20-7060

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES LEE MOSIER, SR. — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF CRIMINAL APPEALS OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CHARLES LEE MOSIER, SR.
(Your Name)
HUGHES UNIT (TDCJ NO. 2062833)
RT. 2 ,BOX 4400
(Address)

GATESVILLE, TX 76597
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

GROUND ONE: DOES A STATE'S INITIAL-REVIEW POST-CONVICTION COLLATERAL PROCEEDINGS MEET CONSTITUTIONAL STANDARDS WHEN THOSE PROCEEDINGS FAIL TO PROVIDE A PRISONER THE OPPORTUNITY TO GATHER, PRESENT, AND CONSIDERATION OF EVIDENCE IN SUPPORT OF AN INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL CLAIM, FOR WHICH THE INTITIAL-REVIEW COLLATERAL PROCEEDINGS IS THE FIRST MEANINGFUL OPPORTUNITY TO RAISE AN INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL CLAIM?

GROUND TWO: WAS PETITIONER'S TRIAL COUNSEL AND CO-COUNSEL INEFFECTIVE DURING EITHER THE GUILT/INNOCENCE PHASE OR SENTENCING PHASE OF THE TRIAL, PURSUANT TO STRICKLAND V. WASHINGTON, 466 U.S. 688 (1984); AND, IF NOT, DOES STRICKLAND NEED TO BE MODIFIED TO ADDRESS SITUATIONS WHEN TRIAL COUNSEL IS UNAVAILABLE AS A WITNESS?

LIST OF PARTIES

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

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

RELATED CASES

Petitioner, Charles Lee Mosier's, habeas petition filed pursuant to 28 U.S.C. § 2254, is pending in the U.S. District Court for the Northern District of Texas, Fort Worth Division and has been STAYED pending the resolution of this Petition for Writ of Certiorari. See, Mosier v. Lunpkin, No. 4:19-CV-355-O (N.D. Tex - Nov. 3, 2020) ,Dkt. No. 10.

*** While it involves an entirely different Petitioner, the same exact issue and substantially similar briefing, will be raised in this Court on a Petition for Writ of Certiorari to be filed in the case of Ex parte Paul Salazar, No. WR-90,899-02 (Tex.Crim.App. - October 21, 2020)(available at http://www.txcourts.gov/cca/); which the § 2254 habeas petition has also been STAYED. See, Salazar v Lumpkin, No. 5:19-cv-01489 (W.D. Tex (San Antonio Div) Nov. 5, 2020), Dkt. No. 8.

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STATUTES/RULES

COMMENTARY

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

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the 432nd District Court of Tarrant County appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was SEPT. 23, 2020. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, Article III, Section 2 - "... The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed ..."

USS. CNSTITUTION, 6th Amendment - "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed and ... [] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. CONSTITUTION, 14th Amendment - "..., nor shall any State deprive any person of life, liberty, or property, without due process of law..."

Texas Code of Criminal Procedure, Article 11.07 - APPENDIX "F"

Texas Rules of Appellate Procedure, Rule 73 - APPENDIX "F"

STATEMENT OF THE CASE

1. The Petitioner, Charles Lee Mosier, Sr., was charged in the 432nd District Court of Tarrant County, Texas with continuous sexual, abuse of a child. The allegations were that Mosier sexually abused Amy and Alex, relatives who lived with him.[1]

2. The children reported the alleged abuse after moving out of Moiser's house to live with their mother. The defense theory at trial was that "the children accused [Mosier] of abuse so they could move in with their mom, who was not as strict" as Mosier and his wife. The problem was that the "Allegations were not made until the alleged goal and motivation to lie -- the desire to move to a more lenient home environmant -- had already been achieved."

3. The trial record did not reveal what reason the children provided to the adults to explain their motivation to move. However, at trial Amy claimed that the reason she wanted to move was the alleged molestation and Alex claimed that he was just tired of living there. There was also no testimony at trial concerning the motivation to actually report the alleged abuse a month or so after the children moved out. But, Alex did claim at trial that he was present when Amy made the outcry, was angry with Amy for reporting the abuse, and stated more than once that he never wanted anyone to know about what had happen.

4. However, Mosier's trial counsel failed to disclose to the Jury, through cross-examination or otherwise, that prior to trial Amy revealed that it was Alex who "told her 'if you don't tell now nothing will happen about it.'" State Habeas Writ Application EXHIBIT "S" - "State's Disclosure #3 (hereinafter "Disclosure #3").

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1. Unless otherwise noted, the facts (quotes) come from the State appellate court's Opinoin on direct review., APPENDIX "C" - COA Opinion.

Nor did trial counsel disclose to the Jury that Amy "had just had an argument with their mother [] and was made at her when [Amy] made the outcry..." State Habeas Writ Application, EXHIBIT "R" - "State's Disclosure #2" (hereinafter "Disclosure #2"). Which would have all supported a different defense theory that the children made the false allegations in an attempt to not have to move back into Moaiser's stricter home enviorment after the children continued to get in trouble at their mom's and when their mom could still not keep a stable home environment. 5 RR 67, 76, 81; 6 RR 64.

5. Moreover, trial counsel failed to disclose to the Jury that prior to trial Alex claimed that the reason he wanted to move out of Mosier's house was because of the alleged abuse and, in contrast, it was Amy who was just tried of living there. Disclosures #2 & #3.

6. After the outcry, CPS had the children report their allegations to a forensic interview expert at Alliance for Children. Those forensic interviews were recorded. 5 RR 145-146, 149. It would appear that the very reason the State prosecutors felt compelled to disclose the statements the children made to prosecutors in preparation for trial was because those statements were inconsisent with the recorded forensic interviews and Brady required the disclosure. Nevertheless, Moiser could not plead in his state habeas writ application the specific prior inconsistent statements that the children made during the forensic interviews compared to at trial (and to the prosectuors) because the state habeas trial court ignored Mosier's requests for access to the recordings and to make the recordings a part of the writ record. See, State Habeas Writ Application, GROUND NINE; Motion to Compell the District Attorney to Produce (anf) File Electronicly Recorded Statements of Both Complainant's Made to Expert Forensic Child Interviewer; Motion for Live Evidentiary

Hearing, Petition for Writ of Mandamus (No. WR-90,089-02 & -03).

7. Amy testified at trial that the abuse began when she was 10 years old; but, on that first occasion she resisted. Then, a week or two later, accroding to her testimony, Mosier forced her to perform oral sex on him in the bathroom, ~~while she was laying down~~ (with no mention about him grabbing her hair). 5 RR 110. Then, Amy testified, approximately a week after the bathroom incident, -- and when she was 12 years old --, Mosier went into her bedroom and forced her to have vaginal sex with him. 5 RR 117. Amy also testified that she once witnessed an indicent when Mosier allegedly sexaully abused Alex.

8. Multiple times during trial, Mosier's counsel asked Amy whether she had ever told different stroies to different people, including whether she had ever claimed the abuse started before she was 10 years old -- which she denied. 5 RR 134-135 However, trial counsel never disclosed to the Jury, through cross-examination or otherwise, that Amy had indeed at different times claimed,:

- the attempted abuse happen when she was 2 years old,
- the forced vaginal sex happen first in time and when she was 10 years old, and
- the oral sex in the bathroom happen later, when she was 11 years old, and Mosier had grabbed her hair, while she was knealing, during that incident.

Disclosure #3. Nevertheless, trial counsel argued to the Jury that during his questioning he had exposed the prior inconsistent statements.

