

No. \_\_\_\_\_

**21 - 6410**

IN THE

SUPREME COURT OF THE UNITED STATES

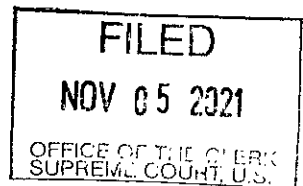
Steve Herbert Speckman — PETITIONER  
(Your Name)

**ORIGINAL**

vs.

Bobby Lumpkin - Director — RESPONDENT(S)  
Texas Department Criminal Justice

ON PETITION FOR A WRIT OF CERTIORARI TO



United States Court of Appeals - 5<sup>th</sup> Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Steve Herbert Speckman  
(Your Name)  
#1860160 - Lynaugh Prison  
1098 S. Hwy 2037  
(Address)

Fort Stockton TX 79735  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

## QUESTION(S) PRESENTED

1) Did the U.S. 5<sup>th</sup> Circuit Court of Appeals misconstrue the 28 USC 2244(d)(1)(A) federal statute when in this case it failed to recognize the one-year limitations period begins to run when the U.S. Supreme Court decided the timely properly filed direct review writ of certiorari petition? Should the 5<sup>th</sup> Circuit Court have issued a certificate of appealability to resolve the U.S. District Court's inappropriate dismissal of the 2254 petition as time barred?

2) Did the U.S. 5<sup>th</sup> Circuit Court misconstrue the 28 USC 2244(d)(1)(A) and 2244(d)(1)(B) federal statute when it failed to recognize in this case a timely pro se motion for rehearing filed with the intermediate state appellate court stops the appeal and while "pending" prevents the 2244(d) one-year limitations period from starting to run? As in this case, since the timely motion for rehearing is docketed and undecided (pending) for purposes of 2244(d) statute has the one-year limitation on 2254 petition relief actually began to run?

3) Did the U.S. 5<sup>th</sup> Circuit Court Clerk's failure to present the Petitioner's timely and properly supported petitions to the Court judges for review and decision deny the Petitioner due process of law under the 14<sup>th</sup> Amendment to the United States Constitution? Did the Court Clerk's actions render the result of the appeal proceeding unfair and unreliable?

4) Is a timely presented ineffective assistance of counsel complaint that clearly violates one's 6<sup>th</sup> Amendment guarantee to effective counsel made on initial state habeas corpus adjudicated on the merits for purpose of 2244(d) where the state court record demonstrates it was completely

ignored by the state courts review process? Can a reasonable application of the Strickland test be applied as required by federal law where as in this case the record demonstrates no investigation, findings of fact, conclusions of law or consideration of ground is conducted and no state procedural bar is relevant as well?

Can the state then reasonably use the affirmative defense that the ineffective assistance of counsel complaint is time barred under 28 USC 2244(d)?

## LIST OF PARTIES

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

## RELATED CASES

*Speckman v. Lumpkin No. 20-10613 U.S. 5<sup>th</sup> Circuit Court of Appeals  
Judgment entered April 23, 2021, - Motion for Panel Rehearing Judgment - June 14, 2021*

*Speckman v Lumpkin No. 4-20-cv-00107-O U.S. District Court for Northern  
District, Fort Worth Division Judgment entered May 13, 2020 - 2254 petition*

*Speckman v State No. WR-81, 947-02 Court of Criminal Appeals  
Judgment entered September 11, 2019 11.07 habeas corpus application*

*Speckman v State No. 07-13-00212-CR 7<sup>th</sup> State Court of Appeals  
Judgment entered May 23, 2014 Direct Appeal*

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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**

☒ For cases from **federal courts**:

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

☐ reported at \_\_\_\_\_; or,

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

☒ is unpublished.

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

☐ reported at \_\_\_\_\_; or,

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

☒ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at \_\_\_\_\_; or,

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

☐ is unpublished.

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

☐ reported at \_\_\_\_\_; or,

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

☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 23, 2021.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 14, 2021, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_. *see note below*

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_\_.

