No. 20-7440

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL SALAZAR — 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

Paul Salazar
(Your Name)
TDCJ # 2103847
Hughes Unit
(Address)
Rt. 2, Box 4400
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 PROCEDURES MEET CONSTITUTIONAL STANDARDS WHEN THOSE PROCEDURES FAIL TO PROVIDE PRISONERS THE OPPORTUNITY TO GATHER, PRESENT, AND CONSIDERATION OF EVIDENCE IN SUPPORT OF AN INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL CLAIM, FOR WHICH THE INITIAL-REVIEW COLLATERAL PROCEEDINGS WAS THE FIRST MENAINGFUL OPPORTUNITY TO RAISE AN INEFFECTIVE ASSISTANCE OEF COUNSEL AT TRIAL CLAIM?

GROUND TWO: WAS SALAZAR'S TRIAL COUNSELS INEFFECTIVE DURING VOIR DIRE AND IN FAILING TO OBJECT TO THE CONVICTION AND SENTENCE FOR COUNT II ON DOUBLE JEOPARDY GROUNDS; AND, SHOULD THIS COURT'S DECISIONS RELATED TO TRIAL COUNSEL'S DUTY TO INVESTIGATE (i.e. WIGGINS) APPLY TO COUNSEL'S FAILURE TO SUFFICIENTLY QUESTION PROSPECTIVE JURORS DURING VOIR DIRE?

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

Salazar v. Lumpkin, No. 5:19-cv-01489-FB (W.D. Tex.Nov. 5, 2020), Dkt. No. 8 (STAY OF PROCEEDINGS GRANTED)

** A substantially similar Petition for Writ of Certorari was filed in Charles Lee Mosier, Sr. v. Texas in this Court ***

TABLE OF CONTENTS

APPENDIX E - TEXAS COURT OF CRIMINAL APPEALS' SUMMARY DENIAL
of Motion to Address Procedural DUE PROCESS Concerns
Common in PRO SE Cases (from mandamus case)
(No. WR-90,899-01 / August 21, 2020)

APPENDIX F - EXTENDED STATUTORY PROVISIONS
Art. 11.07, Texas Code of Criminal Procedure
Rule 73, Texas Rules of Appelate Procedure

TABLE OF AUTHORITIES CITED

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 A 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 144TH District Court of Bexar County court appears at Appendix B 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 Oct 14, 2020. A copy of that decision appears at Appendix A.

[ ] 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, 5th Amendment:-

"No person shall... be subject for the same offence to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law ..."

U.S. Consitution, 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 the district wherein the crime shall have been committed ... and to have the Assistance of Counsel for his defense."

U.S. Constitution 14th Amendment:

"... No State shall ... deprive any person of life, liberty, or property, without due process of law ..."

APPENDIX "F" contains Article 11.07 of the Texas Code of Criminal Procedure and Rule 73 of the Texas Rules of Appellate Procedure

STATEMENT OF THE CASE

1. The Petitioner, Paul Salazar, was charged in the 144th District Court of Bexar County, Texas with continuous sexual abuse of a child. The allegations were that Salazar sexually abused his daughter, D.S.[1]

2. D.S. could only "provide details about the first incident, when she was in first grade[and] could not provide details about the latter other incidents." Rather, when D.S. reported and testified about other allegations, she referred to "other indidents," "that would happen", "those things would happen," or simply that Salazar had "molested" her, spread over different time periods and different locations. Yet, those so-called "other incidents" included just kissing, touching the buttucks, and picture taking; and D.S. often used general terms, such as, "molested," felt "uncomfortable," and "do stuff," to describe all the allegations. 3 RR 65-66 (molested, last time), 132 (same), 152 (last time just kiss), 156-157 (same), 4 RR 14 (focus was first time), 19-20 (same), 24 (same), 42 (told SANE molested, "do stuff", and hurt), 75-79 (felt "uncomfortable," grabbed butt), 94 ("Its happen I think twice ... first time ... [then] his house ... but he did it differently .. he took pictures"), 97 (gabbed butt hurt).

3. Nevertheless, Salazar was charged by indictment with two separate counts. Count I alleged ~~that~~ that Salazar, pursuant to Texas Penal Code § 21.02, during a period that was 30 or more days in duration, committed two or more enumerated acts of sexual abuse

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1 The facts and quotes come from the State appellate court's Opinion on direct appeal, unless otherwise noted. See, Salazar v. State, No. 04-16-00743-CR (Tex. App. San Antonio October 11, 2017)(available at http://www.txcourts.gov/4thcoa/) and APPENDIX "C".

against D.S. Specifically, that Salazar penetrated D.S.'s mouth, sexual organ, and anus with Salazar's sexual organ and three acts of sexual contact: Salazr touched D.S.'s gentials, caused D.S. to touch part of Salazar's genitals, and Salazar touched D.S.'s anus. Count II alleged that Salazar also exposed his sexual organ to D.S. In short, because exposure was a lesser incldued offense of Count I, the State prosecutor had to prove at least three different instances of sexual abuse, with at least two indidents 30 or more days apart (in order to avoid a double jepoardy violation).

4. At trial, the State prosecuting attorney made no election as to which alleged incidents the State was seeking a conviction on for which counts. Moreover, both counts alleged "on or about" dates, with both including September 12, 2013 (the last incident), and the Court's Charge authorized a conviction for each count for an incident prior to the presentment of the indictment. 1 CR 106-107, 116. Meaning, the Jury could have relied on the same incident to convict Salazar in both Count I and Count II.

5. At trial, Salazar's counsel did, during an unrealted objection, explain that D.S. "never specified in the forensic [interview] when she saw [Salazr's private part], she never said, just that she saw [Salazar's private part]." 4 RR 10. Thus, the State trial court limited outcry testimony to exposure incidednts that were "part and parcel of these incidents that we are talking about", mainly the first incident and the outcry testimony was so limited. 3 RR 209, 4 RR 9-10.

6. Viewing the evidence in the light most favorable to the eventual guilty verdicts, the State appellate court, on direct appeal, found sufficient evidence to support both counts. For Count I,

the evidence was suuficient because "D.S. reffered to 'other incidents' during the time period when she was in first and second ggrade, the summer, and a weekend, and occuring at ~~hre~~ her mother's apartment and one or both of [Salazar's] residences." In essence, under the standard " in favor of the verdict", the State appellate court considered that the Jury resolved the inference that the "other incidents" included "sexual abuse" as alleged in the indictment and not just other conde~~ct~~ act like kissing, butt grabbing, or picture taking. For Count II, the evidence was sufficient because the "jury heard testimony that the abuse occurred at [D.S. Mom's] homesand the two locations where [Salazar] lived between 2011 and 2013..." The State appellate court did not discribe the abuse, or incident, relied on to prove exposure. Just as the State appelate court never described an alleged incident that was solely exposure. At the end of therday, the State appellate court had no occassion to consider which specific alleged incidents the Jury relied upon to convict Salazar for each count.

