19-7380

No._____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

DINO J. CONSTANCE,

Petitioner,

v.

U.S. DISTRICT COURT OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Dino J. Constance
DOC# 317289

Coyote Ridge Corr. Center
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Connell, WA 99326
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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

I. Did the Ninth Circuit's unique five-part test for Mandamus relief cause a Fourteenth Amendment 'Equal Protection' violation? Are Equal Protection violations of this nature occurring regularly in the Sixth, Ninth, and/or Tenth Circuits?

II. Should the five-part tests endemic to these circuits be stricken or declared unconstitutional? Should this Court standardize the requirements to establish extraordinary circumstances for Mandamus relief across all Circuits?

III. Did conducting a § 2254 review without most of the post-conviction record, where this caused indisputable violations of Supreme Court holdings to remain uncorrected, perpetuated the unlawful suppression of a meritorious state court record, and triggered the erroneous withholding of a Certificate of Appealability, constitute extraordinary circumstances for the purpose of obtaining Mandamus relief?

Petitioner Dino Constance respectfully requests that this Court issue a Writ of Certiorari to review the decisions of the Ninth Circuit Court of Appeals to deny Mandamus Relief.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

1. Dino Constance, Petitioner
2. U.S. District Court of Washington, Respondent
3. Washington Dep. Attorney General Mandy Lynn Rose, Real Party in Interests

TABLE OF CONTENTS

(Continued...)

REASONS FOR GRANTING THE WRIT:

INDEX OF APPENDICES

[16] The 189 Exhibits listed in APPENDIX M and the actual documents contained in the "EXHIBITS" section of APPENDIX N are the same. Because the Petition for Writ of Mandamus involved a previously "lost" post-conviction record, the 189 EXHIBITS make up the bulk of that record and are very voluminous. Due to the prohibitive cost of reproducing and mailing these documents, and because Coyote Ridge Corrections Center refused to make the copies, Petitioner is forced to provide this material on CD (APPENDIX N.)

TABLE OF AUTHORITIES

Federal Rules:

Supreme Court Cases:

Federal Appellate Cases:

Federal District Court Cases:

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dino Constance Respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in this case.

OPINIONS & ORDERS DELIVERED IN THE COURTS BELOW

1. The Order rendered on August 28, 2019 by the Ninth Circuit Court of Appeals on Petitioner's Petition for Writ of Mandamus, denying mandamus relief and refusing all further filings appears at **APPENDIX A.**
2. Petitioner's Petition for Writ of Mandamus filed on August 6, 2019 appears at **APPENDIX B.** (Exhibits & Attachments are herein provided on CD.)
3. The Order rendered on March 7, 2017 by the Ninth Circuit Court of Appeals, denying Petitioner/Appellant's Motion for Reconsideration or Reconsideration **En Banc** to issue a Certificate of Appealability appears at **APPENDIX C.**
4. Petitioner/Appellant's Motion for Reconsideration or Reconsideration En Banc to issue a Certificate of Appealability filed on February 10, 2017 appears at **APPENDIX D.**
5. The Order rendered on January 30, 2017 by the Ninth Circuit Court of Appeals, denying Petitioner/Appellant's Motion for a Certificate of Appealability appears at **APPENDIX E.**
6. Petitioner/Appellant's Motion for a Certificate of Appealability filed on October 3, 2016 appears at **APPENDIX F.**
7. The Order rendered on September 1, 2016 Adopting the Report & Recommendation of the Federal District Court of Washington, dismissing Petitioner's Petition for Writ of Habeas Corpus and denying a Certificate of Appealability appears at **APPENDIX G.**
8. Petitioner's OBJECTIONS to the Magistrate's Report & Recommendations to the Federal District Court of Washington filed on June 23, 2016 appears at **APPENDIX H.**

*9. The Magistrate's Report & Recommendation (R&R) to the Federal District Court of Washington rendered on February 29, 2016 appears at **APPENDIX I.**

10. The Unpublished Opinion of the Washington State Court of Appeals rendered on December 30, 2014, denying the appeal of the Findings & Conclusions to defendant's motion for post-conviction relief appears at **APPENDIX J.**

11. A copy of Attachment E to Petitioner's underlying mandamus petition (the opening state post-conviction motion) is herein provided and appears at **APPENDIX K.** (It was unfurnished in violation of Habeas Rule 5.)

12. A copy of Attachment D to Petitioner's underlying mandamus petition (the final/amended state post-conviction motion for relief) is herein provided and appears at **APPENDIX L** (also unfurnished by Habeas Respondent.)

13. Petitioner's SUBMISSION OF THE RELEVANT STATE COURT RECORD, filed by post-conviction counsel on June 22, 2016 (after the R&R), lists the previously unfurnished 189 Post-Conviction Exhibits (the bulk of the Post-Conviction record) and reveals the enormity of what the Magistrate lacked for habeas consideration. It appears at **APPENDIX M.**

14. The 189 unfurnished Post-Conviction Exhibits were later provided (in electronic form) as Exhibits to Petitioner's mandamus petition, together with other key evidence, and are available on compact disk (CD) upon request of the Court.** If requested it will be furnished as **APPENDIX N.**

15. Admissions and other proof of past perjury and frauds on the courts by alleged victim Jean Ann Koncos appears at **APPENDIX O.**

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*This is the last reasoned decision in either the mandamus or habeas corpus case, and as noted, was drafted in the absence of all post-conviction briefing and evidence (App. N.) All subsequent decisions came by way of one-page orders without analysis or comment beyond a one or two-sentence recitation of the legal standard involved.

**This (unlawfully suppressed) evidence goes to the strength of the underlying habeas and mandamus cases, establishes pervasive prosecutorial misconduct, and is not furnished in paper form due to excessive volume.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Ninth Circuit Court of Appeals issued it's denial of Petitioner's Petition for Writ of Mandamus on August 28, 2019. That ruling became final also on August 28, 2019 due to the court's accompanying order that "No further filings will be entertained on this closed case." This Court has jurisdiction under 28 U.S.C § 1254(1) to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sec. 1 of the Fourteenth Amendment to the U.S. Constitution provides that:

> No State shall...deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The Writ of Mandamus is authorized by the All Writs Act; 28 U.S.C § 1651(a):

> The Supreme Court and all courts established by Act of Congress may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Certificate of Appealability (COA) Provision of the Antiterrorism & Effective Death Penalty Act.

28 U.S.C. § 2254 specifies:

> (g) A copy of the official records of the state court duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opionion, or other reliable written indica showing such factual determination by the State court shall be admissible in the federal court proceeding.
>
> (h) ...If the applicant, because of indigency or other reason is unable to produce such part of the record, then the state shall produce such part of the record and the Federal court shall direct the state to do so by order directed to an appropriate State official.

28 U.S.C. 636(b)(1)(C) requires that:

> A judge of the court shall make de novo determination of those portions of the record or specified proposed findings or recommendation to which objection is made...

STATEMENT OF THE CASE

1. Introduction -

In this Washington State case, a well respected middle aged mortgage broker with no significant criminal history, Dino J. Constance, was arrested on May 7, 2007. After no pretrial investigation and a grossly deficient 2½ day trial, he was convicted of three counts of solicitation to murder and one count of solicitation to assault his estranged wife, Jean Ann Koncos. Mr. Constance was sentenced to fifty-three (53) years in prison without parole.

