

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAMON KEYS,

Petitioner,

v.

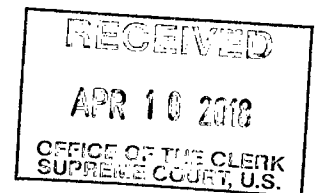
JAMES FALK,
Warden, Limon Correctional Facility

CYNTHIA COFFMAN,
Attorney General of the State of Colorado

Respondent(s),

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI



Damon Dares Keys
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Limon, Co. 80826
(*Pro se* petitioner)

QUESTION(S) PRESENTED

Petitioner followed up a habeas filed in the U.S. District Court with an application for a Certificate of Appealability to the Tenth Circuit U.S. Court of Appeals. In his first claim, petitioner stated that the warrant issued in his case was void *ab initio*. The U.S. District Court erroneously barred the claim.

First, the District Court failed to address a simple question of jurisdiction raised in the habeas application. The Colorado Court of Appeals issued a remand to a court that did not have jurisdiction over the offense on the face of the warrant. Then, it incorrectly concluded petitioner had a full and fair opportunity to litigate his claim at the state court level. The initial ruling of the post-conviction court denying petitioner's motion to suppress is based on perjured testimony of a detective. In finding no prejudice in petitioner's COA, the Tenth Circuit merely reiterated the U.S. District Court's opinion and incorrect interpretation of facts by the post-conviction court and CCA. The case thus presents the following questions.

- I. Did the Tenth Circuit err when failing to address question of jurisdiction and erroneously affirming procedural bar when the Tenth Circuit's decision was based on a recitation of the District Court's opinion pertaining to his void *ab initio* argument?
- II. Did the state court err in concluding that the warrant in this case was not void *ab initio*?

QUESTION(S) PRESENTED

U.S. District Court incorrectly applied a procedural default on petitioner's claim that police deliberately evaded Fourth Amendment requirements when they arrested petitioner, seized his shoes, tested and destroyed them for a crime wholly unrelated for which the shoes were sought.

The State filed a Pre-Answer Response brief. In its brief, the State merely implied that the claim was never raised at the state court level. Petitioner filed a Reply to Pre-Answer Response

brief and proved that the claim was raised at the state court level. But, the U.S. District Court did not default the claim on the *State's* affirmative defense. Instead, the Court defaulted the claim on an affirmative defense that the *Court* itself had raised.

In its decision, the Tenth Circuit referred to the five-page decision of the CCA, case#96CA964. On p 6, at 3-10, the Court inaccurately concluded that the five-page decision was an alternative to the void *ab initio* argument. Contrary to the Tenth Circuit's assertion, based on its observation of facts implemented, it would be impossible to reach the conclusion that it did.

The five-page decision on the pretext claim of the CCA has nothing to do with the void *ab initio* argument that was raised on direct appeal (case#96CA964). The void *ab initio* argument raised by Counsel James Grimaldi was rejected and the merits of the claim were never addressed by the CCA. The CCA stated that the court would not address the claim because it had not been raised at trial court level.

There is additional proof that the five-page decision is in no way related to the void *ab initio* argument. On p 12, 8-12 of the opinion based on the pretext claim raised by counsel, the CCA referenced to a detective's statement at a pre-trial suppression hearing. The void *ab initio* claim was not raised at the trial court level prior to petitioner's initial direct appeal. Furthermore, the CCA answered every aspect of the pretext argument raised by counsel, but erroneously concluded the search and seizure of the shoes were incident to arrest. In finding no prejudice in petitioner's COA, the Tenth Circuit merely reiterated the U.S. District Court's opinion and errant statement of the CCA. The case thus presents the following questions.

- III. Did the Tenth Circuit err in deferring to the recitation of the state court's errant statement, then upholding a procedural default based on an affirmative defense raised not by the State, but that of the U.S. District Court when the Tenth Circuit decision was based on a flagrant misreading of the entire record pertinent to an opinion issued by the Colorado Court of Appeals?
- IV. Did the state court err in determining that police did not evade Fourth Amendment requirements when engaging in a pretext, in order to seize, keep, test and destroy

shoes belonging to petitioner merely by executing a Denver arrest warrant wholly unrelated to an investigation for which the shoes were sought?

QUESTION PRESENTED

Petitioner filed a pre-trial motion to substitute counsel for an irreconcilable conflict and irreparable breakdown of communication of trust. The motion was filed on the basis that his attorney had been lying about retaining witnesses and a twelve-year plea bargain. In finding no prejudice, the Tenth Circuit relied upon the state court's and U.S. District Court's misapplication of the *Strickland* standard to deny a Certificate of Appealability.

- V. Did the Tenth Circuit err in deferring to an erroneous interpretation of law when applying *Strickland* standard to a pre-trial substitution of counsel claim when the law only requires a petitioner to prove he has "good cause" for substitution?

QUESTION PRESENTED

Petitioner stated that his counsel at his second trial was ineffective for his failure to investigate, test forensic evidence independently, present evidence through defense experts and impeach Colorado Bureau of Investigation agents Joe Clayton and Kathryn Brown Dressel. In the early stages of this case, the police indicated in media statements that the only physical evidence submitted to CBI was found on "the scene." Police believed that the evidence linked petitioner to the crimes in this case. The evidence consisted of blood, hair fibers fingernail scrapings and fingerprints. It was also stated by police that petitioner would be released as a suspect if the evidence came back negative. Even though the evidence came back negative, petitioner was not released.

Instead, several weeks later, the prosecution team conjured a lie that there was blood found on one of petitioner's black NIKE tennis shoes. Petitioner's shoes were not found at the scene. Coincidentally, a black NIKE tennis shoe belonging to one of the victims was collected from the scene and tested by CBI. There were no results for the shoe submitted in this case.

Mool Verma, an anthropologist worked for CBI and tested the crime scene evidence. His testimony, coupled with the media statements of police would have proved the 'alleged'

evidence found on petitioner's tennis shoe, in all reality, never existed. In finding no prejudice in petitioner's COA, the Tenth Circuit merely referred to the state court's erroneous conclusion even though the state's witnesses clearly mislead the court in order to obtain a conviction. The record was not read in its entirety.

QUESTION PRESENTED

- VI. Did the Tenth Circuit err in deferring to the state court finding that petitioner was not prejudiced by his second trial counsel's failure to retain expert witnesses to test forensic evidence found at the crime scene, which would impeach agents Clayton and Dressel and subsequently prove that evidence 'allegedly' derived from his shoe did not exist when the Tenth Circuit flagrantly ignored the entire record?

