NO 19-8306

IN THE

SUPREME COURT OF THE UNITED STATES

MARCEL COLLINS NWAGWU

PETITIONER

V

LORIE DAVIS, DIR., TEXAS DEPT. OF CRIMINAL JUSTICE

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MARCEL COLLINS NWAGWU, pro se

MONTGOMERY PROCESSING CENTER,

806 HILBIG ROAD, CONROE, TX – 77301

QUESTIONS PRESENTED

1. Whether, in this case, under the authorities of Martinez, Trevino and Ayestas, Petitioner is entitled to Rule 60 (b) (6) relief due to the alleged initial – review collateral attorney's deceptive conduct and abandonment which caused his procedural default of ineffective assistance of trial counsel claim?

2. The Fifth Circuit Court agreed that Petitioner's Rule 60 (b) (6) motion was not a successive habeas petition, however it denied a COA saying that the petitioner failed to show that a reasonable jurist could conclude that the district court abused its discretion in dismissing his Rule 60 (b) motion. Did the Fifth Circuit Court use the appropriate standard as established in Slack v. McDaniel to deny a COA to appeal the dismissal of Rule 60 (b) (6) motion on procedural grounds by the district court without reaching the merits of his claim?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

RELATED CASES

Green v. Lee, No. 12-cv-5796 (ADS), U.S. District Court for the Eastern District of New York. Judgment entered Aug. 12, 2013

Henry v. Poole, No. 03-2884, United States Court of Appeals for the Second Circuit. Judgment entered May 24, 2005.

Hart v. Gomez, No. 98-15932, United States Court of Appeals for the Ninth Circuit. Judgment entered Apr. 26, 1999.

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DECISIONS BELOW:

1. The order of the United States Court of Appeals for the Fifth Circuit denying a COA to appeal the dismissal of Rule 60 (b) (6) by the district court as shown in Appendix (A) and is unpublished.
2. The order of the United States District Court for the Western district of Texas in Austin, dismissing Rule 60 (b) (6) motion as successive habeas petition as shown in Appendix (B) and is unpublished.

JURISDICTION

The order of the United states of Appeals for the Fifth Circuit denying a COA to appeal dismissal of Rule 60 (b) (6) by the district court was entered on December 10, 2019. A copy is attached as Appendix (A) to this petition. No petition for rehearing was filed in my case. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

This case raises issues on the effective assistance of counsel entrenched in the Sixth Amendment, and Due Process Clause of the Fourteenth Amendment to the United States Constitution. The District Court had jurisdiction under the general federal question jurisdiction conferred by 28 U. S. C 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VI to the United States Constitution, which provides:

> In all Criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

And Amendment XIV to the United States Constitution, which provides:

> Section 1, [Citizen of the United States] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws.
> Section 5[Power to enforce amendment.]
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of the article.

The Amendment is enforced by Title 42, Sect. 1983, United State Code:

> Every person who under color of statute, ordinance, regulation, or usage of any state, Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 2244 (d) (1) (A):

> (1) A 1 – year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall be from the latest of -
> (A) the date on which the judgment became final by the conclusion of the direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the Constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review, or
(D) the dates on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
(2) The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Fed. Civ. Proc. And Rules, Rule 60 (b):

Grounds for relief from Judgment, order or proceedings:

On motion and just terms, the court may relieve a party or its legal representative for a final judgment, order or proceeding for the following reasons:
(1) Mistakes, inadvertence, surprise or excusable neglect,
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for new trial under Rule 59 (b).
(3) fraud (Whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party,
(4) the judgment is void,
(5) The judgment has been satisfied, released, or discharged, it is based on an earlier judgment that has been reversed or vacated or applying prospectively is no longer equitable; or
(6) any other reason that justifies relief.

STATEMENT OF THE CASE

Nwagwu, was charged with indecency with a child by contact and indecency with a child by exposure. Petitioner entered a plea of not guilty to both charges.

At the first trial on this case in March 2009, the Complainant testified that petitioner grabbed her wrist with his left hand that has missing fingers and forced her to touch his penis, and that his pants were down to his ankles. (Note: Petitioner's left hand is missing the thumb, two fingers are completely missing and the other two are burned down to a nub) This trial ended in hung jury.

At retrial in August 2009, the complainant now testified that it was petitioner's right hand that grabbed her wrist and forced her to touch his penis and not his left hand, and that his pants were up on his waist, not down on his ankles. She also told the Court that she lied at the earlier trial in March 2009.

