

Appendix. Pursuant To Supreme
Court Rule 141(i)

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IN THE 252ND DISTRICT COURT
OF JEFFERSON COUNTY, TEXAS

EX PARTE

*

HERMAN BENARD

*

WRIT NO. 95033-C

***ARTICLE 11.07, § 4 - DISMISSAL RECOMMENDATION;
WITH TRANSMITTAL ORDER***

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On April 26, 2018, the district clerk filed the instant post-conviction habeas corpus application and forwarded same to this Court pursuant to Texas Rule of Appellate Procedure [“T.R.A.P.”] 73.4(a), and Texas Code of Criminal Procedure Article 11.07, §3(b).
2. In this second-subsequent [C-writ] habeas application, inmate-applicant, Herman Benard, challenges the validity of his 2011 conviction for Murder and resulting forty-eight-year sentence, Trial Cause 95033.
3. Applicant’s conviction was affirmed on direct appeal. *See Bernard v. State*, No. 09-11-00178-CR, 2012 WL 1795131 (Tex. App. - Beaumont May 16, 2012, pet. ref’d) (mem. op., not designated for publication).
4. Applicant raises two grounds for relief claiming this trial court “constructive[ly]” denied him the right to counsel at a critical stage of the proceeding, that being a hearing on his post-conviction motion for new trial

[Ground 1]; and, presenting a “free-standing claim” which alleges this Court’s denial of his federal and state constitutional right to a “speedy and public trial” [Ground 2].

5. This Court’s files indicate applicant’s initial [A-writ] application, No. 95033-A, was denied on July 24, 2013, by the Court of Criminal Appeals [CCA] without written order in CCA Case No. WR-79,378-02; and that applicant’s first-subsequent [B-writ] application, No. 95033-B, was dismissed on November 22, 2017, by the CCA for failing to satisfy the requirements of Article 11.07, § 4, Texas Code of Criminal Procedure in CCA Case No. WR-79,378-03.

6. This Court finds that Ground 1’s claim in the instant C-writ application is identical to Ground 1’s claim rejected as subsequent per § 4 of Article 11.07 in applicant’s B-writ application; and, that Ground 2’s claim in the instant application presents a claim that could have, and should have, been complained of on direct appeal. *See Ex parte Richardson*, 201 S.W.3d 712, 713 (Tex. Crim. App. 2006) (citing *Ex parte Townsend*, 137 S.W.3d 79, 81-82 (Tex. Crim. App. 2004), and *Ex parte Pena*, 71 S.W.3d 336, 338 (Tex. Crim. App. 2002)).

7. Indeed, this Court notices that the claims presented now in Grounds 1 and 2 were also raised in applicant's federal habeas corpus petition and denied in federal district court, with Judge Clark noting that neither claim had been properly presented to the CCA on initial state habeas review. *See Benard v. Director, TDCJ-CID*, Civil Action No. 1:13cv599, 2016 WL 5402790, at *1, 3 (E.D. Tex., Sept. 28, 2016); thereafter, the Fifth Circuit Court of Appeals denied applicant's motion for certificate of appealability to contest the district court's ruling. *See Benard v. Davis*, No. 16-41419, 2017 WL 6942428 (5th Cir. Aug. 2, 2017).

8. Also, this Court finds that applicant's response to Question 14(C) in the instant C-writ application which suggests that the federal courts dismissed his federal habeas petition "under the Federal Exhaustion Doctrine" and directed that he present these claims in state court, is incorrect; as Judge Clark, and Magistrate Judge Hawthorn, correctly noted, such claims presented in a second [or later] state habeas application would not be considered by the CCA. *See Benard v. Director*, 2016 WL 5402790, at *1.

9. Having examined the habeas record, including the files from applicant's A-writ and B-writ applications, the appellate record in the

underlying cause, and the Ninth Court's memorandum opinion on direct appeal, this Court finds the claims submitted in Grounds 1 and 2 in the instant C-writ application do not satisfy Article 11.07, §4's "one bite"-exception because the supporting facts fail to show that either of these claims could not have been submitted previously in an original writ application, or in applicant's previously considered A-writ application filed pursuant to Article 11.07, because the factual [or legal] basis for Grounds 1 and 2's claims was unavailable through the exercise of reasonable diligence on September 11, 2012, the date applicant filed his prior A-writ application. *See* Texas Code Criminal Procedure Article 11.07, §4(a)(1), (b) - (c).

10. Therefore, this Court concludes Grounds 1 and 2's claims fails to satisfy the statutory exceptions to Article 11.07, §4's abuse-of-the-writ provisions for subsequent writ applications; as such, this Court further concludes that it is barred from considering the merits of Grounds 1 and 2's claims, and that said claims should be dismissed. *See Ex parte Sledge*, 391 S.W.3d 104, 111 (Tex. Crim. App. 2013) (To overcome Article 11.07, §4's abuse-of-the-writ provisions, a subsequent post-conviction writ application

must contain facts "that establish either new law, new facts, or actual innocence.").

RECOMMENDATION

Based on the foregoing facts and applicable law, this Court respectfully recommends that the instant C-writ application, No. 95033-C, be **DISMISSED** as statutorily barred under Article 11.07, §4's abuse-of-the-writ doctrine.

