No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Shahram Shakouri — PETITIONER
(Your Name)

vs.

Bobby Lumpkin — 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

Shahram Shakouri, TDCJ-ID No. 01558021
(Your Name)

1525 F.M. 766
(Address)

Cuero, Texas 77954
(City, State, Zip Code)

(361) 275-2075 Ext. 1233
(Phone Number)

QUESTION(S) PRESENTED

1. The Texas Court of Criminal Appeals [TCCA] in several opinions has observed that, "Even unknowing use of false testimony violates a defendants's due process rights." See Ex Parte Chavez, 371 S.W. 3d 200; Ex Parte Chabot, 300 S.W. 3d 768; and Ex Parte Robbins, 360 S.W. 3d 446. Considering Texas Highest Criminal Court's opinion that even unknowing use of false testimony to obtain a conviction, violates a defendant's due process rights, the questions presented are:

(a) Whether the district court erred to deny relief by reliance on the Fifth Circuit ruling in **Kinsel v. Cain,** 647 F. 3d 265, 272 that "because prosecution did not know that victim's statements were false. Petitioner failt to demonstrate a due process violation";

(b) Whether the district court was authorized to substitute its own interpretation of the State law for that of the Court of Criminal Appeals? Or to contest a well-settled State law? In Schad v. Arizona, 111 S.Ct. 2491, this Court held: "Supreme Court is not free to substitute its own interpretation of state statutes for those of state's courts";

(c) Whether the State Court's interpretation of State law was binding on the federal district court? In Bradshaw v. Richey, 126 S.Ct. 603, this Court observed: "A state court's interpretation of state law...binds a federal court sitting in habeas corpus";

(d) Whether the Fifth Circuit's decision in Kinsel v. Cain, supra is even applicable to Texas cases where it conflicts with the Texas Highest Criminal Court's precedents on unknowing use of false testimony; and

(e) Whether the lower courts created a question of law on unknowing use of false testimony in Texas which requires legal clarity from this Court? See Rule 10. In other words, in which manner should the Texas courts resolve the issue of unknowing use of false testimony in the future? Should the courts decide the issue in accordance with the interpretation of the T.C.C.A. that even unknowing use of false testimony violates a defendant's due process rights? Or should the courts adopt the Fifth Circuit's approach that it does not?

2. The Supreme Court has clearly established that "prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83. This Court has further held, "Government's failure to assist defense by disclosing information that might have been helpful in conducting cross-examination amounts to constitutional violation." U.S. v. Bagley, 105 S.Ct. 3375.

In the present case, the post-trial discoveries have established that the prosecution willfully refused to disclose to defense two key witnesses whose testimonies tend to negate the guilt of Petitioner. Considering the foregoing, the questions presented are:

(a) Whether "the prosecution is guilty of misconduct when he deliberately suppresses evidence that is clearly relevant and favorable to the defense, regardless once again, whether the evidence relates directly to testimony given in the course of governments case?" See Agurs, 427 U.S. at 121; and

(b) Whether the State's suppression of favorable evidence that impeaches the credibility of a government witness whose testimony may well be determinative of guilt or innocence is reversible error under Brady? See Giglio v. U.S., 92 S.Ct. 763.

3. Neither the district court, nor the Fifth Circuit addressed the underlying legal question in this case, whether the State had a constitutional obligation to disclose to defense withheld testimonies of two key witnesses under Brady. In regard to this issue, the questions presented are:

(a) Whether the district court's refusal to adjudicate Petitioner's Brady claim violated his constitutionally protected rights under Due Process Clause of the 14th Amendment? Or conflicts with relevant decisions of this Court. See Rules of Supreme Court, Rule 10(c);

(b) Whether the exclusion of material witesses had substantial and injurious effect or influence in determining the jury's verdict under O'Neal v. McAninch, 513 U.S. at 436;

(c) Whether the suppressed testimonies violated Petitioner's fundamental rights to present a complete defense under Crane v. Kentucky, 106 S.Ct. at 2146; or

(d) Whether the violation of Petitioner's rights to present a complete defense was a structural error under Weaver v. Massachusetts, 137 S.Ct. 1899 (2017).

4. "A defendant in a federal prosecution has a constitutional right to a unanimous jury verdict. F.R.Crim.P. 31(a). Unanimity in this context means more than a conclusory agreement that; the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principle factual elements underlying a specified offense. A jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." U.S. v. Gonzalez, 786 F. 3d 714 (9th Cir. 2015)(citing Richardson v. U.S., 119 S.Ct. 1707. See also Beck v. Alabama, 447 U.S. 625.

Considering this Court's controlling authorities on this issue, the questions presented are:

(a) Whether the unconstitutional jury charge violated Petition-

er's constitutional rights to a unanimous verdict under the federal law; or

(b) Whether the State's failure to elect on which specific offence it would rely upon for conviction resulted in an erroneous jury charge, and a genuine risk of juror confusion.

5. In his affidavit submitted to the habeas court, trial counsel admitted that he did not request a lesser-included instruction because: "I do not believe we were entitled to a lesser included charge unless there was some evidence that the offense occured."

Contrary to counsel's admission, the district court erroneously concluded that "trial counsel failed to request a lesser-included instruction for strategic reasons." In light of the foregoing, the questions presented are:

(a) Whether a conviction can be upheld, where the findings of the federal court is clearly contrary to the record, or in oppisition to the Supreme Court's precedents in Beck v. Alabama, 447 U.S. 625, 634 (1980); and Keeble v. United States, 412 U.S. 205, 208 (1973);

(b) Whether the trial counsel's fundamental misunderstanding of Texas law with regard to being entitled to a lesser-included instruction satisfies the requirements of ineffective assistance of counsel under Strickland v. Washington? In Kimmelson v. Morrison, 106 S.Ct. 2574, this Court held; "A failure to file a motion to suppress that is based on lack of knowledge of the rule of evidence, due to counsel's misunderstanding and ignorance of the law or a failure to conduct adequate investigation, can satisfy Strickland's deficiency prong." and

(c) Whether the district court's application of the Strickland standard was objectively unreasonable, because counsel's ignorance of the law in no wise can be a trial strategy.

LIST OF PARTIES

SHAHRAM SHAKOURI
Petitioner,

21-5897

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Respondent.

ORIGINAL

RELATED CASES

No. 19-40699

United States Court of Appeals
For The Fifth Circuit

Shahram Shakouri
Appellant,

v.

Bobby Lumpkin
Appellee.

CIVIL ACTION No. 4:15-CV-447

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SHAHRAM SHAKOURI

v.

DIRECTOR, TDCJ-CID

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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

The opinion of the United Stated Court of Appeals appears at Appendix "A" and "B" to the petition.

The opinion of the United States district court and the Report and Recommendation of the Magistrate Judge appears at Appendix "C" and "D" to the petition.

Petitioner is not aware whether either opinions have been published or not.

