

2-4-2014

## Cobell v. State Appellant's Brief Dckt. 41108

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Cobell 84171

P.O. Box 14 - annex #5

Boise Idaho

83707

NO. 41108

2013 FEB - 5 A 946

Idaho Court of Appeals

Cobell

vs

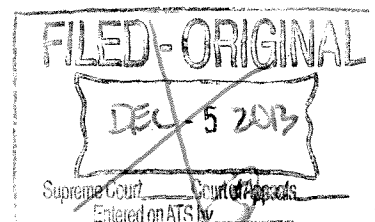
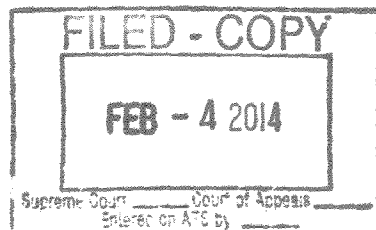
State of Idaho

no. 41108

Informal Brief

Comes now the Appellant Eugene Roy Cobell,  
Pro se and informally.

claiming that a denial to "one bite of the apple",  
one full and fair access to full litigation  
of a Past Conviction, (Cobell) would be  
a miscarriage of justice.



Brief - 1

## Introduction

The Clerks record, pg 23., the last five lines, the District Court stated that the first post-conviction was denied because the issues raised were frivolous;

however this then is an end around the issue of appellants council, clerks record pg 19, par 5., "in the case at hand... it was the denial of council that caused either the failure to properly raise issue, or preserve issue."

However, there is also another reason for the petitioners errors,

no

Second / Successive Petition ...; was filed !

The only pleading filed was a "Petition for and Order of Second Petition for Past Conviction Relief." (foot note pg. 1. "Refiling Review".

---

1. It is upon the District Courts error to not realize no second successive action was filed; and later for appellate and District Attorneys error to not realize the same; has completely cause misunderstandings.
2. Here-upon, the Petition for<sup>2-26-2011, (attached)</sup> and Order, pg 2., raised a "cause and prejudice" issue that the District Court did not address; and
3. Petition for<sup>2-26-2011, (attached)</sup> and Order pg 2., raised a claim that his issues, even if presented

for the first time, should be allowed to proceed upon new Court precedent; and,

4. Petition for Order and...

The Petitioner states he did not fail to raise the "actual innocence claims" but "failed to raise in a proper means,"  
above 22.

5. Further, Petition for / and order, pg 3, part 1. asked for a Black 529 U.S. ruling

---

See, Wyatt v. Terhune 315 F.3d 1108 (9th Cir 2003), the District Court was in error to not rule on these issues, and, the Court was in error to then dismiss a "Second Petition for Post Conviction Relief" that was never filed.

---

Here-upon,

The Courts, District and Appellant,

the State Attorney Generals Office,

Appellant Council,

Petitioners Council have wasted an extensive

amount of time and resources, arguing

a second successive Petitions, flows,

when one was never filed.

I have no legal ability, so now what?

what do we do to correct this error?

---

The Petitioner / Appellant prays,  
this Court will rule in his favor,  
on 26 July 2011 Petition for Pre filing  
Review;

1. Introduction, that Res Judicata; Slack  
(pg. 3) 529 U.S., Appellant can file a Peti-  
tion for Post Conviction relief,  
Regarded as a First / Original action.

"One bite of the apple.

2. pg. 3, "alternatively", pg. 7, the Petitioner /  
Appellant prays this Court will find the  
denial of access to courts for a pro se  
litigant.
3. Alternatively to above 1., 2. to allow the

appointment of Council in District Court;

or De Novo / or Nunc Pro Tunc here;

to argue, it ought to file a petition or,

1. actual Innocence
2. new Precedent
3. regarded as a First / Original Action
4. Cause and Prejudice that denies fair and just access,  
et. seq.

Eugene Corbett  
December 3, 2013



Attached,

Petition for Pre-filing Review; -;

& St. Atty Gen. has a copy of

(a)

Page 2., par. 2.; pg 4. par. 1., states,  
actual Innocence claim, requires an evidentiary hearing,  
because a medical issue requires an Evidentiary  
Hearing, (a) expert opinion; and,

It was ineffective of trial council to not have  
filed motions for an Expert Opinion;

(i.e.) [that the defendants wife testified to impotence,  
thus at the least - defendants physician should have  
been called who had tried to treat the condition],  
supported by actual fact, pg. 5.,

Res Judicata, Holland 566 U.S.

www.nlada.org.

(b) equally, cause and prejudice was supported  
by actual fact;

Whalon/Hunt 223 F.3d.

