19-6461

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Vernon A. Collins — PETITIONER
(Your Name)

vs.

State of Maryland — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals of Maryland
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Vernon A. Collins
(Your Name)

P.O. Box 861
(Address)

Trenton, New Jersey 08625
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

(I). TO DETERMINE WHETHER OR NOT A WRIT OF ERROR CORAM NOBIS PETITION CAN BE BARRED UNDER THE TWO PRONG TEST UNDER THE DOCTRINE OF A LACHES DEFENSE THAT CHALLENGES THE CONSTITUTIONALITY OF A CRIMINAL CONVICTION UNCONSTITUTIONALLY ACQUIRED UNDER STRUCTURAL ERRORS DEFICIENT ADVISORY ONLY JURY INSTRUCTIONS THAT TOLD JURORS THE COURT'S INSTRUCTIONS COULD BE DISREGARD AS TO THE PRESUMPTION OF INNOCENCE AND THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT?

(II). TO DETERMINE WHETHER UNDER THE DOCTRINE OF A LACHES DEFENSE TWO PRONGS TEST OF UNREASONABLE DELAY AND PREJUDICE CAN A PETITION FOR WRIT OF ERROR CORAM NOBIS CAN BE BARRED BASE ON SPECULATIVE CONCLUSIONS FORMER WITNESSES WHO TESTIFIED MAY NOW BE UNAVAILABLE TO TESTIFY WITHOUT A TRANSCRIPT WILL PREVENT UTILIZATION OF THE FORMER TESTIMONY EXCEPTION TO THE HEARSAY RULE FOR RE-PROSECUTE WITHOUT THE COURT HAVING FIRST FOUND PROOF OF UNAVAILABILITY OF THE FORMER WITNESS WHICH IS A PREREQUISITE UNDER THE EXCEPTION TO THE HEARSAY RULE ?

(III). TO DETERMINE WHETHER OR NOT THE PUBLICATION OF SKOK AND JENKINS DECISIONS IN 2000 COULD SERVED TO HAVE PUT COLLINS ON NOTICE OF A POTENTIAL CAUSE TO CHALLENGE HIS 1972 CONVICTION AND HIS FAILURE TO SEEK CORAM NOBIS RELIEF IN 2000 COULD BE BARRED UNDER THE DOCTRINE OF LACHES ALTHOUGH UNTIL UNGER WAS DECIDE IN 2012 STATE IMPEDIMENTS LAWS OF WAIVER AND NON-RETROACTIVITYENJOINED ANY COLLATERAL CHALLENGES TO ADVISORY ONLY JURY INSTRUCTIONS?

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:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES AND RULES

OTHER

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 B to the petition and is

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[X] is unpublished.

The opinion of the Court of Special Appeals of Maryland court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] 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 July 26, 2019
A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Fourteenth Amendment

Article 23 of the Maryland Declaration of Rights

STATEMENT OF THE CASE

This case has its genesis based on the fact on May 23, 1972 an Anne Arundel County Grand Jury returned a five (5) count indictment against Vernon Allen Collins and five other individuals, charging that with while they were all housed, as prisoners in the Maryland House of Correction (a former Maryland prison). They all committed the following offenses against another prisoner to wit" In Count 1, Assault with Intent to Murder against Isaac Cecil Bethel (former Art. 27, 12); Count 2, Malicious injury to tongue, nose, eye, lip, limb, etc., against Isaac Cecil Bethel (Art. 27. 385); Count 3, Unlawful shooting, stabbing, assaulting, etc., with intent to maim, disfigure or disable or to prevent lawful apprehension against Isaac Cecil Bethel (Art. 27, Sec. 386) Count 4, unlawfully did make an assault upon and did then and there beat the said Isaac Cecil Bethel (Common Law Assault); and Count 5, unlawfully did make an assault against upon Isaac Cecil Bethel.

On October 17, 1972, in Circuit Court for Anne Arundel County, trial commenced, and Collins pleads not guilty, and selects jury trial. October 18, 1972 upon a Oral Motion for Judgment of Acquittal fld. at close of States case, Judge Sachse denied Motion. That motion renewed at close of all testimony, Motion granted as to 2nd count of indictment, denied as to remaining counts. Pursuant to former Md. Rule 756 and Article 23 the late Judge Sachse instructs the jury, the court's instructions were advisory only, and the case continued until October 19, 1972. That jury returns a verdict of guilty on the 1st count of indictment, and the trial judge sentenced Collins the same day (October 19, 1972) to terms of five (5) years imprisonment consecutive to any sentences then currently serving. Collins did not appeal his conviction.

