No. 20-7596

IN THE SUPREME COURT OF THE UNITED STATES

OLEN WARE, II,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OLEN WARE, II
TDCJ#0186784
Wynne Unit, TDCJ-CID
810 FM 2821
Huntsville, Texas 77349
Petitioner, Pro se

NON-CAPITAL CASE

QUESTIONS PRESENTED

After initially filing his *pro se* Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254 on September 21, 2018 his case was assigned to the Honorable Keith P. Ellison, Judge of the United States District Court for the Southern District of Texas, Houston Division.[1] Petitioner, a layman of the law, presented a timely motion to amend his federal writ petition pursuant to Rule 15, Fed. R. Civ. Proc. On June 19, 2019, the district court below then granted summary judgment to the Respondent the next day on June 20, 2019, without ever stating the court was denying his motion to amend or the fact it was even filed and the reason his motion to amend was ignored in the court's memorandum opinion denying his federal petition for writ of habeas corpus.[2] Petitioner avers and asks this Court to determine if the federal district court below erred by failing to consider or rule on his Motion to Leave to Amend his Federal Petition for Writ of Habeas Corpus pursuant to Rule 15 (a)(2) of the federal rules of civil procedure The Court of Appeals for the Fifth Circuit then refused a Certificate of Appealability, foreclosing appellate review of both the merits of Petitioner's claims and the district court's denial of his Federal petition seeking habeas corpus relief.

[1] *Olen Ware, II v. Lorie Davis, Director, TDCJ-CID*, Civil Case No H-13-3398.
[2] *Olen Ware, II v. Lorie Davis, Director, TDCJ-CID*, Civil Case No H-13-3398.

The following questions are presented.

1. Did the Fifth Circuit err in finding that jurists of reason could not have found it debatable that the district court erred by dismissing Petitioner's Petition for A Writ Of Habeas Corpus By A Person In State Custody Pursuant to 28 U.S.C. §§ 2241, 2254, with prejudice without it considering Petitioner's timely Motion to Amend His Petition pursuant to Rule 15, F.R.C.P ?

2. Did the Fifth Circuit err by not finding jurists of reason could not have found it debatable that the district court erred by upholding the Texas Court of Criminal Appeals decision that trial counsel was not ineffective?

3. Did the Fifth Circuit err by finding jurists of reason could not find it debatable that the district court erred by upholding the state intermediate court of appeals decision to affirm Petitioner's judgment and sentence with a finding that appellate counsel was not ineffective?

4. Did the Fifth Circuit err by finding jurists of reason could have not found it debatable that the district court erred by holding the Texas Court of Criminal Appeals decision that the trial court did not abuse its discretion by denying Petitioner's motion to suppress, denying his motion for a mistrial, overruling Petitioner's objections thereto, and allowing the admission of unauthenticated crime scene photos.

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I. PETITION FOR WRIT OF CERTIORARI

Olen Ware, II (hereinafter "Petitioner") petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.[3]

II. OPINIONS BELOW

The Fifth Circuit's unpublished opinion denying a Certificate of Appealability and attached here as Appendix 1. The district court's order granting summary judgment to Respondent denying Petitioner's petition for a writ of habeas corpus by a person in State custody 28 U.S.C. § 2254. Fifth Circuit denial of Petitioner's request for a Certificate of Appealability and motions for rehearing and rehearing *en banc* is attached as Appendix 2.

III. JURISDICTION

The Fifth Circuit entered final judgment on June 20, 2019. *See* Appendix 1. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

This case involves the relationship between 28 U.S.C. § 2255, the primary avenue for collateral review of federal criminal judgments, which authorizes a district court to grant relief from a final judgment in a civil case on equitable

[3] *See* Appendix A.

grounds. It also implicates the Court of Appeals' application of 28 U.S.C.§ 2253, which bars plenary appellate review in a habeas corpus proceeding unless a court issues a COA.

V.
STATEMENT OF THE CASE

Petitioner avers that the Respondent, Lorie Davis, Director of the Texas Department of Criminal Justice-Correctional Institutions Division, ("TDCJ-CID") is illegally restraining him of his liberty based upon an erroneous conviction out of the 208th Judicial District Court of Harris County, Texas, *styled*: *State of Texas* v. *Olen Ware, II,* numbered 1328054, after a jury found him guilty as charged for the felony offense of capital murder. CR-119 & 130-131.3 The * same jury then assessed punishment at sixty-years confinement in the TDCJ-CID on June 21, 2013. CR-61 62 & 129.129.

