NO. 22-7254

ORIGINAL

****

IN THE UNITED STATES SUPREME COURT

****

DANNY WAYNE ALCOSER, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

****

On Petition for Writ of Certiorari to the
United States Supreme Court of Appeals for the

Texas Court of Criminal Appeals, Case no. PD-0531-22
from the Seventh Court of Appeals, Case no. 07-18-00032-CR
Styled as Danny Wayne Alcoser v. The State of Texas
Affirmation of Conviction, mandate issued February 8, 2023

Texas Court of Criminal Appeals, Case no. PD-0675-22
from the Tenth Court of Appeals, Case no. 10-22-00323-CR
Styled as Danny Wayne Alcoser v. The State of Texas
Petition for Discretionary Review pending as of March 3, 2023

Texas Court of Criminal Appeals, Case no. PD-0676-22
from the Seventh Court of Appelas, Case no. 07-22-00283-CR
Styled as Danny Wayne Alcoser v. The State of Texas
Petition for Discretionary Review pending as of March 3, 2023

****

PETITION FOR WRIT OF CERTIORARI

****

Danny Wayne Alcoser
TDCJ-ID # 02187801
Robertson Unit
12071 F.M. 3522
Abilene, Texas 79601
(pro se litigant)

QUESTIONS PRESENTED

I. Did the Texas Appellate Court(s) so far depart from the accepted and usual course of judicial proceedings by chosing to ignore its own rules and procedures which in the manners of its action is depriving, hindering, and impeding upon petitioner's Constitutionally protected Due Process rights to have, in accordance to them rules and procedures, a full, fair, and adequate proceeding(s) before the tribunal as to call for an exercise of this court's supervisory power?

A. Was the petitioner deprived of his right to have an amended motion for new trial properly filed and presented to the courts; trial and appellate?

B. Did the appellate court(s) enter judgments without first curing a fundamental error of procedural right?

C. Was the appellate court's decision to dismiss petitioner's notice of appeal from the July 13, 2022 ruling on the amended motion for new trial an error/abuse of discretion?

D. Does the district clerk's action have a bearing on petitioner's Due Process rights when a deputy clerk therefrom fails to transfer an electronically filed document, filed online by counsel, into the defendant's electronic or paper case file?

II. Did the Texas Appellate Court(s) so far depart from the accepted and usual course of judicial proceedings as to deprive petitioner his right to raise ineffective assistance of counsel claim on direct appeal as to call for an exercise of this court's supervisory power?

III. Is Article 11.07 of the Texas Code of Criminal Procedure uncostitutional in nature in the manner that the State forbids applicants/appellants to raise sufficiency of evidence to the grounds of innocence on collateral review?

IV. Is Texas Penal Code § 22.01 (b)(2)(B) unconstitutional when it charges an offender with an aggravated Class A misdemeanor once the relevant relationship is removed from the equation even though there is no Texas Penal Code that supports an offense as a Class A misdeneanor arrgavated simple assault?

PARTIES TO THE PROCEEDINGS

Petitioner/Appellant:

Danny Wayne Alcoser
TDCJ-ID # 02187801
Robertson Unit
12071 F.M. 3522
Abilene, Texas 79601

Petitioner's Appellate Counsel on Petition for Discretionary Review:

Tate N. Saunders
State Bar No. 00794594
Post Office Box 1234
Kyle, Texas 78640

Petitioner's Appellate Counsel on Direct Appeal:

E. Alan Bennett
State Bar No. 02140700
Sheehy, Lovelace, & Mayfield, P.C.
510 North Valley Mills Drive, Suite 500
Waco, Texas 76710

Petitioner's Trial Counsel:

Brittany L. Lannen,
formerly Scaramucci
State Bar No. 24061388
Lannan Law Firm, PLLC
Post Office Box 438
Valley Mills, Texas 76589

Trial Judge at Original Trial - Guilt/Innocence & Sentencing:

Ralf T. Strothers, retired
State Bar No. 19420500
19th Judicial District Court
501 Washington Avenue, Suite 303
Waco, Texas 76701

Trial Judge at Subsequent Proceeding:

Thomas C. West
State Bar No. 21206935
19th Judicial District Court
501 Washington Avenue, Suite 303
Waco, Texas 76701

Rospondent/Appellee - The State of Texas:

Berry N. Johnson
State Bar No. 10683010
former District Attorney
Law Office of Berry N. Johnson
4008 Trice Avenue
Waco, Texas 76707

Joshua S. "Josh" Tetens
State Bar No. 24053513
Criminal District Attorney - McLennan County, Texas
219 North Sixth Street, Suite 200

State Trial Counsel:

Hilary C. LaBorde
State Bar No. 24034529
Post Office Box 919
Gatesville, Texas 76528

Gabrielle A. Massey
State Bar No. 24045211
Human Trafficking Institute
712 N.E. H-Street, Suite 1651
Washington, DC 20002

State's Appellate Counsel on Direct Appeal and Petition for Discretionary Review:

Sterling A. Harmon
State Bar No. 09019700
Assistant District Attorney - Appellate Division Chief
219 North Sixth Street, Suite 200
Waco, Texas 76701

DIRECTLY RELATED PROCEEDINGS

Nineteenth Judicial District Court, cause 2016-1261-C1, The State of Texas v. Danny Wayne Alcoser, guilty verdict all three counts entered January 4, 2018.

- January 4, 2018 notice of appeal filed.
- January 19, 2018 original motion for new trial filed.
- February 2, 2018 amended motion for new trial alleged e•filed.

Seventh Court of Appeals, case no. 07-18-00032-CR[1], Danny Wayne Alcoser v. The State of Texas, all trial verdicts reversed December 20, 2019. Alcoser v. State, 596 S.W.3d 320 (Tex.App.-Amarillo 2019).

Texas Court of Criminal Appeals, case no. WR-90,777-02, In re Danny Wayne Alcoser.

- November 6, 2020 writ of mandamus filed.
- December 9, 2020 leave to file mandamus denied.
- January 15, 2021 motion to reconsider dismissed.

Texas Court of Criminal Appeals, case no. PD-0166-20, Danny Wayne Alcoser v. The State of Texas, in part reversal and remand entered March 30, 2022. Alcoser v. State, _ S.W.3d _, No. PD-0166-20, 2022 Tex. Crim. App. LEXIS 186 (Tex.Crim.App.March 30, 2022).

Seventh Court of Appeals, case no. 07-18-00032-CR, Danny Wayne Alcoser v. The State of Texas.

- April 11, 2022 motion to withdraw appellate counsel filed.
- May 4, 2022 order entered denying motion to withdraw counsel.
- May 16, 2022 motion for rehearing filed.
- May 19, 2022 order of abatement entered; back to trial court. Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 3435 (Tex.App.-Amarillo May 19, 2022).

Nineteenth Judicial District Court, cause 2016-1261-C1, The State of Texas v. Danny Wayne Alcoser.

- June 23, 2022 order entered to remove appellate counsel.
- July 13, 2022 lost amended motion for new trial filed & denied.
- October 3, 2022 notice to appeal July 13, 2022 ruling.

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1. transfer from Tenth Court of Appeals, case no. 10-18-00014-CR, under Texas Supreme Court equalization order - Tex. Gov. Code § 73.001.

Seventh Court of Appeals, case no. 07-18-00032-CR, Danny Wayne Alcoser v. The State of Texas, judgment and opinion to affirm conviction as to Count - I entered August 9, 2022.