TRANSMITTAL ORDER: WRIT NO. 95033-C

THE CLERK OF THIS COURT IS HEREBY ORDERED to immediately forward the following items to the Texas Court of Criminal Appeals pursuant to Texas Rule of Appellate Procedure 73.4(b)(2) and Texas Code of Criminal Procedure Article 11.07, § 3(d):

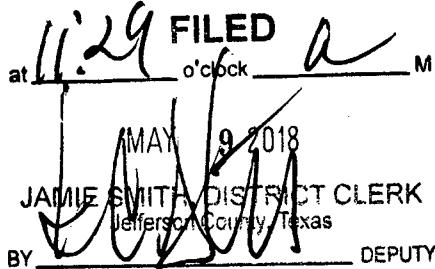
1. the application for writ of habeas corpus filed in this habeas proceeding;
2. this Court's findings, conclusions, recommendation, and accompanying Order in this habeas proceeding;
3. any answers, responses, affidavits, exhibits, attachments, or other papers received by this Court from either the applicant or the State in this habeas proceeding;

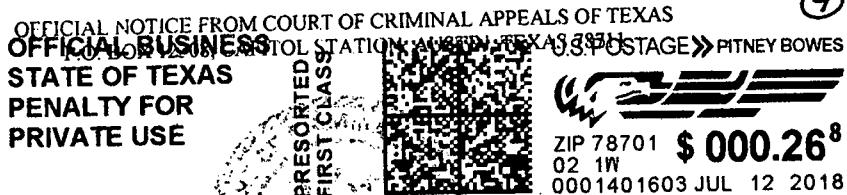
4. the clerk's record in this habeas proceeding; and
5. any records, documents, or other matters used by the Court in preparation of its findings, conclusions, and recommendation in the instant habeas proceeding.

THE CLERK OF THIS COURT IS FURTHER ORDERED to transmit a copy of this Order, including the Court's findings, conclusions, and recommendation, to the appellate division of the Jefferson County District Attorney's Office, and to forward same by certified mail, return receipt requested, to inmate-applicant, Herman Benard, TDCJ No. 01712727, who is presently incarcerated in the TDCJ's Eastham Unit.

Entered this day, the 9th of May, 2018.


Raquel West, Presiding Judge
252nd District Court
Jefferson County, Texas





7/10/2018

BENARD, HERMAN

Tr. Ct. No. 95033-C

WR-79,378-04

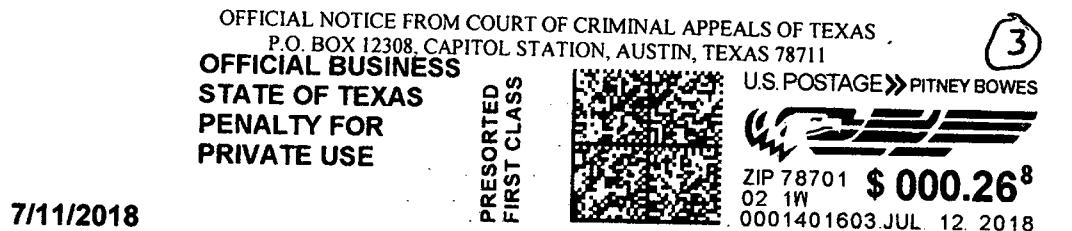
On this day, the Court has denied applicant's "MOTION FOR OBJECTION TO, TRIAL COURTS DISMISSAL RECOMMENDATION".

Deana Williamson, Clerk

3-50

HERMAN BENARD
EASTHAM UNIT - TDC #1712727
2665 PRISON ROAD #1
P. O. BOX 16
LOVELADY, TX 75851

FMAGNAB 75851



7/11/2018

BENARD, HERMAN

Tr. Ct. No. 95033-C

WR-79,378-04

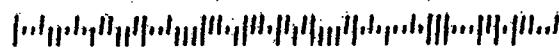
The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

60
50

HERMAN BENARD
EASTHAM UNIT - TDC #1712727
2665 PRISON ROAD #1
P. O. BOX 16
LOVELADY, TX 75851

FMAGNAB 75851



Appendix. Pursuant to Supreme
Court Rule 14 1(i)

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1:18-CV-410.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

HERMAN BENARD §
VS. § CIVIL ACTION NO. 1:18-CV-410
DIRECTOR, TDCJ-CID §

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, Herman Benard, an inmate confined at the Eastham Unit with the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Background

Petitioner challenges a 2011 conviction and sentence for murder wherein petitioner was sentenced to a 48 year term of imprisonment. Petitioner concedes in his petition that he has already sought habeas corpus relief concerning this conviction and sentence. It would appear petitioner has yet to seek permission from the Fifth Circuit Court of Appeals to file a successive petition.

Analysis

Petitioner concedes he has already sought habeas corpus relief concerning this conviction and sentence. Title 28 U.S.C. § 2244(b) provides the procedure for dealing with second or successive petitions for writ of habeas corpus filed by a state prisoner under 28 U.S.C. § 2254. Section 2244(b) requires individuals who seek to file a second or successive habeas corpus petition to obtain leave of the appropriate Court of Appeals for an order authorizing the district court to consider such a second or successive application. Title 28 U.S.C. § 2244(b)(3) reads, in part, as follows:

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

28 U.S.C. § 2244(b)(3). In addition, the amendments require that the court dismiss a claim presented in a second or successive habeas corpus petition if that claim was presented in a prior habeas application.

Here, petitioner concedes he has already filed a previous writ of habeas corpus attacking the same conviction and sentence. Furthermore, it would appear petitioner has not requested permission to file a second or successive habeas application from the Fifth Circuit Court of Appeals. Section 2244(b)(3)(A) constitutes a bar to the district court's jurisdiction to consider a successive habeas petition unless a three-judge panel of the United States Court of Appeals for the Fifth Circuit has first granted the petitioner permission to file such a petition. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (per curiam); *see also Crone v Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003) (section 2254 habeas petition). Thus, petitioner's claims must be dismissed.

Recommendation

The above-styled petition should be dismissed without prejudice.

