22-7042

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C.

CAUSE NO. _____

ROSA SERRANO, PETITIONER

V.

BOBBY LUMPKIN,

TDCJ DIRECTOR, RESPONDENT

WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

21-50889

UNITED STATES DISTRICT COURT

WESTERN DISTRICT FOR TEXAS

WACO DIVISION

W-19-CA-414-ADA

Rosa Serrano
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ISSUES PRESENTED

1. Whether removal of state court proceeding divested state court of jurisdiction to enter a judgment of conviction when it proceeded to trial upon filing a notice of removal under 28 U.S.C. 1443 prior to state trial, thus rendering a void conviction where federal habeas is granted;

2. Whether a procedural default not raised by respondents grants district court to enter a sua ponte order not presented to the proceedings for consideration as an affirmative defense and a void conviction excludes a procedural bar to overcome barrier to liberty from a void conviction;

3. Whether a void conviction is considered an "actual innocence" to grant federal habeas when state court was divested of jurisdiction to render a judgment of conviction when actual and constructive notice of removal was filed with the state court;

4. Whether a federal habeas compels for Petitioner to seek a protected activity under the Whistleblower Act (31 U.S.C. 3730(h)) is shown by removal to district court to review the denial of a federal right granted under the Medicaid Act (42 U.S.C. 1396(a), and by third-party standing in prosecution of Petitioner under *Powers v. Ohio*, 111 S.Ct. 1364;

5. Whether notice of removal required remand of removed state court criminal proceeding in 20170D0317, instead of dismissal. And by joinder to federal habeas corpus did it also dismiss the state court criminal proceeding with prejudice when rendered jointly and final disposition as to indictments of 20170D0316, 20170D3617 and 20170C0389, herein expunging all criminal proceedings against Petitioner along without further prosecution by refiling of criminal proceedings for all previous state criminal prosecutions.

LIST OF AUTHORITIES

FEDERAL STATUTES

PUBLICATIONS

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 D, E 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 45 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 courts**:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was October 07, 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: November 07, 2022, and a copy of the order denying rehearing appears at Appendix E.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

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

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

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

STATEMENT OF FACTS

On August 08, 2017 (20170D0317) a judgment of conviction was entered, and sentence was entered on August 14, 2017, however removal was done prior to trial (ECF. Doc. No. 26,27,28,30)[1] to district court on August 01, 2017. Actual and constructive notice was sent and declared in the court reporter's record on August 04, 2017, that the criminal proceeding had been removed. Acknowledgment was done in EP-17-CV-221-FM order entered on November 09, 2017 (ECF. No. 52), yet the union of the civil rights removal under 42 U.S.C. 1443 denies union to federal habeas in 28 U.S.C. 2254. *Preiser v. Rodriguez* rule, 93 S.Ct. 1827 (1973) decides the distinction between a federal habeas and civil rights claim cannot share or interchange the use of pleadings to disposition of the issues raised. If contesting of incarceration the federal habeas serves as the process to challenge the state conviction, however, to challenge the treatment or conditions of prisoners is done under civil rights claim. Each distinctly hold its own definitions to apply for the relief granted under each federal statute, where union is specifically denied when the issues although of the same focus require a separate relief thus union is denied under statute. Focus on each claim raised in the proper filing allows for courts to grant relief prescribed under federal statute. No other relief can be granted without the proper filing when the statute demands strict compliance, therefore where district court in EP-17-CV-00221-FM added the civil rights removal under 1443, it erroneously dismissed the filing with prejudice when denied. Thus, the state conviction (20170D0317) removed prior to trial was declared void by district court on November 09, 2017 (ECF Doc. No. 52) when dismissed with prejudice instead of being remanded back to

[1] ECF Doc. No. 26,27,28,30, 35 and 52 relates to EP-17-CV-221-FM
ECF Doc. No. 45 relates to W-19-CA-414-ADA
ECF Doc. No. 18 relates to A-22-CV-523-SH-LY
Exhibits A relates to 08-17-00044-CV
Exhibits B relates to 08-17-00190-CR
Exhibits C, D relates to 21-50889
Exhibits E, F, G relates to 20170D0317

state court. Therefore, the dismissal is void, but more importantly where *Coleman v. Thompson* rule, 111 S.Ct. 2546 (1991) requires in federal habeas to appointed legal counsel in collateral attack of state conviction when contempt orders cannot be appealed. The federal habeas being the only manner to attack the state conviction of contempt orders (08-17-00044-CV) and where state habeas did not appoint appellate counsel under *Coleman* rule, supra, mandates appointment of counsel along with evidentiary hearing. Where neither legal counsel and evidentiary hearing were held in state habeas, it grants such appointment and hearing in federal habeas. It was denied, where Petitioner never received due process on either contempt orders rendered void by a void state judgment and by the lack of appellate counsel in the state habeas in 08-17-00044-CV, it instantly voided the contempt orders. Therein, leaving undisputed that the detention of Petitioner in county jail prior to trial of Medicaid Fraud for void contempt orders denied due process. And where federal habeas is ideally set to challenge a court without jurisdiction to enter a valid judgment of conviction. It enables for the federal habeas to attend to the requirement of due process under the constitution, without this fundamental provision it denies anyone equal protection of the law and equal access to the courts. Hereby the complexity of the removal of a civil rights claim to a federal habeas pending for the decision of the void contempt orders was inappropriate when *Preiser* rule, supra disallows this union. The exception is set by Congress to receive the relief entitled with the requirement of equality, without any equality available to Petitioner and third-party standing for enrollees of a federal right under Medicaid Act (42 U.S.C. 1396a), securely grants removal to address the violations of access to medical care under the Act. Petitioner is granted standing to secure a federal right to enrollees by its conviction and more so when federal statute defines the need to guarantee access. Hinderance limits enrollees to access while Petitioner is able to explore and expose any deviation of federal funds when as a provider could attest that payment for the

