19-7401

No.

IN THE

Supreme Court of the United States

DUMISAI HASANI HOCKADAY,

Petitioner,

v.

HELENE CHRISTNER, Colorado Department of Corrections, Nurse Practitioner, in her Official and/or Individual capacity, et al.,

Respondent,

And

JAN SMITH, Colorado Department of Corrections, ADA Coordinator-Designee, in her Official and/or Individual capacity, et al.,

Respondent.

On Petition For A Writ Of Certiorari To

The United States Court of Appeals for the Tenth Circuit, Case No. 19-1259, and The United States District Court for the District of Colorado, No. 17-cv-01018-MSK-NRN.

CORRECTED PETITION FOR A WRIT OF CERTIORARI

Dumisai Hasani Hockaday, *pro se*
Prisoner No. 159095
DCC-Delta Correctional Center
11363 Lockhart Road
Delta, Colorado. 81416
970.874.7614

QUESTIONS PRESENTED FOR REVIEW

1. Whether the underlying activity of the United States Court of Appeals for the Tenth Circuit is ethical or not under *Thomas v. Arn,* 474 U.S. 140, at *151 (1985); *Greenlaw v. United States,* 554 U.S. 237, at *244 – *245 (2008); *Musacchio v. United States,* 136 S. Ct. 709, at *716 (2016).
2. Whether the Colorado Department of Corrections is trying to comingle two administrative regulations in order to confuse, confound, or disconcert an attempt to complete the grievance process under *Ross v. Blake,* 136 S. Ct. 1850, at *1859 – *1860 (2016).
3. Whether governing law in the Tenth Circuit—*See e.g., Sealock v. Colorado,* 218 F.3d 1205, at *1210 (10th Cir. 2000), precludes summary judgment under *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, at *248 (1986).
4. Whether a prima facie claim of deliberate indifference was established, and whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious damage to his future health under *Helling v. McKinney,* 509 U.S. 25, at *35 (1993); *Estelle v. Gamble,* 429 U.S. 97, at *104 (1976); and *Erickson v. Pardus,* 551 U.S. 89, at *90 (2007).
5. Whether the use of Dr. Perez or Mr. Munroe's statements violated the Confrontation Clause under *United States v. Hubbell,* 530 U.S. 27, at *36, fn.19 (2000).

6. Whether the fact-finder would give greater or less weight to a DOC employee's affidavit which contradicts her own prior deposition testimony simply because of her official character under *Michigan v. Harvey,* 494 U.S. 344, at *351 (1990).
7. Whether error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial or quasi-judicial proceedings under *United States v. Olano,* 507 U.S. 725, at *732 (1993). *See, e.g.,*
    a) Whether or not full faith and credit has been given a foreign judgment, and whether the revival results in a new judgment under *Baker v. GMC,* 522 U.S. 222, at *233 (1998).
    b) Whether the Department of Corrections enforcement action is time barred and, more particularly, whether Colorado state law determines the timeliness of the Government enforcement action under *State ex rel. Coffman v. Robert J. Hopp & Assocs., LLC,* 2018 COA 69, at ¶37, 442 P.3d 986, at *997 (Colo. Ct. App., May 17, 2018).
    c) Whether the United States District Court for the District of Colorado properly entertained jurisdiction of the claim based on Colorado law under 28 U.S.C. § 1343 (3); *Hagans v. Lavine,* 415 U.S. 528, at *545 – *550 (1974); *Ariz. Christian Sch. Tuition Org. v. Winn,* 563 U.S. 125, at *144 – *145 (2011).
    d) Whether the State of Colorado and the Department of Corrections are different sovereigns for double jeopardy purposes and whether the prosecutorial powers of the two jurisdictions have independent origins,

or, said conversely, whether those powers derive from the same ultimate source under *United States v. Wheeler*, 435 U. S. 313, at *320 (1978).

e) Whether the Double Jeopardy Clause bars the State of Colorado and the Colorado Department of Corrections from successively prosecuting a defendant on like charges for the same conduct under *Heath v. Ala.*, 474 U.S. 82, at *88 – *89 (1985); *Robertson v. Watson,* 560 U.S. 272, at *275 (2010); and *Gamble v. United States,* 139 S. Ct. 1960, at *1979 (2019).

LIST OF PARTIES

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

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

COLORADO DEPARTMENT OF CORRECTIONS, in its Official Capacity,

RICK RAEMISCH, Colo. Dep't of Corr.'s, Executive Director, in his Individual and/or Official Capacities,

ANTHONY DECESARO, Colo. Dep't of Corr.'s, DOC Employee (Attorney), in his Individual and/or Official Capacities,

CHERYL GALLEGOS, Colo. Dep't of Corr.'s, DOC Employee, in her Individual and/or Official Capacities, and

JESSICA TOMLIN, Colo. Dep't of Corr.'s, ADA Coordinator, in her Individual and/or Official Capacities.

TABLE OF CONTENTS

TABLE OF AUTHORIES CITED

CASES PAGE NUMBER

STATUTES AND RULES PAGE NUMBER

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

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

The opinion of the United States court of appeals appears at Attached Appendix A, pg.3 and Attached Appendix N, pg.109 to the petition and is unpublished.

The opinion of the United States district court appears at Attached Appendix C, pg.10-12, Attached Appendix D, pg.13-23, and Attached Appendix I, pg.70-82 to the petition and is reported at *Hockaday v. Christner,* No. 17-cv-01018-MSK-NRN, 2019 U.S. Dist. LEXIS 106952 (D. Colo., June 26, 2019).

JURISDICTION

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

The date on which the United States Court of Appeals decided Mr. Hockaday's Motion to Show Cause was on September 18, 2019. The appeal was dismissed on October 11, 2019.

[x] A timely petition for rehearing en banc (motion for reconsideration) was denied by the United States Court of Appeals on the following date: September 30, 2019, and a copy of the order denying rehearing appears at Attached Appendix N, pg.109.

[x] A timely motion to reconsider, vacate, or modify was filed, but not filed in the Court, and no action was taken by the United States Court of Appeals on the following date: October 18, 2019 *Id.,* Attached Appendix B, pg.4-9, and a copy of the order taking no action on motion to reconsider, vacate, or modify appears at Attached Appendix A, pg.3

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

CONSTIUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article IV, Sec. 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

2. Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Amendment One:

The right to petition the government for redress of grievances.

4. Amendment Four:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5. Amendment Five:

Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law.

