Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 22-6362

IN THE

Supreme Court of the United States

CARLOS SANTANA R. GARCIA,

Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutional Division,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
Fifth Circuit

Petition For Writ Of Certiorari

CARLOS SANTANA R. GARCIA
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ORIGINAL

QUESTION(S) PRESENTED

I. Did the Court of Criminal Appeals of Texas and the U.S. District Court Northern District of Texas San Angelo Division, err by deciding the merits of petitioners writ of habeas corpus appeal, based on the incorrect and unreasonable application of established Federal law as determined by the Supreme Court of the United States and applied an unreasonable determination of the facts presented by the 51st District Court findings and conclusions of laws?

II. Is it unconstitutional under the FIFTH, SIXTH, and FOURTENTH Amendment for a defense attorney to provide inaccurate legal advice to a criminal defendant during communication of a states plea deal, which substantially affects defendants direct ability to make a knowing, willing, and intelligent decision to the states plea deal?

III. Is it unconstitutional under the FIFTH, SIXTH, and FOURTENTH Amendment for a State to intentionally circumvent and violate a states statue in a criminal trial, thereby infringing a defendants Constitutional right to Confrontation and Due Process with equal protection under the law?

IV. Does the Constitution under the principles of the FIFTH, SIXTH, and FOURTENTH Amendment make a distinction whether a criminal defendant has an appointed counsel or retained counsel in order to receive the Constitutional rights established in those Amendments, and if no such distinction is warranted, did the trial Judge in petitioners trial infringe petitioners right to Compulsory Process and Due Process with equal protection under the law?

cont.

Cont. Question(s) Presented

V. Did the U.S. District Count of the Northern District of Texas San Angelo Division err by applying a conflicting interpretation standard and incorrect application of 28 U.S.C. § 2244 (d)(1)(A)-(D), equitable tolling, and its authority to correct an injustice, which calls for this Supreme Court supervisory powers, to the end that it may secure a clear uniformity in the district courts and court of appeals where other courts and sister courts have applied a different standard and application, in regards to Petitioners habeas corpus writ?

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 follows:

- Ex parte Carlos Santana Garcia, Tr. ct. No. A-03-1086-S-W-1, District Court of Tom Green County, Texas, 51st Judicial District. Recommendation of dismissal entered March 10, 2019
  Recommendation of denial entered June 25, 2019
- Ex parte Carlos Santana Garcia, Tr. ct. No. A-03-1086-S-W-1, CCA No. WR-89,713-01. Court of Criminal Appeals of Texas at Austin, Texas Judgment entered Jan. 15, 2020.
- Carlos Santana R. Garcia v. Director, TDCJ-CID, No. 6:20-cv-00084-H, U.S. District Court Northern District of Texas, San Angelo Division, order and judgment entered Feb. 23, 2022.
- Carlos Santana R. Garcia v. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, No. 22-10225, U.S. Court of Appeals for the Fifth Circuit, order and judgment entered July 27, 2022.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rule 29.6, Carlos Santana R. Garcia, makes the following disclosure:

1) Mr. Garcia is not a subsidiary or affiliate of a public owned corporation.
2) There is no publicly owned corporation, not a party to the appeal that has a financial interest in the outcome of this case.

RELATED CASES

LIST OF PROCEEDINGS IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO CASE

COURT	DKT NUMBER	CASE CAPTION FOR PROCEEDING	DATE JUDGMENT
51st Dist. Ct.	NO. A-03-1086-S	State of Texas v. CARLOS SANTANA GARCIA	4/21/2004
51st Dist. Ct.	NO. A-03-1086-S	Motion for State to provide Funds for expert witness(es)	10/31/2004
51st Dist. Ct.	NO. A-03-1086-S	Motion for Statement of facts of prior proceedings involving the defendant and Memorandum of Authorities	10/13/2004
51st Dist. Ct.	NO. A-03-1086-S	Pre-trial Hearing	11/2/2004
51st Dist. Ct.	NO. A-03-1086-S	States Motion in Limine	second part 2/14/2005 first part 2/16/2005
51st Dist. Ct.	NO. A-03-1086-S	State of Texas v. CARLOS SANTANA GARCIA	2/17/2005
51st Dist. Ct.	NO. A-03-1086-S-W-1	Application for Writ of Habeas Corpus. Art. 11.07 Filed w/Memorandum Brief	10/23/2018
51st Dist. Ct.	NO. A-03-1086-S-W-1	Trial Court's Finding and Recommendation of dismissal	3/10/2019
51st Dist. Ct.	NO. A-03-1086-S-W-1	Affidavit of William R. Moore (Trial Attorney) signed	2/19/2019
Court of Criminal Appeals of Texas (CCA)	NO. WR-87,713-01	On Application for a Writ of Habeas Corpus Cause NO. A-03-1086-S-W-1 in the 51st Dist. Ct. From Tom Green County (order/remand evid. hearing)	5/8/2019

Court	DKT NUMBER	CASE caption FOR PROCEEDING	date Judgment
51st Dist. Ct.	NO. A-03-1086-S-W-1	Trial Courts Findings and Recommendation of denial of defendants application No. 1 For Post conviction writ of habeas corpus	6/25/2019
CCA	NO. WR-87,713-01	TR. Ct. No. A-03-1086-S-W-1 Postcard Official Notice	1/1/2020
U.S. Dist. Ct. Northern Dist. Texas San Angelo Division (U.S.D.C)	DKT * 1, 2, 4 no. 6:20-CV-00084-H	Petition For Writ of Habeas Corpus 28 U.S.C. §2254 with Brief and Affidavit	8/11/2020
U.S.D.C.	DKT * 5, 13 no. 6:20-CV-00084-H	Requesting Evidentiary Hearing with Brief	10/13/2020
U.S.D.C.	DKT * 11, 12 no. 6:20-CV-00084-H	Motion For Leave to Proceed in Forma Pauperis	10/13/2020
U.S.D.C.	DKT * 14 no. 6:20-CV-00084-H	Order to show cause, notice and instructions to parties	10/13/2020
U.S.D.C.	DKT * 20 no. 6:20-CV-00084-H	Response Lumpkins answer with Brief in Support	12/1/2020
U.S.D.C.	DKT * 23 no. 6:20-CV-00084-H	Motion to receive copies of orders, decision, decree, opinions, etc. to notify any action	7/14/2021
U.S.D.C.	DKT * 27 no. 6:20-CV-00084-H	Motion requesting Discovery in 28 U.S.C. §2254 writ	2/11/2022
U.S.D.C.	DKT * 29, 30 no. 6:20-CV-00084-H	Order and Judgment of Petitioners Writ, 28 U.S.C. §2254	2/23/2022
U.S.D.C.	DKT * 31 no. 6:20-CV-00084-H	Notice of Appeal	3/4/2022

Court	DKT Number	Case Caption of Proceeding	date judgment
U.S.D.C.	DKT #32 no. 6:20-cv-00084-H	Motion for leave to proceed in forma pauperis on appeal	3/8/2022
U.S. Court of Appeals Fifth Circuit (5th Cir.)	no. 22-10225	Carlos Santana R. Garcia v. Bobby Lumpkin, Director, TDCJ-CID U.S.D.C. no. 6:20-cv-84 Appeal Docketed	3/9/2022
5th Cir.	no. 22-10225	Motion to proceed in forma pauperis	3/9/2022
5th Cir.	no. 22-10225	Motion for extension of time	4/4/2022
5th Cir.	no. 22-10225	Application for Certificate of Appealability from the U.S.D.C. no. 6:20-cv-84	7/27/2022
5th Cir.	no. 22-10225	Motion for extension of time to file petition for panel rehearing and/or rehearing en banc	8/16/2022
United States of the Supreme Court (U.S.S.Ct.)		Carlos Santana R. Garcia v. Bobby Lumpkin, Director, TDCJ-CID no. 22-10225 U.S.D.C. 6:20-cv-00084-H Application to extend time to file a petition for writ of certiorari	9/23/2022
U.S.S.Ct.	no. 22A296	Granted extension of time to file to December 9, 2022.	10/7/2022

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner CARLOS SANTANA R. GARCIA respectfully prays that the court grant a writ of certiorari to review the judgments below.

OPINIONS BELOW

[✓] For cases from federal courts:

- The order and judgment of the United States court of appeals of the Fifth circuit appears at Appendix A to the petition and no known opinion was written.
- The order and judgment of the United States district court of the Northern District of Texas San Angelo Division appears at Appendix B to the petition and no known opinion was written.

[✓] For cases from state courts:

- The judgment of the court of criminal appeals of Texas, the highest state court to review the merits appear at Appendix C to the petition and no written order or known opinion was written.
- The trial courts 51st Judicial district of Tom Green County, Texas findings and recommendation of dismissal and denial of petitioners post conviction writ of habeas corpus appears at Appendix D & E to the petition and no order nor opinion was written.

JURISDICTION

[✓] For cases from federal courts:

- The date of the order and judgment on which the United States Court of Appeals of the Fifth Circuit denied Petitioners motion for issuance of a certificate of appealability was July 27, 2022. A copy of that order and judgment appears in Appendix A.
- A timely motion for extension of time to file petition for panel rehearing and/or rehearing en banc was filed and was denied by the U.S. Court of Appeals Fifth Circuit on August 16, 2022, a copy of that decision appears in Appendix F.
- The date of the order and judgment on which the United States district court of the Northern district of Texas San Angelo division denied Petitioners writ of habeas corpus 28 U.S.C. § 2254 was on February 23, 2022, a copy of that order and judgment appears in Appendix B.
- An application to extend time to file a Petition for a writ of certiorari was filed with the clerk of the Supreme Court of the United States in accordance with Rule 13.5. The application was granted on October 7, 2022, a copy of that authorization appears in Appendix G.

Mr. Garcia invokes this courts jurisdiction to grant petition for a writ of certiorari under 28 U.S.C. § 1254(1); § 1651(a); § 2106.