- August 24, 2022 motion for rehearing filed.
- September 12, 2022 rehearing denied.

Texas Court of Criminal Appeals, case no. PD-0531-22, Danny Wayne Alcoser v. The State of Texas; related to case no. 07-18-00032-CR.

- October 3, 2022 Petition for Discretionary Review filed.
- October 19, 2022 petition refused.
- November 1, 2022 motion for rehearing filed.
- November 23, 2022 rehearing denied.

Nineteenth Judicial District Court, cause 2016-1261-C1, The State of Texas v. Danny Wayne Alcoser.

- October 3, 2022 notice of appeal from trial court's July 13, 2022 order entered on amended motion for new trial.

Tenth Court of Appeals, case no. 10-22-00323-CR, Danny Wayne Alcoser v. The State of Texas; related to causer 2016-1261-C1.

- October 3, 2022 notice of appeal filed.
- October 12, 2022 dismissed - want of jurisdiction.
- November 30, 2022 judgment & opinion withdrew and reissued; dispostion same.
- December 15, 2022 motion for rehearing/reconsideration en banc filed.
- January 6, 2023 rehearing denied.

Seventh Court of Appelas, case no. 07-22-00283-CR, Danny Wayne Alcoser v. The State of Texas; related to cause 2016-1261-C1.

- October 11, 2022 notice of appeal filed.
- October 26, 2022 dismissed - want of jurisdiction.
- November 21, 2022 motion for rehearing filed.
- December 9, 2022 rehearing denied.

Texas Court of Criminal Appeals, case no.'s PD-0675-22 & PD-0676-22, Danny Wayne Alcoser v. The State of Texas; related case no.'s 10-22-00323-CR & 07-22-00283-CR.

- December 6, 2022 extension for time to file Petition for Discretionary Review filed.

- January 24, 2023 PD cases consolidated.
- March 3, 2023 Petition for Discretionary filed.

Seventh Court of Appeals, case no. 07-18-00032-CR, Danny Wayne Alcoser v. The State of Texas.

- December 12, 2022 order entered denying request for revisit of the August 9, 2022 judgment and opinion.

Nineteenth Judicial District Court, cause 2016-1261-C1, The State of Texas v. Danny Wayne Alcoser.

- January 24, 2023 order entered waiving prosecution of Counts II & III ; without prejudice.

Seventh Court of Appeals, case no. 07-18-00032-CR, Danny Wayne Alcoser v. The State of Texas.

- February 8, 2023 mandate issued affirming conviction as to Count - I; Counts II & III remanded to trial court; new trial.

Supreme Court of the United States of America, case no. 22A749, Alcoser v. Texas.

- February 17, 2023 extension for time to file writ of certiorari filed and granted; deadline set for April 22, 2023.

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*note: These Articles are parallel to the United States Constitution provisions. See pages 3-5.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the denial of his appeal, refusal of his petition for discretionary review, and the current pending petitions for discretionary review before the Court of Criminal Appeals described below.

REFERENCES TO OPINIONS IN THE CASE

Petitioner's original judgment and opinion on appeal is reported at 596 S.W.3d 320 (Tex.App.-Amarillo 2019)[Appendix Tab B]; Granting of State's Petition for Discretionary Review reported at In re Alcoser, 2020 Tex. Crim. App. LEXIS 390 (Tex.Crim.App. May 6, 2020); Reverse and Remand by the Court of Criminal Appeals is reported at Alcoser v. State, _ S.W.3d _, No. PD-0166-20, 2022 Tex. Crim. App. LEXIS 186, 2022 WL 947580 (Tex.Crim.App. March 30, 2022)[Appendix Tab J]; Decision on Remand reported at Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 5722, 2022 WL 3219808 (Tex.App.-Amarillo August 9, 2022 no pet.h.)[Appendix Tab O]; Refusal of Petitioner's Petition for Discretionary Review is reported at In re Alcoser, No. PD-0531-22, 2022 Tex. Crim. App. LEXIS 737 (Tex.Crim. App. October 19, 2022)[Appendix Tab Q]; and Denial of rehearing is reported at In re Alcoser, No. PD-0531-22, 2022 Tex. Crim. App. LEXIS 834 (Tex.Crim.App. November 23, 2022)[Appendix Tab R].

Petitioner's Subsequent appeal[2] dismissal reported at Alcoser v. State, No. 10-22-00323-CR, 2022 Tex. App. LEXIS 7571, 2022 WL 7288319 (Tex.App.- Waco October 12, 2022), withdrawn and reissued,

2. stems from case no. 07-18-00032-CR, regards to order made on amended motion for new trial during July 13, 2022 abatement hearing.

Alcoser v. State, No. 10-22-00323-CR, 2022 Tex. App. LEXIS 8749, 2022 WL 17342399 (Tex.App.- Waco November 30, 2022)[Appendix Tab S]; Petitioner's Petition for Discretionary Review, case no. PD-0675-22, pending as of March 3, 2023. [Appendix Tab V].

Petitioner's subsequent appeal[3] dismissal reported at Alcoser v. State, No. 07-22-00283-CR, 2022 Tex. App. LEXIS 9752, 2022 WL 15334404 (Tex.App.- Amarillo October 26, 2022)[Appendix Tab T]; Petitioner's Petition for Discretionary review, case no. PD-0676-22, pending as of March 3, 2023. [Appendix Tab V].

This case is of such imperative public importance as to justify deviation from normal appellate pratice and to require immediate determination in this court. See 28 USC § 2101(e).

This Honorable Court has on February 17, 2023 granted petitioner's application, 22A749, to include April 22, 2023 as the deadline for filing petitioner's petition for writ certiorari.[Appendix tab Y].

JURISDICTION

The Court of Criminal Appeals refused petitioner's petition for discretionary review, PD-0531-22, October 19, 2022 [Appendix tab Q] to which it denied rehearing on November 30, 2022 [Appendix tab R]; also sets pending petitioner's petition for discretionary review, PD-0675-22 & PD-0676-22 consolidated, as of March 3, 2023.[Appendix tab V]. This court's granting of extension, 22A749, sets a filing

3. created duplicate to that as case no. 10-22-00323-CR, notice of appeal from July 13, 2022 ruling on amended motion for new trial. Both cases have been consolidated at Petition for Disrcetionary Review stage - PD-0675-22 & PD-0676-22.

deadline as of April 22, 2023 [Appendix tab Y].

This court's jurisdiction is invoked under 28 USC §§ 1257 (a), 1254 (1), 2101 (e), and Rule 12 of this Supreme Court. Because this petition calls into question Texas Penal Code § 22.01 (a)(1), (b)(2)(B); Rules of Appellate Procedure 21.4 (b), 21.6, 21.8, 44.2, 44.3, and 44.4; and Code of Criminal Procedure 11.07, affecting public interest, and the Attorney General is not a party, 28 USC § 2403 (b) may be applicable. A copy of the petition has been served on the Attorney General.

CONSTITUTIONAL PROVISIONS AND STUTUTES

First Amendment to the United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speach, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

Sixth Amendment to the United States Constitution

> 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 against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Eighth Amendment to the United States Constitution

> Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to the United States Constitution

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 privileges or immunities of citizens of the United State; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdivtion the equal protection of the laws.

Article 1, Section 27 of the Texas Constitution

The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the power of government for redress of a grievance or other purpose, by petition, address or remonstance.

