APPENDIX

A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STEVE BALLESTEROS,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 5:18-CV-00134-C
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER

Petitioner Steve Ballesteros, proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254. The petition, filed on May 21, 2018,[1] is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Respondent filed an Answer with Brief in Support urging that Petitioner's habeas petition be dismissed as barred by the applicable statute of limitations in 28 U.S.C. § 2244(d) and alternatively arguing that Petitioner's claims are partially procedurally barred and wholly without merit. Petitioner filed a response. As explained below, the Court finds that the petition must be denied and dismissed with prejudice.

I. BACKGROUND

Respondent has lawful custody of Petitioner pursuant to a judgment of conviction from the 140th District Court of Lubbock County, Texas. In Cause No. 2012-434,714, styled *State of Texas vs. Steve Ballesteros*, Petitioner was indicted for murder. He pleaded not guilty, but after a trial, a jury found him guilty and sentenced him to 80 years' imprisonment.

Plaintiff filed a direct appeal, and his conviction was affirmed by the Amarillo Court of Appeals on February 5, 2015. He did not file a petition for discretionary review.

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[1] *See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998) (A prisoner's habeas petition is deemed to be filed when he delivers the papers to prison authorities for mailing.).

Petitioner's attorney filed his first state application for habeas relief on November 11, 2015, but the Texas Court of Criminal Appeals (TCCA) dismissed the application for noncompliance with Texas Rule of Appellate Procedure Rule 73.1 on February 8, 2017. Before his first application was dismissed, on January 31, 2017, Petitioner filed a second state habeas application with the assistance of counsel. The second application was denied by the TCCA without written order on June 7, 2017. Petitioner filed a third state writ application on March 12, 2018, but it was dismissed as subsequent.

Petitioner filed the instant federal petition on May 21, 2018. The Court understands Petitioner to challenge his conviction here on the following grounds:

1) his appellate attorney was ineffective for not perfecting and correcting his direct appeal because he failed to raise grounds two through eight below;

2) his trial counsel rendered ineffective assistance because he did not research or investigate Petitioner's claims and proceeded to trial even though he had a conflict of interest;

3) his trial counsel rendered ineffective assistance when he failed to object to the admission of Petitioner's statement, which was made before he was read his Miranda rights;

4) his due process rights were violated when the prosecution offered exhibits 163 and 164 into evidence over Petitioner's objections;

5) his trial attorney rendered ineffective assistance when he failed to object to Petitioner's typed statement to police even thought it was false;

6) the prosecutor improperly tampered with the jury by conversing with jury members in the hallway during trial breaks;

7) his due process rights were violated when the prosecutor introduced a tampered copy of Petitioner's statement instead of the original one; and

8) his conviction was obtained through false or fabricated evidence, including his video confession.

Petitioner seeks an evidentiary hearing and to have his conviction overturned.

II. STATUTE OF LIMITATIONS

AEDPA establishes a one-year limitation on filing federal habeas corpus petitions. Namely, 28 U.S.C. § 2244(d) provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) 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 under this subsection.

Under the statute, the habeas clock begins to run when one of the circumstances included in § 2244(d)(1)(A)-(D) triggers the Act's application.

A. Statutory Tolling

Under Section 2254(d)(2), the one-year statute of limitations is tolled for "[t]he 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." *North v. Davis*, 800 F. App'x 211, 213 (5th Cir. 2020) (citing *Carey v. Saffold*, 536 U.S. 214, 219–20 (2002)). A state habeas application is properly filed when it "compli[es] with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2010). Thus, in order to toll the federal statute of limitations, a state application must conform with the state-court's procedural filing

requirements, or any prerequisite "that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review." *Mathis v. Thaler*, 616 F.3d 461, 471 (5th Cir. 2010). The Fifth Circuit has specifically recognized that "[a] petition dismissed by the TCCA for noncompliance with Rule 73.1 is not properly filed and does not toll AEDPA's limitations period." *North*, 800 F. App'x at 214.

B. Equitable Tolling

In "rare and exceptional circumstances," the doctrine of equitable tolling may preserve a Petitioner's claims when the strict application of the statute of limitations would be inequitable. *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Larry v. Dretke*, 361 F.3d 890, 896-97 (5th Cir. 2004). Equitable tolling does not apply when an applicant has "failed to diligently pursue his rights." *Larry*, 361 F.3d at 897. "Ignorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing." *Id.* (quoting *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999)).

Even attorney error or negligence will not generally support a claim for equitable tolling. *See North*, 800 F. App'x at 216 (citing *Maples v. Thomas*, 565 U.S. 266 (2012)). For example, an allegation that state habeas counsel was ineffective for failing to comply with the TCCA's filing requirements is "a garden variety claim of excusable neglect that does not warrant equitable tolling." *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 651–52 (2010)).

III. DISCUSSION AND CONCLUSION

After carefully reviewing the state court records and the pleadings, the Court finds that an evidentiary hearing is not necessary to resolve the instant petition. *See Young v. Herring*, 938 F.2d 543, 560 n. 12 (5th Cir. 1991) ("[A] petitioner need not receive an evidentiary hearing if it would not develop material facts relevant to the constitutionality of his conviction."). The Court has conducted a thorough examination of Petitioner's pleadings, Respondent's answer, the

relevant state court records, and the applicable law. As argued by Respondent, the petition is untimely.

Petitioner acknowledges that he filed his petition more than two years after the limitations deadline. But he argues that his claims could not have been discovered sooner because his appellate attorney misled him (Doc. 2 at 9). He asserts that he did not know about the one-year statute of limitations, and he trusted his attorney's advice. (*Id.; see also* Doc. 19).

Petitioner's federal petition was filed over two years too late. Neither his status as a pro se prisoner, nor his ignorance of the law excuses his failure to diligently pursue his rights. Nor does his state habeas attorney's alleged negligence support his claim for equitable tolling. Petitioner has not presented any circumstances extraordinary enough to overcome the strict application of the statute of limitations. For the reasons discussed above and in Respondent's Answer, the Court finds that the petition must be dismissed with prejudice as time barred.

