

ORIGINAL

No: 21-7691

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

Larry Fuller — PETITIONER (Your

vs.

People of the State of Colorado — RESPONDENT(S) ON

PETITION FOR A WRIT OF CERTIORARI TO

COLORADO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Larry Fuller D.O.C. No.54946 A.V.C.F.
12750 Highway 96 @ Lane 13
Ordway, CO. 81034 (No Phone)

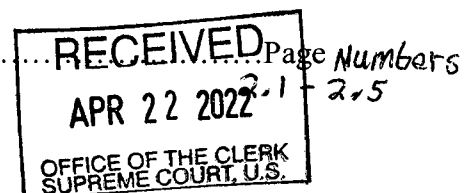
QUESTION(S) PRESENTED

- 1) Did the lower courts err denying Fuller an Evidentiary Hearing to hear and rule on the merits of his claims, violating his Due Process Constitutional rights? Resulting in a Fundamental Miscarriage of Justice.
- 2) Did the court err by not granting Fuller his motion for Justifiable Excuse/Excusable Neglect Exception to the time limitations set by § 16-5-402(1) C.R.S. violating his Due Process Constitutional Rights?
- 3) Did the lower courts err by not granting Fuller Counsel or Alternate Defense Counsel for his post-conviction defense, violating his Due Process Constitutional rights?
- 4) Did the lower courts err by not granting Fuller an Extended Proportionality review, nor even acknowledging it, and ruling on the merits of his claims presented in it, **especially as a nonviolent defendant**, violating his Due Process Constitutional Rights'?
- 5) Did the District trial court committed error and if Plain error?, by committing Ex parte Communication with the jury and witness/jury tampering, violating Fuller's Right to a Fair Trial and Impartial Jury Constitutional rights? Resulting in a Fundamental Miscarriage of Justice.

LIST OF PARTIES [X] All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED.....



OPINIONS BELOW.....	Page 3.
JURISDICTION.....	Page 3.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	Page 4.
STATEMENT OF THE CASE.....	Page 5-6.
REASONS FOR GRANTING THE WRIT.....	Page 6-21.
CONCLUSION.....	Page 21.

INDEX TO APPENDICES

APPENDIX A

Decision of the State Court of Appeals (Order Affirmed) Case No: 2019CA0569 Date April-29th-2021.

APPENDIX B

Decision of State Trial Court (denial of 35(c) Case No: 08CR1227 Date Feb-14th-2019.

APPENDIX C

Decision of the State Supreme Court for the Tenth Circuit (denial of Certiorari) Case No: 2021SC551 Date Jan-18th-2022.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
STATUTES AND RULES	2.1 - 2.4
OTHER	2.5

Table of Authorities cited

Cases	Pages Number
People v. Bergerd, 223 P.3d 686-696-97 (Colo. 2010)	6.
Haines v. Kerner, 404 U.S. 519, 520-21 (1972)	6, 14.
U.S. v. Thomas, 221 F.3d 430, 438, (3rd Cir. 2000)	6.
Owens v. U.S., 483 F.3d 48, 63 (1st Cir. 2007)	6, 18.
Martinez v. Ryan, 566 U.S. 1 & 132 S.Ct. 1309 1377 (2012)	6, 8, 15, 18.
U.S. v. Mosquera, 845 F.2d 1122, 1124-25 (1st Cir. 1988)	6.
People v. Rodriguez, 914 P.2d 230, 253 (Colo. 1996)	6, 7.
People v. Hansen, 972 P.2d 283 (Colo. App. 1998)	7.
Edwards v. People, 129 P.3d 977, 982 (Colo. 2006)	7.
People v. Schneider, 25 P.3d 755, 760, (Colo. 2001)	7.
People v. Long, 126 P.3d 284 (Colo. App. 2005).	7.
People v. Lacallo, 2014 COA 78	8, 9.
People ex rel T.B., 452 P.3d 36 2016 Colo.App. LEXIS 1834 2016 COA. 151 M 9.	
Mc Coy ¶¶ 5-36	9.
People v. Wylie, 260 P.3d 57, 60 (Colo. App. 2010)	9.
People v. Miller, 113 P.3d 743, 749-50 (Colo. 2005)	9.
People v. Benavidez, 222 P.3d 391, 393 (Colo. App. 2009)	9.
U.S. v. Garza-Lopez, 410 F.3d 268, 273-74 (5th Cir. 2005)	9.
Wend v. People, 235 P.3d 1089	9.
Whittle v. State, 77 a.3d 239, 243, (Del. 2013)	9.
U.S. v. Young, 470 U.S. 115, 105 S.Ct 1038, 84 L.Ed 2d 1 (1985)	9.
Wilson, 743 P.2d at 419-20	9.
People v. Abad, 962 P.2d 290 (Colo. 1997)	9.
People v. White, 981 P.2d 624 (Colo. App. 1998)	9.
Harris v. Derobertis, 932 F.2d 619 (7th Cir. 1991)	10.

Table of Authorities cited, continued.....

