

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Scott Carmell — PETITIONER
(Your Name)

vs.

Lorie Davis, Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals, Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Scott Carmell, TDCJ No. 777548
(Your Name)

2661 FM 2054
(Address)

Tennessee Colony, Texas 75884-5000
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether a defendant is denied Due Process when he is tried in a court that 1) proceeds without constitutional authority, 2) refuses to affirmatively establish jurisdiction in the record when challenged multiple times to do so, and 3) convicts under a first degree statute whose elements of offense are the same, verbatim, as a second degree statute, thus not conferring jurisdiction on the court.
2. Whether a defendant is denied his Fourteenth Amendment right to Due Process when a state habeas court incorrectly and unreasonably procedurally bars an original habeas proceeding, attacking a new judgment, as a "second or subsequent" habeas action and the bar is given deference from the federal habeas courts that follow, thereby foreclosing review of the claims and functionally suspending Petitioner's habeas corpus action.
3. Whether a Petitioner is denied Due Process under the Fourteenth Amendment in the federal habeas court when after the pleadings in the petition, answer, and reply are filed, and no other pleadings are authorized except upon request by a party, the court determines that the Respondent's answer is meritless and sua sponte orders the Respondent to file an amended or supplemental answer instead of proceeding with the pleadings as filed.
4. Whether a defendant is denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel when his appellate counsel fails to argue issues that would have, as in other cases, resulted in reversal and remand to the trial court, while presenting

weaker arguments that were without merit and failed.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The United States Court of Appeals' opinion, unpublished: Appendix A.

The United States District Court opinion, unpublished: Appendix D.

The Texas Court of Criminal Appeals' order, unpublished: Appendix F.

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 21, 2017.

A timely petition for rehearing was denied by the United States Court of Appeals on March 29, 2018.

An extension of time to file the petition for a writ of certiorari was granted to and including July 18, 2018 on May 3, 2018 in Application No. 17A1207.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Article I, §9, provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

The United States Constitution, Amendment VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to... be informed of the nature and cause of the accusation... and to have the Assistance of Counsel for his defence.

The United States Constitution, Amendment XIV, provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 10, 1997, Petitioner Carmell, a citizen of the United States, was convicted by a jury in Denton County, Texas, for sexual assault and indecency with a child, to wit, his teenage step-daughter who testified they were "married." There are many twists and turns in this multi-decade case. Most relevant here are the petitioner's out-of-time appeal that concluded on October 11, 2011 and the subsequent original or first post-conviction habeas corpus proceeding in the state and federal courts.

In an out-of-time appeal the Texas Second Court of Appeals affirmed Petitioner's convictions and this Court denied his petition for writ of certiorari, thus concluding direct review on October 11, 2011. Carmell v. Texas, 132 S.Ct. 409 (2011). App'x. E.6.

Petitioner then timely filed a state application for a writ of habeas corpus. Among other claims for relief he brought 1) the lack of trial court jurisdiction, and 2) the ineffective assistance of appellate counsel. The Texas Court of Criminal Appeals incorrectly dismissed the jurisdictional claim and multiple other claims as "second or subsequent" under the Texas Code of Criminal Procedure, article 11.07 § 4. This violated state and federal law in two ways: 1) an initial habeas action following the conclusion of direct appeal is not a "second or subsequent" action; 2) Jurisdiction is a fundamental right that must affirmatively appear in the record, which it does not in this case. Further, jurisdiction cannot be presumed, is not subject to procedural rules of waiver or forfeiture, and can be challenged or questioned at any time. All other claims were likewise incorrectly dismissed as subsequent claims, except the ineffective assistance of appellate counsel claim, for which the court denied relief. App'x. F.

Petitioner raised all of his claims in his timely 28 U.S.C. § 2254 petition for writ of habeas corpus in the United States District Court (E. D. Tex.).

Of the two magistrate judges appointed to the case, the first magistrate determined that Petitioner's habeas actions were not "second or successive." App'x. I.4. The magistrate also determined the Respondent's answer was meritless. However, instead of entering a Report and Recommendation into the record, he incorrectly sua sponte ordered the Respondent to file an amended or supplemental answer to Petitioner's claims. App'x. I.5. The Respondent's original answer addressed each claim in clear, unambiguous terms. Functionally, the Respondent was coached to do a better job. The magistrate's order is in conflict with federal law and other federal courts that hold a much more limited and restricted use of amended or supplemental pleadings.

A second magistrate replaced the first. She correctly confirmed that "a state conviction 'becomes final upon direct review, which occurs upon denial of certiorari by the Supreme Court'." . . . and that "The Supreme Court denied his petition for a writ of certiorari on October 11, 2011. Carmell's convictions became final on October 11, 2011." The magistrate then affirms that the present habeas action was timely filed following the conclusion of direct review on October 11, 2011. App'x. E.6, 7. But, showing no intermediate habeas action, incorrectly recommended that the district court defer to the state's second or subsequent procedural bar. App'x. E.4, 5. Like state courts, this foreclosed review of all claims except the ineffective assistance of counsel claim. The district court denied relief. App'x. D.

Petitioner sought a Certificate of Appealability (COA) in the United States Court of Appeals, Fifth Circuit (Fifth Circuit). This included all claims for habeas relief presented in the state and federal courts below. Additionally, Petitioner requested a COA on three procedural issues: 1) the "second or successive" bar; 2) the district court's sua sponte order; and 3) the district court's denial of a motion for discovery. The Fifth Circuit granted a COA on the ineffective assistance of appellate counsel claim and the district

court's denial of the motion for discovery. COA was denied regarding the sua sponte order. In addition, the court denied a COA regarding the "second or successive" procedural bar and thereby in one broad sweep denied all of Petitioner's remaining claims. Petitioner was again wrongfully denied his due process right to have his first or original claims heard.

Under the statement regarding Jurisdiction in his principal appellate brief and also in his reply brief, the Petitioner questioned and challenged the Fifth Circuit Court of Appeals to determine whether it had full subject-matter jurisdiction to hear the merits of the case, or limited jurisdiction allowing it only to vacate the trial court's judgment and dismiss the indictment due to the lack of trial court jurisdiction. The trial court did not have jurisdiction because 1) the court was not presented with an indictment by a quorum of the grand jury as required by the Texas Constitution, Article V, §§ 12(b), 13; 2) the court did not answer repeated challenges to affirmatively establish jurisdiction in the record; rather, it unlawfully removed multiple documents from the record concerning jurisdiction and fraudulently conducted the trial; and 3) more specifically, the charge in counts 3 and 4 is impossible to determine, i.e., a first or second degree offense, because Texas Penal Code §§ 22.021(a)(1)(B)(iii) is found verbatim in § 22.011(a)(2)(c). Neither the Respondent nor any of the lower courts presented any facts that, as a matter of law, would show jurisdiction in the trial court. Accordingly, in its December 22, 2017, ~~the~~ decision, the Fifth Circuit did not establish if it had full or limited jurisdiction, the matter was not discussed. App'x. A.

A timely petition for rehearing was denied on March 29, 2018. App'x. B.

REASONS FOR GRANTING THE WRIT

I.

JURISDICTION

This Court should grant review to resolve a split of authority as to the duty of a court to establish jurisdiction in the record and to correctly inform a defendant on the consequences associated with the lack of jurisdiction in a criminal case.

The decisions in the lower federal and state courts created conflict of authority on the critical issue of jurisdictional law as determined by this Court, namely 1) whether jurisdiction must affirmatively appear in the record, and 2) whether the absence of a showing of jurisdiction in the record constitutes cause for vacating a conviction and dismissing the case. These are issues of significant importance to all defendants and Petitioner. Both issues were thoroughly presented in the lower courts and are ready for a final resolution by this Court. The impact of jurisdiction, or the lack thereof, on a defendant's legal status is a matter of great importance. The courts below departed so far from the normal course of judicial proceedings and from this Court's authority so as to deserve this Court's authority and supervision.

On March 22, 1995, Petitioner was arrested in Denton County, Texas. Shortly thereafter he was indicted in cause no. F-95-0348-E. He filed a pre-trial application for a writ of habeas corpus on May 20, 1996, and a supplement on September 13, 1996, questioning the court's jurisdiction in each. On September 30, 1996, he filed a Notice of Objection in which, among other things, he challenged the court's jurisdiction again. It was unanswered. More specifically, a Motion for Status of Jurisdiction was filed on October 8, 1996. App'x. H.1. Instead of answering any of these, the trial officials unlawfully removed the documents from the record before transmitting it to higher courts.

In a December 19, 1996, pre-trial hearing on a motion to quash the F-95-0348-E indictment, "State presented court w/new indictment." App'x. G. Petitioner again raised the jurisdictional issue in a December 30, 1996 pre-trial hearing. Again the court avoided it by immediately changing the topic. Petitioner was convicted in January 1997, under the new cause no. F-96-1227-E.

