NO. 18-9540

IN THE

SUPREME COURT

OF THE UNITED STATES OF AMERICA

****

CLIFTON DEWAYNE HARVIN
Petitioner,

v.

T.D.C.J. DIRECTOR, LORIE DAVIS
Respondent,

****

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

Clifton D. Harvin Pro-Se
Petitioner
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ORIGINAL

QUESTION(S) PRESENTED

QUESTION #1). When a Petitioner relies upon the McQuiggin V Perkins 133 S.Ct. 1924 miscarriage of justice actual innoccence exception to overcome the AEDPA one year statute of limitations, and the District Court conducts only a statuatory and equitable tolling analysis where actual innocence was precluded in that analysis, in direct opposition to McQuiggin supra without consideration of McQuiggin supra in any way, did the Fifth Circuit err by finding that the actual innocence claim to overcome the time bar doesn't deserve encouragement to proceed further, and then rely solely on that to preclude even the overview of the claims for valdity, without conducting a correctness of the District Court's procedural ruling analysis, conflicting with McQuiggin supra and Slack V McDaniel 120 S.Ct. 1595 in the time bar context?

QUESTION #2). In the actual innocence context, there exists a split between United States Court of Appeals. The split concerns the terms "newly presented" and "newly available." Which should control in the actual innocence miscarriage of justice exception?

QUESTION #3). Should this Court finally answer whether a Petitioner may be entitled to federal habeas corpus relief on a freestanding claim of actual innocence where a State, in this case, Texas, allows a freestanding actual innocence claim as a federal due process violation question with no federal oversight, if a Petitioner can present a truly persuasvie innocence claim?

QUESTION #4 Did the Fifth Circuit err by finding that reasonable jurists could not debate the denial on the merit the claims related to the revocation and punishment when reasonable jurists have disagreed on the resolution of these issues already?

LIST OF PARTIES

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Appendix-G The Fifth Circuit ORDER granting Petitioner's Motion To Supplement or Correct eh Record on Appeal. This Appendix-G contains The Dissenting Opinion of Judge Meyers of the Texas Texas Court of Criminal Appeals that was joined by Judge Johnson. (Published)(September 21, 2016)(2016 WL 5400892, Ex Parte Harvin 500 SW 3d 418.

Appendix-H The Transcript of the December 19, 2011 Actual Innocence Evidentiary Hearing Ordered by The Texas Court of Criminal Appeals in Ex Parte Harvin No.WR-72,328-01,2011 Tex.Crim. Unpub. LEXIS 408(Tex.Crim.App. June 8,2011).See Appendix-G p.8.

Appendix-I Record excerpt from(ECF 20 RR Vol.3 p.15)April 16,1996 Plea of no lo contendere. State V Harvin TR.Ct.Cause No.95-08-0076M-CR Honorable Judge Roger Towery presiding 97th Judicial District Court Montague County, Texas.

Appendix-J The Statement of Judge Cochran of The Texas Court of Criminal Appeals in No.PD-0634-13.(Unpublished)(October 30,2013).

Appendix-K The Order of the Court on Certificate of Appealability Issued by District Court Judge Barbara Lynn. U.S.D.C. No.7:17-cv-00003-M-BP.(Unpublished)(May 19,2018). (ECF 55).

Appendix-L Fifth Circuit ORDER denying Petitioner's Motion to Extend Time to File a Motion for Reconsideration/Petition for Rehearing En Banc in No.18-10697. Also containing the Fifth Circuit ORDER stating no action would be taken on the motions above that were filed pending the answer to the motions.

Appendix-M Ex Parte Rodriguez 542 SW 3d 585(mem),2018 WL 1101-663, WR-85,744-01.(Tex.Crim.App.2018)(Published).

Appendix-N Constitutional and Statutory Provisions Involved.

TABLE OF AUTHORITIES

STATE CASES

FEDERAL STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

1).Harvin V Davis Order Denying COA No.18-10697(5th.Cir. March 4,2018)(Unpublished)(Appendix-A).

2).Ex Parte Harvin No.WR-72,328-03,2016 WL 5400892(Tex.Crim. App. September 21,2016)(Order Denying Habeas Relief)(unpublished), With Judge Alcala's Concurring Opinion.(Appendix-F)(Published at 500 SW 3d 418).

3).Ex Parte Harvin No.WR-72,328-03,WL 5400892(Tex.Crim.App.September 21,2016)(Published)(Dissent of Meyers,J. with attached EXHIBIT-A Opinion Granting Habeas Relief and Concurrance of Judge Johnson). (Appendix-G).

4).Magistrate FCR in Harvin V Davis No.7:17-cv-00003-M-BP(Time Bar Finding on Claims 1-5 & 13-16)(unpublished)(June 6,2017)(Appendix-B).

5).District Court Order Dismissing Claims 1-5 & 13-16 as Time Barred. USDC No.7:17-cv-00003-M-BP.(Unpublished)(August 2,2017).(Appendix-C).(ECF 29 & 31).

6).Judge Cochran's Statement Harvin V State No.PD-0634-13,2013 WL 5872844.(Unpublished)(Tex.Crim.App. October 30,2013)(Appendix-J).

7).Magistrate FCR Denying Claims 6-12 & 17(USDC No.7:17-cv-00003-M-BP Harvin V Davis)(unpublished)(March 1,2018)(ECF 44).(Appendix-D).

8).District Court Order Denying Habeas Corpus USDC No.7:17-cv--00003-M-BP(Unpublished)(May 14,2018)(Appendix-E)(ECF 47).

9).District Court Order on COA Application Denying COA.USDC No.

7:17-cv-00003-M-BP.(Unpublished)(June 19,2018)(ECF 55)(Appendix-K).

10).Denial of Motion for Extension of Time to File Rehearing and Re-Hearing En Banc-due to disciplinary lockdown and late notice-and letter from Fifth Circuit notifying no action taken on Rehearing and Rehearing En Banc already filed.(March 25,2018 and April 22,2018). (Unpublished)(Appendix-L).(5th Cir.No.18-10697)

11).Ex Parte Rodriguez 542 SW 3d 585(Mem),2018 WL 1101663,WR-85,744-01(Tex Crim App.2018).(Used by District Judge at Appendix-E p.3-4)(Dissenting Opinion Published)(Appendix-M).

JURISDICTION

The date which the United States Court of Appeals denied COA was March 4, 2019. No petition for a rehearing or rehearing En Banc was timely filed because the Fifth Circuit denied Petitioner's motion for extension of time to file based on late notice-March 12,2019 and Unit Lockdown- Petitioner filed the Motions for Rehearing and En Banc,before he received the denial of the extension of time motions, on March 24, 2019.(Appendix-L).No action was taken on the motions because of the denial of extension of time. This writ of certiorari is timely before the Honorable Court. Sup.Ct.R.13.1.

The jurisdiction of this Court is envoked under 28 U.S.C. § 1254 (1). Title 28 U.S.C. § 1291,2253 and 1254 confer jurisdiction to review decisions made by a district court in a judicial capacity as well as a United States Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION
2. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
3. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (APPENDIX-N)

STATEMENT OF THE CASE

This case is about innocence. Petitioner was charged with aggravated sexual assualt of his daughter, A.H., shortly after Petitioner and his wife were seperated on August 28,1994. A.H. has compietely recanted her false claim that Petitioner sexually assualted her in conformity with her audio taped statement that RISA, the outcry witness in this case,made her say this happened.(EX-1 & 33 EX-14 p.6). It is noteworthy to notice the Court that all exhibits relied upon in this Statement and entire case are entered as attachments at (ECF 24 EX-1-41) and are identicle in both the State Habeas Proceedings and Federal Habeas proceeding. At the state level, there was an initial Art.11.07 habeas corpus where Petitioner was granted relief and was given an out of time PDR. All remaining claims were dismissed without prejudice(Ex Parte Harvin No.Ap-76,914 May 15,2013). There were 3 remands from the Texas Court of Criminal Appeals,hereafter TCCA, and (3) live evidentiary hearings held.Those evidentiary hearings are referred to throughout as(HC 1,2,&3 ECF 60-2 Att.B,C,D). Correct sequence of TCCA events can be seen at(Appx.G)attached hereto. Appendix G is The Dissenting Judge Meyers and concurring Judge Johnson's Opinion with EXHIBIT-A attached Opinion originally delivered to the Court GRANTING Habeas relief.(Ex Parte Clifton Dewayne Harvin WR-72,328-03).Petitioner has relied extensively on this dissent and the opinion attached granting habeas relief for the purpose of demonstrating that reasonable well tenored jurists have not only debated but outright disagreed on the State Court resolution of this case.