Order 1st 594 U.S. allows 150 days to file certiorari from order denying timely rehearing  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). *date.*

*Note: The order denying rehearing entered June 14, 2021 was filed with timely Petition for Rehearing En Banc as Appendix on June 28, 2021. The Petition for Rehearing En Banc remains undecided - See Question 3 - I was unable to obtain a copy of order denying rehearing entered June 14, 2021 - I apologise to the Court for this issue*

☒ For cases from **state courts**:

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

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

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_\_.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Article 14 -

Section 1, All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and 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 law.

### Article 6

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 defense.

### The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

#### 28 USC 2244(d)

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

## 28 USC 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 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 State court proceedings.

## Federal Rules of Appellate Procedure

### Rule 35 En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered.

A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless;

(1) en banc consideration is necessary to secure or maintain uniformity of

the court's decisions;

## Rule 35

### (b) Petition for Hearing or Rehearing En Banc

A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) The panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions;

## Texas Constitutional and Statutory Provisions Involved

### Texas Constitution Article 5

#### Section 5 (c)

Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and judges thereof shall have the power to issue the writ of habeas corpus, and, in criminal matters, the writs of mandamus, procedendo, prohibition, and certiorari.

### Texas Code of Criminal Procedure Article 4.04

#### 53a Court of Criminal Appeals

##### Section. 1

The Court of Criminal Appeals and each judge thereof shall have, and is hereby given, the power and authority to grant and issue and cause the issuance of writs of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari.

## Texas Rules of Appellate Procedure

### Rule 49.1

A motion for rehearing may be filed within 15 days after the court of appeals' judgment or order is rendered.

### Rule 49.3 Revision 2020 or previous

#### Decision on Motion

A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied.

### Rule 68.2 Discretionary Review with Petition

#### Time to file Petition

(a) First Petition. The petition must be filed within 30 days after either the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing was overruled by the court of appeals.

## STATEMENT OF THE CASE

1. Petitioner placed on 10 years deferred adjudicated probation on July 12, 2004.
2. Petitioner immediately hired attorney Danny Burns to perfect appeal and withdraw plea. Mr. Burns filed a motion for new trial to develop record on appeal but failed to file critical motion for final adjudication to advance motion for new trial. Due to counsel's error the Petitioner was deprived of the entire judicial process of direct appeal and his chance to present available evidence and testimony that would prove his innocence of the state charge. See ground 3 2254 petition - Charge - One count of sexual assault of minor under 14 years - alleging touching
3. Petitioner convicted and sentenced to 30 years in prison imposed by judge at hearing on May 29, 2013. - No new charge - probation revoked for missed payments.
4. Direct appeal granted on May 29, 2013
5. Appointed appellate counsel filed motion to withdraw on May 9, 2014 stating he would take no further action in this case. Counsel failed to address attorney errors.
6. 7<sup>th</sup> State Court of Appeals affirmed on May 23, 2014
7. Appellant filed a timely pro se direct review motion for rehearing on June 6, 2014 with the 7<sup>th</sup> Court of Appeals to address the court's failure to grant counsel's motion to withdraw and appoint new counsel as agreed on by both parties.
8. The 7<sup>th</sup> Court of Appeals has failed to decide the timely motion for rehearing, it is still shown as "pending" on the court docket with no disposition for purposes of 28 USC 2244(d)(1)(B) and is precluding the Appellant from filing a Petition for Discretionary Review (PDR) with highest state court. The direct appeal has not concluded for purpose of 28 USC 2244(b)(1)(A) as well. Appendix C - Docket'
9. A PDR is an important process in Texas appeal and is still outstanding, as a

motion for rehearing tolls the time to file a PDR and stops the direct appeal process for purposes of 28 USC 2244(d) 1-year limitation as well.

10. Appealed to Court of Criminal Appeals (highest state court) on certiorari petition, timely filed on August 14, 2014, denied without written order September 20, 2014.

11. Petitioner filed a timely direct review certiorari petition with the U.S. Supreme Court who accepted it as such on November 20, 2014 No. 14-8503. - Denied on April 19, 2015

12. The one-year AEDPA 2244(d) statute of limitations either has not begun to run as the motion for rehearing is still "pending" as the intermediate appellate court docket confirms, or began to run regarding errors that occurred at sentencing on May 29, 2013 when the U.S. Supreme Court decided the direct review certiorari petition on April 19, 2015. Either way the one-year AEDPA limitations period has not expired for the 2254 petition filed on January 31, 2020.

