

22-5240

IN THE
UNITED STATES SUPREME COURT

ORIGINAL

ROBERT CARLOS DEL CID,
(Petitioner)

vs. §

BOBBY LUMPKINS,
Director Of TDCJ-ID,
(Respondent) §

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Cause No. 21A760

PETITION FOR
WRIAT OF CERTIORARI

Challenge To The Ruling Of The United
States Court Of Appeals, Fifth Circuit,
Cause No. 21-50438; And Ruling In The
United States District Court, Western
District Of Texas, Cause No. 5:19-CV-766

Respectfully submitted, RECEIVED
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SUPREME COURT, U.S.

ROBERT CARLOS DEL CID
Petitioner, Pro Se
TDCJ #2073807
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QUESTION OF THE ISSUES PRESENTED

- I. WHETHER OR NOT THE MAILBOX RULE ENTITLES PETITIONER FOR EQUITABLE TOLLING, WHEN THE SUPREME COURT, AS WELL AS THE LOWER COURTS, ACCORD DEFENDANTS LEAVE TO SO UTILIZE THE RULE;
- II. WHETHER OR NOT A CRIMINAL DEFENDANT IS ENTITLED TO "COUNSEL OF CHOICE", AND DENYING A DEFENDANT SUCH A RIGHT INFRINGES UPON THE 6th AND 14th AMENDMENT GUARANTEE;
- III. WHETHER OR NOT THE VOIR DIRE PROCEEDINGS COMES UNDER CONSTITUTIONAL PROTECTION AND WHEN JURORS CONDUCT SO TAINTED THE VOIR DIRE PROCEEDING AS TO DEPRIVE PETITIONER OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL
- IV. WHETHER OR NOT THE 6th AND 14th AMENDMENT GUARANTEE PROTECTS AN ACCUSED AGAINST DEFICIENT PERFORMANCE OF TRIAL COUNSEL, RESULTING INTO PREJUDICE AGAINST PETITIONER'S RIGHT TO DUE PROCESS AND A FUNDAMENTAL FAIR TRIAL

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LIST OF ALL PARTIES

1. Hon. JAMES C. HO
United States Circuit Judge
United States Court of Appeals
Fifth Circuit

2. Hon. FRED BIERY
United States District Judge
Western District of Texas
San Antonio Division

3. OFFICE OF THE TEXAS ATT. GENERAL
Hon. LORI DENISE BRODBECK
(Assistant Attorney General)
Respondent

4. Mr. Robert Carlos Del Cid
TDCJ #2073807
Petitioner

REQUEST FOR ORAL ARGUMENT

That your Appellant asserts Oral Argument should occur only upon the request of this Court, and the appointment of Counsel, for clarity on the issues presented; however, your Petitioner asserts this case can and should be resolved on the Merits, along with the Arguments, Authorities and Discussions advanced in this his "WRIT OF CERTIORARI".

IN THE
UNITED STATES SUPREME COURT

ROBERT CARLOS DEL CID, §
(Petitioner)

vs. § Cause No. 21A760

BOBBY LUMPKIN,
Director Of TOCJ-ID,
(Respondent) §

**PETITION FOR
WRIT OF CERTIORARI**

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, ROBERT CARLOS DEL CID, Petitioner, Pro Se, in the above styled and numbered cause, files this his 'Petition For Writ Of Certiorari', in good faith, contending Due Process and the interest of justice would be best served by this Court GRANTING the same, and in support thereof, your Petitioner would show unto this Honorable Court the following:

I.

PLEA FOR LIBERAL SCRUTINY

That your Petitioner seeks the 'Protection' that comes

with Pro Se litigation, and respectfully request of this Honorable Court to construe said Writ, liberally, as required in Erickson v. Pardus, 127 S.Ct. 2197, (2007). Your Petitioner is a layman and should not be held to the same stringent standards of litigation, demanded of Attorneys. Moreover, it appears that the lower courts deprived Petitioner of 'protection' that comes with Pro Se Litigation in denying relief on Petitioner's meritorious claims. Liberal scrutiny would establish, although inartfully pleaded, your Petitioner presents valid points of error, and hence, your Petitioner respectfully request of this Court to accord him far lesser standards than what is required of Attorneys, as required by this Court's ruling. Hence, Petitioner respectfully request the 'protection' that comes with pro se litigation, as accorded him in Erickson, supra; Haines v. Kerner, 92 S.Ct. 594, (1972). See also Bourne v. Gunnells, 921 F.3d 484, (C.A. 5 - 2019).

II.

JURISDICTION

That this Court has Jurisdiction to entertain said 'Writ of Certiorari', pursuant to Rule 10, 14, 33, Rules of the Supreme Court; U.S.C.A., Amend. 5; 14. Moreover, Petitioner asserts this case is "Certworthy" and ripe for this Court's intervention and review, in light of a split of Authority between the circuits that this Court has typically

sought to resolve. Reyes Mata v. Lynch, 135 S.Ct. 2150, 2156, (2015); "Compelling reasons" exist, which includes the existence of conflicting Decisions on issues of law among Federal Court of Appeals, among State Courts of last resort, or between Federal Courts of Appeals [and] State Courts of last resort. City & County of San Francisco v. Sheehan, 135 S.Ct. 1765, 1779, (2015); Brown v. United States, 139 S.Ct. 14, (2018); Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S.Ct. 408, (2018). See also this Court's ruling in the case of Nguyen v. United States, 123 S.Ct. 2130, 2134, (2003)(The Court of Appeals had "so departed from the accepted and usual course of judicial proceedings" as to call for the exercise of this Court's Supervisory Power); Rule 10, (a)(c), Rules of the Supreme Court. Petitioner additionally relies upon the Constitutional mandates of Slack v. McDaniel, 120 S.Ct. 1595, (2000); Williams v. Taylor, 120 S.Ct. 1495, (2000).

