18-8124

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TONY R. GROSS — PETITIONER
(Your Name)

vs.

JAMES S. HAVILAND, Warden. RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

TONY R. GROSS, A-336-748.
(Your Name)

P O BOX 4500
(Address)

LIMA, OH. 45801.
(City, State, Zip Code)

419-224-8000
(Phone Number)

QUESTION(S) PRESENTED

1) Might the states and especially Ohio be required to accept and enforce the 6th and 14th amendment mandates of Gideon v Wainwright, 772 U.S. 335, (196), and Argersinger v Hamlin. 07 U.S. 25, (1972), and require the APPOINTMENT OF COUNSEL in Death Penalty Cases for "ALL "HEARINGS," before a Judicial Officer, even pretrial ones, in order to sustain a valid conviction?

2) In order to eliminate confusion amongst the states--some states hold--a state court loses jurisdiction if it fails to appoint counsel in a criminal case, following Zerbst v Johnson, 304 U.S. 458 while others, and especially Ohio, hold that a court which fails to appoint counsel does not lose its jurisdiction and holds that Zerbst, only applies to Federal Court proceedings irrespective of Rothgery v Gillespie County, 554 U.S. 191, (2008).

LIST OF PARTIES

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

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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[ ] is unpublished.

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

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[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is Exh's 1 & 2 , and is;
[X] reported at 2018-Ohio-2418; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

JURISDICTION

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

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

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

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

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

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

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

The date on which the highest state court decided my case was 6.27.18 & 7.12.18
A copy of that decision appears at Appendix A, Exh's 1 & 2.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including 12.09.2018 (date) on 10.04.2018 (date) in Application No. 18 A 359.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6th Amd., to the U.S.Constitution which provides that this amendment stands as a bar to a valid conviction where there has been no appointment of counsel in a serious criminal matter and made applicable to the states via the 14th amd., to the U.S. Constitution, and thus, it holds this is a violation of due process of law via the 14th amd., to the U.S. Constitution and thus voids a court of its jurisdiction in such cases and subjects the conviction to vacation--at any point in time--for the due process of law violation.

STATEMENT OF THE CASE

1) Sometime in the early afternoon of July 12th, 1994 the Petitioner was taken before Ohio's West County Court of Muskingum County for an **Initial Appearance Hearing** and was charged with the shooting death of MCSO's Deputy, MIchale Lutz.

2) **That court "DID NOT"** have those proceedings transcribed and merely scribbled some notes as a substitute for the transcripts--See Attached Exhibit 5 of Appendix B... and noted the presumption of guilt was great based upon the "probably cause statement" and no bail was permitted. These Notes and the way they were transcribed are and were outside the dictates of Ohio's Crm.R.5(B)(7), with attached Exh-6 supporting the fact that-that they were never even docketed in the docket sheet for the case becauae it's 1st entry was made 8 days later on July 20th, 1994. These records were sent for repeatedly over the years to no avail and it was only after the court moved to a new address and new personnel was hired did it ever reply -and send the records--see attached letters, Exh-7 & 8.

3) At the Initial Hearing the Petitioner was stood before the court by a non-uniformed person to whom the Petitioner relayed to him he wanted Attorney, Don Dal Ponte contacted to represent him at the hearing and failing that he would like an non-interested person--such as the Ohio Highway Patrol to go to the creek beside the Petitioner's home and retrieve a pair of bloody pants that the Petitioner had thrown there EARLER THAT MORNING AND FURTHER HE NEEDED a lab representative to take blood and urine samples for independent testing in order to support his plan to plead NGRI if he could not get the pants... the man standing there merely stated for the Petitioner not to cause a scene and to answer the judge if he was asked anything.

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At some point the Judge asked the Petitioner if he wanted to say anything--to which the Petitioner immediately replied, "Can I have an attorney appointed?" to which the Judge asked if the Petitioner could afford to retain counsel... if he had a job and to which the Petitioner replied in the negative to both questions and before the Petitioner could say one single thing more the Judge took over the conversation and went on and stated counsel would be appointed and then asked if the Petitioner feared for his safety to which the Petitioner replied yes... the Judge then ordered the Petitioner held without bail and for him to be transported and held in Franklin County. See attached Exh-9, for a full, sworn description.

The United States Supreme Court held in Johnson v Zerbst, 304 U.S. 458 that in order to constitute a court there must be full representation of the parties present--including counsel for the accused--in serious criminal cases. While here in this case, the record--what there is of it--clearly reflects counsel was never appointed for the accused in this capital homicide case. Furthermore, becaue of how the Hearing was conducted... with the court considering evidence of probable cause it may also be considered a preliminary hearing due to its findings, but still; none-the-less the court was divested of its' jurisdiction per the holdings of Zerbst, id.

