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Supreme Court of the United States

Supreme Court, U.S.  
FILED

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Case No. 25-5570

Eric Thomas Noe

Petitioner

vs

Shawn McKenzie, Warden

Respondent

Motion to Grant COA

Comes now the petitioner, Eric Thomas Noe, pro'se, and hereby petitions this most eminent Court to grant me a Certificate of Appealability, pertaining to the District Court's decision to dismiss with prejudice my petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 - on essentially the same grounds as raised in my petition via the memorandum of law thereto; my response to the Warden's motion to dismiss; and my objections to the Magistrate Judge's report and recommendation - (please see these documents) - as the basic argument I present therein is not only valid but sound.

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SUPREME COURT, U.S.

To preface, I must quote His Excellency, the venerable William Penn, "laws were made for man, not man for the law." In accordance, the United States Constitution establishes via Article I, Section IX, Clause II, the right to habeas corpus as an unfailing and final bulwark to prevent an illegal imprisonment, saliently stating that "the privilege of the writ of habeas corpus shall not be suspended..." Indeed? As this is the precise purpose of my petition. For my trial was a one-sided utter sham, in that I elected to exercise my right to self-representation, and contrary to my desire and expectation, not only was I denied this right, I was ultimately denied my most basic constitutional right to present a defence; my direct appeal, concerning a "Brady violation" issue, was conspicuously rejected for a spurious reason; the one collateral appeal which the state of Kentucky grants me, was merely summarily denied, out-of-hand, after apparently sitting on the judge's desk for almost four years; and now, lamentable to say, it does in truth appear that I am being denied my right to habeas corpus. Why? In the name of expediency in order to uphold the first principle of finality? Have our cardinal values been transvalued since the Constitution was written? Thus, I humbly ask merely one thing, that my petition be given a fair examination based on it's merits.

The guiding principle of our judicial system is impartiality; the essence of justice is fairness — I maintain that the District Court's decision is erroneous as it is not objective, and thus is not properly grounded in reason and truth, and derivatively in United States law; but rather is demonstratively biased in favor of the prosecution, and inimical toward me, a pro'se petitioner.

The District Court Judge declares on page 3 of his memorandum opinion and order that, "Noe asserts one objection to Judge Atkins' recommendation. Noe essentially argues that Judge Atkins' factual assertions on timeliness are wrong and that he is therefore entitled to traditional equitable tolling." Whereas, in point of fact, I present two arguments which are so intimately intertwined that they cannot be properly considered in isolation:

In summa, as quoted from my objections, "I contend that my petition is indeed timely according to a proper interpretation of the AEDPA, per 28 U.S.C. § 2244 (d) (1) (B), in accordance with Holland v Florida, 560 U.S. 631 (2010) — as I have been diligently pursuing my rights, and have been impeded by being completely denied access to the state courts; and 2) because the one-year statute of limitations is not jurisdictional that my petition is apposite, legal

and just, according to the "equitable principles" which govern the Great Writ - as my conviction is based on a substantial constitutional violation, namely the denial of the most basic constitutional right afforded to defendants in the United States: the right to present a defence - via primarily being denied my right to self-representation, in violation of Faretta v California, 422 U.S. 806 (1975), and thus further, as I am actually innocent of the crime of which I was convicted." My Objections.

To clarify, concerning argument 2, I am in essence asserting an actual-innocence gateway claim per McQuiggin v Perkins, 569 U.S. 383 (2013); and thus am ultimately seeking an equitable exception to § 2244 (d) (1), rather than an extension of the time statutorily prescribed - as I cannot produce the relevant documentation to directly support my equitable tolling argument, but only as no such documental evidence exists due to both state court and state prison negligence and/or malice - notwithstanding I maintain that, concerning my equitable tolling argument, my claim can be cogently substantiated once the evidence available is properly considered comprehensively, in extenso.

Crucially, it must be here noted and underscored that the District Court did not even consider

argument 2, my exception claim, which constitutes not only the heart, but the breadth of my argument!

Firstly, concerning my equitable tolling argument - On page 6 of the District Court's memorandum opinion and order it states, "as Krow aptly describes the situation '[Noe's] own accounting gives him, at best, more than 14 months of inaction.'" This period of inaction, I concede, is true, although it would in fact be a less than 13 month period of inaction - from 10-6-23 - 10-29-24 - not taking into account the time I spent working on these documents, absent resources and any cooperation or correspondence from the state courts, and having to collaborate with an inimical state prison system, but the determination that this period of inaction was merely the consequence of me "dawdling," that it was due to some fundamental fault of my own, is certainly not true; rather, this period of inaction was due entirely to state court impropriety and negligence - as I was awaiting throughout this period a reply from the state courts pertaining to my collateral appeal, my motion to vacate judgment pursuant to RCr 11.42, which I never received - a reply which is requisite in order to proceed.

In order to arrive at this period of inaction calculation, the District Court concludes that

My collateral appeal pursuant to RCr 11.42 became final - and thus that the clock restarted for statute of limitation purposes - on 10-6-23, the date that my motion to proceed on belated appeal was stricken by the Kentucky Court of Appeals for failure to pay the filing fee. I object to this conclusion by the District Court - As the failure to pay the filing fee was due to no fault of my own: I submitted an inmate money transfer authorization to inmate accounts on 8-15-23, once I had the money on my account to cover the filing fee, it appears that the money transfer was approved by someone in inmate accounts (see the pertinent exhibits submitted), however this money transfer was never processed, for a reason unbeknownst to me, it was merely returned to me a few days after I received the returned and stricken motion to proceed on belated appeal, absent an explanation - Moreover, primarily, as my motion to proceed on belated appeal is improper, and was merely stricken not denied based on its merits. Upon learning that my collateral appeal pursuant to RCr 11.42 had been summarily denied, I promptly submitted a legitimate and timely notice of appeal, i.e., on 2-20-23. I submitted the motion to proceed on belated appeal three months later, as I did not receive a reply pertaining to my notice of appeal, only to perhaps induce some action on my appeal.