Alternatively, based on the law and facts clearly set forth in Respondent's Answer, the Court finds that (1) Petitioner's first ground for relief is unexhausted and procedurally barred; and (2) his remaining claims are without merit. Finally, to the extent that Petitioner exhausted his claims, the Court finds that he has failed to demonstrate that the adjudication of his constitutional claims resulted in a decision contrary to clearly established federal law or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

It is, therefore, ORDERED:

1. The instant petition is dismissed with prejudice as barred by the statute of limitations.

2. All relief not expressly granted is denied and any other pending motions are hereby denied.

3. Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), Petitioner has failed to show that reasonable jurists would (1) find this Court's "assessment of the constitutional claims debatable or wrong," or (2) find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling," and any request for a certificate of appealability is DENIED. *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

SO ORDERED.

Dated April 13, 2021.

SAM R. CUMMINGS
Senior United States District Judge

APPENDIX

B

United States Court of Appeals for the Fifth Circuit

No. 21-10470

United States Court of Appeals
Fifth Circuit
FILED
November 9, 2021
Lyle W. Cayce
Clerk

STEVE BALLESTEROS,

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 Northern District of Texas
USDC No. 5:18-CV-134

ORDER:

Steve Ballesteros, Texas prisoner # 01911241, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 petition challenging his conviction and sentence for murder. The district court found that the petition was time barred and that all of the claims were meritless.

To obtain a COA, Ballesteros must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court dismissed Ballesteros's petition on both procedural and substantive grounds, he "must show *both* that jurists of reason could debate

the validity of the procedural . . . ruling *and* that those same jurists could debate the validity of the merits ruling." *Cardenas v. Stephens*, 820 F.3d 197, 201 (5th Cir. 2016); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Ballesteros contends that he is entitled to delayed commencement of the one-year limitation period under 28 U.S.C. § 2244(d)(1)(B) as well as equitable tolling of the limitation period based on the state courts' delay in dismissing his first state habeas corpus application. Ballesteros did not make these arguments in the district court, and this court does not consider arguments first raised in a COA motion in this court. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003). Thus, Ballesteros fails to make the requisite showing. *See Cardenas*, 820 F.3d at 201; *see also Slack*, 529 U.S. at 484. Accordingly, the motion for a COA is DENIED.

KURT D. ENGELHARDT
United States Circuit Judge

APPENDIX

C

United States Court of Appeals for the Fifth Circuit

No. 21-10470

STEVE BALLESTEROS,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:18-CV-134

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

Before JONES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX

D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

3-18CV-1341N

STEVE BALLESTEROS
PETITIONER

VS.

SENIOR WARDEN R. STEVEN
RESPONDENT

MEMORANDUM FOR WRIT OF HABEAS CORPUS
IN SUPPORT OF PETITION

ARGUMENT

I. DIRECT APPEAL WAS DENIED DUE TO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The Petitioner's right to adequate representation on direct appeal is the same as when he goes to trial, it is considered structural and is a violation of his Sixth Amendment right and his right to Due Process under the Fifth and Fourteenth Amendment and his right to Texas Due Course of Law under the Texas Constitution, Article I, Section 19.

Retained counsel, Robert Sirianni Jr., never once mentioned the AEDPA 1-year limitation deadline to Petitioner to filing his Federal Habeas petition in the court of federal appeal. The whole time he represented to him, asuring him he was giving his best effort.(Spitsyn v. Moore, 345 F.3d 796 (CA9 2003) p800 ...we acknowledge that where an attorney's misconduct is sufficiently egregious it may constitute an "extraordinary circumstance" warranting equitable tolling of AEDPA statute of limitation) Counsel realized his folly and removed himself from my case and claimed he retired from practice.

So my I.A.C. of appellate counsel was not discoverable until he excused himself and left me trying to fix it and hopefully get relief.(Fleming v. Evans 481 F.3d 1249(CA10 2007)p1256,...attorney did not act with mere negligence, but rather deceived him into believing that he was actively prusuing...legal remedies when in fact, he was not.) Predicate fact was not there until attorney was no longer representing him because they could not file an I.A.C. on themslves.

Furthermore, the errors presented have not been adjudicated on it merits and if this court does find that the denial on 6/07/2017 was a judgement on its merits, these are claims that are violations of constitutional law and a

violation of clearly established Federal law, Supreme Court precedence. Lewis v Moyle, 391 F.3d 989 (CA9 2004) p996, The principle that comity and federalism conerns are not implicated where a state court does not reach a claim applies here with equal force. Because the state court explicitly held on other ground, we do not apply AEDPA deference to its discussion... The denial of 6/07/2017, the district court adopted the state's proposal of non-compliance and the errors are still unjudged. Pham v. Terhune, 499 F.3d 740 (CA9 2005) p742,...this court must "defer to the state court's determination of the federal issue unless that determination's 'contrary to, or involved an unreasonable application of clearly established Federal law'" In reviewing a state court's summary denial of a habeas petition this court must "look through" the summary disposition to the last reasoned decision. However, when no reasoned state court decision denying a habeas petition exists, the federal court should "perform an 'independent review of the record' to scertain whether the state court decision was objectively unreasonable." Citing Himes v. Thompson, 336 F.3d 848, 852 (9thCir. 2003).

The 5th Circuit has upheld that effective assistance on direct appeal is a constitutional right. In Lofton v. Whitley, 905 F.2d 885 at 887 (5thCir. 1990), the Court has stated, "An accuesed is constitutionally entitled to effective assistance of counsel on direct appeal as of right." So if appellate counsel is less than adequate defendant is constitutionally deprived. Petitioner contends that he was constructively denied assistance of counsel on direct appeal because attorney filed a petition that didnot assert any of the constitutional errors presented here, due not receiving transcripts on time prejudice should

appeal lawyer

be presumed.

The Supreme Courts decision in Evitts v. Lucey, 496 U.S.387, 105 S.Ct.830 at 831 (1985), "Nominal representation on an appeal as of right-like nominal representation at trial-does not suffice to render the proceedings constitutionally adequate...has not previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process." So when the appeal attorney was not given time to prepare, due to not receiving trial transcripts in time, Petitioner was denied due process and harm occurres. Attorney presented two harmless grounds of error, psychologist not taking the stand and sudden passion, missing constitutional errors, rendering him ineffective.