federal funding was not allocated to the enrollee. Raising the claim of FCA (Fraudulent Claim Act) in a civil rights claim to where a qui tam can attach. But where all this was denied by district court and the order on November 09, 2017 (ECF No. 52), became void by denial of appellate counsel, the dismissal of the removal regardless became void and remains in district court. Precedent case law by this Court supports that a conviction becomes void when a structural error is detected by the lack of counsel. This will enable for courts to uphold the constitutional mandate that requires equal protection of the law by an imbalanced adversarial attack to permit a fair adjudication of the conviction entered. Ignoring this provision clearly contradicts the protocol that it will not be tolerated in any circumstance, and where it attributed to a state criminal proceeding of Medicaid Fraud, it concisely secures that due process will be given in a criminal trial, it was not. Where detention of Petitioner by a void contempt order without any regard to due process along with the other defects of the contempt and commitment orders entered, denied due process. Once it was used to be jointly prosecuted in state court, any detention signals that due process could not be granted when Petitioner was detained on a void contempt orders. However, district court in EP-17-CV-221-FM (ECF No. 52) upheld the contempt orders valid, it escaped to challenge the distrust of denial of due process by a wrongful detention prior to trial. Yet, the state criminal proceeding was removed prior to trial, constructive and actual notice was given to state judge, and state court continued to trial. District court in EP-17-CV-221-FM to support the state conviction dismissed the removal on November 09, 2017 (ECF No. 52), however removal was done prior to trial on August 04, 2017 (ECF. No. 26,27,28,30). To avoid ruling contrary or illegitimatize the state court order of August 08, 2017 (Ex. "F"), district court supported by upholding the void contempt order and dismissing the removal, without appellate counsel and evidentiary hearing, although required, inevitably the order became void by structural error of

denial to appoint legal counsel in criminal proceeding. Conclusive that no judgment of conviction exists when jurisdiction was dispelled from state court under removal statute, it instantly grants federal habeas. Such obvious error does not challenge the authority of this Court that has been firm on what constitutional provisions are mandatory and ignorance does not substitute for justice. A second successive habeas was allowed on numerous issues concerning the due process for disciplinary cases issued to Petitioner while in custody by TDCJ. The disciplinary cases became secondary to primary issued in the habeas in W-19-CA-414-ADA (ECF. No. 45) where custody of Petitioner was afforded by a void conviction when the state court was divested of jurisdiction upon removal of criminal proceeding (ECF. No. 26,27,28,30) prior to trial to district court, yet without an assigned cause number for the removal as a civil rights claim, joinder to federal habeas in EP-17-CV-00221-FM the criminal conviction was dismissed with prejudice instead of remanded to state court for new trial. Therein leaving a question as to the criminal proceeding removed was ever properly decided when the federal habeas disposed of all removed proceedings with dismissal with prejudice. Hence, pending the issue of wrongful conviction to be raised once again in this successive habeas. Yet, district court failed to discuss the primary issue of jurisdiction and dismissed the petition on a procedural bar or default that was never raised by respondent (ECF Doc. No. 45). Without the pleading of such affirmative defense by respondent does not permit for district court sua sponte issue an order that incorrectly dismisses the petition, prior to evidentiary hearing. Additionally, without appointment of counsel (ECF No. 35) by a previous federal habeas in EP-17-CV-00221-FM, it enables for a successive petition to survive any procedural bar raised, however no affirmative defense was filed. Plus, a dismissal with prejudice by district court in EP-17-CV-221-FM (ECF No. 52) voids state conviction rendered, regardless. Without a motion to remand by the prosecuting attorney when the notice of removal was filed in district court, the

removal was unchallenged, and waiver is set where dismissal with prejudice applies as well to the removed criminal proceedings from state court. Ultimately, the state indictments and conviction, although removed prior to state trial, state trial court proceeded to trial and entered a void conviction while pending removal to district court. Inevitably, the state removed proceedings all became void when dismissed with prejudice rather than remanded, plus by lack of motion to remand, affirms the removal was done where dismissal with prejudice in a jointly held federal habeas petition and civil rights claim in EP-17-CV-221-FM (ECF No. 52) disposed of both proceedings. Where the State is unable to refile when dismissed with prejudice where the order entered on November 09, 2017 (ECF. No. 52) disposed of all the issues and removal. Failure to approach the issue of a void conviction by removal and dismissal with prejudice, greatly prejudices Petitioner to be subjected to a void conviction. This erroneously dismissed this successive petition which needs to address the constitutional violation of legal counsel of a criminal proceeding. Without this appointment of legal counsel, it never holds bar to receive relief, when such an elementary application fails to hold any conviction valid. Until the elementary application of the constitutional violation of a Sixth Amendment right; a successive petition fails to offer an affirmative defense by procedural bar. This does not escape district court's holding that the state court was without jurisdiction to enter conviction, but whether a previous federal habeas addressed all the constitutional rights were given, when viewed of this mandated requirement, it places district court to hold the evidentiary hearing. But also, to declare the conviction void when attained upon removal from state court to district court that eventually the order became void when lack of legal counsel (ECF No. 52) as required under *Coleman,* supra and dismissal with prejudice. Dismissal by district court (ECF No. 45) and court of appeals affirmation that mandamus (21-50430) disposed of the issue of the habeas, however, the disposition states that an adequate remedy

by appeal exists thus mandamus becomes unnecessary, thus still arriving at the same effect of no legal counsel where none was given in state appellate court. Nor will the state appellate court issue legal counsel or void the order issued on March 08, 2017 (Ex. "A"). State appellate court refuses to recognize the error when a fundamental requirement was not met, where it instantly voids the conviction. And the federal habeas as well in both EP-17-CV-00221-FM and W-19-CA-414-ADA failed to regard this omission as a constitutional violation and did not appoint legal counsel. A simple and ostensible error calls for federal overview of the state court proceedings in 20170D0317 when joined to federal habeas on September 14, 2017 (ECF. No. 26,27,28,30) and dismissal with prejudice to render the state conviction unenforceable. Even though an error by joinder of the two claims it leaves a void conviction regardless and the removed state proceeding was dismissed with prejudice rather than remand, when required to uphold conviction. District court dismissal in W-19-CA-414-ADA by brushing aside the issue of wrongful conviction by lack of state court's jurisdiction but by also, by the denial of legal counsel under *Coleman,* supra rendered regardless a void order in federal habeas. Therefore, residing the primary issue unresolved as to jurisdiction along with legal counsel when denied in both state habeas and previous federal habeas. This issue can be raised for the first time in appeal, the Fifth Circuit's denial of COA to continue with the appeal does not render the conviction valid. No supporting authority is offered to support the disposition entered on October 07, 2022 (Ex. "D"), and motion for rehearing denied on November 07, 2022 (Ex. "E").