That is, most pertinently, my motion to proceed on belated appeal was improper as my appeal was not belated but timely. Thus, once it was stricken I decided to forego it.

I do not understand how an improper and procedurally stricken motion to proceed on belated appeal nullifies a legitimate and timely filed notice of appeal/appeal? My argument is that it should not. Moreover, it should be noted that I have yet to receive a reply pertaining to my notice of appeal.

In concurrence, I would aver that my activity pertaining to my petition for writ of habeas corpus betrays my true ethic, my passion and diligence, in pursuing my rights - For when a court corresponds appropriately, I respond accordingly, promptly and sufficiently, as someone eager to secure his rights. Also, I have handwritten or typed over twenty copies and various versions of my appeal completely in vain, including multiple accompanying motions each time; despite this, I relentlessly persevere.

Concerning my exception argument, as this most Eminent Court affirms:

Per the precedential case, it must be noted that my petition for writ of habeas corpus is my first, and only, petition, as McQuiggin v Perkins, 569 U.S. 383 (2013) attests, "Sections 2244 (b) (2) (B) and 2254 (e) (2)... reflect Congress' will to modify the miscarriage of justice exception with respect to second-or-successive petitions and the holding of evidentiary hearings in federal court. These provisions do not demonstrate Congress' intent to preclude courts from applying the exception, unmodified, to 'the type of petition at issue here' - an untimely first federal habeas petition alleging a gateway actual-innocence claim... In a case not governed by those provisions, i.e., a first petition for habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted." at 396, 397 (quoting House v Bell, 547 U.S., at 539 (2006)).

In that, "equitable principles have traditionally governed the substantive law of habeas corpus, Holland reminded, and affirmed that 'we will not construe a statute to displace courts' traditional equitable authority absent the clearest command.' The text of § 2244 (d) (1) contains no clear command countering the courts' equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition. at 397 (quoting Holland v Florida, 560 U.S., at 646 (2010)).

At heart, "the character of respondent's constitutional claim should be central to an evaluation of his habeas corpus petition." Murray v Carrier, 477 U.S. at 498.

And also - a petitioner for writ of habeas corpus is entitled to an equitable exception to the AEDPA's one-year statute of limitation if the petitioner can show that, "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." McQuiggin v Perkins, 569 U.S. at 399. And to specify, "evidence is 'new' for the purposes of the actual-innocence inquiry so long as it was not presented at trial." Hubbard v Rewerts, 98 F.4th 736 at 743 (6th Cir. 2024), (citing Schlup, 513 U.S. at 324.)

The new evidence that I propose which demonstrates my actual-innocence is primarily the exculpatory evidence that I was denied as advanced in my petition via the memorandum of law thereto - viz., the police body camera video footage and the victim's statement to police which exonerates me; secondarily, it is any and all other exculpatory evidence which was not presented at my trial - per my main claim: that I was ultimately denied my right to present a defence - e.g., the four defence witnesses that my "co-counsel" failed to subpoena.

Ergo it is imperative that, the standard which governs the miscarriage of justice exception to the AEDPA's statute of limitations is that as delineated in Murray v Carrier, 477 U.S. 478 (1986), which requires that "the petitioner must show that the constitutional error 'probably' resulted in the conviction of one who was 'actually innocent,'" as opposed to Sawyer v Whitley, 505 U.S. 333 (1992), which "made no attempt to reconcile its more exacting standard of proof with Carrier's use of probably." McQuiggin v Perkins, 569 U.S. 383 (2013).

I aver that this standard has been met in my case. Granting that my basic argument is not only valid but sound, reasonable jurists could indeed agree that my petition should have been resolved in a different manner, especially as the District Court did not even consider my exception argument.

Moreover, in essence, I contend that, to simply dismiss my first petition for writ of habeas corpus on the ground that it is untimely per the AEDPA's one-year statute of limitation - that is, without even considering the merits thereof, violates the "suspension clause" as it does indeed in praxis suspend my right to habeas corpus via the imposition of a time limit; and this violation is not obviated by the "exception clause."

For Article III, Section II, Clause II, does not apply to Article I, Section IX - Clause II therein states, "the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it." Surely James Madison and the other Framers did not mean by this that the privilege of the writ of habeas corpus could indeed be suspended at some point in the future via a restriction imposed by Congress for an "evolving" reason? In similar fashion, contemplate Clause III, would it be proper for Congress to enact an exception thereto? perhaps one that states that a bill of attainder is permitted if a person acquires an estate of a certain size, or accumulates so much wealth, and is convicted of a particular species of fraud? No...

Article I, Section IX denotes "powers denied to the United States." Clause II therein I maintain is unequivocal and axiomatic. For the legal concept of the United States comprehends the three branches of government, and this law particularly is directed at both the executive and legislative branches. the privilege of the writ of habeas corpus is an indispensable right granted to the people, exercised via the judicial power; the power which is denied to the United States is that of suspension, the power to suspend this right.

