19-8344

**Docket No.** _____

ORIGINAL

*In the*

# Supreme Court of the United States

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BRETT COMBS,

*Petitioner*

v.

STATE OF NEVADA; ATTORNEY GENERAL OF THE STATE OF NEVADA,

*Respondents*

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On Petition for Writ of Certiorari from the United States District Court for the Southern District of Nevada

## PETITION FOR WRIT OF CERTIORARI

Brett Combs #44920048
in Pro Per
c/o Parcells Law Firm
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## QUESTION PRESENTED

This Court in Miller-El v. Cockrell, 537 U.S. 322 (2003) determined that the state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim.

This Court's rulings in Miller v. Pate, 386 U.S. 1, 7 (1967) , Strickland v. Washington, 466 U.S. 668, 681-82, 686-692, Napue v. Illinois, 360 U.S. 264, 269 (1959) , Alcorta v. Texas, 355 U.S. 28 (1957), and a New York case. People v. Savvides, 1 N.Y.2d 554, 557; 136 N.E.2d 853, 854-55; 154 N.Y.S.2d 885, 887; United States v. Agurs, 427 U.S. 97, 103-104 (1976); Busby v. Davis, 892 F.3d 735, 749 (2018); and Mooney v. Holohan, 294 U.S. 103, 112, 113, speaks of the detriment to a defendant's case when a state presents false evidence, perjured testimony, and affects the jury's opinion of a witness's credibility to determine a defendant's guilt or innocence (and where defense counsel knowingly does nothing to defend his client to refute the presentation of the false evidence and perjured testimony by the state nor presents the evidence or witnesses to), which makes the case not only fundamentally unfair, but also violates his or her 6th and 14th Amendment rights.

Petitioner did not commit the Colorado robberies, did not send a fax change of address, Respondents did not have "reasonable suspicion" to look for Petitioner at his residence because of a false tip that he was going to commit an armed robbery of the Timbers Bar, and was not at 9421 Shellfish Drive, Las Vegas, Nevada when he was arrested. These were the false facts that Respondents relied on to convince the jury to convict Petitioner and for which his trial counsel did nothing to refute the evidence nor advocate for his defense.

Though Petitioner focuses and presents evidence just on Grounds 1.2, 1.3, 1.8, 1.15, 7, and 8, all the constitutional claims in Petitioner's state and federal writs would be debatable among reasonable jurists, and they would also determine that the district court's "procedural ruling" was incorrect that the state court's ruling was an unreasonable determination of the facts on all grounds given the evidence presented by Petitioner.

How much falsified, destroyed, and/or hiding of evidence and facts, perjury by Respondents' witnesses, and ineffective assistance of counsel (including a conflict of interest) does Petitioner need to present to satisfy the provisions of 28 U.S.C. §2254(d)(2) and 2254(e) before a court will determine that Petitioner's 6th and 14th Amendment constitutional rights were and continue to be violated based on an unreasonable determination of the facts under 28 U.S.C. §2254(d)(2) and that his liberty has been and continues to be denied?

The Eighth Judicial District Court for the State of Nevada and U.S. District Court of Nevada for the Southern District have abused their discretion by either ignoring, falsifying, and/or twisting Petitioner's facts, ignoring the perjured testimony, and the ineffective assistance of trial and habeas counsel, and the 9th Circuit erred by just rubber-stamped the District Court's ruling.

## LIST OF PARTIES

Brett Combs, Petitioner
State of Nevada, Respondent
Attorney General of the State of Nevada, Respondent

## RELATED CASES

*State of Nevada v. Brett Combs aka Brett Clinton Combs*, Case No. C261306 Eighth Judicial District Court, Judgment of Conviction filed July 28, 2010.

*State of Nevada v. Brett Combs aka Brett Clinton Combs*, Case No. C261306 Nevada Supreme Court, Order of Affirmance filed June 8, 2011.

*State of Nevada v. Brett Combs aka Brett Clinton Combs*, Case No. C261306 Eight Judicial District Court, Findings of Fact and Conclusions of law filed May 14, 2014.

*State of Nevada v. Brett Combs aka Brett Clinton Combs*, Case No. 65864 Nevada Supreme Court, Order of Affirmance filed December 18, 2015.

*Brett Combs v. State of Nevada; Attorney General for the State of Nevada*, Case No. 2:11-cv-00528-PMP-VCF, United States District Court for the Southern District of Nevada, Order filed September 30, 2019.

*Brett Combs v. State of Nevada; Attorney General for the State of Nevada*, Case No. 19-17177, United States Court of Appeals for the 9th Circuit, Order filed January 23, 2020.

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**OTHER AUTHORITY**

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 Appendix A to the petition and is

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

The opinion of the United States district court appears at Appendix B to the petition and is

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

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

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

The opinion of the _____ court appears at Appendix _____ to the petition and is

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

## JURISDICTION

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

The date on which the United States Court of Appeals decided my case was January 23, 2020.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Constitution of the United States of America - 14th Amendment, Section 1**
Citizenship Rights, Equal Protection, Apportionment, Civil War Debt

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

**Constitution of the United States - 6th Amendment**
Right to Speedy Trial by Jury, Witnesses, Counsel

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

**28 U.S.C. Section 2253(c)**

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

## 28 U.S.C. Section 2254(d) (2)

(2) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be grantedn with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## 28 U.S.C. Section 2254(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim 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.

## Nevada Revised Statutes 213.151(3)

Arrest of alleged violator of parole: Powers and duties of peace officers.

1. The Board's written order, certified to by the Chief Parole and Probation Officer, is sufficient warrant for any parole and probation officer or other peace officer to arrest any conditionally released or paroled prisoner.

2. Every sheriff, constable, chief of police, prison officer or other peace officer shall execute any such order in like manner as ordinary criminal process.

3. Any parole and probation officer or any peace officer with power to arrest may arrest a parolee without a warrant if there is probable cause to believe that the parolee has committed acts that would constitute a violation of his or her parole.

4. Except as otherwise provided in subsection 5, after arresting a paroled prisoner for violation of a condition of his or her parole and placing the parolee in detention or, pursuant to NRS 213.15105, in residential confinement, the arresting officer shall:

(a) Present to the detaining authorities, if any, a statement of the charges against the parolee; and

(b) Notify the Board of the arrest and detention or residential confinement of the parolee and submit a written report showing in what manner the parolee violated a condition of his or her parole.

5. A parole and probation officer or a peace officer may immediately release from custody without any further proceedings any person he or she arrests without a warrant for violating a condition of parole if the parole and probation officer or peace officer determines that there is no probable cause to believe that the person violated the condition of parole.

