22-6674 ORIGINAL

CASE NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

FOR THE FOURTH CIRCUIT

ANTONIO COLLINS-- PETITIONER

vs.

SHELBY SEARLS -- RESPONDENT(S)

ON A PETITION OF CERTIORARI TO

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON DIVISION

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANTONIO COLLINS
PO BOX 1
HUTTONSVILLE WV 26273

QUESTIONS PRESENTED

1. Can a determining judgment be ruled upon when a lower court's judge has to "read" a petition, "before ruling" a denial; for the petition to be further reviewed by a higher court to challenge the ruling judge's process of denying the petition?

2. When there is case law to verify the presented issues arguing, why does the case have to go on four years while still violating the Petitioners constitutional due process rights?

3. When the issues raising doesn't concerns the Petitioners actual innocence or guilt why is the prosecuting team permitted to present circumstantial statements trying to overshadow the violated issues raising?

4. Due to the delay in answering the habeas corpus with a constitutional comparison of what's right and what's wrong, does a direct decision to overturn a violated constitutional right eliminate the courts from further violating the Petitioners due process rights among other rights when taking Petitioner through the lengthy appeal process?

5. Can an automatic release to my detainer be incorporated with the order when finalizing my issues at hand due to the amount of excess time I've had to do and to also do without having to be judged again by the parole boards seemingly overriding judgment reigning supreme?

6. Was the West Virginia Supreme Court of Appeals in the wrong for denying Petitioners appeal when the evidence supporting the facts within show that Petitioners rights have been violated?

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:**

Charles Williams, Superintendent "et al."

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

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 ___A___ to the petition and is
[ ] reported at _____; or
[ ] has been designated for publication but is not yet reported; or
[✓] is unpublished.

[ ] For cases from **state court**:

The opinion of the highest court to review the merits appears at Appendix __B__ to the petition and is
[✓] reported at Case no. 2:21-cv-00454
; or
[ ] has been designated for publication but is not yet reported; or
[} is unpublished.

The opinion of ___West Virginia Supreme Court of Appeals___
_____ appears at Appendix __B__ to the petition and is
[✓] reported at 19-1027 _____; or
[ ] has been designated for publication but is not yet reported; or
[ ] is unpublished.

[ ] For cases from **federal courts**:

The date on which the United States court of appeals decided my case was December 27, 2022.

[ ] 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: _____, 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 _____ in Application No. _____.

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

[✓] For cases from **state courts**:

The date on which the on which the highest state court decided my case was March 6 2017. A copy of that decision appears at Appendix B.

[ ] 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 _____ in Application No. _____.

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

Constitutional and Statutory Provisions involved

Statement of the case

On December 22, 2022 Petitioners habeas corpus was denied by the United States Court of Appeals for the Fourth Circuit (Appx. A). Petitioner has been appealing from the decision of the Supreme Court of Appeals of West Virginia (Appx. B) and also the United States District Court for the Southern District of West Virginia Charleston Division (Appx. C); due to signing a plea bargain on October 28, 2013 pertaining to a four count indictment (Appx. D); count one: attempted murder; count two: attempted murder and having once been convicted of a crime; count three: malicious wounding and count four: malicious wounding; for injuring two individuals. Petitioner has never claimed to be innocent nor has any innocence issues ever been raised. Petitioner has only argued that the sentence that was deemed appropriate has been decided upon in accordance with the violations specified for the double jeopardy provisions. Upon researching the sentence as being the punishment for Petitioner, Petitioner discovered both the West Virginia Constitution and the United States Constitution supporting the illegal structural accepted plea bargain (Appx. E) having been sentence under. For both of the constitutions to specify the regulations concerning the double jeopardy provisions and to compare Petitioners charges to the documentations, Petitioner started submitting motions and petitions concerning the time having been incarcerated for on the stated charges. Petitioner trial counsel has submitted a Motion to Reconsider and For Leave to Withdraw to only have his withdrawal heard and the reconsideration ignored (Appx. F). Another counsel was then appointed (Appx. G), to only withdraw due from the courts failure to notify him of his duties (Appx. H). Petitioner was then appointed another counsel (Appx. I), to only have the attorney step in to assist, to then convince Petitioner to have the pro se habeas corpus dismissed from the docket (Appx. J), "supposedly" to resubmit another one. The appointed attorney was then

relieved of his ineffective duties (Appx. K), due to his lack of resubmitting a "per se" perfected habeas corpus (in a timely manner); to leave the Petitioner in a position of filing additional motions to only be denied the opportunity to have the dismissed petition placed back on the docket which was accepted in a pro se manner and to be denied adequate counsel (Appx. L). Petitioner then submitted a writ of mandamus (Appx. M), to only have the reigning judge turn it over to the attorney that the raising mandamus was about. Another habeas corpus and a motion for the appointment of counsel was submitted and the motion for the appointment of counsel was denied (Appx. N) once Petitioner was transferred to another, to now be in an appealing process to gain the attentive ruling judges attention to appoint counsel and to overturn the illegal sentence incarcerated under.

