NO. ____________________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JOSUE MARQUEZ AREVALO - PETITIONER

VS.

RANDY WHITE, WARDEN - RESPONDENT(S)
ANDY BRESHEAR, ATTORNEY GENERAL

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

Josue Marquez Arevalo, pro se
Kentucky State Penitentiary
266 Water Street
Eddyville, Kentucky 42038

Petitioner, Pro Se

February 20, 2018

QUESTIONS PRESENTED

I

THE SIXTH CIRCUIT COURT OF APPEALS ERRORED TO PETITIONER'S SUBSTANTIAL PREJUDICE IN NOT APPOINTING COUNSEL, AND IN NOT GRANTING CERTIFICATE OF APPEALABILITY AS THE RESPONDENT'S, AND DISTRICT COURT MADE ANSWERS, AND RULINGS DIRECTED TO OTHER CASES UNDER THE GUISE OF PETITIONER'S CASE, AND FAILED TO SERVE PETITIONER COPIES OF Orders entered into the record.

II

THE PETITIONER HAS BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION; AS A RESULT OF THE DEPARTMENT OF PUBLIC ADVOCACY'S ABANDONEMENT OF THE PETITIONER'S CASE AFTER SUPPLEMENTING THE PLEADINGS, AND KNOWING THE PETITIONER WAS UNABLE TO SPEAK OR WRITE ENGLISH FLUENTLY.

III

THE PETITIONER HAS BEEN DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION; AND PROTECTED RIGHTS UNDER INTERNATIONAL TREATY, AND LAW BY VIOLATIONS OF ARTICLE 36, OF THE VIENNA CONVENTION ON CONSULAR RELATIONS; WHEN THE TRIAL COURT, LEXINGTON POLICE DEPARTMENT, AND THE COMMONWEALTH OF KENTUCKY, FAILED AND REFUSED TO INFORM THE PETITIONER OF HIS PROTECTED RIGHT TO REQUEST AIDE AND ASSISTANCE FROM THE MEXICAN CONSULT.

IV

THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

V

THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, BY THE DENIAL OF EVIDENCE OF ACTUAL INNOCENCE.

VI

THE PETITIONER WAS DENIED DUE PROCESS UNDER THE SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, WHEN THERE WAS NO GUNPOWDER RESIDUE TESTS PERFORMED ON THE PETITIONER TO DETERMINE WHETHER OR NOT HE HAD FIRED A WEAPON.

QUESTIONS PRESENTED

VII

THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION WHEN HE WAS DENIED THE RIGHT AND SERVICES OF A DEFENSE EXPERT WITNESS.

VIII

THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, WHEN THERE WAS A LACK OF EVIDENCE TO SUPPORT A FINDING OF GUILT ON THE OFFENSE CHARGED.

IX

THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, WHEN THE COMMONWEALTH WAS ALLOWED TO USE MS. CARMELLA AREVALO'S "EXCITED UTTERANCE" AS TO THE PETITIONER BEING THE SHOOTER, WHEN SHE HAD NOT WITNESSED THE SHOOTING AND IT WAS MERELY HER "SPECULATION"- ESPECIALLY SINCE SHE KNEW OF NO MOTIVE THE PETITIONER HAD TO ACTUALLY KILL THE "VICTIM".

X

THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AS A RESULT OF CUMULATIVE ERROR.

PARTIES

The Petitioner is Josue Marquez Arevalo, represented by Josue Marquez Arevalo, Pro Se, Kentucky State Penitentiary, 266 Water Street, Eddyville, Kentucky 42038.

The Respondent(s) are: Randy White, Warden, Kentucky State Penitentiary, 266 Water Street, Eddyville, Kentucky 42038.

2). Andy Breshear, Attorney General, Office Of The Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204.

3). The Respondent(s) are Represented by the Hon. Jason B. Moore, Assistant Attorney General, Office Of The Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

No Parties to this action are Corporations

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ANDY BRESHEAR, ATTORNEY GENERAL

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT .

The Petitioner, Josue Marquez Arevalo, respectfully prays a Writ Of Certiorari issue to review the Judgment and Opinion of the Sixth Circuit Court Of Appeals, entered on the 18th day of October, 2017.

OPINIONS BELOW

The Sixth Circuit Court of Appeals entered its Order Denying Petition For Rehearing on the 18th day of October, 2017.

The Sixth Circuit Order Denying Certificate Of Appealability was entered on the 18th day of July, 2017.

The Order of the United States District Court, Eastern District Of Kentucky, Denying Writ Of Habeas Corpus for Luther Creech, was entered on the 13th day of May, 2016; Petitioner has received no other Order from the United States District Court Denying Writ Of Habeas Corpus.

The Order of the Kentucky Supreme Court Denying Discretionary Review was entered on the 10th day of September, 2014.

The Order of the Kentucky Court Of Appeals Opinion Affirming, was entered on the 11th day of October, 2013.

the Order Overruling Movant's RCr. 11.42 Motion For Post-Conviction Relief, was entered by the Fayette Circuit Court on the 17th day of October, 2012.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. §1254 (1), and 28 U.S.C.A. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

"...and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor be deprived of life, liberty, or property, without due process of law;..."

The Sixth Amendment to the United States Constitution provides in pertinent part:

"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... and to be informed of the nature and cause of the accusation ...and to have the Assistance of Counsel for his defense."

The Eighth Amendment to the United States Constitution provides in pertinent part:

"...nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...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."

STATEMENT OF THE CASE

Pedro Lilly was murdered on March 14, 2006, outside his home at 828 Ward Drive, in Lexington, Fayette County, Kentucky. No one seen the actual shooting. On that date, Officers responded to the call of shots fired at the location. CR 1, 7/23/07; 11:04:09. The first officers to arrive discovered that Lilly was seated behind the steering wheel of his vehicle, in his driveway, with the door closed. Glass was littered on the ground. Id., at 11:04:35. Officers also encountered Lilly's paramour (also the Petitioner's mother), Carmella Arevalo, repeatedly screaming, "Josue shot my Pedro!" in Spanish. Id., at 11:05:57. Although Ms. Arevalo later admitted that she did not see the actual shooting, and knew of no motive for the Petitioner to shoot Lilly. During later statements to the Police, Ms. Arevalo further stated that "threats" had been made against Lilly by three (3) unknown Mexican Nationals who had briefly stayed in Carmella and Lilly's home.

Numerous witnesses who heard the shots fired "alleged" that they seen the Petitioner running from the scene of the shooting. However, not one of those "witnesses" seen the Petitioner with a weapon of any kind. In addition, Lexington Police Detective Robert Wilson, of the Homicide Unit testified that Edwardo Cortez identified "Mario" as the shooter.

Shortly after the shooting, Police arrived at the scene. One of the first Officers to arrive was Police Officer Lorenzo Buenoto. Officer Buenoto is of Spanish/American decent, and speaks "Spanish". Upon his arrival, by Officer Buenoto's own admission, Carmella Arevalo was "hysterical', screaming, and running back into and out of the house located at 828 Ward Drive. Carmella at first alleged that the Petitioner had shot Lilly, screaming "Josue shot my Pedro". However, she later admitted that she did not actually see the shooting. During later statements, Ms. Arevalo further revealed that "threats" had been made against "Pedro" by three unknown Mexican Nationsl. Evidence further existed that Pedro was aa "Coyote", and that the three unknown Mexicans may have "owed" Pedro money. Carmella expressly testified that threats against Pedro had been made. TR 3, 7/24/07 10:25:50. Carmella further testified that she seen a man with long hair and a yellow shirt running by her window. Id., at 10:29:25- 33. In fact, Pedro had just returned from out of town, possibly running illegals..

After obtaining several statements implicating the Petitioner as the shooter, Police obtained a search warrant and arrested the Petitioner at his residence on Race Street. A weapon was found in the apartment, which was later alleged to be the murder weapon. However, no gun powder test was run on the weapon to determine if it had been recently fired. It was "alleged" that two thumb prints belonging to the Petitioner were lifted from the weapon. Which in and of itself fails to show the Petitioner ever "fired" the weapon. No tests were later conducted on the Petitioner to properly determine if he had powder residue on his hands, or clothes.

