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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

JAMES GLENN BARLOW,)	CASE NO. _____
)	
Petitioner,)	
)	PETITION UNDER 28 U.S.C. § 2241
VS.)	FOR A WRIT OF HABEAS CORPUS
)	
TAUESE VA'AOMALA SUNIA,)	
Warden of the American Samoa)	
Territorial Correctional Facility)	
Department of Public Safety)	
American Samoa Government)	
)	
SOLIALI'I FALEPO)	
Hawai'i Office Director and)	
Hawai'i Liaison Officer)	
American Samoa Government)	
1427 Dillingham Blvd., Suite 210)	
Honolulu, Hawai'i)	
)	
Respondents)	

NOW COMES JAMES GLENN BARLOW and petitions this Court for a writ of *habeas corpus* to remedy his unlawful detention by Respondents, and in support hereof shows as follows:¹

1. Custody. Petitioner is currently incarcerated in the Territorial Correctional Facility in the Village of Tafuna, on the Island of Tutuila, in the United States Territory of

American Samoa. Petitioner, who is now in his seventies, has been held at this facility for more than six years. Petitioner is under the direct custody and control of the Respondent and his agents.

2. Prior Proceedings. Petitioner's incarceration is the result of a conviction and sentence imposed by the High Court of American Samoa, a United States court, which is located in the Village of Pago Pago on the Island of Tutuila in the United States Territory of American Samoa.²

(a) Trial Proceedings. Petitioner's trial occurred on June 24-26, 2014. The case was entitled *American Samoa Government v. James Glenn Barlow* (HCCR No. 26-2012). The case was tried before the Honorable F. Michael Kruse, Chief Justice of the High Court of American Samoa.³ On July 15, 2014, Chief Justice Kruse issued an order convicting petitioner of seventeen of nineteen charged violations of territorial criminal statutes. Petitioner was convicted of (1) two counts of sodomy with a minor, (2) two counts of deviate sexual assault in the first degree with a minor, (3) two counts of sexual abuse in the first degree with a minor, (4) two counts of furnishing pornographic materials to a minor, (5) three counts of aiding a minor to possess or consume alcohol, (6) three counts of endangering the welfare of a minor, (7) Driving While Under the Influence of Alcohol, and (8) Careless Driving. In January of 2015, the Chief Justice imposed a sentence totaling 24 years in prison. Copies of the Amended Criminal Complaint and the Judgment of Conviction and Sentence are attached as Exhibits "A" and "B".

(b) Direct Appellate Proceedings. In a timely fashion and in accordance with available procedures, Petitioner directly appealed his conviction to the Appellate Division of the High Court of American Samoa. By its decision dated November 1, 2017, the panel affirmed Petitioner's conviction and sentence. (HCAP No. 02-15). Petitioner's Motion for Rehearing was

denied on January 4, 2018. Copies of the Appellate Division decisions are attached as Exhibits “C” and “D”. Copies of petitioner’s appellate brief and motion for rehearing are attached as Exhibits “E” and “F”.

(c) Other Proceedings. There have been no further appeals and petitioner has filed no other petitions, applications or motions addressing the issues raised in this petition challenging his conviction and sentence. Petitioner has, however, filed a civil action in the High Court of American Samoa against the American Samoa Government asserting claims for negligence, negligent infliction of emotional distress and intentional infliction of emotional distress due to the Government’s failure to timely respond to petitioner’s discovery requests in his criminal case, its failure to protect petitioner from brutal assaults by other inmates at the correctional facility, and its failure to provide him with adequate medical attention for injuries he received from the attacks upon him at the prison. This case does not affect the finality of petitioner’s conviction and sentence in his criminal case. In it the petitioner seeks monetary damages only, in the amount of \$2,000,000.00. This lawsuit does not challenge Glenn Barlow’s conviction. The case, entitled *James Glenn Barlow v. American Samoa Government* (Case No. HCCA-010-2015), is assigned to the Honorable Lyle L. Richmond, Associate Justice of the High Court of American Samoa, and is pending at this time. A stamped, filed copy of the complaint is attached as Exhibit “G”.

3. Jurisdiction. This Court has jurisdiction under [28 U.S.C. §2241\(c\)\(1\) and \(3\)](#); [Art. I, § 9](#), cl. 2 of the United States Constitution (Suspension Clause) and pursuant to [5 U.S.C. § 702](#), and the All Writs Act, [28 U.S.C. § 1651](#).

4. The Parties.

(a) The Petitioner. The petitioner, JAMES GLENN BARLOW, a natural born citizen of the United States, is currently incarcerated in the American Samoa Territorial Correctional Facility in the Village of Tafuna on the Island of Tutuila in the United States Territory of American Samoa.⁴

(b) The Respondents.

(i) TAUERE VA'AOMALA SUNIA, is the Warden of the American Samoa Territorial Correctional Facility. Respondent Sunia is Mr. Barlow's immediate custodian. Warden Sunia is an employee of the American Samoa Government (ASG). As the warden of the institution where petitioner is imprisoned Mr. Sunia is the proper respondent in this habeas corpus action. *Rumsfield v. Padilla*, 542 U.S. 426, 439 (2004); *Mujahid v. Daniels*, 413 F.3d 991, 994 (9th Cir. 2005); *Day v. Trump*, 860 F.3d 686, 689 (DC Cir. 2017).

(ii) SOLIALI'I FALEPO is an agent of Respondent Sunia and the ASG. He is the ASG Hawai'i Office Director and ASG's liaison for the State of Hawai'i. At all times relevant hereto both respondents were acting within their scope of employment as duly authorized agents of the ASG. ASG and the respondents maintain an office and transact business at 1427 Dillingham Boulevard, Suite No. 210, Honolulu, Hawai'i, and may be served with process at this address. (See listing on the web site of the ASG at <https://www.americansamoa.gov/asg-agencies-a-to-z> (last visited 10/1/18 at 8:14 P.M.) and the governor's page at <https://www.americansamoa.gov/office-of-the-governor> (last visited 10/3/18 at 9:29 P.M.)).

5. Venue. The District of Hawaii is the proper venue for this action because it is the site of the federal district court nearest to American Samoa and the one with the most immediate

connection to the named custodian. *United States v. Kil Soo Lee*, 472 F.3d 638, 640 (9th Cir. 2006); *Rumsfield v. Padilla*, 542 U.S. 426, 452 (2004) (Kennedy, J. concurring).

This Court may exercise general jurisdiction over this case and personal jurisdiction over the respondents because this case involves a Federal Claim which arises under federal law, the respondents are not subject to the jurisdiction in any state's courts of general jurisdiction and this court's exercise of jurisdiction is consistent with the United States Constitution and laws. [FRCP Rule 4\(k\)\(2\)\(a\) & \(b\)](#).

Respondents are subject to the jurisdiction of this court by virtue of the transaction of business within this state and by the ownership, use, or possession of real estate situated in this state. See [HRS §634-35\(a\)\(1\) & \(3\)](#); [FRCP Rule 4\(k\)\(1\)\(a\)](#). Respondents regularly transact business in the State of Hawai'i and, as noted, maintain an office in Honolulu.

6. Grounds for the Petition. Petitioner is entitled to *habeas* relief because he is being held under color of the authority of the United States and in violation of the Constitution and laws of the United States within the meaning of [28 U.S.C. §2241\(c\)\(1\) and \(3\)](#). The process and proceedings afforded petitioner in the Territory of American Samoa were in violation of petitioner's rights under the United States Constitution and contrary to clear constitutional directives announced by the United States Supreme Court and United States statutes. The grounds for this petition are more specifically as follows:

(a) GROUND ONE: Petitioner was denied due process because the prosecution wrongfully failed to disclose critical exculpatory evidence including prior inconsistent statements by the alleged victims and juvenile court dispositional agreements made between the government and the alleged victims.

Supporting Facts: Despite repeated requests by the defense, the government failed to disclose exculpatory evidence to the defense, including prior inconsistent statements by the alleged victims and juvenile court dispositional agreements between the government and the alleged victims. The trial court failed to require the government to do so. The court also improperly restricted the defense in its cross examination and denied it access to critical documents it could have used in cross examination.

These actions (1) rendered petitioner's trial fundamentally unfair denying him due process within the meaning of the 5th Amendment to the United States Constitution, (2) denied petitioner his right to meaningfully confront the evidence against him guaranteed by the 6th Amendment to the United States Constitution, and (3) abridged petitioner's right to the effective assistance of counsel guaranteed by the 6th Amendment to the United States Constitution.

Supporting Documentation: Transcript excerpts and documents from the record in support of this ground are attached as Exhibits "N", "O", "P", "R", "S", and "Q".

(b) GROUND TWO. Petitioner's conviction below must be reversed because he was denied his right to a trial by jury guaranteed to him by the 6th Amendment to the United States Constitution and there was no valid waiver thereof.

Supporting Facts: The record reflects petitioner was not afforded a trial by jury. The record does not reflect Petitioner at any time knowingly, voluntarily and intelligently waived his right to a trial by jury. The petitioner, in fact, did not at any time knowingly, voluntarily and intelligently waive his right to a trial by jury. Petitioner was never advised that he had a right to a trial by jury of 6 persons, that he and his lawyer could participate in the jury selection process, that the jury's verdict must be unanimous or that the court alone would determine guilt and impose sentence if petitioner waived his right to a trial by jury. Petitioner was erroneously

informed by his lawyer that he should waive his right to a trial by jury because any appeal would be “easier” if he waived a jury trial. He was also told he could appeal to a panel composed of off-island federal judges if he waived his right to a trial by jury. Instead, he was given an appellate panel composed of local judges whose appointment created an impermissible appearance of impropriety and required their recusal.

Supporting Documentation: High Court Appellate Division decisions attached as Exhibits “C” and “D” showing the appellate panel was composed only of local jurists; Letter from Steven H. Watson, Legal Counsel to the Governor of American Samoa, to Mr. James D. Frye, dated September 2, 2015, promising that Mr. Barlow’s appeal would “be heard *by Judges who are brought in from the United States for the purpose of hearing appeals from decisions of the High Court of American Samoa ... generally U.S. Federal Trial Court or Appellate Court Judges*” (emphasis supplied) attached as Exhibit “H”. Exhibits “I”, “J”, “K”, “L” and “V” are also attached in support of this ground. The facts for this ground will be further established by discovery, stipulation, and evidentiary hearing.

(c) GROUND THREE: Petitioner was denied his 6th Amendment right to effective assistance of counsel because his trial and appellate counsel failed to object at trial and to raise in his direct appeal the denial of petitioner’s right to trial by jury.

