NO. 19-7555

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE EUGENE FRENCH, PETITIONER

PETITION FOR A WRIT OF HABEAS CORPUS

EUGENE FRENCH
GDC 1222808
PRO SE
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7175 MANOR ROAD
COLUMBUS, GA 31907

ORIGINAL

QUESTIONS PRESENTED

1. WHETHER TRANSFER TO THE DISTRICT COURT FOR A HEARING PURSUANT TO THIS COURT'S ORIGINAL HABEAS JURISDICTION IS WARRANTED IN THIS EXCEPTIONAL CASE WHERE PETITIONER HAS RAISED A SUBSTANTIAL QUESTION OF JURISDICTION, THE LOWER FEDERAL COURTS REFUSED TO ADDRESS AND NO STATE OR FEDERAL COURT HAS HELD AN EVIDENTIARY HEARING TO EXAMINE HIS NEW EVIDENCE?

2. WHETHER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("AEDPA") PRECLUDE JURISDICTION CLAIMS NOT DELIBERATELY BYPASSED BY PETITIONER IN THE PRIOR PROCEEDINGS BUT RAISED FOR THE FIRST TIME IN A SUCCESSIVE HABEAS PETITION BASED ON NEWLY DISCOVERED EVIDENCE?

PARTIES TO THE PROCEEDINGS BELOW

PURSUANT TO SUPREME COURT RULE 29.6. PETITIONER MAKES THE FOLLOWING DISCLOSURES:

THIS PETITION STEMS FROM A HABEAS CORPUS PROCEEDING IN WHICH PETITIONER, EUGENE FRENCH, WAS THE MOVANT BEFORE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT. PETITIONER IS A PRISONER IN STATE CUSTODY AT RUTLEDGE STATE PRISON, IN COLUMBUS, GEORGIA.

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PETITIONER EUGENE FRENCH RESPECTFULLY PETITIONS FOR A WRIT OF HABEAS CORPUS.

OPINION BELOW

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IS UNREPORTED, BUT REPRINTED IN THE APPENDIX TO THIS PETITION, PET. APP. 1a.

STATEMENT OF JURISDICTION

THE ORDER OF THE COURT OF APPEALS DENYING AUTHORIZATION TO FILE A SUCCESSIVE PETITION WAS ENTERED ON MARCH 12, 2018. THIS COURT'S JURISDICTION IS INVOKED PURSUANT TO 28 U.S.C. §§ 2241, 2254(a), 1651(a) AND ARTICLE III OF THE U.S. CONSTITUTION.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

THE FOURTEENTH AMENDMENT OF THE UNITED STATE CONSTITUTION STATES, IN RELEVANT PART: "NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW...."

SECTION 2244(b), TITLE 28 OF THE U.S.C. CODE, ENACTED AS PART OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("AEDPA"), PROVIDES IN RELEVANT PART:

> (2) A CLAIM PRESENTED IN A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION UNDER SECTION 2254 THAT WAS NOT PRESENTED IN A PRIOR APPLICATION SHALL BE DISMISSED UNLESS —
>
> (A) THE APPLICANT SHOWS THAT THE CLAIM RELIES ON A NEW RULE OF

CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT, THAT WAS PREVIOUSLY UNAVAILABLE; OR

(B)(i) THE FACTUAL PREDICATE FOR THE CLAIM COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE; AND

(ii) THE FACTS UNDERLYING THE CLAIM, IF PROVEN AND VIEWED IN LIGHT OF THE EVIDENCE AS A WHOLE, WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT, BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACTFINDER WOULD HAVE FOUND THE APPLICANT GUILTY OF THE UNDERLYING OFFENSE.

* * *

3(C) THE COURT OF APPEALS MAY AUTHORIZE THE FILING OF A SECOND OR SUCCESSIVE APPLICATION ONLY IF IT DETERMINES THAT THE APPLICATION MAKES A PRIMA FACIE SHOWING THAT THE APPLICATION SATISFIES THE REQUIREMENTS OF [§ 2244(b)].

* * *

(E) THE GRANT OR DENIAL OF AN AUTHORIZATION BY A COURT OF APPEALS TO FILE A SECOND OR SUCCESSIVE APPLICATION SHALL NOT BE APPEALABLE AND SHALL NOT BE THE SUBJECT OF A PETITION FOR REHEARING OR FOR A WRIT OF CERTIORARI.

SECTION 818. ART. 18, TITLE 10 OF THE U.S.C. CODE, PROVIDES IN RELEVANT PART:

(a) SUBJECT TO SECTION 817 OF THIS TITLE (ARTICLE 17), GENERAL COURTS-MARTIAL HAVE JURISDICTION TO TRY PERSONS SUBJECT TO THIS CHAPTER FOR ANY OFFENSE MADE PUNISHABLE BY THIS CHAPTER AND MAY, UNDER SUCH LIMITATIONS AS THE PRESIDENT MAY PRESCRIBE, ADJUDGE ANY PUNISHMENT NOT FORBIDDEN BY THIS CHAPTER, INCLUDING THE PENALTY OF DEATH WHEN SPECIFICALLY AUTHORIZED BY THIS CHAPTER. GENERAL COURTS-MARTIAL ALSO HAVE JURISDICTION TO TRY ANY PERSON WHO BY LAW OF WAR IS SUBJECT TO TRIAL BY A MILITARY TRIBUNAL AND MAY ADJUDGE ANY PUNISHMENT PERMITTED BY THE LAW OF WAR.

INTRODUCTION

IN SOLORIO V. UNITED STATES, 483 U.S. 435 (1987), THIS COURT HELD THAT THE JURISDICTION OF COURT-MARTIAL DEPENDS SOLELY ON THE ACCUSED'S STATUS AS A MEMBER OF THE ARMED FORCES, AND THAT CIVIL COURTS ARE "ILL-EQUIPPED" TO ESTABLISH POLICIES REGARDING MATTERS OF MILITARY CONCERN. ID.

OBTAINING ABSTENTION FROM THE MILITARY HAS BEEN THE PROCEDURE USED BY STATE PROSECUTORS TO GIVE CRIMINAL (CIVIL) COURTS JURISDICTION OVER SERVICEMEN CRIMINAL CASES. IN LIGHT OF THE PROSECUTOR'S DISREGARD OF THIS PROCEDURE AND FAILURE TO DOCUMENT THE RECORD, PETITIONER FILED AN APPLICATION IN THE ELEVENTH CIRCUIT REQUESTING AUTHORIZATION TO FILE A SUCCESSIVE MOTION UNDER 28 U.S.C. § 2254. HOWEVER, THE ELEVENTH CIRCUIT DENIED PETITIONER'S MOTION ON THE BASIS THAT "FRENCH FAILED TO SHOW THAT THE EVIDENCE COULD NOT HAVE BEEN UNCOVERED THROUGH A REASONABLE INVESTIGATION UNDERTAKEN BEFORE THE INITIAL § 2254 PETITION WAS LITIGATED." PET. APP. 2a-3a (CITING IN RE BOSHEARS, 110 F.3d 1538, 1540 (11TH CIR 1997) (CITING 28 U.S.C. § 2244(b)(2)(B)). (APPENDIX A).

THAT DECISION PLACED THE COURT OF APPEALS IN DIRECT CONFLICT WITH ITS RECENT DECISIONS IN CASES WITH FACTS AND LEGAL ISSUES SIMILAR TO THOSE PRESENTED BY MR. FRENCH. AND, IN TOTAL DISREGARD TO THIS COURT'S CASELAW HOLDING THAT "EVIDENCE WITHIN THE PURVIEW OF GOVERNMENT OFFICIALS, SECRETED BY THEM, WITHHELD BY THEM, OR CONCEALED BY GOVERNMENT CONDUCT, IS EVIDENCE THAT COULD NOT HAVE BEEN DISCOVERED THROUGH THE EXERCISE OF DUE DILIGENCE. SEE E.G. DOBB V. ZANT, 506 U.S. 357 (1993).

