

CASE NO. **20-5529**

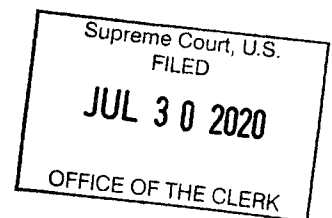
ORIGINAL

IN THE
SUPREME COURT
OF THE
UNITED STATES

HERMAN BENARD
APPELLANT, PRO SE

VS.

LORIE DAVIS
DIRECTOR.
APPELLEE, TDCJ-CED.



E.g., "ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT"

E.g., "PETITION FOR A WRIT OF CERTIORARI"

HERMAN BENARD
TDCJ.3D.#1712727
LEBLANC UNIT
3695 FM 3514
BEAUMONT, TEXAS
77705

THE QUESTIONS PRESENTED FOR REVIEW

1. Having Held THAT A MOTION OR APPLICATION IN A CASE ALREADY ON FILE CAN BE A "SECOND OR SUCCESSIVE MOTION UNDER THE AEDPA, ARE WE NOT THEN REQUIRED TO SAY THAT A MOTION TO AMEND A PETITION BEFORE JUDGMENT IS EQUALLY A SECOND OR SUCCESSIVE MOTION (OR APPLICATION)?
2. WHETHER THE INITIALLY PETITION REMAINED PENDING DUE TO LACK OF A JUDGMENT ENTERED, AND WHETHER THE DISTRICT COURT SHOULD HAVE STAYED THE INITIALLY FILED PETITION?
3. DO A HABEAS PETITIONER LIKE ANY CIVIL LITIGANT, IS ENTITLED TO AMEND HIS PETITION? AND AN AMENDMENT WILL RELATE BACK TO THE DATE OF HIS ORIGINAL PETITION IF THE ADDED CLAIM AROSE OUT OF THE CONDUCT, TRANSACTION OR OCCURRENCE SET FORTH ORIGINALLY? AND...

DOES THE REQUIREMENT GOVERNING SUBSEQUENT WRITS APPLY TO A CLAIM THAT THE TRIAL COURT LACK JURISDICTION? AND DOES THAT PROCEDURAL-DEFAULT RULES APPLY TO JURISDICTIONAL CLAIMS? WHEN THE TRIAL COURT LOST ALL JURISDICTION TO THAT PROCESS?

THE QUESTIONS PRESENTED FOR REVIEW CON'T

4. WHY SHOULD A PRISONER, WHO MAY BE PROCEEDING PROSE, LOSE HIS BASIC CLAIM BECAUSE HE RUNS AFOUL OF STATE PROCEDURAL RULES GOVERNING THE PRESENTATION TO STATE COURT OF THE "CAUSE" FOR HIS NOT HAVING FOLLOWED STATE PROCEDURAL RULES FOR THE PRESENTATION OF HIS BASIC FEDERAL CLAIM?
5. WHETHER INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL SUFFICIENT TO ESTABLISH "CAUSE" UNDER MCCLESKEY FOR FAILURE TO SOONER RAISE THE NEW CLAIMS SOUGHT TO BE THEREBY INJECTED INTO THE CASE?
6. THE DECISION IS IN CONFLICT WITH AUTHORITY DECISIONS OF OTHER FEDERAL APPEALS COURTS. RULE 35(b) FED. R. APP. P. AND IS TRIAL COUNSEL'S INEFFECTIVENESS IN PLEA BARGAIN "CAUSE" FOR PROCEDURAL DEFAULT? AND WHETHER THE CONSTITUTIONAL RIGHT TO COUNSEL EXTENDS TO THE NEGOTIATION AND CONSIDERATION OF PLEA OFFERS THAT LAPSE OR ARE REJECTED?

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HERMAN BENARD
APPELLANT, PRO SE

VS.

LORIE DAVIS
DIRECTOR, TDCJ-CID.
APPELLEE.

Cause no. _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO
REVIEW CASE NO. 18-41132, IN THE UNITED
STATES COURT OF APPEALS FIFTH CIRCUIT.

FROM APPEAL IN CAUSE NO. 1:18-CV-410,
IN THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF TEXAS BEAUMONT DIV.

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, HERMAN BENARD, IN THIS
CAUSE, BEFORE THE SUPREME COURT OF THE
UNITED STATES AND RESPECTFULLY
SUBMITS THIS PETITION FOR WRIT OF
CERTIORARI, PURSUANT TO THE SUPREME
COURT RULE 10, AND RULE 11. FOR THE PURPOSE
OF REVIEWING THE FIFTH CIRCUIT FINAL
JUDGMENT ORDER ON 4-28-20. CAUSE NO.
18-41132 BE DENIED AND ON 5-27-20 DENYING
MOTION FOR RECONSIDERATION AND REHEARING
EN BANC. and - - -

WOULD SHOW THE COURT THE FOLLOWING:

STATEMENT OF THE BASIS FOR JURISDICTION

A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT AND INVOLVES AN ISSUE ON WHICH THE PANEL DECISION CONFLICTS WITH THE AUTHORITY DECISIONS OF OTHER UNITED STATES COURT OF APPEALS THAT HAVE ADDRESS THE ISSUE.

THE DISTRICT COURT'S RULING IS CONTRARY TO FEDERAL AND SUPREME COURT'S LAW ON THE REASONABLE - OR - UNREASONABLE STANDARD OF AEDPA.

BENARD CONTESTED HIS PETITION IS NOT A "SECOND OR SUCCESSIVE" PETITION WITHIN THE MEANING OF 28 U.S.C. § 2244

APPELLANT HAD A RIGHT TO AMEND HIS PETITION UNDER FED. RULES CIV. PROC. RULE 15(A) 28 U.S.C.A. AND SEE, 28 U.S.C. § 2242.

CHAPTER 153 - HABEAS CORPUS

SEC. 28 U.S.C. § 2242. APPLICATION

IT MAY BE AMENDED OR SUPPLEMENTED AS PROVIDED IN THE RULES OF PROCEDURE APPLICABLE TO CIVIL ACTIONS.

FED. RULE CIV. PROC. RULE 15.(2)(C) AMENDED AND SUPPLEMENTAL PLEADINGS

(2) OTHER AMENDMENTS. IN ALL OTHER CASES A PARTY MAY AMEND ITS PLEADING ONLY WITH THE OPPOSING PARTY'S WRITTEN CONSENT OR THE COURT'S LEAVE. THE COURT SHOULD FREELY GIVE LEAVE WHEN JUSTICE SO REQUIRES. SEE. EXHIBIT "G" Pg. 40. APPENDIX. AND (DOC. NOS. 15 AND 16).

THE CONSTITUTIONAL PROVISIONS

IN RE ENRON CORPORATION SECURITIES,
DERIVATIVE & "ERISA" LITIGATION, 540 F.
Supp.2d 759, 766.