[✓] For cases from state courts:

- The date of judgment by the Court of Criminal Appeals of Texas the highest state court which decided Petitioners writ of habeas corpus was on January 1, 2020, a copy of that judgment appears in Appendix C.

Mr. Garcia invokes this courts jurisdiction under 28 U.S.C. § 1257(a); § 1651(a); § 2106.

This petition is timely filed in accordance with the Rules of the Supreme Court, Rule 13.1, Rule 13.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLED

The questions presented implicate the following provisions of the Constitution of the United States and the United States code.

THE FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in a Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness aganist himself, nor be deprned of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE SIXTH AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses aganist him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

THE FOURTENTH AMENDMENT: Section 1. All persons born or naturalizied in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254 (1): 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. § 1257 (a): Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statue of the United States is drawn in question or where the validity of a statue of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statues of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1651 (a): The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2106: The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2253 (c)(1)(A): Unless a circuit justice or judge issues a certificate of appealability an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court or ....

(c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2244(d)(1): A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

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

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

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254 : [redacted] (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was not adjudicated on the merits in State court proceedings unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or invoiced an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

On October 23, 2018, petitioner filed his First application for a writ of habeas corpus under Code of Criminal Procedure Article 11.07 with the 51st Judicial District of Tom Green County of Texas. (hereafter 51st dist.) Petitioners constitutional claims - Although poorly particularized because of being untrained and uneducated as a lawyer, without any trial transcripts or Files of the record — are based on Fifteen (15) claims.

There are thirteen (13) specific claims of Ineffective Assistance of counsel with due process of law violations; one (1) claim that the State violated the Confrontation and Due Process clause; one (1) claim that the trial judge violated the Compulsory Process for obtaining witness(es) in defendants Favor and Due Process Clause with equal protection under the law.

1) Counsel provided erroneous legal advice during plea negotiations, directly causing petitioner to reject a lower charge, a probation sentence with no jail time, directly affecting petitioners ability to make a knowing, willing, and intelligent decision to the states plea deal.

2) Counsel failed to investigate and pursue defense of potential witnesses communicated by petitioner, whom interacted immediately after the alleged accusation or interacted with the alleged victim after the accusation. (A gymnastic instructor, ballet instructor, Pediatrican Physician, (principle, teachers, counselor and nurse at school))

3) Counsel failed to investigate and pursue defense of specific named individuals communicated by Petitioner whom could provide information to Petitioners defense. (Christina Solis, Sergio Cardanaze, Gregory Garcia, Maria Garcia, Jessica Diaz, Mr. Richard (Jessica's companion), Graciela Garcia, Renee (Gracielas Friend), Graciela's co-worker - Female, new receptionist (unknown name).

4) Counsel failed to conduct an independant examination of prosecutors witnesses (Jasmine, Graciela Garcia, Jessica Diaz, nurse, detective, psychologist, videotape interviewer, teacher).

5) Counsel failed to investigate and pursue defense of

Any information, medical journals or forensic/medical expert(s), to build a defense, to rebut the medical testimony of the states expert.

6) Counsel failed to communicate substantial constitutional and statutory laws affored to petitioner, in regards to the declarants videotape interview, denial of these rights to exercise affected the fairness of the trial.

7) Counsel represented petitioner under a personal and self-inflicted conflict of interest (hereafter COI). Counsel had eye surgery in May 2004, had heart surgery in October 2004. On or about the first of January 2005, confronted petitioner, counsel needed to be paid more money in order to continue representing petitioner. Counsel was fully aware of petitioners financial disabilites, this confrontation caused a firm exchange of words, and created a personal wedge that had not existed prior to this exchange. Counsels health issues were existing factors in his failure to execute his duty, and counsels confrontation caused an indifference to advocate with zeal petitioners rights and safeguard procedures at trial afforded most all defendants.

8) Counsel provided misleading statements about pre-trial proceedings, before the start of second trial. ~~Counsel~~ communicated the judge had told him he could not use the same line of questioning of Graciela Garcia he had used in the first trial, and that he could not use any of the testimony Jasmine gave in the first trial. Counsels inaction to challenge the decision, and to invoke state, federal and Supreme Court authorites, denied petitioner a strategic advantage to discredit the validity of Graciela to be truthful, and to challenge Jasmines testimony she gave at the first trial.

9) Counsel failed to file a motion of indigent and motion to obtain expert witness as discussed with petitioner and Angela Garcia (spouse at time) after first trial ended, expressed a dire need for a forensic/medical expert to rebut the nurses testimony for the state. Counsel said it would cost alot of money. Petitioner explained our financial inability to pay for an expert and asked if the courts could help us. Counsel said, yes, he would have to file a motion of indigent, then file a motion to obtain

An expert witness. This course of action was agreed upon. This was the last conversation petitioner had with counsel about an expert. [Ground #5 & #9 are related, in the same discussion Angela (being a registered nurse) told Moore that she knew a General surgeon physician who would be willing to help if his knowledge could be helpful. Moore said he would let us know.]

10) Counsels COI and insufficient participation, failed to object to the States introduction of a 5x7 photo of Jasmine; as prejudicial, no probative value to the trier of facts.

11) Counsels COI and insufficient participation, failed to object to the States admission and playing of videotape interview of Jasmine; as violating right to confrontation under state, federal and Constitutional (Supreme Court) authority; as violating the states statue that child must be declared unavailable in order to submit and play videotape. It had been established by the trial judge and state that Jasmine was available to testify; as violating petitioners constitutional right of opportunity to conduct an independant (contemporanous) cross-examination of the videotape allegations by Jasmine. (see Ground #6) The trial court erred in allowing the admittance and playing of videotape. The videotaped infected the fairness and totality of the trial.

12) Counsel COI and insufficient participation, failed to object to the States direct testimony of Jasmine: as bolstering testimony of previously submitted testimony [videotape] to the jury; as bolstering testimony of an unimpeached witness, needlessly presenting cumulative evidence and unfair prejudice [Trial docket shows the State played the videotape to the jurors first, then elected to call six different witnesses, the following day calls Jasmine to testify.] The State was allowed to present their case-in-chief twice, uncontested, unchallenged and sterile to the juror before any adequate attempt to cross-examine was allowed.

13) Counsel COI and insufficient participation, failed to object to psychologist response solicited by the State on direct and redirect; as directly or indirectly expressing an opinion on the truthfulness and credibility of Jasmines allegations in which the psychologist was not qualified and infringing on the province of the jury to determine the veracity of Jasmine.

14) The State violated petitioners Sixth Amendment right to Confrontation and Fourteenth Amendment right to Due Process with equal Protection under the law, by admitting and playing the videotape of an available witness whom was not declared unavailable, breaching the states statue, and long-standing principal of due process.

15) the trial judge violated petitioners Sixth Amendment right to Compulsory Process for obtaining witness in his favor for his defense and Fourteenth Amendment right to due Process. Counsel requested to the trial judge, the courts assistance to obtain an expert witness to aid in the defense of counsel, this request was denied by the trial judge. the courts denial denied Petitioner his sole viable defense witness inwhich to put the Prosecutors case to its proof, denying petitioner a fair trial.

The 51st Judicial District of Tom Green County of Texas (hereafter 51st dist.) conducted a finding of petitioners constitutional claims by sending a letter to defense attorney William R. Moore (hereafter Moore) requesting "Moore to respond with a written affidavit to the fifteen (15) grounds of ineffective assistance of counsel claims during the trial." (App. H) Recommendation of Dismissal was based solely on Moores response on March 10, 2019. (App. I) The 51st dist. wrote " has reviewed the application, the clerk file, and other information". Petitioners application contains thirteen (13) claims of IAOC, nine (9) which occured off the record before trial, one (1) claim that the State violated petitioners Const. rights, one (1) claim that the trial judge violated petitioners const. rights. It would be contradictory for the 51st dist. to make that official statement, and yet, be completely inaccurate in the letter sent to Moore. It would be reasonable to presume the 51st dist. ct. did not give a true reading to petitioners application and memorandum brief in support.

On May 8, 2019 the Court of Criminal Appeals of Texas (hereafter CCA) ordered the 51st dist. to conduct an evidentiary hearing (App. J) stating in pertinent part, "Applicant has alleged facts that, if true, might entitle him to relief. In these circumstances, additional facts are needed. The trial court is the appropriate forum for findings of fact. The trial court may order trial counsel to file a second response to applicants IAOC claims. The trial court may use any means set out in Tex. Code of Crim. Proc. Art. 11.07 § 3(d)".

The 51st dist. findings consisted of documents filed in petitioners first and second trial, many of the documents have no relevance toward petitioners claims. The 51st dist. recommended denial of application to grounds one(1) through thirteen(13) as inclusive. To grounds fourteen(14) and fifteen(15) as being a complaint of trial error and therefore not cognizable. (App. E)
No full and fair hearing was conducted, no order for Moore to file a second response, no affidavits or interrogations sought out of individuals mentioned by petitioner to accurately develop the record, no reference of trial court transcripts, no reference of petitioners brief in support of application, no fair findings of unresolved and disputed facts in regards to petitioners constitutional claims.

On January 15, 2020, the CCA sent petitioner a official 'Post-card' notice stating, "this is to advise that the court has denied without written order the application for writ of habeas corpus on the finding of the trial court without a hearing and on the courts independent review of the record". (App. C)

On August 11, 2020, petitioner filed his first meritorious 28 U.S.C. § 2254 writ of habeas corpus with brief and affidavit in support, (DKT. #1, 2, 4), in the U.S. District Court Northern District of Texas (San Angelo Division) (hereafter U.S.D.C.). Petitioner articulated to the best of his ability fourteen (14) constitutional claims which are substantially the same as petitioners state writ of habeas corpus. Petitioner has renumbered the order of claims to provide a chronological order and reformated the language of claims to provide clarity. There are twelve (12) claims of IAOC with due process violations; one (1) claim the state violated the confrontation and due process clause; one (1) claim the trial judge violated the compulsory process and due process with equal protection under the law.

