21-5181

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD PATRICK THOMAS — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gerald Thomas, TDCJ No. 1415141
(Your Name)

Polunsky Unit, 3872 FM 350 South
(Address)

Livingston, Texas 77351
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

1. Does Teague v. Lane bar Federal Habeas court from reviewing the merits of an ineffective assistance of trial counsel claim because Martinez v. Ryan and Trevino v. Thaler cases do not announce a new rule applied retroactively to cases on collateral review?

2. Does Martinez v. Ryan, Trevino v. Thaler and Buck v. Davis entitle this petitioner to a merit review of ineffective assistance of trial counsel claims otherwise defaulted in State Habeas Court?

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:

Note; BOBBY LUMPKIN is the Director of Texas Department of Criminal Justice - Institutions Division, and is represented by the Texas Attorney General.

RELATED CASES

STATE v. THOMAS, No. 02-0190X, Harrison County, Texas. Judgement entered February 3, 2003.

THOMAS v. STATE, No. 06-02-00115-CR. Sixth Court of Appeals, Texarkana, Texas. Judgement affirmed March 3, 2004.

Ex parte THOMAS. No.63,060-01. Texas Court of Criminal Appeals, Austin, Dismissed, April 25, 2007.

Ex parte THOMAS, No. 63,060-02;63,060-03; 63,060-04, Texas Court of Criminal Appeals, Dismissed February 3, 2009, December 30, 2010, July 13, 2007, denied as successive.

THOMAS v. DIRECTOR, No. 9:07-cv-257, Eastern District of Texas, Dismissed as time-barred, October 2007

THOMAS v. DIRECTOR, No. 07-41205, United States Court of Appeals Fifth Circuit, Denied, 2008

THOMAS v. DIRECTOR, No. 2:17-cv-322, Eastern District of Texas, Dismissed without prejudice to receive jurisdiction. December 9, 2019.

THOMAS v. DIRECTOR, No. 19-41057. United States Court of Appeals Fifth Circuit. Denied February 25, 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 A 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 B to the petition and is

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[X] is unpublished.

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

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

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was February 25, 2021.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 26, 2021, and a copy of the order denying rehearing appears at Appendix D.

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

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

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

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

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

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

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

STATEMENT OF THE BASIS FOR JURISDICTION
(Expanded)

"A 90-day time limitation to file from the date a rehearing is denied," (Rule 13, No. 3), the due date for filing is June 25, 2021, except for ORDER 589 U.S., extending the deadline due to COVID-19 health concerns to 150 days, or August 25, 2021.

A review is necessary because a U.S. Court of Appeals has decided an important question of Federal Law in a way that conflicts with relevant decisions of this Supreme Court. "We [the Supreme Court] may review the denial of a C.O.A. by the lower courts." See e.g. Miller-El v. Cockrell, 537 U.S. 322, 326-27, 123 S.Ct. 1029 (2003). "When the lower courts deny a C.O.A. and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied." See Slack v. McDaniel, 529 U.S. 473, 485-86, 489-90, 120 S.Ct. 1595 (2000).

The issue is of national importance because Circuit Courts and Courts Below are still unsure of how to apply the Martinez/Trevino exception to the Coleman principle on ineffective assistance of trial counsel claims. The Fifth Circuit in particular takes the view that the exception warrants a retroactivity analysis under Teague v. Lane. This petitioner disagrees and courts below are in need of some guidance on this issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A citizen accused of a crime has the Constitutional right to the effective assistance of counsel at trial under the Sixth Amendment to the United States Constitution. The benchmark for evaluating a claim of ineffective assistance of counsel is whether counsel's conduct so underminded the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland v. Washington, 104 S.Ct. 2052 (1984). Ineffective assistance can be presumed when trial counsel committed so many errors that he ceased to function as an advocate. U.S. v. Cronic, 466 U.S. 658, 104 S.Ct. 2039 (1984).

In Martinez v. Ryan, 132 S.Ct. 1309 (2012) the Supreme Court of the United States determined that the effective assistance of trial counsel is a "bedrock principle in our justice system." Thus, a defaulted claim of ineffective assistance of trial counsel (IATC hereafter), can be presented for the first time on a federal petition for habeas corpus. The Martinez exception was made available to Texas prisoners one year later in Trevino v. Thaler, 133 S.Ct. 1911 (2013), a case first denied habeas relief in the Fifth Circuit.

Coleman v. Thompson, 111 S.Ct. 2526 (1991) bars a petitioner from advancing a claim on a Federal Habeas Petition not already brought up on a State petition, but the Martinez/Trevino Exception allows a Federal Habeas Court to review an otherwise procedurally defaulted claim of IATC. Buck v. Davis, 137 S.Ct. 759 (2017), a case first denied habeas relief in the Fifth Circuit, was determined in this Supreme Court only two months prior to this petition-

er's filing of the instant habeas petition in the Federal District Court, Eastern District of Texas, Marshall Division. (See 2:17-cv-322).

Buck filed a first Federal Habeas petition in October 2004, but was barred under Coleman in 2009 from advancing any new IATC claims. In 2017, This Supreme Court stated in Buck, "Had Martinez and Trevino been decided before Buck filed his 2254 petition, a federal court could have reviewed Buck's IATC claim." (Buck, 137 S.Ct. at 771). This seems to suggest that retroactivity is implied. "Today, however, a claim of IATC defaulted in a Texas post-conviction proceeding may be reviewed in federal court if state habeas counsel was constitutionally ineffective in failing to raise it, and the claim has 'some merit.'" (Buck, 197 L.Ed.2d at 23, quoting Martinez, 566 U.S. at 14).

STATEMENT OF THE CASE

(Facts Material to Consideration of Questions Presented)

In this petitioner's case, the State Trial Court engaged in practices designed to deny him of his procedural due process rights on Direct and Collateral Review. Consequently, this petitioner has not been afforded a fair hearing of the ineffective assistance of trial counsel claims that, if presented in an original state writ application, would have resulted in a reversal of his conviction.

First, the trial judge in State Court stacked the 397-year state sentence on top of the "sister case", a Federal 60-month sentence. The judge's decision to run the State sentence consecutively to the Federal sentence had the effect of denying Petitioner access to a State Prison Law Library, preventing petitioner from learning the State laws that would lead to a meaningful State Habeas petition. The State Trial Judge's action forced this petitioner to write a state habeas application while in federal prison, with no access to state law books or state case law. Although Federal Prison law libraries do not stock state law books, this petitioner was forced to present a state habeas application while in federal prison in order to preserve his federal habeas rights, which were time-sensitive under the A.E.D.P.A.