(Added to NRS by 1975, 196; A 1979, 324; 1991, 312)

## STATEMENT OF THE CASE

The U.S. Supreme Court has explained:

> "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. " *Brady v. Maryland*, 373 U.S. 83, 87 (1967)

Petitioner has been denied his 6th and 14th Amendment rights in the trial in this case, throughout his state post-conviction proceedings, in his Federal habeas petition, and finally again in the denial of his Certificate of Appealability in the 9th Circuit Court of Appeals.

Petitioner has a completely different set of facts from the State of Nevada's ("Respondent") version. Petitioner was arrested on January 8, 2009 at the intersection of Fort Apache and Desert Inn Roads, taken to 9421 Shellfish Drive, Las Vegas, Nevada ("Shellfish") for a short period of time (20-30 minutes), and then taken to Clark County Detention Center. The case agent with the Las Vegas Metropolitan Police Department ("Metro"), Justin Zinger ("Zinger"), falsely testified (in the court proceedings and to obtain a search warrant) about a report by a "confidential informant" (O'Donnell), an armed robbery of Timbers bar, a gun, and where Petitioner was arrested. The prosecutor, Noreen Nyikos Demonte also knew of the false testimony of Officer Zinger, destruction of court-ordered and other evidence, and the false testimony of the State's Colorado and other witnesses because she, too, had the evidence.

Petitioner has proof of these facts, and more, which were never presented by his defense counsel, Martin Hart ("Hart") at trial, who did not impeach the Respondents' Colorado and other witnesses with their false testimony (but had the evidence), nor did Hart present any alibi witnesses, because Hart had a conflict of interest between his former client, Reiger, who was an associate of Donna Hayborn ("Hayborn"), along with Richard Price and Troy Looney. Hayborn was the alleged girlfriend of Petitioner, owner of Shellfish, a convicted drug dealer, and who took a plea agreement to get a deal on her three cases she was charged with in 2009 and 2010.

Petitioner was convicted at trial for being in possession of stolen property, (21 counts) on April 30, 2010.

During Petitioner's state post-conviction proceedings, none of Petitioner's evidence was ever considered by the trial court. Initially, Petitioner was in pro per, but after the State's response to Petitioner's writ petition (which was never received by Petitioner to be able to reply), the trial court appointed counsel, William Gamage ("Gamage") to represent Petitioner with his state habeas petition. Gamage, never raised any of the procedurally-defaulted claims of Petitioner nor argued Petitioner's evidence in his supplemental petitions or during Petitioner's post-conviction hearing, which was focused almost exclusively on Petitioner's conflict of interest issue under one of Petitioner's ineffective assistance of counsel claim. During the appeal of the state habeas writ, Gamage did not include Petitioner's writ petition and exhibits (evidence) nor the first day of trial in the appendix and was removed from Petitioner's case for professional misconduct. The Nevada Supreme Court never considered or reviewed any of Petitioner's evidence in his writ. Gamage has recently been suspended for more than five years by the State of Nevada for his professional misconduct in various client cases.

The trial court denied Petitioner's state habeas petition on May 14, 2014, as did the Nevada Supreme Court on December 18, 2015.

Petitioner filed his Federal habeas writ on April 5, 2011 and an amended petition on October 24, 2011. The United States District Court for Southern Nevada ("District Court") denied most of Petitioner's claims as unexhausted, refused to recognize the ineffective assistance of initial post-conviction counsel, Gamage, under Martinez v. Ryan,132 S.Ct. 1309 (2012), and after review of all briefings, twisted, ignored, and falsified Petitioner's evidence and facts and allowed perjured testimony to support Respondents' case. The District Court denied Petitioner's writ and certificate of appealability on September 30, 2019.

Petitioner then filed a Request for Certificate of Appealability with the United States District Court of Appeals for the 9th Circuit ("9th Circuit") on November 26, 2019, pointing out all his evidence and how it had been falsified and twisted and all the perjured testimony. The 9th Circuit denied certificate of appealability on January 23, 2020, supporting the District Court's "procedural ruling,"and that reasonable jurists would not be able to debate the District Court's findings.

## REASONS FOR GRANTING THE PETITION

### INTRODUCTION

28 U.S.C. § 2253(c)(2) a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(1).

28 U.S.C. § 2254(d)(2), a Federal habeas court may grant the writ if it concludes that the State court's adjudication of the claim "resulted in a decision that 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). Townsend v. Sain, 372 U.S. 293.

28 U.S.C. § 2254(e)(1) states: In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

There is "clear and convincing evidence" pursuant to §2254(e)(1) that the decision of the Nevada Supreme Court was an unreasonable application of clearly established federal law under Strickland v. Washington, 466 U.S. 668, 692-694, because their decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court habeas proceedings by Petitioner. Wiggins v. Smith, 539 U.S. 510, 534, 535 (2003) (APP 21-27).

Hart was Petitioner's defense counsel and represented Wendell Reiger ("Reiger") at the same time in other Nevada cases (APP 173-181). Reiger provided information on various cases to Metro (APP 265-266) because Reiger was facing charges of burglary, conspiracy to commit a crime, robbery, use of a deadly weapon or tear gas in commission of a crime, and habitual criminal. Reiger admitted guilt of all charges except for the burglary charge. Reiger was a suspect in the Colorado robberies (APP 117, 218) which Respondents claim (bad acts - Ground 7) Petitioner had "knowledge" of the stolen property he was charged and convicted of possessing. Hart knew this when he represented Petitioner.

Hayborn (owner of Shellfish) took a plea deal with Respondents for her three drug cases (APP 32-38), the first on January 8, 2009 (the two others in 2010), the same date Petitioner was allegedly arrested at Shellfish. Hayborn had a lot to lose, including the custody of her son if she was convicted of trafficking drugs and possession with intent to sell. In these cases, Hayborn was charged with trafficking of and possession with intent to sell Methamphetamine which were either "denied" or "dismissed." Hayborn never spent any time in prison. She cooperated with the State to help convict Petitioner in exchange for leniency (APP 44-46).

Respondents "reasonable suspicion" to locate Petitioner was that Metro Robbery Division was given a tip that Petitioner was planning to heist a coin truck when it was to arrive at the Timbers' Bar on January 8, 2009 between 10 am and noon. The date Metro received the purported tip was January 7, 2009 (the same date that Reiger entered his plea deal with the state court) as evidenced by Metro's Officer's Report ("Tip Report") (APP 70-72). The "confidential informant" (Kelly O'Donnell) stated that Combs, Reiger, and Price were going to be involved in this alleged armed robbery (APP71). O'Donnell's description of Petitioner is the physical description of Reiger (APP 74). She also stated that Petitioner lived in the area of Bradley and Brent (which is close to 5127 Sparkling Vine - Combs' residence (APP 71). No such robbery occurred (APP 84, 209) and her statements are contrary to that of Metro Officer Zinger in his testimony and affidavit for the telephonic search warrant (APP 132-133, 209-211) where Petitioner was residing.