There was never a hearing in which the parties could present arguments for or against trial court jurisdiction. Jurisdiction was not established in the record. Why? The facts of the case show that jurisdiction cannot

be established. For this reason neither the Respondent nor any of the courts below identified any facts that establish trial court jurisdiction.

The root principle underlying habeas corpus proceedings is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirement of law, the individual is entitled to his immediate release. Jurisdiction is a fundamental systemic requirement of law. It is not optional and cannot be waived or forfeited. Marin v. State, 851 S.W.2d 275, 279, 280 (Tex. Crim. App. 1993). It is an absolute requirement that is not subject to procedural default. Id.; State v. Dunbar, 297 S.W.3d 777 (Tex. Crim. App. 2009). (The Texas habeas court incorrectly procedurally barred the claim of lack of trial court jurisdiction and the lower federal courts sustained the bar. See Question No. 2.) Because a jurisdictional issue is not subject to procedural default, "a void conviction can be challenged at any time." United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002); Long v. Shorebank Development Corp., 182 F.3d 548 (7th Cir. 1999); Puente v. State, 71 S.W.3d 340 (Tex. Crim. App. 2006); Thompson v. State, 604 S.W.2d 180, 181 (Tex. Crim. App. 1980). This includes a challenge that is made long after judgment is entered. Jackson v. FIE Corp., 302 F.3d 515 (5th Cir. 2002).

This issue requires a fact-specific inquiry to understand the errors in the courts below.

A. Jurisdiction Was Not Constitutionally Established.

Fact: The "State presented court w/new indictment." App'x. G.1, 2.

Law: The Texas Constitution, Article I, §§ 12(b), 13, states in pertinent part:

An indictment is a written instrument presented to a court by a grand jury... The presentment of an indictment... invests the court with jurisdiction of the cause... nine members of the grand jury shall be a quorum to transact business and present bills.

In tandem with these constitutional provisions:

When the indictment is ready to be presented, the grand jury shall through their foreman, deliver the indictment to the court... At least nine members of the grand jury must be present on such occasion... The fact of a presentment of an indictment by a grand jury shall be entered upon the minutes of the court.

Vernon's [2005] Ann. Tex. Code Crim. Proc., articles 20.21, 20.22. Not a single member was present in the hearing. As a ministerial act, the court was required to receive an indictment from a quorum of the grand jury only.

This act confers jurisdiction. But here, the court simply acquiesced to the prosecutor circumventing the grand jury process.

In Texas, the prosecutor writes the indictment. Tex. Code Crim. Proc. art. 20.19. But the prosecutor does not have the individual or official capacity or standing to invoke the jurisdiction of the court by presenting an indictment ^{she} crafted. The purpose of a grand jury is to protect citizens from the State's commencement of arbitrary or unreasonable felony prosecutions.

Batiste v. State, 785 S.W. 2d 432, 436 (Tex. App. - Corpus Christi 1990).

To hold that one individual might be the accuser and the prosecutor... would certainly be contrary to the policy of our law to protect our citizens from the inherent dangers arising from the concentration of power in any one individual.

Aguilar v. State, 846 S.W. 2d 318, 321 (Tex. Crim. App. 1993).

"In a felony case the constitution requires an indictment presented by a grand jury and such is essential to a valid trial." Hollingsworth v. State, 87 C.R. 399, 221 S.W. 478 (Tex. 1920). A constitutionally presented indictment serves a jurisdictional function. Cook v. State, 902 S.W. 2d 471, 475 (Tex. Crim. App. 1995). In this context the Due Process clause, coupled with the Texas Constitution, serves a vital function for defendants - it acts as a check on prosecutorial power and ensures that an accused citizen is tried in a court of jurisdiction. Due process was trampled upon when Petitioner was tried in a court that did not and could not establish jurisdiction; it did not have constitutionally established jurisdiction.

The jurisdictional inquiry could end here. But, there is more.

B. The Trial Court Did Not Answer The Jurisdictional Question.

Fact: Petitioner questioned and challenged the trial court multiple times to show that it had jurisdiction. The court did not answer the jurisdictional question nor affirmatively establish jurisdiction in the record.

Law: When jurisdiction is questioned the trial court is required to hold a hearing to consider evidence from each party, for and against jurisdiction, and then either establish its jurisdiction in the record or dismiss the case for want of jurisdiction. Tex. Dept. of Parks and Wildlife v. Miranda, 133 S.W. 3d 217, 226 (Tex. 2004) ("The trial court must determine at its earliest opportunity whether it has constitutional or statutory authority to decide the case before allowing the litigation to proceed.") A State is obliged to prove a court's jurisdiction of the defendant. Deaton v. Dugger, 635 So2d 4 (Fla. 1993). This was not done.

Jurisdiction cannot be presumed. Bowles v. Wade, 913 S.W. 2d 644 (Tex App. Dallas 1995). Instead, as this Court holds, jurisdiction must affirmatively appear in the record... and it is the burden of the party who seeks the exercise of jurisdiction to clearly allege facts essential to showing jurisdiction. If that party fails to make the necessary allegations, that party has no standing. FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596, 608 (1990).

Petitioner challenged the trial court's jurisdiction multiple times via a pre-trial application for writ of habeas corpus and its supplement, a Notice of Objection, and a Motion for Status of Jurisdiction. Appx. H.1,2. The trial officials illegally removed the documents from the record. Petitioner also raised the subject of jurisdiction in a December 30, 1996 pre-trial hearing. The court quickly changed the topic.

Neither the prosecutor in the trial court nor the Respondent in this habeas action presented any facts to show trial court jurisdiction. There are none.

C. Counts 3 And 4 Lacked Subject-Matter Jurisdiction.

Fact: Counts 3 and 4 were prosecuted under Texas Penal Code §22.021 (a)(1)(B)(iii) which is verbatim the same as §22.011 (a)(2)(c).

Law: As a matter of fact and law, the circumstances in Texas Penal

Code § 22.021(a)(1)(B)(iii) are exactly the same as § 22.011(a)(2)(C), first and second degree statutes respectively. Further, the age of the complainant (13) in counts 3 and 4 is "younger than 14 years of age" and "younger than 17 years of age," §§ 22.021(a)(2)(B) and 22.011(c)(1). The phrase "younger than 17 years of age," § 21.11(a)(1), applies to complainants younger than 14 years of age. See e.g., Gonzalez Soto v. State, 267 S.W.3d 327 (Tex. App.- Corpus Christi 2008) (11 year-old complainant); Mireles v. State, 878 S.W.2d 245 (Tex. App.- Corpus Christi 1994). Neither the prosecutor, the Respondent, nor any court found that age 13 is below the age of 14 and not below the age of 17. Since neither statute has a circumstance the other does not have and both include the age of the complainant, the statutes are the same. U.S. v. Dixon, 113 S. Ct. 2849, 2856 (1992); Blockburger v. United States, 52 S. Ct. 180, 182 (1932). And because the counts track the statutory language it is impossible to determine which statute controls.

Placing the words of a statute in an indictment does not always render an indictment sound. Jones v. State, 545 S.W.2d 771 (Tex. Crim. App. 1975). It must do more than simply repeat the language of a statute. Russell v. United States, 39 U.S. 749, 764 (1962). "At a minimum the indictment must be sufficient to give notice of what offense the state is alleging so that the controlling penal statute can be identified." Fisher v. State, 887 S.W.2d 49, 55 (Tex. Crim. App. 1994); Lawrence v. State, 240 S.W.3d 912, 917 (Tex. Crim. App.). And when the controlling statute cannot be identified the charging instrument is not an indictment and does not confer the court with jurisdiction. Teal v. State, 230 S.W.3d 172, 179-180 (Tex. Crim. App. 2007); Duron v. State, 956 S.W.2d 547 (Tex. Crim. App. 1997); Wilson v. State, 520 S.W.2d 377 (Tex. Crim. App. 1973) (Indictment fatally defective and did not confer jurisdiction on court; indictment failed to identify degree of offense.)

For the above three reasons the trial court did not have jurisdiction.

The facts are uncontested. This implicates the trial court and every subcourt: The state habeas court refused to answer this matter; it unlawfully procedurally barred it. The Fifth Circuit did not show facts that affirmatively established trial court jurisdiction, or its own jurisdiction, when challenged to do so. "Every federal court is without jurisdiction unless the contrary appears affirmatively in the record." Oliver v. Trunkline Gas Co., 789 F.2d 341, 343 (5th Cir. 1986). This raises important and urgent questions:

- Whether, and under what circumstances, a federal court can proceed with a case without showing that it and the courts below affirmatively established in the record and determined that it has full subject-matter jurisdiction or, alternatively, limited jurisdiction due to the lack of jurisdiction in a court below.
- Is there never a time for a court to notice and correct the lack of jurisdiction and an unlawful trial court judgment?