4) This court also held in White v Maryland, 373 U.S. 59: Michigan v Jackson, 475 U.S. 625: Brewer v Williams, 430 U.S. 387, and then again this court in Rothgery Gillspie Cty. 554 U.S. 191 said counsel "IS" to be appointed in pretrial hearings and even going so far as to comment on the fact that Ohio appoints counsel at or immediately following the Initial Appearance Hearing. See Ohio's In re Motz, 113 Ohio St.3d 199:

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State v Crider, 2014-Ohio--2240, while State v Wellman, 37 Ohio St. 2d 162: State v Brock, 113 Ohio St3d. 199 and State v Borst, 45 Ohio App. 2d. 240 all instruct the right to counsel in criminal matters is a U.S. Constitutional 6th Amendment Right made applicable to the states via the 14th amendment, Gideon v Wainwright, 372 U.S. 335: Burgett v Texas, 389 U.S. 109 and supported by Ohio's Crm.R. 44(A) which requires the appointment of counsel at the Initial Appearance Hearing and especially in capital cases.

5) This court has held that it's so great an error that the lower courts can't even look to a prejudice review since it's a structural error. U.S. v Gonzalez-Lopez, 136 S.Ct. 1083: State v Stewart, 188 Ohio App3d.850 confers right to counsel at the Initial Appearance Hearing with Fullers v United States, 540 U.S. 519 and Rothgery, supra, holds the **right to counsel attaches at the beginning of the judicial proceedings.** McNeal v Wise 501 U.S. 171 at **"Initial Appearance,"**: Hawk v Olson, 326 U.S. 271: Crooker v Calif, 357 u.S. 433: Moore v Ash, 355 U.S. 155: Gallegos v Neb 342 U.S. 55 all holding that the right to counsel attaches and extends to pretrial proceedings, "... where evidence may be lost or scarificed." per Coleman v Alabama, 399 U.S. 1: Hamilton v Alabama, 368 U.S. 52, "... rights preserved or lost," thus, reflecting and saying as much that it isn't the name of the proceedings that determines whether or not a proceedings is a "critical stage," but rather what transpires at that proceedings such as in this case where without counsel the Pet- was unable to have the pants recovered from the creek beside the Petitiner's home that were thrown there some hours earlier that the shooter of the deputy left there or even have independent urine and blood samples taken in the event the slain offier's fellow deputies tampered with them or lost them to insure that the shooter of their fellow deputy was indeed convicted.

cont'd:

6) Essentially the Petitioner is maintaining that Ohio had a duty in lieu of all of this court's precedence to appoint counsel at the Initial Appearance Hearing, **per the 6th Amend., to the U.S. Constitution.**

7) That such failure constitues a "fundamental" error of a Constitutional magnitude, and that such error deprived the Petitioner of his rights to a fair trial in terms of denying him the ability to present in his defense DNA evidnce--from the pants--that shows, without question, the presense of another unknown other that Cellmark Labs presented in their lab report, and it also deprived the Petitioner of his rights to due process of law that is generally given an accused and the 14th amd., right to present evidence in support of his defense by way of independent lab analysis of his blood and urine and thus handled by a non-biased collector which any attorney would have requested from the Initial Hearing Judge while it was still time and still in the Petitioner's system.

THE 1st DEFENSE IRRETRIEVABLY LOST:

1) Unable to interrupt the Judge, unable to have the man guarding the Petitioner speak on the Petitioner's behalf as he stood before the Court, or ask for a continuance, a phone call or have the privilege of counsel to confide in the Petitioner was unable to convey to anyone and/or especially to appointed counsel that he needed someone--preferrably--the Ohio Highway Patrol to go to the creek beside the Petitioner's home and retrieve the black, bloody pants the Petitioner had thrown in there shortly before the police arrived after the slain officer's assailant had left them in the Petitioner's bathroom the morning of the incident.

2) CellMark Labs reported in ther lab report, (attached App.B, Exh-10-1 through 3), that they found an "UNKNOWN DNA CONTRIBUTOR" on a blanket taken from the back porch of an admitted drug dealer where the slain officer's gun was recovered.

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3) This sample matched neither the Petitioner, nor the victim. The State claimed the Petitioner left it there earlier in the week; however, the Drug Dealer never said the Petitioner had been there earlier in the week--bleeding--he merely stated the Petitioner had been there and he had seen a scar on his arm, (Ron Johnson's Statement to the Police, p. 7).

