NO. 19-6660

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

RONALD F. SCHERMERHORN, JR. - PETITIONER

vs.

LORIE DAVIS - DIRECTOR, TDCJ-CID - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO:

OPINION OF:

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

ON APPLICATION FOR CERTIFICATE OF APPEALABILITY FROM

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) When Opinion reflects Appellate Court relies on States Findings, and Litigant has asserted, States Findings are not entitled to deference because, primarly, "Question of Statutory Law" i.e. Chap. 593 § 4.01(a), presented at trial court have never been addressed and all proceeding Courts have passed on the issue. When this Statute as utilized, applying law in an Ex Post Facto manner has Never been addressed,

Should Litigant have confidence that he received a Constitutionally Full and Fair Procedure?

2) When COA is denied and Opinion reflects the Court relies only on erroneous State Findings, clearly not entitled deference, Does Court of Appeals error conducting merit analysis with only these findings, subjecting Litigant to a higher standard at the COA stage?

3) When State Prosecutor alters offense information reports date for indictment, soley for Statute Compliance, and, Trial Judge differs from Habeas Judge, who, orders affidavits for Findings, Objected to being not reflective of the record, and subject to "Confrontation Clause", and, Prosecutor withholds from "Fact Finders" (Jury), material facts, Statutory in nature and pertinent to accused guilt or innocence of the charge;

Was Litigant denied a Full and Fair Trial pursuant to United States Constitutional Norms?

4) Appellate Court issues opinion that reflects [It] did not review seperate "Brief in Support of (my) COA" by asserting issue of abandonment, contrary to brief. When a Litigant assert his review was not Full and Fair, Proving thru, the Courts own Computer records (P.A.C.E.R) that, Documents were mis-filed, and never corrected despite Litigant's pleas,

Should Litigant have confidence that his ~~=CASE-~~ was Fully and Fairly Reviewed ?

LIST OF PARTIES

All parties appear in the caption of the case on Cover Page.

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Pertinent copies of Reporters Records enclosed

TABLE OF AUTHORITIES

STATUTES AND RULES

ABBREVIATIONS

app. - application
Art. - Article
CC - Courts Charge
Chap.- Chapter
CoA - Court of Appeals
COA - Certificate of Appealability
Ct - Court
Dist.- District
FHC - Federal Habeas Corpus
FOF - Finding of Facts
SHC - State Habeas Corpus
trav.- traverse
SANE - Sexual Assault Nurse Examiner
Bf - Brief
Leg.- Legislature
H.B.- House Bill
mem.- memorandum
obj - objection
Op. - Opinion
para- paragraph
pet.- petition
Gen - General
Reg - Regular
spec- special
sup - support
RR - Reporter Record

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ronald F. Schermerhorn Jr. respectfully petitions this Honorable Supreme Court of the United States for Writ of Certiorari to review; Order issued by United States Court of Appeals for the Fifth Circuit. On June 26, 2019 Petitioner received order from Court of Appeals denying Certificate of Appealability, dated June 19, 2019, that conflicts with 28 U.S.C. § 2253. And, On August 13, 2019, Three member panel denied Petition for Rehearing, renamed by the Court, "Motion for Reconsideration"

PETITIONER'S OPENING PRAYER TO THE COURT

Petitioner prays this Honorable Court to review this Petition for Writ of Certiorari under the more liberal standard established by this Honorable United States Supreme Court in **Haines v Kerner**:

> "...pro se pleadings are to be construed liberally and held to less stringent standards than formal pleadings drafted by lawyers, if the court can reasonably read claims to state a valid cause of action upon which litigant could prevail, it should do so despite litigant's failure to cite proper authority, confusion of legal theories, poor grammer, and sentence construction of a litigant's unfamiliarity with pleading requirements."

404 U.S. 519 (1972)

OPINIONS PRESENTED

The Opinion(s)/Decision(s) presented for review do not indicate they are not published and are attached as:

Appendix "A" - United States Court of Appeals for Fifth Circuit dated June 19, 2019, on review for Certificate of Appealability from; Opinion of:

Appendix "C" - United States District Court, Northern District of Texas, dated August 17, 2018. 4:17-CV-559-Y, And,

Appendix "B" - Appellant's Petition for Rehearing denied Aug. 13, 2019

JURISDICTION

On June 19, 2019, United States Court of Appeals for Fifth Circuit denied Petitioner's Certificate of Appealability. Petition for Rehearing was denied by the same court on August 13, 2019, and a copy of denial appears at Appendix "B". On August 29, 2019, Petitioner filed Application for Extension of Time, that this Honorable Court returned as un-needed, having determined Petitioner's time to file was tollable from order dated August 13, 2019.

Therefore, Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1)

> "cases in the courts of appeals may be reviewed by the Supreme Court by the following...By Writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of Judgment or decree."

28 U.S.C. § 2253(c)

> "(1) Unless a circuit justice or judge issues a Certificate of appealability, an appeal may not be taken to the court of appeals from-"
>
> "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court."
>
> "(2) A certificate of appealability may issue uder paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right"

28 U.S.C. § 2254

> "(a) The Supreme Court, a justice thereof, a circuit judge, or Dist. Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States"

United States Constitution:

Article "I" § 10

"No State shall enter into any...ex post facto law,..."

Amendment 5

"No person shall be...deprived of life,liberty,or property without due process of law"

Amendment 6

"In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process...and to have the assistance of (reasonably effective) counsel"

Amendment 14

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws"

State of Texas Application of:

H.B. 8 Chapter 593 § 1.17 created by 80th Legislation,Reg. Ses. 2007 "Tex.Penal.Code. 21.02 Continuous Sexual Abuse..." eff Sept. 1 2007

Chapter 593 § 4.01(a) Transistion and Effective Date" provision which states in 3 sentences:

1) "Except as provided by subsection (b) and (c) of this section the change in law made by this Act applies only to an offense committed on or after September 1, 2007." and

2) "An offense committed before September 1, 2007 is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose." and

3) "For the purpose of this section an offense was committed before September 1, If Any Element of the offense occurred before that date."