On August 11, 2020, petitioner filed a motion requesting an evidentiary hearing with brief in support to the U.S.D.C. (DKT #5) which was denied on October 13, 2020 (DKT #13).

On October 13, 2020, the U.S.D.C. ordered the respondent to respond to Petitioners 28 U.S.C. § 2254 writ of habeas corpus. (DKT#14) The U.S.D.C. stated in order under respondents answer, "Respondent must mail a copy of the answer, together with a copy of any supporting brief and an appendix containing the above-mentioned exhibits, to Petitioner. . . ." Respondent filed a response with brief and appendix on December 1, 2020 (DKT 20), also filed was the Administrative Record consisting of State court papers (DKT 21). In Respondents brief page six (6), stated, "A copy of the records will not be forwarded to Garcia. An indigent inmate is not entitled to receive a free copy of his trial records for habeas corpus purposes... Garcia will receive the appendix." The U.S.D.C. did not require or order Petitioner to respond to respondents arguments.

On April 26, 2021, petitioner filed motion requesting notification of any decision, order, decree, opinion or memorandum of Petitioners habeas corpus writ § 2254 (DKT#23), which was dismissed as unnecessary on July 14, 2021 (DKT 26).

On January 27, 2022 petitioner filed motion requesting discovery in 28 U.S.C. § 2254 writ with brief, entered on February 7, 2022 (DKT# 27). The motion was denied on February 11, 2022 (DKT#28).

On February 23, 2022, the U.S.D.C. entered its Order and Judgment (DKT#29, 30) (App. B) that "Petitioners 28 U.S.C. § 2254 petition was filed after the applicable 1-year limitation period expired and should, therefore, be dismissed with prejudice. In addition, the court concluded that Garcia has failed to show that reasonable jurists would debate whether the courts procedual ruling was correct and whether he has put forward a valid claim of a constitutional deprivation. The court therefore denies a certificate of appealability."

On March 2, 2022 Petitioner filed notice of appeal in the U.S.D.C. which was entered on March 4, 2022 (DKT#31).

On March 2, 2022, petitioner filed notice of appeal in the U.S. Court of Appeals of the Fifth Circuit (hereafter 5th Cir.) which was docketed on March 9, 2022 (App. K).

On March 22, 2022 petitioner filed motion for extension of time to file motion for a certificate of appealability (hereafter COA) with brief. On April 4, 2022, the 5th Cir. granted extension of time, which was mailed and postdated on April 5, 2022. Petitioners mail-room personal did not deliver this legal mail until April 29, 2022. The deadline to file was April 18, 2022.

On April 8, 2022, petitioner filed motion to extend the length limitation for petitioners motion for COA with brief. On April 18, 2022, the 5th Cir. granted motion, Petitioner received this legal mail on April 22, 2022.

On April 14, 2022, petitioner filed motion for issurance of COA with brief in the 5th Cir. which was denied by order on July 27, 2022, stating; " Garcia fails to make the requiste showing, accordingly, the motion for a COA is DENIED ". (App. A). Within this COA motion, Petitioner notified the 5th Cir., the totality of petitioners rare and extraordinary circumstances, which prevented petitioner in filing his constitutional claims in a writ of habeas corpus in state and federal court, notified the court of petitioners position which provision under 28 U.S.C. § 2244 (d)(1)(B)-(D) applied to his circumstances, notified the court of the U.S.D.C. conflicting interpretation, standard and application applied to § 2244(d)(1)(A)-(D), statue of limitations and equitable tolling compared to other federal and sister circuit courts. Petitioner also addressed the "cause" and "prejudice" prong, addressed all fourteen (14) const. claims — although unduly rushed by the failure of prison mail-room personal to deliver legal mail promptly upon receipt — and affirmed petitioners declaration of innocence to the indictment allegations.

On August 9, 2022 petitioner filed motion for extension of time to file petition for panel rehearing and/or rehearing en banc which was denied on August 16, 2022, therefore no timely petition for hearing could be filed on time.

Petitioner seeks review of the 51st dist. findings and conclusions of law to rule its recommendation to deny petitioners writ of habeas corpus, review of the judgment by the CCA which denied petitioners writ, review of the order and judgment by the U.S.D.C. which denied petitioners § 2254 writ, review of the judgment denying COA by the 5th Cir..

Petitioner respectfully invokes the Supreme Courts of the United States long established authoritative powers under 28 U.S.C. §§ 1254 (1), § 1257(a), § 1651(a), § 2106, § 2243, and as guardians of the Constitutional rights entitled to its citizens to correct an injustice, a miscarriage of justice, and a constitutional infringement.

In Hohn v. U.S. 524 U.S. 236, 118 S.Ct. 1969 (1998) the court held it has jurisdiction under § 1254 (1) to review denials of application for COA by a circuit judge or a panel of a court of appeals. id. @ 252, 118 S.Ct. @ 1978.

REASONS FOR GRANTING THE PETITION

I. Did the Court of Criminal Appeals of Texas and the U.S. District Court Northern District of Texas San Angelo Division, ERR by deciding the merits of petitioners writ of habeas corpus appeal, based on the incorrect and unreasonable application of established federal law, as determined by the Supreme Court of the United States and applied an unreasonable determination of the facts presented by the 51st District Court findings and conclusions of laws?

Yes, the appeals courts adopted the 51st. dist. Findings and conclusions of law, and applied those state and federal standards toward Petitioners thirteen (13) constitutional claims of ineffective assistance of counsel. (hereafter IAOC).

The 51st dist. identified Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) as proper case law. But applied an incorrect and unreasonable standard for relief not required by convicted defendants seeking relief in claims of IAOC. Id. @ 681. The 51st dist. relied on an additional standard, "an applicant must show, by a preponderance of the evidence, his counsel's performance was deficient and that there is a reasonable probability, sufficient to undermine confidence in the result, that the outcome would have been different but for his counsel's performance." In addition stated, "the mere possibility of

A different outcome is not sufficient to prevail on the presudice prong. Rather, the defendent must demonstrate that the presudice rendered sentencing 'fundamentally unfair or unreliable'." (quoting Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.ct. 838 (1993). (see App. E). The Strickland standard clearly states;" First, the defendant must show that counsels performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance presudice the defense. This requires a showing that counsels errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable". Strickland, 466 U.S. 668, 687. The appropriate standard for presudice is further elaborated," The defendant must show that there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. @ 694, 703. This is what Strickland requires. The 51st dist. relies on an additional requirement, but has misquoted and mischaracterized its context stating," The applicant must further overcome 'the strong presumption that counsels conduct fell within the wide range of reasonable professional assistance." The accurate quote and context states in Strickland;" Because of the difficulties inherent in making the evaluation (attorneys performance), a court must indulge a strong presumption that counsels conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption, that, under the circumstances, the challenged action" might be considered sound trial strategy"." Id. @ 689.

The Supreme Court has rejected that Lockhart v. Fretwell modified or in some way supplanted the rule set down in Strickland see. e.g., Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 1386 (2012); Glover v. U.S., 531 U.S. 198, 203, 121 S.ct. 696 (2001); and Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495 (2000) (The Virginia Supreme Court erred in holding that our decision in Lockhart modified or in some way supplanted the rule set down in Strickland Id. 529 U.S. 362, 391. The Supreme Court Justice O'Conner concurring in part and concurred in Judgment stated, "If a court were to reject a prisoners claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different', 'opposite in character and nature', and 'mutually opposed' to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a "reasonable probability that... result of the proceeding would have been different." Williams, 529 U.S.@ 406-407, 425-426).

The 51st dist. applied an incorrect and unreasonable determination of the facts to petitioners IAOC claims. The court failed to conduct a full and fair evidentiary hearing, to inquiry into the totality of circumstances of the actual performance of counsel that occurred off the record and on the record. It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance. Strickland, 466 U.S.@689. 104 S.Ct.@2065; Kimmelman v. Morrison, 477 U.S. 365, 106 S.ct. 2574, 2589 (1986).