Then, the State Trial Judge assigned to petitioner a Direct Appeals lawyer, who not only filed a frivolous direct appeal brief which consisted of nothing more than the notes this petitioner had written for him, but also abandoned this petitioner without providing a copy of the brief, the State's response, or the Court's opinion. Petitioner diligently sought out a response from him on

eight separate occasions, all of which fell of deaf ears. The failure of the court-appointed appellate attorney to notify this petitioner resulted in being time-barred from filing his future 2254 Petition for Habeas Corpus under the A.E.D.P.A.

While still in Federal prison, petitioner filed his primary state habeas application and was granted a hearing on the issue of trial counsel's failure to investigate an alibi witness. The state trial court put the habeas hearing off for over a year, being granted five 90-day continuances. When petitioner finally appeared in court, four years after his trial, his trial attorney had died and the attorney's family (it was a family law firm) lost all of the case work on this case, severely prejudicing petitioner from proving his claims. Four years after trial, the alibi witness wasn't able to pinpoint the exact date and habeas relief was subsequently denied.

When this petitioner was transferred to State prison after the Federal term was completed and immediately following the State Habeas Hearing, he was tasked with petitioning the Federal District Court for habeas relief, which was prior to this Supreme Court's decisions in Martinez v. Ryan, 132 S.Ct. 1309 (2012) and Trevino v. Thaler, 133 S.Ct. 1911 (2013). But he was already time-barred under the A.E.D.P.A. due to being abandoned by his appellate attorney. Consequently, the Federal District Court dismissed the petition without reaching the merits of the petition. (See Cause No. 9:07-cv-257, Eastern District of Texas).

Petitioner then brought a Petition to the Fifth Circuit, providing proof of his diligence in seeking an answer regarding his

direct appeal. His diligence is well documented. (See 07-41205, Fifth Circuit, 2008), but petitioner's request for equitable tolling was denied. The Fifth Circuit wrote, "A petition is not tollable just because a petitioner has a bad lawyer." (See OPINION JUDGEMENT, Fifth Circuit, 07-41205).

But this happened before a similar case from the Eleventh Circuit was decided in this Supreme Court in Holland v. Florida, 130 S.Ct. 1549 (2010). Because Holland proved, just like this petitioner had done in 2008, that his court-appointed appellate attorney had abandoned him, and Holland was diligent in seeking out a response, the time to present a Federal Habeas Petition should have been equitably tolled under the A.E.D.P.A., because being abandoned by the state-court appointed appellate attorney cannot be attributed to the petitioner. This petitioner's original 2254 petition should have been equitably tolled but was not. Instead, this petitioner's original Federal Habeas petition was dismissed as time-barred without reaching the merits because this petitioner was abandoned by his court-appointed appellate attorney.

Since being in State prison, petitioner has had access to State law resources and has had the opportunity to learn the issues that, if presented in his original state habeas application, would have resulted in a reversal of his state conviction. But until Coleman v. Thompson, 111 S.Ct. 1546 (1991) was revisited by this Supreme Court in Martinez v. Ryan, Trevino v. Thaler, Buck v. Davis, this petitioner still could not bring up any new issues in Federal Court, even had he not been time-barred to do so.

REASONS FOR GRANTING THE PETITION

Martinez v. Ryan, 132 S.Ct. 1309 (2012) announced that the effective assistance of trial counsel is a "bedrock principle in our justice system." The Martinez case allows for claims of ineffective assistance of trial counsel (IATC hereafter) to be brought up for the first time in a Federal Habeas petition. The State of Texas Attorney General baulked at the new Martinez exception to the Coleman v. Thompson default procedure, and so did the Fifth Circuit. It took another case to go to this Supreme Court, Trevino v. Thaler, 133 S.Ct. 1911 (2013), to make the Martinez Exception relevant to Texas cases. Petitioner filed a 2254 Habeas Petition in April, 2017, seeking a merit review on new issues of IATC, which this petitioner has yet to receive.

Now, the Fifth Circuit and Federal District Courts below are denying the Martinez/Trevino Exception under Teague v. Lane, 109 S.Ct. 1060 (1989), that retroactivity of Martinez/Trevino has not been determined. The Federal District Court used this argument on this petitioner's case. (See "Magistrate's Report and Recommendation" at page 6). But the Teague argument is meritless and Buck v. Davis, 137 S.Ct. 759 (2017), shows that.

In Buck v. Davis, a decision handed down by this Supreme Court only two months prior to this petitioner's file date in the instant application, the Texas Attorney General also applied the Teague argument to deny Buck's habeas claim. But Buck argued, and this petitioner reurges, that "The Teague analysis applies only to new rules of criminal procedure that govern trial proceedings, not new rules of habeas proceedings that govern collateral

proceedings, and the State in any event waived its Teague argument." Buck v. Davis, 137 S.Ct.at 780. Besides, the Constitutional guarantee which petitioner relies upon is ineffective assistance of trial counsel, which is not at all a new concept. It is a Sixth Amendment Constitutional guarantee.

"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty...The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" Johnson v. Zerbst, 58 S.Ct. 1019 (1938); Avery v. Alabama, 60 S.Ct. 321 (1940); Smith v. O'Grady, 61 S.Ct. 572 (1941).(Quoted in Gideon v. Wainwright, 83 S.Ct. 792, 805 (1963)).

As Chief Justice Marshall opined in Marbury v. Madison, 1 Cranch 137, 177-178, 2 L.Ed. 60, 73 (1803), "If then the courts are to regard the constitution: and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply." (Quoted in Mackey v. U.S., 401 U.S. 667,678, 91 S.Ct. 1160 (1971).

In the event that the Martinez Exception to Coleman requires a retroactive determination under Teague v. Lane, then it is important to note that "Teague recognize[s] two catagories that are not subject to its general retroactivity bar...Courts must give retroactive effect to new 'watershed rules of criminal procedure', implicating the fundamental fairness and accuracy of the criminal proceeding." Montgomery v. Louisiana, 136 S.Ct. 718, 728 (2016)(Quoting Schriro v. Summerlin, 124 S.Ct. 2519 (2014) and Teague, 109 S.Ct. 1060 (1989). The Martinez v. Ryan Exception to

the Coleman principle falls squarely into this Teague exception as a new watershed rule of criminal procedure, as Martinez announces effective assistance of trial counsel a "bedrock principle."

"Procedural rules are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" Montgomery, 136 S.Ct. at 730 (Quoting Schriro, 542 U.S. at 353; Teague, at 313. "Those rules 'merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.'" Schriro, at 352.

In Desist v. U.S., 89 S.Ct. 1030 (1969), Justice Harlan reasoned that one of the two principle functions of habeas corpus was 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.' (Quoted in Teague, 109 S.Ct. at 107). "All 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." "...for example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime." (Justice Harlan, Mackey v. U.S., 91 S.Ct. 1160, 1180-81 (1971) as quoted in Teague v. Lane, 109 S.Ct. 1061 (1989).

Justice Harlan further explained in Desist, "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." (Quoted in Teague, 109 S.Ct. at 1073).

