20-5208
No. ____________

ORIGINAL

FILED
JUL 29 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

William Monterial Jones — PETITIONER
(Your Name)

vs.

LORIE DAVIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

William Monterial Jones
(Your Name)

59 DARRINGTON Rd
(Address)

ROSHARON, TEXAS 77583
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. PURSUANT TO THE PRECEDENT ESTABLISHED IN <u>UNITED STATES V BONNER</u>, 648 F.2d 209 (4th cir 2011), DID THE STATE SUFFICIENTLY PROVE IT'S BURDEN OF PROOF OF GUILT TO SUSTAIN PETITIONER'S CONVICTION WHEN NO "**CONTEMPORANEOUS IDENTITY**" EVIDENCE EXIST TO LINK PETITIONER AS THE PERPETRATOR?

2. CAN A STATE PROCEDURAL RULE ON WHICH THE STATE RELIES ON TO ESTABLISH A PROCEDURAL DEFAULT, IN THE INSTANT CASE, BE ADEQUATE WHEN APPLIED "**ARBITRARILY**" AND "**VIOLATES DUE PROCESS**?"

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. MARK KENT ELLIS – Oringinal Presiding Judge
   1201 Franklin St. Houston, TX 77002
2. John M. Petruzzi – Trial Counsel (Court Appointed)
   4900 Woodway, Ste# 745, Houston, TX 77056
3. Alan Curry – Attorney for the State
   1201 Franklin, Ste# 600, Houston, TX 77002.

TABLE OF AUTHORITIES CITED

CASES

STATE:

FEDERAL:

SUPREME:

STATUES:

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IN THE SUPREME COURT
OF THE UNITED STATES PETITION FOR WRIT
OF CERTIORARI

Petitioner respectfully prays that a writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

THE OPINION OF THE UNITED STATES COURTS OF APPEALS Appear AT APPENDIX B to the Petition and [is unpublished?]

THE OPINION OF THE UNITED STATES COURTS (DISTRICT) Appear at APPENDIX A to the Petition and [is unpublished?]

THE OPINION of The TEXAS COURT of Appeals [1st Dist]-Houston Appear at APPENDIX F to the Petition and [is unpublished?]

JURISDICTION

The date on which the United States court of Appeals decided Petitioner's case was MARCH 25, 2020.

A timely petition for rehearing was denied by the United States Courts of Appeals on the following May 5, 2020, and a copy of the order denying rehearing appears at Appendix B Also.

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

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments VI and XIV to the United STATES Constitution, which provides:

AMENDMENT, VI

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 accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Cansel for his defence.

AMENDMENT XIV

Section 1. 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 priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, within due Process of Law; nor deny to any person its juridiction to equal protection of Law.

STATEMENT OF THE CASE

Petitioner was charged with the felony offence of aggravated robbery and felon in possession of a weapon. Petitioner entered a plea of not guilty to both charges on December 9, 2014. A jury was selected and testimony commenced on December 9, 2014. The Petitioner was found guilty of both charges by the jury, and court assessed punishment at forty (40) years in the Texas Department of Criminal Justice. Petitioner timely filed a written notice of his initial appeal. Appellate Counsel, Ann Lee Moseley, filed on January 9, 2015 a motion for New trial which was later denied by the trial judge, Mark Kent Ellis. Ann Lee Moseley then filed an appellate brief on Petitioner's behalf, alleging insufficiency of the evidence and Speculative Testimony. The First Court of Appeals Affirmed petitioner's Conviction Jones v State, 2016 WL 672842, at 1 (Tex App-Houston [1st Dist] Feb. 18, 2016).

