

No. 18-\_\_\_\_\_

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In the  
Supreme Court of the United States

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EX PARTE  
MELVIN CHARLES PETTIGREW,

*Petitioner.*

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On Petition for Writ of Certiorari to the  
Court of Criminal Appeals of Texas

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**PETITION FOR WRIT OF CERTIORARI**

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OCTOBER 10, 2018

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SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

**QUESTION PRESENTED**

Whether the Court of Criminal Appeals of Texas violated the Petitioner's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution in denying any substantive post-conviction review to the Petitioner?

## **LIST OF PARTIES**

Pursuant to Supreme Court Rule 29.6, Petitioner makes the following disclosures:

This Petition stems from a State of Texas habeas corpus proceeding in which Petitioner, Melvin Charles Pettigrew, was the Movant before the Court of Criminal Appeals of Texas. Petitioner is a prisoner in state custody at the Wynne Unit in Huntsville, Texas.

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## OPINIONS BELOW

The memorandum (Findings of Fact and Conclusions of Law) of the 241st District Court for Smith County recommending denial of Pettigrew's Texas habeas corpus petition was entered on June 28, 2018. This document from the district court appears at App.2a to this petition. The judgment of the Court of Criminal Appeals of Texas was entered against Pettigrew on July 18, 2018. This order is a denial of the habeas corpus petition by the highest Court in Texas hearing criminal cases. The decision of the Court of Criminal Appeals, issued only as a "white card," appears as App.1a to this petition.



## JURISDICTION

The Court of Criminal Appeals of Texas entered its judgment on July 18, 2018. As final judgment of a circuit court has been rendered in this civil matter, this Court has jurisdiction under 28 U.S.C. § 1254(1).



## CONSTITUTIONAL PROVISIONS

- **U.S. Const. amend. V; XIV**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury \* \* \* ; nor

shall any person \* \* \* be deprived of life, liberty, or property, without due process of law \* \* \*.



## **STATEMENT OF THE CASE**

The facts giving rise to this case occurred on the night of September 2, 1996. On said evening, a back-to-college party was held at the Activity Center on West Erwin in Tyler, Texas. Earlier in the evening, a confrontation began between two local gangs. As the party was ending, a gang from Chapel Hill took a position in their vehicles against the west fence on the Center's parking lot. Outside the Center, Carlos Roberts was talking to Tia Brown and Thomas Murphy. When Roberts noticed a red Camaro and another vehicle pull into the parking lot from Erwin, he told Brown and Murphy to leave because something was about to happen. At that moment, shots erupted in the parking lot. The evidence reflects that Pettigrew's brother, Marvin Pettigrew, was in the Camaro along with other gang members. Marvin fired the first shot toward the Chapel Hill gang. Melvin Pettigrew was in the second vehicle with a shotgun and fired the second shot toward the gang, who returned fire toward the direction of Erwin Street.

As Tia Brown and Thomas Murphy were driving out of the parking lot going eastbound on Erwin, a shot fired from the Chapel Hill gang, aimed at the Pettigrew gang, struck Thomas Murphy in the head. Murphy died as a result of the gunshot wound. Although the Camaro was struck many times, only one member of the Pettigrew gang was injured. No one from

the Chapel Hill gang was shot, even though the parking lot was covered with shell casings.

As a result of these facts, an indictment was returned against Pettigrew by the grand jury for Smith County. Pettigrew was charged with murder (first-degree) in violation of Texas Penal Code § 19.02. It was further charged that Pettigrew did intentionally cause the death of an individual, Thomas Murphy, by shooting him with a firearm and further that he did intend to cause serious bodily injury by committing an act clearly dangerous to human life, to wit: shooting a firearm at a group of individuals that caused the death of Thomas Murphy.

On June 16, 1997, Pettigrew proceeded to a jury trial in the 241st District Court for Smith County before the Honorable Diane DeVasto (case number 241-81774-96). The jury returned a guilty verdict as to the murder charge and attendant circumstances. The jury returned a punishment of seventy years' incarceration. On June 27, 1997, the trial court issued a sentence in accord with the jury's sentence. Judgment was entered on June 27, 1997.