13. Petitioner filed pro se 11.07 habeas corpus on December 8, 2015.

14. State district court appointed habeas counsel who filed an "amended application" on April 18, 2018. The pro se application was still pending at that time. Note 4 years pending.

15. By the Court of Criminal Appeals usage of the term "amended application" means an 11.07 habeas corpus that completely replaces the previous pro se application as an initial pleading.

16. The Court of Criminal Appeals denied relief on September 11, 2019.

The state courts decision did not involve a determination of the merits of the ineffective assistance of counsel claims. Grounds 2+3 of the state habeas application properly filed and supported by counsel were not addressed and entirely ignored by the state courts. No findings of fact or conclusions of law or investigation was conducted. The ineffective assistance of counsel complaints have not been resolved and remain completely unheard. Thus, a reasonable application of the Strickland test could not be applied.

This is the substance of question 4 herein.

17. The Petitioner filed a timely 2254 petition on January 31, 2020, bringing the same grounds of ineffective assistance of counsel forward for federal review as were presented to the state.

18. The state court believed the unadjudicated grounds to be time barred under 28 USC 2244(d) as this was the states first and only response to the 2254 grounds the state courts had intentionally ignored.

19. The federal district court for northern district of Texas dismissed the 2254 petition as time barred on May 13, 2020.

The 2254 petition is not however time barred as the U.S. Supreme Court denied direct review certiorari petition on April 19, 2015 and a direct review motion for rehearing timely filed is still pending on court docket with the intermediate appellate court. This is the substance of questions 1+2 herein.

20. The Petitioner filed notice of appeal and subsequent application for certificate of appealability (COA) on September 23, 2020 with the U.S. 5<sup>th</sup> Circuit Court of Appeals.

21. The U.S. 5<sup>th</sup> Circuit Court denied application for COA April 23, 2021
22. Petitioner filed a Petition for Panel Rehearing on May 10, 2021
23. The 5<sup>th</sup> Circuit Court panel denied Petition for Panel Rehearing on June 14, 2021
24. Petitioner filed Motion for Rehearing En Banc on June 28, 2021 pursuant to Fed. R. App. P. 35(a)(1) and Rule 35(b)(1)(A)
25. The 5<sup>th</sup> Circuit Court Clerk misconstrued Fed. R. App. P. 35 and failed to present the timely Motion for Rehearing En Banc to the judge for review and decision.
26. Petitioner filed a timely Motion for Reconsideration of Clerks Action on July 14, 2021. Again the Court Clerk failed to present Motion for Reconsideration of Clerks Action to judge for review and decision.
27. Petitioner filed a Petition for Writ of Mandamus and Motion to Proceed IFP requesting the Court enjoin the Court Clerk to present the Motion for Reconsideration of Clerks Action to judge for decision. Again the Court Clerk failed to docket and present the Mandamus Petition to the Court for decision as mandated by Fed. R. App. P. 21 and 5<sup>th</sup> Circuit Rule 21

The 5<sup>th</sup> Circuit Court Clerks inappropriate actions have denied the Petitioner due process of law on appeal and rendered the appeal results unfair and unreliable. This is the substance of Question 3 herein.

## REASONS FOR GRANTING THE PETITION

### Question 1

The Petitioner argues that the U.S. District Court and U.S. 5<sup>th</sup> Circuit Court of Appeals erred in holding that his federal habeas 2254 petition was not filed within AEDPA's one-year limitations period. 28 USC 2244(d)(1)(A)

The District Court and U.S. 5<sup>th</sup> Circuit's decisions both conflict with a decision from the U.S. Supreme Court as follows, and consideration by this Court is therefore necessary to secure and maintain uniformity of this Courts decisions.  
Appendix B, Appendix A

The U.S. Supreme Court has previously held direct review includes a petition for writ of certiorari to the Supreme Court. Therefore, the "conclusion of direct review" is when the Supreme Court either rejects the petition or rules on its merits. Thus, AEDPA's one-year limitation period begins to run on the date the Supreme Court decides the certiorari petition as provided by 28 USC 2244(d)(1)(A).

