IN THE
UNITED STATES SUPREME COURT

KEVIN TERRELL TATUM *
(Petitioner)

vs. * Cause No. 18-9548

LORIE DAVIS, Dir. Of
TDCJ-ID
(Respondent) *

PETITION FOR

WRIT OF CERTIORARI

Appeal From The United States
Court Of Appeals , 5th Circuit
Cause No. 17-20787, And The
U.S.D.C. Cause No. H-14-1735

Respectfully Submitted,

Kevin Terrell Tatum

Kevin Terrell Tatum
Petitioner Pro Se
TDCJ-ID #1409740
Darrington Unit
Rosharon, Tx 77583

STATEMENT OF THE ISSUES PRESENTED

I. Whether Or Not The DISTRICT COURT erred And Abused Its Discretion In Granting SUMMARY JUDGMENT Against Appellant When There Patently Exist Material, Unresolved Facts Still In Dispute.

II. Whether Or Not The District Court erred In Granting SUMMARY JUDGMENT Against Appellant When There Exist "NEWLY DISCOVERED EVIDENCE" Of RECANTATION From State's Key Witness That Contain Exculpatory Evidence That Negate's Validity Of State's Entire Case.

III. Whether Or Not The DISTRICT COURT Erred And Abused Its Discretion In Rejecting Appellant's "INSUFFICIENT EVIDENCE" Claim, When "NEWLY DISCOVERED EVIDENCE" Of RECANTATION From State's Key Witness Reveals Exculpatory Evidence That Corroborate's Appellant's And Defense Witnesses Version Of The Events.

IV. Whether Or Not The DISTRICT COURT Erred In Granting Summary Judgment Against Appellant's Claim Of INEFFECTIVE ASSISTANCE OF COUNSEL, When Counsel Proffered "NO EXPLANATION" For His Malfeasance And Nonfeasance.

V. Whether Or Not The DISTRICT COURT Erred And Abused Its Discretion In Granting Summary Judgment Against Appellant When Due Process And The Interest Of Justice Warranted An Evidentiary Hearing To Resolve Exculpatory "RECANTED" Statement From State's Key Witness That Nullifies Prior Inculpatory Statements That Contributed To Conviction.

VI. Whether Or Not DISTRICT COURT Erred And Abused Its iscretion For DISREGARDING Witness Testimony, CORROBORATED by 'RECANTED' Testimony Of State's Key Witness, When The Same Establishes Appellant's Innocence Of the charged Offense.

VII. Whether Or Not, In Light Of "Newly Discovered Evidence" Of RECANTEDR Exculpatory Statements Of State's Key Witness, Any Jury, Acting Reasonable, Would Have Convicted Of The Charged Offense.

VIII. Whether Or Not The Court Of Appeals Erred In Not Granting C.O.A.

TABLE OF CONTENTS

TABLE OF CONTENTS, Cont'd: Page

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES, Cont'd: Page

CONSTITUTION:

INDEX OF AUTHORITIES, Cont'd: Page

STATUTE:

RULES:

LIST OF ALL PARTIES

1. Hon. EWING WERLEIN, Jr., Judge
United States District Court
Southern District Of Texas
Houston Division
P.O. Box 61010
Houston, Tx. 77208

2. Hon. Frances Stacy, Magistrate
United States District Court
Southern District Of Texas
Houston Division
P.O. Box 61010
Houston, Tx. 77208

3. OFFICE OF TEXAS ATTORNEY GENERAL
Attn: Mr. Jon Meador
(Assistant Attorney General)
P.O. Box 12308, Capitol Station
Austin, Tx. 78711-2548

4. Ms. Lorie Davis
(Respondent)
Directof Of TDCJ-ID,
P.O. box 99
Huntsville, Tx. 77340

5. Mr. Kevin Terrell Tatum
(Appellant)
TDCJ #1409740
Darrington Unit
59 Darrington Rd
Rosharon, Tx. 77583

6. Hon. SOUTHWICK, HAYNES and HO,
Circuit Judges, U.S. Court Of Appeals,
Fifth Circuit

IN THE UNITED STATES SUPREME COURT

KEVIN TERRELL TATUM, (Appellant/Petitioner)	§	
vs.	§	Cause No. _____
LORIE DAVIS, Director Of TDCJ-ID, (Respondent)	§	

APPELLANT'S BRIEF
IN SUPPORT OF WRIT OF CERTIORARI

Appeal From The United States
District Court, Southern District Of Texas,
Houston Division, Cause No. 4:14-cv-1735

TO THE HONORABLE JUDGES OF SAID COURT:

PLEASE TAKE NOTICE that COMES NOW, KEVIN TERRELL TATUM, Appellant Pro Se, in the above styled and numbered cause, files this his 'Appellant's Brief' in support of his Certificate Of Appealability, in good faith, contending due process and the interest of justice would be best served by this Court Granting the same, and in support thereof, your Appellant would present unto this Honorable Court the following:

I.

PLEA FOR LIBERAL SCRUTINY

That your Appellant respectfully request for this Honorable Court to construe this 'Appellant's Brief' liberally, as required by Haines v. Kerner, 92 S.Ct. 594, (1972) and its progeny. Your Appellant is a layman at law, and should not be held to the same stringent standards of formal pleadings drafted by Attorneys.

II.

JURISDICTION

That this Honorable Court has Jurisdiction to entertain said Writ Of Certiorari in support of Certificate Of Appealability, pursuant to Rule 10, Rules Of Sup, Ct., 28 U.S.C. § 2253 (c)(2); U.S.C.A., Amend. 5; 14.

III.

