No. 21-5852 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Jay Warren Arnold, pro se,
TDCJ No. 2061090,
Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department Of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION(s) PRESENTED

The Fifth Circuit Court of Appeals has denied a COA in this Cause by applying Slack v. McDaniel, 529 U.S. 473, 484 (2000) in a vague and conclusory manner which circumvents the required threshold procedural inquiry and carefully avoids material evidence.

1. Under a de novo review standard, if an indigent prisoner proceeds on appeal under Fed.R.App.P. 24(a)(3), and requests leave to use the Original Record under Rule 24(c), is the incorporation by reference to the constitutional pleadings made in the district court adequate to state a valid claim of the denial of a constitutional right? Or is it otherwise acceptable to "reproduc[e]" the valid constitutional claims in a Rule 40 petition for panel rehearing?

2. Did the Court of Appeals err in refusing to issue a COA regarding statutory or equitable tolling, where the District Court's denial overlooked every fact affirming diligence and relied entirely upon a complete failure to acknowledge the presentation of evidence which conclusively demonstrates that the pro se litigant had been actively misled by a court into pursuing an other State collateral "review" to a higher court, which would otherwise have never been pursued?

3. Does the "narrow exception" recognized in Trevino v. Thaler, 569 U.S. 413 (2013) suggest that "extra-ordinary circumstances" may exist in Texas which per se satisfy the second prong of Pace v. DiGuglielmo, 544 U.S. 408 (2005)? Or does closer inspection of the structurally deficient circumstances which persist in the wake of Trevino justify further corrective measures, such as holding the State of Texas to have electively disentitled themselves from asserting affirmative defenses in federal habeas proceedings?

LIST OF PARTIES

The names of all parties appear in the caption of the case on the cover page.

RELATED CASES

Arnold v. State, No. 10-18-00055-CR, 2018 WL 1004880 (Tex.App.-Waco, Feb. 21, 2018, pdr ref'd)(On other State collateral review)

Ex parte Arnold, 2013-8-C2A, WR-88,555-01 (TCCA July 18, 2018, dsm'd, reh'g den., Aug. 10, 2018)(On initial State post-conviction review)

Ex parte Arnold, 2013-8-C2B, WR-88,555-02 (TCCA Mar. 27, 2019, den., reh'g dsm'd, May 15, 2019)(Subsequent post-conviction review)

Arnold v. Davis, No. 6:19-cv-00332 (W.D. Tex., Waco Division, May 28, 2020)(28 U.S.C. §§ 2241, 2254, dsm'd, COA den.)

Arnold v. Lumpkin, No. 20-50469 (5th Cir. Mar. 16, 2021)(COA den.)

Arnold v. Lumpkin, No. 20-50469 (5th Cir. Apr. 08, 2021)(reh'g den.)

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The Opinions of the Court of Appeals (App. 1a), the District Court (App. 3a), and the Panel Rehearing (App. 13a), are all unpublished.

JURISDICTION

A Judge of the United States Court of Appeals denied a COA on March 16, 2021. A subsequent panel denied rehearing on April 08, 2021.

This Court's March 19, 2020 Standing Order extended the 90 day filing deadline to 150 days, making the instant petition timely filed on or before September 05, 2021. The attached Proof of Service was executed on August 30, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 1651(a).

FEDERAL PROVISIONS INVOLVED

Article 1, Section 9 of the Constitution of the United States of America provides, in relevant part:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d), provides, in relevant part:

> (1)(A) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court. The limitations period shall run from ... the date on which the judgement became final ...
>
> (2) The time furing which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgement or claim is pending shall not be counted toward any period of limitation under this subsection.

Federal Rule of Appellate Procedure 24(c) provides, in relevant part:

> A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

Federal Rule of Civil Procedure 10(c) provides, in relevant part:

> A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion.

Supreme Court Rule 12.7 provides, in relevant part:

> In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court.

STATEMENT OF THE CASE

This case involves a state court conviction of a first time offender who was sentenced by jury to a 60-year aggravated life sentence (the functional equivalent of a sentence to die in prison); the most disturbing of all facts being the Petitioner's 3 children who have lost priceless and irreplacable years with their loving father.

Based upon diligent research, literal statutory interpretation, and reasoned appraisal of the issues at bar, the Petitioner believes this proceeding involves several issues of exceptional importance which merit this Honorable Court exercising its supervisory powers.

A concise recitation of the facts material to the questions presented are as follows.

1. Trial And Direct Appeal: Counsel Forfeited All Substantial Claims

The Petitioner elected to assert his right to a jury trial as a result of an unreasonable plea negotiation process, expecting to be afforded a fair trial and an impartial jury.

In a lopsided 2016 "trial" conducted in the Central Texas County of McLennan's 54th Judicial District Court, which was littered with habitual violations of the Constitution of the United States of America, the only issue "preserved" and reviewed on direct appeal hinged upon trial counsel's anemic objection:

> "[W]e don't think that it's relevant to this proceeding ... and under 403."[1]

Being indigent, the trial court appointed counsel to represent the Petitioner on direct appeal. Minimal information was exchanged.

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1. All facts stated in this petition are true and correct. Citations to the official State trial record will be respectfully deferred until this Court orders full briefing of the issues.