Reasons For Granting The Petition

With the way that the Petitioners plea bargain was constructed in violation of the double jeopardy standards and since the newly discovered/argued evidence concerning the West Virginia Case Law for the indictment and the indictments lack of mentioning applied state statute and the recently decided brief showing that a jury would have found the district courts assessment on the constitutional comparison to be wrong; Petitioners reasons for granting the petition stands as follows.

In December 2013 petitioner was sentenced on a four count indictment; count one: attempted murder; count two: attempted murder (and having once been convicted of a crime not in the indictment); count three: malicious wounding and count four: malicious wounding; for injuring two individuals. Petitioner has submitted pro se motions concerning the ineffective assistance of counsel and the double jeopardy violations, to have the motions accepted on May 19, 2016 to be docketed on the docket letting the courts know that factual basis exist. The courts have appointed appellate counsel, twice once on September 4, 2015 Trent Redman and the second time on June 24, 2016 Dennis Bailey. On January 7, 2016 Trent Redman requested to withdraw based on not being notified of his appointed duties to represent Petitioner and Dennis Bailey was then appointed. On January 31, 2017 Dennis Bailey got the pro se motion withdrawn to resubmit another one in a more perfected format. Dennis Bailey was relieved of his duties after he failed to resubmit the pro se motion in which he was appointed to perfect. With the documented evidence to showcase the appointed attorney's ineffective duties, the illegal sentence in question still stands to prove that the 13 to 50 year sentence should be reduced. Petitioner has presented facts that could be compared to the West Virginia and United States Constitutional Violations at issue based from the charges having been convicted of; to only have

each judge deny the facts having presented.

Petitioners sentence as defined by the prosecution, has constructed a four count indictment with five charges being accounted for when concerning the 13 to 50 year sentence; (1)attempted murder, (2) attempted murder and (3) having once before been convicted of a crime punishable by confinement in a penitentiary (not included within the indictment) only enhancing count two, (4) malicious wounding and (5) malicious wounding; all based from the same underlying offense; with the documentation to prove that petitioner was charged under two state code statutes having been applied for the convictions that transpired from one offense, where two individuals were injured violating the double jeopardy and due process stipulations (Counts one, two, four and five are included in the indictment)

> "(The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.' *Syllabus Point 1, State v Louk*, [169] W.Va. [24], 285 S.E.2d 432 (1981)[, overruled on other grounds, *State v Jenkins*, 191 W.Va 87, 433 S.E.2d 244 (1994)]." *Syllabus Point 1, State v Neider*, 170 W. Va 662, 295 S.E.2d 902 (1992).)

(1)

The double jeopardy standard argued in *State v Collins*, 174 W.Va. 767; 329 S.E.2d 839; 1984 W.Va. LEXIS 512; supports Petitioners raising double jeopardy issues being upheld in violation of Petitioners United States Constitutional Rights and Petitioners right within Article 3 of the West Virginia Constitution;

> "In analyzing double jeopardy , we stated in Syllabus Point 1 of *Conner v Griffith*, 160 W.Va 680, 238 S.E.2d 529 (1977), that: The Double Jeopardy Clause in Article 3, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has aquitted the accused. It protects against second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense. "7 In the foregoing syllabus point, we utilized language from *North Carolina v Pearce,* 395 U.S. 711, 717, 23 L.Ed. 2d 656, 665, 89 S.Ct. 2072, 2076 (1969),

> but went on to say in the text of Conner, 160 W.Va. at 683, **{329 S.E. 2d 843}** 238 S.E.2d at 530: "It is our view that Article 3 Section 5 of the West Virginia Constitution is, at least, coextensive with the three principles set out in North Carolina v Pearce, supra and prohibits multiple punishments for the same offense." (Emphasis added)

and quoted from *State v Henson*, 2019 W.Va. LEXIS 234 (W.Va., May 24, 2019)

> "The purpose of the Double Jeopardy Clause is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." Id. at 73, 468 S.E.2d at 326, Syl. Pt. 3. Further, "[t]he analysis of whether a criminal defendant may be separately convicted and punished for multiple violations of a single statutory provision turns upon the legislatively-intended unit of prosecution." Syl. Pt. 4, *State v Goins*, 231 W. Va 617, 748 S.E.2d 813 (2013).

