22-6199

No. 22-2360

ORIGINAL

SUPREME COURT OF THE UNITED STATES

IN RE CORNELL WHITE

Type: Petition

Prior History: On Petition For Extraordinary Writ Of Habeas Corpus To The Eighth Circuit Court Of Appeals

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

Counsel of Record

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Pro Se

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QUESTIONS PRESENTED

1. Can a federal district or appeals court deny habeas corpus relief without factual finding on the record, that a states asserted procedural default rule is firmly established and regularly followed?

2. Can this Court exercise it's appellate jurisdiction, when a three judge panel denied permission for filing second habeas petition where applicant shows substantial evidence to satisfy requirement of § 2244 (2) (B) (ii) ?

CASE AUTHORITY

OTHER AUTHORITY

LIST OF PARTIES

Pursuant To Rule 14.1 (b)

All parties appear in the caption of the case as shown on the cover

Petitioner respectfully prays that the Petition for an extraordinary writ of habeas corpus issue to review the judgment below.

OPINION BELOW

The Order of the United States Court of Appeals for the Eighth Circuit appears at Appendix A. to the petition and is unpublished.

JURISDICTION

The Eighth Circuit decided petitioner's case on September 25th 2006. Petitioner's motions for rehearing and certificate of appealability were denied without opinion.

The jurisdiction of the Court is invoked under **28 U.S.C. §§§ 1615 (a) 2241 (a)** and **2254 (a)**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment guarantees a criminal defendant a fair trial, the Sixth Amendment guarantees the effective assistance of counsel at trial and direct appeal as the Fourteenth Amendment guarantees that no person shall be

LIST OF PARTIES

OPINION BELOW

JURISDICTION

28 U.S.C. [illegible]

SEC 1915 (a) 2241 (a) 2254 (a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

FACTUAL QUESTIONS

1) Whether petitioner can be denied federal or state habeas corpus relief by repeated summary denials by both courts?
2) What constitutes clear and convincing evidence sufficient to overcome an erroneous procedural default?

STATEMENT OF THE CASE

1.) Petitioner Cornell (White) was indicted by grand jury in the circuit court of Clayton county, St. Louis Mo. for causing the deaths of Timothy and Johnny Bolden by shooting them. White proceeded trial August 18, 1998.

2.) September 18, 1998 the trial court sentenced White to two (2) life sentences for second degree murder, two (2) consecutive life sentences for armed criminal action.

3.) White's conviction and sentences were affirmed on direct appeal in **State v Cornell White,** 9 S.W.3d 643 (1999) Per Curiam order.

4.) Post-conviction counsel Ms. Paige Canfield prepared the first timely filed First Amended Motion to which she "physically" attached White's pro se amended motion containing (6) claims prepared by White himself. This motion is attached at **(App. Exh.P)**

5.) Post-conviction court on November 17 2000 denied both Canfield and White's amended motions with no responsive finding of fact and conclusions of law. This motion is attached at **(App. B1)**

6.) Second counsel entered appearance, and appealed the motion court's denial of Ms. Canfield and White's pro se amended motions. The appeals court in **Cornell White v State,** 57 S.W.3d 34-344 (2001) reversed and remanded White's (6) pro se claims back to 29.15 motion court for sufficient finding of fact and conclusions of law as required by rule 29.15 (j). This order is attached at **(App. C.)**

7.) On October 24 2001 the motion court again denied relief on the pro se claims, with repeated recital it was trial strategy counsel did not object or record refuted the allegations.

8.) Of state's elicitation and knowing use of perjured testimony. mis-representing facts stipulated too; arguing matters not in evidence; disparaging credibility of it's own witness; amending information creating fatal variance; shifting burden of proof in closing and rebuttal arguments. Trial and Appellate counsel were ineffective in failing to object at trial and appellate counsel failing to recognize and assert claims on direct appeal. Courts finding are attached at **(App. D.)**

9) On May 21 2002 Mr. Hoff filed the second denial of White's pro se claims, the appeals court rejected Hoff's filing under it's local rule 380, without consulting it's records to know this was a Supplemental Appeal, the court directed him to repeat the procedure previously done by Ms. Canfield this order is attached at **(App. A1)**