The Court of Appeals for the First District of Texas affirmed the trial court's judgment. *Ware v. State,* No. 01-13-00545-CR, 2014 WL 4952432 (Tex. App. Houston [1st Dist.] Oct. 2, 2014, pet. ref d) (mem. Op. not designated for publication). The Texas Court of Criminal Appeals refused discretionary after Petitioner had filed a writ of habeas corpus in State Court complaining appellate counsel had failed to follow the statutory requirement in notifying him of his right to file a Petition for Discretionary Review ("PDR"), which the TCCA refused on January 14, 2015; *see Ware* v. *State,* No. PD-1470-14. On April 7, 2016, Ware filed

a state habeas application challenging his conviction. 4 On September 19, 2018, the TSCA denied the application without written order.5 Petitioner filed his petition for writ of habeas corpus by a person in State custody on September 21, 2019. Respondent filed his Motion for Summary judgment on April 19, 2019. The district court granted Respondent's motion for summary judgment on June 20, 2019.

Petitioner the filed a request for Certificate of Appealability to the Fifth Circuit Court having jurisdiction, *See Ware v. Lorie Davis*, No. 19-20443, who, after considering same on September 21m 2020 denied Petitioner's request for COA. Petitioner filed a motion for rehearing that was late, but after requesting out of time rehearing the Court granted the motion on December 08, 2020. On that same day, Petitioner filed a motion for rehearing *en banc,* which the Court denied same on December 21, 2020, making his Petition for Writ of Certiorari due to be filed by March 22, 2021. This proceeding followed.

V

REASONS FOR GRANTING THE WRIT

A. Ground One: (Restated):

Jurists of reason could have found it debatable that the District Court erred by dismissing petitioner's petition for a writ of habeas corpus by a person in state custody Pursuant to 28 U.S.C. §§ 2241, 2254, with prejudice without it having considered Petitioner's timely Motion to Amend His Petition pursuant to Rule 15(a)(2), Fed. R. Civ. P. and fact that the district court entered an order ruling Petitioner's Motion in Opposition for Summary Judgment was dismissed as being "moot" even though said motion was not due until June 03, 2019, an **impossible date** created by the district judge in his memorandum and order that was not filed until **June 04", 2019.** (emphasis added). Moreover, a copy of same was not received by Petitioner, until on or about **June 09, 2019.** (emphasis added). The Petition for a Writ of Habeas Corpus by a Person in State Custody filed by Petitioner pursuant to 28 U.S.C. §§'2241, 2254, was dismissed with prejudice without the district court below having had time to have considered it and the Motion to Amend His Petition filed pursuant to Rule 15(a)(2), Fed. R. Civ. P. that were filed on the same day as the order of the district court dated June 20, 2019. Additionally, the Respondent's Motion for Summary Judgment was granted on June 20, 2019 (Docket Entry#20), prejudicing Petitioner and denying him both due process and a fair trial guaranteed him under the

United States Constitution in the proceedings below.

Petitioner's sub-grounds of ineffective assistance of trial counsel were corrected in his Third Motion to Amend his federal writ petition. As a layman of the law, proceeding *pro se,* Petitioner is aware this fact does not excuse a procedural default, which normally is only set aside under rare and unusual circumstances. Petitioner avers any perceived procedural default was due to circumstances beyond his control from being not being able to write or print clearly and/or comprehend complex things such as legal research and the preparation of legal pleadings. But has diligently done his best without any legal assistance. This is not an excuse offered by Petitioner to excuse any procedural default, but is a fact supported by the record before this Honorable Court. Petitioner does not own or have access to a typewriter or copy machine as Texas state' prisoners may purchase a typewriter if they have the funds to do so but must use carbon paper to make copies or have an intermediary who is willing to lend assistance to Petitioner in this regard. Moreover, the record demonstrates that the district judge denied his petition seeking habeas corpus relief based upon the impediments of not filing his response by June 3, 2019, and Petitioner is third attempt to amend his federal petition to include the sub-grounds in ground one related to the ineffective assistance of trial counsel, were determined to be a moot issue. Petitioner respectfully contends, therefore, that he should have been allowed to present the sub-grounds contained in ground one of his third amended federal petition correcting a transposition error by an intermediary [his

father] assisting him with typing up his pleadings filed below due to him being functionally illiterate with hard to read handwriting [print] and therefore sets-out *infra* all the sub-grounds in question alleging ineffective assistance of trial counsel for this Court's consideration. Petitioner's rebuttal was not properly considered by the district courts by its failure to consider and grant leave for good cause and in the interest of justice for him to include the ineffective assistance of counsel sub-grounds Prejudicing Petitioner and denying him due course of law and due process. Petitioner avers he filed his motion for extension of time on May 13, 2019, and after not hearing anything from the court he asked his father to call the clerk to see if they had even received the motion for extension of time and when he did so a deputy clerk on Friday, May 31^, 2019 who confirmed the request for an extension of time had been received and filed on May 13, 2019, but no decision had been made by the judge and that we would just have to be patient. Well, that same day miraculously, the Honorable Keith P. Ellison signed his order granting the requested motion for extension of time filed by Petitioner (the same day my father called) until Monday, June 3, 2019. Moreover, since Petitioner did not receive any notice of the order granting the motion for extension of time until June 7, 2019, as "entered" by the clerk on Monday, June 04, 2019, creating an impossible date for Petitioner to comply with the due date that had passed four days prior it was an impossible date for the Petitioner nor anyone else for that matter, would have been able to respond by the due date (June 4, 2019) set by the district court for Petitioner to prepare and file, his

response to Respondent's motion for summary judgment, prejudicing the Petitioner and denying him due process and creating a procedural default.