In the instant cause the Petitioner filed a direct review certiorari petition with the U.S. Supreme Court on November 19, 2014 which was decided on April 20, 2015. No. 14-8503

Therefore, the one-year limitations period began to run on April 20, 2015 regarding errors that occurred at sentencing on May 29, 2013, and pursuant to the U.S. Supreme Court's holdings in *Burton v Stewart* 549 U.S. 147 (2007) ground 3 of the Petitioner's 2254 petition as well.

The U.S. District Court and U.S. 5<sup>th</sup> Circuit have failed to recognize this fact which clearly satisfies *Slack v McDaniel's* standard of review required to obtain a certificate of appealability. Reasonable jurists would find the district courts assessment of the constitutional claims debatable or wrong.

"The Petitioner has been denied his constitutional right to effective assistance at trial and other critical stages of the proceeding where that right is protected by the 6<sup>th</sup> Amendment, and furthermore, denied his right to appeal and challenge the attorney's errors in a meaningful manner that respects both efficiency and due process and which adequately preserves a defendant's 6<sup>th</sup> and 14<sup>th</sup> Amendment guarantees implicit in the United States Constitution."

### Citations of Conflicting Cases

There are two ineffective assistance of counsel complaints in question here:

- (1) one that occurred at sentence hearing on May 29, 2013 (ground 4 2254) and,
- (2) that occurred on August 11, 2004 at the time the order for deferred adjudicated probation was entered. (ground 3 2254 petition)

(1) "The conviction becomes final on state direct review when the time expires for filing a petition for writ of certiorari with the U.S. Supreme Court, or when the Court decides a properly filed writ of certiorari petition."

*Jimenez v Quarterman* 555 U.S. 113, 119, 129 S.Ct. 681, 686 (2009)

(2) The U.S. Supreme Court has held,

"The judgment becomes final for purposes of 28 USC 2244(b)(1)(A) at the time of sentencing, the sentence is the judgment." in

*Burton v Stewart* 549 U.S. 147, 127 S.Ct. 793, 798 (2007)

abrogating the U.S. 5<sup>th</sup> Circuit Court's holdings in

*Caldwell v Dretke* 429 F.3d 521, 527-28 (5<sup>th</sup> Circuit 2005)

which held "a deferred adjudication order to be a judgment," by which the U.S. District Court and U.S. 5<sup>th</sup> Circuit's decisions were based on ground 3.

The U.S. 5<sup>th</sup> Circuit Court recognized the foregoing in "Tharpe v Thaler 628 F.3d 719, 724 (5<sup>th</sup> Circuit 2010) which held, "The Supreme Court in Burton putatively called the analysis in Caldwell into question by emphasizing that, for purposes of AEDPA, the term "judgment" includes both the conviction and sentence. This arguably blocks our deeming a deferred adjudication order to be a judgment."

However the U.S. 5<sup>th</sup> Circuit Court has failed to accurately apply either of these cases (1) or (2) in this instance.

This brings federal ground 3 ineffective assistance which occurred on August 4, 2004 into alignment to be evaluated in conjunction with federal ground 4 which occurred on May 29, 2013 and further align with the Texas law and the State's intended purpose of deferred adjudicated probation.

### History and Supporting Facts - Question 1

The trial court held a hearing on May 29, 2013 where the Petitioner was adjudicated guilty, convicted and sentenced. A direct appeal was granted on this date as well. Errors that occurred at this hearing are cognizable on following direct or collateral review as they could not be raised earlier. May 29, 2013 is the controlling "judgment" date for direct review and 2244(d)(1)(A) for these errors.

During the direct appeal, the Appellant filed a state certiorari petition pursuant to Tex. Code. Crim. Proc. 4.04 53(a) with the Court of Criminal Appeals to address with the highest state court on direct review the intermediate appellate court's failure to decide his timely prose motion for rehearing. The motion that while

"pending" was preventing the Appellant from filing his Petition for Discretionary Review (PDR) and completing the direct review process.

As the PDR was still outstanding and the motion for rehearing was still "pending" the state certiorari was filed in the midst of the direct review process and intrinsic to it. This extraordinary remedy was necessary to continue and complete the direct review process as the intermediate court's action was not in accordance with the course of the common law.

This matter could not be raised on a PDR as the state argues because the issues raised on the state certiorari petition were the exact issues precluding the Appellant from filing a PDR in the first place.

