

No. 18-6815

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL JERRIAL IBENYENWA — PETITIONER
(Your Name)

vs.

LORIE DAVIS, DIRECTOR, — RESPONDENT(S)
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
ON PETITION FOR A WRIT OF CERTIORARI TO

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

Michael Jerrial Ibenyenwa #1638105
(Your Name)

3872 FM 350, S.
(Address)

Livingston, Texas, 77351
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

QUESTION 1: IS A COA MANDATED IF A PETITIONER DEMONSTRATES THE STATE ARRIVED AT A DECISION CONTRARY TO AND A UNREASONABLE APPLICATION OF STRICKLAND AND LAFLEER BY ISOLATING A SNIPPET OF A TRIAL COLLOQUY, ALONE, IN ASSESSING PREJUDICE AGAINST HIM?

A) IF SO, DOES PETITIONER DESERVE ENCOURAGEMENT TO PROCEED FURTHER WHEN TRIAL COUNSEL INSTRUCTS HIM TO REJECT A FAVORABLE PLEA OFFER AT TRIAL COLLOQUY THROUGH ERRONEOUS LEGAL ADVICE?

QUESTION 2: ARE STATE'S ENTITLED TO AEDPA DEFERENCE ON CONTRA-~~AND~~ADVERTED CREDIBILITY DETERMINATIONS IN UNREASONABLY APPLYING STRICKLAND AND FRYE, IN OPTING TO BELIEVE A ATTORNEY'S AFFIDAVIT OVER INMATE'S AFFIDAVITS, ON A COLD RECORD AND WITHOUT EVER OBSERVING Demeanor OF WITNESSES?

A) IF NOT, DID IBENYENWA MEET COA STANDARDS?

QUESTION 3: COULD JURIST OF REASON DEBATE WHETHER IBENYENWA'S U.S. CONST. AMEND. V, XIV RIGHTS WERE VIOLATED BY A MULTIPPLICIOUS (DOUBLE-DIPPING) / DEFECTIVE INDICTMENT AND JURY CHARGES; WHETHER THE VIOLATIONS DENIED HIM A FAIR TRIAL THROUGHOUT THE ENTIRE TRIAL BECAUSE OF UNDUE PREJUDICE?

QUESTION 4: WHEN A U.S. CONST. AMEND. V, XIV VIOLATION IS APPARENT ON THE FACE OF THE INDICTMENT AND JURY CHARGES, COULD JURIST OF REASON DEBATE OR AGREE COUNSEL RENDERED (IAC) IN FAILING TO OBJECT AND WHETHER SUCH INEFFECTIVENESS PREJUDICED THE DEFENSE?

QUESTION 5: COULD JURIST OF REASON DEBATE WHETHER THE § 21.02 STATUTE IS UNCONSTITUTIONAL, FACIALLY AND/OR AS APPLIED AS VIOLATIVE OF THE U.S. CONST. AMEND. V; XIV; WHETHER THE PROCEDURAL DEFAULT-CAUSE AND PREJUDICE RULINGS WERE SATISFIED BY COUNSEL'S FAILURE TO OBJECT ON THESE GROUNDS WERE CORRECT?

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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A. to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B. to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

OPINIONS BELOW CONT.

Texas High court denying habeas relief appears at Appendix C to the petition and is reported at Ex parte Ibenyenwa, 2015 ~~Tex.~~ Unpub. Tex. Crim. App. Lx.

Texas High court remanding ~~re~~ application appears at Appendix E to the petition and is unpublished.

Texas High court denying reconsideration of the denial of habeas relief and is unpublished.

Texas High court refusing petition for discretionary review and is reported at In re Ibenyenwa, 2012 Tex. Crim. App. 1023 (Tex. Crim. App. August 22, 2012).

Texas lower court judgement and opinion appears at Appendix F to the petition and is reported at Ibenyenwa v. State, 2011 Tex. App. Lx 9908 (Tex. App. — Ft. Worth, Dec. 15, 2011).

Texas lower court judgement and opinion on rehearing appears at G to the petition and is reported at Ibenyenwa v. State, 367 S.W.3d. 420 (Tex. App. — Ft. Worth, March 22, 2012, pet. ref'd) (op. on reh'g).

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 30, 2018.

☒ No petition for rehearing was timely filed in my case.

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

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. V

U.S. CONST. Amend. VI

U.S. CONST. Amend. XIV

STATEMENT OF THE CASE

In March 2009 Ibenyenwa was indicted upon one count of Continuous Sexual Abuse of a Child under fourteen ~~years~~^{years} of age, alleged to have been committed on or about January 22, 2009 (thirty (30)-day period) as registered in Tarrant County, Texas, case no. 1149004D.

First Indictment, ROA 1428 (Attached as Appendix K) The state reindicted him in July 2009 with five additional lesser ~~included~~ offenses, in separate counts: (Count Two and Three) aggravated sexual assault of a child; (Count Four and Five) Indecency with a child; and (Count Six) indecent exposure. Second Indictment, ROA 1364-65, Appx. L. On ~~August~~^{April} 7, 2010 the state waived Count Six. ROA 1487, On April 6, 2010. Ibenyenwa plead not guilty on the remaining counts and trial commenced on the following date. ROA 1531, 1534.

On April 8, 2010 via the Court's charges, the jury found Ibenyenwa guilty on all counts, through five separate verdict forms and rendered punishment at: 50 years' confinement on Counts One through ~~five~~ three (with a \$10,000 fine on the latter two counts); 20 years' confinement on Counts Four and Five, with a \$10,000 fine each count; and pursuant to the State's request those sentences were ordered stacked. Court's Charge ~~ROA~~ at punishment, ROA 960-969, Appx. J; ~~Id. at 1666~~ ROA 1005-06; Judgements of Conviction, Id. at 1367-80, Appx. No objections were lodged by trial defense counsel on the imposition of said judgements and punishments. ROA 1659, 1666, 1674-75.

An appeal was sought with the Texas Second District Court of Appeals

ITCOA) arguing the prosecution, conviction and punishments on Counts One and Two through Five violated the Double Jeopardy Clause and the Cont. Sexual Abuse Statute is unconstitutional on its face and as applied, inter alia; with the State's agreement of the former the court affirmed Count One but acquitted Ihenyenuwa of the remaining counts. ROA 1089. First TCOA Opinion, Ihenyenuwa v. State, 367 S.W. 3d 420 2011 Tex. App. Lx 9908 (Tex. App. - Ft. Worth, Dec. 15, 2011). Appx.