The Petitioner was arrested, and lodged in the Fayette County Detention Center. The Petitioner was later indicted for the Murder of Pedro Lilly. Trial commenced on the 23rd day of July, 2007. Prior to Trial, no attempt was made to contact, or inform the Mexican Consul of the Petitioner's arrest, and Indictment, even though it was known the Petitioner was a Mexican National, and Deportation Proceedings were being held at the same time, or shortly before the Murder Trial in this case; at no time was it explained to the Petitioner that he had a right to Court Appointed Counsel, or to contact the Mexican Consult. Instead, Counsel was retained for him by his sister. A Counsel who later abandoned his case in a critical stage of the proceedings, because the Petitioner did not have an additional three thousand ($3,000.00) dollars to file a Re-Hearing. Further, "Post-Conviction" Review was never explained to the Petitioner.

Prior to Trial, Trial Counsel made no attempt to check with the Petitioner's place of employment to determine "when" he got off work that day. No attempt was made to locate, or question the Black Couple who lived above the Petitioner to determine when the Petitioner arrived at home that day- the names of which the Petitioner does not now know as a result. Even though Deportation Proceedings were being conducted against the Petitioner, no attempt was made to contact "INS", to determine if Pedro's own actions may have caused his death as a result of a war between competing Coyotes, or Mexican Factions. No attempt was made to obtain a Defense Ballistics Expert to determine whether or not the "alleged" fingerprints found on the weapon were in such a position as to allow it to be fired. Or to explain why a proper residue test should have been conducted on the weapon, the Petitioner, or the clothes the Petitioner was wearing to properly determine whether the Petitioner had even fired a weapon. All actions the Mexican Consult might reasonably have requested had they been informed of the allegations considering the lack of proof that the Petitioner had committed the alleged Offense.

In addition, the Petitioner was "prejudiced" throughout the Trial by the repeated use of "Illegal Alien", and references made in regards to the Petitioner being in this country illegally. Trial Counsel started this tirade in Voir Dire to the Trial Jury, and continued throughout the Trial using these and additional terms of "Coyote", to show the Petitioner may have had a tendency to commit illegal actions- which substantially prejudiced the Petitioner. Especially with the repeated testimony of illicit drug use, and prostitution by several of the Comonwealth's Witnesses- who were released from Jail to testify against the Petitioner.

Not a single Witness ever testified as to seeing the Petitioner fire the fatal shots. No powder test was ever made of the Petitioner to determine whether he had powder residue on his hands or clothes. By "Witness Account", at least three separate people were seen fleeing the scene of the shooting.

At the Conclusion of all evidence, the Trial Jury was never informed that the Petitioner would be "deported" at the conclusion of his sentence back to Mexico, an issue that may well have resulted in a lesser sentence being imposed. At the Conclusion of the Commonwealth's case in chief, the Defense rested. Without ever attempting to present a Defense to the allegations made. This allowed the Trial Jury to consider "only" the Commonwealth's "allegations". The Trial Jury was never allowed to consider whether Pedro's death may have been the result of rival Coyotes, or rival Mexican Factions. Evidence that could have been heard without the Petitioner's testimony. It was never explained to the Petitioner he had a right to testify in his own defense, and a right to make that decision himself.

Without being informed of the Petitioner's Deportation Status, the

Trial Jury was allowed to consider the evidence and found the Petitioner Guilty of Murder, with a Jury Recommended Sentence of Forty (40) years incarceration, at eighty-five (85%) percent.

Had the Trial Jury known of, and understood the Deporation Status of the Petitioner; they may well have considered it a Mexican Problem, and allowed the Petitioner to return to Mexico, as he would not have been in Fayette County, or the United States.

Even after the Trial in this case, the Petitioner is unaware of the Mexican Consul ever having been informed of this case. It was never explained to the Petitioner he had a right to "post-conviction relief". Clearly his Direct Appeal was frustrated by his inability to retain Private Counsel, and pay additional Attorney Fees. Even though it was known Petitioner was unable to speak or write English, he was provided entirely no assistance in preparing post-conviction review. Clearly this Petitioner has not been provided all the protections provided for under Article 36, of the Vienna Convention.

On the 19th day of November, 2009, the Petitioner filed post-conviction review pursuant to RCr. 11.42, in the Fayette Circuit Court. Counsel was appointed, and a Spanish Speaking Interpretor was provided for the Petitioner. An Evidentiary Hearing was held on the issues presented. Typical for Trial Counsel, Jason Rapp made excuse after excuse for refusing to investigate or prepare Defense Issues for Trial- under the guise of Trial Strategy. However, there can be no Trial Strategy when there is no investigation- which Rapp admitted to. He refused to even consider the Commonwealth's "time-line" of the case may have been defective.

Ultimately, the Trial Court Dismissed post-conviction review.

timely Notice Of Appeal was filed by Court Appointed Counsel- Ms. Linda Dixon Bullock. After which, the Department Of Public Advocacy "Withdrew" from the case; knowing Petitioner was unable to read or write English, and was incapable of self-representation. The Petitioner ultimately obtained the assistance of another inmate, and was "forced" to file a "Pro Se Brief", without being able to obtain the full Record for Review. On the 11th day of October, 2013, the Kentucky Court Of Appeals Affirmed the Trial Court's Denial of Post-Conviction Review. Discretionary Review was Denied by the Kentucky Supreme Court on the 10th day of September, 2014.

Petitioner filed his Petition For Writ Of Habeas Corpus pursuant to Title 28 U.S.C.A. §2254, on/or about the 7th day of November, 2014. In responding, the Kentucky Attorney General's Office originally filed an Answer to "Rice's Federal Habeas Corpus". The District Court Ordered the Attorney General's Office to "correct" the tendered Pleadings- which was ultimately done. The District Court then went on to Rule on "Luther Creech's Petition, stating in part: "Luther Creech filed, pro se, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254." Petitioner immediately filed his Motion To Alter Or Amend Judgment Pursuant to Rule 59 (E) Of The Federal Rules Of Civil Procedure. Allegedly, an Order was entered November 8, 2016, correcting the Order; however, it was never served on Petitioner.

On the 8th day of May, 2017, the Petitioner filed his "Petition For Writ Of Mandamus" into the Sixth Circuit Court Of Appeals. To the best of Petitioner's present knowledge and beliefs, Judge Henry R. Wilhoit, Jr., never answered that action; as no Response was ever served on Petitioner. Certificate Of Appealability was Denied by the Sixth

Circuit Court Of Appeals on the 11th day of July, 2017. Petition For Rehearing was Denied on the 18th day of October, 2017. Petition For Writ Of Mandamus was Denied on the 23rd day of August, 2017.

Throughout the Federal process, Petitioner was denied the appointment of Counsel; even though Petitioner speaks little English, and writes little English.

Additional facts will be presented in the Petition. This action follows:

REASONS TO GRANT THE WRIT

I. THE SIXTH CIRCUIT COURT OF APPEALS ERRED TO PETITIONER'S SUBSTANTIAL PREJUDICE IN NOT APPOINTING COUNSEL, AND IN NOT GRANTING CERTIFICATE OF APPEALABILITY AS THE RESPONDENTS', AND DISTRICT COURT MADE ANSWERS, AND RULINGS DIRECTED TO OTHER CASES UNDER THE GUISE OF PETITIONER'S CASE, AND FAILED TO SERVE PETITIONER COPIES OF ORDERS ENTERED INTO THE RECORD

In this case, the Respondents' first Answered and filed in Opposition to "Rice's Petition"; not Petitioner's. This defect is compounded when the District Court entered an Order Dismissing "Luther Creech's Petition". Twice the Respondents', and the Court made Decisions and Answers regarding someone else's case, not the Petitioner's

Under this backdrop, how could a Certificate of Appealability be Denied when the Decision rendered does not reflect or concern the Petitioner's case? Allegedly a corrected Order was made on the 8th day of November, 2016, but it was never served on the Petitioner, as reflected by the Legal Mail Log Book, Appendix pp. 46-48. If the Order was not sent to Petitioner, who was it sent to; maybe Luther Creech.

