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PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District Kansas
Name (under which you were convicted): Brent L. Alford	Docket or Case No.: 20:3003
Place of Confinement: EDCF - SE Unit	Prisoner No.: 57845
Petitioner (include the name under which you were convicted) Brent L. Alford v.	Respondent (authorized person having custody of petitioner) Sam Cline
The Attorney General of the State of	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: 18th Judicial District, District Court, Sedgwick County Kansas

   (b) Criminal docket or case number (if you know): 93 CR 401
2. (a) Date of the judgment of conviction (if you know): June 1993

   (b) Date of sentencing: August 1993
3. Length of sentence: Hard 40 - Life
4. In this case, were you convicted on more than one count or of more than one crime? Yes ☑ No ☐
5. Identify all crimes of which you were convicted and sentenced in this case: First Degree murder, aggravated Kidnapping, unlawful possesion of firearm.
6. (a) What was your plea? (Check one)

   (1) Not guilty ☑ (3) Nolo contendere (no contest) ☐

   (2) Guilty ☐ (4) Insanity plea ☐

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(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☑ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☑ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☑ No ☐

9. If you did appeal, answer the following:

(a) Name of court: Kansas Supreme Court

(b) Docket or case number (if you know): 94-71633-S

(c) Result: affirmed

(d) Date of result (if you know): June 1995

(e) Citation to the case (if you know): 257 Kan. 830

(f) Grounds raised: Sufficiency of evidence

(g) Did you seek further review by a higher state court? Yes ☐ No ☑

If yes, answer the following:

(1) Name of court: N/A

(2) Docket or case number (if you know):

(3) Result:

(4) Date of result (if you know):

(5) Citation to the case (if you know):

(6) Grounds raised:

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☑ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: 18th Judicial District, Sedgwick Co. Kansas

(2) Docket or case number (if you know): 93 cr 401

(3) Date of filing (if you know): July 1996

(4) Nature of the proceeding: K.S.A. 22-3504 Illegal Sentence

(5) Grounds raised: Sentencing error

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☑

(7) Result: denied

(8) Date of result (if you know): August 1996

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: 18th Judicial District, Sedgwick Co. Kansas

(2) Docket or case number (if you know): 97 cv 3745

(3) Date of filing (if you know): December 1997

(4) Nature of the proceeding: K.S.A. 60-1507 habeas corpus

(5) Grounds raised: Ineffective assistance of counsel, Confrontation claue issues, Multiplicity, and sentencing issues.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☑

(7) Result: summarily denied

(8) Date of result (if you know): March 1998

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: 18th Judicial District, Sedgwick Co. Kansas

(2) Docket or case number (if you know): 07 CV 3208

(3) Date of filing (if you know): September 2007

(4) Nature of the proceeding: K.S.A. 60-1507 habeas corpus

(5) Grounds raised: Ineffective assistance of counsel at sentencing

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☑

(7) Result: denied as successive

(8) Date of result (if you know): January 2008

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☑ No ☐

(2) Second petition: Yes ☐ No ☑

(3) Third petition: Yes ☑ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: no final adjudication of claims, denied right to appellate counsel and jurisdiction issue. case no. 97 CV 3745. No appealable order ever entered.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Actual Innocence; both freestanding and via claims of Ineffective assistance of counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Trial attorney failed to follow through with mental evaluation authorized by the court (which he asked for) failed to investigate for mental defense. Out of court statement was admitted without prior opportunity for cross examination and was unreliable, not firmly rooted. Substantive and procedural competency violations. Sentencing, double jeopardy (see exh. I, J, K, L and G)

(b) If you did not exhaust your state remedies on Ground One, explain why: Incompetent, The issue was discovered by another inmate (see exhibit #D.)

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO: Inordinate Delay / unjustifiable

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The State court refuse to rule on petitioner original post trial motion, from the denial of his asserted 60-1507 petition, motion for reconsideration filed on April 1st 1998 still pending, case no. 97 CV 3745. motion / files / record. (see exh. #A, E, F)

(b) If you did not exhaust your state remedies on Ground Two, explain why: N/A

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☑ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Motion to reinstate appeal

Name and location of the court where the motion or petition was filed: 18th Judicial District, Sedgwick County Kansas

Docket or case number (if you know): 97 CV 3745

Date of the court's decision: November 2015

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☑

(4) Did you appeal from the denial of your motion or petition?

Yes ☑ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☑ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Kansas Court of Appeals

Docket or case number (if you know): # 114,852

Date of the court's decision: October 2017; review denied Feb. 2018

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: wrote letter to District court Judge James Fleetwood. (see exhibit #H)

GROUND THREE: Double Jeopardy

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): (see attached memorandum at page 22)

(b) If you did not exhaust your state remedies on Ground Three, explain why: brought about by the inordinate delay in the processing of petitioners original 1507

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

_____

_____

GROUND FOUR: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

13. **EXHAUSTION** - Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☐ No ☑

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: Actual Innocence, ~~[illegible]~~ and double jeopardy. Petitioner Incompetent

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: (see a above). State court refusing to rule on original 1507, and then stating subsequent motions successive, procedure not adequate.

14. **SUCCESSIVE APPLICATIONS** - Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☑ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. please see prior Federal petitions at Supporting facts, pg "C" in memorandum.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☑ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. Sedwick County District court, case: 2019-cv-1994, K.S.A. 60-1507. Issues; Actual innocence, ineffective assistance of counsel, procedural + substantive competency claims.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Susan Lind

(b) At arraignment and plea: Eric Godderz

(c) At trial: James K. Craig

(d) At sentencing: James K. Craig

(e) On appeal: Steven R. Zinn

(f) In any post-conviction proceeding: Micheal Whalen

(g) On appeal from any ruling against you in a post-conviction proceeding: Micheal Whalen

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☑

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

The one year statute of limitations does not bar the instant petion because the petitioner has a properly filed pending motion pursuant to 2244(d)(2). The motion was timely filed when the state court dismissed petitioner original 1507 (see exh. #A). The state declined multiple times to enter an order, first, when it was filed; again over 2 years later in August of 2000; The latest in november of 2015, when they flat out refused, without any legal justification (see exh. #F) to rule on merits.

Petitioner would ask this court to look at its recent decision in Strong V. Heimgarter, 2019 U.S. Dist. Lexis 85224 (May 21st); also see Strong V. Hrabe., 750 Fed. Appx. 731, 2018 U.S. App. Lexis 29501 (10th Cir. Oct, 2018). to support his claim of a properly filed motion, which is similar as the motion pending for 35 years in Strong. The principles in Strong should apply equally here.

The motion in the instant case was filed on April 1st, 1998 and still remains pending as of the filing of this petition, over 20 years.

*also see Actual Innocence as an equitable exception.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: unconditional release

or any other relief to which petitioner may be entitled.

Brent Alford pro se
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

Brent Alford
Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRENT L. ALFORD,)

PETITIONER,)

vs.) Case No. _____

SAM CLINE, Warden,)

RESPONDENT.)

MEMORANDUM

(In Support Of The Accompanying 28 USC 2254 Motion)

Comes now the Petitioner Brent L. Alford, pro se, with this Memorandum In Support Of The Accompanying 28 U.S.C. 2254 Motion. And states:

STATEMENT OF FACTS

In Sedgwick County District Court Case No. 93 CR 401, the petitioner was charged with first degree murder, aggravated kidnapping, two counts of kidnapping, and criminal possession of a firearm.

The petitioner's jury trial was held between June 28, 1993 and July 7, 1993. Petitioner was initially represented by Sedgwick County public defender Susan Lind and Eric Godderz. On April 28, 1993, attorney Lind contacted a Dr. Neil Roach by phone regarding the fee for a psychological/psychiatric evaluation of petitioner. On May 12, 1993, attorney Godderz orally moved the court for a psychiatric evaluation of the petitioner. Judge Paul Clark granted the motion the same day, appointing Dr. Gary Merrill to perform the evaluation. On May 14, 1993, James K. Craig entered his appearance, replacing Lind and Godderz. On May 19, 1993, attorney Craig orally moved the court for an additional psychiatric examination and for completion of the previously ordered exam. Somehow the court-ordered evaluations, to determine whether petitioner suffered from a mental disease or defect, was left unfulfilled.

On July 7, 1993, petitioner was found guilty of the crimes charged; with the exception of the two kidnapping charges. A separate hearing on whether the "Hard 40" sentence should be imposed was held that same day. There was no additional evidence presented. The prosecution submitted several aggravating factors in support of the Hard 40 sentence, but the jury only found one -- the heinous, atrocious, and cruel factor. The jury recommended that

APPENDIX B

petitioner be sentenced to the Hard 40.

On August 20, 1993, the petitioner came on for sentencing before Judge Clark. Judge Clark sentenced the petitioner to the Hard 40 for first degree murder, a life sentence for the aggravated kidnapping -- to be served consecutively. Judge Clark also sentenced petitioner to 3 to 10 years for criminal possession of a firearm, but ran that concurrent with the other sentences. The petitioner's convictions and sentences were affirmed in State v. Alford, 257 Kan. 830, 896 P.2d 1059 (1995).

On December 29, 1997, petitioner filed a post-conviction motion under K.S.A. 60-1507. The case number assigned to it was 97 CV 3745. The petitioner raised issues of ineffective assistance of counsel, confrontation clause violations, multiplicity and sentencing issues. The petition was summarily denied in an order dated March 20, 1998. On April 1, 1998, petitioner timely filed a motion to reconsider and attached a notice of appeal. The state district court never ruled on the reconsider motion, and never appointed appellate counsel. The appeal was subsequently dismissed by the district court, on August 28, 2000, for failure to docket in a timely manner. Accordingly, petitioner never had a final adjudication of his original 60-1507 motion, and never had an appeal. The petitioner filed a motion to reinstate his original 60-1507 action on September 8, 2014. The district court denied the motion for what it deemed an apparent lack of jurisdiction.

The court did not address the denial of petitioner's right to appellate counsel. It also refused to enter a ruling on the motion to reconsider, arguably because of the fourteen years that had passed since its filing. On June 2, 2017, the Kansas Court of Appeals ruled concerning 97 CV 3745 that petitioner was denied his statutory right to appellate counsel, under K.S.A. 22-4506(c) and Kansas Supreme Court Rule 183(m). The intermediate court went on to state that one of petitioner's remedies for failure to receive appellate counsel in his original 60-1507 action would be to seek relief under a separate 60-1507 motion. Petition for review of the intermediate court's decision was denied February 27, 2018.

Petitioner was entitled to have a psychiatric examination as contemplated by the statute (K.S.A. 22-3402[3]), and to have the psychiatric report submitted to the court before he was placed on trial. In spite of this knowledge attorney James K. Craig did no investigation beyond motion for "completion of psychological and psychiatric exam." Even though the examination had never been completed and no final or definitive report had been submitted to the court by the designated psychiatrists, attorney Craig allowed the petitioner to go to trial, testify, and ultimately be convicted and sentenced to "*the equivalent of a death sentence*," without benefit of any of the court ordered psychiatric exams or any judicial determination to rebut the presumption -- *inherent in the order* -- that Petitioner suffered from a mental disease or defect during trial and the commission of the crimes charged. See State v. Davis, 281 Kan. 169, 186,

PRIOR FEDERAL PETITIONS

Petitioner previously filed a petitioner under section 2254 on allegations of error related to his state conviction in case no. 93 CR 401. See Alford v. Cline, U.S. District Court for Kansas, Case No. 11-3062-SAC. The court dismissed the petition as "time-barred' on June 2, 2011. On June 8, 2017, in Case No. 17-3017, the Tenth Circuit Court of Appeals later dismissed petitioner's rule 60(b) motion asking to void that judgment. Both motions were improperly dismissed by the district court, which based its ruling on an incorrect reading or failure to apply the tolling and grace period allowed by AEDPA limitation period. In particular, 2244(d)(2), "the time during which a properly filed application for state post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section." See York v. Galetka, 314 F.3d 522, 525-26 (10th Cir. 2003) (limitation tolled while application for state collateral review pending). See also Muniz v. U.S., 236 F.3d 122, 129 (2nd Cir. 2001). *Muniz* supports petitioner Alford's assertion here, that because his initial 2254 was motion erroneously dismissed as untimely, subsequent motion raising same claims not considered second or successive.

The petitioner also filed a motion under 2241, alleging his due process rights violated during sentencing to Hard 40. That case was assigned Case No. 19-3059-SAC. The district court *sua sponte* recharacterized that motion as one coming under 2254 without notification to allow petitioner a chance to withdraw. The court ruled that because the petition "so construed is a second application under 2254" it must be dismissed for lack of jurisdiction. That dismissal was also erroneous. Compare Raineri v. U.S., 233 F.3d 96, at 100, holding that when a district court acting *sua sponte* converts a post conviction motion -- filed under some other statute or rule -- into a section 2255 petition without notice and an opportunity to be heard -- or in the alternative informed consent -- the recharacterized motion ordinarily will not count as a first habeas petitioner sufficient to trigger AEDPA's gatekeeping requirement. The Second Circuit noted, "given the potentially disastrous consequences of having a first petition denied on the merits, district courts may not recharacterize a motion purportedly made under some other rule. See Adam v. U.S., 155 F.3d 582, 583-84 (1998).

The AEDPA was enacted in April of 1996, and allowed defendants whose cases were final until April of 1997 to file for federal habeas relief. The present petitioner's case was final in June of 1995, before enactment of AEDPA, therefore, he had until April 1997 to file for habeas relief. In July 1996 petitioner filed a motion under K.S.A. 22-3504 to correct an illegal sentence. The tolling effect of 2244(d)(2) was triggered after three months, which left nine months on the limitation. The mandate from the appeals court on the illegal sentence motion came on

December 12, 1997.

That same month -- December 29, 1997 -- petitioner filed his original K.S.A. 60-1507 motion, that the court assigned case number 97 CV 3745 to it. Since that 60-1507 motion was filed in the same month as the denial of the illegal sentence motion, no additional time came off the limitation period of 2244(d)(2), which in this case remained at nine months.

The district court summarily denied the 60-1507 motion on March 20, 1998. On April 1, 1998, Petitioner filed a "request to reconsider" the denial of his 60-1507 motion. The state never ruled on said motion. Over two years later the district court dismissed petitioner's appeal rights for failure to docket. The "two years" constitute an "*inordinate delay.*" See, c.f., Jones v. Crouse, 360 F.2d at 158, holding that delay of more that 18 months in processing appeal of collateral attack warranted inquiry into possible due process violations.

But, regardless of why the state refused to rule on petitioner's April 1, 1998, reconsideration motion, it does not affect a federal court from applying 2244(d)(2)'s properly filed motion analysis in establishing limitation period. See Strong v. Heimgarter, 2019 U.S. Dist. LEXIS 85224 (decided May 21, 2019) (relief granted *Strong* on his federal post conviction motion in spite of his state 60-1507 motion was pending for *35 years.*) The *Strong* case is directly on point here, in that the state court never decided "whether to deny or dismiss for procedural reasons, to deny any or all of his claims on the merits, or to grant any kind of relief. Rather it appears that the motion was simply overlooked, and have remained pending." Strong v. Hrabe, 750 Fed. Appx. 731, 733 (10th Cir. 2018). The *Strong* case revealed that the passage of *35 years* did not affect the properly filed pending motion's provisions of 2244(d)(2). Similarly, the instant petitioner's motion has been pending for over *20 years* without final adjudication in the state court, ***whom flat-out refuse to render a ruling***. (See attach Exhibit # F.)

The confluence of AEDPA limitation and erroneous court rulings deprived this petitioner of timely habeas review to which he was entitled, and to deny review as here presented, to correct that error would be nothing short of manifest injustice. Such ultimately would effect an arbitrary and complete denial of the right to habeas review, suspending the Writ and denying the most basic precepts of due process. Courts have often expressed concern that cases in which a petitioner could never have raised his claim create, or at least implicate, grave constitutional issues. See, e.g., Martinez-Villareal v. Stewart, 118 F.3d 628, 632 (9th Cir. 1997). The application of the time bar to petitioner's first federal habeas petition effectively deprives him of the ability to obtain any collateral review in a federal court of the merits of his claim, that his confinement violates his constitutional rights. Such a deprivation constitutes an unconstitutional suspension of the writ of habeas corpus.

Rosa v. Senknoski, 1997 U.S. Dist. LEXIS 11177, at *19 (*Rosa I*). Notably, AEDPA statute of limitation is subject to equitable tolling. *Calderon*, 128 F.3d at 1283 (9th Cir. 1997). The United State Supreme Court advises that courts should construe a statute purporting to limit federal court jurisdiction in a *potentially* unconstitutional way to avoid the constitutional question whenever it is fairly possible to do so. Johnson v. Robinson, 415 U.S. 361, 366-67 (1974).

District court may not dismiss successive habeas petition as abuse of writ without first affording petitioner opportunity to explain his alleged abuse. Miller v. Solom, 758 F.2d 144 (8th Cir. 1985), *app. after remand,* 807 F.2d 747 (1986). Petitioner need not show to certainty or even to probability that constitutional violations occurred. It is sufficient that facts pleaded point to real possibility of constitutional error and when petitioner presents such a possibility, district court should not dismiss without requiring response from respondent or taking other action to follow development of record. Caudra v. Sullivan, 837 F.2d 56 (2d Cir. 1988). This conforms with Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969), where the court stated:

> "[T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness."

The Tenth Circuit federal Court of Appeals has held, generally, that any habeas petition that does not result in an adjudication on the merits of the habeas claim whether that adjudication be on procedural or substantive grounds, will not count as a first habeas petition for purposes of determining whether later habeas petitions are second or successive. Haro-Arteaga v. U.S., 199 F.3d 1195, 1196 (10th Cir. 1999) (per curiam).

FACTS DEMONSTRATING CURRENT PETITION NOT SECOND OR SUCCESSIVE WITHING MEANING OF AEDPA

This court therefore must answer the question of whether a petition is second or successive with reference to the equitable principles underlying the abuse of the writ doctrine.

The petitioner's present petition is a "first" petiton; i.e., not a second or successive petition. Two things establish this fact:

1. The state court's failure to adjudicate petitioner's claims in his first 2254 attempt on the merits; and

2. The federal district court, in deciding petitioner's 2241 motion, mischaracterized it as a successive 2254 post-conviction motion. First, petitioner's first 2254 motion was dismissed as untimely. Next, his second one was actually a 2241 motion that this Court impermissibly converted into another 2254 action; that is, without having first afforded petitioner the opportunity to address the conversion.

(For purposes hereunder, Petitioner adopts and incorporates hereunder the statements made in "**1**" above.)

If the current 2254 is not second or successive within the meaning of AEDPA, then there is no need for petitioner to obtain leavie of this court under AEDPA gatekeeping provisions before filing his petition in the District Court, since the petitioner properly would be considered a first petition that must be evaluated, in the first instance, by the District Court. Stantini v. U.S., 140 F.3d 424, 427 (2nd Cir. 1998); Esposito v. U.S., 135 F.3d 111, 114 (2nd Cir. 1997). AEDPA did not abrogate the well settled traditional rule. As the Supreme Court noted in Felker v. Turpin, 518 U.S. 651, 664 (1996) (the Act's new restrictions on second or successive habeas corpus petitions by state prisoners constitute a modified res judicata rule, a restraint on abuse of the writ.). Calderon v. U.S., 163 F.3d 530, at 538 ("[A]buse of the writ is a substitute for res judicata, and that res judicata, strictly speaking, does not attach to the denial of a first habeas petition.").

Even the Kansas Supreme Court takes issue with ***hair trigger*** responses dismissing post-conviction actions based on the mere form of the proceedings. Recently in Bogguess v. State, 306 Kan. 574, the state's highest court provided the following guidance for determining whether a court ought to apply res judicata to preclude a consideration of the merits of a subsequent claim:

> "When applying the rule of res judicata, Kansas courts must be mindful of the equitable principles animating the doctrine. Thus, courts must consider the substance of both the first and subsequent action and not merely their procedural form. There is a growing

disposition to enlarge the scope of the doctrine of res judicata; and to place more regard on the substance of a decision than on the form of the proceedings. The doctrine may be liberally applied, but it requires a flexible and common-sense construction in order to vindicate its fundamental goals which are embedded in the requirements of justice and sound public policy. This framework neither favors nor disfavors the application of the rule in any particular case. It merely requires that before the doctrine is either invoked or rejected, a court must conduct a case-by-case analysis that moves beyond a rigid and technical application to consider the fundamental purposes of the rule in light of the real substance of a case at hand."

Keeping this admonition in mind, the following considerations should weigh heavily in this Court determination of petitioner Alford's case.

Conventional notions of finality of litigation have no place where life or liberty is at stake. If government is always to be accountablel to the judiciary for a man's imprisonment, access to the courts on habeas musst not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ. Sanders v. U.S., 373 U.S. 1, 8 (1963).

AEDPA does not define what constitutes a "second or successive" petition. However, not every habeas corpus or 2254 petition "that is filed after a prior one is properly considered a second or successive filing in the technical sense meant by AEDPA. Galtieri v. United States, 1997 U.S. App. LEXIS 36157, at *11. See also Rainer v. U.S., 233 F.3d 96, 100 (1st Cit. 2000) ("[N]ot every post-conviction motion, nor even every habeas petition, furnishes the foundation for treating a subsequent habeas petition as "second or successive.").

Generally, courts look to *abuse of the writ* jurisprudence to infrom the wording second or successive. *Esposito,* 135 F.3d at 113. That doctrine embodies a complex and evolving body of equitable principles informed and controlled by historical usuage, statutory developement and judicial decisions. *Felker,* 518 U.S. at 664 (quoting *McCleksey,* 499 U.S> at 489. And in this regard, we an essential distinction was noted between a dismissal of a petition -- for technical procedural reasons -- which dos not affect a petitioner's right to file a subsequent petition and a dismissal on the merits, that render any subsequent petion second or successive within the meaning of AEDPA. This "essential distinction' is recognized primarily because of the constitutional implications for prisoners of not doing so. After all, a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review. Martinez v. Villareal, 523 U.S. at 645; see also In re Page, 179 F.3d 1024, 1025 (7th Cir. 1999) excusing a prior petition from "counting" as a first petition in such cases avoids serious constitutional questions arising under the Suspension Clause. U.S. Const. art. I, Sec. 9, cl. 2; also see Lonchar v. Thomas, 517 U.S. 314, 324 (1995) ("Dismissal of a first federal habeas

petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." To forclose further habeas review in such cases would not curb abuse of the writ, but rather would bar habeas review altogether. Camarano v. Irwin, 98 F.3d at 46.

In the instant matter, this Court has discretion to conclude that the petitioner's present petition is a "first" petiton; i.e., not a second or successive petition. The district court's dismissal of petitioner's previous petetions were erroneous given 2244(d)(2) limitation period. And this error was compounded by the state court's failure to adjudicate petitioner's claims, that should not have been dismissed as time-barred but dismissed for failure to exhaust. See Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604-05, 146 L. Ed. 2d 542 (2000) (notwithstand inclusion of new claims, habeas petition filed after petition was dismissed without prejudice for failure to exhaust remedies is not a "second or cuccessive" petition). To consider petitioner's present petition second or successive, therefore, would require this court to confront directly the Suspension Clause implications of denying him an opportunity to have his first petition heard on the merits -- even though it was prioerly filed within the time period to which he was entitled under AEDPA and Supreme Court precedent. While the Suspension Clause does not always require that a "first federal petition be decided on the merits and not barred procedurally, a serious constitutional question would arise if the instant petitioner were denied the opportunity to file his first petition within grace period to which he was entitled. Rodriguez v. Artuz, 990 F. Supp. 275 (S.D.N.Y. 1998). *Rodriquez* left open the possibility that "in some cases the one-year provision of AEDPA itself might be appled in a manner that renders the nhabeas remedy ineffective or inadequate to test the legality of detention so as to raise problems under the Suspension Clause. *Id.* at 283; see also Warren v. Garvin, 219 F.3d 111, 1113 (2nd Cr. 2000) (noting availability of equitable tolling as "an avenue for avoiding Suspension Clause issues in those cases in which "strict application" of the one year limitation period to late-filed petitions would raise Suspension Clause issues; Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (But despite the typical emphasis on the reasons a federal petition was filed beyond the time limits, in some circumstances a court may equitablyi toll the limits based on the merits of a petitioner's claim.).

Alternatively, if a district court has doubts about whether it faces a first or a second petition within the meaning of AEDPA, it can transfer the case to the court of appeals and invoke the gatekeeping function. See Mancuso v. Herbert, 166 F.3d 97, 99 (2nd Cir. 1999). The Court of Appeals noted that "constitutional implications" preclude application of the AEDPA's second or successive provisions in cases where the initial application was erroneously dismissed due to judicial error. Muniz, 236 F. 3d at 127-29.

A restriction or modification of the unit of habeas corpus constitutes a "suspension if it leaves habeas corpus inadequate or ineffective to test the legality of a person's detention" Swain v. Pressley, 430 U.S. 372, 381 (1977). Thus, the time limit imposed by Congress is an unconstitutional suspension of the writ if it constitutes an obstacle that renders habeas an "inadequate or ineffective means of testing the constitutionality of petitioners imprisonment, as opposted to permissible regulation tailored to curb abuse of the writ. The present day writ of habeas corpus, the "common law worlds' freedom writ and the highest safeguard of liberty." Smith v. Bennett, 365 U.S. 708 (1961).

Excusing a prior petition from counting as a first petition in such a case as here avoids serious constitutional questions arising under Suspension Clause. *Martinez v. Villareal,* 523 U.S. at 645. The overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the constitution is found to exist. Chessman v. Teets, 523 U.S. 156 (1957); Kuhlmann v. Wilson, 477 U.S. 436, 454 (plurality opinion of Powell, J.) (noting the clear intent of Congress that successive federal habeas review sould be available when the ends of justice so require).