F, ROA 1415-16. After considering the state's motion for rehearing the court reversed its prior decision and substituted the acquittal for vacatur. Second TCOA Opinion, Ihenyenuwa v. State, 367 S.W. 3d 420 (Tex. App. 2012), ROA 1394, 95; Appx. G.

Thereafter, the Texas Court of Criminal Appeals (TCCA) denied Ihenyenuwa's (PAR) over two judges recommending a grant. ROA 1427, In re Ihenyenuwa, 2012 Tex. Crim. App. Lx. 1023 (Tex. Crim. App., Aug. 22, 2012). In November 2013, two §11.07, C.C.P. (§11.07) applications for habeas relief were file with the State trial court raising six claims for relief with supporting documentation; after consolidating the applications and remand for evidentiary by TCCA the trial conducted a hearing by affidavit and recommended relief by denied. Ex Parte Ihenyenuwa, 2014 Tex. App. Lx.

(Tex. Crim. App., Aug. 20, 2014); ROA ~~115~~ 1255-56, 1747-60, 1774. The TCCA denied relief on the findings of the trial court without written order and denied a motion for reconsideration. Ex parte Ihenyenuwa, 2015 Tex. App. Lx. (Tex. Crim. App. ^{Jan} Feb. 14, 2015); Ex parte Ihenyenuwa, 2015 Tex. Crim. App. Lx 11 (Tex. Crim. App., Feb. 11, 2015).

On early 2015 a timely Amended Petition for 28 U.S.C. § 2254 habeas petition (§ 2254) and motion for In Forma Pauperis (IFP) status were filed with the United States District Court, Ft. Worth Division (USDC-FW) were filed and leave were granted, the petition essentially raised the same errors as presented on § 11.07. Amended Petition, ROA 28.41 (Appx. V 1); ROA 2. Motions for Evidentiary hearing, Discovery; and ultimately the § 2254 petition, Certificate of Appealability (COA) were denied. ROA 4 and 5; Order and Opinion, USDC-FW and Judgement (Appx. B 1). Ihenyenuwa v. Davis, No. 4:15-cv-060-D (N.D. Tex. March 13, 2017). Notice of Appeal was timely filed on April 14, 2017 and IFP on appeal was permitted while motion for reconsideration of the denial of the § 2254 was denied. ROA 4 and 5.

On June 26, 2017, the United States Court of Appeals, Fifth Circuit filed Ihenyenuwa's seemingly cumbersome, pro se Certificate of Appealability with Brief in support (COA) containing six (6) questions and multiple issues. COA (Attached as Appx. U 1). On May 30, 2018, Honorable Gregg J. Costa, Circuit Judge, in a summary fashion denied the COA and relevant motions as moot. Fifth Circuit Order denying COA (Appx. A 1), Ihenyenuwa v. Davis, No. 17-10420 (5th Cir., May 30, 2018). Motion to extend the time to file for rehearing were denied and the subsequent motion for rehearing was refused by the Clerk of Court for untimeliness.

Petition for writ of certiorari was deposited in the prison mail-system, ^{first-class} postage prepaid on August 20, 2018 and the petition is currently due August 28, 2018. See S. Ct. Rule 13.1 and 3; Rule 24.2.

The Clerk of Court received said documents on August 27, 2018, post-marked August 22, 2018. On September 19, 2018, the Clerk notified Ibenyemwa, after returning his documents, that he would have "60 days" to correct the deficiencies within the petition, namely, ~~was~~ failing to provide "actual" copies of "lower court orders" rather than "handwritten" sworn copies for the required appendix. See U.S. SUP. CT Rule 14.1(c); 14.5.

Ibenyemwa has placed the corrected petition within the prison mail-system, first-class postage pre-paid on November 8th, 2018. The petition is currently due November 18, 2018.

REASONS FOR GRANTING THE PETITION

Question 1: Is a COA mandated if a petitioner demonstrates the State arrived at a decision contrary to and a unreasonable application of Strickland and Lafley by isolating a snippet of a trial colloquy, alone, in assessing prejudice against him?

a) If so, does petitioner deserve encouragement to proceed further when trial counsel instructs him to reject a favorable plea offer at trial colloquy through erroneous legal advice?

1) Review should be granted pursuant to S. Ct. Rule 10(a) because the U.S. Court of Appeals has subjected petitioner to a silent, unarticulated higher standard of review for COA than provided under: 28 U.S.C. § 2253(c)(2) and Miller-El, 537 U.S. 322 (2003). Slack v. McDaniel, 529 U.S. 437, 120 S.Ct. 1595 (2000).

The question of whether a COA will issue before a petitioner may appeal the district court's denial of habeas relief is governed by 28 U.S.C. § 2253(c)(2) for those under Anti-terrorism and Effective Death Penalty Act (AEDPA). The Statute requires a "Circuit justice or judge" to issue a COA before an appeal may be taken to the court of appeals. See Miller-El, 537 U.S. 322, 123 S.Ct., at 1039 (quoting 28 U.S.C. § 2253(c)(1)). To be granted a COA a petitioner must make "a substantial showing of the denial of a constitutional right." See § 2253(c)(2). To make such a showing, a petitioner "must demonstrate that the question or issues are debatable among jurist of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." See Miller-El, 537 U.S., at 336 and Barefoot v. Estelle, 463 U.S. 880 (1983).

This court has made it clear the analysis ^{requires} an overview of the claims and the general assessment of their merit; the court must look into the district court's application to the petitioner's claim and determine whether the court's resolution was debatable among jurist of reason. Miller-El, 123

S.Ct., at 1039. The threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims," in fact it "strictly forbids it." Id.

The Fifth Circuit refused to issue CEA, though CEA standards were easily met. See Opinion and Order, Appx. A, at 3. Due to this important question/issue presented that will impact jurisprudence in this nation's courts; extreme divergence in the lower courts which lack uniformity with this court's and the Fifth Circuit's own precedent; it is vital that this court exercise its supervisory power.

In this instant case, as demonstrated enfil. 07, L.L.P., Ibenyenwa raised a claim of ineffective assistance of counsel (IAC), i.e. that counsel provided erroneous legal advice by advising him to reject a favorable plea-bargain offer, on August 12, 2004 of ten-years incarceration in exchange for a plea of guilt to Count Two (aggravated sexual assault) because of a erroneous understanding that he was probation eligible and would receive probation; though he was only eligible for probation on Count Six. Second state application (attached as Appx.