6. Amendment Eight:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

7. Amendment Ten:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

8. Amendment Eleven:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

9. Amendment Fourteen, Sec. 1. [Citizens of the United States.]:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10. 42 U.S.C. § 1395dd (a):

Medical screening requirement. In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this title [42 USCS §§ 1395 et seq.]) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.

11. 42 U.S.C. § 1395dd (e)(1):

(e) Definitions. In this section:
(1) The term "emergency medical condition" means—
(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
(ii) serious impairment to bodily functions, or
(iii) serious dysfunction of any bodily organ or part; or

12. 42 U.S.C. § 1395dd (h):

(h) No delay in examination or treatment. A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) or further medical examination and treatment required under subsection (b) in order to inquire about the individual's method of payment or insurance status.

13. Colorado Department of Corrections-Administrative Regulation #850-04 (IV)(C)(3):

Offenders who require an accommodation to file a grievance, or who are otherwise unable to complete the grievance form, are authorized to obtain assistance from other offenders, if the assistance requested does not interfere with the security of the facility. Alternative assistance may be requested through the office of the ADA Inmate Coordinator (AIC).

14. Colorado Department of Corrections-Administrative Regulation #850-04 (IV)(D)(5):

An offender may only pursue a grievance concerning a problem that affects the offender personally and shall pursue it without the assistance, involvement, or intervention of an agent or attorney.

15. Colorado Revised Statutes [hereinafter C.R.S.] § 13-80-102(1) (i), General limitation of actions – two years:

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, must be commenced within two years after the cause of action accrues, and not thereafter:

(i) All other actions of every kind for which no other period of limitation is provided.

16. C.R.S. § 13-80-108(1), When a cause of action accrues:

Except as provided in subsection (12) of this section, a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.

17. C.R.S. § 13-80-110, Causes barred in state of origin:

If a cause of action arises in another state or territory or in a foreign country and, by the laws thereof, an action thereon cannot be maintained in that state, territory, or foreign country by reason of lapse of time, the cause of action shall not be maintained in this state.

18. Restatement Second of Judgments § 19, The general rule of bar:

A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

19. Texas Rules of Appellate Procedure--Rule 26, Time to Perfect Appeal:

26.2 Criminal Cases.

(b) *By the State.* --The notice of appeal must be filed within 20 days after the day the trial court enters the order, ruling, or sentence to be appealed.

20. Texas Civil Practice & Remedies Code § 16.0045(a)(1)(2), (1999), Five-year limitations period. *See also* 1995 Tex. HB 2330 (enacted, June 15, 1995):

(A) A person must bring suit for personal injury not later than five years after the day the cause of action accrues if the injury arises as a result of conduct that violates:
(1) Section 22.011, Penal Code (Sexual Assault); or
(2) Section 22.021, Penal Code (Aggravated Sexual Assault).

21. C.R.S. § 24-1-110 (t), Principal departments:

(1) In accordance with the provisions of section 22 of article IV of the state constitution, all executive and administrative offices, agencies, and instrumentalities of the executive department of the state government and their respective functions, powers, and duties, except as otherwise provided by law, are allocated among and within the following principal departments created by this article:

(t) Department of corrections;

22. C.R.S. § 24-3-101, Agency defined:

As used in this article, the term "agency" means every agency in the executive branch of the state government which is required by the constitution or statutes of the state to exercise discretion or to perform judicial or quasi-judicial functions. As so qualified, the term "agency" includes, but is not limited to, boards, commissions, departments, divisions, offices, and officers.

23. C.R.S. § 16-11.7-101, Legislative declaration:

(1) The general assembly finds that, to protect the public and to work toward the elimination of sexual offenses, it is necessary to comprehensively evaluate, identify, treat, manage, and monitor adult sex offenders who are subject to the supervision of the criminal justice system and juveniles who have committed sexual offenses who are subject to the supervision of the juvenile justice system.

(2) Therefore, the general assembly declares that it is necessary to create a program that establishes evidence-based standards for the evaluation, identification, treatment, management, and monitoring of adult sex offenders and juveniles who have committed sexual offenses at each stage of the criminal or juvenile justice system to prevent offenders from reoffending and enhance the protection of victims and potential victims. The general assembly does not intend to imply that all offenders can or will positively respond to treatment.

24. Colorado Constitution, Article IV, Section 22, Principal departments:

All executive and administrative offices, agencies, and instrumentalities of the executive department of state government and their respective functions, powers, and duties, except for the office of governor and lieutenant governor, shall be allocated by law among and within not more than twenty departments. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections, or units in such manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary commissions may be established by law and need not be allocated within a principal department. Nothing in this section shall supersede the provisions of section 13, article XII, of this constitution, except that the classified civil service of the state shall not extend to heads of principal departments established pursuant to this section.

25. C.R.S. § 24-1-101, Legislative declaration:

The general assembly declares that this article is necessary to create a structure of state government which will be responsive to the needs of the people of this state and sufficiently flexible to meet changing conditions; to strengthen the powers of the governor and provide a reasonable span of administrative and budgetary controls within an orderly organizational structure of state government; to strengthen the role of the general assembly in state government; to encourage greater participation of the public in state government; *to effect the grouping of state agencies into a limited number of principal departments primarily according to function; and to eliminate overlapping and duplication of effort.* (Emphasis added). It is the intent of the general assembly to provide for an orderly transfer of powers, duties, and functions of the various state agencies to such principal departments with a minimum of disruption of governmental services and functions and with a minimum of expense. To the ends stated in this section, this article shall be liberally construed.

STATEMENT OF THE CASE

Mr. Hockaday's amended charging document [*Hockaday v. Raemisch, et al.,* No. 17-cv-01018-GPG, *Id.,* Attached Appendix J], is not a model of clarity. However, this petition for a writ of certiorari raises substantial issues of ongoing violations of constitutional rights and civil liberties, basic, fundamental, and serious errors, Colorado state law claims, whether any genuine factual issues existed which could have been resolved in favor of either party, jurisdictional conflicts, plain error, fundamental fairness, and questions of equal justice and equal application of our laws. Additionally, Tenth Circuit Judges Matheson and Bacharach shape public opinion to be consistent with their world view, which in this incident, is contrary to, or involved an unreasonable application of clearly established Federal law, as determined, by the Supreme Court of the United States.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Tenth Circuit's appellate review is unconstitutional and devoid of due process. This procedure is lacking in legitimacy, credibility, and offends the fundamental canons of decency and fairness, it demonstrates a shocking intolerance by the Tenth Circuit that is divisive to other pro se prisoner litigants in the circuit, and our nation. Further, the Tenth Circuit has entered a ruling that has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

As a result of the action taken by the Tenth Circuit, Mr. Hockaday could not file an appeal of a judgment in a civil case, as to whether the United States District Court for the District of Colorado applied the proper standard in evaluating the summary judgment

decision against him, or whether the allegations in Mr. Hockaday's pendent state law claims state a cause of action on which relief could be granted as a question of law.