II. PETITIONER'S DUE PROCESS RIGHTS AND TEXAS DUE COURSE OF LAW WERE VIOLATED BECAUSE HIS CONVICTION WAS OBTAINED BY THE USE OF FALSE EVIDENCE, PROSECUTORIAL/GOVERNMENTAL MISCONDUCT

The Petitioner's right to Due Process under the Fifth and Fourteenth Amendments and his right to Texas Due Course of Law under the Texas Constitution, Art.I Sec.19, were violated. The Supreme Court has held that a conviction based on false evidence that is known to be false by representatives of the state violates a defendant's due process rights under the Fourteenth Amendment. In Napue v. Illinois 360 U.S. 264, 269, 79 S.Ct.1173, 1177 (1959), "The Supreme Court and the Texas Court of Criminal Appeals have determined that the knowledge requirement is satisfied if the prosecutor knew or should have known the evidence was false) Sledge v. State,860 S.W.2d 710,712 (Tex.App.-Dallas 1993, Pet. ref'd) (citation omitted).

In Ex Parte Peterson, 117 S.W.3d 804 (Tex.Crim.App.2003), the Court of Criminal Appeals explained that the proper inquiry is whether the Petitioner was

"required to move for a mistrial because the prosecutor deliberately or recklessly crossed 'the line between legitimate adversarial gamemanship and manifestly improper methods' that render trial before the jury unfair ti such a degree that no judicial admonishment could have cured it." Id. at 816, quoting Ex Parte Bauder, 974 S.W.2d 729,732 (Tex.Crim.App.1998). For the purpose of aggravated perjury, materiality refers to misstatements having substantial potential for obstruction of justice. Kmiec v. State, 91 S.W.3d 820 (Tex.App.-Houston[1st Dist.] 2002, pet. ref'd); Tex. Penal Code Sec.37.09 (obstructing justice statute prohibits altering, destroying or concealing any record, document, or thing with intent to impair its verity, legibility or availability as evidence in the investigation or official proceeding criminalizes the concealment of physical evidence).

A. PROSECUTORS INTRODUCED FALSIFIED AND FABRICATED EVIDENCE INTO TRIAL, AND USING UNCONSTITUTIONALLY OBTAINED EVIDENCE

State's Exhibit 161 is claimed to be a true and accurate statement of defendant and Detective Johnson said that Petitioner signed and fingerprinted it, 5RR 149, it was not the original but a computer copy. The prosecution team did not produce the original as required by law. Under Tex. R. Evid.1002, "An original writing, recording or photograph is required in order to prove its content..." Castellno, 863 S.W.2d at 485 (Tex.Crim.App.1993) Held that under the facts of the case, the police officer "acted under color of law and was therefore a member of the prosecution team...and as such his knowledge of the perjured testimony was imputable to the prosecution." When Det. Johnson testified to the validity of the statement that's when it became part of the prosecution and should of been

corrected.

Furthermore, the Petitioner was greatly prejudiced because the statement became the focal point at trial and was the most important piece of evidence relied upon by the state. The prosecutions first part of closing arguments, "Well members of the jury, I'll submit to you that he gave you all the detail that he needed to right there in that statement." 6RR 11. The second part of prosecutions closing argument, "We put the full video in. There's dead space after that, there 's other things the Court ruled that you heard about. And you know that statement was typed while the video was rolling." 6RR 16.

When Exhibits 163 and 164 were entered into evidence they were objected to yet Assistance District Attorney, Barron Slack, went as far as saying, "If he would of admitted to doing it I wouldn't be doing all this, and I'll call the officer if you want to do it that way." 5RR 276-277. The prosecution never included the photos in the discovery, never offered a police report or called any officer to support the evidence. When objected to the Court said, "you've been given notcie of it, objection overruled." This was highly prejudicial in that thejury viewed the fabricated pictures and the weight it carried against the defendant was extremely damaging as they took them as authentic and true. Petitioner vehemently denied any such action. In the Tex. R. Courts (vol.I 2015) rules of professional conduct: rule 8.04 misconduct-(a) a lawyer shall not (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyers honesty, trustworthiness, or fitness as a lawyer... (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;...

B. DUE PROCESS VIOLATION BECAUSE PETITIONER WAS NOT READ HIS MIRANDA RIGHTS BEFORE THE INTERROGATION

(U.S. v. Carter 236 F.3d 777,783 (6th Cir.2001) "prosecutorial misconduct may be so exceptionally flagrant that it constitutes plain error and is grounds for reversal even if the defendant did not object to it...if the error 'seriously affects the fairness, integrity or public reputation of judicial proceeding.") Yet when defense counsel questioned Det. Johnson he admitted to not reading Petitioner his Miranda Rights before the interrogation. 5RR 172. At that point the prosecution should of moved for mistrial or at least admonish the jury to disregard the testimony and the evidence

It is well settled that a prosecutor has a "constitutional duty to correct known false evidence." Duggan v. State,778 S.W.2d 465,468 (Tex.Crim.App.1989). Tex. R. Courts (vol.I 2015), Rules of Professional Conduct, rule 3.03(a)(5) A lawyer shall not knowingly:...(5)offer or use evidence that the lawyer knows to be false. In fact,"[t]he duty to correct known false evidence is not only a prosecutorial ethic, but a constitutional requirement." Id.(citation omitted). Because Petitioner was read his rights at the end of the interview, his rights were violated. In U.S. v. McConer,530 F.3d 484,497 (6thCir.2008), the Supreme Court held in Seibert that, the Siebert plurality therefore held that the "question first" tactic violates Miranda because Miranda warnings "inserted in the midst of coordinated and continuing interrogation," are ineffective to advise the defendant of his rights and the consequences of waiver. Seibert,542 U.S.622,S.Ct.2601.

C. THE PETITIONER WAS PREJUDICED BY JURY TAMPERING WHICH VIOLATES HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY

Texas law strictly prohibits attorneys from speaking with jurors about the

case outside the presence of the court. The Texas Code of Criminal Procedure provides that:

> No person shall be permitted to be with a jury while it is deliberating. No person shall be permitted to converse with a juror about the case on trial except in the presence and by permission of the court.