STATEMENT OF ARGUMENT

A fundamental right to legal counsel is never eviscerated by waiver even if not previously raised in a habeas. The denial of legal counsel remains a constant structural error where on appeal it can be challenged. When the fundamental error is discovered to become such a defect that the trial or

hearing is flawed. Until district court holds an evidentiary hearing on the issue of appellate counsel requirement in state habeas and full hearing held on the issues as to state court's jurisdiction, then due process can be announced to be applied, however as of yet no trial counsel was granted nor evidentiary hearing (ECF No. 35, 52). This cannot continue when this Court's authority and precedence require the provisions of the Constitution to be applied not ignored. Now two district courts have brushed aside the constitutional right to legal counsel under *Coleman,* supra. Clearly this Court is vested with authority that such oversight of the primary function of an adversarial proceeding holds a balance of legal counsel to present the jurisdictional defect of the state court trial prior to trial under the removal statute and explore the detention of Petitioner prior to state trial. These issues were raised in the appeal of the criminal conviction 08-17-00190CR, where sadly the opinion rendered stated that Petitioner was never incarcerated for the contempt orders, however the judgment of conviction indicates the dates of incarceration (Ex. "F" "G"). And, prior to trial undoubtedly raises the issue of due process was not given when the contempt orders became void by lack of appellate counsel in 08-17-00044-CV (Ex. "A"). However, when Petitioner attempted to correct this error by motion for rehearing in 08-17-00190-CR, it was forwarded to Criminal Court of Appeals and disposed as PDR would secure a decision (Ex. "C"). The PDR was stricken for non-compliance. Once the issue was raised of void contempt orders repeatedly entered to multiple incarcerations, that regardless became void by omission of appellate counsel was sufficient to dismiss state conviction when denied due process and remand for new state trial if removal was lacked subject matter jurisdiction, no jurisdictional defect by district court was known. But a void judgment of conviction by lack of jurisdiction grants dismissal of the conviction, and the PDR cannot be stricken for non-compliance when the court lacks jurisdiction to consider a void judgment, it can only enter a dismissal, the Court of Criminal Appeals for Texas

refuses to enter dismissal of a void judgment of conviction. Once again, raising the defect in this habeas corpus filing, district court instead of exploring the constitutional violation of lack of legal counsel, it applied a procedural bar yet inapplicable sua sponte. Additionally, removal of state proceedings went unchallenged when a motion to remand was not filed by prosecuting attorney to assure remand of denied removed proceeding, instead district court dismissed with prejudice in denial of removal. Thus, preventing the State to refile indictments and prosecution of the void conviction and void indictments, plus liberating Petitioner of the void state conviction in 20170D0317. Where remand is the only method to preserve the state conviction, and dismissal with prejudice disposed of the removal from further prosecution. When district court in EP-17-CV-221-FM inadvertently dismissed with prejudice did not affirm the state conviction, contrarily it dismissed all criminal conviction and future prosecutions without refiling on the same indictments dismissed with prejudice.

I. ISSUE 1

Where removal was done prior to state trial under 1443, it enabled for Petitioner to await remand of state criminal proceeding until the conviction could be entered. Although the removal was done, remand was not done, and when the dismissal in federal habeas petition which cannot obtain a civil rights claim and furthermore when dismissal is not the proper form for a civil rights claim, solely remand. Yet, by dismissal with prejudice the state conviction entered during the removal was also declared void and unenforceable in habeas proceeding (EP-1-CV-221-FM) (ECF No. 52). Without the remand order filed in district court, the removed proceeding remains unresolved when not appointed a cause number. Additionally, the dismissal of the federal habeas is void when denied legal counsel in collateral attack of contempt orders when *Coleman,* supra commands legal counsel when the only manner and first attack of the conviction. Where contempt orders cannot

be appealed, the only alternative is to be collaterally attacked, therein requiring legal counsel in the federal habeas, nonetheless this was denied, and denial of legal counsel (ECF No. 35, 52) constructs to a structural error. Where the federal habeas petition (EP-17-CV-221-FM) notes no legal counsel was provided in state appellate process in habeas corpus petition, and without hearing on the issues raised, it compels district court to appoint legal counsel and hearing in W-19-CA-414-ADA. More importantly, removal divested the state court of jurisdiction and where no remand is done, the state conviction remains void. The need to approach this issue is critical where civil removal is greatly recognized, no Supreme Court precedence exists to address the issue of removal of criminal proceedings. Herein placing a significant issue for consideration by this Court to address the denial of due process by a state court when lack of jurisdiction is present by removal and dismissal with prejudice as well allocates the state order unenforceable.

"It is accepted Fifth Circuit law that actual or constructive notice of the removal of a case to federal court will satisfy the filing requirement of 28 U.S.C. § 1446(e)." *Dukes v. South Carolina Ins. Co.,* 770 F.2d 545, 547 (5th Cir.1985); *Medrano v. Texas,* 580 F.2d 803, 804 (5th Cir.1978); *Adair Pipeline Co. v. Pipeliners Local Union No. 798,* 203 F.Supp. 434, 437 (S.D.Tex.1962) (presentation of removal petition to judge in open court satisfies the notice requirements of 28 U.S.C. § 1446(e)), *aff'd,* 325 F.2d 206 (5th Cir.1963).

"The new section provided that all criminal petitions shall be filed first in the federal district court. Once a copy of the removal petition is filed with the clerk of the state court, 'the State court shall proceed no further unless and until the case is remanded.'" 28 U.S.C. § 1446(e). "This automatic removal mechanism has remained in force to this day." *See e.g., Murray v. Ford Motor Co.,* 770 F.2d 461, 463 (5th Cir.1985) (state court was without power to set aside its own default judgment after it learned that case had been removed). *Butler v. King*, 781 F.2d 486,489 (5th Cir. 1986).

"While we cannot sanction the use of removal petitions to harass or delay criminal prosecutions, it is clear that Congress intended for state court proceedings to be stayed while the merits of removal petitions founded on civil rights claims were considered in federal court." *Id.*

"Consequently, the district court was entirely correct in declaring the conviction on the original two-count indictment to be void, and in ordering the state to retry Hardwick or release him." *South Carolina v. Moore,* 447 F.2d 1067, 1072-74 (4th Cir. 1971); *Allman v. Hanley,* 302 F.2d 559, 562 (5th Cir. 1962) (civil case); 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3737, at 744 (1976). *See Hardwick v. Doolittle,* 558 F.2d 292, 296 (5th Cir.1977)

Where undoubtedly a civil rights claims exist when a qui tam can exist in this claim, but also where third-party standing can hold the federal right protection of enrollees upon the prosecution of Petitioner. Therefore, removal is mandated when the civil rights claim exists for prosecution when a protected activity covers Petitioner under the Whistleblower Act (31 U.S.C. 3730(h)). Inevitably the removal of state criminal proceeding met all requirements of civil rights claim and where existence of FCA (False Claim Act (37 U.S.C. 3729)) prescribes federal jurisdiction. Where Petitioner as provider can represent the rights of enrollees denied a federal right under the Medicaid Act 42 U.S.C. 1396a.