Four months post-trial, without any mention of a right to file a motion for new trial, and after being notified of missing witnesses and evidence, in a response letter dated "July 21, 2016", appointed counsel informed the Petitioner that "the appellate court prohibits me from introducing any evidence that was not made part of the record at trial," and for his INDIGENT client to "feel free to hire the writ counsel of [] choice" to pursue any other issues.

Counsel proceeded to file an utterly meaningless direct appeal brief, which had no chance of success - in large part due to trial counsel's failure to "preserve" any claims for review.

Petitioner filed a timely pro se petition to the Texas Supreme Criminal Court of Appeals ("TCCA"), but, given the sole issue raised on appeal, the PDR itself had no chance of success. Any attempt to petition to this Court for direct certiorari review would have been futile and a complete waste of Judicial/Clerical resources.

2. State Post-Conviction And Other Collateral Review Proceedings

In September of 2017, with nearly 11 months of AEDPA tolling remaining, and to counterbalance trial and appellate counsel's fused deficiencies, the Petitioner attempted to assert his State statutory rights to post-conviction discovery ("at any time ... after trial"), and indigent habeas counsel ("for purposes of filing an application for a writ of habeas corpus, if an application has not been filed"). Both of those requests were ignored by the sitting habeas Judge.

The Petitioner has never asked for any of the initially filed motions to be federally tolled; only for the State court induced "review" (discussed below) that would never have otherwise been pursued in the absence of a misleading appellate court Opinion.

Although pertinent State caselaw strongly supports a contrary holding, the disputed collateral "review" proceedings in this Cause apparantly created a complete ("two-forum" trap) jurisdictional bar which prevented the Petitioner's ability to exhaust State "remedies" until after the other collateral review proceeding was closed.

The supposed two-forum bar was invoked by the State, without any citation to a single rule or law in support, in their Answer to the Petitioner's otherwise timely filed initial protective State habeas application (filed nearly 4 months prior to the AEDPA deadline).

At the State's own behest (without ruling on a Motion to Stay the otherwise timely filed protective State habeas application, pending the outcome of the other State collateral review) the TCCA dismissed the initial timely filed application without written order.

An Emergency Motion for Reconsideration and Stay was immediately filed with the TCCA, but was Denied post-expiration of the AEDPA filing deadline. Once the other State collateral review concluded, a second State habeas application was filed, of which (in short):

- 95% of the presented claims were ignored
- 5% of the claims were misconstrued
- Motions for continuance and remand were ignored
- All attempts to expand the record were ignored

Pursuant to 28 U.S.C. §§ 2241, 2254, the Petitioner executed his federal habeas petition seven days after exhausting State "remedies".

Two noteworthy Facts regarding the State proceedings are that: 1) her actors are fully aware of the existence of undisclosed material evidence, yet remain in violation of their continued statutory duty to disclose, and 2) their affirmative defense asserted in the proceedings below was derived exclusively from their own unsupported request to dismiss the initial protective State habeas application.

REASONS FOR GRANTING REVIEW

The Petitioner moves this Honorable Court to exercise its supervisory power and provide much needed aid to indigent prisoners in Texas.

Equally applicable to every State in the Union, and premised upon the notion that all States are playing by uniform rules, 28 U.S.C. § 2254(b)(1)(A) bars the grant of federal habeas corpus relief to any prisoner in state custody who fails to first provide their respective State an opportunity to fairly adjudicate constitutional violations.

A statutory exception to this general procedural requirement contemplates that extraordinary "circumstances [may] exist that render [a particular state's] process ineffective to protect the rights of the applicant." Id., § 2254(b)(1)(B)(ii).

Such extraordinary circumstances have been held by this Court to exist in Texas. See Trevino v. Thaler, 569 U.S. 413 (2013)(recognizing "significant unfairness" in the Texas post-conviction procedural scheme); See also Martinez v. Ryan, 566 U.S. 1 (2012)(holding such a scheme to be "an equitable matter").

From a broad standpoint, the instant case presents several compelling reasons why states such as Texas that continue to habitually exploit the AEDPA to their undue advantage, and where such extraordinary circumstances have been held to exist, should now be further held to have electively disentitled themselves from the protective federal shield of § 2244(d)(1)'s affirmative defense.

More narrowly, the proceedings below reflect a supposed "remedy" that has revealed itself to be completely inadequate and ineffective to protect the Petitioner's constitutional rights, and has thus far resulted in a Complete Suspension of the Writ, in violation of Art. 1, Sec. 9 of the Constitution of the United States of America.

1. The Court Of Appeals Has Implicitly Decided An Important Question Of Federal Law Pertaining To Indigent Pro Se Litigants Which Conflicts With Sub Silentio Circuit Precident Applied To Attorney Filings And Deserves To Be Settled By This Court

As a preliminary issue, due to the vague and conclusory manner in which a COA was denied in this Cause, it must be presumed that the Circuit Court determined that no valid claims of the denial of a constitutional right had been presented. See Appx. A, at 2 ("Arnold has not made the requisite showing"); Citing Slack v. McDaniel, 529 U.S. 473, 484 (2000). Although a timely Fed.R.App.P. 40 motion was filed which accounted for and corrected the potential deficiency, the panel on rehearing made no corrections to the vague holding. See Appx. C.

