No. 23-5712

IN THE SUPREME COURT OF THE UNITED STATES

Gerald Vaughn Gwen, Petitioner

v.

Arizona Attorney General, Respondent

ON WRIT CERTIORARI TI THE U.S. SUPREME COURT

Gerald Gwen #332970
Arizona State Prison Complex
Red Rock Correctional Ctr.
1752 East Arica Road
Eloy, Arizona 85131

TABLE OF CONTENTS

Table of Authorities

Constitutional provisions

Fifth Amendment

Eighth Amendment

Article I, §9, **Cl.2**

Statutes

Fed. R. Evid. 901

28USCS§1251 (1)

28USCS§1615 (e)

28USCS§636

28USCS§2241

28USCS§2253

28USCS§2254

USCS App. Ct R2710

USCS Sec. 2254 cases R8, R11

ADEPA-Act 1996

Circuit court decisions

U.S. Supreme Court decision

Questions Presented

Whether the District court judge's fairly and equitably discharged their duty in accordance with the effective and expeditious administration of the business of the court in manner consistent with the demands of due process of law; or was so far a departure from accepted and usual course of judicial proceedings; from which the District court did 'suspend' the right of Writ of Habeas Corpus contrary to Article I, section 9, cl. 2 of the United States constitution, violated Petitioner's substantive rights.

Whether the Court of Appeals, Ninth circuit entered decision that was in conflict with decision of another United States court of appeals on the same important matter, wherefore Appellate courts denial of Petitioner's right to appeal pursuant to USCS §2253; from which the denial of COA did 'suspend' right to Writ of Habeas Corpus contrary to Article I, section 9, cl.2 of the United States constitution, violated Petitioner's substantive rights.

Whether Petitioner was deprived procedural due process when District court's dismissal of Writ of Habeas Corpus without reaching the merits, or without adequate de novo review, or without holding evidentiary hearing statutorairily-mandated as proscribed under 28USCS §2254 (d), amounted to a denial of justice .

Whether Petitioner was denied "fundamental fairness" or due process of law when he was not accorded fair opportunity to make required showing of "absolute innocence" by clear and convincing evidence or that his conviction was contrived in violation of the United States constitution rendering the state court hearing unconstitutional.

Whether the District court has entered a decision that was in direct conflict with decision of this courts determination of rule defined *in Jackson v. Virginia,* in regard to sufficiency of evidence necessary to satisfy reasonable doubt.

List of Parties

A) Gerald Vaughn Gwen, Petitioner, *pro se*

B) Arizona State Attorney General, Respondent, represented by Michelle L. Hogan

C) United States District court, District of Arizona, Hon. James A Teilborg, judge; Hon James F. Metcaf, magistrate judge.

D) Arizona Department of Correction, Ryan Thornell, director

E) United State Court of Appeals, Ninth circuit, Honorable judge's Silverman. H.A.Thomas, Nguyen and Bade.

List of Proceedings-Related Cases

Cases involved:

A. Superior Court of Arizona, Yavapai County, No. V1300CR201508451 and V1300CR201780299;

B. Arizona State Court of Appeals, No. 1-CA-CR-18-0775;

C. Arizona Supreme Court, No. CR-20-0668-PR;

D. United States District Court, District of Arizona, No. 3:20-cv-08327-JAT (JFM);

E. United States Court of Appeal, No. 22-15944.

State court proceedings:

1. The date the Superior State of Arizona, Yavapai County, decoded my case was September 19, 2018; sentenced on October 18, 2018;
2. The date the Arizona Court of Appeals decoded my case was January 17,2020; Direct appeal conviction affirmed;
3. The date the Arizona Supreme Court decided my case was July 28, 2020.
4. The date the Superior court decided my petition for post- conviction relief was November 22, 2018, review denied.

Federal District court proceedings:

1. The date the District court, District of Arizona decided my case no. 20-cv-08327 JAT (JFM) was June 15, 202, dismissed with prejudice;
2. The date the District court, District of Arizona decided case n. cv-19-08098 PCT JAT (JFM) was April, 2019, dismissed without prejudice.(Related)

United States Court of Appeals:

1. The date the Ninth Circuit decided case no. 22-15944 was March 13, 2023, COA denied; motion to reconsider denied on April 24, 2023. (Related)

Basis for Review

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

From the United States District court appears at appendix A to the petition and is unpublished to date.

From the United States court of Appeal, Ninth Circuit appears at appendix B to the petition and is unpublished to date.

The writ of certiorari should be granted to aid the Supreme courts determination:

1. If the State courts possess the requisite subject matter jurisdiction, as defined by the Supreme Court, to proceed in criminal trial where state court never established constitutional requisite for seeking an indictment as proscribed by the Fifth Amendment to the constitution.
2. If the Federal District courts procedural ruling was correct in dismissal of Writ of Habeas Corpus petition with prejudice was an abuse of discretion amounting to manifest miscarriage of Justice".
3. Whether the Habeas Corpus proceeding were so far a departure from decision of this court Statutory rule, "the constitution now prohibits the criminal conviction of any person – including, apparently, a person against whom the facts have already been found beyond a reasonable doubt by a jury....."