A.H. began to make sexual assualt outcries against her half-brother in April 1994(EX-6). Risa Ford, the outcry,ran a daycare out of her home where Janice Ford, her sister and Janie Ford, her mother,

all resided.(EX-14 p.5-6). Risa, on the day A.H. was to see the CPS at her school concerning her half brother's sexualt that supposedly was to have taken place at the daycare, abused A.H. that morning(EX-6 p.2-5). After the seperation on August 28,1994, Barbara,Petitioner's wife, moved the kids into 24 hour daycare at the Ford's daycare despite the abuse and being told to watch out for further abuse at the daycare.(EX-6 p.4). Petitioner, a small time drug dealer and cockfighter, gave up everything and became a christian in order to salvage his marriage and fatherhood. In October 1994 the children again began to report physical abuse at the daycare.(EX-22 &23).After visit Petitoner's autistic son would cry and lock the car doors upon approach to the Ford Daycare. This time it was Janice Ford who reportedly was abusing the kids. Petitioner threatened to take custody of the kids during Thanksgiving if the abuse did not stop. The very night when the kids were dropped off after Thanksgiving with Petitioner, Risa Ford made the call to the police that resulted in this charge.

Petitioner, after a friend posted his bond, enforced his custody orders upon Risa Ford and took his children to the Calvary Baptist Church. The entire event was recorded. That recording is(EX-33 and is filed in the District Court at(ECF 7)along with a Motion Requesting Proper Transcription(ECF 6) that was denied(ECF28). The TCCA transcription in(APPX.F)is not a true and correct transcription. Petitioner was rearrested for taking this action and his bond was raised 10,000 for it. Review of this tape, as the TCCA did,is critical to this actual innocence claim. Judge Meyers at (Appx.G p.14-15) refused to defer to the habeas court's credibility finding#3 because the habeas judge relied only on this recording to determine credibility in this case.Judge Meyers and concurring Judge Johnson found nothing...

"that calls into question the credibility of the recantation." That conclusion necessarily must include that Risa Ford made A.H. make this false outcry which she readily recanted when out of the reach of Risa Ford. Please hear the tape. Not only does the tape show this was a coerced and false sexual assualt allegation, it also completely refutes many of the false statements made in the Sheriff's Report(EX-14)that ironically completely fails to include the April sexual assualt allegation that was ruled out after Risa Ford physically abused A.H. on the morning of the CPS interview(EX-6) nor does this Sheriff's report include the October physical abuse of Janice Ford(EX-22-23). April 94,August 94,October 94,November 94.

Petitioner, after being indicted, was denied counsel by the now biased and recused trial Judge Roger Towery,(RR V.2 p.6)(ECF 24 X-24-29) solely because Petitioner was out on bond posted by a person who did not want to be identified. That denial of counsel resulted in Attorney Morris, now disbarred(EX-15),following Petitioner out of the Courtroom and offering to represent Petitioner for 800.00 in this first degree felonly offense. (EX-15) reveals the financial condition of this ex-head prosecutor(HC1 p.72)who readily admitted at the first evidentiary hearing that he lies to his clients about work he has not performed.(HC1 p.129). Hiring this attorney based on the Court's order in (RR V 2)Petitioner returned to Court hoping for a trial. This attorney did no pretrial investigation, filed no pretrial motions, gave erroneous advice that a a person on deferred probation could return and prove innocence. That advice was concurred with by the Trial Court Judge and Prosecuting attorney. All three knew a guilty plea in Texas is the same as a no lo plea, which is what the erroneous advice coerced Petitioner into, are the same;

and all three knew Petitioner adamantly declared his innocence and refused to plead guilty. This stated by Honorable Judge Meyers at (Appx. G p.20-21)particularly where he noted Petitioner"refused to sign anything indicating he was guilty." This refusal to pled guilty and adamant denial of guilt is evidenced by the Judge"marking every word of guilt out of the plea agreement(EX-7)including the entire sworn judicial confession." Also see (RR V 3 p.6) where the Judge stated on the record that all words of guilt were stricken. The Sworn Judicial Confession portion of (EX-7) were redacted by the Respondent in her Response.(ECF 17). AS were the Dissenting Opinion of the TCCA and all evidentiary hearing transcripts. These were Ordered to be included by the Fifth Circuit on March 4, 2019 by granting Petitioner's Motion to Correct, the same day the Fifth Circuit denied Petitioner's Motion for Certificate of Appealability.(Appx A,G). The egregious acts of this unethical attorney, and his abandonment as counsel creating a conflict of interest, can finally be shown by his own perjury and subornation of perjury from his innocent claiming and refusing to plead guilty client at(RR V 3 p.15). (Appx. I) Moris stated on the record at that cite that the District Attorney's Office had proved us with the "Grand Jury Testimony" as part of the "discovery"in this case. Petitioner claimed that Morris had schooled him to simply respond yes to his questions in order to get the plea, (HC1 p.331-333)so that Petitioner could return and prove innocence while on the deferred probation and protect his young daughter from a public trial that (EX-17)said would be the case while still in the hands of Risa Ford. The TCCA in denying this claim(Appx.p F)after requesting a finding on whether the Grand Jury **Transcripts** were provided prior to the plea in all three remands,reduced this to a sem-

anticle unreasonable finding...that the **testimony** could have been conveyed some other way,e.g."orally." But only after the habeas Court found no Grand Jury **transcripts** ever existed.(Tr.Ct.FFC #3 at #4). See(Appx.G p.12). DA Cole, who had a long working relationship with Morris,(HC1 p.72),when questioned about the transcribing and provision of the transcribed Grand Jury testimony at(HC1 p.108-09),said **"obviously because his attorney stated on the record they were."** Morris testified at(HC1 p.134)the question was not part of his normal questioning in a guilty plea." Morris also said he rememberd nothing about the case but would if it stood out(HC1 p. 121). DA Cole said at(HC1 p.47)this case was the only one he had ever offered a nolo plea in of this type. If DA Cole believed Morris obviously said the Grand Jury Testimony was transcribed and provided by his office (Appx.I),when it never existed and could not be legally provided in discovery, then DA Cole, just as Judge Meyers found at(Appx.G p.21-22)has a constitutional and ethical duty to correct known false testimony. Judge Meyers found Morris suborned perjured testimony and noted his concerns of why DA Cole and Judge Towery did not challenge the testimony elicited by this attorney when both would have known either the Grand jury Trancripts"did not exist or could not have been properly disclosed to Applicant." T.C.C.P.20.02 precludes provision of anything that transpires before the Grand Jury absent a particularized and granted motion, Morris never filed a single motion in this case, not even oral testimony,defeating Judge Keller's semanticle and unreasonable finding. The denying opinion found Morris effective based solely on his habit and custom.(Appx.F p.35) compare(Appx.G p. 12-13). though Morris openly admits he lied to clients about work he had not performed in their cased when had done nothing.(HC 1 p.129), and has been disbarred for exactly those reasons.

been disbarred for those exact same reasons.(ECF 24 EX-15). The Judge and DA Cole stood idly by and allowed this lying attorney to suborn perjured testimony,by perjuring his own self to establish his work in the case after presentation to the officers of the Court, (ECF 24 EX-17), knowing Petitioner was only pleading nolo because he fully believed it was not a guilty plea or admission of guilt, so he could return to prove his innocence while on deferred probation, as opposed to putting his young daughter through a public trial while still in the hands of Risa Ford on the day of this plea.

While on that deferred probation, Petitioner continued his adamant denial of guilt(ECF 60-2 Att.B,HC1 p.47,87-90) at Court ordered Psychotherpy.(ECF 24 EX-2)Is the view questionaire that clearly shows the Ford's abuse and Petitioner's adamant denial of guilt. The Phychotherpist had Petitioner polygraphed(ECF 24 EX-3).Petitioner was never required to attend another sex offender class after Psychotherpist Michael Strain saw(ECF 24 EX-7). Psychotherpist Strain,DA Cole nor Judge Towery,who unusually modified(ECF 24 EX-7 ECF 20 RR V 3 p. 5-6) to assure petitioner he wasn't pleading guilty, moved to revoke Petitioner's deferred probation. Instead DA Cole joined what the Second Court of Appeals called an"actual innocence"claim,(ECF 24 EX-20 p.2), believing it was possible(HC3 p.90)at the time, and requested his own credible polygraph. The result(ECF 24 EX-4)and Cole not objecting to it being placed into the record,(ECF 20 RR V 4). Judge Towery then ordered his own test(ECF 20 RR v 5 at 5)(ECF 24 EX-5)(CR 128). The Judge and DA Cole followed through with the coercive promise to allow Petitioner to prove innocen while on deferred probation.(ECF 24 EX-5)show "STRONGLY NDI NO DECEPTION INDICATED-probability of deception less than 0.01%. Judge Towery took the motions underadvisement