Because the District Court also made no reference to the claims, it must be further presumed that Court believed Slack's first prong had not been met. See Appx. B, at 9-10. However, brief inspection of the Original Record reveals that 26 valid claims had been presented (5 fully briefed, making a substantial showing of the denial of Petitioner's Sixth Amendment right to effective trial counsel).

a. Applicable Law And Related Holdings

There appears to be no rule or law prohibiting the initial showing of a valid constitutional claim from either 1) being incorporated by reference to the district court pleadings in the initial COA brief to the appellate court, or 2) being stated for the first time on appeal in a Rule 40 petition for panel rehearing.

No responsive pleading was filed in the Circuit Court, so there was no opportunity to correct any potential deficiencies in a reply brief prior to the Court's ruling.

Rule 24(c) specifies that "A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the orig-

inal record without reproducing any part." The Rule's plain language implies that a qualified party, whose habeas petition is denied on procedural grounds, need not "reproduc[e]" the constitutional claims made in the district court. See Duncan v. Walker, 533 U.S. 167, 174 (2001)(recognizing a court's duty to prevent statutory surplusage).

Such an interpretation is butressed by the "de novo" review of the record applicable to requests for a procedural only COA. See e.g., Hancock v. Davis, 906 F.3d 387, 389 (5th Cir. 2018)(habeas petitions denied on procedural grounds invoke de novo review on appeal).

Other Appellate Rules lend additional support to this interpretation. See e.g., Rule 28(e)(allowing "refer[ence] to an unproduced part of the record"); Rule 30(f)(allowing courts to "dispense with the appendix and permit an appeal to proceed on the original record"); See also S.Ct.R. 12.7 ("In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court").

In Dye v. Hofbauer, 546 U.S. 1, 4 (2005), this Court held that a federal habeas petition explicitly referencing external appended documents "incorporates those documents by reference"; citing Fed.R.Civ. P. 10(c)("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion").

To interpret Dye's holding to not extend to the COA stage would potentially create statutory surplusage in Rule 10(c)'s "any other pleading or motion" clause. Proceedings under Appellate Rule 22(b) must be held to relate to the proceeding under Civil Rule 10(c).

The only authority found which is squarely on point arose through the pleadings of a prominent Texas attorney. See Bagwell v. Dretke, 376 F.3d 408, 410 (5th Cir. 2004)(granting a COA to determine "whether

a petitioner who seeks to challenge a procedural dismissal of his § 2254 petition must state, in his COA application to the appellate court, the constitutional claims he sought to raise in that petition or, if the constitutional claims are not stated in the appellate COA application, whether this Court may look to the pleadings filed in the district court to determine if the proper 'showing' has been made under Slack [] as to the merits of the constitutional claim").

The Bagwell Court provided little guidance on this issue because Bagwell's attorney cured the potential deficiency prior to the Court taking a position on the issue. See Id. ("The State first argues th[e] petition must be dismissed...Bagwell, however, has since filed a motion seeking leave to amend his COA application, and the State offers no persuasive reason why this motion should be denied").

A prime opportunity is now presented to this Court to answer the important procedural question left unanswered in Bagwell as to whether the appellate court may look to the pleadings filed in the district court in such a scenario, or alternatively in a Rule 40 motion.

Indeed, "given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." Lonchar v. Thomas, 517 U.S. 314, 330 (1996).

b. The Potential Deficiency In The Instant Cause Was Cured By The Subsequent Filing Of A Petition For Panel Rehearing

Because no brief was filed by the Appellee in response to the request for the issuance of a COA, the Petitioner was afforded no opportunity to correct the potential deficiency in a reply brief prior to the Court's ruling, thus making the Rule 40 petition the first opportunity to correct the potential deficiency.

Had the panel at least acknowledged the pleadings in the Rule 40 petition it would be unnecessary to address this issue on certiorari. However, the panel denied rehearing without elaboration, see Appx. C, thus making it necessary to repeat the facts in this petition.

Petitioner's initial briefing to the Appellate Court, at *1 (June 18, 2020), in the interest of brevity, cited Doc. 19-1, at *6-31. Attached to that initial request for a COA was a Rule 24(c) motion, which the Circuit Clerk stated in response that "[w]e are taking no action on this motion because it is unnecessary. The Court will have access to the original record." Appx. E.

The plain language of Rule 24(c), illuminated by the Clerk's response that the motion was "unnecessary", gave the Petitioner the fair impression that his initial appellate briefing was sufficient. Moreover, the Clerk's response made it appear unnecessary to reproduce the claims in the Granted July 06 Motion to Amend, as was deemed persuasively acceptable in Bagwell, supra.

Inspection of the Original Record in this Cause reveals that Doc. 1 (May 28, 2019) contains 22 Grounds stating "valid claim[s]" of the denial of Petitioner's Sixth and Fourteenth Amendment right to the effective assistance of trial and appellate counsel, and 1 Ground stating a valid (3 in 1) Fourteenth Amendment / False Testimony claim. See also Doc. 8 (June 12, 2019), Motion to Amend Claim 23 and supplement with 3 additional Fifth, Sixth and Fourteenth Amendment claims of Double Jeopardy and Illegal Sentence / Void Judgement.