The deviation by the Tenth Circuit from the procedure normally followed in addressing statutory and constitutional questions in the same case, as well as concern that the merits of these important questions had been decided erroneously, serves as a stark reminder that our due process, liberty interest, double jeopardy, and deliberate indifference jurisprudence has so far departed from American interests and from American norms.

ISSUE #1

Whether the underlying activity of the United States Court of Appeals for the Tenth Circuit is ethical or not.

STANDARD OF REVIEW

An appellate court may not alter a judgment to benefit a nonappealing party. It takes a cross-appeal to justify a remedy in favor of an appellee. The rule has been called "inveterate and certain." *See Greenlaw v. United States,* 554 U.S. 237, at *244 – *245 (2008). An appellate court's function *is* to revisit matters decided in the trial court. When an appellate court reviews a matter on which a party failed to object below, its review may well be constrained by other doctrines such as waiver, forfeiture, and estoppel, as well as by the type of challenge that it is evaluating. *See Musacchio v. United States,* 136 S. Ct. 709, at *716 (2016).

¶1. This issue was properly preserved in a motion entitled *Motion to Reconsider, Vacate, or Modify,* which was submitted, but not filed in this action on October 18, 2019 to the United States Court of Appeals for the Tenth Circuit as to Case No. 19-1259. *Id.,* Attached Appendix B, pgs.4-9.

¶2. In the United States District Court for the District of Colorado, Defendant Helene Christner by and through her attorneys did not challenge Mr. Hockaday's grounds

for the motion for leave to proceed *in forma pauperis* on appeal, either in a separate document or in the response itself.

¶3. The Tenth Circuit has impeached the order, opinion, and inferred judgment of Senior United States District Judge Marcia S. Krieger (*Id.*, Attached Appendix C, pg.11), all in absence of a timely filed objection or cross-appeal from the attorneys of Defendant Helene Christner.

¶4. Forfeiture in the U.S. district court by the opposing party to make the timely assertion of a right, led to the Tenth Circuit's breach of due process, which was introduced under the guise of a show cause order charged to Mr. Hockaday on August 20, 2019. *See Freytag v. Commissioner,* 501 U.S. 868, at *894 – *895 (1991) ("Forfeiture is "not a mere technicality and is essential to the orderly administration of justice." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2472, at pg. 455 (1971)."). The time limits would be undermined if an appeals court could modify a judgment in favor of a party who filed no notice of appeal.

¶5. An interesting quagmire in the respondent's defense of this issue would be: If an objection were timely filed or otherwise, and Judge Krieger *still* granted Mr. Hockaday's motion for leave to file *ifp* on appeal, a notice of appeal on behalf of the appellee intending to challenge the district court's ruling on the affidavit must be filed in order to justify the Tenth Circuit's reversal of the lower court's decision on the *ifp* motion. Where then, is the opposing party's notice of appeal?

¶6. Even though it is within the purview of the appellate court to order Mr. Hockaday to show cause pursuant to 10th Cir. R. 8.1, forfeiture of challenge to Judge

Marcia S. Krieger's order, opinion, and inferred judgment in the lower court and the Tenth Circuit's reversal of the judge's ruling thereof, suggests a course of action that is unconstitutional and without any due process. *See also Thomas v. Arn,* 474 U.S. 140, at *148, *151, *155 (1985). ("We hold that a court of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired.")

¶7. This judicial action of ignoring lawful process substantiates an obstruction of constitutional process by the Tenth Circuit.

¶8. In summary, the Tenth Circuit has displayed a lack of moral objectivity that is complicit with transgressing the rule of law and the Constitution of the United States that U.S. circuit judges have sworn to uphold and defend.

ISSUE #2

Whether the Colorado Department of Corrections is trying to comingle two administrative regulations in order to confuse, confound, or disconcert an attempt to complete the grievance process.

STANDARD OF REVIEW

An administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end — with officers unable or consistently unwilling to provide any relief to aggrieved inmates. . . An administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. . . When rules are so confusing that . . . no reasonable prisoner can use them, then they're no longer available. . . And finally, the same is true when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation. *See Ross v. Blake,* 136 S. Ct. 1850, at *1859 – *1860 (2016).

¶9. Due to a violent assault by another inmate for being administratively labeled a sex offender, Mr. Hockaday suffered a shattered bone in his dominant writing hand on

July 29, 2016 while confined at Sterling Correctional Facility [hereinafter SCF]. It was extremely painful to write with a fractured right hand depending on what circumstances dictate--*i.e.,* punitive segregation or a faulty call box.

¶10. Some inmates throughout SCF were knowledgeable of Mr. Hockaday's plight, including those prisoner's in agreement with the actions of the assailant. With that said, due to concerns of safety and well-being, Mr. Hockaday could not rely on other potentially prejudiced inmates to assist a sex offender in pursuing a procedurally sound grievance.

¶11. The Colo. Dep't. Of Corr.'s argued in the Defendant's reply in support of motion for summary judgment, that Mr. Hockaday failed to comply with an optional administrative procedure, this rule is contrary to CDOC Admin. Reg. #850-04 (IV)(D)(5). *Id.,* Const. & Stat. Prov. Inv., pg.3, at #13 and #14. *See* Attached Appendix F, at pg.34.

¶12. According to the "Grievance Substance/Format" section of CDOC Admin. Reg. § 850-04 (IV)(D)(5), the prison's own grievance policy makes clear the following: "An offender may only pursue a grievance concerning a problem that affects the offender personally and shall pursue it without the assistance, involvement, or intervention of an agent or attorney." *Id.,* Dist. Ct. Docket No. 149-7, Exhibit E Attachment 2, pg.5 of 17, at #5; *see also* Pro Se Hockaday's Motion for Leave to File a Surreply Brief, pg.2-3, at ¶¶1-6, which was submitted to the U.S. district court on March 20, 2019.