Supporting Facts: Petitioner’s trial and appellate counsel were fully aware of the facts supporting ground number two at all relevant times. The lack of a meaningful waiver in the record is apparent and demanded inquiry. As a long-time member of the American Samoa bar, appellate counsel was intimately familiar with all of the judges and attorneys involved in this case. The failure to raise the jury trial denial ground constituted *per se* ineffective assistance of trial and appellate counsel.

Supporting Documentation: Petitioner's and his attorney's filings on the waiver of jury trial (Exhibits "I" and "J"); High Court Appellate Division decisions dated November 1, 2017, and January 4, 2018 (Exhibits "C" and "D"); Job vacancy announcement for position of Associate Justice of the High Court of American Samoa. (Exhibit "T"); Affidavits of petitioner and Mark Frederick Ude (Exhibits "L" and "V"). The facts for this ground will be further established by discovery, stipulation, and evidentiary hearing.

(d) GROUND FOUR: The petitioner was denied his right to a speedy trial guaranteed by the 6th Amendment to the United States Constitution

Supporting Facts: Petitioner was arrested on March 16, 2012. His trial did not occur until more than two years and two months later while petitioner languished in jail. The delay was patently unreasonable. Petitioner did not cause the delay or acquiesce to it. The delay prejudiced the petitioner in the presentation of his defense. The record shows witnesses' memories faded and critical information became unavailable.

Supporting Documentation. Transcript excerpts and documents from the record in support of this ground are attached as Exhibits "K".

7. Exhaustion of Available Remedies. The territory of American Samoa is not a sovereign distinct from the United States. Because of the composition of his appellate panel the territorial appellate process afforded petitioner was illusionary and futile. Accordingly, there is no exhaustion requirement as to the claims raised in this petition.

Even assuming that there is an exhaustion requirement, petitioner has exhausted all available administrative or judicial remedies relating to the grounds in this petition. The issues contained in grounds one and four were fairly presented to the Trial and Appellate Divisions of

the High Court of American Samoa in his trial and direct appeal. Petitioner's conviction and sentence are now final.

Because the grounds of this petition involve issues affecting fundamental fairness and unreliability in the trial process they must be viewed as structural errors. A structural error is one which is a violation of a basic protection without which a criminal trial cannot reliably serve its function.

Even assuming *arguendo* ground two was required to have been raised below the requirement is excused because of the ineffective assistance of trial and appellate counsel in failing to raise it at trial and in the direct appeal as alleged in ground three. Ineffective assistance of counsel claims are not required to be raised in a direct appeal but may be asserted for the first time in a collateral proceeding such as this one.

Petitioner has not previously brought a motion in the trial court under [28 U.S.C. § 2255](#) because the § 2255 motion is unavailable, inadequate and ineffective to test the legality of the challenged conviction. This remedy is not available to the petitioner because his conviction was not rendered in a "court established by an Act of Congress" as required by the statute. [28 U.S.C. § 2255\(a\)](#). Moreover, neither the rules of the High Court of American Samoa nor the territorial statutes provide this remedy to persons incarcerated in American Samoa.

Petitioner is not subject to the administrative remedy exhaustion requirements of the Federal Prisoner Litigation Reform Act because this petition is not an action "brought with respect to prison conditions...". See [42 U.S.C. §1997\(a\)](#).

8. Memorandum of Law. As required by Instruction Number 2 of this court's 2241 Habeas Corpus Instructions, the petitioner has refrained from argument and citation of authority in this petition except where required by rule, caselaw, proper attribution of quoted material, or

statute. Attached hereto as Appendix 1 is a Memorandum of Law which contains additional argument and citation of authority in support of this petition. The memorandum is incorporated herein by reference.

9. Exhibits. A descriptive index to the Exhibits referenced in this petition is attached as Appendix 2.

10. Verification. The petitioner's signed verification is attached as Appendix 3.

WHEREFORE, the petitioner prays that this Honorable Court:

- (a) Assume jurisdiction over this matter and the parties;
- (b) Expedite consideration of this action pursuant to [28 U.S.C. § 1657](#) because it is an action brought under chapter 153 (habeas corpus) of Title 28;
- (c) Grant the petitioner the right to take discovery under [28 U.S.C. §2246](#) and [Rules 26 through 37](#) of the Federal Rules of Civil Procedure and such other provisions as may apply including depositions, affidavits, answering affidavits, interrogatories to the affiants, requests for admissions and such other mechanisms as are appropriate;
- (d) Pursuant to [28 U.S.C. § 2243](#) issue an order directing Respondent to show cause why the writ of habeas corpus should not be granted;
- (e) Grant Petitioner a writ of habeas corpus directing the Respondent to immediately release Petitioner from custody, or in the alternative, that Petitioner be provided a bail hearing before this Court;
- (f) Enjoin Respondent from transferring Petitioner to any location other than one within this judicial district pending litigation of this matter;

- (g) Enjoin Respondent from taking any action against the petitioner in retaliation for his filing this petition;⁵
- (h) Award Petitioner attorney's fees and costs under the Equal Access to Justice Act (EAJA), as amended, [5 U.S.C. § 504](#) and [28 U.S.C. § 2412](#), and on any other basis justified under law; and
- (i) Grant such other and further relief as the Court deems just, mete and proper in the premises.

RESPECTFULLY SUBMITTED, this 31st day of October, 2018, at Lihu'e, Hawai'i.

/s/Bentley C. Adams, III
BENTLEY C. ADAMS, III
Hawaii Bar No. 7666
Georgia Bar No. 002550
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Attorney for Petitioner

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¹ The information set forth in this pleading substantially follows the 2241 Habeas Corpus Form posted on this Court's website.

² In American Samoa "[t]he highest legal authority is the High Court, which is headed by a chief justice and associate justices, all appointed by the U.S. Secretary of the Interior. The High Court has appellate, trial, and land and titles divisions." From the web site of the American Samoa Government at <https://www.american-samoa.gov/judicial-branch> (last visited 5/15/18 at 4:46 PM) See also Art III, §3, Constitution of American Samoa.

³ Territorial statutes provide "[t]he Chief Justice or the Associate Justice shall have power to hear and determine alone any ... matter in any case before the appellate, trial, or land and titles divisions of the High Court and to enter an order with respect thereto..." [A.S.C.A. §3.0209](#). The Chief Justice was assisted in this trial by two Associate Judges appointed by the Governor of American Samoa. "The associate judges shall be entitled to be heard on all questions before any division of the High Court and to examine any party or witness in the proceedings, and shall also advise the court on such questions as the court may refer to them." [A.S.C.A. §3.0210](#).

⁴ Petitioner is a teacher educated in the United States who had been employed by the American Samoa Community College for several years prior to his arrest.

⁵ The inclusion of this prayer for relief was prompted by reports of recent retaliatory beatings and abuse of inmates at the Tafuna facility by guards. See “Abuse of two escapees reported – by other inmates within TCF”, Samoa News, March 12, 2018 at <http://www.samoanews.com/local-news/abuse-two-escapees-reported—other-inmates-within-tcf> (Last visited 5/29/18 at 8:47 P.M.).

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

APPENDIX 1

BENTLEY C. ADAMS, III
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Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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Petitioner,)	CASE NO. _____
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Department of Public Safety,)	
American Samoa Government)	
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SOLIALI'I FALEPO)	
Hawai'i Office Director and)	
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Honolulu, Hawai'i)	
)	
Respondents)	

MEMORANDUM OF LAW IN SUPPORT OF PETITION UNDER

28 U.S.C. §2241 FOR A WRIT OF HABEAS CORPUS

TABLE OF CONTENTS

Table of Authorities..... iii

1. Introduction 1

2. The Right to Federal Habeas Corpus in Americans Samoa.....1

 a. The Insular Cases and “Fundamental Rights” 1

 b. Jake King’s Case and the Right to a Trial by Jury
 in American Samoa..... 1

 c. Habeas Corpus as a Fundamental Right in American Samoa..... 2

3. Habeas Jurisdiction of the Federal Courts over American Samoa 2

4. The Respondents..... 3

5. Venue in the U.S. District Court for the District of Hawaii 3

6. The Facts in Petitioner’s Case..... 4

7. Grounds for the Petition and Argument in Support Thereof 6

 a. PETITIONER WAS DENIED DUE PROCESS BECAUSE THE PROSECUTION WRONGFULLY FAILED TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE INCLUDING PRIOR INCONSISTENT STATEMENTS BY THE ALLEGED VICTIMS AND JUVENILE COURT DISPOSITIONAL AGREEMENTS MADE BETWEEN THE GOVERNMENT AND THE ALLEGED VICTIMS..... 6

 b. PETITIONER’S CONVICTION BELOW MUST BE REVERSED BECAUSE HE WAS DENIED HIS RIGHT TO A TRIAL BY JURY GUARANTEED TO HIM BY THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THERE WAS NO VALID WAIVER THEREOF..... 12

 c. PETITIONER WAS DENIED HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE DENIAL OF PETITIONER’S RIGHT TO TRIAL BY JURY AND HIS APPELLATE PANEL’S COMPOSITION..... 20

d. THE PETITIONER WAS DENIED HIS RIGHT TO A SPEEDY TRIAL GUARANTEED BY THE 6 TH AMENDMENT TO THE UNITED STATES CONSTITUTION.....	20
8. Exhaustion of Available Remedies	21
9. Conclusion.....	23

TABLE OF AUTHORITIES

<u>CASES:</u>	Page(s)
<i>Agasiva v. American Samoa Government</i> , 8 A.S.R.3d 1 (2004)	27
<i>Alvarez v. Lopez</i> , 835 F.3d 1024 (9 th Cir. 2016).....	15
<i>American Samoa Government v. Agasiva</i> , 6 A.S.R.2d 32 (1987)	24
<i>Armstrong v. United States</i> , 182 U.S. 243 (1901)	24
<i>Balzac v. Porto Rico</i> , 258 U.S. 298 (1922).....	24
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	20
<i>Barry v. Barchi</i> , 443 U.S. 55 (1979).....	22
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	2
<i>Braden v. 30th Judicial Circuit Court of Kentucky</i> , 410 U.S. 484 (1973).....	2
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	6
<i>Brookhart v. Janis</i> , 384 U. S. 1 (1966).....	25
<i>California v. Sivongxxay</i> , 3 Cal. 5th 151 (2017).....	15
<i>Caperton v. Massey Coal Company</i> , 556 U.S. 868 (2009).....	18
<i>Corporation of the Presiding Bishop of the Church of Jesus Christ and Latter-Day Saints v. Hodel</i> , 830 F.2d 374 (D.C. Cir. 1987)	27
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	26
<i>Davila v. Davis</i> , ___ U.S. ___, 137 S.Ct. 2058 (2017).....	20
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974).....	6, 25, 26
<i>Day v. Trump</i> , 860 F.3d 686 (DC Cir. 2017).....	3
<i>De Lima v. Bidwell</i> , 182 U.S. 1 (1901).....	24
<i>Doggett v. United States</i> , 505 U.S. 647 (1992).....	20
<i>Dooley v. United States</i> ,182 U.S. 222 (1901)	24
<i>Dorr v. United States</i> , 195 U.S. 138 (1904).....	24
<i>Downes v. Bidwell</i> , 182 U.S. 244 (1901).....	24
<i>Fonoti v. American Samoa Government</i> , 6 A.S.R.3d 25 (2002)	19
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	6
<i>Goetze v. United States</i> , 182 U.S. 221 (1901)	24
<i>Grafton v. United States</i> , 206 U.S. 333 (1907).....	22
<i>Hawai’i v. Gomez-Lobato</i> , 130 Haw. 465, 312 P.3d 897 (2013)	14