Is the Fifth Circuit forming new case law here that allows it to selectively pick and choose when to answer or not answer jurisdictional issues? Uncorrected, the lower courts will get the message that jurisdiction is a peripheral matter that does not have to be answered when questioned, that can be presumed, and that it is not a fundamental right that requires attention. If not corrected, the same problems regarding jurisdiction will result when other litigants question jurisdiction in the Circuit and eventually in all Circuits. Is this to become the new normal in American jurisprudence?

Historically this Court established the standard in regard to jurisdiction: "It is a well-settled rule in jurisprudence that the jurisdiction of any court may be inquired in every other court when the proceedings in the former are relied upon and brought before the latter." Williamson v. Berry, 49 U.S. 495, 540 (1850). It is fundamental that for a court to act it must have jurisdiction. U.S. v. Cotton, 122 S.Ct. 1781 (2002); Ex parte McCordle, 71 U.S. (7 Wall) 506, 514 (1868). It is a systemic requirement that is ~~not~~

not subject to procedural default, forfeiture or waiver. Cotton, 122 S.Ct. at 1785. Further, ordinarily the judgment of a court

until reversed is regarded as binding on every other court. But if it acts without authority, its judgments and orders are nullities, ... void, and form no bar to recovery sought even prior to reversal in opposition to them. They constitute no justification and all parties concerned in executing such judgments are considered in law as trespassers.

Williamson, 49 U.S. at 541.

The principle that a record cannot be impeached by a pleading is not applicable where there is want of jurisdiction. The want of it makes the record utterly void and unavailable for any purpose.

The want of jurisdiction is a matter that may always be set up against a judgment when it is to be enforced or when any benefit is claimed under it.

Id., at 542. "The rule is that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing." Id., at 543. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." Haywood v. Drown, 129 S.Ct. 2108, 2126 (2009).

"Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in the cause under review...' 'And if the record discloses that the lower court was without jurisdiction this Court will notice the defect..."

FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596, 607 (1990) (quoting Mitchell v. Maurer, 55 S.Ct. 162, 165 (1934); Bender v. Williamsport Area School Dist., 106 S.Ct. 1326, 1331 (1986)) (lower court judgment vacated and case dismissed). The lack of jurisdiction in a criminal trial is a systemic or fundamental error that deserves to be considered and corrected in the interest of justice. See Cotton, 122 S.Ct. at 1785.

II.

PROCEDURAL BAR

This Court should grant review to resolve a split of authority and to determine the duty, if any, of a federal court to review the propriety of a state court's procedural bar to habeas corpus claims and the Constitutional consequences thereof.

Due to the significant Constitutional consequences of a state court's procedural bar of habeas claims, proper review of the bar and its impact on a petitioner's Constitutional right to habeas corpus is a matter of great importance to all petitioners. By sanctioning the lower courts' rulings, the decision of the Fifth Circuit Court of Appeals created conflict of authority on critical issues of federal law. The following questions are relevant:

1) Whether there is never a time for a federal court to review and not defer to a state court's procedural bar of habeas corpus claims that is based on state procedural law.

2) Whether a federal habeas petitioner can show cause for a state procedural default by establishing that through no fault of his the state court unlawfully applied a "second or subsequent" procedural bar to his claims, thus prejudicing petitioner.

3) Whether the federal district court properly applied the "cause and prejudice" standard when declining to hear Petitioner's habeas claims, when there is not a precise definition of the "cause and prejudice" standard to give that test meaning.

These are issues of significant importance both to the incarcerated community and the Petitioner. This is ready for final resolution by this Court.

The issue presented here involves a question of fact and law that requires a highly fact-specific inquiry: How many state applications for writ of habeas corpus were filed following the conclusion of direct appeal on October 11, 2011?

Facts:

- October 11, 2011: An out-of-time direct appeal became final upon the denial of a petition for writ of certiorari. Carmell v. Texas, 132 S.Ct. 409 (2011).

- August 16, 2012: The present state application for writ of habeas corpus was timely filed.
- September 25, 2013: The Texas Court of Criminal Appeals procedurally barred all habeas claims as "second or subsequent, except the claim of ineffective assistance of appellate counsel.

Law: A petitioner "is entitled to one free-standing collateral attack per judgment." Magwood v. Patterson, 130 S.Ct. 2788, 2798 (2010).

"Due process of law, within the meaning of the Fourteenth Amendment, is secured if laws operate on all alike and do not subject individuals to the arbitrary exercise of power of government." Leeper v. Texas, 139 U.S. 462 (1891); Missouri P.R.C. v. Mackey, 127 U.S. 205 (1888). The Texas Court of Criminal Appeals prejudiced Petitioner and violated his right to Constitutional due process, as did the federal courts when deferring to the state court, when applying a "second or subsequent" procedural bar to original claims following the conclusion of direct review. The bar "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). The decision is "contrary to... clearly established federal law" as determined by this Court. *Id.*, (d)(1). The bar was not ^{only} incorrect, it was unreasonable in light of the fact that only one habeas application was filed following direct review becoming final on October 11, 2011. App'x. E.6,7. Neither the Respondent nor any lower court showed any intermediate habeas action between October 11, 2011 and the August 16, 2012 filing of this present habeas proceeding.

The procedural history of this case does not support the bar. The State habeas court incorrectly based its procedural bar on a distinctively different and separate habeas proceeding that challenged a different judgment. In that proceeding habeas relief was denied by the Texas court on November 13, 2002. A habeas petition then followed in the federal district; relief denied on March 6, 2006. On appeal the Fifth Circuit reversed and remanded with a conditional grant of

habeas relief, i.e., either an out-of-time appeal in state court or release from incarceration. The federal district court issued an order accordingly. Thus, that habeas proceeding was successful. App'x E-1, 2.

The Texas Second Court of Appeals granted an out-of-time appeal and withdrew its May 2, 2001 mandate on April 22, 2009. App'x J. 2. Relying on Texas Court of Criminal Appeals' precedent case law, the court explained:

The granting of an out-of-time appeal returns the appellant to the point at which he can begin the appellate process... the case was restored to the status it had when appellant filed his initial appeal.

Thues v. State, 863 S.W.2d 489-91 (Tex. Crim. App. 1993); Ex parte Lopez, 763 S.W.2d 427, 428-30 (Tex. Crim. App. 1989).

Carmell v. State, 331 S.W.3d 450 (Tex. App.- Fort Worth 2010, pet. ref'd.). App'x J. 3, 4-5.

This is identical to In re Williams, 444 F.3d 233 (4th Cir. 2006) where this district court granted his habeas petition by directing the state court to allow a direct appeal. The subsequent petition in time that he brought after he lost on direct appeal was not a "second or successive" petition. When the first petition allowed the defendant to bring direct appeal, the counter of collateral attacks reset to zero. Likewise, this Court held in Magwood, 130 S.Ct. at 2978 that a second petition filed after a successful § 2254 petition is not a "second or successive" action.

In Petitioner's case, the first district court magistrate judge had this when he cited In re Johnson, 483 F.App'x 922 (5th Cir. 2012), in pertinent part:

As to the claims addressed by the state appellate court in the out-of-time, review of these claims was not final under AEDPA until the state court process of review was completed.

App'x I. 4. Correctly, the state court's bar was given no deference.

In contrast, the district court's second magistrate recommended deference to the bar. App'x E. 4. This prevailing in the courts below is an error of great magnitude.

This Court previously specified in Miller-El v. Dretke, 54 U.S. 231, 240 (2005) that a Texas court's factual findings are presumed to be sound unless a peti-

tioner rebuts the "presumption of correctness by clear and convincing evidence." The magistrate's Report and Recommendation verifies Petitioner's facts as presented herein. App'x. E.1,2,5,7. Is this not "clear and convincing?" Nevertheless, the magistrate recommended deference to the bar, App'x. E.4,5. which the district court adopted in its final judgment: App'x. D.

This raises an important question: How can the facts of this case show an original habeas action following the conclusion of direct review be barred in federal court as a second or successive action? No one in his senses and not under delusion would determine on the one hand, and no honest and fair person would accept on the other that the first and only habeas proceeding following direct review is a second or successive action. "This Court has declined to interpret 'second or success' as referring to all § 2254 applications filed second or successively in time..." Panetti v. Quarterman, 127 S.Ct. 2842, 2853 (2007) (citing Slack v. McDaniel, 120 S.Ct. 1545 (2000)).