Petitioner as a pro-se litigate filed a P.D.R which the highest state court refused on July 27, 2016 Jones v. State, P.D.R N. 0240-16. Petitioner then filed a pro-se 11.07 state Habeas writ on August 8, 2017, alleging No Evidence and Ineffective Assistance of Trial Counsel Ex Parte Jones No. WR-86,603-03). On March 28, 2018, this Court asked the trial court to resolve the issue. However, during this process, Kelly Russell recanted her initial Affidavit and without holding any type of hearing on Russell's credibility and controverted and disputed facts of Petitioner's evidence, the Court charged Petitioner with Abuse-of-the-writ. Applicant then filed a Traverse in the Federal Dist. Court about January 7, 2019. On April 22, 2019, without holding a hearing again on the disputed facts and New found witnesses, [SEE Appendix D], the Dist. court denied Traverse with prejudice, and summarily rejected Petitioner's claim of cause and prejudice. Petitioner, through due dilligence, then filed a writ for C.O.A. to the fifth (5th) circuit Court about June 14, 2019, which was denied March 25, 2020. Petitioner then filed a timely Motion for rehearing in the 5th cir and was denied May 5, 2020. Petitioner Now files ~~for this~~ A writ for Certiorari.

I. REASONS FOR GRANTING THE PETITION.

The Petitioner humbly urges the court to grant this petition for the following reasons:

(A). THE Federal District COURTS OF APPEAL'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS.

The United States Court of Appeals for the Southern District determined that: "[Petitioner] has not demonstrated that his challenge to the Sufficiency of the evidence merits relief Under the Standard of review found in the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2254(d), [Further] Petitioner was 'identified' as the suspect because his "**DNA**" was recovered from '**items discarded**' by the perpetrator at the scene and [Petitioner] sustained gun-shot wounds "Consistent" with those inflicted by one of the store clerks. None of the evidence offered by [Petitioner] refutes any of the state's courts findings of facts, which are presumed correct on federal habeas review." [SEE. UNITED STATES DISTRICT COURT'S OPINION at 14-19, APPENIX (A)].

The Fourth Circuit concluded: "On Appeal, the court relied on two main arguments to conclude that there was insufficient evidence to convict defendant. FIRST, there was a conspicuous absence of any 'Contemporaneous Identity' evidence linking defendant to the robbery. A 'discarded' Yankee's hat was identified as worn by the robber. Forensic evidence from the hat showed that there were 'Multiple' DNA matches and that one of them, identified as the 'predominant' profile, belonged to the defendant. Despite claims otherwise, no credible physical evidence indicated that defendant was wearing the Yankees hat on the night of the robbery. The government argued that because defendant's DNA was 'pre-dominant' it was reasonable for the jury to infer that he was wearing the hat on the night of the robbery. However, the DNA expert testified that he Could not conclude who 'last wore the hat' based on the 'DNA' despite the government's emphasis on the word 'predominant.' Any assumption that defendant was the last wearer was an impermissible inference by the jury. The court also pointed out that the government's 'scientific theory' as to [Identity] lacked any evidentiary support in the record." UNITED STATES V BONNER, 648 F.3d 209 (4th cir 2011).

Petitioner's case is analogous to Bonner's, in that; there is no 'Contemporaneous identity' evidence linking petitioner to the robbery. In the case at bar, discarded items found in the parking lot was identified as worn by the perpetrator (IV RR at 14-17). Forensic evidence from the do-rag showed that there were 'multiple DNA' matches and one of them identified as the 'predominant' profile belonged to Petitioner (IV RR at 14). Despite otherwise; no credible' physical evidence indicated that Petitioner was wearing these items on the night of the robbery. Specifically, both store clerks testified that Petitioner was 'not the man who robbed them' (III at 26, 66-7, 129-30; III RR at 45, 81, 143) and 'blood' found at the scene 'excluded' Petitioner as the alledged perpetrator (IV RR at 19). Also, Petitioner could not be identified - in court - as the person who robbed the store clerks. Furthermore, Petitioner received Compensation from Crime Victims, which further indicates that no Contemperaneous identity evidence linked Petitioner to the robbery (III RR at 155:6).