²
~~1~~ 1, p. 14(2), ROA ¹²¹³ ~~1412~~; ROA 1226, 1432. Claims of this sort are addressed under Lafley v. Cooper, 132 S.Ct. 1376, 1385 (2012) (To establish prejudice when a defendant rejects a plea bargain based upon erroneous legal advice he must show reasonable probability he would have accepted the offer, the court would have accepted it, and the prosecutor would not have withdrawn it).

Ibenyenwa developed the record and made a prime facie showing

of prejudice; second state application, Appx. ² p. 1412). ROA 1213; Addendum
 Memorandum of Law, Appx. ² p. 1-5, ROA 1223-1226; Records indicated pre-
 bation eligibility, Appx. 5, ROA 1229; Counsel contrived to request probation
 offer plea expired ^{that} 1235; Ibenyenuwa left a similar trial in tears and
 requested counsel to seek another plea offer, Michael J. Ibenyenuwa Affidavit,
 Appx. N, ROA 1474; requested a plea again the day of trial, Ill. and Counsel con-
 tinued to argue with court over eligibility after plea expired, Trial Record,
 Appx. M, p. 1-5, ROA 1230-34; the actual trial convictions and sentences
 were more severe than the plea offer, Judgments of Convictions, Appx.
 ROA 1344-1363. Based upon all these factors Ibenyenuwa was entitled to a
 evidentiary hearing, latter, 1325. Ct., at 1387, 1389, to satisfy the prejudice
 prongs, Id. 1393, Strickland, 466 U.S., at 694, Cullen v. Pinholster, 131 S. Ct. 1388,
 1408 (2011), but was silently denied. ROA 1177-79, 1769-70.
 Based upon the three-dimensional record as a "whole," the state
 arrived at a contrary to and an unreasonable application of Strickland
 in finding "[Ibenyenuwa] rejected the States' expired 10 year plea
 offer again[after]" he was advised that he was not eligible for probation,
 see on a cold record. See States Proposed Memorandum, Findings of Fact
 and Conclusions of Law (FFCL), Appx. D, p. 5-6, ROA 1751-52. See also
 28 U.S.C. § 2254(d), Bell v. Cone, 535 U.S. 685, 698-99 (2002), Richter,
 131 S. Ct., at 785, latter, 132 S. Ct., at 1390, Miller-El, 537 U.S., at 346
 Trial court had before it evidence to support the claim to support the
 claim but clearly ignored it). Thus, fateminded Jurist could disagree

on the correctness of the state's decision, as it was not conclusively supported by the record as a whole. Yarborough v. Alvarado, 541 U.S. 652, 664 (2004); Woods v. Donald, 135 S.Ct. 1376 (2015) (per curiam), (quoting Richter, 131 S.Ct., 1376 (2015)).

On Ibenyenwa's 28 U.S.C. § 2254 habeas petition, contrary to the USDC-FW opinion, he rebutted the state's findings with clear and convincing evidence by maintaining trial counsel ~~continued~~ was staunch ~~that~~ in her understanding Ibenyenwa was eligible for and would receive probation from the inception of her representation throughout trial; and instructed him to reject the 10-year plea offer again at voir dire. § 2254 Amended Petition, Appx. V, p. 66, ROA 35; § 2254 Memorandum of Law, Appx. W, p. 35-36, ROA 76-77; Op. and Order, Appx. B, p. 12-14, ROA 315-17; Trial Record, Appx. M, 2-14, ROA 1230-34. See Miller-EI, 537 U.S., at 340, 28 U.S.C. § 2254(c)(1). Furthermore, the state was not entitled to AEDPA deference. Op. and Order, Appx. B, p. 12, ROA 315. See Snyder v. La, 552 U.S. 472, 477 (2008); Chester v. Thaler, 666 F.3d 340, 344 (5th Cir. 2011). A evidentiary hearing was sought in the federal court on these grounds and denied, ROA 156-160, 178.

More importantly, why this court should exercise its authority, the Fifth Circuit has already ruled on the same grounds Ibenyenwa seeks for the grant of the COA. See U.S. v. Delbosque, 2015 U.S. App. Lx. 23054 (5th Cir. 2015) (when a defendant is directed by counsel to an-

swer the court in the affirmative rejecting a plea offer in open court, and his assertions have not been tested in an evidentiary jurist of reason would find it debatable whether counsel has provided (IAC) and whether such ineffectiveness prejudiced the defendant); Brown v. Yates, 2014 U.S. App. Lx. 1804 (9th Cir. 2014) (unpublished) (reversed and remanded) (only evidence that in the record is petitioner's sworn evidence that counsel erroneously informed petitioner); U.S. v. Reed, 719 F.3d 369, 376 (5th Cir. 2013) (vacatur and remand for evidentiary hearing required because affidavit was sufficient to prove that defendant would have accepted plea offer but for counsel's erroneous advice of a certain sentence.)).

Petition for COA, Appx. U, p. 21-23.

Moreover, this court has ruled Strickland prejudice inquiry requires a probing and fact specific analysis. Sears v. Upton, 561 U.S. 945, 955, 130 S.Ct. 3259 (2010). See also U.S. v. Batamula, 788 F.3d 166, 171 (5th Cir. 2015) (citing U.S. v. Kayode, 777 F.3d 719, 728-29) (Judicial admonishments are no substitutes for effective assistance of counsel and are "one of many factors and circumstances the court may consider in the... prejudice analysis."). In addition to, U.S. v. Roetzsch, 781 F.2d 1149, 1151 (5th Cir. 1986) (When a defendant's allegations contradict his sworn testimony given at a [hearing] we have required more than "mere contradiction of his [sworn test-

imony] 'typically' specific factual allegations supported by the affidavit of a reliable third person.¹¹⁾

Lastly, since counsel was clearly ignorant on the law of probation while the 10-year plea offer was available, which caused Ihenyenwa to lose the benefit plea, Hinton v. Alabama, 134 S.Ct. 1081, 1089 (2014) and Lafley, 132 S.Ct., at 1387. Strickland's ~~pre~~deficiency prong was satisfied. Strickland, 466 U.S., at 688. This court should issue COA on Ihenyenwa claims/question with additional considerations for another pointed Fifth Circuit decision, Banks v. Vanney, 2017 U.S. App. Lx. 17135 (5th Cir. 2017) (Vacate and remand where state court denied habeas relief upon the trial record^{about} reflecting petitioner maintained his innocence throughout trial).

