Appendix "A"

WRIT NO. W01-73701-R(A)

EX PARTE	§	IN THE 265th JUDICIAL
	§	DISTRICT COURT
ROBERT NORMAN SMITHBACK	§	DALLAS COUNTY, TEXAS

STATE'S RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

The State, having considered the allegations contained in Applicant's Application for Writ of Habeas Corpus in the above numbered and entitled cause, makes the following response:

I.

HISTORY OF THE CASE

Pursuant to a negotiated plea bargain agreement, Applicant entered a plea of guilty to the offense of aggravated sexual assault of a child. The trial court accepted the plea, deferred adjudication, and placed Applicant on community supervision for a period of five years in accordance with the plea bargain agreement. Subsequently, pursuant to the State's motion, the trial court adjudicated Applicant and sentenced him to forty-five years' confinement in the Texas Department of Criminal Justice, Institutional Division. Applicant did not file a direct appeal. This is his first Application for Writ of Habeas Corpus.

II.

ISSUES RAISED IN APPLICATION

Applicant contends that: (1) his plea of guilty was unlawfully induced; (2) his conviction was obtained by the failure of the prosecution to disclose favorable evidence; (3) he was deprived of effective assistance of counsel; (4) he was denied the right to appeal; and (5) there was no evidence to support his conviction.

III.

STATE'S RESPONSE

General Denial

The State makes a general denial of Applicant's allegations in their entirety. Applicant has not provided sufficient proof to merit consideration of his claims. In any post-conviction collateral attack, the burden of proof is on the applicant to allege and prove facts, which if true, entitle him to relief. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The standard of proof is by a preponderance of the evidence. *See Ex Parte Adams*, 768 S.W.2d 281, 287-88 (Tex. Crim. App. 1989). Applicant has failed to meet his burden of proof by a preponderance of the evidence. Accordingly, his request for habeas relief should be denied.

Involuntary Plea

Applicant contends that his plea was involuntarily made because one of the State's witnesses did not appear on the day of the plea hearing and, if he had been aware of this, he

would not have accepted the plea. When an accused agrees to a plea bargain, however, there is a presumption that the plea is voluntary. *See State v. Vasquez*, 889 S.W.2d 588, 590 (Tex. App.–Houston [14th Dist.] 1994). The defendant has the burden of dispelling that presumption. *See Ex parte Adams*, 768 S.W.2d 281, 288-89 (Tex. Crim. App. 1989). In order for a plea to be involuntary, the defendant must show that, at the time he made the agreement, he was not aware of a direct consequence of his plea. *Brady v. United States*, 397 U.S. 742, 755 (1970). The State contends that Applicant has failed to show that his plea was not entered knowingly, intelligently, and voluntarily. Therefore, this allegation should be dismissed as Applicant has failed to carry the burden of proof.

***Brady* Evidence**

Applicant next contends that the State failed to disclose the fact that the complaining witnesses' mother was unwilling to come and testify or bring her daughter to court. The State has an affirmative duty to disclose all material, exculpatory evidence to the defense under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This includes evidence that may be used to impeach a witness's credibility. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *McFarland v. State*, 928 S.W.2d 482, 511 (Tex. Crim. App. 1996). To establish a *Brady* claim, a habeas applicant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the applicant, and (3) the evidence was material. *United States v. Bagley*, 473 U.S. at 682; *Ex parte Kimes*, 872 S.W.2d 700, 702-3 (Tex. Crim. App.1993); *see also Kyles v. Whitley*, 514 U.S. 419, 434, (1995); *Spence v. Johnson*, 80 F.3d 989, 994

(5th Cir. 1996). Evidence is material only if there is a reasonable probability[1] that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. at 682; *Ex parte Adams*, 768 S.W.2d 281, 289-90 (Tex. Crim. App. 1989). A due process violation will occur only if a prosecutor fails to disclose evidence favorable to the accused which creates a probability of a different outcome. *See Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

In the present case, Applicant alleges that his attorney was aware of the victim's unwillingness to testify but failed to inform Applicant about it. If Applicant's counsel was made aware of any hesitation on the part of the witnesses by the State, there clearly is no violation of *Brady*. Applicant's ground for relief is without merit.