The District Judge Granted leave to file Doc. 8 (June 14, 2019). The Respondant acknowledged only the initial 23 valid claims. See Doc. 12, at 1-4 (Aug. 12, 2019). These acknowledged 23 valid claims fully satisfy the first prong of Slack's threshold procedural inquiry.

In fact, the Petitioner actually exceeded Slack's first threshold procedural requirement by filing Doc. 19 (May 21, 2020), which included briefing of 5 of the presented IATC claims and made a substantial showing of the denial of his Sixth Amendment rights. See Doc. 19-1, at *6-31 (copy attached to the Rule 40 petition as Appx. D).

Doc. 19-1 fully briefed 5 claims establishing that trial counsel was ineffective by 1) failing to request the lesser-offense of Third Degree Assault Strangulation ... in the Count I Charge, 2) failing to object to Count I being Jeopardy barred by Count II, 3) failing to object to the Count I Indictment being Illegally amended, off the Record, without any Notice or the Required Motion For Leave To Amend, 4) failing to wage objections under Rules 602, 701 and 704(b), allowing the State to invade the province of jury with uniformed officer[]'s Illegal 3rd person hearsay/opinion testimony and State's emphasized speculation of Deft's elemental culpabilities, and 5) failing to conduct reasonable investigations and present available mitigating evidence to negate the ADA's deceptive 'barn' or 'garage out in the middle of nowhere' contentions, [] or further object to the State's evidence being [State law] Factually Insufficient to reject the Affirmative Defense of Voluntary Release in a Safe Place.

C. Opportunity To Qualify And Emphasize Standard Of Pro Se Leniency Applicable In The Context Of Habeas Corpus Proceedings

By granting the pro se Petitioner a minimal degree of leniency in this Cause, upon full inspection of the Original Record, and under a de novo review of the pleadings, any reasonable jurist would find it debatable that the Court erred in determining these pleadings failed to state a valid claim of the denial of a constitutional right.

This preliminary issue presents the Court with an excellent opp-

ortunity to emphasize and qualify the directive of Haines v. Kerner, 404 U.S. 519 (1972), in the habeas context, that pro se litigants are not to be held to the same rigorous and stringent standards as the pleadings of an attorney. See United States v. Qazi, 975 F.3d 989, 992-93 & n.2 (9th Cir. 2020)(acknowledging that the rule of Haines is considered "settled law", but that this Court "has not clearly articulated its purpose"); quoting Rory K. Schneider, Illiberal Construction of Pro Se Pleadings, 159 U.Pa.L.Rev. 585, 604 (2011).

2. The Court Of Appeals Has Sanctioned The District Court's Departure From The Accepted And Usual Course Of Judicial Proceedings By Refusing To Acknowledge Or Consider Material Facts And Evidence Weighing In The Petitioner's Favor

This Court has repeatedly emphasized the threshold standard of Slack, supra. See Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (At the COA stage, the only question is the debatability of the issues or whether further proceedings might deserve the encouragement of reasonable jurists); See also Buck v. Davis, 137 S.Ct. 759, 773-74 (2017)(A preliminary showing that a claim is debatable does not require it be shown that the claim will ultimately succeed).

The Petitioner in this Cause was seeking tolling of the AEDPA 12-month statute of limitations. 28 U.S.C. § 2244(d). Generally, those seeking to toll a statutory limitations period bear the burden of proof in establishing their entitlement to relief. See e.g., Wall v. Kholi, 131 S.Ct. 1278, 1285 (2011)(holding that § 2244(d)(2) requires an affirmative showing that "a judgement or claim" was reviewed "in a proceeding outside of the direct review process"); See also Holland v. Florida, 560 U.S. 631, 649 (2010)(holding that equitable tolling, while being a flexible remedy, requires affirmative evidence showing

reasonable "diligence" and "extraordinary circumstances").

a. Facts And Evidence Presented Below Fully Establish The Debatability Of The District Court's Procedural Denial Of Statutory Tolling

The evidence presented in the case at bar was a Memorandum Opinion of the Waco Tenth Court of Appeals, in which the Court explicitly authorized further "review" of their interlocutory Judgement, outside of the direct review process. See Appx. D, at 2:

> "Notwithstanding that we are dismissing this appeal, Arnold may file a motion for rehearing with this Court within 15 days after this opinion and judgement are rendered... [and may] have the opinion and judgement of this Court reviewed by filing a petition for discretionary review... with the Court of Criminal Appeals within 30 days after either the day this Court's judgement is rendered or the day the last timely motion for rehearing is overruled by this Court."

It is interesting to observe the great lengths the District Court went through to avoid the appropriate phrase "other State collateral review." See Appx. B at *4 ("related appeal"); at *5 (only "dealt with side issues relating to his potential habeas filing"); at *7 (or was an "other battle").

Moreover, there is no debate these subsequent review proceedings were all "properly filed." Artuz v. Bennett, 531 U.S. 4, 8 (2000). Nor is it debatable that they all involved "the pertinent judgement or claim." See Appx. D at *1 (In re "Trial Court No. 2013-8-C2").