The defendant was accused only upon seeking a child custody change after learning that the wife was abusing his beloved toddler son; a wife who had just lost custody of her two previous children in vicious custody proceedings.

With a negligible trial record, an extremely fruitful two-year post-conviction investigation revealed hard evidence establishing a huge array of Constitutional errors and violations. These include pervasive violations of Brady v. Maryland 373 U.S. 83 (1963) spread across the counts, no cumulative Brady analysis, no 'true threat' jury instruction, 'eavesdropping' on attorney-client communications, and others.

Similarly, the investigation revealed widespread actual prejudice associated with Strickland 466 U.S. 668 (1984) errors caused by trial counsel's lack of investigation. The new Brady & Strickland evidence was never analyzed collectively or cumulatively, and fundamentally transformed the case.

After updating the record in extensive post-conviction proceedings, the state post-conviction (trial) court reversed and dismissed only Count 4 of the joined trial, despite the reversal causing spoilage of the other convictions due to faulty jury instructions. The state appellate court affirmed all of the post-conviction court's decisions. Upon exhausting state remedies, Mr. Constance timely filed his § 2254 Petition, pro se, in late 2015.

Many times the size of the trial record, the powerful post-conviction record has been revered as "overwhelming" by multiple attorneys. But it was "lost" for federal habeas corpus consideration (and the balance of the record was severely fouled.) This huge post-conviction record, with evidence proving literally dozens of Brady violations and other misconduct, and many other errors, was never furnished by Respondent in violation of Habeas Rule 5.

Over repeated objections and several motions seeking to perfect the record, the District Court Magistrate reviewed the case in the absence of that record, and recommended dismissal of the Petition and denial of a Certificate of Appealability (COA).[1] Counsel then filed overlength OBJECTIONS. App. H.

The adopted without change district court order makes no mention of the lack of a cumulative Brady analysis required under Kyles 514 U.S. at 436-37. This is despite this requirement having been reaffirmed in Wearry v. Cain U.S. ___, S.Ct. 1002, 194 L.ED.2d 798 (2016) while habeas proceedings were still ongoing, and this issue being repeatedly briefed by Mr. Constance and his counsel. App. H at 5-7. In 2017, the Ninth Circuit Court of Appeals also denied two timely Motions for a COA, despite the very strong merits of the largely updated record, again without any analysis. App. D & F.

After attempting to obtain a COA by way of FRAP 2 in 2018, with no access to appeal or other means to challenge the inherently flawed record-absent decision, on August 6, 2019 Mr. Constance sought mandamus relief. He asked the federal appellate court to compel perfection of the unfurnished and only partially updated Relevant State Court Record, and to compel the full review he never received, or to issue the obviously appropriate and overdue COA.

[1]Although former counsel reentered the case and furnished much of the missing record well after the last reasoned decision (the R&R), all twenty-five (25) post-conviction briefs, specifically required by Habeas Rule 5, were still not designated as part of the Relevant State Court Record.

On August 28, 2019, the Ninth Circuit Court of Appeals denied the Petition for Writ of Mandamus based on the claimed failure to meet the test for extraordinary circumstances set out in Bauman v. United States District Court 557 F.2d 650 (9th Cir. 1997.) The COA was also again denied.

Petitioner intended to seek Ninth Circuit review en banc, but was precluded from doing so by an order that "No further filings will be entertained on this closed case", also entered on August 28, 2019. App. A.

2. The Overwhelming Merits of the Post-Conviction Case -

The post-conviction record in this case reveals so many exculpatory facts and issues, it is difficult to be concise. But first, the circumstances of this "murder for hire" case are unusual. No "contract" was ever recorded, no under cover police officer ever posed as a "hit man", no "hit fee" was ever paid, and no one was ever harmed.

The case was based almost exclusively on the testimony of four (4) accusers. Post-Conviction investigation revealed that all four were highly disreputable men. All either had intense personal biases against the defendant (and had conspired with the wife to defraud the courts), or had received undisclosed deals and favors from the state. Essentially, Mr. Constance was convicted based on the word of two nearly destitute men who had been trying to blackmail him, and unknown to the jury, two others (both known criminals) who had quite literally been bought off by the state.

The (often concealed) Brady violations (App. L at 2) were so pervasive that one of them led to the at-gunpoint kidnapping and rape of a woman in nearby Portland, Oregon. App. K at 21-26. After months of stonewalling the documented misconduct that led to these crimes, it became the primary issue in Prosecutor Tony Golik's election to office - but too late to affect the results of the election. (Still featured at ClarkCountyConservative.com)

The witnesses in originating Counts 1 & 2, Michael & Jordan Spry, were Mr. Constance's temporary roommates in early 2007. In final eviction, they were reliant on him for even basic sustenance. On March 27, 2007 they had a heated financial disagreement with Mr. Constance and Constance moved out.

On April 1, 2007 Michael Spry sent Mr. Constance a "flaming" eight (8) page Email, demanding money and intensely threatening him. Despite the intensity & variety of the threats, the Email makes no mention of solicitations or threats to report same. The state had copies of the parties' Emails but disclosed only those sent by Mr. Constance. App. K at 30 Line 19,- 31.

With his hateful Email undisclosed, Mr. Spry was able to appear credible at trial, claiming he only wanted to "help" Mr. Constance. He claimed (and appeared to be) an "ordained Baptist minister". But post-conviction it was discovered that he had been defrocked, was a highly vindictive drug addict, a life-long severe sexual predator, and anything but credible. App. B at 8 e).

On April 2, 2007, Jordan Spry left Mr. Constance two long voicemails, threatening to sabotage Mr. Constance's child custody case if he did not pay Jordan's father $1,500. Again, no mention of solicitations was recorded. These "blackmail recordings" were the only exculpatory evidence at trial. But all copies of them disappeared and the case went to appeal, then up on habeas without this valuable evidence. Jordan had thirteen (13) undisclosed warrants.

On April 3, 2007 the Sprys met with Ms. Koncos, who had just received Mr. Constance's custody change motion. Only then, as a product of this collaboration, did the Sprys levy the first solicitation allegations. They did this on Ms. Koncos' computerized pleading paper, to support her motion to the family court. Koncos and the Sprys tried to claim that they had "warned" her of Mr. Constance's alleged solicitations since well before the March 27, 2007 financial dispute; a credibility-bolstering ruse that broke down just

before trial. Ms. Koncos then confirmed no such pre-March 27th warnings ever existed. This was by no means Ms. Koncos' first fraud on the courts. App. O.

The Count 3 witness, Ricci Castellanos, received numerous undisclosed favors from the state, to include dismissal of a sentence he had been avoiding for years, insulation from arrest, and even cash money. Post-conviction investigation revealed that this man, a known jailhouse informant, suffered from major mental illness; which was known to the state but not disclosed. This included hallucinations and "murder ideation". App. B at 10-11 k).

After repeatedly testifying, post-conviction, that he had expected and was expecting nothing from the state, the very next day he called the prosecutor's office to inquire how much he would again be paid. Dismissal of the old sentence was withheld until Mr. Constance's successful conviction.

The Count 4 witness, Zachary Brown, arguably made the case for the state.[2] At 6'1' 245 lbs., he was intimidating and the only accuser with the physical prowess and violent temperament to have harmed the 5'10" 195 lb. Jean Koncos. All other accusers were small, weak, feeble, and/or sickly men.