In addition, the Petitioner is a Non-English Speaking Inmate, who does not read or write English. However, he was denied the appointment of Counsel to pursue post-conviction review. Not because the case does not have merit; but simply due to bias and prejudice of non-

English speaking Petitioner's- in violation of the First, Eighth, and Fourteenth Amendment Rights to the United States Constitution.

As this is an issue of First Impression, and potentially could affect thousands of foreign Nationals in American Jails, and Prisons; this Court should grant Certiorari Review to properly determine the merits of this issue. Especially as Treaty Violations have and continue to occur as a result of this abuse to Foreign Nationals. The Decision to deny Certificate Of Appealability in this case is not because the Decision is not debatable among reasonable jurists; but rather based on biased prejudice of Foreign Nationals.

II. THE PETITIONER HAS BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION; AS A RESULT OF THE DEPARTMENT OF PUBLIC ADVOCACY'S ABANDONMENT OF THE PETITIONER'S CASE AFTER SUPPLEMENTING THE PLEADINGS, AND KNOWING THE PETITIONER WAS UNABLE TO SPEAK OR WRITE ENGLISH FLUENTLY

This is an issue of First Impression, to the best of the Petitioner's present knowledge and beliefs, on the issue of Appellate Review, and Post-Conviction Review; when the Defendant seeking a review is unable to speak, read, or write English, and is denied assistance by the State "after the State is fully aware" that a Non-English Speaking Inmate is attempting to have issues presented for judicial relief. The Kentucky Department Of Public Advocacy represented the Petitioner at Trial Court Level in post-conviction proceedings, and Supplemented the tendered pleadings; after which the Department Of Public Advocacy represented the Petitioner during the course of an Evidentiary Hearing on the issues. During this representation of the Petitioner, the Department Of Public Advocacy filed a Motion for, and obtained "Funds For A Spanish Speaking Interpreter". The Department Of Public Advocacy was fully aware that the Petitioner was a Non-English Speaking Inmate, even to the point of having tendered Pleadings filed by the DPA Translated into Spanish for the Petitioner. Further, the Department Of Public Advocacy recognized the issues presented had merit, and supplemented those tendered issues.

After the Trial Court Denied post-conviction review, the Petitioner was led to believe the DPA would handle his Appeal. In point of fact, the DPA Filed Notice Of Appeal, Designation Of Record; and all necessary Appellate Motions. Then the case was transferred to the Post-Conviction Branch of the DPA, where the DPA filed a Motion To Withdraw, leaving the Petitioner- a non-English Speaking Petitioner- to fend for himself. Petitioner was not even provided with Spanish Speaking Instructions on how to proceed with Appeal.

In addressing this issue, the Kentucky Court Of Appeals simply held that there is no Constitutional Right to appointed Counsel in State Post-Conviction proceedings. The Court never addressed the "totality" of the circumstances, and the known fact this Petitioner was a Non-English Speaking prisoner. In addressing this issue, this Court has held:

> "When any inmate, even an illiterate or non-English-speaking inmate, shows that an actionable claim which he desired to bring has been lost or rejected, or that presentation of claim is currently being prevented, because capability of filing suite has not been provided, he demonstrates that the state has failed to furnish adequate law libraries or adequate assistance from persons trained in the law in violation of constitutional right of access to the Courts." (Emphasis Added) Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1987)

In this case, the Petitioner has been denied that "Constitutionally Protected Right" as laid out in Lewis. The DPA abandoned the case, after knowing the Petitioner could not read or write English. They even refused to provide Spanish Speaking Instructions to inform the Petitioner what he needed to do. The Kentucky Department Of Corrections has no Spanish Speaking Legal Aides to assist Non-English Speaking Inmates. Lewis v. Casey, Supra.. But this issue becomes more compounded. Original Direct Appeal Counsel "refused" to file a Petition For Rehearing due to a lack of funds. Trial Counsel refused to obtain Expert Witnesses, due to a lack of Funds. Even the DPA's own Motion To Withdraw states: "post-conviction proceeding... is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense". Counsel did not say the case had no issues. Did not say a Non-English Speaking Inmate was capable of self-representation. The "focus" was on "money"; just as at Trial, and Direct Appeal. Anders v. State Of California, 386 U.S. 738, 87 S.Ct. 1396 (1967), specifically addresses this very issue.

Because this Petitioner is an Illegal Alien, Non-English Speaking Foreign National, and is Indigent; he is/and has been denied full and fair access to the Courts on the issues presented-in violation of the First, Sixth, Eighth, and Fourteenth Amendment Rights to the United States Constitution. As a result, this Court should grant Certiorari Review to determine what Rights a Non-English Speaking Foreign National has on Appellate, and Post-Conviction Review under the First and Fourteenth Amendment Rights to the United States Constitution. This issue would directly affect thousands of Foreign Nationals- especially Mexicans- languishing in American Jails and Prisons, unable to Petition the Courts to redress of Grievances, due to an inability to speak, or write English.[1]

III. THE PETITIONER HAS BEEN DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION; AND PROTECTED RIGHTS UNDER INTERNATIONAL TREATY AND LAW BY VIOLATIONS OF ARTICLE 36, OF THE VIENNA CONVENTION ON CONSULAR RELATIONS; WHEN THE TRIAL COURT, LEXINGTON POLICE DEPARTMENT, AND THE COMMONWEALTH OF KENTUCKY, FAILED AND REFUSED TO INFORM THE PETITIONER OF HIS PROTECTED RIGHT TO REQUEST AIDE AND ASSISTANCE FROM THE MEXICAN CONSULT

Article II, Section 2, provides in part:

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;..."

Article VI, provides in part:

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1. If the Court elects not to address these issues at this time, it is requested that the Court use its powers to grant a conditional Writ Of Habeas Corpus to remand the case back to the District Court for a Hearing

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...".

This issue represents a Separation Of Powers Issue. The United States entered into a "Treaty". That "Treaty" was ratified by Congress. The Vienna Convention is a 79-Article Treaty negotiated in 1963, and ratified by the United States in 1969. See: United States v. Lombera-Camorlinga, 206 F.3d 882, 884 (9th Cir., 2000). The Treaty governs "the establishment of consular relations, [and] define[es] a Consulate's function in a receiving nation." United States v. Alvarado-Torres, 45 F.Supp.2d 986, 988 (S.D.Cal., 1999). Josue Marquez Arevalo asserts that Article 36, of the Treaty bestows a private, judicially-enforceable right on Foreign Nationals to consult with Consular Officials. Arevalo asserts that because this right was violated, his conviction must be reversed. Especially as the Commonwealth of Kentucky has refused the "aide and assistance" of Spanish Speaking individuals to assist in the Appellate Process, and capable of assisting a Spanish Speaking Inmate in the Legal Process. This is an issue of first impression to the best of the Petitioner's current knowledge and beliefs; and would affect thousands of Foreign Nationals currently incarcerated in American Jails and Prisons.

A. WHETHER THE VIENNA CONVENTION CONFERS AN ENFORCEABLE INDIVIDUAL RIGHT

Ratified Treaties become the law of the land on an equal footing with State and Federal Statutes. United States Constitution, Article VI, CL 2. They are to be construed initially according to their terms. United States v. Alvarez-Machain, 504 U.S. 655, 663, 112 S.Ct. 2188, 2193, 119 L.Ed.2d 441 (1992). Treaty construction is a particularly sensitive

Buisness because international agreements should be consistently interpreted among the signatories. "Treaties are contracts between or among independent nations". (Emphasis Added),. United States v Li, 206 F.3d 56, 60 (1st Cir., 2000). See Also: Goldstar v. United States, 967 F.2d 255, 259 (4th Cir., 1990).

For the enforcement of its provisions, a Treaty depends "on the interest and honor of the governments which are parties to it." Head Money Cases, 112 U.S. 580, 598, 5 S.Ct. 247, 254, 28 L.Ed. 798 (1884). "Infraction becomes the subject of international negotiations and reclamations." Id.. ("it is obvious that with all this the judicial courts have nothing to do and can give no redress.").

Against the backdrop of these principles, the Vienna Convention appears to be a standard Treaty whose purpose is to facilitate consular activity in receiving states. The Preamble states:

> "Believing that an international convention is consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, [and] realizing that the purpose is to ensure the efficient performance of functions by consular posts on behalf of their respective states."

