No. _____

21-6134

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR ROSALES,

Petitioner,

V.

BOBBY LUMPKIN,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS

VICTOR ROSALES (Pro Se)
3060 FM 3514 # 2032104
BEAUMONT, TEXAS, 77705

QUESTIONS PRESENTED

1. DOES A TEXAS PRISONER HAVE A CONSTITUTIONAL RIGHT TO APPOINTMENT OF EFFECTIVE ASSISTANCE OF COUNSEL IN COLLATERAL PROCEEDINGS WHICH PROVIDE THE ONLY MEANINGFUL OPPORTUNITY TO RAISE CLAIM(s) OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AS SUCH CONSTITUTIONAL RIGHT IS AFFORDED TO INDIGENT PRISONERS FILING A DIRECT APPEAL, PURSUANT TO THE HOLDINGS OF DOUGLAS V. CALIFORNIA, 83 S.Ct. 814 (1963); and EVITTS V. LUCEY, 105 S.Ct. 830 (1985)?

2. DID THE FIFTH CIRCUIT COURT OF APPEALS DECISION TO DENY ROSALES' REQUEST FOR ISSURANCE OF A CERTIFICATE OF APPEALABILITY CONFLICT WITH THE HOLDINGS OF BAREFOOT V. ESTELLE, 463 U.S. 893 (1983); MILLER-EL V. COCKRELL, 537 U.S. 338 (2003); and FLIEGER V. DELO, 16 F.3d 883 (8th Cir. 1994)?

3. DID THE FEDERAL DISTRICT COURT'S DECISION TO DENY MR. ROSALES' REQUEST FOR AN EVIDENTIARY HEARING CONFLICT WITH THE HOLDINGS OF TOWNSEND V. SAIN, 372 U.S. 293 (1963); AND KEENEY V. TAMAYO-REYES, 504 U.S. 1, 5 (1992), WHEN MR. ROSALES, DUE TO HIS INDIGENT STATUS, AND THE COURT'S FAILURE TO APPOINT COUNSEL, PROVIDED THE COURT WITH THE ONLY EVIDENCE (an internet Blog) HE COULD OBTAIN TO SUBSTANTIATE HIS CLAIM?

LIST OF PARTIES

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

RELATED CASES

1. ROSALES V. STATE, 03-15-00735-CR, slip opinion (Tex.App.-Austin 2017, pet. ref'd);

2. ROSALES V. STATE, No. PD-1297-17 (Tex.Crim.App. 2018);

3. EX PARTE ROSALES, No. WR-90,107-01 (Tex.Crim.App. 2019);

4. ROSALES V. LUMPKIN, No. 1:19-CV-01053 (W.D.Tex. 2020); and

5. ROSALES V. LUMPKIN, No.20-50997 (5th Cir. 2021)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeal appears at Appendix (A) to the petition and is UNPUBLISHED;

The order of the United States Court of Appeal's denial of petitioner's request for rehearing and/or rehearing en banc appears at Appendix (B) to the petition and is UNPUBLISHED;

The opinion of the United States district court appears at Appendix (C) to the petition and is UNPUBLISHED.

JURISDICTION

The date on which the United States Court of Appeals decided petitioner's case was AUGUST 11, 2021, and no petition for rehearing was timely filed.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

U.S. CONST., AMEND. VI

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

U.S. CONST., AMEND. XIV

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

28 U.S.C. §2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district wherein the restraint complained is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of the state which contain two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have current jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (Non-applicable)

28 U.S.C. §2253

(a) In a habeas corpus proceeding or a proceeding under 28 U.S.C. §2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

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

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

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

(B) the final order in a proceeding under section 2255 (28 U.S.C. §2255.

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

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

28 U.S.C. §2254

(a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) 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 unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An applicant for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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 the claim:

(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 facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(4) If the applicant has failed to develope the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that:

(A) the claims relies on:

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously discovered through the exercise of due diligence; and

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court

shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

In May of 2014, Mr. Rosales was charged by indictment with two counts of aggravated sexual assault of a child, one count of indecency with a child by contact, and two counts of indecency with a child by exposure. (ECF No. 16-18 at 19-20). The State sought to introduce alleged evidence of extraneous offenses during its case in chief pursuant to Article 38.37 of the Texas Code of Criminal Procedure. (Id. at 58-59). In October of 2015, a jury convicted Mr. Rosales of one count of aggravated sexual assault of a child and sentenced him to forty (40) years imprisonment. See: STATE V. ROSALES, No. D-1-DC-14-300723 (299th Dist. Ct., Travis Cnty., Tex. Oct. 23, 2015). (ECF No. 16-19 at 19-20).