¶13. For Mr. Hockaday, this is a restrictive policy in this environment because the language of this agency rule is categorical, and unambiguously prescribes a mandatory procedure. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, at *661

(2007). Further, a "plain and unambiguous" text "must" be enforced "according to its terms." *See also Hardt v. Reliance Standard Life Ins. Co.,* 560 U. S. 242, at *251 (2010).

¶14. The ADA Inmate Coordinator, as mentioned in CDOC Admin. Reg. #850-04 (IV)(C)(3), is by Tenth Circuit precedent, an "agent," and thereby precluded from rendering assistance, involvement, or intervention to offenders pursuing a grievance. The ambiguous nature of both agency rules demonstrates confusion and misrepresentation on behalf of the department of corrections.

¶15. Judges in this jurisdiction have long established that DOC employees are indeed agents. *See, e.g., Neely v. Ortiz,* 241 Fed. Appx. 474, at *476 (10th Cir. 2007) ("agents of CDOC"); *Schwartz v. Booker,* 702 F.3d 573, at *584, fn.13 (10th Cir. 2012) ("serve as agents of the state department"); *Vreeland v. Schwartz,* 613 Fed. Appx. 679, at *681, fn.1 (10th Cir. 2015) ("agents of the state"); *United States v. Ferrell,* No. 17-1024, 2018 U.S. App. LEXIS 5364, at **3 (10th Cir. 2019) (CDOC Parole Officers as "parole agents.").

¶16. The facts of this case raise questions about whether Mr. Hockaday had an "available" administrative remedy to exhaust. As explained earlier, CDOC's exhaustion defense rests on Hockaday's failure to seek relief through Colorado's "alternative assistance" process. Which has been proven to operate as a simple dead end to the exhaustion requirement.

¶17. The principles in *Blake* establish that: "Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available. Accordingly, exhaustion is not required." *Id.,* at *1860.

¶18. Such interference with an inmate's pursuit of relief renders the administrative process unavailable, to which, §1997e(a) poses no bar.

ISSUE #3

Whether governing law in the Tenth Circuit—*See, e.g., Sealock v. Colorado,* 218 F.3d 1205, at *1210 (10th Cir. 2000), precludes summary judgment.

STANDARD OF REVIEW

More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, at *248 (1986).

¶19. The Tenth Circuit has discussed at length the elements essential to an inmate claiming a violation of his 8th Amendment rights arising from inadequate or delayed medical treatment. The Court has recognized two types of conduct which may constitute deliberate indifference in a prison medical case: (1) a medical professional failing to treat a serious medical condition properly; and (2) a prison official preventing an inmate from receiving medical treatment or denying access to medical personnel capable of evaluating the inmate's condition. *See Sealock v. Colorado,* 218 F.3d 1205, at *1211 (10th Cir. 2000).

¶20. The controlling law in this jurisdiction establishes that a "delay in medical care only constitutes an Eighth Amendment violation where the plaintiff can show that the delay resulted in substantial harm." *Id.,* at *1210.

¶21. Judge Krieger concludes: "Viewing this factual dispute in the light most favorable to Mr. Hockaday as the Court must, a reasonable jury could find that the delay in treatment resulted in substantial harm." *See* Attached Appendix D, at pg. 21.

¶22. The deliberate indifference standard inquires as to whether Ms. Christner engaged in the "wanton infliction" of unnecessary pain. On its face, Mr. Hockaday has shown deliberate indifference and that such delay in receiving medical treatment caused him substantial harm.

¶23. This Tenth Circuit precedent suggests that Mr. Hockaday has come forward with evidence that would be sufficient to demonstrate a triable Eighth Amendment claim against Defendant Nurse Practitioner Helene Christner.

ISSUE #4

Whether a prima facie claim of deliberate indifference was established, and whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious damage to his future health.

STANDARD OF REVIEW

"Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment," and this includes "indifference . . . manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed" (footnotes and internal quotation marks omitted); (citing – *Estelle* 429 U.S. at *104-105 (1976)); *see also Helling v. McKinney,* 509 U.S. 25, at *35-37 (1993) (*quoting – Erickson v. Pardus,* 551 U.S. 89, at *90 (2007)).

¶24. Nurse Practitioner Christner does not contest that Mr. Hockaday had a serious medical condition. *Id.,* Attached Appendix D, at pg.21.

¶25. Her belief was that "there was no substantial risk of serious harm in delaying an X-ray for Mr. Hockaday."

¶26. An Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.

See Farmer v. Brennan, 511 U.S. 825, at *842 (1994).

¶27. The signs and symptoms of a bone fracture are: (1) A swelling or bruising over a bone; (2) Deformity of a limb; (3) Localized pain that intensifies when the affected area is moved or pressed; (4) Loss of function in the area of the injury; and (5) A bone that perforates the skin. *See* Scott C. Litin M.D., Mayo Clinic Family Health Book, Chapter 27, at pg.921, Fifth Edition (2018).

¶28. As stated in Attached Appendix G, at pg.43, at ¶¶15-16, the following statements of injury contradict NP Christner's statement of treatment, *Id.* Dist. Ct. Docket No. 149-12, at ¶¶10-11, it denotes: (1) Deformity with abrasion; (2) Deformity to the third and fourth digits with moderate swelling; (3) Decreased range of motion (dysfunction); and (4) Excruciating pain. These symptoms would be probative of a substantial risk of serious harm.

¶29. The pain and suffering imposed by Christner's failure to get Mr. Hockaday treatment lasted over ninety-one (91) hours. *Id.,* Attached Appendix J, pg.92, at ¶18. Ms. Christner knew that there was a risk that if Mr. Hockaday was not seen by a specialist (Ramon Perez, D.O.) within three days after the injury, that his treatment or recovery would be adversely affected. Defendant Christner disregarded the excessive risk to Mr. Hockaday's health that resulted from the delay.

¶30. There is evidence that Ms. Christner knew that adequate medical services were unavailable at SCF, it shows she was informed that Mr. Hockaday might be suffering from a broken hand, and that she was present when Mr. Hockaday displayed symptoms

consistent with a bone fracture. *See* WRIT, pg.18, at ¶47; *See also* Attached Appendix J, pg.93, at ¶20.

¶31. Mr. Hockaday *still* suffers continued pain and a tingling/numbing sensation throughout his forearm and right grasping organ, indicating possible circulatory (Ulnar Artery and Vein) and/or nerve damage (Ulnar Nerve). *Id.*, Dist. Ct. Docket No. 167. The 5th metacarpal naturally healed in a deformed and twisted position. *See* Attached Appendix P, at pg.117. Furthermore, Mr. Hockaday's grip strength has worsened because the greater threat that Ms. Christner had not considered was muscle atrophy that would imperil my ability to grasp. *Id.,* Attached Appendix J, pg.94, at ¶26.