The 51st dist. mischaracterized ground one of petitioners claim, providing a false representation of the facts presented by petitioner. Petitioner has never stated that William R. Moore (hereafter Moore) made a plea offer of misdemeanor assault without any allegation of sexual assault. In ground two the 51st dist. mischaracterized petitioners statements, ...'Applicant alleges that he provided names...." A clear reading of ground two says 'Applicant suggested and provided information of individuals whom interacted...." Petitioner has never known the name of Jasmines pediatrician, gymnastic and ballet instructors, principles, teachers, and counselors, but did know their exact locations of business or work place. The 51st dist. relied on Moores affidavit response, "Moore states he spoke to those persons he could, and that they were either not helpful or openly hostile." This conclusion is misleading compared towards Moores affidavit. Moore specifically identifies one teacher who was hostile, no one else. Moore gives a misleading general statement that the physician at Community was classified 'patient-doctor' and not shared. This is a false statement and highly misleading, under Texas Rules of Evidence Rule 509(b), states in a criminal proceeding their is no physician-patient privilege. Both of Moores responses cannot be considered reasonable effective assistance of counsel. In Ground two and three Petitioner identified and named specifically Fifteen (15) potential witness. not one witness was called to testify in favor of the defense at trial. The 51st dist. calls attention to the clerks record showing nine (9) individuals subpoenaed by Moore. that the trial docket shows most of these were not called to testify. Goes on to add. giving deference to trial counsel's judgment this court believes no competent trial counsel would call a hostile witness to testify or call a witness whose testimony would not be helpful to the defense. except under the most extreme and necessary circumstances. Its obviously clear the 51st dist. did not give a true reading to the trial court docket or the trial transcripts. All of the witnesses Moore subpoenaed where the prosecutors witnesses to prove their case-in-chief. All of the witnesses were called to testify by the prosecutor. not one witnesses had any favorable testimony for petitioners defense. So why would Moore help subpoena the states witnesses? Based on the 51st dist. belief, Moore is incompetent. Petitioners believes Moore knew he had no witnesses to present a defense and subpoenaed nine (9) witness for the prosecution to pull the 'wool over the eyes' to make it seem he had nine witnesses for the defense. It seems this tactic proved successful in the 51st dist. rapid determination. In Ground four the 51st dist. relies on Moores credibility and again shows no true reading of petitioners application with brief. In Ground five and nine which the 51st dist. combined together. show again no true reading was conducted. Moores affidavit response contradicts the motion filed for an expert. Moores motion filed at that time gives a true and accurate state of mind of Moores reasoning to the importance of obtaining an expert and why. The 51st dist. did not apply this analysis. but relied on Moores affidavit. In Ground six, Moore does not address or deny petitioners claim that Moore failed to advise petitioner of his constitutional provisional right for contemporaneous cross-examination of Jasmines videotape testimony. The 51st dist. seems to apply a standard of "no harm no foul" to justify bypassing a substantial constitutional provisional right. The 51st dist. produced a document that was filed by the State in Petitioners first trial. Specifically 'NOTICE OF INTENT TO USE HEARSAY STATEMENT OF CHILD ABUSE VICTIM' filed on March 11, 2004. This notice specifically identifies the 'outcry statement' made to Graciela Garcia, it does not identify the videotape testimony, the name of the interviewer, or Jasmines unavailability status. Regardless of this document no timely motion was filed in Petitioners second trial to admit the 'outcry statement' according to procedure of law, something Moore failed to recognize and should have invoked to prevent this evidence to be admitted. This document has no bearing on Petitioners claim nor on the admittance or reliability of the videotape. The 51st dist. never really address claim other than, "Applicant does not cite the statues to which he refers, and fails to provide an evidentiary proof that counsels failure to properly communicate these substantial rights effected Appellants right to a fair trial." The 51st dist. did not read the brief in support of application. Petitioner named the statue twice, but not the specific section within the statue, petitioner was not aware that he had to guide the blind. In addition its counsels duty to provide Petitioner an understanding of the law as it applies to his case and defense, if Petitioner knew the law to protect himself and exercise his constitutional rights he wouldn't need a lawyer. As mentioned in brief, a layman has no skill in the science of the law, unfamiliar with the rules of evidence, lacks the knowledge to prepare his defense, requires the guiding hand of counsel, his advice should permit Petitioner to make an informed decision, with out he faces the danger of conviction.

In Ground seven, the 51st dist. did not apply a reasonable determination of the facts based on the events and circumstances that occurred at that time and place. The clerks docket sheet shows Moore had eye surgery in May 2004, another surgery prior to November 2004. Moores affidavit confirms he had by-pass heart surgery in October 2004. Moores health issues were not alleged, they were a fact. The confrontation by Moore asking for more money was a fact also, the shift in Moores availibity

And biased attitude was a factor in Moores representation of petitioner at trial. In ground eleven, the 51st dist. concluded the videotape was properly admissable under Article 38.071. Texas Code of Criminal Procedure (hereafter T.C.C.P.). This is a general open-ended statement and does not address Petitioners specific claim of IAOC nor the courts err by not declaring Jasmine unavailable before admitting and playing the video. In ground thirteen, did not give a true reading to petitioners claim or trial transcripts. Moore failed to object to the psychologist bolstering the truthfulness and credibility of Jasmines allegations. In the Texas Rules of Evidence. Rule 702_2 prohibits the direct or indirect opinion of expert testimony that a child of sex abuse is telling the truth (rarely make these things up, rare for a child to lie, that child has always been consistent or behavior is consistent with sexual abuse), this infringes upon the jurors exclusive province to determine the ultimate question in the case. In grounds ten, eleven, twelve, and thirteen the 51st dist. concluded; "Applicant failed to show by a preponderance of evidence that a different result would have occurred if trial counsel had objected and the court had sustained the objection". (see App. E)

The 51st dist. relied on a 'paper hearing' to resolve Petitioners IAOC claims. State court habeas findings based solely on a paper record are not necessarily entitled to a presumption of correctness. Ellis v. Collins 956 F.2d 76 (5th Cir. 1992). In Nethery v. Collins, 993 F.2d 1154.1157 n.8 (5th Cir. 1993) held that because the State habeas judge was not the judge at the State trial, the 'paper hearing' was not a adequate and fair hearing. Thus, there is a danger of 'trial of affidavit'. Id. @ 1157.

In Petitioners federal proceedings: requested a evidentiary hearing and discovery (DKT #5, 27), which was denied (DKT #13, 28) by the U.S. D.C. In Petitioners federal brief (DKT #2) in support of writ petition, identified the 51st dist. incorrect and unreasonable application of established federal law, and the unreasonable determination of the facts presented. In the U.S.D.C. order (DKT #29) it stated, "Garcia's 14 IAOC claims are based on alleged constitutional errors that occurred before and during his 2005 trial". (see App. B). This is factually incorrect and would indicate that the U.S.D.C. did not give a true reading to Petitioners petition or brief. Petitioners

§2254 Petition clearly identifies twelve (12) IAOC claims, one (1) const. claim aganist the state, and one (1) const. claim aganist the trial judge.

In Williams v. Taylor, 529 U.S. 362 (2000) the court stated, "The writ may issue if... the state court adjudication resulted in a decision that (1) was contrary to... clearly established Federal law, as determined by the Supreme Court of the United States or (2) involved an unreasonable application of... clearly established federal law, as determined by the Supreme Court of the United States Id. @ 400, 413, 425-26. Errors that undermined confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the Federal writ. Id. @ 375. The deprivation of the right to effective assistance of counsel recognized in Strickland is such an error.

II. Is it unconstitutional under the Fifth, Sixth, and Fourtenth Amendment for a defense attorney to provide inaccurate legal advice to a criminal defendant during communication of a states plea deal, which substantially affects defendants direct ability to make a knowing, willing and intelligent decision to the states plea deal.

Yes, it has long been held that criminal defendants are entitled to effective assistance of counsel, this Sixth Amendment right to counsel extends to all critical stages including plea-bargainning process applicable to the states through the Fourtenth Amendment.

Petitioner made a const. claim of IAOC during the plea communication in which Moore provided erroneous legal advice on a critical point of law, in which Petitioner unequivocally relied on to his detriment and rejected the States plea deal.

It has long been held that criminal defendants are entitled to EAOC during all "critical stages of the criminal process". Montejo v. Louisiana, 556 U.S. 778, 786, 129 S.Ct. 2079 (2009); (quoting U.S. v. Wade, 388 U.S. 218, 227, 87 S.ct. 1926 (1967); Powell v. Alabama, 287 U.S. 45, 57, 53 S.ct. 55 (1932); and Hill v. Lockhart, 474 U.S. 52, 57, 106 S.ct. 366 (1985), applied the right (and the corresponding Strickland analysis), "to ineffective assistance claims arising out of the plea process". See, e.g., Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376 (2012). The advice of competent counsel is a procedual safeguard enabling voluntary and intelligent plea bargaining. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663 (1978). In determining the voluntariness of a plea, courts must examine the totality of the circumstances. Haynes v. Washington, 373 U.S. 503, 513 (1963); Leyra v. Denno, 347 U.S. 556, 558 (1954). The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternate courses of action open to the defendant. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709 (1969); Machibroda v. U.S. 368 U.S. 487, 493, 82 S.Ct. 510 (1962). In People v. Whitfield 40 Ill.2d 308, 239 N.E.2d 850 (1968) the Supreme Court wrote "It follows logically that if a defendant has the right to make a decision to plead not guilty, he also has the right to make the decision to plead guilty." see Lyles v. State, 178 Ind. App. 398, 382 N.E.2d 991 (1978) (A decision of the upmost importance: whether or not to plead guilty).

In Petitioners state and federal writ with briefs, Petitioner has articulated the details of the plea communications that occurred between Petitioner, Angela Garcia (spouse at time), and Moore. Petitioner described the exact place, time of day, individuals present, and the substantial convensation that took place on April 2004. (see App. L). Prior to Petitioners first trial, four plea deals were offered by the State through Moore to Petitioner, one (1) was for a twenty (20) year prison sentence, two (2) was for a ten (10) year prison sentence, three (3) was for a ten (10) year adjudication probation sentence. All three (3) plea deals were under the stipulation Petitioner plead guilty to the indictment charge of first degree felony, aggravated sexual assault of a child, which Petitioner rejected through Moore. The fourth plea deal occurred on the day Petitioner and Angela were in court for a pre-trial hearing, Moore said the D.A just offered us a plea deal, if Petitioner pleads guilty to a class C felony, injury to a child, Petitioner will get five (5) years probation. Petitioner specifically asked Moore, "will I have to register, register as a sex offender?" Moore replied, "Yes, you would". Petitioner responded, "No, I can't accept that, I can't be a registered sex offender for life." Moore replied, "I dont think its for life, I think its for only ten (10) years". Petitioner relied on Moores legal advice to make the decision to reject the plea deal. (see App. M).

There is no such requirement under T.C.C.P. Art. 62.001 (which is extraordinary lengthy and confusing) (see App. N) that a criminal defendant be required to register if convicted under Texas Penal Code Section 22.04, Injury to a child. (see App. O)

The ineffectiveness of Moores legal advice substantially affected petitioners ability to make a well informed knowing, willing, and intelligent decision in respects to the plea offer, as Moores erroneous advice adversely distorted the true essence of the plea deal. Moores legal advice under these circumstances was not the product of any defense strategy or tactic, noting the deference applied in Strickland. Moores legal advice was based on a mistaken belief and "a startling ignorance of the law." Kimmelman 477 U.S. 365, 106 S.Ct. 2574, 2588 (1986). Moore did not conduct any research about the plea offer, no research about the law or statues, he came out of the court room and communicated the plea deal and answered petitioners three questions. Petitioner went through a trial that ended in a mistrial (7-5 not guilty, jury dead-locked), and a second trial ten (10) months later that resulted in the conviction of the indicted charge with a thirty (30) year prison sentence, had Moore provided accurate legal advice, petitioner would have accepted the states plea deal. Petitioner would have never gone to trial or be convicted of the indicted charge. In retrospect, Petitioner would be innocent of the charge now convicted. [redacted]

The 51st dist. based their conclusions on an unreasonable determination of the facts presented in the state court proceeding. The court provided Moore a generous presumption of credibility based on his tenure as a lawyer and judge, which holds no weight to Moores actions at that time and place.

