglasses, white hair evidence that is lost and exculpatory by virtue of its color alone, suspect description that is not even close to Mr. Gibson's, and the trial testimony of Michele Cole that the suspect did not have brown eyes, they were blue, (Mr. Gibson has brown eyes), all undermine confidence in the verdict beyond a reasonable doubt. The handcuff fingerprint proves Mr. Gibson did not commit the Idaho robbery, thus, since the court ruled the same man committed both crimes, the handcuff fingerprint is the intimate "materially exculpatory" forensic evidence that proves Mr. Gibson did not commit the Idaho robbery, therefore, it also proves Mr. Gibson did not commit the murder Brian Cole.

Mr. Gibson filed a direct appeal through appointed counsel, which was denied. See Appendix "E". On direct appeal, the State C.O.A. acknowledged that the handcuff fingerprint did not match Mr. Gibson, but refused to acknowledge that evidence was lost/destroyed or altered, issues raised in Mr. Gibson's Statement of Additional Grounds, (SAG), within the content of abuse of discretion and prosecutor misconduct arguments. Against Mr. Gibson's explicit instructions not to argue against the ER 404(b) Idaho evidence because it contained the materially exculpatory handcuff fingerprint that exonerates Mr. Gibson, appellate counsel made that argument, arguing the print is exculpatory, but the Idaho evidence should not have been admitted at all. The State C.O.A. made an unreasonable determination of the facts, committing manifest/plain errors that, 1.) stated there was no prosecutor misconduct, contrary to the clear

evidence presented in the SAG, 2.) that the white hair evidence was found and sent to crime lab for testing, which is contradicted by the trial record, and 3.) omitted consideration of evidence entitled to substantial or considerable weight. Mr. Gibson filed a Motion for reconsideration that rebutted the court's manifest/plain errors, which was denied. See Appendix "G". Mr. Gibson Filed a Motion for Discretionary Review, which was denied without comment. See Appendix "F".

Mr. Gibson next filed a Personal Restraint Petition, (PRP), renewing his arguments of lost/destroyed/altered evidence, that were not addressed on direct appeal, prosecutor misconduct, abuse of discretion, ineffective assistance of counsel, evidence not presented at trial/newly discovered evidence. Mr. Gibson advised the C.O.A. in his PRP Introduction, that this was an actual innocence claim supported by forensic evidence, and the court committed manifest/plain error on the lost white hair evidence and prosecutor misconduct issues raised in SAG, thus, in in Extraordinary Circumstances, the interests of justice prevail to require the re-litigation of some issues already raised in the SAG, but incorrectly ruled on. Mr. Gibson submitted as evidence in the PRP, the WSCL Conclusion Report that showed the State only submitted the two brown hairs from the shirt, and the liquid sample, for late DNA testing, proving the State lied to the court about finding and submitting the white hair strand evidence, thus prosecutor misconduct, and manifest error by the C.O.A., of no prosecutor misconduct, and white hair evidence was found/sent to lab for testing.

The State admitted in their response to PRP that the white hair strand evidence was missing, both the handcuff fingerprint and white hair strands were exculpatory, but that their exculpatory value was argued at trial. The prosecutor lied about both pieces of evidence in closing argument, claiming the suspect wore gloves the entire time, and the white hairs were "Lint", both statements contradicted by trial record. This was prejudicial because, the court ignored that materially exculpatory evidence in its findings of facts completely, likely because of the prosecutor misstatements in closing. The State C.O.A. ignored this fact completely, failed to acknowledge its own manifest errors, and ruled Mr. Gibson cannot renew issues already raised in his SAG, petition was dismissed as frivolous, refusing to address most issues Mr. Gibson presented. See Appendix "G".