The complainant's mother, Ms. Sheila Wilkins testified that these incidents happened on the days Kellcee Justice, the complainant in this case, was sick from school and was left at petitioner's apartment. The record from the Round Rock Independent School District (RRISD) showing days Kellcee was sick included January 10th and 24th of 2006.

Gladys Carillo-Delgado, who worked as a forensic interviewer at the Center for Child Protection, testified that Kellcee stated that petitioner pushed her down to the ground and tried to kiss her, and not that she fell to the ground when she freed herself from petitioner as Kellcee testified at the trial. Ms. Carillo-Delgado also testified that Kellcee knew the difference between truth and lie, and gave example of each.

Sergeant Justin Newsome of the Austin Police Department testified that he was assigned the case, and he arrested and interviewed the petitioner who denied the allegations. Sergeant Newsome also stated that petitioner said that he believed, in his own opinion, that Kellcee's mother, Ms. Wilkins, had planted the information in Kellcee's head to get back at him for ending their relationship because of money issues.

The prosecutors presented petitioner's time sheets from his employer, Texas Commission on Environmental Quality (TCEQ) that showed petitioner was off on 10th and 24th of January 2006 – the days the complainant was sick from school.

The jury believed the complainant's allegations corroborated with petitioner's time sheets that showed he was off the days complainant was sick from school and convicted the petitioner. The jury also assessed his punishment at twenty years imprisonment for indecency with a child by contact, and ten years imprisonment for indecency with a child by exposure.

On October 21, 2010, the Texas Third Court of Appeals affirmed the judgment of conviction for indecency with a child by contact, and reversed and dismissed the judgment of conviction for indecency with a child by exposure on double jeopardy grounds. Nwagwu V State, 2010 Tex. App. LEXIS 8463 (Tex. App. 2010). No petition for Discretionary Review was filed.

On January 5, 2012, petitioner, through his attorney Ms. Jade Meeker, filed his first State Habeas application, challenging his conviction for indecency with a child by

contact. Texas Criminal Court of Appeals denied it on July 25, 2012 without written order. WR-77-924-01.

Petitioner then sought relief in the United States District Court for the Western District of Texas where he filed his first federal habeas petition, 28 U.S.C. § 2254. The District Court denied his petition as time-barred as shown in Appendix (C). The Fifth Circuit Court of Appeals denied Certificate of Appealability (COA) on the basis of statute of limitations bar. See Appendix (D).

In June 2014, petitioner discovered that the State falsified and manipulated petitioner's time sheets to fit the days Kellcee was sick from school, and that his trial attorney, Mr. John Butler and habeas attorney Ms. Meeker were deficient in failing to investigate his case which would have led to discovering the new evidence.

Petitioner then filed his second state's habeas application, pro se, claiming actual innocence, and alleging perjury, prosecutorial misconduct, no evidence to support conviction and ineffective assistance of counsel for failing to investigate his case. Texas Criminal Court of Appeals dismissed on January 28, 2015 for non-compliance with Texas Rules of Appellate Procedure, Rule 73.1.

About a month and a half later, petitioner resubmitted his application, asserting the same claims on his second application. He claimed that his counsel had been ineffective for failing to investigate his case which gave way for the knowing use of false testimony and falsified material evidence by the prosecution to obtain his conviction. The trial

Court recommended that the application be dismissed pursuant to Article 11.07 § 4 (a) of the Code of Criminal Procedure saying petitioner could have raised all these claims in the first application. See Appendix (E). Texas Criminal Court of Appeals adopted the recommendation and dismissed the application without written order pursuant to Article 11.07 § 4 (a)

Nwagwu then went back to Fifth Circuit Court of Appeals requesting permission to file second federal habeas petition based on the new evidence, raising actual innocence, perjury, prosecutorial misconduct, no evidence to support conviction and ineffective assistance of trial and initial-review collateral counsels. The Fifth Circuit Court of Appeals denied it. See Appendix (F).

After that petitioner filed Rule 60 (b) (4) motion with the District Court based on the new evidence which it denied in part and dismissed in part as successive habeas petition until the [Fifth Circuit] has granted petitioner's permission to file one, as shown in Appendix (G). Petitioner, then, again filed subsequent motions to the Fifth Circuit for permission which it denied. See Appendix (H) and (I).

Thereafter, petitioner filed a Rule 60 (b) (6) motion with the District Court to reopen his 2013 28 U.S.C. § 2254 based on "extraordinary circumstances" and the authorities of Martinez V Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012); Trevino v Thaler, 569 U.S. 1015, 133 S.Ct. 1911 (2013); and Ayestas v Davis 138 S. Ct. 1080, 200 L. Ed. 2d 367 (2018).

