

20-5735 ORIGINAL

In The
Supreme Court of the United States

Supreme Court, U.S.
FILED

07 2020

OFFICE OF THE CLERK

Michael Dean Perry - Petitioner - Appellant

vs.

Lorie Davis, Director TDCJ - Respondent - Appellee

Ken Paxton, Attorney General of Texas

Susan San Miguel, Assistant Attorney General of Texas

Edward L. Marshall, Chief, Criminal Appeals et al;

On Petition For A Writ of Certiorari to

Fifth Circuit Court of Appeals, New Orleans, La.

(Texas Court of Criminal Appeals, Austin, Tx.)

Petition For Writ of Certiorari

Michael Dean Perry TX Sub 1838827

McCannett Unit

3001 S. Emily Drive

Beeville, Texas 78102

Questions Presented

1. Did the Trial/Habeas Court erroneously forever suspend Petitioner's Constitutional rights to the Great Writ of Habeas Corpus Ad Subjiciendum, by discarding, excuse me, destroying "800 plus pages of his (2) two Writ of Habeas Corpus applications, (2) two (50) fifty page Memorandum of Law, (70) seventy exhibits, and other supporting documents, that conclusively prove his Actual, Factual, and legal Innocence? Even using liquid white out to erroneously conceal the real filing date? Wasn't this fundamental error and prejudicial? The Judges order contravened clearly controlling legal principles! See the Court of Criminal Appeals per curiam opinion WR-62,970-06, the original Mandamus proceeding on file in the Clerks of Eric (C.A) and Fifth Circuit Court of Appeals. (Petitioner avers that he does not have additional copies due to no copy machine in prison and the government will not return documents.)

2. Did the United States District Court erroneously deny Petitioner relief in and of the Fed. R. Civ. P. Rule 60(b) Motion for relief from judgment, by failing to apply the law as according to the due process of law provisions of the Fifth Amendment and due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and even the due course of law provisions of Art. I, Section 19 of the Texas Constitution, by, inter alia, ingenuously and ingloriously stating that Perry's appeal is not taken in good faith whereas, the Court has reviewed the record in this case

and does hereby CERTIFY that Perry's appeal of the denial of his motion for relief from judgment is not taken in good faith because it presents no non-frivolous issues. To comply with Rule 24 in this regard, it often may suffice for the district court to incorporate by reference its decision dismissing the prisoners complaint on the Merits. Remember "Bucks Warning"? No Jurisdiction! The Court even uses unpublished cases and Civil Rights cases in its erroneous reason to claim Perry's appeal was taken in good faith. Indeed, Frivolous! The use of those "unpublished" cases. (See Document #99) The other Rule 60(b) Motion Perry filed! Claiming, inter alia, that the Mandamus Perry filed in the C.C.A. in which the State and Court failed to answer within 35 days, but instead discarded, excused, destroyed "800 plus pages" of Perry's habeas corpus and evidence of his Actual, Factual, and Legal Innocence - forever suspending his fundamental right to The Great Writ of Habeas Corpus Ad Subjiciendum. Right?

3. When the State fails to file an answer to the habeas corpus within 15 days by statute and the habeas court fails to issue an (DDI) Order Designating Issues to be resolved in 20 days, for a total of 35 days, and/or either forward the writ to the Court of Criminal Appeals of Texas within 180 days, or file for an extension of time, compelling petitioner to file a writ of Mandamus, is this considered a collateral attack and subject to time tolling, especially considering, inter alia, the C.C.A. issued an Abatement order, holding the proceedings in abeyance until the State filed an appropriate response, and did the habeas court lose plenary power and jurisdiction?

4. Did the State Court and Federal Court deny Petitioner his Fundamental and Substantial Constitutional Rights to redress and due process of law by failing to provide him with a full, fair, and live Evidentiary Hearing in order to develop the facts in support of his Actual, Factual, and Legal Innocence claims, and also both of his Ineffective Assistance of Counsel claims at trial and on his First Appeal as of Right? And denied his rights to Discovery?

5. Did the Courts of Appeal and the District Courts erroneously deny Petitioner a (COA) Certificate of Appealability, by exceeding the limited scope of the COA analysis, but instead reached their conclusion only after essentially deciding the case on the Merits, repeatedly faulting Perry for having failed to demonstrate extraordinary circumstances erroneously. The question for the District Court and Court of Appeals was not whether Perry had show his case is extraordinary or that he is actually innocent; it was whether jurists of reason could debate the above said issues! There never has been an adjudication of Perry's grounds in State Court on the Merits, of which also precludes denying Perry relief based on the Merits in Federal Court, Right? Therefore, wasn't this all error? And therefore, the denial of the Rule 60(b)(1), (2), (3), and (6) Motion was an abuse of discretion?

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(s) whose judgment is the subject of this petition is as follows;

Ken Paxton, Attorney General

Jeffrey C. Mateer, First Assistant Attorney General

Adrienne McFarland, Acting Deputy Attorney General

Susan San Miguel, Assistant Attorney General

Lovie Davis, Director, TOLCS

David Brabham, State Court District Judge, Gregg County, tx. (188th)

Carl Dorrrough, District Attorney, Gregg County, tx.

Tanya Reed, Assistant District Attorney, Gregg County, tx.

Zan Colson Brown, Assistant District Attorney Gregg County, tx.

George C. Hanks, Jr. District Judge, Southern District, Galveston, tx.

Ron Clark, District Judge, Eastern District, Tyler, tx.

John D. Love, Magistrate Judge, Eastern District, Tyler, tx.

Gregg J. Costa, United States Circuit Judge, 5th Circuit, New Orleans, La.

Leslie H. Southwick, United States Circuit Judge, 5th Circuit, New Orleans, La.

Priscilla R. Owen, Chief United States Circuit Judge, 5th Circuit, New Orleans, La.

Sharon Keller, Presiding Judge, Court of Criminal Appeals, Austin, tx. et al;

Siam Schilhab, General Counsel, Court of Criminal Appeals, Austin, tx.

Tim Cone, Court Appointed Attorney at Trial, Gregg County, tx.

Lew Dunn, Court Appointed Attorney on Appeal, Gregg County, tx.

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Writ of Mandamus Tex. Gov't Code § 22

XIX

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

A. For Cases from Federal Courts;

1. The opinion of the United States Court of Appeals appears at Appendix (A) to the petition and is unpublished.
No. 17-41010 Denial of COA 5th Circuit Court of Appeals. (10-22-2018)
2. The opinion of the United States Court of Appeals appears at Appendix (B) to the petition and is unpublished.
No. 18-41126 Denial of Rule 60(B) Motion and COA in the 5th Circuit Court of Appeals. (
3. The opinion of United States Court of Appeals appears at Appendix (C) to the petition and is probably unpublished.
No. 18-41126 Denial of Motion for Extension of Time to file Motion for rehearing en banc, of which was erroneously denied by the clerk and erroneously construed as a Motion for reconsideration, of which Petitioner timely filed an objection thereto!

Opinions Continued

4. The opinion of United States Court of Appeals appears at Appendix (D) to the Petition and is probably not published.
No. 19-40297 Denial of Writ of Mandamus requesting Appeals Court to require State Court to adjudicate Art. 11.07 habeas on Merits! (IFP Granted!)
5. The opinion of the United States District Court, Eastern District of Texas, Tyler Division appears at Appendix (E) Denial of discretion to compel State actors to adjudicate his habeas corpus and forward them to the Court of Criminal Appeals after he withdrew every ground (44) and pursuant to Fed. R. Cr. P. Rule 60(b)(1), (2), (3), (4), (5), and (6)! Unpublished!
6. The opinion of the United States District Court, Eastern District of Texas, Tyler Division appears at Appendix (F) and is unpublished!
Denial of Evidentiary Hearing.
7. The opinion of the United States District Court, Eastern District of Texas, Tyler Division appears at Appendix (G) and is unpublished!
Dismissal of Habeas, Evidentiary Hearing, and COA, all based on an adjudication on the Merits without first adjudication the grounds in State Court. All without plenary power or jurisdiction.
8. The opinion of the United States District Court, Eastern District of Texas, Tyler Division appears at Appendix (H) and is unpublished!
Denial of Discovery

Opinions Continued

9. The opinion of The United States District Court, Eastern District of Texas, Tyler Division appears at Appendix (I) not published. Denial of Protective Order to exhaust state remedies and time tolling.
10. The opinion of The United States District Court, Eastern District of Texas, Tyler Division appears at Appendix (J) not published. Denial of Further right to proceed (I & P) Informa Parpetis on Appeal.
11. The opinion of The United States District Court, Eastern District of Texas, Tyler Division appears at Appendix (K) not published. Denial of Motion for Contempt of Court for failure of Respondent to timely answer the Show Cause Order on habeas and/or timely filing for extension of time. Time Barred right? Equal Protection, right?
12. The opinion of The United States Court of Appeals appears at Appendix (L) not published. Denial of Rehearing En Banc on Mandamus No. 19-40297 Petition for Writ of Mandamus, U.S. District Court, for the Eastern District of Texas, Tyler Division
13. The opinion of The United States District Court, Eastern District of Texas, Tyler Division appears at Appendix (C-2) not published. Although the Court granted leave to file excess pages in his Motion for Summary Judgment (docket no. 36) the Court failed to issue a ruling on S.J.!

Opinions Continued

B. For Cases From State Courts;

1. The opinion of The Court of Criminal Appeals of Texas appears at Appendix (A) not published. White Card denial of (PDR) Petition For Discretionary Review No. PD-1209-14, CoA No. 06-13-00051-CR
2. The Opinion of The Court of Criminal Appeals of Texas appears at Appendix (B) not published. White Card denial of Writ of Mandamus in and of Failure of State and Court to answer refiled Art. 11.07 habeas corpus. Court I and II B. (Refiled on April 24, 2018)
3. The opinion of Court of Criminal Appeals of Texas appears at Appendix (C) not published. White Card denial of Contempt of Court in Support of Original Application for Writ of Mandamus.
4. The opinion of Court of Criminal Appeals of Texas appears at Appendix (D) not published. White Card dismissal of applications for writ of habeas corpus without written order, erroneously alleging noncompliance with Texas Rules of Appellate Procedure 73.1. Specifically, Multiple grounds raised on a single page. Indeed, this assertion made based solely on the States response to the writ of Mandamus and State Courts ODI and without plenary power and without jurisdiction.

Opinions Continued:

5. The opinion of Court of Criminal Appeals of Texas appears at Appendix (E) not published. White Card dismissal of Motion for Reconsideration / Rehearing Writ of Mandamus Denial WR-62,970-06 of the discarding, excusing, destroying "800 plus pages" of Petitioners (2) two Art. 11.07 Writ of Habeas Corpus Applications.
6. The opinion of Court of Criminal Appeals of Texas appears at Appendix (F) not published. White Card denial of Motion to Supplement Habeas Corpus Record with 'Mis Carriage of Justice'.
7. The opinion of Court of Criminal Appeals of Texas appears at Appendix (G) not published. White Card denial for leave to refile both Writ of Habeas Corpus Count I and Count II, B.; (5/26/2020) (Moms 87th Birthday!) Writ of Habeas Corpus Ad Subjiciendum, a Writ of Right That Shall Never Be Suspended! Right?
8. The opinion of Court of Criminal Appeals of Texas appears at Appendix (H) not published. Re filed Both Count I and Count II, B. Habeas Corpus Applications, to no avail.