Mr. Gibson filed a Motion for Discretionary Review, which was denied, but commented on by the S.Ct. Commissioner. The Commissioner applied the wrong standard to the lost/destroyed/altered evidence, citing a claimed Brady violation, which was not claimed by Mr. Gibson. The Commissioner admitted the handcuff fingerprint did not match Mr. Gibson, but applied the wrong standard, say it was only potentially useful evidence, requiring a show of bad-faith, ignoring the verbal request to preserve by Spokane authorities, and that its exculpatory value was apparent to police before its destruction because the police attributed that print directly to the suspect. The Commissioner's ruling was contrary to clearly established

federal law and an unreasonable determination of the facts and evidence Mr. Gibson submitted to the court, supported by the trial record.

The Commissioner ignored the altered evidence admissibility issue, ineffective assistance of counsel for misstating weapon match, failure to do basic research, etc. Mr. Gibson argued the John Walsh buccal swab had a broken chain of custody, was never admitted as evidence at trial, and illegally cited in court evidence rulings. The Commissioner ruled a claim of a missing buccal swab, contrary to Mr. Gibson's argument of broken chain of custody. The Commissioner abused his discretion, failed to address manifest errors committed by the Court of Appeals in the PRP and Direct Appeal, failed to conduct a full and fair review, omitted consideration of evidence entitled to substantial or considerable weight, and misstated the arguments presented by Mr. Gibson, resulting in an unreasonable determination of the facts and issues presented to the court, committing multiple manifest/plain errors in its rulings, denying Mr. Gibson of due process. See Appendix "H".

Mr. Gibson next filed a habeas corpus petition in U.S. District Court which was denied. See Appendix "B" & "C". The U.S. Magistrate and District Court Judge continued the systemic practice of the State Courts, abusing their discretion by failing to conduct a full and fair review, refusing to consider all relevant evidence, omitted consideration of evidence entitled to substantial or considerable weight, and made findings of fact that were contrary to Mr. Gibson's actual arguments. The

Magistrate stated that Mr. Gibson was claiming the State failed to disclose the exculpatory fingerprint evidence, white hair strand evidence and altered fake beard evidence. Respondent's counsel made that false claim in its response to show cause, intentionally misstating Mr. Gibson's Grounds raised in the habeas petition, which never claimed a failure to disclose on lost/altered evidence.

The altered evidence issue was inadmissibility claim per Washington State case law doctrine. See *WA Allen v. Porter*, 19 Wn.2d 503, 508, 143 P.2d 328 (1943), *WA State v. Mitchell*, 56 Wn.App. 610, 784 P.2d 568 (1990). All courts have intentionally refused to address this issue because it requires mandatory reversal and a new trial. The Magistrate never addressed that issue of inadmissible evidence, contrary to the District Court's assertions that the Magistrate did address the altered fake beard admissibility issue, directing Mr. Gibson to DKT 23, at page 26. A review of that page clearly shows that it has nothing to do with altered evidence.

To show just how confused the U.S. District Court Judge was about the facts of this case, the Judge stated that the Idaho robbery was a bank robbery. The Idaho robbery was a kids clothing store called Kid's Fair.

The Magistrate's misstatements about the arguments Mr. Gibson made in his habeas are manifest/plain errors dealing directly with constitutional violations that affected the outcome of proceedings, denying Mr. Gibson of a fair trial and due process under the Sixth and Fourteenth Amendments. It required a

manifest/plain error review of the entire habeas petition by the Ninth Circuit, which refused to do so.

Mr. Gibson made a special request that the District Court in objecting to the R&R, asking the Court to take notice that every judicial authority associated with this case has refused to acknowledge the existence of the three "materially exculpatory" unknown DNA profiles in the combination of the hat and sunglasses, that do not match Mr. Gibson, along with the fact that the suspect description by five independent eyewitnesses does not match Mr. Gibson. The District Court refused to acknowledge this exculpatory evidence in its' ruling adopting the R&R.

Mr. Gibson requested a Certificate of Appealability from the District Court with his objections to the R&R, which was denied.

Mr. Gibson next filed an application for Certificate of Appealability to the Ninth Circuit Court of Appeals, which was denied, stating that appellant has not made a "substantial showing of the denial of a constitutional right." Mr. Gibson filed a Motion for Reconsideration en banc, which was also denied. The Ninth Circuit made an unreasonable determination of facts about the constitutional violations that Mr. Gibson presented to the Court that clearly show substantial constitutional violations that were prejudicial to Mr. Gibson, affecting the outcome of proceedings, denying Mr. Gibson of a fair trial and due process under the Sixth and Fourteenth Amendments of the United States Constitution. See Appendix "A" & "D".