The District Court dismissed it for want of jurisdiction, saying it was a successive habeas petition, and sue sponte denied a COA as shown in Appendix (B). Petitioner then sought a COA from the Fifth Circuit to appeal the dismissal of his Rule 60 (b) (6) motion.

The Fifth Circuit agreed with the petitioner that his Rule 60 (b) (6) motion was not a successive habeas petition, however, it denied a COA saying:

> Because he seeks a COA to appeal the denial of his Rule 60 (b) motion, he must show that a reasonable jurist could conclude that the district court's denial of his Rule 60 (b) motion was an abuse of discretion. Nwagwu has not made such a showing.

REASONS FOR GRANTING THE WRIT

A. Conflicts with Decisions of Other Courts.

The holding of courts below that Fed. R. Civ. P. 60 (b) (6) motion premised on Martinez V Ryan, 566 U.S. 1, 132 S. Ct. 1309 and its progeny is a "successive" habeas petition is directly contrary to the holding of Martinez, and other two federal circuits. In Harris V Brooks, 794 F. 3d. 401, 403 n.2 (3rd Cir. 2015), the Third Circuit held that petitioner's Rule 60 (b) motion invoking Martinez was not an impermissible second or successive habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In re: William Leonard Pickard, 681 F. 3d 1201, 1206 (10th Cir. 2012), the Tenth Circuit stated that it should not be read to say that a motion is an improper

Rule 60 (b) motion if success on the motion would ultimately lead to claim of relief under 28 U.S.C.§ 2255.

B. This case also presents fundamental question of the interpretation of this Court's decision on Slack V McDaniel, 529 U.S. 473, 120 S.Ct. 1595 (2000), concerning issuance of COA when a District Court denies a habeas petition on procedural grounds. This issue is of great public importance because it affects the issuing of a COA by lower courts in all 50 States, and the District of Columbia. In view of the large amount of litigation's over Rule 60 (b) (6) premised on Martinez, Trevino and Ayestas, guidance on the question is also of great importance to prisoners, because it affects their ability to receive fair decision in proceedings that may result in forever incarceration or severe hardship, and lose confidence in getting their fair shot in the judicial system.

The issues' importance is enhanced by the fact that the lower courts in this case have seriously departed from the holdings in Martinez and its progeny, and Slack. This Court held in Slack that when a district court has denied a habeas petition on procedural grounds without reaching the underlying constitutional claim, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484, 120 S.Ct. 1595. The Fifth Circuit in this case, denied issuing a COA, saying that petitioner did not make a showing that a reasonable jurist could conclude that the district court's denial of his Rule 60 (b) motion was an abuse of discretion. The Fifth Circuit used the standard

meant for obtaining a COA when the district court has denied a habeas petition on the merits, not when it has denied a habeas petition on procedural grounds as in the instant case.

C. Petitioner's claims have never been considered and expressly rejected by courts on the merits because of his initial-review collateral attorney's alleged deceptive conduct and abandonment.

Furthermore, this is a case that involves one of the worst crimes in our society, a case of child sexual abuse, a crime an accuser "is always guilty until proven innocent" in the eye of the public. Some courts have refused to review this kind of cases when they do not involve recantations from the accusers. And we know that some people will never recant what they have said. There are some instances however, where after conviction, a credible evidence emerges that shows the crime did not happen, or may not have occurred, and considering the severe consequences of conviction, the courts should be asked to review such cases, especially, where, as in this case, the trial is rift with lies and inconsistent statements. In as much as we don't condone child molesters and predators, we also should not allow innocent people and their families to be destroyed because of crimes that didn't happen or may not have occurred, as the new evidence in this case has shown.

The heinousness and abhorrence of this crime in our society has made almost all the 50 States and the District of Columbia to remove any statute of limitations in

prosecuting this crime whenever it is reported. If one is convicted, they may serve a long time in prison. When they are released, they register as sex offenders for the rest of their lives, no community wants them in their neighborhoods, in fact they become complete second rated citizens with limited rights – outcasts with their lives destroyed forever. Thus it would seem reasonable that courts should review new evidences that cast doubt that sexual abuse of a child is committed.

ARGUMENT I & II (Combined together)

Whether in this case, under Martinez, Trevino and Ayestas, petitioner is entitled to Rule 60 (b) (6) relief due to his initial-review collateral attorney's alleged deceptive conduct and abandonment that caused the procedural default of the ineffective assistance of trial counsel claim.