III.

PROCEDURAL HISTORY OF THE CASE

That your Petitioner was initially charged with the offense of Capital Murder, Cause No. 2014CR8889. Said charge was subsequently dismissed, and on March 24, 2016, Petitioner was re-indicted for the lesser offense of Murder, Cause No. 2016CR2819. Said offense was alleged to have occurred on or about July 2, 2014. Trial commenced June 13,

2016. Before the trial commencement, your Petitioner 'moved' the Court to retain Counsel and remove 'Court Appointed Counsel.' Said 'motions' were post marked May 19, 2016 and May 31, 2016, respectively. Petitioner [retained] Counsel on June 10, 2016.

Said retained Counsel, THERESA CONNOLLY, moved the Court to 'substitute' Counsel, while filing its first 'Motion For Continuance' to get a grip on the facts of the case, strategize the defense, and render the necessary 'effective' assistance envisioned by the 6th Amendment guarantee. The Trial Court, on June 10, 2016, accorded a hearing on the 'Motions.' (See Vol. 3). At the Hearing, Petitioner made it clear his family retained Counsel, Ms. CONNOLLY, and that the 'Court Appointed Attorneys' JOHN ECONOMIDY and/or TIMOTHY MOLINA, were no longer needed, due to a change in Petitioner's financial status, and an apparent irreparable conflict in defensive strategy. (R. III - 13,14). Instead of honoring Petitioner's "Attorney Of Choice", the Trial Court ruled to deny Petitioner's 'choice' and denied retained Counsel's motion to 'substitute' for the two (2) appointed Counsels. (R. III - 26). The Trial Court, instead of substituting Counsel, as requested, elected to accord Ms. CONNOLLY the Right of 'appearance' and sought to have a co-counsel of sorts, without accounding her any 'extension of time' or 'continuance' to get acquainted with the facts of the case, as well as the law, to render the necessary 'effective' assistance envisioned by the 6th

Amendment. The Trial Court demanded the trial start, even though there were no compulsion to conduct trial, and retained Counsel made it clear she desired to present mitigating evidence that may prove helpful to Petitioner. Trial commenced three (3) days after the 'hearing', June 13, 2016, and on June 16, 2016, the Jury found your Petitioner guilty, and assessed punishment at life imprisonment, without the benefit of any mitigating evidence that may have altered guilt/innocence as well as punishment.

Petitioner Appealed! The Appeal was advanced to the Fourth (4th) Court of Appeals, located in San Antonio, Texas, Cause No. 04-16-00391-CR. On July 5, 2017, said Court Affirmed the conviction. Thereafter, your Petitioner advanced a 'Petition For Discretionary Review', (P.D.R.), contending, *inter alia*, the Court of Appeals grossly erred and abused its discretion in denying Petitioner relief on his meritorious claim, Cause No. PD-0782-17. Said P.D.R. was refused by the Texas Court of Criminal Appeals January 24, 2018. Petitioner filed for a Reh'g, and the same was rejected April 5, 2018. Thereafter, your Petitioner advanced a State Habeas Writ, Cause No. WR-89,973-01, April 24, 2019. Said Writ was denied July 17, 2019. Petitioner then sought Federal Habeas relief, and advanced his Federal Habeas Writ June 24, 2019, Cause No. SA-19-CV-0766-FB. Said Writ was subsequently denied May 3, 2021, under the erroneous premise 'Petitioner failed to establish that equitable tolling should apply.' Afterwards, your

Petitioner advanced a Certificate of Appealability, (C.O.A.) w/Brief in support, to the United States Court of Appeals, located in New Orleans, L.A., Cause No. 21-50438. Said C.O.A. was docketed July 12, 2021, according Petitioner 40 days in which to advance his C.O.A. On February 23, 2022, the United States Court of Appeals denied C.O.A.

Afterwards, your Petitioner, contending the lower court erred in its analysis and denial of Petitioner's case as time barred, and disregarded the merits of his many Constitutional claim, sought refuge in the United States Supreme Court for relief. Petitioner moved the Court for an 'Extension of Time' to advance his 'Writ of Certiorari.' In a letter from this Court, dated May 22, 2022, the Court, Hon. Judge ALITO, extended the time for filing to and including July 23, 2022. Hence, your Petitioner, in light of the MAILBOX RULE, files this his 'Certiorari' in a timely manner.

IV.

STATEMENT OF THE FACTS

That the State sought to present a multi-faceted indictment, alleging several theories in which the offense may have occurred. On March 24, 2016, your Petitioner was indicted for 'knowingly and intentionally' causing the death of the Complainant, WILLIAM O'NEILL, alleged to have occurred July 2, 2014, or in the alternative, intended to cause serious bodily injury to the Complainant by committing

an act 'clearly dangerous to human life' that caused the death of the Complainant, or alternatively, intentionally and knowingly commit or attempted to commit Robbery or unauthorized use of a motor vehicle, and in the commission thereof, committed an act clearly dangerous to human life that caused the death of the Complainant, WILLIAM O'NEILL.