Standard of Review- AEDPA

Under 28 U.S.C. §2254(d), Respondent predictably argues herein that Petitioner's constitutional ineffective assistance of counsel claims are not subject to federal habeas review. (Respondent's Motion for Summary Judgment at 13 20). While Petitioner acknowledges that AEDPA's standard of review of state court convictions in federal habeas actions "is difficult to meet and was meant to be, *Harrington* v. *Richter,* 562 U.S. 86 (2011), in the final analysis, what is required is for a petitioner to demonstrate *either* that the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. §2254(d)(l) and with respect to the "unreasonable application" prong of §2254(d)(l), the Supreme Court has held that a federal habeas court is permitted to "grant the writ if the state court identifies the correct governing legal principle from this Court's decision *but unreasonably applies that principle to the facts'* of petitioner's case." *Wiggins v. Smith,* 539 U.S. 510, 520 (2003) (emphasis added); *see also Rompilla* v. *Beard,* 545 U.S. 374, 380 (2005) (finding that although the state court identified the correct governing legal principle *{Strickland* v. *Washington)* its

application of the same was objectively unreasonable). This rule applies equally "when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" *Id.* at 520, citing *Lockyer* v. *Andrade,* 538 U.S. 63, 76 (2003) and *Williams* v. *Taylor,* 529 U.S. 362, 409 (2000); *see also Panetti* v. *Quarterman,* 551 U.S". 930 (2007) ("That the standard is stated in general terms does not mean the application was reasonable.7 The state court's decision in applying (or misapplying) Supreme Court precedent in any given case of course, must not only be "incorrect or erroneous," but "objectively unreasonable" as well. *Williams* v. *Taylor,*529 U.S. at 409. The previously expressed view by the Fifth Circuit that the term "reasonable" was subjective and embraced *"all* reasonable jurists," *See Drinkard* v. *Johnson,* 97 F.3d 751, 769 (5th Cir. 1996) (emphasis added) was specifically *rejected* by the Supreme Court in *Williams* Ta*ylor,* 529 U.S. at 409-10 (AEDPA "directs federal courts to attend to every state court judgment with utmost care, but it does not require them law.") Moreover, "the fact that one court or even a few courts have applied the precedent in the same manner to close facts does not make the state court decision 'reasonable.'" *Valdez* v. *Ward,* 219 F.3d 1222, 1230 (10th Cir. 2000). As Judge Wiener reasoned for the Court in *Gardner* v. *Johnson,* 247 F.3d 551, 560 (5th Cir. 2001), "Although *Williams* teaches that state court decisions should not be reversed merely because they are incorrect *i.e.,* just because we would equally clear that neither should such decisions be upheld when we conclude that the state court has not just misapplied the law to

the facts but has done so in an *objectively unreasonable* manner. Stated another way, even though the AEDPA requires the federal courts to show more deference to state court decisions that they would in a *de novo* review, this cannot be interpreted to mean that an 'objectively unreasonable 'application of federal law should be allowed to stand. Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is as patently incorrect as to be 'unreasonable.'" As to AEDPA's prohibition against granting a claim unless the state court adjudication of the same resulted in an "unreasonable determination of the facts in light of the are presumed to be correct" and are to be deferred to "'unless they were 'based on unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" *Gardner v. Johnson, supra,* at 557, quoting *Chambers* v. *Johnson,* 218 F.3d 360, 363 (5th Cir. 2000). To successfully challenge the state court's factual findings, a petitioner must rebut the presumption of correctness with "clear and convincing evidence." 28 U.S.C. §2254(e)(l). But the presumption of correctness "does not apply when 'some reason to doubt the adequacy or the accuracy of the factfinding proceeding' exists." *Barnett* v. *Hargett,* 174 F.3d 1128 (10th Cir. 1999). And a state court's failure to consider evidence which should be considered in addressing a constitutional claim can render its decision unreasonable. *Williams* v. *Taylor,* 529 U.S. at 416; and *Wiggins* v. *Smith,* 539 U.S. at 528 ("This partial reliance on an erroneous factual finding further

