Gibbons

19-7398

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW GIBBONS – PETITIONER

vs.

WARDEN, NATE KNUTSON – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

ANDREW GIBBONS

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QUESTIONS PRESENTED

1. Is petitioner (Gibbons) procedurally defaulted on his claim of ineffective assistance of counsel for failure to investigate a mental illness defense when counsel was notified by client that serious mental illness symptoms were being experienced at the time of the offense? Did the last state court, the Minnesota court of appeals, to render an opinion:
   a) Plainly state that the court was relying on a state procedural rule, the *Knaffla*-bar, to foreclose federal habeas review, (which would procedurally default petitioner) or,
   b) "Actually rely" on a state procedural rule to bar federal review?
      i. If so, which state procedural rule did the opinion rely on to deny relief of which claims? – *Knaffla*, *Spears*, or *Opsahl*?
2. Did counsel act reasonably in not investigating a mental illness defense when counsel was notified by client that mental health information, in the form of Gibbons' reliance on anti-psychotic medication, existed from the time of the offense for serious mental illnesses? – in a guilty plea context.
3. Was Gibbons prejudiced by counsel's failure to investigate a mental illness defense when counsel convinced Gibbons to plead guilty?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from **state courts**:

The judgment of the United States court of appeals for the eighth circuit appears at Appendix A to the petition and is **unpublished**.

The order denying petitioner's rule 60 motions appears at Appendix B to the petition and is **unpublished**.

The respondent's response to petitioner's rule 60(b) (6) motions, p. 4, appears at Appendix C to the petition and is **unpublished**.

The order adopting report and recommendation appears at Appendix D to the petition and is **unpublished**.

The report and recommendation of the magistrate appears at Appendix E to the petition and is **unpublished**.

The order from the Minnesota Supreme Court appears at Appendix F to the petition and is **unpublished**.

The opinion of the Minnesota court of appeals appears at Appendix G to the petition and is **unpublished**.

The table of contents, dated 12-2-16, and the evidentiary hearing questions for defense counsel, dated 12-1-16, to the second post-conviction petition appears at Appendix H to the petition.

The appeal memorandum to the Minnesota court of appeals, p. 18, appears at Appendix I to the petition.

JURISDICTION

For cases from **state courts**:

The date on which the United States Court of Appeals for the Eighth Circuit decided my case was:

8-22-19

No petition for rehearing was timely filed in my case.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

USCS Constitutional Amendment 6

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

Minnesota Statute § 611.026

Mental Illness Defense

Criminal Responsibility of Persons with a Mental Illness or Cognitive Impairment

No person having a mental illness or cognitive impairment so as to be incapable of understanding the proceedings or making a defense shall be tried, sentenced, or punished for any

crime; but the person shall not be excused from criminal liability except upon proof that at the time of the committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong.

Minnesota Rule of Criminal Procedure 20.02

Defense of Mental Illness of Cognitive Impairment—Mental Examination

Subd. 1. Authority of Order Examination, --The trial court may order the defendant's mental examination if:

(a) The defense notifies the prosecutor of its intent to assert a mental illness or cognitive impairment defense pursuant to Rule 9.02, subd. 1(5);

(c) The defendant offers evidence of mental illness or cognitive impairment at trial.

Subd. 2. Defendant's Examination. –If the court order a mental examination of the defendant, it must appoint at least one examiner as defined in Minn. Stat. ch. 253B, or successor statute, to examine the defendant and report to the court on the defendant's mental condition.

Minnesota Statute § 245.462

Definition

Subd. 20. Mental Illness.

(a) "Mental illness" means an organic disorder of the brain or a clinically significant disorder of thought, mood, perception, orientation, memory, or behavior that is detailed in a diagnostic codes list published by the commissioner, and that seriously limits a person's capacity to function in primary aspects of daily living such as personal relationships, living arrangements, work, and recreation.

(c) For purposes of case management and community support services, a "person with serious and persistent mental illness" means an adult who has a mental illness and meets at least one of the following criteria:

(1) the adult has undergone two or more episodes of inpatient care for a mental illness within the preceding 24 months;

(2) the adult has experienced a continuous psychiatric hospitalization or residential treatment exceeding six months' duration within the preceding 12 months;

(4) the adult;

(i) has a diagnosis of schizophrenia, bipolar disorder, major depression, schizoaffective disorder, or borderline personality disorder;

(ii) indicates significant impairment in functioning; and

(iii) has a written opinion from a mental health professional, in the last three years, stating that the adult is reasonably likely to have future episodes requiring inpatient or residential treatment, of a frequency describes in clause (1) or (2), unless ongoing case management or community support services are provided;

Knaffla-bar

State v Knaffla, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (holding that, once a petitioner has directly appealed a conviction, neither matters raised in that appeal nor matters known but not raised will be considered upon subsequent petition for postconviction relief)

Spears-bar

Spears v State, 725 N.W.2d 696, 700 (Minn. 2006) ("Similarly [to the *Knaffla* court], a postconviction court will generally not consider claims that were raised or were known and could have been raised in an earlier petition for postconviction relief.")

Opsahl-bar

Opsahl v State, 677 N.W.2d at 421 (Minn. 2004) "Trial strategy is not reviewable on a claim of ineffective assistance."

Brown v State, 746 N.W.2d 640, 642 (Minn 2008) ("*Knaffla* similarly bars postconviction reciew of claims that could have been raised in a previous postconviction petition.")

STATEMENT OF THE CASE

NOT PROCEDURALLY DEFAULTED

Petitioner (Gibbons) is not procedurally defaulted in this certiorari / § 2254 action as the last state court to render a judgment, the Minnesota court of appeals, did not make a plain statement that the state court was relying on a procedural rule to bar relief. The statement was not "plain," according to *Harris*, *Coleman*, and *Long*, as the statement also addressed whether the district court had "abused its discretion" when denying on *Knaffla*-grounds.

Even if this Honorable Court determines that the statement to bar relief is a "plain statement," the Minnesota appellate court opinion did not "actually rely" on said statement to bar relief. Gibbons brought forth three grounds for relief for ineffective assistance of counsel. The Minnesota appellate court opinion cited the *Knaffla* court and a "similar" *Spears* court. According to the opinion's citation, *Knaffla* applies to post-conviction petitioners who have done a direct appeal, while; the *Spears* citation applies to post-conviction petitioners who have done a previous post-conviction petition. Clearly, both of these state procedural rules can not apply to Gibbons exact particular precise procedural position – either there was a direct appeal with a following post-conviction petition, or there were two post-conviction petitions. Since the Minnesota appellate court did not specify which claims were barred for which reasons,

specifically ground three in the opinion, (App. G) op. p. 6, lines 3-14 (which is ground one in the § 2254 petition), the last state court to render an opinion did not clearly, explicitly, and expressly "actually rely" on a state procedural rule to bar relief according to *Harris*, and *Coleman.*

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL'S PERFORMANCE AND PREJUDICE IN A GUILTY PLEA CONTEXT

Trial counsel was notified repeatedly via letter from petitioner (Gibbons) that Gibbons was receiving psychiatric services at the time of the offense for schizoaffective, and that Gibbons was un-medicated at the time of the offense, or at least not taking medication as prescribed, for several months before the crime.

Counsel refused to investigate this avenue until after Gibbons pled guilty. After Gibbons pled guilty, trial counsel did retrieve the psychiatric evidence that Gibbons was asking to be procured, but when the information was mailed to trial counsel, counsel said that he did not believe anything in those records would be beneficial, presumably without reading the diagnosis from the time of the offense. Failure to investigate is both deficient performance of counsel, under *Hernandez*, *Bouchillon*, and *Morrow*, and prejudices a defendant in making a voluntary and intelligent guilty plea, under *Morrow*.

The diagnosis that trial counsel did not read was that Gibbons' symptoms of schizoaffective were too severe to be treated in an outpatient treatment setting – that he should have been hospitalized for mental health reasons. Gibbons asserts that this is *prima facie* grounds for a rule 20.02 investigation; to see if doctors would find whether Gibbons did, or did not, know at the time of the offense the nature of his acts, or that they were wrong.