Cases	Pages Number
Dunn v. Blumstein, 405 U.S. 330 (1972) (U.S.S.C.)	10.
Graham v. Richardson, 403 U.S. 365 (1971); 7250 Corp., 799 P.2d 2922.	10.
Arteaga-Lansaw v. People, 159 P.3d 107, 110 (Colo. 2007)	10.
Sanchez v. People, 325 P.3d 553, 2014 CO 29 119	10.
Byrd, 209 F.3d at 535	10.
U.S. v. Scull, 321 F.3d 1270, 7277 (10 th Cir. 2003)	10.
U.S. v. Dutkel, 192 F.3d 893, 897 (9 th Cir. 1999)	10.
Havenor v. State, 125 Wis. 444, 104 N.W. 116	10.
People v. Wiedemer, 852 P.2d 429, 440 n.15 (Colo. 1993)	10, 18.
Groppi v. Wisconsin, 400 U.S. 505 91 S.Ct. 490, 27 L.Ed 2d 571	10.
Brisbin v. Schauer, 176 Colo. 550, 492, P.2d 835 (1971)	10.
Wharton v. People, 104 Colo. 260, 90 P. (2d) 615	10.
State v. Robinson, 246 Wash. (2d) 909, 167 P.2d 986	12.
Jones v. State, 88 OKla. Crim. 243, 202 P.2d 228	12.
Wilson v. People, 743 P.2d 415 (Colo. 1987)	12.
Oaks v. People, 150 Colo. 64, 68, 371 P.2d 443, 446-47 (1962)	12.
Harris v. People, 888 P.2d 259 (Colo. 1995).	12.
Bergerv. U.S., 295 U.S. 78, 88, 79 L. Ed 1314, 55 S.Ct. 629 (1935)	12.
U.S. v. Orozco, 916 F.3d 919, 2019 U.S. App. LEXIS 5580 (10 th Cir.)	12.
Merritt v. Hunter, CA. Kansas 170 F.2d 739	12.
Napue v. Illinois, 360 U.S. 264 79 S.Ct. 1173, 3 L. Ed 2d 1217	12.
House v. Bell, 547 U.S. 518, 126 S. Ct. 2064 2076, 165 L. Ed 2d 1 (2006)	12, 13.
Schlup v. DeLo, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L. Ed 2d 808 (1995)	13.
Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444 20 L. Ed 2d 491 (1968)	13.
Betts v. Litscher, 241, F.3d 594, 596 (7 th Cir. 2001).	14.
U.S. v. Tweet, 550 F.2d 300 (1977)	15.

Table of Authorities Cited, continued...

Cases	Pages Number
STRICTLAND v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	15, & 16.
Harris v. Wallace, 984 F.3d 641 (8th Cir. 2021)	15.
Coleman, 501 U.S. at 750	15.
Wooten v. Norris, 578 F.3d 767 778 (8th Cir. 2009)	15.
U.S. v. O'Brien, 972 F.2d 12, 14 (1st Cir. 1992)	16.
Remmer, Id at 229-30	16.
Keeney v. Tamayo-Reyes, 504 U.S. 1, 11, 12, 112 S.Ct. 1715, 118 L.Ed.2d 3189 (1992)	16.
Ryna-Abarca, v. People, 2017 CO 15, 47. 390 P.3d 816, 823,	16.
Friend v. People, 2008 CO 90 S. Ct. Colo.	16.
Wells-yates v. People, 2019 CO 90 M	17.
People v. Tran, 2020 Colo. App. LEXIS 1188	17.
People v. Mershon, 874 P. 2d 1025	17.
Porcuro v. U.S., 784 F. 2d 38, 40 (1st Cir. 1986)	17.
U.S. v. Candelario-Santana, 834 F.3d 8	17.
U.S. v. Laureano-Perez, 797 F.3d 45, 46 (1st Cir. 2015)	17.
Waller v. Georgia, 467 U.S. 39, 46 n 4, 104 S.Ct. 2210, 81 L.Ed 2d 31 (1984)	17.
Estes v. Texas, 381 U.S. 532, 588, 85 S.Ct. 1628, 14 L.Ed 2d 543 (1965)	17.
U.S. v. Negrón-Sostre, 790 F. 3d 295, 30 (1st Cir. 2015)	17, 18.
Neder v. U.S., 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed 2d 35 (1999)	18
Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3108, 92 L. Ed 2d 460 (1986)	18.
Close v. People, 180 P.3d Id at 1019-20	18.
People v. Chavez, 442 P.3d 843, 2019 Colo. LEXIS 519 CO 59	18.
Halbert v. Michigan, 545 U.S. 605	18.
Calderon v. Thompson, 523 U.S. 538, 559, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)	18.
McCleskey v. Zant, 499 U.S. 467, 494, 111 S. Ct. 1454, 113 L. Ed.2d 517 (1991)	18.
Jeremias v. State, 412 P.3d 43, 49 (Nev. 2018)	18.

Table of Authorities Cited, continued

Cases	Pages Number
People v. Hubbard, 184 Colo. 243, 247, 519 P.2d 945, 947 (1974)	19.
People v. Germany, 674 P.2d 345, 350 (Colo. 1983)	19.
Taylor v. People, 155 Colo. 15, 17, 392 P.2d 294, 295 (1964)	19.
Jackson v. Shanks, 143 F.3d 1313, 1317 (10 th Cir. 1998).	19.
Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284, 1969 U.S. LEXIS 1435 (1969)	20.
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 1967 U.S. LEXIS 2198, 24 A.L.R. 3d 1065 (1967)	20.
Sharrow v. People, 438 P.3d 730, 2019 Colo LEXIS 263, 2019 CO 25, 2019 WL 1510448	20.
GriFFin v. ILLINOIS, 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed. 891 (1956)	20.
Gardner v. California, 393 U.S. 367 (1969).	20.
CF. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	20.

Statutes and Rules	Page Number
28 U.S.C. § 1257 (a)	3, 6.
§ 16-5-402 (1) C.R.S. (Colorado Revised Statute)	5, 6, 7, 8, 9, 20.
C.A.R. 51.1 (a) (Court Appellate Rule 51.1(a))	6.
Colorado Rules of Criminal Procedure Postconviction 35(c)	5, 6, 9, 13, 14, 18, 19, 16.
C.R.S. (Colorado Revised Statute) 16-5-402	9.
C.R.S. (Colorado Revised Statute) 18-1-410	9, 19.
Colo. R. 52(b) (Colorado Rule 52(b))	8.
(Section) § 18-18-405 C.R.S. (Colorado Revised Statutes)	16.
§ 18-18-407 (1)(F) C.R.S. (Colorado Revised Statutes)	16.
§ 18-2-201 (1) C.R.S. (Colorado Revised Statutes)	16.
§ 18-18-405(1)(2)(a)(1)(B) C.R.S. (Colo. Revised Statutes)	17.