10.) Missouri Supreme Court rule 29.15 allow one timely 29.15 motion and local rule 380 contains no language prohibiting an attorney from filing his/her client's pro se filings. This rule is attached at **(App. F.)**

11.) Thereafter Mr. Hoff wrote stating; "I plan to prepare and file a brief containing whatever claims I think are meritorious and if your case winds in Federal court you argue you attempted to present your other issues

the court would not let you do so. this letter is attached at **(App. G.)**

12. Mr. Hoff wrote this letter breaking a promise he made not once but twice January 18 2001, February 12 2002. That he would file pro se claims with brief prepared by him. These letters are attached at **(App. Item C. Exh.M)**

13. White filed Motion to file Supplemental Brief Out of Time, asking the appeals court to dismiss counsel and allow White to proceed pro se with the filing of his pro se claims. The court remained silent on this motion attached at **(App. Item. P.)**

14. White timely filed his 2254 petition on April 1 2003 the magistrate Judge adopted the state appeals courts interpretation of asserted procedural bar Mo. local rule 380, the magistrate made no attempt to ascertain for himself the adequacy of this rule for a determination that it "was firmly established and regularly followed state practice."

The magistrate's findings in pertinent parts is attached at (App. Q.)

15. Eighth Circuit Appeals Court denied COA 2.16/2007 attached at (App. A2)

16. white returned to 29.15 motion court filing abandonment of counsel 11/26/2007 motion was denied no finding made this order is attached at **(App. four)**

17.) State habeas corpus was filed 9/9/2009 denied on finding. This order is attached at **(App. J.)**

18.) A habeas petition was file in Mississippi County, Southern District Appeals Court denied petition without findings. This order is attached at **(App.EE)**

19.) Returning to state appeals court filing recall of mandate 6/15/2015 no finding made. This order attached at **(App.Exh.TT)**

20.) Returning to eighth circuit application for permission filing in district court denied 11/30/2015, no findings made. This order attached at **(App. GG.)**

21.) State appeals court filing second recall of mandate denied 6/5/2017 no findings made order and motion attached at **(App. Exh.B2)**

22.) Eighth circuit filing application for permission of filing in district court denied 1/20/2017 no findings made. This order attached at **(App. Exh.AA)**

23.) White file state habeas petition in Missouri Supreme Court was denied 5/1/2018. This order is attached at **(App. RR)**

24.) White files 74.06 (b) (4) motion arguing appeals court order of May 21 2002 is void rule 380 does not bar counsel from pro se filings and rule is neither firmly established or regularly followed, motion was denied 1/23/2020 no findings made. This order and motion attached at **(App.Exh.S)**

25.) White files motion for Declaration of Counsel's right to file client's pro se briefs this motion is denied, with court stating court views motion as attempt at post-conviction relief. No where in this motion does ask

the court for relief from his judgment and sentence. This motion and court's order are attached at **(App. Exh.E)**

26.) White filed his final application in eighth circuit court of appeals asking permission to file second habeas petiton in district court this motion to was denied 8/2/2022 no comment was made even though in this motion White presents the court with citations to state cases where the eastern district appeals court has accepted pro se filing when one is represented by counsel. This order and motion is attached at **(App.BB)**

REASONS FOR GRANTING THE PETITION

1. THE PETITIONER SHOWS THIS PETITION IS IN AID OF THE COURT'S APPELLATE JURISDICTION BECAUSE THE THREE JUDGE PANEL OF THE EIGHTH CIRCUIT HAS MADE A DECISION TO DENY THE APPLICATION FOR LEAVE TO FILE A SECOND HABEAS PETITION. WHEN NO COURT STATE OR FEDERAL HAS SHOWN ON THE RECORD THE STATES ASSERTED PROCEDURAL RULE IS FIRMLY ESTABLISHED OR REGULARLY FOLLOWED STATE COURT PRACTICE.

The three judge panel has decided it need not answer whether state's rule 380 is well established and regularly followed as a procedural bar, before denying White the protections of the Fifth Sixth and Fourteenth Amendments Constitution.