REASONS FOR GRANTING THE WRIT

U.S.C.S Supreme Court Rule 10

Rule10. Considerations Governing Review on Certiorari:

By the eighth circuit court of appeals dismissing the 28 USC § 2254 petition without reaching the merits of the 28 USC § 2254 appeal memorandum, the circuit court has thereby entered a decision in accordance with the district court of Minnesota's order finding procedural default in conflict with procedural default doctrine enunciated by the U.S. Supreme Court and lower circuits.

(c) A United States court of appeals (for the eighth circuit) has decided an important federal question in a way that conflicts with relevant decisions by this Court; whether there was a "plain statement" required by procedural default doctrine.

1. *Caldwell v Mississippi*, 472 U.S. 320, 327 (1985)
2. *Harris v Reed*, 489 U.S. 255, 266 n. 13 (1989)
3. *Michigan v Long*, 463 U.S. 1032, 1040-41 (1983)

(c) A United States court of appeals (for the eighth circuit) has decided an important federal question in a way that conflicts with relevant decisions by this Court; whether the state court "actually relied" on the "plain statement."

1. *Coleman v Thompson*, 501 U.S. 722 (1991)
2. *Harris v Reed*, 489 U.S. 255, (1989)

(a) A United States court of appeals (for the eighth circuit) has entered a decision in conflict with the decision of another United States court of appeals on the same important matter in regards to "actually relying" on a state procedural rule to bar relief.

1. *Calderon v United States District Court (Bean)*, 96 F.3d 1126 (9th Cir) (1996)

2. *Koerner v Grigas*, 328 F.3d 1039 (9th Cir.) (2003)
3. *Valerio v Crawford*, 306 F.3d 742 (9th Cir.) (2002)

By the eighth circuit dismissing the 28 USC § 2254 petition without reaching the merits of the 28 USC § 2254 appeal memorandum, the circuit court has passed on the issue of whether petitioner is being held in violation of his 6th amendment right to effective counsel, in a guilty plea context.

(c) A United States court of appeals (for the eighth circuit), by way of dismissing the petition as procedurally defaulted and failing to reach the merits of the underlying § 2254 ground for relief, has decided an important federal question in a way that conflicts with relevant decisions by this Court; whether there was a violation of the 6th amendment right to effective counsel – in a guilty plea context.

1. *Strickland v Washington*, 466 U.S. 668

(a) A United States court of appeals (for the eighth circuit), by way of dismissing the petition as procedurally defaulted and failing to reach the merits of the underlying § 2254 ground for relief, has decided an important federal question in a way that is in conflict with the decision of another United States court of appeals on the same important matter; whether there was a violation of the 6th amendment right to effective counsel – in a guilty plea context.

1. *Bouchillon v Collins*, 907 F.2d 589 (5th Cir) (1990)
2. *Ford v Paratt*, 638 F.2d 1115 (8th Cir) (1981)
3. *Johnson v Mabry*, 752 F.2d 313 (1984) (8th Cir) (1985)
4. *Morrow v Paratt*, 574 F.2d 411 (8th Cir) (1978)
5. *U.S. v Hernandez*, 450 F. Supp. 2d 950 (8th Cir) (2006)

(c) A United States court of appeals (for the eighth circuit), by way of dismissing the petition as procedurally defaulted and failing to reach the merits of the underlying § 2254 ground for relief, has decided an important federal question in a way that conflicts with relevant decisions by this Court; whether petitioner has met the "reasonable probability" of insisting on trial rather than plead guilty.

1. *Lee v United States*, 137 S. Ct. 1958 (2017)

DISCUSSION OF MINNESOTA COURT OF APPEALS "PLAIN STATEMENT"

The first issue addressed in the instant certiorari / § 2254 action is that of where an underlying supposed "plain statement" that is composed of the first two sentences of the Minnesota appellate court opinion (App. G) is allegedly not "plain." This issue is of national importance because, it would seem to petitioner (Gibbons), magistrate's, district court's, and circuit court's, (at least in the eighth circuit) are unaware that if a statement contains two topics, it is not a statement that is clear of extraneous matter concerning a state procedural rule – i.e., it is not "plain."

Reviewing state courts at the federal level need to be notified by this Court what a "plain statement" *is*, or *is not*, by discussing the Minnesota appellate court opinion's purported plain statement. Reviewing state courts at the federal level need to be made aware, it would seem to Gibbons, when they have jurisdiction to review the merits of a § 2254 action.

In the lower federal courts' over-abundance of caution to not violate a state's right to foreclose federal review for a petitioner not following a state procedural rule, the lower federal courts are showing that they themselves do not know when they actually do have jurisdiction. This is a mockery, and a farce, to judicial proceedings resulting in delayed merits review of a

§2254 action where it is clear that the petitioner is being held in violation of a constitutional right. The federal courts should be jumping to find ways to exert their jurisdiction, and this injustice should not be repeated to any petitioner, in any state. This Court needs to clarify what a "plain statement" *does*, or *does not*, consist of, it appears to Gibbons.

Harris does give an example of what a *pro forma* one line plain statement to deny federal review would be composed of. What *Harris* does not do is: describe how a statement is not plain. Gibbons asserts that if a sentence explicitly states a state procedural rule, and combines the statement with a comment about a lower court not abusing its discretion, the statement is not plain.

Minnesota uses the *Knaffla*-bar to deny relief to appellants and petitioners on subsequent petitions after an appeal. *Knaffla* states that a prisoner only gets one review where; any issue already litigated on appeal, or any issue known to petitioner but not raised on appeal, is waived on subsequent post-conviction petition.

In the respondent's "response to petitioner'srRule 60(b)(6) motions" (App. C), p. 4, lines 7-11, the respondent quotes the first lines of the Minnesota appellate court opinion, and states that Gibbons argued under *Harris* that the Minnesota court of appeals "did not clearly decide his case on independent state grounds." This is a reference by respondent to the *Harris'* "plain statement" rule. *Harris* gives a prime example of what a "plain statement" looks like, *Harris*, 489 U.S. 255 (1989) at 265 n. 12.

> "a state court that wishes to rely on a procedural rule in a one-line *pro forma* order easily can write that "relief is denied for reasons of procedural default.""

Gibbons asserts that the following citation is not a "plain statement," from p. of 1 the Minnesota appellate court opinion (App. G).

> "Appellant, pro se, challenges the denial, without a hearing, of his second petition for post-conviction relief. Because the district court did not abuse its discretion in denying appellant's petition on *Knaffla* grounds, we affirm."

Plain: adj. 2: free from extraneous matter. Webster dictionary.

Plain: adj. 1: free from all additions. Webster thesaurus.

The second sentence of the opinion's opening statement affirming the denial of post-conviction relief is not plainly speaking of the *Knaffla*-bar. It also addresses the district court not abusing its discretion. Therefore, the last state court to render an opinion did not contain a "'plain statement'" that [its] decision rests upon adequate and independent state grounds." (quoting *Michigan v Long*, 463 U.S. 1032, 1042 (1983)) *Harris v Reed*, 489 U.S. 255, 261 (1989).

Whether the disputed state-law ground is substantive or procedural does not matter under the *Long* "plain statement" rule.

> "the *Long* "plain statement" rule applies regardless of whether the disputed state-law ground is substantive (as it was in *Long*) or procedural, as in *Caldwell v Mississippi*, 472 U.S. 320, 327 (1985)." *Id.* at 261

Finally, on the notion of a "plain statement" *Harris*, at 261, states that the last state court to render a judgment must "clearly and expressly," *Harris*, at 263, state its judgment rests on a state procedural bar.

Clear: adj. 4: easily heard, seen, or understood. Webster dictionary.

Clear: adj. 5: free from doubt. Webster dictionary.

Clear: adj. 2: not subject to misinterpretation or more than one interpretation. Webster thesaurus.

Express: 1: explicit, exact, precise. Webster dictionary.

Express: 1: of a particular or exact sort. Webster thesaurus.