The denial of Petitioner's Federal Writ (APP 2-20) by the District Court was not only an abuse of discretion and plain error, but an unreasonable determination of the facts in light of the evidence presented (new and old) by Petitioner.

GROUND 1.2 (FAX)

No investigation was performed by Hart to find out the origin of the fax, who sent it, or even if a fax was actually received by Nevada Department of Parole and Probation ("P&P"). Petitioner told Hart he did not send the fax because he did not change his address. The evidence of a fax was a vital component to Respondents' case. Miller v. Pate, 386 U.S. 1, 5, 7 (The 14th Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence).

Hart did nothing to refute the testimony of the States' witnesses that Petitioner sent a fax change of address, nor did he call the witness who allegedly received the fax, P&P Officer Gilbert. Alcala v. Woodford, 334 F. 3d 862 at 873 (impeachment evidence would have given jury information to discount testimony). Hart never challenged P&P Officer Lindquist's testimony on how she knew that Petitioner sent the fax (APP 268-277). Hart only asked Lindquist one question when the jury was present (APP 277). Lindquist testified in Petitioner's Federal gun trial (2:10-CR-00173) that she did not know who sent the fax (APP 267).

The only piece of evidence the State had to show there was a change of address, was the alleged fax that Lindquist stated she received from Officer Gilbert that Petitioner faxed to P&P on January 8, 2009 which Respondents were aware of and allowed to be destroyed before trial.

P&P Officer Robert Raymond ("Officer Raymond") was ordered by the court in the state gun preliminary hearing, Clark County Justice Court Case No. 09F00630X, (APP 95) to give Petitioner's parole file to Respondents to give a copy to defense counsel. P&P destroyed the file and did not comply with that court's order. During this preliminary hearing, the "evidence" that Petitioner lived at Shellfish was Hayborn's claim that Petitioner lived with her at Shellfish and that she typed up a letter and brought it to P&P's Officer Gilbert on January 7, 2009. This "evidence" is in direct conflict with the testimony of Officer Lindquist (above).

Noreen Nyikos Demonte ("Nyikos"), Respondents' prosecutor, had the Gun Prelim transcript and knew of the order prior to her "after calendar call." statement (APP 282-284). This order to turn over Petitioner's parole file was also noted in the Chronos (APP 286-287) by Officer Raymond. This is a false statement to the state court by Nyikos.

Nyikos relied on the untruthful testimony of Officer Lindquist to prove to the jury Shellfish was Petitioner's residence. Nyikos made false statements that Petitioner sent a fax and P&P had reasonable suspicion because of the Tip (APP 284, 287, 288) to go to Shellfish. Respondents' testimonial evidence was fabricated. Officer Gilbert, who entered the chrono into P&P's computer never entered the Shellfish address, just "new address" and never testified at trial (APP108). Respondents concealed and destroyed exculpatory evidence; Hart did

nothing to refute this evidence to the jury by presenting evidence he had or could have obtained that Shellfish was not Petitioner's residence. Hart also objected at the preliminary hearing (APP290) said Petitioner "doesn't live there" in reference to the testimony of Metro Officer Zinger's, in the Status Check hearing stated Petitioner was found at Shellfish (APP 341), and later in his closing argument to the jury, stated that Shellfish was Petitioner's residence (APP 285; 8:12). Hart was not defending Petitioner.

Respondents claim that the fax had been destroyed as "part of P&P's normal file disposal policies." According to P&P's policies and procedures, parole files are to be destroyed **after 100 years** after the case has been closed (APP 91).

Hart failed to present evidence to refute that Shellfish was not Petitioner's residence (utility bills (APP 76-81), phone bills, rental agreement, and testimony of resident he shared his home at 5127 Sparkling Vine, Las Vegas, Nevada ("Sparkling Vine"); that Petitioner did not send the fax (no evidence a fax was sent to P&P ); and that Petitioner was arrested at the intersection of Fort Apache and Desert Inn Roads ("Intersection") (APP85) and taken to Shellfish by ROP Officers (APP 86), all of which would have resulted in a reasonable probability of a different outcome had the jury heard this evidence. (APP285-287).

When Hart filed his Motion to Suppress, he used bad law (stalking horse). Hart failed to argue and present evidence to prove that Petitioner was not at Shellfish when he was arrested (Terry stop - APP 85), did not send the fax change of address, was already in custody at Clark County Detention Center at the time the search warrant was issued (APP 100-101), and the tip was false (dispatch records - APP 84-86) giving Metro no basis for reasonable suspicion to believe Petitioner was conducting current criminal activity (armed robbery of coin truck at Timbers' Bar) to obtain a search warrant. Officer Zinger committed perjury during the Preliminary Hearing (APP 288-290, 306-307) stating that the basis for the search warrant was "reasonable suspicion" Petitioner was planning to commit the armed robbery and that Petitioner was present when he executed the search warrant. Officer Zinger committed perjury to Judge Bonaventure at the time of application of the search warrant because he had no "reasonable suspicion" because there was no armed robbery at Timbers (APP132).

Nyikos also knew there was no "reasonable suspicion," even though she stated that was the reason for the search warrant. The "reasonable suspicion" evaporated when the Timbers' tip went to fruition at 11:02 a.m (dispatch records APP 84). See, also, oral arguments in hearing on Motion to Suppress, Day 1 of the State Trial (APP 284, 288) (Nyikos arguing the tip is a reasonable suspicion...knowing she knew the tip to be false and there was no "reasonable suspicion"). Nyikos admitted in the state habeas evidentiary hearing that she knew the tip to be false (APP 291). This "reasonable suspicion" was also the basis for the ruling on Petitioner's 4th Amendment Motion to Suppress and Hart's bad law argument denying same after trial by the trial court (APP305).

Hart testified at the state habeas evidentiary hearing that when asked the question by Gamage that if the items found at Shellfish had been suppressed, how would it have affected Respondents' case. Hart stated that "It would have tubed the case for the State. If the evidence is suppressed they're right out of luck." (APP 297). Hart, when asked about using bad law to argue his Motion to Suppress, he stated he did not know what else he could have cited to or "would have argued to get it suppressed properly." (APP 295). It is clear that at the time of this Motion to Suppress, Hart had valuable, convincing evidence to argue no exigent circumstances, no reasonable suspicion, no Timbers robbery, no parole conditions, and case authority to support these arguments to defend his client, but he did not do anything except use bad law (APP 293).

United States v. Knights, 534 U.S. 112, 121 (2001) (requiring "sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable"). Petitioner told Hart he was not at Shellfish when he was arrested (APP 296).