Ineffective Assistance of Counsel

Applicant alleges that he was denied effective assistance of counsel. A defendant's right to counsel is guaranteed by both the federal and state constitutions. *See* U.S. CONST. amend. VI, XIV; TEX. CONST. Art. I, § 10. The U.S. Supreme Court has recognized that the "right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). In so doing, the U.S. Supreme Court established a two-prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, the defendant must show a deficient performance of counsel, which requires showing that, considering all the circumstances and specific acts performed, counsel made errors so

[1] A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Ex parte Adams*, 768 S.W.2d 281, 289-90 (Tex. Crim. App. 1989).

serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See Strickland v. Washington*, 446 U.S. 668, 687 (1984). Second, the defendant must also show that this deficient performance, *i.e.*, counsel's errors, prejudiced the defense by depriving the defendant of a fair trial. *See Strickland*, 446 U.S. at 687. Unless the defendant makes both showings, it cannot be said that the conviction resulted from ineffective assistance of counsel. *See Strickland* 446 U.S. at 687.

The *Strickland* test applies in Texas, both for the guilt/innocence phase and for the punishment phase of the trial. *See Hernandez v. State*, 988 S.W. 2d 770, 772-73 (Tex. Crim. App. 1999); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). Essentially, defendant must show: 1) that his counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms; and 2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687; *See also Hernandez*, 726 S.W.2d at 55, 57 (stating that the Texas standard for ineffective assistance of counsel parallels the federal standard). A reasonable probability is defined as probability sufficient to undermine confidence in the outcome. *See Strickland*, 466 U.S. at 687; *Hernandez*, 726 S.W.2d at 55, 57; *Miniel v. State*,831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *See Strickland*, 446 U.S. at 686. Proof of

ineffective assistance of counsel requires a showing of harm-that the ineffectiveness of counsel contributed to the conviction or punishment or deprived the applicant of a fundamental right. A defendant must show omissions or other mistakes which amount to professional errors that raise a reasonable possibility that the outcome of the trial would be different but for the errors. *See Strickland*, 486 U.S. at 688. Furthermore, the defendant must affirmatively prove prejudice, as there is no assumption of prejudice unless no counsel was provided at all. Ineffective assistance of counsel can be found for many reasons, but the totality of the circumstances is viewed in determining the question. *See, e.g., Cannon v. State*, 668 S.W.2d 40 (Tex. Crim. App. 1984).

Applicant contends that his trial counsel was ineffective in the following ways: (1) failing to investigate the case; (2) failing to protect Applicant's civil rights; (3) failing to file pretrial motions; (4) failing to disclose the "delinquency" of the victim; and (5) failing to communicate with Applicant.

The State contends that Applicant was provided with effective assistance of counsel. The State, however, recognizes that further evidence may be needed regarding counsel's representation of Applicant. Therefore, the State requests that this Court issue an order designating issues and gather evidence, as is customary, by way of affidavit from defense counsel or hearing should the Court deem such to be necessary.

Waiver of Right to Appeal

Applicant alleges that he agreed to waive his appeal as a condition of his plea bargain

agreement but that he actually desired an appeal. It has been held that a waiver of appeal made as a condition of a plea bargain agreement before sentencing occurs is valid. *Blanco v. State*, 18 S.W.3d 218 (Tex. Crim. App. 2000). The State has reviewed the trial court's file in the present case and did not find a written waiver of appeal. However, because Applicant pled guilty pursuant to a negotiated plea bargain agreement and the trial court did not exceed the punishment requested by the State, Applicant's right to appeal was limited to issues (1) of jurisdiction; (2) raised on written motion and ruled on prior to trial; or (3) allowed by the trial court. TEX. R. APP. PROC. 25.2 (a)(3). In the present case, none of the possible appealable issues were present. It is clear that the State need not provide any appeal at all. *McKane v. Durston*, 153 U.S. 684 (1894); *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). Applicant's ground for relief is without merit and should be denied.

Sufficiency of the Evidence

Applicant alleges that there is no evidence or that the evidence is insufficient to support his conviction. Sufficiency of the evidence is not properly raised in a habeas corpus application. The Court of Criminal Appeals will not consider the sufficiency of the evidence in a writ of habeas corpus. *See Ex parte McClain*, 869 S.W.2d 349, 351 (Tex. Crim. App. 1994). Thus, this allegation should be dismissed.