Tex. Crim. Proc. Code Ann. art.36.22; Alexander v. State,919 S.W.2d 756,766 (Tex. App. Texarkana 1996, no pet.)("For anyone outside of the judicial process to communicate to the jury about the case on trial is error."). And case law holds that damage to a criminal defendant is presumed if such contact occurs. "It is generally presumed that a defendant is injured whenever an impaneled juror converses with an unauthorized person about the case." Chairs v. State,878 S.W.2d 250,253 (Tex. App.-Corpus Christi 1994, no pet.), citing Romo v. State, S.W.2d 504 ,506 (Tex. Crim. App. 1982).

Inthis case, Hiram Ballesteros, was present in the courtroom throughout the entire trial and witnessed the prosecuting attorney talking in the hallway with jurors numerous times during breaks and at the end of the day. Exhibit 1. Further ,Crystal King, also recognized some of the jury members talking to two different prosecuting attorneys on more than one occasion. These conversations also occurred in the hallway of the courthouse during breaks threughout the course of the trial. Exhibit 2. The Court of Criminal Appeals held in Green,840 S.W.2d 394,406 (Tex. Crim. App.1992), "when a juror does converse with an unauthorized person, injury to the accused is presumed...the court has to be immediately notified of this." And a hearing should of been conducted on the extent of the damage.

The sheer number of times the unathorized communications happened was enough to ingratiate the prosecution to the jury, and certainly had an influence on

the outcome of the proceeding. The prosecution has undermined the judicial process by influencing the jury through unathorized communication. Harm is presumed and the Petitioner is therefore entitled to a mistrial and/or a reversal of his conviction and sentence.

III. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DETECTIVE NOT READING PETITIONER HIS MIRANDA RIGHTS, FAILING TO OBJECT TO A COMPUTER PRINTOUT OF STATEMENT MADE TO POLICE, AND TO NOTOBJECTING TO VIDEO INTERVIEW

A. BASIC LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL

The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendment of the U.S. Constitution and Art.I, Sec.10 of the Texas Constitution. In Strickland v. Washington,466 U.S.668, 104 S.Ct.2052 (1984), the Supreme Court held that the Sixth Amendment right to assistance of counsel includes the right to effective assistance. Id. at 686. A defendant's Sixth Amendment rights are violated if "counsel's representation fell below an objective standard of reasonableness...under prevailing professional norms," Id. at 688, and that he was prejudiced as a result. Id. at 692. Prejudice occurs when;

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been differant. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.at 694.

In Hernandez v. State,726 S.W.2d 53,57 (Tex.Crim.App. 1986), the Court of Criminal Appeals adopted the Strickland test as the proper test under Texas State law for the effectiveness of a counsel. The appellant "must overcome the presumption that the challenged action might be considered sound trial strategy under thecircumstances." Brennan v. State,334 S.W.3d 64,71 (Tex.App.-Dallas 2009, no pet .); In re K.L.,91 S.W.3d 1,7 n.27 (Tex.App.-Fort Worth 2002, no pet.), quoting

I.A.C. Pt. 1

Avery v. Alabama,308 U.S. 444,446, 60 S.Ct.321,322 (1940)("[t]hat a person who happens to be a lawyer is present at trial alongside the accused,however, is not enough to satisfy the constitutional command...an accused is entitled to be assisted by an attorney,whether retained or appointed, who plays the role necessary to ensure that the trial is fair.").

B. ATTORNEY ADMITTED TO NOT PREPARING FOR TRIAL, AND A CONFLICT OF INTEREST, COMMUNICATION BREAKDOWN AND THAT HARM WOULD COME TO DEFENDANT

At the start of the trial counsel stated, "I am representing to the court there's been a complete breakdown in communication between the client and myself that would render my assistance of him in trial ineffective." 3RR 6. U.S. v. Moore 159 F.3d 1154(CA9 1998),"...relationship...clouded by 'an atmosphere of mistrust, misgiving and irreconcilable differences' resulting from claims of conflicting interests, ineffective assistance, and a breakdown of the client-attorney relationship," at 1159, citing Brown,424 F.2d 1169. When attorney represented this and other testimony in court regarding representation of Petitioner the trial court should of allowed him to withdraw from the case but denied oral motion which rendered lawyer ineffective and inadequate, which continued throughout the proceedings prejudicing Petitioner significantly with miscues and forfeited objections, which would have had a substantial affect on the outcome of the proceedings.

Counsel asserts before trial begins that client fired him due to conflict of interest. Petitioner stated that his impression the past year and a half was that they were going to present their side of this and then five days before trial starts counsel comes with something we never discussed before. Then attorney came to trial saying he's not prepared. 2RR 5-9. (In Cuyler v. Sullivan, 446 U.S.335, 100

I.A.C. trial

S.Ct. 1708,1719 (1980), "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.") Counsel stated that he was preparing for another trial the week before this one that is why he did not visit or prepare, 2RR 7, and that harm would come to defendant, 3RR 6. Deprivation of Petitioner's right is complete when he is erroneously prevented from being represented by counsel of choice, regardless of the quality of the representation he received. Riggio v. Secretary, Dept. of Corr.,704 F. Supp.2d 1244,1251..."the Sixth Amendment includes the right to choose the attorney who will represent him...if a defendant is wrongfully deprived of counsel of choice the error is structural, does not require a showing of prejudice..." With the trial continuing prejudice is presumed and defendant is denied adequate representation.

C. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO STATE'S EXHIBIT 161, WHEN PETITIONER STATED THAT WAS NOT THE STATEMENT HE GAVE

The Petitioner did not have a chance to review the printout of State's Exhibit 161 until Detective Johnson took the stand. When he did finally see the document he realized that it was not an accurate copy of what he said to police during his interview. Trial counsel's response was "what do you want me to do, I can't do anyting about it." Wiggins v. Smith, 539 U.S. 510,123 S.Ct.2527,2530, 'Any reasonable competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defences...the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly stemmed from inattention, not strategic judgement.' Trial counsel did not file Brady motion and made no other effort to locate the original statement. He did

nothing at trial to address this issue other than ask Det. Johnson about the number of pages at the end of his cross-examination. 5RR 183. ..."that for a strategic decision to be reasonable, it must be based upon information the attorney has made after conducting a reasonable investigation." Id. at 2534.