In a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fact." Townsend v. Sain, 372 U.S. 293, 309, n.6, 83 S.Ct. 745 (1963). Rather, it is a mixed question of law and fact. see Cuyler v. Sullivan, 446 U.S. 335, 342, 100 S.Ct. 1708 (1980); Strickland, 466 U.S. @ 698.

Moores affidavit states in Ground one. "I assume that the first three offers put forth by appellant are accurate, I don't recall exactly." This response should give any reviewing court cause for concern about the recollection and credibility of any individual. Moore continues, "The fourth offer presented to me by Allison Williams was for a plea to simple assault with no sexual allegations, and for a deferred adjudication probation." The district attorneys correct name is Allison Palmer, not Williams. Moore goes on to say, "... the discussion was on the misdemeanor level." Moore does not address or deny the five (5) year probation period.

The 51st dist. taking a true examination of Moores version of the plea, would be familiar that (see App. P, T.C.C.P. art. 42.12 § 3(c)) in a deferred adjudication probation sentence for a misdemeanor level offense is not to exceed two years. [Red flag] The 51st dist. stated, "Judicial notice has been taken on the entire file in this case." If a true examination took place, the court would have seen the states document filed on March 9, 2004 (see App. Q) in Petitioners first trial, 'Notice of possible 404(b) 609(f) and 37.07 evidence', which shows Petitioners misdemeanor criminal record, specifically a Class A misdemeanor assault causing bodily injury. [Red flag] Again reflecting on Moores version, simple assault is covered under Texas Penal code Section 22.01 (see App. R) which basicly says in pertinent part (22.01 (b)(2)(A)) an offense causing bodily injury is a Class A misdemeanor, except that the offense is a felony of the third degree, if the defendent has been previously convicted of an offense under this chapter. [Red flag] The district attorney was well aware of petitioners prior misdemeanor class A assault and would not have offered the plea deal in the context that Moore claims. The three red flags should have alerted any impartial reviewing court with knowledge of the law and the available record. Simple put one plus one doesn't add up. The final crux is Moores asserted version, that the district attorney was willing to drop a first degree felony indictment of aggravated sexual assault of a child... to a misdemeanor simple assault with a deferred adjudication probation of no more than two (2) years, and that Petitioner refused to accept that plea deal. No reasonable person facing a five (5) to ninety-nine (99) year prison sentence at trial, a conviction that would mark him as a sexual

Predator for life and having to register as a sex offender for for life, would reject such a gracious plea deal. It makes no rational logical sense. No sane person would refuse such a plea and go to trial. Its more logical and reasonable that the facts presented by Petitioner holds the weight of truth.

In addition the 51st dist. applied an incorrect and unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Williams v. Taylor, 529 U.S. 362, 406, 425. As presented in Question One.

III. Is it unconstitutional under the Fifth, Sixth, and Fourteenth Amendment for the State to intentionally circumvent and violate a states statue in a criminal trial, thereby infringing a defendants Constitutional right to Confrontation and Due Process with equal protection under the law.

Reporters Record Trial Court Transcript No. A-03-1086-S (hereafter R.R.)

Petitioners right to Confrontation and Due process with equal protection under the law was violated by the State, when the state requested and allowed to admit and play the videotape interview testimony of Jasmine to the jurors first, before Jasmine was determined to be unavailable by the Court (see T.C.C.P. Art. 38.071 Section 1), before Jasmine was called to testify, before Jasmine could be fairly cross-examined or impeached at trial.

The state intentionally circumvented and violated state statue T.C.C.P. Art. 38.071 Sec. 1 (see App. S) states, "This Article applies only to a hearing or proceeding in which the court determines that a child younger than 13 years of age would be unavailable to testify in the presence of the defendant about an offense defined by any of the following sections of the Penal Code:".... The statue is very clear in its language, there is no vague meaning in its intent and requirement. The statue was designed this way for two reasons, One, to protect a child from the trauma of confrontation of the accused defendant, in certain situations when the child is to young or emotionally unable to give live testimony in court effectively, in those situations, a court must make a determination on the record that the child is unavailable in order to admit the videotape testimony of

A child to a jury. Two, to protect a defendants constitutional right of confrontation, to afford a defendant the face-to-face confrontation of the accuser, to afford a defendant a fair cross-examination of the accusers' live testimony, before any out-of-court statements are considered to be admitted for their limited purpose.

The State, nor Courts, should be allowed to use a statue that undermines the purpose of the statue. see In Re Chapman, 166 U.S. 661, 17 S.Ct. 677, 680 (1897) writing that "nothing is better settled than that statues should receive a sensible construction, such as will effectuate the legislative intent, and if possible, so as to avoid an unjust or an absurd conclusion." Id.

The availability of Jasmine was never an issue in Petitioners trials. The court and State established on the record that Jasmine was available and would be testifying, prior to the violation. [see R.R. Vol. 3 p. 55 L. 4-6, The Court: "OKAY. And... the child is going to testify?" _Ms Palmer: "Yes". R.R. Vol. 3 p. 67 L. 17-19, Ms Palmer: "Your daughter, Jasmine Pulley, is she available to testify in this trial today?" _Graciela Garcia: "Yes, she is", R.R. Vol. 3 p. 104 L. 14-17, The Court: "Then when do we anticipate Miss Pulley testifying? Later today or..." _Ms Palmer: "Depending on where we are, Your Honor."] The unavailability requirement is only one out of twelve (12) that the court must determine to have been substantial satisfied before the oral statement made in the videotape is admissible into evidence (see T.C.C.P. Art. 38.071 Sec. 5 (a)(1)-(12); App. 9). This is not a capricious procedure that should be deemed just another statue, or given the presumption that the State satisfied the statues requirements. The court made these substantial statement, along with the State, prior to the playing of the videotape. [R.R. Vol. 3 p. 103 L. 10-13, The Court: "OKAY... while I am on break, taking a look at this, we are going to have the videotape —...?", R.R. Vol. 3 p. 104 L. 18-24, The Court: "OKAY. I'm just trying to figure out if I need to be studing any evidentiary rules that may jump at me. And hearing none..." _Ms Palmer: "I cant think of any — I cant think of any issues, Your Honor." _The Court: "I think we hit the big questions on the outcry and videotape, so....", R.R. Vol. 3 p. 106 L. 17-20 The Court: "...can the tape just be played through or do we need to stop and forward?" _Ms Palmer: "It — it can be played through. Your Honor. I would publish it in its entirety."]. It would be reasonable to conclude the court did not take a good faith review of Art. 38.071 Sec. 1 or Sec. 5 (a)(1)-(12) during his break.

"A "systemic requirement" (also known as an absolute requirement or prohibition) is a law that a trial court has a duty to follow even if the parties wish otherwise. Any party that is entitled to appeal may complain on appeal that such a requirement was violated, even if the party failed to complain about the failure, or waived the application of the law." (quoting Mendez v. State, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004)); Marin v. State, 851 S.W. 2d 275, 280 (Tex. Crim. App. 1993)

The Due Process Clause of the 14th Amendment has long been recognized as assuring "fundamental fairness" in a state criminal proceeding. Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265 (1923); Lisenban v. California, 314 U.S. 219. 236. 62 S.Ct. 280 (1941). Although a court is entitled to rely to a great extent on the parties attorney to protect their own clients interest, the court, too, has a duty to ensure that a criminal defendant receives a fair trial. U.S. v. Nobles, 422 U.S. 225, 230, 95 S.Ct. 2160 (1975). In Moore v. Illinois 408 U.S. 786, 92 S.Ct. 2562 (1972) the Supreme Court wrote "It is a state that tries a man, and it is the state that must insure that the trial is fair." "A citizen has the right to expect fair dealings from his Government Id. @ 810 {Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968}, and this entails treating the goverment as a unit rather as an amalgram of seperate entities." In California v. Green, 399 U.S. 149, 190 S.Ct. 1930 (1970), Justice Harlan in a concurring opinion wrote, "There is no reason in fairness why a state would not as long as it retains a traditional adversarial trial produce a witness and afford an opportunity to cross-examine him when he can be made available. That this principle is an essential element of fairness is attested to not only precedent, Barber v. Page 390 U.S. 719, 722-725, 88 S.Ct. 1318 (1968); Smith v. Illinois, 390 U.S. 415 (1965); Motes v. U.S., 178 U.S. 458 (1900), but also by the traditional and precept exceptions to the hearsay rule which recognizes greater flexibility for receiving evidence when the witness is not available." California, 399 U.S. 149, 161-162, 165, 167 n.16, 187; see Williams v. Taylor 529 U.S. 362 (2000) ("... fairness means that the defendant is treated according to the law, with the full panoply of rights and entitlements it it affords."Id.@393 n.17). In OHIO v. ROBERTS, 448 U.S. 56, 100 S. Ct. 2531 (1980) the court wrote, The Confrontation Clause operates in two seperate ways to restrict the range of admissible hearsay. first, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including in cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use aganist the defendant. Second, aspects operates once a witness is shown to be unavailable. Id.@65. In CRAWFORD v. Washington 541 U.S. 36, 124 S.Ct. 1354 (2004), the court wrote, where testimonial evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. Id.@68. "The essential guarantee of the due process clause is that the goverment may not imprison or otherwise physically restrain a person except in accordance with fair procedures." see Treatise on Constitutional Law: Substance and Procedure (West Publishing Co.; St. Paul, Minn., 1986) § 17.4, p. 213.

