20-7470

APPEAL NO.

IN THE
SUPREME COURT OF THE UNITED STATES

PABLO R. GUERRERO, PETITIONER

VS.

JERRY HOWELL ET. AL., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

NEVADA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

NAME: PABLO R. GUERRERO P. Guerrero

SOUTHERN DESERT CORRECTIONAL CENTER

INDIAN SPRINGS, NV. 89070

ORIGINAL

QUESTIONS PRESENTED SEE PAGES: 14/34

1.) QUESTION 1.

1. WHETHER A (BATSON-MCCOLLUM-J.E.B) PROVEN VIOLATION QUALI-FIES AS A 'STRUCTURAL ERROR'. AND IF SO,

a). WHETHER UNDER STRICKLAND AND CRONIC, GUERRERO MAY PRE-SUME PREJUDICE, AS THE ERROR OCCURED DURING (VOIR DIRE), A 'CRITICAL STAGE'.

b). WHETHER GUERRERO DESERVED 'AUTOMATIC REVERSAL ON HIS TIMELY INEFFECTIVE ASSISTANCE (BATSON) CLAIM.

c). WHETHER GUERRERO WAS DENIED 'FUNDAMENTAL FAIRNESS' AT TRIAL.

2.) QUESTION 2.

2. WHETHER A PETITIONER INVOKING THE ACTUAL INNOCENCE EXCEPTION MUST PROVIDE 'NEWLY DISCOVERED' EVIDENCE, OR 'NEWLY PRESENTED' EVIDENCE IN ACCORDANCE WITH SCHLUP V. DELO, 513 U.S. 298 (1995).

LIST OF PARTIES

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

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

1. JERRY HOWELL, (WARDEN)
2. THE STATE OF NEVADA (DISTRICT ATTORNEY)
3. THE STATE ATTORNEY GENERAL (HEATHER D. PROCTER)

RELATED CASES

1. NEVADA SUPREME COURT, APPEAL NO. 43115, 6/15/2005
2. NEVADA SUPREME COURT, APPEAL NO. 59697, 1/16/13 (2/12/13)
3. NEVADA SUPREME COURT, APPEAL NO. 69678 (2017, JUNE, 17)
4. GUERRERO V. WILLIAMS, 2013 U.S. DIST. LEXIS 46726, 4/1/2013
5. GUERRERO V. WILLIAMS, 2020 U.S. DIST. LEXIS 62346, 5/11/2020
6. NEVADA SUPREME COURT, APPEAL NO. 78247, MARCH, 12, 2020

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O	REPLY AND SUPPLEMENT, 3RD PETITION (8TH JUDICIAL DISTRICT COURT, NEVADA) CASE NO. C180840-02 / FILED 1/7/19	O·165-0257
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PETITIONER RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT BELOW.

OPINIONS BELOW

[✓] FOR CASES FROM **STATE COURTS**: (NEVADA)

THE OPINION OF THE HIGHEST STATE COURT TO REVIEW THE MERITS APPEARS AT APPENDIX [A1-A4]. THE OPINION IS UNPUBLISHED. (N.A.C.)

THE OPINION OF THE APPEALS COURT DENYING REHEARING IS FOUND AT APPENDIX [B4-B6] IT IS UNPUBLISHED. (N.A.C.)

THE OPINION OF THE DISTRICT COURT APPEARS AT APPENDIX [H21-H40] IS ALSO UNPUBLISHED. (8TH JUD. DIST. CT.)

THE OPINION OF PETITIONERS 2nd STATE HABEAS PETITION IS FOUND AT APPENDIX [X494-X500] THAT IS UNPUBLISHED. (N.S.C.)

AND THE ORIGINAL FIRST ORDER OF PETITIONER FIRST STATE PETITION IS FOUND AT APPENDIX [U462-U473] IT IS UNPUBLISHED. (8TH JUD. DIST. CT.) THE APPEAL OF THAT DECISION IN THE NEVADA SUPREME COURT AND ITS ORDER IS FOUND AT APPENDIX [V474-V480] IT IS UNPUBLISHED.

JURISDICTION

THIS IS A CASE FROM STATE COURT: (NEVADA)

THE JUDGMENT BEING CHALLENGED IS FROM THE NEVADA APPEALS COURT, WHICH WAS GIVEN ON **3/12/2020**. THE COPY OF THE ORDER IS FOUND AT APPENDIX [A1-A4]. A TIMELY PETITION FOR REHEARING WAS DENIED ON **5/22/2020**, THE ORDER IS FOUND AT APPENDIX [B4-B6]. THE ORDER DENYING A PETITION FOR REVIEW, FILED ON **9/25/20** CAN BE FOUND AT APPENDIX [E12-E14]. AFTER RECIEVING PERMISSION BY THE NEVADA SUP-REME COURT TO FILE A WRIT OF CERTIORARI AND **120 DAYS** TO DO SO, PETITIONER MAILED HIS WRIT OF CERTIORARI ON **JANARY 15TH**, THERE-AFTER, THE U.S. CLERK OF THE COURT RETURNED SAID PETITION WHICH HAD BEEN TIMELY, BACK TO PETITIONER TO CORRECT THE APPENDIX. SEE APP-ENDIX [F15-F17]. THE LETTER FROM THE CLERK WAS DATED **JAN. 25TH, 2021**, AND ALLOWED UPTO **60 DAYS** TO CORRECT AND RESEND PETITION. AS THAT TOOK PLACE, THE NEVADA SUPREME COURT GRANTED PETITIONER A EXTENSION TO FILE A WRIT OF CERTIORARI IN THIS COURT BY **MARCH 15, 2021**. THAT ORDER CAN BE FOUND AT APPENDIX [G18-G20] GIVING THIS COURT THE JURISDICTION REQUIRED THROUGH 28 U.S.C. § 1257 (a).

PETITIONER ALSO CHALLENGES THE ORDER GIVEN IN 2011 WHICH RULED ON THE MERITS OF GUERRERO'S FIRST TIMELY HABEAS CORPUS PETITION THAT CAN BE FOUND AT APPENDIX [U462-U473]. AND ITS APPEAL DECISION, AT APPENDIX [V474-V480]. THESE DECISIONS ARE DIRECTLY RE-LATED TO THE ISSUES WITHIN THIS PETITION. AND NOTICE OF APPEAL WAS TIMELY FILED.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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2. AMENDMENTS, 6TH, FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL " IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A ... TRIAL BY IMPARTIAL JURY."	7, 15, 22, 28, 30, 36, 40,
3. AMENDMENTS, 14TH,	7, 15, 16, 17, 23, 28, 29, 36, 37, 39, 40
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STATEMENT OF THE CASE

PETITIONER **PABLO R. GUERRERO** WAS FOUND GUILTY IN THE **8TH JUDICIAL DISTRICT COURT** ON **(OCT. 16, 2003)**, **CLARK COUNTY; LAS VEGAS, NV.**

HE WAS SENTENCED TO A TOTAL OF **30 YEARS TO LIFE** IN PRISON FOR THE FOLLOW-ING CRIMES; **COUNT 3**: PREVENTING OR DISSUADING VICTIM FROM REPORTING A CRIME, **COUNT 4**: SEXUAL ASSAULT; 120 MONTHS TO LIFE IN THE [NDOC]. **COUNT 5**: CONSPIRACY TO COMMITT BURGLARY. **COUNT 7**: BURGLARY WHILE IN POSSESION OF A FIREARM **COUNT 8**: CONSPIRACY TO COMMIT KIDNAPPING. **COUNT 9**: FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON; 60 MONTHS TO LIFE (X2) IN [NDOC] **COUNT 10**: FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON RESULT-ING IN SUBSTANTIAL BODILY HARM; 180 MONTHS TO LIFE IN THE [NDOC] (X2 - FROM 1997' TO — 2007' NEVADA WAS GIVING `EQUAL AND CONSECUTIVE' SENTENCES FOR COMMITING CRIME WITH A WEAPON), **COUNT 11**: CONSPIRACY TO COMMIT MURDER. **COUNT 12**: ATTEMPTED MURDER WITH A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM. **COUNT 13**: CONSPIRACY TO COMMIT ROBBERY. **COUNT 14**: ROBBERY WITH THE USE OF A DEADLY WEAPON. **COUNT 15**: GRAND LARCENY.

TRIAL (VOIR DIRE) TOOK PLACE **OCT. 7, 2003**. THE NEXT DAY **OCT. 8, 2003** THE `STATE' WENT ON TO `MAKE A RECORD' CLAIMING DEFENSE COUNSEL HAD VIOLATED `BATSON,' AND `LIBBY V. STATE.' THE DEFENSE, INTENTIONALLY ELIMINATED EIGHT, OUT OF NINE MEN, WITH PEREMPTORY CHALL-ENGES. THE JUDGE ASKED THE STATE, `WHAT DO YOU WANT ME TO DO?' THE JURY EMPANELED WAS TWELVE WOMAN, ONE MAN (THIS INCLUDES THE ALTERNATE). ON DIRECT APPEAL, GUERRERO HAD THE SAME COUNSEL APPOINTED, DAVID C. AMESBURY. COUNSEL DID NOT RAISE THE BATSON ISSUE, & THE APPEAL WAS DENIED. THE COURT DISMISSED (SUA SPONTE), THE `CONSPIRACY TO COMMIT ROBBERY WITH A WEAPON' CHARGE. (APPEAL 43115 - DOC. 12768, JULY 12, 2005).

ON **JUNE 6, 2006**, GUERRERO FILED A TIMELY 1ST HABEAS CORPUS PETITION, CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL'. HE THEN SUPPLEMENTED THE PETITION WITH THE `INEFFECTIVE-ASSISTANCE FOR VIOLATING BATSON' CLAIM, FILED **JULY, 21, 2006**. (CASE NO. C180840-02). POST CONVICTION COUNSEL SUPPLEMENTED THE BATSON GROUND AND ADDED OTHER GROUNDS ON **APRIL, 12, 2007** (BATSON/P. 44-47).

AFTER RECIEVING TWO AFFIDAVITS FROM CO-DEFENDANT(LEON), WHICH STATE:(GUERR-
-ERO **DID NOT** COUNSEL OR ENCOURAGE HIM IN ANYWAY TO COMMIT 'ATTEMPTED MURDER'), THE
DISTRICT COURT HELD AN EVIDENTIARY HEARING, JAN. 31, 2011 (FILED 3/4/2011). AFTER APPOINTING
(LEON) HIS TRIAL COUNSEL, THE DISTRICT COURT THEN ALLOWED LEON WHO HAD BEEN COUNSELED TO
PLEAD THE 5TH AMDT., TO REMAIN SILENT. (HE DID NOT HAVE THAT RIGHT, AS HE HAD BEEN FOUND
GUILTY, AND BECAUSE HE HAD SWORE IN HIS AFFIDAVITS). THE EVIDENCE IS 'MATERIAL'.

AFTER FIRING HIS ATTORNEY, GUERRERO WAS ALLOWED TO PRESENT A WRITTEN ARGUMENT TO
HIS 1ST PETITION. THE ARGUMENT UNITED (BATSON, HILLERY, J.E.B, MCCOLLUM, POWERS, LIBBY AND
LIBBY II WITH THAT OF STRICKLAND)/CRONIC AND THE STRUCTURAL ERROR - PRESUMED PREJUDICE-
-AUTO-MATIC REVERSAL REMEDY). SEE CASE NO. C180840-02 (FILED APRIL, 4, 2011). GUERRERO'S
SISTER THEN HIRED THE OFFICE OF 'PATTI, SGRO, & LEWIS TO FURTHER ARGUE PETITIONERS' POINTS.
(FILED MAY, 29, 2012). THE PETITION WAS DENIED OCT. 13, 2011.

IN A TIMELY MANNER, IN PROPER PERSON, PETITIONER INTRODUCES A 3RD. AFFIDAVIT FROM
(LEON). "PETITIONER'S MOTION FOR REHEARING BASED ON NEWLY DISCOVERED EVIDENCE." IT WAS
FILED NOV. 14, 2011, BUT DENIED ERRONEOUSLY.

AFTER MANY COMPLAINTS TO THE 'NEVADA SUPREME COURT' ABOUT COUNSEL ABANDONING
HIS (BATSON - IAC) GROUND AND ACTUAL INNOCENCE, THE COURT DENIED APPEAL NO. 59697/JAN.
16, 2013.

GUERRERO THEN FILED A TIMELY 'IST. FEDERAL PETITION' WITH THE (BATSON - IAC) GROUND.
AFTER A STAY, AND A 2ND. STATE PETITION BY (MARIO VALENCIA) APPEAL NO. 69678, HELD BARR-
-ED BY LACHES AND PROCEDURAL DEFAULTS. THE PETITION WAS DENIED JUNE 15, 2017. MR. VAL-
-ENCIA RE-OPENED THE FEDERAL PETITION, BUT PASSED THE CASE TO (KEVIN NEIDERT).

ON JUNE, 22, 2017. THIS COURT DECIDES 'WEAVER V. MASSACHUSETTS'. GUERRERO
DISCOVERS ITS REASONING, AROUND SEPT. 14TH, 2018. ON OCT. 25, 2018, APPELLANT FILES A 3rd.
HABEAS PETITION. THE SAME 'BATSON-IAC GROUND - ACTUAL INNOCENCE' AND DENIAL OF 'FUNDA-
-MENTAL FAIRNESS'. HE ALSO 'SUPPLEMENTED' AND REPLIED TO THE STATES MOTION TO DISMISS,
FILED JAN. 7, 2019. THE DISTRICT COURT DENIED THE PETITION JAN, 31, 2019. GUERRERO FILED A
TIMELY NOTICE OF APPEAL FEB. 26, 2019. PETITIONER FILED A OPENING BRIEF IN THE NEVADA

SUPREME COURT, FILED SEPT. 13, 2019. THE BRIEF WAS SENT TO THE APPELLATE COURT WHICH DENIED IT, MARCH 12, 2020. A 'PETITION FOR REHEARING' WAS FILED APRIL 1, 2020. IT GOT DENIED ON MAY 22, 2020. A TIMELY MOTION WAS MADE BY APPELLANT, FILED JUNE 8, 2020 TO THE NEVADA SUPREME COURT, THAT COURT GRANTED THE OPPORTUNITY TO FILE A SPECIAL PETIT-ION. JUNE 18, 2020, APPEAL NO. 78247. NOT ABLE TO SECURE A ATTORNEY, PETITIONER SENT HIS PETITION AND A MOTION FOR EXTENSION OF TIME AND PAGE LIMIT; WITH A DECLARATION. THE MOTION WAS FILED, JULY 22, 20. GUERRERO SENT THIS MOTION ON 'JULY 15, 20.' THEREFORE, THAT ITEM AND PETITION SHOULD BE CONSIDERED FILED ACCORDING TO THE FEDERAL 'MAILBOX' RULE.