Below is a summary of the factual background for Mr. Rosales' conviction:

The jury heard evidence that on October 25, 2013, Mr. Rosales' 13-year old niece (Y.R.), and Rosales, went to a Motel room to meet a friend of Rosales. While waiting for the friend, Y.R. claimed, to the jury, that once they were inside the room, she sat down on the bed and Rosales started looking at her pretty weird and began asking her if she and her boyfriend had ever done anything sexual together, and then grabbed her, pinned her down on the bed, took off her cloths, kissed her, and eventually penetrated her sexual organ with his. However, the jury also heard a DIFFERENT version of events by Y.R. She later stated that while in the motel room, Mr. Rosales went into the bathroom, got undressed, walked out with an erected penis, sat down on the bed beside her and began asking questions about her sex life with her boyfriend, eventually kissing her and having intercourse. (Ct. Records RR. 5, p.39-50). The jury, in addition, heard evidence of a THIRD version of this event from Dr. Beth Nauert, who testified that while examining Y.R., she was told by Y.R. that Mr. Rosales made her take off some of her cloths first before he took off

his. (Ct. Records RR. V.6, p.20). Thus, the jury were provided with three different versions of this alleged sexual assault.

Other evidence considered by the jury included the testimony of Y.R. mother, who testified that Y.R. was very rebellious in nature, skipping school to be with her boyfriend, fighting with her aunt, missing multiple days of school, secretly meeting with her boyfriend against her parents demands, dressed extremely provocatively/gothic, and continuosly lying to her parents. (Ct. Records RR. V.5, p? 29, 58-62, 81-82, 104, 250-252, 258).

Dr. Beth Nauert, a pediatrician who examined Y.R. shortly after the alleged assault, testified that she observed two tears in Y.R.'s hymen that was consistent with a single episode of previous vaginal penetration. Although Y.R. testified that, prior to the alleged sexual assault, she had never engaged in any sexual penetration to cause such tears to her hymen, she also NEVER testified or stated to anyone after the alleged event, or at trial, that bleeding of her hymen occurred due to the alleged tearing of her hymen during the alleged sexual assault, which would had occurred had such sexual assault actually happened.

Although a substantial amount of contrary, conflicting and questionable evidence was presented to the jury regarding this alleged sexual assault, the jury still found Mr. Rosales guilty of aggravated sexual assault of a child as charged and assessed punishment at 40-years imprisonment.
See: ROSALES V. STATE, No. 03-15-00735-CR, 2017 WL 5247497 (Tex.App.-Austin, Nov. 10, 2017, pet. ref'd).

On November 10, 2017, Rosales' conviction was affirmed on direct appeal. Id. Mr. Rosales then filed a Petition for Discretionary Review (PDR)(ECF No. 16-24), which the Texas Court of Criminal Appeals refused on April 18, 2018, ROSALES V. STATE, No. PD-1297-17 (Tex.Crim.App. Apr. 8, 2018). Mr. Rosales did not file a writ of certiorari in the U.S. Supreme Court. (ECF No.1 at 3).

On June 7, 2019, Mr. Rosales filed a pro se State Habeas Corpus application after being denied appointment of counsel. (ECF No. 16-30 at 14-40). Mr. Rosales raised the following constitutional violations:

(1). Trial counsel provided ineffective assistance of counsel when counsel failed to object to a jury charge based on the fact that the jury could not consider the evidence of extraneous offenses unless they believed beyond a reasonable doubt that Rosales had committed those offenses;

(2). trial counsel provided ineffective assistance when counsel failed to object to the prosecutor's improper bolstering of the complainant's credibility during closing arguments; and

(3). Trial counsel provided ineffective assistance of counsel when counsel failed to procure an expert witness to rebut the false testimony of the State's expert witness, that it was possible for a torn hymen not to bleed.
(Id. at 19-24).

On July 31, 2019, the Texas Court of Criminal Appeals denied Mr. Rosales' application without a written order or evidentiary hearing, despite the fact the convicting court failed to order Mr. Rosales' trial counsel to answer the claims of error against him, failed to enter into record any Findings of Fact and Conclusions of Law, or provide any determinations as to why Rosales' writ of habeas corpus should be denied. (ECF No.7-26). EX PARTE ROSALES, No. WR-90,107-01.

On September 16, 2019, Mr. Rosales filed his pro se Federal Writ of Habeas Corpus, after requesting appointment of counsel, raising the same claims from his State habeas application. (ECF No.1). On December 19, 2019, Respondent filed an answer to the petition to which Rosales replied on January 31, 2020. (ECF Nos. 9, 12).

On August 24, 2020, the United States District Court for the Western District of Texas denied Rosales' habeas corpus application and ordered no certificate of appealability should issue. Cause No. 1:19-CV-01053 (ECF No. 18). (APPENDIX-C)

On December 18, 2020, Mr. Rosales filed a timely Certificate of Appealability into the Fifth Circuit Court of Appeals raising the same claims as stated above, pursuant to 28 U.S.C. §2253(c)(1) and (c)(2), however, his request for a C.O.A. was denied on August 11, 2021, in Cause No. 20-50997. (APPENDIX-A)

Mr. Rosales immediatedly filed a Motion For Extention of Time to file a Petition For Rehearing and/or Rehearing En Banc, asserting that he had not receive the Court's denial of his request for a C.O.A. until August 18, 2021, the Fifth Circuit Court of Appeals denied Rosales' request for Extension of Time on September 2, 2021. (Document: 00516002086) (APPENDIX-B)

