No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WESLEY WAYNE SCHAEFER — PETITIONER
(Your Name)

vs.

LORIE DAVIS,
Director, TDCJ-ID — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

WESLEY WAYNE SCHAEFER
(Your Name)
TDCJ-ID # 1713603
EASTHAM STATE FARM
2665 PRISON ROAD # 1
(Address)

LOVELADY, TEXAS 75851
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

A: Whether a Court may assume, from a silent record, the defendant was sufficiently made aware of the consequences of his guilty plea?

B: Whether the United States Constitution requires a Grand Jury indictment in a State Court under the Fifth and Fourteenth Amendment?

C: Whether a defendant may be convicted of both a lesser and greater offense based upon the same evidence offered as proof of the alleged violation of State law?

D: Whether Trial Counsel renders reasonable effective assistance of counsel, when he fails to properly advise his client of the consequences of his plea?

E: Whether the United States District Court has a duty to conduct a de novo review of state court records of federal questions that are mixed questions of law and fact?

F: Whether the United States Constitution requires a jury to unanimously return a verdict of guilt?

G: Whether the Due Process Clause to the United States Constitution, requires equal protections in the application of State law under the Federal Constitution?

LIST OF PARTIES

[x] 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:

The Director of TDCJ-ID is represented by:

The Attorney General of Texas
Ken Paxton
P.O. Box 12548
Austin, TX 78711-2548

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IN THE

SUPREME COURT OF THE UNITED STATES

PEITITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix - A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix - B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 11, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 07, 2018, and a copy of the order denying rehearing appears at Appendix - C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, and statutes involved in this case are lengthy in their citations. Therefore, pursuant to Supreme Court Rule 14.1(f), the provisions are cited herein and provided within the Appendix referred to in subparagraph 1(i):

STATEMENT OF THE CASE

The Petitioner readily admitted to and plead guilty to the lesser included offense of possession of child pornography pursuant to Texas Penal Code § 43.26. Defense counsel explained that these cases would not be available for use during a trial for the greater offense of Continuous Sexual Abuse of Young Child or Children, pursuant to Texas Penal Code § 21.02. In fact, defense counsel explained, that the State would not be able to try the Petitioner on the greater offense, as it would amount to double jeopardy under the Constitution. The State tried the Petitioner and he was found guilty of the greater offense, for which the State used the evidence for the already plead cases to demonstrate guilt on the greater. The State was allowed to convict the Petitioner of two separate enumerated statutes for the same offense, using the same evidence to obtain a greater punishment than would normally be allowable under statute.

Trial Counsel failed to admonish the Petitioner, the State failed to admonish the Petitioner, and finally the Trial Court itself failed to admonish the Petitioner as to the nature of the charges, his plea, or to even inquire into the Texas Code of Criminal Procedure, art. 26.13(6)(d); (See, Appendix - L) Instead, all courts involved have assumed such admonishment was given and assumed through a silent record that due process was afforded the Petitioner.

The State of Texas has instituted a penal statute, which allows the jury to convict upon mere preponderance of evidence, and under a wide varity of penal provisions. (See, Appendix - L) Furthermore, the State of Texas, in the instant case, has convicted the Petition on a lesser-included offense, and then decided to try the Petitioner on the greater offense, thereby implicating the prohibitions of the Constitution against double jeopardy. The Petitioner sought a State habeas application pursuant to Texas Code of Criminal Procedure, art. 11.07, wherein the Petitioner was to be afforded due process, and the statute to be most favorably construed to give effect to the remedy of habeas corpus, which would protect the rights of the Petitioner. (See, Appendix - J, - K)

The United States District Court allowed an improper argument by the State, and further wholly failed to conduct a de novo review of the grounds before the Court, on a mixed question of law and fact. Afterwards, the Court of Appeals for the Fifth Circuit failed to issue a Certificate of Appealability, pursuant to 28 U.S.C. § 2253, after denial by the U.S. District Court on

federal habeas review under 28 U.S.C. § 2254. (See, Appendix - G, - H)

In Texas, a defendant is not to be convicted minus a unanimous verdict by the jury. (See, Appendix - I, - M, - N)

Lastly, the Petitioner was not afforded the effective assistance of counsel at trial as counsels performance was not reasonable or within prevailing norms, and prejudice ensued.