The State had no intention to inform the court of the proper reading and requirements of Art. 38.071 Sec 1; Sec. 5(a)(1)-(12), no intention to abide by the statue, no intention to recognize defendants fundamental right to Confrontation or defendants due process with equal protection under the law to ensure a fair trial. The States intent to play the videotape first was motivated by Jasmines video testimony of three seperate and independant extraneous allegations of sexual assault (R.R. Vol.3 p.117 L.16; p.128 L.12; p.131 L.12), which petitioner had only been given notice and charged with one specific act in the indictment. The Federal courts recognized as a cardinal principle of the common law that evidence of the commission of a wholly seperate and independant crime is inadmissible as part of the case aganist defendant. see Michelson v. U.S., 335 U.S. 469, 475, 69 S.Ct. 213 (1948); U.S. v. Parker, 416 U.S. 989, 94 S.Ct. 2396 (1974); U.S. v. Goodwin, 492 F.2d 1141, 1148 (5th Cir. 1974), not because the jury may believe he committed a similiar act, but that the prejudice would be to great. The State was further motivated by Jasmines extrinsic allegations that petitioner had done something similiar in a sexual abuse nature to Sabrina and Samantha (R.R. Vol. 3 p.148 L.18-25; p.149 L.1-7; p.150 L.20-25;

P.151 L.1-3]. The State sought out to highlight Jasmines allegation that Petitioner had done something similiar before to others at the conclusion of the videotape. [R.R. Vol 3 P. 152 L.11-16]. The General Rule in all English speaking Jurisdictions is that an accused person is entitled to be tried on the accusations made in the states pleadings and not some collateral crime (allegation) or for being a criminal generally. This rule is now deemed axiomatic and is followed in all jurisdictions. see. e.g., Maynard v. State, 685 S.W.2d 60, 66 (Tex. Crim. App. 1985); Pavlacka v. State, 892 S.W.2d 897, 904 (Tex. Crim. App. 1994); Rankin v. State, 953 S.W.2d 740, 744 (Tex. Crim. App. 1996); Robles v. State, 85 S.W.3d 211, 213 (Tex. Crim. App. 2002). The video had inflammatory statements that Petitioner had been arrested before [R.R. Vol. 3 P. 121 L.13], drank beer [R.R. Vol. 3 P. 149 L.13], and was a bad man.

The State could not solicit these allegations from Jasmines live direct testimony without properly filed notification. but under the guise and circumventing a state statue. the state was allowed to introduce and open 'Pandoras box' of all these allegations into the minds of the jury and trial uncontested. The state then chose to call six different witnesses. waited till the next day. then called Jasmine to the stand to testify. the State was allowed to lead Jasmine along testimony given on video. allowed to ask 'do you remember', allowed to provide testimony in question form. in essence introducing their case-in-chief twice, thereby bolstering their version of the facts, before the defense was allowed a fair opportunity to cross-examine or impeach the testimony of a child. "Reason, principle, and common human experience" (quoting Estelle v. Willians, 425 U.S. 501, 96 S. Ct. 1691 (1975), dictate that a jury will respond negatively to a defendant compelling a child witness to testify after they have already seen the videotape of the childs allegations and just heard for a second time the childs live direct testimony repeated by the States leading questions. The possible, if not probable reaction of the jury to a trial incident of this nature would be unduly prejudicial to the defendant. Due process should not condone such a monumental abuse. see Long v. State, 742 S.W.2d 302, 322 (Tex. Crim. App. 1987). The States closing argument amplified this incident [R.R. Vol. 4 P. 99 L. 6-9, Ms Palmer: " She brought her stuffed animal with her and, of course, almost tore it apart in the course of her testimony. I know as you saw her just wringing it as she was testifying... but she got through it." R.R. Vol. 4 P. 99 L. 1-5, Ms Palmer: "I think it took a lot of courage for her to tell her mother at all, much less to come in here and tell all of us, to a room full of strangers. I cant tell you how much I admire and respect the courage it took to do that... walk in this room and leave her mother behind. leave her grandmother behind."] The state also brought up the three extraneous accusations [R.R. Vol. 4 P. 100 L. 10-12, Ms Palmer: "... it started the summer before first grade the other two occasions occurred during first grade." R.R. Vol 4 P. 101 L. 18-22 Ms Palmer: "So what would prompt her to make all this up, to fabricate three very seperate and distinct instances? Theres just nothing. There is nothing she could gain from manufacturing what she has talked to you about today."] to the jury.

In Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340 (1986) the court wrote, if a procedure is found to be inherently prejudicial, a guilty verdict will not be upheld if the procedure was not necessary to further an essential state interest. Id. @ 568. It is clear the State had no concern that Jasmine would suffer any trauma, the statue failed in its purpose and intent, and only provided the state an unconstitutional free pass to deprive Petitioner of a fair trial. (see App. T, Trial Docket). "Structural error is constitutional error of the first magnitude and no amount of showing of want of prejudice will cure it." U.S. v. Cronic 466 U.S. 648, 659 n. 25, 104 S. Ct. 2039, 2047 n. 25, (1984). Automatic reversal is required because "there are some const. rights so basic to a fair trial that their infraction infects the entire trial process and can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, 827 (1967). Structual error exists when a defendant has been denied "a particular guarantee of fairness." U.S. v. Gonzalez-Lopez 548 U.S. 140, 146, 126 S. Ct. 2557, 2562 (2006).

IV. Does the Constitution under the principles of the Fifth, Sixth, and Fourtenth Amendment make a distinction whether a criminal defendant has an appointed counsel or retained counsel in order to receive the Constitutional rights establised in those Amendments, and if no such distinction is warranted, did the trial judge in Petitioners trial infringe Petitioners right to compulsory

PROCESS AND DUE PROCESS with EQUAL PROTECTION under the LAW?

Petitioner made a constitutional claim that the trial Judge violated petitioners Right to Compulsory Process for obtaining a Witness in his Favor and violating petitioners Right to Due Process with Equal Protection under the law, by denying Petitioners Motion and verbal request for the courts assistance to obtain an Expert witness for his defense at trial.

There were two (2) motions Filed five (5) months after Petitions First trial ended in a Mistrial, one, was a MOTION FOR STATE TO PROVIDE FUNDS FOR EXPERT WITNESS(ES) (hereafter Motion I, see App. U, V), two, was a MOTION FOR STATEMENT OF FACTS OF PRIOR PROCEEDINGS INVOLVING THE DEFENDANT AND MEMORANDUM OF AUTHORITES (hereafter Motion II. see App. W, X), both motions were Filed on September 21, 2004, @ 3:29 P.M., both Motions were decided and signed on October 13, 2004 by trial Judge Ben Woodward, both Motions indicate petitioners indigent status and circumstances. The Judge Granted Motion II and denied Motion I. The Judge made a notation on the order Form denying Motion I. (see App. V) "Defense Attorney is Retained. Defendant is not indigent." The Judges Ruling granting Motion II contradicts this reasoning and ruling. The Judge recognized and declared Petitioner indigent when he granted Motion II, therefore the Judge erred in his Judgment in denying Petitioners motion I.

The Supreme Court recognized in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980) that their is no basis for drawing a distinction between retained and appointed counsel that would deny Equal Justice to defendants who must chose their own lawyers. Id. The Sixth Amendment to the Constitution provides the Fundamental right to have Compulsory Process for obtaining witnesses in the accused Favor and that right is constitutionally required in state courts under the 14th Amendment to the U.S. Constitution. Id. @ 344, 100 S.Ct. @ 1716. In Pennsylvania v. Richie, 480 U.S. 39, 107 S.Ct. 989 (1987) Justice Powell writing for the court, criminal defendants have the right under Compulsory Process Clause to the Goverments assistance in compelling the attendence of favorable witnesses at trial and the right to put before a Jury evidence that might influence the determination of Guilt. Id. @ 40, 107 S.Ct. @ 992. "This is a Fundamental element of due process of law". (quoting Washington

v. Texas 388 U.S. 14.19, 87 S. Ct. 1920 (1967) (same). Once an attorney relationship has been established through the appointment or retention of counsel, as a matter of federal law the method by which the relationship was created is irrelevant: The existence of a valid attorney-client relationship provides a defendant with the full const. provisions afforded by the Sixth Amendment. Montejo v. Louisiana, 556 U.S. 778, 797, 129 S.Ct. 2079 (2009). The Supreme Court analysis in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985) begin with a revisiting of the "elementary principle" that every criminal defendant, indigent, or otherwise, must have "a fair opportunity to present his defense." Id. e 76, 105 S.Ct. e 1092. A fair criminal process is one in which the defendant was not deprived of "any substantive or procedual right to which the law entitles him." (quoting Williams 529 U.S. 362, 393 n.17 (2000)). "There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has." (quoting Griffen v. Illinois, 351 U.S. 12, 19, 76 S.Ct. 585 (1956). Experts are often necessary both for the prosecution and for the defense." A defendant may be at an unfair advantage, if he is unable because of poverty to parey by his own witness's the thrusts of those aganist him." (quoting Reily v. Barry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929). The accused should have the opportunity to the presentation of the evidence of his own experts. see U.S. v. Ash, 413 U.S. 300, 315, 93 S.Ct. 2568 (1973); U.S. v. Wade, 388 U.S. 218, 227 (1967).

The trial judge failed to apply the proper analysis and abused his discretion. It makes no logical sense to approve motion II, based on Petitioners indigency and const. rights to equal protection of the laws and due process of law, and in the same breathe to deny motion I, declaring petitioner not indigent because he has retained counsel. No hearing was conducted to determine, if their is a satisfactory showing that the defendant is financially unable to pay the fees of an expert witness, in which he request, and if an expert requested "is likely to be a significant factor" confronting the States case and presenting a defense at trial. see Rey v. State, 897 S.W.2d 333, 339 (Tex. Crim. App. 1995); (quoting Ake 470 U.S. 68, 74, 82-83). If a defendant request an expert who can buttress a viable defense, due process is implicated when the trial court refuses the request. see Taylor v. State 939 S.W.2d 148, 152 (Tex. Cr. App.