highlights the unreasonableness of the state court's decision.") In addition, when fact findings are influenced by an incomplete or incorrect view of the relevant law, no deference is due them and *de novo* review is authorized. *United States* v. *Mask,* 330 F.3d 330, 337 (5th Cir. 2003) (citing *United States* v. *Blount,* 98 F.3d 1489, 1495 and n.16 (5th Cir. 1996); and *United States* v. *Capote- Capote,* 946 F.2d 1100, 1102 (5th Cir. 1991) (holding that district court's findings and conclusions based on an incorrect view of the law are due no deference). In the final analysis, as the Supreme Court has stressed, "[e]ven in the context of federal habeas, deference *does not imply abandonment or abdication of judicial review. Deference does not, by definition, preclude relief*!" *Miller-El* v. *Cockrell,* 537 U.S. 322, 340 (2003) (emphasis added). **And "nothing in AEDPA requires federal courts to turn a blind eye to state proceedings or to rubberstamp them."** *Delgado* v. *Lens,* 223 F.3d 976, 979 (9th Cir. 2000) (emphasis supplied). As will be demonstrated *infra,* Respondent spent very little time in its Motion for Summary Judgment in addressing the evidence adduced in the state habeas proceedings below, and when it does so, only the most generic overview is provided. Specific arguments made by Petitioner with respect to what the habeas record demonstrates, are not even addressed, much less analyzed, by Respondent. Instead, a rather concise regurgitation of -the AEDPA standard of review is advanced, no doubt, in an effort to obtain a favorable disposition of counsel, which prejudiced him by his guilty plea being entered unknowingly, unintelligently and therefore necessarily involuntarily without ever having had the

ability personally to accept or reject the State's plea offer of forty-years in each case to be served concurrently by counsel recklessly and ineffectively rejecting himself on Petitioner's behalf at some unknown time then informing Petitioner *after-the fact,* immediately to a trial before a jury for guilt/innocence and punishment, which prejudiced him. Petitioner's claims by jettisoning substantive review of them on the merits and without having to deal with the reality that the answer filed by the State and adopted *in toto* by the trial court do not, in significant part, accurately reflect what the habeas counsel, which prejudiced him by his guilty plea being entered unknowingly, unintelligently and therefore necessarily involuntarily without ever having had the ability personally to accept or reject the State's plea offer of forty-years in each case to be served concurrently by counsel recklessly and ineffectively rejecting himself on Petitioner's behalf at some unknown time then informing Petitioner *after-the fact*, immediately prior to when Petitioner thought he was supposed to be proceeding to a trial before a jury for guilt/innocence and punishment, which prejudiced him.

In exercising due diligence Petitioner now presents the sub-grounds contained in his Motion for Leave to Amend his petition filed before the district court entering an order granting summary judgment and deny Petitioner's request to amend his petition under Rule 15, F.R.C.P. in the interests of justice as being moot in the same Memorandum and Order issued by the district court on June 4, 2019 the day after my motion had been filed by the clerk, below. Because he is *pro se,* Petitioner should not

be faulted for failing to more particularly plead or prove the allegations in his application. *See Estelle,* 429 U.S. at 106 ("a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the Petitioner can prove no set of facts in support of his claim which would entitle him to relief") (citations omitted). The Supreme Court noted that, if a Petitioner is deprived of the opportunity to proceeding, then it is likely that he will be unable to do so in any future proceeding as a result of the statutory bar on subsequent writs. *See* Tex. Code Crim. Proc. Art. 11.07, § 4. In order to afford Petitioner his one full bite at the apple in this initial habeas proceeding, and in order to ensure that Petitioner has been fully afforded his Sixth Amendment rights, Petitioner concludes that the interests of justice require appointment of counsel and further proceedings under these circumstances. Petitioner requests humbly, therefore, that this Court not deny Petitioner relief at this stage, but would instead, remand this case to the habeas court below for appointment of counsel and further proceedings as to his ineffective-assistance claims. Due to the issue involving the transposition error by the only intermediary Petitioner had access to, my father, who served as a sworn police officer in Harris County for twelve-years is miracles in this endeavor and I love him and my mother dearly and cherish their belief and support in me and without further aside, I respectfully request that this Honorable Court reserve its decision in these proceedings by looking to ground one of his State writ application in which he

clearly sets out and that the reason it was not considered by the federal district court is because that court ordered a date his responsive pleading must be filed that was impossible for him to have met; requiring on May 31, 2019 that he file his response by June 03, 2019- however, the order in question was not file-stamped by the clerk of the court until June 04, 2019 and was not received by Petitioner until June 7, 201., Logic dictates, one who presented those grounds in the State habeas court would also do so in the federal petition, the fact he had filed consecutive amendments to his federal petition is *prima facia* evidence of his diligent efforts to get it right even though he is not trained in the law.

GROUND TWO (Restated): Whether jurists could have found reason(s) debatable that the District Court erred by dismissing petitioner's petition for a writ of habeas corpus by a person in state custody Pursuant to 28 U.S.C. §§ 2241, 2254, with prejudice without having considered his motion for leave to file his third amended petition seeking habeas corpus relief under the circumstances discussed *supra,* and Petitioner includes them here as he believes this Court will sustain ground one so the Court may consider his ineffective assistance claims and if the Court rules against him, what will it matter anyways? Petitioner requests that this Honorable Court consider his complaint of his trial attorney failing to have rendered him effective assistance during his trial in violation of the Sixth Amendment at trial.