Although the Supreme Court declined to determine the Teague issue in Buck, it did agree that the Teague Argument had been waived under Danforth v. Minnesota, 128 S.Ct. 1029 (2008)(State can waive a Teague defense...by failing to raise it in a timely manner.) In this petitioner's case, the State did not raise a Teague defense at all. It was raised Sua Sponte by the Magistrate Judge in Federal District Court. (See "Report and Recommendation",Appendix "C" at page 6). Thus, like Buck, any Teague argument could also be waived in this petitioner's case as well.

Habeas relief was granted to Buck by this Supreme Court on February 22, 2017, and the Fifth Circuit overturned Buck's sentence on April 13, 2017, five days before this petitioner filed the instant habeas petition in Federal District Court on IATC claims. Buck's procedural posture is nearly identical to that of Petitioner.

BUCK:	PETITIONER:
Conviction affirmed on Direct Appeal.....April, 1999	Conviction affirmed on Direct Appeal.....March 2004
State Habeas filed (Failed to mention IATC expert testimony).....1999	Pro Se State Habeas filed (Failed to mention many IATC claims).....August 2005
First Federal Habeas. Oct. 2004 (Coleman barred IATC claim)	First pro se Federal habeas Oct. 2007 (Coleman barred IATC claims)
Fifth Circuit denied COA 2011	Fifth Circuit denied COA 2008
Supreme Court determined that Martinez applied Feb. 22, 2017	
Habeas relief granted in Fifth Circuit April 13, 2017	
	April 18, 2017: Filing of instant IATC claims in District Court

Petitioner would rely on Buck v. Davis to show that he should be granted a merits review of the habeas petition that was presented

to the Federal District Court on April 18, 2017. Petitioner submitted a Motion to show Cause and Prejudice in Federal District Court. (Docket #1) under Martinez v. Ryan,and Trevino v. Thaler. Cause is based on the procedural defects that were caused by the State, of which this petitioner had no control, and Prejudice was based on the ineffectiveness of trial counsel, namely that counsel's errors led to an unconstitutional conviction. Having shown Cause and Prejudice, "jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional claim and jurists of reason would find it debatable whether the district court was correct in its procedural ruling under Slack v. McDaniel, 120 S.Ct. 1595 (2000).

This petitioner vehemently believes that because of State Trial Court decisions and omissions regarding collateral procedural rules, he is being held on multiple life sentences due to procedural default. However, this default cannot be attributed to this petitioner, rather must be attributed to the State Trial Court, who, knowing the conviction was based on a very weak case, made certain decisions and omissions so that the conviction could still stand, if only by procedural default. Legal and Judicial gamemanship ought not be tolerated in a Court of Law! The State ought not benifit from this windfall of procedural default under the guise of comity and finality when it was the State Trial Court that caused the procedural default in the first place.

This includes the dismissal of this petitioner's first Federal Habeas due to having been abandoned by his trial court-appointed appellate attorney. In Rose v. Lundy, 102 S.Ct. 1198, (1982)(Dismissal of mixed petition), this court said, "We have

determined that a habeas petition filed after an initial petition was dismissed without an adjudication on the merits is not a 'second or successive' petition." (Quoted in Slack v. McDaniel, 120 S.Ct. 1595 (2000).

Because the trial court's appointed attorney on direct appeal caused the procedural default on this petitioner's initial 2254 habeas petition, exactly like in Holland v. Florida, 130 S.Ct. 2549 (2010), and because the original 2254 petition was dismissed without reaching a merits review, and because the Coleman v. Thompson principle applied at the time further hindered a review on any new claims of IATC not already raised in a State Habeas proceeding, and now the Martinez/Trevino cases allow for Federal review of IATC claims not first presented in a State habeas petition, and because Buck v. Davis was decided on the merits even though his first Federal habeas petition barred any new claims of IATC, a merits review is warranted in this petitioner's case.

The Fifth Circuit has refused to take the cause of this petitioner's State and Federal procedural default into consideration when it denied a merits review on the substantial IATC claims, which, if this petitioner had been given a fair opportunity to show in his first State Habeas Corpus petition, would have resulted in a reversal of his conviction. "A factor is external to the defense if it cannot fairly be attributed to the petitioner." Davila v. Davis, 137 S.Ct. 2058 (2017).

By moving IATC claims out of the direct appeals venue, where a defendant has a constitutional guarantee to counsel, and then failing to provide counsel on collateral review, the State impeded

the defendant's right to raise a meaningful IATC claim on his State Habeas petition. In this petitioner's case, after the State District Attorney denied all claims on his State Habeas Application "in whole and in part," the Texas Court of Criminal Appeals ordered fact finding on two specific issues. Only then did the trial court appoint an attorney to represent this petitioner, but only for the purpose of the habeas hearing on those two designated issues, and not to develop new grounds for review. The State habeas procedure made it impossible for the appointed habeas attorney to add any new claims to petitioner's pro se application at that point. Petitioner's attorney simply was not hired by the state for such a task. Had an attorney been appointed by the trial court before the Court of Criminal Appeals designated issues for fact finding, it is highly likely that the grounds that petitioner now complains of would have been included in the original state habeas application and relief granted accordingly.

The Martinez Court contends that this practice is unfair to the pro se litigant, and in these circumstances the defaulted IATC claims can be entertained by a Federal Court. As Judge Alcala of the Texas Court of Criminal Appeals questioned, "How can the right to the effective assistance of counsel at trial be ensured if a state has no adequate vehicle for a defendant to assert that the right was violated?" Ex parte Garcia, 486 S.W.3d 565 (2016).

Like Buck v. Davis, where Petitioner Buck was barred from going back to the Texas Courts with another State Habeas writ, this petitioner could not go back to the state courts under the "one-bite-from-the-apple" mantra. Then, by running the 397-year

State sentence consecutive to the 60-month Federal sentence in the Federal "sister-case" the State effectively denied this pro se petitioner access to State law resources in order to prepare an effective State Habeas petition, further impeding this petitioner's ability to present these legal issues. But in order to attempt to preserve his rights in Federal Court, this petitioner was forced to write a State Habeas petition while in Federal prison, without access to State legal resources.

Also like Buck, the Coleman v. Thompson principle did not allow this petitioner to bring new IATC claims to the Federal Court's attention on a 2254 Habeas petition. But Martinez and Buck now give Slack proper application here. This petitioner's present Habeas Corpus Petition should be treated as a first/original petition under Slack v. McDaniel, 120 S.Ct. at 1599. "Today, however, a claim of ineffective assistance of trial counsel, defaulted in Texas post-conviction proceedings, may be reviewed in federal court if state habeas counsel was constitutionally ineffective in failing to raise it, and the claim has 'some merit.'" (Or the state habeas petition was presented pro se as in this petitioner's case). Buck, 137 S.Ct. at 779-80 (2017).