Article 1, Section 10 of the Texas Constitution

In a criminal prosecution the accused shall have a speedy public by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witness against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have a right to produce and have the evidence admitted by disposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

Article 1, Section 13 of the Texas Constitution

Excessive bail shall not be required, nor excessive fine imposed, nor crual or unusal punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Article 1, Section 19 of the Texas Constitution

No citizen of this State shall be deprived of life, liberty, property, privilege or immunities, or in any manner disfranchised, except by the due course law of the land.

Provision 22.01 (a)(1), (b)(2)(B) of the Texas Penal Code

(a) a person commits an offense if the person:
(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:
(2) a person whose relationship to or association with the defendant is described by Section 71.021 (b), 71.003, or 71.005, Family Code, if:
(B) the offense is committed by intentionally, knowingly, or receklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.

Rule 21.4 (b) of the Texas Rules of Appellate Procedure

(b) Within 30 days after the date when the trial court imposes or suspends sentence in open cout but before the court overrules any preceding motion for new trial, a defendant may, without leave of the court, file one or more amended motions for new trial.

Rule 21.6 of the Texas Rules of Appellate Procedure

The defendant must present the motion for new trial to the trial court within 10 days of filing it, unless the trial court in its discretion permits it to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court.

Rule 21.8 of the Texas Rules of Appellate Procedure

(a) The court must rule on a motion for new trial within 75 days after the imposing or suspending sentence in open court.

(b) In ruling on a motion for new trial, the court may make oral or written findings of fact. The granting of a motion

for new trial must be accomplished by written order. A docket entry does not constitute a written order.

(c) A motion not timely ruled on by written order will be deemed denied when the period prescribed in (a) expires.

Rule 44.2 of the Texas Rules of Appellate Procedure

(a) If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) any other error, defect, irregularity, or variance that does not affect the substantial rights must be disregarded.

(c) Unless the following matter were disputed in the trial court, or unless the record affirmatively shows the contrary, the court of appeals must presume:

(1) that venue was provided in the trial court;

(2) that the jury was properly impaneled and sworn;

(3) that the defendant was arraigned;

(4) that the defendant plead to the indictment or other charging instrument; and

(5) that the court's charge was certified by the trial court and filed by the clerk before it was read to the jury.

Rule 44.3 of the Texas Rules of Appellate Procedure

A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularitites.

Rule 44.4 of the Texas Rules of Appellate Procedure

(a) A court of appeals must not affirm or reverse a judgment or dismiss an appeal if:

(1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and

(2) the trial court can correct its action or failure to act.

(b) If the circumstances described in (a) exist, the court of appeals must direct the trial court to correct the error. The court of appeals will then proceed as if the erroneous action or failure to act had occurred.

Article 11.07 of the Code of Criminal Procedure

Section 1.

This article establishes the procedure for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Section 2.

After indictment found in any felony case, other than a case in the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed.

Section 3.

(a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court which the conviction being challanged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction being challenged), and forward a copy of the application by certified mail, return receipt requested, by secure electronic mail, or by personal service to the attorney representing the state in that court, who shall answer the application not later than the 30th day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are contraverted, previously unresolved facts material to the legality of the applicant's confinment. Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the bases of the instant habeas corpus. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answer filed, and a certificate reciting the date upon which the finding was made.

Failure of the court to act within the allowed 20 days shall constute a finding.

(d) If the convicting court decides there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issue of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearing, as well as using personal recollection. The state shall pay the cost additional forensic testing ordered uner this subsection, except that the applicant shall pay the cost of the testing if the applicant retains counsel for purposes of filing an application under this article. The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. On completion of the transcript, the reporter shall immediately transmit the transcript to the clerk of the convicting court. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, and any other matter such as official records used by the court in resolving issues of fact.

(e) For the purpose of (d), "additional forensic testing" does not include DNA testing as provided for in Chapter 64.

Section 4.

(a) if a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

> (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article the factual or legal bases for the claim was unavailable on the date the applicant filed the previous application; or
>
> (2) by a preponderance of the evidence, but for a violation of the United State Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

(b) For purpose of Subsection (a)(1), a legal bases of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have

been reasonably formulated from a final decision of the United State Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or brfore that date.

(c) For purpose of Subsetion (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of a reasonable diligence on or before that date.

Section 5.

The Court of Criminal Appeals may deny relief upon findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as thought originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the applicant to custody or order his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Section 6.

Upon any hearing by a district judge by virtue of this Act, the attorney for applicant, and the state, shall be given at least seven full days' notice before such hearing is held.

Section 7.

When the Attorney for the state files an answer, motion or other pleading related to an application for a writ of habeas corpus shall mail or deliver to the applicant a copy of the answer, motion, pleading, or order.

STATEMENT OF THE CASE

On May 15, 2016 petitioner was detained by the Mclennan County sheriff's department, which the State successively executed its indictment. The indictment and charge of the court, during trial, charged Assault Family Violence - Count I; Indangering a child - Count II; and Interfering with a 911 call - Count III.

Relevant to the issues in this petition, petitioner directs this court's attention to count one of assault family violence. Although there were other alternative selectables the State chose two specific elements, the first was 71.003 "family" and the second 71.005 "household." However, it chose not to use 71.0021 (b) "dating" relationship. See Texas Penal Code § 21.01 (a)(1), (b)(2)(B).

On January 4, 2018 a jury found petitioner guilty on all three counts. His trial counsel - Brittany Scaramucci - withdrew and the court appointed E. Alan Bennett for the appellate process. Mr. Bennett made his one and only visit with petitioner while he sat in county jail. At that time petitioner was made aware that counsel had filed a generic motion for new trial. At the conclusion of their visit an agreement was reached that counsel would file an amended motion for new trial.

Come February 2, 2018 counsel wrote petitioner a letter, which stated: "As you requested, I filed the enclosed Defendant's Amended Motion for New Trial" [Appendix tab D, exhibits A & B]. However, that amended motion never made it into any record, not the clerk's file [Appendix tab D, exhibit D] nor the appellate record sent to court of appeals [Appendix tab L].

On December 20, 2019 with an incomplete record, the Seventh Court of Appeals reversed all three of the trial convictions. See Alcoser v. State, 596 S.W.3d 320, 2019 Tex. App. LEXIS 11107, 2019 WL 7044470 (Tex.App.-Amarillo December 20, 2019); [Appendix tab B]. The court's reversal is based on erroneous jury instruction in regards to culpable mental state and lack of definition of the statutorly defined word of "Reasonable belief," grounds one and

four were never reached. To that decision the State filed with the Court of Criminal Appeal its Petition for Discretionary Review (PDR), case no. PD-0166-20. See In re Alcoser, 2020 Tex. App. LEXIS 390 (Tex.Crim.App.2020).

Pending PDR stage petitioner filed, on November 6, 2020, a writ of mandamus with the Court of Criminal Appeals, case no. WR-90,777-02 as an attempt to remedy procedural error. He attempted to have the missing/lost amended motion for new trial properly filed, presented to the trial court, and a hearing held thereto; and those testimomies and evidence developed therefrom made part of the record for direct appeal. The court denied leave to file mandamus [Appendix tab C].