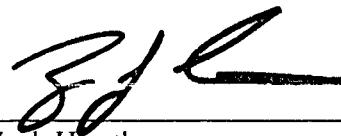
Objections

Within fourteen (14) days after receipt of the Magistrate Judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1)(c).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen (14) days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings,

conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 24th day of August, 2018.



Zack Hawthorn
United States Magistrate Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

HERMAN BENARD, §
§
Petitioner, §
§
versus § CIVIL ACTION NO. 1:18-CV-410
§
DIRECTOR, TDCJ-CID, §
§
Respondent. §

**MEMORANDUM ORDER OVERRULING OBJECTIONS AND ADOPTING THE
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Petitioner, Herman Benard, an inmate confined at the Eastham Unit with the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge recommends dismissing the petition as successive.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such referral, along with the record, and pleadings. Petitioner filed objections to the Magistrate Judge's Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

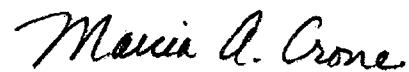
After careful consideration, the court finds petitioner's objections are without merit. Petitioner concedes he has already sought habeas corpus relief concerning this conviction and sentence. This Court is without jurisdiction to consider a successive habeas petition unless a three-

judge panel of the United States Court of Appeals for the Fifth Circuit has first granted the petitioner permission to file such a petition. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (per curiam); *see also Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003) (section 2254 petition).

ORDER

Accordingly, the objections of the plaintiff are **OVERRULED**. The findings of fact and conclusions of law of the Magistrate Judge are correct, and the report of the Magistrate Judge is **ADOPTED**. A Final Judgment will be entered in this case in accordance with the Magistrate Judge's recommendations.

SIGNED at Beaumont, Texas, this 15th day of November, 2018.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

HERMAN BENARD,

Petitioner,

versus

DIRECTOR, TDCJ-CID

Respondent.

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CIVIL ACTION NO. 1:18-CV-410

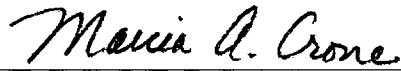
FINAL JUDGMENT

This action came on before the court, Honorable Marcia A. Crone, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and **ADJUDGED** that this petition filed pursuant to 28 U.S.C. § 2254 is **DISMISSED** as successive.

All motions by either party not previously ruled on are **DENIED**.

SIGNED at Beaumont, Texas, this 15th day of November, 2018.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

Case 1:18-cv-00410-Ma

UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

WARD
HF
RECTOR, TDCJ-CID

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§
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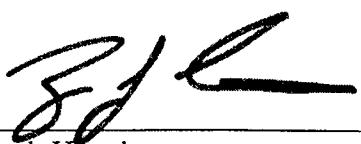
CIVIL ACTION NO. 1:18-CV-410

ORDER GRANTING MOTION TO PROCEED IN FORMA PAUPERIS

Appellant seeks permission to proceed *in forma pauperis* on appeal (docket entry no. 8). Having reviewed appellant's application solely on the basis of financial status, the court finds that appellant meets the indigency requirements of 28 U.S.C. § 1915. It is therefore,

ORDERED that permission to proceed *in forma pauperis* (docket entry no. 8) is
GRANTED.

SIGNED this 7th day of December, 2018.



Zack Hawthorn
United States Magistrate Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

HERMAN BENARD,

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§

Petitioner,

versus

CIVIL ACTION NO. 1:18-CV-410

DIRECTOR, TDCJ-CID,

§
§
§
§
§

Respondent.

MEMORANDUM ORDER DENYING CERTIFICATE OF APPEALABILITY

Petitioner, Herman Benard, an inmate confined at the Eastham Unit with the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On August 24, 2018, the Magistrate Judge to whom this case was referred entered a Report and Recommendation, recommending the petition for writ of habeas corpus be denied for lack of jurisdiction as successive (docket entry no. 2). Petitioner filed Objections to the Report and Recommendation arguing his petition should not be considered successive as he has overcome a procedural default by showing cause and prejudice. Objections, pg. 2 (docket entry no. 4).¹ On November 15, 2018, this court overruled Petitioner's Objections and adopted the Report and Recommendation (docket entry no. 5). A Final Judgment was entered on that same day (docket entry no. 6). Petitioner filed a Notice of Appeal on December 3, 2018, which was docketed by the Fifth Circuit Court of Appeals on December 13, 2018 (docket entry no. 7).

¹

Petitioner appears to argue that this petition is not successive as the present claims were previously dismissed as unexhausted and procedurally barred in his original petition. *Benard v. Director*, 1:13cv599. Petitioner challenges the determination made in his first writ of habeas corpus, arguing that petition should have been dismissed as a mixed petition as not all of the claims were exhausted.

The court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying post-conviction collateral relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability requires petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, petitioner need not establish that he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

In this case, petitioner has not shown that the issues are subject to debate among jurists of reason or worthy of encouragement to proceed further. Petitioner has not sought leave of the Fifth Circuit Court of Appeals for an order authorizing the district court to consider the successive petition. As a result, this court lacks jurisdiction to consider this petition. A certificate of appealability shall not issue in this matter.

ORDER

Accordingly, a Certificate of Appealability is **DENIED**.

SIGNED at Beaumont, Texas, this 19th day of March, 2019.