However, given that Petitioner had informed his attorney that his statement consisted of five pages and that State's Exhibit 161 was only three pages, trial counsel knew or should have known that his client was claiming that potentially exculpatory evidence was being hidden or suppressed. Accordingly, counsel had adequate grounds to file a Brady motion. Hayes v. State,85 S.W.3d 809,814 (Tex.Crim. App.2002)("The standard under Brady v. Maryland is that the prosecutorial suppression of exculpatory evidence violates due process when the evidence is material either to guilt or punishment."). Washington, supra ("Prosecutorial misconduct reasonably reaches only that conduct which is qualitatively more serious than simple error and connotes an intentional flounting of known rules or laws."). Id. at 236.

Any reasonable attorney acting within the normal range of competency would have challenged the admissibility of this heavily weighted evidence in every way possible. Thomas, supra, (Counsel for appellant had a duty, Appellant suffered,"). "Although the Supreme Court has said that 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[,]' an attorney's cited strategy does not prevent[the reviewing court] from determining whether a specific act or omission was 'outside the wide range of professionally competent assistance.'" Ex parte Ellis, 233 S.W.3d 324,

330(Tex.Crim.App.2007)(citions omitted). And in this case, the Petitioner's counsel could have had - no reasonable and rational strategic reason for not challenging the validity of his client's written statement. (In fact. "no reasonable trial attornev would pursue such a strategy under the facts of [this] case.") Ex parte Walker. 425 S.W.3d 267,268 (Tex.Crim.App. 2014)(Price,J.,concurring).(quoting Pape v. Thaler,645 F.3d 281,291(5th Cir.2011)) Counsel should have moved for a mistrial.

I.A.C. Trial

In Duarte v. U.S.,81 F.3d 75(CA7 1996), Consider the suppression question. The absence of a motion to suppress was clear. But omitting a motion to suppress raises questions about counsel's performance only if there was a basis for that relief.[...]It is not possible to criticize counsel's performance unless (defendant)not only had, but also conveyed to his lawyer, some factual basis for filing a motion to suppress. ...a lawter may not dismiss his client as a liar out of hand, without a investigation... It is the defense lawyer's job to be an advocate, not to be the prosecutor's lackey. Because of the Petitioner's trial counsel's failure to combat or contest this statement he was ineffective in a way that undermined confidance in the outcome of the proceeding. The Petitioner was therefore deprived of effective assistance of counsel, and is entitled to relief under this petition.

D. COUNSEL WAS INEFFECTIVE FOR WITHDRAWING PETITIONER"S OBJECTION TO EXHIBIT 160, FAILING TO OBJECT TO HIS MIRANDA RIGHTS VIOLATION, FAILING TO OBJECT TO THE TAMPERING OF VIDEO STATEMENT

(The Petitioner was never read his Miranda Rights before his interview with law enforcement; Charette, 625 F.2d 57 (5th Cir.1980) Governmental overreaching,

the "bad faith" standard. requires "a finding of gross negligence or intentional misconduct on the part of the Government which seriously prejudiced the defendant." [The merits] of Thompson's Miranda claims, [is] governed by the Supreme Court's decision in Seibert, 542[p1016] U.S. 600, 124 S.Ct. 2601. The plurality and Justice Kennedy's concurrence in that case, read together, make clear that a deliberate two-step interrogation strategy can violate Miranda. Specifically, when police deliberately withheld warnings until after obtaining an in-custody confession, the warnings are ineffective unless the impact of the prior unwarned confession has been dissipated. Seibert, 542 U.S. at 622 [omitted], from Thompson v. Runnel, 621 F.3d 1007 (CA9 2010).)

I.A.C. Trial

The Petitioner contends that he was not read his Miranda Rights until after the police had interviewed him completely and many statements were obtained. He contends further that the video of the police interview was tampered with and that Det. Johnson instructed him on what to say, that portion of video was removed. Yet, the original should be preserved for such an instance as this. He discussed this with his counsel, but counsel did not address the issue at trial other than to cross-examine Det. briefly on the subject, I made the mistake of not reading him his Miranda Rights before I began questioning him about the incident. Id at 5RR 172-173. But this line of questioning took place well after the video was played for the jury. Counsel took no further action with respect to this issue, filed no motion for mistrial, made no objection or request to the court. In fact, counsel advised the trial court that the Petitioner elected to waiver the motion to supress the videotaped statement. 5RR 151-152.

Once again, any reasonable attorney acting within the normal range of competency would have challenged the admissiblity of this heavily weighted evidence in every way possible. Thomas, supra. Given the Petitioner's contentions to his counsel, he could have had no reasonable and rational strategic reason for not challenging the videotaped statement. Walker, supra.

Taken together, these errors are "errors so serious that counsel was not functioning as 'counsel' as guaranteed by the Sixth Amendment." Further, "counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable." Strickland, supra at 687, 104 S.Ct. at 2064. Therefore, the Petitioner respectfully requests that this Honorable Court grant relief under this Petition because of counsel's failure to contest the inadmissable evidence.

IV. THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE HIS CONVICTION WAS OBTAINED THROUGH A BRADY VIOLATION

As previously stated, "[t]he standard under Brady v. Maryland is that the prosecutorial suppression of exculpatory evidence violates due process when the evidence is material either to guilt or punishment." Hayes, supra. In this case, the prosecution did suppress exculpatory evidence when it failed to turn over to the defense (or at least permit the defense to see) the exact document that the Petitioner signed while in police custody. The Petitioner has affirmed that State's Exhibit 161, which purported to be a typewritten statement that he signed, was not the precise document that he signed. The Petitioner has also alleged serious and significant irregularities in the taking of his oral and written statement. These irregularities which in fact constitute false evience as stated above, constitute exculpatory evidence that the prosecution was required to turn

over to the defense under Brady v. Maryland.

