

NO. 17A782

IN THE SUPREME COURT OF THE UNITED STATES

FEBRUARY 3, 2018

Mr. Glenn Sunkett-Petitioner

v.

United States of America -Respondent

PETITION FOR WRIT OF CERTIORARI

Mr. Glenn Sunkett

In Pro Per

K.V. S. P.

P. O. Box 5102

Delano Ca. 93216

QUESTION PRESENTED

A). In Petitioner's case, does the judgement from the District Court for the Northern District of California, conflict with the U.S. Supreme Court decision rendered in *Buck v. Davis*, 580 U.S. ____ (2017); when the District court denied Petitioner's federal Writ of Habeas Corpus **and** application for Certificate Of Appealability at the same time, in the same proceeding, without Petitioner ever filing a COA in the District Court?

B). If this court finds that this is in fact a due process violation, as deemed so in *Buck v. Davis*, did the District court's violation then divest the Ninth Circuit of jurisdiction to hear Petitioner's appeal, and apply the proper standard set forth in *Buck v. Davis*?

C) If this court finds that the Ninth Circuit did indeed have jurisdiction to act upon Petitioner's appeal, then, did the Ninth Circuit Court deny Petitioner's application for a COA in a manner that conflicts with the U.S. Supreme Court decision rendered in *Buck v. Davis*, when it failed to resolve the question, at the COA stage and before issuing its denial, whether jurist of reason could disagree with the District Court's resolution of Petitioner's constitutional claims, or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further?

TABLE OF CONTENTS

QUESTION PRESENTED

TABLE OF AUTHORITIES

OPINION BELOW

JURISDICTION

STATUTORY PROVISIONS INVOLVED

LIBERAL CONSTRUCTION OF PRO SE PLEADINGS

APPLICATION OF FEDERAL RULES OF CIVIL PROCEDURE

STATEMENT OF THE CASE

STATEMENT OF FACTS

ARGUMENT

REASON FOR GRANTING WRIT

CONCLUSION

APPENDIX A-F

VERIFICATION/PROOF OF SERVICE

TABLE OF AUTHORITIES

Cases

Miller-El, 537 U.S. at 336-337).

Marshall v. Jerrico, Inc., 100 S.Ct. 1610,1613 (1980).

Buck v. Davis, 580 U.S. ____ (2017) (slip opinion)

Erickson v. Pardus, 551 U.S. 89, 94 (2007).

Woodford v. Garceau, 538 U.S. 202,208 (2003)

Mayle v. Felix, 125 S.Ct. 2562, 2566 (2005)

Cullen v. Pin holster, 131 S.Ct. 1388,1402, fn. 12 (2011)

Taylor v. Maddox, 366 f. 3d 992, 999 (9th Cir. 2004)

Gonzales v. Thaler, 132 S.Ct. 641 (2012)

Rios v. Garcia, 390 f.3d 1082, 1086 (9th Cir. 2004)

Ross v. Blake, 578 U.S. ____ (2016)

Earp v. Stokes, 423 f.3d 1024, 1032 (Ninth Cir. 2005)

Phelps v. Alameida, 569 f.3d 1120, 1124 (9th Cir. 2009)

Mayle v. Felix, 125 S.Ct. 2562, 2569 (2005)

Cooks v. Solis, 606 f.3d 1206, 1212 (9th Cir. 2010).

Statutes and Rules

28 U.S.C. § 1254(1).

28 U.S.C. § 2243

28 U.S.C. § 2253

28 U.S.C. § 2254

5th Amendment

Federal Rules of Civil Procedure

IN THE SUPREME COURT OF THE UNITED STATES

FEBRUARY 3, 2018

Mr. Glenn Sunkett-Petitioner

v.

The United States of America-Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mr. Glenn Sunkett, respectfully prays that a writ of certiorari issue to review the judgement(s) of the United States Court of Appeal for the Ninth Circuit, in case no. 16-17320, entered August 18, 2017 (Certificate Of Appealability), and November 8, 2016 (Motion for Reconsideration).

OPINION BELOW

On August 18, 2017, a panel of the Circuit Court of Appeals entered its opinion affirming the judgement of the United States District Court for the Northern District of California. The court ruling is attached herein.

JURISDICTION

The Court of Appeals entered its judgement denying a COA on August 18, 2017, and a Motion for Reconsideration on November 8, 2017. Jurisdiction of this court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. 28 U.S.C. § 2243.