1996).(see App. U "...it is anticipated that the State will again use an "expert" witness. Defendant will need to rebut such testimony.... It is essential to the defense to be able to rebut the states testimony."). In AKE it was emphasized that one of the defendants need for an expert was to assist in every aspect of his defense theory including impeachment of the States expert witness. AKE, 470 U.S. 68, 82, 105 S.Ct. 1095. The recognized that a defense strategy of exposing weaknesses in the states proof and presenting the jury with alternative theories is a legitimate and necessary function of the adversary system. Id.

In Petitioners case the medical examination confirmed their was no evidence of any trauma to corroborate the allegations.([redacted]) In the first trial the nurse confirmed this medical fact, yet being trained, certified, and recognized as a sexual assault nurse examiner by the Attorney General's office of the State of Texas, her testimony was tailored to favor the states position. The nurse was adamant that in all her years and the hundreds of children she examined, there is not any trauma found in children, that in allegations of sexual penetration its very rare to find any injury, that she rarely finds any injury or trauma in a child.

Petitioners spouse Angela was a registered nurse in charge of her own floor at Shannon Medical Hospital, was on her fifth year of college toward a masters degree in medicine. Angela attended the first trial that ended in a mistrial. Petitioner and Angela meet with Moore immediately after the trial in his office. The nurses testimony was discussed. Angela explained that based on the extreme nature of the sexual allegations, that the nurses testimony is incorrect. That trauma or injury to a childs sexual organ does occur at the time of assault, healing does occur internally and externally, yet, healing is a process that leaves behind unmistakeable anamolies and scars, over time that scar or injury will be a thin line or extra layer of skin in that area, but it will never just disappear leaving no evidence. Petitioner discussed with Moore the financial disability to pay for an expert and asked Moore if the Courts could help us get an independent medical expert to challenge the nurses testimony, and to explain to a jury medically how the female sexual organ of a child reacts and responds to an intrusion of penetration by an adult males sexual organ, and the injuries/scars left behind by that intrusion. This was a critical and substantial issue, highlighted more so by the nurses testimony, and the extreme nature of the sexual allegations being made.

The State sought to remove any juror during voir dire who would want medical proof that sexual assault occurred [R.R. Vol. 2 P. 77 L.5-8]. The State spent time making the point, that no injuries or trauma is found in children, when a females childs sexual organ is penetrated by an adult males sexual organ their is no physical medical evidence, its very rare to find any evidence in a child. [R.R. Vol 3 P.165 L.12; P.166 L.14; P.167 L.2-15; P.173 L.17]. In closing argument the state made the point to the jurors that their had been no evidence presented that sexual assault did not occurr [R.R. Vol 4 P.99 L.17-20; P.126 L.7-9, P.130 L.12-14]. Its unclear if the State was referring to defendant not testifying, whom was the only person who could verbally deny the allegations, as Moore presented no defense at all.

Few defendants or their attorneys are remotely competent to understand, identify, or articulate medically what type of injurys are manifested when, as alleged, an adult males sexual organ penetrates the sexual organ of a female child.

The Supreme Court in Ake recognized that due process requires access to the raw materials integral to the building of an effective defense. Ake, 470 U.S. 68, 77, 105 S.Ct. 1087. To implement this principle, the State "must provide defendant the 'basic tools for an adequate defense' within our adversarial system and has 'required that such tools be provided to those defendants who cannot afford to pay for them.'" Id. (citing Britt v. North Carolina, 404 U.S. 226, 227, 92 S.Ct. 431 (1971). The purpose of the appointment of an expert is to level the playing field. The medical issue in this case is fact-dependant: "Medicine in any of its subspecialties eludes mathematic precision, as evidence by the need for a "second opinion" with regard to any important medical question." Rey 897 S.W.2d @ 338. When evidence is weak it may well be that the persuasiveness of that evidence derives entirely from the enhancing effect caused by "expert" testimony prodding the jury toward a particular conclusion. A defendants inability to rebut expert testimony coming before the jury with what is effectively a presumption of correctness, is "devastating" to the unassisted defendants chance of presuading the juror to reject such evidence. Ake, 470 U.S.

68, 82-84. The court in AKE reasoned it is best for the jury to hear "the experts for each party". Id. @ 81.

The constitutional error in this case is structual, the error infected the trial from beginning to end as petitioner was denied from offering any meaningful objective medical evidence or from rebutting the States evidence with a defense expert, thus providing the fact-finder an optimal vantage from which to gauge all relevant facts and make an informed decision on the merits. There are few errors that are more structual in nature than one which eliminates a "basic tool of an adequate defense" and in doing so dramatically affects the accuracy of the jurys determination. Rey 891 S.W.2d @ 345; (quoting Britt, 404 U.S. @ 221, 92 S.Ct. @ 438).

V. Did the U.S. District Court of the Northern District of Texas San Angelo Division err by applying a conflicting interpretation standard and incorrect application of 28 U.S.C. § 2244(d)(1)(A)-(D), equitable tolling, and its authority to correct an injustice, which calls for this Supreme Court supervisiory powers, to the end that it may secure a clear uniformity in the district courts and court of appeals where other courts and sister courts have applied a different standard and application, in regards to petitioners habeas corpus writ?

The 51st dist. nor the Court of Criminal Appeals relied on or denied petitioners writ of habeas corpus on the grounds that the petition was barred by the statue of limitations. (see App. C). The respondent brought forward the statue of limitation argument in their response to petitioners 28 U.S.C. § 2254 writ as a barrier aganist petitioners constitutional claims. Petitioner was not order by the U.S.D.C. to respond or clarify petitioners position, to address respondents asserted reliance on the statue of limitations bar. "Response pleadings may be necessary for a pro se plantiff to clarify his legal theories" see Neitzke v. Williams 490 U.S. 319 330, n.9, 109 S.Ct. 1827, 1834, n.9 (1989). The U.S.D.C. was not precluded from conducting a full, fair and true review of petitioners 14 const. claims, in which the state did not rely exclusively on the procedual ground. Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. Unit A 1981).

The U.S.D.C. cited several cases in their order (see App. B) in reference to equitable tolling that hold no direct or reasonable relationship toward Petitioners 28 U.S.C. §§ 2244(d)(1)(B); § 2244(d)(1)(D): And extraordinary circumstances. The U.S.D.C. cited one case in reference to the statue of limitation application § 2244(d)(1)(D) and morseled out an unreasonabe statement in which to deny relief, based on an unreasonable presumption. The U.S.D.C. Failed to read the courts interpretation of § 2244 (d)(1)(D) and apply that interpretation accordingly. see In re Davilla 888 F.3d 719 (5th Cir. 2018);

Petitioner has not claimed any ignorance, mistake, or confusing in reading AEDPA's time for filing an appeal. Petitioner filed his writ in accordance with the provisional exceptions under § 2244(d)(1)(B) and (D), affording Petitioner the one full year to file his writ, in accordance with the procedures and process that are required to be followed in an appeal and apping equity in the interest of justice to correct a constitutional violation.

Petitioners impediment and discovery is directly related to Petitioners Ground one const. claim of IAOC in which Petitioner unequivocally relied on Moores legal advice for years without question. In 2003, Petitioner had no knowledge of the operation of law, Rules of evidence, law or the fundamentals of constitutional law in order to defend himself in a criminal proceeding. Therefore, Petitioner sought out an attorney (Moore) whose duty was to bring all this knowledge to bear for Petitioner. see McMann v. Richardson, 397 US 759, 771 (1970); Powell v. Alabama 287 U.S. 45, 57. (1932); Strickland v. Washington, 466 U.S. 668, 680 (1984); Kimmelman v. Morrison 477 U.S. 365, 384 (1986). The Supreme Court has repeatedly emphasized that "the purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights". Johnson v. Zerbst 304 U.S. 458, 465 (1938). In McNeil v. Wisconcin, 501 U.S. 171, 175 (1991) the court wrote: "the purpose of the Sixth Amendment counsel guarantee — and hence the purpose of invoking it — is to protect the unaided layman at critical confrontations..." Id. @ 177, at which counsel would help the accused "in coping with legal problems or meeting his adversary" U.S. v. Ash, 413 U.S. 300, 312 (1973), whether "formal

OR informal, in court or out". U.S. v. Wade, 388 U.S. 218, 226 (1967).

In May 2018, petitioner read an article in a Rolling Stone magazine about a Texas politician facing a sexual abuse allegation, the politician agreed to a plea deal offer of pleading guilty to injury to a child with a five year probated sentence because it did not require the politician to register as a sex offender. This article was a complete contradiction to the legal advice told to petitioner by Moore in April 2004. In 2018, petitioners knowledge of the law had not changed (due to limited access to high security prisoners, petitioner has been housed in Admin. Segregation High Security since 2010) petitioner spent two months requesting law material until locating the correct statue that confirmed Moore had in fact lied to me in April 2004 about the sexual offender registration requirement. Petitioner immediately sought out to learn where and how to file an appeal. In this process petitioner discovered everything Moore had said, didn't say, didn't do, was a violation of the fundamental principals established in the Sixth Amendment. Moore had a duty to carry out basic duties, communicate substantial constitutional laws and rights, defend petitioner with zeal and loyalty and to advocate petitioners innocence at trial.