Furthermore, prisoners like Alford who seek habeas relief under §2254 must also satisfy other specific, and precise, procedural standards. These procedural prerequisites include a requirement that: "[a] claim presented in a second or successive habeas corpus application . . . that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). This prohibition on the filing of successive habeas corpus petitions serves an important role in the administration of justice. As the court of appeals has explained:

> Pursuant to this gate-keeping function, AEDPA instructs the courts of appeals to dismiss any claim presented in a second or successive petition that the petitioner presented in a previous application. See 28 U.S.C. § 2244(b)(1). If a petitioner presents a new claim in a second or successive habeas corpus application, we must also dismiss that claim unless one of two narrow exceptions applies:
>
> (A) the applicant shows that the claim relies on a new rule of constitutional [*13] 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.

Id. § 2244(b)(2)(A)-(B)(ii). "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." Id. § 2244(b)(3)(A). A petitioner's failure to seek such authorization from the appropriate appellate court before filing a second or successive habeas petition "acts as a jurisdictional bar." United States v. Key, 205 F.3d 773, 774 (5th Cir.2000).

Here, Alford's current petition raises claims about the mental deficiency he suffered during trial and commission of the crimes charged that this Court cannot expect him to have raised prior to now. See State v. Ford -- quoting Pate v. Robinson, 383 U.S. 375, 384 -- recognizing, "[W]e remind district courts of the United States Supreme Court's observation that '***it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial***.'" This factual predicate provides ample exception for the claim it could not have been discovered previously through the exercise of due diligence -- not in his court-recognized presumption of suffering from a mental disease or defect. (For purposes hereunder, Petitioner adopts and incorporates hereunder the statements made in "__" above.)

ARGUMENTS AND AUTHORITIES

FIRST ACTUAL INNOCENCE CLAIM: PETITIONER IS ACTUALLY INNOCENT OF THE CRIMES CHARGED.

Federal habeas law provides a waiver of the one year statute of limitations based upon a claim of actual innocence. A solid actual innocence claim functions as a "gateway" through the procedural bar of the federal habeas statute's one year time limitaiton. See McQuiggin v. Perkins, 569 U.S. 383 (2013).

Eighteen years before *McQuiggin,* our highest court explained that when a death sentenced petitioner asserts actual innocence -- not as a free-standing constitutional claim but instead as a *gateway* to consideration of otherwise procedurally barred or defaulted constitutional claims -- he does not have to establish his innocence with absolute certainty. Rather, he only has to establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice. See Schlup v. Delo, 513 U.S. 298 (1995). The present petitioner's evidence of innocence need likewise carry less of a burden. Petitioner -- operating on the assumption that his claims are, in principle, legally well founded -- his evidence of innocence, therefore, does not have to be strong enough to make his sentencing "constitutionally intolerable," *since his conviction was not the product of a fair trial.* For Petitioner, the evidence need only establish sufficient doubt about his guilt to justify the conclusion that his sentencing would be a miscarriage of justice. On the other hand, if the habeas court is convinced that those new facts raise sufficient doubt about Alford's guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, Alford's threshold showing of innocence justify a review of the merits of the otherwise procedurally barred or defaulted constitutional claims.

The *Schlup* court made it absolutely clear that a petitioner is not required to establish his or her innocence with absolute certainty for passage through the *actual innocence gateway* but, rather, only needs to show that, in light of new evidence, it is more likely than not that no reasonable jurror would have found him guilty beyond a reasonablt doubt. *Id.,* 513 U.S. at 327-29; and at 328 notes, "The [ ] standard reflects the proposition, firmly established in the legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt." In deciding whether a petitioner has made the requisite showing of innocence, the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the boundry between guilt and innocence. The United States Supreme Court *reaffirmed* the actual innocence exception to procedural bars adopted in *Schlup* and *emphasized* that the gateway standard does not require absolute certainty about the petitioner's guilt or innocence. House v. Bell, 547 U.S. 518 (2006).

Hence, the present petitioner's purported failure to file a federal habeas application within AEDPA's one year limitation period may be excused based on a sufficiently supported claim of actual innocence. Lopez v. Trani, 628 F.2d 1228, 1230 (10th Cir. 2010). Actual innocence is an equitable exception to the statute of limitations, rather than a basis for tolling. *Id.* The 10th Circuit Court of Appeals rejects the reading of precedent that would require a habeas petitoner seeking equitable tolling on actual innocence grounds to demonstrate that he diligently pursued his actual innocence. *Id.,* at 1231. Similarly, in the context of second and successive petitions, the Supreme Court recognized the miscarriage of justice exception to permit a petitioner asserting a claim of actual innocence to avoid a procledural bar without a showing of cause and prejudice. *Schlup,* 513 U.S. at 317-21; Riley v. Snider, 2000 U.S. App. LEXIS 3158; 2000 WL 231833, at *2 (10th Cir. 2000).

In the present case, a showing that the petitioner was incompetent or suffered from diminished capacity at the time of trial and commission of crimes would demonstrate he was actually innocent of the charged crimes. The criminal law concept of diminished capacity requires the presence of a mental disease or defect not amounting to legal insanity which a jury may consider in determining whether the defendant has the "specific intent" required for the crime charged. State v. Borman, 264 Kan. 476, Syl. 3, 756 P.2d 1325 (1998). The state must prove premeditation and an intent to kill at the time the murder is committed. Proving premeditation does not substitute for proving intent at the time of the murderous act. K.S.A. 21-3401 makes no allowance for premeditation as a culpable mental state. Diminished capacity shall be a defense to a prosecution under any statute that the defendant, as a result of meantal disease or defect, lacked the culpable mental state required as an element of the crime. Diminished capacity defense did not exclude criminal responsibility because it only negate one element of specific intent crimes; and a defendant asserting the defense was not not required to give thirty days notice to the state as if he had used the insanity defense under K.S.A. 22-3219. State v. Gray, 791 P.2d 753, 1990 Kan. App. LEXIS 296 (1990). **Petitioner Alford's defense was contingent on the court ordered evaluation that never happened. As such, the trial court improperly continued the trial when culpability and competency were in doubt.**

The *Schlup* court reasoned that negation of an element satisfied the definition of actual innocence because without it he could not have been found guilty of capital murder, the charge for which he was incarcerated. Although the prototypical example of actual innocence is the case where the state convicted the wrong person of the crime (Sawyer v. Whitley, 050 U.S. 333, 340), one is also actually innocent if the state has the right person but he is not guilty of the offense of when he was convicted. *Schlup,* 513 U.S. at 321 (noting a prisoner's interest in relief "if he is innocent of the charge for which he was incarcerated.").

In *Schlup* the court specifically stated that a claim of actual innocence requires the introduction of "new reliable evidence" that was not presented at trial. In the context of a gateway claim of actual innocence, new evidence that is either newly discovered or newly presented. A Ninth Circuit magistrate judge was held to have erred in stating that "only newly discovered evidence is properly submitted in support of a *Schlup* claim of actual innocence." New evidence necessary to support a claim of actual innocence under *Schlup* encompasses not only newly available but also newly presented evidence. See Sistrunk v. Armenakis, 292 f.3D 669, 673 n. 4 (9th Cir. 2000). The Fifth Circuit concluded that a showing of facts establishing an affirmative defense that would result in the defendant's acquittal constitutes a sufficient showing of actual innocence to allow a petitioner to proceed with a procedural defaulted constitutional claim. See Finley v. Johnson, 243 F.3d 215, at 221 (5th Cir. 2000). Therefore, Mr. Alford's showing of facts that are highly probative of an affirmative defense, and which if accepted by a jury would result in the defendant's acquittal, equally constitutes a sufficient showing of actual innocence. (Petitioner incorporates by reference, as though fully set forth hereunder, the statements set forth in discussion of Double Jeopardy; *infra*.)

The petitioner here is presenting *new reliable evidence* that was not before the jury. That evidence consist of two court ordered psychiatric evaluations -- *or, two court orders creating the currently* ***unrebuted*** *presumption petitioner suffered from a mental disease or defect during trial and commission of the crimes charged* -- that the jury was never aware of. (See attached Exhibits I thru M.) The state submitted its case to the jury without relevant material obtained from psychological evaluations. By presenting the case to the jury before the evaluations were completed and a judicial determination, the prosecution misled the jury into believing petitioner possessed the requisite criminal culpability. Without the court-ordered psychiatric/psychological evaluations, the state could not put together the necessary evidence to establish criminal responsibility *beyond reasonable doubt.* The admission of the evaluation for the limited purpose of supporting an affirmative defense against specific intent of the crime(s), was essential to rebut the existence of one or more elements of the crime. Because Petitioner was not allowed to present evidence of his mental instability to negate an element of the crime, the jury naturally imputed culpability that does not exist. See, e.g., State v. Egelhoff, 272 Mpnt. 114, 900 P.2d 260 (1995) *rev'd* 510 U.S. 37 (arguing that the jury may be misled into believing that the prosecution has proven the mental state). In Ake v. Oklahoma, 470 U.S. 68, at 82-83, discussion include a hypothetical situation of a defendant whose defense may be "devastated" by the absence of a psychiatric examination. Also see in Lewin Psychiatric Evidence, 26 Syracuse L. Rev. 1051, 1060 (1975).

One can kill yet be yet be actually innocent of first-degree murder under *Schlup.* In each of the following cases the petitioner was convicted of murder and was admittedly responsible for the victim's death, yet satisfied *Schlup's* gateway standard by presenting new evidence which demonstrated that it was more likely than not that no reasonable juror would have convicted him due to the existence of an affirmative defense. Smith v. Baldwin, 477 F.3d 805, 813-14 (9th Cir. 2006); Jaramillo v. Stewart, 340 F.3d 877, 883-84 (9th Cir. 2003); Finley v. Johnson, 243 f.3D 215, 220-22 (5th Cir. 2001); Fairman v. Anderson, 188 F.3d 635, 645 (5th Cir. 1999); see also Britz v. Cowan, 192 F.3d 1101, 1103 (7th Cir. 1999) *cert. denied* 529 U.S. 1006 (2000) (rejecting the state's arguements (1) that a showing of legal innocence of murder on grounds of insanity would not satisfy *Schlup's* gateway standard, and (2) that to be actually innocent of murder under *Schlup* requires a showing that the petitioner didn't kill his victim. The Eighth Circuit acknowledged that while a prototypical example of actual innocence is the case where the state has convicted the wrong person of the crime, one is also actually innocent if the state has the right person but the person is not guilty of the crime with which he or she is charged. Adding, that should defendant's contention that he could not deliberate prove true, he would have been incapable of satisfying an essential element of the crime for which he was convicted, for such meets the definition of actual innocence. See Jones v. Delo, 56 F.3d 878, 883 (8th Cir. 1995).

Petitioner Brent L. Alford alleges that he did not possess the intent necessary for first-degree murder because he suffered from diminished capacity and was incompetent at the time of his trial. The presumption bestowed on Petitioner by the trial court was never rebutted. Even though ordered by the court, the psychiatric exams were never done. This leave doubt as as to petitioner's mental state. See Sawyer v. Whitley, 505 U.S. 333, 505 U.S. 333, 343 (1992) ("noting that negation of an element of the offense accords with the strictest definition of actual innocence").

For the aformentioned reasons, it is more likely than not that no reasonable juror would have voted to find petitioner guilty beyond a reasonable doubt. The ends of justice demand consideration of merits of claim on successive petition where there is colorable showing of factual innocence; second habeas petition should be remanded for consideration of whether the ends of justice require consideration of claim on the merits. Procedural default is excused under actual innocence exception where petitioner's claim, if true, rendered conviction void and could not be legal cause of imprisonment. Gonzalez v. Abbott, 967 F.2d 1499, 1504 (11th Cir. 1992); Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) *cert. granted* 485 U.S. 1005;

State v. Strasburg, 60 Wash. 106, 119, 110 P.1020 (1910) ("[T]he sanity of the accused, at the time of committing the act charged against him, has always been regarded as much a substantive fact, *going to make up his guilt*, as the fact of his physical commission of the act [. . .] To take from the accused the opportunity to offer evidence tending to prove this fact, is, in our opinion, as much a violation of his constitutional right of trial by jury as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act or physically set in motion a train of events resulting in the act."). "Focusing on the merits of a petitioner's actual-innocence claim and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of justice exception, i.e., ensuring that federal constitutional errors do not result in the incarceration of innocent persons." McQuiggin v. Perkins, 569 U.S. 383, at 400 (2013). In all federal courts, an accused is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime. Consequently, the trial judge or jury must reach a judgment or verdict of not guilty by reason of insanity even if the evidence as to mental responsibility at the time the offense was committed raises no more than a reasonable doubt of sanity. Lynch v. Overholser, 369 U.S. 705, 713 (1962); see also United States v. Fitts, 284 F.2d 108, 112 (10th Cir. 1960) ("If the evidence of 'mental illness' is deemed legally sufficient to raise the issue of insanity, the appellant was entitled to a directed verdict of acquittal, for the government offered no evidence of his sanity, hence no factual issue for the jury.").

In the instant matter, the statutory procedure to determine whether Petitioner suffered from a mental disease or defect during commission of the crimes charged and at trial was initiated but not completed. *The failure to do so is evidence itself of a reasonable doubt as to both.* In fact, the presumption of his mental incompetency **is inherent in the order** directing *without objection* his psychiatric exams. See State v. Davis, 281 Kan. 169, 184, 130 P.3d 69 (2006). When Petitioner properly invoked K.S.A. 22-3302 and 22-3219 upon compelling facts, he had a substantial right to have the issue of his mental competency determined in accordance with the procedure therein provided; and entitled to a contemporaneous determination which normally affords greater accuracy of judgment than one made years after the event. To put Petitioner to trial while an order was outstanding to inquire into his mental competency, without the psychiatric report or finding as to his condition, as contemplated by the statutes, defeated its very purpose. Substantial rights are too important to rest on tenuous foundations, hypothetical assumptions, or speculation. C.f. Sullivan v. U.S., 205 F. Supp. 545 (1962). With substantial facts to back up his allegation, that during those crucial moments Petitioner was not mentally competent, and that there was no resolution of that precise issue before he was tried, convicted and sentenced, the protection of the Fourteenth Amendment, requires that his conviction and sentence be set aside, unless upon adequate hearing it is shown that he was mentally competent. Lee v. Alabama, 386 F. 2d 97, 105 (5th Cir. 1967). *But, to determine the issue nunc pro tunc has disadvantages.* A psychiatrists' opinions made years after the event constitutes an inadequate substitute for the opinion of the psychiatrist appointed for that very purpose in advance of and at the time of trial." *Sullivan*, at 551.

SECOND ACTUAL INNOCENCE CLAIM: PETITIONER SUFFERED FROM A MENTAL DISEASE OR DEFECT DURING TRIAL AND THE COMMISSION OF THE CRIMES CHARGED. THAT IS, A SUBSTANTIVE DUE PROCESS COMPETENCY CLAIM.

Petitioner adopts and incorporates by reference the statements made in his FIRST ACTUAL INNOCENCE CLAIM, as though fully set forth hereunder.

The petitioner is raising herein substantive and procedural competency claims, both freestanding (i.e., *freestanding under the actual innocence umbrella*) and via claims of ineffective assistance of counsel:

(1) That he was actually incompetent to proceed to trial; and that

(2) The state district court failed to suspend proceedings and hold a competency hearing when there was a *bona fide* doubt as to his competency to proceed to trial.

It is well settled that the criminal trial of an incompetent defendant violates due process. Medina v. California, 505 U.S. 437, 453 (1992). This prohibition is fundamental to an adversary sustem of justice. Drope v. Missouri, 420 U.S. 162, 172 (1975). A petitioner may overcome the procedural bar only if he can demonstrate "cause" for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Romero v. Tansy, 46 F.3d 1024, 1028 (10th Cir. 1995), unless the petitioner is entitled to an exception. If the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice, or if the nature of petitioner's claim renders it exempt from the procedural bar rule. See Zapata v. Estelle, 588 F.2d 1017, 1021 (5th Cir. 1979) noting, his claim can be heard in federal habeas corpus. In further juxtaposition, competency claims based on substantive due process are subject neither to waiver, nor to procedural bar. See Nguyen v. Reynolds, 131 F.3d 1340, 1346 (10th Cir. 1997); James v. Singletary, 957 F.2d 1562, 1569 (11th Cir. 1992), competence to stand trial is an aspect of substative due process. Lafferty v. Cook, 949 F.2d 1546, 1550 (10th Cir. 1991) (citing Pate v. Robinson, 383 U.S. 375, 378 (1966) and Coleman v. Saffle, 912 F.2d 1217, 1224 (10th Cir. 1990), because of the conflation of cause (here incompetence) and prejudice in the substantive due process claim presented in this case procedural default does not apply. *Zapata*, 588 F.2d at 1021.

Competency claims can raise issues of both substantive and procedural process. Walker v. Attorney Gen., 167 F.3d 1339, 1343 (10th Cir. 1990). Although "sometimes there is overlap" procedural competency and substantive competency are distinct claims. Barnett v. Hargett,

174 F.3d 1128, 1133 (10th Cir. 1999). A procedural due process competency claim is based upon a trial court's alleged failure to hold a competency hearing, or an adequate competency hearing, while a substantive competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent. Allen v. Mullin, 368 F.3d 1220, 1239 (10th Cir. 2014). The right at issue in a substantive competency claim; i.e., the right not to be tried while incompetent. Therefore, in the habeas context, the remedy must involve the issuance of the writ because the conviction cannot constitutionally stand. See, e.g., *McGregor,* 248 F.3d at 952 (noting that a substative competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent); see also Godinez v. Moran, 509 U.S. 389, 396 (1993) (a criminal defendant may not be tried unless he is competent).

In the present case, under the plain language of the Kansas competency statute K.S.A. 22-3302(1) provides, when a judge finds there "is reason to believe" that the defendant is incompetent to stand trial 22-3302(1) holds that the competency concern is sufficient to warrant an order for a medical determination on the issue. State v. Davis, 281 Kan. 169, 183, 130 P.3d 69, 81 (2006). And, once a court finds that there is reason to believe that the defendant is incompetent to stand trial *the proceedings shall be suspended and a hearing conducted to determine the competence of the defendant. Davis*, 281 Kan. at 177. The essential purpose of 22-3302(1) is to prevent an incompetent person from being brought to trial or imprisoned for the crime charged. It seeks to achieve this objective by a pretrial inquiry when there is reason to doubt an accused's competency to understand the proceedings against him or properly to assist in his defense by providing for an examination by a qualified psychiatrist under 22-3302(3), a report to the court, and a judicial determination. Emphasis is placed on the importance of the professional and institutional obligation inherent in assuring that only those who are competent be tried. See U.S. v. Boigegrain, 155 F.3d 1181, 1188 (10th Cir. *cert. denied* 142 L. ed. 2d 686, 119 S.Ct. 828 (1999).

Before trial in the instant matter defense attorneys Susand Lind and Eric Godderz moved the court orally for a mental evaluation on May 12, 1993. The judge granted the motion that same day and entered an order appointing a psychiatrist (Dr. Gary Merrill) to examine petitioner and report to the court. (See attached Exhibit # I.) On May 14, 1992, attorney James Craig replaced Lind and Godderz. On May 19th he moved the court, orally, for another evaluation of petitioner Alford. In response, the court entered an "order to complete psychological and psychiatric exams." The order appointed a second psychiatrist (Dr. Neil Roach) to complete the previous court-ordered exams. (See Exhibit # J.) The attorneys' request for a pretrial mental evaluation, and resultant court order, illustrate that counsels and district judge Paul Clark had *reason to believe* there was a question as to petitioner's competency to stand trial.

Accordingly, the orders themselves were not requied to contain the specific findings of "reason to believe the defendant is incompetent," rather the findings is inherent in the order itself. *Davis,* 281 Kan. at 184.

The presumption of incompetence bestowed on Petitioner by the trial court remains. While the district court record does not contain the "motion for evaluation," courts have concluded that the granting of a motion for a psychological evaluation is sufficient to establish "a bona fide doubt as to the defendant's competency to stand trial." Brizendine v. Swenson, 302 F. Supp. 1011, 1019 (W.D. Mo. 1969); State v. Bertrand, 123 N. H. 719 (1993) (Whenever a trial court orders a criminal defendant to undergo psychiatric evaluation to determine competency, such an order shall be deemed to reflect the existence of a bona fide doubt as to defendant's competency); same, State v. Cancially, 2018 N.H. LEXIS 93; also see Silver v. State, 193 So. 3d 991, 993 (Fla. 2016) (holding that, although the competency motion was not part of the record on appeal, a trial court's appointing experts to evaluate a defendant's competency suggests there were reasonable grounds to do so).

In State v. Johnson, 395 N.W. 2d 176, the court pointed out, when a defense counsel fails to bring evidence of a client's incompetence to the court's attention, the court is deprived of the evidence necessarly to determine whether a competency hearing is required. Adding, where the evidence withheld is sufficient to raise a bona fide doubt (*reason to doubt*) as to defendant's competence, the failure to present this information to the court deprives the defendant of his constitutional right to a fair trial. This deprivation of the defendant's right to a fair trial renders the outcome of the trial unreliable. *Id.,* 184 n. 5. There are some occasions where a presumption of prejudice is appropriate. *Cronic,* 466 U.S. at 659-60. It is particularly appropriate to presume prejudice in circumstances where the very nature of the attorney's deficient performance caused deficiences in the record, affecting the court's ability to fully evaluate whether the deficient performance prejudiced the defendant. Trial counsel's failure to raise mental state before trial is inherently prejudicial. There may be cases in which the ineffectiveness of counsel is so pervasive that a particularized inquiry into prejudice would be "unguided speculation." See, e.q., U.S. v. Poterfield, 624 F.2d 122, 125 (10th Cir. 1980). This is certainly the case here.

Because Mr. Alford's competency motion was uncontested by the state, the presumption of incompetency remains, but is rebuttable. The Kansas Supreme Court noted, "Where a defendant has placed his or her mental state in issue, a court-ordered psychiatric examination may be the only way the State can rebut the defense." See State v. Cheever, 295 Kan. 229, at 224; also see Mitchell v. Gibson, 262 F.3d 1036 (2001) (In any event, a doubt sufficient to require an expert evalluation may be overcome by the results of the evaluation itself).

Petitioner's claim is that he was put to trial while he was mentallly incompetent, and contends that the state committed a fundamentally unfair act, depriving him of his substantive right to due process. Further, that his failure to address substantive claim in the state court, *then*, does not bar federal review. The state trial court has done nothing at all to rebut the presumption of incompetence bestowed on petitioner by the judge.

Petitioner's failure to raise this claim in a prior petition cannot be construed as abuse of writ within meaning of Rule 9(b) where failure was the result of his low mentality and his inability to obtain legal advice except from other inmates. Vance v. Bordenkircher, 505 F. Supp. 135 (N.D. W.V.A. 1981) *affirmed* 692 F.2d 978 (4th Cir. 1992). Delay in filing of petition for habeas by person incompetent at the time of original trial, and presumably incompetent subsequent to that time, is not ground for dismissal of petition. Horance v. Wainwright, 781 F.2d 1558 (11th Cir. 1986) cert. denied 439 U.S. 869 (1986). District court should not summarily dismiss a prisoner's petition containing sufficient allegations of constitutional violations; moreover, due to *pro se petitioner's* general lack of expertise, court should review habeas petition with lenient eye, allowing border-line cases to proceed. Williams v. Kullman, 722 F.2d 1048 (2nd Cir. 1983). The court determined that it was inconsistent to hold that petitioner failed to act timely with respect to the remedies that he subsequently sought, during the time when he was presumed incompetent, as it would be to find him barred from taking advantage of the use of the writ of habeas corpus because of his procedural defaults. *Id.,* 781 F.2d 1558. **The defense of incompetence cannot be waived by the incompetent.** See *Pate,* 383 U.S. at 384. It inevitably follows from this that "counsel cannot waive it for him by failing to move for examination of his competency." Kibert v. Peyton, 383 F.2d 566, 569 (4th Cir. 1997). Thus, the question of effective assistance of counsel involves a determination of the point at which counsel is required to raise the issue of competency. Strategic considerations do not eliminate defense counsel's duty to request a competency hearing.

A petitioner alleging a substantive claim must demonstrate that he actually lacked a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him." Duskey v. U.S., 362 U.S. 402 (1960). Thus, a petitioner alleging a substantive competency claim must show that he was convicted during a period of incompetency. *McGregor,* 248 F.3d at 953. The procedural default rule of Wainwright v. Sykes, 433 U.S. 72, does not operate to preclude a defendant who failed to request a competency hearing at trial, or pursue a claim of incompetency on direct appeal, from contesting his competency to stand trial and be sentenced through post-conviction proceedings. See Zapata v. Estelle, 588 F.2d 1015, 1021

(5th Cir. 1979). And, post-conviction evidence can often be relevant to establishing substantive incompetency. See, e.g., *Nguyen,* 131 F.3d at 1345-57 (10th Cir. 1997).

The present case creates the possibility that the abuse and neglect of state procedure, and him, by others will prejudice petitioner's ability to prove that he was denied a fair trial, by putting the burden on an incompetent man to show he was incompetent at the time of trial. This position, under the facts of this case, is without substance. First, the unduly hurried trial did not provide a fair opportunity for development of facts on the incompetency of petitioner. See *Patev. Robinson,* 383 U.S. at 377, whereupon the court reversed on the ground that Robinson was convicted in an unduly hurried trial without a fair opportunity to obtain expert psychiatric testimony and without sufficient development of the facts on the issue of Robinson's insanity when he committed the homicide and his incompetence during trial. Second, it places upon the petition by reason of the state's failure to comply with the statute and orders of the court, the burden of showing that he incompetent at the time of trial; the very issue which was to have been resolved had the statutory procedure for competency been complied with. *Id.,* 383 U.S. at 385. The Court added, the failure of the state court to invoke the statutory procedures deprived Robinson of the inquiry into the issue of his competence to stand trial. At the time of trial the denial or failure to complete his pretrial court-ordered psychiatric exam, which provided him expert assistance, deprived him an opportunity to gather evidence of his mental state and a definitive medical diagnosis of his incompetence. People v. Ary, 173 Cal. App. 4th 80 (2009) (holding that it violates due process to place on defendant the burden of proving his incompetence at a retrospective hearing. It is impossible to adequately determine *years later* whether a defendant [*petitioner Alford, inclusive*] was actually competent during his trial, in the light of sparse medical records concerning competency. U.S. v. Collins, 430 U.S. 1260, 1267 (10th Cir. 2005).

