22-5216

No. ______________

ORIGINAL

FILED
JUL 15 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Ray Salazar — PETITIONER
(Your Name)

vs.

Bobby Lumpkin Dir., T.D.C.J. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Western District Court-Austin Division
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ray Salazar
(Your Name)

Ramsey I Unit 1100 FM 655
(Address)

Rosharon, TX 77583
(City, State, Zip Code)

281-595-3491 (017)
(Phone Number)

QUESTION(S) PRESENTED

Due Process Clause of the Fourteenth Amendment prohibits criminal prosecution of defendant who is not competent to stand trial. Salazar alleged trial counsels rendered ineffective assistance for failing to timely and adequately conduct an investigation into Salazar's known mental health history. He further alleged his trial counsels rendered ineffective assistance for their awareness but failing to timely advocate for a court appointed psychiatrist to have assisted the defense. He also alleged he was denied effective assistance of counsel on first appeal as of right held by the due process clause of the Fourteenth Amendment. Salazar alleged his counsel withdrew without properly advising any rights to appeal and was without counsel during the 30 day period to file a notice of appeal that was a critical stage of a criminal proceeding. Salazar alleged for trial court failing to hear and rule on motion for new trial, denied him of his equal protection, procedural, and due process, because motion raised issues outside the factual record of mental disorders and competency to have waived jury trial and plead guilty.

Salazar respectfully ask this Honorable Court to take judicial notice of the court proceeding, records, and documents in court's consideration of four questions.

#1. The question is: Did trial counsels render constitutional effective assistance of counsel under the Sixth Amendment in their awareness of Salazar's mental health issues years prior to trial but did not find the importance for timely and adequately full investigation into his mental history until a month before trial?

#2. The question is: Did trial counsels render constitutional Sixth Amendment for effective assistance, for counsels awareness of Salazar's mental disorders but no need to have timely requested and obtained a court-appointed mental health expert to assist by evaluating, examining to determine Salazar's competency prior to trial and as a expert witness for the defense?

#3. The question is: Before withdrawing did counsel advise that with the Courts permission he had a limited appeal and if so did counsel assist in a rapid replacement counsel to appeal ~~with~~ at the critical stage of his criminal proceeding to File a Notice within the 30 days allowed to File For appeal?

#4. The question is: Did the trial judge receive information prior to trial and post-conviction Motion for new trial which, objectively considered, should reasonably have raised a doubt about Salazar's competency and alerted judge to the possibility that Salazar could neither understand the proceeding or appreciate their significance?

LIST OF PARTIES

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

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follow:

Bobby Lumpkin, Dir. T.D.C.J. -C.I.D.

Represented by The State Attorney General

P.O. BOX 12548

Austin, Texas 78711-2548

RELATED CASES

Salazar v. The State of Texas, No. D-1-DC-16-900145-A
In the 299TH District Trial/Habeas Court
Judgment entered March 27, 2020.

Salazar v. The State of Texas, Tr. Ct. D-1-DC-16-900145-A / WR-68,072-03
Court of Criminal Appeals
Judgment entered July 8, 2020.

Salazar v. Director, T.D.C.J.-C.I.D., No.1:20-CV-764-LY
District Court For The Western District of The
Austin Division. Judgment entered July 26, 2021.

Salazar v. Director, T.D.C.J.-C.I.D., No.1:20-CV-764-LY, No.21-50719
United States Court of Appeals For The Fifth Circuit.
Judgment entered April 18, 2022.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts:**

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the 299TH District court appears at Appendix D to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 18, 2022.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 17, 2022, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ________ (date) on ________ (date) in Application No. ___A______.

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

[ ] For cases from **state courts**:

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

[ ] A timely petition for rehearing was thereafter denied on the following date: ________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ________ (date) on ________ (date) in Application No. ___A______.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved, in this case.

U.S. Const. Amend. V: No person shall be held to answer for a capital of infamous crime...without due process of law.

U.S. Const., Amend. VI: In all criminal prosecutions, the accoused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed... and to be informed of the nature and cause of the accusation, to b e confronted with the witnesses against him, to have compulsory process for ob taining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST., Amend. XIV:... No state shall... deprive any person of life, liberty, or property, without due process of law.

Fed. R. Civ Proc. 72(b) Dispositive Motions and Prisoner Petitions

(1) Findings and Recommendation.
(2) Objections. Within 14 days after being served, a paty may serve and file specific written objections to the proposed finding and recommendation.
(3) Resolving Objections. The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.

18 U.S.C. §3006A(e)(1) Upon request- counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application... upon finding, after appropriate inquiry, that the services are necessary and finds perosn is financially unable to obtain them the Court Shall authorize counsel to obtain the services.

28 U.S. §636 (b)(1)(A) a judge may dsignate magistrate judge to hear and determine any pretrial matter pending before the Court..

(B) a judge may also designate a magistrate toconduct hearings, including evidentiary hearings, and to submit to a judge of the ocurt proposed findings of fact and recommendations for disposiiton...

(C) the magistrate shall file his proposed findings and recommendations...

28 U.S.C. §636(b)(1)(c) Jurisdiction, Powers, and Temporary Assignment (B) A judge may also designate a Magistrate judge to conduct hearings, including evidentiary hearings, to submit to a judge of the Court proposed Findings of Fact and recommendation disposition...

28 U.S. §1254 Court of Appeals; Certiorari; Certified Questions Cases in the Courts of Appeals may be reviewed by the Supreme Court by the Following Methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

28 U.S.C. §2253(c)(1)(2) Unless a circuit justice or judge issues a Certificate of appealability, an appeal may not be taken to the Court of Appeals. From - (2) A Certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing the denial of a Constitutional right.

28 U.S.C. §2254(a) The Supreme Court, a Justice thereof, a Circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the U.S.

Texas Code Criminal Procedure ANN. Art. (Hereinafter, Tex. Code. Crim. Proc.) 46B.004 Raising Issue of Incompetence To Stand Trial (a)(b)(c); (a) Either party may suggest by motion, or the trial Court may suggest on its own motion, that the defendant may be incompetent to stand trial...

(b) If evidence suggesting the defendant may be incompetent to stand trial, comes to the attention of the Court, the Court on it's own motion SHALL suggest defendant may be incompetent to stand trial.

(c) On suggestion that the defendant may be incompetent... the Court shall determine by informal inquiry whether there is some evidence from any source that would support a finding that defendant may be incompetent to stand trial.

Tex. Code Crim. Proc. Ann. Art. 46B.005. Determining Incompetency To Stand Trial. (a) If after an informal inquiry the court determines that evidence exists to support a finding of incompetency, the court SHALL order an examination under Subchapter B' to determine whether the defendant is competent to stand trial in a criminal case.