In establishing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) Congress explicitly laid out three (3) circumstances which the statue of limitations would begin to run after the date on which the prisoners judgment became final. Felder v. Johnson 204 F.3d 168, 172 (5th Cir. 2002); see §§ 2244(d)(1)(B) Government impediment; §§ 2244(d)(1)(C) new right made retroactive; §§ 2244(d)(1)(D) factual predicate discovery; When Congress established AEDPA it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights. Slack v. McDaniel 529 U.S. 473, 483 (2000). it did not seek to end every possible delay at all cost. Id. Congress has ensured that the court house doors will not shut on those prisoners who through no fault or lack of diligence of their own, failed to meet the initial deadline. Miller v. Marr, 141 F.3d 976, 977 (10th Cir. 1998). Dismissal of a first federal habeas petition is a particular serious matter. These exceptions make the writ available to address later arising circumstances, without these exceptions a petitioner could inappropriately be denied the protections of the Great Writ entirely risking injury to an important interest in human liberty. see Lonchar v. Thomas, 517 U.S. 314, 116 S.Ct. 1293, 1299 (1996); see also Ex Parte Yerger 8 Wall 85, 95, 19 L.Ed. 332 (1869) (The Writ "has been for centuries esteemed the best and only sufficient defense of personal freedom"). It might be admitted that there would be a stronger presumption in favor of deciding the merits of a first-time petition than for a successive petition. Lonchar 517 U.S. @ 1306. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriage of justice within its reach are surfaced and corrected. see Harris v. Nelson, 394 U.S. 286, 291 (1969)

The U.S.D.C. did not liberally construe §2244(d)(1)(B) should apply to Petitioners circumstances and case. Section 2244(d)(1)(B) is focused on goverment conduct (action) in violation of the constitution or laws of the United States. Wood v. Spencer, 487 F.3d 1, 6 (1st. Cir. 2007). An individual who passes the eligibility requirements for admission to the Texas State Bar is an agent of the State. Moore was an agent of the State and by his IAOC impeded Petitioners efforts to timely file. The word "impediment" is not defined in the statue itself, nor is it self-elucidating. Moore v. Battaglia, 476 F.3d 504, 506 (7th Cir. 2007). Where a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the "state ... unconstitutionally deprives the defendant of his liberty". Cuyler 446 U.S. 335, 336, 343, 100 S.Ct. 1708, 1711, 1715 (1980). The defendant is thus "in custody in violation of the constitution" 28 U.S.C. §2254(a) and federal court have habeas jurisdiction over his claim. Id. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel. Kimmelman 479 U.S. 365, 379 (1986); Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2646 (1986). The court in Coleman v. Thompson, 501 U.S. 722, 750 (1991) wrote cause for a procedural default exist where "something external to the petitioner, something that cannot be fairly attributed to him..." impeded [his] efforts to comply with the states procedual rule" Id. @ 753. It is not the gravity of the attorneys error that matters, but that it constitutes a violation of Petitioners right to counsel, so that the error must be seen as an external factor. i.e.. "imputed to the state". Id.@752. A showing that the factual or legal basis for a claim was not reasonably available to Petitioner, or that some interference by officials made compliance impracticable, would constitute cause under this standard. see Reed v. Rose 468 U.S. 1, 4, 104 S.Ct. 2901, 2909 (1984); Murray 477 U.S. @ 488. In appropriate cases "the Supreme Court has said "the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamental unjust incarceration." Id. @ 495; Coleman 501 U.S. @ 750; (quoting Engle v. Isaac 456 U.S. 107, 135 (1982)).

The U.S.D.C. determines in its order that Petitioner should have known that Moore had provided erroneous legal advice or that Petitioner could have discovered this lie in 2004 or at the trial in 2005, thus thats where the "factual predicate" began to run. The U.S.D.C. could not have given Petitioners claim a liberal reasonable reading. Petitioner unequivocally relied on everything Moore said, how does any human being discover a lie if they believe that lie to be the absolute truth. The U.S.D.C. seems to imply that Petitioner intentionally sat on this const. claim for years slowly gathering every scrap of evidence. That is not only an unrealistic conclusion, but an absurd implication. When Petitioner read the article, Petitioner has followed the procedures in filing an appeal in state and federal court, all without a lawyer, and all within the one-year afforded Petitioner with the applicable exceptions of §2244(d)(1)(B), and (D), (2) following Congress intent, the 'cause' and 'prejudice' prong, equity in the interest of justice, being applied to Petitioners writ of habeas corpus.

In Fleming v. Evans 481 F.3d 1249 (10th Cir. 2007) the court recognized "the date on which the factual predicate could have been discovered through the exercise of due diligence" §2244(d)(1)(D) would be the day on which defendant could have reasonably discovered the violation. In U.S. v. Denny 694 F.3d 1185 (10th Cir. 2012) the court recognized that §2255(f)(4) and §2244(d)(1)(D) are similiar, these provisions are an example of what are called "discovery rules" for delaying the accrual of a cause of action. It is irrelevant whether that information has come to the defendants attention by serendipity or diligence, even exceptional diligence. Id.@1190. The exercise of

REASONABLE diligence is an ongoing process. what is required at any particular time depends on what one has notice of at that time. Id. @ 1190. In RE DAVILLA 888 F.3d 719 (5th Cir. 2018) the court explained its interpretation of §2244(d)(1)(D) it "held that this means the date a petitioner is on notice of facts which would support a claim, not the date on which the petitioner has in his possession evidence to support his claim." In RE Young 789 F.3d 518, 528 (5th Cir. 2015) (same). In Johnson v. U.S. 544 U.S. 295, 315, 125 S.Ct. 1571, 1584 (2005). Justice Kennedy with whom Justice Stevens, Justice Scalia and Justice Ginsberg join, dissenting. In discussing, 28 U.S.C. §2255.6(4). Justice Kennedy wrote "in my view it is well within the realm of reasonable statutory construction to apply the term "discover" to an order vacating a conviction. The ordinary meaning of the term "discovery", after all, is, "the act, process, or an instance of gaining knowledge of ascertaining the existence of something previously unknown or unrecognized". Id. In Urie v. Thompson, 337 U.S. 163, 170 (1949) a tort claim act of a statue of limitations [under the Fed. Emp. Liability Act], the court was reluctant to charge Urie with the "unknown and inherently unknowable" and held that because of his "blameless ignorance" of the fact of his injury, his claim did not accure until his [diease] manifested itself. Id. In Wims v. U.S. 225 F.3d 186 (2d Cir. 2000) the court found that the district court treated §2255 (4) as if it was a basis for 'extending the limitations period' after Wims conviction became final. The district court interpreted the section as if it provided a ground for tolling of the limitation period, rather than as defining the time when the limitations period begin. Id. @ 189. See §2255 (4) [Like §2244(d)(1)(D)] is not a tolling provision that extends the length of the available filing time by excluding certain periods that post-date the start of the limitations clock from the calculation of how much time has run, rather, it resets the limitation periods beginning date, moving it from the time when the conviction became final. see §2255 (1) [§2244 (d)(1)(A)], to the latter date on which the particular claim accrued. see also Smith v. McGinnis 208 F.3d 13, 15 (2d Cir. 2005) [AEDPA takes into consideration circumstances, such as the discovery of new facts, that reset the statue of limitations §2244(d)(1)(D). Id. @ 17; Hannigan v. U.S. 131 F.Supp.3d 480 (U.S.D.C. East dist. N.C. S.Div. 2015) (same).

AEDPA's statue of limitations defense . . . is not jurisdictional, Day v. McDonough, 547 U.S. 198.205.213 (2006). it is subject to a rebuttable presumption in favor of equitable tolling. Irwin v. Department of Veterans Affair 498 U.S. 89.95 (1990). That presumption strength is reinforced by the fact that equitable principles have traditionally governed substantive habeas law. Munaf v. Green 553 U.S. 674 (2008). The "AEDPA statue "does not set forth an inflexibule rule requiring dismissal whenever" its clock has run". Holland v. Florida 560 U.S. 631. 645 (2010); (quoting Day 547 U.S. e 208). In Holland it made clear that courts must be flexible and exercise their equitable powers on a case-by-case basis instead of blindly following 'Mechanical rules'. Id. e 650; (quoting Holmberg v. Armbrecht 327 U.S. 392. 396 (1946). A court is not inexorably bound to follow past precedent when doing so would prevent it from "according all the relief necessary to correct ... particular injustices" Id. (quoting Hazel-Atlas Glass Co., v. Hartford Empire Co., 322 U.S. 238. 248 (1944), mindful "that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." Holland 560 U.S. 631. 130 S.Ct. 2549. 2563. Holland recognized that a petitioner is entitled to equitable tolling if he shows that he has been pursuming his rights diligently and that some extraordinary circumstances stood in his way and prevented timely filing. Id. The diligence required for equitable tolling purpose is "reasonable diligence" see Lonchar v. Thomas, 517 U.S. 314, 326 (1996). not "maximum feasible diligence". (quoting Moore v. Knight 368 F.3d 936, 940 (CA7 2004); Aaron v. U.S. 291 F.3d 708. 712 (11th Cir. 2002). Equitable tolling is appropriate when a defendant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. see Irwin 498 U.S. 89. 96. 111 S.Ct. 453. 458 (1990). The term "extraordinary" refers not to the uniqueness of a party circumstances, but rather to the severity of the obstacle impeding compliance with a limitation period. Harber v. Ercole 648 F.3d 132. 137 (2d Cir. 2011) Habeas corpus allows courts "to cut through barriers of form and procedural mazes" to effectuate the writs ultimate purpose: safeguarding individual freedom aganist lawless state action and ensuring "that miscarriages of justice ... are surfaced and corrected". (quoting Harris v. Nelson 394 U.S. 286. 291 (1969)). Justice Harry A. Blackmun, writing a concurring opinion in Sawyer v. Whitley, 505 U.S. 333. 112 S.Ct. 2514 (1992) wrote: "By the traditional understanding of habeas corpus. A "fundamental miscarriage of justice" occurs whenever a conviction or sentence is secured in violation of a Federal constitutional right". Id. e 357. 112 S.ct. e 2528. The court would do well to heed Justice Hugo L. Black's Admonition: "It is never to late for courts in habeas corpus Proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the constitution. Id.

If there is any direct conflict between the state rule and the rights guaranteed by the federal Constitution, the latter must prevail. see Riggs v. Fairman, 399 F.3d 1179. 1194 (9th Cir. 2005). "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding". U.S. Const. Art. VI. cl. 2; see also McCulloch v. Maryland 4 Wheat. 316. 17 U.S. 316. 426. 41 L.Ed. 579 (1819).

CONCLUSION

I. CARLOS SANTANA R. GARCIA, Respectfully pleads, that this court, should grant his petition for writ of certiorari.

Respectfully Submitted,

Carlos Santana R. Garcia

DATE: December 7, 2022