CASE No. 23 - 6838

IN THE SUPREME COURT OF THE UNITED STATES

DANNY LEE WARNER JR. – Petitioner

VS.

STATE OF MONTANA – Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MONTANA SUPREME COURT

DANNY LEE WARNER JR.
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QUESTIONS PRESENTED

1. Are unsworn assertions in a response brief sufficient to overcome clear and convincing direct evidence that prosecutor illegally searched and seized seven attorney-client privileged phone conversations prior to trial or is this a *per se* violation of the Fourth, Sixth, and Fourteenth Amendments to the U.S. Constitution?

   a. Where no physical or direct evidence of guilt exists to bear the heavy burden borne by prosecutor in convicting a person presumed innocent of committing a crime, is a warrantless search and seizure presumptively prejudicial when attorney-client privileged conversations are illegally recorded and downloaded by prosecutor prior to trial?

   b. Is the intentional intrusion into attorney-client privilege *per se* prejudicial requiring a new trial or is a criminal defendant entitled to an evidentiary hearing as a matter of law once *prima facie* evidence of intentional intrusion is demonstrated?

2. Can the Fourteenth Amendment tolerate a State criminal conviction obtained by the calculated and capricious employment of false evidence, repeated improper remarks during summation, and manifest misconduct by prosecutor, or does this deprive defendant of Due Process and constitute a presumption of prejudice that the fundamental fairness of the trial was unquestionably undermined according to Donnelly?

   a. Does the intentional suborning of perjured testimony by the State's representative and subsequent use during closing argument as evidence of guilt presumptively undermine the fundamental fairness of a trial, particularly where prosecutor's remarks on evidence not of record and defendants' silence as evidence of guilt were all in the same closing argument?

3. Is a State court's Ake error of refusing to appoint an independent psychiatric expert to the defense for examination and assistance in presenting defense (or allow rebuttal examination once State obtained its own evaluation and report) structural error requiring dismissal of indictment?

4. Is a waiver of fundamental constitutional rights and protections valid where it is neither knowing or voluntary?

5. Is Montana Code Annotated §46-14-202 facially vague and unconstitutional as applied?

6. Does a State courts deliberate disregard for its mandatory obligations (where the plain language removes discretion) or gross misapprehension of facts and the effect of the evidence before it presumptively violate the Fourteenth Amendment or is the Montana Supreme Court's absolute refusal to apply, fulfill, or enforce its own precedent or statutory requirements a clear case of inadequacy requiring this Court's intervention to prevent a gross miscarriage of justice?

a. Is a High Courts' refusal to take judicial notice when State statute mandates they do so a *per se* violation of Due Process and Equal Protection?

b. Can a challenge to the constitutionality of a State statute be procedurally barred or is a High Court required to entertain such a challenge under the Fourteenth Amendment?

c. Can a High Court that clearly and unambiguously holds a lower court has no discretion to refuse to hold a hearing to address a particular issue later overlook or deliberately disregard the indisputable fact that the lower court did not conduct that hearing for which it had no discretion to refuse to hold?

7. Does the loss of alibi and exculpatory evidence due solely to IAC that could have been prevented by the trial court require a hearing under the Fourteenth Amendment or is dismissal of the indictment proper considering spoliation should be imputed to the State?

a. Similarly, is the spoliation of alibi and exculpatory evidence due solely to counsel's failure to investigate or obtain it a presumption of prejudice for purposes of ineffective assistance of counsel claim or structural error where trial court had opportunity to prevent its loss?

8. Does a self-represented criminal defendants Sixth Amendment right extend to presenting the defense of his choice, filing documents without standby counsel first reviewing or initialing them, withdrawing motions, and requesting issuance of subpoenas or is the control of one's own defense limited to the discretion of the judge?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State v Warner, No. DC-15-2016-0000542-IN, Eleventh Judicial District Court, Flathead County, Montana. Judgement entered November 21, 2017.

State v Warner, No. DA 18-0046, Montana Supreme Court. Memorandum opinion issued April 21, 2020. Appellate counsel refused to submit Motion for Rehearing.

Warner v Montana, No. 20-5010, United States Supreme Court. Certiorari denied November 5, 2020.

Warner v State, No. DV-15-2021-0000684-PR, Eleventh Judicial District Court, Flathead County, Montana. Summary Denial order issued December 16, 2021.

Warner v. State, No. DA 22-0189, Montana Supreme Court, memorandum opinion issued June 20, 2023. Motion for Rehearing filed July 12, 2023, being summarily denied August 22, 2023.

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CASE No.

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 judgement below.

OPINIONS BELOW

The memorandum opinion of the Montana Supreme Court that is the subject of this Petition appears at Appendix A and is reported at 412 Mont. 555, 530 P.3d 848(2023).

The December 16, 2022 summary denial of Mr. Warner's Petition for Post-Conviction Relief from the Eleventh Judicial District Court, Flathead County, Montana appears at Appendix B and is unpublished.

JURISDICTION

The Montana Supreme Court ("M.S.Ct.") issued its memorandum opinion on June 20, 2023 that denied Mr. Warner's Petition for Post-Conviction Relief ("PCR") and subsequently summarily denied his timely filed Petition for Rehearing, issuing the Remittitur August 22, 2023.[1] The jurisdiction of this Court is invoked under 28 U.S.C. §§1257(a), 1331, and 2403(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

[1] A copy of the Order denying Mr. Warner's Petition for Rehearing and Remittitur are attached as Appendix D.

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

18 U.S.C. §2515

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

STATEMENT OF THE CASE

Danny Lee Warner Jr. was arrested November 23, 2016 for allegedly robbing two men at gunpoint, though only charged with a single count of robbery containing an unconstitutionally vague "and/or" provision, allowing that he may or may not have robbed one of two people; this and/or provision was erroneously included in the jury instruction and there is no way of ascertaining whether Mr. Warner robbed either Jordan Miller or Dustin McGiboney, or whether the jury convicted him of being a bad person.

Initially, William Managhan was appointed to represent Mr. Warner, though after refusing to investigate or discuss the case with him, Mr. Warner elected to represent himself "due to the fact that this court will not address the issue of ineffective assistance of counsel on the part of William Managhan." Appendix G-8 ("Defendant does want it noted on the record that he has likely lost exculpatory evidence due to Mr. Managhan's disregard for Mr. Warner's interests and refusal to obtain this evidence"). Mr. Warner would first raise Managhan's ineffective assistance of counsel on December 8, 2016, informing the court that "I've called every single day and told him I had a timely issue I needed him to investigate,

look into and take care of for me, with no response at all." 12-8-2016 Tr. Pg. 7, 13-16.[2] Over the next two months, Mr. Warner repeatedly requested Managhan be removed from his case and have the court address Managhan's ineffectiveness in light of the potential loss of alibi and exculpatory evidence (as mandated by Montana law), however, the court would ignore every single request Mr. Warner made, constituting constructive denial of counsel and spoliation of exculpatory evidence.

Significantly, as this Court noted in Faretta, Montana is one of the few State whose constitution entitle a criminal defendant to represent themselves and be represented by counsel simultaneously, though the trial court consistently rejected Mr. Warner's filings because "you have an attorney of record." Appendix C-54. Conversely, after allegedly being allowed to represent himself Mr. Warner was not able to file documents without first having standby counsel review and initial them (several times having motions and requests for subpoenas denied for not having standby counsels initials on them,[3] which created, *inter alia*, procedural delays), was denied other privileges any attorney would have (such as withdrawing a motion the court held was not even properly before it), and deprived of all ability to present the defense he wanted and needed to prove his innocence, constituting structural error.

On December 8, 2016 (the ONLY time counsel met with or spoke to him about the case in almost 100 days of representation) Mr. Warner instructed Managhan to, *inter alia*, request a psychological examination and appointment of an independent professional to address state of mind at the time of the offense and assist in the preparation and presentation of the defense, however, he refused to do so. Mr. Warner subsequently moved the court for the assistance of an independent psychiatric expert to assist the defense pursuant to Ake v Oklahoma, 470 U.S. 68, 83 (1985) (see DOC1[4] 16) though his motion was simply ignored. Despite the trial court having previously ruled that the motions were not properly before the court (3-22-2017 Tr., pg. 16, 7-8[5]) it would later blindside Mr. Warner with no warning or notice (at what was to be his Pretrial Conference) by presenting him with a Hobson's choice: either withdraw the

[2] Appendix J-1.
[3] Appendix C-59/60.
[4] DOC1 refers to documents in Mr. Warner's underlying criminal proceedings in Case No. DC-15-2016-0000542-IN; docket is found in Appendix A-19/26.
[5] Appendix J-6.

motion for psychological examination and assistance or go to the State hospital to have it conducted, rather than appointing an independent defense expert as Mr. Warner had requested. After Mr. Warner pointed out the inconsistencies in the judges legal reasoning (and both the court and head of OPD acknowledged that the statute itself was "a gray area" exactly as Mr. Warner was asserting), the judge abdicated his impartiality to the State, relinquishing his gatekeeping function in the process, requiring Mr. Warner to ask that an objection be noted to preserve the issue for appeal (exactly as any effective lawyer would) and asserted that he wanted the motion to be withdrawn so as to preserve his right to speedy trial. At this point the judge became emotional, began sputtering, reversed course, and asserted that he was not going to allow Mr. Warner to withdraw his motion, but was ordering him to the State hospital, inventing a statutory interpretation *sua sponte* that did not exist and the Legislature could not possibly have intended: that because Mr. Warner could not afford his own psychological expert, the court was obligated to send him to the State hospital once he had requested an examination, knowingly trampling Mr. Warner's Speedy Trial and Due Process rights. See Appendix F for transcript of entire hearing.

Mr. Warner adamantly objected to being examined by the STATE hospital, going so far as to petition the M.S.Ct. for a Writ of supervisory control, who subsequently assured Mr. Warner that "[a]ny psychiatric report on a criminal defendant is a privileged communication." Warner v Eleventh Jud. Dist. Ct., OP 17-0429, Order of August 8, 2017, at 2. The State hospital, however, filed the report with the court (unbeknownst to Mr. Warner as it never provided him a copy) in the public domain, where both the State and court had access to it (as did the public as a whole), while Mr. Warner had no knowledge of its existence.