On July 2, 2014, WILLIAM O'NEILL was working at Papa John's Pizza, and was delivering Pizza for Papa John's at 6033 Dezavala Rd., at an apartment complex, located in San Antonio, Texas. While delivering Pizza, Mr. O'NEILL exited his car, and left it running, (R. VII - 14). The State key witness, JUSTIN SMOLEK, was also present at the scene, and proffered testimony for the State, contending Petitioner purportedly told him, while walking through the parking lot, that Petitioner was going to take the car that O'NEILL was driving. (R. VII - 15). The State presented evidence that Petitioner and its witness, SMOLEK were users of the drug, Methamphetamine. SMOLEK further testified that after Petitioner took the Complainant's car, he walked away. (R. VII - 16,17). Afterwards, he testified to hearing the car Petitioner drove away in clashed with another vehicle, and that Petitioner continued driving away from the scene. It was then SMOLEK states he observed the Complainant on the ground. Allegedly, your Petitioner hit the Complainant with his own car, which resulted into the Complainant's death. Someone, according to SMOLEK, called 911, (R. VII - 18). The Complainant was taken to the local hospital, wherein he was pronounce deceased.

Afterwards, the Complainant's car was discovered, along with a Papa John's Pizza sign and delivery bag. These items belonged to the Complainant. Moreover, a soda cup was retrieved inside of the Complainant's car that was tested for DNA, and Petitioner was the profile contributor of the DNA retrieved from the cup. Fingerprints were also retrieved from the Complainant's vehicle that matched Petitioner's fingerprints. Thereafter, a warrant for Petitioner's arrest were issued, and Petitioner was subsequently charged with Capital Murder, later reduced to Murder, Cause No. 2016CR2819. Petitioner was tried 82 days after being indicted, and was found guilty. Petitioner asserts mitigating evidence was available but never advanced by 'Court Appointed' Counsel, in addition, defense Counsel advanced a single witness at the punishment phase of trial, and did not present the report of Dr. JOANNE MURPHY, who conducted a psychological evaluation of Petitioner, (R. III - 14, 16), and whose report would have mitigated guilt and innocence as well as the punishment phase of Trial. Petitioner was assessed punishment at life imprisonment, for an unintentional act that resulted into the death of the Complainant, without the Jury's consideration of the exculpatory impact of weighing mitigating evidence.

v.

GROUND FOR RELIEF

That your Petitioner asserts the United States Court of

Appeals, Fifth Circuit, along with the United States District Court, as well as State Court of last resort, has issued a ruling in conflict with decisions of another United States Court of Appeals on the same important matter. In addition, the lower court rulings has so far departed from the accepted and usual course of judicial proceedings , as to call for an exercise of this Court's Supervisory Power to settle important questions of Federal Law, as the lower court's decision in denying Petitioner relief conflicts with relevant decisions of this Court. Rule 10, Rules of the Supreme Court; Reyes Mata v. Lynch, 135 S.Ct. 2150, 2156, (2015); Nguyen v. United States, 123 S.Ct. 2130, 2134, (2003).

VI.

POINTS OF ERRORS

Your Petitioner asserts his case is 'Certworthy', in light of the following grounds:

1. The lower court erred and abused its discretion in determining Petitioner's claims were time barred, when this Court's precedent renders protection under the MAILBOX RULE, and when other circuits, along with decisions of this Court, is in conflict with the Fifth Circuit ruling;
2. The lower court erred and abused its discretion in determining Petitioner was not deprived of the Constitutional guarantee when Petitioner was denied the right of an 'Attorney Of His Choice', and when said ruling conflicts with another United States Court of Appeals, warranting this Court's exercist of its Supervisory Power to resolve the conflict the lower court's ruling created;

3. The lower court erred and abused its discretion in not determining your Petitioner was deprived of his right to a fair and impartial trial, due to tainted and prejudicial 'Voir Dire Proceeding', when its ruling conflicts with relevant decisions of the United States Supreme Court;
4. The lower court erred and abused its discretion in not determining Art. 26.04, permitting the 'appointment of counsel for indigent defendants' is not applicable when defendant 'retains' Counsel and state court has decided an important question of Federal Law, governing the 6th Amendment Right to Counsel, in a way that conflicts with another state court decision and rulings from United States Court of Appeals.

Petitioner comes under the umbrella of Rule 10 (a)(b) and (c), warranting decisions on the merits to resolve the many conflicts the 5th Circuit decision created with this Court and other United States Court of Appeals. Rule 10, *supra*; U.S.C.A., Amend. 5; 6; 8; 14.

VII.

