No. _____

In the
Supreme Court of the United States

Joanna Blauch,
Petitioner,
v.
People of the State of Colorado by and through the
People of the City of Westminster,
Respondent.

On Petition for Writ of Certiorari to the Adams County District Court, Case No. 17CV30021; the Westminster Municipal Court, Case No. 2013-2484-DV

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is a growing sinkhole-sized need for some things to be simply clearer.

1. Does ruling the substantive nature of materially relevant documentary evidence with apparent exculpatory value effected non-existent, without applying any statutorily required standards of evidentiary error, contravene constitutionally guaranteed substantial rights by applying standards of *Strickland v. Washington*, 466 U.S. 668 (1984) in a vacuum?

2. Does it breach well-established law to rule that actual existing conflicted representation, memorialized by counsel in writing, does not require upholding voluntary "knowing and intelligent" standards for valid waivers of substantial rights?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joanna Blauch respectfully requests that the Court grant a writ of certiorari to review the decisions of the Westminster Municipal Court denying postconviction relief and the Adams County District (in its Appellate capacity for Municipal Court decisions) affirming Westminster Municipal Court's order.

The petitioner is the defendant and defendant-appellant in the courts below. The respondent is the People of the State of Colorado by and through the People of the City of Westminster in the courts below.

OPINIONS BELOW

The order of the Westminster Municipal Court denying postconviction relief issued December 6, 2016 is unpublished, docketed as Case No. 2013-2484-DV, and reprinted in Appendix A.

The order of the District Court, Adams County, Colorado affirming the Westminster Municipal Court's order issued February 20, 2018 is unpublished, docketed as Appeal from Westminster Municipal Court, Case No. 2017 CV 30021, and reprinted in Appendix B. Petition for Rehearing was subsequently denied April 30, 2018.

The order of the Colorado Supreme Court denying Petition for Writ of Certiorari issued September 17, 2018 is unpublished, docketed as Supreme Court

Case No: 2018SC420, and reprinted in Appendix C.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Westminster Municipal and Adams County District Courts on the basis of 28 U.S.C. § 1257. The Colorado Supreme Court denied Petitioner's Petition for a Writ of Certiorari on September 17, 2018. This petition follows timely pursuant to United States Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

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 to 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 defence.

AMEND. XIV: 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.

STATEMENT OF THE CASE

A. Requisite Factual Background

On the night of March 21, 2013 I was strangled by a man I was staying with.

The police came. They saw fresh bruise marks on my neck from the strangulation. They also saw other bruising and injury marks. They took photographs of the strangulation marks. They allowed the man who strangled me to go free and uncharged. They arrested and charged me.

My family isn't financially wealthy. My senior-citizen, Vietnam combat nurse Veteran mother drained from retirement savings to defend me when I was prosecuted. I gave the biggest check in my life to counsel who promised thorough defense. My mother further exhausted retirement funds for attorneys to defend every available appeal right. No more funds for attorneys exist from my mother's retirement, so this petition is pro se.

This requisite factual background is documented and demonstrated in the record.

Because I kept peeing blood for five days, I reported a gang rape I suffered to the Denver police **on the day of** March 21, 2013 and a registered

(Sexual Assault Nurse Examiner) nurse performed a rape kit exam. During the rape kit exam, the nurse took ***before*** photographs of my body, including my neck, (documented at 5:47 PM) and wrist/forearm, (documented at 5:58 PM.)

A few hours later, approximately 10:30 PM, the man I was staying with said "you owe me," demanding I take my pants off and get in bed with him. I decided to leave. He became enraged. He refused to return my purse with my keys, cellphone, and wallet; which was in his locked car and garage.

His behavior escalated. He grabbed my wrist/forearm, dragged me across the room, threw me on the couch and strangled me until I was unconscious. He ran outside. My head pain was blinding.

Confused, I went outside. I saw a Westminster police car. I thought the neighbors must have heard my screams, so I walked up to the police. They arrested and charged me with battery-(dv), criminal mischief-(dv), and obstruction-(dv). They also took ***after*** photographs within hours of arresting me, **on the late night of** March 21, 2013 showing fresh bruise marks to my neck and arm. The man who strangled me went free and uncharged.

About a week after the incident at issue, I met with the female Denver police detective assigned to the rape I reported. She said she was without the rape kit and I had to deliver it to the police myself. I went back to the examining nurse. The nurse gave me a time- and date-stamped copy of the rape kit,

including the photographs taken during the exam.

The photographs the nurse took—mere hours ***before the man strangled me***—included photographs of my neck and forearm/wrist area. Those photographs were absent the fresh bruise marks shown in *the photographs the police took* ***after the man strangled me.***

Asserting my innocence and protecting my rights was always my most important defense objective. The initial attorney I hired had a divergent defense objective of plea bargaining. The subsequent attorney expressed shock, saying she would fight for dismissal. She substituted as counsel.

Ample evidence shows I was thoroughly involved. I presented counsel with every possible piece of evidence to assert my innocence and protect my rights. Ample evidence shows counsel ignored, devalued, and suppressed exculpatory evidence proving self-defense. She would say she was doing certain things. I would find out she was not doing them or doing the opposite.

Throughout, counsel's documented pattern dismissed ongoing questions and concerns. I asked, specifically, what actions she was taking to investigate and prepare the defense. Within one month of her representation, I documented in writing burgeoning breakdown in communication. Especially, the breakdown appeared around ongoing defense strategy and her actions—they were inaccurate, incomplete, and damaging to the defense.

Throughout volumes of communications, I followed

up consistently. I made ample exculpatory evidence supporting self-defense easily available. Counsel literally refused to actually look at some items while diminishing materially relevant, apparent exculpatory value of others. Her incongruous actions indicated strategy preparations were incomplete, inaccurate, and opposing any actual defense. I asked about what she was actually doing, specifically, against the mass of general items she billed for.

Instead of focusing on defense strategy, she said she thought her job was to "manage" me on a personal level. Frequently, she replied to my questions and concerns with baseline dismissal. She shared personal life details. She placed responsibility for her emotional state onto me, while requesting constant reassurances on an emotional personal level.