"Federal courts are authorized under 28 U.S.C § 2243, to dispose of habeas corpus matters "as [law] and [justice] require'." *Id.*

B. 28 U.S.C § 2253

This United States Supreme Court has interpreted the congressional intent of 28 U.S.C § 2253 to mean that "A COA determination should be made in a 'separate proceeding' [distinct] from a decision on the merits of a Petitioner's claim." (see *Miller-El*, 537 U.S. at 336-337).

C. 28 U.S.C § 2254

Under this section, a Petitioner must show that he is in state custody, and his continued detention violates his Fifth Amendment right to due process to a fair and just court proceeding. Petitioner must also show that the state court of appeal decision is "contrary to," or an unreasonable application of "clearly established" "Supreme Court precedent."

D. 5th AMENDMENT

The due process clause in our constitution entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudication proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. (*Marshall v. Jerrico, Inc.*, 100 S.Ct. 1610,1613 (1980).

E. *BUCK v. DAVIS*, 580 U.S. ____ (2017); REITERATING *MILLER-EL v. COCKRELL*,

537 U.S. 322 (2003).

On February 22, 2017, in the case *Buck v. Davis*, 580 U.S. ____ (2017), the United States Supreme Court, reiterated and instructed the correct and proper standard for a federal court of appeals and/or District Court to examine a state prisoner's Certificate of Appealability. In *Buck*, the high court held:

A state prisoner who's petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law require that he first obtain a COA from a circuit justice or judge.

Buck v. Davis, 580 U.S. ____ (2017) (slip op., at p. 12) (citing 28 U.S.C. § 2253 (c) (1)). (Emphasis added).

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* (citing 28 U.S.C. § 2253 (c) (2)). Until the prisoner secures a COA, the court of appeals [may not] rule on the merits of his case. *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). The COA inquiry, we have emphasized, is [not coextensive] with a merits analysis. (See *Buck v. Davis*, slip op. at p. 13).

At the COA stage, the only question is whether the applicant has shown that "jurist of reason could disagree with the court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. at 327). (Emphasis added).

This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Id.* "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at pp. 336-337).

LIBERAL CONSTRUCTION OF PRO SE PLEADINGS

It's been long established that federal courts hold pro se pleadings to less stringent standards than formal pleadings drafted by a licensed attorney, and liberally construe such pleadings when determining whether they state a cause of action. (e.g. see *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

APPLICATION OF FEDERAL RULES OF CIVIL PROCEDURE

Federal rules of civil procedure apply to all habeas corpus proceedings. The civil rules "govern the procedure in the United States District Courts in all suits of civil nature." Rule 1. This includes "proceedings for... habeas corpus," Rule 81 (2) (2), but only "to the extent that the practice in such proceedings is not set forth in statutes of the United States [or] the rules governing section 2254 cases [habeas rules]," civil rule (2) (2); see also habeas rule II. Thus, "[t]he federal rules of civil procedure apply in the context of habeas suits to the extent that

they are not inconsistent with habeas corpus rules." (*Woodford v. Garceau*, 538 U.S. 202,208 (2003); *Mayle v. Felix*, 125 S.Ct. 2562, 2566 (2005) (In ordinary civil proceedings, the governing rule, rule 8 of the federal rules of civil procedure, requires only "a short and plain statement of the claim showing that the pleaded is entitled to relief." [Omitted] Rule 2 (c) of the rules governing habeas corpus requires a more detailed statement. The habeas rule instructs the petitioner to "specify all the grounds for relief available to [him] "and to "state the facts supporting each ground." By statute, congress provided that a habeas petition "may be amended... as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242.).

STATEMENT OF THE CASE

Petitioner was tried on multiple charges stemming from a robbery that occurred in Mendocino County, California. (Case no. SCUJ-CRCR-09-0089877-002). The central issue of the People's case was eyewitness identification, made by two Caucasian witnesses. The Petitioner is African-American. The Petitioner's defense against the identifications at trial was a scientifically based one, necessary to show the jury commonality in mistaken identification, and the significant impact the erroneous, tainted, and suggestive identification process employed on both witnesses by law enforcement, combined with complicating factors experienced by both witnesses such as cross-race issues, fear, stress, weapons focus, and poor lighting at the time, as well as their prior conflicting descriptions of the perpetrator, and their own racially biased testimony, has in evaluating the 'certainty' of the eyewitness identifications.