Tex. Code Crim. Proc. Ann. Art. 46B.021. Appointment of Experts. (a) On a suggestion that the defendant may be incompetent to stand trial, the court may appoint one or more disinterested experts to

Tex. Code Crim. Proc. Ann. Art. 26.04 Procedures For Appointing Counsel (j) An attorney appointed under this article SHALL: (2) represent the defendant until charges are dismissed, the defendant is acquitted, ... "Appeals are exhausted," ... (3) With respect to a defendant not represented by other counsel, Before Withdrawing as counsel for the defendant after a trial or the entry of plea of guilty: (A) Advise the defendant of the defendant's right to file a motion for new trial and "A Notice of Appeal"; (B) If the defendant wishes to pursue either or both remedies described by paragraph (A), Assist the defendant is requesting the prompt appointment of replacement counsel; (C) If replacement counsel is not appointed promptly and the defendant wishes to pursue an appeal, file a timely notice of Appeal:

Texas Rules Appellate Procedure (Herein after T.R.A.P) Rule 21.2 When Motion For New trial required. A motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record.

Tex. R. A. Proc. Rule 25.2 Criminal Cases. (a) Rights to appeal (B) after getting the trial court's permission to appeal,

Federal Rule Appellate Procedure (F.R.A.P.) 40 (a) Limited nature of Petition For Rehearing a petition For rehearing is intended to bring to the attention of the panel claimed errors of Fact or law in the opinion. It is not used For reargument of the issue previously presented or to attack the court's well-settled Summary Calendar procedures. Petitions for rehearing of panel decisions are reviewed by panel members only

Fed. R. Civ. Proc. 15(a) Leave To Amend Complaint

* Tex. Code Crim. Proc. Ann. Art.

Art. 46B.001 (1) "Adaptive behavior" means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group. (9) "Local mental health authority" has the meaning assigned by Section 571.003, Health and Safety Code.

STATEMENT OF THE CASE

On July 16, 2018, in the 299th district court of Travis, County, Texas; Salazar plead guilty to the Charge of Sexual assault-habitual and in plea was a waiver of his appeal in the plea bargain. Salazar pled guilty under habitual offender penal Code, thus Sentencing Salazar to 30 years prison time. No appeal was taken. Salazar Filed his State habeas Corpus prose May 22, 2019. The habeas Court without court's independent case in Support and without Salazar's Motion request For Full and Fair evidentiary hearing. The habeas Court adopted the State's proposed Findings of Facts and Conclusion of law as it's own on March 27, 2019 and deny habeas. See App. (G).

The Texas Court of Criminal Appeals, denied habeas on July 8, 2020. on the Findings of the trial Court, and without written order, ~~on See App(~~) For Tr. Ct No. D-1-DC-16-900145-A, No. WR-68,072-03. See App. (F). Salazar Filed Filed Motion For leave to proceed In Forma Pauperis and was granted along with his §2254 petition for writ of habeas Corpus. The U.S. District Court Judge Lee Yeakle For the Western District of Texas, Austin division referred Salazar petition to Magistrate Judge Andrew Austin. The Magistrate Judge Submitted his report and recommendation for the disposition of the Case on May 28, 2021. Judge Yeakle without conducting a review of Salazar objections nor reviewing Magistrate's report Factual Findings for Clear error or it's legal Conclusion de novo or Mixed question of law and Fact adopted Magistrate's report on July 26, 2021 and denied habeas and Certificate of appealibility. See App. (B).

Salazar timely Filed a Notice of appeal as well as his request for C.O.A., to the Fifth Circuit Court of Appeals New Orleans, LA on October 26, 2021. On April 18, 2022, the Fifth Circuit Court of Appeals denied Salazar's application For a Certificate of Appealibity. Salazar Filed leave to petition For rehearing and/or rehearing enbanc with brief in Support, on May 6, 2022. The Fifth Circuit invoked it's rule 27.5 authorizing the Clerk to dispose his petition as "untimely" May 17, 2022. Salazar Filed Motion to expedite appeal May 31, 2022. The Fifth Circuit denied on June ~~8~~, 13, 2022.

STATEMENT OF THE CASE

On October 22, 2015, Salazar was charged and arrested for alleged sexual assault. Officer Robert Rangel #7228 of the Austin Police Dept., was the only officer Salazar directly spoke to on the day of alleged assault. Officer Rangel wrote a detail police report that reveals evidence of Salazar's strange and irrational behavior. See App (P) Attorney Work Product / Police Report.

At the police station during intake a nurse notice Salazar very emotional and distressed and talk of dying. Salazar was placed for observation without clothes in a padded cell. On October 26, 2015, Dr. Bobby MacPhearson, noted Salazar's behavior for possible mental health disorders and prescribed ZXprexa 15mg and Gabapetin 300mg, and for regular monitoring and counsel check-up. These are in the Travis County medical records reflecting Salazar was receiving psych medications, counseling, treatment from October 22, 2015 thru July 19, 2018. The records would also indicate that months prior to trial Salazar stop taking his medications.

Salazar's family had informed trial counsels years prior to July 18, 2018, trial date, that he had a history of mental health issues diagnosed by a psychiatrist and was receiving treatment thru MH.MR. out-patient services of Travis County, Texas. Salazar's own trial counsel stated in her affidavit that "he was very depressed, emotional, and crying" during trial proceedings. On July 18, 2018, suffer from a lack of medication and detached from reality Salazar waived his trial, plead guilty, and waived appeal. See, Ex parte Hagans, 558 S.W. 2d 457, 462 (Tex. Crim. App. 1977) (The State overlooks the principle that, unless competent, a defendant cannot knowingly waive his right to trial and plead guilty).

Salazar's Post-Conviction proceeding were filed on May 22, 2019, App. with memorandum of law and exhibits in support. On August 7, 2019, a motion was filed for full and fair evidentiary hearing. Court records show it was received and filed by the district clerk on August 14, 2019 and submitted to the court for a hearing and ruling. The record is silent the habeas court conducted it's ministerial duty to hear and rule on motion. And by operation of law the motion was never heard, thus deny his procedural due process.

See, Murray v. Earle, 405 F. 3d 278, Cert. denied 126 S.Ct. 749, 163 L.Ed 2d 573 ("Discretionary Function," For whose performance a government official May be entitled to official immunity From Suit under Texas law, involves personal deliberation, decision, and judgment, and is to be distinguished From "Ministerial duty," which requires rote obedience to orders or performance of Function to which the actor has no Choice).