9. Alex testified at trial that when he was between 12 and 14 and had gotten in trouble at school, Mosier told him to perform oral sex on Mosier in the bedroom. Mosier's wife had went outside with Amy when that alleged abuse happen. According to the trial testimony, some months later, when Alex was 14 or 15 years old,

Mosier allegedly made Alex perform oral sex on him in the bathroom, while Alex was on the ground. 5 RR 51. Alex also testified that when he was 16 years old, after he and Mosier had watched some pornography, Mosier made Alex perform anal sex on Moiser and then Moiser performed anal sex on Alex (with no mention of any type of mutal oral sex during this alleged incident & and Alex was in the livingroom talking to Moiser before it happen.)

10. Again, Mosier's trial counsel asked Alex if he had ever told different stories to different people -- which Alex denied. 5 RR 77. However, trial counsel never disclosed to the Jury that Alex had indeed at different times claimed:

- the abuse first started when he was 10 to 12 years old,
- Mosier's wife was in the kitchen during the first alleged incident,
- Alex was "kneeling" on the floor during the first bathroom allegation,
- prior to the porn allegation Alex was asleep in his room, and,
- He described the sequennce of events during the porn allegation as follows:

> "Charles Sr. made him watch porn in the master bedroom and then made him suck his penis. Than, Charles Sr. sucked [Alex's] penis. Then, Charles Sr. produced a bottle of oil, which he used to lubricate his penis and [Alex's] anus. The defendant than had [Alex] lay on his side on the bed and lied behind him. Charles Sr. then had anal intercourse with [Alex]. ... Charles Sr. then had [Alex] switch places with him and moade [Alex] have anal intercourse with him using the oil again."

Disclosure #2.

11. On direct review the state appellate court described both children as reluctant witnesses. Particularly, Amy's testimony was choppy, brusque, and quite often altogether unresponsive. And she frequently responded to questions posed with answers, "not for

sure", or "kind of." Moreover, the parties agreed at trial that the credibility of the children was the main issue. 6 RR 90-91, 93-96, 99, 105-106, 108-118.

12. A non-examining SANE nurse testified about her review of a SANE exam report prepared by a different SANE nurse, who was no longer employeed at the hospital were the SANE exam took place. The SANE exam report (with photgraphs) was itself admitted into evidence as a busisness record. It was established at trial that the purpose of the SANE exam was to "get information that [the police] need for any criminal type prosecution." 4 RR 25. The non-examining SANE nurse testified as to the "results" and "findings" of the SANE exam report. 5 RR 179-180. That included testimony that there was a single tear in Amy's hymen. Then, the non-examining SANE nurse gave her expert opinion, based on the SANE exam report and the photographs, that "beyond all boubt" the tear in Amy's hymen was caused by "blunt force penetrating trauma" -- somthing going inside her hymen into the vagina, like a "penis." 5 RR 182. The non-examining SANE nurse did admit that she could not determine exactly when the single tear to Amy's hymen happen (or who/what caused it).

13. The Jury also heard, during the guilt/innocence phase of the trial, testimony that Mosier allegedly sexaully abused his sister, Jackie, when they were kids. Yet, the State appellate court, on direct review, held that evidence was inadmissible at trial because of the remoteness, the lack of intervening misconduct, Mosier's age at the time the alleged offense against Jackie occurred, and the significant differences between Mosier's alleged abuse of Jackie and alleged abuse of Amy and Alex. Specifically, the alleged conduct against Jackie was "more heinous." But, according to the State

appellate court, the trial error in admitting that evidence was harmless during the guilt/innocence phase because, even though the state prosecutors spent much of their time during closing arguments addressing Jackie's extraneous offense testimony, the prosecutors tempered their remarks by reminding the Jury that Moiser was not on trial for abusing Jackie. The State appellate court also relied on the inopposite defense theory of outcry in order to move out of Moiser's and the physical evidence from the SANE exam report (and testimony).

14. Prior to trial Amy also claimed that Moiser's son, Charles (or "Chuck") Jr., had sexually abused her by "causing his naked penis to contact the 'line' [or hymen] of her vagina" and multiple instances of oral sex. Disclosure #3. Indeed, Jr. pled guilty to and was convicted of abusing Amy. State Habeas Writ Application, EXHIBIT "P" & "Q" - Jr.'s plea papers/judgment of conviction. And, at trial Mosier's counsel argued to the Jury that,

> "You know whatelse is possible? That there's more than one person named Chuck in this case. We know that he's 22 years of age, he lives on the same house during the same time that the children, [Amy] and [Alex], were there."

6 RR 97. The state prosecutor even objected that trial counsel was "implying Chuck abused these children -- Chuck Jr." 6 RR 98. Yet, trial counsel did not even attempt to present to the Jury any evidence, through cross-examination or otherwise, that Jr. abused Amy.

15. The Jury did get to hear evidence that Amy could not have observed the instance of oral sex between Alex and Mosier that occurred in the bathroom. Additionally, the Jury heard evidence, and the State prosecutor admitted, that Mosier had "a tatto of his own wife's name right above [his penis] ... right there for people to look at." 6 RR 111. Yet, the children were unable to identify that

key tatto.

16. During the punishment phase hearing, the State prosectuor argued, without objection, to the Jury,:

> "And whatever your sentence is, we're going to accept it. [Alex] and [Amy] will accept it, [Jackie], will accept it.
>
> ...
>
> We're asking you to punish him for the rape and sexual assault of his own sisiter, [Jackie].
>
> ...
>
> Now how do you put a number for their losses here? How do you quantify what [Alex] and [amy] and What [Jackie], what they had taken from them and can never get back.
>
> ...
>
> ... But you've got more than just one victim. You're judging this man for two victims here in the State of Texas and one vicitm in the State of Arkansas, [Jackie]."

8 RR 33-34.

17. There were no limiting instructions in the Court's Charge to the Jury related to the non-examing SANE expert's testimony (or at punishment related to the extraneous offense) because Mosier's trial counsel never requested any.

18. The Jury found Moiser guilty of continous sexual abuse of a child and sentenced him to 50 years confinement.

19. Mosier appealed his conivction. The 2nd District Court of Appeals of Texas held that the trial court abused its discretion in admitting the extraneous offense evidence related to Mosier's sister, Jackie, during guilt/innocence phase of trial; but, that the error was harmless. See, Mosier v. State, No. 02-11-00159-CR, 2017 WL 2375768 (Tex. App. - Fort Worth June 1, 2017, pet. ref'd) (mem. op., not designated for publication); See also, APPENDIX " ".

20. Mosier filed a state post-conivction application for writ of habeas corpus, pursuant to Article 11.07 of the Texas Code of Criminal Procedure. In that initial-review collateral proceeding Mosier assrted, in part, that his trial counsel and co-counsel, were ineffective when they:

- Failed to object on Due Process and Sixth Amendment grounds to the State prosecutors arguing that the Jury was judging Mosier for and should punish Mosier by putting a number to, the extraneous offenese allegation related to Mosier's sister.

- Failed to object on constitutional confrontation grounds to the non-examining SANE nurse's testimony related to the results and findings of the SANE exam report written by another SANE nurse.

- Failed to object on constitutional confrontation grounds to the admittance into evidence of the SANE exam report (and photographs) as a business record (and without chain of custody evidence).

- Failed to object on constitutional confrontation grounds to the testimony of the non-examining SANE nurse of her expert opinion, based on the inadmissible SANE exam report and photographs.

- Failed to at least request a limiting instruction regarding the non-examining SANE nurses testimony.

- Failed to present evidence, by cross-examination or otherwise, that Mosier's son, Chuck Jr., had abused Amy.

