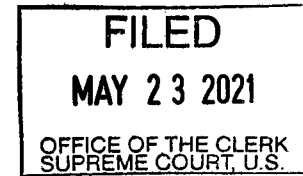


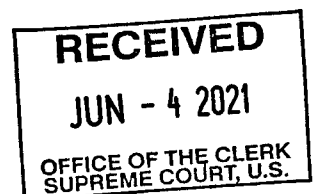
ORIGINAL

20-8269  
No.



\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

KENNETH RAY MARSHALL - PETITIONER  
  
VS.  
  
DEXTER PAYNE - RESPONDENT  
  
ON PETITION FOR A WRIT OF CERTIORARI TO  
U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT  
  
PETITION FOR WRIT OF CERTIORARI  
  
NAME: Kenneth Ray Marshall ADC# 92968  
  
ADDRESS: P.O. Box 500  
  
CITY STATE ZIP: Grady, AR 71644  
  
PHONE NUMBER: None



## QUESTIONS PRESENTED

I. Whether the decision of the state court that failed to apply the correct standard of “reasonableness” to assess trial counsel’s conduct under *Strickland v. Washington*, 466 U.S. 668 (1984) is contrary to and/or involves an unreasonable application of clearly established federal

law. 28 U.S.C., § 2254(d)(1)..... pages 7 - 9

A. Whether failure of the state court to extend the “prevailing professional norms” legal principle to state criminal procedure rule implemented to safeguard constitutional right is contrary to and/or involves an unreasonable application of clearly established federal law. *Williams*

*v. Taylor*, 529 U.S. 369 @ 407 (2000). 28 U.S.C., § 2254(d)(1)..... pages 9 - 12

II. Whether the decision of the state court to find no violation of Petitioner’s Sixth Amendment right to speedy trial is contrary to and/or an unreasonable application of clearly established federal law *Coleman v.*

*Thompson*; 501 U.S. 722 (1991). 28 U.S.C., § 2254(d)(1)..... pages 12-13

A. Whether the failure of the state court to assess trial counsel’s conduct that resulted in violation of Petitioner’s right to speedy trial under correct standard of “reasonableness” (*Strickland, supra*) is contrary to and/or involves an unreasonable application of clearly established federal law. 28 U.S.C., § 2254(d)(1)..... pages 13 -15

B. Whether the decision of the state court that no speedy trial violation occurred is an unreasonable determination of the facts in light of the evidence presented in those proceedings. 28 U.S.C., § 2254(d)(2)..... pages 15 -18

III. Whether the decision of the state court that trial counsel’s performance was not ineffective assistance of counsel is contrary to and/or involves an unreasonable application of clearly established federal law; and too, is an unreasonable determination of the facts in light of the evidence presented in those proceedings. 28 U.S.C., § 2254(d)(1) & (2)..... page 18

A. Whether the decision of the state court that trial counsel's acts of commission and omission were not "cause" for violation of Petitioner's right to speedy trial is contrary to and/or involves an unreasonable application of clearly established federal law; and is an unreasonable determination of the facts in light of the evidence presented in those proceedings. 28 U.S.C., § 2254(d)(1) & (2).....	pages 18 - 23
B. Whether the decision of the state court that Petitioner did not suffer "prejudice" as the result of trial counsel's "deficient" performance resulting in violation of right to speedy trial is contrary to and/or involves an unreasonable application of clearly established federal law. 28 U.S.C., § 2254(d)(1).....	pages 23 - 25
C. Whether this Court should accord deference to the findings of the state court or trial counsel's conduct. 28 U.S.C., § 2254(d)(1); Strickland, supra.....	page 25
1. Whether the findings of the state court that are contrary to and/or involve an unreasonable application of clearly established federal law should be accorded deference. 28 U.S.C., § 2254(d)(1); Williams v. Taylor, supra.....	pages 25 - 26
2. Whether trial counsel's conduct that was below that of reasonable competent professional assistance should be accorded deference. Strickland, supra.....	pages 27 - 29
IV. Whether Petitioner was denied full review by the federal courts below on his constitutional claims hereon. Thompson v. Coleman, 501 U.S. 722 @ 736 (1991).....	pages 29 - 30
A. Whether Petitioner was denied due process and opportunity for review on the merits hereon by the Circuit Court for reasons of circumstances beyond his control.....	pages 31 - 32

## **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:      Dexter Payne, Director of Arkansas Department of Correction

                    State of Arkansas, Leslie Rutledge - Attorney General

## **RELATED CASES**

- Marshall v. Payne, No. 20-3372; On Petition for Re-Hearing and Rehearing en banc; U.S. Court of Appeals for the 8th Circuit. (Add. @ A1) denied 3/8/2020
- Marshall v. Payne, No. 20-3372; On Application for Certificate of Appealability and Motion To proceed In Forma Pauperis; U.S. Court of Appeals for the 8th Circuit (Add. @ A3) denied 1/27/2021
- Marshall v. Payne, No. 4:20-cv-00372JM/PSH; Order & Judgment denying and dismissing Petition for Writ of Habeas Corpus; U.S. District Court for the Eastern District of Arkansas (Add @ B1-3) dated 10/30/202
- Findings and Recommendation of the Magistrate to deny and dismiss Petition for Writ of Habeas Corpus; U.S. District Court for the Eastern District of Arkansas (Add. @ B4-11) dated 10/15/20
- Marshall v. State, 2020 Ark. 66, 594 S.W.3d 78; affirming denial of petition for post-conviction relief; Columbia County Circuit Court (Add. @ C1-7) dated 2/20/2020
- State v. Marshall, No. 2014-2-5; Order denying petition for post-conviction relief; Columbia County Circuit Court (Add @ D1-4) dated 11/13/2018
- Marshall v. State, 2017 Ark. 347, 532 S.W.3d 563; affirming conviction on direct appeal; Arkansas Supreme Court; (Add @ C8-11) dated 12/7/2017

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

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

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

☐ For cases from **state courts**:

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

☒ reported at 2020 Ark. 66, 594 S.W.3d 78; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the Columbia County,  
Arkansas Circuit Court appears at Appendix D to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was  
1/27/2021

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 3/8/2021 and a copy of the order denying rehearing appears at Appendix A1

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_ A \_\_\_\_\_.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was 2/20/2020.  
A copy of that decision appears at Appendix C1-7

☐ A timely petition for rehearing was thereafter denied on the following date:  
\_\_\_\_\_,  
and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_ A \_\_\_\_\_.