Fendquist 776 F.2d

Somez 2v. 91

wheeler, cv 01

Dilmore, 220 F. 3d

Civil Rights Act of 1960,

(et. seq)

14415  
Cobell 89471  
P.O. Box 14-Annex 15  
Boise, Idaho - 83707

2013 DEC -5 A 9

P.C. 7-26-11  
COPY #2  
26 July 2011  
No Merits Ruling

In The District Court of the Fourth Judicial District Court  
Of the State of Idaho, In and To the County of Ada

Eugene Ray Cobell  
(P)

Case No.

Warden J. Smith  
(R)

Petition for Prefiling Review,  
and Order of Second Petition  
for Post Conviction Relief

Comes now the Petitioner Eugene Ray Cobell;  
who is Institutionalized in Idaho State Correctional In-  
stitution, and receiving legal correspondence as,  
Cobell 89471, P.O. Box 14-annex-15, Boise, Idaho-83707.

Cobell does seek a Writ, (or other), granting of ap-  
proval to file a second-Petition for Post Conviction  
Relief, A.C. § 19.4908, (see) Hernandez v State 133 Idaho  
794 (ce. of app 1999); Palmer v. Dermitt, 102 Idaho 591  
(Ida Sup Ct 1981), [U.P.C.P.A.],

against Warden J. Smith, of Ida. St. Cor. Inst., and  
Olivia Craven, Idaho Board of Pardons and Parole, (John-  
Jane Doe (x-)), members of Idaho Department of Corrections,  
Education and Treatment Division.

All subordinates of Idaho Board of Corrections; whom

under theories of coconspiracy, [The] Warden Smith and others under color of State Law are exercising over the whole person, (mind and body) seizure, and continuing confinement.

This, Fourth Judicial District Court did pass judgement on June 9, 2008.

a 'first' U.P.C.P.A. was denied summarily without evidentiary.

per 3  
Petitioner does allege that he should be allowed to file a 'second' U.P.C.P.A. generally, or under, *Reine Pro Tunc*, as cause and prejudice can allow the case to proceed forgiving errors that caused the first case to be dismissed, and caused the petitioner to inadvertently omit key claims/issues.

per 4  
Petitioner also does allege new Precedent in U.S. Court of appeals or U.S. Supreme Court should be reviewed against the claims/issues.

per 4  
Petitioner also does allege that he failed to raise in a proper means that the Court could understand, a claim/issue of 'Actual Innocence', in-part.

Authority

(new precedent)

Philips v Almeida, 569 F.3d 1120 (9th Cir 2009)

Holland v. Florida, 560 U.S. — (2010)

Cone v. Bell, 556 U.S. — (2009) and

Restatement (Second) of Agents § 385

Restatement of Contracts § 447

State v. Arregui, 254 Pac. 788 (Wash Ct 204704-1925)

Lindquist v Ida. Bd. of Cor., 776 F.2d 851, 851-58 (9th Cir 1985)

Constitution of Idaho Art V § 1, R. Civ. P. 1.3 Law and  
equity

Hernandez v State, 133 Idaho 794 (cl app 1999)

Palmer v. Dermitt, 102 Idaho 591 (Sup Ct 1981)

I.C. § 19,490B Annotated

Stork v McDaniel, 529 U.S. 473 (2000)

Chisholm v. Georgia, 2 U.S. 419 (1793) 431-433,

West v. State, 123 Idaho 250 (cl. app 1993)

Samuel, v. Hysmith, Nungesser, & Gandy, 996 P.2d 303 (2000, 2001)

Wink, Nevada. and, RIA, 2006 and 2010

Laws of Texas

Equitable Clean-up Doctrine

Unconscionability Doctrine

Civil Rights Act of 1960 at I.

D.C. § 6.904 (C) Reckless - Wanton Action

T.C. § 3.201

Constitution of Idaho, annotated at Article I § 17  
"False Informant Exception".

Argument (In Part)

Introduction; the Petitioner has asked for the ability to file Habeas Pro Tunc; i.e. (see) State v. Arregui, 44 Idaho, Sup. Ct. No 4704 (1927) at 2.; that State and Court made Rules should not be used to prevent an inalienable right to habeas U.P.C.P.A. review. (id) Slack v. McDaniel, 529 U.S. 473 (2000); that when unjudicated issues are brought in a second action the action is regarded as a first habeas U.P.C.P.A.; this follows the decision of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), any constitutional violation that occurred is ongoing until repaired and the "State returns the individual to constitutional wholeness"; (Respectfully) Mary v. Madison 5 U.S. (1 Cranch) 137 167/168 (1803), and Arregui, 44 Idaho at 10, a duty imposed upon the court to ensure remedy for any constitutional violation.