Pettigrew filed a timely notice of appeal (appeal number 12-97-00210-CR). On appeal, Pettigrew argued that: (1) the evidence was legally and factually insufficient to support the guilty verdict on the murder charge and the attendant circumstances; (2) the trial court erred when it denied his motion to dismiss the indictment because the grand jury transcript revealed that persons other than an attorney for the State or a grand juror questioned a witness before the grand jury; and (3) the trial court erred when it denied his motion to compel endorsement of the grand

jury witnesses' names to be listed on the back of the indictment. In an opinion issued on April 29, 1999, the Court of Appeals of Texas, Twelfth District, affirmed the lower court on the merits.

Pettigrew filed a petition for discretionary review in the Court of Criminal Appeals of Texas (case number 1417-99). The petition was denied on June 20, 2001.

In 2018, Pettigrew filed a petition for writ of habeas corpus in the trial court. This was Petitioner's first petition for a writ of habeas corpus. The writ was properly filed in the District Court and was assigned Case Number 241-81774-96-A.

Therein, Pettigrew argued: (1) the petition should be considered on the merits by the court; (2) Pettigrew's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated when trial counsel failed to investigate and present witnesses who would have supported the defense of self-defense; (3) Pettigrew's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated when appellate counsel failed to argue that the trial court erred in issuing a self-defense instruction to the jury; and (4) Pettigrew is entitled to an evidentiary hearing on these issues. The District Court, in a Memorandum (Findings of Fact and Conclusions of Law) dated June 28, 2018, recommended denial of the writ to the Court of Criminal Appeals of Texas. The District Court failed to perform any balancing test to weigh the competing interests of the parties, or to hold a hearing to allow a record to be made on this issue. The trial court simply made a finding that the delay

between the date of the offense and this application make it likely that witnesses and attorneys involved in the case would “likely be unable to recall much of anything regarding this case.”

As required by Texas law, the District Court ordered transfer of the case to the Court of Criminal Appeals of Texas. The case was assigned number WR-57,087-02. The court denied the application for writ of habeas corpus without written order on July 18, 2018.



## **REASONS FOR GRANTING THE PETITION SUMMARY**

Under Supreme Court Rule 10, the Court will review a decision of a state court of last resort has decided an important question of federal law that has not been settled by this Court. S. Ct. R. 10(c). This case involves the interpretation and application of Tex. Code Crim. Proc. Art. 11.01, et seq. Specifically, this case involves the determination of whether the right to due process of law is violated by decision of the Court of Criminal Appeals of Texas to, in effect, suspend Pettigrew’s right to pursue a habeas corpus petition under Texas law without any analysis or balancing of the competing interests of the parties.

Article 11.01 of the Texas Code of Criminal Procedure provides that:

The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed

to anyone having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.

Tex. Code Crim. Proc. Art. 11.01. “The Court of Criminal Appeals, the District Courts, the County Courts, or any Judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by law.” Tex. Code Crim. Proc. Art. 11.05. As stated in *White v. White*, 1996 Tex. App. LEXIS 5109, \*2 (1996), “[t]here is no time deadline for filing an application for writ of habeas corpus and this court will not impose one.”

In Pettigrew’s case, in denying his habeas corpus petition, the Texas courts argued that the delay between the date of the offense and this application make it likely that witnesses and attorneys involved in the case would “likely be unable to recall much of anything regarding this case.” Memorandum at ¶ 8, 9 (citing *Ex parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013)). Pettigrew concedes that the *Perez* decision stated that the State need not make a “particularized” showing of prejudice to have a habeas corpus petition dismissed. *Perez*, 398 S.W.3d at 215. However, Pettigrew submits that said standard is meant to guard against “excessive and unjustified delays” in the filing of a habeas corpus application by a defendant. *Id.*

At no point did the Texas courts engage in any analysis of what constitutes excessive and unjust delays. Instead, the trial court merely noted that the issues raised by Pettigrew involve neither new law

nor new evidence. While new law or new evidence are the types of issues that must be raised in order to support a federal habeas corpus petition raised after the statutorily mandated filing deadline, no such standard exists in Texas habeas corpus law. Despite the lack of a statutorily mandated filing deadline, the Texas courts denied Pettigrew's habeas corpus petition based upon nothing more than mere speculation that witnesses may not remember the events comprising the case against Pettigrew. Pettigrew notes that the State, in its responsive pleading, made no mention of specific difficulties in having witnesses recollect the events at issue.