QUESTION PRESENTED

Petitioner specified in his habeas and COA that counsel was ineffective in his investigation and cross-examination of the victim Donald Staats. It had been well stated throughout the case that petitioner and victim knew each other. During the assault, the victim escaped at one point in time to inform eyewitnesses that he had been robbed. He also dialed 911. At no time did the victim identify the attacker as someone in which he was familiar.

In its ORDER DENYING CERTIFICATE OF APPEALABILITY, the Tenth Circuit indicated that the victim did not remember seeking help. That statement is irrelevant to the argument presented by petitioner. The Tenth Circuit is describing the victim's testimony at trial and made no reference to the fact the victim sought help on the night of the assaults and did not indicate that the assailant was petitioner.

- VII. Did the Tenth Circuit err in deferring to an element of the case that was not relevant to the argument presented?

QUESTION PRESENTED

Petitioner filed in his habeas and COA that counsel was ineffective in his investigation and cross-examination of his ex-girlfriend Disa Tonkin. It has been stated by petitioner that his ex-girlfriend had undocumented contact with the prosecution in this case. For example, when petitioner was charged with the crimes in this case, his ex-girlfriend was present at the hearing. The only way she could have known of his advisement of charges is if the police or district attorney contacted her and informed her. Ms. Tonkin also made several attempts of extracting an ‘alleged’ confession from petitioner that would have assisted counsel in his impeachment and attack on the credibility of the prosecution team as a whole. In its opinion, the Tenth Circuit implied that the prosecution did not foreclose any jailhouse confession. The entire point of petitioner’s claim was the fact that simple questions about her undocumented contact with the prosecution team would open the door for prosecutorial misconduct.

- VIII. Did the Tenth Circuit err in its opinion when only referencing to the issue of the prosecution’s failure to submit evidence of a jailhouse confession when the Tenth Circuit’s decision blatantly ignored the record establishing facts that support petitioner’s claim that required an investigation of Ms. Tonkin’s undocumented contact with the prosecution?

QUESTION PRESENTED

Petitioner stated that counsel was ineffective for failing to advance a reasonable doubt defense. When counsel raised his opening statement, he preached that the prosecution had the “wrong guy.” The police issued media statements that implied that physical evidence recovered from the scene is what led them to believe petitioner was the assailant. The prosecution submitted DNA evidence, claiming it was extracted from a cutting from petitioner’s shoe, which is an obvious fabrication. The evidence could have been easily dispelled if counsel would have investigated the crime scene evidence and media statements issued by police. The Tenth Circuit referenced to the erroneous assumption of the CCA opinion that stated the identification aspect of the case was the main focus at trial. To the contrary, the identification was the rather weak.

- IX. Did the Tenth Circuit err in deferring to the CCA opinion when stating that the identification evidence was the main focus of the trial when the record clearly states that it was clearly one of the weakest?

QUESTION PRESENTED

Petitioner filed in his habeas that his counsel was ineffective for failing to object to prosecutorial misconduct when the district attorney made a racist comment in the degradation of an African-American in front of an all-white jury when stating, “This is the defendant’s hood.” The CCA, U.S. District Court and U.S. Court of Appeals ignored the obvious negative implications of this statement.

- X. Did the Tenth Circuit err in deferring to the decision of the CCA that defends an obvious racial slur when the Tenth Circuit decision requires no further inquiry to establish a reversible error pertaining to prosecutorial misconduct?

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT**

The Petitioner, Damon Keys, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Tenth Circuit Court of Appeals, rendered in these proceedings on December 5, 2017.

OPINION BELOW

The Tenth Circuit Court of Appeals affirmed petitioner's conviction in its Cause no. 17-1144. The opinion is reprinted in the appendix is attached to this opinion. The order of the Tenth Circuit Court of Appeals denying rehearing is reprinted and attached to this petition.

JURISDICTION

The original opinion of the Tenth Circuit Court of Appeals was entered December 5, 2017. A timely motion to that court for a rehearing was denied on January 5, 2018.

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., AMEND. IV

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.

U.S. CONST., AMEND. VI

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 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.

U.S. CONST., AMEND. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

28 U.S.C. § 2254

(a) The Supreme Court, A Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant the judgment of a State court shall not be granted unless it appears that-

- (A)** the applicant has exhausted the remedies available in the courts of the State; or
- (B) (i)** there is an absence of available State corrective process; or
- (ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim-

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

- (A) the claim relies on-
 - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 300A of title 18.

- (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

The Court must construe the Application and other papers filed by a *pro se* litigant liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

STATEMENT OF THE CASE

This case actually originates from an unrelated case in another jurisdiction. On August 2, 1994, petitioner failed to appear in Denver County court for a drug case. That morning, he contacted the court (via telephone) because his car had been stolen and had no transportation. The court informed him that he would be contacted (via mail) to receive a new court date.

Reynelda Sowell drove through the entrance of the East-70 Drive-in Theater in Aurora, Colorado on the evening of August 7, 1994, and witnessed a violent scuffle in progress, near the ticket booth. (v4, 84) Out of fear, she backed her vehicle away. When police arrived, two victims (Donald Staats and Lara Stevenson) had been very seriously injured. (v4, 119, 132) A sum of \$312 was discovered missing from the till within the ticket booth. (v5, 290) With neither victim able to provide assistance in identifying the suspect, police focused their investigation on footprints near the ticket booth.

Police investigators inquired whether any of the theater's employees matched the physical description of the suspect, and when it was learned that none did, police focused their suspicions on petitioner, because he was the boyfriend of a theater employee named Disa Tonkin. (v4, 147) In the following days, police showed a presence at the motel where petitioner was staying with Disa Tonkin, and conducted interviews, but did not make substantial headway in the investigation. (v2, 50)

On August 11, 1994, police learned from Disa Tonkin that petitioner failed to appear in Denver. After police searched the NCIC/CCIC database and came up with no warrant, they contacted Detective Mike Gassman of the Denver Police Department. At 8:27 A.M., Gassman faxed a 'no bond' FTA warrant to the Aurora detectives.

Anxious to examine petitioner's shoes. Aurora police surrounded petitioner's motel room. Police, with guns drawn, ordered petitioner to exit the room, by megaphone. Fearing for

his safety and well-being, petitioner reluctantly exited the premises. Aurora police executed the Denver warrant, and in so doing, confiscated the shoes and divorced petitioner from them permanently by sending the shoes to the Colorado Bureau of Investigation. (v5, 68-69, 126-127)

On September 1, 1994, police conducted interviews with every major television station in the State of Colorado. Police stated that the physical evidence leading them to believe petitioner was involved was collected at “the scene.” (Exhibit-O, COA, para. 2).

At a suppression hearing, the trial court denied petitioner’s motion to suppress evidence the prosecution claimed was derived from *his* tennis shoe. The prosecution argued that police could seize petitioner’s shoes **incident to arrest**. The court erroneously agreed. Petitioner proceeded to trial.