Table of Authorities cited, continued-----

STATUTES and Rules	Pages Number
Fed. R. Crim. P. (Federal Rules of Criminal Procedure) 32 (a)(3)(D)	17.
Habeas Corpus 28 U.S.C. § 2254	5, 15, 16, 17.
Habeas Corpus 28 U.S.C. § 2255	17, 18.
Colorado Rules of Criminal Procedure Post Conviction 35(b)	19.
Supreme Court Rule 29 I	21.
Other	Pages Number
ABA (American Bar Association) standards For criminal Justice 22-6.2 (2d ed. 1986) (b)(i)(ii)	7.
U.S. Constitutional Amendment XIV	10, 11, 13.
Colorado Constitution Article II Section 25	11.
U.S. CONSTITUTION Amendment V	11.
U.S. Constitution Amendment VI	11, 14, 17.
Colorado Constitution Article II §§ 16, 23.	11.
U.S. Constitution Amendment VIII	16, 17.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5: **No person shall be held** to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb**; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**;

Amendment 6: **In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and **to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.**

Amendment 8: Bail—Punishment. Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted.**

Amendment 14: Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

STATEMENT OF THE CASE

On March-11th-09, by jury, Fuller was convicted of a F2 possession with intent, M1 Dangerous weapon>gravity knife. On June -11th-2009, Fuller was convicted by the trial court Judge (not the jury) as a Habitual offender (**Non Violent**), with **NO VIOLENT priors**; and as well sentenced on June -11th-2009 to a term of 96 years in the Department of Corrections with a term of 5 years mandatory parole.

Fuller's Direct Appeal. Case No: 2009CA1578 in the Colorado Court of Appeals resulted: Judgment and Sentence Affirmed on Nov-23-2011. Fuller then filed an initial post-conviction 35 (c) Motion, (Weld County District Court), Case No: 2008CR1227 (denied); then appealed the decision to the Court of Appeals, Case No: 13CA1578. On Nov-26-2014 the Judgment Order was Affirmed and Case Remanded with Directions. Fuller then appealed to the Federal District Court, 10th circuit, Case No: 17-1063 (cert. denied), and then appealed to the U.S. Supreme Court, Case No: USA17-1063, which was denied (for being 2 days late) receiving his last action dated Mar-13-2018 and post marked on March-13-2018.

Note also: Between this time Fuller did in fact as well file a Habeas Corpus 2254 Case No: 16-cv-00891 On Date: March-15th-2016 to the United States District Court for the District of Colorado (10th Circuit) and filed a Motion To Amend Pleading (to this Habeas Corpus) On Date: April-29th-2016. This (Order on Application for Writ of Habeas Corpus) was denied on Date: Jan-18th-2017. And the (Order Denying Certificate of Appealability), from the U.S. Court of Appeals Tenth Circuit, was denied Dated: June-20th-2017.

2) Then not years as the lower courts state, but, (**only nine months later from denial of his appeal to the U.S. Supreme Court**) Fuller filed a (Motion for and Memorandum of Law in Support of Justifiable Excuse/Excusable Neglect Exception to the Time Limitations Set by § 16-5-402 (1) C.R.S.) on Dec-28th-2018, Case No: 08CR1227 and in junction with that, on Dec-30th-2018, Fuller filed a 2nd 35 (c) post-conviction Motion in the District Court of Weld County Colorado on, Case No: 08CR1227, on claims of new evidence and change in state case law, where on the 14th day of February, 2019 was denied. At every stage Fuller has requested ADC/Counsel numerous times and was denied every time, including; Fuller as well filing a Motion for Appointment of Counsel on Appeal on June-4th-2019, Case No: 19CA569, which was also denied. Fuller Appealed and filed a Motion for Limited Remand on Sept-16th-2019, Case No: 19CA569,

constitutional error in a post-conviction proceeding although the same issues could have been raised on appeal. In doing so, however, the court recognized the People may be entitled to raise the affirmative defense of abuse of process. The court cited with approval ABA Standards for Criminal Justice 22-6.2 (2d ed. 1986). In relevant part, that standard provides:

(b) Where an applicant raises in a subsequent application a factual or legal contention which the applicant did not use due diligence in

(i) raising in an earlier application, or,

(ii) having raised the contention in the trial court, failed to pursue the matter on appeal,

A court may deny relief on the ground of an abuse of process. Abuse of process should be an affirmative defense to be pleaded and proved by the state.

In this case, Nor Fuller's, the People did not plead or prove an abuse of process in the trial court. Hence, this affirmative defense is not available. See People v. Hansen, 972 P.2d 283 (Colo. App. 1998), Rodriguez, supra, reaffirmed that Crim. P. 35(c) is focused on allegations of constitutional error: "[P]ostconviction proceedings have a dual purpose: **to prevent constitutional injustice** and to bring finality to judgment." People v. Rodriguez, supra, 914 P.2d at 252. The Supreme court has repeated this proposition at least twice. Edwards v. People, 129 P.3d 977, 982 (Colo. 2006); People v. Schneider, 25 P.3d 755, 760 (Colo. 2001). Thus, as the purpose of postconviction proceedings is to correct constitutional error, we conclude a district court may deny a motion for postconviction relief without a hearing if the allegations do not raise a constitutional claim. People v. Long, 126 P.3d 284 (Colo. App. 2005). Fuller did indeed exercise due diligence as he proves by the record as expressed on pages 15-18 in his Opening Brief Case No: 19CA569 and pages 21-24 in his Reply Brief, same Case No: 19CA569 and in short in his petition here on pages 13-15, and Fuller as well raised several constitutional claims in his Issues/Claims, satisfying the standards for an evidentiary hearing, constitutional review and relief.

Fuller's Claims have great merits and should be heard in the interest of Justice and Comity.

Fundamental Miscarriage of Justice

It would be of great Constitutional Violation to not allow Fuller Due Process of having his claims heard and ruled upon.

Fuller claims are as follows:

Claim One: That the trial court (Denied defendant right to Due Process and Equal Protection),

Violating his Right to Fair Trial and Right to an Impartial Jury, when it erred by failing to conduct a hearing to investigate the Prosecutions Ex parte and/or the improper communications/information to jurors prior to their deliberations, (Discovered as New Evidence), and committed Abuse of Discretion and Structural Error.

