

CAUSE No. **20-8358**

IN THE Supreme Court of
The United States

IN Re: Ex parte: Hector Sanchez

Motion for leave to submit 'original' writ of
Habers Corpus

Petitioner asks leave to file his 'original' writ
of habers corpus in this Court

ORIGINAL

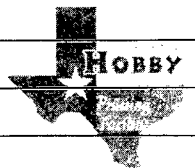
Hector Sanchez

Hector Sanchez
petitioner - prose
TDCS # 2093641

FILED

JUN 17 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.



Cause No.

IN THE Supreme Court
of The United States

IN RE: Ex parte: Hector Sanchez

From the U.S. Court of Appeals for the Fifth Circuit denial
of Motion to authorize second § 2254 application cause no. 20-50825

For 'Original' Writ of Habeas Corpus 28 U.S.C. §§ 2241, 2242, 2254

Petitioner's Brief
IN support of 'original' writ of habeas corpus

"My father did not rape me. Someone at some point has to listen
to the truth" - Jennifer Sanchez (see, appendix, H. 368)

"The truth is my dad never touched me on my breast or
anywhere else inappropriately" - Mark Sanchez (see, appendix, H. 362)

Hector Sanchez
petitioner-pro se
TDCJ # 2093641
Luther Unit
1800 LUTHER DRIVE
NAVASOTA, TX. 77868

Cover Letter

Questions For the Court

- 1) May a panel of a U.S. Court of Appeals disregard unanimous circuit precedent when making a § 2244(b)(2)(A) 'prima facie' determination?
- 2) Does a panel of a U.S. Court of Appeals overstep its jurisdiction when it makes an actual § 2244(b)(2)(A) ruling as opposed to a 'prima facie' determination?
- 3) Does the Fifth Circuit's usurpation of the district court's jurisdiction in a § 2244(b)(2)(A) adjudication exceed Congress' Exception Clause?
- 4) If a U.S. Court of Appeals exceeds Congress' enacted § 2244(b)(3)(D) 30 day statute of limitation period, does the forfeiture rule apply thereby redirecting the claim to the U.S. District Court to adjudicate 'in the first instance'?
- 5) May a panel of a U.S. Court of Appeals intermesh this Court's 'new rule' and 'retroactive' doctrines to fabricate an unfounded reason to deny the § 2244(b)(2)(A) requisite?
- 6) If decisions of this Court hold in cases that 'prejudice is presumed', do all such cases fall under the same rule?
- 7) May a Federal Rule of Civil Procedure Rule 60 motion be used to challenge a procedural defect in the integrity of a U.S. Court of Appeals § 2244(b)(3)(C) 'prima facie' determination of a § 2244(b)(2)(A) requisite when there is a legally defensible argument challenging the legal and/or factual basis for the denial, including the court's jurisdiction?
- 8) Is *Idaho v. Green*, 139 S. 4738 a new rule of constitutional law made retroactive to cases on collateral review?

Considerations For Governing Review

- a) A panel from the Fifth Circuit ruled that *Idaho v. Guera*, 139 S.Ct. 733 is not a new rule applicable to § 2244 (b)(2)(A) is in opposite of six other U.S. Court of Appeals there by creating a split within the Circuits.
- b) A panel from the Fifth Circuit's mode of making a § 2244 (b)(2)(A) 'prima facie' determination is in conflict with a unanimous Circuit, including its own, binding precedent.
- c) A panel of the Fifth Circuit has a divergent interpretation of its role in § 2244 (b)(3)(C) as it has intermeshed two independent doctrines, 'new rule' and 'retroactive', to fabricate an unfounded posture in federal habeas jurisprudence to deny a § 2244 (b)(2)(A) requisite.
- d) The Fifth Circuit has disregarded this Court's holding that a Federal Rule of Civil Procedure Rule 60(b) motion may be used to challenge the integrity of a federal habeas proceeding, including a writ of jurisdiction ruling.
- e) The Texas Court of Criminal Appeals abused its authority as it intentionally misapplies Texas' enacted legislative statute Tex. Code. Crim. Proc. art. 11.07, sec. 4 to conform to its desire to prohibit access to REVIEW to all forms of relief available thru art. 11.07 state habeas application, when sec. 4 only prohibits a subsequent petition 'challenging the same conviction' unless certain requisites are met, and such an abuse of authority violates the Due Process and Equal Protection Clauses.

Certificate of Interested Persons

Petitioner, certifies that the following persons have an interest in the outcome of this case, in order that the Justices of this Court may evaluate possible disqualification or recusal:

- Hector David Sanchez, petitioner, is confined in the Luther Unit of the Texas Dept. of Criminal Justice, Correctional Institutions Division
- Bobby Lumpkin, respondent, Director of Correctional Institution Division of TDCJ, has custody of Hector Sanchez

Statement Regarding Evidentiary hearing and/or Oral Argument

Petitioner requests an evidentiary hearing and/or oral argument in order to assist the Court in determining whether to grant relief in this non-death penalty case.

"Reason for not making application to the district court of the district in which applicant is held"

28 U.S.C. § 2244(b)(3)(E) precludes review from any other Federal court. Exceptional circumstances warrant exercise of this Court's discretionary powers, and that adequate relief cannot be obtained in any other form from any other court. All content is directly related.

Jurisdiction

Title I does not deprive this Court of jurisdiction to entertain writ of habeas corpus petitions filed as original matters pursuant to 28 U.S.C. §§ 2241, 2242, also § 2254, BBR and even § 1651(a).

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Supreme Court of The United States

Original Petition of Habeas Corpus

Petitioner respectfully prays for this Court to entertain
this Habeas Corpus Petition

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Summary of the Case

Before and after Sanchez pled guilty on June 7, 2016, he and his family informed his counsel, Ms. Cathy Compton, that he wanted to appeal his case. Ms. Compton never discussed or explained that in his plea were appeal waiver. After Sanchez pled guilty she told him that he could not appeal due to the appeal waiver and abandoned him. Ms. Compton NEVER filed a notice of appeal. After exhausting his state remedies, Sanchez filed his first § 2254 on January 22, 2019. This Court decided *Idaho v. Garza*, 139 S.Ct. 733 on February 27, 2019. The U.S. district court denied the petition on March 11, 2019. Garza was unavailable until mid-September 2019, when the Texas Dept. of Criminal Justice (TDCJ) law library 'AccessToCourts' Nexis Lexis case law holdings list was updated. The previous update was January 2019. Sanchez filed for Certificate of Appealability on March 27, 2019. Upon discovery of Garza's new rule, Sanchez filed a Motion to Stay on December 16, 2019. The Fifth Circuit denied both the C.O.A. and Stay on April 14, 2020. After filing for a panel rehearing which was denied on June 8, 2020, aware at the time constraint to file his Garza claim, he had to abandon his C.O.A. Sanchez filed his second state habeas petition on June 19, 2020. The Texas Court of Criminal Appeals (TCCA) denied the petition on August 26, 2020, invoking Tex.C.Cr. Proc. art. 11.07 sec. 4 prohibition on subsequent habeas petitions. Sanchez filed a motion to authorize a second § 2254 on September 22, 2020. The Fifth Circuit took no action requesting the brief in support of the petition. Sanchez submitted the requested material on November 24, 2020. The Fifth Circuit denied on December 28, 2020 without reaching the merits of the claim. On February 3, 2021 Sanchez filed a Fed. R. Civ. Proc. Rule 60(b) motion challenging the legal and factual basis of the denial. The court invoked § 2244(b)(3)(E) prohibition of appeal or reconsideration, also instructing that motions submitted under Fed. R. Civ. Proc. are not accepted in that court on February 9, 2021. Sanchez now seeks habeas relief from this Court in this 'Original' writ of habeas corpus petition due to the fact that adequate relief cannot be obtained in any other form from any other court.