MARCIA A. CRONE
2 UNITED STATES DISTRICT JUDGE

Appendix, Pursuant to Supreme
Court Rule 14.1(i)

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United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 02, 2017

Mr. David O'Toole
Eastern District of Texas, Beaumont
United States District Court
300 Willow Street
Room 104
Beaumont, TX 77701-0000

No. 16-41419 Herman Benard v. Lorie Davis, Director
USDC No. 1:13-CV-599

Dear Mr. O'Toole,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Gardner

By: Christina A. Gardner, Deputy Clerk
504-310-7684

cc w/encl:

Mr. Herman Benard
Mr. Thomas Merrill Jones

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41419
USDC No. 1:13-CV-599



A True Copy
Certified order issued Aug 02, 2017

HERMAN BENARD,

Tyler W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the
Eastern District of Texas, Beaumont

O R D E R:

Herman Benard, Texas prisoner # 1712727, was convicted of murder and sentenced to 48 years of imprisonment. He now moves this court for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition as procedurally barred and on the merits. Benard also moves for judicial notice and for leave to file a supplemental brief.

Benard contends that the district court erred by: (1) finding procedurally barred his claim that he was denied assistance of counsel at a critical stage of the criminal proceedings; and (2) denying on the merits his claims that his trial counsel was ineffective by failing to seek a pretrial hearing on the issue of speedy trial and by failing to investigate witnesses and prepare for trial. While

No. 16-41419

Benard also argued below that his trial counsel was ineffective by failing to object to the trial court's responses to jury notes requesting review of certain evidence during deliberations, that his appellate counsel was ineffective by failing to argue that statements made by the prosecutor during closing arguments violated his Fifth Amendment rights, and that the cumulative effect of these errors violated his constitutional rights, he does not meaningfully address these issues in his COA briefing and, accordingly, has waived them. *See Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987); *see also Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA, Benard must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a claim on the merits, a COA will be granted only if the applicant "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For a claim denied by the district court on procedural grounds, Benard must show "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." *Id.* Benard has not made the requisite showing. *See id.*

Accordingly, Benard's COA motion, motion for judicial notice, and motion for leave to file a supplemental brief are DENIED.



EDWARD C. PRADO
UNITED STATES CIRCUIT JUDGE

(2)

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 28, 2020

Mr. David O'Toole
Eastern District of Texas, Beaumont
United States District Court
300 Willow Street
Room 104
Beaumont, TX 77701-0000

No. 18-41132 Herman Benard v. Lorie Davis, Director
USDC No. 1:18-CV-410

Dear Mr. O'Toole,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

By: Charles B. Whitney, Deputy Clerk

cc w/encl:
Mr. Herman Benard

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-41132

HERMAN BENARD,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

O R D E R:

Herman Benard, Texas prisoner # 1712727, has moved for a certificate of appealability (COA) to appeal the district court's dismissal without prejudice of his 28 U.S.C. § 2254 application in which he raised claims as to his conviction for murder. The district court found that the application was an unauthorized successive § 2254 application that the court lacked jurisdiction to consider.

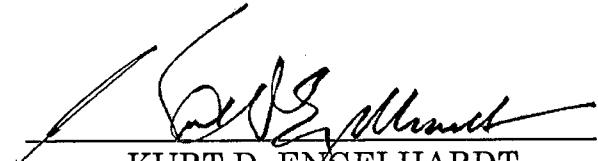
In his COA motion, Benard challenges the district court's conclusion that his instant § 2254 application is successive. He suggests that the application should not be treated as successive because he had not fully exhausted his state remedies as to each of his claims when he filed his first § 2254 application. He argues that the district court should have dismissed his initial application without prejudice because it contained exhausted and unexhausted claims and

No. 18-41132

that the merits of his instant application—which effectively is a continuation of his first application—should be considered because he has now exhausted all claims. Benard additionally suggests that his instant application should not be treated as successive because he can show cause and prejudice to excuse the procedural default of a claim that the district court in the initial § 2254 proceeding found was procedurally barred. He further briefs the merits of his claims that he was constructively denied counsel in connection with a motion for a new trial and was not afforded a speedy trial.

To be granted a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When the district court disposes of a § 2254 application on procedural grounds, as here, a movant must show “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 v. McDaniel*, 529 U.S. 473, 484 (2000).

Benard has not made the required showing. Thus, his motion for a COA is DENIED. His motion for judicial notice likewise is DENIED.



KURT D. ENGELHARDT
UNITED STATES CIRCUIT JUDGE

(3)

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 14, 2020

#1712727
Mr. Herman Benard
CID LeBlanc Pre Release Facility
3695 FM 3514
Building 5-0-23B
Beaumont, TX 77705-0000

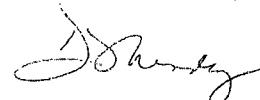
No. 18-41132 Herman Benard v. Lorie Davis, Director
USDC No. 1:18-CV-410

Dear Mr. Benard,

Your "Motion for Rehearing with Suggestion of Rehearing En Banc" has been accepted in its present form and filed on May 12, 2020. However, a petition for panel rehearing of an administrative order is not available. Any review of a single judge order of this Court must be in the form of a motion for reconsideration by a panel of judges. See 5th Cir. R. 27.2. Accordingly, your document has been filed as both a motion for reconsideration of the Court's order of April 13, 2018, and as a petition for rehearing en banc. Once the court has ruled, you will be notified accordingly.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

(2)

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 27, 2020

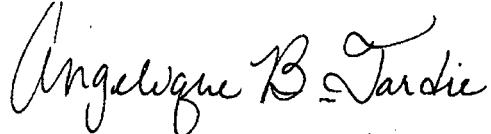
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-41132 Herman Benard v. Lorie Davis, Director
USDC No. 1:18-CV-410

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By:
Angelique B. Tardie, Deputy Clerk
504-310-7715

Mr. Herman Benard

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-41132

HERMAN BENARD,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before HAYNES, GRAVES, and ENGELHARDT, Circuit Judges.