Petitioner had a fundamental right not to stand trial while incompetent. And to require an incompetent defendant -- someone who is presumably unable to understand the proceedings or assist in his own defense -- to prove that he remains incompetent is unconstitutional. C.f. People v. Bender, 20 Ill. 2d 45, 53-54, 169 N.E. 2d 328 (1960) ("Let us assume that defendant is in fact unable to co-operate with counsel and present his case in a rational manner. It would be a strange rule, indeed, to impose upon him the burden of proving his own incompetence, for the very disability which he would be seeking to prove renders him incapable, either logically or legally, of sustaining the burden of proof."). Whenever evidence appears in the trial of a criminal case, from whatever source, tending to establish mental incompetency of the accused to commit the offense charged, the burden of proof is on the government to prove mental competency to commit the offense *beyond a reasonable doubt* as well as the existence of evey fact necessary to constitute the crime charged. Davis v. U.S., 160 S.Ct. at 360, 40 L. Ed.

499 (1895). It is well settled that the presumption of sanity controls until some evidence to rebut the presumption is offered by the defendant. When this occurs the government is then required to prove sanity beyond a rasonable doubt. *Id.* Information tending to establish the requisite doubt "need not be presented in a form of admissible evidence." Lokos v. Capp, 625 F.2d 1258 (1988). The court orders themselves are relevant evidence to rebut the presumption of competency, since the judge granted the order presumably because he found *reason to believe the defendant is incompetent.* See K.S.A. 22-3302(1). Further, the decision whether to order a competency evaluation is a matter wholly within the sound discretion of the court, and we give weight to the court's observation of the defendant's mental health status. U.S. v. Prince, 938 F.2d 1092, 1095 (10th Cir. 1995).

The present petitioner was deprived of both his procedural and substantive rights to due process, the former when the court failed to conduct a hearing on his competency, on its own initiative, and the latter by submitting him to a criminal prosecution when he was incompetent to stand trial. The trial court cannot avoid these responsibilities. U.S. v. Williams, 113 F.3d 1160 (1997). A claim of ineffective assistance of counsel for failure to raise the issue of competency has heightened importance because it implicates both the Sixth amendment right to counsel and the Fifth amendment right to not be tried while incompetent. Without having afforded petitioner the opportunity to establish his incompetence "in the crucible of a full blown evidentiary hearing." Sena v. N.M. State Prison, 109 F.3d 652 (10th Cir. 1997). It cannot be said with surety that Petitioner's substantative due process right to stand trial while competent was not violated. A hearing assures his right to procedural due process is met by affording petitioner his constitutional right to a fair trial. *Drope,* 420 U.S. at 181-82.

Certainly when a defendant is unable to assist counsel or understand the proceedings, "the entire conduct of the trial from beginning to end is obviously affected." Arizona v. Fulminante, 499 U.S. 279, 3019-10 (1991). Structural error is a special category of constitutional error that affects the framework within which the trial proceeds rather than simply an error in the trial process itself. State v. Wise, 176 Wm. 2d 1, 13-14, 288 P.3d 1113 (2012). If a structural error occurs in a criminal trial, the trial "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded a fundamentally fair. *Id.,* at 14. A structural error "resists" a harmless error analysis because it taints the entire proceeding. State v. Levy, 156 Wn. 2d 709, 725, 132 P.3d 1076 (2006); Rose v. Clark, 478 U.S. at 577-78. thus, when a court assigns the burden of proof to show incompetency to an already presumed incompetent defendant, after structural error, preventing a competency determination, without which, petitioner was put to trial, convicted and sentenced while incompetent.

THIRD ACTUAL INNOCENCE CLAIM: PETITIONER'S FUNDAMENTAL RIGHT TO COUNSEL WAS ABRIDGED WHEN DEFENSE COUNSEL FAILED TO MAKE A MEANINGFUL ADVERSARIAL CONTEST OF THE PROCEEDINGS.

Petitioner adopts and incorporates the aforementioned as though fully set forth hereunder.

This case is governed by the *Cronic* standard for breakdown of the adversarial process rather than the the *Strickland* for specific attorney error.

The United States Supreme Court held that the right to counsel protected by the Sixth Amendment entails more than mere appointment, or even presence, of counsel. Instead, the Sixth Amendment guarantess the effective assistance of counsel -- not as an end in itself --*but as a means of vindicating the underlying right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.* U.S. v. Cronic, 466 U.S. 648, 654-56 (1984). It follows, the court held, that when the *adversarial testing* does not occur, the Sixth Amendment is violated. *Id.,* at 656-57. If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable. *Id.,* at 659.

In the present case, trial counsel's failure to investigate petitioner's mental illness both created a reasonable probability that he was tried while incompetent and left counsel unprepared to present a viable defense. The *Strickland* court is also in agreement that the duty to investigate derives from counsel's basic function, which is "to make the adversarial testing process work in the particular case." Strickland v. Washington, 466 U.S. 668, at 690 (1984). Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, the Supreme Court has noted that counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary. *Id.,* at 691.

The record of this case reveal that no psychiatric evaluation was ever performed before petitioner was placed on trial. Instead of seeking a continuance, counsel simply abandoned his client's only possible defense. Making such a decision immediately before trial and after having neglected to pursue obvious courses that would have led to contemporaneous psychiatric evidence, falls short of an acceptable level of performance by counsel -- especially where it leaves the client totally defenseless. See Profitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987). Trial counsel failed to obtain the opinions of Dr. Gary Merrill or Dr. Neil Roach, the psychiatrists appointed by the court. The Fifth Circuit has found counsel ineffective where he

knew and failed to examine or obtain psychiatric exam. Beavers v. Balkcom, 636 F.2d 114 (1981). Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacum. It is not enough to assume that counsel thought there was no defense, and exercised his best judgment. Counsel, nor the court, could say what a prompt and thoroughgoing investigation might disclose as to the facts. Powell v. Alabama, 287 U.S. 45, 58 (1932). One court held, "this court would be awash in a sea of speculation were it to make a determination that a colorable insanity defense could not have persuaded a jury that petitioner was insane and therefore not legally responsible for his actions." Loe v. U.S., 545 F. Supp. 662 (E.D. Va. 1982). A California court noted, "the psychiatrist is likened to an interpreter without whom neither attorney nor client could understand the significance of the client's information. San Francisco v. Superior Court of San Francisco, 37 Cal. 2d 227, 231 P.2d 26 (1951); also U.S. v. Kovel, 296 F.2d 918, 922 (2nd. Cir. 1961) (analogy of the client speaking a foreign language). Manifestly, under the present circumstances counsel required expert assistance in determining whether there was a basis for a substantial defense of diminished capacity and in preparing and presenting such a defense, if after examination, it appeared justified. Petitioner, herein, was deprived of an adequate opportunity to determine the possible existence of a substantial defense. U.S. v. Taylor, 437 F.2d 371 (4th Cir. 1971).

Regardless of whether there is a demonstrable effect on outcome for *Strickland* purposes, counsel's abdication means that there can be no confidence in the fundamental fairness of the proceedings. *Cronic*, 466 U.S. at 655-56 (right to counsel assures fairness of trial itself).

The Fifth Circuit further noted that defense attorney who was on notice of his client's mental history but failed to investigate or pursue a defense did not provide effective assistance of counsel. Davis v. Alabama, 596 F.2d 1214 (1979). When a condition may not be visable to a layman, counsel cannot depend on his own evaluation of his client's sanity once he has reason to believe an investigation is warranted, because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court. See Bouchillon v. Collins, 907 F.2d 589, 597 (1990). Similarly, the trial court also relies on counsel to bring these matters to their attention, judges must depend to some extent on counsel to bring issues into focus." Drope v. Missouri, 420 U.S. 162, 176-77 (1975). If counsel here fails to alert the court to the defendant's mental status the fault is unlikely to be made up. 907 F.2d at 597.

There is nothing difficult about identifying the defect in counsel's performance here. Since the law provides that Petitioner cannot be convicted of the crime charged if he was unable to form the requisite intent, and preliminary indications created reasonable grounds for suspecting that he may be suffering from a mental disease or defect, then counsel had a duty

to make further inquiry. Becauses his choices were uninformed due to inadequate preparation, under *Cronic* he cannot be said to have subjected the prosecution's case to meaningful adversarial testing. Attorney Craig never contacted petitioner's parents prior to or or during trial. If he had, Mr. Craig would have discovered that petitoner suffered head trauma as a teenager and was not the same afterwards, had serious drug problems, was suffering withdrawel from cocaine and herion at the time of trial and commission of crimes and had attempted suicide shortly before crime by slicing his wrist. Moreover, the failure of counsel to investigate the possibility of an insanity defense where facts known to, or accessible to, trial counsel raised a reasonable doubt as the defendant's mental condition, such likewise attributed to the denial to petitioner of his Sixth Amendmental fundamental right under *Cronic* he otherwise would have enjoyed. Mr. Craig's decision not to investigate the possibility of presenting expert testimony was *unreasonable* and something the ordinary, fallable lawyer, would have at least undertaken an investigation into the viability of presenting expert psychiatric testimony in defense of Mr. Alford. See, e.g., Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E. 2d 878 (1974).

In Bell v. Cone, 535 U.S. 685, the Supreme Court reiterated how a petitioner might fall into *Cronic's* second category, "the attorney's failure must be completed" if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *Id.,* at 697. The high court further acknowledged that in certain cases there could be constitutional error of the first magnitude and and amount of showing of want for prejudcie would cure it. *Cronic,* 466 U.S. at 659. Further stating, "apart from circumstances of that magnitude, however, there is generally not basis for finding a Sixth amendment violation unless sthe accused can show how specific errors of counsel undermined the reliability of the finding of guilt. A true advocate cannot permit a case to go before a jury when an order is outstanding as to his mental status. Attorney Craig acquiescence was absolute denial of petitioner's right to pretrial mental examination. But it is expecially dangerous when, as here, the evidence goes to mental or emotional difficulties. See Saeyer v. Whitley, 505 U.S. 333, 343 (1992) (noting that negation of an element of the offense accords with the strictest definition of acutal innocence); Penry v. Lynaugh, 492 U.S. 302, 324 (evidence of mental difficulties can diminish blameworthiness for a crime even as it indicates that there is probability that the defendant will be dangerous in the future). Attorney Craig never offered any strategic justification, no mater how implausible, for the failure to inquire further into petitioner's mental status.

Accordingly, because he entirelly failed to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights that makes the

adversary process itself presumptively unreliable. *Cronic,* 466 U.S. at 659. The Tenth Circuit Court of Appeals has been reluctant to find constructive denials of counsel and has found a complete absence of meaningful adversarial testing only where the evidence overwhelmingly establishes that the attorney abandoned the required duty of loyalty to his client, and where, *as in the instant matter,* counsel acted with reckless disregard for his clients best interest and, at times apparently with the intention to weaken his client's case. See Osborn v. Schillinger, 861 F.2d 612, 624 (1988). Where attorney Craig sought and received an order for a psychiatric evaluation, but continued to trial -- proceeding to trial with petitioner's mental state in doubt violated his due process rights. The risk, alone, of violating these rights, are substantial. The language of "reckless disregard for his client's interest" is manifest here.

Even without a breach of loyalty however, where there has been a complete absence of adversarial testing a Sixth amendment violation is established under *Cronic* without the showing of prejudice that is otherwise required under *Strickland. Cronic,* 466 U.S. at 654. As the Supreme Court explained in *Cronic,* however, formal representation alone is not enough to satisfy the Sixth amendment. *Id.,* at 645-55. The question is whether the government's case was subject to meaning adversarial testing. It is well known that the adversarial process cannot function properly without adequate investigation. See U.S. v. Ross, 703 F.3d at 873-74 (Adequate investigation entails, at a minimum, reading and analyzing a mental health evaluation).

Where the evidence is conflicting, and the truth is clouded, the adversarial process is crucial to reaching a just verdict. U.S. v. Nixon, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive."). It has been empahsized, truth as welll as fairness is best discovered by powerful statements on both sides of the question. *Pension,* 488 U.S. at 84. Indeed the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. *Nixon,* 418 U.S. at 709.

Attorney Craig ceased to function as the state's adversary in any meaningful sense, it was as though counsel was absent, therefore, no further showing of harm is needed to identify a Sixth amendment violation. *Cronic,* 466 U.S. at 653-55. "When the process loses it character as a confontation between adversaries the constitutional guarantee is violated." *Id.,* at 656-57. Mr. Craig never presented any evidence as to petitioner's mental state or offered any strategic justification for failure to address court-ordered evaluation nor is it likely that this kind of non-performance would ever be justified by legitimate strategic considerations. Accord *Cronic,* 466 U.S. at 689. The Tenth Circuit had declined to rely on retrospective competency hearings in the context of ineffective assistance claims. *U.S. V. Collins,* 430 F.3d at 1267 (2005).

FOURTH ACTUAL INNOCENCE CLAIM: THE STATE VIOLATED THE CONFRONTATION CLAUSE TO SECURE THE PETITIONER'S CONVICTION AND SENTENCE. PETITIONER, AS A CONSEQUENCE, WAS DENIED HIS SIXTH AMENDMENT RIGHT UNDER THE UNITED STATES CONSTITUTION.

Petitioner adopts and incorporates by reference the aforementioned as fully set forth hereunder.

The *Confrontation Clause* of the SIxth Amendment, applicable to the states through the Fourteenth Amendment, guarantees the right of a criminal defendant to be confronted with the witnesses against him, including the right to cross-examine those witnesses.

In 1980, the Supreme Court in its seminal *Ohio v. Roberts* decision provided the framework for determining whether admission of out-of-court statements of a witness who does not testify at trial violates the defendants right to confrontation. *Id.,* 448 U.S. 56, at 66. First, the witness must be unavailable; second, the witness' out-of-court statement must have "adequate indicia of reliability". *Id.,* 448 U.S. 56, at 66. In general, an out-of-court statement may constitutionally be introduced against a defendant only if the statement bears *adequate indicia of reliability.*

In the present case, the state introduced an out-of-court statement purportedly written by the victim. (State's Exhibit 79.) (See Exhibit "G".) Written statement State's Exhibit 79 was not under oath and never authenticated. There was noting done to establish who wrote the statement. The statement was introduced for the sole purpose to help prosecute for a prior crime in which declarent and boyfried had vested interest. The statement was dated with one date, but was scratched out some time later and replaced with another date. The prosecution admitted the statement without any explanation or proof of its reliability. The prosecution admitted the statement under Kansas rule for marital discord. Hearsay statements admitted under the marital discord exception, almost by definition, do not share the same tradition of reliability that supports the admissibility of statements under firmly rooted hearsay exception. Marital discord does not fall under any firmly rooted hearsay. See *Marital discord; Fact or Judicially Legislated Fiction,* 46 U. Kan. L. Rev. 63, at 107. "Hearsay statements made by a deceased spouse-declarant are admissible as evidence of marital discord if the court finds that the statements have particular guarantees of trustworthiness." See State v. Thompkins, 271 Kan. 324, 21 P.3d 997 (2001) (citing *Ohio v. Roberts,* 448 U.S. at 65).

Defense counsel, in the instant matter, raised questions directly relating to the reliability of

out-of-court statement when, in part, he stated:

> "That statement was made at the request of the District Attorney's office. That statement, your Honor, was intended to assist them in the prosecution. We feel, therefore, it does not have an 'indicia of reliability.' It is made by a person who has a vested interest in the coutcome of that prosecution. More importantly, we feel that statement contains not merely the state of mind of the victim Kim Jackson; but, it also attempts to introduce numerous statements that were allegedly made by the defendant. In this case we feel that any reference to alleged statements that were made by defendant to Kim Jackson, who then included them in a statement to the District Attorney office, should not be admissible. We feel they are hearsay. We feel more importantly that they have no indicia of reliability and should, therefore, be excluded by the court."

The presiding judge and prosecutor never addressed the reliability issue.

The Eleventh Circuit held, on the subject, that:

> "Although the appellant did not request a hearing, he claims that the court should have held one on its own initiative. We decline to require such a hearing to be held as a matter of course. When the opposing party requests such a hearing, however, and when issues relating to trustworthiness of the testimony are in dispute we are hard pressed to see a circumstance in which a hearing should not be held. Such a hearing affords the opposing party a full and adequate opportunity to contest the admission of the statement, presents the trial judge with more facts on which to base its ruling, and aids this court in performing its review." U.S. v. Lang, 904 F.2d 618, at 624-25 (1990).

Defense counsel gave no adversarial testing of state's Exhibit #79 (the twelve page out-of-court written statement), in turn aquiescenced as to the reliability of said statement. Although defense counsel objected to the introduction of the out-of court statement at the time that it was introduced he failed to make timely objections during the trial as required by law to keep the issue open for appeal. The right to effective assistance of counsel may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial. Murray v. Carrier, 477 U.S. 478, 496 (1986) (dictum). In Fenske v. Thalacker, 60 F.3d 478, 481-82 (8th Cir. 1995), the court noted that the failure to request limiting instructions when prior unsworn statement of witness admitted not ineffective assistance when witness had opportunity to explain or deny statement. Here the statement was admitted without any adversarial testing at all done by defense counsel. (Also see Exhibit #1.)

FIFTH ACTUAL INNOCENCE CLAIM: PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING "HARD 40" SENTENCING.

At the time of petitioner's Hard 40 sentencing hearing, the United States Supreme Court had held that the jury instruction given in this case was unconstitutionally vague. See Maynard v. Cartwright, 486 U.S. 356 (1988). The *Maynard* court held that Oklahoma's especially *henious, atrocious or cruel* aggravating circumstances in its death penalty statute gave no more guidance to jury than did previously invalidated "outrageously or wantonly vile, horrible, or inhuman" language and, therefore, Oklahoma's aggravating circumstances was unconstitutionally vague under Eighth Amendment.

The HAC aggravating factor found unconstitutional in *Maynard* contained almost identical language to the Hard 40 jury instructions in the present case. See shell v. Mississippi, 498 U.S. 1, 2 (1990) (Marshall, J., concuring). Further, the *percuriam* opinion in *Shell* found the HAC aggravating factor unconstitutionally vague despite a so called limiting instruction. "Although the trial court in this case used a limiting instruction to define the especially heinous, atrocious, or cruel factor, that instruction is not constitutionally sufficient. *Id.,* 498 U.S. at 1. Again, the limiting instruction given in *Shell* was basically identical to that given in the Hard 40 sentencing proceeding in the instant case. Thus, at the time of the petitioner's Hard 40 proceeding, the HAC jury instruction had been found to be unsconstitutionally vague on two occasions by the Supreme Court. Nevertheless, Attorney Craig failed to object to the instruction.

Mr. Craig admitted to the district court that he was "not terribly experienced in the criminal law." (Transcript of Sentencing, pg. 8.) Defense counsel has a duty to request appropriate jury instructions and to object to erroneous ones. U.D. v. Hook, 781 F.2d 1166, 1172 n. 8 (6th Cir. 1986). Mr. Craig's failure to object to the unconstitutionally vague jury instruction was deficient performance. See Miller v. State, 298 Kan. 921, 932, 318 P.3d 155, 164 (2014) (counsel's failure to challenge an unconstitutional reasonable doubt jury instruction was objectively unreasonable); Browning v. State, 120 Nev. 347, 363, 91 P.3d 39, 51 (2005) (holding the failure of appellate counsel to challenge the depravity of mind instruction based upon *Godfrey* was objectively unreasonable). Further, attorney Craig's failure to object to the unconstitutionally vague HAC jury instruction was prejudicial to the petitioner.

The Kansas Supreme Court, relying upon *Maynard* and *Shell,* held the so called HAC limiting instruction -- *given in the present case* -- was unconstitutionally vague, and that, to be constitutional, the HAC instruction must contain language that "the death of the victim was preceded by torture of the victim or serious physical abuse." State v. Willis, 254 Kan. 119, 129,

864 P.2d 1198, 1206 (1993). *Willis* specifically held that his instruction was to be applied in "all cases on appeal as of the date of this opinion which which vagueness of K.S.A. 21-4625(6) sentencing instruction has been asserted as an issue on appeal. 254 Kan. at 130.

In petitioner's direct appeal, appellate counsel challenged the HAC instruction as being unconstitutionally vague. In rejecting this argument, the Kansas Supreme Court held that the vagueness challenge was precluded because it was not raised in the trial court; holding:

> "The failure to give the supplemental instruction set forth in *Willis* regarding the term 'especially henious, atrocious or cruel manner' will not be considered in a vagueness argument except in those cases where the same argument was presented to the trial court and the appellate court." State v. Alford, 257 Kan. 830, 840, 896 P.2d 1959, 1067 (1995).

Thus, clearly, attorney Craig's failure to object to the unconstitutionally vague HAC instruction below precluded review of that claim on the petitioner's direct appeal. Further, but for Craig's failure to object to this instruction, the petitioner's Hard 40 sentence would have been vacated under *Willis* and its progeny. That is because the HAC aggravating factor was the only factor out of ~~the~~ four, found by the jury, beyond a reasonable doubt, during the Hard 40 proceeding. There is a reasonable probability that, but for attorney Craig's deficient performance, the outcome of the sentencing proceeding would have been different; i.e., *it likely would have resulted in the reversal of the petitioner's Hard 40 sentence*. See Rice v. State, 353 P.3d 471 (Kan. Ct. App. 2015, unpublished) (holding appellate counsel at *Van Cleave* hearing was ineffective in failing to raise issues of trial counsel's ineffectiveness in connection with trial counsel's performance during the Hard 40 sentencing proceeding; and, vacated the Rice's Hard 40 sentence due to ineffective assistance of appellate counsel's failure to raise instances of trial counsel's ineffectiveness).

SIXTH ACTUAL INNOCENCE CLAIM: THE INORDINATE DELAY WAS PARCEL OR ATTRIBUTED TO THE PETITIONER'S DEVELOPMENT OF THE UNDERLYING CONSTITUTIONAL VIOLATIONS DEMONSTRATING HIS ACTUAL INNOCENCE. SUCH OFFENDS THE DUE PROCESS CLAUSE.

Petitioner first contends that the state district court refused to process and rule on his asserted post-conviction motion he filed on April 1, 1998, under K.S.A. 60-1507, in case number 97 CV 3745. Secondly, that the trial court lacked subject matter jurisdiction to enter judgment against him.

ARGUMENT

Petitioner contends that he was denied due process of law in the Kansas district court by *inordinate delay* in the adjudication his asserted post-conviction remedy under K.S.A. 60-1507 and that he is, therefore, entitled to invoke federal habeas corpus to test the legality of his state restraint. Smith v. Kansas, 356 F.2d 654 (1966). Habeas corpus relief is appropriate for an unconstitutional denial of the right to appeal. Harris v. Champion, 15 F.3d 1538, 1558 (10th Cir. 1994) (protection against unreasonable delay in the appellate process is provided by the due process clause); Mathis v. Hood, 851 F.2d 612, 615 (2nd Cir.) (federal habeas review remains available to protect indigent prisoner's right to appeal).

Moreover, requiring a petitoner to raise the issue of exhaustion first in state court would unnecessarily frustrate a petitioner's right to a speedy adjudication of his or her claims. See *Way*, 421 F.2d at 146-67 (conditionally excusing petitioner from having to raise the issue of delay to the very courts responsible, on the face of the pleadings, for the very delay of which he complains); Brooks v. Jones, 875 F.2d 30, 31 (2nd Cir. 1989) ("When the petitioner can substantiate his complaint that his right to appeal is being violated by inattentive and time consuming procedures, to require one more technical step would be to tolerate the frustration of the petitioner's due process rights).

The concept of federal-state comity involves mutuality of responsibilities, and an unacted upon responsibility can relieve one comity partner from continuous deference. The wait for action, must not be so exhausting as to frustrate its purpose. Dixon v. State of Florida, 388 F.2d 424, at 426 (5th Cir.).

The court held in *Bell v. Todd* that, "When a trial court has failed to rule on an incarcerated litigant's pending motion, reviewing courts have consistently vacated the judgment and remanded the case to the trial court with directions to consider and act on pending motion." *Id.*, 2005 Tenn. App. 583, 206 S.W.3d 86 (2005). *Bell* reminds the careful practitioner that the

trial court must examine and address a *pro se* litigants outstanding motions before entering judgment in a case. Furthermore, "A state court's failure to rule on a motion for consideration is a denial of habeas petitioner's due process right under the Fourteenth amendment." The due process clause grants an aggrieved party, the opportunity to present his case and have its merits fairly judged. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982); Simmons v. Schriro, 187 Fed. Appx. 753 (9th Cir.) (the prisoner presented a viable Fourteenth Amendment due process claim arising out of the state court's failure to rule on his reconsideration motion; the prisoner filed the motion after a state court summarily dismissed his first post-conviction relief petition).