REASONS FOR GRANTING THE PETITION

INTRODUCTION

Mr. Gibson is a pro se prisoner, who has very limited resource materials to guide him in filing this type of legal brief. Lacking the legal acumen necessary to articulate his issues precisely to this Court, Mr. Gibson asks for tolerance by the Court in how Mr. Gibson presents his case for review. Thank you.

THE NINTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY, STATING THAT APPELLANT HAS NOT MADE A "SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT," CITING 28 U.S.C. § 2253(C)(2), AND MILLER-EL V. COCKRELL, 537 U.S. 322, 327 (2003), IS MISPLACED, CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE UNITED STATES SUPREME COURT, AND AN UNREASONABLE DETERMINATION OF THE FACTS UNDER 28 U.S.C. § 2254(d)(1) & (2).

In chessman v. Teets, 350 U.S. 3, (1955), the United States Supreme Court held: The Ninth Circuit was bound as a matter of law to accept as true all allegations of the petition for habeas corpus. See Thomas v. Teets, (CA 9th Cal), 205 F.2d 236. In Lynch v. Johnston, 160 F.2d 950 (9th Cir. 1947), the Court held: If a petition is not drawn with desirable precision and clarity by a pro se petitioner, 'technical nicity' is not required in setting forth the allegations and issues supported by the trial record and state court post conviction proceedings relied upon to impeach the validity of his conviction, when the petition plainly states constitutional violations and resulting prejudice that affected the outcome of trial.

LOST DESTROYED EVIDENCE:

The Ninth Circuit and U.S. District Court's conclusion that

the loss and destruction of "materially exculpatory" white hair strand evidence and handcuff fingerprint evidence, whose inculpatory/exculpatory value was apparent before it was lost or destroyed, is not a due process violation denying petitioner a meaningful opportunity to present a complete defense with a reliable result, is out of step with this Court's rulings in California v. Trombetta, 467 U.S. 479, 489 (1984), Arizona v. Youngblood, 488 U.S. 51, 58 (1988), and Illinois v. Fisher, 540 U.S. 544, 549 (2004). It is an unreasonable determination of facts and contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1)&(2)

In United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1992), which is the only case in which a federal court determined a defendant's due process rights were violated due to destruction of "materially exculpatory" evidence, since the Supreme Court's rulings in Trombetta and Youngblood, the Ninth Circuit ruled: Equipment that was destroyed, despite requests to preserve it in order to prove the defense position that the equipment was being used for legitimate purposes, and comparable equipment was an inadequate substitute, constituted violation of due process. Id. at 931.

Mr. Gibson's Statement of the Case appraises this Court of the facts surrounding the handcuff fingerprint and why its' inculpatory/exculpatory value was apparent once the Idaho police got the results back from the State Crime Lab that the print was a good print with no known matches in the national databases.

In Trombetta, the Court set the standard for "materially

exculpatory" evidence: 1.) Its exculpatory value must have been apparent before the evidence was destroyed, and 2.) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other available means. Id. at 489. The handcuff fingerprint meets that exact criteria. It was tested at the State Crime Lab, it was a good print, it did not match any of the victims, it had no known matches in the national databases, and it was directly attributed to the suspect because it was lifted from his personal handcuffs.

In *Youngblood*, the Court addressed "potentially exculpatory" evidence, and required that a showing of bad faith on the part of police for loss/destruction of said evidence was required. Id. 58. In *Illinois v. Fisher*, the Court reiterated the "bad faith" requirement, and noted the distinction for "materially exculpatory" evidence which does not require a showing of bad faith. Id. at 549. The *Trombetta* Court also held: "Whatever duty the constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in a suspect's defense. Id at 489.