in what the Second Court of Appeals called an"appalling scenario." (ECF 24 EX-20 p.1-2). The appalling scenario statement was made years before the new recantations in 2010-2011 came to light. These are(ECF 24 EX-1,EX-21, EX-38),and 2011 HC3 testimony(ECF 60-2 Att.D p.18-29 Appx.H)the actual innocence hearing ordered by the TCCA.(Appx.G p.12-15). A.H.testified she gave up trying to tell the truth in the third grade. When asked what was the truth she stated.."[T]hat my brother did it and **my father didn't."** That third grade truth telling is evidenced by (ECf 24 EX-35)only available in 2011(HC3 p.18-19)where AH testified she obtained her CPS file. (ECF 24 EX-35)outcry and recant at school and away from Risa and AH' mother, was recanted when at home in the presence of Risa and her mother based on fear(Appx.H p.18-29). The sexual abuse of her half brother continued until she was 12-13 years old because no one believed her.(HC1 p.32-33 ECF 60-2 Att.B). A.H. testified there that her mother opened her legal mail from Attorney Martin containing(ECF 24 X-1)when she was 22 years old.(ECF 24 EX-35)was never provided to Petitioner prior to this plea on April 16, 1996. (EX-35)is dated March 26 1996,less than a month before the plea. The fear of the mother kicking AH out and seperating her from her autistic brother was not known until 2010-2011. Risa's influence can be seen in the April 1994(ECF 24 EX-6)outcry and recantation after AH was beaten on her way to reaffirm the school outcry against her half brother, and in the(ECF 24 EX-35)school recant concerning Petitioer and outcry aginst Her half brother a second time. The result, when in the hands of Risa and now her mother she would recant the school outcries that she would make when apart from them. The influence of Risa in (ECF 24 EX-14 p.6)is substantiated.(ECF EX-1)clearly shows that as late as 2010 AH was scared of her mother finding out she was gonna help prove Petitioner's innocence...

(ECF 24 EX-21),Cynthia Harvin's affidavit,and didn't want to give live testimony, but once her legal mail was opened by her controlling mother, she appeared at the October 2010 live evidentiary hearing and has appeared at every hearing since, testifying that Petitioner is actually innocent.(HC1 and HC3). The evidence and testimony provides an alternate perpetrator to explain the medical evidence in (ECF 24 EX-32 p.3,5). This Doctor's report was not presented at trial but by Petitioner in the presently contested writ of habeas corpus and only available in 2011(HC3 p.18-19). There has been no evidentiary hearing on this writ, only in the initial writ.

Petitioner challenges the Fifth Circuit's time bar ruling as well a the remaining adjudicated claims.(Appx.A). The adjudicated claims, most importantly the ineffective assistance claims at revocation,where the TCCA Dissenting Judge's found a conflict of interest based on attorney Walsh failing to move to recuse Jack McGaughey,(Appx.G p.24-25), because McGaughey "switched sides"from being retained and representing Petitioner concerning pre-trial taking of polygraphs(ECF 24 EX-14p.6 & EX-34), to then prosecuting Petitioner at revocation and punishment. Walsh failed to disqualify McGaughey knowing he previously represented Petitioner(ECF 20 RR V 6 p.50)and untimely objected at the revocation. An evidentiary hearing has been requested based on the TCCA's denial on the(Tr.Ct.FFC #2 at #12 October 27,2010)(Appx.F p.27-28, 40). (The new (ECF 24 Ex-34)wasn't available until 2011 in the CPS file.(Appx.H p.18-19). The District Court deferred to the TCCA's 2010 (Tr.Ct.FFC #3 at #12)finding),(Appx.E at p.4). Reasonable jurist have not only debated, but outright disagreed on the State's resolution of the revocation, punishment and appellate IAOC claims(Appx. G p.3 and P.24-25). The Fifth Circuit erred by not granting COA when reasonable jurists have disagreed on the merit of these claims. See also(Appx.M).

REASONS FOR GRANTING THE PETITION

This Court particularly considers certain issues in deciding whether to grant certiorari. Sup.Ct.R 10. Petitioner will stick to those named there but does request liberal construction and respectfully petitions the Honorable Court to consider any others that Petitioner's layman argument may present within the brief.

Petitioner will attempt to track the order of the Questions presented in order to demonstrate a cohesive theory of innocence that is intertwined with numerous and valid constitutional error in both the procedurally barred[time barred] claims and those adjudicated on the merits. Please see(ECF 1 p.8-32) for more detail.

Challenging the Fifth Ciruit' order denying COA(ECF 61 & Appx. A) here is jurisdictionally available to this Court. See Correa V Davis 138 S.Ct. 1080; 2018 U.S. LX 1913. Title 28 U.S.C. § 1291, 2253 and 1254 confer jurisdiction to review decisions made by a District Court in a judicial capacity. The District Court's procedural ruling time barring Petitioner's claims related to the plea,1-5 & 13-16, was plain error. The Fifth Circuit sanctioned the plain error.

Petitioner relied upon the McQuiggin V Perkins 133 S.Ct.1924, 1931 miscarriage of justice **exception** to overcome the AEDPA one yaer statute of limitations.(ECF 1 at p.6-7,8-13,14-32). The U.S. Magistrate (ECF 29 p.6 Appx.B) excluded actual innocence at(ECF 29 p.6), concluded Petitioner was not entitled to"equitable tolling." Only an equitable and statuatory tolling review was conducted. McQuiggin V Perkins supra was not mentioned nor considered. Petitioner objected(ECF 30 p.2-3)restating it was the McQuiggin V Perkins **exception** he was proceeding under(ECF 30 p.7). The District Court Judge(ECF 31)adopted the Magistrate's Recommendations, verbatim.(Appx.C)

This Court in(McQuiggin V Perkins at 1931-1933)specifically noted at 1931.."that Perkins was not seeking to extend the time statuatorily prescribed";citing(Rivas V Fisher 687 F3d 547 Fn42) explaining the difference in equitable tolling and exception. Petitioner later, after adjudication of the remaining claims,filed an Application to the District Court for Certificate of Appealability(ECF 53). Petitioner again at(ECF 53 p.2-4)specifically presented his argument to the District Court under the McQuiggin supra framework. In so doing Petitioner also cited Fifth Circuit Law,Scranton V Davis 2017 US App. LX 1279,for direction in showing the required Slack V McDaniel 529 U.S. 484 commands in the procedural bar [time bar] context post McQuiggin. The McQuiggin Supra exception is thoroughly set out further at(ECF 53 p.14-20)the COA Application.The response, complete reliance on the Magistrate's(ECF 47)recommendation that concerns nothing else but the claims adjudicated on the merits 6-12 and 17.(Appx.L). The McQuiggin analysis has never been properly conducted in this case and is further shown by the Fifth Circuit's Order denying COA.(ECF 61 Appx.A) here.The Fifth Circuit's sanction of the District Court's departure from Supreme Court precedent here has resulted in a refusal to consider Petitioner's innocence in any meaningful way contrary to the Miscarriage of Justice exception announced in McQuiggins supra.

Given the evolving standards of decency concering actual innocence and the balance between..."[s]ocietal interests in finality, comity, and conservation of scarce judicial resources with individual interest in justice that arises in the extraordinary case," Schlup V Delo 513 U.S.at 324, the Court's certiorari power is needed so that it may consider the departure of the lower courts from the actual innocence precedent announced in McQuiggins to insure that the lower courts have not overlooked...,

because of that departure, a truly persuasive and extraordinary case of actual innocence. If the District Attorney-who offered this plea, and he did despite what (ECF 24 EX-17)says(ECF 60-2 Att.B HC1 p.47), based solely on (ECF 24 EX-33) recant, had a reasonable doubt about Petitioner's guilt, and acquittal at trial, then no reasonable juror could disagree with his assessment that this was a"weaker case." The "newly available evidence" as the TCCA called it,(Appx.F p.30-32) is new evidence;(ECF 24 EX-1, EX-21 Cynthia Harvin's affidavit Appx. H EX-1 HC3 EX-1, HC3 p.18-29 60-2 Att.D now Appx.H, ECF 24 EX-38 Appx. H p.39-42 Scoughton Testimony). The new 2010-2011 evdiences are new.

McQuiggin supra at 1935 held:"To envoke the miscarriage of justice **exception** to AEDPA's statute of limitations, we repeat,a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." The McQuiggin review is warranted based on the new evidence. The District Court dismissed the plea claims without conducting a validity review and the Fifth Circuit denied the plea claims without conducting a validity overview.(Appx.B & C)(Appx.A ECF 61). The Fifth Circuit used the Slack V McDaniel 529 U.S. 473,483-84 standard, although erroneously,to find"[H]arvin failed to make this showing.""Reasonable jurists could not debate his claim of actual innocence to overcome the time bar **deserves encouragement to proceed further.**"Slack 484, validity was precluded based on that **therefore** erroneous language that precluded overview.