The laws of Section IX revolve around the first principle of individual liberty and serve as the very basis of enduring justice and right - Hence they are immutable; they are not subject to amendment or modification, thus no exception can legally be applied to them. For to apply an exception is to amend or modify, which in relation to these laws is tantamount to an annulment.

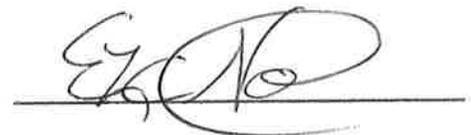
To summarize my argument as concisely and cogently as possible, I contend that if a petition for writ of habeas corpus clearly demonstrates that the petitioner is indeed being imprisoned contrary to the laws of the United States, then per the Constitution, the Supreme Court of the United States has not only the patent authority, but even more a solemn duty, to act in order to prevent this illegal imprisonment, to do otherwise, to simply dismiss this petition for violating a procedural technicality despite its merits, would in praxis be to suspend the privilege of the writ of habeas corpus.

In fine, the privilege of the writ of habeas corpus is indispensable to securing and maintaining our Cardinal Right - that of individual liberty - and ethos as Americans; hence its placement in Article I of the Constitution. As the venerable William

Blackstone delineates concerning jure personarum, "the principal aim of society is to protect individuals in the enjoyment of those absolute rights" - properly denominated "the natural liberty of mankind" - "which were vested in them by the immutable laws of nature... Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals." Commentaries on the Laws of England, Chapter the First, Page 5 (1765).

Wherefore, I humbly implore this August Court to grant me a certificate of appealability, and ultimately to grant my petition for release - as my basic claim, that I am being illegally imprisoned by the state of Kentucky in violation of the first principles of the United States Constitution, is true.

Sincerely Submitted,  
your humble fellow citizen  
Eric Thomas Noe #291623, pro'se  
Eastern Kentucky Correctional Complex  
West Liberty, KY 41472



United States District Court  
Eastern District Kentucky  
Central Division Lexington

Eric Thomas Noe

Petitioner

vs

Ivan Krow, Warden

Respondent

Memorandum of Law

Ancillary to the Issues Raised in  
- Petition for Writ of Habeas Corpus -

Introduction

After a two day trial by jury, during which I represented myself pro'se with co-counsel, and in which there was no defence presented, on 1-18-17 I was convicted of first degree robbery, for robbing the chase bank located on Main Street in Richmond, KY; proximately, this same day, I was sentenced to twenty years imprisonment. This conviction was directly appealed to the Supreme Court of Kentucky, and was affirmed on 11-22-18- that is, the date on which the decision became final; subsequently, as my primary issues are procedural in nature, I submitted a legitimate and timely Motion to Vacate Judgment Pursuant to RCr 11.42, along with the apposite Motions for an Evidentiary Hearing and to Proceed In Forma Pauperis and for Appointment of Counsel on Appeal, wherein I presented material issues of fact which cannot be determined on the face of the record, and which, if true, justify relief. Nevertheless, this motion was merely summarily denied, some four years later, on 1-11-23, absent a due hearing, and without so much

as a reply; in fact, I have yet to receive a copy of the order of denial, despite several requests therefor. I was only able to ascertain that this motion was denied via a copy of my case history which I received on 2-17-23, i.e., 36 days after the date of entry. Even so, I directly submitted a Notice of Appeal, i.e., on 2-20-23, wherein I cited CR 73.02 (d), which allows for a 10 day extension of the original 10 day time limit to file notice of appeal due to excusable neglect, claiming excusable neglect as I did not receive a copy of the order of denial; and have yet to receive a reply thereto. Moreover, it must be noted that, according to my case history, this motion was never even properly filed (see last page of case history attached)- How does a motion which was not filed get denied? How is the denial of a motion which was not duly filed legal? Alas, finally, in the name of due diligence and equity, on 4-11-24, I submitted a Motion to Vacate Judgment Pursuant to CR 60.02 Subsection (f), wherein I raised the same issues which I am herein raising; and once again this motion was simply ignored and was summarily denied thereby; and I have yet to receive the first reply thereto.

Also, it must initially be noted that, I was completely unaware that a co-counsel option- that is, that a hybrid representation configuration option, was available to defendants in the state of Kentucky until 7-21-16, the day of my "Faretta Hearing," when the trial judge appointed the self-same attorney: Bobby Amburgey, who was originally my court appointed representation, whom in this capacity I had endeavored in vain to dismiss on the grounds of a conflict of interest, to be my co-counsel- accordingly, I directly

objected to this appointment; firstly via oral motion, and as this was in vain, subsequently via written motion, filed on 8-10-16; wherein I stated that I desired to proceed pro'se, on my own absent counsel, but that if compelled to proceed with counsel, to please replace Bobby Amburgey, as there exists an inherent conflict of interest between us- in that Bobby Amburgey has cogently demonstrated to me, on a number of occasions, that he was de facto a vassal of the prosecution. Nevertheless, this motion was simply ignored, and I was compelled to proceed as hybrid representation, against my wish and over my objection- moreover with a hostile co-counsel who thus proceeded to actively work against me, and served only to thwart my trial preparation and defence strategy!

