United States Court of Appeals for the Fifth Circuit

No. 20-40620

United States Court of Appeals
Fifth Circuit
FILED
August 2, 2021
Lyle W. Cayce
Clerk

ROBERT TRACY WARTERFIELD,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 4:17-CV-330

ORDER:

IT IS ORDERED that Appellant's motion for a certificate of appealability is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for appointment of counsel is DENIED.

/s/ *Carl E. Stewart*

CARL E. STEWART
United States Circuit Judge

Appendix A

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

ROBERT T. WARTERFIELD, #1829999	§	
	§	
	§	
VS.	§	CIVIL ACTION NO. 4:17cv330
	§	
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation recommending that the petition for writ of habeas corpus be denied as time-barred, and the case be dismissed with prejudice. Petitioner filed objections.

In Petitioner's objections, he argues his petition is not time-barred or alternatively, that he should receive equitable tolling. He also reurges the issues raised in his petition. Petitioner is simply mistaken. He fails to show that he timely filed his petition or that he is entitled to equitable tolling. The Report and Recommendation of the Magistrate Judge, which contains proposed findings of facts and recommendations for the disposition of such action, has been presented for consideration. After conducting a *de novo* review of Petitioner's objections, the Court determines they are without merit and concludes that the findings and conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the Court.

Appendix B

It is therefore **ORDERED** the petition for writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 10th day of August, 2020.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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

ROBERT T. WARTERFIELD, #1829999	§	
	§	
VS.	§	CIVIL ACTION NO. 4:17cv330
	§	
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

Having considered the petition for writ of habeas corpus, and rendered its decision by opinion and Order of Dismissal issued this date, the Court **ORDERS** that the case is **DISMISSED** with prejudice.

SIGNED this 10th day of August, 2020.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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

ROBERT T. WARTERFIELD, #1829999	§	
	§	
VS.	§	CIVIL ACTION NO. 4:17cv330
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Petitioner Robert T. Warterfield filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

Petitioner is challenging his Collin County conviction for two counts of aggravated sexual assault of a nine-year-old child and two counts of indecency by contact with the same child. Cause No. 416-80757-2011. On December 7, 2012, Petitioner was sentenced to two life sentences and two terms of confinement for twenty years, respectively. The Fifth Court of Appeals affirmed his convictions on August 27, 2014. Cause No. 05-13-00017-CR. Petitioner filed an application for writ of habeas corpus in state court on June 7, 2016, which the Texas Court of Criminal Appeal (CCA) denied without written order on May 3, 2015. Petitioner filed the present petition on May 5, 2017. He argues that he is entitled to federal habeas corpus relief based on a myriad of issues including ineffective assistance of counsel, due process violations, prosecutorial misconduct, and trial court appellate court, and CCA errors. The Director filed a response, asserting Petitioner's case is barred

Appendix C

by the statute of limitations. Petitioner filed a reply.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was enacted. The law made several changes to the federal habeas corpus statutes, including the addition of a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). The AEDPA provides that the one-year limitations period shall run from the latest of four possible situations: the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review; the date an impediment to filing created by the State is removed; the date in which a constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *Id.* at § 2244(d)(1)(A)-(D). The AEDPA also provides that the time during which a properly-filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation. *Id.* at 2244(d)(2).[1]

In the present case, Petitioner is challenging his conviction. The appropriate limitations provision is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. The CCA refused his petition for discretionary review on February 4, 2015, and Petitioner did not file a petition for a writ of certiorari. In interpreting § 2244(d)(1)(A) in light of Supreme Court rules, the Fifth Circuit concluded that a state conviction "becomes final upon direct review, which occurs upon denial of certiorari by the Supreme Court or expiration of the

[1]The Fifth Circuit discussed the approach that should be taken in applying the AEDPA one-year statute of limitations in *Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998) and *Fields v. Johnson*, 159 F.3d 914 (5th Cir. 1998).

period for seeking certiorari." *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999). Under Rule 13.1 of the Supreme Court Rules, Petitioner had ninety days from the refusal of his petition for discretionary review to file a petition for a writ of certiorari. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). The Court notes, however, that Petitioner filed a motion for reconsideration with the CCA concerning the denial of his PDR. Texas law bars a motion for rehearing or reconsideration although Texas inmates frequently file them. The Fifth Circuit held in *Lookingbill* that the amount of time a motion for rehearing/reconsideration was pending should toll the deadline only if the CCA had, in fact, considered the motion. *Lookingbill v. Cockrell*, 293 F.3d 256 (5th Cir. 2002), *cert. denied*, 537 U.S. 1116 (2003). While it is not entirely clear if the CCA considered Petitioner's motion, it makes no difference to the timeliness of the instant petition. The CCA refused Petitioner's petition for discretionary review on February 4, 2015, and it denied Petitioner's motion for rehearing on March 4, 2015. Accordingly, using the later date of March 4, 2015, a writ of certiorari would have been due by June 2, 2015, and the instant petition would have been due no later than June 2, 2016. It was not filed until May 5, 2017 – eleven months and three days beyond the limitations period.

The provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a properly-filed application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation. Petitioner filed an application for a writ of habeas corpus on June 7, 2016, which the CCA denied without written order on May 3, 2017. However, Petitioner filed his state writ five days beyond the AEDPA one-year deadline of June 2, 2016. Thus, the state writ does not serve to toll the statute of limitations, and the petition is time-barred in the absence of any other tolling provisions.

The United States Supreme Court recently confirmed that the AEDPA statute of limitation is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 130 (2010). "A habeas petitioner is entitled to equitable tolling only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 130 S. Ct. at 2562). "Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). In making this determination, it should be noted that the Fifth Circuit has expressly held that proceeding *pro se,* illiteracy, deafness, lack of legal training, and unfamiliarity with the legal process are insufficient reasons to equitably toll the statute of limitations. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir. 2000). The petitioner bears the burden of proving that he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

As a general rule, equitable tolling has historically been limited to situations where the petitioner "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Furthermore, equitable tolling cannot be used to thwart the intent of Congress in enacting the limitations period. *See Davis*, 158 F.3d at 811 (noting that "rare and exceptional circumstances" are required). At the same time, the Court is aware that dismissal of a first federal habeas petition is a "particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas,* 517 U.S. 314, 324 (1996).

Petitioner filed a reply to the Director's response in which he reurges the issues raised in his petition, asserts that his petition is not time-barred, and argues that even if it is time-barred, equitable tolling is warranted. The relevant dates are outlined above, however, showing that the petition is time-barred. In an attempt to bypass the limitations bar, Petitioner claims that "numerous malfeasances" by the State burdened him such that he is entitled to equitable tolling. He fails, however, to state specifically what the State allegedly did that caused him to untimely file his habeas petition. Additionally, the Court notes that, contrary to Petitioner's assertion, Respondent filed applicable state court records. *See* Dkt. #14-1, -2, -3, -4.

The Court also notes that Petitioner asks for an evidentiary hearing. However, evidentiary hearings are not required in federal habeas corpus proceedings. *See* Rule 8, *Rules Governing § 2255 Cases in the United States District Courts*; *see also McCoy v. Lynaugh*, 874 F.2d 954, 966-67 (5th Cir. 1989). Quite the contrary, "to receive a federal evidentiary hearing, a petitioner must allege facts that, if proved, would entitle him to relief." *Wilson v. Butler*, 825 F.2d 879, 880 (5th Cir. 1987), *cert. denied*, 484 U.S. 1079 (1988). *See also Townsend v. Sain*, 372 U.S. 293, 312 (1963). "This requirement avoids wasting federal judicial resources on the trial of frivolous habeas corpus claims." *Wilson*, 825 F.2d at 880. Petitioner fails to show that he is entitled to an evidentiary hearing. *See United States v. Auten*, 632 F.2d 478, 480 (5th Cir. 1980) (noting that mere conclusory allegations are not sufficient to support a request for an evidentiary hearing). In sum, Petitioner untimely filed his petition, and he fails to show extraordinary circumstances that would warrant equitable tolling. Consequently, the petition should be dismissed as time-barred.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. §

2253(c)(1)(B). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed.2d 542 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Petitioner's § 2254 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the court

find that Petitioner is not entitled to a certificate of appealability.

RECOMMENDATION

It is recommended Petitioner's motion for relief under 28 U.S.C. § 2254 be denied and the case dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).

SIGNED this 17th day of September, 2018.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

APPLICANT ROBERT TRACY WARTERFIELD **APPLICATION NO.** WR-82,182-02

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT HEARING.

PC - 5-3-17

JUDGE **DATE**

Appendix D

Filed: 12/9/2016 4:04:28 PM
Lynne Finley
District Clerk
Collin County, Texas
By Christina Joseph Deputy
Envelope ID: 14212006

W416-80757-2011-HC

Ex parte Robert Warterfield	§	In the
	§	
	§	416th District Court
	§	
	§	of Collin County, Texas

Findings of Fact and Recommendation

On this day came to be heard Applicant's Application for Writ of Habeas Corpus and the State's Response. The Court finds that:

Ineffective Assistance of Counsel

1. Counsel William L. Schultz is an officer of the Court, well known to the court, and credible;
2. Counsel Schultz's affidavit is credible;

Monetary Dispute

3. Applicant alleges that trial counsel was ineffective because he was originally retained and then became appointed so that he could earn more money. According to Applicant, this "monetary dispute" caused counsel to act poorly;
4. Counsel was co-counsel under a fee arrangement in two Dallas County cases;

Appendix E

5. As the cases progressed, it was discovered that one of the cases actually took place in Collin County; that case was dismissed and then filed in Collin County;
6. Counsel was then appointed to represent Applicant in Collin County as a courtesy to Applicant and because he knew the case better than any other attorney that might be appointed;
7. Counsel and Applicant discussed the appointment;
8. Because Applicant had recently been convicted in the remaining case in Dallas County and sentenced to life, counsel advised Applicant that he could seek appointment of another attorney in Collin County;
9. Applicant informed counsel that he wished for him to be appointed in the instant cases;
10. There was no monetary dispute;
11. The county paid for all expenses related to these cases;
12. If there was a monetary dispute, it may have been between Applicant and the lead attorney in the Dallas County case;
13. Counsel was appointed in the instant case because he was familiar with the case and Applicant agreed to the apointment;

14. Applicant has not shown by a preponderance of the evidence that counsel was deficient in seeking to be appointed in these cases or due to a monetary dispute;

