Docket No. 22-7410

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: REYNALDO PALOMO

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

PALOMO v. LUMPKIN

case No. 22-10756

PETITION FOR WRIT OF CERTIORARI

Submitted by and for:

/s/

Reynaldo Palomo
TDCJ #02104888
PRO SE PRESENTATION
William G. McConnell unit
3001 S. Emily Drive
Beeville, Texas 78102

QUESTION(s) PRESENTED

This case present an important nationwide issue concerning what constitues an expeditious remedy and/or a prompt hearing under 28 U.S.C. §2254. The question(s) are: (1) what constitues "extraordinary circumstances," and (2) the true understanding of 28U.S.C. §2253(c)(2). This petition represents an opportunity for the Supreme Court to provide a more indepth definition on "extraordinary circumstance" under the law, and a more indepth meaning of 28 U.S.C. §2253(c)(2). Mr. Palomo present the questions that follow:

(1) The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)(28 U.S.C. §2244(d)(1) established a 1-year statute of limitation for a state prisoner's filing of a federal habeas corpus petition (§2254), but the AEDPA is subject to equitable tolling cases that have alleged facts that are sufficient to satisfy the extraordinary circumstances prong of the equitable tolling test?

(2) Does 28 U.S.C. §2244(d) provide a bright line limitation to define the meaning of "...extraordinary circumstance. .." in the statute?

(3) Did Congress intend to allow district courts around the to employ inordinate delay by failing to define "...an extraordinary circumstances..." in 28 U.S.C. §2244(d)?

(4) Did Congress impermissibly delegate its law making authority, to the U.S. district court, to determine for themselves what extraordinary means under the law?

(5) Does the text of 28 U.S.C. §2244(d) require adherence to Congress' intent for the statute to "provide an expeditious remedy for correcting erroneous sentences?

(6) Does not 28 U.S.C. §2253(c)(2) say that if applicant show the denial of a constitutional rights, is otherwise entitled to the issuance of a COA?

(7) Does the text of 28 U.S.C. §2253(c)(2) require adherence to Congress' intent for the statute to "provide an expeditious remedy for correcting erroneous sentences?

LISTS OF PARTIES

All parties do not appear in the caption of the case on the cover page. Mr. Palomo is the appellant below. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

(1) Bobby Lumpkin, Director, Texas Department of Criminal Justice-Correctional Institution Division, Respondent/Appellee.

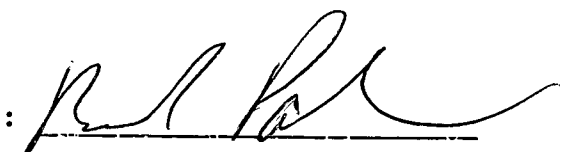
(2) Karen S. Mitchell, Lead Attorney, representing respondent Director, TDCJ-CID. P.O. BOX 12548, CAPITOL STATION, Austin TX 78711-2548.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rule 29.6, Reynaldo Palomo, makes the following disclosure:

(1) Mr. Palomo is not a subsidiary or affiliate of a publicly owned corporation.

(2) There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of this case.

By: 

Reynaldo Palomo
TDCJ #02104888
PRO SE REPRESENTATION
William G. McConnell unit
3001 S. Emily Drive
Beeville, TX 78102

TABLE OF CONTENTS

Questions Presented i
List of Parties.....ii
Table of Contents.....iii
Table of Authorities.....iv
Petition for a writ of Certiorari.....1
Jurisdictional Statement.....1
Constitutional and Statutory Provision Involved 2
Statement of Case 3
Reason to grant the Writ 5
Conclusion.....17
Proof of Service.....18
Appendix.....App-1