The Cause and Prejudice Standard was designed to counter the Doctrine of Comity, a long-time standing in the Federal Court System, giving Federal Courts authority to review the merits of a state-court conviction otherwise procedurally barred. Not all cases fit neatly into the 2254 scheme. At 2254(b)(1), "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be

granted unless it appears that -(B)(iii) circumstances exist that render such [State corrective process] ineffective to protect the rights of the applicant." Considering the procedural complications imposed upon this petitioner, Federal habeas should be implimented to insure that this petitioner's conviction is constitutional.

Federal merits review of a procedurally defaulted claim is permitted when the petitioner is able to "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." Hughes v. Quarterman, 530 F.3d 336, 341 (5th Cir. 2008). Applying Martinez in the C.O.A. context, "we have held that to succeed in establishing cause, the petitioner must show: (1) that his claim of IATC at trial is substantial - i.e., has some merit, and (2) habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." Garza v. Stephens, 738 F.3d 669, 672 (5th Cir. 2013). This petitioner has met this standard.

This petitioner has also motioned in Federal District Court and in the Fifth Circuit for the appointment of an attorney, who may better present this complex procedural issue. Both requests were denied. This petitioner reurges this request.

To establish IATC, a petitioner must show that counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Strickland v. Washington, 104 S.Ct. 2052 (1984). "Strickland asks whether it is 'reasonably likely' the result would have been different had counsel acted differently." Harrington v. Richter, 131 S.Ct. 770 (2011). Because trial counsel failed to advocate in any meaningful way, this petitioner's trial cannot be relied upon to have produced a jusy result under U.S. v.

Cronic, 104 S.Ct. 2039 (1984), and Strickland, 104 S.Ct. 2052 (1984). In an adversarial system as is ours, "it is the defendant's attorney, not the prosecutor, who is primarily charged with protecting the defendant's rights." Mayberry v. Pennsylvania, 91 S.Ct. 499 (1971). In this petitioner's case, the ineffectiveness of court-appointed trial counsel implicated the Fourth, Fifth, Sixth, and Fourteenth Constitutional Amendments.

FACTS OF THE CASE

Initially, the FBI and the local police department worked together on this case. This petitioner was arrested by an FBI Agent on what was later to be determined to be a state arrest warrant. The arrest stemmed from a CD depecting two teenage boys exposing themselves on a computer camera. The CD was actually in possession of a third teenager who used the CD in a blackmailing scheme against this petitioner. The CD was confiscated from the Blackmailer by Federal Agents and local police and became the evidence that led to the 60-month Federal sentence. This petitioner was indicted in State and Federal courts on charges stemming from the CD. Petitioner was a church minister in the community.

Meanwhile, fueled by an investigation by lawsuit lawyers, the state case grew over the course of the next 18 months prior to state trial to include many additional charges in State Court, including three first-degree aggravated sexual assaults and one second degree sexual assaults. The local police constantly questioned other young people with little resulting difference, each month over a one-year period, until the lawsuit lawyers became involved

in the case. The allegations of sexual assaults came only after the lawsuit lawyers became involved.

After passing a polygraph exam, the Federal prosecutor dropped four of the five Federal charges involving the production of the CD and Petitioner pled guilty to possession of the images which were on the CD and computer hard drive, and received a 60-month Federal sentence. After beginning the Federal sentence, this petitioner stood trial on eleven counts in State Court, including possession and production of the CD, (the same charges which were dropped by the Federal prosecutor), as well as the additional four counts of second and first degree sexual assaults, and received a 397-year State prison sentence.

The State sentence was run consecutively to the Federal sentence, and after the State trial, Petitioner was returned to Federal prison to serve out the 60-month sentence before beginning the 397-year State sentence. The lawsuit lawyers went on to sue various entities of the church, garnering 62-million dollars in four separate insurance settlements and one jury trial judgement.

No one ever went to the police with a complaint. Outcries were only made to the lawsuit lawyers who obstructed justice by interfering with the ongoing police investigation. In order to cover up this fact, the State prosecutor did not call the local police detective to testify.

This petitioner filed the instant 2254 application after studying law in the State prison law library. Because State law resources were unavailable to him to bring these issues to light in the first instance, and because the State-appointed appellate attorney abandoned this petitioner resulting in being time-barred

on his original 2254 application, and because the Coleman v. Thompson principle limited the Federal Courts from reviewing any new grounds not already presented in State Habeas Court, and because Martinez v. Ryan now allows IATC claims to be reviewed in Federal Court which were not first brought up on the State level, and because Buck v. Davis was adjudicated on the merits, this petitioner asks this court to grant a merits review based upon the following issues:

ISSUE ONE

DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S MOTION IN LIMINE, WHICH LIMITED A LEGITIMATE DEFENSE DISTURBING PETITIONER'S SIXTH AMENDMENT RIGHTS

"A criminal defendant's constitutional right to a meaningful opportunity to present a complete defense is grounded in the 14th Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process and Confrontation Clause." Crane v. Kentucky, 106 S.Ct. 2146 (1986). A trial court's "clearly erroneous ruling" excluding evidence may rise to the level of a constitutional violation if the evidence excluded is relevant and reliable and "forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." Wiley v. State, 74 S.W.3d 399, 405 (Tex.Crim.App. 2002).

A legitimate defense was available in this case called "Frame-Up," which is defined as a conspiracy motivated by greed or money. This conspiracy was orchestrated by lawsuit lawyers who had already filed a civil suit in this case, prior to trial. No one ever went to the police with a complaint against Petitioner during a 12-month-long police investigation. There were no outcry wit-

nesses. In fact, the local police detective who was in charge of the case for the State did not even testify for the State at trial. (the prosecutor did however call on the FBI Agent to testify for the State, but his testimony was limited.) There was no medical or expert-interview testimony and no physical evidence presented with regard to the sexual assault charges. Only through the lawsuit lawyers working hand-in-hand with the prosecutor and police, where state witnesses were repeatedly solicited for stories in exchange for huge cash settlements, did the sexual assault charges materialize.

At trial, the prosecutor asked for and was granted a Motion in Limine limiting the defense from using the Frame-Up defense, (RR:4/8/17-24), to which defense counsel's only response was, "You mean I have to approach the bench before I can talk about that?" (RR:4/8/22). In cross examination of Complainant Justin Strong, a 15-year old whose complaint included three aggravated sexual assaults, defense counsel asked, "did you have a lawyer at that time?" (RR:5/154/5), which was immediately objected to by the prosecutor. A discussion at the bench ensued which was out of the hearing of the jury and the court reporter. (RR:5/154/7). It is a fair assumption to conclude that the judge upheld the Prosecutor's Motion in Limine at that bench discussion.