Heath v. Alabama, 474 U.S. 82 (1985)..... 22

Jeffredo v. Macarro, 599 F.3d 913 (9th Cir. 2010) 27

Jones v. Barnes, 463 U.S. 745 (1983)..... 27

King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977)..... 2, 14

King v. Morton, 520 F.2d 1140 (DC Cir. 1975) 2, 14

Kirby v. United States, 174 U.S. 47 (1899) 26

Kyles v. Whitley, 514 U.S. 419 (1995)..... 6

Majhor v. Kempthorne, 518 F.Supp.2d 221 (D.C. Dist. 2007)..... 25

Mayberry v. Pennsylvania, 400 U.S. 455 (1971)..... 18

Mujahid v. Daniels, 413 F.3d 991 (9th Cir. 2005)..... 3

O’Sullivan v. Boerckel, 526 U.S. 838 (1999) 22

Padilla v. Kentucky, 559 U.S. 356 (2010) 17

Pointer v. Texas, 380 U.S. 400 (1965)..... 26

Puerto Rico v. Sanchez Valle. 579 U.S. ___, 136 S.Ct. 1863 (2016)..... 22

Puerto Rico v. The Shell Co., 302 U.S. 253 (1937) 22

Rumsfield v. Padilla, 542 U.S. 426 (2004) 3

Smith v. Illinois, 390 U. S. 129 (1968) 25

Strickland v. Washington, 466 U.S. 668 (1984) 20

Sullivan v. Louisiana, 508 U.S. 275 (1993)..... 16, 22

Swoops v. Sublett, 196 F.3d 1008 (9th Cir. 1999) 27

Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015), *cert den.* 136 S.Ct. 24671 (2016)..... 23

Tumui v. Fa’alevao, 2 A.S.R.2d 33 (1983)..... 23

United States v. Christensen, 18 F.3d 822 (9th Cir.1994) 14

United States v. Cochran, 770 F.2d 850 (9th Cir.1985). 13, 14

United States v. Duarte-Higareda, 113 F.3d 1000 (9th Cir. 1997) 14

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)..... 21

United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991)..... 6

United States v. Kil Soo Lee, 472 F.3d 638 (9th Cir. 2006)..... 3

United States v. LaValee, 306 F.2d 199 (2nd Cir. 1962) 27

United States v. Ted Stevens, (Cr. No. 08-321, D.D.C. 4/7/09)..... 12

Withrow v. Larkin, 421 U.S. 35 (1975)..... 18

CONSTITUTIONS:

U.S. Constitution, 6th Amendment..... 12, 19, 20
 U.S. Constitution, 5th Amendment..... 12
 U.S. Constitution, 14th Amendment..... 12
 U.S. Constitution, Article III, Section 2..... 13
 Revised Constitution of American Samoa, [Article 1, Section 7](#)..... 2

STATUTES:

[28 U.S.C. § 2255](#) 20, 21
[28 U.S.C. §§81-131](#)..... 2
[28 U.S.C. §455](#)..... 18
[28 U.S.C. §2241](#)..... 1, 2, 3, 6
[A.S.C.A. §3.0210](#) 5
[A.S.C.A. §3.0220](#) 5
[A.S.C.A. §3.0223](#)..... 5
[A.S.C.A. §3.0309](#)..... 17
[A.S.C.A. §43.0801](#) 5
[A.S.C.A. §43.0804](#) 21
[A.S.C.A. §46.2402](#) 5
[D.C. Code Ann. §13-423\(a\) \(2001\)](#) 25
[HRS §634-35\(a\)\(1\) & \(3\)](#)..... 4

RULES:

[Canon 2, Code of Conduct for United States Judges](#)..... 18
[Canon 2, Rule 2.11, Model Code of Judicial Conduct](#) 18
[FRCP Rule 4\(k\)\(1\)\(a\)](#) 3
[FRCP Rule 4\(k\)\(2\)\(a\) & \(b\)](#)..... 3
[Rule 1\(b\), Rules Governing Section 2254 Cases in the United States District Courts](#)..... 20
[Rule 140, High Court Rules](#)..... 5
[Rule 22, American Samoa Appellate Court Rules](#)..... 25

OTHER:

Elizabeth K. Watson, “Citizens Nowhere: *The Anomaly of American Samoa’s Citizenship Status After Tuaua v. United States*”, 42 U. Dayton L. Rev. 411 (2017).....26

Jennie A. Durkin, “*Memorandum on Discovery*”, Oct. 15, 2010 at https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/waw_discovery_policy.pdf (last visited 8/16/18 at 3:07).....25

1. **Introduction.** The petitioner, JAMES GLENN BARLOW, is a natural born citizen of the United States and a prisoner in the United States Territory of American Samoa, held pursuant to a judgment of conviction from the High Court of American Samoa. He seeks the Writ of Habeas Corpus pursuant to the provisions of [28 U.S.C. §2241](#).¹ This brief will address the availability of federal habeas relief for prisoners in American Samoa, the propriety of the United States District Court for Hawai'i as the venue of the action, and the grounds for the petition.

2. **The Right to Federal Habeas Corpus in American Samoa**

(a) **The Insular Cases and “Fundamental” Rights** In the early part of the 20th Century in a series of sometimes contradictory decisions often referred to as the Insular Cases, the United States Supreme Court developed a legal framework for the territories acquired by the United States following the Spanish-American War.² The Insular Cases distinguished “incorporated” territories like Alaska and Hawai'i from America's new “unincorporated” island possessions like Guam, Puerto Rico, the Philippines and American Samoa, because the latter were not acquired for the ultimate purpose of obtaining statehood. Under their doctrine only the most fundamental rights were bestowed upon these unincorporated territories whereas constitutional rights applied with full force in territories on a path to statehood.³

(b) **Jake King's Case and the Right to a Trial by Jury in American Samoa** In the mid 1970's Jake King, the owner and publisher of The Samoa News, was prosecuted under territorial statutes for failing to pay his income taxes to the American Samoa Government (ASG). King, a United States citizen, pleaded Not Guilty and demanded a trial by jury. Relying on the Insular cases, the High Court of American Samoa denied King's jury demand holding it was not a fundamental right. King sought *mandamus* to compel the United States Secretary of the Interior to have his subordinates in the territory afford King a jury trial. The District of Columbia federal

courts ultimately concluded a jury trial was, in fact, a fundamental right quite compatible with the Samoans' customs and traditions and their intellectual abilities to logically comprehend and participate. *King v. Morton*, 520 F.2d 1140 (DC Cir. 1975), *on remand*, *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977).

(c) **Habeas Corpus as a Fundamental Right in American Samoa**. In contrast to the right to a trial by jury, the right to Habeas Corpus has been repeatedly recognized in American Samoa. It is guaranteed in the territorial constitution. [Article 1, Section 7, Revised Constitution of American Samoa](#); *King v. Andrus*, 452 F.Supp. 11, 16 (D.D.C. 1977) (The territorial Constitution "include[s] ... the time honored writ of habeas corpus.").⁴

Clearly, the writ of habeas corpus is recognized as a fundamental right in American Samoa. Accordingly, federal habeas corpus review in this case should not be foreclosed by the Insular Cases' archaic analytic framework. Indeed, because petitioner is a natural born United States citizen it is questionable whether the strictures of the Insular Cases would even apply to him.

3. **Habeas Jurisdiction of the Federal Courts over American Samoa**. The territory of American Samoa, unlike every other U.S. territory, does not have a United States District Court and is not located within any United States court district.⁵ See [28 U.S.C. §§81-131](#). However, the fact that the petitioner is being held outside the geographic boundaries of any United States court district is not determinative as to whether federal habeas relief is available. "[T]he language of [28 U.S.C.] §2241(a) requires nothing more than the court issuing the writ have jurisdiction over the custodian ... even if the prisoner himself is confined outside the court's territorial jurisdiction." *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 495 (1973) (prisoner petitioner in Alabama - respondent in Kentucky) Federal courts may even entertain habeas petitions from prisoners on U.S. military bases in foreign countries. In

Boumediene v. Bush, 553 U.S. 723 (2008), non-citizen detainees being held outside the territorial United States at the United States Naval Station at Guantanamo Bay, Cuba, were held to be entitled to bring *habeas corpus* actions under 28 U.S.C. §2241..

4. **The Respondents.**

(a) Respondent TAUESE V'AOMALA SUNIA is subject to the jurisdiction of the Federal courts and an appropriate party to this proceeding. Mr. Sunia is the Warden of the American Samoa Territorial Correctional Facility. Respondent Sunia is Mr. Barlow's immediate custodian. Warden Sunia is an employee of the ASG. As the warden of the institution where petitioner is imprisoned Mr. Sunia is a proper respondent in this habeas corpus action. *Rumsfield v. Padilla*, 542 U.S. 426, 439 (2004); *Mujahid v. Daniels*, 413 F.3d 991, 994 (9th Cir. 2005); *Day v. Trump*, 860 F.3d 686, 689 (DC Cir. 2017).

(b) Respondent SOLIALI'I FALEPO is an agent of Respondent Sunia and the ASG. ASG and the respondents maintain an office and transact business at 1427 Dillingham Boulevard, No. 210, Honolulu, Hawai'i. (See listing on the web site of the ASG at <https://www.americansamoa.gov/asg-agencies-a-to-z> (last visited 10/1/18 at 8:14 P.M.)) Respondent Falepo is the Director of the ASG Honolulu office, serves as the "laison (sic) for all ASG business in the Aloha State", and may be served with process at this address. (From the Governor's page on the web site of the ASG at <https://www.americansamoa.gov/office-of-the-governor> (last visited 10/3/18 at 9:29 P.M.)).⁶

At all times relevant hereto respondents were acting within their scope of employment as duly authorized agents of the ASG.