TABLE OF AUTHORITIES

CASES: Pages

Benton v. Maryland, 395 U.S. 784 (1969).....14
Bryant V. Scott, 28 F.3d 1411 (5th Cir.1994).....13
Clisby v. Jones, 960 F.2d 925 (11th Cir.1992).....1
Evitts v. Lucey, 469 U.S. 387 (1985).....17
Ex Parte Reynaldo Palomo, W15-75896-K(A);WR-59,972-03 (2020)....3
Ex Parte Reynaldo Palomo, W15-75896-K(B);WR-59,972-04 (2021)....4
Felder v. Johnson, 204 F.3d 168 (2000).....8
Fisher v. Johnson, 174 F.3d 710 (5th Cir.1999).....8
Franks v. Delaware, 438 U.S. 154 (1978).....11
Giglio v. United States, 405 U.S. 159 (1972).....16
Illionis v. Vitale, 447 U.S. 410 (1980).....14
In Winship, 397 U.S. 358 (1970).....10
Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990)..... 7
Jackson v. Virginia, 443 U.S. 307 (1979).....10
Malik v. State, 953 S.W.2d 234 (Tex.Crim.App. 1997).....15
Miller-El v. Cockrell, 537 U.S. 322 (2003).....6,11,15
Napu v. Illinois, 360 U.S. 264 (1959) 16
Pace v. DiGugliemo, 544 U.S. 408 (2005).....5,6
Palomo v. State, PD-0252-18 (Tex.Crim.App.).....3
Simmons v. United States, 390 U.S. 377 (1968).....12
Slack v. McDaniel, 529 U.S. 473 (2000).....6,9,11,14
Strickland v. Washington, 466 U.S. 668 (1984).....11,12,13,14,17
United States v. Agure, 427 U.S. 97 (1976).....16
Will v. Calvert Fire Ins. Co., 437 U.S 655 (1978).....2

STATUETS:

28 U.S.C. §1651.....2
28 U.S.C. §1651(a).....1
28 U.S.C. §2244(d).....i,1,2,5,8,17
28 U.S.C. §2244(d)(1)(B)(C)(D).....8
28 U.S.C. §2253(c)(2).....i,1,2,3,9,17
28 U.S.C. §2254.....i,4,6,9,17

SUPREME COURT RULES:

20.....2
29.6.....ii

PETITION FOR WRIT OF CERTIORARI

Mr. Palomo respectfully petitions the Supreme Court to issue the writ of Certiorari. This case present an important issue concerning what constitues "extraordinary circumstances" [28 U.S.C. § 2244(d)]. He also asks this Court to order the Fifth Circuit to provide its honest service, to fullfill its duty, and to follow the lead of the Eleventh Circuit mandate in Clisby v. Jones, 960 F.2d 925 (11th Cir.1992).

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has the original and exclusive jurisdiction in any case where the Constitutional validity of an act of Congress is questioned. In Mr. Palomo's case he has two question need answered: (1) the true meaning of "extraordinary circumstance" and (2) the true understanding of 28 U.S.C. §2253(c)(2).

Moreover, the Supreme Court has exclusive jurisdiction because Mr. Palomo is request this Court to order the Fifth Circuit, Court of Appeals to execute its duty. Under 28 U.S.C. §1651(a), the remedy by ordering against a lower federal court is a drastic and extraordinary remedy reserved for really extraordinary causes. It is given that the writ's traditional use in aid of appellate Jurisdiction, both at common law and in the federal courts, has been to confine the lower court against which order is sought to a lawful exercise of the lower court's prescribed jurisdiction. Because of the Fifth Circuit failure to exercise its jurisdiction in Mr. Palomo case the effectiveness and validity of an act of Congress is left in question.

The Supreme Court has exclusive jurisdiction to issue a writ of

Texas Code of Criminal procedure:
§ 11.07 3
§36.27 17

Texas Penal Code:
6.04(b)(2) 15
19.03(a)(2) 15

Tex.R,Evid.:
613(a) 13

Tex.R.App.Proc.:
73.1 3

order to a circuit of the United States Court of Appeals. That authority is vested in the Supreme Court by 28 U.S.C. §1651, and the Rules of the Supreme Court, Rule 20.

The Supreme Court has recognized that "where a district court persistently and without reason refuses to adjudicate a case properly before it, the Court of Appeals may issue the writ 'in order that it may exercise the jurisdiction of review given by law'. see Will v. Calvert Fire Ins. Co., 437 U.S. 655,662-63, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978). Indeed, this court is not alone in recognizing that a writ may be appropriate to address a district court's failure to adjudicating a case properly before it. In Mr. Palomo's case the Fifth Circuit had failed and refuse to get over the hurdle of procedural bar AEDPA statute of limitation and failed to address 28 U.S.C. §2253(c)(2), after mr. Palomo had showen the Court's that his Constitutional rights had been violated, thus was entitled to the issuance of a COA.

Additionally, the Supreme Court of the United States is the only court in the country that has the authority to decide the question and define "extraordinary circumstance" prong of the equitable tolling test [28 U.S.C. §2244(d), and whether Mr. Palomo has a right to be entitled the issuance of a COA [28 U.S.C. §2253(c)(2)].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1651 which states:

"(a) The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of these respective jurisdictions and agreeable to the usage and principles of law.