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

**U.S Const. Sixth Amendment:** In all criminal prosecutions, the accused shall enjoy the right to a speedy....trial.... and to have the assistance of counsel for his defense.

**28 USC . § 2254(d):(d):** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

**28 USC § 2254(d)(1):** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

**28 USC § 2254(d)(2):** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

**Ark. Rules Crim. P. Rule 28.1(b):** Any defendant charged with an offense and incarcerated in prison in this state pursuant to conviction of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

## STATEMENT OF THE CASE

Petitioner was first arrested and held to trial on the charges hereon on November 26, 2013. In December 2013, he was transferred to the Arkansas Department of Correction (ADC) for parole violation while still awaiting trial hereon. He remained incarcerated in the ADC until trial, conviction and sentencing hereon on June 17, 2015. A period of 568 days between date of arrest and his trial. Cf: Marshall v. State, 2020 Ark. 66, 594 S.W.3d 78 (Add @ C1-7) (Denying Rule 37 Petition For Post-Conviction Relief.) On conviction - after trial by jury in the Columbia County Arkansas Circuit Court - on charges of commercial burglary, aggravated residential burglary, and being a habitual offender, Petitioner was sentenced to a term of life and 360 months. The conviction and sentence was affirmed on direct appeal to the Arkansas Supreme Court in an opinion delivered December 12, 2017. Cf: Marshall v. State, 2017 Ark. 247, 532 S.W.3d 563 (Add @ C8-11).

On February 9, 2018, Petitioner filed timely petition for post-conviction relief under Rule 37, Arkansas Rules of Criminal Procedure (ARCrP), raising his claim hereon of denial of his Sixth Amendment right to the effective assistance of counsel at trial by reason of conduct that caused denial of his right to speedy trial. Petitioner identified multiple acts of commission and omission on the part of trial counsel in violation of Rule 28, ARCrP (Add @ D5-11) as "cause" for violation of right to speedy trial; and as "prejudice" Petitioner argued that he was held to trial, convicted, and sentenced to imprisonment after the time for speedy trial had elapsed under Arkansas law. (Add. @ D5).

Petitioner had raised the claim of violation of his right to speedy trial prior to trial by pro se Motion To Dismiss For Violation of Rule 28 ARCrP; and a hearing was held

thereon on 1/14/2015 where that motion was denied by the trial court. (Add D @ 12-13). A previous pro se Motion To Substitute Counsel that also raised the claim was also denied by the trial court at a hearing held on December 4, 2014. Id.

The State's response to Petitioner's Rule 37 petition addressed none of the specific acts identified therein and attributed trial counsel's conduct to trial tactics and strategy; and the trial court in denying relief on the petition - in a decision filed November 13, 2018 - as well, failed to address the specific acts of "deficient" performance by trial counsel identified by Petitioner; also attributing counsel's conduct to trial strategy in finding no speedy trial violation. (Add. @ D1-4).

Petitioner filed timely notice of appeal of the trial court's denial of his Rule 37 petition to the Arkansas Supreme Court, raising as error claims of deficiency in the trial court's order denying relief on his petition; and too, re-stating his claim of denial of effective assistance of counsel by trial counsel's failure to safeguard his right to speedy trial. Petitioner again identified those specific acts of commission and omission by trial counsel in violation of Rule 28, ARCrP, as "cause" for violation of his right to speedy trial; and as "prejudice," his being held to trial, convicted, and sentenced after time for speedy trial had elapsed in this case. In an opinion issued February 20, 2020 that court denied relief on the petition, affirming the trial court by pointing to three (3) periods of delay - that it attributed to Petitioner - amounting to 263 days putting trial at 305 days after date of arrest to bring it within the 12 months period required by Rule 28.1 (Add. @ D5). Cf: Marshall v. State (Add. @ C1-7).

Petitioner then timely filed on June 10, 2020 his federal petition for writ of habeas corpus in the United States District court for the Eastern District of Arkansas on grounds: 1) The state court's finding that trial counsel's conduct that deprived him of

speedy trial was not “cause” for ineffective assistance of counsel was contrary to and/or involved an unreasonable application of clearly established federal law; 2) The state court’s decision to deny relief was based on an unreasonable determination of the facts base on the evidence before that court; and 3) Its conclusion that Petitioner was not “prejudiced” by trial counsel’s conduct in violation of Rule 28, ARCrP., was contrary to and/or involved an unreasonable application of clearly established federal law. The District Court’s Order denying relief and dismissing his petition (Add. @ B1-2), adopted in its entirety the Magistrate’s Findings and Recommendations (Add. @ B4-11), that rested solely on the decision of the state court to deny his Rule 37 petition. (Add. @ C1-7).

Because the District court in denying relief had also denied certificate of appealability (Add. @ B12), Petitioner’s initial appeal to the Court of Appeals for the Eighth Circuit was heard on Application for Certificate of Appealability and Motion To Proceed In Forma Pauperis which was denied on 1/27/21 (Add. @ A3). Because of the then existence of multiple circumstances beyond his control that influenced his choice Petitioner filed with his Petition For Rehearing and Re-Hearing en banc a Request to File an Over-length Petition that was denied by the Eighth Circuit, along with the Petition For Re-Hearing, on 3/8/2021. (Add. @ A1). This petition follows.