Count 4 was added after the arrest. Mr. Constance told police to speak to Mr. Brown, to show that if he wanted to harm Ms. Koncos he could have hired this man. But the state made yet another secret deal with this witness as well, quashing his two no-contact orders which resulted in his release from jail. Post-conviction, Mr. Brown testified that Mr. Constance never contacted him after leaving the jail, and never even gave him his wife's name.

[2]Mr. Constance only met Mr. Castellanos & Brown while being jailed for five days (the longest jailing of his life) for a false child support violation that had been cleverly fabricated by Ms. Koncos. When there, the naive Mr. Constance told Castellanos and Brown all about his problems with the Sprys and his concerns for his son. Although the Count 3 & 4 witnesses had full knowledge of the Sprys' allegations, and had been secretly motivated to embellish or copy them, the prosecutor told the jury that the witnesses knew nothing of each other (save the two Sprys), so were independently credible.

The lead detective on the case, John O'Mara, had a terrible record for dishonesty, incompetence, and failure to follow proper procedures. He grossly mischaracterized Mr. Constance, his actions, and his record to obtain an illegal warrant that led to the only non-testimonial evidence in the case; a single ambiguous but still damaging recording. The recording was easy to explain, but counsel was so ill prepared he failed to do so, and he insisted that Mr. Constance not testify. See App. B at 5, & 11-12 at n).

On habeas, in the absence of the post-conviction evidence that disproves it, the magistrate clearly relied on the detective's highly prejudicial false information. Det. O'Mara was fired from the Clark County Sheriff's Office not long after Mr. Constance's conviction. Det. O'Mara's substandard record was also in no way disclosed or discovered for trial.[3] App. B at 17, ftnte. 13.

The above information is very abridged and does not do justice to the substantive strength of the underlying post-conviction record. Defendant's exhibits were limited to two (2) at trial. Now, even without twenty-three (23) of the twenty-five (25) missing state post-conviction briefs, defense exhibits total 189, and most contain multiple documents. App. M.

It took eight (8) days of post-conviction evidentiary hearings, supplementing the absurd 1½ day defense case at trial, to admit all the new evidence - again, none of which had been admitted when the R&R was drafted. This huge trove of evidence meticulously documents each and every one of the alleged Brady, Strickland, and other constitutional errors listed in App. L, as well as other errors that have arisen since the conclusion of state court proceedings. Yet the Ninth Circuit Court of Appeals found this record insufficiently meritorious to compel review of, by way of mandamus relief.

[3]For additional highlights of the post-conviction record, see App. B at 6-13, and Attachment E to that Petition (herein furnished as App. K.)

3. The Suspicious Circumstances Of The 'Lost' Post-Conviction Record -

Clark County, Washington is a jurisdiction where the elected prosecutor, Tony Golik, became elected largely based on the convictions and 'publicity stunt' sentence in this case; The Constance case was prominently featured in Mr. Golik's campaign website, and he actually took credit for saving Ms. Koncos' life. But when his Brady deal/raped woman issue blew up in the man's face, this case became a great liability to his position; then and now.

Clark County now ranks 7th, nationally, for post-conviction exonerations (according to the national registry of exonerations), and Mr. Golik's office is now under Justice Dept. investigation. The county has incurred at least $43.5 million in misconduct-related wrongful imprisonment § 1983 settlements and awards since 2014, is now uninsured against more such lawsuits, and may be nearto bankruptcy. (See Davis v. Clark County & Spencer v. Clark County -citations not available because these cases have recently been removed from the Washington State DOC Law Library version of Lexis Nexis.)

The Constance case post-conviction record contains proof of many times the misconduct that resulted in the above mentioned settlements and awards. Mr. Constance can show very substantial damages,[4] and possible trebble damages under Rico as well. And because there is no winnable case remaining to retry, proper review of the full record in this case would inevitably lead to reversal of the remaining convictions, dismissal of the criminal case, and the § 1983 action that could bankrupt Clark County and/or cost the State of Washington tens of millions of dollars; Fair, unbiased review could literally change the face of the profitable criminal justice map in Washington State.

[4]Mr. Constance has been wrongfully incarcerated for over (12) years, has missed the boyhood of his only child, can substantiate lost income of $300k-$600k per year, and now at 60 years of age has developed serious health problems associated with his incarceration.

The misconduct that was necessary to obtain the politically expedient convictions for Mr. Golik's 2010 election to office, can only be described as corrupt, fraudulent, irresponsible, reckless, dangerous, criminal, and absolutely scandalous. It was only possible because Petitioner expended no resources to obtain proper trial counsel; something that very much changed after the convictions. The state appellate court's affirming these convictions despite the overwhelming post-conviction record, can only be explained by an overriding need to protect the one (1) remaining most profitable Washington State county from the ramifications of it's misconduct:

Historically speaking, the Pierce & Clark County criminal justice systems are in a class by themselves and are known to be the two most notorious in Washington State. Together they account for a disproportionate number of "offenders" being steadily deposited to the State's profitable prison system, thereby accounting for much of the State's revenue.

However, Pierce County has recently undergone major changes toward lawful and Constitutionally compliant conduct due to the federal indictment of it's former elected prosecutor, the infamous Mark Lindquist. But in finally forcing these changes, the U.S. Justice Dept. has placed even greater demands on the State's other "cash cow", Clark County, to fill the financial void.

And so, this Petitioner finding justice represents a second serious blow to the state's budget, and explains why review of this case is being avoided with such reckless abandon (i.e.: misplacing a 4,000 page $250,000 post-conviction record, refusing to perfect, performing a supposedly de novo review with no record, and the like.) Meaningful review of the post-conviction record has never occurred because the local courts simply will not allow it. But this has come at the expense of several bedrock Constitutional principles, and this Petitioner's wrongful lifetime imprisonment.

REASONS FOR GRANTING THE WRIT

A. Inconsistent And Amorphous Requirements To Establish Extraordinary Circumstances For Mandamus Relief, Particularly In The Ninth Circuit, Leave Much Room For Judicial Error And Caused An 'Equal Protection' Violation In This Case. Clarification And/Or Standardization From This Court Is Needed.

Mandamus Tests & Factors In The Various Circuits -

In Honorable Michael J. Roche v. Evaporated Milk Assn. 87 L.ED 1185, 319 U.S. 21 (1943), this Court first stated that the Writ of Mandamus is intended to "confine a inferior court to the lawful exercise of its prescribed jurisdiction or to compel it to exercise it's authority when it has a duty to do so." In Banker's Life & Casualty Company v. The Honorable John W. Holland, 346 U.S. 379 L.Ed 106, 74 S.Ct. 145 (1953) this Court made it clear that mandamus is not a substitute for appeal, nor any other means of obtaining relief. Rather, mandamus is an extraordinary remedy, and should be invoked only in the most drastic and extreme of circumstances.

Mandamus "does not lie against a federal district judge merely because he committed reversible error"; Something more is required. A writ of mandamus "is appropriately used, however, when there is usurpation of judicial power, or a clear abuse of discretion". Id. 346 U.S. at 383.