POINT OF ERROR NUMBER ONE (RESTATEMENT)

PETITIONER COMES WITHIN THE PROTECTION
OF THE MAILBOX RULE, AND IS THEREFORE
NOT TIME BARRED FROM THIS COURT ADDRESSING
THE CONSTITUTIONAL MERITS OF HIS CLAIMS

ARGUMENTS, AUTHORITIES and DISCUSSIONS

That this Court, and other Court of Appeals, present rulings in conflict with the Fifth Circuit determination on the applicability of the mailbox rule. In the instant case, the point of conflict is whether or not your Petitioner comes within the ambit of the A.E.D.P.A. limitations, as articulated in 28 U.S.C. § 2244 (d). The Respondent contends Petitioner's application is untimely and barred by statute of limitations because it was filed on **APRIL 26, 2019**. Your Petitioner asserts the Court erred in its calculation, and premised its determination on the date in which the prison mailroom marked its docketing the Petition, but gives flagrant disregard to the date in which the 'petition' left Petitioner's hand and was placed in the Unit Mailbox, for filing purpose. TDCJ's BOARD POLICY, BP-03.91, governing correspondence rules, Sec. IV (G), makes it clear:

"All outgoing mail, except packages, shall be delivered **Within Two Business Days**. Outgoing packages shall be delivered to a USPS employee within three business days."

Hence, when mail is placed in the Unit Mailbox for the purpose of sending mail out, mailroom personnel is required to deliver the same within **Two Business Days**. It's only when the mail is outgoing that mailroom personnel 'documents' the date of its leaving the unit, by initialing and documenting the date of its leaving. Critical to this Court's analysis of Petitioner's claim is the date in which the outgoing mail was placed in the Unit Mailbox. This Court precedent has long recognized a document to the Court is deemed filed the

date in which it is delivered to prison officials for mailing. See Houston v. Lack, 108 S.Ct. 2379, (1988). See also Richards v. Thaler, 710 F.3d 573, (C.A. 5 - 2013)(That Petitioner is entitled to equitable tolling, for filing purposes, when date of filing is not when prison authorities "Stamped" date of receipt, but rather, when the petition was placed in the unit mailbox). See also Campbell v. State, 320 S.W. 3d 338 339, (Tex. Cr. App. 2010)(Applying prison mailbox rule to criminal cases).

Your Petitioner is alleged of being time barred by two (2) days, i.e., April 26 - date in which the mailroom supervisor denoted date of 'outgoing' mail, versus April 24, 2019 - date in which the Petition was placed in the unit mailbox for filing purposes. Petitioner, like the defendant in Houston, Richards and Campbell, supra, is entitled to equitable tolling. Because the United States Court of Appeals, Fifth Circuit, has decided an important question of Federal Law in a way that conflicts with the relevant Decision of this Court in Houston v. Lack, supra, this Court should exercise its Supervisory Power and REVERSE the lower court's ruling and accord Petitioner equitable tolling on the filing of his petition. The lower court's ruling deprived your Petitioner of his rights to fundamental fairness and due process of law, guaranteed him by way of U.S.C.A, Amend. 5; 14. The prison mail log denotes when the 'outgoing' or 'ingoing' mail leaves or enters the unit, but does not give any indication on date or time the same was

placed in the mailbox. Because the Respondent wrongly concludes your Petitioner did not 'file' his Writ until April 26, 2019, he somehow missed the tolling provisions of 28 U.S.C. § 2244(d)(1). Due Process and the interest of justice warrants equitable tolling, and for this Court to adequately consider argument that the 'Writ' had to be filed at some time prior to the documented date in which the 'out going mail' was leaving the unit, and placed in the hands of U.S.P.S. workers. This claim is 'Certworthy', and warrants the Court's intervention to determine whether or not this Court's precedent of Houston v. Lack, *supra*, is applicable to the instant case. This Court must find the lower court ruling has so far departed from the accepted course of actions governing Mailbox Rule application, as to warrant the Court exercist of its Supervisory Power to resolve the conflict and breach of Petitioner's due process rights. Nguyen v. United States, *supra*. Rule 10, Rules of the Supreme Court; U.S.C.A., Amend. 5; 14. Because the lower court declines to accord Petitioner equitable tolling, and in light of the applicability of the Mailbox Rule, this Court should Grant Certiorari to alter a fundamental miscarriage of justice from prevailing against Petitioner in his challenge to the Constitutionality of his life sentence. Petitioner asserts Richards, *supra*, should prove persuasive in the Court's analysis of his claim. Petitioner asserted, under the pain and penalties of perjury, the foregoing Petition was true and correct and filed on April

24, 2019. Since the lower court's ruling is in conflict with relevant Supreme Court decisions, this Court must intervene to resolve the conflict. Rule 10 (c), Rules of the Supreme Court. In addition, your Petitioner, through his Federal Writ Counsel, filed a 'Motion To Amend' his 6th Amendment claim of Ineffective Assistance of Counsel, seeking to supplement his argument with thirteen (13) additional claims of Counsel's ineffectiveness. The United States District Court acknowledged the legality of Petitioner's filing the 'Motion to Amend' in the context of the rules that apply in 28 U.S.C. § 2254 cases. Mayle v. Felix, 545 U.S. 644, 654 (2005). On page 9 of the Court's Order, the Court noted:

"Rule 12 provides that the "Federal Rules of Civil Procedures, to the extent that they're not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Rule 12, Rules Governing Section 2254 Cases. The applicable rule is Rule 15(a)(2), which provides that a "court should freely Grant leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2)."