At trial, the prosecution centered his case on DNA evidence, by producing agent Kathryn Dressel of CBI as an *expert* in DNA examination. Even though Dressel is no expert in DNA examination, she was accepted as one nonetheless. Pointing to a blood stain on a black Nike tennis shoe, the prosecution theorized that the genetic profile of blood found on the shoe is shared by just one out of 415,000 Caucasian persons. Based on the assumption that the black Nike tennis shoe from which the blood stain was obtained belonged to petitioner, the prosecution argued that there was a high probability petitioner committed the robbery. However, the evidence in this case reveals not just one pair of black Nike tennis shoes, but two. The other pair belonged to Donald Staats and was obtained from the ticket booth. (v5, 21) As noted by the defense, this pair, too, was subjected to forensic testing. (v8, 12) Yet at trial, when reporting the DNA results, the prosecution’s *so-called* DNA expert reported results obtained only from “the left tennis shoe.” (v5, 177, 178) The prosecution did nothing whatsoever to show that the DNA result was obtained from petitioner’s shoe as opposed to the victim’s shoe.

Moreover, the method of DNA analysis used by CBI was the “PCR” method, which is *novel* in Colorado courts. It was even novel to the CBI examiner who conducted such testing, as she had first been exposed to the method in February of 1994, and never conducted such testing in a criminal case until August of 1994, shortly before conducting the analysis of blood found on the shoes in this case. (v4, 141)

At trial, the defense introduced Dr. John Charles Gerdes, who is a clinical director of research and development at a company called Immunological Associates of Denver. (v7, 90) Mr. Gerdes is a salaried employee who does not receive extra pay for his expert testimony in court cases. (v7, 122-123) He, like the inventor of the PCR method, is opposed to forensic use of the method for the purposes of including individuals as suspects in criminal cases. (v7, 111) He testified that because the method involves amplifying minute genetic substance millions of times. The process is “exquisitely sensitive.” (v7, 95-96) False inclusions can easily result from contaminated specimens. (v7, 110-111)

After examining the CBI results, Dr. Gerdes was emphatic in his belief that most if not all of the genetic specimens used in petitioner’s case showed signs of contamination. (v7, 114, 118-120) He explained that at genetic sites where only two alleles can exist, the results recorded by the CBI examiner showed *three* (v7, 110-111) This indicates that the test sample from the black tennis shoe has been contaminated and contains a mixture of more than one genetic specimen. (v7, 119-121)

The prosecution attempted to supplement the DNA evidence with the testimony that a footprint which was found at the crime scene could have been made by petitioner’s shoe. (v5, 81-82) By all accounts, however, petitioner was a regular at the drive-in, who appeared on foot, virtually every night. (v4, 140-42, 149) If his footprints appeared at the theater, therefore, it was

no great coincidence. The prosecution also presented Donald Staats as a witness, who testified to his opinion that petitioner was the perpetrator; yet Staats was heavily impeached with evidence of his inability to recollect; his exposure to newspaper articles depicting petitioner as the suspect; and with his prior inconsistent statements, for example, that he had no opportunity to view the suspect and that the perpetrator may have been a particular male theater employee. (v4, 175, 177-81, 182; v7, 44-46, 50)

Finally, there was Disa Tonkin, petitioner's erstwhile girlfriend, who urged the jury that she was testifying as a concerned citizen, but who in fact had agreed to testify against petitioner only two days before trial, and only after the prosecution guaranteed her complete immunity from prosecution as an accessory. (v5, 303-304). She claimed petitioner confessed to the crime and *allegedly* showed her a bag full of evidence before throwing it away, however, is sharply inconsistent with her repeated staunch insistences, at relevant times, that she believed petitioner was innocent. (v5, 307, 311; v7, 52-54) The defense introduced, for example, a letter from Disa Tonkin in August of 1994, in which she discussed her belief petitioner was innocent. Disa Tonkin also was present at petitioner's advisement of charges. She only could know petitioner was being charged that day if she had contact with the police, in which there is no record. Petitioner was convicted on all counts and sentenced to 96 years in prison. He appealed.

Petitioner's appellate brief contained six claims, two arrest warrant claims (the warrant was void *ab initio*-having been issued not by a judge, but by a deputy clerk, a pretextual, subterfuge arrest claim), a substitution of counsel claim, a conflict of interest claim, a competency claim and that evidence was insufficient to support petitioner's convictions. The void *ab initio* claim was not ruled on. The pretext argument was denied on the erroneous

conclusion that police seized personal effects **incident to arrest**. Petitioner's case was overturned on a conflict of interest with his trial attorney. Case#96CA964.

On retrial, the trial court denied the motion to suppress. Counsel also filed several motions to retain expert witnesses for his defense (*See exhibit-N of COA, registry of actions indicating requests for expert witnesses*). Additionally, counsel misrepresented a twelve-year plea bargain to petitioner over the course of his representation.

Three days before trial, counsel attended a meeting in the judge's chambers with the prosecutor and judge in which he agreed to abandon every motion he had filed.

The next day, he visited petitioner and informed him of the meeting. Petitioner immediately filed a motion for substitution of counsel based on an irreconcilable conflict of interest and breakdown of communication of trust because of counsel's consistent lying about representation he did not acquire. Petitioner presented the motion on the first day of trial.

On the first day of retrial, the court failed to conduct an adequate inquiry and compelled petitioner to proceed to trial, **over objection**. Petitioner consistently sought substitution of counsel. Counsel even filed to withdraw. The court refused. Petitioner proceeded to trial and was convicted on all counts. He appealed.

Counsel only filed two claims relevant to the arrest warrant. The CCA issued a limited remand to determine if the warrant issued in this case was void *ab initio*. Petitioner appeared *pro se*. The post-conviction court issued an adverse ruling on petitioner's motion to suppress. Petitioner's motion to suppress was denied and affirmed on appeal. He filed a writ of habeas corpus that was dismissed without prejudice. He then filed a Colo. Crim. Pro., Rule 35 (c), which was denied and affirmed on appeal.

In 2015, Petitioner filed an application for a writ of habeas corpus. He filed the two Fourth Amendment claims based on the warrant executed during his arrest. Petitioner also filed a “good cause” for substitution of counsel claim, several ineffective of counsel claims and a prosecutorial misconduct claim based on a racist overtone implemented by the prosecutor in closing arguments of petitioner’s second trial.