On June 18, 2019, the habeas Court ordered For both trial Counsels Erin Shinn and Jason Jarvis to Submit affidavits pursuant to Article 11.07 §3(d) on the question whether Counsels rendered ineffective assistance. Defense Counsel Mrs. Erin Shinn timely submitted hers within the 30 day order on July 17, 2019. Counsel Jason Jarvis submitted his 125 days past the order on November 8, 2019, and was accepted by the Court. The State was afforded 300 days to Submit and File it's proposed Findings of Fact and Conclusion of law. On March 20, 2020, and the habeas Court Fully adopts State's Findings of Fact and Conclusion of law as it's own on March 27, 2020 and denying habeas corpus. See App. (G). The Court of Criminal Appeals, in Tr. Ct. No. D-1-DC-16-900145-A, WR-68,072-03, by white Card denied without written order the application For writ of habeas corpus "On the Findings of the trial Court", without a hearing on July 8, 2020.

Salazar Filed on July 17, 2020, his habeas Corpus action Under 28 U.S.C §2254. Salazar diligence to develop the Factual record on matters that were outside the record Filed a Motion For a Full and Fair evidentiary hearing in the Federal district Court on February 22, 2021. On February 26, 2021, by text only orders a general denial citing Rules Governing §2254, Rule 8. See, Hall v. Quarterman, 534 F. 3d 365, 367-69 (5th Cir.(Tex.)(2008) (Petitioner entitled to evidentiary hearing because State did not provide Full and Fair hearing at which to develop Facts); See also, James v. Brigano, 470 F. 3d 636, 642, (6th Cir. 2006) (Petitioner entitled to evidentiary hearing because State trial judge, Not petitioner, erred in not Fully developing Factual record). See also, Drake v. Portuondo, 321 F. 3d 338 (2nd Cir. 2003) (... Drake should be permitted to develop the record Further. "Where specific allegation before the Court show reason to believe that the petitioner May, if the Facts are Fully developed,

be able to demonstrate that he is... entitled to relief, it is the duty of the Court to provide the necessary Facilities and procedure For an adequate inquiry").

As the United States Supreme Court noted in Townsend v. Sain, 372 U.S. 293, 319 (1963) (ordinarily [the Complete State-Court] Record including the transcript of testimony, the pleadings, Court opinions, and other pertinent documents-is indispensable to determining whether the habeas applicant received a full and fair State-Court evidentiary hearing resulting in reliable Findings). Under Townsend, Salazar must First "allege Facts which, if proved, would entitle him to relief." Id., at 312, 83 S.Ct. 745.

Salazar meet the Factors of Townsend: 1) the State Factual determination is not Fairly supported by the record; 2) the Fact-Finding procedure employed by the State Court was not adequate to afford a Full and Fair hearing; 3) there is a Substantial allegation of Newly discovered evidence; 4) the Material Facts were not adequately developed at the State-Court hearing); 5) For any reason it appears that the State trier of Fact did not afford the habeas applicant a Full and Fair Fact hearing.).

Salazar asserts the Magistrates report and recommendations of its review of the paper evidence, the district court failed to account for several Clearly erroneous Findings of the State Court's adoption. The errors in Fact Finding and Credibility determination under the Tex. Code Crim. Proc. Ann. Art. 46B.001(9) local Health authority has meaning assigned by §571.003 Health + Safety Code, Art. 46B.003, art. 46B.004, and Art. 46B.021. These State laws and procedures protect a defendant with mental health disorders and protected by the Due Process Clause of the 14th Amendment. U.S. Constitution. Salazar asserts for the reason stated above the Federal district Court should have resolved by Rule 8(a) Governing §2254. IF addressed in a evidentiary hearing might have highlighted the unreasonableness of the State and Federal Court's determination and adoption of State's Findings and Conclusions in light of the evidence after Fully developing the Factual record.

See, Hall v. Quarterman, 534 F.3d 365 (5th Cir. 2008) (In reviewing the paper evidence, the district Court Failed to account For Several Clearly erroneous Findings of the State Court. The errors in Fact Finding and Credibility determination under Tex. Health + Safety Code Ann. §591.003 in the State Court should have been resolved by an evidentiary hearing in the district court under §2254(e)(2) and Rule Governing

§2254 Case U.S. District Court Rule 8(a)... if addressed in a evidentiary hearing, might have highlighted the unreasonableness of the State Court's determination of the Facts and entitled Hall to habeas relief).

On May 28, 2021, Magistrate judge submitted his report and Recommendation For district judges review. Salazar assert the report mirrors General Findings of the State habeas Court's adopted Findings and Conclusions. Salazar Filed his objections on June 18, 2022, as shown in his declarations and Certificate of Service. See App. (C). The Federal district judge in Cause No. 1:20-CV-764-LY entered it's order on April 18, 2022. "The Court is of the opinion that the objections do not raise issue that were not adequately addressed in the report and recommendation. Therefore, Finding No error, the Court accepts and adopts the report and recommendation Filed in the Case For substantially the reasons stated therein," Denied habeas and C.O.A.

Salazar asserts he was not afforded any Corrective procedures to amend or alter his Complaint under Fed. R. Civ. P 15(a). See, Lonestar Ladies Inv. Club v. Schlotzskys Inc., 238 F. 3d (5th Cir. (Tex) 2001) (denying leave to amend Complaint under Fed. R. Civ. P. 15(a), absent articulable reason, is not an exercise of discretion, but rather an "abuse of discretion"). See also, Haines v. Kerner, 404 US 512, 30 L. Ed. 2d 652, 92 S. Ct. 594, reh den 405 US 948, 30 L. Ed. 2d 819, 92 S. Ct. 963 ("A Complaint should not be dismissed For Failure to State a Claim unless it appears beyond doubt that the plaintiff can prove no set of Facts in support of his Claim which would entitle to relief... allegations of the pro se Complaint, which we hold to less stringent standards than Formal pleadings drafted by lawyers, it appears. Id. at 404 U.S. 521).

Salazar timely Filed his objections therefore district judge's ministerial duty to have reviewed Magistrate's report Factual Findings For clear error and its legal Conclusion de novo was triggered by 28 U.S.C.A. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b). ~~The~~ The record is silent that district judge Conduct his independent assessments. See, Cleven v. Mid-America Apartment Communities, Inc., 328 F.R.D. 452, stay pending appeal denied (W.D. Tex. 2018 WL 7077068) (Parties are entitled to de novo review of the portions of the U.S. Magistrate Judge's report to which a party objects: 28 U.S.C.A. §636(b)(1)(C) and Fed. R. Civ. P. 72(b).

See also, Papa v. Thaler, 565 U.S. 1162, 181 L. Ed. 2d 987 (5th Cir.(Tex) 2011) ("In reviewing State Courts denial of habeas relief, For purposes of deciding whether to grant Federal habeas relief on grounds previously rejected by State Court, Federal Court examines Factual Findings For Clear error, and review do novo question of law and Mixed question of law and Fact).