5. **Venue in the United States District Court for the District of Hawai'i.** The United States District Court for the District of Hawai'i is the proper venue for this case because it is "*the site of the federal district court nearest to American Samoa*" and "*the one with the most*

immediate connection to the named custodian.” (emphasis supplied) *United States v. Kil Soo Lee*, 472 F.3d 638, 640 (9th Cir. 2006); *Rumsfeld v. Padilla*, 542 U.S. 426, 452 (2004) (Kennedy, J. concurring).

The Respondents are subject to the jurisdiction of this court by virtue of their “transaction of ... business within this state” and by the “ownership, use, or possession of ... real estate situated in this state”. See [HRS §634-35\(a\)\(1\) & \(3\)](#); [FRCP Rule 4\(k\)\(1\)\(a\)](#). Respondents regularly transact business in the State of Hawai’i. As noted, Respondent Falepo is located in the State of Hawai’i. Sunia is located in American Samoa but when he leaves the Samoan Islands he flies on Hawaiian Airlines which is the only U.S. domestic airline which services American Samoa.⁷ Every Hawaiian Airlines flight to or from American Samoa goes through Honolulu. Respondent Sunia and the ASG pay Hawaiian Airlines money for Sunia to fly on its airplanes. He has also purchased other goods and services while in Hawai’i. Warden Sunia transacts business in the State of Hawai’i each time he flies to Honolulu. As a prominent official of the American Samoa Government much of his travel for training, conferences and the like is related to his official duties as a territorial law enforcement officer and his exercise of custody over petitioner.⁸

This Court may exercise general jurisdiction over this case and personal jurisdiction over the respondent because this case involves a Federal Claim which (1) “arises under federal law[,] ... [(2)] the [respondents] [are] not subject to [the] jurisdiction in any state's courts of general jurisdiction ... and ...[(3)] [this court’s] exercis[e of] jurisdiction is consistent with the United States Constitution and laws.” [FRCP Rule 4\(k\)\(2\)\(a\) & \(b\)](#).

Given an opportunity for discovery petitioner will further develop these facts.

6. **The Facts in Petitioner’s Case.** On July 15, 2014, the petitioner was convicted of sixteen charged violations of American Samoa territorial criminal statutes. He was tried in a

bench trial before a panel consisting of the Honorable F. Michael Kruse, Chief Justice of the High Court of American Samoa, appointed by the Secretary of the Interior, as presiding judge, and two Samoan local judges appointed by the Governor who basically served in an advisory capacity. Barlow was convicted of (1) two counts of sodomy with a minor, (2) two counts of deviate sexual assault in the first degree with a minor, (3) two counts of sexual abuse in the first degree with a minor, (4) two counts of furnishing pornographic materials to a minor, (5) three counts of aiding a minor to possess or consume alcohol, (6) three counts of endangering the welfare of a minor, (7) Driving While Under the Influence of Alcohol, and (8) Careless Driving.

In January of 2015, the Chief Justice imposed a sentence totaling 24 years in prison. Copies of the Amended Criminal Complaint and the Judgment of Conviction and Sentence are attached to the petition as Exhibits “A” and “B”.

In a timely fashion and in accordance with available procedures, Petitioner directly appealed his conviction to the Appellate Division of the High Court of American Samoa. See [A.S.C.A. §43.0801, et seq.](#) (Chapter 8 - Appellate Procedure); [A.S.C.A. §46.2402](#) (Procedure on Appeals). The three member panel which heard the appeal was ostensibly composed of two Acting Associate Justices of the High Court (Judges Patea and Sunia) and one Associate Judge which is a minimum quorum. [A.S.C.A. §3.0220](#) (Appellate division – Composition). However, while the Associate Judge could ask questions and be heard, he did not actually get a vote. [A.S.C.A. §3.0210](#). Under territorial appellate procedures, even if there are more Judges than Justices on the panel the two Justices’ opinion prevails. [A.S.C.A. §3.0223](#). The Acting Associate Justices were both members of the American Samoa Bar Association, membership in which is required to practice law in American Samoa. Rule 140, [High Court Rules](#). The Associate Judge panel member was not a member of the Bar. For all practical purposes, the two Acting Associate Justices constituted the appellate panel.

By its decision dated November 1, 2017, the panel affirmed Petitioner's conviction and sentence. (HCAP No. 02-15). Petitioner's Motion for Rehearing was denied on January 4, 2018. Copies of the Appellate Division decisions are attached to the petition as Exhibits "C" and "D". Copies of petitioner's appellate brief and motion for rehearing are attached to the petition as Exhibits "E" and "F". Further facts will be developed as needed.

7. **Grounds for the Petition and Argument in Support Thereof.** Petitioner is entitled to *habeas* relief because he is being held under color of the authority of the United States and in violation of the Constitution and laws of the United States within the meaning of 28 U.S.C. §2241(c)(1) and (3). The process and proceedings afforded petitioner in the Territory of American Samoa were in violation of petitioner's rights under the United States Constitution and contrary to clear constitutional directives announced by the United States Supreme Court and United States statutes. The grounds for this petition are more specifically as follows:

(a) **GROUND ONE:**

PETITIONER WAS DENIED DUE PROCESS BECAUSE THE PROSECUTION WRONGFULLY FAILED TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE INCLUDING PRIOR INCONSISTENT STATEMENTS BY THE ALLEGED VICTIMS AND JUVENILE COURT DISPOSITIONAL AGREEMENTS MADE BETWEEN THE GOVERNMENT AND THE ALLEGED VICTIMS.

Government disclosure of exculpatory material and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Davis v. Alaska*, 415 U.S. 308 (1974). The disclosure of exculpatory and impeachment evidence is required when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because *Brady* and *Giglio* are constitutional obligations, *Brady/Giglio* evidence must be disclosed regardless of whether the defendant makes a request for such exculpatory or impeachment evidence. *Kyles v. Whitley*, 514

U.S. 419, 432-33 (1995). In addition, under *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), the Ninth Circuit Court of Appeals held that, upon a defendant's request, the government is required to review personnel files of law enforcement officials that the government intends to call as witnesses. There is no requirement that the defendant make a showing of materiality prior to the review.⁹

The record reflects that in this case, despite repeated requests, the government failed to disclose exculpatory evidence to the defense, including prior inconsistent statements by the alleged victims and juvenile court dispositional agreements between the government and the alleged victims, and that the court improperly failed to require the government to do so. The court also improperly restricted the defense in its cross examination and denied it access to critical documents it could have used in cross examination.

Prior to trial, the government told the court that full disclosure had been made. (See remarks of Assistant Attorney General Mitzie Folau-Jessop on October 16, 2013, that “[w]e’ve given him everything we have.” (T-11)) (Exhibit N).

On November 8, 2013, petitioner filed two affidavits with the court. The affidavits were from two assistant public defenders who had represented the alleged victims in juvenile court proceedings against them. The affidavits recited that two years earlier, at the government’s request, the attorneys had questioned their clients about whether Mr. Barlow had engaged in any sexual conduct with them. The alleged victims denied any sexual misconduct had occurred and this was conveyed to the prosecutors.

At a hearing on November 18, 2013, Folau-Jessop placed the blame for not disclosing this on the defense attorney for failing to tell the government about these statements which the government had presumptively known about for two years. (“[H]ad I known about these informations [sic] earlier ... I would have been able to do my due diligence and investigate. So

as soon as I find out information, that's when that information is then transferred to the defendant and his attorney.” (T-11) (Exhibit K). In other words, in the government's view, there is no duty to disclose unless the defense discovers the existence of exculpatory evidence on its own.

As trial neared in June of 2014, the Government, now represented by another attorney, finally made a partial disclosure. In an email to petitioner's counsel dated June 17, 2014, one week before the commencement of the trial, the government told the defense the alleged victims “had not disclosed anything regarding the sexual acts” when their cases had been disposed of in the juvenile court. The email explained that the prosecuting attorney in the juvenile court (Assistant Attorney General Terrie Bullinger) had suspicions about Barlow because of her 19 year old son's earlier association with Barlow “before this case ever happened”. Despite this suspicion, the email asserted Bullinger herself “never asked the minors ... if anything sexual happened” and when their public defender attorneys had asked the minors about it “they [merely] did not disclose any information to them.” The prosecution stated it was unable to give the defense anything in the government's files, including dispositional agreements, because these items were “confidential”. (Exhibit Q).

At trial from June 24-26, 2014, Bullinger was called as a witness by the defense. She testified that although she “was suspicious because of my personal knowledge of Mr. Barlow”, after at first denying she ever personally met with the juveniles, she rather coyly ultimately claimed she “*had no recollection of talking to the boys*” personally and that she only remembered communications with their public defenders who had told her that “*nothing was said*, admitted that anything had happened”. (emphasis supplied). (T-222, 223, 226). By her account this had occurred in January or February of 2012. (T-223). Bullinger offered no

explanation as to why this information had not been disclosed to the defense until right before the trial.

The defense also called one of the public defenders, Ms. Leslie Cardin. Prior to her testimony the chief public defender, Doug Fiaui, appeared and advised the court that the juveniles did not waive the attorney-client privilege. (T-232). Petitioner's attorney argued any privilege was waived because the information from the boys was requested by the Government and the public defenders had disclosed the content of their conversations with the boys with the knowledge and consent of the juveniles. (T-233). The trial court disagreed and ruled what the juveniles told their public defenders was confidential and inadmissible and Cardin could not testify to the "communication the juveniles made to her". (T-234, 237). The trial court actually threatened the witness: "She's potentially in trouble given the facts I'm hearing." (T-238).¹⁰

Cardin testified that in late 2011 she had been approached by Bullinger and asked to talk to the juveniles. Bullinger also conveyed a plea proposal which involved the boys "cooperat[ing] with the government in the prosecution of Mr. Barlow." (T-240-241). Cardin and another public defender talked to the juveniles and conveyed what they told them to Bullinger. After this exchange Bullinger visited the public defender's office with the "victim-witness person" from the prosecutor's office and spoke with the boys in private outside the presence of the public defenders. According to Cardin, after the meeting with the boys Bullinger told Cardin that the statements made to her were consistent with what Cardin had been told and "they had *denied* that any sexual contact had occurred." (emphasis supplied). (T-242-245).

Tellingly, the Government did not recall Bullinger, the unnamed "victim-witness person" or any other witness to refute Cardin's testimony that there was a second set of denials made to the prosecutors directly.