The U.S. District Court denied petitioner’s habeas application. The court procedurally barred the void *ab initio* claim. The court also defaulted the pretextual arrest claim, reciting an erroneous interpretation of facts by the CCA. Furthermore, the default was not raised by the State, but by the district court. His Certificate of Appealability was denied. A petition for rehearing was also denied.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT’S MISAPPLICATION OF PROCEDURAL BAR PURSUANT TO *STONE* WARRANTS THIS COURT’S ATTENTION.

a. Pertinent facts

The District Court’s decision to bar this claim pursuant to *Stone* is erroneous. The Tenth Circuit’s opinion also contains glaring factual errors that affected the court’s consideration of the prejudice issue regarding a procedural bar.

On p. 5, the Court states that petitioner’s habeas motion did not contain caselaw to support his argument that the post-conviction court lacked jurisdiction over the offense on remand. The fact that petitioner did not present caselaw in his federal habeas is irrelevant because a jurisdiction claim can be raised at any stage of proceedings, even on appeal. And, petitioner did cite caselaw in his COA brief.

b. Legal Argument-Subject Matter Jurisdiction

In this case, the county that ruled on petitioner's motion to suppress did not have jurisdiction over the offense. Any ruling pertinent to the warrant should have been nullified by the United States District Court or Court of Appeals.

Jurisdiction of the subject matter is attached in the trial court upon the filing of a complaint; *See Public Service Co. v. Miller*, 135 Colo. 575 (1957); *See also C.R. Civ. P.*, 3(b). A court must always have jurisdiction to act, and any action taken by a court when it lacks jurisdiction is a nullity. *See People v. Verbugge*, 998 P.2d 43 (Colo. App. 1999); *See also People v. Widhalm*, (Colo. App. No. 97CA1077, February 18, 1999) (1999 WL 74166).

c. Legal Argument pursuant to Stone v. Powell, 428 U.S.465 (1976)

And, second, the U.S. District Court stated petitioner had a "*procedural opportunity to litigate*," under *Stone*. The Court procedurally barred his claim on that erroneous interpretation of law pursuant to *Stone*.

Standard of Review-*Stone v. Powell*, 428 U.S. 465 (1976)

Stone "announced in its holding in terms of full and fair litigation," it "repeatedly sp[eaks] of 'full and fair consideration'; *Stone's* use of "consideration" and "litigation" interchangeably suggests that in some instances **more than procedural opportunity to raise and litigate a Fourth Amendment claim is required**"; "opportunity" formulation is designed to prevent petitioners from deliberately foregoing hearings in the state courts in order to argue in federal courts that they had no full and fair state hearing (quoting *Stone, supra*, 428 U.S., at 494, 486, 489)(Emphasis in bold added).

Additionally, the U.S. Court of Appeals erroneously concluded that petitioner had a full and fair hearing. In the panel opinion, the Court cited *Gamble v. Oklahoma*, 583 F.2d 1161, 1165

(10th Cir. 1978), stating that the CCA applied a colorable application of the correct Fourth Amendment standard, which was all that was required pursuant to *Gamble*. The CCA cannot apply a correct standard of law to a decision from a court lacking jurisdiction over the offense. Furthermore, the decision in *Gamble* never once indicated that a colorable application of the correct Fourth Amendment standard was applied. The district court ruled in *Gamble*'s favor.

Outcome

The court held that defendant had not fair opportunity to litigate his Fourth Amendment claim. Petitioner moves this Court to grant Certiorari to correct this error.

II. THE DECISION OF THE STATE COURT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

a. Pertinent facts relating to issuance of warrant

Excluding the jurisdiction aspect of this claim, petitioner did not receive a “*full and fair*” hearing on his void *ab initio* claim. The erroneous decision of the post-conviction court is based on perjured testimony of a detective that lied about where he actually had obtained the warrant (*Exhibit-A, pg. 63, at 18-22, COA*). Also see (*Exhibit-B, pgs. 66-at 24-25 and pg. 67-at 1-3, COA*).

Furthermore, the courtroom Gassman *claimed* to have called (and went to) is Division S-11 (*Exhibit-D, COA, pg. 67, at 5-9*). The warrant was issued from the district court, which is located on Bannock Street. Division S-11 is a *county* court, located on Cherokee Street (*Exhibit-E, COA, county court document, Division S-11 is for arraignments*).

District court clerk-Marie Moya

The clerk that had issued the warrant also testified in this case. She was shown a document that there was not a warrant and he was not supposed to be arrested (*Exhibit-F, COA, pg. 45, at 2-5*).

Denver Chief District Court Judge-Jeffrey Bayless, and Denver County Judge-Julian Ettenberg

Honorable Bayless, testified to the standard procedures of a failure to appear in the Denver *county* court. He stated that the judge in the county court would issue the warrant for an individual's arrest (*Exhibit-G, COA, pg. 16, at 4-6*). Judge Ettenberg testified that there were no orders for the district court (*Exhibit-H, COA, at 3-8*). Both judges confirmed, a warrant would have been issued by Judge Ettenberg. Plus, there were *no* orders for the *district* court to issue a warrant in this case.

b. Legal Argument-warrant is void ab initio

Subject to only a few specifically established exceptions, searches conducted outside the judicial process are unreasonable *per se*. *Katz v. United States*, 389 U.S. 347 (1967); *U.S. Const.* Amend. IV, XIV. The United States Constitution requires that a seizure be based on specific, objective facts indicating that society's legitimate interests require the seizure of a particular individual. However, an arrest made is invalid if the warrant is invalid. Here, the warrant was not merely invalid, but a nullity, void *ab initio*. Therefore, the arrest, as well as the search and seizure incident thereto, were unconstitutional.

Without probable cause of the commission of a crime, the constitutional validity of the arrest depends solely upon the warrant. All the evidence seized upon petitioner's arrest was seized

unlawfully. Therefore, that evidence, and all evidence '*allegedly*' derived therefrom, must also be suppressed as fruit of the poisonous tree. *Wong v. United States*, 371 P.2d 471. The warrant upon which petitioner was arrested is invalid *ab initio*. “The authority to issue warrants must necessarily derive from a specific statutory provision.” *State v. Nunez*, 634 A.2d 1167, 1169 (R.I. 1993). No “good faith” exception pursuant to *United States v. Leon*, 468 U.S. 897 (1984).

Petitioner was arrested with a warrant that failed to satisfy criminal procedure rule requirements. He was not arrested on a written order issued by a judge. Rather, he was unlawfully taken into custody on an *order* issued by a “(Deputy) Clerk of Court.” The clerk did not hold the legal authority to issue a warrant.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals. Upon review, the Court should suppress evidence unlawfully seized and remand his case for a new trial.