PROCEDURAL HISTORY OF THE CASE

That your Appellant/Petitioner was charged and convicted for the offense of Murder, alleged to have occurred against the Complainant, BONNIE MOCK, on or about September 28, 2005. Your Appellant pleaded not guilty. Trial commenced before a Jury on December 4, 2006. Appellant presented the mitigating circumstances of 'Self Defense', but due to Ineffective Counsel, did not present the mitigating evidence of 'sudden passion' arising out of an adequate cause. Your Appellant was subsequently found guilty on December 8, 2006, and punishment

was assessed at forty-five (45) years imprisonment. Appellant Appealed. The Appeal was advanced before the First Court of Appeals, located in Houston, Texas, Cause No. 01-06-01190-CR. Your Appellant advanced a Pro Se Brief on Direct Appeal, seeking to advance argument before the Court challenging the Constitutionality of his confinement, after his Appointed Counsel advanced an Anders Brief. Said Appeal was denied February 29, 2008. Thereafter, your Appellant advanced a Petition For Discretionary Review, Cause No. PD-1392-08, challenging the lower court's ruling. Said PDR was advanced to the Texas Court of Criminal Appeals, and was refused by the Court March 11, 2009. Appellant did not advance a 'Writ of Certiorari', making said case final June 9, 2009.

On August 31, 2009, approximately three (3) months after Direct Appeal was final, your Appellant advanced a State Habeas Writ, before the 179th Judicial District Court of Harris County, Texas, Cause No. 1042008-A; Writ No. 73,771-05. Said Writ was filed before the Court September 9, 2009, and the Trial Court 'designated issues to be resolved' on September 30, 2009. Said Writ was pending before the State Court a full four (4) years, which prompted the filing of a 'Writ of Mandamus'. Prior to the resolution of Appellant's State Habeas Claim that was pending before the Court, your Appellant, with the aid of a inmate paralegal, moved the Court for leave to advance additional points of error for resolution. Thereafter, your Appellant advanced 'supplemental' points of error by submitting before the Court

the necessary 'Writ Forms' with 'Memorandum Of Law' annexed thereto, on June 12, 2012. The Trial Court 'designated issues to be resolved' on said 'supplemental points' on September 25, 2012. However, instead of 'supplementing' the points with Appellant's initial Writ, styled as Cause No. 1042008-A, that was pending before the Court, the Trial Court elected to categorized the 'supplemental points' of error under a distinct Cause Number, i.e., Cause No. 1042008-B.

The categorization of the 'supplemental points' under a distinct cause number prompted confusion and resulted into the Respondent moving the Court for 'Summary Judgment' of Appellant's entire Federal Habeas Writ, styled as Cause No. H-14-1735.

Pursuant to the provisions of Art. 11.07 § 3, V.A.C.C.P., Appellant's State Habeas Writ was advanced before the Texas Court of Criminal Appeals for final resolution. However, instead of forwarding both the initial Writ and the Supplemental Points, now categorized as Cause No. 1042008-A; and Cause No. 1042008-B, as one distinct Writ that consisted of supplemental points of error, the Trial Court apparently only forwarded the initial Writ, styled as Cause No. 1042008-A and said Writ categorized as WR-73,771-05. Your Appellant assumed his State Habeas Writ was final, and sought refuge in the Federal Judiciary for the resolution of his claims. It was then your Appellant learned, for the first time, the Trial Court elected to piecemeal his Writ and excluded the 'supplemental' Writ, which consisted of supplemental points.

After Respondent, JON MEADOR, Assistant Attorney General, moved to Dismiss Appellant's Federal Habeas, due to pending litigation in the State Court, Petitioner wrote a letter of inquiry to the Texas Court of Crim. Appeals, seeking clarification. It was then Appellant learned his 'supplemental' points, styled as Cause No. 1042008-B, were not advanced with Cause No. 1042008-A for resolution. Said Federal Writ was held in abeyance, pending resolution of the supplemental points.

Prior to the resolution of the 'supplemental points', and subsequent to the filing of the "B" Writ, your Appellant was presented with 'Newly Discovered Evidence', resulting into the Affidavit of the State's key witness, CHARLIE IVORY, who proffered 'recanted' exculpatory evidence. Your Appellant sought to advance this 'Newly Discovered Evidence' before the Court July 31, 2013, to supplement his 'No Evidence' point of error that were advanced in the "B" Writ. Appellant specifically and pointedly moved the Court for leave to supplement Writ with Affidavit and Exhibits. Thereafter, the Writ was subsequently advanced to the CCA for resolution on October 13, 2013, which was posterior to the presentment of the 'supplemental' points and the 'newly discovered evidence' of 'recanted' testimony by the State's key witness. Said Writ was styled as Cause No. 73,771-05. On March 14, 2014, the CCA denied Appellant's State Habeas Writ without written order.

Thereafter, on June 18, 2014, your Petitioner advanced his Federal Habeas Writ before the Federal Judiciary. Said

Writ was styled as Cause No. H-14-1735. Your Appellant discovered, from the Respondent's response, the Trial Court did not 'Consolidate' Cause Nos. 1042008-A and 1042008-B. By piecemealing said points of error and categorizing the same under two distinct cause numbers, Appellant was caused to revisit the State Court for resolution of his Habeas Claims, styled as the "B" Writ. On September 29, 2014, the U.S.D.C., Hon. FRANCES STACY, issued forth an Order "Staying" Petitioner's Writ pending resolution of Cause No. 1042008-B.

Your Petitioner objected to revisiting the State Court, contending Writs "A" and "B" were consolidated and should have been advanced together for 'exhausting' purposes. The Respondent, JON MEADOR, sought to exploit the Trial Court's error in not 'consolidating' his claims advanced in the "A" & "B" Writs, and moved the Court to dismiss the Federal Writ on 'Procedural Default Grounds.' In the interval, your Appellant advanced a 'Motion For Leave To Recuse Respondent, JON MEADOR' on the grounds said Respondent was engaging in unethical and improper conduct, seeking to retain the conviction at all cost, up to and including tampering with witnesses. Moreover, mysteriously, the Texas Court of Criminal Appeals, on its own motion, elected to reopen the case, Cause No. 73,771-05, and changed its ruling in said cause from [Denial Without A Written Order] to [Dismissal For Non-Compliance]. The CCA erroneously concluded Cause No. 77,771-05 was non-compliant with the Habeas Rules, for failure to annex the required '11.07 Writ Forms' to the 'supplemental points' advanced in

the "B" Writ, and thus, on April 15, 2015, the CCA elected to [Dismiss The Writ As Non-Compliant], urging your Appellant to return to State Court for resolution.