Mr. Rosales immediatedly filed his Petition For Rehearing and/or Rehearing En Banc, but such was denied on September 17, 2021. Cause No. 20-50997. (APPENDIX-B)

REASONS FOR GRANTING THE WRIT

I. DOES A TEXAS PRISONER HAVE A CONSTITUTIONAL RIGHT TO APPOINTMENT OF EFFECTIVE ASSISTANCE OF COUNSEL IN COLLATERAL PROCEEDINGS WHICH PROVIDE THE ONLY MEANINGFUL OPPORTUNITY TO RAISE CLAIM(s) OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AS SUCH CONSTITUTIONAL RIGHT IS AFFORDED TO PRISONERS FILING A DIRECT APPEAL PURSUANT TO THE HOLDINGS OF DOUGLAS V. CALIFORNIA, 83 S.Ct. 814 (1963); AND EVITTS V. LUCEY, 105 S.Ct. 830 (1985)?

II. DID THE FIFTH CIRCUIT COURT OF APPEALS' DECISION TO DENY ROSALES' REQUEST FOR ISSURANCE OF A CERTIFICATE OF APPEALABILITY CONFLICT WITH THE HOLDINGS OF BAREFOOT V. ESTELLE, 463 U.S. 893 (1983); MILLER-EL V. COCKRELL, 537 U.S. 338 (2003); AND FLIEGER V. DELO, 16 F.3d 883 (8th Cir. 1994)? AND

III. DID THE FEDERAL DISTRICT COURT'S DECISION TO DENY ROSALES' REQUEST FOR AN EVIDENTIARY HEARING CONFLICT WITH THE HOLDINGS OF TOWNSEND V. SAIN, 372 U.S. 293 (1963); AND KEENEY V. TAMAYO-REYES, 504 U.S. 1, 5 (1992), WHEN ROSALES, DUE TO HIS INDIGENT STATUS, AND THE COURT'S FAILURE TO APPOINT COUNSEL, PROVIDED THE DISTRICT COURT WITH THE ONLY EVIDENCE (an internet Blog) HE COULD OBTAIN TO SUBSTANTIATE HIS CLAIM?

The questions presented above warrant this Court's attention because:

(a). The decisions of the Texas and Federal courts are in conflict with the decisions of the U.S. Supreme Court and other Circuit Courts; and

(b). The importance of these questions is not only important to the constitutional rights of Mr. Rosales, but to others similarly situated.

I.

On July 30, 2019, Mr. Rosales filed his Motion For Appointment of Counsel into the 299th Judicial District Court of Travis County, Texas, in Cause No. D-1-DC-14-300723-A for the purpose of pursuing an application for Writ of Habeas Corpus pursuant to C.C.P. Art. 11.07. However, no ruling was made on Rosales' motion, to his knowledge, thus, he was forced to file his collateral proceedings pro se. See: WR-90,107-01. (APPENDIX-D) and (APPENDIX-E)

Mr. Rosales' reasons for appointment of counsel were as followed:

(a). Applicant is indigent and without counsel assistance;

(b). Applicant has very limited legal skills and has no means or ability to conduct the needed investigation(s) and/or obtain expert witness testimony due to his incarceration; and

(c). Applicant's case is very complexed and requires appointment of counsel to conduct investigation(s) and/or obtain expert witness testimony for evidentiary hearing purposes.

This case seeks to vindicate the Constitutional right to habeas counsel in INITIAL-REVIEW collateral proceedings. It calls for an answer to the question expressly "left open" in COLEMAN V. THOMPSON, 111 S.Ct. 2546 (1990), and touched on by MARTINEZ V. RYAN, 132 S.Ct. 1309 (2012), and TREVINO V. THALER, 133 S.Ct. 1911 (2013).

The Texas Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by the U.S. Supreme Court. Although the Supreme Court has never resolved the question at hand, the Texas Court of Criminal Appeals has essentually held that a State prisoner does NOT have a Constitutionally protected right to Habeas Counsel in INITIAL-REVIEW collateral proceedings. See: EX PARTE GRAVES, 70 S.W.3d 103 (Tex.Cri.App. 2002)(There is no constitutional right to effective assistance of counsel on a writ of habeas corpus).

Mr. Rosales avers that the Texas Court of Criminal Appeals' holding is contrary to the Supreme Court precedents of DOUGLAS V. CALIFORNIA, 83 S.Ct. 814 (1963); EVITTS V. LUCEY, 105 S.Ct. 830 (1985); HALBERT V. MICHIGAN, 125 S.Ct. 2582 (2005); and the rationales of MARTINEZ and TREVINO, supra.