15. Applicant has not shown by a preponderance of the evidence that the outcome of trial would have been different had counsel not been appointed or if there had been a monetary dispute;

Failure to Prepare Applicant to Testify

16. Applicant contends that his trial counsel was ineffective because he did not adequately prepare him to testify. According to Applicant, because of counsel's inadequate preparation, the State was able to impeach him with a 1994 conviction that had been previously held inadmissible;

17. Counsel explains that he advised Applicant that given the horrific facts of the offense, his testimony would not have any impact on the jury;

18. Because Applicant insisted on testifying, counsel then advised that Applicant should stress his strides in rehabilitation since the offense, emphasize his contrition, and not place blame on others;

19. Because counsel was worried about the State's use of Applicant's prior convictions, including the 1994 conviction, counsel warned Applicant not to let the State catch him in a lie;

20. Counsel was surprised by Applicant's testimony that ultimately opened the door to the State's use of his 1994 conviction;

21. Applicant had always maintained to counsel that due to his drug and alcohol addiction, he had no memory of the events;

22. Applicant testified about an elaborate plot by the police and prosecutors in Dallas transferring DNA from his running shorts to the victim's clothing;

23. Counsel then reminded him that he had previously testified that he could not remember the events; Applicant then responded that he would not do something like that to a child;

24. It was this testimony that opened the door to the State's use of Applicant's 1994 conviction;

25. Counsel warned Applicant that if he was caught in a lie, the State would likely use his 1994 conviction to impeach him;

26. Applicant chose to testify that he would not molest a child;

27. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient;

28. Applicant has not shown by a preponderance of the evidence that the outcome of trial would have been different;

Failure to Challenge Expert Testimony

29. Applicant alleges that trial counsel was ineffective for failing to object to the chain of custody for DNA sample #4, for not arguing that use of the DNA sample violated a plea bargain agreement in a 1994 conviction, and for not challenging the reliability of the DNA test results;

30. Counsel did not challenge the chain of custody for sample #4 because he did not believe it was good strategy to attack evidence that had been sufficiently identified and he was nervous about making identity at issue given the other extraneous offenses that could be used against Applicant;

31. Counsel did not believe that the State's use of sample #4 violated the prior plea agreement;

32. Counsel had his own DNA expert sitting with him at trial, and the expert did not suggest that counsel challenge the statistical data related to the DNA testing;

33. Counsel had a valid legal strategy for not challenging the evidence as Applicant has suggested;

34. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient;

35. Applicant has not shown that either of the objections would have been sustained or that a challenge to the statistical data would have been successful;

36. Applicant has not shown by a preponderance of the evidence that the outcome of the trial would have been different had counsel made these objections;

Failure to Enforce the 1994 Plea Agreement

37. Applicant alleges that counsel was ineffective for not objecting to the State's use of his 1994 conviction against him as a violation of that 1994 plea agreement;

38. Counsel did argue that the State could not use the 1994 conviction at trial;

39. After Applicant's direct testimony, the trial court conducted a hearing to determine the admissibility of the 1994 conviction, and it ruled that Applicant had opened the door to the testimony and rejected counsel's argument that use of the conviction to impeach would violate the 1994 plea agreement;

40. The trial court's ruling was litigated on appeal;

41. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient or that the outcome of trial would have been different had counsel made arguments that he did in fact make;

42. Applicant also alleges that counsel was ineffective for not challenging the State's use of his DNA sample from 1992;

43. Counsel did seek to suppress all physical and biological evidence obtained through various warrants in 1992;

44. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient or that the outcome of trial would have been different had counsel made arguments that he did in fact make;

45. Applicant alleges that counsel was ineffective for not challenging the statute of limitations that applied to this case;

46. Counsel he did not challenge the statute of limitations because he believed that the State was correct that there was no statute of limitations for these offenses;

47. The issue of the correct statute of limitations was addressed for the first time on appeal, and the court of appeals held that notwithstanding

language in the plea agreement there was no statute of limitations for these offenses;

48. Applicant has not shown by a preponderance of the evidence that counsel was deficient for not challenging the statute of limitations in this case and that the challenge would have been successful;

Failure to Object to Jury Charge

49. Applicant alleges that counsel was ineffective for failing to object to the jury charge and request that the charge include language regarding illegally obtained evidence;

50. Applicant does not specify what arguments or testimony made Article 38.23 of the Texas Code of Criminal Procedure applicable to this case;

51. Applicant has failed to meet his burden of proof by a preponderance of the evidence that counsel was deficient for not requesting this instruction or that the outcome of trial would have been different had counsel requested the instruction;

Failure to Object to Cumulation Order

52. Applicant alleges that counsel was ineffective for not objecting to the trial court's cumulation order. According to Applicant, counsel should have objected because it was not proven, because the oral

pronouncement was vague and improper, and because the order was invalid;

53. Counsel does not believe that these are viable arguments to make against the cumulation order and thus would not have made these challenges to the order;

54. Applicant offers no factual or legal support for the objections that he claims counsel should have made;

55. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was ineffective for failing to object or that the outcome of trial would have been different had counsel objected to the cumulation order;

Cumulative Error

56. Applicant alleges that the cumulative effect of errors prejudiced him;

57. Applicant has neither shown by a preponderance of the evidence that counsel was deficient or that the outcome of trial would have been different had counsel acted differently;

58. There is no cumulative effect of errors in these cases;

Jury Charge

59. Applicant alleges that the jury charge should have included an article 38.23 instruction and the correct statute of limitations;

60. Article 38.23 is a purely statutory requirement;

61. Texas courts have confined the scope of post-conviction writs of habeas corpus to jurisdictional or fundamental defects and constitutional claims. Violations of statutes, rules, and other non-constitutional doctrines are not recognized;

62. Because 38.23 is a statutory requirement, this issue is not cognizable on writ of habeas corpus;

63. Applicant has not cited any case law or authority requiring the statute of limitations to be placed in the jury charge;

64. The court of appeals has already established that, contrary to Applicant's assertions, there is no statute of limitations for these offense;

65. It would have been error to put the statute of limitations that Applicant proposes in the jury charge;

Trial Court Errors

66. Applicant alleges various errors by the trial court;

Knowledge of Monetary Dispute

67. Applicant alleges that the trial court violated his right to a conflict-free attorney because he knew of the monetary dispute with his trial counsel;

68. The habeas applicant bears the burden to allege and prove by a preponderance of the evidence facts that, if true, entitle him to relief;

69. There was no monetary dispute between Applicant and counsel;

70. Applicant has not proven facts of the dispute by a preponderance of the evidence;

Allowed Plea Agreement to Be Violated

71. Applicant alleges that the trial court erred in allowing the State to use his 1994 plea to impeach him and not applying the statute of limitations from 1994 to these cases in violation of his 1994 plea agreement;

72. Applicant raised these issues on direct appeal and the court of appeals rejected the arguments;

73. Claims that are raised and addressed on direct appeal cannot be re-litigated in habeas corpus;

Expert Testimony

74. Applicant alleges that the trial court erred in admitting the State's evidence on DNA;

75. The admission of evidence is governed by the Texas Rules of Evidence;

76. Habeas corpus is available only for jurisdictional defects and violations of constitutional or fundamental rights; a claim alleging the violation of a rule of evidence is not cognizable on habeas corpus;

Favoritism

77. Applicant alleges that the trial court erred in appointing trial counsel because he knew that counsel had already been paid and was somehow showing favoritism;

78. Counsel and Applicant discussed the appointment;

79. Because Applicant had recently been convicted in the remaining case in Dallas County and sentenced to life, counsel advised Applicant that he could seek appointment of another attorney in Collin County;

80. Applicant informed counsel that he wished for him to be appointed in the instant cases;

81. Because Applicant agreed to counsel's appointment, he has not alleged facts that if true entitle him to relief;

Predetermined Cumulation

82. Applicant alleges that the trial court had "predetermined cumulation";

83. Applicant offers no evidence in support of this allegation;

84. Applicant has not proven facts by a preponderance of the evidence that entitle him to relief;

Prosecutorial Misconduct

85. Applicant alleges that the prosecutors engaged in misconduct;

Use of Perjured Testimony

86. Applicant alleges that the State's DNA and forensic experts committed perjury by overstating the statistical data to the jury;

87. Applicant has not provided any evidence that the testimony regarding the statistical data in this case was incorrect;

88. Applicant has not alleged facts that, if true, entitle him to relief;

89. Due to issues that have arisen regarding DNA mixture calculations the State has requested that the test results in these cases be recalculated;

90. The original calculations indicated that Applicant could not be excluded as a contributor of the male profile and that the probability of electing a random, unrelated person with the same DNA profile is 1 in 33.0 quadrillion;

91. The new calculations state, however, that based on the analysis of the sample it is at least 794 million times more likely if the victim and Applicant were the source of the DNA than if an unknown individual and the victim were the source of the DNA sample;

92. Although the statistical data is different, this does not mean that the experts gave perjured testimony;

93. Nor does it establish by a preponderance of the evidence that Applicant was prejudiced by the testimony;

94. The DNA test results still show a very high likelihood that Applicant is the source of the DNA in these cases;

95. Applicant has not met his burden of proof by a preponderance of the evidence that he suffered a constitutional violation and that he was prejudiced by the violation;

Violation of 1994 Plea Agreement

96. Applicant alleges that the State violated the 1994 plea agreement by impeaching him with the conviction, using it to initiate the prosecution, using an improper statute of limitations, and "making performances with bad faith and unfair dealing";

97. The writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal;

98. Applicant did not complain at trial that the State used the prior conviction to initiate the prosecution and to "make performances with bad faith and unfair dealing";

99. Applicant cannot raise these allegations in writ of habeas corpus;

100. Applicant raised the issues of the State's use of the prior conviction for impeachment and the applicable statute of limitations on direct appeal, and the court of appeals rejected these claims;

101. Claims that are raised and addressed on direct appeal cannot be re-litigated in habeas corpus

Incorrect Jurisdiction

102. Applicant also alleges that the State knew that Collin County was the correct jurisdiction, and thus the City of Dallas, who according to Applicant, destroyed evidence, should not have been involved in this case;

103. Applicant's allegations are wholly without merit. It is clear that the offense took place in the portion of the City of Dallas that is located in Collin County;

104. Applicant has failed to prove facts by a preponderance of the evidence;

Ineffective Assistance of Appellate Counsel

105. Counsel Derk Wadas is an officer of the Court, well known to the court, and credible;

106. Counsel Wadas's affidavit is credible;

107. The counts in this case were not cumulated with each other;

108. Instead, the judgment reflects that the sentences for Applicant's convictions in this cause are to run concurrently;

109. The court did, however, order that these sentences run consecutively to a previous Dallas County conviction, which was in his discretion;

110. Counsel believed this to be lawful, and thus did not challenge the cumulation order on direct appeal;

111. Although there was a discussion at trial as to whether the prior conviction could be used by the State, there was never a disagreement as to whether Applicant was the person who was convicted in Dallas County;

112. Counsel believed the cumulation order to be lawful;

113. Counsel had a valid legal strategy for not challenging the cumulation order on direct appeal;

114. Applicant has not met his burden of proof by a preponderance of the evidence that counsel was deficient; and

115. Applicant has not shown by a preponderance of the evidence that the outcome of the appeal would have been different had counsel raised the issue.