III. THE TENTH CIRCUIT’S MISAPPLICATION OF PROCEDURAL DEFAULT WARRANTS THIS COURT’S ATTENTION.

a. Pertinent facts

On p 5 of the order denying petitioner’s certificate of appealability, the panel refers to the 5-page decision of the pretextual arrest argument in as an alternative ruling to the void *ab initio* claim. In another paragraph, the panel stated that petitioner had an opportunity to appeal the

pretextual, subterfuge arrest motion on appeal after his void *ab initio* remand hearing. Contrary to the U.S. Court of Appeals' assertion, the analysis and interpretation of this matter is incorrect.

The pretextual arrest claim was erroneously defaulted by the U.S. District Court and upheld by the U.S. Court of Appeals. In its opinion, the panel inaccurately concluded that the pretextual arrest claim was "abandoned" on appeal in case#96CA964. Respectfully, the Court's conclusion is imprecise and the Court should issue a writ on this claim.

Petitioner, with overwhelming evidence can prove that; (1) the claim was raised at a suppression hearing at the trial court level; (2) counsel raised the pretextual arrest argument in the CCA, case#96CA964; (3) the CCA ruled on the claim. And, the opinion refers to the detective's testimony at the suppression hearing before the appeal(case#96CA964); (4) petitioner did not receive a "full and fair" litigation of the claim pursuant to *Stone* because the CCA applied an erroneous standard of law pursuant to the Fourth Amendment. The application of law is based on a search incident to arrest. Evidence shall prove the arrest was a subterfuge and served only as a guise to conduct an exploratory search for evidence of an unrelated crime; (5) after the second trial, the prosecutor in the post-conviction hearing on the void *ab initio* argument recognized there was a prior ruling in the CCA for this claim; and (6) even if the claim was "abandoned," the cognizable default was not raised by the State which is required by the U.S. Supreme Court.

Evidence in support of section (1) stated above:

In 1995, Detective Piel of the Aurora Police Department testified in a suppression hearing. He verified that he had no interest in arresting petitioner with the warrant for which he was sought.

He states:

Q: by counsel: *“Just so I am clear those shoes were in no way related in your mind to evidence that might be connected with the drug case that he was being sought for; is that right?”*

A: *“No. I had absolutely no interest in the drug case other than we had a warrant for him in regards to that.”* (**Exhibit-A, petition for rehearing, p 39, at 25 and p 40, at 1-6**)

Evidence in support of section (2) stated above:

Counsel argues: *“At the suppression hearing, the prosecution argued this was fine because once Aurora police arrested petitioner on a Denver arrest warrant, Aurora police could seize the shoes as part of a search incident to arrest, and maintain custody of them since, in light of his arrest, petitioner’s rights were “diminutio” (a taking away; loss or deprivation) (v2, 77-78). The district court erroneously agreed.”* (**Exhibit-B, petition for rehearing, argument raised by counsel in direct appeal-case#96CA964, p 16, at 4-7**)

Evidence in support of section (3) stated above:

In its opinion, the panel incorrectly suggests that the 5-page ruling of the CCA is an alternative to the void *ab initio* argument. Petitioner submits contrary evidence to the U.S. Court of Appeals’ decision:

The CCA decision references to testimony of Detective Piel at the suppression hearing in 1995 before the initial trial. It reads:

“Here, the arresting officer testified that the shoes defendant was wearing at the time of his arrest were of the type that had left footprints in the soil at the theatre.” (**Exhibit-C, petition for rehearing, opinion of CCA, case#96CA964 p 12, at 8-10**)

The shoeprint excuse by the police is irrelevant because petitioner was at the theater every day. It was used in order to seize them for evidence of the unrelated crime. And, there could be no possibility that the opinion of the CCA refers to the void *ab initio* argument because it was never raised before the initial trial.

Evidence in support of section (4) stated above:

The erroneous decision issued by the CCA related to the pretextual, subterfuge arrest claim was based on the ridiculous assumption that police simply conducted a **search incident to arrest**. Testimony of Piel indicates that the warrant served as a guise to arrest and seize his shoes for the unrelated crime. The CCA also construed an inapplicable standard of law pursuant to the Fourth Amendment. A “full and fair” hearing was not issued pursuant to *Stone*.

Evidence in support of section (5) stated above:

On remand after his second trial, petitioner sought to argue a motion to suppress that included the pretextual arrest argument. The prosecutor and post-conviction court recognized that this claim already had a ruling from the CCA. Petitioner was *pro se*. He questioned a detective about his motivation.

Q: by petitioner: “*Well actually, you and several detectives testified that you had no desire to pick me up for the FTA, and that your only desire was to talk to me about the E-70 Drive-in robbery; is that correct?*”

Objection, by prosecutor McHugh: “*Judge I’m going to object. The Court--There’s been a previous ruling of the court of appeals and what the issue was.*” (*Exhibit-D, petition for rehearing, p 44, at 7-13, post-conviction testimony from void ab initio hearing. See also 19-25*)

Evidence in support of section (6) stated above, with legal support:

In its Pre-answer response brief, the State claimed that petitioner never raised this claim at the state court level. In his Reply to the Pre-answer brief, petitioner proved that the claim was raised. But, in an Order to Dismiss in Part, the U.S. District Court acted as an advocate for the State when it raised the default, erroneously stating the claim was ‘abandoned.’ The State never made that assertion. Furthermore, the court did not send its Order to Dismiss in Part to petitioner. Petitioner had to file a clarification motion to receive a copy of it.

b. The components of a federally cognizable default with Applicable Law and Analysis

The District Court court’s decision to default this claim is erroneous and without legal merit, in direct violation of “*clearly established Federal law, as established by the Supreme Court of the United States.*” Title 28 U.S.C. § 2254 (d) (1).

The conclusion also “*resulted in a decision that was based on an unreasonable determination in light of the evidence presented.*” Title 28 U.S.C. § 2254 (d) (2). *United States Const. Amends. IV and XIV*; *Stone v. Powell*, 428 U.S. 465 (1976).

See also Trest v. Cain, 118 S. Ct. 478, 480 (1997) (“procedural default is normally a ‘defense’ that the State is ‘obligated to raise’ and preserv[e], if it is not to ‘lose the right to assert the defense thereafter’” (quoting *Gray v. Netherland*, *infra*, 518 U.S. At 165-66)); *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996) (“because procedural default is an affirmative defense for the Commonwealth [,] ... the Commonwealth would be obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter”). In *Trest v. Cain*, the Court further stated:

“Petitioner appealed and the court vacated the decision and remanded the cause for further proceedings, finding that the court of appeals was not required to raise the petitioner’s potential procedural default sua sponte. The court determined that procedural default was a defense that the state was obligated to raise and preserve for appeal. The court concluded that the court of appeals was not required to raise the petitioner’s default remedy.”