In summa, I was unjustly convicted via a sham-trial in which I was ultimately denied the most basic constitutional right which our criminal justice system guarantees to every defendant: the right to present a defence; the manner in which this unfolded was comprehensive and cumulative, and was primarily the result of 1) prosecutorial misconduct and 2) the denial of my right to self-representation, per Faretta v California, 422 U.S. 806, 95 S.Ct. 2525 (1975). Further, an objective examination of my case will cogently reveal that this was not merely incidental, but rather was in large part by design as the product of the prosecution and my co-counsel working in concert, precisely in order to procure an unjust conviction; and thus that this fundamental constitutional violation- as it is malicious in nature and is tantamount to having no trial at all- does indeed rise to the level of a "flagrant miscarriage of justice," requiring release.

On the Denial of my Right to Present a Defence

Per both the United States Constitution, Amendments Six and Fourteen, and the Kentucky Constitution, Sections Two and Eleven, the right to present a defence, as the very ground of the constitutional right to due process of the law, is more fundamental than any rule of evidence or procedure- "The right of an accused in a criminal trial to due process is, in essence, the right to defend against the state's accusations." Chambers v Mississippi, 410 U.S. 284, 294 (1973).- As therein, above all else, a criminal defendant is guaranteed a meaningful opportunity to present a complete defence. Crane v Kentucky, 476 U.S. 683, 690 (1986).

Therefore, in essence, per Holland v Florida, 130 S.Ct. 2549, 177 L.Ed. 2d 130, 560 U.S. 631 (2010) wherein The Court concludes that "a petitioner is entitled to equitable tolling if he shows 1) that he has been pursuing his rights diligently, and 2) that some extraordinary circumstance stood in his way and prevented timely filing;" at 649 noting that, "the diligence required for equitable tolling purposes is reasonable diligence... not maximum feasible diligence-" at 653 As I have been diligently endeavoring to obtain a state remedy, and have been impeded merely by being denied access to the courts- I aver that my petition is timely. For I have been diligently endeavoring to obtain a state remedy for my issues, especially and most ardently for the patent denial of my right to self-representation, since my conviction; particularly in the form of a collateral appeal, as my primary issues are procedural in nature. However, I have been kept completely in the

dark, constrained in a state of limbo for years, concerning my post-conviction motions- as I have been unable to obtain a single reply from the state courts pertaining to any of my post-conviction motions. Most pertinently, it must be underscored that I have yet been unable to obtain a copy of the order denying my motion to vacate judgment, despite several requests therefor- most recently I submitted a "Motion Requesting a Copy of Order of Judgment" to the Madison Circuit Court Clerk on 4-11-24 pertaining to said motion, and have yet to receive a reply thereto- thus I still do not know the grounds on which my motion was denied! Moreover, most saliently, as The Court elucidates, "the Writ of Habeas Corpus plays a vital role in protecting constitutional rights... the importance of the Great Writ, the only writ explicitly protected by the Constitution... counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open;" at 649 "that often the exercise of a court's equity powers... must be made on a case by case basis... the flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct... particular instances. at 650 As the primary issue I herein raise constitutes a flagrant basic constitutional violation, federal law affirms that my petition is apposite and timely in accordance with the "equitable principles" which govern the Writ of Habeas Corpus. at 646.

### On Prosecutorial Misconduct

Firstly, the prosecution withheld key exculpatory evidence from me, the defence, in the form of police body camera video footage, of the police officers who conducted the initial warrantless search of my apartment, and also of the police officers who later executed the search warrant at my apartment- As this footage would have conclusively demonstrated the precise location of the "box-cutter" as discovered by police in my apartment, which correlates the box-cutter to the robbery, and thus substantiates the first degree robbery conviction; and there was no other photographic or video evidence depicting this produced; moreover I contend that the box-cutter was in fact not located where police allege.

Also, the prosecution withheld from me the victim in this case, Carolyn Hisle's, statement to police- This may have been accomplished by proxy via my co-counsel; as the discovery was always in his hands, and was never properly made available to me: I rarely got to inspect it; when I did however I noticed that multiple crime supplements, including the victim's statement to police, etc., were missing. This is an issue which I complained of multiple times, especially the morning of the first day of trial, when I approached the bench pretrial and moved to have the trial postponed- Hence the victim was not subpoenaed, by either the defence or the prosecution to testify. As the victim's statement speaks greatly in favor of exonerating me of the first degree robbery charge.

That is, I am essentially asserting a "Brady violation"- As pursuant to Brady v Maryland, 373 U.S. 83 (1963) the Commonwealth

and or its agents shall provide to the defence any and all exculpatory evidence or information tending in any way to negate or mitigate the guilt of the defendant. Tate v Commonwealth, No. 2008-SC-000205-MR (KY 2009).

For the due process clause of the Fourteenth Amendment affords a criminal defendant the fundamental right to a fair opportunity to present a complete defence; Crane v Kentucky, 476 U.S. 683, 690 (1986) and "it is crucial to a defendant's fundamental right to due process that he be allowed to develop and present any exculpatory evidence in his own defence, and we reject any alternative that would imperil that right." Mc Gregor v Hines, 995 S.W. 2d 384, 388 (KY 1999). Under Brady the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87, 83 Sct 1196-97. And, as our Supreme Court later recognized, the Brady doctrine has been modified so that it applies "regardless of whether or not there has been a request by the accused." Commonwealth v Bussell, 226 S.W. 3d 96, 99 (KY 2007). Moreover, the responsibility Brady and its progeny places on prosecutors is based upon the obligation of their offices. "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the governments behalf in the case, including the police." Kyles v Whitley, 514 437, 438 (1995).