Your Appellant advanced an objection, and forwarded a copy of the "B" Writ, which clearly consisted of the required "11.07 Writ Forms". Moreover, Appellant advanced argument that the State High Court presented a false analysis, prompted by the Respondent's meddling. The State's respondent, Hon. ANDREW SMITH, responded to Appellant's "B" Writ and specifically and pointedly made reference to both the '11.07 Writ Forms' as well as the 'Memorandum Of Law' annexed to the forms in addressing Appellant's points in the "B" Writ. (See Page five (5) of State's response to the "B" Writ). Your Petitioner asserts the CCA's false analysis, and its reopening Cause No. 77,771-05, on its own Motion, was due in part to unethical meddling from the Respondent, JON MEADOR.

After the ruling of Non-Compliance, the Respondent sought to dimiss Petitioner's claims on the grounds of 'procedural default' and a breach of the A.E.D.P.A., contending the four (4) years Appellant's Writ was pending before the State Court can no longer be tolled, and moved the Court for Dismissal as 'time barred.' The U.S.D.C., Hon. FRANCES STACY, Rejected the Respondent's efforts to manipulate the Court with a false 'non-compliance' assertion and rebuffed both the CCA and Respondent's analysis, asserting the following:

> "The statute of limitations defense asserted by Respondent in this case is complicated by two thins: (1) Tatum's filing of his "Second" state application for writ

> of habeas corpus as a **SUPPLEMENT** to his first; and (2) Tatum's assertion, in his second state application for writ of habeas corpus, of a claim of actual innocence, which is predicated on a June 2013 affidavit from Charlie Ivory. It is Tatum's **SUPPLEMENT** argument that is the most straight-forward and compelling."

(See Page 15 of Magistrate's Memorandum and Recommendation), annexed hereto as an addendum. The U.S.D.C. determined the Trial Court filings of two separate state applications for Writ of Habeas Corpus was contrary to the contents of those filings, wherein Appellant stated on page 3, Cause No. 1042008-B, "the current claims are **SUPPLEMENTAL** points to previously filed writ that is still pending and not yet resolved." (See Document No. 48-1 at 8). Hence, the Magistrate opined it would be Inequitable Tolling to Dismiss Petitioner's claims as a 'default judgment' for failing to comport with State Habeas Rules, contending:

> "Here, two circumstances, which were completely out of Tatum's control, warrant Equitable Tolling. First, the Texas Court of Criminal Appeals denied his state application for writ of habeas corpus on March 19, 2014, but then, sua sponte, over a year later, [withdrew] that denial and dismissed the application as improperly filed. Secondly, as set forth above, the Texas Court of Criminal Appeals addressed and rejected on the merits all of Tatum's **SUPPLEMENTAL** claims ...Under these circumstances, where the record shows that Tatum has pursued his claims diligently, both in this court and in the state courts, equitable tolling should be available to save Tatum's claims from the limitation bar in § 2244 (d)."

(See Page 17, of Magistrate's Recommendation). The Respondent filed a written objection to the Magistrate's analysis, seeking to have the case dismissed as 'time barred', and disregarding the Magistrate's determination, in an objection

dated September 19, 2017. The Magistrate Judge determined Appellant's point of error on the merit, but elected to recommend 'Summary Judgment' in favor of the Respondent, and recommended the case be Dismissed, in an thirty-seven (37) page Opinion dated September 6, 2017.

Appellant objected and asserted Jurist of reason would find the Magistrate's recommendation of 'Summary Judgment' debatable or wrong, in light of clear controverted facts still in dispute that warrants the denial of 'Summary Judgment.' Moreover, Appellant sought to establish the Magistrate's determination is wholly contrary to the facts presented, and breaches clearly established Federal Law, as determined by the United States Supreme Court. Your Appellant relied upon Rule 56 (c)(a)(b), Federal Rules of Civil Procedures, in support of his position why 'Summary Judgment' should not be granted.

The U.S.D.C., Hon. EWING WERLEIN, Jr., entered an Order adopting the Magistrate's 'Recommendation' in an Order and Judgment dated November 28, 2017. Appellant advanced a 'Notice Of Appeal' before the U.S.D.C, and the Court, Hon. Judge EWING WERLEIN, Jr., filed the Appeal December 15, 2017. This Honorable Court docketed the Appeal January 5, 2018, Cause No. 17-20787. The District Court subsequently Granted Appellant leave to proceed in Forma Pauperis. This Honorable Court, In a letter dated January 29, 2018, presented Appellant with a forty (40) day 'Notice' in which to advance a C.O.A., W/Brief in support, causing the due date for filing the same on or about March 9, 2018. Appellant presents this his Brief in support of his Writ Of Certiorari.

IV.

STATEMENT OF THE CASE

That your Appellant/Petitioner was tried and convicted for the offense of Murder, Cause No. 1042008. Said offense was alleged to have occurred on September 28, 2005. (Tr. - 9). Trial commenced December 4, 2006, before a Jury. (Tr. - 158) On December 8, 2006, the Jury found your Appellant guilty of the offense charged and assessed punishment at forty-five (45) years imprisonment. (Tr. - 173, 182).

Petitioner pursued the affirmative defense at trial of self-defense, contending his actions were 'lawful', as prescribed by the provisions of Art. 9.31; 9.32 V.T.C.A., and that the facts, (including the 'newly discovered evidence' of "Recantation" from the State's Key Witness, CHARLIE IVORY), patently establishes your Appellant was caused to defend himself, that he reasonably believed he could not retreat, and that the force used against the Complainant and others was immediately necessary to defend his person against the Complainant's attempt to unlawfully cause harm to Appellant, justifying Appellant's use of deadly force.