Moreover, Applicant pled guilty to the offense of aggravated sexual assault of a child and signed a judicial confession. A judicial confession, standing alone, is sufficient evidence to support Appellant's conviction. *Dinnery v. State,* 592 S.W.2d 343, 353 (Tex. Crim. App.

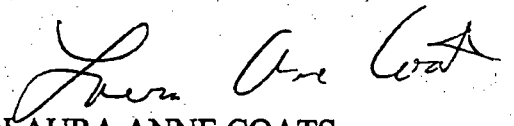
1979); *Cevalles v. State,* 513 S.W.2d 865, 866 (Tex. Crim. App. 1974); *Davenport v. State,* 858 S.W.2d 1, 3 (Tex. App. -- Dallas 1993, no pet.). The judicial confession in the present case clearly states that Applicant received all of his State and federal warnings. Applicant has failed to meet his burden of proof by a preponderance of the evidence. Accordingly, his request for habeas relief should be denied.

IV.

CONCLUSION

The State respectfully requests that this Application for Writ of Habeas Corpus be dismissed.

Respectfully submitted,
BILL HILL
CRIMINAL DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS



LAURA ANNE COATS
ASSISTANT DISTRICT ATTORNEY
STATE BAR NO. 00790476
FRANK CROWLEY COURTS BUILDING
133 N. INDUSTRIAL BLVD., LB-19
DALLAS, TEXAS 75207-4399
(214) 653-3600

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing response has been served on Robert Norman Smithback, # 1080109, Preston Smith Unit, 1313 County Road 19, Lamesa, Texas 79331, on this 19th day of November, 2002.

LAURA ANNE COATS

Appendix "B"

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JAN 12 2004
CLERK, U.S. DISTRICT COURT
By _____ Deputy

cmeen 1/12/04
ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT N. SMITHBACK §
§
Petitioner, §
§
VS. §
§ NO. 3-03-CV-2896-H
DOUGLAS DRETKE, Director §
Texas Department of Criminal Justice, §
Correctional Institutions Division §
§
Respondent. §

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Robert N. Smithback, appearing *pro se*, has filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated herein, the application should be dismissed on limitations grounds.

I.

Petitioner pled guilty to aggravated sexual assault of a child and was sentenced to 45 years confinement. No appeal was taken. Instead, petitioner filed an application for state post-conviction relief. The application was denied without written order. *Ex parte Smithback*, No. 54,603-01 (Tex. Crim. App. Jun. 18, 2003). Petitioner then filed this action in federal court.

II.

Petitioner challenges his guilty plea and resulting conviction in five grounds for relief. Succinctly stated, petitioner contends that: (1) his guilty plea was unlawfully induced; (2) the prosecutor failed to disclose exculpatory evidence; (3) he received ineffective assistance of counsel; (4) he was denied the right to appeal; and (5) the evidence was insufficient to support his conviction.

By order dated December 18, 2003, the court *sua sponte* questioned whether this case was barred by limitations. Petitioner addressed this issue in a written response filed on January 5, 2004. The court now determines that this case is time-barred and should be summarily dismissed.

A.

The Antiterrorism and Effetive Death Penalty Act of 1994 ("AEDPA") establishes a one-year statute of limitations for federal habeas proceedings. *See* ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, Pub.L. 104-132, 110 Stat. 1214 (1996). In most cases, the limitations period begins to run when the judgment becomes final after direct appeal or the time for seeking such review has expired. *See* 28 U.S.C. § 2244(d)(1)(A).[1] This period is tolled while a properly filed motion for state post-conviction relief or other collateral review is pending. *Id.* § 2244(d)(2). The one-year limitations period is also subject to equitable tolling in "rare and exceptional cases." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1494 (1999).

B.