Claim Two: That the trial court (Denied defendant right to Due Process and Equal Protection), Violating his Right to Fair Trial and Right to an Impartial Jury, when the Trial Court Judge engaged in Ex-parte and/or improper communications with Jurors (Discovered as New Evidence), and committed Structural Error and Abuse of Discretion.

Claim Three: That the trial court (Denied defendant right to Due Process and Equal Protection), Violating his Right to Fair Trial and Right to an Impartial Jury, when it erred by failing to conduct a hearing to address the Trial Courts Judge's improper Ex parte communications with Jurors. (Discovered as New Evidence) and committing Structural Error and Abuse of Discretion.

Claim Four: The Defendant did not receive his Right to an Impartial Jury, (Denying Defendants Right to Due Process and Equal Protection) when the trial court engaged in Jury Tampering/Witness Tampering (Discovered as New Evidence) and committed Plain Error and Abuse of Discretion.

Claim Five: That there has been a significant change in Colorado Law which applies to Defendants case, conviction and sentence and the Interest of Comity and Justice allowing for the retroactive application of the changed law vacating Fullers dangerous weapon conviction for a Gravity Knife.

Claim Six: The Defendant did not receive Effective Assistance of Counsel during the trial process, sentencing stages and to the transition to his direct appeal.

Claim Seven: The Defendant did not receive Effective Assistance of Direct Appellate Counsel.

Fuller contends his claims should be reviewed and that he be granted Justifiable excuse exception to the time limitations set by §16-5-402 (1) C.R.S. and consideration for a hearing granted under Martinez v. Ryan, 566 U.S. 1. Though Fullers Claims: (One through Four), Ex parte improper violations by the Prosecution and trial court Judge are due process violations and structural error, Fullers trial counsel could not raise these issues in trial since the existence of these issues/claims were not known by Fullers trial counsel until after Fullers trial and sentencing; even unpreserved should be subject to plain error review (also), under Colo. R.52 (b). See: People v. Lacallo, 2014

COA 78. Although there is disagreement about which standards of review should apply, People ex rel T.B., 452 P.3d 36 2016 Colo. App. LEXIS 1834, 2016 COA. 151 M (claim for plain error). There is persuasion by the majorities reasoning in McCoy, ¶¶ 5-36, and the reasoning of the special occurrences in Lacallo, ¶¶ 59-73. De novo Review can be applied under plain error. See People v. Wylie, 260 P.3d 57, 60 (Colo. App. 2010), because defendant did not raise this issue in the trial court, we review for plain error. People v. Miller, 113 P.3d 743, 749-50 (Colo. 2005). **Plain error addresses error that is obvious and substantial, and so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction.** Id. at 750. To the extent defendant's argument requires us to interpret statutory provisions, we do so de novo. People v. Benavidez, 222 P.3d 391, 393 (Colo. App. 2009). See also U.S. v. Garza-Lopez, 410 F.3d 268, 273-74 (5th Cir.2005).

Whether District Court committed error and if Plain error? Improper actions first falls on the trial court, Wend v. People, 235 P.3d 1089. Fuller's trial judge failed to review alleged prosecutorial misconduct and failed to intervene. (Nor did the trial court Judge address or answer to Fuller's trial court public defender's motion confronting the trial court Judge's own illegal Ex parte and Tampering actions). See: Whittle v. State, 77a.3d 239,243(Del. 2013). Secondly, where the trial court failed it is the appellate courts responsibility **to avoid a miscarriage of justice for a defendant even when defense counsel seriously lapses at trial**, see U.S. v. Young, 470U.S. 1, 15, 105 S. Ct 1038, 84 [1098] L. Ed 2d 1(1985). **Ensuring fundamental fairness in trial is the beacon of plain error review.** Id.; Wilson, 743 P.2d at 419-20.

In reference to Colorado's Justifiable excuse exception to the time limitations set by §16-5-402 (1) C.R.S., 35(c) post-conviction C.R.S. 16-5-402 and C.R.S. 18-1-410, the constitutionality of the concepts of the Colorado courts application of them needs this courts review and guidance for Colorado courts to use its application constitutionally and fairly, because with Colorado's justifiable excuse and excusable neglect, neither the statute nor the case law provides any meaningful definition of either term under rules of statutory construction. Each must mean something different from the other because legislatures do not use superfluous words. Case law puts the burden on the defendant to establish these factors and to allege facts in the motion that would carry the burden, see People v. Abad, 962 P.2d 290 (Colo.1997) and People v. White, 981 P.2d 624 (Colo.App.1998). the constitutionality of a statute may come into question if no defendant

Entitling Fuller to a hearing, See; People v. Wiedemer, 852 P.2d 424, 440 n. 15(Colo.1993). As the C.O.A. described on page 3-4 on their Affirmed Order. (Appendix A).

See the attachments proving alleged facts are true. These Four Attachments are: (1). Motion for Disclosure of Jurors' contact information, (two pages) dated 09-29-09, (2). Letter headed: Chambers District Court, by District court judge Marcelo A. Kopcow, to Jurors (one page) dated October-2nd-2009, (3). Response to Order Regarding Motion for Disclosure of Juror's Contact Information, (two Pages) dated 10-05-09 and (4). Order Regarding Motion for Disclosure of Juror's Contact Information and Issuance of Protective Order, (two pages), dated October-27th-2009.

In reference to Claims One through Four:

The 14th Amendment to the U.S. Constitution states that no state shall deny to any person within its jurisdiction the Equal Protection of the laws. The right to equal protection finds support in the Due Process Clause of the Colorado Constitution Article II Section 25 and U.S. Constitution Amendment V. (b). Where a jury trial is granted, the right to a fair and impartial jury is a constitutional right which can never be abrogated. Groppi v. Wisconsin, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed2d 571; U.S. Const., Amends VI, XIV; Colo. Const., Art II §§ 16, 23. See Brisbin v. Schaur, 176 Colo. 550, 492, P.2d 835 (1971).

The right to a fair trial by jury guaranteed by the U.S. Const., Amends VI XIV and Article II, Section 23 of the Colo. Constitution: "The right to trial by jury shall remain inviolate in criminal cases." This right contemplates a fair and impartial jury to hear the case; such is the mandate of Article II, Section 16, of the Colo. Constitution: "That in criminal prosecutions the accused shall have the right to a trial by an impartial jury." Wharton v. People, 104 Colo. 260, 90 P.(2d) 615.