- Presented the wrong defensive theory to the Jury that the children fabricated the allegations as a means of escaping Mosier's strict rules, when it was undisputed that the first outcry did not occur until the children had already moved out of Mosier's house; when there was available evidence that the children fabricated the allegations as a means of preventing their return to Mosier's custody when they kept getting in trouble at their mom's and their mom could still not keep a stable home enviorment.

- Failed to properly expose all the prior inconsistent statements of both the children about the allegations of abuse.

21. The state habeas trial court, pursuant to Article 11.07 § 3(c) of the Texas Code of Criminal Procedure, determined that there were "controverted, previously unresolved facts material to the legality of [Mosier's] confinement" and, pursuant to Artilce 11.07 § 3(d), designated the above issues to be resolved by a Magistrate Judge.

22. Mosier's trial counsel, T. Richard Alley, died prior to MOsier filing his state habeas writ application. Mosier's co-counsel, Hon. James Wilson, filed an affidavit responding to Mosier's claims. Importantly Wilson admitted that,:

- The reason they did not object to the references to the extraneous offense related to Mosier's sister during the State prosecutor's closing arguments at the punishment phase was because counsel beleived the arguments were proper summation of the evidence.
- The reason they did not object to the admission of the SANE exam testimony was because they did not believe it was a violation of the Confrontation Clause.
- The reason they did not attempt to admit any evidence that Jr. abused Amy was because the State prosecutor's motion in limine reagarding that information had been granted and counsel bleived there was never a point in the trial where that evidence became relevant or admissible.
- THE CHOOSEN DEFENSE STRATEGY WAS TO BRING OUT THE INCONSISTENCES IN THE STATEMENTS OF THE CHILDREN.

23. Moiser filed a REPLY to Wilson's affidaivt asserting that it failed to respond to all the actual claims raised by Mosier and requested an additional affidavit from Wilson. The state habeas trial court ignored that request.

24. Mosier filed with the state habeas court a motion asking that court to cause the actual SANE exam report and photographs to be made a part of the writ record. See, Motion for the Court Reporter or District Attorney to Produce and File State's EXHIBIT "6" and "7" Missing From the District Clerk's File. The state habeas trial court ignored that request.

25. Mosier filed with the state habeas trial court a motion requesting access to the electronic recordings of the forensic interviews of the children and that they be made a part of the writ record. See, Motion to Compell the District Attorney to Produce and File Electronicaly Recorded Statements of Both Complainant's Made to Expert Forensic Child Interviewer. Mosier even asserted in the body of the state habeas writ application that he needed access to the recordings in order to plead the specific facts concerning what prior inconsistent statements exhisted. See, State Habeas Writ Application, GROUND NINE. The state habeas trial court ignored those requests.

26. Mosier filed with the state habeas trial court a motion requesting a live evidentiary hearing (or alternative relief such as additional affidavits, etc.). See, Motion for Live Evidentiary Hearing. Moiser agrued that Martinez/Trevino stressed the importance of full and fair consideration, with evidence outside the trial record, of ineffective assistance of counsel at trial claims raised in initial-review collateral proceedings. Then, because Due Process applied when States choose to afford prisoners avenues for relief from convictions, in order for Mosier to have an adequate opportunity to be heard there was a need for additional gathering of evidence. Moiser pointed out that the need to gather additional evidence was heightened in his case because trial counsel had passed away and the burden to overcome that counsel acted with reasonable professional

judgment (and according to sound trial strategy). Moiser detailed all the missing evidence and the imporatnce of that evidence to the full and fair consideration of his claim(s). For example, Mosier pointed out how co-counsel did not respond to the specific claim of why he did not personally object to the State's closing arugments at punishment related to the extraneous offense(s) and why counsel did not object to, not just the testimony about the SANE exam report, but also the admittance into evidence of the SANE exam report as a business record and without chain of custody evidence. Moiser also reminded the court that the District Attorney or other officals, had still yet to produce the electronic recording of the fornensic interivews and the actual SANE exam report. The state habeas trial court ignored that request.

27. Twice, once prior to a remand being ordered and once after the remand was ordered, Moiser filed a petition for writ of mandamus in the Texas Court of Criminal Appeals ("TCCA") requesting that the state habeas trial court be instructed to rule on all of Mosier's pending motions (production of SANE exam report, production of electronic recordings of forensic interviews, and live evidentiary hearing). Moiser argued that,

> "[i]t appears common practice in this State for convicting courts to ignore the pleadings (and motions) of prisoners in post-conviction habeas writ proceedings. Perhaps, the convicting courts rule on them when the courts enter their Findings of Fact and Conclusions of Law. But, by that time it is to late to really help. Afterall, if like Mosier, the applicant is asking for the court's help in gathering evidence to support the claims made in his writ application, it is to late by the time the court makes Findings and Conclusions. Additionally, there is no procedure in this Court for an applicant to complain that the convicting court has not helped him gather necessary supporting evidence. Indeed, in practice, this Court rules on post-conviction habeas writ applications before an appicant can even file objections.
>
> Mosier is doing everything he can to meet his burden of proof and support his writ application with relevant evidence. However, being a prisoner, he needs the convicting court's help in gathering that relveant evidence."

Moiser also pointed once again to Martinez/Trevino stressing the importance of a fair opportunity for a prisoner to present claims of ineffective assistance of counsel at trial in an initial-review collateral proceeding. The TCCA refused to even consider Mosier's requests. See, Ex parte Mosier, No. WR-90,089-02 (Tex.Crim.App. Summary Denial)(available at http://www.txcourts.gov/cca/), Ex parte Mosier, No. WR-90,089-03 (Tex.Crim.App. Summary Denial) (available at http://www.txcourts.gov/cca).

28. On December 2, 2019, out of the blue and days before the state habeas courts deadline to make Findings of Fact, the State prosecutor filed PROPOSED Findings of Fact and Conclusions of Law. On December 10, 2019, prior to Mosier having an opportunity to respond to the State's PROPOSED Findings, the Magistrate Judge adopted the State prosecutor's PROPSED Findings. And, on December 11, 2019 the state habeas trial court adopted the Magistrate Judge's actions.

29. Moiser timely filed OBJECTIONS to the state habeas trial court's Findings of Fact and Conclusions of Law in the TCCA. Moiser in a detailed manner explained all the ways the Findings were incomplete and erroneous. Including Moiser's complainat that the Findings "merely repeat[ed] and restate[d] the comments made by trial co-counsel and appellate counsel in their affidavits. Yet, the Findings fail to mentinon the facts asserted by Moiser, which are supported by the writ record (exhibits)."

30. Moiser filed a motion to STAY, pursuant to Rule 73.7 of the Texas Rules of Appellate Procedure, in the TCCA requesting an opportunity to gather, obtain, and submit missing evidence. Mosier requested that the state habeas trial court be instructed to help Mosier gather the missing evidence. Specifically, Mosier requested,:

- the SANE exam report which was admitted at trial as State's EXHIBIT "6" & "7",

- the electronic recordings of the statements of both complainants made to the State prosecutor's expert forensic child interviewer, and

- additional affidavit from trial co-counsel responding to specific calims not addressed in counsel's prior affidavit.