See also § 26.2, Federal Habeas Corpus Practice and Procedure.

IV. THE DECISION OF THE STATE COURT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

a. Pertinent facts regarding unlawful arrest and seizure of personal effects

On August 11, 1994, Detective Gassman acquired a failure to appear warrant from the Denver courthouse. Gassman then faxed that warrant to Aurora police, which were anxious to detain petitioner, seize his personal effects and question him for an unrelated crime.

Armed with the unlawful warrant, police surrounded the motel room in which petitioner was staying. With weapons drawn, police, with megaphone, ordered petitioner to exit his motel room. With the threat of his life imminent, petitioner reluctantly exited the room. Petitioner was arrested. During his arrest, Aurora detectives seized his tennis shoes as evidence of the unrelated incident in Aurora.

b. Argument-Pretextual, subterfuge arrest.

Assuming *arguendo* that police arrested Petitioner pursuant to a valid arrest warrant, nonetheless, the validity of the warrant did not justify their seizing of his shoes and sending them to the forensic lab of CBI.

Petitioner was shoeless while Aurora police arrested him, transported him to the jail, and interrogated him. Then, contrary to normal procedure, petitioner was not permitted to wear his

own shoes in jail, nor were the shoes stored as his personal property, nor were they transported with him to the Denver County Jail.

Instead, once Aurora police arrested him on the Denver warrant, they seized the shoes, kept them, and ultimately cut holes in them, in order to further a nascent investigation of criminal activity in Aurora.

At the suppression hearing, the prosecution argued this was fine because once Aurora police arrested petitioner on a Denver arrest warrant, Aurora police could seize the shoes as part of a **search incident to arrest**, and maintain custody of them since, in light of his arrest, petitioner's rights were "diminutio" (a taking away; loss or deprivation). The district court erroneously agreed.

The district court, prosecution and CCA were erroneous in contending that police could seize and continuously hold petitioner's shoes in the manner that they did as part of a **search incident to arrest**. There is no question that police are permitted to search a lawfully arrested person and the area within the arrestee's immediate control.

However, the primary justification for permitting warrantless searches and seizures incident to arrest is preserving and avoiding destruction of evidence of the crime for which the defendant has been arrested. *Chimel v. California*, 395 U.S. 752 (1969).

Here, of course, police admitted the shoes bore no relationship whatsoever to the purpose for which petitioner was arrested, a failure to make a court appearance in Denver. Aurora police did not follow conventional booking procedures, nor did they seize or conduct forensic testing on petitioner's shoes pursuant to standard police department inventory measures. To the contrary, such procedures were brazenly circumvented. Aurora police hastened to arrest him on the Denver warrant in order to secure his custody, and the benefits pertaining thereto, for the purposes of

furthering their nascent investigation of a serious offense in Aurora. That is, the arrest, and the immediate seizure of petitioner's shoes were for the purposes of an exploratory search.

c. Standard of Review-Legal argument with Applicable Law and Analysis

The United States Constitution guarantees the freedom from unreasonable searches and seizures. *U.S. Const. amends. IV, XIV*. A root principle of this guarantee is that governmental officials may not conduct exploratory searches. Therefore, all evidence derived therefrom, must also be suppressed as fruit of the poisonous tree. *Wong v. United States*, 371 P.2d 471.

While the United States Supreme Court has established some exceptions to the warrant requirement, these exceptions cannot be taken beyond their logic and policy rationale to accomplish a search or seizure which the Constitution would not otherwise allow. The unlawful seizure of petitioner's shoes and other personal effects are products of a subterfuge.

Whether an arrest is based on a pretext turns on the motivation of the arresting officer. The creation of a pretext to justify an arrest violates the Fourth Amendment. *See United States Const. Amend. IV*; *See also United States v. Prim*, 698 F.2d 972, 975 (9th Cir.1983).

Randall Prim was detained at an airport in Portland, Oregon with an outstanding nonsupport warrant. The true motive of why he was detained was for suspicion of cocaine possession.

At the suppression hearing, Snyder, Abe and Kempshall testified that, although they were all aware of the outstanding nonsupport warrant, the reason for the relocation and detention of defendant was that they suspected him of trafficking in narcotics, not because of the outstanding warrant. Abe further testified that the purpose for the relocation was to interrogate defendant and obtain his consent to a search.

The court ruled:

“Accordingly, the nonsupport warrant was not the cause of the officers' action and thus not the cause to which the objective standard should be applied. For this reason, the trial court's reliance upon the nonsupport warrant to justify probable cause is clearly erroneous. If anything, it provides a pretext after the fact to justify the officers' actions. Such pretextual use to justify an arrest or search has been clearly recognized as violative of the fourth amendment.” Brown v. Illinois, 422 U.S. 590, 611, 45 L. Ed 2d 416, 95 S. Ct. 2254 (1975) (Powell, J., concurring); Taglavore v. United States, 291 F.2d 262 (1961).

In *Taglavore*, the court concluded that detectives sought him with a nonsupport warrant because he was suspected to have drug paraphernalia on his person.

The court ruled:

“However, there is one fixed and essential prerequisite to all of these searches: in each case there must be a valid, bona-fide arrest to which the search is merely incident. Where the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal. Worthington v. United States, 6 Cir. 1948, 166 F.2d 557; Henderson v. United States, 4 Cir. 1926, 12 F.2d 528, 51 A.L.R.420. ‘An arrest may not be used as a pretext to search for evidence.’ United States v. Lefkowitz, 1932, 285 U.S. 452, 467, 52 S. Ct. 420, 424, 76 L. Ed 877. To put it in other words, the search must be incident to the arrest, and not vice versa.”
Reversed. See U. S. Const. Amends IV and XIV.

On August 2, 1994, the court informed petitioner that he would not be arrested for failing to appear. The court also stated that he would receive a new court date, not that he would be arrested. A notice was put into his file. No warrant was issued.

Early August 11, 1994, there was NO “outstanding warrant.” A detective lied about it. He acquired it for a subterfuge.

At petitioner’s suppression hearing, Detective Piel testified that he had no interest in the FTA. Police engaged in a deliberate scheme to evade Fourth Amendment requirements by forcing petitioner from the safety of his motel room and executing a FTA warrant to seize his shoes for an unrelated case.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the U.S. District Court and Tenth Circuit Court of Appeals. Upon review, the Court should suppress the evidence unlawfully seized and remand his case for a new trial.

V. THE TENTH CIRCUIT’S MISAPPLICATION OF THE STRICKLAND STANDARD WARRANTS THIS COURT’S ATTENTION.

a. Pertinent facts

In its opinion, the panel recites an erroneous interpretation of law and analysis of this claim by the CCA. On p 7, the panel stated that the CCA reasonably concluded that any actual conflict did not have an adverse effect on Keys’ counsel, as required to meet the deficient-performance prong of the familiar test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984).