Petitioner was sentenced to 45 years confinement for aggravated sexual assault of a child. Judgment was entered on October 2, 2001. Petitioner did not appeal. Therefore, his conviction

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[1] The statute provides that the limitations period shall run from the latest of–

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking direct review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

became final 30 days thereafter, or on November 2, 2001. *See* TEX. R. APP. P. 26.2. Petitioner filed an application for state post-conviction relief on November 6, 2002. The application was denied on June 18, 2003. Petitioner filed this action in federal court on October 24, 2003.[2]

The limitations period started to run on November 2, 2001, when petitioner's conviction became final. *See* 28 U.S.C. § 2254(d)(1)(A). Yet he waited more than one year to seek post-conviction relief in state court.[3] In an attempt to excuse this delay, petitioner argues that he is not represented by counsel and mistakenly believed that the AEDPA limitations period did not commence until after the Texas Court of Criminal Appeals denied state post-conviction relief. (*See* Pet. Reply at 1, ¶ I). Neither excuse constitutes a "rare and exceptional" circumstance sufficient to toll the statute of limitations. *See, e.g. Felder v. Johnson*, 204 F.3d 168, 172-73 (5th Cir.), *cert. denied*, 121 S.Ct. 622 (2000) (ignorance of law and *pro se* status held insufficient to toll statute of limitations); *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir.), *cert. denied*, 120 S.Ct. 504 (1999) (unfamiliarity with legal process, illiteracy, and lack of representation do not merit equitable tolling). Nor is the limitations period tolled merely because petitioner believes that he is entitled to habeas relief. *See Mason v. Cockrell*, 2003 WL 21488226 at *2 (N.D. Tex. Apr. 23, 2003), *citing Melancon v. Kaylo*, 259 F.3d 401, 408 (5th Cir. 2001) ("'Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some

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[2] Petitioner's initial pleading is dated October 24, 2003, but was not received by the district clerk until December 1, 2003. The court will consider the pleading filed as of the earlier date. *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (*pro se* federal habeas petition deemed filed when delivered to prison authorities for mailing).

[3] The court recognizes that petitioner timely filed a prior federal habeas case that was dismissed without prejudice for failure to exhaust state remedies. *Smithback v. Cockrell*, No. 3-02-CV-1901-L (N.D. Tex. Nov. 8, 2002). However, the statute of limitations was not tolled during the pendency of that action. *See Duncan v. Walker*, 533 U.S. 167, 181, 121 S.Ct. 2120, 2129, 150 L.Ed.2d 551 (2001) (federal habeas petition is not "application for State post-conviction relief or other collateral review" sufficient to toll limitations period under 28 U.S.C. § 2244(d)(2)); *Hasbell v. Dretke*, 2003 WL 23095987 at * 2 (N.D. Tex. Dec. 5, 2003).

extraordinary way from asserting his rights."). Consequently, this case is time-barred and should be summarily dismissed.

RECOMMENDATION

Petitioner's application for writ of habeas corpus is barred by limitations and should be dismissed with prejudice.

DATED: January 12, 2004.

JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JAN 12 2004
CLERK, U.S. DISTRICT COURT
By _____ Deputy

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT N. SMITHBACK	§	
	§	
Petitioner,	§	
	§	
VS.	§	
	§	NO. 3-03-CV-2896-H
DOUGLAS DRETKE, Director	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division	§	
	§	
Respondent.	§	

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT

On this date the United States magistrate judge made written findings and a recommended disposition of petitioner's application for writ of habeas corpus in the above-styled and numbered cause. The United States district clerk shall serve a copy of these findings and recommendations on all parties by certified mail, return receipt requested. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to these findings and recommendations must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings and recommendations to which objections are being made. The district court need not consider frivolous, conclusory or general objections. The failure to file such written objections to these proposed findings and recommendations shall bar that party from obtaining a *de novo* determination by the district court. *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982). *See also Thomas v. Arn*, 474 U.S. 140, 150 (1985). Additionally, the failure to file written objections to proposed findings and recommendations within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate

judge that are accepted or adopted by the district court, except upon grounds of plain error or manifest injustice. *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: January 12, 2004.

JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
JAN 22 2004
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT N. SMITHBACK *
Petitioner *
v. *
*
DOUGLAS DRETKE, DIRECTOR, TEXAS *
DEPARTMENT OF CRIMINAL JUSTICE *
Respondent *

CA-3:03-CV-2896-H

ORDER

Before the Court are the Findings and Recommendation of the United States Magistrate Judge, filed January 12, 2004, and Petitioner's Objections thereto, and Petitioner's Motion for an Opnion (sic), filed January 22, 2004.

The Court has made the required independent review of the pleadings, files, and records in this case; the Findings and Recommendation of the Magistrate Judge and Petitioner's Objections. Having done so, the Court is of the opinion that the Findings and Recommendation of the Magistrate Judge are correct and they are **ADOPTED** as the Findings and Conclusions of the Court, and Petitioner's Objections are **OVERRULED**.