Later Justin was again asked on cross examination if he had mentioned these sexual assaults to anyone else? He answered:

> A: No. I didn't, I never told anyone before the police came to me. (RR:5/156/7-8)

But this was not true according to the actual police report, which clearly states, "The lawsuit lawyer contacted the prosecutor, who

contacted [this detective] and [this detective] then went to the juvenile lock-up facility to take the report. (See Marshall, Texas Police Report). Justin's lie on a material fact could have nullified the Motion in Limine, allowing the defense to reveal to the jury that a) Justin had committed purjury; b) the lawsuit lawyers were working behind the scene manipulating witnesses; c) providing the motive for lying on the witness stand.

Instead, the defense rested. (RR:5/156/12), leaving the impression with the jury that Justin told the police about the sexual assaults in the course of a normal police investigation. The jury would never know the involvement of the lawsuit lawyers and their obstruction of justice. The prosecutor purposely chose not to call the local detective to testify so that the lawsuit lawyer's involvement in the case would stay hidden from the jury.

But the Sixth Amendment right to confrontation of a state's witness guarantees that an accused has an absolute right to cross examine to show bias, prejudice, ulterior motives, and reasons to lie. Davis v. Alaska, 94 S.Ct. 1105 (1974). The right of cross examination is "the principle means by which the believability of a witness and the truth of his testimony are tested." ID.415 U.S. 316. See also Pennsylvania v. Ritchie, 480 U.S. 39, 52, 107 S.Ct. 989 (1987).(Explaining Confrontation Clause right is "designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross examination.) The right to confrontation is basically a trial 'right'." Barker v. Page, 88 S.Ct. 1318, 1322 (1968). "The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally

protected right of cross examination." Davis at 316-17. This is especially true when there is a pending lawsuit on the charged offense. U.S. v. Powell, 124 F.3d 655 (5th Cir. 1997).

Limiting this legitimate defense was the equivalant of not having a defense at all. Without the jury being informed that the sexual assault charges stemmed not from a 12-month-long police investigation or an outcry to family or friends, but from an outcry only to lawsuit lawyers who had constantly solicited the state witnesses, the jury was without the proper facts to make an informed decision on guilt. The prosecutor had made that decision for them. Had the jury known the circumstances surrounding these allegations, which the prosecutor took great care to hide, the jury would likely have arrived at a different conclusion as to the determination of guilt.

But this petitioner need not show that the jury would have arrived at a different conclusion absent the improperly prohibited viable cross examination. "We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross examination designed to show a prototypical form of bias on the part of the witness and thereby 'to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness.'" Davis v. Alaska, 94 S.Ct. at 1111.

"To establish a Confrontation Clause violation, a defendant need not show that the jury would have rendered a different verdict, but that a reasonable jury might have received a significantly different impression of the witness's credibility had

defense counsel been permitted to pursue his proposed line of cross examination." U.S. v. Templeson, 624 F.3d 215 (5th Cir. 2010).

Therefore, defense counsel's lack of advocacy along with a lack of an objection and obtaining the judge's decision on the record regarding the denial of a viable defense constituted ineffective assistance of trial counsel, implicating this petitioner's Sixth Amendment right to effective assistance of counsel.

ISSUE TWO

TRIAL COUNSEL FOR THE DEFENSE WAS INEFFECTIVE IN FAILING TO SEEK SUPPRESSION OF EVIDENCE OF AN ILLEGAL, PRIVATE SEARCH, A VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS

Article 38.23, Texas Code of Criminal Procedures, forbids the admission of evidence seized by any person when that evidence has been obtained in violation of state law. Moreover, in Florida v. Jardins, 132 S.Ct. 1409 (2013), this Supreme Court stated, "the scope of license - expressed or implied - is limited not only to a particular area, but also a specific purpose." So when Jacob the Blackmailer testified that he "started rummaging and going through all his CD's and stuff," (RR:4/44/10), he absolutely committed an illegal private search and seizure. Although Jacob the Blackmailer had this petitioner's permission to use his computer for the expressed purpose of searching the internet for a used truck and truck accessories, there was no expressed or implied permission to rummage through personal property or the "trash bin" of the computer.

Under state law, his actions could have been excused had his intentions been to turn over the property to law enforcement, under Art. 38.23,(Tex. Code Crim.Proc.), but Jacob testified that

"one of the very first things that happened...is we called him and asked for 500 dollars." (RR:4/56/15), which indicates no intent to turn the CD over to law enforcement authorities.

There is also evidence of evidence tampering. The FBI Agent testified at the state trial, "shortly after I hear his [the petitioner's] voice, it stopped." (RR:4/146/25). "Almost immediately after I heard Mr. Thomas' voice [on the video clip] it turned off, almost immediately." (RR:4/149/3-4). This was the last clip they made, indicating that the part where the teens were told to turn off the computer due to their misbehavior was purposely edited out. Because the tape was edited, this petitioner could not use it to prove that the teens lied when they said that Petitioner did not tell them to stop.

The CD in question depicts two teenage boys, both complainants in the case and plaintiffs in the pending civil lawsuit, exposing themselves on the computer camera and making leud videos of themselves. The FBI Agent describes it as "Monkeying around," (RR:4/137/8) and "Locker-room talk," (RR:4/148/5). The Agent further explains, "I would not describe what was going on in the video clips as sexual acts." (RR:4/147/10).

The CD evidence (which was the basis for the 60-month Federal sentence) was clearly a product of an illegal private search and seizure and should have been suppressed as such. It was prejudicial to the defense as it led to the conviction of four charges directly and was used to bolster the State's witnesses on the more serious charges that had absolutely no supporting evidence, and the evidence was edited. Defense counsel was ineffective in failing to advocate to suppress this illegally seized evidence. (See e.g.

Jenschke v. State, 147 S.W.3d 398 (Tex.Crim.App. 2004)(Private search and seizure was illegal and inadmissible at trial where there was a lack of intent to turn the evidence over to law enforcement.)

ISSUE THREE

COUNSEL FOR THE DEFENSE FAILED TO MOTION TO SEVER COUNT SEVEN, A THIRD-DEGREE CHARGE OF POSSESSION OF CHILD PORNOGRAPHY, WHICH PETITIONER PLEAD GUILTY TO IN OPEN COURT, BUT HAD AN ABSOLUTE RIGHT TO SEVER, TAINTING HIS PRESUMPTION OF INNOCENCE ON THREE FIRST-DEGREE CHARGES

Before trial began, but after the jury was seated in the jury box, this petitioner's attorney urged him to "plead guilty to something." So, having already pled guilty in Federal Court to the possession charge, which was being supported by the CD evidence, this petitioner pled guilty to the same charge in State Court, in front of the jury. But this petitioner was not told that the evidence used to support this charge in State Court was changed.