¶32. In retrospect, NP Christner could have scheduled an earlier action that might have materially changed how Mr. Hockaday's hand injury was ultimately treated. There is an abundance of case law establishing that broken or fractured bones are sufficiently serious to trigger a prison's duty to provide treatment. *See, e.g., Heidtke v. Corr. Corp. of Am.*, 489 Fed. Appx. 275 (10th Cir. 2012) (fractured arm bone); *Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134 (10th Cir. 2005) (fractured hip); *Brown v. Hughes*, 894 F.2d 1533, at *1538 (11th Cir. 1990) (broken foot).

¶33. Ms. Christner's refusal to refer Mr. Hockaday to a doctor or a hospital (10 minutes away) for more experienced and knowledgeable treatment, coupled with her utter lack of concern for the well-being of an inmate with whose care she had been entrusted, constitutes precisely the deliberate indifference not tolerated by the Constitution.

ISSUE #5

Whether use of Dr. Perez or Mr. Munroe's statements violated the Confrontation Clause.

STANDARD OF REVIEW

We have held that "the act of production" itself may implicitly communicate "statements of fact." By "producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." *See United States v. Hubbell,* 530 U.S. 27, at *36, fn.19 (2000).

¶34. Authentication of the medical records as those described in the subpoenas establishes the papers as Defendant Christners', thereby supplying an incriminatory link in the chain of evidence against her.

¶35. This argument pertains to the defendants motion filed in the U.S. district court named "Defendant Christner's Rule 26(a)(1)(A) Disclosures, Bates CDOC 0034-0037," submitted in this action on June 28, 2018 and Deposition of Dumisai Hockaday.

¶36. Mr. Hockaday will focus on the Relevant Documentation/Evidence particularly: BMG Health Clinic – office clinic notes dated 8/9/2016.

¶37. These documents, data compilations, and tangible things were in the defendant's possession, custody or control, and disclosed to the district court.

¶38. Mr. Hockaday filed Dist. Ct. Docket No. 147 with the inclusion of other affidavits in support, referencing the previously submitted statements of Dr. Perez and Mr. Munroe's purported opinions about treatment options and standard of care.

¶39. In the defendant's response, Ms. Christner argues that the opinions from both Dr. Perez, and Mr. Munroe (Correctional Health Partners), should not be considered because it violates the hearsay rule. *Id.,* Dist. Ct. Docket No. 150, pg.4, at #7. Ironically,

Mr. Hockaday obtained the documents from the Defendants themselves as they are held to be party admissions or implicitly authenticated when received. It is therefore admissible under Fed. R. Civ. P. 56(c).

¶40. On August 9, 2016 Dr. Perez concludes: "I have made recommendation to proceed with operative fixation and stabilization given the *unstable* and *comminuted pattern* of the fracture." *Id.,* Defendant Christner's Rule 26(a)(1)(A), pg. Bates CDOC 0036, at Assessment/Plan.

¶41. The aforementioned (¶40), is the orthopedic surgeons' preferred course of treatment, not Mr. Hockaday's. This was the first meeting between Dr. Perez and myself.

¶42. Dr. Perez further states: "...however given that we are already 12 days out from injury we may be in a position that surgery will be deemed less effective..." *Id.,* Defendant Christner's Rule 26(a)(1)(A), pg. Bates CDOC 0036, at Assessment/Plan.

¶43. In addition, Mr. Munroe's opinion (surgery authorization) was based upon the findings and conclusions of orthopedic surgeon Ramon Matthew Perez. *Id.,* Deposition of Dumisai Hockaday, pg.57, at ¶¶7-20 (taken on August 15, 2018 at Trinidad Correctional Facility).

¶44. In essence, both Dr. Perez and Mr. Munroe's standard of treatment conclude that the delay in properly diagnosing the right hand injury deprived Mr. Hockaday of one treatment option O.R.I.F., or Open Reduction Internal Fixation which might have been pursued had the injury been timely treated. "Conservative" treatment with casting was recommended after denial of a delayed surgery. *Id.,* Const. & Stat. Prov. Inv., pg.3, at #12.

ISSUE #6

Whether the fact-finder would give greater or less weight to a DOC employee's affidavit which contradicts her own prior deposition testimony simply because of her official character.

STANDARD OF REVIEW

If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal "obligation to speak truthfully and accurately," *Harris, supra*, at *225, and we have consistently rejected arguments that would allow a defendant to "'turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.'" *Id.*, at *224 (*quoting – Walder v. United States*, 347 U.S. 62, at *65 (1954)). *See also Hass, supra*, at *722; *United States v. Havens*, 446 U.S. 620, at *626 (1980) (*quoting – Michigan v. Harvey,* 494 U.S. 344, at *351 (1990)).

¶45. This argument abides in the same nature as Mr. Hockaday's motion entitled "Defendant Christner's Contradicting Affidavits" submitted in the U.S. district court on June 26, 2019.

¶46. On 08/08/2017, a notice of entry of appearance by Robert Charles Huss on behalf of Helene Christner was filed. *Id.,* Dist. Ct. Docket No. 48. Ms. Christner was deposed by Mr. Huss in the summer months of 2017, her statements thereupon were the subject matter of a defendant's motion to dismiss [Dist. Ct. Docket No. 70] filed on August 25, 2017.

¶47. Christner admits that "she examined Mr. Hockaday's hand immediately after the incident in question." *Id.,* Attached Appendix G, pg.48, at ¶35-36. A damning confession that suggests: (1) personal participation; (2) places her on-site at SCF on July 29, 2016; and (3) a determination of treatment, or deliberate indifference thereof from the care-giver.

¶48. Mr. Huss withdrew as attorney on June 25, 2018 [Dist. Ct. Docket No. 118]. Andrew M. Katarikawe, Esq., enters as counsel of record on May 25, 2018. [Dist. Ct. Docket No. 102], and on January 28, 2019, Ms. Christner filed an affidavit that contradicts her earlier sworn testimony to former counsel of record Robert Charles Huss. *Id.,* Dist. Ct. Docket No. 149-12, Exhibit H, p.1-2, at ##3-4.

¶49. Ms. Christner's failure in attempting to correct or retract any of her previous statements submitted to the district court is sufficient to create a factual dispute as to their alleged good faith. *See, e.g., Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, at *1223-24, fn.2 (10th Cir. 2000).