Judgment will be entered accordingly.

SO ORDERED.

DATED: January 22, 2004

BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

RIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED
JAN 22 2004
CLERK, U.S. DISTRICT COURT
By _____ Deputy

ROBERT N. SMITHBACK,	§	
	§	
Petitioner,	§	
	§	
VS.	§	
	§	NO. 3-03-CV-2896-H
DOUGLAS DRETKE, Director	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division	§	
	§	
Respondent.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

1. Petitioner's application for writ of habeas corpus is barred by limitations and dismissed with prejudice.

2. The Clerk shall transmit a true copy of this Order and the Order accepting the Findings and Recommendation of the United States Magistrate Judge to all parties.

SIGNED this 22 day of JAN., 2004.

UNITED STATES DISTRICT JUDGE

Appendix "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT N. SMITHBACK, ID # 1080109, Petitioner, vs. NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	No. 3:06-CV-1419-P (BH) ECF Referred to U.S. Magistrate Judge

FINDINGS, CONCLUSIONS, AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b), and an Order of the Court in implementation thereof, subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions, and recommendation of the Magistrate Judge are as follows:

I. BACKGROUND

On August 8, 2006, the Court received an Application for Writ of Habeas Corpus filed by petitioner pursuant to 28 U.S.C. § 2241 to challenge the constitutionality of his confinement. (Pet. at 1.) Petitioner also submitted an application to proceed *in forma pauperis* without the requisite certificate of inmate trust account. On August 12, 2006, the Court issued a Notice of Deficiency and Order wherein it notified petitioner of the deficient application, and directed that he submit the certificate. Furthermore, although the Court recognized that petitioner purports to bring the instant action pursuant to § 2241, it notified him that his petition lacked relevant information requested on the standard form used for actions filed pursuant to 28 U.S.C. § 2254, and thus directed petitioner to complete and return such standard form. The Court ordered petitioner to correct these deficiencies within thirty days.

On August 23, 2006, the Court received petitioner's notice of intention to amend to add civil rights claims pursuant to 42 U.S.C. § 1983 in addition to his habeas claims. On that same date, petitioner paid the $350.00 filing fee for such a § 1983 action, but the fee was not reflected on the docket for this matter due to a docketing error. On August 25, 2006, the Court received an amended petition filed on the standard § 2254 form, wherein petitioner specifically challenges his October 2, 2001 conviction in Cause No. F01-73701-TR for aggravated sexual assault of a child, and also indicates that he seeks to amend his habeas application to seek relief under § 1983. The amended petition raises four claims: (1) denial of right to trial by jury; (2) conviction obtained by a unlawfully induced plea; (3) conviction obtained by used of a coerced confession; and (4) conviction obtained by the State's failure to disclose evidence favorable to him.

On August 28, 2006, the Court denied petitioner's request to amend this habeas action to assert § 1983 claims. It informed him that, "[i]f he desires to pursue claims under 42 U.S.C. § 1983, the proper procedure is to commence a separate civil action by filing a complaint under that statute with the $350 filing fee for such actions."

On August 30, 2006, the Court received a motion for leave to amend wherein petitioner indicated his desire to supplement this habeas action with claims under 42 U.S.C. §§ 1983, 1985, and 1986, thus transforming this habeas action in large part to a non-habeas, civil action against nineteen defendants, including Nathaniel Quarterman, the respondent in this habeas action. On August 31, 2006, the Court received a motion for preliminary injunction and a motion to transfer documents.

On September 1, 2006, the Court denied the August 30, 2006 motion for leave to amend. On September 25, 2006, it received a "Notice of Error and Motion for Inquary [sic]" wherein

petitioner argued that he paid a $350.00 filing fee and asked the Court to conduct an inquiry into the missing fee payment.[1] He further requested that the Court "make the proper disposition, severing Petitioner's Civil Rights claims, and open a new Civil Action so that justice may be administered properly." On that same date, the Court received "Petitioner's First Motion for Leave to Amend Application" wherein petitioner submits that he filed the instant action to obtain habeas relief from a final felony conviction based upon four grounds for relief, two of which he concedes are unexhausted and thus non-actionable in this action. He asks for leave to amend his petition so that he may pursue the following previously exhausted habeas claims: (1) conviction obtained by a unlawfully induced plea; (2) ineffective assistance of counsel during plea proceedings; and (3) conviction obtained by the State's failure to disclose evidence favorable to him.