Standard of Review- Ineffective Assistance of Counsel Claims

The "*Strickland*" *[Strickland* v. *Washington,* 466 U.S. 668 (1994)] standard applies to claims for ineffectiveness of counsel ("IAC"). IAC claims require a showing that counsel was deficient committed error(s) no reasonable attorney would have made and that counsel's errors were "prejudicial". To establish prejudice on an IAC claim, the petitioner must show that "there is a reasonable probability that, but for counsel's deficient performance, the jury would have reached a more favorable verdict". Although "reasonable probability" sounds like the petitioner must show that the jury verdict "probably" would have been different, the actual burden is somewhat lower: *Strickland* is satisfied where the effect of counsel's error is "sufficient to undermine confidence in the outcome of the case". Such a standard falls short of the "preponderance of the evidence" standard, which requires more than a 50% certainty of error. The *Strickland* standard of prejudice is quite similar to the showing a petitioner must make for "*Brady*" claims, where the prosecution has suppressed evidence more favorable to the defendant. Again, a "reasonable likelihood" does not require a showing that the result "probably" would have been different. *See Kyles* v. *Whitley,* 514 U.S. 419, 434 (1995). Once a petitioner has satisfied the *Strickland* standard (or the similar *Kyles* standard for *Brady* claims), the *Brecht* standard has necessarily been satisfied as well, so no further showing of harmless error is necessary. *See Kyles, supra.* Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to

second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that any act or omission of counsel was unreasonable.

SUBSTANTIVE REVIEW UNDER AEDPA

(1) The Clearly Established Federal Law Requirement

The initial or "threshold" inquiry under § 2254(d) is whether the petitioner "seeks to apply a rule of law that was clearly established" when his conviction " became final." *Kennaugh* v. *Miller,* No. 01-2281, F.3d., *slip op.* at 1608 (2d Cir. April 12, 2002) (citation and internal quotes omitted); *see, e.g., Lindstadt* v. *Keane,* 239 F.3d 191, 198 (2d Cir. 2001); *Jenkins v. Artuz,* Nos. 01- 2355, - 2328, F.3d, 2002WL 483547, at *6 (2d Cir. April 1, 2002). "If not," the petition must be denied, and the conviction sustained unless the state courts have unreasonably determined the facts - a rarity indeed. *Sellan* v. *Kuhlman,* 261 F.3d 303, 309 (2d Cir. 2001). The initial or "threshold" inquiry under § 2254(d) is whether the petitioner "seeks to apply a rule of law that was clearly established" when his conviction "became final." *Kennaugh* v. *Miller,* No. 01-2281, F.3d , slip op. at 1608 (2d Cir. April 12, 2002) (citation and internal quotes omitted); *see, e.g., Lindstadt* v. *Keane,* 239 F.3d 191, 198 (2d Cir. 2001); *Jenkins* v. *Artuz,* Nos. 01- 2355, -2328, F.3d , 2002 WL 483547, at *6 (2d Cir. April 1, 2002). "If not," the petition must be denied, and the conviction sustained unless the state courts have unreasonably determined the facts - a rarity indeed. *Sellan* v. *Kuhlman,* 261 F.3d 303, 309 (2d Cir. 2001). Several considerations

inform the "clearly established" analysis, which can sometimes prove "complex." *Id.* They include the following: First, on its face, § 2254(d)(1) "restricts the source of clearly established law" to the "jurisprudence" of the U.S. Supreme Court. *Williams,* 529 U.S. at 412; *accord Francis S.,* 221 F.3d at 108. Second, the phrase "clearly established Federal law" refers solely to the Supreme Court's holdings, as opposed to its *dicta,* at the time of the relevant state court decision(s). *See, e.g., Kennaugh,* slip op. at 1607; *Jenkins*, 2002 WL 483547, at *6; *Brown v. Artuz,* 283 F.3d 492, 501 (2dCir.2002). Third, despite the latter principles, the "determination" whether a given Supreme Court precedent was clearly established "will ordinarily be made by the lower federal courts"- not the Supreme Court itself- pursuant to their "independent obligation to say what the law is." *Kennaugh,* slip op. at 1608 (citation and internal quotes omitted). Thus, one can expect a sizable body of district and circuit court authority to develop as to when Supreme Court holdings became "clearly established" for AEDPA purposes. Fourth, and finally, a rule of law may be clearly established by either a general standard enunciated in the Supreme Court's cases or its specific application in a particular context. *See id.* at 1608-11. For example, in *Gilchrist* v. *O'Keefe,* the petitioner challenged a state court's refusal to assign new counsel after he assaulted his court appointed lawyer. *See* 260 F.3d 87 (2d Cir. 2001), *cert, denied,* No. 01-8995, S. Ct., 2002 WL 971360 (May 13, 2002). The Second Circuit evaluated the claim under both the general requirement of *Gideon* v. *Wainwright,* 372 U.S. 336 (1963), that waivers of counsel be knowing