"We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, *id.*, at 112; the litigant must have a close relation to the third party, *id.*, at 113-114; and there must exist some hindrance to the third party's ability to protect his or her own interests. *Id.*, at 115-116. See also *Craig* v. *Boren,* 429 U. S. 190 (1976). These criteria have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties. See, *e. g., Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); see also *McGowan* v. *Maryland,* 366 U. S. 420 (1961). By similar reasoning, we have permitted litigants to raise third-party rights in order to prevent possible future prosecution. See, *e. g., Doe* v. *Bolton,* 410 U. S. 179 (1973)." *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

"Rachel gives such persons a clear right of removal and an immunity from state prosecution on any charge which might be sustained by proof of conduct within the federal protection." *Georgia v. Rachel*, 384 U.S. 780, 792, 86 S.Ct. 1783, 1790, 16 L.Ed.2d 925.

"Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." *Washington v. Virginia*, Civil Action No. 3: 18CV871 (E.D. Va. Feb. 28, 2019).

Uncontroverted that a civil rights claim exists, then it entitles Petitioner to federal habeas for the U.S. Attorney to investigate to determine whether Petitioner belongs in a protected activity to initiate a qui tam claim when enrollees federal right are hindered. Petitioner a provider can attest of the denial of service by denial of the claim submitted for payment, although allocated for

additional benefits under ARRA (American Recovery and Reinvestment Act- Stimulus Grant 2009).

II. ISSUE 2

By simply dismissing the federal habeas by a procedural bar, it denies district court to assert an affirmative defense for respondents. Absurdly, district court and Fifth Circuit uphold a defense presented by the district court when impartiality is a requisite to hear any claim concerning a state court without jurisdiction. It is inane to believe a district judge can arbitrarily decide for respondents without weighing the constitutional violation of lack of jurisdiction. A procedural bar not raised by respondent cannot grant district court authority to prepare the defense for respondents. Impartiality is not shown by district court's conduct to dismiss and brush aside the jurisdictional defect raised by state appellate court in 08-17-00190CR. Where a previous habeas could not hold the jurisdictional defect when the denial of the state appeal was done afterwards. Thereby, casting a successive habeas when the previous habeas dealt with the contempt orders and the successive habeas deals with removal divested state court of jurisdiction. Although repeatedly brought forth in the motion for rehearing and PDR, state appellate courts ignore the jurisdictional defect, even though a necessary requirement for a valid conviction, and federal habeas' intent is clear to be applied when a court is shown without authority to hold trial.

"Habeas corpus has long been available to attack convictions and sentences entered by a court without jurisdiction. See, *e. g., Ex parte Watkins,*3 Pet. 193, 202-203 (Marshall, C. J.). In later years, the availability of the writ was expanded to encompass claims of constitutional error as well. See *Waley* v. *Johnston,* 316 U. S. 101, 104-105; *Brown* v. *Allen,* 344 U. S. 443. But unless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited. *Stone* v. *Powell,* 428 U. S. 465, 477 n. 10. *United States v. Addonizio*, 442 US 178, 185 (1979)

Where no room exists for any other interpretation as to how a court can enter a conviction when it lacks jurisdiction, a challenge is afforded under habeas proceeding. However, a procedural bar

cannot eradicate that state court lacked jurisdiction and meets the harmless error exception when the error is blatantly egregious. Whether the procedural bar exists it is inconsequential when a jurisdictional defect is present, this is nevertheless erased to validate the conviction. Yet, district court to enter a procedural bar that was not plead by respondents does not support entry of a procedural bar.

"This Court has stated that in order to raise the procedural bar at the appellate level, the government must attempt to invoke it in the district court first." *US v. Kallestad*, 236 F.3d 225, 227 (5th Cir. 2000); *United States v. Drobny,* 955 F.2d 990, 995 (5th Cir.1992). "The government concedes that it is attempting to affirmatively invoke the procedural bar for the first time on appeal. It asserts, however, that this is permissible because the magistrate judge, and the district court by adopting the magistrate's findings, raised the procedural bar *sua sponte."*

"...[t]he relevant concerns are whether the petitioner has been given notice that procedural default will be an issue for consideration, whether the petitioner has had a reasonable opportunity to argue against application of the bar, and whether the State intentionally waived the defense." *Smith v. Johnson*, 216 F.3d 521, 524 (5th Cir. 2000).

Whether a procedural bar was offered in respondent's response is of no consequence when the ultimately the issue remains unresolved is the jurisdictional defect. Along with the other defects of the omission of legal counsel, which should loudly and emphatically announce that a void conviction exists by "actual" denial of legal counsel (ECF No. 35, 52). Invoking no authority for any court to act to enter a judgment of conviction or uphold the proceeding as valid by ignorance of constitutional amendment. When it should be admonished by the misuse of the adversarial process to deny access to legal counsel when it is clear that criminal contempt has already been adjudication as a defense needing appellate counsel to prepare collateral attack of a conviction. It is disregarded and condoned to violate Petitioner's right to legal counsel when contempt orders cannot be appealed but collaterally attacked. This exception is made by a constitutional mandate not by Petitioner's desire or waiver which leads to a procedural bar to assert by not invoking a right under the Constitution. However, Petitioner was never granted the constitutional amendment until raised by Petitioner, and yet the courts continue to ignore this mandatory provision,

questioning the bias of district court along with court of appeals to disregard this federal right. This has been settled it is not impossible to render a correct disposition of the what the provision requires, a detailed interpretation is not needed nor extensive argument to support Petitioner's contention, that due process cannot exist by the lack of legal counsel. Moreover, the jurisdictional defect is still present and cannot evolve to authority to state court to enter a conviction, even though respondent's incomprehensibly believe state court's judgment is valid by permissible decisions by the appellate courts. Yet, when challenged on this issue, the one factor continues to occur, brush aside the fact, and look at the legal sufficiency of the evidence without support of rebuttal by Petitioner when wrongly incarcerated, that became void by lack of appellate counsel in state habeas, and submission to detention by federal court when denied legal counsel and evidentiary hearing (ECF No. 35,52).

"If it was further shown that 'the habeas applicant did not receive a full and fair evidentiary hearing in a state court,'" *id.* at 312, *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), the Court concluded that a federal evidentiary hearing was mandatory, and specified six circumstances in which a hearing was required:

If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* at 313, 83 S.Ct. 745; *Cardwell v. Greene*, 152 F.3d 331, 336 (4th Cir. 1998).