The Defense requested, by way of a 402 hearing, to introduce expert evidence on cross-race eyewitness identification to explain to the jury how these specific psychological factors, all on the record in this case, have a significant impact on a witness's memory, perception, and certainty in what they've experienced before and after the incident. (5RT 1084-1089).

The trial court denied the Defense request to introduce expert testimony due to the public defender making the request 'late' in trial (5RT 1090). On June 30, 2009, Petitioner was found guilty of all charges and allegations. After the trial concluded, the trial court acknowledged that the identification procedure employed by law enforcement was "highly suggestive." (7RT 1756).

Petitioner filed several Marsden Motions which were heard on September 30, 2009, October 23, 2009, January 8, 2010, January 22, 2010, and February 24, 2010 claiming ineffective assistance of counsel; that counsel failed to investigate and retain a eyewitness expert for trial, failed to investigate and call critical alibi witnesses, failed to investigate and introduce exculpatory evidence indicating Petitioner's innocence, and a variety of other IAC questions. All motions were denied.

Petitioner then raised these same IAC claims, and several due process issues at his Motion for New Trial hearing. Public Defender, Ms. Lynda Thompson provided testimony at this hearing and admitted to many of the claims made against her which were pertinent to Petitioner's IAC claims. (7RT 1639, 1640, 1644-46, 1649-50, 1662,-66, 1671-74). Lead investigator for the defense, Mr. William Kidd, also testified at this hearing and stated that he recommended the Public Defender investigate an eyewitness identification expert for trial evidence six months prior to the trial date. (7RT 1612-13). The trial court denied this motion on October 15, 2010 and sentenced Petitioner to 63 years in California state prison.

Petitioner filed a timely state habeas petition and Opening brief in the First Appellate District Court of Appeals. (Case no. A130086) Petitioner raised these same IAC and due process issues (as well as several others) to this state appellate court as well. Most significant to this current federal writ, Petitioner claimed three things:

- 1). The Public Defender failed to investigate and retain an eyewitness identification expert at trial for evidence against the central issue of the People's case, and to properly educate the jury, and give credibility to the Defense's scientifically based facts and studies.
- 2). The Trial Court denied the Petitioner the right to present a complete defense against the central issue of the People's case, when it denied Petitioner his constitutional right to present expert testimony in his defense at trial due to the Public Defender's "late" request/error.
- 3). The Public Defender's cumulative errors and/or deficiencies such as
 - a) failing to investigate and retain expert witness, (b) failing to investigate alibi witnesses provided her before trial, (c) failing to competently establish an alibi, (d) failing to present readily available exculpatory evidence; and (e) failing to meet and confer with Petitioner in a manner necessary to elicit all matters of defense, significantly impacted the outcome of Petitioner's trial.

The Appeals court denied the direct appeal and the habeas corpus inside the same Opinion on October 25, 2012.

On October 25, 2012, Petitioner promptly filed a Petition for Review in the California Supreme Court. On January 3, 2013, the court summarily denied the petition.

Petitioner filed a writ of habeas corpus in pro-per in the U.S. District Court Northern District of California on June 2, 2015. (Case no. 3:14-cv-00069-RS). Petitioner raised the same IAC and due process claims he'd exhausted in the state court. In this petition, Petitioner also claimed that the State Appellate court's decision was concluded on its own errors in trial facts, and the court made several "unreasonable determinations of facts, which it relied on significantly in its resolve (and ultimate denial) of whether the trial court's denial of eyewitness expert testimony at trial was just, and not prejudicial to the defense. On December 6, 2016 the District Court--without ever resolving the errors and unreasonable determination of facts shown to be made by the lower court--denied the petition and entered a judgment against the petitioner. **(See Appendix A; District Court Judgement)**. In the same order, the District Court denied a certificate of appealability on all constitutional claims; without a COA ever being filed in the court. **(See Appendix B; page. 29 of the District Court's Order denying petition for writ of habeas corpus an COA)**.