In above mentioned attachment (3). Response to Order Regarding Motion for Disclosure of Juror's Contact Information, (two Pages) dated 10-05-09, filed by Fuller's trial Public defender "in response to the trial Judges Ex parte letters to every member of the jury" she objected to the Court sending letters to Jurors regarding defense counsel's intention to interview jurors (in short) stating:(1). Mr. Fuller sought Disclosure of the juror list in order **to interview jurors and determine whether or not he had been convicted on any improper basis.** (2). The Court disclosed the jury list to counsel. In the Courts order it indicated a letter was being sent to each juror, **(after the fact the letters had already been sent).** (3). **Counsel was not given the opportunity to review the letter and note any objections.** No hearing was set to determine

whether or not the letter should have been sent to jurors and for Counsel to express an objection prior to letters being mailed. **Counsel is not aware of any authority which grants the court authority to send letters to jurors regarding being contacted concerning their jury service.**

(4). **Mr. Fuller's right to determine if his conviction is proper has been chilled by the Court's communication with jurors.** There is no authority to preclude counsel from contacting jurors before Oct-23- 2009, however **counsel needs to conform behavior with the court's correspondence in order to avoid any appearance of impropriety** in the eyes of the jurors in light of the letter the Court sent.

***A jury is no longer impartial which has been misled by inadmissible evidence.** State v. Robinson, 246 Wash. (2d) 909, 167 P (2d) 986; Jones v. State, 88 Okla. Crim. 243, 202 P. (2d) 228. **Encompassing the constitutional basis for this prosecutorial duty [the duty to refrain from improper methods calculated to produce a wrong conviction as to use every legitimate means to bring about a just one],** Wilson v. People, 743 P.2d 415 (Colo.1987), Oaks v. People, 150 Colo. 64, 68, 371 P.2d 443, 446-47(1962). Among the rights guaranteed to the people of this state, none is more sacred than that of trial by jury. Such right comprehends **a fair verdict, free from the influence of poison of evidence which should never have been admitted**, and the admission of which arouses passions and prejudices which tend to destroy the fairness and impartiality of the jury. "Prosecutorial misconduct that misleads a jury can warrant reversal of a conviction," Harris v. People, 888 P.2d 259(Colo.1995). *If the jury received this improper information from anyone working for with or through the prosecution, their actions amount to prosecutorial misconduct, which absolutely requires the court to conduct a hearing to investigate such conduct. See: Berger v. U.S., 295 U.S. 78, 88, 79 L. Ed 1314, 55 S. Ct. 629(1935), A new trial was ordered. Also see: United States v. Orozco, 916 F.3d 919, 2019 U.S. App. LEXIS 5580(10th Cir.). *Where a court failed to observe safe guards, it amounts to denial of due process of law, court is deprived of Juris. Merritt v. Hunter, C.A. Kansas 170 F.2d 739. The standard applied in such cases has been "whether the testimony may have had an effect on the outcome of the trial. Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217.*If the trial court (rightly so) would have granted a hearing...Fuller's defense counsel would have had the opportunity to prove that the Leaked Ex parte /Improper information to the jury prior to their deliberations "may have had an effect on the outcome of the trial." Fuller claims that the **"interest of comity and justice"** would best be served if these claims were reviewed by this court, see: House v. Bell, 547 U.S. 518,126 S. Ct. 2064,

2076,165 L. Ed.2d 1 (2006). The U.S. Supreme Court held that: “In an effort to “balance the social interest in finality, comity and conservation of sacred judicial resources with the individual interest in justice that arises in the extraordinary case, Schlup v. Delo, 513 U.S. 298, 324 115 S. Ct. 851, 130 L. Ed. 2d 808(1995). **The Court has recognized a miscarriage of justice exception.** In appropriate cases, the court has said,” **the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration.** Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968). The 14th Amendment requires that any empaneled jury in a state case must be impartial.

As the Court of Appeals describes on the applicability of exception to the time bar, Factors relevant to such determination are: **(1).** Fuller emphasizes his inability as not a trained attorney prevented adequate challenge to the prior convictions. **(2).** Fuller had reason to question the constitutionality of his convictions, investigated their validity and took advantages of avenues of relief that were available (to the best of his ability) emphasizing as a pro se defendant untrained in the Law and indigent. Fuller offers the following reasons for not filing these claims as an Attorney with a Law degree could have. And it should not prevent him from Constitutional relief from Constitutional Violations used to wrongfully convict him. Fuller explains and emphasizes the vital disagreement the court has between Fuller receiving Justice and relief for his Meritous claims is “Filing out of time”, which is “the very factor and exact reason for Justifiable Excuse/Excusable Neglect exception to the time limitations”. As a pro se defendant. **(3).** The Courts’ in its denials of Fuller’s New Evidence claims never completely described every element of the procedural defaults to Fuller except that they (New Evidence claims) could not be brought up for the first time in his Appeal/Opening Brief when not raised in his initial 35(c) to the District Court. The Courts only assessed that very rule but never at any stage described that Fuller can now (then) file as many or other 35(c) motions at the same time his initial one is being heard. The Courts kept asserting He can’t file New Evidence now, that it should have been brought initially and contending “Falsely” that Fuller had access to all his transcripts and could have raised these claims in his initial 35(c); at the same time the Courts emphasized the records transcribed are in each jurisdiction in each stage as his filed motions moved forward while exclaiming caution of collateral attack. Only just now **for the First Time** in all of Fuller’s filed motions the Court of Appeals in their recent denial (Order Affirmed) dated April-29th-2021 (Appendix A) they explained/described that I could have filed these claims in another 35(c) while the initial one was already in Appeals or being heard.