The United State Supreme Court expressly recognized that "the consistent practice in civil and criminal cases alike has been to treat timely 'motions for reconsideration' as rendering the original judgment nonfinal for purpose of appeal for as long as the motion is pending." See U.S. v. Healy, 376 U.S. 75, 78-79 (1964). Also see. U.S. v. Dieter, 429 U.S. at 8; and, (See attached Exhibit A). Directly on point is the case of Strong v. Heimgartner, 2019 U.S. Dist. Kansas LEXIS 85224 (May 21, 2019, decided). In *Strong,* the Tenth Circuit Court of Appeals ultimately concluded that because Strong had a post-conviction motion pending in state court for the last *thirty-five years* the statute of limitations for filing a federal habeas action was tolled. Strong v. Hrabe, 750 Fed. Appx. 731, 733 (2018).

Where a petitioner has demonstrated inordinate delay, courts have placed the burden on respondents to demonstrate why further resort to state courts should be required. See Burkett v. Cunningham, 826 F.2d 1208, 1212 (3rd Cir. 1987) (Burkett I); Bartone v. U.S., 375 U.S. 52 (1963) (("Where state procedural snarls on obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding). Whether a petitioner should be excused from exhausting state remedies due to delay in adjudicating his state appeal is a separate inquiry."). A showing of prejudice is necessary only for the due process claim. Carpenter v. Young, 50 F.3d 869, 871 (10th Cir. 1995). Prejudice typically takes on one of three forms where appellate delay is alleged: (1) impairment of the grounds for appeal; (2) anxiety or concern; or (3) oppressive incarceration. *Harris,* 15 F.3d at 1583. **Today, the present petitioner's motion has been pending for over two decades without final adjudication**. See Gardner v. Plumley, 2013 U.S. Dist. LEXIS 160870, 2013 WL 599904 (S.D.W. Va. Nov. 12, 2013) (j. Goodwin) (finding inordinate delay where petitioner's state proceeding was pending for nearly twenty years without a dicision for the court).

Only when appellate delay prejudiced the petitioner's due process rights as to make his confinement constitutionally deficient would habeas relief based on appellate delay be

appropriate for a petitioner whose conviction has been affirmed. Diaz v. Henderson, 905 F.2d 652, 653 (2nd Cir. 1990); *Burkett*, 826 F.2d at 1226 (3rd Cir.) (ordering unconditional release where no relief short of discharge could fully remedy constitutional violations); Turney v. Bagley, 401 F.3d 718 (6th Cir. 2005) (under certain circumstances inordinate delay or deprivation of access to the appellate process renders the appeal worthless such that a petition for habeas corpus may be unconditionally granted. (See headnotes 7, 8 & 9.) The power to dismiss a criminal complaint with prejudice must be exercised with great caution and only in cases where no other remedy would protect against the state's abuse. State v. Crouch & Reeder, 230 Kan. 783, 788, 641 P.2d 394 (1982). In *Preiser v. Rodriquez* the court said, "It is clear that the essence of habeas corpus is an attack by a person in custody upon the legality of the custody, and that the traditional function of the writ is to secure release from illegal custody." *Id.*, 411 U.S. 475, 484 (1973).

In closing, *and after serving over 26 years of a unconstitutional conviction,* under the facts and circumstances of this case, Petitioner would ask this Court to grant him the relief of unconditional release because of several unrectifiable due process violations -- present herein -- at both the trial level and habeas proceedings. The Tenth Circuit has recognized -- in an instance such as the present petitioner's -- release was reasonable because *Hannon* already served *twenty six years* at hard labor and state was not prejudiced. See Hannon v. Maschner, 981 F.2d 1142, 1145 (1992). Safeguarding this constitutionally guaranateed declaration of right and remedy is the primary duty of the courts.

SEVENTH ACTUAL INNOCENCE CLAIM: THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL OF PETITIONER AFTRE TRIAL JUDGE (1) CORRECTLY OR INCORRECTLLY ARRIVED AT A JUDGMENT OF ACQUITTAL THAT, IN TURN, TERMINATED THE PROSECUTION; AND, (2) BARS FURTHER PROCEEDINGS AGAINST PETITIONER DEVOTED TO THE RESOLUTION OF FACTUAL ISSUES GOING TO THE ELEMENTS OF THE OFFENSE CHARGED.

Petitioner adopts and incorporates by reference the aformentioned, as though fully set forth hereunder.

The Doubley Jeopardy provisions in the Fifth Amendment to the United States Constitution provides that, "No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." It has now been held applicable to the states through the due process clause of the Fourteenth Amendment.

The United States Supreme Court's decision in *United States v. Scott* confirms that the relevant distinction between court rulings that trigger protection under the Double Jeopardy Clause and those that do not is between judicial determinations that go to a criminal

defendant's lack of criminal culpability, and those that hold that a defendant, although criminally culpable, may not be punished because of a supposed procedural error. Culpability (i.e., the ultimate question of guilt or innocence) is the touchstone, not whether any particular elements were resolved or whether the determination of nonculpability was legally correct. *Id.,* 437 U.S. 82, at 98. An offense comprises constituent parts called elements, which are facts that must be proved to sustain a conviction. See, e.g., U.S. v. Dixon, 509 U.S. 688, 696-97 (1993). The double jeopordy clause precludes another trial once the court finds the evidence legally sufficient to support the verdict. *Martin Linen Co.,* 430 U.S. 564, 571 (1977). Thus an "acquittal" includes a ruling by a court that the evidence is insufficient to convict, a factual finding that necessarily establishes a criminal defendant's lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence. *Scott,* 437 U.S. at 91, 98 and n. 11. These sorts of substantive rulings stand apart from procedural rulings because it goes directly to factual guilt or innocence. Evans v. Michigan, 568 U.S. 313, 319 (2013).

The present petitioner contends that his trial ended upon insufficient resolution of his culpable mental state. When a court misconstrues the statute under which a defendant was charged, an acquittal "by mistake" can occur, and although based on an error of law, such prevents the State from retrying the case. *Evan v. Michigan,* supra. Culpable mental state being an essental element of Petitioner's charged crimes, K.S.A. 22-3301 et seq., and K.S.A. 22-3219, therefore, became entirely relevant in answering the question of petitioner's mental state during commision of crime, during trial, and at sentencing. Equally relevant is when the court-ordered examination into Petitioner's mental state is not fulfilled. Thus, the issue of whether petitioner suffered from a mental disease or defect was never resolved; and, in the same vein, never rebuted. The jury was allowed to convict in spite of Petitioner having been denied his fundamental right to establish his diminished mental state as his theory of defense. Trial counsel, the prosecutor, and trial judge each had an independent duty to see that the question of petitioner's mental state was resolved beforehand. Having failed to do so, is indication the district judge obviously *misconstrued* the mandate in K.S.A. 22-3302 to *suspend the proceedings* before allowing conviction or sentence. By doing so, the trial judge shirked his responsibility under K.S.A. 22-3419(1) to *"order the entry of judgment of acquittal,"* since a *'decision to grant a motion for judgment of acquittal is not discretionary"* in the instance where, as here, there is not sufficient evidence of each element of a charged crime (i.e., insufficient evidence of petitioner Alford's criminal culpability).

Manifestly, under the present circumstances counsel required expert assistance in determining whether there was a basis for a substantial defense of diminished capacity and in preparing and presenting such a defense, if after examination, it appeared justified.

Because he did not receive it, the petitioner herein was denied an adequate opportunity to determine the possible existence of a substantial defense. C.f., U.S. v. Taylor, 437 F.2d 371 (1971). Speculation must play no role in answering what possible avenues of defense an adequate examination might or might not have revealed. It is enough that having asked and been granted a court order for a psychiatric exam to inquire into petitioner mental state, such demonstrated doubt as to his mental condition. It is well settled that psychiatric evidence at the time of the crime is relevant and admissible to determine whether the mental element of a crime was present. Because petitioner was not allowed to present evidence of his mental instability the jury naturally imputed culpability that was never proven to exist. See, e.g., State v. Egelhoff, 272 Mont. 114, 900 P.2d 260 (1995) *rev'd* 510 U.S. 37 (arguing that the jury may be misled into believing that the prosecution has proven the mental state).

This petitioner's competency to stand trial, and his capacity to formulate the specific/general intents for the crime charged, were never judicially rebuted nor resolved after the court found *reason to believe* petitioner was incompetent. This, in turn, amounted to insufficient evidence to prove culpability to commit the crimes. See K.S.A. 21-5202(a); American Tabacco Co. v. U.S., 328 U.S. 781, 787 (1946) (failed to prove guilt beyond a reasonable doubt). To allow the state a retrospective hearing at this point would further frustrate petitioner's due process rights. See *Due Process Concerns With Delayed Psychiatric Evaluation And the Insanity Defense; Time Is Of Essence,* 64 U.L. Rev. 861-93. The United States Supreme Court upheld that the double jeopardy clause bars a post-acquittal proceeding, not only when it might result in a second trial but also if reversal would translate into "further proceedings of some sort" devoted to the resolution of factual issues going to the elements of the offense charged. *Evans v. Michigan,* supra (citing *Martin Linen,* 430 U.S. at 570; Lowe v. State, 242 Kan. 64, 66, 744 P.2d 856 (1987). Because at this point a retrospective hearing will be devoted to the resolution of "factual" issues going to prove a specific element of the charged offense, they constitute "*further proceedings of some sort,*" which the double jeoparty clause forbids. Thus, whether the trial is to a jury, to the bench, or even an appeal or collateral proceeding, subjecting the defendant to post-acquittal fact-finding proceedings going to guilt or innocence violated the double jeopardy clause. Arizona v. Rumsey, 467 U.S. 203, 211-12 (1984; see also Lowe v. State, 242 Kan. 64, 744 P.2d 856 (1987) (a postacquittal appeal is barred by the double jeopardy clause); and, State v. Whorton, 225 Kan. 251, 589 P.2d 610 (1979) ("No appeal lies from a judgment of acquittal.). To permit further proceedings or a second trial would negate the purpose of the *Double Jeopardy Clause:* i.e., **to forbid the prosecution from affording another opportunity to supply evidence that it failed to muster in the first instance**. See Green v. U.S., 355 U.S. 184, 185) (1957). Most relevant here are cases that have defined an acquittal to encompass "**any ruling**" that the prosecution's proof is

insufficient to establish criminal liability for an offense. *Burks,* 430 U.S. 1, at 10; *Martin Linen,* 430 U.S. at 571.

It cannot be answered whether a complete psychiatric evaluation based on a thorough examination corroborate, modify or refute the claim that the petitioner here had "the requisite mental capacity to commit a crime" on March 5, 1993. Not since the records furnished here provide no basis for a resolution of that question. The *Double Jeopardy Clause* doesn't permit it. And, the evidence presented at trial is insufficient; hence, reasonable doubt. Therefore, allowing the state a chance to complete the court-ordered psychiatric evaluation ordered over *twenty-six years ago* will infringe on Petitioner's right to a fair trial and finality. There is no substitute for a prompt exam to determine criminal responsibility at the time of the crime. Anything less than a prompt evaluation decreases the reliability of the evidence and increases the potential that petitioner's due process rights will be violated. See *Due Process Concerns With Delayed Psychiatric Evaluation And the Insanity Defense; Time Is Of Essence,* 64 U.L. Rev. 861. There is a vast and incalculble difference between a timely psychiatric examination with a report delivered to counsel when he is preparing for trial and the mere submission of a report after trial -- on a circumscribed remand. The former can be a vital aid to a defendant, the latter is only its pale shadow of limited utility at best. See,e.g., U.S. v. Taylor, 437 U.S. 371, 378 ("We cannot accept the **truncated** interview of February 27 as having met the need for expert assistance shown by counsel. Unlike a determination of competence to stand trial, which focuses on a limited aspect of a defendant's present mental condition, an inquiry into possible lack of criminal responsibility at the time of commission of the offense involves a complex evaluation of his total personality at a previous point in time. It requires that the expert have a substantial opportunity to observe the defendant and his mental processes."). The Fourth Circuit held that a defendant's right to a fair trial is violated when counsel does not halve an adequate opportunity to determine the existence of a substantial affirmative defense. U.S. v. Walker, 537 F.2d 1192, 1194 (1976).

Moreover, prejudice to petitioner is clearly present, when after the substantial delay in awaiting an appeal, his conviction is reversed and the state is allowed to retry him, when witnesses die or become forgetful and other evidence no longer exists or is unattainable. See U.S. v. Reason, 549 F.2d 309 (4th Cir. 1977). Because a determination of petitioner's criminal responsibility cannot be made by the expert soley because the examination was delayed the judge must be reversed without a new trial. C.f. Wood v. Zahradnick, 475 F. Supp. 556, 559 (1979):

> "This is a case, as this court concluded in its July 9, 1979 memorandum, in which, after a seven year delay between trial and psychiatric examination, gaps in the facts in the record and the information available to the examining psychiatrist simply precluded a

> certain and accurate determination of criminal responsibility. To now allow the state to retry petitioner, when his opportunity to prove an insanity defense would be hampered to a substantial degree, would work a deprivation of due process."

Also, if the analysis leads to a conclusion that the right to speedy trial is violated, the prejudice of the violation must be rectified. Where the prejudice cannot be rectified the remedy must be discharge from custody with prejudice to retrial. Struck v. U.S., 412 U.S. 434, 440 (1973).

A state has an interest in receiving "one complete opportunity to convict those who have violated its laws." Sattazahn v. U.S., 537 U.S. 101, 115 (2003). United States Supreme Court decisions all instruct that an acquittal due to insufficient evidence precludes retrial, *whether correct or not*, **and regardless of whether the courts decision flowed from an incorrect antecendent ruling of law**. See *Evan v. Michigan,* supra, and cases cited therein. A "mistaken acquittal" is an acquittal nonetheless and our country's highest court has long ago held that a verdict of acquittal cannot be reviewed, on error or otherwise, without putting a defendant twice in jeopardy and thereby violating the U.S. Constitution. *Evans,* quoting U.S. v. Ball, 163 U.S. 662, 672 (1896). This is because to permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the government, with its vastly superior resources, might wear down the defendant so that even though innocent he may be found guilty. *Scott*, 437 U.S. at 91. And retrial following an acquittal would upset a defendant's expectation of repose, for it would subject him to additional embarrassment, expense, and ordeal while compelling him to live in a continuing state of anxiety and insecurity. The Supreme Court rejects the notion that a defendant's constitutional rights would turn on the happenstance of how an appellate court chooses to describe a trial court's error. *Evan v. Michigan,* supra.

The prosecution and trial court committed legal error, by presenting its case to the jury, when Petitioner's mental state was in doubt at the time and before trial; and, criminal culpability being an essential element of the crime. The trial judge violated longstanding protocol in Petitioner's case by not following the dictates in K.S.A. 22-3419(1). The rule codified in 22-3419 has been the norm since the year 1866, and is succinctly spelled out in Craft v. State, 3 Kan. 450, 485-86, 1866 Kan. Lexis *11:

> "But upon the question of whether there is any evidence of a particular material fact, they are not the exclusive judges. The law requires the court, after the jury shall have made its finding to determine that. Upon this branch of the case, then, the single duty of this court is to determine whetherthere was evidence upon each material fact, necessary to a legal conviction; and upon this subject the examination will be confined to a single point."

The double jeopardy clause precludes granting the state ***"a second bite of the apple"*** via a remand for a retrospective hearing or a second trial to establish criminal culpability it failed to before or during first trial. To allow the state and the trial court to avoid responsibility for their errors would not serve the ends of justice. See, e.g., 2017 Kan. App. Unpub. 979, at *10.

The United State Supreme Court reiterated in *Smith,* 543 U.S. at 473, any contention that the double jeopardy clause must itself leave open a way of correcting legal errors is at odds with the well established rule that the bar will attach to preverdict acquittal that is patently wrong in law. Petitioner herein contends that his preverdict acquittal is the product of insufficient proof to establish liability for the offenses. This court must inquire whether the district court's decision to not suspend the proceedings as required by K.S.A. 22-3302 or K.S.A. 22-3219 -- once the court, by its court order, created the presumption Petitioner suffered from a mental disease or defect -- was that "**any ruling** " going to lack of criminal culpability that fell within the acquittal unbrella of a *misconstruction of the statute(s).*

Respectfully Submitted

Brent L. Alford pro se

Exhibit #A

FILED

EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

APR 1 12 46 PM '98

CLERK OF 18TH JUD. DIST. SEDGWICK COUNTY, KANSAS
BY

BRENT L. ALFORD
Petitioner,

Vs.

STATE OF KANSAS
Respondent,

Case No. 97C3745

COPY

REQUEST TO RECONSIDER ORDER TO DISMISS

Comes now the Movant Pro Se, and requests this Honorable Court to reconsider it's ruling in the aforementioned case. On the 20th day of March 1998, the court issued an order denying relief to Movants 60-1507 petition. Respondent stated the reason relief was denied, was because the issues were previously addressed and resolved on direct appeal. Movant contends that this is a misrepresentation because the issues presented are separate and distinct.

As a basis for this request to reconsider, the Movant provides as follows:

(1) Ineffective Assistance of Counsel - This issue is being raised in this court for the first time. Here the Movant allege his trial counsel made numerous trial errors. While the Respondent believes this issue was decided by a single adverse ruling pertaining one statement. In (STATE V. VANCLEAVE, 239 KAN. 117 Syl. 1 716 p.2d (1988), the court held that a claim of Ineffective Assistance of Counsel will not be considered for the first time on direct appeal. The court did go on to outline a remand procedure for hearing a claim of Ineffective Assistance of Counsel before the original trial court has had the opportunity to address the issues. Appeal counsel informed Movant when appeal was

perfected that raising Ineffective Assistance of Counsel on direct appeal was not a viable option. Movant presents this issue to show the accumulation of errors (not one in itself) by trial counsel that would render him ineffective.

(2) Confrontation Clause - Again this issue was not before the court as the Respondent claims (see Exhibit 1 attached) STATE V. ALFORD, 257 KAN. 830, 896 p.2d 1059 (1995). The appellate courts ruling states the evidence was admitted to show discord, under the Kansas Rule for Marital Discord (STATE V. TAYLOR, 234 KAN. 401, 408, 673 p.2d 1140 (1983). Movant is not challenging the courts decision on the admissibility of evidence under this rule, but is in fact challenging the rule itself. Movant presented a direct challenge to the Kansas Rule for Marital Discord. The question of whether or not it safe guards against Movants confortation rights, guaranteed through the states by the 14th Amendment by allowing evidence which can not be cross examined and there was nothing done to assure statements bore a guarantee of trustworthiness.

(3)A. MULTIPLICITY - Here the Movant ask whether or not elements of the one crime are included in the other, and that the trial records does not show a distinction for "bodily harm" a required element for aggravated Kidnaping. The appellate court only addressed the issue of one crime and whether or not the alternative means in which said crime can be committed. [Multiplicity] does not depend on whether the facts proved at trial are actually used to support the conviction of both offenses; rather, it turns on whether the necessary elements of proof of the one crime are included in the other (see STATE V. LASSLEY, 218 KAN. at 76). On a test for determining also see (STATE V. MASON 250 KAN. 393). This issue is unique on its own and is before this court for consideration for the first time.

B. Lessor Included Offense of Aggravated Kidnaping; - In support of this issue K.S.A. 21-3107(2) provides: "Upon prosecution for a crime, the defendant maybe convicted of either the crime charged or an included crime, but no both. An included crime may be any of the following: (a) a lesser degree of the same crime, (b) a crime necessarily proved if the crime charged were proved". Also K.S.A. 21-3107(3) requires the trial court to instruct on all lesser crimes upon which defendant might reasonably be convicted, instruction on lesser included offenses must be given even if the evidence is weak and inconclusive and consists solely of the defendants testimony (STATE V. HILL, 242 KAN. 68, 73, 744 p.2d 1228 (1987). Respondent did not reply to this issue. Movant understands that although the state is not required to respond to 60-1507 motions, K.S.A. 60-1503(a) does mandate the court to order the state to respond if the court concludes the petitioner may be entitled to relief. Therefore Movant prays that the Honorable Court order the district attorney to respond to petitioners motion.

(4) Abuse of Judicial Discretion, and Improper Jury Consideration; The Movant allege abuse of discretion and improper jury considerations because in arguing for the aggravating factor, the state relied on prior crime evidence to help establish the aggravated factor in question and the jury was not given any guidance on how or how not to use evidence of prior crime. This issue is dealt with in more detail in Movants 60-1507 petition. This issue is before this court for first consideration.

(SEE EXHIBIT A)

Wherefore, the Movant prays this Honorable Court will direct the Respondent to answer all the allegation set forth in his K.S.A. 60-1507 petition, pursuant to K.S.A. 60-1503(a). Further that the court finds that the allegations set forth in petition are with merit, and are such a constitutional magnitude that they require a reversal of his conviction, or at least grant an evidentiary hearing so that all matters may be resolved.

Respectfully Submitted,

Brent L. Alford

Brent L. Alford Pro Se
H.C.F. P.O. BOX 1568
HUTCHINSON, KANSAS
67504

*Please stamp file and return

FILED

APP [illegible] NO. _____

APR 1 12 47 PM '98

[illegible] COURT
18TH JU[illegible] DISTRICT
[illegible] COUNTY, KANSAS
BY _____

EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

BRENT L. ALFORD
Petitioner,

Vs.

STATE OF KANSAS
Respondent,

Case No. 97C3745

COPY

NOTICE OF APPEAL

Notice is hereby given that petitioner Brent L. Alford, Pro Se, in the above captioned case, appeal to the Kansas Court of Appeals, from the judgement entered in this case on the 20th day of March 1998.

Respectfully Submitted; 3-30-98

Brent L. Alford

Brent L. Alford Pro Se,
H.C.F. P.O. BOX 1568
HUTCHINSON, KANSAS
67504

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above along with three (3) copies were mailed first class postage prepaid from H.C.F. Hutchinson, Kansas to the clerk of the District Court in Sedgwick County, Kansas 525 N. Main Wichita, Kansas 67214 on this 30 day of March 1998.

SUBSCRIBED and sworn to me on this 30th day of March 1998.

B.D. Kidd

B. D. KIDD
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Exp. 6-21-99

NOTARY PUBLIC _____

MY COMMISSION EXPIRES June 21, 1999

Respectfully submitted,

Brent L. Alford

Brent L. Alford

Exhibit # B

COPY

MICHELLE M. SEHEE #18267
Assistant District Attorney
18th Judicial District
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(316)383-7138

EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

BRENT L. ALFORD, Movant) Case No. 97 C 3745
v.
STATE OF KANSAS, Respondent.

ORDER DENYING RELIEF PURSUANT TO K.S.A. 60-1507

NOW ON THIS 20th day of ~~February~~ March, 1998, the movant's *pro se* K.S.A. 60-1507 motion comes on for consideration. There are no appearances.

THEREUPON, the court, after being duly advised in the premises, finds as follows:

1. The movant filed a K.S.A. 60-1507 motion with this court on December 29, 1997.

2. The movant alleges (1) his right to confrontation was denied, (2) the trial court abused its discretion by sentencing him to the "hard 40" sentence, (3) his charges were multiplicitous as the act giving rise to the aggravated kidnaping was also the same act giving rise to first degree murder, and (4) he was deprived of effective assistance of counsel.

3. The movant took a direct appeal from his conviction and sentence to the Kansas Supreme Court in State v. Alford, 257 Kan. 830, 896 P.2d 1059 (1995). The court addressed the confrontation issue as the admission of a written statement. The court found the statement was not hearsay and was admissible. This court cannot revisit an

issue previously addressed and resolved against the movant by the appellate courts. Robinson v. State, 209 Kan. 667, 498 P.2d 35 (1972).

4. The court's opinion also resolved the issue of whether there was sufficient evidence the movant's crime was more than simply a routine shooting and contained the type of conduct for which the hard 40 sentence was appropriate. The movant now frames the same issue as whether the trial court abused its discretion in imposition of sentence. The supreme court considered the aggravating factors involved in sentencing and found the factors were supported by the record. This court is bound by the supreme court's opinion and will not revisit the issue.

5. The movant next raises the issue of whether his crimes were multiplicitous. Again, this issue was resolved on direct appeal. The court determined the aggravated kidnaping facilitated the commission of his crime of murder in the first degree. State v. Alford, 257 Kan. at 843. This court will not revisit the issue.

6. The movant's final claim of ineffective assistance of counsel is also without merit. The movant claims his counsel erred in failing to object to the admission of the victim's written statement after his motion to suppress was denied. The supreme court noted this issue and found that in any event the statement was admissible. State v. Alford, 257 Kan. 840. This determination precludes a finding of ineffective assistance. When the underlying substantive issue has no factual or legal merit, the movant has failed to demonstrate either error or prejudice under the two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 674 (1984).

7. The motion, files and records conclusively show the movant is not entitled to relief. Supreme Court Rule 183(f).

8. Neither the movant's presence nor the appointment of counsel is required under Supreme Court Rule 183(h)(i).

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED the defendant's *pro se* K.S.A. 60-1507 motion is denied.

IT IS SO ORDERED.

Paul W Clark

THE HONORABLE PAUL W. CLARK
Judge of the District Court

DISTRICT COURT SEAL SEDGWICK COUNTY KANSAS

STATE OF KANSAS
SEDGWICK COUNTY
I hereby certify that the foregoing is a true and correct copy of the original instrument on file in this court. Dated: 8-30-18
Clerk of the District Court
By Amy VanEyck
Deputy Clerk

SUBMITTED BY:

MICHELLE M. SEHER, #18267
Assistant District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Order was mailed, first class postage prepaid, to Brent L. Alford, #57845, Hutchinson Correctional Facility, P.O. Box 1568, Hutchinson, Kansas 67504, on this 24th day of February, 1998.

MICHELLE M. SEHER, #18267
Assistant District Attorney

Exhibit
C

DEBRA S. PETERSON, #11971
Assistant District Attorney
18th Judicial District
Sedgwick County Courthouse
535 North Main Street
Wichita, Kansas 67203
(316) 660-3266

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

BRENT L. ALFORD,
Movant/Appellant.

v.