Actual conflict materialized within ongoing broken-down communication. The day before trial I wrote to counsel I felt shaky around her representation. Her actions showed she was aligning with the prosecutor, not the defense. She had never resolved the ongoing implications of a pre-trial letter to the prosecutor—how damaging it was—that she was presenting my innocence as questionable.

Less than 24 hours before trial, counsel responded by memorializing the existing actual conflict in writing. Counsel documented feeling threatened and: "i have doubts about my ability to be an effective advocate tomorrow," and "if my actions have made you unhappy to the point where you do not

trust me to proceed tomorrow then i need to tell the judge."

I received counsel's documented notice of actual conflict by email at 8:51 PM on the night before trial scheduled to start at 7:30 AM the next day. Before walking into the courtroom, I asked if she needed to tell the judge about the existing conflict she documented; feeling threatened by me and her doubtful ability to advocate effectively. She said no. The record shows the conflict was not lawfully waived.

B. National Misdemeanor Landscape

Water turned acidic, both raining down from the skies and flowing unseen beneath the surface in carved-out conduits, erodes foundational bedrock until a giant gaping hole opens up causing everything in the vicinity to sink into implosion. Such is the national misdemeanor landscape sinkholed into lower courts. A comprehensive study by the National Association of Criminal Defense Lawyers summarized the "staggering burden" on the courts of "explosive growth of misdemeanor cases" resulting in unmet constitutional obligations and wasted taxpayer money. (See National Association of Criminal Defense Lawyers, 2009, *Report: Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts.)*

Former delineations against felony prosecutions no longer apply as lifelong collateral consequences, some stripping the same constitutional rights as felony

convictions, grow in scope and severity daily.

> "There is no such thing as a low-stakes misdemeanor. The misdemeanor sentence itself, which can range from time served to up to twelve years in some jurisdictions, is often significant. But the collateral consequences of such a conviction can be far worse, affecting a person's work and home lives for decades, and sometimes for the rest of their lives. As a result of misdemeanor convictions, defendants can be fired from their jobs, barred from future employment in many fields, deported, evicted from public housing together with their entire family, and refused housing by private landlords."

(See Roberts, Jenny, *Informed Misdemeanor Sentencing* (March 12, 2018). Hofstra Law Review, Vol. 46, No. 171, 2017; American University, WCL Research Paper No. 2018-01.)

"In fact, so many Americans have a criminal record that counting them all is nearly impossible." (See Friedman, Matthew, *Just Facts: As Many Americans Have Criminal Records As College Diplomas*, November 17, 2015, accessible at Brennan Center for Justice website.) Relentless prosecution, as in misdemeanor cases like this, where defendants insist on asserting their provable innocence with materially relevant admissible documentary

evidence, grounds itself well beyond public confidence instilled by this Court's well-established equitable doctrines in the pursuit of justice. "America has a due process problem," is how an October 16, 2018 article by Mark Chenoweth accessible at www.Forbes.com summed it up in *Have Americans Forgotten Why Due Process Matters?*

Every day growing misdemeanor sinkholes invade our states, our communities and our families serving to interminably cripple our economy. This Court's guidance is needed for lower courts like these to reestablish boundaries of procedural due process compliance and rebuild the foundations of severely eroded everyday functional public confidence in the constitutional baseline of our courts system.

REASONS FOR GRANTING THE PETITION

I. [Question 1] This Court should decide whether ruling the substantive nature of materially relevant documentary evidence with apparent exculpatory value effected non-existent, without applying any statutorily required standards of evidentiary error, contravenes constitutionally guaranteed substantial rights by applying standards of Strickland v. Washington, 466 U.S. 668 (1984) in a vacuum.

From probable cause rationales to sentencing,

evidence determinations are the cornerstones of fair trials. Colo. R. Evid. 103, identical to Fed. R. Evid. 103, predicates error on rulings excluding evidence that affect substantial rights. Those cases, per Colo. R. Evid. 301, identical to Fed. R. Evid. 301, must apply harmless error standards. Further, while Colo. R. Civ. P. 61 is not identical to Fed. R. Civ. P. 61 on harmless error judgments, they appear aligned. Both rules require substantial rights reviewing lenses. (See Colo. R. Evid. 103, Fed. R. Evid. 103, Colo. R. Evid. 301, Fed. R. Evid. 301, Colo. R. Civ. P. 61 and Fed. R. Civ. P. 61.)

Without due diligence, before or at trial, postconviction claims involving excluded evidence collide constitutionally between ineffectiveness and innocence evidence. *Strickland* maintains the necessity—for substantial rights to present complete defenses—that defendants are duly diligent in presenting admissible, materially relevant, exculpatory evidence to counsel. *Strickland* at 691.

Otherwise innocent defendants suffer unconstitutional convictions when lower courts, as here, override circumstantial totality requirements around excluded materially relevant documentary evidence effecting into non-existence apparent exculpatory value. If counsel first refuses to examine critical admissible plausible defense support—and lower courts then refuse to apply lawfully required asserted error standards—nothing remains except certain death march. The constitution contemplates

fair trials, not certain deaths.

A. This Court did "not establish mechanical rules;" "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

No postconviction denial exists that I was strangled. No denial exists of what both the *before* and *after* photographs prove. *Before* strangulation, my neck was free of fresh bruise marks. *After* strangulation, bruise marks appear. No denial exists that strangulation—proven with *before* photographs next to *after* photographs showing fresh neck bruises—presents valid need for self-defense to live.

In totality of circumstances, neither judge ever mentioned strangulation fact, proven postconviction, by new innocence evidence previously suppressed by counsel's refusal to examine it. Never denied is the fact that critical defense evidence here includes excluded materially relevant, apparently exculpatory *before* photographs proving valid self-defense need. Any mention by either judge of photographs, admitted into or excluded from evidence, entirely omits proven corresponding strangulation fact. What the photographs prove—the strangulation fact requiring self-defense—is foundational to asserted claims. The photographs are authenticated and their origin is irrelevant.

Character assassination is familiar trial tactic.

Throughout, the prosecutor's case foundation was claiming defendant exaggeration and mental illness because I reported a rape. Further, defense counsel aligned with the prosecutor's claims of exaggeration and mental illness. (*Tr.* 07/12/16, pp.70:25-71:9, 106:21-107:8, and 108:20-109:25.) Although, counsel never raised competency as lawfully required if mental illness indeed exists. (*Tr.* 08/30/16, p.37:3-12.)