The State first indicted petitioner based upon the CD evidence, just as the Federal prosecutor had done. Not happy with the FBI's computer forensic examination, which during the State trial this petitioner would learn that they could not even determine which computer, if any of them, had been used to record the videos that the teens had made, The FBI Computer Forensic Examiner testified on cross examination regarding the CD material:

Q: Now, which one of these machines was this made on?
A: I do not know. -(RR:4/184/2-3)
A: I can't tell you if they were even made on those computers. (RR:4/184/20-21)
A: I did not find any link between the CD and the three computers. (RR:4/185/9-10)
Q: Did you find the [CD] files on the hard drive of any of these units?
A: No, sir. I did not. (RR:4/186/4-6)

The State's Computer Forensic Expert further testified: "No Sir, I wasn't able to review them. They had been deleted. (RR: 5/53/18). "...not only deleted, they had been overwritten by newer data." (RR:5/53/25). "We looked for the videos, they were not there." (RR:5/58/3). "Those videos are not there, they have been overwritten."

The State's forensic examiner, however, did find numerous examples of child pornography on the "slack-space" of the computer hard drive. These images were not "saved to a file", but only viewed and, by default, saved on the internal harddrive by the computer itself.

Unknown to this petitioner, the State then changed the evidence it would use to support the possession charge to the images that were "harvested" from the computer hard drive rather than the CD evidence which petitioner was originally indicted under. Only in closing argument did the prosecutor reveal that the internet pornography from the slack space of the harddrive would be used to prove this charge. "Count Seven, the Possession of Child Pornography, defendant pled guilty. The State has to prove its case and you were provided with a few examples of pornography that was found on the defendant's computer.(RR:6/66/19)). This petitioner had pled guilty to the wrong evidence!

But at the time of trial in 2003, the Possession Charge, Texas Penal Code 43.26, was not included in Texas Penal Code 3.03(b) so that had counsel requested severence of Count Seven from the other counts, the court would have granted it by law. Rather than pleading guilty in front of the jury, a Motion to Sever the

Possession charge entirely was proper. Having Petitioner plead guilty to this charge in front of the jury was in no way a plausable and reasonable defense strategy because this petitioner had an absolute right to severance, as the material shown to the jury was far too prejudicial and too great a threat to the determination of guilt on the first-degree sexual assault charges. Secondly, the internet slack-space harddrive material has been held to be insufficient to support the charge of "knowingly possessing child pornography."

A severance of this charge, or an objection was necessary to preserve this error because State Courts agree that joinder of the possession charge is far too prejudicial to the greater sexual assault charges in these circumstances. For example, in Thrift v. State, 134 S.W.3d 475 (Tex.App.-Waco 2004), the defendant's conviction of Indecency with a Child was reversed because of the improper admission of photographs of sexually aroused teenage males which were found in the defendant's home. The photographs were highly prejudicial and irrelevant to any contested issue at trial.

Similarly, in Pawlak v. State, 420 S.W.3d 807 (Tex.Crim.App. 2013), thousands of pornographic images found on the computer disks taken from the defendant's home should have been excluded under Rule 403, Rules of Evid. There was no showing that the defendant created any of the images or participated in any of the activities shown in the images. The computer images offered no rebuttal value because five complainants testified to being sexually assaulted by Pawlak, and because of its sheer volume, the pornography evidence was highly prejudicial, and the prejudice outweighed its probative value. The Pawlak case was remanded for harm analysis.

Moreover, in U.S. v. Moreland, 665 F.3d 137 (5th Cir 2011), the Fifth Circuit determined, "when a defendant lacks knowledge about a computer's cache files, and lacks access to and control over those files, it is not proper to charge him with Possession and Control of the child pornography images located in those files. ...[E]ven when the defendant has exclusive possession of his computer, evidence of storage of child pornography images in the hard drive, without more, is insufficient to sustain a conviction or sentence for knowing possession or receipt of child pornography." (Moreland, at 152).

In U.S. v. Kuchinski, 469 F.3d 853 (9th Cir. 2006)(Quoted in Moreland, 665 F.3d at 153), the prosecutor offered no evidence to show that Kuchinski was a "sophisticated" computer user, had ever tried to access the cache or 'even knew of [its] existence'" (U.S. v. Kuchinski, 469 F.3d at 862). Various courts around the country have refused to find that a defendant constructively possessed child pornography located on the "slack space" of a computer hard drive, but recoverable with sophisticated forensic software, "without additional evidence of the defendant's knowledge or control of the images." Moreland, 665 F.3d at 154. As the Moreland case points out, Tex. Penal Code 43.26 did not criminalize viewing child pornography as late as 2011. (See Moreland at 160, Footnote 1). Petitioner's State trial was in 2003.

This is exactly the type of evidence though that the State chose to use to support the possession of child pornography charge. As the computer forensic examiner testified in this petitioner's trial, "We actually read every, single, physical sector on the

hard drive." (RR:5/42/13). "We can look at any deleted files, internet history files, deleted pictures...We can do a lot of things that people are not used to seeing happen." (RR:4/43/25). "We actually have some very specialized software that we can actually read that drive the same as if it were the files on the regular hard drive." (RR:5/43/14). "When you delete a file from the computer, its not actually deleted." (RR:4/70/8).

To be clear, this petitioner is not arguing here that the evidence was insufficient to support the possession charge, although this is absolutely true. This petitioner complains that his trial attorney was ineffective for: a) advising this petitioner to "plead guilty to something" when he stood charged of three first-degree offenses which could be stacked for 297 year sentence; b) allowing petitioner to plead guilty to inadmissible evidence that he didn't even know existed on the slack space of the hard drive; c) failing to seek severance of the prejudicial possession charge altogether which would have preserved the issue for direct appeal, where the conviction would likely have been overturned.

A harm analysis would show harm because of the lack of any supporting evidence for guilt on the sexual assault charges. Although legally sufficient based solely upon the complainant's testimony, there was no outcry evidence, no testimony from the detective who investigated the assault accusations, no physical or medical evidence and no interview testimony whatsoever. This petitioner would show prejudice and harm because the photographic evidence located on the slack space of the hard drive, bolstered state witness testimony and inflamed the minds of the jury when the evidence provided no evidentiary support to the more serious

charges. "We have held that no reasonable jury could convict a defendant where the government has done nothing 'more than pile inference upon inference' to prove guilt." U.S. v. McDowell, 498 F.3d 308, 314 (5th Cir. 2007)(Quoting U.S. v. Maseratti, 1 F.3d 330, 337 (5th Cir. 1993).

The internet pornography evidence "harvested" from the slack space of the hard drive proved to be highly prejudicial and defense counsel was ineffective for failing to seek severence of Charge Seven from the rest of the case, which included three first-degree aggravated sexual assaults, when severence was legally mandated by State law. Tex.Penal Code 3.03(b)(2003). Defense counsel was also ineffective for allowing this petitioner to plead guilty to this material in open court without communicating what evidence the State was going to use to support this charge. Defense counsel did not advocate for this petitioner in any way concerning this issue.

