22-6688

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DANNY RICHARD RIVERS, Petitioner,

vs.

BOBBY LUMPKIN, DIRECTOR, TDCJ-CID, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS
(Appeal No. 18-11490)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- Did the Fifth Circuit Court of Appeals violate due process and/or commit reversable error when it applied PINHOLSTER to bar evidentiary hearing?

- Under this Court's recent ruling in SHINN V MARTINEZ-RAMIREZ, MARTINEZ exceptions to procedural default for ineffective assistance of trial counsel claims does not apply to §2254(e)(2)'s evidentiary hearing bar for failing to develop the factual basis of the claim.

  But when a Texas pro se petitioner develops evidence to support his claims in the state habeas proceedings -- but fails to present that evicence in compliance with state procedural rules -- is this a procedural default covered by MARTINEZ, or is the petitioner still considered to have "failed to develop" the claim under §2254(e)(2)?

- Did the Fifth Circuit Court of Appeals violate Federal Rules of Civil Procedure 52(a)(6) and this Court's precedent in AMEDEO V ZANT when it supplanted its fact finding over the district court's finding?

- Did the Fifth Circuit Court of Appeals deny habeas review of petitioner's evidence supporting his ineffective assistance of trial counsel claim because of a state procedural rule that was either not in effect or not firmly established at the time of the petitionaer's state habeas proceeding?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules and Statutes:

Tex.R.App.Proc. 73.7
Fed.R.Civ.Proc. 52(a)(6)
28 U.S.C. §2254(d)
28 U.S.C. §2254(e)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

I, Danny Richard Rivers, respectfully pray that a Writ of Certiorari issue to review the judgement and opinion of the Fifth Circuit Court of Appeals, rendered in these proceedings on May 13, 2022.

OPINIONS AND ORDERS IN THE CASE

The Fifth Circuit Court of Appeals affirmed my conviction in its cause No. 18-11490. The opinion is unpublished, and I do not have a copy for the Appendix whereas I had to attach my only copy to my petition for rehearing in the Circuit Court and I am pro se, incarcerated and have no access to copies.

On August 12, 2022 the Fifth Circuit denied both petition for panel rehearing and petiton for hearing en banc.

JURISDICTION

The original opinion of the Fifth Circuit Court of Appeals was entered May 13, 2022. A timely motion to that Court for rehearing was overruled on August 12, 2022.

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

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shal 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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized 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 priviledges or immunities 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.

3. 28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in coustody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, not withstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,

as determined by the Supreme Court of the United States; 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

4. FED.R.CIV.P. 52(a)(6)

When there are two permissible views of evidence, fact finders choice between the two cannot be clearly erroneious.

5. TEXAS RULES APPELLATE PROCEDURE 73.7. New Evidence Application Forwarded to Court of Criminal Appeals.

If an Article 11.07 or 11.071 application has been forwarded to this Court, and a party wishes this Court to consider evidence not filed in the trial court, then the party must comply with the following procedures or the evidence will not be considered.

(a) If the court of Criminal Appeals has received an Article 11.07 11.071 application from the district clerk of the county of conviction and has filed and set the application for submission, a party has two options:

(1) The party may file the evidence directly in the Court of Appeals with a motion for the Court of Appeals to consider the evidence. In this motion, the party should describe the evidence, explain its evidentiary value, and state why compelling and extraordinary circumstances exist for the Court of Criminal Appeals to consider the evidence directly. The moving party must immediately serve copies of the notion and the evidence the party seekes to file on the other party or parties in the case. If the Court of Criminal Appeals grants this motion, the Court will consider the evidence in its review of the application. The Court of Criminal Appeals will grant such a motion only if the Court concludes the circumstances are truly exceptional.

(2) The party may file in the Court of Criminal Appeals a motion to supplement the record in the trial court. In this motion, the party should describe the evidence the party intends to file, explain its evidentiary value, and state why the evidence could not have been filed in the trial court before the Court of Appeals filed and set the application for submission. The moving party must immediately serve copies of the motion and the evidence the party seeks to file on the other party or parties in the case.

If the Court of Criminal Appeals grants the motion to supplement, the party may file the evidence with the district clerk of the county of conviction, and should attach a copy of the motion to supplement and the Court of Criminal Appeals order granting said motion. The district clerk shall immediately send a copy of the materials to the trial judge assigned to the habeas case and to the other party or parties in the case, and otherwise comply with the procedures set out in Rule 73.4(b) of these rules.