Basically, in summa, "Brady concerns those cases in which the

government possesses information that the defence does not and the government's failure to disclose the information deprives the defendant of a fair trial." Bowling v Commonwealth, KY 80 S.W. 3d 405, 410 (2002). Further, it is clear that Brady places a duty upon the Commonwealth "to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police;" Taylor v Commonwealth, KY 63 S.W. 2d 151, 158 (2001) and that "the duty on the state, mandated by the due process clause, to reveal exculpatory evidence is always applicable." Key v Commonwealth, KY 633 S.W. 2d 55, 56 (1982).

Also it must be here noted that the law distinguishes two types of exculpatory evidence: that which is merely "potentially useful," and that which is "material." And per California v Trombetta, 457 U.S. 479 (1984) evidence is duly material if it both possesses an apparent exculpatory value, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. "In such cases, the destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith." Whittaker v Commonwealth, No. 2015-CA-000556-MR (KY 2016).

Concerning this case, it is clear that the foresaid police body camera video footage is appositely constitutionally material, as not only does this footage constitute key and central evidence- as my first degree robbery conviction was based on the location of the box-cutter as discovered by police in my apartment- there was no other photographic or video evidence depicting this available.

Therefore, in either case, I contend that this long tenured prosecution team was well aware of the evidentiary value of this footage; and further that therefore they knowingly and willfully withheld this evidence from me, as it is exculpatory in nature! For- as an additional point of fact which betrays the truth of the matter- the police preserved, and the prosecution presented at the suppression hearing held on 10-28-16 in this case, essentially irrelevant police body camera video footage. Thus why not rather preserve and present this patently most germane video evidence?

Wherefore, if this footage does in fact depict the box-cutter in a location other than that in which the police alleged- as indeed I assert to be the truth- than I most certainly would be exonerated of the first degree robbery charge; and thus there would be more than a reasonable probability that, had this footage been disclosed to me, the result would have been different.

Concerning the victim, Carolyn Hisle's, statement to police, I contend that this, properly considered, also constitutes duly material evidence, as the prosecution withholding it from me impeded my ability to prepare and present a defence- As precedent dictates, "a cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced." James v Commonwealth, 482 S.W. 3d 92-94 (KY1972). This includes delaying disclosure of information to prevent the defence from making informed decisions about strategy. Grant v Commonwealth, 244 S.W. 3d 39, 43 (KY 2008). Withholding evidence is prejudicial to a defendant's "substantial

rights," including the right to prepare a meaningful defence- For had this statement been properly disclosed to me, that is, at an adequate time before trial, I would have adamantly insisted on Carolyn Hisle being subpoenaed as a defence witness; adversely, as it turned out, come the first day of trial, unbeknownst to me, the victim had not been subpoenaed to testify, neither by the prosecution nor the defence. Hence the trial concluded absent the victim's testimony. And as Carolyn Hisle merely briefly stated that she was neither "threatened" nor did she see a weapon, and thus would have most assuredly testified accordingly, this statement per se may have sufficed to acquit me of the first degree robbery charge.

Further, I assert that the prosecution colluded with my co-counsel, Bobby Amburgey, in order to deprive me of this valuable defence witness; and that this is something which I can prove via an evidentiary hearing, questioning Bobby Amburgey pertaining to this matter. As, despite the fact that I declared in open court multiple times that I did not want my co-counsel involved in either negotiations or discussions with the prosecution concerning my case, in addition to making this clear to him in private- as firstly we were on hostile terms; hence my motion to dismiss Bobby Amburgey as counsel filed on 8-10-16, which went unanswered!- on the morning of trial, before the trial commenced, he approached me and admitted that he had participated in a pretrial conference with the prosecution concerning the victim's testimony- i.e., without my knowledge and against my wish- wherein he agreed with the prosecution that it would be best

to forego the victim's testimony and thus to rescind her subpoena- whereby he acted in direct opposition to my request and adverse to my defence strategy; as he knew that I was going to utilize an affirmative defence, and in this regard that I was relying on the victim's testimony: For during a pretrial hearing the trial judge instructed me to supply my co-counsel a list of the defence witnesses, if any, that I wanted to subpoena- as this was his duty- to which I directly supplied him a list containing four defence witnesses: three character witnesses, professors that I had worked with at ECU, and the victim, Carolyn Hisle... My co-counsel was utterly remiss in this duty: For as of 9am the morning of trial, he had not subpoenaed a single witness! Hence the trial ultimately concluded absent a defence!

And as our Supreme Court reprises, "the objectives underlying the right to proceed pro se may be undermined by unsolicited... participation by standby counsel..." The United States Supreme Court has thereto imposed two restrictions: "First, the pro se defendant is entitled to actual control over the case he chooses to present to the jury. This is the core of the Faretta right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the Faretta right is eroded." Allen v Commonwealth, 410 S.W. 3d 125 (KY 2013).

Thus, as my co-counsel made a tactical decision which affected the trial process and ultimately led to the deprivation of a valuable, key, defence witness, not only was this a consequence of prosecutorial misconduct, it was a violation of my right to self-representation.

In addition, most detrimentally, the prosecution egregiously and maliciously monitored the whole of my communications- my phone calls, email, and visits- from the time of my arrest until the commencement of my trial; especially as I was acting as my own attorney, this should not have been countenanced (see motion to prevent prosecution from monitoring phone calls)- As saliently this is tantamount to one attorney in a case being granted the special privilege of being able to monitor the whole of their opposing attorney's communications. This intrusion betrayed both my trial preparation and defence strategy; and led to the prosecution taking steps to actively impede me; most pertinently, this led to the prosecution colluding with my co-counsel in order to deprive me of two crucial defence witnesses, and of my brother's faithful support.