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit DENIED Petitioner's Petition for C.O.A. on May 18, 2021. See Exhibit "B". Petitioner filed an out of time motion for reconsideration. The Appellate Court GRANTED leave to file out of time motion for reconsideration. However, the Court DENIED motion for reconsideration on July 12, 2021. See Exhibit "A".

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for capital or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger,nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

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

FOURTEENTH AMENDMENT

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

28 U.S.C. § 2253(C)(2). A certificate of appealability under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254 (d). An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

18 U.S.C.A Fed.R.Crim.Proc. Rule31.

(a) Return. The jury must return its verdict to a judge in open court. The verdict must be unanimous.

(b) Lesser Offense or Attempt. A defendant may be found guilty of any of the following:

(1) an offense necessarily included in the offense charged;
(2) an attempt to committ the offense charged; or
(3) an attempt to committ an offense necessarily included in the offense charged, if the attempt is an offense in its own rights.

Violence Against Women Act of 1994. 42 U.S.C. § 13981, (a), (b), (c)

The text of the above Act appears in the petition on page 5.

Texas Constitution Article V, § 4(b) mandates, among other things, that when the Court considers a case en banc, "five Judges shall constitute a quorum and the concurrence of five Judges shall be necessary for a decision."

Texas R. App. Proc. Rule 76. Submission En Banc.
The Court will sit en banc to consider the following types of cases:

(a) direct appeal;
(b) cases of discretionary review;
(c) cases in which leave to file was granted under rule 72;

(d) cases that were docketed under Code of Criminal Procedure articles 11.07 or 11.071;
(e) certified questions; and
(f) rehearing under Rule 79.

Texas Code of Crim. Proc.Art. 11.07 Procedure after conviction without death penalty.

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

* * *

STATEMENT OF THE CASE

I. Violence Against Women Act.

The Vilence Against Women Act (VAWA) was enacted for the salutary purpose of protecting women who were victims of violent crimes.

> Congress enacted the Violence Against Women Act of 1994 (hereinafter "VAWA") as a response to increasing nationwide problems with domestic violence, sexual assault, and other forms of violent crimes against women. In enacting the statute, Congress specifically invoked its legislative powers under the Commerce Clause and § 5 of the Fourteenth Amendment, 42 U.S.C. § 13981(a), and created a federal substantive right "to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). Further, Congress provided victims of these crimes with a private cause of action for compensatory and punitive damages, injunctive relief and any other appropriate remedy against any person who commits a crime of violence motivated by gender. 42 U.S.C. § 13981(b) & (c). The VAWA's self-stated purpose is "to protect the civil rights of victims of violence motivated by gender and to promote public safety, health and activities affecting interstate commerce by establishing a Federal Civil right cause of action for victims of crimes of violence motivated by gender." 42 U.S.C. § 13981(a). Santiago v. Alonso, 96 F. Supp. 58, 60-61 (D.P.R. 2000).

Nevertheless, despite the salutary purpose of the VAWA, it created a preserve incentive for immigrants to falsly claim to be victims of domestic violence in order to obtain legal status in the United States. Indeed, this is a recognized phenomenon.

> Hundreds of Americans say their foreign wives exploited a section of the VAWA that helps victims of spousal abuse to remain in the United States even if they exit their

marriage. The spurned husbands say their immigrant spouse have lied to police, judges, and women's shelters in their efforts to manufacture evidence of abuse.

"A Husband Spurned," State, (Nov 8, 2010) As noted by one former enforcement agent for ICE, "This is a tough situation. You want to have the law protect domestice violence victims, yet the law also creates another vulnerability in our immigration system that is exploited by fraudsters." "Immigrants preying on Americans with False Tales of Abuse to stay in U.S., Experts say," Fox News (Sept. 8, 2016)(emphasis added).

At the trial of the instant case, there was, in fact expert testimony provided by Gary Davis, a Texas attorney certified by the Texas Board of Legal Specialization in Immigration and Naturalization law that discussed this vulnerability to the system.

Q: And then what happens when [immigrants] get to this country and they promptly separate after a few days.

A: It becomes very difficult for the non-U.S. citizen spouse. At that point options are limited because when someone has entered the country under a fiance' visa, they can only become permanent residents, or technically adjust their status to permanent resident, through the marriage relationship that led to the fiancee visa.

The only alternative to that, that has any reasonable chance to succeed through the relationship would be if the person were abused, they could file under the Violence Against Womens Act for a self-petition. If that self-petition where to be approved, then the person would be eligible to seek a Green Card without the sponsorship of the U.S. citizen spouse.

Q: And how hard is that to do to persuade-to go that way? It would seem like everybody would say that.

A. Frankly, it happens quite frequently; but because of protections and the sensitive nature of the request itself, there are built into the statute privacy limitations such that the non-U.S. citizen spouse, their-whatever evidence they submit is taken basically at face value... (RR Vol 203-04)(emphasis added).

II. Factual Background.

The bottom line to this case is simple. Either Afsaneh Marous, whom Petitioner brought to the U.S. on fiance' visa, was a victim of violence motivated by gender entitled to VAWA or she, like others have done, has perpetrated a serious fraud upon the State court in order to be able to remain in the United States of America and have a path to citizenship. If it is the latter, Petitioner, albeit unknowingly, now assists her in continuing to perpetrate this egregious fraud on this Honorable Court and the Federal Government.

It is especially noteworthy, that according to the testimony of Mary Todd, a women's shelter aid at trial, Afsaneh Marous (A.M.) obtained a Green Card sometime in 2008. (RR VI 47-48) and Exhibit "M". See also (D.E. 24) Reply To Respondent's Answer, Exhibit "F".

A. Afsaneh Marous

Mohammad Manteghinezhad (M.M.), Afsaneh's boyfriend and the State appointed translator describes Afsaneh Marous as a liar and a self-proclaimed con artist, a women with huge appetite for sex. See. M.M.'s affidavit; Exhibit "N" at 2.

Mr. Abbas Roshani, A.M.'s first husband in Tehran described her as a compulsive liar and a prostitute. Mr. Roshani said that A.M. also falsely accused him of sexual assault, and stole all of his belongings, shortly after their marriage. Mr. Roshani's mother, described her former daughter-in-law as a shameless thief. See Objections To The

State's Answer To The Applicant's Writ Of Habeas Corpus (D.E. 7-1) Exhibit "L" at 21, 25.

A.M.'s former employer in Tehran, Mr. Alipour D.D.S., described her as a professional thief who stole $5,000.00 from him and he filed criminal charges against A.M., Id., at 26.

Mr. Piroozneya, A.M.'s former employer in Allen, Texas referred to her as a very dangerous women who almost destroyed his business and his marriage. Piroozneya filed a lawsuit against A.M. to recover some of the damages she had caused.

A.M.'s sister-in-law, Shiva Marous, described her as a serial liar. Shiva also related to Petitioner that she overheard A.M.s mother telling her "plant something in his [Petitioner's] house so he can be arrested." Id., at 33.