(b) If the Court of Criminal Appeals has received an Article 11.07 or 11.071 application from the district clerk of the county of conviction, but he Court has not yet filed and set the application for submission, the party must file in the Court of Criminal Appeals a motion to stay the proceedings pending the filing of the evidence in the trial court. In this motion, the party should describe the evidence the party intends to file and explain its evidentiary value. The moving party must immediately serve the motion and the evidence the party seeks to file on the other party or parties in the case. If the Court of Criminal Appeals grants the motion, the Court will specify a designated time frame for the party to file the evidence with the district clerk of the county of conviction. The party should attach a copy of the motion to stay proceedings and the Court of Criminal Appeals order granting said motion to the evidentiary filing. The district clerk of the county of conviction shall immediately send a copy of the filed materials to the trial judge assigned to the habeas case and to the other party or parties in the case, and otherwise comply with the procedures set out in Rule 73.4(b) of these rules.[This rule was adopted Dec. 1, 2016 to become effective Feb. 1, 2017. See TCCA Misc.Docket # 17-001]

STATEMENT OF THE CASE

Pretrial- I initially hired counsel Rick Mahler (Mahler) in November 2009 to represent me for charges of two counsts of Aggrivated Sexual Assault. Mahler and I met one time for an initial consult in which I explained my innocence and that I believed I was being set up by my estranged wife and that she may be the driving force behind the false allegations.[1] A search warrant had been executed on my home while I was out of town working on a construction project in East Texas. A Dell laptop computer was siezed and I informed Mahler that I did not believe the laptop contained anything inappropriate on it. He asked if I was the only one who used the laptop and I informed him that it was kept in common areas and that I had two roomates and a live-in girlfriend, along with my daughters and possibly their friends who all use the computer and gave him a list of names. I informed Mahler that Vance Booher, Justin Caraway, and Misty Ross all lived with me during this time of which sexual abuse was alleged and that they could testify to aminus between my Ex (Christi) and I and also to my interaction with the alleged victims. Mahler assured me he would investigate and prepare a defense if necessary.

Despite my attempts by numerous phone calls and text messages, I had no further contact with Mahler until Feb. 2021 when he called to inform me that the states computer investigation was complete and that no charges were being sought where the computer was concerned. I asked him again to please contact my proposed witnesses and he assured me he would if necessary. I did not hear from him again until I was re-arrested due to additional charges brought in Aug. 2010. At that time we only discussed how additional charges

FN 1- See: Affidavits of Mahler p8(2)(g), Trotter p5(2)(f), Barber p7(2)(f)

had allegedly came out from additional interviews of the alleged victim. He told me this was not uncommon.

Due to Mahler's lack of attention and correspondence with me on my case, my father (whom was essentially funding the defense) and I decided to hire additional counsel. We hired Frank Trotter in Aug. 2010 who at some point brought on counsel Mark Barber as co-counsel. I explained to Trotter the same things I spoke with Mahler about, that I believed this was all driven by my ex, Christi, due to the divorce proceeding issues. I gave them a list of people they should interview to include Vance Booher, Justin Caraway, Misty Ross, and Chance Trevino. Trevino had recently told me that Micheal Seanz, the alleged "whistle blower" who informed Christi of his "suspicions" that something inappropriate may be going on, had in fact been engaging in an intimate relationship with Christi and that Seanz had been trying to pit Trevino against me for quite some time unbeknownst to me.

Approximately one year later, with zero correspondence from niether Mahler, Barber, nor Trotter, in Aug. 2011 the state added two counts of Possession of Child Pornography and the original charges of Aggrivated Sexual Assault are changed to one count of Continuous Sexual Abuse and three counts of Indecency with a Child. At that time I assured counsel Trotter and Barber that I had never downlaoded Child Pornography(C.P.) and that I was concerned about Christi having access to my home and the computer while I was out of town. I informed them that my father, Danny Ri[illegible]rs, Sr., operates a Papa Johns franchise and multiple realestate pr[illegible]perties and that I had been working out of town on these properties for months and specifically the month leading up to the original arrest and search

warrant. I informed them that my employee, Antonio Fernandez, and my father would testify that I was not home to download any pornography placed on the computer at that time. I also asked counsel to have our own experts examine the computer because it didn't make sense to me how almost a year and a half after the computer examination was complete that these charges come about. Counsel Barber filed a motion for continuance to obtain experts on the computer and the continuance was granted. However, no experts were ever obtained. Counsel Barber has since been found guilty of filing frivolous motions with the court.[2]

Despit my attempts through many phone calls and messages, I had no contact with Barber or Trotter until they called me to set up a meeting 7 days before trial. Mahler, Trotter, and Barber were all present and I pleaded with them to please interview my proposed witnesses and to obtain experts to support our defense. Counsel informed me that they would be using the states witnesses against them. Shortly thereafter, counsel Mahler notified me that he would be spending the next 4 days at the D.A.'s office reviewing the state's evidence. He called me to meet him there on one such day to view the alleged C.P. and the download dates and times. I assured Mahler that I could not have been the one who downloaded the images because I was out of town and as I had told Trotter and Barber, Rivers Sr. and Fernandez would confirm the same. Counsel then moved the court for severance of the C.P. charges from the sexual abuse charges. Their position being that 1) according to the state's investigation, the last time I had contact with the alleged victims was October 1, 2009 and the downloads were October 13th and after

FN 2- See: Exhibit 9 to 2254 habeas memorandum(list of Barbers criminal charges)

and thus have nothing to do with the sexual abuse and; 2) a trial should be had to adjudicate the alleged C.P. before entering such into the sexual abuse trial. Counsel's theory being that once you've started alleging C.P., even if it's not proven, you've "put the skunk in the box" and you can't remove that taint.[3]