Jurisdiction

For Cases From Federal Courts

1. The date on which the United States Court of Appeals decided my case was March 5, 2020 Appendix (B)
2. A timely petition for rehearing en banc was filed, but was erroneously denied by the clerk and treated as a motion for an extension of time to file a motion for reconsideration and subsequently denied by the court on April 2, 2020. Appendix (C)
3. An extension of time to file the petition for a writ of certiorari was timely filed on June 12th, 2020. See *Spotville v. Cain*, 149, F.3d 374, 378 (5th Cir. 1998); *Houston v. Lack*, 482 U.S. 266, 275-76, 108 S.Ct. 2329, 101 L.Ed.2d 245 (1988) appears at Appendix (I) However, to date, July 2, 2020 The honorable court has/was Not Responded to and including N/A N/A in Application No. N/A (Rule 30)

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

For cases from state courts; Whereas, the gravamen of this writ of certiorari concerns only the denial of the Fed. R. Civ. P. Rule 60(b) motion, of which invokes this honorable court's jurisdiction! The state court records are intended to apprise the court of some of the misconduct by the despots in and of the judiciary et al;

Constitutional And Statutory Provisions Involved Court.

STATUTES and Rules of Federal:

1. 28 USC § 636 (b)(1) Consent to Proceed Before a Magistrate Judge and the rules and procedures governing that procedure and the requirement to file a proper objection to the Report and Recommendation and request for a de novo review by the District Judge within 14 days!

2. 28 U.S.C. § 2244(d)(1) AEDPA's one-year statute of limitations in § 2244(d)(1) applies to each claim in a habeas application on an individual basis. A Federal Habeas Corpus Petition must be filed within one year of: (1) the final judgment on direct review; (2) the expiration of seeking such review; (3) the removal of any state imposed impediment that unconstitutionally prevented the filing of the habeas petition; (4) the Supreme Court's announcement of a new, retroactively applicable constitutional right; or (5) the date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence.

The Court held that the phrase "collateral review" in 28 U.S.C. § 2244(d)(2) means judicial review of a judgment in a proceeding that is not part of direct review. (Writ of Mandamus?) (Actual Innocence?) (Equitable tolling.)

The Second or successive habeas petition does not apply in the case at bar § 2244(b)(3) Rule 60(b) There never has been an adjudication on the merits of Petitioner's grounds due to the misconduct of the State!

Petitioner has only filed one 28 U.S.C. § 2254 Habeas Application that was

never adjudicated on the merits either. See also Supreme Court Rule 20; 4(b) 28 U.S.C. § 2241(b) Neither the denial of the petition, without more, nor an order of transfer is an adjudication on the merits, and does not preclude further application to another court.

3. 28 U.S.C. § 2254 A state prisoner is entitled to habeas relief only if he is held in custody in violation of the United States Constitution, laws or treaties of the United States. Review under 28 U.S.C. § 2254 (d)(1) is limited to the record that was before the state court that adjudicated the claims on the merits. The Supreme Court acknowledged that a habeas petitioner who raises a claim that was not adjudicated on the merits in state court, and is therefore not subject to § 2254(d), may present new evidence in federal court, as long as he satisfied the requirements of § 2254(e). At a minimum, therefore, § 2254(e)(2) still restricts the discretion of federal courts on habeas to consider new evidence when deciding claims that were not adjudicated on the merits in state court. A claim not adjudicated on the merits when the state court makes its decision on a materially incomplete record. A record may be materially incomplete when a state court unreasonably refuses to permit further development of the facts of a claim (Discards 800 plus pages of evidence) In such a circumstance, the principles of comity, finality and federalism, that animate AEDPA deference are not offended because a state court has passed on the opportunity to adjudicate, [the] claims on a complete record. And denial of Evidentiary Hearing!

4. Rule 60(b) Federal Rules of Civil Procedure; Grounds for relief from

a Final Judgment, order, or Proceeding. On Motion and just terms, the Court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under rule 59 (b); (Federal Rules of Civil Procedures
- (3) fraud (whether previously called intrinsic or extrinsic) misrepresentation, or misconduct by an opposing party;
- (4) The judgment is void;
- (5) The judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable, or;

(6) Any other reason that justifies relief. (Emphasis Added.)

Rule 60(c)(1) must be made within a reasonable time and for reasons (1), (2), and (3) notwithstanding (b) no more than a year after entry of the judgment. See Appendix (L) and (M) 59 (b)

5. Rule CV-3(b) of the United States District Court, for the Eastern District of Texas, Tyler Division is a local court rule of which erroneously restricts a 28 USC § 2254 Habeas Application to 30 pages!

6. Fed. R. Civ. P. Rule 24(a)(3)(A) provides that a party who was permitted to proceed in forma pauperis in the district court action, [or] who was

determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless the district court, before or after the notice of appeal is filed, certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; See Appendix (N)

7. Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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

Constitutional And Statutory Provisions Involved

Statute and Rules of State:

1. Appendix (A) (PDR) Petition for Discretionary Review, No. PD-1209-14, COA No. 06-13-00051-CR OF Which preserved error on (3) Three grounds. Prosecutorial Misconduct, Judicial Misconduct, and Ineffective Assistance of Counsel. See Rule 33.1 Preservation How Shown Rules of Appellate Procedure - pages 17, 20, 27.
2. Tex. R. App. P. Rules 23.2, 23.4(a), 23.1 Appendix (D) Rules governing the filing of an Art. 11.07 Writ of Habeas Corpus, including the new amended rules concerning the Clerks duties in processing the application.
3. Tex. Code Civ. Proc. Art. 11.07 Habeas Corpus, A Writ of Right That Shall Never Be Suspended Ad Subjiciendum, OF Which is suppose to be the proper remedy to challenge by collateral attack an erroneous conviction! Appendix (B)(E)(G)(H)
4. Tex. Code Civ. Proc. Chapter 11, Habeas Corpus, The rules governing the Great Writ of Habeas Corpus Ad Subjiciendum. page 19.
5. State Bar of Texas Rules of Conduct by Attorney's Rule 3.08 page 35.
6. Writ of Mandamus Govt Code § 22. The All Writs Act, 28 USC § 1651, The extraordinary remedy to compel a lower court and/or clerk to perform a ministerial duty! Appendix (B)(C)(E)
7. White Card Denial Without Written Order - Miscarriage of Justice! Appendix (F)

STATEMENT OF THE CASE

1. See *BUTZ V. Mandoza-Powers*, 474 F.3d 1193 (CA9 2007) p. 1194. When a district court dismisses with prejudice a petition for writ of habeas corpus under 28 U.S.C. § 2254 without reaching the merits of the claims raised therein, the petitioner may seek relief from judgment through a motion under Fed. R. Civ. P. 60(b), because such a motion is not the equivalent of a second or successive petition under [AEDPA]. We hold that where, as here, the district court dismisses the petition for failure to pay the filing fee or to comply with the court's orders, the district court does not thereby reach the "merits" of the claims presented in the petition and a Rule 60(b) motion challenging the dismissal is not treated as a second or successive petition. See *Crosby*, 125 S.Ct. at 2648-49. Butz may file a Rule 60(b) motion without obtaining prior authorization from this court. (Granted)

See also *Ward V. Norris*, 577 F.3d 925 (CA8 2009) p. 932

Federal Rule of Civil Procedure 60(b) allows a habeas petitioner to seek relief from final judgment and to request reopening of his case in certain circumstances. Rule 60(b) applies to habeas proceedings to the extent it is not inconsistent with AEDPA. *Gonzalez*, 545 U.S. at 529[.] AEDPA imposes three requirements on second or successive habeas petitions: first, any claim that has already been adjudicated in a previous petition must be dismissed, § 2244(b)(1). Second, any claim that has not already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence, § 2244(b)(2). Third, before the district court may accept a successive

2. petition for filing, the Court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2) new-rule or actual-innocence provisions § 2244(b)(3). [Gonzalez] p. 933. A Rule 60(b) motion is a second or successive habeas application if it contains a claim for the purpose of determining whether the motion is a habeas corpus application, claim is defined as an asserted federal basis for relief from a state court's judgment of conviction or as an attack on the federal court's previous resolution of the claim on the merits. Gonzalez, 545 U.S. at 530[.]

No claim is presented if the motion attacks some defect in the integrity of the federal habeas proceedings; id. at 532[.] Likewise, a motion does not attack a federal court's determination on the merits if it merely asserts that a previous ruling which precluded a merits determination was in error - for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar. id. at n. 4. This reasoning is illustrated in Gonzalez, in which the petitioner moved for relief from judgment under AEDPA, because the motion challenged only the statute of limitations that applied to the habeas proceeding and did not assert a claim. The Supreme Court held that it was not a second or successive habeas petition. (Denied for lack of jurisdiction.)

See Phelps v. Alameida, 569 F.3d 1120 (CA 9 2009) p. 1134

In sum, Tomlin's v. McDanel, 865 F.2d 209, 210 (9th Cir. 1989) per se approach to Rule 60(b) is no longer good law. The district court's per se rejection of Phelps motion for reconsideration, which relied directly and exclusively on Tomlin, therefore rested upon an erroneous

3.

view of the law. *Faile*, 988 F.2d at 986-87. Accordingly, the district court abused its discretion, *Id.*

p. 1135. As stated above, courts applying Rule 60(b)(6) to petitions for habeas corpus have considered a number of factors in deciding whether a prior judgment should be set aside or altered. Most notably, the Supreme Court in *Gonzalez* and the Eleventh Circuit in *Ritter*, laid out specific factors that should guide courts in the exercise of their Rule 60(b)(6) discretion. In discussing these factors, we do not suggest that they impose a rigid or exhaustive checklist. Rule 60(b)(6) is a grand reservoir of equitable power. *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992) [omitted] and it affords courts the discretion and power to vacate judgments whenever such action is appropriate to accomplish justice.

Gonzalez, 545 U.S. at 542, 125 S.Ct. 2641 [omitted] (1563) see also;

Ochoa Canales v. Quarterman, 507 F.3d 884 (CA5 2007) p. 887

[The Court in *Gonzalez*]... held that district courts have jurisdiction to consider Rule 60(b) motions in habeas proceedings so long as the motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings. [125 S.Ct. 2641, 545 U.S. 524 (2005)] In other words, a Rule 60(b) motion that attacks only a defect in the integrity of the federal habeas proceedings should not be treated as a successive habeas application. (Further discussion on whether a COA is required when the court denies a Rule 60(b) motion) (1646)

Writ Granted under Rule 60(b) see *Lincoln v. Warden Smith Field SCI*,

4. 595 Fed Appx. 143 (CA 3 2014) p. 144 The Commonwealth of Pennsylvania appeals the District Court's order granting relief to Robert Lincoln under Federal Rule of Civil Procedure 60(b) and issuing a conditional writ of habeas corpus. For the following reasons, we affirm.