In Slack supra, the District Court dismissed Slack' petition on its conclusion that Slack' petition was a second or successive one. This Court at 120 S.Ct.1595, 1600 para.3(b) held..."[B]ecause Slack' claim was dismissed it was error. Thus Slack has demonstrated that reasonable jurists could conclude that the district ...

court's abuse of the writ holding was wrong." Similarly, the District Court dismissed the plea related claims as time barred based solely on statuatorily and equitable tolling basis where actual innocence was specifically precluded. The exception in McQuiggin was not used in any way.(ECF 29 &31). The time bar and procedural bar are the same since McQuiggin and are considered the same under the Slack analysis since McQuiggin. See for guidance shepards from McQuiggins. Boliver V Davis 2017 U.S. App. LX 20384.Because the district court wholly failed to conduct the McQuiggin analysis, that no fair minded jurist could disagree Petitioner has expressly raised below, thus Petitiner has demonstrated that reasonable jurist could conclude the district court's procedural [time bar] ruling was wrong, just as in Slack i.d. In Boliver supra, Bolivar sought COA to appeal the dismissal as time barred his 2254. The standard, once a procedural bar arises, is set out plainly. In order to obtain a COA, Boliver,and petitoner, must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(C)(2) Miller El V Cockrell 537 U.S.322,336,123 S.Ct. 1029; Slack V McDaniel 529 U.S. 473,484,120 S.Ct.1595. Because both Boliver and Petitioner's claims were denied by the district court on procedural grounds, it must be shown "at least, that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurist of reason would find it debatable whether the district court's procedural ruling was correct. Slack at 484. Boliver failed to do so and was denied COA. In Scranton V Davis 2017 U.S. App.LX 21637, another shepard from McQuiggin supra, The issue reasonable jurist would find debatable is whether the district court erred in it's procedural ruling that Scranton's 2254 was time barred and that he provided no new

evidence in support of his claim of innocence McQuiggin at 1928. Just as in Slack supra, the Fifth Circuit did not apply the correct legal standard in affirming the procedural ruling of the district court. Why? Because the Fifth Circuit relied upon only it's sua sponte determination that..."[R]easonable jurists could not debate whether his claims of actual innocence to overcome the time bar **deserves encouragement to proced further."** Once a procedural bar is errected by the district court, the Slack standard at 484, changes to review of whether reasonable jurists could debate the petition states a valid claim of the denial of a constitutional right and then whether reasonable jurist could debate the **correctness of the district court's ruling.** Slack at 484. Not whether , as the Fifth Circuit found,that the claim doesn't deserve encouragement to proceed further without consideration of the correctness of the district court's procedural ruling that is obviously erroneous.The Fifth Circuit effectively departed from the Slack standard in refusing to consider the correctness of the district court's ruling and thereby sanctioned the district court' departure from McQuiggin. The damage of the Fifth Circuit's departure from the Slack commands,in the procedural context, was exacerbated when it then relied**"therefore"**,on the erroneous deserves encouragement language,to conclude reasonable jurist could not debate the denial of the claims related to the plea as time barred. Black's Dictionary defines the term therefore to mean #1For that reason;on that ground or those grounds, #2 To that end also termed thereupon. The only reasonable understanding of the Court's use of therefore here literally means that they relied on their own opinion that the actual innocence claim doesn't deserve encouragement to proceed further finding to preclude even the overview of the plea claims to

determine whether reasonable jurist could debate whether they state valid constitutional right denials. Slack demands that a threshhold overview for validity be conducted and then a correctness of the district court's procedural ruling debatability review be done , once a procedural bar has been errected precluding merit adjudication. No validity of the constitional claims raised has been conducted at either the Federal or Fifth Circuit level based upon their refusal to follow Supreme Court authority and proceed in the manner they have. This basically invokes and allows the invocation of their own precedent in direct opposition of their own and the Supreme Court. Even if the proper Slack commands, validity and district court correctness, are inverted, the failure to determine the correctnes of the district court ruling and then rely on thier own determination that the claim doesn't deserve encouragement, to preclude the validity prong of Slack, as the Fifth Circuit obviously did here, no one could debate that this is error when the district court procedural ruling is plain error. The validity of the constitutional claims raised pertaining to the plea, and demonstrating the debatability thereof, can be shown by review of the claims themselves and the fact that two of the highest court judges in Texas have not only debated but outright disagreed on the merit of these same claims to the point of actually granting habeas relief on one end and denial on the other. (Appx. G and ECF 60-2 Attachment-A). The Fifth Circuit and other Circuits have almost routinely considered dissenting judges and judges below opinion for granting relief as a basis to suggest reasonable jurist could debate debate the state court's resolution of a claim. See Dickson V Quaterman 453 F 3d 643 at 648 Fn 6. This Court in Buck V Davis 136 S.Ct. 2409 considered Buck received two dissenting votes on en banc rehearing

to grant certiorari. This is so even with deference that the AEDPA imposes on district courts while considering the debatability of the underlying constitutional claims. The fact that two well respected and tenored judges of Texas' highest court felt so strongly about the way the denying opinion went about denying these claims, and actually had delivered an opinion granting habeas relief on numerous constitutional right violations(Appx.G p.3,25),demonstrates reasonable judges have disagreed with the state court resolution. Failure by the district court to utilize the McQuiggin standard in the correct manner and the Fifth Circuit' failure to conduct the overview of the claims,without considering **correctnes**,overrules McQuiggin and Slack at the same time. The evidence and testimony from 7½ years in the TCCA and three live evidentiary hearing convinced Judge Meyers and Johnson that Petitioner was entitled to "an error free day in court"(Appx.G p.1) and that the only reason Petitioner did not get that error free day in Court, "which he is so clearly entitled", is because he doesn't bring the same "pedigree" that Rick Perry and Tom Delay brought to their appeals. The judges further opined that it saddened them that the majority doesn't give Petitioner the relief he deserves based on it not being the "politically expedient thing to do." These Judges went to the extent to attach as EXHIBIT-A to their dissent opinion,the opinion originally delivered to the Court for the above Court to consider. Petitioner relies substantially on their reasonable assessment of both the procedurally barred claims, and the adjudicated on the merit claims,to suggest that reasonable jurist could debate the validity of the constitutional rights violation raised in the petition. The validity of these claims have not but should be considered properly, and they have not. This Court made

clear the standard in procedurally barred claims in Gonzales V Thaler 565 U.S.134, 132 S.Ct.648,(quoting Slack V McDaniel 529 U.S. 473, 484,120 S.Ct.1595 at 1604). The Fifth Circuit has contravened this standard,in order to not review the validity of these claims, as well as the fundamental principles consistent with the AEDPA. There can be no deference to the district court's procedural ruling that is plain error. If Petitioner has shown valid constitutional right violations and incorrectness of the district court's procedural ruling, that no reasonable jurist could debate otherwise, then COA should have issued. As this Court did in the unpublished case of Vizcarra V Reagans 2017 U.S.App.LX 3424, a shepard from McQuiggin supra, FRAP 32.1 , where the case was sent back for proper consideration of McQuiggin V Perkins,citing Schlup V Delo 513U.S. 298, 115 S.Ct.851, certiorari should be granted here as well, respectfully. In essence, the Fifth Circuit had no jurisdiction, Miller El V Cockrell 123 S.Ct.1029, 1039-42, to do anything with the time barred claims other than to first decide if reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right;then secondly, decide whether reasonable jurist could debate the correctness of the district court's procedural ruling. This so as late as 2018 in Fratta V Davis 889 F 3d 225, at 231 a Fifth Circuit shepard from McQuiggin. The Court's supervisory power is needed here to insure conformity with both the Slack and McQuiggin standards to maintain the integrity and respect for the justice system.

QUESTIONS TWO AND THREE PERTAIN DIRECTLY TO ACTUAL INNOCENCE

Question two concerns a split between United States Courts of Appeals in the actual innocence context. The split cannot be denied based upon Fratta V Davis 889 F 3d 225,231-231 Fn20.(citing Wright