Counsel, in this Feb. 10th, 2012 hearing just two days before trial, confirm that they just became aware of the specific dates of downloads despite the report being available in the state's files. This hearing was based on Mahler's last minute review of the state's files. Counsel Trotter states:

> "When we were here before, we weren't aware of the report from the expert witness and we even -- after --after examining the state's file, we found that the child pornography that was found on the Defendant's computer by the State's own file states that one of the items that he's been indicted for was downloaded October 13th, 2009..." (at vol 3, p 1, Severance Transcripts)

The State's position at severance was that with no physical or DNA evidence the alleged C.P. was essential as motive evidence to prove intent and state of mind of the Defendant, both of which are elemental to the sexual abuse charges.[4] Ultimately, the Judge denied severance, stating:

> "The child pornography, the two counsts, is admissible to show motive of the defendant." (at vol 3, p 17, lines 22-25, Severance Transcripts)

At Trial- The State's case rested primarily on the testimony of the alleged victims who testified to multiple acts of sexual abuse and the State contended that I had "groomed" the alleged victims by showing them pornography to include child pornography. The State produced testimony from E.R. Technician Dr. Scott Meyers who gave

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FN 3- See: Severance Hearing vol 3, p 5,6 - Transcripts

his opinion that after viewing an array of images provided by the State, at least 2 of those images contained actors under the age of 18. Dr. Meyers was unable to describe the video or image with any specificity. Counsel Trotter and Mahler object to Dr. Meyers testifying to evidence not yet offered. The State did not produce the image or video. The objection was overruled. The video and image was shown the next day by detective Timothy Fox from the forensic lab. The video and image did not match the description of what Dr. Meyers testified to.

Counsel cross examined witnesses bringing forth inconsistant testimony. Counsel attempts to show animus between Christi and I, motive for the allegations, and her access to my home where the computer was found. Evidence showed that the alleged C.P. was found in a program set up by Christi under her user name. Testimony showed that Christi had in fact entered my home against court orders while I was out of town in respects to the time frame the alleged C.P. was downloaded. That Christi informed the state's investigator that I was out of town and how to enter the house. The laptop computer was found, according to testimony, in my master bedroom closet.

Defense counsel put on their sole witness, Antonio Fernandez, whom they interviewed immediately before his testimony. Fernandez testifies that he and I were out of town working in East Texas when the alleged C.P. was downloaded. On cross examination the state asked Fernandez if he had any documentary evidence to support his testimony and he said he was not asked to bring any.(vol 10, p 71-76(Direct); p 76-83(Cross)).

Counsel, in summary of their chosen defense, stated the following at closing:

> "So what's really going on here? What really is? Okay. We've got a mother who loses her child, the one she's closest to, her house, her standing in the community, money, she has to pay money, she loses al that. She has motive. No. 1, she has motive, revenge, a woman's scorn. She's got the kids because if Danny's gone all the time, she's got the kids living with her all the time. Right? She's got opportunity. Kids are there, Danny's gone, she can do anything with those kids...she's got access. She's got the garage codes. She's got access to the computer. She knows how to use it. She knows how to use Limewire [computer program]. She's got it all." (vol 11, p45)

Ultimately the jury convicted me on all 6 counts but assessed nearly bare minimum sentencing on all counts. I was convicted in count 1 for Continuous Sexual Abuse of a Child; in count 2 through 4 for Indecency with a Child; and counts 5 and 6 for posession of Child Pornography. I received a 30; a 3; a 3; a 2; 2; and 2 respectively. After the cumulation hearing, I ended up with a 38 year sentence.

Post Conviction- In my 11.07 application, I asserted, among other things, a claim of ineffective assistance of trial counsel for failing to conduct a reasonable investigation to include, but not limited to, failing to properly prepare and interview and call witnesses on my behalf. I was proceeding pro se and had no means at the time to obtain affidavits from the proposed-but-not interviewed-or-called witnesses to submit with my application. Instead, I made a colorable claim that was sufficient to warrant a remand to the trial habeas court for resolution of my IATC claims. (EX PARTE RIVERS, Wr-84,550-A&B, TCCA Oct. 5, 2017). Despite my request for evidentiary hearing and multiple requests for

for appointment of counsel for this "paper hearing", I was denied.

Trial Counsel filed affidavits in response to my claims in of which, among other things, they discounted my claims with their unsubstantiated allegations that I had "admitted guilt," thus restricting their pre-trial investigations; and that they had interviewed all my proposed witnesses and that those witnesses were not called because "they only had imadmissable hearsay and had nothing to add to the defense."

Upon review of these statements made by counsel, I took the following steps to develop my claims in the trial habeas court:

• On 10/19/2016 I motioned for appointment of counsel stating that I needed counsel for "**investigative procedures, such as eliciting depositions,** to utilize article 11.07 3(d) to my advantage, so as to elicit the facts requested by the Court of Criminal Appeals"; furthermore, that I agreed with Justice Alcala's concurring opinion in this case that "appointment of counsel was mandatory because the interest of justice requires representation; [citing] Tex.CCP Article §1.051(d); EX PARTE POINTER, 492 SW3d 318, 320-21 (TCCA 2016)" The motion was denied.