United States v. Howard, 447 F.3d 1257, 1262 (9th Cir. 2006) (citing to Motley) ruled that before conducting a parole search pursuant his parole conditions (which the State or P&P could not produce because of the conveniently-destroyed parole file), police must have probable cause to believe the parolee lived at that residence.

Motley v. Parks, 432 F.3d 1072, 1079 (9th Cir. 2005) ("condition of parole that permits warrantless searches provides officers with the limited authority to enter and search a house where the parolee resides, even if others also reside there"; and "Nothing in the law

justifies the entry into and search of a third person's house to search for the parolee." Petitioner's conditions of parole were destroyed when P&P destroyed Petitioner's parole file. Hart did not argue, question, or object to any testimony by Respondents' witnesses to testimony regarding such conditions of parole.

The determination of whether or not a parolee lives at a specific address was addressed in Portnoy v. City of Davis, 663 F.Supp.2d 949, 955 (Dist. Court, ED California 2009) (four patterns to determine whether or not probable cause existed).

The findings by the Nevada Supreme Court for this Ground 1.2 are based upon false testimony by Respondents' witnesses (APP 23) and not based on the factual physical evidence in Petitioner's state writ (APP 298-301). The wallet referred to in the Nevada Supreme Court's decision (APP 23) was planted at Shellfish (APP200-201) pictures of wallet on and not on the desk). Metro also searched Shellfish on 1.18.09, 1.21.09, and 1.22.09 (APP185-186). Hart does not refute this evidence (APP 359-360).

Petitioner, in the concurrent filing of his Motion for Discovery and Motion for Evidentiary Hearing in his Federal Writ presented new evidence that Petitioner's parole file never contained the fax (APP187-190), that he did not commit the Colorado robberies (APP164-171), and Petitioner was not at the Shellfish residence but was arrested at the Intersection and taken to Shellfish by ROP officers (APP 85-86). Both of these motions were denied by the District Court based on the same reason as it did for the denial of the writ and ground, that no reasonable jurist would have found that the state court's decision was based on an unreasonable determination of the facts. (APP7-11)

## GROUND 1.3 - TIP

Metro had probable cause at the time of the Tip Report and could have gone to Sparkling Vine which was Petitioner's address in Scope (APP302). NRS 213.151(3). The Tip Report gave Petitioner's residence as "Bradley and Brent." (APP71) Metro did not do this.

Metro stopped Petitioner at 10:52 a.m. at the Intersection, there was no evidence of any current or future criminal activity by Petitioner in his vehicle or on his person; Petitioner was not in possession of a firearm; at 11:02 a.m. it was reported that the coin truck drop had been made; at 11:28 am, dispatch records show the vehicle was at

Shellfish (APP 84-86); Metro email says Tahoe at Shellfish (APP 128). Petitioner was seized **without probable cause** taken at gunpoint to Shellfish by ROP officers knowing that the coin truck drop had been made and tip was false. Hart never presented any evidence that these statements were false or present a Terry argument in his Motion to Suppress, Terry v. Ohio, 392 US 1(1968); Wong Sun, et al v. United States, 371 U.S. 471, 487-88 (1963).

Officer Zinger stated in his telephonic search to Judge Bonaventure an informant stated that Petitioner was planning an armed robbery and there was stolen property and other items at Shellfish; Zinger lied to judge (APP 71, 131-132). At the time of application of the search warrant, Officer Zinger and other Metro and P&P officers knew that the tip was false. Petitioner was in custody at CCDC at the time of this application (APP 100-101). Metro had no reasonable suspicion, no warrant exception, and there were no exigent circumstances of current criminal activity by Petitioner because there was no armed robbery of Timbers (APP 85-86).

At the state trial, Officer Zinger testified the tip was to go to Shellfish (APP 322). Hart could have, once Officer Zinger admitted this, impeached his testimony with the Tip Report (APP 71) and dispatch records (APP 85-86), but Hart did nothing.

Officer Zinger also committed perjury in his Declaration of Arrest of Haybornwhen he stated that "the information which led to the service of the search warrant was given to us by a reliable citizen source of information. Much of the information received was verified both before and during the service of the search warrant. The citizen source advised that the reason for knowing all the information was due to smoking methamphetamine on multiple occasions with Hayborn." (APP 88-89). This is not true; see Tip Report (APP 71).

Because Petitioner was on parole at the time of this incident, Metro and P&P must articulate a particularized reasonable suspicion that Petitioner was engaged in current criminal activity and subject to a search clause in order to show an exception to the warrant requirement. United States v. Knights, 534 U.S. at 121. Metro could not show reasonable suspicion; the tip was false and they knew it; no exception existed.

Petitioner was already in custody at CCDC (APP 100-101) at the time Officer Zinger applied for the search warrant (1425 hours).

Officer Zinger falsely testified that he arrested Petitioner at Shellfish at 1400 hours (APP 306-307). Officer Zinger's false testimony was a violation of Napue v. Illinois, 360 U.S. 264, 269) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend")

Respondents allowed Officer Zinger to commit perjury, thereby suborning same. Nyikos knew the tip was false (APP 291). Nyikos also knew about the Tip Report and made a false statement about the persons named in the report (APP071, 291). Because Nyikos supported this false testimony, the information was even more material because she elicited the basis for the tip. See e.g. Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) (information is especially material when it is contrary to the position taken by the prosecutor). Hart knew about the dispatch records, impound report, and Petitioner's vehicle being stopped (APP 278-284, 308-309, 330, 338, 344-348). At trial, had Hart refuted Petitioner was not at Shellfish by submitting the Tip Report, dispatch records, the temporary custody record (APP 84-86, 100, 104) to the jury, and impeached Officer Zinger's testimony that the tip was known to be false (conceded by Nyikos, APP 291-292), there is a reasonable probability of a different outcome at trial.

In closing arguments at trial, Hart egregiously and fraudulently argued that the tip was related to the Colorado robberies and was a credible tip because the police did find evidence of the robberies at Petitioner's house (APP285). Hart's false statements about the Colorado robberies, stating that Shellfish was Petitioner's residence, and the tip had a substantial or injurious effect upon the jury. Kotteakos v. United States, 328 U.S. 750, 776 (S.Ct. 1946). Although applied to prosecutors, since the standard is the same, the test is whether the arguments manipulated or misstated the evidence. Darden v. Wainwright, 477 US 161, 181 (1986).

Hart caused extreme prejudice to Petitioner and denied him due process and a fair trial in violation of Petitioner's 6th and 14th Amendment rights. There is a reasonable likelihood of a different result at trial had Hart not made these false and misleading statements against his own client in his closing argument.

Hart's arguments at closing and Officer Zinger's testimony of photos on the wall in Hayborn's bedroom (APP 303-304, 351) were not supported by evidence in the record and were misconduct.