In the District Court, the Petitioner relied primarily upon the holdings of Kholi and Duncan, supra. See 533 U.S., at 174-75 (contemplating the "universe of applications for collateral review", the tolling provision was held "to include review of a state court judge-

ment that is not a criminal conviction").

The pertinent evidence was presented and argued several times in support of this contention. See:

- Doc. 1, at *12 (05/28/2019)
- Doc. 7, at *1 with attached Exhibit 2 (06/12/2019)
- Doc. 16, at *3 (08/28/2019)
- Doc. 17, at *2 (01/06/2020)
- Doc. 19-1, at *5 (05/21/2020)

Yet, not once did the District Court acknowledge the evidence or discuss the potential application of Duncan or Kholi. The Court did, while discussing equitable tolling, lightly touch on the subject by stating the other State collateral review was "not any actual challenge of [the] conviction on the merits." See Appx. B, at *5. This essentially adopted the Respondent's assertion in their Answer with Brief In Support. See Doc. 12, at *11 (08/12/2019)(arguing that the other collateral review was not "a challenge to [the] conviction").

These adverse contentions directly conflict with Kholi, supra, where this Court flatly rejected the State of Rhode Island's undifferentiated contention "that 'collateral review' includes only 'legal' challenges to a conviction or sentence[.]" 131 S.Ct., at 1283. Also rejected in Kholi was the contention that § 2244(d)(2) only applies to claims cognizable "in a federal habeas petition." Id., at 1287.

It is important to note that both Rhode Island's and Texas' acute interpretation of § 2244(d)(2) creates statutory surplusage, as such a narrow reading of the statute renders meaningless any distinguishment between "State post-conviction" review, and, as construed in Duncan, "other State collateral review." 533 U.S., at 175. Such an interpretation encroaches upon long-standing rules of statutory construction. See Id., at 174, quoting Bacon's Abridgment, sect. 2, "a

statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

Just as this Court was unwilling in Duncan to "render the word 'State' insignificant, if not wholly superfluous", ibid, it should be equally unwilling to render the "or other collateral" clause wholly superfluous in the case at bar. The legislators clearly intended to differentiate between 'State post-conviction review' and 'other State collateral review.'

The Texas habeas statute, Tex.C.Crim.Proc. Art. 11.07, fits into the former, while the disputed "review" in this Cause to the latter. While Art. 11.07 itself contains no reference to either term, Sec. 3 does make several references to the phrase "after final conviction." See also Art. 1.051(d)(distinguishing between "appellate and postconviction habeas corpus matters").

Therefore, Duncan's "recognition of the diverse terminology that different States employ", Id., at 177, provides strong guidance to recognize that Texas specifically employs the term "post-conviction" in the context of their habeas corpus proceedings.

While there may be legitimate dispute about how far to broaden the scope of the 'other State collateral review' clause, the purpose which the clause serves was well defined in Kholi: to "potentially obviat[e] the need for a litigant to resort to federal court"; an expansive notion which includes "motions that do not challenge the lawfulness of a judgement." 131 S.Ct., at 1288.

Indeed, the Fifth Circuit has itself already applied § 2244(d)(2) to collateral review proceedings well beyond the District Court's narrow interpretation below. See e.g., Emerson v. Johnson, 243 F.3d

931, 934-35 (5th Cir. 2001)(extending the statute so far as to include the pendency of **procedurally barred** motions).

Notwithstanding the fact that State procedural rules explicitly prohibit the filing of a motion for rehearing after the denial of an Art. 11.07 habeas petition, the tolling provision was held to apply "during the period in which a Texas habeas petitioner has filed such a motion." Id., citing Tex.R.App.P. 79.2(d)("A motion for rehearing ... may not be filed").

Likewise, a post-conviction DNA motion under Art. 64.01, C.C.P., which most closely approximates a discovery motion, provides only an indirect means of waging an Effective challenge to a conviction. See Hutson v. Quarterman, 508 F.3d 236, 240 (5th Cir. 2007)(holding the pendency of post-conviction DNA motion statutorily tolled); But see Ex parte Baker, 185 SW 3d 894, 895 (TCCA 2006)(Texas' DNA "statute does not say that a favorable finding will have any effect on the conviction"); see also Ex parte Tuley, 109 SW 3d 388, 391 (TCCA 2002)("Chapter 64 provides for forensic DNA testing but **does not provide a vehicle for obtaining relief** if testing reveals affirmative evidence of innocence"), emphasis added.

As stated in Appx. D, at *2, the disputed proceedings in this Cause stemmed from an "interlocutory appeal", outside of the direct review process, in which the appellate Court explicitly authorized "rehearing ... to have the opinion and judgement of this Court reviewed ... review ... rehearing[.]"

While it is true that this other State collateral "review" did not wage a direct challenge to the conviction on the merits, a very strong argument, which will be reserved in the instant petition, proves that it was a means of waging an EFFECTIVE challenge to the

conviction; which gave it a distinct potential to obviate the need for federal review, thus fulfilling Kholi's central concern.