• On 10/28/2016 I appealed the denial of appointment of counsel.

• On 11/02/2016 I submitted interogatories to trial counsels in reference to their failures to interview and call witnesses.

• On 12/18/2016 I submitted "Applicant's Response/Objections to trial counsel Rick Mahler's answers to Interogatories. **I requested that affidavits and/or depositions be ordered by the court** as I adamantly contended that counsel had not interviewed the proposed witnesses as he had claimed.

• On 12/21/2016 I filed a "Motion and Application for

Continuance and/or additional time to file responsive pleadings" in which at p. 2 at #'s 1-5 I explained that I needed time to submit testimonial/rebuttal evidence to directly refute trial counsel's affidavits and attached an affidavit of my own in support.

• On 12/23/2016 I filed a "Combined response/rebuttal/objection to the affidavits of Rick Mahler, Frank Trotter, and Mark Barber" where I argue once again that depositions/affidavits should be ordered which will directly demonstrate the perjurous nature of counsel's affidavits.

• On 01/24/2017, after the trial habeas judge ignored all my requests and submitted his findings, I filed "Applicant's objections/ rebuttal/ and Request for Additional/Amended and omitted findings of fact and conclusions of law." At p. 7, at #2 I stated:

> "Applicant objects to this finding for two reasons, first is that no counsel provided "proof" to support any such interviews, no notes, reports, phone logs, appointment logs, or other proof of any kind. Second, Applicant has requested (and given notice to the trial court previously) that affidavits from some or all of his witnesses which counsel "claims" to have interviewed should be obtained to refute or deny counsel's claims. This Applicant has requested affidavits and will supplement same to the Court upon receipt. His Father Rivers Sr. has already indicated that he would do so. Applicant believes that Chance Trevino and Misty Ross will follow with their own."

Ultimately, a family member was able to obtain affida[illegible] from 3 of my 5 proposed witnesses. On Jan. 24, 2017 Anto[illegible] Fernandez provided an affidavit which I submitted Feb. directly to the Texas Court of Criminal Appeals. Un[illegible] there existed no procedural rule or guidance in th[illegible] or the Tex.R.App.P. as to how a party is to suppl[illegible] after the application has been set for submission. me, because of such, Texas had recently adopted a

App.P. Rule 73.7 (coincidentally to be enacted Feb. 1, 2017) implementing a procedure for which evidence should be submitted in such a scenario. (See: "Order Adopting Amendments to TRAP [...] 73.7, Misc. Docket no. 16-005, 17-9007, and 17-001, Supreme Court of Texas) Accordingly, I submitted two additional affidavits just after the new rule but with no notice of this rule whereas it was not posted in the prison law library and the amendment was not in the law books available at the time to prisoners. I filed Misty Ross's affidavit on Feb. 24, 2017 and Rivers Sr.'s affidavit on March 31, 2017. The case interpreting rule 73.7 for the first time, EX PARTE SPECKMAN, was decided in Sept. of 2017, months AFTER my 11.07 was denied.

On June 07, 2017, the TCCA made their ruling, adopting the trial court's findings and denying relief without mention of my submitted witness affidavits. The record is completely silent as to any reasoning behind the TCCA's silence on my witness affidavits. No directives were issued in reference to the affidavits being improperly submitted or otherwise barred from review.

Federal Habeas:

In federal habeas I raised the same claims of IATC and sub-submitted, without objection, my 3 witness affidavits, as well as other supporting evidence, with my amended petition and memorandum. I argued that the state habeas findings should not be given deference under §2254 d(1) and (2) (Memorandum at p 37-38), and therefore requested evidentiary hearing and de novo re

The respondent argued that I failed to dilig
my claim and that my uncalled and uprepared witne

because I did not submit supporting affidavits. I claimed that I did submit affidavits and **the federal district judge made an explicit finding of fact that I did in fact submit the supporting affidavits, both in the state and in the federal procedings and that the affidavits were before the TCCA when they made their decision.** The respondent did not object or appeal the factual determination. Despite the favorable finding, the district judge, nevertheless, deferred to the states "credibility determination" on the competing affidavits. Because the record does not dispute the finding that the witness affidavits were before the TCCA when when they made their decision, but the record does not reflect any credibility determination, I moved for a COA in the 5th circuit. The COA was granted.

In his reply to my opening brief, the respondent argues for the first time that my affidavits were not reviewed because they were not properly submitted and thus procedurally barred from review in the federal court under PINHOLSTER. I argued that: the respondent had long abandoned the procedural bar argument; that the district judge had already determined the affidavits were before the TCCA when they made their decision; and that the state court's findings command no deferrence under §2254(d), and thus, a hearing should be held.