Moiser explained the need for each request and, once again, argued Martinez/Trevino stressed the need for the full and fair presentation and consideration of ineffective assistance of counsel at trial claims raised in an initial-review collateral proceedings. Moiser even cited to Evitts v. Lucey that even when a particular review procedure is not consitutionally required, when the State chooses to open review to a conviction, those procedures must comport with the Due Process Clause of the 5th and 14th Amendments of the U.S. Constitution. On May 7, 2020 the TCCA ~~denied~~ DISMISSED this motion to STAY. See, Ex parte Mosier, No. WR-90,089-01 (Tex.Crim App. May 7, 2020)(available at http://www.txcourts.gov/cca/).

31. On September 23, 2020 the TCCA denied, without written order, Mosier's state habeas writ application. The TCCA also adopted the state habeas trial court's Findings of Fact and Conclusions of Law. The TCCA noted that the Findings were made without a hearing. See, Ex parte Mosier, No. WR-90,089-01 (Tex.Crim.App. Sept. 23, 2020)(available at http://www.txcourts.gov/cca).

REASONS FOR GRANTING THE PETITION

GROUND ONE: DOES A STATE'S INITIAL-REVIEW POST-CONVICTION COLLATERAL PROCEEDINGS MEET CONSTITUTIONAL STANDARDS WHEN THOSE PROCEDURES FAIL TO PROVIDE A PRISONER THE OPPORTUNITY TO GATHER, PRESENT, AND CONSIDERATION OF EVIDENCE IN SUPPORT OF AN INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL CALIM, FOR WHICH THE INITIAL-REVIEW COLLATERAL PROCEEDINGS IS THE FIRST MEANINGFUL OPPORTUNITY TO RAISE AN INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL CLAIM?

The whole point of this Court's decision in Trevino was that Texas' direct review procedures did not provide prisoners a "meaningful opportunity" to litigate an ineffective assistance of counsel at trial claim because there was not an adequate opportunity to investigate the claim or to develop the record in support of such a claim and "in Texas 'a writ of habeas corpus' issued in state collateral proceedings ordinarily' is essential to gathering the facts necessary to ... evaluate ... ineffective-assistance-of-trial-counsel claims.'" See, Trevino v. Thaler, 133 S.Ct. 1911, 1918-1919, 1921 (2013)(quoting Ex parte Torres, 943 S.W.2d 469, 475 (Tex.Crim.App.1997)(en banc) (brakets omitted)). Due to Texas' direct review procedures not affording, as a systematic matter, meaningful review of a claim of ineffective assistance of counsel at trial ("IACT"), this Court found an exception to Coleman and allowed a prisoner to overcome the failure to exhaust and a procedural default for not raising a substantial claim of IACT during "initial review collateral proceedings." See, Martinez v. Ryan, 132 S.Ct. 1309, 1315, 1318 (2012). But, what about when a prisoner does follow a State's established procedures and exhausts a calim of IACT claim and those procedures did not provide the prisoner an opportunity to gather facts in support of that claim, to expand the record with that sought after evidence, nor did the state habeas court even consider the evidence that was

submitted by the prisoner? The result feared in Trevino and Martinez is the same: the prisoner will have been "deprive[d] ... of any [meaningful] review of that claim at all" by any court. See, Trevino, 133 S.Ct. at 1918 (citing Martinez, 132 S.Ct. at 1316).

That is especially true because review by a Federal habeas court would initially be limited to the state court record. See, Cullen v. Pinholster, 131 S.Ct. 1388 (2011).

MOSIER'S REQUESTS FOR RELEVANT EVIDENCE

In this case, Charels Lee Mosier, Sr., the Petitioner, filed motions during his initial-review collateral proceedings asking for the state habeas trial court's help in gathering evidence in support of his IACT claim. For instance, Moiser asserted in his state habeas writ application that trial counsel was ineffective when he failed to object on constitutional confrontation grounds to the admittance into evidence of the SANE exam report (with pictures), as well as a non-examining SANE nurse's testimony as to the results and findings contained in that report and her expert opinion about those findings. Thus, Mosier requested that the entire SANE exam report be made a part of the writ record. As another example, Mosier asserted that his trial counsel was ineffective to not cross-examine the complainant's about all their prior inconsistent statements and asked that those prior inconsistent statements be made a part of the writ record. Indeed, Mosier explained how he could not even completely or sufficently plead that subclaim and explain exactly what those prior inconsistent statements were without access to the electronic recording containing the prior inconsistent statements.

Nevertheless, the state habeas trial court ignored all of Mosier's motions and, based on the incomplete record and without even considering the exhibits Mosier was able to submitt, made Findings of Fact and Conclusions of Law recommending that habeas relief be denied.

Then, the Texas Court of Criminal Appeals ("TCCA") refused to require the state habeas court to even rule on Mosier's motions and refused Mosier's request that the state habeas court be instructed to provide Mosier an opportunity to gather, and expand the record with, the requested evidence in support of the IACT claim.

To make matters worse, Mosier's trial counsel had passed away during Mosier's direct review proceedings and prior to initial review collateral proceedings. Thus, Mosier was already greatly hendered in overcoming the strong presumption that his trial counsel "rendered adequate assistance and made all signficant decisions in the exercise of reasonable professional judgment." See, Burt v. Titlow, 134 S.Ct. 10, 17 (2013)("it should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'")(quotes and cite omitted)).

Yet, as refelected by the state habeas trial court's Findings, "[t]he choosen defense strategy ... was to bring out the inconsistencies in statements of the children" and trial cousel likely failed to object to admittance of the SANE exam report, as well as the testimony about that report and expert opinion based on that report, because he misunderstood the reach of Crawford and its progeny. See, APPENDIX "B" - Findings #23. ("Wilson believes that Mr. Alley did not object to the admission of the SANE exam testimony because he concluded it was not a violation of the Confrontation Clause.") and #34.

GATHERING AND SUBMITTING EVIDENCE NECESSARY PART OF PROCEEDINGS

This Court has had occassion to say that one of the "attributes of any constitutionally adequate habeas corpus proceeding" is the habeas court's "authority to admit and consider relevant exculpatory evidence that was not introduced during the earlire proceeding." See, Boumediene v. Bush, 553 U.S. 723, 779, 786 (2008). Or, in the words of former Justice Brennan, to be an adequate corrective process state collateral review proceedings "should provide for full fact hearings to resolve disputed facts, and for compilation of a record...." See, Case v. Nebraska, 381 U.S. 336, 347 (1965) (BRENNAN, J., concurring). And, it is clearly established Federal law, for at least a state's post-conivction pre-execution sanity proceedings, that a basic requirment of due process and an opportunity to be heard is the "opportunity to submit evidence and argument..." See, Panetti v. Quaterman, 127 S.Ct. 2842, 2856 (2007)(citing Ford v. Wainwright, 477 U.S. 399, 427 (1986)(POWELL, J., concurring) (quote omitted)). Not to mention that, until the AEDPA, 28 U.S.C. § 2254(d) used to eplictly require "a full and fair hearing" in state court as a prequiste to a Federal habeas court's deference to state court fact findings.

Then, while this Court has recognized that a constitutionally sufficent investigation, or gathering of evidence, and the abuilty to expand the record with that evidence are vital to a meaningful opportunity to litigate an IACT claim, this Court also recognized that,:

> "While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record."

See, Martinez, 132 S.Ct. at 1317. Yet, when a prisoner chooses to follow the state's established procedure and properly exhaust a claim of IACT during initial-review collateral proceedings, review by the Federal habeas courts will be limited to the state court record and the evidence the prisoner was able to gather and expand the record with in state court. See, Pinholster, 131 S.Ct. at _____. Meaning, if the state courts did not provide the prisoner with meaningful proceudres to gather and submit evidence for the state's initial-review collateral court's consideration of an IACT claim, there is a real danger that no court will ever perform any meaningful review of such a claim.