Hence, Rule 15(a) establishes a "Motion To Amend" should not be denied absent a substantial reason to do so. Jacobsen v. Osbourne, 133 F.3d 315, 318, (C.A. 5 - 1998). Petitioner advanced, through his Writ Counsel in his 'Motion To Amend', thirteen (13) distinct points of ineffective assistance, to add to Petitioner's initial claim of I.A.C., namely, Counsel failed to present the mitigating evidence of mental health and childhood abuse, to mitigate the guilt/innocence as well as punishment phase of trial. The lower court denied

Petitioner's I.A.C. claims, due to its improper analysis of 'time bar', in words as follows:

....As set forth previously, the limitations period in this case for filing a federal habeas petition expired on April 24, 2019. Petitioner did not raise these new allegations until March 2020 when he filed his reply to Respondent's answer. (See Reply to Respondent's Answer, pg. 38-39). Because one of the allegations "relate back" to petitioner's original federal petition under Federal Rules of Civil Procedure 15(c), the new claims are Untimely by almost a year."

See Addendum - United District Court's Memorandum Opinion and Order - annexed hereto. Said denial conflicts with Jacobson v. Osbourne, *supra*; Mayle v. Felix, 545 U.S. 644, 654, (2005); and United States v. Trevino, 554 F.App'x 289, 293, (C.A. 5 - 2005). The lower court's 'time barred' objection breaches equitable tolling provisions and does not comport with the required 'substantial' reason for denial of thirteen (13) new claim. Jacobson v. Osbourne, *supra*. Rule 15(a) accords the Court the discretion to grant 'Motion To Amend' claims in 2254 cases. Petitioner was deprived of Fundamental Fairness and due process protection in light of the Court's misapplication of Rule 2244(d)(1) to the instant case, when Petitioner qualifies for 'equitable tolling' on his many claims before the Court. See Spotsylvania v. Cain, 149 F.3d 374, 378, (C.A. 5 - 1998); Richards, 710 F.3d at 578-79. Because the lower court ruling, in denying Petitioner 'equitable tolling' in his advancement of his many Constitutional errors, and because the Court misapplied the 'Mailbox Rule', this Court must determine the lower

court's ruling has so far departed from the accepted norm of judicial proceedings, and its ruling is so in conflict with this Court and United States Court of Appeals precedent, as to warrant this Court's exercist of its Supervisory Power to resolve the conflict. Rule 10 (c), *supra*; U.S.C.A., Amend. 5; 14. Because Petitioner asserts his Federal Habeas Writ was 'timely' filed, and the Respondent asserts the Federal Writ was 'not timely' filed, due process and the interest of justice warrants this Court's intervention to settle the conflict.

WHEREFORE, PREMISES, ARGUMENTS and AUTHORITIES CONSIDERED, your Petitioner contends due process and the interest of justice warrants this Courts exercist of its Supervisory Power to resolve the conflict between its precedent and the lower court determination of the facts, as required in Rule 10, *supra*. Petitioner further prays this Court would accord him equitable tolling and permit the advancement of his meritorious claims, presented, *infra*. Petitioner prays this Court would find this claim 'Certworthy' and GRANT him Certiorari relief by REVERSING the lower court's ruling.

VIII.

POINT OF ERROR NUMBER TWO (RESTATEO)

THE COURT ERRED IN NOT FINDING THE DENIAL
OF THE RIGHT TO HAVE "COUNSEL OF CHOICE"
VIOLATES THE 6th AND 14th AMENDMENT GUARANTEE,
AND CONFLICTS WITH OTHER CIRCUITS OPINIONS
ON THIS MATTER, WARRANTING REVERSAL

ARGUMENTS, AUTHORITIES and DISCUSSIONS

That it has been recognized the 6th Amendment guarantee entitles a criminal defendant the Right to 'Counsel Of His Choice.' Wheat v. United States, 108 S.Ct. 1692, 1697 (1988). Hence, when the trial court unreasonably or arbitrarily interferes with the right to choose Counsel its denial rises to the level of a Constitutional violation. Whether the Court abused its discretion, in depriving Petitioner the right to have the 'Counsel Of His Choice', has acted unreasonably or arbitrarily must be gleaned from the facts and circumstances of each case. (id).

In the case at bar, your Petitioner, June 10, 2016, retained Counsel THERESA CONNOLLY to represent him in his case. Petitioner sought to dismiss 'Appointed Counsels' JOHN ECONOMIDY and RICHARD MOLINA, due to a conflict in trial strategy, and in light of their inability to advance mitigating evidence that may prove helpful in altering the outcome during guilt/innocence as well as punishment. The Court conducted a 'hearing' on 'Retained' Counsel's "MOTION TO SUBSTITUTE COUNSEL and EXTENSION OF TIME TO PREPARE FOR TRIAL." (R. III - 2). The Trial Court denied Retained

Counsel's "Motion To Substitute Counsel" and permit the now Retained Counsel leave to represent Petitioner. (R. III - 26). Instead, even though the Trial Court was fully cognizant of the fact 'Retained' Counsel requested additional time to learn the facts, as well as the law, governing the case in order to render the required and appropriate 'effective' assistance of counsel, envisioned by the 6th amendment guarantee, the Court altered Counsel's request to 'Substitute', to that of granting her leave to make an appearance in the case, and function as co-counsel of sorts. (See Volume 3). The Trial Court simply 'rushed' to trial after being fully apprised Petitioner had retained Counsel, and move to dismiss 'Court Appointed Counsels', due to a change in his financial status, and Ms. CONNOLLY's willingness to advance mitigating evidence of Petitioner's psychological profile, wherein, Dr. JOANN MURPHEY, after diagnosing Petitioner, opined Petitioner needs mental help. (See EXHIBITS "A"; "B"; and "C", annexed hereto and can be made a reference for all purposes). Said Exhibits establishes your Petitioner suffered extensive childhood abuse and has other psychologically diagnosed problems. It has been long recognized 'childhood abuse' and other mental health concerns, may be used as mitigating evidence during trial and/or punishment. See rationale of Penry v. Johnson, 109 S.Ct. 2934 (1989)(REVERSED for failing to permit jury to consider 'childhood abuse' and 'mental retardation' as mitigating evidence, in breach of 8th and 14th Amendment). The same diminishes a defendants 'blameworthiness'. (id).