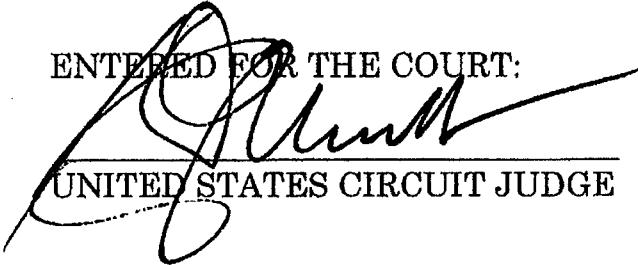
PER CURIAM:

- (✓) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- () The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for

Rehearing En Banc is also DENIED.

- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

Appendix. Pursuant To Supreme
Court Rule 14.1(i).

Table of Contents

1. MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT WITH ATTACHED AFFIDAVIT AS EXHIBIT "A"
2. EXHIBIT "B", AFFIDAVIT WITH "HIGH-LIGHTED" IMPORTANCE.
3. EXHIBIT "C", AFFIDAVIT ABOUT WITHHELD EVIDENCE. MISSING CURTAINS.
4. EXHIBIT "D", EVIDENCE ABOUT SPEEDY TRIAL VIOLATIONS.
5. EXHIBIT "E", PHYSICAL ASSESSMENT. EVIDENCE OF MEDICAL RECORDS TO PROVE APPELLANT SUFFERED A CONCUSSION FROM THE ASSAULT OF THE VICTIM.
6. EXHIBIT "F", COURT ORDER GRANTING TWO MOTIONS (DOC. NOS. 15 AND 16) TO AMEND THE INITIAL PETITION BY THE UNITED STATES MAGISTRATE JUDGE.

Mo - file Mov K
5/6/11

NO. 95033

STATE OF TEXAS

vs.

HERMAN BENARD

§ IN THE DISTRICT COURT
§ 252ND JUDICIAL DISTRICT
§ JEFFERSON COUNTY, TEXAS

(1)

MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, HERMAN BENARD, the Defendant in the above styled and numbered cause, and files this Motion for New Trial and Motion in Arrest of Judgment pursuant to Rules 21 and 22 of the Texas Rules of Appellate Procedure, and in support thereof would show this court the following:

1. The Defendant was sentenced on April 6, 2011. This Motion, filed within the thirty-day timetable, is therefore timely. A hearing must be commenced before the 75th day after the sentence, which is June 20, 2011, or this motion is overruled by operation of law.
2. In support of defendant's motion, the following facts outside the record are hereby alleged:

Counsel suspected that Mr. Benard was drugged and therefore committed the offense while involuntarily intoxicated. Investigation and attempts to develop these facts through James Rideaux met with a dead end.

After Movant's trial, Anthony Curtis Simmons approached Movant and gave the attached Affidavit (See Exhibit A). This Affidavit provides facts and substantiates Movant's theory that he was involuntarily exposed to crack cocaine that resulted in his aberrant behavior and the death of Ms. King.

3. The trial court has the discretion to grant a new trial in the interests of justice, as the Court of Criminal Appeals has emphasized:

For more than one hundred and twenty years, our trial judges have had the discretion to grant new trials in the interest of justice. In Mullins v. State, 37 Tex. 337, 339-340 (1872-73), the Supreme Court, which at that time had criminal jurisdiction, held:

... The discretion of the District Court, in granting new trials, is almost the only protection to the citizen against the illegal or oppressive verdicts of prejudiced, careless, or ignorant juries, and we think the District Court should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts.

State v. Gonzalez, 855 S.W.2d 692 (Tex. Crim. App. 1993).

4. For the foregoing reasons, and for such other reasons that may arise on the hearing of this Motion, Defendant requests a new trial.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court set aside the judgment of conviction entered in this cause and order a new trial on the merits.

Respectfully submitted,

By: 

JAMES R MAKIN

1900 Broadway

Beaumont, TX 77701

Tel: (409) 833-2827

Fax: (409) 832-4393

State Bar No. 12852500

Attorney for HERMAN BENARD

FILED
at 10:25 o'clock AM

MAY - 6 2011

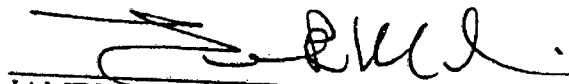
LOLITA RAMOS
CLERK DISTRICT COURT OF JEFFERSON CO., TEXAS
BY TOLIVER DEPUTY

CERTIFICATE OF PRESENTMENT

By signature above, I hereby certify that a true and correct copy of the above and foregoing has been hand-delivered to the Office for the 252nd Judicial District Court of JEFFERSON County, on this day, May 6, 2011.

CERTIFICATE OF SERVICE

This is to certify that on 5/6/11, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Jefferson County, Jefferson County District Attorney's Office, 1001 Pearl, Beaumont, Texas 77701, by hand delivery.



JAMES R. MAKIN

ORDER FOR A SETTING

On _____, 2011, the Defendant filed a Motion for New Trial and Motion in Arrest of Judgment. The Court finds that the party is entitled to a hearing on this matter, and it is THEREFORE ORDERED that a hearing on this motion is set for _____, at _____.
Signed on _____

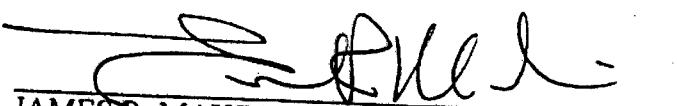
JUDGE PRESIDING

AFFIDAVIT

BEFORE ME, the undersigned authority, appeared JAMES R. MAKIN, who after being duly sworn by me stated the following under oath:

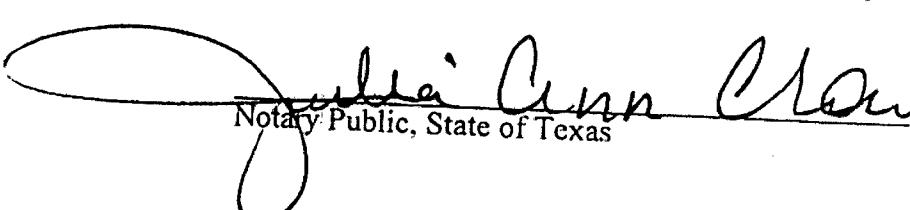
"My name is JAMES R. MAKIN. I am the attorney for HERMAN BENARD in this cause. I am over the age of 18 years, have never been convicted of a felony, and am competent to make this affidavit.