V Quaterman 581 F 3d at 591 collecting cases. The split concerns The Schlup V Delo 513 U.S. 298 standard, federal law. The split concerns the terms "newly presented and newly discovered." The Fifth Circuit has expressly stated these are two different standards and applies them subjectively. The Fifth Circuit in Fratta supra found Fratta could not prove actual innocence because he could not meet either newly presented or newly discovered because he had the evidence substantially in question and he presented it to the Court. In Fn 22 of Fratta the Court pointed out that Schlup 513 U.S.at 324 held..."A defendant must show"new reliable evidence...not presented at trial." The Seventh Circuit has held in Gomez V Jaimet 350 F 3d 956,963, a collecting case from Wright supra,"(all Schlup requires is that the new evidence be reliable and it was not presented at trial.") As stated earlier, the TCCA has termed Petitioner's evidence as "newly discovered and new.(Appx E p.30,32)although unreasonably determining it not credible. The trial court found only one affidavit(ECF 24 EX-1)to not be credible and one piece of evidence(ECF 24 EX-33)the audio taped recant at the church. (ECF 24 EX-21 HC3 EX-1)wasn't considered as TCCA had ordered on third remand. See(Appx.G p12-15). See Ex Parte Harvin No.WR-72,328-01, 2011 Tex.Crim.Unpub. LEXIS 408(Tex.Crim. App.June 8, 2011). Eventhough the trial court on remand refused to answer the TCCA questions, causing the Dissenting Judge's who granted relief to completely disregard the trial court's findings(Appx.G p. 12-15), The denying TCCA judge's formed their own opinion on credibility that Petitioner has claimed was unreasonable when juxtaposed with the Dissenting Judge's strikingly contrasting opinions of the record and evidence. Still newness of the 2010 and 2011 recantaions survived the TCCA's rendition while denying relief in direct opposition to the trial court's [illegible]

ition to the trial court findings. Credibility and newness are at least debatable among reasonable jurists. The trial court's credibility determination was based solely on Petitioner's audio recorded church interview. Judge Meyers and the concurring Judge Johnson found nothing on the recording, after conducting their own independant review of the (ECF 24 EX-33)recording, "that calls into question the credibility of the recording."(Appx.G p.14).TCCA's credibility determination was based on the fact A.H. was in her daddy's lap at the church, and the fact that Kasi Scoughton and Cindy Harvin were closely associated with Petitoner as well as the fact A.H. never visited Petitioner in prison and still lived with her half brother and the rest of her family, including her austitic brother she was afraid of being seperated from due to the fear of her mother ever finding out she would come forward to tell the truth. That truth was her brother did it and"my father didn't." (HC3 p.18-30). All of these reasons the TCCA relied upon in denying relief, are easily dispelled by the record and evidence and are unreasonable in light of it.

If the Fifth Circuit relied upon their failure to believe the recantations in 2010-2011 are not new, and there is some evidence that the District Court Magistrate did, despite the TCCA denying opinion that they are new,(Appx.B at 4) adopted verbatim by the district court(Appx.C)despite Petitioner's objections(ECF 30), then the split among the U.S.Court's of Appeals and the Fifth Circuit's subjective application of the newly discovered and newly available standards needs to be resolved at least in the context of the McQuiggin framework and in the future claims presented to this Court as freestanding claims of actual innocence. The audio recantation at Petitioner's and his children's church was not presented at the

time of this involuntary plea.(ECF 24 EX-17)was shown to the Judge.

QUESTION 3: A FREESTANDING CLAIM OF ACTUAL INNOCENCE.

Petitioner has raised and exhausted his freestanding claim of actual innocence in the Courts below. The question was left open in Herrera V Collins 506 U.S.390,404-05, and as late as McQuiggin V Perkins 133 S.Ct.1924,1931. There is,therefore, no authority to proceed under from the Supreme Court. However,Texas has authorized a freestanding claim of actual innocence as a viable avenue to obtain habas relief as **a federal due process violation.** The question left open in Herrera,based on Texas' calling a freestanding claim a federal due process violation, should be answered as a matter of federal law oversight. Should a viable freestanding claim of acual innocence provide an avenue for federal habeas relief? Texas' use of a freestanding AI claim to grant a federal due process habeas claim, has answered the question open in Herrera, and decided a federal question that has not been, but should be decided by this Court. Sup.Ct.R.10(c). Texas has called the Herrera claim a frestanding AI claim. The TCCA has termed Petitioner's claim a freestanding claim.(Appx.F at28-29),applying the Herrera standard. Ex Parte Elizondo 947 SW 2d 202,207 controls in Texas. A Schlup claim of AI is not recognized on an initial writ. EX Parte Villegas 415 SW 3d 885(ECF 1 at p.10). Ex Parte Tuley 109 SW 3d 388,390-91,controls in the plea context. Also see Ex Parte Calderon 309 SW 3d 64-65. These cases form the need showing why this Court's supervisory power is needed in Texas' adjudication of federal law. These cases are very similar to Petitioner's case,and their granting of habeas relief and Petitioner's denial, demonstrates the need for this Court to exercise its authority over Texas' subjective, and in Petitioner's case, unreasonable application of exactly...

what it expressly defines as a question of federal law. Incarceration of an innocent person offends federal due process, therefore a bare claim of actual innocence raises a constitutional challenge to the conviction. Tuley supra at 390. The TCCA in Elizondo at 206 reveals the split raised above by Courts of appeals in Question two by using the terms newly available and newly discovered as the Fifth Circuit does at their will. This question in both the Schlup and Herrera, now Elizondo contexts allows for arbitrary resolution as each individual court deems necessary to deny or grant habeas relief. The Schlup understanding is used in both contexts defining newness. Assuming that the TCCA's(Appx.F p.30,31)terming Petitioner's evidence **new**, and that the below Court's have deferred to that determination, then leaves the TCCA and hopefully this Court if Certiorari is granted, the duty to consider the old and new evidence in a holistic manner to decide whether a properly instructed jury would have convicted in light of the new evidence. What's new and what's not, the credibility of that evidence, what the credibility of the witnesses at trial would have been, is necessary in this resolution. House V Bell 547 U.S. 518,538-39. (ECF 1 at 12). Those properly instructed jurors would have surely heard Risa Ford, the outcry, try to explain why A.H recanted the sexual assualt allegation concerning her half brother ,(EFC 24 EX-6) after Risa physically abusing A.H. on the morning when the CPS interview was to take place. That explanation would have to be considered along with (ECF 24 EX-33)where A.H., knowing she was being recorded while out of Risa's reach, told Petitioner, his pastor and wife, and A.H.'s grandmother that RISA made her say this(ECF 24 EX-14 p.6). They would have heard the tape itself and seen, as the Dissenting Judge's did(Appx.G p.14),

there is nothing that calls into question the credibility of the recantation.Not only would the jury hear of the April 1994 recant after the now outcry abused A.H. on the morning of the CPS school interview, while considering the Risa made her say it statement in this case,the jury would have also had to consider the timeline in Janice Ford's abuse in October 1994(ECF EX-22-23), directly before the false outcry of abuse in this case coming in November 1994. The jury would then have the opportunity to hear of the March 25,1996(ECF EX-35)outcry and recant there,while in the hands of Risa and her mother, after making the outcry and recant in school,that her half brother was abusing her still (HC3 p.18-29 Appx.H p.18-29)and continued to abuse her until she was 12 or thriteen years old because no one believed her daddy"didn't do it and her brother did."(HC1p32 ECF 60-2 Att.B p.32). Of course (ECF 24 EX-35)would have to had been provided by the DA Tim Cole and wasn't. But now it is newly available because A.H. obtained it herself in 2011. (HC3 p.18). Petitioner, who the TCCA claims manipulated many things in the case, cannot be blamed for the April 1994 recant after Risa's abuse nor can the 1996 recant that(ECF EX-35)show was the case. A.H.would recant and make sexual assualt outcries when at school and away from Risa and her own mother, but when further investigation took place, or was to take place, suddenly A.H. would recant the sexual abuse while in the hands of Risa and her mother. This innocence claim is much much more about hearing the cries for justice of this sexually assualted child,that went unbelieved in order to deny habeas relief in these proceeding, way more than it's about exonerating this innocent defendant. The Texas Court of Criminal Appeals arbitrarly and capriciously turned a blind eye to the sexual assualt allegations made by this 22-23 year old woman in order to deny Petitioner's valid freestanding actual inn-

ocence due process right violation. One of the reasons the TCCA found A.H.'s recantations to be incredible, was the fact she still lives at home with her family, including her half brother, and never visited Petitioner in prison. This was in spite of her testimony concerning her fear of her mother taking her autistic brother from her if she told the truth and kicking her out(Appx.H HC3 p.28-33 ECF 60-2 Att.D). Including her mother opening the then 22 year old's legal mail containing (ECF 24 EX-1)that shows she didn't want to give live testimony but after her mother opened the legal mail she came and testified in the first evidentiary hearing. The TDCJ rules precluded her visitation but for her mother approving it. She is now on Petitioner's visit list and has been for years now. Cynthia Harvin's(ECF 24 X-21)affidavit that was entered(Appx.H EX-1) supports the fear of the mother that caused A.H.,as late as 2005-2010, to refuse to take the chance to help prove Petitioner's innocence based on that fear, and being seperated from her brother.(ECF 24 EX-38 &Appx.H)testimony from Kasi Scoughton all support the fear of the mother not known to petitioner at the time of trial, revocation or punishment in this case. Other reasons for the TCCA not believing the recantations is the closeness of these affiants. These affiants are upstanding citizens and no one has or can call their character into question. Credibility was also determined sua sponte by the TCCA based on the sheriff's report(Appx. F). For instance, the deputy in the report at(ECF EX-14 p.3) claimed he asked A.H. if she liked going with her Daddy. He reported she said no. (ECF EX-33)the tape recording,easily dispells this. The tape will show that on January 4,1995, just weeks after this supposed statement was made, that the kids came running so fast when they heard their dad's voice at the front door of Risa's house they had to be