MORE LIMITED QUESTION THAN PRIOR CERTIORARIS GRANTED

Although in present times it is waning, it remains true that,:

> "Because the scope of the state's obligation to provide collateral review is shrouded in so much uncertainty, ... this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims."

See, Kyles v. Whitley, 498 U.S. 931, 932 (1990)(STEVENS, J., concurring in the denial of application for stay). Nevertheless, at least twice this Court has already granted certiorari to review what the constitutional standards are for an adequate corrective process for state collateral review. See, Case, v 381 U.S. at _____, Woods v. Nierstheimer, 328 U.S. 211, 217 (1946). Passage of the AEDPA which barrs relitigation of Federal Constitutional calims priorly litigated in the state courts, and requiring that very exhaustion of the claims in state courts, unless the prisoner meets a standard that is difficuly to meet, because it was meant to be difficult to

to meet, Harrington v. Richter, 526 U.S. 86, 102-103 (2011), only heightens the need for this Court to grant certorari to address just what procedural due process prisoners are due during initial review collateral proceedings in state courts. That is even more so, when as mentioned, AEDPA limits a Federal habeas court's review to the state court record. See, Pinholster, 131 S.Ct. at _____. Most importantly, this Court has implictly, if not explictly, recognized how vital it is that a prisoner have a meaningful opportunity to litigate an IACT claim during initial-review collateral proceedings. See, Trevino, 133 S.Ct. at 1921.

While cases like Case and Woods embraced the broad question of constitutionally adequate corrective processes for state collateral review, herein the question is limited to constitutionally adequate corretive processes for raising IACT claims during initial-review collateral proceedings (that is, when the collateral proceedings are the first opportunity to raise such a claim in any meaningful manner).

Moreover, the concern is not whether the Constitution requires States to provide a post-conivction remedy generally. Rather, "[e]ven if a State need never provide a postconviction means of challenging the constitutionality of a conviction or sentence, if it chooses to do so, the Due Process Clause might require that the choosen means be full and fair." See, Randy Hertz and James S. Liberman, Federal Habeas Corpus Practice and Procedure, 2019 Edition § 7.1[b] (p. 403) (Matthew Bender)(citing Swartout v. Cooke, 562 U.S. 216, 220 (2011), District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52, 67, 69 (2009), Halbert v. Michigan, 545 U.S. 605, 610 (2005), Evitts v. Lucey, 469 U.S. 387, 393 (1985)).[2]

2. Much of the reasoning of this petition comes from Professors Hartz and Liberman.

Then, just like in Martinez/Trevino, this Court in Coleman recognized that this Constitutional principle underlying the holding in Evitts -- meaningful direct appellate review proceedings -- might apply to state postconvicion procedures whenever it is the case that "state collateral review is the first place a prisoner can present a challenge to his conviction" and thus, whenever, "a state collateral proceeding may be considered" the prisoner's "'one and only appeal.'" See, Coleman v. Thompson, 501 U.S. 722, 755-756 (1991)(cited omitted). Indeed, this Court has granted prisoners relief in similar circumstances when state collateral proceedings was the first opportunity to raise the Constitutional violation. See i.e., Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016), Johnson v. Mississippi, 486 U.S. 578 (1988), Yates v. Aiken, 484 U.S. 211 (1988), Ford v. Wainwright, 477 U.S. 399 (1986).

NO OTHER FEDERAL REMEDY

Also of import is that a § 2254 habeas petition does not provide an avenue for the Federal courts to resolve the constitutionality and adequancy of state collateral review proceedings. See, i.e., Valle v. Florida, 654 F.3d 1266, 1267-1268 (11th Cir. 2011), Word v. Lord, 648 F.3d 129, 131-132 (2nd Cir. 2011), Morris v. Cain, 186 F.3d 581, 585 n.6 (5th Cir. 1999), Gibson v. Jackson, 578 F.2d 1045, 1046-1047 (5th Cir. 1978). Nor would a constitutionaly deficient state colateral procedure overcome the AEDPA's bar to relitigation of Federal constitutional claims. See, Sully v. Ayers, 725 F.3d 1057, 1067 n.4 (9th Cir. 2013), Ballinger v. Prelesnike, 709 F.3d 558, 562 (6th Cir. 2015), Black v. Workman, 682 F.3d 880, ___ (10th Cir. 2012), after remand, 335 Fed.Appx.335 (10th Cir. 2012), Atkins v.

Clarke, 642 F.3d 47, 49 (1st Cir. 2011). All meaning that certiorari review in this Court, directly from state post-conviction collateral proceedings, is the only opportunity for Federal review of the constitutionality and adequacy of those state initial-review collateral procedures.

TEXAS' POSTCONVICTION RELIEF PROCEDURES

Texas' "exclusive" felony post-conviction collateral relief procedure is governed by Article 11.07 of the Texas Code of Criminal Procedure. See, Tex. Code Crim. Proc., art. 11.07 § 5.[3] The convicting trial court, or the state habeas trial court, is tasked with the initial gathering of facts and fact finding; but, only the TCCA is the ultimate decision maker. See i.e., Ex parte Adams, 768 S.W.2d 281, 288 (Tex.Crim.App.1989); See also, Moore v. Texas, 137 S.Ct. 1039, 1044 (2017), In Re Cathey, No. 16-20312 at ____ n.19 (5th Cir. - May 11, 2012). After the attorney representing the State -- usuaully the same prosecuting attorney that obtained the conviction (the District Attorney) -- has had an opportunity to file an Answer, the habeas statute requires that,:

> "... it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement."

See, Tex. Code Crim. Proc., art. 11.07 § 3(c). When the convicting trial court does so find, that court "shall" resolve the designated issues using "affidavits, depositions, interrogatories, additional forensic testing ,and hearings, as well as using personal recollection." Id. at § 3(d). The, the convicting trial court transmits that court's Findings of Fact and Conclusions of Law to the TCCA. Id. at § 3(d) (findings), § 5 ("conclusions").

With, or without, Findings of Fact from the convicting trial court, the TCCA first reviews whether the habeas writ application alleges "sufficient specific facts that, if proven to be true, might entitle the applicant toprelief." See, Ex parte Medina, 361 S.W.3d 633, 640 (Tex.Crim.App.2011). Upon such a favorable finding, the TCCA sometimes remands cases back to the convicting trial court for additional fact gathering and fact finding. See i.e., Ex parte Dawson, 509 S.W.3d 294 (Tex.Crim.App.2016)(describing processing of habeas writ applications in the TCCA), Ex parte Harleston, 431 S.W.3d 67, 70 (Tex.Crim.App.2014), Ex parte Flores, 387 S.W.3d 626, 634-635 (Tex.Crim.App.2012), Ex parte Raterson, 993 S.W.2d 114, _____ (Tex.Crim.App.1999). Once the TCCA determines that sufficient facts have been gathered and factual findings made, the TCCA makes an independent determination whether the writ record supports the convicting trial court's Findings and makes the ultimate decision whether to grant relief. See i.e., Tex. Code Crim./Proc., art. 11.07 § 5("Upon reviewing the record the [TCCA] shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify.").

There is no provision in Texas' collateral review laws for pre-filing discovery or even any discovery after filing. Texas law does not even provide for pre-filing appointment of habeas counsel in non-capital felony convictions. See i.e., Ex parte Pointer, 492 S.W.3d 318, 320-321 (Tex.Crim.App.2018), Ex parte garcia, 486 S.WW3d 565 (Tex.Crim.App.2016)(discussing appointment of counsel in habeas proceedings). While Article 11.07 mentions "motions filed", there is no specific procedure for the convicting trial court to consider and rule on any motions filed by the parties. See cf., Tex. Code

Crim. Proc., art. 11.07 § 3(d).