Question 2: Are States entitled to AEDPA deference on controverted credibility determinations in unreasonably applying Strickland and Frye, in opting to believe a attorneys' affidavit over inmates' affidavits, on a cold record and without ever observing demeanor of witnesses?

a) If not, did Ihenyenwa meet COA standards?

- 1) Review should be granted pursuant to S. Ct. Rule 10(a) because the U.S. Court of Appeals has subjected petitioner to a silent, unarticulated higher standard of review for COA than provided for under: 28 U.S.C. § 2253(1)(2); Miller-El, 537 U.S., at 336; Slack, 529 U.S., at 484; the question presented is of national importance, and the court of Appeals has departed exceedingly beyond normal judicial proceedings in refusing to issue COA so as to call for an exercise of the Court's supervisory power.

The Court's supervisory power is warranted on this perplexing but easy question. COA case law applies on this important question. Miller, *supra*, at 8 - 9.

On State habeas, Ibenyenwa presented a viable claim of IAC, in that, trial counsel failed to convey a favorable plea bargain offer of Fifteen-years incarceration, in exchange for a plea of guilt to Count Two, aggravated sexual assault, made on March 26, 2010 9:49 AM during its four (4)-day window of opportunity, which he would have accepted had he known. Ibenyenwa Aff'd'4, Appx. N, ROA 1474; ^{First} State appl., Appx. X, p. 10, ROA 1304; Second State appl., ~~Appx. AA~~ Appx. AA, p. 14, ROA 1304. See Strickland, 466 U.S., at 688-94; Missouri v. Frye, 132 S. Ct. 1399 (2012). Ibenyenwa developed this claim in demonstrating: Two family members conceded counsel stated only a ten-year offer was made (Monica Ibenyenwa Affidavit, Appx. P, ROA 1710; Laveris Marie Osaji Affidavit, Appx. O, ROA 1709); after attending a similar trial he left the courtroom in tears, instructed counsel to seek a plea offer from the State; counsel never replied, and he requested a plea again through counsel the day of trial (Ibenyenwa affidavit, supra; Second Plea offer, Appx. T, p. 3-4, ROA 1435-36); State Prosecutor, William Albert Vassar IV, went on record acknowledging only a ten-year offer was made and:

"On Wednesday, September 9th, 2009, I received an email from [Trial Counsel, Hon. Mamie Bush-Johnson] [stating] that the Defense was rejecting that offer. And so, therefore, currently, since September 9th, 2009, there has not been any other offers on the table."

(emphasis added) Trial Record, Appx. M, p. 12, ROA 1233, 1489; he was convicted on more serious convictions and sentences than the plea offer (Judgements of Conv., Appx. H, p. 1-15, ROA 1344-1363); trial

co-counsel, Hon. Mary J. Young (Meer) declared only a 10-year offer was made (Hon. Young Aff'd, Appx. R, p. 2); Thengyenua became aware of the lapse plea offer (15-years) through State Bar grievance filed against State Prosecutor, Hon. Vassar, on or about September 4, 2012 (Second Plea offer, supra; State Bar Grievance Response, Appx. 1 p. 1429-30, and, while Johnson admitted she conveyed offer two times, Johnson Aff'd, Appx. R, p. 2-4, ReA 1714-16). Despite the above presentation, the State found Johnson conveyed the 15-year offer on "March 25, 2010 and March 30, 2010" and it was "credible and supported by the record," in its objectively unreasonable ^{fact-finding} and unreasonable application of Strickland, FFL, Appx. D, p. 5, ReA 1751. See Miller-EI, 537 U.S. at 346 (e.g. State-trial court never made findings on whether Thengyenua and his family members' affidavits were "credible" or "not credible and not worthy of belief"); Wiggins v. Smith, 539 U.S. 510, 528, 123 S.Ct. 2571 (2003) (fact-finding unreasonable when state court misapprehended the record on a material, factual issue central to petitioners' claims - "certain partial reliance on an erroneous fact-finding can support a finding of unreasonable-ness", e.g. trial court relied heavily upon Johnson's affidavit that the offer of 15-years was conveyed on "March 25, 2010 and March 30, 2010," when offer was not made until "March 26, 2010 9:46 AM")!

Yarborough, 541 U.S., at 664; Woods, 135 S.Ct. 1376.

On multiple occasions Ibenyemwa requested a evidentiary hearing, for Strickland's deficiency and prejudice prongs, based upon the above facts; vehemently warned the habeas judge whom was not the trial judge, it could not resolve credibility disputes between affidavits and on a cold record - based upon its own recollection but, was silently denied. ROA 1720-23, 1726-27, 1730-32, 1738-43. See Ames v. Scott, 61 F.3d 333, 346-47 (5th Cir. 1995) (full and fair hearing when state-trial judge whom presided over petitioner's trial conducts credibility determinations on a paperhearing); May v. Collins, 955 F.2d 299, 314 (5th Cir. 1992) (Habeas judge whom was not trial judge "cannot compare the information presented in affidavits against [their] own first hand knowledge of trial."). Strickland, supra; Missouri v. Frye, 132 S.Ct. 1399 (2012).

This court has made it clear, federal courts offer deference to state courts' credibility assessments. Marshall v. Lonberger, 459 U.S. 422, 434, 103 S.Ct. 843 (1983) (Rehnquist, J., delivered opinion) ("Title 28 U.S.C. § 2254(d) gives federal habeas court no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not them," Citing U.S. v. Oregon Medical Society, 343 U.S. 326, 72 S.Ct. 591 (1952)); Patterson v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885 (1983); id., at 459 U.S., at 443 (Brennan, J., dissenting) ("It is hard

to Judge [prisoner's] credibility on a cold record." *Snyder*, 552 U.S. at 473. However, all these precedential decisions relied upon a trial court's findings "when actually observed the demeanor of the affiant." See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S.Ct. 1504 (1985) ("this is not to suggest the trial judge may insulate his findings from review by determining them as credibility determinations. . ."). *Blackledge v. Allison*, 431 U.S. 63, 82 n.25, 97 S.Ct. 1621 (1977) ("when the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive. . ."). *Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842 (1974), and *Holiday v. Johnson*, 313 U.S. 342, 352, 61 S.Ct. 1015, 1018 (1941); *Patton*, 467 U.S. at 1038 (a credibility determination is largely one of demeanor).