Applying the *Strickland* standard is a misapplication of law in this particular instance.

Counsel filed several motions regarding numerous expert witnesses (*See Exhibit-N, registry of actions*). For several months, counsel told petitioner he would speak with and acquire expert and lay witnesses on his behalf. But, on the weekend before trial, petitioner was informed by counsel that had failed to contact or secure any. Petitioner filed a motion for substitution of counsel and presented it on the first day of trial.

b. Despite Even the Court's Failure to Conduct an Adequate Inquiry, Petitioner Demonstrated "Good Cause" For Substitution

When an indigent defendant voices his objections to court-appointed counsel, the trial court has the obligation to inquire into the reasons for dissatisfaction. The record nonetheless showed good cause for substitution of counsel. Because petitioner is not presenting here an assertion of ineffective assistance of counsel in *this* particular claim, it is unnecessary for him to demonstrate, as it would be under *Strickland v. Washington*, 466 U.S. 668 (1984), that defense counsel's refusal to pursue any other lines of defense that would have resulted in a reasonable probability of a different outcome.

Counsel lied to his client, about his preparation and defense. Counsel filed several motions to the court requesting funds for expert witnesses (*Exhibit- O, COA, registry of actions, motions for expert witnesses*). The motions were approved by the court, but no action was taken.

Counsel did not speak with, or acquire a single expert on behalf of his client. He abandoned the motions regarding experts in DNA, footprints, psychology and /or psychiatry and identification. He failed to acquire any witnesses to present knowledgeable evidence, or expert testimony. On top of these failures by counsel, is the exceptionally high level of tension caused

by counsel because of his misinformation and lack of preparation.

The question or standard of review here is not whether these discrepancies, if properly addressed by new counsel, would have changed the outcome of the case. The standard of review must lie in whether disagreements between petitioner and defense counsel about these and other defense matters constituted “good cause” for substitution. Both separately and combined, the grounds were sufficient to demonstrate “good cause” for substitution.

c. Standard of Review

Erroneous denial of a motion for substitution of counsel is structural error, and thus reversible *per se*. This is equally true for defendants who are indigent and who are wealthy enough to retain counsel of choice. It is well established that where a wealthy defendant seeks to substitute retained counsel, any unreasonable or arbitrary denial of the request is reversible error, irrespective of any additional showing of prejudice by the defendant. *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985). No additional showing of prejudice is required because arbitrary interference with a defendant's right to retain counsel of choice is prejudicial in itself, in that it removes the defendant's right to present a defense which is to *his* liking, and since it would be impossible to quantify the effect of the erroneous denial on the proceedings. *Wilson v. Mintzes*.

Granted, an indigent defendant has no constitutional right to representation by any particular attorney. *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982); *Armedo-Sarmiento*, 524 F.2d 591. Generally, an indigent defendant takes who the court appoints.

However, the constitutionally recognized interest in being represented by a particular attorney of one's choice does not vanish completely because a defendant is indigent and his counsel is appointed. *U.S. Const. amend VI*. Moreover, once “good cause” for substitution of

appointed counsel has been demonstrated, denial of substitution constitutes an unreasonable and arbitrary interference with a defendant's right to representation by counsel of choice and to present a defense. An indigent defendant's demonstration of "good cause" for substitution of counsel places him on equal footing with a wealthy defendant who need not demonstrate good cause in order to substitute retained counsel.

Whereas, in the situation of a request to substitute *retained* counsel it is the defendant's financial means, and the absence of a financial or administrative burden on the State, which render it unreasonable to deny substitution of counsel; in the situation of a request to substitute *appointed* counsel it is the demonstration of "good cause" which renders it unreasonable to deny substitution of counsel. In either circumstance, denial of a motion to substitute counsel is unreasonable and arbitrary, and the magnitude of the constitutional error is unquantifiable.

The trial court erroneously denied his motion for substitution of counsel even though petitioner demonstrated a prima facie showing of an irreconcilable conflict between himself and his court-appointed attorney. *See United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990); *See also United States Const. Amend. VI and XIV*.

In *Walker*, the court ruled: "*Defendant's conviction on charges related to the distribution of lysergic acid diethylamide was reversed and remanded for a new trial because denial of defendant's motion for substitution of counsel was an abuse of discretion. The motion was timely, the judge's inquiry was inadequate, and the conflict was based on trial preparation and prevented defendant from presenting an adequate defense.*"

Also see *United States v. Williams*, 594 F.2d 1258 (1997). *See United States v. Welty*, 674 F.2d 185, 188 (3rd Cir. 1982).

A petitioner needs only to make a prima facie showing that can establish “good cause,” such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparent unjust verdict.” *United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990); *United States v. Williams*, 594 F.2d 1258 (197). See *United States v. Welty*, 674 F.2d 185, 188 (3rd Cir. 1982); *See also United States Const. Amend. VI and XIV*.

CONCLUSION

For the foregoing reasons, prays that this court grants a Writ of Certiorari on this claim, and remand his case for a new trial.

VI. THE TENTH CIRCUIT’S MISAPPLICATION OF THE STRICKLAND STANDARD WARRANTS THIS COURT’S ATTENTION.

a. Pertinent facts

Physical Evidence Found at “the scene”

Mool Verma, an anthropologist for the State, tested the *only* physical evidence submitted to CBI in this case. In the first trial, he stated that NO blood, hair fibers, fingerprints or victim fingernail scrapings, linked petitioner to the offense (*Exhibit-P, pg. 69. at 10-17*). In the very beginning, the said evidence was the only “physical evidence” submitted to CBI in this case.

Along with the abundance of physical evidence that did NOT match that of petitioner, the OTHER pair of black NIKE tennis shoes found at the scene was submitted also. It is also the *actual* source from which the DNA originated (*Exhibit-Q, COA, para. 2, black NIKE tennis shoe collected from the scene*). It is also the very reasons why the State needed two witnesses to

testify to a procedure that required only one person. The idea of two serologists was to draw attention from the OTHER shoe.

Testimony of Dressel and Clayton

When agent Dressel was interviewed by police, she *claimed* to analyze petitioner's shoes and 'allegedly' extracted the cuttings from those shoes *herself* (**Exhibit-R, COA, statement of Dressel, pgs. 15, last paragraph-16).**

In petitioner's first trial, Dressel changed her testimony. She involved Joe Clayton in an alleged testing process. The following statement is inconsistent with her initial statement to police.