"We join four of our sister circuits in holding that where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2254(e)(2) will not preclude an evidentiary hearing in federal court." *See McDonald v. Johnson,* 139 F.3d 1056, 1059 (5th Cir. 1998) (holding that 'a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission'); *Burris v. Parke,* 116 F.3d 256, 258-59 (7th Cir.) ('To be attributable to a failure' under federal law the deficiency in the record must reflect something the petitioner did or omitted.'), *cert. denied,* ___ U.S. ___, 118 S.Ct. 462, 139 L.Ed.2d 395 (1997); *Jones v. Wood,* 114 F.3d 1002, 1013 (9th Cir.1997) ("Where, as here, the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary

hearing on otherwise exhausted habeas claims."); *Love v. Morton,* 112 F.3d 131, 136 (3d Cir.1997);*Id.*

Unfortunately, where the state linked both criminal proceedings onto the contempt orders, it makes them inseparable to claim that some legal counsel was offered therefore the provision was met. One criminal prosecution is separate from the other although linked together requires each one legal counsel in both trial court and appellate counsel. While state failed to appoint appellate counsel under *Coleman,* supra, district court failed to appoint counsel in district and hold evidentiary hearing in EP-17-CV-00221-FM, thereby compelling district court in W-19-CA-414-ADA (ECF No. 45) to assign counsel and hold evidentiary hearing to declare the conviction void. Not approaching the issue does not condone state trial court usurping the authority of federal court. Until the simple task of questioning whether legal counsel caused a prejudicial effect, then harm arose which structural error exists to void conviction apart from the removal. Petitioner's strife to insist on a constitutional right is not cosmetic appearance to fairness but necessary to equal access and equal protection of the law. This is the only requirement that must be met by granting an opportunity to defend of the alleged indictment, even if the evidence indicates the guilt of Petitioner, until rebuttal is done, its appearance is essential to a conviction. Rebuttal is needed to offset the charged offense; however, this cannot be done until a full investigation as to the retaliatory act by the State towards Petitioner when filing numerous complaints with federal agencies which oversee Medicaid. Endangering federal funding when non-compliance is shown of the Act, it hinders for the State to continue to condone the denial of a federal right. Nevertheless, the State is empowered to enforce the provisions of the Act, it fails egregiously and continues to ignore the practice to further permit exploitation of the Act to fund HMOs. The purpose is obscured by condoning the practice to deny payment for services rendered under the state plan, in other words, compel enrollment to the HMOs to receive less benefit from the Act.

"...compensating MCOs on a capitated basis creates an incentive to minimize utilization of services, to ensure that the capitated payment covers the services that are medically necessary." *Frew v. Hawkins*, 401 F. Supp. 2d 619, 671 (E.D. Tex. 2005).

This is only permitted in states that do not participate in the expansion, where oversight is clearly requiring what benefits must be given, and in Texas non-participant to the expansion give reign for HMOs to rule and administer the Act as they feel feasible to maximize profit. Not the well-being or care of the enrollee, which is a federal right. Thus, in sum Petitioner's removal from state court to federal district court under 1443 is proper when a civil rights claim can exist when Medicaid services are denied to a federal right under the Act. Meeting all the qualifications for removal and divestment of state court when FCA exists by the misuse of federal funds to HMOs to deny a federal right. Petitioner's conviction serves as method to secure a protected activity as a Whistleblower and investigate a false claim of federal funding when used inappropriately to deny a federal right since removal as of 2017.

"However, developing systems to hold plans accountable for ensuring that Medicaid beneficiaries receive the care that they need has been a challenge for states." *Frew v. Gilbert,* 109 F.Supp. 2d 579, 636 (E.D. Tex. 2000).

"The population's poverty makes it likely that they will need many visits, making capitated fee arrangements unprofitable for providers." *Id.*

"The Medicaid program provides federal funding for medical services to the poor. State participation is voluntary, but once a state joins the Medicaid program, it is charged with administering a state plan and must meet certain federal mandates." *Frazar v. Gilbert*, 300 F.3d 530, 534 (5th Cir. 2002).

All these issues were not raised which ultimately declare Petitioner innocent of the conviction, whether removed or remanded. Compounded by void contempt orders onto to a federal claim, clearly distorts and convolutes the issues into a quagmire of misunderstanding and evasion tactics to avoid prosecution. But further from the appearance to avoid prosecution, it is to launch an investigation by the prosecution of Petitioner when a protected activity requires an in-depth review of the practice by states excluded from the expansion. Ordinarily, a tactic of removal is to avoid

prosecution, however Petitioner's intent is measured by third-party standing to a federal right of others, not for the purpose of avoidance, but an investigation. Undeniably Petitioner has been heavily burdened and punished for a conviction that is void, and innocent of the act when payment was not received of the federal funding for services rendered from 2008 through 2011. All these claims remain unresolved until a full investigation can be compelled, where complaints previously filed went ignored or evaded by the State although true. By prosecution it ultimately forced an investigation as to the alleged fraud by Petitioner, it will enable for resolution as to funding of the Medicaid Act to the State's supervision of a federal right is not disturbed. Also, as important is the Boren Amendment (42 U.S.C. 1902(a)(13)) prescribes adequate reimbursement rates, however this is not case with Petitioner, where the HMOs outright admit to misuse of the funds. The evidence can be proven by the denied claims although determined true and valid, they were not paid. The ARRA funding was misused, and the practice continues with all state excluded from the expansion by their legislative branch. Without any ability for an enrollee to challenge the denial of service when unable to compel release of federal funding to attain medical care needed, it compels Petitioner to third-party standing. Plus, prosecution induces an investigation as to alleged fraud by Petitioner is retaliatory for multiple complaints to federal agencies to make the State compliant to the Act. Absurdly, the district attorney has absolute confidence of the conviction, yet are unwilling to claim that a removal occurred prior to trial and removed jurisdiction and rendered a void conviction. Petitioner's contention that the U. S. Attorney should investigate dispels the alleged fraud, and where tedious and detailed investigation as to how Texas allocates federal funding to which HMOs misuse the funding and deny services entitled to enrollees, would categorically place Petitioner into a protected activity, Whistleblower. Having no other alternative to expose the fraud by the State to permit HMOs pay for reimbursement of

services contrary to the Boren Amendment, Petitioner was compelled to indictment, yet removal was done, it was never disposed. Removal to habeas action is denied, moreover when the habeas failed to appoint legal counsel under *Coleman,* supra, it inevitably cancelled the order of dismissal, and removal remains undisposed since 2017. Within the 10-year statute of limitations for civil rights claim under 42 U.S.C. 1983 and FCA, it relates to the 2008 ARRA funding which was emphatically misused by the HMOs. Evidence in Petitioner's possession exists where HMOs contract specifically mandates compliance to the state plan, by not enabling to offer the services as the State plan, the HMOs denied the services. Unequivocal of the fraud by the HMOs and the State's non-compliance to Act, compels overtaking by CMS and allows the expansion which is greatly needed in Texas. Furthermore, it would also discourage any political manipulation of a federal right when Republican states participate to deny the expansion to permit the manipulation to continue by the HMOs. However, turning again to the principle of the civil rights removal was deemed necessary when federal rights are hindered, and Petitioner's third-party standing permits for claims in federal district court not state court. The culprit of the fraud is the State, and by denying due process to Petitioner by detention of void contempt orders and assimilation of theft of real property to Medicaid fraud, completely provides for suppression of the issue raised by Petitioner, fraud.