Express: 2: so clearly expressed as to leave no doubt about meaning. Explicit. Webster thesaurus.

Does the opinion state that it affirms because the district court did not abuse its discretion, because petitioner is *Knaffla*-barred, or both?

The issue of whether the Minnesota appellate court opinion plainly stated that it expressly, explicitly, and clearly is resting its judgment on an independent and adequate state law ground is incumbent upon this Court to ascertain for itself.

> *Michigan v Long*, 463 U.S. 1032, 1038 (1983) "It is, of course, "incumbent upon this Court ... to ascertain for itself ... whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v Bryan*, 282 U.S. 765, 773 (1931)."

Gibbons respectfully implores this Honorable Court to grant certiorari to set a precedent by discussing what a "plain statement" is *not*, by example of the Minnesota appellate court opinion (App. G).

DID NOT ACTUALLY RELY ON STATE PROCEDURAL RULE

The second issue addressed in the instant certiorari petition is that; concerning the allegation of the lower courts that petitioner (Gibbons) is procedurally defaulted: did the last state court to render an opinion "actually rely" on a state procedural rule to foreclose federal review? Gibbons asserts the Minnesota appellate court did not. This is an issue of national importance because:

1) there are surprisingly few precedents regarding this issue of "actually relying" on a state procedural rule, aside from *Harris* and *Coleman* actually stating that a state court must "actually rely" on a state procedural rule, in the opinion, to bar federal review. It would seem to

Gibbons that only the 9th circuit has had the opportunity to address the issue of what does not constitute "actually relying" on a state procedural rule to bar federal review. And

2) this Court, Gibbons asserts, should provide a clear example, by way of discussing the Minnesota appellate court opinion, of how a state court needs to write their opinion if they are trying to foreclose federal review. This Court should state that; merely citing a state court procedural rule in the opening paragraph of the opinion, but not discussing how that state procedural rule directly applies to a petitioner's particular precise procedural position (when it does not because there was no direct appeal), and in fact: citing a "similar" rule that precisely would bar federal review, but again not discussing how that rule applies to a petitioner's particular precise procedural position, rather; denies entire post-conviction petition on the formerly stated state procedural rule that does not apply to a petitioner's particular precise procedural position, is too general to bar federal review.

In short, citing two state procedural rules, but not stating which rule applies to which grounds for relief, rather; dismissing entire petition on a state procedural rule that does not apply to the particular precise procedural position petitioner is in, is insufficient to bar federal review.

This is of national importance so state courts are not allowed to usurp this Court's jurisdiction with sloppy, ambiguous, and unclear opinions. Every petitioner deserves to know the state rules he has violated that cause him to be restrained of his liberty, in clear, express, and explicit terms.

The Report and Recommendation (App. E), p. 14, says that the "operative question" is

> "whether the state court relied on an independent and adequate procedural rule to bar relief."

The operative word, according to Gibbons, being *relied.*

Gibbons asserts: that even if this Court determines that the first two sentences of the Minnesota appellate court opinion (App. G) do indeed constitute a "plain statement" under *Harris*, the opinion did not "actually rely," on said plain statement when applying the *Knaffla*-bar to the facts of Gibbons' second post-conviction petition.

> *Harris v Reed*, 489 U.S. 255, 261 (1989) "[T]he state court must have actually relied on the procedural bar as an independent basis for its disposition of the case." *Ibid.*" [*Caldwell v Mississippi*, 472 U.S. 320, 327 (1985)].

The Minnesota appellate court opinion did not "actually rely" i*d.*, on a state-procedural rule when dismissing the second post-conviction petition on *Knaffla* grounds. The first sentence of the opinion (App. G) states Gibbons' particular precise procedural position – "second petition for post conviction relief." Then the opinion states that the Minnesota appellate court agrees that the petition is denied on *Knaffla* grounds, and that the district court did not abuse its' discretion.

On the second page *State v Knaffla* is cited, where it is plain to see that the "*Knaffla*-bar" applies to petitioner's who have done a previous direct appeal, and then a post-conviction petition. Immediately thereafter, *Spears v State* is cited as "similar" to the *Knaffla* court in that; successive post-conviction petitions are "generally not considered." This is the exact particular precise procedural position Gibbons is in, as opposed to a post-conviction petition position where *Knaffla* would apply, i.e. after an appeal. So, is Gibbons procedurally barred under *Knaffla* or *Spears*?

Nowhere in the opinion is it mentioned that *Knaffla* and *Spears* are interchangeable, or that Gibbons is procedurally barred under *Spears*. The closest the opinion comes to this notion is in the *Spears* citation the quote says that *Spears* is "similar [to the *Knaffla* court]" where similar means: "marked by correspondence or resemblance" (Webster dictionary), yet these two rules are distinguishable.

The second post-conviction petition alleged three grounds for ineffective assistance of counsel in violation of the 6th amendment. Those grounds for relief were addressed in the Minnesota appellate court opinion (App. G) on: p. 4 for ground one, that counsel implied guilt without Gibbons' acquiescence; p. 5 for ground two, that counsel did not seek a dispositional departure; pp. 5-6 for ground one again; and p. 6 for ground three, the instant ground for this certiorari / § 2254 action: counsel not investigating a mental health defense when notified by Gibbons of his mental health problems at the time of the offense – in a guilty plea context.

Considering the notion that the opinion cited two procedural rules to bar relief, *Knaffla* and *Spears*, and by not stating explicitly, expressly, or clearly which of these two court's applied to which three grounds, rather dismissed entire petition on *Knaffla* grounds, which *does not* apply to Gibbons' particular precise procedural position, as opposed to *Spears* grounds, which *does* apply to Gibbons' particular precise procedural position, Gibbons will now discuss 9th circuit analogous cases where it was found that such situations; where it is not clear upon which rule a state decision rests for which grounds, are insufficient to preclude federal review.

The first 9th circuit authority is *Koerner v Grigas* where, a petitioner's 18 claims were found to be either: litigated previously, and were not barred; or could have been raised previously, and were procedurally barred. Analogous to both *Knaffla* and *Spears* in that; for both *Knaffla* and *Spears*, previously raised issues, and issues not raised previously, are barred under both rules, but different to the application of the current certiorari / § 2254 action in that, *according to the opinion* (App. G), *Knaffla* is in regards to post-conviction petitions after a direct appeal, and *Spears* is in regards to successive post-conviction petitions. To be clear: the Minnesota appellate court opinion affirms the denial of relief on *Knaffla* grounds, then quotes both *Knaffla* and *Spears* on opinion p. 3 (App. G), where it is plain *from the opinion* that only

Spears would apply to Gibbons particular precise procedural position – and nowhere is it stated in the opinion that *Knaffla* and *Spears* are interchangeable, only "similar."

Accordingly, since the Nevada Supreme Court in *Koerner* did not specifiy which claims were barred for which reasons, like Gibbons' second post-conviction opinion, the 9th circuit found none of the 18 claims to be procedurally defaulted.

Koerner discusses *Coleman v Thompson*, 501 U.S. 722 (1991) in that; upon habeas a federal court must ascertain for itself if a state court judgment actually rests upon independent and adequate state grounds.

> *Koerner v Grigas*, 328 F.3d 1039, 1051 "Instead [**29] in such cases, "federal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds." *Id.* at 736."

Coleman, in *Koerner*, gives guidance for when the applicable state law ground is ambiguous or unclear; that the federal court must make their own inquiry – if there is no federal law basis for the decision. In the Minnesota appellate court opinion (App. G), the state procedural rule of *Knaffla* is mentioned twice. *Strickland* is applied to both ineffective assistance of counsel claims ground one and two, but not the instant ineffective assistance of counsel claim three (which happens to be ground one in the instant certiorari / § 2254 petition). Also, when discussing the instant ineffectiveness claim another state case is cited: *Opsahl v State*, 677 N.W.2d at 421 (Minn. 2004), but the opinion did not discuss *Strickland.* At best, the opinion interwove state and federal law, but there is no doubt from the face of the opinion that the *Knaffla*, *Spears*, and *Opsahl* courts are independent and adequate state law grounds. Accordingly, Gibbons is asserting that there is no "plain statement" in the opinion, as already addressed on pp. 9-12`, and that under *Harris*, 489 U.S. at 261, the opinion did not "actually rely" on the *Knaffla*-bar, as stated on op. p. 1 (App. G), when denying review of the

constitutional 6th amendment ground for ineffective assistance of counsel for failure to investigate after counsel is notified of mental problems of the client, at the time of the offense – in a guilty plea context.