On March 30, 2022 the Court of Criminal Appeals entered its judgment and opinion to reverse and remand, in part, the Seventh Court of Appeals judgment. See Alcoser v. State, _ S.W. _, No. PD-0166-20, 2022 Tex. Crim. App. LEXIS 186, 2022 WL 947580 (Tex.Crim. App. March 30, 2022); [Appendix tab J]. The Court of Criminal Appeals concluded that the petitioner was not egregiously harmed as to his assault family violence conviction. Thus, remanded the cause for the Seventh Court of Appeals to address the remaining points of error. The two grounds remaining were one and four. Ground One - whether the trial court abused its discretion in denying a mistrial, and ground two - whether the evidence is factually insufficient to support the conviction in Count I for assault family violence.

Upon the Seventh Court of Appeals return of jurisdiction the petitioner filed a motion to withdraw appellate counsel and to self represent [Appendix tab D]. His motion declared counsel's

performance was not only deficient but actually deprived him of his liberty. For support of his claims he attached counsel's letters. Those letters showed: counsel asserts the amended motion for new trial had been filed [Appendix tab D, exhibit A], that it would be included in the appellate record filed with the Seventh Court of Appeals, id exhibit C; and then after confronting counsel about the motion's absence, counsel's letter declaring the amended motion's filing to be irrelevant because he raised none of those claims in the brief he had filed, id exhibit F. Accompanied that motion to withdraw counsel were petitioner's supporting affidavit with attached exhibits. He asserts that those exhibits solidify his claims made in his amended motion for new trial. I.e. that State's claim of a relevant relationship between the petitioner, complainant, child, and household are nonexistant before, during, or after the alleged incident. That supporting affidavit included: trial court transcripts, during voir dire, showing the State claiming the petitioner and complainant to be common-law married, id exhibit 2; a marriage certificate filed in the prosecuting county that shows petitioner legally married to another woman other than the complainant, id exhibit 4; trial transcripts showing complainant claiming her child being that of the petitioner's, id exhibit 3; a survey on acknowledgement of paternity (AOP) that shows, for whatever reason, the complainant and petitioner denied to declare paternity between petitioner and child, id exhibit 5; a court order terminating petitioner's rights as a household member, id exhibit 7; and a hand written letter from complainant describing petitioner acting in self defense and no children were involved, id exhibit 8.

Subsequent his motion to withdraw counsel petitioner sent the Seventh Court of Appeals a letter to inquire about the motion to to withdraw counsel. He also alerted the court of his intent to raise additional ground over any matters discovered in the trial court [Appendix tab E]. The court's response was an order denying the motion to withdraw counsel. See Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 3280, 2022 WL 1463976 (Tex.App.-Amarillo May 19, 2022); [Appendix tab F].

On May 19, 2022 after receiving petitioner's superfluous motion to reconsider, riddled with counsel issues [Appendix tab G], the Seventh Court of Appeals abate the appeal to the trial court to address matters and issues between petitioner and counsel, and to return to its court findings of fact and conclusions of law. The order further stated that any findings durning that abatement period would not be addressed or considered, on any issue developed in the trial court, upon the return of jurisdiction. See Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 3435, 2022 WL 1590751 (Tex.App.-Amarillo May 19, 2022); [Appendix tab H]. Petitioner responded by submitting another motion for additional abatement orders [Appendix tab I]. He acknowledged receiving the court's abatement order then asked the court to expand on its order so that his rights to a full, fair, and adequate direct would not be foreclosed by that order. The court remained silent.

On June 23, 2022 the Nineteenth Judicial District Court held the first of two hearings. Here the court determined that there were conflicts between counsel and petitioner. Their ability to communicate had broken down, the relationship deteriorated. Thus,

counsel was relieved of his duties [Appendix tab K].

On July 13, 2022 the trial court held its second hearing. There it found that the amended motion for new trial, petitioner's complaint for the last four years plus, had never been made part of the trial clerk's electronic record [Appendix tab D, exhibit D], or paper file. Nor had it been made part of the appellate record for direct appeal [Appendix tab L]. The State conceded to the facts and had no objection to it becoming part of the clerk's file or appellate record. The judge accepted the motion for the record, denied leave to file a late motion, then he entered a oral and written order [Appendix tab M] denying that amended motion for new trial.

Seven days following return of jurisdiction the Seventh Court of Appeals entered its judgment and opinion. Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 5722, 2022 WL 3219808 (Tex.App.-Amarillo August 9, 2022); [Appendix tab O]. The court declared there being three issues before its court; ground one and four not previously addressed during its initial review, and the issues regarding the amended motion for new trial. Grounds one and four were denied relief and the matter of the amended motion was brushed under the rug of justice as the court claimed the issues pertaining to the amended motion for new trial were best left to a writ of habeas corpus. Petitioner's conviction as to Count I was affirmed. Simultaneously, the court declared petitioner's motion for additional abatement MOOT.

On September 28, 2022, in regards to the trial court's ruling made on the amended motion for new trial on July 13, 2022, the

petitioner filed a notice of appeal [Appendix tab P]. The notice created two case numbers in two different appellate courts. First is case no. 10-22-00323-CR, which was dismissed for want of jurisdiction [Appendix tab S]. See also Alcoser v. State, No. 10-22-00323-CR, 2022 Tex. App. LEXIS 7571, 2022 WL 7288319 (Tex.App.-Waco, Oct. 12, 2022), withdrawn and reissued, Alcoser v. State, No.10-22-00323-CR, 2022 Tex. App. LEXIS 8749, 2022 WL 17342399 (Tex.App.-Waco, Nov. 30, 2022). Id. The second is case no. 07-22-00283-CR, which was also dismissed for want of jurisdiction [Appendix tab T]. See also Alcoser v. State, No. 07-22-00283-CR, 2022 Tex. App. LEXIS 7952, 2022 WL 15334404 (Tex.App.-Amarillo, Oct. 26, 2022). Both courts claimed the notice to be untimely. Both cases were taken to the Court of Criminal Appeals by way of petition for discretionary review [Appendix tab V].

Following the Seventh Court of Appeals decision on August 9, 2022 to affirm petitioner's conviction, petitioner filed a pro se petition for discretionary review [Appendix tab Q] which declared the Seventh Court of Appeals to have erred in its judgment and opinion and action to deny rehearing. The matter at issue explained that the court of appeals was not only going against its own rules but was incorrect about the manner and means to seek relief on the amended motion for new trial that was lost for over four years from all records and proceedings. The Seventh Court of Appeals refused the petition. Id. See In re Alcoser, No. PD-0531-22, 2022 Tex. App. LEXIS 737 (Tex.Crim.App., Oct. 19, 2022); rehearing denied, In re Alcoser, No. PD-0531-22, 2022 Tex. Crim. App. LEXIS 834 (Tex.Crim. App., Nov. 30, 2022); [Appendix tab R].

On December 12, 2022 the Seventh Court of Appeals entered another order under case no. 07-18-00032-CR. The order denied petitioner's request for the court to revisit its August 9, 2022 opinion and judgment. See Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 9210, 2022 WL 17661190 (Tex.App.-Amarillo, Dec. 12, 2022); [Appendix tab U]. That order also affirmed that for the court's August 9, 2022 opinion and judgment the motion for new trial opined upon was none other than the "amended" motion for new trial that the trial court brought up at the July 13, 2022 hearing. Id at fn. 3, compare with Appendix tab M.

On January 23, 2023 the Nineteenth Judicial District Court - trial court - entered an order granting the State's waiver to the prosecution of the counts II and III reversed for new trial. However, the court entered the order without prejudice in the event petitioner prevailed in any post conviction proceeding, as explained in the State's order to the court [Appendix tab W].