¶50. The previous statements used to impeach Ms. Christner are not those of her former counsel Mr. Huss, but of Christner herself.

¶51. Ms. Christner further suborns perjury with compromised fact-witness testimony from Nurse Nicole L. White (formerly known as Nicole L. Stumpf), to corroborate Ms. Christner's conflicted statements of her whereabouts and treatment options.

¶52. Under the circumstances, Defendant Christner's preceding testimony exhibits an assertion against interest. Thereafter, Christner's conduct by and through her attorneys presents a premeditated fraud upon the Court.

¶53. Such action puts the true testimony into direct conflict with the false. In the present case, the conflict of testimony is so clear that it is evident that one or more of the witnesses must have committed perjury.

ISSUE #7

Whether or not full faith and credit has been given a foreign judgment, whether the revival results in a new judgment, and whether the United States District Court for the District of Colorado properly entertained jurisdiction of the claim based on Colorado law. *See, e.g.,* C.R.S. § 13-80-110, *see also* Const. & Stat. Prov. Inv., pg.4, at #17. Whether error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial or quasi-judicial proceedings.

STANDARD OF REVIEW

Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. *See Baker v. GMC,* 522 U.S. 222, at *233 (1998). State law claims pendent to federal constitutional claims conferring jurisdiction on a district court generally are not to be dismissed. Given advantages of economy and convenience and no unfairness to litigants, they are to be adjudicated, particularly where they may be dispositive and their decision would avoid adjudication of federal constitutional questions. *See Hagans v. Lavine,* 415 U.S. 528, at *545 – *550 (1974).

¶54. Two lawsuits, initiated by different parties in different states, give rise to the full faith and credit issue before the Supreme Court of the United States.

¶55. The applicability of the borrowing statute turns on where a cause of action "arises." The Colorado Supreme Court's analysis in *Jenkins v. Panama Canal Ry. Co.* makes clear that where a cause of action arises is distinct from which state's substantive law applies, but it does not lay out a test for where a claim arises. *See* 208 P.3d 238, at *243 (Colo. 2009) ("the borrowing statute only assigns limitations periods based on where a case arose, and does not consider the applicable substantive law").

¶56. This limitations, and full faith and credit defense was originally put into play in Attached Appendix J, pg.99, at ¶¶53-57. CDOC then bears the burden of establishing compliance with the Act, and statute of limitations by presenting evidence that the alleged infraction was committed within the limitations period or by establishing an exception to

the limitations period. The question of jurisdiction in the U.S. district court was passed on *sub silentio,* the decision does not stand for the proposition that no defect existed.

¶57. The Colorado Department of Corrections offered prisoner Hockaday the opportunity to have a sexual violence needs classification review if you do not have a judicially or institutionally determined sex offense, but have an indication of sexually abusive behavior.

¶58. In 1999, a grand jury in KLEBERG County which is located in Kingsville, Texas, refused to criminally indict Mr. Hockaday of a sexual assault [Texas Penal Code § 22.011(A)(1)], that allegedly occurred on March 5, 1999.

¶59. The people for the State of Texas did not appeal the "no bill" decision of the grand jury in a timely manner [here 20 days], thereby waiving any criminal claim for relief. *See* Tex. R. App. P. Rule 26.2(b). *Id.,* Const. & Stat. Prov. Inv., pg.4, at #19.

¶60. The Court thus concludes that the refusal of a grand jury to indict, without more, constitutes a termination of the proceedings in the accused's favor under Texas law. *See Zello v. Glover*, 59 S.W.2d 877, at *878 (Tex. Civ. App. 1933); *Rust v. Page*, 52 S.W.2d 937, at *941 (Tex. Civ. App. 1932); *see also Smith v. Smith*, 1999 U.S. Dist. LEXIS 9378, No. 3:97-CV-2410-G, 1999 WL 378214, at *3 fn.4 (N.D. Tex. May 27, 1999), *aff'd*, 211 F.3d 594 (5th Cir. Mar. 24, 2000). (*quoting – Harnish v. Am. Airlines,* No. 4:98-CV-476-Y, 2000 U.S. Dist. LEXIS 22734, at *4 (N.D. Tex., June 1, 2000); *see also* Restatement (Second) of Torts § 659 (b) (1977) ("Manner of Termination: Criminal proceedings are terminated in favor of the accused by: (b) the refusal of a grand jury to indict").

¶61. A failure to indict from Texas courts of competent jurisdiction on a criminal charge was not a bar to a civil action by Ms. Aguirre, even though it arose from the same set of facts on which the criminal proceedings were based.

¶62. In the state of Texas, a person must bring suit for personal injury (sexual assault) not later than five years after the day the cause of action accrues [here March 5, 1999].

¶63. Pursuant to Tex. Civ. Prac. & Rem. Code § 16.0045(a) (1999), Ms. Aguirre failed to exercise a civil action against Mr. Hockaday on or before March 5, 2004 therefore barring recovery of a civil remedy in court from another person.

¶64. In 1995, the Legislature enacted a special five-year statute of limitations for sexual abuse cases: "A person must bring suit for personal injury not later than five years after the day the cause of action accrues if the injury arises as a result of conduct that violates: (1) Section 22.011, Penal Code (sexual assault); or (2) Section 22.021, Penal Code (aggravated sexual assault)." *See S.V. v. R.V.,* No. 94-0856, 933 S.W.2d 1, at *4 (Texas 1996).

¶65. In spite of that, on October 8, 2015 in his official capacity, licensed attorney and administrative hearing officer Anthony DeCesaro Atty. Regis. No. 14461 maintained the precise cause of action from the barred 1999 Texas claim in a civil penalty action against Mr. Hockaday.

¶66. If this Court finds merit in petitioner's argument, Mr. Hockaday would waive any monetary or retrospective equitable relief against Anthony DeCesaro in his official capacity, and seek in substance only prospective relief against Mr. DeCesaro, in his official

capacity, for alleged violations of federal law. *See Verizon Maryland v. Public Service Commission of Maryland,* 535 U.S. 635, at *645 (2002) (*quoting – Idaho v. Coeur D'Alene Tribe,* 521 U.S. 261, at *296 (1997)).

¶67. If the borrowing statute applies here, CDOC and Mr. DeCesaro's civil penalty action are time-barred by reason of lapse of time according to Texas state law.