STATEMENT OF CASE WITH FACTUAL BACKGROUND

Petitioner, Ronald F. Schermerhorn at trial pled "Not Guilty" to wit: "Aggravated sexual assault of a child" (RR3 9-10), but was found guilty and sentenced to Life on the Greater Offense, "Continuous sexual abuse of a child..." (Tex. Penal Code § 21.02) by a Jury, that had withheld from them (RR3 145:23-24), The Statutory provisions included by Texas Legislature on House Bill 8-Chapter 593 § 4.01(a). See (Exhibit "F" at 1148)

This new statute, passed by Texas 80th Legislature, Regular Session had no predecessor and an effective date of September 1, 2007.

Petitioner met Sanchez family during a lake flooding event summer 2006 (RR3 11:14-17; 21:10-14; 59:9), when the Sanchez family trailer had to be moved to higher ground, and relocated next to Petitioner's unit. The children of the "families" became inseperable, and spent every waking moment together. (RR3 22-23).

Petitioner involved his business, giving the Sanchez family's Special Olympics Team, "Grand Prairie's Pride", a sponsorship and financial support with sponsor paid outings to Sporting events, various water and amusement parks, theatrical restraunts, and camping trips. Petitioner's company also provided "limited" life skills employment to Max Sanchez, (father of complainant Q.S.) and other qualified team members not related to the Sanchez family. (RR3 25-26)

Petitioner in late 2010 informed Gina Sanchez, (mother of Q.S.) also special needs (RR3 15:14), that Petitioner would have to close his business and discharge employees, including Max, and could no-longer sponsor or provide monies for their Special Olympics Team. (RR3 26)

Under the disguise of 'disipline' Petitioner received a "text" from Q.S. asking me to let "Micah and Emma" know that, Herself, JoJo, and Lil Max would not be allowed over anymore, that "mom" was mad, and she or JoJo would call or text later. (RR3 48:14-16; 50:22-51:6).

After no contact for 4 months, Q.S. was locked up in a room for over four hours (RR3 48:18-21; 84:24) and not allowed to leave until she conveyed a believable story. (Q.S.) was coerced and peppered by four different, angry, and upset people with questions of abuse (RR3 48:18-21-84:24-86:16) and was only allowed to leave 4 hours later when story given emulated her "severly" mentally challenged (RR3 16:16-17), big sister Jo Jo's suggestions. (RR3 88:23).

Complainant, (Q.S.), an impressionable, high functioning, special needs person (child)(RR3 18) alleged after coercion (RR3 154:23). that she had been assaulted and penetrated by Petitioner Hundreds of times, (RR3 83:7-12) beginning the day they met at the lake. (RR3 63:12-64:9).

Testimony by Sexual Assault Nurse Examiner (SANE) is contradictory to testimony of (Q.S.). SANE testimony indicates: Complainant's speculum exam was "**Normal**" and "**Not Consistant**" with being sexually assaulted. Her exam "**was consistant**" of a post-pubescent virgin, hymenal tissue **Intact**, No signs of teaing, and NO evidence of Any Penetration, that would be consistant **IF** sexual assault or abuse had occurred, (RR3 143:11-144:25).

Prior to Charge being read: State was challenged "outside presense of jury" (RR3 145:23-146:2), that evidence heard indicates, first alleged penetration began prior to statutes inception, thus State were prosecuting "Continuous sexual abuse...""outside purview of law" (RR3 146:15-17)

Contrary to Statute provisions, complaint and testimony of (Q.S.)

State responds: "we have alleged September 15, 2007, because that's when the continuous statute came into play" (RR3 147:1-3)

---> Not when alleged Act allegedly began per complaint and testimony<---

State then attempts to cure defect by stating:

"anything that happened before would simply be a lesser-included offense." (RR3 147:4-7)

See (Exhibit "G" for Directed Verdict Hearing, above)

Both Statements contrary to statute provisions, which provides:

"An offense committed before September 1, 2007, is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For the purpose of this section and offense was committed before Septemeber 1, 2007, if Any Element of the offense occurred before that date."

See (House Bill 8, Chapter 593 §-4.01(a) sentence 2, 3 (Exhibit "F" at 1148))

Yet, visiting trial judge denied "Directed Verdict motion" (RR3 147:8)

The Jury brought back in, the charge read to the Jury, (RR3 148:7) See (Exhibit "CC"), that contained verbage allowing Juror's to select a date of offense prior to statute inception. Instead of "Corrective Instruction limiting jury to evidence of alleged acts occurring after Sept. 1 2007 Statute's inception. Furthermore, No corrective instruction was orally given limiting date range for jurors fact finding, in light of confliction between statute's inception and evidence presented, returning a finding of Guilt, and never polled (RR3 164).

Post Trial - Direct Appeal

Petitioner urged his appointed appellate counsel to address the Jury charge issue that directly affected Ex Post Facto issue, "ignoring his client's instructions" See (Writ of Certorari 16-9496) at 9, responds "I can only address the record". States findings implied thru affidavit that Appellate Counsel failed to do so:

(95: Hon. Salvant did not attack the jury charge because there was no legal reason to do so. See Affidavit)

(98: Hon. Salvant did not make ex post facto violation claim because there was no legal reason to do so. See Affidavit)

See (States FOF. - Exhibit "K" at 11:21 # 95, 98)

Texas Court of Criminal Appeals - State Writ of Habeas Corpus

Petitioner filed State Writ of Habeas Corpus July 16, 2016, specifically addressing applicable "Date issues" of charge without corrective instruction. This allowed jury to make findings on testimonial evidence of Acts alleged, prior to statute's inception on Sept. 1, 2007. State instructing: (they are not bound by dates) (SHC.app at 8; mem. at 13; FHC.mem. at 8 And further withholding statutory information of Chap. 593 § 4.01(a) from jury. (SHC.app. 6; mem. at 1-7; Exhibit "D" at 22)

When State ordered Affidavits for Findings, Petitioner filed objection citing "Confrontation Clause violation", by certified mail, Return Receipt never responded to. See (Exhibit "H") ; and (Exhibit "D" at 14)

State findings were infered to by affidavits, Petitioner again objected, citing "Confrontation Clause violation" and Ex Post Facto with Due Process violations by State, withholding from jury, statutory implementation Article-Chapter 593 § 4.01(a), misleading the "visiting" Trial Court Judge on the statutory law. See (Exhibit "J" at 1-3); (Exhibit "D" at 12, 13).