On February 8, 2023 the Seventh Court of Appeals under case no. 07-18-00032-CR entered its mandate to the judgment it entered on August 9, 2022 [Appendix tab X].

On February 17, 2023 Honorable Justice Alito granted petitioner's aplication for extension of time for filing his writ of certiorari to include April 22, 2023.

Since then petitioner has served the State parties with form challenging the Constitutionality of its statute(s) [Appendix tab Z].

REASONS FOR GRANTING CERTIORARI

Before this court sit a matter of "first impression" amongst other matters to which Due Process is at question. The opinion of this court will affect all States of America on how the law should be applied to a procedure when an issue of this magnitude ever arises. And, to continue the guarantee that all born or naturalized citizens of the United States will further to enjoy the Equal Protection of Our United States Constitution.

I. Did the Texas Appellate Court(s) so far depart from the accepted and usual course of judicial proceedings by chosing to ignore its own rules and procedures, which in the manner of its action is depriving, hindering, and impeding upon petitioner's Constitutionally protected Due Process rights to have, in accordance to them rules and procedures, a full, fair, and adequate proceeding(s) before a tribunal as to call for an exercise of this court's supervisory power?

A state is not required by the Federal Constitution to provide appellate courts or a right to appellate review. Griffin v. Illinois, 351 U.S. 12. 18. 76 S. Ct. 585, 590, 100 L. Ed. 891, 898 (1965); McKane v. Durston, 153, U.S. 684, 686-688, 14 S. Ct. 913, 914-915, 38 L. Ed. 867, 868 (1894). Nonetheless, Texas has granted criminal defendants a statutory right of appellate review. Article 44.02, V.A.C.C.P. (1966). When the State elects to act in a field were its actions has significant discretionary elements, it must act consistent with the dictates of the Texas and Federal Constitution. Evitts v. Lucey, 469 U.S. 387, 401, 105 S. Ct. 830, 839, 83 L. Ed. 2d 821, 833 (1985). Ward v. State, 740 S.W.2d 794, 796 (Tex.Crim.App.1987) (en banc).

A. Was the Petitioner deprived of his rights to have an amended motion for new trial properly filed and presented to the courts; trial and appellate?

The Texas Rule of Appellate Procerude 21.4 (b) permits a defendant to file an amended motion for new trial subsequent an original filing as long as there had been no ruling on any preceding motion and it is filed within the same 30 day time period following the imposition or suspension of the defendant's sentence in open court. Further, following its filing, the defendant must present that motion to the trial court within 10 days thereof. Id at 21.6. Thereafter the trial court must rule on that motion on or before the 75th day from the defendant's sentence imposed or suspended in open court. Id at 21.8. If the court decides to rule on that motion, it may then at that time make an oral or written findings of fact, id at (b); if no ruling is made within that 75 day time period the motion will be deemed denied by the operation of law. Id at (c).

Petitioner was convicted January 4, 2018. The trial court appointed E. Alan Bennett as petitioner's appellate counsel. Mr. Bennett, subsequent his original filing, submitted an amended motion for new trial by way of electronic filing through a e•file service provider at https://efile.txcourts.gov [Appendix tab D, exhibit D] on Fabruary 2, 2018. See McAffee v. Thaler, 630 F.3d 383, 392 (5th Cir.2011)(The Texas Court of Criminal Appeals (CCA) has held that it is-"as a matter of federal constitutional law, that the time for filing a motion for new trial is a critical stage of the proceedings, and that a defendant has a constitutional right to counsel during that period. []. The CCA in Cooks noted that

a "motion for new trial is a necessary step to adduce facts not otherwise in the record, in order to be able to present these points of error based on those facts in the appeal." See 240 S.W.3d at 910 (citing Tex. R. App. P. 21.2). This rings particularly true in the context of an ineffective assistance claim. See Tex. R. App. 21.2; see also Thompson v. State, 9 S.W.3d 808,813 (Tex.Crim.App.1999) ("Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectivensee.")(citation omitted); DeLeon v. State, 322 S.W.3d 375, 381 (Tex.App-Houston [14th Dist.] 2010, no pet.)("A proper record is best developed in a habeas corpus hearing or in a motion for new trial hearing."). Thus, if a defendant fails to make a motion for new trial on an ineffective assistance claim, there will be no record available on direct appeal for the appellate court to review. And although a defendant is not precluded from pursuing an ineffective assistance claim on habeas, not only will the defendant have spent time in prison awaiting the opportunity to press the claim, he or she will have to do it without assistance of counsel in pursuing it. McAffee, 630 F.3 at 392-393.

Unfortunately, however, in petitioner's case there was an amended motion for new trial that was lost and recently found. It was not placed in neither the clerk's electronic file or paper file. Nor had it been made part of the appellate record for direct appeal. See appendix tab L. (July 13, 2022 trial hearing), see also Gardener v. State, 306 S.W.3d 274, 305 (Tex.Crim.App.2009)("A motion for new trial must be 'presented' to the court within 10 days of being filed. This puts the trial court on actual notice that the moving party

desires the trial court to take action, such as set a hearing or make a ruling, on his motion for new trial. The movant has the burden of presentment, which must be apparent from the record." A simple docket sheet entry will suffice presentment. Id ad 305; Stoke v. State, 277 S.W.3d 20, 25 (Tex.Crim.App.2009)("The docket sheet entry...was sufficient to show that the motion [for new trial] was presented to the trial court as required by Rule 21.6."); Beseril v. State, No. 11-21-00023-CR, 2022 Tex. App. LEXIS 6822, 2022 WL 4099416 (Tex.App.-Eastland, Sept. 8, 2022)(the failure to present a motion to the trial court could never be considered reasonable strategy.); Ward v. State, 740 S.W.2d 794, 800 (Tex.Crim. App.1987)(en banc)(qouting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

During the July 13th hearing the trial court found that the lost amended motion for new trial had a timely file mark stamp of February 2, 2018. The State conceded to it absence and had no objections to the motion becoming part of the trial clerk's record nor its submission to the appellate court in a supplemented record as true and correct. The trial court accepted the motion, asserted its application to those records, then declared that it was not granting leave to file said motion. However, the court entered both an oral and written order to deny that amended motion for new trial [Appendix tab M]; [Appendix tab L]. Compare with the Seventh Court of Appeals December 12, 2022 order, which stated, "that the trial court has exceeded the scope of [its May 19, 2022] order of abatement by even considering the amended motion for new trial," and that "the trial [court lacked subject matter jurisdiction] to address the

amended motion." [Appendix tab U]; see also Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 9210, 2022 WL 17661190 (Tex.App.-Amarillo, Dec. 12, 2022). In Griffin, the CCA said that "the proper remedy is to 'reset the appellate deadline and abate the appeal,' allowing an out of time motion to be filed." Griffin v. State, 507 S.W.3d 720, 721 (Tex.Crim.App.2016)(citation omitted).

B. Did the appellate court(s) enter a judgment without first curing a fundamental error of procedural right?

The Texas Rules of Appellate Procedure 44.2 - 44.4 provides that when an appellate record in a criminal case reveals constitutional error that is subject to harmless error review, that the court of appeals must reverse judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. If an error is not constitutional in natue it must be disregarded unless there was a defect, irregularity, or variance which affected the appellant's substantial right.