In post-conviction proceedings, all judicial authorities acknowledge the handcuff fingerprint does not match Mr. Gibson, but ruled it is only "potentially exculpatory" evidence, requiring a showing of bad faith. See Appendix "B, C, E, & H". All courts to date, have refused to acknowledge that the trial record clearly established that Spokane Det. Henderson made the verbal request to preserve the Idaho evidence three days after the two crimes occurred on 11-7-92.

The District Court Magistrate's Report and Recommendation, (R&R), details that the print was tested, does not match Mr. Gibson, spells out exact criteria set forth in Trombetta for "materially exculpatory evidence" but applied the wrong standard, refusing to address the argument that its' inculpatory/exculpatory value was apparent once the crime lab results came back, proving it was a good print with no known matches.

On Direct Appeal, the State C.O.A. ruled the Idaho evidence was properly admitted under res gestae, as opposed to ER 404(b). The handcuff fingerprint evidence was presented at trial, by the State and its' witnesses, and argued by defense in closing, but the State intentionally misrepresented to the Court in closing that: 1.) none of the evidence presented at trial was inconsistent with the defendant, 2.) the trial testimony was that the suspect wore gloves from the very beginning and Teresa Benner testified the defendant was wearing gloves, both intentional false claims contrary to the trial record.

Idaho law enforcement, testified for the state that the suspect did not have on gloves when he entered the store and moved Kathy Ward to the back office area where the Benners and their children were. Once that was done, the suspect pulled out from his daypack, 2 sets of handcuffs, flexcuffs, and gloves. The trial record also clearly shows that when the State asked Teresa Benner if she recalled whether the suspect had anything on his hands, she answered, "I don't recall," an answer she had to give three times because the Bench Trial Court said repeatedly,

that it did not understand Mrs. Benner's answer to the question.

Mr. Gibson' Statement of Facts appraises this Court about the lost white hair strand evidence, the resulting prosecutor misconduct and manifest error on direct appeal by the State C.O.A. All courts have refused to acknowledge or address this manifest error to date. The missing white hair strand evidence is "materially exculpatory" evidence by virtue of its color alone. The trial record clearly established that Mr. Gibson had completely brown hair in 1992, based on Mr. Gibson's 1994 driver's license, utilized in the 2011 photo montage.

Thus, the State knew at the May 17, 2012 pre-trial hearing, that Mr. Gibson's hair color was completely brown in 1992, therefore, the white hair evidence was "materially exculpatory" for Mr. Gibson.

It is truly unknown if the white hair strand evidence is actually missing, or actually submitted for testing and came back as not matching Mr. Gibson. The Washington State Crime Lab (WSCL), noted in its bench notes that the evidence was missing in 2006. At the May 17, 2012 pre-trial hearing, the State told the Court they located the white hair strand evidence, submitted it to the WSCL for DNA testing. Two minutes later the State fabricates a story to the Court that a WSCL technician analyzed the white hairs from the hat and determined they were not suitable for DNA testing. In closing argument, the State intentionally misrepresented that the white hairs were "Lint," a false claim unsupported by the trial record. In response to PRP, the State admits the white hairs are missing and exculpatory, but

that their exculpatory value was argued at trial.

In Respondent's Response to Show Cause, the State Attorney General tells the U.S. District Court that the white hair evidence likely came from someone who wore the hat at the T.V. show "America's Most Wanted." This was another complete fabrication, the white hairs were extracted from the hat at the crime scene. When Mr. Gibson refuted that false claim, the State's response was that the white hairs were "fake" white hairs, thus no value, another complete fabrication, unsupported by the trial record. Because the State keeps changing its story about the white hair evidence, it is truly unknown whether the State has this evidence, tested it, and it does not match Mr. Gibson, or it is actually lost. Not only is this clear prosecutor misconduct, but it is also bad faith as well. The trial record clearly shows the State claimed to have found the white hair evidence and submitted it for testing to the crime lab as of May 17, 2012, and the State knew at that time Mr. Gibson did not have white hair in 1992, thus, its' exculpatory value was apparent to the prosecutor.