After returning from the State hospital, Mr. Warner submitted a motion for independent psychiatric evaluation and assistance of a psychiatric expert to act on behalf of the defense (as he was allegedly representing himself at this point), however, this was summarily denied by the trial court despite the State having had a psychological examination of Mr. Warner conducted and had received their report unbeknownst to Mr. Warner, all of which is a clear violation and unreasonable application of Ake. The State hospitals negative opinions were used after trial by both the State and the court, though again Mr.

Warner had no knowledge of the reports existence. Indeed, the trial court relied upon the State hospital report (along with unverified newspaper articles about Mr. Warner) at sentencing in assessing Mr. Warner's "dangerousness." Appendix E. The trial court adopted the State's sentencing recommendation, imposing a fifty-year (50) prison sentence, with a thirty-five (35) year parole restriction.

Significantly, on appeal, the M.S.Ct. grossly misapprehended the facts and effect of the evidence, erroneously asserting that "[t]he record clearly demonstrates Warner, *while representing himself*, twice moved for a psychiatric examination" though the record CLEARLY demonstrated that Mr. Warner did not begin representing himself until March 22, 2017[6] and prior to this the court had consistently rejected Mr. Warner's filings because it claimed that he could not submit documents to the court on his own behalf while represented by counsel. Appendix C-53 and 57. Moreover, the State Hospital did not provide Mr. Warner a copy of the report and illegally submitted it to the court on the public docket despite the M.S.Ct. assurances that it would be "a privileged communication." Warner, *supra.*

On September 29, 2017 (days before trial was scheduled to begin) County Attorney Travis Ahner filed a motion for leave to file an amended information to add a charge that there was absolutely no evidentiary foundation for and that Ahner knew to be false; he did so only to allow the victim to testify that Mr. Warner had admitted that he robbed him when he allegedly called him from the jail, though there was no record of any call having been made and Mr. Warner certainly never made any call as evidenced by the Chief of the jail testifying that he could not have made the call without some kind of record at the jail being made. On October 23, 2017 (days after trial had ended) the court would allow Ahner to dismiss this false charge, though Mr. Warner would petition the M.S.Ct. to force the State to pursue the charge so he could have his day in court, considering the State had already gained an unfair advantage in being allowed to use false and perjury testimony at trial.

On August 16, 2017 Ahner deliberately downloaded three privileged phone conversations between Mr. Warner and his investigator and another between him and his attorney; on September 11, 2017 this

[6] DOC1, Doc.36, Appendix C-62.

prosecutor deliberately downloaded three more privileged phone conversations between Mr. Warner and his attorney, all of which should never have been recorded in the first place. Ahner deliberately disregarding the conspicuous X mark in the privileged column and intentionally clicking on the phone number, constitute both intentional intrusion and illegal search and seizure. Appendix C-36. On October 4, 2017 (six days before trial) Deputy County Attorney Allison Howard would listen to a privileged phone call between Mr. Warner and his investigator that should never have been recorded in the first place (let alone listened to by a prosecutor) as it was clearly marked privileged; on October 12, 2017 (on the last day of trial) Howard would once more listen to a privileged phone call between Mr. Warner and his investigator (from the first day of trial) in an attempt to assist Ahner in preparing his closing arguments. Appendix C-42. Appendix K contains : an index of over one hundred (100) confidential calls that were illegally recorded and subsequently searched and seized by prosecutors.

Mr. Warner would not learn of this intentional intrusion until after trial and promptly filed a Motion for new trial, presenting the court with *prima facie* evidence of the purposeful intrusion into his attorney-client privilege; in his response to Mr. Warner's Motion for new trial the prosecutor would outright lie about not having access to privileged phone calls and the court would erroneously accept these unsworn assertions as evidence and (without conducting an evidentiary hearing) summarily deny Mr. Warner's motion. The M.S.Ct. would unreasonably acquiesce to the lower courts erroneous acceptance of unsworn assertions in a response brief as "evidence" despite the clear and convincing evidence Mr. Warner presented that the prosecutor downloaded seven privileged phone conversations. The trial court erroneously denied Mr. Warner compulsory process when he attempted to subpoena the full records of all calls accessed by prosecutors. See Appendix C-60/61 and G-14/15.

On October 12, 2017 a jury mistakenly convicted Mr. Warner of robbing either Jordan Miller and/or Dustin McGiboney (a crime that carries a maximum penalty of forty years in prison), while on November 21, 2017 the judge would sprinkle magic dust on the jury's findings and transform them into an entirely different set of facts and circumstances without a hearing or any form of due process and Mr. Warner was suddenly subject to one hundred (100) years in prison.

On November 6, 2017 Mr. Warner filed a Motion for mistrial and dismissal and a motion for judgement as a matter of law or new trial (DOC1 245/246), both of which were summarily denied without consideration or an evidentiary hearing. Mr. Warner filed a timely notice of appeal, sought certiorari from this Court in a timely manner, submitted a timely Petition for Post-Conviction Relief and subsequent notice of appeal when it was summarily denied, and timely petitioned for a rehearing when the M.S.Ct. issued the erroneous decision that is the subject of this Petition.

REASONS FOR GRANTING THE PETITION

As an initial matter, it is well settled law that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." Boddie v Connecticut, 401 U.S. 371, 379 (1971)("Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right"). Refusing all ability to be heard is a *per se* deprivation of Due Process and Equal Protection, particularly where State law (both statutory and common) mandates particular process and procedures that are ignored or overlooked. Conversely, when State courts unreasonably and arbitrarily apply the law, Equal Protection is presumptively denied given this Court holding "that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action" or inaction, as it were. Minnesota v National Tea Co., 309 U.S. 551, 557 (1940). It should be noted that every document in Appendix C was made available to the trial court along with Mr. Warner's Petition for PCR, thus was part of the record on appeal to the M.S.Ct., all of which were simply ignored by both.

The summary denial of several meritorious issues on appeal from the summary denial of Mr. Warner's Petition for PCR, solely because Appellate counsel refused to raise them on direct appeal[7] (without addressing or analyzing ineffective assistance of appellate counsel) is an unreasonable application of Federal and State statute, and directly contrary to clearly established law as announced by this Court in a

[7] Appellate counsel informed Mr. Warner that he could ONLY raise certain issues on PCR, asserting that they were "frivolous on direct appeal" and testified to this in an affidavit that Mr. Warner presented the trial court and M.S.Ct. Appendix C-30/31.

plethora of opinions. Rather than consider the facts or merits of Mr. Warner's claims, the M.S.Ct. blindly accepted the States assertions that each were procedurally barred, but one: ineffective assistance of counsel, though even this was given less than adequate treatment, as the M.S.Ct. grossly misapprehended the facts and effect of the evidence on the record before it.

Moreover, the M.S.Ct. requiring strict adherence to statute by Mr. Warner while simultaneously disregarding its own Rules and precedent (as well as acquiescing in the lower court's refusal to abide by or fulfill its mandatory obligations) was glaringly unreasonable. As an example, the M.S.Ct. implicitly held (without expressly asserting) that seven of the eight meritorious claims made by Mr. Warner were procedurally barred because they "were or could reasonably have been raised on direct appeal." ¶7, Appendix A-5. The M.S.Ct. did not reach any kind of reasonableness determination and conveniently omitted the word "conclusively" when citing the standard for the trial courts discretion to dismiss a petition for PCR, evincing a double standard that runs rampant throughout every aspect of Mr. Warner's numerous dealings with the M.S.Ct.

Mr. Warner maintains that this Court's plethora of precedent regarding a criminal defendants fundamental right to challenge their convictions through direct review extends to petitions for PCR where, as here, State statutes separate the two with specific prerequisites for each. Significantly, given the fact that Appellate counsel Koan Mercer informed Mr. Warner that the law separates claims that must be brought on PCR from those that may be raised on direct appeal, the grounds for relief that Mr. Warner enumerated in his petition for PCR could not "**reasonably** have been raised on direct appeal." MCA 46-21-105(2)(emphasis added). Additionally, State law is very specific that (exactly as Mr. Warner pointed out) "Unless the petition and the files and records of the case **conclusively** show that the petitioner is not entitled to relief, the court **shall** cause notice of the petition to be sent to the county attorney in the county in which the conviction took place and to the attorney general and *order that a responsive pleading be filed.*" MCA 46-21-201(1)(a)(emphasis added). Mr. Warner's Petition for PCR and the record conclusively showed that he was entitled to relief and the trial court abused its discretion by summarily denying it rather than ordering the State to respond, while the M.S.Ct. acquiesced in this error.

The M.S.Ct. determination that all of Mr. Warner's claims were procedurally barred but one was and unreasonable and arbitrary application of State statute given the indisputable fact that it grossly misapprehended the facts and effect of the evidence on the record before it and refused to take judicial notice of either facts or law as it was REQUIRED to by State law, denying Mr. Warner all process due him. The pathetic sixteen paragraph memorandum opinion issued in its haste to be done with Mr. Warner bears this out, though it undoubtedly and utterly failed to provide him the constitutional minimum of protections under their own or the United States constitution. "[W]hen the adequacy and independence of any possible State law ground is not clear from the face of the opinion we will accept as the most reasonable explanation that the state court decided the way it did because it believed that federal law required it to do so." Michigan v Long, 463 U.S. 1032, 1040-41 (1983). Indeed, Mr. Warner invokes the Long presumption here given the fact that the entirety of the M.S.Ct. memorandum opinion is murky, ambiguous, and unreasonable, not resting on any independent state law or constitutional provision. The M.S.Ct. decision did not rest on constitutionally adequate State grounds: its refusal to address or analyze seven meritorious issues was grossly inadequate and erroneous for a multitude of reasons, as explained below.