In *Lincoln v. Palakovich*, 384 F. App'x 193 (3d Cir. 2010) (*Lincoln I*), where we remanded the case with instructions to consider whether Lincoln's right to a direct appeal was prejudiced by the conduct of his direct-appeal counsel. *Id.* at 197. On remand, the District Court held an evidentiary hearing and found that Lincoln's counsel withdrew his direct appeal without consulting Lincoln, depriving him of his Sixth Amendment right to effective assistance of counsel. *Lincoln v. Palakovich*, No. 07-cv-1373, 2011 WL 3802725, at *4 (E.D. Pa. Aug. 25, 2011).

Also see *D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709 (N.D. Ohio 2010) p. 731. Rule 60(b) authorizes extraordinary relief, but only of a particular type. Under this rule, a court only has the power to vacate a prior judgment: a court may not avail itself of Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior order or judgment. See *Dalay v. Gordon*, 475 F.3d 1039, 1044 (CA 9 2007); This obviously does not mean that, having vacated the prior judgment under Rule 60(b), a district court may do nothing else at all, rather, the case is returned to the procedural posture in which it existed prior to the court's entry of judgment. A district court may, moreover, enter a new judgment in the same order in which the court vacates the old. See *Schanen v. United States Dept. of Justice*, 798 F.2d [p. 732] 348, 350 (9th Cir. 1986) p. 733. It is well-established that a district may vacate a previously entered judgment disposing of a habeas petition. Rule 60(b) authorizes

5

relief from judgment under five enumerated circumstances, as well as a "catchall" [i.e.] [i.e.] it is the "catchall", Rule 60(b)(6), that is the issue here! p. 734. The catchall, Rule 60(b)(6), provides courts with broad equitable power, [although] that power is tempered by a stringent standard and required to exercise [it]. Rule 60(b)(6) applies only in exceptional or extraordinary circumstances which are not addressed by the first five numbered classes of the Rule! *OLL v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (Finding extraordinary circumstances, the court granted relief.)

See *Souter v. Jones*, 395 F.3d 577; 2005 U.S. App. Lexis 860; 2005 FED App. 0027P (6th Cir. 2005) Procedural Posture: Petitioner inmate petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his murder conviction. The United States District Court for the Western District of Michigan at Grand Rapids granted respondent State of Michigan's Summary Judgment Motion and dismissed the petition as time-barred. The inmate appealed and was granted a certificate of appealability, where an inmates habeas petition was time-barred, he established a gateway actual innocence claim, such that he was entitled to "equitable tolling" based upon recanted expert testimony and other new evidence. (See also *Hughes v. Irving* 967 F.Supp 775 (E.D. NY 1997) (Granted?))

Overview: The victim's body was found in the middle of the road, and her clothes were not torn or stained, suggesting she was not hit by a car. Two sexual lacerations were discovered on her head. The inmate had been intoxicated and had engaged in "amorous" activities with the victim until she walked off down the road. There was no blood on the inmates clothes, and pieces of glass found on the victim did not match the inmates bottle.

6. The inmate was tried and convicted over 12 years after the victim's death. The appellate court determined that the habeas petition was time-barred under 28 U.S.C. § 2244 but the inmate met his burden of establishing a gateway actual innocence claim, such that he was entitled to equitable tolling and could proceed to argue the merits of his ineffective assistance of counsel and due process claims. The inmate presented new evidence that (1) two experts altered or recanted their opinions linking the inmate's bottle to the victim's death. (2) The bottle manufacturing process could not have produced a bottle with a sharp edge (3) the victim's clothes were bloody.

With regards to a magistrate judge's recommendation, a party shall file objections with the district court or else waive the right to appeal. By operation of the supervisory rule, only those specific objections to the magistrate's report made to the district court will be preserved for appellate review. The United States Supreme Court has affirmed the Walter rule, holding that it is a valid exercise of the supervisory power of the Court of Appeals. While the United States Court of Appeals for the Sixth Circuit has regularly enforced the Walter rule, the Sixth Circuit has also noted that it plainly is not a jurisdictional rule; the court of appeals retains subject matter jurisdiction over the appeal regardless of the ultimately filing or nonfiling of objections. The Supreme Court has emphasized that, because the Walters rule is a nonjurisdictional waiver provision, the court of appeals may excuse the default in the interest of justice. (Emphasis Added!)

* State-court proceedings are considered to be still pending during the time for seeking United States Supreme Court review of the state judge-

7. went on that application independent of whether the petitioner actually petitions the Supreme Court to review the case. The effect of Abela is to toll the limitations period for an additional 90 days beyond the date of the final state-court judgment to account for the certiorari window, regardless of whether a petition for writ of certiorari is ever filed.^{*}

Now see *Hernandez v. Thaler*, 630 F.3d 420, 2011 U.S. App. Lexis 288, 78 Fed. R. Civ. 3d 472 No. 10-50319 (5th Cir. 2011)

^{*} Where a habeas corpus petitioner seeking to challenge his sentence under 28 U.S.C. § 2254 did not file a petition for certiorari with the United States Supreme Court following the conclusion of his state-court direct appeal, a direct appeal becomes final for AEDPA purposes when the time expires for filing a petition for certiorari challenging the state high court's affirmance of the conviction. The time for filing a petition for certiorari expires ninety days after the state high court enters judgment. Sup. Ct. R. 13.1^{*}

p. The Federal Rules of Appellate Procedure have for their primary purpose the securing of speedy and inexpensive justice in a uniform and well ordered manner; they were not adopted to set traps and "pitfalls" by way of technicalities for unwary litigants!

The AEDPA allows a petitioner to appeal a district court's final order in a 28 U.S.C. § 2254 proceeding "only if either the appellate court or the district court issues a Certificate of Appealability (COA) (THE TRAP) when the district court denied a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue "only" when the prisoner shows both that jurists of reason would

8. Find it debatable whether the district court was correct in its procedural ruling. ("PITFALL")

Again see *Souter v. Jones*, *supra*; Having determined that Souter has put forth a credible claim of actual innocence, we must next resolve the issue of whether an actual innocence exception to AEDPA's statute of limitations exists. 1212 The majority of the court of appeals which have addressed this question have allowed for equitable tolling based on actual innocence under certain circumstances. See *Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004) (adopting the Eighth Circuit's approach in *Flanders*); *Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2002) (cert. denied, 532 U.S. 1236, 155 L.Ed.2d 20203, 123 S.Ct. 1361 (2003)) (requiring that equitable tolling based on a claim of actual innocence be accompanied by some action or inaction on the part of the respondent that prevented [the petitioner] from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations); *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (2005 U.S. App. Lexis 46) (holding that equitable tolling is appropriate when a prisoner is actually innocent and diligently pursues his federal habeas claims); *Felder v. Johnson*, 204 F.3d 168, 171 & n.8 (5th Cir.) (cert. denied, 531 U.S. 1035, 148 L.Ed.2d 532, 121 S.Ct. 622 (2000)) (finding that a claim of actual innocence does not constitute a rare and exceptional circumstance, but suggesting that a showing of actual innocence might). But see *David v. Hall*, 318 F.3d 343, 347 (1st Cir.) (cert. denied, 540 U.S. 815, 157 L.Ed.2d 30, 124 S.Ct. 66 (2003)) (holding that prisoners who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence

9. is overwhelming). To answer the question of whether an actual innocence exception to the statute of limitations exists, we begin our analysis with the text of the statute itself.

By analogy, we note that despite the fact that the statute fails to mention tolling, the majority of the court of appeals which have addressed (2005 U.S. App. Lexis 48) the issue, including this one, have held that the doctrine of equitable tolling applies to the one-year limitations period. See, e.g.: *Dunlap*, 250 F.3d at 1007; *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Cert. denied*, 526 U.S. 1074, 143 L.Ed.2d 558, 119 S.Ct. 1474 (1999); *Miller v. U.S. State Dept. of Cont.*, 145 F.3d 616, 618 (3d Cir. 1998); *Miller v. Ward*, 141 F.3d 976, 978 (10th Cir.), *Cert. denied*, 525 U.S. 891, 142 L.Ed.2d 173, 119 S.Ct. 210 (1998); *Calderon v. United States Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997), *Cert. denied*, 523 U.S. 1081, 140 L.Ed.2d 648, 118 S.Ct. 1389 (1998). In *Dunlap*, we held that inclusion of the four sub-parts detailing the operation of the limitations period did not imply that Congress intended to preclude equitable tolling of the limitations period. See also *Harris* 209 F.3d at 329 (holding that the inclusion of [the four] statutory provisions does not give rise to the inference that the application of the limitation period must (2005 U.S. App. Lexis 49) otherwise be absolute). Moreover, though Congress included a thirty-day tolling period in a parallel limitations provision in AEDPA governing capital prisoners represented by competent counsel in state post-conviction proceedings, 28 USC § 2263(b)(3)(B),¹³ the inclusion of a provision in that section does not imply that the absence of a similar one in § 2244(d)(1) was intentional. *Calderon*, 128 F.3d at 1289. The Ninth Circuit concluded that

10. The inclusion of the tolling provision in § 2263(b)(3)(B) signaled Congress's intent to limit tolling to thirty days in that one specific circumstance, but not to upset the normal default rule allowing longer tolling periods for other habeas situations. *Id.*

In interpreting a statute, we presume that Congress legislates against the background of existing jurisprudence unless it specifically negates that jurisprudence. *Young v. United States*, 535 U.S. 43, 49-50, 152 L.Ed.2d 79, 122 S.Ct. 1036 (2002); *Natl. Private Truck Council, Inc. v. Okla. Tax Comm'n.* 515 U.S. 582, 590, 132 L.Ed.2d 509, 115 S.Ct. 2351 (1995); *United States v. Shabani*, 513 U.S. 10, 13, 130 L.Ed.2d 225, 115 S.Ct. 382 (1994). Because at the (2005 U.S. App. Lexis 50) time AEDPA was enacted there was a rebuttable presumption that equitable tolling applied to statutes of limitations and no indication that Congress intended otherwise, we conclude that the one-year limitations period in AEDPA was subject to equitable tolling. *Overlap*, 250 F.3d at 1004. Similarly, in enacting AEDPA, Congress was working against the jurisprudential background of *Winnay v. Carrier*, and *Schlup v. Delo*, in which the Supreme Court held that a showing of actual innocence, defined as more likely than not that no reasonable jurist would vote to convict, was sufficient to overcome a procedurally defaulted habeas petition. Congress adopted a more (395 F.3d 599) stringent actual innocence exception in AEDPA's successive-petition and evidentiary-hearing provisions, requiring that the factual predicate of the claim could not have been discovered earlier and a showing by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the

11. underlying offense. 28 U.S.C. § 2244(b)(2)(B); 2254(c)(2) The fact that Congress adopted a narrower actual innocence exception in these two provisions is indicative (2005 U.S. App. Lexis 51) not of Congress's desire to exclude the exception with regards to the limitations period, but rather of its attempt to limit the scope of the exception in those two specific areas. The more reasonable inference to be drawn from the absence of an exception in § 2244(d)(1) is that Congress intended not to alter the existing jurisprudential framework which allowed for a showing of actual innocence to overcome a procedural default. Following the passage of AEDPA, the Courts of Appeal, including this one, have continued to apply the Schrup actual innocence exception to cases involving other types of procedural default, such as where the default is based on an adequate and independent state-law grounds. See, e.g.; Williams v. Bagley, 390 F.3d 932, 973 (6th Cir. 2004); Hubbard v. Puchak, 378 F.3d 333, 341 (3rd Cir. 2004); Jamillo v. Stewart, 340 F.3d 877, 883 (9th Cir. 2003). Of course, these procedural limitations existed prior to AEDPA, and therefore, Congress, which did not address them in the statute, did not alter the application of the Schrup actual innocence exception to them. By contrast, AEDPA's limitations provisions were an entirely new legislative (2005 U.S. App. Lexis 52) creation, and thus, the determinative issue is whether Congress, in creating this new procedural limitation, intended for the existing jurisprudence governing habeas procedural limitations to apply. While the limitations provisions were new Federal law, many states had already established statutes of limitations in post-conviction proceedings. Moreover, the Supreme Court had already held