Corrbet Hutchinson said A.M. asked him to hack into Petitioner's computer and place child pronographic pictures on his hard drive to make sure that he would be arrested and convicted. See Exhibit "O" at 2, n. 10.

Mrs. Nasrin Abdi, A.M.'s next door neighbor in Tehran, and A.M.'s confidant described her as a liar and a women with many boyfriends. See Exhibit "P" at 27.

Mr. Pooya Tajali, a church member who lived in the same neighborhood as A.M. in Tehran, referred to her as "Jendeh-i-khiabani"; (back-alley-hooker). See Exhibit "L" at 26.

Mr. Musa Sawlehe, A.M.'s former boyfriend in Tehran referred to her as a prostitute. Id., at 24.

The late Mr. roshani Sr., described his former daughter-in-law as a "shamless prostitute who wants men just for their money and sex." Id., at 37.

This is the character of the women who falsely accused Petitioner of sexual assault, sent him to prison for 23-years in order to exit the marriage and not get deported. And these are testimonies that the jury did not hear due to trial counsel's failure to investigate the case. See also Exhibit "P".

B. Shahram Shakouri

At trial, Petitioner categorically denied ever threatening A.M. or forcing her to have sex against her will. He claimed that A.M. had a hidden agenda, that she used him to migrate to the United States to be with her old boyfriend Reza Shahmohammadi; a dentist in Los Angeles, California. A.M. contacted Reza, who flew to Dallas, Texas and spent a few days with A.M. in the Marriot Hotel in 2007. That Reza later sent emails and test messages to Petitioner asking for $100,000.00 in exchange for dropping the charges. (RR 5: 141-144).

Petitioner further asserted that A.M. had a huge appetite for sex, as M.M. confirmed in his affidavit, and she often used sex toys on herself. (RR 85-87). He alleged that contrary to A.M.'s testimony, she brought several sex toys from Iran which she later planted in Petitioner's home to be discovered by a subsequent search warrant. See M.M.'s affidavit Exhibit "N" at 2, n. 10.

In his affidavit, M.M. further stated that the flash drive containing pornographic images was planted in Petitioner's laptop bag by A.M.'s son. Id.

In sum, Petitioner was wrongfully convicted based upon a web of lies spun by a compulsive liar and planted evidence of a con artist, who took advantage of VAWA, and Petitioner's kindness and generosity.

III. Procedural History

The post-trial discovery of exculpatory evidence in 2014 has clearly established that Petitioner's State trial in January 2009 was inundated by false testimony of State's principle witness, manufactured evidence, suppression of impeachment evidence, ineffective assistance [I.A.T.C.] on several plains, prosecutorial misconduct, and Brady violations amongst other deficiencies.

The post-trial discoveries furhter demonstrates that the State willfully suppressed exculpatory evidence which was crucial to the determination of Petitioner's guilt or innocence. That jury was precluded from hearing refutable testimonies, and Petitioner was deprived of his constitutional rights to present a complete defense.

In 2010, prior to discovery of withheld material evidence, Petitioner filed his direct appeal in the Court of Appeals; Fifth District of Texas. Naturally, the record before the Appellate Court was devoid of the testimonies of withheld witnesses that Complainant lied to the lead prosecutor, and to the jury, planted evidence in Petitioner's home, confessed to being a con artist, and more. The Appellate Court hence, was totally unaware that the State obtained a wrogful conviction based entirely on false testimony and tainted evidence. Nor did the Court know that the government was guilty of Brady violation.

The Court of Appeals, Fifth District of Texas, ultimately denied relief in large measure because trial counsel was not required and did not provide an affidavit in response to Petitoine's claim of ineffective assistance of counsel. The Court held:

> "Here we do not have an adequate record to review Appellant's claim of ineffectiveness. The record before us is devoid of

evidence from the trial counsel himself." See Shakouri v. State, Tex.App.LEXIS 7064 (Tex.App.Dallas 2010).

In other words, Petitioner's direct appeal fell victim to the defects in the integrity of State's procedural framework. On this isuse, this Honorable Court in Trevino v. Thaler, 133 S.Ct.1911 (2013) observed:

> "Texas did not afford meaningful review of I.A.T.C. claim. Where a State procedural framework, by reason of its design and operation, made it highly unlikely in a typical case that a defendant would have a meaningful opportunity to raise an I.A.T.C. claim on direct appeal." And "Texas procedures make it nearly impossible for an I.A.T.C. claim to be preented on direct review."

It is abundantly clear from the record that the Appellate Court did not have sufficient facts for a meaningful review of Petitioner's direct appeal, or rendition of a just and informed judgment.

The Court of Criminal Appeals denied Petitioner's PDR. So in 2015, he filed his application for writ of habeas corpus pursuant to art. 11.07 in which he objected to violation of his due process rights under Brady, and the State reliance of false testimony and manufactured evidence to obtain a conviction. In support of his claims, he presented the Court with affidavits from two withheld witnesses who had intimate knowledge of the case. One of these affiants, Mohammad Manteghinezhad or (M.M.) a Persian interpreter, and a State actor helped the Prosecution to communicate with the Complainant, and to investigate the case.

Although the State acknowledged that M.M. was appointed as an interpreter by the lead Prosecutor and aided the government in its investigation and prosecution of this case, nonetheless, the State

did not offer any reason(s) as to why it failed to disclose to defense any information about M.M. or Hutchinson, the other withheld witness. In other words, the State failed to explain why it did not comply with its constitutional obligation to disclose favorable evidence to the defense, or to adhere to this Court's clearly established law under Brady v. Maryland.

The Court of Criminal Appeals denied Petitioner's 11.07 habeas application in August of 2015 without a written order. Even though, the State habeas judge; (1) was different from the trial judge; (2) did not preside over trial; (3) did not have personal recollection of the issues before him; and (4) refused to hold an evidentiary hearing and relied on paper hearing and trial by affidavit.

The T.C.C.A. delcined to order an evidentiary hearing even though an evidentiary hearing was necessary to consider evidence improperly excluded from consideration by the State habeas court, which were material to the legality of Petitioner's confinement. Valdez v. Cockrell, 274 F. 3d 941 (5th Cir. 2000). The Court further refused to address the underlying legal question in the case. Whether the nondisclosure of material witnesses violated Brady.

It is worth noting that Petitioner's 11.07 habeas application was filed on July 22, 2015 and was denied on August 20, 2015 by a single judge on recommendation of a staff attorney, when the T.C.C.A. was on summer recess. Even though the Tex.Code of Crim. Proc. Art. 11.07; and Tex.Const.Art. V, § 4(b) requires a panel of three judges or the en banc court to decide the 11.07 habeas applications, Petitoner's habeas application was denied by a single judge.

On this issue, Justice Alcala in Ex Parte Dawson, 509 S.W. 3d 294 observed:

> "The instant habeas application is representative of hundreds, and possibly thousands, of prededurally similar applications that are being disposed of as if they had been considered by a quoram of this Court, but in actuality are seen and considered by only a single judge on this Court...Nothing in the Texas Constitution or statutes authorizes a single judge on this Court acting alone to decide habeas applications."