Given the Texas courts undue and improper limitation on the right to seek habeas corpus relief, Pettigrew was denied the opportunity to have his habeas corpus petition, and his underlying conviction, decided upon the merits. As a result, Pettigrew's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution was violated. Because a material distinction exists between the decision issued by the Texas courts in this matter and the mandates of the United States Constitution, because the end result in this case lacks common sense and is perverse, and because the decisions of the Texas courts permitted a violation of Pettigrew's constitutional rights, Pettigrew submits that this Court should grant his petition for a writ of certiorari.

## I. THE COURT OF CRIMINAL APPEALS OF TEXAS VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES IN DENYING ANY SUBSTANTIVE POST-CONVICTION REVIEW TO THE PETITIONER

Pettigrew's substantive arguments in this matter turn upon the constitutional right of due process of law. The Fifth Amendment to the United States Constitution states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be deprived of life liberty, or property, without due process of law.” U.S. Const., amend. V; *see also* Texas Const, art. I, § 19. As an initial matter, the Petitioner submits that the Fifth Amendment's due process protections are applicable to the states via operation of the Fourteenth Amendment to the United States Constitution. *Aguirre-Mata v. State*, 992 S.W.2d 495 (Tex. Crim. App. 1999).

In evaluating due process claims, this court inquires whether the practice “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). As stated by Justice Frankfurter, due process

embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just.

*Solesbee v. Balkcom*, 339 U.S. 9, 16, 70 S.Ct. 457, 461, 94 L.Ed. 604 (1950).

The Due Process Clause will be validated upon actions that “violate those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community’s sense of fair play and decency.” *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977). The Supreme Court has “defined the category of infractions that violate ‘fundamental fairness’ very narrowly.” *Dowling*, 493 U.S. at 352-53, 110 S.Ct. at 674. The “primary guide in determining whether the principle in question is fundamental is, of course, historical practice.” *Montana v. Egelhoff*, 518 U.S. 37, 41-44, 116 S.Ct. 2013, 2017, 135 L.Ed.2d 361 (1996).

There can be little doubt that the right to petition for habeas corpus relief has a long history in American jurisprudence, even going back to the English common law. The writ’s English origins precede the Magna Carta. *See* W. Duker, *A Constitutional History of Habeas Corpus* 27-40 (1980); L. Yackle, *Postconviction Remedies* 8-9 (1981). Although the precise beginnings of habeas corpus are lost in antiquity, it is quite certain that soon after the Norman invasion various writs of habeas corpus developed in England to ensure the presence of the accused or witnesses at trial. *See* 3 W. Blackstone at \*129-38; W. Duker at 129-94. By the fourteenth century, however, Chancery and Common Law courts used writs of habeas corpus to review lower court judgments and examine the cause of imprisonment. *See* Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 Can. B. Rev. 92,

112 (1938). This review, however, examined only the confining court’s jurisdiction, and not the correctness or fairness of the trial or judgment. *See Oaks, Legal History in the High Court-Habeas Corpus*, 64 Mich. L. Rev. 451, 468 (1966).

The present day writ of habeas corpus, the “common law world’s ‘freedom writ’” and that “highest safeguard of liberty,” *Smith v. Bennett*, 365 U.S. 708, 712, 6 L.Ed.2d 39, 81 S.Ct. 895 (1961), traces its origins to English laws dating back to 1166. *See Michael O’Neill, On Reforming the Federal Writ of Habeas Corpus*, 26 Seton Hall L. Rev. 1493, 1495-96 (1996) (citing Assize of Clarendon, enacted in reign of King Henry II). The “great object of [the writ of habeas corpus] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment.” *Ex Parte Watkins*, 28 U.S. 193, 202, 7 L.Ed. 650 (1830). The writ, along with the right to trial by jury, is among the most fundamental features distinguishing our free society from a police state, where unbridled and arbitrary imprisonment is used as an instrument of tyranny. *See Johnson v. United States*, 333 U.S. 10, 17 n.8, 92 L.Ed. 436, 68 S.Ct. 367 (1948).

What does not appear in the history of the petition for writ of habeas corpus is “individual judges dismissing writs for *ad hoc* reasons, but, rather, the gradual evolution of more formal judicial, statutory, or rules-based doctrines of law.” *Lonchar v. Thomas*, 517 U.S. 314, 322, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996). As the writ has evolved into an instrument that now demands not only conviction by a court of competent jurisdiction, *see In re Coy*, 127 U.S. 731,

756-758, 32 L.Ed. 274, 8 S.Ct. 1263 (1888), but also application of basic constitutional doctrines of fairness, *see Jones v. Cunningham*, 371 U.S. 236, 243, 9 L.Ed.2d 285, 83 S.Ct. 373 (1963).