INSTEAD, ON THE 15TH OF JULY, TERRANCE JACKSON WAS HIRED BY GUERRERO'S FAMILY AND FILED FOR AN EXTENSION OF TIME. THE COURT GIVES HIM 30 DAYS TO FILE ANY PETITION, HE; DESPITE BEING 'AWARE' THAT A 'PETITION' MUST BE FILED BY AUG. 30, 2020, FILES A MOTION INSTEAD, ON AUG. 28, 2020. THE SUPREME COURT OF NEVADA DENIES THE MOTION, FILED SEPT. 25, 2020. THE PETITIONER THEN FILES A MOTION TO WITHDRAW COUNSEL AND TO STAY ISSUANCE OF REMITTITUR PENDING APPLICATION FOR A WRIT OF CERTIORARI IN THE **U.S.S.C.** THE MOTION IS GRANTED.

PETITIONER HAS UNTIL JAN. 25, 21 ACCORDING TO THAT ORDER, FILED OCT. 14, 2020, TO FILE THIS WRIT. HE CHALLENGES, THE APPELLATE COURTS' RULING AND THE NEVADA SUPREME COURTS' RULING. AND RECHALLENGES THE ORDER OF HIS 1ST TIMELY STATE PETITION, AS IT IS 'CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.' AFTER A EXTENSION, THIS PETITION MUST BE FILED BY MARCH 15, 2021. SEE APPX. NO. [G], [F].

ABREVIATIONS FOR UPCOMING ARGUMENTS

1. (IAC) INEFFECTIVE ASSISTANCE OF COUNSEL
2. (DIST. CT. C.C., NEV.) DISTRICT COURT, CLARK COUNTY, NEVADA
3. (U.S.S.C) UNITED STATES SUPREME COURT
4. (N.S.C) NEVADA SUPREME COURT
5. (N.A.C) NEVADA APPEALS COURT
6. (AMDT.) AMENDMENT (6TH/14TH ETC.)
7. (T.TR.) TRIAL TRANSCRIPTS
8. (APPX.NO.) APPENDIX NUMBER

ARGUMENT (1)

1. PETITIONER IS BEING HELD AGAINST THE U.S CONSTITUTION AND NEVADA CONSTITUTION AND CLEARLY CONTRARY TO `CLEARLY ESTABLISHED FEDERAL LAW. SPECIFICALLY, THE 6TH AND 14TH AMDT., THE RIGHT TO A FAIR TRIAL, IMPARTIAL JURY, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION AND DUE PROCESS OF LAW.

1.(a). STRICKLAND (PRONG 1 / CAUSE), (BATSON VIOLATION).

"THE RIGHT TO EFFECTIVE ASSISTANCE MAY BE VIOLATED BY EVEN AN ISOLATED ERROR OF COUNSEL IF THAT ERROR IS SUFFICIENT EGREGIOUS AND PREJUDICIAL." MURRAY V. CARRIER, 106 S.CT. 2639-2640 (1986); U.S., V. CRONIC, 446 U.S 648, 657 N.20 (1984). PETITIONER SUBMITS THAT THAT IS THE CASE HERE, AS COUNSEL VIOLATED (BATSON-J.E.B-MCCOllUM-POWERS) AND LIBBY, THE STATE DECISION APPLYING J.E.B., AND ITS BATSON LINEAGE.

THE `BATSON' DECISION HOLDS THAT THE U.S. CONSTITUTION FORBIDS EXCLUSION OF JURORS SOLELY ON ACCOUNT OF RACE. 476 U.S., 79 (1986). THE `MCCOllUM' DECISION FORBIDS CRIMINAL DEFENDANTS FROM DISCRIMINATING AGAINST JURORS ON THE ACCOUNT OF RACE. 505 U.S., 42 (1992). THE J.E.B., DECISION HOLDS THAT THE U.S. CONSTITUTION FORBIDS EXCLUSION OF JURORS ON ACCOUNT OF GENDER. 511 U.S., 127 (1994). IN `POWERS', THIS COURT EXPLAINED THE DAMAGE DONE BY DISCRIMINATION ON THE JURORS, DEFENDANTS, AND SOCIETY; IT REJECTED PEREMPTORY CHALLENGES ON "THE VERY STEREOTYPE THE LAW CONDEMNS." 499 U.S., 400, AT 410 (1991). THE COURT IN LIBBY DESCRIBED BATSONS (3) STEPS IN A GENDER DISCRIMINATION CHALLENGE, AND EXPRESSED," WE TAKE THIS OPPORTUNITY TO INSTRUCT THE DISTRICT COURTS OF THIS STATE TO CLEARLY SPELL OUT THE THREE-STEP ANALYSIS WHEN DECIDING A BATSON/J.E.B.-TYPE

ISSUE." LIBBY 975 P.2d 839 (1999). QUOTING, McCollum; CONCURRING JUSTICE, (J. LEAVITT), RECOGNIZED, "THE RULE APPLIES TO DEFENDANTS AS WELL AS PRO-SECUTORS." 975 P.2d AT 841. PETITIONER RAISES THESE LAWS AND PROCEDURES, AS A LIGHT TO COUNSEL'S CONDUCT.

IN OCT. 7-8, 2003, DURING VOIR DIRE, AT GUERRERO'S TRIAL. BATSON WAS 'CLEARLY ESTABLISHED' IN FEDERAL AND NEVADA COURTS. LOOKING AT GUERR-ERO'S CASE, AND HIS SUBSTANTIAL RIGHTS. COUNSELS DECISION TO CHALLENGE 8 OF 9 POTENTIAL (MALE) JURORS WAS UNREASONABLE AND UNLAWFUL. (IAC) CLAIMS ARE VIEWED THROUGH THE LAW AT THE TIME OF TRIAL. "COUNSEL'S PER-SPECTIVE AT THE TIME," STRICKLAND, 466 U.S., AT 689.

TO ESTABLISH "DEFICIENT PERFORMANCE" UNDER THE FIRST PRONG, THE DEFENDANT MUST SHOW COUNSEL MADE AN ERROR SO SERIOUS THAT HE WAS NOT FUNCTIONING AS THE "COUNSEL" GUARANTEED BY THE SIXTH AMDT. STRICKLAND, 466 U.S AT 687. HERE, COUNSEL'S CHOICES" FELL BELOW AN OBJECTIVE STANDARD OF RE-ASONABLENESS." Id AT 690. ACTIVE 'DISCRIMINATION.'

IT WAS NOT POSSIBLE FOR GUERRERO TO 'OBJECT,' SINCE IT WAS DEFENSE COUNSEL WHO VIOLATED THE LAW. RECOGNIZING IT'S BURDEN, THE STATE OBJECTED; 'MADE A RECORD.' AS A RECORD, IS NECESSARY, TO PROVIDE THE BATSON ANALYSIS USED TO ADDRESS BATSON'S (3) STEPS, AND DETERMINE THE POTENTIAL IMPACT ON THE 'RIGHTS OF THE DEFENDANT, THE INDIVIDUAL JURORS, AND THE INTEGRITY OF THE JUD-ICIAL SYSTEM AS A WHOLE', SEE WEAVER, 137 S.CT. AT 1910-12 (2017).

HERE IS THE FACTS... (T.TR. VOL 2. PAGES 18-19 (OCT. 8, 2003) APPX NO. [Y.503-Y505]

MS. LOWRY: MAY I ALSO JUST MAKE A RECORD, YOUR HONOR.

THE COURT: YES.

MS. LOWRY: THE STATE NOTED THAT SEVEN OUT OF THE DEFENSES EIGHT PEREMPTS THEY EXCUSED MEN. ITS **IRONIC** THAT THEY TALK ABOUT HAV-

-ING A JURY OF THEIR PEERS FOR THEIR CLIENTS WHEN, IN **FACT** THEY VIRT-
-UAIN **KICKED** OFF ALMOST All OF THE MEN THAT WERE SEATED IN THE BOX.
IT CAME TO THE POINT WHERE, AT THE END OF SELECTION, THE PANEL START-
-ED TO **LAUGH** KNOWING THAT IF A MAN SAT DOWN, THEY WERE GOING TO BE
EXCUSED.

THERE **IS** SPECIFICALLY CASE **LAW** ON POINT IN THE STATE OF NEVADA,
LIBBY V. THE STATE OF NEVADA, 113 NEVADA 251, THAT CITES THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT THAT FOUND THE DEFENDANTS
USE OF All SEVEN PEREMPTORY CHALLENGES TO STRIKE MEN FROM THE VENEER
AND ESTABLISH A PRIMA FACIE CASE OF **GENDER** BIAS, AND GENDER BIAS IS
ALSO AN ISSUE TO LOOK AT WHEN YOUR LOOKING AT BATSON, SO I JUST WANT-
-ED TOO--

THE COURT: WELL, WHAT DO YOU WANT ME TO DO?

MS. LOWRY: AT THIS POINT--

THE COURT: THE ONLY THING I CAN DO -- DO YOU WANT -- **THE REMEDY**
FOR THIS IS WHAT, TO GET RID OF THIS PANEL?

MS. LOWRY: AT THIS POINT, I'M JUST MAKING A RECORD AND CITING
THE CASE.

AFTER THIS, BATSON'S (3) STEP ANALYSIS NEVER TOOK PLACE AND THE
JURY CHOSEN BY STEREO-TYPICAL DISCRIMINATION REMAINED. GUERRERO CAN
THEREFORE, **OVERCOME** THE "STRONG PRESUMPTION" THAT DEFENSE COUNSEL'S
DECISION TO DISCRIMINATE, FAILS UNDER *STRICKLAND'S*, "*SOUND TRIAL STRATEGY*."
466 U.S. AT 689. WHY? BECAUSE THIS COURT LABELED IT MISCONDUCT. IN
MCCOLLUM, THE COURT HELD THAT "[d]EFENSE COUNSEL IS LIMITED TO 'LEGIT-
-IMATE, LAWFUL CONDUCT." 505 U.S., AT 57. ELIMINATING "DISCRIMINATION"
FROM A LONG LIST OF PERMISSIBLE REASONS DEFENSE COUNSEL MIGHT HAVE FOR
STRIKING A PROSPECTIVE JUROR. 505 U.S., AT 58.

1. (a), (i). MISCONDUCT.

"THERE ARE FUNDAMENTAL DIFFERENCES BETWEEN ATTORNEY MISCONDUCT AND TACTICAL ERRORS." TAYLOR V. ILLINOIS, 484 U.S., 400, AT 434 (1988). AND "THE RATIONALES FOR BINDING DEFENDANTS TO ATTORNEY'S ROUTINE TACTICAL ERRORS **DO NOT** APPLY TO ATTORNEY MISCONDUCT. AN ATTORNEY IS NEVER FACED WITH A LEGITIMATE CHOICE THAT INCLUDES MISCONDUCT AS AN OPTION," Id. AT 434." IF THE ERRONEOUS NATURE OF THE ATTORNEY'S DECISION WAS SUFFICIENTLY EVIDENT AT THE TIME, THEN THE SYSTEM DOES WANT TO DETER THE ATTORNEY'S BEHAVIOR, AND CAN AND DOES SO BY DIRECTLY SANCTIONING THE ATTORNEY FOR MALPRACTICE. IT **DOES NOT** BIND THE DEFENDANT, WHO BY **ESTABLISHING** MALPRACTICE WOULD HAVE ALSO ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL". TAYLOR, 484 U.S., AT 435." CONSEQUENTLY, MISCONDUCT IS AMENABLE TO DIRECT PUNITIVE SANCTIONS AGAINST ATTORNEYS AS A DETERRANT THAT CAN PREVENT ATTORNEYS FROM SYSTEMICALLY ENGAGING IN MISCONDUCT THAT WOULD **DISRUPT** THE TRIAL PROCESS." THE STATE, IN THIS CASE, ACKNOWLEDGED THAT COUNSEL'S VIOLATION OF BATSON-J.E.B WAS NOT A LEGITIMATE TACTICAL DECISION THAT'S WHY IT MADE A RECORD'.
AT TRIAL, THE STATE MADE ITS PRIMA FACIE, STEP (1); ON APRIL, 16, 2010. THE STATE DISTRICT COURT HELD A EVIDENTIARY HEARING, FILED JULY, 28, 2010 PAGES 71-72 (**APPX NO. [R·375]** (STEP TWO; NOT A GENDER NUETRAL REASON)

THE FOLLOWING TOOK PLACE: (RECROSS EX., OF DAVID C. AMESBURY).

... AND I THINK WOMEN AS A JUROR, A MAJORITY AND I BELIEVE WE DISCUSSED THIS, ARE -- WOULD HAVE A BETTER FEEL WHETHER THEY HONESTLY BELIEVED THIS WOMAN'S STORY OR NOT, WHERE MEN WOULD BE MORE SYMPATHETIC

AND THAT WAS OUR STRATEGY. SO WE WANTED TO **STACK** THE JURY WITH **WOMEN**

Q. OKAY, AND WERE YOU SUCCESSFUL IN BEING ABLE TO DO THAT?

A. COULDN'T -- AS I SIT HERE TODAY I COULDN'T TELL YOU.

Q. BUT IT WAS YOUR STRATEGY TO **STRIKE** AS MANY **MEN** AS YOU COULD FROM THE JURY?

A. LIKELY, YES.

Q. OKAY. AND THAT WAS A STRATEGIC DECISION?

A. YES.

GUERRERO RAISES [FOUR] POINTS FROM COUNSEL'S RESPONSE. ONE: IT IS BATSON'S STEP (2), RESPONSE. TWO: THE (U.S.S.C) DETERMINED THAT THE STATE IN J.E.B. HAD 'STRATEGIZED' USING 9 OF 10 PEREMPTORIES TO REMOVE MALE JURORS. IT THEN HELD, "WE SHALL NOT ACCEPT AS A DEFENSE TO GENDER BASED PEREMPTORY CHALLENGES THE VERY STEREOTYPE THE LAW CONDEMNS." J.E.B., 511 U.S., AT 137. THREE: UNDER BATSON'S STEP (2); "A LEGITIMATE REASON IS NOT A REASON THAT "MAKES SENSE" BUT ONE THAT DOES NOT DENY EQUAL PROTECTION." PURKETT V. ELEMENTARY, 514 U.S 765, 767 Id. AT 769 (1995). FOUR: J.E.B HELD, "THE EQUAL PROTECTION CLAUSE **PROHIBITS** DISCRIMINATION IN JURY SELECTION ON THE BASIS OF GENDER", J.E.B., 511 U.S., AT 127. SEE **APPX NO. [J-64]**, **APPX NO [Y-504] APPX NO. [R-346-R348]**, AND (EXIBIT 1, 4 FINAL ARGUMENT).

1.(a),(ii). STATE ACTION

THIS UNLAWFUL CONDUCT ALSO AMMOUNTS TO STATE ACTION. UNDER MCCOLLUM, "THE FACT THAT A DEFENDANT EXERCISES A PEREMPTORY CHALLENGE TO FURTHER HIS INTEREST IN AQUITTAL DOES NOT CONFLICT WITH A FINDING OF STATE ACTION." MCCOLLUM, 112 AT 2365. STATE ACTION IS ATTRIBUTABLE, (IMPUTED) TO THE STATE, WHICH MAY NOT " CONDUC[T] TRIALS AT WHICH PERSONS WHO FACE

INCARCERATION MUST DEFEND THEMSELVES WITHOUT ADEQUATE LEGAL ASSISTANCE." CUYLER V. SULLIVAN, 466 U.S., 335, 344 (1980); MURRAY V. CARRIER, 106 S.CT. 2639 AT 2645-46 (1986).