Salazar Filed petition For rehearing and/or rehearing en banc with * Suggestions in Support. Salazar received the Federal Court's order off April 18, 2021 From the Prison legal mail on April 26, 2022. The U.S. Fifth Circuit Court of Appeals in NO. 21-50719; U.S.D.C. No. 1:20-CV-764 invoked it's Rule 27 allowing authorization For Clerk to dismiss as "Untimely" without any references to specific records when it was post mark stamp or the Civil docket Sheet to explain Clerk's determination For "untimelyness"? Salazar explained in his "Motion to expediate appeal", on May 31, 2022, that From the Fifth Circuit to the Ramsey I Unit mailroom staff and For Salazar to receive an official lay in to pick up and sign For his legal mail took 8 calendars days off the 14 plus the day after under FRAP Rule 40(a). Salazar in his Motion to expediate appeal * asserted good Faith, diligence, and the Four Factors For excusable neglect held by Pioneer Inv. Service Co. v. Brunswick Associates Ltd. Partership, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed. 2d 74, 24 Bankr. Ct. Dec. (CRR) 63, 28 Collier Bankr. Cas. 2d (MB) 267, (1993). *Petition (For rehearing* and/or rehearing en banc See App. (D) For Motion to Expediate See App. (E).

The questions presented were not allowed to Fully develop in the Factual record or were unreasonably denied in ligh of the Facts of the evidence and unreasonable determination of Supreme Court preceding case law.

Salazar's First question is: Were Counsels ineffective For their awareness of his mental health disorders or any evidence prior to trial? If so would it be Reasonable or a strategic decision not to pursue or timely and adequately investigate after a credible source into his mental health history?

Petitioner has asserted he was denied effective assistance of Counsel For Failing to an adequate investigation of his mental health history or offer evidence of mental health disorders prior to trial or as mitigating evidence during the punishment phase of trial. Salazar and his Family had informed his trial counsel Darla Davis and Erin Shinn From their First meetings Salazar's had a mental health history and treatment through MH.MR.. MH.MR. records would indicate at age 12 he was evaluated by a psychiatrist and diagnosed with A.D.D. and depression. And up to adulthood was treated with prescribed medications and psychological counseling thru MH.MR. Out-Patient Services of Travis County, Texas.

See, Strickland v. Washington, 466 at 491, 80 L.Ed 2d 674, 104 S.Ct. 2052 (... Counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary.)

Salazar asserted at trial neither of his defense Counsels presented any type of trial strategy to show that his alleged offense was possibly influenced by his mental health disorders. The record of trial Counsel Erin Shinn affidavit stated that, "in her observation he did not show signs of mental issues nor did she believe he was suffering From mental illnesses or insane at of the offense. The State and Federal Courts have Found that Counsels determination not to investigate was not unreasonable and within the professional norm.

Salazar has asserted that courts have held that for counsels awareness of their clients mental health disorders but failed to investigate fell below the reasonable norm of professionalism and ineffective assistance of counsel. There was no reasonable professional or tactic decision to support his trial counsels decision not to have adequately investigated history of his mental issues. When competency was not determined. There was mounting evidence of Salazar mental medical records, but trial counsel failed to ~~subpoena~~ Subpoena for an adequate defense or mitigating evidence throughout trial or punishment phase. See, Davis v. Alabama, 596 F. 2d at 1217 (5th Cir. 1979) ("A defense attorney must be prepared to investigate and develop evidence on behalf of his client." It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and to a degree of guilt or penalty. An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense).

Salazar requested his case file from trial counsel Erin Shinn. In her letter dated March 7, 2019, states she is giving me everything legally she could give. See App. (O) Reply Letter. There was evidence that trial counsel Erin Shinn had be investigating Salazars ~~[illegible]~~ medical records from the county jail of his psych records, and interviewing Dr. Bobby MacPherson for his assement of bipolar depression medications and side-effects. Those handwritten notes on these medical records are computer date July 2016. See App. (Q) Attorney's review of medical records in 2016.

There is further evidence found from the case file labled "Attorney Work Product Confidential." It was a police report dated October 22, 2015, day of the offense. Officer Robert Rangel #72 report and documentation of Salazar's irrational and strange behavior and talk of suicide. See App. (P) Attorney Work Product. Also see Motion for Continuance, that counsels states without "they would render ineffective assistance of counsel". See App. (H) Motion for Continuance. Also see Motion for new trial, stating Salazar was suffering from his mental disorders. See App. (~~N~~ I) Motion for New Trial - Affidavit. See App. (J) T.D.C.J. Medical Record

Salazar asserted that for counsels awareness but failure to timely or adequately investigate his mental health history was deficient performance for the following: 1) denied mental history to be put into the factual record; 2) unreasonable decision without any investigation into known history without supporting facts to support their professional judgment; 3) failed to investigate his mental status at the time of offense; 4) failed to subpoena his M.H.M.R. or county jail medical records to induce to the courts for court-appointed psychiatrist; failed to determine competency. Salazar's also asserted that deficient performance caused prejudice to his defense for: 1) depriving Salazar a documented an current evaluation by a mental health expert and determine competency; 2) depriving Salazar his only opportunity to present for the factual record and appeal or evidence of his diminished capacity; 3) preventing a viable insanity defense; 4) precluded developing any mitigating evidence for trial or punishment phase.

See Roberts v. Dretke, 381 F.3d at 498 (5th Cir. 2004) (To establish a claim of ineffective assistance of counsel a petitioner must establish that his trial counsel provided deficient performance, such that it was below an "objective standard of reasonableness", and that he was prejudiced by that deficient performance, such that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable"). Strickland v. Washington, 466 U.S. 668, 687-88, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) ("[A] particular decision not to investigate must be directly assessed for reasonableness, in all circumstances, applying a heavy measure of deference to counsel's judgments". Id. at 691. See also Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." Id. Trial counsel provides deficient performance if he fails to investigate a defendant's medical history when he has reason to believe that the defendant suffers from mental health problems); See also, Profit v. Waldron, 831 F.2d 1245, 1248-49 (5th Cir. 1987)

("It must be a very are circumstance indeed where a decision not to investigate would be "reasonable after counsel has notice of the client's history of mental health problems") See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981) (Holding that counsel has duty to obtain medical records and speak with treating physicians). See, Powell v. Alabama, 287 U.S. 45, 58, 53 S.Ct. 55, 60, 77 L.Ed. 158 (1932) ("To do no investigation at all on an issue that only implicates the accused's only defense, but also his present competency, is not a tactical decision. Tactical decision must be made in the context of a reasonable amount of investigation, not in a vacuum. "It is not enough to assume that counsel... thought there was no defense, and exercised [his] best judgment... Neither [he] nor the Court could say what a prompt and thoroughgoing investigation might disclose as to the facts").