4. Whether the federal District court adequately, by direct or de novo review, decided the federal question whether Petitioner is being held in "custody" in violation of the U.S. constitution.

Rule 20.1 Statement of Jurisdiction

The jurisdiction of the Supreme court in invoked under 28USCS§1254 (1); 28USCS§1615 (e) and USCS Supreme court rule (10).

The Supreme court should entertain Writ of Certiorari to because exceptional circumstance warrant the exercise of this courts discretionary powers, to correct a miscarriage of justice and that relief cannot be obtained by any other court, or by any other form.

Both, the District court and the Ninth Circuit court did suspend the privilege of the writ in violation of United States Constitution, Article I, §9, cl. 2.

When the District court dismissed Petitioner's Writ of Habeas Corpus with prejudiced, where District judge's did violate the federal constitution depriving Petitioner of fundamental right to de novo review, denial of evidentiary-hearing statutorily-mandated under §2254 (d), and when District court judge's abused its discretion in application of *Slack v. McDaniel,* to deny certificate of appeal ability without stating the specific constitutional issue that satisfy the showing required by 28USCS§2253 (e), is sufficient to establish an exceptional circumstance warranting Supreme court review.

The Court of Appeals For The Ninth Circuit foreclosed Petitioner's right to appeal under §2253 by its denial of Certificate of Appeal ability without reaching the

merit of claim presented by notice of appeal or that court abused its discretion by avoidance of allowing a showing of a constitutional violation. The courts subjective ruling of technical error that was, for all intent and purposes, not absolute, is sufficient to establish an exceptional circumstance warranting Supreme Court's review. See, Miller-El v. Cockrell, 537 U.S. 322 (2003); Buck v. Davis, 137 S. Ct. 759 (2017); and Gonzales v. Thaler, 565 U.S. 134 (2012).

Petitioner believes his allegation of 'absolute innocence" falls within the one percentile of jurisdiction of Supreme court's appellate review sufficient to grant writ.

Relief Sought

1. The Writ of Certiorari seeks resolution of Petitioner's writ of habeas corpus brought under §2254 in Federal District court;
2. Issuance of writ of Habeas Corpus;
3. An order for immediate release from custody;
4. Declaratory judgment were appropriate;
5. Reversible al all related cases;
6. Grant such other relief he may be entitled to.

Rule 20.4 Statement

Petitioner asserts requirement under USCS Supreme court rule 20.4 (a) has been satisfied, where an application for Writ of Habeas Corpus was made to the U.S. District court, District of Arizona and is compliant with 28USC§2241 and 28USC§2254, D.C. no. 3:20-cv-08327 JAT (JFM), dismissed with prejudiced.

Statement of the Case

Petitioner had a trial by jury of 12 persons in which he proceeded *pro se* and was provided advisory counsel. Petitioner was found guilty of all counts and sentenced to a consecutive five year prison term. Petitioner filed a first post-conviction relief petition, motion to vacate judgment, pursuant to Ariz. R. Crim. P 24.2. Relief was denied. Petitioner filed a notice of direct appeal in state court of appeals challenging his conviction and was appointed appellate counsel. His appellate counsel filed an Ander's brief leaving petitioner without counsel for his appeal, but was permitted to file a supplemental brief. The Arizona court of appeals denied relief affirming the conviction. Petitioner filed for review of appellate decision that was denied without a written explanation as required by Arizona Constitution, Article IV, § 2.

On December 07,2020 Petitioner filed his application for writ of habeas corpus in Federal District court, District of Arizona under 28USCS§2254 (doc. 1). The Arizona Attorney General was directed to answer the allegations in complaint and

did so on December 16, 2021 (doc. 23), and was replied to by Petitioner on May 21, 2021(doc. 43). The Habeas court issued its report and recommendation on February 03, 2022.

Petitioner filed his objections to the R&R on February 19, 2022 (doc. 57) and respondents filed their reply to objections on March 04, 2022. The District court judge rendered a decision in the matter on June 15, 2022 dismissing the petition with prejudice (doc.60). The district court denied COA and Petitioner sought issuance of COA in U.S. Court of Appeals, Ninth Circuit, which was denied.

Reasons for grant of Writ:

A) Manifest necessity where District court and U.S. court of appeals did suspend privilege of the writ;
B) Supreme courts holding in *Jackson v. Virginia,* whereby a petition that assert actual innocence or a conviction contrived on lees that minimal evidence to sustain the verdict results in a miscarriage of justice;
C) Deprivation of right to evidentiary hearing required under §2254 (d);
D) Denial of COA or an abuse of Supreme court decision in Slack v. McDaniel;
E) Magistrate's report and recommendation was insufficient to satisfy requisite direct review;
F) District judge's failure to conduct de novo review deprived petitioner of right to fair procedure;
G) Impact on petitioner's Sixth amendment right to fair trial.

[A] Manifest necessity

Under our constitution "The privilege of the writ of habeas corpus shall not be suspended..." (Art. I, §9, cl. 2). In actuality the District court did "suspend ", I.D., Petitioner's "privilege of the writ of habeas corpus", I.D., to prejudicially favor respondents by employing ineffective methods not reasoned by or supported by sound jurisprudence in fairly deciding the merits of claims presented in the petition.