The 5th Circuit accepted the late breaking procedural bar argument, supplanting the district court's finding with it's own finding that "In light of this [rule 73.7], and the TCCA's silence with respect to the affidavits, our only conclusion can be that the TCCA decided they were improperly submitted and not in evidence." Based solely on their conclusion that the affidavits were not

properly presented to the state habeas court, the 5th Circuit decided that I was not improperly denied an evidentiary hearing in federal habeas court and affirmed the district court's ruling.

REASONS FOR GRANTING THE WRIT

I. The court of appeals decision is in conflict with this Court's holdings in SMITH V CAIN, 132 SCt 627 (2012); CULLEN V PINHOLSTER, 131 SCt 1388 (2012), and its own holding in BROADNAX V LUMPKIN, 987 F3d 400 (5th Cir. 2021); whereas, the foregoing cases clearly establish an exception to PINHOLSTER, and that exception is applicable to the case at hand.

The Court of Appeals has denied my requested relief on the premis that the evidence supporting my IATC claim is barred from federal review by PINHOLSTER because the court conluded that despite "the TCCA's silence with respect to the [evidence], our only conclusion can be that the TCCA decided [the evidence] was improperly submitted and not in evidence." (Court's Opinion at pg 10)

While I will address the "properness" of how my evidence was submitted in §II and III below, for this point of error I must point out that the Court of Appeals has narrowed the scope of review too far by focussing solely on how, if, or when this evidence was submitted or considered. In order for PINHOLSTER to apply in the first place, the State habeas proceeding must stand the test of §2254(d)(1) and (2). If it does not pass that test, the court is free to review the evidence anyways.

(A) THE STATE'S STRICKLAND ANALYSIS WAS CONTRARY TO, OR AT LEAST INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW.

PINHOLSTER confirms limitations on federal habeas courts

consideration of evidence when reviewing claims that have been adjudicated in the state court. In such circumstances, the petitioner must demonstrate habeas relief is warranted under 2254(d) on the state record alone. If the petitioner succeeds in satisfying this threshold requirement, then a federal habeas court may entertain new evidence pursuant to limitations of §2254(e)(2).

The Court of Appeals moved to fast to invoke PINHOLSTER without first determining if the state proceeding was in violation of §2254(d). In this case, on the state record, the trial habeas judge's findings that were adopted by the TCCA **applied an incorrect standard when determining whether or not I was prejudiced by counsel's performance.** The trial court's findings state:

"7. Applicant failed to show that but for any of the alleged errors, applicant would not have been convicted."

(Conclusions of Law)(SHCR-02 supp. at 425-29, 432-33)

In STRICKLAND V WASHINGTON, 466 US 668, 104 SCt 2052 (1984) this Court determined that to establish prejudice, a petitioner need only show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id at 2068; see also WILLIAMS V TAYLOR, 529 US 362, 405-06 (2000). The trial habeas court has applied a standard more akin to a SCHLUP actual innocence standard.

Accordingly, §2254(d)(1) has been met and therefore under SMITH and BROADNAX, PINHOLSTER does not apply, regardless of what happened later with the witness affidavits.

(B) THE STATE HABEAS PROCEEDING WAS INSUFFICIENT TO DEVELOP THE FACTS NECESSARY TO RESOLVE THE FACTUAL DISPUTE.

The State court's findings of fact do not command deferrence under AEDPA, whereas, the paper hearing conducted by the trial habeas judge was insufficient to develop the facts necessary to resolve the factual dispute. See: MAY V COLLINS, 955 F2d 299, 312 (5th Cir.)("]I]t is necessary to examine in each case whether a paper hearing is appropriate to the resolution of the factual dispute underlying the petitioner's claim.")

In some circumstances, "paper hearings" are sufficient to resolve the "credibility" between conflicting affidavits. See: PERILLO V JOHNSON, 79 F3d 441 (5th Cir. 1996). In ARMSTEAD V SCOTT, the 5th Circuit held that "a paper hearing was adequate because, [u]nlike the scenario in NETHERY, the trial judge in ARMSTEAD's case who made the factual finding with regards to the conflicting affidavits via 'paper hearing' was the same judge that presided over ARMSTEAD's guilty plea. The judge had the opportunity to fully assess Armstead during his guilty plea process and determine his credibility then" ARMSTEAD, 37 F3d at 208.

My case differentiates from ARMSTEAD. In ARMSTEAD, the judge had some personal recollection to rely upon to make his credibility assessment--the plea hearing. The factual dispute in my case, however, revolves around my offer of proof provided in my own affidavit testifying about witnesses I proposed to my attorney's that they never interviewed and/or called, as well as what they would have testified to and that they were available. I previously NEVER testified at any proceeding in front of the trial judge. My uncalled witnesses have never testified and there exists nothing

on the record for the trial habeas judge to "recollect" that would assist him in substantiating his "credibility determination."[FN4]

In PERILLO V JOHNSON, the Fifth Circuit decided that because the habeas judge was not the trial judge, he "could not supplement his own recollection of the trial and [petitioner's attorney's] performance in it, thus there is a danger of "trial by affidavits." Id at 79 F3d 441(5th Cir. 1996) at 447. While I agree the trial judge's recollection can be useful in some situations (such as plea admonishment issues; credibility of witnesses that testified; counsel's performance at trial, etc...) it cannot be said that Judge Brotherton's trial recollection in this case could have ANY effect as to credibility between myself (who never testified) and counsel on matters that happened off the record and outside of trial proceedings.