Thereafter, Habeas Judge, who did not preside at trial, adopted State findings, without 1st hand knowledge of trial. State implies: "because the alleged offense occurred after the effective date of statute, Applicant has failed to prove ex post facto violation" See (Exhibit "K" at 13:5).

Objection clearly shows "an offense was committed before September 1, 2007, If Any Element of the offense occurred Before that date." See, (Exhibit "J" at 4; Exhibit "F" at 1148 "Chap. 593 § 4.01(a)"). Furthermore, **NO WHERE** in findings or proceedings does State articulate or defend Why, Article 4 of H.B. 8 chap. 593 § 4.01(a) is ignored and **NEVER** addressed.

On April 12, 2017, Texas Court of Criminal Appeals (denies without written order or hearing, Petitioners writ of habeas corpus on findings of (habeas) court.)

United States Supreme Court

This Honorable Court received June 6, 2017 Petitioner's Writ of Certiorari mailed May 30, 2017, to review Texas Court of Appeals decision. This Honorable Court docketed case as No. 16-9496 on June 12, 2017.

Writ demonstrated that: Jury was not given instruction to not include evidence prior to Sept. 1, 2007, the statute's effective date, nor were they apprised of statute limitations under chap. 593 § 4.01(a) See (Exhibit "F" at 1148). Jury was erroneously instructed: "State is not bound by the specific date..." (Exhibit "CC" at 2-3; Writ 16-9496 at 8) When, evidence heard indicates: **IF**, sexual assault occurred, it would have begun prior to statutes inception of September 1, 2007. (Writ 16-9496 at 7).

> "...this Act applies only to an offense committed on or after Sept. 1, 2007...an offense was committed before Sept. 1, 2007 if Any Element of the offense occurred before that date." (Chap. 593 § 4.01(a)).

Amazingly, State concede's, [It] altered the offense date from complaint to comply with statute requirements:

> "we have alleged September 15, 2007 because that's when the continuous statute came into play..."

(Exhibit "G" RR3 147:1-3; Writ 16-9496 at 7)

State **cannot** cure this defect claiming, "anything that happened before would simply be a lesser included offense" (RR3 147:4-7 Exhibit "G") when the only date testified to was "summer 2006", and therefore, since alleged beginning is 2006, the entire offense per statute would have allegedly occurred **PRIOR** to 2007 - and Ex Post Facto, per statute's plain text.

This Honorable Court denied Writ of certiorari on October 2, 2017, and further denied Petition for Rehearing on December 4, 2017.

United States District Court - Northern District of Texas

Petitioner filed his Writ of Habeas Corpus with United States District Court on October 12, 2017, with Motion to stay. See (4:17-CV-559-Y), showing the State Court was not entitled to deference in their Habeas findings, 1) Trial Judge and Habeas Judge differed, See (U.S.Dist.Ct.Dkt.30-Id #20 WR-86,330-01 Pro Se obj to FOF - Exhibit "J" at 2); 2) Petitioner thru clear and convincing evidence displayed: Trial Record on pleadings differed from findings. (Exhibit "K" at 3:6,7 cf RR3 9-10) and, (FHC.mem. at 6); 3) Confrontation Clause violation, "out-of-court" statements (affidavits) testimonial in nature, used for findings. 4) Petitioner rebutted findings; States usage of Tex.Penal.Code. § 21.02 - Chap. 593 § 1.17, when evidence presented is outside statute parameters of chap. 593 § 4.01(a), making its usage ex post facto, while State ignores even the Existance of Chapter 593 § 4.01(a). (FHC.mem.at vii-xii, 2)

On 28 U.S.C. § 2254 application, Petitioner demonstrated in ground 1, State was prosecuting ex post facto, introducing evidence of alleged offenses, allegedly beginning summer 2006, when statute chap. 593 § 4.01(a) states: "...this Act applies only to an offense committed on or after September 1, 2007." Altering complaint date for indictment, soley to comply with the "new Statute's" requirements:

> "we have alleged September 15, 2007 because that's when the continuous statute came into play."

(Exhibit "G" RR3 147:1-3; FHC.app at 11). And, State withheld from the jury effective dates and exceptions of statute 593 § 4.01(a)(FHC.mem at ix,2)

Yet, District Court concede's, without issuance of COA: "...testimony at trial reflects that...Petitioner (allegedly) began to engage in sexual activity with Q.S. in 2006..." (Dist.Ct.op - Appendix "C" at 2) And, "...the State Habeas court did not specifically address petitioner's Due Process claim" See (Dist.Ct.op at 8 - Appendix "C"), Nevertheless, fails to review de novo without AEDPA deference.

It was further addressed to District Court that Jury was improperly instructed to date applications to the charge, when testimony, if it is to be true and believed, indicates alleged offense began in 2006, prior to statute inception date of September 1, 2007.

> "you are further instructed...you are not required to agree unanimously on which specific acts of...were committed by the defendant or the exact date when those acts were committed." and, "...State is not bound by the specific date..." See (Exhibit "CC" 2:6 thru 3:2)

(SHC.mem. at 13; FHC.mem at 8; Exhibit "CC" at 2 para 6 thru 3 para 2)

Moreover, the charge **Does not**, include an instruction, nor were instructions given orally, in light of statutes effective date, that (You **cannot** consider evidence of alleged acts occurring prior to Sept 1, 2007)

An instruction of this type should have been used, But, was not, and with the jury told they could use any dates for the charge, it is Debateable what date the jury used for its findings of guilt, (when the only date in evidence is "summer 2006"), and "Prosecutor continues withholding important factual information in § 4.01(a)" from the Jury. See (FHC.mem. at 8)

Additionally, at no time, has **Any Lower Court** addressed the statutory application of chap. 593 § 4.01(a) at 1148, as it applied to Tex.Penal.Code § 21.02, located at chap. 593 § 1.17 at 1127, as Petitioner addresses both in every proceeding.