Concerning federal law- foremost, in our criminal justice system a defendant's constitutional right to a fair trial is paramount and indispensable.

"Truth, Lord Eldon said, is best discovered by powerful statements on both sides of the question. This dictum describes the unique strength of our system of criminal justice. The very

premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective..." United States v Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984).

"In a long line of cases that includes Powell v Alabama, 287, U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Johnson v Zerbst, 304 U.S. 458 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial... a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland v Washington, 466 U.S. 668, S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

Per the Sixth Amendment a defendant in a state criminal trial has an independent constitutional right of self-representation, and he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so- Conjointly, in its essence, "the Sixth Amendment includes a compact statement of the rights necessary to a full defence... Because these rights are basic to our adversary system of criminal justice, they are part of due process of law that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the states, which, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of

American justice." Faretta v California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

Wherefore, as our criminal justice system is built upon the foundation of "Truth" and the trial process revolves around the first principle of "fairness," the veracity and merit of my claim here should be affirmed without further ado- as the prodigious advantage which this intrusion yielded the prosecution is manifest!

Nevertheless, in the name of assiduity, to speak more technically as to the law, as the United States Supreme Court decrees, "once a defendant's right to counsel has attached, government intrusion into the attorney-client relationship violates the Sixth Amendment if the defendant can show that there is a realistic possibility he was prejudiced by that intrusion. Most pertinently, the law outlines four factors relevant to the determination of whether the defendant suffered injury from the intrusion: 1) Whether the government purposely intruded... 2) Whether any evidence offered at trial was obtained directly or indirectly from the intrusion; 3) Whether the prosecutor obtained any details of the defendant's trial preparation or defence strategy; 4) Whether the overheard conversations had been used in any other way to the substantial detriment of the defendant." Weatherford v Bursey, 429 U.S. 545 550-51 (1977).

Firstly, I must underscore the fact that I was in the unique position of being both the attorney and the client in my case. Therefore, the government intruding into my communications whilst I

am discussing trial preparation and defence strategy, with an assistant who is providing me with both research and investigatory information- especially after they had discovered that I am discussing such, and even more, after I had duly protested in open court against this injury, as it was indeed impeding my ability to prepare and present a defence- constitutes a gross, ultimately fatal, and base violation of due process of law; one which is patently inimical to the first principle of fundamental fairness in the trial process.

To return to the factors outlined under Weatherford v Bursey, for point of clarification and summation- Foremost, the government did purposely intrude: this fact is manifest and without question; as both the prosecution and trial court affirm; hence my motion to prevent the prosecution from monitoring my phone calls, "as I am representing myself in this case, and this is hindering my ability to prepare and present a defence." Further, and most brazenly, did the prosecution intrude, and continued to intrude, with the primary and express object of obtaining information pertaining to both my trial preparation and defence strategy; hence once again my motion to prevent the prosecution from monitoring my phone calls. For the prosecution continually implemented measures to impede me at every step, in accordance with my trial preparation and defence strategy, as discussed on the phone- In any case, the prosecution positively obtained information pertaining to both my trial preparation and defence strategy, via monitoring my phone calls whilst I was acting as my own attorney; this is most cogently evidenced by the recordings of these phone calls, which were in the possession of

the prosecution, and in which I discussed such; and thereto, in turn, the prosecution responded accordingly, in order to hinder me:

The prosecution was thereby able to ascertain that my brother was not only a potential defence witness, but even more, that he was basically an auxiliary and lieutenant for me, performing both valuable research and assisting with investigation: As a potential defence witness, he had stated to me, via the phone, that he was willing to testify as to the nature of my being in possession of a box-cutter, as he knew that I did much work as a painter on the side- and that thus I always kept a box-cutter in the closet, precisely where the police actually discovered it- as a box-cutter is an essential tool for a painter. The research/investigation that he was conducting for me was sundry and comprehensive.

Accordingly, once my right to self-representation attached, I submitted a motion to prevent the prosecution from monitoring my phone calls, as this was preventing me as a pro se defendant from preparing a defence- A hearing was held on this motion, wherein the trial judge, acknowledging the value of my brother's assistance to my defence, although he did not grant me this motion, in lieu thereof, granted me access to the law library located in the courthouse, and whilst there, contact visits with my brother; as this would afford us due privacy in order to discuss my case and prepare for trial. However, I never received the first visit; as the prosecutions response was in praxis an abuse of subpoena power- that is, the prosecution directly subpoenaed my brother to be a witness for the prosecution, on specious grounds, thereby

effectively cancelling the visits and nullifying the trial court's decree, which was fatal to my defence; hence my motion the morning of the first day of trial in which I approached the bench pretrial and moved to have the trial postponed, as I was utterly unprepared for trial...

As, succinctly, the United States Supreme Court holds "that a defendant has a constitutionally protected right to represent himself in a criminal trial... that the Confrontation Clause of the Sixth Amendment gives the accused a right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence;" Faretta v California, 422 U.S. 95 at 816 that "the compulsory process clause grants a defendant the right to offer the testimony of favorable witnesses and to compel their attendance at trial;" Washington v Texas, 388 U.S. 14, 19 (1967) appositely noting that "a prosecutor's contact with potential defence witnesses may impede the defendant's exercise of his compulsory process rights;" Chambers v Mississippi, 410 U.S. 284 (1973) and that "subpoenas may not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a disposition, hearing, or trial; moreover, concluding that "a state cannot rigidly apply otherwise valid rules if their application to a specific case would abridge the defendant's compulsory process rights." Taylor v Illinois, 434 U.S. 400 (1988).