And in Cheney v. U.S. District Court for the District of Columbia 524 U.S. 376 380-81, 124 S.Ct. 2567 159 L.Ed.2d 459 (2004), the Court set the modern day standard for determining if mandamus relief should be granted. This Court prescribed a three-part test for determining if the extraordinary circumstances needed to warrant mandamus relief have been met:

1) The Petitioner seeking the writ's issuance must have no other adequate means to attain the relief which the petitioner desires.
2) The Petitioner must satisfy the burden of showing the Petitioner's right to the writ's issuance is clear and indisputable.
3) The issuing Court, in the exercise of its discretion, must be satisfied the writ is appropriate under the circumstances.

The majority (10) of the Circuits continue to use the three-part test originally set out in Cheney, or a close variation of that test, with some occasionally substituting in an "irreparable harm", "usurpation of judicial power", or "abuse of discretion" element for the third prong:

DC Circuit - Uses Cheney.
See In re: Kellogg Brown & Root, Inc. 795 F.3d 137 (DC Cir. 2015.)

Federal Circuit - Uses Cheney.
See Gaines v. McDonald 598 Fed. Appx. 993 (2015)

First Circuit - Uses Cheney derivative, with "irreparable harm" element.
See Rectical Foam Corp. 959 F.2d 1000, 1005 (1st Cir. 1998.)

Second Circuit - Uses Cheney.
See United States v. Prevezon Holdings Ltd. 839 F. 3d 227 (2nd Cir. 2016.)

Third Circuit - Uses Cheney derivative, with "irreparable harm" element.
See In re: Shawley 238 Fed. Appx. 765 (3rd Cir. 2007.)

Fourth Circuit - Uses Cheney.
See In re: Sirleaf 2019 U.S. App. LEXIS 13308

Fifth Circuit - Uses Cheney.
See In re: Volkswagen of Am., Inc. 545 F.3d, 304, 311 (5th Cir. 2005)(en banc.)

Seventh Circuit - Uses Cheney.
See United States v. Henderson 915 F.2d 427 (7th Cir 2018.)

Eighth Circuit - Uses Cheney.
See In re: Kerry 894 F.3d 900 (8th Cir. 2018.)

Eleventh Circuit - Uses Cheney.
See In re: Moody 739 F.3d 1289 (11th Cir. 2014.)

However, where the Sixth, Ninth, and Tenth Circuit often cite to cases such as Banker's Life & Cheney, in practice they utilize their own very different five (5) part test, to determine if extraordinary circumstances appropriate for issuance of a Writ of Mandamus exist. The Ninth Circuit's controlling case is Bauman v. U.S. Dist. Court 557 F.2d 650 (9th Cir 1977.) The Sixth Circuit uses an identical test under John B. v. Goetz, 531 F.3d 448 457 (6th Cir. 2008). Those cases delineate the following five (5) factors:

1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires.
2) Petitioner will be damaged or prejudiced in a way not corrrectable on appeal.
3) The district court's order is clearly erroneous as a matter of law.[5]
4) The district court's order is an oft-repeated error, or manifests a persistent disregard for the federal rules.
5) The district court order raises new and important problems, or issues of law of fist impression.

Petitioner's Extraordinary Circumstances Under Cheney -

Here, Petitioner sought mandamus relief in the form of perfection of his record and proper de novo review, or issuance of a COA; Mr. Constance sought to compel the district court to reopen the case, obtain and add his post-conviction record to the federal court record, and provide review of that record (or a COA) - all of which was that court's duty.

First, without a COA to pursue his relief on appeal, factor #1 of the Cheney test is clearly satisfied; With no other means to seek relief, Mr. Constance even attempted to acquire a COA by way of FRAP 2. But with the case prematurely closed (before proper review of the full record), he could not even get his motion on the docket. Only the drastic remedy of mandamus, as its own action and with a unique case number, enabled him to do so.

Because Petitioner had an absolute right to de novo review of a reasonably complete record for habeas corpus consideration, his right to issuance of the writ was also clear and indisputable. Similarly, given the merits of his claims and the low standard for COA issuance under AEDPA, requested here in the mandamus context, Mr. Constance's right to the writ was again clear and insisputable. Thus the #2 factor under Cheney is clearly satisfied.

[5]The Tenth Circuit's test under Cooper Tire & Rubber Co. 568 F.3d 1180, 1186 (10th Cir. 2009) is almost identical to the Bauman test; substituting "abuse of discretion" for Bauman's #3 "clearly erroneous as a matter of low" factor.

Petitioner also had a clear and indisputable right to de novo review of counsel's OBJECTIONS to the R&R.[6] Fed. R. Civ. Proc. 72(b)(3); 28 U.S.C. § 636(b)(1)(C); McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991.)

With factors #1 & #2 having been satisfied, Petitioner turns the Court's attention to the more undefined, discretionary factor #3. Given that the review - what little of it there was - was conducted and the last reasoned decision arrived at in the absence of the relevant portion of the record (the post-conviction record), this is beyond extraordinary and should weigh heavily on any court's discretion; "Review" without the only relevant portion of the record is no review at all, and is absurd.

And all this occurring in the presence of clear and repeated violations of this Court's commands for a cumulative Brady analysis (which should have rendered all subsequent proceedings mute with a new trial having been ordered years ago), is also shocking. Particularly with this key requirement having been reaffirmed in Wearry while habeas proceedings were ongoing, this is most extraordinary as well. Something is very wrong with this picture.

The repeated denial of the COA (by the Magistrate, the District Judge, & the appellate court when so moved under 28 U.S.C. § 2253), despite the low standard for issuance being vastly exceeded - in and of itself - was also an extraordinary circumstance. And it was an abuse of discretion, a usurpation of judicial power, if not an evasion of an act of Congress as well - all of which should motivate the exercise of a court's discretion to correct.

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[6]But even if the District Judge did read the portion of the post-conviction record (the 189 Exhibits) provided to him after the R&R had been submitted, he did so in the complete absence of all twenty-five (25) post-conviction briefs (briefs explicitly required under Habeas Rule 5) that lent substance, explanation, and context to that untimely explosion of evidence. As such, just as the Magistrate had almost no post-conviction record to draw responsible conclusions from, the still incomplete Relevant State Court Record (with no briefs) also made it impossible for the District Judge to fulfill the requirement for de novo review as well.

Given that Mr. Constance was facing a wrongful, slow death in prison, with no access to appeal and without the possibility of parole, the situation certainly posed the "irreparable harm" that some circuits also look for when considering whether to grant mandamus relief.

If all this were not enough, Petitioner's many objections and motions to compel compliance with Habeas Rule 5, or to complete, perfect, or reconstruct the deficient record, were answered by the district court's mere echoing of Respondent's irrelevant claim that "everything sent up from the state ha[d] been provided". And the adjudication of the § 2254 petition (including denial of the Motion for a COA) occurred in the absence of any oral arguments in violation of FRAP 34(2); more error contributing to the cumulatively extraordinary circumstances in the federal proceedings.

In the underlying state proceedings, the 2½ day trial and 53 year sentence, the dozens of Brady violations, the lack of a pretrial investigation and a "true threat" jury instruction, the erroneous joinder instruction, a witness-victim conspiracy, the (soon-to-be fired) lead detective's perjured information subverting the R&R, and the eavesdropping on privileged attorney-client communication, all add up to far more than mere reversable error.[7]

But alone, the lack of proper habeas corpus review of the previously unfurnished post-conviction record and the ramifications thereof, clearly caused a drastic situation that could only be remedied by a Writ of Mandamus. The difference between obtaining the review Mr. Constance was entitled to but had been deprived of, or not, meant justice, exoneration , and freedom, as

[7]The Prosecutor's obvious political aspirations motivating his misconduct, and Petitioner's two (2) related motions to recuse him being withheld from the record by the Respondent, is also extaordinary. Each count being anchored by only a single highly questionable "paid off" witness further adds to the extraordinary circumstances in this matter.

opposed to wrongful life imprisonment. Except for the execution of an innocent man, one can scarcely imagine a set of circumstances more dire and extraordinary, or a more appropriate use for the Writ of Mandamus.