III. ISSUE 3

"Actual" innocence is indistinguishable from innocence, however where the respondents concede in A-22-CV-523-SH-LY (ECF No. 18) even though Petitioner is innocent by lack of jurisdictional defect, the factual sufficiency supports the conviction, however Petitioner was not allowed to present any evidence of non-payment. Yet, by detention of a void contempt order and denial of

appellate counsel in state habeas evolved to a trial without due process when preparation for trial cannot be done while incarcerated.

"For Coleman to prevail, therefore, there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

Petitioner was incarcerated for void contempt orders on February 09, 2017, until May 12, 2017, and then released on bond. On July 12, 2017, Petitioner was re-arrested on the same void contempt orders prior to trial. Although raised in the motion for rehearing of the criminal appeal in 08-17-00190 CR (Ex. "C"), it was refused to be filed and forwarded to the Criminal Court of Appeals. The Criminal Court of Appeals denied the motion for rehearing of 08-17-00190CR and requested Petitioner to file PDR although void by removal under 1443 (Ex. "C").

"...a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case " `clearly and expressly' " states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989).

> "But the decision in *Coleman* goes the other way. It holds that the state court must have overtly intertwined consideration of the federal issue with its state procedural bar before the clear and express statement of reliance upon the procedural bar is required." `

The PDR was filed then stricken for non-compliance, although a void conviction is present by the lack of jurisdiction in the removal to district court prior to trial. Exhausting the requirement of state appellate courts and denied motion for rehearing by the highest appellate state court, it met the requirement under 2254. But the issue remains unresolved to again raise the issue of the void contempt orders played denial of due process by wrongful detention prior to trial, to prevent Petitioner any defense or rebuttal of the alleged charges.

IV. ISSUE 4

Third-party represents the interest or rights of others when hindered to present a claim, therein Petitioner asserts through prosecution the federal right of others (children) under the Act.

Unrepresented by the State to protect their federal right, Petitioner stands in to protect the federal right when claims are denied for services mandated by the Act, but also when the state plan requires that HMOs will provide the same service, with higher reimbursement rate from the ARRA funding or Medicaid Act. To which enrollees would have equal access to medical care as the originally established under the civil rights movement of 1966, by Petitioner's removal of the prosecution to federal district court prior to trial under 1443, the requirements were met under *Georgia v. Rachel* rule, diversity met through the act of a protected federal right, the intent is met as defined of 42 U.S.C. 1983.

"Plaintiffs argue under *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498 (1990), that states participating in Medicaid must adopt reasonable and adequate reimbursement rates, and therefore, that health care providers have enforceable rights to reasonable rates under § 1983." *Virginia Hospital & Healthcare Ass'n. v. Kimsey*, 493 F. Supp. 3d 488, 493 (E.D. Va. 2020).

"The *qui tam* provision has been used in the past, as is presently being attempted, to stop fraud in the medical arena." *See, e.g., United States ex rel. Glass v. Medtronic,* 957 F.2d 605 (8th Cir.1992); *United States ex rel. Woodard v. Country View Care Ctr. Inc.,* 797 F.2d 888 (10th Cir. 1986). *US ex rel. Foulds v. Texas Tech University*, 980 F. Supp. 864, 867 (N.D. Tex. 1997).

And qui tam can be held in a civil rights petition, Petitioner was rightly casted for removal to federal forum, when due process along with federal right were denied, and by third-party standing provides for federal jurisdiction. The prosecution of Petitioner requires thorough investigation of fraud under the Whistleblower act when a federal right arises by the fraud of federal funding for the Act. Without this protected activity Petitioner is subject to attack for raising the issue with federal agencies, and the U.S. Attorney's interest to ascertain that a federal right is protected to the enrollee, it provides that Petitioner can be considered for this protection. The State prepared an adversarial squarely on evidence provided by Petitioner and failed to investigate the federal funding under ARRA was not provided to enrollees as required by CMS (Center for Medicaid and Medicare Services), yet the State will not investigate any wrongdoing by its division, when it obstructs federal funding for enrollees, however it does not account, that CMS' request was

ignored. Petitioner solicited the aid of CMS to have an inquiry as to the funding allocated for enrollees and denied to providers (Petitioner), whereupon CMS requested an inquiry as to Petitioner's allegation, the State failed to investigate. Instead, subjected Petitioner to audits, which were cleared, except for the last one when Petitioner was incarcerated for void contempt orders. Until the contempt orders are explored and examined by appointment of legal counsel and evidentiary hearing will the State be shown to deny due process and impede a fair tribunal to acquire a void conviction. Arguably the question remains, if Petitioner was illegally detained, then due process was denied, and issues presented in prosecution of Petitioner relate to a federal right for removal of a civil rights claim are set for a federal investigation. Undisputed that a civil rights claim can be raised in qui tam when FCA claim arises from denial of a federal right for both enrollees and Petitioner. Petitioner is held to be a protected participant in investigation of displacement of federal funding intended for enrollees, however misuse was done of ARRA funding. In addition, non-participating states of the expansion continue the practice for HMOs to designate the reimbursement however contrary to the Boren Amendment.

"Thus, the Boren Amendment provides that a State must reimburse providers according to rates that it 'finds, and makes assurances satisfactory to the Secretary,' are 'reasonable and adequate' to meet the costs of 'efficiently and economically operated facilities.' The State must also assure the Secretary that individuals have 'reasonable access' to facilities of 'adequate quality.'" *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 507, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990).

"In *Wilder v. Virginia Hospital Ass'n,* the Supreme Court held that the Boren Amendment to the Medicaid Act, which required reimbursement according to rates that a state finds 'are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities,' was enforceable by health care providers under § 1983." *Frazar v. Gilbert*, 300 F.3d at 538.