REASONS FOR GRANTING THE PETITION

DUE PROCESS is DEAD in the United States, and special interest groups rule the Nation as a whole. The Country as a whole has been witness to many travesties of justice over the past few month, and over the past few decades.

Recently, during the Senate Confirmation Hearing and Appointment of the newest Supreme Court Justice Bret Kavanaugh, the mere allegation of Sexual Assault can taint a persons sterling reputation, and forever mark them with a Scarlet Letter. The unsanctioned, unjustified, and unconstitutional presumption of guilt, or at minimum, a denial of the presumption of innocence and trial by jury is unprecedented. An alleged victim is to be believed without doubt or even question, and due process be damned.

During the hearing, the Senator from Texas stated, that there should be corroborating evidence in any allegations of sexual assault, however, in Texas the controlling precedence holds that the testimony of the victim ALONE is adequate or sufficient to convict. **Carmell v. Texas**, 529 U.S. 513, 529 (2000)

Further, in the instant case, and many more similar cases, unanimity is unnecessary to convict upon specific or actual agreed upon acts by the jury.

The presumption of innocence, combined with the burden of proof, are Constitutional Guarantees that should never be limited in scope, benefit, or effect. Chaos and Anarchy reign supreme when the judicial branch allows the constitution to be interpreted in ways which: increase the rights of the accuser above the rights of the accused. If anything, the rights of the accused are greater than the rights of the accuser. When liberty is at stake, to prevent unjustified incarceration, and loss of liberties the accused has the ultimate benefit of rights under the constitution, that are not limited merely due to the nature of the charge.

Never before in the history and jurisprudence of our great nation, has an issue so divided the rights of one over another, in reference to mere allegations of sexual assault, been so decisive. The "ME-TOO" movement has crushed the reputations of many men and women in this country. The Petitioner was a practicing Medical Doctor, with many years of experience and degrees. The pervasive lynch mob mentality, and general anarchy that exist when the mere hint of any type of impropriety of a sexual nature is sniffed out is unprecedented. It is time to end these lynch mobs, through the media, and destroy anarchy. Returning to the prevailing interest of Liberty and Justice for ALL, not merely those who can create the largest media storm.

The blanket policies, legislated, and purposefully designed to circumvent the liberties guaranteed by the Constitution, which protect an accused from unjustified conviction has to come to an end. Special interest groups do not have the right to dictate policies for our democracy. Unanimous verdicts are mandated in all but two States, Oregon and Louisiana, and even these States are currently in the process of reversing these "Jim Crow era policies," to ensure the rights of the accused are protected.

The law in Texas under Texas Penal Code § 21.02, Continuous Sexual Abuse of a Young Child or Children, was purposely designed and purposefully used, to circumvent the protections of the United States Constitution. Our Founding Fathers felt it necessary to protect the Rights of the accused, and the Constitution within the Bill of rights has Four separate enumerated provisions which protect the rights of the accused. The Fourth, Fifth, Sixth, and Eighth Amendment. This does not touch on the fact that the Fourteenth Amendment made these guarantees applicable to the States through the Federal Constitution. Thus, protecting the rights of the accused Nation wide.

Under no guise of the Constitution does it provide avenues to circumvent the edicts thereof. The need for full disclosure of the nature of offenses and/or allegations, founded in the Constitution, are protected and defendant's right to evidence was clearly protected under **Brady v. Maryland**, 373 U.S. 83 (1963)

Furthermore, the right of effective assistance of counsel was enunciated in **Strickland v. Washington**, 466 U.S. 668 (1984) There are no provisions within the Constitution which would lessen the right of the accused merely because of the nature of the offense. In fact, there is a greater need for the protections of the Constitution when liberty interest are at risk.