MCCOLLUM HELD: "THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE **PROHIBITS** A STATE CRIMINAL DEFENDANT FROM ENGAGING IN PURPOSE--FUL RACIAL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES TO EXCLUDE POTENTIAL JURORS, BECAUSE (1). SUCH AN ACTION INFLICTS HARM ON THE DIGNITY OF PERSONS AND THE INTEGRITY OF COURTS; (2). SUCH AN ACTION CONSTITUTES STATE ACTION FOR EQUAL PROTECTION PURPOSES, AS (a). THE CLAIMED CONSTITUTIONAL DEPRIVATION RESULTS FROM THE EXERCISE OF A RIGHT OR PRIVILEGE HAVING ITS SOURCE IN STATE AUTHORITY, (b). A DEFENDANT CHAR--GED WITH SUCH DISCRIMINATION CAN BE DESCRIBED AS A STATE ACTOR, AND (C). THE ADVERSARIAL RELATIONSHIP BETWEEN A DEFENDANT AND THE PROSECUTION DOES NOT NEGATE THE GOVERNMENTAL CHARACTER OF THE ACTION; (3). A PROS--ECUTOR - THAT IS, THE STATE HAS THIRD-PARTY STANDING TO RAISE SUCH AN EQUAL PROTECTION CLAIM ON BEHALF OF THE EXCLUDED JURORS; AND (4). THE IN--TERESTS SERVED BY PROHIBITING SUCH AN EXERCISE OF PEREMPTORY CHALLENGES ARE NOT REQUIRED TO GIVE WAY TO THE CONSTITUTIONAL RIGHTS OF A DEFENDANT, INCLUDING THE DEFENDANT'S RIGHTS, UNDER THE CONSTITUTION'S SIXTH AMEND--MENT, TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO TRIAL BY IMPART--IAL JURY." Id. AT 2350. THAT BEING SAID, "THE STATE CANNOT AVOID ITS CON--STITUTIONAL RESPONSIBILITIES BY DELEGATING A PUBLIC FUNCTION TO PRIVATE PARTIES." MCCOLLUM, QUOTING; CF. TERRY V. ADAMS, 345 U.S., 461 (1953).

IN **NEVADA**, "STATE ACTION IS PRESENT WHEN THE STATE DELEGATES TO A PRIVATE ENTITY POWERS TRADITIONALLY EXCLUSIVELY RESERVED FOR THE STATE." CUMMINGS V. CHARTER HOSPITAL, 111 NEV. 639 (1995). STATE ACTION IS TYPICALLY VIEWED WITH A **2-PART** APPROACH; "(1). FIRST, THE DEPRIVATION MUST BE CAUSED BY THE EXERCISE OF SOME RIGHT OR PRIVILEDGE CREATED BY THE STATE OR BY

A RULE OF CONDUCT IMPOSED BY THE STATE OR BY A PERSON FOR WHOM THE STATE IS RESPONSIBLE;(2). SECOND, THE PARTY CHARGED WITH THE DEPRIVATION **MUST** BE A PERSON WHO MAY FAIRLY BE SAID TO BE A STATE ACTOR. THIS MAY BE BECAUSE HE IS A STATE OFFICIAL, BECAUSE HE ACTED TOGETHER WITH OR HAS OBTAINED SIGNIFICANT AID FROM STATE OFFICIALS, OR BECAUSE HIS **CONDUCT** IS OTHERWISE CHARGEABLE TO THE STATE." LUGAR V. EDMONSON OIL COMPANY, INC., 457 U.S., 922 AT 937 (1982); TARKANIAN V. NATIONAL COLLEGIATE ATHLET. ASSOC., 103 NEV. 331 (1987). A (BATSON-MCCOLLUM-J.E.B) VIOLATION SATISFIES **LUGAR'S 2**-PART APPROACH. (SEE MCCOLLUMS DEFINING FEATURES (2), (a),(b)); (1), BECAUSE THE STATE ALLOWED COUNSEL TO PARTICIPATE IN ATTEMPTING TO SECURE A FAIR AND IMPARTIAL JURY VIA PEREMPTORY CHALLENGE. SEE STATE V. RAYMOND, 11 NEV. 98 (1876); STATE V. AH SAM, 15 NEV. 27 (1880); MCCOLLUM, 505 U.S AT 57, (2), BECAUSE DEFENSE ATTORNEY VIOLATED (BATSON-MCCOLLUM-J.E.B-POWERS) WHERE "GENDER, LIKE RACE, IS AN UNCONSTITUTIONAL PROXY FOR JUROR COMPETENCE AND IMPARTIALITY." J.E.B, 511 U.S., AT 129. AND HIS 'CONDUCT' THEREFORE IS CHARGED TO THE STATE. AS, DISCRIMINATION IS A ERROR "SO SERIOUS THAT COUNSEL WAS NOT FUNCTIONING AS THE 'COUNSEL' GUARANTEED THE DEFENDANT BY THE **SIXTH** AMENDMENT." STRICKLAND V. WASHINGTON, 466 U.S., 668, 687 (1984).

BATSONS STEP(3) "FINALLY, THE TRIAL COURT MUST DETERMINE WHETHER THE DEFENDANT HAS CARRIED HIS BURDEN OF PROVING PURPOSEFUL DISCRIMINATION." HERNANDEZ V. NEWYORK, 500 U.S. 352, 363 (1991). AS WE SAW FROM THE TRIAL TRANSCRIPTS, THE TRIAL COURT WAS READY TO GIVE THE STATE THE REMEDY COMMON IN NEVADA, TO REPLACE THE 'JURY PANEL'. SEE FOSTER V. STATE, 111 P3d 1083 (2005). THIS WOULD COMPLETE THE EQUAL PROTECTION VIOLATION, AS THE COURT HAD WITNESSED THE CONDUCT AND DID NOT ARGUE AT ALL ABOUT IT, ITS ONLY REMARKS WERE THAT ATLEAST THERE WAS MANY RACES IN THE WOMEN. (NONE, HISPANIC).

THIS LEADS TO GUERRERO'S 'QUESTION OF LAW'. SEE: APPX NO. [P.273-274]

I.(a),(iii). QUESTION 1.

1.) WHETHER A (BATSON-MCCOLLUM-J.E.B) PROVEN VIOLATION QUALIFIES AS A 'STRUCTURAL ERROR', AND, IF SO,

a). WHETHER UNDER STRICKLAND AND CRONIC, GUERRERO MAY PRESUME PREJUDICE AS THE ERROR OCCURED DURING (VOIR DIRE), 'A CRITICAL STAGE'.

b). WHETHER GUERRERO DESERVED 'AUTOMATIC REVERSAL' ON HIS TIMELY INEFFECTIVE ASSISTANCE (BATSON) CLAIM.

c). WHETHER GUERRERO WAS DENIED 'FUNDAMENTAL FAIRNESS' AT TRIAL.

I.(a),(iv). CONFLICT IN CIRCUITS

THERE IS APPARENT CONFLICT IN THE U.S APPEALS COURTS AS TO THE 'PRESUMPTION OF PREJUDICE'. COMPARE VIRGIL V. DRETKE, 446 F.3d 598 (5TH CIR. 2006) ("THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DOES NOT HOLD THAT A STRUCTURAL ERROR ALONE IS SUFFICIENT TO WARRANT A PRE-SUMPTION OF PREJUDICE IN THE INEFFECTIVE ASSISTANCE OF COUNSEL CONTEXT.") WITH, WINSTON V. BOATWRIGHT, 649 F.3d 618 (7TH CIR. 2011) (PRESUMING PREJUDICE FOR BATSON-MCCOLLUM STRUCTURAL ERROR). AND, U.S. V. HUEY, 76 F.3d 638 (GRANTING A NEW TRIAL, WITHOUT ANY SHOWING OF (IAC), FOR A PROVEN BAT-SON-MCCOLLUM VIOLATION). THE NINTH CIRCUIT IN, CARRERA V. AYERS, 670 F.3d 938 (9TH CIR. 2011/FN. 6-MAJORITY), ("SIMILARILY, WE NEED NOT AND DO NOT ADDRESS THE DISSENTS CONTENTION THAT PREJUDICE MUST BE PRESUMED UN-DER STRICKLAND WHEN COUNSEL'S ALLEGED ERRORS RESULT IN A STRUCTURAL ERROR.") **HAS NOT** ADDRESSED THE ISSUE. AND THIS COURT ADMITTED GRANTING 'AUTOMATIC' RELIEF TO DEFENDANTS WHO PREVAILED ON CLAIMS ALLEGING GENDER

DISCRIMINATION. ALTHOUGH, IT ALSO SAID; "THOUGH THE COURT HAS YET TO LABEL THOSE ERRORS STRUCTURAL IN EXPRESS TERMS." IT ALSO EXEMPTED DISCRIM-INATION CASES FROM ITS 'WEAVER' HOLDING, "NEITHER THIS REASONING NOR THE HOLDING HERE CALLS INTO QUESTION THE COURTS' PRECEDENTS" WEAVER, 137 S.CT. AT 1912. SPEAKING OF, (HILLERY, BATSON, J.E.B), WHEN IT COULD HAVE HELD THE SAME 'STANDARD' FOR ALL (STRUCTURAL ERROR - IAC) CLAIMS.

GUERRERO CAN SHOW WHY 'DISCRIMINATION' IN JURY SELECTION IS A 'STRUCTURAL ERROR', THAT BEING, BECAUSE (VOIR DIRE) IS A 'CRITICAL STAGE' OF ANY TRIAL. UNITING STRICKLAND AND CRONIC, WITH 'STRUCTURAL ERROR'.

1.(b). VOIR DIRE', A CRITICAL STAGE', AND 'STRUCTURAL ERROR'.

'THE RIGHT[S] LOST AT VOIR DIRE; U.S CONST. AMdT. 6 / AMdT. 14 (FAIR TRIAL, IMPARTIAL JURY, EQUAL PROTECTION, DUE PROCESS; AND THE 'EFFECT-IVE ASSISTANCE OF COUNSEL'. (THIS INCLUDES THE 14TH AMdT. RIGHTS OF THE EXCLUDED JURORS). SEE APPX NO. [J.54], AND, GUERRERO'S AND THE JURORS RIGHTS UNDER THE NEVADA CONSTITUTION. SEE APPX NO. [M.119].

U.S. CONST. AMDT. 6 ("IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A... TRIAL, BY AN IMPARTIAL JURY.") "THE SIXTH AMDT. GUARANTEES A DEFENDANT'S RIGHT TO TRIAL BEFORE AN IMPARTIAL JURY." MURRAY V. SCHRIRO, 882 F.3d 778, 802 (9TH CIR. 2018); SKILLING V. U.S., 561 U.S. 358, 377 (2010) "THE CONSTITUTION SECURES TO AN ACCUSED PERSON THE RIGHT TO BE TRIED BY AN IM-PARTIAL JURY." STATE V. AHSAM, 15 NEV. 27 (1880). THE RIGHT OF TRIAL BY JURY AS GUARANTEED BY THE CONSTITUTION IS AS MUCH FOR THE PROTECTION OF THE WHOLE PEOPLE AS FOR THE INDIVIDUAL PRISONER." STATE V. MCCLEAR, 422 P.2d 541 (1967), "A FAIR AND IMPARTIAL JURY IS THE **ULTIMATE** OBJECT TO BE SECURED BY THE CON-STITUTIONAL RIGHT TO CHALLENGE A JUROR FOR CAUSE." STATE V. RAYMOND, 11 NEV. 98 (1876). THAT IS WHAT TRIAL COUNSEL IN THIS CASE DID NOT SECURE." IN ESSENCE, THE RIGHT TO A JURY TRIAL GUARANTEES TO THE CRIMINALLY ACCUSED A FAIR TRIAL

BY A PANEL OF IMPARTIAL "INDIFFERENT" JURORS." IRVIN V. DOWD, 366 U.S. 717 (1961). THIS COURT ALSO SAID, THE "DEFENDANT DOES HAVE THE RIGHT TO BE TRIED BY A JURY WHOSE MEMBERS ARE SELECTED PERSUANT TO NONDISCRIMINATORY CRITERIA." J.E.B, 114 S.CT. AT 1421. "AMONG THOSE BASIC **FAIR TRIAL** RIGHTS THAT CAN NEVER BE TREATED AS **HARMLESS** IS A DEFENDANT'S RIGHT TO AN IMPARTIAL ADJUDICATOR, BE IT JUDGE OR JURY." GRAY V. MISSISSIPPI, 481 U.S. 648, 668 (1987). "A CRIMINAL DEFENDANT'S RIGHT TO A FAIR TRIAL IS AN ESSENTIAL PART OF OUR SYSTEM OF JUSTICE." NEBRASKA PRESS ASSN. V. STUART, 427 U.S 539, 551-55 (1976). "A FAIR TRIAL IN A FAIR TRIBUNAL IS A BASIC REQUIREMENT OF DUE PROCESS." RE-MURCHISON, 349 U.S. 133, 136 (1955). THE DENIAL OF A IMPARTIAL JURY VIOLATES THE **14TH AMDT.**; THE DUE PROCESS, AND ALSO THE EQUAL PROTECTION CLAUSE. THE RIGHT 'GUARANTEES' PROTECTS PETITIONER, THE JURORS AND THE PEREMPTORY CHALLENGE NO MATTER WHO EXCERCISES IT." THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT MANDATES THAT ALL PERSONS SIMILARLY SITUATED RECIEVE LIKE TREATMENT UNDER THE LAW." GAINES V. STATE, 998 P.2d 166, 173, (2000); CITY OF CLEBURNE LIVING CTR. 473 U.S. 432, 439 (1985). "THE EQUAL PROTECTION CLAUSE, AS INTERPRETED BY DECISIONS OF THIS COURT, GOVERNS THE EXERCISE OF PEREMPTORY CHALLENGES IN EVERY TRIAL". J.E.B., 114 S.CT. 1427-28 (FN. 12). THE "INDIVIDUAL JURORS THEMSELVES HAVE A RIGHT TO NONDISCRIMINATORY JURY SELECTION PROCEDURES." J.E.B., AT 1427. "ALL PERSONS, WHEN GRANTED THE OPPORTUNITY TO SERVE ON A JURY, HAVE THE RIGHT **NOT** TO BE EXCLUDED SUMMARILY BECAUSE OF DISCRIMINATORY AND STEREOTYPICAL PRESUMPTIONS THAT REFLECT AND REINFORCE PATTERNS OF HISTORICAL DISCRIMINATION." J.E.B., AT 1428. "EQUAL OPPORTUNITY TO PARTICIPATE IN THE FAIR ADMINISTRATION OF JUSTICE IS FUNDAMENTAL TO OUR DEMOCRATIC SYSTEM..." J.E.B., AT 1430, AND "IT REAFFIRMS THE PREMISE OF EQUALITY UNDER THE LAW THAT ALL CITIZENS, REGARDLESS OF RACE, ETHNICITY, OR GENDER HAVE THE CHANCE TO TAKE PART DIRECTLY IN OUR DEMOCRACY." POWERS, 499 U.S AT 407.