As to the dispositional agreements with the juveniles, the High Court refused to consider the matter and referred petitioner to the juvenile division of the court which, after a hearing mid-trial, refused to disclose the juvenile's dispositional agreements or any other documents to the petitioner. (This hearing was conducted on June 25th, 2014, before the Honorable John L. Ward, II, Judge, District Court of American Samoa, sitting by designation as Acting Associate Justice of the High Court Family Court Division [the transcript title page mistakenly refers to it as the Appellate Division] – transcript excerpt attached to the petition as Exhibit "R").¹¹

All three of the juveniles testified at trial and gave conflicting accounts of their prior statements.¹² A.A.G. Bullinger's testimony that she "*had no recollection of talking to the boys*" actually worked out pretty well for the Government. Had Bullinger admitted she had done so and that the juveniles had denied the sexual contact with petitioner, her testimony would have contradicted all of their testimonies.

Although the Government never even attempted to rebut Cardin's testimony (and explicitly agreed with much of it) it stood by silently as all three of the juveniles gave accounts which differed dramatically from Cardin's and, to a lesser extent, even Bullinger's. It is particularly troubling that knowing there had been at least one prior denial by L.B. the Government nonetheless allowed him to testify he had never told anyone Barlow had not molested him. (T-119).

The record established without dispute that the prosecuting attorneys from the Office of the Attorney General for the ASG failed to fully and fairly disclose to the defense the following: (1) The alleged victims had made prior inconsistent statements denying the allegations to A.A.G. Bullinger and another member of the A.G.'s staff; (2) In their statements to their attorneys and the prosecutors the alleged victims not merely "did not disclose" the sexual allegations but had actually "*denied* that any sexual contact had occurred"; and (3) The government had made

dispositional agreements with the juveniles in exchange for their testifying against petitioner. (This was only partially acknowledged during trial through Bullinger's testimony.)

The Government falsely represented to the trial court that it had "given [the defense] everything we have." When the defense discovered this was not true the government responded by accusing petitioner's attorney of misconduct for not telling the government about information it had had in its possession for years. Nonetheless, the government continued to withhold the information and never fully disclosed the exculpatory evidence it had in its possession. No notes, memoranda or recordings of the statements to the assistant attorney general and the victim-witness person, the specifics of the exculpatory conversation, or the name of the victim-witness person present were ever disclosed. The precise terms and copies of the dispositional agreements offered to the juveniles to induce their trial testimonies against petitioner were never disclosed and the courts below did nothing to remedy the situation.

The trial court (and the juvenile court which is a division of the trial court) (1) failed to require full disclosure, (2) improperly restricted the petitioner from introducing the juveniles' prior inconsistent statements or cross-examining the juveniles about the dispositional agreements and their prior inconsistent statements to their public defenders¹³, and (3) made clearly erroneous and unsupported factual findings in support of its decisions (the attorney-client confidentiality ruling).

The appellate panel found no harmful error occurred because the defense did discover the prior inconsistent statements to the public defenders prior to trial and did present evidence of that through its examinations of Bullinger and Cardin. (at page 14 of the opinion). This finding was clearly erroneous because the evidence was undisputed that the juveniles made denials not only to the public defenders but to the prosecutors as well. This second set of prior inconsistent statements was *never* disclosed. Moreover, the appellate panel's analysis fails to take into

consideration that Cardin was not allowed to testify as to what the juveniles told the public defenders whereas evidence that they made specific denials to Bullinger was not subject to any attorney-client privilege.¹⁴

The government's actions in this case bring to mind the high profile public corruption prosecution of Alaska Senator Ted Stevens a few years ago. There, as here, the government withheld prior inconsistent statements made by a critical government witness. In an unpublished but highly publicized decision the Honorable Emmet G. Sullivan, Judge, U.S. District Court for the District of Columbia, roundly criticized the government for its conduct and set aside Senator Stevens' conviction. *United States v. Ted Stevens*, Cr. No. 08-321, D.D.C. 4/7/09).¹⁵

The actions by the government and the trial court in this case (1) rendered petitioner's trial fundamentally unfair denying him due process within the meaning of the 5th Amendment to the United States Constitution, (2) denied petitioner his right to meaningfully confront the evidence against him guaranteed by the 6th Amendment to the United States Constitution, and (3) abridged petitioner's right to the effective assistance of counsel guaranteed by the 6th Amendment to the United States Constitution.

Transcript excerpts and documents from the record referenced in support of this ground are attached to the petition as Exhibits "N", "O", "P", "Q", "R", and "S".

(b) **GROUND TWO:**

PETITIONER'S CONVICTION BELOW MUST BE REVERSED
BECAUSE HE WAS DENIED HIS RIGHT TO A TRIAL BY JURY
GUARANTEED TO HIM BY THE 6TH AMENDMENT TO THE
UNITED STATES CONSTITUTION AND THERE WAS NO
VALID WAIVER THEREOF.

Petitioner was not afforded a trial by jury but was instead convicted and sentenced following a bench trial.

On November 1, 2013, prior to trial, petitioner's attorney filed a document entitled "Defendant James Barlow's Request for A Bench Trial" with the clerk of the High Court of American Samoa. This pleading, signed only by the attorney, simply stated: "Now comes the defendant, by and through counsel, and hereby requests a Bench Trial for the trial date for 18 October 2013," The document also contains a handwritten notation which reads as follows: "Require a 'personal' waiver by defendant, and not through counsel." Underneath this notation there is a scribbled signature which appears to be that of Chief Justice Michael Kruse. A true and accurate copy of this document is attached to the petition as Exhibit "I".

On November 5, 2013, a document entitled "Affidavit in Support of Request for Bench Trial" was filed with the clerk. The document contains the notarized signature of the petitioner and recited, "[t]hat I had earlier requested, through my attorney in District Court, a Jury Trial for my DUI and other misdemeanors in February 2012[,]...[t]hat upon further evaluation of this matter, that I hereby waive my right to a Jury Trial, [and] [t]hat I hereby request a Bench Trial for my scheduled trial on 18 November 2013." (Exhibit "J".)

The record does not reflect any colloquy between the court and the petitioner following the filing of these documents prior to, during or after petitioner's bench trial. These documents constitute the entire record of the purported waiver of petitioner's right to a trial by jury.

Petitioner submits the record is insufficient to establish a valid waiver of his right to a trial by jury because it does not show the waiver was knowingly, voluntarily and intelligently made.

A criminal defendant's right to a jury trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir.1985). The right also resides in Article III, Section 2 of the federal

Constitution (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury”). These protections extend to persons accused of crimes in American Samoa. *King v. Morton*, 520 F.2d 1140 (DC Cir. 1975), *on remand*, *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977).

The right to a jury trial may only be waived if the following four conditions are met: (1) the waiver is in writing; (2) the government consents; (3) the court accepts the waiver; and (4) the waiver is made voluntarily, knowingly, and intelligently. *Cochran*, 770 F.2d at 851. The adequacy of a jury waiver is a mixed question of fact and law which the court reviews *de novo*. *United States v. Christensen*, 18 F.3d 822, 824 (9th Cir.1994).

With regard to the fourth requirement that the waiver be voluntarily, knowingly, and intelligently made, the 9th Circuit Court of Appeals has set forth guidelines for a district court to follow in making that determination. The trial court must inform the defendant “(1) *twelve members of the community compose a jury*, (2) *the defendant may take part in jury selection*, (3) *a jury verdict must be unanimous*, and (4) *the court alone decides guilt or innocence if the defendant waives a jury trial.*” (emphasis supplied) *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997). Because no colloquy appeared in the record the *Duarte-Higareda* court reversed the bench trial conviction of a non-English speaking defendant although there was a translator present and a written waiver of jury trial was signed by the defendant.

In *Hawai’i v. Gomez-Lobato*, 130 Haw. 465, 312 P.3d 897 (2013), the Supreme Court of Hawaii applied *Duarte-Higareda* and reversed the bench trial conviction at issue. In that case, Gomez-Lobato, a native Spanish speaker, represented by counsel and had the assistance of an interpreter. He had signed a standard jury trial waiver form. The trial court had engaged in a colloquy with the defendant. In reversing the conviction the State Supreme Court noted the absence of the *Duarte-Higareda* interrogatories in the record and concluded, “[a]lthough the family court conducted a colloquy with Gomez-Lobato regarding the waiver form, the family

court's questions were not sufficient to establish that Gomez-Lobato knowingly, voluntarily, and intelligently waived his right to a jury trial.” 312 P.3d at 903. The court emphasized that while trial courts may not be required to conduct the full *Duarte-Higareda* four-factor colloquy in every case, the colloquy must be sufficient to establish a defendant validly waived his or her right to a jury trial "under the totality of the circumstances surrounding the case.” 312 P.3d at 904.

In *California v. Sivongxxay*, 3 Cal. 5th 151 (2017), a death penalty appeal, the defendant was a Laotian refugee with no formal education. The trial court did engage in a colloquy with the defendant. Of the *Duarte-Higareda*, four-factor colloquy, the court told him (1) he had a right to a trial by a jury of 12 people, (2) he and his attorney would participate in the jury selection process and (3) that if he gave of his right to a trial by jury the judge alone would determine his guilt and punishment. While acknowledging the colloquy engaged in by the court lacked the advisement as to the juror unanimity requirement the court nonetheless concluded the waiver was shown to have been knowing, voluntary and intelligent and that “under the totality of the circumstances standard, the presence or absence of a reference in a colloquy to this particular attribute of a jury trial, or to the impartiality requirement, is not necessarily determinative of whether a waiver meets constitutional standards.” 3 Cal. 5th at 168.

In *Alvarez v. Lopez*, 835 F.3d 1024 (9th Cir. 2016), the court revisited the jury trial waiver issue in a different context. The issue there was whether an Indian tribal court violated a criminal defendant's rights by failing to inform him that he could receive a jury trial only by requesting one. While Alvarez was informed that he had a right to a jury trial he was not told he had to request it to get one under tribal court rules. None of the *Duarte-Higareda*, four-factor colloquy questions were posed. Alvarez represented himself, was convicted, and sentenced to five years in prison. He did not seek a direct appeal of his conviction.

Alvarez raised the jury trial waiver issue for the first time when he filed a federal habeas corpus action. While acknowledging its reluctance to intrude on tribal sovereignty, the court nonetheless concluded “we think it clear that Alvarez's interests here outweigh those of the Community. It hardly undermines tribal sovereignty to require that the Community inform defendants of the nature of their rights, including what must be done to invoke them. The fact that such a requirement presents minimal intrusion into a tribe's sovereignty may explain why "all tribal courts presented with the question have concluded that there must be a knowing and voluntary waiver of [the] ... jury right” [and] ... [b]ecause denial of the right to a jury trial is a structural error, it requires automatic reversal. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).” 835 F.3d at 1029-1030.