THIS CASE PRESENTS THE PRECISE CIRCUMSTANCES IN WHICH THIS COURT RECOGNIZED THAT WOULD BE PROPER TO EXERCISE ORIGINAL HABEAS JURISDICTION IN FELKER V. TURPIN, 518 U.S. 651 (1996). THE ISSUES PRESENTED ARE UNLIKELY TO ARRIVE AT THIS COURT IN ANY POSTURE OTHER THAN AN ORIGINAL PETITION. WITHOUT RESOLVING THESE QUESTIONS, CIVIL COURTS WILL CONTINUE TO ARBITRARILY INTERFERE WITH MILITARY AFFAIRS. AND, PROSECUTORS WILL BE FURTHER ENTICED TO DISREGARD RULES AND PROCEDURES, LAWS, AND THE DUTY TO DISCLOSE UNDER BRADY V. MARYLAND, 373 U.S. 83 (1963) AND ITS PROGENY. THE COST IS CLEAR, UNDERMINING THE PUBLICS CONFIDENCE IN THE JUDICIAL PROCESS.

FOR THESE REASONS, THE COURT SHOULD GRANT THIS PETITION.

MR. FRENCH STATES PLAINLY, THIS CASE IS IN AID OF THIS COURT'S APPELLATE JURISDICTION. AS COROLLARY, IT MUST BE NOTED THAT THE PROSECUTORIAL MISCONDUCT IN MR. FRENCH'S CASE DESTROYS THE PUBLICS CONFIDENCE IN THE JUDICIAL PROCESS JUST AS IN BRADY. MOREOVER, THE EXTREME MEASURES TAKEN BY THIS PROSECUTOR TO GET A CONVICTION - CONCEALMENT OF HIS FAILURE TO GET JURISDICTION, PROSECUTION OF SAME CRIMES AFTER ACQUITTAL, AND UNLAWFUL SUPPRESSION OF EVIDENCE - CREATES AN ESPECIALLY ODIOUS PUBLIC IMPRESSION. HIS ACTIONS AFFECT EVERY CITIZEN WHO MIGHT BE HALED INTO COURT. THE MESSAGE CLEAR -- A PROSECUTOR CAN SACRIFICE JUSTICE TO WIN. THIS COURT CAN USE ITS POWER AND AUTHORITY, IN AID OF ITS APPELLATE JURISDICTION, TO RESTORE PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM.

STATEMENT OF FACTS

SINCE MR. FRENCH'S TRIAL, EVIDENCE HAS SURFACED THAT SHOWS NOT ONLY THAT THE STATE DID NOT OBTAIN JURISDICTION FROM THE MILITARY TO PROSECUTE THE CASE IN CIVIL COURT, BUT THAT THE STATE PROSECUTOR CONCEALED THIS FACT FROM THE DEFENSE. MOREOVER, THIS NEW EVIDENCE INDICATES THE PROSECUTOR ALSO MISREPRESENTED HIS JURISDICTIONAL STANDING TO THE COURT. NO COURT HAS HELD AN EVIDENTIARY HEARING TO ASSESS MR. FRENCH'S NEW EVIDENCE.

IN LATE 2015, WHILE MR. FRENCH WAS IN THE VETERANS REENTRY PROGRAM AT JOHNSON STATE PRISON, OFFICIALS FROM THE VETERANS ADMINISTRATION CAME TO SPEAK TO THE VETERANS, ANSWER QUESTIONS, AND PROVIDE CURRENT INFORMATION. WHILE ANSWERING QUESTIONS ABOUT THE SOLDIERS AND SAILORS RELIEF ACT THE SUBJECT OF ABSTENTION WAS BRIEFLY MENTIONED BY THE REPRESENTATIVE. MR. FRENCH SIGNED UP FOR THE LAW LIBRARY AND RESEARCHED CASES DEALING WITH ABSTENTION. HE DISCOVERED, THROUGH CASELAW, THE REQUIREMENT FOR ABSTENTION IN HIS CASE AND THE REQUIREMENT FOR IT TO BE REFLECTED IN HIS CASE RECORD.

IN OCTOBER 2015, MR. FRENCH OBTAINED A COPY OF HIS CASE RECORD AND DISCOVERED THAT THE GEORGIA PROSECUTOR HAD NOT OBTAINED ABSTENTION FROM THE DEPARTMENT OF DEFENSE (DOD). THUS, COURT-MARTIAL HAD SUBJECT-MATTER JURISDICTION OVER MR. FRENCH'S CASE AND STATUTORILY REQUIRED TO TRY HIM.

THE MICHIGAN PROCEEDINGS VERIFIED THE AFOREMENTIONED. PETITIONER'S ACCUSERS FILED THE SAME CLAIMS IN TWO DIFFERENT STATES, FIRST IN MICHIGAN AND LATER IN GEORGIA, CHANGING THE LOCATION IN THE ALLEGATIONS TO THE STATE FILED IN.

THE MICHIGAN PROSECUTOR OBTAINED JURISDICTION FROM THE MILITARY AND TOOK CASE NO. 2003-680851-NA TO TRIAL, APPENDIX C. ON

FEBRUARY 25, 2005 MR. FRENCH WAS ACQUITTED OF ALL ALLEGATIONS AND JURISDICTION WAS RELEASED BACK TO THE MILITARY, APPENDIX D.[1]

ELEVEN DAYS PRIOR TO MR. FRENCH'S ACQUITTAL, ON FEBRUARY 14, 2005, GEORGIA STARTED PROSECUTING HIM FOR THE SAME FACTUAL ALLEGATIONS, APPENDIX G. ON JUNE 29, 2006, A GEORGIA JURY CONVICTED MR. FRENCH AFTER HIS MICHIGAN ACQUITTAL. MR. FRENCH WAS SENTENCED TO TWO CONCURRENT 20-YEAR SENTENCES.

PORTIONS OF TRIAL RECORD ESTABLISH MR. FRENCH'S STATUS AS AN ACTIVE DUTY ARMY OFFICER. (T. P. 48 AND 316). FURTHERMORE, THE TRIAL RECORD ESTABLISHES THAT THE PROSECUTOR DID NOT OBTAIN JURISDICTION FROM THE MILITARY. TO THIS VERY DAY, THE PROSECUTOR HAS NOT DISCLOSED THIS FACT. THE REQUESTS FROM MR. FRENCH HAVE GONE UNANSWERED. NO ONE ELSE KNEW ABOUT THE DISTRICT ATTORNEY'S FAILURE TO GET THE REQUIRED JURISDICTION TO PROSECUTE THE CASE, JUST HIMSELF. THE DISTRICT ATTORNEY'S STATUTORY DUTIES OF THE CASE TO OBTAIN JURISDICTION FROM THE MILITARY AND HIS FULFILLMENT THEREOF WAS NOT A PART OF ANYTHING PROVIDED TO THE DEFENSE, EVEN AFTER DISCOVERY REQUEST. THE DISTRICT ATTORNEY CONCEALED THIS JURISDICTIONAL FAILURE FROM THE DEFENSE AND THE COURT.

THE STATE'S CASE AGAINST EUGENE FRENCH WAS HINGED ON THE CREDIBILITY OF THE WITNESSES - WHO WERE 19-YEARS OLD AT THE TIME OF TRIAL - BECAUSE THERE WAS NO EVIDENCE IN THIS CASE, NOT EVEN EYEWITNESS EVIDENCE BY HIS ACCUSERS. AND, THE DISTRICT ATTORNEY UNLAWFULLY SUPPRESSED THE FALSE ALLEGATION OF KIDNAPPING

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1. MICHIGAN COURT DOCUMENT FROM CASE NO. 2003-680851-NA ESTABLISHES THAT THE MICHIGAN PROSECUTOR OBTAINED JURISDICTION FROM THE MILITARY AND TOOK THE CASE TO TRIAL ON FEBRUARY 25, 2005. IT ALSO ESTABLISHES THAT GEORGIA DID NOT HAVE JURISDICTION. THE MILITARY COULD NOT GIVE TWO STATE COURTS - IN TWO DIFFERENT STATES - JURISDICTION OVER THE SAME CASE AT THE SAME TIME.