Fuller feels he was misled by the courts previously. Intentionally or not, Fuller positively would have filed another separate 35(c) motion immediately had he known he could “**Obviously**” since **for fact Fuller raised these New Evidence claims as soon as he discovered them**; after finally receiving his transcripts for the first time to personally view, after being denied numerous (8 times) motioning for his transcripts before filing his 35(c) which **Fuller proved by pinpointing in the record, in his Reply Brief on page 21 under Due diligence and pages 13-15 here.** Once discovered, Fuller raised these violations/claims in every motion forward totaling 7 motions through each stage and only in his 8th motion at the last stage (Fullers Reply Brief) of his 2nd 35(c) process did the Court of Appeals finally describe completely for the first time “that multiple or more than one 35 (c) can be filed by Fuller. Yet instead Fuller is being punished, not allowed Due Process and being docked for not being a trained attorney with a law degree. This “runaround” faulting Fuller unjustly is also **a miscarriage of justice**, violating his U.S. Constitutional VI Amendment rights and reflects the case of a 7th circuit defendant, where the state “gave him the runaround,” then used his ensuing procedural short comings to block all avenues of relief. When defendants are entitled to counsel on direct appeal so that they will not make the same kind of procedural errors that unrepresented defendants tend to commit. **The constitution does not permit a state to ensnare an unrepresented defendant in his own errors and thus foreclose access to counsel, Betts v. Litscher, 241, F.3d 594, 596(7th Cir.2001).**

Fuller’s Direct Appellate Attorney was ineffective as was his trial Public Defender.

This injustice is compounded by the following facts. (1). Fuller always emphasized in every motion for the courts to read his motions liberally (as a pro se defendant) under Haines V. Kerner, 404 U.S. 519, 520-21 (1972). (2). Fuller requested by motion and/or in each motion numerous times for each court to please assign him Counsel or ADC Counsel as to which “he was denied every time”. Yet then faulted for his legal insufficiencies. (3). Because of the fact Fuller is very indigent, (having to file for request for counsel) and every motion subpar, he again is being punished, not allowed Due Process and docked for being poor. If Fuller had money to retain an actual post-conviction Attorney, it would be “greatly” likely all his motions and claims would have been done correctly, timely, and sufficiently. (4). Fuller’s trial counsel was ineffective for not further pursuing the violations of Leaks to the Jury possibly by the prosecution, Ex parte Communications by the trial court Judge/Witness tampering or as claims of new evidence. Instead she only did the bare minimum of (covering for herself) and failed to inform Fuller at any point of

these Violations of (New Evidence Issues) described in Fuller's Claim Six: (5). Claim Seven: Fuller's Direct Appellate Counsel was ineffective for also not raising Fuller's (New Evidence Claims) and for not ever informing Fuller of these violations of Leaks to the Jury possibly by the prosecution, Ex parte Communications by the trial court Judge/Witness tampering described in Fuller's (New Evidence Claims One through Four) and for not filing ineffective assistance of counsel on Fuller's trial counsel. As with the courts not completely describing all elements of their denials, Fuller's Trial Counsel and Direct Appellate Counsel were silent on the issues never informing him. Silence can only be equated with fraud where there is a legal and moral duty to speak where an inquiry left unanswered would be intentionally misleading. See: U.S. v. Tweet, 550 F.2d 300(1977). Fuller satisfies both prongs of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct 2052, 80 L Ed.2d 674(1984). Fuller should be granted a hearing and relief under Martinez v. Ryan, U.S. 132 S. Ct 1309, 1377 (2012). Where claims under state law of ineffective assistance of trial counsel must be raised in an initial review collateral proceeding, a procedural default will not bar a Federal Habeas court from hearing ineffective assistance claims if in the initial review collateral proceeding there was no counsel or counsel in that proceeding was ineffective, Martinez v. Ryan, 566 U.S. 1. Fuller also seeks relief under recent court ruling Harris v. Wallace, 984 F.3d 641 (8th Cir. 2021). Which Excused Procedural Default by state prisoner. The U.S. Court of Appeals for the 8th circuit ruled the Martinez Exception should have allowed a procedurally defaulted claim (federal habeas) of IACP to be heard by the U.S. District Court for the Eastern District of Missouri, remanding for a hearing on that claim, with consideration of Coleman, 501 U.S. at 750. See: Wooten v. Norris, 578 F.3d 767 778 (8th Cir. 2009) (emphasis added). Martinez created a narrow exception to that rule where: (1). the claim of ineffective assistance of trial counsel was a substantial claim, (2). the "cause" consisted of there being no counsel or only ineffective counsel during the State Collateral Review Proceeding and (3). The State Collateral Review Proceeding was the initial review proceeding with respect to the ineffective assistance of trial counsel claim. In Harris the Federal district Court was silent on his matter. Harris filed Post conviction ineffective assistance of counsel, (denied). Harris appealed Post conviction counsel was ineffective for not raising his Plea counsel was ineffective in advice. The Court of Appeals found he procedurally defaulted because it wasn't raised in his Post-conviction motion, (denied). He filed pro se Habeas Petition under 28 U.S.C. § 2254. The District Court denied petition. He appealed and the 8th circuit granted a Certificate of Appeal ability (COA)

on the issue. Fuller case here mirrors Harris's in many ways. Fuller also on Date: March-15th-2016 filed a pro se Habeas Petition under U.S.C. § 2254 reiterating his original IAC claim. Fuller shows "Cause and Prejudice and his claim has "more" than some merit satisfying both prongs under Strickland v. Washington, 466 U.S. 668 (1984). A trial court is obligated to "conduct a sufficient inquiry to determine whether the communication was harmless." Id. (quoting United States v. O'Brien, 972 F.2d 12, 14 (1st Cir. 1992). The Supreme Court held that Remmer was not entitled to an automatic reversal, but rather to a hearing before the trial court, and that the jury tampering would be presumed to be prejudicial. Remmer, Id. at 229-30.

Fuller claims that a fundamental miscarriage of justice will result if his claims are procedurally barred from review. In Perkins, the U.S. Supreme Court held that: "We have applied the miscarriage of justice exception to overcome various procedural defaults. These include...Failure to develop facts in state court, see Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-12, 112 S. Ct. 1715, 118 L.Ed.2d 3189(1992), and failure to observe state procedural rules...Id. At 1931.