Accordingly, the circumstances here are such that any reasonable fair minded jurist would have to be thoroughly satisfied with the writ's appropriate use. Thus it is clear that these circumstances satisfied all three (3) of the Cheney factors, as well as all other factors and elements commonly considered in any circuit's three-part Cheney or Cheney derivative test.

The Request For A COA In The Mandamus Context -

In Buck v. Davis 137 S.Ct. 759 (2017), the petitioner sought a COA by way of a motion under CR 60(b)(6), was denied, appealed, and the decision was affirmed. On certiorari, this Court held that the Fifth Circuit essentially decided the CR 60 motion on the merits by concluding that "...[Buck] had not shown extraordinary circumstances that would permit relief under [Rule] 60(b)" and relied on that conclusion to deny the COA. Id. at 773.

Justice Robertson explained why this was improper:

> The question for the Fifth Circuit was not whether Buck had "shown extraordinary circumstances" [necessary to warrant Rule 60(b) relief]... A "court of appeals should limit its examination to a threshold inquiry into the underlying merit of [the] claims" and ask only if the district court's decision [to deny the COA] was debatable".

Here, the Ninth Circuit committed the identical error, only in a mandamus context instead of CR 60. The Ninth Circuit's order made no mention of a threshold inquiry, only a supposed lack of extraordinary circumstances - just as in Buck. Accordingly, with respect to the COA portion of Mr. Constance's mandamus petition, in denying relief based on the claimed failure to meet extraordinary circumstances (under Bauman), the court failed to ask the proper question and erroneously denied the COA.

Had the proper threshold inquiry under AEDPA's COA provision and/or Slack v. McDaniel 529 U.S. 473, 484 (2000) been made, it is indisputable that Mr. Constance's claims warranted issuance of a COA. The failure of any prior court to perform a cumulative Brady analysis consistent with this Court's commands in Kyles & Wearry, **alone vastly exceeds the standard for granting a COA**; Not only was the district court's decision debatable, a new trial was required based on this Court's past and recent holdings.

The Fourteenth Amendment Violation of Equal Protection Under The Law -

Without question, the Ninth Circuit mandamus panel denied the COA erroneously. But more importantly, it also denied the primary relief requested because Mr. Constance "ha[d] not demonstrated that this case warrants the intervention of this Court by means of the extraordinary remedy of mandamus", further directing the Petitioner to the Bauman standard.

Of course, with no analysis accompanying the decision, which of the Bauman factor(s) is responsible for the petition's failure is not specifically stated. But without a COA, the first and second factors of the Bauman test are are clearly satisfied. Similarly, with the glaring violation of this Court's commands in Kyles & Wearry alone, the Ninth Circuit panel here would have had to have been fully satisfied that "the district court order is clearly erroneous as a matter of law." Thus, only Bauman factors #4 & #5 (or some unidentified factor) remain to account for the Petition's denial.

Bauman's #1 & #2 factors are clearly very similar to the first factor in Cheney, and the "clearly erroneous" third Bauman factor is obviously analogous to Cheney's "clear and indisputable" entitlement to relief. But the final two factors in Bauman are different. They are both unique to the Ninth & Tenth Circuits, and neither is specifically authorized by statute or sanctioned by

this Court. And they would appear to have nothing whatsoever to do with any of the other authority prominently cited, and noted herein. Indeed there are significant differences between the Cheney and Bauman/Cooper Tire standards of review and they are called into scrutiny by this case. **But what is really important here is not which of the Bauman factors caused the denial, but rather if the Cheney test would have produced the same result.**

Because these last two factors have no similarity to any of the Cheney reqirements, recognized and adhered to by the vast majority of the circuits, they add something extra needed to obtain mandamus relief in the Ninth & Tenth Circuits. The Cheney decision included not a word about 'frequency of repetition', "court rules", "new and important problems", or "law of first impression". Thus these last two elements are extraneous to the requirements for mandamus relief in nearly all other circuits.

Furthermore, where all three (3) factors in the Cheney test are always required, the Bauman court acknowledged that less than all five (5) factors must be present for issuance of the writ in many cases, thus adding a uniquely amorphous aspect to the "non-exhaustive" Bauman test.

If a citizen similarly situated as Mr. Constance (or Mr. Constance himself) in a different circuit, is entitled to mandamus relief under the Cheney test, so must he be in the Ninth Circuit under Bauman. If either of the two (2) extraneous factors in Bauman (or any other aspect of that case, for that matter) precludes mandamus relief where it would be granted in another circuit, as apparently occurred here, Bauman runs afoul of the Fourteenth Amendment's "equal protection" clause.

Accordingly, if this Court finds that the extraordinary circumstances explained in Mr. Constance's Petition for Writ of Mandamus would indeed have

warranted mandamus relief under Cheney, unless the Ninth Circuit misapplied it's own standard, the equal protection violation becomes clear.

The equal protection violations attributable to the extraneous aspects of the Bauman test are not limited to the case at bar. Other mandamus petitions have been decided (and denied) in the Ninth Circuit based on the extraneous #4 & #5 factors.[8] See White v. U.S. Dist. Court for the N. Dist. of Cal. 565 Fed. Appx. 623 (9th Cir. 2014) where the Court stated:

> Even assuming clear error, mandamus is inappropriate because the district court decision to deny a stay **does not present an "oft-repeated error or manifest [] a persistent disregard for the federal rules"** (Perry v. Schwartzenegger 591 F.3d 1125, 1136 (9th Cir. 2009). [Emphasis is added.]

See also In re: Cement Antitrust Litigation etc. 688 F.2d 1297 (9th Cir. 1982), where the court said:

> In the present case, it is the fifth Bauman factor that implicates our supervisory mandamus authority; we are faced with the need to resolve a significant question of **first impression.** [Emphasis is added.]

The court went on to deny the Petition for a Writ of Mandam in that case based on the fifth Bauman factor.

In United States v. Mehrmanesh 625 F.2d 766 (9th Cir. 1980) the court both rejected an appeal and also denied mandamus relief. In considering the mandamus petition, Judge Fletcher Stated:

> Indeed, the final guideline in Bauman for the appropriateness of mandamus relief is that "[t]he district court's order raises new and important problems, or issues of law of first impression." ...If this case is not appealable, the other Bauman guidelines indicate the appropriateness of of mandamus relief as well. Petitioners have no other adequate means of attaining the relief they desire, and they will be damaged in a way not

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[8]It should be noted that in the vast majority of these cases, the Ninth Circuit denies the petition without offering an opinion or analysis explaining why. Rather, in almost all cases it merely denies the petition with the identical verbiage that appears in App. 1. As such, a great many cases that may have been denied based on the extraneous Bauman factors cannot be positively identified.

not correctable on appeal from a conviction. Bauman v. Dist Court 557 F.2d at 654-55. The remaining guideline, which suggests that mandamus is appropriate if the error is oft-repeated, is not appropriate here... I think the error of the district court in denying defendant's motion to dismiss is clear and mandamus should issue if the court will not entertain the appeal.