> *Koerner v Grigas*, 328 F.3d 1039, 1049 (9th Cir.) (2003) "All that *Coleman* teaches in that no presumption applies where no federal law basis for the decision is evident, and that federal courts must make their own inquiry."

In *Valerio*, an *en banc* panel of the 9th circuit reviewed the district court's rejection of several habeas claims as procedurally defaulted. Because the Nevada Supreme Court did not clearly and expressly rely on an independent and adequate state ground, *because it did not specify which claims were barred for which reasons*, the court found that none of the claims were procedurally barred.

> [*1049] "The Nevada Supreme Court determined that only some of these eighteen claims had been litigated previously, but determined that dismissal was proper because the other claims could have been raised previously and were procedurally barred. *Id.* at 772. The *en banc* court held that, *because it failed to specify which claims were barred for which reasons*, the Nevada Supreme Court 'did not clearly and expressly rely on an independent and adequate state ground.'" *Id.* at 775. (quoting *Coleman*, 501 U.S. at 735). Accordingly, none of the eighteen claims could be held to be procedurally defaulted. *Id.*" (emphasis added)

Koerner evaluates *Coleman* in regards to a state appellate court opinion that is unlike *Harris*' presumption: that the opinion relied on federal law; but is like *Coleman*, in that the state law ground upon which the opinion rested was either ambiguous or unclear.

Gibbons asserts that: while the opinion (App. G) stated the *Knaffla*-bar on p. 1 and stated that the district court did not abuse its' discretion in denying on *Knaffla* grounds, the Minnesota appellate court opinion did not "actually rely" on this state procedural rule because; when the opinion also cites *Spears*, on p. 3, the state law ground upon which the instant certiorari / § 2254 ground is barred becomes ambiguous and unclear, especially considering that the *Spears* court

states "a post conviction court will *generally* not consider claims ..." (emphasis added), leaving open exceptions to the procedural bar.

This makes the state procedural rule upon which the opinion relied ambiguous or unclear because, as stated, the *Spears* court citation leaves room for exceptions (according to the opinion), and only Gibbons' ineffective ground two is found to not have met the exception of the "need for fact-finding" (op. p. 5, line 20) while ground three, the instant certiorari / § 2254 ground, is reviewed upon the merits with no reference to either *Knaffla* or *Spears* in its corresponding paragraph (App. G) (op. p. 6, lines 3-14).

Compounding this issue of ambiguity and a lack of clarity is the fact that directly after the opinion states that Gibbons did not explain why his ineffective assistance of counsel *claim* was not available previously – as opposed to claim(*s*) (emphasis added).

> "He does not explain why his ineffective assistance of counsel claim was not available at the time of his first postconviction petition ..." (App. G) (op. p. 3, lines 20-22).

the opinion refers directly to ineffective ground one *only* when talking about why a *claim* was not previously raised:

> "but he reiterates his view that his counsel erred by saying or implying that appellant was guilty without appellant's consent." (App. G) (op. p. 3, line 22, p. 4, line 1).

To be certain, the instant certiorari / § 2254 action is requesting review and relief on ineffective counsel ground three from the face of the opinion (App. G), op. p. 6, lines 3-14, which is ground one of the certiorari / § 2254 action.

Koerner relied upon *Calderon v United States District Court (Bean)*, 96 F.3d 1126 (9th Cir) (1996). In *Bean* the California court held that 39 claims were "procedurally barred in that

they were or could have been, but were not raised on appeal or were waived by failure to preserve them at trial." *Id.* at 1128

> [*1051] "One of the grounds relied upon – that the issues actually were raised on appeal – would not bar federal review. *Id.* at 1131. The other ground - [*1052] that the issues were not raised on appeal and therefore were waived – likely would bar federal review. *Id. Finding that "the California Supreme Court's order provides no basis upon which to apply" the latter ground*, the panel determined that if was too "ambiguous" to bar federal review. *Id.*" (emphasis added)

Like *Bean*, according to the Minnesota appellate court opinion citing both *Knaffla* and *Spears*, this Court can see that one of the state grounds relied upon by the state would not bar federal review because it does not apply to Gibbons' particular precise procedural position – *Knaffla*; while the other state law ground – the *Spears* court, certainly would bar federal review, absent any exceptions to the *Spears* bar; but it is never stated that Gibbons' claims are barred under *Spears*, nor is a discussion evident as to how ground three does not meet a *Spears* exception.

The second 9th circuit case is *Valerio v Crawford*, where a state court opinion did not specify which cases pertain to claims 4-8, 10-12, and 16-18, for relief.

In *Valerio*, citing *Coleman*, the 9th circuit made clear that the state procedural rule "must also be actually relied on in the particular case in question." If the "last state court … did not clearly and expressly *rely* on an independent and adequate state ground, a federal court may address the petition." (emphasis added)

> *Valerio v Crawford*, 306 F.3d 742, 773-74 (9th Cir) (2002) [*773] "The rule must also be actually relied on in the particular case in question. "In habeas, if the decision of the last state court to which the petitioner presented his federal claims … did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." *Coleman v Thompson*, 501 U.S. 722, 735, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). [*774] "[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review." *Morales v Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996)."

A state court opinion that does not clearly and expressly *rely* on an independent and adequate state ground does not bar federal review. The operative question this Court needs to resolve is: did the Minnesota appellate court "actually rely" on *Knaffla* grounds to bar relief of Gibbons' second post-conviction petition absent a direct appeal? When the Minnesota appellate court opinion itself cites *Knaffla* as only applying to petitioner's who have done an appeal, and cites *Spears* as regarding petitioners who have done successive post-conviction petitions – clearly, when looking at the particular precise procedural position of Gibbons – both *Knaffla* and *Spears* could not apply. Like *Valerio*, one ground would bar federal review of Gibbons' petition, *Spears*; and the other would not as Gibbons did not do a direct appeal, *Knaffla*. The reviewing state court did not specify which of Gibbons' asserted three grounds for post-conviction relief, on ineffective assistance of counsel grounds, were barred for which reasons, rather; denied entire petition on grounds that do not apply to Gibbons petition: *Knaffla*. At best, the opinion (App. G) stated that the *Spears* court was "similar" to *Knaffla*, yet these are still distinguishable courts of procedural rule. This is a prime example of a state court opinion that is too ambiguous, as to which state law ground was relied upon, to bar federal review.

> [*774] "The facts of this case are indistinguishable from those in *Calderon v United States District Court (Bean)*, 96 F.3d 1126 (9th Cir. 1996). In *Bean*, two groups of claims were presented to the California Supreme Court on state habeas corpus. One group (the *Waltreus* group) had already been raised on appeal in state court and could not be presented again in state court. *See In re Waltreus*, 62 Cal. 2d. 218, 42 Cal. Rptr. 397 P.2d 1001 (1965). The other group (the *Harris/Dixon* group) had not been raised and had therefore been waived. *See in re Harris*, 5 Cal. 4th 813, 825 n.3, 855 P.2d 391, 21 Cal. Rptr. 2d 373 (1993) (discussing *In re Dixon*, 41 Cal. 2d 756, 264 P.2d 513 (1953)).
>
> [*774] "In denying the petition, the California Supreme Court cited both *Waltreus* and *Harris/Dixon* as bases for its decision and *did not specify which claims fell into which group*. We held that the California Supreme Court was not sufficiently clear to bar federal habeas corpus review of the claims: (emphasis added)

> The order, which we agree with the district court is ambiguous, does not specify [**85] which of *Bean's* thirty-nine claims the court rejected under *Waltreus*, and which it rejected under *Harris/Dixon*. "[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review." *Bean*, 96 F.3d at 1131 (citations omitted).
>
> [*774] In affirming the Nevada district Court's dismissal of [prisoner's] claims ..., the Nevada Supreme Court failed to specify which claims had previously been presented to the state court and could not be relitigated, and which had never been presented to state court and had been waived. ...
>
> *By* [*775] *failing to specify which claims were barred for which reason, the Nevada Supreme Court 'did not clearly and expressly rely on an independent and adequate state ground.*" (quoting *Coleman*, 501 U.S. at 735)." (emphasis added)

The Minnesota appellate court opinion, to its' credit, did clearly and expressly state its' independent and adequate state procedural rule to bar federal review on p. 2 of the opinion (App. G), although it also talked about the lower court's discretion.