EVIDENCE, WHICH HE ADMITTED TO THE JUDGE, WOULD IRREPARABLY DAMAGE HIS CASE (T. AT 5).

A. THE COURT OF APPEALS DECISION

ON MARCH 12, 2018 THE COURT OF APPEALS DENIED MR. FRENCH PERMISSION TO FILE A SECOND HABEAS PETITION ASSERTING SUBJECT-MATTER JURISDICTION AND BRADY CLAIMS IN THE DISTRICT COURT. THE LOWER COURT HELD THAT MR. FRENCH FAILED TO SHOW THAT THIS EVIDENCE COULD NOT HAVE BEEN UNCOVERED THROUGH REASONABLE INVESTIGATION UNDERTAKEN BEFORE THE INITIAL §2254 PETITION WAS LITIGATED. *IN RE BOSHEARS*, 110 F. 3d 1538, 1540 (11TH CIR. 1997) (CITING 28 U.S.C. § 2244(b)(2)(B)). APPENDIX A AT 3a.

B. THE SUPREME COURT OF GEORGIA DECISION

ON JANUARY 7, 2019 THE SUPREME COURT OF GEORGIA DENIED MR. FRENCH'S PETITION FOR WRIT OF CERTIORARI ASSERTING CLAIM OF JURISDICTION OF THE GEORGIA COURT OF APPEALS. THE SUPREME COURT OF GEORGIA CONCURRED WITHOUT EXPLANATION. SPECIFICALLY, MR. FRENCH ASSERTED TRIAL COURT LACK OF JURISDICTION THROUGH AN O.G.G.A. §9-11-60 MOTION. THE TRIAL COURT DENIED THE MOTION, HOLDING IT LACKED MERIT, WITHOUT FURTHER EXPLANATION. ON MOTION FOR DISCRETIONARY APPEAL THE GEORGIA COURT OF APPEALS DENIED THE APPLICATION, HOLDING IT LACKED JURISDICTION. THE GEORGIA SUPREME COURT CONCURRENCE IS AT APPENDIX E.

REASONS FOR GRANTING THE WRIT

THIS COURT'S POWER TO GRANT AN EXTRAORDINARY WRIT IS VERY BROAD BUT RESERVED FOR EXCEPTIONAL CASES IN WHICH "APPEAL IS CLEARLY AN INADEQUATE REMEDY." EX PARTE FAHEY, 332 U.S. 258, 260 (1947). TITLE 28 U.S.C. 2244(b)(3)(E) PREVENTS THIS COURT FROM REVIEWING THE COURT OF APPEALS' ORDER DENYING MR. FRENCH LEAVE TO FILE A SECOND HABEAS PETITION BY APPEAL OR WRIT OF CERTIORARI. THE PROVISION, HOWEVER, HAS NOT REPEALED THIS COURT'S AUTHORITY TO ENTERTAIN ORIGINAL HABEAS PETITIONS, FELKER V. TURPIN, 518 U.S. 651, 660 (1996). NOR HAS IT DISALLOWED THIS COURT FROM "TRANSFERRING THE APPLICATION FOR HEARING AND DETERMINATION" TO THE DISTRICT COURT PURSUANT TO 28 U.S.C. § 2241(b).

RULE 20 OF THIS COURT REQUIRES A PETITIONER SEEKING A WRIT OF HABEAS CORPUS DEMONSTRATE THAT (1) "ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM OR IN ANY OTHER COURT;" (2) "EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THIS POWER;" AND (3) "THE WRIT WILL BE IN AID OF THE COURT'S APPELLATE JURISDICTION." FURTHER, THIS COURT'S AUTHORITY TO GRANT RELIEF IS LIMITED BY 28 U.S.C. § 2254, AND ANY CONSIDERATIONS OF A SECOND PETITION MUST BE "INFORMED" BY 28 U.S.C. § 2244(b). SEE FELKER, 518 U.S. AT 662-63.

THIS CASE SATISFIES THESE REQUIREMENTS.

I. STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT

AS REQUIRED BY RULE 20.4 AND 28 U.S.C. §§ 2241 AND 2242,[3] MR. FRENCH STATES THAT HE HAS NOT APPLIED TO THE DISTRICT COURT BECAUSE THE CIRCUIT COURT PROHIBITED SUCH AN APPLICATION. SEE APPENDIX A. MR. FRENCH EXHAUSTED HIS STATES REMEDIES FOR HIS JURISDICTION AND BRADY CLAIMS WHEN THE GEORGIA SUPREME COURT DENIED HIS PETITION FOR WRIT OF CERTIORARI ON JANUARY 7, 2019 (APPENDIX E). NO APPLICATION FOR CLEMENCY WAS FILED TO THE GEORGIA BOARD OF PARDONS AND PAROLES BECAUSE UNDER GEOAGIA LAW THE BOARD CANNOT PARDON THE CRIME MR. FRENCH IS CONVICTED OF. SINCE MR. FRENCH EXHAUSTED HIS STATE REMEDIES AND WAS DENIED PERMISSION BY THE COURT OF APPEALS TO FILE A SECOND HABEAS PETITION, HE CANNOT OBTAIN RELIEF IN ANY OTHER FORM OR ANY OTHER COURT.

II. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION

THIS CASE PRESENTS A RARE CONFLUENCE OF CIRCUMSTANCES WARRANTING THE EXERCISE OF THIS COURT'S HABEAS JURISDICTION. THE COURTS OF APPEALS AND THE GEORGIA SUPREME COURT DENIED MR. FRENCH RELIEF WITHOUT A HEARING BASED ON THE OFT

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[3] THIS COURT'S RULES ALSO REQUIRE THAT THE ISSUANCE OF A WRIT "BE IN AID OF THE COURT'S APPELLATE JURISDICTION." SUP. CT. R. 20.1. THERE IS NO QUESTION THAT PETITIONER'S REQUEST FOR A WRIT OF HABEAS CORPUS WOULD BE IN EXERCISE OF THIS COURT'S APPELLATE JURISDICTION. SEE EX PARTE BOLLMAN, 8 U.S. (4 CRANCH) 75, 100-01 (1807) (THE COURT'S STATUTORY AUTHORITY TO ISSUE A WRIT OF HABEAS CORPUS IS "CLEARLY APPELLATE" BECAUSE IT INVOLVES "THE REVISION OF A DECISION OF AN INFERIOR COURT"); EX PARTE HUNG HANG, 108 U.S. 552, 553 (1883).

CITED RULE THAT "THE CLAIM SHOULD HAVE BEEN RAISED IN HIS FIRST HABEAS CORPUS PETITION." MR. FRENCH'S NEW EVIDENCE, HOWEVER, IS AN EXCEPTION TO THE RULE.

FEW - IF ANY - JURISDICTION CASES INVOLVE A STATE PROSECUTOR'S DELIBERATE DISREGARD OF MILITARY - FEDERAL - JURISDICTION AND A PERSON'S CONSTITUTIONAL PROTECTION JUST TO OBTAIN A CONVICTION. MOREOVER, REPROSECUTION OF CRIMES AFTER ACQUITTAL BY ANOTHER STATE COURT, ARE EVEN MORE RARE IN STATES SUCH AS GEORGIA WHERE THE CONSTITUTION AND LAWS SPECIFICALLY PROHIBIT SUCH ACTIONS.

A. THE USURPATION OF MILITARY JURISDICTION BY A STATE PROSECUTOR IN THIS CASE IS RARE AND EXCEPTIONAL

THIS COURT HAS HELD THAT "[T]HE JURISDICTION OF A COURT-MARTIAL DEPENDS SOLELY ON THE ACCUSED'S STATUS AS A MEMBER OF THE ARMED FORCES [.]" SOLORIO V. UNITED STATES, 483 U.S. 435 (1987). A STUDY OF FEDERAL CASE LAW REVEALS NO CASE IN WHICH A STATE PROSECUTOR PROSECUTED AN ACTIVE DUTY SERVICEMAN FOR A CRIMINAL OFFENSE USUALLY PROSECUTED IN COURT-MARTIAL UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ), MUCH LESS A CASE WHERE THE PROSECUTOR DID NOT ATTEMPT TO OBTAIN JURISDICTION FROM THE DEPARTMENT OF DEFENSE (DOD) TO PROSECUTE THE CASE IN CIVIL COURT. MOREOVER, THE USURPATION PRESENTED TO THIS COURT IS OF THE RARE VARIETY: THE PROSECUTOR HID THE FACT THAT HE DID NOT HAVE LAWFUL JURISDICTION TO PROSECUTE THE CASE.