In Ayestas v Davis, 138 S. Ct. 1080, 200 L. Ed. 2d 37, the lower federal courts denied petition on the basis that the claim had procedurally defaulted, but the Supreme Court of the United States unanimously reversed it, holding that failure to raise the claim on the first habeas corpus petition could be excused under the authorities of Martinez V Ryan, 566 U.S. 1, 132 S. Ct. 1309 (Procedural default can be excused for ineffective assistance of counsel (IAC) on a first habeas petition).

Martinez held that an Arizona Prisoner seeking federal habeas relief could overcome the procedural default of trial-level ineffective assistance of counsel claim by showing that the claim is substantial and that the State habeas counsel was also ineffective in

failing to raise the claim in a state habeas proceedings. Martinez, 566 U.S. at 14, 132 S. Ct. 1309. Trevino extended that holding to Texas prisoners. Trevino V Thaler, 569 U.S. 1015, 133 S. Ct. 1911.

The substantiality of the effective assistance of trial counsel claim and the ineffective assistance of post-conviction counsel are both governed by the framework set out in Strickland V. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice, with performance being measured against an objective standard or reasonableness." Rompilla V. Beard, 545 U.S. 374, 380, 125 S. Ct. 2456 (2005).

Strickland recognized that an attorney's duty to provide reasonable effective assistance include the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." Strickland, 466 U.S. at 691, 104 S. Ct. 2052; see also ABA Standards for Criminal Justice; Prosecution Function and Defense Function 4-4.1 (3rd ed. 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case ..."). "The duty to investigate is essential to the adversarial testing process because the testing process generally will not function properly unless defense counsel has done some investigation into the people's case and into various defense strategies." Kimmelman V. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574 (1986).

In the instant case it appears no such investigations were done by Mr. John Butler, the defense counsel in this case. Petitioner directs the Court to Exhibit (A), Exhibit (B), and Exhibit (C). Exhibit (A) is petitioner's work time sheets he obtained from his employer TCEQ in 2014. Page 1 is clearly showing that he was not off at the relevant times as opposed to the State evidences shown in Exhibit (B) pages 43 and 44, and the false statements on pages 142 and 143. Exhibit (C) shows alibi evidence of petitioner living with his sons at that time, and was with them on the morning of January 10, 2006, before taking them to school which made him to be 1½ hours late to his regular job at TCEQ.

The failure of counsel to review the business records and school records apparently resulted from inattention and not reasoned strategic judgment, and it led to the knowing use of false testimony and falsified evidence to obtain the conviction of the petitioner. Counsel is bound to make reasonable efforts to review material counsel knows the prosecution will probably rely on as evidence to corroborate the complainant's testimony. Rompilla, U.S. at 377, 125 S. Ct. 2456.

There is obvious reason that the failure to examine the business records and school records that had been in counsel's possession for four months before trial, see Exhibit (D), and to investigate alibi evidence fell below the level of reasonable performance. Counsel knew that the state intended to use the dates Nwagwu was off from his job to corroborate its witnesses' credibility and testimony. Counsel further knew that the state would attempt to establish that the sexual abuse incident happened because both

Nwagwu and Kellcee were allegedly at home together on the days Nwagwu was off from his job.

With every effort to view the facts as an effective defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily documents, he was seriously compromising the defense of his client. Without making reasonable efforts to review the documents, defense counsel could have had no hope of knowing whether the prosecution was presenting correct dates or falsified and manipulated dates Nwagwu was off from his job to fit the dates the complainant was sick from school. "Where contested pieces of evidence were introduced largely to establish a certain time frame, the failure by a habeas petitioner's trial counsel to investigate the correct time frame is not reasonable." Green V. Lee, 964 F. Supp. 2d 237, 257 (E.D.N.Y. 2013). This failure to conduct a reasonable investigation into the time frame takes on added significance in a child sexual abuse case id. See e.g. Hart V. Gomez, 174 F.3d 1067, 1070-71 (9th Cir. 1999) (holding failure to introduce evidence supporting defendant's contention that sexual abuse could not have occurred under the circumstances alleged rendered counsel ineffective); Henry V. Poole, 409 F.3d. 48, 64-65 (2d Cir. 2005) (faulting counsel for failing to discover obvious discrepancy in the dates); Rompilla, 545 U.S.374, 125 S. Ct at 2465-67 (faulting defense counsel for not consulting a "readily available file" "sitting in the trial court house, open for the

asking" and emphasizing that "the unreasonableness of attempting no more than they did was heightened by the easy availability of the file at the trial court house"); Williams V. Taylor, 529 U.S. 362, 395, 120 S.Ct. 1495 (2000) (faulting counsel for failing to access available records.)