This is an important question and appears to be one of "First Impression" White has found no case authority and should be addressed by the by Court under U.S.C. §2244 (b) **(App. Exh.BB)**

II. THE PETITION SHOWS THE DISTRICT COURT'S PROCEDURAL RULING WAS CLEARLY ERRONEOUS BECAUSE HAD THE MAGISTRATE ANSWERED THIS QUESTION FOR HIMSELF HE WOULD HAVE FOUND MISSOURI SUPREME COURT RULE 380, WAS PREVIOUSLY KNOWN AS SPECIAL RULE 3.062, SPECIAL RULE K.01 AND THESE RULES HAVE BEEN APPLIED ON A DISCRETIONARY BASES.

The habeas corpus petition before the court calls for the Court to exercise it's Equitable Relief powers every person seeking habeas corpus relief is entitled to one un-encumbered opportunity for a fair merits determination

of claims properly presented for review.

III. THE SUMMARY DENIAL OF THE APPLICATION FOR PERMISSION TO FILE SECOND OR SUCCESSIVE HABEAS PETITION, CLEARLY AND CONVINCING DEMONSTRATE EVIDENCE THAT BUT FOR CONSTITUTIONAL VIOLATIONS, OF ELICITATION AND KNOWING USE OF PERJURED TESTIMONY AND MIS-REPRESENTATION FACTS STIPULATED TOO, ARGUING MATTERS NOT IN EVIDENCE, DISPARAGING CREDIBILITY OF IT'S OWN WITNESS, CREATING FATAL VARIANCE BETWEEN INDICTMENT AND EVIDENCE PRESENTED AT TRIAL, JUDGE ALLOWED PROSECUTOR TO ARGUE BEYOND HIS STIPULATIONS, PROSECUTOR SHIFTED BURDEN OF PROOF DURING CLOSING AND REBUTTAL ARGUMENT, LASTLY TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO MISCONDUCT COMMITTED BY PROSECUTOR DURING STATE TRIAL DIRECT APPEAL COUNSEL WAS INEFFECTIVE IN FAILING TO RECOGNIZE AND ASSERT THE OBVIOUS ERRORS. AS NO REASONABLE JURY WOULD HAVE FOUND MR. WHITE GUILTY OF UNDERLYING OFFENSE.

This warrants the exercise of this Court's Supervisory Appellate power.

Pursuant to **28 U.S.C. §2244 (2) (B) (ii)** a motion to file a second or successive habeas petition: the facts underlying the claim, if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing that but for the Constitutional errors no reasonable fact finder would have found applicant guilty.

PETITION FOR WRIT OF HABEAS CORPUS EXTRAORDINARY CIRCUMSTANCES

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is clearly a inadequate remedy." **Exparte Fahey,** 332 U.S. 258, 260 (1947). The Court has authority to entertain original Habeas Petitions. See **Felker v Turpin** 518 U.S. 651, 660 (1996). The petitioner's last hope for review lies with this Court, his case presents exceptional circumstances that warrant the exercise of this Court's discretionay powers especially in light of the (three Judge panel) ignoring that part of the Application where petitioner shows that the eastern district has allowed pro se filings when party was represented by counsel. See, **State v Nolan, 499 S.W.2d** 249 (Mo.ED 1973); **Bonner v State,** 535 S.W.2d 289 (Mo.ED 1976); and **State v Cella,** 976 S.W.2d 543, 545 (Mo.ED 1998); claims (1a) State elicited and used perjured testimony, (1b) misrepresented fingerprint evidence contrary to both Stipulations as they are central to guilt or innocence of petitioner. **Marschand v Norfolk Western Rwy.** 81 F.3d 710 (8Cir 1996); **Stirone v U.S.** 361 U.S. 212, 80 **S.Ct.** 270; **Mooney v Holohan,** 294 U.S. 103 (1933) and **Gaither v U.S.** 413 F2d 1061 (C.A.D.C. 1969). Lastly the trial court failed to inform jury of State's stipulations during trial or jury instructions stating; "attorney may make stipulations are agreements and those are to consider as evidence. And petitioner

placed bloody hand print on rear doorjamb. Had counsel reminded Trial Judge of his obligation to inform jury State had stipulated "blood found on petitioner's boot could be found in 1 in 11,000 African-Americans in the United States, and that petitioner's fingerprints where not on doorjamb there is no remaining evidence from which guilt could be found."