The one Article in the Treaty that protects individual non-consular rights is Article 36, Titled "Communications and Contact With Nationals of Receiving States", which provides:

"1). With a view to facilitating the exercise of consular functions relating to nations of the sending State:

(a) If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (Emphasis Added)

(c) Consular officers shall have the right to visit nationals of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. (Emphasis Added)

(2) The right referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under this Article are intended." (Emphasis Added). Vienna Convention, 21 U.S.T. at 110-01, 596 U.N.T.S. at 292-94.

Principally because of the reference to "rights" in Article 36, the Courts had, so far declined to decide whether the Vienna Convention intended to enact individually enforceable rights of consultation. This Court, in dicta, has also held this question open. See: Breard v. Greene, 523 U.S. 371, 376, 118 S.Ct. 1352, 1355, 140 L.Ed.2d 529 (1998).

Proper interpretation of a Treaty presents a question of law that this Court must review de novo. United States v. Page, 232 F.3d 536, 540 (6th Cir., 2000)(Citing United States v. Morgan, 216 F.3d 557, 561 (6th Cir., 2000). Under the Supremacy Clause of the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." United States Constitution, Article VI, cl 2.

In Federal Republic Of Germany et al., v. United States, 426 U.S. 111, 119 S.Ct. 1016, 143 L.Ed.2d 192 (1999), a motion was filed for leave to file a complaint, seeking as relief an injunction prohibiting the execution the execution of Walter LaGrand pending final resolution of Germany's case against the United States in the International Court Of Justice (ICJ)- a case in which Germany claimed that Arizona's execution of LaGrand violated the Vienna Convention. Germany also sought a stay of that execution [pending the Court's disposition of the motion] for leave to file an original bill of complaint after a normal course of briefing and deliberation on that motion. Motion For Leave To File A Bill Of Complaint and for a Remporary Restraining Order or Preliminary Injunction 2 (motion). The ICJ issued an Order "indicat[ing]" that the United States should have taken all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision in the ICJ proceeding." ¶., at 6-7.

Germany explained that it did not file its case in the ICJ until it learned that the State Of Arizona had admitted that it was aware, when LaGrand was arrested, that he was a German National. That admission came only eight days before the ICJ issued its preliminary ruling. Nevertheless, the United States Supreme Court declined to exercise its original jurisdiction.

On June 27, 2001, the International Court Of Justice (ICJ) principle judicial organ of the United Nations, delivered its judgment in the LaGrand Case-(Germany v. United States) in its judgment, which is final, without appeal, binding for the United States and all parties, the Court, with regard to the merits of the dispute held:

> "That by not informing Karl and Walter LaGrand without delay following their arrest of their rights under the Vienna Convention of Consular Relations, and thereby depriving Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States breached its obligations to Germany and to the LaGrand brothers under Article 36, of the Convention;" (Emphasis Added
>
> By not permitting review and reconsideration, in light of the rights set forth in the convention, of the convictions and sentences of the LaGrand brothers after the violation referred to above had been established, the United States breached its obligations to Germany and to the LaGrand brothers;
>
> Takes note unanimously of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in of its obligation under Article 36, paragraph 1 (b), of the Convention and finds that this commitment must be regarded as meeting Germany's request for a general assurance of non-repetition;
>
> Finds that should nationals of parties to the Convention be sentenced to severe penalties, without their rights under Article 36, of the Vienna Convention having been respected, the United States, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violations of the rights set forth in the Convention."

Having regard to the Petition filed in this Court, whereby the Petitioner institutes these proceedings against the Commonwealth of Kentucky for "violations of the Vienna Convention on Consular Relations [of 24 April, 1963], committed by the Commonwealth of Kentucky, the Petitioner bases the jurisdiction of the Court on Article 36, paragraph 1, and on Article 1, of the Optional Protocol concerning Compulsory

Settlement of Disputes, which accompanies the Vienna Convention.

The Petitioner respectfully requests the Court to adjudge and declare:

1). That the Commonwealth of Kentucky, by not informing the Petitioner without delay, following his arrest of his rights under Article 36, paragraph 1 (b), of the Vienna Convention, and by depriving Mexico of the possibility of rendering assistance, which ultimately resulted in the conviction of Petitioner, violated its international legal obligations to the Mexican Governmant, in its own right and in its right of diplomatic protection of its nationals, under Article 5, and Article 36, paragraph 1, of said Convention;

2) That the Commonwealth of Kentucky, by applying rules of it domestic law, in particular the doctrine of procedural default, has barred Josue Marquez Arevalo from raising his claims under the Vienna Convention, and by ultimately convicting him, thereby leaving the Writ as the only available course of action, violated its international obligation to Mexico under Article 36, paragraph 2, of the Vienna Convention to give full efect to the purpose for which the rights accorded under Article 36, of the said Convention are intended;

3). That the Commonwealth of Kentucky, by failing to take all measures at its disposal to ensure that Petitioner was not convicted, before informing him of his rights under the Vienna Convention, violated its international legal obligation to comply with the Rules and Articles mentioned, and so refrain from any action in Petitioner's case, which might interefer with the subject matter;

And pursuant to the following international legal obligation:

4). That the Commonwealth of Kentucky shall provide the Nation of Mexico an assurance that it will not repeat its unlawful acts and that in any future cases of detention of or criminal proceedings against Mexican Nationals, the Commonwealth of Kentucky will ensure in law and practice the effective exercise of the rights under Article 36, of the Vienna Convention On Consular Relations. This requires the United States to provide effective review of an remedies for criminal convictions impaired by violations of the rights under Article 36.

In this matter, the Petitioner was not informed by the Police at the time of his arrest that he had a right to contact the Mexican Consul and request legal assistance. This was further compounded when Trial Counsel, the Commonwealth Attorney, and the Trial Court all failed to properly notify and inform Petitioner of this right. To date, no attempt was, or has been made to notify the Mexican Consul in regards to this matter.

The "prejudice" of this violation becomes more clear when "private counsel" abandoned the Petitioner's Direct Appeal when he was unable to pay an additional three thousand ($3,000.00) dollars for a "Rehearing" of his Appeal. Further, when the Petitioner was not informed of his ability to obtain assistance from the Kentucky Department Of Public Advocacy.

Still further when the Petitioner was not informed, or provided an adequate means of filing post-conviction review. Most recently when the Department Of Public Advocacy "abandoned" the Petitioner's Appeal, after having represented him at an Evidentiary Hearing, Supplementing his RCr. 11.42; and knowing the Petitioner could not read or write English- all due to a lack of funds, or understanding of the English Language. All of this because the Commonwealth Of Kentucky has breached an International Treaty, and intentionally violated the Petitioner's "Protected Rights" under said "Treaty". What compounds, and makes this matter worse; this is not the first occasion in which the United States has violated Article 36, of the Vienna Convention against the Nation of Mexico. Since the LaGrand Brother's case, the United States has twice violated Article 36, specifically against Mexican Nationals, creating a pattern of abuse directed towards one nation. This issue further reflects violations to the "Separation Of Powers" Doctrine of the United States Constitution. The Executive Branch made the Treaty. Congress ratified said Treaty. The States have through the Judicial Branch, breached the Treaty, and on more then one occasion.

As such, this Court should grant Certiorari to properly determine the merits of this issue; and whether there has been violations to the Separation Of Powers Doctrine to the United States Constitution as a result of the actions taken. This issue has the potential of affecting thousands of Foreign Nationals currently incarcerated in American Jails and Prisons; and warrants review by this Court.

IV. THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

This Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), provides the framework for analyzing ineffective assistance of counsel claims. Specifically, "the purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Id., 466 U.S. at 669-692. Strickland, Supra., provides a two-prong test in evaluating an ineffective assistance of counsel claim:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., 466 U.S. at 687.

Strickland defined prejudice as proof by the Defendant "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, at 694. Strickland also made it clear that "reasonable probability" does not mean certainty or even that it is more likely than not that counsel's poor showing made the difference between acquittal and conviction. Rather, as Justice O'Connor wrote for the Court in Strickland:

> "The result of a proceeding can be rendered unreliable, and hence proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

The Kentucky Supreme Court held in Norton v. Commonwealth, Ky., 63 S.W.2d 175 (2002), that "in order to show that trial counsel's performance was deficient and that deficient performance prejudiced the defendant, the movant must also demonstrate that, absent the errors by trial counsel, there is a 'reasonable probability' that the jury would have reached a different result, not that counsel's allegedly deficient performance would have compelled acquittal." "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)

(Citing Strickland v. Washington, 104 S.Ct. 2052).