The U. S. Court of Appeals for the Ninth Circuit did "suspend", I. D., petitioner's "privilege of writ of habeas corpus" by denial of Certificate of Appealability for a subjectively technical error without consideration of the issues on the merits.

This manifest injustice through the miscarriage of justice were intentional, and caused by the district courts and appellate courts willful acts defiant under manifest disregard doctrine. See, ex parte Yeager, 75 U. S. 85, 19L.ED 332, 1868 U.S. Lexis 1085 (1868).

[B] Absolute Innocence

The question whether federal district court gave equitable consideration to Petitioner's claim of "absolute innocence" or "sufficiency of evidence" claim, concisely stated in the petition for writ of habeas corpus relief. (doc. 1), deprived Petitioner of his substantive right to adequate review, thus a violation of due process.

Petitioner believes, if properly considered, a jurist of reason would have found issue of innocence debatable or whether the court's ruling was procedurally correct.

Whether the due process standard recognized in *Re Winship,* was considered to constitutionally protect petitioner against conviction except upon evidence that is sufficient fairly to support a conviction that every element of the crime has been established beyond a reasonable doubt. Jackson v. Virginia, 443 U.S 307 (1979); El. Al. Vo. 78-5283. (The Supreme Court reasoned the answer to that question is clear).

Petitioner was deprived substantive right to federal hearing, (later discussed), to make required showing by "clear and convincing" evidence that for constitutional error no reasonable person would have found him guilty of the underlying offense".

The district judge failed to dispose of the question whether petitioner's constitutional rights have been violated in reaching the conviction. "Guilt, therefore, pose the circumstance in which substitute federal review under the writ is especially necessary". Gall v. Parker, 231 F. 3d 26, 336-37 (6th cir 2000).

Relevancy of Innocence

The district court judge's never considered whether petitioner's claim of malicious prosecution on part of state officials affected his right to fair and impartial trial or his innocence, satisfies the statutes stringent "cause" and "prejudice" standard under(§2254).

The district court's decision was in conflict with relevant decision of this court.

The Supreme court firmly held, "Innocence" is established only if the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense". USCS§2254 (B), (f), ("It is manifest miscarriage of justice under such circumstance").

Without federal hearing, statutorily-mandated, petitioner was deprived his right to claim innocence, resulted in miscarriage of justice.

Federal Habeas courts have generally recognized "actual innocence" and adhere to clear legislative intent of section 2254 to place legal methods concerning the "violation of the constitution on laws of laws of the United States".

Petitioner was foreclosed from demonstrating a constitutional violation that itself responsible for having been convicted despite being innocent. Brecht v. Abrahamson, 507 U.S.619, 629 (1993), (Quoting Arizona v. Fulimante, 499U.S. 279, 280 (1991), see also, Rose v. Clark, 478 U.S. 570, 77-78 (1986), (Cataloguing constitutional rights that "require reversal without regard to the evidence in the particular case, because they render a trial fundamentally unfair").

The federal district court has lost sight of the fundamental purpose of the Great Writ, to assure that constitutional violations are surfaced and corrected. This opinion was shared by Supreme Court in Schirio v. Summerlin, 542 U.S. 348, 362 (2004), (Breyer, J., joined by Stevens, Souter and Ginsberg, JJ.) delivered opinion; "Great writs objective "include" protecting the innocent against erroneous conviction". Federal district court should have granted writ of habeas corpus, as matter of law, on principle, (1) Petitioner's allegation of accumulative error had substantial and injurious effect; (2) Petitioner is actually innocent; (3) and, the sufficiency of evidence adduce in state court hearing was insufficient as matter of law. Baus v. Cambra, 204 F.3d 964, 977 (9thcir 2020); Bretch v. Abrahamson, 507 U.S. 619.

The AEDPA-act of 1996 permits prisoner's to use a strong showing of probable innocence as a "gateway" through certain procedural impairments to habeas corpus relief. Herrera, 506 at 404 (emphasis added), se I.D. at 416 "Our federal habeas cases have treated claims of "actual innocence", not as an independent constitutional claim, but as a basis upon which habeas petitioner may have an independent constitutional claim considered on the merits.

Relief on basis of "no evidence", Petitioners is entitled to grant of writ on ground that the trial was devoid of any direct or circumstantial evidence necessary to support conviction as defined by the Supreme Court. Petitioner's trial cannot legally be described adequate or sufficient to support his verdict beyond a reasonable doubt. The question whether the so-called evidence admitted at the trial reaches the high threshold of "no evidence" criterion of Thompson V. Louisville, 362 U.S. 199, or that of constitutional standard of evidence necessary to convict In Re Winship, 397 U.S. 358. (The Supreme Court reasons the answer to that question is clear).

From the onset of the commencement of case the state lacked requisite probable cause or reasonable cause to seek an indictment of which Supreme Court deems violates an accused constitutional right to due process requiring reversible. The indictment was vulnerable for relying solely upon sufficiency of statements of witness who had no direct knowledge of the facts. The Arizona Supreme court placed stringent requirement upon prosecutors seeking grand jury indictments. In Aranzi Rae Jon Willis v. State of Arizona, no. CR-21-0258-PR established that prosecutor presenting before grand jury has duty to present all evidence and exculpatory evidence. By the state's own admission it had presented no evidence to support probable cause. (see, appx. H, Ex E), or intentionally withheld exculpatory evidence.