(b) An alternative writ or rule nisi may be issued by a

justice or judge of a court which has jurisdiction."

28 U.S.C. §2253(c)(2) which states:

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

STATEMENT OF THE CASE

The Texas Court of Criminal Appeals (the CCA) refused Mr. Palomo petition for discretionary review (PDR) on May 18,2018, and denied rehearing on August 22,2018. (see **Palomo v. State, PD-0252-18 (Tex. Crim.App.)**. On December 20,2019, Mr. Palomo sent a writ of habeas corpus 11.07 [Tex.Code Crim.Proc 11.07] to the Dallas County Clerk, to be file. (see Appendix One). The State filed a response to dismissed the applicantion (applicant has not entered the date of his declaration and has not signed the declaration)(see Appendix two). On January 22,2020, Mr. Palomo filed with the court's (Dist.Court No. 4, Dallas County,TX) four motion and a letter (to said Judge) correcting the problem. (see Appendix three). The Texas Court of Criminal Appeals received the writ habeas corpus 11.07, on February 11,2020 (Ex Parte Reynaldo Palomo, W15-75896-K(A); WR-59,972-03). On February 18,2020, the CCA recieved a supplemental clerk's record, and on February 19,2020, Mr. Palomo writ of habeas corpus 11.07 [W15-75896-K(A); WR-59,972-03] was dismissed without written order for non-compliance (Tex.R.APP.Proc. 73.1)(see Appendix four). On February 19,2020, Mr. Palomo had wrote the CCA about the four motion (Appendix three), if the court had issued a designating order, Mr. Palomo never heard from the CCA. (see Appendix five). On April 30,2020, Mr. Palomo sent a second writ of habeas corpus 11.07, to be file with the District Court No. 4 of Dallas

County, Texas (see Appendix Six). The State's response to the applicantion (Appendix seven). Mr. Palomo, filed a response to the State's response (Appendix Eight). On December 01,2020, Mr. Palomo, filed with the District Clerk of Dallas County, a "Proposition of law on 'Finding of Facts and Conclusion of law'." (see Appendix Nine). On December 02,2020, Mr. Palomo recived the trial court's 'findings of fact and conclusions of law' and Mr. Palomo, objected to the trial courts findings of fact and conclusion of law, on December 11,2020. (Appendix Eleven).

On March 22,2021, Mr. Palomo, sent to be file with the CCA a motion 'Requesting an Evidentiary hearing' with a 'Memorandum brief (see Appendix Twelve). Mr. Palomo recived a white card from the CCA, claiming the Mr. Palomo 'motion requesting an evidentiary hearing' was dismissed. (see Appendix) On June 11,2020, Mr. Palomo, found out that his writ of habeas corpus 11.07 [W15-75896-K(B);WR-59972-04](see Appendix Fourteen) had been dismissed. On June 23,2020, Mr. Palomo sent to the CCA, a motion for 'rehearing & submissions EN BANC', with affidavit. (See Appendix Fifteen). These also were denied.

On May 11,2022, Mr. Palomo sent to the United States District Court of the Northern District of Texas, a writ of habeas corpus 28 U.S.C. §2254, applicantion IN FORMA PAUPERIS (with six month print-out), and a motion leave to exceed the 50 page limit. (see Appendix sixteen). The United States Magistrate Judge David L. Horan, submitted his 'findings, conclusions, and recommendation on June 30,2022.(see Appendix seventeen). On July 27,2022, the Honorable United States District Judge David C. Godbey, "Order accepting findings, conclusions and the recommendation of the U.S. Magistrate Judge. (see App-

endix Eightteen). On July 31,2022. Mr. Palomo file with the U.S. District Court of the Northern District of Texas, 'Notice of Appeal' and on August 03,2022, Mr. Palomo sent a 'Notice of Appeal' to the Fifth Circuit. (see Appendix Twenty). Mr. Palomo filed with the Fifth Circuit, 'motion to leave to proceed on appeal in forma pauperis', and also filed a "brief for COA." (Appendix Teenty-one). Mr. Palomo, also filed a motion for reconsideration and rehearing en banc, after being denied. (Appendix Twenty-Two).