and intelligent, and the specific prerequisites for self-representation outlined in *Faretta* v. *California,* 422 U.S. 806 (1975). Though the*Supreme Court had never faced the precise scenario before the Second Circuit, the appellate court concluded that the right to counsel, through general precedents like *Gideon,* was fundamental and clearly established. *See also Lainfiesta* v. *Artuz,*253 F.3d 151, 154 (2d Cir. 2001) ("qualified right to counsel of choice," while not itself clearly established, "emerges out of a defendant's broader right to control the presentation of his defense"), *cert, denied,* 122 S. Ct. 1611 (2002); *but see Morale v. Artuz,*281 F.3d 55, 58-59 (2dCir.) (though clearly established where accused and witness are physically separated, face-to-face confrontation right probably was not so established in the "precise context" of a disguised witness testifying in defendant's presence), *{petition for cert, filed,* No. 01- 10169 (May 8, 2002)). In State Court the Petitioner requested a live evidentiary hearing on several occasions and the appointment of counsel to assist him since he had no formal legal training to no avail. Here, in petitioner's claims rely on a new rule of constitutional law or a factual predicate previously undiscoverable through the exercise of due diligence; and (2) the petitioner establishes by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty. 28 U.S.C. § 2254(e)(2). In his case, Petitioner did present unresolved previously uncontroverted factual issues to the State habeas court satisfying §2254(e)(2). However, Section 2254(e)(2) has "force [only] where § 2254(d)(1) does not bar federal habeas

*relief Pinholster,*131 S. Ct. at 1401, it does not bar relief in the instant case. Petitioner believe that he has vaulted this formidable hurdle encompassed and further, as articulated in *Pinholster* an evidentiary hearing, is still appropriate to as enough facts exist to make an informed decision on the merits. *Schriro* v. *Landrigan,* 550 U.S.465, 474-75 (2007). Petitioner believes he has met this standard for a hearing, and requests that this Court appoint counsel to assist him in further litigation of his meritful contentions.

This Court should review Petitioner's ineffective assistance of counsel claims under the standard set forth in *Strickland* v. *Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Ineffective assistance of counsel is a mixed question of law and fact which we review *de novo. Id.* at 698, 104 S.Ct. at 2070; *Baker* v. *Metcalfe,* 633 F.2d 1198, 1201 (5th Cir.), cert, denied, 451 U.S. 974, 101 S.Ct. 2055, 68 L. Ed. 2d 354 (1981). To obtain reversal of a conviction or death sentence based on ineffective assistance of counsel, a convicted defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. To establish prejudice, a defendant must show that there is a reasonable probability that, but for his attorney's deficient performance, the factfinder would have had a reasonable doubt about his guilt. *Id.* at 695, 104 S.Ct. at 2068-69. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. The right to effective assistance of counsel is intended to ensure that the defendant

receives a fair trial. *Id.* at 687, 104 S.Ct. at 2064. Therefore, to establish prejudice, the defendant must show that counsel's errors were so severe as to deprive him of a fair trial with a reliable result. *Id.* In determining whether there was prejudice, the Court must look at the totality of the evidence before the jury. Because the defendant must prove both deficiency and prejudice, a defendant's failure to prove either will be fatal to his claim. The Supreme Court has stated that when analyzing prejudice in an ineffective assistance of counsel case, a court should not focus solely on outcome determination, without considering whether the result of the proceeding was unreliable or fundamentally unfair. *Lockhart* v. *Fretwell,*506 U.S. 364-113 S.Ct. 838, 842-43, L. Ed. 2d 180 (1993). The touchstone of the prejudice inquiry is the fairness of the trial and the reliability of the jury or judge's verdict considering any errors made by counsel, not solely the outcome of the case. *Strickland,* 466 U.S. at 696, Likewise, the sufficiency of the "untainted" evidence should not be the focus of the prejudice inquiry. The materiality standard under *Brady* v. *Maryland,* is identical to the prejudice standard under *Strickland.* In *Kyles* v. *Whitley,* the Supreme Court emphasized that materiality under *Brady* has never been a sufficiency of the evidence test. Instead, the defendant must show that "the favorable evidence could reasonably in the verdict." *Kyles,* U.S. at 115 S.Ct. at 1566. The United States Supreme Court has itself opined claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting [such a] claim in an initial-review

collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Martinez v. Ryan,* 132 S.Ct. 1309, 1317 (2012). In addition, the Supreme Court noted that prisoners "unlearned in the law" may not "comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law." *Id.* Moreover, considering all these considerations, the Supreme Court concluded that, in order to present an ineffective assistance, claim in accordance with the State's procedures, "a prisoner likely needs an effective attorney." *Id.* Without the assistance of effective appointed counsel in habeas proceedings, the Supreme Court recognized that such a proceeding may not be "sufficient to ensure that proper consideration [is] given to a substantial claim." *Id.* at 1318. This, it explained, was of concern, given that the right at stake, the right to the effective assistance of counsel, is a "bedrock principle in our justice system," without which the very fairness and accuracy of the underlying criminal proceeding cannot be guaranteed. *Id.* at 1317.9 Here, in making the Court's determination that applicant may have a colorable ineffective assistance claim that requires the appointment of habeas counsel in the interests of justice, The federal courts, including the United States Supreme Court have held that *pro se* litigants pleadings should (1) liberally construe an applicant's pleadings that complains of ineffective assistance of counsel, and (2) examine Petitioner's complaints for substantive merit rather than for technical procedural compliance. This liberal approach to construing the pleadings is firmly recognized as appropriate considering applicant's status as a *pro se* litigant. *See*