## **REASONS FOR GRANTING THE PETITION**

Petitioner submits that the petition hereon presents compelling reasons for this Court's consideration and resolution including: conflict of the decision of the courts below with relevant decisions of this Court as to: the necessity of consideration of "prevailing professional norms" in assessing the "reasonableness" of trial counsel's representation under *Strickland v. Washington*, 466 U.S. 668 @ 688-89; the application of the "prevailing professional norms" to the State rule of criminal procedure governing speedy trial under *Williams v. Taylor*, 529 U.S. 362 @ 407 (2000); and the State court supplying an essential element of fact where the record is silent in order to dispose of the constitutional question presented under *Carnley v. Cochran*, 369 U.S. 506 @ 516 (1962). Too, because the federal courts' review of these issues has been based solely on the Findings and Recommendations of the Magistrate that adopted the conclusions of the State court; conclusions that besides being contrary to and/or an unreasonable application of clearly established federal law, too, they lack independent and adequate State grounds to support the judgment as it is based on an unreasonable determination of the facts in light of the evidence presented to that court, there has been no review on the merits of Petitioner's claims. And, Petitioner contends, he was as well denied review on the merits by the Court of Appeals below by reason of the co-occurrence of exigent circumstances beyond his control that effected to deny meaningful review of his claims by that Court.

### **I. Failure to apply appropriate standard of "reasonableness" to assess trial counsel's conduct.**

Petitioner submits that the decision of the State court (and the courts below) with regard to his claim of ineffective assistance of counsel at trial is contrary to and/or

involves an unreasonable application of clearly established federal law. Title 28 USC § 2254(d)(1). This is so, first, because although that court correctly identified the governing legal principle to determine “reasonableness” it failed to apply it- in pertinent part - to the facts of Petitioner’s case; and too, it was applied contrary to clearly established federal law. Cf: Bell v. Cone, 535 U.S. 685 @ 694.

In Strickland, supra., the well established Federal precedence governing this case, the United States Supreme Court held - in regard to a claim of denial of the Sixth Amendment right to effective assistance of counsel - that a defendant must show that counsel’s representation “fell below an objective standard of reasonableness.” 466 U.S. @ 687. And although, Petitioner notes, the state court in this case pointed to this test (Add. @ C4), its application was contrary to clearly established federal law because it failed to consider the “prevailing professional norms” legal principle as part of that test as imposed by Strickland: “The proper measure of attorney performance remains reasonableness under prevailing professional norms.” Id. @ 688.

Petitioner submits that the inclusion of “prevailing professional norms” is a condition precedent to measuring the “objective standard of reasonableness” of trial counsel’s conduct:

“....The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms....”

Strickland, 466 U.S. @ 690

See: Knowles v. Mirzayance, 556 U.S. 111 @ 122 (2009)(Court failed to apply specific rule that has been squarely established by the Supreme Court.)



Because the state court, in this case, failed to apply the “prevailing professional norms” legal principle to measure trial counsel’s conduct by an “objective standard of reasonableness” as Strickland (Id.) mandates, its consideration of trial counsel’s conduct, identified by Petitioner, to determine the effectiveness of his representation, is not only erroneous but contrary to clearly established federal Law. Cf: Bell, 535 U.S. @ 694 (Contrary clause of 28 USC, § 2254(d)(1) implicated if state court applies a rule differently from governing law.)

**A. Failure to extend “prevailing professional norms” standard to State criminal procedure guidelines.**

Second, Petitioner observes this Court has established that a state court decision also involves an unreasonable application of its precedence if it unreasonably extends a legal principle to a new context where it should not apply or unreasonably refused to extend that principle to a new context where it should apply. Williams v. Taylor, 529 U.S. 362 @ 407.

Petitioner notes that the State court has established with regard to the constitutional right under the Sixth Amendment to speedy trial - which violation of that right is the basis of the claim for ineffective assistance of counsel in this case - that:

“A speedy trial is a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, or oppressive delays manufactured by ministers of justice.”

Jones v. State, supra., 347 Ark. 455 @ 463, 655 S.W.3d 402 @ 407 (2002)

And, Petitioner contends, those, “fixed rules of proceedings of law” (Id.) are embodied in Rule 28, ARCrP, which was implemented to safeguard this constitutional right in the State of Arkansas. See e.g. Davis v. State, 349 Ark. 171, 889 S.W.2d 769 (1994). And as such, Rule 28 provides the “prevailing professional norm” by which to measure trial

counsel's conduct under Strickland's "objective standard of reasonableness" test. Id. @ 688-89.

Petitioner submits that it was incumbent on the state court to consider his claims in the context in which they were presented. And that court, though it correctly pointed to the "objective standard of reasonableness" test, it completely avoided his claim that trial counsel's conduct violated the "fixed rules" of Rule 28, ARCrP, which in this case, he contends, is the "prevailing professional norm" by which to measure counsel's conduct under that test. Petitioner observes that this Court in Strickland noted several "prevailing professional norms," but specifically refused to limit them for this reason. Id. @ p. 688. Cf: Wright v. West, 505 U.S. @ 308-309 (A squarely established general rule of application designed for the specific purpose for evaluating a myriad of factual contexts.)

Petitioner's claim hereon - as in the state court - is that trial counsel's performance was "deficient" for reasons of commission and omission in obtaining delays and/or acquiescing to the grant of delays in violation of the "fixed rules of proceedings of law" under Rule 28; and so failing to safeguard his right to speedy trial, and which resulted in the violation of that constitutional right. In the state court, as hereon, Petitioner presented his claim of ineffective assistance of counsel based on the violation of his constitutional right to speedy trial, challenging time to trial based on: the validity of excluded periods under Rule 28 (Add. @ 5-11); the legal justification for excluded periods under Rule 28; trial counsel's act of commission in obtaining a delay where there was no legal justification or "good cause" shown under Rule 28.1(b), (Add. @ D-5); his acts of omission in acquiescing to the State obtaining and/or the trial court's grant of delays where there was no legal justification and/or "good cause" shown in

violation of Rule 28.3 (Add. @ D10-11); and that trial counsel's conduct specifically failed to comply with the "fixed rules" established by Rule 28. (Jones v. State, supra.). And as such, his conduct was "deficient" and "cause" for violation of Petitioner's right to speedy trial. Strickland, supra.

That the state court never applied the legal principle "elaborated in prevailing professional norms" - in this case Rule 28 - is demonstrated by the fact that although the very delays it found "excludable" in order to find no speedy trial violation (The 2/6/14 delay while Petitioner was "incarcerated and the 10/2/14 delay obtained by the State for plea negotiation) were specifically identified by Petitioner as violating the provisions of Rule 28, yet the court never addressed their violation of the rule. Add. @ C1-7.