Although the holding in MARTINEZ was equitabale tolling issues, the rationale highlighted a significant risk of injustice when a prisoner is not afforded counsel in an INITIAL-REVIEW collateral proceeding. After the scathing criticism in TREVINO, which articulated how the Texas procedural system fails to provide an adequate vehicle by which prisoners may effectively challenge their effectiveness of trial counsel's performance on direct appeal, the State of Texas has refused to correct the clear flaws in it's system. This has created a violation of Constitutional magnitude which affects every INDIGENT prisoner in Texas. All indigent Texas prisoners will continue to receive inadequate habeas review in violation of the 14th amendment of the U.S. Constitution until the U.S. Supreme Court answers this question.

Therefore, the question presented above is of great public importance.

The answer to this question is framed by two Supreme Court decisions concerning state-funded appellate counsel. See: DOUGLAS V. CALIFORNIA, 83 S.Ct. 814 (1963), and ROSS V. MOFFITT, 94 S.Ct. 2437 (1974).

In DOUGLAS, the Supreme Court held that "where the merits of the one and only appeal an indigent prisoner has of right are decided without benefit of counsel, an unconstitutional line is drawn between the rich and poor which violates the 14th amendment." Thus, DOUGLAS established that as a matter of Constitutional law, adequate appellate review is impossible unless counsel has been appointed to indigent prisoners. This is why texas appoints appellate counsels to indigent prisoners on their initial-direct appeal.

In ROSS V. MOFFITT, 94 S.Ct. 2437 (1974), the Supreme Court held that a State court need not appoint counsel to aid a poor person seeking to pursue a second-tier discretionary appeal, such as a Petition For Discretionary Review and/or Art. 11.07 Writ of Habeas Corpus collateral proceeding in Texas. See: EX PARTE GRAVES, 70 S.W.3d 103 (Tex.Crim.App. 2002).

However, in MARTINEZ, supra., the Supreme Court clarified that COLEMAN expressly "left open" the question of "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance of trial counsel. See: MARTINEZ, at 1315.

Furthermore, in a subsequent ruling, TREVINO V. THALER, supra., the Supreme Court held that Texas procedures made it "virtually impossible" for appellate counsel to present an adequate ineffective assistance of counsel claim on direct appeal/review. See: TREVINO, at 1918. Consequently, the better procedural mechanism for pursuing a claim of ineffective assistance of counsel is almost always through writ of habeas corpus proceedings because no evidentiary hearings are held on direct appeals to resolve any claims/evidence "out-side" the trial record. See: FREEMAN V. STATE, 125 S.W.3d 505, 506 (Tex.Crim.App. 2003).

This, unquestionably, makes HABEAS CORPUS the INITIAL-REVIEW collateral proceeding for ineffective assistance of trial counsel claims in TEXAS and is the equivalent of a prisoner's Direct Appeal as to such claims. See: EX PARTE BUCK, 418 S.W.3d 98, 109 (Tex.Crim.App. 2013).

Mr. Rosales avers that this distinction should put the answer to this question squarely under DOUGLAS, supra., because:

a. Habeas Corpus is a WRIT OF RIGHT. See: TEX.CONST. ART. I, §12; TEX. C.C.P. ART 1.08;

b. Habeas Corpus is the designated "first-tier" and "initial-review" collateral proceeding for ineffective assistance of trial counsel in Texas;

c. Habeas Corpus decides the claim's merits and no other court has addressed the ineffective assistance of counsel claims;

d. Error-correction is the Habeas proceeding's prime function;

e. Habeas Corpus is NOT a discretionary review;

f. Habeas Corpus is a Texas prisoner's "one and only appeal" as to ineffective assistance of trial counsel claims; and

g. Texas direct appeal procedures make raising ineffective assistance of trial counsel claims "virtually impossible" as stated in TREVINO V. THALER, supra., at 1918.

By Texas making it virtually impossible to raise an ineffective assistance of trial counsel claim(s) on direct appeal, and not constitutionally providing appointment of habeas corpus counsel by right to raise such claim(s) at the initial-review collateral proceeding, Texas has significally diminished a prisoner's ability to file a meaningful/meritorious claim of ineffective assistance of trial counsel. The prisoner, unlearned in the science of law, cannot be expected to possess the legal knowledge necessary to prepare thoughtful and meritorious habeas applications. The prisoner might not only misapprehend the substantive details of federal constitutional law, or fail to comply with the State's procedural rules, but while confined in prison, the indigent prisoner is in no position to develope the evidentiary basis for his ineffective assistance of trial counsel claim(s), which most often turns on evidence outside the trial record, as in Mr. Rosales' case. This is significant because in Habeas Corpus proceedings the burden is on the prisoner to allege and prove facts which, if true, entitle him/her to habeas relief. See: EX PARTE MALDONADO, 688 S.W.2d 114, 116 (Tex.Crim.App. 1985); EX PARTE McPHERSON, 32 S.W.3d 860, 861 (Tex.Crim.App. 2000); and EX PARTE RICHARDSON, 70 S.W.3d 865, 870 (Tex.Crim.App. 2003).