Texas has enacted a statute which allows a jury to convict under a less than clear, or even full consideration of, what alleged criminal statutes were proven by the prosecution. Under no guise of the Constitution is it legal or ethical to allow such conduct by a jury in a criminal case. See, **Old Chief v. United States**, 519 U.S. 172, 117 S.Ct. 644, 650-651 (1997)

Texas, and the nation as a whole, has implemented what is known as a "Nuclear Option." Should a person or entity desire to eliminate or taint an individual, all they have to do is claim sexual assault, and forever, the person accused is tainted. This Nation has a history of such actions. The Salem Witch Trials, Jim Crow laws, or being black meant guilt, Japanese internment during World War II, Deportation of Mexican Nationals during the 1930's under F.D.R., and now the Me-Too movement which allows the segregation, castigation, incarceration, and even destruction of a persons liberties without any actual proof being proffered in support thereof. Texas Penal Code § 21.02, is one such statute which needs limiting, and unanimous verdicts required for all provisions thereof.

How many other good people need to be destroyed before this Country's legal system says: "ENOUGH!" Certainly, it cannot happen soon enough, and the rights of the accused needs to be restored, and the balance restored with respect of the modern day witch hunts for alleged sexual predators.

The Petitioner has set forth a number of viable questions for review in this Honorable Court, however, it stands to reason that in the instant case, the United States Court of Appeals has entered a decision in a way that decides an important question of federal law which conflicts with a decision by a state court of last resort, and so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Further, the State Court under state habeas statutes has decided an important question in a way that conflicts with the decisions of another state court of last resort, or of a United States Court of Appeals. Finally, the State Court, United States District Court, and United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court.

I.

THE SHOWING FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Obtaining a Certificate of Appealability, ("COA") requires a

substantial showing of a constitutional error, **28 U.S.C. § 2253(c)(2)**. "To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under **Barefoot**, [463 U.S. 880 (1983)] includes showing that a reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues were 'adequate to deserve encouragement to proceed further' **Barefoot**, **supra**, at 839, and fn. 4, 103 S.Ct. 3383 ("sum[ming] up the 'substantial showing' standard." **Slack v. McDaniel**, 529 U.S. 473, 483-84 (2000) The substantial showing requires a Petitioner to show one of three requirement, not all three. The three requirements being: "reasonable jurist would find the district court's assessment of the constitutional claims **[1.] debatable** or **[2.] wrong**," **Slack v. McDaniel**, 529 U.S. 473, 484 (2000), "or that **[3.]** the issue were **adequate to deserve encouragement to proceed further.**" **Miller-El v. Cockrell**, 537 U.S. 322, 336 (2003)(Internal quotations marked and citations omitted, **emphasis added**).

It may also be held, that a substantial showing exist when the relief sought on appeal is not squarely foreclosed by statute, rule, or authoritive court decision, or lacking any factual basis in the record. See, **Autry v. Estelle**, 464 U.S. 1301-02 (1983)--(Because of the potential conflict between Circuits, it could not be said that issues lacked substance.)

II.

QUESTION(S) AT ISSUE

A: Whether a Court may assume, from a silent record, the defendant was sufficiently made aware of the consequences of his guilty plea?

The U.S. District Judge, in his Final Order Adopting the Magistrate Report and Recommendation, alleged that the Petitioner "was aware of the consequences of pleading guilty to **some** of the charges against him, not withstanding the absence of a formal admonishment in the record." (Appendix ["App."] - B, p. 3, **emphasis added**) However, the District Court relies on the unfounded, unsupported, and unreliable findings of the Magistrate which were mere assumptions, not actual facts, and relies upon denials of certiorari in this Honorable Court to demonstrate precedence. Furthermore, the District Court relied upon **Burton v. Terrell**, 576 F.3d 268, 271-72 (5th Cir. 2009), and **Burdick v. Quarterman**, 504 F.3d 545, 547048 (5th Cir. 2007), which is misplaced.

The U.S. District Judge agreed with the Petitioner that the continual reliance upon the denial of certiorari in this Honorable Court as precedence was improper. "Petitioner correctly criticizes the Magistrate Judge for stating the United States Supreme Court's denial of certiorari can be viewed as an affirmation of the merits of an underlying decision." (App. - B, p. 6) this did not, however, change the opinion of the District Court.