Accordingly, this Court **recommends that the** Application be **DENIED**. All motions and requests filed by Applicant in support of his Application are **DENIED.**

IT IS ORDERED that the Clerk of this Court shall send copies of the Order to: (1) Applicant, Robert Warterfield, TDCJ # 01829999, Clements Unit, 9601 Spur 591, Amarillo, TX 79107-9606, (2) the Appellate Division of the Collin County Criminal District Attorney's Office, and (3) the Court of Criminal Appeals.

SIGNED this 27th day of December, 2016.

JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS,

SHERMAN DIVISION

ROBERT TRACY WARTERFIELD, §
Petitioner §
§
§
v. § Civil Action No. 4:17-cv-330
§
§
§
LORIE DAVIS, DIRECTOR, TDCJ-CID, §
Respondent §

OBJECTIONS TO REPORT AND RECOMMENDATION OF

UNITED STATES MAGISTRATE JUDGE (DKT. #34)

Comes now Robert Tracy Warterfield, Petitioner pro se, to lodge his timely Objections to "Report and Recommendation of United States Magistrate Judge" (Dkt. #34) issued by the Honorable United States Magistrate Judge Christine A. Nowak on the 17th day of September, 2018 pursuant to Habeas Rule 11(a), Fed.R.App.P., Rule 22, Fifth Circuit Rule 22, 28 U.S.C.§2253, and the directive contained in Document #34. The due date for these objections is fourteen days after service, which occurred on the 26th day of September, 2018. Thus, October 10, 2018 is the due date. Being that these Objections were dropped in the inmate mailbox and thus filed on October 8, 2018, they are timely filed.

A seperate Request for Certificate of Appealability is being filed simultaneously with these Objections.

Appendix F

OBJECTIONS

Error of Law, #1:

Magistrate Judge Nowak has misapplied AEDPA and Supreme Court precedent. Specifically, "the date a judgement becomes final by the conclusion of direct review or the expiration of the time for seeking such review" (28 U.S.C.§2244(d)(1)(A)), and "By 'final' we mean a case in which a judgement of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied." (Cites omitted and emphasis added) Griffith v. Kentucky, 479 U.S. 314, 321 n.6, 107 S.Ct. 708, 712 n.6, 93 L.Ed.2d 649 (1987). The critical determination correctly identified but incorrectly resolved by Judge Nowak, is "when did the conviction become 'final' and thus triggered the §2244 one-year limitations?" "Because it triggers the limitations period, the date a judgement becomes final is often critical in assessing the timeliness of a federal petition." Mark v. Thaler, 646 F.3d 191, 193 (5th Cir. 2011). "A state conviction becomes final, triggering the limitations period for filing a federal habeas petition, when there is no further availability of direct appeal to the state courts." Id. (Emphasis added). Indeed, under Supreme Court Rules, Rule 13.1, there is a 90-day period after refusal of a petition for discretionary review. However, this is qualified by Supreme Court Rule 13.3 which states that the 90-day period "runs from the date of denial of rehearing..."

Judge Nowak states:

~~The Court notes...~~

> "The Court notes, however, that Petitioner filed a motion for reconsideration [sic] with the CCA concerning the denial of his PDR. Texas law bars a motion for rehearing or reconsideration although Texas inmates frequently file them. The Fifth Circuit held in Lookingbill that the amount of time a motion for rehearing/reconsideration was pending should toll the deadline only if the CCA had, in fact, considered the motion. [cite omitted] While it is not entirely clear if the CCA considered Petitioner's motion, it makes no difference to the timeliness of the instant petition."

Dkt. #34, p.3; PageID#: 522.

On the contrary, it makes a huge difference. First of all, the Magistrate states, erroneously as as Petitioner's impoverished pro se knowledge extends, that Texas law bars a rehearing on PDR, but she does not cite any such law (only Lookingbill). Whats more, the Respondent through her Designee admits that the 90 day period for certiorari commences "ninety days after the CCA denied Warterfield's motion for rehearing of his PDR. Sup.Ct.R. 13.1" Dkt. #12-1, p.9; PageID#: 149. It is assumed that Respondent meant Rule 13.3 and not 13.1. So, under AEDPA (§2244(d)(1)(A)), Supreme Court precedent (Griffth, supra), Supreme Court Rules (Rule 13.3), and by Texas' own admission, clearly the time that a properly filed motion for rehearing of PDR is pending delays the triggering of the one-year limitation. Additionally, in arguendo the Magistrate is correct about Texas law, the motion for rehearing in this case was, by all indications, actually considered by the CCA. Their response was "denied' rather than "dismissed," a nuance of words the implications of which the CCA is well aware of. Consequently, Texas and

Petitioner are in agreement that the time during which the motion for rehearing was filed and pending is to be included in the calculation of timeliness; an agreement also in harmony with federal laws and rules.

At this point, March 4, 2015, the day the motion for rehearing of PDR was denied, is where the Magistrate's and Texas' calculation diverges from Petitioner's calculation. On the one hand and supported by Supreme Court Rule 13.3, Texas and the Magistrate asserts that the 90-day period for certiorari starts then and ends on June 2, 2015, thereafter triggering the one-year AEDPA limitations. Page ID#: 149. On the other hand and supported by §2244(d)(1)(A), Griffith, supra, Texas Rules of Evidence, Rules 2, 18, and 79, and Supreme Court Rule 13.5 which qualifies 13.3, Petitioner calculated that the availability of direct review was NOT exhausted on March 4, 2015, but instead the availability of direct review terminated unconditionally on March 15, 2015. Thereafter, the 90-day period for certiorari ran ending on June 12, 2015. On June 12, 2015 is when the conviction became "final" pursuant to AEDPA and Supreme Court precedent and triggered the running of AEDPA's one year limitations. The conviction was NOT "final" on June 2, 2015 pursuant to §2244 (d)(1)(A) and Griffith's definition of "final." If the March 4, 2015 denial of rehearing was a be-all, end-all unconditional termination point where nothing more could be done, then the State is correct; or more importantly, the Magistrate. If instead the March 15, 2015 date by operation of Tex.R.App.P., Rule 18(a)(2) marked the unconditional termination point, then Petitioner is correct and his §2254 petition is timely.

Specifically, under Texas Rules of Appellate Procedure, Rule 18, the issuance of the mandate is purposely withheld for ten days leaving OPEN the proceedings and providing the availability for seeking further direct review of the conviction. Critically, it is not the issuance of the mandate on March 16, 2015 that is claimed as the unconditional termination point. It is the ten period from March 5, 2015 to March 15, 2015 that is the crux of Petitioner's timeliness claim pursuant to Rule 18(a)(2). During those ten days, there most definitely remained the availability of further direct review of the conviction. For example, a motion pursuant to Tex.R. App.P., Rule 2 to suspend Rule 79.5 and the second motion for rehearing of the PDR. Whatever the method of direct review by either party or the CCA, the proceeding had not reached the point of unconditional termination until March 15, 2015. Ninety days thereafter ended on June 12, 2015, triggering the AEDPA one-year limitations period. Thus, on June 12, 2016 the one year was set to expire. Before this deadline on June 7, 2016, Petitioner's state 11.07 was filed, and tolled "The Clock" under 28 U.S.C. §2244(d)(2) with only five days left. Thereafter, on Wednesday, May 3, 2017 the CCA denied the 11.07. The present petition under §2254 was filed on Friday, May 5, 2017. Based on the foregoing calculation, Petitioner solemnly believes and so declared that it was in fact a timely filed petition. Consequently, only one additional day of "The Clock" was used, resulting in four days left until expiration and a timely filed petition. A merits determination is warranted and the Magistrate's conclusion and calculation to the contrary is erroneous and a

misapplication of 28 U.S.C. §2244(d)(1)(A) and Griffith's, supra definition of "final."

Indeed, Supreme Court Rule 13.3 identifies the date that the motion for rehearing was denied as the point that the 90-day period for certiorari begins. However, this creates a conflict with 28 U.S.C. §2244(d)(1)(A) and Griffith's, supra definition of "final." The hierarchy of laws dictates what should govern this situation; to wit, AEDPA and Court precedent. Additionally, Sup.Ct.R. 13.3 is itself qualified by Rule 13.5. Indeed, extensions to file a writ of certiorari are granted. See Ayestas v. Davis, 584 U.S. _____ (2018), Application (16A130) granted by Hon. Justice Clarance Thomas twice extending the filing deadline from September 8, 2016 to October 24, 2016 and again from October 24, 2016 to November 7, 2016. Thus, Rules 13.1 and .3 is modified by Rule 13.5.

In sum, Petitioner respectfully objects to Honorable Magistrate Judge Nowak's timeliness calculation and her application of Federal and Texas laws and rules, and reasserts that, with the foregoing duly considered, the present petition was in fact timely filed with four days remaining on the AEDPA limitations period. A merits determination of the petition (Dkt. #1) is warranted.

Error of Law, #2:

An additional error of law made by Magistrate Nowak in her Report and Recommendation, Dkt. #34, is the application of the AEDPA time bar under any circumstances to this case. This entire prosecution

is void ab initio and without subject matter jurisdiction. There exists no conviction, direct appeal, PDR and et cetera up to and including no time bar.