I. Procedural Disbarment

The right to direct review of a criminal conviction cannot be said to be fulfilled where State statute separates the types of issues that can be raised on direct appeal from those in which remedial measures must be sought through a Petition for PCR; indeed, when appellate counsel refuses to raise meritorious claims as instructed to by his client because he believes them to be "frivolous on direct appeal" and insists they can only be raised on PCR, the right to appeal cannot said to be complete when the review court refuses to address the very claims counsel refused to raised. Procedurally barring Mr. Warner's claims deprived him of all dignity, due process, and equal protection of the laws. The State relied almost exclusively on MCA §46-21-105 rather than argue the merits of the claims presented to the M.S.Ct. and this statute is unconstitutional as applied given the indisputable fact that it is a *per se* deprivation of a criminal defendants fundamental rights under the Sixth and Fourteenth Amendments. Indeed, Montana's

statutory mandate that "[i]n every case judgement must be rendered on the merits" precludes procedural disbarment of Mr. Warner's issues without (at minimum) full, fair, and impartial consideration of the issues he put before the Highest Court in the State. MCA §25-9-101.

The M.S.Ct. has held that it "will not consider grounds for postconviction relief that *reasonably* could have been raised on direct appeal." DeShields v. State, 2006 MT 58, ¶15(emphasis added). This reasonableness standard opens the door to an obligation to, at minimum, address and analyze those grounds given the indisputable fact that there could be no other way to determine if the asserted ground(s) could have been *reasonably* raised on direct appeal. Indeed, this Court has held that the fundamental nature of Due Process is a "meaningful opportunity to be heard" and refusing to address or analyze Mr. Warner's issues on either direct appeal or PCR explicitly deprives him of all process due him.

Mr. Warner is similarly situated to other convicted criminals who have a right to appeal their convictions, but were able to receive fair and impartial review by the M.S.Ct.; MCA §46-21-105 treats these similarly situated convicts differently by allowing some to raise grounds for relief on PCR, while depriving others (such as Mr. Warner) of those same grounds. Indeed, this statute implicates several fundamental rights, including the inalienable right to defend one's life and liberty under Article II, §3 of Montana's Constitution, and is therefore subject to the strictest scrutiny under the Fourteenth Amendment. There is no justification for such disparate treatment, let alone any "reasonable" explanation, particularly in light of the public's "interest in establishing and maintaining the validity of state action" Barrus v. Mont. First Judicial Dist. Court, 2020 MT 14, ¶21.

Conversely, the "waiver of grounds for relief" provision of MCA §46-21-105 is unconstitutional where the M.S.Ct. has asserted that it "will not engage in presumptions of waiver; any waiver of one's constitutional rights must be made specifically, voluntarily, and knowingly." State v. Bird, 2002 MT 2, ¶35("there can be no waiver by one who does not know his rights or what he is waiving"). This precludes any person but the individual whose liberty is at stake from waiving any ground for relief, including appellate counsel who does not want to raise a particular issue for whatever reason. Mercer's refusal to raise issues as instructed to, deprived Mr. Warner of the "opportunity for direct appeal" under MCA §46-

21-105(2) despite the right to appeal all properly preserved issues pursuant to MCA §46-20-104, a right that belongs exclusively to Mr. Warner, NOT to Mercer or anyone else; the M.S.Ct. had a lawful duty to "consider the orders, rulings, or proceedings" and determine "the appeal according to the substantial rights" of Mr. Warner. MCA §46-20-701(1).

Similarly, this Court has long since settled the issue of waivers with "[a] trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." Godinez v. Moran, 509 U.S. 389, 400 (1993). A waiver of the fundamental right to direct review of a criminal conviction requires the same standard: once Mr. Warner raised ineffective assistance of appellate counsel for refusing to raise several meritorious claims on direct appeal (offering an affidavit from Mercer admitting this), Due Process required the M.S.Ct. to evaluate and determine whether the statutory waiver of grounds for relief was made by Mr. Warner knowingly and voluntarily.

Mr. Warner "has no adequate remedy of appeal" when appellate counsel refuses to raise a particular issue, thus they are *per se* appropriate for PCR. MCA §46-21-101. "In the context of a criminal prosecution, this Court has stated that a defendant's attorney cannot waive a defendant's fundamental rights" State v. Finley, 2003 MT 239, ¶33. This must include Mr. Warner's inalienable right to defend his life and liberty under Article II §3 of Montana's Constitution. Dignity demands that he be allowed to do so in the way that he decides is best; appellate counsel has no discretion or authority to refuse to raise any issue that Mr. Warner specifically instructs him to – it is not Mercer's life or liberty that is in jeopardy, but Mr. Warner's. Similarly, the Montana Legislature has no authority to enact any law that infringes an individual's ability to defend their lives and liberties.

The dismissal of Mr. Warner meritorious PCR claims pursuant to MCA §46-21-105 sufficiently triggers this Courts authority to assess its constitutionality; Mr. Warner lacked standing to challenge the constitutionality of this particular statute prior to the State using it as a defense to his meritorious claims in their response brief, though now Mr. Warner has been injured in fact by the dismissal of those meritorious claims solely for being procedurally barred and the M.S.Ct. had a lawful duty to take this issue up when he raised it in his Reply to the State's response. See State v. Krantz, 241 Mont. 501, 506

(1990)(Mr. Warner "faces direct injury to his liberty interest"). Moreover, Mercer's performance was *de facto* deficient in failing to raise or adequately argue the meritorious issues now presented and *per se* prejudicial given the indisputable fact that unconstitutional statutes and issues the M.S.Ct. has held are afforded greater protections are inherently more important than those Mercer did raise.

Mr. Warner urged the M.S.Ct. to employ plain error review on all issues not raised by Appellate counsel on direct appeal given the fact that his fundamental rights were implicated and he was entitled to relief under Article II, §16 of Montana's Constitution. See State v. Finley, 276 Mont. 126, 134 (1996). Mr. Warner should not have been precluded from invoking plain error review of multiple issues that "create[d] cumulative prejudice, and we accordingly view them collectively rather than individually." Anderson v. BNSF Ry., 2015 MT 240, ¶78.[8] Importantly, Article II, §16 of "the Montana Constitution guarantees that all persons have a speedy remedy for every injury." White v. State, 661 P.2d 1272, 1275 (1983). In Montana, "[p]etitions for postconviction relief are prescribed by statute and are civil in nature." Daniels v. State, 2020 MT 300N, ¶4. "Under § 3-2-204(5), MCA, [the M.S.Ct. has] a duty to determine **all** of the issues of the case and to do complete justice." Quigley v. Acker, 1998 MT 72, ¶19.

Given the inadequacy of the process afforded Mr. Warner, utter disregard for equal protection under the law, and serious Sixth Amendment violations by Montana and its representatives, there likewise must be a presumption of permanent prejudice, particularly where prosecutor intentionally invaded Mr. Warner's attorney-client privilege prior to trial, deliberately made several improper remarks, knowingly used perjury testimony twice, and filed false charges days before trial (solely for an improper purpose), then promptly dismissed the charge immediately after Mr. Warner was falsely convicted of a crime that he did not commit. The M.S.Ct. did not afford Mr. Warner adequate Due Process in either his direct appeal or his appeal to the summary denial of his petition for PCR (the issue properly before this Court) and the Fourteenth Amendment to the U.S. Constitution cannot tolerate such arbitrary or capricious action.

[8] The trial court sustained a number of objections Mr. Warner made during the State's improper questioning of witnesses and this alone demonstrates a pervasive pattern of intentional and cumulative misconduct.

II. Prosecutorial Misconduct

This Court has held "that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v Phllips, 455 U.S. 209, 219 (1982). The prosecutorial misconduct in Mr. Warner's underlying criminal proceedings was structural error as the cumulative effect of County Attorney Travis Ahner's improper remarks, intentional intrusion into the attorney-client privilege, suborning of perjury testimony, illegal search and seizure, and knowingly filing false charges for an improper purpose (all with the trial courts tacit agreement and acquiescence) deprived Mr. Warner of a fair trial. "Misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." Berger v United States, 295 U.S. 78, 89 (1935)("It is as much [a prosecutors'] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." @88). Conversely, the prosecutors case was weak, relying as it did, exclusively on impermissibly suggestive showup identification of Mr. Warner as the perpetrator of the crime (without a shred of physical or corroborating evidence), to the extent that the jury's deliberation of irrelevant evidence and prosecutorial misconduct without a doubt rendered an invalid verdict. Given the fact that the State's case was extremely weak and the evidence of his guilt virtually nonexistent, the cumulative effect of Ahner's misconduct undoubtedly deprived Mr. Warner of a fair or impartial trial under the Sixth and Fourteenth Amendments.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v United States, 449 U.S. 383, 389 (1981). While this Court has never considered a claim of infringement of the Fourth Amendment through police and prosecutor purposeful intrusion, it has asserted that, under the Sixth Amendment, prejudice is presumed with "various kinds of State interference with counsel's assistance." Strickland v. Washington, 466 U.S. 668, 692 (1984). Significantly, given the fact that Mr. Warner was representing himself, confidential communications with his investigator was a crucial and absolutely essential element of preparing and presenting his defense; the intentional invasion into this relationship deprived Mr. Warner of a fair trial under the Sixth Amendment.

See United States v Rosner, 485 F.2d 1213, 1224 (2nd Cir. 1973)("The essence of the Sixth Amendment right is...privacy of communications with counsel").

As evidenced by Appendix A-1/9 and Appendix D, the M.S.Ct. implicitly held that prosecutors enjoy absolute immunity from their egregious acts and omissions by virtue of being an "officer of the court" and that, as officers of the court, unsworn assertions in a response brief are sufficient to overcome direct and conclusive evidence of outrageous conduct that shocks the conscience, constituting clear error and a manifest miscarriage of justice that cannot stand.

a. Intentional Intrusion

Intentional intrusion is an issue of national significance and the questions posed by Mr. Warner meet all of the criteria of this Courts Rule 10(b) and (c). Due Process protects with ferocity the fundamental fairness of the trial mechanism and it could be argued that nothing is more significant or sacred in all of American jurisprudence than "a jury of one's peers" or a group of diverse people who must come together to unanimously judge their neighbor capable of committing a crime beyond a reasonable doubt. Conversely, the Constitution is intended to protect this Country's citizens from abuses of authority and power, thus, when government conduct is outrageous and shocking to the universal sense of justice it must be seen as structural error that requires the strictest scrutiny.

After accessing the Securus call platform where over a hundred (100) of Mr. Warner's **privileged** phone conversations had been illegally recorded[9] County Attorney Travis Ahner deliberately disregarded the conspicuous X mark in the privileged column of Mr. Warner's attorney and investigator and intentionally clicked on their phone numbers, then took the additional affirmative step of downloading several confidential conversations to his computer, constituting both intentional intrusion and illegal search and seizure. Appendix C-36. This purposeful intrusion is *per se* prejudicial given the indisputable fact that Mr. Warner and Joseph Schussler (Mr. Warner's investigator) can be heard discussing the

[9] The phone calls between Mr. Warner and his attorney's, legal assistant, and investigator should never have been recorded in the first place, though once they had been, the State had no right to access them without a properly issue warrant. The phone number (406)756-7004 is for attorney Sean Hinchey and Mr. Warner had to use this number to discuss his case with Mr. Hinchey and his legal assistant (who did all of the legal research and prepared his filings), thus these calls should never have been recorded, let alone made available to prosecutors.

investigation and preparing for trial, thus the prosecutor became privy to defense strategy prior to trial. Indeed, a prosecutor "[h]unting for privileged communications is outrageous conduct that shocks the conscience." United States v. Adams, 2018 U.S. Dist. LEXIS 208752*62.

"When the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed." Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir.1995). Shillinger seems to be the soundest interpretation of this Courts sole meaningful attempt at addressing purposeful intrusion into the attorney-client privilege among the various Circuits. Weatherford essentially held that once a criminal defendant's right to counsel has attached, government intrusion into the attorney-client relationship violates the Sixth Amendment if the defendant can demonstrate that there is a realistic possibility that he was prejudiced by that intrusion. Weatherford v Bursey, 429 U.S. 545 (1977).

> "From the Supreme Court's discussion of what the defendant in Weatherford had *not* shown, the lower courts have elicited four so-called Weatherford factors to consider in determining whether a Sixth Amendment violation has been established:
> (1) was evidence used at trial produced directly or indirectly by the intrusion;
> (2) was the intrusion by the government intentional;
> (3) did the prosecution receive otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; and
> (4) were the overheard conversations and other information used in any other way to the substantial detriment of the defendant?
> Weatherford, 429 U.S. at 554, 557; United States v. Steele, 727 F.2d 580, 585 (6th Cir.), cert. denied, 467 U.S. 1209, 104 S. Ct. 2396, 81 L. Ed. 2d 353 (1984); United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981).
> "While the lower courts are in agreement that these are the factors to be evaluated to establish the requisite prejudice, they are far from unanimous on the crucial question of what combination of these factors is necessary to make out a sixth amendment violation." United States v. Kelly, 790 F.2d 130, 137 (D.C. Cir. 1986).

Indeed, the Kelly court noted the disagreement among the Circuits that Mr. Warner urges this Court to resolve:

> "The Third Circuit is the only court to clearly hold that a Sixth Amendment violation is established by a showing under any one of the factors. United States v. Costanzo, 740 F.2d 251, 254-55 (3d Cir. 1984). Two other circuits have evaluated the Weatherford factors seriatim, implying but not holding that each factor alone can establish a constitutional violation. Clutchette v. Rushen, 770 F.2d 1469, 1471-72 (9th Cir. 1985); United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981). Other courts have relied on various combinations of the factors. Two circuits have indicated that an

> intentional intrusion alone does not establish a violation, unless there is communication of confidential information or some other form of prejudice. United States v. Singer, 785 F.2d 228, 234 (8th Cir. 1986); United States v. Steele, 727 F.2d 580, 586 (6th Cir. 1984). One circuit has held that when the intrusion is unintentional or intentional but justified a defendant must show both communication of confidential information and resulting prejudice. United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir. 1985). Finally, one circuit has held that a defendant must show prejudice when the intrusion is unjustified, but that once the defendant has shown communication of confidential information to the prosecution the burden shifts to the government to show a lack of prejudice. United States v. Mastroianni, 749 F.2d 900, 907-08 (1st Cir. 1984)." United States v. Kelly, 790 F.2d 130, 137, note 5 (D.C. Cir. 1986).

Nearly forty years later the ambiguities and disagreements among the Circuits on this issue persist. The Tenth Circuit (along with the D.C. and Third Circuits) has held that purposeful intrusion is *per se* prejudicial, violating the Sixth Amendment with no showing of prejudice needed by a criminal defendant, while the Sixth Circuit (as well as the Second and Eighth) maintains that the defense must prove both intentional intrusion and prejudice in every circumstance. Contrast Shillinger v Hayworth, 70 F.3d 1132 (10th Cir. 1995) with Chittick v Lafler, 514 Fed. Appx. 614 (6th Cir. 2013). The Ninth Circuit (where Mr. Warner is located) takes a middle of the road approach, holding that once a defendant demonstrates *prima facie* evidence of purposeful intrusion, the burden shifts to prosecutors to prove that there was no prejudice.

The notion that a criminal defendant or his attorney are responsible for ensuring that their conversations remain confidential is antithetical to this Courts well-established standard that the Sixth Amendment guarantees criminal defendants a right to counsel and that governmental interference into this relationship constitutes a violation of that right. See Perry v Leeke, 488 U.S. 272, 279 (1989). Mr. Warner urges this Court to adopt a Rule similar to Shillinger: that when governmental intrusion into the attorney-client privilege is intentional, and there is no legitimate law enforcement purpose, prejudice must be presumed, and the State must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). The Circuits that place the burden squarely on a criminal defendant to prove both purposeful intrusion and prejudice misapprehend this Court's precedent as applied to the Sixth Amendment, particularly considering there is no way to ascertain prejudice where prosecutors become privy to defense strategy prior to trial. The instant Petition

provides this Court both novel notions never presented before and a perfect opportunity to settle the law in this regard; this Court has yet to address or analyze intentional intrusion into the attorney-client privilege in the Fourth or Fourteenth Amendment context, though herein has the facts and circumstances necessary to do so. The intentional intrusion in the underlying criminal proceedings highlights how badly the various Circuits and High Courts have misapprehended the standard set by this Court in Strickland: that with claims "of affirmative government interference in the representation process [] no special showing of prejudice need be made." Strickland @ 682.

There is a long-standing general rule among the judiciary in America that warrantless searches are presumptively unreasonable. See, *e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967). When a prosecutor conducts a warrantless search and subsequent seizure it must be *per se* prejudicial where the seizure is of confidential attorney-client communications, to which there is no way to ascertain what information he may have gathered or what was used at trial. Indeed, when a prosecutor intentionally intrudes into confidential communications to gather information (as Ahner did), a search within the meaning of the Fourth Amendment has occurred and "[s]uch conduct thus is presumptively unreasonable absent a warrant." Collins v Virginia, 138 S.Ct. 1663, 1670 (2018).

In fact, Mr. Warner can only provide proof of purposeful intrusion into seven recorded privileged phone calls because the trial court refused to issue the subpoena he submitted to obtain the complete logs of all of his phone calls, who had access to them, and when each call was accessed; Securus Technologies, Inc. ("STI") would not release these records to Mr. Warner without a subpoena, but had no objection to releasing them to him and had prepared them in advance in anticipation of the subpoena issuing. In addition to the trial court depriving Mr. Warner of compulsory process, Ahner's failure to disclose the fact that he had seized seven phone calls prior to trial was a Brady violation. Brady v. Maryland, 373 U.S. 83 (1963). Though Mr. Warner cannot identify exactly what Ahner used at trial, the fact that he downloaded and listened to seven attorney-client privileged phone conversations wherein trial strategy was discussed by Mr. Warner and his investigator and attorney violated 18 U.S.C. §2515. This Court need only listen to calls numbered 56, 64, and 76 to ascertain that the prosecutor indisputably became aware of

Mr. Warner's trial strategy when he deliberately downloaded these calls considering Mr. Warner and his investigator can clearly be heard discussing the presentation of the defense.

Given the fact that there are a plethora of cases across the United States against STI alone (countless more against other telecommunications services providers that provide services to prisons and jails), the issue of recording attorney-client phone conversations and making them available to prosecutors is of nationwide importance. Nevertheless, the question Mr. Warner presents this Court is the product of disagreement between Circuits, and this Court should issue the Writ to resolve and answer it: is the intentional intrusion into attorney-client privilege *per se* prejudicial when there is no legitimate justification? It is incumbent upon this Court to clarify the constitution and law in this regard by addressing and analyzing this question under the facts and circumstances of the instant case.

Conversely, in every Circuit an evidentiary hearing is required to determine if the intrusion was intentional and the extent of the prejudice if any. Mr. Warner was denied even that fundamental right, despite providing the trial court incontrovertible direct evidence that the prosecutor illegally searched and seized seven attorney-client privileged phone conversations; instead, the trial court erroneously accepted Ahner's unsworn assertions in a response brief as evidence, while the M.S.Ct. acquiesced in these errors by allowing the lower courts erroneous decision to stand, then itself improperly accepting the prosecutors unsworn assertions in a response brief as evidence that he did not intrude into Mr. Warner's attorney-client privilege despite the clear and incontrovertible direct evidence that Mr. Warner provided; like Kelly, Mr. Warner presented "enough of a factual showing [of intentional intrusion by the State] to merit further evidentiary development." United States v. Kelly, 790 F.2d 130, 137 (D.C. Cir.1986).

b. Improper Remarks

It is clearly established that "the Fifth Amendment [] in its bearing on the States by reason of the Fourteenth Amendment, forbids [] comment by the prosecution on the accused's silence." Griffin v. California, 380 U.S. 609, 615 (1965)("...the prosecutor's comment and the court's acquiescence are the

equivalent of an offer of evidence and its acceptance" @ 613) In the instant case, the prosecutors remarks went well beyond simply commenting on Mr. Warner's silence, explicitly offering it as evidence of his guilt:

> "He doesn't say a word? Not one word? What's going on? You got me, that's what's going on, that's what's going on in Mr. Warner's mind." Tr. Tr. Pg. 774, 4-7, Appendix J-15.

This is exacerbated by the additional improper remark that Mr. Warner allegedly made threats against officers while he was being booked into jail:

> "Telling officers 'you think you're safe here. You're not.' Now why would Mr. Warner say that? What can we infer from his mental state in saying that?" Tr. Tr. Pg. 766, 8-11, Appendix J-13; see also Tr. Tr. Pg. 775, 18-19, Appendix J-15.

Setting aside the indisputable fact that, even if Mr. Warner had made such threats (which he certainly did not), this was completely irrelevant to the crime that he had been charged with and could only be characterized as a "prior bad act" to which the trial court had previously ruled the State was forbidden from introducing. The prosecutor added the "You're not" for emphasis, though no witness had ever testified to this, and repeated this improper remark twice during his closing argument to convince the Kalispell jury that Mr. Warner's threats against Kalispell police proved that he was a bad person who, even if not guilty of the particular crime he had been charged with, was a bad person who should be in prison to protect the Kalispell public.

Additionally, it is well-established that prosecutors are forbidden from attacking the character of defense counsel and Mr. Warner maintains that this must naturally extend to critical remarks made against self-represented criminal defendants in the role of counsel. In the instant case, the County Attorney asserted during closing arguments:

> "Where did that information come from? Did it come from an individual who's representing himself and has all of the information of the victims? Why did that take place?" Tr. Tr. 770, 2-5, Appendix J-14.

This last had the sole intent and effect of inflaming the Kalispell jury and making Mr. Warner look like a bad person, though regardless of the context the Court places these remarks into, they were irrelevant to the crime Mr. Warner was being tried for and would be highly inappropriate and improper if made against

an attorney who was representing Mr. Warner; as such, they should be viewed the same here and weighed with the other improper remarks and misconduct of Ahner that undermined the fundamental fairness of the trial. A prosecutor cannot circumvent a defendants' decision to not testify by attacking his character as counsel simply because he elected to represent himself, particularly where (as here) the prosecutor did not meet his burden of proving Mr. Warner committed the crime he was being charged with, but instead convinced the jury that he was a bad person who, even if not guilty of this particular crime, should be in prison to protect the public. Indeed, this remark, in conjunction with the irrelevant testimony and improper remarks about alleged threats Mr. Warner made against Kalispell police after his arrest, were sufficient to convince the Kalispell jury that Mr. Warner was "guilty" of robbery, despite the evidence to the contrary, let alone the overwhelming amount of reasonable doubt present in the case.

"A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). Only a jury can strip a man of his liberty and its verdict must be based upon the evidence developed at trial and demonstrate that the State met its burden as to the elements of the charged offense. See generally, Thompson v City of Louisville, 362 U.S. 199 (1996). At every stage of Mr. Warner's underlying criminal proceeding through to the present, every entity involved operated to subvert the fundamental fairness of his basic guarantee of trial by jury, from the public defender and prosecutor to the trial and appellate courts, resulting in the most egregious manifest miscarriage of justice imaginable. Significantly, when a court allows the admission of evidence not related to the actual charged offense (such as alleged threats Mr. Warner may have made during booking or an alleged phone call to the victim from the jail), the jury's conviction may not be based upon the elements of the crime and this is fatal error. See Stirone v United States, 361 U.S. 212, 219 (1960).

On review, "defendants have not forfeited any of their rights, including their right to have a jury decide whether there is reasonable doubt as to any element of the crime charged. For that reason, a constitutional error is harmless only if there is no reasonable doubt about whether it affected the jury's actual verdict in the actual trial." Greer v. United States, 141 S. Ct. 2090, 2102 (2021)("the Government retains the burden [on appeal] to show that any constitutional error is harmless beyond a reasonable doubt."). Further,

"illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless... before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). "When specific guarantees of the Bill of Rights are involved this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." Donnelly v DeChristoforo, 416 U.S. 637, 643 (1974). This is EXACTLY what Mr. Warner begs this Court to do in the instant Petition.

III. Ineffective Assistance of Counsel

This Court has held that "[a] court hearing an ineffectiveness claim **must** consider the totality of the evidence before the judge or jury." Strickland @695. Also, that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed *as of the time of counsels' conduct.*" Strickland @ 690. The M.S.Ct. treatment of Mr. Warner's IAC claims (both trial and appellate) was an unreasonable application of federal law and grossly inadequate given their boast that the right to counsel under Montana's Constitution is broader and provides greater protection than does the right afforded by the U.S. Constitution. See, *e.g.*, State v Garcia, 2003 MT 21, ¶37.

a. Appellate Counsel

Mr. Warner had a right to effective assistance of counsel on appeal. See generally, Halbert v Michigan, 545 U.S. 605 (2005). Mr. Warner's appellate attorney asserted under oath that:

> "Mr. Warner requested his direct appeal briefing include several claims that I refused to include because I believed them to be frivolous **on direct appeal**." Affidavit of Koan Mercer, Appendix C-30/31 (emphasis added).

Mercer explained to Mr. Warner, during the preparation of his direct appeal, that State statute precluded the M.S.Ct. from reviewing any conviction or claim on direct appeal unless a specific objection had been timely lodged during trial **and** the particular issue could be determined from the record alone; according to Mercer, if both of these prerequisites were not present then the claim would be considered "frivolous on direct appeal" and had to be raised in a petition for Post-Conviction Relief as a matter of law. As such,

Mercer maintained that IAC, purely constitutional questions, assignments of error against the trial court that were not specifically objected to, and other issues that could not be determined from the record alone had to be brought on PCR; Mr. Warner had no reason to doubt or question this legal reasoning or advice from appellate counsel and waited to raise these issues on PCR, only to have the trial court summarily deny them without issuing findings of fact or conclusions of law, and the M.S.Ct. complicitly and capriciously condemn them to default purgatory, implicitly (though not expressly) holding that Mr. Warner should have raised them on direct appeal. Indeed, the M.S.Ct. refused to address or analyze seven meritorious claims and would not even look at ineffective assistance of appellate counsel for not raising the issues they procedurally defaulted despite Mercer's affidavit admitting that Mr. Warner instructed him to raise the claims on direct appeal.

Mercer's affidavit admitting that he refused to raise the seven issues the M.S.Ct. procedurally defaulted was sufficient to overcome the presumption of effective assistance and trigger strict scrutiny of the reasons and reasonableness of Mercer's refusal to raise the claims he was specifically instructed to and Mr. Warner was deprived of Due Process by the M.S.Ct. in not addressing or analyzing ineffective assistance of appellate counsel; indeed, this is a *per se* unreasonable application of, *inter alia*, Strickland that requires *de novo* review by this Court considering Mr. Warner is now bereft of any other means of seeking relief.

Moreover, both the trial court and the M.S.Ct. intentionally interfered with Mr. Warner's ability and attempts to argue his issues and develop the record in that regard. To adequately argue the claims appellate counsel insisted he must bring on PCR, Mr. Warner required more than the 10,000 words allotted by Rule, however, the M.S.Ct. summarily denied his motion for leave to file an over-length brief and *sua sponte* denied his Opening brief, ordering that he remove portions of that brief, the attached affidavit, and all references to it from his brief. Similarly, the M.S.Ct. summarily (and erroneously) denied Mr. Warner's motion for court to take judicial notice of facts despite the Rule that **requires**[11] they

[11] Montana Rules of Evidence 201 and 202.

do so when a party requests it and provides the facts to be noticed, both of which Mr. Warner did.[12] After these summary denials (in addition to the trial courts absolute refusal to allow him to develop the record), the M.S.Ct. would grossly misapprehend the facts and effect of the evidence before it (exactly as they did in his direct appeal and Mr. Warner asserted they would again on PCR) and determined that Mr. Warner's "mere speculation" and "bald assertions" were not borne out by the record (a record that he was deliberately prevented from developing by the courts themselves) and that he therefore failed to adequately argue, *inter alia*, IAC.

Where an attorney offers bad counsel or misrepresents the law to the extent that it results in a waiver of grounds for relief (*i.e.* procedural default) it must be seen as *per se* prejudicial and strictly scrutinized in the same way pleading guilty would. See Gideon v Wainwright, 372 U.S. 335 (1963). Of particular importance, Mr. Warner was entitled to effective assistance on direct review under the Sixth Amendment, however, Mercer's acts and omissions deprived him of that right and resulted in procedural default, which "requires that responsibility for the default be imputed to the State." Murray v. Carrier, 477 U.S. 478, 488 (1986).

In the same way that courts must presume that an attorney has provided their client with effective assistance, it is reasonable for the client to presume the same and not question what counsel tells them, advises, or how they explain the law. As such, it is only after the fact that a defendant can, for the first time, recognize or formulate an argument that their attorney's performance was deficient in some way, and Due Process demands that they be entitled to a full and fair review of any claim of IAC as a matter of law, regardless how frivolous the claim may be on the surface. Indeed, this Court has held that a criminal defendant has the right to a direct appeal and effective assistance of counsel for that review, and it follows that he likewise has a corresponding right to review of counsel's performance as a matter of law.

The M.S.Ct. declined to address or analyze appellate counsel's effectiveness despite his own admission that he refused to raise claims that Mr. Warner specifically instructed him to and depriving him of such a

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determination constitutes clear error under the Fourteenth Amendment to the U.S. Constitution. "The core of due process is the right to notice and a meaningful opportunity to be heard." Lachance v. Erickson, 522 U.S. 262, 266 (1998). Mr. Warner had a right to direct review of his conviction as a matter of law and given the serious and solemn consequences of not raising meritorious issues (in addition to the fifty (50) years Mr. Warner must now spend in prison for a crime he did not commit), appellate counsel's performance should have been subject to strict scrutiny; indeed, Mercer knew or should have known that his failure to raise the claims Mr. Warner instructed him to would constitute waiver of grounds for relief as to those issues, thus this failure is *per se* ineffective assistance of counsel under the Sixth Amendment given the fact that it resulted in procedural default. Moreover, Mercer's own admission that the claims Mr. Warner insisted he raise were "frivolous on direct appeal" should have been sufficient to trigger scrutiny (at minimum) of the very issues he admitted he refused to raise on direct appeal and adequate analysis to determine if they were "stronger" than those he did raise; instead, the M.S.Ct. simply ignored appellate counsel's ineffective assistance altogether and never mentions the issues Mercer admitted to not raising on direct appeal, disregarding their lawful duty to do so. Indeed, this Court has held that the right to effective assistance of counsel applies on an appeal as of right. See general Evitts v Lucey, 469 U.S. 378 (1985); Davila v. Davis, 582 U.S. 521, 541 (2017) (the constitution "guarantees [prisoners] effective assistance of counsel at both trial and during an initial appeal."). It naturally follows that appellate counsel's refusal to raise meritorious issues on direct appeal as instructed to, or (as here) informs his client that a particular claim can only be brought in a petition for PCR (both with full knowledge that he would be waiving all grounds for relief and placing a procedural bar before his client) is *per se* IAC.

"So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland [], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Murray @ 488. This is an implicit instruction to lower courts, such as the M.S.Ct., to assess the effectiveness of counsel's assistance prior to procedurally defaulting any claim of IAC, particularly where defendant demonstrates that it was counsel's deficient performance that directly resulted in the procedural default and the appellate attorney admits to his own

ineffectiveness. Moreover, "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not '[conduct] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)." *Id.*

Given Mr. Warner's right to direct review as a matter of law, any waiver of grounds for relief must be made knowingly and voluntarily. See Brady v. United States, 397 U.S. 742, 748 (1970)("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). As this Court noted in Garza, "courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable – for example, on the grounds that it was unknowing or involuntary." Garza v Idaho, 139 S.Ct. 738, 745 (2019). Like the waiver of a right to appeal, waiver of grounds for relief that derive from appellate counsel's refusal to raise issues as instructed must be assessed according to the knowing and voluntary standard. United States v Brown, 892 F.3d 385, 394 (D.C. Cir. 2018)("Like all other courts of appeals, our circuit holds that a defendant may waive his right to appeal his sentence as long as his decision is knowing, intelligent, and voluntary")(citations and syntax omitted). Mercer's admitted misrepresentations and bad counsel in insisting that Mr. Warner must bring certain claims on PCR cannot be anything other than an involuntary and unknowing waiver of grounds for relief, thus invalid under any standard. Indeed, prejudice is presumed "when counsels constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." Roe v Flores-Ortega, 528 U.S. 470, 484 (2000). This Court has clearly held that "counsel's failure to raise a particular claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts" (Murray, *supra.*) and Mr. Warner urges this Court to do exactly that given the fact that the M.S.Ct. did not address or analyze ineffective assistance of appellate counsel at all.

b. Trial Counsel

Managhan's complete failure to investigate, discuss the case with his client, or put the State's case to any adversarial testing whatsoever was clearly ineffective assistance of counsel. This Court lists several

duties that an effective attorney owes their client and Managhan did not fulfill a single one: A duty of loyalty, to avoid conflicts of interest, to advocate their clients cause, to consult with their client and keep the client informed, to investigate, and "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland @ 690.

Indeed, the Preamble to the Montana Rules of Professional Conduct require that an attorney be "competent, prompt, and diligent" in "all professional functions." See (5). Managhan's failure to obtain the Starbucks and/or VFW surveillance videos before they were overwritten fell far below any objective standard of reasonableness considering A) Mr. Warner specifically instructed him to acquire the alibi and exculpatory evidence he needed to prove his innocence; B) his own investigator suggested he obtain audio/video surveillance from the VFW and surrounding business **before** Mr. Warner had instructed him to; and C) there can be absolutely no reasonable justification for not promptly and diligently obtaining the alibi and exculpatory evidence he knew existed.

Moreover, the M.S.Ct. gross misapprehension of the facts and effect of the evidence before it was a manifest miscarriage of justice, *in se*, while it simply glossed over the indisputable fact that Managhan waited until the alibi and exculpatory evidence had been destroyed to even request it:

> "After Warner assumed representation of his own case, he had an opportunity to interact with the OPD investigator who explained the actions he had taken to obtain the requested video surveillance." Appendix A-7, ¶12.

The M.S.Ct. is referring to the April 3, 2017 Investigation report (Appendix C-51) that HE had requested himself from HIS investigator after he began to represent himself; this is but one of many gross misapprehensions by the M.S.Ct. Managhan's investigator was Daniel Nelson, who did absolutely nothing exactly as Managhan himself; Mr. Warner's initial investigator was Rick Hawk (the individual who prepared the report alluded to), who promptly conducted the investigation Mr. Warner asked him to, though by this time (more than 130 days after Mr. Warner's arrest) the alibi and exculpatory evidence had been lost. In its decision, the M.S.Ct. does not address Managhan's failure to obtain the Starbucks or VFW surveillance video, though again grossly misapprehends the facts, glossing over the Starbucks video completely:

"Mere speculation that surveillance video taken at night from a distance away may have existed earlier and may have weighed contrary to the victims' testimony does not establish the time frame in which the defense investigation occurred fell below an objective standard of reasonableness nor does it show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." Appendix A-7, note 3.

This gross misapprehension of the facts and evidence Mr. Warner presented was a manifest miscarriage of justice and unreasonable application of, *inter alia*, Strickland. First and foremost, the Starbucks and VFW surveillance videos were from inside of both well-lit businesses, so the "taken at night from a distance away" was made up by the M.S.Ct. out of whole cloth, as it can be found *nowhere* in the record and neither party asserted this "fact." Managhan himself stated that Mr. Warner told him that he was at the Starbucks at the time the robbery occurred and this could only have taken place on December 8, 2016, as this was the sole time Managhan met with or discussed the case with Mr. Warner, thus the question remains: Why did Managhan wait so long to request the surveillance videos that would have provided an alibi and exculpatory evidence at trial? Appendix C-49. Significantly, Mr. Warner demonstrated clearly in his opening brief exactly how he was prejudiced by Managhan's failure to obtain this alibi evidence:

"Managhan refused to [obtain surveillance from the Starbucks] and Mr. Warner was prejudiced as evidenced by Ahner's closing remarks:

'And let's be clear you heard no testimony from there [indicating the witness stand] that Mr. Warner was anywhere other than at the scene of the robbery.' (Tr. Tr. pg. 766,12-14, Appendix J-13)

"Managhan did not even request an investigator or any type of investigation until sixty-three days after Mr. Warner's arrest (App. D-2), despite his solemn duty to investigate. Bragg v Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001)" Opening Brief, DA-0189.

Similarly, in the same opening brief, Mr. Warner asserted:

"Miller would tell officers the night of the robbery that he intended to go to the VFW to specifically search for the person who had robbed him, would later tell Detective Ottosen that he had searched the VFW looking for the robber, but did not find him, and would testify to both of these at trial...the surveillance from the VFW would have had the additional evidentiary value of showing that Miller would have seen Mr. Warner at the bar, but not identified him." *Id.*

At minimum the VFW surveillance would have provided reasonable doubt that Mr. Warner had robbed Miller, thus Managhan's failure to obtain it clearly prejudiced his defense.

As demonstrated by Mr. Warner in his briefing to both the M.S.Ct. and the trial court, Managhan utterly failed to investigate or obtain alibi and exculpatory evidence that he knew existed and was specifically instructed to by Mr. Warner days after his arrest. This Court has held that "a court deciding an actual

ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland @ 690 (1984). Managhan could not provide any reasonable justification, excuse, or "strategic decision" for not timely obtaining the audio/video surveillance from either the Starbucks (where Mr. Warner told Managhan he was at the time of the robbery) or the VFW, where the victim testified he searched for the man who robbed him and walked right past Mr. Warner seated at the bar drinking a beer, particularly where the OPD investigator who reviewed the initial case file informed Managhan that audio/video surveillance would be beneficial to the defense. The M.S.Ct. determined that Managhan ultimately did request his investigator obtain these surveillance videos (long after they had been destroyed) and thus was not ineffective, which is an unreasonable application of, *inter alia*, Strickland. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness **in all circumstances**." *Id.* @ 691(emphasis added).

In addition to the unreasonable application of Strickland by the M.S.Ct., it unreasonably refused to apply its own precedent. Mr. Warner raised IAC and the possible loss of exculpatory evidence as early as December 8, 2016, when both surveillance videos still existed:

> "Mr. Warner: I've been calling this man every day since he was assigned to me, told him I had a timely—a timely issue I needed to discuss with him, he has shown no interest in my defense, I may have already lost evidence in my case because of this, so I don't feel this man is willing to represent me" 12-8-2016 Tr., pg. 6, 5-7; Appendix J-1.

This issue would come to a head (after Mr. Warner had raised ineffective assistance of counsel and/or the loss of exculpatory evidence no less than ten times[13]) with the following exchange between Mr. Warner and the court on March 2, 2017:

> "Mr. Warner: So we're not going to address his ineffectiveness?
> "The Court: No." 3-2-2017 Tr., pg. 6, 23-25; Appendix J-2.

The trial court would completely ignore every motion filed by Mr. Warner to have Managhan removed from his case for IAC and only set a status hearing after Managhan himself submitted a Motion to

[13] DOC1 11, 12, 13, 14, 17, and 18, 29; see also letter written to judge on 1-31-2017 that was rejected by his judicial assistant solely because he was represented by counsel. Conversely, Mr. Warner raised IAC in open court on 12-8-2016, 3-2-2017, and 3-22-2017, among several other instances.

Dismiss Public Defender & Proceed Pro Se, an egregious error *in se*; indeed, in a letter to Mr. Warner Managhan acknowledged that the judge would have to conduct a hearing to address Mr. Warner's allegations of IAC. Appendix C-50. By refusing to fulfill its mandatory obligation to conduct an inquiry once Mr. Warner raised Managhan's ineffectiveness and the potential loss of exculpatory evidence, the trial court was complicit in (thus culpable for) depriving Mr. Warner of his fundamental right to review "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment" Brady v. Maryland, 373 U.S. 83, 87 (1963).

The court would neither remove Managhan, ensure that he obtained the exculpatory evidence that Mr. Warner insisted he needed to prove his innocence, nor conduct any inquiry whatsoever into Mr. Warner's allegations of ineffective assistance of counsel, though in Montana a judge "does not have discretion to ignore a defendant's allegations of ineffective counsel and refuse to conduct an inquiry." Halley v. State, 2008 MT 193, ¶24. "We agree with Weaver that the threshold issue is not whether counsel was ineffective, but whether the District Court erred in failing to make an adequate inquiry into his claim of ineffective assistance of counsel." State v. Weaver, 276 Mont. 505, 511 (1996). ("'In determining if [the] defendant presented a seemingly substantial complaint about counsel, it follows that the district court **must** make an adequate inquiry into the defendant's complaints.' Finley, 53 Mont. St. Rep. at 318. When a defendant files a motion to remove his attorney based on allegations of ineffective assistance, whether through a motion for substitution of counsel or a motion to proceed pro se, the district court **must** make a critical analysis of the defendant's complaints regarding his counsel and make an initial determination of whether the defendant has presented seemingly substantial complaints. See Finley, 53 Mont. St. Rep. at 318."). Despite this, the M.S.Ct. did not even address the indisputable fact that the trial court made absolutely no inquiry whatsoever, which is clear error and an unreasonable and unequal application of the law under the Fourteenth Amendment.

Given that the trial court had no "discretion to ignore a defendant's allegations of ineffective counsel and refuse to conduct an inquiry" it was a *per se* violation of Mr. Warner's fundamental rights for the trial court to do exactly that and should have resulted in remand by the M.S.Ct; instead, it acquiesced in the

lower courts error (exactly as it did in admitting the lower court erred by not balancing all four speedy trial factors, then held it was harmless by itself allowing a single factor to be dispositive of Mr. Warner's speedy trial claim), making a gross mistake of law and manifest miscarriage of justice.

Furthermore, the spoliation of exculpatory evidence through IAC is the natural counterpart to a Brady violation and must be "imputed to the State" under the Sixth and Fourteenth Amendments (as in Murray), particularly where the trial court had an opportunity to prevent the spoliation or loss of exculpatory evidence by simply discharging its lawful duty to inquire into allegations of IAC. "Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts [] it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest." Strickland @ 692.

Mr. Warner's right to review exculpatory evidence is unquestionably protected by the Due Process Clause. See United States v Agurs, 427 U.S. 97 (1976); accord United States v Bagley, 473 U.S. 667 (1985). Moreover, Managhan's duty to investigate and obtain alibi and exculpatory evidence he knew existed is well-established under Strickland and the body of law that has evolved from it. Additionally, this Court has held that in "cases concerning the loss of material evidence, sanctions will be warranted [] if there is a reasonable likelihood that the [evidence] could have affected the judgement of the trier of fact." United States v Valenzuela-Bernal, 458 U.S. 858, 873-74 (1982). Seven years later the only sanction available is the complete dismissal of the indictment against Mr. Warner. Significantly, this Court has long since held that "[t]here are [] circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." United States v. Cronic, 466 U.S. 648, 658 (1984).

The spoliation of alibi and exculpatory evidence due to Managhan's deficient performance is sufficiently egregious and prejudicial to constitute ineffective assistance of counsel, while the trial courts complicity can be nothing short of a manifest miscarriage of justice that, at minimum, calls into question the adequacy and accuracy of the jury's determination of Mr. Warner's guilt. Where the fundamental fairness of a criminal conviction is at issue, strict scrutiny must be the standard of review, yet the M.S.Ct.

gave Mr. Warner's meritorious claims a cursory glance and grossly misapprehended the facts and effect of the evidence even in that brief look. As such, Mr. Warner's IAC claim against Managhan is inseparably tied to the trial courts' refusal to conduct a Gallagher inquiry[14] and the M.S.Ct. refusing to address or analyze these (even after Mr. Warner clearly and adequately argued this in his Petition for Rehearing) is an obvious violation of Mr. Warner's Sixth and Fourteenth Amendment protections, particularly where it asserted that Mr. Warner's IAC claims were "mere speculation" and "bald assertions" **solely** because both it and the trial court intentionally interfered with his attempts to develop the record. "In making this determination, a court hearing an ineffectiveness claim must consider the **totality** of the evidence before the judge or jury." Strickland @ 695("a particular decision not to investigate **must** be directly assessed for reasonableness in all the circumstances").

Mr. Warner maintains that the fundamental miscarriage of justice exception that this Court has held "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a [] court may grant the writ even in the absence of a showing of cause for the procedural default" applies to the instant case and this Court should, indeed, grant his Petition for a Writ of Certiorari. Murray @ 480. Under this legal theory, had the attorney obtained the alibi or exculpatory evidence that he knew existed "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." House v Bell, 547 U.S. 518, 536-37 (2006).

Mr. Warner informed his attorney less than two weeks after his arrest (the first and only opportunity he had to do so) that he was at the Starbucks when the robbery occurred and explicitly instructed to obtain the audio/video surveillance from this place of business to prove he had an alibi to the robbery. Prior to this, when the OPD investigator conducted his initial review of Mr. Warner's case he informed Managhan that surveillance from the VFW and other area businesses would assist the defense, though Managhan ignored both and never attempted to obtain either surveillance video. Significantly, Mr. Warner specifically instructed Managhan to obtain the VFW surveillance as well, thus "the question is whether

[14] See State v Gallagher, 1998 MT 70, ¶15.

there is a reasonable probability that [had Managhan obtained ***either*** of the surveillance videos] the factfinder would have had a reasonable doubt respecting guilt." Strickland @ 695 ("a reasonable probability is a probability sufficient to undermine confidence with the outcome"). The answer to that question is a resounding "YES" considering Mr. Warner provided *prima facie* evidence that the Starbucks video would have shown him there at the time of the robbery (rather than the scene of the crime), while the VFW surveillance would have provided (at minimum) reasonable doubt that he had committed the crime;[15] the spoliation of both alibi and exculpatory evidence permanently prejudiced Mr. Warner's entire case and he could not possibly have received a fair trial because Managhan intentionally lost the evidence that would have demonstrated his innocence; individually, each of the surveillance videos were exculpatory evidence that would have undermined the otherwise weak case presented by the prosecution, though together provide a presumption of innocence that requires this Court to issue a Writ that remands this case to be dismissed entirely, as this IAC should be imputed to the State where the trial court had an opportunity to prevent its loss.

Spoliation is not cognizable until after the underlying claim has been resolved and the claimant either loses or suffers some diminution in its evidentiary value, thus Mr. Warner maintains that this issue is properly before the Court. The spoliation of alibi or exculpatory evidence in a criminal case due solely to IAC must, of necessity, be raised after trial: without a fully developed record of the spoliation or the IAC that caused it, a defendant is deprived of the process and protections guaranteed him by the U.S. Constitution. In the instant case the spoliation claim is made all the more meritorious by the trial courts egregious failure to fulfill its lawful duty of inquiring into Mr. Warner's allegations of IAC and the potential loss of exculpatory evidence when he first raised these at his arraignment; the M.S.Ct. acquiescing in the trial courts egregious error elevates the spoliation to a gross miscarriage of justice that can only be rectified by this Court. Significantly, "the appropriate test for prejudice finds its roots in the

[15] Mr. Warner was drinking a beer at the bar of the VFW when the victim testified that he searched it for the man who robbed him; the fact that the video surveillance would have shown the victim walking past Mr. Warner without recognizing him as the robber would have provided the jury reasonable doubt that Mr. Warner had committed the crime

test for materiality of exculpatory information not disclosed to the defense by the prosecution [] and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." Strickland @694.

Managhan clearly knew that the Starbucks and VFW surveillance videos existed as early as December 8, 2016 as this was the sole time he spoke with Mr. Warner about the case, yet in his January 26, 2017 investigation request he asked his investigator to "follow up on the video surveillance from the mall parking lot or Starbuck [sic] per the client's claim that he was there at the time of the alleged robbery. Also check with the VFW about surveillance they have in bar or parking lot." Appendix C-49.

The M.S.Ct. erroneously asserted that "the State presented direct evidence from both robbery victims who identified Warner as the perpetrator of the robbery." Appendix A-7, note 3. Setting aside the incontrovertible fact that Mr. Warner was only ever charged or convicted of a single count of robbery (thus there were not and could not be "victims") or that Dustin McGiboney testified under oath that he was not robbed, both identifications were indisputably tainted as the M.S.Ct. was well aware: Miller was shown a single photograph and TOLD that Mr. Warner was the robber (as the investigating officer testified to), rather than being asked or independently identifying Mr. Warner as the robber; indeed, Miller (the ONLY victim of the crime) only identified Mr. Warner once he was in handcuffs, while McGiboney did not identify Mr. Warner for the first and only time until trial as he sat at the defense table and admitted that he looked Mr. Warner up on the jail website and saw pictures of him. Despite this, McGiboney's identification was clearly discredited as evidenced by the following exchange:

"Q. (By Mr. Warner)...you recall [the robber] by their very distinct eyes...
"A. [McGiboney] yes
"Q. You said you stared them in the eyes
"A. Uh-huh...
"Q. So you told the detective that the person that you stared in their eyes had blue eyes?
"A. Right.
"Q. Can you tell me what color my eyes are?
"A. They're obviously not blue...
"Q. What color are they?
"A. Brown." Tr. Tr. Pg. 291-92; Appendix J-8.

Significantly, the two impermissibly suggestive showup identifications were the ONLY "evidence" used to convict Mr. Warner and "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland @ 696. Managhan's failure to obtain either the alibi or exculpatory surveillance videos (and their subsequent spoliation) was clear error that affected the outcome of the trial. The M.S.Ct. unreasonably applied federal law: "In every case the court should be concerned with whether [] the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

In addition to its gross misapprehension of the facts and effect of the evidence (as noted above) and its failure to properly apply clearly established federal law, the M.S.Ct. erroneously refused to adequately address or analyze the totality of the circumstances regarding Mr. Warner's IAC claims; the fact that the trial court did "not have discretion to ignore [Mr. Warner's] allegations of ineffective counsel and refuse to conduct an inquiry"[16] was a material fact that the M.S.Ct. deliberately disregarded and is significant considering the trial court had an opportunity to prevent the loss of alibi and exculpatory evidence by simply fulfilling its lawful duty as early as December 8, 2016 when he first raised IAC and the imminent loss of exculpatory evidence. Appendix J-1. This error cannot be harmless given that it affected the fundamental fairness of the trial.

Moreover, Mr. Warner maintains that the fundamental miscarriage of justice exception where "a constitutional violation has probably resulted in the conviction of one who is actually innocent" extends to evidence that a jury was never able to consider because of IAC and judicial misconduct applies hereto. Murray @ 495-96. Mr. Warner is actually innocent of robbery and the surveillance video from the Starbucks would have proven that beyond any doubt considering the time/date stamp on it would have demonstrated that he was there when the robbery occurred rather than at the scene of the crime. Significantly then, had Managhan obtained this alibi evidence (or the exculpatory evidence from the

[16] Halley v. State, 2008 MT 193, ¶24.

VFW) which he knew existed, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." House v Bell, 547 U.S. 518, 536-37 (2006). Indeed, the Starbucks video would qualify as "evidence so strong that a court cannot have confidence in the outcome of the trial." Schlup v Delo, 513 U.S. 298, 316 (1995).

A State court is required to reasonably apply federal constitutional standards, particularly where it is as well-established as the Strickland doctrines are. By maintaining that because Managhan ultimately did request that his investigator obtain the Starbucks and VFW video surveillance a full two months after Mr. Warner's arrest (and six weeks after he became aware of their existence), the M.S.Ct. held Mr. Warner's IAC claim to an unreasonable and higher standard than that required by this Court, which has repeatedly announced that a petitioner need only demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland @ 694("A reasonable probability is a probability sufficient to undermine confidence in the outcome"). The M.S.Ct. misapplying Strickland undoubtedly matters because Mr. Warner can demonstrate a reasonable probability that the result of his trial would have been different had Managhan obtained either the alibi evidence from the Starbucks **or** the exculpatory evidence from the VFW.

An attorney's acts or omissions that affect a criminal defendants' Sixth or Fourteenth Amendment protections are properly attributed to the State and Mr. Warner maintains that such is the case here: by deliberately disregarding alibi and exculpatory evidence, Managhan utterly failed to place the prosecutions' case in any adversarial testing whatsoever, while the spoliation of that evidence due to the trial courts' refusal to fulfill its mandatory lawful duty to conduct an inquiry into Mr. Warner's allegations of IAC allowed the State to convict Mr. Warner without meeting its burden of proving that he committed the crime beyond a reasonable doubt. This Court has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). This was enhanced by the Courts holding that "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that

substantially impairs the truth-finding function." Ivan v. New York, 407 U.S. 203, 205 (1972). Mr. Warner was completely deprived of the process due him during trial and continues to be denied all Due Process.

c. Sentencing Counsel

Right to effective assistance at sentencing. Glover v United States, 531 U.S. 198, 203-04 (2001)("Any amount of [additional] jail time has Sixth Amendment significance"). At sentencing, Mr. Warner was represented by Sean Hinchey, who allowed the court to sentence him to fifty (50) years without challenging the increase in penalty Mr. Warner suddenly became susceptible to on that day, the existence of the State hospital report (which Mr. Warner did not even receive and the M.S.Ct. had previously determined would be a confidential communication for Mr. Warner alone), and did not object to any of the States "evidence" such as the unverified newspaper articles, alleged gang membership, along with a host of other irrelevant and untrue "facts" that the trial court used as aggravating factors during sentencing

d. Faretta Right to Self-Representation

Implicating Mr. Warner's Sixth Amendment right to a fair trial and to represent himself under Faretta, the M.S.Ct. had a clear legal duty to address Mr. Warner's claims of being deprived of both rights by the trial court; like an IAC claim, deprivation of the right to represent oneself was not proper for direct appeal, as Mr. Warner did not specifically object to, *e.g.*, the trial courts insistence that standby counsel review and initial all documents before they were submitted to the court, or the trial courts' refusal to accept documents directly from Mr. Warner on several occasions, refusal to issue subpoenas, and not allowing Mr. Warner to withdraw motions that the court had held were not even properly before it, thus these issues could not be determined from the record alone and were proper for PCR. The M.S.Ct. erroneously and unreasonably decided that the allegations that Mr. Warner had a right to represent himself was procedurally barred and neglected to address or analyze this claim in any way.

IV. Ake Error

Ake clearly established the law that a State must provide a criminal defendant with a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively

"conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake v Oklahoma, 470 U.S. 68, 83 (1985). This requirement is not satisfied by the appointment of a neutral psychiatrist answerable to the court, nor one who does not make themselves available to the defense for cross-examination. "Instead, due process requires the appointment of one psychiatrist *for use by the defense in whatever fashion defense counsel sees fit.*" Williams v Calderon, 52 F.3d 1465, 1473 (9th Cir. 1995). In his dissent, Circuit Judge Pregerson argues that the trial courts Ake error (like that of Mr. Warner's) was structural. Calderon @ 1013, et. seq.

Early in the proceedings, Mr. Warner provided the trial court sufficient *prima facie* evidence that he had "serious mental health problems" at the time of the offense,[17] was being treated for co-occurring diagnoses for Mixed Personality Disorder and Mood Disorder (among other significant mental health diseases) and requested a defense expert to conduct an evaluation. It can be presumed that Mr. Warner properly made the requisite showing considering the court did order that Mr. Warner be examined by the State hospital – if Mr. Warner had not demonstrated a need for psychiatric assistance to evaluate him and assist him in the presentation of his defense then the court would not have ordered an examination at all. Once the trial court ordered him to the State hospital for an evaluation, Mr. Warner was entitled to a counter-report as a matter of law. Refusing to appoint a defense expert or allow Mr. Warner an examination by an independent professional to counter the State hospital report precludes harmless error analysis as these infected the entire trial process, constituting structural error. Brecht v Abrahamson, 507 U.S. 619, 629-30 (1993).

Mr. Warner need not demonstrate if or how he was prejudiced by the courts refusal to appoint a psychiatric defense expert: the trial courts denial of a defense expert was based solely upon his poverty (contrary to Ake), thus the trial court not only failed to ensure that Mr. Warner had a fair opportunity to present the defense of HIS choice, but tipped the scales decidedly in the States favor by having Mr. Warner sent to the STATE hospital (trampling his Speedy trial right in the process) and refused to allow

[17] Appendix I-4.

for state of mind. Moreover, there is nothing in statute that either supports the notion that Mr. Warner could only have a mental health professional to assist him in preparing and presenting his defense if he could afford one, nor that he must pay for it himself or be sent to the STATE hospital for an evaluation if he cannot afford one. Additionally, the very person that the judge brought into the courtroom to "clarify the law" acknowledged that Mr. Warner "makes a good point" and that "it is a gray area" that highlights the unconstitutionally vague nature of the statute itself. 4-19-2017 Tr. Pg. 6, 18-19, Appendix F. Given the fact that Mr. Warner was being treated for co-occurring diagnoses of mood disorder, ADHD, and mixed personality disorder at the time of the underlying criminal offense,[19] there were serious questions as to whether he had the requisite state of mind to knowingly or purposely commit the crime for which he was charged.

MCA §46-14-202 is facially vague and unconstitutional[20] as applied given the inherently discriminatory nature of depriving a criminal defendant of competent psychiatrist assistance solely because of his poverty. Mr. Warner was deliberately denied an independent psychiatrist to assist him in the preparation and presentation of his defense. "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." Griffin v Illinois, 351 U.S. 12, 17-18 (1956)("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color").

The decision to refuse Mr. Warner a defense expert as described above cannot possibly be harmless error considering that, once Mr. Warner was examined by the State hospital and the State had its own evaluation, Mr. Warner was entitled to an examination by an individual independent of the State, thus when he requested an examination for the defense on July 5, 2017 the trial court was obligated to grant the motion and appoint an independent psychiatric professional – instead, the court simply ignored Mr. Warner's motion and never ruled on it. Regardless, once the decision was made to have Mr. Warner

[19] See Appendix I-4.

[20] Mr. Warner presented a challenge to the constitutionality of MCA 46-14-202 to the M.S.Ct. and Montana Attorney Genera as early as May 5, 2017. Appendix G-22/23.

evaluated, he was entitled to a defense expert and psychiatric assistance as a matter of law. This Ake error was structural as Mr. Warner was prevented from developing psychiatric evidence to rebut the State's case and enhance his defense in mitigation; indeed, the judge determined Mr. Warner's "future dangerousness" from the State hospital report, despite the fact that Mr. Warner was never provided a copy of this report and neither the State nor the court had any right to have this report at all. Categories of error found to be structural by this Court include "certain basic, constitutional guarantees that should define the framework of any criminal trial." Weaver v Massachusetts, 137 S.Ct. 1899, 1907 (2017).

In the final analysis, from this Ake error Mr. Warner is "entitled to habeas corpus relief under 28 U.S.C. §2254(d)(1) as state courts determination that he received all mental health expert assistance to which he was entitled under Ake was contrary to, or an unreasonable application of, clearly established law." McWilliams v Dunn, 137 S.Ct. 1790 (2017).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of certiorari should be granted. The multitude of errors in Mr. Warner's underlying criminal proceedings, all of which rendered the verdict void and require dismissal of the indictment. Individually, each error requires reversal, from the structural errors of Ake and deprivation of the self-representation right (McKaskle v Wiggins, 465 U.S. 168, 177(1984)) to IAC, prosecutorial misconduct, and judicial bias that permeated every facet of Mr. Warner's underlying criminal proceedings entitle him to relief; cumulatively, these errors demand dismissal of the indictment and Mr. Warner's immediate release as he is actually innocent of the crime for which he was charged and mistakenly convicted.

Respectfully submitted this 13th day of November, 2023.

Resubmitted this 17th day of February, 2024

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