District Court limits its review to "the presumptive correctness" of State Courts factual findings (Appendix "C" at 5), despite, deference is not entitled, when "Questions of Law or Mixed Questions of Law and Fact" are present and at issue. And still, District Court concede's: "State Habeas Court did not specifically address Petitioner's Due Process claim" without reviewing de novo. (Appendix "C" at 8).

United States Court of Appeals for Fifth Circuit

While this Honorable United States Supreme Court requires all argument to be contained in the Writ of Certiorari without a seperate brief in support. Court of Appeals for Fifth Circuit requires arguments to be provided in a seperate brief in support. See (Exhibit "L")

Petitioner is 99.4% convinced, Court of Appeals **did not**, review his "Brief in support of his COA" See (Exhibit "D"), and would show following:

Opinion of Court of Appeals contains issues that the Court "deemed abandoned" i.e. "(Petitioner's) claims of actual innocence and ineffective assistance of counsel are deemed abandoned." (Appendix "A" at 4)

Opinion of District Court contains denia of actual innocence claim citing **Herrera**, for "no new reliable evidence")Appendix "C" at 10,11). Petitioner's actual innocence claim is a "**Schlup**" type claim, tied to Ineffective Assistance of Counsel for failure to admonish Petitioner of his right to testify, and denying this right, coupled with sufficiency of evidence. See (Appendix "C" at 12; and FHC.mem. at 10).

Furthermore, Ineffective Assistance of Counsel, though not a primary ground, is addressed at (Appendix "D" pg 17, 22, 27).

Petitioner further proves, the Court mis-filed Documents, See (Exhibit-"M" at 7 and "Q" at item "G"), and Never corrected despite certified letters pleading to do so (Exhibits "N" and "O"), clearly highlighting lack of confidence that Petitioner had a full and fair review of his brief.

Though Petitioner did not zealously pursue these issues, the are hardly abandoned, just insufficient room to argue, after, at District Court level, the Court required Petitioner to reduce his Brief from 41 pages to 25 per local rule. On the other hand, for the same reasoning in Petitioner motion for increas, Respondent's motion was granted, filing 39 pages. Petitioner, instead of arguing about an "unlevel" playing field, focused on his ex post facto issue, being clearly Unconstitutional.

Therefore, Petitioner demonstrates, he was denied a full and fair review of his "Brief in support of his COA" (Appendix "D").

On merit issues, Petitioner argues, he has never had a full and adjudication of his Ex Post facto Claim, in that, **All lower courts** have passed and failed to address chap. 593 § 4.01(a)(Exhibit "F" at 1148), that controls how and when the "Continuous..." statute may be applied, and when another penal code must be used. (Exhibit "D" at 7).

None of the lower courts acknowledge, the Fact finders, excused from the court room by retired visiting Judge, the Honorable David Cleveland: who presided over trial, but not Habeas proceedings: denied statutory issues, material to jurors assessment of facts as to guilt or innocence on "Continuous statute" as it applied to petitioner (Exhibit "D" at 23/29).

Further showing how "presumption of correctness"does not apply to State findings when this statutory issue of chap. 593 § 4.01(a), is fully and completely addressed by Petitioner at State Habeas Court Level, and **EVERY** proceeding thereafter, without a single court addressing (Exhibit "D" at 7)

The State further prejudiced Defendant, omitting Chapter 593 § 4.01(a) (Exhibit "F" at 1148) from findings, conclusions, all evidence and records that Fact Finders were Constitutionally entitled to in "their quest for the truth." (Exhibit "D" at 8)

While Petitioner asserts this withholding by state is intentional; it is apparent from the record, this was accomplished with the foresight that an ex post facto issue was being undertaken. State displays this by stopping abruptly at trial with "white board" presentation at years 2007-2008, see (RR3 53:25-55:7; SHC.mem. at 3; FHC.mem. at 1). Discussion, in the form of testimony between Q.S. and Prosecutor exhibits alleged acts a year or more prior to the "2007" entry on the board. (RR3 56:10-13). Prosecutor states: "let me put that up there on the board" (RR3 56:14-15). Prosecutor then realized, if she followed thru, it would be "Publicly" displayed to jurors offense was being prosecuted Ex Post Facto. Prosecutor asked Judge for (permission to approach) (RR3 56:16). After brief dicussion with Judge, Prosecutor Ferguson, reaskd questions, ignores "board" and misdirects, changing the subject asking Q.S. what she did at the lake (RR3 57:3-15).

To further support Petitioner's assemblage of truth, State is unclear how to respond at directed verdict hearing, Prosecutor Ferguson responds:

> "we have alleged Sept. 15, 2007 because that's when the continuous statute came into play" (emphasis added)

See (Exhibit "G"; RR3 147:1-3; FHC.mem. at 1; Pet.trav. at 3).

Prosecutor Ferguson in attempt to cure her unwittingly admittance of Ex Post Facto Violation states:

> "anything that happened before would simply be a lesser-included offense" (Exhibit "G"; RR3 147:6, 7).

Failing to realize, statute would forbid prosecution if alleged "Continuous..." act began **BEFORE** statute inception, as testimony implies, and District Court concede's. See (Appendix "C" at 2; Exhibit "D" at 6)

> "For the purpose of this section, an offense was committed before Sept. 1, 2007 If Any Element of the offense occurred before that date (and)...is covered by the law in effect when the offense was committed..." (Exhibit "F" at 1148 - 593 § 4.01(a) sentence 3, and 2)

See also (FHC.mem. at 2; Pet.trav. at 4; Exhibit "D" at 3, 7-8).