THE **PREJUDICE** BEGAN AT **VOIR DIRE**; ITS DAMAGE AND "THE MESSAGE IT SENDS TO ALL THOSE IN THE COURT ROOM, AND ALL THOSE **WHO** MAY LATER LEARN OF THE DISCRIMINATORY ACT, IS THAT CERTAIN INDIVIDUALS, FOR NO REASON OTHER THAN GENDER, ARE PRESUMED UNQUALIFIED BY STATE ACTORS TO DECIDE IMPORTANT QUESTIONS UPON WHICH REASONABLE PERSONS COULD DISAGREE." J.E.B AT 1428. **VOIR DIRE** WAS SUPPOSED TO ALLOW GUERRERO," TO ESTABLISH A RE-LATION IF NOT A BOND OF TRUST," EDMONSON, 500 U.S. AT 629 (1991), WITH THE JURORS; INSTEAD, THE JURORS 'LAUGHED' AT THE DEFENSE.

UNDER **POWERS V. OHIO**, SUPRA, AND **CAMBELL V. LOUISIANA**, 523 U.S. AT 397-398 (1998). GUERRERO HAS STANDING UNDER THE **14TH AMDT.**, TO ASSERT THE 'EQUAL PROTECTION RIGHTS' OF THE EXCLUDED JURORS. SEE **APPX NO.** [M.115-120]; **APPX NO.** [R.343-358].

ONE, SINCE PETITIONER HAS PROVEN DISCRIMINATION 'ATTRIBUTABLE TO THE STATE'; STATE ACTION. SEE **APPX NO.** [J.61-62]

AND **TWO**, HE CAN SATISFY THE (3) PRECONDITIONS ESTABLISHED IN **POWERS**, AND **CAMBELL**. THE **FIRST**, THE **DEFENDANT** SUFFERED AN "**INJURY IN FACT**," THAT IS, "DISCRIMINATION AT THE VOIR DIRE STAGE "**CASTS**" DOUBT ON THE INTEGRITY OF THE JUDICIAL PROCESS'... AND PLACES THE **FAIRNESS** OF A CRIMINAL PROCEEDING IN DOUBT." POWERS, 499 U.S., AT 411. THIS CLOUD OF DOUBT **DEPRIVES** THE DEFENDANT OF THE CERTAINTY THAT A **VERDICT** IN HIS CASE "IS GIVEN IN ACCORDANCE WITH THE LAW BY PERSONS WHO ARE FAIR". CAMBELL, SUPRA, QUOTING (POWERS, 499 U.S. AT 413). THIS CLOUD CAST DOUBT ON THE INTEGRITY OF 'DEFENSE COUNSEL' AND RAINED DOWN ON ANY CHANCE TO 'BOND' WITH THE JURY AND TO RECIEVE A 'FAIR TRIAL AND IMPARTIAL JURY.' THE **SECOND**, GUERRERO HAD A "CLOSE RELATIONSHIP" TO THE EXCLUDED JURORS, SEE **APPX. NO.** [J.60-61], AS BOTH SHARE A COMMON INTEREST IN ELIMINATING DISCRIMINATION, AND THE CRIMINAL DEFENDANT HAS AN INCENTIVE TO SERVE AS AN EFFECTIVE ADVOCATE BECAUSE A VICTORY MAY RESULT IN OVERTURNING HIS

CONVICTION. POWERS, AT 413-414." IF JURY SELECTION IS THE FIRST OPPORT-
-UNITY TO "ESTABLISH A RELATION, IF NOT A BOND OF TRUST, WITH THE
JURORS" AND THAT RELATION AND BOND "CONTINUES THROUGHOUT THE ENTIRE
TRIAL". POWERS, AT 413. THEN AS **mccollum** SAID; THE "EXCLUSION OF A
JUROR ON THE BASIS OF RACE," (MCCOLLUM) OR, GENDER (J.E.B.), "SEVERS THAT
RELATION IN AN INVIDIOUS WAY." EDMONSON V. LEESVILLE CONCRETE CO., 500
U.S. 614, AT 629 (1991). THE **THIRD**, "GIVEN THE ECONOMIC BURDENS OF
LITIGATION AND THE SMALL FINANCIAL REWARD AVAILABLE," A JUROR DIS-
-MISSED BECAUSE OF RACE PROBABLY WILL LEAVE THE COURTROOM POSSESSING
LITTLE INCENTIVE TO SET IN MOTION THE ARDOUS PROCESS NEEDED TO VIN-
-DICATE HIS OWN RIGHTS." POWERS, Id., AT 415; CAMBELL, 523 U.S. AT 398. "EX-
-CLUDED GRAND JURORS HAVE THE SAME ECONOMIC DISINCENTIVES TO ASSERT
THEIR OWN RIGHTS AS DO EXCLUDED PETIT JURORS." POWERS, SUPRA, AT 415;
CAMBELL, SUPRA, AT 400. "[W]HATEVER HIS RACE, A CRIMINAL DEFENDANT HAS
STANDING TO CHALLENGE THE **SYSTEM** USED TO SELECT HIS GRAND... JURY, ON
THE GROUND THAT IT ARBITRARILY EXCLUDES ... MEMBERS OF ANY RACE, AND
THEREBY DENIES HIM DUE PROCESS OF LAW"). PETERS V. KIFF, 407 U.S. 493,
AT 507 (1972); CAMBELL, AT 401. THE UNLAWFUL CONDUCT BY DEFENSE ATT-
-ORNEY, THE SYSTEM USED TO SELECT GUERRERO'S PETIT JURY, DENIED HIM
DUE PROCESS OF LAW.

THE **BATSON** COURT ITSELF RECOGNIZED "THE JOB OF ENFORCING BATSON
RESTS FIRST AND FOREMOST WITH TRIAL JUDGES." BATSON, 476 U.S., AT 97, 99
N. 22. "BATSON SOUGHT TO PROTECT THE RIGHTS OF DEFENDANTS AND JURORS,"
FLOWERS V. MISSISSIPPI, 139 S.CT. 2228, AT 2243 (2019). IN THIS CASE,
THE COURT, THE TRIAL JUDGE, DID NOT PROTECT GUERRERO, OR THE JURORS.

1.(b),(i). 'CRITICAL STAGE' AND 'STRUCTURAL ERROR'; PRESUM-
-ED PREJUDICE AND 'FUNDAMENTAL FAIRNESS', AND PREJUDICE.

THERE IS DIFFERENT DOCTRINES INVOLVED IN THIS CASE, BUT THEY ARE NOT ANTAGONISTIC. THE FIRST, (**VOIR DIRE**). THIS COURT FOR YEARS HAS BEEN "AFFIRM-ING VOIR DIRE AS A CRITICAL STAGE OF THE CRIMINAL PROCEEDING." LEWIS V. U.S. 370, 374 (1892); GOMEZ V. U.S., 490 U.S. 858 AT 873 (1989). "A CRITICAL STAGE IS ANY 'STAGE' OF A CRIMINAL PROCEEDING WHERE **SUBSTANTIAL** RIGHTS OF A CRIMINAL ACCUSED MAY BE AFFECTED." HOVEY V. AYERS, 458 F.3d 892, 901 (9TH CIR. 2006). THIS COURT CHARACTERIZED A "**CRITICAL STAGE**" AS ONE THAT "HELD SIGNIFICANT CONSEQUENCES FOR THE ACCUSED." BELL V. CONE, 535 U.S. 685, 696 (2002). AND THAT 'COURTS' MAY PRESUME THAT A DEFENDANT HAS SUFFERED UNCONSTITUTIONAL PRE-JUDICE IF HE "IS DENIED COUNSEL AT A CRITICAL STAGE OF HIS TRIAL." CRONIC, 466 U.S. AT 659. THE **NINTH CIRCUIT** HAS DISTILLED A THREE-FACTOR TEST FOR DETER-MINING WHAT CONSTITUTES A 'CRITICAL STAGE' IN THE 'SIXTH AMENDMENT CONTEXT.' ONLY "ONE OF THESE FACTORS MAY BE SUFFICIENT FOR A STAGE OF THE PROCEEDINGS TO BE CONSIDERED "CRITICAL"." HOVEY V. AYERS, AT 901. THE APPLICABLE FACTOR IN THIS CASE IS **A.)** "FAILURE TO PURSUE STRATEGIES OR REMEDIES RESULTS IN A LOSS OF SIGNIFICANT RIGHTS." WHAT SHOULD HAVE BEEN DEFENSE COUNSEL'S LAWFUL OBJ-ECTIVE OR STRATEGY? "THE ONLY LEGITIMATE INTEREST DEFENSE ATTORNEY SHOULD HAVE HAD WAS SECURING A **FAIR** AND **IMPARTIAL** JURY." EDMONSON V. LEESVILLE CON-CRETE CO., 111 S.CT. 2077, 2083 (1991). SINCE, "'PEREMPTORY CHALLENGES' ARE A 'MEANS TO THE CONSTITUTIONAL END OF AN IMPARTIAL JURY AND A FAIR TRIAL'." GEO-RGIA V. MCCOLLUM, 505 U.S. AT 57 (1992). SEE **APPX NO.** [0-204-205].

IS THIS (STRICKLAND-CRONIC-BATSON) ERROR 'INTERTWINED' WITH 'STRUCT-URAL ERROR' AND ITSELF STRUCTURAL ERROR? YES. THAT'S BECAUSE (VOIR DIRE) IS PART OF THE TRIAL 'FRAMEWORK', (THE MECHANISM); DESPITE **ALSO** BEING A 'CRITICAL STAGE'. A '**STRUCTURAL ERROR**,' "AFFECT[S] THE FRAMEWORK WITHIN WHICH THE TRIAL PROCEEDS." ARIZONA V. FULMINANTE, 499 U.S. 279 AT 309-310 (1991). WEAVER, 137 S.CT. AT 1908 (2017). IN NEVADA, BATSON VIOLATIONS ARE CONSIDERED 'STRUCTURAL ERROR'.

SEE: DIONAMPO V. STATE, 185 P.3d AT 1037 (2008); CORTINAS V. STATE, 195 P.3d AT 322 (2008); BRASS V. STATE, 128 NEV. 748, 754 (2012); COOPER V. STATE, 432 P.3d 202 (2018)." THE NEVADA SUPREME COURT REVIEWS DE NOVO WHETHER THE DISTRICT COURT'S ACTIONS CONSTITUTED STRUCTURAL ERROR". MORGAN V. STATE, 134 NEV. ADV. REP. 27 (2018). SEE APPX NO. [J.66] ; APPX NO. [M] (YET, IT HAS NOT REVIEWED GUERRERO'S CASE).

ALL THESE CITED CASES ARE (BATSON) RELATED. NONE, LIKE GUERRERO'S (IAC). AND THIS COURT, "HAS YET TO LABEL THOSE ERRORS STRUCTURAL IN EXPRESS TERMS." WEAVER, 137 S.CT. AT 1912. SEE, E.G., NEDER, SUPRA, AT 8, 119 S.CT. 1827 (1999). THIS COURT ALSO STATED, "AND THIS OPINION DOES NOT ADDRESS WHETHER THE RESULT SHOULD BE ANY DIFFERENT IF THE ERRORS WERE RAISED INSTEAD IN AN INEFFECTIVE-ASSISTANCE CLAIM ON COLLATERAL REVIEW." WEAVER, AT 1912. (SPEAKING OF ITS 'AUTOMATIC REVERSAL' PRECEDENTS). GUERRERO IS IN DIRE NEED OF THIS COURTS GUIDANCE AND CLARIFICATION.

THE **RECORD**, (OBJECTION). ONE OF THE EXTRAORDINARY FACTS OF THIS CASE IS THAT IT WAS IMPOSSIBLE FOR GUERRERO TO OBJECT; SO THE STATE FELT ITS BURDEN TO PROVIDE A FAIR TRIAL AND ITSELF OBJECTED. THE RECORD IS NECCESSARY TO PROVIDE THE BATSON ANALYSIS USED TO ADDRESS BATSON'S (3) STEPS AND TO DETERMINE THE POTENTIAL IMPACT ON THE RIGHTS OF THE DEFENDANT, THE JURORS, AND THE INTEGRITY OF THE JUDICIAL SYSTEM. SEE FLOWERS, 139 S.CT. AT 2243; WEAVER, 137 S.CT. AT 1910-12. AND ALSO, FOR THE APPELLATE COURTS.

I. (b)(ii), PREJUDICE - PRESUMED PREJUDICE; UNDER STRICKLAND/CRONIC/ STRUCTURAL ERROR - 'AUTOMATIC REVERSAL'.

TRADITIONALLY, A PETITIONER MAY PROVE PREJUDICE BY DEMONSTRATING A REASONABLE PROBABILITY THAT, BUT FOR HIS TRIAL COUNSEL'S DEFICIENT PERFORMANCE, A DIFFERENT OUTCOME WOULD HAVE RESULTED. Id AT 694. TRADITIONALLY, THIS COURT PRESUMED PREJUDICE ONLY UNDER 'CRONIC'. AND THAT WAS "ONLY WHEN SUR-

-ROUNDING CIRCUMSTANCES JUSTIFY A PRESUMPTION OF INEFFECTIVENESS." CRONIC, 466 U.S. AT 662. SEE APPX NO. [J.63]

THIS COURT CLARIFIED IN **WEAVER**, THAT," IN CERTAIN SIXTH AMEND-MENT CONTEXTS, PREJUDICE IS PRESUMED". CRONIC, 466 U.S. 648, 656-58 (1984); QUOTING ALSO STRICKLAND, 466 U.S. AT 692 (1984).

AS FOR 'STRUCTURAL ERROR', IT "DEF[IES] ANALYSIS BY HARMLESS ERROR STANDARDS," FULMINANTE, 499 U.S. 279, AT 309-10, AND "THE GOVERN-MENT IS NOT ENTITLED TO DEPRIVE THE DEFENDANT OF A NEW TRIAL BY SHOWING THAT THE ERROR WAS "HARMLESS BEYOND A REASONABLE DOUBT." CHAPMAN, 386 U.S., AT 24 (1967). THESE ERRORS ARE 'IMMUNE' TO 'HARMLESS ERROR', BECAUSE THEY AFFECT THE VERY 'FRAMEWORK' INTENDED TO ENSURE THE CONSTITUTIONAL PROTECTIONS OF THE TRIAL, FOR THE DEFENDANT AND JURORS.