In 2017, Petitioner asked the T.C.C.A to reconsider his habeas application by a panel of three judges consistent with Justice Alcala's opinion in Ex Parte Dawson, and in accordance with Tex.R.App.Proc. 76(d) which requires the Court to sit en banc to consider cases that were docketed under Code of Criminal Procedure art. 11.07 or 11.071.

As it is evident from the foregoing facts, Petitioner's appeal fell victim "to extreme malfunctions in the State criminal justice system." This is especially true when considering that the State was guilty of prosecutorial misconduct, fraud on the court, and illegal search and seizure of Petitioner's email account. See Exhibit "G" at 14-18.

In light of the foregoing, a reasonable fact-finder could infer that Petitioner's State appellate review did not meet the rudimentary requirement of full and fair review. As the State courts failed to reach a reasonable determination of the facts under § 2254(d)(1) & (2).

IV. Federal Review

Petitioner did not receive a fair treatment at the federal level either. On July 2, 2015, Petitioner filed his § 2254 Petition, followed by his supplemental pleading on December 21, 2015 in the Eastern

District of Texas-Sherman Division. See Exhibits "J" and "K".

On July 25, 2016, the State responded to Petitioner's § 2254 Petition (D.E. 16). Petitioner filed his reply on November 21, 2016 (D.E. 24). See Exhibit "F". The case then was assigned to the Magistrate Judge; Christine A. Nowak for review.

The Magistrate Judge, who was new at the job, heavily relied on the defective and inadequate finding of the State Appellate Court to assess the merit(s) of Petitioner's Petition. As it was discussed before, the findings of the State Appellate Court is not entitled to assumption of correctness, because the Court of Appeals did not have sufficient facts for a meaningful appellate review in the absence of withheld testimonies, and a "record devoid of evidence from the trial counsel himself."

Consequently, the Report And Recommendation of the Magistrate Judge (D.E. 31); dated August 2, 2018; (1) does not reflect the real fact of this case; (2) is not supported by the record on Petitioner's claim of I.A.T.C.; (3) conflicts with this Court's precedents in Brady v. Maryland, (4) is in direct opposition to well-settled State law on unknowing use of false testimony; and (5) it does not consider that "error of federal law [exclusion of material witnesses] had substantial and injurious effect or influence in determining the jury's verdict. O'Neal v. McAninch, 513 U.S. 432, 436, 115 S.Ct. 992 (1995).

The District Court adopted the Magistrate Judge's Report and Recommendation and denied relief. See Exhibit "C". Even though the State habeas judge was different from the trial judge, and neither the State nor the federal court held an evidentiary hearing. Instead, both courts "conducted only a paper hearing," and relied on "trial by affidavit."

On this issue, the Fifth Circuit Court held:

"Where judge in habeas Petitioner's capital murder trial was not the State habeas judge, and the State habeas corpus judge conducted only a paper hearing, and could not compare the information presented in various affidavits against the first hand knowledge of the trial, there was danger of "trial by affidavit," and findings of fact in State habeas corpus proceedings were not entitled to presumption of correctness." Perillo v. Johnson, 79 F. 3d 441, 442 (5th Cir. 1996).

On October 18, 2018, 21-days after the district court denied his § 2254 Petition, Petitioner filed a motion for relief from the judgment in which he claimed because the State habeas judge was different from the trial judge, and because neither the State nor the federal courts accorded him an evidentiary hearing, the findings of fact in his habeas proceedings were not entitled to presumption of correctness. Petitioner relied on the Fifth Circuit ruling in Perillo, supra, and Valdez v. Cockrell, 274 F. 3d 941 (2000). See (D.E. 38) Exhibit "G".

The district court construed the motion as second-or-succesive petition and the Fifth Circuit affirmed. Notwithstanding that the motion was filed within 28-days of the entry of judgment, and a Rule 59(e) in nature according to this Court's recent ruling in Banister v. Davis, 140 S.Ct. 1698 (2020).

However, Petitioner who is unschooled in the art of law, mistakenly labled his motion as Rule 60(b). The State responded to Petitioner's post-trial motion (D.E. 46), and Petitioner filed a reply (D.E. 50). The District Court denied Petitioner's post-trial motion on July 25, 2019; Exhibit "J". He later supplemented his petition for COA on February 7, 2020; Exhibit "K".

On May 18, 2021, the Fifth Circuit denied Petitoner's Application for COA; Exhibit "B". Petitioner then filed an 'Out-of-Time Motion for Reconsideration' on June 9, 2021. The Fifth Circuit GRANTED the motion to allow the late filing, but DENIED reconsideration on July 12, 2021; See Exhibit "A".

* * *

REASONS FOR GRANTING THE PETITION

1. The United States Court of Appeals For The Fifth Circuit has entered a decision in conflict with the decisions of the Court of last resort in Texas. In other words, the Fifth Circuit has decided an important federal question on the issue of "unknowing use of false testmony" in a way that conflicts with the decisions of the Texas Court of Criminal Appeals, and with this Court's precedents.

A. Texas Law On Unknowing Use Of False Testimony.

Texas Court of Criminal Appeals has long recognized that "The Due Process Clause of the 14th Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does it knowing or unknowingly. Ex Parte Ghahremani, 332 S.W. 3d 470, 476 (Tex. Crim. App. 2011).

In Ex Parte Chavez, 371 S.W. 3d 200 (Tex.Crim.App. 2012) the Court held: "This Court allows applicants to prevail on due process claims when the State has unknowingly used false testimony."

In Ex Parte Chabot, 300 S.W. 3d 768 (Tex.Crim.App.2009), the Court held: "Although the present case involves unknowing, rather than knowing use of perjured testimony, it saw no reason for subjecting the two types of errors to different standards of harm." The Court concluded that, "applicant's due process rights were violated, notwithstanding the absence of the State's knowledge of the perjured testimony at the time of trial." The Court also agreed that "it was more likely than not that perjured testimony contributed to the applicant's conviction and punishment." See also Ex Parte Robbins, 360 S.W.3d 446, 459-60 (Tex.Crim.App.2011); Ex Parte Cruz, 466 S.W.3d 855 (Tex.Crim.App.2015);

and Ex Parte Chaney, 563 S.W.3d 239 (Tex.Crim.App.2018).

The Texas law at the time of Petitioner's appeal provided fully adequate notice that even unknowing use of false testimony violates a defendant's due process rights. The federal court's failure to resolve the unknowing use of false testimony on an adequate and independant state ground consistent with the T.C.C.A.'s opinion in the foregoing precedents, resulted in violation of Petitioner's due process rights under the 5th and 14th Amendments to the U.S. Constitution. It further prevented the courts from recognizing that State's use of false testimony: (1) gave the jury the false impression of truthfulness; (2) "created a misleading impression of facts." Alcorta v. Texas, 78 S.Ct. 103 (1957); (3) allowed the State to obtain a conviction based entirely on materially false testimony. Ex Parte Weinstein, 421 S.W. 3d 655 (Tex. Crim.App.2014), and (4) violated Petitione's fundamental rights to have a meaningful opportunity to present a complete defense, "to put before jury evidence indispensable to the central dispute in a criminal trial." Crane v. Kentucky, 106 S.Ct. 2142.