Nyikos argued in the state habeas evidentiary hearing's oral argument, the robbery logs evidenced the Timbers' surveillance went to fruition before P&P was contacted (APP 291-292). **The court ordered those police logs to be filed so that they would get into the record but Nyikos ignored the court's order** (APP 310-311). Not following court orders seems to be a pattern with Respondents.

The knowing use of false evidence by a state falls under the 14th Amendment. The same applies even if a state is not soliciting false evidence but allows it when it appears. Napue v. Illinois, 360 U.S. 264, 269-270.

In Jones v. Wood, 114 F.3d 1002, 1010-1011, the 9th Circuit noted that a "strategic decision.....must be a *reasonable* strategy." The 9th Circuit in Jones cited to Strickland, 466 U.S. at 691, 104 S.Ct. at 2066-67, where the this Court stated "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all *1011 circumstances, applying a heavy measure of deference to counsel's judgments," and "inquiry into counsel's conversation with the defendant may be critical to a proper assessment of counsel's investigation decisions..." and that "Taking Jones's allegations as true, he establishes that his lawyer's representation was deficient."

In Jones, the test of physical evidence would be sound strategy because it would establish the defendant's innocence. The failure of counsel as a "strategic decision" not to test the physical evidence, the 9th Circuit found would not be sound and fell below the *Strickland* level. Id. at 1011. Because Hart did not present the physical evidence to show Petitioner was innocent (APP 338-339), was not arrested at Shellfish (APP 84-86), his fingerprints were not on the gun (APP 60, 62) Respondents' witnesses claim Petitioner used to commit the Colorado robberies, no DNA evidence, that he was taken to Shellfish by ROP officers, and was in custody at CCDC (APP 100) when Officer Zinger stated he read Petitioner his Miranda rights at 1400 hours at Shellfish (APP 307), Hart's actions fell below the Strickland level. Had Hart argued these facts and evidence and impeached Officer Zinger's testimony, the "evidence" of the gun and stolen property found at Shellfish would have been suppressed. Hart had the Colorado

evidence (sketch of Hewett's assailant and fingerprints from both robberies) to refute the testimony of Hewett and Margaret Bannatyne (Rabbit Hole robbery) but he did not use that evidence.

"Government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense" Strickland, 466 U.S. at 686. At the time the State appointed Hart to Petitioner's case, the State was aware that Reiger was a suspect. In order to get a "win," they appointed Hart to collude with them to convict Petitioner. Hart and Respondents knew that Durango Police Department ("DPD") was looking for Reiger as a suspect in the Colorado robberies (emails between DPD and Metro - APP 218). Nyikos knew about Reiger's plea deal because Nyikos was one of the prosecutors in his case (APP220).

The findings by the Nevada Supreme Court for this Ground 1.3 that Hart made a "tactical decision" and determined there was "substantial evidence of Combs' guilt" (APP 24) are based upon an unreasonable determination of the facts, perjury, and falsified evidence known by Respondents and Hart.

The District Court stated in its Order (APP10) denying Petitioner's Federal Writ that (1) "Furthermore, Zinger did not testify that he served the search warrant upon petitioner at 9421 Shellfish Court," and (2) "Petitioner was not arrested on suspicion of planning to rob a coin truck at Timbers." These statements twists Petitioner's facts (1) Petitioner stated that Zinger's testimony was that he was present at Shellfish when the search warrant was served (APP290, 307), and (2) that this was the reason they were looking for Petitioner (APP 289) and why they arrested Petitioner at the Intersection. Hart did not refute those facts with evidence he had.

Ground 1.8 - Conflict of Trial Counsel

This claim was denied by the Nevada Supreme Court in its Order of Affirmance (APP22-23) stating that Petitioner did not prove Hart's representation of him was deficient and that it fell below an objective standard of reasonableness, "and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different." (Citing to Strickland v. Washington, 466 U.S. at 687-88, 697). The facts as stated by the Nevada Supreme Court are unproven and not true (associate of Combs), and are an unreasonable determination of the

facts. The fact that Reiger was a suspect in Colorado was known by Hart because he had the emails (Emails, APP 218, 314) and the arguments of post-conviction counsel, Christopher Oram (Petitioner's state habeas appellate counsel after removal by the Nevada Supreme Court of Gamage for misconduct in his representation of Petitioner), also stated that Reiger was a suspect in the Colorado robberies, that Hart had a conflict, and Respondents made false representations of when Hart concluded his representation of Reiger and were ignored by the Nevada Supreme Court. The Nevada Rules of Professional Conduct Rule 1.9 is related to former clients and confidentiality. (APP 317-323).

The ABA specifically states in its Rule 1.7 at [6], "Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." Contrary to the state habeas court's order (APP 327), Hart was still representing Reiger at the time he was representing Petitioner. Reiger was a suspect in the Colorado robberies, and Hart was in conflict because he had knowledge of information on other criminal cases given to Metro for leniency and Reiger was given a plea deal (APP 225).

Even though this claim was exhausted in the Nevada Supreme Court (APP 22-23), the District Court denied allowing the claim to move forward stating that the claim was unexhausted (APP 325). This is plain error. The District Court further denied Petitioner's IAC claims 1.1, 1.4 through 1.14 and 1.16 through 1.20 because they were not raised on appeal to the Nevada Supreme Court. As stated in this Order, Petitioner argued under Martinez v. Ryan that Petitioner had ineffective assistance of initial post-conviction habeas counsel, Gamage (who was remove for professional misconduct in Petitioner's case and later suspended for five years by the State Bar of Nevada, also for his professional misconduct in representing his clients during the years he also represented Petitioner). These claims were not raised by Gamage.

The District Court erred in its ruling that "Martinez specifically does not apply to an appeal from the denial of a state post-conviction habeas corpus petition" and, therefore, did not show cause to excuse any procedural default of the claims under Ground 1 of Petitioner's writ. Gamage was appointed habeas counsel to represent Petitioner in his initial post-conviction habeas petition.

The constant twisting of facts in Petitioner's case to support Respondents' facts and the decision of the Nevada Supreme Court should be and is of utmost concern to Petitioner's protections under the 6th Amendment and under AEDPA.

Ground 1.15 - Julie Hewett's Identification
(Colorado Sorrel Sky Gallery Robbery)

Hewett testified she did not pick anyone in the first line up for the Sorrel Sky Gallery robbery (APP328). She lied and Hart did not impeach Hewett's testimony. Hart had the evidence (APP346). Hart asked DPD Officer Brammer at trial for the first line up photos where Hewett picked out Barker (APP 329). Hart never compared Petitioner's line-up picture with that of Lorenzo Barker's during trial to show the jury and to have them make a credible determination of Hewett's testimony.