Petitioner contends that assessing counsel's performance in context of the "prevailing professional norms" is an integral part of determining the reasonableness of that conduct. Cf: Roe v. Flores-Ortega, 528 U.S. 470 @ 489 (2000), Souter, Stevens, and Ginsberg, JJ., concurring in part and dissenting in part (The prevailing professional norms are Strickland's touchstone of reasonableness.); Strickland, supra., @ 690 (The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.).

In addition, Petitioner notes, he presented the same facts and legal theories in state court as before this Court and the court below (Jones v. Jerrison, 20 F.3d 849 @ 852 (8th Cir. 1994); raising and pointing to specific federal constitutional rights that were denied. Cf: Ford v. Norris, 364 F.3d 916 @ 921 (8th Cir. 2004). That those advanced in the state court are consistent with the facts and legal theories advanced hereon: That the "fixed rules" of Rule 28 ARCrP., is the objective standard of reasonableness "by

which to guide and measure trial counsel's conduct"; and as such is the "prevailing professional norm." Strickland, supra., @ 688-89. Cf: Kenley v. Armontrout, 937 F.2d 1298 @ 1302-03 (8th Cir. 1991) (There is a factual commonality.); See: Stranghoener v Black, 720 F.2d 1005 @ 1007-08 (8th Cir. 1983) (Federal claim should not present significant additional facts such that the claim was not fairly presented to the state courts.). The failure of the state court to apply the specific rule to measure trial counsel's conduct under "an objective standard of reasonableness under prevailing professional norms" - in this case Rule 28, ARCrP resulted in a decision, in Petitioner's case, that is not only erroneous but contrary to and/or involves an unreasonable application of clearly established federal law.

## **II. Failure to accord appropriate review to Petitioner's speedy trial claim**

Although a determination made by the State court in this case is presumed to be correct; this is a rebuttable presumption that may be overcome by Petitioner by clear and convincing evidence. 28 USC § 2254(e)(1). And federal courts must ascertain for themselves if a petitioner is in custody pursuant to a state court judgment that rests on independent and adequate grounds. Coleman v. Thompson, 501 U.S. 722 @ 736 (1991).

Here, Petitioner contends that the state court was able to dismiss his claim of violation of his Sixth Amendment right to the effective assistance of counsel by denying his claim of violation of his right to speedy trial (which is the basis of the ineffective assistance of counsel claim) in part by arbitrarily legitimizing the acts of commission and omission committed by trial counsel and identified by Appellant as "deficient" performance resulting in denial of speedy trial and "cause".(Add. @ C-5); doing so not only contrary to and/or based on an unreasonable application of clearly established

federal law. Strickland, supra. 28 USC § 2254(d)(1), but to, by resting its conclusion that there was no speedy trial violation or an unreasonable determination of the facts in light of the evidence before the court. USC § 2254(d)(2).

**A. Failure to correctly assess trial counsel's conduct resulting in violation of speedy trial**

Strickland (supra.) established that "[w]hen a convicted defendant complains of the ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. "466 U.S. @ 687-88. As Appellant contended in arguments above, Rule 28, ARCrP - in place to safeguard the constitutional right under the Sixth Amendment to speedy trial in Arkansas - provides this "objective standard of reasonableness" required by Strickland (Id.); and its "fixed rules" ( Jones, supra., 347 Ark. @ 463, 65 S.W.3d @ 407) are the "prevailing professional norms" by which to measure the "reasonableness" of trial counsel's performance. Strickland @ p. 690:

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms...."

Because the State court failed to apply this - or any - objective standard of reasonableness by which to measure trial counsel's performance; but rather, based its judgment on its own speculative conclusions, its decision is an unreasonable application of clearly established federal law. Id.

In Petitioner's case, a period of 568 days elapsed between date of his arrest on the charges hereon and date of trial and conviction thereon. A period of 203 days in

excess of that permitted by law. Cf: Rule 28.1, Add. @ D5-78.; Marshall, Add. @ C1-7. Petitioner contends that only 68 days of this period was validly excludable under Rule 28 to toll speedy trial: A period of 67 days for his mental fitness exam (which the state court also found "excludable" to toll speedy trial and which Petitioner never contested); and a period of one (1) day from date of filing of his pro se Motion To Dismiss For Violation of Speedy Trial on 1/13/15 until the next day 1/14/15 when that motion was heard and denied in the trial court.

Although, Petitioner pointed to multiple violations of Rule 28 in the delays obtained prior to trial and "identified" acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment that resulted to deny him speedy trial, the state court - besides the 67 days for mental fitness exam - relied on two other delays (both of which were "identified" by Petitioner) to find no speedy trial violations. The court noted a 2/6/14 to 6/19/14 delay of 133 days obtained by trial counsel; and a 10/2/14 to 12/4/14 delay of 63 days for plea negotiations (which it attributed to Petitioner), totaling with the 67 days for mental fitness examination to 263 days that it excluded from the 568 days for a period of 305 days to trial to find no speedy trial violation. Marshall, Add. @ C5.

Petitioner also "identified" the 2/6/14 to 6/19/14 delay obtained by trial counsel as an act of "deficient" performance. The delay was obtained by trial counsel so that Petitioner - who at the time was "incarcerated" in the ADC awaiting trial - could attend a rehab program provided by the ADC. Petitioner contends this delay directly violated the letter and intent of Rule 28.1(b) (Add. @ D5) which mandates trial for defendants while "incarcerated" and such time is not excludable. Because trial counsel's conduct in obtaining the delay violated the "fixed rules" of legal proceeding under Rule 28.1, the

“prevailing professional norm” (Strickland, supra.) there was no “legal justification” or “good cause” shown for the delay. Cf: Rule 28.3(f) (Periods of delay must be for good cause.) (Add. @ D11); and as such it fell below the “objective standard of reasonableness” for professionally competent assistance.

**B. Failure to determine whether state court’s decision rests on adequate and independent state grounds**

In addition to dismissing his claim of ineffective assistance of counsel by finding no speedy trial violation based on a decision that is contrary to and/or an unreasonable application of clearly established federal law, the State court decision is also based on an unreasonable determination of the facts based on the evidence before that court. This is so because that court relied on an exercise in speculation to supply an essential element of fact where the record is silent, in order to find that no speedy trial violation occurred. Cf: Clancy v. U.S., 365 U.S. 312 @ 315 (1961) (Where the record is silent the court should deal with the record as it finds it.); Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280 n.6 (2010)( Where record is silent resulting conclusion must necessarily be speculation.)