Alternatively; This Court may review Phelps Almeida, 569 F.3d 1120 (9th Cir. 2009), (New Precedent, citing Retroactive Authority), the below cause and prejudice claims/issues, or ..., does give this Court authority/jurisdiction to "recalcidize", and issue an injunction over the First Dismissal, and remand for an amended Brief to be filed (id) amended U.P.C.P.A.

- Respectfully -

The U.S. Supreme Court has found in case history, (see) due process, *Schlup & Delo*, 513 U.S. 298 (1995), (etc), "Actual Innocence": Conviction of an innocent person is a "miscarriage of justice" that cannot be ignored.

Ref: E.E.O.C. v. *Kmwt Inc.*, 718 F. Supp 1425, 1428 (N.D. Iowa 1988); Jurisprudence holds that insufficient fact was before the Court to make a merits Ruling, before the completion of discovery; that because this claim is brought on a 'medical claim' of inability to perform the action alleged as a crime, the State of Idaho Supreme Court has also found evidentiary is required, Ref: *West & Hake*, 123 Idaho 250 (Ida App. 1993) and internal citations of,

This medical claim does raise a question of ineffective Council to investigate, expose, and prevent this issue, and opens a gateway to other claims of legal malpractice by trial attorney, that if allowed to proceed on a second U.P.E.P.A., could be fully briefed; Ref: *Samuel & Hephworth, Mungesser, Legamy Inc.*, 996 P.2d 303 (2000),



the Idaho Supreme Court has found that a legal malpractice issue requires evidentiary; (same) New Precedent of Holland v. Florida, 560 U.S. at Justice Alito - Concurring IV (see) the substantive ethical violations of an attorney are a cause and prejudice that under law and equity allows for a second action;

This court may also look to the genuine issue of, [www.nadad.org](http://www.nadad.org), the National Legal Aid and Defender Association found (newspaper) in 2010, Review of Idaho, Ada County Public Defenders are not functioning in a manner that meets constitutional minimums; (same) the reports cite deficiency in trial lawyers filing appropriate appeals and deficiency in the Appellate Public Defenders Office, 2006 report.

the Petitioners did allege that Prosecutorial Error, or misconduct did effect the trial and sentence process in a manner that was not harmless; New Precedent as found in the U.S. Supreme Court, Cone & Bell, 556 U.S. (2009) that such a claim can be brought in a second habeas, and when done so evidentiary is required. (Inherent Citing Omitted).

The final allegation is that venturing into the  
 by the Prosecution threatening Recommendation, the  
 Defense Council Recommendation, (see), the  
 failure to consult the client and court in  
 the interests of the "and" and overbearing attorneys  
 a) the agency;  
 that cause the Court to not consider the  
 full measure of mitigating factors, and the  
 statutory requirements of a sentence are denied  
 to being violated. Again this in part is an  
 other medical record that should require or  
 evidencing (see) as large multiplicity some  
 that require and evidence; and  
 in fact the U.S. District Court and the U.S. Supreme  
 Court have found as a likely error some,  
 protected by U.S.C.A. 2381 Amendment

Thus far and above the petition also alleges  
 the suffer from  
 apparent danger present and ongoing, especially  
 threat, pain - suffering, debilitation, etc. -  
 that entrance imminent danger, the ongoing,  
 threat, pain - suffering, debilitation will soon  
 come in the future.

## Cause and Prejudice

Introduction, this allegation is claimed as supported by "actual fact", and contains the issue that the Petitioner is suffering from legal disability of State Created Barrier that hinders, or chill his abilities; Her-up, the Petitioner does ask for the Court to consider appointment of Council for a limited purpose of arguing cause and prejudice, if the Petitioner's efforts fail to meet the Courts standard to allow a second action to be filed or alternatively to allow a Shelpe 569 4.3d, Reconsideration and remedy.

Cause and Prejudice is reviewed under the standards of manifest injustice, external factors, or exceptional circumstances that but for, the Petitioner would not have been unfairly or unjustly denied a notice, opportunity and remedy.

The Petitioner claims he was prejudiced from unfair and unjust, "Coercion" (inclusive of Retaliation)

a.) Force under law; because the conduct of the State, ... etc. overcame the free-will of the petitioner to act in a manner of self protection, therefore

rendering the prior actions, rulings, etc., involuntary when placed against the petitioners, and void, all prior actions; Ref: [Miller v. Casey 489 U.S. 1198] review of state created barrier.