On December 16, 2016, Petitioner filed a timely notice of appeal. On December 30, 2016, Petitioner filed a timely motion for reconsideration requesting that the court review petitioner's constitutional claims, and to consider and correct the errors the State Appellate Court made in the facts that held significant influence in its Opinion, as well as in the federal District Court Opinion. (Dist. Ct. Doc. No. 30). On May 3, 2017, the District Court issued an order denying Petitioner's motion for reconsideration (Dist. Cf. Doc. No. 31).

On February 10, 2017, Petitioner filed his Application for a Certificate of Appealability in the Ninth Circuit Court. (Case no. 16-17320) (9th Cir. Doc. No. 4). Petitioner brought only the 3 issues listed above to the court, which specifically and competently details violation(s) of Petitioner's constitutional right to due process and a fair court proceeding. Petitioner also claimed and showed that the lower courts rulings were made in error, and decided, on an unreasonable determination of the facts directly related to its resolve of whether the exclusion of expert testimony was just and non-prejudicial to the Petitioner at trial.

On August 18, 2017, the court denied Petitioner's Application for a COA without review of the merits, or resolving any of the errors in the facts--Petitioner proved by the trial record--made by the lower courts. **(See Appendix C; Ninth Circuit Order)**. On September 14, 2017, Petitioner filed a motion for reconsideration (9th Cir. Doc. No. 7); reiterating the constitutional violations and prejudicial errors that occurred and still exist and stand uncorrected inside the lower courts opinions. On November 8, 2017, the court denied the motion for reconsideration without review of the merits. **(See Appendix D; Ninth Circuit Order)**. For that reason, no mandate was issued.

STATEMENT OF FACTS

In support of this instant motion to vacate the Ninth Circuit Court's judgement, and in order to prevent an erroneous ruling from working an injustice, Petitioner respectfully adopts, incorporates, reaffirms, and realleges all facts and information set forth in Petitioner's application for Certificate Of Appealability, and Motion For Reconsideration, as though fully

set forth herein. (See **Appendix E; Petition for COA in the Ninth Circuit; see also Appendix F; Motion for Reconsideration in the Ninth Circuit.**)

ARGUMENT

The District Court Opinion was obviously adopted in large part from the State Appellate Courts Opinion because its decision also used the same errors in the facts, first introduced by the State Appellate Court, to deny Petitioner relief, despite Petitioner's clear presentation of a prima facie case for relief, and substantial showing of error, and the denial of constitutional rights under 28 U.S.C § 2253 (c) (2). In its Order, the District court denied Petitioner's federal writ of habeas corpus on the merits and an issuance of a certificate of appealability at the same time, in the same proceeding. (See **Appendix B**). The court's error constituted an "unreasonable determination of facts" under the provisions of 18 U.S.C. § 2254(d) (2), and undoubtedly violated the Supreme Court decision rendered in *Buck v. Davis*.

Then, the Ninth Circuit clearly violated *Buck v. Davis* when it reviewed, then denied, Petitioner's COA erroneously and prejudicially by failing to first resolve the question of whether jurists of reason could disagree with the District Court's resolution of Petitioner's constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. (See **Appendix C**).

To show error, and the denial of constitutional rights, Petitioner supported all arguments and constitutional claims with reliable material, Reporter's transcripts, trial evidence, and case records that were all generated and presented in the state court proceedings. (See *Cullen v. Pinholster*, 131 S.Ct. 1388,1402, fn. 12 (2011); see also *Taylor v. Maddox*, 366 f. 3d 992, 999 (9th Cir. 2004) (A federal court may not "second-guess" the state court's fact-finding process unless, on "review of the state court record," it determines that the state court was not merely wrong, but actually unreasonable.).

Buck v. Davis, reiterated and instructed the correct and proper standard for a federal court of appeals and/or a district court to examine a state prisoner's Certificate of Appealability. This high court held:

"A state prisoner who's petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge." *Buck v. Davis*, 580 U.S. ____ (2017) (slip op., at p. 12) (citing 28 U.S.C. § 2253 (c) (1)).

"A COA determination should be made in a 'separate proceeding,' [distinct] from a decision on the merits of a petitioner's claim." (*Miller-El v. Cockrell*, 537 U.S.

322, 336-337 (2003).

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* (citing 28 U.S.C. § 2253 (c) (2)). Until the prisoner secures a COA, the court of appeals [may not] rule on the merits of his case. *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). The COA inquiry, we have emphasized, is [not coextensive] with a merits analysis. (See *Buck v. Davis*, slip op. at p. 13).