The Court Appointed Attorneys were dismissed as Counsels sought no breach of the 8th and 14th Amendment guarantee due to failure to present mitigation evidence of 'childhood abuse'. Consequently, the Court erred in failing to permit Petitioner to have the 'Attorney of his Choice' to represent him and argue the defensive theories relevant to the case. The Court must indulge a presumption in favor of the accused choice of Counsel. Wheat, 108 S.Ct. at 1700. It can ignore the defendant's choice ONLY when such "drastic action is necessary to further some overriding social or ethical interest." U.S. v. Collins, 920 F.2d 619, 626, (C.A. 10 - 1990); United States v. Hobson, 672 F.2d 825, 828, (C.A. 11 - 1982). Hence, when a Trial Court unreasonably or arbitrarily interferes with the right to choose Counsel, its denial may rise to the level of a Constitutional violation. Wheat, 108 S.Ct. at 1700.

Consequently, the lower court ruling conflicts with other Circuit Courts rulings, along with relevant rulings by this Court, as to call for an exercise of this Court's supervisory power to resolve the conflict. Rule 10, *supra*. Said claim is 'Certworthy' and ripe for this Court's intervention and review, in light of an apparent split of authority between the 5th, 10th and 11th Circuits that this Court has typically sought to resolve. Reyes Mata v. Lynch, 135 S.Ct. 2150, 2156, (2015). In addition, 'compelling reasons' exist for the Grant of Certiorari, due to the existence of conflicting decisions on this issue of law.

among Federal Court of Appeals [and] State Courts of last resort. City & County of San Francisco v. Sheehan, 135 S.Ct. 1765, 1779, (2015); Brown v. United States, 139 S.Ct. 14, (2018). The Right to retain Counsel of choice stems from a defendant's Right to decide what kind of Defense he wishes to present. United States v. Nichols, 841 F.2d 1485, 1502, (C.A. 10 - 1988). Consequently, your Petitioner was deprived of the free exercist of his 6th and 14th Amendment Right to 'Counsel of his Choice'. See Slack v. McDaniel, 120 S.Ct. 1595, (2000); Williams v. Taylor, 120 S.Ct. 1495, (2000). In light of the conflicts between the Circuits, and the 5th Circuits entering its decision that clearly conflicts with the decision of another United States Court of Appeals on the same import matter, i.e., 'Right to Counsel Of Choice', this Court must exercise its Supervisory Power to resolve the conflict, and Grant Petitioner's 'Writ of Certiorari'. U.S.C.A., Amend. 5; 14.

WHEREFORE, PREMISES, ARGUMENTS and AUTHORITIES CONSIDERED, your Petitioner prays and respectfully urge of this Honorable Court to find the lower court decision on this error runs in conflict with other United States Court of Appeals, making said claim 'Certworthy' and ripe for this Court viewing and resolution. Petitioner prays this Court would determine he was deprived of the 6th Amendment guarantee, as argued, supra, warranting REVERSAL. Or in the

alternative, your Petitioner prays for whatever other, further or different relief this Court deem he is justly entitled, in the interest of justice. It is so prayed for.

VIII.

POINT OF ERROR NUMBER THREE (RESTATEMENT)

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING PETITIONER WAS DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL, IN LIGHT OF THE IRREPARABLE "TAINT" OF THE VOIR DIRE PROCEEDINGS

ARGUMENTS, AUTHORITIES and DISCUSSIONS

It has been long recognized a criminal defendant is entitled to the Right of a fair and impartial trial. U.S.C.A., Amend. 5; 14; Gray v. Mississippi, 107 S.Ct. 2045, 2056, (1987). In the instant case, Petitioner asserts the lower court has entered a decision in conflict with this Court, as well as State Courts of last resorts as to call for an exercise of this Court's Supervisory Power. Rule 10, *supra*.

Petitioner asserts he suffered irreparable damage to his right to a fair and impartial trial during the Voir Dire proceeding, resulting into the trial coming out stillborn. This court has long recognized Voir Dire is a critical stage in the criminal trial for Constitutional purposes. Gomez

v. United States, 109 S.Ct. 2237, 2246, (1989). This Court has also consistently recognized the Right to a Fair and impartial adjudicator. Gray, *supra*. The level of respect which the Court holds this Right is characterized in their statement in Gray, *supra* that, "because the impartiality of the adjudicator goes to the very integrity of the legal system the Chapman v. California, 87 S.Ct. 824, (1967), harmless error analysis cannot apply." In addition, this Court further stated, "we recognize that some Constitutional Rights are so basic to a fair trial that their infraction can never be treated as harmless error. The Right to an impartial adjudicator, be it Judge or Jury, is such a Right." Gray, 107 S.Ct. at 2056. See also the case of Knight v. State, 839 S.W. 2d 505, 511, (Tex. App. - Beaumont 1992).