IF IT APPEARS THAT GIVEN AN OPPORTUNITY TO AMEND THE PLEADING. THE PLAINTIFF WOULD BE ABLE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED. THE COURT SHOULD GRANT LEAVE TO AMEND.

1. BENARD ADDED ADDITIONAL GROUND THAT: THE TRIAL COURT DENIED APPLICANT HIS SIXTH AMENDMENT RIGHT TO COUNSEL, WHEN HE WAS CONSTRUCTIVE DENIED ASSISTANCE OF COUNSEL DURING A CRITICAL STAGE OF THE PROCEEDING. MAYO V. CORKRILL, 287 F3d 336 (5TH CIR. 2002).

SATTERWHITE, 486 U.S. AT 256, SEE ALSO, U.S. V. CROWIE, 466 U.S. 648, 659 N.25 (1984).

["THE COURT HAS UNIFORMLY FOUND CONSTITUTIONAL ERROR WITHOUT ANY SHOWING OF PREJUDICE WHEN COUNSEL WAS EITHER TOTALLY ABSENT, OR PREVENTED FROM ASSISTING THE ACCUSED DURING A CRITICAL STAGE OF THE PROCEEDING"].

THE CONSTITUTIONAL PROVISIONS

IN THE INSTANT CASE, PETITIONER CLAIM A CONSTRUCTIVE DENIAL OF COUNSEL WHEN HE WAS DEPRIVED OF THE GUIDING HAND OF COUNSEL TO PRESENT A WITNESS AND EVIDENCE OF CONSPIRACY AGAINST DEFENDANT AT A CRITICAL STAGE OF THE PROCEEDINGS. THE "HEARING" ON THE MOTION FOR A NEW TRIAL WAS A CRITICAL STAGE THAT DEFENDANT WAS ENTITLED TO UNDER LAW. PETITIONER WAS DENIED COUNSEL TO PRESENT A VIABLE DEFENSE, AT A CRITICAL STAGE OF THE PROCEEDINGS.

U.S. V. CROWL, 466 U.S. 648, 104 S. CT. 2039.

SEE, ALSO, MC LOY V. LOUISIANA, 584 U.S. ____ (2018) #16-8255

THE SIXTH AMENDMENT ENTITLES EVERY CRIMINAL DEFENDANT TO ASSISTANCE OF COUNSEL AT ALL CRITICAL STAGES OF PROCEEDINGS. UNLESS RIGHT IS COMPETENTLY WAIVED BY DEFENDANT.

FED. RULES CR. PROC. RULE 44(A). 18 U.S.C.A.;

U.S.C.A. CONST. AMEND. 6. SEE, MOTION FOR NEW TRIAL AND ATTACHED EXHIBIT "A", EXHIBIT "B". AND EXHIBIT "E", IN THE

APPENDIX. SEE, ALSO, WILSON V. SELLERS, 584 U.S. ____ 2018, NO. 16-6855; ERICK DANIEL DAVILA V. LORIE DAVIS, 137 S. CT. 2058; 198 L. ED. 2D 603; 2017 U.S. LEXIS 4060.

THE CONSTITUTIONAL PROVISIONS

2. BENARD STATES, HE ASSERTED A FREE-STANDING CLAIM THAT THE TRIAL COURT DENIED APPLICANT HIS FEDERAL AND STATE CONSTITUTIONAL SIXTH AMENDMENT RIGHT TO A SPEEDY AND PUBLIC TRIAL.

U.S. CONST. AMEND. 6. 414. AND TEX. CONST.

ART. I. § 10: TEX. CODE CRIM. PROC. ANN.

1.05 (WEST 2005). BARKER, 407 U.S. AT 532, 92

S. CT. 2182: U.S. V. TILGAND. 111, 880 F.2D 602; U.S. 2018

BENARD CLAIM HE WAS DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW OF THE "FIFTH AND FOURTEEN" AMENDMENT.

FROM THE 2 YEARS LENGTHY DELAY OF OPPRESSIVE PRE-TRIAL INCARCERATION, AND THE LENGTHY DELAY PREJUDICE AND IMPAIRED HIS DEFENSE. BARKER, 407 U.S. AT 532, 92 S. CT. 2182; ZAMORANO V. STATE, 84 S.W. 3D 643, 657). IF THE DEFENDANT IS IN JAIL AWAITING TRIAL PUNISHMENT HAS EFFECTIVELY STARTED WITHOUT A CONVICTION.

(RIGHT TO SPEEDY TRIAL IMPOSED ON STATE BY DUE PROCESS CLAUSE OF THE 14TH AMENDMENT. SEE, KLOPFER V. W.C., 386 U.S. 213, 222-24 (1967).

THE CONSTITUTIONAL PROVISIONS

AFTER BENARD WAS ARRESTED FOR MURDER IN 2005. HIS CASE WAS REPEATEDLY RESET AND LINGERED ON THE DOCKET FOR OVER 72 MONTHS BEFORE IT WENT TO TRIAL IN 2011. BENARD WAS INCARCERATED FOR 6 YEARS DURING THIS TIME AND HE ASSERTED HIS RIGHT TO A SPEEDY TRIAL.

BENARD SUFFERED OPPRESSIVE PRE-TRIAL INCARCERATION AND STRESS AND ANXIETY AND LOST OF MEMORY FROM THE LENGTHY STAY IN JAIL. SEE, EXHIBIT "D" IN THE APPENDIX.

IN THE INSTANT CASE, BENARD CLAIMS HIS STAY IN THE COUNTY JAIL AWAITING TRIAL, THE STATE CAUSE A DELAY SIX TIMES AS LONG AS THAT GENERALLY SUFFICIENT TO TRIGGER JUDICIAL REVIEW AND WHEN THE PRESUMPTION OF PREJUDICE, ALBEIT UNSPECIFIED IS NEITHER EXTENUATED, AS BY THE DEFENDANT'S ACQUIESCENCE, NOR PERSUASIVELY REBUTTED. THE DEFENDANT IS ENTITLED TO RELIEF." DOGGETT, — U.S. AT — 112 S. CT. AT 2694.

U.S. V. DRIEDD, 489 F3D 593; 2007 U.S. APP. LEV'S 18607 (7TH CIR. 2007); SEE, ALSO, UNITED STATES V. GEORGE, 85 F3D 1433, 1436 (9TH CIR. 1996).
SEE, EXHIBIT "D", IN THE APPENDIX.