During trial, Hewett was used to demonstrate that Petitioner had knowledge the jewelry was stolen because he was the assailant who robbed Hewett. Hart failed to impeach Hewett with physical evidence (physical description and fingerprints and sketch of assailant APP 329) which he possessed. Hart was given Colorado discovery by Nyikos (APP 346). Petitioner just recently obtained that discovery from Colorado. The fingerprints taken from the gallery were not Petitioner's and the sketch bears no resemblance to Petitioner.

In Kyles v. Whitley, 514 U.S. 419, the court reiterated its ruling in United States v. Agurs, 427 U.S. 97 (1976) that "the effective impeachment of one eye witness can call for a new trial even though the attack does not extend directly to others" 514 US at 445. Once materiality is established, no further harmless error analysis is necessary and evidence is material if it impeaches a witness crucial to the prosecution's case. [Emphasis added]; Silva v. Brown, 416 F.3d 980, 986 (9th Cir. 2005) (citing Banks v. Dretke, 540 U.S. 668, 698 (2004)).

This same argument is made for the testimony of Margaret Bannatyne ("Bannatyne"), the victim of the Rabbit Hole robbery, Respondents' claim Petitioner had "knowledge and for which he was charged and convicted of. Again, Hart had the evidence to impeach Bannatyne's testimony but did not use it. Bannatyne identified Price as her assailant in her lineup, but Hart did not show the jury the picture of Price to allow the jury to make their determination of

credibility (APP 330-331). There is also Bannatyne's statement after the robbery where she describes her assailant (APP 332-333), which Hart also did not use but had in the Colorado discovery (APP 346).

Officer Brammer's report states that Hewett described her assailant as olive skin tone and possibly Hispanic. Hewett changed her description at the preliminary hearing and denied she ever told police the robber was possibly Hispanic and had olive toned skin (APP 334, 335). Also, at no time did Hewett testify that her assailant had very noticeable scars on his face, which she conceded at trial (APP336). Hewett's testimony was a lie and impeachment could have occurred by Hart. Hart had this report (APP335) and was reading from it in his closing argument.

The fact Hewett picked someone else (APP329) is also a factor to weigh against her identification and Hewett had at least one meeting with Metro. White v. Helling, 194 F. 3d 937, 942-44 (8th Cir. 1999) (found a Brady violation in a 27 year old murder case because the Government did not disclose that its chief eyewitness had originally identified someone else and identified the defendant only after meeting with the police).

In Beaudreaux v. Soto, No. 15-15345, 2017 BL 328927 (9th Cir. Sept. 18, 2017, the court determined under Strickland Beaudreaux's counsel was ineffective for failing to object to or move to exclude the testimony of an eyewitness. The court believed that because of the importance of this witness's testimony, the chance for success in a suppression motion, and absence of any plausible reason for not filing a suppression motion, "a reasonably proficient attorney would have filed the motion."

Petitioner told Hart that he was in Las Vegas at the time of the Sorrel robbery; that he purchased a vehicle and the evidence was a bill of sale for the Tahoe (his vehicle) dated November 17, 2008 (APP 308-309, 338, 344, 346-347), but this evidence, too, went missing though it was allegedly investigated by Nyikos and Hart. Hart never investigated this information. Petitioner told Hart that after he left Las Vegas on November 17, 2008, he drove to Sacramento to be with family and friends. Hart also never investigated this fact to corroborate Petitioner's whereabouts. Hart never called alibi witnesses at trial to show that Petitioner was in California or for the purchase of the Tahoe (APP 338, 344-348).

The Nevada Supreme Court's decision was based upon an unreasonable determination of the facts (APP 25) because Respondents, Hart, and Gamage withheld Petitioner's evidence he presented in his state writ.

Ground 7 - Bad Acts

In the bad actions motion, the State was required to prove by clear and convincing evidence that the defendant committed the collateral offense in accordance with state law (APP312-313).

The individuals (who were also suspect in the Colorado robberies) had "knowledge" that the property at Shellfish was stolen according to Metro (APP 128). Hart had this email (APP 106, 128, 314) but never investigated or used this evidence at trial to show others had knowledge of the stolen property, including Hayborn, to cast doubt on Respondents' claims. Hayborn was given leniency in the form of dismissals/denials in her three convictions for her false testimony in Petitioner's Federal case and in the State's pre-trial proceedings (APP32-41).

Hart had the Colorado discovery (APP 346). The fingerprint evidence alone would have impeached both witnesses and Petitioner did not have the requisite "knowledge" of the stolen property. Hart never impeached Hewett's testimony with the fingerprint evidence or the sketch provided by Hewett (APP329) though the evidence was in his possession. Hart also never impeached Bannatyne's testimony with her report describing her assailant's physical description or the fingerprint evidence.

The Nevada Supreme Court's decision was an unreasonable determination of the facts (APP 24-25) based upon falsified testimonial evidence given and physical evidence withheld to show Petitioner's residence was not Shellfish and he was not found there, others, including Hayborn, had "knowledge" because the stolen property was in her residence, the Colorado fingerprint evidence, and the sketch of Hewett's assailant (APP 329). **The Colorado cases have been dismissed** (APP 164-171).

The District Court ruled that Ground 7 was without merit in light of Alberni v. McDaniel, 458 F.3d 860, 867 (9th Cir. 2006) that no clearly established federal law exists. (APP 18). What the District Court failed to acknowledge is the fact that the Colorado cases were

dismissed and Petitioner was never charged nor convicted of the Colorado robberies and, therefore, had no "knowledge" of stolen property (APP 164-171).

Ground 8 - Insufficient Evidence

What the Nevada Supreme Court relied upon in its ruling (APP21-27) was fabricated evidence. The Nevada Supreme Court's reliance on the false testimony of Respondents' witnesses to prove there was "substantial evidence" to support Petitioner's conviction is an unreasonable determination of the facts in this case given Petitioner's evidence.

In Strickland v. Washington, 466 U.S. 668, 696, this Court stated:

> "...the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." [Emphasis added.]

There was a definite "breakdown in the adversarial process" and "fundamental fairness" was non-existent. Hart failed and refused to argue and present the evidence he possessed or could have possessed to prove Petitioner was innocent (APP 338-349), including alibi evidence.

In Jones v. Wood, 114 F.3d 1002, 1011 (9th Cir. 1997), "The 'prejudice' prong of the *Strickland* test is also satisfied because raising the specter of Busby's involvement in the murder attacks the heart of the prosecution's case....failing to investigate Busby's potential involvement to exhaustion was a grave error."

Taking Petitioner's allegations as true, Hart's representation of Petitioner was completely deficient. Hart's failure to present the evidence of his actual whereabouts, his residence, impeached Respondents' witness testimony, and that others knew of the stolen property at Shellfish, including Hayborn, Price, and Reiger (APP 128), which could have proven Petitioner's innocence, was "a grave error." Hart could not point the finger at Reiger because off his conflict of

interest.