12. That where a habeas petitioner had defaulted on his federal claims in state court by failing to file timely in post-conviction proceedings, federal habeas review of the claims is barred unless the prisoner can demonstrate... that failure to consider the claims will result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). Thus, five years prior to the enactment of a federal statute of limitations, it was already well established that a procedural default resulting from an untimely filing could be excused by a federal habeas court where a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Carrier*, 477 U.S. at 496. Absent evidence of Congress's contrary intent, *there* (2005 U.S. App. Lexis 53) is no articulable reason for treating habeas claims barred by the federal statute of limitations differently. Similar to our holding in the equitable tolling context, we conclude that against the backdrop of the existing jurisprudence and in the absence of evidence to the contrary, Congress enacted this new procedural limitation consistent with the *Schup* actual innocence exception. Therefore, equitable tolling of the one-year limitations period based on a credible showing of actual innocence is appropriate. Inclusion of an actual innocence exception to the limitations provision does not foster abuse and (3956.3db00) delay, but rather recognizes that in extraordinary cases the societal interests of finality, comity, and conservation of scarce judicial resources (2005 U.S. App. Lexis 54) must yield to the imperative of correcting a fundamentally unjust incarceration. *Carrier*, 477 U.S. at 495 (internal citations omitted). As the Supreme Court has stated, the miscarriage of justice standard

13. is altogether consistent... with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence. *Caldwell v. Thompson*, 523 U.S. 538, 558, 140 L.Ed.2d 728, 118 S.Ct. 1489 (1998). Any concerns that recognition of an actual innocence exception to the limitations period will result in a deluge of untimely, frivolous constitutional claims is belied by this Court's experience that a credible claim of actual innocence is extremely rare. See *Supra* text accompanying note 4. Moreover, the existing availability of an actual innocence exception to other procedurally defaulted claims has not resulted in abuse and delay. It is only the extraordinary case, such as this one, the present case, in which the habeas petitioner can present new evidence which undermines this Court's confidence in the outcome of the trial and therefore requires assurance that it was free of non-harmless constitutional error. 14. The State (2005 U.S. App. Lexis 55) argues that recognition of an actual innocence exception would be inconsistent with § 2244(d)(1) because it would render the new evidence scenario of the limitation provision superfluous. Resp. Br. at 11. We find this argument to be wholly unpersuasive. The new evidence scenario states that the one-year limitations period begins to run from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. § 2244(d)(1)(D). The State argues that if this Court recognizes an actual innocence exception § 2244(d)(1)(D) would be rendered a nullity. Resp. Br. at 11. This argument fails to recognize the difference between timely claims brought under § 2244(d)(1)(D) and gateway actual innocence claims. A claim filed

14. Within one-year of the discovery of new evidence proceeds directly to the district court for a determination of the merits of the habeas petitioner's constitutional claims. By contrast, under the Schlup actual innocence gateway, the petitioner must clear "the procedural bar" of demonstrating a credible claim of actual innocence before a court will reach the merits of his constitutional claims! [THE TRAP] Because one (2005 U.S. App. Lexis 56) must meet a significantly greater burden to pass through the gateway, no petitioner would forego filing within the one-year period under §2244(d)(1)(b) if possible. The actual innocence exception would be limited to the rare and extraordinary case where a petitioner can demonstrate a credible claim of actual innocence and the one-year limitations window has closed. [PITFALL] is, therefore, an (395 F.3d 601) actual innocence exception would not be inconsistent with the AEDPA limitations period itself.¹⁶

Finally, we conclude that constitutional concerns counsel in favor of upholding equitable tolling based on a credible claim of actual innocence. Several courts have recognized that denying federal habeas relief from one who is actually innocent would be constitutionally problematic.¹⁷ See *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1218 (11th Cir. 2000) (noting that barring a habeas petitioner who can demonstrate actual innocence "raises concerns because of the inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person's innocence"); *Tristman v. United States*, 124 F.3d 361, 378-79 (2d Cir. 1997) (2005 U.S. App. Lexis 57) (finding serious Eighth Amendment and due process concerns if AEDPA's procedural limitations barred a habeas petitioner claiming actual innocence from

15. collateral review); *In re Davis*, 119 F.3d 245, 248 (3d Cir. 1997) (where no other avenue of judicial review available for a party who claims that she is factually or legally innocent (or both)... we would be faced with a thorny constitutional situation); *Miller*, 141 F.3d at 978 (noting that where a petitioner claims actual innocence, the limitations period "raises serious constitutional questions" which possibly renders the habeas remedy inadequate and ineffective); *Holloway v. Jones*, 166 F. Supp.2d 1185 at 1190 (holding that the use of AEDPA one-year limitations period to preclude a petitioner who can demonstrate that he or she is factually innocent of the crimes that he or she was convicted of would violate the Suspension Clause... as well as the Eighth Amendment's ban on cruel and unusual punishment). Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core (395 F.3d 602) of our criminal justice system. That concern is reflected... in the fundamental (2005 U.S. App. Lexis 58) value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. *Schlup*, 513 U.S. at 325 (quoting *In re Winship*, 397 U.S. 358, 372, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970) (Harlan, J., concurring)). In light of these grave constitutional concerns, we believe equitable tolling of the statute of limitations based on a credible showing of actual innocence is appropriate.

In sum, we hold that where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him/her guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims.

16.

Conclusion:

Based on The Foregoing, we conclude that though Souter's habeas petition is time-barred, (12 years?) he has demonstrated a credible claim of actual innocence, such that he is entitled to equitable tolling and may proceed to argue the merits of his ineffective assistance of counsel and due process claims. The district court's dismissal of his habeas petition is hereby reversed and the case is remanded for further proceedings consistent (2005 U.S. App. Lexis 59) with this opinion.

Opinion by Karen Nelson Moore, Circuit Judge, Sixth Circuit. Petitioner-Appellant Larry Pat Souter appeals the district court's dismissal of his petition for a writ of habeas corpus. Souter, currently incarcerated in a Michigan Correctional Facility, was convicted in 1992 of the murder of Kristy Ringler. In 2002, Souter filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction. The district court granted the state of Michigan's motion for summary judgment, finding that the petition was barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244 (d)(1). (2005 U.S. App. Lexis 2) We granted Souter a certificate of appealability on two issues: (1) whether his petition was timely filed within one year of his discovery of new evidence; and (2) whether he is entitled to equitable tolling because he is actually innocent of the crime for which he was convicted. Because we find that Souter has demonstrated a credible claim of actual innocence, he is entitled to equitable tolling, and the district court's dismissal of his habeas petition is hereby reversed.

The Petitioner, hereinafter referred to as "Perry," argues that due to

17. The extreme length and detailed account of the adjudication of Souter's appeal on the merits, it would be impractical for Perry to recite Souter's case in its entirety due in part to the page limitation of the Cert. writ, and although there are a great deal of similarities in the two cases, there are some fundamental differences whereas, Souter's case was actually adjudicated on the merits, first in state courts and then in the federal courts. Although a little late (2 years) nonetheless, there was an adjudication on the merits and Souter's actual innocence claims. And even though Souter did not file an objection to the Magistrate judges R.R., thereby precluding review. See *Smith v. Detroit Fed'n of Teachers*, local 1231, 829 F.2d 1370, 1373 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981); *Douglas vs. United Services Auto Assn* 79 F.3d 1415 (5th Cir. 1998) Rule 33.1 Preservation how shown Tex. R. App. P.; Souter was granted a COA, time tolling, and an adjudication of the merits of his actual innocence claims. And his ineffective assistance of counsel claims. In stark contrast, Perry's habeas corpus (Art. 11.07 Texas) was never adjudicated on the merits. 7 1/2 years now and counting. Whereas, after Perry filed both Art. 11.07 habeas corpus applications - Court I and Court II, paragraphs B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS, AT, AU, AV, AW, AX, AY, AZ, BA, BB, BC, BD, BE, BF, BG, BH, BI, BJ, BK, BL, BM, BN, BO, BP, BQ, BR, BS, BT, BU, BV, BW, BX, BY, BZ, CA, CB, CC, CD, CE, CF, CG, CH, CI, CJ, CK, CL, CM, CN, CO, CP, CQ, CR, CS, CT, CU, CV, CW, CX, CY, CZ, DA, DB, DC, DD, DE, DF, DG, DH, DI, DJ, DK, DL, DM, DN, DO, DP, DQ, DR, DS, DT, DU, DV, DW, DX, DY, DZ, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EL, EM, EN, EO, EP, EQ, ER, ES, ET, EU, EV, EW, EX, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FH, FI, FJ, FK, FL, FM, FN, FO, FP, FQ, FR, FS, FT, FU, FV, FW, FX, FY, FZ, GA, GB, GC, GD, GE, GF, GG, GH, GI, GJ, GK, GL, GM, GN, GO, GP, GQ, GR, GS, GT, GU, GV, GW, GX, GY, GZ, HA, HB, HC, HD, HE, HF, HG, HH, HI, HJ, HK, HL, HM, HN, HO, HP, HQ, HR, HS, HT, HU, HV, HW, HX, HY, HZ, IA, IB, IC, ID, IE, IF, IG, IH, II, IJ, IK, IL, IM, IN, IO, IP, IQ, IR, IS, IT, IU, IV, IW, IX, IY, IZ, JA, JB, JC, JD, JE, JF, JG, JH, JI, JJ, JK, JL, JM, JN, JO, JP, JQ, JR, JS, JT, JU, JV, JW, JX, JY, JZ, KA, KB, KC, KD, KE, KF, KG, KH, KI, KJ, KK, KL, KM, KN, KO, KP, KQ, KR, KS, KT, KU, KV, KW, KX, KY, KZ, LA, LB, LC, LD, LE, LF, LG, LH, LI, LJ, LK, LL, LM, LN, LO, LP, LQ, LR, LS, LT, LU, LV, LW, LX, LY, LZ, MA, MB, MC, MD, ME, MF, MG, MH, MI, MJ, MK, ML, MM, MN, MO, MP, MQ, MR, MS, MT, MU, MV, MW, MX, MY, MZ, NA, NB, NC, ND, NE, NF, NG, NH, NI, NJ, NK, NL, NM, NN, NO, NP, NQ, NR, NS, NT, NU, NV, NW, NX, NY, NZ, OA, OB, OC, OD, OE, OF, OG, OH, OI, OJ, OK, OL, OM, ON, OO, OP, OQ, OR, OS, OT, OU, OV, OW, OX, OY, OZ, PA, PB, PC, PD, PE, PF, PG, PH, PI, PJ, PK, PL, PM, PN, PO, PP, PQ, PR, PS, PT, PU, PV, PW, PX, PY, PZ, QA, QB, QC, QD, QE, QF, QG, QH, QI, QJ, QK, QL, QM, QN, QO, QP, QQ, QR, QS, QT, QU, QV, QW, QX, QY, QZ, RA, RB, RC, RD, RE, RF, RG, RH, RI, RJ, RK, RL, RM, RN, RO, RP, RQ, RR, RS, RT, RU, RV, RW, RX, RY, RZ, SA, SB, SC, SD, SE, SF, SG, SH, SI, SJ, SK, SL, SM, SN, SO, SP, SQ, SR, SS, ST, SU, SV, SW, SX, SY, SZ, TA, TB, TC, TD, TE, TF, TG, TH, TI, TJ, TK, TL, TM, TN, TO, TP, TQ, TR, TS, TT, TU, TV, TW, TX, TY, TZ, UA, UB, UC, UD, UE, UF, UG, UH, UI, UJ, UK, UL, UM, UN, UO, UP, UQ, UR, US, UT, UY, UZ, VA, VB, VC, VD, VE, VF, VG, VH, VI, VJ, VK, VL, VM, VN, VO, VP, VQ, VR, VS, VT, VU, VV, VW, VX, VY, VZ, WA, WB, WC, WD, WE, WF, WG, WH, WI, WJ, WK, WL, WM, WN, WO, WP, WQ, WR, WS, WT, WU, WV, WW, WX, WY, WZ, XA, XB, XC, XD, XE, XF, XG, XH, XI, XJ, XK, XL, XM, XN, XO, XP, XQ, XR, XS, XT, XU, XV, XW, XX, XY, XZ, YA, YB, YC, YD, YE, YF, YG, YH, YI, YJ, YK, YL, YM, YN, YO, YP, YQ, YR, YS, YT, YU, YV, YW, YX, YY, YZ, ZA, ZB, ZC, ZD, ZE, ZF, ZG, ZH, ZI, ZJ, ZK, ZL, ZM, ZN, ZO, ZP, ZQ, ZR, ZS, ZT, ZU, ZV, ZW, ZX, ZY, ZZ.