7. Prior to jury selection proceedings, or voir dire, Salazar's lead trial counsel, Joe D. Gonzales, asked the State trial judge, "Judge, how do you typically handle voir dire?", indicating that trial counsels were unfamilar with how Judge Rummel conducted voir dire. 2 RR 3. Numerous times trial counsels were concerned with the time they had left to conduct their questioning of prospective jurors. 2 RR 157, 170, 180, 186. Yet, the State trial judge assured trial counsels that she was "not trying to rush you or anything" and that she did not "want to cut [defense counsel] off"; to the extent that she offered to "call to get the air extended." 2 RR 170. Salazar's trial co-counsel, Christian Henricksen, refused the oportunity to have additional time to question prosepctive jurors.

Neverhteless, co-counsel speed up his questioning of prosepctive jurors, because he was worried about the time left, and did nott question each potential juror individually. 2 RR 180. In the end, rather than accept the State trial court's offer of more time to question prospective jurors, cocounsel felt like he was "out of time" and asked a "blanket question" about whether any ofthe potential jurors thought they "would not be afairrjuror on this case, and haven't told us that yet..." 2 RR 186.

8. During voir dire prospectiverjurors number 13, 20, and 22 (as well as 47 &60) all indicated that they could not be fairr jurors for Salazar's trial. 2 RR 157, 186-187. However, concerned about non-existent time issues and inspite of those "red flags", Salazards trial counsels did nottfollow-up, in any manner, with thoserprosecpteive jurors, including prospective juror number 12 -- who was actually bias as a matter of law -- who ended up on Salaza's Jury. Moreover, Salazar's trial counsels wasted two peremptory strikes on prosepctive jurors number 20 and 22 (and prospective jurors numberr47 and 60 were past the jury strike cut off zone used at trial, 2 RR 207))

9. Salazr's lead trial counsel, Mr. Gonzales, began voir dire for the defense and covered topics such as wrongful convictions, the presumption of innocence, the right to reamin silent and the State's burden of proof, cops protectiong children, wyay children learn about sex, false outcrys, types of evidence, and the range offpunishment. 2 RR 116-157. Trial counsel concluded by asking about biases against Salazar and whether if "because of something that has happened in your family or close to you that has caused you so much grief or angst that you can not be fair to Raul Salazar..."

2 RR 157. Sixteen prosepective jurors raised their hands, including prospective juror number 20 and 22.

10. Co-counsel, Mr. Henricksen, did the defense's individual questioning of prospective jurors. Yet, he still spoke of general topics, such as the difference from when he was a prosecutor and now being a defense attorney and how that affected him in dealing with sex offenses and false allegations,.2 RR 158-160. Co-counsel did get around to begining his individual questioning of prospective jurors and got to No(s) 1, 2, 3, 4, and 5 before he strated to worry about time. 2 RR 160-170. The concern about time caused co-counsel to "totally [lose his] trian of thought" and he opened it back up to general voir dire by asking if there was "anyone" who could not hold the State prosecutor to their burden of proof. 2 RR 171-172. Co-counsel tried to get back on track to asking individual questions and got to prosepective juror No(s). 6, 7, 8, 9, and 10. Once again, worried about time, co-counsel asked generally if "there [was] anyone else that has something that you think we should know that we don't up to this point" and nine prospective jurors responded to that inquiry. 2 RR 180-186. Meaning, at least 24 prospective jurors within the jury strike cut off zone, including prospective jurors number 13, 20, and 22, did not get individually questioned by defense counsel. Co-counsel finished by asking:

> "I'm pretty much out of time, but just to -- kind of blanket question here. If anyone that thinks that, or Juror Number 20 -- or Juror Number 30 or higher that thinks that you would not be a fair juror on this case and you haven't told us that yet, please raise your card."

2 RR 186. To that question, 14 prospective jurors responded they could not be fair, including prospective juror number 13 and 20.

2 RR 157. Sixteen prospective jurors raised their hands, including prospective juror number 20 and 22.

10. Co-counsel, Mr. Hendrickson, did the defense's individual questioning of prospective jurors. Yet, he still spoke of general topics, such as the difference from when he was a prosecutor and now being a defense attorney and how that affected him in dealing with sex offenses and false allegations. 2 RR 158-160. Co-counsel did get around to beginning his individual questioning of prospective jurors and got to No(s) 1, 2, 3, 4, and 5 before he started to worry about time. 2 RR 160-170. The concern about time caused co-counsel to "totally [lose his] train of thought" and he opened it back up to general voir dire by asking if there was "anyone" who could not hold the State prosecutor to their burden of proof. 2 RR 171-172. Co-counsel tried to get back on track to asking individual questions and got to prospective juror No(s). 6, 7, 8, 9, and 10. Once again, worried about time, co-counsel asked generally if "there [was] anyone else that was something that you think we should know that we don't up to this point" and nine prospective jurors responded to that inquiry. 2 RR 180-186. Meaning, at least 24 prospective jurors within the jury strike cut off zone, including prospective jurors number 13, 20, and 22, did not get individually questioned by defense counsel. Co-counsel finished by asking:

> "I'm pretty much out of time, but just to -- kind of blanket question here. If anyone that thinks that, or Juror Number 20 -- or JurorNumber 30 or higher that thinks that you would not be a fair juror on this case and you haven't told us that yet, please raise your card."

2 RR 186. To that question, 14 prospective jurors responded they coud not be fair, including prospective juror number 13 and 20.

11. During voir dire, propsepective jurors number 5, 28, 29, and 39 each indicated, in some manner, that they would automatically believe a class of witnesses, namely children. 2 RR 167-186, 203. While at one point trial counsel got close to asking the right questions calulated to bring out information which would have indicated a propspective jurors inability to impartially judge the credibilty of a class of witnesses, namely children; generally, trial counsels appeared to mix that issue up with the State prosecutor's burden of proof and the presumption of innocence. 2 RR 167-168, cf. 2 RR 168-172, 184-186, 192-195, 203-204. Prospective jurors number 5 and 29 ended on Salazar's Jury and trial counsels wasted two peremptory strikes on prospective jurors number 28 and 39.

12. During voir dire red flags were raised about many other prospective jurors' ability to be fair and impartial jurors who could uphold their oaths and the law. For instance, red flags were raised when prospective juror No. 4 said his business affairs would district his attention, when prospective juror No. 41 revealed his step children had been abused, and when prospective juror No. 43 explained that she could not sit in judgment of others. 2 RR 67-68, 96-98, 165-166. As a result of trial counsels not asking more and better questions of these prosepctive jruors, No. 4 -- who was distracted by buisness affairs -- ended up on Salazar's Jury and trial counsel possibily wasted two peremtory strikes on No(s) 41 and 43.