Importantly, a court of appeals must not affirm or reverse a judgment or dismiss an appeal for a formal defect or irregularity in the appellate procedure without allowing reasonable time to correct or amend the defect or irregularity.

Moreover, a court of appeals must not affirm or reverse a judgment or dismiss an appeal if the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and the trial court can correct its action or failure to act.

As stated above, per the order of the appellate court, the trial court found that there had been a timely filed amended motion for new trial which transpired electronically online using a State government electronic filing system that somehow got lost then found some four years later and accepted by the trial court for records.

Upon reinstatement of the appeal under case no. 07-18-00032-CR the Seventh Court of Appeals entered a judgment affirming the petitioner's conviction on August 9, 2022 [Appendix tab 0]; Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 5722, 2022 WL 3219808 (Tex.App.-Amarillo, Aug. 9, 2022).

The Texas Rule of Appellate Procedure 44.2 provides that if a constitutional error is found there must be a reversal of judgment or conviction unless the court determines the error did not contribute to the conviction or to punishment, id at (a); however, if there is error which affects a substantial right the error must not be disregarded. Id at (b).

The Texas Court of Criminal Appeals held in Mosley v. State, that TRAP 44.2(b) is taken directly from [FRCP] 52(a) without substantive change. Hence, in construing the impact of Rule 44.2 (b), federal case law would appear to provide especially useful guidance. 983 S.W.2d 249, 259 (Tex.Crim.App.1998).

The Fifth Circuit, which encompasses Texas, holds that Federal Rule 52 (b) provides "a plain error that affects substantial rights may be considered even though it was not brought to the court's attention." To grant relief under this rule, the appellate court must determine (1) that there was error, (2) that the error is "plain," meaning obvious, and (3) that the error affected

substantial rights, meaning that it must be prejudicial and effect the outcome of the district court proceeding. Finally, because ganting relief under plain error review is discretionary than mandatory, the court of appeal should correct the plain error affecting substantial rights only if the error "seriously affect[s] the fairness, integrity or public reputation of a judicial proceeding. Id at 736 (internal quotation marks omitted); accord United States v. Mansolo, 129 F.3d 749, 751 (5th Cir.1997). The Supreme Court also held that Rule 52 applies regardless of the seriousness of the error, including constitutional error. Seale, 600 F.3d at 488; see also United States v. Jackson, 168 Fed.Appx. 294 (10th Cir.2006)("If he can do so we may exercise our discretion to correct the fortified error if the error seriously affected the fairness, integrity or public reputation of judicial proceedings.").

Upon the reinstatement of appeal the Seventh Court of Appeals addressed the two remaining issues as well as the matter of the lost amended motion for new trial. The court of appeals clearly acknowledged its absence; it stated, "at the hearing held on July 13, 2022, for the purpose of ruling of this court's order of May 19, 2022, it was called to the attention of the court that appellant had filed a motion for new trial." [Appendix tab O]; Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 7522, 2022 WL 3219808 (Tex.App.-Amarillo, Aug. 9, 2022). Compare that with its December 12, 2022 opinion that stated, "...the trial court's attention was directed to [an] amended motion for new trial, timely filed February 2, 2022. For purposes of our review [on August 9, 2022], we did presume the trial court denied the Amended Motion for New Trial that was brought to its attention at the July 13, 2022

hearing." [appendix tab U, fn. 3]; Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 9210, 2022 WL 17661190 (Tex.App.-Amarillo, Dec. 12, 2022).

The appellate court for petitioner's convicting county explains how often courts mistakenly rely on Texas Supreme Court cases that reverse decisions by the court of appeals for violation of the rules of appellate procedure that clearly applied to proceedings in those appellate courts. In re B.N., 303 S.W.3d 16, 22 (Tex.App.-Waco 2009).

In this regard, it is critical to first note the scope of the appellate rules. Rule 1.1 provides,

> This rule governs procedure in appellate courts and before appellate judges and post trial procedure in trial courts in crinimal cases.

Tex. R. App. P. 1.1 with that rule in mind, Rule 44.3, provides,

> A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.

Id. at 23.

The court then turns to what precedent it established and how Rule 44.3 would effect an error related to a "formal defect or irregularity in an appellate procedure," and how "the coming fight in application of this new standard will be: what is appellate procedure? Are objections to evidence appellate procedure? Is a motion for new trial?

Id. at 23.

The CCA states that Rule 44.4 is implicated when "a trial court's error prevents the proper presentation of a case to the appellate court and that error can be remedied (without requiring an entire

new trial or punishment hearing)...." Fakeye v. State, 227 S.W.3d 714, 717 (Tex.CriM.App.2007)(quoting LaPointe, 225 S.W.3d 513, 521 (Tex.Crim.App.2007)).

This Honorable Court has held that "at the same time and without detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly reconized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unecessarily infringe on competing interest. United States v. Morrison, 449 U.S. 361, 364 (1981).

C. Was the appellate court's decision to dismiss petitioner's notice of appeal from the July 13, 2022 ruling on the amended motion for new trial an error/abuse of discretion?

Texas Rules of Appellate Procedure 26.2 states,

(a) the notice of appeal must be filed:
(1) within 30 days after the sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or
(2) within 90 days after the sentence is imposed or suspended in open court if the defendant timely files a motion for new trial.

Subsequent the trial court hearing on July 13, 2022 petitioner filed his notice of appeal which the district clerk of the convicting county. His appeals from an amended motion for new trial found by by the court to have been lost for over four years. Said motion was filed electronically using a third party service provider at http://eflie.txcourts.gov [Appendix tab D, exhibit B]. That motion

to have been sent by Venessa Butler from counsel's firm and received by deputy clerk Trica Gann on February 2, 2022. The trial court noted its absence. The State conceded to the facts. And thereafter the court entered its ruling both verbally and written Appendix tab L]; [Appendix tab M]. The notice stated his desire to appeal from that order entered [Appendix tab P].

The filing of that notice caused the creation of two case numbers in seperate court of appeals. First is case no. 10-22-00323-CR in the Tenth Court of Appeals on the 83rd day after the trial court ruled on the amended motion for new trial. However, the court of appeals denied the appeal for want of jurisdiction [Appendix tab S]; Alcoser v. State, No. 10-22-00323-CR, 2022 Tex. App. LEXIS 7571, 2022 WL 7299319 (Tex.App.-Waco 2022), withdrew and reissued, Alcoser v. State, No. 10-22-00323-CR, 2022 Tex. App. LEXIS 8749, 2022 WL 17342399 (Tex.App.-Waco 2022). Second is 07-22-00283-CR in the Seventh Court of Appeals, filed on the 90th day after the trial court enter its ruling. This case also dismissed for want of jurisdiction [Appendix tab T]; Alcoser v. State, No. 07-22-00283-CR, 2022 Tex. App. LEXIS 7952, 2022 WL 15334404 (Tex.App.-Amarillo 2022). Both courts claim petitioner's notice to be barred as untimely. The Seventh Court of Appeals went as far as to claim the notice of appeal a nullity. It asserted the the trial court had exceeded the scope of its May 19th abatement order by entertaining the amended motion for new trial, and that it lacked subject matter jurisdiction to act in such a manner.