The later-discovered evidence disputing the people's time frame would have proved indispensable in presenting the defense and discrediting the prosecution's witnesses. Indeed, the trial counsel's theory of the case – rejection theory – would have been aided rather than impeded by the introduction of evidence undermining the veracity of the accuser and her mother. The failure plainly falls below acceptable professional standards under Strickland. Green 964 F. Supp 2d at 258, citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052.

Strickland further requires a defendant to demonstrate prejudice - "a reasonable probability that, but for counsel's unprofessional error[s], the result of the proceeding would have been different," meaning "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

That trial counsel's failure to familiarize himself with the business records and school records that contained exculpatory evidence of his client goes a long way to establish prejudice. The state prosecutor emphasized to the jury at the closing argument:

> If you look at the employment records and school records we offered into evidence, you will see that both Mr. Nwagwu and Kellcee Justice, the victim in this case, Kellcee was absent from school, Mr. Nwagwu for part of the work day was absent from work on January 10th and 24th … So the

fact that Kellcee and Mr. Nwagwu were absent from school and work respectively corroborate that testimony.

Effective trial counsel would not have failed to review and familiarize himself with the employment records and school records, and introduce the significant exculpatory evidence that shows Nwagwu and Kellcee were not at home together – meaning the sexual abuse incident never happened, because Nwagwu was not off from his work and Kellcee was not at his apartment at those relevant times. Counsel's deficient performance prejudiced the petitioner. The Prosecution' s case rested on the jury's believing Kellcee's allegations and it's case was already weakened by lies and inconsistencies in the government witnesses' testimony. Thus, had the new evidences been presented to the jury, it was reasonably likely that the jury would have credited these evidences and concluded that a reasonable doubt existed as to whether petitioner sexually molested the complainant. Accordingly, there is a reasonable probability that, but for trial counsel's deficient performance the outcome would have been different. Therefore, reasonable jurists could debate whether petitioner has presented a "substantial" claim of IAC.

Post-conviction habeas attorney, Ms. Meeker, eventually filed an application that contained only one narrow claim of ineffective assistance of trial counsel with respect to counsel's failure to object inclusion of exposure count, but did not assert that trial counsel was ineffective for failing to investigate petitioner's case.

As with trial counsel, the record provides no support for any "strategic justification" to disregard completely an investigation of Nwagwu's case. Ms. Meeker allegedly did no research on her client's case. Had she made a cursory review of the law, she would have discovered the federal Antiterrorism and Effective Death Penalty Act (AEDPA) that gives a state petitioner one year to file a federal habeas petition, starting from the date on which the judgment became final, 28 U.S.C. § 2244 (d) (1) (A), in fact she would have discovered that she had until November 10, 2011 to file petitioner's state habeas application in order to overcome the federal AEDPA one year statute of limitations period. Nwagwu's judgment became final on October 21, 2010, and Ms. Meeker filed the petitioner's state application on January 5, 2012, after the federal statute of limitations had run out.

Counsel failed to comply with Texas Rules of Appellate Procedure, Rule 73(3) which states "you must file the entire writ application form including those sections that do not apply to you. If any pages are missing from the form, or if the questions have been renumbered or omitted, your entire application may be dismissed as non-compliant." Counsel filed only seven pages out of twelve as shown in Exhibit (E). As a consequence of counsel's failure to properly file the state writ of habeas corpus, Nwagwu's AEDPA one-year time-limitation was ticking. Under applicable Federal Statute of Limitations, only "properly filed" state writ would be equitably tolled.

Ms. Meeker also failed to "explain the matter to the extent reasonably necessary to permit [Nwagwu] to make informed decision regarding the representation," as required by the Texas Rule of Professional Conduct 1.03 (b). Counsel never apprised petitioner of any Statute of limitations regarding the filing of Writ of Habeas Corpus. This would have helped petitioner to find a means to file a "protective" federal habeas petition preserving his federal remedies before the Statute of Limitations ran out.

Consider, petitioner acted as diligently as reasonably could have been expected under the circumstances:

1. Petitioner's efforts at the earliest possible time to secure counsel for the purpose of filing a habeas application, even before the Texas Third Court of Appeals' opinion was issued in October 2010. See Exhibit (F).
2. Counsel has at least ten months from the time full payments of legal fee were made to file State Writ to toll federal AEDPA Statute of Limitation, but failed to do so. See Exhibit (G)
3. Ms. Meeker also allegedly deceptively led Nwagwu and his friend to believe she was diligently prosecuting petitioner's habeas application, and that it was taking longer than expected to get the Clerk's Report as shown in Exhibit (H). This was a shock as she was the court appointed attorney who prosecuted the Direct Appeal. Exhibit (I) is a copy of the District Clerk's form for obtaining documents from the office. It explains it takes up to ten working days to obtain documents not months.