STATE OF KANSAS,
Respondent/Appellee.

Case No. 97 C 3745

ORDER DISMISSING APPEAL

NOW on this 17th day of August, 2000, the State's motion to dismiss appeal comes on for hearing. The State of Kansas appears by and through its attorney, Debra S. Peterson, Assistant District Attorney. There are no other appearances; however, the court notes the letter sent by the movant on or about August 15, 2000.

THEREUPON, the court, after being duly advised in the premises, finds as follows:

1. The movant filed a notice of appeal on April 1 1998.

2. Supreme Court Rule No. 2.04 requires that an appeal be docketed with the

Clerk of the Appellate Courts within twenty-one days after a notice of appeal is filed.

3. The movant has not yet docketed his appeal.

4. This appeal must be dismissed pursuant to Supreme Court Rule No. 5.051 for the movant's failure to docket his appeal in a timely manner.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the State's motion to dismiss appeal is sustained.

IT IS SO ORDERED.

Paul W. Clark
THE HONORABLE PAUL W. CLARK
Judge of the District Court

SUBMITTED BY:

Debra S. Peterson
DEBRA S. PETERSON, #11971
Assistant District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Order was mailed, first class postage prepaid, to Brent L. Alford, #57845, HCF, P.O. Box 1568, Hutchinson, Kansas 67504, on this 25th day of August, 2000.

Debra S. Peterson
DEBRA S. PETERSON, #11971
Assistant District Attorney

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument which is on file or of record in this court.
Dated this 21st day of July, 2014
CLERK OF THE DISTRICT COURT
18th JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
By Brenda S.

DISTRICT COURT SEAL SEDGWICK COUNTY, KANSAS

Respectfully submitted,

Brent Alford

Brent L. Alford, Pro Se
Oswego Correctional Facility
2501 West 7th Street
Oswego, KS 67356

CERTIFICATE OF SERVICE

I hereby certify this 23rd day of January, 2018, a true and correct copy of the above and foregoing Request for Appointment of Counsel, and Affidavit by Charles M. Torrence in support hereof, was placed in the U.S. Mail, postage prepaid, addressed to: Boyd Isherwood, Assistant District Attorney, 1900 E. Morris, Wichita, KS 67211; and, the original and one copy was sent to the Clerk of the Kansas Appeallate Courts.

Brent Alford

Brent L. Alford, Pro Se

State of Kansas)
)ss.
County of Labette)

Affidavit by Charles M. Torrence
(In Support of Appellate Case # 17-117270-S)

I, Charles M. Torrence, do hereby declare under penalty of perjury, that the following is true and correct:

1. That I am the person that have identifed issues for Brent L. Alford to present on appeal or via motion or petition (c/o Sedgwick County District Court Case No. 93 CR 401).

2. I am the person that identified via Record of Action in 93 CR 401, and the Record on Appeal in Appellate Case # 17-117270-S, that the district court had ordered that a competency evaluation be performed on Brent L. Alford to determine whether he was competent to stand trial and whether he was able to formulate the general/specific intent for the crimes charged in 93 CR 401. **And, in reviewing said documentation, I discovered that the State had failed to conduct either a competency evaluation or competency hearing on Brent L. Alford as was court-ordered in 93 CR 401.** But I wasn't able to discover this until recently.

3. Brent L. ALford does not understand how the court system works. In fact, he cannot recall most of what transpired during his criminal proceedings in 93 CR 401. He does not even recall most of what transpired during his crime. From talking to him I have learned that he did not understand what was being said by the judge, prosecutor or his lawyers. **Without my assistance he would not have ever discovered on his own that the court-ordered competency evaluation had not been fulfilled.** In my opinion not only was Brent L. ALford incompetent to stand trial, he was not in a right state of mind to formulate the requisite general or specific intents for the crimes charged in 93 CR 401.

4. Brent L. ALford needs counsel appointed to him by this Court to assist him in the prosecution of his appeal and for the pro se motions he has pending in the Kansas Appellate Courts.

5. I currently suffer from psychotic delusions, and have for some years now. I'm not getting any better, and my memory has also been failing me for some years now. In short, I'm not mentally fit to assist Brent L. Alford with his legal issues. And guaging by the experience of the other jailhouse lawyers in the prison, I believe Brent won't been able to find another inmate with the legal technical knowledge necessary to handle issues of the import Brent's issues are.

Charles M. Torrence, **Affiant**
Inmate No. 8977
2501 West 7th Street
Oswego, KS 67356

Subscribed and Sworn to me this 23 day of January, 2018.

NOTARY PUBLIC - State of Kansas
ROBERT A. BRILL
My Appt Expires 3/31/18

Notary Public

My appointment expires: 3 31 2018
(month) (day) (year)

Exhibit # E

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS

Brent L Alford vs. State Of Kansas (Habeas Corpus)

Appellate Court No. 15-114852-A

District Court No. 97C 03745

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EXHIBIT States Exhibit 79 – Hand Written Statement

Exhibit # F

COPY

FILED
APP DOCKET NO.

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

2016 APR -1 P 2:32

CLERK OF DIST COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
BY

BRENT L. ALFORD,
Movant

v.,

STATE OF KANSAS,
Respondent

District Court Case No. 97CV3745

ORDER CONCERNING MOVANT'S MOTION TO SET ASIDE VOID JUDGMENT, OBJECTION TO THE COURT'S FAILURE TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND MOTION FOR APPOINTMENT OF COUNSEL

On the 4th day of November 2015, movant's pro se motion to set aside void judgment, objection to the court's failure to make findings of facts and conclusions of law, and motion for appointment of counsel comes before the court for consideration on the pleadings. There are no formal appearances.

Upon considering the motions, files, and records of the case, the court finds that movant is entitled to have more specific findings of fact and conclusions of law but is not otherwise entitled to relief and summarily denies relief without a hearing. The court's rationale is as follows:

1. In July 1993, a jury convicted movant of first-degree murder, aggravated kidnapping, and unlawful possession of a firearm in 93CR401. He was sentenced to a Hard 40 life sentence on the murder charge, life on the aggravated kidnapping charge, and three to ten years on the firearm charge. The sentences on the aggravated kidnapping and firearm charge were run concurrently with one another but consecutively to the Hard 40 sentence.

DC 18

2. In July 1995, our Supreme Court affirmed movant's convictions and sentence on direct appeal.

3. In July 1996, movant filed a motion to correct an illegal sentence. The district court denied his motion and he appealed.

4. In December 1997, our Supreme Court again affirmed movant's sentence.

5. In December 1997, movant then filed a 1507 motion in 97CV3745, alleging his right to confrontation was denied, the trial court abused its discretion by sentencing him to the Hard 40 sentence, his charges were multiplicitous as the act giving rise to the aggravated kidnapping was also the same act giving rise to first-degree murder, and he was deprived of effective assistance of counsel.

6. In March 1998, the district court summarily denied his 1507 motion.

7. In April 1998, movant timely and concurrently filed a motion to reconsider and a notice of appeal.

8. In August 2000, the district court dismissed movant's appeal because it was not timely docketed. The court's order generally informed movant about the procedure for getting the appeal reinstated under Supreme Court Rule 5.051; the procedure required movant to file a reinstatement request with the Court of Appeals within 30 days. There is no indication in the record that movant ever took any steps to adhere to that procedure, or that movant complained to the district court about the failure to rule on the motion to reconsider.

9. In September 2007, rather than pursue relief on the motion to reconsider or through an appeal, movant filed a second 1507 motion in 07CV3208, with the assistance of 1507 counsel. He claimed that trial counsel was ineffective at sentencing by failing to

present "valid" mitigation evidence and investigate or discover "valid" mitigation evidence.

10. In June 2008, the district court denied the motion because it was untimely and successive and because movant presented nothing justifying an exception to those rules. Movant appealed.

11. In April 2010, the Court of Appeals issued a mandate denying movant's appeal and affirming the district court's decision.

12. In September 2014, movant filed a motion to reinstate his appeal rights in this case. He claimed that the appeal should not have been dismissed because the court never ruled on his timely motion for reconsideration in 1998.

13. In December 2014, movant filed an amended motion to reinstate his appeal rights.

14. In May 2015, movant filed a motion to set aside void judgment. He made essentially the same arguments as he made in the motions to reinstate appeal rights while claiming the order dismissing the appeal should be set aside as being void.

15. On October 9, 2015, this court summarily denied relief on movant's motion to reinstate appeal rights. This court did so by filing a motion minutes sheet that indicated, "Motion Denied."

16. On October 19, 2015, movant filed a notice of appeal and a motion for appointment of counsel to assist in the appeal. Movant also filed an objection to the court's failure to made adequate findings of fact and conclusions of law when denying his motion to reinstate appeal rights.

17. On October 28, 2015, the State filed a response to movant's motion to set aside void judgment, motion for appointment of counsel, and objection to the court's failure to

make adequate findings of fact and conclusions of law. The State requested that this court make more specific findings of fact and conclusions of law and also deny relief on the motion to set aside void judgment.

18. On November 4, 2015, this court took up movant's motions in chambers and determined that the objection to the court's inadequate findings of fact and conclusions of law was essentially a timely motion to reconsider the motion to reinstate the appeal. This court supplemented its previous order by adopting the position presented in the State's response, which also requested that the court deny the motion to set aside void judgment. The court ordered the State to prepare the current order setting out the court's revised findings of fact and conclusions of law.

19. On the motion to set aside void judgment, movant asserts that this court's order dismissing the appeal in 2000 was erroneously entered because of the outstanding motion to reconsider filed in 1998. Although movant correctly notes that the motion to reconsider from 1998 was never ruled on, there appears to be no authority or need for this court to withdraw the order dismissing the appeal. Movant is not attempting to appeal the denial of his 1507 motion. In fact, he is asserting that there was no authority to appeal because of the pending motion to reconsider from 1998.

20. As for his objection to inadequate findings of fact and conclusions of law, this court can remedy the situation by finding that it has no authority to reinstate the appeal. At the time of the dismissal, movant was generally informed that he had to contact the Court of Appeals to get his appeal reinstated. He apparently did not avail himself of that procedure, as he makes no mention of it and there is no evidence of it in the district court record. Nonetheless, this court has no authority to reinstate the appeal.

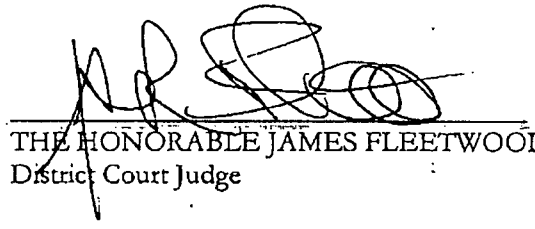
21. As for movant's motion for appointment of appellate counsel, it appears that movant has appointed counsel already so his request is moot.

22. Finally, to the extent that movant is requesting a ruling on his motion to reconsider from 1998, this court declines to enter a ruling on the merits because of movant's failure to pursue any closure on the issue in the 14 years since his appeal was dismissed in August 2000. Instead of pursuing relief on his motion to reconsider or requesting reinstatement of his appeal, movant turned his attention to motion to correct illegal sentence and a second 1507 motion with assistance from 1507 counsel.

23. Although movant's motion should have been ruled on upon its filing, a defendant cannot let a matter rest indefinitely and must give some indication why there was an inordinate delay in bringing an issue to the court's attention. See *Woodberry v. State*, 33 Kan. App. 2d 171, 176-77, 101 P.3d 727 (2004) (applying the doctrine of laches when Woodberry filed a 60–1507 claim regarding ineffective assistance of counsel approximately 22 years after conviction; presuming prejudice to the State because Woodberry knew about the allegations since the time of trial, because memories of the witnesses and victims, if still available, were probably compromised by the delay, and because he offered no justification or explanation for the delay); also, *cf. State v. Cole*, Nos. 105,745 and 105,746, 2012 WL 1649886 (2012) (unpublished opinion), *rev. denied* Mar. 27, 2013 (a defendant who waited 8 years to assert his right to appeal under *State v. Ortiz* was barred from raising his claim because he "let the matter rest" and waived his rights by inaction). The passage of 14 years is not reasonable, especially in light of movant's decision to take other legal actions in lieu of pursuing his appeal or resolving the motion to reconsider. Had movant sought to reinstate his

appeal with the Court of Appeals within 30 days of the dismissal, the Court of Appeals could have taken action to examine whether it had jurisdiction and, if necessary, ensure that the motion to reconsider was ruled upon before proceeding with the appeal. Movant's inaction then and his delay in raising the issue bars relief now.

Accordingly, for the reasons stated above, this court finds that movant is not entitled to reinstatement of his appeal, reconsideration of his 1507 motion, an order setting aside a void judgment, or the appointment of counsel.



THE HONORABLE JAMES FLEETWOOD
District Court Judge

PREPARED BY:

DAVID LOWDEN, #15525
Attorney for the State

Exhibit
G

Jan 13, 1:30pm

Jan 13th 1:30pm is the date and time I arrived at 918 N Broadway, #E I went there to get some more of my clothes and other personal items of mine that I needed to get, And so as I was getting ready to leave the apartment I meet him at the door, and he says to me, 'Oh so you finally came to see me, So I said well I came to get some of my things, And then he said well sit down and talk to me, And then I said well Angela and her boyfriend were waiting for me at Popeyes, I told them I would be right back, and then he said well I thought you were coming home, I didnt say anything at that point, because I knew if he knew that I wasnt coming back, no telling what he would have done or said at that point, so he got mad at me and locked the door, And he told me to sit down and talk and lets talk, if you are not back up at popeyes they will come and get you, and I told him no they will not

Come and get me, because her Boyfriend had to go back to work, so then he said well you can call her later and tell her that you are coming to get your clothes, so At that point I knew he wasn't going to let me leave, And then he started asking me why I never came when I said that I was, he said you where just lying to me just to get rid of me, And he really got mad At that point, so I told him well I got off work early And there where some things I needed to do, I was trying to say Something that wouldn't get him mad, so at that point he knew I wasn't coming home. So he started asking me where my Clothes were And I told him over to Angela's house, And then he said well where have you been staying, I told him I was staying with Angela like I told you, And I stayed over to Tammy's house, [redacted] Then I told him that I had to use the bathroom Because everytime I stood up to do anything

he would tell me to sit down, so he let me go to the bathroom, I pretended that I had to use the bathroom, so he was sitting on the couch, and yelled out come on back in there and sit down, and I said ok, but at that point, I broke and ran from the bathroom to the back door to try and get away, but he caught me and ~~threw~~ pulled me back into the front in the middle of the floor and threw me on the floor, and said I know if I let you leave you were not coming back, you were trying to run from him and get away, And he asked me why I tryed to run, And I told him I was scared of what you were going to do to me, And he said just shut up dont say anything and hit me in the head with the hammer I screamed out and he told me to shut up and to get up and take your clothes off, And I said why do you want me to take my clothes off, he said just shut-up and take your Mother Fuckin' Clothes off so I did and sit back on the couch, crying And trying to tell him I was coming

home today, so he told me to stop lying and to get over on the bed, so I went and sit on the bed. Then he walked around the corner and he brought back a orange extention cord, and said its time for you to be tied up, so he did, then he came over and sit down by the bed and he had a hammer and to razor blades, one that he took out of a razor that you shave your legs and one of those carpenters knifes, that you cut carpet with, and he said I'm going to ask you one more time where your clothes are, and if you lye I going to cut you on your face or hit you with the hammer, so I told him that they were over to Jeff's house, and he said I knew you were lying, and he cut me on my face for the first time, and then he stood up and started walking around, and then he said, so how long have you been staying over there, I told him since I left which was the 7 of Jan, and then he asked me are you fucking him, and I said no that I was sleeping on the couch

And I fell off the bed because I was tired

And he came over and told me to get up and shut up and he raised the hammer as if he was going to hit me.

he had calm down a little but then after walking around and he heard me crying and told him I will beat

then what And he was sleeping in bed, And then he
past he came SAID, Kim you are saying that, he never
ever And sit tryed to be with you, And I told him no,
back down And he yelled at me and said Stop lying
to me, you are probably sucking his
And SAID Good And hit me dick And everything, And I told him
in my chest I was not; And he asked me if I had
with his Jeff I told him no I didnt, And then
he SAID do you know who you are fuckin
with, And he SAID you dont know who
I couldnt stop crying so he hit me in the head again to make sure he was you are fuckin with, And he SAID I
going to ask you again are you fuckin Jeff
And I SAID no, then that's when he hit
me On the side of my knee with the
① hammer, I yelled he kept telling me to
shut up before he hit me again. So he
Then he SAID it was time so he went and got my socks that I had on And tied them together And put the knot part of the sock in my mouth
① Then he SAID I did came over And sat on the other side of
the bed, And started saying, It was my fault
that our lives were going to end today,
he was telling me I could have avoided all
this if I would have come back inside
he SAID it was to late, that he knew if he
let me leave that I surely would not come
back home, I would go And call the Police,
I told him no I wouldnt call the Police

So he got up and came over and sit back down on the chair and said he was going to take the stiches out of his arm and cut his wrist again, so he started cutting some of the stiches out, and I was telling him not to cut those stiches that it would start bleeding again, I kept telling him not to do that And so, so, he asked me did I still love him, I didnt love him but I was scared for my life, if I would have told him no I dont know what else he would have done, so I said I didnt love him the way I used to because of what had happen. I told him I cant sit here and watch him kill himself and he told me that he wanted me to see him die so I would remember that for the rest of my life, he wanted me to hurt like he was hurting, then he said that he couldnt live without me, that I was his life. And then he came back over and sit on the bed and started crying saying how much he love me, and he started saying how he was ready to die, that he was tired of living and hurting without me in his life

KR

And he kept cutting the stiches in his arm. At that time I was crying and telling him that I that he has a son and a family that cares about him and how do he think they will feel if he would kill himself. And he said well my mother will take care of my son, and he asked me if I would make sure that his son gets back to Oklahoma safely, and he told me he was going to let me live so I could make sure he son got back to Oklahoma, and I told him yes I will do that, but he didnt have to kill himself and then he came back around to the side of the bed where I was and he untied me, and he said you do still love me cause you still care about me, so I told him yes I do, Then he asked me if I would make love to him for the last time, At this point I was a little relieved because he had untied me, then he told me to lay across the bed, and he asked me did I want to, I told him no, I didnt ~~feel~~ feel like having sex, and he said just this last time, please do this for me, so he tried to have sex but he didnt get aroused at all

so he said my dick will not get hard
so he get up and told me to turn ~~around~~ over
so I did, then he tryed to have sex
with me in my ass. And I jumped and
told him NO Please dont do this, I can't
take the pain I know I would be having
so he said either I let him fuck me in
my ass or he will cut my face again, so I
told him I didnt want him to do either
I pleaded and begged him not to, so he didnt
do either. then I raised up off the bed, I
told him that I had to use the bathroom
and he told me to go and use the bathroom
on my coat like he had done, I said
no I dont want to use the bathroom on
my coat then he said well piss in the
bed. So I went over and use the bathroom on
my own coat, and he thought I was trying
to do something to him when I was looking
in my coat pockets and he said you better
not try anything, he was standing behind
me with the hammer in the air, I told
him I wasn't trying to do anything. So
I finished pissing and got back on the

bed, And then he SAID Im going to tie you back up, So he did then he started asking me, how long had I knew Jeff, I SAID well a little after I started working at Burgerking, And so on. And then he SAID, well what was he saying to you when he came threw drive thru, I SAID he SAID hi And so on, And then he SAID ~~you~~ I have been fucking Jeff for the longest haven't you, And I told him no I have not, Then he asked me if I liked him, I SAID no he SAID Im going to ask you Again have you fucked him And where my clothes were, I told him no And that my Clothes were over to Jeff house, And then he cut me Again for the second time on my face, then he told me to wipe the blood off my face And neck. Then he untied me And told me to put my Clothes on and leave And that he was going to kill himself now, I knew then he was testing me to see if I would leave or try to stop him from killing himself, so I was telling him not to kill himself over And over Again, And then I started to put my Clothes on to leave, but he came back out of the

bathroom And told me, NO you are not going Any where to leave my Clothes off. And he told me that [redacted] When I went to work the next Day that he will not be there when I came Back, So he wanted me to stay with him tonight, So he told me to go and get some peroxide and put it on my Cuts So I did and he did it for 2 minute and stopped And I finished, then he started Crying saying Why did I Cut your face. Why did I cut your face, Then he said that he love me. Then he said I know when you go to work you are going to call the Police on me, I told him no I am not going to call the Police, he said I know you are, But it will be to late, that he will be dead when they get there. I was still doctoring on my face and on my leg at the time, I finished doing that, he was laying in bed at that time I was standing on the right side of the bed, he said lets get ready

XR

for bed, so I was getting ready to lay down in bed and there was a knock on the door, so he jumped up off the bed and went to Answer the door and Asked who was it and they Sayed it's the Police so he Said to me it's the Police and he let them in, And I heard the Policeman Asked is the lady of the house here and he Said yes And they Asked where was I he pointed where I was, they Came on in And I saw the Policeman he looked at me And [redacted] Asked me if I was alright And I shake my head no And motion my lips to get me out of here before Brent turned around And then the Policeman he Said, I need to talk to you outside, And I Said real quick ok, And I grabbed my Clothes And went into the bathroom to put them on And the policeman Came on in and Asked me some questions, And Brent yelled out that he was Sorry, And the Policeman told him to be quiet that he can't talk to me now, And they were talking to him And one was talking to me, then they Called someone else to come and get

the evidence and to take pictures, and
after the policeman and the man
that took pictures and everything we
was waiting for someone to come and
get us so we could go to the Police Station
but, they called over the Walkie talkie
and told the one police officer that they
did not need me to come down, that that
what I told them would be fine. So
after they left I cleaned up a bit and
came on over to Jeff's house, I called
my Mom and told her what had happen
then I went to the hospital after my
Mom said go to the hospital now, so they
could check me out. So I did and I
got ten stiches in one cut and 3 in the
other. Other.

Exhibit
H

APP DOCKET NO.
2015 APR -9 A 8:35
CLERK OF DIST COURT
JUDICIAL DISTRICT
BY

Brent Alford #57845
E.D.C.F-S.E.U
2501 W. 7th Str
Oswego, KS 67356

Copy sent by email / interoffice mail to David Lowden w/ request for State's Response 4-8-15

taken care of by judge's aide rec'd in Crim 4-9-15

To. Chief Judge Honorable James Fleetwood

Dear Judge,

I'm writing to try and explain the reason for the motion I filed in your court. I am a lay person and am not educated in the law. I titled the motion "reinstate appeal rights" for various reasons. But what I wanted you to know was really only two things. Briefly I'll try to explain. First, I was indigent at the time (see filings) and never appointed any counsel to assist or help me in any way. Second, at the time I also had a timely motion to reconsider, which tolls time to appeal. I filed the motion & the notice of appeal at the same time. After waiting for over two years the court dismissed appeal for failure to docket. I filed the notice of appeal because I was afraid I may run out of time & lose appeal rights. Does a defendant risk the loss of appellate rights by filing a motion to reconsider? I only filed the motion because the court didn't understand my position & facts of case. In closing your Honor, I could find no time limit for a K.S.A. 60-259 motion, only that it tolls appeal time until ruled on by the court. So do I have a right to recieve Judgment on my outstanding pending motion - if so can you please set a hearing or

render a judgment. Also since that disposes of the case can I not appeal your decision. This has caused an inordinate delay in appeal process, and the court should have concerns about appellates due process. Also the record will show that I was indigent and filed a notice of appeal to let the court know that I wanted to appeal its ruling. One of the Ortiz factors, "was not appointed attorney to perfect appeal" should have applied in my case. Also the fundamental fairness doctrine discussed in ORTIZ, held that it should be applied to appeals which are filed to early as well as to those which are filed late. A K.S.A 60-1507 petition is the exclusive statutory remedy for a collateral attach on a criminal conviction & sentence. This has caused me to lose appeal rights in the Court of Appeals, Supreme Court & also Federal review. When liberties & other interests are at stake nothing is more vital than to be represented by counsel. That would ensure that any other rights or privileges that are due are not lost. This has caused me a great deal of anxiety over the years, and waiting for a final resolution has caused undue stress. I just want it over. I am sorry for writing directly to you. It wont happen again. I was just hoping that you would resolve this issue one way or the other. Thanks for Your Time & Consideration Respectfully,

Brent Alford pro se.