Texas Rule of Appellare Procedure 26.2 governs the time to perfect an appeal in criminal cases. The appellate timetable will

be set in motion upon the imposition or suspension of a sentence in open court. The use of the phrase "impose or suspend" in the appellate rule, such as Rule 21.4 indicates an application to an appeal of a conviction and sentence, not to a separate appealable order. Appeals from convictions and appeals from orders are two different things. Smith v. Smith, 559 S.W.3d 527, 531 (Tex.Crim.App. 2018). Consistant with Rule 21.4's limitation of motions for new trial to appeal from a conviction and sentence, Rule 26.2(a)(2) uses the phrase "impose or suspend." Thus, Rule 26.2(a)(2)'s plain language indicates that it applies only to an appeal from a conviction and sentence. See id; see also Swain v. State, 319 S.W.3d 878, 880 (Tex.App.-Fort Worth 2010 no pet.)(plain reading of Rule 26.2(a)(2) reveals that a timely filed motion for new trial can only extend the deadline for filing appeal from imposition or suspension, not from mere appealable orders); see also Burnett v. State, 959 S.W.2d 652, 655 (Tex.App.-Houston [1st Dist.] 1997 pet ref'd)(Rule 2 of the Texas Rule of Appellate Procedure allows a court of appeals to suspend rules in a criminal matter "in the interest of expediting a decision or for other good cause shown." This court has held where a defendant has been effectively denied the right to counsel during the period in which a motion for new trial must be filed, good cause to suspend the rules and reinstate jurisdiction to the trial court has been shown under Rule 2).

The record in this case show both counsel conflict [Appendix tab K] which led to his relief of duty, and prejudice by not seeking and misleading client of the application of the amended motion for new trial into any proceeding or record [Appendix tab D and L].

Despite the fact that amended motion for new trial had been concealed for over four years in some electronic filing system elsewhere, the Seventh Court of Appeals alleged, by the operation of law, that the once lost yet recently found amended motion e•filed February 2, 2018 had been denied.

D. Does the district clerk's office have a bearing on petitioner's Due Process rights when a deputy clerk therefrom fails to transfer an electronically filed document, filed online by counsel, into the defendant's electronic or paper case file?

Texas Code of Criminal Procedure 2.21(a)(4) states,

(a) In a criminal proceeding a clerk of the district or county shall:

(4) accept and file electronic documents received from the defendant, if the clerk accepts electronic documents from an attorney reprsenting the State.

On February 2, 2018 petitioner's appellate counsel electronically filed an amended motion for new trial [Appendix tab D, exhibit B]. The file mark indicated the document was received 2/2/2018 at 12:32 P.M. by deputy clerk Trica Gann. However, that document was never transfered into petitioner's case file nor made part of the appellate record prepared for the Seventh Court of Appeals [Appendix tab L].

Petitioner has not been able to locate any case law to support a violation of this type, or if it can be construed as an error to or deprivation of Due Process. Therefore, petitioner will try to use Griffith v. State, to address the issue. Although its distinguishable in regards to the party involved the matter of injury stands to be constitutional. The motion for new trial filing period is a critical stage of the proceeding such that a defendant has a right to the effective assistance of counsel under the Sixth

Amendment. If a defendant is denied effective representation at that stage, and the defendant is harmed by that violation, he is entitled to relief. The proper remedy is to "reset the appellate deadline and abate the appeal, "allowing out-of-time motion for new trial to be filed. To prove harm, the defendant must present at least one "facially plausible" claim to the court of appeals that could have been argued in a motion for new trial by was not due to ineffective assistance of counsel. Griffith v. State, 507 S.W.3d 720, 721 (Tex.Crim.App.2016)(citations omitted).

In this instant setting, petitioner argues to this court that the trial court clerk's action, failure or refusal to act impeded upon the function of Rule 21.4 et seq. of the Texas Rule of Appellate Procedure. Not only was the amended motion for new trial initially unable to be found, the presentment to the trial court never properly occurred, nor could the court have entered a ruling absent the motion or it deny by the operation of law for that matter.

II. Did the Texas Appellate Court(s) so far depart from the accepted and usual course of judicial proceedings as to deprive petitioner his right to raise ineffective assistance of counsel claim on direct appeal as to call for an exercise of this court's supervisory power?

On April 11, 2022 petitioner file with the Seventh Court of Appeals his motion to withdraw appellate counsel [Appendix tab D]. Subsequent its filing his sent the court an inquiry letter regarding the status of that motion [Appendix tab E]. There he revealed to court his intent to raise additional ground upon the reinstatement of appeal following an abatement order, citing Spendler v. State,

740 S.W.2d 789, 791 (Tex.Cr.App.1987)(qouting Garrett v. State, 749 S.W.2d 784 (Tex.Cr.App.1986)("[the Court of Criminal Appeals] held that a Court of Appeals is not bound by a remand order from [the Court of Criminal Appeals] and is free to consider a new ground of error that is presented after the case is remanded to that court."); see also King v. State, 687 S.W.2d 762 (Tex.Cr.App.1985) (Teague, J., dissenting opinion.)("Rule 74(o) [now 38.7] of the Texas Rule of Appellate Procedure provides "a brief may be amended or supplemented whenever justice requires, on whatever terms the court may prescribe.")). The Court of Appeals entered an order denying that motion to withdraw counsel [Appendix tab F]; Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 3280, 2022 WL 1463976 (Tex.App.-Amarillo 2022).

On May 19, 2022, after being urged to reconsider, the court of appeals remanded the appeal to the trial court. In its order it declared that any developments to injuries will not be addressed by additional submissions of briefs upon the reinstatement of its jurisdiction; declaring that restriction per order of the Court of Criminal Appeals. See Alcoser v. State, No. 07-18-00032-CR, 2022 Tex. App. LEXIS 3435, 2022 WL 1590751 (Tex.App.-Amarillo 2022); compare with Alcoser v. State, _ S.W.3d _, No. PD-0166-20, 2022 Tex. Crim. App. LEXIS 186, 2022 WL 947580 (Tex.Crim.App.2022). The Court of Appeals false inference to what the Court of Criminal Appeals stated in its order deprived petitioner from seeking remedy, in the interest of justice, to the injury incurred by appellate counsel's performance.

During the abatement period the trial court found conflict

existed between counsel and petitioner [Appendix tab K], which said conflict regarded counsel not filing or securing the amended motion for new trial into the clerk's file or appellate record as counsel stated in his letters to petitioner [Appendix tab D, exhibits A & C]. The trial court affirmed the amended motion's absence, accepted the amended motion, entered it into record, then denied it [Appendix tab L]. On this matter alone petitioner could have have raised an additional ground to the appellate court that would have forced the appellate court, per rule 44.2 - 44.4, Texas Rule of Appellate Procedure, to abate the appeal for expansion of the record as requested in his motion for additional abatement [Appendix tab I] that the court of appeal MOOTED after reinstating the appeal. During the additional abatement further record would have been developed on the matters pertaining to the amended motion for new trial, and the opportunity to submit another amended motion for for new trial at that time. One which would include exhibits to support the claim as counsel failed to do in either of his motions for new trial. See this petition's appendix tab D. In that appendix, in its attached supporting affidavit are the documents exculpatory to the charge by the State. Specifically, the selected elements of family or household member under Texas Family Code § 71.003 and 71.005. These elements if removed would reduce the State's charge to a Class A misdemeanor assault, which in according to Texas Provision § 12.21 of the Texas Penal Code is punishable by no more than a year in jail (not prison), and up to a 4,000.00 fine.