ran back into the house to get their coats as they ran to the car. The tape will show A.H. instantly began asking Petitioner if they could go do things, such as swimming ect., as soon as they were in the car.The Sheriff's report(ECF 24 EX-14 p.5) also says that Petitioner apologized for putting his finger in her hole and told her it would be a long time before he saw her. There is no such apology on this tape and petitioner can be heard telling A.H. he would see her next week! Because the TCCA relied heavily on this Sherrif's report and the tape refutes most of the report,this tape should be heard in order to allow a fair reasonableness review here. The sheriff was sure not to put in anything damning Petitioner, yet he left out the recent April outcry that was recanted after Risa abusing A.H.(ECF 24 EX-6) and Janice Ford's abuse only days before the forced outcry(ECF 24 EX-22-23 EX-2)Risa's motive for forceing the false outcry-to protect her abusive daycare business. The TCCA used the sheriff's report unreasonably in light of the taped interview at the church to deny a federal due process claim. The timeline and evidence must be hollistically considered in a proper AI claim to determine what affect they would have on a reasonable juror. Reasonable doubt existed before the new 2010-2011 recantations became available to Petitioner. The TCCA at(Appx.E p.31-32) unreasonably used the fact that A.H.said on the tape that no one hurt her tweedle, the real answer she gave, as opposed to the no one molested her statement used there by the TCCA,to discredit the new affidavit and testimony of A.H. At HC1 she said no one molested her in **November 1994.** The April recanted after Risa abuse outcry was months before the October 1994 false outcry and her saying no one the tape on January 4,1995, as if a child's memory was infaliable. Morris gave gave a sworn affidavit(ECF 24 EX-13) then claimed he could remember nothing.(HC1 p.115-121. ECF 60-2 Att.B p.115-121.

Where he,Morris,admitted Special Prosecutor Ron Poole had told him what to put in the affidavit he swore to.(HC1 p.39, ECF 60-2 Att.B p.39). Similarly, DA Cole gave a sworn and perjured sworn affidavit that Special Prosecutor, Ron Poole,prepared for him to sign.(ECF 24 EX-16). Petitioner responded and threatened to pursue aggravated perjury charges if Cole didn't correct the false statements in the sworn affidavit(ECF 24 EX-18). DA Cole was forced to recant the false affidavit in open court.(HC1 37-40). DA Cole at (HC1 p.47)claims to have known of only one recant, the church recant he never bothered to even hear, eventhough he felt the need to say he did. However, the March 1996(ECF 24 EX-35) outcry and school recant testified to by A.H.after obtaining her CPS file(HC3 p.18-29)would have been within his knowledge just weeks before this April 16,1996 plea where Petitioner, according to Cole,(HC1 p.47 & 87)adamantly denied his guilt in what Cole called a"weaker case" based on a recant he never even heard. This March 25,1996 recant and outcry was not known to Petitioner at the time of the first writ's drafting nor at the time of the first evidentiary hearing.(HC1 p.324-325). A fact the TCCA used against Petitioner in (Appx.E p.44) to defeat Petitioner's claim of denial of evidence. Claiming it had already been established that the tape recantation was the only one prior to the plea.See (Appx. E p.37) where the 2010 habeas testimony,concerning Petitioner's knowledge of other recantations, is unreasonably used by the denying TCCA Judge to agin defeat Petitioner's ineffective assistance claim by restating,Petitioner at the end of the first hearing-October 5,2010-admitted he knew of no other recants. (ECF 24 EX-35)was not available until 2011(HC3 p18). A CPS document the denying Court called bare bones. The Dissent at(Appx. G p.14)recognized that A.H. put the

meat on the bones of this document at (Appx. H p.18-29), where she told the truth she gave up telling in the 3rd grade, that Petitioner didn't do it and her half brother did, and continued to long after Petitioner was taken from her. The brother was a juvenile at the time of the March outcry and that explains why his name doesn't appear on either(ECF 24 EX-6 and EX-35).(Appx. H is HC3).

No one ever heard the church recording naming Risa as the one who made A.H. say this. The only other person to ever have this tape was Jack McGaughey,(ECF 24 EX-14 p.6 and EX-34) my attorney prior to the plea, eventhoug he later denied he represented petitioner, but only because he then represented the State at revocation and punishment, where he denied all evidence at both.(ECF 20 RR V 6 46-55 and V 8 p. 5-15), including (ECF 24 Ex 14 p.6)with his name on it. Petitioner's attorney Morris discounted the tape for any purpose.(Appx.F 18-19). The hypothetical jury would now hear DA Cole, a well known and aggresive procsecutor, say he offered this plea despite what (ECF 24 EX-17)says, see(HC1 p.47), the first no lo plea he ever offered in a sexual asualt case, based solely on the taped recant he never actually heard, although he lied and said he did prior to the first habeas hearing. The jury would hear from Reverend Gonce and his wife(ECF 24 EX-14 p.6)and A.H.'s Sunday school teacher(ECF 24 EX-32 p.3)who all would testify favorably for petitioner. The credibility of the unheard church recant, as opposed to Risa's,caused DA Cole to have a reasonable doubt in obtaining a conviction at trial(ECF 24 EX-17), coupled with Petitioner's adamant denial of guilt.(HC1 p.47). At a minimum,the new evidence must raise a reasonable doubt as to a defendant's guilt. According to Judge White in Herrera supra, as seen in Elizondo supra at 207. (ECF 24 EX-33)Would have severely impeached(ECF 24 EX-14), and would today to a properly instructed jury.

The Dissent at(Appx.G p.19-20), distinguished Tuley and petitioner's case. That distinction demonstrates exactly why Supreme Court authority is needed in Texas's adjudiction of federal law matters, in this instance an actual innocence federal due process right violation. Petitioner's case is very similar to that of Tuley's other than the fact that Tuley pled guilty, signed a sworn judicial confesstion and stipulated to his guilt. Judge Meyers at(Appx.G p.19-20)pointed out that Petitoner refused to plead guilty or sign anything that indicated he was guilty, including the sworn judicial confesstion.(ECF 24 EX-7 p.5). The judge and prosecutor were aware that [Applicant] Petitioner..."[a]damantly denied guilt and maintained his innocence." Petitioner did sign a stipulation of evidence that A.H. would testtify as to Petitioner's guilt if she testified at trial.(ECF 24 EX-8). The truthfulness of that testimony was not stipulated to and this stipulation was drawn up by DA Cole knowing of the adamant denial of guilt and maintaining of innocence that cannot be denied based on the record and Judge Meyers' opinion confirms the same. This stipulation was not nor was it intended to be an admission to the elements of this offense. Judge Meyers, after conducting a complete review of the record and evidence, at (Appx.G p.19) found this no lo plea doesn't even rise to the level of an Alford plea."[i]n that there is very little evidence to substantiate Applicant's guilt." "Rather, there was evidence of Applicant's innocence, and the record indicates that Applicant was confused about the plea which calls into question whether it was voluntary and intelligently entered." In Ex Parte Elizondo supra at 206 as cited in Tuley supra at 397, the same Judge Meyers stated his understanding the need to necessarily weigh the exculpatory evidence against the weight of guilt adduced at trial. The

persuasiveness of the state's case as a whole is the benchmark. The Court, DA and defendant, based on the complainant's boyfriend's testtimony,Tuley supra at 422, all knew the complainant had recanted shortly after making the false outcry. No one can deny, based on (ECF 24 EX-17),that everyone knew of the church recant. The Court in Tuley required a judicial confession i.d.403 and a plea of guilty. The Court in this present case allowed Petitioner to maintain innocence,not sign a judicial confession and concurred with the erroneous advice of Petitioner's lawyer that returning to prove the claimed innocence would be allowed during the deferred probation. Not only did Judge Towery mark every word of guilt and guilty plea out of the plea(ECF 24 EX-7)(RR V 3 p.5-6) he nor DA Cole moved to revoke Petitioner's deferred probation when Petitioner refused to admit guilt at T.C.C.P. Art.42,12 Court ordered Psychtherpy. Instead, they both participated in what the Second Court of Appeals called a claim of actual innocence.(ECF 24 EX-20 p.2). The persuasiveness of the State's case cannot possibly be determined by anyone at the time better than DA Cole, who offered the no lo plea and followed through with the actual innocence inquiry after the start of the deferred probation based on Petitioner's adamant denial of guilt, and obviously because he had no faith in obtaining a guilty verdict after"the recant"(ECF 60-2 B,HC1 47 and ECF 24 EX-17). The psychotherpist, Michael Strain,also did not move for revocation either after seeing(ECF24 X2) then polygraph #1(ECF 24 EX-3). This is the same Michael Strain who was known for moving to revoke probation for refusing to admit guilt in other no lo contendere cases. See Leonard V State 385 SW 2d 570,577 as cited by the denying TCCA at(Appx.B p.32). (Appx.B) also contains Judge Alcala's concurring opinion completely explaining that she believed this...