Texas is estopped by contract under the UNIMPAIRED April 18, 1994 plea agreement in F93-43772-RV from prosecuting this case after December 10, 1999, and did not have standing thereafter to seek and obtain an indictment. Despite solemnly pledging their faith and inducing Warterfield to plead guilty under the laws then in existence in 1994, Texas thereafter impaired the obligations of that contract through its legislative acts that amended Texas Code of Criminal Procedure, §12.01 in 1997, 2001, and 2007. Through this legislation that unconstitutionally impairs the obligations of contract (See Article One, Section ten, clause one, Constitution of the United States), a ten year statute of limitations for this case (#867045-X) set to expire on December 10, 1999 at the time of contract - in effect amnesty perfected on conditions precedent - has been revoked, recalled, reneged; impaired. Said Acts of Texas are repugnant to the Contracts Clause of the U.S. Constitution. Under U.S. Trust of New York v. New Jersey, 431 U.S. 1 (1977), these violations of the Contracts Clause are neither reasonable or necessary. If the impairments were necessary, then prosecution of 867045-X could not have occurred without the impairment. However, this prosecution could have occurred during the contractually established limitations period, but did not. It is in fact only because of Texas' lack of diligence in pursuing their rights and duties that impairments even approaches necessary. Perhaps the two plus decades of intentional venue obstruction by Dallas authorities that delayed

prosecution for 21 years made the impairments "necessary" from their viewpoint. No impairment or justification thereto, amnesty perfected under laws at formation of contract, no jurisdiction, and no time bar to apply.

Consequently, Magistrate Judge Nowak erred in the legal determination that Texas could impair the obligations of contract as described and thereafter assert the time bar and erred further by sustaining the invocation in her Report and Recommendation (Dkt. #34). Petitioner respectfully objects to these misapplications of law which have precluded a merits determination of his petition. The Contracts Clause is a fundamental, systemic, and absolute right that has to be implemented and is NEVER barred by deadlines or other procedures. No trial court jurisdiction, no time bar. See PageID#: 358-359.

Errors of Equitable Tolling:

In alternate to the foregoing and arguendo a time bar is applicable, Petitioner's requested equitable tolling was variously incorrectly and insufficiently addressed by Magistrate Nowak. There are three independent or conjunctive aspects that are included in the request for equitable tolling. Specifically:

1) Notice of CCA's denial of rehearing of PDR.
2) Texas' wording of Texas Rules of Appellate Procedure induced the missing of a deadline. And,
3) Seven seperate instances of Texas' malfeasances, either individually or in some combination, constitutes

extraordinary circumstances inhibiting timely filing.

Notice:

The date that Petitioner received Notice of the March 4, 2015 denial was not addressed by Magistrate Judge Nowak in her denial of the requested equitable tolling. Petitioner had sought the actual date of service of CCA's "white card" from Clements Unit Mailroom, but was told that after 30 days such a search of the logbooks would not be performed for an inmate. Thus, Petitioner requested that the Court obtain the information regarding actual date of notice. (See PageID#: 357 at "B" and 366, last ¶). Based on Petitioner's best information, the decision was issued on March 4, 2015, the white card postmarked in Austin on Friday, March 6, 2015, and thereafter delivered. Based on Petitioner's previous experience, the earliest he could have received it was March 10, 2015 and quite possibly many days later than that. What is being asked is that the time between CCA's issuance of its denial of motion for rehearing of PDR and that date of actual receipt be equitably tolled and included in the timeliness calculation. Magistrate Judge Nowak did not seek the date of notice or address this claim in her Report and Recommendation (Dkt. #34) before recommending that equitable tolling be denied.

Induced by Tex.R.App.P. to miss deadline:

In Petitioner's preceeding "Error of Law, #1" section, it was

detailed how he honestly believed in and based his calculation of the limitations period on the availability of further direct review under the guidelines in AEDPA (§2244(d)(1)(A)) and Supreme Court's definition of "final" (Griffith, supra). Petitioner's time of filing his state and federal writs, surrounding actions, and solemn asservations all support that he was induced by Texas' wording in Texas Rules of Appellate Procedure to file his writs when he did. He has no control over the wording of Tex.R.App.P., and his being induced to miss a filing deadline under the direction of those words should be considered extraordinary circumstances in light of his reasonable diligence so as to warrant equitable tolling. Basically, if his understanding is in any way plausible, even though wrong, equitable tolling should be granted. Magistrate Judge Nowak did not address this claim before she denied Petitioner's request for equitable tolling. It is respectfully reasserted.

State's Malfeasances:

The State's malfeasances throughout this prosecution, either singularly or in conjunction, are truly extraordinary circumstances. To say they are not extraordinary is to say they are commonplace, or to say they did not occur at all is counterfactual. The Magistrate erroneously dismissed the allegations of malfeasance through her determination that they were conclusory allegations. In rebuttal to this, The Seven Malfeasances are detailed to the best of Petitioner's knowledge and available facts in his Writ and Memo

(Dkt. #s 1 and 10) and in his request for equitable tolling. For example, see PageID#: 359-365. Contained therein are numerous references to the state record. Petitioner is then placed by the Court into a classic Catch-22; to wit, the allegations are conclusory without the record, and the record will not be ordered to be produced because the allegations are conclusory. Forseeing the conundrum, Petitioner attempted to lodge the records himself. They were rejected. See PageID#: 411-414 for an index. Petitioner's Mother had to drive several hours ~~to drive several houre~~ to retreive these records. The State's lodgement, Dkt. #14, addresses only the Stone v. Powell Bar and timeliness; it does not comply with Habeas Rules, Rule 5. Simply, the malfeasances are partially supported by the current record and supported further by the record not yet filed. Indeed, additional factfinding beyond the state record would be beneficial, and ceratinly more information is warranted, but the courts, both State and Federal, have not provided any assistance in the obtaining of additional facts. No supoenas issued, interrogatories allowed, evidentiary hearing ordered, and et cetera. Simply, Petitioner's narrative of the facts has been discounted and undermined. Nonetheless, and respectfully asserted, the allegations are not conclusory, and in fact are quite compelling. Did Dallas officals intentionally obstruct venue for 20 plus years? (Map and Schiller's testimony) Did Ramirez fabricate probable cause and lie about it on the stand with aid and support of a cabal of prosecutors? (Phone log v. perjurous testimony) Did Schultz frauduantly enlarge his pay with the active abetting of the trial judge, Chris Oldner? (Paid in full by family and as court appointed...why?) Did the State

breach the 1994 plea agreement many different times and in many different ways during the prosecution of #867045-X? (passim) Yes, yes, yes, yes, yes, yes, and yes! And yet the State is allowed by the Court to invoke equitable doctrines to oppose equitable tolling and a determination of their malfeasances that if sustained warrants a GRANT to Petitioner of equitable tolling. Yes, a lot of these malfeasances are included as claims in the writ. However, the claims for equitable tolling and claims for habeas relief in this case are as inseperable as the swirls in a marble cake. Just because they are inextricably linked does not preclude their consideration as justification for equitable tolling and then again in a merits determination of the writ. As author of both state and federal writs, I solemnly declare under penalty of perjury that it took additional weeks and weeks or reading, studying, researching, formulating, and writing in order to present this myriad of malfeasances. It is respectfully requested that such additional time be considered as extraordinary circumstances that inhibited the timely filing of the current petition, and that sufficient equitable tolling be granted in order to afford a merits determination of the petition. Also, the State should be precluded from opposing equitable tolling due to the malfeasances themselves. It is also asked that the State be ordered to file a complete record as requested in Document #21 and that an evidentiary hearing held. There are some pointed questions that need to be asked. The State court's factual determiantions are unreasonable, being truly just the rubber-stamped narrative authored by Amy Sue Melo Murphy intended

to further the self-interests of the State and her agents. See Exhibit A, attached hereto. What is demonstarted by the four pages of Exhibit A, is that Mrs. Murphy authored all four. The habeas court did nothing more than rubber-stamp them; literally. It was a complete abdication of judicial duties to Petitioner's opponent, the State. Whats more, the determinations in the ODI and Findings of Fact and Recommendation are preformed without any true consideration of the documents they purport to consider; they were authored and filed simultaneously by Mrs. Murphy as indicated by the circled file stamps. Worthy of deference? A hearing was requested in the state court, but Mrs. Murphy conluded that it too would be denied. Even if the documents were in fact adopted by the habeas court, the spectacle that a due consideration of the merits was not afforded is too real under these and the other sordid acts at the state level. All I ask now, is that the Federal Courts review these claims, first as grounds for equitable tolling, and then in a merits review of the petition, and using whatever means available to help bring these facts to light.

Summation of Equitable Tolling Objections:

Magistrate Judge Nowak has improperly and insufficiently addressed Petitioner's request for equitable tolling. She did not even address the request for the time period that notice was pending of the CCA's denial on March 4. 2015. She did not address that due to the wording of Tex,R.App.P. by Texas, Petitioner was able to reasonably conclude that his direct appeal was not finalized until

March 15, 2015 when any and all possible direct review terminated unconditionally, thereby inducing him, in arguendo, to miss a filing deadline. She then summarily dismissed The Seven Malfeasances as conclusory based on an insufficient record that can only be obtained with a sufficient record. However, it is maintained that even on the record so far adduced by Petitioner, these claims of malfeasances are far from conclusory and at times compelling. Finally, the diligence of Petitioner in the relevant time period is not addressed. Therefore, based on the foregoing, Petitioner respectfully objects to Magistrate Judge Nowak's Report and Recommendation, Dkt. #34, recommending that equitable tolling should be denied. It is requested that the days between June 2 and June 7, 2016, and May 4, 2017 - a total of six days, be considered in the timeliness calculation and a merits determination of the petition made.

CONCLUSION

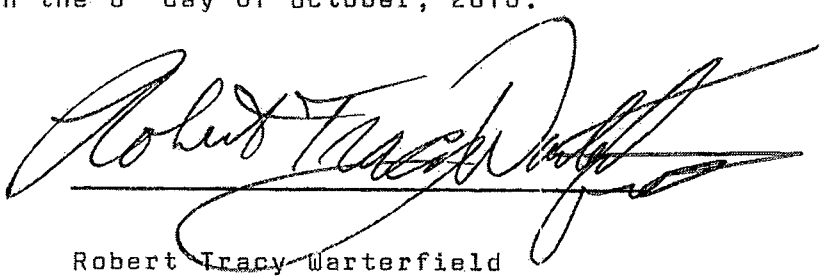
In summation, the Honorable Magistrate Judge Christine A. Nowak made two erroneous legal conclusions that, independent of each other, precluded a merits determination of the petition (Dkt. #1). She misapplied §2244(d0(1)(A) and Griffth, supra in a way that caused a miscalculation of the statute of limitations for filing the instant petition. Additionally, she misapplied art. I., §10, cl.1, The Contracts Clause, and U.S. Trust of New York, supra by determining that Texas is allowed to invoke a time bar defense in a case that is void ab initio. Under the unimpaired 1994 plea agreement contract, conditions precedent were satisfied and amnesty

perfected in 1999. No trial court thereafter could acquire jurisdiction for #867045-X but for the impairing legislation. Without trial court jurisdiction, all is void ab initio and no time bar exists by rights to even be invoked or sustained.