The record shows I delayed reporting the rape. Only doing so after five days of peeing blood from internal injuries. (*Tr.* 07/26/16, p.105:5-10.) No one associated with the rape's prosecution ever levied fabrication allegations. Like most states, Colorado has a "rape shield law." Colorado's supreme court outlined legislative purposes and protections for reporting victims of rape in *People v. Harris*, 43 P.3d 221, 225-26 (Colo. 2002):

> Accordingly, the rape shield statute proscribes subjecting victims, who already have suffered a "crime of violence and domination calculated to humiliate, injure and degrade the female," to the second trauma inherent in an irrelevant and embarrassing probe into the intimate details of their personal lives. (Citing to *People v. McKenna*, 196 Colo. 367, 372 (1978).)

The prosecutor's evidentiary case dwelled mostly

in alleged victim testimony. Three officers testified. None witnessed the incident. The only physical evidence considered was two broken drinking glasses (never fingerprinted or admitted) and my purse (location undocumented by police). Admitted photographs showed the glasses, apartment areas, and the alleged victim's physical appearance (slight scratch on nose) and mine (extensive injuries).

Throughout trial as well as postconviction proceedings, both prosecutor and municipal judge here questioned me specifically about the rape I reported, having me relive for them explicit details. (See e.g., *Tr.* 07/26/16, pp.65:2-67:3 (to which my appellate attorney objected and was overruled by the judge who said that me recounting in her public courtroom—explicit details of the rape I reported in a case unrelated to the case before her—spoke to my credibility) and 126:12-127:20.)

Those details are irrelevant to the incident at trial. Relevant evidence changes the likelihood of material fact being true. The material strangulation fact requiring self-defense is no more likely true or not true by reported rape details. Rape details are not incriminating to the trial incident. Questioning about those details defies rape shield law protections.

Extensive pre-trial arguments, both at motions hearing and on day of trial, were made solely around injury scope involving admission of *after* photographs not *before* photographs. They showed injuries inflicted when the alleged victim grabbed and

strangled me, along with some days-older healing rape injuries. Deliberately omitting context, the prosecutor alleged opposition for potential confusion between fresh bruising from the alleged victim and older healing rape injuries, saying the latter supposedly occurred because I "had to be restrained." (*Tr.* 10/3/13, p.14:13-14.)

Determinations *must* consider totality of evidence before the jury. *Strickland* at 695. The only evidence counsel presented supporting self-defense was diminished defendant "choking" testimony, miniscule police testimony from questioning about reported strangulation and the *after* photographs showing fresh neck bruising. Without denying the strangulation fact was reported, comparatively, four witnesses (three of them police) denied the material strangulation fact itself (including the only defense witness subpoenaed except me). The jury never saw the *before* photographs which were absent neck bruising inflicted by the alleged victim *after* strangling me.

Placing this Court's totality requirement into a vacuum, never does material strangulation fact proven by new innocence evidence factor into either judge's determinations. Particularly compelling, counsel specified she was shown some photographs but "never [actually] saw" the materially exculpatory *before* photographs because she *never* actually looked at them because of rape kit origin. (*Tr.* 07/26/16, p.26:7-17.) Yet, in ruling counsel *did* look at the

before photographs, the municipal judge found a contradictory fact non-existent in the record.

No functional adversarial process occurred with excluded *before* photographs. If admitted, the jury's total comparative deliberation is entirely new. If counsel actually looked at them, her evidentiary mindset is changed about appearing exaggerated. If counsel presented them to the prosecutor at the beginning, claiming exaggeration next to what they prove is incredible. There's no exaggerating—no mechanical rule—to deny what comparative *before* and *after* photographs show: I was strangled.

B. Obstructing this Court's rulings in *Schlup v. Delo*, 513 U.S. 298 (1995) and progeny, lower courts here formatively divorced innocence evidence from constitutional claims.

Question 1 does not distill down to seeking correction of error or misapplication of law from this Court. Neither judge's ruling actually applied lawfully required state, identical to and aligned with federal, error standards affecting substantial rights to new innocence evidence review. Namely, the bolstered *before* photographs proving strangulation fact place side-by-side with *after* photographs.

As in *Schlup*, here postconviction proceedings demonstrated constitutional error in depriving the jury of critical new reliable evidence establishing innocence. *Id.* at 301. Procedurally, access to federal review under habeas claims is otherwise unavailable

here to non-custodial defendant masses. Under *Schlup*'s articulated standards, these claims are credible involving "new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *House v. Warden*, 547 U.S. 518, 537 (2006), citing to *Schlup* at 324. Here, neither postconviction reviewing judge's rulings connected to total record, especially documentarily proven material strangulation fact, divorcing this Court's requirement "to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup* at 329.

This postconviction case admitted new innocence evidence of materially relevant documentary evidence (photographs) with apparent exculpatory value. (*Tr.* 07/26/16, p.103:4-105:10) Reliability remains undisputed. Further, any so-called "prior restraint" evidentiary details occurring during reported rape is irrelevant to admission here, thus not applicative aggravatingly to photographic evidence proving neck strangulation. (See Section I.A. *supra.*) Also excluded by counsel's own suppression, additional testimony bolstering this critical defense evidence.

Live testimony delivered postconviction confirmed direct witness to impact of prior violent threats by alleged victim. Neither judge disputed the testimony's credible content. Further, this hearsay-excepted testimony delivered present sense impressions of alleged victim's violent threats as they

happened. (*Tr.* 06/27/16, pp.21:13-25 (phone call during moments of alleged victim's prior violent threats) and 25:14-24 ("very anxious, very nervous, very stressed" impact of alleged victim's threatening behavior). See also Colo. R. Evid. 803(1-3) (Federal Rules Identical).