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After the prosecutor successfully limited a legitimate defense, introduced illegally seized, edited evidence, and presented prejudicial slack-space computer images, all without objection by defense attorney, tipping the scales in the State's favor, the prosecutor then weighed down the scale with improper testimony and improper comments, also without objection, in order to guarantee a conviction:

ISSUE FOUR

DEFENSE COUNSEL FAILED TO OBJECT TO PROSECUTOR'S USE OF DEFENDANT'S POST-ARREST, POST-MIRANDA SILENCE, DISTURBING HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND HIS RIGHT TO REMAIN SILENT

"The government's use of a defendant's silence during its case-in-chief may constitute a constitutional violation." U.S. v. Rodriguez, 43 F.3d 117, 121 (5th Cir. 1995). In Doyle v. Ohio, 96 S.Ct. 2240 (1976), this Supreme Court reasoned, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Doyle, 96 S.Ct. at 2244. Although this petitioner did not take the witness stand to offer an explanation, the questions asked to the FBI Agent by the prosecutor were designed to impeach petitioner's credibility. Without objection, the prosecutor asked the FBI Agent multiple questions regarding Petitioner's not being forthcoming about information during his post-arrest, post-Miranda interrogation. At RR:4/139/14 to 140/14, the prosecutor questioned the FBI Agent:

> Q: Did it seem like he only gave up as much as you knew?
> A: Yes.
> Q: In other words, if you didn't have him in a bind or knew something, he didn't give you any forthcoming new information?
> A: No.
> Q: And did he ever admit to you any kind of behavior that was illegal at the time?
> A: No.

The error is not harmless because the questions were designed to draw meaning from Petitioner's constitutional right to remain silent. U.S. v. Pennington, 20 F.3d 593 (5th Cir. 1994)(Even when a defendant is willing to give statements after arrest, this does not give a prosecutor the right to impeach him by commenting on what he did not say.)

Comments on defendant's post-arrest, post-Miranda silence violates the Fifth Amendmnet prohibition against self-incrimination and violate a defendant's right to be free from self-incrimination

under State Constitution as well. (U.S. Amend. 5, Texas Const. Art. I, Sec. 10; Nixon v. State, 940 S.W.2d 687 (Tex.App.-El Paso 1996)).

ISSUE FIVE

TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S ADMISSION OF THIRD-PARTY EXTRANEOUS TESTIMONY FROM THREE WITNESSES, WHERE THE TESTIMONY WAS NOT ADMISSIBLE AS AN EXCEPTION TO CHARACTER EVIDENCE UNDER RULE 404(B) AND PROBATIVE VALUE WAS OUTWIEGHED BY PREJUDICIAL EFFECT UNDER RULE 403.

Rev, Stumme, even though she did not testify to a crime or even a bad act, testified for the State regarding Petitioner's envolvement at her Columbus, Ohio, church six years prior to the indicted charges, without an objection or challenge by the defense attorney:

Rev. Stumme: I posted in the seminary notice that I would like volunteers on Friday night for the neighborhood children, to go to the YMCA...for anyone who would like to come and spend some time with these children...and be with them there and [defendant] was one of the volunteers for the program. (RR:5/160/17-25)

Basically to be there and play with them and be involved with the children. (RR:5/161/10). [Defendant] always got in the swimming pool with the young people and was always involved in particular with the young boys in the pool. (RR:5/161/20). I was unconfortable and then he went on internship and I was very happy that he wasn't involved with my children. (RR:5/162/8).

He came back for his senior year...I had an after-school program and if he liked he could tutor in the after-school program and I was still uncomfortable. (RR:5/162/15-20).

Prosecutor Black: During that time, Reverand Stumme, did you notice that he paid particular attention to two individual boys?

A: During that time he tutored, absolutely. He had two boys that he tended to be with, yes.

Q: And were their names Marcus Sowell and Kevin Maddox?

A: Yes.

Q: And did you notice anything about the behavior he had with these two boys as compared to other children?

A: He was a good tutor and he helped them with their school work; but then I heard the boys discussing they were going

to his apartment on weekends with him, and then I got concerned. (RR:5/162/23-163/10).

On cross-examination, Rev. Stumme was asked:

Q: Did anyone make a complaint to you about Mr. Thomas?
A: No. (RR:5/169/2)

This testimony was not relevant to any fact of consequence. The fact of relevance arises because Fact X is offered as circumstantial proof of Fact Y. But there was no "direct or logical connection between the offered evidence and the fact to be proved." Goff v. State, 931 S.W.2d 537, 553 (Tex.Crim.App. 1996)(No relationship between evidence and the charged crime.)

Even so, the extraneous testimony played a very important role in the State's case, which may be summed up through remarks in the State's closing regarding this testimony:

1) When you look at the facts in this case, don't look as it as one little deal because you know something, this is not the first rodeo for this defendant. We brought to you what happened in Ohio. We took it a step further and we said, look, here it is in Wilson. (RR:6/78/3-7).

2) Or Pastor Stumme, she told you the exact kind of behavior that matched... (RR:6/79/6-11)

3) It's not this is the first time that this man had a chance to live his life right and do good by what he was supposed to do. Pastor Stumme saw what was happening. He was teaching himself with his grooming process in Ohio. (RR:7/20/1-17).

Even though there was no evidence that "what happened in Ohio" was anything but good, defense counsel failed to challenge this testimony under Rules 401, 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Montgomery v. State, 810 S.W.2d 372, 287 (Tex.Crim.App. 1990).

It simply cannot be adduced from Rev. Stumme's testimony that Petitioner tossed children around playfully in the pool, or that Petitioner tutored children at the after-school program, and two children outside of the program, without having produced a single complaint from either of those children or their families, had any tendency to make the existence of a fact of consequence, sexual assault of teenage boys six years later, more probable, or that Rev. Stumme's testimony proved that Petitioner had the requisite intent to sexually assault the complainants of the indicted charges.

The testimony suggested a decision on an improper basis. She created a false impression that Petitioner had a sinister motive for being involved with the children. This suspicion lowered the State's burden of proof, allowing the jury to find guilt on the indicted charges based solely on suspicion. This testimony was "irrationally connected" to the alleged crime.

Even if the evidence proved some sort of scheme, plan, or pattern, the courts have disallowed it as an exception under Rule 404(B). In Daggett v. State, 187 S.W.3d 444 (Tex.Crim.App. 2005), the court stated, "Unfortunately, courts frequently admit evidence of extraneous acts under ["plan" or "scheme"] exception not to show acts the defendant took in preparation for the ultimate offense, but to show repeated acts that are similar to the charged offense." Repetition of the same act, however, or even the same crime, does not equal "plan." U.S. v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981). It equals the repeated commission of the same criminal offense obliquely to show bad character and conformity with that bad character." Daggett, 187 S.W.3d at 452. This bad-character-conformity, whether express or not, is precisely what is barred

by Rule 404(B). Michelson v. U.S., 69 S.Ct. 213 (1948).