REASON TO GRANT THE WRIT

The provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)(28 U.S.C. §2244(d)) etablished a 1-year statute of limitations for a state prisoner's filing of a federal habeas corpus petition. However, under the AEDPA provision (28 U.S.C. §2244 (d)), this limitation period was and can be tolled. This Court had decided in Pace v. Digugliemo, 544 U.S. 408,418, 161 L.Ed.2d 669, 125 S.Ct. 1807 (2005), a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his right diligently, and (2) that some extraordinary circumstance stood in his way. The question here is the true meaning of "extraordinary circumstance", and has a true definition been given to the lower court? This case represents an issue of national importance and very likely a huge step in Criminal Justice Reform. This Court by giving a definition of "extraordinary circumstance", could have the largest impact on Mass-Incarceration in history. The one question that has been before all lower courts, producing a different answer, in "extraordinary circumstance" what does it really mean???

In comparing one hundred cases of exonerations this court would discover that the average [Texas] State prisoner will filed his federal habeas petition beyond the dealine, because its unfair to petitioner's who try in good faith to exhaust their state remedies.

On May 25,2022, the writ of habeas corpus 28 U.S.C. §2254 was filed with the Nothern district of Texas (see appendix sixteen), and Mr. Palomo case became final on July 09,2021. Plus, the 90 days it make it around the Month of August of 2012, so Mr. Palomo had filed the 28 U.S.C. §2254, before the one-years statue of limitation. But the Magistrate judge, claims that Mr. Palomo was late. The Magistrate Judge sent Mr. Palomo a "questionnaire", requesting Mr. Palomo to answer two (2) questions. (the questionnaire not in the appendix because Mr. Palomo had to send it back to the Magistrate judge). Upon the Magistrate judge finding, conclusion and recommendation, Mr. Palomo had filed an objection and requested a de novo determination by the district judge, for good cause and the interest of justice.

Now Mr. Palomo will show this Court the following; (1) that he has been pursuing his right diligently, and (2) that some extraordinary circumstance stood in his way. Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct 1807, 161 L.Ed.2d 669 (2005).

Upon the United States District Court Judge denial of Mr. Palomo writ of habeas corpus 28 U.S.C. §2254 relief, Mr. Palomo requested COA from the Fifth Circuit, to vacate, set aside or correct the sentence. see Slack v. McDaniel, 529 U.S. 473,484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); Miller-El v. Cockrell, 537 U.S. 322, 123

S.Ct. 1029,1039, 154 L.Ed.2d 931 (2003).

Ground One:

Mr. Palomo is entitled to equitable tolling under the establish two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.

(a) Supporting facts:

It has been establish that Mr. Palomo has met the first prong: pursuing his right diligently (also see appendix Eighteen). The next issue is "extraordinary Circumstance":

(1) I don't think that Congress or this Honorable Court would be face with this issue that a state prisoner and the Texas Prison system would be face with a real big problem of being under staff, were it would cause problems for the individual who is litigating his case.

(2) That by the prison system being under staff, it has cause for a individual [Mr. Palomo] to decide if he is going to eat or stay in the cell to litigate his case, because of the short of staff, the individual has to spend long period in the dayroom. The Texas Department of Criminal Justice, has a rule that a inmate is not allow to have his legal work in the dayroom: "Offender Orientation Handbook":

III. PERFORMANCE OF LEGAL WORK

A. Locations and Time

1. Locations

"Offenders may perform legal work in the unit's law library, in their cells, or in other areas designated by the Warden. Offenders may not perform legal work in the dayroom, but may possess their legal documents in the dayroom whilt awaiting departure from or upon return to the housing area.

Now the question is; should a individual be time bar, because some extraordinary circumstance stood in his may. see Irwin v. Department

of Veterans Affairs, 498 U.S. 89,96, 112 L.Ed.2d 435, 111 S.Ct. 453 (1990). Petitioner argues that can these circumstances pass the test:

(1) being moved around on a regular bases (because of his prison custody levels "G-3", is a high security level);
(2) being moved to a other unit, and not allow to take any property with him;
(3) having to wait 30 to 45 days to receive his property;
(4) getting to a unit that has a real big problem with being under staff [McConnell unit];
(5) having to wait long periods of time to get back in the cell to work on his legal work.

These circumstance are not in Mr. Palomo control, and he is asking this Court to provided additional insight on what classify "Extraordinary circumstance." Especially, when the circumstance is out of Mr. Palomo control, he doesn't have the access to go in-his-cell-as he wants, he has to wait on a officer to come and open the doors, and if they [the unit] are short handle, then it can take hours before Mr. Palomo can get back in the cell.