Salazar ask the question under the alleged deficient performance of counsel that followed with prejudice to his defense, and ~~for~~ supported by the record. Would this Court ~~today~~ believe that Salazar received a fair trial and right to effective assistance of counsel under his 6th Amendment right and that his Due Process Clause of the 14th Amendment was conducted in his pre-trial, trial, and post-conviction?

The second question did Salazar's trial counsels were aware or had knowledge he suffered from mental health disorders, but did not find the importance of significance to acquire a mental health expert to assist the defense? Or have determined competency to stand trial as the lower Court's found that his due process was adequately conduct?

Salazar has demonstrated the Facts thorough Court and Medical records that his trial counsel awareness of his biupolar depression, treating physicans, counselors, and prescribed medication. Trial Counsel Erin Shinn stated in her affidavit that "She thoroughly reviewed his county jail medical records and found no evidence that suggested mental illness or insanity defense". See App. (Q) Handwritten Notes. Counsel is taking notes as she discusses Salazar's undetermined bipolar depression by Dr. Bobby MacPherson. Also noting his medications, their treatment, and side-effects and the computer generated date for July 2016. The First document that was in his case file was the "Confidential Attorney Work Product". The Police Report dated October 22, 2015, by Officer Robert Rangel of the Austin Police department describes in detail of Salazar's irrational and strange behavior. See App. (P) Attorney Work Product. Salazar talks about "a talking rat ask for help". While in the county jail Salazar was confined in the psych wing and was given Zeprexa 15m and Gabapentin 300mg treatment with antipsychotic medication. See App. (R)

On June 12, 2018, after a busted jury selection Salazar's lead counsel would not be able for July 18, 2018 next jury selection and trial date. On that same day Co-counsel Erin Shinn became lead counsel. She orally requested for a continuance for the ground she had recently become aware of Salazar's bipolar depression and would need to investigate his mental health history and acquire a court-appointed mental health expert for assistance". On June 12, 2018, prior to trial by a credible source that defendant suffers from mental illness, that responded by telling counsel request must be on a motion and then court will consider on the day of trial. This can be found in records and in the affidavits from Erin Shinn.

The Court records indicate that Salazar was indigent and appointed defense Counsel by the Court. His County jail medical records would have demonstrated his mental disorders and suicide attempts would have been a Factor in his Criminal Case and the punishment he will suffer. Salazar has shown that his trial Counsel awareness years prior to July 18, 2018 trial, but Failed to timely acquire a Court appointed psychiatrist to assist the defense. And Failure to have determined that a insanity defense was viable and timely file Notice of Intent to offer evidence to Court. See, Fessel , 531 F. 2d at 1278-79 (5th Cir.

Fessel argued his Counsel Failed to file Motion For an indigent defendant For Court-appointed psychiatrist and that Failure of his attorney to prepare an insanity defense by showing his probable incompetence at the time of the offense violated his 6th Amendment right to effective assistance of Counsel. Fessel Cites his attorney's Failure to Move, Under 18 U.S.C. § 3006A(e) For Court-appointed psychiatrist to assist in the preparation of an insanity defense. This Failure, Fessels Contends, deprived him of psychiatric testimony necessary to the preparation of his defense, and thus Fell below the minimum level of representation guaranteed by the 6th Amendment. This Court has repeatedly stressed the "particularly critical interrelation between expert psychiatrist assistance and minimally effective representation of Counsel" Fessel, 531 F. 2d 1279 (Quoting "United States v. Edwards, 488 F. 2d at 1163).

Salazar asserts For counsels deficient performance For Failing to timely request and acquire a Court appointed psychiatrist For the following: 1) Counsel's awareness years before trial but Failed to act depriving the assistance of a psychiatrist; 2) Competency had become an issue but Failed to move under 18 U.S.C. § 3006A(e); 3) Failed to Follow the procedure mandated by Tex. Code Crim. Proc. Ann. Art. 46B.004, Raising the Issue of Competency To Stand Trial, Art. 46 C. 051, Notice of Intent to Raise Insanity Defense; The prejudice caused the Following: 1) Deprived Salazar an expert witnesses For the defense; 2) Deprived of raising a viable Insanity Defense; 3) Allowed the State's criminal prosecution of a defendant who was not Competent to Stand trial; 4) deprived Salazar his Due Process Clause of the 14th Amendment.

Salazar asserts that the record shown: was indigent defendant; 2) Mental disorders would have been a Factor in his criminal case; 3 the punishment it might suffer. These are the conditions that trigger Ake's application are present. See, Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed. 2d 53, 105 S.Ct. 1087 n.6 (The mental state of an indigent criminal defendant at the time of the offense is a significant factor in his defense, so as to entitle to the assistance of a court-appointed psychiatrist as a matter of Due Process, where (a) the defendant's sole defense is that of insanity). See also, Medina v. California, 112 S.Ct. 2572 (1992) (It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial).

Salazar ask the question after reviewing the records, documents, and Medical records. Would this Court Find that Salazar received a Fair trial and received effective assistance of Counsel as the lower Court's have determined? Or that Salazar received the rights protected by the Due Process Clause?

Salazar has argued he was denied of effective assistance of Counsel for the abandonment of his Counsel during the 30 day period for filing his Notice of Appeal pursuant to Tex. R. App. Proc. 25.2(B)(3) and Tex. Code Crim. Proc. Ann. Art. 26.04(j)(2)(3)A. to challenge jurisdiction defects and voluntariness of his plea. Salazar raises the question after review his argument and records would still find trial counsel rendered effective assistance of Counsel on first appeal as of right held by the due process clause of the Fourteenth Amendment?

Salazar has asserted that after his trial and conviction he requested his Counsel to appeal. His trial Counsel informed him that accepting and pleading guilty that he also waived all appealable rights. He only option was a Motion For New trial. Counsel advice was erroneous in that he waived all rights to appeal and Counsel further erroneous advice is if the Court denied his Motion For New trial that too was unappealable due to the waiver of appeal.

See App (I) Motion For New Trial Letter. On July 20, 2018 Motion For New trial was filed along with counsel motion to withdraw. ON July 25, 2018, the Motion was denied without a hearing nor ruling and the record is silent of any objections from defense counsel for abuse of discretion. Before withdraw counsel failed the procedure mandated by Tex. Code Crim. Proc. Ann. Art. 26.04 (j) (2) (3) A. Procedure for Appointing Counsel: (j) an attorney appointed under this article shall: (2) represent the defendant until charges are dismissed, the defendant is acquitted, "Appeals are exhausted"... (3) with respect to a defendant not represented by other counsel, "Before withdrawing as counsel for the defendant after a trial or the entry of a plea of guilty: (A) Advise the defendant of the defendant's right to file a Motion For New trial and "a Notice of Appeal"; (B) if the defendant wishes to pursue either or both remedies...(A), assist the defendant in requesting the prompt appointment of replacement counsel; and (C) if replacement counsel is not appointed promptly and the defendant wishes to pursue an appeal, file a timely notice of appeal.