In light of the State's commission of displaying a power point presentation that prompted potential Jurist to research details of Petitioner's case and discuss the same amongst themselves during a recess, as observed by a witness in the Courtroom, (See EXHIBIT "D", annexed hereto, and can be made a reference for all purposes), it was all but inevitable the Jury would be tainted sufficient enough to be incapable of being fair and impartial. Consequently, and due to the State Attorney's commission of leaving a display of evidence during his power point presentation available for the potential Jurist viewing, your Petitioner was deprived of the 5th and 14th Amendment guarantee.

In light of the Jurist observing the District Attorney's power point presentation of the case, whether left intentionally or unintentionally for the potential Jurist to observe, the presumption of innocence were all but destroyed, as the potential Jurors were able to hear and observe evidence of the case, enabling them to make a determination as to the guilt of Petitioner, deprived Petitioner of his right to a fair and impartial trial, as Jurist mind were already made up after observing the power point presentation of the State. The Jurors were instructed against researching the case in the media. Instead, the Jurors researched details of the case on their smartphone during lunch recess. Retained Counsel, CONNOLLY, uncovered evidence of the Jury's taint, as a result of research of case from the smartphone: (R. IV - 131-133):

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16 Ms. CONNOLLY: Ms. Wallish?
17 Venireperson WALLISH: Yes, but
18 I've seen on the smartphone.
19 [Venireperson indicating]
20 Ms. CONNOLLY: Thank you. And you pointed
21 -- you just now pointed to Mr. URIEGA when you said
22 "Smartphone." Were you watching it with him?
23 Venireperson WALLISH: No, not here. Not
24 this minute. No Earlier Today.
25 Ms. CONNOLLY: But you were looking at it

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01 with Mr. URIEGA?
02 Venireperson WALLISH: Yes, Simultaneously
03 we were looking at it.
04 Ms. CONNOLLY: On one phone?
05 Venireperson WALLISH: Yes.
06 (Response)
07 Ms. CONNOLLY: I'm sorry, what number are
08 you?
09 Venireperson LEMUS: Fifty-one.

10 Ms. CONNOLLY: Fifty-one, Mr. LEMUS?
11 Venireperson LEMUS: That's correct.
12 Ms. CONNOLLY: And you saw it on the news?
13 And 53, is it Ms. BAL?
14 Venireperson BAL: Yes.
15 Ms. CONNOLLY: And you saw it on the
16 Internet?
17 Venireperson BAL: On The Phone, Yes.
18 Ms. CONNOLLY: You saw it, too? I'm sorry
19 about your loss.
20 Anybody else here see it on the
21 Internet or on the News?
22 Venireperson BEDNARZ: Number 23.
23 The Court: Thank you ma'am.
24 Venireperson BEDNARZ: He just mentioned
25 it to me.

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01 Ms. CONNOLLY: I'm sorry.
02 Venireperson BEDNARZ: He mentioned it to
03 me.
04 Venireperson BEDNARZ: When We Were On Break.

As Voir Dire continued, it was clear the Jury Pool's knowledge that the case was available for observation on the Internet or News was the Power Point presentation displayed by the Prosecution during his preparation of the case. The Powerpoint display was observed by the entire Jury Pool. The display included the Pizza Place Logo of the Pizza Man your Petitioner was accused of running over, with the inflammatory words "ROBERT DEL CID MURDER" displayed across the screen. (R. IV - 74). As to be expected, curiosity were peaked, and the next available break, Jurors took it upon themselves, with today's Smartphone, and pulled up the case after observing the Prosecutor's Powerpoint display: (R. IV - 139, 140):

15 Venireperson WALLISH: Number 48. I can
16 only speak for myself. What I heard this morning was
17 you're not to discuss the case once you're on a case.

18 outside of the Courtroom, outside of the Jury Room. Now
19 when we walk in the room, the information was on the
20 screen and I said, "That Name Looks Familiar." He
21 automatically pulled it up on his cell phone. We looked
22 at the blurb and shut it off. And that's the experience

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01 ... I feel like when we
02 walked in and the information is there hitting you in the
03 face, curiosity and living in a technological age that
04 we're in, he pulled it up and I glanced and we shut it

Clearly, facts of the case, due to the Prosecution gross act of negligence or intentional display of his powerpoint presentation, before trial commenced, and during Voir Dire, proved prejudicial to Petitioner's right to a fair and impartial trial. U.S.C.A., Amend. 5; Gray v. Mississippi, supra. Consequently, the defense moved the Court to Quash the entire Venire Panel, and for good cause. (R. I - 124). Both the defense and prosecution moved the Court for additional time with the Jury Pool, in order to develop the record and avoid a possible Mistrial, but said 'motion' were denied by the Trial Court. (R. I - 70, 124).