The paper hearing was not sufficient to resolve the factual dispute. The mere existence of the 3 witness affidavits I obtained, regardless of whether they were later properly submitted, demonstrates exactly what I have said all along and show what a proper hearing would have produced. The mere existence of the affidavits that were submitted just after the hearing and before the TCCA made their decision defies any logic that the paper hearing was sufficient.

Furthermore, as I demonstrated thoroughly in my statement of

Fn 4- GALLEGOS V UNITED STATES, 174 F3d 1196 (11th Cir 1999) is particularly instructive on the questioning of judging credibility when counsel and the client disagree on factual questions. The issue in GALLEGOS was one of ineffective assistance of counsel. In GALLEGOS the court decided that they would not adopt a per se "credit counsel on every conflict rule." The judge who did the credibility determination in GALLEGOS found in favor of counsel on the basis that the defendant's allegations were unsubstantiated. The judge gave no reasoning as to why the defendant's word was less credible than that of counsel's word of which was also unsubstantiated. There was no evidence on the record to demonstrate why counsel should be considered more credible and the court, therefore, remanded for an evidentiary hearing.

the case section above (p. 12-14 herein), I suggested to the trial court in as many wasys as I could come up with to have them allow me to develop my claim but was ignored. In light of the above, it cannot be said that the hearing, or the credibility determination, should command any deferrence under AEDPA and it cannot be said that I failed to develop my claim. PINHOLSTER does not bar the federal court from conducting an evidentiary hearing and does not bar the witness affidavits from review.

(C) UNDER AEDPA, IF THERE HAS BEEN NO LACK OF DILIGENCE AT THE RELEVANT STAGES IN THE STATE COURT PROCEEDINGS, THE PETITIONER HAS NOT "FAILED TO DEVELOP" THE FACTS UNDER §2254(e)(2).

In WILLIAMS V TAYLOR, 529 U.S. 420 (2000), this Court examined what it means to have "failed to develop the factual basis of a claim" under §2254(e)(2). The Court concluded that this language imposes a fault-based standard, meaning that it erects a bar only to those who bear some responsibility for a lack of evidentiary development in state-court proceedings. The Court acknowledged that "fail" is "sometimes used in a neutral way, not importing fault or want of diligence." Id., at 431. As a matter of ordinary meaning, however, the Court acknowledged that "fail" in §2254(e)(2) cannotes "some omission, fault, or negligence." Ibid. The Court explained that "a person is not at fault when his diligent efforts to perform an act are thwarted" by an external force. Id., at 432.

WILLIAMS found further support for its fault-based reading of "failed to develop" in pre-AEDPA cases that foreshadowed the language in §2254(e)(2). Specifically, WILLIAMS noted similarity between the text of §2254(e)(2) and the language of the Court's decision in KEENEY V TOMAYO-REYES, 504 U.S. 1 (1992). The WILLIAMS Court reasoned that when it enacted AEDPA, Congress had "raised

the bar KEENEY imposed on prisoners who were not diligent" (i.e., those who were at fault) "in state-court proceedings." 529 U.S., at 433 (emphasis added). At the same time, however, "the opening clause of §2254(e)(2) codifies KEENEY's threshold standard of diligence." Id., at 434. Phased differently, under AEDPA, "[i]f there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts under §2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." Id., at 437; See also SHINN V MARTINEZ RAMIREZ, 596 U.S.___(2022). Dissent at p. 11-12

As demonstrated above (pgs. 12-14) I made 7 filings in the state habeas proceedings in my diligent efforts to develop my claim before ultimately developing it against the resistance/ impediments of the state habeas court. That is diligence in the face of opposition--that's perseverance. The record citations listed above at pages 12-14 tell the story of "the diligent petitioner," not the story of "the man who failed to develop his claim."

The record reflects that I made the claim in my habeas application and memorandum an filed an affidavit of my own in support. When counsel made their false claims that they had interviewed the witnesses, among other falsehoods, I submitted a barrage of filings in order to prove my claims. I motioned for appointment of habeas counsel for investigative procedures such as "eliciting depositions from said witnesses." I appealed the denial of that motion for counsel reiterating the importance pertianing to obtaining depositions or affidavits. I submitted interogatories to all three counsels pertaining to the "alleged interviews" that

supposedly took place. Only one responded but provided no proof or evidence that the interviews took place. I submitted my combined "Response/Objections/Rebuttals to all three of counsels affidavits where I requested the court to order affidavits or depositions to prove that counsel had not been truthful and I submitted a motion for continuance of this paper hearing in order to at least have an opportunity to procure rebuttal evidence (witness affidavits) on my own. All my requests were either ignored or denied and the trial habeas judge made findings on Jan. 04, 2017 and submitted them to the TCCA. The findings, of course, found that I "had not presented affidavits or testimony of the proposed but uncalled witnesses. I objected to the findings and informed the TCCA that I would be submitting the witness affidavits as soon as I received them.