THERE ARE (**THREE**) RATIONALES FOR GIVING SPECIAL PROTECTION TO STRUCT-URAL ERRORS. 1). 'THE RIGHT PROTECTS INTERESTS THAT DON'T ONLY BELONG TO THE DEFENDANT.' EXAMPLE: THE RIGHT TO A FAIR TRIAL; IMPARTIAL JURY, MUST PASS THROUGH THE 'PEREMPTORY CHALLENGE' VIA THE DUE PROCESS AND EQUAL-PROTECTION CLAUSES. 'EQUAL PROTECTION' IS THE VIOLATION BATSON HAS SOUGHT TO PROTECT FOR **All** THE PARTIES IN ORDER TO GIVE A FAIR TRIAL AND A IMPARTIAL JURY TO A DEFENDANT. THE RIGHTS OF THE JURORS ARE ALSO IMPLICATED. 2). 'THE EFFECTS OF SUCH AN ERROR ARE DIFFICULT TO MEASURE;' "THE EFFECT OF THE VIOLAT-ION **CANNOT** BE ASCERTAINED." HILLERY, 474 U.S. 254, 263 (1986) (EXCLUSION-RACE) ("SIMILARILY, WHEN A **PETIT** JURY HAS BEEN SELECTED UPON IMPROPER CRITERIA... WE HAVE REQUIRED REVERSAL OF THE CONVICTION BECAUSE THE EFFECT OF THE VIO-LATION **CANNOT** BE ASCERTAINED.") DAVIS V. GEORGIA, 429 U.S. 122 (1976). THIS IS BECAUSE," THEY INFECT THE ENTIRE TRIAL PROCESS." BRECHT V. ABRAHAMSON, 507 U.S. 619, 629-30 (1993). (DISCRIMINATION INFECTS THE TRIAL PROCESS).

ALTHOUGH '**PREJUDICE IS PRESUMED**,' GUERRERO CAN SHOW SOME **PREJUDICE** AND DAMAGE TO HIS TRIAL. IN THE COMMON 'STRICKLAND' TERMS, THE OUTCOME OF

THE PROCEEDING WOULD HAVE BEEN DIFFERENT. IN THIS CASE, COUNSEL COULD HAVE SECURED A 'FAIR AND IMPARTIAL JURY', THE OUTCOME OF VOIR DIRE COULD HAVE LED TO A FAIR TRIAL BY FAIR PERSONS AND PROCEDURES. INSTEAD, COUNSEL INVITED 'CYN-ICISM; INFECTED THE ENTIRE PROCEEDINGS AND CAST DOUBT OVER THE CAUSE.'

"DISCRIMINATION IN JURY SELECTION, WHETHER BASED ON RACE OR ON GENDER, CAUSES HARM TO THE LITIGANTS, THE COMMUNITY, AND THE INDIVIDUAL JURORS WHO ARE WRONGFULLY EXCLUDED FROM PARTICIPATION IN THE JUDICIAL PROCESS. THE LIT-IGANTS ARE HARMED BY THE RISK THAT THE PREJUDICE THAT MOTIVATED THE DIS-CRIMINATORY SELECTION OF THE JURY WILL INFECT THE ENTIRE PROCEEDINGS". J.E.B., 511 U.S. AT 141; EDMONSON, 500 U.S. AT 628, "THE QUERY WRONG, OFTEN APPARENT TO THE ENTIRE JURY PANEL..." "CAS[T] DOUBT OVER THE OBLIGATION OF THE PARTIES, THE JURY, AND INDEED THE COURT TO ADHERE TO THE LAW THROUGHOUT THE TRIAL OF THE CAUSE." POWERS, 499 U.S., AT 412. DISCRIMINATION OF GENDER," INVITES CYNICISM RESPECTING THE JURY'S NEUTRALITY AND ITS OBLIGATION TO ADHERE TO THE LAW." J.E.B., Id. AT 141. "THE POTENTIAL FOR CYNICISM IS PARTICULARLY **ACUTE** IN CASES WHERE GENDER-RELATED ISSUES ARE PROMINENT, SUCH AS CASES INVOLVING RAPE, SEXUAL HARASSMENT, OR PATERNITY. J.E.B. 511 U.S. AT 141. (THIS CASE INVOLVES DOMESTIC VIOLENCE AND SEXUAL ASSAULT CHARGES). GUERRERO ALSO LOST THE **'BOND'** WHICH VOIR DIRE PROVIDES. AND THE ADVERSARIAL PROCESS, IT WAS ALSO DIS-TORTED." IF THE PROCESS LOSES ITS CHARACTER AS A CONFRONTATION BETWEEN ADVERSARIES', THE CONSTITUTIONAL GUARANTEE IS VIOLATED." CRONIC, AT 656-57. THIS COURT HAS ALSO HELD THAT, "THE ATTORNEY'S FAILURE MUST BE COMPLETE." BELL V. CONE, 535 U.S. 685, AT 697 (2002). SO, WHEN COUNSEL **DID NOT** SECURE A 'FAIR AND IMPARTIAL JURY' DURING VOIR DIRE, HE FAILED! AND THAT FAILURE ALSO SEALED THE 6TH AMENDMENT VIOLATION, BECAUSE THE **6TH** AMENDMENT **GUARANTEES**..."THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL", STRICKLAND, 466 U.S. AT 686. AND, A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION IS NOT 'COM-PLETE' UNTIL THE DEFENDANT IS PREJUDICED." WEAVER, 137 S. CT. AT 1911. AND 3).

WHETHER THE PROTECTION AGAINST UNIFORM UNFAIRNESS IS IMPLICATED AS THE ERROR ALWAYS RESULTS IN FUNDAMENTAL UNFAIRNESS. SEE NJONGE V. GILBERT, 2018 U.S. DIST. LEXIS 62002; WEAVER, 137 S.CT. AT 1907; GIDEON V. WAINWRIGHT, 372 U.S. 335, 343--45 (1963); VASQUEZ V. HILLERY, 474 U.S. AT 263 (1986); J.E.B., 511 U.S. AT 141 (1994). SEE APPX NO. [N·137-159] ; APPX NO. [O·210-211].

1.(b)(iii) **FUNDAMENTAL FAIRNESS:** THERE IS MULTIPLE REASONS WHY GUERRERO HAS BEEN DENIED 'FUNDAMENTAL FAIRNESS.' HERE, PETITIONER HAS SHOWN (1 AC). "AN INEFFECTIVENESS CLAIM... IS AN ATTACK ON THE FUNDAMENTAL FAIRNESS OF THE PROCEEDING WHOSE RESULT IS BEING CHALLENGED." STRICKLAND, 466 U.S. AT 697. SEE ALSO WILLIAMS V. TAYLOR, 529 U.S. 362-391 (2000). (RECOGNIZING THAT WHILE THE STRICKLAND "REASONABLE PROBABILITY" TEST CAN RESOLVE "VIRTUALLY ALL" CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, "THERE ARE SITUATIONS IN WHICH THE OVER--RIDING FOCUS ON FUNDAMENTAL FAIRNESS MAY AFFECT THE ANALYSIS.") UNDER STRICK--LAND, THE FOCUS, "THE BENCHMARK" OF THE RIGHT TO COUNSEL IS THE "FAIRNESS OF THE ADVERSARY PROCEEDING." SEE KIMMELMAN V. MORRISON, 477 U.S 365, 374 (1986); NIX V. WHITESIDE, 475 U.S. 157, 175 (1986). "THE RIGHT OF ONE CHARGED WITH CRIME TO COUNSEL MAY NOT BE **FUNDAMENTAL** AND ESSENTIAL TO **FAIR** TRIALS IN SOME COUNTRIES, BUT IT IS IN OURS." BEARD V. BANKS, 542 U.S. 406, AT 418 (2004).

IN HILLERY V. VASQUEZ, THIS COURT STATED, "NOR ARE WE PERSUADED THAT DISCRIMINATION IN THE GRAND JURY HAS NO EFFECT ON THE FAIRNESS OF THE CRIMINAL TRIALS THAT RESULT FROM THAT GRAND JURY'S ACTIONS." 474 U.S. AT 263. THE SAME CONCLUSION MUST ARISE FROM DISCRIMINATION IN THE PETIT JURY IN THIS CASE. THAT MUST BE BECAUSE 'THE PEREMPTORY SYSTEM', "HAS ALWAYS BEEN HELD ESSENTIAL TO THE **FAIRNESS** OF TRIAL BY JURY." LEWIS V. U.S., 146 U.S. 370, AT 376 (1892). THE **14TH** AMDT., AND THE 'DUE PROCESS CLAUSE' SAFEGUARDS "THE FUNDAMENTAL ELEMENTS OF FAIRNESS IN A CRIMINAL TRIAL." SPENCER V. TEXAS, 385 U.S. 554, 563-64 (1967). EQUAL PROTECTION, AND DUE PROCESS HAVE BEEN DENIED TO GUERRERO. [I]F, "THE ULTIMATE FOCUS OF THE

INQUIRY MUST BE ON THE FUNDAMENTAL FAIRNESS OF THE PROCEEDING WHOSE RESULT IS BEING CHALLENGED." STRICKLAND, AT 696-97. GUERRERO SUBMITS THAT, THE ORIGINAL DENIAL BY THE STATE HABEAS COURT WHICH RULED ON THE MERITS OF THIS ISSUE, **SEE APPX NO. [U. 468 N. 16]** (FINDINGS OF FACT), **DID NOT** APPLY THE 'ULTIMATE INQUIRY,' NEITHER DID IT CONSIDER, WHETHER PETITIONER WAS DENIED 'FUNDAMENTAL FAIRNESS.' THAT IS ANOTHER REASON WHY GUERRERO FILED A (3rd) HABEAS (STATE) PETITION. OF WHICH, NEITHER THE STATE NOR THE COURTS HAVE ADDRESSED HIS CLAIMS OF DENIAL OF 'FUNDAMENTAL FAIRNESS' AT TRIAL. IN RIPPO V. STATE, 423 P.3d AT 1087 (2018); THE (NSC) ACKNOWLEDGED THAT, "THE ULTIMATE ISSUE IS THE FAIRNESS OF THE DEFENDANT'S CONVICTION AND SENTENCE." SEE **APPX NO. [M], APPX NO. [S. 73-74]**.

IN WEAVER, THIS COURT ALLOWED A SHOWING OF 'FUNDAMENTAL UNFAIRNESS' TO EQUAL PREJUDICE. 137 S.CT. AT 1913. THAT IS AN OPTION, NEITHER GUERRERO NOR THE DISTRICT COURT NOR ANY COURT HAD ALLOWED GUERRERO TO IMPLEMENT. THAT IS WHY IT HAS BEEN ARGUED AS A 'LEGAL EXCUSE' AND 'PREJUDICE.' (WEAVER, DID NOT EXIST UNTIL AFTER GUERRERO'S (2ND) STATE HABEAS PETITION). SEE **APPX NO. [O. 211]**.

1. (C). THE REMEDY.

IN VASQUEZ V. HILLERY, 106 S.CT. AT 618 (1986), THE (SYLLABUS) READS LIKE THIS," AFTER UNSUCCESSFULLY PERSUING APPEALS AND COLLATERAL RELIEF IN THE **STATE** COURTS FOR THE NEXT **16** YEARS, RESPONDENT FILED A HABEAS CORPUS PETITION IN FEDERAL DISTRICT COURT." [A]FTER GRANTING CERTIORARI, THIS COURT AFFIRMED AND HIS CONVICTION WAS REVERSED. (GUERRERO) TIMELY RAISED THIS (IAC-BATSON) CLAIM IN (2006). IT WAS PLACED UNDER THE WRONG (STANDARD) AND IT WAS DENIED IN (2011). THE CORRECT STANDARD IS THE ONE IN HILLERY, AND RIVERA V. ILLINOIS, 129 S.CT. AT 1455 (2009), ("AUTOMATIC REVERSAL"). WHY? BECAUSE THE BATSON VIOLATION WAS 'PROVEN'; AND BECAUSE, 'PREJUDICE IS PRESUMED'.

THE (2003) JURY THAT CONVICTED GUERRERO, IS STILL THE SAME "UNRELIABLE VEHICLE FOR DETERMINING GUILT OR INNOCENCE," TODAY; 17 YEARS LATER. NO MATTER THE TIME; IT WILL 'FOREVER' BE UNRELIABLE.

THIS COURT HAS PREVIOUSLY HELD, WHERE "[T]HE RESULT BESPEAKS DISCRIMINATION, WHETHER OR NOT IT WAS A CONCIOUS DECISION ON THE PART OF ANY INDIVIDUAL JURY COMMISSIONER," THE JUDGMENT OF CONVICTION MUST BE REVERSED." HERNANDEZ V. TEXAS, 347 U.S. 475, 482 (1954). IN HILLERY, (NOT A DIRECT APPEAL CASE) THIS COURT HELD, "THE ONLY EFFECTIVE REMEDY FOR THIS VIOLATION -- IS NOT DISPROPORTIANATE TO THE EVIL THAT IT SEEKS TO DETER." Id. AT 623, AND THAT IT "REQUIRES OUR CONTINUED ADHERENCE TO A RULE OF MANDATORY REVERSAL." Id. AT 624.

UNDER HILLERY, EXCLUSION OF A JUROR BY DISCRIMINATION, RENDERS THE CONVICTION **VOID.**" JUST AS A CONVICTION IS **VOID** UNDER THE EQUAL PROTECTION CLAUSE IF THE PROSECUTOR DELIBERATELY CHARGED THE DEFENDANT ON ACCOUNT OF HIS RACE" Id. AT 106 S.CT. 618-619. THAT IS BECAUSE, "SOME ERRORS WILL ALWAYS INVALIDATE THE CONVICTION." SULLIVAN V. LOUISIANA, 508 U.S. AT 279 (1993).

UNDER J.E.B., THIS COURT HELD, "THE VERDICT **WILL NOT** BE ACCEPTED OR UNDERSTOOD [AS FAIR] IF THE JURY IS CHOSEN BY UNLAWFUL MEANS AT THE OUTSET." 511 U.S., AT 141 (1994). SEE APPX NO. [J. 72-74], ... APPX NO. [N. 137, 159], (3rd Am. Pet.)

AT STAKE, IS THE PROSCRIPTION OF NO 'DEPRIVATION OF LIBERTY' WITHOUT "DUE PROCESS OF LAW," AND A "IMPARTIAL JURY." ('A CRIMINAL DEFENDANT'S RIGHT TO AN IMPARTIAL JURY ARISES FROM BOTH THE SIXTH AMENDMENT AND PRINCIPLES OF DUE PROCESS.) SEE RISTAINO V. ROSS, 424 U.S. 589, 595 N.6 (1976). THE 'PASSAGE OF TIME' DOES NOT AFFECT THE REMEDY. SEE HILLERY, Id. AT 618-619; (LACHES).

1.(d). DIRECT APPEAL (IAC) - CONFLICT OF INTEREST

(CAUSE) INEFFECTIVE ASSISTANCE IS "**CAUSE** FOR A PROCEDURAL DEFAULT." MURRAY V. CARRIER, 106 S.CT. 2639 AT 2650 (1986). IN (2005), DAVID

C. AMESBURY, (THE SAME AS TRIAL COUNSEL) FILED A 'DIRECT APPEAL' FOR PETITIONER. SEE **APPX NO. [Q]** . PETITIONER HAS SHOWN BY THE TRANSCRIPTS, THAT COUNSEL WAS **AWARE** THAT [H]E, HAD VIOLATED BATSON/LIBBY.