The right to pursue habeas corpus relief in Texas was codified in 1965. Enacted by Acts 1965, 59th Leg., ch. 722 (S.B. 107), § 1. An applicant for habeas corpus relief has a constitutional right to access to courts as well as a statutory right to file an application for writ of habeas corpus with the district clerk. Tex. Const., art. I, § 12; Tex. Code Crim. P. § 11.07(3)(b). Further, only the legislature has the right to suspend statutory laws. Tex. Const., art. I, § 28.

In Pettigrew's case, as discussed above, the Texas Courts have taken it upon themselves to curtail the right of criminal defendants to seek habeas review, by imposing time limits upon the bringing of such an action where the Legislature intended no such restriction. Such action is not permitted under either Texas law or the United States Constitution.

As the Texas Courts violated Pettigrew's right to seek habeas corpus relief, resulting in a violation of Pettigrew's constitutional right to due process of law, Pettigrew asks that the decisions of the Texas courts regarding this issue be vacated, and that this issue be granted review by this Court.



## CONCLUSION

The Texas Courts have eviscerated the Due Process Clause of the United States Constitution, thereby resulting in a violation of the Petitioner's rights. Allowing the Texas courts to continue to infringe upon the constitutional and traditional rights of American citizens is incomprehensible. As such, this Court must make the statement that the rights of Americans cannot be trampled by the judiciary. Therefore, the Petitioner asks this Court to grant this petition under Sup. Ct. Rule 10(c).

Respectfully submitted,

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OCTOBER 10, 2018

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**ORDER OF THE COURT OF CRIMINAL APPEALS  
OF TEXAS DENYING APPLICATION FOR  
WRIT OF HABEAS CORPUS  
(JULY 18, 2018)**

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OFFICIAL NOTICE FROM COURT OF  
CRIMINAL APPEALS OF TEXAS  
P.O. Box 12308, Capitol Station,  
Austin, Texas 78711

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PETTIGREW, MELVIN CHARLES Tr. Ct. No. 241-81774-96-A, WR-57,087-02 This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Deana Williamson  
Clerk

**MEMORANDUM AND ORDER OF THE  
DISTRICT COURT OF TEXAS  
(JUNE 28, 2018)**

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**IN THE 241<sup>ST</sup> DISTRICT COURT OF  
SMITH COUNTY, TEXAS**

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**EX PARTE MELVIN PETTIGREW**

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**Cause No. 241-81774-96-A**

**Before: Christi KENNEDY, District Court Judge.**

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On June 15, 2018, the applicant in Cause Number 241-81744-96 filed his first Application for a Writ of Habeas Corpus. The State filed a response. The Court hereby enters its Findings of Fact and Conclusions of Law.

The Court takes judicial notice of all prior proceedings, reporter's records, the documents and papers contained in the files, and the docket sheets in Cause Number 241-81744-96, and in the first Application for Writ of Habeas Corpus filed under Cause Number 241-81744-96-A.

The Court enters the following Findings of Fact and Conclusions of Law:

1. The Applicant, Melvin Pettigrew, was indicted in Cause No. 241-81744-96, filed in the 241st District Court of Smith County, Texas, with the offense of Murder.

2. On June 27, 1997, Applicant, with counsel, was convicted of the offense alleged by the indictment after a jury trial. Upon hearing evidence and argument of counsel, the jury assessed a sentence of seventy-five (75) years in confinement in the Texas Department of Criminal Justice—Institutional Division, and no fine.

3. Applicant appealed from this conviction and sentence. On April 29, 1999, his conviction and sentence were affirmed by the 12th Court of Appeals. *Pettigrew v. State*, No. 12-97-00210-CR (Tex. App.-Tyler April 29, 1999, pet. ref'd) (not designated for publication).

4. On June 15, 2018, Applicant filed his first writ application under Art. 11.07 of the Code of Criminal Procedure.

5. In his writ application, Applicant alleges that his trial and appellate counsel rendered him ineffective assistance. (Writ App. at 6-10).

6. The Court makes the following findings of fact and conclusions of law regarding the instant writ application:

7. Applicant was convicted on June 27, 1997, for an offense alleged to have occurred on September 2, 1996. The instant writ application was filed with the clerk of this Court on June 15, 2018.

Consequently, over twenty (20) years has elapsed since the date of Applicant's conviction and the date upon which Applicant filed this application.