Under the Texas Constitution and applicable criminal law a certiorari petition is a legal appellate remedy with the Court of Criminal Appeals. See Constitutional and Statutory Provisions Involved page 5. Tex. Const. Art. 5 Sec. 5(c), Tex. Code Cr. Pr. 4.04, 53(e).

The Court of Criminal Appeals filed and docketed the state certiorari petition No. WR-81,947-01 on August 4, 2014. It was not dismissed as would indicate an improperly filed direct review motion or procedurally barred petition, but denied without written order on September 20, 2014 demonstrating it was accepted and decided as such.

The Appellant then filed a timely properly filed direct review certiorari petition with the U.S. Supreme Court which was accepted and filed as such by the Court No. 14-8503 on November 19, 2014 and decided on April 20, 2015. State direct appeal No. 07-13-00232-CR.

Thus it was on April 20, 2015 that the judgment became final by the conclusion of direct review, 2244(d)(1)(A) and the one-year limitations period began to run.

It follows ground 4 of the 2254 petition which occurred at sentence hearing on May 29, 2013 and ground 3 pursuant to Burton supra are timely as 282 days have been used of the one-year deadline.

1. U.S. Supreme Court decided the direct review certiorari petition on April 20, 2015.
2. State DNA motion Tex. Code. Crim. Pro. Ch. 64.02 filed on July 8, 2015 and decided on October 7, 2015
3. State habeas corpus filed on December 8, 2015 and decided September 11, 2019
4. The 2254 petition was timely filed on January 31, 2020.

## Reasons for Granting the Petition

### Question 2

The Petitioner argues his 2254 petition is not time barred under AEDPA because the judgment has not become final, the conclusion of the direct review has not occurred and the time for seeking such review has not expired. The state direct review appellate legal remedies granted by the trial court have not been exhausted due to a state created impediment.

The U.S. 5<sup>th</sup> Circuit Court's decision to deny certificate of appealability further conflicts with U.S. Supreme Court holdings as follows:

In this instance the lower courts have failed to recognize that "a timely filed direct review motion for rehearing, while "pending" stops the direct appeal process and prevents the AEDPA 2244(d) one-year limitation from starting."

### Citations of Conflicting Case

"The one-year AEDPA limitation pursuant to 28 USC 2244(d)(1)(A) does not begin to run until the availability of direct appeal to the state courts and U.S. Supreme Court has been exhausted. Until that time, the process of direct review has not come to an end and a presumption of finality and legality cannot yet have attached to the conviction and sentence."

Jimenez v Quarterman 555 U.S. 113, 129 S.Ct. 681, 686 (2009)

"If a defendant stops the appeal process before reaching state court of last resort, conviction becomes final, and statute of limitations for federal habeas relief begins to run, when time for seeking further direct review in state court expires."

28 USC 2244(d)(1)(A)

Roberts v Cockrell 319 F.3d 690, 692-94 (5<sup>th</sup> Circuit 2003)

## History and Supporting Facts

### Question 2

On June 6, 2014 the Petitioner filed a timely pro se direct review motion for rehearing with the intermediate appellate court to address the court's denial of counsel's motion to withdraw.

However, the appellate court failed to rule on or decide the timely motion for rehearing claiming hybrid counsel. This action is unreasonable as the attorney's duty ended when the court entered its opinion on May 23, 2014, and furthermore, counsel had filed a motion to withdraw on May 9, 2014, quit his job and declared he would take no further action, leaving the Appellant unrepresented at that time.

The Tex. R. App. P. 49.1 does not preclude an appellant from filing a pro se direct review motion for rehearing in this instance or otherwise. Additionally, a motion for rehearing tolls the 30 day period to file a petition for discretionary review (PDR) under Tex. R. App. P. 68.2(k). See Statutory Provisions page 6.

Due to the state courts failure to decide the motion for rehearing the Petitioner has not been afforded an opportunity to file a petition for discretionary review (PDR) with the highest state court or take any constitutional errors relevant to the highest state court's decision to the U.S. Supreme Court on certiorari, as the motion for rehearing remains "pending" on the appellate court docket.

Appendix C - court docket . . . . . 17.