Collins nearly forty years after his October 19, 1972 conviction base on the Court of Appeals decision decided on May 24, 2012 in Unger v. State, 427 Md. 383 (2012) filed a pro se petition for writ of error coram nobis on July 6, 2012 challenging the constitutionality of

the advisory only jury instructions given on October 19, 1972 at his jury trial. However, self appointed Public Defender D. Scott Whitney without notifying or seeking Collins permission or consent on December 2, 2013 motion the Circuit Court for Anne Arundel County, Maryland to withdrew his pro se petition without prejudice, allegedly assigned counsel could not obtain the transcript of the 1972 trial. Collins after notifying the Circuit Court of self appointed counsel's unauthorized action re-filed the pro se coram nobis petition on March 3, 2015. May 7, 2015 the State filed a two-page answer to the petition listing a series of defenses. Paragraph 2, contained the State's sole mention of the defense of laches and stated in its entirety,

> "The allegations contained in the Petition for Writ of Error Coram Nobis have been finally litigated, waived in prior proceedings or are barred by laches."

On August 31, 2015 without first holding a laches hearing the Anne Arundel County Circuit Court Judge Wachs subsequently, thereafter, issued a memorandum order denying coram nobis petition of Collins by finding it "barred by the doctrine of laches as there has been an unreasonable delay in the Collins's assertion of rights and further the delay resulted in prejudice to the opposing party due to Collins inability to obtain the transcript of his plea hearing."

Collins timely noted an appeal and thereafter, the Court of Special Appeals in an unreported opinion dated January 12, 2017,, denied the State's motion to dismiss, vacated and remanded the case back to the circuit court for further proceedings consistent with its opinion. Vernon Allen Collins v. State of Maryland, No. 1780, September Term, 2015, Opinion by Naxarian, J. Filed January 12, 2017.

On July 6, 2017 base on the remand, Judge Wachs conducted a telephone conference laches hearing and informed Collins that the Court would be happy to hear anything from him regarding why the Court should not grant the State's request to dismiss his petition based on what's known as laches under the premises Collins had the burden of

proof. [1] / After Collins argued, the State argued in response as follows: I'll proffer that the State has reviewed our file to the extent that we still have one. We've contacted the court reporter's office. We have contacted the criminal desk here, who's actually located the old file. We have contacted the Attorney General's Office. We've contacted archives. And I have personally contacted Mr. Whitney, who was mentioned, who has also done an attempt to find a transcript in this case. And in all instances we've come up with no transcript. There was no appeal from this case originally. And that's the reason I believe that there isn't a transcript available, because if there was no transcript prepared in 1972, then there'd be no way to get one at this point. I don't. -- it doesn't sound like Mr. Collins denies that there's no transcript in this case. With regard to the undue delay, as the Court pointed out, this --- the first filing by Mr. Collins was nearly 40 years after his conviction, by my estimate at least 35 years after his sentence was completed.

As the Court pointed out, he did file in 2013 that petition was withdrawn without prejudice. He was represented by counsel at that time. I understand he claims that Mr. Whitney didn't tell him that that was being withdrawn. I would simply proffer, Your Honor that I know Mr. Whitney very well. I don't believe that that would be something that he would do, withdraw a petition without his client's know -- either knowledge or consent. I also will say with regard to undue delay, and I think Mr. Collins even made note of, the first case saying that jury instructions -- that he is alleging may have occurred in this case --- are unconstitutional started in 1980. So that's when the clock really would have start running. Now I agree maybe he would have been barred at that point because of waiver, but that doesn't stop him from raising the claim. I think he could have raised a claim at that point. He could have raised the claim initially back in 1972, He filed no appeal in this case. He also could have raised the claim during the window when Adams had been decided that, you know, that he believed -- for a short period of time the Court of Special Appeals had said that

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FN1. Although the burden of proving laches, by a preponderance of the evidence, is on the party asserting the defense. Jones v. State, 445 Md. 324, 340 (2015).

they were going to allow these cases through, so there was another time period where he could have raised that issue again. And as we said, he didn't raise the issue until not only Unger was appealed --- or, excuse me, Unger was decided, but to the point that he then withdrew it and then filed again. So there certainly has been an undue delay. We're talking about over 40 years.