Noting: The Petitioner has, and continues to use due diligence, shows that know he was under duress, and has diligently been attempting to end the duress, but he had no choice but to succumb, because as a 'ward' of the state from involuntary seizure, and breach of the fiduciary duties, etc.; have prevented the petitioners from voluntarily ending of the duress.

b (from) 'Undue Influence in Equity', (id) Equitable Clean-up Doctrine, the equitable counterpart to the laws of duress, and draws the laws of duress into the equity claim; Ref: [Holland, 500 U.S., 1116 - Concurring at III; Phelps 569 F.3d]

Generally as a Ward of the State; and specifically a Ward by "Plea Contract" Ref [Restatement of Contracts §497 definition], (1.) dominion over the plaintiff by his seizure, (2.) unfair persuasion by the state or fiduciary by a denial of a basic right

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(1) Chisholm v. Georgia 2 U.S., at 733

to reduce (id) to basic human right. (see)  
 [Fetal Tissue] (see see case 91575) *Stenberg v*  
*Superior Court of Justice*, 2016 CanLII 123 (1991),  
 the wrongful taking advantage of another person  
 of mind, or taking away unfair advantage of  
 another necessary of reason.

2. (from) *Unconscionability*, (id) *Unconscionability*  
 doctrine; The state or situation existing a  
 relationship upon the petition that was, and con-  
 tinues to be unfair or unjust; or uncon-  
 and action, or otherwise obstructs the exercise  
 (in part), abuse of power, undue influence, or  
 professional conduct; discrimination; abuse of  
 name discrimination; corruption and corrupt  
 acts; conspiracy to defraud; attempts; un-  
 lawful acts; disparagement; advertisement.

1. See: Williams/Hunt v. Early, 203 7.32, 146 (97 M.2000);  
Michael v. Westman, 421 F. Supp. 886 (N.D. 72, 1976)  
 & back of law library, legal books, consultation & demand  
 of counsel ... ability to conduct preparation ... identify  
 name and fact ...

*The Plaintiff v. The Bank of Can.*, 1776 4.28 851,  
 851-56 (1985) The U.S. Court of Appeals did

find that inmates were prejudiced by the lack of a law library and legal assistance program for litigants challenged...; and set forth the minima of resources that would be available to Idaho inmates. (same) Honey & Vernon, CV91-299-S-LMB, U.S. District Ct., Order 16 Dec 1993, citing Sundquist 776 F.3d.

The U.S. District Court, Ida., in Wheeler & Townsend, CV01-00274-S-MHW, Order 29 June 2005 found the prejudice is ongoing, at p.7, E, "after the Supreme Court ruling in Lewis & Casey the Court was informed that I.P.O.C removed all research materials from the prison resource centre. Therefore it is difficult to hold inmates accountable to rules to which they have no access"

In *Holmes v. Calif.*, 220 F.3d 987, 1008-09 (9th Cir 2000), the court stated Lewis & Casey did not give "carte blanche" to remove law libraries, ..., as the Prison Litigation Reform Act of 1996 (PLRA) established that a Motion to Terminate a Court order must be used to end an existing mandate.

(See) the civil right act of 1960 at I.7

the violation of a lawful court mandate (x-),  
is a criminal obstruction of justice.

This issue is not that the petitioner lacked the  
ability to fill out an file Pro-Forma-Forms.  
It is about the lack of Bound 430 U.S.,  
'adequate, effective, meaningful' means to  
identify, present, support with authority (etc),  
a habeas,  
which has been denied.

The Petitioner does ask this Court to not  
prejudice him, or punish him for misconduct  
- criminal in nature - of the State Attorney Gen-  
eral, by denying the right to a second  
U.P.C.P.A., and

to allow a second action to correct the manifest  
injustice of denial of ability to effectively file  
the first U.P.C.P.A.

See also I.C. § 6-904(c) Warden. Wilful - Reck-  
less action in Violation of Idaho Code § 3-201  
Duty of Attorneys.

2. The Petitioner has already identified a genuine issue of material fact, [www.nalda.org](http://www.nalda.org). a Panel of Experts has already found that Alida County Public Defenders fail to properly identify appellate issues in filing appeals; without records, it is impossible to further review of deficient Council or consulting with client on appeal, issues that could be raised on appeal... Holland - Alida Concurrence IV, is grounds for a second action.
3. A review of the Pro Forma - First U.P.C.P.A., Motion / Affidavit for Council has identified the lack of ability of the petitioner to present complicated legal matters this is only exacerbated by the State Created Barriers. with consideration for the Petitioner's age and genetic conditions.