Next, Petitioner filed a petition for a Certificate of Appealability (COA) in the Fifth Circuit. Among other things, he requested a COA regarding the lower courts' procedural bar. COA was denied, foreclosing federal review of all claims barred below.

In Faye v. Noia, 83 S.Ct. 822 (1963), the doctrine that procedural defaults may constitute an independent and adequate state-law ground that precludes federal review was held not to limit the jurisdiction of federal courts under the habeas corpus statute. This is reaffirmed in Francis v. Henderson, 96 S.Ct. 1708 (1976); Wainwright v. Sykes, 97 S.Ct. 2497, 2504 (1977); and, Reed v. Ross, 104 S.Ct. 2901, 2907 (1984), and should be reaffirmed here. As an example, Pirtle holds that there was no reasoned state court decision to which to defer. In Pirtle the state court failed to consider a habeas claim that was properly raised, therefore the state did not adjudicate the claim as required by AEDPA, and therefore, the state court decision was entitled to no

deference on federal habeas corpus. Pirtle v. Morgan, 313 F3d 1160 (9th Cir. 2002). Similarly, see Appel v. Horn, 250 F3d 203, 210 (3rd Cir. 2001); Chadwick v. Janicka, 312 F3d 597, 605 (3rd Cir. 2002); Fortini v. Murphy, 257 F3d 39 (1st Cir. 2001). Here, Petitioner deliberately or otherwise ^{did not} violate or by-pass the state court's habeas procedures. The state court's bar deserves no deference because its use was mistaken and violated law. The lower federal courts had a duty to adjudicate all of the claims that were properly before them. See, e.g., Colorado River Water Conservation District v. United States, 46 S.Ct. 1236, 1244 (1976). Yet the Fifth Circuit held that "a federal court does not have license to question a state court findings of procedural default, if based upon an adequate and independent state ground," citing Smith v. Johnson, 216 F3d 521, 523 (5th Cir. 2000).

But if the scope of habeas jurisdiction is to protect the constitutional rights of the convicted, then fair-minded federal courts will have to reconsider whether they can continue to indulge the fiction that all state courts are correct and just in procedurally barring a state prisoner from habeas review. Wainwright v. Sykes, 47 S.Ct. at 2523.

There is no remedy in the Fifth Circuit. The result is absurd, and the implications for habeas practice that result from Petitioner's case as it now stands are dangerous and open the door for abuse nation-wide in both state and federal courts. Anytime the state has the power to declare and dismiss an original habeas corpus as "second or successive," knowing that a federal court will not correct this — even when there is clear and convincing evidence to the contrary — the petitioner can be wrongfully denied his right to a habeas proceeding and potential relief. Said differently, a state could routinely dismiss all habeas corpus actions as second or successive, for whatever reason, on independent state grounds, know^{ing} that the federal court will defer and not correct the error. Functionally this suspends or suppresses the Constitutional right to habeas corpus and proscribes

benefits of law to which a first time habeas petitioner is entitled.

The Constitution of the United States, Article I, §9, reads in pertinent part: "The Privilege of the Writ of Habeas Corpus shall not be suspended..." Later, the United States Congress granted individuals the right to a federal habeas forum. In 1867 "Congress made the writ generally available in 'all cases' where any person may be restrained in his or her liberty in violation of the constitution or of any treaty or law of the United States." That allows a final judgment of conviction in a state court to be collaterally attacked on habeas corpus. Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996). Congress expressed a clear and strong interest in providing a federal forum for the vindication of the constitutional rights of state prisoners. Reed v. Ross, 104 S.Ct. 2901, 2907 (1984). In enacting §2254, "Congress sought to interpose the federal courts between the States and the people, as guardians of the people's rights to protect the people from unconstitutional action." Mitchum v. Foster, 92 S.Ct. 2151, 2161 (1972). This interest is at its strongest where the state court decline to consider the merits of a constitutional claim, for without federal habeas review no court will ever consider whether the Petitioner's constitutional rights were violated.

Of the multiple claims presented, the most egregious aspect of the State court's Texas Code of Criminal Procedure, article 11.0754 bar and dismissal and its sanctioning by the lower federal courts, is their refusal to hear the claim regarding the lack of trial court jurisdiction. This claim is not subject to procedural default. Cotton, 122 S.Ct. at 1785; Marin v. State, 851 S.W. 2d 275, 279, 280 (Tex.Crim. App. 1993); State v. Dunbar, 279 S.W. 3d 777 (Tex.Crim. App. 2009). See Section I above at 4-11 which is incorporated here by reference thereto. It appears that the lower courts' use of an unfounded and unlawful procedural bar is a concerted effort to prevent Petitioner from being granted habeas relief.

The appeal in the state court was "a continuation of the litigation started in the trial court." Slack v. McDaniel, 529 U.S. 473, 481 (2000). This present habeas action directly followed the October 11, 2011 conclusion of direct review. The law provides that if Petitioner can show "cause" for the violation of the state rule giving rise to the bar, and subsequent prejudice, such bar can be overcome. Edwards v. Carpenter, 529 U.S. 446, 451 (2000). The cause of the bar and dismissal of claims is an objective factor external to Petitioner: The state court incorrectly and unreasonably applied article 11.0754 of the Texas Code of Criminal Procedure, which has no logic or lawful place in this case. "The protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." Panetti, 127 S.Ct. at 2856.

The lower state and federal courts did not act with integrity, fairness, or lawfully. This affected the outcome and prejudiced Petitioner who has a right to have his claims heard and, when heard, may be granted habeas relief.

A full and fair hearing of Petitioner's claims in a state court is a prerequisite for application of AEDPA's review provisions. Nobles v. Johnson, 127 F.3d 409, 416 (5th Cir. 1997). Petitioner's claims were properly raised in the state court. When a claim has not been reached and therefore not adjudicated on the merits, though properly presented in the state court, AEDPA standard is inapplicable and review in federal court is de novo. Gutierrez v. Dretke, 342 F. Supp. 2d 802 (W.D. Tex. 2005). Petitioner is entitled to de novo review.

As demonstrated above, ^{there} ~~the~~ is a lack of guidance in the law to ensure uniform application and due process. Unfortunately, the decisions below may serve to be a model and encouragement for other courts across the country to similarly and unlawfully procedurally bar state prisoners from habeas proceedings. This deserves to be corrected in the interest of justice.

III.

SUA SPONTE ORDER

This Court should grant review to resolve a split of authority as to the duty, if any, of a judge to evenly balance his or her authority so neither litigating party is favored or prejudiced.

The sua sponte order by the United States District Court magistrate judge to the Respondent, and sanctioned by the district court and the Fifth Circuit, created a conflict of authority on a critical issue of federal law, namely, whether the Federal Rules of Civil Procedure associated with habeas corpus proceedings can be described as "set in stone" which prevents a court from issuing a sua sponte order to one party to that party's advantage and not to the other party when in a similar position, and 2) whether such a one-sided order constitutes grounds for setting aside that party's pleading. These are issues of significant importance to all litigants and Petitioners both.

What is the posture of a court to be in regard to the opposing parties in a case? Are courts required to be passive and neutral toward the litigants? What is the proper remedy when they are not? The courts in the Fifth Circuit split from those in other circuits and departed so far from the usual course of judicial proceedings so as to require this Court's supervisory power.

This is a habeas corpus proceeding. Following a "show cause" order the Respondent filed an answer to Petitioner's 28 U.S.C. petition on March 15, 2015, which was followed by Petitioner's reply on April 13, 2015. This closed the pleadings. Finding the Respondent's answer meritless, and absent a motion for leave to file an amended or supplemental answer, on April 28, 2015, the magistrate judge sua sponte issued an order for the Respondent to file an amended or supplemental answer. App'x. I. 5.

The matter of amended or supplemental pleadings is a procedural matter governed by federal law and the Federal Rules of Civil Procedure. Gifford v. Wichita Falls & Southern Ry Co., 224 F2d 374 (5th Cir. 1955); Fed. R. Civ. P. 15. In order to serve the ends of justice, the following procedural sequence

was to be followed: 1) petition, 2) answer, if ordered, 3) reply, 4) evidentiary hearing if appropriate, 5) magistrate judge's Report and Recommendation, and 6) final disposition by the district judge. See Rules Governing Section 2254 Cases, Rules 3, 5; 28 U.S.C. § 2243; Fed. R. Civ. P. 636(b)(c). Rules 3 and 5 specify that a petition, answer, and reply may be filed - nothing more.

In conjunction with this, pleadings filed in a habeas proceeding should be limited to those specified in Rule 7(a), Federal Rules Civil Procedure. Pappas v. Buchkoe, 156 F.Supp. 492 (W.D. Mich. 1957). Petitioner's reply was the final pleading and no pleading was permissible thereafter except via a motion to amend or supplement. Id.; Cornell v. Chase Brass & Copper Co., 48 F. Supp. 979, (S.D.N.Y. 1943); U.S. v. National City Bank of New York, 7 F.R.D. 241 (S.D.N.Y. 1946); Fed. R. Civ. P. 15. Rule 15 does not authorize a court's sua sponte order; neither did the order cite any authority for its issuance.