Likewise to Bonner, the state had argued that because petitioner's DNA was 'predominant,' it was reasonable for the jury to infer that petitioner was wearing the do-rag on the night of the robbery (IV RR at 14, 89). However, the DNA analysist, Christy Smejkal, testified as well that she could not conclude who last wore the do-rag based on DNA despite the state's emphasis on the word predominant (IV RR at 47). It is a known fact demonstrated all throughout United States Court of Appeals precedents, that when DNA is a 'Mixture' there is no way to determine who last wore the item(s) containing the DNA Mixture. See e.g., Sneed v Stephens, 2014 U.S. Dist. Lexis 155678 and United States v Bowers, 811 F. 3d 412 at 418 (2016); also Bonner supra.

Although, in the case at bar, unlike Bonner, there was one additional item, namely a hat, that contained a partial profile allegedly belonging to petitioner found in the parking lot, it too, coupled with the mixture of DNA found on the do-rag, does not place petitioner at the scene on the night of the robbery. Specifically, both witnesses testified that they did not see the perpetrator wearing a baseball cap (III RR at 37-8). Nagy stated that he too did not see the perpetrator wearing a baseball cap in the store (III RR at 62-3). The hat also lacks any Contemporaneous identity evidence linking Petitioner to the robbery; and any connection between the hat and the person who committed the robbery becomes 'Purely Speculative' (III RR at 37-8, 62). Moreover, analogous to Bonner, any assumption that Petitioner was the last to wear those items was an impermissible inference by the jury. The state asked the Jury to draw unwarranted inferences based on two Unconnected pieces of scientific evidence through argument instead of specialized knowledge. (IV RR at 47) also Bonner Supra at 215.

Lastly, the United States Southern District Court of Appeals also reasoned, "in light of [Petitioner's] gun-shot wounds which was consistent with those inflicted from the clerks, there is no evidence offered by [Petitioner] that refutes any of the state's court findings and facts." [SEE United States District Courts Opinion at 14-19, Appendix (A)].

In light of Petitioner's gun-shot wounds; first, the record evidence proves that the shooter [Nagy Aly] testified that he, "did not shoot the perpetrator" (III RR at 75), although he shot all six shots inside the store at the perpetrator as he 'ran' away (III RR at 56-7). Contrary to the states closing argument that, "[Petitioner] was "shot right as he's running out the door in the 'hip'..." (IV RR at 93) and the United States Court of Appeals unreasonable assertion, "that Petitioner received wounds consistant with those inflicted from the clerk" (United States District courts opinion at 14-19, Appendix (A)]; how is it then that Petitioner showed up to the hospital with frontal wounds to the groin and chest area "inconsistent" with the clerks testimony(s) and the United States court's assertions [SEE. exhibit G hospital Record]. Secondly, blood was found at the scene of the crime excluded Petitioner. The absence of any such Contemporaneous identity evidence suggests Petitioner was not the perpetrator.

Moreover, there is no record evidence of any .357 magnum bullets from the store clerk's gun discovered in connection with Petitioner's wounds which demonstrates that he was actually shot by the store Clerks gun. Also, the states elicits their unreasonable opinion that [petitioner's] abandoned car cumulatively proves petitioner's identity as the perpetrator who robbed Mo's food Mart [See. Court of Appeals [1st District]-Houston, 2016 Tex App Lexis 1700, Appendix (E)]. However, the evidence in the record proves that petitioner was actually shot on Airtex blvd, a different location than Mo's Food Mart and was Compensated for his roadside shooting on Airtex blvd (III RR at 155:6]. The evidence Also proves that petitioner's friend picked him up on Airtex blvd (III RR at 131-132).

For the jury to draw inferences from this circumstantial evidence is purely speculative - i.e., merely theorizing or guessing about the possible meaning of facts and evidence presented SEE. JACKSON V. Virginia, 443 U.S. 307 (1979). Furthermore, for the jury to draw any reasonable scientific inference from the multiple DNA profile is unwarranted and impermissible in light of the DNA Expert's testimony (IV RR at 47).