In spite of the well-settled State law that even "unknowing" use of false testimony violates a defendants' due process rights, the Fifth Circuit affirmed the objectively unreasonable decision of the district court that "because the prosecution did not know that victim's statements were false. Petitioner fails to demonstrate a due process violation." In so doing, the Fifth Circuit clearly violated T.C.C.A.'s jurispredence. See Exhibit "D" at 27.

B. Federal Law On Unknowing Use Of False Testimony.

It is especially noteworthy that the district court relied on the Fifth Circuit's ruling in Kinsel v. Cain, 647 F.3d 265, 272 (5th Cir.

2011). The decision of the Fifth Circuit to affirm the contradictory conclusion of the district court on this issue is clearly in conflict with the T.C.C.A.'s interpretation of Texas law, and in opposition to this Court's opinion on "unknowing" use of false testimony in the following cases:

In U.S. v. Agurs, 96 S.Ct. 2392, this Court held:

"The Due Process Clause is violated when the government knowingly or unknowingly uses false testimony to obtain a conviction.";

In Napue v. Illinois, 360 U.S. 264, 269, this Court held:

"If the State knew of falsity of evidence but allowed it to remain without correction, the Court found error. The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears."; and

In Mooney v. Holohan, 294 U.S. 103, this Court held:

"the State violates a defendant's rights to due process when it actively or passively uses perjured testimony to obtain a conviction."

C. The T.C.C.A.'s Interpretation Of Texas Law Was Binding On Fifth Circuit.

The pivotal question before the Fifth Circuit was whether the interpretation of State law by T.C.C.A. that even unknowing use of false testimony violates a defendant's due process rights was binding on the district court. On this issue this Court held:

"Supreme Court is not free to substitute its own interpretation of state statute for those of state's courts. Schad v. Arizona, 111 S.Ct. 2491.

Accordingly, the district court exceeded the limits of its authority by substituting its own interpretation of state law for those of T.C.C.A.

The decision of lower courts further conflicts with this Court's ruling in Bradshaw v. Richey, 126 S.Ct. 603, in which this Court held:

> "State Court's interpretation of state law...binds a federal court sitting in habeas corpus." Citing Estelle v. McGuire, 502 U.S. 62, 76-68.

In sum, no matter which test is applied to determine the validity of the Fith Circuit's decision on unknowing use of false testimony, the result is the same. The Fifth Circuit resolved this issue in a manner fundamentally inconsistent with clearly established Texas law. The decision; (1) conflicts with the T.C.C.A.'s interpretation of unknowing use of false testimony; (2) it is not applicable to Texas cases; and (3) conflicts with this Court's precedents in the above cases.

D. The Ramification Of The Fifth Circuit's Decision.

The decision of the Fifth Circuit further created a split on how the courts in Texas should view the T.C.C.A.'s rulings on unknowing use of false testimony. Or in which manner should the Texas Courts resolve the issue of unknowing use of false testimony in the future? Should the courts decide the issue in accordance with the interpretation of T.C.C.A. that unknowing use of false testimony violates a defendant's due process rights? Or should the courts adopt the Fifth Circuit's approach that it does not?

Assuming that some courts choose to adhere to the Fifth Circuit's precedents. How many Texas defendants will be wrongfully convicted on use of false testimony in the future? And how many prisoners, including Petitioner would have to remain behind bars, because the prosecution obtained a conviction based on unknowing use of false testimony in violation of clearly established Texas law?

The decision of the Fifth Circuit on this issue has further devided the state courts and the federal court in Texas. The state courts tend to rely on T.C.C.A.'s opinion on unknowing use of false testimony, and the federal courts tend to follow the Fifth Circuit's decision. For instance, in Kim v. State, 2020 Tex.App.LEXIS 2198 (Tex. App. Dallas) the Appellate Court relied on the T.C.C.A.'s opinion in Ex Parte Chavez, 371 S.W. 3d 200, 207-08 (Tex.Crim.App.2011), and Ex Parte Robbins, 360 S.W. 3d 446, 459 (Tex.Crim.App.2012) to resolve the unknowing use of false testimony. While, the federal district court in this case relied on Kinsel v. Cain, 647 F. 3d 265, 272, (5th Cir. 2011) to deny relief.

In sum, this Honorable Court should determine which court in Texas has the authority to interpret Texas Laws, and to decide whether the unknowing use of false testimony violates a defendant's due process rights, the Fifth Circuit or the Court of Criminal Appeals of Texas?

In light of the foregoing, Petitioner has identified a substantial and reasonably debatable constitutional question. He is therefore, entitiled to relief, because "a conviction based on a foundation of perjury by the State's chief witness is not allowed to stand." Ex Parte Chabot, 300 S.W. 3d 768 (Tex.Crim.App.2009). And according to this Court:

> "A criminal prosecution based on perjured testimony...simply does not comport with the requirements of Due Process Clause." Albright v. Oliver, 114 S.Ct. 807.

2. The Fifth Circuit Did Not Apply The Correct Governing Legal Pricipal Of This Court To Resolve The Brady Question.

As an initial matter, it is undisputable that the government violated Brady by failing to disclose any information about M.M. and Hutchinson.

M.M., who was appointed by the State as a tranlator for the Complainant in her daily dealings with the State's lead prosecutor, filed an affidavit in 2014 (five years after trial), detailing how the Complainant committed perjury at trial; and conspired with her son and planted evidence in Petitioner's home; said nothing but lies; gave conflicting statements to the prosecutor; lied in the court; lied to the jury under oath; married Petitioner for the sole purpose of migrating to the United States; confessed to being a con artist who tried to extort tens of thousands of dollars from M.M. as well.

Additionally, M.M.'s written testimony shows that; (1) he was acting on government's behalf; (2) had a sexual relationship with the Complainant, who was married to Petitioner at that time; (3) had highly crucial, exculpatory information that was "material" to the "guilt or punishment" of Petitioner. Brady v. Maryland, 371 U.S. 83.

It is notable, that the State had a legal obligation to disclose to the defense any evidence implying an agreement or an understanding. Browning v. Baker, 875 F. 3d 444 (9th Cir. 2017).

Under Brady, prosecutors are responsible for disclosing "evidence that is both favorable to the accused and material either to guilt or to punishment. Bagley, 105 S.Ct. 3375. The failure to turn over such evidence violates due process. Weary v. Cain, 136 S.Ct. 1002, 1006 (2016).

Needless to say that the prosecution did not allow the jury to hear any of M.M.'s testimony, or that of Hutchinson who was working as a confidential informant for the government, and disclosed to the defense similar information after trial. See Exhibit "O".