> "Appellant, pro se, challenges the denial, without a hearing, of his second petition for postconviction relief. Because the district court did not abuse its discretion in denying appellant's petition on *Knaffla* grounds, we affirm."

On p. 3 the opinion cites *Spears v State*. The *Spears* citation says: "generally will not consider claims..." This raise's the questions:

1) What claims would be considered an exception to the *Knaffla / Spears* bar? And

2) Did Gibbons raise his claims in a manner consistent with addressing claims in an exception to the *Knaffla / Spears* state procedural rule? Where it would be incumbent upon the state court to address why ground three did not meet an exception, to "actually rely" on *Knaffla / Spears*.

On the table of contents for Gibbons' second post-conviction, dated 12-2-16, p. 31 (App. H), it is specifically pointed to; alleged by Gibbons, non-*Knaffla*-barred questions. The page dated 12-1-16 specifically address alleged non-*Knaffla* barred questions as well.

P. 18 of the Minnesota appeal brief to the Minnesota appellate court (App. I) clearly addresses "... that these claims are not *Knaffla*-barred because they cannot be decided solely based on the district court record."

P. 5 of the Minnesota appellate court opinion (App. G) discusses the two cases Gibbons used as examples of *Knaffla*-bar exceptions, namely *White* and *Dukes*. On lines 13-15 the opinion compares Gibbons' claims to the merits of *White*'s claims that were *not Knaffla*-barred, rather than discuss how Gibbons' claims *were Knaffla*-barred as well, i.e., not meeting an exception, therefore not explicitly relying on *Knaffla* to bar relief for any asserted by Gibbons grounds.

Continuing on p. 5 of the opinion, lines 18-20, and p. 6, lines 1-2 (App. G), the opinion states the *Knaffla*-bar exception: "need[ed] additional fact-finding," namely, "testimony from [the defendant] and his [trial] counsel." Then the opinion explicitly says that the claim of Gibbons asserting counsel implied guilt without Gibbons acquiescence is distinguishable from *Dukes*. Gibbons raised three ineffective assistance of counsel claims. One of them, the acquiescence argument (ground one), was explicitly denied due to not meeting an exception under *Knaffla*, the other two grounds, specifically ground three, is not discussed as to whether the ground meets an exception to the court rule or not. The *Spears* citation clearly says "generally." Gibbons clearly asserted claims under a *Knaffla*-bar exception: "lawyer-client communication," where correspondence from Gibbons to counsel indicating the desire to research mental health diagnosis from the time of the offense is expressed will be provided if the writ is granted. This is evidence outside the record, meeting a *Knaffla* bar exception according to *White* (App I).

Lastly, there is no "explicit reliance" on a state procedural rule – i.e., *Knaffla* for the instant ineffective assistance of counsel ground for failure to investigate a mental illness defense when *prima facie* evidence exists indicating the appropriateness of a bifurcated trial – in a manifest injustice guilty plea context.

To be certain, even as Gibbons asserted exceptions to the *Knaffla*-bar in his petition and memorandum for his second post-conviction, it is the state appellate court opinion (App. G p. 3, lines 17-19) that clarifies, and leaves open, exceptions to the *Spears* rule. Additionally, the entire petition was denied on *Knaffla* grounds, which, as already discussed, *does not* apply to Gibbons' particular precise procedural position, whereas the *Spears* court, which is only "similar" to the *Knaffla* court, *does* apply to Gibbons' particular precise procedural position. To further discuss how the Minnesota appellate court opinion did not "actually rely" on a state procedural rule to foreclose upon federal review, we can see from the report and recommendation, (App. E) p. 13, that *Knaffla*, via *Brown*, does indeed bar review on petitions after an appeal.

> *Brown v State*, 746 N.W.2d 640, 642 (Minn 2008) ("*Knaffla* similarly bars postconviction review of claims that could have been raised in a previous postconviction petition.")

The citation *supra* clearly shows that the Minnesota appellate court was not trying very hard to foreclose upon federal review, as they could have cited *Brown* instead of *Spears*. But, even if the *Knaffla* court does bar post-conviction review, thereby also barring habeas review, on successive post-conviction petitions, this fact is not express, explicit, or clear (or even mentioned) from the face of the Minnesota appellate court opinion. Clearly, the opinion made a point of citing the *Spears* court in an attempt to bar review, but if the opinion would have cited the *Brown* court Gibbons' claim that the opinion did not rely on the *Knaffla*-bar to foreclose upon federal review

would hold little water. But since the opinion denied the entire petition, not individual grounds, on *Knaffla*, where the *Knaffla* citation in the opinion clearly says *Knaffla* applies to petitioners after an appeal, not successive petitions like *Spears*, and is absent a *Brown* citation clarifying *Knaffla*, the opinion did not expressly, explicitly, or clearly state its' rule upon which its' judgment rested to bar federal review according to *Harris* and *Coleman*. Additionally, since the opinion did not cite *Knaffla*, *Spears*, or *Brown* in the paragraph addressing ground three on op. p. 6, lines 3-14 (App G), the opinion did not "actually rely" on *Knaffla* to bar federal review under *Harris* and *Coleman*. Finally, this Court can see from App. I that ground three was brought on the second post-conviction petition alleging "Knaffla" bar exceptions on all three ineffective counsel grounds, yet the opinion only discussed how claim two did not meet an exception to the "Knaffla" bar, leaving ground three not completely addressed, therefore, no express, explicit, or clear reliance on *Knaffla* to bar federal review has been asserted by the Minnesota appellate court opinion – the last state court to render an opinion.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE EVIDENCE PERTAINING TO A MENTAL ILLNESS DEFENSE

The third, and most important, reason to grant the instant certiorari petition is that petitioner (Gibbons) is being held in violation of his constitutional right to effective counsel in a guilty plea context.

When defense counsel is notified of a client's reliance on anti-psychotic medication, not being properly medicated, i.e., trying different medications over time to find one that works, but amounting to not taking medications sometimes for a week or more at a time over a period of six months, it is both deficient performance of counsel, and materially prejudices a client in the

client's ability to make an intelligent and voluntary guilty plea, that results in a manifest injustice where the only remedy is for Gibbons to be allowed to withdraw his guilty plea.

Mental health, and a mental health patient's rights', is of national importance as; it would seem to Gibbons, there is little precedent in the way of describing what mental illnesses, where a patient was experiencing symptoms of their illness at the time of the offense, are serious enough to be *prima facie* evidence of an "insanity defense" investigation. Not only is there a general stigma towards those who are mentally ill, and may exhibit positive symptoms from time to time, but there also seems to be a general ignorance of a mental health patient's rights' in a guilty plea setting.

If this Court would clarify what mental illnesses are serious enough, when experiencing symptoms of said illness[es], at the time of the offense, this Court would be showing its ability to stay current with modern psychiatric evidence that sometimes; when a person has committed a crime that is completely out of character, and this person has a history of mental illness treatment, positive symptoms of the illness getting worse shortly before the instant offense, and reliant on anti-psychotic medication, defense counsel has an *obligation* to investigate the client's mental health history because, as said: "sometimes" said patient is not 100% guilty of the instant crime, *i.e.*, does not have the requisite *mens rea.*

Gibbons has found no U.S.S.C precedents regarding the mental illness patient's rights' of a defendant in a guilty plea context for trial counsel failing to investigate a defendant's version of the facts surrounding the crime – to wit: a defendant's reliance on anti-psychotic medication to remain law abiding. Gibbons would go so far as to say, this Court would be viewed in a positive light if the Court were to show empathy for such a petitioner's situation as has been described.