The case rests upon inadmissible evidence, speculation and prosecutorial misconduct leaning on a record wholly devoid of any relevant evidence to support crucial elements of the offenses charged.

Habeas courts has duty "to reject state court findings based on evidence inadmissible as a matter of federal law" Gram v. Gill, 223 U.S. 643, 64-651 (1912); Dower v. Richards, 151 U.S. 658, 667 (1984); Fed R. Evid. 901.

The respondents answer failed to adequately defend the allegations in the petition on the merits, or they misframed the claims, or incorrectly misstate the facts altogether, resulting in an answer insufficient to carry burden required by rule 5.

Respondents answer (doc. 23) utterly fails to come forward with a presentation of the pertinent part of state court record which establishes a fact in evidence does exist to satisfy reasonable doubt as to every offense charged. Respondents general defense regarding sufficiency of evidence consists of "ground fails because the Arizona court of appeals reasonably concluded the sufficient evidence supported Gwen's conviction", was insufficient to satisfy stringent standard of Supreme Court rule in *Jackson v. Virginia*.

The trial courts erroneous ruling on defendants rule 20 motion for acquittal, in which court's ruling, in its own words, "the case lacked necessary direct evidence, but there is substantial evidence from which reasonable jurors could conclude or at least infer and then conclude that you are guilty..." (RT 9/18/18 at 147 Appx. H, Ex C). This statement raises federal question whether if statement was it was an incomplete statement of law or whether trial court suggest that requirement of proof beyond a reasonable doubt standard become lees than constitutional standard defined by U.S. Supreme court.

Petitioner argues that the trial court's ruling implies that the threshold for evidence sufficient to convict has somehow diminished in constitutional law, would be in direct conflict with Supreme courts rule stated in *Jackson v. Virginia,* constituted manifest constitutional error. The prosecution in case unmitigated gull in explaining to jury during closing remarks, that there existed no "direct evidence", "This is definitely circumstantial evidence" support fact that state had not proven their case beyond reasonable doubt or that there was "no evidence" to support the conviction. (see, comments at Appx D, RT 9/18/18 at 73).

These statements taken with the trial courts erroneous ruling on motion for acquittal depicts a situation where petitioner's has been convicted upon less than minimal standard of requisite evidence necessary to convict, as matter of law, is sufficient to grant writ.

Quoting the U.S. Supreme court, "The **Winship** doctrine requires more than simply a trial (ID. 317) ritual. A doctrine establishing as fundamental a substantive constitutional standard must also require the fact-finder will rationally apply that standard to the facts in evidence upon "reasonable doubt", at a minimum, is one based upon "reason". Yet a properly instructed jurist may occasionally connect even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of trial judges sitting as a jury" Jackson v. Virginia, 443 U.S. 307.

The Supreme Court in Jackson created a new rule of law. "The constitution now prohibits the criminal conviction of any person, including, apparently, a person against whom the facts have already been found beyond a reasonable doubt by a jury, a trial judge, and one or more levels of state appellate judges, except upon proof sufficient to convince trier of fact have found the established elements of the crime beyond a reasonable doubt", ante, at 319. The district judge failed to accord petitioner right to de novo review to establish whether presence or absence proof sufficient either to affirm or reverse the conviction.

The federal court entered a decision that was contrary to constitutional law, infirm. The district court judge's failure to clearly and explicitly establish what criteria or federal analysis it applied to determination of petitioner's legal claim of "absolute innocence" or "sufficiency of evidence" that established all elements of the crimes were proven beyond a reasonable doubt.

[C] **Mandatory Evidentiary Hearing**

Petitioner was deprived his substantive right to federal hearing pursuant to 28 USCS§2254(d) infecting the entire proceedings with unfairness from which petitioner suffered actual prejudice because the writ was withheld without reaching the merits of all claims.

1. The magistrate judge abuses its jurisdictional authority when he decided final judgment on petitioner's motion for an evidentiary hearing, was dispositive in nature to the claims, violated 28 USCS§636 (b)(1)(3);
2. The magistrate judge abuses its discretion when it enters an erroneous ruling in which court misconstrued or incorrectly summarizes petitioner's grounds for seeking evidentiary hearing, thus never reaching the merits, deprived petitioner of fair procedure. Petitioner's motion for evidentiary hearing clearly stated ground and legal reason was brought under §2254 (d). (appx.H, Ex C);
3. The denial was contrary to, and in conflict with relevant decision of other U.S. Appellate courts. The Ninth circuit court recognized that an "evidentiary hearing allows the parties develop a factual record" (quoting) Jamillo v. Steward, 340 F3d 877 (8th cir 2003). Ninth circuit court has generally held "a federal hearing is mandatory and actionable under §2254 (d)" Yeaman v. United States, 326 F3d 293 (9th cir 1963); Rules governing section 2254 cases R8; ("the function of evidentiary hearing is to try issues of fact, 372 at 309").