In *Missouri v Hunter*, 459 U.S. 359, 368, 74 L. Ed. 2d 535, 543-44, 103 S.ct. 673, 679 (1983),

the United States Supreme Court said:

> "Our analysis and reasoning in *Whalen [v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L. Ed. 2d 715 (1980)] and Albernaz lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear."

Having been charged and convicted on a four count indictment with attempted murder and attempted murder being within the underlining elements for the malicious wounding counts; with an affirmative fifth charge for the enhancement attached to count two of the indictment but only specified within the presented plea bargain "6 to 15 years for having been once before convicted of a crime punishable by confinement in a penitentiary", showcases the required violated elements included within the West Virginia Constitution;

> "The Double Jeopardy Clause in Article 3, Section 5 of the West Virginia Constitution provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. **It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.**'

Syllabus Point 1, Conner v Griffth, 160 W. Va 680, 238 S.E.2d 529 (1977)." *Syllabus Point 2, State v Gill*, 187 W. Va 136, 416 S.E.2d 253 (1992)

As defined within the second and third provision of Article 3, Section 5 of the West Virginia Constitution:

> **"It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense."**

in which the Petitioners current raising issue rest on. For the courts to deny, dismiss or delay in overturning Petitioners 13 to 50 year sentence when two of the three provisions within Article 3 Section 5 of the West Virginia Constitution supports Petitioners petition having been denied;

> "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger v United States*, 284 U.S 299, 304, 52 S.Ct. 180, 182, 76 L. Ed 306, 309 (1932)." Syllabus Point 4, *State v Gill*, 187 W.Va 136, 416 S.E.2d 253 (1992)

showcases a miscarriage of justice; *Graziano v. United States*, 83 F.3d 587, 590 (2d Cir. 1996) (Relief pursuant to Section 2255 is available "for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes 'a fundamental defect which inherently results in [a] complete miscarriage of justice.'"). In *Torres v Santistevan*, 2019 U.S. Dist. LEXIS 208858 cv 19-00209 in the United States District Court of New Mexico;

> "The New Mexico Supreme Court affirmed Mr. Torres' convictions for first degree murder, attempted first degree murder and conspiracy to commit first degree murder, reversed Mr. Torres' convictions for shooting at a dwelling and conspiracy to shoot at a dwelling as violative of constitutional protections against double jeopardy and vacated the habitual offender enhancement of his sentence."

As stated in *State v Wright*, 200 W. Va. 549; 490 S.E.2d 636; 1997 "the test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an

element not required for the greater offense." And as quoted from the Assistant Attorney General "The two distinct statutory provisions at issue in this case are West Virginia Code § 61-2-1 (the first degree murder statute) and West Virginia Code § 61-2-9 (the malicious wounding statute)" showcasing that the simultaneous occurrences within the single event lies within the multiple offenses being charged per both individuals and prove that there are multiple statutory provisions (West Virginia State Code § 61-11-18(a) the enhancement; West Virginia State Code § 61-2-1 the first degree statute(s) and West Virginia State Code § 61-2-9 the malicious wounding(s)); being applied having violated Petitioners guarantee of the equal protection clause for both the due process clause the double jeopardy statute);

> "The four 'tests' or 'clues' of proximate cause in a criminal case are 1) expediency, 2) isolation, 3) foreseeability, 4) intention." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 823 (3d ed. 1982). Rational Basis Test: a principal whereby a court will uphold a law as valid under the equal protection clause if it bears a reasonable relationship to the attainment of some legitimate governmental objective. (Black Laws Dictionary)
>
> " ' Proximate cause' in itself an unfortunate term is merely the limitation which the courts have placed upon the actors responsibility for the consequences of the actors conduct. In a philosophical sense, the consequences of an act go forward to eternity and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts and would 'set society on edge and fill the courts with endless litigation.' [*North v Johnson,* 58 Minn. 242, 59 N.W. 1012 (1894).] As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy." W. Page Keeton et al., Prosser and Keeton on Torts § 41, at 264 (5th ed. 1984)

The Supreme Court specifically stated that the Due Process Clause was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Bell v. Burson,* 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971).