THE LAW HAS NOT CHANGED MUCH, CONCERNING BATSON, SINCE THE 2004-05 DIRECT APPEAL. AT THE 2011 EVIDENTIARY HEARING, THE DISTRICT COURT ACKNOWLEDGED THAT HAD GUERRERO RAISED THE ISSUE ON DIRECT-APPEAL, HE WOULD HAVE RECIEVED 'AUTOMATIC REVERSAL'. SEE **APPX NO. [S]** (SUPPLEMENTAL ARGUMENT [N.427-429] FILED 5/29/12).

THE COURT HEARD AND REPLIED. (P.25)

MR. LEIK: ..... WHAT THE COURT'S TEND TO DO IS JUST REVERSE IT.

THE COURT: BECAUSE THEY'RE ON DIRECT APPEAL.

MR. LEIK: PARDON?

THE COURT: THEY'RE PROBABLY NOT ON POST CONVICTION; THEY'RE PROBABLY ON DIRECT APPEAL.

MR. LEIK: YEAH, WAS THIS RAISED ON DIRECT APPEAL?

THE COURT: NO, IT WASN'T.

MR. LEIK GOES ON TO ARGUE 'THE COURTS INTEGRITY, COUNSEL'S MISCONDUCT, NEW TRIAL, THE STRUCTURAL DAMAGE, PRESUMED PREJUDICE.' (**NO.** 16-25) (PG. 26, **NO.** 3-23) AT **APPX NO. [S.429]**

HOW COULD COUNSEL HAVE RAISED THE ISSUE? ONE WAY COULD HAVE BEEN, UNDER THE 'PLAIN ERROR' STANDARD. "COUNSEL would HAVE HAD TO SHOW THAT ANY ERROR WAS PLAIN AND AFFECTED" GUERRERO'S, "SUBSTANTIAL RIGHTS."

SEE RIPPO V. STATE, 146 P.3d 279, 286 (2006); U.S. V. OLAND, 113 S.CT. 1770 (1993). IN THIS CASE, GUERRERO'S RIGHTS TO A FAIR TRIAL, IMPARTIAL JURY, DUE PROCESS, EQUAL PROTECTION. THE (N.S.C.) COULD HAVE REVIEWED THE ISSUE, "THE POWER OF THIS COURT TO ADDRESS PLAIN ERROR OR ISSUES OF CONSTIT-UTIONAL DIMENSION **SUA SPONTE** IS WELL ESTABLISHED." EMMONS V. STATE, 807 P. 2d. 528 (1991). COUNSEL COULD ALSO HAVE ALERTED THE (N.S.C) OF THE STRUCTURAL NATURE OF HIS ERROR, AS "THE NEVADA SUPREME COURT REVIEWS **DE NOVO** WHETHER THE DISTRICT COURT'S ACTIONS CONSTITUTED STRUCTURAL ERROR". MORGAN V. STATE, 134 NEV. ADV. REP. 27 (2018). THIS COURT HAS EXPLAINED THAT "FAILURE TO RAISE A CLAIM ON APPEAL REDUCES THE FINALITY OF APPELLATE PROCEEDINGS, DEPRIVES THE APPELLATE COURT OF THE OPPORTUNITY TO REVIEW TRIAL ERROR AND UNDERCUTS THE STATE'S ABILITY TO ENFORCE IT'S PROCEDURAL RULES", MURRAY V. CARRIER, 106 S.CT. 2639 (1986). COUNSEL THEREFORE ERRED, IN NOT RAISING THE BATSON CLAIM ON DIRECT APPEAL. IN BATSON, MCCOLLUM, J.E.B; ALL THREE DECISIONS WHERE 'AUTOMATICALLY REVERSED', TWO FOR THE DEFENDANT'S, ONE FOR THE STATE (MCCOLLUM). COUNSEL FOR GUERRERO, BY NOT RAISING THE BATSON CLAIM FORFEITED THE STANDARD OF 'AUTOMATIC REVERSAL' AND PLACED THE APPEAL IN-STEAD, UNDER A 'HARMLESS ERROR' STANDARD. "THE PROCEDURAL DEFAULT IS THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL". SEE EDWARDS V. CARPENTER, 120 S.CT. 1587 (2000). FAILING TO RAISE THE BATSON CLAIM AMMOUNTS TO NOT FILING FOR A 'DIRECT APPEAL' AS TO THAT ISSUE," AND DEFENDANT PRESUMABLY SUFFERED PREJUDICE BECAUSE HE WAS DENIED HIS RIGHT TO APPEAL". LOZADA V. STATE, 871 P.2d 944 (1994). SEE **APPX. NO. [J. 69-70]** "THE RELEVANT STANDARDS OF RE-VIEW ARE CRITICAL TO THE OUTCOME OF THIS CASE." PAYNE V. BORG, 982 F.2d 335, 338 (9TH CIR, 1992). THIS COURT HELD IN U.S V. FRADY, "[W]E HAVE LONG AND CONSISTENTLY AFFIRMED THAT A COLLATERAL CHALLENGE MAY NOT DO SERVICE FOR AN APPEAL". 456 U.S. 152, AT 165 (1982). THEREFORE GUERRERO SUFFERED PRE-JUDICE; FIRST, BECAUSE COUNSEL WORKED UNDER A 'CONFLICT OF INTEREST'.

1.(d),(i). CONFLICT OF INTEREST

THE BATSON VIOLATION IS DIRECTLY RELATED TO COUNSEL'S INEFFECTIVENESS." A CONFLICT OF INTEREST IS A CLAIM THAT COUNSEL WAS INEFFECTIVE' WILLIAMS V. STATE, 2016 NEV. UNPUB. LEXIS 483; SEE ALSO GLASSER V. U.S., 315 U.S. 60, 70 (1942)(FRAMING A CONFLICT OF INTEREST CLAIM AS A CLAIM THAT THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL). THIS COURT HAS IDENTIFIED CATEGORIES WHERE COUNSEL HAS BEEN DENIED ALTOGETHER. ONE IS, "COUNSEL THAT LABORS UNDER ACTUAL CONFLICT OF INTEREST," CRONIC, 466 U.S. AT 658-660 (1984). BECAUSE VIOLATING THE 'EQUAL PROTECTION CLAUSE' HAS CONSEQUENCES, (MONETARY FINE, SUSPENSION, ETC.) COUNSEL DID NOT RAISE A ISSUE WHICH IMPACTED PETITIONER'S SUBSTANTIAL RIGHTS. UNDER CRONIC, 'PREJUDICE IS PRESUMED.'

1.(d),(ii). PREJUDICE / PRESUMED PREJUDICE / DIRECT APPEAL

IN THIS CASE, ON DIRECT APPEAL, PREJUDICE SHOULD BE PRESUMED. BECAUSE PETITIONER WAS 'DENIED HIS RIGHT TO APPEAL' THE BATSON ISSUE, AND BECAUSE, UNDER CRONIC AND STRICKLAND 'PREJUDICE' CAN BE 'PRESUMED.' SEE CRONIC, 466 U.S. AT 658-660 (1984); GARZA V. U.S., 139 S.CT. 738 (2019). SEE APPX. NO. [M·119](40B PETITION) AND (MOTION TO EXTEND/P.2, DECLARATION). SEE APPX. NO. [O·205-208] (REPLY) SEE APPX. NO. [J·68-70]

BY NOT RAISING THE ISSUE, GUERRERO WAS DENIED HIS 6TH AND 14TH AMDT.'S AND THE OPPORTUNITY FOR THE (N.S.C.) TO REVIEW. THIS CAUSED PETITIONER A 'SUBSTANTIAL DISADVANTAGE,' BECAUSE GUERRERO HAD THE BENEFIT OF HIS 6TH AND 14TH AMENDMENT ON DIRECT APPEAL. UNLIKE ON HABEAS CORPUS. "THE RIGHTS TO EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL ARE **GUARANTEED** BY THE 6TH AND 14TH AMDT'S TO THE U.S. CONSTITUTION." EVITTS V. LUCEY, 469 U.S. 387, 392 (1985); RIPPO V. STATE, 423 P.3d 1084, AT 1096 (2018).

THE LAW SAYS THAT " WHERE A PETITIONER DEFAULTS A CLAIM AS A RESULT OF THE DENIAL OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, THE STATE, WHICH IS RESPONSIBLE FOR THE DENIAL AS A CONSTITUTIONAL MATTER, MUST BEAR THE COST OF ANY RESULTING DEFAULT AND THE HARM TO STATE INTER--ESTS THAT FEDERAL HABEAS REVIEW ENTAILS." COLEMAN V. THOMPSON, 111 S.CT. 2546 (1991). THE FAILURE BY COUNSEL, STRIPPED PETITIONER OF THE 'AUTOMATIC REVERSAL' STANDARD; SEALED THE DENIAL OF A 'FAIR TRIAL, IMPARTIAL JURY, EFFECTIVE ASSISTANCE OF COUNSEL, FUNDAMENTAL FAIRNESS, EQUAL PROTECTION, AND DUE PROCESS OF LAW.' THE PROCEDURE ON DIRECT APPEAL FAILED " TO MEET THE STANDARD OF 'DUE PROCESS OF LAW.'" EUITTS V. LUCEY, 105 S.CT. 830, 836 (1985). THIS ERROR, MUST BE," I.E IMPUTED TO THE STATE", COLEMAN, 501 U.S. 722, 750 (1991). SEE APPX. NO [R. 355-358] ., 'FINAL ARGUMENT' AND [N. 353].

" GENERALLY, ONLY WHEN IGNORED ISSUES ARE CLEARLY STRONGER THAN THOSE PRESENTED, WILL THE PRESUMPTION OF EFFECTIVE ASSISTANCE OF COUNSEL BE OVERCOME." GRAY V. GREER, 800 F.2d 644, 646 (7TH CIR. 1986). BECAUSE OF LAW, UNDER (BATSON, J.E.B, MCCOLLUM) 'AUTOMATIC REVERSAL' PRECEDENTS, GUERRERO SUBMITS TO THIS COURT " THAT IT HAD A REASONABLE PROBABILITY OF SUCCESS." KIRKSEY V. STATE, 112 NEV. 980, 998 (1996); ESTABLISHING 'PREJUDICE.' SEE APPX NO. [Q], DIRECT APPEAL GROUNDS BY 'AMESBURY'). COUNSEL ALSO HAD THE TIME TO " WINNOW OUT WEAKER ARGUMENTS ON APPEAL". JONES V. BARNES, 463 U.S. 745, 51-54 (1983). GUERRERO'S BATSON-IAC/BATSON ISSUE IS 'SO IMPORTANT' TO THE JUSTICE SYSTEM, 'OVERALL, THAT IT HEARD WRITS IN 'CHATMAN/FLOWERS.' SEE: P. 40

ARGUMENT (2) 'MISCARRIAGE OF JUSTICE'.

2). PETITIONER PABLO R. GUERRERO IS BEING HELD CONTRARY TO THE U.S. CONSTITUTION AND NEVADA CONSTITUTION. THE 14TH AMDT. WHICH GUARANT-

-EES 'DUE PROCESS OF LAW AND EQUAL PROTECTION', HAVE BEEN VIOLATED AT HIS TRIAL AND IN POST-CONVICTION PROCEEDINGS. HE HAS BEEN DENIED ACCESS TO THE COURTS IN VIOLATION OF ARTICLE 1, SECTION 8 OF THE NEVADA CONSTITUTION, BY THE IGNORING OF 'MATERIAL' EVIDENCE UNDER 'SCHLUP AND BERRY'. SEE: APPX NO. [N. 139-151], APPX NO. [O. 166-170, 179-197], APPX NO. [J. 74-75], APPX NO. [L], APPX NO. [M. 120-123] THE 6TH AMDT.; ALSO APPLIES, AS A MATTER OF 'CONFRONTATION' AND RIGHT TO A 'DEFENSE'.

2.(a). NEWLY DISCOVERED EVIDENCE:

IN 2010, DURING THE PROCEEDINGS OF PETITIONER'S 1ST. TIMELY, STATE HABEAS PETITION, GUERRERO INTRODUCED TWO AFFIDAVITS FROM CO-DEFEND-ANT (ERIBERTO 'EDDIE' LEON). AT TRIAL, LEON HAD PLED THE 5TH. AMDT. DESPITE, HIS COUNSEL HAVING GIVEN LEON'S VERSION OF EVENTS THROUGH THE QUESTIONING OF WITNESSES AND FINAL ARGUMENTS. COUNSEL FOR PETITIONER NEVER SPOKE TO LEON, AND COULD NOT 'CONFRONT' HIM AT TRIAL. IN THE AFFIDAVITS, LEON AD-MITS LYING TO POLICE; CONCERNING GUERRERO'S INVOLVEMENT IN THE CRIMES AGAINST 'SONIA GALLARDO (S.G.)', HIS SISTER AND LAW. (A DOOR WHICH WAS OPENED BY EXPERIENCED DETECTIVES). SEE (LEON'S VOL. STMT. (PAGES 15-18); AND ALSO ; APPX NO. [T]. . SINCE THE TIME OF THE CRIME, PETITIONER VOLUNT-ARILY ADMITTED TO FACTS CONCERNING (BRENDA GUERRERO (B.G.)) HIS THEN, WIFE. AT ALL TIMES, HE DENIED ANY KNOWLEDGE OR CRIME AGAINST 'SONIA'. THE STATE PRODUCED EVIDENCE CONCERNING BRENDA, BUT NO EVIDENCE AGAINST GUERRERO, AGAINST SONIA. THE 'EVIDENCE' IN FAVOR OF PETIT-IONER, WAS PRECLUDED BY THE DISTRICT COURT, THE STATE; AND LEON'S COUNSEL, WHO TWISTED THE 'RULE OF BRUTON'. THE CRIMES PETITIONER IS CLAIMING 'INNOCENCE' TO ARE COUNTS (X, XI, XII). THIS IS ACTUAL/FACT-UAL INNOCENCE, NOT LEGAL INNOCENCE, AS THE STATE CLAIMS.

THESE ARE THE FACTS CONCERNING THE AFFIDAVITS. SEE APPX NO. [W.

485-493] , EVIDENTIARY HEARING 1/31/2011 (FILED 3/14/2011), (P.7)

AT PAGE(7), THE FOLLOWING TOOK PLACE:

(DEFENSE COUNSEL), BY MR. ORONOZ:

Q. MR. LEON, REGARDING THE JULY, 30TH, 2010 AFFIDAVIT. DID YOU IN-FACT WRITE THAT AFFIDAVIT.

A. I DID.

[colloquoy BETWEEN MR. CHRISTIANSEN AND HIS CLIENT]

A. FIFTH AMENDMENT.

Q. OKAY. WELL YOU-- AT FIRST YOU SAID YOU DID AND THEN YOU IN--VOKED YOUR RIGHT.

MR. CHRISTIANSEN: JUDGE, HE'S ALREADY INVOKED HIS FIFTH AMEND--MENT RIGHT NOT TO TESTIFY. HE CAN'T BE FORCED TO ANSWER ADDITIONAL QUEST--IONS. HE'S NOT GOING TO TESTIFY AND IT'S BASED ON MY ADVICE.