The ignored evidence and Kholi's reasoning fully establish the debatability of the District Court's procedural ruling and support the issuance of a COA in this Cause. See Miller-El, supra, 537 U.S., at 340 ("the issuance of a COA can be supported by any evidence").

The lower courts were held in Miller-El to have committed clear error in denying a COA because "the District Court did not give full consideration to the substantial evidence the petitioner put forth in support of the prima facie case." Id., at 347.

Likewise, in Buck, supra, it was observed that "[t]he Fifth Circuit, for its part, failed even to mention the ... evidence" presented in support of finding that the District Court's procedural ruling was debatable. 137 S.Ct., at 778.

Such is also the case with both Courts below in this Cause, as a single reference to the evidence is conspiculously absent from the Opinions. See Appx. A - C [Evidence presented at Appx. of initial COA brief, and argued at *7-8 (06/18/2020); also see Appx. of Rule 40 Motion, and argued at *5-6 (04/05/2021)].

b. Facts And Evidence Presented Below Fully Establish The Debatability Of The District Court's Procedural Denial Of Equitable Tolling

The District Court's Opinion below contained an unprecidented implicit holding, namely, that a "protective" federal habeas petition was required in order to prove diligence. See Appx. B, at *7 (entangling the pro se Petitioner's requests for statutory tolling with those for equitable tolling, the Court stated that the "Petitioner's claims for equitable relief make it clear that he understood the

correct way to obtain statutory tolling"); cf. Id., at *5 (implying the proper course was "to file a protective petition in this court" ... which itself assumes the Court would have granted permission to pursue the above 'other State collateral review', and completely supports the grant of statutory tolling in this scenario).

Not only is the District Court's rigid per se holding the type which this Court had admonished in Holland, supra, 560 U.S., at 649, it is unprecidented in light of Pace v. DiGuglielmo, 544 U.S. 408 (2005). This Court's discussion in Pace about the theoretical filing of a "protective" federal habeas petition, Id., at 416, was strictly confined to the issue of statutory tolling under § 2244(d)(2), and had nothing to do with the question of diligence or whether equitable tolling was appropriate in a particular circumstance. The Court's "equitable" discussion did not commence until the following section. See Id., at 418.

This is a fundamental misapplication of equitable principles, and identical to Holland, "the district court erroneously relied on a lack of diligence" to deny equitable tolling. 560 U.S., at 653.

The District Court in this Cause was only able to arrive at such a conclusion by mechanically glossing over all of the factual circumstances and evidence weighing in the Petitioner's favor. A brief inspection of the logic employed to support its holding, See Appx. B, at *7, reveals that the Court believed an affirmative finding of diligence was also precluded by the fact that the Petitioner:

> "was the person responsible for filing the motions in the state trial court ... [and] sought to pursue a different course of action, that course failed, and now he cannot be heard to complain that the choice ... took too long and prevented him from timely filing in this Court."

> "When told by the court that he was seeking that relief too early, he appealed the decision" ... all of which was simply "a circumstance of his own creation."

Throughout the course of the District Court's Opinion, not one single reference is made to the Waco Court of Appeals' Memorandum Opinion, or its misleading nature which repeatedly misled the Petitioner to seek "rehearing ... to have the opinion and judgement of this Court reviewed ... review ... rehearing." Appx. D, at *2; Mem. Op., Arnold v. State, 2018 WL 1004880 (Tex.App.- Waco, Feb.21, 2018).

The above reference to being "told by the court" pertains to the assigned Sr. District Judge, after whose Feb. 05 Order a notice of appeal was filed on Feb. 14 pursuant to applicable State Rule.

Post-factum perusal of this issue, and the highly debatable facts and circumstances leading up to it, reveal that no other pro se litigant persuing identical relief in the State courts had been instructed to seek "rehearing" or further "review" of the denial or dismissal of their interlocutory claims. See Lara v. State, 2018 Tex.App. LEXIS 7200 (Tex.App.- Houston [1st Dist.] Aug. 30, 2018); Nottingham v. State, 2020 Tex.App. LEXIS 2832 (Tex.App.- Amarillo, Mar. 31, 2020); Vasquez v. State, 2018 Tex.App. LEXIS 7704 (Tex.App.- Eastland, Sept. 20, 2018); Smith v. State, 2017 Tex.App. LEXIS 5206 (Tex.App.- Austin, June 08, 2017); Braley v. State, 2015 Tex.App. LEXIS 12470 (Tex.App.- Texarkana, Dec. 10, 2015); Kossie v. State, 2015 Tex.App. LEXIS 2455 (Tex.App.- Houston [14th Dist.] Mar. 17, 2015); See also In re Blake, 2016 Tex.App. LEXIS 2603 (Tex.App.- Waco, Mar.20, 2016).

These distinguishing cases, which were presented in the Rule 40 petition for panel rehearing, all support an affirmative finding that the Petitioner was misled by the Waco Court of Appeals to seek further "review" which no other litigant was misled into pursuing.

Absent the Waco Court of Appeals misleading inducement, the Petitioner would Never have filed a motion for rehearing or a petition for discretionary review with the TCCA, which in turn would have left over 5 months of AEDPA tolling (Feb. 21 - Aug. 01, 2018). The Record reflects Petitioner's initial protective State habeas application was filed on Apr. 24, 2018, and that the § 2254 petition was executed on May 22, 2019 (one week after exhausting State "remedies").