In both the previously enumerate cases cited, the defendant's attorney submitted affidavits verifying that counsel had explained in adequate form, the nature of the offense, punishment ranges, and possible fines in their case. See, **Burton**, and **Burdick**, **supra**. However in the instant case, the Court assumes such advisement occurred, through an unreasonable set of mere deductions. In fact, the Court acknowledges that "no formal admonishments appear in the record." (App. - B, p. 3; App. - R, p. 10)

Assumptions are not evidence, and antithema to any reasonable concept of due process. Evidence based upon mere conclusions is no evidence at all. In the instant case, State law is clear, a Court has a requisite duty to properly admonish a defendant prior to accepting a plea of guilt, **Texas Code of Criminal Procedure, art. 26.13** (App. - L) No admonishments by any officer of the Court appeal in the record. No affidavit's of trial counsel support the mere conclusions of the U.S. Magistrate Judge or U.S. District Judge. Simply put, there is no actual evidence in the record which may support the illogical string of assumptions made by the U.S. Magistrate Judge, and adopted by the U.S. District Judge. The U.S. District Court Officials understood this lack of evidence, yet blamed it on the prospects of "attorney-client privilege." (App. - R, p. 10)

The U.S. Magistrate's Judge's assertions are directly controverted by his own citations in support of his contentions. **Bradshaw v. Stumpf**, 545 U.S. 175, 183 (2005), and **Tollet v. Henderson**, 411 U.S. 258, 647 (1973), both cited by the

Magistrate, demonstrate that defense counsel affirmatively stated they had advised the defendant. Therefore, the assertion that such evidence could not be obtained by virtue of "attorney-client privileged," bar, is completely incorrect. (App. - R, p. 11) The U.S. Magistrate Judge once again has applied an unreasonable application of precedence that does not apply in the instant case. **Id.**

This Honorable Court stated over Forty-Five (45) years ago, "we take great precautions against unsound results, and we should continue to do so, whether conviction by plea or by trial." **Tollett v. Henderson**, 411 U.S. 258, 263 (1973) When it is unclear, what the advise of counsel was, this Honorable Court has consistently, remanded such cases; "for further proceedings consistent with th[e] opinion." **Id.** 411 U.S., at 269

The instant issue, is debateable among jurist of reason as demonstrated in **Florida v. Nixon**, 543 U.S. 175, 185-86 (2004); wherein the Court stated: "Under **Boykin v. Alabama**, 396 U.S. 238, 242-243, 89 S.Ct. 1709, 23 L.Ed. 274 (1969), a guilty plea **cannot be inferred from silence**; it must be based on expressed affirmations made intelligently and voluntarily. Similarly, the Florida Supreme Court stated, a concession of guilt at trial requires a defendant's 'affirmative, explicit acceptance,' without which counsel's performance is **presumptively** inadequate." **Id.** (**emphasis added**) Citing, **Nixon v. Singleton**, 758 So.2d 618, 625 (2000)(Nixon II). Therefore, the issue can be said to be debatable among jurist of reason. See, **Slack**, 529 U.S., at 483-84, **supra**.

B: Whether the United States Constitution requires a Grand Jury Indictment in a State Court under the Fifth and Fourteenth Amendments?

The United States District Judge claims that the provisions of the Fifth and Fourteenth Amendment, specifically the Grand Jury provisions, does not apply to State Court. (App. - B, p. 13) Boldly stating: "the federal courts have never found this right applies to a state defendant, as compared to a defendant in federal court answering a charge of violating federal law." **Id.**

Plainly, under **Texas Code of Criminal Procedure art. 1.05**, grants: "gives statutory substance to the right conferred in [Tex.Const.] art. I, § 10 . . . to have a grand jury screening before a person may be 'held to answer for a criminal offense' of the magnitude of felony." **Ex parte Patterson**, 740 S.W.2d 766, 775 (Tex.Crim.App. 1987)--(Overturned on other grounds); see also, **Ex parte Beck**, 769 S.W.2d 525 (Tex.Crim.App. 1989)(same); (See also, App. - I)

It is of no small consequences that **Texas Code of Criminal Procedure art. 1.05. Rights of Accused**, mirrors the federal constitution in almost every respect. When compared, the Texas Constitutional Provisions are identical in application and rendered of the same effect and efficiency. Therefore, the U.S. District Judge's holdings are incorrect, or **wrong**, within the meaning of **Slack**, **supra**.