"The Great Writ of Habeas Corpus has been for centuries esteemed as the best and only sufficient defense of personal freedom." **Ex parte Yerger,** 8 Wall 85, 95 75 U.S. 85 (1868).

"[F]undamental fairness is the central concern of the writ of habeas corpus." **Strickland v Washington,** 466 U.S. 668, 697 (1984). In **Harris v Nelson,** 394 U.S. 286, 292 (1969) the Court stated the following;

> There is no higher duty of a court, under our Constitutional system than the careful processing and adjudication of petitions for writ of habeas corpus, for it is in such processing that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of freedom contrary to law.
>
> This Court has constantly said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves; The language of Congress, the history of the writ, the decisions of the Court, all make clear the power to inquiry on federal habeas corpus is plenary.

Background Facts and Introduction

All facts and allegations material to consideration of instant questions presented were fairly and concisely provided to Missouri State courts as shown by the contents

of the Exhibits in the Appendix.

Standard of Review

The standard of review is unique in that it involves **§2254** cases viewed through **§2244** bifocal lens. It is the general standard treatment for federal courts to review State court claims presented by state prisoners claiming their state convictions are improper, "writ of habeas corpus indisputably holds an honored position in our jurisprudence **Drepke v Haley,** 54 U.S. 399-400

1.) Once in a while this Court will take the extraordinary step in granting an original action: in aid of this Court's appellate jurisdiction **In re Davis** 557 U.S. 952 (2009)

2.) **Felker v Trupin,** 518 U.S. 651 (1996) (AEFPA does not bar filing of extraordinary petition §1615 (a))

3.) **The** Supreme Court will issue the extraordinary writ, only in the most critical and exigent circumstances and only when necessary or appropriate in aid of Court's jurisdiction and only when rights are indisputably clear **Wisconsin Right To Life Inc.v Federal Election Comm'n,** 542 U.S. 1205 (2004)

4.) Only exceptional circumstances will justify the invocation of this extraordinary remedy." **Will v U.S.** 90 (1967)

I. Preliminary Memorandum

STATUTORY AND DECISIONAL CONSTRUCTION, CONSTRUED IN LIGHT OF EXIGENT AND PROCEDURAL EXCEPTIONS

A. Standard of Review For §2254 Cases

As a condition of obtaining Habeas Corpus relief from the federal court, a state prisoner must show the state court's ruling on the claim was so lacking in justification, it was an error well understood and comprehended in existing law to be beyond any possibility for fair minded disagreement **Harrington v Richter,** 562 U.S. 86 (2011) at 131 and **Williams v Taylor,** 529 U.S. 362, 412 (2000)

B.

This petition does not constitute abuse of the writ (respondent bears the burden to prove the purpose is to vex, harass, or delay finality). **Sanders v United States,** 373 U.S. at 10 (1963) Practice and Procedure, In **Johnson v Copinger,** 420 F.2d 395 (4 Cir. 1969) it explains that abuse of writ determinations are unfair without a chance to respond. Habeas petitioner may excuse the procedural bar and abuse of writ by showing cause and prejudice by a colorable showing of "factual innocence" **Kuhlmann v Wilson,** 477 U.S. 436, 454 n17 106 **S.Ct.** 2616 (1986)

C.

Past and current (summary denials) are extremely urgent due to the fact petitioner was forty-seven when arrested now soon to be seventy-two. Also the pro se claims previously brought before the courts being dismissed and/ordenied actively disregard petitioner's substantial rights and novel questions presented for review. The writ of Habeas Corpus is the fundamental instrument for safe guarding individual freedom against arbitrary and lawless

state action. **Comer v Schriro,** 463 F.3d 934 (9Cir. 2006). Also,...."it can include a risk of undermining the publics confidence in the judicial process." **Liljeberg v Health Service Acquisition Corp.** 486 U.S. 847, 863-64

D.

Cause and prejudice--- good cause for the procedural violation and/or delay as well as trial court/lower courts clear and convincing errors... **28 U.S.C 2254 (e) (2) (B)** prejudiced petitioner unfair collateral proceedings causing him an actual and substantial disadvantage **U.S. v Frady** 636 F.2d 506 D.C. Cir. (1980)

E.