Extra Ordinary Circumstances

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 34 S.Ct 779 (1914)

Divergent Interpretations of § 2244 (b) (3) (C)

The Fifth Circuit abused its gatekeeping authority and discretion as it has "adopted divergent interpretations of the gatekeeper standard". *Felker v. Turpin*, 518 U.S. 651, 667, 116 S.Ct 2333 (1996). The Fifth Circuit overstepped its jurisdiction and adjudicated that Guerra was not a new rule. § 2244 (b) (3) (C) restricts the courts to a 'prima facie' review. Black's Law Dictionary (11th Edition) defines prima facie as: ① At first sight; on first appearance but subject to further evidence or information; ② Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may be later proved to be untrue. In other words, § 1291 vests jurisdiction to a court of appeals over decisions of the district court, not before the district court has been able to decide the issue. Congress' intent for this orderly procedure is apparent in its legislation at § 2244 (b) (4). § 2244 (b) (3) (C) is a lesser stringent standard due to Congress' clear intent to make the district court the legal adjudicator. This is apparent under § 2244 (b) (4) stringent "the applicant shows that the claim satisfies..." § 2244 (b) (2)'s requisites. Jurisdiction to rebut or prove to be untrue 'in the first instance' was vested solely to the district court.

The Fifth Circuit's disregard for legislatively enacted rules is further evident in the fact that the court took 33 days to 'grant or deny' Sanchez motion. § 2244 (b) (3) (C) is clear, "The court of appeals shall grant or deny... not later than 30 days after the filing of the motion." Using the prison mailing system Sanchez's motion was 'filed' on November 24, 2020. See, *Houston v. Lack*, 497 U.S. 266, 108 S.Ct. 2379 (1988) ("making filing turn on the date the prose prisoner delivers the notice to prison authorities for mailing..."). The Fifth Circuit devied on December 28, 2020.

This Court has maintained that "legislatively enacted rules are surely entitled to more respect than this apparent presumption that, when nothing hangs on the point they do not apply as written." *Day v. McDonough*, 547 U.S. 198, 216, 126 S.Ct. 1675 (2006). The limitation period of § 2244 (b)(3)(D) carries equal force as § 2244 (d)(1). Congress made no distinction between the two. In other words, the same forfeiture rule that applies to a petitioner applies to the court of appeals.

Sanchez argues that "the Fifth Circuit's uniquely severe permanent handicap and Nexus tests are incorrect", and that this Court reject them, due to "the Fifth paying lip service to the principles guiding" § 2244 (b)(3)(C)'s authority, quoting, *Tennard v. Dretke*, 524 U.S. 274, 124 S.Ct. 2562 (2002). This Court has long been guided that "the bar set-up by subsection (b) is not one of rigid application, but rather is within the discretion of the courts on a case by case basis. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness." 83 Harv. L. Rev. at 1183-1184, see, *Felker*, 116 S.Ct., at 2340.

The integrity of the habeas proceeding is called into question as the Fifth Circuit abuses its gatekeeping authority injuring public confidence of the proceedings which have caused a petitioner to be blocked from review of a substantial and meritorious claim. This Court has stated "It is paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." See, *Cooter and Gell v. Hartman Corp.* 496 U.S. 384 (1990) " *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995)

The Fifth Circuit's divergent interpretations now raise the question, does § 2244 (b)(3)(C) exceed Congress' Exception Clause? *Felker* 518 U.S., at 667

Inequitable denial of motion to stay

Upon discovery of Garza's new rule, Sanchez moved in

the Fifth Circuit to stay and hold in abeyance his first § 2254 habeas proceeding. The district court had not adjudicated any of his claims on the merits. (F.184 - F.192). The motion to stay was received by the court on December 16, 2019. (E.171 - 183). On April 14, 2020 the court denied the C.O.A. and motion to stay. (E.108 - E.109). Sanchez sought to use Texas' 'two forum rule'. See, *Ex parte Soffar*, 143 S.W.3d 804, 807 (The Texas Supreme Court has modified its powers abstention doctrine to permit consideration of the merits of a subsequent writ of habeas corpus ... IF the federal court having jurisdiction over a parallel writ enters an order staying all of its proceedings for the applicant to return to the appropriate Texas court to exhaust his state remedy.) (Tex. Crim. App. 2004). The Fifth Circuit abused its discretion when it denied "the petitioner to present his unexhausted claim to the state court in the first instance and then to return to Federal court for review of his perfected petition." *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528 (2005). Sanchez could not have raised his Garza claim in his first § 2254 for the simple fact that it did not exist, also the fact that Garza's decision was not available to TDCJ inmates until mid-September 2019. (pages 23-24).

The Fifth Circuit had authority to remand back to the district court under § 2254 (b)(1)(B)(ii) due to the fact that 'circumstances exist that render such process ineffective to protect the rights of the applicant'. At that juncture there were legal remedies available to have allowed Sanchez to pursue the new Garza claim. This Court has held "it would likely be an abuse of discretion for a [court of appeals] to deny a stay... if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that he ~~is~~ engaged in intentionally dilatory litigation tactics. Such a petitioner's interest in obtaining federal review of his claim outweighs the competing interests in finality and speedy resolution of federal petitions." *Rhines*, 544 U.S., at 270. The Fifth Circuit declined to opine on its denial of the motion to stay.

The Fifth Circuit was cognizant that denying Sanchez's motion to stay and first § 2254 would cause irreparable injury depriving him access to review of his GARRA claim. Circuit Judge James L. Dennis, who presided over both of Sanchez's proceedings, ironically, had previously stressed that a "dismissal of a first federal habeas petition is particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lawcher v. Thomas*, 517 U.S. 314 (1991); see also, *Slack v. McDaniel*, 529 U.S. 475 (2000) (the writ of habeas corpus plays a vital role in protecting constitutional rights). *Haynes v. Davis*, 733 Fed. Appx. 766 (5th Cir 2018) unpublished.

Furthermore, Sanchez argues that had the stay been granted it would be reasonable to ascertain that his GARRA claim may very well have reset AEDPA's 1 yr. statute of limitation clock thereby making his first § 2254 timely filed which would have made it ripe for review on the merits. This Court has ruled "admonishing against interpretations of procedural-prescriptions in federal habeas cases to 'trap the unwary pro se prisoner.'" (quoting, *Rose v. Lundy*, 455 U.S. 509, 520, 112 S. Ct 1193 (1962)). *Slack*, 529 U.S. at 487.

Here the injury to public confidence into the federal habeas proceeding is that the Fifth Circuit knowingly ruled to block access for review of Sanchez's GARRA claim essentially forcing his foot into a procedural snare causing him irreparable harm.

RULE 60(b) motion

On February 3, 2021 Sanchez filed a Rule 60(b) motion to challenge the factual and legal basis for the denial of his motion to authorize. (A.001 - A.030). The Fifth Circuit responded that it would not take any action invoking § 2244(b)(3)(E), also that "as a matter of course filings in this court are"

governed by the Federal Rules of Appellate Procedure. We cannot accept motions submitted under the Federal Rules of Civil Procedure." (A.001)

This Court has held "' the Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the habeas corpus rules.' *Woodford v. Garceau* 538 U.S. 202, 208, 123 S.Ct. 1348 (2003), and 'do not contradict or undermine the provisions of the habeas corpus statute.' *Gonzalez v. Crosby*, 545 U.S. 524, 529-30, 125 S.Ct. 2641 (2005)." Day, 547 U.S., at 212.

Sanchez Rule 60 motion did not seek relief from a state conviction. To be clear, neither the Rule 60 motion nor the second §2254 sought relief from his state conviction. Sanchez's Garza claim solely sought access to an out-of-time appeal, he would have never the less remained 'convicted'.