The record in petitioner’s case does not reflect that James Barlow knowingly, voluntarily and intelligently waived his right to a trial by jury. The court knew petitioner had been assaulted repeatedly at the correctional facility while awaiting trial and that he had suffered serious injuries which could have impacted his cognitive abilities. When petitioner appeared for trial on November 18, 2013, he requested and was granted leave by the Court to discharge his then attorney. (See Transcript excerpt as Exhibit “K” attached to the petition). This was the same attorney who had attempted to waive the jury trial without even first obtaining petitioner’s written consent, a basic requirement. It certainly cannot be presumed that this attorney properly advised petitioner as to his rights and, indeed, the affidavit of the attorney attached as Exhibit “L” and the petitioner’s affidavit attached as Exhibit “V” reflect he did not. Under the totality of the circumstances the trial court should have conducted some sort of inquiry. Its failure to do so leaves a record which is utterly devoid of any indication that petitioner’s jury trial waiver was knowing, voluntary and intelligent.

Moreover, when petitioner signed the waiver affidavit, he had the reasonable expectation he would receive a meaningful appeal which he was denied. As established by the affidavits of his then attorney, Mark Ude, and the petitioner, Mr. Barlow was told any appeal in his case would be heard by a panel of federal judges brought from outside the territory who would have no connection to the ASG or Chief Justice Kruse. (Exhibits “L” and “V” attached to the petition.) That promise was not kept.

Proper advisement of the consequences of a waiver which are intimately related to the criminal process is a necessary component of due process. *Padilla v. Kentucky*, 559 U.S. 356 (2010) (failure to advise of immigration consequences of the plea constituted ineffective assistance of counsel) It is difficult to imagine a consequence more intimately related to appellant’s conviction and his decision to waive his right to a jury trial than the frustration of his reasonable expectation that he would receive a fair and impartial panel to hear any appeal of that conviction. That is particularly true given that the nature of the appellate panel to be afforded petitioner was affirmatively misrepresented by the government.

As affirmatively reflected on the face of the Appellate Division decisions in petitioner’s case, both of the Acting High Court Associate Justices who served on petitioner’s Appellate Division panel (Patea and Sunia) were local judges who also serve as Judges of the District Court of American Samoa. In the public perception, they work for the Chief Justice. They are “under the administration and supervision of the Chief Justice of the High Court.” (See the ASG’s web site at www.americansamoa.gov (Last visited 5/17/18 at 10:12 PM)). Appeals from decisions of the District Court are taken to the High Court. *A.S.C.A. §3.0309*.¹⁶

The Associate Acting Justices who served on petitioner’s appellate panel should never have been appointed and should have recused themselves because “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be

questioned...” [Canon 2, Rule 2.11, Model Code of Judicial Conduct](#). See also [28 U.S.C. §455\(a\)](#). These Acting Associate Justices failed to “act ... in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” [Canon 2, Code of Conduct for United States Judges](#).

The facts and circumstances in this case create the objective appearance that the Acting Associate Justices lacked independence and had a bias towards upholding any decision made by the Chief Justice in order to curry his favor and to encourage him to similarly affirm their judgments. It does not matter if the Acting Associate Justices were not actually biased. It is the objective perception created by the facts and circumstances in this case that is important.

Because of the constitutionally defective process afforded persons convicted of crimes in American Samoa, petitioner was denied his rights to due process and a fair trial.¹⁷ Indeed, the process used “poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” [Withrow v. Larkin](#), 421 U.S. 35, 47 (1975). Here, “the objective inquiry is not whether the judge is actually biased but whether the average judge in his position is likely to be neutral or there is an unconstitutional ‘potential for bias.’” [Mayberry v. Pennsylvania](#), 400 U.S. 455, 466 (1971). In this case there was “a serious, objective risk of actual bias” that required the Acting Associate Justices to recuse themselves. [Caperton v. Massey Coal Company](#), 556 U.S. 868, 129 S.Ct. 2252, 2265 (2009) (appellate judge disqualified where before joining the court he had accepted large campaign contribution from party in matter pending in his court).

Ironically, under American Samoa’s quirky criminal justice framework the Associate Judge, the member of the appellate panel who had the least appearance of a conflict of interest, did not even get a vote.

The criminal justice process in American Samoa has not always been conducted the way it was in petitioner's case. The Secretary of the Interior previously routinely appointed federal judges from other jurisdictions to come to the island and sit on the appellate panels to review the High Court's decisions. For example, in *Fonoti v. American Samoa Government*, 6 A.S.R.3d 25 (2002), the Secretary appointed the Honorable J. Clifford Wallace, Senior Circuit Judge of the United States Court of Appeals for the 9th Circuit, and the Honorable Susan Oki Mollway, Judge, United States District Court for the District of Hawai'i, to serve on the panel.¹⁸ The impartiality and independence of such jurists could not be questioned. That is not true of the two District Court judges who served as Acting Associate Justices on petitioner's panel.

Unfortunately, the Secretary of the Interior has consciously chosen to discontinue a very appropriate practice without regard to the detrimental due process implications for United States citizens and others accused of crimes in American Samoa. The lack of transparency and the arbitrary and capricious nature of the Secretary's decision in this instance is pointedly illustrated by a letter from Steven H. Watson, Legal Counsel to the Governor of American Samoa, to Mr. James D. Frye, dated September 2, 2015, assuring him that Mr. Barlow's appeal would "*be heard by Judges who are brought in from the United States for the purpose of hearing appeals from decisions of the High Court of American Samoa ... generally U.S. Federal Trial Court or Appellate Court Judges*"- (emphasis supplied). The letter is attached to the petition as Exhibit "H".

Because appellant was misled as to the nature of the appeal he would receive his waiver of his right to a trial by jury cannot be viewed as knowing, voluntary, and intelligent.

Because this is a structural error an automatic vacation of his conviction is required.

(c) **GROUND THREE:**

PETITIONER WAS DENIED HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT TO THE DENIAL OF PETITIONER'S RIGHT TO TRIAL BY JURY AND HIS APPELLATE PANEL'S COMPOSITION.

As discussed, *infra*, the claims asserted in ground number 2, as a structural error which goes to the reliability of the process itself, is not subject to any exhaustion requirement. Nonetheless, petitioner's trial and appellate counsel were fully aware of the facts supporting this ground at all relevant times. The facts are largely apparent from the record. As a long-time member of the American Samoa bar, appellate counsel was intimately familiar with all of the judges and attorneys involved in this case. Assuming *arguendo* this ground was required to have been raised in the territorial appeals process the failure to do so constituted *per se* ineffective assistance of appellate counsel which cannot be attributed to the petitioner and any exhaustion requirement is excused. 6th and 14th Amend., U.S. Constitution; *Strickland v. Washington*, 466 U.S. 668 (1984) (The defense attorney was objectively deficient and that there was a reasonable probability that a competent attorney would have led to a different outcome); *Davila v. Davis*, ___U.S. ___, 137 S.Ct. 2058 (2017) (Where failure to bring claim earlier is due to ineffective assistance of appellate counsel in the direct appeal exhaustion is excused).

(d) **GROUND FOUR:**

THE PETITIONER WAS DENIED HIS RIGHT TO A SPEEDY TRIAL GUARANTEED BY THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner was entitled to a speedy trial by the 6th Amendment to the United States Constitution. *Barker v. Wingo*, 407 U.S. 514 (1972); *Doggett v. United States*, 505 U.S. 647 (1992). Petitioner was arrested on March 16, 2012. His trial did not occur until more than two years and two months later while petitioner languished in jail. The delay was patently

unreasonable and was due entirely to the government's refusal to provide meaningful and timely discovery. Petitioner did not cause the delay or acquiesce to it. Petitioner timely asserted his right to a speedy trial. Although when his case was first called for trial on November 18, 2013, petitioner asked for and was allowed to discharge his then attorney, petitioner unequivocally stated "I do not waive a speedy trial." (T-27). The delay prejudiced the petitioner in the presentation of his defense. The record shows witnesses' memories faded and critical information became unavailable. (e.g., Terrie Bullinger could no longer recall her meeting with the victims where they said nothing happened. Donna Clements, an important impeachment witness, had left the Territory by the time of trial.) Transcript excerpts in support of this ground are attached as Exhibit "K".

8. **Exhaustion of Available Remedies.** Because this petition is brought under Section 2241 the exhaustion requirements of the Rules Governing Section 2254 Cases in the United States District Courts do not apply. However, because Rule 1(b) of those rules allow this Court to "apply any or all" of those rules to non-2254 habeas petitions the question of the exhaustion of available remedies will be discussed.

Petitioner has not previously brought a motion in the trial court under [28 U.S.C. § 2255](#) because the § 2255 motion is unavailable, inadequate and ineffective to test the legality of the challenged conviction. This remedy is not available to the petitioner because his conviction was not rendered in a "court established by an Act of Congress" as required by the statute. [28 U.S.C. § 2255\(a\)](#). Moreover, neither the rules of the High Court of American Samoa nor the territorial statutes provide this remedy to persons incarcerated in American Samoa.

Because the grounds of this petition involve issues affecting "fundamental fairness and unreliability" in the trial process they must be viewed as "structural errors". [United States v. Gonzalez-Lopez](#), 548 U.S. 140 (2006). A structural error is one which is "a violation of a basic

protection without which a criminal trial cannot reliably serve its function.” They constitute “structural defects in the constitution of the trial mechanism.” *Sullivan v. Louisiana*, 508 U.S. 275, 279, 281, 282 (1993) (denial of right to jury trial verdict of guilt beyond a reasonable doubt is a fundamental right which requires automatic reversal and “will *always* invalidate the conviction.”); *Barry v. Barchi*, 443 U.S. 55 (1979) (where remedies themselves are being challenged as unconstitutional exhaustion is excused).

Traditional concepts of exhaustion or comity do not apply to this case. The territory of American Samoa is not the same sort of entity as a State. States rely on “authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment”[;] State prosecutions have their roots in an ‘inherent sovereignty’ unconnected to the U.S. Congress. *Heath v. Alabama*, 474 U.S. 82, 89, 106 S.Ct. 433, 88 L.Ed.2d 387. ... [However,] U.S. territories ... are not sovereigns distinct from the United States. *Grafton v. United States*, 206 U.S. 333, 27 S.Ct. 749, 51 L.Ed. 1084. ... ‘[T]he territorial and federal laws [were] creations emanating from the same sovereignty,’ *Puerto Rico v. Shell Co. (P. R.), Ltd.*, 302 U.S. 253, 264, 58 S.Ct. 167, 82 L.Ed. 235, and so federal and territorial prosecutors do not derive their powers from independent sources of authority.” *Puerto Rico v. Sanchez Valle*, ___ U.S. ___, 136 S.Ct. 1863, 1869-1873 (2016). For this reason, there is no exhaustion requirement in this case.