Similarly, Rule 73 of the Texas Rules of Appellate Procedure provides no specific procedure for the convicting trial court to rule on any requests made by the parties. Yet, Rule 73 does mention several pleadings the parties may file in the convicting trial court,:

1) separate memorandum of law,

2) objections or motions,

3) affidavits or exhibits,

4) proposed Findings of Fact and Conclusions of Law.

See ,Tex. R. App. Proc. 73.1(c) & (d), 73.4(b)(2)(and (b)(4). The parties are allowed to ask the TCCA to allow the filing of already obtained evidence in the convicting trial court after the case has been forwarded to the TCCA. Id. at 73.7.

NOTHING IN TEXAS' COLLATERAL REVIEW PROCEDURES REQUIRES A COURT TO HELP A PRISONER IN ANYWAY GATHER SPEIFIC EVIDENCE HE OR SHE WISHES TOUSE TO (DRAFT)OR) SUPPORT THE CLAIMS RAISED IN A POST-CONVICTION HABEAS WRIT APPLICATION.

MOISER'S REQUESTS WERE IGNORED

Thus, for instance, the convicting trial court, or state habeas trial court, was not required to consider or rule on Mosier's motion for live evidentiary hearing, motion to compell production of the SANE exam report, or motion to compell the production of the electronic recording of the complainant's statements. See, Ex parte Moiser, No. WR-90,089-02 (Tex.Crim.App.)(available at http://www.txcourts.gov/cca/), Ex parte Moiser, No. WR-90,089-03 (Tex.Crim.App.))(available at http://www.txcourt.gov/cca/). And, the TCCA summaryly ~~denied~~ dismissed Mosier's request, pursuant

Rule 73.7 of the Texas Rules of Appellate Procedure, to present additional evidence, with the state trial habeas court's help, to the state habeas court. See, Ex parte Moiiser, No. WR-90,089-01 (Tex. Crim.App. May 7, 2020)(available at http://www.txcourts.gov/cca/). Meaning, Mosier was unable to gather and submitt evidence critical to his claim that his trial counsel was ineffective because:

1) 1) Trial counsel failed to object on constitutional confrontation grounds to the admission of the SANE exam report (with photographs), the nonexamining SANE nurse's testimony about the results and finding of that report, and the non-examining SANE nurse's expert opinion and graphic testimony, based on the SANE exam report and photographs, as to the existence and cause of a tear in one of the complainant's hymen; yet, the SANE exam report (with photographs) that was admitted into evidence at trial was not made a part of the writ record, inspite of Mosier's multiple requests.

2) Trial counsel failed to properly cross-examine the complainants as to their prior inconsistent statements and to expose those prior inconsistent statements to the Jury, even though it was trial counsel's express strategy to do so; yet, all the prior inconsisitent statements -- electronic recordings of forensic interviews -- were not made a part of the writ record, inspite of Mosier's multiple requests and Mosier was not even able to plead in his habeas writ application specific facts as to all the prior inconsisitent statements (in the recocrdings).

Moiser's multiple requests argued that the Due Process Clauses of the 5th and 14th Amendments to the U.S. Constitution, incldluing a meaningful and adequate opporunity to be heard, required procedures for him to gather the requested relevant eveidence and to expand the record with that evidence. Mosier stressed that because initial review collateral proceedings were the first meaningful opprtunity to raise an IACT claim, like a defendant's one and only appeal, additional proceduers were required by the Constitution than normal post-conviction proceedings. There is something fundamentally wrong with placing the burden on prisoners to sufficently plead and prove their claims, incldluing overcoming the strong presumption of strategic excuses, without providing the prisoner some avenue to gather ~~the~~ gather and submitt the necessary evidence to meet that burden of proof. That is especialy so in Mosier's case were trial counsel had passed away and the evidence was also necessary to sufficently draft his claims in the habeas writ application. As is its custom, the TCCA wholy ignored such arguments and summaryly denied relief to Mosier.

DUE PROCESS APPLIES

It is well-established that,:

> "[w]hen a State opts to act in a field where its action has significant discretionary elements [like providing appeals, when it does so] it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, act in accord with the Due Process Clause."

See, Evitts v. Lucey, 469 U.S. 387, 401 (1985), Hicks v. Oklahoma, 447 U.S. 343, 346 (1979), Welch v. Beto, 355 F.2d 1016, 1020 (5th Cir. 1966). This Court has implictly acknowledged that the principles

underlying the decision in Evitts should apply to initial-review collateral proceedings, which is the first place a prisoner can present a specific challenge to his or her conviction, because it is similar to a prisoner's "one and only appeal." See, Coleman v. Thompson, 501 U.S. 722, 756 (1991). Indeed, this Court has acknowledged that,:

> "the question is whether consideration of [the prisoner's] claim within the framework of the State's procedures for postconviction relief offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental or transgresses any recognized principle of fundamental fairness in operation. Federal courts may upset a State postconviction relief procedure only if they are fundamentaly inadequate to vindicate the substantive rights provided."

See, Osborne, 129 S.Ct. 2308, 2319 -2320 (citing Medina v. California, 505 USS. 437, 446, 448 (1992)(quotes omitted)). And, in Ford, Justice Powell -- who's opinion is clearly established Federal law, Panetti, 127 S.Ct. at 2856 -- citing to Matthews v. Eldridge, 424 U.S. 319, (1976), determined that, pursuant to Due Process, and an opportunity to be heard, applicable to State collateral review proceedings (in death penalty cases), basic fairness demanded the ability of the court to receive and consider evidence submitted by the prisoner. See, Ford v. Wainwright, 477 U.S. 399, 424 (1986)(POWELL, J., concurring). As a forti, the prisoner must have a meaningful opportunity to gather that evidence.

As this Court has said in relation to discovery during Federal habeas review, " where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." See, Harris v. Nelson, 394 U.S. 286, _____ (1969).

Whether under Medina or Mathews, the ability of a prisoner to gather evidence in support of an IACT calim during initial review collateral proceedings is a fundamental requistie of Due Process and a meaningful opportunity to be heard necessary to vindicate one's bedrock right to counsel. This Court as much held this in Martinez and Trevino. In Martinez this Court determined that:

> "Claims of ineffective assistance of counsel at trial often require investigative work and an understanding of trial strategy.
>
> ...
>
> While confined to prison, the prisoner is in no postion to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.
>
> ...
>
> Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim."
>
> ...

See, Martinez, 132 S.Ct. at 1317-1318. Once again, this was the very reason Texas' direct review proceedings, as a systemic matter, failed to afford a meaningful opportuntiy for review of a IACT claim. See, Trevino, 133 S.Ct. at 1918-1919. The point is that this Court has held that,:

> "The right involved -- adequate assistance of counsel at trial -- is similarly and critically important. In both instances practical considerations, such as the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than direct, review."

See, Id. at 1921. This case simply asks the next question, what if the state's initial-review collateral procceings do not allow prisoners adequate corrective procedures to develop the record and meet their burden in pleading and overcoming the strong presumption that counsel was effective?