An applicant must show harm for habeas corpus relief. That is, he must prove by a preponderance of the evidence that the error contributed to his conviction or punishment. See: EX PARTE WILLIAMS, 65 S.W.3d 656, 658 (Tex.Crim.App. 2001).

In addition, it is the applicant's burden to prove his ineffective assistance of counsel claim by a preponderance of the evidence. See: McFARLAND V. STATE, 845 S.W.2d 824, 843 (Tex. Crim.App. 1992).

Furthermore, a claim of ineffective assistance of counsel must be supported by a record containing direct evidence as to why counsel took the actions or made the omissions relied upon as the basis for the claim(s) See: BUSBY V. STATE, 990 S.W.2d 263, 268 (Tex.Crim.App. 1999).

Not only does a Texas prisoner have to contend with the inherit restrictions of his/her confinement, but Texas Government Code, §552.028, for example, erects an insurmountable barrior which allows all governmental bodies to simply ignor requests for information from a prisoner. How then is an unrepresented Texas prisoner meant to prove their allegations if they are prevented by both statute and their physical confinement from obtaining the necessary evidence to prove their ineffective assistance of counsel claims on collateral review?

Lastly, due process requires that an indigent defendant be provided with the basic tools to present an adequate defense within our adversarial system of justice. See: AKE V. OKLAHOMA, 470 U.S. 68, 77 (1985).

If an indigent defendant establishes a substantial need for the expert, as Mr. Rosales had in his case, without which the fundamental fairness of the trial will be called into question, then AKE requires the appointment of an expert regardless of his designated field of expertise. Id.

The Texas Court of Criminal Appeals has extended AKE to cases involving various types of experts. The burden is on the defendant to make a sufficient threshold showing of need for the expert's assistance. See: GRIFFITH V. STATE, 983 S.W.2d 282, 286 (Tex. Crim.App. 1998).

Mr. Rosales avers that, it is virtually impossible for an indigent, incarcerated prisoner, as himself, to obtain a sworn affidavit from an expert stating what he would testify to, that he would be willing to testify, and that his testimony is unbias, without the appointment of a habeas corpus counsel to interview and obtain such sworn affidavit. Thus, without a constitutional right to habeas counsel in Texas, indigent prisoners will NEVER have adequate or meaningful habeas corpus review pursuant to C.C.P. art. 11.07.

For the above stated reasons, a Writ of Certiorari should be granted and this court should address the question as to whether it is unconstitutional if a Texas prisoner is not granted the right to appointment of counsel during their C.C.P. art. 11.07 habeas corpus "initial-review" collateral proceeding when raising an ineffective assistance of trial counsel claim(s).

II.

Mr. Rosales asserts that the Fifth Circuit Court of Appeals' decision to deny his request for issurance of a Certificate of Appealability conflicts with the holdings of BAREFOOT V. ESTELLE, 463 U.S. 893 (1983); MILLER-EL V. COCKRELL, 537 U.S. 338 (2003); and FLIEGER V. DELO, 16 F.3d 883 (8th Cir. 1994) for the following reasons:

On August 11, 2021, the Fifth Circuit Court of Appeals denied Mr. Rosales' request for issurance of a Certificate of Appealability pursuant to 28 U.S.C. §2253(c)(2) regarding the following claims:

Jurists of reason would find it debatable:

A. Whether trial counsel provided ineffective assistance of counsel when counsel failed to object to a PUNISHMENT jury charge based on the fact that the jury could not consider the evidence of extraneous offenses unless they believed beyond a reasonable doubt that Rosales had committed those offenses;

B. Whether trial counsel provided ineffective assistance of counsel when counsel failed to object to the prosecutor's improper bolstering of the complainant's credibility during closing arguments;

C. Whether trial counsel provided ineffective assistance of counsel when counsel failed to procure an expert witness to rebut the false testimony of the State's expert witness, that it is possible for a torn hymen not to bleed; and

D. Whether the State and Federal Court erred by failing to appoint Mr. Rosales an attorney for habeas corpus proceedings.

In BUCK V. DAVIS, 580 U.S. (2017), the U.S. Supreme Court held that the Fifth Circuit Court of Appeals exceeded the limited scope of the C.O.A. analysis. The C.O.A. statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then if it is, an appeal in the normal course. See also: BAREFOOT, supra.

In HENRY V. COCKRELL, 327 F.3d 429, 431 (5th Cir. 2003), the court explained that: under the A.E.D.P.A., a petitioner must obtain a Certificate of Appealability (C.O.A.) before he can appeal the District Court's decision. See: 28 U.S.C. §2253(c)(1). A C.O.A. will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right." See: 28 U.S.C. §2253(c)(2). See also: FLIEGER, supra.

In order to make a substantial showing, a petitioner must demonstrate that a "reasonable jurists would find the District Court's assessment of the constitutional claim(s) debatable or wrong." SLACK V. McDANIEL, 529 U.S. 473, 484 (2000).

The U.S. Supreme Court in BAREFOOT, supra., held this means that the appellant need not show that he would prevail on the merits, but must ONLY demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issue(s) in a different manner; or that the questions are adequate to deserve encouragement to proceed further. See also: MILLER-EL, supra.