Salazar asserts he requested his attorney to appeal but was erroneously advised he waived all appeal rights, thus trial counsel failing his request to appeal and responsibility after counsel withdrew. Therefore, Salazar did ask for appeal but was refused by his trial counsel, and without any advice from any counsel was left without counsel to file a timely Notice within the 30 day period to do so. Salazar was abandon by his trial counsel during a critical stage of criminal court proceedings. Salazar did have a right to appeal under Texas Rules of Appellant Procedure 25.2 (B) (3); with the court's permission. The record is silent that trial counsel followed any of procedures stated above nor did ask for Court's permission after his Motion For New trial was denied. Salazar states under the Tex. Rule. Appellant Proc. 25.2 (B) does not preclude him from challenging the voluntariness of his plea on appeal. See, Villanueva v. State, 977 S.W. 2d 693 (Tex. App.- Fort Worth, 1998, no pet) (the court stated that because voluntariness is neither jurisdictional nor a pretrial matter, an appellant may only challenge the voluntariness of the plea when he first obtains permission from the Court).

Salazar has asserted and demonstrated from the post-conviction proceedings and the evidence of his trial counsel's letter for new trial of the erroneous advice and the issue of his plea was involuntarily. This insert comes from the State Counsel for Offenders (S.C.F.O.). "The Courts have found when an attorney gives poor advice to a client, or else fails to give advice to a client, the attorney causes two fold damage to the validity of a subsequently entered plea. On one hand, ineffective assistance of counsel may invalidate the defendant's plea under the 14th Amendment which, under principles of Due Process requires that pleas be entered knowingly and voluntarily. On the other hand, the plea might be vacated because the attorney's deficiency violated the client's 6th Amendment right to effective assistance of counsel. See, Ex parte Moussazadeh, 361 S.W. 3d 684 (Tex. Crim. App. 2012) (A guilty plea is not knowing or voluntary if made as a result of ineffective assistance of counsel); See also, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969) (holding that a plea must be knowingly and voluntarily made); See also, Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985) (Noting that whether a plea is voluntary depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases).

Salazar stresses the point that he requested counsel to appeal, and was given erroneous advice that all rights to appeal were lost to the waiver. And for counsel's abandonment Salazar was "denied of right to counsel", during a critical stage of his criminal proceedings. See Chapman v. United States, 469 F. 2d 634, 636 (5th Cir. 1972) ("Counsel is obliged to protect his client's right to appeal"). See also, Garza v. Idaho, 139 S.Ct. 738; 203 L.Ed. 2d 77; 2019 at 139 S.Ct. at 741 (... "prejudice is presumed" in certain Sixth Amendment contexts," ibid., such as when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken," Flores-Ortega, 528 U.S., at 484, 120 S.Ct. 1029, 145 L.Ed. 2d 985. (b) This case hinges on two procedural devices: appeal waivers and notice of appeal. No appeal waiver serves as an absolute bar to all appellate claims. Because a plea agreement is essentially a contract, it does not bar claims outside its scope. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself was knowing and voluntary.

The filing of a notice of appeal is "a purely ministerial task that imposes no great burden on counsel." Flores-Ortega, 528 U.S., at 474, 120 S.Ct. 1029, 145 L.Ed. 2d 985. (c) Garza's attorney rendered deficient performance by not filing notice of appeal in light of Garza's clear requests. (d)... Because Garza retained a right to appeal at least some issues despite his waivers, he had a right to a proceeding and was denied that proceeding altogether as a result of counsel's deficient performance. That he surrendered many claims by signing appeal waivers does not change things. First, the presumption of prejudice does not bend because a particular defendant seems to have had poor prospects. See, e.g., Jae Lee v. United States, 582 U.S. __, __, 137 S.Ct. 1958, 198 L.Ed. 2d 476. Decision (203 L.Ed. 2d 77) Presumption of prejudice applied -- where accused instructed his trial counsel to file notice of appeal but trial counsel decided not to do so because accused's plea agreement include appeal waiver -- regardless of whether accused signed waiver.

The question is not of the trial court abusing it's discretion for denying a hearing and ruling on Motion For New trial. The real question is: Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about Salazar's competency and alerted her to the possibility that Salazar could neither understand the proceedings or appreciate their significance?

The Standard of review Under Texas Rules of Appellate Procedure (T.R.A.P.) 21.2: "When Motion for new trial required states "A motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record." 1) A defendant has a right to a hearing on a Motion For New trial when the motion raises matters that cannot be determined from the record; 2) Court abuses its discretion in failing to hold a hearing when motion for new trial raises matters that are not determinable from the record; 3) If a defendants Motion for new trial and supporting affidavit are sufficient, a hearing on the motion is mandatory. Torres v. State, 4 S.W.3d 295 (Tex. App.- Houston [1st Dist] 1999).

In Texas, a Convicted defendant may Move in the trial Court For a new trial in order to develop the record For a Claim to be raised on direct appeal, including For a claim of ineffective assistance of trial Counsel. See, Reyes v. State, 849 S.W. 2d 812, 816 (Tex. Crim. App. 1993) (en banc). Motions For a new trial that raises issues not determinable From the record, "including allegations of ineffective assistance of Counsel, "May require an evidentiary hearing." Id. In those Cases, however, the motion Must "be Supported by affidavit... Showing the truth of the grounds of attack." See, Trevino v. Thaler, 113 S. Ct. 1911, 1918-19, 185 L. Ed. 2d 1044 (2013) (Citing Ex parte Torres, 943 S.W. 2d 469, 475 (Tex. Crim. App. 1997), also Robinson v. State, 16 S.W. 3d 808, 810-11 (Tex. Crim. App. 2000)). A defendant has a right to a hearing on a Motion For new trial when the motion raises matters that Cannot be determined From the record. Reyes, 849 S.W. 2d at 815; Bruno, 916 S.W. 2d at 8. The trial Court abuses it's discretion in Failing to hold a hearing when motion raises matters that are not determinable From the record.

"A defendant need not establish a prima Facie Case For a Cognizable ground raised in Motion For New trial; he must assert only reasonable grounds For relief that are Not determinable From the record. "The purpose of the hearing is For defendant to develope the issue raised in a Motion For New trial." Jordan, 883 S.W. 2d at 665; Bruno, 916 S.W. 2d at 8.