Arguendo, the U.S. District Judge is correct in his assertion that: "The federal courts have never found this right [5th Amendment Grand Jury Clause] applies to a state defendant,"

the State of Texas has unambiguously held: Texas Constitution art. I, § 10, "and the [U.S. Const.] Fifth Amendment . . . prohibit trying a defendant for a felony without presenting the accusation to the grand jury." **Sledge v. State**, 903 S.W.2d 105, 108 (Tex.App. - Fort Worth 1995), aff'd, 953 S.W.2d 253 (Tex.Crim.App. 1997)

It is well established that the, Bill of Right's [Amendment I through X] apply to the States through the Due Process Clause of the Fourteenth Amendment. (App. - F) This Honorable Court held: "The rights of the constitution are granted to the innocent and the guilty alike, . . . [and they do] not attach only to matters affecting 'the determination of guilt.'" **Kimmelman v. Morrison**, 477 U.S. 365, 385 (1986)

In the instant case, the U.S. District Judge improperly incompletely cites **Woods v. Quarterman**, 503 F.3d 408, 412 (5th Cir. 2007) At Footnote One (1), the Fifth Circuit cites **Studer v. Texas**, (sic) 799 S.W.2d 263 (Tex.Crim.App. 1990). The U.S. District Judge states plainly, "(some internal citations omitted)." (App. - B, p. 3) Had the full citation been cited, the Court would have realized that the Texas Court of Criminal Appeals stated: "Certainly, as a matter of fundamental due process, defendants deserve notice of the charges against them." **Studer**, 799 S.W.2d at 268. Furthermore, "[I]n the context of the undoing of the 'Common Sense Indictment Act' . . . the Court of Criminal Appeals said that a grand jury indictment, as the term was used in the Constitution, certainly meant a statement of **ALL** the essential elements . . . [thus passage of the constitutional

amendment is necessary to change things.]" **Id.** 799 S.W.2d at 269 (emphasis added)

It is easily demonstrated that, this Honorable Court has affirmatively held that the Fifth Amendment Guarantee that a defendant will be tried only on the charges alleged within a Grand Jury Indictment, which cannot be broadened or altered except by a Grand Jury applies to the States. See, **Stirone v. United States**, 361 U.S. 212, 215-217 (1960) Further, the splitting of hairs concerning the applicability of federal court case law does not diminish the applicability of the Grand Jury Guarantee applicable to the States through the Fourteenth Amendment.

The minimum standards of the United States Constitution, as applied to the States, requires the application of the Fifth Amendment Grand Jury requirement. The District Court's arguments are moot, however, arguendo, the District Court assertions are proper and correct, this Honorable Court should foreclose the loop-hole afforded the States and through demonstratable precedence, apply the federal court precedence to the States, and foreclose any doubt in the instant case concerning the applicability of the Constitution to the States concerning a Grand Jury Indictment.

C: Whether a defendant may be convicted of both a lesser and greater offense based upon the same evidence offered as proof of the alleged violation of State law?

The State's main argument in the case at bar makes the factual case for a violation of the United States Constitutional Amendment barring double jeopardy and double punishment.

At trial the State argued the instant conviction under **Texas Penal Code § 21.02. Continuous Sexual Abuse of Young Child or Children:** "They were part of the Counts that he plead guilty to." (8 RR 17-18) These unambiguous statement attributed to the State affrimatively demonstrates that the State relied upon the guilty plea to firm up their case, and demonstrates the legal premise relied upon by the State. Therefore, the reliance on the lesser included offenses violated the United States Constitution on multiple punishments for the same offense.