Finally, the U.S. District Court made a plain error in stating that Mr. Gibson's habeas argument was that the state not only failed to preserve, but also failed to disclose the lost/destroyed evidence. Mr. Gibson never made that claim, that was an intentional misrepresentation by Respondent's Counsel, meant to mislead and confuse the U.S. District court about the issues Mr. Gibson was presenting for review.

The loss/destruction of the white hair strand evidence and

the handcuff fingerprint evidence was prejudicial to Mr. Gibson because Mr. Gibson cannot have additional testing done on it to see if it matches any of the three unknown DNA found in the hat and sunglasses that do not match Mr. Gibson. If there was a match, there is a reasonable probability the outcome of proceedings would have been different. Each of the DNA profiles that do not match Mr. Gibson are also materially exculpatory evidence. Every court to date has refused to acknowledge the existence of these three materially exculpatory DNA profiles. Thus, Mr. Gibson is unable to have comparative testing done on all the materially exculpatory evidence in this case, therefore, he is unable to have a meaningful opportunity to present a complete defense with a reliable result, therefore, a denial of due process under the Fourteenth Amendment of the U.S. Constitution.

ALTERED EVIDENCE:

The Ninth Circuit and U.S. District Court made an unreasonable determination of facts under 28. U.S.C. § 2254(d)(2), when the Ninth Circuit was presented with clear plain error by both U.S.D.C. and U.S. Magistrate, when the Magistrate's ruling that Mr. Gibson was making a claim that the State failed to disclose this evidence was factually incorrect.

Mr. Gibson's claim was that the evidence was not admissible evidence at trial under Washington State Case Law Doctrine, because it was altered from its original condition when acquired by the state as evidence. See WA Allen v. Porter, 19 Wn.2d 503, 508, 143 P.2d 328 (1943), WA State v. Mitchell, 56 Wn.App. 610,

All post-conviction courts have refused to address this issue because it mandates a reversal of conviction and remand for new trial, and the suppression of this altered evidence. The U.S.D.C. committed plain error when it ruled that the Magistrate addressed both the failure to disclose and admissibility issues, directing Mr. Gibson's attention to DKT 23, at 26. A review of that page of the R&R has nothing to do with altered evidence. A review of the R&R shows that the Magistrate simply adopted the misrepresentations of the State Supreme Court and Respondent's counsel, that this was a claim of failure to disclose the fake beard evidence, a claim never made by Mr. Gibson. Thus the Ninth Circuit abused its discretion in failing to conduct a full and fair review of this issue. See Appendix "B & C".

In *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000), (paraphrasing) the Supreme Court held that if a habeas petitioner can demonstrate a sufficient probability that a "fundamental miscarriage of justice" will result for failure to review his federal claims, *Id.* at 451, the Court must remand for review of those federal claims. Allowing the altered evidence to be admitted at trial violated Mr. Gibson's right to a fair trial and due process, under the Sixth and Fourteenth Amendments of the U.S. Constitution.

PROSECUTOR MISCONDUCT:

The Ninth Circuit and the U.S. District Court's conclusion that there was no prosecutor misconduct in this case affecting the outcome of proceedings, is out of step and contrary to

clearly established federal law as determined by the United States Supreme Court, and an unreasonable determination of facts under 28. U.S.C. § 2254(d)(1)&(2). The Statement of the Case, outlines the multiple incidents of prosecutor misconduct in this case that were prejudicial and likely affected the outcome of proceedings. Mr. Gibson presented a total of 19 incidents of prosecutor misconduct in his habeas petition, the resulting prejudice, and how it affected the outcome of trial.

Manifest/plain error occurred on direct appeal when the State C.O.A. ruled there was no prosecutor misconduct, and nothing in the record indicates the prosecutor lied to the court.

Mr. Gibson presented clear evidence that the State misrepresented to the Court at the May 17, 2012 pre-trial hearing, that they located the white hair strand evidence, sent it to the crime lab for testing, then two minutes later, fabricated a story that the lab technician analyzed the white hairs and determined they were not suitable for DNA testing. State Witness WSCL scientist, James Currie, testified the evidence was missing as of 2006. The State's own admission in response to PRP, stating the white hair evidence is missing, is proof that the State misrepresented locating and sending it to the crime lab at the pre-trial hearing. The State's false claim in closing argument that the white hairs were "LINT", was a fabrication, proven by the State's admission to PRP that the evidence was exculpatory.