4. Nwagwu's lack of funds to consult another lawyer, see Exhibit (J)
5. Nwagwu's lack of knowledge and experience of American Justice System and a lay person trusting in his lawyer who is a legal professional. Petitioner had no reason to believe his lawyer was not diligently pursuing his habeas application.

"State habeas counsel is subject to the same Strickland requirement to perform some minimum investigation prior to bringing the … State habeas petition." Trevino v Thaler, 829 F. 3d. 328, 348 (5th Cir. 2016). Because there is evidence suggesting that petitioner's State habeas counsel apparently did not conduct adequate investigation, it is unclear whether counsel's failure to identify petitioner's Strickland's claim as a habeas issue was a strategic decision or evidence of deficient performance. Given that jurists of reason could debate whether petitioner has presented a "substantial" claim of IAC, it necessarily follows that reasonable jurists would debate whether initial-review collateral counsel was deficient in not raising petitioner's Strickland claim. If reasonable jurists may debate whether petitioner's Strickland claim was "substantial", and therefore whether petitioner was prejudiced by the alleged IAC – it necessarily follows that reasonable jurists would debate whether Nwagwu was prejudiced by State habeas counsel's failure to raise his Strickland claim in State habeas proceedings.

When Texas Criminal Court of Appeals denied the Petitioner's State habeas application in July, 2012, Petitioner heard from another inmate that he could appeal his conviction to the federal courts. Petitioner then requested Ms. Meeker to send him a copy of his trial

record, and it took Ms. Meeker over six weeks to send it, giving the same reason she gave for filing his State application untimely, see Exhibit (K).

The alleged deceptive conduct and abandonment of the initial-review collateral attorney led to the procedural default of ineffective assistance of trial counsel claim. This was the reason for filing Rule 60 (b) (6) motion for relief from judgment, which the lower courts dismissed on procedural grounds and denied issuing a COA to appeal the dismissal.

When a district court has denied a habeas petition on procedural grounds without reaching the underlying constitutional claim, "a COA should issue when prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484, 120 S.Ct. 1595.

In the instant case, the District Court dismissed petitioner's Rule 60 (b) (6) motion premised on Martinez and its progeny as a "successive" habeas petition. However, two other circuits have reached a contrary decision on this issue. In Harris V. Brooks, 794 F.3d 401, 403 n.2 (3rd Cir. 2015), the Third Circuit held that Petitioner's Rule 60 (b) motion invoking Martinez was not an impermissible 2nd or successive habeas petition under AEDPA, "because it merely asserted that a previous ruling which precluded merits

determination was in error," citing Gonzales V. Crosby, 545 U.S. 524, 532 n.4, 125 S. Ct. 2641(2005).

The District Court also stated, "Essentially petitioner is requesting the court to review the merits of his Federal application for habeas relief." If Rule 60 (b) (6), which is granted only when "extraordinary circumstances" are involved, leads ultimately to reviewing the merits of a petitioner's federal petition for habeas relief, it wouldn't seem to be considered as "successive" habeas petition, because the "extraordinary circumstances" adversely affected the earlier proceeding. The Tenth Circuit stated, "...

> They certainly should not be read to say that a motion is an improper Rule 60 (b) motion if success on the motion would ultimately lead to claim of relief under § 2255. What else could be the purpose of Rule 60 (b) motion? The movant is always seeking to the end to obtain § 2255 relief. The movant in a true Rule 60 (b) motion is simply asserting that he did not get a fair shot in the original § 2255 proceedings because its integrity was marred by a flaw that must be repaired in further proceedings." In re: William Leonard Pickard, 681 F.3d 1201, 1206 (10th Cir. 2012).

These Circuits' opinions demonstrate that reasonable jurists could debate the merits of the procedural ruling that barred relief in this case. See Lambright V. Stewart, 220 F.3d. 1022, 1027-28 (9th Cir. 2000). ("The fact that another circuit opposes our view satisfies the standard for obtaining a COA.")

The Fifth Circuit also denied a COA saying that Nwagwu did not show that a reasonable jurist could conclude that district court's denial of his Rule 60 (b) motion was an abuse of discretion.