If not for attorney's help, I could not have filed this Petition.  
and more cause and prejudice probably could be found by Council or this Court. or briefed after discovery.



569 F.3d 1120, 09 Cal. Daily Op. Serv. 8037, 2009 Daily Journal D.A.R. 9493  
(Cite as: 569 F.3d 1120)

197k802 k. Relief from judgment; revocation or modification. Most Cited Cases  
Relief under rule providing grounds for relief from a final judgment, order, or proceeding for any reason justifying relief is less warranted in a habeas corpus proceeding when the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

#### [13] Habeas Corpus 197 ⚔ 802

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)5 Determination and Disposition; Relief

197k802 k. Relief from judgment; revocation or modification. Most Cited Cases  
A change in the law should not indefinitely render preexisting judgments in a habeas corpus proceeding subject to potential challenge under rule providing grounds for relief from a final judgment, order, or proceeding for any reason justifying relief; rather, individuals seeking to have a new legal rule applied to their otherwise final case should petition the court for reconsideration with a degree of promptness that respects the strong public interest in timeliness and finality. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

#### [14] Habeas Corpus 197 ⚔ 802

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)5 Determination and Disposition; Relief

197k802 k. Relief from judgment; revocation or modification. Most Cited Cases  
In a habeas corpus proceeding, if there is a close connection between the original and intervening decisions at issue in a particular motion for reconsideration predicated on an intervening change in the law, a court will be more likely to find the circum-

stances sufficiently extraordinary to justify disturbing the finality of the original judgment. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

#### [15] Habeas Corpus 197 ⚔ 802

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)5 Determination and Disposition; Relief

197k802 k. Relief from judgment; revocation or modification. Most Cited Cases  
In a habeas proceeding, in the context of a motion for reconsideration predicated on an intervening change in the law, a court need not be concerned about upsetting principle of comity when a petitioner seeks reconsideration not of a judgment on the merits of his habeas petition, but rather of an erroneous judgment that prevented the court from ever reaching the merits of that petition. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

#### [16] Habeas Corpus 197 ⚔ 802

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)5 Determination and Disposition; Relief

197k802 k. Relief from judgment; revocation or modification. Most Cited Cases  
A central purpose of rule providing grounds for relief from a final judgment in the habeas corpus context is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

\*1122 Albert Joel Kutchins, Berkeley, CA, for the petitioner-appellant.

Juliet B. Haley, Deputy Attorney General, San Francisco, CA, for the respondent-appellee.

Appeal from the United States District Court for the

## Conclusion

To the best ability of the Petitioner, he has tried to raise issue he was not given a fair and just opportunity to present his first (habeas) U. P. C. P. A., because he lacked notice, and was effected by other fiduciary misconduct;

Never the less, by help - informally from other inmates, the Petitioner does believe he has identified an issue requiring review, Actual Innocence, and has shown a probability that the Const. of Sda, Art I § 17 as annotated at the "False Information Exception" was violated, or other rights were violated and evidencing could assist on these other issues.

The bottom line is the request to be allowed a fair and just chance to present all issues.

Preferably by Phelps-injunction to some Resources of the Petitioner; by amendment of Brief. or by a second action.

March, 1927.]

STATE v. ARREGUI.

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Points Decided.

(No. 4704. March 26, 1927.)

STATE, Respondent, v. MATEO ARREGUI, Appellant.

[254 Pac. 788.]

2. Law and court-made rules of expediency must not be placed above the constitution.

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STATE v. ARREGUI.

[44 Idaho,

Opinion of the Court—Taylor, J.

"I can see no such expediency or necessity for the enforcement of any law, as to justify violation of constitutional rights to accomplish it. The shock to the sensibilities of the average citizen when his government violates a constitutional right of another is far more evil in its effect than the escape of any criminal through the courts' observance of those rights. As said in *Gould v. United States*, *supra*, "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right"; and any rule which does so is not founded upon reason or justice.

March, 1927.]

STATE v. ARREGUI.

67

Opinion of the Court—Taylor, J.

"[10] In the hands of the state courts is placed the power to prevent in part the violation of the rights of a citizen ~~by the state courts in violation of state and federal constitutions~~. This is not only in the power of the state court, but its duty."

34481-SHA.Ct. Pg 13-14  
MARBURY v. MADISON

Petition

(2.)

Brief Initial

17

Eugene Ross Cobell  
Respectfully Submitted  
this 26<sup>th</sup> day of July, 2011

a True and Correct Copy  
mailed to Ada County Prosecution  
200 W. Front St.  
Boise, Idaho 83702