CONCLUSION - NO PERFECT VEHICLE

This is not an isolated incident in the breakdown of Texas' initial review collatarl proceedings. See i.e., Cody Joseph Morgan v. Texas, No. _____ (S.Ct. - _____)(TCCA No. WR-89,438-01), Morgenstern v. Texas, No. 17-5892 (S.Ct. - July 11, 2017)(filed), Reed v. Texas, No. 17-5047 (S.Ct. - Oct. 2, 2017), Crespin v. Texas, 136 S.Ct. 359 (U.S. Oct. 19, 2015)(cert denied); See also, Ex parte Empey, 757 S.W.2d 771, 776 (TEX. CRIM. APP. ____>)(TEAGUE, J., dissenting). Moreover, the disinguished scholars Randy Hertz and James Liebman have advocated for this Court to resolve this type of issue,:

> "Various provisions of the [AEDPA] ... limit the scope of [Federal] habeas review and relief based on an assumption that state postconviction proceedings afforded the prisoner a full and fair remedy for violations of federal law that occurred at the prisoner's criminal trial. If that assumption is wrong, AEDPA's limitations on habeas corpus review may effectively deny the prisoner ANY meaningful state OR federal postconviction remedy. This state of affairs makes it crucial that prisoners denied full and fair review in state postconviction proceedings consider arguing that point as a separate ground for United States Supreme Court review on CERTIORARI of the state court proceedings. Although the Supreme Court has repeatedly acknowledged that the question whether inadequate state postconviction procedures violate the Constitution's Due Process, Equal Protection, and Suspension Clause is a substantial issue worthy of the Court's certiorari review

> the Court has consistently declined to address the question [due to vehicle problems]... The real possibility that AEDPA has removed ... the longstanding federal habeas corpus backstop for deficient state postconviction proceedings both increases the importaance of Supreme Court review of th[is] question ... and undermines the Supreme Court previously asserted reason for pretermitting the question. DOubts about the existence of a federal habeas corpus or other lower federal court forum for litigating the constitutionality of state postconviction proceedings enhance the importance of Supreme Court review on CERTIORARI following state postconviction proceedings."

See, Randy Hetz and James S. Liebman, Federal Habeas Corpus Pratice and Procedure, 2019 Edition §77.1[b] (p. 396-397 n. 47) (Matthew Bender).

The very nature of this question, both ~~decificent~~ deficient state initial-review collateral proceedings and PRO SE litigation, means there will likely never be a perfect case as a vehicle to resolve this important question. The question will almost always arise when there is a summary denial by the state courts, meaning there will be open questions about the reason for the denial. That concern is lessened in Mosier's case because the problem includes his inability to sufficiently plead the state habeas writ application. Moreover, PRO SE advocacy will never be perfect, but hopefully it has been sufficient in this case to squarely present the issue and to give the TCCA an opportunity to address the issue. Therefore, Mosier asks this Court to GRANT review herein.

GROUND TWO: WAS PETITIONER'S TRIAL COUNSEL AND CO-COUNSEL INEFFECTIVE DURING EITHER THE GUILT/INNOCENCE PHASE OR SENTENCING PHASE OF THE TRIAL, PURSUANT TO STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984); AND, IF NOT, DOES STRICKLAND NEED TO BE MODIFIED TO ADDRESS STITUATIONS WHEN TRIAL COUNSEL IS UNAVILABE AS A WITNESS?

In all likelihood Strickland v. Washington, 466 U.S. 668 (1984) applies directly to Charels Lee Mosier, the Petitioner's, claim that hs trial counsel and co-counsel were ineffective during both the guilt/innocence pahse and sentencing phase of trial. Yet, there may be an opportunity for this Court to address whether the strong presumption of counsel having rendered "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment", which can not be overcome based on a silent record, Burt v. Titlow , 134 S.Ct. 10, 17 (2013)(quoting Strickland, 466 U.S. at 690), needs to be somewhat modified for cases when trial counsel is unavailable as a witness. More likely, lower courts simply need some guidance from this Court on "examin[ing] counsel's trial tatics and strategy as revealed by the [trial] record because the record best reflects 'counsel's perspective at the time.'" See, Fretwell v. Norris, 133 F.3d 621, 624 (8th Cir. 1988)(cite omitted). In any event, because Mosier's co-counsel was available to testify -- via affidavit -- and based on the trial record, for the most part, trial counsel's strategic, or tatical, decisions and reasons for those decisions are discernable from the post-conviction writ record.

INTERTWINED WITH GROUND ONE

Of course Moiser believes that the TCCA (and the state habeas

trial court) incorrectly determined that his trial counsel and co-counsel were not ineffective. But, it really just involves a straight forward application of Strickland. Nevertheless, whether Mosier can satisfy the Strickland standards is intertwined with GROUND ONE herein. If for no other reason than that central to GROUND ONE is that Texas' initial-review collateral proceedings did not provide constitutionally adequate procedures necessary to prove his claim. Moreover, as part of the TCCA's review of IACT claims during initial-review collateral proceedings is to presume the thruth of the claim and determine whether, if true, the allegations would legally merit relief. See i.e., Ex parte Medina, 361 S.W.3d 633, 640 (Tex. Crim.App.2011).

So, it is at least theoretically possible that the reason the TCCA did not remand Mosier's case back to the state habeas trial court for additional fact gathering amd fact finding was a determination that Mosier could not satisfy Strickland even with the requested additional evidence. Then one would also have to guess at which prong of Strickland, deficient performance or prejudice, that the TCCA felt Mosier could not meet.

Yet, in reality it is doubtful that the TCCA simply assumed the thruth of Mosier's factual assertions because there were Findings of Fact issued by the state habeas trial court. Thus, it is much more likely that the TCCA simply reviewed those Findings of Fact and determined that they were supported by the writ record. See, Ex parte Dawson, 509 S.W.3d 294 (Tex.Crim.App.2016), Ex parte Reedy, 282 S.W.3d 492, _____ (Tex.Crim.App.2009). That, in and of itself, is problimatic, with losts of open questions as to the reasoning for the TCCA's denial of relief; because, the state habeas trial court made very broad findings of fact and conclusions of law.

Did the TCCA simply determine that Moiser could not establish Strickland prejudice? Then, for which subclaims of deficient performance did the TCCA review for the cumlative effect on the outcome of Mosier's trial? Yet, at least for the concerns related to the SANE exam report and accompanying photographs -- how could the TCCA determine prejudice without the actual full SANE exam report and photographs being made a part of the writ record? Likewise, without knowing exactly what other inconsistent statements the children made during the recorded forensic interviews -- how could the TCCA determine whether there was a reasonable probability of a different outcome of Mosier's trial?

STRICKLAND PREJUDICE

At least the TCCA did have the trial record and that was only because Moiser attached a copy as an exhibit to his writ application. And, Mosier did submit several other exhibits, like the State's Disclousures which demonstrated some of the children's inconsistent statements. As Mosier asserted throughout his writ application, that evidecne alone demonstrated the reasonable probility of a different outcome had trial counsel not been ineffective.

Primarily, as the parties all agreed, the credibilty of the children was vital to the State prosecutors obtaining a conviction. 6 RR 90-91, 93-96, 105-106, 108-118. Trial counsel's deficient conduct likewise centered around the children's credibilty. For instance, without the SANE exam report evidence there would have been no physical evidence to support the children's testimony. See i.e., McCormick v. Parker, 821 F.3d 1240, 1248-1249 (10th Cir. 2016). And, pursuant to Texas Penal Code § 21.02 and the allegations

in the indictment, the State prosecutor needed the Jury to believe both children in order to prove two different incidents, over more than a 30 day period (especially when there was only one allegation concerning Alex). Importantly, without a doubt, had trial counsel exposed to the Jury all the actual inconsistent statements of the children, then the Jury would have had a much more difficult time believing the children's testimony. Not to mention, that as the State appellate court emphsised on direct review, the defensive theory pursued by trial counsel was uncredibile itself and ,had the Jury been presented the revised defensive theory, there is a reasonable probabilty that the result of the trial would have been different. Finally, had the Jury known that Jr. abused Amy (and admitted to do doing so), that could have explained to the Jury why the young Amy could fabricate the sexual acts she testified about.