At the COA stage, the only question is whether the applicant has shown that "jurist of reason could disagree with the court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (quoting *Miller v. Cockrell*, 537 U.S. at 327).

This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Id.* "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at pp. 336-337).

Even defects in the COA itself do not deprive a court of appeal of jurisdiction over the appeal. (See *Gonzales v. Thaler*, 132 S.Ct. 641 (2012)).

The District Court is enforcing a local rule, where it is deciding federal habeas corpus petitions on the merits, and automatically denying a COA, without a COA actually being filed in its court. Thereby, the District Court deprived Petitioner of the ability to make a preliminary showing that his claims are debatable. *Buck and Miller-El* flatly prohibit such a departure from the procedure prescribed by 28 U.S.C. § 2253. (*Buck*, slip op. at p. 14; *Miller-El*, at pp. 336-337; see also *Rios v. Garcia*, 390 f.3d 1082, 1086 (9th Cir. 2004) (reversing judgment granting relief and declining, for "lack of COA," to address ground raised by prisoner to save judgment).

The Ninth Circuit Court is simply not abiding by the provisions set forth by this Supreme Court in *Buck v. Davis*, in regard to what the proper standard is when reviewing a petitioner's application for a COA. The court has not given any indication in its order that it followed the proper standard according to *Buck v. Davis* or *Miller-El*, in its review of Petitioner's COA, or his Motion for Reconsideration. **(See Appendix C & D).**

This prejudicial error, justifies the grant for this court to vacate one or both of the California Northern District Court, and The Ninth Circuit Courts' final judgements.

REASONS FOR GRANTING THE WRIT

Both the District Court and the Ninth Circuit Court violated Petitioner's Fifth Amendment right to due process when both courts judgements conflict with this Supreme Court's decision rendered in *Buck v. Davis* 580 U.S. ____ (2017), regarding the proper standard for considering COA relief. Simply put, this United States Supreme Court has interpreted the congressional intent of 28 U.S.C. § 2253, to mean:

"A COA determination should be made in a 'separate proceeding' [distinct] from a decision on the merits of a petitioner's claim." (*Miller-El*, 537 U.S. at 336-337; *Buck*, 580 U.S. ____ (slip op., at p. 13).

Notably, the U.S. Supreme Court also provided this standard for lower courts to follow when evaluating whether to grant a request for a COA as well.

It is a undisputable fact that the District Court's December 6, 2016 order is evidence that the lower court denied federal habeas relief on the merits and a COA (without petitioner filing an actual COA in its court), in one and the same proceeding, which clearly conflicts with 28 U.S.C. § 2243, § 2253, § 2254, *Miller-El v. Cockrell*, and *Buck v. Davis*. The court's ruling caused Petitioner to suffer too heavy a burden and prejudice. (e.g. see *Buck*, slip op. at p. 14) (When a reviewing court... inverts the statutory order of operations and "first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the petitioner at the COA stage) (citing *Miller-El*, 537 U.S. at 336-337). *Miller-El* [flatly] prohibits such a departure from the procedure prescribed by 28 U.S.C. § 2253. *Id.* (e.g. see also *Ross v. Blake*, 578 U.S. ____ (2016) ("We are interpreting and applying" not a judge-made doctrine but a "statutory requirement," and therefore must honor congress's choice.) (Citation).

Next, the Ninth Circuit Order rendered on August 18, 2017, indisputably shows that the Ninth Circuit did not consider and apply the standard for granting COA; a standard of which this Supreme Court established in *Miller-El*, and re-enforced in *Buck v. Davis*. (**See Appendix C**).

In order to prevent the District Court's December 6, 2016, and Ninth Circuit Court's August 18, 2017 erroneous rulings from working an injustice, a grant for recall of the court(s) final order and a scheduled evidentiary hearing is necessary and justified. (e.g. see *Earp v. Stokes*, 423 f.3d 1024, 1032 (Ninth Cir. 2005) ([W]here the petitioner establishes a colorable claim for relief and has never been afforded a state or federal hearing on this claim, we must remand to the District Court for an evidentiary hearing.); *Phelps v. Alameida*, 569 f.3d 1120, 1124 (9th Cir. 2009) (Here, because the District Court incorrectly applied a per se rule to reject Phelps' motion for reconsideration rather than evaluating the specific circumstances of Phelps' case, and because we conclude that the extraordinary circumstances of this case merit relief under fed.r.civ.p. 60(b) (6), we reverse the denial of Phelps' motion for reconsideration and remand for an evaluation of the merits of his habeas petition.).