All (6) of petitioner's pro se claims are properly persevered and were fairly presented to Missouri courts; and would satisfy all components of **28 §2244 (C).** Sanders provides (1) example of "ends of justice" 'where factual issues or involved the applicant can gain a re-determination by showing the evidentiary (or the lack of) on a prior application was not "full" and "fair" Sanders at 83 S. Ct. 1078

F.

None of petitioner's six (6) claims have truly been adjudicated on their merits.

G.

"The law must serve the cause of justice and, simply because petitioner has not led a blameless life, it can not be a means to imprison him for the remainder of his

life." With no evidence to convince a fair minded jurist of his guilt. In a Society devoted to the rule of law, the difference between violating or not violating a constitutional right to effective trial and appellate counsel, a trial "not free" of State's elicitation and use of perjured testimony can not simply be shrugged off. **Npaue v Illinios,** 360 U.S. 264, 269; **Strickland v Washington,** 466 U.S. 668.

This Court first developed the independent and adequate state ground doctrine in cases on "direct review" from state courts and later applied it as well in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. Ibid. "The adequacy of state's procedural bar to the assertion of federal questions" we recognized is not within the state's prerogative to finally decide, rather adequacy is itself a federal question." **Douglas v Alabama,** 380 U.S. 415, 422 85 **S.Ct.** 1074

In instant case the district court did not question the adequacy of State appeals courts local rule 380 as being independent and adequate, this failure has violated the due process clause of the Fourteenth Amendment.

II. AT SEPARATE TIMES THROUGHOUT PETITIONER'S POST-CONVICTION QUEST, BOTH STATE AND FEDERAL APPELLATE COURTS USED INCORRECT SUMMARY DENIALS PROCEDURES WHEN CONSIDERING THE APPARENT WEIGHT OF SUBSTANTIAL AND NOVEL MERITS OF PETITIONER'S ARGUMENTS AND QUESTIONS PRESENTED: DEPRIVING

PETITIONER OF HIS SIXTH AND FOURTEENTH AMENDMENTS RIGHTS. THEREFORE, THIS FURTHER FEDERAL REVIEW IS NECESSARY.

A. Introduction

Out of all cases in petitioner's procedural history, the only court that did not utilize a summary denial was the initial collateral review by the district court for the eastern district of Missouri in 4:03-CV- 415 FRB.

1) After three (3) year delay by the magistrate's Memorandum and Order is completely erroneous and does not consider the filing procedure done by (First) post-conviction counsel Paige Canfield nor does the magistrate find that rule 380 is firmly established and regularly followed state court practice. **(App. Exh.Q 1-4)**

2) The district court cities from **Clemmons v Delo,** 124 F.3d 944 "that petitioner's case was unlike that of Clemmons, and that at time of Clemmons case there was **no** similar rule as in petitioner's case.

3) This is clearly an intentional mis-representation of the record petitioner is more deserving of equitable relief. As counsel here on two (2) separate occasions promised to file pro se briefs with counsel's on appeal **(App.** Item C Exh. M)

4) Had the district court given petitioner a fair review ascertained for itself the adequacy of state's rule 380 it would have found in **State v Nolan,** 499 S.W. 2d 240, Special Rule 3.062 existed when Nolan filed pro se brief with court's permission: at the time of

Clemmons v Delo, 124 S.W. 2d 944, there was **Special Rule K.01** (1994) and **State v Cella**, 976 S.W. 2d 543, 545 **[*3]** R. Peek, Randale and Hasleg filed pro se briefs raising points similar to those addressed by their attorneys (1998) rule 380 is identical to both special rule 3.062, Special rule K.01.

5) When state appeals court rejected counsel's filing of pro se brief counsel stated,("he was going to file a brief containing whatever claims he thought were meritorious if petitioner's case winds up in Federal court petitioner was to argue it was the Appeals Court fault petitioner could'nt present his other issues to the appeals court") **(App G)**. This Letter places Mr. Hoff in violation of Missouri's Professional Rules Conduct **4-1.2. Scope of Representation (a)** and **4-8.4 Misconduct (c) Item C.**

6) Counsel's letter of January 18, 2001 --to be on the safe side, you may want to start reworking your pro se claims into brief point; February 12, 2002 **Exh, M** ---I will also file your pro se points with the brief.