The State's key witness, CHARLIE IVORY, the Complainant BONNIE MOCK and several of IVORY's cousins attended a club called the SURF SHACK on the night of September 28, 2005, where said crew confronted Appellant. IVORY testified that he and Appellant had a long standing rift between each other, and that he and Appellant were scheduled to get into a fight. (R. III - 86). IVORY additionally testified that he, and four

(4) of his cousins, who were at the SURF SHACK, pursued your Petitioner to engage him in a fight. (R. III - 90). IVORY informed the Jury that Appellant, seeking to avoid the fight and confrontation with five suspects, sought refuge in his car, a Fleetwood Cadillac, seeking to retreat. (R. III - 91). Thereafter, IVORY, the Complainant and his four (4) cousins pursued Appellant as he sought to return to his vehicle, demanding Appellant fight. (R. III - 93). Your Appellant got into his vehicle and sought to exit the area, but was blocked in. It was State key witness, CHARLIE IVORY, who asserted that it was he, and his car, that blocked the exit so that your Appellant could not escape. (See Exhibit "A", annexed hereto, consisting of the recanted testimony of IVORY). Your Appellant, in an effort to exit the area and retreat from the parking lot of the SURF SHACK, hit IVORY's car, which damaged the front of Appellant's vehicle. (See Exhibit #47). Said Exhibit was completely ignored by the Respondent, Magistrate and Judge in its 'Summary Judgment' dismissal against Appellant. Said Exhibit, which depicts damage to the front of Petitioner's car, and which corroborates IVORY's recanted testimony wherein he states "it was my car that TATUM hit in his effort to flee the scene," establishes your Petitioner's was in fact seeking to flee the scene, giving credence to the mitigating circumstances of 'Self Defense', prescribed by Art. 9.31, 9.32, V.T.C.A.

The Complainant, BONNIE MOCK, grabbed —the door of Appellant's vehicle, seeking to grabbed your Appellant out of

his vehicle. (R. III - 100). Thereafter, State key witness, CHARLIE IVORY testified to hearing gunshots, in which he suffered a gunshot wound to his foot. (R. III - 103). Another State witness, RONALD HARRIS, was also present in the parking lot on the night of the incident. HARRIS' testified that he knew both Appellant and the Complainant. (R. IV - 47-48). HARRIS' testified before the Jury that he observed Appellant being chased in the parking lot by five or six other guys. (R. IV - 51). These five or six other guys were all yelling at Appellant, who sought to flee from them, to fight with IVORY. (R. IV - 52). HARRIS' testified that he then saw these five or six other guys surround Appellant's car, and that the Complainant approached Appellant's car, and afterwards, he heard gunshots. (R. IV - 54, 56, 60). The State called witness Dr. DWAYNE WOLF, a Medical Examiner for Harris County, Texas, to determine the cause of death. Dr. WOLF' testified the Complainant was shot in the groin area, and due to excessive bleeding, resulted into the Complainant's death. (R. IV - 90).

The defense called witness CHRISTOPHER ALEXANDER, who was also present at the club with Appellant, and testified that he, too, observed what appeared to be fifteen (15) people surrounding Appellant's car, edging him to fight them. (R. V - 5, 6). ALEXANDER further testified that as Appellant sought to leave, some in the crowd used their cars to 'corner off' Appellant's car to prevent him from leaving. (R. V - 9). Thereafter, ALEXANDER testified one of the guys began banging

on the window of Appellant's car, and afterwards, the door came open and he heard gunshots. (R. V - 10). He further testified, and pivotal to Appellant's "SELF DEFENSE" assertion, that one of the guys walking towards Appellant's car was fumbling with his shirt, as if he had a weapon. (R. V - 13).

Witness, ASHLEY PERRY, was also present at the Club, and testified she never seen Appellant before the night of the incident, and that she observed a crowd of people making fighting gestures towards Appellant and then surrounded his car. (R. V - 35). She corroborated Applicant's claim that he was unable to exit, by testifying there was a 'BLACK CAR' that was parked in front of Appellant's car, that prevented Appellant from leaving the parking lot. (R. V - 37).(Said 'Black Car' was owned by IVORY - See his Affidavit annexed hereto as Exhibit "A"). She further testified to observing a dark skinned man beating on Appellant's car, and yelling for Appellant to get out and fight, and afterwards, she hear gunshots. (R. V - 39, 40).

Your Petitioner took the stand on his own defense, and testified that when he exited the club on the night of the incident, he ran into a man he knew as CUJO. (R. V - 55, 56) (CUJO is the nick name for CHARLIE IVORY - See Exhibit "A"). The two exchanged words, and CUJO aggressively approached Appellant, taking off his shirt, and demanding a fight. Appellant, clearly outnumbered, sought to avoid the fight and flee the scene. CUJO' and his buddies then followed Appellant

to his car, which was in the parking lot area of the SURF SHACK Club. (R. V - 61). Your Appellant testified that as he got into his car, and sought to exit, he was 'Boxed In' by another car and prevented from retreating. (R. V - 62). Your Appellant informed the Jury that the car directly in front of his car belonged to CUJO. Appellant testified that several of the men appeared to have approached his car, and that he saw a weapon from one of the Assailants. (R. V - 63, 66). When the guy managed to pull open Appellant's car door, your Appellant testified that he was afraid of being harmed by CUJO and the guys with him. Appellant testified to grabbing his gun and began sporadically releasing shots. (R. V - 66). Said shooting resulted into the Complainant being shot in the leg, and IVORY in the foot. (id). Afterwards, your Appellant exited the parking lot, bumping into the car that was blocking him in, which resulted into Appellant suffering damage to the front area of his car. Petitioner then called the Harris County Sheriff's Office and apprised them there has been a shooting and of his location. (R. V - 69). Upon cross examination, Appellant conceded to shooting the Complainant, but made it clear he was acting in Self Defense. (R. V - 92 - 94).