Estelle v. *Gamble,* 9 n. 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963/ *Brady* held that the prosecution's suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment. *Id.* at 87, 83 S.Ct. at 1196-97. In interpreting the materiality standard, the Supreme Court has adopted the *Strickland* formulation of prejudice and cites both ineffective assistance of counsel and *Brady* cases when defining materiality. *See United States* v. *Bagley*, 473 U.S. 667, 682, 105 S Ct. 3375, 3383-84, 87 L. Ed. 2d 481 (1985) (opinion of Blackmun, J.) (adopting the *Strickland* formula); *Id.* at 685, 105 S.Ct. at 3385 (White, J., concurring in part and concurring in judgment) (also adopting *Strickland* standard); *Kyles* v. *Whitney*, 2d 490 (1995) (citing ineffective assistance of counsel and *Brady* cases alternatively). The *Brady* materiality standard asks"[w]hether it is reasonably probable that a different result might have been obtained had the evidence been disclosed." *Lindsey* v. *King,169* F.2d 1034, 1043 (5th Cir. 1985). 429 U.S. 97, 106 (1976) *(pro se* complaint "is to be liberally construed"); *Haines* v. *Kerner,*404 U.S. 519, 520- 21 (1972) (per curiam) (*apro se* inmate's petition should be viewed liberally and is not held to the stringent standards applied to formal pleadings drafted by attorneys); *see also Hernandez* v. the benefit of liberal construction"); *Brown* v. *Roe,* 279 F.3d 742, 746 (9th Cir.2002) ("Pro se habeas petitioners are to be afforded the benefit of any doubt.") (citations omitted). This Court is patently aware of Petitioner's diligence in trying to comply with all the procedural requirements of the Federal Rules of Civil Procedure in order

to correctly and effectively present meaningful pleadings for this Court's consideration although he has no formal legal training and has had to learn what he does know by the meager, unconstitutional TDCJ unit law library and books his family have paid to be sent to him. The United States Tenth Court of Appeals has held in relevant part, mandated the liberal construction afforded to *pro se* pleadings "means that if the court can reasonably read the pleadings to state a valid claim on which the [petitioner] could prevail, it should do so despite the Petitioner's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Barnett* v. *Hargett,* 174 F.3d 1128, 1133 (10th Cir.1999) (quoting *Hall* v. *Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991)). It is well established that this practice of liberally construing *pro se* pleadings are a proper judicial function that does not transform a judge into an advocate for a habeas applicant. *See id.* (explaining that, although a court "should not assume the role of [an] advocate for the *pro se* litigant and may not rewrite a petition to include claims that were never presented," courts act properly when they "look[s]carefully at the facts and the pleadings in an effort.to ascertain what occurred in prior state proceedings and the true nature of petitioner's claims"). Considering these principles, the Court's review for whether this *pro se* Petitioner may have a colorable claim that would justify the appointment of counsel in the interests of justice does not call upon the habeas court to make legal arguments for Petitioner, nor does it require any court to become an advocate for him. Rather, by

liberally reading the *pro se* pleadings and examining the face of the record to determine whether appointed counsel is required under the circumstances in order to ensure that an Petitioner's claims are given meaningful consideration, Petitioner sincerely and humbly requests this Court adhere to its judicial duties to afford *pro se* litigants wide of Civil Procedure that entitle Petitioner to appointed counsel when the interests of justice require it. Applying the foregoing principles here, Petitioner only requests that hold that applicant's pleadings are adequate to give rise to a colorable ineffective assistance proceeding in *pro se,* Petitioner should not be faulted for failing to more particularly plead or prove the allegations in his petition. *See Estelle,*429 U.S. at 106 ("*a pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief) (citations omitted). I respectfully note that, if Petitioner is deprived of the opportunity to factually and legally develop his ineffective assistance claims in the instant proceeding, then it is likely that he will be unable to do so in any future proceeding as a result of the Statutory bar on subsequent writs. *See* Tex. Code Crim. Proc. art. 11.07, § 4. In order to afford Petitioner his one full bite at the apple in this initial habeas proceeding, and in order to ensure that Petitioner has been fully afforded his Sixth Amendment rights, Petitioner pray the Court will conclude that the interests of justice require appointed counsel and further proceedings under these