13. Based solely on prospective jurors No(s) 4, 5, 13, 20, 22, 28 ,and 43's responses during voir dire -- without any additional questioning -- they were each challengable for cause:

> No. 4 - "not ~~bale~~ able to give [his] fair and impartial attention to this trial" and "my mind would be on those problems that I have over there versus sitting on a jury and actually paying attention and listen" 2 RR 68, 165-166, cf. 2 RR 166 (NOT

rehabilitated by "IF I would hear the evidence...").

No. 5- "I'm going to lean towards [children witneses] no matter what" and "YEAH" to "automatically going to believe the child just because it is a child." 2 RR 167-168, cf. 2 RR 169 (NOT rehabilatated by "I GUESS" to presumption of innocence and State's burden of proof).

No 13 - "not fair juror on this case." 2 RR 186.

No. 20 - "cannot be fair to Paul Salazar." 2 RR 157.

No. 22 - "cannot be fair to Paul Salazar." 2 RR 157.

No 28 - "I tend to beleive the child first and then -- I don't think I would be fair", "[the defense] have the burden toi prove him innocent when it comes to a child. I know that's not the law..." and "I would be looking more for you to prove him innocent." 2 RR 184-185, 192-193, cf. 2 RR 194-195 (NOT rehabilitated by either "I would take all the evidence" or "If [the State] don't prove it, yea, I will find him not guilty" or "YES" to "follow that presumption [of innocence].").

No. 29 - "bias towards the State ... YES, I think I would see it to protect the child first." 2 RR 185, cf. 2 RR 194-195 (NOT rehabililatated by "It's hard for me to say" if "could hold the State to their burden of proof...").

No. 39 - "not be fair juror in this case" and "I don't know how I'm going to feel about the child speaking about what happen whether her or not it's true." 2 RR 186, 203, cf. 2 RR 204 (NOT rehabilitated by "I think I can" too"make a judgment like you would with any other person about whether they are being truthful or not.").

No. 43 - "cannot sit in judgment of another person..." and "I would not fell comfortable judging this man .. my conscious, I -- it bothers me." 2 RR 67, 97-98.

Salazar's trial counsels had an obligation to challenge each of these prospective jurors for cuase and they had not rasonabily legitimate strategic exuse to not challenge each of them for cause. After all, trial counsels either agreed to exuse or chalenged for cause other prospective jurors who were similarly situated and actually attempted, for the wrong reasons, to chalenge No. 28 for cause. Of these prosepctive jurors, No. 4, 5, 13, and 29 were on Salazar's Jury and trial counsels wasted permetory strikes onthe others.

14. The Jury returhed a verdict of guilty on both counts. After a punishment hearing, the Jury returned a verdicte for 35 years (no parole) for Count I and 20 years and a $10,000 fine for Count II. The State trial court sentenced Salazar accordingly and ordered the sentenced to be served consecutively.

15. Salazar appaled his conviction. The 4th District Court of Appeals of Texas held that the evidence was sufficient to sustain the convictions. See, Salazar v. State, No. 04-16-0074-CR (Tex.App. San Antonio October 11, 2017)(available at http://www.txcourts.gov/4thcoa/).

16. Salazar filed a State post-conviction application for writ of habeas corpus. In that initial-review collateral relief proceeding, Salazar asserted, in part, that his trial counsel and trial co-counsel were ineffective when they:

- Failed to object on double jeopardy grounds to the conviction and consecutive sentence for Count II, when the State prosecutor made no election at trial as to which alleged incidents supported each count and there was no testimony that Salazar exposed himself to D.S. on an isolated incident with no other form of sexual abuse occurring at that time; so that, each and every alleged incident of exposure was continuous, incident to, and subsumed by -- part of a single impulse as -- the allegations of sexual abuse in Count I.
- Failed to adequately investigate, or question, prospective jurors further during voir dire, after multiple prospective jurors gave responces which raised "red flags" about whether they could be fair and impartial jrurors. For instance, prospective juror number 13, who was on Salazar's Jury, indicated that

he would not be a fair juror in Salazar's case; yet, counsels did not ask him any individual follow-up questions, failing to conduct the most rudimentary inquiry into his abilty to be fair and impartial. Salazar asserted that the reason counsels failed to conduct a constitutionally adequate investigation into the prospective jurors' bias and prejudices against Salazar was because of counsels incorrect understanding of the availbale resources, or time to ask questions, availbel to further invesitgate, or question, prospective jurors; and, that the constitutionally inadequate investigation prevented counsels from making truely informed, reasonable. and legitimate tatical choices of which prospective jurors to challenge for cause and which ones to exercise peremptory strikes on.

- Failed to request challneges for cause and make wise use of all peremptory strikes against prospective jurors when there was no legitimate tatical excuse to allow them to sit on the jury. For example, prospective juror 20 and 22, like prospective juror No. 13, indicated that they could not be fair to Salazar, with no follow-up questions;yet, counsels exercised peremptory strikes aginst them, when they were challengable for cause as bias and prejudice against Salazar. Had counsels used challenges for cause to remove those two, and other, prospective jurors, counsels would have had at least an additional two peremptory strikes and been bale to remove other prospective jurors, like No. 9, who became the jury foreperson, who had originally responded that she could not be fair (but was rehabilitated) and then quipped that she would be the "best" juror for Salazar's type of case. 2 RR 157, 177-178.

17. In addition to asserting Strickland prejudice, due to the additional peremptory strikes trial counsels would have had were they not ineffective, Salazar asserted that prejudice should be presumed. Errors during voir dire are structural errors, especially when an actually bias juror was on Salazar's Jury; so that, the Jury was not an impartial adjudicator.

18. Salazar's lead trial counsel, Joe D. Gonzales, who is currently the elected District Attorney for Bexar County, Texas, responded in a conclusory fashion that counsels "exrecised challenges for cause against those venire members that indicated that, for whatever reason, they could not be fair to Mr. Salazar." Further, that "[t]he list [of peremptory strikes] that was submitted to the court was the result of trial strategy..." Counsel did not explain any of the tatical decisions about individually complained of prospective jurors nor address that co-counsel often cut off individual questioning of prospective jurors due to a perceived lack of time, when the State trial judge, multiple times, offered additonal time to question prospective jurors. Counsel appeared to blame Salazar's particpation in the process for the decisions; yet, counsel also pointed out that Salazar "struggled" with the legal concepts about the jury (de)selection process.