Mr. Gibson presented these manifest errors to the State C.O.A. in his PRP and requested the re-litigation of issues

because of the manifest errors and failure by the C.O.A. to address all issues raised on direct appeal, citing RAP 16.4(d) "For Good Cause Shown" and "Extraordinary Circumstances" where the "Interests of Justice" prevail for constitutional error or fundamental error. The C.O.A. refused, stating Mr. Gibson cannot raise an issue previously raised and settle on direct appeal, refusing to acknowledge their own manifest/plain errors and failure to address all issues raised on direct appeal, supported by the trial record.

In *Stepanyan v. Sessions*, LEXIS 16298, (2017) (9th Cir. at Footnote 2), the Court held: "Failure to consider relevant evidence" or due process violations prevents a fair hearing, a court must remand in order to permit a reconsideration of the relevant evidence or afford a new hearing to correct due process violations.

The most flagrant, egregious, and ill-intentioned prosecutor misconduct is when the prosecutor intentionally misrepresented to the Court in closing that none of the evidence presented at trial was inconsistent with the defendant. Yet, 90% of the State's own evidence and State witness testimony about suspect description did not match Mr. Gibson. The bench trial court omitted consideration of every piece of exculpatory evidence and State witness testimony that did not match Mr. Gibson, evidence that was entitled to substantial or considerable weight, likely because of this intentional misstatement of the evidence in closing argument.

In *Napue v. Illinois*, 360 U.S. 264, 269-270 (1959), the

Court held: A conviction obtained through the use of false evidence known to be such by representatives of the State, must fall under the due process clause of the Fourteenth Amendment, the same result obtained when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. In *Lisenba v. California*, 314 U.S. 219, 236 (1941), the Court held: As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. *Id.* at 236. In *Sanders v. United States*, 373 U.S. 1, 15 (1963), regarding successive writs, holding: It should be noted that these rules are not operative in cases where the second or successive application is shown, on the basis of the application, files, and records of the case alone, conclusively to be without merit. In such a case the application should be denied without a hearing.

In this case, Mr. Gibson has presented clear evidence of misconduct, supported by the trial record, and that the State C.O.A. was objectively unreasonable in refusing to acknowledge their own manifest errors about that misconduct in direct appeal. The evidence Mr. Gibson presented in both state court post-conviction proceedings and habeas petition clearly show his constitutional violation claims were not adjudicated on their merits.

28 U.S.C. § 2254(e)(1) provides that "a determination of a

factual issue made by a State Court shall be presumed to be correct," and that this presumption of correctness may be rebutted only by "clear and convincing evidence." In *Darden v. Wainwright*, 477 U.S. 168, 181-182 (1986) the Court made it clear that a prosecutor may not misstate the evidence at any time. See also, *United States v. Young*, 470 U.S. 1, (1985) at n. 7(a): In closing argument to the jury the lawyer may argue all reasonable references from the evidence in record. It is unprofessional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw. In *United States v. Mageno*, 762 F.3d. 933, 943-44, (9th Cir. 2013), the Court held at [2]; Prosecutor's improper statements could be considered on plain error review under Fed. R. Crim. P. 52(b), and [3], Defendant's conviction was subject to reversal because there was plain error, the error affected the defendant's substantial rights, and the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See also *Miller v. Pate*, 386 U.S. 1, 7 (1967) and *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

The prosecutor misconduct in this case denied Mr. Gibson of due process and a fair trial under the Sixth and Fourteenth Amendments of the U.S. Constitution. The Findings of Facts are infected with false/perjured statements by State eyewitnesses that the State knew were false, and failed to correct as they appeared, infecting the fact findings with errors, resulting in a conviction based on an unreasonable determination of facts.