In response to Petitioner's Brady Violation in his writ application for habeas corpus pursuant to art. 11.07, the State skillfully avoided answering the fundamental legal question in this case. Why did the prosecution not disclose to defense any information on the withheld witnesses in the first place.

Instead of responding to Petitioner's claim that, had the State disclosed the suppressed evidence, and allowed the jury to listen to M.M. and Hutchinson testimonies, there was a strong probability that at least one juror would have harbored reasonable doubt; the State's attorneys attacked thier own agent, and claimed that M.M. is not credible without offering a shred of evidence.

In other words, the State claimed that M.M. was credible as an interpreter for two years while he was helping the prosecution to communicate with the Complainant, and to investigate and prosecute this case. However, the State arbitrarily decided that M.M. is no longer credible because he decided to reveal the truth, and to assist Petitioner to contest his wrongful conviction.

The State's argument is fundamentaly flawed, because if M.M. is not credible, then the information / interpretation that he provided to the prosecution prior to trial was not credible. The prosecution heavily relied on M.M.'s translation to obtain an arrest warrant, and an indictment. If assuming arguendo that the State is correct and M.M. is not credible, then the arrest warrant was invalid, the information provided to the grand jury was not credible, the indictment is void, and the trial court was without jurisdiction.

Besides, it was not for the State to assess the credibility of M.M.. The basic question here is: "why did the State not allow the

jury to listen to M.M.'s testimony and assess his credibility? "Credibility of the witness, an area within the province of the jury." U.S. v. Martinez-Mercado, 888 F.2d 1489-1492 (5th Cir. 1989). See also Sanchez v. State, 400 S.W. 3d 595, 598 (Tex.Crim.App.2013); and Crane v. Kentucky, 106 S.Ct. 2142.

In sum, the Fifth Circuit neglected to consider that the jury could not-and would not-have convicted Petitioner without substantial reliance on Complainant's false testimony, believing that she was a truthful witness. Petitioner argues that no rational jury would have found Complainant to be truthful had they known about M.M.'s testimony. The lower courts failed to consider that Brady violation, and jury's ignorance of the undisclosed testimonies, resulted in actual prejudice and a wrongful conviction.

2.1. Petitioner Was Prevented From Presenting A Complete Defense.

M.M.'s affidavit further reveals that the government's failure to disclose any information about him or Hutchinson not only violated Brady, but divested Petitioner from a meaningful opportunity to present a complete defense; Crane v. Kentucky, 106 S.Ct. 2142, and deprived him from his fundamental rights to put before the jury exonerating evidence.

Petitioner further argues that the violation of his right to present a complete defense was structural error under Weaver v. Massachusetts, 137 S.Ct. 1899 (2017), and therefore, subject to automatic reversal rather than harmless error analysis. The rational is that "the error's effects are simply too hard to measure--making it almost impossible for the government to show that the error was harmless beyond a reasonalbe doubt." Id.

"The Supreme Court has repeatedly recognized that the right to present a complete defense in a criminal proceeding is on of the foundational principles of our adversarial truth-finding process." Gange v. Booker, 606 F. 3d 278 (6th Cir. 2010).

The undisclosed evidence was vital to Petitioner's defense because he could have used it on cross-examination to impeach portions of Complainant's testimony, or to get the trial court to exclude her testimony entirely. Diamond v. State, 2020 Tex.Crim.App.LEXIS 405. See also Youngblood v. Virginia, 126 S.Ct. 2188; and Thomas v. Donnelly, 416 U.S. at 643.

The controlling law of this Court on this issue states: "Evidence that impeaches the credibility of a government witness whose testimony may well be determinative of guilt or innocence may not be suppressed." Giglio v. U.S., 92 S.Ct. 763.

3. The Lower Courts Failed To Address The Brady Claim.

It is especially noteworthy that the district court refused to even acknowledge that Petitioner raised a Brady claim much less adjudge the claim, and the Fifth Circuit's unwillingness to correct the district Court's error, is in direct conflict with this Court's decisions in Brady v. Maryland, 373 U.S. 83; Banks v. Dretke, 124 S.Ct. 1256; and Strickler v. Greene, 527 U.S. 263. See Rules of Supreme Court, Rule 10.

Both federal courts artfully steered away from addressing the underlying legal question in this case, whether the undisclosed evidence violated Petitioner's rights to due process of law.

The district court's 34-page judgment and the Fifth Circuit's 3-page denial of Petitioner's application for COA is devoid of any

meaningful analysis as to whether the nondisclosure of favorable evidence prejudiced Petitioner's defense.

The lower courts failed to consider the impact of the nondisclo-ure on the defense preperation, on the strength of State's case, or on the jury's verdict. In other words, the federal courts failed to recognized that "the result of the proceeding would have been differ-ent, absent nondisclosure of material evidence." U.S. v. Bagley, 105 S.Ct. 3375.

More fundamentaly, the lower courts failed to consider that the nondisclosure of the material witnesses deprived Petitioner from a meaningful cross-examination of Complainant, in violation of his Sixth Amendment rights.

The main purpose of the "Confrontation Clause" is to secure the opportunity of cross-examination, which is the principle means by which a witness' believability and the truthfulness of her testimony are tested. Johnson v. State, 490 S.W. 3d at 909. When the defense theory is that a witness has a bias or ulterior motive, [like the present case], jurors are entitled to have the defense's theory before them so they can make an informed judgment about the weight to give the witness's testimony. Id.; see also Davis v. Alaska, 94 S.Ct. 1105.

Here, the record is clear that the undisclosed witnesses' [M.M. and Hutchinson] testimonies could have been used at trial to discredit the accuracy of Complainant's false testimony, which was a critical aspect of the State's case. The Sixht Amendment right to cross-exami-nation allows a party to attack the witness's general credibility or to show her possible bias, self-interest, or motives in testifying. Johnson v. State, 490 S.W. 3d 895, 909 (Tex.Crim.App.2016).

Had the State not violated Petitioner's due process rights under Brady, and had disclosed to the defense the two key witnesses who helped the prosecution to investigate, and prosecute this case, they could have testified at trial that the State's Star witness, the Compainant, was not a truthfull person. The undisclosed impeachment evidence in this case was especially important "where the government's case rested entirely on one witness's testimony and credibility." U.S. v. Brown, 865 F. 3d 566 (7th Cir. 2017).

"The Supreme Court has clarified that Chambers and its progeny do not stand for the propostition that a defendant is denied a fair opportunity to defend against the State accusations whenever critical evidence favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation. Pierce v. Thaler, 335 Fed.Appx.784 (5th Cir. 2009).

Under the posture of the above precedents Petitioner argues that the Fifth Circuit's opinion that Petitioner "presented no credible evidence that State suppressed favorable evidence," without the benefit of an evidentiary hearing is objectively unreasonable, because it is virtually impossible to arbitrarily dismiss the potential profound impact of excluded testimonies of Hutchinson, and M.M. on the jurors. Or to despoticly assume that not even one fairminded jurist would have voted for acquittal, had the State allowed them to hear the suppressed testimonies. No fairminded jurist could reach a different conclusion on this issue.