Nonetheless, to the extent any exhaustion is required, petitioner has reasonably exhausted all available administrative or judicial remedies to challenge his conviction relating to the grounds stated in the petition. The issues contained in grounds one and four were fairly presented to the Trial and Appellate Divisions of the High Court of American Samoa in his trial and direct appeal which is now concluded and final. See [A.S.C.A. §43.0804](#) (Decision on Appeal Final Unless Otherwise Provided by Statute).

As previously discussed, even assuming *arguendo* the jury trial ground is subject to an exhaustion requirement, that exhaustion is excused due to the *per se* ineffective assistance of trial and appellate counsel. There is no procedural default for failure to raise an ineffective assistance of counsel claim on direct appeal. “Failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding” such as the matter at bar. *Massaro v. United States*, 538 U.S. 500, 509 (2003) (ineffective assistance of counsel claim raised for the first time in a 28 U.S.C. §2255 proceeding following conclusion of direct appeal).

Even if exhaustion is required, petitioner is not required to exhaust every other possible remedy, such as territorial habeas corpus, as a precondition to federal habeas. Completion of the direct appeals process is sufficient. In *O’Sullivan v. Boerckel*, 526 U.S. 838 (1999), the court addressed the question of what state remedies a federal habeas petitioner must invoke to satisfy the federal exhaustion requirement. The court held a petitioner must have concluded his appeal of his conviction in the state court system including a discretionary review by the state’s supreme court if that court is vested with discretion as to whether a request for appellate review will be entertained unless that discretionary review is outside the standard review process and the state has plainly said that it need not be sought for the purpose of exhaustion. (There is no right to a review of a final decision of the High Court. Even assuming the United States Secretary of the Interior has the authority to do so he has expressly declined to exercise that authority.¹⁹) The completion of the appellate process under these guidelines satisfies the exhaustion requirement.²⁰ This petitioner has done so.²¹

9. **Conclusion.** Serious constitutional errors were committed below which require petitioner’s conviction be vacated. The government concealed important exculpatory evidence, falsely denied its existence to the court, and stood by silently while at least one of its witnesses perjured himself. The trial

court refused to remedy this misconduct and instead improperly restricted petitioner's right of confrontation and cross-examination. Petitioner was denied his right to a trial by jury. There was no valid waiver of this right. Petitioner was denied his right to a speedy trial.

The territory of American Samoa is not a sovereign distinct from the United States. Because of the composition of the appellate panel the territorial appellate process afforded petitioner was illusory and futile. Accordingly, there is no exhaustion requirement as to the claims raised in this petition. Even if that were not true exhaustion is excused as to ground two because of ineffective assistance of trial and appellate counsel which claims are not required to be asserted in the direct appeal. The other claims have been exhausted. Petitioner's direct territorial appeal is concluded.

The federal courts have habeas corpus subject matter jurisdiction in this case. The District of Hawai'i is the appropriate forum. This court has personal jurisdiction over the respondents.

This case is now ripe for this court to step in and exercise some much needed supervision.

RESPECTFULLY SUBMITTED, this 31st day of October, 2018, at Lihu'e, Hawai'i.

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¹ For the reader's convenience, when this document is viewed in PDF format on an internet capable machine text highlighted in **blue** indicates hyperlinks which when clicked on will take the reader to copies of the cited authorities maintained in databases freely available to the public via the open internet. The sites linked to in this petition are maintained by Cornell Law School's [Legal Information Institute](#), the [Federal Register](#), the [American Bar Association](#), the [Hawai'i State Legislature](#), the [American Samoa Bar Association](#), [Google Scholar](#) and other entities. Those entities are solely responsible for the accuracy of these materials.

² Although not an exhaustive listing, those cases include: [Downes v. Bidwell](#), 182 U.S. 244 (1901) (Goods from Puerto Rico subject to tariffs notwithstanding Uniformity Clause), [De Lima v. Bidwell](#), 182 U.S. 1 (1901) (Tariff duties could not be collected from Puerto Rico because of the Uniformity Clause), [Goetze v. United States](#), 182 U.S. 221 (1901) (Extended *De Lima* holding to Hawaiian Islands), [Dooley v. United States](#), 182 U.S. 222 (1901) (Goods from the United States to Puerto Rico entitled to free entry), [Armstrong v. United States](#), 182 U.S. 243 (1901) (Followed *Dooley*), [Dorr v. United States](#), 195 U.S. 138 (1904) (No right to a jury trial in the

Philippines), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (No right to a jury trial in Puerto Rico).

³ See “Citizens Nowhere: *The Anomaly of American Samoa’s Citizenship Status After Tuaua v. United States*”, Elizabeth K. Watson, 42 U. Dayton L. Rev. 411 (2017); *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert denied*, 136 S.Ct. 24671 (2016).

⁴ The American Samoa territorial courts have habeas jurisdiction. [Rule 22 of the American Samoa Appellate Court Rules](#) provides “[a]n application for a writ of habeas corpus shall be made to the appellate division, the trial division or district court.” See also *American Samoa Government v. Agasiva*, 6 A.S.R.2d 32 (1987) (“[H]abeas corpus is appropriate to review unconstitutional actions of prison officials and may be available in ‘exceptional circumstances rising to the level of constitutional deprivation.’” [cites omitted]); *Tumui v. Fa’alevao*, 2 A.S.R.2d 33 (1983) (In habeas corpus action petitioners “were entitled to their day in court, regardless of whether or not they were ultimately entitled to remain in the territory.”).

⁵ “Because American Samoa does not have a federal court like the Northern Mariana Islands, Guam, or the United States Virgin Islands, matters of federal law arising in American Samoa have generally been adjudicated in the United States District Court for the District of Hawaii or the District Court for the District of Columbia.” From the web site of the American Samoa Government at <https://www.americansamoa.gov/judicial-branch> (last visited 5/26/18 at 10:41 A.M.).

⁶ This case presents a situation quite different from that in *Majhor v. Kempthorne*, 518 F.Supp.2d 221 (D.C. Dist. 2007). There, the plaintiff, a prisoner in American Samoa, sought jurisdiction over a number of American Samoa Government officials under the District of Columbia’s “Long Arm” statute. [D.C. Code Ann. §13-423\(a\) \(2001\)](#). The court noted that before it could exercise personal jurisdiction over these defendants there must be “a sufficient nexus between the defendant and the forum state to make it fair to require defense of the action in the forum.” 518 F.Supp.2d at 236. Because there was nothing to suggest any of these defendants had “[t]ransacted any business in the District of Columbia” or “held an interest in, us[es] or posses[es] real property in the District of Columbia” jurisdiction could not be predicated on the Long Arm statute. 518 F.Supp.2d at 237. That is certainly not true of Hawai’i which has a very strong nexus to American Samoa and the respondents.

⁷ Hawaiian Airlines is the flag carrier and the largest airline in the U.S. state of Hawai’i. It is the 10th largest commercial airline in the U.S., and is based in Honolulu, Hawai’i. See Wikipedia online encyclopedia at https://en.wikipedia.org/wiki/Hawaiian_Airlines (last visited 8/7/18 at 11:48PM).

⁸ Respondent Sunia transacts other business in Hawai’i on a daily basis. When he logs onto the internet, sends or receives an email, makes a telephone call off-island or watches broadcast television he uses submarine cables which connect the territory to the State of Hawai’i. The owners and operators of the cable system are paid monies for the use of the cables by American Samoan users of this equipment. Each time he engages in these activities Sunia transacts business in Hawai’i. See “Fiber Optic Cable Makes Landfall In American Samoa” (7/7/09) on

the web site of the Department of the Interior at <https://www.doi.gov/oia/press/2009/Fiber-Optic-Cable-Makes-Landfall-In-American-Samoa> (last visited 8/7/18 at 9:07 PM); “American Samoa’s ASH Cable secures Bandwidth on Tui Samoa Cable” (5/12/18) on the web site of the Samoa News at <http://www.samoanews.com/local-news/american-samoas-ash-cable-secures-bandwidth-tui-samoa-cable> (last visited 8/7/18 at 9:13 PM). There are only two banks in American Samoa. One is the Bank of Hawai’i just around the corner from the prison. Every time he uses the services of this bank Sunia transacts business in Hawai’i.

⁹ See “Memorandum on Discovery” by U.S. Attorney Jennie A. Durkin dated Oct. 15, 2010 at https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/waw_discovery_policy.pdf (last visited 8/16/18 at 3:07 PM).

¹⁰ This ruling, and the court’s corresponding restriction on the cross examination of the alleged victims as to what they discussed with their public defenders, effectively granted the boys nothing less than a license to lie or, to say it more judiciously, “a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry.” ... “[T]o make any such inquiry effective, defense counsel should have been permitted to expose ... the facts ... from which... the ... trier[] of fact and credibility could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. *Brookhart v. Janis*, 384 U. S. 1, 3 (1966); *Smith v. Illinois*, 390 U. S. 129, 131 (1968).” (quotations omitted). *Davis v. Alaska*, 415 U.S. 308, 314, 318 (1974).

¹¹ In his ruling Judge Ward afforded great deference to the territorial laws protecting the privacy of juveniles and their court records. However, “[w]hatever temporary embarrassment might result to [the juvenile] or his family by disclosure of his juvenile record— if the prosecution insisted on using him to make its case— is outweighed by petitioner’s right to probe into the influence of possible bias in the testimony of a crucial identification witness.” *Davis v. Alaska*, 415 U.S. 308, 319 (1974).

¹² (1) T.L. testified petitioner performed oral sex on him. (T-24). T.L. said he first told the police about the sexual acts when he was arrested. (T-43). T.T. admitted he talked to A.A.G. Bullinger but said he told her the same thing he testified to at trial. (T-57). (2) L.B. testified petitioner showed him dirty movies of men having sex and performed oral sex on him. (T-108, 110). L.B. denied he had ever told anyone that petitioner had not performed the acts he testified to. (T-119). L.B. denied he had ever spoken to the public defenders or Bullinger about the sex acts. (T-141). (3) T.T. said he watched “homo sex” on the television and that petitioner had performed oral sex on him. T.T. said he saw petitioner and L.B. engaged in a sex act where L.B. had his penis in petitioner’s anus. (T-165). T.T. said he made his sexual accusations to the police first and spoke to A.A.G. Bullinger only after he had spoken to the police about it. (T-186).