7) Petitioner only received these assurances from Mr. Hoff after he had complained to the appeals court of counsel's conduct **Item K; Item Two** letter to counsel telling counsel petitioner was the master of his own cause December 17 2000. After Hoff filed his illegal brief petitioner wrote the appeals court asking it to dismiss brief filed by allow him to proceed pro se **Item P. See, Holland v Flordia**, 560 U.S. 631, for guidance, [where that court found

counsel's conduct provided the **"Extraordinary circumstance]** granting **relief.**

B. Discussion

Discussion as to why summary denial was inappropriate when considering the matter sub judices decisions governing why it should have reviewed petitioner's claims on their merits.

1) A decision was reached without a full and fair hearing on the merits-- lower courts absolutely have no standing if they intend to argue that despite a summary denial -- petitioner's claims were decided as to their merit--- **Sanders v United States,** 373 at 15, hearing was needed to conduct additional fact finding, mandatory hearing in **Townsain v Sain,** 372 U.S. 293 (1963)

2) Summary denial was so lacking in its justification as to approach an abuse of discretion **Harrington v Richter,** supra, summary dismissal is only appropriate where claims are patently frivolous or false. **Blackledge v Allison,** 531 U.S. 63 at 82-83

3) Summary denial of meritorious claims was inappropriate especially where an exceptional showing of violations of stipulated facts as to the controversial "blood and fingerprint evidence, especially (1) when state admits on appeal, state's closing argument was meant to induce jury to believe petitioner had in fact handled broken glass in cutting face of victim which did not kill him; **(App. H)** where state stipulated absence

of petitioner's fingerprints from crime scene proved nothing **(App. Tr. 98-100).**

4) State furhter argued it had physical evidence of Tim's blood being on petitioner's boot, where state stipulated "it could not absolutely positively be said blood on petitioner's boot was Tim Bolden's as said blood would be found in 1 in 11,000 African-Americans in the United States **(App. Exh C)**

5) It is inappropriate to summarily deny petitioner habeas relief where no dispute as to the **"facts"** could be made by respondent.

6) The district court erred by dodging questions presented in petition thus by setting aside their duty to resolve all issues tied to those above questions which are necessary for the regional maintenance of decisional uniformity and domestic tranquillity in their jurisdiction.

7) A state procedural bar is adequate only if state courts have applied the rule even-handedly to all similar claims, see **Hathorn v Lovorn,** 457 U.S. 2763, 102 **S.Ct.** 2421

C. Uncontested facts absolutely presented herein could not be traversed so in actuality, the summary denial was upside down and summary proceedings in petitioner's favor would have been more proper. --United States ex rel Del Ross v Franzen (7Cri 1982) (record facts contradicts state's fact findings) writ was granted without hearing.

D. Summary denial disallows state from asserting constitutional

contentions, they forfeited the chance to contend claims were not federal worthy claims--- See **Wainwright v Sykes,** 433 U.S. 72 (1977)

E Postcard denial and summary denials deprived petitioner of the chance to rebuke lower state and federal courts determinations as "objectionably unreasonable" and their legal applications as "contrary" because their reasons for denying petitioner his enforceable rights were wholly withheld. State appellate court applied a local rule that has had various names such as **Special Rule 3.062.** (1973); **Special Rule K.01** (1994) now **Special Rule 380** (1995). As shown above these rules have been applied in discretionary manner as they purport to press as bar to counsel filing his client's pro se brief.

F

Federal and state courts incorrectly approved of trial court's fact findings and subsequent verdict, and proceeded to summarily discount petitioner's meaningful claims, which could have allowed for improvement to Missouri's Professional Rules of Conduct for prosecutors.