In regards to the four questions stated above pretaining to the Fifth Circuit's denial of Mr. Rosales' request for issurance of a C.O.A., Rosales will demonstrate that his C.O.A. should have been granted by posing additional questions for this court's consideration:

A.

- WAS EGREIOUS HARM SHOWN WHEN, NOT ONLY DID THE JURY RENDER THE STATE'S REQUESTED SENTENCE, BUT THE EVIDENCE WAS NOT OVERWHELMING? and

- WAS EGREIOUS HARM SHOWN WHEN, DUE TO COUNSEL'S FAILURE TO OBJECT TO THE FAULTY PUNISHMENT JURY CHARGE, ROSALES WAS PROHIBITED FROM RAISING THIS ERROR ON DIRECT APPEAL, WHICH ONLY REQUIRED A SHOWING OF SOME HARM, NOT EGREIOUS HARM?

The Federal District Court acknowledged, as did the State Court of Appeals, that error was committed by trial counsel for failing to make an objection to the faulty PUNISHMENT jury charge. See: (ECF No.17, p.6-7); and ROSALES V. STATE, No. 03-15-00735-CR, 2017 WL 5247497 (Tex.App.-Austin, Nov. 10, 2017, pet. ref'd). Thus, the first prong of the STRICKLAND test had been met, whereas, counsel's performance was DEFICIENT. See: STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).

Although the State and Federal District Court agreed error was committed, the courts concluded that EGREIOUS harm was not established worthy of reversal as required by ALMANZA V. STATE, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985)(egreious harm must be shown when no objection is made to a faulty punishment jury charge);

and SPRIGGS V. COLLINS, 993 F.2d 85, 88 (5th Cir. 1993)(there must be a reasonable probability that the petitioner's non-capital sentence would have been significally less harsh but for counsel's alleged errors).

Mr. Rosales contends that egreious harm was clearly established, not only because the jury rendered the State's requested sentence, but the evidence was not overwhelming of his guilt due to reason there was no direct evidence, other than the complainant's questionable assertions. See: (ECF-1)

In addition, due to trial counsel's failure to make a valid objection to the faulty punishment jury charge, Mr. Rosales was prohibited from raising such error on direct appeal, which only required a finding of SOME harm from counsel's deficient performance for reversal and a new punishment hearing. See: MENDOZA V. STATE, No. PD-0937-37 (Tex.Crim.App. 2014, no pub., 6-18-14); and MIDDLETON V. STATE, 125 S.W.3d 450, 454 (Tex.Crim. App. 2003).

The required "SOME" harm analysis would had been easily established, not only because the jury rendered the same exact sentence requested by the State, but also because the evidence was not overwhelming. This, of course, would have met the second prong of the STRICKLAND test, requiring a showing of prejudice, whereas, there is a clear reasonable probability that the outcome of the APPEAL process would have been different, whereas, Rosales would had to have shown only SOME harm for reversal.

B. DID THE PROSECUTOR ASSERT ITS OWN OPINION OF THE STATE'S KEY WITNESS IN AN UNSWORN MANNER, VIOLATING ROSALES OF A FAIR AND IMPARTIAL TRIAL?

Mr. Rosales contended throughout the State and Federal Habeas Corpus proceedings that his trial counsel provided ineffective assistance as constitutionally required when he failed to object to the prosecutor's following statement during closing argument:

"And so, but must important, of course, is [the complainant]'s CREDIBILITY because that is this case, and I SUBMIT TO YOU, that she is 100 PERCENT CREDIBLE AND YOU CAN BELIEVE HER STORY BEYOND A REASONABLE DOUBT. It proves every element of the offense. Why does the complainant have a reason to lie?" (ECF-1)

A prosecutor may argue his opinion concerning a witness's credibility or truth of a witness's testimony ONLY if the opinion is based on reasonable deductions from the evidence and does not constitute unsworn testimony. See: GONZALES V. STATE, 337 S.W.3d 473, 483 (Tex.App.-Houston 2011).

The District Court stated that, "it is reasonable to believe that petitioner's trial counsel did not object to the prosecutor's statement because he believed the statement was proper under Texas law and an objection would have been futile," citing STOUT V. STATE, 426 S.W.3d 214, 220 (Tex.App.-Houston 2012); and GRAVES V. STATE, 176 S.W.3d 422, 431 (Tex.App.-Houston 2004), as controlling Texas authority for the court's denial of Rosales' claim. Both cited cases are clearly distinguishable from Rosales' case, whereas, in these cited cases, the prosecutor raised the question for the jury as to whether a witness had any motive

to be untruthful, but did not purport to answer that question based on the prosecutor's own opinion or evidence outside the record. Rosales' case, as with SIMONS V. STATE, 648 S.W.2d 21, 22 (Tex.App.-Dallas 1983), the prosecutors were asserting their own opinion of the witness's credibility, which such statement(s) improperly conveys the idea that the prosecutor has a basis for such an opinion OUTSIDE the evidence presented at trial. See: WILLIAMS V. STATE, 417 S.W.3d 162, 172 (Tex.App.-Houston 2013).