18th Judicial District Court
Sedgwick County, Kansas
Filings

Case: 1997C 03745 **User Id:** rroberts

Pltf: ALFORD, BRENT L. #57845 **Deft:** KANSAS, STATE OF

Line	Date	Code	Description	Index	Camera	Roll	Frame
1	12/29/1997	PET	PETITION FILED (NO FEE) (HABEAS CORPUS: TO BE HEARD BY	1997	1	287	913
2			JUDGE CLARK/CY TO D.A./CVS & ACKNOWLEDGMENT LETTER TO				
3			PETITIONER)				
4	12/29/1997	M	BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	1997	1	287	917
5			PROSE PLTF (28 PGS)				
6	12/29/1997	MOT	MOTION FOR APPOINTMENT OF LEGAL COUNSEL PROSE PLTF (EXHS)	1997	1	287	948
7	12/29/1997	PAF	FORMA PAUPERIS AFFIDAVIT PROSE PLTF	1997	1	287	964
8	12/29/1997	M	STATEMENT OF INMATE TRUST FUND: BALANCE ($48.92)	1997	1	287	966
9	12/29/1997	LTR	COVER LETTER REGARDING FILING OF 60-1507 PROSE PLTF	1997	1	287	967
10	01/08/1998	CVS	CIVIL INFORMATION SHEET.	1998	1	6	576
11	03/18/1998	ROH	RECORD OF HEARING/ENTRY OF JUDGMENT/60-1507/RELIEF DENIED	1998	1	60	2600
12			(SEE FILE)/THAT (ADA) PREPARE J.E./ORDER REFLECTING THE				
13			COURT'S ACTION. S/P.CLARK				
14	03/20/1998	JEJ	ORDER DENYING RELIEF PURS. TO KSA 60-1507: S/P/CLARK	1998	1	61	1958
15	04/01/1998	NAP	NOTICE OF APPEAL, PTN APPEALS FROM THE JDGMNT ENTERED ON	1998	2	54	1308
16			TH 20TH DAY OF MARCH 1998.				
17	04/01/1998	REQ	REQUEST TO RECONSIDER ORDER TO DISMISS, FILED BY PLTF-PRO SE	1998	2	54	1309
18	07/11/2000	MOT	D001/KANSAS, STATE OF	200	1	162	1657
19			MOTION TO DISMISS APPEAL				
20			SET: 08-17-00 @ 08:45, DIV. 09 ATTY: PETERSON, DEBRA S.				
21	08/24/2000	MMO	MOTION MINUTES/ORD:SUSTAINED/D.PETERSON TO PREPARE J.E./ORD	200	1	208	1497
22			REFLECTING COURT'S ACTION. S/P. CLARK				
23	08/28/2000	RAP	ORDER DISMISSING APPEAL: APPEAL DISMISSED FOR FAILURE TO	200	2	66	1810
24			DOCKET APPEAL IN A TIMELY MANNER, 8-17-00,				
25			S/PAUL W. CLARK, JUDGE DIV. 9				
26	08/23/2000	LTR	LETTER FORM DEFT REQUESTING COPIES, SENT 8-3-00	200	2	69	1426

Brent L Alford vs. State Of Kansas (Habeas Corpus)

Habeas Corpus

Date		Judge
9/8/2014	Motion To The District Court to Reinstate Appeal Rights Because The District Court Failed to Comply With KSA 22-4506(c) KSA 60-2013 KSA 60-259(f) 7 KSA 60-258. Prose Pltf Brent L. Alford (1c Judge Fleetwood via aide/emailed 9-16-14; 1c D.A./emailed 9-16-14)	James R Fleetwood, Div. 11
9/16/2014	Plaintiff: Alford, Brent L Attorney of Record Pro Se	James R Fleetwood, Div. 11
	Back Loaded - See Mainframe for Journal Entry of Judgment	James R Fleetwood, Div. 11
	Case Status Change: Disposed	James R Fleetwood, Div. 11
	Note: Appeal filed 4-1-98; Order Dismissing Appeal filed 8-28-00.	James R Fleetwood, Div. 11
11/17/2014	Letter to clerk from petitioner: case status inquiry (see clerk's reply letter below) (1c Judge Fleetwood via aide/emailed 11-18-14)	James R Fleetwood, Div. 11
	Clerk's Reply Letter to petitioner's letter filed 11-17-14. (correcting copy of this letter mailed 11-19-14 to petitioner/correcting date)	James R Fleetwood, Div. 11
12/17/2014	Cover Letter from petitioner: enclosed is amended motion	James R Fleetwood, Div. 11
	Amendment to Motion to Reinstate Appeal Rights Pro se Pltf Brent L. Alford (1c Judge Fleetwood via aide/emailed 12-23-14; 1c D.A. via emailed 12-23-14) 1c pltf mailed 12-18-14)	James R Fleetwood, Div. 11
1/6/2015	Letter from petitioner to clerk: status inquiry (see clerk's reply letter)	James R Fleetwood, Div. 11
1/22/2015	Clerk's Reply Letter to petitioner's letter received 1-6-15.	James R Fleetwood, Div. 11

Brent Alford #57845
E.D.C.F - S.E.U.
2501 W. 7th Sta
Oswego, Kansas 67356

WICHITA KS 670
03 MAR 2015 PM 3 L

District Court Judge Div. 11
Att: Honorable James R. Fleetwood
Chief Judge: 18th Judicial District
525 N. Main Street
Wichita, Kansas 67203

67203$3727

Exhibit # I

93CR 401

FILED
APP DOCKET NO. CW

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

MAY 12 9 12 AM '93

CLERK OF THE DISTRICT COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
BY

5/12
1c P.d

THE STATE OF KANSAS,

Plaintiff,

vs.

BRENT ALFORD,

Defendant.

Case No. 93CR 401

ORDER TO ALLOW EVALUATION
BY PSYCHIATRIST

Now on this 12th day of May, 1993, the Defendant's Motion to Allow Evaluation of the same by a psychiatrist at the Sedgwick County Detention Facility comes before the Court. The Defendant appears by counsel, Eric Godderz.

WHEREFORE, the Court orders that Dr. Gary Merrill shall be allowed to perform an evaluation of the Defendant at the Sedgwick County Detention Facility on Saturday, May 15, 1993 at 9:30 a.m. for three (3) hours.

IT IS SO ORDERED.

JUDGE OF THE DISTRICT COURT

Eric Godderz
Assistant Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 mks

D.C. 1.8

DISTRICT COURT SEAL SEDGWICK COUNTY KANSAS

STATE OF KANSAS
SEDGWICK COUNTY
I hereby certify that the foregoing is a true and correct copy of the original instrument 0001 on file in this court. Dated: 10/21/117
Clerk of the District Court
By
Deputy Clerk

1993 0002 066.1.710

bf

Exhibit # J

COPY

JAMES K. CRAIG, #12498
ATTORNEY AT LAW
353 North Market
Wichita, Kansas 67202
(316) 263-7011

1 FSO DA, PD, Dr. + Atty 5-19-93 DP

APP RECEIVED BY BP

MAY 19 2 42 PM '93

CLERK OF THE DISTRICT COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
BY

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, Plaintiff,

vs.

Case No: 93 CR 90
93 CR 178
93 CR 401

BRENT ALFORD, Defendant,

ORDER TO COMPLETE PSYCHOLOGICAL AND PSYCHIATRIC EXAMS

NOW ON THIS 19th day of May, 1993, the court hereby orders that Dr. Neil Roach and any accompanying member of his staff be admitted to the Sedgwick County Jail for the purposes of completing psychological and psychiatric examinations of Brent Alford, the defendant above named. Such admission shall take place on Thursday, May 20th, 1993 and at such other times as may be necessary for the completion of the previously ordered examinations.

Pamela Clark
Judge of the District Court

SUBMITTED AND APPROVED BY:

James K. Craig
Attorney for the Defendant
Supreme Ct. #12498

D.C 1.8

DISTRICT COURT SEAL SEDGWICK COUNTY, KANSAS

STATE OF KANSAS
SEDGWICK COUNTY
I hereby certify that the foregoing is a true and correct copy of the original instrument on file in this court. Dated: 10/20/17
Clerk of the District Court
By
Deputy Clerk

0028

1993 0002 072 0701

Exhibit # K

OFFICE OF THE PUBLIC DEFENDER

COPY

SEDGWICK COUNTY, KANSAS

E. JAY GREENO
CHIEF PUBLIC DEFENDER

604 N. MAIN, SUITE D
WICHITA, KANSAS 67203-3601
(316) 264-8700

April 28, 1993

Dr. Neil Roach
8911 E. Orme
Wichita, KS 67207

RE: Psychological Evaluation on Mr. Brent Alford

Dear Dr. Roach:

As per our telephone conversation on April 28, 1993, it is my understanding that the fee for the psychological examination/evaluation on Mr. Alford will not exceed the price of $1,500.00.

Enclosed you'll find the complaints filed against Mr. Alford as well as pertinent reports. For further inquiry into the case, please contact Mr. Eric Godderz of our office.

Sincerely,

Susan M. Lind
Assistant Public Defender

SML:kv


Kansas Opinions | Finding Aids: Case Name » Supreme Court or Court of Appeals | Docket Number | Release Date |

IN THE SUPREME COURT OF THE STATE OF KANSAS

Exhibit # L

Bar Docket No. 12498

IN THE MATTER OF JAMES K. CRAIG,

RESPONDENT

ORDER OF DISBARMENT

In a letter dated August 31, 2002, to Carol Green, Clerk of the Appellate Courts, respondent James K. Craig, of Wichita, an attorney admitted to the practice of law in the State of Kansas, voluntarily surrendered his license to practice law in Kansas, pursuant to Supreme Court Rule 217 (2001 Kan. Ct. R. Annot. 272).

At the time the respondent surrendered his license, there were 11 docketed complaints against him under investigation. The complaints from clients involved allegations of lack of communication, lack of diligence, and failure to return unearned retainers. Further, the respondent was suspended from the practice of law for a period of 1 year by this court effective October 19, 2001.

This court, having examined the files of the office of the Disciplinary Administrator, finds that the surrender of the respondent's license should be accepted and that the respondent should be disbarred.

IT IS THEREFORE ORDERED that James K. Craig be and he is hereby disbarred from the practice of law in Kansas and his license and privilege to practice law are hereby revoked.

IT IS FURTHER ORDERED that the Clerk of the Appellate Courts strike the name of James K. Craig from the roll of attorneys licensed to practice law in Kansas.

IT IS FURTHER ORDERED that this order shall be published in the Kansas Reports, that the costs herein shall be assessed to the respondent, and that the respondent forthwith shall comply with Supreme Court Rule 218 (2001 Kan. Ct. R. Annot. 276).

DATED this 7th day of October, 2002.

END


Kansas Opinions | Finding Aids: Case Name » Supreme Court or Court of Appeals | Docket Number | Release Date |

Comments to: WebMaster, kscases@kscourts.org.
Updated: October 07, 2002.
URL: http://www.kscourts.org/kscases/supct/2002/20021007/12498.htm.

Exhibit #M

Affidavit by Brent L. Alford

I, Brent L. ALford, hereby declare under penalty of perjury that the following is true and correct:

1. I was not mentally fit to stand trial.

2. One of the reasons my court-appointed defense (Susan M. Lind & Eric Godderz) counsels requested a psychological examination of me was because **(a)** during lawyer visits and court proceedings I wasn't focused on what the lawyer was saying nor on what was going on in the courtroom, instead, I would kept my head down on the table -- off in a totally different world. I couldn't concentrate on what my lawyers were saying to me nor on what was occurring in the courtroom; **(b)** I had attempted suicide shortly before the crimes charged against me occurred and subsequent arrest, and, as best as I can recall, I was treated in the county jail for having sliced my wrist (they had to remove my stitches) and they expressed concern about me attempting it again.

3. I was in no shape mentally to aid or assist in my defense. For example, I should not have ever taken the witness stand in my defense because during that time I was having constant difficulty with separating fact from reality. There were days I would wake up in jail and not realize why I was there. And I recall my retained attorney (James K. Craig) agreed to as much when he told me he was hesitant about putting me on the witness stand for this reason and because of a problem with the court-ordered mental evaluation. The whole trial and sentencing was a blur to me, like it really never happened.

4. The fact that I was using Cocaine and Herion daily did not help my mental state any. I was experiencing frequent delusions and hallucinations outside and even in jail. I thought that my drug use and withdrawel from the drugs was the reason for my delusions, hallucinations, my inability to concentrate, my disinterest, and my inability to distinguish the truth -- but I don't know. No one ever shared the results of the psychological/psychiatric evaluations performed on me.

5. My family even voiced concern to James K. Craig about my mental state before and during trial.

Brent Alford
Brent L. Alford, Affiant

Subscribed and Sworn to before me this 12 day of February, 2019.

NOTARY PUBLIC - State of Kansas
ROBERT A. BRILL
My Appt Expires 3/31/22

Notary Public

My appointment expires:

3/31/22
(month) (day) (year)

Exhibit #N

Brent Alford #57845
Oswego Correctional Facility
2501 West 7th Street
Oswego, KS 67356

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,)	County Appealed From: Segwick
)	District Court Case No: 93 CR 401
PLAINTIFF-APPELLEE,)	Appellate Case No: 17-117270-S
)	
vs.)	
)	
BRENT L. ALFORD,)	
)	
DEFENDANT-APPELLANT.)	

MOTION TO CORRECT ILLEGAL SENTENCE

Comes Now the defendant-appellant, Brent L. Alford, **pro se**, and pursuant to Supreme Court Rule 5.01 and K.S.A. 22-3504(1), moves this honorable Court to correct the egregious illegal sentence imposed upon him when the district court failed to conform to the provisions of K.S.A. 1992 Supp. 21-4624(3); i.e., by presenting evidence *secured* in violation of the U.S. Constitution at Mr. Alford's Hard-40 penalty phase *without Alford being personally **mentally** present*. The district court found *"reason to believe"* Mr. Alford was incompetent and/or suffered from a mental disease or defect and, accordingly, ordered a psychiatric evaluation of Alford. Unfortunately, the evaluation nor competency hearing ever occurred. Therefore, the presumption remains that Mr. Alford was not mentally present at his sentencing hearing.

In Support Hereof, the Mr. Alford states:

1. K.S.A. 22-3504(1) specifically authorizes a court to *"correct an illegal sentence at any time."* This language has generally been interpreted to mean that *"an illegal sentence issue may be considered for the first time on appeal."* State v. Floyd, 296 Kan. 685, 690, 294 P.3d 318 (2013); State v. Gilliland, 294 Kan. 519, 522, 276 P.3d 165 (2012) (court may correct illegal sent *sua sponte*).

2. K.S.A. 1992 Supp. 21-4624(3) *forbids* evidence secured in violation of the United States and Kansas Constitutions.

3. It violates the Constitution to convict or sentence an incompetent person. "A sentence imposed in the absence of the defendant is void, for, under such circumstances, it is mandatory that the defendant be present in court at the time of sentencing." State v. Coy, 234 Kan. 414, 420, 672 P.2d 599

(1983).

4. A defendant's constitutional right uder the U.S. Constitution to be present during criminal proceedings stem from the 6th Amendment right to confront witnesses and the due process right to attend critical states of a criminal proceeding. See State v. Atkinson, 276 Kan. 920, 927, 80 P.3d 1143 (2003) (*right to confront witnesses is a fundamental right*). Courts have interpreted the right to be present to mean something more than that the defendant is in the court room "it assumes that a defendant will be informed about the proceedings so he can assist in the defense." State v. Calderon, 270 Kan. at 245. As a result, the right to be present includes a right to have trial proceedings translated into a language the defendant understands. 270 Kan. at 245.

5. In the present case, the district court judge ordered that an evaluation be performed by a psychologist and a psychiatrist to determine whether Mr. Alford was competent to stand trial and whether he was able to formulate the requisite general/specific intent for the crimes charged. (R. 1, 75, 83). Because the order was not contested the trial court was not required to and did not state in the order the controlling facts and legal principles controlling its decision. Accordingly, the order was not required to contain the specific finding of *"reason to believe"* defendant is incompetent; rather, the finding is inherent in the order itself. State v. Davis, 281 Kan. 169, 184, 130 P.3d 69 (2006).

6. The trial judge having once expressed his ***doubt***, and set the machinery in motion, could not divest Mr. Alford of his right to have the issue tried as contemplated by the statute., The failure to follow through denied Mr. Alford one of his substantial rights. See, e.g., People v. Westbrook, 62 Cal. 2d 197, 204, 397 P.2d 545 (1964). A person presumed by the court to be incompetent cannot knowingly or intelligently *"waive"* his right to have the court determine his competency to stand trial. See Pate v. Robinson, 383 U.S. 375, 384 (1966). *"Determining the competency of an accused to stand trial is a duty that falls on both the state and the trial court."* State v. Collier, 263 Kan. 54, 70.

7. Mr. Alford had a right under the Constitution and statute be be personally present at his sentencing. *"Being present at [sentencing] involves more than physical attendance; it requires that the defendat be able to understand what is happening so that he or she can participate in his or her defense."* Khalil-Alsalaam v. State, 54 Kan. App. 2d 235.

8. In Drope v. Missouri, 420 U.S. 162, 171-72 (1975) the court emphasized that the common law prohibition of trying an incompetent person is *"fundamental to an adversary system of justice"* **and is conceptually similar to the prohibition on trying a defendant in his absence.** Given the importance of the substantive right *"state procedures must be adequate to protect it."* Pate, 383 U.S. at 378. The sentence of a legally incompetent defendant or the failure of a trial court to provide an adequate competency determination violates due process by depriving a defendant of his constitutional right to a fair trial. Drope, 420 U.S. at 178-182.

9. The presumption of incompetency/mental disease or defect **canceled** the previously existing presumption of sanity and made it necessary for the State to rebut that presumption. See, e.g., Butler v. State, 252 Ga. 135, 137-38, 311 S.E. 2d 473 (1984).

10. Mr. Alford is required to designate a record sufficient to establish his claimed error. Hill v. Farm Bur., 263 Kan. 703, 706, 952 P.2d 1286 (1998). On the record before us are two separate orders by the

district court judge for a competency evaluation (R. 1, 75, 83), presumably because under the statute K.S.A. 22-3302 he found *"reason to believe"* the defendant was incompetent to stand trial. *The presumption that Mr. Alford was not competent to stand trial nor able to formulate the criminal intent for his crimes stands until rebutted.* The record hereon contains no proof of any competency determination or hearing having occurred whereupon the State rebutted the presumption of incompetence or mental disease or defect bestowed on Alford by the trial court. (R. 1, 75-187). Thus the court is unable to show defendant could sufficiently comprehend and retain explanations of judicial process, to participate effectively during trial or sentencing. U.S. v. Hoskie, 950 F.2d 1388, 1392-96 (9th Cir. 1991). A court's failure to hold a competency hearing when one is warranted is a violation of both the statute and due process. K.S.A. 22-3302; Pate, 383 U.S. 375, 384; also see Wilkins v. Bowersox, 145 F.3d 1006, 1014 (8th Cir. 1998) (*error in failing to order competency hearing because court made no fact findings to contradict reason to believe defendant is incompetent*).

11. Since the presumption remains that Mr. Alford was incompetent to stand trial and, thus was not *"personally present"* for his Hard-40 sentencing, then ***all*** evidence the State used to obtain Alford's Hard-40 sentence was ***secured*** in violation of both the United States and Kansas Constitutions. The failure to determine competency upon testimony and evidence presented on the record nullifies not only the determination itself but also the trial and resulting sentence." See Cooper v. State, 2016 Md. App. LEXIS 1324, at pg. *23. Furthermore, any competency determination based upon no medical evidence whatsoever cannot stand. State v. Davis, 281 Kan. 169, 181 (2006).

12. In the instant case Mr. Alford has met the threshold burden of citing to the record and showing that a competency hearing was never held, and the mental evaluation never performed, despite an order from the court. This Court in Davis, 281 Kan. 169; State v. Murray, 293 Kan. 1051, 271 P.3d 739 (2012) and State v. Ford, 302 Kan. 455, 353 P.2d 1143 (2015), all attest to the fact that when a defendant's right to a competency hearing has been violated a remedy is necessary.

13. Mr. Alford's argument here is to *any and all* **evidence** the State used to support sentencing him to a Hard-40 sentence.

14. Mr. Alford's case is distinguishable from *Ford*, supra, in which this court ruled that an illegal sentence based on competency can no longer be brought under K.S.A. 22-3504. First, Ford's illegal sentence claim was a jurisdictional issue. Further, since Alford was sentenced to the Hard-40 (*which Ford was not*) his sentence would have had to conform to the provisions against evidence secured in violation of the constitution and an independant illegal sentence ground under K.S.A. 22-3504 (*in this instance, for a particular class of individuals governed under K.S.A. 21-4624(3)*).

15. Mr. Alford alleges that he was incompetent to stand trial or face sentencing, and suffered from a mental disease or defect which precluded him from formulating the requisite criminal intent for the crimes charged. Because the State failed to rebut presumption of incompetence *any and all evidence* it used to obtain Alford's Hard-40 sentence was violative of the precise directive in K.S.A. 1992 Supp. 21-4624(3) (i.e., *to not use evidence secured in violation of the Constitution*).

CONCLUSION

When a court orders an evaluation of an accused, to proceed without first addressing competency

cannot be regarded as a fair determination of guilt. Its reliability is compromised by doubt about defendants ability to participate fully and effectively in his defense. If the system employs a lawyer to present evidence and arguments against the defendant, and the defendant lacks the capacity to understand the evidence against him to test the validity of that evidence, or to present his own evidence then there is an unaccepatable high risk of wrongful conviction. See Massey v. Moore, 348 U.S. 105, 108-09 (1954).

There can be no question that the imposition of an illegal sentence upon an incompetent defendant is an error *"of the most fundamental character,"* if the goal of the court is to mete out justice in accordance with the law, sentencing an incompetent person to a sentence that does not conform to the statute, even if inadvertent, is an error most fundamental to the rule of law.

In the present case Mr. Alford contends that all evidence introduced after the court ordered evaluation, in which by statute, proceedings were suspended until competency was determined, contravened K.S.a. 21-4624(3). Since the district court proceeded without first determig if Alford was competent to stand trial, all evidence presented at penaly phase hearing was secured in violation of the United States Constitution. Therefore it cannot be said that Mr. Alford's Hard-40 sentence conforms to K.S.A. 21-4624(30, and is illegal pursuant to K.S.A. 22-3504.

Brent Alford

Brent L. Alford, **Pro Se**
Oswego Correctional Facility
2501 West 7th Street
Oswego, KS 67356

CERTIFICATE OF SERVICE

I hereby certify this 9th day of January, 2018, a true and correct copy of the above and foregoing "MOTION TO CORRECT ILLEGAL SENTENCE" was placed in the U.S. Mail, postage prepaid, addressed to: Boyd Isherwood, ADA, 1900 E. Morris, Wichita, KS 67211; and the original and one copy to the Clerk of the Kansas Supreme Court.

Brent Alford

Brent L. Alford, **Pro Se**

Exhibit #O

Brent L. Alford, #57845
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2501 West 7th Street
Oswego, KS 67356

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,	) County Appealed From: Sedgwick
	) District Court Case No: 93 CR 401
PLAINTIFF-APPELLEE,	) Appellate Case No: 17-117270-S
	)
vs.	)
	)
BRENT L. ALFORD,	)
	)
DEFENDANT-APPELLANT.	)

SUPPLEMENTAL AUTHORITY MATERIAL TO
RECENTLY FILED MOTION TO CORRECT ILLEGAL SENTENCE

Comes Now the defendant-appellant Brent L. Alford, **pro se**, and pursuant to Supreme Court Rule 5.01, supplement his recently filed Motion to Correct Illegal Sentence with the following arguments and authority:

1. The Court of Appeals on February 2, 2018, relied on State v. Foster, 290 Kan. 696, at 702, in deciding a case, by acknowledging that "[o]ur Supreme Court has held that competency can be challenged for the first time on appeal because the issue involves due process and compliance with K.S.A. 22-3302." See State v. Allen, Appellate Case No. 117,485; 2018 Kan. App. Unpub LEXIS 72, at *5 (attached hereto).

Similarly, Mr. Alford's K.S.A. 22-3504 challenge raises due process concerns and questions the district court's compliance with a statutory obligation. The Allen court held such a challenge warrants review. (Citing State v. Shopteese, 283 Kan. 331, 339 (2007); State v. Barnes, 293 Kan. 240, 255 (2011) {citing due process concerns and addressing the merits of an issue regarding competency to stand trial even where not raised below}; State v. Harkness, 252 Kan. 510, 514-17 (1993) {defendant argued for the first time on appeal that the judge should have halted proceedings, this court decided the issue on its merits}).

2. In Allen the Court of Appeals held that although the statute expressly addresses a defendant's competency to stand trial, the law is clear that ***a criminal defendal also must be competent for sentencing*** (citing to State v. Hall, 292 Kan. 862, 868 {2011}). In the present case, Mr. Alford's competency issues was raised well before the pronouncement of his Hard-40 sentence. (R 1, 75, 83). Our Supreme Court has explained that the statutory directive to suspend the proceedings and conduct a hearing is triggered after the district court finds that there is reason to believe that the defendant is incompetent. State v. Donaldson, 302 Kan. 731, 735-36 (2015). Stated differently, a court must first make the predicate findings "that there is reason to believe that the defendant is incompetent to stand

trial" before the statute mandates a competency hearing and suspension of proceedings under K.S.A. 22-3302(1).

3. Additionally, State v. Sherrod, Appellate Case No. 114,218 (Decided December 30, 2016, and attached hereto), is **analogous** hereon. While Sherrod's appeal was pending he filed a second motion to correct an illegal sentence in the Court of Appelas under original appellate case number. Mr. Sherrod was already appealing the denial of his first illegal sentence motion, but his first motion did not address the claims he made in his second one. Nevertheless, the court addressed his second illegal sentence motion on its merits as well. The Sherrod court, citing to State v. Hall, 292 Kan. 862, 868 (2011), held: ***"We dispence with our purely prudential reluctance to reach an issue not presented in the district court and move to the merits."***

4. Notably, the Appellee, in responding to Mr. Alford's recent illegal sentence motion, has not denied that a competency evaluation of Alford was ordered; further, that said competency evaluation nor a competency hearing occurred. The Kansas Supreme Court has held that when material facts are undisputed, the issue presents only a question of law. State v. Bennett, 51 Kan. App. 2d 356, ***rev. denied*** 303 Kan. 1079 (2015). This being the case, and it undisputed that Mr. Alford has not had his court-ordered competency determination, what remains is the treatment of law to such lack.

5. Where it was questionable as to whether or not certain actions in court had been taken, the court in State v. Higby, 210 Kan. 554, 502 P. 2d 740 (1972) held: "District courts are courts of record. Their proceedings of significance such as events touching upon the rights are to be recorded. The only safe practice if the interests of the accused, the prosecution and the public are to be effectively protected, is that the records control." Id., Syl. 3; Ruitz v. Brooks, 5 Kan. App. 2d 534, syl. 2, 619 P.2d 1169 (1980) (where disputes as to important occurrences, the record must control).