4) The Drug Dealer, Ron Johnson, claimed the Petitioner had came to his home the morning of the incident--as it was getting light--(Ron Johnson's Statement, p. 4), Stating that's how he could see into the car and see that no one was with him; however, MCSO Deputy, William Swank, in his Police Report of 07.19.1994, p. 1, stated he and the other MCSO Deputies had been at the Petitioner's home for approx. and hour and a half BEFORE IT GOT DAYLIGHT enough and he could see well enough to see that someone was lying in the weeds and ordered the Petitioner to stand and arrested him. 35 other MCSO Deputies could testify to that fact as well.
In addition to that conflicting evidence it must also be considered that the Drug Dealer, Ron Johnson, also stated in his statement to the Police that the Petitioner had come to his home that morning at approx. 5:00am, p.5. However, if you review the MCSO's Radio Log Traffic, (Joint Exhibit 3), Ron Johnson's plate and car were seen earlier--right at 5:00am, p. 9-- **ID.** and then actually called in at 5:08am, p. 11. It shows either he or his car was not at his home at or around 5:00am as he claimed.

5) If the Petitioner was surrounded by 35 MCSO Deputies 1½ hour before it got daylight and the radio log shows the Drug Dealer, Ron Johnson's person or car was not at his home at 5:00am as he claimed then who deposited the unknown DNA sample found mixed with the Petitioner's blood, at the Drug Dealer's home? Since--per the Petitioner's statement to the Police--the morning of the incident stated he himself had been hit in the head with a crowbar and then shot, p. 16, while trying to help the slain officer. The Petitioner at trial, in his unsworn statement to the jury, p. 4514, indicated he had thrown up his left hand to

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knock the gun away from the officer's assailant at the scene as it discharged hitting him, knocking him to the ground. Ohio's Bureau of Criminal Identification in their Lab Report, (Defendant's Exhibit E), stated they found gunshot powder residual on the Relator's Left Hand but none on the Petitioner's Right hand. This is consistent with the State's Witness, Shawn Jones's testimony that the shooter he seen shooting the officer--while driving by the scene--was shooting the officer from the gun the assailant was holding in his right hand. This report confirmed the Petitioner was not the shooter: Johnson's testimony, in contrast to 35 MCSO Deputies and Officer Swank's report reflects the Petitioner DID NOT make the trip from the scene to the Drug Dealer's Home to deposit his blood found at the Drug Dealers since all 35 officers knew the Petitioner was fully surrounded for an hour and a half before it got daylight and then there's the Radio Log that shows the Drug Dealer's car was not at his home at 5:00am because he claimed the Petitioner was at his home selling him a gun and bleeding everywhere--suggesting the Petitioner being there caused the Relator's Blood DNA to be found there. It's been shown that another unknown other--whom fought with the Petitioner had instead deposited the blood and took the slain officer's gun there and had the Petitioner been able to speak with counsel, the morning of the incident he could have had the Assailant's pants recovered from the creek and the blood on them would have matched the unknown assailant's DNA found at Ron Johnson's where the slain officer's gun was recovered. It must be noted the pants being in thrown in the creek was not disclosed to the police because the Petitioner did not trust the police to turn in anything to have tested which would have proven their suspect they wanted was innocent, nor was it ever spoken of in trial because appointed counsel, Rick Kitchen and Don Schomacher, after being told indicated they had probably washed away by then... a week or so after the incident and precautioned... if spoken of and never found would make it appear suspicious--if as trying to shift blame elsewhere, but this would have validated

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the Petitioner's Statement to the police and without question confirm the presence of the assailant at the scene--as the Petitioner claimed--and at the Drug Dealer's home where the officer's gun was recovered and thus, matching the BCI Gunshot Residual Test, (Trial Transcript, p. 4491), and the State's witness's testimony whom seen the assailant shooting the officer. The FBI's report, (See App. B, Exh's 11-1-6), shows of the 86 questionable items and the 6 known items submitted to them for lab analysis, (Trial Transcript, p. 4492), that not one of them returned anything in an incriminating manner. The FBI's Fingerprint Lab's Report,(See App. B, EXH-12-1/2), reflects that of the 12 fingerprints taken from the scene that not one matched the Petitioner. The pants taken from the Petitioner were grey, with no pockets; (Trial Transcripts, pgs. 4495/4496), while Ron Johnson and the State Witnesses stated the assailant they seen had on black pants. The shoe sizes taken from atop the commode in the restroom--reported taken from the Petitioner. home were two sizes bigger than the Petitioner wore, reflecting someone other than the Petitioner left tennis shoes at his home. Taken together it proves the Petitioner was denied the one piece of evidence that would have proved his innocence and the presence of another unknown other that he DNA reveled was present but un explained.