4. The U.S. Supreme court defines the appropriate standard on whether to hold evidentiary procedures: stating....."where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing, if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding" 372 at 312".
5. In Townsend v. Sain, 372 U.S. 293 (1963), the Supreme court held a federal hearing is "mandatory" in six situations; of which these six the supreme court emphasizes "even if all relevant facts were presented in the state court hearing, it is the federal judge's duty to disregard the states findings and take evidence anew; if the procedure employed by the state court appears to be seriously inadequate for the ascertainment of the truth". "The duty to try the facts anew exist in every case in which the state court has not ... afforded a full hearing:

The requirement of mandatory federal hearing is also specified under 28 USCS§2254 (d) (explicitly stated "full and fair: hearing in the state court is a prerequisite to federal deference to state court fact-finding").

Although remarks are not admissible evidence, for the purpose of enabling Supreme Court to rule on writ of habeas corpus on the merit, where such remarks can be cancerous to a jury's determination of guilt or innocence. Petitioner proffers two separate reporter transcripts of closing comments that are reportedly from the same hearing date not as evidence in support of writ itself, but rather to aid the Supreme court and the transcripts accurately summarizes what were the factual disputes in case that lead to a constitutional violation.

The documents themselves illustrate the disparity in fairness in state court hearings and a faulty record, where the prosecution was permitted, over objection, to speculate, or misstate the facts in evidence, or introduce or comment on evidence not admitted at the trial, and misrepresent the indictment in such a way as to prejudice petitioner's right to fair trial.

It is important to point to the two separate transcripts, reportedly from the same hearing date, are not identical. The first transcript (appx. D) were prepared for purpose of direct appeal in appellate court. The second transcript (appx. E) were prepared for petitioner's post-conviction relief proceeding which contains an incorrect date of hearing and is sanitized of most of the prosecutor's comments alleged to be improper.

The situation depict the possibility of unlawful conduct aimed at immobility to petitioner's opposition to an injustice. It is hoped that this will allow the court to use its discretionary authority and sound logic to determine the relevancy the two transcripts bear upon the current proceeding.

[D] **Denial of COA – Abuse of Slack v. McDaniel**

Petitioner believes he is entitles to equitable consideration, if not relief itself, from twice being denied right of certificate of appealability.

The federal district court judge's fail to indicate the requisite constitutional issue in denial of COA that identify the absence of a constitutional law procedurally ruled on that would not be debatable. See, Buck v. Davis, 137 Sct. At 774, (Issue only has to be reasonably debatable). The court must state the specific issue or issues that satisfy a showing required by 28USCS§2253 (c) (2) (if court denied a certificate of appealability), (USCS sec. 2254 cases R11).

The great principle of 'stare decisis' comprehends that a lower court will not abuse its judicial discretion where precedence prevails.

Petitioner believes it was a betrayal of "fundamental fairness" and an abuse of discretion in applying *Slack v. McDaniel* to deny COA on some basis not fairly supported by clear constitutional or procedural ground. Simply stating "that no jurist of reason would find the procedural ruling debatable" is insufficient and has been rejected by Supreme Court.

In order for habeas court to invoke decision on ground of "procedural ruling not debatable" the court must determine the absence or presence of a substantial showing on its part that ruling does not deny a constitutional right.

Denial of COA conflicts with other court decisions

Justice Beryer has observed, the decision in Steward v. Martinez v.Villareal, 523 U.S. 637, (1998) and Slack v. McDaniel, 529 U.S. 473 (200) exemplify the Supreme courts tendency to :assure that congress did not want to deprive

prisoner's of first federal review of habeas corpus" and the courts practice of "interpreting statutory ambiguities accordingly".

Ninth circuit court, In Blazak v. Ricketts, 971 F2d 1408, 1410 (1992) stated a certificate of appealablity should issue as matter of law. "The certificate of Appealability should issue to obtain review of judgment for the purpose of correcting errors of fact in the report and recommendation".

Federal statute 28USCS§2253 (c) which governs appeals in habeas corpus proceedings, permits defendants to appeal a final order rejecting their petition. ("In habeas corpus proceedings the final order shall be subject to appellate review").

Abuse of Slack v. McDaniel

"The application of Slack v. McDaniel must be just and practicable" United States v. Zuno-Arce, 209 F3d 1095, 2000 U.S. App. Lexis 6958 (9th cir 2000); Velero v. Crawford, 306 F3d 742, 2002 U.S. App. Lexis 19165 (9th cir 2002); USCS Ct. App. 9th cir, circuit R22-1.

"The application of Slack v. McDaniel should not be applied in a mechanical fashion and appellate court should not be diverted their "ultimate focus" from "the fundamental fairness" of the proceeding whose results is being challenged".

The COA standard determines that prisoner's claim is not even debatable, Chief Justice Roberts explained: "First decide the merits of an appeal .... Than justifies its denial of a COA based on adjudication of the actual merits" I.D. quoting Miller-El at 358 (COA unduly limits habeas corpus petitioners ability to appeal adverse ruling by the district court).

The Supreme Court said of Slack v. McDaniel, "COA is based upon resolve procedural issue first under principle that courts will not pass upon constitutional question". "Appeal from judgment of district judge denying writ of habeas corpus was absolute right". In re Marmo, 138 F2d 1095 U.S. Dist. Lexis (DN J 1905); Marmon v. Nocoll, 199 U.S. 610, 26Sct. 744, 50Led (1905).