case is a"close call." Her denial is based upon Petitioner knowing about the church recant when he pled. Judge Alcala opines that it was the fact that the weight of the taken and passed polygraphs, .."[i]s less probative in light of his earlier conduct during polygraph testing that appeared to be inconsistent with his innocence." Judge Alcala fails to understand that the conduct at the earlier March 17, 1995 polygraph test was known to the Judge who took the plea and ordered the third polygraph and took all (3) passed tests underadvisement(RR V 5 ECF 24 EX-5), and allowed Petitioner to continue to claim actual innocence. Similarly, Petitioner's conduct at the March 17,1995 "polygraph test",which was really nothing more than an interrogation by two different sheriff's with out counsel(ECF 24 EX-14 p.6), was known by DA Cole at the time he offered the most lenient plea in this kind of case(HC1 47) and at the time he chose to order the second taken and passed polygraph(ECF 24 EX-4)after seeing the Physchotherpist report(ECF 24 EX-2 and 3) as opposed to moving to revoke Petitioner's deferred probation. No officer of the trial court placed any weight into the fact that Petitioner failed to finish what was called a polygraph. The reson for petitioner not getting the test he bargained for, was because Sheriff Dirscollasked questions about Petitioner's fantasies at the time when A.H. wasn't even born. Petitioner begged the sheriff of Grayson County to give him the test and ask Petitioner if he committed this crime. Petitioner even offered to pay for the test.(ECF 24 EX-14 p.6-7). Strange the very question that the report says Petitioner wanted to answer is the question asked by the Polygraph Technician specifically picked by DA Tim Cole(ECF 24 EX-4)based on this very report.(CR 55).The same question was asked, and nothing about fantasy, after the judge wanted his own polygraph. See also(ECF 20 RR V 4 and CR 39-95).

(RR V 5 at 5)and(ECF 24 Ex-5). DA Cole at(HC1 p.90-103)vouched for the credibility of these tests and polygraph techs who gave them. To discredit them now based on the unconducted test offered by the sheriff on these grounds is respectfully, arbitrary. The fact remains, the trial plea judge and prosecuting attorney, went forward with the innocence inquiry as opposed to revoking Petitioner's probation,whether the process was a legal farce or not, it took place just as petitioner was promised in order to coerce this plea.

The (Appx.F) denying opinion also cited Ex Parte Calderon 309 SW 3d 64, 64-65 n2. at p.34 of the opinion for the position that in Texas a plea of no lo contendered and guilty are the equivalent. T.C.C.P.27.02(5). Petitioner cites Calderon for the purpose of demonstrating the Supreme Court's authority and exercise of power is needed since Texas has decided a federal question that this Court hasn't but should. Calderon pled no lo contendere and received deferred probation. When Calderon refused to admit guilt at court ordered psychotherpy, just as Petitioner did, his deferred probation was revoked. Calderon knew at the time he pled no lo that the alleged victims had recanted. The charges were dropped in one child sexual assualt case and lowered to indecency on the(1) remaining case that Calderon pled to. The reason he knew of the pretrial recants was because his attorney set up an interview with the prosecuting attorney after the recants came to light by way of the mother. While one of the children was in the said interview and the other waited in the hall with her father, the father scared her to not go in and recant. When she went in she did not recant resulting in the no lo plea. At the time of the plea the child maintained she had been molested,based on her later recant, because she feared being kicked out

of her father's house, just as her sister was for recanting at the interview with the prosecuting DA.Calderon supra at 67. DA Cole testified that A.H. maintained that Petitioner was guilty even after the church recant.(HC1 p.100). The fact that Calderon and petitioner knew of the prior recantations is not dispositive of either of our innocence. A.H. reaffirming Petitioner's guilt, as DA Cole says was the case, and Petitioner's "attorney" on the day of the plea assured Petitioner that was the case, put Petitioner in the same petition before the church recant.Petitioner knew A.H. was still in the custody of Risa Ford on the day of this plea and he knew Risa was behind this false claim. The fear of Risa and newly available fact of the fear of the mother kicking A.H. out of the house and seperating her from her autistic brother who she was very protective of, as she testified to at(HC3 28-29 Appx.H 28-29) must be considered by a hypothetically properly instructed jury. The TCCA in Calderon supra considered the fear of the father and found it brings into question whether the prior recant to the mother would have been available to him at the time of the plea,revocation and punishment. Similarly, the new fear of the mother was not known to Petitioner at the time of the plea, the revocation or punishment based on the fear and influence of the mother and certainly of Risa ford. The TCCA cited Ex Parte Brown 205 SW 3d 545-47, the case in Texas to make newness finding in. Just as they did in the actual innocence remand order in this case. Calderon was granted actual innocence on his freestanding claim and Petitioner was denied.DA Cole setup the 1st polygraph.

Petitioner presents his actual innocence claim as a truly compelling and credible, yet complex case. What is at stake is the likelihood that an innocenct man is incarcerated and a sexually ass-

ualted child has been called a liar most of her life and criticized for trying to tell the truth. That includes when she was a third grader and had not seen he father since January 4, 1995. The third grade recantation that was made at school and recanted when at home with Risa and her mother, took place in March 26,1996.(ECF EX-35). Under these specific case circumstances, this Honorable Court should grant certiorari so that society, which includes Petitioner's daughter A.H., is insured that the innocent are not incarcerated and that arbitrary adjudication of federal questions of due process law are not conducted by state courts of last resort based on the"politically expedient thing to do" or because of the"pedigree" of the one who claims actual innocence. Those critical phrases come directly out of the mouth of Honorable Judge Meyers (Appx.G p.2-3), where at page (3), he specifically opines that Petitioner had almost no counsel and that numerous errors by the attorneys and **judges** in this case plagued the entire process. Judge Johnson concurred in this critical dissent and attaching as EXHIBIT-A the opinion actually granting relief. Many of the presiding judge's of the TCCA,who saw this writ through the initial process where habeas relief was granted, were succeeded by new judges in the interm between the time Petitioner made it back around for this writ being questioned for for reasonableness under 2254 and the AEDPA. Judges Price.Womack and Cochran departed. (Appx.J)is the Statement concurring in the refusal of Petitioner's PDR. Judge Alcala joined. Judge Cochran at(Appx. J p.3-4) said Petitioner did take the"helpful hint from Heloise" that the Second Court of Appeals had provided,.."[b]ut he shot himself in the foot..." By that she meant filing for the out of time PDR. Petitioner may not be the smartest litigant this Court has ever seen

and he apologizes for his lengthy arguments, but he is smart enough to know that in Texas when you are told by someone that you "shot yourself in the foot" means first, that you injured yourself, and second, it means your not gonna get to where you were going or get what you want because of the shot. Petitioner may not be right,but his layman's interpretation of this Statement filed by Judge Cochran was filed to urge petitioner to refile his innocence claim and Brady clim as soon as possible. She reurged petitioner to redraft and clarify the grounds raised(Appx.J p.6) Fn 24 that was advised in Harvin 2013 WL 2112366,at p.3 n.3. Petitioner has done his best to follow the helpful hints the below courts have provided. Perhaps Petitioner's boldness,as a prisoner,has not set well with some of the judges below. Petitioner's boldness is not and has never been from and arrogant stance. The Bible says the "The wicked flee when no man pursueth; but the righteous are bold as a lion."Proverbs 28:1. Some translations say the innocent are as bold as a lion.

Judge Towery was not recused lightly. (ECF 24 EX-24-29)shows the complete process. Petitioner in this actual innocence plea for certiorari review has been told by nearly every judge below, other than Judge Meyers and Johnson, that Judge Towery voluntarily recused. This is not so and his conduct in this case cannot be seperated from the due process violation that has resulted in the incarceration of an innocent man and years of sexual abuse of a young child. The question Petitioner poses to this Court, with all due respect, is simply this...Is there a judge reading this case-and Petitioner's claim presented-who would allow themselves to be accused of bias and prejudice and not answer that accusation in a formal hearing,where the record could be developed for appellate review, by an inmate litigant?