During deliberations, the Jury sent out two (2) notes, and their focus was on whether or not your Appellant was 'blocked in', and whether or not your Appellant was acting in self defense when he shot the Complainant, BONNIE MOCK. The Jury subsequently found your Appellant guilty of Murder, as

alleged in the indictment, but were not instructed to determine the mitigation circumstances of 'provocation', leading to the lesser included offense of Voluntary Manslaughter and 'sudden passion' arising out of an adequate cause. Moreover, your Appellant contends said Jury would not have found him guilty had the Jury heard the exculpatory and mitigating testimony of CHARLIE IVORY's "RECANTATION" of his inculpatory statements against Appellant, seeking to obtain a conviction and excessive sentence against Appellant. (See Exhibit "A", IVORY's Recantation, annexed hereto).

The Respondent seeks to speculate that IVORY was compelled to RECANT, out of intimidation, and that two (2) State witnesses appear to contradict the defensive version of the events. The Respondent wholly ignored State's Exhibit #47, which establishes proof of damage done to the front end of Appellant's vehicle in his attempt to retreat from the parking lot after being blocked in by IVORY's vehicle. The Respondent, along with the District Judge, wholly ignored the exculpatory and mitigating testimony of IVORY, and refused to accord your Appellant a full and fair Evidentiary Hearing to determine whether or not IVORY's recantation was voluntary, knowingly and intelligently presented, as asserted. Your Appellant contends, in light of IVORY's "RECANTATION" alone, combined with defense witnesses that corroborated IVORY's Recanted testimony, establishes unresolved material facts, still in dispute, that warranted the foreclosure of the Respondent's and Magistrate's 'Recommendation' for Summary

Judgment, and that the District Court erred and abused its discretion in Granting Summary Judgment against Appellant. Said determination by the District court conflicts with the provisions of Rule 56, (c)(A)(B), Federal Rules of Civil Procedures, and establishes that Jurist of reason would find the District Court's 'Summary Judgment' dismissal, in the presence of clear facts that are still in dispute, debatable or wrong and would encourage your Appellant to proceed further by the Granting of his Certificate Of Appealability.

V.

GROUNDS FOR RELIEF

That your Appellant asserts his conviction was patently obtained in breach of the United States Constitution, and that relief should be Granted in light of the following errors:

(1) The evidence was INSUFFICIENT to establish every fact necessary to constitute the offense charged, i.e., an absence of Sudden Passion; and an absence of Self Defense

(2) Trial Counsel patently rendered unreasonable, ineffective assistance of Counsel, in light of several omissions and commissions;

(3) The District Court erred and abused its discretion for failing to determine there exist material facts in dispute that warrant resolution, specifically, the allegations advanced in IVORY's Affidavit; Trial Counsel's admission that he did not advance 'Sudden Passion' to mitigate punishment; and Counsel's failure to investigate and advance material witnesses.

Appellant asserts the above errors establishes Jurist of reason would find the District court's Grant of 'Summary Judgment', in the presence of still disputed and unresolved facts, is debatable or wrong, warranting the Grant of COA. See Miller-El v. Cockrell, 123 S.Ct. 1094, (2003). See also argument advanced, infra; Rule 56 (c), et.al., Rules Of Civil Procedures; U.S.C.A., Amend. 5; 14.

VI.

-Material Facts Still In Dispute-

POINT OF ERROR NUMBER ONE

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH EVERY FACT NECESSARY TO CONSTITUTE THE OFFENSE CHARGED

ARGUMENTS, AUTHORITIES and DISCUSSIONS

Petitioner asserts the Lower Court(s) determination of the facts is contrary to the Law, as it relates to the facts. Moreover, said determination by the District Court, issuing a 'Summary Judgment' conflicts with Federal Laws, as determined by the United States Supreme Court. Your Petitioner presented argument, corroborated by the record evidence and 'newly discovered evidence' of recanted testimony, that proves no jury, acting reasonably, would convict, and proves the evidence is wholly INSUFFICIENt. Your Petitioner asserts the District Court's Ruling is contrary to, and involves an

unreasonable application of Federal Law, as determined by the United States Supreme Court, namely, Jackson v. Virginia, 99 S.Ct. 2781, (1979), and its progeny. See also Williams v. Taylor, 120 S.Ct. 1495, (2000); Slack v. McDaniel, 120 S.Ct. 1595, (2000), and their progeny.

The Magistrate, in its determination of this point of error, seeks to have the claims dismissed on 'procedural grounds', asserting Petitioner's argument of "NO EVIDENCE" to establish every fact necessary to constitute the offense charged is now cloaked as a challenge on the SUFFICIENCY of the evidence. (See page 21, of Magistrate's response)("With respect to [Tatum's] first ground for relief, a claim of insufficiency of the evidence does not state a claim for relief in habeas corpus. Ex Parte Easter, 615 S.W. 2d 719, (Tex. Cr. App. 1981). Though [Tatum] couches his argument as 'no evidence' he challenges the sufficiency of the evidence as to self-defense and sudden passion."). Petitioner contends this Court should reject the Magistrate's argument, and Grant his INSUFFICIENT EVIDENCE challenge, in light of the fact the State Court's determination is contrary to Federal Laws, as determined by the United States Supreme Court, and involves an unreasonable application of Federal Law, in light of the facts presented.