To further highlight States "Knowingly" violates "Ex Post Facto Clause". At closing arguments, State "subtly (changed its posture implying the alleged offense began a year later (2007) by altering testimony (and information report) of complainant..." to a time frame later and contrary to what was represented in opening statement and thru live testimony, soley for the purpose of satisfying Statute's effective date requirement found at Chapter 593 § 4.01(a) of House Bill 8, enclosed as (Exhibit "F" see 1148) (SHC.mem. at 8; Exhibit "D" at 5)(RR3 158:17; 159:4; 164:5).

Subtle Ex Post Facto Violations are no more permissable than overt ones. (Exhibit "D" at 9)

REASONS FOR GRANTING WRIT

United States Court of Appeals for Fifth Circuit, (hereinafter, Court of Appeals) concludes; "(Petitioner) cannot make the requisite showing on his Ex Post Facto Claim" (CoA.op. - Appendix "A" at 2) and,"(Petitioner's) claim of actual innocence...are deemed abandoned...For these reasons, (Petitioner's) request for a COA is DENIED." (CoA.op-Appendix "A" at 4).

Court of Appeals concludes: "The state habeas court correctly noted that the indictment charged (Petitioner) with acts occurring between September 15, 2007 and August 31, 2010..." and, ruling: "The state habeas court's conclusion that (Petitioner's) conviction did not violate the Ex Post Facto clause was correct, such that (Petitioner) cannot make the requisite showing on his Ex Post Facto Claim." (CoA.op-Appendix"A" at 2).

This Honorable United States Supreme Court hearing Buck v Davis, 137 S.Ct. 759 (2017) found a similar merits analysis, a flatly prohibited departure from the procedure proscribed by 28 U.S.C. § 2253. In the second sentence of Buck's opinion issued by same Court of Appeals: "Because [Buck] has not shown extraordinary circumstances that would permit relief...we deny application for COA." Id. at 774. And, this Honorable Court emphasized "until the prisoner secures a COA, the Court of Appeals may not rule on the ,erits of the case." Id at 773, 197 L.Ed.2d HN4, as should apply here.

In case at bar, District Court conceded without issuance of COA, Evidence introduced implies acts allegedly began prior to statute inception, (Dist.Ct.op-Appendix "C" at 2), and statute specifies, "if any element of the offense occurred before (Sept. 1, 2007)", then entire alleged act occurs before statute inception, thus statute may not be used and "is covered by--

-the law in effect when the offense was committed, and the former law is continued in effect for that purpose" (Exhibit "F"-Chap. 593 § 4.01(a) at 1148). Court of Appeals concluding: Petitioner could not make requisite showing Based upon State Habeas Conslusions. (not entitled to deference)

Here, as in **Buck**, "Court of Appeals side steps the COA process" by relying upon merit findings of State Habeas Court, "in essence deciding an appeal without jurisdiction" **Buck v Davis**, 137 S.Ct. 759, 773 (2017).

When at COA stage, Court of Appeals should limit it's examination to a beginning point inquiry into the fundamental basics of the claim, and ask "only if the District Courts decision was debatable". **Miller-EL v Cockrell**, 537 U.S. 327, 348 (2003).

Contrary to opinion of Court of Appeals and District Court, Petitioner did rebut findings thru clear and convincing evidence, from the record, and Exhibit(s) "J" and "H", that critical findings made by state habeas court were faulty and erroneous. See (Appendix "D"-Bf.in.sup.of.COA at7, 13).

While State Findings indicate: (the effective date of Continuous sexual abuse statute was September 1, 2007, See Tex.Penal.code. § 21.02, added by Acts 2007, 80th Leg.R.S.ch.593 (HB8) Sec. § 1.17 eff. Sept. 1 2007) See (Exhibit "K"-States FOF at 3:5), ignoring Sec. § 4.01(a). And,

Contrary to State Findings: The record reflects Applicant pled Not Guilty to a different, lesser charge: "Aggravated sexual assault..." see (Tex.Penal.Code § 22.021). Examine (RR3 9:19-10:11 and RR2 pg 4-5) compared to State's erroneous findings that "Applicant pled Not Guilty to Continuous sexual abuse of a child." (Exhibit "K"-State.FOF. at 3:6, 7) Also, erroneously stated in Courts Charge, Exhibit "CC" pg 1, para. 1, 1st sent.

In findings, State ignores pleas from Petitioner to examine and address critical implementation exceptions of Art. 4. See (Exhibit "F" at 1148) Broken down by sentence which reads:

1) "Except as provided by subsection (b) and (c) of this section the change in law made by this Act applies only to an offense committed on or after September 1, 2007." and

2) "An offense committed before September 1, 2007, is covered by the law in effect when the offense was committed and the former law is continued in effect for that purpose." and,

3) "For the purpose of this section an offense was committed before September 1, 2007, If Any Element of the offense occurred before that date."

(Exhibit "F" - House Bill 8 - Chap. 593 § 4.01(a) at 1148)

Furthermore, these matters of law, within the statute were withheld from the jury, who were excused from courtroom for reading. (RR3 145) This withholding of information from the "Fact-Finders", material to the statute Petitioner was being prosecuted on, deprives the Fact Finders of the materiality issue of applicable date range Jurors may use to reach a Constitutionally Just verdict, when withheld information provides a statute effective date of September 1, 2007, and, "if any element of the offense occurred before that date" the Act would not apply, and "the former law is continued", Unbeknownst to Jurors. Yet evidence presented to Jurors by State alleged acts began in 2006. This is an unreasonable application and contrary to clearly established federal law.