In determining whether confidence in the outcome is undermined, the resulting prejudice from counsel's errors must be "considered collectively, not item-by-item". Kyles v. Whitley, 514 U.S. 419, 436 (1995). "[C]onsidered collectively" implies a cumulative analysis. If the Court did not intend a cumulative analysis it clearly would have discussed the prejudice analysis in terms of "individual error" or "error-by-error" evaluation instead of formulating the prejudice test in light of counsel's "errors". Harris v. Bell, 417 F.3d at 639; Lindstadt v. Keane, 239 F.3d 191 (2nd Cir., 2001); Washington v. Smith, 219 F.3d 620 (7th Cir., 2000); Lundgren v. Mitchell, 440 F.3d 754 (6th Cir., 2006). Thus, in determinign whether prejudice has been established, a court must look at all errors as events building upon each other as opposed to a series of isolated events occurring without effect upon or being affected by previous or future errors within a case. Which is where the Trial Court, and State Appellate Courts errored in this action.

The Kentucky Court Of Appeals held in part that "Arevalo never raised this issue during the course of the trial below, nor on direct Appeal." Arevalo v. Commonwealth, File No. 2012-CA-002040-MR, Decided October 14, 2013, page 9, Attached Appendix, page 21. The Court specifically held issues should have been raised prior to trial, then "assumes" Counsel was not ineffective. In Arevalo v. Commonwealth, Kentucky Supreme Court, File No. 2007-SC-000651-MR, Decided November 26, 2008; the Kentucky Supreme Court held: "Josue presented no evidence in this case, and his defense was a complete denial of any involvement in the killing of Lilly". Likewise, during the course of the evidentiary hearing held on this issue, Jason Rapp testified he could not recall certain events. That he "assumed" certain issues. That his memory of this case was vague. Rapp testified that he could not recall all of the details regarding specific evidence, but assumes that he had a strategic reason if he did not object to certain things." (Emphasis Added, page 5, of Trial Court's Opinion, Appendix page 31).

Rapp admitted he did not investigate defense issues, because they conflicted with the Commonwealth's "timeline of the case"- admitting failure to place the Commonwealth's Case In Chief to a proper adversarial test. Rapp admitted he never investigated the Coyote issue. Never investigated the threatening phone calls made to Lilly prior to his death. while specifically informing the Trial Jury of Petitioner's Illegal Alien Status, Counsel never said a word in regards to Lilly's having just returned from Texas after transporting illegal aliens- clear "motive" for his death. Counsel never attempted to contact Mexican Authorities to determine whether Lilly was a member of rival Mexican Cartels then at war with each other- which could have led to his death. Again, Counsel never investigated "alibi Witnesses" because they did not conform to the Commonwealth's timeline of the case.

Ineffective assistance of counsel is determined by cumulative effect, and of all actions taken or not taken by Counsel. Assumptions are not evidence. Ineffective assistance is determined from the totality of circumstances, which the State Courts neglected in this matter; as did the lower Federal Courts.

In the case before this Court, the Petitioner respectfully submits that he was denied this effective assistance of counsel, and meets the two-prong test that is laid out above. First, and foremost, Counsel never informed the Petitioner of his right to request aide and assistance from the Mexican Consult, or to inform the Petitioner of his protected rights under Article 36, of the Vienna Convention- which Counsel "Freely admitted", and conjured up an excuse for. Instead, Counsel represented the Petitioner only as long as the Petitioner was able to pay the fees charged; and refused Expert Witnesses, not based on a lack of need; but upon the "costs" of retaining such experts.

Counsel never informed the Petitioner he had the ability to request assistance from the Department Of Public Advocacy, or of his "right" to request Expert Funds from the Court to retain a Defense Expert Witness. Counsel never informed the Petitioner of his right to file post-conviction relief after his Direct Appeal was denied. All of which denied the Petitioner a fair and full opportunity to timely file for post-conviction review. Trevino v. Thaler, 133 S.Ct. 1911 (2013); Maples v. Thomas, 132 S.Ct. 912 (2012); Martinez v. Ryan, 132 S.Ct. 1309 (2012).

Counsel never attempted to obtain, or interview Defense Witnesses- by his own admission. No attempt was made to interview the Black Couple that lived upstairs from the Petitioner to determine when the Petitioner arrived at home the day of the shooting, or to determine if they could provide the Petitioner with any alibi- because these Witnesses did not meet the Commonwealth's Timeline of the case, again by Counsel's own admissions. No attempt was made to interview the Petitioner's Employer to determine when he got off work the date of this incident, or to determine whether the Petitioner had been off work long enough to reach the residence on Ward Drive- again because this did not meet the Commonwealth's Timeline of the incident, a "true adversarial testing" of the Commonwealth's case.

No attempt was made to locate, or obtain a Defense Ballistics Witness- or even consult one to determine the need for one; again by Counsel's own admissions. This would have allowed the Defense to present evidence of the non-existence of gunpowder residue tests on the alleged murder weapon, as well as the Petitioner, or the clothes the Petitioner had been wearing the day of the shooting. While "ballistics" allegedly confirmed the bullits found were from the weapon recovered from the Petitioner's apartment; there was no test to show the weapon had been recently fired. No test to show the Petitioner had fired a weapon- either by powder residue on his hands or clothes. Finding "prints" on the weapon fails to show the Petitioner fired the weapon. All of which a Defense Expert Witness could have testified to. Why no Defense Expert Witness, because the Petitioner did not have the funds to retain one, and Counsel never attempted to secure such funds from the Court. Throughout the Trial, it was repeatedly stated the Petitioner was an illegal alien. That Pedro Lilly was a "Coyote". That he had other illegal Mexicans live in his home, who made threats against him. Yet Counsel made entirely no attempt to investigate these threats, or to determine if a "Turf WAR" existed that may have led to Lilly's death. Counsel made no attempt to interview the neighbors to determine if they may have seen other Mexicans around the home, or were able to describe them- even after a third Mexican in a yellow shirt was described at the scene.

The Sentencing Phase of Trial is just as important, and could well have resulted in a reduced sentence for the Petitioner. Counsel informed the Jury Petitioner was an illegal alien in voir dire; then never mentioned it during the Penalty Phase of Trial, or the fact the Petitioner would be returned to Mexico no matter what sentence was imposed. Counsel never mentioned Lilly's criminal activities during the Penalty Phase of Trial; and again never mentioned the unknown person in a yellow shirt; or the death threats made to Lilly by unknown people. Counsel claims the Petitioner's Mother's Testimony (Carmella) is critical to the case, but neglected the fact "she" seen a third person fleeing from the scene, and personally knew of threats made against herself, and Lilly; in regards to his illegal activities, and money owed for his Criminal Enterprise.

If ineffective assistance is considered in the totality of circumstances, then the prior Opinions of the Kentucky Supreme Court, Kentucky Court Of Appeals; and this Court; must be considered in the "cumulative effect" of errors. The lower Courts ignore the cumulative effect, and attempt to use the item-by-item analysis- which has been overruled clearly by this Court. As such, this Court should grant Certiorari to properly determine the merits of this issue and what relief if any the Petitioner is entitled to under the law.

V. THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, BY THE DENIAL OF EVIDENCE OF ACTUAL INNOCENCE

The lower Courts improperly decided the merits of this issue, for which further review should be granted. This was a case in which not a single Witness seen the actual shooting of Pedro Lilly. Evidence was presented at Trial that Lilly was involved in "criminal activities", operating as a "Coyote"; in which he transported illegal aliens from Mexico to the United States, and across the United States. A Criminal Enterprise that may reasonably have involved warring Mexican Cartels. Evidence was further presented that three Mexicans had made threats against both Lilly, and Carmella Arevalo. Allegedly because they owed Pedro money. Evidence of actual innocence existed, which Trial Counsel failed and refused to present, or follow up on. Counsel made no attempt to determine from INS, DEA, the Border Patrol; or other State and Federal Authorities- to include the Mexican Consult- the effects of the evidence, or the unknown person in a yellow shirt seen fleeing the scene of the shooting.