"All of the facts herein are true and correct."

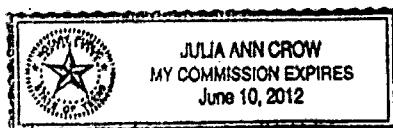


JAMES R. MAKIN
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, this 5th day of
May, 2011.



Notary Public, State of Texas



NO. 95033

STATE OF TEXAS

vs.

HERMAN BENARD

§ IN THE DISTRICT COURT
§
§ 252ND JUDICIAL DISTRICT
§ JEFFERSON COUNTY, TEXAS

ORDER

On _____ the Court heard the Motion of HERMAN BENARD for New Trial.

The Court finds that the Motion should be and is hereby:

GRANTED / DENIED

Signed on _____.

JUDGE PRESIDING

EXHIBIT "A"

UNSWORN DECLARATION

I. ANTHONY SIMMONS (print name) JCSO ID#: 169983

BEING PRESENTLY INCARCERATED IN JEFFERSON COUNTY DETENTION CENTER in Jefferson County, Texas, Declare under penalty of Perjury that the foregoing is True and Correct.

Executed on this Date: APRIL 15, 2011

Signature: Anthony Curtis Simmon

CIVIL PRACTICE and REMEDIES CODE, TITLE 6, Chapter 132, VTCa:

A written Unsworn Declaration made as provided by this chapter by an inmate in a county jail may be used in lieu of an oath required to be taken before a Notary Public.

AFFIDAVIT

I, Anthony Simmons, the Affiant, do hereby declare, under penalty of perjury, that the following statements are true and correct, that I make these statements under no coercion, no duress, and with no expectations of rewards, compensation or promises.

On the day of May 13, 2005, I was residing at 2300 Fillmore, Apt. #3, Beaumont, Texas in an apartment in the rear of Mr. Herman Benard's house. On the day in question, I have knowledge of events that took place in which Mr. Benard knew nothing of, and while incarcerated at the Jefferson County Correctional Facility in April, 2011 I realized who Mr. Benard was after seeing his picture during a News broadcast on television following his conviction and sentence for a murder that took place at his house on the above-mentioned date (5-13-05). Mr. Benard and I were assigned housing on "Sister" dormitories while incarcerated, and we went to recreation at the same times. I had observed Mr. Benard on the recreation yard, but was unaware of just who he was until I saw him that night on the News after his trial. Then it dawned on me who he was, and I approached him on the recreation yard and told him what I knew concerning events that involved the shooting victim, Mr. Benard's cousin, myself, and him. These are the events I related to Mr. Benard, and now testify to in this Affidavit:

I first met Mr. Benard through his cousin, Mr. Rideaux, when his cousin took me one day to Mr. Benard's home, where he (Rideaux) was living. Knowing this will likely surface, I want to acknowledge myself, for the record, that my acquaintance with Rideaux involves my smoking crack cocaine. At the time of this incident, I was employed on a good job, and my smoking is recreational in nature. This is how I was familiar with both Mr. Rideaux and the victim of the shooting, who I knew by the name April. When Rideaux took me to Mr. Benard's house, I immediately got the impression and opinion

that Mr. Benard was a good man who by all appearances was a dedicated father who worked hard to provide for his family. It was also obvious that he was unaware of what his cousin and April was conniving to do. I never met Mr. Benard again after that day, until now, as I have stated earlier. On the day of the shooting, both April and Rideau were at my apartment smoking crack. Rideau had gotten his Social Security check and they were back and forth going buy the drugs they were using. When Rideau's money began to run low, they started discussing how they could get Mr. Benard "hooked" on crack so that he would become a regular buyer and user, thus supplying their habit. I was in another room, but I clearly overheard them plotting about lacing some marijuana with crack and getting Mr. Benard to smoke some so that he could get the "taste" and get hooked. Rideau and April left my house with the intentions of carrying out their plot, and it was later that night that I learned that she had been shot. I had heard April and Rideau talk once while at my apartment smoking, about how April had to maintain her portray as a straight-lace woman, and not let on to Mr. Benard that she was a smoker. She was able to keep up this appearance, play-acting her role and kept Mr. Benard fooled, until the day of the shooting when she went to intentionally try and get Mr. Benard hooked on drugs. I've seen Mr. Benard many times on the recreation yard since I've been in jail, but I truly never recognized him as the man his cousin had introduced me to day over six years ago, the same man that April was portraying herself falsely to be someone who she wasn't. Had I recognized Mr. Benard before now, before his trial, I would have come forward with what I know, because I know Mr. Benard is a good man and father who was duped, manipulated and deceived. April and Rideau betrayed his trust and abused his kindness and generosity, the end result being the culmination of the unfortunate events of that tragic shooting.

Anthony Curtis Simmons

(2)

EXHIBIT " B "

"See, High-Lighted"

AFFIDAVIT

EXHIBIT "B"

I, ANTHONY SIMMONS, the Affiant, do hereby declare, under penalty of perjury, that the following statements are true and correct, that I make these statements under no coercion, no duress, with no promise or expectations of rewards or compensations.