Rule 60's 1946 Amendment subdivision (b) specifies two types of procedures to obtain relief. "One procedure is by motion in the court and in the action in which the judgment was rendered." Nowhere does it stipulate that such a motion is strictly reserved for the district court.

Rule 12 of Habeas Corpus states that "the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." See also, *Crosby*, 545 U.S., at 524-525.

The Fifth Circuit disregards this Court's clarification "In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process'. *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 863-864, 108 S.Ct. 2194 (1988)." *Buck v. Davis*, 137 S.Ct. 759, 778 (2017).

Again paying lip service the Fifth Circuit has acknowledged "a motion that merely targets a procedural defect in the integrity of the federal habeas proceeding is a bona fide Rule 60 motion." *United States v. McDaniels*, 907 F.3d 366 (5th Cir 2018).

(6)

The Fifth Circuit's departure from the orderly legislative procedures enacted by Congress overstepping their jurisdiction, then ignoring Sanchez's Rule 60 motion is in conflict with this Court's clear statement that "the Rule also preserves parties' opportunity to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction - a consideration just as valid in *habeas* cases as in any other, since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94, 101, 118 S.Ct. 1003 (1998). *Crosby*, 545 U.S., at 534. The Fifth Circuit was restarted in its prime face assessment to this Court's new Rule doctrine. (pages 8-10) The Fifth Circuit's hypocrisy is now more evident than when Circuit Judge Dennis acknowledged "the Supreme Court's recent rejection of the notion that finality is the overriding concern when assessing Rule 60(b) motions in *habeas* relief. *Buck*, 137 S.Ct., at 779. As the Court explained, "the whole purpose of Rule 60(b) is to make an exception to finality" ... I would add that the whole purpose of federal *habeas* review is to make an exception to finality. Indeed, in this context, our duty to search for constitutional error is at our apex." *Haynes*, id at, 775-776. Sanchez's constitutional claim is a meritorious claim that beyond 'reasonably demonstrated' the factual occurrences which should have entitled him to relief. Yet the Fifth Circuit declined to implement this Court's precedent, and that of its own articulation.

This Court has developed several doctrinal exceptions to the general finality rule that rest on a "practical rather than technical construction". *Eisen v. Carlisle v. Jacqueslin*, 417 U.S. 156, 94 S.Ct. 2140 (1974). As this Court has "held that a decision is not final, ordinarily, unless it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' ". *Cunningham v. Hamilton County*, 119 S.Ct. 1915, 1919-1920 (1999) (quoting, *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989)). To allow the Fifth Circuit this usurpation of jurisdiction is too great of latitude.

over a proceeding that carries extremely high stakes of personal liberty for plea convicted prisoners who have never had any of their claims adjudicated on the merits in any proceeding. As in the present case, Sanchez has been deprived of a "fair shot at habeas review that Congress intended [him] to have." Crosby, 545 U.S., at 542. The Fifth Circuit ignores the significance of the fact that Sanchez was "shut out of federal court—without any adjudication of the merits" of his underlying constitutional claim due to their ruling which is factually and legally mistaken. *supra*, at 541.

The integrity of the proceeding is called into question as the Fifth Circuit over steps its jurisdiction; their refusal to entertain a viable Rule 60 motion challenging their factual and legal basis; also their continued disregard of this Court's guiding principles of equitable fairness in habeas review. There can be little to no public confidence into a proceeding that was unjustly administered.

GARRA'S New Rule

The Fifth Circuit improperly attempts to intertune a 'NEW Rule' and 'retroactive' analysis. That court disregarded this Court's New rule doctrine, which is independent of a retroactive analysis. This Court articulated in *Teague*, *Perry*, and then again in *Butler v. McKellar*, 110 S.Ct. 1212 (1990), "we reiterate that, in general, a case announces a 'new rule' when it breaks new ground OR imposes a new obligation on the states or federal government, *Perry*, 492 U.S., at 314, 109 S.Ct., at 2944. Put differently, and indeed, more meaningfully for the majority of cases, a decision announces a 'new rule' if the result was not dictated by precedent existing at the time the defendant's conviction became final." (quoting, *Teague*, 489 U.S., at 301) "[underlying emphasis added]"

The Fifth Circuit disregarded the 'either or' aspect of this Court's guidance. The court ignored the facts that: ① *Garra* was decided after Sanchez's conviction became final; ② that *Garra* did impose new obligation on the states and

United States Court of Appeals who had held in opposite of Garza's new rule; ③ that this Court had applied Garza into another collateral proceeding; ④ and that Sanchez had not raised the Garza claim in the first § 2254 petition. Instead the Fifth Circuit fabricates an unfounded intermeshing of principles in order to foreclose relief permanently to an indigent pro se prisoner.

Furthermore for arguendo sake, the Fifth Circuit's focus on Flores-Ortega's 'dicta' as to why Garza is not a new rule is misplaced and demonstrates the court's disconnect to the legal and factual differences between the two cases. The Fifth Circuit misrepresents the 'dicta' (not the holding), of Flores-Ortega, 528 U.S. at 485 where this Court's opinion stated "We believe this prejudice standard bears no new ground, for it mirrors the prejudice inquiry applied in Hill v. Lockhart, 474 U.S. 52 (1985), and Rodriguez v. United States, 395 U.S. 327 (1969)." (citing omitted). The Fifth Circuit concluded "Inasmuch as the holding of Garza is based on Flores-Ortega, which did not announce a new rule of constitutional law for purposes of § 2244(b)(2)(A), it follows that Garza likewise did not announce such a new rule."

(B.032 - B.033). The Fifth Circuit presents no case law to support its posture that if cases have similar prejudice standards then the latter of the cases may not announce a new rule.

Under this skewed logic, U.S. v. Cronk 466 U.S. 648, Cuyler v.

Sullivan, 446 U.S. 335, Rodriguez, 395 U.S. 327, Flores-Ortega, and now Garza would all be considered the same rule. That is factually untrue.

The deficient performances in Garza and Flores-Ortega are not one in the same. On this simple fact the Fifth Circuit's posture fails. The court needed not look further than Garza's 'dicta'.

Justice Thomas with whom Justice Gorsuch and Justice Alito joined dissenting present the factual and legal argument to support that Garza is a new rule. (Dissenting Justices). "the majority relies on Flores-Ortega to create its new rule." Id. at 752. The Dissenting Justice's clear assertion should have alerted the

Fifth Circuit that there are "important factual and legal differences between that case and this one. The most obvious difference is also the most crucial. There was no appellate waiver in Flores-Ortega." *Id.*, at 752-753. With distinction the Dissenting Justices stated "Because Flores-Ortega does not control cases involving defendants who voluntarily waive their appeal rights." *Id.*, at 753. It is transparent that Garza and Flores-Ortega are distinguishably different.

This Court has consistently maintained "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed, that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule'." *Butler*, *id.*, at 415. Justice Harlan explained this posture in *Desist*, 394 U.S., at 263, 89 S.Ct., at 1041, "this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." *Garza* was decided 19 years after Flores-Ortega. It took two decades to hold that an appeal waiver is not an absolute bar to all appellate claims, and does not obviate a counsel's duty to file a notice of appeal. The Fifth Circuit is cognizant that new rules of constitutional law "relevant under AEDPA relitigation bar is only the Supreme Court's holdings, not its dicta," *Langley v. Prince*, 926 F.3d 145, (5th Cir. 2019). The Fifth Circuit did not present case law in which this Court had previously decided Garza's new appeal waiver rule.

When a Court of Appeals departs from this Court's clear guiding principles then fabricating a rogue standard to deprive an indigent pro se prisoner access to review of a constitutional violation injures the public's confidence as constitutional rights are ~~also~~ always in the public's interest.

Garcia's Retroactive Ness

"The unreliability of the fact-finding process which is the touch stone of retroactivity" is the principle that presides over Garcia, quoting, *Mackey v. United States*, 401 U.S. 667, 41 S. Ct. 1160 (1981). To hold that an appeal waiver does not bar all appellate claims is in line with "the observance of 'those procedures that... are implicit in the concept of ordered liberty.'" *supra*, id at 415. Ct., 1180 "Teague v. Lane", 489 U.S. 288, 109 S. Ct. 1061 (1989).

Today's judicial proceedings are vastly different from when Justice Harlan joined this Court. This Court has recognized that today's system is one of pleas, not trials. In Texas 94.6% of cases were resolved via plea in 2016 when Sanchez pled guilty. *La Fler v. Cooper*, 566 U.S. at 170. In Garcia this Court noted that "researchers have found that over 90% of non-capital Federal habeas cases proceed without counsel." *Garcia*, at 749 n.12. Sanchez argues that Federal courts ought not be so quick to disregard and discard potentially meritorious claims arising from a plea conviction. To the contrary due to the fact that "in the 25 years since we first applied *Strickland* to claims of ineffective assistance of counsel at the plea stage

... Pleas account for 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed." *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284, at 298, Federal courts ought to liberally construe such habeas petitions. As this Court has recognized that plea convicted prisoners proceed *pro se*, indigent, at an extreme disadvantage in an attempt to seek relief from a constitutional violation. The low percentage of habeas petition arising from pleas ought to put a court on alert "to search for constitutional error", as that petitioners never had a trial to present a defense where any errors are visible. As in the present case defense counsel acted in more *pro forma* fashion never subjecting any of the prosecution's case to any adversarial testing, agreeing

to send Sanchez to prison. When a plea convicted prisoner files a habeas petition claiming ineffective assistance of counsel, in essence that prisoner is alerting a habeas court that he has never had counsel in any proceeding, pre-trial, guilt-innocent, plea, post-conviction. Such a habeas will lack in ability to articulate constitutional violations, may procedurally default ~~to~~ due to inexperience, and lack due to inadequate prison law libraries. Now that this Court has opened a window of vindication for plea convicted prisoners to obtain possible direct review of their convictions is consistent with this Court's fundamental fairness of "debate between adversaries," valued in our system of justice which contributes "to the truth-seeking functions of trials." *Gardner*, 430 U.S., at 360, 97 S.Ct., at 1206. "To hold otherwise would simply be to ignore actualities." *Powell v. Alabama*, 297 U.S. 45, 58, 53 S.Ct. 55, (1932) "Gray v. Metherland, 518 U.S., at 116 S.Ct. 2074, 2091 (1996).

For this reason this "Court has insisted that all persons, not just those selected by the chance of the calendar, receive the benefit of newly declared constitutional commands that are central to the reliability of the fact finding process at [plea] and without which innocent persons may have been adjudged guilty." *Desist*, 394 U.S., at 272 (Justice Fortas dissent).

Just as the Fifth Circuit held a divergent interpretation of § 2244 (b) (3) (C) it does so again with this Court's evolving doctrine of retroactivity. "Teague is not the straitjacket the [Fifth Circuit] mis understands it to be. . . . TEAGUE does not bar Federal courts from applying, in my read of factual contexts, law that is settled - here," the right to file a notice of appeal regardless of an appeal waiver. quoting, *Gray*, 518 U.S., at 183.

In other words *Gray* follows from the principle that "all new ~~retro~~ constitutional rules which significantly improve the pre-existing fact-finding procedures ARE

to be retroactively applied on habeas." Desist, at 263 (Justice Harlan). This falls squarely with Justice Harlan's third exception to Teague's non retro active guideline which "prohibits a certain category of punishment for a class of defendants because of their status or offense". *Perry*, 492 U.S., at 330, 109 S.Ct. 2934 (1989)

For plea convicted prisoners direct appellate review, for the few who seek it, may be the only opportunity to have the facts reviewed and the truth sought out. When an attorney deprives a defendant of direct review due to an appeal waiver, no fundamental fairness may be derived from such deficiency.

AEDPA does not limit the types of new rules that this Court may hold retroactive on collateral review.

Furthermore, six U.S. Courts of Appeals have either applied *Guerra* as a new rule and retroactive or remanded back in light of *Guerra*, see *Roman v. Mitchell*, 2019 U.S. App. Lexis 14148 (1st Cir 2019); *Rojas-Medina v. United States*, 924 F.3d 9 (1st Cir 2019); *United States v. Cowley*, from 2019 U.S. Dist. Lexis 60221 (6th Cir 2019); *United States v. Culloway*, 2019 U.S. App. Lexis 6528 (7th Cir 2019); *United States v. Rodriguez-Rodriguez*, 2019 U.S. App. Lexis 7746 (9th Cir 2019); and most notably *Fabian-Baltazar v. United States*, 2019 U.S. Dist. Lexis 221879.

The Fifth Circuit's posture that since both *Guerra* and *Flores-Ortega* share a presumption of prejudice, *Guerra* may not be a new rule, hurts rather than helps the court. This Court has consistently held "those whose right to appeal has been frustrated should be treated exactly like any other appellants, they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." *Guerra*, at 738 n.d. 17, Cf; *Griffin v. Illinois*, 358 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Rodriguez v. United States*, 395 U.S. 327 (1969); *Evitts v. Luey*, 469 U.S. 392 (1985); *Person v. Ohio*, 488 U.S. 75 (1988); *Lorada v. Deeds*, 498 U.S. 430 (1991); *Peguero v. United States*, 546 U.S. 23 (1999); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); and *Idaho v. Guerra*, 139 S.Ct. 738 (2019).

This Court has held "that a petitioner seeking leave to file a second application must establish that a combination of Supreme Court cases necessarily dictate retroactivity of the new rule." *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478 (2001).

Most notably, Sanchez pointed to the case of Fabian-Baltazar's habeas proceeding in this Court, 139 S.Ct. 1248, 1248, 203 L.Ed. 2d 412 (2019). This Court granted review, vacated the judgment, and remanded back in light of

Garza. "The new rule becomes retroactive ... simply by the action of the Supreme Court." *supra*, at 533 U.S. 656

As Justice Harlan noted "Some rules have both procedural and substantive ramifications." *Mackey*, 401 U.S., at 692 n.7. *Garza* falls squarely into this category. Courts agree the right to appeal is a substantive right, and now *Garza* provides possible access to a proceeding denied due to an appeal waiver and counsel's procedural deficient performance. The Honorable Justice was clear when he stated that "the writ has historically been available for attacking convictions on such grounds." *supra*, 401 U.S., at 693.

This Court and that of six Court of Appeals have applied *Garza* as a new rule and retroactive.

Established U.S. Court of Appeals 82244(b)(2)(A) precedent

The Fifth Circuit departs from established ~~circuit~~ circuit precedent, and most notably that of its own. Federal courts have held "In so far as second or successive petitions are concerned, the statutes precedent-limiting provision, fairly read, eliminates the lower federal courts' role as deeming new rules of constitutional law a permissible basis for habeas review." *See, In re Vial*, 115 F.3d 1192, 1196-1197 (4th Cir 1997), *In re Hill*, 113 F.3d 181, 184 (11th Cir 1997) (*same*); *cf.*, *Bochan v. Godinez*, 101 F.3d 465, 471 (7th Cir 1996) (noting that under AEDPA amendments "federal courts are no longer permitted to apply their own jurisprudence, but must look exclusively

to Supreme Court case law?') Consequently, an application to file a second ... habeas petition must point to a Supreme Court decision that ... applies the rule in a collateral proceeding." *Rodriguez v. Bay State Corr. Center*, 139 F.3d 270 (1st Cir. 1998); see also, *In re Smith*, 142 F.3d 832 (5th Cir. 1998) (same); also, *Brown v. Lensing*, 171 F.3d 1031 (5th Cir. 1999) (holding *In re Smith* is controlling, binding, precedent.) As previously stated, Sanchez pointed to Fabian-Baltazar's habeas case, 139 S.Ct. 1248.

The F.5th Circuit did not give reason as to why it disregarded established circuit precedent, nor that it was or had overruled its own precedent of *In re Smith*.

Uniformity and consistency are implicit in maintaining the public's confidence in the federal habeas proceedings.

TEXAS' Procedural Bar is Inadequate

The question whether a state procedural rule is adequate is itself a question of federal law. See, *Lee v. Kemna*, 534 U.S. 362, 122 S.Ct. 877 (2002). Therefore, we must begin by construing the state statute. See, *United States v. Williams*, 553 U.S. 285, 293, 128 S.Ct. 1830 (2008) (It is impossible to determine whether a statute reaches to bar without first knowing what the statute covers). Sanchez argues the Texas Court of Criminal Appeals (TCCA) invoking Tex. C. Crim. Proc. art. 11.07 sec. 4 does not preclude a federal court from de novo review of his Guerra claim.

Tex. C. Crim. Proc. art. 11.07 sec. 4 (11.07 sec. 4) states "If a subsequent application ... is filed ... challenging the same conviction ... a court may not consider the merits or grant relief ... unless the application contains sufficient specific facts establishing that:" [underline emphasis added]. The TCCA's reliance on 11.07 sec. 4 fails for the most obvious factual reason. Sanchez's subsequent state

habeas application did not challenge his conviction. His second application sought access to an out-of-time appeal. Had the TCCA granted him relief, Sanchez would have none the less remained 'convicted', even throughout any direct appeal proceedings. (C.065-C.074, at C.067)

Texas' art. 11.07 state habeas application provides prisoners the option to pursue six separate and distinctly different forms of relief, such as from ① a conviction, ② a sentence, ③ a time credit, ④ parole, ⑤ mandatory supervision, and ⑥ an out-of-time appeal or petition for discretionary review. Sanchez argues the Texas legislation was keenly aware of the multiple forms of relief available. If the legislation's intent was to restrict a subsequent application to all six avenues of relief, all the legislation had to do was omit the 'challenge the same conviction' proviso it enacted in Tex.C.Crim.Proc. art. 11.07 sec. 4. The fact that Texas' legislation has not removed or amended the proviso proves that the TCCA's attempt to use 11.07 sec. 4 as a 'catch-all' state procedural bar to be inadequate. Sanchez argues the TCCA abused its authority and discretion as the court has abridged his substantive right to pursue an out-of-time appeal. When construing state statutes the TCCA has held "we presume the statute is valid and that the legislature did not act arbitrarily or unreasonably in enacting it." *Rodriguez v. State*, 935 S.W.3d 60 (Tex.Crim.App. 2002).

This Court has held that when a state invokes a state procedural rule that frustrates the exercise of a federal right, that rule is 'inadequate' to preclude federal courts from reviewing the merits of the federal claim. See, *Staub v. City of Baxley*, 355 U.S. 313, 325, 78 S.Ct. 277 (1958) (holding that a denial of petitioner's constitutional claim for failure to attack specific sections of the challenged ordinance was an inadequate state law ground.) The inadequate state law ground doctrine is rooted in a concern that a state's rigid adherence to technical requirements of dubious

validity may result in Fundamental Fairness where Federal rights are at stake. See, *Davis v. Wechsler*, 263 U.S. 22, 23, 44 S.Ct. 13 (1923) (holding the assertion of Federal rights when plainly and reasonably made, is not to be defeated under the name of local practice.)

Sanchez has not attempted to by-pass "the orderly procedures of the state courts". *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963). To the contrary, he argues the TCCA invoked 11.07 sec 4 "For the purpose of evading compliance with a Federal standard." *NAACP v. Alabama ex rel Flowers*, 377 U.S. 288, 84 S.Ct. 1302 (1964). The TCCA has deprived him "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court." *Michal v. Louisiana*, 350 U.S. 91, 93, 76 S.Ct. 158 (1956)

Just as in Sanchez's first state habeas proceeding, the Texas courts are presenting a "pattern to evade constitutional rights" of plea convicted prisoners who have in appeal manner and have presented a potentially meritorious claim. (quoting, *Beard v. Kindler*, 130 S.Ct. 612)

In short, the TCCA's reliance on 11.07 sec 4 is inadequate.

The injury to the public's confidence into the integrity of the state's proceedings stems from the TCCA's overreaching interpretation of 11.07 sec. 4 in its attempt to curtail an indigent pro-se prisoner's attempt to have his claim reviewed by a state or Federal court. The public maintains a strong interest in a court's correct interpretation of legislatively enacted statutes.

Cause and Prejudice to overcome Texas procedural Bar.

Sanchez relies on *Trevino v. Thaler*, 569 U.S. 413, 133 S.Ct. 1911 (2013) to obtain Federal review of his Garza claim. A Strickland prejudice analysis is different from and made after a 'cause and prejudice' analysis. See, *Detrich v.*

Ryan, 740 F.3d 1237, 1245 (5th Cir. 2013)

Sanchez's original state habeas proceeding was his initial review. Sanchez has NEVER had counsel during any state or Federal collateral proceeding. He has proceeded indigent and pro se. His Garza claim is a substantial claim. Sanchez has demonstrated due diligence in attempting have his claim reviewed on the merits.

Recently this Court acknowledged "that it would be inequitable to refuse to hear a defaulted claim when the state had channeled the claim to a forum where the prisoner might lack the assistance of counsel raising it." *Davila v. Davis*, 137 S.Ct., at 2061-2062 (2017). Furthermore, another viable 'cause' to overcome the state bar is the simple and obvious fact that Garza's legal basis did not exist during his first state habeas proceeding. Sanchez could not have "possessed or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." *McCleskey v. Zant*, 499 U.S. 467, 11 S.Ct. 1454 (1991)

The prejudice prong in the present case is not complicated. Sanchez has been at an "actual and substantial disadvantage" in being able to have his Garza claim raised and adjudicated on the merits. (quoting, *United States v. Frady*, 456 US 152, 102 S.Ct. 1534 (1982)). His Garza claim provides overwhelming evidence that meets this Court's 'reasonably demonstrated' standard required to obtain relief. Sanchez will file a notice of appeal if relief is granted. Sanchez has attempted to and is once again submitting a writ of habeas corpus to a Federal court, now this Court, to have his constitutional claim reviewed on the merits. To hold the TCCA's invocation to be an adequate state bar would mean to foreclose Federal review of a constitutional violation, closing all avenues of relief. The U.S. Constitution and the rights it bestows are greater than the TCCA's state bar.

This Court has held "that while [the state] was free to structure its state court procedures in this way its 'decision is not without consequences for the state's ability to assert a procedural default in later proceedings.'" *Martinez*, 566 U.S., at 13 (quoting, *Evitts v. Lucey*, 469 U.S. 387).

In other words, the U.S. Constitution does not mandate the states to create and implement a system of appeals. However, when a state of its own choosing creates a system of appeals, the U.S. Constitution does mandate that that system comply with the Equal Protection and Due Process Clauses. Texas' system creates an inequitable unfairness for which it may not preclude de novo review from a federal court.

First Habeas Corpus Proceedings Unreasonable Determination of the Facts.

During the course of his first state habeas proceeding, Sanchez raised solely claims of ineffective assistance of counsel. Upon review of the application and supporting evidence the TCCA sua sponte raised a claim of actual innocence. Affidavits were submitted from the alleged victims recanting the allegations. (H. 355-362, H. 363-368, H. 369-374). These were submitted in support of an ineffective use of witness claim. The TCCA remanded back to the habeas court with an order instructing the court to make credibility determinations to see if Sanchez was 'actually innocent'. (G. 274-G. 275). The TCCA cited this binding precedent in *Ex parte Elizondo* 947 S.W.2d 202 (Tex. Crim. App. 1996). Under *Elizondo* "in habeas hearings the judge is the ~~fact~~ fact-finder who determines the credibility of witnesses" because it is the habeas court "which had the opportunity to view the witnesses" *id.*, at 210, 212. As in *Elizondo*, Sanchez's recantations were from now more mature witnesses.



Elizondo is Texas' adaptation of this Courts Schip v. Delo, 513 US 299, 115 S.Ct. 851 (1995). Both contradicting case laws warrant an evidentiary hearing to make credibility determinations of witnesses.

The state knows Judge Jessica Crawford was not a sitting judge in any court of Guadalupe County, Texas during the ~~feature~~ of Sanchez's case. Judge Crawford has never met Sanchez or the Affiants, she has no knowledge of the Affiants demeanor, characteristics, or ever witnessed any testimony from them. Disregarding the TCAs order, Judge Crawford, without Sanchez's presence, discussed the claims with his ex-counsel and the ~~past~~ prosecutor. Declining to hold a full and fair hearing, she makes an unreasonable determination of the facts and deems the Affiants not credible, and his ex-counsel credible. Sanchez's Affiants were not allowed to testify and Sanchez was denied the ability to cross examine his ex-counsel. The TCA applied a blind deference and denies his state application. (G.276-277)

In his first state application in the U.S. District Court Western District of Texas San Antonio Division civil no. SA-19-CA-0059-XR, case no. 5:19-cv-00059, Sanchez alerted the court that the state failed to hold an evidentiary hearing. (F.250, F.262-265, F.272). This Court has instructed that federal courts should "be constantly alert" to "the [unbias] judge's first-hand knowledge of witnesses, testimony, and issues," quoting, Nearly in Martin K & B Co., 87 S.Ct. 1072 (1967). Although the less District Judge Xavier Rodriguez stated "Although [Sanchez] refers to the issues raised in the federal petition and the evidence presented to support it... Petitioner's arguments were already rejected by the state court during Petitioner's state habeas proceeding." (F.185-192, at F.191). The lower state court nor the TCA provided any 'reasonable' reasoning as to why they failed to hold an evidentiary hearing.

Sanchez filed a motion for certificate of appealability (C.O.A.) from the Fifth Circuit, (E.114 - .170). In his brief, he alerted the court of the unreasonable determination of the facts made by the TCCA and District Judge Rodriguez, furthermore that he has never been provided any evidentiary hearing to make credibility determinations of the affiants. (E.164 - E.169). The Fifth Circuit, as well as Judge Rodriguez, and the T.C.C.A. each applied a blind deference to the state habeas court ignoring Sanchez's notifications and disregarding this Court's holding that "a Federal evidentiary hearing is required unless the state court take of fact has after a full hearing reliably found the relevant facts." *Townsend v. Wainwright*, 372 U.S. 293, 312-313, 83 S.Ct. 745, 757 (1963). In that "a Federal habeas challenge to a state court conclusion that counsel rendered effective assistance is NOT a finding of fact binding on the Federal court to the extent stated by 28 USC §2254 (d), but is a mixed question of law and fact". *Strickland* 466 U.S. at 670.

Sanchez's affiants presented sworn testimony exonerating him, challenging his counsel's credibility, and police coercion.

Following *Wilson v. Sellers*, 138 S.Ct. 1188 (2018) "a Federal habeas court should look at all the arguments in state and Federal court and examine the state court record." ~~id.~~ and may only "defer to those reasons if they are reasonable" *id.* at 1191-1192. The Fifth Circuit, District Judge Rodriguez, and the TCCA failed to explain how state habeas Judge Crawford's witness credibility determinations were reasonable. When courts apply this impermissible blind deference approach, indigent, pro-se, petitioners are given an insurmountable hurdle to clear that has no place in AEDPA's relitigation bar.

Furthermore, disturbingly Judge Rodriguez applied the incorrect *Jackson v. Virginia*'s 'clear and convincing' standard to Sanchez's actual innocence claim when he adjudicated that Sanchez's evidence had not 'established his innocence'. (F.191). This Court was clear that *Murray v. Creech*, 106 S.Ct. 2639 was controlling in *Schlip*.

The Caere standard "does not require absolute certainty about the petitioner's guilt or innocence". House v. Bell, 547 U.S. 518., at 538. The Fifth Circuit disregarded this clear error. In addition to using the incorrect standard, both the district court and the Fifth Circuit failed to evaluate 'all' of the evidence Sanchez submitted. (H. 293-H. 311, H. 312-H. 328, H. 287-292). Submitted were his certified medical records that clearly show he was in an 'altered mental status' all day due to ethylene glycol intoxication, during both police interrogations and supports that he falsely confessed, also that he was unable to 'consent' to a DNA buccal swab that was taken without a search warrant. (H. 296-309, H. 379). The medical records show the totality of the circumstances surrounding Sanchez's illegally elicited ~~the~~ false confessions and illegally obtained DNA. (H. 296, H. 299, H. 300, H. 302, H. 305, H. 306).

Sanchez submitted a scientific study that supports his defense that his DNA was present by another means other than direct contact as the charge alleges. The study was unknown to Sanchez, it was performed by the Human Biology Program at the University of Indianapolis in Indiana, along with the Strand Analytical Laboratories in Indianapolis, Indiana. The study proved as scientific fact the phenomena of Secondary DNA transfer. (H. 312 - H. 328). Using a multitude of modern DNA testing amplification kits, the study proved that DNA may be present at a crime scene by means other than direct contact. (H. 312, H. 318, H. 321). Such as a father's sperm was found on his daughter's underwear due to the mix of laundry washing. (H. 323). The Fifth Circuit is aware of Schlup's "In light of all the evidence" requirement. Bosley v. Cain, 409 F.3d 657, 662 (5th Cir. 2005). Neither court addressed either credible pieces of evidence. Sanchez alerted the courts to his daughter Jennifer's statement in the detective's report "she got into the shower and was running cold water on her head" (H. 381). This corroborates his secondary DNA defense. Using the correct standard of review and evaluating 'all' of the evidence, it is probable that "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Schlup, 513 U.S. 297-329

(1995). Sanchez has yet to have been afforded a habeas proceeding that Congress had intended or where this Court's precedent was followed.

This 'Original' Writ of Habeas Corpus
is timely filed

This Court decided *Guerra* on February 27, 2019. Sanchez filed his first §2254 on January 22, 2019. The district court denied on March 11, 2019. Guerra's decision was unavailable to all TDCJ inmates until mid-September 2019, when the TDCJ state law library updated its Nexis-Lexis computer case law holdings list. The previous update was January 2019. To amplify the matter, to date, May 2021, the state law library has not updated its holdings list since April 2020, one full year. The TDCJ ~~the~~ state law library has yet to provide how this unconstitutional delay serves any penological interests. Furthermore, the TDCJ state law library has removed all the Supreme Court, Federal, and Texas South Western Reporter case law books from the Luther Unit law library where Sanchez is being held in custody.

28 U.S.C §2244 (d)(1)(B)'s period of limitation begins when an illegal or unconstitutional impediment created by the state action is removed. "For §2244(d)(1)(B) to apply, the petitioner must show a causal relationship between the unconstitutional state action and being prevented from filing a timely petition. See, *Winkfield v. Bagley*, 66 F. App'x 578, 583 (6th Cir. 2003). Under §2244 (d)(1)(B), the statute of limitation does not begin until an illegal or unconstitutional impediment created by state action is removed." *McCray v. Burt*, 2018 U.S. App. Lexis 37285 (6th Cir 2018).

This Court held in *Lewis v. Casey*, 116 S.Ct 2174 (1996) the "right that Bounds acknowledged was the right of access to the courts... that an inmate must demonstrate that the alleged shortcomings in the prison libraries or legal assistance program have hindered or are hindering his efforts to pursue a non frivolous legal claim."

In the reality of period of limitations an order to not default on raising a claim it is inevitable that TDCJ's state law library intentionally blocks access to current case law through its antiquated computer system.

Greer became available to Saucy mid-September 2019. Saucy filed a motion to stay during his C.O.A. proceedings on December 16, 2019. (E.171-E.183) 92 days had passed. From December 16, 2019 to April 14, 2020 when his C.O.A. and motion to stay were denied, 119 days tolled. (E.108-E.109). From April 14, 2020 through June 8, 2020, Saucy sought reconsideration and a panel rehearing. (D.683-D.107) 58 days tolled. After denial of panel rehearing (D.083), Saucy argues of the period of limitation period, and that Texas may impose laches filed his subsequent state habeas application on June 19, 2020 (C.064). 9 days passed between the denial of the panel rehearing to the filing of the state habeas. From June 19, 2020 until the TCCA denied invoking 11.07 sec.4 on August 26, 2020, 76 days tolled. On September 22, 2020 Saucy filed a motion to authorize in which the Fifth Circuit requested the §2254 application and brief which was produced to the court on November 24, 2020. The Fifth denied the motion to authorize a second §2254 on December 28, 2020, 97 days tolled. From December 28, 2020 till Saucy filed a Rule 60 motion on February 3, 2021, 36 days passed. The Fifth Circuit declined to entertain on February 9, 2021, 6 days tolled. Saucy argues he has until September 7, 2021 to have filed this §2241, §2254.

This Court likewise held in *Holland v. Florida*, 130 S.Ct. 2549 (2010) that "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.*, at 2562

Underlying Constitutional Claim

Ineffective assistance of counsel - Sanchez's attorney Cathy Compton (Ms. Compton) failed to file a notice of appeal when Sanchez and his family expressed their interest and desire to appeal. Ms. Compton told Sanchez and his family that nothing could be done, she informed Sanchez that he could not appeal due to an appeal waiver that was part of his plea.

Standard of Review

In *Idaho v. Garza* 139 S.Ct. 738, (2019), this Court held that the duty to file an appeal on behalf of a client arises when the client makes known to counsel his desire to appeal his conviction. "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029 (2000). *Garza's* decision held that "Flores-Ortega's presumption of prejudice applies regardless whether a defendant has signed an appeal waiver." *Garza*, *id.*, at 745. Furthermore, in that plea convicted prisoners may have fewer appealable claims, "no appeal waiver serves as an absolute bar to all appellate claims" *id.*, 744.

In the federal habeas process adjudication on the merits refers to whether the court decided the case on a substantive point, as opposed to a procedural one. See, *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir 1997).

Therefore, review is 'de novo' since the claim was not adjudicated on the merits. See, *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997).

ARGUMENT

The present claim is not complicated, rather it is clear-cut and straight forward. To support his Green claim Sanchez submits his own affidavit. (H. 340-.341) He testifies that upon arrival to his lawyer's office for only the third scheduled office appointment he was "blindsided by an unauthorized and uninformed plea deal offer" that he "was only given two hours to agree or else the D.A. would pull [the] offer". This scheduled meeting (H. 331, H. 340) was supposed to have been for Ms. Compton to interview Adela his wife and eyewitness, Jennifer his oldest daughter and alleged sexual assault victim, and Marleah his younger daughter and alleged indecency victim. Sanchez and these willing affiants were scheduled to meet Ms. Compton in her office on May 25, 2016 at 3pm. Ms. Compton informed Sanchez that she needed to have the deal signed and returned to the D.A. by 5pm. Sanchez "demanded more time but my lawyer refused.." (H. 340)

Even though the facts show that Ms. Compton had already agreed to send Sanchez to prison, she claims in her affidavit "we already had an appointment set" "because we were still planning to go to trial up to that point." Up to that point the record is clear, Ms. Compton pronounced Sanchez guilty with never having interviewed the witness and alleged victims. (H. 348-.349)

Ms. Compton proclaims that she had informed Sanchez of the plea offer, she presented a desktop 'screenshot' of a text she supposedly sent him. (H. 335). Her 'screenshot' clearly shows that there is no response back from Sanchez. Sanchez submitted the text extracted from his cell phone from a Verizon store since he was already incarcerated in TDCJ and his wife and daughters were not tech savvy, nor did they have the software to do so. (H. 331 - H. 334). The fact of the matter is Ms. Compton did not send him a text. Ms. Compton states "I did not believe him when he told me that he had not received the text". (H. 348 - H. 349). Ms. Compton failed to explain why she never called him to discuss a life changing decision. After all she was insistent that her and Sanchez did not primarily communicate through text. (H. 344)

Ms. Compton exposed her true sentiment of how she felt about Sanchez and his case. "I believe then as I do now that he was attempting to make himself look like the victim in this case to his wife and children in an attempt to manipulate their feelings for him and to make them feel guilty for his situation". (H. 349). Ms. Compton's conflict of interest deprived him of the true adversarial testing the 6th Amendment requires. Ms. Compton jumped to this conclusion with never having spoken to Sanchez's wife and daughters. Ms. Compton NEVER believed Sanchez was innocent, she never intended to defend him, she simply took his money and car. The record is clear at 4:26 pm on May 25, 2016 Ms. Compton emailed the signed plea to the D.A. (H. 329). A total of 86 minutes had passed since she had blindsided him with the plea and pressured him into signing it. The evidence shows that Sanchez signed the paperwork on May 25, 2016. (G. 281)

In her office Ms. Compton failed to go into detail as to what he was signing, she only presented "a lot of pressure filled with negative prospects of receiving a life sentence if I pushed for trial by jury." (H. 340) With no significant investigation Ms. Compton condemned Sanchez to prison. She never mentioned appeal waivers or inquired

if he was interested in appealing.

Ms. Compton claims "Mr. Sanchez had almost two weeks to reconsider his plea and never communicated to me that he did not want to accept the plea." (H.350). Sanchez was never informed that he could 'reconsider' his plea. To the contrary, Ms. Compton only informed him that he should take this time to spend with his family. (H.333) Ms. Compton lied to Sanchez when she told him he did not have to surrender himself to the court until July 19, 2016 and that is what the D.A. agreed to. (H.329, H.330). The D.A.'s email clearly does not reflect Ms. Compton's statement. (H.330). The D.A. was adamant "the defendant must plea guilty and be sentenced on our pre-trial date of 6/7/16". (H.330).

Ms. Compton's manipulative tactics are now more apparent in her perjured sworn testimony in that she had "reviewed... medical records. I filed motions to suppress evidence that I believe we should try to keep out of the case". She claims to have obtained Sanchez's medical records from San Antonio Methodist Hospital where he received two weeks of I.C.U. life saving treatment. (H.347, H.293-H.311)

The state court records do not lie, Ms. Compton never obtained these critical medical records. (H.287-H.292).

The only subpoenas Ms. Compton filed were for the custodian of records to appear in court, on the day set for trial, June 7, 2016, with the medical records. (H.288, H.291)

The first time Ms. Compton would have 'reviewed' his medical records would have been during trial. This does not meet an objectively reasonable standard.

Ms. Compton deceived the state habeas court and yet Judge Crawford ruled this credible, as did the TCCA, Judge Rodriguez, and the Fifth Circuit. Ms. Compton's affidavit testimony is not credible. Applying credibility to perjured sworn testimony is not "a guard against extreme malfunctions in the state criminal justice system". *Harawton* 562 U.S. at 102, 131 S.Ct 770.

On June 7, 2016 before his plea hearing Sanchez "told my attorney I wanted to appeal." however, "She told me that

was not possible --" (~~H.340~~ H.340).

Certainly, Sanchez's affidavit alone would be open to scrutiny. However, to bolster credibility, Sanchez also submits two other affidavits from two of his aunts, Rebecca and Martha Torres, who were present at his plea hearing. (H.336 - H.339). Rebecca testifies that "When I questioned her about -- speaking it -- Ms. Compton became very agitated -- informing me that the plea was set and could not be appealed." (H.338). Martha testifies "Then my sister preceded to ask her a question about appealing the plea -- Ms. Compton -- became irritated -- impolitely told us that nothing else could be done." (H.336). What makes these two affidavits testimony survive all scepticism is the fact that they were submitted in Sanchez's first state habeas proceeding in support of a different ineffective assistance claim. Neither Sanchez nor his aunts are clairvoyant and were incapable of knowing this Court would decide *Guzera* two years later. Sanchez's aunts' affidavits were submitted on June 27, 2017. (H.337, H.339)

To cement Sanchez and his aunts' credibility and erase all doubt, Ms. Compton acknowledges this interaction between her, Sanchez, and his aunts. "I told a woman that I'd never seen before that I was going to discuss the case with Hector and not any one else because we'd already gone over all this and it was not going to be a family meeting at this point." (H.351). Just as Ms. Compton failed to consult with Sanchez in her office, she failed to do so once again at his plea hearing. 'At this point' Sanchez and his family were minutes from being torn apart for up to 20 years.

Ms. Compton never informed him that she could have requested the Court's permission to appeal or that Sanchez could have appealed the written motions that were filed before trial. See, Tex.C.Crim.Proc. art 44.02

"a defendant must know that he had a right to appeal and that he was giving up that right." *United States v. Portillo*, 18 F.3d 290, 292 (5th Cir. 1994). It is beyond dispute that Sanchez and his family did in fact say "something to counsel indicating that he had no interest in appealing." *Long Van Phan v. United States*, 722 F.3d 320 (5th Cir. 2013).

After Sanchez, under insurmountable mental pressure, pled guilty before the court he instructs Ms. Compton "I again told my attorney that I wanted to appeal." To which she replied "that an appeal is not applicable when you plea bargain and when you sign our all of your rights agreeing ~~to~~ to an appeal waiver." (H.340). Ms. Compton "then showed [Sanchez] a paper and said 'look, the judge check off right here that you have no right of appeal and that you waived the right of appeal'". To which he told her "You never explained to me that that was part of the deal. Show me what all I signed". She left where I was being held at and never came back. I never seen her again". (H.341). The state court records are clear, Ms. Compton never filed a notice of appeal. It is also evident that Ms. Compton's failure to perform her constitutional duty to consult about appealing caused Sanchez to unintelligently, unknowingly, and involuntarily sign the waiver of appeal.

It is obvious that Ms. Compton's sole intention was to send Sanchez to prison and walk away just as she in fact did. Her lack of interest in defending him is blatantly apparent when Mariah testified that "She then pressured us to sign the plea deal with hardly any time to do so". (H.354, H.356). Jennifer testified "She gave my dad little time to sign -- my dad's lawyer had never called me. I wanted to talk to her before hand to clarify what happened". Adela testified that (whether in Spanish) his "attorney didn't want to talk to them" and she didn't give Hector ~~time~~ any time, that she just told him

to sign and plead guilty. (H.364, H.370).

This Court clarified that "consult" meant "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Ortega*, 528 U.S. 470. Cf. *White v. Johnson*, 180 F.3d 648, 652 (5th Cir 1999) ("counsel's duty to [consult] requires more than simply notice that an appeal is available or advise that an appeal may be available").

Sanchez has 'reasonably demonstrated' that he did in fact inform his lawyer that he wanted to appeal. There is little doubt Ms. Compton's failure to consult about appealing invalidates the appeal waiver, which opens Sanchez to be able to appeal a broader range of issues. He has already in this brief made mention that he is entitled to a *Jackson v. Denno* hearing, a Fourth and Fourteenth Amendment illegal search and seizure, and of course Sixth Amendment ineffective assistance of counsel. Sanchez's available appealable issues are not limited to the matters asserted in this brief, he may have a meritorious Brady violation as well. The fact of the matter is that he will appeal, which claims will be presented will be for Sanchez's appeal lawyer to present after consulting with him.

Sanchez has clearly demonstrated that "there was no reasonable basis for the state to deny relief." *Warrington v. Richter*, 562 U.S. 86, 93, 131 S.Ct. 770 (2011). Sanchez is entitled to habeas relief, he is entitled to an out-of-time appeal. This Court ought to "carefully examine [Texas'] procedural rule requirements to ensure that they do not operate to discriminate against claims of Federal rights." *Brown v. Western R. Co. of Ala.*, 338 U.S. 294, 298, 70 S.Ct. 105 (1950).

Further more, the trial court likewise failed in its duty to ensure Sanchez entered a voluntary waiver of appeal. "The defendant's waiver is unknowing and involuntary where the [trial] court explains the terms of the appellate waiver incorrectly, *United States v. Delgado-Ramirez*, 263 F. App'x 983, 984 (5th Cir. 2007), or not at all, *United States v. Robinson*, 137 F.3d 516, 518 (5th Cir. 1999) ('A defendant's waiver of [his] right to appeal deserves and, indeed, requires the special attention of the [trial] court:')." *United States v. Jacobs*, 635 F.3d 778 (5th Cir. 2011).

The trial court never inquired if Sanchez was interested in appealing. The trial court's certification of right to appeal states an ambiguous 'no right to appeal'. ("G.281 (a)"). The trial judge William Kirkendall never defined any ~~scope~~ scope of Sanchez's rights to appeal. Since plea bargains are "essentially contracts", (*Puckett*, 556 U.S. 129), applying "normal principles of contract interpretation" (*Codey*, 590 F.3d 293, 296, (5th Cir. 2009)) of the trial court's ~~waiver~~ waiver it is apparent the certification is contrary to Greer's holding that "no appeal waiver serves as an absolute bar to all appellate claims" *id.*, at 739.

Courts have recognized "given the significance of the rights they involve, we construe appeal waivers narrowly, and against the government" *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006). The trial court's 'no right to appeal' hurts the states posture, because "any ambiguity must be construed in favor of the defendant's right to appeal." *United States v. Sommer*, 127 F.3d 405, 408 (5th Cir. 1997). The record shows the trial judge was not "so clear and informative as to substitute for counsel's duty to consult." *Flores*, at 480. The fact "that the trial judge erroneously failed to advise [Sanchez] of his rights] to appeal... since this deprivation appears on the record before us" may only weigh in favor of granting Sanchez relief. *Rodriguez*, 395 U.S., at 340.

Conclusion

Ms. Compton's tenure as Sanchez's attorney should not be able to be construed as objectively reasonable.

Her now apparent "conflict of interest adversely affected [her] performance." *Cyler v. Sullivan*, 446 U.S. 335. Her then hidden, negative attitude towards Sanchez infected her from even performing a bare minimum 'purely ministerial act' of filing a notice of appeal after he clearly demonstrated his interest in appealing.

Sanchez "retained a right to appeal at least some issues despite the waiver he signed. In other words, [Sanchez] had a right to a proceeding, and was denied that proceeding altogether as a result of [Ms. Compton's] deficient performance." *Grera*, at 747.

Neither, the state habeas court, the TCCA, nor the Fifth Circuit considered whether Sanchez's *Grera* claim should be applied prospectively due to the circumstances in which his substantive right was violated during a critical stage. No court has challenged or contested Sanchez's contention that he indeed received ineffective assistance of counsel.

Absent any dispute, the reality that the Due Process and Equal Protection principles converge in this claim should have factored into a court's analysis of Sanchez's case. See *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2068 (1983).

Sanchez has met both prongs of his ineffective assistance of counsel claim. He has also demonstrated appealable claims to pacify a Court's exception to a *Strockland* claim. There is no doubt that the outcome would have been different. This Court should grant Sanchez habeas relief which would be in line with its consistent principles of fundamental and equitable fairness.