Wherefore, the defendant-appellant, Brent L. Alford ***supplements*** his recently filed Motion to Correct Illegal Sentence with material argument and authority.

Respectfully submitted,

Brent Alford

Brent L. Alford, **Pro Se**

CERTIFICATE OF SERVICE

I hereby certify this 8th day of February, 2018, a true and correct copy of the above and foregoing Supplemental Authority (material to his recently filed K.S.A. 22-3504 motion) was placed in the U.S. Mail, postage prepaid, addressed to: Boyd Isherwood, Assistant District Attorney, 1900 E. Morris, Wichita, KS; and the original and one copy to the Clerk of the Kansas Appellate Courts.

Brent Alford

Brent L. Alford, **Pro Se**

Exhibit
#P

COPY

BOYD K. ISHERWOOD, #18828
Chief Attorney, Appeals
Office of the District Attorney
18th Judicial District
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IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS, Plaintiff/Appellee v. BRENT L. ALFORD, Defendant/Appellant.	Appellate Case No. 17-117270-S District Court Case No. 93CR401

OBJECTION TO PRO SE APPELLANT'S 12-27-17 MOTION TO DETERMINE WHETHER APPEAL CONSTITUTES POST-ACQUITTAL PROCEEDING

The State of Kansas, through Assistant District Attorney Boyd K. Isherwood, objects to Appellant's 12-27-17 motion to determine whether appeal constitutes post-acquittal proceeding and 1-8-18 memorandum in support thereof, as follows:

1. On 5-9-17, Appellant filed his opening brief asserting: (1) his sentence was illegal as it was based upon evidence secured in violation of the Constitution, and (2) his sentence was illegal due to the State's failure to conform to K.S.A. 21-4624(5) because the instructions and verdict form improperly implied that the jury had to unanimously agree in order to impose life with parole eligibility after fifteen years.

2. On 9-15-17, the Appellee filed its opening brief and responded to each of Appellant's allegations of error.

3. On 11-1-17, the Appellant filed a reply brief.

4. On 10-30-17 a motion was filed by the Appellant seeking remand to the district court regarding issues surrounding an issue not previously asserted as error in Appellant's opening brief, Appellant's competency to stand trial.

5. On 12-20-17, this Court denied the Appellant's motion to remand, stating, "[t]he court has considered and denies Appellant's motion to remand for determination of whether his 'sentences are unconstitutional for failure of the State to complete the process on [Appellant's] competency.'"

6. On 12-27-17 Appellant filed a motion to determine whether his appeal constituted a post-acquittal proceeding and on 1-8-18 Appellant filed a memorandum in support thereof; these materials once again assert a constitutional violation based upon concerns linked to the process employed to determine Appellant's competency before the district court.

7. Appellee respectfully requests that Appellant's motion be denied as it is substantially similar to the request by Appellant previously denied by this Court.

BOYD K. ISHERWOOD, #18828
Attorney for Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the Appellee's objection was mailed first class prepaid postage to: Brent L. Alford, Inmate No. 57845, El Dorado Correctional Facility, Southeast Medium Unit, 2501 W. 7th St., Oswego, Kansas 67356, on this 23rd day of January, 2018.

BOYD K. ISHERWOOD, #18828
Attorney for Appellee

Exhibit # Q

Brent L. Alford
Oswego Correctional Facility
2501 West 7th Street
Oswego, KS 67356

IN THE SUPREME COURT FOR THE STATE OF KANSAS

BRENT L. ALFORD,	)	
	)	Appellate Case No. 114852
PETITIONER/APPELLANT,	)	District Court Case No. 97 CV 3745
	)	County Appealed From: Sedgwick
vs.	)	
	)	
STATE OF KANSAS,	)	
	)	
RESPONDENT/APPELLEE.	)	

MOTION QUESTIONING THE SUBJECT MATTER JURISDICTION OF THE KANSAS APPELLATE COURTS TO HAVE RENDERED A DECISION IN APPELLATE CASE NO. 114852

Comes Now the petitioner/appellant Brent L. Alford, **pro se**, and moves this Court for an Order to determine, based on the following, whether the Kansas Appellate Courts were without subject matter jurisdiction to render the decisions they did in this case.

ARGUMENTS AND AUTHORITIES

1. Scope of appellate right lies within legislative domain. Brinson, 223 Kan. 465, Syl. P1 (1978); Materi, 192 Kan. 292 (1963) (under Kansas Constitution Article 3, Section 3, appellate jurisdiction only that conferred by statute). Futher, National Bank of Topeka, 146 Kan. 97-99, 100 (1937), sets forth a longstanding rule that an appellate court cannot expand or assume jurisdiction where a statute does not provide for it.

2. A judgment rendered without jurisdiction is void. And, significantly, a judgment void for want of jurisdiction may be attacked at any time and may be vacated because it is a nullity. ***A void judgment is not entitled to the respect accorded to and is attended by none of the consequences of, a valid adjudication.*** Indeed, a void judgment need not be recognized by anyone, but may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to given to it. It has no legal or binding force or efficacy for any purpose or at any place. It cannot affect, impair, or create rights, nor can any rights be based on it. Although, it is not necessary to take any steps to have a void judgment reversed or vacated, ***it is open to attack or impeachment in any proceeding, direct or collateral, and at any time or place, at least where the invalidity appears upon the face of the record.*** All proceedings founded on the void judgment are themselves regarded as invalid and ineffective. In re M.K.D., 21 Kan.

App. 2d 541, 901 P.2d 536 (1995).

3. K.S.A. 60-2103(a) provides the starting point for appeals taken in a K.S.A. 60-1507 action. In order for the district court to obtain and maintain jurisdiction it had to be instituted under this statute. The statute requires a notice of appeal to be filed within 30 days from entry of judgment -- ***but also contains an exception that, when one of the listed posttrial motions is timely filed, the time for filing an appeal begins to run upon the entry of an order on that motion.*** Spillman v. Missouri-Kan-Tex R. Co., 795 P.2d 952; 1990 Kan. App. LEXIS 590 **HN 2**).

One of the listed motions in the statute is a motion to alter or amend under K.S.A. 60-259(f). Kansas courts consider a motion to reconsider to be equivalent to a motion to alter or amend. Honeycutt v. City of Wichita, 251 Kan. 451, 460 (1992).

4. The Appellant in this case filed a motion to reconsider simultaneously with a notice of appeal. (R. XV, 3) (R. I, 62). The filing of a notice of appeal did not deprive the trial court of jurisdiction to act upon various posttrial motions. See Fowler v. American Sont. Ins. Co., 702 P.2d 946; 1985 Kan. App. LEXIS 596. A party does not risk the loss of appellate rights by filing a motion for additional findings. A motion challenging the adequacy of the court's findings tolls the time to appeal under K.S.A. 60-2103(a). See Squires v. City of Salina, 9 Kan. App. 2d 199, 200-01 (1984). Appellant did an act according to the statutory directives of 60-2103, which if properly done tolls the time to appeal. The State may not discriminately apply its statutes relating to appeals. State v. Young, 200 Kan. 20, 24 (1967). Notice of appeal filed before district court rules on Rule 59 motion (i.e., the federal equivalent of a 60-259(f) motion) does not take effect until motion is decided. See, e.g., Otis v. City of Chicago, 29 F.3d 1159, 1166 (7th Cir. 1994).

5. Focusing on the jurisdiction basis the district court was stripped of its jurisdiction when it failed to rule on appellant Alford's motion to reconsider. K.S.A. 60-2103 requires the district court to rule on said motion before appeal time can commence. The district court does not indicate under what statutory authority it acquired jurisdiction to dismiss appeal without ruling on the motion to reconsider. While this motion pursuant to K.S.A. 60-259 was pending, under K.S.A. 60-2103 the district court had no authority to dismiss said appeal pursuant to Sup. Ct. Rule 5.051 for failure to docket in a timely manner. Kansas appellate courts may exercise jurisdiction only under circumstances allowed by statute. Harsch v. Miller, 288 Kan. 280, 287 (2009).

The court in U.S. v. Healy, 376 U.S. 75, 78-79 (1964), expressly recognized that "the consistent practice in civil and criminal cases alike has been to treat timely 'motion for reconsideration' as rendering the original judgment nonfinal for purpose of appeal for as long as the motion is pending." See also U.S. Dieter, 429 U.S. 6, 8 (1976). Because of the district court's arbitrary disregard of the motion, the present appellant's 60-259(f) motion was never ruled on.

6. Furthermore, a notice of appeal filed after final judgment on the merits but before the trial court's ruling on a motion filed pursuant to 60-159(f) is premature. However it can "ripen" into a valid notice of appeal when all of the claims against the parties are resolved. Resolution Trust Corp. v. Bopp, 251 Kann. 539, 541-45 (1992); Sup. Ct. Rule 2.03. It also would be undesirable to proceed with an appeal while the district court has before it a motion; the granting of which would vacate or alter the judgment appealed from. Since a notice of appeal filed before the disposition of a posttrial motion, even if it was treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion. The ***pending*** motion for reconsideration rendered the notice of appeal a nullity. Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 59-60 (1982). Premature notice of appeal lies dormant until final judgment, at which point the notice of appeal becomes effective to endow appellate court with subject matter jurisdiciton. See State v. Brown, 299 Kan. 1021, 1026 (2014).

7. Both the district court and the Court of Appeals panel cites to City of Kansas City v. Loop, 269 Kan. 159, 4 P.3d 592 (2000) as being directly on point. But fail to point out two things that goes directly to jurisdiction: **(first)** Loop did not file a motion that tolled the time to appeal and did not have any motions pending when his appeal was dismissed; **(second)** Loop was not denied his statutory right to counsel. (See Opinion in Appellate Case No. 114852, page 8).

The district cour refuse to declare its statutory authority. K.S.A. 60-2103 was never cited in spite of its absolute relevancy. The Court of Appeals panel also consciously refrain from citing to any governing statutes in its opinion. But in a *smoke-and-mirrors act* the Court of Appeals declares, over 15 times, its sole authority for jurisdiction is a supreme court rule. (See Opinion in Appellate Case No. 114852).

Yet, it is fundamental that jurisdiction is controlled by statute and an appeal can only be perfected if taken within the time limits and in the manner provided by the applicable statutes. Bopp, 251 Kan. 539, 541 (1992). The time limits imposed by supreme court rules are not jurisdictional and can be waived. Lakeview, 227 Kan. 161, 167 (1980).

8. The Kansas Supreme Court's power to promulgate rules is limited to rules necessary to implement the court's constitutional and statutory authority. See Jones, 260 Kan. 547, 558 (1998) ("it would violate separation of powers to read a supreme court rule in a way that conflicts with a statute"). Supreme Court Rule 5.051, used in the instant case, directly conflicts with K.S.A. 60-2103(a) tolling provision and time to appeal. Also important to note that this rule also conflicts with K.S.A. 22-4506(c) governing right to appellate counsel. The Kansas appellate courts' **use**, or misuse of the rule and statutes, demonstrates a clear violation of the separation of powers doctrine.

9. The rule of Daniels and Danes, 242 Kan. 822, 827, 752 P.2d 653 (1988), is that a party's prompt action within 10 days (for a motion specified in K.S.A. 60-2103(a)), from the date upon

which he learns of the judgment is sufficient to **preserve** the right to attack the judgment. See also Nicklin v. Harper, 18 Kan. App. 2d 760, 764, 860 P.2d 31 (1993). In Daniels, 230 Kan. 32, 630 P.2d 1090 (1981) the court noted: "In each individual case, a rule of reason must be applied to insure that the rights of the parties are protected and that they are not denied their legal rights through forces beyond their control." 230 Kan. at 38.

CONCLUSION

Jurisdiction can be challenged at any time and once challenged, cannot be assumed and must be decided. Bosso v. Utah Power & Light Co., 495 F.2d 906, 910. There is, as well, no discretion to ignore lack of jurisdiction. Joyce v. U.S., 474 F.2d 215. It is a longstanding rule that if a district court does not have jurisdiction, an appellate court cannot acquire jurisdiction.

Clearly -- absent compliance with the statutory rule requiring courts to rule on certain timely filed motions in order for time to appeal to commence -- the district court had no authority. The Kansas Appellate Courts fail to acknowledge that after a party files a timely motion pursuant to K.S.A. 60-259(f), 60-2103 provides the only statutory authority the district court has is to enter a judment on that motion. The statute gives it no other power. "When a trial court has failed to rule on an incarcerated litigant's pending motion, reviewing courts have consistently vacated the judgment and remanded the case to the trial court with directions to consider and act on pending motions." Bell v. Todd, 2005 Tenn. App. 206 S.W. 3d 86. Bell reminds the careful practititioner that the trial court must examine and address a pro se litigant's outstanding motions before entering judment in a case.

Inasmuch as the district has not yet brought the case (i.e., 97 CV 3745) to final judgment, there is no appealable final orlder entered and accordingly the Kansas appeallate courts lacked jurisdiction over attempted appeal. Sell v. U.S., 539 U.S. 166, 176 (2003).

Respectfully submitted,

/Brent Alford/

Brent L. Alford, **Pro Se**

CERTIFICATE OF SERVICE

I hereby certify this 22 day of August, 2018, a true and correct copy of the above and foregoing Motion questioning whether the Kansas Appellate Courts had subject matter jurisdiction to render the decisions in Appellate Case No. 114852 was placed in the U.S. Mail, postage prepaid, addressed to: District Attorney Office, Courthouse Annex, 535 N. Main, Wichita, KS 67203; and the original and one copy to the Clerk of the Kansas Appellate Courts.

Brent Alford

Brent L. Alford, **Pro Se**
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2501 West 7th Street
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FILED
United States Court of Appeals
Tenth Circuit

July 6, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: BRENT L. ALFORD,

Movant.

No. 20-3100
(D.C. No. 5:20-CV-03003-SAC)
(D. Kan.)

ORDER

Before **BRISCOE**, **EID**, and **CARSON**, Circuit Judges.

Brent L. Alford, a Kansas state prisoner appearing pro se[1], filed an application in district court for a writ of habeas corpus under 28 U.S.C. § 2254. Because he had not obtained authorization from this court to file a second or successive § 2254 application as required by 28 U.S.C. 2244(b)(3)(A), the district court lacked jurisdiction to consider his claims on the merits. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008). Although it could have dismissed the motion for lack of jurisdiction, the district court transferred it to this court pursuant to 28 U.S.C. § 1631, to give Alford an opportunity to obtain authorization to file it. *See In re Cline*, 531 F.3d at 1252 (recognizing that district court may dismiss unauthorized second or successive § 2255 motion or transfer the motion to this court under § 1631 if it is in the interest of justice to do so). Alford then filed a

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[1] Because Mr. Alford is pro se, we construe his filings liberally. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972); *Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010).

APPENDIX C

motion in this court seeking authorization to file a second or successive § 2254 application in district court. He also filed a motion for remand and an addendum to the motion for remand. We deny authorization because Alford has failed to satisfy the gate-keeping requirements in 28 U.S.C. § 2244(b)(2). We also deny his motion for remand.

Background

In 1993, Alford was convicted of first-degree murder, aggravated kidnapping, and unlawful possession of a firearm. He was sentenced to a "hard 40" life sentence (*i.e.*, forty years without parole) on the murder conviction, a consecutive life sentence on his aggravated-kidnapping conviction, and a concurrent three to ten-year term on his firearm conviction. The Kansas Supreme Court (KSC) affirmed his conviction and sentence on appeal. *State v. Alford,* 896 P.2d 1059, 1062 (Kan., 1995). Because Alford's conviction became final before the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted, he had until April 24, 1997, to file an application under § 2254. *See Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001).

Before filing his § 2254 application, Alford filed a series of unsuccessful post-conviction motions in state court. As pertinent here, he filed a motion to correct his sentence in state court in 1996. The Kansas district court denied the motion and the KSC affirmed that order in 1997. That same month, Alford filed another motion challenging his sentence in state court, which was summarily denied in 1998. Shortly thereafter, Alford filed a combined motion to reconsider and notice of appeal. The appeal was

dismissed as untimely in 2000. The Kansas district court never ruled on the motion to reconsider.

Alford filed his first § 2254 application in 2011, about fourteen years after the 1997 deadline. The district court ordered him to show cause why his application should not be dismissed as time-barred. Alford responded, but failed to demonstrate that the application was timely or that he was entitled to equitable tolling. Accordingly, the district court dismissed it as time-barred. Alford did not appeal that order.

In 2016 Alford filed a motion pursuant to Federal Rule of Civil Procedure 60(b), seeking relief from the 2011 dismissal order. As pertinent here, he argued that the district court erred by dismissing his § 2254 application as time-barred because, when he filed that application, he had a properly filed motion for post-conviction review pending in state court (the motion for reconsideration of the denial of his motion to correct his sentence), which tolled the limitation period. *See* 28 U.,S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."). He also argued that the state court's failure to rule on the motion to reconsider violated his right to due process. The district court denied the motion in part and dismissed it in part. In its order, the court noted that Alford's response to the show cause order with respect to his first § 2254 application did not raise the tolling argument he raised in the 2016 motion.

On appeal, we concluded that the portion of the motion challenging the district court's application of the statute of limitations was a true Rule 60(b) motion. *See*

Spitznas v. Boone, 464 F.3d 1213, 1216 (10th Cir. 2006) (explaining that a "true" Rule 60(b) motion "challenges only the federal habeas court's ruling on procedural issues," including timeliness). But we denied a certificate of appealability (COA) because Alford failed to show "that reasonable jurists could debate whether . . . the Rule 60(b) motion. . . should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Alford v. Cline*, 696 F. App'x 871, 873 (10th Cir. 2017) (internal quotation marks omitted) (*Alford I*). We also denied a COA as to the district court's dismissal of his remaining claims for lack of jurisdiction, because they were unauthorized second or successive claims for relief under § 2254. *See* § 2244(b)(3)(A); *Spitznas*, 464 F.3d at 1215 ("[A] 60(b) motion is a second or successive petition if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction."); *see also In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (holding that the dismissal of a § 2254 application as time-barred is a decision on the merits.).

In 2019, Alford filed another habeas petition, this time under 28 U.S.C. § 2241. Because the petition challenged the validity of his conviction and sentence, the district court construed it as a § 2254 application and dismissed it as an unauthorized second or successive habeas application.

Alford filed the § 2254 application at issue here in 2020. He maintained that it was not second or successive because his first application was erroneously dismissed as time-barred. Specifically, relying on *Strong v. Hrabe*, 750 F. App'x 731 (10th Cir. 2018), he maintained that the one-year limitations period in § 2244(d)(1) was tolled under

§ 2244(d)(2) as to his first § 2254 application because when he filed it, his motion to reconsider was still pending in state court. *See Strong*, 750 F. App'x at 736 (concluding that the limitations period for the petitioner's § 2254 application was tolled because when he filed it, his state court post-conviction motion was still pending). The district court noted that Alford filed his motion to reconsider within the AEDPA limitation period, and, based on *Strong*, concluded that because the state court had not ruled on that motion "it is possible that Mr. Alford's petition is not time-barred." Mem. & Order at 3, *Alford v. Cline*, No. 5:20-cv-03003-SAC (D. Kan. May 22, 2020), ECF. No. 12. The district court then transferred the petition to this court to give Alford an opportunity to seek authorization to file it.

Discussion

1. Motion for Remand

As an initial matter, we address Alford's contention in his motion for remand that his proposed new habeas application is not second or successive because his first § 2254 application was erroneously dismissed as time-barred given that (1) he filed it when his motion to reconsider was still pending in state court, and (2) the timeliness of a habeas petition is an affirmative defense and the district court did not require the respondent to establish that Alford's application was untimely.[2] He complains that the dismissal of his

[2] The motion for remand makes an assortment of arguments about the abuse of the writ standard, *see Reeves v. Little*, 120 F.3d 1136, 1138 (10th Cir. 1997), excessive delay, and the district court's construction of his 2016 and 2019 filings as second or successive § 2254 applications without giving him an opportunity to respond. All of those arguments boil down to an assertion that his first § 2254 application was timely and that his subsequent applications were erroneously dismissed as second or successive.

first § 2254 application as untimely means his substantive claims have never been addressed on the merits, and he seeks a remand to allow the district court to address them.

It is true that the respondent in a habeas proceeding has the burden of establishing that the petition is untimely under § 2244, including § 2244(d)(2)'s statutory tolling provision. *See Strong*, 750 F. App'x at 733. While "a district court may, on its own initiative, dismiss a facially untimely § 2254 petition" even when the state fails to assert the timeliness defense in its answer to the petition, if untimeliness is not clear from the face of a habeas petition, the court may not dismiss the petition as untimely unless the respondent has met its burden of establishing untimeliness as an affirmative defense. *Kilgore v. Attorney Gen. of Colo.*, 519 F.3d 1084, 1089 (10th Cir. 2008) (citing *Day v. McDonough*, 547 U.S. 198, 202, 209–10 (2006)).

It is also true that the time period for filing a first § 2254 application is tolled under § 2244(d)(2) while a proper state-court post-conviction motion is pending. *See Strong*, 750 F. App'x at 733, 736 (concluding that the § 2244 limitations period was tolled because the state district court had not ruled on the pending state court motion and the respondent failed to establish that the motion was not a properly filed post-conviction motion under Kansas law). Relying on § 2244(d)(2) and *Strong*, the district court's transfer order recognized the possibility that the pendency of Alford's motion for reconsideration might have tolled the deadline for filing his first § 2254 application.

But *Strong* is inapposite. There, the petitioner sought a COA to challenge the district court's dismissal of his first § 2254 application as untimely given that he filed it when his state-court post-conviction motion was still pending. *See* 750 F. App'x at 731,

736. Here, by contrast, Alford is raising the statutory tolling argument in an effort to avoid application of the rule that the dismissal of a habeas petition as untimely is a dismissal on the merits for purposes of determining whether a subsequent petition is second or successive, *see In re Rains*, 659 F.3d at 1275. Putting aside the questions (1) whether Alford's first application was untimely on its face, and (2) whether a motion to reconsider the denial of a post-conviction motion is itself a "properly filed application for State post-conviction or other collateral review" within the meaning of § 2244(d)(2), the time for Alford to raise his statutory tolling argument was in an appeal of the order dismissing his first § 2254 application, *see Strong*, not in a subsequently filed § 2254 application. Alford did not seek a COA to challenge the 2011 dismissal order, and we do not have jurisdiction to review that order now.

The dismissal of Alford's first § 2254 application was thus a decision on the merits, and his subsequent applications, including the one at issue here, are second or successive applications that the district court lacks jurisdiction to rule on without our authorization. We thus reject Alford's argument that authorization is unnecessary, and we deny his motion for remand.

2. Motion for Authorization

To obtain authorization, Alford must make a prima facie showing that his second or successive § 2254 application meets the gatekeeping requirements of § 2244(b)(2). *See Case v. Hatch*, 731 F.3d 1015, 1027-29 (10th Cir. 2013). Specifically, we may authorize him to file a petition that raises a claim he has not raised in a previous § 2254 application, § 2244(b)(1), if the new claim relies on (1) "a new rule of constitutional law,

made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) a factual predicate that "could not have been discovered previously through the exercise of due diligence" and that, "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." 28 U.S.C. § 2244(b)(2)(A)-(B).

Alford seeks authorization to raise two claims. The first is a claim of "[a]ctual [i]nnocence" "both freestanding and via claims of ineffective assistance of counsel." Mot. for Auth. at 8. This proposed claim is rooted in counsel's alleged ineffectiveness with respect to Alford's claimed incompetency when he committed the offenses and at the time of trial, confrontation clause violations, and at sentencing. *Id.* Alford acknowledges that this claim is not based on a new rule of law, and although he asserts that it is based on newly discovered evidence, neither his motion for authorization nor his proposed § 2254 application cites new facts, much less new facts suggesting that "no reasonable factfinder would have found [him] guilty of the underlying offense," § 2244(b)(2)(B)(ii).

Alford's second proposed claim is based on the state court's "[i]nordinate delay" in ruling on his motion to reconsider. Mot. for Auth. at 9. But in his motion for authorization, when asked whether this claim relies on a new rule of law or newly discovered evidence, he checked the boxes next to "No," *id.*, and he cited no new rule of retroactively-applicable constitutional law and no new facts, much less new facts

that would somehow establish his actual innocence based on the state court's failure to rule on his motion to reconsider.

Because Alford has failed to meet the standard for authorization in § 2244(b), we deny his motion. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

July 21, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: BRENT L. ALFORD, Movant.	No. 20-3100 (D.C. No. 5:20-CV-03003-SAC) (D. Kan.)

ORDER

This matter is before the court on Appellant's Motion for Reconsideration/ Motion for Remand which we have construed as a Petition for Rehearing. Upon consideration the Petition is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BRENT L. ALFORD,

Petitioner,

v. **CASE NO. 20-3003-SAC**

SAM CLINE, Warden,
El Dorado Correctional Facility,

Respondent.

MEMORANDUM AND ORDER

This matter is a petition for writ of habeas corpus filed under 28 U.S.C. § 2254. Petitioner proceeds pro se and has paid the filing fee.

Background

Petitioner was sentenced in the Sedgwick County District Court in August of 1993, in Case No. 93-CR-401. On appeal, the Kansas Supreme Court affirmed Petitioner's sentences. *State v. Alford*, 896 P.2d 1059 (Kan. 1995).

Petitioner previously filed a petition under § 2254 on allegations of error related to his state conviction in Case No. 93-CR-401. *See Alford v. Cline*, Case No. 11-3062-SAC. The Court dismissed the petition as time-barred on June 2, 2011. *Id.* at ECF No. 4. On August 2, 2016—more than five years later—Petitioner filed a motion for relief from void judgment, which was denied on January 24, 2017. *Id.* at ECF No. 9. Petitioner appealed the district court's denial of his Rule 60(b) motion. The Tenth Circuit concluded that reasonable jurists could not debate the correctness of the district's court's decision, declined to issue a certificate of appealability ("COA"), and dismissed the matter. *Alford v. Cline*, 696 F. App'x 871 (10th Cir. 2017).