According to the U.S. Supreme Court Rule 13.3 the Petitioner's pro se motion for rehearing is properly filed as it is timely and docketed for review.

"The 14<sup>th</sup> Amendment to the United States Constitution guarantees a criminal defendant pursuing a first appeal by right certain minimum safeguards necessary to make that appeal "adequate and effective" *Griffin v Illinois* 351 U.S. 12, 20 (1956)" "The record in this case reflects that the first appeal as of right has not been adjudicated in accordance with due process of law as the defendant has not had the opportunity to complete his appeal in accordance with the Texas appellate law by filing his PDR with the highest state court." *Evitts v Lucey* 469 U.S. 387, 395-96 (1985)

"A defendant who still has the right to file a PDR is considered to be in the midst of the direct review process."

*Forman v Dretke* 383 F.3d 425, 429 (5<sup>th</sup> Cir. 2004) citing  
*Salinas v Dretke* 354 F.3d 336, 339 (5<sup>th</sup> Cir. 2004)

In this case the Petitioner desired to file a PDR but in following the Tex. R. App. P. 49.1 first chose to file a motion for rehearing which stopped the direct appeal process and tolled the 30 day period to file a PDR.

Tex. R. App. P. 68.2(a), 49.1, 49.3 See Statutory Provisions pg. 6

The state appellate court has failed to decide the timely motion for rehearing pursuant to Tex. R. App. P. 49.3 which stipulates the motion must either be granted or denied, therefore it remains "pending" on the court docket, and thus, is preventing the Petitioner from filing his PDR and concluding his direct appeal by reaching the state court of last resort.

This state action has created an impediment which has stalled the direct appeal process, where it remains today. The State created impediment has prevented the Petitioner from exhausting his state direct review remedies and denied him his constitutional right to due process of law on direct appeal.

According to 28 USC 2244(d)(B) the one-year AEDPA limitation has not begun to run. See Statutory Provisions page 4

Here, the 28 USC 2244(d)(1)(A) federal statute applies as well. The direct review has not concluded at the time for seeking such review has not expired, and thus, the AEDPA limitations period has not begun to run. The judgment has not become final according to federal statute.

### Note with Emphasis:

The direct review either concluded when the U.S. Supreme Court decided the direct review certiorari petition filed with and accepted by the Court as such; or the direct review process has not concluded as the timely pro se direct review motion for rehearing filed with the intermediate state appellate court remains undecided and is still "pending" for purposes of federal statute.

In the first instance the direct appeal concluded when the U.S. Supreme Court decided the direct review certiorari petition on April 20, 2015 and the one-year AEDPA limitation began to run at that time regarding errors which occurred at sentencing hearing held May 29, 2013.

If the direct review did not conclude when the U.S. Supreme Court decided the direct review certiorari petition, then the direct review has not concluded and the one-year AEDPA limitation has not yet begun to run because the time for seeking further direct review has not expired due to a state created impediment, for purposes of 2244(d)(1)(A) and (B). The pro se direct appeal motion for rehearing remains undecided and while "pending" stops the appeal and tolls the time to file a PDR. The PDR is still outstanding part of direct review process and thus the state direct appeal has not concluded.

In either case the one-year AEDPA limitation period has not expired when the Petitioner filed his 2254 petition on January 31, 2020.

## Reasons for Granting the Petition

### Question 3

In the U.S. District Court cause No. 4:20-CV-107-O opinion and order dated May 13, 2020 an appeal was granted and assigned No. 20-10613 by the U.S. 5<sup>th</sup> Circuit Court of Appeals. Appendix B

Once an appeal has been granted by the U.S. Court an appellant is entitled to due process of law under the 14<sup>th</sup> Amendment to the United States Constitution throughout the appeal proceeding.

In this case the 5<sup>th</sup> Circuit Clerk has misconstrued the Fed. R. App. P. and thus failed to file and present timely properly submitted petitions to the Court Judges for review and decision. This action by the Court Clerk has denied the Appellant due process of law rendering the result of the appeal unfair and unreliable.

If the Court Judges do not receive correct appropriate facts and information regarding the pertinent cause a fair and reasonable decision cannot be determined.

A Court Clerk has a ministerial duty to present timely and properly filed motions to the Court Judges for review and decision as provided by the Fed. R. App. P. The Clerk must act in accord with the dictates of the Constitution, and, in particular, in accord with the due process clause.