In *Thengwen* was § 2254 petition and COA, contrary to the usual FW decision - which, in part of reason would find debatable, he rebutted the state's findings of fact with clear and convincing evidence; he would have accepted the 15-year offer had he known, however Judge had no authority to make credibility assessments and failed to expressly make findings on his and family members affidavits; there existed a previously unresolved controversy on whether counsel conveyed the 15-year offer and counsel submitted perjured, manufactured and self-serving evidence to support a notification of the offer;

Johnson's evidence conflicts with trial and habeas record. See § 2254 Amend. Pet., Appx. V, p. 7; § 2254 Mem. of Law, Appx. 1p. 8-9, ROA 48-49; LOA, Appx. U, p. 31-32 and 35-36; Op. and Order, Appx. B, p. 12-14, ROA 315-317. See also Schriro v. Landrigan, 550 U.S. 465, 473-75, 127 S.Ct. 1973 (2007) (fact-finding process is objectively unreasonable if not supported by record or fact-finding process is deficient in some material way and will not be disturbed unless rebutted with clear and convincing evidence); Richter, 131 S.Ct., at 786; Woodford v. Viscio, 537 U.S. 19, 27 (2002); Ayala v. Wong, 756 F.3d 656, 692 (9th Cir. 2014) (refusing to defer to state where procedural errors rendered the trial court's determination unreliable); Netherly v. Collins, 943 F.2d 1154, 1157 n.8 (5th Cir. 1993), citing Ellis v. Collins, 956 F.2d 76 (5th Cir. 1992); Armistead v. Scott, 37 F.3d 202 (5th Cir. 1994); Taylor v. Maddox, 366 F.3d 942, 1000-01 (9th Cir. 2004).

Ibenyen was sworn affidavit that counsel failed to convey the favorable 15-year offer during its window of opportunity ~~is~~ ^{is} sufficient, which he would have accepted is sufficient to create a genuine issue of material fact as to whether counsel's assistance was constitutionally deficient under the first prong of Strickland and a prima facie showing of prejudice under Strickland. See First State Appl., Appx. X, p. 11; Ibenyenwa Aff'd't, supra; Second Plea offer, supra. See also Kayode, 777 F.3d, at 723-24; Strickland, supra; Frye, supra, at 1409.

Thus, since the state stepped at its erroneous and objectively unreasonable credibility determinations, it was not entitled to

deference on the prejudice prong either by failing to expressly rule on it, see *FCL, App. D*, p. 5, *ROA 1751*; see also *Rampilla v. Beard*, 545 U.S. 379, 390 (2005); *Loden v. McCarty*, 778 F.3d 484, 494-95. The record is currently incomplete to resolve this claim on

fault of the state and the USAF by blithely refusing to develop the record. Ibanenwa met COA standards. See COA, supra, at p. 30-35; COA denial, App. A, p. 3. *Miller-EL*, 537 U.S. at 336.

Given the lower courts' divergent and egregious affront to this Courts and the Fifth Circuit's own authoritative precedent, it is of national importance and necessary for this court to act upon the question presented to prevent manifest injustice/normally arising from the state-trial court blindly adopting the state attorneys'

FCL verbatim on a cold record ~~without~~ a fair hearing. See *Anderson*,

470 U.S. at 572.

Question 3: Could jurist of reason debate whether Ibanenwas U.S. Const. Amend. V, XIV rights were violated by a multiplicitous (double-dipping) defective indictment and jury charges, whether the violations denied him a fair trial throughout the entire trial because of undue prejudice?

~~This direct question asserted revolves around the analysis~~

~~of COA case law creation~~

1) Review should be granted pursuant to S. Ct. Rule 10(a) because the U.S. Court of Appeals has subjected petitioner to a silent, unarticulated higher standard of review for COA than provided for under 28 U.S.C.

§ 2253(1)(2); Miller-El, 537 U.S., at 336; Slack, 529 U.S., at 484; the question presented is of national importance, and the Court of Appeals has departed exceedingly beyond normal judicial proceedings in refusing to issue COA so as to call for an exercise of the Court's supervisory power.

This core question presented revolves around the applicability of COA case law previously presented. Miller-El, supra at 8-9. The court's supervisory power is necessitated by the Court of Appeals subjecting Ibenyehwa to a higher standard of review, albeit, inconspicuously and because this unique (factually and legally) question is ripe for the Court's review of the State's forsaken and unlawfully employed process in indicting, prosecuting, convicting and punishing him with a continuing offense and five of its lesser offenses, in separate counts, all which were encompassed in the continuous offense, and occurred on or about the same date against the same individual that ostentatiously violated the double jeopardy and due process clauses. (Dividing a single offense into multiple offenses).

Jurist of reason would debate with the USDC-FW assessment of the ^{AEDPA to the} constitutional claims, or as wrong because: just as the State, the court failed to properly address both parts of the claim. Compare Op. and Order, at 5-7 with § 2254 Amend. Pet., at 6-7 and § 2254 mem. of Law, at 13-17. See Slack, supra; Miller-El, supra. In passing, the court referred to the State's erroneous findings but, failed to decisively rule on the second part of the claim (unfair trial

- multiplicitous indictment and jury charge), concluding:

"Nothing in the record objectively establishes that the prosecutor's charging decision - i.e., to add charges that [Ibenyenwa] was legitimately subject to prosecution, was motivated by his desire to punish [him] for rejecting the plea offers and pleading not guilty and pursuing a jury trial."

Op. and Order, at 6-7.

In addition to the USNC-FW conclusion that the record fails to objectively establish the prosecutor's improper motive in its charging decision: the prosecutor's additional charges were violative under § 21.02(c), Tex. Pen. Code; Dixon v. State, 201 S.W.3d 731 (Tex. Crim. App. 2006), U.S. CONST. Amend. V; XIV; Ibenyenwa provided a sequence of events and documentary evidence to support the vendictiveness claim (§ 2254 Mem. of Law, at 12-147); the state and the USNC-FW denied requests to develop record (ROA 185-196, 235). See U.S. v. Goodwin, 457 U.S. 368, 380 n.12 (1982). Thus, meeting the threshold inquiry to proceed further. Id., 457 U.S., at 376 n.8.

Ibenyenwa challenged the state court's decision on ground one, in pertinent part, his trial was fundamentally unfair from the indictment through the punishment phase of trial by the multiplicitous indictment and jury charge that prejudice the defense by giving the jury a distinct, immutable impression that more than one crime was committed which led to multiple, monotonous convictions and a harsher sentence under § 2254 (d)(1)-(2). See § 2254 ^{Mem. of Law} ~~Amend. Pet.~~ 11, 11-14.