In Jones, the defendant insisted that the physical evidence be tested because it would help establish his innocence and the failure of counsel as a "strategic decision" not to test the physical evidence, the 9th Circuit found that counsel's decision not to test the physical evidence fell below the Strickland level. Id. at 1011 [Emphasis added]. Petitioner insisted on Hart presenting the physical evidence (DNA and fingerprints), but Hart refused. This also falls below the Strickland level.

Strickland v. Washington, 466 U.S. 668, 690-91, 692, 698 "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Petitioner has repeatedly identified all the acts or omissions of Hart.

"In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691.

"Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. " Id at 692

"In Cuyler v. Sullivan, 446 U. S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest." Id at 692.

"An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is

challenged. Since fundamental fairness is the central concern of the writ of habeas corpus." Id at 697-98.

Campbell v. Reardon, 780 F. 3d 752 (7th Cir. 2015), addressed the effects of trial counsel's ineffectiveness and prejudice to the defendant based on prejudice and performance when trial counsel does not present witnesses or evidence, fails to properly investigate, fails to impeach witnesses, and what is considered trial counsel's "strategic decisions." The 7th Circuit Court's determination that if defense counsel did not investigate the witnesses, then the defendant's counsel performed deficiently under Strickland. Id at 773.

Lindstadt v. Keane, 239 F. 3d 191, 204-205, (2nd Cir. 2001). The key issues in this case of IAC and the prejudicial impact which was caused by the IAC were the daughter's statement to the police, defense counsel made no challenge to the physical evidence the prosecution produced, defense counsel's gratuitous comments, and defense counsel called two of defendant's probation officers where there was no corroboration of their testimonial evidence. In Petitioner's case, Hart did not make any argument, present evidence to refute or impeach the witnesses' testimony, or present alibi or other evidence that Petitioner did not send a fax, Shellfish was not his residence, he was not planning an armed robbery, he was not arrested at Shellfish and not hiding behind a staircase (APP 124), did not commit the Colorado robberies, and did not impeach the State's witnesses. Cumulatively, Hart's actions fell completely outside the range of professionally competent assistance.

This Court opined in California v. Trombetta, 467 U.S. 479-481, 485; 104 S.Ct. 2528; 81 L.Ed.2d 413 (U.S. 1984) that "The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever the government witnesses lie under oath. Napue v. Illinois, 360 U.S. 264, 262-272 (1959; see also Mooney v. Holohan, 294 U.S.103 (1935). But criminal defendants are entitled to much more than protection against perjury. A defendant has a constitutionally protected privilege to request and to obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. Brady v. Maryland, 373 U.S., at 87. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. United States v. Agurs, 427 U.S., at 112. The prosecution must

also reveal the contents of plea agreements with key government witnesses, see Giglio v. United States, 405 U.S. 150 (1972), and under some circumstances may be required to disclose the identity of undercover informants who possess evidence critical to the defense. Rovario v. United States, 353 U.S. 53 (1957)." *Id. at 485*

This Court further stated that "Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." (citing to Powell v. Alabama, 287 U.S. 45, 68-69; 53 S.Ct. 55; 77 L.Ed. 158 (1932) "[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not kow how to establish his innocence."). Id at 1317. All these case principles and constitutional protections are thrown out the window when trial counsel (Hart) and habeas counsel (Gamage) were ineffective by not defending their client (Petitioner) and colluding with the prosecutor (Respondent) to suppress the evidence to prove the defendant's innocence, all in an attempt for Hart to protect his other and former client and for Gamage to protect Hart.

When you combine the above with the protections the 6th Amendment is supposed to afford a defendant whose trial counsel has failed him at the pre-trial, trial, and direct appeal levels, and the protections this Court afforded defendants in initial post-conviction proceedings when habeas counsel is appointed under Martinez v. Ryan, 132 S.Ct. 1309, 1318 (2012) ("...when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d *1319 931 (2003) (describing standards for certificates of appealability to issue)."

A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system Martinez v. Ryan, 132 S.Ct. at 1317.

Wiggins v. Smith, 539 US 510, 523 (2003), this Court addresses a violation of a 6th amendment right to counsel on a failure to investigate under 28 U.S.C. 2254. This Court's determination of "reasonable professional judgment" was as follows: "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," Strickland, 466 U. S., at 688, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," id., at 689 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight")."

In light of the evidence that Hart had, but failed to present to the jury to prove Petitioner's innocence, which Petitioner presented in his state and federal writs, as well was the additional "new evidence" that Petitioner presented to the District Court was powerful and clearly shows Petitioner was innocent of the charges he was convicted of. Hart's conduct and performance was highly incompetent, prejudicial, and inadequate to the defense of Petitioner.

The ABA's Model Code of Professional Responsibility, Canon 7, EC7-19, 7-24, 7-26, and 7-27, provides for the defense counsel to "advocate for his client zealously, to secure and protect the client's legal rights, "not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence," suppress evidence he has a legal obligation to produce, and not use fraudulent, false, or perjured testimony evidence.

Lisenba v. California, 314 U.S. 219, 236, 237; 62 S.Ct. 280; 86 L.Ed. 166 (U.S. 1941) states that "If, by fraud, collusion, trickery, and subordination of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law." *Id. at 237*

The court in Lisenba, 314 U.S., at 236 also stated that "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of

justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

To not violate a defendant's 14th Amendment right to due process, the preservation of evidence material to the defense must be preserved. In Arizona v. Youngblood, 488 U.S. 51, 54; 109 S.Ct. 333 335; 102 L.Ed. 281, 287 (1988), after respondent was found guilty as charged, the Arizona Appeals Court reversed the judgment of conviction, stating "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process." (Also citing State v. Escalante, 153 Ariz. 55, 61; 734 P.2d 597, 603 (App. 1986)).

California v. Trombetta at 480-481, "The Due Process Clause of the 14th Amendment to the United States Constitution requires the state to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment." (Citing to United States v. Agurs, 427 U.S. 97 and to Brady v. Maryland, 373 U.S. 83 (1963)). This Court also stated that the 14th Amendment requires the state to preserve the "potentially exculpatory evidence on behalf of defendants." *Id. at 481.* [Emphasis Added.]

This Court goes on to state that "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with the prevailing notions of fundamental fairness. We have long interpreted this fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.' United States v. Valenzuela-Bernal, 458 U.S. 858, 867 [***420] (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." California v. Trombetta at 485.

"Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. Cf. *United States v. Valenzuela-Bernal, supra, at 870.* Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices. In nondisclosure cases, a court can [*487] grant the

defendant a new trial at which the previously suppressed evidence may be introduced. But when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing -- as the California Court of Appeal did in this case -- the State's most probative evidence." California v. Trombetta 467 U.S. at 486-487.