Thus, In Bonner, the government's entire case consists of four pieces of circumstantial evidence: (1) a hat with multiple DNA Matches worn by Bonner was also worn by one of the robbers; (2) Bonner's wallet discovered in the alleged getaway car; (3) phone records; and (4) a seperate phone record showing a call from a nearby gas station to Ms. Edmonds Bonner Supra at 214. Similar to Bonner's case, Petitioner's case consists of circumstantial evidence of: DNA, Gunshot wounds, and an abandoned Vehical. the Bonner Court Concluded, in light of circumstantial case, when identity is in dispute," while it is possible to convict a defendant Solely on Circumstantial evidence, usually there is some specific "Identity" evidence or uncontroverted physical evidence that links the defendant to the scene of the crime Bonner supra at 214-15.

For example, United States V Morales, 546 F. 3d 13, 21 (1st cir 2008) (noting the defendant had a suspicious influx of cash after the robbery with which he made purchases, as well as testimony that the defendant had Stated that he has 'Scored a hit,' and another individual took the defendant to a specific mile-marker to retrieve a pistal that was traced by ballistics, both casings found on the floor of a nearby abandoned Vehical used in the crime as well as to a bullet that struck a security officer injured during the crime); Brown V O'Brien, 624 F. Supp. 2d 136, 146-47 (D. Mass 2009) (noting the defendant was seen at the crime scene just before the robbery, also the defendant was aware of the weekly bingo jackpot and identified himself (shortly before) to another by the Same first name as the robber, was identified as wearing clothing that fit the description of the clothing observered on the robber, and was described as matching the physical appearance of the robber by height, weight, and hair"); Cooper V Berghuis, NO. 1:06-CV-42, 2009 U.S. DIST-LEXIS 17193 2009 WL 537510 (W.D. Mich. March 3 2009) (noting no eyewitnesses could positively identify the defendant as the perpetrator who wore the mask. On habeas review, the court upheld a state court conviction based not only on the defendant's DNA found on clothing used in robbery, but also on multiple eyewitnesses descriptions that matched the defendant by height, build, and hair, also the robber was 5'7" tall, "Kind of wiry" or "pretty Scrawny looking," had a receding hairline (seen through the mask) which was darkish, black-ish, gray color), as well as testimony that the clothing used by the robber was own by the great niece of the defendant's girlfriend Berguis supra at 56. SEE Also United States V Kwong, 14 F.3d, 194 (2nd cir 1994), United States V

Tilmon, 19 F.3d 1221, 1229-31 (7th cir 1994); and United States v Kittrell, 269 F. App'x 338, 342 (4th cir 2008).

Analogous as the cited cases above, the state in the instant case relied upon Roberson v State, 16 SW 3d 156 (Tex App-Austin 2000, pet. ref'd) and Jones v State, 458 SW 3d 625 (Tex App-Houston [1st Dist] 2015, pet. ref'd), for the proposition that "DNA alone" found on pieces of clothing at the scene was sufficient to identify a defendant [Petitioner] as a perpetrator. However, in Jones supra at 628-29 (there was a significantly large amount of circumstantial evidence that linked the defendant to the robbery. i.e., witness testimony of his description that gave great weight to the defendant's guilt, noting DNA found on work shirt, baseball cap, t-shirt, and the waist band of his pants, that also contained the dead victims blood DNA, which could not be explained and witness testimony of his description and weight/height testimony of defendant's 'Nickname' as Dumpling, and eye witness saw television broadcast and recognized wig worn in robbery). Likewise in Roberson supra at 156; 161-163, (noting sperm found 'inside' victim vagina, on victim's night-gown, and panty liner; was consistent with Roberson's DNA as opposed to some unidentified suspect, and four females all testified to a prior agravated sexual assult which Roberson's DNA was consistant with each one).