In this case, the state court counted as an “excluded” period, in order to find no speedy trial violation, the delay from 10/2/14 to 12/4/14 - a period of 63 days - for plea negotiation. Petitioner had specifically “identified” this delay as an act of omission by trial counsel because he contended that the delay was obtained by the State, and as such, was not permitted under Rule 28.3(d) as a period validly excludable by the State. (Add. @ D10-11) Trial counsel, Petitioner contended, was “deficient” for acquiescing in the grant of this delay where there was no “good cause” shown or legal justification under Rule 28.3(d). In addition, the record - the trial docket memorializing the delay - is

silent as to an essential fact: who obtained the delay. (Add.. @ D10-11). Despite this deficiency the state court attributed the delay to Petitioner in order to find no speedy trial violation. Marshall, Add. @ C5.

Rule 28.3 provides that all “excluded” periods that toll speedy trial “shall” be set forth in a written order or docket entry. (Add. @ D10). And with regard to this provision the state court has established: “Notwithstanding good cause, the record must properly explicate the rationale for speedy trial to be tolled.” *Berry v. Henry*, 364 Ark. 26, 216 S. W.3d 93 (2005).

Despite this glaring deficiency in the record as to an essential element of fact - who obtained the 10/2/14 delay - the state court chose to indulge in speculation where the record is silent (*Graham, supra.*) in order to make a determination of fact (*Cf: Clancy v. U.S., supra.*) (Where record is silent court should deal with record as it finds it), in contravention of the established precedence of this Court in order to deny Appellant’s constitutional claims. *Cf: Carnley v. Cochran*, 369 U.S. 506 @ 516(1962) (Supreme Court precedent requires that any doubts arising inevitably from a silent record be resolved in favor of defendant.).

And although Rule 28.3 provides that though such periods of delay shall be set forth by the trial court in a written order or docket entry it permits that, “it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to speedy trial pursuant to Rule 28....” (Add. @ D10). In this case though the trial court had on two (2) occasions the opportunity to “make the determination” as to this deficiency in the record and failed to do so: First, at a hearing held on 12/4/14 where Appellant refused the plea offer (Add. @ C5); and again at the 1/14/15 hearing in the trial court when Petitioner “moved to enforce his right to speedy



trial pursuant to Rule 28“ (Rule 28.3, *supra*.) and where he had specifically “identified” this delay for these reasons as “deficient” performance by trial counsel and “cause” for violation of his right to speedy trial. (Add. @ D12). Further lending credence to Appellant’s contention that the State obtained this delay.

And too, to counter the State court’s finding that trial counsel was not ineffective for not having filed what would have been a “meritless” motion to dismiss for violation of speedy trial, because of the defect in the docket entry such a motion would have been “meritorious” as the 63 days excluded by this delay when added to the 305 days conceded in bringing Petitioner to trial would have exceeded the 12 months permitted for trial under the Rule. Rule 28.1; Cf: *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234.; *Walker v. State*, 282 Ark. 52, 701 S.W.2d 372 (1986); *Clark v. State*, 274 Ark. 81, 621 S.W.2d 857 (1981). Based on these facts Petitioner submits that it is clearly evident the decision of the State court does not rest on independent and adequate state grounds (*Coleman v. Thompson*, *supra*), as it is factually apparent that a clear violation of his constitutional right to speedy trial occurred, and that he has not been afforded a full and fair review of this claim.

Petitioner submits that trial counsel’s conduct in this instance was deficient; first, for acquiescing in the grant of continuance to the State where no “good cause” or legal justification existed. Rule 28.3 (Not making a contemporaneous objection). And too, for failing to make what would have been a meritorious motion to dismiss.

Section 2254(d) and (e)(1) requires federal habeas courts to extend deference to the factual findings of state courts; but deference does not imply abandonment or abdication of judicial review. *Miller-el v. Cockrell*, 537 U.S. 322 @ 340 (2003). Federal habeas remains available when, as here, the state court’s decision is contrary to and/or

involves an unreasonable application of clearly established federal law, and too, is based on an unreasonable determination of the facts based on the evidence before that court.

**III. Failure to determine that trial counsel's performance was below that of a reasonable competent professional**

Petitioner submits that because the state court in its "objective standard of reasonableness" assessment of trial counsel's conduct, first, failed to consider counsel's "functions as elaborated in prevailing professional norms" (Strickland, supra., 466 U.S. @ 690), Strickland's touchstone of reasonableness (Roe v. Flores-Ortega, 528 U.S. @ 488); and too, failed to determine the "reasonableness" of acts committed by trial counsel and identified by Appellant as "deficient" under that "touchstone of reasonableness" (Id.) established by the "fixed rules" (Jones, supra., 347 Ark. @ 463, 65 S.W.3d @ 407) of Rule 28, ARCrP.; and as well based its judgment on an unreasonable determination of the facts in light of the evidence before that court (substituting speculation where the record is silent), no determination was ever made as to material facts that establish that trial counsel's performance was "deficient" and below that of a reasonable competent professional under Strickland, supra.

**A. Failure to determine "cause" under the correct standard of "reasonableness"**

Petitioner submits that the decision of the State court is not only contrary to and/or involves an unreasonable application of clearly established federal law (§ 2254(d)(1)), but too, an unreasonable determination of the facts in light of the evidence before that court (USC § 2254(d)(2)), as it failed to determine:

1. The trial court failed to determine the "reasonableness" of trial counsel's conduct as required by Strickland supra.

Although that court did acknowledge that trial counsel's performance was governed by Strickland (Add. @ C4) it never alluded to or made effort to consider the acts identified as "deficient" by Petitioner under any standard of "reasonableness" as Strickland requires:

"the court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."

@ 690

Because that court failed to do so and its findings as demonstrated herein are erroneous, its decision for this reason is contrary to and/or an "unreasonable application of clearly established federal law. § 2254(d)(1).