Defense counsel's ineffectiveness in not seeking to keep this testimony from the jury affected Petitioner's substantial rights because it had a substantial and injurious effect on the jury's verdict by suggesting that Petitioner was a serial child-abuser.

Without objection or challenge, the prosecutor used two additional witnesses to provide extraneous testimony. First was Jacob the Blackmailer. Although his testimony was legitimate to providing testimony on the blackmail scheme, the prosecutor went into extraneous testimony. Also, Matthew Guzman provided pure third-party extraneous testimony, most of which was never revealed previously. When cross-examined, "Who was the first person you told?" He answered, "My lawyer." (RR:5/182/1-8). This referred to the lawsuit lawyers on the civil lawsuit already pending.

But Jacob and Matthew were plaintiffs in the lawsuit. Accordingly, their testimony could have easily been excluded. "To be relevant as an extraneous offense of Frame-Up, then the admission of extraneous offense testimony must not be a part of that frame-up." Wheeler v. State, 67 S.W.3d 879, 887-88 n.22 (Tex.Crim.App. 2002).Because they were part of the frame-up as plaintiffs in a pending civil suit, their extraneous testimony cannot be used.

Petitioner relies on the State case Walker v. State, 195 S.W. 3d 250 (Tex.App.-San Antonio 2006), which mirrors this case:

"Defense counsel should have conduced a reasonable investigation and filed a discovery request to learn about extraneous matters that might affect Walker's credibility; he should have taken reasonable steps - such as filing a motion in limine - to prevent such matters from coming before the jury; and when these

matters were raised before the jury, he should have objected and requested a limiting instruction to mitigate the harm to Walker. His strategy to handle it only if it came up at trial fell below an objective standard of adequate representation." Failure to discover and prevent the admission of inadmissible extraneous conduct evidence fell below an objective standard of adequate representation. Ex parte Manchaca, 854 S.W.2d 128, 131-32 (Tex.Crim.App. 1993).

ISSUE SIX
DEFENSE COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S REMARK IN CLOSING IMPLYING THAT THERE WERE OTHER EXTRANEOUS OFFENSES WHICH WERE NOT IN EVIDENCE

The closing, the prosecutor told the jury, "I submit to you things happened to these boys that we don't even know about." (RR:7/83/17). It was manifestly improper because it injected new "facts" harmful to the accused. Cooks v. State, 844 S.W.2d 697, 727 (Tex.Crim.App. 1992). Without a proper objection, a jury instruction to disregard was not given and there is no fair assurance that the improper argument did not influence the jury's verdict or had only a slight effect. The jury could infer from this comment that the government knew more than it was able to tell them. The prosecutor may not "roam beyond evidence presented during trial." U.S. v. Gallardo-Trapero, 185 F.3d 307 (5th Cir. 1999).

A proper objection would have preserved the issue for appeal where the conviction would have been overturned. In Melton v. State, 713 S.W.2d 107, 114 (Tex.Crim.App.);Reed v. State, 991 S.W.2d 354 (Tex.App.-Corpus Christi 1999); Geuder v. State, 76 S.W.3d 133 (Tex.App.-Houston [14th Dist.] 2002), a proper objection by

defense counsel preserved this error and the courts reversed the conviction because this error was so prejudicial that even an instruction to the jury to disregard did not remove the prejudicial effect.

ISSUE SEVEN

DEFENSE COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S REMARKS TESTIFYING TO THE TRUTH OF THE COMPLAINANTS

The prosecutor may not bolster the credibility of its witnesses by personally attesting to their truthfulness. U.S. v. Taylor, 210 F.3d 311 (5th Cir. 2000). The prosecutor may not express a personal opinion on the merits of the case or on the credibility of the witnesses. U.S. v. Berma, 30 F.3d 1539 (5th Cir. 1999).

In closing, the prosecutor stated; "I can tell you this, Justin Strong sat right there and told you the truth, as hard as it was, he told you the truth. He wasn't faking that. He wasn't making it up. He wasn't pulling facts out of the air..." (RR:7/77/20-78/2).

We the prosecutor began with "I can tell you this," he made the statement a personal opinion, as though he knew as a fact in his role as prosecutor that the witness was telling the truth. "Such comments repeatedly have been condemned [by the courts] as highly improper because they raise the likelihood that a jury would believe that the only way to aquit the defendant is by 'abandoning [their] confidence in the integrity of the government.'" U.S. v. Young, 105 S.Ct. 1138 (1985); Berger v. U.S., 88 S.Ct. 629 (1935).

Defense counsel failed to object to those highly prejudicial remarks. Without an objection, no curative measures were taken by the court to limit the damage is caused and error was not preserved

for appeal where the conviction would likely have been overturned.

ISSUE EIGHT

DEFENSE COUNSEL FAILED TO OBJECT TO PROSECUTOR'S CLOSING REMARK THAT COMPLAINANTS "DIDN'T HAVE A MOTIVE TO LIE" AFTER LIMITING DEFENDANT'S RIGHT TO PRESENT A MOTIVE

The prosecutor was granted a Motion in Limine limiting the defendant from using the frame-up defense. (See Issue One), but in closing, he told the jury, "These kids didn't have a motive to make this up." (RR:7/77/3-7). Defense counsel did not object to this blatently unfair and misleading statement. The prosecutor knew that there was a motive behind these stories, which was the reason for his Motion in Limine in the first place. Instead of allowing the jury to decide, the prosecutor decided for them by not allowing the motive to be presented by the defense.

The remark was a "willful and calculated effort on the part of the State to deprive the accused of a fair and impartial trial." Cantu v. State, 939 S.W.2d 627, 633 (Tex.Crim.App. 1997). Defense counsel's failure to object allowed the jury to infer that the witnesses had no motive to lie when in fact the prosecutor himself knew this was not true.

Gaddis v. State, 753 S.W.2d 393, 398 (Tex.Crim.App.) would remind us that, "in making closing argument to a jury, counsel is given wide latitude in drawing inferences from evidence, so long as the inferences are reasonable, fair, and offered in good faith." In this petitioner's case, the prosecutor made important decisions regarding witness' credibility for the jury rather than allowing the jury to be the fact-finders. Therefore, defense counsel's failure to object was prejudicial, resulting in an unfair trial.

This petitioner has demonstrated that his conviction rests on a trial that was unconstitutional, and had Petitioner been offered the opportunity, would have prevailed on a State Habeas Writ. This petitioner had also demonstrated that the trial court is responsible for the default, when Petitioner was impeded from advancing these issues in the State Habeas proceeding. Petitioner was also impeded from advancing these issues in Federal Court when his State Appellate Attorney abandoned him. This petitioner has further shown that he meets the criteria in Martinez v. Ryan, and urges this Supreme Court to grant a merits review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gerald Patrick Thomas

Date: July 7, 2021