To show actual innocence, "petitioner need not show that he is actually innocent of the crime he was convicted of committing; instead, he must show that a court cannot have confidence in the outcome of his trial". Majoy v. Roe, 296 F.3d 770 (9th Cir., 2002). "Sufficiency of evidence review, for purpose of habeas relief; does not focus on whether trier of fact made correct guilt or innocence determination; but rather on whether it made rational decision to convict or acquit." Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The Petitioner is only required "...petitioner must show that it is more likely then not that no reasonable jury would have found petitioner guilty beyond reasonable doubt." Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); See Also: Harrington v. Norris, 49 F.3d 440 (8th Cir., 1995); Carriger v. Stewart, 132 F.3d 463 (9th Cir., 1997); Souter v. Jones, 395 F.3d 577 (6th Cir., 2005).

Had the Trial Jury been allowed to consider the full involvement of Lilly's criminal activities, as well as the "turf wars" that were, and continue to occur in Mexico with different Factions, and Cartels; a "Reasonable Probability" exists as to a different result in the trial proceedings. Especially as multiple individuals were stated to have been fleeing the scene of the crime shortly after the shooting, and no one seen the actual shooter. No one seen the Petitioner with a weapon of any kind. No gunpowder tests were run on the Petitioner to determine if he had fired a weapon, and no tests were performed on the weapon to determine if it had been recently fired. Given the evidence as a whole, no reasonable jurror could have found the Petitioner Guilty of the Offenses charged. As such, a "reasonable question" exists as to whether the verdict was the result of the evidence, or the passions and prejudices of the Trial Jury. Especially as the Jury was informed before the Trial ever began that the Petitioner was an Illegal Alien, and evidence submitted during the course of Trial suggested that the Petitioner had been involved in several other crimes- to include the use of drugs.

As such, this Court should grant Certiorari to properly determine the merits of this issue; and to settle the question of law as it applies to the issue of "actual innocence".

VI. THE PETITIONER WAS DENIED DUE PROCESS UNDER THE SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, WHEN THERE WAS NO GUNPOWDER RESIDUE TESTS PERFORMED ON THE PETITIONER TO DETERMINE WHETHER OR NOT HE HAD FIRED A WEAPON

After the Petitioner's arrest, numerous items were seized from the Petitioner's apartment; to include a weapon, ammunition, and clothing. While a "Ballistics Test" was allegedly run on the weapon seized, there was no gunpowder tests run on the weapon to determine if it had been recently fired. Or at least no such testimony was presented to the Trial Jury. Likewise, no gunpowder residue tests were performed on the Petitioner, or his clothing to determine whether he had recently fired a weapon. At least not to the Petitioner's current knowledge and beliefs. While Trial Counsel made "lame excuses" for this ommission, he never asked a single Police Officer, or Detective testifying "why no such tests were run". Counsel made an "assumption" for the Police in regards to this lack of evidence; which clearly failed to put the Commonwealth's Case In Chief to a proper adversarial test.

This in essence, was evidence of actual innocence. The Petitioner expressly related this concern to Defense Counsel, who refused to have the items tested, or to obtain a Defense Expert Witness to test the items. Such denial denied the Petitioner evidence of actual innocence in this case. A case in which several people were seen fleeing the scene of the crime, after threats had been made against Pedro Lilly and Carmella Arevalo due specifically to Pedro Lilly's criminal enterprise, and Human Trafficking. Evidence further existed that Lilly had just returned from a out of town trip- possibly running illegal aliens.

As such, this Court should grant Certiorari on this issue to properly determine the merits of this issue, and what relief, if any, the Petitioner is entitled to under the law.

VII. THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION WHEN HE WAS DENIED THE RIGHT AND SERVICES OF A DEFENSE EXPERT WITNESS

During the course of Trial in this matter, "Scientific Evidence" was presented to the Trial Jury by the Commonwealth in the form of Ballistic Tests, and Fingerprint Analysis. No attempt was made by Trial Counsel to obtain a Defense Expert Witness to refute the claims made by this evidence- or even to interview a Defense Expert Witness to determine if one's services could aide in the Defense of the allegations made. Counsel's excuse, the "costs" of retaining a Defense Expert Witness, and the Petitioner did not have the funds for one. No attempt was made by Counsel to secure funds from the Court for a Defense Expert Witness. <u>Ross v. Moffitt</u>, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

While two (2) "thumb prints" were ALLEGED TO HAVE BEEN FOUND on the weapon "alleged" to have been used in this crime, other fingerprints of a unidentified source were also found. This may have reflected that someone "other than the Petitioner" had also used, handled, and touched the weapon- possibly firing it. Further, ONLY "THUMB PRINTS" WERE FOUND. One on the cylinder of the weapon. No prints were alleged to have been found on the shells, or shell casings. No test was made to determine if the weapon had been recently fired. No gunpowder residue tests were performed on the Petitioner to determine if he had recently fired a weapon. Again, no gunpowder tests were performed on any clothing items recovered and removed from the Petitioner's apartment to determine whether the Petitioner had fired a weapon. No gunpowder residue tests of any kind were submitted during the course of the Petitioner's Trial. Trial Counsel made light of this. However, it was essential to the Defense, especially in showing the Petitioner had not fired a weapon recently.

A Defense Expert Witness would have allowed the Petitioner to present evidence of the need for gunpowder residue tests to ensure that the Petitioner had fired a weapon. Especially as Police failed to make such tests on the Petitioner at the time of arrest; or on the items seized from the Petitioner. The lack of "Powder Residue" may have presented sufficient evidence to create a reasonable doubt in the minds of the Trial Jury; which reasonably could have led to a different outcome in the proceedings. Especially as there was not one Witness to the actual shooting, three separate people were seen fleeing the scene of the crime; and no motive for the shooting was ever presented to the Trial Jury.

The State Court, and lower Federal Court Decisions made light of this fact, and this Court's prior precedent on this issue, and the lack of evidence. As such, this Court should grant Certiorari on this issue to clarify the prior Precedent of this Court in regards to this issue.

VIII. THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, WHEN THERE WAS A LACK OF EVIDENCE TO SUPPORT A FINDING OF GUILT ON THE OFFENSE CHARGED

In this case, there was a total lack of reliable evidence for the Offenses charged. No Witness existed as to the actual shooting. A minimum of three people were seen fleeing the scene of the shooting. A man in a yellow shirt, Mario, and allegedly the Petitioner- although seen at a distance. The weapon found in the Petitioner's apartment provides no "real" evidence. No gunpowder residue tests were performed on the weapon, the Petitioner, or the Petitioner's clothing; to determine whether the weapon had been recently fired, or whether the Petitioner had recently fired a weapon. In addition, while two (2) "thumb prints" identified as the Petitioner's were allegedly found on the weapon, these were only "thumb prints". No prints belonging to the Petitioner were found on any shells; either in the weapon, or in the ammunition box recovered. Plus, numerous unidentified prints were found on the weapon. While the Petitioner may have handled the weapon at some point in time, someone else had recently handled the weapon, and left far more prints. Reasonable doubt that someone other then the Petitioner may have placed the weapon in the Petitioner's apartment while he was not at home, or sleeping- as the Petitioner was awakened at the time of his arrest.

"Hearsay" allegations were made that the Petitioner had made threats to an "unidentified Mexican". These "allegations" came from Commonwealth Witnesses who were in jail- or had just been released from jail- and were facing criminal charges, searching for a reduced sentence in exchange for their testimony against the Petitioner. An issue Trial Counsel never brought to the Trial Jury's attention- even though specifically told how to by the Trial Judge. Numerous instances, and evidence of uncharged crimes were brought to the Trial Jury's Attention in regards to the Petitioner.

Into this comes evidence of Lilly's illegal and criminal activities, and being a Coyote who had just returned from a trip to Texas. Of threats made against Lilly, and Carmella; by unknown Mexican, for money owed to Lilly for his criminal enterprises. The "evidence" against the Petitioner, especially absent any gunpowder residue tests of the Petitioner, or his clothing; was "weak hearsay" at best.