Petitioner was "deprived of substantive or procedural right to which the law entitles him", Williams, Supra at 393. "A process due, beside the point, that it is critical to correct application of Slack v. McDaniel to avoid miscarriage of justice.

Petitioner believes h was deprived his right to appellate review as matter of law. The district court judge's side stepped proper procedure of determining whether petitioner's constitutional rights had been violated, undermined the concepts of writ of habeas corpus.

The Ninth circuit court Denied COA without reaching the merits of the issues presented for review, a requirement as determined by the Supreme Court. Petitioner move appellate court for a reconsideration which it has rejected the COA on basis of a subjective technical error under USCS ct. app. 9th cir, R27-10, despite petitioner's demonstrating good cause for delay in receiving mail (Appx. H, Ex. A, B) was not sound discretion.

"Mere error which affect substantive rights of parties are sufficient to reverse judgment" Thompson v. United States, 258 F196, ID. 2887, 1949 U.S. App. Lexis 1182 (8th cir); 28USCS§2211.

"Delayed receipt should be considered in weighing interest of justice", Kent v. Johnson, 821F2d 1220, 1987 U.S. App. Lexis 6391 (6th cir).

Due process of law, when meaning of Fourteenth amendment, is secured if laws operate on all alike, and do not subject individual to arbitrary exercise of powers of government. P.R. Co. v. Mackey, 127 U.S. 205, 8Sct. 1161, 32 Led 107, 1888 Lexis (1888).

Chief Justice Warren's opinion where the court identified a strong federal policy favoring hearings, or at least sufficient fact-development and fact-resolution procedures." Because the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed".

The Supreme Court has termed necessity of hearing policy to the prescription against suspending the writ of habeas corpus except in time of war or rebellion. Townsend, 372 U.S. at 311.

Petitioner was not permitted to appeal constitutional error violates the due process clause of the Fifth and Fourteenth amendment to the United States constitution.

[E] **Respondents Defaulted answer**

Petitioner believes it was appropriate to enter default judgment against state for failure to fully comply with formal requirement of law, specifically rule governing section 2254 cases R5 or the courts order.

Petitioner filed motion for entry of default judgment against respondents for its failure to provide all transcripts related to petitioner challenge of his conviction. The magistrate judge gave no consideration to equitable principle or whether petitioner would be prejudiced, when respondent having sufficient notice to

comply or at very least correct deficient acted indifferent among the various choices available to them, chose a course that violated petitioner federally protected rights.

Respondents answer (doc.23), among other things, abused affirmative defenses, stated inconsistent defense under same claim failure to adequately address all claims on the merits.

The procedural default rules are not optional or left to discretion of the court "believe", "avoidance doctrine" should enable Supreme court substance to decide, if only for a first, whether procedural doctrine in case, equally applied, would constitutes actionable default under §2254 to justify grant of writ of habeas corpus.

[F] **Insufficient direct review**

Petitioner believes the law favors grant of writ of habeas corpus relief for "cause" and "prejudice" from the magistrate judge's erroneous determinations in report and recommendation which deprived petitioner of substantive right of due process of law. Magistrate's denial of motion to expand the record constructive notice that respondents were violating R5 for its failure to provide all relevant state court records where petitioner had challenged the conviction in a state court proceeding. It was duty of court to enforce rights and duties of all parties. It was clear abuse of discretion not to grant motion to expand the record under circumstance resulted in an unreasonable or erroneous determination of the facts.

The magistrate judge knowingly proceeded to determination of claims without all relevant facts was "cause" for "prejudice" resulting in manifest injustice.

The report utterly failed to identify what petitioner's legal claims were and the federal ground in which they rested. The Supreme court has held in this regard, "protection from arbitrary action is very essence of due process" Slocher v. Board of Higher Education , 350 U.S. 551, 76Sct. 637 (1996).

Petitioner has been further prejudiced by the magistrate's report in which he denominated the various constitutional claims presented, where claims had been converted into sub-categories, thus transgressed petitioner's substantial right to be free from arbitrary, erroneous, or judicial interference. By denominated the various claims for relief, diminished there meaning and demonstrating a constitutional violation took place was lost, creating an unreliable report and recommendation based upon some other factor than the one presented for relief.

This type of adverse deportment results in risk of misframing or affecting analysis of the dominate claim omitting one or more dimensions of the requisite federal analysis, which may very well rob district judge of its province de novo review that itself is responsible for denial of the writ.

The magistrate judge's report and recommendation represents a uniform modification of fundamental habeas corpus review as determined by the Anti-terrorism Effective Death Penalty Act of 1996. The magistrate had duty to review the rule on the same questions as did a different court in a previous proceeding involving the same parties and the same issue.

Appearance if Bias

Magistrate Judge's report gives the appearance of bias when the report recognizes an important legal question upon which the judge determined that the record clearly reflected prosecutorial misconduct existed from the prosecutor's closing

comments for his intentional misrepresentation of the grand jury indictment, constituted reversible error, but recommended a dismissal of claim on ground contradictory to its findings in the state court record. In order to support such a drastic recommendation, not supported by record, magistrate judge must demonstrate that legal determination by state courts is prerequisite. Beyer v. White, 762 F2d 1012 (8th cir 1985).