This honorable court had determined in Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1191, 185 L. Ed. 2d 1044 (2013), that Texas does allow, per its rules, an appellant to raise ineffective

assistance of counsel claims on direct appeal. Regardless the fact that Texas has a habeas vehicle for ineffective assistance of counsel claims, petitioner made a record in the trial court, on abatement, showing he was prejudiced by the acts of appellate counsel deficient performance. Because of that showing the Court of Appeals, at minimum, should have allowed additional briefing on the record developed, or should have ordered additional abatement to further develop the record on those matters to correct the procedural error then permit additional briefing thereafter. See Texas Rule of Appellate Procedure 43.6 ("the court of appeals may make and other appropriate order that the law and the nature of the case require."); McIntire v. State, 698 S.W.2d 652, 662 (Tex.Crim.App.1985)(op. on reh'g)(abatement to determine feasibility of hearing on three year old motion for new trial.).

CONSTITUTIONAL QUESTIONS

III. Is Article 11.07 of the Texas Code of Criminal Procedure unconstitutional in nature to the manner that the State forbids the applicant/appellant to raise sufficiency of evidence to the ground of innocence on collateral review?

Texas Article 11.07 permits an applicant/appellant to collaterally attack nearly every subject available except sufficieny of evidence. Nothing in this rule states anything specific to this disallowance, only case precedence. See titled section Constitutional Provisions and Statutes in this petition and compare with Ex parte Banspach, 130 Tex. Crim. 3, 91 S.W.2d 365 (1936)("the merits of a case involving the guilt an innocence is not the proper subject of inquiry in a habeas proceeding."); see also Ex parte Sanchez, 918

S.W.2d 526, 527 (Tex.Crim.App.1996)("the Great Writ should not be used to litigate matters which should have been raised on appeal.").

In petitioner's case the Seventh Court of Appeals denied his sufficiency of evidence ground and affirmed his conviction as to Count -I of assault family violence which was raised by appellate counsel who was removed of his duties based on the trial court's findings of conflict. The Court of Appeals declared that the best avenue for appellant's matter involving that lost amended motion for new trial is habeas. However, even if deficient performance could be found, which has here; the matter goes into the sufficiency of evidence standard under Jackson v. Virgina, which Texas declares prohibited by way of 11.07. In Texas when dealing with a jury charge the State applies whats called a hypothetically correct jury charge under Malik v. State, 953 S.W.2d 234 (Tex.Crim.App.1997) before it reviews sufficiency of the evidence over "the element of the offense." Wooley v. State, 273 S.W.3d 260 (Tex.Crim.App.2008), which elements become a part of the chared offense that must be proven beyond a reasonable doubt, Geick v. State, 349 S.W.3d 542, 547-48 (Tex.Crim. App.2011); "not some other alterative statutory element that it did not allege." Sanchez v. State, 460 S.W.3d 675 (Tex.App.-Eastland 2015)(quoting Cada v. State, 334 S.W.3d 766, 774 (Tex.Crim.App.2011). A Texas jury is not permitted to conclude on "Mere speculation or factually unsupported inferences or presumptions," Hopper v. State, 214 S.W.3d 9 (Tex.Crim.App.2007). Theorizing or guessing about the possible meaning of facts and evidence presented" reached by speculation is not a fact or evidence to support a finding beyond a reasonable doubt. Broughton v. State, 569 S.W.3d 592, 607-08 (Tex.Crim.App.2016)(quoting Hopper at 16).

Due to appellate counsel's performance or lack thereof, petitioner was deprived from making a record. His opportunity to have the Court of Appeals review an amended motion for new trial or exhibits thereto was removed. Not to mention the unknown impact it could have had on the outcome of the Court of Appeals decision.

Restricting rights to have the sufficiency of evidence reviewed on collateral review is not only a waste of judicial time and resources but can be construted as cruel and unusal punishment by forcing an inmate to await the completion process on 11.07 then again the 2254 process while sitting in a hot Texas prison illegally confined, all because the State of Texas does not want prisoners raising sufficiency of evidence grounds on collateral review, ratherly it is well content with an appellate counsel's performance falling below professional standards and leaving an indigent pro se litigant who is not allowed appointment of counsel for collateral review to seek relief on his own. See Appendix tab Z.

IV. Is Texas Penal Code § 22.01 (b)(2)(B) unconstitutional when it charges an offender with an aggravated Class A misdemeanor once the relevant relationship is removed from the equation even though there is no Texas Penal Code that supports an offense as a Class A misdemeanor aggravated simple assault?

For the purpose of this question the court can refer to the section of this petition titled Constitutional Statutes and Provisions.

This code is specific in its written form that there must be a relevant relationship between the complainant and person alleged to have committed an offense of assault. But when there is no relevant relationship at issue is there still a charge? Not according to the Texas Court of Criminal Appeals. See Ortiz v. State, 623

S.W.3d 804 (Tex.Crim.App.2021)(Judge Keller's dissenting opinion describes impeding as an aggravated element by which the nature of conduct leads to the result of the offense); see also McCall v. State, 635 S.W.3d 261, 271-72 (Tex.App.-Austin 2021)(The opinion in Ortiz "wholly...forecloses"...simple bodily injury assault as a lesser included offense of occlusion [impeding] assault). Id at 270. Moreover, if appellant's assault by occlusion is remanded for for review under sufficiency of evidence, he would be entitled to "greater relief than acquittal for occlusion assault because it would bar his retrial for simple bodily injury assault." See Benavidez v. State, 323 S.W.3d 179, 182-83 (Tex.Crim.App.2010). McCall at 272. See Appendix tab Z.

It is apparent from the record that at the time of the alleged event for which the State charged the petitioner in Count - I of assault family violence there was no relevant relationship to which the State could legally charge him for as it so selected. Furthermore, if he would be acquited of the offense the State could be barred from retrying him for a lesser included offense. This is why petitioner believes the State is chosing to ignore or refuse his pleading for relief and why this court should assist in the matter so justice can occur, not only for him but any other citizen of the State of Texas or elsewhere from having to tiptoe around the justice system for relief.

CONCLUSION AND PRAYER

Because there must be a showing of harm and conflict with case precedence with this court or of the Fifth Circuit, and because

this court allow the review of the State's highest court's decision and the joining of more than one case, including review before or after rendition of a judgment in criminal cases. It is petitioner's belief he has met this burden with the facts herein this petition and respectfully prays for this court to agree and thereafter grant his petition for Petition for Writ of Certiorari.

Respectfully Submitted,

Danny Wayne Alcoser

Danny Wayne Alcoser
TDCJ-ID # 2187801
Robertson Unit
12071 F.M. 3522
Abilene, Texas 79601
(petitioner pro se)

Certificate of Compliance

This petition is type written and is in complaince with Rule 33.2 (b) of this court's rules, and requirements.

Executed 4/6/____

Danny Wayne Alcoser
Danny Wayne Alcoser

UNSWORN DECLARATION

I, Danny Wayne Alcoser, petitioner herein, declare under the penal of perjury that the foregoing contents in this petition have been typed by me personally and are true and correct. [28 USCS § 1746].

Executed on 4/6/2023

Danny Wayne Alcoser

Danny Wayne Alcoser

INMATE FILING

This is to declare that this Petition for Writ of Certiorari is being personally handed to the Robertson Unit Law Library Supervisor to process and apply indigent postage on my behalf then forward it to the Unit's mailroom to be processed and mailed on this the 6 day of April, 2023.

Danny Wayne Alcoser

Danny Wayne Alcoser