As for equitable tolling, it was improperly and insufficiently reviewed on a deficient record. Thus, the recommendation to deny equitable tolling is per se unreasonable.

Petitioner respectfully asks that the Honorable Amos L. Mazzant, III., United States District Court Judge, upon review of these Objections Order the State to lodge a complete record from indictment under F10-61715-Y (Dallas County) through denial of WR-82,182-02. Furthermore, without AEDPA deference, an evidentiary hearing ordered to assess and adduce facts that relate, inter alia, to Petitioner's request for equitable tolling. Thank you sir for your consideration of my ever respectful requests.

Respectfully submitted on the 8th day of October, 2018.



Robert Tracy Warterfield
Petitioner, Pro Se
Wm. P. Clements, Jr. Unit
TDCJ #1829999
9601 Spur 591
Amarillo, Texas 79107-9606

VERIFICATION

My name is Robert Tracy Warterfield, my date of birth is October 4, 1968, and my inmate identification number is 1829999. I have personal knowledge of the foregoing facts. I am presently incarcerated at the Clements Unit, TDCJ in Amarillo, Potter County Texas. I solemnly declare under penalty of perjury that the assertions made by me in the foregoing Objections are true and correct.

EXECUTED on the 8th day of October, 2018.

Robert Tracy Warterfield

CERTIFICATEOF SERVICE

I, Robert Warterfield, do hereby certify that a true and correct copy of the foregoing Objections was mailed to Respondent, first class postage affixed on October 8, 2018.

Robert Tracy Warterfield

Ex. A, P. 1 of 4

W416-80757-2011-HC

Ex parte Robert Warterfield	§	In the
	§	
	§	416th District Court
	§	
	§	of Collin County, Texas

State's Request for Order Designating Issues

The State of Texas files this Request for Order Designating Issues.

1.

Robert Warterfield (Applicant) was convicted of two counts of aggravated sexual assault of a child and two counts of indecency with a child. The jury set punishment at life confinement in the aggravated sexual assault cases and twenty years' confinement in the indecency cases. The jury also assessed a $10,000 fine in each case.

2.

Applicant appealed his conviction. On August 27, 2014, the Dallas Court of Appeals affirmed the conviction. *Warterfield v. State*, No. 05-13-00017-CR, 2014 WL 4217837 (Tex. App.—Dallas Aug. 27, 2014, no pet.) (not designated for publication).

3.

On June 14, 2016, the Clerk served the State with the instant writ application.

Ex. 1, p. 2 of 4

W416-80757-2011-HC

Ex parte Robert Warterfield	§	In the
	§	
	§	416th District Court
	§	
	§	of Collin County, Texas

Order Designating Issues

The Court, having reviewed the Application and the State's Request for an Order Designating Issues, decides that there are controverted, previously unresolved facts material to the legality of Applicant's confinement that require resolution. Accordingly, the Court designates the following issues to be resolved:

1. Ground 1: Whether trial counsel was ineffective and
2. Ground 5: Whether appellate counsel was ineffective.

These issues shall be resolved by affidavit. Applicant is NOT to be returned to Collin County at this time.

Applicant's trial counsel, **William Schultz** shall file an affidavit responding to the above-designated issue. The original affidavit shall be filed with the Clerk of this Court no later than ~~**August 26, 2016**~~ October 29, 2016. In the affidavit, counsel shall address the following:

Ex. A, p. 3 of 4

W416-80757-2011-HC

Ex parte Robert Warterfield	§	In the
	§	
	§	416th District Court
	§	
	§	of Collin County, Texas

Response to Article 11.07 Application for Writ of Habeas Corpus

The State of Texas files this Response to Application for Writ of Habeas Corpus:

1.

Robert Warterfield (Applicant) was convicted of two counts of aggravated sexual assault of a child and two counts of indecency with a child. The jury set punishment at life confinement in the aggravated sexual assault cases and twenty years' confinement in the indecency cases. The jury also assessed a $10,000 fine in each case.

2.

Applicant appealed his convictions. On August 27, 2014, the Dallas Court of Appeals affirmed the convictions. *Warterfield v. State*, No. 05-13-00017-CR, 2014 WL 4217837 (Tex. App.—Dallas Aug. 27, 2014, no pet.) (not designated for publication).

Ex. A, P. 4 of 4

W416-80757-2011-HC

Ex parte Robert Warterfield	§	In the
	§	
	§	416th District Court
	§	
	§	of Collin County, Texas

Findings of Fact and Recommendation

On this day came to be heard Applicant's Application for Writ of Habeas Corpus and the State's Response. The Court finds that:

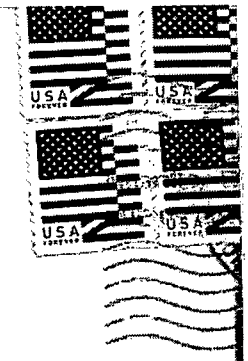
Ineffective Assistance of Counsel

1. Counsel William L. Schultz is an officer of the Court, well known to the court, and credible;
2. Counsel Schultz's affidavit is credible;

Monetary Dispute

3. Applicant alleges that trial counsel was ineffective because he was originally retained and then became appointed so that he could earn more money. According to Applicant, this "monetary dispute" caused counsel to act poorly;
4. Counsel was co-counsel under a fee arrangement in two Dallas County cases;

Robert Wartes #1628999
Clements Unit
9601 Spur 591
Amarillo, Texas 79107-9606



Legal Mail

United States District Court
Eastern District of Texas
101 E. Pecan St., Suite 112
Sherman, Texas 75090

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

ROBERT TRACY WARTERFIELD, Petitioner	§	
V.	§	Civil Action No. 4:17-cv-00330-ALM-CAN
LORIE DAVIS, DIRECTOR, TDCJ-CID, Respondent	§	

PETITIONER'S MOTION TO ALTER OR AMEND JUDGEMENT

COMES NOW, Robert Tracy Warterfield, Petitioner pro se, and pursuant to 59(e) of the Federal Rules of Civil Procedure, files this his "Petitioner's Motion to Alter or Amend Judgement," and in connection would show the Court as follows:

GROUNDS FOR RELIEF AND ARGUMENT

1) The Court issued its Final Judgement before the ruling of an interlocutory appeal pending before the Fifth Circuit was resolved.

Currently before the United States Court of Appeals for the Fifth Circuit is the pending interlocutory appeal in Cause No. 18-40936. The results of that appeal has direct bearing on this Court's hearing of Petitioner's §2254 petition, and the Final Judgement (Dkt. #46) made prior to resolution of the interlocutory

Appendix G

appeal is premature. Such a premature judgement denies Petitioner his rights to procedural due process of law as guaranteed by the Fifth Amendment and his right to petition for the redress of grievances as guaranteed by the First Amendment.

It is asked that the above cause be re-opened and the judgement vacated, and held open until the Court has the benefit of considering the results of Petitioner's interlocutory appeal when making its final judgement. This motion does not seek any relief pursuant to Rule 60 of Federal Rules of Civil Procedure.

2) The Court has made a manifest error of law in determining that the §2254 petition is time-barred.

In Santobello v. New York, 404 U.S. 257 (1971) the Supreme Court of the United States succinctly ruled:

> "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be filfilled." Id. 404 U.S. at 262.

In Ricketts v. Adamson, 483 U.S. 1 (1987) the Supreme Court of the United States held:

> "[T]he construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law[.]" Id. 483 U.S. at 6 n.3.

Pursuant to Texas law, "law existing at time contract is made becomes part of contract and governs transaction." Wessely Energy Corp. v. Jennings, 736 S.W.2d 624 (1987). Not only are statutory laws in existence at formation of the plea agreement on April 18, 1994 expressly written into the contract as fixed obligations that

must be performed under Santobello, but so too is the State Constitution likewise treated.

> "To this we may add, that since the Constitution is also a law - the supreme law - Sec. 16. Art. 1, prohibiting enactment of laws impairing the obligations of contracts also becomes part of each contract, protecting it to the extent of the meaning of that clause from impairment even by constitutional amendment." Langever v. Miller, 124 Tex. 80, 83, 76 S.W.2d 1025 (1934).

The meaning of the Texas Constitution's Contracts Clause (Art. 1, §16) was decided in the case preceding Langever. In Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007 (Tex 1934), the Court's holding maintains that the State Contracts Clause, an obligation of the plea agreement, is absolute due to Art. 1, §29 making it inviolable where applicable. Unlike the Federal Contracts Clause, also an obligation of contract protected by Santobello, the Texas clause is without exception (i.e., "police power"). Id. 124 Tex at 54.

Consequently, under the interpretation of the 1994 plea agreement required by Ricketts, only the laws in existence at formation can be used to interpret and enforce said agreement. The laws in existence at formation are fixed obligations of contract whose performance is unequivocally guaranteed by Santobello. The laws in existence at formation are integral components of the contract's consideration and part of the quid pro quo. Performance thereto is a must per Santobello.

Therefore, on or about December 9, 1999, Petitioner Warterfield acquired a vested contractual right to amnesty, to be free from prosecution in case #867045-X. See Acts 1987, 70th Leg., Ch. 716, §1 eff. Sept. 1, 1987. Any indictment returned thereafter does not vest

the trial court with either personal or subject matter jurisdiction, and the purported prosecution is void ab intitio. Even under the Federal Contracts Clause is amnesty a vested right. However, the Magistrate Judge's R&R does not address this, and the Court adopted the omission. The alleged prosecution being void ab intio, no time bar pursuant to 28 U.S.C. 2244(d)(1)(A) is apposite to this case, and the Court's ruling that the §2254 petition is time-barred is manifest error of law.

3) Alternately, if it is determined §2244(d)(1)(A) does apply, the Court's calculation erroneously excludes ten days that would otherwise make the §2254 petition timely.