In SIMONS, supra., the prosecutor stated to the jury that two police officers who testified "WERE TELLING YOU THE TRUTH" about the way the defendant was driving. The trial court sustained counsel's objection and instructed the jury to disregard the prosecutor's improper statement. Id. The prosecutor went on to tell the jury, "I SUBMIT TO YOU," the officer's testimony was very credible and they had no motive to lie to you. The court sustained counsel's objection again. Id.

In WILLIAMS V. STATE, 771 S.W.2d 601, 608 (Tex.App.-Dallas 1989), the court sustained counsel's objection to the prosecutor's following statement to the jury:

"The officers who testified had no reason to come down here and lie to you. They have nothing to lose by telling you the truth or by telling you a lie. They have nothing to gain. They just came in here to tell you the truth..." Id.

The U.S. Supreme Court has clearly held, it is patently improper for a prosecutor to either comment on the credibility of a witness or express a personal belief that a witness is being truthful or untruthful. See: UNITED STATES V. YOUNG, 470 U.S. 1, 17 (1985);

See also: HODGE V. HURLEY, 426 F.3d 368, 378 (6th Cir. 2005).

Although, in Rosales' case, the prosecutor did not present direct evidence that was outside the record, the prosecutor's bolstering of the complainant's credibility as being a truthful witness certainly had more than a probability of arousing the passion and prejudices of the jury by creating substantial influance that the evidence of Rosales' guilt layed outside the record, as YOUNG, supra., strongly condemns. It must be noted that the State's case rested entirely on the complainant's allegations against Mr. Rosales. There were no witnesses, no DNA evidence, and no direct evidence whatsoever linking Mr. Rosales to the alleged offense. Mr. Rosales never denied bringing the complainant to the Motel. However, it was to meet a friend who failed to show up. See: (ECF-1)

C.

SHOULD TRIAL COUNSEL HAD OBTAINED AN EXPERT WITNESS TO REBUT THE STATE'S EXPERT WITNESS WHO TESTIFIED THAT IT IS POSSIBLE FOR A HYMEN NOT TO BLEED AFTER BEING TORN IN THE MAGNITUDE OF THE COMPLAINANT'S, WHEREAS, SUCH REBUTTAL EVIDENCE WOULD HAD CASTED A REASONABLE DOUBT TOWARDS ROSALES' GUILT OF THE CHARGED OFFENSE? and

SHOULD AN EVIDENTIARY HEARING HAD BEEN HELD WHEN MR. ROSALES, DUE TO HIS INDIGENT STATUS, AND THE COURT'S FAILURE TO APPOINT COUNSEL, PROVIDED THE COURT WITH THE ONLY EVIDENCE (An Internet Blog) HE COULD OBTAIN TO SUBSTANTIATE HIS CLAIM THAT A HYMEN WILL ALWAYS BLEED WHEN TORN AS THE COMPLAINANT?

During the guilt and innocence phase of trial, the complainant, a thirteen year old, weighing only 105 lbs., testified that during the alleged sexual assault, Mr. Rosales penetrated her vagina with his penis and that prior to the alleged assault, she was a virgin and had never experienced sexual penetration of any form. The State's expert witness, Dr. Beth Nauert, testified that during her examination of the complainant, she discovered the complainant's hymen was previously torn in two places, consistent with having a previous penetration episode. Mr. Rosales' trial counsel asked Dr. Nauert if, after such tears in the hymen occurred, would bleeding occur? Dr. Nauert stated that it is possible for a torn hymen NOT to bleed. Trial counsel never presented any rebuttal expert witness to testify to the contrary of the State witness' false medical statement. See: (ECF-1)

During trial, the complainant testified that immediately after the alleged sexual assault she got dressed and left the Motel room to wait for Mr. Rosales in his vehicle, which they then went to a football game where Mr. Rosales' daughter was cheer-leading. The complainant, not once, to anyone during this case's investigation, her examination with Dr. Nauert, nor during her trial testimony, did she ever state she had bled after the alleged sexual assault and had to clean up blood from her hymen being torn in two places. If she was a virgin prior to the alleged assault, as she testified, bleeding would had occurred from the hymen being torn in two places.

Mr. Rosales contends that if such sexual assault actually occurred the complainant would had bleed blood in an amount worthy of mentioning to someone investigating the case, etc., and by the complainant not stating any blood was present after the alleged assault, such evidence confirms the complainant fabricated the allegation out of anger towards Mr. Rosales for not taking her to see her botfriend, among other things. See: (ECF-1)

Mr. Rosales is indigent and has been throughout his entire State and Federal habeas corpus proceedings. Mr. Rosales is also incarcerated and has no available means to obtain an attorney and/or investigator to obtain a sworn affidavit from a medical expert who would testify at an evidentiary hearing that a hymen torn in two places, as the complainant, would ALWAYS bleed. Mr. Rosales requested appointment of counsel, both at the State and Federal courts, but was denied. Mr. Rosales requested an EVIDENTIARY HEARING on this issue in hope of being appointed counsel to substantiate this claim, however, both courts denied his request.