Prejudice is pretty clear not only to the State, but to everyone really, because as the Court points out, we don't know what was said in that transcript. We can make speculations, but there's no way that the State can possibly defend against those accusations without a transcript. We don't know what we're defending against. It's possible that what was said could be something different. Particularly, as I'm sure the Court aware having gone through a lot of these cases, jury instructions were not nearly as uniform back then as they are today, and so assuming that a judge gave some specific jury instruction is quite the leap of faith. Beyond, that, prejudice doesn't just go to our ability to defend against what Mr. Collins is raising at this point, it also goes to our ability to retry him. And the --- what is left over of these files is fairly sparse, given that it's 40 years later. And certainly the court -- the State, to the extent that we even know who the witnesses are, would not be able to produce any of them, would not be able to retry him. And so for those reasons the State is certainly prejudiced, and we would ask that the Court find laches applies in this case.

In rebuttal, Collins reiterated there is no possible way the State could suffered any prejudice because he has already served the five year sentence imposed for the October 19, 1972 conviction. Even if they retried the case, they could give him the time back. And argued other courts have agreed those jury instructions were given prior to 1980 in all jury trials. His position was at least an attempt to reconstruct those portions of the record, without the court saying, well, you know, you can't --- you don't know what he said. We don't know exactly what he said, but we know that it was statutory law in effect that those instructions were to be given in a jury trial. The docket entries establish this was a jury trial and the court gave jury instructions.

Without the circuit court making any factual findings as why it believed there was an unreasonable delay or unnecessary delay; or any factual findings of prejudice. Nonetheless in granting the State's laches defense Judge Wachs ruled as follows:

> THE COURT: All right. Sir, I appreciate your time. I just disagree with you. I do believe there was unnecessary delay in the filing of your petition in this matter. I believe the State was prejudiced. I accept the State's proffer regarding the efforts they've made to see whether it was feasible to reconstruct the record in this matter, and it's just not feasible at this point. And I don't even think you disagree with that particular point. There's no way we can adequately address what instructions were or were not given. So I'm going to grant the State's motion to dismiss based on laches. And that's a wrap for today. Thank you. We're --- that's the end of the hearing. Have a nice day.

Collins, timely noted an appeal and the Court of Special Appeals in an unreported opinion dated April 22, 2019 affirmed the decision denying coram nobis relief under the State's doctrine of a laches defense. Holding: "Initially, we note that prior to the Court of Appeals' decision in Skok, coram nobis relief was only available in Maryland in limited circumstances to correct a factual error that led to a final judgment. Skok, 361 Md. at 6-70. Collins, therefore, could not have filed a petition for writ of error coram nobis challenging the alleged giving of the advisory only jury instruction in his 1972 trial prior to the Skok Court's expansion of the writ in 2000. Thus, in our view, Collins's delay in filing his petition for coram nobis relief should not be held against him during the first two decades following his conviction. See Jones, 445 Md. at 342 ("For a delay to constitute laches, the delaying party must have had notice of a right or cause of action.") (quoting Frederick Rd. Ltd. P'ship v. Brown & Sturm, 360 Md. 76, 118 (2000)). **Appendix (A) at pg. 16.**

But two significant decisions were issued in 2000; (1) the Court of Appeals' decision in Skok, expanding the writ of error coram nobis to include challenges to criminal convictions on constitutional of fundamental grounds where no other remedy is available, and (2) the Fourth Circuit's decision in Jenkins, holding that Maryland's advisory only jury instructions

had violated Jenkins's right to due process in his State of Maryland criminal trial. With these publication of those decisions, Collins was on notice of his potential cause of action to challenge the 1972 conviction. Jones, supra, 445 Md. at 344 (stating that for laches, "delay to begins when a petitioner knew or should have known of the facts underlying the alleged error."); State Ctr., LLC v. Lexington Charles Ltd. P'ship, 438 Md. 451, 590 (2014) (In determining whether a delay is unreasonable, we must analyze [] when, if ever, their claim became ripe [i.e., the earliest time at which [the petitioners] were able to bring their claim[.] Here Collins waited another twelve years (until 2012) to file his petition for writ of error coram nobis --- a delay we readily conclude was unreasonable. **Appendix (A) at pgs. 16-17.**

We turn now to whether the State was prejudiced by Collins's delay in filing his action. The coram nobis court credited the State's assertions that it was not possible to obtain or create a transcript of the 1972 trial or "even feasible to reconstruct the record" at this point in time. The State also informed the court that, "what is left over of these files is fairly sparse" and "the State, to the extent that we even know who the witnesses are, would not be able to produce any of them, would not be able to retry him." [2]/

Pursuant to Adams-Bey, we assume that the trial court gave the advisory only instruction at Collins's trial. Nevertheless, we hold that Collins delay in filing his petition hampered the State's ability to re-prosecute Collins in the event he succeeded in overturning the 1972 conviction. By 2000, approximately twenty-eight years had elapsed since his 1972 conviction. That Collins waited an additional twelve years to file his coram nobis petition exacerbated the State's already disadvantaged position to the prejudice of the