In defining the one-year statute of limitation in 28 U.S.C. §2244 (d), Congress explicitly laid out three circumstances under which the statute of limitations would begain to run after the date on which the prisoner's judgment became final. see §§2244(d)(1)(B), (C),(D). The Supreme Court has previously noted that Congress did not provide for tolling based on a failure to receive timely notice. Felder v. Johnson, 2000 U.S.App. LEXIS 14; 204 F.3d at 172; also see Fisher v. Johnson, 174 F.3d 710,714 (5thCir.1999)("Congress Knew AEDPA would affect incarcerated individuals with limited access to outside information, yet it failed to provide any tolling based on possible delays). Has Congress gave a description of

"extraordinary circumstances," on prison's being understaffed, that have resulted "in a prisons that are inadequately supervised." So the important question is what is the true define meaning of "... extraordinary circumstance..." in the statute? The presentation of this question is an important nationwide issue, because of the going problem of prisons being understaff, the Supreme Court has an opportunity to provide a more indepth dinfinition on "extraordinary circumstance" under the law. 28 U.S.C. §2244(d).

What is the true understanding of "28 U.S.C. §2253(c)(2)", because Mr. Palomo has showen the U.S. District Court of the Northern District of Texas, and the Fifth Circuit, that because they denied Mr. Palomo 28 U.S.C. §2254 habeas on procedural ground (time bar), that they "NEVER" reached Mr. Palomo's underlying constitutional claim, COA should be issue if the prosoner shows at least jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right. see Slack v. McDaniel, 529 U.S. 473, 146 L.Ed.2d 542, 120 S.Ct. 1595 (2000).

Mr. Palomo, from the vary begainning of this journey, he has claim his innocent. Looking, at the first writ he submitted to the Texas Court of Criminal Appeals, it had "fifteen grounds for relief" that Mr. Palomo was seeking. (see Appendix one & six) And on the 28 U.S.C. §2254 he had submitted nine (9) issues, and one of those is ineffective assistance of counsel [with eight (8) issues], the U.S. District Court would not jump the hurdle of procedural bar. So Mr. Palomo, appealed their decision, and brought the same nine (9) issues and six (6) issues of ineffective assistance of counsel. They [5th Circuit] also couldn't or wouldn't jump the hurdle of

procedural bar. (see Appendix Twenty-two).

These are the issues that Mr. Palomo as follow:

1. A claim of insufficient evidence/no evidence.

Mr. Palomo was indicted for casuing the death of an individual by the name of "MARIA VALESQUEZ". There was 'no DNA', 'no finger print' and "NO PHYSICAL EVIDENCE," that could place Mr. Palomo at the crime scene, and the only gun found belong to a suspect by the name of Richard Cardoso. (see the records; R.R.:Vol. 4 p.11-19) The firearm examiner, testify that the medical examiner's office never produce a bullet form the autopsy of the decease (whose nmae was Maria Del Carmen V[e]lasquez)(also in the records RR:Vol.3 p.136-137). Then there a detective Mr. Montenegro who testify that the victim [Mike Albanna] told him that there was a knocked at the door, and he let two (2) individuals in the gameroom, "NOT THREE"(Mr. Palomo is the third suspect). There was a witness by the name of Joel Hobbs, who made a police statement at police headquarters: "that he had seen the truck pull into the parking lot and two (2) individuals got out of the truck and went in the gameroom." They didn't allow him to testify. (see one of the ineffective counsel claim).

Clearlt there is a Due Process violation of the Fourteenth Amendment, "a defendant in a ciminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charge'." In Winship, 397 U.S. at 364. This Court has ruled in Jackson v. Virginia, 443 U.s. 307 (1979), "unless no rational trier of fact could have found proof of guilt beyond reasonable doubt." There is reasonable doubt in this case, because the state never proved what Mr. Palomo was indicted for, that he cause the death of "MARIA V[A]LESQUEZ", so

Mr. Palomo has satisfie the stand that a jurists of reason could agree that there is a constitutional violation claim, and this claim is adequate to deserve incouragement to proceed further. Slack v. McDaniel, 529 U.S. 473,484; Miller-El v. Cockrell, 537 U.S. 322,327 (2003).