Under Rule 15, Fed. R. Civ. P., the Respondent could have requested permission from the court or Petitioner to amend or supplement the answer, but did not; the Respondent chose to stand on the original answer as argued. "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." Fed. R. Civ. P. 12(b). As required by law and in response to the "show cause" order, the Respondent presented every defense in fact or law that was deemed appropriate and sufficient at the time to show for Petitioner's incarceration. Fed. R. Civ. P. 8(b), 12(b); Bland v. California, 20 F.3d 1469, 1474 (9th Cir. 1994) (In a habeas corpus proceeding, the state responds to a habeas petition only after the court issues a Show Cause order and the state's must allege facts and/or theories of law tending to establish the legality of the petitioner's detention, after which the petitioner can file a reply).

The Respondent's answer was clear, precise, definitive and unambiguous. It addressed each of Petitioner's claims by seeking to have the entire petition

procedurally dismissed while answering the merits of only some of the claims. The Respondent did not refute the multiple facts presented by Petitioner that merit habeas relief; they were thus admitted. Shakeman v. Democratic Organization of Cook County, 533 F.2d 344 (7th Cir. 1976); People's Natural Gas Co. v. Federal Power Commission, 127 F.2d 153 (D.C. App. 1942). The Respondent's pleadings were closed with the filing of the answer. First Presbyterian Church of Santa Barbara v. Rabbitt, 118 F.2d 732 (9th Cir. 1940). But, while neither party nor the court contended that the answer was ambiguous or confusing, requiring further pleading to clarify matters, the magistrate found the Respondent's answer meritless and sua sponte ordered the Respondent to submit an amended or supplemental answer. App'x. I. 4, 5.

As a matter of law, the Respondent's original answer complied with the "show cause" order; nothing more from the Respondent was needed or authorized thereafter. Following Petitioner's reply, the case was ready for the magistrate's Report and Recommendation and the district court's final disposition, which Petitioner requested in his reply.

What is the scope of the magistrate's sua sponte power in a habeas proceeding? Significantly, Rule 4 of the Rules Governing Section 2254 Cases indicates that after proper examination, if the judge does not summarily dismiss the case, the judge must order the Respondent to file an answer or take other appropriate action. It does not give the court continuing power to sua sponte order additional answers. In short, Rule 4 give the district court the ability to order the Respondent to show cause for a petitioner's incarceration, but that ability expires when the judge orders the Respondent the first time to file a "show cause" answer. There is no second time. Rule 4 permits sua sponte court action only as an initial matter. Thus, the district court's order for the Respondent to file an amended or supple -

mental pleading after it issued the initial "show cause" order was an impermissible action that shows favorable bias toward the Respondent and prejudice toward Petitioner. It does not represent law and order; it appears to represent personal values and bias of a judge; a mere expression of an arbitrary agenda to not grant habeas relief even when the Respondent's answer is meritless and admits Petitioner's claims.

Where responsive pleadings have already been filed a party "may amend a pleading only by leave of court or by written consent of the adverse party." Diamond & Gem Trading, 195 F.3d 765, 770 (5th Cir. 1999) (quoting Dussanuy v. Gulf Coast Inv. Corp., 66 F.2d 594, 597 (5th Cir. 1981). See also Andrade Garcia v. Columbia Medical Center of Sherman, 996 F.Supp. 605, 608 (E.D. Tex. 1998). Any- less than seeking leave in this case is insufficient to warrant a second answer. See also Parham v. Clinton, 374 F.App'x. 503 (5th Cir. 2010); Bownes v. City of Gary, Ind., 112 F.R.D. 424 (N.D. Ind. 1986).

In addition, and very importantly, because the Respondent did not seek, ^{leave,} the Respondent's right to amend or supplement the original answer and assert new theories to show cause was waived. N.W. Enterprises, Inc. v. City of Houston, 27 F.Supp.2d 754, 784 (S.D. Tex. 1998) (Plaintiffs did not seek leave to amend and thus their right to amend was waived); Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977). And, "Absent exceptional circumstances, a district court has no obligation to invite [a party] to amend [or supplement] his or her [pleading] when the [party] has not sought such amendment [or supplement]." U.S. Ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 242 (1st Cir. 2004). The magistrate judge had no duty or discretion to issue an order to amend or supplement absent a motion for leave or in response to "exceptional circumstances," which a meritless answer is not.

"In the context of motions to amend pleadings, 'discretion' may be mis-

leading, because Fed. R. Civ. P. 15(a) 'evinces a bias in favor of granting leave to amend.'" Smith v EMC Corp., 393 F.3d 590, 595 (5th Cir. 2004). How much more is there bias here where Respondent did not seek leave to file a second answer.

Under compulsion of the magistrates order the Respondent relitigated issues that the Respondent previously conceded. The ordered supplement fundamentally altered the Respondent's position in regard to Petitioner's claims. It altered the original defense, resulting in a significantly different legal posture, i.e., new theories and arguments that were previously available but waived were argued.

Petitioner was detrimentally and prejudicially affected by the order. Under the former pleading the Respondent had a meritless answer that was self-defeating; under the supplemental answer the court ruled in the Respondent's favor. Is this equitable justice? The Respondent was allowed to sit idly by while awaiting the magistrate's assessment of the pleadings. If the Respondent's answer was meritorious and habeas relief denied, the Respondent wins. If the magistrate finds the answer meritless the Respondent need not seek leave because the court will order the Respondent to take "two⁶ bites of the apple;" the Respondent wins via a forced supplement. The Respondent reaped benefits without seeking leave. "Piecemeal...review has a detrimental effect on judicial administration... to the detriment of litigants," as Petitioner experienced. Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1276 (11th Cir. 2000).

The sua sponte order defeats the purpose of the Federal Rules of Civil Procedure, Rule 1, which is "to secure the just, speedy, and inexpensive determination of every action." "Finality is a critically important concept in our system of jurisprudence. At some point battles must end." Powers v. Boston Cooper Corp., 926 F.2d 109, 112 (1st Cir. 1991). This case was ready for final

adjudication following the closure of the initial pleadings, i.e., petition, answer, reply.

Petitioner filed motions in the district court to have the magistrate's order overruled, vacated, dismissed, etc. Relief was denied. And, not only did the Respondent not request leave to amend or supplement, the Respondent did not answer Petitioner's motions to argue that the deficiencies in the original answer could be cured in a second answer.

When the Respondent's original answer was found to be meritless and habeas relief could likely follow, the sua sponte order turned the adversarial judicial process into a system of coaching or mentoring the favored party: "Respondent, take another 'bite of the apple' and do a better job or habeas relief will be granted."

This raises a serious question: Upon an apparent inadequate pleading, why did the Respondent receive an order to amend or supplement when Petitioner did not receive a similar order before habeas relief was denied? This violates the principles of equity, Fourteenth Amendment due process and equal protection, and the interest of justice by the rules.

The magistrate judge incorrectly and unreasonably avoided producing the Report and Recommendation on the merits as originally argued when the order was issued. This was reinforced when Petitioner's motions challenging the order were denied, and again when the Fifth Circuit denied a Certificate of Appealability on this issue. If allowed to go uncorrected this will create new and serious pitfalls for pro se litigants who are incarcerated when no cause is presented for that incarceration in the government's original answer to a Show Cause order.

This case demonstrates that there is a lack of guidance in the law to ensure uniform application, due process, and equal protection thereunder in regard to amended and supplemental pleadings. The actions in the courts below conflict with decisions in district and circuit courts nation-wide, as

demonstrated above. This leaves Petitioner's freedom subject to location. Simply put, courts in other circuits would not have sua sponte ordered an amended or supplemental pleading in response to the Respondent's meritless answer; instead, habeas relief would have likely been granted. This discrepancy merits this Court's supervisory power.

The courts below did not provide any authority for the sua sponte order. Is the Fifth Circuit sanctioning and establishing a new practice of law? The proper action would have been for the Fifth Circuit to grant a COA and reverse the cause, remanding it to the district court with an order ^{to} vacate the magistrate's order, disregard the supplemental pleading, and rule on the original pleadings.

This Court is asked to weigh the equities and establish a uniform standard for courts to observe when a meritless answer to a Show Cause order is set forth.

IV.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court should grant review to resolve a nationwide split of authority as to the duties of counsel on direct appeal, if any, to fully defend a defendant beyond the mere appearance of doing so.