Thus, all these cases above reveals that DNA evidence need not identify a defendant to the exclusion of all others; However, they each envolve some "additional" physical evidence of identification beyond DNA evidence on clothing to support a conviction.

Here, in the case at bar, only very flimsy fact — i.e., a "mere Modicum" of evidence tend to tie petitioner to the robbery. NOTABLY, Petitioner's case Lacks "any physical description" of the robber from the victims. Therefore, the State's reliance on Roberson and Jones supra and the United States Southern District court's of Appeals decision is "**unreasonable**" and in "**conflict**" with other United States courts of Appeals, because the State asked the jury to draw 'SPECULATIVE' and 'UNWARRANTED' inferences based on two 'unconnected' pieces of 'scientific' evidence through argument instead of Specialized Knowledge see Bonner supra at 215.

(B) THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISION OF THIS COURT.

IN JACKSON v Virgina, 99 S.Ct. 2781, 2788; 61 L. Ed. 2d 560 (1979) SEE ALSO; TEX Penal Code Ann. 2.01 (2003) the Supreme Court elucidated:

After Winship, the critical question on review of the sufficiency of the evidence to support a criminal conviction must not be simply to determine whether the jury was properly instructed, but to determine whether the 'record evidence' could reasonably support a finding of guilt beyond a reasonable doubt JACKSON supra at 2788. Furthermore, though juries may draw reasonable inferences on a witness(s) testimony, those inferences must be supported by evidence and cannot be based on mere speculation HOOPER v State, 214 SW 3d 9 at 15 (Tex Crim. App. 2007) (Citing JACKSON V. Virginia, 443 U.S. "Speculation is defined as 'mere theorizing or guessing about the possible meaning of facts and evidence presented." Id at 16. Conclusions reached through speculation are not necessarily wrong, but they are "not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.") id.

Moreover, any evidence that is relevant - that has any tendency to make the existance of an element of a crime 'slightly' more probable than it would be without the evidence - c.f., Fed. Rule. EVID. 401 - could be deemed a "mere Modicum," but it could not seriously be argued that such a "Modicum" of evidence could by 'itself' rationally support a conviction beyond a reasonable doubt JACKSON supra at 2789.

Therefore, as demonstrated above throughout petitioner's writ, the State's reliance upon the jury to make an unwarranted scientific inference was an impermissible, speculative inference instead of being founded on adequate specialized expert knowledge (IV RR at 47). Furthermore, the jury's reliance on a "mere Modicum" of evidence in the case at bar, was nothing less than mere theorizing or guessing about the possible meaning of facts and evidence presented in Petitioner's case.

The courts' reasoning and decisions that Petitioner's sufficiency of the evidence does not merit relief under the standard of review found in the "AEDPA's," because none of the evidence offered by Petitioner refutes any of the States Court findings and facts, are in 'Conflict' with other United States Courts of Appeals Bonner supra, [United States Dist. court's opinion at 14-19, Appendix (A)].

(C). IMPORTANCE OF QUESTION PRESENTED.

This case presents a fundamental question that must be decided by this court:

Is it reasonable for the United States Disteict and 5th cir courts to conclude that the State sufficiently proved it burden of proof of guilt to sustain Petitioner's Conviction; "WHEN NO CONTEMPORANEOUS IDENTITY EVIDENCE EXIST TO LINK PETITIONER AS THE PERPETRATOR OF THE ROBBERY BEYOND A REASONABLE doubt!" The United States Southern District and 5th cir reasoned that ~~it~~ is sufficient, while other sister courts all reasoned that it is not.

This court should correct any misinterpretation of the <u>JACKSON</u>'s beyond a reasonable doubt standard, in light of, the "ABSENCE OF CONTEMPORANEOUS IDENTITY EVIDENCE" and make it clear that any jury who determines a petitioner's guilt upon scientific inferences from meager Mixture of DNA Evidence "alone" is insufficient to convict because DNA experts, themselves, cannot determine who last wore the items.