Where the same criminal conduct violates two differed Penal Statutes, the two offenses are the same for Double Jeopardy purposes, if one of the offenses contains all of the elements of the other. See, e.g., **North Carolina v. Pearce**, 395 U.S. 711 (1969)

In the instant case, the single indictment was pulled apart and the Petitioner tried piecemeal. Beginning with Counts Two through One hundred and twenty eight ("2-128"), and the second portion being Count One (1). Therefore, any argument that the Petitioner was convicted under a single indictment is misplaced.

The Petitioner was found guilty on Counts 2-128, prior to Count 1. The State then proceeded to try and convict the Petitioner on a greater offense, included within the proof necessary on Count 2-128, when compared to Count 1. The State argued that, "When you make child pornography, that's sexual performance of a child." (8 RR 17) Therefore, the State plainly relied upon Counts (2-128) to demonstrate the culpability of the Petitioner in Count 1. Thereby, implicating the Double Jeopardy Clause of the Fifth Amendment.

D: Whether Trial Counsel renders reasonable effective assistance of counsel, when he fails to properly advise his client of the consequences of his plea?

The United States District Judge, again, makes assumptions as to the advisement of defense counsel in the instant case. (App. - B, p. 5) See, **Question A:, supra.** The United States District Judge stated: "Having thoroughly reviewed the record in this matter and as noted previously, the Court concludes Petitioner was advised, both by counsel and the trial court, of the potential punishment he faced if he plead guilty to these charges." (App. - B, p.5) However this statement does not comport with what the United States District Judge stated previously.

The United States District Judge, Sam Sparks, stated the Petitioner: "was aware of the consequences of pleading guilty to **some** of the charges against him, **notwithstanding the absence of a formal admonishment in the record.**" (App. - B, p. 3, emphasis added) Furthermore, the United States Magistrate Judge failed to identify any actual factual record of such advisement, and instead relied upon an unreasonable set of deductions, based upon mere assumptions concerning the record. See, **Question A: supra,** Incorporated by reference herein.

The United States Magistrate Judge strings together a proposed scenario, making unreasonable assumptions, and claims there would be evidence, but for, the "attorney-client privilege," afforded defendants. (App. - R, p. 10) This is a false assertion, and easily ascertained through an evidentiary hearing under federal law.

Furthermore, as will be addressed below at **Question E:**, incorporated by reference herein, the District Court failed to properly conduct a de novo review, despite his claims that he did, of the State Court's denial of the instant ineffective assistance of counsel claim on the merits. Such de novo review is mandatory under the AEDPA, and **Strickland v. Washington**, 466 U.S. 668, 694 (1984)--(because effective assistance of counsel is a mixed question of law and fact, we owe no special deference to the finding of the state court on the question.)

This Honorable Court has held that when a defendant is represented by counsel during the plea process, and enters his plea on the advise of counsel, he may attack the voluntary and intelligent character of the plea by showing that the advise of counsel was not within the range of competence demanded of attorneys in criminal cases. **Hill v. Lockhart**, 474 U.S. 52, 58-59 (1985) Therefore, when, as in the instant case, the Petitioner was not adequately notified of his rights or consequences of his plea, relief is warranted. See e.g., **Ex part Kelly**, 676 S.W.2d 132, 133 (Tex.Crim.App. 1984); see also, **Lafluer v. Cooper**, 132 S.Ct. 1376 (2012), and **Missouri v. Frye**, 132 S.Ct. 1399 (2012)

It has long been held that trial counsel's failure to familiarize himself with the fact and law relevant to the case, in relation to the guilty plea, constitutes ineffective assistance of counsel, and renders the plea involuntary. **Herrin v. Estelle**, 481 F.2d 125 (5th Cir. 1974); see also, **Johnson v. Zerbest**, 304 U.S. 458, 460 (1938)

Therefore, the federal law is well established, and jurist of reason have long held that the Petitioner is entitled to adequate advisement in how to plea, and a natural outgrowth of this right is advisement as to the consequence of such plea in mandatory as well.

E: Whether the United States District Court has a duty to conduct a de novo review of state court records of federal questions that are mixed questions of law and fact?