2. Whether Rule 28, ARCrP, established a "prevailing professional norm" that served to provide an "objective" guide to determine the reasonableness of trial counsel's conduct." Strickland @ p. 688.

Petitioner contends that under Strickland's standard of reasonableness: "The proper measure of an attorney's performance remains simply reasonableness under prevailing professional norms." (Id.); and this standard requires for its consideration a "prevailing professional norm" to guide that determination. As the Court in Strickland noted, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms' not whether it deviated from best practice or most common custom. Id. @ 690. Petitioner contends that in this case the "prevailing professional norm" is Rule 28, ARCrP., which not only guides, but because it is the law, "inexorably commands" (Bobby v. Van Hook, 558 U.S. 4 @ 7 (2009) counsel's compliance, as it is in place to safeguard the constitutional right to speedy trial.

Arkansas has established that “(a) speedy trial is a trial conducted according to fixed rules, regulations and proceedings of law, free from vexatious, capricious, or oppressive delays manufactured by ministers of justice.” (Jones, *supra.*). Petitioner contends that the provisions of Rule 28, ARCrP., with its purpose to safeguard the Sixth Amendment right to speedy trial, are sacrosanct. See e.g., *Davis v. State*, *supra.* (Arkansas Rules of Criminal Procedure, Rule 28 provides the enforcement for the constitutional right to speedy trial.). And as such, he submits, the Rule establishes the “prevailing professional norm” that serves as a guide to determine the “objective standard of reasonableness” of trial counsel’s conduct in this case. And the failure to impose that “prevailing professional norm” is contrary to and/or an unreasonable application of clearly established federal law.

3. Whether the violation of the “fixed rules” (*Jones v. State*, *supra.*) established by Rule 28 would amount to “reasonable professional conduct” under a Strickland analysis.

Petitioner here contends that although Strickland recognized counsel’s “overarching duty to advocate the defendant’s cause (466 U.S. @ p. 688); that duty is limited to legitimate, lawful conduct. *Nix v. Whiteside*, *supra.*, 475 U.S. 157 @ 166 (1985). With regard to the “prevailing professional norms,” the Court noted, “[t]hese standards confirm that the legal profession has accepted that an attorney’s ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct.” *Id.* @ p. 168.

Petitioner contends that competent attorney would not violate the “fixed rules” established by Rule 28, which is the law, and to do so cannot be considered reasonable professional conduct under Strickland.

4. Whether trial counsel's conduct in this case in obtaining the 2/6/14 to 6/19/14 delay amounting to 133 days for Petitioner to attend an in-unit rehab program provided by the ADC while he was already "incarcerated" in the ADC violated the clear language and intent of Rule 28.1(b) ARCrP - and so, the law. *Nix v. Whiteside*, supra.

Petitioner here contends that the very intent of Rule 28.1(b) is to provide for trial of a criminal defendant "while incarcerated." Cf: Add. @ D5; See: *Dupree v. State*, 316 Ark. 324, 871 S.W.2d 570 (1994). Because he was already "incarcerated" in the ADC awaiting disposition of the charges hereon, there was no "legal justification" or "good cause" shown to toll speedy trial for reason that directly violated the "fixed rules" under Rule 28. Cf: *David v. State*, 295 Ark.131, 748 S.W.2d 117 (1988) (There must be good cause shown for grant of continuance.).

And too, counsel's actions in obtaining this delay was "deficient" and not those of a "reasonably competent attorney" and cannot be deemed a "strategic choice" because a "thorough investigation of the law" would have found it violated the "incarcerated" provision of Rule 28.1(b) (Add. @ D5) (*Strickland*, 466 U.S. @ 690); and so outside the "wide range of professionally competent assistance. *Id.*

5. Whether trial counsel's acquiescence to the 10/2/14 to 12/4/14 delay amounting to 63 days obtained by the State for plea negotiations - but attributed to Petitioner by the Arkansas Supreme Court (*Marshall*, Add. @ C5); and his failure to safeguard Petitioner's speedy trial right was "deficient" performance.

Petitioner submits that trial counsel's conduct in this instance was "deficient" for multiple reasons. First, Rule 28.3(d) provides for the valid "excludable" periods that may be obtained by the prosecution - and a delay for plea negotiations is not allowed. (Add. @ D10-11). Counsel's acquiescence to and failure to make a contemporaneous

objection to the grant of this delay for this reason was deficient. Cf: Frederick v. State, 2012 Ark.App. 552, 423 S.W.3d 649. And then too, Rule 28.3 mandates that “excluded period” “shall” be set forth in a written order or docket entry. (Add. @ D10). The record here - the trial docket (Add. @ D12) - is silent as to this essential element of fact: Who obtained this delay. Cf: Berry v. Henry, supra. (The record must properly explicate the rationale for speedy trial to be tolled.). And as well, when given the opportunity on two (2) separate occasions - one (1) at which Appellant had raised his speedy trial claim and specifically pointed to this delay as violation of Rule 28.3 - the trial court although permitted by Rule 28.3, failed to correct this omission. (Add. @ D10).

Petitioner notes in addition that even by itself this delay is important, because, as he noted, had the 63 days excluded by this continuance been disallowed it would have overextended the period for speedy trial by 3 days. Because trial counsel failed to make what would have been an otherwise “meritorious” motion to dismiss for violation of speedy trial his performance failed below that of a reasonable, competent attorney. Strickland, supra. Cf. Walker v. State, supra., 288 Ark. @ 56, 701 S.W.2d 377 (1986):

“Had the dismissal motion been made, it would have been error not to have granted it. We thus hold the failure to make the dismissal motion was ineffective assistance of counsel, the defendant suffered prejudice from it, and we have no alternative but to reverse the conviction and dismiss the case. Clark v. State, 274 Ark. 81, 621 S.W.2d 857 (1981).”

6. Whether trial counsel’s acts of commission and omission with regard to the delays that resulted in the speedy trial violation in Petitioner’s case, were “cause” for violation of his right under the Sixth Amendment to the effective assistance of counsel.