The decision of the Fifth Circuit Court of Appeals created a conflict of authority on critical issues of federal law. It entered a decision that conflicts with relevant decisions of this Court and courts of other circuits, has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Additionally, the state court's denial of Petitioner's ineffective assistance of appellate counsel claim was unreasonable, or contrary to Federal law. The issues below are of significant importance both to the incarcerated community and Petitioner.

Was Petitioner denied his Sixth Amendment right to counsel, i.e., effective

assistance of counsel, when appellate counsel failed to argue multiple reversible grounds of error that received reversals in other courts? How many can be omitted before counsel is ineffective? Is there a hierarchy of importance? Where is the line between effective and ineffective counsel?

On direct appeal appellate counsel failed to present numerous meritorious grounds ^{for} a reversal of conviction. Appellate counsel's performance fell below an objective standard of reasonableness when he did not address the 1) lack of trial court jurisdiction, 2) sentences in Counts 3 and 4 violating the Eighth and Fourteenth Amendments, 3) prosecutor knowingly using the complainant's ~~the~~ perjured testimony, 4) prosecutor withholding impeaching evidence, and 5) ineffective assistance of trial counsel.

Petitioner has a Sixth Amendment right to effective assistance of counsel on appeal. Strickland v. Washington, 104 S.Ct. 2052 (1984); Douglas v. California, 327 U.S. 353 (1963). Here, counsel's failings make the adversarial process presumptively unreliable. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984). The actual or constructive denial of assistance of counsel is presumed to result in prejudice. Penson v. Ohio, 109 S.Ct. 346, 354 (1988); Cronic, above; Strickland, above.

The ineffectiveness of appellate counsel denied Petitioner of a constitutional appeal. Further, the lower state and federal courts misconstrued Petitioner's claims thus exacerbating the harm done to Petitioner. There was no legitimate basis for counsel failing to raise the following issues.

A. The Trial Court Did Not Have Jurisdiction

The trial court lacked jurisdiction for three reasons. First, the "state presented court w/new indictment." App'x.G.1,2. When an indictment is not presented to a court by a quorum of the grand jury and properly documented in the record as required by law, the fairness, integrity, and public reputation of judicial proceedings are seriously affected.

The Texas Constitution Article V, §§12(b), 13, require that a quorum of the grand jury presents the indictment to the court. This is essential

to a valid trial. Hollingsworth v. State, 87 C.R. 399, 221 S.W. 978 (Tex. 1920). An indictment given to a court in any other way does not confer jurisdiction. Lott v. State, 18 Tex. Crim. 627 (1885); Cook v. State, 902 S.W.2d 473, 475 (Tex. Crim. App. 1995). Without jurisdiction conferred on the court by a quorum of the grand jury presenting the indictment, the court's action is void. Ex parte Kirby, 626 S.W.2d 533, 534 (Tex. Crim. App. 1981).

Second, Petitioner questioned the trial court four times documentarily and challenged it to establish jurisdiction in the record. These were not answered. He also raised in a pre-trial hearing that these documents were filed and the court immediately changed the topic. Additionally, the court officials unlawfully removed the four documents from the record, indicating that they would have been harmful to the state's case and the court's actions. Result: The trial court never affirmatively established jurisdiction in the record; a hearing was never held. But as a matter of law, when challenged, "The trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed." Tex. Dep't. of Parks and Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004).

Third, appellate counsel did not argue that the court did not have subject matter jurisdiction over Counts 3 and 4 because the circumstances therein fit squarely within Texas Penal Code §§ 22.021 (a)(1)(B)(iii) and 22.011 (a)(2)(C), first and second degree statutes respectively. The elements of offense are the same, verbatim, with neither statute have a circumstance the other does not. Furthermore, the complainant's age at the time of these counts (13) is included in § 22.021 (a)(2)(B) and § 22.011 (c)(1). The statutes are the same. U.S. v. Dixon, 113 S.Ct. 2849, 2856 (1992). Either provision could arguably apply. Garcia v. State, 911 S.W.2d 866, 870 (Tex. App.- El Paso 1995).

"At a minimum the indictment must be ~~sufficient~~ sufficient to give notice of what offense the State is alleging so that the controlling ^{penal} provision can be identified." Fisher v. State, 887 S.W.2d 49, 55 (Tex. Crim. App. 1994).

When the controlling statute cannot be identified the charging instrument is not an indictment and does not vest the court with jurisdiction. Teal v. State, 230 S.W.3d 172, 179-180 (Tex. Crim. App. 2007); Duron v. State, 956 S.W.2d 547 (Tex. Crim. App. 1997); Wilson v. State, 520 S.W.2d 377 (Tex. Crim. App. 1975) (Indictment fatally defective. Reversed and dismissed).

In sum, certain essential facts concerning jurisdictional matters in this case are indisputable: 1) an indictment was not constitutionally presented to the trial court, 2) jurisdiction was not established in the record when repeatedly questioned, and 3) in Counts 3 and 4 Texas Penal Code §§ 22.021 and 22.011 are the same. These issues are more extensively discussed in Section I, above at 4-11, which is incorporated here by reference thereto as if fully set forth here.

Appellate counsel did not study the facts and/or law regarding these jurisdictional issues, or he abandoned Petitioner Carmell. The trial court never acquired jurisdiction; the entire prosecution was illegal. "It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction... a lawyer must know what the law is..." Bounds v. Smith, 97 S.Ct. 1491, 1497 (1977). Counsel was ineffective and prejudiced Petitioner.

B. The Life Sentences in Counts 3 and 4 Violate The Eighth Amendment

As shown in the previous section, the elements of offense in Texas Penal Code §§ 22.021 (a)(1)(B)(iii) and 22.011 (a)(2)(c) are the same, verbatim. Moreover, the age of the complainant here (13) is in §§ 22.021 (a)(2)(B) and 22.011 (c)(1), i.e., younger than 14 and 17 years of age respectively. Thus the first degree § 22.021 and the second degree § 22.011 are the same, U.S.v. Dixon, 113 S.Ct. at 2856; Blockburger v. United States, 52 S.Ct. 180, 182 (1932), except the punishment: Appellate counsel was ineffective for not arguing that the first degree life sentences under § 22.021 in Counts 3 and 4 are violative of the Cruel and Unusual Punishment Clause which is applicable to the states via the Due Process Clause of the Fourteenth

Amendment. Hutto v. Finney, 98 S.Ct. 2565 (1978); Robinson v. California, 370 U.S. 660 (1962).

The § 22.011 second degree punishment range of 2-20 years was deemed sufficient by the Texas Legislature, regarding the charged circumstances in in Counts 3 and 4, when it enacted the statute. The § 22.021 first degree life sentence is unnecessary because the second degree punishment achieves the purpose for which the punishment is inflicted. Robinson, 370 U.S. at 666; Weems v. United States, 271 U.S. 349, 381 (1910). Both statutes are applied legislatively to the complainant's age in this case (13). See e.g., Tex. Pen. Code § 21.02; Tex. Code Crim. Proc. art's 7A.035, 38.07, 38.071, 38.072. However, they have different punishment ranges - the harsher one being violative of the Eighth Amendment.

Additionally, the aggravated first degree statute must genuinely narrow the class of persons eligible for a first degree sentence as opposed to a second degree sentence. Zant v. Stevens, 103 S.Ct. 2733, 2742-43 (1983); Godfrey v. Georgia, 100 S.Ct. 1754 (1980); Jurek v. Texas, 98 S.Ct. 2950, 2955 (1976); Furman v. Georgia, 92 S.Ct. 2226 (1972). Since the elements of offense are the same in both statutes and the age of the complainant is encompassed by both statutes, the required narrowing function of an additional aggravating circumstance is not properly and constitutionally achieved, i.e., there is no aggravating circumstance in Petitioner's case to justify a first degree life sentence. The punishment here under § 22.021 is excessive and unusual in relation to the same offense found under § 22.011.

The performance of counsel fell below a reasonable standard by failing to address this matter. On appeal a reversal could have resulted with a remand for resentencing, reducing a life sentencing to a 2-20 year sentence. In Glover, this Court found counsel's failure to argue an issue, resulting in an increase in the defendant's sentence of six to 21

months, to be unreasonable. Glover v. U.S., 531 U.S. 198, 201 (2001). How much more is it unreasonable here. Any amount of actual jail time has Sixth Amendment significance. Id., at 203.

Appellate counsel's performance was ineffective in failing to know the law and arguing this issue. He prejudiced and harmed Petitioner. This Court can determine in an objective manner that the statutes are the same, with the exception of punishment, and reject the difference in punishments so there is a uniform application for Petitioner and all defendants similarly situated. Certiorari is requested for further explanation of this issue.