(2)

With the third charge having been included within count two of the described guilty plea offering as 13-F-741(I) and to have never been included within the indictment for the Petitioner to be permitted with a fair notice also violates Petitioners due process and the double jeopardy stipulations (having been once before convicted of a crime punishable by confinement in a penitentiary);

> "An indictment is sufficient under Article 3, § 14 of the West Virginia Constitution and W.Va. R. Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy." *Syllabus Point 6, State v Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999)

the evidence being convincing for the prosecution to introduce can be characterized as a 404(b)(1) violation:

> Rule 404. Character evidence; crimes or other acts.
>
> (b) Crimes, wrongs, or other acts.
>
> (1) Prohibited uses. Evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

The Supreme Court of the United States stated in *Alleyne v United States*, 570 U.S. 99, 110-11, 133 S.Ct. 2151, 2159-60, 186 L. Ed. 2d 314 (2013) that;

> A number of contemporaneous treatises similarly took the view that a fact that increased punishment must be charged in the indictment. As one 19th century commentator explained:
>
> "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the first offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown 8 170]." Archbold 51 (15th ed. 1862).

> Another explained that "the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." Bishop § 81, at 51. This rule "enabled [the defendant] to determine the species of offence" with which he was charged "in order that he may prepare his defence accordingly ... and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted." Archbold 44 (emphasis added). As the Court noted in Apprendi, "[t]he defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with the crime." 530 U.S., at 478, 120 S.Ct. 2348.

The indictment fails to " 'contain an allegation of every fact which is legally essential to the punishment to be inflicted' " *Alleyne v United States*. Additionally, the indictment fails to put the Petitioner "on fair notice of the charge against which he or she must defend." *Syllabus Point 6, State v Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999). Evidence presented during the course of the proceedings that the Petitioner was guilty of the crimes committed does not cure the defect in the indictment.

In attempting to eliminate abusive and illegitimate uses of Rule 404(b), the West Virginia Supreme Court, in *State v McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), explicitly adopted and applied the standard and criteria discussed in *Huddleston v United States*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 1502, 99 L.Ed.2d 771, 783-84 (1988). They adopted the four part analysis set forth in Huddleston, and this analysis has been repeatedly reaffirmed in West Virginia:

> [w]here an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in State v Dolin, 176 W.Va 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. **If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial courts general charge to the jury at the conclusion of the evidence.**

The McGinnis Court continued at length as to the importance of using this specific process, rather than just making knee-jerk decision on admissibility of evidence of other bad acts based on general admissibility criteria:

> "We think, however, that the protection against such unfair prejudice emanates not form a requirement of a preliminary finding by the trial court, but rather from four other sources: first), from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second), from the relevancy requirement of Rule 402 – as enforced through Rule 104(b); third), from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice... and fourth), from Federal Rules of Evidence 105, which provides that the trial court shall, upon request instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.
>
> In West Virginia, therefore, to determine whether evidence is admissible under Rule 404(b), the trial court must utilize the four part analysis set forth in Huddleston. First, the trial court must determine whether the "other crime" evidence is probative of a material issue other than character. Evidence reflecting only a propensity to commit a crime is inadmissible. The burden is squarely on the prosecution to identify, with particularity, the specific purpose for which the evidence is being offered. In other words, the prosecution has the burden of identifying a specific and relevant purpose that does not involve the prohibited inference from character to conduct.

"In determining whether the admissibility of evidence of "other bad acts" is governed by Rule 404(b), we first must determine if the evidence is "intrinsic" or "extrinsic." *State v Watson*, 2015 LEXIS 680 (May 21, 2015) (citing *United States v Williams*, 900 F.2d 823, 825 (5th cir 1990): "Other act' evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." (Citations omitted). **If the** proffer fits into the "intrinsic" category , evidence of other crimes should not be suppressed when those facts come in as res gestae – as part and parcel of the proof charged in the **indictment.** (See *United States v Masters*, 622 F.2d 83, 86 (4th Cir 1980)).