In the next three issues, the Ninth Circuit and U.S. District Court made an unreasonable determination of facts that was contrary to clearly established federal law as determined by the U.S. Supreme Court, under 28 U.S.C. § 2254(d)(1) & (2).

INEFFECTIVE ASSISTANCE OF COUNSEL:

Mr. Gibson's habeas petition presented a total of 9 issues of seriously deficient performance by defense counsel, citing the trial record where each incident took place. The Statement of the Case appraises this Court of the Ineffective Assistance claims as well. The Ninth Circuit was objectively unreasonable in concluding there was no prosecutor misconduct, thus, no resultant ineffective assistance of counsel related to that prosecutor misconduct, refusing to address those claims presented in habeas.

The Magistrate's R&R has multiple plain errors incorrectly stating that Mr. Gibson was claiming counsel failed to object to the WSCL DNA conclusions of the hat evidence, and that the Walsh buccal swab is missing. (See Exhibit "C" at pg. 21 of R&R). Mr. Gibson's actual claim was that counsel was seriously deficient for failing to object to the use of the Walsh buccal swab because it has a broken chain of custody, was never admitted as evidence, and the trial court cited it in its evidence ruling, which was not allowed unless admitted at trial. This was prejudicial because the post-conviction courts cited reliance on the WSCL report that Mr. Gibson's DNA was in the hat, as further proof guilt. Without knowing who the Walsh buccal swab actually

came from, it invalidates the WSCL deconvolution of the DNA in the hat.

All courts have failed to address counsel's seriously deficient performance for misstating weapon match in bank case to this instant case, at pre-trial hearing. This was prejudicial because it likely planted the seed in the court's mind that Mr. Gibson committed this crime due to false claim of weapon match from bank case, resulting in the bench court refusing to consider 90% of the State's evidence that exonerates Mr. Gibson of this crime.

In *Strickland v. Washington*, 466 U.S. 668, 696 (1984), the Court held: In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. (Paraphrasing), Some errors will have a pervasive effect of the inferences to be drawn from evidence at trial, altering the entire evidence picture. If a verdict is weakly supported by the record evidence, the error by counsel can affect the verdict.

Counsel was seriously deficient for failing to do basic research on lost, destroyed, and altered evidence. Counsel lied to Mr. Gibson, stating that said evidence goes only to the weight of the evidence. The altered fake beard evidence was not admissible at trial, due to alteration, as previously presented to this Court. Due process violation for the destruction of the materially exculpatory fingerprint evidence, requested to be preserved, exculpatory value apparent in 1992 by police, required dismissal of charge. Thus counsel's performance was seriously

deficient, and counsel was not acting as "counsel" guaranteed a defendant by the Sixth Amendment.

In *Hinton v. Alabama*, 571 U.S.____, 143 S.Ct.____(2014) [No. 13-6440]: this Court held at "A"(6): An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*. In *Buck v. Davis*, 580 U.S.____, 137 S.Ct____ (2017) at pg. 17, this Court held: A Court of Appeals should limit its examination at the Certificate of Appealability stage to a threshold inquiry into the underlying merits of the claims, and ask only if the District Court's decision was debatable. Clearly, in this case, it was debatable, since the Court committed multiple plain errors and failed to address all issues of clear constitutional violations that affected the outcome of proceedings.

ABUSE OF DISCRETION/INSUFFICIENT EVIDENCE:

Because this was a bench trial, these two issues are combined. The Statement of the Case appraises this Court of the abuse of discretion issues and insufficient evidence. At all stages of proceedings, every judicial authority has engaged in an abuse of discretion by omitting consideration of evidence entitled to substantial or considerable weight, denying Mr. Gibson of a full and fair review, and a fair trial and due process under the Sixth and Fourteenth Amendments. See *Parsons v. Ryan*, 754 F.3d 657, 753 (9th Cir. 2014). Not one judicial authority will acknowledge the existence of the three unknown

exculpatory DNA profiles in the hat and sunglasses, the fact that Mr. Gibson is not even close to the actual suspect's description, or that Mrs. Cole testified that she was positive the suspect did not have brown eyes, and Mr. Gibson has brown eyes.