In January of 2017, in anticipation of said witness affidavits, I visited the prison law library and searched the Texas Code of Criminal Procedures and the Texas Rules of Appellate Procedure for guidance on how to submit evidence <u>after</u> the case is forwarded to the TCCA. To my frustration, there was no rule or guidance governing such circumstances.

Through pure diligence and persistance, I received affidavits from three of the five witnesses while my case was pending review. Inexperienced and uneducated in procedural law, but thankful for <u>HAINES V KERNER</u>'s liberal construction principles (Id. 404 US 519, 520), I submitted the affidavits in the best manner I saw fit -- clearly describing the content, why they were being submitted, and instructed the clerk to supplement the record..

I was constant and earnest in my efforts to develop the

factual basis of my claim -- which by the way is the definition of "diligence." Since there was no lack of diligence at the relevant stage in the state court proceedings, I have not "failed to develop" the facts and therefore §2254(e)(2) does not bar a hearing or consideration of the affidavits.

II. **The Court of Appeals decision is in conflict with this Court's Precedent layed out in FORD V GEORGIA, 498 US 411 (1991) and it's progeny, whereas, in barring my supporting evidence from review, the Court of Appeals has relied upon a Texas state procedural rule (Tex.R.App.P. Rule 73.7) and the case law interpreting that rule (EXPARTE SPECKMAN, 537 SW3d 49, 54(TCCA 2017)) that was not firmly established at the time the evidence was submitted in the state court.**

(A) AFFIDAVITS PRESENTED IN SUPPORT OF IATC CLAIMS FOR FAILURE TO INVESTIGATE.

The easiest issue to address here is the affidavit of Antonio D. Fernandez. The appeals court erred when it excused the TCCA for not considering this affidavit in making their decision because of Tex.R.App.P. 73.7, whereas this affidavit was submitted (according to certificate of service on filing) on Jan. 27, 2017 and filed to the docket in the TCCA on Feb. 01, 2017.

Texas adopted into legislature the new amendment to Tex.R.App. Proc., 73.7, in December 2016 to be enacted on February 01, 2017. EXPARTE SPECKMAN, supra, the case interpreting this new rule, was not held until Sept. 2017. Therefore, it cannot be said that Fernandez' supporting affidavit that was filed on January 27, 2017 was barred from review by any firmly established rule or law, especially not the ones used by the appeals court,

or that I had any notice of how to present it in accordance with that rule or law. See: TAYLOR, 504 F3d 429 (a petitioner is entitled to notice of how to present a claim in state court..)

Prior to this rule, there existed no guidance in the Tex.R. App.P. or the TCCP Art 11.07 on how to present evidence after the case has been set for submission.

Until the enactment of rule 73.7, and the ruling in EXPARTE SPECKMAN in Sept. 2017, this pprocedural rule was not firmly established and thus cannot be the basis of denying the review of Fernandez's affidavit in federal court (which was submitted 4 days prior to the enactment of said rule), or the basis for considering the TCCA's ruling as reasonable on the conclusory basis that the TCCA applied this non-existant procedural rule in order to ignore my evidence. The district judges finding on this affidavit that it was before the TCCA was not clearly erroneous and therefore should not have been disturbed by the appellate court.

The remaining two affidavits, those of Misty Ross and Danny Rivers Sr., were submitted just after the enactment of rule 73.7 and 5 months prior to the holding in EXPARTE SPECKMAN. (Ross's affidavit submitted in February and Rivers Sr.'s in March). After having searched the rulebooks in January and finding that there was no procedure or guidance for this situation, and without any postings of this new rule in the Unit law library, I filed them in the same manner as Fernandez's.[5] Under FORD V GEORGIA, these two

FN 5- Each affidavit was submitted with a cover letter stating: "I am sending these affidavits to you at this time in a showing of good faith and due diligence in fulfilling my statements made that I would obtain such affidavivits as soon as possible in support of my claims and in rebuttal of my trial counsel's claims and to verify the filings made with the court." I instructed the court to supplement the record with the affidavits.

affidavits should be accepted as well because the rule was not firmly established, but in the alternative, the appeals court erred in accepting the respondent's late breaking procedural bar argument and further erred when it supplanted the federal district judge's permissible finding with it's own.

III. The Fifth Circuit's ruling violates Federal Rules of Civil Procedure 52(a)(6) 28 USCA when it supplanted its own finding over the district judge's finding when the district judge's finding was not "clearly erroneous."