Colorado's seminal longstanding precedent in *People v. Jones*, 675 P.2d 9 (Colo. 1984) makes clear prior violent threats of alleged victim known to defendant are "admissible as direct evidence of an essential element of self-defense, namely, the reasonableness of the defendant's belief in the imminent use of unlawful physical force against him." *Id.* at 17 In a Department of Justice commissioned report, researchers affirm describing an injurious event can "take on very different meaning if jurors were given the context of the events. The same may be true for violent domestic relationships, with outward manifestations of normality that take on very different meaning when the private violence is described." (See Hartley, Carolyn C. and Ryan, Roxann, *Prosecution Strategies in Domestic Violence Felonies: Anticipating and Meeting Defense Claims, Final Report.*)

The municipal judge fully disregarded lawfully required error and substantial rights standards related to excluded photographic innocence evidence. The district judge recognized asserted error attached to "Photographs" before him in footnote 2 of his order. However, he ruled on an issue of admitted

(*after* photographs) versus excluded (*before* photographs)—evidence and claims not actually before him—instead of what was. (See Section I.C. *infra*.) Any error determinations by either judge dealt with other assertions, not excluded *before* photographs proving innocence with self-defense from factual strangulation.

Counsel's investigation for presenting any viable defense grounds Sixth Amendment rights to effective representation. Here, all counsel had to do was look. Just look. Minimal effort.

Remarkably, neither judge dealt with the factual strangulation, proven with side-by-side *before* (excluded from trial) and *after* (admitted at trial) photographs and bolstered by live testimonial support of present sense reporting of prior violent threats. In both orders—literally—only one passing reference to factual strangulation with municipal judge mentioning one question, asked alleged victim right before deliberation, was whether he'd strangled me.

No legitimate interests in trial process exist in depriving the jury of this critical self-defense evidence. No danger of unfair prejudice exists as the question before the jury involved the factual strangulation and corresponding valid self-defense need. No temptation exists for jury acquittal based on alleged victim character. It was a simple question multiple times over: did he strangle her or not? (See *Tr.* 10/03/13, pp.304:4-16, 306-308:20-7, 320-322:16-13, 323:4-10, 339-34:24-24, 343-348:11-3, 351:19-22,

and 354:14-18.)

With previously excluded new documentary innocence evidence (*before* photographs absent neck strangulation marks) in front of the jury next to previously admitted (*after* photographs showing fresh neck strangulation marks) the strangulation fact is proven. The proven factual strangulation further bolstered by live testimony of alleged victim's prior violent threats when they happened. Which, gives rise to valid self-defense need in light of his confession of firm preemptive grabbing, recognized as "provocation" by the prosecutor in directing the jury to ignore it. (*Tr.* 10/03/13, pp.158-159:22-25 and 367:12-21.) The jury would then have concluded subsequent strangulation required self-defensive physical contact.

C. The district/appellate judge misunderstood what evidence the claim rested on and ruled on a claim that was not raised.

In two short paragraphs with footnote to a claim neither raised by, nor relevant to, this appeal the district judge ruled on "Photographs." The actual relevant claim raised: "A new trial is required because the municipal court ignored, like trial counsel, admissible exculpatory photographic and third-party evidence showing Ms. Blauch was strangled during the incident at issue by [alleged victim], who counsel knew had a propensity for

violence."

New evidence claims are generally only allowable in postconviction petitions. Federal laws require state remedies exhaustion with habeas corpus writs unavailable to non-custodial defendant masses. Suffering unconstitutional misdemeanor convictions with lifelong collateral consequences—some stripping same constitutional rights as felonies—a district court here is the only appellate reviewing body otherwise available to defendant masses for substantial innocence evidence previously excluded or suppressed.

Further obfuscating review of issues not raised nor relevant to the issue actually before the district judge, he cites only generally to "2013CV32514, Order on Appeal, pp.5-7." A superseding "Amended Order on Appeal" with exact same case heading also issued subsequent to a "Petition for Rehearing." Assuming reliance on the order subsequently superseded, the issue he cited to there as having been raised and ruled on was still not the issue before him. That issue dealt with the prosecutor having moved completely outside the context of being restrained in the course of reported rape into a back door improperly propped open and confusing the jury with otherwise inadmissible evidence outweighed by prejudice.

That direct appeal raised six issues. None had anything to do with previously excluded *before* photographs admitted postconviction. The district judge clearly misunderstood what claim required

review. Nor, that the evidence the claim before him rested on was previously excluded rape kit ***before* photographs** proving factual strangulation. Only his first sentence mentions a "choice not to introduce photographs from [the] rape kit." Then, evidence actually introduced at trial—the ***after* photographs**—is gone.

No ruling by the trial judge happened about the rape kit *before* photographs at issue to the district judge. No record evidence shows the trial judge even knew they existed. All evidence shows that counsel "never saw" those *before* photographs to adequately inform herself of what they prove: that factual strangulation is a substantially valid need for self-defense.

Nowhere inferred in the district judge's brief mentions of "[p]hotographs" is that he, himself, ever saw them. Much less, put them side-by-side to comprehend their substantive nature supports a valid self-defense claim with factual strangulation inflicting corresponding neck bruising. Any legally required deference to lower courts comes from trust to rectify unconstitutional trial procedures and restore personal trial rights. Allowing inapplicable rulings contravenes required review of constitutional trial rights.

D. Allowing lower courts to rule the substantive nature of evidence proving valid need for self-defense effectively non-existent while snubbing statutorily required

evidentiary error standards contravenes constitutional guarantee of fair trial and sends the message: you should have let yourself die.

This Court's standards regarding innocence evidence requires showing a fair probability, in light of ***all evidence*** including wrongly excluded, the jury "would have entertained a reasonable doubt of [] guilt." *Sawyer v. Whitley,* 505 U.S. 333, 339 n. 5 (1992), (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n. 17 (1986)) No Circuit appears to have yet denied documentary photograph innocence evidence value by effecting non-existent its substantive nature.

Here, the lower courts pushed beyond merely denying evidentiary value. The municipal judge acknowledged this specific excluded *before* photographic innocence evidence existed. The district/appellate judge failed to recognize its existence entirely; not reviewing the actual evidentiary claim presented. Both judges omitted entirely proven material strangulation fact. Therefore, evading entirely evidentiary substantive nature—effectively ruling it non-existent.