Salazar will demonstrate From the Court records that on June 15th, 2018, trial counsel orally requested For a Continuance on the grounds that defense counsel had recently become aware of Salazar's bipolar disorder. In Counsel's Motion For Continuance States: ..."On the eve of trial (June 15th, 2018) undersigned counsel learned that the defendant has been previously diagnosed with bipolar disorder." "The defense will need additional time to procure a Complete Mental health history via medical records, diagnosis, etc., and Consult with an expert to best utilize said information." See App. (H) Motion For Continuance. The trial Court received ~~[illegible]~~ From a Credible Source that Salazar Suffered From bipolar disorder.

By trial counsel raising issue of bipolar disorder the Court abused it's discretion because Art. 46B.004. Raising issue of incompetency to stand trial had been triggered by such a request. See, Tex. Code Crim. Proc. Ann. Art. 46B.004 (a) Either party may suggest by motion, or "the trial court may suggest ~~on~~ its own motion, that the defendant may be incompetent to stand trial. (c) On suggestion that the defendant may be incompetent to stand trial, the Court SHALL determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial. (c-1) "A suggestion of incompetency is the threshold requirement for an informal inquiry under subsection (c) and may consist solely of a representation from any credible source that the defendant may be incompetent. See, Rodriguez v. State, 329 S.W. 3d 74, 78 (Tex. App.-Houston [14th Dist.] 2010, no pet.). "We review a trial Court's implicit decision to not hold a sua sponte informal inquiry for an abuse of discretion. A defendant has the right to be competent throughout his entire trial, which includes sentencing. Thus, the Texas competency statutes allow competency to be raised, by either party or the judge, at any time before sentence is pronounced... Accordingly, when determining if the trial Court should have [held a competency hearing], we do not typically consider evidence brought to the trial Court's attention for the first time after sentencing. Rather, we consider only the evidence actually known by the trial Court up until the point of sentencing." See also Lindsay v. State, 310 S.W. 3d 186, 188-89 (Tex. App.-Amarillo 2010, no pet.). But see Lasiter v. State, 283 S.W. 3d 909, 926 (Tex. App.-Beaumont 2009, pet. ref'd (New Evidence on Competency May be Considered in Motion For New Trial).

Salazar ask the question: did he met the requisites for a Motion For New trial that are: 1) Affidavit: 2) credible grounds; 3) issues that were outside the record? Records reflect his Motion For New trial ~~Contend~~ contained the following: 1) Affidavit; 2) credible ground for incompetency; 3) the medical records of his mental health history, diagnoses, and medications were outside the record. Salazar argues that not only did the trial Court failed it's ministerial to hear and rule abusing it's discretion but violated Salazar's fundamental right to a fair trial was a egregious 14th Amend. Violation and structural error by the trial court.

Salazar asserts the purpose for the Motion For New trial was to allow the Factual record that Salazar does suffer from a clinically ~~regon~~ recognize Mental health disorder For bipolar depression was off his medications months prior to trial and involuntarily, unknowingly, or intelligently waived his trial, and plead guilty while sufferring from his mental illness. The question is: Did the trial judge receive information prior to trial or post-convictions Motion For New trial which, Objectively considered, Should reasonably have raised a doubt about ~~defend~~ Salazar's Competency prior to trial or sentencing and alerted her to the possibility that Salazar could neither understand the proceedings or appreciate their significance?

Salazar has demonstrated from the court proceedings and record that the State denied Salazar an indigent defendant his equal protection and adequate State procedures For a defendant sufferring mental illness. The hearing and ruling For motion and possibily granting would have corrected a "structural error" For egregious violation of the right to a Fair trial. "State procedures Must be adequate to insure the right to be tried while Competent." Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 2d 815 (1966). "A Court Must Sua Sponte Conduct an inquiry into a defendant's Mental Capacity if the evidence raises a bona fide doubt as to the defendant's competency at that time. Id., Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed. 2d 103 (1975).

Salazar asserts records show that trial court judge not only denied his Constitutional due process but was aware of his mental disorders and allowed and participated in the ~~con~~ trial, Conviction of a defendant who was mentally incompetent. See, Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L. Ed. 835 (1956) ("Constitutional due process requires that trial of an accused May be conducted only when he is legally Competent."). Salazar ask the question: Did the trial Court abused it's discretion For court's awareness of mental health issue that we not allowed to fully develop For the Factual record. Therefore, depriving Salazar his equal protection and procedural due process Clause of the Fourteenth Amendment? See, Medina v. California, 505 U.S. 437, 439, 112 S.Ct. 2572, 120 L.Ed. 2d 353 (1992) ("Due process Clause of the Fourteenth Amendment Prohibits Criminal Prosecution of defendant who is Not Competent to Stand trial").

REASONS FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S MISAPPLICATION "FAILS TO DEMONSTRATE THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIM'S DEBATABLE OR WRONG STANDARD OF SLACK v. MC DANIEL WARRANTS THIS COURTS ATTENTION.

In the U.S. Fifth Circuit Court of Appeals in Salazar's Case NO. 21-50719, For his application For Certificate of appealability From the denial of his habeas corpus and Certificate of appealability From the U.S. District Court For the Western District of Texas No 1:20-CV-764. The Fifth Circuit Court On April 18, 2022, the order denying his application For a C.O.A., state the Following reason: "Because Salazar "Fails to demonstrate" that reasonable jurists would Find the "district court's assessment" of the Constitutional Claims debatable or wrong, a C.O.A. is DENIED. Citing Slack v. McDaniel, 529 U.S. 473, 484 (2000). "As he Fails to make the required Showing For a COA", this Court does not reach whether the district Court erred by denying an evidentiary hearing." See U.S. v. Davis, 971 F.3d 524, 534-35 (5th Cir. 2020), Cert. denied, 142 S.Ct. 122 (2021).

Salazar ask the Court to take judicial notice of the Facts and records Focusing the district court's action and court procedure in determining Court's assessments of Salazar's Constitutional Claims. The District Court authorized Magistrate Judge Andrew Austin to hear and rule on non-dispositive Matters in U.S.D.C. No. 1:20-CV-764. On May 28, 2021, Magistrate Submits his report and recommendation to DENY All relief including a C.O.A. Salazar timely Filed Objections to Magistrate's report on June 18, 2021, as evidence in his declaration and Certificate of service and deposited using the Institutional Mail box. See, Bilotto v. Allied Property & Casualty Ins. Co., 79 F. Supp. 3d 660 (W.D. Tex. 2015) (Any Magistrate's Judge's memorandum or recommendation to which there are objections requires de novo

review by the Court, which means that the Court will examine the entire record, and will make 'an Independant Assessment' of the law, 28 U.S.C. § 636(b)(1) & Fed. R. Civ. Proc. 72(b).