19. 19. Trial co-counsel, Christian Hanricksen, who is currently an Assistann District Attorney for Bexar County, Texas, while admitting that he "d[id] not independently recall why we chose to strike who we did, why we challened who we did for cause, or the basis for the questions of individual panel memebers," was still able to claim that all ~~decions~~ decisions "were effective and

based on sound strategy." Co-counsel claimed that their so-called strategic decisions were "informed not only by information apparent in the record, but also information such as juror information cards, non-verbal cues from panel memebers and answers given by panel memebers unidentified in the record." Like lead counsel, co-counsel appeared to blame Salazar's engagement in the voir dire process and failed to either directly address the time to question prospective jurors concern or detail any tatical decisons for individually complained of prospective jurors.

20. For the double jeopardy claim, trial counsel responded that Salazr "confused the legal principle of double jeopardy with the State's right to proceed on an indictment alleging separate offenses." And, co-counsel claimed that Salazar,:

> "attempt[ed] to reframe [a] sufficiency of the evidence issue [raised on direct appeal] as a double jeopardy claim. However, the jury and the appellate court found that the evidence presented by the State was sufficient to support separate allegations of abuse as alleged in both counts of the indictment."

That response appeared to folllow the response from appellate counsel that there was no double jeopardy violation because the State appellate court found the evidence sufficient for both counts due to D.S.'s "use[] [of] the plural form of wording to express how many time[s]" the alleged abuse happen.

21. The State habeas trial court explictly only reviewed the affidavits of trial counsel when concluding that counsels were not ineffective. See, APPENDIX "B" - Findings of Fact and Conclusions of Law, Conclusions #5. Of course, the State habeas trial court found that counsels affidavits were "truthful and credible" and recommended that relief be denied. Id. Conclusions #9, Findings

5 & #8. For the double jeopardy claim, the State habeas trial court concluded that the Texas Legislature ~~intded~~ intended that the exposure count not be subsumed by the acts of sexual abuse alleged in Count I and that "[a]s stated on appeal, the court finds that [Salazar's] conviction in Count II is supported by the record." Id. Finding #3. The State habeas trial court did not address the State prosecutor's failure to make an election at trial nor detail any evidence from trial of an alleged incident of exposure that was separate from any other alleged acts of sexual abuse. Then, for the jury selection calims, based on the presumption of sound trial strategy, the State habeas court determined that counsels were not ineffective. Id. Conclusion #5. The State habeas trial court did not address the presumption of prejudice due to a bias juror being on the Jury nor detail (or resolve the factual conflicts) any of the responses of individually complained of prospective jurors. For instance, trial counsels' claimed to have challenged for cause all prosepective jurors that indicated they could not be fair to Salazar and the trial record revealed that, inspite of indicating that he could not be a ~~fiar~~ fair juror in Salazar's case, prosepctivee juror number 13 was on Salazar's jury.

22. The writ record was forwarded to the Texas Court of Criminal Appeals ("TCCA"). However, the writ record did not include the exhibits attached to Salazar's State habeas writ application (such as the trial record) and other pleadings filed by the parties. Yet, on July 23, 2020 the TCCA denied a motion to supplement the writ record with those missing items. See, Ex parte Salazar, No. WR-90,899-02 (Tex.Crim.App. July 23, 2020)(NOTICE)(available at http://www.txcourts.gov/cca/). Neverhteless, supplemental clerk's

records were filed with the TCCA, which included most of those exhibits and pleadings that were orignally missing. See, Ex parte Salazar, No. WR-90,899-02 (Tex.Crim.App. August 6, 2020)(NOTICE)(available at http://www.txcourts.gov/cca/), Ex parte Salazar, No. WR-90,899-02 (Tex.Crim.App. August 19, 2020)(NOTICE)(available at http://www.txcourts.gov/cca/).

23. Salazr also requested the TCCA to ORDER that the jury strike list and jury information cards be made a part of the writ record. The TCCA denied both a motion to supplement the writ record and motoin to STAY (pusuant to Tex. R. App. Proc. 73.7) concerning this mssing material evidence necessary to evaluate and prove Salazar's ineffective assistance of counsel at trial claims. See, Ex parte Salazar, No. WR-90,899-02 (Tex.Crim.App.July 23, 2020)(NOTICE)(available at http://www.txcourts.gov/cca).

24. For instance, in the motion to STAY it was argued,:

> "The point is that Salazar has the burden of proof to present evidence in this habeas proceedings demonstrating he is entitled to relief, but no way to require production of that evidence without the court's help. As the U.S. Supreme Court has recognized,:
>
> > "... while confined to prison, the prisoner is in no postion to develop the evidentiary basis for a calim of ineffective assistance, which often turns on evidence outside the trial rrecord."
>
> See, Martinez v. Ryan, 132 S.Ct. 1309, 1317 (2012). Indeed, Due Process and Equal Proetection demand that, even in post-conviciton habeas proceedings, that prisoners be able to gather the record necessary to litigate his or her claims. How would Slazar be given a meaningful opportunity to be heard, as required by Due Process, if he has no way to aquire the evidence necssary to meet his burden of proof in this case? Thus, Due PRocess should require that the convicting court insure the jury strike list, jury cards, and additional detailed testimony of counsels is made a part of the writ record." (cited omitted)

25. Likewise, in the corresponding mandamus case to Salazar's habeas writ application, the TCCA denied a motion to address procedural due process concerns commpn in PRO SE cases. See, In Re Salazar, WR-90,089-01 (Tex.Crim.App. AUgust 21, 2020)(NOTICE)(available at http://www.txcourts.gov/cca/).

26. In the TCCA Salazr OBJECTED to the State habeas trial court's Findings of Fact and Conlcusions of Law.Specifically, in Salazar's SUPPLEMENTAL OBJECTIONS Salazar OBJECTED that the State habeas trial court "solely relied on and adopted facts from Salazar's attorney's affidavits and wholly failed to refer to the record from trial [which was attached as an exhibit to Salazar's State habeas writ application]." Salazar explained how he could not meet his burden without the court considering the trial record that was attached as an exhibt to the writ application. For example, the trial record was necessary for the court to make a finding about whether the evidence admitted at trial would support a separate convication and sentence for both offenses because there was an alleged indideent of exposure separate and dinstinct from any other alleged abuse. Just like, the trial record was necessary to demonstrate what questions were askedsof the individually complained of prospective jurors and their responses. Salazar cited to Trevino and that the Supreme Court had determined that a post-conviction habeas writ application in Texas was the first (and only) meaningful opportunity to raise an ineffecitve assistance of counsel at trial claim. Thus, Salazar argued that the procedures followed should adhere to the constitutional norm of fairness and due process that applies on direct appeals. Then, Salazar cited to D.A. v. Osborne, 129 S.Ct. 2308, 2320 (2009) and that a State's post-conviction relief procedures must be adequate to vindicate the substantive rights provided.