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FN2. The State claim that the delay "prejudiced the State in its ability to mount another prosecution" in the event Collins is granted relief. According to the State, the "sparse" record consisting of "the indictment, docket entries, motions for discovery and responses, including a witness list (without annotation as to the nature of the witness's possible testimony), the jury list and the victim's medical records." "Given the paucity of the records," the State asserting that "the task of proving beyond a reasonable doubt what occurred during the assault and Collins's involve in it [would be] severely hampered." Appendix (A) at 15.

State. Jones, 445 Md. at 357 ("for purposes of determining whether laches bars an individual ability to seek coram nobis relief, prejudice involves not only the State's ability to defend against the coram nobis petition, but also the State's ability to re-prosecute.) Moreover, because Collins never obtained a transcript of the 1972 proceedings, the State would be unable to utilize the former testimony exception to the hearsay rule for any witnesses who may have testified at Collins's 1972 trial but who are now unavailable. See Md. Rule 5-804(b)(1). Because the delay placed the State in "a less favorable position," id at 340, the prejudice component of the laches doctrine was established. Accordingly, we hold that the coram nobis court did not err in ruling that Collins's request for coram nobis relief was barred by the doctrine of laches. Collins v. State, Appeal No. 1009, September Term, 2017 (decided April 22, 2019). **Appendix (A) at pgs. 17-18.**

Collins timely filed with the Court of Appeals of Maryland a petition for writ of certiorari and subsequent thereafter filed a supplement. The Maryland Court of Appeals denied Collins's petition for writ of certiorari in an order issue on July 26, 2019. **Appendix (B)**

REASONS FOR GRANTING THE PETITION

(I). TO DETERMINE WHETHER OR NOT A WRIT OF ERROR CORAM NOBIS PETITION CAN BE BARRED UNDER THE TWO PRONG TEST UNDER THE DOCTRINE OF A LACHES DEFENSE THAT CHALLENGES THE CONSTITUTIONALITY OF A CRIMINAL CONVICTION UNCONSTITUTIONALLY ACQUIRED UNDER STRUCTURAL ERRORS DEFICIENT ADVISORY ONLY JURY INSTRUCTIONS THAT TOLD JURORS THE COURT'S INSTRUCTIONS COULD BE DISREGARD AS TO THE PRESUMPTION OF INNOCENCE AND THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT ?

In instance case, the Courts of Special Appeals of Maryland holding that Collins's petition for a writ of error coram nobis relief challenging the constitutionality of his 1972 conviction were barred under the doctrine of laches constitutes an abused of discretion. Since a coram nobis petition involving challenges to a conviction procured under advisory only jury instructions that informed jurors that they could disregard those instructions as to the presumption of innocence and the State's burden of proving guilt of assault with intent to murder beyond a reasonable doubt qualified as "structural error. Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

In that light since ambiguity was not the issue in Article 23 advisory only jury instructions; rather, such instructions are clear, but erroneous, as they give the jury permission to disregard any or all of the court's instructions, including those bedrock due process instructions on the presumption of innocence and the State's burden of proving the defendant's guilt beyond a reasonable doubt as is illustrated in Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

> But the essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculations-its view of what a reasonable jury would have done. And when it does that, the wrong entity judge[s] the defendant guilty.
>
> Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: In Fuminante, we distinguished between, on the one hand, structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards, and, on the other hand, trial errors which occur during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error the former sort, the jury guarantee being a basic protectio[n] whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to trial by jury elects, we have said, a profound judgment about the way in which law should be enforced and justice administered. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error. (alteration in original) (internal quotation marks and citations omitted) (citing Arizona v. Fulminate, 499 U.S. 279, 307-09, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

"508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Thus because the rational underpinning Sullivan applies equally to advisory only jury instructions and because the trial court's giving the advisory only jury instruction in Collins 1972 trial was structural error not susceptible to harmless error analysis. Collins's 1972 conviction for assault with intent to commit murder procured upon a structural error, as those structural errors gave Collins jury permission to disregard any or all of the court's instructions, including those bedrock due process instructions on the presumption of innocence and the State's burden of proving the defendant's guilt beyond a reasonable doubt

as is illustrated by Sullivan v. Louisiana, supra, 508 U.S. 281-82 (1993).