Counsel's own testimony regarding reconstructed circumstances bolsters ample record evidence of unconstitutional omission of materially relevant exculpatory documentary innocence evidence. Aligning with the prosecutor's repeated assertions throughout, counsel agreed her own perspective was

mentally ill defendant who exaggerated police reports of both strangulation and rape. (See *Tr.* 07/12/16, pp.70:25-71:9 (saying multiple times she viewed defendant mentally ill); 105:5-108:17 (violating rape shield protections in submitting supposed explicit details of the reported rape); and 38:17-42:14, Exhibits AK and AL (repeatedly diminishing strangulation fact to "choking," despite definitely knowing strangulation while claiming, first, never hearing that fact and then being impeached by documentary evidence.)

Qualified legal expert testified claims of supposed defendant mental illness do not excuse counsel's performance deficiencies. That, if counsel's mental illness assertion were sincere, legal responsibility to assess competency exists. Further, in his assessment, nothing here reached a level actually triggering competency evaluation. (*Tr.* 08/30/16, pp.36:24-37:12.)

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984) The record amply demonstrates counsel's judgements around what information the defendant supplied in regard to informed strategic choices and evidentiary investigations were functionally conflicted by her resulting emotional state and divided loyalties.

Counsel testified defendant's communications were constantly upsetting, making her "life really miserable...because [she] was always worried that [defendant] was always mad at [her]." Although, claiming her constant emotionally upset state didn't lessen her representative abilities. In the very next uttered breath, she admitted her "really miserable" emotional state made communicating more difficult, because: "You know, you don't want someone to be mad at you. I mean, you know, it was managing someone who has some – a mental illness. That's how I feel." (*Tr.* 07/12/16, pp.100:4-23 and 101:4-12.)

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. *Strickland* at 691.

This Court goes on in this section of *Strickland* in discussing only when limited investigation decisions may apply. Ample record documentation shows counsel informed of evidentiary facts materially supporting valid self-defense need from strangulation and prior threatened violence. She either dismissed or ignored them altogether, choosing to alternatively advance denial. Denial was implausible with no

evidentiary support appearing anywhere. Further, defense's legal expert testified self-defense was the only viable defense. (*Tr.* 08/30/16, p.74:1-13.)

Counsel proceeded throughout abandoning the only viable defense with every prosecutorial alignment and piece of untouched materially relevant evidence. She culminated closing by manufacturing non-existent supposed fact to the jury: "What [defendant] did is she admitted was she hit him out of frustration." (*Tr.* 10/03/13, p.367:11-12.) The jury never received instruction "out of frustration" being defense to any charge here. Defense's legal expert confirmed: "Frustration is no defense." (*Tr.* 08/30/16, p.96:1-97:22.)

It should be "lucky" enough to endure rape kit examination that produces materially relevant documentary evidence with apparent exculpatory value. It should be "lucky" enough not to actually die from strangulation apparent from neck bruising. Or, as counsel charged with advocacy communicated, to be "lucky" enough that the alleged victim "could have killed you then and he could have bashed your head in, too, but those things did not happen." (Exhibit AL)

"Luck" is not this Court's standard assuring fair trial. It was erroneous ruling to delete material facts, while manufacturing some and relying on other non-existent facts. Divorcing, then, this Court's requirement of determinations within totality of circumstances was unreasonable. Lower courts'

duties to correct error through appeal is this Court's well-established precedent with habeas writs otherwise unavailable to non-custodial defendant masses, as here, guarding against such malfunctions in state criminal justice systems. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015), citing to *Harrington v. Richter*, 562 U.S. 86, 102-3 (2011).

This question presents novel issues this Court has never addressed showing how far lower courts—inculcating countless lifelong repercussive unconstitutional misdemeanor convictions—otherwise allow themselves in refusing applicative law and this Court's precedents. Otherwise, lower courts ignoring into non-existence material strangulation fact that reliable documentary evidence proves valid need for self-defense sends the message: you should have let yourself die.

II. [Question 2] This court should decide whether ruling that actual existing conflicted representation, memorialized by counsel in writing, does not require upholding voluntary "knowing and intelligent" standards for valid waivers of substantial rights breaches well-established law?

This Court makes clear: "We generally disfavor inferred waivers of constitutional rights. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1939); *Barker v. Wingo*, 407 U.S. 514, 525-526 (1972)." (See concurrence by Messrs. Justices Stewart and Powell in *Estelle v.*

Williams, 425 U.S. 501, 515 (1976).)

Constitutionally sound foresight in lower courts like these, predicated by this Court's well-established requirements for valid voluntary "knowing and intelligent" waivers of substantial rights, sustains due process and fair trials. Question 2 does not distill down here to misapplication of law or even factfinding error when lower courts refuse to apply the law at all to any facts regarding waivers of substantial rights. This case clear of applicative habeas gatekeeping hurdles—given determinative totality—asks this Court's reasonableness in determining constitutionally defective rulings without predicated valid waiver. Within this Court's procedural framework of constitutionally guaranteed procedural rights this case asks consequently:

- Whether this Court allows lower courts to consistently prop open constitutional claim floodgates in compelling—without this Court's required voluntary "knowing and intelligent" valid waiver—conflicted representation especially by privately retained counsel-of-choice.
- Whether this Court allows conflicted counsel alignment with prosecutor in depriving defendant of chosen defense objective of asserting innocence.
- Whether this Court allows conflicted counsel to deliberately obstruct defendant's right to constitutional claims of defective prosecution

lawfully requiring pre-trial assertion.

- Whether this Court allows conflicted counsel to lead allegedly mentally ill defendant into trial without competency assessment.
- Whether this Court allows conflicted counsel to personally suppress critical, materially relevant, apparently exculpatory documentary defense evidence bolstered by live testimony solidifying juror reasonable doubt.
- Whether this Court allows conflicted counsel to manufacture non-existent fact (especially material fact falsely alleging defendant admitted a criminal act "out of frustration") violating counsel's candor duty to the tribunal.