REASONS FOR GRANTING THE PETITION

GROUND ONE: DOES A STATE'S INITIAL-REVIEW POST-CONVICTION COLLATERAL PROCEDURES MEET CONSTITUTIONAL STANDARDS WHEN THOSE PROCEDURES FAIL TO PROVIDE PRISONERS THE OPPORTUNITY TO GATHER, PRESENT, AND CONSIDERATION OF EVIDENCE IN SUPPORT OF AN INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL CLAIM, FOR WHICH THE INITIAL-REVIEW COLLATERAL PROCEEDINGSWAS THE FIRST MENAINGFUL 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 prisoner's a "meaningul opportunity" to litigate an ineffective assistance of counsel at trial ("IACT") claim because there was not an adequate opportunity to investigate the claim or to develop the record in support of such a claim;aand, "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 (2018)(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 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 exhaust a claim of IACT using Texas' intial-review collateral proceedings and those procedures did not provide the prisoner an opportunity to gather facts in support of that claim, to expand the record with that

the record with that sought after evidence, nor did the State habeas (trial) court even consider the evidence that was submitted by the prisoner? The result is the same as that feared in Trevino and Martinez: 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. 1318 (2011).

SALAZAR'S REQUESTS FOR RELEVANT EVIDENCE (AND CONSIDERATION THEREOF)

In Salazar's case, there were motions filed during the initial-review collateral proceedings asking for the State habeas trial court's help in gathering evidence in support of Salazar's IACT calims. For instance, the memorandum,of law filed with Salazar's State habeas writ application explained that, in support of the claim that trial counsel and trial co-counsel were ineffective during voir dire, or jury selection, Salazar had to "make educated guesses on which party [peremtory] struck which prospective jurors" because he "d[id] not have access to the jury strike list[s]" and therefore a motion requesting that the jury strike list and the juror information cards be made a part of the writ record was filed with (and attached to) Salazar's State habeas writ application. However, the State habeas trial court ignored that motion and all requests for a ruling on that motion.

Thus, the writ record forwarded to the Texas Court of Criminal Appeals ("TCCA") did not include the jury strike lists nor the juror information cardes, which were vital to Salazar's IACT claim.

Moreover, even the exhibits, including the trial record, that were attached to Salazar's State habeas writ application, were not originally forwarded to the TCCA. In fact, the State habeas trial court's Findings of Fact and Conclusions of Law, which were adopted by the TCCA, failed to even mention the trial record and relied solely on the post-conviction affidavits of Salazar's counsels. Therefore, it is evident that the State habeas trial court did not even consider the evidence from the trial record, which Salazar was able to present, that was vital to Salazar's IACT claim. For example, the State habeas trial court did not consider that the State prosecutor never made an election at trial as to which alleged incidents the State was seeking a conviction on for each count (or that there was no evidence of an alleged incident of exposure that was totally separate from any other alleged abuse). Additionally, the State habeas trial court did not consider the propsepctive jurors responses during voir dire,,like prospective juror number 13 who responded that he could not be a fair juror on Salaza's case.

Then, intially, the TCCA denied motions to supplement the record and to STAY the habeas proceeding in order for the missing items to made a part of the record (including the attachments to Salazar's State habeas writ application)and additional, more detailed, affidavits from trial counsels). See, Ex parte Salazar, No. WR-90,899-02 (Tex.Crim.App. July 23, 2020)(available at http://www.txcourts.gov/cca/). Nevertheless, Salazar was able to get the writ record supplemented with the trial record and other exhibits that were attached to his State habeas writ application. However, the TCCA never made any attempts to have the jury strike list or jury information cards made a part of the writ record; as well, as no additiona affidavits were ever order from Salazar's trial counsels.

Salazr OBJECTED to the TCCA for all of these failures of the State habeas trial court and the TCCA in failing to provide procedures for him to gather and expand the record with the missing items which were vital to proving his IACT claims and the failuree of the State habeas trial court to even consider the exhibits Salazar did present, like the trial record. Those failures made it pratically impossible for Salazar to overcome the strong presumption that his trial counsels "'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.'")(citeoomitted)). Afterall, it was the trial record which demonstrated that there was no evidence at trial of an alleged incident of exposure separate and distinct from any ofthe alleged acts of sexual abuse alleged in Count I; so that, trial counsel was ineffective to not object to the conviction and consequtive sentence in Count II. And, the trial record demonstrated that Salazar's trial counsels did NOT, as they claimed in their affidavits,?"

> "exercisedchallenges for cause against those venire members that indicated that, for whatever reason, they could not be fair to Mr. Salazar. Likewise, Mr. Henricksen and I exercised our peremptory challenges to exclude those individuals that expressed a belief that they could not be fair."

See, APPENDIX "B" - Findings,-ATTACHMENT "A" - Affidavit of Tiral Counsel. Indeed, how coud a court review Salazar's claimsthat his trial counsels were ineffective in their exercising of peremptory strikes without the jury strike lists being made a part of the writ

record, in order to know which prospective jurors counsels did actually strike? Not to mention that trial counsels' post-convction affidavits failed too address their "strategy" as to individually complained of prospective jurors and failed to address the very specific times when counsels did not follow-up with additional questions when a prospective juror indicated they could not be fair to Salazar (nor the fact that counsel appeared to be worried about a lack of time when the State trial judge offered additional time to question prospective jurors).

It is concerns like these which caused the procedure provided in Texas' initial-reivew collateral proceedings to prevent a "meaningful opportunity" to litigate IACT claims and violated DUE PROCESS.

] GATHERING AND PRESENTING EVIDENCE NECESSARY PART OF PROCEDURE

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 earlier proceedings" 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 ( ) (BRENNAN, J., concurring). And, it is clearly established Federal law, for at least a State's post-conviction 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. Quarterman, 127 S.Ct. 2842, 2856 (2007)(quoting Ford v. Wainwright, 477 U.S. 399, 427 (1986)(POWELL, J., concurring)). Not to mention, until the AEDPA, 28 U.S.C. § 2254(d) used to explictly require "a full and fair hearing" in State court as a prerequiste to a Federal habeas court's deference to State court fact findings.

And, while this Court has recognized that a constitutionally sufficient investigation, or gathering of evidence, and the ability to expland t h e record are vital to a meaningful opportunity to litigate an ineffective assistance of counsel at trial 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 exhaust a claim of IACT during intial-review collateral proceedings in State court, review by the Federal habeas court 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 prisoners with a meaningful proceudres to gather and submit evidence supporting an IACT calim during intial-review collateral proceedings, there is a real danger that no court will ever perform any meaningful review of such a claim.

MORE LIMITED QUESTION THAN PRIOR CERTORARI'S 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 uncertain uncertainty, ... this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably mertorious federal constitutional claims."