AT PAGE (8), PETITIONER.

THE DEFENDANT: YOUR HONOR, WE DO OBJECT TO THAT,

THE MARSHALL : HEY, QUIET.

AT PAGE (9), (THE STATE)

MS. LUZAICH: WELL, FIRST I WOULD ASK THAT THE COURT STRIKE THE AFFIDAVIT IN LIGHT OF THE FACT NOBODY WAS ABLE TO ASK ANY QUESTIONS ABOUT IT. I DON'T THINK THAT THE COURT CAN EVEN CONSIDER ANYTHING ON THE PAGE OR EVEN THE FACT THAT IT EXISTS.

SEE ALSO 'DISTRICT COURT MINUTES' AT APPX NO. [W] THERE IS A LETHAL DILEMA IN THIS SCENERIO IN MANY WAYS. THE FIRST IS, N.R.S 176.515, PROVIDES THAT A NEW TRIAL MAY BE GRANTED BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE." THE SECOND, THERE IS CLEARLY ESTABLISHED FED-

-ERAL LAW' ON THE ISSUE. WHICH SAYS," AS A GENERAL RULE, WHERE THERE CAN BE NO FURTHER INCRIMINATION, THERE IS NO BASIS FOR THE ASSERTION OF THE PRIVILEGE." AND "UPON CONVICTION, CRIMINALITY CEASES; AND WITH CRIMIN--ALITY THE PRIVILEGE", MITCHELL V. U.S., 526 U.S 314, AT 320; 119 S.CT, AT 1320-21. " IF NO ADVERSE CONSEQUENCES CAN BE VISITED UPON THE CONVICTED PERSON BY REASON OF FURTHER TESTIMONY, THEN THERE IS NO FURTHER INCRIMINATION TO BE FEARED", MITCHELL, AT 1321 (1999). LEON HAD BEEN CONVICTED ALREADY, HE NOW CONFESSED TWICE, ONCE UNDER "28 U.S.C.§ 1746 (7/30/10), AND ONE UNDER "N.R.S. 208, 165." SEE **APPX NO. [T]** A 3RD AFFIDAVIT WAS ALSO INTRODUCED.

2(a),(i). THE DISTRICT COURT ERRED.

THE DISTRICT COURT ERRED BY ALLOWING LEON TO PLEAD A 5TH AMDT. HE **DID NOT** HAVE, AND BY ALLOWING LEON'S COUNSEL, (WHO HAD HIS OWN INTEREST) TO INTERVENE, PREVENT, WITHHOLD, THE TRUTH OF THE MATTER ASSERTED IN LEON'S AFFID--AVITS', WITH LAW, OR A RIGHT THAT DID NOT EXIST. GOING BACK TO THE TRANSCRIPTS, AT (PAGE 8) **APPX NO. [W]**, THE COURT ENCOURAGED THE ERROR.

THE COURT: AND SO, ITS GOING TO CONTINUE TO BE YOUR POSITION THAT YOU'RE NOT ANSWERING QUESTIONS IN THAT REGARD BECAUSE IT MAY TEND TO IN--CRIMINATE YOU, IS THAT CORRECT?

THE WITNESS: CORRECT.

LEON HAD BEEN SENTENCED TO 30 YRS. TO LIFE. HE DID FIFTEEN AND WENT HOME (MEXICO). THERE WAS **NO** CONSEQUENCES, HE ADMITTED HIS GUILT.

THIS AMMOUNTS TO THE '**EXTERNAL IMPEDIMENT**' AND '**CAUSE**' UNDER MURRAY V. CARRIER, 477 U.S. 478, 488 (1986). BECAUSE "SOME OBJECTIVE FACTOR EXTERNAL TO THE DEFENSE IMPEDED COUNSEL'S EFFORTS TO COMPLY WITH THE STATES PROCEDURAL RULE." THAT IS, TO PROVIDE 'NEWLY DISCOVERED' EVIDENCE UNDER N.R.S 176.515, IN ORDER TO OBTAIN A NEW TRIAL. AS FOR '**PREJUDICE**,' THE SHOWING REQUIRES" THAT THE ERROR WORKED TO HIS ACTUAL AND SUBST-

-ANTIAL DISADVANTAGE INFECTING HIS ENTIRE TRIAL WITH ERROR OF CONST-
-ITUTIONAL DIMENSIONS." U.S. V. FRADY, 102 S.CT. 1584 (1982). GUERRERO HAD
THE RIGHT TO PRESENT EVIDENCE," NEW RELIABLE EVIDENCE... THAT WAS NOT
PRESENTED AT TRIAL." SCHLUP, 513 U.S. AT 324; GRIFFIN V. JOHNSON, 350 F.3d 956,
AT 961 (2003). THAT (LEON) ACTED ALONE IN THE ATTEMPTED MURDER, THAT EVEN
THOUGH BOTH GUNS BELONGED TO GUERRERO, PETITIONER HAD NO 'SPECIFIC INTENT' TO
HARM SONIA. AND COULDN'T THEREBY; BE SUBJECTED TO 'CONSTRUCTIVE' POSSESSION
OF THE WEAPON **HE** USED. (GUERRERO WAS NOT PRESENT WHEN LEON SHOT SONIA).

BY THE WAY LEON'S COUNSEL ATTACKED GUERRERO AT TRIAL, VIOLATING HIS
DUE PROCESS RIGHTS', YOU COULD EASILY CONCLUDE THAT (P. CHRISTIANSEN HAD A
ALTERNATE MOTIVE FOR PREVENTING LEON FROM TESTIFYING TO WHAT HE SWORE AT
THE HEARING) SEE T.TR. 10/14/03, (PAGES 105-108); T.TR. 10/15/03 (PAGE 149). AT
TRIAL, COUNSEL SAID," AND I'M THE ONE THAT WENT AFTER PABLO TO GET HIM TO
TELL YOU WHAT HAPPENED THAT DAY". (NO. 6-7 PAGE 149, T.TR. (OCT. 15, 2003). HAD
THIS BEEN A RANDOM WITNESS, WHO WITNESSED A MURDER FOR EXAMPLE; IT WOULD
BE ABSURD FOR THE STATE, THE COURT, OR ANY COUNSEL, TO COUNSEL A WITNESS TO
HOLD BACK THE TRUTH WHICH CAN MAKE THE DIFFERENCE IN ESTABLISHING THE
ONLY 'MATERIAL' EVIDENCE, WHICH COULD CREATE 'REASONABLE DOUBT' IN A JURY'S
MIND. IF GUERRERO WOULD HAVE 'CONFRONTED' LEON UNDER OATH, ALONG WITH THE
ISSUES TIMELY RAISED IN HIS 1ST. PETITION, HE WOULD HAVE RECIEVED A NEW TRIAL
SEE **APPX NO. [L], [N], [O]** . 'DUE PROCESS' REQUIRED 'FUNDAMENTAL FAIR-
-NESS,' WHICH PETITIONER WAS DENIED. GUERRERO MADE A HUGE DEAL ABOUT THE
ATTORNEY THE NEVADA SUPREME COURT GAVE HIM, WHO DID NOT RAISE THESE ISSUES,
IN THE APPEAL OF THE DENIAL OF HIS TIMELY WRIT. SEE APPEAL NO. 59699. UNFORTUN-
-ATELY, GUERRERO DOES NOT HAVE THE LEGAL TRAINING TO HAVE MADE A DIFFERENCE.

IN 2018, UNDER HIS 1ST TIMELY FEDERAL PETITION (WHICH HAD BEEN
STAYED BECAUSE OF THOSE 'LETTERS TO THE N.S.C'); GUERRERO RESPONDED TO
A ORDER, THIS IS WHERE HE FIRST FINDS THE 'WEAVER/AND MITCHELL' DECISIONS.

THE MOTION WAS RECIEVED ON 9/21/18, (CASE NO. 2:13-CV-00328-JAD-CWH). ONLY (THIRTY SOMETHING) DAYS LATER, GUERRERO FILED UNDER (BRADFORD/WEAVER/MITCHELL). RERAISING THE SAME ISSUES FOR A 3rd. TIME; All (IAC). INCLUDING ALSO THE ACTUAL INNOCENCE GROUND. SEE **APPX NO. [N], [O]**, DESPITE THE ARGUMENTS PROVIDED ON THE OCT. 25, 2018 3rd PETIT-ION, THE COURT[S] HELD THAT GUERRERO HAD NOT PROVIDED 'NEW' EVIDENCE OF IN-NOCENCE OR 'NEW' FACTS, PETITIONER DISAGREES. WHICH BRINGS UP A LEGAL QUESTION AND **DISPUTE** AMONG THE CIRCUIT COURTS. SEE **APPX NO. [A], [H]**

2.(a).(ii). QUESTION (TWO).

2.(a),(ii). WHETHER A PETITIONER INVOKING THE ACTUAL INNOCENCE EXCEPTION MUST PROVIDE 'NEWLY DISCOVERED' EVIDENCE, OR 'NEWLY PRE-SENTED' EVIDENCE IN ACCORDANCE WITH SCHLUP V. DELO, 513 U.S. 298 (1995)

SEE: GOMEZ V. JAIMET, 350 F.3d 673, 679-80 (7TH CIR. 2003); GRIFFIN V. JOHNSON, 350 F.3d 956, 962-63 (9TH CIR. 2003) **VS.** HUBBARD V. PINCHAK, 378 F.3d 333, 341 (3rd CIR. 2004); KIDD V. NORMAN, 651 F.3d 947 (8TH CIR. 2011).

IN THIS CASE, BASED ON THE AFFIDAVITS WHICH WHERE STRICKEN, THE DISTINCTION BETWEEN "NEWLY DISCOVERED" EVIDENCE AND "NEWLY PRE-SENTED" EVIDENCE IS SIGNIFICANT. SINCE, THE AFFIDAVITS GUERRERO PRE-SENTED AS 'NEW', WERE IN (2011). IN THE 9TH CIRCUIT, WHICH LAS VEGAS BE-LONGS TO, GUERRERO MUST FIRST FURNISH "NEW RELIABLE EVIDENCE... THAT WAS NOT PRESENTED AT TRIAL." SCHLUP, 513 U.S. AT 324. THE AFFIDAVITS ARE AT **APPX NO. [T]**, THE STANDARD UNDER GRIFFIN V. JOHNSON, IS "NEWLY PRESENTED" EVIDENCE. 350 F.3d 963-64. BEGINNING WITH (JUSTICE STEVENS) MAJORITY OPINION IN SCHLUP; "TO BE CREDIBLE, [AN ACTUAL INNOCENCE] CLAIM REQUIRES PETITIONER TO SUPPORT HIS ALLEGATIONS OF CONSTITUTIONAL ERROR WITH NEW RELIABLE EVIDENCE -- THAT WAS NOT PRESENTED AT TRIAL." 513 U.S. AT 324. "ACTUAL INNOCENCE" REVIEW MUST INCORPORATE "All EVIDENCE, INCLUDING

THAT ALLEGED TO HAVE BEEN ADMITTED ILLEGALLY (BUT WITH DUE REGARD TO ANY UNRELIABILITY OF IT) AND EVIDENCE TENABLY CLAIMED TO HAVE BEEN WRONG-FULLY EXCLUDED OR TO HAVE BECOME AVAILABLE ONLY AFTER THE TRIAL." Id. AT 327-332, SEE 350 F.3d 962. ANOTHER CONSIDERATION UNDER SCHLUP IS WHETHER, "THE COURT IS ALSO SATISFIED THAT THE TRIAL WAS FREE OF NON-HARMLESS CONSTITUTIONAL ERROR." Id. AT 350 F.3d 961; 513 U.S. AT 316.

2.(b). FACTS NOT PRESENTED TO JURY.

THERE IS EVIDENCE THE JURY DID NOT HEAR, THAT OCCURED MOSTLY BY (IAC) AND LEGAL ERROR.

1.) BRENDA GUERRERO'S VOLUNTARY STMT. SEE 11/7/01 VOL. STMT, (PAGES 14, 18, 21, 24). (P. 18)" **A**... THEN WHEN I WAS TALKING TO MY MOTHER AND SHE TOLD ME THAT SHE HAD GOTTEN SHOT, I GOT HYSTERICAL. AND HE ASKED ME WHAT HAD HAPP-ENED. AND I TOLD HIM. AND HE ACTED LIKE HE WAS IN SHOCK. HE SAID THAT **THAT WASN'T SUPPOSED TO HAPPEN.** AND THAT EDDIE HAD **FUCKED UP.** THAT'S WHAT HE SAID". (P. 24) BRENDA SAYS," THAT'S CORRECT. HE SAID IT WASN'T SUPPOSED TO HAPPEN, AND THAT EDDIE HAD FUCKED UP. THAT HE ALWAYS FUCKED UP. THAT'S WHAT HE SAID."

THIS TOOK PLACE ONLY ABOUT HALF AN HOUR AFTER GUERRERO HAD STOPPED TO PUT GAS WHERE HE SMOKED MORE MARIJUANA. HE THEN ALLOWED BRENDA TO CALL HER PARENTS TO CHECK ON THEIR KIDS. AFTER THIS CALL (MARICELA GUERR-ERO CALLED TALKED TO BRENDA AND PETITIONER. SEE **APPX NO. [Z]**, PAGE 4 OF 5, DETC. CERVANTES, SGT.; DETC. G. MARTINES, PAGE 2 OF 3). IT IS IMPORTANT TO NOTE THAT; (PABLO, MARICELA, BRENDA, SONIA) HAD A VERY CLOSE RELATIONSHIP PRIOR TO THIS DAY). SO, IT SHOULDN'T BE SURPRISING THAT GUERRERO WHO WAS UNDER THE INFLUENCE, WOULD BE COMPLETELY HONEST WITH HIS SISTER IN FRONT OF BRENDA. THESE ARE THE FACTS **2.)** DETC. MARTINES OFFICERS REPORT (P. 2 OF 3) "MARICELA WAS TOLD NOT TO LET PABLO KNOW THAT SHE WAS IN THE COMPANY

OF THE POLICE, AND TO GATHER INFORMATION.... MARICELA GUERRERO SPOKE WITH PABLO GUERRERO, AND I OVERHEARD THE CONVERSATION.... SUMMERIZING THE FIRST PHONE CALL,.... HE ALSO SAID, THAT HE HAD HEARD WHAT HAPPENED TO SONYA GALLARDO FROM HER PARENTS, AND THAT EDDIE (ERIBERTO LEON) WAS THE ONE THAT SHOT SONIA.... THAT HE HAD NOTHING TO DO WITH SONIA GETTING HURT".... WHEN (SGT. CERVANTES) CALLED GUERRERO AND BRENDA PLAYING THE ROLE OF A RELATIVE (PAGE 4 OF 5) THIS IS WHAT HE WITNESSED. "I ASKED IF "EDDIE" WAS THERE AND SHE SAID "NO". MR. GUERRERO THEN GOT ON THE PHONE AND STARTED ASKING ABOUT SONYA. HE THEN CONTINUED TO SAY OVER AND OVER THAT "I TOLD EDDIE NOT TO HURT HER." **APPX NO. [Z]**

BECAUSE GUERRERO DID NOT KNOW MARICELA WAS BEING OVERHEARD BY POLICE, HIS STATEMENT TO HER IS RELIABLE. HIS STATEMENT TO (SGT. CERVANTES) IS ALSO RELIABLE, SINCE HE DID NOT KNOW IT WAS A DETECTIVE, BUT THOUGHT HIM TO BE A COUNSELOR/RELATIVE OF BRENDA'S FAMILY.