FEDERAL JURISDICTION CASES INVARIABLY HINGE ON WHETHER A GIVEN COURT HAS JURISDICTION TO PRESIDE OVER A GIVEN CASE. FEDERAL COURTS HAVE FOUND THAT JURISDICTION MUST "BE ESTABLISHED AS A THRESHOLD MATTER" BECAUSE "JURISDICTION IS THE POWER TO DECLARE LAW" AND "WITHOUT JURISDICTION A

COURT CANNOT PROCEED AT ALL IN ANY CAUSE." SEE STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT, 523 U.S. 83 (1998). AN EXHAUSTIVE REVIEW OF FEDERAL CASES IN THE PAST 10 YEARS SHOWS THAT SERVICEMEN CRIMINAL CASES ARE TRIED BY COURT-MARTIAL, UNLESS ABSTENTION IS GRANTED.[4] THIS IS NOT SUCH A CASE.

IF THE NEXUS OF EVENTS PRESENT IN THIS CASE - COURT MARTIAL JURISDICTION, THE GEORGIA PROSECUTOR'S FAILURE TO OBTAIN JURISDICTION FROM THE MILITARY TO PROSECUTE THE CASE AND HIS UNLAWFUL CONCEALMENT OF THIS FACT, AND MICHIGAN'S LAWFUL PROSECUTORIAL POSITION - DOES NOT PRESENT THE SORT OF "EXCEPTIONAL CIRCUMSTANCES" CONTEMPLATED BY RULE 20.4 AND FELKER, IT IS HARD TO IMAGINE WHAT CASE WOULD.

FOR STARTERS, FRENCH HAS A CLEAR CONSTITUTIONAL CLAIM ON THE MERITS WITH NO SUBSTANTIVE OR PROCEDURAL IMPEDIMENTS TO RELIEF IN THIS COURT: FRENCH'S SENTENCE AND CONVICTION ARE BY A COURT WITHOUT JURISDICTION. THE MILITARY HAD ALREADY GIVEN MICHIGAN JURISDICTION BECAUSE FRENCH'S ACCUSERS CLAIMED THE ALLEGED INCIDENTS OCCURRED THERE, APPENDIX C; MILITARY ABSTENTION OVER A CASE IS RARE AND NEVER IN U.S. HISTORY HAS THE MILITARY GIVEN COURTS IN TWO SEPARATE STATES JURISDICTION TO PROSECUTE A SERVICEMAN FOR THE SAME FACTUAL INCIDENT. THUS: JURISDICTION WAS NOT LAWFULLY OBTAINED BY GEORGIA FOR THESE SAME ALLEGED INCIDENTS. WITHOUT JURISDICTION GEORGIA COULD NOT HAVE TRIED FRENCH, NOR LAWFULLY AND CONSTITUTIONALLY CONVICTED AND SENTENCED HIM. UNDER THESE CIRCUMSTANCES THE WRIT IS AVAILABLE TO CONSIDER CONSTITUTIONAL CLAIMS AS WELL AS QUESTIONS OF JURISDICTION. SEE WALKER V.

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4. COLORADO RIVER WATER CONS. DIST. V. U.S., 47 LED 2D 483, 424 U.S. 800 (1976) "ABSTENTION FROM THE EXERCISE OF FEDERAL JURISDICTION IS THE EXCEPTION, NOT THE RULE."; WILTON V. SEVEN FALLS CO., 132 LED 2D 214, 515 U.S. 277 (1995) ([F]EDERAL COURTS HAVE A "VIRTUALLY UNFLAGGING OBLIGATION" TO EXERCISE THE JURISDICTION CONFERRED ON THEM BY CONGRESS. CITING COLORADO RIVER, SUPRA, AT 813, 817-818, 47 LED 2D 483...)

JOHNSTON, 312 U.S. 275 (1941); SEE ALSO SANDERS V. UNITED STATES, 373 U.S. 1 (1963).

IN SANDERS FOR EXAMPLE, THIS COURT HELD THAT A SECOND PETITION WAS APPROPRIATE WHERE A VIOLATION OF CONSTITUTIONAL RIGHTS IS ALLEGED, EXPLAINING THAT "[C]ONVENTIONAL NOTIONS OF FINALITY OF LITIGATION HAVE NO PLACE WHERE LIFE OR LIBERTY IS AT STAKE AND INFRINGEMENT OF CONSTITUTIONAL RIGHTS IS ALLEGED ... STANDARDS FOR CONSIDERATION OF SUCCESSIVE CLAIMS." 373 U.S. AT 8; "A COURT MUST ADJUDICATE EVEN SUCCESSIVE CLAIMS WHEN REQUIRE TO DO SO BY THE ENDS OF JUSTICE." SCHLUP V. DELO, 513 U.S. 296, 299 (1995).

SECOND, THE UNUSUAL CIRCUMSTANCES IN THIS CASE MAKE APPARENT THE "VITAL FLAW" IN THE STATE PROCEEDINGS, REQUIRING A NEW EVIDENTIARY HEARING. SEE BROWN V. ALLEN, 344 U.S. 443 (1953). MR. FRENCH'S NEW EVIDENCE EVISCERATES THE STATE'S CASE AGAINST HIM. BECAUSE THE PROSECUTOR CONCEALED HIS JURISDICTIONAL ERROR FROM THE DEFENSE AND DELIBERATELY MISREPRESENTED HIS JURISDICTIONAL STANDING TO THE COURT, HIS PROSECUTION OF THE CASE DID NOT CONFER JURISDICTION UPON THE TRIAL COURT. AMERITOX, LTD V. MILLENNIUM LABS, INC, 803 F.3d 518, 539 (2015) ("SEE PARKER, 972 F.2d AT 587 ("[A] COURT CANNOT OBTAIN JURISDICTION OVER A CASE MERELY BY TRYING IT; ITS DECISION TO RETAIN JURISDICTION WOULD BE, EFFECTIVELY UNREVIEWABLE.")

FRENCH'S CONVICTION IS CONSTITUTIONALLY DEFECTIVE. THIS COURT MADE IT CLEAR THAT IT REVIEWS CASES SUCH AS THIS UNLESS THERE IS AN ADEQUATE SUBSTITUTE. SEE BOUMEDIENE V. BUSH, 128 S.CT. 2229 (2008) ("[O]N APPLICATION FOR HABEAS CORPUS WE ARE NOT CONCERNED WITH THE GUILT OR INNOCENCE OF THE PETITIONERS. WE CONSIDER HERE ONLY THE LAWFUL POWER OF THE COMMISSION TO TRY THE PETITIONER FOR THE OFFENSE CHARGED") SEE YAMASHITA, SUPRA AT 8, 66 S.CT. 340, 90 LED 499).

B. THE PROSECUTOR'S DELIBERATE CONCEALMENT OF HIS FAILURE TO OBTAIN JURISDICTION IN THIS CASE IS RARE AND EXCEPTIONAL

THIS COURT HAS HELD THAT "IT IS AS MUCH [A PROSECUTOR'S] DUTY TO REFRAIN FROM IMPROPER METHODS CALCULATED TO PRODUCE A WRONGFUL CONVICTION AS IT IS TO USE EVERY LEGITIMATE MEANS TO BRING ABOUT A JUST ONE." BERGER V. UNITED STATES, 295 U.S. 78 (1935); "THE PROSECUTION'S DUTY TO DISCLOSE THUS EXISTS EVEN IF THERE HAS BEEN NO REQUEST BY THE ACCUSED[.]" SEE E.G. STRICKLER V. GREENE, 527 U.S. 263, 280 (1999). A STUDY OF FEDERAL HABEAS CASELAW HAS NOT REVEALED TO FRENCH ANY CASELAW IN WHICH A PROSECUTOR CONCEALED HIS FAILURE TO PERFORM PROCEDURAL REQUIREMENTS EFFECTING THE ADVERSARIAL PROCESS. MOREOVER, THE FACTS PRESENTED TO THIS COURT ARE RARE AND DISTURBING.