The pivotal questions before the Fifth Circuit were: Why did the State (1) not meet its constitutional obligation to disclose evidence favorable to defense in the first place; (2) not allow the jury to

assess the credibility of the excluded witnesses; and (3) not consider that the nondisclosure of material witnesses prejudiced Petitioner's defense. The Fifth Circuit failed to address any of the above questions.

In sum, Petitioner alleges that the district court's failure to properly consider his Brady claim and the Fifth Circuit's reluctants to rectify the mistaken judgment: First, resulted in substantial denial of his constitutional rights. 28 U.S.C. § 2253(c)(2). Slack v. McDaniel, 529 U.S. 473, 483 (2000). Second, it created a "grave doubt about whether [the evidentiary suppression] had substantial and injurious effect or influence in determining the jury's verdict." O'Neal v. Balcarcel, 933 F. 3d 618 (6th Cir. 2019)(citing McAninch, 513 U.S. at 436 (quoting Brecht, 507 U.S. at 627).

3.1. The Remedy For Brady Violation Is A New Trial.

Petitioner clearly proved by a preponderance of evidence that he is entitled to post-conviction relief because the decision of the lower courts to sidestep his Brady claim conflicts with this Honorable Court's precedents, and defies the Constitution.

Petitioner demonstrated that (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence was favorable to him; and (3) the evidence was material. Strickler v. Greene, 527 U.S. 263, 281-82.

Petitioner furhter established that M.M. was working on government's behalf. Thus, the contents of his post-trial affidavit that Complainant lied under oath, planted evidence in Petitioner's home to be discovered by subsequent search warrant etc., was "in the government's collective knowledge," thus it was imputable to the prosecution.

See U.S. v. Brown, 865 F.3d 566 (7th Cir. 2017); Giglio, 405 U.S. at 154; Ex Parte Chavez, 371 S.W. 3d 200, 205 (Tex.Crim.App.2012).

Jurists of reason thus could affirmatively conclude that it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure. Smith v. Cain, 132 S.Ct. 627, 2012, U.S. LEXIS 576 at *5. A reasonable probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial. Kyles v. Whitley, 115 S.Ct. 1555 (1995).

The remedy for Brady violation is a new trial. Ex Parte Miles, 359 S.W. 3d 347, 364 (Tex.Crim.App.2012). Petitioner, thus, is entitled to relief under Brady. He has identified an error of law in the lower court's judgment well understood by a reasonable trier of facts.

In light of the preceeding argument, jurists of reason could arguably debate that a "grave doubt" exists as to whether the trial court's error of federal law; Brady violation, had substantial and injurious effect on the jury's verdict, and led to the wrongful conviction of an innocent person.

These jurists of reason could further construe the government's unknowing use of false testimony as a constitutional error, thus, rejecting the Fifth Circuit's conclusion that "innocence claim is not a basis for habeas relief absent an independent constitutional violation."

Accordingly, Petitioner is entitled to relief because the adjudication of his petition on the merits; (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of

the United States; or (2) resulted in a decision that was based on an unreasonable determination of the fact in light of the evidence presented in the state court preceeding. 28 U.S.C.S. § 2254(d). See Williams, 529 U.S. at 402-03 (2000).

4. Petitioner's Constitutional Right To An Unanimous Jury Verdict Was Violated.

Petitioner objected at trial that the court's charge at guilt-innocence deprived Petitioner of his right to a unanimous verdict. (RR7: 252-54; RR8: 183-86). The charge as submitted contained four separate application paragraphs in the disjunctive and instructed the jury to find Petitioner guilty if they found any of the four beyond a reasonable doubt.

The Complainant testified at trial that she was sexually assaulted by her husband without her consent for months on multiple occasions each week. She testified to a variety of separate incidents, involving separate sexual acts, some by varying degrees of force, some by varying degrees of threats, and some to which she aquiesced. In regard to the Due Process right to a unanimouns verdict, the Court of Criminal Appeals explained:

> "An unanimous jury verdict ensures that the jury agrees on the factual elements underlying an offense--it is more than mere agreement on a violation of a statute. The unanimity requirement is undercut when a jury risks convicting the defendant on different acts, instead of agreeing on the same act for a conviction." [citation omitted].

Looking at the Schad v. Arizona, 501 U.S. 624 (1991) opinion, the Holley Court noted that the two cases entertained different factual senarios. In Schad, one single killing occured. But in Holley, [a perjury case] a single count encompassed two or more

separate offenses. Because the jury instruction did not require jurors to agree on the falsity of one particular statement, the court concluded that "there was a reasonable possibility that the jury was not unanimous with respect to at least one statement in each count." Id. at 929.

Applying the Holley reasoning to the instant case [foot note omitted], the jury charge given in Petitioner's case created the possibility of a non-unanimous jury verdict. The breast-touching and the genital touching were two different offenses, and therefore, should not have been charged in the disjuctive. By doing so, it is possible that six members convicted Petitioner on the breast-touching offense (while the other six believed he was innocent of the breast-touching) and six members convicted Petitioner on the genital-touching offense (while the other six believed he was innocent of the genital-touching). Petitioner was entitled to an unanimous jury verdict. [citation omitted] Hence, the trial court erred by charging Petitioner in the disjunctive.

Fransis v. State, 36 S.W. 3d 121, 125 (Tex.Crim.App.2000). the Court has more recently applied the Fransis principle to cases in which were repeated incidents of the same conduct:

> A similar danger arises when a multitude of incidents are presented to the jury and the State is not required to elect. Six jurors could convict on the basis of one incident and six could convict on another (or others). While each of the incidents presented may constitute the commission of a sexual abuse offense, the jury must agree on one distinct incident in order to render a unanimous verdict. [emphasis added]. Phillips v. State, 193 S.W. 3d 904, 913 (Tex.Crim.App.2000).

Defense counsel expressed his concern in his objections and argument, but his concern was insufficient to preserve Petitioner's contitutional right to a unanimous jury verdict where the court's charge allowed the jurors to find Petitioner guilty based upon a collective

"umbrella" agreement regarding the months of alleged abuse.

Because Petitioner objected to the charge at trial, he need only show "some harm" to prevail, Almanza v. State, 686 S.W. 2d 157, 171 (Tex.Crim.App.1984), but this Court may determine it should analyze the error as constitutional error under the unaimity requirement of the Sixth Amendment which requires reversal.

> "There can be no question that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally...The Sixth Amendment right to a jury trial, as incorporated against states byway of the Fourteenth Amendment, required a unanimous verdict to convict a defendant of a serious offense." Ramos v. Louisiana, 140 S.Ct. 1390 (2019).