He made it clear the clearly established law the state violated that squarely addresses the issues and/or in which establishes a legal principle that clearly extends to this case, see Moses v. Payne, 555 F.3d 742, 750 (9th Cir, 2009) (per curiam) (citing Wright v. Van Patten, 552 U.S. 120, 123, 125-26, 128 S.Ct. 743 (2008) (per curiam)). The Due Process and Double Jeopardy clauses, respectively, states a defendant has the right to a fundamental fair trial in a fair tribunal, which includes the presumption of innocence; and prohibits placing a defendant in jeopardy for the same one offense twice. U.S. CONST. Amend. V, XIV; Tuney v. State of Ohio, 47 S.Ct. 437 (1977); Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977); Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180 (1952). § 2254 Mem. of Law, at 14-15.

The facts in this case demonstrate the state failed the § 2254 (d)(1)-(2) test and isn't entitled to deference. see Richter, 131 S.Ct., at 786. There was substantial and overwhelming evidence a unfair trial resulted: The state indicted, ^{convicted} ~~convicted~~, sentenced Ibenyewa for committing a continuous offense and realleged that same offense into four additional counts, ^{all} alleged to have occurred "on or about January 22, 2009" (Complaint, supra; Indictment, supra; Judg. of. Conv., supra; Courts Charge, supra; Courts Charge on punishment, supra); The state inculcated all five counts to the jury the entire proceeding (REA

1480-1675); The trial court and state instructed the jury to consider the ~~whole~~ charges¹ as a whole." (Court's charge, at 8; ROA 1460); The TCOA initially ordered the superfluous counts Two through Five, judgement of acquittal¹ (TCOA Judgement and Opinion, Appx. G, p. 1, 13; ROA 1403, 1415); Hon. Vassar admitted to not fully recognizing the law on double jeopardy after trial and direct appeal (State Bar Grievance, Appx. 1 p. 1-2; ROA 1321, 1429-30 ("Mr. Ibenyenwa was indicted and found guilty of multiple counts because the sexual abuse the young victim suffered from happened multiple times over several months.")).

The state admits Ibenyenwa's multiple convictions and sentences under Count Two through Five were improper under double jeopardy but denied the violation prejudiced him throughout trial, see FFCL, at 3. The mere threat of multiple punishment is sufficient to invoke the double jeopardy clause. U.S. v. Wilson, 470 U.S. 332, 334, 95 S.Ct. 1013 (1975). Moreover, Ibenyenwa prejudice by the superfluous charges and at all phases of trial (indictment through punishment) and the state failed to expressly make findings on these central items. See FFCL, *supra*; COA, at 16, see also Miller-EL, *supra* (highlighting unreasonableness).

This court has made it clear: "A single offense should normally be charged in one count rather than several, even if different means

¹ This is dispositive.

of committing the same offense are alleged," Sanabria v. U.S., 437 U.S. 54, 66 n.70, 98 S.Ct. 2170, 2180 n.70; Multiplicity is triggered when a defendant is charged with a single offense in more than one count in a indictment, when one is arguably the lesser offense of the other, absent legislature's clear intent, Blockburger, Supra, Brown, Whalen v. U.S., 445 U.S. 684, 100 S.Ct. 1432⁽¹⁹⁸⁰⁾; Bell v. U.S., 349 U.S. 81, 84, 75 S.Ct. 670 (1955) (holding "if Congress does not notify the punishment for a offense] clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.").

This question is of national importance: To countenance the government's "creative pleadings" (which was contrary to legislative intent. See § 21.02, Tex. Penal code²; Dixie, 201 S.W.3d, at 737 (Lochran, J., concurring) (urging Texas legislature to enact a new statute that focuses upon a new sexual, continuing course of conduct while preserving principles of due process, notice, double jeopardy, etc.); charging "compound and predicate offenses" through a State's prosecutorial "sleight of hand," thereby, enables and incentivises states to multiply offenses from one crime and permits undue leverage in plea negotiations; frustrates evenhandedness in sentencing and raising the price of trial

² See Price v. State, 434 S.W.3d 601 (Tex. Crim. App. 2014) (holding the § 21.02 Statute ambiguous in violation of double jeopardy), though peti trial occurred in 2010.

for an accused person, in violation of U.S. CONST. Amend. V, XIV, in combination with the statutory enabling³-streamlines sexual based offenses with no overt protection for defendants against a unfair trial. Furthermore, in this instant case Count One failed to allege any dates whatsoever relied upon for the 30 day period, as such, was inclusive of all dates, and the jury was impermissibly free to choose a period. The prosecutor's naked desire to inject prejudice through superfluous, repetitive counts into the record confused the jury and complicated the trial, and weighed too much with the jury and to so overpersuade them as to prejudice Ibenyenwa and denied a fair opportunity in a fair trial to defend himself on the monotonous counts.⁴

Stated plainly, it was the states' modus operandi to magnify Ibenyenwa's wickedness in the eyes of the jury beyond what was stated in Count One - an impermissible foul blow. See Burger v. U.S., ³⁹⁵~~385~~ U.S. 78, 88 (1935). Counts Two through Five was "another name for the same rose," leading this court to enter stage left and right to prevent manifest injustice to similarly situated defendants in the nation facing increasingly similar trials to provide the necessary antidote, as empowered by the Constitution.

³ Texas permits: non-unanimous jury verdicts (§ 21.02, Tex. Penal Code); leading questions (Tex. R. Evid. 611(a), (c)); ~~leading questions~~ Testimony alone sufficient for conviction (§ 38.07, T.C.C.P.), ect...

⁴ Judges warning about the consequences revolving around superfluous charging. Balle, U.S., 470 U.S. 856 (1985) (dissenting opinion); Missouri v. Hunter, 459 U.S. 359, ~~360~~ 372, n 4 (1983) (Marshall J., dissenting).

Question 4: When a U.S. CONST. Amend ^{xiv} violation is apparent on the face of the indictment and jury charges, could jurist of reason debate or agree counsel rendered (IAC) in failing to object and whether such ineffectiveness prejudiced the defense?

- i) Review should be granted pursuant to S. Ct. Rule 10(a) because the U.S. Court of Appeals has subjected petitioner to a silent, unarticulated and higher standard of review for COA than provided for under: 28 U.S.C. § 2253 (2); Miller-El, 537 U.S., at 336; Slack, 529 U.S., at 484; and the question presented is of national importance, and the Court of Appeals has departed exceedingly beyond normal judicial proceedings in refusing to issue COA so as to call for an exercise of the Court's supervisory power.