The United States District Judge plainly enunciates: "This Court **does not undertake a de novo review** of the state court's denial of a claim on the merits." (App. - B, p. 5, emphasis added) Further, minus benefit of a proper review of the records, the Court boldly asserts the Magistrate afforded the state court's denial of the Petitioner's claims "proper deference." **Id.**

As stated above, this Honorable Court has stated: "Because effective assistance of counsel is a mixed question of law and fact, we owe no special deference to the finding of the state court on the question." **Strickland**, 466 U.S., at 694

The Fifth Circuit, has consistently held mixed questions of federal law and fact, require a de novo review on the merits. See, **United States v. Mullen**, 178 F.3d 334, 341 (5th Cir. 1999), **Goodwin v. Smith**, 439 F.2d 1180 (5th Cir. 1971) Furthermore, this Honorable Court held: "Whether state prisoner waived his constitutional right's was not a question of fact, but an issue of federal law." **Brewer v. Williams**, 430 U.S. 387, 398-400 (1977)

If neither a defendant, nor his counsel, correctly understood the essential elements of the crime with which the defendant was charged, defendant's guilty plea would be invalid under due process clause. See, **Bousley v. United States**, 523 U.S. 614, 618-619 (1998)

Thus, it is well established federal law, that the Petitioner was entitled to a de novo review of his claims, which he admittedly did not receive, on a mixed question of federal law and fact. Therefore, the United States District Judge, admittedly, failed to comply with well established federal precepts, and afford the Petitioner a de novo review in his case. (App. - b, p. 5)

F: Whether the United States Constitution requires a jury to unanimously return a verdict of guilt?

The conviction in the case, by its very definition, is a continual offense. (See, App. - 0) Therefore, a jury, with specificity, agree that a defendant acted in a specific manner, however, the statute allows a jury to convict a defendant minus benefit of a unanimous verdict as to which specific acts the defendant committed. **Jacobensen v. State**, 325 S.W.3d 733, 737 (Tex.App. - Austin 2010, no pet.); and **Holton v. State**, 487 S.W.3d 600, 606-607 (Tex.App. - El Paso 2015, no pet.)

As of date, the Texas Court of Criminal Appeals, at Austin, has not weighed in on the issue concerning the Constitutionality of the Statute at **Texas Penal Code § 21.02**, which is new to the Texas Penal Code lexicon. As such, **Texas Penal Code § 21.02** cannot be said to be squarely foreclosed by statute or

authoritive court decision, and deserves this Honorable Courts attention to determine the applicability of the unanimous verdict aspect in this statute. See, **Autry v. Estelle**, 464 U.S. 1301-1302 (1983), **supra**.

The wording of **Texas Penal Code § 21.02**, allows a jury to convict a defendant, on any specific acts it feels meet the criterion, however, the statute is not an umbrella of all prohibited sexual misconduct. As the Respondent so aptly pointed out, **Texas Penal Code § 43.26, Possession or Promotion of Child Pornography** does not rise to the level of the Continual Sexual Abuse of a Young Child or Children level.

The Respondent within the answer stated, "These are separate offenses, each with distinct elements the state had to, and did, prove." (Respondent's Answer at 24) However, as stated earlier, the State argued that "They were part of the Counts that he plead guilty to." (8 RR 17-18), and "when you make child pornography, that's sexual performance of a child." (8 RR 17) The State would have it both ways in the instant case.

The State would have possession of child pornography equal sexual performance of a child, and demonstrate guilt on the greater offense under **Texas Penal Code § 21.02.** The law was not constructed in such a manner to become a blanket policy for all misconduct, and possession and/or promotion of child pornography does not rise to the level of **Penal Code § 21.02.**

The United States District Judge, has applied: **Johnson v. Louisiana**, 406 U.S. 256, 259 (1972)--("we note at the outset that

this Court has never held jury unanimity to be a requisite of due process of law.") (App. - B, p. 6) As noted above at page 6, supra, in Louisiana, there is no right to a unanimous verdict under the old "Jim Crow Era laws," purposely designed to ensure guilty verdicts against blacks. Further, it is noted, that unlike the Louisiana law and ruling in the Supreme Court in 1972, the **Continual Sexual Abuse of a Young Child or Children** statute is a continuing offense under law, not a single crime within the meaning of **Schad v. Arizona**, 501 U.S. 624 (1991), of which the U.S. Magistrate originally applied within his recommendation. (cf. App. - B, p. 6; App. - R, p. 23) Instead, the statute very plainly requires a person commit: "**(b)(1)** during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims, and" (App. - O) The statute then goes on to enlist eight separate manner and means to commit the crime. **Id.**