II. SECOND REASON FOR GRANTING THE PETITION

(A) The United States Southern Distrit Court of Appeals Decision Conflicts With Decisions of Other Courts.

The State (Respondent) determined that: "[t]he director 'believes' that [Petitioner] has not sufficiently exhausted his state remedies as required by <u>28 U.S.C. § 2254(b)(1)</u> with regard ~~to~~ his ineffective assistance of Counsel allegation 2(b), 'failure to object to State's prejudicial remark; nevertheless, because his unexhausted claim is procedurally barred, **the director does not move for dismissal for failure to exhaust.**'" [See. Respondent's MOTION At 4-6 /Appendix C.]

The United States Southern Disteict Courts of Appeals also determined: "Because [Petitioner] cannot return to the State court to raise his unexhausted ineffective assistance claim concerning his 'attorney's failure to object to prejudicial comment by prosecutor, this also qualifies as a default that bars Federal review (citing Nobles v Johnson, 127 F.3d 409 (5th cir 1997)). [See United States Dist. opin. at 8-11/Appendix A].

However, Nobles v Johnson, 127 F. 3d 409 (5th cir 1997) Concluded: "'**AFTER CONSIDERING**' Noble's sixth Amendment claim based on Counsel's failure to sufficiently introduce mitigating evidence; '**we fail to discern**' evidence of any Constitutional violation whatsoever, much less a Constitutional violation that impacted the jury's findings at that punishment phase . . . even assuming counsel's deficient performance, Nobles could not in any case demonstrate prejudice, given that the evidence actually presented during the punishment phase. **We thus find that 'a TEXAS COURT,' [if] presented with a successive state habeas petition on this claim, would find it barred under article 11.07 §5(a).**" id at 422-23.

Moreover, in Hopkins v Jarvis, 648 F. 2d 981, 983 n.2 (5th cir 1981) concluded: "When the state has not **raised** lack of exhaustion in the district court or on appeal, ordinarly that Constitutes an implied waiver of the Exhaustion requirment." [SEE Respondent's Motion to Dismiss at 4-6 / Appendix C].

Lastly, in Washington v Watkins, 655 F. 2d 1346, 1355 (5th cir Unit A 1981), concluded: "the methodology for applying this standard '**involves**' an '**inquiry**' into the actual performance of Counsel conducting the defense' **and a determination**' of whether reasonable effective assistance was rendered based on the totality of circumstances in the entire record..." id at 1355.

In light of the Fifth (5th) Circuit precedents cited above, the District Court's determination that Petitioner's ineffective assistance claim concerning "ATTORNEY'S FAILURE TO OBJECT TO PREJUDICIAL COMMENT BY PROSECUTOR," is defaulted because Petitioner cannot return to the State, is Applied in an arbitrary manner.

SPECIFICALLY, when the state has either expressly or impliedly waived lack of exhaustion in the distrcit Court JARVIS supra at 983 n.2., and the district court's methodology fails to involve an inquiry into the actual performance of Counsel WATKINS supra at 1355 and Johnson supra 127 F.2d 3d 409 (5th cir 1997), that determination to bar a substantial claim of ineffective Assistance of Counsel becomes premature and applied in a arbitaary manner. SEE Also Banard v Collins, 13 F. 3d 871, 878 (5th cir 1994) (concluding, "that district court's finding of absence of 'cause' was premature in the absence of an evidentiary hearing or other appropriate proceedings to determine 'exactly when' Banard's counsel could have discovered the claim through reasonable diligence and investigation.")
[SEE, Petitioner's Motion to Supplement Record based on Newly Discovered Evidence

/Appendix D.]. And [Petitioner's Motion to Amend 11.07 state habeas writ before final disposition / Appendix E].