Fuller also requested that his Claim Five as a second offense in violation of Section § 18-18-405 C.R.S. 2008 be vacated as Special Offender Deadly Weapon [SE] in violation of §18-18-407 (1) (F) C.R.S. (2008). Due to the change in Colorado law, gravity knives are no longer considered deadly weapons. Fuller as an enhancer, has a prior F5 conspiracy to possess, in violation of § 18-2-201 (1) C.R.S. (1993). Even ameliorative, Fuller's Misdemeanor (1) dangerous weapon conviction in effect is detrimental as one of two blocks as the enhancer of a double jeopardy clause and effect doubling Fuller's sentence. As a lesser offense, a misdemeanor to Fuller's F (5) (1993) attempt to possess and present F (2) (2008) possession with intent conviction it is used in parallel as an enhancer effectively constituting for half (48 years) of Fuller's 96 year sentence. By this Enhancement Fuller's original Felony 3 was raised to an Felony 2 then he was charged and convicted as an Habitual Offender being sentenced to 96 years in prison as a **Nonviolent** offender. Fuller should be given relief of the new change in case law and the granting of his justifiable excuse/excusable neglect under Ryna-Abarca, v. People, 2017 CO 15 47. 390 P.3d 816 823, unpreserved double jeopardy is reviewable by Appellate Courts for plain error. See also: Friend v. People, 2008 CO 90 S. Ct. Colo. *Violating U.S. const. Amend. VIII, Cruel & unusual Punishment.* Fuller also request that his (Motion for Limited Remand), (**Requesting an Abbreviated Proportionally Review**), he initially filed with this 35(c) dated September-16-2019 be heard and

ruled on since to date it has been ignored by the COA. (**See Attached**). Requesting an Abbreviated Proportionally Review, in which Fuller should be considered for as a **Non Violent defendant**. With **no prior violence of any kind**. Fuller adds in light of this request recent relevant case law as follows: Wells-Yates v. People, 2019 CO 90 M and People v. Tran, 2020 Colo. App LEXIS 1188 that burglary should no longer be considered per se, Grave and Serious. Also see: People v. Mershon, 874 P2d 1025, Barbaric sentences-challenging constitutionality of life sentences imposed under Habitual. Fuller also makes the correction he was convicted of Possession with Intent, § 18-18-405(1), (2)(a)(1)(B), C.R.S. [F2]. Not for Manufacturing, incorrectly stated on said "Limited Remand". *His 96 yr Sentence (Nonviolent) violates U.S. Const. Amend VIII cruel & unusual punishment.* Generally, when a court disposes of a § 2255 petition without a hearing, allegations must be accepted as true except to the extent they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact. Porcaro v. United States, 784 F.2d 38, 40 (1st Cir. 1986), cert. denied, 479 U.S. 916, 107 S. Ct. 320, 93 L. Ed. 2d 293 (1986). **Fuller's allegations are not contradicted by the record**. Nor are Fuller's allegations inherently incredible or - considering Fuller's pro se status - unduly conclusory. **In fact Fullers allegations are 100% proven by the record to be true, as seen in his attached exhibits.**

Consequently, the order denying petitioner's motion for appropriate relief must be vacated and the case remanded for further proceedings. On remand, the court should do either of the following. First, the court might conduct the necessary proceedings to determine whether Fuller allegations (Claims One through Four) have merit and determine whether the challenged portion affected the sentencing decision (**may have affected the outcome of the trial**) See Fed. R. Crim. P. 32(c)(3)(D) (if defendant alleges a factual inaccuracy, court shall either make a finding as to the allegation or a determination that no finding is necessary. See: U. S. v. Candelario-Santana, 834 F.3d 8 This court reviews de novo whether a district court violated a defendant's Sixth Amendment right to a public trial. U. S. v. Laureano-Pérez, 797 F.3d 45, 46 (1st Cir. 2015). The Sixth Amendment affords defendants the right to a public trial. U.S. Const. amend. VI. This constitutional guarantee "embodies a view," **that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.**" Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring)). Denial of a public trial constitutes structural error, U. S. v. Negrón-Sostre, 790 F.3d

295, 301 (1st Cir. 2015), **rendering the entire trial process "fundamentally unfair,"** Neder v. U. S., 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). **Given the magnitude of this error, a defendant need not demonstrate prejudice.** Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007). "The mere demonstration that [a defendant's] right to a public trial was violated entitles a petitioner to relief." Id. (citation and internal quotation marks omitted).

The courts have thus far not allowed Fuller meaningful opportunity to attack the constitutionality of his conviction considering these claims presented here. Fuller did allege facts which if true, would entitle him to a hearing, relief and from the time bar. Fuller supports his arguments with numerous citations providing extensive evidentiary support for his allegations, with Documented Filed Motions of the events outlining his claims/issues as required. See: Close v. People, 180 P.3d Id. At 1019-20, citing, People v. Wiedemer, 852 P.2d 424, 441-42 (Colo.1993), People v. Chavez, 442 P.3d 843, 2019 Colo. LEXIS 519, 2019 Co 59, also Maetinez v. Ryan, 566 U.S. 1 & Halbert v. Michigan, 545 U.S. 605. Fuller's Constitutional Due Process Rights were violated by the courts not giving him essential fairness of the state ordered proceedings by not allowing these claims/issues to be brought and heard by any court violating his Constitutional Rights. Instead denying his every motion/s under fault of Fuller's indigent and pro se inability to act as a trained attorney versed in criminal law. The courts may not act as Fuller's advocate, but neither are they supposed to take advantage of his inabilities or academic disabilities; while at the same time, every time, denying him post-conviction (ADC) Alternate Defense Counsel or any counsel to assist him after he filed numerous motions requesting counsel, emphasizing his need for counsel due to his legal inabilities.