Mental health awareness has come to the forefront in many situations regarding enforcement policies in regards to a person experiencing a mental health crisis confronted by police, at least in Minnesota. Police have been required to undergo more training in this regard in Minnesota, as well; and it would seem the local district court needs to train its' public defender as to what a mental illness patient's rights' are in a guilty plea context, too. This Court should set a national precedent, by granting the certiorari writ for this petition, to further national awareness of some of the obstacles a person struggling with mental illness may have to overcome, especially in regards to unintentionally harming those a patient loves when experiencing positive symptoms of their serious mental illness. This Court should grant the writ to reduce some of the stigma surrounding mental illness and, as a side note, it would show that even the best intentions to manage mental health do not always work.

COUNSEL'S PERFORMANCE REQUIREMENT (DEFICIENCY PRONG OF *STRICKLAND)*

Strickland, 466 US 668.

Paragraph 4 of the letter from counsel dated 7-17-15 (not provided):

> "...I do not think there would be anything beneficial towards your case in those records." ... "we do not need any additional records on that point, especially if they suggest you were refusing to be medicated or follow medical advice (because that actually suggests you would not do well on probation)."

It may be true that if petitioner (Gibbons) says things that would lead counsel to believe certain lines of investigation may be fruitless or even harmful, counsel can choose to do no investigation along that avenue. Contrary to that notion, in the instant certiorari / § 2254 claim, is that Gibbons stating, in the letter dated 2-19-15 (addressed to chief public defender – not provided): "My medications were changed every week for 3 weeks and then completely

discontinued," and stating to counsel in face-to-face conversations that appellant stopped taking medications, should not have led counsel to not investigate or, to the point; believe that a schizophrenic not taking medication shows un-amenability to probation. Here is why:

> *State v Wall*, 343 N.W.2d 22, 25 (Minn. 1984) "the refusal of a schizophrenic to take his medications is itself a result of the disease."

Knowing that counsel effectiveness standards do not change upon geographic location:

> *Hawkman v Paratt*, 661 F.2d 1161, 1167 (8th Cir.) (1981) "The counsel effectiveness standards ... are federal constitutional requirements which do not vary from one geographic location to another"

let us take a look at what the 5th circuit says about counsel's *obligation* to investigate once notified of client's mental problems – that counsel is indeed *obligated.*

> *Bouchillon v Collins*, 907 F.2d 589, 597 (5th Cir.) (1990) "[i]t must be a very rare circumstance indeed where a decision not to investigate would be "reasonable" after counsel has notice of the client's history of mental problems."

And

> "The Court concluded that this was not a reasonable trial tactic: to do no investigation at all on an issue that not only implicates the accused's only defense ... is not a tactical decision. Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum."

Let us look at what the 8th Circuit says about deficient performance; that the 8th circuit has repeatedly stated reasonable performance includes an adequate investigation:

> *U.S. v Hernandez*, 450 F. Supp 2d 950, 969 (8th Cir) (2006) "On the "deficient performance" prong of the "ineffective assistance" analysis, the Eighth Circuit Court of Appeals has repeatedly stated that "[r]easonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories." *Lyons v Luebbers*, 403 F.3d 585, 594 (8th Cir 2005) (quoting *Foster v Lockhart*, 9 F.3d 722, 726 (8th Cir 1993))." ... "The strength of the presumption that counsel's performance was reasonable "turns on the adequacy of counsel's investigation." *White v Roper*, 416 F.3d 728, 732 (8th Cir 2005). Where, for example, counsel's investigation was "too superficial" to reveal the strengths or weaknesses of testimony

> supporting the government's or the defendant's case, or to discover evidence providing powerful support of the defendant's version of events, "*the presumption of sound trial strategy founders ... on the rocks of ignorance*" id." (emphasis added)

It should be apparent from the cited: 5th circuit case law (emphasis added), and 8th circuit case law (emphasis added) that counsel is to communicate with client about the case, and how to proceed, and where to investigate. Counsels' decision not to investigate after having notice of Gibbons' history of mental problems only shows counsel's complete lack of investigation, which is "unreasonable" under *Bouchillon*, and "founders on the rocks of ignorance" under *Hernandez*, which falls under the deficiency prong of *Strickland*: 466 US 668.

COUNSEL'S FAILURE TO INVESTIGATE AMOUNTS TO A MANIFEST INJUSTICE GUILTY PLEA WITHDRAWAL STANDARDS DUE TO PLEA BEING INVOLUNTARY AND UNINTELLIGENT

Johnson specifies two 8th circuit cases where a defendant is prejudiced if counsel does not do an in-depth investigation of the defendant's version of the facts before convincing his client to plead guilty.

> *Johnson v Mabry*, 752 F.2d 313, 315-16 (1984) (8th Cir) (1985) "[*315] Within the context of an arraignment hearing, however, where the defendant enters a guilty plea, *the issue of prejudice necessarily centers upon whether the attorney's failure to competently investigate any material facts prejudiced defendant's ability to make an intelligent and voluntary plea of guilty.* ... For this reason, cases in which the undiscovered information would have been helpful to the defense are distinguishable. See [*316] e.g., (emphasis added)
>
> *Ford v Paratt*, 638 F.2d 1115 at 1118 (8th Cir) (1981) (counsel's failure to substantiate rumored pregnancy of prosecutrix in rape case and rumor as tool to force defendant to plead guilty prejudiced the defendant's ability to make intelligent and knowing decision)"

Ford specifically states that if Counsel did not investigate the plea is unintelligent and involuntary and manifest injustice has occurred.

Morrow clearly states that if counsel failed to investigate with eye-witnesses then the defendant was prejudiced in regards to being able to make an intelligent and knowing guilty plea.

> *Morrow v Paratt*, 574 F.2d 411, 413-14 (8th Cir.) (1978) (counsel's failure to interview one of the robbery participants, who had stated that defendant had tried to avoid involvement in announced robbery, prejudiced defendant's ability to decide whether to plead guilty)

Hernandez clearly states that "prejudice," in a guilty plea context, revolves around what the appellant can specifically show, if not but for counsel's failure to investigate, and how that evidence would have changed the outcome of a trial.

> *U.S. v Hernandez*, 450 F. Supp 2d 950, 970 (8th Cir) (2006) "to demonstrate "prejudice" in the context of a claim of failure to investigate, the defendant cannot rely on general allegations of what a proper or reasonable investigation would have revealed, but must show specifically [**49] what would have been revealed by further investigation and how the further evidence would have made a different outcome to the trial a reasonable probability. See, e.g., *Palmer v Clarke*, 408 F.3d 423, 444-45 (8th Cir 2005)."

Clearly; had counsel investigated with eye-witnesses to Gibbons' behavior, at the time of the offense, in the form of expert psychological and psychiatric testimony, one could reasonably juxtapose how he was prejudiced by defense counsel not investigating with eye-witnesses; just as *Morrow* was, because the release of information (R.O.I.) (not provided), in the instant claim, provides testimony that strongly supports a favorable rule 20.02 investigation finding as the R.O.I. states Gibbons' psychotic symptoms were so severe that they could only be treated in an intensive day treatment program.

According *Johnson*, citing *Ford*; a plea is unintelligent and involuntary if counsel fails to investigate material facts, thus defendant is prejudiced. It is clear that counsel did no investigation after counsel was notified of psych records from the time of the offense, in the

instant claim. Prejudice from inaction will be addressed separately under the "Prejudice" section of this petition pp. 31-35

For the notion of brief economy: (since prejudice and deficiency are so closely intertwined) *Morrow* is cited at length on pp. 31-32 of this petition, but it is under *Morrow* that the notion of investigating eye-witnesses is "ordinary." – deficiency. Deficiency is covered on pp. 26-28 of this petition.