THE 2nd DEFENSE IRRETRIEVABLY LOST:

1) Page 25 of the Petitioner's Statement MCSO Officers took the morning of the incident reflect that the police were taking lab samples for various tests while at the hospital. Also--since it was never raised--due to insufficient evidence because the Petitioner-at his Initial Appearance--never had the benefit of Counsel; was not allowed to address the court for an appointment of counsel of choice; for a continuance; the use of the phone... or even speak to the court and thus was was not allowed to request full, independent urine and blood samples for I-V TOX DRUG SCREENS... ; thus, not trusting the MCSO Deputies he suspected they would not allow and would lose any samples that reflected the basis for a Voluntary

cont'd:

Intoxication/NGRI Defense and thus needed his own but had no one to ask to have them done; consequently, the urine samples taken by the MCSO Deputies were never subjected to any Drug Screens other than the TOX I and II Drug Screens when had the Petitioner been allowed the full I-V Drug Tox screens he could have shown via the tests the full extent of his intoxication that morning since he can show--as recorded in his amended Post Conviction Petition, Claim Nine, pgs.41-48, made to the Muskingum County Court of Common Pleas that the Petitioner was on prescription medications consisting of 500 mg Vikadans, 3x/per day: Somma, 3x/day, Flexiril, 3x/day and Ambian Sleeping Pills, (see that documents App.I, p. 32): That he had, in addition to those drugs, injected 2 Ambium Sleeping Pills just prior to the incident: drank multiple 64oz containers of beer and had smoked some $150.00 worth of crack cocaine, p. 41. App. I, pgs. 12, 13 and 14 of that document reflect 3 different affidavits attesting to personal, lst hand knowledge, of the Petitioner using drugs that evening. Several state witnesses, Dan Brewer, (App. I, pgs. 18-21): Terry BoCook, (App. I, pgs. 22-25): Morris Leslie, (App. I, pgs. 16-17): 470 CC Urine taken with 120 cc's sent to Lab, (App. I, p. 34): 5 tubes of blood taken, (App. I, p. 34): "Patient does not remember whether he was unconsciousness or not," (App. I, p. 33): Petitioner asked for an Attorney at the Hospital before court hearing, (App. I, p. 32.): Pages I-28, I-29, I-30, I-31 in App. I of Claim #9 are the actual lab reports reflecting nothing in the Petitioner's Blood or Urine other than cocaine; thus, the State did not do a full TOX SCREEN test and in that the court did not allow for the Petitioner to ask for Independent Lab full Tox Screen Drug tests the Petitioner could not show the extent of intoxication he was experiencing that evening to justify a Voluntary Intoxication Defense or NGRI Defense when Ohio "Specific Intent" is an element of homicide and where insanity due to addiction and not of sound mind where it can be shown the accused has a chronic substance abuse history the state must show that the accused had the will power to control impulse

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to commit the act charged, State v Rudder, 195 Ohio St.2d.189: State v Mosher, 37 Ohio.App.3d. 50... holding that "...insanity which becomes fixed, and established as a diseased condition of the mind produced by habitual intoxication affects criminal responsibility in the same way any insanity produced by any other cause."

It can be shown too that the Petitioner's been involved with 13 different public agencies towards getting treatment for polysubstance addictions and had four previous prison incarcerations associated with drug use and addiction.

2) It must be noted the State cannot account for so many of it's own witnesses attesting to the fact they personally had seen the Petitioner take drugs that evening and described his condition as being highly intoxicated just minutes before the incident unfolded but despite that coupled to the fact the Petitioner had and used his own prescription drugs that evening the drug screens reflected nothing but cocaine.

3) The State trying to avoid a possible and very plausible affirmative defense of NGRI by Voluntary Intoxication and requiring a showing of a cognitive level to show culpabilty sufficient to justify a death sentence turned and denied altogether that the State "EVER" even took urine samples, (see motion hearings transcripts of 02.15.1996, p. 165).

4) Apparently the state did not want to contend with an affirmative defense of NGRI by Voluntary Intoxication in context to current law and denied any samples ever existed: the samples themselves "DO NOT" make sense in lieu of the state's own witnesses' testimony as to the condition of the Petitioner in terms of intoxication before the incident transpired. It would seem they have been altered or as the Relator suspected substituted, untraceable urine samples--as the Petitioner suspected they would even back then-- so as to insure the Petitioner could not muster a viable defense for taking the life of their fellow officer.

Clearly, neither defenses nor the evidence to support the defenses

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can ever be raised or obtained at this point in time but had the Initial Appearance Court appointed counsel--as this court has repeatedly urged the states to do--this document or it's contents-- certainly would not be before the court today.