In order to establish “cause” to show that counsel was ineffective a defendant must show that counsel’s representation fell below “an objective standard of

reasonableness under prevailing professional norms.” Strickland, *supra*. (Judicial scrutiny of counsel’s performance must be highly deferential....[A] judge must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that under the circumstances, the challenged action “might be considered sound trial strategy.”) *Id.* @ 689. Petitioner contends that he has demonstrated hereon, as well in the state court and court below, that trial counsel’s acts of commission and omission violated the “objective standard of reasonableness” established by Rule 28, ARCrP; and so, did not comport with the “prevailing professional norm” of legal conduct required by Strickland. And that those acts of commission and omission were not only “deficient” and not those of competent professional assistance they resulted to deny Petitioner constitutional right to speedy trial.

**B. Failure to conclude that trial counsel’s deficient performance  
“prejudiced” Petitioner**

To establish “prejudice” a defendant must show that there is a reasonable probability that but for counsel’s unprofessional errors the result of the proceedings would have been different. Strickland, 466 U.S. @ 694. Petitioner here submits that as the result of trial counsel’s “deficient” performance he was held to trial, convicted, judgment entered, and he was sentenced after the time for speedy trial had elapsed in his case.

Here, Petitioner submits that because the state court failed to properly apply the applicable standard of review to his claim of denial of constitutional right under the Sixth Amendment to the effective assistance of counsel at trial; and further failed to apply the applicable standard of review to the consideration of his claim of denial of his Sixth

Amendment right to speedy trial; and in addition, based its judgment on an unreasonable determination of the facts based on the evidence before that court, its decision to deny relief on those claims is clearly an unreasonable application of Supreme Court precedent. Cf: *White v. Woodall*, 572 U.S. 415 @ 425 (2014); *Williams v. Taylor*, *supra.*, 529 U.S. @ 407 (2000).

In *Strickland*, this Court held that where trial counsel's deficient performance resulted to deprive a defendant of a substantive or procedural right to which he is entitled under law prejudice is presumed. *Id.* @ 692; *Williams v. Taylor*, 529 U.S. @ 393. In this case, trial counsel's "deficient" performance deprived Petitioner of his constitutional right to a speedy trial; and in such case, an inquiry into fundamental unfairness is unnecessary. *Id.* As this Court noted, "[p]rejudice in these circumstances is so likely that a case-by-case inquiry into prejudice is not worth the cost. *U.S. v. Cronin*, 466 U.S. 648 @ 658 (1984). And as it noted in *Strickland*; "Moreover, such circumstances involved impairment of the Sixth Amendment right that are easy to identify and for that reason and because the prosecution is directly responsible easy for the government to prevent. *Id.* @ 692. Cf: *Stephens v. State*, 295 Ark. 541, 750 S.W.2d 52, citing *Dickey v. Florida*, 398 U.S. 30 (1970) (the Supreme Court has held that the right to a prompt inquiry into criminal charges is fundamental and it is the duty of the charging authorities to provide a prompt trial.). Cf: *Hodges v. U.S.*, 408 F.2d 543 (8th Cir. 1969); See e.g., *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981) (Primary burden is on the State to assure cases are brought to trial.).

And consistent with *Strickland*, the Arkansas Supreme Court has established that where ineffective assistance of counsel caused the denial of a defendant's right to



speedy trial the defendant suffered prejudice. Rule 28, ARCrP.; Walker, *supra*.; Clark, *supra*.

**C. Lack of reasonable argument or theory to support according “deference” to the findings of the trial court or trial counsel’s conduct**

This Court has held that with the addition to the requirement under title 28 USC, § 2254(d) to show that the State court’s application of Strickland, *supra*, was unreasonable to that case already “highly deferential” review of trial counsel’s conduct, requires that a habeas petitioner show not only no reasonable arguments or theories could have supported the State court’s decision, but too, that it is not possible that fair minded jurists could disagree that those arguments or theories are inconsistent with the holdings of a prior decision of this Court. *Harrison v. Richter*, 562 U.S. 86 @ 101-02 (2018).

**1. Deference is not due because of failure to apply proper standard of “reasonableness” and/or to extend ruling legal principle to state rule of criminal procedure.**

Because the State court in this case made no effort at all to provide any “arguments or theories” to support its decision, this Court is left to determine what - if any - “could have supported (its) decision.” *Id.* Petitioner submits that this task would escape even the fairest minded jurists, as there can be no reasonable argument or theory to support the failure to apply this Court’s mandatory standard of “reasonableness” to an assessment of trial counsel’s conduct under Strickland. And the failure to include in such an assessment the “touchstone of reasonableness” - “the prevailing professional norms” (*Roe v. Flores-Ortega*, *supra*.) must lead to the conclusion that the State court’s decision was based on “best practices or most common custom” which this Court refuted in Strickland (466 U.S. @ 690).

The State court never advanced any arguments or theories to condone trial counsel's violation of Rule 28, not even trial strategy. And Petitioner contends that even this argument or theory is not available as even a reasonable investigation or knowledge of the State rules of criminal procedure would avail counsel of those guidelines. *Strickland*, @ 466 U.S. 690-91. And given the necessity of inclusion of "the prevailing professional norms" in the consideration of the "reasonableness" of trial counsel's conduct, it is difficult to see how fair minded jurists could disagree that the failure to include this standard in that assessment is fatal to the State court's decision. *Yarborough v. Alvarado*, 539 U.S. 652 @ 664 (2004); Cf: *Knowles v. Mirzayance*, 556 U.S. @ 112 (Court failed to apply specific rule that has been squarely established by the Supreme Court.)

And as Rule 28, ARCrP embodies the "fixed rules of proceedings of law" (*Jones v. State*, *supra*.) implemented to safeguard the constitutional right to speedy trial; and as such provides in this case the objective standard of reasonableness under prevailing professional norms by which to guide an assessment of trial counsel's conduct, the failure of the State court to apply that legal principle to Rule 28 is contrary to and/or involves an unreasonable application of clearly established federal law. 28 U.S.C., § 2254(d)(1); *Williams v. Taylor* 529 U.S. @ 407 (State court decision involves an unreasonable application of Supreme Court if it unreasonably refused to extend legal principle to a new context where it should apply.). And, as in this case, the failure to do so is so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fair-minded disagreement. *Harrison v. Richter*, 562 U.S. 86 @ 103 (2011).