① The state and trial court failed to answer the habeas within established time limits under Chapter 11 habeas corpus of Texas Code of Criminal Procedures and Rule 73 Rule of Appellate Procedures wherein, the state has 15 days to file an answer and then the court has 20 days to issue an (OOI) order designating issues to be resolved, of which may include affidavits from court appointed attorneys. The Writ of Habeas Corpus is a Writ of Right that shall never

② *McCree v. Hampton*, 824 S.W.2d 578, 579 (Tex. Civ. App. 1992) (Art. 11.07)

18. Be "Suspended" Right?

Perry answers that he did in fact file a myriad of Objections in All of the Courts denial of relief see Rule 33.1 Preservation how shown. Perry must Object to the Facts and conclusions in which he disagrees, Douglas V. United Services Auto Assn, 79 F.3d 1415 (5th Cir. 1996) otherwise he will be barred from raising the same on appeal. However, while we have regularly enforced the Walters rule, we have also noted that it plainly is not a jurisdictional rule. The Court of Appeals retains subject matter jurisdiction over the appeal regardless of the untimely filing or nonfiling of objections. Kent V. Johnson, 821 F.2d 1220, 1222 (6th Cir 1987). Perry answers that it appears we have a "Circuit Split" right? In Thomas V. Arn, 474 U.S. 140, 155, 88 L. Ed 2d 435, 106 S. Ct. 466 (1985) The Supreme Court emphasized that, because the Walters rule is a non-jurisdictional waiver provision, the Court of Appeals may excuse the default in the interest of justice. 474 U.S. at 155 (2005 U.S. Lexis 16). Nevertheless, Perry did file a myriad of lengthy objections and as such he is able to raise All of the issues and grounds that the Court erroneously denied relief on!

Perry answers that he timely filed a prose Motion For a New Trial, Addendum to Motion For New Trial, (PDR) Petition For Discretionary Review, and (2) two Art. II.07 Writ of Habeas Corpus Count I, Count II, paragraph B (49 grounds each) 70 exhibits and (2) two 50 page Memorandum of Law. Notwithstanding the Motion For Rehearing on banc in the Sixth Court of Appeals on Direct Appeal.

Perry answers that he filed both Art. II.07 habeas corpus applications in the 188th Judicial District Court on his elderly mother's birthday.

19. of May 26, 2015. See *Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998). However, the writs were stamped filed on June 1, 2015. Let me explain all of the misconduct by the State and Court in the mishandling of my habeas corpus appeal whereas, once Perry filed the applications, the State and Court failed to file a response within the prescribed time limits. ⁽²⁾ Chapter 11, Code of Criminal Procedures and Rules of Appellate Procedures Rules 23.1, 23.2, and 23.4 Under the new rule changes (West 2016) (eff. Jan. 1, 2014) The Trial Court will now only have 180 days from the date the State receives the applications to resolve the issues. On the 181st day the district clerk is required to send the applications to the Court of Criminal Appeals, unless the C.C.A. has granted the Trial Court an extension!

A. The State still has 15 days to respond.

B. The Trial Court still has 20 days from the State's deadline to designate the issues (ODI)

C. The Trial Court has 145 days to order affidavits and/or conduct a hearing, order proposed findings of facts and conclusions of law and resolve the issues.

Because this is a hard and fast, "lose your shirt" kind of deadline, the State should also calendar the 180 days to make sure there are no missed opportunities. The new rules effect all applications filed after January 1st, 2014. Perry's was filed May 26, 2015. BUT NOT stamped filed until June 1st, 2015 on page one of both writ applications, but wait, State actors did something unethical and illegal whereas, they used liquid white out marker to conceal the June 1, 2015 date and stamp filed June 15, 2015 on page two of both applications! Indeed, the Federal Court avers that Perry received

⁽²⁾ *McCree v. Hampton*, 824 S.W.2d 578, 579 (Tex. Crim. App. 1992) (A.T. 11.07)

20. back the writ applications on June 30, 2015, but makes no mention of the state tampering with a governmental record or destroying 800 plus pages of Perry's habeas corpus and evidence. See the lengthy report and recommendation by Magistrate Judge John D. Love Documents #72-1, #99, #103, #69-1, #20, #21, #65-1, #67-1, and #94-1 Due diligence. Nonetheless, again, it would be impossible to recite all of the arguments set forth by the Magistrate judge in his lengthy Reports and Recommendations. Therefore, Perry is left little choice but to send all of R.R. to this honorable court as an appendix, to fully apprise this honorable court of the District Court's erroneous reasoning to deny Perry relief. And to apprise the court of some of the misconduct of state actors at trial and on appeal. Especially the malfeasance concerning the "Great Writ of habeas corpus." Whereas, Perry will also provide this honorable court with official documents filed by the state concerning the habeas proceedings and the writ of habeas corpus proceedings in the Texas Court of Criminal Appeals, all of which concern the grounds for relief in the Rule 60(b) Motion, since Perry preserved error by filing all those lengthy objections, not only in state court, court of criminal appeals, Sixth Court of Appeals, but also in both United States District Courts, Eastern District of Texas at Tyler and Southern District at Galveston Texas. Whereas, Perry must object to the facts and conclusion in which he disagrees. Douglas v. United Services Act Ass'n 79 F.3d 1415 (5th Cir 1998) otherwise he will be barred from raising the same on appeal. also see R. App. P. Rule 33.1 Preservation how shown. Perry avers that he objected to all the misconduct by the Government. Again, Perry reiterates, that (P. Art. 11.07)(C) §2254)

21. after he timely filed both Art. II, 07 Writ of Habeas Corpus applications in the 188th State Judicial District Court in Gregg County, TX. On May 26, 2015, Perry's known birthday, see *Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998); The State did something unethical, and even criminal whereas, the State lied about the actual filing date when they stamped the filing date of June 1, 2015 and signed it on both Count I and Count II, B habeas applications on the front cover page. Then the State used liquid white out in a vain attempt to conceal the June 1, 2015 date and witness signature. However, Perry was able to hold the document up to a light and still see the June 1st, 2015 date. Then the State stamped page 2 of both applications with the date of June 15, 2015, in order to make it appear that they answered the writ within 15 days and then the court issued the order to reject in 20 days however, instead of timely forwarding both habeas applications to the Court of Criminal Appeals for adjudication on the merits as according to statute and Rules of Appellate Procedures or filing for an extension of time, the State and Court discarded, excused, destroyed, "800 plus" pages of Perry's habeas corpus applications and exhibits. Committing several felonies and misdemeanors that are not protected by Prosecutorial Immunity. And violations of the Canons. Perry was compelled to file a Writ of Mandamus in the Court of Criminal Appeals of Texas (WRC-62,920-06) See the District Clerk's Response to Petitioner's Writ of Mandamus Appendix (19) See page 3, III. The officer of the district clerk followed the order of the district court to return the application to Perry for failure to comply with the instructions for the application; On June 15, 2015, Michael Dean Perry filed an application (States Motion to Reject Habeas Appendix (2))

27. ③ For writ of habeas corpus for each count, and a memorandum of law, (x2, 50 pages each) with exhibits to accompany each application. (20 exhibits total). The total number of pages for both applications and both memorandum of law and exhibits was 956. Indeed, "800 plus pages"? As according to this order, the state and court filed the writs, states motion to reject and court's order, along with at least one of Perry's habeas corpus applications to the Court of Criminal Appeals on or about June 23, 2015. See Appendix A, B, and C cited by the state. The assistant district attorney kept a copy of only one of the applications. She discarded the other "800 plus pages" because she expected to see them again when Perry refiles his application. See copy of writ application, attached as Appendix C. (Sorry, no extra copy.) Now see Appendix B. A deputy in this office (filling in for the vacationing deputy who usually handles the writ paperwork) followed the District Court's Order (Judge David Brabham) and returned the applications to Perry on either June 23 or 24, 2015. She did not keep copies of the writ applications, memorandum of law, or exhibits, (sorry so sloppy, no liquid white out in my cell). She did not note the date in the records, but did attach the District Court's Order. She did not attach the states motion to reject and return Petitioner's Application for Writ of Habeas Corpus. And Perry avers that apparently the state and the court denied the writs on the merits without a finding of fact and conclusions of law and without obtaining affidavits from court appointed attorneys. The Texas Court of Criminal Appeals made no mention and/or adjudicated the habeas on the merits during the entire year of the writ of mandamus proceeding WR-62, 20-06.

③ ATT. 11.07

23. ⑥ In fact, The C.C.A. stated in relevant part in their per curiam opinion that the habeas applications were not sent to their Court, nor did the state or district court file for an extension of time. The Judges order contravened "clearly controlling legal principles" and caused the district clerk to violate her ministerial duty to forward the writ of habeas corpus to them, that the state "discarded" 800 plus pages of both writ applications because the state expected Perry to refile them, in violation of Chapter 11, Texas Code of Criminal Procedures Habeas Corpus, and Rules 73 of Texas Rules of Appellate Procedures. Perry avers that he regrets not being able to submit a copy of the per curiam opinion WR-62,920-06 Original Mandamus proceeding, but the only remaining copy he had was submitted to the 5th Circuit Court of Appeals and never returned.