APPENDIX E

Petitioner filed another habeas petition in 2019, this time under § 2241. *See Alford v. Cline*, Case No. 19-3059-SAC. The Court, however, found that he was challenging the validity of his conviction and thus construed the petition as a § 2254 action. The Court further found it was a second or successive action under § 2254, which required Petitioner to first obtain authorization from the circuit court of appeals before this Court could consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A). Without such authorization, "[a] district court does not have jurisdiction to address the merits of a second or successive . . . § 2254 claim." *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam). Because Petitioner had not obtained prior authorization, the Court dismissed his petition.

Analysis

This petition is Mr. Alford's third under § 2254. His initial petition was dismissed as time-barred. While a habeas petition filed after an initial petition was not adjudicated on its merits is not a second or successive petition (*see Slack v. McDaniel*, 529 U.S. 473 (2000)), the Tenth Circuit has found that dismissal as time-barred is a dismissal on the merits. *See McDowell v. Zavaras*, 417 F. App'x 755 (10th Cir. 2011) (collecting cases from other circuits). Therefore, this subsequent habeas petition challenging the same convictions is second or successive. *Id.*

A prisoner may not file a second or successive action under § 2254 without first obtaining authorization from the circuit court of appeals allowing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A). Without such authorization, the Court does not have jurisdiction to address the merits of Mr. Alford's § 2254 petition. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam).

When a district court receives a successive petition without the necessary authorization, the court may either dismiss it for lack of jurisdiction or transfer it to the circuit court in the interest

of justice. *Id.* at 1252. Factors the Court considers in deciding whether a transfer is in the interest of justice include "whether the claim would be time barred if filed anew in the proper forum, whether the claims alleged are likely to have merit, and whether the claims were filed in good faith." *Id.* at 1251 (citing *Trujillo v. Williams*, 465 F.3d 1210, 1223 n.16 (10th Cir. 2006)). In the present case, the Court finds grounds to transfer the action to the Tenth Circuit Court of Appeals.

While Petitioner should have been well aware that he needed to request authorization from the Tenth Circuit before filing a petition here, he has a basis for questioning the time bar. Petitioner points to the Tenth Circuit's ruling in *Strong v. Hrabe*, 750 F. App'x 731 (10th Cir. 2018). In *Strong*, the petitioner filed a § 2254 petition in this Court thirty-five (35) years after his conviction. Mr. Strong argued the one-year statute of limitations provided for by 28 U.S.C. § 2244(d)(1) was tolled under § 2244(d)(2) because he had filed a post-conviction motion which remained pending in state district court. The Tenth Circuit agreed with Mr. Strong that the motion was a "properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim" and therefore the statute of limitations was tolled. *Id.* at 736.

In this case, Mr. Alford filed a motion to reconsider the state district court's denial of his state habeas action at the same time he filed a notice of appeal on April 1, 1998, within the AEDPA limitation period. The state court has never ruled on his motion to reconsider. *See Alford*, 696 F. App'x at 872. Therefore, it is possible that Mr. Alford's petition is not time-barred.

The Court finds that in the interest of justice, the petition should be transferred to the U.S. Court of Appeals for the Tenth Circuit for its determination on whether Petitioner may proceed.

IT IS THEREFORE ORDERED BY THE COURT that this matter is an unauthorized second or successive petition under 28 U.S.C. § 2254, which this Court lacks jurisdiction to consider. All pending motions (ECF Nos. 4, 5, 9, and 11) are denied.

IT IS FURTHER ORDERED that this matter is transferred to the U.S. Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1631 for its determination on whether this successive application for habeas corpus relief may proceed.

IT IS SO ORDERED.

Dated in Topeka, Kansas, on this 22nd day of May, 2020.

s/ Sam A. Crow
SAM A. CROW
SENIOR U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 28, 2020

Brent L. Alford (#57845)
El Dorado Correctional Facility
Southeast Medium Unit
2501 West 7th Street
Oswego, KS 67356

Re: Case No. 30-3100, *In re Alford*

Dear Mr. Alford:

The court received from you today a document captioned *Supplement* through which you seek to supplement your *Motion to Reconsider Motion for Remand.* As you are aware: (1) on July 6, 2020, this court denied your motion seeking authorization to file a second or successive § 2254 application in district court and denied your motion for remand; and (2) on July 21, 2020, the court construed your Motion for Reconsideration/Motion for Remand as a petition for rehearing and denied it. Accordingly, the court construes your submission as a second petition for rehearing and/or a motion to reconsider the court's previous ruling on your first petition for rehearing.

Tenth Circuit Rule 40.3 prohibits both a second petition for rehearing and a motion to reconsider the court's ruling on a previous petition for rehearing. *See* 10th Cir. R. 40.3. ("The court will accept only one petition for rehearing from any party to an appeal. No motion to reconsider the court's ruling on a petition for rehearing may be filed."). Accordingly, this court will neither accept your submission for filing nor take any action regarding it.

This case is closed. Please be advised that the court may not respond to future correspondence or submissions.

Sincerely,

CHRISTOPHER M. WOLPERT
Clerk of the Court

CMW/lal

APPENDIX F

Alford v. State, 2017 Kan. App. Unpub. LEXIS 408

Copy Citation

Court of Appeals of Kansas

June 2, 2017, Opinion Filed

No. 114,852

Reporter

2017 Kan. App. Unpub. LEXIS 408 * | 395 P.3d 841 | 2017 WL 2403121

BRENT L. ALFORD, Appellant, v. STATE OF KANSAS, Appellee.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review denied by, Motion denied by, As moot Alford v. State, 2018 Kan. LEXIS 117 (Kan., Feb. 27, 2018)

Prior History: **[*1]** Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, Judge. State v. Duke, 263 Kan. 193, 946 P.2d 1375, 1997 Kan. LEXIS 153 (Oct. 31, 1997)

Disposition: Affirmed in part and dismissed in part.

Core Terms

reinstate, notice, void, appointment

Appendix G

Counsel: Carl F.A. Maughan, of Maughan Law Group, of Wichita, for appellant.

Brent L. Alford, appellant, Pro se.

Matt J. Maloney, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Judges: Before ATCHESON, P.J., MALONE and POWELL, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: Brent L. Alford appeals the district court's denial of his motion to reinstate his appeal of a K.S.A. 60-1507 proceeding that was dismissed for failure to timely docket in 2000. Alford's brief filed by appointed counsel claims the district court erred when it summarily denied the motion to reinstate the appeal. In a pro se supplemental brief, Alford argues that the district court erred in denying his motion to set aside void judgment, and he also argues that he was denied his constitutional right to a speedy and meaningful appeal. We find that the district court did not err in denying Alford's motion to reinstate his appeal, and we also find that the issues raised in Alford's supplemental brief are not properly before this court.

This case presents a lengthy procedural history. In 1993, Alford was **[*2]** convicted of first-degree murder, aggravated kidnapping, and unlawful possession of a firearm. He received a hard 40 life sentence on the murder conviction. The Kansas Supreme Court affirmed Alford's convictions and sentence in 1995. See *State v. Alford*, 257 Kan. 830, 896 P.2d 1059 (1995).

On December 29, 1997, Alford filed a pro se K.S.A. 60-1507 motion, along with a brief in support of the motion. He also filed a motion for appointment of legal counsel. Alford's motion alleged a denial of his right to confrontation, multiplicitous convictions, abuse of discretion at sentencing, and ineffective assistance of trial counsel. On March 20, 1998, the district court summarily denied Alford's K.S.A. 60-1507 motion. The district court found that the first three issues raised in Alford's K.S.A. 60-1507 motion were addressed in his direct appeal. The district court also found there was no merit to Alford's ineffective assistance of counsel claim, which was based primarily on counsel's failure to object to the admission of Alford's written statement to the police, because the Supreme Court had found in the direct appeal that the statement was admissible in any event; thus, Alford was unable to show he was prejudiced by his counsel's performance.

Alford filed a timely notice of appeal **[*3]** from the denial of his K.S.A. 60-1507 motion, absent a separate motion for appointment of legal counsel for the appeal. On July 11, 2000, the State filed a motion to dismiss the appeal citing Alford's "failure to docket his appeal in a timely manner." In an order dated August 17, 2000, the district court dismissed Alford's appeal because it was not timely docketed, citing Kansas Supreme Court Rule 5.051 (2000 Kan. Ct. R. Annot. 33) as the reason for the dismissal. The order dismissing the appeal reflects that a copy was mailed to Alford at the Hutchinson Correctional Facility.

On September 8, 2014, Alford filed a motion to reinstate appeal rights. The motion argued that the district court erred in dismissing his appeal because a pending motion for reconsideration had never been ruled on by the district court. Alford's motion did not provide any explanation as to why he waited 14 years to seek reinstatement of his appeal. On May 12, 2015, Alford filed a second document entitled "motion to set aside void judgment," which made essentially the same arguments as the motion to reinstate his appeal. On August 10, 2015, Alford filed a third document entitled "request for leave of court to amend petition to include a contention that petitioner **[*4]** was and has been denied swift and imperative appellate review, and meaningful appeal."

On October 9, 2015, the district court summarily denied Alford's motion to reinstate appeal rights. On October 19, 2015, Alford filed a timely notice of appeal. Alford's notice of appeal stated he was appealing "from a decision denying relief defendant sought pursuant to K.S.A. 60-1507 for the

reinstatement of appeal rights (control), void judgment and denial of appellate review and meaningful appeal.

On October 28, 2015, after Alford filed his notice of appeal but before the appeal was docketed, the State filed a response to Alford's motion to set aside void judgment. The district court denied the motion to set aside void judgment on November 4, 2015. The record on appeal does not reflect that the district court has ever ruled on Alford's request for leave of court to include a claim for swift and meaningful appellate review.

Alford's brief filed by appointed counsel claims the district court erred when it denied the motion to reinstate the appeal. Alford contends that his filing of the notice of appeal from the denial of his K.S.A. 60-1507 motion triggered his "statutory right to appointment of appellate counsel." Alford maintains **[*5]** he did not waive his right to counsel and the denial of his right to counsel "effectively resulted in the destruction of his right to appeal." Alford also argues that *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982), is applicable in this case and provides a basis for reinstatement of his appeal.

The State argues that once an appeal has been dismissed by the district court for failure to docket in a timely manner, the "dismissal is final" unless the appellant complies with Supreme Court Rule 5.051 (2017 Kan. S. Ct. R. 32). Citing *City of Kansas City v. Lopp*, 269 Kan. 159, 4 P.3d 592 (2000), the State argues that Alford's failure to comply with Rule 5.051 deprived the district court of jurisdiction to reinstate his appeal. Lastly, the State argues that *Ortiz* does not apply in this case.

In Kansas, the right to appeal is governed by statute. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015). Also, whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Fuller v. State*, 303 Kan. 478, 492, 363 P.3d 373 (2015).

Alford's appeal from the denial of his K.S.A. 60-1507 motion was dismissed by the district court in August 2000 based on Alford's failure to docket the appeal in a timely manner. The applicable version of Supreme Court Rule 5.051 in 2000, which is substantially similar to the current version of the rule, stated the following: **[*6]**

> "The district court shall have jurisdiction to dismiss an appeal where the appellant has filed the notice of appeal in the district court but has failed to docket the appeal with the clerk of the appellate courts. Failure to docket the appeal in compliance with Rule 2.04 shall be deemed to be an abandonment of the appeal and the district court shall enter an order dismissing the appeal. The order of dismissal shall be final unless the appeal is reinstated by the appellate court having jurisdiction of the appeal for good cause shown on application of the appellant made within thirty (30) days after the order of dismissal was entered by the district court. An application for reinstatement of an appeal shall be made in accordance with Rule 5.01 and Rule 2.04 and shall be accompanied by a docket fee unless excused under rule 2.04." Supreme Court Rule 5.051 (2000 Kan. Ct. R. Annot. 33).

The order dismissing Alford's appeal stated that the appeal was being dismissed "pursuant to Supreme Court Rule No. 5.051 for the movant's failure to docket his appeal in a timely manner." The order reflects that a copy was mailed to Alford. The vehicle for Alford to reinstate his appeal was Rule 5.051. Clearly, Alford's motion to reinstate his appeal, made with the district **[*7]** court over 14 years after the dismissal, did not comply with Rule 5.051. In addition to being untimely, the motion was filed with the wrong court as the rule states the appeal can only be reinstated by the appellate court having jurisdiction over the appeal, not the district court. Based solely on Rule 5.051, the district court did not err in denying Alford's motion to reinstate his appeal.

As the State asserts in its brief, *Lopp* is directly on point. In that case, the district court granted the City's motion to dismiss Lopp's appeal pursuant to Supreme Court Rule 5.051. Lopp next filed a motion

in the Court of Appeals to docket the appeal out of time, which the Court of Appeals denied. Lopp then hired new counsel who subsequently filed a motion with the district court seeking to reinstate the appeal, and the district court granted Lopp's motion. Lopp then attempted to file a docketing statement with the Court of Appeals, but the Court of Appeals denied Lopp's attempt to docket his appeal out of time. 269 Kan. at 160-61.

On review, our Supreme Court affirmed the Court of Appeal's judgment. In doing so, our Supreme Court found that "[t]he district court clearly had no jurisdiction to reinstate the appeal." *Lopp*, 269 Kan. at 161. Our Supreme Court determined that Rule 5.051 requires **[*8]** that the motion to reinstate the appeal must be filed with the appellate court having jurisdiction over the matter, *not* the district court. 269 Kan. at 161. Our Supreme Court concluded that "Lopp failed to follow Rule 5.051; therefore, the district court had no jurisdiction to reinstate the appeal." 269 Kan. at 161.

Based on the language of Rule 5.051, as interpreted by our Supreme Court in *Lopp*, we agree with the State that the district court lacked jurisdiction to reinstate Alford's appeal. In the interest of a complete analysis of Alford's claim, it does appear that Alford was denied his statutory right to counsel in his original K.S.A. 60-1507 appeal. Once Alford filed his notice of appeal from the denial of his K.S.A. 60-1507 motion, K.S.A. 1998 Supp. 22-4506(c) and Kansas Supreme Court Rule 183(m) (1998 Kan. Ct. R. Annot. 197) provided for the appointment of appellate counsel by the district court. But even this defect does not confer jurisdiction upon the district court to reinstate Alford's appeal after it had been dismissed for failure to docket. Alford's remedy for failure to receive appellate counsel would be either to attempt to file an appropriate application to reinstate his appeal with the appellate court pursuant to Rule 5.051 or to seek relief under a separate K.S.A. 60-1507 motion. However, we must conclude that the district **[*9]** court did not err when it denied Alford's motion to reinstate his appeal because the district court lacked jurisdiction to grant the motion. See *Lopp*, 269 Kan. at 161.

Finally, Alford argues in his pro se supplemental brief that the district court erred in denying his motion to set aside void judgment and in denying his constitutional right to a speedy and meaningful appeal. These arguments reprise the claims Alford made in the additional motions he filed with his motion to reinstate appeal rights. We conclude these issues are not properly before this court. The record reflects that the district court did not deny Alford's motion to set aside void judgment until after he filed his notice of appeal on October 19, 2015. The record also reflects that the district court has *never* ruled on Alford's request for leave of court to include a claim for swift and meaningful appellate review. Supreme Court Rule 2.03 (2017 Kan. S. Ct. R. 14) allows for a premature notice of appeal if the notice is filed "after a judge of the district court announces a judgment to be entered, but before the actual entry of judgment." However, this rule does not permit an appellate court to review decisions that were not announced in the district court at the **[*10]** time the notice of appeal was filed. Thus, we conclude that this court lacks jurisdiction to address the issues Alford has attempted to raise in his pro se appellate brief.

Affirmed in part and dismissed in part.

Alford v. Cline, 696 Fed. Appx. 871

Copy Citation

United States Court of Appeals for the Tenth Circuit

June 8, 2017, Filed

No. 17-3017

Reporter
696 Fed. Appx. 871 * | 2017 U.S. App. LEXIS 10183 ** | 2017 WL 2473311

BRENT L. ALFORD, Petitioner - Appellant, v. SAM CLINE; DEREK SCHMIDT, Respondents - Appellees.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] (D.C. No. 5:11-CV-03062-SAC). (D. Kan.).
Alford v. Cline, 2011 U.S. Dist. LEXIS 50306 (D. Kan., May 10, 2011)

Core Terms

district court, sentence, state court, void, reconsideration motion, merits

Counsel: BRENT L. ALFORD, Petitioner - Appellant, Brent L. Alford, Pro se, Oswego, KS.

For SAM CLINE, DEREK SCHMIDT, Respondents - Appellees: Kristafer R. Ailslieger, Office of the Attorney General for the State of Kansas, Topeka, KS.

Judges: Before PHILLIPS, McKAY, and McHUGH, Circuit Judges.

Opinion by: Monroe G. McKay

Opinion

Appendix H

[*872] ORDER DENYING CERTIFICATE OF APPEALABILITY *

Brent L. Alford, a Kansas state prisoner appearing pro se, seeks to appeal the district court's denial of his Rule 60 (b) motion to set aside its order denying his application for a writ of habeas corpus under 28 U.S.C. § 2254. To do so, Mr. Alford must first obtain a certificate of appealability (COA). Because we conclude that reasonable jurists could not debate the correctness of the district court's decision, we decline to issue a COA, and we dismiss this matter.

In 1993, Alford was convicted of first-degree murder, aggravated kidnapping, and unlawful possession of a firearm. He was sentenced to a "hard 40" life sentence on the murder conviction, life on his aggravated-kidnapping conviction, and 3 to 10 years on his firearm conviction. The aggravated kidnapping and first-degree murder sentences were to be served consecutively; the firearm sentence, [**2] concurrently. Mr. Alford's sentences were subsequently affirmed on appeal. *State v. Alford*, 257 Kan. 830, 896 P.2d 1059 (Kan. 1995).

In 1996, Mr. Alford filed a motion in state court to correct his sentence, which was denied. The denial was affirmed by the Kansas Supreme Court in 1997. That same month, Mr. Alford filed a second motion in state court attacking his sentence. This was summarily denied in 1998. The following month, Mr. Alford filed a combined motion to reconsider and notice of appeal. In 2000, Mr. Alford's appeal was dismissed because it was not timely docketed; the Kansas district court never ruled on his motion to reconsider.

Next, Mr. Alford filed a § 2254 application for habeas corpus in federal district court. Because his conviction became final before the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted, he had until April 24, 1997, to file an application under 28 U.S.C. § 2254. *See Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001). Mr. Alford filed his § 2254 application in March 2011. The district court ordered Mr. Alford to show cause why his application was not untimely under the AEDPA. After Mr. Alford failed to demonstrate that the application was timely or that he was entitled to equitable tolling, the court dismissed the application as time-barred.

Fast-forwarding past further [**3] postconviction proceedings in state courts that are not relevant here, Mr. Alford filed a Rule 60 motion under the Federal Rules of Civil Procedure in federal district court in 2016, seeking relief from the 2011 order denying habeas relief. Construing his pro se filing liberally, the district court understood Mr. Alford to be making three arguments:

> **[*873]** 1) at the time of the court's dismissal of his petition, he had a properly filed application for state post-conviction review pending, which tolled the limitation period . . . 2) the order dismissing petitioner's § 2254 petition is void, meaning the time limitations for filing a Rule 60(b) motion are inapplicable; and 3) petitioner was deprived of due process because (a) the state court failed to rule on his motion for reconsideration of the dismissal of his first motion for state habeas corpus review, and (b) the order of the state court dismissing petitioner's appeal of the dismissal of his first motion was void in that the state court did not have the authority to take any action on petitioner's appeal while the motion to reconsider remained pending.

(R. at 74-75 (citations omitted)). Ultimately, the district court denied the Rule 60 motion in part and dismissed in [**4] part.

In *Spitznas v. Boone*, 464 F.3d 1213 (10th Cir. 2006), we laid out the "steps to be followed by district courts in this circuit when they are presented with a Rule 60(b) motion in a habeas or § 2255 case." *Id.* at 1216. First, the court should "consider each of the issues raised in the motion in order to determine whether it represents a second or successive petition, a 'true' Rule 60(b) motion, or a mixed motion." *Id.* at 1224. A Rule 60(b) motion "is a second or successive petition if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." *Id.* at 1215. A "true" Rule 60(b) motion "challenges only the federal habeas court's ruling on procedural issues," including timeliness. *Id.* at 1216. We refer to a Rule 60(b) motion with "both true Rule 60(b) allegations and second or successive habeas claims" as a "mixed" motion. *Id.* at 1217. In the case of a mixed motion "the district court should (1) address the merits of the true Rule 60(b) allegations as it would the allegations in any other Rule 60(b) motion, and (2) forward the second or successive claims to this court for authorization" if doing so is in the interest of justice. *Id.*

What we have here is a mixed motion. Insofar as it attacks the court's application of the statute of limitations, it is a "true" Rule 60(b) motion. *Id.* at 1216. The remainder of the motion, including Mr. [**5] Alford's arguments that he was deprived of due process by the state court's failure to rule on his motion to reconsider and the subsequent dismissal of his appeal, makes new claims that he could have asserted previously, but did not. These claims are thus second or successive. *Id.* at 1215.

We start with the "true" 60(b) issues. As to these, Mr. Alford must first obtain a COA before proceeding on appeal. *See id.* at 1218. We will issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, the applicant must show "that reasonable jurists could debate whether (or for that matter, agree that) the petition"—here, the Rule 60(b) motion—"should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed

further." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (quotation marks omitted).

Mr. Alford moved for relief under Rules 60(b)(4) and (6). Rule 60(b)(4) requires a court to grant relief if "the judgment is void." Fed. R. Civ. P. 60(b)(4). "A judgment is void only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law." *United States v. Buck*, 281 F.3d 1336, 1344 (10th Cir. 2002) (quotation marks omitted). Under Rule 60(b)(4), a litigant was afforded due process if "fundamental [**6] procedural prerequisites—particularly, adequate **[*874]** notice and opportunity to be heard—were fully satisfied." *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir.1994). "[A] judgment is not void merely because it is erroneous." *Buck*, 281 F.3d at 1344 (internal quotation marks omitted).

The district court denied relief under Rule 60(b)(4), holding that it had jurisdiction to enter its order denying Mr. Alford's § 2254 application. It also recognized that Mr. Alford was given adequate notice and opportunity to be heard: Prior to entering its order, the court ordered "[Mr. Alford] to show cause as to why his petition should not be dismissed as time barred. [Mr. Alford] responded to the show cause order but did not raise the tolling argument that he now raises." (R. at 77.)

The district court also denied relief under Rule 60(b)(6), holding that Mr. Alford's Rule 60 motion was untimely. Rule 60(b)(6) allows a party to seek relief from a final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). A motion under Rule 60(b)(6) must be made "within a reasonable time" after entry of the order. Fed. R. Civ. P. 60(c). Mr. Alford's Rule 60 motion was filed more than five years after his § 2254 application was denied. As the district court explained:

> Because the grounds for petitioner's objection to the dismissal of his § 2254 petition were present prior to the dismissal, because [**7] he did not raise the objection when given the opportunity by the court prior to the dismissal, because petitioner did not appeal the dismissal, and because he waited over five years to file his Rule 60(b) motion and did not offer any justification for the delay, the court finds the petitioner did not file his motion within a reasonable time and is therefore not entitled to relief under Rule 60(b).

(R. at 79.) On appeal, Mr. Alford makes no argument regarding the district court's denial of his Rule 60 motion. He does not argue, for example, that the court's order denying his § 2254 application is void, nor has he identified "any other reason that justifies relief" from that order. Instead, Mr. Alford reargues the timeliness and the merits of his § 2254 application. But we do not have jurisdiction to review the order denying his § 2254 application, as that order was not appealed, and such an appeal would by now be untimely. *See* *Bowles v. Russell*, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007); Fed. R. App. P. 4(a)(1)(A), 4(a)(4)(A)(vi). Our review is limited to the order denying and dismissing Mr. Alford's Rule 60 motion. And as to *that* order, Mr. Alford has failed to establish that reasonable jurists could debate the correctness of the district court's decision.

On to the second or successive claims. "A district court does not have jurisdiction [**8] to address the merits of a second or successive § 2255 or 28 U.S.C. § 2254 claim until this court has granted the required authorization." *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008). "[I]f a district court determines that it lacks jurisdiction over a civil action, it shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought." *Id.* (quotation marks and emphasis omitted). "Although § 1631 contains the word 'shall,' we have interpreted the phrase 'if it is in the interest of justice' to grant the district court discretion in making a decision to transfer an action or instead to dismiss the action without prejudice." *Id.* (ellipses and brackets omitted).

Here, the district court recognized that it did not have jurisdiction over the second or successive claims and declined to transfer the action. As before, Mr. Alford must first obtain a COA to appeal this part of the district court's decision. *See id.* at **[*875]** 1252. And, as before, Mr. Alford has failed to address the court's reasons for dismissal, i.e., the application raised unauthorized second or successive claims, which the district court lacked jurisdiction to consider. Nor does he argue that the district court abused its discretion [**9] when "it conclude[d] it is not in the interest of justice to transfer the matter to this court for authorization." *Id.* at 1252. Instead, as before, he reargues the merits of these claims. We do not consider the merits, however, because Mr. Alford has not established that reasonable jurists could debate the district court's conclusion that it lacked jurisdiction over these claims.

We **DENY** Mr. Alford's request for a certificate of appealability, and **DISMISS** this matter. We **GRANT** Mr. Alford's motion for corrections and modifications of the record to the extent that he seeks to amend his opening brief to correct certain factual errors.

Entered for the Court

Monroe G. McKay

Circuit Judge

Footnotes

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.