If the actual statement that the Petitioner signed had been properly disclosed to the defense. it would have never been admitted into evidence because a reasonably competent defense counsel would have been able to show that it constituted false evidence that would have been unduly prejudicial to the Petitioner. The introduction of this evidence violates the Petitioner's constitutional rights under the Fifth and Fourteenth Amendments. The Petitioner is therefore entitled to have his conviction set aside or vacated on the grounds that it was obtained through a Brady violation.

CONCLUSION

The Petitioner has fulfilled his evidentiary burden under the law and has proved by a preponderance of the evidence that his claims are meritorious and entitled to relief because his conviction was obtained by the use of falsified evidence.

APPENDIX

E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STEVE BALLESTEROS §
Petitioner §
§
v. § Civil Action No. 5:18-CV-00134-C
§
LORIE DAVIS, Director, §
Texas Dept. of Criminal Justice, §
Correctional Inst.Div. §
Respondent, §
§

PETITIONER"S REPLY

RULE 5 BAR

Respondent alleges Rule 5 bar to Petitioner's first claim of ineffective assistance of appellate counsel which is covered by AEDPA's (d)(1)(D), the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. As Petitioner stated in app;ication this ultimate fact could not have been discovered until appeal counsel excused himself from the case, Appl. 2254 brief p.1.

The determination of the date on which the factual predicate for a habeas claim is first discoverable is a "fact-specific" inquiry which requires a district court to analyze the factual bases of each claim and to determine when the fact underlying the claim were known or could with due diligence have been discovered. RIVAS v. FISCHER, 687 F.3d 514 at 534,(2d Cir.2012). Those courts that have given meaning to the term agree that a factual predicate consist only of the "vital facts" underlying the claim Id at 534, citing McALEESE v. BRENNAN, 483 F.3d 206,214 (3rd Cir.

2007); also FLANAGAN v. JOHNSON, 154 F.3d 196,199 (5th Cir.1998).

Petitioner was within the 1-year limitation period as when the Texas Court of Criminal Appeals denied without written order on 6-07-2017, as shown by Respondent's exhibit E of Respondent's answer with brief. Petitioner's exhibit F, shows that counsel informed Petitioner, thur family first, that they terminated representation. On that date the Petitioner claims the factual predicate became discoverable for AEDPA purposes. As Petitioner state in App. brief p.1, counsel could not file I.A.C. on themselves showing their deficiency.

In HOLLAND v. FLORIDA,130 S.Ct.2549, 177 L.Ed.2d 130 at 135 -136, The Court's case recognize that equity courts can and do draw upon decisions made in other similar cases for guidance,exercising judgement in light of precedent, but with awareness of the fact that specific circumstances often hard to predict,could warrent special treatment in appropriate cases...an attorney's unprofessional conduct can be so egregious as to create an extraordinary circumstance warrenting equitable tolling, as several other federal courts have specifically held.

Exhibit B, affidavit of jesus Ballesteros sr. states, in pertinent part, that he and Petitioner were under the impression that they were going to represent Petitioner all the way to the Supreme Court if need be. Mr. Sirianni goes even further by claiming to retire from practicing law, exhibit F, which a website show that said attorney is still practicing law in the state of Florida.

Petitioner does not dispute the fact that his petition was due on March 7, 2016, but through lies and misrepresentation by Mr. Sirianni, who is licensed to practice law in federal court, as stated in exhibit D, admission of minor misconduct, counsel should of known of the limitations of AEDPA, 1year limit to file federal petition. "THe 1-year statute of limitations included in the AEDPA does not operate as a jurisdictional bar to habeas corpus petitions and can, in appropriate and exceptional circumstances, be 'equitablly tolled.' Blacks Law Dictionary defines the doctrine of 'Equitable Tolling,' explaining the 'statute of limitations will not bara claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired.' At the root of the doctrine is the principle constituting what is fair and right, natural law." WESSINGER v. CAIN, 358 F.Supp.2d 523 at 526 (U.S.D.C. M.D. La.2005).

Bad faith and intentional misconduct by Mr. Sirianni warrent consideration of this Court for statutory tolling, equitable tolling and evidentary hearing. FLEMING v. EVANS, 481 F.3d 1249,1251 (10th Cir.2007) Evidentary hearing was warrented before District Court to determine whether 1-year limitations period for filing habeas petition should have been equitably tolled on grounds that Petitioner's counsel, who was retained...did not act with mere negligence, but rather deceived petitioner into believing that he was actively pursuing petitioner's legal remedies when, in fact , he was not; counsel alleges misrepresentations may have amounted to an extraordinary circumstance...

Although Mr. Sirianni did inform Petitioner of his filing of the direct appeal and 11.07, assuring Petitioner and family that they were doing all that could be done with time to spare to file in federal court, exhibit A-B. The Supreme Court has confirmed that AEDPA's statute of limitations is not jurisdictional and 'does not set forth an inflexible rule requiring dismissal whenever its clock has run.'" HOLLAND v. FLORIDA, 130 S.Ct.2549, 2560(2010) (quoting DAY v. McDONOUGH, 547 U.S.198, 205(2006)) " Rather, the limitations period in §2244(d)'is subject to equitable tolling in appropriate cases'-specifically where the petitioner shows'(1)that he has been pursuing his rights diligently, and(2)that some extraordinary circumstance stood in his way and prevented timely filing." Id at 2560,2562.

Exhibit F shows where appellate counsel acknowledges that he received my additional errors to be included in the 11.07. Also, Petitioner's affidavit, exhibit A, states that, I would write attornet and he would not answer my inquiries. Exhibit B also attest to this fact. That is why the e-mails were used to send the additions, exhibit F. "where a circumstance is extraordinary depends not on 'how unusual the circumstance alleged to warrent tolling is among the universe of prisoners, but rather how severe an obstacle it is for the petitioner endeavering to comply with AEDPA's limitations period.'" DIAZ v. KELLY, 515 F.3d 149,154(2d Cir.2008).

Petitioner was actively involved in his attempts with his attorney and even though Petitioner did not know of the AEDPA

statute of limitations he was aware that counsel could not be lax in their work by taking their time the way they did, even though attorney knew better, exhibit A-B attest to this fact, as well as exhibit D. Petitioner is therefore entitled to statutory tolling, as well as equitable tolling, where applicable.