circumstances. Therefore, Petitioner avers that this court in Applying the foregoing principles here, would hold that Petitioner's pleadings are adequate to give rise to a colorable ineffective assistance claim to warrant the appointment of counsel in the interests of justice. Failure to thoroughly investigate all the facts and applicable law relevant to this case, **(a)** Specifically, Petitioner claims that trial counsel was ineffective by not being prepared to prosecute the Motion to Suppress at the hearing held pretrial by the state court, which prejudiced the Petitioner. Counsel told Petitioner he planned to file the motion to suppress because he believed the State had erred in the process of serving and executing the search warrant and he was going to challenge the process during a pretrial hearing on his motion to suppress. Petitioner submits that trial counsel was deficient during the suppression hearing by failing to make the court aware that the officer executing the search warrant was not verified by same. The Texas Code of Criminal Procedure, Art. 38.01, search governs how a search warrant may be obtained and executed. A "search warrant" is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate or commanding him to search for a specific item or person. No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate's clerk shall

make a copy of the affidavit available for public inspection in the clerk's office during normal business hours. The record before the Court contains the search warrant in question and corroborates Petitioner's assertion on its face that it was never verified by the officer who executed and therefore, anything gleaned from it should have been excluded as being tainted and fruits of the poisonous tree, **(b)** Counsel was deficient never signed or initialed any documents advising him of his constitutional rights. Recently in *Salinas* v. *Texas,* 12-246, recently decided by the Supreme Court, who determined, *inter alia,* The Fifth Amendment of the Bill of Rights states that no U.S. citizen "shall be compelled in any criminal case to be a witness against himself." It has since been interpreted to mean that a defendant's act of remaining silent — of refusing to testify — cannot be used as evidence against him or her in court. However, in *Salinas* the Supreme Court determined that if a criminal defendant did not invoke his Fifth Amendment privilege it would be forfeit under the "use it or lose it "doctrine in cases involving *Miranda, Berghuis* v. *Thompkins,* 560 U.S. 370 (2010).

In the instant case, at the time Petitioner was questioned he had in fact asserted his right to remain silent without his attorney present, which the police attempted to obviate without ever having him sign his acknowledgement police had in fact made him. aware of his Fifth Amendment rights, also failing to have him initial each one that were imparted to him by detectives that traditionally demonstrates at that point if he talked with police and answered their questions he would do so at his own peril.

"Constitutional protections should not be just for those who have legal training and know what they need to say to the police to invoke their rights," and as his case predates *Salinas* v. *Texas, supra,* the consequence of the Court's counter-intuitive ruling, the majority of Americans are no longer under the full protection of the Fifth Amendment. Under the jurisprudence existing at the time of this case. The Supreme Court ruling in *Miranda* created precedent law requiring detainees to be advised of their constitutional rights, but it did not specify the wording that must be used to do so. The Court's ruling stated: "• • The person in custody must, prior to interrogation, be clearly informed that he/she has the right to remain silent, and that anything the informed that he/she has the right to consult with an attorney and to have that attorney present during questioning, and that, if he/she is indigent, an attorney will be provided at no cost to represent him/her." The term "custody" has been defined as being put under formal arrest or being deprived of freedom in a manner commonly associated with being under arrest. The term "interrogation" has been defined as the explicit questioning of a person in a manner that is reasonably likely to provoke an incriminating statement. Because of the widespread ramifications of the *Miranda* ruling, police and other law enforcement agencies across the country instituted a policy of advising every suspect taken into custody, or questioned as a criminal suspect, of their rights. This mandatory notice is commonly referred to as the *Miranda rights.'* Petitioner submits that the time he was arrested and taken into custody that police failed to read him his Miranda rights and that is why there is no

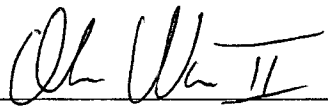
documentation in the record to contradict his contention; Failing to read a suspect his *Miranda rights* can result in any statements or confession made to be considered inadmissible in court. Therefore, Petitioner requests that this Court find this issue deserves encouragement to proceed further, **(c)** Counsel was ineffective for failing to notify the trial court of her desire to reserved opening statement (7RR75-76),10 forfeiting same and prejudicing the defense, **(d)** Counsel was ineffective for failing to properly convey any and all plea bargain offers made by the State prior to his trial beginning. Petitioner bases this claim on fact his trial attorney had mentioned in passing Petitioner should have taken the plea offer during the guilt/innocence portion of his trial. However, Petitioner was never advised of a plea offer made by the State. As a threshold matter, the Sixth. For purposes of this proceeding Petitioner will refer to the court "Reporter's Record" as "RR" followed by the volume number, and then the page cited and the "Clerk's Record" as "CR" followed by the volume number and finally the page number cited.

CONCLUSION

This Court should grant certiorari to review the Fifth Circuit's judgment refusing to grant a COA on the issues raised in Petitioner's motion, in opposition to summary judgment and summarily reverse the decision below, hold this case as it considers the scope of other cases *supra,* or grant such other relief as justice requires.

SIGNED on this the 16Th day of March 2021.

Respectfully submitted,



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