II. *IN FORMA PAUPERIS*

Although petitioner has moved to proceed *in forma pauperis* in this habeas action, he has not submitted the requisite certificate of inmate trust account. Nevertheless, by paying $350.00 as a filing fee for his attempt to transform this habeas action into a mixed habeas/civil rights action, petitioner has paid more than the $5.00 filing fee for this habeas action. Consequently, the $5.00 filing fee will be deducted from $350.00 filing fee, and petitioner's request to proceed *in forma pauperis* is denied as moot.

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[1] The inquiry revealed a docketing error, which resulted in the fee payment not being reflected on the docket sheet until September 28, 2006. The fee is docketed as Receipt # DS003457.

III. FILING FEE AND REQUEST TO SEVER

Petitioner has paid $350.00 in apparent anticipation that the Court would grant his request to amend the instant habeas action to include claims filed pursuant to 42 U.S.C. § 1983. The Court, however, has denied such requests to amend. Petitioner now asks that the Court sever his civil rights claims into a new civil action so that justice may be administered properly. Justice, however, does not necessitate the requested severance. Severance appears unnecessary because the Court has not allowed petitioner to amend his habeas petition so that he may pursue civil rights claims in this action. Moreover, the Court can adequately avoid any injustice associated with the overpayment of the filing fee in this habeas action by directing that the excess fee payment, *i.e.*, $345.00, be put toward the filing fee for a properly filed civil action. Consequently, the Court denies the request for severance.

The Court hereby orders the Clerk of the Court to hold the excess $345.00 for a properly filed civil action. To the extent that petitioner wishes to proceed with a civil action, he must pay the remainder of the $350.00 filing fee, *i.e.*, $5.00 (with a specific reference to Receipt # DS003457 to alert the Clerk's Office of the prior payment of $345.00) and file a § 1983 action on the standard form for such actions within thirty days of the date of the order accepting these findings. If petitioner does not wish to proceed with a civil action, he must advise the Clerk of the Court of this in writing within thirty days of the date of the order accepting these findings. Upon receipt of such notice, the Clerk's Office shall refund to him the prior payment of $345.00.

IV. NATURE OF ACTION

Petitioner challenges his October 2, 2001 state conviction in Cause No. F01-73701-TR for aggravated sexual assault. Section 2254 specifically governs any challenge to petitioner's state con-

viction. Petitioner has not shown that § 2241 governs his habeas petition. By attempting to proceed under § 2241, petitioner merely seeks to avoid the applicable statute of limitations and § 2254's prohibition on filing successive petitions. However, a petitioner may not utilize § 2241 merely to avoid the various provisions specifically applicable to § 2254 actions. *See, e.g., Branch v. Dretke*, No. 3:03-CV-2607-H, 2004 WL 1877798, at *1 (N.D. Tex. Aug. 20, 2004), *accepted by* 2004 WL 1960192 (N.D. Tex. Sept. 2, 2004). The Court thus considers this action to arise under § 2254, not § 2241.

V. PRIOR FEDERAL HABEAS PETITIONS

Petitioner previously challenged his October 2, 2001 state conviction in Cause Nos. 3:01-CV-1901-L and 3:03-CV-2896-H. The Court dismissed the former action without prejudice for petitioner's failure to exhaust state remedies and dismissed the latter action with prejudice because petitioner had filed it outside the one-year period of limitations. The latter action raised five claims: (1) his conviction was obtained by an unlawfully induced plea; (2) his conviction was obtained by the State's failure to disclose evidence favorable to him; (3) ineffective assistance of counsel; (4) denial of right to appeal; and (5) no evidence supports the conviction.

Because petitioner has filed previous habeas petitions, the Court must determine whether the instant petition is successive within the meaning of 28 U.S.C. § 2244(b).