Gibbons upheld his end of the legal proceeding to tell counsel how Gibbons wanted to pursue the defense in this case. Gibbons also: from the very beginning of the case, and before he pled guilty, notified counsel that he was un-medicated at the time of the offense, and was receiving psychiatric care at the time of the offense, and told counsel Gibbons' diagnosis as schizoaffective.

Gibbons will provide the letters to and from counsel and Gibbons, as well as the diagnosis included in the R.O.I. from River Ridge, an outpatient mental illness / chemical dependency treatment center, that diagnosed Gibbons as needing an intensive day treatment program to treat his schizoaffective and major depression, at the time of the offense, if certiorari is granted.

These exhibits have already been included in the initiating post-conviction petition, and documents under habeas rule 7 would also be submitted, where this Court would need to determine if habeas rule 7 should be granted.

PREJUDICE (SECOND PRONG OF *STRICKLAND)*

Strickland, 466 US 668.

One of the guilty plea questions asks if Gibbons was trying to protect the victim. Gibbons said "No." According to the reply brief of the post-conviction brief, p. 18 (not provided); Gibbons stated that he believed, at the time of the offense, that he was trying to protect the victim in his paranoid schizophrenic psychotic state. Had counsel investigated, the question may have been answered differently, and intelligently. *Morrow* states that an alleged ineffective assistance of counsel claim evaluation is a two-step process in the 8th circuit. *Morrow* also states that *ordinarily* a reasonably competent attorney will envestigate witnesses.

> *Morrow v Paratt*, 574 F.2d 411-413 (1978) "Overview: Pursuant to a plea bargain, the prisoner entered a plea of guilty to a robbery charge and a firearm count was dismissed. ... The court found as a matter of law that the prisoner received ineffective assistance of counsel, because his attorney failed to adequately investigate the facts before advising him to plead guilty. Further, the prisoner was materially prejudiced by his attorney's failure to interview eyewitnesses."
>
> [412] "The evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process in the 8th. Circuit. *Rinehart v Brewer*, 561 F.2d 126, 131 (8th Cir. 1977). First, the defendant must show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *Benson v United States*, 552 F.2d. 224 (8th Cir. 1977) cert. denied, 434 US 581, 98 S. Ct 164, 54 L.Ed 2d 120 (1977); *Pinnell v Cauthron*, 540 F. 2d 938, 939 - 40 (8th Cir. 1976); *United States v Easter*, 539 F.2d 663, 666 (8th Cir. [*413] 1976) cert denied, 434 US 844, 98 S. Ct 145, 54 L. Ed 2d 109 (1977). Secondly the defendant must show he was materially prejudiced in the defense of his case by the actions or inactions of defense counsel. *Rinehart v Brewer*, supra, 561 F. 2d at 131; *Benson v United States*, supra, 552 F.2d at 224; *Pinnell v Cauthron*, supra, 540 F.2d at 943; *Crimson v United States*, 510 F.2d 356, 358 (8th Cir. 1975)."
>
> "This court recently stated that *ordinarily* a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent investigation of the witnesses. *Benson v United States*, supra, 552 F.2d at 255." (emphasis added)

In the *Morrow* case: counsel did do a lot of investigating but never investigated eyewitnesses (paraphrased).

> [*412] "The district court concluded that in light of the lack of evidence before it that Morrow admitted to his attorney that he intended to rob the gas station or the he rendered assistance to the others, it was incumbent upon Morrow's attorney to further investigate the facts."

To juxtaposition to the instant claim, Gibbons, from day one of the investigation, stated he was un-medicated at the time of the offense, and in several letters to counsel afterwards, expressed a desire to pursue mental health aspects of the case, for serious mental illnesses. *Morrow* found that the client was materially prejudiced by counsel not investigating eyewitnesses.

> [413] "In regard to the second inquiry of the ineffective assistance of counsel claim, the district court found that Morrow was *materially prejudiced by his attorney's failure to interview eyewitnesses*. The district court properly noted that had Morrow decided to stand trial, a key factual issue would have centered upon Morrow's intent. With intent as a critical issue, any corroboration or lack thereof of Morrow's rendition of the robbery would be significant." (emphasis added)

This is prejudice under *Strickland*: 466 US 668

To juxtaposition the instant case to *Morrow*; Gibbons is stating that counsel did not investigate with eye-witnesses whom could provide expert eye-witness testimony, and in fact could have provided documented symptoms of his symptomatic psychotic state from the time of the offense, even though counsel was notified that such potentially exculpatory evidence was available (deficiency). Since Gibbons is claiming that he would be presenting an "insanity defense," the central issue at a trial would be whether he held the requisite *mens rea* at the time of the offense to be held guilty, much like *Morrow's* case where intent would be a central issue to *Morrow's* claim (although *Morrow* was not doing an "insanity defense"). Intent in both *Morrow*'s case and Gibbons' case would be a central issue, however, so in the instant case expert

eye-witness psych reports would have been very helpful in showing that there was *prima facie* evidence of the appropriateness of a rule 20.02 investigation for the purpose of a bifurcated trial.

> *Nichols v Bell*, 440 F. Supp. 2d 730, 759 (Tenn.) (2006) "To establish prejudice, a petitioner who enters a guilty plea must show that there is a *reasonable probability* that, but for counsel's errors, he would have not pleaded guilty and would have insisted on going to trial." (emphasis added)

Gibbons will provide correspondence to counsel, from before sentencing, that he was at least interested in withdrawing his guilty plea due to mental illness reasons, and letters from trial counsel stating a refusal to investigate, if the certiorari writ is granted.

The magistrate stated that a case from 2017, *Lee*, was not applicable to Gibbons' assessment of the parameters of how a guilty plea can be withdrawn i.e., how prejudice is assessed, but Gibbons counters with the notion that *Lee* is the current standard for all existing plea withdrawal claims and is in accordance with two previous U.S. Supreme Court Cases, and lifts the notion of "reasonable probability" from *Nichols*, *supra*:

> *Lee v United States*, 137 S. Ct 1958, 1965 (2017) "*Flores-Ortega*, 528 U.S. 470 at 483, 120 S. Ct 1029, 145 L. Ed 2d 985. When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the results of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceeding," "we cannot accord" any such presumption "to judicial proceedings that never took place." Id at 482-483, 120 S. Ct 1029, 145 L. Ed 2d 985."

> "We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right." Id at 483, 120 S .Ct 1029, 145 L. Ed. 2d 985. As we held in *Hill v Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, *the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*" 474 U.S. at 59 (52), 106 S. Ct 366, 88 L. Ed 2d 203." (emphasis added)

There is a "reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" *id*, as will be addressed via exhibits of correspondence between counsel and client if certiorari is granted.

The "Insanity Defense" section of this petition, p. 35, shows that there is a "reasonable probability" *id.*, that Gibbons would have not only "not have pleaded guilty and would have insisted on going to trial," i*d.*, but also that the result would have been that he would be found not guilty, so long as at least one psych doctor found that he did not know that his actions were wrong at the time of the offense.

Let us look at the potentially exonerating factors:

1. Psychiatric information from the time of offense that states Gibbons should have been in a mental health hospital for paranoid schizophrenic delusions.
2. Actively pursuing mental health probation directive – weekly emails to probation officer would prove this. (Addressed in letter to counsel dated 1-24-15 (not provided), as a character witness.) (This P.O. would need an affidavit under habeas rule 6.)
    a. 2-3 serious mental illnesses listed under Statute 245.462 Subd. 20 (c) (4) (i)
3. Documented mental health diagnoses, from several doctors with all the same diagnoses, going back to 2006. (Would have been verified had counsel pursued Dr. Kennedy, from River Ridge, at the time of the offense, at least, to verify history of diagnosis from 2006.) (Diagnosis from Dr. Johnson - 2006 – has been discovered by Gibbons and will be placed in evidence at the appropriate evidentiary hearing, or habeas rule 7. (These doctors would need an affidavit under habeas rule 6.)