THE IRREFUTABLE MATERIAL FACTS FOUND IN THE NEWLY DISCOVERED EVIDENCE ARE REMARKABLE IN THAT: (1) THE PROSECUTOR FAILED TO OBTAIN JURISDICTION FROM THE MILITARY TO PROSECUTE THE CASE - WHICH WAS REQUIRED BECAUSE OF FRENCH'S MILITARY STATUS AS AN ACTIVE DUTY OFFICER; (2) THE PROSECUTOR UNLAWFULLY CONCEALED THIS FACT FROM THE DEFENSE; (3) THE PROSECUTOR MISREPRESENTED HIS JURISDICTIONAL STANDING TO THE COURT; AND (4) THE PROSECUTOR DELIBERATELY AND KNOWINGLY PROSECUTED FRENCH WITHOUT THE JURISDICTION TO DO SO AND IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS OF DUE PROCESS.

THE PROSECUTOR ALSO PROSECUTED FRENCH FOR FACTUAL ALLEGATIONS HE HAD ALREADY BEEN ACQUITTED OF IN MICHIGAN, APPENDIX D. AND, MOREOVER, UNLAWFULLY SUPPRESSED EVIDENCE OF FALSE ALLEGATIONS OF KIDNAPPING MADE

AGAINST MR. FRENCH BY HIS ACCUSERS, AS EVIDENCED BY THE ELEVENTH CIRCUIT'S FINAL ORDER WHICH ON DISSENT, JUDGE MARTIN STATED AS FOLLOWS:

> "THIS IS THE KIND OF CASE THAT KEEPS ME UP AT NIGHT. I HAVE A REAL QUESTION, BASED ON THE RECORD I HAVE REVIEWED HERE, ABOUT WHETHER EUGENE FRENCH ACTUALLY COMMITTED THE AWFUL CRIME FOR WHICH HE IS NOW IMPRISONED. AND EVERY MEMBER OF THIS PANEL AGREES THAT THERE WERE PROBLEMS WITH THE PROCESS THAT RESULTED IN HIS CONVICTION. TO BEGIN, HIS TRIAL LAWYER WAS INEFFECTIVE. SEE PANEL OP. 15. AT TRIAL, THAT LAWYER TRIED TO INTRODUCE EVIDENCE THAT MR. FRENCH'S ALLEGED MOLESTATION VICTIM PREVIOUSLY AND FALSELY ACCUSED MR. FRENCH OF KIDNAPPING HER. THAT EVIDENCE WAS VITAL TO RAISING DOUBTS ABOUT THE CREDIBILITY OF THE VICTIM - THE STATE'S STAR WITNESS - AND IT SHOULD HAVE BEEN ADMITTED UNDER GEORGIA'S EVIDENTIARY RULES. THE TRIAL COURT MADE A MISTAKE WHEN IT EXCLUDED THAT EVIDENCE[.]"
>
> <u>FRENCH V. WARDEN</u>, 790 F.3d 1259, 1272 (2015) (11TH CIR)

> "... THE STATE HAS SOUGHT TO EXCLUDE THE EVIDENCE OF MR. FRENCH'S VICTIM'S PRIOR FALSE ALLEGATIONS AGAINST HIM. ... THE STATE - IN ITS SEARCH FOR THE CORRECT OUTCOME, NOT MERELY A SUCCESSFUL CONVICTION - SHOULD WANT THAT EVIDENCE AIRED IN COURT... I CONTINUE TO HAVE DOUBTS ABOUT WHETHER HE COMMITTED THE CRIMES OF WHICH HE WAS CONVICTED AND FOR WHICH HE IS SERVING A TWENTY-YEAR SENTENCE."

[790 F.3d 1273]. THE PROSECUTOR'S ACTIONS OVERALL ARE "INEXCUSABLE" AND "OUTRAGEOUS". AND, COULD BE CONSIDERED VINDICTIVE.

THE NEWLY DISCOVERED EVIDENCE, ESTABLISHES A VOID JUDGMENT, AND ENTITLES FRENCH TO IMMEDIATE RELEASE. VOID JUDGMENTS THAT REACH THIS

COURT ARE EXTREMELY RARE.

HABEAS CORPUS CAN LIE TO TEST THE JURISDICTION OF THE TRIAL COURT OR TO SECURE THE RELEASE OF PERSONS DETAINED WITHOUT JUDICIAL AUTHORIZATION OR UNDER VOID PROCEEDING. WHERE A COURT IS WITHOUT AUTHORITY TO PASS A PARTICULAR SENTENCE, SUCH SENTENCE IS VOID, AND THE DEFENDANT IMPRISONED UNDER IT MAY BE DISCHARGED ON HABEAS CORPUS. EX PARTE NIELSEN, 131 U.S 176 [9 S.CT. 672, 33 L.ED. 118 (1889); HARLAN V. MCGOURIN, 218 U.S. 442 [31 S.CT. 44, 54 L.ED. 1101] (1910)]. SUPREME COURT COMPELLED TO REVERSE THE DECISION OF A STATE COURT BECAUSE OF LACK OF JURISDICTION. SEE MANSFIELD C. & L. M. R. CO. V. SWAN, 111 U.S. 379 [4 S.CT. 510, 28 L.ED. 462 (1884).

THE FACTS THAT MR. FRENCH HAS PRESENTED WARRANT HABEAS CORPUS RELIEF.

C. CASE EXCEPTIONAL BECAUSE IT MAY BE DEEMED TO ARISE IN A NEW SOLORIO CONTEXT

ONLY RARELY DOES A CASE ARISE IN A NEW CONTEXT OF LAW. FRENCH AVERS THAT HIS CASE MAY BE ONE THAT DOES. THE FACTS OF HIS CASE MAY BE DEEMED A NEW CONTEXT OF SOLORIO V. UNITED STATES, 483 U.S. 435 (1987).

IN SOLORIO THE PETITIONER COMMITTED CRIMES OFF-BASE IN HIS HOME. WHEN COURT-MARTIAL PROCEEDINGS STARTED SOLORIO ASSERTED THAT BECAUSE THE CRIMES OCCURRED OFF-BASE THE STATE COURT HAD JURISDICTION TO PROSECUTE AND THAT COURT-MARTIAL WAS WITHOUT JURISDICTION TO PROSECUTE. THIS COURT RULED THAT SOLORIO'S MILITARY STATUS GAVE COURT-MARTIAL JURISDICTION TO TRY HIS CASE. ID. THIS COURT ALSO DISMISSED THE THE PREVIOUS HOLDING OF "CIVIL" COURT JURISDICTION OVER MILITARY MATTER:

HOLDING:

> "[T]HE RIGHTS OF MEN IN THE ARMED FORCES MUST PERFORCE BE CONDITIONED TO MEET CERTAIN OVERRIDING DEMANDS OF DISCIPLINE AND DUTY, AND CIVIL COURTS ARE NOT THE AGENCIES WHICH MUST DETERMINE THE PRECISE BALANCE TO BE STRUCK IN THIS ADJUSTMENT. THE FRAMERS EXPRESSLY ENTRUSTED THAT TASK TO CONGRESS." BURNS V. WILSON, 346 U.S. 137, 140 (1953)."[1]

[483 U.S. 440]. THUS IT IS EXPRESSLY CLEAR THAT FOR A "STATE" COURT TO GET JURISDICTION TO TRY A SERVICEMAN FOR CRIMINAL MATTERS IT MUST OBTAIN JURISDICTION FROM THE DEPARTMENT OF DEFENSE.