Similarly, at sentencing, in relation to the alleged extraneous offense evidence against Mosier's sister, the State appellate court recognized that that allegation was "more heinous" and that the state trial court had determined that Mosier's sister was "highy credible." APPENDIX "C" - COA Op., p. 21, 28. Not to mention that Mosier's sister testifed that the alleged abuse 'stuck with [her]' and 'affect[ed] every aspect of her life.'" Id. at p. 9. Those are similar circumstances as when the TCCA has found Strickland prejudice due to inadmissible extraneous offense evidence. See, Ex parte ROgers, 369 S.W.3d 858, 860-861 (Tex.Crim.APp.2012) Thus, it was particularly prejudical when the State prosecutor asked the Jury to judge and punish Mosier for the alleged extraneous offense against his sister by quantifiying, or putting a number, to her losses. 8 RR 33-34. Additionally, it appears that the TCCA may

have had a difficult time determining prejudice for sentencing proceedings and ~~whether~~ how this Court's declaration that "any amount of jail time" has Sixth Amendment signficance applies in practice. See i.e., Ex parte Miller, 548 S.W.3d 497, 501 (Tex.Crim.App.2018).

DEFICIENT PERFORMANCE

That leave the question of ~~whether~~ her trial counsel's conduct was deficient performance. As for the failure to object to the State prosecutor's closing arguments at sentencing, this Court has determined that "intorduction of relevant evidence of particular [extraneous] misconduct in a case is not the same thing as prosecution for that conduct." See, U.S. v. Felix, 112 S.Ct. 1377, 1382 (1992). Thus, it would not necessarily violate Double Jeopardy for Mosier to be prosecuted by the State of Arkansas for the alleged extraneous offense against Mosier's sister. However, if Mosier was not being "prosecuted" for the alleged extranoues offense, it was imporper for the State prosecutor to ask the Jury to judge and punish Moiser for that allegation by adding a number of years to his sentence. See i.e., Tucker v. State, 456 S.W.3d 194, 221-222 (Tex.App. - San Antonio 2014)(ALVEREZ, J., dissenting)(citing amoung other authorities Klueppel v. State, 505 S.W.2d 572, 574 (Tex.Crim.App.1974)). The State habeas court soley considered whether the arguments were a summation of the evidence, not whether they violated Donnelly v. DeChistoforo, 416 U.S. 637 (1974) or some other provision of the U.S. Constitution. ~~Mosier~~ Moiser asserted that the ~~argumtn~~ argument violated his Constitutional right to be tried by a Jury in Arkansas for the State prosecutor to ask a Texas Jury to judge and punish Mosier for the extranoues offense against his sister. See, U.S. Const.

Art. III, Sec. 2 and 6th Amend.; See also i.e., Rogers v. Lynaugh, 848 F.2d 606, 611 (5th Cir. 1988).

As for the SANE exam report, as well as the non-examiining SANE nurse's testimony about that report's findings and results and her expert opinion based on that report, this Court addressed that issue in Williams v. Illinois, 123 S.Ct. 2221 (2012). First, unlike Williams, the SANE exam report, with photgraphs, was admitted into evidence, for the truth of the matter asserted, at Mosier's trial. However ,because the examining SANE nurse was not avaailable to testify (and there was noiprior opportunity to cross-examin her), the SANE exam report was not addmissible under the buisness records expection and trial counsel should have objected under the Confrontation Clause to the report's admittance into evidence. See i.e., Bullcoming v. New Mexico, 131 S.Ct. 2705((2011), Paredes v. State, 462 S.W.3d 510, 517 (Tex.Crim.App.2015), Russeau v. State, 171 S.W.3d 871, 880-881 (Tex.Crim.2005); See also, U.S. v. Cameron, 699 F.3d 621 (1st Cir. 2012). Thus, the concern voiced by Justice SOTOMAYOR happened in Mosier's case, the non-examining SANE nurse testified as "an expert witness to discuss others' testimonial statements" when those testimonial statements were themselves inadmissible at trial. See, Bullcoming ,131 S.Ct. at 2722 (SOTOMAYOR, J., concurring). Williams was unsuccessful on such a claim because the trial was before the court. Yet, even the plurity opinion in Williams agreed with the dissent that had the same thing in Williams' trial happen at a jury trial, "[a]bsent an evaluation of the risk of jury confusion and careful jury instructions, the testimony could not have gone to the jury." See, Williams, 132 S.Ct. 2236. Thus, a reading of Williams as a whole, should have led any reasonably professional

attorney to object to the non-examining SANE nurse's expert opinion testimony based on the inadmissible SANE exam report. While the State habeas court ackowleged that the reason trial counsel did not object was because of his understanding of the Confrontation Clause, that court also appeared to focus on the idea that the non-examining SANE nurse based her expert opinion on the photographs that were a part of the SANE exam report. APPENDIX "B" - Finding # 25, 29, & 30; See cf., Carter v. Douma, 796 F.3d 726, 736-736 (7th Cir.,2015)(misunderstanding of law not stratgic excuse). Nevertheless, the plurilty in Williams acknowledged, and Mosier argued below, that the non-examining SANE nurse "was not competent to testify to the chain of custody of the [photographs of] the victim [, which] was a point that any trial judge or attorney would immediately understand." See, Williams, 132 S.Ct. at 2237.

Meaning, when the SANE exam report (with the photographs) was not admissible at trial as a business record, (especially when it was perpared for litiation), then chain of custody testimony was necessary for the photographs to be admissible. The non-examining SANE nurse could not provide that chain of custody testimony -- and any reasonable professional attorney would have known that. Therefore, the non-examining SANE nurse's expert testimony that was based on the inadmissible SANE exam report (and photographs) violated the Confrontation Clause and trial counsel should have objected. Really, the entire Court in Williams saw that as a constitutional violation during a jury trial.

Finally, trial counsel did not do what he thought he did and did not follow through on his choosen (and available) defense strtegy. Trail counsel thought he had and wanted to expose all the children's prior inconsistent statements and that Jr. had abused Amy; but, the

trial record reveals that counsel did not do either of those. (Of course, that is the problem with the state habeas court only considering the affidavit of co-counsel and not the exhibits -- trial record -- sumitted by Mosier.) Any reasonabiliy competent attorney would have folowed through on his choosen strategy, especially when there was evidence available and admissible to support that strategy. To not do so, especially considering the resulting prejudice, was deficient performance.

IMPORTANT QUESTIONS INCLUDED

Within this straight forward Strickland claim, there are several important questions this Court could address. Those include the application of the "any amount of jail time" stanadard to sentencing proceedings where there is a large amount of discretion of the sentencer (ex. no sentencing guidelines). Also, the reach of the allowance of extraneous offenses to be brought up during sentencing and just how the Jury can consider those extraneous offenses -- can the Jury be asked to increase the sentence by a number of years in order to judge and punish the defendant for that extraneous offense? And, of course, how the situation in Williams applies to Jury trials. All within the lenses of law that any reasonably professional attorney should already be aware of.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

DATE: December 22, 2020

Charles Lee Mosier, Sr.

INDEX TO APPENDICES