"Proof of a violation of a federal statute, by itself, does not entitle a plaintiff to relief under § 1983. Instead, in *Blessing v. Freestone,* the Court explained that to obtain relief under § 1983, "a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law.*" Whether a statutory violation amounts to a violation of a statutory right actionable under § 1983 depends on three factors recognized in *Blessing:*

'First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.'" *Id.*

Thereby without any other elevated obstacle to detract the fraud by HMOs when funding is retained to deny a federal right as provided by the Act by political manipulation of non-participating states to the expansion, the state continues to deny services entitled to enrollees. Where prosecution of Petitioner opens a probe as to denial of due process when a Whistleblower and further inquiry as to the denial of federal right of enrollees. This encapsulates the purpose of a civil rights claim and rightly Petitioner removed the state criminal proceeding to project scrutiny by the U.S. Attorney's office of a FCA claim. Upon discovery that a FCA claim exists it compels review of the prosecution of Petitioner, but more importantly the review of a federal right which secures equal access to medical care under the Act. Where unquestionable that a federal right is being denied institutes a federal claim under a civil rights pleading thus grants removal to district court when the inequality is exemplified by allocated federal funding in ARRA for additional services but where denied. In essence, the criminal prosecution was regardless a civil rights claim when inequality by economic disparity to attain medical care is shown by retention of federal funding, it mandates for review in federal jurisdiction, the state court is incapable and unable to address the claim. Rightly shown by the denial of the investigation of THHSC by the State. The same requested agency by CMS to review Petitioner's allegation is the same agency that decidedly prosecuted Petitioner rather that compel THHSC to comply to the Act. Thereinafter, Petitioner to receive an objective review of the fraud could not be accomplished when incarcerated for a void contempt order, that led to a false indictment, and pronounced guilt, and sentenced without a trial on the indictment filed. All these acts by state actors constitute a denial of equal protection of the

law, it enables for removal but moreover when the State failed to file a motion to remand it finalizes acceptance of the removal. And dismissal with prejudice grants a void conviction to where refiling of the indictments cannot be done. (ECF No. 52). And, proceeding to trial does not ignore the requirement to file the motion to remand, otherwise the removed proceeding divests state court's jurisdiction and renders a void conviction.

"Even if this matter was improperly removed, the plaintiffs waived the opportunity to challenge the removal. That is because plaintiffs' motion for remand was untimely under 28 U.S.C. § 1447(c). The plaintiffs do not dispute that they failed, as required by section 1447(c), to file a motion to remand within thirty days after defendants filed their notice of removal. Hence, after the expiration of the thirty-day period set forth in section 1447(c), the district court properly retained jurisdiction, assuming that this is an action that originally could have been brought in federal court, an issue we examine in the next section." *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1543 (5th Cir. 1991).

"Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties." *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir. 1991)

These issues of the federal habeas do not solely address Petitioner's plight but standing as a third-party in a civil rights claim for a protected federal right to enrollees, as well Whistleblower Act. And where a civil rights claim can exist by FCA or qui tam action when fraud is detected by denial of federal right funded but never implemented to enrollees of additional services under ARRA and continues to exist by non-participating states of the expansion.

V. ISSUE 5

On November 09, 2017 (ECF No. 52) an order was rendered as to federal habeas along with removed state proceedings in 20170D0317, 20170D0316, 20170D3617 and 20170C0389 (ECF Nos. 26,27,28,30) which decided all issues raised in federal habeas and civil rights removal to be dismissed with prejudice. However, by dismissal it did not remand the state proceedings back to state trial court, which divested state court of its jurisdiction, plus where an order for dismissal with prejudice prevents any further prosecution, typically a remand order would be better situated

rather than dismissal. Where dismissal with prejudice automatically renders the state prosecution void of the removed proceedings and denies further prosecution. Inevitably, federal district failed to distinguish the removed proceedings when joined to federal habeas, it grants the same relief. And casts an overall dismissal rather than remand, district court inadvertently voided all the state prosecutions and convictions rendered by state court. Since the dismissal was entered after the state trial court's disposition of the judgment of conviction was entered. Enabling for the dismissal with prejudice to be inclusive of the concluded state court proceedings whether dismissed or rendered a conviction of guilt. This is assembled by the removal and dismissal doctrines of civil proceedings; it alike applies to criminal prosecutions when dismissal is not unique to only civil proceedings. Notice of removal of criminal only requires notice of removal prior to trial, which was undisputedly done by Petitioner (ECF No. 26,27,28, 30) without any other controverted claim unresolved, the issue becomes settled by disposition in federal habeas along with removed state proceedings, in dismissal with prejudice of state conviction (20170D0317). However, inclination as to denial of appellate counsel and evidentiary hearing in federal habeas under *Coleman,* supra voids the dismissal with prejudice when rendered void by denial of legal counsel, where state appellate court failed to appoint appellate counsel and execute a hearing on state habeas. This unquestionably grants relief to Petitioner of void conviction (20170D0317) when district court inadvertently dismissed with prejudice all claims raised in the conviction along with indictments by state prosecutors in removal of state prosecution under 1443.

"Any time a district court dismisses, rather than remands, a removed case involving pendent claims, the parties will have to refile their papers in state court, at some expense of time and money. Moreover, the state court will have to reprocess the case, and this procedure will involve similar costs. Dismissal of the claim therefore will increase both the expense and the time involved in enforcing state law." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 353, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988).

Additionally, prosecution and conviction were rendered void as entered on August 08, 2017 (Ex. "F" "G"), in 20170D0317, it is unquestionable a dismissal with prejudice and not remanded, conclusively establishes determination of the state court proceedings as final and void to enforce. And state court stripped of its authority in its state conviction when dismissed with prejudice rather than remanded as required of removed state proceedings under 1443, the conviction rendered became unenforceable. Petitioner is "actually innocent" to fall under federal habeas' relief from custody and parole of a void conviction when dismissed by prejudice rather than remanded to state court. Again, reminding the Court, notice of removal was done prior to trial under 1443, state court pursuing to trial when notified of removal uncontrovertedly voids the conviction when state court was divested of jurisdiction to preside over the proceeding. Fallibly the entry of dismissal by prejudice grants relief from prosecution and voids the state conviction in 20170D0317 along with the other state indictments removed prior to trial. Where trial court in state proceedings were all held jointly, removal was done for all these proceedings and entry of notice of removal for all these cases were dismissed with prejudice. Thus, instantly placing Petitioner to a void conviction in criminal conviction and contempt orders. The contempt orders void by lack of legal counsel and evidentiary hearing under *Coleman,* supra. And joinder of all the state court proceedings to federal habeas unifies the dismissal with prejudice for all prosecutions and future prosecutions in EP-17-CV-221-FM (ECF No. 52). Distinguished by this Court by precedent case law in *Carnegie*, supra sets for remand rather than dismissal otherwise dismissal mandates refiling of indictment, however the November 09, 2017 (ECF No. 52), of all removed proceedings from state court were dismissed with prejudice. And Petitioner is rendered "actually innocent", and state actors cannot again prosecute for the same indictments or related to the cause of the indictment. District court in this federal habeas inadequately considered the dismissal was appropriate to uphold the state

conviction by dismissal with prejudice, however this Court's precedence indicates reversal of conviction, without further prosecution by refiling. Dismissal with prejudice denies the state to enter a new indictment or present any further prosecution on the alleged similar conduct by Petitioner to claim ownership to real property or Medicaid Fraud. The state conviction is instantly void by dismissal with prejudice of removal rather than remanded.

"As many lower courts have noted, a remand generally will be preferable to a dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case. In such a case, a dismissal will foreclose the plaintiff from litigating his claims. This consequence may work injustice to the plaintiff: although he has brought his suit in timely manner, he is time barred from pressing his case." *Id.* at 352.