This pertinent question revolves around the applicability of COA case law, and the Court of Appeals' refusal to grant said COA, in subjecting Ibenyenwa to a silent and higher standard of review. See Miller-El, *supra*, at 8-9. See also Op. and order, at 3; COA, at 26-27. The underlying question is of significance for the court to exercise its supervisory power, as counsels were irreparably ignorant and inattentive to the multiplicity and double-jeopardy barred counts in the indictment and jury charges in denying Ibenyenwa effective assistance of counsel.

For multiple reasons jurist of reason could debate or disagree with the U.S.D.C.-FW assessment of whether counsels' were ineffective in failing to make a meritorious objection to the indictment and jury charges on double jeopardy grounds, as presented in ground three of the petition; or agree the issues presented are adequate to deserve encouragement to proceed further. Miller-El, *supra*; Slack, *supra*. See also § 2254 Amend. Pet. and Mem. of Law, at 9 and 22-27; Op and

Order, at 12-13; LOA, at 23, 26-27.

The USAC-FW improperly deferred to the state's findings, in its objectively unreasonable application of Strickland; relying on "state law" that, "[a] defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode [Tex. Pen. Code § 3.02(a)]"; "the state's erroneous and objectively unreasonable fact-findings that counsel had no reason to believe at the time there was an issue of double jeopardy in the indictment and/or jury charges was reasonable. See Op. and Order, at 12-13; FFCL, at 4 and 10; Johnson Aff'd, at 1. See also § 2254(d)(1); Richter, 131 S.Ct., at 786; Bell, supra.

Ibenyenwa sought relief under Federal law not State law. See Estelle v. McGuire, 112 S.Ct. 475, 502 U.S. 62, 67-68 (1991); 28 U.S.C. § 2254(a). The Supreme Court law regarding multiplicitous indictments and jury charges, double jeopardy, and due process existed well before the time of Ibenyenwa's 2010 trial and these legal principles were clearly established. See § 2254 ^{Mem. of Law} ~~Amend. Pet.~~ 25-26. See also Blockburger, supra; Brown, supra; Stromberg v. California, 238 U.S. 359, 51 S.Ct. 532 (1931); Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466 (1992); Lockhart v. Fretwell, 506 U.S. 364 (1993).

The multiplicitous and double-jeopardy barred charges

in Counts Two through Five were stark~~ly~~ and apparent on the face of the indictment and jury charges; so much so, direct appeal-appellate counsel, State's attorney, and three TCOA judges unanimously agreed with this palpable fact. See Indictment, at 1-2; Court's charge, at 1-14; Court's charge on punishment, at 1-10; Second TCOA judgement and opinion, at 12; ROA 1189-91, 1458-1462. Thus, the deficiency is evident. Strickland, 466 U.S., at 668.

Counsel's meritorious objections would have resulted in a substantial change in the outcome of the proceedings, one sufficient to undermine confidence in the outcome. See Strickland, 466 U.S., at 694; Cullen, 131 S.Ct., at 1403 (i.e. Pre-trial habeas corpus on the multiplicitous indictment, Blockburger, supra, Ex parte Weise, 55 S.W. 3d 617, 620 (Tex.^{Crim.} App. 2001); Trial objection Guilt/Innocence, pre/post-Court's charge and Court's charge on punishment, Ball, supra; Blockburger; request lesser-included offense instruction, Walt v. State, 917 S.W. 2d 270, 278 (Tex. Crim. App. 1996). See also Emery v. Johnson, 139 F.3d 191, 198 (5th Cir. 1997) (no deficiency against counsel unless a sound basis exist for objection). The above unquestionably establishes counsel were ignorant on key points of law that were clearly applicable at Ibenyewa's trial. See Hinton, supra. Ibenyewa is still in threat of double jeopardy for the same offenses. See Hamling v. U.S., 418 U.S. 87, 117 (1974);

U.S. v. DeBrow, 74 S.Ct. 113 (1953); Apprendi v. New Jersey, 530 U.S. 466 (2000).

Even if deference did apply, Ibenyenwa would still be entitled habeas relief as, "it is reasonably likely the result would have been different." See Miller, 537 U.S., at 340; Richter, 131 S.Ct., at 791-92 (i.e. lesser counts, confusion, monotonous charges before the jury, ect...). The State's unreasonableness is further underscored by its heavy reliance upon Johnson's self-serving, legally and factually deficient statements, based upon faith—"no reason to believe"—thereby, deferring to counsel's ignorance in its misapprehension of the facts and general law. Wiggins, 539 U.S., at 528; Hinton, *supra*. See also FFCL, at 4; Johnson Aff'd, at 1. Although 28 U.S.C. § 2254(c)(1) does not apply on request for COA, Miller-El, 537 U.S., at 342, the standard has been met. See § 2254 Mem. of Law, at 23-26.

Lastly, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." Bollenbach v. U.S., 326 U.S. 607, 614 (1946). The Court of Appeals operated beyond the scope of COA case law applicable in refusing to grant the COA.

Question 5: Could jurist of reason debate whether the § 21.02

statute is unconstitutional, facially and/or as applied as violative of the U.S. CONST. Amend. V, XIV; whether the procedural default - cause and prejudice exceptions were satisfied by counsel's failure to object on these grounds? were correct?

1) Review should be granted pursuant to S.Ct. Rule 10(a) because the U.S. Court of Appeals has subjected petitioner to a silent, unarticulated and higher standard of review for COA than provided for under: 28 U.S.C. § 2253(c)(2); Slack, 529 U.S. at 444; and the question presented is of national importance, and the Court of Appeals has departed exceedingly beyond normal judicial proceedings in refusing to issue said COA so as to call for an exercise of the Court's supervisory power.

This monumental question of importance, hence again revolves around the Court of Appeals' applicability of relevant COA case law, in refusing to grant COA on these genuine issues in subjecting Ihenyenuwa to a silent, over-arching and untold standard of review. See Miller-El, supra at 84, 89.

and order, at 3; COA, at 19-23. which necessitates this Court's authority on the underlying issues of whether the § 21.02 statute is unconstitutional ^{it debatable} facially and/or as applied; jurist of reason would find whether the amended petition on this claim stated a denial of a constitutional right and the issue is adequate to deserve encouragement to proceed further. See § 2254

Amend. Pet. at 9. See also Miller-El, 537 U.S. at 371; Slack, supra.