2. Ineffective Assistance of Counsel.

Mr. Palomo has estabish that trial counsel [Bradley K. Lollar] was ineffective throughout the whole process of his case, Mr. Palomo apply the Strickland v. Washington, 466 U.S. 668 (1984), and has satisfy the two (2) prong test: (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) because of counsel's unprofessional errors, the result of the proceedings would have been different. Petitioner has six (6) issues that he would like to addresses.

a. failed to investigate the documents.

The "affidavit for arrest warrant", was knowingly and intentionally falsify to have Mr. Palomo arrested. The head detective Scott Sayers [the affiant] allege that witness "Mike Albanna" identify Mr. Palomo as a suspect on June 29,2015, but the witness Mike Albanna didn't identify Mr. Palomo till June 01,2015, thats after he got out of the hospital (Det. S. Sayers, say that he showa six photo line-up to Mike Albanna, "but there is no six photo line-up in the records"). Had trial counsel investigated the affidavit arrest warrant, he could have filed a 'motion to suppress the tainted affidavit'. A defendant in a criminal proceeding have the right under the 4th and 14th Amendment to challenge the truthfulness of factual statements made in an affidavit supporting the arrest warrant. see Franks v. Delaware, 438 U.S. 154,156 (1978).

A trial counsel deficient performance failure to investigate the 'affidavit arrest warrant', is a representation that was below an objective standard of reasonableness, and the deficient performance prejudice Mr. Palomo liberty by physical restraint his freedom and illegaly arresting him. (4th Amend. of the United States Constitutional). see also Strickland, 466 U.S. at 680.

b. failed to suppress or object to the in-court/out-court identification.

Trial counsel failure suppress the out-court identification, because it was tainted, when the witness [Mike Albanna] told the det. Scott Sayers, that he had seen photos off facebook before he went to police headquarters. see Simmons v. United States, 390 U.S. 377 (1968). Also, trial counsel failure to object to the in-court identification and allowing detective Scott Sayers to testify that witness Mike Albanna identify Mr. Palomo. Id.

Both these issues fall under "Strickland v. Washington", trial counsel representation fell below an objective standard of reasonable and there is no stratgic that can justify, why trial counsel failed to suppress the out-court identification. And at trial had trial counsel objective to the in-court identification, then it had to be rule on, and the judge could have not allow the testimony of detective Scott Sayers and witness Mike Albanna, about identify Mr. Palomo, then the trial might have had a different outcome. Id

c. failed to investigated the fact to the case.

Trial counsel was ineffectived because he failed to investigate the facts, this is really a weak case. There is "no DNA", "No finger prints" and "NO PHYISCAL EVIDENCE", that can place Mr. Palomo at the scene of the crime.

Any reasonable trial counsel would have investigated the facts and the witnesses to a crime. But Mr. Brandly K. Lollar [trial counsel] failed to do any kind of investigation, and his representation was below an objective standard of reasonableness, and this deficient performance prejudiced Mr. Palomo to being wrongfully convicted to a crime were there "no phyiscal evidence." Strickland, 466 U.S at 680.

d. failed to interview the state's witnesses.

Had trial counsel interview the witnesses, he would have known that there was one witness [Joel Hobbs] that saw the pickup truck pull into the parking lot and that two individuals got out of that truck and went into the gameroom. And witness [Mike Albanna] told the Detective on the morning of June 29,2015, that he let into the game room two individuals. Both these stories go hand and hand, and had the jury heard Joel Hobbs, testimony then the trial would had a different outcome.

The Fifth Circuit has held that "counsel's failure to interview eyewitnesses", is unprofessional conduct, thus falling below the standard of a reasonable competent attorney, practicing under prevailing professional norms. see Bryant v. Scott, 28 F.3d 1411 (5th Cir.1994); Strickland, 466 U.S. at 688.

e. failed to impeach two of the state's witnesses.

The cornerstone of this incredibly weak case is the testimony of "Mike Albanna" and "Miguel Machado", who both made inconsistent statements, other then these two witnesses there is no physical evidence that can connect Mr. Palomo to the crime.

Trial counsel had every right to impeach these witnesses (under TEX.R.EVID. 613(a)). Trial counsel conduct fell below an objective

standard of reasonableness and this failure was a deficient performance, thus violating Mr. Palomo Six Amendment of the United States Constitutional. Strickland, 466 U.S. 668,688.