PROCEDURAL DEFAULT

The Supreme Court has recognized exceptions to the doctrine of procedural default where a federal habeas corpus petitioner can show "cause and actual prejudice" for his default...MOORE v. QUARTERMAN, 526 F.SUpp.2d 654,674-75 (W.D.Tex.2007)(quoting COLEMAN v. THOMPSON, 501 U.S.at 750 (1991) HARRIS v. REED,489 U.S.at262 (1989)), To establish "cause" a petitioner must show either that some objective external factor impeded the defense counsel's ability to comply with the state's procedural rules or petitioner's trial or appellate counsel rendered ineffective assistance of counsel.

Appellate counsel was ineffective on direct appeal for not including claims 2-8 of application 2254, which are clearly violations of constitutional rights, which should be addressed on direct appeal and were clear on the record. But through counsel 's negligence and inattentiveness he did not include them even though Petitioner asked him to. MURRY v. CARRIER,477 U.S.488,106 S.CT.2639,2645(1986)(holding that proof of ineffective assistance by counsel satisfies the "cause" prong of the exception to the procedural default doctrine.) With counsel disregarding these errors he was clearly ineffective. Also coupled with the counsels

admission of minor misconduct, exhibit D, stating-misleading advertisement and potentially misleading advertisement and misconduct, counsel lied, misrepresented and was negligent. Acting in bad faith toward client and actively misleading Petitioner, should render Mr. Sirianni ineffective.

With that, counsel did not perfect petition as required by federal courts. My arguement is not that the petition was properly filed, but that it was not prefected as required in RHINES v. WBER, 544 U.S.at 269 (2005), for the federal court to review. RESpondent claims 11.07 that was denied on 6-7-17 was perfect when in State's proposed facts and conclusion of law, Petitioner's exhibit C, shows that ground 2 was recommended to be dismissed for raising multiple grounds on a single page and citing the appropriate rule governs it, Tex.R.App.P. 73.1, 73.2. Grounds 3 and 4 are similarly addressed as non-compliant.

Texas Rules of Procedure, rule 44.3, Defects in Procedure, states, "A court of appeal must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing reasonable time to correct or amend the defect or irregularities." Petitioner is therefore left with the impression the the petition was denied for noncompliance, which it was. The incompetence is further evident when the counsel's paralegal e-mail stating, they advise client to contact a Texas attorney for further assistance, exhibit E. Proper exhaustion is required for federal review, ROSE v. LUNDY 455 U.S.509 102 S.Ct. 1198(1982), that Federal District Courts

may not adjudicate mixed eptitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims.... state courts must have first opportunity to decide a petitioner 's claims, at 518-19. From RHINES at 273, 125 S.Ct. at 1533. Also in WYNN (292 F.3d 226(5th Cir.2002), the district court acknowledged that alleged deception by the prisoner's attorney that a timely...motion had been filed may have been a rare and extraordinary circumstance warrenting equitable tolling...

In MORRIS v. DRETKE, 413 F.3d 484 at 490(CA5 2005), "The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the states highest court. "MERCADEL v. CAIN, 179 F.3d 271,275 (5th Cir.1999). Such presentation can take place via direct appeal or states habeas proceedings. ORMAN v. CAIN, 228 F.3d 616,620 (5th Cir.2000). So correction and exhaustion is required by law to proceed in federal court. Filing 11.07 petition was required by Petitioner. "Because theexhaustion doctrine is designed to give state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts.. ." O'SULLIVAN v. BOECKEL, 526 U.S. 839,119 S.Ct. 1728,1732(1999). The petition was not a successive one but a corrected one that was filed in March of 2017, which was required by Petitioner.

AEDPAS STANDARD OF REVIEW

28 U.S.C. §2254(d)(1), resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal Law, as determined by the Supreme Court of the

United States;. Respondent claims that Petitioner's claims are not met under AEDPA standard and that fairminded jurist could disagree on his grounds of error 2,3,5 and 6.

In PRICE v. VINCENT, 538 U.S.634, 123 S.Ct.1848 (2003), "First we have explained that a decision by a state court is 'contrary to' our clearly established law if it "applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this court and nevertheless arrives at a result different from our precedent." at 1853. In the Supreme Court case of CUYLER v. SULLIVAN, 466 U.S.335, 100 S.Ct.1708,1719 (1980) "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice...to obtain relief." Trial counsel made it very clear that he was not prepared and that harm would come.(reports records. RR)vol. 2RR p.7. vol.3RR p.6. Respondent claims trial counsel was not prepared due to Petitioner's own doing. yet trial counsel was counsel of Petitioner for a year and a half. coming to visit Petitioner and even having a psychologist interview Petitioner to support defense. attorney was claiming to be preparing. My family gave trial counsel additional funds to hire psychologist. So for Respondent to claim that trial counsel was not prepared. that was because trial counsel was ill prepared to begin with and came up with the defense of pleading guilty and going to the punishment phase hoping I would agree. Yet as stated in Petitioner's affidavit. why would he take an open plea when the chance of

a life without parole are great and an appeal is non-existent. When Petitioner could of taken the pretrial offer of 50 years. Exhibit A.

MICKEN v. TAYLOR. 535 U.S. 162.165. 122 S.Ct. 1237 at 1243(2002) As used in the remend instruction[of WOOD V. GEORGIA.450 U.S. 261]...we think "an actual conflict of interest" meant precisely a conflict that affected counsel's performance-as opposed to a mere theoretical division of loyalties. These are two well established Supreme Court cases that show the appeal courts arrived at a conclusion contrary to Supreme Court precedents.