A. The documentation of existing conflicted representation, memorialized by counsel, is undisputed evidence here.

The trial judge here no longer worked for the municipality and postconviction hearings happened before an entirely new judge. The trial judge seemed to recognize the gravity of misdemeanor prosecution, potential sentencing, and lifelong collateral consequences foundationally on nebulously-tracked masses of defendants' lives. Pretrial, within a month of arrest, he refers to "the imminence of a trial" questioning subsequently-substituted counsel whether I planned to plea bargain away asserted

innocence. That, "nothing attracts the attention as much as being executed in the morning." Right before setting trial, he stated this sort of inevitability, "it forces – it really does force the mind" and subsequently-substituted counsel agreed, laughing with him (heard on audio transcript.) (*Tr.* 04/24/13, p.2:4-18.)

> "In the past, this Court has held that a waiver of the Sixth Amendment right to counsel is valid only when it reflects "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, supra, at 464. In other words, the accused must "kno[w] what he is doing" so that "his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)." *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988).

No judge, nor anyone else, denied material fact of conflicted representation memorialized by counsel's documentation. Instead, both municipal and district/appellate judges chose non-compliance with this Court's lawful standards for constitutionally-guaranteed procedural waiver protections of substantial rights. This Court also recognized counsel hesitant to raise conflicts especially those, like here, substantially documented in the record. *Wood v. Georgia*, 450 U.S. 261, 265 n. 5 (1981). If the documented existing conflict were raised to the trial judge, complying with this Court's requirements, the

judicial bias alleged postconviction would likely assuage itself.

Defense's expert here confirmed as lawfully questionable, prosecutor's rebuttal recall of the alleged victim right before closing where several simple pointed, easily understood by jury, questions foundationally attacked functionally non-existent defense. (*Tr.* 08/30/16, pp.57:25-58:22.) The municipal judge speculated counsel lacking surrebuttal "was a waste of time" and a jury could be lost, not because counsel pointedly denied effective advocacy, but because of general supposed thought of beating "a dead horse." To further bolster her speculative determination, she cited unrelated fact that defense's expert was not present during trial (neither was this municipal judge) to observe jury impact thereof.

This Court's mandate extending from *Johnson v. Zerbst*, 304 U.S. 458 (1938) and progeny, of voluntary "knowing and intelligent" waivers of substantial rights to conflict-free counsel, disfavored by inference and recorded by trial judge, serves as prophylactic containment of continuing lower court hindsight allowances of hypothetical justifications in some states, including Colorado. (See, e.g., *People v. Garner*, 381 P.3d 320, 333 n.9 (Colo. App. 2015) (citing to range of current states, including Colorado allowing this ongoing practice contrary to this Court's rulings). Perhaps reserved as future question, this Court has never addressed these ongoing allowances for lower court determinations

using post-hoc hypotheticals, rather than what the record shows as actual indefensible basis, for counsel's unreasonable acts or omissions of deficient performance.

The crux of this Court's question here is foundational non-compliance cases like this allowed against this Court's deep-rooted constitutionally-compliant procedural waiver requirement. Especially, for substantial rights regarding self-documented conflicted representation. Heightened, as the appellate/district judge inferred in specifically highlighting that authoritative cases cited here deal mostly with conflict-causing broken-down communication of court-appointed versus counsel-of-choice.

Defenses legal expert delivered extensive testimony consistently outlining clearly evident documented pattern of counsel's conflicted deficient performance. "So she's - I don't know if she's - if she even understands what self-defense is at this point." "Because they had nothing else in - in the trial." (See e.g., *Tr.* 08/30/16, pp.42:14-46:12 (outlining deficient performance with not presenting, nor even examining, materially relevant exculpatory self-defense evidence and countering municipal judge's determination that surrebuttal examination of final pointed denial of self-defense was, hypothetically, "a waste of time.") "If you don't have a clear defense that the jury can understand right from the get-go - if you look at [counsel's] opening statement, it's not even clear. Her first paragraph is not even

addressing what self-defense is." (See also e.g., *Tr.* 08/30/16, pp.52:2-56:25 (delineating attorney conduct evidencing actual strategic preparations versus post-hoc hypothetical justification for actions lacking demonstrated reasoning.)

Divided loyalty results from doubtful ability to effectively advocate. Counsel's unequivocal testimonial confession: "Yes. I - yes, I change my answer. I had doubts about my ability to be effective for her." (*Tr.* 07/12/16, p.67:16-17.) In cases like this, documented conflicted representation lives within layered contributing circumstances including broken-down communications. Attorneys "systematically understate both the existence of conflicts and their deleterious effects." *West v. People*, 341 P.3d 520, 532 (Colo. 2015); *see also United States v. Nicholson*, 611 F.3d 191, 213 (4th Cir. 2010). The record shows counsel obstructed defendant's right to raise the conflict issue, counsel documented in writing, then confessed in live testimony. Defense's legal expert confirmed counsel, not defendant bears primary responsibility to raise documented actual existing conflict. (*Tr.* 08/30/16, pp.34:21-36:10.)

Counsel confessed her primary interest, especially with advising defendant, was not protecting defendant interests, substantial rights, and effectively advocating. Rather, counsel acted to avoid being thrown "under the bus" by her characterization of a "loose cannon" client she felt threatened by. (See *Tr.* 07/12/16, pp.67:6-70:5; 93:8-11; 94:9-11; and Exhibit J.) Counsel summarized divided loyalty

between protecting client interests, sustaining this Court's constitutionally-guaranteed substantial rights, and effective advocacy against being "a puppet." (See *Tr.* 07/12/16, pp.58:21-25 and 86:24-87:1) Defense's legal expert confirmed counsel exercises individual "independent, professional judgment and don't "just do things because the client says." Here, however, he pointed out even he suffered similar opposing confusion as counsel here in realizing her functional advocacy role causing "serious issues with trust and communicating." (*Tr.* 08/30/16, p.41:7-19)

Legal representation, heightened with privately-retained counsel-of-choice, moves beyond mere transactions. Defense responsibilities, legally binding with this Court's established standards for both counsel and defendant, never involve any sort of "puppet" or "master" relationship. Certainly effective advocacy requires conflict-free, truthful, functional interaction to achieve defense objectives despite this Court clearly indicating no entitlement to "meaningful" relationship, When ample record evidence shows lower courts allowing conflicted, disingenuous, unreliable representation masses of defendants suffer irrevocable obstruction of this Court's well-established constitutionally-guaranteed procedural rights to fair trials.

B. Ruling against circumstances surrounding documented actual conflict does not establish waiver of conflicted representation.