To conclusively illustrate my assertion that this was in fact an abuse of subpoena power, and moreover, that the deprivation of my brother's valuable assistance and faithful support was accomplished via the prosecution and my co-counsel working in concert, it must be underscored that: the prosecution did in truth brazenly respond to the trial court's decree granting me contact visits with my brother by directly subpoenaing my brother to be a witness for the prosecution, on specious grounds, thereby effectively nullifying this decree; that this was accomplished absent a due hearing and without notifying either me or my brother of the cancelation; that although there was no due hearing, there was rather an illegal ex parte hearing, held on this matter, wherein my co-counsel stood in for me, without my knowledge, and without notifying me of either the hearing itself, or of the outcome; that, as my co-counsel later admitted to me, although he was thus aware that these contact visits had been cancelled days in advance of our first scheduled visit, which he himself had scheduled per the judge's order, and as he was in contact with my brother, not only did he not contact my brother to inform him of the cancelation, but rather he contacted him in order to prompt him to take a day off of work and show up at the courthouse the morning of our first scheduled visit; that both my brother and I showed up at the courthouse the morning of our first scheduled visit, duly expecting a law library contact visit per the trial court decree- only to learn then that these visits had been cancelled: I learned of the cancelation via a sheriff deputy whilst I was sitting in the law library awaiting the arrival of my brother; my brother was

stopped by a sheriff deputy in the parking lot of the courthouse who firstly issued him a subpoena to be a witness for the prosecution, and then informed him that our visit had been cancelled- Therefore, most saliently, my co-counsel led my brother into an ambush at the behest of the prosecution!

Lastly, to highlight the substance of the injustice, and speak to the heart of the issue, as Arthur v Commonwealth, 307 S.W. 2d 182 (KY 1957). reprises, "the interest of the Commonwealth in a criminal prosecution is not that it shall win a case but that justice shall be done. The decisions of this court provide abundant support of this principle. We have many times declared that there rests upon prosecuting attorneys the obligation to deal fairly with the accused and to recognize his legal rights as well as the rights of the Commonwealth, and that these public officials should see that the truth is disclosed and justice shall prevail."

For I do not understand why our criminal justice system has come to so heavily favor the prosecution over and above the defence? Is this deference given to the whim of the majority, in the name of safety above all else, above liberty even?... in American society? Where, as James Beck intimates, we believe not in the sovereignty of the state, nor in the sovereignty of the people, but rather extol and maintain the dignity of the individual; and thus exalt, *optimo jure*, the inalienable rights of Life, Liberty, and the pursuit of Happiness, as the true palladium of a Just and Free-Society The Constitution of the United States,

Project Gutenberg (2003).- Do we now apply the converse logic, which is inimical to both the spirit which underlies our Constitution and the "bedrock, axiomatic and elementary, principle whose enforcement lies at the foundation of the administration of our criminal law"- and rather hold as a fundamental value determination that it is far worse to let a guilty person go free than to convict an innocent person? In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970).

Wherefore, in essence, my right to due process of the law under the Sixth and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution was violated by the use of illegal methods by the prosecution in order to procure an unjust conviction- Most gravely, my motion to prevent the prosecution from monitoring my phone calls, on the ground that this was impeding my ability as a pro se defendant to prepare and present a defence, should have been granted in the name of the first principle of fundamental fairness in the trial process; as allowing the prosecution to monitor my phone calls whilst I was discussing trial preparation and defence strategy- which due to the cancelation of the contact visits with my brother, I had no choice but to discuss on the phone- patently advantaged the prosecution and was per se ultimately fatal to my defence.

## On the Denial of my Right to Self Representation

The other substantial issue which thus contributed most effectually to the deprivation of my fundamental constitutional right to present a defence was in praxis the denial of my right to self-representation- that is, I contend that the denial of my right to self-representation was not merely incidental, but was rather by design as the product of the prosecution and my co-counsel working in concert with the object of impeding my defence.

Other than for the reasons as intimated above: that the prosecution maliciously monitored the whole of my trial preparation communications; that my co-counsel colluded with the prosecution in order to deprive me of my brother's valuable assistance and faithful support, via standing in for me during an illegal ex parte hearing concerning the cancelation of the contact visits with my brother, wherefore he led my brother into an ambush at the behest of the prosecution in which he was issued a subpoena to be a witness for the prosecution; that he colluded with the prosecution in order to deprive me of the victim, Carolyn Hisle's, testimony, via withholding and concealing from me her statement to police- as the discovery was always in his hands and was never properly made available to me; that he stood in for me during a conference pertaining to her testifying; that he participated in both discussions and negotiations with the prosecution concerning my case, thereby exercising control of vital points of defence strategy without my knowledge, despite my objection- I was

primarily denied my right to self-representation as I was compelled to proceed in a hybrid representation configuration, that is, with a co-counsel, against my wish and over my objection. But further, not only was I compelled to proceed with a co-counsel over my objection, I was compelled to proceed with a hostile co-counsel, one which by the time my trial commenced we were not even on talking terms, as there existed an inherent conflict of interest between us, in that my co-counsel was de facto a vassal of the prosecution.

In the precedential case the Court rejected the notion that the state can compel a defendant to accept a lawyer he does not want. In the words of the Court:

"The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." Faretta v California, 422 U.S. 95 at 833.