THE CONSTITUTIONAL PROVISIONS

A RECORD THAT IS SILENT AS TO THE CAUSE FOR DELAY GIVE RISE TO A PRESUMPTION THAT NO VALID REASON FOR DELAY EXISTS. FAILURE TO RAISE ISSUE WHICH WAS OBVIOUS ON THE RECORD AND MUST HAVE LEAPED OUT UPON EVEN A CASUAL READING OF THE TRANSCRIPT WAS DEFICIENT PERFORMANCE AND ONE WHICH WOULD HAVE RESULTED IN A REVERSAL ON APPEAL. SEE, COURT RECORDS, INDEX, NOTE OF RESETTING PAGES 7-THRU-101, FROM 6-2-05-THRU. 4-6-11. AND LETTER TO THE COURT Pg. 84-10-6-10.

THE REQUIREMENT OF SPEEDY JUSTICE HAS BEEN PART OF THE ANGLO-AMERICAN COMMON-LAW TRADITION SINCE THE MAGNA CARTA. IT CAME TO THIS COUNTRY AND WAS EMBODIED IN THE EARLY STATE CONSTITUTIONS, AND LATER IN THE SIX AMENDMENT TO THE UNITED STATES CONSTITUTION. IF THAT RIGHT IS NOT HONORED IN A CASE OF THIS KIND THE BASIC VALUES WHICH THE "FRAMERS" INTENDED TO PROTECT BY THE SIX AMENDMENT'S GUARANTEE OF A SPEEDY TRIAL AND WHICH MOTIVATED CONGRESS TO ENACT THE SPEEDY TRIAL ACT OF 1974 WILL BECOME NOTHING MORE THAN MANAGERIAL CONSIDERATION FOR THE PROSECUTOR TO MANIPULATE. SEE, EXHIBIT "D" IN THE APPENDIX.

STATEMENT OF THE CASE

Appellant is currently incarcerated in the Texas Department of Criminal Justice - Institutional Division at the LeBlanc Unit, located at 3695 FM 3514 Beaumont, Texas 77705. Appellant is serving an imposed sentence of forty eight (48) years, following a conviction of murder in the 252nd Criminal District Court of Jefferson County, Texas. The Honorable Judge Layne Walker presiding. The sentence and judgment was imposed by a jury on April 6, 2011. On April 12, 2011 Appellant filed written notice of appeal. Perfecting direct appeal to the Court of Appeals, Ninth District of Beaumont, Texas.

On May 6, 2011 Appellant filed a motion for new trial and motion in arrest of judgment w/affidavit. See, Appendix. Also, motion was filed in a timely manner.

The trial court did not rule on the motion for new trial and it was overruled by operation of law on July 20, 2011. On September 2, 2011 counsel filed brief for Appellant. Rule of Appellate Procedure 21.8(c).

STATEMENT OF THE CASE
CONT.

AT THIS STAGE APPELLATE COUNSEL MR. BARLOW'S KNEW APPELLANT WAS BEING DEPRIVED OF COUNSEL AT A CRITICAL STAGE.

IN SEPTEMBER 2011, APPEAL COUNSEL MR. BARLOW'S WAS NOTIFIED BY BEAUMONT'S WIFE OF THE MISSING TIMELY FILED MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT WITH ATTACHED AFFIDAVIT AS EXHIBIT "A" FROM THE RECORD. AND MR. BARLOW REPLIED, (SIC) MY GOD! WHERE DID YOU GET THAT? THE COURT OF APPEALS NINTH DISTRICT BEAUMONT, TEXAS GRANTED LEAVE TO FILE A SUPPLEMENTAL BRIEF ON SEPTEMBER 23, 2011. FOLLOWING THE FILING OF A SUPPLEMENTAL RECORD. PURSUANT TO THAT COURT'S ORDER. CR. I [Supp.] -3. SEE ALSO, CR. I [Supp.] -10, CR. I [Supp.] -10-11. CR. I [Supp.] -2. ADDING ADDITIONAL ISSUES TO THE ISSUES RAISED IN THE ORIGINAL BRIEF.

APPEAL COUNSEL MARKED THE MOTION ON TOP RIGHT CORNER (NO FILE MARK 5/6/11), AND ON THE SECOND PAGE OF THE MOTION THE DATE SEEM TO BE OR APPEARS TO BE ALTERED. SEE, MOTION FOR NEW TRIAL. Appendix.

STATEMENT OF THE CASE
COURT.

IN TRIAL CAUSE NO. 95033 APPELLANT'S CONVICTION WAS AFFIRMED ON DIRECT APPEAL ON MAY 16, 2012. SEE, BEAUMONT V. STATE, NO. 09-11-00178-CR. 2012 WL 1795131 (TEX. APP. BEAUMONT. PET. REF'D).

ON JUNE 15, 2012 APPELLANT FILED A PETITION FOR DISCRETIONARY REVIEW IN THE COURT OF CRIMINAL APPEALS OF TEXAS AND ON JULY 25, 2012. THE COURT OF CRIMINAL APPEALS REFUSED THE PDR.

ON SEPTEMBER 5, 2012 APPELLANT FILED APPLICATION FOR WRIT OF HABEAS CORPUS 31107. CAUSE NO. 95033-A AND COMPLAINING OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, INEFFECTIVE ASSISTANCE OF APPEAL COUNSEL, AND CUMULATIVE ERRORS OF BOTH COUNSELS. AND THE APPLICATION WAS DENIED WITHOUT WRITTEN ORDER ON JULY 24, 2013. CASE NO. WR-79, 378-D2, BY THE COURT OF CRIMINAL APPEALS OF TEXAS.

STATEMENT OF THE CASE, CONT.

ON SEPTEMBER 27, 2013 Appellant Filed A Petition For writ OF HABEAS CORPUS § 2254 IN THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION. RON CLARK, Judge Presiding. THE COURT REFERRED THIS MATTER TO THE HONORABLE ZACK HAWTHORN, UNITED STATE MAGISTRATE Judge, AT BEAUMONT, TEXAS, FOR CONSIDERATION PURSUANT TO 28 U.S.C. § 236. CIVIL ACTION NO. 1:13-CV-599, 2016 WL 5402790. THE PETITION WAS PENDING FOR 3 YEARS. PETITIONER WAS ENTITLED TO 323 DAYS OF Tolling.

UNDER FED. R. CIV. P. Rule 15(A), FED. R. CIV. P. Rule 15(C)(2) AND 28 U.S.C. § 2242

BEFORE THE INITIAL PETITION WAS RULED ON - OR - A FINAL DECISION WAS REACHED. PETITIONER FILED A MOTION TO LEAVE TO AMEND HIS INITIAL PETITION. WITH A MOTION FOR AMENDMENT ON MARCH 2, 2015. THE MAGISTRATE JUDGE GRANTED THE MOTION AS MERITORIOUS, ON DECEMBER 21, 2015. CASE NO. 1:13-CV-00599-RC-ZJH. DOCUMENT NO. 17, AND ORDERED THE RESPONDENT SHALL HAVE 30 DAYS IN WHICH TO RESPOND TO THE ADDITIONAL GROUND FOR REVIEW. SEE, EXHIBIT "G" IN THE APPENDIX.