Criminal cases in other jurisdictions have defined the phrase (Fundamental Miscarriage of Justice) narrowly. See, e.g., Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) "The Supreme Court has defined the term 'miscarriage of justice' as encompassing only those 'extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime.'" (quoting McCleskey v. Zant, 499 U.S. 467, 494, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991)); Jeremias v. State, 412 P.3d 43, 49 (Nev. 2018) (miscarriage of justice "defined as a 'grossly unfair' outcome"). The relief that is afforded by Colo. R. Crim. P. 35(c) was designed to be substantially similar to the relief that is available under 28 U.S.C.S. § 2255. The U.S. Supreme Court has construed § 2255 to allow collateral attacks on convictions only when

there has been a fundamental defect constituting a miscarriage of justice, such as when convictions or sentences have been entered without jurisdiction or when there are claims of constitutional error. Part of the Court's analysis focused on how the common law writ of coram nobis has been similarly construed to limit its application to fundamental errors rendering the proceedings invalid. The state supreme court has indicated that Colo. R. Crim. P. 35(b), the predecessor to today's Rule 35(c), fulfilled the purposes of the obsolete writ of coram nobis by providing a postconviction remedy to prisoners in custody for sentences that were imposed in violation of the prisoner's constitutional rights. But this also bolted the door to Fuller having Due process right to have his Claim/s of his Constitutional Rights violated, "heard or addressed" since under Colorado's Habitual sentencing laws, Fuller is not eligible for relief under Colo. R. Crim. P. 35(b), further obstructing Fuller access to Due Process. Since Fuller did indeed present his claims of constitutional error in his Rule 35 (c) Motion and the lower courts did not address them at all on their merits. Cases interpreting Crim. P. 35(c) have indicated it was promulgated for the express purpose of allowing defendants to raise constitutional claims in postconviction proceedings. In People v. Hubbard, 184 Colo. 243, 247, 519 P.2d 945, 947 (1974), the supreme court stated: "Although Crim. P. 35(c) is primarily intended to provide a procedure which will permit judicial review of alleged constitutional infirmities in criminal proceedings, it is couched in language which recognizes that there must be some finality in the reviewing process." See also People v. Germany, 674 P.2d 345, 350 (Colo. 1983) (analyzing § 18-1-410, C.R.S. 2006, the statutory counterpart to Crim. P. 35(c); **"state's interest in finality is not a justification for permitting unconstitutional convictions to stand"**); Taylor v. People, 155 Colo. 15, 17, 392 P.2d 294, 295 (1964) (Crim. P. 35(c) "provides a convicted person with a means to attack any alleged violations of his alleged constitutional rights").

Federal courts "do not review issues that have been defaulted in state court on an independent and adequate state procedural ground, **"unless the default is excused through a showing of cause and actual prejudice or a fundamental miscarriage of justice."** Jackson v. Shanks, 143 F.3d 1313, 1317 (10th Cir. 1998). In a criminal case in which a defendant appellant alleges that it was prejudicial error to allow the jury to hear certain testimony, the reviewing court must first determine if it was error to allow the jury to hear this testimony, and if so, whether such error was prejudicial or harmless. In determining the latter point, a reviewing court must first read the entire record, disregarding the objectionable material. If the error alleged is constitutional in nature and if the court finds that there is overwhelming evidence of the defendant appellant's guilt, aside from

the disputed material, then it must hold that the error is not prejudicial but harmless beyond a reasonable doubt and affirm the judgment of the trial court. If the reviewing court cannot say that there was overwhelming evidence of the defendant's guilt, disregarding the controversial material, the error is prejudicial and not harmless and the court must reverse the judgment of the trial court. Harrington v. California, 395 US 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284, 1969 U.S. LEXIS 1435 (1969); Chapman v. California, 386 US 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 1967 U.S. LEXIS 2198, 24 A.L.R.3d 1065 (1967). In Fuller's Case here the Judge / trial court disregarded the above Standards "in total" refusing to have a hearing regarding Fuller's defense attorneys motions addressing the ex parte leak to the jury during their deliberations that Fuller had prior felony convictions; and to further violate Fuller's rights the trial Judge himself Committed illegal Ex parte communication with the jury (dissuading jurors) by writing a letter to every jury member which chilled jurors from talking to investigators. As described above on pages 11-12 and proven in the court documents attached, proves not only a travesty of justice and breakdown of due process rights but surly a miscarriage of justice.

Fuller is poor/indigent and could not afford post-conviction counsel being unable to act as a trained attorney to properly bring the constitutional violations committed upon him to light he motioned numerous times to the courts for ADC/Counsel and was denied every time...

Sharrow v. People, 438 P.3d 730, 2019 Colo. LEXIS 263, 2019 CO 25, 2019 WL 1510448

JUSTICE SAMOUR delivered the Opinion of the Court. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L. Ed. 891 (1956). See also, Gardner v. California, 393 U.S. 367 (1969). The rationale of Griffin covers the present case. Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. **They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs' altogether.** A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee, which is a denial of equal protection. See, Cf. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

Fuller ask this court to grant this petition allowing his issues outlined here and in his 35 (c), Opening brief and Reply Brief, **CaseNo.2019CA569** to be fairly heard, granting his Justifiable Excuse/Excusable neglect exception to the time limitations set by §16-5-402 (1) C.R.S./Motion and to grant Fuller his requested relief that an Evidentiary Hearing be held on his claims/issues

and that he be given an Abbreviated Proportionality Review as a Nonviolent defendant and/or that his sentence be vacated or that he be given a new trial and any relief this court deems fit And or in the event Fuller is allowed to proceed in this Supreme Court or Ruled remanded to the lower court Fuller again request that he be given an ADC/Attorney to help him since he is not trained in the law with limited ability and access to navigate the law.

CONCLUSION

Mr. Fuller respectfully request that the petition for writ of certiorari should be granted.

Respectfully submitted,
Date: April - 14th - 2022

Signed: Larry Fuller

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Larry E. Fuller
PETITIONER

VS

People of the State of Colorado
RESPONDENT(S)

PROOF OF SERVICE

I, Larry E. Fuller, do swear or declare that on this date, 04-14-22 as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Office of the Clerk

1 First Street NE

Supreme Court of the United States

Washington, D. C. 20543

(AND)

Attorney General of Colorado

1300 Broadway 10th floor

Denver, Colorado. 80203

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

Executed on April - 12th - 2022

Signature: _____

Petitioner: Larry Fuller