Dissent of FLETCHER.

In Calderon v. United States Dist. Court 134 F.3d 981 (9th Cir. 1997) the Ninth Circuit's ruling stated in part:

> The state contends (and Taylor does not dispute) that the first two factors of the Cement standard are satisfied because the state has no alternative procedural mechanism, such as direct appeal.
>
> In determining whether the third factor is present, we recognize that a lesser showing is required in so-called "supervisory mandamus" cases, "where the petition causes an important question of law of first impression..." In such cases - one of which the instant case certainly seems to be - mandamus may issue upon a showing of ordinary (as opposed to clear) error. [Emphasis is added.]

Ultimately, the court denied the writ because the #5 Bauman factor involving "law of first impression" was not sufficiently important.

Although the Petitioner in the case at bar was not afforded any reason for the denial of his petition, the above cases show that the Ninth Circuit does in fact deny mandamus petitions based on the Bauman factors that are extraneous to the requirements prescribed in Cheney. With this knowledge, and given the strength of Mr. Constance's petition, it does appear that Ninth Circuit mandamus petitioners are regularly being denied equal protection under the law.

Mandamus is "one of the most potent weapons in the judicial arsenal". Cheney 524 U.S. at 465. When fatal due process errors persisted in Mr. Constance's flawed habeas proceedings, and drastic measures were called for to vindicate his rights, Mr. Constance relied on mandamus for protection from the errors. Having been denied such protection, where he would have received it

in another circuit, Petitioner's Fourteenth Amendment right to equal protection under the law have been violated.

Accordingly, a United States court of appeals has entered a decision in conflict with numerous other courts of appeals on the same important matter. The presumed constitutionality of the Ninth Circuit's Bauman test for mandamus relief has not been, but should be settled by this Court.

B. A Simple Mathematical Analysis Reveals A Significant Disparity In The Likelihood Of Mandamus Relief Being Granted In The Sixth, Ninth, and Tenth Circuits As Opposed To Other Comparable Circuits.

There is a mathematical side to the argument presented in the previous section of this Petition. As noted on Page 3, this Petitioner is a mortgage broker, and as such may be regarded as a "mathematical man" by profession. Mr. Constance favors this occupation in part because "numbers don't lie", and often reveal the plain truth of any given matter more effectively and conclusively than the many grey shades of language, law, or human discretion.

In researching this Petition on Lexis Nexis, Petitioner noticed that the Ninth Circuit seemed to grant mandamus relief more sparingly than other circuits. This prompted some investigating, which has yielded some meaningful information.

Following is a simple, straightforward mathematical analysis that endeavors to: a) determine the likelihood of obtaining mandamus relief in each of the thirteen circuits, and b) present a plain English realistic comparison of those likelihoods, in particular comparing Cheney vs. non-Cheney circuits. This analysis employs no integral calculus, standard deviations, or other sophisticated mathematical processes; only simple percentages & probabilities immediately ascertainable from the observable data are employed. Hence there are no "smoke & mirrors" here; only cold, hard mathematical facts.

First, presented below is a summary of the data obtained from the Lexis Nexis data base, on which this analysis is based. It was last updated for Washington's Dept. of Corrections on August 8, 2019. The selected data is limited to supervisory mandamus petitions only, properly brought at the appellate court level only; Appeals of district court cases are not included.

Since this analysis endeavors to compare the Cheney test with the Bauman (/John B.) & Cooper Tire tests, all petitions considered prior to June 24, 2004 (the date Cheney was decided), are omitted from the data below. As Cooper Tire was only decided on June 9, 2009, all Tenth Circuit peitions considered prior to that date are are also omitted from the data. And petitions in all circuits that were held to be moot, or where the court determined that it lacked jurisdiction, are omitted as well.[9]

By adhering to the above parameters, only petitions that would lend the data to gauging the relative challenge and difficulty in obtaining Mandamus relief in the Federal Appellate Courts (based on the standard of review each circuit uses) are selected. Petitioner has made every effort to insure that the data will support a uniform, fair, and unbiased analysis.

If the Sixth, Ninth, and Tenth Circuits do indeed grant a significantly lower proportion of mandamus petitions than the Cheney circuits, this would advance the argument that the five-factor Bauman/John B. and/or Cooper Tire standards violate equal protection. Because only these three circuits use the five-part tests, it would support the argument that the extraneous factors make obtaining mandamus relief more difficult and less likely than in the three-part Cheney circuits. See Figure 1.

[9]Mr. Constance spent a great many hours combing through the data base after filtering off the petitions that predate the respective controlling cases. This insures that nearly of the relatively few petitions that remain, conform to the above-noted parameters.

MANDAMUS PETITIONS BY CIRCUIT

(6/24/04 - 8/8/19)

Fig. 1

Circuit	Petitions Considered	Granted	Denied	Percent Granted
1st Cir.	**801**	**12**	**789**	**1.5%**
2nd Cir.	91	15	76	16.4%
3rd Cir.	**926**	**11**	**915**	**1.2%**
4th Cir.	**>2,500**	**11**	**>2,500**	**<0.5%**
5th & 11th Cir.	320	49	271	15.3%
6th Cir.	68	11	57	16.2%
7th Cir.	45	12	33	26.7%
8th Cir.	33	10	23	30.3%
9th Cir.	394	53	341	13.5%
10th Cir.	82	8	74	9.8%
DC Cir.	**485**	**38**	**447**	**7.8%**
Federal Cir.	269	64	205	23.8%

The above data was obtained from Lexis Nexis.

1) The following query was used to identify granted mandamus petitions:

"mandamus grant*" @10 or ("mandamus" and ("petition granted" or "petition is granted" or "petition will be granted")) not ("petition denied" or "petition is denied" or "will be denied" or "deny the mandamus petition" or "deny the petition for writ of mandamus" or "deny the petition for a writ of mandamus" or "mandamus denied" or "mandamus is denied" or "mandamus will be denied" or "we deny *'s petition for writ of mandamus" or "we deny *'s mandamus petition" or "advisory mandamus" or "mandamus not appropriate" @5 or "as moot" or "dissent" or "lack jurisdiction" or "lack of jurisdiction").

[10] Petitioner acknowledges that a small number of granted and denied mandamus petitions could have been missed by the queries. But because the same queries were used for all circuits, and most hits were subsequently reviewed, any discrepancy should be minimal and statistically insignificant.

2) A reciprocal query replacing GRANT*/GRANT/GRANTED with DEN*/DENY/DENIED, but with slightly different filters, was used to identify failed Petitions.

3) "Hits" were then painstakingly reviewed for parameter compliance and to screen duplicates, at which time all cases predating Cheney were omitted.

4) The Appellate Court Update was similarly queried, and the results manually added into each circuit's figures.[11]

Upon compiling the data, Petitioner was shocked at the huge variances in mandamus utilization across the circuits. At first glance, one is taken back by the extremely large number of mandamus petitions litigated in the First, Third, and Fourth Circuits, and the extremely low proportion of those petitions that are granted. Together these three (3) circuits considered in excess of four thousand (4,000) Petitions for Writ of Mandamus over the past fifteen (15) years, yet granted only a mere handful.