Due to reason no court, at any habeas corpus stage, would appoint Mr. Rosales counsel to help substantiate his claim that a hymen would ALWAYS bleed when torn in two places as the complainant, Mr. Rosales did the very best he possibly could on his own and provided the Courts with an internet "BLOG" which states a woman can have penetration and not bleed. However, once the hymen is torn, or her "cherry is poped," as the blog states, bleeding will ALWAYS occur. Mr. Rosales provided the courts with this blog in request for an evidentiary hearing, but the courts rejected the evidence. (APPENDIX-D, E, & F)

It is unquestionable that, had Mr. Rosales' trial counsel obtained an expert witness to present evidence to the jury, as stated in the blog, there is a reasonable probability that a different outcome would had occurred at trial, whereas, the jury would had been provided with medical evidence rebutting the State's expert witness, that it is possible for a hymen not to bleed when torn in two places as the complainant, as such evidence would had raised at least two questions for the jury's consideration.

1. Did the complainant lie about the sexual assault? or
2. Did the complainant lie about being a virgin at the time of the alleged sexual assault?

Such evidence from the expert witness would had casted a clear reasonable doubt towards Mr. Rosales' guilt of the charged offense, due to the complainant's questionable and conflicting testimony on multiple other issues throughout trial. In other words, if the jury would had found the complainant had lied about being a virgin at the time of the alleged sexual assault, such lie, coupled with the multiple lies already revealed during her trial testimony, would had raised a reasonable doubt of Rosales' guilt, and a reasonable probability of a different outcome of the trial.

Pursuant to STRICKLAND V. WASHINGTON, supra., a trial counsel must undertake a reasonable amount of investigation. 466 U.S. at 690-691; and CHARLES V. STEPHENS, 736 F.3d 380, 389 (5th Cir. 2013). Counsel must, at minimum, interview potential witnesses and make an independent investigation of the facts and circumstances of the case. See: KATELY V. CAIN, 704 F.3d 356, 361 (5th Cir. 2013).

It was Rosales' trial counsel who posed the question to Dr. Nauert, would bleeding occur after such tears in the hymen, so counsel was already aware this was vital evidence for the jury's consideration.

The Federal District Court asserted that, to prevail on an IAC claim based on counsel's failure to call a witness, the petitioner must name the witness, demonstrate the witness was available to testify, delineate the content of the witness' proposed testimony, and show the testimony would have been favorable to the defense, citing DAY V. QUARTERMAN, 566 F.3d 527, 538 (5th Cir. 2009), as authority. The court further stated that a petitioner cannot simply allege but must affirmatively prove prejudice under STRICKLAND when complaining of counsel's failure to investigate, citing WILKERSON V. COLLINS, 950 F.2d 1054, 1065 (5th Cir. 1992), as authority. And lastly, the court stated that, a petitioner alleging that an investigation is deficient must show what the investigation would have uncovered and how the petitioner's defense would have benefitted from this information, citing NELSON V. HARGETT, 989 F.2d 847, 850 (5th Cir. 1993); and LOCKHART V. McCOTTER, 782 F.2d 1275, 1282 (5th Cir, 1986). See: (ECF-17)

Mr. Rosales contends that he has clearly provided the name of someone who could have testified to rebut the State's expert witness, Ms.(SHARMA MANJO at Quora.com) what that rebuttal evidence would had been (Bleeding will ALWAYS occur after a hymen is torn as the complainant) and how such evidence would had added a probability to a different outcome of the trial (Finding a

reasonable doubt to the truthfulness of the complainant's alleged sexual assault allegations). The "BLOG," provided by Mr. Rosales was sufficient evidence for granting an evidentiary hearing pursuant to the holdings of TOWNSEND, supra., and KEENEY, supra.

D.

SHOULD HAD THE FEDERAL DISTRICT COURT GRANT MR. ROSALES' REQUEST FOR APPOINTMENT OF COUNSEL FOR HIS COLLATERAL REVIEW PROCEEDINGS AND/OR AN EVIDENTIARY HEARING PROCEEDING?

For this court's convenience, Mr. Rosales will adopt the factual and legal arguments stated within sections (A) through (C) for reasons to grant the writ of certiorari regarding this question, whereas, it is obvious throughout the arguments of this petition Mr. Rosales was in dire need of appointment of counsel to substantiate his claim(s) of ineffective assistance of trial counsel, both at the State and Federal level, and the courts created a clear unreasonable decision by not granting counsel to Mr. Rosales.

CONCLUSION

For the reasons stated above, Mr. Rosales prays this court grant his request for issurance of a Writ of Certiorari to review the Fifth Circuit Court of Appeals denial of Rosales' request for a C.O.A. and/or consider the important questions presented in this petition.

Executed on this 26 day of October, 2021.

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