In sum, such a structural error as advisory only jury instructions that gave Collins jury permission to disregard any or all of the court's instructions, including those bedrock due process instructions on the presumption of innocence and the State's burden of proving the defendant's guilt beyond a reasonable doubt that was not susceptible to harmless error analysis, as conceded to have occurred in 1972. **Appendix (A) at pg. 17.** Those structural errors could not be subject to the doctrine of a laches defense two prong test of unreasonable delay and prejudice to sustain and maintain a conviction of assault with intent to commit murder procured by the prosecution without violating his due proceed rights under the 14th amendment of the United States Constitution, after Collins had already completely served the sentence imposed under that illegitimate conviction, and must be vacated.

(II). TO DETERMINE WHETHER UNDER THE DOCTRINE OF A LACHES DEFENSE TWO PRONGS TEST OF UNREASONABLE DELAY AND PREJUDICE CAN A PETITION FOR WRIT OF ERROR CORAM NOBIS CAN BE BARRED BASE ON SPECULATIVE CONCLUSIONS FORMER WITNESSES WHO TESTIFIED MAY NOW BE UNAVAILABLE TO TESTIFY WITHOUT A TRANSCRIPT WILL PREVENT UTILIZATION OF THE FORMER TESTIMONY EXCEPTION TO THE HEARSAY RULE FOR RE-PROSECUTE WITHOUT THE COURT HAVING FIRST FOUND PROOF OF UNAVAILABILITY OF THE FORMER WITNESS WHICH IS A PREREQUISITE UNDER THE EXCEPTION TO THE HEARSAY RULE ?

In holding that Collins's delay in filing his petition for writ of error coram nobis hampered the State's ability to re-prosecute [3]/ in the event he succeeded in overturning the 1972 conviction the State Court of Special Appeals held:

We turn now to whether the State was prejudiced by Collins's delay in

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FN3. It should be judicially note that prejudice involving the State's ability to defend against the coram nobis petition was not an issue in the case sub judice. Since the appellate court held pursuant to Adams-Bey, we assume that the trial court gave the advisory only instruction at Collins's trial. Appendix (A) at 17.

filing his action. The coram nobis court having credited the State's assertions that it was not possible to obtain or create a transcript of the 1972 trial or "even feasible to reconstruct the record" at this point in time. The State also informed the court that, "what is left over of these files is fairly sparse" and "the State, to the extent that we even know who the witnesses are, would not be able to produce any of them, would not be able to retry him."

Pursuant to Adams-Bey, we assume that the trial court gave the advisory only instruction at Collins's trial. Nevertheless, we hold that Collins's delay in filing his petition hampered the State's ability to re-prosecute Collins in the event he succeeded in overturning the 1972 conviction. By 2000, approximately twenty-eight years had elapsed since his 1972 conviction. That Collins waited an additional twelve years to file his coram nobis petition exacerbated the State's already disadvantaged position to the prejudice the State. Jones, 445 Md. at 357 ("for purposes of determining whether laches bars an individual's ability to seek coram nobis relief, prejudice involves not only the State's ability to defend against the coram nobis petition, but also the State's ability to re-prosecute.") Moreover, because Collins never obtained a transcript of the 1972 proceedings, the State's would be unable to utilize the former testimony exception to the hearsay rule for any witnesses who may have testified at Collins's 1972 trial but who are now unavailable. See Rule 5-804(b)(1). Because the delay placed the State in "a less favorable position," id. at 340, the prejudice component of the laches doctrine was established.

Appendix (A) at pages 17-18.

It is upon those erroneous conclusions that because Collins never obtained a transcript of the 1972 proceedings that the State's ability to re-prosecute since the State's would be unable to utilize the former testimony exception to the hearsay rule pursuant to Rule 5-804(b)(1) for any witnesses who may have testified at Collins's 1972 trial but who are now unavailable.

Collins argues those assertions were speculative as to whether the State would even need to utilize the former testimony exception to the hearsay rule under Md. Rule 5-

804(b)(1) to re-prosecute. Since just like in Lopez v. State, 205 Md. App. 141 (2012 the State did not offer any type of evidence at the laches hearing of any attempt made by the prosecution to locate or contact any of the former witnesses or the victim who testified at 1972 trial in order to determine whether those former 1972 State's witnesses would be unavailable to testify, in the event Collins 1972 convictions were reversed under Unger. See Lopez v. State, supra, which held, where as to the second prong, requiring some showing of prejudice to the State. Although, while the State in Lopez proffered, that the State's Attorney no longer had a file in these cases, the record does not reveal any attempt to locate or contact any of the victims, particularly the younger ones. Id. 205 Md. at 174-175.