This Honorable Court, having heard <u>United States v Gaudin</u>, held: "Trial Judges refusal to submit question of materiality to the jury was unconstitutional." 115 S.Ct. 2310 (1995), and "confirms that the jurys constitutional responsibility is not merely to determine the facts but to apply the law to those facts and draw the ultimate conclusion of guilt or-

-innocence. The point is put with unmistakeable clarity in **Allen**, which involved the constitutionality of statutory inferences and presumptions." 115 S.Ct. 2310, 2316 (1995)(Quoting, **County Court of Ulsten City v Allen**, 442 U.S. 140, 156 99 S.Ct. at 2224 (1979)).

Petitioner demonstrating the convicting jury was denied material applicable dates, pertinent to implementation and exceptions to statute at 593 § 4.01(a). The Court, without issuance of COA still concede's: "the state habeas court did not specifically address Petitioner's Due Process claim" (Appendix "C"-Dist.Ct.op. at 8).

Contrary to statutory date requirements, the Courts charge reflects erroneous/faulty instructions for a finding of guilt by Jurors:

> "you are further instructed...you are not required to agree unanimously on which specific acts of...were committed by the defendant or the exact date when those acts were committed." and, "...State is not bound by the specific date" (Exhibit "CC" at 2, para 6 - pg 3, para 2)

See (Exhibit "D" - Bf.in.sup.of.COA. at 22).

This enabled Jurors to make a decision based soley upon what alleged to have occurred prior to statutes inception, unaware, State manipulated indictment in an Ex Post facto manner, altering dates of complaint to a date after statutes inception, to meet statutory provisions.

> "we have alleged September 15, 2007, because that's when the continuous statute came into play" (RR3 147:1-3; Exhibit "G")

Thus, it is unclear and debateable what date Jurors used for finding of guilt, when the only "date" provided thru evidence "summer 2006", is prior to statutes inception. Clearly Ex Post Facto, Clearly Debatable.

Altering "the legal rules of evidence and recieves less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender" is, Ex Post Facto. See **Calder v Bull**, 3 Dall at 390 1L.Ed 648 (1798)

Petitioner demonstrated that, not only is Jury deprived of pertinent material facts for Ex Post Facto application, but the District Court errors from the outset, Granting deference to State Haneas Findings when: State Trial Judge differed from State Habeas Judge, who holds hearing by affidavit on issues that include "mixed questions of law and fact", Objected to citing "Confrontation Clause", protected by 6th Amendment of United States Constitution. See (Exhibit "H"). Nor does State habeas Court conduct evidentiary hearing to resolve issues, including Ex Post Facto questions of law. States failure to do so results in: States Fact Findings were not entitled to a "presumption of correctness in Federal Proceeding" **Bower v Quarterman**, 497 F.3d 459 (5th Cir 2007). And Yet, Courts still "applies the presumption of correctness to those findings" in considering Petitioner's claims, without de novo review by Court of Appeals. See (Appendix "D" at 7, 13).

This is further contrary to Court of Appeals opinion in **Carty v Thaler** that, deference to state court decision also does not apply if: Petitioner properly exhausted his claim is state court, but the court did not adjucate the claim(s) on the merits, the Court of Appeals instead reviews claims de novo without AEDPA mandated deference. 583 F.3d. 244, 253 (5th Cir 2009).

> Does Petitioner meet this standard for de novo review after upon initial review, Dist. Court concede's "the state habeas court did not specifically address Petitioner's Due Process claim" (Appendix "C" 8) And, when, this Honorable Supreme Court in **Stoger v California**, note: State allowing prosecution of time barred statute violating Ex Post Facto Clause, also violates Due Process? 559 U.S. 607 (2003)?

Nevertheless, this review, granted deference to "presumption of correctness" further contrary to clearly established federal law. In **Miller v Fenton**, the Court noted presumption of correctness does not apply to : "Questions of Law or Mixed Questions of Law and Fact" 474 U.S. 104, 114 (1985)

Since a COA inquiry is not coextensive with a merits analysis:

> Does Court of Appeals error, not reviewing a threshold into the fundamental basics, that the State Findings contained error, and were not entitled to a presumption of correctness? And
>
> That deference should not have been afforded when Jurist(s) of Trial and Habeas Court differed and mixed questions of statutory law and facts withheld from jury remained unresolved?

Bearing in mind, Petitioner from the outset maintains his innocence, was not allowed to testify, nor admonished of this right, and States own Expert indicates thru testimony, that, physical evidence **WAS NOT** consistant with sexual assault, and Contradicts testimony of (Q.S.). State established in opening statement, followed by testimony, that, Petitioner met (Q.S.) in 2006, (RR3 11:14-17; 56:9)(Appendix "D" at 4), and it was summer of 2006 when alleged sexual assault began. (RR3 63:12-64:9)(Exhibit "J" at 4).

This new Statute implementation is specific, the three sentences read:

> "...this Act applies only to an offense committed on or after September 1, 2007. An offense committed before September 1, 2007 is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For the purpose of this section, an offense was committed before September 1, 2007, If Any Element of the offense occurred before that date." Chap. 593 § 4.01(a)

See (Exhibit "F" at 1148)(Gen.Sp.Laws.TX.80th.Leg.Reg.Ses.2007 593 § 4.01(a).

Only after the Jury, the ultimate Fact Finders were excused is the Statutory law brought forth preserved and questioned in Directed Verdict. (Exhibit "G"; RR3 145-147). This is Contrary to clearly established federal law. **United States v Gaudin**, confirms, a "jurys constitutional responsibility is not merely to determine the facts, but to apply those facts and draw the ultimate conclusion of guilt or innocence." 115 S.Ct. at 2316 (1995). Therefore, a Jury cannot perform it's consititutional resposibility when they are excused and not priviliged to material facts pertinent to charge.

Trial Counsel then addressed visiting Judge, (since state presented evidence that the alleged offense began prior to statutes inception, State is therefore prosecuting a statute outside purview of law.) (Exhibit "G" RR3 146-47) State with no regard for statutory provisions resopnds to the court:

> "we have alleged September 15, 2017, because that's when the continuous statute came into play." (Exhibit "G" RR3 147:1-3)

Nevertheless, Federal Courts fail to address the "matters of law" in the statutory application of Texas House Bill 8 Chap. 593 § 4.01(a), that State Habeas Court ignored in it's findings, followed by the same in lower Federal Courts. See (Exhibit "F" at 1148; and Appendix "D" at "v").