IN CONTEXT TO THE 2nd Question PRESENTED FOR REVIEW:

1) The Ohio Supreme Court dismissed the Petitioner's Writ for Habeas Corpus premised upon the holdings of Zerbst, supra, and did so, sua-sponte... refusing to even allow the state to respond.

2) Thus, the Petitioner isn't arguing that they aren't allowed to do so, but rather he's arguing the fact, that in this particular case, and in lieu of this court's multiple and prior precedents that many, many states, (Alabama; Weakley v State, 721 So 2d. 235: Ex parte Pritchett, 117 So.3d. 356: Alaska: Larson v State 2013 Alas App. Lexis 108: Flanigan v State, 3 P.3d 372-376: California: People v Allen, 21 Cal 4th. 424--In re Bell, 19 Cal 2d 488: People v Lanigan, 22 Cal. 2d 569: Arkansaw: Swagger v State 227 Ark 45: Watson v State, 2001 Ark App. Lexis 695. NON IN-CLUSIVE LIST!), have adopted verbatim Zerbst, supra, holdings a court which fails to appoint counsel in a serious criminal matter loses its jurisdiction at that point---a point Ohio seemed to follow in In re Moltz but then and turns and dismisses the Petitioner's case premised on both Moltz and Zerbst, supra.

3) Thus, and despite repeatedly admonishments to the states--dating back to Coleman v Alabama, 399 U.S. 1 and Hamilton v Alabama, 368 U.S.52, Ohio still refuses to see the wisdom--on how evidence and defenses may be lost at these pretrial proceedings, (suxh as this case), and still hold to their Crm.R.5 which instucts that counsel is to be appointed at the Inital Appearance but in practice, their judge-made--common-law permits them to forego the appointment of counsel for the hearing as long as coun-

cont'd:

cel is appointed shortly after and thus, forego altogether the very real need an accused person has for meeting with counsel to preserve both evidence and defenses, and to continue to allow this practice violates the due process of law assured by the 14th amd., to the U.S. Constitution. For as in this case and in other similar cases it allows the state a windfall of convictions simply because the accused cannot support his innocence with a showing of evidence crucial to his defense--not by his fault, or even fault of this court in lieu of it's prior holdings but rather because the state seeks to minimize "ANY AND ALL POTENTIAL ADVANTAGES" even those this court require be afforded and choose to argue about it later hoping a default will prefer and this practice comes at the expense not to societ so much but rather to the innocent and wrongfully accused, so in addition it's noted Georgia in State v Houston, 134 Ga.App 36 seems to follow Zerbst, supra aš well as McCall v State 232 Ga.App 684 and in Idaho in Birk v Bennett, 258 Iowa 1016 it mirrows Zerbst. In Indinia, Knox County Counsel v McCoimick, 217 Ind. 493 it follows it too and so does In re Gaskill, 1959 Ok Cr-20 in the state of Oklahoma and West Virginia too in State, ex rel Robinson v Bates, 149 W.Va. 516 and the list goes on and on with these states, in state cases, following Zerbst, and mirrowing its holding despie so many other states holding that Zerbst only applys to federal courts and these are modern day cases within the past few years; thus, Ohio's argument--in justification of retaining it's judge made law--which allows a court to appoint counsel shortly after the Initial Appearance Hearing instead at the Hearing--Ohio holds that the accused remains, LEGALLY, in the exact same position after the hearing as he would if he had counsel at the hearing due to nature of the proceedings and thus chooses to forego the possible need

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an accused needs for pre-hearing consultation with counsel whom in this case would have requested independent blood and urine samples while not arguing the accused has the right to such procedures but instead arguing he would have standing to make a case in the event the court refused the motion and as in this case--at a later date--it shows the state even denies it took the samples and then produes but (1) tox, drug screen when 5 were needed and it would allow the accused to have evidence recovered elsewhere that no other persons knew existed before it is lost that this court in Coleman v Alabama, supra, recognized so long ago.

REASONS FOR GRANTING THE PETITION

1) That in cases such as this case--where there is a showing of actual innocence--this court can look to the facts and determine if this case and other similar ones warrant a reversal due to the courts that conducted the initial pretrial hearings failure to appoint counsel, in serious criminal cases-and if so-does it warrant a full reversal or warrant a showing of prejudice before relief can be granted whereby granting the first initial confrontation between the judicial officer and the accused a protected status as being a critical stage of the proccedings; thus too, bringing together, amongst the states a ruling which signals this courts sentiments it has for pretrial proceedings in serious criminal matters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tony R. Gross, counsel, pro se.

Date: 11.27.2018.