However, in this case the Court Clerk has failed to do so as follows:

### Supporting Facts - Question 3

A single judge entered an unexplained order denying the Petitioner's Application for Certificate of Appealability on April 23, 2021 and the subsequent entry of the panel's decision to deny relief occurred on June 14, 2021. Appendix A

The letter from the 5<sup>th</sup> Circuit Court Clerk entered May 17, 2021 claiming the appeal mandate issued with the court's order entered on April 23, 2021 is premature and inaccurate as the panel rehearing of that order and subsequent panel's decision entered on June 14, 2021 demonstrates.

The Petitioner filed a timely petition for rehearing en banc on June 28, 2021 with the 5<sup>th</sup> Circuit Court in response to the panel's decision because it conflicts with U.S. Supreme Court holdings.

An en banc rehearing is permitted when the panel's decision "conflicts with a decision of the U.S. Supreme Court and en banc review is necessary to secure or maintain uniformity of the Court's decisions," and can be filed by Petitioner. Fed. R. App. P. Rule 35(a)(1) and 35(b)(1)(A). See Statutory Provisions page 5

This is precisely what has occurred here and the rigid standard of Rule 35(a) and (b) have been demonstrated and met in the Petition for Rehearing En Banc.

The Court Clerk has failed to recognize this fact and observe the relevant Rules of Appellate Procedure. In a letter entered July 2, 2021 the Clerk contends the Petition for Rehearing En Banc is untimely and not allowed, and no action will be taken on my Petition. Both these allegations are incorrect and contrary to Fed. R. App. P. 40(a) and Rules 35(a) and (b).

In response to the Clerk's foregoing misunderstanding the Petitioner filed a timely Motion for Reconsideration of Clerk's Action on July 14, 2021.

The Clerk again denied due process and failed to present the Motion for Reconsideration of Clerk's Action to the next judge of assignment for review and decision.

The Court Clerk does not have the authority or jurisdiction to rule on or obstruct a timely filed Motion for Reconsideration of Clerk's Action filed pursuant to the U.S. 5th Circuit Court Rule 27.1 which provides "A motion for reconsideration of clerk's action is subject to review by a single judge upon motion for reconsideration made within 14 day period set forth by Fed. R. App. P. 40.

The Clerk entered a letter on July 29, 2021 in response to the Petitioner's Motion for Reconsideration of Clerk's Action. The Clerk contends paragraph 3, that a Motion for Rehearing En Banc and Motion for Panel Rehearing must be "filed at the same time." [sic]. This is unreasonable as the substance of the Motion for Rehearing En Banc is the panel's decision itself.

According to the Fed. R. App. P. 35, a properly supported Motion for Rehearing En Banc can be filed in response to the panel's decision when it conflicts with U.S. Supreme Court holdings. In this instance the Petitioner has done just that.

Additionally, the Clerk's letter does not suffice to compensate in any way for the fact the Clerk has failed in his ministerial duty to present the timely Motion for Reconsideration of Clerk's Action to the judge as the law and 14 Amendment requires.

In response to the foregoing Clerk's actions the Petitioner filed a Petition for Writ of Mandamus pursuant to Fed. R. App. P. 21 on August 10, 2021 requesting the Court judges enjoin the Court Clerk to present the timely filed Motion for Reconsideration of Clerk's Action to the judge for review and decision.

A Motion to Proceed IFP was also submitted with the Petition for Writ of Mandamus as required by U.S. 5<sup>th</sup> Circuit Rule 21 which provides "If the petitioner accompanies the petition with the requisite filing fee or motion to proceed IFP, the clerk will docket the petition in accordance with Fed. R. App. P. 21(A)(3).

Here again, the Clerk has failed to docket the petition in accordance with the law.

On September 9, 2021 the Petitioner sent a letter to the U.S. 5<sup>th</sup> Circuit Court requesting the status and docket number of the Petition for Writ of Mandamus.

As of November 1, 2021 no communication from the 5<sup>th</sup> Circuit Court Clerk has been received regarding the status of the Petition for Writ of Mandamus or the letter of inquiry sent September 9, 2021.