4. Character witnesses who could attest that instant offense was completely out of character. (The character witnesses were listed in the letter to counsel dated 1-24-15 (not provided) that will be placed in evidence at the appropriate evidentiary hearing, or habeas rule 7.) (These witnesses would need an affidavit under habeas rule 6.)

It should be apparent from pp. 31-35 that a petitioner is prejudiced if counsel does not investigate with eye-witnesses to the crime, or behavior at the time of the offense, in this instant certiorari / § 2254 claim, under *Strickland*, 466 US 668.

"INSANITY DEFENSE," AND THE REASONABLE PROBABILITY THAT THE PETITIONER WOULD BE FOUND NOT GUILTY, OR INSIST ON A TRIAL, *i.e.*, NOT PLEAD GUILTY

Petitioner (Gibbons) has a history of mental illness going back to when he first reported his symptoms to Dr. Johnson at 1800 Nicollet Ave in Minneapolis in 2006. Those symptoms include: religious delusions of grandiosity, recurring intrusive thoughts, and paranoid schizophrenic delusions.

Gibbons moved in with his new girlfriend and her two daughters. There was never even a hint of sexual deviancy perpetrated to the minor children – Gibbons was at least intermittently taking his anti-psychotic medications. This went on for roughly 18 months before Gibbons' medications were turned off by Dr. Kennedy at the MI / CD treatment center River Ridge, only then did the sexual penetration start.

Gibbons is not going to go into great detail about what his thoughts were as he will save that information for the state and defense psychologist and psychiatrist once a rule 20.02 investigation is awarded, but Gibbons will give a general idea of his thoughts instead.

Religious delusions of grandiosity: Gibbons came to believe that God had answered his prayers in the sense that God was providing all three females for the interest of marriage, once the daughters were of age, and could be surrogates, as the mother could not conceive. It is not that God was talking to him, it just all seemed to fall into place and seemed pre-ordained. God had approved of the grooming process of pleasing Gibbons so long as marriage was the end result.

Recurring intrusive thoughts: The same thought, whether it be a sentence fragment or a grand design, will continually recur for hours on end should Gibbons not have anti-psychotic medications at least every few days. Thoughts become actions, if applicable, (like burglary) and Gibbons has no defense against his mind telling him what to do, so he is seemingly forced to follow through with his thoughts via actions.

Paranoid schizophrenic delusions: Gibbons believed that the way the victim was acting towards other males (adult and juvenile) outside the home was improper, and that she was just opening herself up to sexual attack by other males in that she acted very flirty. Gibbons was trying to show the victim what her actions meant to males, that she was acting promiscuous, and that by performing the said act he was actually protecting her in the sense that she was learning what her actions meant to males, and why she should stop, that she was inadvertently acting sexy, and inviting males to use her sexually, so Gibbons performed the said act in a manner that gave her the distinct impression that he was only interested in instant gratification (this issue needs to be addressed in trial). Couple this with recurring thoughts to educate and protect the child, and the false psychotic belief in pre-destined grooming for polygamy approved by God, so long as the victim was never physically hurt, and some jurors may find that Gibbons did not

know the nature of the act, or that it was wrong, at the time of the offense. This is applying the MN statute 611.026 defense in conjunction with a rule 20.02 investigation.

What Gibbons sees happening, according to his insanity defense investigation is: that; if a rule 20.02 investigation is permitted, then the state and defense each will hire a psychologist and psychiatrist to speak with him to determine his state of mind at the time of the offense. The state doctors will find that Gibbons *did* know what he was doing was wrong, and the defense doctor's will find that he *did not* know what he was doing was wrong. Insanity defenses are won by a fair preponderance of the evidence in Minnesota. At this point in the case both psych opinions are in equipoise. Now take into consideration:

1. Documented mental illness going back to 2006 with the same diagnosis by every doctor,
2. Criminal record revolving around mental illness going back to 2008 where the case in 2010 expressly acknowledged that Gibbons needs medication to remain law abiding (medication directive),
3. Character witnesses that will testify that Gibbons' actions were completely out of character,
4. The offenses only happened while in an un-medicated state,
5. Diagnosis from the time of the offense says that Gibbons should have been hospitalized for serious mental health reasons,
6. And this diagnosis is from the same time as the offense, but before arrest,
7. Gibbons has no history of sexual deviancy in juvenile or adult record,
8. Gibbons stopped the offense when victim said she did not want to do "what we do together" anymore,
9. Mental health symptoms get worse over time,

10. Symptoms can return immediately and worse once medications are stopped,
11. Gibbons has been hospitalized in the past for mental illness reasons, and
12. Gibbons turned himself in to MI / CD inpatient treatment at twin town in St. Paul, MN on 8-8-13 where his medications were adjusted and henceforth he remained law abiding for 18 months until the offense was reported.

and all of a sudden the defense's psych opinion' carries more weight than the state's psych opinion'.

Gibbons should be permitted to withdraw his guilty plea and be awarded a trial where he can provide expert psych testimony about his thoughts and behavior at the time of the offense (§611.026) & (rule 20.02) to convince jurors that they should believe the defense psych doctor over the states psych doctor as in Minnesota 611.026 cases are won by a preponderance of the evidence, and jurors can choose to believe either the state's or defense's doctor's opinions when voting guilty or not guilty.

CONCLUSION

Petitioner (Gibbons) has shown that the last state court to render an opinion, the Minnesota appellate court, did not make a "plain statement" under *Caldwell*, *Harris*, and *Michigan* to foreclose upon federal habeas review as the purported plain statement talked about both the *Knaffla*-court-bar but also mentioned that the local district court did not abuse its discretion when denying post-conviction relief on Gibbons' second post-conviction petition. This is patently not "plain" as two topics are mentioned – *Knaffla*, and abuse of discretion.

Gibbons has shown that the last state court to render an opinion, the Minnesota appellate court, did not "actually rely" on a state procedural rule to bar federal habeas review under both

Harris and *Coleman* as the opinion mentioned three courts to bar review but did not discuss which rules barred which of Gibbons three ineffective assistance of counsel grounds – especially the instant certiorari / § 2254 petition ground one, ground three in the opinion. It is incumbent upon this Honorable Court to determine if the asserted non-federal ground, allegedly relied upon, is sufficient to bar federal review, and Gibbons has discussed and compared at length his particular precise procedural position – second post-conviction petition – to relevant 9th circuit cases – *Bean*, *Koerner*, and *Valerio* - where it would seem to Gibbons that he has effectively persuaded this Court to rule in his favor. Additionally, it is the Magistrate's report and recommendation that points out the *Brown* authority specifying that *Knaffla* bars successive post-conviction petitions, but this is not express, explicit, or clear from the Minnesota court of appeals opinion. The merits of the underlying ground for relief should have been reviewed at all lower federal levels as there is insufficient reliance on a state procedural rule to bar federal review.

Gibbons has shown under *Bouchillon*, *Ford*, *Mabry*, *Morrow*, and *Hernandez* that counsel has an obligation to investigate a defendant's version of the facts surrounding a crime, particularly with eye-witnesses to behavior of a defendant at the time of the offense, and to not investigate is both deficient performance and prejudices a defendant under *Strickland* and *Morrow*. Additionally, Gibbons has shown that under *Lee* a petitioner must show that there is a reasonable probability that a petitioner would have insisted upon trial if not but for counsel's error's, and evidence pertaining to this will be presented if the certiorari writ is granted in the form of correspondence between Gibbons and trial counsel before and after he pled guilty, as well as the R.O.I. detailing the hospitalization recommendation diagnosis.

The petition for a writ of certiorari should be *granted* to set national precedents in regards to: what a "plain statement" *is not*; what "actually relying" on a state procedural rule *is not*; and

what rights a mental health patient has, in a guilty plea context, when there is evidence that a defendant was suffering positive symptoms of serious mental illnesses at the time of the offense, and whether said evidence is *prima facie* evidence for an "insanity defense," as well as setting a precedent to show what a "reasonable probability of insisting on trial" consists of.

Pages: 40

Respectfully submitted,

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