"the overarching duty of trial counsel to advocate the defendant's cause" noted in Strickland (466 U.S. @ 688) is "limited to legitimate lawful conduct....he must observe.... the statute law." Such is Rule 28.

Because trial counsel's conduct in obtaining this delay violated the rule of law under Rule 28; and that conduct resulted in the denial of Petitioner's constitutional right to speedy trial, it cannot be deemed reasonable - as reasonable and competent attorney would not violate the law. Strickland, supra.; Nix, supra. And because that conduct violated the law, there is no - nor "could be" any - reasonable argument or theory that satisfies Strickland's "highly deferential" standard accorded the "wide range of reasonable professional judgment." 466 U.S. @ 687-94; Harrison, supra.

And with regard to trial counsel's acquiescence in the State's obtaining and the 10/2/14 to 12/4/14 grant of delay that was not permitted under Rule 28.3(d), (Add. @ D10-11), this Court should as well not accord any deference to trial counsel's conduct. First, because the delay obtained by the State for this reason violates the Rule (Id.); then, because the record is silent as to an essential element of fact: who in fact obtained the delay (Id.); and on two (2) occasions of opportunity to correct this defect (Id.) no effort was made to do so; and finally, the failure to make what would have been a meritorious motion to dismiss for violation of speedy trial based on this excluded period. Walker v. State, supra.; Clark v. State, supra.

Because the State court relied on a silent record to support its decision (Cf: Carnley v. Cochran, 369 U.S. @ 516), Petitioner submits that neither presumption of correctness under Title 28, U.S.C., § 2254(e)(1) or deference under § 2254(d) should attach to that decision. And in view of the ample opportunities to correct this defect - especially when brought to the trial court and defense counsel's attention by pro se

Motion for Post Conviction Relief (Cf: Rule 28.3) Petitioner submits that fair minded jurists would not disagree that there is no argument or theory to support deference. Harrison, supra.

#### **IV. Failure to accord Petitioner fair and adequate review on the merits.**

The order of the District Court to dismiss and deny the application for federal habeas relief in this case (Add. @ B1-2) entered on October 30, 2020, adopted in its entirety the Findings and Recommendations of the Magistrate (Add. @ B4-11). Those findings rested entirely on the decision of the Arkansas Supreme Court that denied Petitioner's Rule 37 Petition for Post Conviction Relief that raised the same claims of constitutional violation as hereon. (Add. @ C1-7) The State court concluded that because there was no speedy trial violation trial counsel was not ineffective for failing to file what would otherwise have been a meritless motion to dismiss for violating speedy trial - thus reducing Petitioner's claim to trial error and avoiding the constitutional issues presented. Id. The District Court concluded that Petitioner did not raise a constitutional issue on which federal relief could be granted. (Add. @ B1).

Petitioner argues that he has heron demonstrated as he did to the courts below - that the State court decision is both a factual and legally erroneous exercise to avoid consideration of the constitutional presented by Petitioner.

And, Petitioner contends, because - to date - review of the claims raised in his federal habeas petition has been based on what has been demonstrated to be an arbitrary and summary treatment of the constitutional issues presented therein that is not only contrary to and/or involves an unreasonable application of clearly established federal law; but as well, is based on an unreasonable determination of the facts in light

of the evidence before that court, there has been no independent and fair review on the merits of his claims hereon.

Petitioner submits that this lack of adequate review is shown by the failure of the federal courts below to independently test the efficacy and validity of the constitutional claims presented in his habeas petition including: The correctness of the “reasonableness” standard employed by the State court to assess the effectiveness of trial counsel’s conduct under Strickland, *supra.*; considering the novel claim of application of Strickland’s “prevailing professional norms” principle to the State rule of criminal procedure governing speedy trial; or to determine if the decision of the State court rested on independent and adequate State grounds.

Section 2254(d) requires federal courts to extend deference to the factual findings of the State court; but as this Court noted in *Miller-El v. Cockrell*, *supra*, 537 U.S. @ 340, deference does not imply abandonment or abdication of review. And as this Court has also established, the federal court must ascertain for themselves if a petitioner is in custody pursuant to a State court judgment that rests on independent and adequate State grounds. *Coleman v. Thompson*, *supra.*, 501 U.S. @ 736.

In this case, although the Court of Appeals below purported to “carefully review the original file of the district court” (Add. @ A3), where that review was founded in the District Court’s reliance on the Magistrate’s findings (Add. @ B-1), which adopted the obviously erroneous conclusions of the State court (Add @ B-1); such a review by the Court of Appeals - in this context - could only have been abbreviated and truncated, and not one on the merits, as to have missed the efficacy of the claims as presented hereon that were before that Court.

**A. Failure to receive a review on the merits by the court of appeals because of circumstances beyond petitioner's control.**

Petitioner here contends that in addition he was denied full and adequate review on the merits of his claims herein on Petition For Re-Hearing and Re-Hearing en banc by the Court of Appeals for reason of the co-occurrence of several factors beyond his control that effected to deny him opportunity for meaningful review of his habeas claims; and which may well implicate notice and due process. Those factors include: The mandatory jurisdictional limitations of Rule 40, FRAP; The Covid-19 pandemic; its impact on not only access to legal services at Petitioner's ADC unit of confinement, but too, postal services; and as well, other governmental administrative influences and intrusions on postal services that affected to delay those services.

On receipt of denial by that Court of his initial application for certificate of appealability and motion to proceed in forma pauperis (Add. @ A3), the Clerk of that Court as well informed Petitioner by letter therewith of the mandatory time frames imposed by Rule 40, FRCP in which to Petition for Re-Hearing, includes the strictly enforced fourteen (14) days period for filing with no grace period for mailing. Add. @ A2. Petitioner had already experienced delay in communication through the postal service with the 8th Circuit that had resulted in his filing multiple motions for leave to proceed in forma pauperis (On 12/17/2020 and again on 01/07/2000) because he did not receive notice of receipt of the first. Add. @ A4-5. A delay Petitioner attributes to both the pandemic as well as other noted governmental intrusions on postal services. Too, Petitioner was presented with the fact that the pandemic had also adversely restricted access to his ADC unit legal services, including typing and copying.