See, Kyles v. Whitely, 498 U.S. 931, 932 (1990)(STEVENS, J., concurring in denial of application for stay). Nevertheless, at least twice this Court has gratned certiorari to review what constitutes an adequate corrective process for state collaterial review. See, Case v. Nebraska, 381 U.S. 336 (1965), Woods v. Nierstheimer, 328 U.S. 211, 217 (1946). Passage of the AEDPA, which barrs relitigation of Federal Constitutional claims priorly litigated in State collateral review proceedings -- and requiring exhaustion in State courts ---= unless the prisoner meets a standdrd that is difficult to meet, because it was meant ot be difficult to meet, Harrington v. Richter, 562 U.S. 86, 102-103, 131 S.Ctr.770 (2012), only hieghtens the need for this Court to grant certiorari to address just what procedural process prisoners are due during intial-review State collateral proceedings. As mentioned, that is especiually true because the AEDPA limits Federal habeas courts review to the State court record. See, Pinholster, 131 S.Ct. at _____.

Most importantly, this Court has recognized, implicltly if not explictly, the importance of a meaningful opportunity for a prisoner to litigate an IACT claim during intial-review collateral proceedingsSee, Trevino, 133 S,Ct, at _____, Martinez, 132 S.Ct. at _____.

While ~~cases~~ like Case and Woods embraced the broad question of adequate corrective processes ~~of~~ for all State collateral review, herein the question is limited to the constitutional adequate corre1

corrective process for raising an IACT claim in a State's intial-review collateral proceeding.

Moreover, the concern is NOT whether the Constitution requires States to provide post-conviction remedy generally. Rather, "[e]ven if a State need never provide a post convition means of challenging the constitutionality of a conviction or sentemce, if it chooses to do so, the Due Process Clause might require that the chosen means be full and fair." See, Randy Hertz and James S. Liberman, Federal Habeas Corpus Pratice 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 Thjird 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)). Then, just like in Martinez and Trevino this Court in Coleman recognized that this same constitutional principle -- meaningful direct appellate review procedures -- might apply to State post-convicion procedures whenever it was the case that "state collateral review is the first place a prisoner can present a challenge to his concivtion" 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). Indeed, this Court has granted prisoners relief in similar circumstances when state collateral proceedings were ~~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 federal petition does not provide an avenue for the Federal courts to resolve the constitutional adequacy 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 collateral review proceedure overcome the AEDPA's bar to relitigation of Federal constitutional claims. See i.e., 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), aff'm after remand, 485 Fed.Appx 335 (10th Cir.2012), Atkins v. Clark, 642 F.3d 47, 49 (1st Cir.2011). All meaning that certorari review by this Court, after the inital-review collateral proceedings, is the only opportunity for Federal review of the constitutional adequacy of those State court procedures.

SALAZAR'S REQUESTS WERE IGNORED

Here is the bottom line. Salazar's State habeas writ application asserted that his trial counsel and trial co-counsel were ineffective when counsels failed to ask prospective jurors additional questions when specific prospective jurors indicated that they had a bias or prejudice and would be unfair towards Salazar. For instance, when propsepctive juror number 13 indicated that "[could]not be fair to Paul Salazar even before this case starts[,]" Salazar's

trial counsels made no further inquiry whatsoever into why, or the extent of, that prospective jurors bias and prejudice against Salazar's case. Salazar's writ application also asserted that his trial counsels were ineffective in their use of permetory strikes and challenges for cause. Indeed, without a constitutionally sufficent investigation, or proper questioning of prospective jurors, Salazar's trial counsels could not make truely strategic deicions of which propsepctive jurors to challenge for cause and which to exercise peremtory strikes against. Salazar explained in detail more than ten prospective jurors that trial counsels should have questioned further, nine prospective jurors that trial counsel should have challenged for cause, and at least three prospective jurors that trial counsel should exercised permetory strikes for (had they had additional strikes). In doing so, Salazar had to assue, or make educated guseses, about which prospective jurors trial counsels did actually exercise peremtory strike on (as Salazar did not have access to the jury strike lists).

Salazar's lead trial counsel simply respnded that counsels "were able to cover general principles of law" "within the time allotted by the [State trial] court" and,:

> "exercised challenges for cause against those venire members that indicated that, for whatever reason, they could not be fair to Mr. Salazar. Likewise, [we] exercised our peremtory [strikes] to excuse those individuals that expressed a belief that they could not be fair."

See, APPENDIX "B" - Fidings, ATTACHMENT "I": In the same vain, Salazr's trial co-counsel responded that they "obtained significant information from the panel" (including "tone, body language, and other non-verbal ques") and that,:

~~limited [b]ased on [his] knowledge of [their] common practice~~,

> "[b]ased on [his] knowledge of [their] common practice, limited memory of voir dire in this case and a review of the record, the decisions that we made in this case dealing with questioning of panel members, challenges for cause, and peremptory strikes were effective and based on sound strategy."

See, APPENDIX "B" - Findings, ATTACHMENT "II". At least trial co-counsel admitted that he "d[id] not independently recall why we choose to strike who we did, why we challenged who we did for cause, or the basis for questioning of individual panel memebers." Id. Yet, co-counsel also pointed out that Salazar's trial counsels relied on the information from the "juror information cards" when making their strategic decisions concerning jury selection.

Thus, neither of Salazar's trial counsels offered an explanation for failing to further question specific complained of prospective jurors when those prospective jurors indicated that they had a bias or prejudice aginst Salazar or relevant legal principles. In fact, the trial record demonstrates that trial counsel was incorrect in his belief that all venire members who indicated they could not be fair to Salazar were either challenged for cause of peremtory struck. Neither did either counsel address the fact that the trial record revealed they cutt-off additional questioning of prospective jurors because they were concerned about the time they had, when the State trial judge had explictly offered counsels additional time to question prospective jurors. Moreover, as mentioned, the trial record demonstrates other specific jurors who had some bias or prejudice against Salazar's case and either trial counsels exercised peremtory strikes against them instead of challenges for cause, or counsels left them on the Jury (incldiuing the Jury foreperson).

The point is that, in order to meet his burden of proving that his trial counsel were ineffective, Salazar, at the least, needed

the State habeas trial court to consider the trial record, which was an exhibit to Salazar's State habeas writ application. Yet, the State habeas trial court's Findings, adopted by the TCCA, explictly solely relied upon the post-conviction affidavits of Salazar's trial counsels in concluding that counseles were not ineffective. See, APPENDIX "B" - Findings#5. Likewise, Salazar needed to have the juror strike list and juror information cards made a part of the writ record in order tooshed more light on the information trial counsels used to make decisions during voir dire and exactly what those decisionswwere. Yet, the State habeas trial court and the TCCA refused to either supplement the writ record with those items or to order the State habeas trial court to help Salazar gather those items and make them parttof the writ record. Then, niether the TCCA or the State habeas trial court would require trial counsels to file additional affidaivts addressing their failure to ask further questions (and time concerns) and what tatical reasons he had for leaving specific indvidually complained of prospective jurors on the Jury.