She blurts out: *"First of all, the cutting from the tennis shoe has been placed into a plastic bag for me by the serologists, and in this case it was Agent Joe Clayton."* (**Exhibit-S, COA pg. 162, 9-12).**

Agent Joe Clayton testified stated that he would complete his testing process, not Dressel.

He states: *"My tests best read when the blood is dry. So I will take the swatch and allow it to air dry. I have a number of tests available to me in the laboratory to determine, one, is it blood, is it human blood, and then I will try and identify some genetic marker in that sample to see if I can trace it back to who could or could not be a donor."* (Emphasis in bold added) (**Exhibit-T, COA, pg. 130, at 6-12).**

Dressel's lack of expertise in DNA examination

In 2002, an audit was conducted by the National Forensics Service Testing Center (NFSTC) on a CBI laboratory in Montrose, Colorado. According to the NFSTC, every

individual conducting DNA Examination must successfully complete a minimum of twelve semester or equivalent credit hours (college-or university passing grade) in the areas of biochemistry, genetics, molecular biology and population genetics and/or statistics to even *qualify* as a *DNA Examiner* (*Exhibit-V, COA, pgs. 16 and 17, §5.2-Standard 5.2.1*). She was removed for lack of qualifications as a technical manager. This audit also verifies that agent Dressel was never an expert a DNA examination because she lacked education in population genetics. This information was available to counsel at the second trial.

b. Legal argument

The accused is also guaranteed the right to right to a fair trial, including a meaningful opportunity to present a complete defense and the opportunity to present evidence that another may have committed the charged offense. U.S. CONST., amends VI, XIV. *Holmes v. South Carolina*, 547 U.S. 319, 324-27 (2006); *Crane v. Kentucky*, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 2146-47, 90 L. Ed. 2D 636 (1986). A claim for ineffective assistance of counsel will be sustained where “counsel's strategy for not investigating or submitting such mitigating evidence is remarkably deficient...” *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

For the foregoing reasons, petitioner prays that this court grants a Writ of Certiorari on this claim, and remand his case for a new trial.

**VII. THE TENTH CIRCUIT'S MISAPPLICATION OF
THE STRICKLAND STANDARD WARRANTS
THIS COURT'S ATTENTION.**

a. Pertinent facts- Donald Staats

The panel opinion relied on a statement that is not relevant to the argument presented in petitioner's habeas brief and COA. It indicated that the victim Staats did not remember seeking help when he testified. On the night of the incident, the victim sought help on two different occasions but did not know his attacker. If petitioner was the assailant, the victim could have easily stated that on either occasion. He did not.

b. Legal Argument

The accused is also guaranteed the right to right to a fair trial, including a meaningful opportunity to present a complete defense and the opportunity to present evidence that another may have committed the charged offense. U.S. CONST., amends VI, XIV. *Strickland v. Washington*, 466 U.S. 668 (1984).

**VIII. THE TENTH CIRCUIT'S MISAPPLICATION OF
THE STRICKLAND STANDARD WARRANTS
THIS COURT'S ATTENTION.**

a. Pertinent facts-Disa Tonkin

The panel also pointed out the cross-examination of Ms. Tonkin's inconsistent statements. The problem here is, counsel never sought advice or information from petitioner in

reference to his ex-girlfriend. He did nothing but lie to his client for over a year about his representation. His lack of communication contributed to his ineffectiveness.

b. Legal Argument

The accused is also guaranteed the right to right to a fair trial, including a meaningful opportunity to present a complete defense and the opportunity to present evidence that another may have committed the charged offense. *U.S. CONST., amends VI, XIV. Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

For the foregoing reasons, petitioner prays that this court grants a Writ of Certiorari on this claim and remand his case for a new trial.

**IX. THE TENTH CIRCUIT'S MISAPPLICATION OF
THE STRICKLAND STANDARD WARRANTS
THIS COURT'S ATTENTION**

a. pertinent facts

Petitioner also claimed that counsel was ineffective for failing to raise a reasonable doubt defense and to require the State to meet its burden of proving guilt beyond a reasonable doubt. The trial court dismissed the claim.

b. legal argument

The “failure to investigate and develop a defense constitutes ineffective assistance when counsel's omissions result in 'withdrawal of a potentially meritorious defense,' and the failure to raise the defense cannot be explained on tactical grounds.” *People v. Dillard*, 680 P.2d 243, 245-46 (Colo. App. 1984) quoting *People v. Jackson*, 28 Cal.3d 264, 618 P.2d 149 (1980). If true, petitioner's allegations demonstrate these circumstances and entitle him to relief.

As discussed, the case against petitioner was hardly overwhelming. *Fisher v. Gibson*, 282 F.3d 1283, 1306 (10th Cir. 2002). There was NO physical evidence leading to petitioner. It led to someone else. Also, counsel never sought to investigate the cuttings removed from the OTHER NIKE tennis shoe.

CONCLUSION

For the foregoing reasons, petitioner prays that this court grants a Writ of Certiorari on this claim and remand his case for a new trial.

**X. THE TENTH CIRCUIT'S MISAPPLICATION OF
THE STRICKLAND STANDARD WARRANTS
THIS COURT'S ATTENTION.**

a. Pertinent facts

The panel decision stated that petitioner admitted that the racial issues of the prosecutor were not fully developed on the record. During rebuttal, the prosecutor defended his decision as one that *allegedly* was neither based on race, nor on the decision the district attorney's office to prosecute an innocent man. During the same argument, however, the prosecutor, referred to an

area mentioned, as Petitioner's "hood," imitating a stereotypical African-American dialect, while smirking.

b. Legal Argument

The prosecutor committed reversible misconduct by injecting racial overtones into a trial that would be decided by an all-white jury. The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments of the United States Constitution. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). *Strickland v. Washington*, 466 U.S. 668 (1984).

A fair trial implies one in which the prosecution does not throw the prestige of his public office, and the expression of his own opinion of guilt onto the scales against the accused. A.B.A. *Standards for Criminal Justice* Standard 3-5.8 (1993ed); accord *State v. Monday*, 171 Wash.2d 667, 677, 257 P.3d 551 (2001). Likewise, a fair trial demands a trial free from the injection of subtle appeals to racism. "Like wolves in sheep's clothing, a careful word here and there can trigger a racial bias." *Id.* At 678. Thus, the prosecutor's pronunciation of a word to conjure racial bias subtly, but most likely deliberately, can constitute reversible error. *Id.* At 678-79 (prosecutor's use of "po-leese" rather than "police" called the jury's attention to the accused's race).

If this issue is left unnoticed, it would unconstitutionally permit any district attorney the authority to treat African-Americans in any fashion he or she pleases.

CONCLUSION

For the foregoing reasons, petitioner prays that this court grants a Writ of Certiorari for this claim and remands his case for a new trial.