C. The Prosecutor Knowingly Used Perjured Testimony

Appellate counsel was ineffective and prejudiced Petitioner when he failed to argue the issue of the prosecutor using the complainant's perjured testimony. Among others, Counts 3 and 4 are the main emphasis here.

Petitioner pled not guilty, and is factually innocent. It is a fundamental miscarriage of justice for an innocent person to be incarcerated. Schlup v. Delo, 115 S.Ct. 851 (1995); Herrera v. Collins, 113 S.Ct. 853 (1993).

And since the prosecutor did not correct what she knew to be false, as required under Napue, Petitioner needed counsel to do so. Napue v. People of the State of Illinois, 79 S.Ct. 1173, 1177 (1959).

The sworn affidavit the complainant gave to the police and attached to the Warrant of Arrest specified an offense date of June 1992. This is confirmed in the State's Notice of Intent to Use Bad Acts... The notice, like the affidavit, specifies that the alleged acts "began" in June 1992. But Counts 3 and 4 charge those actions in 1991, transforming what would have been a second degree charge into a first degree charge and life sentence for something that did not happen. Police reports confirm this with the documents above. Significantly, at the time of the alleged acts in Counts 3 and 4 the complainant was in another state for three-and-a-half

months. Simply put, the prosecutor wrote and presented her indictment to the court. See pp. 6-7 above. By circumventing the grand jury she falsely charged Petitioner and procured false testimony to achieve false first degree convictions.

The intentional use of known perjured testimony violates Petitioner's right to due process. Mooney v. Holohan, 55 S.Ct. 340 (1935). And if counsel studied the record, argued perjury and prevailed, the convictions and life sentences would have been reversed. Counsel was ineffective and prejudiced Petitioner by not arguing this issue which is well-documented.

D. The Prosecutor Withheld Impeaching Evidence

Appellate counsel was ineffective for failing to argue that the prosecutor withheld impeaching evidence that would have undermined the state's case. A key state witness - Petitioner's wife and complainant's mother - was committing adultery and birthed an illegitimate baby while Petitioner awaited trial. "Bias may be induced by a witness'... dislike or fear of a party, or by the witness' self-interest." United States v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465 (1984).

Petitioner had a Sixth and Fourteenth Amendment right to confront his wife about how her adultery and baby influenced her testimony, and also how her daughter's testimony - the complainant - was influenced to help remove Petitioner from his home and family. He had a right to expose his wife's motive, bias, ill-will, animus and prejudice in testifying for the state. Pennsylvania v. Ritchie, 107 S.Ct. 489 (1987); Delaware v. Van Arsdall, 106 S.Ct. 1431 (1986); Davis v. Alaska, 94 S.Ct. 1105 (1974); Pointer v. Texas, 85 S.Ct. 1065, 1070 (1965).

Confrontation is a "fundamental guarantee of life and liberty." Kirby v. United States, 19 S.Ct. 574, 577 (1899). Confronting Petitioner's wife about these matters would have placed her in her true context and given the jury

an opportunity to accurately assess her credibility, moral turpitude, and prejudicial bias. Berger v. California, 89 S.Ct. 540 (1979).

The Texas Court of Criminal Appeals holds that it is always proper to place a witness in his or her actual setting regarding what might be the motivation to testify for the state. Lewis v. State, 815 S.W. 2d 560, 565 (Tex. Crim. App. 1991); Hurd v. State, 725 S.W. 2d 249, 252 (Tex. Crim. App. 1987). Petitioner's right to confront is paramount over the prosecutor's biased interest in hiding these matters. The prosecutor's actions are condemned in Brady v. Maryland, 373 U.S. 83 (1963).

The prosecutor opened the door regarding the marital relationship and other family relationships. Hiding the adultery and dishonesty of Petitioner's wife shows the prosecutor's prejudice and awareness that placing these before the jury would weaken if not destroy the government's case. The information was material to the case. Thomas v. State, 841 S.W. 2d 399, 405 (Tex. Crim. App. 1992).

This strategically hidden information surfaced during the jury's guilty-not guilty deliberations. Defense counsel informed the court that the prosecutor hiding these matters and even lying about them affected his ability to cross-examine the witness. The court refused to re-open the trial.

In Thomas v. State, 847 S.W. 2d 539 (Tex. App. - Fort Worth 1995) the trial court erred by denying the defendant the right to cross-examine the state's witness about her relationship with her boyfriend and his jealousy and violence as a motive for testifying and falsifying a rape charge; case reversed. In Reeser v. State, 821 S.W. 2d 715, 717-718 (Tex. App. - Houston [4th Dist.] 1991) the defendant was allowed to prove a basis for bias, a motive for deception, or animus by the complainant; the adultery was well-established for the jury. In L.M.W. v. State, 891 S.W. 2d 754, 763-764 (Tex. App. - Fort Worth 1994) the evidence that a state witness might be using the criminal justice

system to gain an advantage in a divorce proceeding was relevant, probative of bias, and probative that the charges could be fabricated.

Here, appellate counsel was ineffective for not arguing for Petitioner's right of confrontation to expose the same types of matters as in the above cases. Had counsel been effective the outcome of the appeal would be different.

E. Trial Counsel Was Ineffective

Appellate counsel was ineffective when he failed to argue the ~~in~~ ineffectiveness of trial counsel. Properly developed the outcome of the appeal would have been different.

Trial counsel abandoned Petitioner, which he admitted at the close of the guilty-not guilty stage in closing argument when he told the jury: "We have not contested in any form or fashion that he's not guilty completely." Counsel so utterly and admittedly failed to defend Petitioner against the charges that the trial was the functional equivalent of a guilty plea, rendering counsel's representation presumptively inadequate. United States v. Cronk, 466 U.S. 648, 104 S. Ct. 2039 (1984). The damage done by counsel was compounded at the end of the punishment phase: "There's never been any other expectation than this trial was strictly a punishment trial, at least not on my part." This is not an adversarial strategy.

"[A] party whose counsel is unable [or unwilling] to provide effective representation is in no better position than one who has no counsel at all." Evitts v. Lucy, 105 S. Ct. 830, 836 (1985). In Carmell v. Quarterman, 292 Fed. Appx. 317 (5th Cir. 2008), case no. 06-40578, the Fifth Circuit reversed and remanded because "Carmell's attorney's completely failed to challenge the state's case..." At 329. Here, Petitioner Carmell's trial attorney did not challenge the state's case and his appellate attorney did not argue this point that would have resulted in a reversal. When counsel abandons his client his performance is objectively unreasonable.

In not contesting the state's case, the trial itself was "of little avail." Cronic, at 653, 104 S.Ct. at 2043. There is no excuse or justification for the appellate attorney not addressing this issue. Our adversarial system of criminal justice requires partisan advocacy on both sides of a case. Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555 (1975). The Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 87 S.Ct. ¹³⁴⁶~~1347~~, 1349 (1967). And when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." When this occurs no specific showing of prejudice is required. Cronic, at 659, 104 S.Ct. at 2039.

This ineffectiveness claim could stop here, but there is more that shows a denial of Petitioner's Sixth Amendment rights. Because trial counsel had no intention of contesting the state's case, but only helping the state reach a predetermined outcome of incarceration, the following resulted.

Trial counsel did not investigate. Petitioner told counsel of witnesses, tape recordings, computer files, appointment books, etc. that would verify the complainant being out of state at the time of alleged offenses, and ultimately her perjury. Counsel refused to act. Finally, under pressure from Petitioner, counsel filed a motion to have an investigator appointed to the case. Petitioner was deceived to believe he was getting an investigator; a psychiatrist was appointed.¹ There was no investigation. An investigation might have revealed a defense - witnesses and/or impeachment evidence - beyond what Petitioner provided. Davis v. Alaska, 94 S.Ct. 1105 (1974); United States v. Tucker, 716 F.3d 567, 581-583, nn. 16, 18 (9th Cir.

1. These documents were removed from the record by trial officials. However, Petitioner was able to provide copies to the Fifth Circuit.

1983). Neither counsel nor the court can say what a prompt and thorough investigation might have disclosed because counsel, working with the court, effectively prevented an investigation by having a psychiatrist appointed. Under these circumstances, Petitioner was "not accorded the right of counsel in any substantial sense." Powell, at 58, 53 S.Ct. at 60.

"Effective representation hinges on adequate investigation and pretrial preparations." Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1984). A thorough investigation is the foundation upon which effective assistance of counsel is built. Powell v. Alabama, 287 U.S. 45, 58, 53 S.Ct. 55, 60 (1932). Simply put, counsel was ineffective when he failed to conduct a pre-trial investigation. Wiggins v. Smith, 539 U.S. 510 (2003).