THE COURT, CLASSIFIED GUERRERO'S STATEMENT TO BRENDA AS AN **'EXCITED UTTERANCE'** ADMISSABLE UNDER THE HEARSAY RULE, 'THAT EDDIE HAD FUCKED UP,' SEE: **N.R.S 51.065** / MEDINA V. STATE, 122 NEV. 346 (2006). "A STATEMENT RELATING TO A STARTLING EVENT OR CONDITION MADE WHILE THE DECLARANT WAS UNDER THE STRESS OF EXCITEMENT CAUSED BY THE EVENT OR CONDITION IS NOT INADMISSABLE UNDER THE HEARSAY RULE." YET COUNSEL, DID NOT GET THE STATEMENT IN. THAT IS BECAUSE, THE STATE AND LEON'S COUNSEL TAG-TEAMED TO PREVENT THE STATEMENT FROM COMING IN. PREVENTING MARICELA, BRENDA, AND GUERRERO FROM SAYING ANYTHING TO INCULPATE LEON. DENYING GUERRERO HIS RIGHT, **6TH AMDT.** TO 'PRESENT A DEFENSE, DUE PROCESS. ALL TO PROTECT (LEON) UNDER (**BRUTON**), WHICH DID NOT APPLY, BECAUSE LEON'S COUNSEL HAD THE OPPORTUNITY TO 'CONFRONT' GUERRERO. SEE: T.TR. 10/13/03 (PAGES 136-160); MARICELA GUERRERO, T.TR 10/10/03 (PAGES 111-125); T.TR. 10/14/03, PAGES 76-79/108-123). 3). THE THIRD, AND MAIN FACT THE JURY DID NOT HEAR, IS THE

WORDS OF LEON, (THE MAN). (1) AFFIANT ON JANUARY, 2011 CALLED TO TESTIFIED..... BUT WAS ADVISED BY APPOINTED COUNSEL NOT TO TESTIFY BECAUSE OF HIS PENDING APPEAL.....2) I MADE FALSE STATEMENTS REGARDING THE INVOLVEMENT OF PABLO RAMON GUERRERO. 3) IN MY STATEMENT I ADMITTED TO HAVE SHOT SONIA GALLARDO, AT DERECTION OF PABLO RAMON GUERRERO WHICH WAS NOT THE TRUTH. I MADE THESE STATEMENT AT THE TIME BECAUSE DETECTIVE SGT. CERVANTES MADE THE QUESTION OF IMPLICATING PABLO RAMON GUERRERO.) SEE **APPX NO. [T]** (EXIBITS). LEON/VOL. STMT. (PAGES 15-18)

2). (C). THIS CASE IS NOT FREE FROM CONSTITUTIONAL ERROR

UNDER THE U.S. FIFTH AMENDMENT; 14TH AMDT. AND ARTICE 1, SECT. 8, OF THE NEVADA CONSTITUTION, "NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW."

"THE DUE PROCESS CLAUSE **PROTECTS** THE ACCUSED AGAINST CONVICTION EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF **EVERY** FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED," IN RE WINSHIP, 90 S.CT. 1068 (1970). IN SHARMA V. STATE, 56 P.3d 868, 872 (2002), (PRIOR TO PETITIONERS TRIAL), AND MITCHELL V. STATE, 149 P.3d 33 (2006). THE (N.S.C.) REVERSED CASES WHICH CHALLENGED THE 'NATURAL AND PROBABLE CONSEQUENCES DOCTRINE INSTRUCTION. IN SHARMA, THE COURT HELD THAT THE INSTRUCTION VIOLATES DUE PROCESS. THE 14TH AMDT. (IT IS SUBJECT TO HARMLESS ERROR.) SEE ALSO BOLDEN V. STATE, 124 P.3d 191 (2005). (THEORY OF VICARIOUS COCONSPIRATOR LIABILITY WITH REGARD TO SPECIFIC INTENT CRIMES WAS ERROR). GUERRERO WAS ALSO CHARGED WITH VICARIOUS COCONSPIRATOR LIABILITY. THESE ARE (3) OF THE INSTRUCTIONS THAT PREVENTED THE DUE PROCESS CLAUSE FROM PROTECTING PETITIONER. **FILED 10/16/03.**

#10- "EVERY CONSPIRATOR IS LEGALLY RESPONSIBLE FOR AN ACT OF A CO-CONSPIRATOR THAT FOLLOWS AS ONE OF THE PROBABLE AND NATURAL CONSEQUENCES OF THE OBJECT OF THE CONSPIRACY EVEN IF HE WAS **NOT** PRESENT AT THE TIME

OF THE COMMISSION OF SUCH ACT."

#16 - " WHERE TWO OR MORE PERSONS ARE ACCUSED OF COMMITTING A CRIME TOGETHER, THEIR GUILT MAY BE ESTABLISHED **WITHOUT** PROOF THAT EACH DID EVERY ACT CONSTITUTING THE OFFENSE CHARGED." (NO SPECIFIC INTENT)

#39 - " IT IS **NOT** NECESSARY TO PROVE THE **ELEMENTS** AND **DELIBER-ATION** IN ORDER TO PROVE **ATTEMPTED MURDER**." THIS CLEARLY AGAINST KEYS V. STATE, 766 P.2d 270 (1998), (HOLDING THAT ATTEMPTED MURDER IS A SPECIFIC INTENT CRIME REQUIRING THE DELIBERATE INTENTION TO KILL".). THIS VIOLATES WINSHIP, 397 U.S. AT 364; SANDSTROM V. MONTANA, 442 U.S. AT 520 (1979).

IN ROSE V. CLARK, THIS COURT HELD " THE JURY'S CENTRAL OBLIGATION UNDER THE DUE PROCESS CLAUSE IS TO DETERMINE WHETHER THE STATE HAS PROVED EACH **ELEMENT** OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT," 106 S.CT. AT 3110 (1986). THE STATE INTERFERED WITH THE JURY'S OBLIGATION, AND DE-FENSE COUNSEL WAS INEFFECTIVE. SEE APPX. NO. [T], THE LETTER THAT CAME WITH THE 3rd AFFIDAVIT BY 'DELINDA MARTINEZ' DESCRIBES THE REMORSE LEON FELT FOR NOT COMING FORTH SOONER WITH THE TRUTH. BECAUSE HE FEARED BEING LABELED A 'SNITCH' AT THE MAXIMUM SECURITY PRISON (ELY) HE HELD BACK, UNTIL HE GOT THE HUMAN URGE TO COME CLEAN. THE COURT DID NOT REVIEW THE MOTION. SEE 12/14/11, PETITIONER DID NOT DELAY TO INTRODUCE THE 3rd. AFFIDAVIT. THE MATERIAL IS FAVORABLE AND ADMISSIBLE UNDER N.R.S 51.345, COLEMAN V. STATE, 321 P.3d 901 (2014). IN NEVADA, "[G]OOD CAUSE AND PREJUDICE PARALLEL THE SECOND AND THIRD BRADY COMPONENTS. STATE V. BENNETT, 119 NEV. 589, 599 (2003). "MATERIALITY FOR THE PURPOSES OF BRADY FOCUSES ON WHETHER THE WITHHELD EVIDENCE MIGHT CREATE A REASONABLE DOUBT IN THE MIND OF THE JURY. WEARRY V. CAIN, 136 S.CT. 1002, 1006 (2016). HUEBLER, 128 NEV. AT 202 (2012). THIS EVIDENCE WOULD HAVE CORROBORATED GUERRERO'S 'DEFENSE' PROVING TO BE WHAT HE GOT ON THE STAND FOR, (WAIVED 5TH AMDT.), WITHOUT BEING ABLE TO ACCUSE LEON. SEE T.TR. 10/14/03, (PAGES 108-123). THIS ESTABLISHES **PREJUDICE.**

GUERRERO HAD BEEN DRINKING WHEN HE FOUND OUT BRENDA WAS BEING UNFAITHFUL, AND SMOKING MARIJUANA. SEE T.TR. 10/15/03, (PAGES 7-10). IN NEV-ADA, 'VOLUNTARY INTOXICATION' IS A DEFENSE TO SPECIFIC INTENT CRIMES. SEE N.R.S 193.220 / VINCENT V. STATE, 625 P.2d 1172 (1981); ARNOLD V. RUNNELS, 421 F3d 859, 868 (9TH CIR. 2005). (SEE SCHLUP, FN. 47/48).

2.(d). 'IT IS MORE LIKELY THAT 'NO REASONABLE JUROR' WOULD FIND GUERRERO GUILTY.' (AFTER THE 'NEWLY PRESENTED EVIDENCE).

'IF ERIBERTO LEON'S AFFIDAVITS ARE TRUE' AND HE WAS CAJOLED BY DETC. SGT. CERVANTES, BY WHAT SEEMED AS A PARTIAL WAY OUT; AND IF THE JURY INSTRUCTIONS GIVEN WERE 'LEGAL' STATEMENTS OF LAW REQUIRING 'SPECIFIC INTENT' OF EVERY FACT NECESSARY, AND BRENDA, MARICELA, (DETC. RODRIGUEZ; CERVANTES) AND PETITIONER ALL TESTIFIED TO GUERRERO'S REACTIONS / SURPRISE; SHOCK, AND EXITED UTTERANCES; ADMISSABLE UNDER N.R.S 51.065, WERE HEARD BY JURORS; AND HAD THE JURY BEEN PROPERLY INSTRUCTED ON GUERRERO'S 'INTOXICATION,' COUPLED WITH THE AFFORMENTIONED FACTS AND EVIDENCE, THE JURY WOULD HAVE TAKEN INTO CONSIDERATION SUCH INTOXICATION DURING THEIR DELIBERATIONS ON WHETHER THERE WAS REASONABLE DOUBT ON WHETHER GUERRERO HAD THE 'MENS REA' NECESSARY TO COMMITT 1ST DEG. KIDNAPPING. / ATT. MURDER / THE 'DEFENSE' AT THE LEAST WOULD HAVE LOWERED THE OFFENSE TO A 'LESSER.' THE **EFFECTIVE** ASSISTANCE OF COUNSEL, (OBJECTING) TO ILLEGAL INSTRUCTIONS WOULD HAVE HELPED. SEVERANCE, AND THE ACTUAL REQUIREMENT OF 'PROOF BEYOND REASONABLE DOUBT.' HAD GUERRERO NOT BEEN COMPELLED TO BE A 'WITNESS-AGAINST HIMSELF' IN VIOLATION OF THE 'DUE PROCESS CLAUSE,' BY COUNSEL. THEN UPON HEARING (LEON) SAY PETITIONER 'DID NOT' COUNSEL, ENCOURAGE, OR IN ANY WAY, INSINUATE THAT LEON HURT, OR SHOOT, OR KILL, (SONIA GALLARDO) THEN 'NO REASONABLE JUROR' WOULD LIKELY VOTE TO CONVICT. 'ABSOLUTE CER-TAINTY **IS NOT** A REQUIREMENT UNDER 'SCHLUP.'

3. WHY REVIEW? (2254(d)(1),(2), U.S.C.ss 2254(e)(1); (e),(2)(B)

GUERRERO HAS SHOWN THAT THE ORIGINAL COURT AND NOW THE APPEALS COURT HAVE CLEARLY WENT AGAINST (STRICKLAND, CRONIC; BATSON, J.E.B, MCCOILUM, RIVERA, HILLERY; CARRIER, COLEMAN, SCHLUP) SEE WILLIAMS V. TAYLOR, 529 U.S 362, AT 407 (2000) "AN UNREASONABLE APPLICATION ALSO OCCURS WHEN A STATE COURT UNREASONABLY REFUSES TO EXTEND A GOV-ERNING LEGAL PRINCIPLE TO A CONTEXT IN WHICH IT SHOULD HAVE CONTROLLED." IN THIS CASE;" AUTOMATIC REVERSAL, PRESUMED PREJUDICE, NEWLY PRESENTED EVIDENCE". GUERRERO ALSO SHOWED CAUSE/PREJUDICE BY THE **PARALLELING** OF STRICKLAND'S (2) PRONG TEST. SEE RIPPO V. STATE, 423 P.3d AT 1098 (2018); STRICKLER V. GREENE, 527 U.S. 263 (1999); COLEMAN V. THOMPSON, 501 U.S. AT 722, 50-55 (1991). WITHIN THE CONTOURS OF STRICKLAND-CRONIC "A FAIRMIND-ED JURIST' COULD CONCLUDE THAT A 'PRESUMPTION OF PREJUDICE' IS WARRANTED AND 'AUTOMATIC REVERSAL' BY THE DENIAL OF GUERRERO'S 6TH AND 14TH AMDT. SEE BELL V. COME, 535 U.S. 685 AT 697 (2002). "A CONSTITUTIONAL CLAIM THAT IMPLICATES 'FUNDAMENTAL FAIRNESS' COMPELS REVIEW REGARDLESS OF POSSIBLE PROCEDURAL DEFAULTS." MURRAY V. CARRIER, AT 2653 (N,8). BATSON'S (3) STEP ANALYSIS AND REMEDY, STRICKLAND'S (2) PRONG TEST, CRONIC; THE CAUSE AND PREJUDICE TEST AND AUTOMATIC REVERSAL, ARE ALL FEDERAL TESTS STATE RULES ARE INTERWOVEN WITH. SEE MICHIGAN V. LONG, 463 U.S 1032, 1040-41 (1983); FOSTER V. CHATMAN, 136 S.CT, 1737 (2016). IN LIGHT OF CHATMAN, WEAVER, AND FLOWERS V. MISSISSIPPI. AND THE UNDISPUTABLE FACT THAT THE QUESTIONS IN THIS PETITION WOULD AFFECT THE JURORS, PETITIONER, THE COURTS, AND ALL OF THE COMMUNITY (INCLUDING OTHER PRISONERS) IN ACCORDANCE WITH U.S. LAW, GUERRERO PRAYS THIS COURT WILL REVIEW THIS WRIT.

4. CONCLUSION: GUERRERO IS BEING HELD AGAINST THE U.S CONSTITUTION, AND HE PRAYS FOR THIS COURT TO GRANT THIS WRIT OF CERTIORARI.

RESPECTFULLY SUBMITTED J. GUERRERO 3/5/2021