The report itself was plagued with inaccuracies, material misrepresentation, vouching for state court fact-finding and unreasonable determination of the facts in light of the evidence presented or lack of evidence.

Petitioner is prejudiced by the presence of judicial bias where courts presumption of correctness in state court records was not fairly supported by demonstrative facts in magistrate's analysis. The report simply acquiescence to state court decision violates petitioner's substantive right to due process.

The responsibility of the habeas corpus court to hear and determine the facts, and dispose of the matter as "law and justice require".

The Supreme Court in Townsend v. Sain, held "that the federal judiciary must resolve any factual dispute material to the claim appropriately raised in the habeas corpus petition".

The report and recommendation focused on everything but the constitutional violation alleged. Petitioner believes magistrate judge, a qualified judge, it is hoped, did not fairly examine the state court record or accurately summarize their important contents for the district judge, thereby facilitating district judges' decision in the light most favorable to sustaining the integrity of the judiciary and

upholding the federal constitution, laws for the expressed purposes of protecting essence of the great writ

There is no controversy attributed to whether the writ should issue as law and justice require.

[G] **Insufficient De Novo Review**

Petitioner alleges the district court judge "short shrift" fundamental duty to conduct de novo review of issues raised in objection to magistrate's report and recommendation. It was failure of district judge not to review dispositive matters de novo following objections to report and recommendation, to review the record responsibly and independently. Or conduct or order evidentiary proceedings before finding by magistrate judge to prejudicially favor respondents amounted to a violation not only to Magistrate Judges Act, or Habeas rule 8 (b), but also a violation of Article III of the due process clause of the Fifth amendment. Stokes v. Singletary, 952 F2d 1567, 1576 (11th cir 1992).

District court judge's failure to conduct de novo review essential granted right to magistrate judge to affect final judgment in a way the statute governing section 2254 cases simply do not permit.

Whether report and recommendation might attach legal consequences to Federal Habeas rules that went unrealized by district judge amounted to a denial of justice.

The legal question whether district judge, in carrying out its essential function, applied the correct legal standard of fact review to applicable state court findings. Constitutional law requires a definitive determination of the law on the facts alleged for the adjudication of an actual dispute.

District judge failed to sort out simple instances of right from wrong and give some redress to the later. "adjudication is the effect to identify the rights of the contending parties now by identifying what were, in law, the rights and wrings, or validity or invalidity, of their actions" District court judge's simply skipped this essential function of mandatory review, was an abuse of discretion.

The reviewing court must consider the evidence, in the current case (doc. 60), made no substantial finding on any federal question presented in habeas corpus petition, no reference to state court record and no presentation of evidence to support denial of writ.

Miscarriage of Justice

To the extent that "de novo "review was properly conducted in case, the supposedly review of magistrates report and recommendation, district judge merely replicated the erroneous findings of magistrate's report... An example is illustrated at doc. 57 at 7, district judge incorrectly states "the R&R rejected Gwen's argument that the judge had allowed the prosecutor to make inappropriate remarks in closing ..... the challenged remarks were not inappropriate" (ID. at 6 doc. 56) the magistrates report states "petitioner's argument fairly raise a claim of prosecutorial misconduct based on the comments" ID. At 17 doc. 56. The district judge failed to sort out the inconsistency of statement in the report, despite constructive notice pled in petitioner's objections to R&R.

This example illustrates the lack of "de novo" review as defined and specified under Habeas Corpus Rule and Practices.

Petitioner was further prejudiced from district judge's suggestion that no prejudiced occurred from an improper act, if that person clarifies the statement

cures the prejudice and removes the issue from juror's deliberation. Petitioner argues that fatal error did affect petitioner's sixth amendment constitutional right to fair and impartial trial.

District judge's acquiescence to magistrate's erroneous finding, without sufficient de novo review, was not sound jurisprudence in the performance of his duties. The federal rules of evidence, R403 provides that evidence, "if its probative value is substantially outweighed by a danger of one or more of the following: infair prejudice, confusing the issue, or misleading the jury...." The prosecution in case did, ID. "Confuse the issue" ID. Did "mislead the jury" constituted reversible error. The Supreme Court stated in, Brotten v. United States, 389 U.S. 818 (1968) (Limiting instruction did not effectively protect the accused against prejudicial effect).

Federal review contemplated by the rules governing section 2254 cases, assures federal courts review whenever "objective impediments" to the vindication of constitutional rights have undermined the capacity of the state courts to redress constitutional violations.

The Supreme Court attaches its historical application of the writ – as a means of assuring essentially appellate review of state court's resolution of certain especially important national legal questions, including review of state court decisions by lower federal courts when the Supreme Court cannot itself provide that review. The question becomes how accused challenging a state court conviction achieve justice if the federal court providing the means fail to deliver a fair process.

Petitioner had right of review by U.S. Appellate court, ID. State courts, see, eg. Pierre v. Louisiana, 306 U.S. 354, 358 (1939); Ex-parte Hawk, 321 U.S. 114, 118 (1944).

[H] **Impact on Right to Fair Trial**

It is not debatable whether the effects of accumulative errors had an adverse effect upon petitioner's Sixth amendment right to fair and impartial trial.