Texas Law allows for the said hearing under T.R.C.P.18(a). Judge Towery recused on October 1.2009, eventhough he had illegally participated in the initial writ denial-a violation of Texas Law. The initail writ was filed on May 25, 2009 and remanded the first time on September 29, 2009.(Appx.G p.7).(ECF 24 EX-25 & 27). Jack McGaughey, the head DA at the time of the writ, and Petitioner's ex-attorney(ECF 24 EX-14 p.6 and EX-34), denied the writ but when the TCCA remanded the writ to the trial court, and him knowing Judge Towery was forced to recuse, then on December 17,2009 recused himself and the entire DA's office.(ECF 24 EX-19). The reasons he asked to be recused for were the exact reasons he would have known of when he initially participated and denied the first writ. If these court officer's ethics and morals are above reproach, then why did they act in this manner, to the extent of breaking the law, where Towery is concerned,to deny the writ? Nothing should be more abhorent to a good judge than the bad acts termed bias here, of which Towery evidently chose not to challenge.(ECF EX-24-29). Judge Towery entered into and modified this plea in order to coerce this innocent claiming and refusing to plead guilty defendant into a nolo plea, which has the same legal effect in Texas, knowing full well Petitioner refused to plead guilty and maintained his innocence. Petitioner's word may not be good enough, but Judge Meyers and Johnson's should carry plenty of weight(Appx.G p.3 & 17-22), where at 21 he emphasized Towery's actions. The use of the Judge's Moon Rule language is important to this actual innocence claim and shows why Petitioner uses these constitutional right violations in this freestanding AI claim. The Moon Rule, Moon V State 572 SW 2d 681.682, as used by Judge Meyers for guidance, explains... [T]he purpose of the Moon Rule is to prevent unjust convictions and

the burden they place on both the innocent defendant's and society. The rule exists because of our recognition that unwitting or coerced, and yet innocent, defendant's require protective intervention of the trial court." Judge Towery here not only did not protect this innocent defendant, he sat idly by while Petitioner's own attorney suborned perjured testimony while committing aggravated perjury himself, concerning the grand jury transcripts.(Appx.G p.3,p.22, p.25).He not only sat idly by, but joined in the coercion and carried through with the coercion, that this was not a guilty plea and Petitioner could return to prove innocence during deferred probation. (ECF 20 RR V 4, V 5, V 3 p.5-6,ECF 24 EX-7 & EX-11). The fact he is now recused on Petitioner's motion based on bias and prejudice must be deferred to. The judge who done all of the above,allowed Jack McGaughey to prosecute Petitioner at revocation after he was aware of McGaughey's prior representation(RR V 6 p.50)allowed McGaughey to withhold every single piece of evidence at revocation from the defense.(RR V 6 46-55, p.108) and then at punishment(RR V 8 5-15). The deferred probation was revoked and Petitioner was sentenced to 60 aggravated years in prison, the equivilent to a life sentence. When asked at bar if there was any reason sentence should not be imposed, Petitioner stood and said," Yes your Honor, I'm innocent." Petitioner remains actually innocent.

QUESTION FOUR PERTAINS TO THE CLAIMS ADJUDICATED ON THE MERITS. CLAIMS SIX-TWELVE AND SEVENTEEN.

The Fifth Circuit at(Appx.A p.2)concluded that reasonable jurist could not debate the denial on the merit of the claims related to the revocation and punishment. Claim #17 pertains to the direct appeal and is not mentioned here.

Claims Six and Seven pertain to Attorney Walsh's failure to move to recuse Jack McGaughey...

prior to the revocation hearing knowing he was petitioner's prior attorney. The only reason Walsh was found effective by the federal district court was their opinion that the motion would have been"futile."(ECF 44 p.13 Appx.D). The Magistrate's (ECF 44 FCR)was adopted in part by the District Court at(ECF 47 & 48 Appx.E) and was used to deny Petitioner's Application for COA in the District Court.(ECF 53 and ECF 55 Appx.K). The Magistrate found, based on (Appx.G p24) which is Ex parte Harvin 500 SW3d 418(Meyers,J.dissenting), "That Harvin **retained McGaughey**."(Appx.D p.10)and found that Harvin"consulted with him[McGaughey] about the planned polygraph."(Appx.D p.13). again referenceing Judge Meyers dissent(Appx.D). Judge Meyers found Attorney Walsh ineffective for the failure to recuse McGaughey at both revocation and punishment(Appx. G p23-25). Calling it an "obvious conflcit of interest." Judge Meyers and concurring Judge Johnson must be considered reasonable jurists. Magistrate Judge Ray must be considered a reasonable jurist. All three agree Petitioner **retained Mcgaughey**. Proving Walsh knew of the prior representation and felt the need to recuse McGaughey is easily shown.(ECF 20 RR V 6 p50). Walsh did move to recuse McGaughey but untimely according to Judge Towery(ECF 20 RR V 6 p.55).If the motion was futile, then why would Walsh move for it? Walsh knew of the prior representation and complete denial of all evidence in plenty of time to file to recuse McGaughey((ECF 20 RR V 6 p.46-50). Walsh filed no discovery motion at both revocation and punishment where he presented no defense at all. (ECF 20 RR V 8 p.11). The District Court at(Appx.E p.4 overrules all three judges opinions that McGaughey was retained. Judge Lynn relied on the TCCA denying opinion(Appx.F p.40)to find that Petitioner failed to present clear and convincing evidence that the denying opinion's

finding was erroneous. The TCCA's opinion was base on(Tr.Ct.FFC #2 at #12 Appx.F p.27-28,40) on **October 27,2010.** That finding was made without(EFC 24 EX-35), a second state generated document with McGaughey's name as Petitioner's attorney on it, that wasn't available until **July 2011** when A.H. obtained her CPS file and provided it to Petitioner.(Appx.H p.18-19 HC3 p.18-19). The 2010 trial court finding, relied on by both the TCCA and District Court is unreasonable in light of the evidence. (ECF EX-14 p.6 and 34)are documented evidence that McGaughey represented petitioner prior to this trial for at least setting up polygraph tests from February of 1995 to May of 1995. Judge Lynn finds that Ex Parte Spain 589 SW 2d 132,134, and Landers V State 256 SW 3d295,304 are inapposite.(Appx.**E** at 3-4)even-though Judge Meyers and Johnson rely them in their reasoned opinion granting relief(Appx.**G** p.24). Judge Lynn furthermore opines, while relying on an unwritten order,Rodriguez___SW 3d__,(2018 WL 1101663 (Tex.Crim. App.Feb.28,2018) which is now(Appx.M). However, just as in Petitioner's case(App.G & M)the dissenting judge's wrote and published written dissents, demonstrating reasonable jurists disagreement or at leats debate.Ex Parte Rodriguez,the TCCA dissenting Judge's(Appx.G p24) and denying TCCA Judge's(Appx.F p.40)all rely on these very same cases to adjudicate Petitioner's claim,yet Judge Lynn finds them inapposite. Rodriguez supra is presented here for guidance in demonstrating the due process violation where prejudice is presumed, when the attorney representing the state has"switched sides." It is clear from Rodriguez that if he had two state generated documents such as petitioner has presented here,with the attorney's name on them, he would no doubt have garnered these three TCCA judge's votes.Because this is a federal due process issue where disagreement, far past debat

debate has been shown on this ineffective assistance of counsel claim, the Fifth Circuit erred by not granting COA on the issues adjudicated on the merits(Appx.A p.3). Those merit determinations include Walsh's failure to recuse Judge Towery prior to revocation and then punishment when this inmate Petitioner was able to do so based on an appearance of bias to the degree that Towery chose recusal over being heard ,even though Towery broke the law and continued to participate in this case while under the recusal motion.(ECF 24 EX-24-29).Walsh had no reasonable expectation that Towery would be fair long before the revocation hearing,and for sure after what he saw at revocation at punishment. Walsh knowing of the complete denial of all evidence(ECF 20 RR V 6 p. 48)never filed for discovery understanding it was a due process violation not to receive it.(ECF 20 RR V 8 p.5-15). The cumulative result at both revocation and punishment, denial of all evidence and a (60) year aggravated sentence. The direct appeal he then filed was completely frivolous.(ECF 24 EX-20)(Appx.H p.13-17)yet he was found competent after the habeas judge told him..."you didn't know the law." Walsh presented no defense at punishment where he did nothing but try to attack the underlying plea(ECF 20 RR V 8 p.11) which ammounted to nothing to appeal.(Appx.F p.46). These are substantial constitutional right violations that are at least debateble among jurists of reason. Therefore, the Fifth Circuit erred by concluding otherwise,respectfully.

CONCLUSION

The record shows that Petitioner has never been resigned to let a moment pass where he didn't let his innocence be known. From January 4th,1995 when he boldly recorded the truth in this case. The same truth A.H. tells today as Petitioner presents his freestanding and MC-Quiggin actual innocence exception case to this Court. Petitioner has

thrown every dagger at the heart of this wrongful conviction as it has came to his hand. No stone has been left unturned and no step avoided in this long journey for justice. Today, the daggers are gone and Petitioner is left with only a sling, a stone and a prayer. That prayer, to God almighty, is that He would finally open the eyes and ears of Lady Justice by using this Honorable Court's discretionary powers to grant rare certiorari review, so that justice may prevail.

For the above reasons, Petitioner prays this Court would grant certiorari.

Respectfully submitted,

Clifton D. Travis

Date, May 25, 2019

CERTIFICATE OF COMPLIANCE

CLIFTON DEWAYNE HARVIN
Petitioner,

V

LORIE DAVIS-DIRECTOR TDCJ
Respondent.

As required by Supreme Court Rule 33.2(b), I do hereby certify that the writ of certiorari contains 40 pages, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1 (d).

I declare under the penalty of perjury that the foregoing is true and correct to the best of my belief.(See 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Respectfully submitted,

Clifton D. Harvin

Date, May 25 ,2019