VI. SECOND OR SUCCESSIVE APPLICATION

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA) limits the circumstances under which a state prisoner may file a second or successive application for habeas relief in federal court. Under Fifth Circuit precedent, "a later petition is successive when it: 1) raises a claim challenging the petitioner's conviction or sentence that was or

could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ." *Crone v. Cockrell*, 324 F.3d 833, 836-37 (5th Cir. 2003); *accord United States v. Orozco-Ramirez*, 211 F.3d 862, 867 (5th Cir. 2000).[2] A petition that is literally second or successive, however, is not a second or successive application for purposes of AEDPA if the prior dismissal is based on prematurity or lack of exhaustion. *See Slack v. McDaniel*, 529U.S. 473, 487 (2000) (declining to construe an application as second or successive when it followed a previous dismissal due to a failure to exhaust state remedies); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-46 (1998) (declining to construe an application as second or successive when it followed a previous dismissal due to prematurity, and noting the similarities of such dismissal to one based upon a failure to exhaust state remedies). "To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." 523 U.S. at 645.

In this case, petitioner has previously filed two relevant federal petitions. Although the Court dismissed one of these petitions for lack of exhaustion, it dismissed the other petition as untimely. A dismissal based on untimeliness is not the type of procedural dismissal that would make a later-filed petition non-successive. *See Villanueva v. United States*, 346 F.3d 55, 62 (2d Cir. 2003); *Altman v. Benik*, 337 F.3d 764, 766 (7th Cir. 2003). "[A] prior untimely petition . . . count[s] because a statute of limitations bar is not a curable technical or procedural deficiency but rather operates as an irremediable defect barring consideration of the petitioner's substantive claims."

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[2] Although the Fifth Circuit Court of Appeals decided *Orozco-Ramirez* in the context of a motion to vacate under 28 U.S.C. § 2255, it also found it appropriate to rely upon cases decided under 28 U.S.C. § 2254 in reaching its decision. *See* 211 F.3d at 864 n.4. In the present context, this Court also finds it appropriate to make no distinction between cases decided under § 2255 and those under § 2254.

Altman, 337 F.3d at 766. Under *Orozco-Ramirez* and *Crone*, petitioner was therefore required to present in his prior action all available claims:

> "The requirement that all available claims be presented in a prisoner's [prior] habeas petition is consistent not only with the spirit of AEDPA's restrictions on second and successive habeas petitions, but also with the preexisting abuse of the writ principle. The requirement serves the singularly salutary purpose of forcing federal habeas petitioners to think through all potential post-conviction claims and to consolidate them for a unitary presentation to the district court."

Orozco-Ramirez, 211 F.3d at 870-71 (quoting *Pratt v. United States*, 129 F.3d 54, 61 (1st Cir. 1997)).

Whether the Court considers the claims raised on the standard § 2254 form or the claims raised in the most recent proposed amendment to this habeas action, the instant federal petition is successive within the meaning of 28 U.S.C. § 2244(b) because it raises claims that petitioner raised or could have raised in his prior petition that the Court found untimely. When a petition is second or successive, the petitioner must seek an order from the Fifth Circuit Court of Appeals that authorizes this Court to consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A). The Fifth Circuit "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of [§ 2244(b)]." *Id.* § 2244(b)(3)(C). To present a claim in a second or successive application that was not presented in a prior application, the application must show that it is based on: (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *Id.* § 2244(b)(2). Before petitioner files his application in this Court, a three-judge panel of the Fifth Circuit Court of Appeals must determine

whether the application makes the requisite prima facie showing. *See id.* § 2244(b)(3)(A) and (B). The Fifth Circuit has not issued an order authorizing the district court to consider this successive application for habeas relief. Petitioner must obtain such an order before this case is filed.

Although it is appropriate for the Court to dismiss the successive § 2254 petition without prejudice pending review by a three-judge panel of the Fifth Circuit Court of Appeals, it is also appropriate in some circumstances to transfer the successive petition to the Fifth Circuit for a determination of whether petitioner should be allowed to file the successive motion in the district court. *See Henderson v. Haro*, 282 F.3d 862, 864 (5th Cir. 2002); *In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997) (approving the practice of transferring a successive petition to the Circuit and establishing procedures in the Circuit to handle such transfers). In this instance, it appears more appropriate to dismiss the instant federal petition without prejudice than to transfer it to the Fifth Circuit Court of Appeals. First, such dismissal will give petitioner an opportunity to draft a motion for authorization to raise the specific claims that he wants to present in his federal petition – thus avoiding possible confusion due to the various attempted amendments in this action. Such dismissal also eliminates any need for a formal ruling from this Court on his pending motion to amend. In addition, by filing this petition to challenge a 2001 conviction based upon facts that were known long ago, petitioner has abused the judicial process.[3]