1. Inadmissible evidence was admitted at trial contrary to Fed R. Evid. 901;
2. Prosecutor was allowed to modify the indictment in way the constitution does not permit, amounted to reversible error;
3. Petitioner was prejudiced by allowing case manager to testify when he acted unilaterally in preforming as custodian of the jury. see, Rideau v. Louisiana, 373 U.S. 723 (1963);
4. The trial itself did violate the Fourteenth amendment. A jury verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. The trail lacked requisite evidence to carry burden of proof beyond reasonable doubt. Sinclair v. United States, 279 U.S. 749, 765.

Summary Conclusion

The question whether the Writ of Habeas Corpus should issue forthwith rest upon Supreme Courts determination of important federal questions; (1) whether the lower courts have entered decision that were a departure from the accepted and usual course of judicial proceedings, or (2) whether lower court's decision on important federal question were made in a way that conflicts with decision of this court; or (3) whether the court's decision represents a suspension of the writ in violation of Article I, §9, Cl.2; (4) whether the writ should issue on premise of actual innocence under principle *In re Winship* and *Jackson v. Virginia.*

The federal judge's abandoned the limit of legislative authority. The judges structure controversy of its own making, where respondents answer neither refutes or argues the claims validity or simply abandons defense of claim altogether. The court cannot take up role of advocate for state courts or perform the function of respondent in case. In this regard the district judge's give the appearance of prejudice and bias were the decisions were so one sided and petitioner was prevented from presenting any evidence can be viewed as a jurisdictional error. Kamkin v. Howard, 633 F3d 877 (9th cir 1980).

The Supreme court may find that the resolution of case can be reach," as law and justice require" if it reaches the merits of the important question of innocence. Petitioner was deprived substantive right to due process of law sufficient to establish entitlement to grant of writ of habeas corpus. Therefore it may be unnecessary to order additional briefing from respondents to adjudicate the claims.

The Supreme Court has held that "the equity, ultimate equity, on the prisoner's side is a sufficient showing of actual innocence" Whithron v. Williams, 507 U.S.

680, 700 V903 ID. At 718; petitioner was not permitted to make such required showing that had ultimate bearing on outcome of case.

The deprivation of mandatory evidentiary hearing undoubtedly prejudiced Petitioner and placed the entire proceedings into uncertain controversy, was obstacle to affording justice sufficient to award the writ. The hearing was mandatory under 28USCS§2254 (d) and actionable under due process clause of the Fourteenth amendment.

The district court abused its discretion in its application of *Slack v. McDaniel.* The standard outlined by Supreme Court "reasonable jurist could debate ... whether... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"

"Habeas corpus lies to assure that no defendant forfeits life or liberty without basic structure of fair trial" Johnson v. Zumbrest, 304 U.S. 458, 468 (1938).

The prosecution's misconduct, the deliberate and especially egregious of the trial type, combined with pattern of malfeasance infected the state court hearing with unfairness and cannot be depended upon as reliable vehicle for justice.

Petitioner's conviction was not fairly supported by evidence in the record as a whole.

The prosecutor's remarks in state court hearing constituted reversible error sufficient to compel grant of the writ.

The prosecutor violated petitioner's Sixth amendment right to fair trial when his actions unconstitutionally modified the charge in indictment, mislead the jury to t

petitioner to find him guilty for a charge in which the state says does not exist or could not prove..

> "It is also uncontested that a check was a stolen Cucina Rustica check: ID. At 25 (appx. C)
>
> "One of the things I want to clarify is the defendant is not being charged with stealing the checks. That is not a charge. He wasn't because there is no proof" ID. At 29 (appx. C).

The prosecutor misrepresented the indictment prejudiced jury's province to decide the verdict based upon the evidence. Count four "Theft" which specifically identifies "stolen Cucina Rustics (Dahl Restaurant Group) checks" as an element of the offense as charged in the indictment and from which the states comments says it could not prove. (appx. G).

Petitioner believes strongly federal judge's departure from the basic belief that the ordinary criminal procedures established by legislatures and by the habitual practices of prosecutor's and state courts are a fitting norm for measuring the "process that is due" under the due process clause of the federal constitution; that due process is all a criminal defendant is entitled to; and that the role of federal courts charged with enforcing federal constitutional rights is therefore merely to remedy instances of egregious deviation from prevailing procedural norms or "normal procedures of the times", but who will protect an unsuspecting pro se litigant from erosion of rights when federal courts have foreclosed those protections guaranteed by federal constitution.

The dismissal of his habeas corpus petition was a drastic departure from the accepted and usual course of judicial proceedings and decision of the U.S. Supreme court, has resulted in "miscarriage of justice"

The district court judges have betrayed the constitution, reduced the habeas corpus proceeding in dilemma of immobility, which undermines the writs objective of vindication of violations to constitutional rights.

Pursuant to 28USCS§2241 Supreme court has power to grant writ of habeas corpus under such circumstance without regard to the evidence where trial in rendered fundamentally unfair.

Wherefore by reason deemed compelling petitioner moved this court for issuance of writ of habeas corpus, as matter of law.

Respectfully submitted this ~~18th~~ 1st day of ~~July, 2023~~ September, 2023.

By _____

Gerald V. Gwen, *pro se*