In Jackson v. Virginia, supra, the United States Supreme Court has long ruled 'Sufficiency of The Evidence' is essential to Due process of Law, making the same Constitutional. In addition, the United States Supreme Court

specifically and pointedly highlighted the "NO EVIDENCE" challenges to the sufficiency of evidence violates Due Process of Law and is Unconstitutional. See Jackson v. Virginia, 99 S.Ct. at 2788-2789, wherein the Court resolved the conflict between the "NO EVIDENCE" criterion of Thompson v. Louisville, 80 S.Ct. 624, (1960), and the "INSUFFICIENT EVIDENCE" criterion established in In Re Winship, 90 S.Ct. 1068, (1970). The Supreme Court asserted, "Under Winship, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment Due Process, it follows that when such a conviction occurs in a State Trial, it cannot constitutionally stand", 99 S.Ct. at 2788. Moreover, the Court opined, "That the Thompson "No Evidence" rule is simply [inadequate] to protect against misapplications of the Constitutional Standard of reasonable doubt is readily apparent. A mere modicum of evidence may satisfy a 'No Evidence' Standard.. the Thompson "No Evidence" Standard simply Fails to supply a workable or even a predictable standard for determining whether the due process command of Winship has been honored." Jackson, 99 S.Ct. at 2789; 2790. In light of the State's unconstitutional usage of the 'No Evidence' Criteria in challenges to the sufficiency of the evidence to convict, and in light of the clear argument by the United Supreme Court that 'guilt beyond a reasonable doubt' is essential to the Due Process Clause, this Court has jurisdiction to correct a fundamentally flawed conviction, as "Congress in § 2254, selected the Federal District Courts as precisely the forums that are responsible for determining

sufficient 'reasonable belief' he could not retreat, was threatened, and was compelled to act in self defense. (See Statement Of Facts, supra). Petitioner advanced his claim, 'in substance', and asserts the sole standards the Federal Judiciary analyzed challenges on the evidence is the 'Insufficient Evidence' standard enunciated in Jackson v. Virginia, supra. Consequently, your Petitioner asserts his conviction was obtained in breach of Federal Law, as defined by the United States Supreme Court precedent in Jackson.

The sole purpose of a State Habeas challenge is to highlight whether or not the conviction was obtained in breach of the United States Constitution. The Supreme Court has determined 'guilt beyond a reasonable doubt' is the essential of Due Process guarantee, defined as "every fact necessary" to constitute the offense charged. In Re Winship, supra; Jackson v. Virginia, supra; U.S.C.A., Amend. 14. Your Appellant's assertion there exist 'No Evidence' to establish "An Absence Of Sudden Passion", and "An Absence Of Self Defense", comports with the 'Equal Probability' and 'Equal Possibility' argument advanced in Cruz, supra; Reveles, supra, and are implied elements of the offense of Murder. It should follow whenever the State fails to establish 'An Absence Of Sudden Passion', and an 'Absence Of Self Defense', as these terms are defined by Law, this Court should find a breach of the Jackson v. Virginia, mandate, and that Appellant met his burden of establishing the evidence was wholly insufficient to constitute the offense charged. The lower court(s) erred and

abused its discretion in disregarding Appellant's evidentiary challenge on the sole standard recognized by the Federal Courts, i.e., the Jackson Standard, by erroneously concluding your Petitioner's unconstitutional 'no evidence' standard should not be regarded under the Jackson Insufficient Evidence Standard, and thereby rejecting Appellant's constitutional challenge of his conviction on the grounds of Insufficient Evidence. The lower court erred in determining there exist no 'material facts in dispute' on said point, and hence, erroneously granted 'Summary Judgment' against Appellant without the appropriate resolution of said error, when there patently exist material facts still in dispute that warrant the foreclosure of 'Summary Judgment'. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, (1986) and its progeny; Rule 56, F.R.C.P., supra. Appellant presents an Affidavit from the State's key witness, CHARLIE IVORY, who 'recanted' his version of the events presented to the Jury. IVORY's Affidavit aligns with the defense witness and Appellant's version of the event. (See Exhibit "A", annexed hereto). Said recantation places the material facts of the case in dispute, that warrants resolution. The lower court erred and abused its discretion for disregarding said controverted, unresolved facts material to the legality of Appellant's confinement.

Moreover, the District Judge misconstrued hand gestures made by the Complainant as a form of 'surrendering', and made an issue of the fact the Complainant was 'surrendering' and posed no threat to Appellant, that justified his getting shot

in the leg. (See Magistrate's Recommendation, adopted by the Court, pg. 22). The gesture of 'holding one's hands up or out front' is a gesture common amongst African-American males that indicates 'what's up' or 'what do you want to do', all inferring I'm ready for battle. The common African-American male from the streets would verify the above. Assuming, arguendo, the Complainant did in fact raise his hands outward or upward, it is of no consequence. Witnesses verify the Complainant was banging on Appellant's car, was fumbling under his shirt as if he had a weapon, and sought to drag Appellant out of his own car. This, by law, constitutes 'provocation' or caused such fear and threats to Appellant's life as to warrant the use of 'deadly force' to stop the other's advances against Appellant. The Complainant was right in front of Appellant's car when he got shot. The District Court ignored Appellant's claim that he felt threatened and in fear of his life when the Complainant sought to yank Appellant from his own vehicle. Appellant 'reasonably believed' he observed the Complainant reaching for a gun under his short, and shot the Complainant to preclude harm. IVORY's Affidavit corroborates Appellant's version, as well as witness ALEXANDER testimony that the Complainant was [fumbling with his shirt, as if he was reaching for a weapon.] (R. V - 13). Petitioner asserts IVORY's Affidavit Buttress his Insufficient Evidence claim, and that no jury, acting rationally, would have determined the State met its burden after throwing IVORY's Affidavit in the evidentiary mix. See Ex Parte Elizondo, 947 S.W. 2d 202,

(Tex. Cr. App. 1996); Schlup v. Delo, 115 S.ct. 851, 864, (1995)(the Supreme Court explained that a 'Petitioner must show that the constitutional error "probably" resulted in the conviction of one who is actually innocent of the charged offense). Weighing the newly discovered evidence of IVORY's exculpatory statements against his inculpatory statements at trial, Appellant asserts the Jury would have been obligated, after being properly instructed, to determine the State cannot meet its burden of finding 'proof beyond a reasonable doubt' that Petitioner is guilty of the charged offense of Murder, as that term is defined, in the absence of the infered lesser elements of the offense. See Herrera v. Collins, 113 S.Ct. 853, (1993). Clearly, at best, the evidence gives rise to 'equal probabilities' and 'equal possibilities' concerning the key element of the offense, and this, by law, amounts to "NO EVIDENCE" at all in support of the key elements of the offense. See U.S. v. Reveles, supra.