"If accused is adjudged guilty and imprisoned for years on strength of some evidence as would suffice in civil case, he suffers from severe disadvantage which amounts to lack of fundamental fairness." In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "To end of reducing risk of loss of personal liberty through error, and to other ends, reasonable-doubt standard of criminal law is indispensable." Id.. See Also: Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). "A state must prove every ingredient of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming an ingredient upon proof of the other elements of the offense." Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

In this case, there was no evidence presented that the Petitioner fired the fatal shots, or had even fired a weapon. No evidence existed as to "who" fired the shots, merely speculation. Even giving the evidence a favorable light and stating the Petitioner was seen fleeing the scene of the shooting- he was not seen with a weapon of any kind. He was not seen at Lilly's car, or talking to Lilly. Further, at least two other people were seen fleeing the scene of the shooting. Even had the Petitioner been there, it would be natural to flee the scene if someone began shooting.

The State Courts, and lower Federal Courts failed to address the merits of this issue. As such, and because this issue could be debatable among reasonable jurists; this Court should grant Certiorari on this issue to make a proper determination of the issue, and to settle the law in regards to this issue.

IX. THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, WHEN THE COMMONWEALTH WAS ALLOWED TO USE CARMELLA AREVALO'S "EXCITED UTTERANCE" AS TO THE PETITIONER BEING THE SHOOTER, WHEN SHE HAD NOT WITNESSED THE SHOOTING AND IT WAS MERELY HER "SPECULATION"- ESPECIALLY SINCE SHE KNEW OF NO MOTIVE THE PETITIONER HAD TO ACTUALLY KILL THE "VICTIM"

During the course of Petitioner's Trial, much was made of the "excited utterance" of Carmella Arevalo shortly after Pedro Lilly was shot. Both in the 911 Tape that was heard and played to the Trial Jury, and by Officer Buenoto's testimony as to what he seen and heard shortly after he arrived at the scene.

During Carmella Arevalo's sworn testimony, she stated she had come home from work "sick", and had gone straight to bed. When she "heard the shots", she seen someone running by her bedroom window with long hair, and a yellow shirt. Ms. Arevalo further testified that three unknown Mexican Nationals had made threats against Pedro Lilly because they owed him money. However, and most importantly, Ms. Arevalo testified that at no point did she see the actual shooting. She only looked out the door "after" she heard the gunshots, and after she had seen someone else run by her window in a yellow shirt.

Whether or not she seen the Petitioner fleeing the scene of the shooting is not material. She testified she never seen the Petitioner with a weapon, and that she never seen the actual shooting. It was purely "speculation" as to whether the Petitioner fired the shots. Especially as Ms. Arevalo knew of no motive for the Petitioner to kill Lilly.

Again, not a single Witness testified or submitted any testimony or statements; as to having seen the actual shooting, or shots fired. All that was seen was between one and three separate people fleeing the scene of the shooting- no one even stated they seen a firearm. Fleeing the scene, which could have been for any reason - to include fear of being shot themselves.

As such, and because the lower Courts failed to address the merits of this issue, this Court should grant Certiorari to properly determine the merits of this issue, and what relief, if any, the Petitioner is entitled to under the law.

X. THE PETITIONER WAS DENIED DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AS A RESULT OF CUMULATIVE ERROR

Numerous errors were committed throughout the course of the Petitioner's case, both Pre-Trial, at Trial, and on Appeal- and throughout post-conviction review. The errors enunicated in the Arguments above are fully incorporated into this Argument. In McQueen v. Commonwealth, Ky., 721 S.W.2d 794 (1987), the Kentucky Courts recognized that cumulative error can mandate an 11.42 reversal. In James v. Commonwealth, 198 Ky. 577, 247 S.W. 945 (1923), the Court stated that "we have frequently held that where a number of errors appeared in the record, none of which singly and/or alone will be sufficient to authorize a reversal, one would be ordered if, considering them in the aggregate, we were satisfied that the substantial rights of the defendant have been prejudiced thereby." In Pennington v. Commonwealth, Ky.App., 577 S.W. 2d 19 (1978), the Court held that "although some of the errors appearing in the record standing alone would be insufficient upon which to base a reversal, nevertheless, when we review the cumulative effect of... all clearly demonstrate that Appellant was denied a fair trial." Pennington, Supra., at 23-24.

By not taking steps to ensure that Article 36, of the Vienna Convention was upheld and safeguarded the Petitioner's protected rights, Trial Counsel, the Commonwealth, and the Trial Court all denied the Petitioner protected rights under the united states constitution; International Treaty; and established Law.

This has further prejudiced the Petitioner when he was denied a fair and full opportunity to a Direct Appeal of his Criminal Conviction. Once the Petitioner's limited funds were exhausted, Counsel abandoned the Appeal; without ever informing the Petitioner of his right to seek assistance from the Department Of Public Advocacy, or informing the Petitioner of his right to post-conviction review. An issue that has almost denied the Petitioner post-conviction review, as well as Habeas Corpus Relief under Title 28 U.S.C.A. §2254. This is further more complicated and compounded when no one has bothered to provide Spanish Speaking Assistance to the Petitioner, or Spanish Translated Materials, so the Petitioner could understand the process he needed to do.

The Petitioner was denied the effective assistance of Trial Counsel. The Trial Record reflects that Counsel made no attempt to present a Defense to the allegations made. Counsel failed- by his own admission- to interview potential Defense Witnesses, or to follow up on the threats made against Pedro Lilly by three unknown Mexican Nationals. Counsel never attempted to obtain a Defense Expert Witness- by his own admissions, even though ballistics analysis of the Murder Weapon was at best shaky. Even worse, Counsel never even interviewed a Defense Expert Witness to determine if his services could aide in the Defense- based solely on "costs", and the Petitioner's inability to pay for such services. Fingerprints were not checked, as demonstrated by the unknown prints found on the murder weapon. No attempt was made to perform gunpowder residue tests on the alleged murder weapon, the Petitioner, or the Petitioner's clothing. Counsel further never attempted to investigate the time frame from the time the Petitioner left his place of employment, to the time he arrived at home. By Counsel's own admissions, "because it failed to meet the Commonwealth's timeline". The time Petitioner left work, till the crime occurred was never checked by Counsel for a possible alibi. Important, especially as numerous "other people" were observed at the crime scene after the shooting, and no one seen the actual shooting, or the Petitioner with a weapon after the shooting.

As a result of the ineffective assistance of Trial Counsel, the Petitioner was denied the right and opportunity to present evidence of actual innocence. Prior to the shooting, threats had been made against Pedro Lilly because three other individuals owed him money. Evidence further reflected that Pedro Lilly was involved in criminal activities, and a criminal organization. That he had just returned from Texas, running illegal aliens. That an unknown man in a yellow shirt was seen running by Carmella Arevalo's window just after the shooting. It was never determined whether rival criminal Cartels, or Criminal Factions; may have been at war with each other, and Lilly was the victim of such a war.

The Petitioner was further clearly prejudiced when no attempt was made to run gunpowder residue tests on the Petitioner, his clothing, or the alleged murder weapon recovered. This well may have provided, and proven evidence of actual innocence, and certainly failed to show the alleged murder weapon had been recently fired, or fired by the Petitioner.

Petitioner was denied the right to present a Defense Expert

Witness. The prejudice of this is obvious, as no gunpowder tests were performed. Further, only two (2) fingerprints of the Petitioner's were found on the weapon- both thumb prints. However, numerous other "unidentified" prints were found on the weapon recovered. It would be impossible to fire a weapon using only a person's thumbs. A Defense Expert Witness could have clarified all of these issues, and possibly presented evidence to substantiate a reasonable doubt that the Petitioner did not commit the offense alleged. However, what is most striking is the reason, the sole reason for the denial of an Expert Witness- the cost. Counsel never attempted to locate or interview a Defense Expert Witness, never determined the costs for such services. Simply made an unqualified assumption the costs for such services was more then the Petitioner could afford. No attempt was made to secure such funds from the Court.