Henceforth, the dismissed with prejudice state proceeding removed to federal district court under 1443 and attached to federal habeas disposed of all claims and prevents state prosecutors to refile when dismissed with prejudice (ECF No. 52). Nunc pro tunc order does not clear or clarify the inadvertence by district court to deny Petitioner to legal counsel and evidentiary hearing. But it denies any kind of modification without any error in clerical error. This Court has decidedly set precedence as to when dismissal allocates disposition on the merits of claims raised in removal. A nunc pro tunc order does not subject Petitioner to an altered judgment when the issue of clerical or misspelled caption would fall under a correction to clarify the parties or omission of a decided issue. That district court's intent was to uphold the state conviction, which regardless was rendered void by removal under 1443, it automatically dismissed all state indictment of theft of real property and Medicaid Fraud (20170D0317) on these indictments now consequently denies further prosecution on these indictments by refiling. Thus, liberating the qui tam to go forward. And where Petitioner has standing as a third-party it conveys freedom from future or further prosecution upon discovery of the dismissal with prejudice. Where a nunc pro tunc order cannot remedy the error by district court in EP-17-CV-00221-FM. Nunc pro tunc orders customarily adjoin

corrections of the record to dispose of clerical errors, however the entry of dismissal with prejudice is not cohesive of this remedy.

"However, it is clear that there are limits on the court's authority to make retroactive revisions to prior orders." *State v. Bonnell*, 140 Ohio St. 3d 209, 2014 Ohio 3177, 16 N.E.3d 659 (2014).

"But a nunc pro tunc entry cannot cure the failure to make the required findings at the time of imposing sentence." *See State v. Miller,* 127 Ohio St.3d 407, 2010-Ohio-5705, 940 N.E.2d 924, 16 ("a nunc pro tunc order cannot cure the failure of a judge to impose restitution in the first instance at sentencing"). *Id.*

"In *Perkins* itself, the court said that 'a defect in a judgment, order or decree which expressed exactly the intention of the court at the time when it was made cannot be remedied by a nunc pro tunc entry.'" *Perkins v. Perkins,* 225 Mass. 392, 114 N.E. 713, 713-14 (1917). *Fierro v. Reno*, 217 F.3d 1,5 (1st Cir. 2000).

Finally, disposing of the state conviction being void either by denial of legal counsel and evidentiary hearing, removal of state court proceeding to district court under 1443 (ECF No. 26,27,28,30) prior to trial, and dismissal with prejudice in habeas petition order entered on November 09, 2017 (ECF No. 52), entitles Petitioner to relief from a void conviction. Irrespective of which proceeding, or method used, the state conviction is void, it cannot escape the inevitable void disposition of the state conviction. Thus, succumbing to pursuance of a qui tam action when third-party standing invoked by Petitioner's prosecution and without persecution of a state proceeding, when dismissed with prejudice, it enables to lift the void conviction to proceed with the FCA claim by U.S. Attorney. In camera review can be viewed by district court in Austin Division which is more apt to dispose of federal pre-emption doctrine along with legislative construction. Lifting the retaliatory act by state actors and HMOs to limit and deny medical access as raised by Petitioner's assertion that fraud has occurred and continues while the expansion is denied in Texas. Yet, this process is not limited solely to Texas, it includes all non-participating states under the expansion of the Act under ACA (Affordable Care Act). This would surely place a freedom from a constraint to a federal right to current enrollees of limited access to medical care

afforded under the Act, but also to additional future enrollees under the expansion, which CMS directly oversees. Denial of a federal right to access medical care under Act prejudices all residents where States that fail to participate in the expansion, hindering the right of possible enrollees along with current enrollees under the Act. Furthermore, where denial of removal is disallowed after 30-days of notice of removal filed and without a motion to remand filed by prosecuting attorney, it inevitably left the removal in district court even if denied by district court in its order on November 09, 2017 (ECF No. 52). Waiver of the removal was performed by the prosecuting attorney when if failed to file the motion to remand and casts the removed proceeding to district court. However, the issues now remain in the civil rights petition pending motion for rehearing in 22-5601 for the wrongful incarceration and state actors enforcement of void orders. This enables for this Court to consider that when automatic disposition of the issues without an evidentiary hearing and joinder of civil rights claims all united grants relief when dismissed with prejudice. Exclusion is not formed by denial of removal, which regardless was done after the 30-days, furnishes a void act and entry of dismissal with prejudice is inclusive the state conviction (20170D0317) and state indictments removed. Hereby, translating that any further prosecution is disallowed, and Petitioner can assert a claim against state actors for enforceability of a void conviction dismissed with prejudice. Setting forth that remand along with motion to remand is necessary to invest state court's jurisdiction when removal of state criminal proceeding to district court, and ordinarily a well-known doctrine applicable in civil actions, remotely known in criminal proceedings, the accepted practice of remand is unequivocally required to reinstate state's jurisdiction when removed. Any other interpretation is not needed, when removed criminal proceedings have been shown to reflect the need for a motion to remand, otherwise waiver is set, and an order of remand is required under 28 U.S.C. 1447(c) prior to continuing to state trial. A

denial of removal serves no purpose but to confuse and assume that removal was not accepted, but technically as the rules and statutes prescribe the proceeding if not remanded it is dismissed with prejudice, allocates the plaintiff or state denial to refile. Whether dismissed with or without prejudice is not preclusive of a needed remand order under 1447 (c), rather it mandates dismissal of state proceeding removed, as in this instant case, dismissed with prejudice, renders Petitioner "actually" innocent of the conviction. And prescribes a federal habeas when state courts are unwilling or unable to grant relief to Petitioner, to declare "actually" innocent. Petitioner's plight becomes necessary to expose the tactic to manipulate the Act which was intently sought to provide medical care for a population with restricted income to acquire medical care. Where all these issues exist for consideration by this Court, it has never been approached as to the claim of third-party standing, a federal right of a protected activity, appellate counsel in habeas action for contempt orders, dismissal of criminal prosecution without a motion to remand filed, non-enforceable state conviction which was dismissed with prejudice when not remanded, and evidentiary hearing.

WHEREFORE PREMISES CONSIDERED, Petitioner prays that the writ of certiorari is GRANTED, and state conviction is declared VOID. Petitioner further prays reassignment under 28 U.S.C. § 2106 to Austin Division court upon remand and the State is prevented to refile any indictment on the related charges dismissed with prejudice. And for any other relief entitled to Petitioner.

Submitted on this day 31 January 2023.

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Certificate of Service

On this day a copy of the writ of certiorari was emailed to Edward.marshall@texasattorneygeneral.gov.

Rosa Serrano