The C.C.A. went on to aver that Perry's only remedy was to refile the Habeas Corpus. Indeed, Perry filed a myriad of lengthy objections with all of the Appellate Courts, explaining in pungent detail how difficult, if not impossible to refile both writ of habeas corpus applications minus his 70 plus exhibits - 800 plus pages that were discarded by the state - committing several felonies.

And as it turns out, Perry was right. There never has been any adjudication of the merits of Perry's 49 plus grounds, nor even an evidentiary hearing or affidavits from Court appointed counsel. Perry has tried to refile both writ of habeas corpus applications several more times, to no avail. The most recent refiling of both Art. 11.07 habeas applications was in 2018 see WR 62,920-13, in the C.C.A. Writ of Mandamus. Both of those applications disappeared.

⑦ Art. 11.07 (per curiam opinion WR-62,920-06 only copy sent to 5th Circuit.)

24. And Perry filed those writs while his initial C.O.A. was pending in the Fifth Circuit Court of Appeals No. 17-41010 (U.S.D.C. No. 6:16-cv-1108 Perry v. Davis) (See *In re Perry*, slip op. no. WR-62, 920-06 and WR-62, 920-13) Lexis 153 (T.C.L.A. 2-10-2016)

Perry avers that since the state and court continued to violate Perry's fundamental rights to due process of law by failing to process both of his writ of habeas applications several times now. Whereas, not only did the state and court lose jurisdiction and plenary power but they also waived the right to file an answer or objection (180 day time limit). Notwithstanding the rules governing the Great Writ of Habeas Corpus - "A Writ of Right that shall never be suspended", pursuant to Chapter 11 Habeas Corpus of Texas Code of Criminal Procedures and Rules of Appellate Procedures, effective January 1, 2014, states that the district clerk of the county of conviction shall except and file all Code of Criminal Procedure art. 11.07 applications. Tex. R. App. P. 73.4 (a) (West 2016) Rule 73.2, which formerly authorized district clerks to return writ applications that were not on the form to applicants, now says that this court (C.C.A.) may dismiss an application that does not comply with these rules. And Perry avers that nowhere in these rules previously or in the present authorizes, either the district clerk, or the district attorney, or even the District Court, to "discard, excise, destroy, and tamper with" liquid white out, "800 plus pages, 20 exhibits of impeachment and exculpatory evidence, that Perry submitted as his two art. 11.07 Writ of Habeas Corpus applications on his elderly mother's birthday of May 26, 2015". Perry avers that both art. 11.07 writ applications were erroneously stamped filed June 1, 2015 on the front page. However, that date was covered up with liquid white out.

(¹ Appendix (A))

25. But you could hold the page up to the light and clearly see the June 1, 2015 date. Then on page 2 of both writ applications, the date of June 15, 2015 was stamped. Subterfuge, to make it appear that the State answered the writ of habeas corpus within 15 days by statute. Then the Court of Conviction (Habeas Court) is required to issue an (ODI) Order Designating Issues to be resolved within 20 days, for a total of 35 days, and for file for an extension of time with C.C.A. or lose jurisdiction, within 80 days, total. See the States Motion to Reject and Return Petitioners Application for Writ of Habeas Corpus filed on June 23, 2015. And in the wrong courtroom, the 124th District Court in Gregg County, Tx. Perry was tried and convicted in the 188th District Court in Gregg County, Tx Appendix (20) How is it that the State can stamp-file the applications on June 1, 2015 - While that date out, then stamp-file the applications on June 15, 2015, only later to file-stamp both motions to Reject the Habeas Corpus on June 23, 2015? A copy of which was included as an exhibit with his (COA) Certificate of Appealability in the Fifth Circuit Court of Appeals See Perry vs. Davis, No. 17-41010 and Subsequent (COA) Perry v. Davis No. 18-41126 (Rule 60 (b) Michael Dean Perry v. Lorie Davis Director TDCJ U.S.D.C. No. 6:16-cv-1108 Tyler, Tx.) of which Perry filed the Rule 60(b) motion challenging the erroneous denial of his 28 U.S.C. § 2254 Writ of Habeas Corpus of which Perry avers was based on fraud whereas, see Document 99 filed 11/14/2018 by Magistrate Judge John D. Love and Senior District Judge Ron Clark. Wherein, the Court states in part that Perry asserts that the underlying basis for the Court's dismissal of his habeas petition is fallacious and replete with artifice, subterfuge, and surplusage. He traces the history of his state court litigation and argues that he is entitled to equitable tolling of the limitation (McCre v. Hampton, 824 S.W. 2d 578, 579 (Tex. Crim. App. 1992) (Art. 11.07))

26. ...ious period because the State [a]llegedly destroyed 800 pages of exhibits to his state habeas applications. Indeed, Allegedly.

Perry avers that he had no idea that the State Destroyed 800 plus pages of Perry's habeas corpus and evidence of his actual and factual innocence and impeachment and exculpatory evidence and evidence of the fraud that was committed by state actors, including, but not limited to witness tampering, evidence tampering whereas, document 99, supra Perry contends that there was a fundamental miscarriage of justice, prosecutorial misconduct, and violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 114, 10 L.Ed.2d 215 (1963) in his case. He argues that he made a credible showing of actual innocence and that the proof of his guilt was completely lacking. Perry complains that a witness named Wilma McKinney was not called during the guilt or innocence phase of his trial, calling her a "Fidavit, Newly Discovered Evidence". That he was denied an Evidentiary Hearing in both state and federal court. That the writ of habeas corpus should be liberally construed, he does not allude to the court's determination that the only claims properly before the court were those raised in his original and amended federal petitions and that neither of these petitions set out cognizable grounds for habeas corpus relief.

And Perry avers that the court is again using artifice and subterfuge in order to hide evidence from this honorable court by only using bits and pieces of all of Perry's objections, and instead of the gravamen of Perry's complaints/grounds. The District Judge makes no mention of the (2) two Recant Affidavits presented by the alleged victim since trial, that Perry submitted with his habeas corpus applications both the art. 11.02 and the 28 U.S.C. § 2254, and even with his ⁽¹⁾(PDR) Petition for Discretionary Review, ⁽¹⁾PD-1209-14 (CoA No. 06-13-00051-CR)

27. Perry was provided "All" the Courts with an original copy of his Court appointed Attorney's letter, Tim Lone, wherein, he states in part, that he obtained a tape recorded recant statement from alleged victim, Alanna McKinnis, and a statement from the Grandmother, Wilma McKinnis, exonerating Perry, and long before trial, but he never disclosed this fact, 'The State of Texas Knew it'. Tim Lone avers in his disingenuous letter to me in part, that if I wanted to listen to the tape recordings, I should have just asked! Indeed, a copy of that letter, marked as exhibit #22A was presented to the 5th Circuit Court of Appeals as well with Perry's C.O.A. to no avail.

Perry begs this honorable Court to review "All" the record in the case at bar, and especially All the arguments set forth in Perry's Rule 60(b) Motion and also his motion to Alter or Amend Judgment, notwithstanding "All" of Perry's "lengthy objections" to the Report and Recommendations of the Magistrate Judges in the case at bar. Whereas, Perry must object to the facts and conclusions in which he disagrees; Douglas V. United Services Auto Assn, 79 F.3d 1415 (5th Cir 1996) otherwise he will be barred from raising the same on appeal. Also see Rules of Appellate Procedure Rule 33.1 Preservation How Shown!

Now see Document #72-1 Date Filed: 8/22/2017 U.S. District Court, Eastern District of Texas, Tyler Division, of which is 21 pages in length and concerns the denial of Perry's 28 USC § 2254 habeas corpus and mandamus proceedings and even Perry's actual and factual innocence claims. Whereas, the ruling by the Court actually adjudicates some of Perry's grounds on the merits in order to deny him habeas corpus relief and/or COA, and without an adjudication on the merits in state court-habeas court

28. First, Remember Buck's warning? Buck v. Davis, 137 S.Ct. 759, 773 (2017) cited in Perry's COA in the 5th Circuit No. 18-41126 (March 13, 2019) (page 80 of 11.) As the Supreme Court has recently warned [w]hen a Court of Appeals Side Steps [The COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication on the actual merits, its deciding an appeal without jurisdiction. Instead, [w]hen the district court denies a habeas corpus petition on procedural grounds without reaching the prisoner's underlying constitutional grounds, a COA should issue when the petitioner shows that justice of the reason would find it debatable whether the petitioner states a valid claim of a denial of a constitutional right and that justice of the reason would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000) Since this is a death penalty case, any doubt as to whether a (pp. 90 of 11) COA should issue must be resolved in favor of the petitioner, Pippin v. Dietke, 434 F.3d 782, 787 (5th Cir 2005) Indeed, Perry's 120 years in prison effectively qualifies as a death penalty; Perry's 60 years of Age! Perry will not be eligible for parole until 2042!

Furthermore, see Document # 72-1 in part, page 20 of 21; The Court again uses subterfuge in order to make it appear that Perry was two weeks late in filing the 28 USC § 2254 application (see page 20 of 21) The Court states that Perry signed two state applications for the writ of habeas corpus. These two applications, including the attached memorandum of law and (10) exhibits, totaled 956 pages. Indeed, there's no mention of Perry's motion entitled, List of Exhibits, of which explains in pungent detail each exhibit and how each exhibit supports Perry's grounds for relief and innocence.

29.

Almost all of which was destroyed by the government, what wasn't destroyed was covered in liquid white out. The state filed a motion to reject and return the applications to Perry because Perry had not followed the instructions on the state habeas corpus requiring only one issue per ground and only two pages of facts to support each issue. On June 23, 2015, the trial court issued an order directing that Perry's applications be rejected and returned to him. To be sure, the federal court makes no mention of the date the state answered the habeas corpus, to be sure, Perry did not receive any motion or order from the state until long after he filed the original application for writ of mandamus in the Texas Court of Criminal Appeals, on or about September 9, 2015. In fact, the C.C.A. order the state and court to file an answer. See *In re Perry*, slip op. no. WR-62,970-06, 2016 Tex. Crim. App. Unpub. Lexis 153 (Tex. Crim. App. February 10, 2016). Perry sought mandamus relief from the C.C.A., which denied leave to file the mandamus petition on February 10, 2016. [D]espite denying leave to file the mandamus petition, the C.C.A. held that the district court's order directing return of Perry's applications was improper, but concluded that Perry had no remedy other than re-filing his state habeas petitions. Perry did not do so. Oh, Really, move subtle Eugene! And Perry poses this question, how is it that the government can commit a bunch of felonies by destroying evidence and covering up their crimes with liquid white out and just call it "improper"? By the way, Perry did re-file the state habeas corpus (3) three more times! The proof of Perry's re-filing is irrefutable!

As an aside: TDCJ no longer sells typewriters. They lost their contract with the company that sells typewriters. All of Perry's pleading are handwritten. (Sorry so sloppy!)