Regardless of standard used, the harm in this case was particularly egregious because most, if not all, of the incidents testified to by Complainant were--at most--second degree sexual assaults or were not even criminal assault. See Petitioner's Direct Appeal, Exhibit "P" at 39-42.

5. Contrary to the District Court's Erroneous Findings Trial Counsel was Ineffective for not requesting a Lesser-Included Instruction.

With regard to whether Petitioner's trial counsel was ineffective for not requesting a jury instruction on the lesser-included offense of sexual assault, the Magistrate Judge found that trial counsel had a "strategic reason" for not requesting such an instruction and, in any event, that Petitioner was not prejudiced by the lack of instruction because there was "no evidence to demonstrate that, had the jury been given the instruction, it would have chosen to convict him of the lesser-included offense." RR at 16-17 Exhibit "D".

The Magistrate Judge's first finding is not supported by the record. As discussed below, it is clear from the record that the trial counsel's failure to request a lesser-included instruction was based upon his incorrect belief that the defense was not entitled to such an instruction and not because of "strategic" reasons.

With regard to prejudice findings, the case law makes it clear that Petitioner did not, as the Magistrate Judge concludes, have to "demonstrate that had the jury been given the instruction, it would have chosen to convict him of the lesser-included offense." Indeed, both state and federal law are clearly to the contrary. See, Beck v. Alabama, 447 U.S. 625, 634 (1980); Keeble v. United States, 412 U.S. 205, 208 (1973); Crace v. Herzon, 798 F.3d 840 (9th Cir. 2015); Breakiron v. Horn, 642 F. 3d 126, 136 (3rd Cir. 2011); Sanders v. State, 913 S.W. 2d 564, 571 (Tex.Crim.App.1995).

> Contrary to the Magistrate Judge's findings, the record does not support the conclusion that Petitioner's trial counsel failed to request a lesser-included instruction for "strategic reason." Instead, the record shows only that trial counsel misunderstood Texas law with regard to being entitled to a lesser-included instruction.

The Magistrate Judge suggests that Petitoner's trial counsel failed to ask for a lesser-included instruction for "strategic reasons." In fact, the record makes it clear that trial counsel did not request such an instruction because he incorrectly believed the defense was not entitlted to one under Texas law. Indeed, in his affidavit submitted to the State habeas court, trial counsel explained: "I do not believe we were entitled to a lesser-included charge of sexual assault unless there was some evidence that the offense occured." See (D.E.

32-1) Exhibit "E-1" at 4. He then goes on to claim that no such evidence existed because "Mr. Shakouri would not admit [the sexual assault] occured and neither did anybody else." Id.

A. Strategy Cannot Be Based Upon A Misunderstanding Of The Law.

From trial counsel's affidavit, it is clear that counsel believed that Petitioner was required to "admit" the underlying sexual assault in order to be entitled to a lesser-included instruction on sexual assault. That belief demonstrate a fundamental misunderstanding of Texas law. Moreover, it is clear that a decision based on a misunderstanding of Texas law cannot be excused as "trial strategy."

For example, in Richards v. Quarterman, 566 F. 3d 553, 569 (5th Cir. 2009), the Fifth Circuit upheld the grant of habeas relief where it appeared from trial counsel's affidavit that he did not request a lesser-included instruction because he "misunderstood the law governing lesser-included offense." See also, e.g. United States v. Span, 75 F. 3d 1383, 1387 (9th Cir. 1996)("A trial attorney's failure to request jury instruction receives no deference, however, when it is based on a misunderstanding of the law..."); White v. Ryan, 895 F. 3d 641, 666 (9th Cir. 2018)("A decision based on a misunderstanding of the law is not sound trial strategy."); Vinyard v. United States, 804 F. 3d 1218, 1225 (7th Cir. 2015)("A strategic choice based on a misunderstanding of law or fact, however, can amount to ineffective assistance."); Hardwick v. Crosby, 320 F. 3d 1127 (11th Cir. 2003)("A tactical or strategic decision is unreasonable if it is on a failure to understand the law.").

The legion of above cases are consistent with clearly decided Supreme Court law. See Wiggins v. Smith, 539 U.S. 510, 526 (2003)

(findings ineffective assistance when counsel's "failure to investi gate thoroughly resulted from inattention, not reason strategic judgment"); Strickland v. Washington, 466 U.S. 668, 690 ("Strategic" choices must be "made after thorough investigation of law and facts".).

B. The Harm Analysis Employed By The Magistrate Judge In Reaching Her Conclusion is Contrary To The Harm Analysis Required By The United States Sureme Court.

As noted above, the Magistrate Judge found that Petitioner did not demonstrate any prejudice as a result of trial counsel's failure to request the lesser-included instruction because there was "no evidence to demonstrate that had the jury been giventhe instruction, it would have chosen to convict him of the lesser-included offense." RR at 17. Indeed, at first blush, it could be said that the failure of trial counsel to request a lesser-included instruction cannot be harmful given that, if the jury did not believe the greater offense had taken place and only believed the lesser offense had taken place, the jury would have acquitted defendant. Nevertheless, it is clear this is not the law.

For example, in Breakiron, the defendant had argued in a post-conviction motion following his state court conviction that trial counsel was ineffective for failing to request a jury instruction on theft, which is a lesser-included offense in the charge of robbery. This argument was rejected by the state habeas court under the theory that the jury necessarily rejected an argument that the defendant was only guilty of theft when it convicted him of robbery and, thus, because the court believed the evidence was legally sufficient on the robbery charge it was not likely that the jury would have returned a

verdict only on the theft charge. **Breakiron**, 642 F. 3d at 139.

The Third Ciruit Court of Appeals found that the resolution of the case by the state habeas court was unreasonable in light of Supreme Court precedent in Beck:

> Without a theft instruction, the jury was left with only two choices-conviction of robbery or outright acquital. In such all-or-nothing situations, "where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubt in favor of conviction." Beck, 447 U.S. at 634 (quoting Keeble 412 U.S. at 212-13.) Thus even though juries are obligated "as a theoretical matter" to acquit if they do not find every element of a crime there is a 'substantial risk that the jury's practice will diverge from theory" when it is not presented with the option of convicting of a lesser offense instead of acquiting outright. Id. (quoting **Keeble**, 412 U.S. at 212-213, 93 S.Ct.
> By conceding theft but not requesting a theft instruction, Breakiron's counsel exposed him to that "substantial risk," and the record reveals that he had no strategic reason for doing so.

For the reasons set forth above, the decision of the district court involved an unreasonable application of clearly established federal law and unreasonable determination of fact. The Court failed to consider that (1) trial counsel's misunderstanding of the law satisfies the deficiency prong of **Strickland**; and (2) its findings on this issue is fundamentaly inconsistence with the requirements of Fed.R. Crim.Proc. Rule 31(c)(1), and this Court's clearly established precedents. See Petitioner's objections to the Magistrate Judge's Report and Recommendation, Exhibit "E".

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shahram Shakouri

Shahram Shakouri

Date: October 1, 2021

Exhibit – 'A'