There is nothing Petitioner says to this, other than it is also a manifest error of law to exclude the ten days from March 5, 2015 to March 15, 2015. The proceedings were kept open during this time, and it did not become the ministerial duty of the clerk to issue the mandate until March 16, 2015. It is hoped that the Court will reconsider its calculation, to have a change of heart, and rule that the §2254 petition was timely filed.

4) The Court's assessment of Petitioner's equitable tolling request is infirmed by manifest errors of fact.

The Court has consistently refused to order Respondent to make a complete lodgement of the State records in this case. Petitioner's

attempt to adduce a more complete record was rejected. The Magistrate Judge ruled that the Seven Malfeasances ~~of~~ by the State, critical to consideration of the equitable tolling request, were conclusory and bald assertions. Even with the record adduced, that characterization is patently wrong. The malfeasances are abhorrent whatever the means served thereby. Petitioner asks that the Court scrutinize those allegations with a complete record, and then reassess the factual allegations supporting equitable tolling. For example, the record does not have 4RR;44. Detective Schiller states basically that on December 9, 1989 that he was aware that the crime scene was in Collin County. Why did it take until early 2011 to notify the authorities in Collin County? However, there is still documentation in the record adduced in this Court that shows that the 21 years of venue obstruction is not a conclusory or bald assertion. See map. There are 6 more malfeasances to go, and they too are NOT bald assertions. To reject the record or to not order that it be filed based on the pleadings and to thereafter make factual determinations is manifest error of fact.

STANDARD

"A Rule 59(e) motion must clearly establish either manifest error of law or fact or must present newly discovered evidence and cannot raise issues that could, and should, have been made before the judgement issued." United Nat. Ins. Co. v. Mundell Terminal Servs., 740 F.3d 1022, 1031 (5th Cir. 2014). However, it "cannot be used to raise arguments which could, and should, have been made

before the judgement issued and cannot be used to argue a case under a new legal theory." Elementis Chromium L.P. v. Coastal States Petroleum Co., 450 F.3d 607, 610 (5th Cir. 2006). The Federal Rules of Civil Procedure "favor the denial of motions to alter or amend a judgement." S. Constructors Grp., Inc. v. Dynaelectric Co., 2 F.3d 606, 611 (5th Cir. 1993). "Reconsideration of a judgement after its entry is an extraordinary remedy that should be used sparingly." Templet v. HydroChem Inc., 367 F.3d 473, 479 (5th Cir. 2004).

SUMMATION

This motion is sincere, brought in good faith, and absent of dilatory purposes. Logic dictates that a final judgement should be made only with the advent of the results of an interlocutory appeal. The Contracts Clauses and vested amnesty was never addressed by the Court and never allowed to be properly developed. Respondent and the Magistrate Judge have ignored the claim, and hence the Court through adoption. The calculation excluding ten days for which Petitioner is entitled to under Federal law is pivotal to a timeliness determination. It is asked that the Court reconsider this exclusion of time from its calculation, for the injustices that transpired in the State courts will likely not see the light of day and thus encouraged to be repeated in additional cases. The same can be said for equitable tolling. Simply, any balancing of equities is impossible on a partial record. A full record and litigation based on that record is the only fair and just course. The malfeasances of the State are real, supported by facts, and repugnant. Justice insists

a merits review of the §2254 petition.

RELIEF SOUGHT BY PETITIONER IN THIS MOTION

Pursuant to 59(e) of the Federal Rules of Civil Procedure, Petitioner moves this Court to grant his request to alter or amend the final judgement entered by this Court on August 10, 2020, and to thereafter remand to the Magistrate Judge or else enter a new final judgement in Petitioner's favor which grants the habeas corpus relief requested in his §2254 and injunction petitions. The existing final judgement is requested to be vacated.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner Warterfield respectfully prays that this motion will in all things be granted.

Respectfully submitted this 19th day of August, 2020.

Robert Tracy Warterfield
Petitioner, Pro Se
TDCJ #1829999
CID-Clements Unit
9601 Spur 591
Amarillo, Texas 79107-9606

CERTIFICATE OF SERVICE

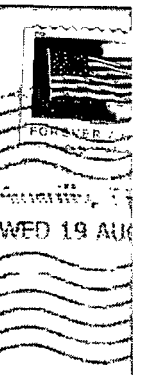
I, Robert Tracy Warterfield, hereby certify that I have mailed a true and correct copy of the foregoing Motion to Alter or Amend Judgement on August 19, 2020 with first class postage affixed and addressed to:

Jennifer Wissinger
Assistant Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Robert Tracy Warterfield

Petitioner, Pro Se

Robert Troy Winfield, #1829999
Clements Unit
9601 Spur 591
Amarillo, Texas 79107-9606



Legal Mail

United States District Cou
Eastern District of Texas
101 E. Pecan St., Suite 112
Sherman, Texas 75090

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40936

ROBERT TRACY WARTERFIELD,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

ORDER:

Robert Tracy Warterfield, Texas prisoner # 1829999, filed a 28 U.S.C. § 2254 application in the district court. Warterfield subsequently filed an application for injunctive relief seeking an injunction requiring Texas authorities to comply with a prior plea agreement. The district court construed this application as a petition for a writ of mandamus and denied it for lack of jurisdiction. Warterfield then filed the instant interlocutory appeal. He also moves for leave to proceed in forma pauperis (IFP) on appeal and for the appointment of counsel.

Warterfield initially was directed to file a request for a certificate of appealability (COA). However, a COA is necessary only to challenge "the final order in a habeas corpus proceeding." 28 U.S.C. § 2253(c)(1)(A). Because

Appendix H

Warterfield's § 2254 application remains pending in the district court, there has not been any final order and a COA is DENIED AS UNNECESSARY. The clerk is DIRECTED to establish a briefing schedule and to include the Respondent in the briefing schedule. The parties should address, along with any other issues they deem appropriate, both whether the district court correctly reconstrued Warterfield's motion as a petition for a writ of mandamus and, if this was error, the proper resolution of Warterfield's claim for injunctive relief.

Warterfield's motion for appointment of counsel is DENIED. He has demonstrated an ability to draft complex legal pleadings and has not shown that his case presently involves either exceptional circumstances or that it is unusually complex or difficult. *See Ulmer v. Chancellor*, 691 F.2d 209, 212-13 (5th Cir. 1982).

The district court denied Warterfield leave to proceed IFP on appeal, finding that he had sufficient resources to pay the costs of his appeal. Warterfield has submitted an IFP application and financial statement to this court indicating he maintains a similar amount of resources. He has not shown that paying the filing fee would result in undue hardship or deprivation of the necessities of life. *See Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339-40 (1948). Warterfield must pay the full filing fee within 15 days of the date of the order or his appeal will be dismissed. *See* 5TH CIR. R. 42.3.

COA DENIED AS UNNECESSARY; MOTION FOR APPOINTMENT OF COUNSEL DENIED; MOTION FOR LEAVE TO PROCEED IFP ON APPEAL DENIED.

JAMES C. HO
UNITED STATES CIRCUIT JUDGE

@ Exhibit #7 #7, Pg 1

001221

DRAWER #7

Cause No. F93 43772

THE STATE OF TEXAS
V.
Robert Wentworth

FILED
SEP 10 1993
COUNTY CRIM. DALLAS CO. TEXAS
DEPUTY

IN THE 292nd DISTRICT COURT
DALLAS COUNTY, TEXAS

PLEA BARGAIN AGREEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Defendant, Counsel for Defendant, and Counsel for State herein and would show that a plea bargain agreement has been entered into between the undersigned, and that under the terms of said agreement, and both sides agree they will waive their right to a jury trial and agree to and recommend the following:

Defendant will plead ✓ guilty ✓ MRD nolo contendere

Defendant will testify _____ will not testify ✓

✓ confinement in Penitentiary for 10 years

_____ confinement in Dallas County Jail for _____ days

_____ fine of $ 1000.00

_____ NO PROBATION

✓ PROBATION TO BE GRANTED FOR 10 years subject to all the terms and conditions imposed by the trial court. Further, the judge, as provided by Article 42.12, Sec. 11 V.A.C.C.P., may at any time during the period of probation alter or modify the conditions.

_____ supervised work or community service for _____ hours as provided by Article 42.12, Sec. 16 and 17 V.A.C.C.P.

_____ SHOCK PROBATION TO BE GRANTED _____ days after sentence, subject to good behavior of defendant in the Penitentiary.

_____ participation in SPECIAL ALTERNATIVE INCARCERATION PROGRAM; probation to be granted _____ days after sentence subject to the defendant's receipt of a rating of satisfactory or better in all areas of inmate evaluation criteria while in the program.

_____ Restitution of $_____ to be paid by defendant.

Conviction to be as follows:

✓ Felony _____ Misdemeanor
_____ Non-conviction Deferred Probation

Defendant's back time date is: 8-19-93 to PRESENT

Additional provisions of the agreement are: * Supplemental Plea Bargain

* deadly weapon allegation dismissed

file d COX Waddell to backstage.

The undersigned certify they have read the terms of the above agreement and that it fully contains all the provisions of said agreement.

JOHN VANCE
DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

By Mark McLaughlin
Assistant District Attorney

x Robert Wentworth
Defendant

Counsel for Defendant

If a victim impact statement has been returned to the State, a copy of said statement shall be turned over to the Court by the State's attorney prior to the Court's acceptance of this plea.

COMMUNITY SERVICE IS WAIVED FOR GOOD CAUSE SHOWN

JUDGE

Rev. 8/89

APPENDIX I

DEFENDANT'S EXHIBIT A 20-40620.117

#7, Pg 2

No. F94-54377

STATE OF TEXAS VS.

Robert Warterfield

IN THE 292nd DISTRICT

COURT OF DALLAS COUNTY, TEXAS

001222

COURT'S ADMONITION OF STATUTORY AND CONSTITUTIONAL RIGHTS AND DEFENDANT'S ACKNOWLEDGMENT

The Court hereby admonishes you of the following Statutory and Constitutional Rights prior to your entry of a plea of guilty/nolo contendere in this case pursuant to Article 26.13 of the Texas Code of Criminal Procedure and the Constitutions of Texas and the United States of America:

1. You are charged with the crime of Sexual Assault

and the range of punishment is not less then 2 nor more than 20 years and up to $10,000 and Agg Sexual assault is 5-99 or life and up to $10,000

2. Any recommendation as to what your punishment should be by the prosecuting attorney is not binding on the Court. I will follow the plea bargain agreement in this case, if there is one, unless evidence is presented that makes me unable to do so and, if so, I will tell you and allow you to withdraw your plea.