In light of the clear prejudice to Petitioner's right to a fair and impartial trial, wherein, as a result of the prosecution's action, the entire panel were adversely exposed to the facts of the case, due process and the interest of justice warranted the quashing of the entire panel. The poison afflicted upon Petitioner, as a result of the prosecution's display of prejudicial and inflammatory material before the panel, prompted the result trial to come out 'stillborn', as one cannot throw the proverbial skunk in

the Jury box, then asked the Jury to ignore the smell. Dunn v. United States, 307 F.2d 883, 886, (C.A. 5 - 1962); Walker v. State, 610 S.W. 2d 481, 486, (Tex. Cr. App. 1980). Consequently, the Trial Court erred in its denial of the motion to 'quash' the entire Jury Panel, as Petitioner's right to a fair and impartial trial, and the presumption of innocence were irreparably damaged. Hence, the United States Appeal Court has entered a decision in conflict with this Court's precedent, and by a State Court of last resort, warranting this Court's intervention and exercise of its Supervisory Power to resolve the conflict. Rule 10, *supra*; Gray, *supra*; Gomez, *supra*; Knight, *supra*; U.S.C.A., Amend. 5; 14.

IX.

POINT OF ERROR NUMBER FOUR (RESTATEMENT)

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING PETITIONER WAS DEPRIVED OF THE 6th AND 14th AMENDMENT GUARANTEE, IN CONFLICT WITH THIS COURT'S PRECEDENCE, WARRANTING THE COURT'S INTERVENTION AND SUPERVISORY ASSISTANCE

ARGUMENTS, AUTHORITIES and DISCUSSIONS

That it has been long held by this Court a criminal defendant is entitled to reasonable, effective assistance of Counsel. U.S.C.A., Amend. 6; Strickland v. Washington, 104

S.Ct. 2052, (1984). Moreover, the type of breakdown in the adversarial system is not limited to Counsel's performance as a whole, a Single Error or Omission may also be the focus of a claim of Ineffective Assistance of Counsel as well. U.S. v. Cronic, 104 S.Ct. 2039, (1984).

In the case at bar, Petitioner advanced argument that Counsel was ineffective for failure to present the 'mitigating' evidence of childhood abuse, and other mental health issues, which, if presented properly, establishes a reasonable probability the entire outcome of the trial and or punishment would have altered. Strickland, *supra*. Petitioner's retained Counsel later supplemented said claim of Ineffectiveness with thirteen (13) additional points of error. (See Reply Brief, pg. 38-40). Petitioner clearly has diagnosed mental health and childhood abuse evidence that should have been presented to the Jury for mitigation purposes. See Exhibits "A"; "B"; and "C". Counsel's omissions, in failing to advance said evidence to mitigate guilt/innocence or punishment, was clearly deficient, and but for Counsel's deficiency, there exist a reasonable probability the entire outcome of the trial/punishment would have altered. (*id*).

Prior to trial, your Petitioner moved to dismiss 'Court Appointed Counsel' and hired retained Counsel, due to a conflict in defensive strategy. Appointed Counsels believed the Petitioner's background and history of child hood abuse and mental health diagnosis were unhelpful, while Petitioner disagrees. See rationale of Perry v. Johnson, *supra*.

The Courts have long recognized that mitigating circumstances, such as childhood abuse and mental health matters, are circumstances that may attribute to a defendant being less culpable than others who have no excuses. Miller v. Dretke, 420 F.3d 356, (C.A. 5 - 2005). One's mental state can provide Jurors with a firm basis to determine a defendant's culpability for their crime, versus having no mitigating evidence at all. (id), at 356. See also Zant v. Stephens, 103 S.Ct. 2733, 2747, (1983); Wiggins v. Smith, 123 S.Ct. 2527, (2003).

Petitioner asserts the provisions of Art.26.04, C.C.P., governing the appointment of Counsel for indigent defendants has no more enforcing power, for 6th Amendment purposes, when the defendant can present sufficient money to retain Counsel. The Court erred and abused its discretion in not permitting 'Counsel of His Choice'. Petitioner moved to dismiss Court Appointed Counsel, and had his family to retain Counsel, CONNOLLY, due to her agreement to advance the mitigating circumstances and evidence of child hood abuse and mental health matters, aimed at challenging Petitioner's culpability, and to mitigate punishment. As a result of Appointed Counsel's omissions, your Petitioner received a Life Sentence, thereby establishing and meeting the prejudice prong of Strickland, supra. As a result, and pursuant to Petitioner's other thirteen (13) claims of I.A.C., this Court should conclude the lower court's ruling in denying relief on this point were presented in such a way

as to be in conflict with relevant decisions of this Court, warranting this Court intervention and exercist of its Supervisory Powers to resolve the conflict. Rule 10, *supra*. Petitioner contends his establishment of the 8th and 14th Amendment breach warrants REVERSAL. Strickland, *supra*; Wiggins, *supra*; U.S. v. Cronic, *supra*.

WHEREFORE, PREMISES, ARGUMENTS and AUTHORITIES CONSIDERED, your Petitioner prays this Court would Grant his 'Writ of Certiorari', in light of the above arguments. Petitioner additionally prays for REVERSAL herein, as Petitioner's conviction were patently obtained in breach of the United States Constitution, Slack v. McDaniels, *supra*; and in breach of Federal Law, as determined by the United States Supreme Court, Williams v. Taylor, *supra*, warranting RELIEF. Alternatively, your Petitioner prays for whatever other, further or different relief this Court deem Petitioner is justly entitled, in the interest of justice. It is so prayed for.

Respectfully submitted,



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