STATEMENT OF THE CASE, CONT.

PETITIONER FILED REPLY TO RESPONDENT SUPPLEMENTAL BRIEF ON MARCH 11, 2016

THE MAGISTRATE JUDGE FILED HIS REPORT AND RECOMMENDATION REQUESTING THAT THE INITIAL PETITION BE DENIED ON THE MERIT, AND THE AMENDMENT CLAIM BE DISMISSED AS PROCEDURAL BARRED FOR UNEXHAUSTED ON AUGUST 9, 2016. AND PETITIONER OBJECTED TO THE MAGISTRATE JUDGE REPORT. DOCUMENT NO. 25 AND SHOWED "CAUSE AND PREJUDICE" FOR PROCEDURAL DEFAULT.

ON SEPTEMBER 27, 2016 THE DISTRICT JUDGE, RON CLARK, OVER RULING PETITIONER'S OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT IN A FINAL JUDGMENT. NO. 1:13-CV-599. DOCUMENT NO. 31. SEE, OBJECTION PG. NO. 7, 8, - TO - DOCUMENT NO. 25, FILED 8-9-16.

ON OCTOBER 18, 2016 APPELLANT FILED AN APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. AND ON AUGUST 2, 2017 IN CAUSE NO. 16-41419 THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT. DENIED BENARD'S COA MOTION

STATEMENT OF THE CASE, CONT.

On MARCH 27, 2018 Appellant returned to the state court to exhaust his unexhausted claims in his amended motion. CAUSE NO. 95033-C. And to show "cause and prejudice" for procedural default claims. THE TRIAL COURT FILED DISMISSAL RECOMMENDATIONS ON MAY 9, 2018 STATING CLAIMS SHOULD HAVE BEEN BROUGHT ON DIRECT APPEAL. WHICH WAS PETITIONER'S EXACT CLAIM FOR "CAUSE AND PREJUDICE."

THE COURT OF CRIMINAL APPEALS OF TEXAS DISMISSED WITHOUT WRITTEN ORDER, THE APPLICATION FOR WRIT OF HABEAS CORPUS. CASE NO. WR-79,378-D4.

Appellant returns to the UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION, CHALLENGING THE PROCEDURAL DEFAULT CLAIMS IN CAUSE NO. 1:18-CV-410 AND AGAIN THE CASE WAS ASSIGNED TO MAGISTRATE JUDGE ZACK HAZTHORN, WHO RECOMMENDED THE PETITION BE DISMISSED WITHOUT PREJUDICE FOR LACK OF SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 2244. HOLDING THE PETITION IS A SECOND OR SUCCESSIVE PETITION. PETITIONER OBJECTED.

STATEMENT OF THE CASE, CONT.

THE DISTRICT JUDGE, MARCIA A. CRONE OVERRULED APPELLANT'S OBJECTIONS AND ADOPTED THE MAGISTRATE JUDGE'S REPORT ON NOVEMBER 15, 2018.

BENARD APPEAL CONTENDING HIS PETITION IS NOT A "SECOND OR SUCCESSIVE" PETITION WITHIN THE MEANING OF 28 U.S.C. § 2244.

FROM SAID JUDGMENT APPELLANT HAS PERFECTED THIS APPEAL TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT COMPLAINING OF THE ISSUES SET FORTH HEREINAFTER. IN CAUSE NO. 18-41132, WHICH WAS DENIED ON 4-28-2020, DOCUMENT NO. DD515397888. AND DENIED MOTION FOR RECONSIDERATION AND REHEARING EN BANC ON 5-27-2020, DOCUMENT NO. DD515430150.

WHICH CALL FOR THIS COURT'S JUDICIAL DISCRETION ON REVIEW OF WRIT OF CERTIORARI PURSUANT TO SUPREME COURT RULE 10 AND RULE 11.

ALR GUMENUT
DNE

Bernard contended His Petition is not a "SECOND OR SUCCESSIVE" Petition WITHIN THE MEANING OF 28 U.S.C. § 2244. SEE, TONY STRICKLAND V. RICK THALER, 701 F3d 171; 2012 U.S. LEXIS 22898 NO. 11-46317, NOV. 7, 2012.

Bernard STATES, THE DISTRICT COURT'S Ruling is CONTRARY TO FEDERAL AND SUPREME COURT'S LAW ON THE REASONABLE OR UNREASONABLE STANDARD OF AEDPA. SEE, KEN E. LOTT, 594 F3d 1296 (11TH CIR. 2010).

APPELLANT HAD A RIGHT TO AMEND HIS PETITION UNDER FED. RULES CIV. PROC. RULE 15(A) 28 U.S.C.A. AND SEE. 28 U.S.C. § 2242. SEE, ALSO, HALL V. CAINE, 216 F3d 518, 521 (5TH CIR. 2000).

ON MARCH 2, 2015, BEFORE THE FEDERAL DISTRICT COURT RULED ON ANY MERITS OF BERNARD'S INITIAL PETITION. CAUSE NO. 1:13-CV-599 BERNARD FILED A MOTION FOR LEAVE TO AMEND HIS INITIAL PETITION. AND A MOTION MOTION TO AMEND THE INITIAL PETITION. (DOCS. 15 AND 16). SEE, EXHIBIT "B"; ATTACHED IN THE APPENDIX.

ARGUMENT, CONT.

THE UNITED STATES MAGISTRATE JUDGE, ZACK HAWTHORN "GRANTED" THE MOTION AS "MERITORIOUS" ON DECEMBER 21, 2015. SEE, EXHIBIT "G" PAGE 3D. #966. IN THE APPENDIX.

JOHNSON V. UNITED STATES, 192 F3d 802, 805 (7TH CIR. 1999) (HOLDING THAT A PETITIONER MAY AMEND A HABEAS PETITION, RATHER THAN FILING A SECOND OR SUCCESSIVE PETITION, WHEN THE FIRST PETITION HAS NOT YET REACH A FINAL DECISION).

SEE, MERCADIEL V. CAIRN, 179 F3d 271-76, 77, 78 (5TH CIR. 1999).

SEE, ALSO, LARRY W. YACKLE, A PRIMER ON THE NEW HABEAS CORPUS STATUTE, 44 BUFF. L. REV. 381, 382 (1996) (STATING THAT UNDER AEDPA, WHEN "A FEDERAL COURT INITIALLY THINKS A CLAIM IS MERITORIOUS, THE COURT MAY NOT ACT PROMPTLY BUT MUST WITHHOLD JUDGMENT WHILE THE PRISONER FIRST SEEKS RELIEF IN STATE COURT").