VII.

-Inability To Retreat-

On page 22 of the Magistrate's recommendation, it was noted that "critical to the Jury in this case, as reflected in the jury notes sent to the Court during deliberations, was whether Tatum was prevented from leaving the parking lot before the shooting." The Magistrate then relied upon one (1) witness, alleged to be [uninterested], who testified there was no car in front of Tatum's at the exit. This alleged

[uninterested] witness testimony is refuted by four (4) other witnesses, including the State's Key Witness, CHARLIE IVORY, and State's Exhibit No. 47, which depicts clear damage to the front area of Appellant's vehicle as he attempted to escape but was blocked in. Said four (4) witnesses, along with State's Exhibit No. 47, presents evidence and material facts in dispute, establishing the District Court erred in its grant of summary Judgment against Appellant on this point. See Celotex Corp v. Catrett, supra.

VIII.

-Sudden Passion-

Your Appellant asserts the evidence clearly gives rise to 'Sudden Passion', which is an implied element of the offense of Murder, warranting the proof of 'An Absence of such influence.' Appellant relies upon the case of Mullaney v. Wilbur, 95 S.Ct. 1881, (1975), and its progeny, along with this Court's factually similar case of Holloway v. McElroy, 632 F. 2d 605, (C.A. 5 - 1980), which stands for the proposition that the 'absence of Sudden Passion' is an implied element of the offense of Murder. When the evidence gives rise to such an influence, the State is compelled to establish an 'absence' of such an influence, beyond a reasonable doubt. See also the case of Gold v. State, supra. It is clear Texas Penal Code, Art 19.02 (2)(B)(3) establishes that Murder is committed when the cause of death is [Other Than Sudden Passion]. The evidence in the instant case clearly

establishes your Appellant acted under the "immediate influence of a passion such as terror, anger, rage, etc., and hat 'provocation' was induced by the Complainant, IVORY and others, seeking to harm him, which produced such a passion in a person with ordinary temper, prompting your Appellant to act without the capacity for cool reflection, and that there exist a causal connection between the provocation, passion and the resulting homicide. McKinney v. State, 179 S.W. 3d 565, 569, (Tex. Cr. App. 2005); Hernandez v. State, 127 S.W. 3d 206, (Tex. App. 1st Dist. 2003); Escobedo v. State, 202 S.W. 3d 844, (Tex. App. 10th Dist. 2006); Swaim v. State, 306 S.W. 3d 323, (Tex. App. 2nd Dist. 2009).

The Magistrate, in its recommendation adopted by the District Court, seeks to negate Appellant's claim of nsufficient Evidence, contending there are no 'material facts in dispute on this ground of relief,' and seeking to negate IVORY's entire recanted testimony as 'unreliable.' (See page 20, footnote 1 of the Magistrate's recommendation). The Magistrate erred. Due Process and the interest of justice warranted the resolution of said claim via a full and fair Evidentiary Hearing. See Richards v. Quarterman, 578 F. Supp. 2d 849, (N.D. Tex. 2006).

Because the District Court's adoption of the Magistrate's recommendation is contrary to Federal Law, as determined by the United States Supreme Court, argued, supra, and because the State's Court's determination breached 28 U.S.C § 2254 (d)(1)(2), this Court should determined the District Court

In the case at bar, your Appellant asserts Counsel rendered unreasonable, ineffective assistance of Counsel in light of the following omissions and commissions, to wit:

1. Trial Counsel Rendered Ineffective Assistance Of Counsel For Omitting To Advance "Sudden Passion" To Mitigate Charge And Punishment;

2. Trial Counsel Rendered Ineffective Counsel For Omitting To Adequately Investigate The Case;

3. Trial Counsel Rendered Ineffective Counsel For Omitting To Object At Various Stages At Trial;

(1) Trial Counsel erred and rendered Ineffective Counsel for omitting to advance argument on 'Sudden Passion', to mitigate the charge and punishment. Your Appellant relies upon the cases of Mullaney v. Wilbur, supra; Holloway v. McElroy, upra, and related cases, (See argument advanced, supra, pp. 24-26 - addressing 'Sudden Passion'), and asserts the record evidence establishes sufficient aspects of 'provocation' giving credence to the lesser included offense of 'Voluntary Manslaughter'. Counsel, in his response to Applicant's "B" Writ, Conceded to not advancing 'Sudden Passion' as mitigation to the charge and punishment. (See Counsel's Affidavit of 10/7/13) Counsel knew or should have known effective representation and his 6th Amendment duties warranted his advancing Jury Instructions on 'Sudden Passion', to mitigate the Charge and Punishment, when the evidence clearly gives rise to fact there was an adequate provocation, that a passion or emotion such as fear, terror, anger, rage or resentment existed, and that the homicide occurred while the

passion still existed and before there was reasonable opportunity for the passion to cool, and that there exist a causal connection between the provocation, the passion and the homicide. See Davis v. State, 268 S.W. 3d 683, (Tex. App. 2nd Dist. 2008); Gold v. State, 736 S.W. 2d 685, (Tex. Cr. App. 1987); Holloway v. McElroy, supra; Mullaney v. Wilbur, supra. Counsel's non-objection and non-explanation to his not advancing the 'lesser included offense' of 'Voluntary Manslaughter', to mitigate punishment and the charge, clearly gives light to 'Material Facts Still In Dispute' that warrant resolution and the denial of the Magistrate's "Motion For Summary Judgment." See also Swaim v. State, 306 S.W. 3d 323, (Tex. App. 2nd Dist. 2009). (See also statement of facts, supra). But for Counsel's malfeasance and nonfeasance, in omitting to advance argument to mitigate the charge and punishment, there exist a reasonable probability the entire outcome of the trial and/or punishment would have altered, Strickland v. Washington, supra. A single error or omission may be the focus of a claim of Ineffective assistance as well. U.S. v. Cronic, supra.