Salazar's timely objections therefore triggering the procedure under 28 U.S.C.A. § 636(b)(1)(C) & Fed. R. Civ. Proc. 72(b), for district court judge's ministerial duty to review reports fact findings for 'clear error' and it's legal conclusion de novo. The district judge Lee Yeakel abused his discretion for refusing to obey the rules of the statutes triggering his ministerial duty to conduct his independant assessment to the questions of Salazar's constitutional claims. See, Murray v. Earle, 405 F. 3d 278 (5th Cir. Tex. 2005) cert. den. 126 S.Ct. 749, 163 L. Ed. 2d 573 ("discretionary function," for whose performance a government official may be entitled to official immunity from suit under Texas law, involves personal deliberation, decision, and judgment, and is to be distinguished from "ministerial duty," which requires rote obedience to orders or performance of function to which the actor has no choice).

See, App. (B) district court's adoption of Magistrate's report and for it's determination to do so. It states, "In light of the objections, the Court undertakes a de novo review of the record and applicable law." "The Court is of the opinion that the objections do not raises issues that were not adequately addressed in the report and recommendation." Therefore, finding NO ERROR, the Court accepts and adopts the report and recommendation filed in this case for substantially the reasons stated therein. The district judge only cites the procedure of review but the record is silent of any independant assessment issue by issue of Salazar's question of his constitutional claims.

See, Johnson v. Mc Cotter, 635 F. Supp. 695 (E.D. Tex. 1986) (This Court, after comprehensively reviewing the entire record and pleadings in this cause, find that many of the points raised by the petitioner have been resolved against him, or fail to state a claim under Federal habeas corpus law because they are conclusory. However, the Court must fully consider and dispose of each ~~claim presented in petitioner's application~~ distinct and separate point raised by the petitioner);

See, also Flowers v. Blackburn, 759 F.2d at 1196 (5th Cir. 1985) (... granted the Motion of petitioner James Flowers For a Stay of execution and asked the district Court to provide us with a statement of reason For the denial of each claim presented in petitioner's application For a writ of habeas Corpus).

The record is Silent of to any review conducted as described by the Case law stated above. See, Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992), (quoting Blake v. Kemp, 758 F.2d 523, 542 (11th Cir.) cert. denied, 474 U.S. 998, 106 S. Ct. 374, 88 L. Ed. 2d 367 (1985) ("We are disturbed by the growing number of Cases in which we are forced to remand For consideration of issues the district Court chose not to resolve ... Blake, 758 F.2d at 523. Accordingly, We now exercise our supervisory power over the district courts); See, also U.S. v. Jones, 899 F.2d 1097, 1102 (11th Cir.), cert. denied, -- U.S. --, 111 S. Ct. 225, 112 L. Ed. 2d 230 (1990) (... and instruct the district Courts to resolve all claims For relief raised in a petition For writ of habeas Corpus pursuant to 28 U.S.C. §2254 (1988), regardless whether habeas relief is granted or denied. "A claim for relief For purpose of this instruction is any allegation of a Constitutional Violation").

The district judge Lee Yeakel reverberates the Function required by the statutes 28 U.S.C. §636(b)(1)(c) and Fed. R. Civ. Proc. 72(b), but lacks any substance of a comprehensive reviewing For clear error or de novo.

Salazar ask the question: if the records show that the district judge abused his discretion For Failing his Ministerial duty to review the ~~reports~~ Magistrate's report and recommendations Factual Finding For clear error and it's Legal Conclusion ~~clear~~ de no and Mixed question of law and Fact de novo. And if the record is Correct then the district judge Failed to Conduct his independent assessment to each of Salazar's Constitutional claims. Then would it be safe to say correctively and truthfully there are No assessments? If everything Salazar has asserted From the records and proceedings are to be Found true. Then how ~~did~~ can the Fifth Circuit court of appeals support or have determined that, "Salazar Fails to demonstrate that reasonable jurists would Find the district Courts "assessments" of Salazar's Constitutional Claims debatable or wrong Standard of Slack v. McDaniel? The Fifth Circuits misapplication standard of Slack v. McDaniel warrants ~~this Court's attention for Salazar's Substantial Constitutional Claims.~~

THE MISAPPLICATION STANDARD OF SLACK V. MCDANIEL AND THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF OTHER CIRCUITS.

In the closely analogous case of Bare Foot V. Estelle, 463 U.S. 880, 893 (1983) The Supreme Court held..that the appellant need not show that he would prevail on the merits, but must "demonstrate that the issue are debatable among jurist of reason; that a court could resolve the issue [in a different manner]; or that the question are 'adequate to deserve encouragement to proceed Further,' [citations omitted]." See also, Flieger v. Delo, 16 F. 3d 878, 883 (8th Cir. 1994). "We do not require petitioner to prove.... that some jurist would grant the petition For habeas Corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received Full Consideration, that petitioner will not prevail." See Miller-EL V. Cockrell, 537 U.S. 322, 338 (2003) ("ThereFore doubts as to whether to issue a Certificate of appealability should be resolved in Favor of the appellant) Fuller v. Johnson, 114 F. 3d 491, 495 (5th Cir. 1997); See also, Buxton v. Collins, 925 F.2d 816, 819 (5th Cir. 1991); Buie v. McAdory, 322 F. 3d 980 (7th Cir. 2003). Salazar has asserted and demonstrated at issue states a valid claims of constitutional rights, of a Fair trial, effective assistance of Counsel, and Due Process clause.

See, Miller-EL, 537 U.S. at 327, 154 L. Ed. 2d 931, 123 S.Ct. 1029 (at issue here are the Standard AEDPA imposes before a Court of appeals may issue a COA to review a denial of habeas relief in the district court. Congress mandates that a prisoner seeking post conviction relief under 28 USC §2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek permission to initiate appellant review of the dismissal of his petition. the Court of Appeals should limit its examination to a threshold inquiry into the underlying merit of his claim. Slack v. McDaniel, 529 U.S. 473, 146 L. Ed. 2d 542, 120 S.Ct. 1595 (2000).

Consistent with our prior precedent and the text of the habeas Corpus Statute, We reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a Constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this Standard by demonstrating that jurists of reason could disagree with the district court's resolution of his Constitutional claims or that jurists could conclude the issue presented are adequate to deserve encouragement to proceed further. Sleek, Supra, at 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595. Applying those principles to petitioner's application, We conclude a COA should have issued.

These Cases illustrate the Fact that the Fifth Circuit Court of Appeals is out of step with this Court and with other circuits in its Consideration of the Sleek v. McDaniel, 529 U.S. 473, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000), "that a reasonable jurist would find the district Court's assessment of the Constitutional Claims' debatable or wrong Standard or its determination to support it's decision without district court's assessments. Certiorari should be granted to correct this error.

For these reasons Salazar has Stated and demonstrated the deprivation of his substantial Constitutional rights, a Writ of Certiorari Should issue to review the judgment and opinion of the Fifth Circuit of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ray Salazar

Date: July 15, 2022