While it is well established, Federal Courts may not intervene in State Statutes, Federal Courts may intervene when application of said statute violated the constitutional rights of an accused.

Notwithstanding the negative findings of physical evidence, If testimony are to be true and believed, then alleged assault would have begun in 2006, **IF IT HAD HAPPENED.** On the other hand, since States Expert testimony supports that sexual assault **DID NOT** occur, then Petitioner's claim of actual innocence, being intertwined with sufficiency and Ineffective Assistance, both in the background, then Ex Post Facto Claim indeed has merit, is debateable, and at a minimum, worth of a COA.

State in their findings, with un-entitled deference only articulates what benifits the State, ignoring Due Procees Rights of an accused in Art. 4 of the Statute, specifically, Chapter 593 § 4.01(a). Similarly, this Honorable Court dealt with this same type of issue 2 decades ago in **Carmell v Texas**, 529 U.S. 534 120 S.Ct. 1620 (2000), arguing the "fairness of a statutes application, with Ex Post Facto ramifications.

In **Carmell v Texas**, 120 S.Ct. 1620 (2000), Justice Stevens noted:

> "...the Government refuses after the fact to play by it's own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction."

Texas used a newer version of Texas Code of Crimianal Procedure Art. § 38.07 to convict Mr. Carmell on 15 sexual offenses. Four of those counts were pre-September 1993, and subject to an earlier version of Art. § 38.07, that had an out-cry limitation of 6 months, in contrast to the newer applied version that had a 1 year, until the 18th birthday limitation.

State of Texas argued that Art. § 38.07 was an evidence rule, not subject to Ex Post Facto Clause. This Honorable Court disagreed, holding the newer version as applied was Ex Post Facto, and:

> "altered the legal rule of evidence and recieves less or different testimony that the law required at the time of the commission of the offense, in order to convict the offender." Id.

In **Calder v Bull**, 3 Dall, 386, 390 1 L.Ed.648 (1798), Justice Chase stated:

> "that the proscription against Ex Post Facto Laws was derived from English Common Law well known to the Framers, and set-out Four Categories of Ex Post Facto Criminal Laws", Making Unconstitutional:

1. "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action" or
2. "Every law that aggravates a crime, making it greater than it was when committed." or
3. "Every law that changes punishment and inflicts a greater punishment than the law annexed to the crime when committed." or
4. "Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

State of Texas historically repeats itself in case at bar, knowingly prosecuting Petitioner on a statute that did not exist at the time of the alleged beginning commission of offense, (regardless of date "alleged" on an indictment, that is not evidence), provides a harser minimum sentence,-

-providing for reduced quantum of evidence necessary for conviction, and eliminates jury enanimity. This as oppossed to prosecuting Petitoner on the law annexed to an alleged offense beginning in 2006, as mandated by Chap. 593 § 4.01(a), despite physical evidence, initally does not support charge.

While a prisoner that fails to make the ultimate showing that his claim is meritorious, does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus when reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decide(s) the merits of an appeal...(including "Findings on the merits"), then justifies its denial of COA based on its (findings)..." too heavy of a burden is placed on the prisoner at the COA stage. **Miller -EL v Cockrell**, 537 U.S. at 336, 337 123 S.Ct. 1029 (2003), departing from proscribed procedure, flatly prohibited by U.S.C. 28 § 2253.

Since the District Court implies: "Testimony at trial reflects... Petitioner (allegedly) began to engage in sexual activity with Q.S. in 2006" (Appendix "C" at 2); And, statutory provisions provide: 1) "...this Act applies only to an offense committed on or after September 1, 2007"; and, 2) "An offense committed before September 1, 2007, is covered by the laws in effect when the offense was committed, and the former law is continued in effect..."; and, most note worthy, 3) "...an offense was committed Before September 1, 2007, If Any E;ement of the offense occurred before that date." And When, Jury is not apprised of these facts, and hears evidence of offense prior to statute inception without - corrective instruction. It can not be determined what time parameter or date jury used when only one is introduced. Therfore, Prosecution would be Ex Post facto.

As in **Carmell v Texas**, 120 S.Ct. 1620 (2000), State fails in case at bar to follow its own rules, manipulating and bending them to prosecute a barred statute, hiding and withholding from the Fact Finders material facts they were Constitutionally entitled to. These withheld statutory provisions violated Petitioner's Constitutional Rights under Article "I" § 10 and Amendment 5 and 14 of the United States Constitution. See **United States v Gaudin**, 115 S.Ct. 2310, 2316 (1995). Under 28 U.S.C. 2253, this conviction should be deemed Constitutionaly debatable, worthy of (COA).

Additionally, it is a Due Process violation for State to allege an offense date that is not consistant with; information report, soley for the purpose of meeting statutory requiremnets, to prosecute an otherwise barred statute. **Stoger v California**, 559 U.S. 607 (2003).

> "we have alleged September 15, 2007 because that's when the continuous statute came into play." (emphasis added)

See (Exhibit "G"; RR3 147:1-3)

Furthermore, State cannot cure this defect by claiming:

> "anything that happened before (Sept. 1, 2007) would simply be a lesser included offense." (Exhibit "G"; RR3 147:4-7)

when the "before" date presented as evidence was "summer 2006", and the only date presented by State to be regarded as evidence. Therefore per statute, the entire offense would be **PRIOR** to September 1, 2007 and not prosecutable on this Act.

Since the Sept. 15, 2007 date on indictment, is an "alleged" for statute conformity date, and it is inandof itself not evidence, but was implied to the jury as such, question remains:

> What date did the Jurors select or decide upon to establish a beginning point of the alleged offense?

If the Juror's selected summer 2006, this is clearly Ex Post Facto.