Bell's sole defense was that he was not in the state at the time of the alleged offense. The conviction was constitutionally infirm because defense counsel did not present this defense at trial. Bell v. State of Georgia, 554 F.2d 1360 (5th Cir. 1977). Inversely, Petitioner's ~~accuser~~ accuser was not in the state at the time of at least six alleged offenses (counts 1, 3, 4, 7, 10, 11) - 40% of the indictment. Although informed by Petitioner, trial counsel did not pursue this defense. A trial without adequate preparation amounts to no trial at all. Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967). Trial counsel simply and egregiously avoided a defense that would have revealed the complainant's persistent perjury and obliterated the state's case. Without an investigation counsel could not make a reasonable decision as to what defensive strategy to pursue, and as a result he pursued none. See Wiggins, at 525.

Trial counsel failed to argue the unconstitutionality of Texas Penal Code § 22.021 in Counts 3 and 4 pursuant to the "void-for-vagueness" doctrine. As explained above, Penal Code Sections 22.021 (a)(1)(B)(iii) and 22.011 (a)(2)(C) are the same, verbatim, and the age of the complainant

is included in §§ 22.021 (a)(2)(B) and 22.011 (c)(1). Because they are the same it is impossible to determine what controls Counts 3 and 4; they are void for vagueness. There is no statutory guidance as to what statute is to be used in this case. This invites arbitrary and discriminatory enforcement by failing to establish guidelines for those charged with enforcing the law, "... allowing policemen, prosecutors and juries to pursue their personal predilections." Smith v. Goguen, 94 S.Ct. 1242, 1248 (1974). A criminal law must establish determinate guidelines for law enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 92 S.Ct. 2249 (1972). "Where inherently vague statutory language permits selective law enforcement, there is a denial of due process." Smith, above. A lack of guidelines is reason for finding a statute void for vagueness. See Adley v. State, 718 S.W. 2d 682, 685 (Tex. Crim. App. 1985); Sanchez v. State, 974 S.W. 2d 307, 312-313 (Tex. App.- San Antonio 1998). Had counsel argued this issue he could have prevailed and had Counts 3 and 4 dismissed. His lack of action resulted in life sentences. For further explanation of the sameness of the statutes see above at pp. 8-9 and 27-29, which are incorporate here by reference thereto.

Trial counsel was ineffective when he failed to argue that as a matter of law Petitioner was eligible for a second degree charge in Counts 3 and 4 rather than the first degree charge under which he was convicted. The first degree § 22.021 and second degree § 22.011 statutes are the same, as explained in the section above and at pages 8-9 and 27-29 above. Here, a question arises: Is a defendant denied his Sixth Amendment right to effective assistance of trial, and/or appellate counsel, when neither argues

that the defendant is eligible to be tried under a second degree statute instead of the first degree statute that is the same and under which he was convicted and sentenced to a substantially longer term of imprisonment? Further, consistent with Strickland, 466 U.S. 668, is prejudice shown when counsel fails to inform the defendant and argue before the court that his client is eligible for a second degree charge with a maximum 20-year sentence, but instead allows him to receive a first degree life sentence? See also Johnson v. State, 650 S.W.2d 784 (Tex. Crim. App. 1983). The Fifth Circuit thinks not.

But in U.S. v. Soto, 132 F3d 56 (D.C. Cir. 1997), counsel's failure to raise the issue of and request a downward adjustment of the sentence was constitutionally ineffective. When lawyers "fail altogether to raise a potentially helpful provision of law, such drastic mis-steps clearly satisfy both of the Strickland tests. Id., at 59. In Glover v. U.S., 121 S.Ct. 696, 700 (2001), Strickland prejudice was found with a wrongful sentence increase by at least six months, possibly by 21 months. How much more so here where Petitioner went from an eligible 20-year maximum sentence to a life sentence. See also Booth v. State, 725 S.W.2d 521 (Tex. App. - Tyler 1987) (Counsel's failure to advise Booth that he was eligible to be tried and sentenced under a lesser statute was ineffective assistance of counsel.)

Trial counsel failed to object to the prosecutor "re-trying" a misdemeanor conviction during the punishment stage of trial. The prosecutor is allowed to present evidence of a "prior criminal record of the defendant," but not the details; a copy of the judgment is sufficient. Tex. Code Crim. Proc., art. 37.07(a)(1); Walkerr v. State, 610 S.W.2d 481, 483 (Tex. Crim. App. 1980); Mullins v. State, 492 S.W.2d 277 (Tex. Crim. App. 1973). In contrast, the prosecutor explicitly and without objection from defense counsel presented

the details of a prior misdemeanor. This resulted in 42 pages of the record or 25% of the punishment stage. This was unlawful, violated due process, and prejudiced Petitioner. In Baldwin v. State, 659 S.W.2d 730, 733 (Tex. App. - 8th Dist. 1983), defense counsel did not object when a mere single detail of a previous offense was revealed. This was not harmless beyond a reasonable doubt. How much more so here when 42 pages of details were given. Trial counsel had a duty to stop this character assassination, but did not. Had appellate counsel developed this Petitioner's case would have been reversed for new sentencing, as in Baldwin.

Trial counsel did not object to the lack of trial court jurisdiction.

Counsel knew or should have known the facts and law regarding jurisdiction. These are explained above in Section I, pages 4-11, which is incorporated here by reference thereto. Trial counsel's failure to raise jurisdictional issues and helpful provisions of law was ineffective and prejudicial under the Strickland tests. See also Soto, 132 F3d at 59. Beyond that, counsel's failure here regarding a matter of such huge magnitude made the trial presumptively unreliable and prejudicial. Cronic, 466 U.S. 648; Penson, 109 S.Ct. at 354. There was no rational or reasonable reason for trial counsel to not raise this matter as a defensive strategy.

In summation, trial counsel was ineffective, if not incompetent, as demonstrated above at page 33 and following. His multiple and prejudicial failings are best summarized by him telling the jury, "We have not contested in any form or fashion that he's not guilty completely" and "There's never been any other expectation than this trial was strictly a punishment trial, at least not on my part." This is not a defensive, adversarial strategy, nor is appellate counsel's failure to raise and argue these issues. Both trial and appellate counsels' failures deprived Petitioner of his right^{to} the effective assistance of counsel and prejudiced him.

F. Cumulative Error

Appellate counsel was ineffective when he did not argue cumulative error and taint in the trial proceedings regarding the multiple constitutional errors demonstrated in the preceding pages. Petitioner was denied due process by the combined effect of individual errors which rendered trial and appellate counsels' performance less persuasive than it could have been. Chambers v. Mississippi, 410 U.S. 284 (1949).

Many of counsels' errors involve procedure, for example, jurisdictional matters. "Errors that indicate ignorance of basic Texas procedure constitutes ineffective assistance." Vela v. Estelle, 708 F.2d 954, 963-964 (5th Cir. 1983); Lloyd v. Whitley, 477 F.2d 149 (5th Cir. 1992) (The Fifth Circuit has consistently insisted that effectiveness of counsel requires familiarity with State law). Trial and appellate counsel failed in this area.

Especially egregious here was 1) trial counsel's refusal to investigate and contest the prosecution's case, and 2) the unlawful removal of documents from the record relating to jurisdiction and also a psychiatrist being appointed under a motion for an investigator. These things would inform any competent attorney of foul, prejudicial play.

Appellate counsel was objectively deficient and ineffective by failing to address the issues in this petition (excluding Sections II and III above), issues that were stronger than the ones he argued and which resulted in reversals elsewhere. See Sanders v. Cotton, 398 F.3d 572, 585 (7th Cir. 2005). The lower courts erred. Regarding counsel, the appropriate remedy here is to allow Petitioner Carmell to have an out-of-time appeal so the failures of counsel can be corrected or, alternatively grant habeas relief. See e.g., Milliken v. Bradley, 418 U.S. 717, 746 (1974).

But for counsels' unprofessional errors the results of the proceedings would have been different. Neither trial nor appellate counsel were functioning as guaranteed by the Sixth and Fourteenth Amendments. There is a reasonable probability that but for counsel's failures, Petitioner would

have prevailed. Errors above received reversals and remands in other cases; Petitioner here was denied relief. This conflict raises the following questions: 1) What merits or constitutes presumed ineffectiveness and prejudice? 2) What constitutes "undermining confidence in the outcome?" 3) What is "reasonable probability?" 4) What is enough to undermine confidence in the outcome? There are no definite, consistent answers in case law. While Petitioner did not receive relief below, he would have in other courts. What is the standard?

CONCLUSION

Trials and subsequent proceedings based on the lack of trial court jurisdiction, unreasonable and illegal procedural bars, unauthorized sua sponte orders that favor a party, and the ineffectiveness of counsel are matters of grave concern to public policy and American jurisprudence. These deserve further explanation. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott Carmell

Scott Carmell

July 13, 2018