3. If the punishment I assess does not exceed the punishment recommended by the prosecutor and agreed to by you and your attorney (the "Plea Bargain Agreement") you cannot appeal this case without my permission except for matters raised by written motions filed prior to trial.

4. If you are not a citizen of the United States of America, a plea of guilty or nolo contendere before me for the offense charged may result in your deportation, the exclusion from admission to this country, or a denial of naturalization under Federal law.

5. If you have a Court appointed attorney, you have a right to have ten (10) days from the date your attorney was appointed to prepare for trial. You have a right to have two (2) entire days after being served a copy of the charging instrument to be arraigned unless you are on bond. You have a right to be tried on an indictment returned by the grand jury.

6. If you receive deferred adjudication and later it is found that you have violated your probation you may then be found guilty and the Court can then set your punishment anywhere within the range provided by law.

JUDGE PRESIDING

ACKNOWLEDGMENT

I have read the above and foregoing admonitions by the Court regarding my rights. I understand the admonitions, and I understand and am aware of the consequences of my plea. Furthermore, my lawyer has explained to me all of the admonitions given by the Court in the document.

Signed this 18th day of April, 1994.

COUNSEL FOR DEFENDANT

Jeff Pierce
PRINTED NAME OF COUNSEL

BAR CARD NO. 15945200

x Robert Warterfield
DEFENDANT

~~Jeff~~ Robert Warterfield
PRINTED NAME OF DEFENDANT

9/87

211/93 #7, pg3

CAUSE NO. F93 43772

STATE OF TEXAS

VS.

Robert Waterfield

FILED
BILL LONG
DIST. CLERK DALLAS CO., TEXAS
DEPUTY

IN THE 292nd

DISTRICT COURT

DALLAS COUNTY, TEXAS

001216

WAIVER OF JURY
FELONY PLEA OF GUILTY / NOLO CONTENDERE / INDICTMENT / INFORMATION

Comes now the Defendant with the consent and approval of Defendant's attorney and does in person, in writing, and in open court, waive the right to trial by jury and requests the Court to consent to and approve this waiver.

Attorney for Defendant

X Robert Waterfield
Defendant

Comes now the undersigned attorney for the State and consents to and approves Defendant's waiver of jury.

Assistant District Attorney
Dallas County, Texas

Comes now the Court and hereby consents to and approves Defendant's waiver of jury in this cause.

JUDGE

☑ Not applicable.

ORDER CHANGING NAME OF DEFENDANT (IF APPLICABLE)

Comes now the Defendant and suggests to the Court that Defendant's true name is other than that set forth in the charging instrument and requests that the charging instrument and all other papers in this cause be amended so that the Defendant's true name will hereinafter be shown to be:

Defendant

MOTION GRANTED. SO ORDERED.

JUDGE

DEFENDANT'S WAIVERS AND JUDICIAL CONFESSION

Comes now the Defendant in open Court in the above entitled and numbered cause represented by Defendant's attorney with whom Defendant has previously consulted and makes the following voluntary statement

1. That I am the person named in the charging instrument in this cause.

2. That I am mentally competent and that I understand the charge contained in the charging instrument in this cause and enter my plea as set forth herein.

3. That I have been advised as to the consequences of a plea of guilty or nolo contendere including the minimum and maximum punishment provided by law and that any recommendation of the prosecuting attorney as to the punishment is not binding on the Court.

4. That I understand that I have the right to a trial by a jury whether I plead "guilty", "not guilty" or "nolo contendere".

5. That I have the right to remain silent but if I choose not to remain silent, anything I may say can be used against me.

6. That I have the right to be confronted with the witnesses against me whether I have a trial before the Court or the jury.

7. That I have the right to be tried on an indictment returned by a grand jury.

However, I desire to waive and do waive the following rights:

1. I waive the right to be prosecuted by a Grand Jury Indictment and announce my election and consent to be charged by an Information, where trial is not by Indictment.

2. I waive any defect, error or irregularity of form or substance in the charging instrument.

3. I waive arraignment and the reading of the charging instrument.

4. I waive my right to remain silent and state that I will testify and make a judicial confession of my guilt knowing anything I may say can be used against me.

5. I waive in writing and in open court the appearance, confrontation and cross-examination of witnesses, and I further consent to an oral or written stipulation of the evidence and testimony and I agree to the introduction of testimony by affidavit, written statements of witnesses, a judicial confession and any other documentary evidence.

6. I waive any additional time for arraignment or preparation for trial, and I waive the right to a 10 day waiting period for trial after the appointment of counsel (if counsel appointed) and announce ready for trial.

#7,896

001214

CAUSE NO.: 93-43772-RV

THE STATE OF TEXAS

vs.

ROBERT WARTERFIELD

IN THE DISTRICT COURT

292nd JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

* PLEA BARGAIN
Supplemented

1. The prosecutor agrees that this conviction will not be used for impeachment of the Defendant should he testify in any subsequent case of which the prosecution has knowledge. (Exhibit "A").

2. Prosecutor agrees this conviction will not be used as an extraneous offense or act against the Defendant in any subsequent case of which the prosecution has knowledge.

(Exhibit "A")

3. The Prosecutor agrees that this conviction will not be used in the punishment phase of any subsequent case of which the prosecution has knowledge. (Exhibit "A").

April 13, 1994

PROSECUTOR

Defendant

Defendant

DEFENDANT'S EXHIBIT B

20-40620.122

Exhibit

#7,897

001215

Incident Date	Service #
9/25/90	90-33350 R.P.D.
11/25/90	087563-Y ✓ X
7/24/92	0474865-B
6/17/93	0474865-B
9/17/89	656521-X ✓ X
10/1/89	691635-X ✓ X
12/9/89	867045-X ✓ X
12/29/89	910909-X ✓ X
1/1/90 D.P.D.	001238-Y ✓ X
1/10/90	22765-Y ✓ X
1/22/90	49627-Y ✓ X
2/17/90	112276-Y ✓ X
8/28,29/92	0709188-Y

Exhibit #8

#8,091

August 24, 2016

Dear Judicial Conduct Commission Members,

My contact information is:

Robert Tracy Warterfield, #1829999
Clements Unit
9601 Spur 591
Amarillo, TX 79107-9606

This is a complaint of the conduct of:

Chris Oldner, Judge of the 416th District Court, Collin County

Court case information:

Cause no. 416-80757-2011
Writ no. W-416-80757-2011-HC
My attorneys: William Schultz and Joshua Andor
State's attorneys: Gregg Willis, Claire Miranda, Crystal Levonius, and John R. Rolater, Jr.

Additional witnesses:

Kimberly Mayer, attorney; Micheal Snipes, Dist Judge Retired; Craig Watkins, attorney; Carmen White, attorney; Russel Wilson, attorney; and family members

Facts and allegations:

Judge Oldner unnecessarily appointed and paid attorney William Schultz, who was defrauding taxpayers and my family, to represent me. Schultz had been retained in October of 2010 with Kimberly Mayer, who was actually my initial contact and Schultz was a referral, to represent me in two pending cases. The contract was verbal. Together they were paid over $80,000.00 (either $83,000.00 or $88,000.00 (see schedule enclosed)) to represent me in Cause no.s F-1061655 and F-1061715 (see Exhibit A of enclosed motion/Anderson Letterhead). They were both paid in full for both of these cases no later than April 2011. Kim and Bill, as I call them, became aware in late 2010 or early 2011 that the F-1061715

Appendix J

#8, 192

case would have a change a venue from Dallas to Collin County. The meeting with Kim and Bill where I was told of the transfer was at the Dallas County Jail around Febuary 2011. I was indicted in Collin County during the January 2011 Term under Cause No. 416-80757-2011. At the meeting where I was told of the transfer, Bill suggested that I claim indigency so that he could be court appointed to my case. I asked him how he could be so sure that he would be the attorney appointed, and he said that, "I use to work with those folks." I was immediately suspect of his dubious proposition and his moral certitude. I knew that he lived and generally practiced in Collin County, so it should have been cheaper and easier for him with one of the cases being transferred up there. My conclusion then as now was that he was a money-grubbin' fraudster, but could not express this opinion for fear of alienating the attorney to whom my family had paid tens of thousands of dollars to and who would be "representing my interests" in the case that remained in Dallas. Kim, though present, did not defend me then or at trial. I reluctantly agreed with Bill.

So in the F-1061655 case that was tried in the 7th District Court in January 2012, both Kim and Bill were my attorneys. In March 2012, I was transferred to Collin County. Kim withdrew. She never told me; just sent word through my family. She would not defend me in Collin County. Neither did she refund the fees prepaid for the F-1061715 case that became 416-80757-2011. She too generally practiced in Collin County.

At a meeting on or about March 7, 2012 at the Collin County Detention Facility, Bill renewed with me what I consider a fraudulent scheme. At that time he wanted me to sign an affidavit

#8,093

of indigency so that he could get court appointed. I asked him again how he was so sure that he would be the one appointed to my case since I was under the impression that it was a structered process. He told me then that he use to work as a prosecutor with the judge of the court to which my case had been assigned to, meaning that he could get court appointed with ease. That he did. An amazing coincidence too!

I felt trapped in more ways than one. I made complaints about Schultz to Judge Oldner at a September 5, 2012 pretrial hearing. For some reason this proceeding was not included in the reporter's record. Therefore, and until it is produced to substantiate my contentions, I will not refer further to this pretrial proceeding other thsan to say that I was not happy nor trusting in having William Schultz as my attorney. It devolves further.

Finally, in the weeks leading up to trial, I had had it with Bill and could care less if I alienated him. Therefore, on November 30, 2012 I filed a prose motion with the court to replace Schultz as my attorney. Judge Oldner took some five minutes or so to read the motion before conducting a hearing. The motion speaks plainly and is found in the clerk's record starting at page 193. I also include a copy with this Complaint for convience. Simply, past this point, Judge Oldner cannot deny knowing that Schultz was already paid in full to represent me in this case. His knowing before November 30, 2012 has yet to be determined. Gregg Willis, Collin County District Attorney, knew before the case was transferred and pre-approved and allowed Schultz to be court appointed so as to receive fees in addition to those paid by my family.