Even more importantly at the laches hearing the coram nobis court did not make any findings that the State had proven by a preponderance of the evidence the legal prerequisite that any of the 1972 witnesses or the victim were now unavailable to testify in a re-prosecution. A legal prerequisite that must first be met before any former trial transcript testimony would be authorized to be offering into evidence under the former testimony exception to the hearsay rule. See Vielot v. State, 225 Md. App. 492, (2015) which held "Before the court can admit former testimony under Md. Rule 5-804(b)(1), the court must find the declarant unavailable." Once the trial court determines that the witness is unavailable under Md. Rule 5-804(a), former testimony is admissible as a hearsay exception if the testimony was "given as a witness in any action or proceeding or in a deposition taken in compliance with law, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop Ms. Paverse's former) testimony by direct, cross, or redirect examination. Md. Rule 5-804(b)(1). Id. at 504. id. at 501. [4]

In sum, in the case sub judice, the Court of Special Appeal's conclusions that

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FN4. Md. Rule 5-804(b)(1) is parallel to the Federal Rules of Evidence Rule 804 (a) when a declarant is unavailable as a witness. (a) Cannot be present to or testify at the trial or hearing because of death or a then existing infirmity, physical illness, or mental illness.

Collins's delay in seeking coram nobis relief 12 years after both Skok and Jenkins were decided, prejudiced the State ability to re-prosecute him base on the lack of the 1972 trial transcript is null and void on its face. Since those conclusions were made without any finding by the coram nobis court that the State had met is burden of proving by a preponderance of the evidence that the former 1972 trial witnesses were or would be unavailable to testify in the even Collins's 1972 conviction were overturned, and must be vacated for abuse of discretion. See Muhammad v. State, 177 Md. App. 188, (2007) ('the trial judge's ultimate determination that the witness is, indeed, unavailable and that [Rule 5-804] has therefore been satisfied is subject to review by the abuse of discretion. id. at 298.

(III). TO DETERMINE WHETHER OR NOT THE PUBLICATION OF SKOK AND JENKINS DECISIONS IN 2000 COULD SERVED TO HAVE PUT COLLINS ON NOTICE OF A POTENTIAL CAUSE TO CHALLENGE HIS 1972 CONVICTION AND HIS FAILURE TO SEEK CORAM NOBIS RELIEF IN 2000 COULD BE BARRED UNDER THE DOCTRINE OF LACHES ALTHOUGH UNTIL UNGER WAS DECIDE IN 2012 STATE IMPEDIMENTS LAWS OF WAIVER AND NON-RETROACTIVITY ENJOINED ANY COLLATERAL CHALLENGES TO ADVISORY ONLY JURY INSTRUCTIONS?

Although the Court of Special Appeals held, Collins, could not have filed a petition for writ of error coram nobis challenging the giving of the advisory only jury instructions in his 1972 trial, prior to the Maryland Court of Appeal's expansion of the writ in Skok, 361 Md. at 66-77 in 2000. And base on Jones, 445 Md. at 342 that held for delay to constitute laches, the delaying party must have had notice of a right or cause of action.") (quoting Frederick Rd. Ltd. P'ship v. Brown & Sturin, 360 Md. 76 118 (2000)) ruled in its view, Collins delay in filing his petition for coram nobis relief should not be held against him during the first two decades following his conviction.

That court nonetheless opined that because two significant decisions were issued in 2000; (1) the Court of Appeals decision in Skok, expanding the writ of error coram nobis to include challenges to criminal convictions on constitutional or fundamental grounds where no

other remedy is available, and (2) the Fourth Circuit Court's decision in Jenkins, holding that Maryland's advisory only jury instructions had violated Jenkins's right to due process in his State of Maryland criminal trial. Hence, with the publication of those decisions, Collins was on notice of his potential cause of action to challenge the 1972 conviction. Jones, supra, 445 Md. at 344 (stating that for laches, "delay to begins when a petitioner knew or should have known of the facts underlying the alleged error."); State Ctr., LLC v. Lexington Charles Ltd. P'ship, 438 Md. 451, 590 (2014) (In determining whether a delay is unreasonable, we must analyze [] when, if ever, their claim became ripe [i.e., the earliest time at which [the petitioners] were able to bring their claim[.] Because Collins waited another twelve years (until 2012) to file his petition for writ of error coram nobis --- a delay we readily conclude was unreasonable. Collins v. State, No. 1009, Sept. Term, 2017, decided April 22, 2019. **Appendix (A) at pgs 16-17.**

Collins asserts despite the Skok Court broadening of the parameters of coram nobis relief to encompass not only errors of fact that affect the validity or regularity of legal proceedings, but also legal errors of a constitutional or fundamental proportion. Skok v. State, 361 Md. 52, 760 2d, 647, Id. at 75 (citation omitted).