The Supreme Court has said that the question at COA level for the Court of Appeals was not whether [petitioner] had shown that his case is extraordinary; it was whether jurists of reason could debate that issue. Buck V. Davis 137 S.Ct 759, 774, 197 L. Ed. 2d1 (2017). Therefore, the question in the instant case should have been whether jurists of reason could debate the procedural ruling of the district court, not whether a reasonable jurist could conclude that the district court abused its discretion. Concluding that the district court abused its discretion entails ruling on the merits of a petitioner's claims.

Ballentines Law Dictionary defines Conclude as:

> To form a final judgment after consideration, consultation or advice. To come to an end, whether of a story or argument.

Thus, the Fifth Circuit had considered the merits of petitioner's Rule 60 (b) (6) motion and come to the conclusion that Nwagwu did not show that a reasonable jurist could conclude that the district court abused its discretion, which is the standard for obtaining a COA when a district court has denied a habeas petition on the merits.

When a reviewing court inverts the statutory order of operations and "first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. Buck, 137 S. Ct at 774, 197 L. Ed. 2d1, citing Miller-EL V. Cockrell, 537 U.S. 322, 336-37, 12 S. Ct. 1029 (2003) The Court should use its supervisory power to make it clear to

lower courts not to depart from judicial precedents set for obtaining a COA or unduly restrict this part way to appellate review. Tennard V. Dretke, 542 U.S. 274, 124 S. Ct. 2562 (2004).The Court should also guide lower courts on which standard to use when deciding to issue a COA when a district court has denied a habeas petition on procedural grounds without reaching the merits of the claim. The more lower courts depart from these precedents, the more likely prisoners would come back to the Court, and the more it would adversely affect the limited resources of the Court. Prisoners continue coming back to the courts because courts continue using the wrong standards in reaching their decisions.

Petitioner also alleges that the State sponsored and suborned the false and misleading testimony of Kellcee Justice who testified for the state as to which hand the petitioner grabbed her wrist and forced her to touch petitioner's penis, and Kellcee's mother as to the dates alleged that petitioner was at home with the alleged victim, in violation of his due process rights of the Fourteenth Amendment to the United States Constitutuion, (as set forth in Giglio V. United States, 405 U. S. 150, 92 S. Ct. 763 (1972).

At an earlier trial in this case that ended in a hung jury, it was clearly demonstrated to the jury, the same prosecutors, the same judge and the same defense counsel, that it was impossible for the petitioner to take hold of the complainant's wrist with his left hand that has missing fingers as Kellcee falsely testified to be true under oath as shown in Exhibit (K). The fact as to which hand was used was, in fact, determinative and relevant

factor to the outcome of this case. This fact was relevant to the guilt and innocence phase and outcome at the first trial in March 2009 that resulted in a deadlock.

The simple fact that the changing of the hand allegedly used by the petitioner to grab the alleged victim's wrist, from the left hand to the right occurred after the demonstration at the First trial, that petitioner's left hand with missing fingers could not have done what Kellcee alleged was done to her was mere hindsight, speculation and a made-up story allegedly sponsored and suborned by the prosecution. This alone was enough to raise reasonable doubt, unless for the racism that plagued petitioner's trial, see Exhibit (L). To corroborate this story, the prosecution introduced falsified time sheets of petitioner showing he was off from his job the days the complainant was sick from school.

The complainant's testimony with respect to being at petitioner's apartment on the dates she was sick from school, the dates they alleged she was sexually molested, and the introduction of falsified and manipulated petitioner's work time sheets, may constitute the prosecution's involvement to deceive the court and jury to obtain a conviction.

Courts have held that prosecution's knowing solicitation of or failure to correct perjured testimony violates defendants due process right "if the false testimony could in any reasonable likelihood have affected the judgment of the jury." United States V. Agurs, 427 U. S. 97, 103, 96 S. Ct. 2392 (1976). And where the use of known perjury

involves prosecutorial misconduct, it constitutes "corruption of truth-seeking function of the trial process." i.d. It should also be considered as an extraordinary circumstance.

Absent the alleged sponsoring and subornation of perjury by the prosecution, the state had no case. Thus, the alleged actions of the prosecution prejudiced petitioner. Therefore, reasonable jurists could debate whether the petition states a valid constitutional claim of the denial of a constitutional claim.

Rule 60 (b) (6) is available only in "extraordinary circumstances." Gonzales, 545 U.S. at 535, 125 S. Ct. 2641. In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the parties" and "the risk of undermining the public confidence in the judicial process." Buck, 137 S. Ct. at 778, 162 L. Ed. 2d1

In the circumstances of this case, reasonable jurists could conclude that the District Court abused its discretion. The Fifth Circuit's conclusion that petitioner has not made a showing that the district court's denial of his Rule 60 (b) (6) motion was an abuse of discretion was baseless. In addition to the alleged deceptive conduct and abandonment of the initil-review collateral attorney discussed above, there was this alleged corruption of truth-seeking function of trial process by the prosecution. Petitioner's conviction may have been obtained in part by the alleged prosecutions sponsoring and subornation of perjury and the falsification and manipulation of material evidence.