The district court should not have dismissed petitions summarily without further inquiry concerning the "contrary" and "unreasonable determination" standard, summary dismissals deprived petitioner of the opportunity to make such distinctions as in **Miller v pate,** 386 U.S. 1 (1967); **Stirone v United States,** 361 U.S. 212 (1960) and **H Hackfeld & Co. v United States** 197 U.S. 442, 447 25 **S.Ct.** 456

III. Preliminary Memorandum

Both counsel on direct and collateral review counsel committed clear error by knowingly omitting a pink elephant issue, prosecutorial misconduct, trial court failed to supervise and control sitpulations, and post-conviction counsel's evil conduct--- which placed petitioner at a difficult procedural disadvantage, which petitioner has yet to overcome / recover from thus depriving petitioner of his Sixth Amendment right, perhaps petitioner's most meritorious claims are thrown into near hopeless default.

A. Introduction To Facts Underlying Lucille Liggett and Roslyn Koch Mistakes

Ms. Liggett obtained two stipulations from state concerning testimony of county police lab technican from Travis Garner's trial.

There testifying; (1a) [he could not absolutely positively say blood on petitioner's boot was that of Timothy Bolden because said blood could be found in 1 in 11,000 African-Americans in the United States; (1b) stipulating the absence of petitioner's fingerprints from the crime scene proved nothing.

During trial prosecutor elicits testimony from Derrickson "there was noting inconsistent with blood on petitioner's boot and that of Timothy Bolden." (App.Tr.681). Then during closing state argues, [because glass was lying in liquid thats why petitioner's fingerprints could'nt be lifted but he goes over with broken glass].(App. 780)

In rebuttal state capitalizes off Derrickson's perjured testimony [Arguing state has physical evidence of Timothy's blood being on petitioner's boot and that petitioner placed bloody print on rear doorjamb] even though Det. Bruce Ewing had testified petitioner's fingerprints were not found anywhere in the Bolden's home. (App.Ehx.C, Tr.808, 427-28)

On direct appeal assistant attorney general Linda Lemke admits state's argument concerning fingerprint evidence was meant to induce jury to believe petitioner had in fact handled broken glass. (App. Exh.H)

Counsel was ineffective in allowing jury to retire with factual incorrect impression that Timothy's blood was in fact on petitioner's boot and that petitioner placed bloody print on doorjamb, in light of stipulations with Mr.Sidel and testimony of Det. Ewing. See Driscoll v Delo, 71 F.3d 701 (8cir 1995)

B. Williams v Taylor, 529 U.S. 362 (2000) and Wiggins v Smith 539 U.S. 510 (2003) as in capital cases perhaps petitioner who was forty-one when arrested December 8 2022 will be seventy-two with earliest parole hearing date 2045 when he's ninty-five should have been afford IAC protections during state trial and appeal process.

D.

The Strickland two part has been satisfied.

E.

A criminal defendant has the right to present a complete defense United States v Holmes, 413 F.3d 770 (8Cri 2000)

Appellate counsel "must argue all claims that are arguable"

F.

The court of appeals was unaware of the reversal and remand of petitioner's pro se claims, are chose to ignore them from Cause No. 78939. Thus claims presented by Mr. Hoff does not constitute a final decision nor did the appeals court have jurisdiction to consider his claim, it was not in Motion prepared by Ms. Canfield (Exh .P)

The judgment entered in Cornell White v State 90 S.W.3d 498 (Mo.App. ED 2002) is void under Mo.Sup.Sup.R. 74.06 (b) (4)

G.

United States v Argrs 427 U.S. 97 96, S.Ct. 2392 (1976) prosecutors ---- Although charged with investigating and prosecuting the accused with earnest and vigor officer must be faithful to overriding interest, that justice be done.

Up Date To Claims I and II

Under Townsend v Sain, 372 U.S. 292 (1963) Federal courts "must grant an evidentiary hearing under subsection (1) where the merits of factual disputes were not resolved in state court hearing; (2) the state's factual determination is not fully supported by the record a whole; (3) the fact finding procedure employed by the state was not adequate to afford a full and fair hearing; (4) there are substantial allegations of "wrongly excluded evidence.

In Lucas v Jerusalem LLC, 2012 U.S. Dist. LEXIS 65596 a case for some guidance, "where evidentiary ruling at trial

are reversible when 1) the evidence was wrongly excluded and 2) the wrongly excluded evidence was so critical that there was no reasonable assurance the jury would have reached the same conclusion had the wrongly evidence been presented.