The Court of Criminal Appeals has held that its "revised approach" to the doctrine of laches "will permit courts to more broadly consider the diminished memories of trial participants and the diminished availability of the State's evidence, both of which may

often be said to occur beyond five years after a conviction becomes final.” *Ex parte Perez*, 398 S.W.3d 206, 216 (Tex. Crim. App. 2013). In *Perez*, the Court discussed the kinds of prejudice that the State may suffer that would now be sufficient to support a finding that the doctrine of laches precludes habeas relief. The Court wrote:

Consistent with the common-law doctrine of laches, going forward, we will (1) no longer require the State to make a “particularized showing of prejudice” so that courts may more broadly consider material prejudice resulting from delay, and (2) expand the definition of prejudice under the existing laches doctrine to permit consideration of anything that places the State in a less favorable position, including prejudice to the State’s ability to retry a defendant, so that a court may consider the totality of the circumstances in deciding whether to grant equitable relief.

*Ex parte Perez*, 398 S.W.3d at 215.

8. The Court finds and concludes that the delay between the date of offense and this application has made it extremely likely that should there be a retrial, the witnesses would be asked to testify about matters that occurred over twenty-one years ago. Consequently, the State’s ability to respond to this writ or to retry this case has been prejudiced by Applicant’s unexcused delay in filing this application. *See Ex parte Perez*, 398 S.W.3d at 215; *Ex parte Saenz*, 491 S.W.3d 819, 826 (Tex. Crim. App. 2016) (“[T]he doctrine of laches is intended to address the broader interests of the criminal-justice system, such as prejudice to the State’s

ability to prosecute a defendant or to respond to allegations due to the loss of evidence . . . ”).

9. The Court finds and concludes that, after two decades, Applicant’s attorneys will also likely be unable to recall much of anything regarding this case that could be helpful in defending themselves against his claims.

10. The Court finds and concludes that Applicant has offered nothing to excuse or to explain his two-decade delay in filing this application. He has not argued that he has recently discovered new evidence or that the law has changed substantially since the date of his conviction. Further, his bare allegations contain no argument or evidence showing any harm arising from the alleged ineffectiveness of counsel.

11. The Court finds and concludes from the record, and also from the content of this writ application, that both of Applicant’s grounds have existed since the time of his trial and appeal.

12. The Court finds and concludes that the unexcused two-decade delay between Applicant’s conviction and his first writ application has ensured that the memories of the parties involved have faded; that evidence may well have been lost or destroyed; and that the State’s ability to respond to his writ allegations has been seriously, if not fatally, impeded.

Consequently, this Court is within the law to find and conclude from the record that the doctrine of laches should bar this application. *See Ex parte Smith*, 444 S.W.3d 661, 663 (Tex. Crim. App. 2014) (habeas relief ultimately denied on the basis of laches due to a ten-year delay); *Ex parte Carrio*, 9 S.W.3d 963 (Tex. Crim. App. 1999) (habeas relief denied under laches

due to a 14-year delay between the conviction and application); *Ex parte Roberts*, 494 S.W.3d 771 (Tex. App.-Houston [14th Dist.] 2016, pet. ref'd) (no abuse of discretion in trial court's denial of habeas application where applicant waited thirteen years to file); *Ex parte Reyna*, 435 S.W.3d 276, 280 (Tex. App.-Waco 2014, no pet.) (trial court did not err in denying relief after a twenty-year delay); *see also Ex parte Perez*, 398 S.W.3d at 216 n.12 (recognizing that "delays of more than five years may generally be considered unreasonable in the absence of any justification for the delay").

13. The Court finds and concludes that Applicant's bare assertions in this case are insufficient to entitle him to relief. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).

14. The legal procedures in this case were proper and as provided by the Constitution and Texas law.

15. The Court concludes that the Application for Writ of Habeas Corpus is not well taken and should in all things be DENIED.

## ORDER

The Court orders the Clerk of the Court to immediately transfer to the Court of Criminal Appeals:

- (1) a copy of the Application for Writ of Habeas Corpus;
- (2) any answers and waivers executed by the State;
- (3) a copy of the files and docket sheets in the original cause of action and the files and docket sheets in the first Application for Writ of Habeas Corpus; and

(4) This certificate.

SIGNED AND CERTIFIED on this 28th day of June, 2018.

/s/ Christi Kennedy  
Judge Presiding on Exchange of Benches  
114th District Court  
Smith County, Texas