On the day of May 13, 2005, I was residing at 2300 FILLMORE APT 3, Beaumont, Texas in an apartment in the rear of Mr. Herman Benard's house. On the day in question, I have knowledge of events that took place that Mr. Benard knew nothing of, and while incarcerated at the Jefferson County Correctional Facility in April, 2011 I realized who Mr. Benard was after seeing his picture during a news broadcast on television following his conviction and sentence for a murder that took place on the above-mentioned date (5-13-05). Mr. Benard and I were assigned housing on 'sister' dormitories while incarcerated, and we went to recreation at the same times. I had been observing Mr. Benard on the recreation yard, but was unaware of just who he was until I saw him that night on the news after his trial. Then it dawned on me who he was, and I approached him on the recreation yard and told him what I knew concerning events that involved the shooting victim, Mr. Benard's cousin, myself and him. These are the events I related to him, and now testify to in this Affidavit:

I first met Mr. Benard through his cousin, Mr. Rideaux, when his cousin took me one day to Mr. Benard's

home, where he (Rideaux) was living. For the record, I want to now acknowledge, by my own admission, that at this time I was a crack addict. This is how I was familiar with both Mr. Rideaux and the victim of the shooting, who I knew as April. When Rideaux took me to Mr. Benard's house, I immediately got the impression, and formed the opinion, that Mr. Benard was a dedicated father who worked and provided for his family. It was also obvious that he was unaware of what his cousin and April was conniving to do. I never met Mr. Benard again after that day, until now, as I have stated earlier. On the day of the shooting, both April and Rideaux were at my house smoking crack. Rideaux had gotten his Social Security check and they were back and forth going buy the drug. When his money began to run low, they began discussing how they could get Mr. Benard "hooked" on crack so that he could start buying and supplying for them. They plotted, in front of me, how they could slip some drugs in his drink first, and then when he was drugged and delirious, lace some marijuana with crack and get him to smoke some whereas he could get the taste and get hooked. Rideaux and April left my house with the intentions of carrying out their plot, and it was later that night that I learned that she had been shot. I have heard April and Rideaux talk many times, while at my house smoking, about how April had to portray herself as a straight (unaddicted) woman, and not let on to Mr. Benard that she was a smoker. She was able to keep up this appearance play-acting her role and kept Mr. Benard fooled, until the day of the shooting, when she tried to get him hooked on

Crack. I've seen Mr. Benard many times on the recreation yard since I've been in jail, but I truly never recognize him as the man his cousin, Rideaux, introduced me to that day, and who April was portraying herself falsely as, some one who she wasn't. Had I recognized him before he was convicted, I would have come forward with what I know, be cause I realize Mr. Benard is a good man and father who was manipulated and betrayed by his cousin and April, which led to the unfortunate events of that tragic shooting.

I, ANTHONY SIMMONS, have made the above statement of my own accord, and to the best of my knowledge and remembrance, and declare them to be true. Execute on this 9 day of April, 2011.

Anthony C. Simmons

SUBSCRIBED AND SWORN to before me on this
____ day of April, 2011.

Notary Public for the State of Texas

My commission expires ..

(3)

EXHIBIT "C"

AFFIDAVIT

Exhibit "C"

I, Alessandro Manys, the Affiant, herein state the I am of sound mind, competent, and make the following statement under no duress, no coercion, willingly and knowingly, with expectations or promises of gratitudes or rewards.

I state, for the record, that I am the ex-common law spouse of Mr. Herman Benard, that we lived together for 22 years, and that I am very familiar with his house, the furnishings and details of his home where he lived with our sons. I know that the window in which Herman is alleged to have shot the victim from had a total of 6 curtains hanging to cover it. These curtains also had a draw-string to open them. These same curtains are the ones that he took with him when we separated, and having visited his home on several occasions over a course of 6 months, I have observed those 6 curtains over that particular window. During those visits I cannot recall ever seeing that window without those curtains. On May 13, 2005 after his arrest and incarceration for the shooting, Herman communicated to me that he wanted me to go to his house and close it up, including taking furniture, clothing, household objects, etc. One of the first things I noticed upon entering the house was that some of the curtains were missing from the picture window. I assume the authorities had taken them as evidence, knowing as I did that he had allegedly fired the gun through that particular window. But after his trial and conviction, my attention was recalled to the fact that some of the curtains were missing when I had went to close

up his house. An issue arose during his trial about what po the curtain was in and that a curtain with a bullet hole was in. That's what made me think about the curtain not being over the window the day I went to close the house. I knew it would have been there unless it was taken by authorities, and I was surprised they were not presented as evidence at the trial. Everyone can, and do testify that the picture window had always been covered by the 6 curtains Herman took from our house while separated.

I declare that I am 42 years of age; my birthdate is 12/12/1968; I currently reside at 4445 Pradice; my State driver's license or ID number is 21014627; my State Security number is 461-61-7348.

Cassandra manuel, declare under penalty of perjury, that the foregoing AFFIDAVIT statements are true and correct to the best of my knowledge and memory. Executed this 19th day of September, 2011.

Cassandra manuel
Affiant

SWORN AND SUBSCRIBED TO BEFORE ME THIS 19th DAY
of September, 2011.

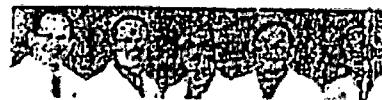
John R. Lee
Notary Public



MY COMMISSION EXPIRES ON: 09.18.2012

(4)

Exhibit "D"



CANCER CENTER of
SOUTHEAST TEXAS
See our profile on the [Texas HealthCare](#)

Exhibit "D"

Jailed man accused of murder has been waiting for his day in court for over 5 years

Posted: Jan 22, 2014 11:10 PM CST
Updated: Jan 23, 2014 8:33 AM CST
By Angel San Juan - [bio](#) | [email](#)

BEAUMONT - Imagine being behind bars for more than five years without having your day in court. That is what a Port Neches man accused of murder has been living.