Argument, Cont.

LITTLE JOHN V. ARTUZ, 271 F3d 360, 362 (2nd 2001).

3. Habeas Corpus Key, 672, 894.1

Thus, when amendment of a Petition under Antiterrorism and Effective Death Penalty Act (AEDPA) is sought before the District Court rules on the merits of the Petition, the motion to amend is not a "second or successive Petition." §2254. Fed. Rules Civ. Proc. Rule 15.

Ching v. U.S., 298 F3d 174 (2nd Cir. 2002).

[27] Applying this principle, we determined in LITTLE JOHN that a motion to amend a §2254 Petition brought while an initial §2254 Petition was still pending before the District Court could not be construed as "second or successive." We therefore held that Fed R. Civ. P. Rule 15, rather than the more stringent standard of the AEDPA, governs such motions to amend. 271 F3d at 362; see, also, Fama v. Comm'r of Corr. Servs., 235 F3d 804, 815, 816 (2nd Cir. 2000).² The holding in LITTLE JOHN was based

RR GUMENT, COURT.

ON OUR UNDERSTANDING THAT THE AEDPA ENSURES "EVERY PRISONER ONE FULL OPPORTUNITY TO SEEK COLLATERAL REVIEW. PART OF THAT OPPORTUNITY—PART OF EVERY CIVIL CASE—is AN ENTITLEMENT TO ADD OR DROP ISSUES WHILE THE LITIGATION PROCEEDS." 271 F3d AT 323 (quoting Johnson, 196 F3d AT 805).

THE GENERAL CONCERN THAT CIVIL PLAINTIFFS HAVE AN OPPORTUNITY FOR A FULL ADJUDICATION OF THEIR CLAIM IS PARTICULARLY HEIGHTENED IN THE AEDPA CONTEXT.

BENARD CONTENDS BECAUSE ROSE V LUNDY CONTROLS THIS CASE, THIS COURT SHOULD HOLD HIS NEW PETITION IS NOT A "SECOND OR SUCCESSIVE" PETITION. SEE, SLACK, 529 U.S. AT 478-79. BECAUSE BENARD RAISED UNEXHAUSTED CLAIMS IN HIS FIRST PETITION THAT THE DISTRICT COURT DISMISSED FOR FAILURE TO EXHAUST STATE REMEDIES.

ROSE V. LUNDY, 455 U.S. 509, 102 S. CT. 1198, 71 L. ED. 2d 379 (1982). SEE, CRONE V. COCKRELL, 324 F3d 833, 838 (5TH CIR. 2003).

U.S. V. THOMAS, 221 F3d 430 (3RD CIR. 2000).

IN RE MORRIS, 363 F3d 891 (9TH CIR. 2004).

ARGUMENT, CONT,

SEE, DUNCAN, 121 S. CT. AT 2130 (STEVENS, J., WHOM SOUTER, J., JOINS, CONCURRING IN PART AND IN THE JUDGMENT). ("[T]HERE IS NO REASON WHY A DISTRICT COURT SHOULD NOT RETAIN JURISDICTION OVER A MERITORIOUS CLAIM AND STAY FURTHER PROCEEDINGS PENDING THE COMPLETE EXHAUSTION OF STATE REMEDIES").

CREWS V. HORN, 360 F3d 146 (3rd Cir. 2004).

6. HABEAS CORPUS KEY, 352, 279

DISTRICT COURTS HAVE THE DISCRETION TO STAY MIXED HABEAS CORPUS PETITIONS CONTAINING BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS. BUT WHEN AN OUTRIGHT DISMISSAL COULD JEOPARDIZE THE TIMELINESS OF A COLLATERAL ATTACK, A STAY IS THE ONLY APPROPRIATE COURSE OF ACTION. 28 U.S.C.A. §§ 2244(d). 2254(b)(1).

LARVELA V. ARTUZ, 254 F3d 374, 378, 380 (2nd Cir. 2001).

AKINS V. KENNEDY, 410 F3d 451 (8TH Cir. 2005).

RHINES, 125 S. CT. AT 1534-35.

DLVERA V. GILBIBINO, 371 F3d 569 (9TH Cir. 2004).

KELLY V. SMALL, 315 F3d 1063, 1070 (9TH Cir. 2003).

SEE, ALSO RHINES V. WEBER, 409 F3d 982, NO. 02-2990, 2005 WL 1322628 (8TH Cir. June 2, 2005) (OPINION FOLLOWING REMAND FROM THE SUPREME COURT.

ARGUMENT, DUE, CONT.

A motion for new trial generally must be determined within 75 days or it will be deemed overruled by operation of law and that the time for conducting the hearing may not be extended by the trial court. TEX. CODE CRIM. PROC. ANN. ART. 40.05

A hearing conducted after a motion for new trial has been overruled by operation of law is not authorized and will not be considered on appeal.

In the trial court's fact findings and conclusion of law and recommendation the trial judge did a paper hearing for the first time on the motion for new trial and Benard claims his 14th amendment due process of law was violated by this court's proceeding. TREVINO V. STATE, 525 S.W. 2d 738 (TEX. CRIM. APP. 1978). A hearing conducted after a motion for new trial has been overruled by operation of law is not authorized and will not be considered on appeal.

SEE, EX PARTE CASEY TYRONE SLEDGE, 391 S.W. 3d 104; 2013 TEX. CRIM. APP. LEXIS 156
JANUARY 16, 2013 NO. AP-72,947

Alcala, Dissenting
Opinion

ARGUMENT, ONE, CONT.

I DISAGREE WITH THE MAJORITY OPINION HOLDING THAT APPLICANT'S CLAIM IS PROCEDURALLY BARRED UNDER TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 11.07.

SECTION 4. THE STATUTE THAT CONTAINS PROCEDURAL REQUIREMENTS FOR CONSIDERATION OF SUBSEQUENT HABEAS APPLICATIONS. 2 SEE TEX. CODE CRIM. PROC. ART. 11.07 § 4(A).

I CONCLUDE THAT THIS COURT HAS JURISDICTION TO ADDRESS APPLICANT'S SUBSEQUENT WRIT BECAUSE THE REQUIREMENT GOVERNING SUBSEQUENT WRITS DO NOT APPLY TO A CLAIM THAT THE TRIAL COURT LACKED JURISDICTION AND, ALTERNATIVELY, (2) IF THOSE REQUIREMENT DO APPLY, THAT CLAIM RAISES A CONSTITUTIONAL VIOLATION THAT SATISFIES THE PROCEDURAL REQUIREMENTS SO AS TO PERMIT REVIEW.

ALTERNATIVELY, APPLICANT'S CLAIM MEETS REQUIREMENTS FOR SUBSEQUENT WRITS.