"[W]ishful thinking."

Colo. R. Civ. P. 12(b)(2) and (3) parallels Fed. R. Civ. P. 12(b)(3)(A) as both require assertions "alleging a defect in instituting the prosecution" pre-trial or associated defendant rights are forever lost. This Court defines selective-prosecution claims as "independent assertion[s] that the prosecutor has brought the charge[s] for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463. (1996). Decades ago this Court sought to instill the efficiency of constitutionally-sound procedural foresight in lower courts because "inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial." *Davis v. United States*, 411 U.S. 233, 241, (1973).

Within one month of representation, written documentation to counsel (Exhibit AD) outlined burgeoning communication breakdown patterned ongoing throughout entire proceedings.

> "As we discussed, I have affirmed over and over that it is not my desire to go to trial, especially because the police needed to arrest the actual attacker and not his victim. The most important thing to me is that and all of my potential rights to appeal be entirely preserved. Whatever possible pre-trial motions can be made, need to

> be made upfront, so that every possible contingent angle is covered, should there unnecessarily be a trial."

Further, counsel received written notice of rapidly growing severity of her incongruous actions causing "significant concern" indicating need to address "breakdown in communication." In keeping with defendant authority vested under Colorado's Rules of Professional Conduct, Rule 1.2, Comment 3, prior authorization for counsel to proceed with other written representations without first review and express approval was withdrawn on June 26, 2013.

Prior to deadline for pre-trial motions, supporting defense objective to avoid the burden of trial, asserting selective prosecution was made clear to counsel. In postconviction hearing, the municipal judge, herself, specifically questioned about pre-trial selective prosecution asserted according to defendant's clearly stated documented defense objective. (*Tr.* 07/26/16, pp.124:1-126:11.) The judge never denied viable credibility of this assertion required pre-trial, only making passing reference to its fact in ruling. Further, counsel herself confirmed into the record selective prosecution in this case had foundational merit (*Tr.* 08/15/13, p.48:14-18) and she deliberately obstructed its assertion. (See *Tr.* 07/12/16, pp.44:15-48:11 and Exhibits H, E, and AO.)

"Wishful thinking" is how counsel subsequently justified deliberately obstructing defense objective in asserting lawful pre-trial substantial rights. (*Tr.*

07/12/16, p.46:16-17.) Counsel admitted receiving in writing notice that prior authorization to file motions without prior review and express approval had been withdrawn. Counsel confessed deliberate deception in forgoing defendant's right to assert defective prosecution claims, required by law to be asserted pre-trial, because of disdain she had for any impending conversation thereof. She recognized knowing the severe breach of trust and clearly communicated distress causing defendant to be "literally sick to [her] stomach." (See Exhibits AD, H, and I and *Tr.* 07/12/16, p.59:4-23; *Tr.* 07/26/16, pp.14:18-16:4) Mere personal inconvenience dictated counsel's personal choice to irrevocably violate defendant's trust causing defendant to be "literally sick to [her] stomach."

The municipal judge evaded the foundational asserted claim before her that actually conflicted counsel needed to withdraw. Or—**at the very least**—otherwise comply with this Court's valid waiver requirements. With significant attribution to predicated circumstances only, she never denied actual existing documented conflicted representation. Instead, she solitarily confined ample evidence of conflicted, disingenuous, unreliable counsel-of-choice.

There is no divining the unknowable in terms of how case minutiae documented in a record plays out determinatively. Defense's legal expert definitively affirmed, specifically cited to by the municipal judge, broken-down communication unequivocally affected

trial proceedings even without being able to divine the unknowable. (*Tr.* 08/30/16, p.85:15-16.) The municipal judge cited agreement with defense expert's statement of case law obligating counsel to raise documented conflict exacerbated by broken-down communications to the trial judge, even if otherwise confusing as to appropriate remedy, minimally "to have the Court sort out something." (*Tr.* 08/30/16, pp.34:13-36:13.)

"You have upset me [sic] and i do not understand why you are doing this on the eve of trial," was counsel's emotional response to written communication triggering counsel's duty, and corresponding documented affirmative knowledge thereof, to raise actual conflicted representation to trial judge on record. The municipal judge highlighted defendant's preemptive proactive email to counsel the day before trial "expressed feeling uncomfortable" with documented existing conflicted representation; then recognizing defendant's rebound attempt to ameliorate counsel's consistently apparent lack of self-confidence. This Court saw a psychologist literally swear in an affidavit to advising another defendant before this Court that praise would ameliorate counsel's apparent lack of self-confidence. See *United States v. Cronic*, 466 U.S. 648, 651 n.6 (1984).

Lower courts charged by federal courts with correcting error and constitutional defects realize systematic understating of "both the existence of

conflicts and their deleterious effects." *West*, 341 P.3d at 532; *see also Nicholson*, 611 F.3d at 213. *West and Nicholson*. Here, the municipal judge conflated circumstances with conflicted representation. Conflating existing ***cause*** cannot erase existing ***effect***. Constitutional deprivation results from conflicted representation like this. Distorted lower court hindsight results in subsequent appellate/habeas claims in lower court non-compliance with this Court's constitutionally-sound foresight in mandating valid waivers of substantial rights to conflict-free counsel.

C. Requiring valid waivers of actual existing conflicted representation protects this Court's interests in equitable principles for defendants, especially those with privately retained counsel of choice, suffering constitutionally defective advocacy.

"This [municipal postconviction] Court is not persuaded that lacking a clear theory of defense is ineffective."

This case before this Court clears gatekeeping hurdles otherwise barring federal courts from reaching the merits of corresponding habeas claims. Per 28 U.S.C. § 2254(b)(1)(A), claims are exhausted in state courts. The lower courts' rulings rest outside independent state procedural ground. See, e.g., *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012). This

petition is not successive per 28 U.S.C. § 2244(b) or untimely per 28 U.S.C. § 2244(d).