It can only be surmised the Clerk has again obstructed the appeal and denied the Appellant due process of law by failing to docket the Petition for Writ of Mandamus.

The 5<sup>th</sup> Circuit Court Clerk's aforementioned actions have rendered the results of the appeal proceeding fundamentally unfair and unreliable.

## Reasons for Granting the Petition

### Question 4

The state 11.07 habeas corpus application properly researched and supported by appointed habeas counsel was not adjudicated on the merits in state court proceedings as the court's decision did not involve a determination of the merits of the ineffective assistance of counsel claims.

The manner in which the 11.07 habeas corpus proceeding was conducted was illegal, rendering the review process and result unconstitutional, ineffectual, unfair and a meaningless event. Due process of law was denied the Applicant. The State court record clearly establishes this fact.

The ineffective assistance of counsel federal 2254 grounds 3+4, which the state was given the first chance to address, caused a deprivation of liberty without due process of law by depriving the Petitioner of a substantive and procedural right to which the United States Constitution entitled him. The attorney's errors in question so undermined the adversarial process that the trial cannot be relied on as having a just result. The State court record further demonstrates this fact.

However, the attorney's derelictions properly presented by counsel have been completely ignored by the state courts on habeas corpus review. They remain uninvestigated as the court's findings of fact and conclusions of law are absent any mention of these attorney's errors whatsoever. They remain completely unheard and unresolved. A record has not been developed to support a denial of relief. Appendix D Appendix F

Without AEDPA the state court's analysis would have been different. The court could not have defaulted to AEDPA and used the affirmative defense by immediately claiming the constitutional violations contained in the habeas pleading were time barred for federal review under 28 USC 2244(d).

The state court would have been required to actually conduct findings of fact and conclusions of law, and an investigation in order to reasonably and constructively apply the Strickland test, due to federal accountability on 2254 habeas review.

The Petitioner argues that the deference due AEDPA should apply to AEDPA in its entirety. A federal claim of ineffective assistance of counsel subject to the one-year limitations period under 2244(d)(1)(A) should not be exempt from federal review if it can be established it was not adjudicated on the merits in state court and both 2254(d)(1) and (2) statutes can be demonstrated and qualified by the state court record as well.

"The threshold question under AEDPA is whether the Appellant seeks to apply a rule or law that was clearly established at the time his state conviction became final. That question is easily answered because the merits of his claims are squarely governed by the U.S. Supreme Court's holdings in *Strickland v. Washington* 466 U.S. 688 (1984)"

*Williams v. Taylor* 529 U.S. 362, 390 (2000)

## Supporting Facts Question 4

By its own admission the Court of Criminal Appeals (highest state court) acknowledges its failure to adjudicate the "amended application" submitted as an initial habeas pleading on the merits. In its remand order and final opinion it clearly states "we remanded one of his amended claims for a response from guilty plea counsel and further findings of fact and conclusions of law. This addresses in part only ground 1. Appendix E, Appendix F

By the state court's usage of the term "amended application" means a habeas application that completely replaces the original pro se habeas corpus as an initial pleading. Habeas counsel submitted 3 grounds of ineffective assistance of which grounds 2+3 have been ignored.

The record affirmatively demonstrates the outstanding, unadjudicated ineffective assistance complaints occurred. Attorney Mr. Burns did not understand the deferred adjudication procedure and failed to first file a motion for final adjudication to properly advance the filed motion for new trial, intended to develop the record on appeal. Attorney Mr. Scott failed to present available and provided mitigating witnesses who would have testified favorably on the Petitioner's behalf, and remained completely silent throughout the entire sentence hearing. The reporters record establishes this fact.

The state courts cannot reasonably ignore these attorney's errors and pretend the Petitioner was not harmed as the attorney's duties were simple and required for a successful and fair outcome of the relative procedures where competent counsel is guaranteed by the 6<sup>th</sup> Amendment to the United States Constitution.

state court's decision did not involve a determination of the merits of the ineffective assistance of counsel claims. The state court based its decision to deny relief on an unreasonable determination of the facts presented and contained in the state court record. The record further demonstrates the facts presented were not challenged or addressed and that the application of the Strickland test was therefore objectively unreasonable.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Steve Robert Spahn

Date: November 1, 2021