For the Petitioners indictment to neglect the facts concerning Petitioners enhanced

portion of the sentence and state codes to specify that all facts pertaining to Petitioners offenses must be documented; Petitioner argues that the due process clause has been violated with the contradictory state codes over shadowing the constitutions instructions to protect:

> "It is well established that all individuals in the United States citizens and aliens alike are protected by the Due Process Clause of the Constitution." "It is equally well established that the Due Process Clause incorporates the guarantees of equal protection."(citing *Johnson v. Robison*, 415 U.S. 361, 364 n. 4, 39 L. Ed. 2d 389, 94 S. Ct. 1160 (1974))
>
> ("Although an individual's right to equal protection of the laws does not deny the power to treat different classes of persons in different ways, it denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of such statute; a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike).

The Supreme Court defines the constitutional right to "equal protection of the laws" as a "personal right," *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995); *cf. Shelley v. Kraemer*, 334 U.S. 1, 22, 92 L. Ed. 1161, 68 S. Ct. 836 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."). We take special note of the {267 F.3d 1005} fact that we have based our previous decisions in *Garberding* and its progeny upon this equal protection right, unamended by ancillary constitutional considerations such as state sovereignty. Furthermore, Petitioner finds no reason why the right in its personal nature should not extend to Petitioner just as it did to the claimants in previous cases.

(3)

Along with the multiple double jeopardy violations, the ineffective assistance of trial and appellate counsel in which the Petitioner was denied counsel and having the submitted petitions and orders in support thereof, the Martinez/Trenvino exception concerning the procedural default

argued in *Martinez v. Ryan*, 566 U.S. 1, 14-15, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012);

> "Where, under state law, claims of ineffective assistance (IA) of trial counsel had to be raised in an initial-review collateral proceeding (IRCP), a procedural default would not bar a federal habeas court from hearing a substantial claim of IA at trial if, in the IRCP, there was no counsel or counsel in that proceeding was ineffective. The inmate's attorney in the IRCP filed a notice akin to an Anders brief, in effect conceding a lack of any meritorious claim, including a claim of IA at trial, which the inmate argued was IA. The Ninth Circuit did not decide if it was. Rather, it held that because he did not have a right to an attorney in the IRCP, the attorney's errors in the IRCP could not establish cause for the failure to comply with the State's rules. Thus, the Ninth Circuit did not determine if the attorney in the IRCP was ineffective or whether the claim of IA of trial counsel was substantial. Nor was prejudice addressed. Those issues remained open for a decision on remand. While 28 U.S.C.S. 2254(i) precluded relying on IA of a post conviction attorney as a ``ground for relief," it did not stop its use to establish ``cause" to excuse procedural default. The judgment upholding the denial of habeas relief was reversed, and the case was remanded for further proceedings."

stands to support Petitioners ineffective assistance of counsel claims against the appellate counsel (Appx. J) & (Appx K); while the trial court abandoned the motion filed by then court appointed counsel (Appx. F).

Subsequently, the United States Supreme Court granted *certiorari* in *Shinn v. Ramirez*, No. 20-1009, 141 S. Ct. 2620, 2021 U.S. LEXIS 2444, S. Ct., 209 L. Ed. 2d 748 (May 17, 2021). The Supreme Court will examine the question of whether and to what extent the ban on evidence outside of the state court record set forth in 28 U.S.C. 2254(e)(2) applies to claims in which cause and prejudice have been demonstrated under *Martinez-Trevino* to set aside a procedural default,; as is the case in which the Petitioner has been petitioning for the ineffective assistance of counsel and the disregarded docketed motions.(Appx. F) & (Appx. L). The Martinez/Trevino framework, set out by the Supreme Court, carved out an exception allowing the ineffective assistance of post-conviction counsel to serve as "cause," in a limited set of circumstances, including a requirement that the claim be "substantial."*Martinez v. Ryan*, 566 U.S. 1, 14-15, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). In this framework, the Supreme Court

clarified that to be substantial, a Petitioner must demonstrate that his claim has "some merit." Id. at 15. This is the standard applied by this Court in addressing Petitioner's habeas claim.

Under rational basis review, a classification enjoys a strong presumption of validity and is constitutional as long as there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Congress, in creating categories of treatment, "need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it", whether or not the basis has a foundation in the record.

CONCLUSION

Petitioner prays that this Honorable Court grants the petition for writ of certiorari and issues the certificate of appealability to correct Petitioners sentence upon reviewing the petition and or ultimately appoint counsel and schedule a hearing for oral arguments to correct the Constitutional issues raising.

Respectfully submitted this 18th day of January, 2023.

(Name)