His story is just one of a 500-case backlog in Jefferson County's 252nd District Court.

Jefferson County officials say this backlog is not only denying people justice, it is also costing taxpayers thousands of dollars.

Court records we obtained show that 150 of those 500 backlogged cases have been active for over a year since the defendants in the case were formally charged.

But it's packed full of pending cases, some unresolved for almost seven years

One of those cases is that of 44-year-old Christopher Robin, the Port Neches man is accused of killing his roommate back in November 2007. He's been in the Jefferson County Jail for five-and-a-half years.. 2,054 days to be exact.

We calculated that his stay in the county jail has cost Jefferson County taxpayers at least \$154,000

Then there's the case of 45-year-old John Alexander, he's free on bond, but he's been charged with failure to render aid and driving while intoxicated, third offense.

His case has been in limbo for more than five years

Former Judge Layne Walker was over the 252nd District Court since 2003. He resigned January 14th, but when we contacted him about this report, he told us, "There is no backlog, there's been more cases moved in my court than anyone else."

The county's other criminal district judge John Stevens currently has 146 active cases compared to the 500 case backlog in Walker's former court.

But we also checked with the Texas Indigent Defense Commission, which keeps records of cases involving people who had to rely on county-paid defense attorneys.

It shows in the past two years, Walker disposed more of those cases than Stevens, 78 more in 2013, and 64 more in 2012.

Walker also told us it's not how many cases tried that makes a good judge.

In the meantime, other Jefferson County district judges, including Stevens, Bob Wortham, Larry Gist and Larry Thorne, are working with the district attorney's office and defense lawyers to reduce the backlog in the 252nd district court.

In just one week, we're told 20 cases had been cleared.

After talking to him over the phone for a response, former Judge Walker texted us, "You also need to remember that I have spent the last two years defending myself daily from the lies of three local idiots. There's your story of how these people can totally occupy a court with frivolous suits and lies."

Walker did not specify who those "local idiots" are, but we do know he's faced two or three lawsuits, one of them from Port Arthur attorney and judicial candidate Stella Morrison

However a federal judge has asked Morrison to re-submit her suit, after he dismissed it as

originally filed because it did not meet required guidelines.

We also contacted the attorney for those two men whose cases have been unresolved for years, but did not hear back from him.

On a related note, Texas Governor Rick Perry has not yet made a decision on who will fill Walker's vacant seat, until a new judge is elected.



Ex-Secret Service agent warns: 'The targeting of political enemies is worse than Americans know'...



Advertisement
The FDA has approved a solution for snoring & sleep apnea that does not require a cumbersome CPAP



Simple solution to help your joints - flying off shelves



Beaumont arrest records. Who do you know? You may be surprised! Search anyone!..



(Texas): This 1 weird "loophole" has become the car insurance companies worst nightmare!



[Texas] man finds an unlikely testosterone booster.

5

Exhibit "E"

PHYSICAL ASSESSMENT

W06 EXHIBIT "E"

NAME: Bernard, Herman ID# 183494 DATE/TIME: 5/17/05

ACTIVITY:	VITAL SIGNS:
<input checked="" type="checkbox"/> ALERT	B/P 149/87
<input checked="" type="checkbox"/> AWAKE	HR 61
STANDING	RR 20
SITTING	TEMP. 97.1
<input checked="" type="checkbox"/> LYING	
UNRESPONSIVE	
SKIN:	COMMENTS: (ANY ABN. FINDINGS CIRCLED MUST HAVE AN EXPLANATION)
<input checked="" type="checkbox"/> WARM	C/o nausea & dizziness
COOL	States something is wrong in head. States feels heavy.
<input checked="" type="checkbox"/> DRY	
<input checked="" type="checkbox"/> INTACT	
DIAPHORETIC	
ABN.	
PUPILS:	
<input checked="" type="checkbox"/> PERLA	
SLUGGISH	
MOUTH:	
<input checked="" type="checkbox"/> PINK	
<input checked="" type="checkbox"/> MOIST	
DRY	
ABN.	
LUNGS:	
<input checked="" type="checkbox"/> RESP. EVEN & UNI	
ABN.	
H.R.:	
<input checked="" type="checkbox"/> REG.	
IRREG.	
<input checked="" type="checkbox"/> STRONG	
WEAK	
UP/LOW EXT. ROM:	
<input checked="" type="checkbox"/> WNL	
ABN.	
BEHAVIOR:	
<input checked="" type="checkbox"/> APPROPRIATE	
ABN.	
INTAKE %:	PLACE % OF FOOD INTAKE
BREAKFAST	10
LUNCH	
DINNER	
NURSE SIGNATURE:	<u>Clark, E</u>

6

EXHIBIT "G"

ZACK HAWTHORN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

HERMAN BERNARD

§

VS.

§

CIVIL ACTION NO. 1:13cv599

DIRECTOR, TDCJ-CID

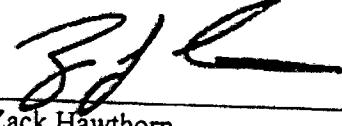
§

ORDER

Petitioner has filed two motions (doc. nos. 15 and 16) seeking leave to amend his petition to add an additional ground for review. As the motions appear to be meritorious, it is

ORDERED that the motions are **GRANTED**. The respondent has shall have 30 days from the date set forth below to respond to the additional ground for review.

SIGNED this 21st day of December, 2015.



Zack Hawthorn
United States Magistrate Judge