> In light of these serious collateral consequences, there should be a remedy for a convicted person who is not incarcerated and not on parole or probation; who is suddenly faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional or fundamental grounds. Such person should be able to file a motion for coram nobis relief regardless of whether the alleged infirmity in the conviction is considered an error of fact or an error of law.

at 361 Md. at 78:

Or even the United States Court of Appeals for the Fourth Circuit conclusions reaches in Jenkins, a habeas corpus case, addressing Maryland's advisory only jury instructions, holding.

> "Jenkin's due process rights under the Fourteenth Amendment to the United States Constitution were violated at his 1975 State of Maryland criminal trial when the judge instructed the jury that the judge's instructions were advisory. Jenkins v. Hutchinson, 221 F.3d 679 (4th Cir. 2000). Id. at 681. The Jenkins Court noting that trial judge had advised the jury that they were the judges of the law as well as the facts and, "[with each individual instruction, the court reminded the jury of the advisory nature of the instructions." Id. at 685. The Fourth Circuit concluded "that there is a reasonable likelihood that the jury interpreted these instructions as allowing it to ignore the "advise' of the court that the jury should find proof beyond a reasonable doubt. As a result, the Court held that the advisory instructions violated Jenkins' right to due process, Id, and affirmed the order of the district court granting Jenkins relief.

Collins v. State, No. 1009, Sept. Term, 2017, decided April 22, 2019. **Appendix (A) at 2-3, and at 8.**

However, contrary to the Court of Special Appeals conclusions, Collins could not be held to have been put on notice in 2000 for a number of reasons:

'1) prior to the Court of Appeals' decision in Skok v. State, 361 Md. 52 (2000), coram nobis relief was only available in Maryland in limited circumstances to correct a factual error that led to a final judgment. Skok, 361 Md. at 66-70. Collins, therefore, could not have filed a petition for writ of error coram nobis challenging the giving of the advisory only jury instructions in his 1972 trial prior to the Skok Court's expansion of the writ in 2000. Collins delay in filing his petition for coram nobis relief should not be held against him during the first two decades following his conviction in 1972. See Jones, 445 Md. at 342 ("For a delay to constitute laches, the delaying party must have had notice of a right or cause of action.") (quoting Frederick Rd. Ltd. P'ship v. Brown & Sturm, 360 Md. 76, 118 (2000);

'2) despite the Court of Appeals decision in Skok, expanding the writ of error coram nobis to include challenges to criminal convictions on constitutional or fundamental grounds where no other remedy was available. Collins still could not have raised the present claims under the holdings of Stevenson v. State, 289 Md. 167, 423 A.2d 558 (1980) or Montgomery

v. State, 292 Md. 84 (981) decided in 1980 and 1981. Since Skok did not overrule Stevenson's holding that advisory only jury instructions were not retroactive or Prokopis's conclusion of waiver regarding advisory only jury instruction when not raised on direct appeal, any attempt to raise that claim would have been doom under Prokopis v. State, 49 Md. App. at 535 (1981);

'3) in 2000 because the publication of Jenkins v. Hutchinson, 221 F.3d 679 (4th Cir. 2000) did not judicially overrule Stevenson's non retroactive impediments or either Prokopis's waiver impediments both that prevented Collins from making collateral challenges to the advisory only jury instructions. Since the federal courts in Jenkins did not address or decided any procedure impediments but actually addressed the merits of Jenkins claim and held advisory only jury instructions were unconstitutional. Jenkins could not be held to put Collins "on notice" of any potential cause of action to challenge the 1972 assault with intent to murder conviction since it did not have the potential to adversely affect Collins's 1972 conviction in light Stevenson and Prokopis impediments.

'4) case law of the Court of Appeals, as late as 2008 establishes neither Skok or Jenkins removed the procedure impediments set forth in Stevenson and Prokopis. Since in State v. Adams, 406 Md. 240 (2008) the high court held: Because Stevenson did not announce a new rule and Adams waived any challenge based thereon, there is no need to consider retrospectively here. See Guardino v. State, 50 Md. App. 695, 702 n.3, 440 A.2d 1101, 1105 n.3 (1982) (no retrospective question was presented by Stevenson v. State, 289 Md. 167, 423 A.2d 558 (1980) because it merely affirmed what if found to be long established law judging functions of the jury.") Prokopis v. State, 49 Md. App. 531, 535, 443 A.2d 1191 (1981) (Applicant acknowledges that Stevenson v. State is not retroactive. Id. 406 Md. at 258; at 299; also see State v. Adams-Bey, 449 Md. 690 (2016): "We were confronted again with a postconviction case concerning advisory only instruction in State v. Adams, 406 Md. 240, 958 A.2d 295 (2008). We reaffirmed the constitutional standard was not "new law," and, consequently, concluded that a criminal defendant who failed to object to

the advisory only instruction at trial waived the right to assert it as a ground for post conviction relief. Id. at 256-61.