In like manner, the State habeas trial court failed to consider the trial record for the double jeopardy claim, which Salazar asserted his trial counsels were ineffective to not object to. In making the Findings, which were adopted by the TCCA, the State habeas trial court solely considered the opinion of the State appellate court from the direct appeal. See ,APPENDIX "B" - Conclusion #3. However, the State appellate court was following a different standard of viewing the evidencde in the light most favorable to the verdict that is not directly applicable to the double jeopardy claim. It was the trial record which would have demonstrated both that (1)

there was no evidence offered at trial of an alleged incident of exposure that was separate from the allegations of sexual abuse in Count I, and (2) that because the State prosecutor did not make an election as to which conduct the State was relying for a conviciton on each count, that it was impossible to determine what specific indidents the Jury relied upon to conviction Salazar in Count I and that the Jury did not rely on the same incident to convict Salazar in Count II. Therefore, when the State court failed to consider the exhibits Salazar was able to present, the court prevented Salazar from proving his IACT claim.

Salazar specifically comaplained that these actions prevented him from meeting his burden of proof, under Strickalnd, in the initial-review collateral proceedings. In his motion to STAY, filed pursuant to Rule 73.7 of the Texas Rules of Appellate Procedure, Salazar pointed to the decisions of this Court in Trevino and Martinez; and, he argued that "because this 11.07 habeas writ application was Salazar's first and only opportunity to raise these grounds, therprocedures followed should adhere to the constitutional norm of fairness and due procees that apply on direct appeal." (citing Coleman). Then Salazar asked,:

> "How would Salazar be given a meaningful opportunity to be heard, as required by Due Process, if he has no way to aquire the evidence necessary to meet his burden of proof in this ccase?"

Finally, Salazar cited the 5th Circuit's decision in Virgil v. Dretke, 446 F.3d 598, 609 (5th Cir. 2006).which faulted trial counsel and the Texas courts for not responding with a specific tatical reason for keepingga prospective juror on the Jury who stated during voir dire that they could not be faireand impatial. The TCCA explcitly denied those DUE PROCESS concernsraised in the motion to STAY (and

motion to supplement the writ record) and implictly denied Salazar's OBJECTIONS (supplemental) when thetTCCA denied Salazar's State habeas writ application.

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 proving providing appeals, whenit 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 decison 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 topa prisoner's "one and only appeal." See, Coleman, 501 U.S. at 756. Indeed, this Court had acknowledged that,:

> "the question is whether consideration of [the prisoner's] claim within the framework of the ~~State's~~ State's procedures for post conviction releif offends some princple 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 post conviction relief procedure only if they are fundamentaly inadequate to vindicate the substive rights provided."

See, Osborne, 129 S.Ct. at 2319-2320 (citing Medina v. California, 505 U.S.437, 446, 448 (1992)(quotes omitted)). And, in Ford Justice Powell -- who's opinion is clearly established Federal law, Panetti v. Quarterman, 127 S.Ct. 2842, 2856 (200&) -- citing to

Mathews 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 meaningul opportunity to gather that evidence.

Whether under Medina or Mathews, the ability of a prisoner to gather evidence in support of an IACT calim during intial-review collateral proceedings is a fundamental requisitie of due process 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 ofdineffective assistance at trial often require investigative work and an understanding of trial strategy.
>
> ...
>
> 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.
>
> ...
>
> Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedingsfor developing the factual basis for the claim."

See, Martinez, 132 S.Ct. at 1317-1318. Once again, this was the very reason that Texas' direct review procedures, as a systemic matter, failed to afford a meaningful opportunity for review of a IACT claim. See, Treviono, 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 pratical consideration, 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 intial consideration of the claim during collateral, rather than direct, review."

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

CONCLUSION - NO PERFECT VECHICLE

This is not an isolated incident inthe breakdown of Texas' initial-review collateral relief proceedings. See i..e, Cody Joseph Morgan v. Texas, No. _____ (U.S. S.Ct. _____)(TCCA No. Wr-89,438-01), Morgenstern v. Texas, No. 17-5892 (U.S. S.Ct. July 11, 2017(filed), Reed v. Texas, No. 17-5047 (U.S. S.Ct. Oct. 2, 2017), Crespin v. Texas, 136 S.Ct. 359 (U.S. S.Ct. Oct. 19, 2015); See also, Ex parte Emprey, 757 S.W.2d 771, 776 (Tex.Crim.App._____)(TEAGUE, J., dissenting). Moreover the disinguished scholars Professors Randy Hertz and James S. 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 basedon 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 prisoner 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 Claus,is a substantial issue worthy of the Court's certiorari review the Court has consistently declined to address the question [due to vechicle problems]... The real possibility that AEDPA has removed ... the longstanding federal habeas

> corpus backstop for deficient state postconviction proceedings both increases the importance 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 Hertz and Jameas S. Liebman, Federal habeas Corpus Pratice and Procedure, 2019 Edition § (Matthew Bender)(p. 396-397 n.47).[3]

The very nature of this question, both deficient State proceedings and PRO SE litigation, means there will likely never be a perfect case as a vehicle to decide this important question. The question will almost always arise when there is a summary denial by the State court, meaning there will be questions about the reason for the denial. Moreover, PRO SE advocacy will never be perfect; but, hopefully it has been sufficient in this case to squarely present the issues and to give the TCCA and opportunity to address the issues. Therfore, Salazar asks this Court to grant review herein.

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3. Much of the contents of this petition are from the reasoning provided by Professors Hertz and Liebam.

GROUND TWO: WAS SALAZAR'S TRIAL COUNSELS INEFFECTIVE DURING VOIR DIRE AND IN FAILING TO OBJECT TO THE CONVICTION AND SENTENCE FOR COUNT II ON DUBLE JEOPARDY GROUNDS; AND, SHOULD THIS COURT'S DECISIONS RELATED TO TRIAL COUNSEL'S DUTY TO INVESTIGATE (i.e. WIGGINS) APPLY TO COUNSEL'S FAILURE TO SUFFICIENTLY QUESTION PROSPECTIVE JURORS DURING VOIR DIRE?