All DNA evidence in this case is on a wearable item that can be worn by anyone at any given time, it is not intimate DNA that could only have been deposited during the commission of the crime. See *Mikes v. Borg*, 947 F.2d 353, 360 (9th Cir. 1990), at 360. In *Borum v. United States*, 127 U.S. App. D.C. 48 (D.C. Cir. 1967), the Court held: (paraphrasing): Fingerprint evidence was insufficient to sustain a conviction where there was no direct or circumstantial evidence that a defendant touched the evidence during the commission of the crime. That same analogy holds true in a DNA case where the DNA is not intimate DNA. The State presented no evidence to support its theory that the DNA in the fake beard was deposited during the commission of the crime, nor did it offer rebuttal evidence to Mr. Gibson's explanation as to how his DNA was in the fake beard. If Mr. Gibson's DNA is in fact in the hat, it is only as a result of cross contamination by the actual suspect, or Det. Henderson, when processing the evidence, which is likely how Henderson's DNA was in the hat sweatband, because he testified he never wore the hat.

The habeas petition clearly details the abuse of discretion by the trial court. Federal law requires that a jury or judge consider all evidence before reaching a verdict or making a ruling. See *Brown v. Patton*, 544 U.S. 133, 138 (2005). In *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the Supreme Court

instructed that "The relevant question is whether...any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. It requires an evaluation of the totality of the evidence presented at trial. In *Eddings v. Oklahoma*, 455 u.s. 104, 113-114 (1982), SYLLBUS, Held at (b): The sentencer and reviewing court may determine weight to be given relevant mitigating evidence but may not give it no weight by excluding it from their consideration. That also must apply to a bench trial court in reaching a verdict and Findings of Fact that include all exculpatory evidence presented at trial..

The bench court abused its discretion when it cited that Heather Bender saw a suspect that was 5'11", and Mrs. Cole saw a suspect that was 5'10", in its Findings of Facts, both claims impeached on cross exam and re-direct, by overwhelming evidence of their original police statements in 1992-93. The handcuff fingerprint, white hair strands, three DNA in suspect disguise, suspect height, weight, age, eye color, and fingerprint evidence at murder scene, all materially exculpatory evidence, none of it matching Mr. Gibson, yet, none of it mentioned in the Court's Findings of Facts, undermine confidence in the verdict. No rational trier of fact, considering all the evidence, as required by federal law, could have found Mr. Gibson guilty beyond a reasonable doubt. Because the Court ruled it had no doubt the same man committed both the Idaho and Spokane crimes, the materially exculpatory handcuff fingerprint proves Mr. Gibson is not that man.

EVIDENCE NOT PRESENTED AT TRIAL:

Mr. Gibson presented discovery evidence documents related to his bank robbery cases that clearly showed the accomplices in the bank cases were an exact physical match to the suspect in this case, wearing the same type of disguise, hat, sunglasses, and fake beard. Since 90% of the evidence presented at trial by the State did not match Mr. Gibson, had this evidence been presented at trial as "other suspect evidence" there is a reasonable probability the outcome of proceedings would have been different. The State Courts misunderstood this argument, the U.S. District Court and Ninth Circuit refused to address it.

Constitutional Law 840.3 stipulates: To prevail on a new evidence claim, petitioner defendant must only show that the "new evidence" is sufficient to undermine confidence in the verdict. See *Weary v. Cain*, 577 U.S.____, 136 S.Ct.____, (2016) (Lexis 1654). Mr. Gibson demanded that his counsel present this evidence at trial. Counsel told Mr. Gibson that she did not know how to get this evidence admitted for trial review, even though it came through discovery from the State. This was issue 5.2 of the habeas petition.

The refusal by every judicial authority associated with this case, to consider all relevant exculpatory evidence, coupled with the systemic problem of manifest or plain errors committed by all courts to date, have seriously affected the fairness, integrity and public reputation of judicial proceedings, requiring this Court to exercise its supervisory powers to prevent a miscarriage of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Patrick Gibson

Date: 10-10-18