30. See page 2 of 21 B. The Federal Court Proceedings in part; Whereas, due to the extreme length of the court's order and this honorable court's (40) 60-its page limit, Perry will only be able to address a mere fraction of all the misstated facts and subterfuge; On June 23, 2016, Perry submitted a document styled petition for writ of habeas corpus in the U.S. District Court, Southern District of Texas (Galveston Division) This petition, which appears at docket no. 1, is dated June 7, 2016 and did not identify the conviction being challenged, but simply asked the court for additional time to pay the (\$5.00) filing fee and complained about the operation of the law library at the unit where he is confined (Wayne Scott Unit) And Perry avers that that motion was for an extension of time to pay the \$5.00 filing fee for the 28 U.S.C. § 2254, and not the 2254! Perry stated that he had tried to file a habeas corpus petition on June 3, but that he never received any acknowledgment and did not believe it had been mailed out, Perry avers that this is not true either. Perry avers that he signed, dated, and filed the 28 U.S.C. § 2254 habeas corpus on his elderly mother's birthday of May 26, 2016, and as such it was deemed filed on that date, the date he placed it in the prison mailing system see: *Spottville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) Just like Perry signed and dated, then filed his state habeas corpus application, on his elderly mother's birthday in honor of her, May 26, 2015. Making Perry's federal 2254 writ timely.

On page 3, the court goes on to state that on July 27, 2016, Perry filed a standard federal habeas corpus form raising four grounds for relief (docket no. 9). This form is dated June 3, 2016, and is presumably the one which Perry stated he filed on that date! The Magistrate Judge erroneously

returned to it as Feery's amended petition of which it was not. Feery
 never got to file an amended petition due to this abuse of discretion.
 Feery has also filed several hundred pages of exhibits in court-
 ven with his amended petition. These exhibits include a copy of his
 103-page state habeas application (Count I and Count II, both applications)
 as well as copies of state court orders and motions. However, Feery
 avers that the court fails to even mention the fact that both writ
 applications and supporting motions were covered in legal white out,
 concerning the actual filing date, Sub Ter Feery - To Wake I appear that
 Feery was two weeks late in filing the 28 U.S.C. § 2254.
 The Magistrate Judge goes on to say that one of Feery's state ap-
 plications, containing 49 grounds for relief in 103 pages, is attached
 to Feery's original petition, docket no. 1, and the amended petition, do-
 cket no. 9. Feery did not state in either of these petitions that he intend-
 ed to incorporate the grounds raised in his state applications, but raised
 the issue of incorporation for the first time in his reply to the dis-
 positional answers. And Feery avers that a petition is required to only
 raise the same grounds in the 2254, that he raised in the 1103, right?
 One of Feery's state applications, containing 49 grounds for relief,
 in 103 pages, is attached to Feery's exhibits at docket no. 10-2, pp. 21 Thro-
 ugh 124. Rule CV-3(b) of the local Rules of Court for the Eastern Dist-
 ict of Texas provides that absent leave of the court, a habeas corpus
 petition under 28 U.S.C. § 2254 in a non-death penalty case shall not exceed
 30 pages in length excluding attachments. And Feery avers that he did
 not file his writ of habeas corpus in the Eastern District of Texas
 for a very good reason and for reasons, mainly due to all the Prisoner
 (Ex parte: Feery, 943 S.W.2d 469 (Tex. Civ. App. 1997))
 (First Brief at App. 1) (Same Feery 11/4/40) (most waste any ground) 31.

32. Civil Rights Lawsuits filed in that courtroom against the respondents in Gregg County Courthouse and Sheriffs Office, "Bias and Partial". Therefore, Perry did not need to seek leave of the Eastern District Court. Because the rules provide that a petitioner can file the 28 U.S.C. § 2254 in either jurisdiction, the jurisdiction of conviction or in confinement (Prison). However, the Southern District Court erroneously terminated all of Perry's motions and evidence and transferred his case to the Eastern District. Again, see the detailed discussion on the merits of Perry's grounds well, some of Perry's grounds, and without jurisdiction! Remember, the courts in the state never ruled on the merits and/or adjudicated his writ of habeas corpus Art. II. 07. They were too busy destroying evidence and using liquid white out in order to hide evidence from the Court of Appeals. Those tampered with Government Records and Physical Evidence, you know, both Court I and Court II, B habeas applications that were attached to the 28 U.S.C. § 2254 habeas corpus were transferred to the Eastern District Court in Tyler, TX. Constituting even more felonies, right? Surely both of those Art. II. 07 writ of habeas corpus applications are still in the Clerk's Office in Tyler, TX, right?

See page 19-20 Document # 221 in part; Summary and Conclusion; After Perry's convictions were affirmed on direct appeal, he sought habeas corpus review. He filed in the trial court on May 26, 2015! Not true. First Perry filed a POR! The trial court ordered that his petitions be returned to him, and Perry stated that he received his applications and exhibits back by June 30, 2015. Not true. Perry stated that he only received the remnants of his applications and exhibits, all of which were missing pages and covered in liquid white out, constituting several felony crimes.

33.

And impeding Perry's writ of habeas corpus appeal and due process of law! All of this misconduct was going on while the writ of mandamus (WR-62,920-06) was pending in the Texas Court of Criminal Appeals! Perry file a myriad of lengthy objections in "All of the Courts involved in this case, thereby preserving his myriad complaints for Appellate Review!" p.19 Perry then sought mandamus from the C.C.A., which concluded that the return of his habeas applications was improper but that Perry's only remedy was to re-file his writ applications. [Perry did not pursue this remedy, but instead sought Federal habeas corpus relief after his state mandamus proceedings were concluded. Again, not true! Perry re-filed the writ applications (3) Three more times to no avail. But first, see the clerk's response to the mandamus that is dated as being filed on June 23, 2015 and signed by Judge David Blabham as Appendix (19) Now see the Certificate of Service signed and dated by the clerk, Barbara Duncan on September 15, 2015. Even though the state and clerk lied and said Perry filed the writ applications on June 15, 2015, Perry did not receive an answer within 15 days or court order denying the writ in 20 days, for a total of 35 days! See page 4 of clerk's response, the assistant district attorney kept a copy of only one of the applications. (Perry assumes, so that she, Tanya Reed, can review all the errors and misconduct alleged by Perry, to be able to clean it up and/or destroy more evidence in order to defeat the re-filed writ of habeas corpus and hide evidence from the Appellate Courts! She discarded the other "800 plus pages" because she expected to see them again when Perry re-files his application. See copy of writ application, attached as Appendix C.

34. Perry assumes that a copy of The Writ was sent to The C.L.A. Appendix C? See Order Appendix B. A deputy in this office (filling in for the vacationing deputy who usually handles the writ paperwork) followed the District Court's order and returned the applications to Perry on either June 23 or 24, 2015 ("She did not keep copies of the writ applications.") Memorandum of Law, or exhibits, "did not note the date in the records." Indeed, so how is it that the Magistrate Judge can conclude that Perry was (2) two weeks late filing the 28 USC § 2254, based on all this misinformation and subterfuge? And if the State and Court notified the Texas Court of Criminal Appeals about all of this state action long before it issued its per curiam opinion on February 10, 2016. Why on earth didn't the C.L.A. notify Perry sooner? Subterfuge! None of the courts reported the felonies committed by state actors in destroying "800 plus pages" of Perry's habeas corpus and exculpatory and impeachment evidence, as is required by law and the canons. Again see Document #22-1 page 20; the Court has conducted a careful de novo review of those portions of the Magistrate Judge's proposed findings and recommendations to which the Petitioner objected. See 28 U.S.C. § 636(b)(1) And Perry avers vociferously that that's not true either! The Judge only erroneously did a review of the portions of the Magistrate Judge's report that he could misapply in order to deny relief! Disingenuously stating that upon such de novo review, the Court has determined that the report of the Magistrate Judge is correct and the Petitioner's objections are without merit. And Perry avers that the Judge only reviewed a fraction of Perry's allegations of fraud and misconduct. Moreover, again, look at the State's motion to reject

35. in which the state lists Perry's entire 49 grounds on both Counts. Of which all 49 grounds are the same on Count I, and Count II, B, for a total of 98 grounds. Whereas, the Constitutional Violations are numerous, that any reasonable jurists could plainly see. A copy of the States Motion to Rejet was also filed with the 5th Circuit Court of Appeals as an exhibit attached to his COA in support thereof. Perry avers that he has not been granted an Evidentiary Hearing, in State Court or Federal or Discovery. Probably because the Government destroyed all of Perry's evidence. In fact, a Full, Fair, and Live Evidentiary Hearing might reveal the extent of the Misconduct. So called Brady Violations, see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Also see *United States v. Taveria*, 719 F.3d 705, 708 (6th Cir. 2013) (Reversed); *State ex rel. Griffin v. Denney*, 342 S.W.3d 723 (Mo. 2011) (Reversed); *Arizona v. Youngblood*, 109 S.Ct. 333 (1988); *California v. Trombetta*, 104 S.Ct. 2528 (1984); *Prosecutorial Misconduct Indeed*, *Dennis v. Wetzel*, 966 F.Supp.2d 489 (E.D. Pa. 2013); *United States v. Olson*, 737 F.3d 625, 626 (9th Cir. 2013). Like the demonstrative knife use at the enoneas trial, Hearsay, Witness tampering, illegal searches seizure, see *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014). Manufacturing or fabricating Evidence before indictment and trial, 'Prosecutorial Immunity Not yet attached', see (ABA) American Bar Association Rule 3.08 Model Rule of Professional Conduct. See *Washington v. Davis* No. 17-0009 Decided: December 20, 2017 (U.S. 5th Circuit Court of Appeals) Before Clement, Owen, and Graves. In light of the specific circumstances of this case, we grant Washington's COA. Vacate the District Courts denial of an evidentiary hearing and dismissal of Washington's habeas petition and Remand for further discovery and an evidentiary hearing on Washington's ineffective habeas counsel. In which Perry was denied all of the abovesaid, even though his case mirrors this case.

36. Again See Perry's Rule 60(b) Motion for Relief from a Judgment or Order Filed on August 13, 2018 by placing the writ in the prison mailing system See, *Spotville v. Cain* 149 F.3d 374, 378 (5th Cir 1998) Perry relates back to that motion and adopts the arguments therein to fully apprise this honorable Court of all of his objections and entitlement to relief. See Rule 60(b)(1) Mistake, inadvertence, surprise - ('800 plus pages destroyed'), or excusable neglect. (Motion for protective order?) (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) Fraud (Whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by opposing party; (Destroyed) '800 plus pages of habeas corpus and 20 exhibits, used liquid white out to conceal filing dates, lied to Court of Appeals about this conduct - Fraud on the Court. See *Fierra v. Johnson*, 197 F.3d 147 (5th Cir 1999) (Rule 60(b)); (4) The judgment is void; Habeas Court lost jurisdiction and plenary power'; (5) The judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable' (Perry's prior erroneous conviction for tampering with physical evidence was reversed on direct appeal and was later used to enhance this sentence. (6) Any other reason that justifies relief. (Emphasis supplied)

See Document #99 Appendix (E) in part; The Court only cites - repeats (4) four of Perry's grounds, the first four listed on the application form itself, but not the (49) forty nine grounds argued in both art. 11.07 habeas corpus applications, for a total of (98) ninety eight grounds for relief. So that the Court can erroneously claim that Perry's grounds (four) were not cognizable in federal habeas corpus - The in finities in finities in state habeas corpus proceedings do not constitute grounds for Federal habeas corpus relief. Or the Wayne Scott Unit Law Library.

37.