I ALTERNATIVELY, CONCLUDE THAT, EVEN IF THE SUBSEQUENT-WRIT STATUTE APPLIES TO JURISDICTIONAL CLAIMS, APPLICANT IS ENTITLED TO RELIEF BECAUSE HE HAS SATISFIED ONE OF THE STATUTORILY ENUMERATED EXCEPTIONS. THE STATUTE PERMITS A COURT TO CONSIDER THE MERITS OF A SUBSEQUENT

ARGUMENT, ONE, CONT.

Application if it contains facts establishing that "By a preponderance of the evidence. But for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." TEX. CODE CRIM. PROC. ART. 11.07 § 4(A)

(2). Applicant has alleged facts that satisfy this criterion. But for this constitutional violation - namely, the constructive denial of counsel at a critical stage, no rational juror could have found the applicant guilty beyond a reasonable doubt." TEX. CODE CRIM. PROC. ART. 11.07. § 4(A)(2). See Blue, 230 S.W.3d at 161; see, also Ex Parte Knipp, 232 S.W.3d 214 (Tex. Crim. App. 2007) (391 S.W.3d 117) (Permitting review of applicant's subsequent application raising double-jeopardy constitutional claim under Texas Code of Criminal Procedure Article 11.07 Section 4(A)(2)).

We presumed that the legislature under stands applicable legal concepts when it enacts legislation. See, Miller v. State, 33 S.W.3d 257, 260 (Tex. Crim. App. 2000)

Argument, One, Cont.

(In construing a statute, it's is presumed that the legislature is aware of case law affecting or relating to the statute"). The legislature therefore, understood that a court's power to act could never be affected by a party's consent, action, or inaction, and therefore could not have intended for procedural default to preclude a claim alleging that a trial court lacked jurisdiction. A court lack jurisdiction may not acquire it by a defendant's action or inaction or by subsequent judicial action. See, Marin v. State, 851 S.W.2d 275, 279 (Tex. crim. app. 1993).

(Jurisdiction not optional with parties and cannot be waived by consent);

See Chambers, 23 Tex. at 104; Huang, 872 S.W.2d at 699. Because the legislature understood that procedural-default rules do not apply to jurisdictional claims. It could not have rationally intended to limit subsequent writ that allege that a trial court lacked jurisdiction over a case through the inapplicable concept of procedural default. The record conclusively shows that the trial court lack jurisdiction over this cause. 6

Argument, One, Cont.

ALTHOUGH THIS IS A SUBSEQUENT WRIT. A JUDGMENT THAT IS NULLITY FOR LACK OF JURISDICTION "MAY ALWAYS BE COLLATERALLY ATTACKED." SEIDEL, 39 S.W. 3d AT 224 (CITING HONG, 872 S.W. 2d AT 698). I THEREFORE, WOULD CONSTRUCT THIS APPLICATION AS ONE SEEKING A WRIT OF HABEAS CORPUS UNDER THE COMMON LAW OR PERMIT THE AMENDMENT OF THIS APPLICATION TO INCLUDE THIS GROUND AND GRANT RELIEF.

Argument, Two

BENARD STATES HE ASSERTED A FREE STANDING CLAIM THAT HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED IN HIS OBJECTION TO THE MAGISTRATE JUDGE REPORT AND THE DISTRICT JUDGE'S ORDER OVERRULING OBJECTION AND ADOPTING THE MAGISTRATE JUDGE'S REPORT. SEE, CASE NO. 1:13-CV-599. DOC. NO. 31, Pg. 4, Pg. 1077. SEE, IN RE ENRON CORPORATION SECURITIES DERIVATIVE "ENISA" LITIGATION, 540 F. Supp. 2d 759, 766, IF IT APPEARS THAT GIVEN AN OPPORTUNITY TO AMEND THE PLEADING, THE PLAINTIFF WOULD BE ABLE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED, THE COURT SHOULD GRANT LEAVE TO AMEND.

ARGUMENT, TWO, CONT.

THE SECOND QUESTION CERTIFIED FOR THIS IS WHETHER THE DISTRICT COURT SHOULD HAVE STAYED (RATHER THAN DISMISSED) THE FEDERAL HABEAS PETITION FOR A REASONABLE TIME TO ALLOW BENARD TO RETURN TO STATE COURT AND EXHAUST THE AVAILABLE STATE POSTCONVICTION REMEDIES. SEE, RHINES, 125 S. CT. AT 1534-35.

IN, RHINES V. WEBER, 544 U.S. 229, 125 S. CT. 1528
11. HABEAS CORPUS KEY, 352, 679

BENARD CLAIMS A DISTRICT COURT SHOULD STAY, RATHER THAN DISMISS, A MIXED HABEAS PETITION CONTAINING EXHAUSTED AND UNEXHAUSTED CLAIMS IF THE PETITIONER HAS GOOD CAUSE FOR FAILURE TO EXHAUST. HIS UNEXHAUSTED CLAIMS ARE POTENTIALLY MERITORIOUS AND THERE IS NO INDICATION THAT THE PETITIONER ENGAGED IN INTENTIONALLY DILATORY LITIGATION TACTICS. 28 U.S.C.A. 2254 (b) (1) (A). SEE, ALSO CLEMENTS V. MALONEY, 485 F3D 158, 168, 169 (1ST CIR. 2007).

IT IS INEFFECTIVE TRIAL COUNSEL FOR "CAUSE" TO TELL APPELLANT'S WIFE AND BOYS (SIC) YOUR DAD WILL BE HOME THE NEXT DAY AFTER, BEFORE YOU'RE OUT OF SCHOOL.

"CAUSING" APPELLANT TO LOSE OUT ON A PLEA-BARGAIN. LAFER V. CORDER, 566 U.S. — (2012), 132 S. CT. 1376, 2012 U.S. LEXIS 2322: MISSOURI V. FRYE, 566 U.S. — (2012).

ARGUMENT, TWO, CONT.