Essentially, in those circuits supplemental mandamus review does not exist as a viable judicial tool. Unquestionably, persons in need of such review in those circuits are being prejudiced by the lack of mandamus availability, extraordinary circumstances or no extraordinary circumstances. Fortunately, this is markedly different from all other circuits, where mandamus is deemed viable and utilization is many times more prevalent.

Although these huge differences should concern the Court also because of potential equal protection violations, this has no bearing on the issue at hand. In any case it is clear that for whatever reason, be it judicial philosophy or some other factor, the numbers for these circuits are anomalous to the instant analysis; The First, Third, and Fourth Circuits cannot reasonably be considered "comparable circuits" for the current purpose of

[11]The Data Tabulation Sheets appear at the end of the INDEX OF APPENDICES.

determining if litigants in the Sixth, Ninth, and Tenth Circuits are being denied equal protection under the law, due to differences in the Bauman/Cooper Tire standard of review verses Cheney. Those circuits will therefore be excluded from the instant analysis.

Similarly, the DC Circuit is also being excluded because that circuit is unique. Regulating the work of the federal government, many of the petitions regularly considered by the DC Circuit will be of a different nature than all other circuits, rendering that circuit not useful for comparison purposes.

Of the remaining nine (9) circuits, where mandamus is regularly considered and utilized, the Ninth and Tenth Circuits rank dead last for the proportion of petitions granted, and the Sixth Circuit's number is just slightly higher. See Figure 2.

MANDAMUS PETITIONS IN COMPARABLE CIRCUITS BY PERCENT GRANTED

(6/24/04 - 8/8/19)

Fig. 2

Circuit	Petitions Considered	Granted	Denied	Percent Granted
8th Cir.	33	10	23	30.3%
7th Cir.	45	12	33	26.7%
Federal Cir.	269	64	205	23.8%
2nd Cir.	91	15	76	16.4%
6th Cir	60	11	57	16.2%
5th & 11th Cir.	320	49	271	15.3%
9th Cir.	**349**	**53**	**341**	**13.5%**
10th Cir.	**82**	**8**	**74**	**9.8%**

Although the Sixth & Ninth Circuit's figures are similar to some other circuits', it is statistically unlikely that two (2) of the three (3) non-Cheney circuits appear at the very bottom of the rankings, particularly given the Ninth Circuit's reputation for liberal rulings. This may be explainable by the fact that these two (2) circuits have a unique attribute in common; They are a part of a minority of Circuits that use their own five-part standards of review instead of the three-part Cheney standard.

The figures become more meaningful when averages are considered. Averaging the "percent granted" figures above, on average the Cheney circuits grant 22.5% of their mandamus petitions. But the two non-Cheney circuits grant only 12.03% of petitions; a very significant difference. But because of the large variance in the number of petitions considered among the circuits, these figures are skewed. A more equitable way to calculate averages is to consider the total number of petitions considered by each of the two (2) categories; Cheney circuits verses non-Cheney circuits. See Figure 3 below.

TOTAL MANDAMUS PETITIONS
BY STANDARD OF REVIEW

(6/24/04 - 8/8/19)

Fig. 3

	Cheney Circuits	Bauman/CooperTire Circuits
Total Considered:	758	499
Total Granted:	150	72
Avge. Percent Granted:	**19.8%**	**14.4%**

Given that over a thousand petitions were considered, the difference between 19.8% and 14.4% is still significant. Thus the figures are clear.

Regardless of how one approaches the issue, mathematically speaking the Bauman and Cooper Tire standards of review produce a significantly lower proportion of granted mandamus petitions than the Cheney standard.

Apparently, the extraneous factors in the five-part Bauman & Cooper Tire tests that were most likely responsible for the failure of Mr. Constance's petition, are having a similar effect on many other petitions as well. Accordingly, the analysis supports the contention that the five-part tests used only in the Sixth, Ninth, and Tenth Circuits are more restrictive than the three-part test used in the other circuits under Cheney, and therefore violate the Fourteenth Amendment's Equal Protection Clause.

The Government Created A Class That Is Being Discriminated Against -

> The Fourteenth Amendment requires that all persons subjected to legislation be treated like, under like circumstances and conditions, both in privileges conferred and in the liabilities imposed. When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference.
>
> L Ed Digest Constitutional Law § 316.2.

It is well settled that the Equal Protection Clause protects persons, not groups, and a class of persons' protections apply to administrative as well as legislative acts. And of course, the legislation that authorizes the federal Writ of Mandamus applies to all persons in the United States.

But by imposing a different standard of review than that used by the rest of the country, the judicial administrators of the Sixth, Ninth, and Tenth Circuits have inadvertently created a class of persons that is subjected to different treatment. And as demonstrated above, persons residing within these circuits (the class in question) are being disadvantaged and discriminated against by way of diminished availability to the mandamus remedy.

In Cleburne v. Cleburne Living Center 87 L.Ed 2d 313 S.Ct. 3249, this Court explained that:

> Under our rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a reasonable state interest."

Id. at 440.

Here, the class was created by three (3) Courts of Appeals, not legislation, but the principle still applies. No necessity for rejecting this Court's Cheney standard of review was rationally related to the interests of the state. While imposing (or continuing to impose) the five-part standards after this Court's holdings in Cheney, the inferior courts relayed no rational reason for the differences.

Although the third Cheney factor grants wide ranging discretion, adding, as a rule, obscure and extraneous requirements for mandamus relief, goes beyond the purpose of granted case by case discretion. As such, persons residing within the Sixth, Ninth, and Tenth Circuits have been arbitrarily classified to be prejudiced against, and their rights to equal protection under the law are being violated.

Extraordinary writs like mandamus are "useful safety valves for correcting **serious errors**". [Emphasis is added.] Mohawk Indus. Inc. v. Carpenter 588 U.S. 100, 111, 130 S.Ct. 599 (2009). Indeed the great importance of the Writ of Mandamus is demonstrated by the **extremely serious errors** in the case at bar. But to be lawfully useful, the writ must be equally available to persons residing in all circuits.

C. The Absence of Any Cumulative Brady Analysis In The District Court's Order Despite It's Being Issued Amidst This Court's Decision in Wearry v. Cain, And The Appellate Court's Repeated Refusals To Review & Reverse For This Reason, Indicates Willful & Blatant Disregard For This Court's Authority. It Also Provides A Simple And Expedient Means To A Ruling In This Case.

Given the proof of secret deals for tainted testimony and other misconduct in the post-conviction record, and the ramifications of reversal to Clark County and it's prosecutor, it is not surprising that the full record never made it to federal district court for consideration by the magistrate. This likely occurred because of the expected cumulative effect of **so much** Brady evidence (recall the dozens of violations.) App. H at 7-18 & App. L at 2-5.

Particularly in combination with the extensive Strickland evidence (App. L at 5-7), there exists little or no possibility of reconviction - Michael Spry's self-promoted credibility over his "minister" status, his hateful threatening Email, Jordan's many warrants (mostly for crimes of dishonesty), the falsified timeline of the Sprys' allegations, Castellanos' many secret deals & benefits and his history of (and lying about) testimony for pay, his "murder ideation" diagnosis, Brown's quashed no contact orders and the crimes it led to; All this would have **decimated** the accusing witness' credibility in this case - a case where credibility was everything.[14] App. H at 18-22.