Further, while previously retained appellate counsel presented this Court's recent beneficial decision in *McCoy v. Louisiana*, No. 16-8255, 2018 WL 2186174 (U.S. May 14, 2018), to Colorado's supreme court applied to trial counsel's override of defendant's consistently asserted defense objective of asserted innocence, they declined review. Thus, this case presents no barriers to this Court's commitment to comity, federalism, and finality. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Instilling lower court compliance with this Court's well-established requirements increases avoidance of compelling constitutionally defective advocacy with voluntary "knowing and intelligent" waiver. Thereby, raising lower court efficiency of equitably principled foresight as stopgap for surfacing appellate claims.

The municipal judge's one-paragraph ruling on trial preparations ("*Not prepared for trial.*") recites plus-side/minus-side facts without equitable connection to subsequent recitation of conclusory legal theory absent authoritative support. Recited plus-side factfindings: counsel "worked very hard," "put in many hours," and "had [varied] voluminous communication." Recited minus-side: "lacking a clear theory of defense," waiting for prosecution's lead before picking "a horse to ride," and generally counsel "will still ride multiple horses hoping

something sticks with the jury."

Lacking clear defense grounded in defendant's objective of asserting innocence (*the cause*), counsel herself suppressed critical materially relevant, exculpatory evidence and permitted unchecked multiple instances of fatal improper misconduct. The confused jury saw quashed presumption of innocence with prosecutor's burden shifting and counsel subsequently abandoning any possible defense with manufactured fact admitting guilt in closing (*the effect*). The cause (conflicted representation) created the effect (unconstitutional deprivation of trial rights and unfair trial).

In simple clearer terms, resulting conclusions must logically follow from preceding factfindings. Anyone can "work hard," "put in many hours," or have "voluminous communication" with a client. Equally as probable—tending toward pervasive struggle or lack of adequate preparation and actual conflict within broken-down communication—for counsel to work hard, put in many hours and communicate profusely and then still lack clear defense.

Lacking clear defense, affirmed by the municipal judge from evidence here, does not equal having several prepared defenses (or, "multiple horses" to ride, in the judge's vernacular citing to invented rationale available to present. (See also Section II.A. *supra*.) Lacking clear defense certainly does not infer adequate preparation for counsel ready to get

on whatever "horse" the prosecution might present—much less counsel can ride certain specific horses.

If plus-side/minus-side premises corresponded relevantly and true to similar determinations that might be objectively reasonable. Here, ample evidence demonstrated in the record proved otherwise. This Court ruled constitutionally guaranteed effective representation does not entitle a meaningful relationship with counsel in *Morris v. Slappy*, 461 U.S. 1, 14, (1983). However, resulting factfinding and applicative legal conclusions must arise from reasonable determinations of resulting impact of conflicted representation on substantial rights sustained otherwise with adequate trial preparation ensuring clear defense. Meaningful relationship aside, when counsel unequivocally confirms doubtful ability to effectively advocate triggering existing need to tell the trial judge on the record—well-established by this Court is that required valid waiver be rendered to proceed otherwise.

D. In order for actual existing conflicted representation to be validly waived the evidence in the record must meet the voluntary "knowing and intelligent" standard for waiver of fundamental trial rights.

"There would be no point."

Why did counsel allow flat denial of defense's

entire case—material strangulation fact requiring self-defense—over and over as the last words to the jury go unrebutted? Her answer: "there would be no point." (*Tr.* 07/12/16 pp.120:121:23.)

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done."" *Johnson v. Zerbst*, 304 U.S. 458, 461 (1938). The right to be heard through effective advocacy **is the whole point** of counsel under the Fourteenth Amendment. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. . . . A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 9-10 (1954). See also *House v. Mayo*, 324 U.S. 42 (1945); *Hawk v. Olson*, 326 U.S. 271 (1945); *Reynolds v. Cochran*, 365 U.S. 525 (1961).

Counsel confessed finely delineating conflicted representation with divided loyalty of "I, again, not a puppet;" disordered against unequivocal knowledge of her client's fervent assertion of right to be heard. (*Tr.* 07/12/16, pp. 86:24-87:25.) Lynn Hecht Schafran, the first recipient of the "Distinguished Service Award of the National Association of Women Judges" for her work in eliminating bias in courts published research in The Judges' Journal showing

that having credibility in jury trials "is being seen as someone of consequence, someone who matters, someone to be taken seriously. Part of being taken seriously is having your harms and injuries taken seriously—not devalued and trivialized." (See Schafran, Lynn Hecht, *Credibility in the Courts: Why Is There a Gender Gap*, 34 Judges J. 5 (1995).)

The nexus of affirmative self-defense—material strangulation fact—so reduced by counsel here, she communicated to defendant that despite material facts indicating attempted murder by alleged victim ("could have killed you then and he could have bashed your head in, too," Exhibit AL), was ultimately of no consequence to counsel. Counsel's thematic hindsight justification for constantly trivializing defendant's expressed concerns of clear manifestations of counsel's ongoing conflicted representation essentially threefold:

- defendant's participation severely and pervasively unsettled her emotionally;
- her primary concern was avoiding being "a puppet" to defendant specifically;
- and she had to personally manage a supposedly mentally ill client.

(See discussions and citations in Sections I.A. and I.D. *supra*.)

This was counsel's unequivocal rationale for obstructing this Court's establishment of defendant's right to rely on counsel to safeguard fair trial

procedures. Both judges defied this Court's mandate to apply probabilistic determinative reasoning to total circumstances. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Instead, omitting demonstrative record evidence from reasoning, into entirely unchecked deference, contrary to balanced review required within circumstantial totality as mandated by 28 U.S.C. § 2254.

While benchmark for reviewing lower court decisions is "clearly established Federal law as determined by the Supreme Court," applying 28 U.S.C. § 2254(d)(1) "does not require citation of [Supreme Court] cases — indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." See *Early v. Packer*, 537 U.S. 3, 8 (2002); see also, *Mitchell, Warden v. Esparza*, 540 U.S. 12, 16 (2003). For lower courts, this Court's allowances function as the proverbial inch. With unchecked reasoning disregarding clearly established Federal law and omitting ample undisputed material fact contained in the record, lower courts continue taking mile after mile after mile moving into indeterminate infinity. If this Court allows lower courts unchecked trampling of constitutionally guaranteed fundamental trial rights, the message is: you should have let yourself die.

CONCLUSION

The Court should grant a writ of certiorari and summarily reverse the decision below.

Respectfully submitted,
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