¹³ The court’s actions improperly impaired appellant’s ability to confront his accusers and dispute the allegations. It was an error of constitutional magnitude. “The right of confrontation is one of the fundamental guarantees of life and liberty, and a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all

the States composing the Union.” *Kirby v. United States*, 174 U.S. 47, 55-56 (1899) (quotations omitted). The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution “to be confronted with the witnesses against him.” The right of confrontation is secured for defendants in federal and state criminal proceedings through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400 (1965); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974); *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁴ Giving the defense access to the dispositional agreement, and Bullinger’s and the victim-witness person’s files, notes, memoranda, recordings, emails, calendars, cellphone call records, or other records at least some of which would most certainly have been generated in connection with any witness interview would have enabled the defense to “refresh” Bullinger’s rather convenient loss of memory. Only the defense was truly in a position to properly evaluate such evidence for its exculpatory and impeachment value. To suggest no such records exist is disingenuous at best.

¹⁵ See “A Cautionary Tale: The Ted Stevens Prosecution”, (Washington Lawyer, Oct. 2009) by Anna Stolley Persky. <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/october-2009-ted-stevens.cfm> The government’s conduct in that case led to the suspension of two prosecutors by the Justice Department. See “Prosecutors Face Penalty in ’08 Trial of a Senator”, by Charlie Savage (New York Times, 4/24/12) <https://www.nytimes.com/2012/05/25/us/politics/2-prosecutors-in-case-of-senator-ted-stevens-are-suspended.html>

¹⁶ There is another reason there is a serious appearance of impropriety in this case. The only full-time appointed Associate Justice of the High Court of American Samoa throughout the proceedings below was the Honorable Lyle L. Richmond. Justice Richmond suffered a stroke almost two years ago. (According to a story appearing in the February 22, 2017, edition of the Samoa News, “[t]he High court has set trial dates for cases which have been pending for some time before Associate Justice Lyle L. Richmond, who has not been in court for a few months due to health reasons.” “High Court Schedules Trials for Pending Cases”, Samoa News, 2/22/17 at [http:// www.samoanews.com/local-news/court-report-47](http://www.samoanews.com/local-news/court-report-47) (last visited 5/26/18 at 9:48 A.M.)). Justice Richmond was on medical leave during the time of the appellate proceedings in petitioner’s case. Justice Richmond, who is in his eighties, never returned to the bench. In July of 2018 the respondent Secretary of the Interior publicly announced the position of Associate Justice of the High Court of American Samoa open for application. See Exhibit “T” attached to the petition. The announcement summarizes the job as follows: “*The Associate Justice of American Samoa is appointed by the Secretary of the Interior and receives professional supervision from the Chief Justice of American Samoa.*” (emphasis supplied). Upon information and belief petitioner alleges that both of the Acting Associate Justices who served on petitioner’s appellate panel (The Honorable Elvis Patea and the Honorable Fiti Sunia) were under consideration for and have applied for Justice Richmond’s slot. The Secretary of the Interior will likely consult with the Chief Justice before he makes any appointment.

¹⁷ Noting “a right of appeal is now universal for all significant criminal convictions”, it has been observed, “[t]here are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person’s liberty or property, and ...

depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.” *Jones v. Barnes*, 463 U.S. 745, 764, fnt 1 (1983), Brennan, J., dissenting.

¹⁸ Similarly, in *Majhor v. American Samoa Government*, ___ A.S.R.3d ___ (AP No. 05-06, Decided 4/2/09) (copy attached to the petition as Exhibit “M”), the Secretary appointed the Honorable Terry J. Hatter, Jr., Senior District Judge, United States District Court for the Central District of California, and the Honorable Consuelo B. Marshall, Senior District Judge, United States District Court, Central District of California, to serve on the panel. See also *Agasiva v. American Samoa Government*, 8 A.S.R.3d 1 (2004).

¹⁹ The Secretary has refused to conduct hearings, review the records, or even read the briefs in such cases stating that to conduct any review would “put the Secretary in the position of an appellate court, over the duly constituted judiciary.” *Corporation of the Presiding Bishop of the Church of Jesus Christ and Latter-Day Saints v. Hodel*, 830 F.2d 374, 378-379 (D.C. Cir. 1987). A.S.C.A. §43.0804’s mandate that decisions of the Appellate Division are deemed “final” and the Secretary’s quoted remarks in the *Presiding Bishop* case make it abundantly clear any review by the Secretary is outside the standard review process and need not be sought for the purpose of exhaustion. See also Associate Justice of American Samoa job vacancy announcement attached to the petition as Exhibit “T” (“The Director of the Office of Insular Affairs does not involve himself in any way in the judicial decisions that the Associate Justice renders.”)

²⁰ Similarly, the 9th Circuit has more recently held that in order to satisfy the exhaustion requirement, a criminal defendant must pursue a direct appeal or show that such an appeal would have been futile. *Jeffredo v. Macarro*, 599 F.3d 913, 918, 921 (9th Cir. 2010); *Swoops v. Sublett*, 196 F.3d 1008, 1009-1010 (9th Cir. 1999). Petitioner has met this standard as to all grounds of his petition which may be subject to the exhaustion requirement.

²¹ As has been observed by one jurist, 28 U.S.C. § 2254’s exhaustion requirement “is satisfied by one exhaustion; always to require a second, not to speak of a third or a fourth, might well invite the reproach that it is the prisoner rather than the state remedy that is being exhausted.” *United States v. LaValee*, 306 F.2d 199, 203 (2nd Cir. 1962), (Friendly, J., concurring).

APPENDIX 2

INDEX TO EXHIBITS

- Exhibit “A” - Amended Criminal Complaint in *American Samoa Government v. James Glenn Barlow*, originally filed on March 8, 2012, in the District Court of American Samoa under case number DCCR 542-11 before bind over to the High Court where assigned case number HCCR 26-12
- Exhibit “B” - Judgment of Conviction and Sentence dated and filed February 3, 2015 in *American Samoa Government v. James Barlow*, High Court Case No. HCCR 26-12
- Exhibit “C” - High Court Appellate Division decision in *James Barlow v. American Samoa Government*, Case No. AP 02-15, dated November 1, 2017
- Exhibit “D” - High Court Appellate Division decision in *James Barlow v. American Samoa Government*, Case No. AP 02-15, dated January 4, 2018
- Exhibit “E” - Appellant’s Brief to High Court Appellate Division in *James Barlow v. American Samoa Government*, Case No. AP 02-15, filed September 30, 2015
- Exhibit “F” - Appellant’s Petition for Rehearing to High Court Appellate Division in *James Barlow v. American Samoa Government*, Case No. AP 02-15, filed November 29, 2017
- Exhibit “G” - Complaint in *James Barlow v. American Samoa Government*, High Court of American Samoa, Case No. 010-2015 filed February 15, 2015
- Exhibit “H” - Letter from Steven H. Watson, Legal Counsel to the Governor of American Samoa, to James D. Frye, dated September 2, 2015
- Exhibit “I” - Request for a Bench Trial in *American Samoa Government v. James Barlow*, High Court Case No. HCCR 26-12 filed November 1, 2013

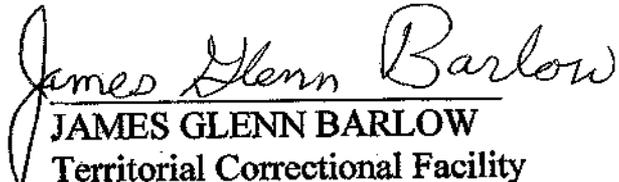
- Exhibit “J” - Affidavit in Support of Request for Bench Trial in *American Samoa Government v. James Barlow*, High Court Case No. HCCR 26-12, filed November 5, 2013
- Exhibit “K” - Excerpt from Transcript of hearing on November 18, 2013, in *American Samoa Government v. James Barlow*, High Court Case No. HCCR 26-12
- Exhibit “L” - Affidavit of Mark Frederick Ude
- Exhibit “M” - Decision of the Appellate Panel of the High Court of American Samoa dated April 2, 2009, in the case of *Richard Mahjor v. American Samoa Government*, AP No. 05-06)
- Exhibit “N” - Excerpt from Transcript of hearing in High Court Trial Division dated October 16, 2013 in *American Samoa Government v. James Barlow*, High Court Case No. HCCR 26-12
- Exhibit “O” - Affidavit of Leslie Cardin
- Exhibit “P” - Affidavit of Donna Clement
- Exhibit “Q” - Email from AAG Tiffany Oldfield to Kristopher Meek dated June 17, 2014
- Exhibit “R” - Excerpt from Transcript of hearing in Family Court Division of High Court of American Samoa dated June 25, 2014
- Exhibit “S” - Excerpts from transcript of trial from June 24-26, 2014
- Exhibit “T” - Job vacancy announcement for position of Associate Justice of the High Court of American Samoa
- Exhibit “V” - Affidavit of James Glenn Barlow

APPENDIX 3

VERIFICATION

The undersigned, JAMES GLENN BARLOW, hereby declares under penalty of perjury that the facts stated in the foregoing Petition for Writ of Habeas Corpus are true and correct, one and all.

This 31st day of October, 2018.


JAMES GLENN BARLOW
Territorial Correctional Facility
Tafuna, American Samoa

Mailing address:

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Leone-Pago Pago, American Samoa 96799

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Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

JAMES GLENN BARLOW,)

Petitioner,)

VS.)

TAUESE VA'AOMALA SUNIA)
Warden of the American Samoa)
Territorial Correctional Facility)
Department of Public Safety,)
American Samoa Government)

SOLIALPI FALEPO)
Hawai'i Office Director and)
Hawai'i Liaison Officer)
American Samoa Government)
1427 Dillingham Blvd., Suite 210)
Honolulu, Hawai'i)

Respondents)

CASE NO. 1:18-CV-423

PETITION UNDER 28 U.S.C.
§ 2241 FOR A WRIT OF HABEAS
CORPUS

CERTIFICATE OF SERVICE

This is to certify that I have this date served true and accurate copies of the foregoing Petition for Writ of Habeas Corpus, Exhibits and Memorandum of Law upon the following named persons by placing the same in the United States Mail with sufficient postage affixed thereto to insure delivery and addressed as follows:

TAUESE VA'AOMALA SUNIA
Warden, American Samoa Territorial Correctional Facility
Department of Public Safety
American Samoa Government
Post Office Box 1086
Pago Pago, American Samoa 96799

SOLIALI'I FALEPO
Hawai'i Office Director and Hawai'i Liaison Officer
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TALAUEGA ELEASALO VA'ALELE ALE
Attorney General
American Samoa Government
Post Office Box 7
Pago Pago , American Samoa 96799

This 3rd day of oct, 2018.

/s/Bentley C. Adams, III
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