IN FRENCH'S CASE, THE ALLEGED INCIDENTS WERE REPORTED OCCURRING OFF-BASE. THE STATE COURT (CIVIL) PROSECUTED WITHOUT OBTAINING JURISDICTION. FRENCH ASSERTS THAT COURT-MARTIAL HAD STATUTORY JURISDICTION TO PROSECUTE - DEPARTMENT OF DEFENSE HAD JURISDICTION AND RESPONSIBILITY TO INVESTIGATE AND PROSECUTE. AS SUCH THE CONTEXT IS NEW.

THE MEANINGFUL ISSUES ARE:

(1) PETITIONER WAS AN OFFICER
(2) JUDICIAL GUIDANCE FOR THE CONDUCT WAS COURT-MARTIAL
(3) THE DISRUPTIVE RISK IS CIVIL INTRUSION INTO MILITARY AFFAIRS AND NEGATIVE AFFECT ON UNIT READINESS
(4) RISK CIVIL COURTS ARBITRARILY DICTATING POLICIES FOR MILITARY COMMANDS
(5) INTERFENCE WITH GOVERNMENT INVESTIGATION AND IMPEDING UPON THE JURISDICTION OF THE DEPARTMENT OF DEFENSE
(6) ABROGATING SERVICEMEN RIGHTS TO TRIAL BY COURT-MARTIAL AND RIGHT TO A FAIR TRIAL
(7) DISREGARD FOR THE AUTHORITY OF CONGRESS AND FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES

(8) THERE IS MINIMAL RISK OF DISRUPTIVE INTRUSION BY THE JUDICIARY INTO THE FUNCTIONING OF OTHER BRANCHES
(9) RISK CIVIL AUTHORITIES ARBITRARILY DICTATING FORCE READINESS
(10) WILL PROVIDE FURTHER GUIDANCE TO MILITARY AND CIVIL AUTHORITIES
(11) SPECIAL CONSIDERATIONS ARE ABSTENTION AND PROCEDURAL REQUIREMENTS

THIS CASE PRESENTS ISSUES NEVER ADDRESSED BEFORE AND INVOLVES FEDERAL LAW. FRENCH'S CASE FALLS WITHIN THE JURISDICTION OF THIS COURT AND WILL BE A CLEAR EXAMPLE FOR THE LOWER COURTS. SEE E.G., SOLORIO HOLDING "CIVIL COURTS" ARE "ILL EQUIPPED" TO ESTABLISH POLICIES REGARDING "DISCIPLINE AND DUTY" FOR MEN IN THE ARMED FORCES WHICH IS SUBSTANTIATED BY THE CONFUSION CAUSED BY THE "SERVICE-CONNECTION" APPROACH. THIS CASE WILL FURTHER THE APPELLATE JURISDICTION OF THIS COURT.

D. PROSECUTION IN TWO DIFFERENT STATES IN TWO DIFFERENT STATE COURTS FOR THE SAME ALLEGED FACTUAL OFFENSES ARE EXCEPTIONALLY RARE

ONLY RARELY - IF EVER - DOES A SUBSTANTIAL CASE OF DOUBLE JEOPARDY BASED ON BEING TRIED IN TWO DIFFERENT STATE COURTS FOR THE SAME FACTUAL OFFENSE SLIP THROUGH THE CRACKS OF THE FEDERAL HABEAS SYSTEM. NEVER HAS THERE BEEN A CASE - LIKE MR. FRENCH'S - OF ALLEGED PHYSICAL ASSAULT BEING TRIED IN TWO DIFFERENT STATE COURTS, IN TWO DIFFERENT STATES, BROUGHT BEFORE THE FEDERAL HABEAS SYSTEM. ORDINARILY, THE WRIT OF HABEAS CORPUS CAN BE USED TO INQUIRE INTO THE JUDGMENT OF A COURT OF COMPETENT JURISDICTION. A JUDGMENT, IN ITS NATURE, CONCLUDES THE SUBJECT ON WHICH IT IS RENDERED, AND PRONOUNCES THE LAW OF THE CASE. THE JUDGMENT OF A COURT OF RECORD WHOSE JURISDICTION IS FINAL IS AS CONCLUSIVE

ON ALL THE WORLD AS THE JUDGMENT OF THIS COURT WOULD BE. IT IS AS CONCLUSIVE ON THIS COURT AS IT IS ON OTHER COURTS, IT PUTS AN END TO INQUIRY CONCERNING THE FACT BY DECIDING IT. SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218, 254 (1973) CITING EX PARTE WATKINS, 3 PET. AT 202-203.

MR. FRENCH'S CASE REPRESENTS AN EXTREME ABERRATION OF HOW DOUBLE JEOPARDY CASES ARE NORMALLY REVIEWED IN FEDERAL COURT. THE DISTRICT COURT AND THE COURT OF APPEALS UTTERLY IGNORED MR. FRENCH'S EVIDENCE OF HIS PRIOR PROSECUTION IN MICHIGAN AND HIS DOUBLE JEOPARDY CLAIM DURING HIS FIRST FEDERAL HABEAS PETITION, EFFECTIVELY CHILLING RELIEF ON THAT CLAIM. THUS, THE COURT OF APPEALS RECENT ACKNOWLEDGMENT OF THE EVIDENCE OF MR. FRENCH'S MICHIGAN PROSECUTION IS UNUSUAL AND RARE. IT BRINGS INTO QUESTION WHETHER THIS CLAIM, NOW RIPE, IS PART OF HIS INITIAL PETITION AND APPEAL OR RIPE NOW AS A SUCCESSIVE CLAIM. THE COURT OF APPEALS EXPRESSLY HIGHLIGHTED THE FACT THAT THE MICHIGAN PROSECUTOR OBTAINED JURISDICTION FROM THE MILITARY TO PROSECUTE HER CASE AGAINST MR. FRENCH (PET. APP 3a).

IN THAT CASE, MR. FRENCH'S ACCUSERS CLAIMED TO MICHIGAN AUTHORITIES THAT HE COMMITTED CRIMES AGAINST THEM IN MICHIGAN WHILE LIVING THERE (APPENDIX F)[5]. ON FEBRUARY 25, 2005, AT A BENCH TRIAL, MR. FRENCH WAS AQUITTED OF ALL CHARGES, THE CASE WAS DISMISSD, AND JURISDICTION WAS RELEASED BACK TO THE MILITARY. FRENCH'S ACCUSERS THEN WENT TO GEORGIA - WHERE FRENCH WAS STATIONED AT FORT STEWART ARMY BASE - AND RAISED

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5. COMPARING MICHIGAN COMPLAINT DOCUMENT (APPENDIX F) TO GEORGIA INDICTMENT NO. 2005R10640 (APPENDIX G) ESTABLISHES THAT THE SAME FACTUAL ALLEGATIONS WERE RAISED IN BOTH STATES. MICHIGAN PROSECUTED ITS CASE NO. 2003-680851-NA TO COMPLETION AND THE JUDGMENT STILL STANDS.

THE SAME FACTUAL CLAIMS BUT CHANGED THE LOCATION IN THE STORIES TO GEORGIA. FRENCH IS NOW SERVING A 20-YEAR SENTENCE AFTER BEING CONVICTED OF TWO COUNTS ON THE GEORGIA INDICTMENT. THIS IS A TRUE MISCARRIAGE OF JUSTICE BASED UPON EXTRAORDINARY CIRCUMSTANCES. "IN DETERMINING WHETHER EXTRAORINARY CIRCUMSTANCES ARE PRESENT, A COURT MAY CONSIDER A WIDE RANGE OF FACTORS. THESE MAY INCLUDE, THE RISK OF INJUSTICE TO THE PARTIES AND THE RISK OF UNDERMINING THE PUBLICS CONFIDENCE IN THE JUDICIAL PROCESS." BUCK V. DAVIS, 197 LED2D 1 (2017). MR. FRENCH'S INCARCERATION IS UNJUST.