> The district court is not bound by the admissiability rules that would govern at trial instead, the emphasis on actual innocence allows the reviewing tribunal to consider the probative force of relevant evidence either "excluded" or "unavailable at at trial ---- we believe that Judge Friendley's description is appropriate. The habeas court must make it's determination concerning petitioner's innocence in light of all the evidence including that alleged to have been (tenable claimed to have been wrongly excluded with any unreliability of it.

In Thomas v Dywer, 2007 U.S. Dist. LEXIS 53079 That court holding Dywer's evidence must new in the sense that it was "wrongly excluded at petitioner's trial" or only discoverable afterward.

UP DATE TO CLAIM III,

Jurisdictional and Comparative Analysis Between Summary Denial and 28 U.S.C. 2244 (2) (B) (ii)

1) This Court in Sawyer v Whitley, 585 U.S. 333, we have previously held that if a state prisoner cannot met cause and prejudice standard, a federal court may hear the merits

of successive claims, if failure to hear claims would constitute a miscarriage of justice.

2) County of Scacrmento v Lewis, 523 U.S. 533, 848, 118 S.Ct. 1708--- conduct intended to injure in some way unjustifiable by any governmental interest is the sort of official action most likely to rise to the conscience shocking level. The three Judge panel, ignore State's Stipulations of fact, (1) blood found on petitioner's boot could not absolutely positively be said blood on petitioner's boot was that of Timothy Bolden because said blood would be found in 1 in 11,000 African-Americans in the United States (App.Tr98-100, Exh.C); (1b) also the absence of petitioner's fingerprints from the crime scene proves nothing.

3) Yet during closing prosecutor, argued "because broken glass was lying in liquid thats why prints could'nt be lifted but petitioner goes over with broken glass" (App. Tr.780); and "state has Statements from eyewitnesses placing him in the house and physical evidence --- victim's blood being on petitioner's boot, and theres no other explanation for that other than petitioner was involved in the cutting and by being in involved in the cutting hes working together with Travis Garner (App.Tr808-09, 292-93) no statements from eyewitnesses were entered into evidence.

If this is not clear and convincing evidence petitioner asks what is? Absence state's knowing use of perjured testimony and mis-representing it's stipulations there is no other evidence to support petitioner's convictions and

sentences.

4) The State's closing argument created a fatal variance, the information charged the jury to find that petitioner shot and killed Timothy Bolden, not "that he was cut which did not kill him" no evidence was offered to support a conviction for causing the death of Johnny Bolden.

5) Petitioner has found no case authority on all fours for claims here, rather the rights violated herein are clearly established there is no need for case on fours with the facts factual circumstances here, see Vaugh v Ruoff, 253 F.3d 1124, 1130 (8 Cir 2001) Rather it need only be apparent from the existing law the complained of conduct is unlawful (citing Anderson 483 U.S. at 60) Long before the violations alledged here the Supreme Court determined that presenting fabricated testimony to a jury is a violation of a defendant's right to a fair trial.

CONCLUSION

1) Within the meaning of 28 U.S.C. § 2244 (b) the court should hold that a silent denial is not an adjudication on the merits.

2) the order to show cause directs the custodian to serve and file a written return, which must plainly and unequivocally state the authority and cause of such imprisonment or restraint.

3) the return must be "responsive" to the grounds actually presented in the application the State's return did not address question of the asserted procedural bar nor the fact

of the underlying claims (App. Exh. I and Exh.Z)

4) the cumulative prejudicial effect the multiple acts of prosecutorial mis-conduct and ineffective trial and appellate counsel in determining whether habeas Corpus relief is warranted Philip v Woodford 267 F. 3d 966 (9 Cir 2001)

PRAYER FOR RELIEF

Petitioner request that this Court grant the extraordinary writ of habeas corpus in whole and grant the relief most appropriate.

Respectfully, submitted

_____

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CERTIFICATE OF SERVICE

on this day of October, 25th, 2022 a true copy of Motion for Leave to Invoke Court's original Jurisdiction was mailed postage paid to United States Attorney General Jeffery B. henson, 111 South Tenth Street, Suite 20.333, St.Louis iiMissouri 63102