The affect of all this previously undisclosed & undiscovered evidence on the viability of this case, illustrates the wisdom of this Court's holdings in Kyles & Wearry that undisclosed/undiscovered exculpatory evidence be analyzed collectively, and that the remedy for failing to do so is a new trial.

[14]Also important is the fact that the one ambiguous recording was put in a clear criminal context only when the (very motivated by Brady deals) Ricci Castellanos testified that an agreement to kill Ms. Koncos had supposedly been reached in some other (unrecorded) conversatation. Without his credibility, any inculpatory effect of the only nontestimonial evidence in the case evaporates, leaving no case at all and revealing the defendant's innocence.

The observation that all lower courts, State & Federal, appear to have knowingly ignored this Court's commands for a cumulative Brady analysis, despite the huge volume of suppressed exculpatory evidence, reveals a major problem with this case. As federal appellate courts exist in part to enforce this Court's decisions, it should concern this Court that here the Ninth Circuit repeatedly refused to do so.

The issue of no cumulative Brady analysis ever being undertaken **was** prominently and repeatedly discussed -in the § 2254 Petition's memorandum and briefing, counsel's OBJECTIONS to the R&R (App. H at 5-7), the Motion for a Certificate of Appealability (App. F at 12-18), and the Petition for Writ of Mandamus (App. B at 7, 19 para. 4 & 25.) **(Emphasis is added.)** The courts had many opportunities, particularly the Ninth Circuit, to address this key issue but continuously failed to. Thus either the Ninth Circuit ignored this Court's commands or all judges involved never read the documents presented to them; There is simply no other possibility.

In allowing the lack of cumulative Brady analysis to go uncorrected, both in it's initial denial of a Certificate of Appealability and again in denying mandamus relief, the Ninth Circuit Court of Appeals decided an important question of federal law in a way that conflicts with a recently reaffirmed relevant decision of this Court.

The number of constitutional errors & violations in this case, and the reasons for granting relief, is excessive. And the (as yet unreviewed) evidence establishing the many, many errors is voluminous. See App. N. But this Court need not read the extensive documentation involved. Rather, the Court need only read the last reasoned decision in the case - the magistrate's R&R/District Court order (App. G & I.)

After doing so, and noting the total absence of any cumulative Brady or Brady/Strickland Analysis,[15] the Court need only reverse the remaining convictions consistent with past rulings in Kyles & Wearry. This will not only bring to an end a fundamental miscariage of justice, it will send a message to the lower courts, state and federal, that this Court expects its decisions to be adhered to.

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[15] As the standard for prejudice in Strickland and for materiality in Brady are virtually identical, the Constitutionally sufficient analysis would include the cumulative effects of all the undisclosed and undiscovered evidence. But no court has ever even attempted any such analysis in this case. Quite to the contrary, the post-conviction court's Findings & Conclusions, the State Appellate Court's Unpublished Opinion, and the District Court Order all discuss many (but not all) of the Brady violations and Strickland errors, discounting and dismissing them one by one and item by item - precisely what is not supposed to happen.

D. The Unlawful Suppression Of An Enormous State Post-conviction record, That Proves Pervasive State Misconduct, Requires Reversal, and Would Lead to Exoneration, May Represent The Ultimate Violation Of Due Process. Any Such Abuse Is Of Broad Public Concern.

As noted, the Magistrate's review occurred in spite of many letters, objections, motions, and proof of the deficient state of the record. And when the cover-up of the post-conviction record began to falter (when counsel reentered the case), the state-friendly local courts began to protect the state by way of absurd rulings and orders; The district court order simply mirrored the state's Unpublished Appellate Opinion; 50 pages and unanimous, but containing **not one word** about the repeatedly briefed #1 issue - the violation of the cumulative Brady analysis requirement under Kyles & Wearry.

By successfully suppressing the post-conviction record, and excluding it from federal habeas corpus proceedings, officials in Clark County and/or Washington State were able to insulate the local government from the disruptive consequences of another eight (8) figure § 1983 lawsuit, **and the changes that would follow.** But the decision of the Ninth Circuit Court of Appeals in three (3) times denying a COA, where issuance was beyond appropriate and required, is more difficult to understand.

Outlandish as it seems, unless the liberal Ninth Circuit court is actively "running interference" for the liberal State of Washington, that court should not care if this case ultimately bankrupts Clark County, or leads to Mr. Golik's indictment. Rather, it should only care about promoting the law and protecting bedrock constitutional principles. Should this case become a catalyst for change and improvement in the rouge Clark County jurisdiction, so much the better. But this leaves one at a loss to understand how the Ninth Circuit could have refused this Petitioner A COA (let alone review of the full

record) on three (3) separate occasions, unless the overly restrictive Bauman standard precluded or prevented mandamus relief.

Properly defending a wrongful criminal indictment, before and especially after conviction, is a costly and arduous endeavor. Any nullification of such endeavor by way of government action or judicial error, is appalling. Given the reputation of Clark County, Washington for frequent and unrestrained Constitutional violations, and the failure of due process at multple stages of this case, the Court should be concerned. So should every American citizen who values his or her Constitutionally guaranteed right to due process of law.

Given that the merits of this case are so great, and the evidence of guilt (once the post-conviction record is incorporated) so minimal, failure of both federal courts to compel the record and grant so much as a COA, reveals that something extraordinary has occurred. There has to be some rational explanation for why a case such as this has received such unfavorable treatment from the courts, even to the point of judicial malfeasance.

Perhaps the suppression efforts explain the Ninth Circuit's failures here. Perhaps not. But in any case, there can be no due process of law when not just exculpatory evidence, but entire exculpatory records - highly meritorious in nature - are "covered-up", or for whatever reason precluded from consideration. Without reasonably complete records from which to draw responsible conclusions, the entire concept of the rule of law; indeed the entire criminal justice system, is reduced to a sham.

By denying mandamus relief, thereby allowing the post-conviction record to remain suppressed and unreviewed in violation of Acts of Congress, statute, Habeas Rule 5, and any reasonable common sense practice, the Ninth Circuit Court of Appeals sanctioned the lower court's departure very far from the accepted and usual course of judicial proceedings.

As noted in the underlying Petition for Writ of Mandamus, the notion that any rouge, lawless prosecutor in Washington State or elsewhere may engage in any manner of misconduct, and then be able to simply suppress or "lose" the record of it to avoid reversals and financial penalties, is an absolutely frightening proposition. And it happened in this case. **Accordingly, the long-term, multi-layered catastrophic collapse of due process in this case, however it happened, requires the exercise of this Court's supervisory power.**

CONCLUSION

For all the reasons noted above, this Court should grant a Writ of Certiorari to conduct a full review of this case, vacate the convictions, and resolve the issue with inconsistent mandamus standards of review. Should the court decline to resolve the mandamus issue, it might consider designating mandamus as the accepted and usual method of seeking relief when both lower courts deny a COA, after also failing to perform the proper threshold inquiry; Save certiorari, habeas petitioners have no other recourse.

Cursory review of only the district court order will also support reversal, for lack of a cumulative Brady analysis, will demonstrate this Court's resolve, and will end a fundamental miscarriage of justice.

Alternately, at the very least this Court should grant a long, long overdue and unmistakably appropriate Certificate of Appealability, and remand to the Ninth Circuit for appellate review of the previously ignored post-conviction record.

Respectfully submitted:

Dated: 12/20/19 By: 

Dino J. Constance, Petitioner pro se