HISTORY OF THE SPEEDY TRIAL RIGHT

RECOGNITION OF THE CRITICAL NEED FOR CRIMINAL DEFENDANTS TO PROCEED TO TRIAL IN A TIMELY MANNER HAS A LONG AND AUSPICIOUS HISTORY IN AMERICAN LAW AND ENGLISH COMMON LAW. THE SUPREME COURT DETAILED MUCH OF THIS HISTORY IN ITS 1967 SPEEDY TRIAL CASE, KLOPFER V. NORTH CAROLINA, WHICH HELD THAT THE RIGHT APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT. 386 U.S. 213, 222-23, 87 S. CT. 988, 18 L. ED. 2D 1. THE KLOPFER COURT CITED A TWELFTH-CENTURY CASE FROM ASSIZE OF CLARENDON INSTRUCTING SHERIFFS TO BRING DEFENDANTS TO THE TRAVELING JUSTICES WHEN THE JUDGES "ARE NOT ABOUT TO COME SPEEDILY ENOUGH INTO THE COUNTRY WHERE THEY HAVE BEEN TAKEN" IN ORDER TO ENSURE A PROMPT TRIAL FOR THE CRIMINAL DEFENDANTS. *Id.* AT 223. N.9 (QUOTING 2 ENGLISH (880 F3d 611) HISTORICAL DOCUMENTS 408 (DAVID C. DOUGLAS, AND G.W. GREENAWAY, EDS. 1953)). THE MAGNA CARTA INCORPORATES THIS REQUIREMENT IN ITS EARLY THIRTEENTH CENTURY LANGUAGE ESTABLISHING BASIC GUARANTEES OF JUSTICE:

Argument, Two, Cont,

"We will sell to no man, we will not deny or defer to any man either Justice or Right." *Id.* at 223 (emphasis added) (quoting Magna Carta, c. 29 (c. 40 of King John's Charter of 1215) (1225), translated and quoted in Sir Edward Coke, The Second Part of The Institutes of the Laws of England 45 (Brooke, 5th ed., 1797) ("Coke's Institutes")).

The early seventeenth century commentaries on English common law by Sir Edward Coke interpreted the Magna Carta's language as guaranteeing to any defendant the right to Justice "speedily without delay." *Id.* at 224 (quoting Coke's Institutes 45).

When it came time for the nascent states to draft their own constitutions and declarations of rights, the long-established right to prompt justice was often incorporated in 1776, both Maryland's Declaration of Rights and Virginia's Bill of Rights included a right to "a speedy trial by an impartial jury". Francis H. Heller, the sixth amendment to the constitution of the United

Argument, Two, cont.

STATES: A Study in Constitutional Development 22-23 (1929). DELAWARE, MASSACHUSETTS, and PENNSYLVANIA also included the clause in their original state constitutions. ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 159, n.23 (1992). WHEN ANTI-FEDERALISTS RAISED CONCERNS REGARDING A TOO-STRONG NATIONAL GOVERNMENT, THE REMEDY ADOPTED- THE BILL OF RIGHTS- INCORPORATED THE LONGSTANDING RIGHT TO A SPEEDY TRIAL AS ONE OF THE ESSENTIAL PROTECTION OF INDIVIDUAL RIGHTS AGAINST THE RISK OF ARBITRARY GOVERNMENTAL POWER. U.S. CONST. AMEND VI.

"[T]HE RIGHT TO A SPEEDY TRIAL IS AS FUNDAMENTAL AS ANY OF THE RIGHTS SECURED BY THE SIXTH AMENDMENT.

"KLOPFER, 386 U.S. AT 223. IT'S ORIGIN IN OUR LEGAL SYSTEM DATES BACK OVER 800 YEARS AND IT WAS UNDERSTOOD AS PART OF THE ESSENTIAL SAFEGUARDS AGAINST THE NEWLY FORMED GOVERNMENT OF THE UNITED STATES.

ARGUMENT, TWO, CONT.

FURTHER, WHILE A DEFENDANT MAY WAIVE HIS STATUTORY RIGHT TO A SPEEDY TRIAL BY FAILING TO RAISE IT, HE CANNOT WAIVE HIS CONSTITUTIONAL RIGHT. SEE, BARKER V. WINGO, 407 U.S. 514, 529-30, 92 S. CT. 2182, 33 L. ED. 2D. 101 (1972). THOUGH THE RIGHT MAY APPEAR ABSTRACT AND RELATIVE, THE SUPREME COURT AND THIS COURT HAVE LAID OUT CLEAR METHODS IN DETERMINING WHETHER A DEFENDANT'S CONSTITUTIONAL SPEEDY TRIAL RIGHT HAS BEEN VIOLATED. THIS COURT SHOULD TURN TO THE CONTROLLING LAW AND APPLY IT TO THE EXCEPTIONAL FACTS OF THIS CASE.

ARGUMENT, THREE

"CAUSE AND PREJUDICE"

IN THE ALTERNATIVE, THE COURT OVERLOOKED BEHARD'S CONTENTION THAT HE HAD DEMONSTRATED LEGAL "CAUSE AND PREJUDICE" FOR FAILING TO PRESERVE ERROR BY ASSERTING, BOTH IN STATE COURT AND FEDERAL COURT, THAT THE FAILURE TO PRESERVE ERROR

ARGUMENT, THREE, CONT.

"Cause and Prejudice"

WAS INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL. SEE, RULES-SECTION 2254 CASES-RULE 9., 83 HARV. L. REV. AT 1153-1154.

BENARD STATES HIS TRIAL AND APPELLATE COUNSEL FAIL TO RAISE SUCH AN INTEGRAL PART OF APPLICANT'S CASE ON HIS APPEAL OF RIGHTS. (DIRECT APPEAL) CONSTITUTES A DENIAL OF THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. AND WAS CONSTITUTIONALLY DEFICIENT AND PREJUDICIAL TO DEFENDANT FOR THE PURPOSE OF "CAUSE AND PREJUDICE" ANALYSIS. SEE, SECTION TO MAGISTRATE JUDGE FINDING Pg. 7+8, CASE NO. 1:13-CV-599 SEE, ALSO, U.S. V. WILLIAMSON, 183 F3d 458, 462-63, 77 LSTH CIR. 1999. (HOLDING THAT "[S]OLID MERITORIOUS ARGUMENT BASED ON DIRECTLY CONTROLLING PRECEDENT SHOULD BE DISCOVERED AND BROUGHT TO THE COURT'S ATTENTION" BY APPELLATE COUNSEL.

IF APPELLATE COUNSEL FAILS TO RAISE A CLAIM THAT HAS INDISPUTABLE MERIT UNDER WELL-SETTLED LAW AND WOULD NECESSARILY

ARGUMENT, THREE, CONT.

RESULT IN REVERSIBLE ERROR. APPELLATE COUNSEL IS INEFFECTIVE FOR FAILING TO RAISE IT. EX PARTE MILLER, 330 S.W.3d 210, 223 (TEX. CRIM. APP. 2009); SEE, SMITH V. ROBBINS, 528 U.S. 259, 284, 288, 291, 126 S. CT. 746 (2000).

BENARD STATES APPEAL COUNSEL KNEW ABOUT THE "DEPRIVATION" OF COUNSEL AT THIS STAGE, A FEDERAL CONSTITUTIONAL RIGHT BEING VIOLATED.