ISSUE #8

Whether the Department of Corrections enforcement action is time barred and, more particularly, whether Colorado state law determines the timeliness of the Government enforcement action. Whether the United States District Court for the District of Colorado properly entertained jurisdiction of the claim based on Colorado law. *See, e.g.,* C.R.S. § 13-80-102(1) (i), *see also* Const. & Stat. Prov. Inv., pg.3-4, at #15. Whether error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial or quasi-judicial proceedings.

STANDARD OF REVIEW

Because the [Colo. Dep't. of Corr.'s] did not contain a clear statute of limitations applying to government enforcement actions at the times relevant to this action, a catch-all provision applies. *See State ex rel. Coffman v. Robert J. Hopp & Assocs., LLC,* 2018 COA 69, at ¶37, 442 P.3d 986, at *997 (Colo. App. 2018). When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed. When questions of jurisdiction have been passed on in prior decisions sub silentio, the United States Supreme Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before it. The Court would risk error if it relied on assumptions that have gone unstated and unexamined. *See Ariz. Christian Sch. Tuition Org. v. Winn,* 563 U.S. 125, at *144 – *145 (2011).

¶68. This limitations defense was originally put into play in Attached Appendix J, pg.89, at ¶¶1-4. The department of corrections then bears the burden of establishing compliance with the statute of limitations by presenting evidence that the enforcement action was committed within the limitations period or by establishing an exception to the

limitations period. The question of jurisdiction in the U.S. district court was passed on *sub silentio,* the decision does not stand for the proposition that no defect existed.

¶69. In 2017, the legislature passed a law creating a two-year limitations period for administrator actions from the date on which a violation allegedly occurred. S.B. 17-215, 71st Gen. Assemb., 1st Reg. Sess. (May 1, 2017). However, during the years in question for this case, the Colorado Department of Corrections did not include a clear statute of limitations for government enforcement actions brought under the department of corrections.

¶70. Statutes of limitations and other filing deadlines "ordinarily are not jurisdictional." *See Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817, at **819, (2013). If C.R.S. § 13-80-102(1) (i) were jurisdictional, the 2 year time limit could not be enlarged by agency or court. The Colorado General Assembly has not made such a clear statement here. Rather, the statutory text, context, and history establish that §13-80-102(1) (i) imposes a nonjurisdictional defense that becomes part of a case only if a defendant raises it in the district court. Which Mr. Hockaday indeed asserted.

¶71. Under state law, the Colorado Department of Corrections [hereinafter CDOC] is authorized to conduct an enforcement proceeding regarding deviant sexual behavior [outrageous conduct]. The theory behind CDOC's administrator action is based upon prior bad-act evidence. This state action is an enforcement action in adversary legal proceedings to impose sanctions on conduct prohibited by law.

¶72. As before, Anthony DeCesaro Atty. Regis. No. 14461, presided over the action against Mr. Hockaday on October 8, 2015 at the Buena Vista Correctional Complex located in Buena Vista, Colorado. The enforcement action was filed on May 26, 2015.

¶73. The action must be filed no later than the second anniversary of the accrual date, or else, the tort action therefore be forever barred is itself a statute of limitation and subject to the general law of Colorado with respect to the tolling of statute of limitations.

¶74. Only offenders with unadjudicated sexual abuse allegations are entitled to the SVN classification review. With that said, CDOC defends and supports its position by stating, "Information that would warrant an SVN classification review can be discovered at any time during DOC custody." Therefore, section 13-80-102(1) (i), C.R.S. 2015, sets forth a two-year statute of limitations for all other actions of every kind for which no other period of limitations is provided.

¶75. A cause of action does not become "complete and present" until the plaintiff can file suit and obtain relief. *See Reiter v. Cooper,* 507 U.S. 258, at *267 (1993). *See* Const. & Stat. Prov. Inv., pg.4, at #16.

¶76. Pursuant to Colorado's discovery rule, on November 7, 2012 DOC Agent #1026 Smith found by the exercise of reasonable diligence an unadjudicated sexual abuse allegation from 1996. Mr. Hockaday was not formally charged or arrested, nor were the operative facts fully determined in a court of competent jurisdiction. *See* Attached Appendix J, pg.90, at ¶5; *See also* Attached Appendix M, at pg.108.

¶77. This undoubtedly is the meaning of "unadjudicated" and clearly establishes the accrual date in question, so that the issue may be decided as a matter of law.

¶78. CDOC's enforcement action should have been filed on or before November 7, 2014 and yet, it was not, and therefore null and void. *See* WRIT, pg.25, at ¶72. In *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, at *96 (1990), the Supreme Court held: "Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants."

¶79. Anthony DeCesaro's unjustified harm arising out of the misuse of governmental processes resulted in: (1) Violent assaults; (2) Broken bones that did not align upon healing; (3) Threats of sexual violence, attempted rape and sexual harassment; (4) Attacks by other inmates; (5) Continuous threats of violence.

¶80. Mr. Hockaday's contentions in this particular argument are clearly related to his initial complaint regarding the rumors started by the original Defendants and their misappropriated assignment of an "S4" (sex offender) suffix to his prison file.

¶81. The U.S. district court judge's indifference to the government's forfeiture of its own enforcement action was an affront to the integrity of the judicial system and must be corrected accordingly.

ISSUE #9

Whether the State of Colorado and the Colorado Department of Corrections are different sovereigns for double jeopardy purposes and whether the prosecutorial powers of the two jurisdictions have independent origins, or, said conversely, whether those powers derive from the same ultimate source.

STANDARD OF REVIEW

The [Department of Corrections] is not a sovereign entity. Rather, it has been traditionally regarded as subordinate governmental instrumentality created by the state to assist in the carrying out of state governmental functions. [DOC] is nothing more than "an agency of the state." Any power it has to define and punish [conduct prohibited by law] exists only because such power has been granted by the state; the power derives from the source of its creation. The judicial power to try a defendant in [state agency proceedings] springs from the same organic law that created the state court of general jurisdiction. *See United States v. Wheeler,* 435 U.S. 313, at *320 (1978).

¶82. Pursuant to Fed. R. Evid. Rule 103 (e), Mr. Hockaday respectfully asks this United States Court of Appeals for the Tenth Circuit and its panel of justices to take notice of a plain error affecting Mr. Hockaday's substantial right, even if the claim of error was not properly preserved.