Because the Fifth Circuit generally requires that a plaintiff provide evidence of being "actively misled" to prove extraordinary circumstances and justify the application of equitable tolling, See e.g., Coleman v. Johnson, 184 F.3d 398, 402 (5th Cir. 1999), both of the courts below committed clear error in failing to consider the evidence put forth to prove the Petitioner was in fact misled to pursue the controverted other State collateral review in this Cause.

b(1). Essential Context Establishing Diligence Overlooked By The District And Circuit Courts

In Holland, supra, a case which was strictly limited to the issue of equitable tolling, the lower courts were held to have erred by not considering the various pro se efforts (i.e., numerous letters, etc.) which demonstrated "reasonable diligence." 560 U.S., at 252-53, citations omitted.

Interestingly, the Holland Court could have simply held, as the District Court in the case at bar, that Holland was not diligent enough because he should have known to "file a protective petition in th[e federal district] court." Appx. B, at 5. But as Holland and Pace both make clear, that is not the standard of equity.

Completely overlooked by the Courts below were all of the facts establishing that the incarcerated Petitioner:

1) made repeated requests, beginning in September of 2017, for the disclosure of material evidence in the State's possession and indigent habeas counsel (illusory Rights In Name Only) to help facilitate the proper presentation of the withheld evidence;
2) filed a "protective" State habeas application, and a subsequent motion to Stay, with over three months of AEDPA tolling remaining;
3) was cited to no rule, law or State court precident in support of denying his motion to stay the protective State habeas filing (while precident does exist supporting the Grant of a Stay);
4) relied upon a fair belief the motion to stay would be granted;
5) had his motion to stay ignored, while the post-dismissal Emergency motion to Stay was not ruled upon and denied until August 10, 2018 -- nine days post-expiration of the AEDPA filing deadline;
6) could not possibly have predicted the necessity of filing a "protective" federal habeas petition until it was already too late (even if filed on the same day as denial of the Emergency motion);
7) while simultaneously litigating the above "other State collateral review", which he was misled into pursuing, was diligently working to re-type and re-submit his extensive State habeas application, which he was not permitted to file until after the mandate issued in the other State collateral review;
8) received no official notice of the second State habeas application being denied (evidence attached to the initial § 2254 filing, see Doc. 1, at *4, 15 & Ex. 1), and only learned of the denial through communication with his family a month later; after which he
9) immediately sent a motion for reconsideration the next day; and
10) executed his federal habeas petition seven days after the motion for reconsideration was dismissed by the TCCA.

Upon recognition of the numerous efforts extending well beyond reasonable diligence, along with the inherently misleading nature of the unacknowledged evidence, and the District Court's rigid per se holding that equitable tolling required the filing of a protective federal habeas petition, it is not difficult for reasonable jurists to debate and conclude that the courts below committed clear error by not granting a COA in this Cause.

3. Texas' Refusal To Correct Their Structurally Deficient Scheme In The Wake Of Trevino Is A Compounding Problem Which Greatly Affects Indigent Prisoners And Justifies Further Corrective Measures Be Taken By This Court

This Court recognized in Martinez, supra, that certain inequitable circumstances, such as where indigent prisoners seek to vindicate complex claims which typically require expansion of the trial record, "may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings." 566 U.S., at 9.

In lieu of addressing that constitutional question, however, the Court opted to carve out a "narrow exception" to the procedural default rule. Id.; See 28 U.S.C. § 2254(b)(1)(A)(barring the grant of federal habeas relief to any claim not exhausted in State courts).

The issue in Martinez was labeled "an equitable matter", and the exception was tailored in a manner which "permits a state to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings." 566 U.S., at 13-16.

The Martinez exception was later held to apply to Texas' method of attenuating such claims. See Trevino, supra, 569 U.S., at 425-26 (perceiving "significant unfairness" in the Texas procedural scheme).

Although using correlative phraseology, the holdings in Martinez and Trevino (specifically pertaining to the necessity of expanding the trial record) ostensibly constitute a finding that extra-ordinary "circumstances exist that render [the State's] process ineffective to protect the rights of the applicant." § 2254(b)(1)(B)(ii).

It is axiomatic that the Martinez/Trevino exception implicates values beyond the concerns of deficiently performing trial counsel. See e.g., Strickland v. Washington, 466 U.S. 668, 692 (1984)(intimating that "various kinds of state interference with counsel's assistance [sic] is legally presumed to result in prejudice"); See also United States v. Bagley, 473 U.S. 667, 679-82 & n.8-13 (1985)(the "materiality" standard is rooted in claims of perjured testimony, suppressed evidence and ineffective assistance of trial counsel).