In light of the facts of this case, the federal district judge's finding of fact that the three affidavits "were[] filed in the state habeas proceedings and were before the Texas Court of Criminal Appeals" (ECF44, p2) was a permissible finding. Texas Rules of Appellate Proc. 73.7 was not enacted until after I submitted Fernandez's affidavit and so novel and not firmly established when I filed the remaining affidavits. The respondent never raised the issue of 73.7 in any of the federal habeas proceedings in the district court. The respondent did not file objections, motion for reconsideration, or notice of appeal on the findings that the affidavits "were before the TCCA." Based on both the state and federal records, the district judge made a permissible view of the evidence in the record. When there are two permissible views of evidence, fact finders choice between the two cannot be clearly erroneous. Fed.R.Civ.P 52(a)(6) 28 USCA. AMEDEO V ZANT, 108 SCt 1771 1778(1998) Citing ANDERSON V BESSEMER CITY, 470 US at 574; US V RIVAS-LOPEZ, 678 F3d at 356(5th Cir 2012)(district court finding of fact reviewed for clear error.)

The Court of Appeals erred when it supplanted it's finding

over the district judge's finding when that judge's finding was not "clearly erroneous." It was not the district judge's responsibility to sift through all "possible" scenarios of state procedural law and case law to uncover an excuse for the state before making his determinations. Because the reasoning for the TCCA's silence on my profferred affidavits is not in the record, the district judge's finding cannot be said to be "unquestionably" erroneous. While both conclusions may be plausable, niether are unquestionable, and therefore this case should be remanded for an evidentiary hearing.

Most importantly here, in citing PINHOLSTER to bar my witness affidavits, the appeals court inadvertantly defied the principles layed out in PINHOLSTER -- that principle being that federal habeas review under §2254(d) (1) and (2) is limited to the "state record."

The district judge, after reviewing the state court record, found that my three supporting affidavits were submitted in the state proceedings and were "before the TCCA when they made their decision" which is indeed supported by the state court record, whereas, no amount of speculation can dispense with the fact that the affidavits were submitted and docketed under the cause 84,550 months prior to the TCCA's decision on that cause. There also existed no evidence on the state court record (or federal record at that point) that the affidavits were not in evidence because of TRAP 73.7.

The Court of Appeals, however, supplanted the district judge's finding, determining instead that: "In light of this [rule 73.7], and the TCCA's silence with respect to the affidavits, our only conclusion can be that the TCCA decided they were improperly submitted and not in evidence." (emphasis added). This finding was

conclusory and not supported by the state court record.

The district judge made his conclusion that the affidavits were before the TCCA at the time of their decision based on the record of which shows the filing of the three supporting affidavits prior to their decision. The Court of Appeals made their conclusion base on the "silence" of the record. The Appeal Court's finding cannot override the district court's finging in this situation. Fed.R.Civ.P. 52(a)(6).

In summation, we have the conclusory finding by the Court of Appeals that the TCCA decided the affidavits were improperly submitted and thus not in evidence; we have the district court's finding that they were submitted and before the TCCA; and we have the district court's finding that the TCCA made a credibility determination between the competing affidavits (witness vs. counsel). The only "clearly erroneous" finding here is the alleged credibility determination.

This case goes right back to the reason I requested a COA: the district judge made an unchallenged permissible finding that the affidavits were before the TCCA, but erred under MILLER-EL by referring to a credibility determination not found or supported by the state court record. To remedy the situation, there must be an adjudication that includes consideration of the witness affidavits.

IV. Nevertheless, under the reasoning of MARTINEZ V RYAN and TREVINO V THALER, the procedural bar allegedly governing the witness affidavits is attributed to the State of Texas.

The reasoning of MARTINEZ and TREVINO applies with equal force to the threshold diligence/fault standard of KEENEY, supra, WILLIAMS,

supra, and §2254(e)(2). Under WILLIAMS, whether petitioners who satisfy MARTINEZ are nevertheless subject to §2254(e)(2) turns on whether they were at fault for not developing evidence in support of their trial-ineffectiveness claims in state postconviction proceedings. All agree that a habeas petitioner is not at fault when the responsibility for an error is properly imputed to the State or to some other external factor. MARTINEZ cases are among the rare ones in which attorney error constitutes such an external factor. That is because a State's "deliberat[e] choic[e]" to move trial ineffectiveness claims outside of direct appeal and into postconviction review "significantly diminishes prisoners' ability to file such claims." MARTINEZ, 566 U.S. 1, at 13; see also TREVINO, 569 U.S. 413 (2013). Together, MARTINEZ, TREVINO, and WILLIAMS demonstrate that when a State both provides a criminal defendant with ineffective assistance of counsel [illegible] AND decides to remove his trial-ineffectiveness claims from appellate review, postconviction counsel's ineffectiveness cannot fairly be attributed to the defendant, and he cannot therefore be said to have "failed to develop the factual basis of [his] claim." §2254(e)(2). The same holds true whether the state provides ineffective habeas counsel or provides "no counsel" in the initial-review collateral proceeding. MARTINEZ, at 1.

MARTINEZ is applied to Texas habeas proceedings under TREVINO. I had ineffective trial counsel and the state refused my repeated request for habeas counsel. If one were to review this case under the premise that the affidavits were not in evidence because of a procedural matter, that procedural defualt should be attributed to the State.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgement of the Fifth Circuit Court of Appeals.

Respectfully submitted on this 16th day of November, 2022 by,

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