¶83. Regarding the dual-sovereignty carve-out from the double jeopardy clause, "sovereignty" in this context does not bear its ordinary meaning. The dual-sovereignty test the United States Supreme Court has adopted focuses on a different question: not on the fact of self-rule, *but on where it came from.*

¶84. The executive department now consists of nineteen separate units which were created pursuant to article IV, section 22 of the Colorado Constitution and the Administrative Organization Act of 1968, C.R.S. §§ 24-1-101 to -136. *See Colorado General Assembly v. Lamm,* 700 P.2d 508, at *530 (Colo. 1985). These governmental units have been delegated a vast array of responsibilities vital to the citizenry of the State of Colorado. *See* Const. & Stat. Prov. Inv., pg.5, at #24 and #25.

¶85. The Department of Corrections is an agency of the state created pursuant to Article IV, section 22, of the Colorado Constitution. The Colorado Department of Corrections is an instrumentality rather than a political subdivision. It is also an official department within the executive branch of the state government of the State of Colorado. The province of the executive branch is to see that the laws are faithfully executed. *See* C.R.S. § 24-1-110 (t), at Const. & Stat. Prov. Inv., pg.4, at #21.

¶86. As an agency in the executive branch, CDOC and its agents represent the government in all adversarial proceedings convened inside the penitentiary according to C.R.S. § 24-3-101. *See* Const. & Stat. Prov. Inv., pg.4, at #22 ("...required by the constitution or statutes of the state to exercise discretion or to perform judicial or quasi-judicial functions.").

¶87. In summary, as a coequal branch of state government, the Colorado Department of Corrections' power to prosecute incarcerated offenders whether in a judicial or quasi-judicial setting stems from its source of creation. Any power it has to define and impose sanctions on conduct prohibited by law in adversary legal proceedings exists only because such power has been granted by the laws and bylaws of the State of Colorado.

ISSUE #10

Whether the Double Jeopardy Clause bars the State of Colorado and the Colorado Department of Corrections from successively prosecuting a defendant on like charges for the same conduct.

STANDARD OF REVIEW

The Double Jeopardy Clause, of course, bars the second prosecution for the same offense only if that prosecution is brought by the same sovereign as the first. *See Heath* v. *Alabama*, 474 U.S. 82, at *88 – *89 (1985). Thus, the only possible way the Government's *second* prosecution could have offended the Double Jeopardy Clause is if the Court understood the criminal contempt prosecution to be the Government's *first*

prosecution--*i.e.*, one brought *on behalf of the Government* (*quoting – Robertson v. Watson,* 560 U.S. 272, at *275 (2010)). After all, the [dual-sovereignty] doctrine rests on the fact that only same-sovereign successive prosecutions are prosecutions for the "same offense." *See also Gamble v. United States,* 139 S. Ct. 1960, at *1979 (2019).

¶88. Pursuant to Fed. R. Evid. Rule 103(e), Mr. Hockaday respectfully asks the Tenth Circuit and its panel of justices to take notice of a plain error affecting Mr. Hockaday's substantial right, even if the claim of error was not properly preserved.

¶89. The elements essential to issue #9 clearly establish that the Colorado Department of Corrections is not an independent sovereign, it is a state government agency created by the State of Colorado. Any power it has to define and impose sanctions on conduct prohibited by law in adversary legal proceedings exists only because such power has been granted by the laws and bylaws of the State of Colorado.

¶90. The ordinary rule under the double jeopardy clause is that a person cannot be prosecuted twice for the same offense. Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

¶91. With that said, and as Justice Alito opined in *Gamble,* "...only same-sovereign successive prosecutions are prosecutions for the 'same offense.' " *Id.,* 2019 U.S. LEXIS 4173, at ***43.

¶92. The Colorado Department of Corrections has statutory authority and discretion to classify an inmate as a sex offender for treatment purposes. *See* § 16-11.7-101, C.R.S. 2015. *Id.,* Const. & Stat. Prov. Inv., pg.5, at #23. Sex offender classification hearings are quasi-judicial proceedings. Therefore, Mr. Hockaday's challenge to this state action must be brought as a civil action against the DOC.

¶93. The facts upon which a sexual violence needs classification was based, arises out of the same transaction or common nucleus of operative facts as another already tried. *See* Restatement (Second) of Judgments §19. *Id.,* Const. & Stat. Prov. Inv., pg.4, at #18. *See* Attached Appendix L, at pg.107. Civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights.

¶94. There are three separate guarantees embodied in the Double Jeopardy Clause: (1) It protects against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against multiple punishments for the same offense. The first prong of this test--whether a state government agency subjected Mr. Hockaday to a separate prosecution for the same offense after acquittal--is at issue here. *See Robinson v. Neil,* 409 U.S. 505, at *509 (1973) ("While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial.").

¶95. The department of corrections reprosecuted both the Colorado (El Paso) Case No. 09M2301, and the 1993 Alamosa, Colorado criminal action (Case No. unavailable, please see Alamosa County-Arrest No. 568-93) in the October 8, 2015 quasi-judicial action. I was acquitted of wrong-doing in both criminal contempt proceedings.

¶96. In *United States v. Scott,* 437 U.S. 82, at *97 (1978), the Supreme Court held: A defendant is acquitted only when "the ruling of the judge, whatever its label, actually

represents a resolution, correct or not, of some or all of the factual elements of the offense charged."

¶97. Further, as Chief Justice Rehnquist explained in *Hudson v. United States,* 522 U.S. 93, at *102 (1997): But in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even "*attempting* a second time to punish criminally."

¶98. The State of Colorado and the Colorado Department of Corrections with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

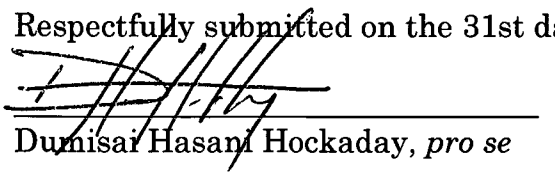
¶99. For this reason, Justice O'Connor in *Heath* stated: "We therefore assume, *arguendo,* that, had these offenses arisen under the laws of one State and had petitioner been separately prosecuted for both offenses in that State, the second conviction would have been barred by the Double Jeopardy Clause." *Id.,* at *88.

¶100. Constitutional trial errors, fall in the category of errors which are of such a character that their natural effect is to prejudice a litigant's substantial rights, not in the category of technical errors, and must be corrected.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted on the 31st day of December, 2019.



Dumisai Hasani Hockaday, *pro se*

Prisoner No. 159095

DCC– Delta Correctional Center

11363 Lockhart Road

Delta, Colorado. 81416