The instant case presents significant facts which this Court may deem appropriate to further hold that, where the Martinez/Trevino exception applies, a) extra-ordinary circumstances decisively exist which per se satisfy the second prong in an equitable tolling inquiry, and/or b) there is no justification to distinguish between the affirmative defenses delineated in 28 fol. § 2254, Rule 5(b).

a) The Trevino Exception Per Se Justifies The Grant Of Equitable Tolling For Indigents Who Demonstrate Reasonable Diligence

The basic underlying premise of this issue appears to speak for itself, and this pro se litigant does not wish to ramble on endlessly citing the myriad examples which justify such an equitable holding. As formerly mentioned, two Texas Bills passed in the wake of Trevino regarding post-conviction discovery and indigent habeas counsel, both of which appear to be illusory and misleading rights in name only.

Regarding any supposed "right" to post-conviction discovery, per-

haps a good starting point would be for Texas to get their pre-trial issues properly resolved first. See e.g., Hillman v. Neuces Cty., Tex. and Neuces Cty. DA's Office, 579 SW 3d 354 (Tex. 2019)(Assistant DA fired for ethically "refusing to withhold exculpatory evidence").

As far as the "right" to indigent habeas counsel goes, beyond the pro se litigants that are continuing to be misled by the plain in pari materia language of the applicable statute[s], see generally, supra, at *19, citing distinguishing interlocutory State cases, the issue was well summarized by In re Garcia, 486 SW 3d 565 (TCCA 2016), d.op., Alcala, J., joined by Johnson, J.,

("Texas already spends enough money[.]")

It appears to be a more cost effective means of ensuring the protection of an indigent defendant's most fundamental rights, not for the State to fairly adjudicate actual constitutional violations, but, rather, to train "better-qualified attorneys ... at the front end of the process[.]" Id., at 566-67, Conc.op., Keller, P.J., joined by Keasler and Hervey, JJ.

This inverted logic succinctly demonstrates why prisoners being illegally restrained in the Lone Star ("Hook 'em") State are in dire need of this Honorable Court's equitable intervention.

Accordingly, this Court should hold the equitable Trevino exception justifies invoking § 2254(b)(1)(B)(ii) in Texas, and that these extraordinary circumstances per se satisfy the second prong of Pace, supra, for indigents who demonstrate reasonable diligence.

b. This Court Should Hold Trevino To Not Distinguish Between The Affirmative Defenses Delineated In The Rules Governing Section 2254 Cases In The United States District Courts

With regard to the observation in Martinez, supra, about prisoners being "in no position to develop the evidentiary basis for [the complex claims rooted in the materiality standard], which often turn on evidence outside the trial record", 566 U.S., at 12, the pro se Petitioner in this Cause filed numerous claims in the State habeas proceedings involving "Ineffective Assistance of Trial Counsel ... Suppression of Material Evidence and Materially False/Misleading Testimony ... False Testimony ... False Evidence", the majority of which required evidentiary development.

Several attempts were made to counter the State's Dec. 04, 2018 Answer that "No evidentiary hearing is needed or warranted" and that "the vast majority of these claims would have been cognizable on appeal, and are not proper in a habeas application." See e.g., (12/17/2018)(Objection To State's Answer, Page 2: "All Defaulted Claims Have Been Raised As IAC"); (01/08/2019)(Proposed Designation Of Issues: enumerating IAC claims); (01/25/2019)(Motion For Continuance, Page 1: "The Court's instant ODI ... inequitably Favors the state's, defense and appellate counsel's interests - ensuring the vast majority of the outlined Ineffective Assistance of Counsel and related Fundamental claims ... will Not be addressed"); (03/06/2019)(Motion To Remand, Page 1: "The habeas court has ... refused to acknowledge the Vast majority of plainly outlined [IAC] claims"); (05/06/2019)(Motion For Reconsideration: "The Habeas Court's Findings of Fact Are Not Supported By The Record ... intentionally used False testimony ... unadjudicated IAC claims").

Within the above State court pleadings were several requests for indigent habeas counsel, undisclosed evidence, and an evidentiary hearing to supplement the incomplete Record with material impeachment

evidence and testimony. However, once the State's Answer was filed on Dec. 04, 2018, the substance of every pro se document was blatantly ignored by the State courts.

It is simply disgraceful for a State to even attempt to assert any form of affirmative defense on a Record such as this.

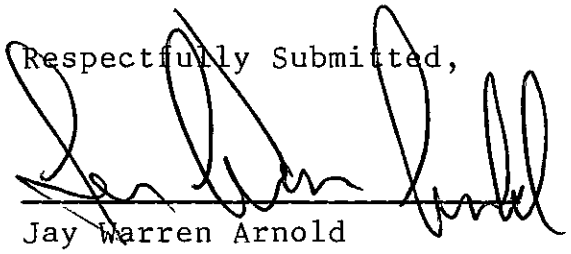
28 fol. § 2254, Rule 5(b) runs directly parallel to the exhaustion statute, § 2254(b)(1)(A), and provides a means for states to assert various affirmative defenses and avoid answering the merits of any asserted claims. Such defenses include any "failure to exhaust state remedies, a procedural bar ... or a statute of limitations."

This Court's holding in Trevino provedes an exception to a pro se petitioner's failure to exhaust state remedies which involve complex claims typically requiring development of the trial record. Based upon the State habeas record in the case at bar, the State of Texas must be held to have electively disentitled themselves to any form of affirmative defense in federal habeas proceedings.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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