As long ago as Mooney V. Holohan, 294 U.S. 103,112, 55 S.Ct. 340 (1935), the Supreme Court made clear that deliberate deception of a court and jury by the prosecution of known false evidence is incompatible with "rudimentary demands of justice." Not only did the prosecution knowingly presented false evidence in this case, they, in fact, were the ones who allegedly coached their witnesses to change their stories and then presented falsified evidence to corroborate them. If any concept is fundamental to the American System of Justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit. Limone V. Condon, 372 F.3d. 39, 44-45 (2d Cir. 2004).

Sponsoring and suborning perjury to get a conviction would "poison public confidence" in the judicial process. It thus injures not just the defendant, but "the law as an institution... the community at large, and... the democratic ideal reflected in the process of our courts." Buck, 137 S.Ct. At 778, 197 L. Ed. 2d1. Now in this case, the State of Texas has paroled the petitioner and handed him over to U. S. Immigration and Customs Enforcement (ICE) to be deported to the country he left 39 years ago, a country he doesn't even know anymore, without his claims heard in any court. This would amount to gross miscarriage of justice. The undenied facts alleged in this case would justify setting aside the judgment for that purpose. Petitioner is entitled to a fair trial. He has not had it. The government makes no claim that he has. Fair hearings are in accord with elemental concepts of justice, and the language of Rule 60 (b) (6) is broad enough

to authorize the Court to set aside the judgment and grant petitioner a fair hearing Klapport V. United States, 335 U.S. 601, 615, 69 S.Ct. 384 (1949).

Petitioner relies on Martinez, Trevino and Ayestas, supra, in filing his Rule 60 (b) (6) motion with respect to "extraordinary circumstances" that marred his original 28 U. S. C. § 2254 proceedings. In these cases, the Supreme Court recognized a "particular concern" in the application of a procedural default rule that would prevent a petitioner from presenting a claim of trial error, especially "where the claim is one of ineffective assistance of counsel." Martinez, 566 U.S. at 12, 132 S. Ct. 1309. "The right to the effective assistance of counsel," the Court reasoned, "is a bedrock principle in our justice system," ibid. The Court thus held that where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel," then "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel… was ineffective." Trevino, 569 U.S. at 429, 133 S.Ct. 1911 (quoting Martinez, 566 U.S. at 17, 132 S. Ct. 1309; alteration omitted). Therefore, the fact that Nwagwu's initial-review collateral counsel failed to raise his ineffective-assistance-of-trial counsel claim in his first state habeas application does not bar federal review, as Nwagwu has apparently shown that the

"attorney in his first collateral proceeding was ineffective" and that "his claim of ineffective assistance of trial counsel is substantial." 1d at 19, 132 S. Ct. 1309.

The bedrock principle of effective assistance of counsel should be paramount in a child sexual abuse case like this one, where no third-party witnesses are present. The Second Circuit states,

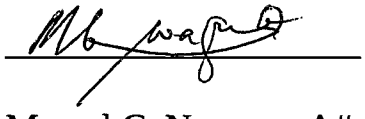
> "The prosecution of child sexual abuse cases is challenging. With third-party witnesses often unavailable, these cases frequently hinge on judgments about credibility in which jurors must choose between contradictory stories proffered by the defendant and the complainant. Just as the complainants are entitled to effective advocacy, so too are those charged, especially given the consequences of conviction. Thus, we have underscored the importance of effective representation for defendants in child sexual abuse prosecutions... The teaching of the law in this Circuit is that defense counsel is obliged, where possible, to elucidate any inconsistencies in the complainant's testimony, protect the defendant's credibility, and attack vigorously the reliability of any physical evidence of sexual contact between the defendant and complainant. Eze V. Senkowski, 321 F. 3d. 110, 112 (2d Cir. 2003).

In a child sexual abuse case like the petitioner's, where the new evidence shows that the sexual abuse incident may not have occurred under the circumstances alleged, and that this evidence was not introduced at trial due to ineffective assistance of counsel, the courts should be required to review the case, given the severe consequences of conviction of child sexual abuse, or any sexual offenses where third-party witnesses are unavailable.

CONCLUSION

For all the foregoing reasons, Nwagwu respectfully requests the Court to grant certiorari in this case.

Respectfully Submitted,



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