Because the petition sought to be filed in this action is successive, and because the Fifth Circuit has not granted petitioner authorization to file a successive petition, the Court should dismiss

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[3] This Court previously dismissed a prior petition as untimely. There is ample reason to believe the instant petition is likewise untimely. The Court may not, however, consider the timeliness of a successive petition without the requisite pre-approval of the Fifth Circuit Court of Appeals.

the instant action without prejudice pending review by a three-judge panel of the Fifth Circuit Court of Appeals. If the Court dismisses this action as recommended, it should deny all pending motions.

VII. SANCTIONS

As noted above, petitioner has filed two prior habeas actions relating to his 2001 aggravated sexual assault conviction which he challenges herein. Petitioner, furthermore, has a history of abusive litigation, as reflected by his bar to proceeding *in forma pauperis* in civil actions by 28 U.S.C. § 1915(g). In an effort to avoid future unnecessary and abusive filings, the Court thus considers the propriety of sanctions.

The federal courts possess the inherent power "to protect the efficient and orderly administration of justice and . . . to command respect for the court's orders, judgments, procedures, and authority." *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993). Included in such inherent power is "the power to levy sanctions in response to abusive litigation practices." *Id.* Sanctions may be appropriate when a *pro se* litigant has a history of submitting multiple frivolous claims. *See* Fed. R. Civ. P. 11; *Mendoza v. Lynaugh*, 989 F.2d 191, 195-97 (5th Cir. 1993). *Pro se* litigants have "no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986). "The goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests." *In re Sindram*, 498 U.S. 177, 179-80 (1991).

In view of petitioner's litigation history, the Court deems it appropriate to admonish or warn him that sanctions may be imposed, if he files another successive habeas petition without first obtaining authorization from the Fifth Circuit. Not only has petitioner ignored the prohibition against second or successive petitions under § 2244 without obtaining Fifth Circuit approval, he has

attempted to circumvent such prohibition by bringing the present action under § 2241. Should he persist with his legal maneuvering, he should be monetarily sanctioned and barred from filing any additional habeas or civil actions in federal court without first obtaining permission from the Court.

VIII. RECOMMENDATION

For the foregoing reasons, the undersigned Magistrate Judge recommends that the Court **DISMISS** the instant action without prejudice pending review by a three-judge panel of the Fifth Circuit Court of Appeals. The Court should also **WARN** petitioner that, if he files another successive habeas petition without first obtaining leave from the Fifth Circuit, he will be subject to sanctions, up to and including monetary sanctions payable to the Court and being barred from filing any additional habeas or civil actions in federal court without first obtaining permission from the Court.

SIGNED this 23rd day of October, 2006.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a copy of these findings, conclusions and recommendation on all parties by mailing a copy to each of them. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must file and serve written objections within ten days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. Failure to file written objections to the proposed findings, conclusions and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (*en banc*).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

Appendix "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 11 2007
CHARLES R. FULBRUGE III
CLERK

No. 06-11299
USDC No. 3:06-CV-1419

ROBERT N SMITHBACK

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas

ORDER:

Robert N. Smithback, Texas prisoner # 1080109, seeks a certificate of appealability (COA) to appeal the dismissal of his habeas corpus petition as an unauthorized successive 28 U.S.C. § 2254 petition. Smithback filed his petition pursuant to 28 U.S.C. § 2241. His petition challenged his conviction for aggravated sexual assault of a child under the age of 14, for which he was sentenced to 45 years of imprisonment.

Smithback has failed to show that his petition falls under § 2241 rather than § 2254. *See Wadsworth v. Johnson*, 235 F.3d 959, 961 (5th Cir. 2000). Smithback argues that the prohibition on filing second or successive § 2254 petitions without first obtaining authorization from this court violates the

Suspension Clause. Smithback has failed to show that jurists of reason would find it debatable whether the district court was correct in dismissing his petition as an unauthorized successive § 2254 petition. Accordingly, his request for a COA is DENIED. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Thomas M. Reavley

THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE