No. 20-8449

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN KEITH GORHAM — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR, TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRIAN KEITH GORHAM #01998550
(Your Name)

2665 PRISON RD 1
(Address)

Lovelady, Texas 75851
(City, State, Zip Code)

n/a
(Phone Number)

QUESTION(S) PRESENTED

Gorham will present three brief statements with three concise questions for this Honorable Court's review.

Gorham alleged multiple Sixth Amendment rights violations: first, the right to "an impartial [and legitimate] jury[:]" Because one juror, through deceit on voir dire, had gained a seat on the jury, though because of past and present criminal entanglements-even as the jury was seated he was facing revocation of probation and a ten year prison sentence-for crimes including those of moral turpitude (i.e., aggravated assault with a deadly weapon against a woman and child), who was categorically absolutely disqualified from jury service by constitutional as well as statutory law, had been erroneously empanelled; second, his right to an impartial jury was again violated, when the Court, upon learning of this error, in blatant violation of established law, disregarded the implied bias which the situation presented, maintained him on Gorham's jury and moved his trial forward rather than dismissing the disqualified juror and sua sponte declaring a mistrial; and third, the right to effective assistance of counsel during direct appeal, when appellate counsel failed to raise the Court's abuse of discretion for not sua sponte calling a mistrial. Gorham was then illegally convicted by a jury of illegitimate composition- eleven qualified and one absolutely disqualified jurors. The bias implied when an unqualified juror is empanelled impugns all confidence in a fair trial and a just result. In finding that Gorham had failed to show a valid claim of the denial of a constitutional right, the Fifth Circuit relied upon the standard promulgated in Slack v. McDonal,529 U.S. 473,484(2000),but wholly misapplied it to Gorham's case. This case presents the following questions:

Did the Fifth Circuit err in finding that no prejudice towards Gorham emanated from the bias implied by an absolutely unqualified juror being seated onbhis jury; from the Court's abuse of discretion in not sua sponte dismissing said unqualified juror and declaring a mistrial; and , from appellate counsel's failure to address the Court's abuse of discretion in this matter at that venue?

QUESTIONS PRESENTED

Gorham alleged that his trial counsel was ineffective for, a) opening the door to testimony accusing him of domestic violence and abusive behavior, b) opening the door to the introduction of testimony of past criminal history, and c) eliciting inadmissible testimony from an expert witness attesting to the truthfulness of the complainant. Gorham was covicted in large part, by the taint this left upon his already illegitimate jury. Counsel's errors unecessarily exposed the jury, as Justice Keel agreed, to testimony that was extraordinarily damaging to Gorham's character, and to prejudicial effect. In finding that Gorham had failed to show a valid claim of the denial of a constitutional right, the Fifth Circuit relied upon the standard set forth in Slack v. McDonald, 529 U.S. 473,484(2000), but grossly misapplied it to Gorham's case. The case thus presents the following question.

Did the Fifth Circuit err in finding that Gorham had not been prejudiced by his attorney opening the door to the character damaging testimony of alleged family violence, abuse and otherwise neglectful or ciminal behavior and did they, likewise, err in finding that Gorham had not been prejudiced when his attorney had elicited- from an expert- inadmissible testimony in which this expert declared his accuser to be believed as absolutely truthful?

Using a habeas applcation form, dated 01/14/14, Gorham submitted his 11.07; it was duly accepted by the court. Gorham then filed a supplemental ground (#11) to his application, but this single additional ground he submitted on plain paper rather than on the prescribed application form. Because there is a poverty of written instruction (clear or otherwise) regarding the submission of additional ground to supplement or otherwise amend an application which has been accepted by the court, but not yet decided, Gorham did not understand the expectation that he, in order to effect the addition of another ground, resubmit his application in its entirity (including the additional ground) on the prescribed form. That the 175th Dist. Court likewise did not understand this became demonstratedly clear when they accepted Gorham's supplemental ground-on plain paper- and answered it on its merits. The actions of the 175th in this matter clearly demonstrates that this rule is not clear, and a plethora of court decisions on similar matters stren-

uously suggest that neither is it firmly established. Time barring further action from Gorham then was a simple matter of procedural ploys. This case thus presents the following questions.

Did the Fifth Circuit err in finding, that Gorham is not entitled to relief, solely because he failed to comply with a procedural rule that is so ambiguous that even the courts themselves seem not to fully apprehend it; that Gorham is time barred; and that the Court is more apt to consider an undeniably ambiguous procedural rule rather than a structural constitutional error?

LIST OF PARTIES

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

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

RELATED CASES

State v. Gorham,2012-CR-10383 (175th Dist.Ct.,Bexar Co.,Tex.April 17, 2015).

- Gorham v. State, No.04-15-00305-CR (Tex.App.-San Antonio,February 11,2016, no pet.).
- Ex parte Gorham, No.84,647-02 (Tex.Crim.App.) Judgment entered May 3,2017.
- Ex parte Gorham, No.84,647-03 (Tex.Crim.App.) Judgment entered June 5,2019
- Gorham v. Davis, No.5:19-CV-00743 U.S.District Court for the Western District of Texas. Judgment entered Nov.25,2019.
- Gorham v. Lumpkin, No.19-51188, U.S.Court of Appeals for the Fifth Circuit. Judgment entered March 2,2021.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

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

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

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

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

[x] For cases from **state courts:**

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

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

The opinion of the Fourth Court of Appeals court appears at Appendix B to the petition and is

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

[X] For cases from **state courts cont.:**

The opinion of the 175th District Court.,Bexar Co.,Tex. appears at Appendix A to the petition and is

[ ] reported at _____;or,

[ ] has been designated for publication but is not yet reported;or,

[x] is unpublished

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was March 02, 2021.

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

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

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

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

[xx] For cases from **state courts:**

The date on which the highest state court decided my case was 06/05/2019. A copy of that decision appears at Appendix C &D.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST.,AMEND.VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of hte nautre and cause of the accusation; to be confronted with the witnesses against him;to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST.,AMEND.XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of a process issued by a State court; or

(B) the final order in a proceeding under section 2255

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Mr.Brian Gorham ("Gorham") was charged and convicted in State v. Gorham,No.2012-CR-10383 (175th Dist.Ct.,Bexar Co.,Tex.April 17,2015). Gorham was sentenced to life and appealed to the Texas Fourth Court of Appeals represented by appellate attorney Andrew Fletcher ("Fletcher"). Gorham's conviction was affirmed on direct appeal and his motion for rehearing was denied on February 11,2016. Gorham v. State,No.04-15-00305-CR(Tex.App.-San Antonio,Feb.11,2016,no pet.).

Gorham,pro se and a layman and untrained in any aspect of the law, strenuously labored in preparing and researching his state habeas corpus challenging his conviction and sentence, filed on October 27,2016,which was ultimately dismissed by the Texas Court of Criminal Appeals ("CCA") on May 3,2017, for failing to comply with the Texas Rules of Appellate Procedure ("TRAP"). Ex parte Gorham,No.84,647-02(Tex.Crim.App.). Twelve days later Gorham resubmitted his "Supplemented" 11.07 arguing the exact same grounds,which was subsequently denied without written order on June 5, 2019. Ex parte Gorham,No.84,647-03(Tex.Crim.App.). Sixteen days later Gorham mailed in his Federal habeas petition.

On November 25,2019 U.S.Dist.Judge Orlando Garcia DENIED Gorham's §2254 stating "...barred by the statute of limitations set forth in 28 U.S.C.§2244(d). On March 26,2020 Gorham appealed this procedural decision (no ruling on grounds) to the 5th Circuit, Gorham v. Lumpkin, No.19-51188(5th Cir.) that was also DENIED on March 2,2021 stating in pertinent "Gorham has failed to make the requisite showing." Gorham timely files this Writ of Certiorari ("WOC") to this Honorable Supreme Court of the United States.

Jury Sworn and Impaneled Prior to Start of Testimony.

On February 24,2015 a jury of twelve was selected,sworn (panel and juror oath) and impaneled in Cause No.2012-CR-10383 (175th,San Antonio Texas). The same day after the jury was dismissed,juror number 12 Francis Achebe ("Achebe") was arrested on a Motion to Revoke ("MTR") blue warrant. This warrant was based on a 2007 conviction out of Bexar County, Texas that Achebe pled guilty to Aggravated Assault with a Deadly Weapon (against woman and child). Achebe was placed on probation for 10 years on January 12, 2009, and he violated his Felony Probation.

On February 25,2015,Achebe somehow bailed out of jail and returned to jury duty. This is relevant because typically on a "blue warrant" there is no bail, and this is highly suspicious as he was "SATISFACTORILY" terminated off probation less than two months later.(see EX"FF").[2] At this point ADA Alexander ("Alexander") and trial attorney Rolando Garcia ("Garcia") had already discussed any options available and then informed Honorable M.Roman ("Hon.Roman") about this "situation." Gorham was not informed by Garcia of all options available,just, if Gorham wanted to go forward with eleven jurors. Gorham was advised to decline using eleven jurors. Hon.Roman decided to take a recess to allow her legal team to research the laws that are applicable in this "situation." After the recess, the court holds a hearing so both sides can question this juror. The following questioning and testimony is had in pertinent part (see 3RR6,16-21;7,11-12;8,1-22):

> THE COURT: Anything we need to cover? MR.ALEXANDER: Yeah,I need to develop the record for it, Judge. But I'm going to be arguing he's disabled under 36.29. And that the Court then has the discretion to go forward over defense counsel's objection with 11; THE COURT: Achebe. We need to ask some questions. We understand that you were at the Municipal Court, you were paying tickets,and you were arrested. THE VENIREPERSON: Yes. THE COURT: You are now out on bond is that correct? THE VENIREPERSON: Yes,Ma'am. THE COURT: It appears that you are on probation for aggravated assault with a deadly weapon,is that correct,out of 379th? THE VENIREPERSON: Yes,Ma'am. THE COURT: There is a motion to enter adjudication, which means,basically, that there are some allegations of infractions. And are there any allegations of No.1's which is another crime? THE VENIREPERSON: No Ma'am. THE COURT: They're all technicals then is that correct? THE VENIREPERSON: Yes Ma'am,correct. THE COURT: Failure to report? THE VENIREPERSON: No it was actually marijuana I came under-- THE COURT: Paying your fees and fines, is that what you're saying? THE VENIREPERSON: No. THE COURT: What is it? THE VENIREPERSON: They did a urinalysis and they said that I had a certain amount of marijuana. THE COURT: A positive UA THE VENIREPERSON: Yes Ma'am THE COURT: Anything else? we call that a No.2 allegation okay...;MR. ALEXANDER: Mr.Achebe, I'm trying to figure out where to start here. I guess let's start with the case your on probation for. It's 2004-CR-9090,right? THE VENIREPERSON: Yes,Sir. MR.ALEXANDER: I did a little research on the case. It's for aggravated assault with a deadly weapon; is that right? THE VENIREPERSON: Alleged. MR.ALEXANDER: The alleged facts,right, a woman claimed that you came to her home with

[2] Reporter's Record will be referred as, volume-RR-page number-lines, i.e., 3RR12,16-21. Exhibits will be posed as EX"__."

a shotgun,correct,and that you pointed it at her and/or her children because someone owed you something right,like you needed something back? THE VENIREPERSON: That's their story. I never- MR. ALEXANDER: And again, it's alleged that you were threatening to shoot someone and you departed the scene.

Garcia objects (see 3RR9,23-25;10,1-3):

MR.GARCIA: Your Honor, I'm going to object to this line of questioning. And the issues should be restricted to whether Mr.Achebe can be fair and impartial. And you know just developing the record to--in an inflammatory manner is highly objectionable.

Achebe had previous encounters with the law and the court system including marijuana posession,driving while license invalid,criminal mischief $1500.00-$20,000.00, and aggravated assault with a deadly weapon to name a few. (See EX"BB"). Achebe has been caught lying to the judge twice about why he was arrested, lied on his juror card (see EX"AA"), lied taking the panel and juror oath,and now he'll be caught again during Alexander's questioning (3RR12,8-25;13,1-10) in part:

MR.ALEXANDER: Do you remember downstairs yesterday being placed under oath by the presiding Judge-- THE VENIREPERSON: Yes,Sir. MR. ALEXANDER: --swearing to tell the truth? THE VENIREPERSON: Yes, Sir. MR.ALEXANDER: Do you remember filling out your juror card? THE VENIREPERSON: Yes,Sir. MR.ALEXANDER: This is your card isn't it? THE VENIREPERSON: Yes. MR.ALEXANDER: Do you see this line here, have you ever been accused,complainant or a witness[3] in a criminal case? THE VENIREPERSON: Yes. MR.ALEXANDER: And you filled this out? THE VENIREPERSON: Uh-huh. MR.ALEXANDER: What box is checked off? THE VENIREPERSON: I put no there. MR.ALEXANDER: You've been accused nine different times. THE VENIREPERSON: Never convicted. MR. ALEXANDER: But listen to my words. You have been accused?[3] THE VENIREPERSON: Yes.

Alexander speaking to the court (3RR 14,14-25;15,1-4):

MR.ALEXANDER: And Judge, I'm going to ask the court, one,to take judicial notice of essential jury room proceedings as the Court has presided over it as well, and the oath that is administered. I'm also going to be offering---I'll show it to defense counsel--Mr. Achebe's juror card as Exhibit No. A, his criminal history report for the D.A.'s office judicial dialogue software as Exhibit B, and his motion to enter adjudication of guilt and revoke his community supervision that's currently active[3] out of the 379th District Court under Cause No.2004-CR-9090 as Exhibit C. MR.GARCIA: No objection. MR.ALEXANDER: And ask that they be entered into the record for purposes of appellate review.[3]

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[3] my emphasis throughout,i.e., absolutely disqualified[3]

Alexander doesn't dare ask for a mistrial at this point,but instead he tries to pursuade the 175th that Achebe is "disabled."(3RR18,13-25):

> MR.ALEXANDER: I think he's clearly demonstrated that his condition of being an active defendant in our jurisdiction makes him unable to fully and fairly perform his function as a juror. And the Court has discretion and actually, let me poin--before I go there--let me point the Court to another case which is Reyes v. State and this is 30SW3d409. Now that case is on point because it talks about jurors being disabled because of their situation. This is also out of the Court of Criminal Appeals. Mr. Achebe because of his situtation, because of being a probationer supervised in this county, I believe is disabled.

Alexander continues his attempt to mislead the 175th. He even gives her the standard of review.(3RR19-20):

> Also,because of his situation of being untruthful during the voir dire process has made him disabled. Now, Judge you have discretion in this matter as to whether or not to declare him disabled. And that was given to us by the Court of Criminal Appeals under Scales v. State. And that would be 380 S.W. 3d 780. THE COURT: 380? MR. ALEXANDER: Yes,ma'am. S.W.3d 780. It's a 2012 case. And that one--what's important about that, not only does it tell you that you have discretion in these matter, but also the standard of review upon appeal[3] is abuse of discretion, which the Court is aware is a very forgiving standard. Because the appellate court realizes that's there's no one in a better situation to assess this individual in a situation than the trial court that was watching it happen. As a backup, Judge, if you don't believe he's disabled, which I think he is, I think he can also be excused because of implied bias[3]. Now, he says he can be fair and impartial, but I don't really think he can. Now there have been cases that have gone through, not only the Court of Criminal Appeals, which would be you Uranga v. State, which is 330 S.W.3d 301. There has also been several that's gone through the Fifth Circuit, Hatton v. Quarterman[3] at 570 F.3d 595, And I won't bore you with the rest. But essentially, these are situations in which the Court was able to determine that a person had an implied bias. An example would be, an assistant district attorney on the panel, who gives all the right answers, and responds that,yes,I can be fair and impartial despite my employment. But the Court can and has found that because of this person's employment, because of their situation, they have an implied bias to go for a conviction. And I thin,by analogy,although normally argued by the defense, I think that's kind of what we have here too. Because he's actively being prosecuted in this jurisdiction by the district attorney's,regardless of his answers,he has an implied inherent bias. THE COURT: You have the cases on implied bias? MR.ALEXANDER: Actually, I have a little printout here Judge. There's a Fifth Circuit,Ninth Circuit. There's a cite to the U.S.Supreme Court, as well. And I also do have --although I have. . .

Garcia requests a recess (3RR21) so that he can do his own research. The judge allows the continuance and is contemplating the time

that she wants everyone back (see 3RR22). The court excuses the jury untill 3:30 (3RR23). The 175th wants to hear from Garcia about what he figured out during his continuence. Garcia does not lie, he tell the judge exactly and only the truth, that Achebe is not "disabled"[3] (3RR26 1-6,18-22):

> . . .position is the same position. It hasn't changed over the lunch hour. We feel that in order to disqualify or to classify a juror as disabled a juror has to be suffering from a physical illness, mental condition and emotional state that hinders his ability to perform... And based on the fact that the State wasn't able to establish that he had any condition that would impair his ability to serve as a juror, the defense maintains that he should be--that he should continue as a participating member of this jury.

Here is where Alexander tries to sway the court into believing his arguement is valid (3RR27;28,1-11):

> MR.ALEXANDER: Again,I am going to reurge the point. The Court of Criminal Appeals stated in the Hill case,that disabled means any condition--any condition that inhibits a juror from fully and fairly performing the function of a juror. Not despite what his words are --and by the way, Judge,you have the discretion not to believe him. But no matter what he stated on the record, he is being--because of his situation, he is being actively prosecuted by the same office that I am employed by in this jurisdiction for a 3G felony offense. It is not his first time in court. It is not even his first criminal allegation.
> The fact that he has demonstrated his inability to follow his oath, just to tell the truth[3] by,frankly, **lying on his juror card**[3] I think shows that he is not able to fully and fairly carry out his role as a juror. And I think he's disabled because of that,because of the situation he has put himself in, not only through his criminal conduct,but through his being less than forthcoming during the jury selection process.[3] THE COURT: The problem remains that he has stated that he can be fair and impartial despite everything that you brought out, despite the fact that he's on probation, despite the fact that there's a motion to enter. And I just don't see how-- MR.ALEXANDER: I would also argue that he's inherently biased on his situation and is therefore disqualified. THE COURT: Well,we have done our very best to research everything that we can,and I am convinced that I have not been able to overcome that hurdle. And so I'm going to allow him to stay on the jury.

Hon.Judge Roman has just allowed an absolutely disqualified juror to remain on Gorham's jury; instead of calling a mistrial under manifest necessity. The records are crystal clear, it could not get any clearer, Achebe lied, verifiable lies totaling eleven times. Achebe has been convicted of Aggravated Assault with a Deadly Weapon, a high crime, a 3G offense against a woman and her child, making it a crime of moral turpitude.

Trial on the Merits During Guilt/Innocence

During cross-examination of B.Stockford (complainant's mother) Garcia deliberately opened the door to inadmissible evidence by going into specific acts of misconduct, not relevant to the charge.

Garcia opened the door and let the jury hear inadmissible evidence of (alleged) domestic violence,child abuse/neglect, only making Gorham appear like an unfit parent, an unsupporting fiance, when in reality it was quite the opposite.

Garcia opened the door by introducing a police report that was supposedly going to reveal Stockford's retalitory motive in fabricating allegations against Gorham. Alexander seen an opening and attacked admitting damaging evidence that went unrebutted.

This is what transpired in pertinent (4RR96-97):

> MR.ALEXANDER: Your Honor,I think due to counsel's last line of questioning, I think he has opened the door into specific instances of misconduct between this defendant and this witness, and I'l like to go into it at this point. (hearing outside presence of the jury). MR.ALEXANDER: Sure,Judge. I believe based on counsel's last line of questioning during cross-examination,where he was,I'm assuming, attempting to impeach this witness with a purported prior act of misconduct,this threat that he talked about, I believe he's now opened the door for me to be able to go into specific acts of misconduct committed by this defendant against this witness.

The 175th allows Alexander to continue questioning Stockford.(See 4RR97-99). From the objective record, Garcia during his attempted impeachment of Stockford, also known as the outcry witness clearly opened the door to specific acts of conduct inadmissible by Tex.Rules of Evidence ("TRE") 608(b),403 and 404(a)-(b). Garcia tries to justify his reasoning, but the court agrees with Alexander and allows him to proceed. (see 4RR100,13-20):

> MR.GARCIA: Your Honor, I think we're going outside of scope 404(b) for prior acts. I think it was related to the offense report. MR. ALEXANDER: Actually,Judge, this also goes into the door that I believe he opened while cross-examining the complainant. His specific question was about how this defendant treated her. THE COURT: You may proceed.

Garcia opened this door by mistake violating TRE 608(b). Inadmissible under 404(a) Gorham was never convicted or even charged with a crime. the outcry witness, Mother of the complainant, ex-fiance who had been recently asked to move out of Gorham's home, has every motive to be untruthful and to mislead the jury.

Furthermore CPS Investigator Alexandria Lom (State's Expert witness) on cross was asked by Garcia (4RR124,20-25;125,9-13):

> Q. And,once again,as we're going along the track of your agency does,you're still functioning or your agency is still functioning under the assumption that this[3] child is telling the truth,correct? A. Well,we had a valid outcry,sir. Q. (by MR.GARCIA) Are you telling this jury that when a child makes an automatic outcry-makes an outcry that that child is telling-you're absolutely sure that child is telling the truth? A. Yes.

Garcia's questioning regarding the truthfulness of this child continues.(4RR125). Alexander requests a bench conference and the 175th states the following. (4RR126,1-6):

> THE COURT: It's not their function to decide whether the child is telling the truth or not. That's not their function. All they do is a video. They take the information.They have no business trying to figure out whether the child is telling the truth and if this information from her which is----.

It is all to clear the 175th recognizes that this is a violation of TRE 702, as it relates to the truthfulness of a witness. A further review of the record will affirm this in pertinent (4RR127,5-18;128,14-25):

> MR.GARCIA: But she just said-and that's what triggers it-that automatically,she said that any child that makes an outcry,is automatically telling the truth. MR.ALEXANDER: Your question was that she ended up agreeing with you. THE COURT: This is the problem. That this agency cannot make that assumption,all they do is take the information. They record. They ask questions as they're supposed to. But for them to assume that the child is telling the truth is not their responsibility. So I don't know how you got that answer out of her,but that is erroneous[3];in my opinion. I just have never[3] heard that before. Never[3]. And here's the problem. That response should never be asked during a trial. A doctor can't say that,neither can anyone else...MR.GARCIA: But Judge,what if-what if in their mind they feel that way,Judge? Because some of the professionals do. THE COURT: The objection needed to be made. She cannot give that opinion. MR.GARCIA: Okay,that's the second. THE COURT: Can give that opinion, and that includes doctors.

Prosecutor Alexander took an unorthodox step of asking for a limiting instruction, something Garcia failed to do. Garcia leaves this in the minds of the jury during his closing arguments (see 5RR67) "Because you have the first initial contact, CPS, they're automatically guilty. You heard her, "Kids don't lie."

Finally, Gorham is influenced to take the stand. Almost from the beginning of cross-examination Alexander attacks Gorham's credibility while testing his integrity. (see 5RR46,2-18):

Q. Well,let me slow you down right there. So April 1998,in the Reno Township of Nevada, you were convicted for operating a motor vehicle while intoxicated, were't you? A. If that--yes. Q. Also, in September of 2001, in Sparks, Nevada, you were convicted for operating a motor vehicle while intoxicated? A. Correct Q. And also in December 2004, in East Fork Township, Douglas County,Nevada, you were convicted of operating a motor vehicle while intoxicated? A. Correct Q. And you're even currently under indictment for operating a motor vehicle while intoxicated within our jurisdiction, aren't you? A. Correct.

Garcia never objected one time. Garcia knowing this case is strictly a he said-she said, and that credibility had everything to do with it. Alexander purposely violated TRE 609(b) and 404(b) to assasinate Gorham's character and gain a conviction on irrelevant inadmissible evidence.

Gorham;after having been judged by an illegally composed jury, in which one absolutely disqualified juror- because he was a convicted felon,who had a ten year prison sentence hanging over his head for violating his felony probation-had been impaneled;after having been denied effective counsel,as his attorney failed to object to the ADA's illegal impeachment,using crimes over ten years old, and completely irrelevant to the case being tried,and opening the door to the presentation of inadmissible evidence of "alleged" misconduct between Gorham and the complainant's mother,severly damaging his credibility,and eliciting further inadmissible testimonial evidence from an expert witness, on the truthfulness of the complainant;and after the State offerred neither DNA nor medical exams or reports,no evidence at all, in fact, excepting a rather disingenuous fabrication stemming from strife;was found guilty and Hon.Roman sentenced him to life in prison. Gorham still,and has continuously maintained his innocence, and by way of this WOC demonstrates his resolve;he will not abandon his expectation of Judicial Justice.

Post-Conviction Appeal and Writ of Habeas Corpus Proceedings

Gorham timely filed a notice of appeal and was appointed Bexar Co., appellate Public Defender Richard Dulany ("Dulany"). Five months after sentencing and coincidentally the day Dulany turned in Gorham's brief he was fired. Dulany's brief never was submitted to the Fourth Court of Appeals. Dulany in a reply email to Gorham's father stated "I was fired yesterday.Coincidentally I was also going to file Brian's brief yesterday. I'm going to send you a much more detailed message when I'm

at my computer. It is a bad situation and I will give you some options." (See EX"DD").

Andrew Fletcher was assigned the case on September 28,2015 and two days later after "mastering" the record,he files the same one ground Dulany already prepared. Fletcher files an IAC claim on appeal,knowing this type of claim on appeal is the hardest to win,most complex and must be clear by the record, and no other grounds. Gorham's appeal was "affirmed" in part because the Fouth Court of Appeals couldn't tell from the record what trial counsel's strategy was. Gorham will reiterate, Dulany wrote the brief, Fletcher plagiarized the brief and signed it as if he wrote it and submitted on September 30,2015.

Fletcher's one ground claimed Garcia failed to object to an "Absolute Disqualified" juror preserving error for appeal and that Garcia lacked legal knowledge. (see Appellant's Brief).

On October 27,2016 after diligently pursuing his right,Gorham properly filed his state habeas 11.07 containing ten grounds. On November 15, 2016 in a "boiler plate" reply the state denied all allegations generally.

On November 17,2016 Gorham filed a "Motion to Recuse" trial Judge Roman who's also the current habeas judge. Gorham's recusal motion was in compliance with Tex.Rules Civ.Proc (TRCP) 18(a)-(b). Hon.M.Skinner "Denied" this motion for[3] Roman on November 30,2016. On December 5,2016 Hon.Roman issues an "Order Designating Issues" ("ODI") to trial counsel Garcia and appellate counsel Fletcher.

Gorham then files a "writ of mandamus" on December 27,2017 asking the Fourth Court of Appeals to compel Hon.Roman to comply with the Rules set out in TRCP 18(a)(f)(1)(A)(B). On January 5,2017 the Appeals Court dismisses as "Moot" as Roman was succeeded at her post (by Torres-Stahl).

Gorham then files a "Supplemental Ground[3] Eleven to Applicant's 11.07 Writ of Habeas Corpus." on February 21,2017. This ground eleven is erroneously accepted,considered and answered on it's merits.

On May 3,2017 the CCA "dismissed your application for writ of habeas corpus without written order for non-compliance with Texas Rules of Appellate Procedure 73.1. Specifically,applicant's supplemental ground eleven is not set out on the prescribed form. Gorham did not receive the dismissal until May 9,2017 and eight days later re-submitted his

second application challenging the same conviction raising the exact same grounds only incorporating ground 11 in the entire application.

On August 23,2017 the CCA remanded Gorham's 11.07 back to the 175th to further develop the record. The CCA gave the 175th 120 days to hold a hearing and have it's FFCL back to them. On November 21,2017 Hon. Judge Melissa T. Herr,not Hon.Roman,not Hon.Torres-Stahl,not Hon.M. Skinner recommended Gorham's writ be "denied."

On April 18,2018 the CCA re-remanded Gorham's 11.07 to the 175th compelling her to get Garcia to respond to the allegations. The 175th for the third time recommended that the CCA deny Gorham's 11.07.

Over a year later on June 5,2019 the CCA denied Gorham's 11.07 without written order. Honorable Justice Keel dissenting and Hon.Justice Yeary did not participate. Gorham received his denial on June 11,2019 and 13 days later filed his federal writ of habeas corpus.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT ERRED IN ITS APPLICATION OF SLACK V. MCDONALD WHEN IT DECLARED,"GORHAM HAS FAILED TO MAKE THE REQUISITE SHOWING," THAT "JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT." THIS GORHAM HAS SHOWN MANIFESTLY;THIS FACT WARRANTS THIS COURT'S ATTENTION.

The Fifth Circuit's opinion misapplied Slack v. McDonald,529U.S.473, 484(2000). First, the Court states "Gorham has failed to make the requisite showing." The Court is saying Gorham's petition does not state a valid claim of the denial of a constitutional right. In this issue alone there are three constitutional violations, Ineffective Assistance of Counsel ("IAC"); Right to trial by impartial jury,and; Abuse of Discretion ("AOD") on the trial court ("175th"). This is fact and Gorham will now show this Court he is entitled to relief.

Gorham's right to trial,by an impartial jury did not happen in the state court. Gorham will start with Texas state cases in urging relief. Citing the CCA in Butler v. State,830 S.W.2d 125(Tex.Crim.App.1992), "this Court in Moore,acknowledged that a trial judge should not Sua sponte excuse a juror except on grounds of **absolute disqualification.**" Gorham emphasizes the relevant part of In R.R.E. v. Glenn,884 S.W.2d 189(Tex.App.-Ft.Worth 1994):

> "While we make no holding as to the validity of this article, the effect of our opinion is that a party,whether he be a party to a civil action or a defendant in a criminal action, has not been afforded his Constitutional rights if the jury composition in his case includes a person who has been convicted of a felony and has not been pardoned by the Govenor."

Gorham cites the Texas Code of Criminal Procedure ("TCCP"):

Art. 35.19 Absolute Disqualification

No juror shall be impaneled when it appears that he is subject to the second,third or fourth cause of challenge in Article 35.16, though both parties may consent.

Art. 35.16 Reasons for Challenge for Cause

(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons (in pertinent):

2. That the juror has been convicted of misdemeanor theft or a felony[3];

3. That the juror is under indictment or other legal accusation[3] for misdemeanor theft or a felony[3];

4. That the jury is insane;

No juror shall be impaneled when it appears that the juror is subject to the second,third or fourth grounds of challenge for cause set forth above,although both parties may consent. All other grounds for challenge may be waived[3] by the party or parties in whose favor such grounds of challenge exist.

Gorham cannot emphasize how close the similarities in his case and in Ex parte Smith,817 S.W.2d 797(Tex.App.-Amarillo 1991) in relevant:

"Appellant was charged by indictment for the offense of aggravated robbery. A jury was impaneled and sworn,appellant pleaded not guilty, and evidence was adduced on the first day of trial. That evening, one of the jurors contacted appellant's attorney and disclosed that he had a prior felony and conviction and was currently under indictment for felony offense. Before the trial resumed the next morning,appellant's attorney informed the court of the juror's disqualifications. See Tex. Code Crim.Proc.Ann.arts.35.16(a)(2)-(3),35.19 (Vernon 1989). ¶ The court questioned the juror and, after finding that he was absolutely disqualified, excused the juror. The State moved for a mistrial and,although appellant objected and implored the court to proceed with eleven jurors, the court declared a mistrial. ¶ In later denying the habeas corpus relief appellant sought, the court announced its earlier finding that manifest necessity[3] existed for declaring the mistrial. Still, the court considered appellant's urging of the application of the statutory provision for a verdict by eleven jurors in a felony case when 'one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury.' Tex. Code Crim.Proc.Ann.art.36.29(a)(Vernon Supp.1991). However, the court reasoned that for a juror to be disabled, the juror must first be "abled"[3] or qualified[3], but that the excused juror was absolutely disqualified and never constituted a juror[3]. Thus reasoning the court found that jeopardy did not attach;but,the court further found that if jeopardy did attach,manifest necessity existed for the mistrial. ¶ In Pfeffer v. State,683 S.W.2d 64(Tex.App.-Amarillo1984), pet'n ref'd,687 S.W.2d 768(Tex.Crim.App.1985),we held,upon settled authority, that jeopardy attached when the jury was impaneled and sworn to try the cause[3]; and that once jeopardy attached, defendant had the right to have his guilt or innocence determined by that jury unless, in the absence of his consent to a mistrial, a new trial was mandated by manifest necessity[3], such as the absolute disqualification of an impaneled juror. Thus, we conclude that upon discovering an impaneled juror was absolutely disqualified because of a misdemeanor theft conviction,the trial court had no viable alternative other than to declare a mistrial[3];even though defendant objected. . .Appellant does not challenge the holdings in Pfeffer that the impaneled juror's absolute disqualification created a manifest necessity for the mistrial without the attachment of jeopardy;¶¶ After a jury was impaneled and

and sworn in Strickland, one juror moved out of the county and,on it's own motion,the trial court granted a mistrial over defendant's objection.¶ Considering these authorities, the trial court correctly concluded that the Strickland court's holding in reliance on article 36.29(a) was not applicable to appellant's prosecution, and that the Tinney court's tacit approval of applying the article 36.29(a) procedure with defendant's consent was not an acceptable method for proceeding when an absolutely disqualified juror is erroneously impaneled[3]. It was determined in Carrillo v. State,597 S.W.2d 769,770-71(Tex.Crim. App.1980),that the discretion vested by, and to be exercised under, article 36.29(a) is limited to situations where a (qualified,impaneled) juror dies or is "disabled from sitting" because of a physical, mental or emotional condition. The limited discretion persists. Landrum v. State,788 S.W.2d 577,579(Tex.Crim.App.1990). It follows that article 36.29(a) cannot apply to the situation where an impaneled juror is absolutely disqualified because he has been convicted of, or is under indictment for, any felony. In that situation, neither the State nor Defendant can consent to waive disqualification[3],DeBlanc v. State,799 S.W.2d 701,707(Tex.Crim.App.1990),cert.denied, __U.S.__, 111 S.Ct.2912,115 L.Ed.2d 1075-76(1991),for "a new trial shall be ordered, without regard to a showing of injury or probable injury or of consent or waiver." Thomas v. State,796 S.W.2d 196,197-98(Tex.Crim. App.1990)(quoting Ex parte Bronson,158 Tex.Cr.R.133,254 S.W.2d 117, 121(1952)).

The law says,not Gorham,not Garcia,not Fletcher, "neither the State nor the defendant can consent to waive disqualification." Ex parte Smith, 817 S.W.2d 797. Gorham will cite Almanza v. State,585 S.W.3d 585(Tex. App.-Waco2017):

"To be tried by a jury is a category two right under Marin v. State, 851 S.W.2d 275,280(Tex.Crim.App.1998). It is catergorized as such because it is a right that must be implemented by the trial court unless affirmatively waived[3]. ¶ The Fort Worth Court of Appeals has held that a defendant may raise the issue of whether it is error to allow a disqualified juror to serve on the jury for the first time on appeal." Mayo v. State,971 S.W.2d 464(Tex.App.-Fort Worth 1998).

Gorham cites the relevant parts of Marin v. State,851 S.W.2d 275,280 (Tex.Crim.App.1993):

"Waivable rights,on the other hand,do not vanish so easily. Although a litigant might give them up and, indeed has a right to do so,he is never deemed to have done so in fact unless he says so plainly,freely,and intelligently, sometimes in writing and always on the record. Goffney v. State,843 S.W.2d 583,585(Tex.Crim.App.1992). He need make no request at trial for the implementation of such rights, as the judge has an independent duty to implement them absent an effective waiver by him. As a consequence, failure of the judge to implement them at trial is an error[3] which might be urged on appeal whether or not it was first urged in the trial court[3]. ¶ In the instant cause the Court of Appeals rightly determined that article 60.51(e) is waivable only, inasmuch as the Legislature said so expressly by providing that appointed counsel "may waive the [10

days of] preparation time with the consent of the defendant in writing or on the record in open court[3]."

There is a duty required of the 175th when she intends to depart from constitutional norms. The requirement is typically before[3] asking the parties if they acquies to the procedure. This duty is to provide a 'full and fair warning' as to the ramifications that waiving a constitutional right must entail. The record is void of asking Gorham anything during this hearing. This Court says in Powell v. Alabama,287 U.S.45,69(1932) "Even the intelligent and educated layman has a small and sometimes no skill in the science of law. . .He lacks both the skill and knowledge adequate to prepare his defense,. . ." The 175th and Garcia had obligatory duties to forewarn Gorham about his 'waiving' a right to an impartial jury.

The record is clear,Gorham, not Garcia, Gorham never gave up his right to an impartial jury plainly,freely,intelligently in writing and definetely not on the record. The 175th never asked Gorham, because she didn't even realize Achebe was absolutely disqualified, thus, abusing her discretion violating Gorham's due process and right to impartial jury. Gorham concludes the state cases and cites State v. Gutierrez, 541 S.W.3d 91(Tex.Crim.App.2017)"Sometimes voir dire can be reopened to explore a venire member's potential biases, but once the jury is sworn[3], the defendant's only remedy[3] for a harmful violation of his right to an impartial jury is a mistrial[3]." Franklin v. State,138 S.W.3d 351 (Tex.Crim.App.2004); Camacho v. State,864 S.W.2d 524(Tex.Crim.App.1993).

The 175th upon being notified of Achebe's absolute disqualification should have first[3] determined if Achebe failed to answer honestly a material question on voir dire,(including on his juror card and while taking both oaths) and that a correct response would have provided a valid basis for a challenge for cause. McDonough Power Equip.,Inc. V. Greenwood,464 U.S.548,556(1984). Had she done this first[3], the need for further hearing would be unecessary.

This Court expressed in Chapman v. California,386 U.S.18,21(1967) "Whether a conviction for a crime should stand when a state has failed to accord federal constitutionally guaranteed rights is every bit as much a federal question as what particular federal constitutional provisions mean, what they guarantee, and whether they have been denied." This issue should have been GRANTED on state habeas review and the USDC

and 5th Circuit don't even consider it to be a constitutional violation.

Gorham strongly believes Hon.Roman failed to realize she had an absolute disqualified juror on her hands. Hon.Roman held a hearing to determine if Achebe was biased[3] not absolutely disqualified. Gorham couldn't challenge nor strike him, he was already sworn and impaneled. Juror Achebe stated he can be fair and impartial, and this is what Hon. Roman based her decision on to keep him on Gorham's panel.(see3RR27). In Brooks v. Dretke,418 F.3d 430(5thCir.2005) a case precisely on point to Gorham's stating in applicable part "The determination of implied bias is an objective legal judgment made as a matter of law and is not controlled by sincere and credible assurances by the juror that he can be fair."

If Gorham decided to plead guilty, the Court must[3] 'fully and fairly' inform him (admonish) him of his rights and what he is actually waiving. The same goes if he chooses to represent himself at trial. The issue, Hon.Roman, never[3] once asked Gorham what he[3] wanted to do,this was also[3] an abuse of discretion. The Court in Ex parte Smith,817 S.W.2d797(Tex. App.-Amarillo 1991) made it perfectly clear in relevant part "...manifest necessity existed for declaring the mistrial...the juror must first be "abled" or qualified, but that the excused juror was absolutely disqualified and never constituted a juror...in absence of his consent to a mistrial, a new trial was mandated by manifest necessity,such as an absolute disqualification of an impaneled juror...the trial court had no viable alternative other than to declare a mistrial...neither the State nor defendant can consent[3] to waive diqualification."

Gorham filed IAC on his 11.07 because Fletcher failed to raise Abuse of Discretion on the 175th and here's Fletcher's reply in applicable part (see Fletcher's Affidavit to 11.07):

> "Mr.Gorham complains that I should have argued on appeal that the trial court ought to have sua sponte removed an empaneled juror, Francis Achebe, when it became apparent that he was absolutely disqualified, and not merely disabled. **I recognized,but did not raise**[3], that issue because I believed the applicant was precluded from raising the claim on direct appeal because the error was invited."

Fletcher was ineffective, says the case law in Ex parte Smith;Mayo v. State,971 S.W.2d 464(Tex.App.-Ft.Worth 1998);In R.R.E. v. Glenn,884 S.W.2d 189(Tex.App.-Ft.Worth 1994);Marin v. State,851 S.W.2d 275(Tex. Crim.App.1993);Camacho v. State,864 S.W.2d 524(Tex.Crim.App. 1993);

Butler v. State,830 S.W.2d 125(Tex.Crim.App.1992);DeBlanc v. State, 799 S.W.2d 701 (Tex.Crim.App.1990);Thomas v. State,796 S.W.2d 196(Tex. Crim.App.1990) and;Franklin v. State,138 S.W.3d 351(Tex.Crim.App.2004) were all available to him during the two days he mastered four days worth of trial transcripts. Fletcher clearly states "I recognized, but did not raise that issue because I believed the applicant was precluded from raising the claim on direct appeal because it was invited[3]." It is clear,Fletcher's opinion[3] was wrong and unreasonable and was not a fair appeal the result of which is worthy of confidence.

II. THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

• United States v. Sharpe,513 Fed.Appx.232(3rdCir.2013):

> "To obtain a new trial for false juror testimony, a defendant must show:(1) that the 'juror failed to answer honestly a material question on voir dire';and (2)'that a correct response would have provided a valid basis for a challenge for cause.' McDonough Power Equip.,Inc v. Greenwood,464 U.S.548,556,104 S.Ct.845,78 L.Ed.2d 663 (1984).¶ To satisfy the first prong of McDonough,a defendant must show that the juror's answer was dishonest, as opposed to merely 'mistaken, though honest.'" McDonough,464 U.S.at555.

- Gorham has shown this easily through the statement of the case and the aforementioned argument. Achebe lied at every stage, juror card, juror and panel oath and at the re-opening of voir dire. Felony conviction for Aggravated Assault with a Deadly Weapon (against woman and child).

• Sampson v. United States,724 F.3d 150 (1stCir.2013):

> "Defendant was deprived of his right to impartial jury and was entitled to a new penalty-phase hearing in capital case because of juror's repeated lies[3]...Few accounterments of our criminal justice system are either more fundamental or more precious than the accused's right to an impartial jury..but finality is also valuable, and not every instance of juror dishonesty requires setting aside a previously rendered verdict. Concluding, as we do, that we can proceed to the merits of the juror dishonest claim, we adopt the district court's finding of fact, articulate the proper legal framework, array the district court's findings of fact against that framework, and hold that the defendant's sentence must be set aside and a new penalty-phase hearing conducted."Id.

- Gorham has shown Achebe lied repeatedly. He had a ten year sentence hanging over his head, Would he jeopardize his freedom for Gorham's?

• U.S. v. Godfrey,787 F.3d 72(1stCir.2015):

> "We review the district court's ruling on a claim of juror bias for clear abuse of discretion. United States v. Lowe,145 F.3d 45,48(1st Cir.1998). In assessing juror bias claims,"the deference due to district courts is at it's pinnacle:'A trial court's findings of

juror impartiality may be overturned only for manifest error.'" Skilling v. U.S.,561 U.S.358,396(2010)(quoting Mu'Min v. Virginia, 500 U.S.415,428(1991)). That being said,the presence of even a single bias juror requires reversal. See Parker v. Gladden,385 U.S. 363,366(1966)(defendant "was entitled to be tried by 12,not 9 or even 10,impartial and unprejudiced jurors.").

- Gorham has presented precedent, argument and facts showing at least one juror was impartial explicitly or implicitly.

· Franklin v. Anderson,267 F.Supp.2d 768(S.D.Ohio 2003):

"The Court directs that judgment be entered in favor of the Petitioner and against Respondent on the Sixth Claim and the aspect of his first claim predicated upon failure of appellate counsel to raise the bias juror issue during his direct appeal...The Petitioner is entitled to a conditional writ of habeas corpus which will result in his release from custody if he is not retried within 180 days."

- Gorham has raised this claim in both 11.07's, §2254 and COA. Fletcher was ineffective, and admits he missed it because the lack of knowledge of law. Gorham a layman revealed this to him and he will not admit fault, takes no responsibility for Gorham's additional five years of incarceration. Gorham is entitled to release.

· Green v. White,232 F.3d 671,677-78(9thCir.2000) "Concealment by venireman during voir dire uncovered before jury deliberations inherently involves prejudicial misconduct which cannot be rebutted by either the people or a review of the entire record because of its subjective intangible and subliminal nature."

· U.S. v. Torres,128 F.3d 38(2ndCir.1997):

"Blackstone states,that exclusion of a prospective juror for implied bias is appropriate when it is shown: that he is of kin to either party within the ninth degree; that he has been an arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party[3]."

- Gorham has submitted EX "FF" showing Achebe who was just arrested for 1) Dirty U/A; 2) Failing to pay fines/fees; and 3) not reporting in January (a month before trial,3 months before being discharged off probabtion SATISFACORY), Achebe had not even went to his hearing and had 10 years hanging over his head. The exact and perfect case is Brooks v. Dretke,418 F.3d 430 finding that the sum of all factual circumstances surrounding this juror in particular the power of the District Attorney, and the timing and sequence of events that compelled the conclusion of implied bias. Alexander[3] even argues this during the unnecessary "bias" evidentiary hearing. (see 3RR 26-28).

· Neder v. United States,527 U.S.1,7(1999)(stating that there is a "limited class of fundamental constitutional errors that...are so intrinsically harmful as to require automatic reversal (i.e.,'affect substantial rights') without regards to their effect on the outcome").
- Gorham should have been granted relief at appeal, then on 11.07, and now the USDC and 5th Circuit say there is no constitutional violation. It can't get any clearer, due to the nature of the charge, no one Court will take the initiative to see the whole trial was tainted before it even started. Gorham is innocent, was convicted by a tainted jury and had ineffective assistance of counsel on appeal. This issue requires this Court's attention.

III. THE FIFTH CIRCUIT ERRED IN ITS APPLICATION OF SLACK V. MCDONALD WHEN IT DECLARED,"GORHAM HAS FAILED TO MAKE THE REQUISITE SHOWING," THAT "JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT." THIS GORHAM HAS SHOWN MANIFESTLY;THIS FACT WARRANTS THIS COURT'S ATTENTION.

This issue incorporates three claims of ineffective assistance of trial counsel.

a) Garcia deliberately opened the door to inadmissible evidence from the outcry witness Brandi Stockford, violating TRE 608(b),403 and 404 (a)-(b) violating Gorham's right to effective assistance of counsel. Gorham cites Tex.R.Evid. 608:

Evidence of Character and Conduct of a Witness

(b) Specific Instances of Conduct

> Specific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility other than conviction of a crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved extrinsic evidence.

Gorham recites what is said in Brown v. Dretke,419 F.3d 365,376 (5th Cir.2005)"A Federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling violates a specific federal constitutional right or is so egregious such that it renders the petitioner's trial fundamentally unfair." The State court said "...this court finds that Applicant was not deprived of effective assistance of trial counsel." (See FFCL May 26,2017 at 8).

In Robertson v. State,187 S.W.3d 475(Tex.Crim.App.2006), the CCA agreed the applicant was entitled to relief due to IAC for opening the door to inadmissible evidence. In Gorham's case it was critical to limit evidence presented in front of the jury that had no probative value, only a prejudicial effect.

Garcia, by opening the door allowed Alexander to question Stockford about specific instances of misconduct between Gorham and Stockford. In doing so, Alexander elicited untrue, unproven accusation of domestic violence, racially motivated discipline towards complainant, alcohol abuse, all issues that were false, misleading and used to sympathize with the jury, bolster this fabricated story and to discredit Gorham, rendering him a bad guy in general.

Justice Keel states in her dissent (see Attachment A):

> "Counsel also opened the door to testimony about Applicant's domestic violence against the complainant's mother. The attorney claims that he did so in order to reveal the mother's retaliatory motive in fabricating allegations against Applicant. But the question that opened the door - why did she call the police on a particular day - did not reveal any such motive and caused the admission of damaging evidence of domestic violence. . .Defense counsel performed deficiently, and his explanations for his performance do not hold up to scrutiny. We should file and set this cause for further evaluation.."

One of the Judges from the Court of Criminal Appeals of Texas clearly states "Defense counsel performed deficiently,..."

The testimony complained about above coupled with Gorham's inadmissible DWI convictions engraved in the jury's mind, "bad person," "bad conduct" equals guilty can't be trusted. This was unreasonable, there can be no, absolutely no strategy to leave this impression in the jurors minds before deliberations. There is no factual evidence in the record to substantiate the witness' testimony. And being that Stockford is the mother of the alleged victim, it was a free for all for her to make Gorham look this way. This severly damaged Gorham's only defense, in "credibility." Counsel's actions meet both prongs of Stickland, counsel was ineffective.

b) Garcia was ineffective for eliciting inadmissible evidence from expert witness to the truthfulness of the complainant in violation of Tex.R.Evid 702. This violating his right to effective assistance of counsel. Gorham states what the Tex.R.Evid. 702 says:

Testimony by Experts

If scientific,technical,or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge,skill,experience,training or education may testify thereto in the form of an opinion or otherwise.

Petitioner's Attorney elicits the following inadmissible evidence from CPS Investigator Alexandria Lom ("Lom")(4RR 125,9-13): Q. (by MR. GARCIA) Are you telling this jury that when a child makes an automatic outcry-makes an outcry that that child is telling-you're absolutely sure that child is telling the truth? A. Yes.

The Fifth Circuit says in Viterbo v. Dow Chem.Co.,826 F.2d 420,424 (1987)"Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." Again citing the Fifth Circuit in Doddy v. Oxy USA,Inc.,101 F.3d 448,459(1996) "Although substantive aspects of the case are governed by Texas law, the Federal Rules of Evidence control the admission of expert testimony."

The 175th makes it perfectly clear as Gorham reiterates (see 4RR127):

> THE COURT: This is the problem. That this agency cannot make that assumption,all they do is take the information. They record. They ask questions as they're supposed to. But for them to assume that the child is telling the truth is not their responsibility. So I don't know how you got that answer out of her, but that is erroneous, in my opinion. I just have never heard that before. Never. (4RR128) THE COURT: And here's the problem. That response should never be asked during a trial. A doctor can't say that, neither can anyone else...

Garcia alleges his strategy is (See Trial Counsel's Affidavit)"The strategy behind the question was to illuminate the fact that the witness's biased, preconceived notion of an outcry witness's credibility rendered her unable to objectively evaluate the truthfulness of an outcry statement."

This is a clear violation of Gorham's right to effective assistance and due process. Gorham cites Sandoval v. State,409 S.W.3d 291(Tex.App.-Austin 2013):

> "[E]xpert testimony that a particular witness is truthful is inadmissible under Rule 702." Yount v. State,872 S.W.2d 706,711 (Tex. Crim.App.1993). Thus, the state may not elicit expert testimony that a particular child is telling the truth, or that child complainants as a class are worthy of belief. Pavlacka v. State,892 S.W.2d 897, 903 n.6(Tex.Crim.App.); Yount,872 S.W.2d at 711; Cf.Barshaw v. State, 320 S.W.3d 625,629-30(Tex.App.-Austin 2010),rev'd on other grounds, 342 S.W.3d 91(Tex.Crim.App.2011). Nor may an expert offer an opinion on the truthfulness of a child complainant's allegations. Schutz

v. State,957 S.W.2d 52,59(Tex.Crim.App.1997). Such testimony "crosses the line" between evidence that will genuinely assist the jury and that which usurps the jurys function to judge the credibility of witnesses. Pavlacka,892 S.W.2d at 903 n.6; Yount,872 S.W.2d at 708. Instead the experts, it is jurors who must draw "conclusions concerning the credibility of the parties in issue." Yount,872 S.W. 2d at 710; See Brooks v. State,323 S.W.3d 893,899(Tex.Crim.App.2010) ("[T]he jury is the sole judge of the witnesses credibility and the weight to be given their testimony.").

This issue was one of three that was remanded by the CCA and in her dissent Justice Keel states:

"Counsel asked a CPS investigator whether she was "absolutely sure" that children who outcry about abuse are telling the truth. Asked by the trial judge about his basis for asking that question the attorney answered that he had not yet "decided" if he had a strategy for the question. If he was telling the truth at trial; and did not have a strategy when he asked the question, then he was not truthful at habeas when he claimed that he did have a strategy. If he did have a strategy- to show bias on the aprt of the witness- the question was unreasonable because the prosecution's case depended on the complainant's credibility, and the answer buttressed her credibility more than it demonstrated the witness's bias."

The Fifth Circuit says in Moore v. Johnson,194 F.3d 586,604(1999); Proffit v. Waldron,831 F.2d 1245,1248(5thCir.1987)"...holding tactical decisions that give no advantage to a defendant are not reasonable and court will not engage in presumption of reasonablemess under these circumstances." This Court says in Kumho Tire Co., v. Carmichael, 526 U.S. 137(1992) "All expert testimony is filtered through Fed.R.Evid. 702 and 104(a)."

Garcia was ineffective,period, this was a persistant scheme, not strategy. Citing Lyons v. McCotter,770 F.2d 529(5thCir.1985):"... passing over admission of prejudicial and arguably inadmissible evidence may be a strategic decision by trial counsel, whilde passing over admission of prejudicial and clearly inadmissible evidnece has no strategic value and may constitute ineffective assistance of counsel."

c) Garcia failed to object to the use of inamissible previous convictions and unadjudicated crimes for impeachment during Gorham's cross-examination at guilt-innocence. Garcia purposely violated TRE 609(b) and 404(b) in turn violating Gorham's Constitutional right to effective assistance of counsel. Citing TRE 609(b):

Impeachment by Evidence of a Criminal Conviction

(b) Limit on Using the Evidence After 10 Years.

This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it,whichever is later. Evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

As stated in the Statement of the Case, Alexander on cross impeached Gorham with three previous DWI convictions from Nevada ('98,'01&'04). All irrelevant to the charge, all over 10 years old. Garcia never once objected. In fact this is his response (see Trial Counsel's Affidavit):

> "Both Applicant and counsel agreed that the defendant's alcohol dependency and subsequent rehabilitation efforts would be relevant to Applicants defense. On the one hand, Defendant's admission of alcohol abuse would serve to neutralize damaging testimony elicited from the complainant's mother. Secondly, in the event of a guilty verdict, Defendant's voluntary admission of alcohol dependency and subsequent participation in a rehabilitation program could serve to mitigate punishment. Therefore, it was agreed that the defense would not object to any reference to Defendant's alcohol related incidents."

This is absolutely false and perjured as Gorham was never made privy to any defensive strategies. Gorham cites Meadows v. State,455 S.W.3d 166(Tex.Crim.App.2015) "609(b) supercedes 609(a) and it's inadmissible to bring up convictions over 10 years old and non moral turpitude to impeach a witness." Justice Keel, in her dissent states:

> "Another justification for opening the door to the DWI evidence was that Applicant's 'alcohol dependency and subsequent rehabilitation efforts would be relevant to Applicant's defenses.' Applicant's only[3] defense was that he did not commit the crime. His history of alcohol dependency was not relevant[3] to that defense. Nor did it[3] 'neutralize' damaging testimony given by the complainant's mother. Instead, the DWI evidence confirmed[3] her testimony that Applicant was a drunken lout."

Garcia filed a motion in limine to prevent the use of said previous convitions and failed to get a ruling on said motion. It gets worse as Garcia let's Alexander keep going (5RR 46,15-18): Q: And you're even currently under indictment for operating a motot vehicle while intoxicated within our jurisdiction aren't you? A: Correct. The Court would have abused her discretion should Garcia have objected. See Ex parte Menchaca,854 S.W.2d 128(Tex.Crim.App.1993)"To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence, as here, has no strategic value."

Justice Keel wasn't finished and continued in her dissent:

"For example during the guilt phase of trial defense counsel opened the door to Applicant's history of DWI convictions. At habeas he justified having done so because of the potential mitigation value of that history. It is doubtful that the evidence had any mitigation value, but even if it did, its admission at guilt was premature. More importantly, however, the trial court assessed punishment, so any mitigation value could not justify admitting this evidence before the jury."

The record is clear, counsel did absolutely nothing to help his client. Garcia let the State sabotage his client, Gorham believing this to be true as his fees were yet to be paid in full. As well as Garcia never had a strategy and it was him who "accidently" opened the door to Gorham's history of DWI convicitons. Gorham plead not guilty, because he is, credibility has everything to do with this kind of case and Garcia let Alexander crush any Gorham had. Garcia is ineffective and this is a valid constitutional claim.

IV. THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

• U.S. v. Binder,769 F.2d 595,602(9thCir.1985)(state's expert witnesses improperly bolstered child complainant's testimony by testifying that the children could distinguish reality from fantasy and truth from falsehood).

• U.S. v. Scop,856 F.2d 5(2ndCir.1988) "Even expert witnesses possessed of medical knowledge and skills that relate directly to credibility may not state an opinion as to whether another witness is credible."

V. THE FIFTH CIRCUIT ERRED IN ITS APPLICATION OF SLACK V. MCDONALD WHEN IT DECLARED,"GORHAM HAS FAILED TO MAKE THE REQUISITE SHOWING," THAT "JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING." THIS GORHAM HAS SHOWN MANIFESTLY: THIS FACT WARRANTS THIS COURT'S ATTENTION.

The Fifth Circuit's opinion misapplied Slack v. McDonald,529 U.S. 473,484(2000). The Court says "Gorham has failed to make the requisite showing." The Court is saying the USDC's procedural ruling is correct and Gorham is time barred. Gorham strongly disagrees and will show this Court that a structural Constitutional error should trump a clerical procedural error due to its ambiguity.

The determination of whether a state procedural rule is "adequate" is a question of federal law. Lee v. Kemna,534 U.S.362,375(2002)("[T]he adequacy of state procedural bars to the assertion of federal questions,"

we have recognized,is not within the State's prerogative decide;rather, aedquacy "is itself a federal question"(quoting Douglas v. State of Ala., 380 U.S.415,422(1965)).

The state procedural rule must have been sufficiently clear at the time of the default to have put the petitioner on notice of what conduct was required. Where there is reason for confusion or uncertainty with respect to state procedures, a procedural default may be inadequate to bar federal habes review. See,e.g., Ford v. Georgia,498 U.S.411(1991) (State procedural rule is so novel that prisoner "could not be deemed to have been apprised of its existence"); James v. Kentucky,466 U.S.341, (1984)(rule "not always clear or closely hewn to.").

Gorham's COA proved, jurists of reason would find it debatable whether the district court was correct in its procedural ruling. The rules are ambiguous, and the USDC and Fifth Circuit failed to apply the 'Liberal Construction Doctrine' set out in Haines v. Kerner,404 U.S.519,520(1972); Hernandez v. Thaler,630 F.3d 420,426-27(5thCir.2011).

Gorham clearly has valid constitutional violations as presented in the aforementioned grounds. It is apparent that the 'rules' only apply to Gorham, but not the Court's themselves.

A brief summary of pertinent dates:

- Feb.11,2016 Motion to rehear direct appeal denied
- Oct.30,2016 Original 'properly filed' 11.07 submitted (10grounds)
- Nov.15,2016 State's general denial
- Nov.17,2016 Motion to Recuse Hon Roman submitted
- Nov.30,2016 Motion to Recuse DENIED (unavailable option)
- Feb.21,2017 "Supplemental Ground 11" submitted
- Mar.1,2017 175th recommends 'Denial' in her FFCL (175th does recommend 'dismissal' but is not specific as to, why.)
- May 3,2017 CCA "dismissed your application for writ of habeas corpus without written order for non-compliance with Texas Rules of Appellate Procedure 73.1. Specifically[3], applicant's supplemental[3] ground eleven is not set out on the prescribed form.
- May 9,2017 Gorham received notification of 'dismissal.'
- May 17,2017 Gorham resubmits exact same grounds,not seperately
- May 26,2017 175th recommends Denial
- Aug.23,2017 CCA remands back to 175th (3 unresolved issues)
- Nov.21,2017 175th recommends Denial
- Apr.18,2018 CCA remands back to 175th

• July 2018 175th recommends Denial

• June 5,2019 CCA denies without written order

The issue, Gorham failed to put a supplemental ground on a complete application and submit it in it's entirety. Nowhere in the Tex.R.App. Proc;Tex.R.Evid.,nor;the CCA's Application (dated 01/14/14) does it give a procedure on 'how to' file a supplemental or amended ground,nowhere. But this is what it does say, Tex.R.App.Proc.73.1(c) in pertinent "any ground[3] not raised on the form will not be considered." Meaning Gorham's "Supplemental Ground Eleven" should have never been considered, similar to his "supplemental Ground Twelve" that went unheard, unconsidered.

The 11.07 form application also makes this clear, "if your grounds and brief summary of the facts have not been presented on the form application, the Court will not consider your grounds." Gorham interprets this to mean, since there are no rules on how to file a Supplemental or Amended ground, if the ground is not on the form the CCA will not review ("consider") it. Gorham is a layman, not a rule writer nor is he trained to interpret the rules.

In a federal §2254 it is said, if a petition appears to comply with the formal requirements of Rules 2 and 3 and the model form, the clerk must file the petition [Rules Governing §2254 Rule 3(b)]. However, if the petition does not appear to "substantially comply" with the rules, the clerk may promptly present it to a district jduge who may authorize the clerk to "return" the petition to the petitioner along with a statement for reasons for its return [Rule 2(e)-clerk retains copy of petition].

The use of the term "return" in the rule rather than "dismissal," along with the requirement that the clerk keep a copy of the petition, suggests that the court may retain jurisdiction over the case while the petition is returned for correction or amendment. If so, this jurisdic-

In general, the "substantial compliance" language of Rule 2(e) has not been applied with rigid formalism, particularly with petitions filed by pro se petitioners,Wilson v. Foti,832 F.2d 891,892(5thCir.1987) petition improperly filed under 42 U.S.C.§1983 treated as habeas petition; Johnson v. Onion,761 F.2d 224,225(5thCir.1985). Greater tolerance for vague and conclusory claims is exercised concerning petitions drafted by pro se litigants than would be the case with represented petitioners;(Guidroz v. Lynaugh, 852 F.2d 832,834(5thCir.1988).

Gorham's freedom rests on his assumed understanding on how to 'properly file' a Supplemental Ground Eleven? This Court in Mullaney v. Wilbur,421 U.S.684,691 n.11(1975)"On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an obvious subterfuge to evade consideration of a federal issue." This is all to clear, the State assumed Gorham understood to add a supplemental ground you must file an entire application with the ground. Why wouldn't the clerk send it back or just discard it like they did with Gorham's Supplemental Ground Twelve?

From the original 'properly filed' application to the submission of Supplemental Ground Eleven was 144 days of tolled time. Gorham did not flagrantly violate the Rules, procedures or instructions. Gorham will point thisCourt to the differences in the application that was used (EX "E1-E2")and the revised version (EX"F1-F3"). Gorham respectfully requests this Honorable Court to take judicial notice of these five pages and notice on EX F-1 this is the distinct difference, in pertinent:

INSTRUCTIONS

1. All applicants and petitioners, including attorneys,must use the complete application form. You must use this application form, which begins on the page following these instructions, to file an application, **or an amended or supplemental application,** for a writ. . .

2. Failure to follow these instructions may cause your entire application to be dismissed.

And to emphasize Gorham's interpretation of instruction #12 "Warning: If the application form does not include all of the grounds for relief, additional grounds[3] brought at a later date may be procedurally barred... (see EX"F-3"). This means the additional grounds (supp.grnd.11) are procedurally barred, not the entire application.

In Jones v. Stephens,541 Fed.Appx.499(5thCir.2013): "Jones admits he failed to follow the instructions on the form adding additional grounds by inserting four pages into the 11.07 not using additional page 10 to add additional grounds. Jones' 11.07 was not 'properly filed.' Gorham was nowhere close, even if it was the CCA specifically stated Supplemental Ground Eleven...

The CCA states "...not set out on the prescribed form." While this is unequivocally true for the initial application. Gorham avers there are no firmly established rules governing the "form" for grounds sub-

mitted as a supplement to an application which has not yet been ruled on. Gorham has read hundreds of cases and has yet to come across one even remotely close to his. Gorham believes this issue, his issue, is the first of it's kind.

There is no precedent regarding supplemental grounds. Gorham concludes this violation is not[3] 'firmly established' and believes the citing in Forgy v. Norris,64 F.3d 399,402(8th Cir.1995) applies to his conclusion, "...procedural rule first anounced in petitioner's case did not bar federal review as "unexpected state procedural bars are not adequate to foreclose federal review of constitutional claims")."

Likewise, state procedural rules applied to novel circumstances not previously faced by the state courts are not sufficiently established to bar federal review on the merits. Gorham is entitled to relief. Gorham references Del Vecchio v. Illinois Dept.of Corr.,31 F.3d 1363,1381(7th Cir.1994) "...procedural rule inadequate where state court had "never [previously]faced the question' and its resolution in petitioner's case was "novel")." Gorham falls under Forgy and Del Vecchio.

This Court in Dugger v. Adams,489 U.S.401,410 n.6(1989)"It is not necessary that the state courts apply the particular procedural bar in every applicable case. It is sufficient that the rule is applied even-handedly "in the vast majority of cases."" This is where the subterfuge is most prevalent as the CCA only refers to the second part not addressing the lack of Supplemental instructions, only the form wasn't used.

As far as 'properly filed,' Gorham is entitled to statutory, equitable or 'gap' tolling. In Larry v. Dretke,361 F.3d 890(5thCir.2004) Larry contends that because the state trial court issued findings of fact and denied his habeas petition on the merits his application was "accorded some level of judicial review" making it "properly filed" under the precedent of this Court. See Villegas v. Johnson,184 F.3d 467,470 n.2(5thCir.1999).Id at 895. The 175th answered[3] 'Supplemental Ground Eleven," this is **some level of judicial review.**

The Bexar County District Clerk file stamped Gorham's 11.07 on Oct. 30,2016. The State made their 'general denial' on November 15,2016. This Court in Artuz v. Bennett,531 U.S.4(2000): states in relevant part:

> "An application is "filed" as that term is commonly understood, when it is delivered to and accepted by,the appropriate court officer for placement into the official record, see,e.g.,United States v. Lombardo,241 U.S.73,76(1916)("A paper isfiled when it is delivered

to the proper official and by him received and filed");Black's Law Dictionary (7th Ed.1999)(defining "file" as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record."). And an Application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. See,e.g.,Habteselaisse v. Novak,209 F.3d 1208,1210-1211 (CA10 2000);199 F.3d at 121 (case below); Villegas v. Johnson, 184 F.3d 467,469-470."

Gorham properly filed his 11.07 in Bexar County on October 30,2016. An 11.07 number was assigned, different from his Trial Court Number in 2012-CR-10383-W1. The trial court ordered issues designated. Gorham's time should have been tolled at a minimum of 144 days, Had it, Gorham would still have ample time to file and not be allegedly 'barred."

Gorham was diligent in this complex game of chance. Gorham has a very out dated law library, no use of any type of internet to do any type of research. What the Courts don't understand is an unexperienced layman doesn't just go right into the law library and figure out what to do in one or two months. Gorham is pro se, there are no Lawyers, paralegals, law clerk's at this unit.

Gorham citing Balisteri v. Pacifica Police Dept.,901 F.2d 696,699 (9th Cir.1988) "this Court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements."

Gorham has proved that he is not time-barred, and proved his claims are of constitutional magnitude. Gorham is entitled to relief by way of new trial within 60 days, and jeopardy attached as the panel was sworn and impaneled.

VI. THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

- Lopez v. Schiro,491 F.3d 1029,1043(9thCir.2007):

"Courts have recognized an exception to the general rule of declining to review the correctness of a State court's application of a procedural bar in cases where the state court's interpretation is "clearly untenable and amounts to a subterfuge to avoid federal review of a deprivation by the state of rights guaranteed by the Constitution."

- The 175th and CCA were well aware of the Constitutional violations and saw an easy way out, dismiss Gorham and he'll be time-barred. Then deny without written order his next 11.07. This is subterfuge.

• Brackens v. Davis,2018 U.S.Dist.LX 161271: Dismissed specifically for exceeding two pages allowed for each ground.

- Gorham uses this in apposite as this is in the initial application and is clearly stated in the rules and instructions.

• Wood v. Hall,130 F.3d 373,377(9thCir.1997):

> "State rules that are inconsistantly or arbitrarily applied to bar federal review generally fall into two categories:(1) rules that have been selectively applied to bar the claims of certain litigants; or (2) rules that are so unsettled due to ambiguous or changing state authority that applying them to bar a litigants' claim would be unfair.

- Gorham claims his issue fits both categories.

• Prihoda v. McCaughtry,910 F.2d 1379,1383(7th Cir.1990) "A basis of decision applied infrequently,unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted."

- Gorham is claiming the same discrimination.

• Brown v. Lee,319 F.3d 162,174(4thCir.2003)"procedural bar not regularly applied where state court failed to impose the bar in five out of nine cases."

- Gorham cannot find just one case on point.

• Banjo v. Ayers,614 F.3d 964,968(9thCir.2010)"There is no tolling for the gap or interval period between sets of state habeas petitions where the latter petition constitutes a "new round" of collateral review."

- Gorham filed the exact same grounds, it wasn't a "new round."

• King v. Roe,340 F.3d 821,823(9th Cir.2003):

> "However, if the second petition is merely limited to an elaboration of the facts relating to the claims in the former petition, the petitioner is entitled[3] to gap tolling for the period between the petitions. Thus, if the second petition was an attempt by the petitioner to correct deficiencies[3] in the first petition, the petitioner is still making a proper use of state court procedures."

- Gorham is entitled to gap tolling as his second 11.07 only corrected the deficiency stated in the CCA's Dismissal. Nothing new.

Certiorari should be granted to correct this error.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

Brian Keith Gorham #01998550
Eastham Unit
2665 Prison Rd 1
Lovelady, Texas 75851

CERTIFICATE OF SERVICE

The undersigned is an inmate at the TDCJ-CID EASTHAM Unit in Houston County, Texas. Gorham is indigent and is mailing, postage prepaid to The Supreme Court of the United States of America, Washington, D.C. 20543.

Executed on this the 27th day of May, 2021.

Brian Keith Gorham

DECLARATION

I, Brian Keith Gorham, certify, verify and state under Penalty of Perjury that the foregoing is true and correct pursuant to 28 U.S.C. §1746.

Executed on this the 27th day of May, 2021.

Brian Keith Gorham

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Keith Gorham

Date: May 27th, 2021