In his Rule 60(b) motion for relief from judgment, Perry asserts that the underlying basis for the court's dismissal of his habeas petition is fallacious and replete with artifice, subterfuge, and surplusage. He traces the history of his state court litigation and argues that he is entitled to equitable tolling of the limitations period because the state - "Allegedly" destroyed "800 (plus) pages of exhibits to his state habeas applications; to be sure, the word "Allegedly," and the word "plus" that's now missing, emphasizes Perry's allegations of fraud on the courts and Perry. Don't forget the miscarriage of justice see *United States v. Williams*, 790 F.3d 1059 (CA. 10 2015) Although the court somewhat mentions Wilma McKinnis's Affidavit, but no other arguments, nor does the court mention the alleged victims (2) two recent Affidavits since trial and direct appeal. The court also cites a couple of prison civil rights lawsuits that were not even published in its erroneous reasoning to deny Rule 60(b) relief. And All of the aforesaid was done without justification. Remember *Buck v. Davis*, Supra? Appendix (b) Also see Document #103 wherein, the court also uses unpublished cases in order to deny relief. The court also erroneously applies Fed. R. App. P. 24(a)(3)(A), to claim that Perry's appeal was not taken in good faith because it presents no non-frivolous issues. Oh, Really? Like the state destroying "800 plus pages" of Perry's impeachment and exculpatory evidence and proof of his Actual, Factual, and Legal Innocence. Because this court has certified that Perry's appeal is not taken in good faith, the IFP is denied. Again, the court cited unpublished Prisoner Civil Rights lawsuits. Talk about frivolous and not conducting the business of the court expeditiously. See Art. I, (a) Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, to determine whether a covered judge has engaged

38.

in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability;

See the Complaints Filed by Perry on the Judges involved in the case at bar, both State and Federal judges to wit:

Complaint Filed on State Court Judge David Brabham, on or about April, 8th, 2019 RE: CJL No. 19-0013. And the Complaint Filed on the Federal Judges and Magistrate Judge, John D. Love, Ron Clark, and George C. Hanks, Jr. Complaint Numbers: 05-20-90049 Through 05-20-90051

The Complaint of the Federal Judges was denied on March 9, 2020 by the Chief United States Circuit Judge Hon. Patricia R. Owen. Perry filed a Motion for extension of time to file an opposition Motion of which was granted. Perry has not been able to file that Motion at this time due to the "Corona Virus pandemic" and "No access to the Law Library".

Also see the Complaint Filed on assist district attorney Tanya Reed with the State Bar of Texas concerning, inter alia, destroying "800 plus pages of Perry's writ of habeas corpus and evidence and the use of liquid white out to conceal the filing date, lying in her Affidavit to the State Bar, and Court of Appeals. Notwithstanding all of her Misconduct at and before Perry's erroneous trial.

See Appendix (A) RE: 201403874 Also Submitted to the 5th Circuit Court of Appeals with COA. See COA No. 18-41126 Appendix (B) (5th Circuit)

Perry recently Filed for Leave to refile Both Writ of Habeas Corpus, Court I, and Court II, B Art. 11.07 T.C.C.P. Tex. R. App. P. 73.1 on May 1, 2020 *Spotville V. Cam, Supra*. However, even though the Court of Criminal Appeals previously told Perry that this only remedy was to refile both Court I, and Court II, B. See the per curiam opinion WR 62,920-06. See Perry's Motion Appendix (2) and the Emergency Protective Order Appendix (10)

39. White card denial, date: May 26, 2020 Perry's Mom's birthday Wilma McKinney, the very same date Perry tried to mail/file the original habeas corpus, Mom's birthday! And The 28 USC 2254 as well! Coincidence? Also see the Motion for Recusal of Judge Andlov Change of Venue Date filed: April 27, 2020, Spottville V. Cain, Supra. Appendix (8) White Card Denial Appendix (2) and Appendix (2) Of course, Perry avers that the Court of Criminal Appeals erroneously lists Court I, WR-62,970-11, T.C. No. 42,139-A-14-1, and Court II, B, WR-62,970-12, T.C. No. 42,139-14-1. Indeed, Perry did not specify that he wanted to refile those same two applications, indeed, they were denied already therefore, it would be futile to refile the very same applications! In fact, Perry did rewrite both applications and re submitted them see WR-62,970-13 (44) grounds each! Court I, and Court II, B, to no avail, they disappeared! Perry avers that he will have to rewrite both habeas applications again! Nevertheless, the Great writ of Habeas Corpus is a writ of Right that shall never be suspended! A writ requiring a person to be brought before a court to determine whether the person has been detained legally; i.e. have the body (first words of the writ) yet. Perry has never been brought before the court. Perry never has had an Evidentiary hearing in State or Federal court, Perry never has been granted discovery or habeas counsel. See *Garratt V. The Cotton*, 807 F.2d 482, 484 (5th Cir. 1984) Denial without a written order by Texas Court of Criminal Appeals, Not a ruling on merits! In fact, there never has been a ruling on the merits of Perry's grounds! Denying Perry his United States Constitutional Rights under 1st Amendment Bill of Rights - to petition the Government for a redress of grievances; The 14th Amendment, due process and equal protection of laws, Nor be

40. Deprived of life, liberty or property, without due process of law, the same language is included in the 5th Amendment.

Again, the State and Court never processed the writ of habeas corpus as according to statute. See *McCree v. Hamton* 824 S.W. 2d 578, 579 (Tex. Civ. App. 1992). The State Court lost plenary power and jurisdiction, in and of the first filing of the Art. 11.07 on May 26, 2015. All orders issued after the fact were null and void. There is inherently a conflict with all the courts in the case at bar. Perry avers that all the courts in the case at bar have engaged him in a fencing contest for almost (8) eight years now without ever adjudicating his writ of habeas corpus on the merits. The mandamus should have issued (WR-62,970-06). Courts are required to rule on motions within a reasonable amount of time, see *Burns v. State*, 832 S.W. 2d 424 (Tex. App. Houston [1st Dist. 1992]). Yet, the C.A. sat on the mandamus for at or about (10) ten months before issuing its en banc per curiam opinion (WR-62,970-06 February 10, 2016). Not so with the motion for leave to refile both habeas corpus applications, filed on May 1st, 2020, and then denied on May 26, 2020, record time.

As an aside: See Perry's pro se Motion for Summary Judgment filed on January 9th, 2017, *Spotville v. Cain*, supra. For a pungently detailed description of all the United States Constitutional violations, in which the U.S. District Court deemed the Motion meritorious, but failed to issue a ruling on the Motion. Appendix (C2) Also see the original writ of mandamus filed on March 25, 2019 *Spotville v. Cain*, supra, in the 5th Circuit Court of Appeals. To fully apprise this honorable court of Perry's right to the writ of habeas corpus; A writ of Right that shall never be suspended. Right? (See also Supreme Court rule 20; 4(b) 28 USC § 2241(b) Neither the denial of the petition, without more, nor an order of transfer is an adjudication on the merits, and does not preclude further application to another court.

[Rules 10 and 14.1(h) 33)

Argument

Reasons For Granting The Petition

The Law is Well established and unambiguous, whereas, "The Great Writ of Habeas Corpus Ad Subjiciendum Shall Never Be Suspended". However, the State and Habeas Court discarded, excuse me, destroyed "800 plus pages" of Perry's Art. 11.07 Writ of Habeas Corpus applications, both Court I and Court II paragraph B, (70) Seventy exhibits, (2) two (50) Fifty page memorandum of Law and used ligned white out in order to conceal the actual filing date of June 1, 2015, well actually, both applications signed and dated by Perry on May 26, 2015, Perry's Mom's birthday! The habeas Judge David S. Brabham acquiesce to this felonious misconduct by denying the habeas corpus and directing the clerk to return the habeas applications to Perry! The Judges order contravened clearly controlling legal principles and caused the clerk to violate her ministerial duties to forward the habeas corpus to the Court of Criminal Appeals! Perry's only remedy is to refile his habeas corpus. Indeed! See WR-62,970-06 Writ of Mandamus per Corbin opinion. By failing to forward the Writ of Habeas Corpus to the Court of Criminal Appeals within 180 days, the habeas court lost plenary power and jurisdiction right! Therefore, all orders issued thereafter the 181st day were null and void! The Court of Criminal Appeals should have granted the habeas right? Further more, Perry avers that the Writ of Mandamus was also a Collateral Attack on this judgment and Perry should have been granted time tolling! Considering all the Courts actually denied Perry relief based on the merits of his claims without first

adjudicating his grounds (98 grounds) on the merits in State Court. Furthermore, Perry was entitled to the 'Mail box rule'. Whereas, Perry signed, dated, and tendered both of his Art. 11.07 habeas applications to prison officials for mailing on his elderly mother's birthday of May 26, 2015. See *Houston v. Lack*, 487 U.S. 266, 275-76, 108 S.Ct. 2379 (1988). Irregardless of the State using artifice with the use of liquid white out to conceal the filing date. Furthermore, Perry timely filed his 28 U.S.C. § 2254. Whereas, Perry signed, dated, and tendered his 2254 to prison officials for mailing on his elderly mother's birthday of May 26, 2016 (1 year AEDPA). Irregardless of the subterfuge used by the Court to erroneously allege that Perry was two weeks late filing his § 2254 Habeas Application.

Notwithstanding the aforesaid, the Courts erroneously denied Perry relief based on his Actual, Factual, and legal Innocence claims. The alleged victim has recanted several times now. Alanna McKinney and her Grandmother Wilma McKinney (Perry's Mom) have provided Perry with sworn notarized Affidavits exonerating him and alleging police misconduct, in particular, illegal search and seizure of Perry's home. Perry avers that the only two people on his TDCJ visitation list are his elderly Mom, Wilma McKinney and niece, Alanna McKinney. Indeed, apparently TDCJ does not consider Alanna McKinney a victim. Both are ready, willing, and able to testify at a New Trial or Evidentiary Hearing, that Perry is actually innocent. See *Holloway v. Jones*, 166 F.Supp. 2d 1185 at 1190 (holding that the use of AEDPA one-year period of limitations to preclude a petitioner who can demonstrate that he or she is or was convicted of a crime they did not commit would violate the "Suspension Clause" as well as the

(See Appendix (38) Approved Visitors list TDCJ)

1 Eighth Amendments ban on Cruel and Unusual Punishment. Indeed, Perry's (2) Two 60 year Sentences for the same Alleged Crime and (2) Two \$10,000.00 Fines, constitutes Cruel and Unusual Punishment. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system (395 F3d 602) that concern is reflected... in the fundamental (2005 U.S. App. Lexis 58) value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. 'Schup, 513 U.S. at 325 (quoting In re Winship, 397 U.S. 358, 372, 25 LEd 2d 368, 90 S Ct 1068 (1970) (Harlan J. concurring). In light of these grave constitutional concerns, we believe equitable tolling of the statute of limitations based on a credible showing of actual innocence is appropriate.

In sum, we hold that where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him/her guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims.

Perry is of the belief that the courts in the case at bar have erroneously applied the law as according to well established Supreme Court Precedence on time tolling, Suspension Clause, Actual and Factual Innocence Claims, and Ineffective Assistance of Counsel, Whereas, the courts have so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power. Both State and Federal. Rule 10.

Conclusion

The petition for a writ of Certiorari should be granted.

Respectfully Submitted,

x Michael Dean Perry

Executed on this the 2nd day of July, 2020