THE COURT OF APPEALS DECISION TO NOW ACKNOWLEDGE MR. FRENCH'S PRIOR PROSECUTION ALSO PRODUCES OTHER VIABLE CLAIMS FOR REVIEW ON A SUCCESSIVE PETITION: (1) THE RIGHT NOT TO BE TRIED;[6] AND (2) JURISDICTION OF THE COURT. AS RECOGNIZED IN EX PARTE LANGE, 85 U.S. (18 WALL.) 163 (1873) (THE COURT FOUND THAT A STATE COURT LACKED JURISDICTION WHEN THERE WAS A VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY.). CASES LIKE MR. FRENCH'S ARE EXCEPTIONALLY RARE.[7]

THE PRINCIPLES OF FINALITY AND COMITY "MUST YIELD TO THE IMPERATIVE OF CORRECTING A FUNDAMENTAL UNJUST INCARCERATION." ENGLE V. ISSAAC, 456 U.S. 107, 135 (1982); FOR THIS REASON, FEDERAL COURTS MUST ADJUDICATE DEFAULTED OR SUCCESSIVE CLAIMS, WHEN "REQUIRED TO DO SO BY THE ENDS OF JUSTICE," BECAUSE... "HABEAS CORPUS" IS AN "EQUITABLE REMEDY." SCHLUP V. DELO, 513 U.S. 298, 299 (1995).

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6. CLASS V. UNITED STATES, 200 LED2D 37, 51 (2018)

7. PETITIONER HAS FOUND NO CASES IN WHICH A COURT OF APPEALS DISREGARDED FACTS, THEN LATER ACKNOWEDGED THOSE FACTS BUT STILL DID NOT ADDRESS THE ISSUE. THE ELEVENTH CIRCUIT ROUTINELY CORRECTS "PLAIN ERROR" WHEN (1) AN ERROR HAS OCCURRED, (2) THE ERROR WAS PLAIN, AND (3) THE ERROR AFFECTED SUBSTANTIAL RIGHTS. SEE UNITED STATES V. ZINN, 321 F.3d 1084, 1087 (11TH CIR 2007). THE COURT OF APPEALS EXPRESS ACKNOWLEDGMENT OF FRENCH'S PROSECUTION IN MICHIGAN MAKES THE EXERCISE OF HABEAS JURISDICTION EVEN MORE COMPELLING.

III. THE COURT OF APPEALS ERRED IN BARRING MR. FRENCH'S SECOND PETITION

THE COURT OF APPEALS DENIED MR. FRENCH PERMISSION TO FILE A SECOND PETITION, HOLDING THAT FRENCH "FAILED TO SHOW THAT THIS EVIDENCE COULD NOT HAVE BEEN UNCOVERED THROUGH A REASONABLE INVESTIGATION UNDERTAKEN BEFORE THE INITIAL § 2254 PETITION WAS LITIGATED."

THE PURPOSES OF § 2244(b)(2) THAT "INFORM" THIS COURT'S CONSIDERATION OF MR. FRENCH'S ORIGINAL HABEAS PETITION ARE TWOFOLD: SECTION 2244(b)(2)(B)(i) REQUIRES THAT THE PETITIONER DILIGENTLY DISCOVER AND PRESENT HIS NEW EVIDENCE IN HIS FIRST HABEAS PETITION. MR. FRENCH HAS DILIGENTLY DONE SO. SECTION 2244(b)(2)(B)(ii) REQUIRES THAT THE CLAIM RAISED IN A SECOND PETITION "IMPUGN" THE RELIABILITY OF THE UNDERLYING CONVICTION. MR. FRENCH'S SUBJECT MATTER JURISDICTION AND <u>BRADY</u> VIOLATION CLAIMS DO EXACTLY THAT.

A. THE FACTUAL PREDICATE FOR THE CLAIMS COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE

SECTION 2244(b)(2)(B)(i) REQUIRES THAT A CLAIM BROUGHT IN A SECOND PETITION MUST BE DISMISSED UNLESS "THE FACTUAL PREDICATE FOR THE CLAIM COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE." THE CLEAR PURPOSE OF THIS PROVISION IS TO ENSURE THAT PETITIONER'S DILIGENTLY DISCOVER ALL EVIDENCE AND PRESENT IT TO THE DISTRICT COURT IN THE FIRST HABEAS PETITION.

HERE, ALL OF THE EVIDENCE UNDERLYING MR. FRENCH'S JURISDICTION AND <u>BRADY</u> CLAIMS WAS DISCOVERED AS SOON AS THE STATE PROVIDED THE RESOURCES TO OBTAIN THE INFORMATION -- VIA THROUGH VETERANS ADMINISTRATION OFFICIALS WHILE MR. FRENCH WAS IN THE VETERANS REENTRY PROGRAM AT JOHNSON STATE

PRISON IN 2015 AND MR. FRENCH RESEARCHED THE INFORMATION HE WAS PROVIDED. IT MUST BE NOTED THAT SUCH INFORMATION CANNOT BE OBTAINED BY THE AVERAGE CITIZEN. OBTAINING JURISDICTION FROM THE MILITARY IS A SPECIALIZED FIELD AND PROCESS, AND IN THIS INSTANCE, KNOWN AND PERFORMED ONLY BY THE PROSECUTOR.

IN THIS CASE, THE RECORD IS ABSENT OF ANY EVIDENCE OF THE PROSECUTOR OBTAINING THE REQUIRED JURISDICTION TO PROSECUTE FROM THE MILITARY. AND, EVEN UPON REQUEST THE STATE HAS REFUSED TO RESPOND, (EXHIBIT I), NOR HAS THE STATE PROVIDED MR. FRENCH THE REQUESTED JURISDICTIONAL EVIDENCE. THE REASON WHY THE PROSECUTOR HAS NOT PROVIDED THE JURISDICTIONAL EVIDENCE IS BECAUSE IT DOES NOT EXIST. HE DID NOT FILE AN APPLICATION FOR ABSTENTION. AND, AS FRENCH HAS DISCOVERED THROUGH HIS RESEARCH, THIS DOCUMENT IS REQUIRED TO BE APART OF THE RECORD. SEE LANTANA V. HOPPER, 102 F.2d 118; CHICAGO V. NEW YORK, 37 F.SUPP. 150

THE PROSECUTOR CONCEALED THE FACT THAT HE DID NOT HAVE JURISDICTION TO PROSECUTE MR. FRENCH AND DID NOT MAKE A RECORD OF THIS. THEREFORE, THROUGH DUE DILIGENCE, FRENCH WAS UNABLE TO DISCOVER THE FACTS BEFORE HIS INITIAL 2254 PETITION WAS LITIGATED. MOREOVER, WITHOUT THIS VIOLATION OF DUE PROCESS. NO REASONABLE FACTFINDER WOULD HAVE FOUND MR. FRENCH GUILTY. ONCE THE COURT FOUND IT LACKED JURISDICTION THE JUDGE WOULD HAVE BEEN REQUIRED TO DISMISS THE CASE. SEE EX PARTE McCARDLE, 74 U.S. (7 WALL.) 506 (1868). FRENCH'S APPLICATION MADE A PRIMA FACIE SHOWING THAT SATISFIES 28 U.S.C. § 2244(b)(2) AUTHORIZING THE FILING OF HIS 2254 APPLICATION.

THE COURT OF APPEALS REASONING THAT BECAUSE FRENCH HAD A "PUBLIC DOCUMENT" THAT SHOWED THE MICHIGAN PROSECUTOR COORDINATING JURISDICTION WITH THE MILITARY, HE SHOULD HAVE DETERMINED, THROUGH REASONABLE INVESTIGATION,

PLACES AN UNDUE BURDEN UPON MR. FRENCH AND IS UNREASONABLE FOR SEVERAL REASONS:

FIRST, THE MILITARY DOES NOT HAVE TO GIVE JURISDICTION, THIS IS DISCRETIONARY, AS SHOWN BY THE "PUBLIC DOCUMENT" OF THE MICHIGAN PRETRIAL PROCEEDINGS.

SECOND, THE INFORMATION IN MICHIGAN DID NOT ALERT MR. FRENCH TO THE JURISDICTIONAL REQUIREMENTS IN GEORGIA. FURTHERMORE, JURISDICTIONAL REQUIREMENTS VERY FROM STATE TO STATE.