'5) Collins's right to challenge his 1972 conviction for all intending purposes only accrued in May, 2012 when Maryland's Highest Court decided Unger v. State, supra, 427 Md. at 417 that represented a change in the law by removing Stevenson, Prokopis and Adams procedural impediments that previously prevented Collins from seeking collateral coram nobis relief. See Jones v. State, 445 Md. 324 (2015) quoting from Telink, Inc., v. United States, 24 F.3d 42, 46 (9th Cir. 1994) (The petitioner's right to challenge their convictions accrued when (a Supreme Court case) was decided). Jones at 356; Moguel v. State, 184 Md. App. 465 (2009) also see e.g., Beaty v. Selinger, 306 F.3d 914, 927 (9th Cir. 2002) ("Delay for purpose of awaiting a change of previously unfavorable law is reasonable delay for purposes of laches, and does not constitute a lack of diligence.") (citing cases); Marks v. Estelle, 691 F.2d 730, 732 (5th Cir. 1982) ("The 'unless "clauses of the rule is consistent with its equitable nature. In effect, delay is excused if the petition is based on a change in the law or newly discovered evidence.

Thus until Unger was decided in 2012 holding that those portions of Stevenson v. State, 289 Md. 167, 423 A.2d 558 (1980) opinion declaring that the interpretation of Article 23 in Stevenson was not a new state constitutional standard, were erroneous and overruled. Id. 427 Md. at 417; also see . State v. Waine, 444 Md. 692, (2015) in which, the court rejected the State's claim of waiver as having been "foreclosed by Unger. The court concluded that the advisory only instruction went to the very core of the process of law" and, based on the full retroactivity conferred by Unger, ordered that Waine was entitled to a new trial. Id. 444 Md. at 698. As so under those circumstances coram nobis relief could not have been held to have been ripe in 2000 when both Skok and Jenkins were decided. Delay in that light could only began when Unger was decided on May 24, 2012 in which Collins could be legally concluded to have knew or should have known of the facts to seek coram nobis relief base on advisory only jury instructions. Jones supra, 445 Md. at 344 (stating that for laches, "delay begins when

a petitioner knew or should have known of the facts underlying the alleged error."); State Ctr., LLC v. Lexington Charles Ltd. P'ship, 438 Md. 451, 590 (2014) ("In determining whether a delay is unreasonable, we must analyze [] when, if ever, the claim became ripe (i.e., the earliest time at which [the petitioners] were able to bring their claims)[.]"

Considered with all those precepts in mind, until Unger was decided overruling the previously impediments set forth in the precedential rulings in Stevenson, Prokopis, and Adams opinions. Collins was legally barred under the law of the case doctrine from seeking collateral relief to challenge the advisory only jury instructions. See Scott v. State, 379 Md. 170 (2004): ("Under the doctrine, once an appellate court rules upon a question presented in appeal, litigants and lower Courts become barred by the rulings, which is considered to be the law of the case. Id. 397 Md. at 184; also see Goldstein § Baron Chartered v. Chesley, 375 Md. 244, 825 A.2d 985 (2003) "Id at 253, 825 A.2d at 990 (internal quotation omitted). As so, here Collins delay begin when Unger was decided in May, 2012 therefore, the delay of one month and half in filing his petition for writ of error coram nobis was not at all lengthy or unreasonable but rather in compliance's with clearly establish case law as determined by the Court of Appeals.

In sum, Collins coram nobis petition could not be barred under the doctrine of a laches defense because neither Skok or Jenkins could be held to have legally put Collins on notice to seek coram nobis relief in light of the waiver and non-retroactive impediments that precluded coram nobis relief challenges to advisory only jury instructions until Unger was decided in 2012 removing those impediments. As so laches was unavailable as defense due to the State's failure to prove unreasonable delay, or prejudice. Moriarty v. Glueckert Funeral Home, Ltd. 925 F.Supp. 1389 (N. D. Ill. 1996) id. 925 F. Supp. at 1397).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: October 21, 2019