BENARD STATES AND THE RECORD WILL SHOW, IF THE MOTION FOR NEW TRIAL WOULD HAVE BEEN FILED AS INDICATED BY STAMPED DATE ON THE SECOND PAGE OF THE MOTION FOR NEW TRIAL. THERE WOULD BE NO REASON FOR APPELLATE COUNSEL TO REQUEST LEAVE OF COURT OF APPEALS TO FILE A SUPPLEMENTAL RECORD. GRANTED. SEPTEMBER 23, 2011. SEE, MOTION FOR NEW TRIAL w/ ATTACHED AFFIDAVIT. IN THE APPENDIX.

CARLOS TREVIÑO V. RICK THALER, 133 S. CT. 1911 (2013). INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPELLATE REVIEW COULD AMOUNT TO "CAUSE", EXCUSING A DEFENDANT'S FAILURE TO RAISE (AND THUS PROCEDURALLY DEFAULTING) A CONSTITUTIONAL CLAIM. Id., AT _____, 132 S. CT. 1309, 182 L. ED. 2D 272.

"Cause and Prejudice"

ARGUMENT, THREE, CONT.

Bernard STATES Appeal Counsel MR. BARLows WAS NOTIFIED BY Bernard's WIFE OF THE MISSING TIMELY FILED MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT WITH ATTACHED AFFIDAVIT AS EXHIBIT "A" FROM THE RECORD. MR. BARLows WITH THE COURT'S LEAVE FILED FOR SUPPLEMENTAL RECORD AND A SUPPLEMENTAL BRIEF. THE MOTION WAS OVERRULED BY OPERATION OF LAW ON JULY 20, 2011. TEXAS RULE OF APPELLATE PROCEDURE 21.8(c)

SEE, EXHIBIT, MOTION FOR NEW TRIAL WITH AFFIDAVIT IN THE APPENDIX.

Bernard STATES, THAT IT APPEARS THAT THE MOTION FOR NEW TRIAL WAS NEVER PRESENTED TO THE TRIAL COURT AND ON THE FACE OF THE MOTION FOR NEW TRIAL THERE IS WRITTEN "NO FILE MARK" 5/6/11, WRITTEN BY APPEAL COUNSEL MR. BARLows. AND ON PAGE (2) IS A STAMP MARK THAT THE DATE APPEARS TO HAVE BEEN ALTERED. ALL INDICATIONS THAT THE TRIAL JUDGE NEVER REVIEWED THE MOTION FOR NEW TRIAL. SEE, RAY JASPER V. RICKTHALER, 765 F. Supp. 2d 783, 847, 2011. U.S. DIST. LEVIS 5107.

ARGUMENT, THREE, CONT.
"Cause and Prejudice"

MURRAY V. CARRIER, 477 U.S. 478, 488, 106 S. CT. 2639 2645, 91 L. Ed. 2d. 397 (1986) (Holding THAT PROOF OF INEFFECTIVE ASSISTANCE BY COUNSEL SATISFIES THE "CAUSE" PRONG OF THE EXCEPTION TO THE PROCEDURAL DEFAULT DOCTRINE).

BEWARD STATES THERE IS OTHER EVIDENCE THAT MAY HAVE ARISE ON THE HEARING OF THIS MOTION, HAD COUNSEL BEEN ALLOWED TO PRESENT THIS MOTION FOR NEW TRIAL TO THE TRIAL COURT AND EVIDENCE THAT MAY HAVE SECURED APPELLANT'S ACQUITTAL, OR GROUNDS FOR A LESSER INCLUDED OFFENSE HAD THIS EVIDENCE BEEN PRESENTED TO A JURY. THIS EVIDENCE IS ATTACHED AS EXHIBIT "B", "C", "D", "E", SEE, APPENDIX.

DAVILA V. DAVIS, 137 S. CT. 2058; 198 L. Ed. 2d 603; U.S. 2017 U.S. LEXIS 4060.

THE COURT HELD IN EVITT THAT "[A] FIRST APPEAL AS OF RIGHT -- IS NOT ADJUDICATED IN ACCORD WITH DUE PROCESS OF LAW IF THE APPELLANT DOES NOT HAVE THE EFFECTIVE ASSISTANCE OF AN ATTORNEY."

Argument, THREE, CONT.

"Cause and Prejudice"

469 U.S., AT 396, 105 S. CT. 830, 83 L. ED 2d 821.
THE COURT ADDED THAT "THE PROMISE OF
GIDEON V. WAINWRIGHT, 372 U.S. 335, 83
S. CT. 792, 9, L. ED 2d 799 (1963).] THAT A
CRIMINAL DEFENDANT HAS A RIGHT TO
COUNSEL AT TRIAL WOULD BE A FUTILE
GESTURE UNLESS IT COMPREHENDED THE
RIGHT TO THE EFFECTIVE ASSISTANCE OF
COUNSEL" "ON APPEAL". ID., AT 397, 105 S. CT
830, 83 L. ED. 2d 821 AND WE STATED IN
MARTINEZ ITSELF THAT "IF THE ATTORNEY
APPOINTED BY THE STATE TO PURSUE THE
"DIRECT APPEAL" IS INEFFECTIVE THE
PRISONER HAS BEEN DENIED FAIR PROCESS."
526 U.S., AT 11, 132 S. CT. 1309, 182 L. ED. 2d 272
(CITING COLEMAN V. THOMPSON, 501 U.S. 722,
754, 111 S. CT. 2546, 115 L. ED. 2d 670 (1991); EVITT
SUPRA, AT 396. DOUGLAS, SUPRA, AT 357-358).
SEE, CARPENTER V. MOHR, 123 F3d (6TH CIR. 1998)
HOLLOWAY V. HORN, 161 F. Supp. 2d 452; 2001
U.S. DIST. LEXIS 13463 CIVIL ACTION NO. 00-CV-1757.
EDWARDS V. CARPENTER, 529 U.S. 448, 120 S. CT.
1587 (2000).

PRAYER

WHEREFORE, Appellant Prays That This Honorable Court Reverse This Cause and Grant Appellant Relief to which He may be entitled to in this Proceedings.

Respectfully Submitted,

Herman Bernard July 23, 2020
HERMAN BERNARD, ID. NO. 1712727, PRO SE

DECLARATION

I, HERMAN BERNARD, TDCJ- ID. NO. 1712727
PRESENTLY INCARCERATED AT THE
LEBLANC UNIT OF TDCJ-CID. DO HEREBY
DECLARE UNDER PENALTY OF PERJURY
PURSUANT TO 28 U.S.C. § 1746. THAT THE
FOREGOING PETITION FOR A WRIT
CERTIORARI IS TRUE AND CORRECT.

EXECUTED ON THIS 23TH DAY OF
JULY, 2020

Herman Bernard July 23, 2020

HERMAN BERNARD
TDCJ. NO. 1712727
LEBLANC UNIT
3695 FM 3514
BEAUMONT, TEXAS
77705