Furthermore. Respondent states that trial counsel stated in his affidavit that 6 minutes into the interrogation that the Detective read Petitioner his Miranda Rights. Respondent's exhibit B. Yet during cross-examination by trial counsel the Detective admitted to not reading Petitioner his Miranda Rights until after he got the initial statement. vol. 5RR p.172-173. THOMPSON v. RUNNEL. 621 F.3d 1007(CA9 2010). Miranda claims. [is] governed by the Supreme Court's decision in SEIBERT. 542 U.S. 600. 124 S.Ct. 2601. The plurality and Justice Kennedy's concurrence in that case read together, make clear that a deliberate two-step interrogation strategy can violate Miranda. Specifically, when police deliberately withhold warning until after obtaining an in-custody confession. at 1015-16. When trial counsel made this statement in the affidavit he knew it was a misrepresentation of a fact. and the presumption of correctness should go to Petitioner.

BRADY VIOLATION

Throughout the whole post-conviction proceedings not once has any of the respondents offered to produce original statement the Petitioner gave to police. Once they claim to have a statement but not the original as required by law. Another instance Respondent claim the issue should of been raised on direct appeal and not on habeas review for first time, exhibit C. Now Respondent claims the issue is without merit. yet the original has not been presented as evidence as required by Texas Rules of Evidence, rule 1002, An original writing, recording or photograph is required in order to prove its content...The Federal Courts have a similar rule governing this type of situation, Federal Rules of Evidence: rule 1002, Requirement of the Original.

Petitioner has made this claim from the beginning to trial counsel and trial counsel did nothing to locate the original or to further the defense. ROMPILLA v. BEARD, 545 U.S. 374, 125 S.Ct. 2456,2465-66 (2005).[T]he A.B.A. Standard for Criminal Justice... describe the obligation [of the defense counsel] in terms no one could misunderstand in the circumstances of a case...: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to fact relevent to the merits of the case...The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." When counsel failed to investigate Petitioner's allegations, the conflict of

interest was further inflicted.

All theseineffective assistance of counsel show that counsel did poor preparation for trial and tried to cover it up by getting Petitioner to agree to a open plea. In U.S. v. SANCHEZ-BARRETO 93 F.3d 17, 21(CA1 1996), plainly alleged facts amounting to malpractice, if found to be true...that [attorney]...had pressured him into pleading guilty...in order to "hid lack of preparation" for trial...further alleged attorney had not made even "minimum" efforts to "act as his counsel for defendant" and was only interested in a fee... Had attorney done a partial investigation it would of uncovered that they had tampered with the evidence, a Brady violation and could of moved trial court for mistrial.

JURY TAMPERING

Under DAVIS v. STRACK, 270 F.3d 111, 122 (CA2 2001), We have held that if a petitioner cites to specific provision of the U. S. Constitution in his state court brief, the petitioner has fairly presented his constitutional claim to the state court, Petitioner notified state of the jury tampering claim in state habeas ground 2 as ineffective assistance of counsel for its constitutional violation. When trial counsel was informed of the potential jury tampering he should of asked for a hearing to assess the damage. His further incompetence is evident by not doing his duty as counsel. STOUFFER v. TRAMMELL, 738 F.3d 1205 (CA 2013), When confronted with credible evidence of jury tampering, a trial court has a duty to investigate..."the proper inquiry is whether the unauthorized conduct or contact is potentially prejudicial, not

whether the parties alleged to have tampered with the jury did so intentionally." Yet trial counsel again did nothing, which shows his inattentiveness toward the Petitioner.

PROSECUTORIAL MISCONDUCT

Prosecutorial Misconduct is covered by the Due Process right of the Fifth and Fourteenth Amendments. NAPUE v. ILLINOIS, 360 U. S. 264,269, 79 S.Ct. 1173(1959), "the Supreme Court and the Texas Court of Criminal Appeals have determined that the knowledge requirement is satisfied if the prosecutor knew or should have known the evidence was false." With the knowledge the prosecutor had that they did not have the original copy of the statement that is enough to satisfy the requirement of diliberate deception. Yet they further the knowledge by putting the tampered evidence up on the wall with highlights of the inserted statements that were put in by them.

The prosecution introduced pictures as evidence that were never discussed prior to the introduction of the evidence. BERGER v. U.S., 295 U.S. 78, 55 S.Ct. 629 (1935), He may prosecute with earnestness and vigor... But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction... With the prosecutor never allowing the defense to even see the photos they should of never be allowed into evidence at trial.

They further claim that the police took the pictures, yet no police report was written, no investigation was done or inqu-

iry, nothing to further the allegations, vol. 5RR p.276-77. "More than 30 years ago this Court held that the Fourteenth Amendment can not tolerate a state criminal conviction obtained by the knowing use of false evidence. MOONEY v. HOLOHAN, 294 U.S. 103, 55 S. Ct. 340 [omitted]. There can be no retreat from that principle here. MILLER v. PATE, 386 U.S. 2, 87 S.Ct. 785,788 (1967). A mistrial should of be asked for, also for the entering in of this false fabricated evidence by the prosecution. "Although the State is obliged to 'prosecute with earnestness and vigor,' it is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." BERGER, 295 U.S. at 88. Accordingly, we have held when the state withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process[.] See BRADY, 373 U.S. at 87. CONE v. BELL 556 U.S. 449, 129 S.Ct.1769 (2009).

The Respondent reserved the right to argue the date of the time the Petitioner mailed his 11.07. In HOUSTON v. LACK, 487 U.S. 266 (1988), the U.S. Supreme Court "held that a pro se prisoner's notice...is deemed filed as of the date the notice is delivered to prison officials for mailing." The Fifth Circuit subsequently extended the prison mailbox rule to other pro se prisoners filings, BROWN v. TAYLOR, 829 F.3d 365 (5th Cir. 2016). As Petitioner has no control when the officials process the mail out for mailing it is out of his hands once its put in the mailbox.

APPENDIX

F

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

OFFICIAL BUSINESS
STATE OF TEXAS
PENALTY FOR
PRIVATE USE

PRESORTED
FIRST CLASS

U.S. POSTAGE PITNEY BOWES
ZIP 78701 $ 000.26[8]
02 1W
0001401603 APR 11 2018

4/11/2018

BALLESTEROS, STEVE Tr. Ct. No. 2012-434,714-C WR-65,458-04

The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

76-2

STEVE BALLESTEROS
HUGHES UNIT - TDC # 1911241
RT. 2, BOX 4400
GATESVILLE, TX 76597

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BNAB 76597