Therefore, the statute as literally read, is not the proffered "single crime," but an amalgamation of several crimes that a jury need not agree upon, but merely, feel it was something along those lines. As a result, **Texas Penal Code § 21.02**, is unconstitutional and defense counsel had a legal duty to object, to preserve the error, as the claims cannot be said to be meritless for the purpose of an objection by defense counsel.

Once again, the Petition must point out **Question A:** incorporated by reference herein, as the assumptions of the Magistrate and United States District Judge are not facts, but mere conclusions assumed through no actual factual records.

The United States District Judge admitted that: "Counsel's failure to object to the court's statement violated Petitioner's right to effective assistance of counsel only if the failure was prejudicial to the outcome in this matter." (App. - B, p. 17) It is noted, the State argued during trial, "They were part of the Counts that he plead guilty to." (8 RR 17-18) The unambiguous arguments of the State affirmatively demonstrates the State's reliance upon the guilty pleas to demonstrate the greater offense. Therefore, the reliance on the lesser-included offense to prove the greater offense, violates the prohibition on multiple punishments under the Double Jeopardy Clause of the United States Constitution, and the failure to object would have be detrimental to the defense in the instant case. The United States District Judges reasoning in the instant case is flawed, and wrong. (App. - B, p. 6-7)

G: Whether the Due Process Clause to the United States Constitution, requires equal protections in the application of State law under the Federal Constitution?

"**Section 1.** All person born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make nor enforce any law which shall abridge the privileges or immunities of citizens of the United State; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deprive any person within its jurisdiction the equal protections of the law." **U.S. Const. Amend. XIV**, in pertinent part.

This Honorable Court has held: "The rights of the constitution are granted to the innocent and guilty alike, . . . [and they do] not attach only to matters affecting 'the determination of guilt.'" **Kimmelman v. Morrison**, 477 U.S. 365, 385 (1986)

Therefore, as literally read, yes, the Fourteenth Amendment applies to the States under the United States Constitution.

The instant question is related to the fact that the United States Magistrate, and District Judges made assumptions under federal law which do not apply, and when facts didn't directly appear in the record, either made-up answers, or decided carte blanc the Petitioner's case was meritless. The United States District Judge stated at the end of his opinion, "The Court has undertaken a **de novo** review of the entire case filed in this action," (App. - B, p. 10) however, this is directly refuted by the earlier statements as to "[t]his Court does **not undertake de novo review** of the state court's denial of a claim on the merits." (App. - B, p. 5)

The nature of the offense in this case is understandably prejudicial, however, the Petitioner is entitled to due process, and equal protections under law, same as any other defendant, same as Bret Kavanaugh, or any other person accused of a improper sexual act. Due Process has not been served in this case, and until it has been, special interest groups continue to sow discord in our Great Nation.

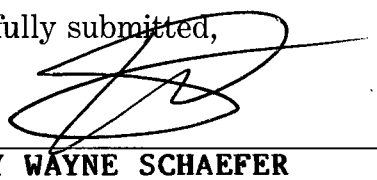
How long does this nation continue on the path it currently finds itself? One has to wonder when, if ever, accused persons will obtain benefit from the Bill of Rights enunciated within the Constitutional Amendments I. through X. Courts today look at the nature of the offense prior to any review, and if the offense is sexual in nature, naturally a Court finds it difficult, at best, to adequately apply due process, for fear of future ostrication should they desire to advance their career in the future. No more, should this be the norm, allow DUE PROCESS, the BURDEN OF PROOF, and PRESUMPTION OF INNOCENCE to LIVE.

III.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



WESLEY WAYNE SCHAEFER
 # 1713603

Date: **October 30, 2018**