There was a clear lack of evidence to support the offense alleged. The Commonwealth's Case In Chief was based around "hearsay". Witnesses "alleged" the Petitioner had been seen with a weapon. An "alleged" motive that no one knew of was made, unsupported by any other evidence. The Petitioner never stated to Police he had been sexually assaulted, and no medical records existed for this "allegation". Further, the Petitioner's mother knew of no problem between Lilly and the Petitioner. Again, "no one" seen the actual shooting.

The Petitioner was denied due process by the use of an excited utterance. Clearly Carmella Arevalo testified, and stated all along that she never witnessed the actual shooting of Lilly. That at the time of the shooting, she had been in the bedroom, sick. Whatever her excited utterance was, it was merely speculation on her part. Especially as she knew of no motive. Further, Ms. Arevalo seen someone else fleeing the scene of the crime by her window, and stated threats had been made against both her and Lilly by Mexican Nationals unknown who owed Lilly money.

"Cumulative error noted as grounds for reversal". Lucas v. Commonwealth, Ky.App., 840 S.W.2d 212 (1992). See Also: Funk v. Commonwealth, Ky., 842 S.W.2d 479 (1992); Corwin v. Johnson, 150 F.3d 467 (5th Cir., 1998); United States v. Mays, 69 F.3d 116 (6th Cir., 1995).

The cumulative effect of the errors stated above substantially denied the Petitioner due process and a full and fair opportunity to present a defense to the allegations made. Especially the violations of International Law, and International Treaty. The State Courts made light of these issues, and the cumulative effect of the issues. The lower Federal Courts did likewise. Considered in the "Cumulative Effect" a reasonable doubt exists as to whether the Petitioner received a fair and full opportunity to present these issues. Not because they lacked merit; but because the Petitioner failed to have funds. Equal Protection of the law cannot exist when it is based on a person's Financial Status. This Court has consistently held this to be true. Especially in a case involving a Foreign National that speaks little to no English.

The lower Federal Court erred to Petitioner's Substantial Prejudice in not granting Certificate Of Appealability on this issue. As such, this Court should grant Certiorari on this issue to properly consider whether the "Cumulative Effect" of errors in this case denied the Petitioner protected due process, and equal protection rights under the United States Constitution.

CONCLUSION

The lower Federal Courts erred to Petitioner's substantial prejudice in failing, and refusing to grant Certificate of Appealability in regards to the issues raised and presented. First, and foremost, this Petitioner is a Foreign National who speaks little English. Yet was forced to shift through the American Judicial Process on his own, and in a language he did not understand. This was a hurdle in its own; without the ineffective assistance of Counsel that occurred.

In past Precedent by this Court, the denial of a Defense Expert Witness alone was sufficient grounds to warrant reversal. In this case, not only was no attempt made to consult with, or obtain a Defense Expert Witness; such denial was based on "Fianancial Status", not the need, or lack of need. Simply the funds to retain one. In deciding whether Counsel was ineffective, the Court failed to consider Counsel's actions. Counsel plainly stated he could not recall incidents in the case, or answer why he did actions he did. He "assumed" it was Trial Strategy. Only "assumed" it was. Counsel's "Assumptions" were not evidence. Not when he could not recall why he did what he did, by his own admissions.

The lower Federal Courts clearly had a hard time deciding "who's" case they were hearing. The Commonwealth Answered "Rice's Petition". The Court Ruled on "Luther Creech's" Petition. Allegedly a corrected Order was issued. But it was never mailed to Petitioner. Clearly the lower Courts took advantage of the Petitioner's lack of knowledge of the law, and the English Language; to deny the Petitioner protected due process, and equal protection of the law Rights. Rights that would have been afforded an English Speaking Litigant.[2]

2. If this Court elects not to address the issues presented in this Writ at the present time, it is requested that the Writ issue and that the matter be remanded back to the United States District Court for redetermination in light of the prior precedent established by this Court in regards to the issues presented.

Violations to International Treaty have occurred in this case. One of the arresting Officers was Mexican/American, and therefore, should have fully, and clearly known the prejudices suffered by Mexican Nationals. No attempt was made to contact the Mexican Consult in Petitioner's behalf. However, it was a Treaty Obligation. One in which the United States had been repeatedly found to have violated before the World Court. A clear Separation Of Powers Issue exists as a result of this abuse. One this Court has never previously addressed, choosing instead to side step the issue, and the Constitutional ramifications that result. As such, this Court should grant Certiorari to determine this issue, and whether Separation Of Powers has occurred as a result.

This case presents a clear issue of Actual Innocence. Numerous unidentified fingerprints were found on the alleged murder weapon. A man (unknown man) was seen fleeing the scene of the shooting in a yellow shirt. No attempt was made to locate this man, or determine who he was. Evidence existed Lilly had just returned from Texas, where he transported Illegal Aliens. Evidence further existed that three unknown Mexicans had made threats against Lilly, and Carmella Arevalo; in regards to money owed Lilly. Trial Counsel made no attempt to locate or investigate this evidence of actual innocence. His entire Trial Strategy consisted of presenting "No Defense"; maybe because the Commonwealth's case was inconclusive as to "who" the shooter was, as no one seen the actual shooting. For whatever reason, Trial Counsel presented "No Defense" to the charges made, clear from the Trial Record.

From the start of this Trial, Trial Counsel repeatedly referred to the fact the Petitioner was an Illegal Alien. At a time when prejudice is clearly at its peak in regards to Illegal Aliens. This coupled with the fact of the other Cumulative Errors of Counsel; clearly denied the Petitioner the semblance of a fair and impartial trial.

Finally, SlaCK V. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), provides a two-prong test which must be met in order for a Certificate Of Appealability to issue. Slack provides, "COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists would find it debatable whether the district court was correct in its ruling." Id., at 1604.

In expalining the new position of the Court, the Slack Court expressly provided that "to obtain COA under §2254 (c), a habeas petitioner must make a substantial showing of the denial of a constitutional right, a demonstration that, under Barefoot, incudes a showing that reasonable jurists could debate whether (or for that matter agree) the petition should have been resolved in a different manner, or that the issues presented were 'adequate to deserve encouragement to proceed further'." (Emphasis Added). Id., 1603-04, citing Barefoot v. Estelle, 463 U.S. 893.

Petitioner respectfully asserts that he makes the requisite substantial showing of the denial of a constitutional right in each of the Ten (10) issues presented. Especially when the Court, and the Commonwealth filed an Answer, and Ruling to this action; that revolved around issues of someone elses case. Further, by the fact this Court has never addressed the Separation Of Powers Argument involved in the International Treaty Violations that have occurred. An issue that has been "clearly debatable" in the lower Courts Of Appeal throughout the Circuits.

This Court held in Donnelly v. DeChistoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), at 1875:

"Our activist tendencies should promote not law and order, but constitutional law and order. Judges, too, can be tyrants and often have been. Prosecutors are often eager to take almost any shortcut to win, yet as I have said they represent not an ordinary party but We the People. As I have noted, their duty is as much "to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one"." Berger v. United States, 295 U.S. 88, 55 S.Ct. at 633."

The lower Courts failure to address the merits of the Argument raised demonstrates the Decision rendered "would be debatable whether the district court was correct in his procedural ruling." Slack v. McDaniel, Supra., at 1603. This Court has just recently reaffirmed the "debatable issue" in Buck v. Davis, 137 S.Ct. 759 (2017), which the lower Courts failed to consider in the Decision rendered.

The issues in this case have not been addressed by the lower Courts. Simply because this Petitioner is a Non-English Speaking Pro Se Litigant, with little knowledge of the law; and fails to have knowledge of the law of a schooled Attorney, fails to lessen the Constitutional Violations that have and continue to occur in the way this case has been prosecuted from the start against someone who does not speak or understand the English Language.

WHEREFORE, the Petitioner respectfully moves this Court to grant Certiorari on the issues presented for review; to make a determination of the issues raised and presented; to remand this action back to the United States District Court for a proper determination of the issues of this action; to appoint Counsel, and allow Counsel to supplement the tendered Pleadings, especially in regards to the International Treaty Violations that have and continue to occur; for any and all other just and proper relief to which the Petitioner may appear to be entitled to under the law.

Respectfully Submitted,

Josue Marquez Arevalo, *pro se*
Kentucky State Penitentiary
266 Water Street
Eddyville, Kentucky 42038