On its face and/or as applied to Ihenyenuwa the Cent. Sexual Abuse statute allows prosecutors to seek a multi-count indictment and charges to the jury on said charge, in addition to its underlying sexual offenses in separate counts that mimic, track the same language and wording within the statute itself; against the same alleged victim and during the same ~~see~~ temporal period or date - which results in a multiplicitous indictment and punishment for one act, in violation of Double Jeo-

parody clause, applicable to the states by virtue of the due process clause of

the Fourteenth Amendment. See U.S. CONST. Amend. V, XIV; Blockburger, *supra*;

Grainy, 470 U.S. at 343 ("when a defendant has been once convicted and punished for a particular crime, principles of fairness and finality

require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense," *letting Ex parte*

Lange, 18 Wall 163 (1874); *In re Nielsen*, 131 U.S. 176, 9 S.Ct. 672 (1887)).

Section 21.02 of the Texas Penal Code provides in pertinent part:

(b) A person commits an offense if:

(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

(2) at the time of the commission of each of the acts of sexual abuse,

the actor is 17 years of age or older and the victim is a child younger

than 14 years of age.

(c) For purposes of this section, "acts of sexual abuse" means any act that

is a violation of one or more of the following penal laws:

(2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching

through clothing, the breast of a child;

(4) aggravated sexual assault under Section 22.021.

(d) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

Ambiguously,⁵ the statute then walks back, a defendant may be so charged but not convicted of an individual offense of sexual abuse in the same criminal action where the individual offense is: (1) charged in the alternative; (2) occurred outside the period in which the continuous sexual abuse was alleged to have been committed; or (3) is considered by the trier of fact to be a lesser included offense.⁶ In short, as applied to Ibenyenwa, the § 21.02 statute worked unconstitutionally because there were no separate and distinct acts relied upon by the state for the indictment, prosecution and conviction outside the temporal period in which the continuous abuse was alleged. See Indictment, *supra*; Judg. of Conviction, *supra*; Court's charge, *supra*; Court's charge on punishment, *supra*. Count 1 failed to allege a thirty (30) day period whatsoever ("on or about January 22, 2009")⁷ and,

⁵ In 2014 Texas acknowledged § 21.02 statute was ambiguous, as violative of double jeopardy in permitting multiple punishment. *Price v. State*, 434 S.W.3d 601 (Tex. Crim. App. 2014).

Other states have sought to protect defendants from double jeopardy violations ~~see~~ and due process protections. See *State v. Rahway*, 81 P.3d 1151, 1177, 103 Hawaii 236 (2003) (Nakayama, J., dissenting) (referencing continuous sexual abuse of a child, HRS § 707-733.5)) and California Pen. Code § 268.5(c), continuous sexual abuse of a child (2010) both explicitly disallowing defendants to be charged for underlying sexual offenses occurring in the same time period and against the same victim.

⁶ *Id.*, at § 21.02(c).

⁷ Ibenyenwa's conviction is "void" for failure to charge a offense; lack of notice; charge on essential element. See *Hamling*, *supra*; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072 (1970); *Sullivan v. Lo*, 508 U.S. 275, 113 S.Ct. 2078 (1993); *U.S. Apprendi*, *supra*; U.S. CONST. Amend V, VI, XIV.

as such, were inclusive of all dates. Id. Once a juror has used the underlying "same offenses" to convict him on Count one, to re-allege, and/or then reconvict or punish him for the same offenses as alleged in counts 2-5, is a double jeopardy violation that isn't readily rectified by vacatur. Ibenyenwa refers to this nefarious prosecutorial scheme as "double-dipping" and "double-up-
ping" offenses, which resulted in a prejudicial and unfair trial,⁸ in that the scheme affected his substantial rights. Frady, ^{infra} ~~supra~~. See § 2254 Amend. Pet. and Mem. of Law at 9; and 23-24.

Just as of reason would find the USDC-FW ruling debatable because Ibenyenwa demonstrated "cause for the default and actual prejudice as a result of the ~~ca~~ violation of federal law." See Colman v. Thompson, 501 U.S. 722, 750 (1991); Slack, *supra*. See also Op. and Order, at 8-9; § 2254 Amend. Pet. at 9. Counsel's failure to preserve a claim in state court can constitute cause to overcome a procedural default, just as a claim of "new and novelty." See Colman, at 753-54; Read v. Ross, 468 U.S. 1, 15, 104 S.Ct. 2901, 2910 (1984).⁹ See also LOA, at 20; ROA 124. The USDC-FW never ruled on whether Ibenyenwa met the prejudice prong, nevertheless it was satisfied. See Op. and Order, *supra*; LOA, at 20-21; ROA 36, 69, 123, 310. See also Murray v. Carrier, 477 U.S. 478, 494⁽¹⁹⁸⁶⁾, U.S. v. Frady, 456 U.S. 152, 170 (1982).

Furthermore, the USDC-FW improperly deferred to the state courts

⁸ Issue raised at question 3, *supra* at 19.

⁹ A claim is "novel and new" where a Supreme Court decision "may overturn a longstanding and wide spread practice to which the Court has not spoken, but which a near-unanimous body of lower courts authority has expressly approved."

conclusions and ruled cause was not satisfied, albeit erroneously, because the legal proposition was not settled at the time of Ibenyeh-wa's 2010 trial. See Op. and Order, at 9.12-13; FFL, at 8-9. See also Hunter, 459 U.S., at 368 (not deferring to a state's conclusions); Lisenba v. California, 314 U.S. 219, 238, 62 S.Ct. 280 (1941) (same); Blackburger, *supra*; Brown, *supra*; U.S. CONST. Amend. V, XIV. § 2254 (d) (1) and (2) were met and deference doesn't apply. Richter, 131 S.Ct., at 785-86.

For the foregoing reasons it is clear a COA is in order on these complex issues to prevent manifest injustice on this potential bellwether case; and so the court can weigh in on these intricate issues of double jeopardy, due process, prosecutorial charging decisions, credibility determinations and findings on a cold record, and verbatim adoption of a state's attorney proposed findings bundled in one case. See U.S. CONST. Amend. V, XIV; Slack, *supra*; Miller, *supra*.

VERIFICATION

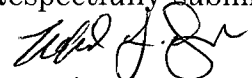
I, hereby declare that the above and foregoing facts and appendices attached hereto are true and correct under penalty of perjury.


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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Michael J. Ihenyenwa

Date: November 19, 2018
~~August 19, 2018~~