MOREOVER, in Citing Nobles v Johnson, 127 F. 3d 409 at 422-23 to Validate their decision to barr petitioner's Ineffective assistance claim, the district court has deviated and has so far departed from the accepted and usual course of judicial 5th circuit proceedings, which obliges the United State Courts to first consider if there is any evidence of Constitutional Violation which substantially impacted the jury's findings and warrants petitioner the right to return to State pursuant to the exceptions in 11.07 § 5(a). — as in Noble v Johnson supra at 422-23. However, the district court has failed to do exactly what the precedent they have cited declared that must first be done in situations such as the case at bar. Also, for the fifth (5th) circuit to adopt the district court's findings, absent any independant inquiry into the merits of Petitioner's 6th and 14th constitutional Amendment rights to due process of law and effective assistance of counsel, where the state has waived lack of Exhaustion, was, too, a departure of their own usual course of judicial proceeding Watkins supra at 1355. [See Appendix B]

ADDITIONALLY, pertaining to Petitioner establishing cause, he specifically filed a motion to Supplement to improve his 11.07 state habeas writ, before the final disposition of the Highest State Court, pursuant to Ex Parte Saenz, 2016 Tex crim App Lexis 68) [See. Appendix E, Petitioner's Motion to Amend writ]. HOWEVER, the state court denied petitioner's Motion by operation of Law, which denied petitioner his 6th and 14th U.S. Const. Rights to Effective Assistance of Counsel and right to due process and equal protection of the Law. THEREFORE, with the exception of the fourth amendment violations, that a petitioner has been given a full and fair opportunity to Litigate in sole court STONE v Powell, 96 SCt 3037 (1976). The writ today appears to extend to all dispositive Constitutional claims presented in a proper procedural manner see. BROWN v ALLEN, 344 U.S. 443.

THUS, Petitioner urges that he had presented his ineffective claim; "failure to object to prejudicial remark, in a proper procedural manner. In light of the fact that the State has waived lack of Exhaustion, without the District and 5th cir. United states Appeal courts inquiring into the Constitutionality of petitioner's rights to effective assistance of Counsel and due process, nor inquiring if Petitioner has established sufficient cause to excuse default through adequately filing motion to amend writ, was pantently unreasonable and Violated Petitioner's due process rights.

(b). THE COURT OF APPEALS for the District court And Fifth (5th) Circuit DECISIONS CONFLICTS ~~WITH~~ DECISIONS OF THIS COURT.

Both the District courts and the 5th cir court's determination not to consider Petitioner's ineffective assistance of trial counsel "for failure to object to prejudicial remark," is in conflict with TRAVINO V THALER, 133 S.Ct. 1911 (2013).

In TRAVINO V THALER, supra, the court held, "that where as here, the state procedural frame work, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance to trial counsel on direct appeal, our holding in MARTINEZ applies:

> [A] proceedural default will not bar a federal habeas court from hearing a 'SUBSTANTIAL' claim of ineffective assistance at trial if in that initial-review collateral proceeding, there was "No counsel" or 'counsel' in that proceeding was ineffective." 566 U.S., at, 132 S.Ct. 1309, 182 L.Ed 2d 272, 278, 288).

For neithe court to establish through inquiry if Petitioner's ineffective assistance of trial counsel claim was "substantial" or not, is in conflict with this court's established precedent.

(c) IMPORTANCE OF THE QUESTION PRESENTED

This case presents another fundamental question that calls for an exercise of this Court's supervisory power;

Is it reasonable for the United State's district and 5th circuit courts to conclude that Petitioner's ineffective assistance of counsel claim was procedural defaulted, when those decision has so far departed from the usual course of judicial proceedings, being applied arbitrarily and Violated due Process.

This Court should correct any unreasonable deviations from the well established 5th cir and Supreme Court's precedents, and make it clear that when the State has waived lack of exhaustion, it is the United State's courts of Appels duty to make an independent determination concerning the Petitioner's substantial Merits of his propeely presented Claim.

CONCLUSION

For the reasons herein, the Districts and 5th cir courts rulings was in error and the petition for a writ of Certiorari should be granted!

Respectfully Submitted,

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PRO-SE