#8, pg 4

What else did Mr. Willis know and do to assist Schultz? How did this case so conviently end up before Judge Oldner who was mentored at the D.A.'s Office in the 90s by Schultz?

Therefore, as of the motion I filed to dismiss Bill, if not sooner, Judge Oldner knew that Schultz was conducting a scheme to defraud taxpayers. What else can it be called to materially misrepresent facts to get money? Schultz was paid in full for this case, then sought out additional fees as court appointed, and enlisted his former co-workers who undeniably knew that Schultz had been paid in full by my family. Transferring the case is no justification. Additionally, Bill asked for and accepted fees in 2011 after he had hatched his scheme and the case was transferred. (See schedule included). Fees ~~that~~ gladly accepted from my family intending (nay, knowing) that he would be court appointed.

Apparently then, Judge Oldner not only knew of Schultz's fraudulent schem and helped to conceal it from the Bar and authorities (who themselves may well be involved!), but actively abetted it and was instrumental in its consumation. His furtherance cannot be characterized as "unwittingly." Judge Oldner ultimately distributed $27,760.74 in "Attorneys Fees" (CR:258) undeniably knowing that Schultz had been retained and paid in full by my family.

So now I am at the point of prosecuting my state habeas corpus pro se (6ee, W-416-80757-2011-HC). In it I basically allege the foregoing. I also filed two motions to have Judge Oldner recuse himself or otherwise is disqualified. In the writ and motions I allege judicial misconduct with a nadir of abetting a fraudulent scheme. How can he sit in judgement of such a claim that he has

such a personal and economic interest in? Must I continue to be victimized by this robed ruffian?

At this point, and to the best of my information from outside sources, the motions to recuse or disqualify have been denied. The courts and their clerks have sent me nothing in this regard.

In summation, Judge Oldner has allowed his long friendship with Schultz to adversely influence his judicial conduct and judgement. He not only made an unnecessary appointment and approved excessive compensation, he did so based on favoritism and by abrogating the established appointment process without putting in the record a single justification for doing so. Then, knowing that Schultz was seeking court appointed fees after having been privately retained and paid in full, not only concealed the conduct of Schultz, but knowingly and actively furthered the crime to completion. Judge Oldner obviously will not remove himself from considering this claim in my writ; he has too much to lose. The local administrative judge has not reassigned it. All of which leaves me with but one option at the state level: A judicial conduct complaint. Are my claims meritorious in y'all's judgement?

#8,896

William Schultz:

DATE	AMOUNT	INSTRUMENT	TOTAL
11-23-10	$10,000.00	Check #5978	
02-18-11	15,000.00	Cashier's check	
03-27-11	5,000.00	Check #131	
04-19-11	5,000.00	Counter debit	
			$35,000.00

Kimberly Mayer:

10-21-10	$10,000.00	Check #5944	
12-17-10	3,000.00	Check #6002	
12-28-10	20,000.00	Check #6008	
02-06-11	20,000.00	Check #6041	
			53,000.00
			$88,000.00

Note:

Personal and account information is currently being withheld to maintain anonimity of family members who are absolutely law abiding citizens. One of my family members was harassed and driven off the stand by ex Dallas D.A. Craig Watkins. Please consider and treat them as crime victims of the alleged fraud.

#8,877

Cause No. 416-80757-2011

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
VS.	§	No. 416
ROBERT TRACY WARTERFIELD	§	COLLIN COUNTY, TEXAS

DEFENDANT'S MOTION FOR DISMISSAL OF ATTORNEY

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, ROBERT T. WARTERFIELD, the Defendant in the above entitled and numbered cause, and moves that the court dismiss his appointed attorney, namely William Schultz, from any further legal representation, and in support of this motion shows:

I

Mr. William Schultz and Mrs. Kimberly Mayer were retained by the Defendant in October of 2010 through agency and funding provided by family members to represent him in two criminal cases. (See: Exhibit A included.) One case was recently tried in Dallas County and the second one, the present case, was transferred from Dallas County to Collin County due to jurisdictional mandates. In the Dallas County case, both attorneys represented the Defendant throughout the trial. In the Collin County case, after transfer Mrs. Mayer provided notice of her withdrawal. Mr. Schultz expressed a desire to continue representation of the defendant in the present case in a meeting at the Collin County Detention Facility on or about March 7, 2012.

Appendix K

#8, 09

Throughout the entirety of these prosecutions, the defendant has maintained his innocence, questions the authenticity of forensic evidence, and has repeatedly expressed a dire need for an independent forensic expert to investigate the prior examinations and to conduct an independent examination of evidence for tampering. At Mr. Schultz's urging and advice, the defendant swore in an affidavit of indigence, a fact that indeed was true and a result of incarceration and prosecution by the State. According to Mr. Schultz, legal representation in which the defendant entrusted to be honest, the main purpose of having him as a court appointed attorney was so that he could then obtain funding from the Court in order to hire a forensic or other necessary expert. However, it is now the eve of the trial date and no such expert, to the Defendant's knowledge, has ever been requested on the Defendant's behalf. Thus, what the Defendant had been originally been led to believe was in his best interests, now appears to be nothing more than his unwitting involvement in an apparent fraudulent scheme wherein Mr. Schultz attempts to be paid twice; once by the Defendant's family and once by the court, for representing the Defendant in the same case. To compound this deception and to the harm of the Defendant, no forensic expert has been appointed to investigate the authenticity of the States' so-called "evidence."

Nature of Monetary Dispute

II

At this time, the defendant has a complete lack of faith in being able to receive adequate representation from Mr. Schultz. In addition to the alleged deception described above, Mr. Schultz (1) has

ineffectively and half-heartedly asserted the defendant's positions and lawful objectives, (2) has repeatedly broken his word given to the Defendant, and (3) on at least one occasion has offered, in the Defendant's opinion, an unsound legal opinion.

In support of "(1)", since early to mid-October of 2012, the defendant has asked Mr. Schultz to file a formal motion to obtain discovery material from the State since conferences have not resulted in production of discovery. Mr. Schultz had not responded to the requested motion and evaded defendant's questioning on the topic at our meeting on November 19, 2012.

In support of "(2)", Mr. Schultz has given his word and not followed through on several occasions. Mr. Schultz had given his assurance that the Defendant would be able to inspect the discovery material produced by the State with an adequate allotment of time before the trial. Mr. Schultz's failure in this respect gives rise to the following likelihoods: that the defendant will be faced with a prejudicial surprise at trial, will be unable to narrow and refine a defense strategy and tactics, will be unable to effectively assist in his defense, and will not have full knowledge of facts in order to prepare for trial. This and other actions by Mr. Schultz has led to the likelihood of unnecessary delays and wasting of scarce judicial resources.

Additional breaches of his word to the Defendant includes promising on October 15, 2012 to visit within two or three days which became thirty plus days with no explanation, notice, or response to

#8, Pg 10

attempts to contact by both mail and by family member's phone calls. This within the critical weeks before trial where in the Defendant sought to resolve critical pretrial issues. Another breach of his word is the aforementioned promise to seek a forensic expert on behalf of the Defendant.

In support of "(3)", the defendant believes that an unsound legal opinion was provided by Mr. Schultz on August 28, 2012, at a meeting in which the Defendant, Mr. Schultz and the defense's investigator, Billy Meeks, were all present. Mr. Schultz proposed and then demanded very angrily to the defendant that he accept that issues of the contract (See: plea bargain of April 18, 1994) and its related disputes be addressed through a motion in limine for the punishment phase only, if any. The Defendant strongly disagreed since provisions of the contract may well bar this prosecution all together or otherwise form the basis for the suppression of the evidence in the guilt-innocence phase, if any. As a consequence, Defendant felt that all contract disputes and rulings be settled pretrial with a record of errors preserved and that the proposed use of a motion in limine for the punishment phase for such a topic was and is an inappropriate and unsound legal opinion that would have led to great and unwarranted harm to the Defendant.

This lack of faith in Mr. Schultz is profound and unlikely to be mollified at the Court's urging as happened previously on September 5, 2012.

III

The Defendant respectfully requests that if this motion is granted, that a substitute attorney be appointed and permitted sufficient time to investigate the case, acquire discovery, respond to reasonable and lawful objectives of the Defendant, and other actions to ensure that the defendant receives a fair trial. The requested dismissal of Mr. Schultz is not sought for delay only and is made in good faith on the facts as known or perceived by the Defendant. The Defendant thought that a workable understanding had been reestablished on September 5, 2012, only to see what faith was left in Mr. Schultz erode even further.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests that the Court dismiss Mr. Schultz as appointed counsel and appoint substitute counsel, the subject of this motion.

Respectfully submitted,

Robert T. Warterfield-Defendant

Collin County Detention Facility
Robert T. Warterfield
5A-DD
4300 Community Avenue
McKinney, Texas 75071

#8, 9/17

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to the Collin County District Attorney's office on this_____day of _____20_____.

"Exhibit A" #8, pg 13

ANDERSON, ANDERSON & ANDERSON, P.C.

Attorneys & Counselors at Law
A Professional Corporation

THE COLONNADE I
15301 N.Dallas Parkway
Suite 250
Addison, Texas 75001
Telephone: (972) 248-8383
Facsimile: (972) 248-0492

REYBURN U. ANDERSON
Board Certified in Family Law
Texas Bd. Legal Specialization

JEFFREY O. ANDERSON
Board Certified in Family Law
Texas Bd. Legal Specialization

KIMBERLY A. MAYER
Of Counsel - Criminal Support

E-Mail: kmayerlaw@sbcglobal.net
WebSite: TexasDivorceLaw.com

October 25, 2010

Michael Ware
Dallas County District Attorney's Office
133 N. Industrial Blvd.
Dallas, Texas 75207

VIA FAX 214-653-5774

Bent Creek Collin Co. / Hughes LN Dallas Co.

Re: Robert Tracy Warterfield; Cause No. F-1061715, F-1061655

Dear Hon. Michael Snipes: Case transferred to Collin County.

William Schultz and I have been retained to represent Mr. Warterfield in the above listed cases. We would appreciate it if you would give one of us a call so that we set up a time for a meeting to discuss these two cases. Thank you for your courtesy in this matter.

If you have further need of information, my cellular phone number is (214) 315-3938.

Sincerely yours,

ANDERSON, ANDERSON & ANDERSON, P.C.
Attorneys & Counselors at Law

Kimberly Anderson Mayer

CC: Michael Ware, Dallas County District Attorney's Office

20-40620.136