Maybe the problem is that the TCCA, and the State habeas trial court, put so much emphasis on trial counsels' affidavits that the review under Strickland became more subjective -- about trial counsels state of mind -- rather than an objective evaluation of what a reasonably professional attorney would have done in the circumstances. See i.e., Harrington v. Richter, 131 S.Ct. 770, 790 (2011); See also, Williams v. Taylor, 529 U.S. 362, 410 (2000)(O'CONNOR, J., for the Court)("should not transform the inquiry [under § 2254(d)(1)] into a subjective one by resting its determination instead on the simple fact that at least one of the Nations's jurists has applied the relevant federal law in the same manner the state court did..."). For, any objectively reasonable attorney in the shoes of Salazar's trial counsels would have been aware of his or her duty established by the 4th District Court of Appeals of Texas, the jurisdiction over Bexar County, Texas where Salazar was prosecuted. In Walker v. State, 195 S.W.3d 250 (Tex.App. - San Antonio 2006) the court addressed a situation similar to Salazar's case,:

> "The prospective jurors were [] never asked if they could be fair and impartial in the case or whether they could make a decision based solely upon the evidence presented. And [trial counsel] did not even attempt to strike any of the prospective jurors for cause. Instead, he used two of his peremtory strikes on [two prospective jurors who expressed bias in favor of law enforncement.] According, [three other prospective jurors who expressed bias in favor of law enforcement], all became jurors."

Id. at 257. Thus, the 4th District Court of Appeals of Texas held

when information is elicted during voir dire indicating a potential prejudice of bias,:

> "to adequately represent [the accussed] and protect his constitutional right to an impartial jury, [trial counsel] had a duty to further question the prospective jurors to discover if there was actual bias that could form the basis of a challenge for cause and to itelligently exercise [] peremtory challenges."

Id. at 257. Therefore, the court held that trial counsel's "failure to ask any questions fell well below an objective standard of reasonableness." So, the TCCA's and State habeas court's focus on trial counsel's claimed state of mind, as revealed by their affidaivts, overlooked their objective duty established by Walker. See i.e., State v. Morales, 253 S.W3d 686, 696 (Tex.Crim.App.2008) (determing, based on a silent record, that trial counsel could have have a strategic reason to leave a bias juror on the Jury rather than avaluating the objective duty of reasonable professional counsel in the same situation)).

Additionally, the 5th Cirucit U.S. Court of Appeals has held,:

> "[the prospective jurors'] unchallenged statements during voir dire that they could not be 'fair and impartial' obligated Virgil's counsel to use a peremptory or for-cause challenge on these jurors. Not doing so was deficient performance under Strickland."

See, Virgil v. Dretke, 446 F.3d 598, 610 (5th Cir. 2006). Then, counsel's affidavit in Virgil, like Salazar's trial counsels' affidaivits, stated that he asked all necessary questions and struck all prospective jurors that expressed some type of prejudice or bias. Id. at 610. Yet, in Virgil, like Salazar's trial counsel, counsel did not explain why the complained of prospective jurors answers did not indicate a bias or prejudice nor give any explanation for keeping them on the jury. Id. Under Strickland's objective standard Salazar's trial counsel's were ineffective.

However, as far as Salazar is aware, this Court has never addressed a case applying Strrickland to voir dire complaints. For instance, this Court has never indicated whether the legal theory of a consitutionally adequate investigation (i.e. Wiggins v. Smith, 539 U.S. 510, 522-523, ____ (2003)(the "principal concern indeciding whether [trial counsel] exercised 'reasonable professional judgemnt' is not whether counsel should have [followed the complained of strategy]. Rather we focus on whether the investigation supporting counsel's decison not to[follow the complained of strategy] was itself reasonable" and "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decison with respect to [the complained of strategy] impossible.") would apply to trial counsel's questioning of prospective jurors. And, Salazar explictly asked the TCCA to apply these constitutionally **adequate inve**stigation principles to his IACT claim.

One thing for sure, this Court has determined that "... part of the guarntee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." See, Morgan v. Illinois, 112 S.Ct. 2222, 2230 (1992). Salalzar's trial counsels failed to insure that Salazar was afforded adequate voir dire. And, this Court has ackownledged that,:

> "as with any other trial situation where an adversary wished to exclude a juror because of bias, then,.it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality."

Id. at 2232 (quote omitted). Salazar asks this Court to address how Strickland applies to trial counsel's conduct during voir dire which "plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored." Id. at 2230.

Salazar's State habeas writ application also asserted that trial counsels were ineffective to not object on double jeopardy grounds to his convcion and sentence in Countr II. So, the question is what would have happen had trial counsels objected on double jeopardy grounds? What if trial counsel had pointed out the State trial court that the State prosecutor had failed to make an election as to which conduct the State was seeking a conviciton on for each count and, thus, it was impossible to determine what conduct the Jury relied on to convict Salazar of COpunt I; and that, it was possible the Jury relied on the same conduct, or alleged incidtent, to convict Salazar of both counts becuase there was no evidence that there was ever an exposure only during any incident separate from all the other alleged incidents (necessary for a conviction in Count I)? Any reasonablily professional attorney in the shoes of Salalzar's trial counsels (who objected that the complainant never described a separate incident of exposure) would have been aware of two lines of Texas' double jeopardy cases:

1) Aekins v. State, 447 S.W.3d 270, 275 (Tex.Crim.App.2014) which applied this Court's double jeopardy cases (i.e. Blockbuster) to explain a double jeopardy violation when there is a single impulse, or under the merger doctrine, and the lesser-included concduct is "subsumed" by the greater conduct (like exposure being subsumed by the act of penetration), and

2) Ex parte Pruitt, 233 S.W.3d 338, 346-348 (Tex.Crim.App.2007) which held that it was "impossible to determine with any certainty which specific indcidents the jury actually aquitted appellant of in the prior trial" when the State prosecutor failed to make a proper election as to which conduct the State was seeking a conviction for.

See i.e., Guzman v. State, 591 S.W.3d 713, 732-733 (Tex.App. - Houston [1st Dist] 2019)(considering argument that exposure was a lesser-included of continuous sexual abuse only if evidence of a separate incident of solely exposure), Villareal v. State, 590 S.W.3d 705, 79 (Tex.App. - Waco 2019)(arguing that continuous sexual abuse invites double jeopardy violation); See also, Aekins, 447 S.W.3d at 277-278 ("a line cases" established that the Texas Legislature's intent was to punish only once for all conduct within one complete act of sexual assault).

The State court's focus on sufficient evidence to sustain the conviction in Count II, based on viewing the evidence in the light most favorable to the verdict, overlooked the reasonable proabability of a different result had trial counsels pointed out that the State prosecutor made no election; so that, it was impossible to tell what alleged incidents the Jury relied upon to convict Salazar in Count I and whether the Jury relied on the same alleged incident to convict Salazar in Count II.

Importantly, because trial counsels' affidavits reveal their failure to object to the double jeopardy violation was based on their failure to recognize the constitutional violation, they did not have a truely legitimate strategic excuse not to object. Indeed, there could be no true legitimate strategic excuse to allow Salazar to be punished with an additional consecutive 20 year sentence in violation of double jeopardy.

This concern is intertwined with GROUND ONE and the State habeas trial court's failure to consider the trial record, attached as an exhibit to Salazar's State habeas writ application, when making the Findings of Fact, which were adopted by the TCCA. As such, Salazar asks this Court to grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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