Petitioner humbly asserts, that he set forth in his habeas Corpus, COA, and Motion for Reconsideration (9th Cir. Doc. No. 7), he provided plain and detailed claims for relief, which cogently "made a substantial showing of a denial of constitutional rights," under 28 U.S.C. § 2253 (c) (2), and strongly argued that "jurist of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." Petitioner now request for this Supreme court, or instruct either lower court to, conduct a de novo determination with respect to all legal claims presented in Petitioner's COA and/or Motion for Reconsideration, according to the standards established in *Buck*, and *Miller-El* (e.g. see *Buck*, 580 U.S. ____ 2017 (slip op. at p. 14) (that a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable). *Id.*, at slip op., p. 15 ("[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the petitioner will not prevail.").

Petitioner also asserts that the state appellate court's decision in determining whether the Petitioner had a constitutional right to present a complete defense, and introduce expert testimony at trial against the central issue of the People's case, was concluded on its own error in trial facts and unreasonable determinations of fact. The Federal District then failed to address and correct the lower court errors, and proceeded to use the same errors and unreasonable determinations of facts in their own Opinion in deciding the denial of the eyewitness expert issue and the IAC issue. The Ninth Circuit had an opportunity to correct these errors but failed to even address the error, and failed to recognize and award relief for a legitimate violation of Petitioner's due process rights.

As a direct result of the District Court's December 16, 2016, and Ninth Circuit's August 18 2017, prejudicial judgements denying a COA in a manner that conflicts with 28 U.S.C. § 2253, § 2254, *Buck v. Davis*, and *Miller-El*, petitioner is entitled to an evidentiary hearing and this court should remand this case back to the Ninth Circuit to hold such a hearing. In the alternative, at least, petitioner should be granted leave to file an amended motion for reconsideration in the Ninth Circuit, in order to detail all errors and unreasonable determination of facts made by the State Appellate Court and the federal district court, and detail a substantial denial of several constitutional rights, that entitle Petitioner to federal habeas relief. (See *Mayle v. Felix*, 125 S.Ct. 2562, 2569 (2005) (The petitioner seeks to amend his habeas corpus petition... under rule 15 of the federal rules of civil procedure, which applies to habeas corpus petitions, as well as other pleadings.).

CONCLUSION

In light of the inconsistency with the Northern District Court and Ninth Circuit Courts' approach to issuing a COA, compared to other District's and Circuit's around the United States, Petitioner's petition for certiorari should be granted to secure and maintain uniformity. Further, certiorari should be granted to correct the inconsistencies of the lower courts

judgement compared with the United States Supreme Court analysis and decision rendered in *Buck*.

Wherefore, Petitioner respectfully request for this Supreme court to grant the following relief:

- 1). Grant this instant motion in full, under 28 U.S.C. § 2243, in the interest of justice.
- 2). Determine whether the District Court and/or Ninth Circuit Judgements conflict with 28 U.S.C. § 2253, *Buck, and Miller-El*, and violated Petitioner's constitutional right to due process and a fair proceeding.
- 3). Correct all issues of procedural and prejudicial error made by the state courts, the federal District Court, and the Ninth Circuit Court.
- 4). Conduct a De novo determination in this court, or instruct the lower court to do so, with respect to Petitioner's COA and motion for reconsideration; and ultimately issue a COA sua sponte, according to *Cooks v. Solis*, 606 f.3d 1206, 1212 (9th Cir. 2010). Alternatively, grant leave to file an amended motion for reconsideration, under fed.r.civ.p., rule 15, to be heard by an en banc court or the merit panel.
- 6). Grant an evidentiary hearing, with respect to all constitutional claims presented in Petitioner's COA and motion for reconsideration (9th Cir. Doc. No. 7).
- 7). Any other, and further relief, or decision making process, I pray this Supreme court deem fair and just.

I declare under penalty of perjury that the foregoing is true and correct, except as for those matters stated upon information and belief, and as for those matters I believe them to be true.

Respectfully submitted,

February 3, 2018.

Mr. Glenn S. Sunkett

AF-1727

Petitioner in pro-per