(2) Appellant asserts Counsel rendered unreasonable, ineffective assistance for omitting to adequately investigate the case, by establishing, advancing and interviewing witnesses who would have corroborated your Appellant's vehicle suffered front damage, as a result of Appellant's attempt to retreat from the scene and avoid the shooting. Newly

Discovered Evidence, as highlighted in CHARLIE IVORY's Affidavit, proves your Appellant's crashed into IVORY's car, in Appellant's effort to flee the scene. ("It was my car that Tatum hit while trying to flee")(See Exhibit "A" annexed hereto and can be referenced for this claim). Damage was done to both Appellant's and Ivory's car. (See State's Exhibit No. 47). Counsel knew or should have known effective representation and the 6th Amendment guarantee warranted his investigating and advancing witnesses who would have corroborated the Appellant's version of the events, namely, the car repair shop that Appellant visited to have the front end of his car repaired. Appellant specifically and pointedly advised Counsel of the repair shop. Moreover, it was the determination of Appellant's attempt to flee that had the Jury strained in its deliberation. By hiring an Investigator to establish the damage to Appellant's car, Counsel could have established the key element of self defense. Appellant assert but for Counsel's nonfeasance, in omitting to investigate and advance witnesses to corroborate the damage to his car, there exist a reasonable probability the outcome of the trial would have altered. Strickland v. Washington, supra.

(3) Counsel rendered ineffective assistance for failing to object to: (a) a venireperson's comment that a person was guilty if he was arrested and tried, thereby tainting the entire Jury pool. See Knight v. State, 839 S.W. 2d 505, (Tex. App. Beaumont 1992); Gray v. Mississippi, 107 S.Ct.

2045, 2056, (1987); Gomez v. United States, 109 S.Ct. 2237, 2246, (1989); (b) the State presentment of uncorroborated and non-factual extraneous offenses, specifically, alleged threats to the Complainant's mother that Appellant never committed; and (c) the State's comments about drug dealers, gang members, drive-by shootings and street justice, which were calculated to inflame the jury. But for Counsel's nonfeasance, there exist a reasonable probability the entire outcome of the Trial would have altered. Counsel was 'verbally reprimanded' by the State Bar of Texas for his deficient performance in representing Appellant, establishing their investigation proves Counsel's malfeasance and nonfeasance in his representation of Appellant.

Your Appellant asserts 'material facts in dispute' still exist, and that the resolution of the 'newly discovered evidence' cannot be resolved in the absence of a full and fair evidentiary hearing to determine the validity of IVORY's recantation. Had the Jury heard the 'recanted' testimony of IVORY, there exist a reasonable probability the entire outcome of the Trial would have altered. Hererra v. Collins, supra. Moreover, the record evidence establishes the mitigating evidence of the lesser included offenses of both 'self defense' and 'voluntary manslaughter', which mitigates the charge and/or punishment. Appellant established Counsel rendered deficient performance and ineffective assistance of Counsel that warranted the foreclosure of 'Summary Judgment' by the lower court.

PRAYER FOR RELIEF

WHEREFORE, PREMISES, ARGUMENTS and AUTHORITIES CONSIDERED, your Appellant prays the Court would determine 'Jurist of reason' would find the lower court's determination debatable or wrong, warranting the grant of C.O.A. Miller-El v. Cockrell, supra Appellant prays the Court would determine the lower court erred and failed to apply the governing legal principles to the facts of the case. William v. Taylor, supra. Appellant prays the Court would find the lower court's decision was contrary to, and involved an unreasonable application of clearly established Federal Law, as determined by the Supreme Court, and was premised upon an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254 (d)(1)(2), Williams v. Taylor, supra.

Appellant prays the Court would find the lower court erred in granting 'Summary Judgment' when there patently exist material facts in dispute that warrants resolution. Rule 56(c), supra, and prays the Court would encourage Appellant to proceed further by Granting this Certificate of Appealability with Brief in support, or alternatively, any other, further or different relief this Court deem is just and proper, in the interest of justice. It is so prayed for.

Respectfully submitted,

Kevin Terrell Tatum

KEVIN TERRELL TATUM #1409740
Appellant Pro Se
Darrington Unit
Rosharon, Tx. 77583

A F F I D A V I T

PURSUANT TO TITLE 6, CHAPTER 132, V.T.C.A., CIVIL PRACTICE AND REMEDIES CODE; AND 28 U.S.C. § 1746:

I, KEVIN TERRELL TATUM, Appellant, Pro Se, being currently confined in the TDCJ-ID, Darrington Unit, located in Brazoria County, Texas, have read the foregoing Writ Of Certiorari w/Att. filed in good faith, and hereby DEPOSE and DECLARE under the pain and penalty of PERJURY the foregoing Writ Of Cert. is true and correct to the best of Appellant's belief and knowledge.

Executed on this the 29 day of April, 2019.

Kevin Terrell Tatum

KEVIN TERRELL TATUM #1409740
Appellant, Pro Se

CERTIFICATE OF SERVICE

Appellant, KEVIN TERRELL TATUM, files this his Pro Se Writ Of Certiorari w/Att. in good faith, hereby Certify that a true and correct legible copy of said "Writ" was served on THE OFFICE OF TEXAS ATTORNEY GENERAL, Mr.Jon Meador, on this the 29 day of April, 2019.

Kevin Terrell Tatum

KEVIN TERRELL TATUM #1409740
Appellant Pro Se
Darrington Unit
Rosharon, Tx. 77583