Owing to the fact that, properly speaking, "due process of law," in the United States of America, means that there are certain fundamental principles of liberty, not defined or even enumerated in the Constitution, but having their sanction in the free and enlightened conscience of just individuals, and that no individual can be deprived of life, liberty, or property, except in conformity with these fundamental decencies of liberty.

Thus, most seminally, the primary object of the Bill of Rights is to maintain the autonomy and dignity of the individual; and indispensable to this is the exercise of individual and voluntary, free choice, in accordance with this overarching moral imperative—The Constitution of the United States, Project Gutenberg (2003) and it is in this vein that the Court continues to explain:

"To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defence. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defence ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." Faretta v California, 422 U.S. 95 at 834.

In concurrence, and in a case perhaps even more pertinent to mine, Wake v Barker, 514 S.W. 2d 692 (KY 1974) maintains that "a salient aspect of the pro se right... is directed to considerations distinct from the objective of achieving what would be the best result in the litigation from a lawyer's point of view. As the Supreme Court said in Adams v United States ex rel. McCann, supra,

317 U.S. 269, 87, 268 (1942), the 'right to dispence with a lawyer's help... rests on considerations that go to the substance of an accused's position before the law.' It is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process. An accused has a fundamental right to confront his accusers and his 'country,' to present himself and his position to the jury not merely, as a witness or through a 'mouthpiece,' but as a man on trial who elects to plead his own cause. He is not obliged to seek what counsel would record as a victory but what he sees as tantamount to condemnation or doubt rather than vindication. A defendant has the moral right to stand alone in his hour of trial. The denial of that right is not to be redeemed through the prior estimate of someone else that the practical position of the defendant will be enhanced through representation by another, or the subsequent conclusion that the defendant's practical position has not been disadvantaged... Even if the defendant will likely lose the case anyway, he has the right- as he suffers whatever consequences there may be... to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case."

Therefore, accordingly concluding "that an accused who has made a valid waiver of counsel has a right, if his waiver so indicates, to proceed to trial without counsel being in any way associated with him." at 695.

Even if my being compelled to proceed with co-counsel over my objection is to be countenanced, my being compelled to proceed, particularly with a hostile co-counsel, one that I objected to via written motion- wherein I claimed a conflict of interest, in that in my estimation he was de facto a member of the prosecution team- most certainly should not...

As I made my objection to proceeding with counsel palpably clear, not only by protesting several times in open court, but as this was in vain, more validly, via written motion, filed on 8-10-16- wherein I stated that I desired to proceed pro'se, on my own absent counsel, but that if compelled to proceed with counsel, to please replace Bobby Amburgey, as there exists an inherent conflict of interest between us- in that Bobby Amburgey had demonstrated to me on a number of occasions that he was de facto a member of the prosecution team: The fact that Bobby Amburgey had cogently demonstrated this to me, was the catalyst which prompted me to move to represent myself- as there existed no other viable option; and as I had recently graduated magna cum laude with a BA in philosophy, and thus have some experience in both rhetoric and public speaking, I concluded that I would thereby have at least semi-capable, and what is most important, genuine and interested, representation. That is, I firstly moved to represent myself precisely in order to dispence with having this, in my estimation, vassal of the prosecution attached to me as counsel- However, I was frustrated in my desire, and expectation as an American Free Citizen- who thus to my understanding has the fundamental moral

and constitutional right to stand alone in his hour of trial- and was rather compelled to proceed with this self-same vassal of the prosecution attached to me as co-counsel.

Therefore, I was essentially denied my fundamental constitutional right to self-representation as I was compelled to proceed with a hostile co-counsel- one in which there existed an inherent conflict of interest between us, in that my co-counsel was rather representing the prosecution's interest- who thus proceeded to actively work against me and served only to thwart my trial preparation and defence strategy. Furthermore, and more saliently, as i elected to represent myself in large part for a moral reason, in order to take a particular moral stand- for I had a genuine position and proper defence which I wanted to present to the jury, one which could only be duly accomplished via me standing alone, with the ability to handle my own defence- my co-counsel, especially as he was a tool of the prosecution, undermined, corrupted, and ultimately destroyed my position!

#### Conclusion

In fine, I appeal to "Truth," "Honor," and "Integrity." For if these cardinal human values are properly acknowledged, my petition will be granted; as my basic assertion- that I was convicted via a sham-trial in which I was denied my most fundamental constitutional right to present a defence- is manifest. That is, it is patently obvious that my trial was completely one-sided, in that there was no defence presented; further, that this was not

merely incidental and was due to no great fault of my own, but was rather by design as the product of the prosecution and my co-counsel working in concert: In brief, contrary to my expectation, and in most ignoble fashion, was I consequently not only deprived of my free will to make my own choice, in my hour of trial, to handle my own case, I was in esse detained, muted, and summarily convicted.

WHEREFORE, I beseech this honorable court, as a natural born citizen of the United States of America, to do both the ethically and legally apposite thing, and grant my petition for release- as I am being illegally held prisoner in the state of Kentucky in violation of the United States Constitution, Amendments Five, Six, and Fourteen, according to which I am a victim of undue summary justice.

Sincerely Submitted,

Eric Thomas Noe, Pro'se

Little Sandy Correctional Complex

505 Prison Connector

Sandy Hook, KY 41171

A handwritten signature in black ink, appearing to read 'Eric Thomas Noe', is written over a horizontal line.