"To meet this standard of constitutional materiality, see United States v. Agurs, 427 U.S. at 109-110, evidence must both possess exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S., at 489.

The 9th Circuit Court of Appeals in the case of Chapman v. United States, 524 F.3d 1073; 2008 U.S. App. Lexis 9700 (9th Cir. 2008) dismissed an indictment against three defendants after the government admitted it did not disclose discovery documents to defense counsel, in violation of Brady and Giglio. The prosecution's failure to produce the documents and their agreement to produce the documents availed the 9th Circuit to uphold the district court's dismissal of the indictment.

The Constitution prohibits the deliberate fabrication of evidence whether or not the officer knows that the person is innocent. Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir.2001).

The basis for the Nevada Supreme Court's decision to deny Petitioner's claim, as outlined by the District Court in its Order (APP19-20) and also its reason for denial of Petitioner's claim and Federal Writ was Nevada's state law involving stolen property and the testimony of Respondents' witnesses testifying about what evidence they found at Shellfish, some of which was not of record, along with false testimony from Respondents' Colorado witnesses, because the evidence they testified to and/or presented was false and those Colorado cases were dismissed (APP 164-171). Petitioner was never charged nor convicted of the Colorado robberies.

The rulings by both the Nevada Supreme Court and District Court on this ground are based on an unreasonable determination of the true facts in this case and in violation of 28

U.S.C. §2254(d)(2) and Petitioner's rights under the 6th and 14th Amendments.

Abuse of Discretion and Error - District Court

The District Court in its Order (APP2-20) on Petitioner's Federal Writ, was not only an abuse of discretion, but an unreasonable determination of the facts in light of the evidence presented (new and old) by Petitioner under 28 U.S.C. 2254(d)(2) and was not correct in its procedural ruling.

Petitioner, in his opposition to motion to dismiss, reply to Respondent's answer and motions for discovery and evidentiary hearing, and reply to Respondents' opposition to Petitioner's motions (ECF 72, 112, 113, 114, and 122 respectively) laid out all facts supporting his Federal Writ's claims and evidence in support of his claims.

The District Court blatantly either ignored this evidence, made false statements about the facts, or twisted Petitioner's facts. The District Court also ignored Petitioner's actual innocence claim. Teleguz v. Pearson, 689 F.3d 322, 326-327 (providing supporting evidence of Schlup gateway innocence claim and that may only award habeas relief if the resulting state court decision is based on 28 U.S.C §2254(d)), citing to Schulp v. Delo, 513 U.S. 298; 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

The District Court denied Petitioner an evidentiary hearing stating that "...petitioner's arguments are based upon misinterpretations, mixtures of different documents, and taking documents out of context....Petitioner has given this court no reason to believe that discovery or an evidentiary hearing would develop facts that would show that he is entitled to relief." citing to Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) and 28 U.S.C. §2254(e)(2)(B).

The District Court goes further to state at Footnote 9 that Petitioner had three opportunities to "develop the facts" which were the motion to suppress, the trial, and the state habeas writ. The only opportunity to develop facts by Petitioner was at the time of filing his state habeas writ which evidence was ignored by the trial court and Petitioner's appointed habeas counsel, Gamage. Petitioner had no control over what Hart argued in his

Gamage. Petitioner had no control over what Hart argued in his motion to suppress and conducting the trial. In fact, as the state court, Nyikos, and Hart were debating the facts of how P&P and Metro determined Shellfish was Petitioner's residence, Petitioner asked the state court if he could speak, and the state court rejected his request (APP 284) regarding the fax and residence issue and complete false statements by Nyikos regarding the document at the gun preliminary hearing) These are highly disingenuous statements and rulings made by the District Court.

With regard to the denial of Petitioner's Federal Writ, the District Court stated "The court rejects his arguments for the same reasons why the court has rejected his motions for discovery and for an evidentiary hearing. Petitioner bases his arguments on taking documents out of context and then misinterpreting those arguments. Petitioner gives the court no reason to believe that the state courts have made findings of fact based upon unreasonable interpretations of the evidence presented. See 28 U.S.C. §2254(d)(2)."

The District Court has denied Petitioner a "full and fair" hearing to further develop his facts which development was denied Petitioner at trial by the ineffective assistance of Hart, and at the state habeas hearing due to the ineffective assistance of Gamage, to allow Petitioner to support his claims denying him his constitutional rights. Townsend v. Sain, 372 U.S. at 313, 316; 83 S.Ct. 745. The decisions by the District Court and the Nevada Supreme Court were based on an unreasonable determination of the facts under 28 U.S.C. §2254(d)(2). Taylor v. Maddox, 366 F.3d 992, 1001(9th Cir. 2004). There was no "semblance of a full and fair hearing" because the Nevada Supreme Court did not decide the issues of fact tendered by Petitioner because those facts and evidence were not included brought up in the evidentiary hearing nor was Petitioner's state writ included in the appendix of the state habeas appeal due to the ineffective assistance of habeas counsel, Gamage. Townsend v. Sain, 366 F.3d at 314.

Petitioner has given the District Court sufficient evidence to refute Respondents' facts. The District Court is taking the evidence that Petitioner has presented in his state and federal writs and twisting them out of context or falsifying the facts to support Respondents' case.

The District Court erred in not only denying Petitioner his Federal Writ, but also his certificate of appealability (APP 2-20).

Petitioner refuted the District Court's rendition of Petitioner's claims and facts, errors and abuse of discretion in his Request for Certificate of Appealability filed in the 9th Circuit, making a "substantial showing" as required under 28 U.S.C. § 2253(c)(2). The 9th Circuit just rubber-stamped the District Court's decision by denying Petitioner's Certificate of Appealability for the same reasons (APP 1).

## CONCLUSION

The evidence and facts claimed by Respondents of the events which took place on January 8, 2009 was a violation of Petitioner's 14th Amendment right to due process of law and a fair trial and a violation under 28 U.S.C §2254(d)(2) based on an unreasonable determination of the facts. Petitioner's 6th Amendment right to competent defense counsel and state habeas counsel have also been violated. The courts in Petitioner's cases have ignored, twisted, and falsified evidence, and prevented Petitioner from further developing additional facts to further prove what Petitioner has known was a wrongful conviction and his innocence. Therefore, this Petition for a Writ of Certiorari should be granted.

April 1, 2020

Brett Combs

BRETT COMBS, in pro per

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRETT COMBS — PETITIONER
(Your Name)

VS.

STATE OF NEVADA, ET AL. — RESPONDENT(S)

**PROOF OF SERVICE**

I, GALE SANDERS, do swear or declare that on this date, APRIL 15, 2020, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Allison Herr, State of Nevada, Office of Attorney General, 555 E. Washington Ave., Ste. 3900, Las Vegas, Nevada 89101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on APRIL 15, 2020

(Signature)