On the otherhand, it is indisputable, no corrective instruction was was given. So, if Juror's followed States erroneous instruction that: State "was not bound by dates" when, factualy, State WAS BOUND to the statute's inception date. Thus it is reasonable to conclude, that a date, purported as evidence by State, such as Sept. 15, 2007 "alleged...because that's when the continuous statute came into play" might have been used, regardless that evidence of of alleged acts began in "summer 2006" was heard by jury.

This would also be Ex Post Facto by the plain meaning and text conveyed.

> "An offense was committed before September 1, 2007, if Any Element of the offense occurred before that date", and "an offense committed before Sept. 1, 2007 is covered by the law in effect when the offense was committed and the former law is continued in effect for that purpose." Chap. 593 § 4.01(a) sentence 3 and 2.

State, bypassing legislative intent, acts in a manner "contrary to" the "plain meaning" of the statute. **Smith v State**, 789 S.W.2d at 592 (Tex Crim App 1990); and "it is not for the courts to add or subtract from such a statute." **Coit v State**, 808 S.W.2d 473, 475 (Tex Crim App 1991). In **Boykin v State**, the Court further instructed statute review in avoidance of Ex Post Facto Issues.

> "When attempting to discern this collective legislative intent or purpose we necessarily focus our attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. We do this because the text of the statute is the law, in the sense that it is the only thing actually adopted by the legislators, probably through compromise, and submitted to the Governor for her signature. We focus on the literal text also because the text is the only definitive evidence of what the legislators (and perhaps the Governor) had in mind when the statute was inacted into law...Yet a third reason for focusing on the literal text is that the legislature is Constitutionally Entitled to expect that the Judiciary will faithfully follow the specific text that was adopted."

818 S.W. 2d 782, 785 (Tex Crim App 1991)

Case at bar, application of statute is analogous to holdings of **Boykin v State,** "Plainly, the State prosecuted appellant under the wrong statutory provision." 818 S.W.2d 782, at 786 (Tex Crim App 1991).

Additionally, State's improper and Ex Post Facto use of statute is also contrary to "clearly established federal law", as noted by this Honorable United States Supreme Court, who also address statutory construction in **Estate of Cowart v Nicklos Drilling Company**. When analyzing a statutes language of the statute itself: when statute is clear, "Judical inquiry into It's meaning, in all but the most extraordinary circumstances is finished." 505 U.S. 469, 475 112 S.Ct. 2589 (1992); **De Marest v Manspeaker** 498 U.S. 184, 190 111 S.Ct. 599, 603 (1991).

With these statutory issues never addressed by a single lower court, including "State Court", and findings not entitled to deference, and when, District Court concede's the record reflects sexual activity began in 2006:

> Does Court of Appeals error, adjudicating claim, prior to issue of COA, implying: "the state habeas court correctly noted the indictment charged (Petitioner) with acts occurring between September 15, 2007 and August 31, 2010" when, State habeas court CANNOT "correctly" note a date on indictment contrary to allegations of complainant, when by States own admission, alleges this "date" to meet new statute requirements?
>
> "we have alleged September 15, 2007 because that's when the continuous statute came into play" (Exhibit "G"; RR3 147:1-3).

Therefore, Petitioner's Due Process rights, being violated by the Courts concession, (Appendix "C" at 8) with Ex Post Facto protections guaranteed by Art. "I" § 10 and Amendments 5 and 14 of the United States Constitution, Petitioner demonstrates a substantial showing of Constitutional violation pursuant to 28 U.S.C. § 2253, worthy of COA for the debateable issues. Accordingly Writ should be GRANTED.

Petitioner's case at, clearly mirrors **Carmell v Texas**, both cases involve State utilizing and applying a statute in a manner contrary to clearly established federal law and the legislative intent of Texas Legislature. This Honorable Court remanding **Carmell** as Ex Post Facto, as should this Honorable Court consider in case at bar. Justice Stevens notes:

> "...legislative changes, in a sense, mirror images of one another In each instance, the Government refuses, after the fact, to play by it's own rules, altering them in a way that is advantageous only to the State to facilitate an eaiser conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the Government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."

529 U.S. 534 120 S.Ct. 1620 (2000); See also, **Stoger v California**, 123 S.Ct. 2446, at 2450 (2003).

CONCLUSION

Bearing in mind from the outset, Petitioner has claimed his innocence of this charge, having been prosecuted Ex Post Facto "in order to convict the offender", and that States own physical evidence is in contradiction to testimony of Complainant, further supports Petitioner's claim: Sexual abuse or assault did not occur. Petitioner asserts, United States Court of Appeals for Fifth Circuit, should have, at a minimum, issued Certificate of Appealability, and orders consistant with the facts and arguments contained therein, also supported by Court of Appeals previous rulings:

Any doubts about whether habeas petitioner has met the standard for obtaining Certificate of Appealability (COA), will be resolved in his favor **Buxton v Collins**, 925 F.2d 816, 819 (5th Cir 1991), and "the severity of the penalty may be considered in making this determination." **Haynes v Quarterman**, 526 F.3d 189, 193 (5th Cir 2008). Petitioner asserts a sentence

-of Life, for an accused with no other convictions, including "Traffic citations", for an offense that contains so much "Gray", Physical evidence supporting Petitioner and not the State, clearly warrants consideration of Certificate of Appealability. See Haynes, Id 526 F.3d at 193.

PRAYER

Petitioner Prays this Honorable United States Supreme Court GRANT his Writ of Certiorari, and order a proceeding consistant with facts and arguments contained therein. Remanding for Ex Post Facto and Due Process violations, or at a minimum, return case to United States Court of Appeals Fifth Circuit for issuance of Certificate of Appealability.

CERTIFICATION

I, Ronald Schermerhorn, do herby swear and declare, under penalty of perjury, that on 8th day of November, 2019, I placed the foregoing Writ of Certiorari with Forma Paurpis, including Appendices and Exhibits, Postage Pre-paid by Petitioner pursuant to 28 U.S.C. § 1746 to:

Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543-0001

Respectfully Submitted

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