THIRD, THE COURT OF APPEALS IS IMPOSING A MANDATORY PRESUMPTION UPON MR. FRENCH, WHICH IS IMPERMISSIBLE

FOURTH, THE PROSECUTOR IS THE ONLY ONE WHO KNOWS WHETHER HE OBTAINED JURISDICTION AND HE IS REQUIRED TO MAKE A PUBLIC RECORD OF THAT JURISDICTION. THERE IS NO PUBLIC RECORD OF SAID JURISDICTION FOR MR. FRENCH TO REFER TO.

FIFTH, THERE IS NO DOCUMENT IN THE RECORD DISCUSSING COORDINATING JURISDICTION BETWEEN THE STATE OF GEORGIA AND THE MILITARY

SIXTH, WITH A REASONABL INVESTIGATION MR. FRENCH CANNOT FIND EVIDENCE WHEN THE PROSECUTOR CONCEALS THE EVIDENCE AND MAKES NO RECORD OF IT.

OUR FEDERAL COURTS HAVE CONSISTENTLY HELD THAT EVIDENCE WITHIN THE PURVIEW OF THE GOVERNMENT OFFICIALS, SECRETED BY THEM, WITHHELD BY THEM, OR CONCEALED BY GOVERNMENT CONDUCT, IS EVIDENCE THAT COULD NOT HAVE BEEN DISCOVERED THROUGH THE EXERCISE OF DUE DILIGENCE. SEE E.G. DOBB V. ZANT, 506 U.S. 357 (1993) (PER CURIAM) (TRANSCRIPT NOT DISCOVERED BASED ON DEFENDANT'S RELIANCE ON THE STATE'S ASSERTIONS THAT IT HAD NOT TRANSCRIBED); SEE ALSO STRICKLER V. GREENE, 527 U.S. 263, 282, 289 (1999) CONDUCT BY STATE IMPEDING ACCESS TO EXCULPATORY INFORMATION PROVIDED

CAUSE FOR FILING A SUCCESSIVE PETITION). THE COURT OF APPEALS RULING MAKES MR. FRENCH RESPONSIBLE FOR THE PROSECUTOR'S DUTIES BY LAW AND REMOVES ALL RESPONSIBILITY FROM THE PROSECUTOR TO PERFORM HIS DUTIES LAWFULLY. MR. FRENCH HAS A LEGAL RIGHT TO EXPECT THE PROSECUTOR TO PERFORM HIS DUTIES IN ACCORDANCE WITH THE LAW.

B. MR. FRENCH'S SECOND PETITION MEETS THE REQUIREMENTS OF 28 U.S.C. § 2254

1. MR. FRENCH IS ENTITLED TO AN EVIDENTIARY HEARING

IF THIS COURT TRANSFERS MR. FRENCH'S HABEAS PETITION TO THE DISTRICT COURT, MR. FRENCH WOULD BE ENTITLED TO AN EVIDENTIARY HEARING UNDER 28 U.S.C. § 2254(e)(2). SUBJECT TO THE REQUIREMENTS OF § 2254, A FEDERAL EVIDENTIARY HEARING IS REQUIRED "WHERE NEWLY DISCOVERED EVIDENCE WHICH COULD NOT REASONABLY HAVE BEEN PRESENTED TO THE STATE COURT IS ALLEGED, THE FEDERAL COURT MUST GRANT AN EVIDENTIARY HEARING, UNLESS THE ALLEGATION OF NEWLY DISCOVERED EVIDENCE IS IRRELEVANT, FRIVOLOUS OR INCREDIBLE." *TOWNSEND V. SAIN*, 372 U.S. 293, 317. (1963) (OVERRULED ON OTHER GROUNDS).

SECTION 2254(e)(2) DOES NOT PRECLUDE AN EVIDENTIARY HEARING IN THIS CASE BECAUSE MR. FRENCH CONSISTENTLY, BUT UNSUCCESSFULLY, SOUGHT AN EVIDENTIARY HEARING TO PROVE HIS INNOCENCE IN STATE COURT. BY THE TERMS OF ITS OPENING CLAUSE, § 2254(e)(2) BARS AN EVIDENTIARY HEARING ONLY TO PRISONERS WHO HAVE "FAILED TO DEVELOP THE FACTUAL BASIS OF A CLAIM IN STATE COURT PROCEEDINGS." *IN RE WILLIAMS V. TAYLOR*, THIS COURT HELD THAT A PETITIONER WHO DID NOT RECEIVE A HEARING IN STATE COURT MAY RECEIVE AN EVIDENTIARY HEARING IN FEDERAL COURT "UNLESS THERE IS LACK OF DILIGENCE, OR SOME GREATER FAULT, ATTRIBUTABLE TO THE PRISONER OR THE PRISONER'S

COUNSEL." 529 U.S. 420, 435 (2000). THE COURT HELD THAT "[D]ILIGENCE WILL REQUIRE IN THE USUAL CASE THAT THE PRISONER, AT A MINIMUM, SEEK AN EVIDENTIARY HEARING IN STATE COURT IN THE MANNER PRESCRIBED BY STATE LAW." TO NO AVAIL, MR. FRENCH ASSERTED HIS JURISDICTION AND BRADY CLAIMS AND INNOCENCE, AND REQUESTED AN EVIDENTIARY HEARING AT EVERY LEVEL OF THE STATE PROCEEDINGS.

2. THE GEORGIA SUPREME COURT'S MINIMAL FACTUAL FINDINGS DESERVE NO DEFERENCE UNDER §2254

THE GEORGIA SUPREME COURT'S REVIEW OF MR. FRENCH'S EXTRAORDINARY MOTION FOR NEW TRIAL IS ENTITLED TO NO DEFERENCE UNDER §2254 SINCE THE STATE COURTS FAILED TO CONDUCT AN EVIDENTIARY HEARING AND THE GEORGIA SUPREME COURT MADE AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE MR. FRENCH HAD PRESENTED.

UNDER AEDPA'S AMENDMENTS TO §2254, A FEDERAL COURT MAY GRANT HABEAS RELIEF IF THE STATE COURT'S DECISION "WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING." 28 U.S.C. §2254(d)(2). FACTUAL DETERMINATIONS MADE BY STATE COURTS ARE PRESUMED CORRECT UNLESS REBUTTED BY "CLEAR AND CONVINCING EVIDENCE." §2254(e)(1). WHEN THE STATE COURT CONDUCTED AN EVIDENTIARY HEARING, THIS COURT HAS HELD THAT THESE STANDARDS ARE "DEMANDING BUT NOT INSATIABLE" AS "DEFERENCE DOES NOT BY DEFINITION PRECLUDE RELIEF." MILLER-EL V. DRETKE, 545 U.S. 231, 240 (2005).

AEDPA'S PROVISIONS DEFERRING TO STATE COURT FACTUAL DETERMINATIONS ARE INAPPLICABLE WHERE, AS HERE, THE PETITIONER DID NOT HAVE THE OPPORTUNITY FOR A FULL AND FAIR HEARING IN STATE COURT. THERE IS NO STATE

COURT ADJUDICATION ON THE MERITS BY THE STATE HIGHEST COURT, A FEDERAL COURT SITTING IN A HABEAS CORPUS PROCEEDING SHOULD "LOOK THROUGH" A SUMMARY RULING TO REVIEW THE LAST REASONED DECISION BY A STATE COURT. WILSON V. SELLERS, 584 U.S. ____ (2018).

CONCLUSION

THIS COURT HAS THE POWER AND AUTHORITY TO DISCHARGE. MR. FRENCH UNDERSTANDS THE REQUEST IMPOSES SUCH A HEAVY PENALTY UPON THE PROSECUTION; HOWEVER, THE EGREGIOUS NATURE OF THE CONSTITUTIONAL VIOLATIONS NECESSITATES THE PENALTY. THE PENALTY FITS THE VIOLATION. REMAND IS NOT A SOLUTION TO A COURT THAT HAS NO JURISDICTION. IF THE CASE GOES BACK TO THE TRIAL COURT - THE TRIAL COURT HAS NO JURISDICTION TO PROSECUTE. FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE GRANTED AND MR. FRENCH DISCHARGED.

RESPECTFULLY SUBMITTED,

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THIS 6TH DAY OF DECEMBER, 2019