Mr. Palomo, has satisfie the standard under 28 U.S.C. §2253(c)(2), and has made a substantial showing of the denial of a constitutional right, that trial counsel was ineffectived under the Sixth Amendment Constitutional. Thus, also satisfie standard "Slack v. McDaniel, 529 U.S. 473,484., that any jurists of reason could agree that trial counsel was ineffectived, and Mr. Palomo has requested a evidentiary hearing on this claim.

3. FATAL VARIANCE EXIST between the indictment/jury charge and th proof at trial.

A VARIANCE occurs when there is a discrepancy between the allegation in the charging instrument [Indictment] and the proof at trial, it render the evidence insufficient to sustain the conviction.

The discrepancy is that the state indicted Mr. Palomo with causing the death of "MARIS VALESQUEZ", but at trial it was proven that the decease was "Marie Del Carmen V[E]lasquez". The state 'never' prove that "MARIA V[A]LESQUEZ" and "Maria Del Carmen V[e]lasquez" were the same person. Mr. Palomo is in jeopardy of being charge of the murder of "Maria Del Carmen V[e]lasquez." Benton v. Maryland, 395 U.S. 784: Illionis v. Vitale, 447 U.S. 410.

4. Evidence legally insufficient to support the capital murder conviction without the theory of transferred intent in the hypothetically correct jury charge.

Mr. Palomo is suffer a "Due Process" [14th Amend.] violation because the evidence was held to be sufficient because such finding would depend on a legal ground not submitted to the jury.

The state presented no evidence that Mr. Palomo intended to shoot "MARIA VALESQUEZ". The state's case for the indicted murder was legally insufficient absent the doctrine of transferred intent, which it failed to argue or submit in any fashion to the jury. A person commits capital murder if he (1) intentionally commits murder (2) in the course of committing or attempting to commit robbery. see Tex.Penal Code §19.03(a)(2). The offense indicted in this case required proof of specific intent to kill the indicted complainant. Texas Penal Code §6.04(b)(2) provides that " [a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different person or property was injured, harmed, or otherwise affected. id. Under the circumstance of this case, Mr. Palomo would suffer a due process violation if the evidence was held to be sufficient because such finding would depend on a legal ground not submitted to the jury. "Due Process prevents an court from affirming a conviction based upon legal and factual grounds that were not submitted to the jury. see Malik v State, 953 S.W.2d 234,238 n.3 (Tex. Crim.App 1997). This Court should remand this case to the Fifth Circuit Court's of Appeals with instructions to conduct a proper sufficiency review. Mr. Palomo has satisfie the standard that a jurists of reason could agree that Mr. Palomo 'due process' rights were violated under the 14th Amend. Miller-El v. Cockrell, 537 U.S. 322,327 (2003).

5. PROSECUTORAL MISCONDUCT.

The Due Process Clause of the Fourteenth Amendment under the United States Constitutional is violated where the state [prosecutor]

knowingly uses perjured testimony to obtain a conviction. If the prosecution present a false picture of the facts by failing to correct it's own testimony when it became apparent that the testimony was false, then the conviction must be reversed. Napue v. Illinois, 360 U.S. 264. In Giglio v. United States, the court explained that "deliberate deception of a court and jurors by the presentation on known false evidence is incompatible with rudimentary demands of justice." id. 405 U.S 159 (1972). This Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is "Fundamentally" unfair and must be set aside if there is any reasonable likeihood that the false testimony could have affected the judgment of the jury." United State v. Agure, 427 U.S. 97 (1976).

The false testimony Mr. Palomo is claiming that the prosecutor presented to the jury, that witness "Miguel Machado", had not received a deal for his testimony. After Mr. Palomo was find guilty guilt in December of 2016, this witness Miguel Machado, received the deal that he told the jury, he turn down. Witness Miguel Machado, capital murder charge was drop to Agg. Robbery, and he received a bond reduce to $25,000.00, and was release on personal recognizance bond. And on July 02,2019, witness Miguel Machado was sentence to nine (9) years, under a capital murder charge. (see cause number F15-75897).

6. Appellant counsel was ineffected.

Appellant counsel [Christi Dean] should have raise three (3) issues that have merits to be heard. The trial court claim that that Mr. Palomo should have raise them on direct appeal. The claims are: (1) VARIANCE between the allegation and proof, (2) trial court erred

and improperly amend the indictment, and (3) trial court failed to comply with Texas Code of Criminal Procedure Article 36.27. Under Evitts v. Lucey, 469 U.S. 387, the "due process clause" of the 14th Amend., guarantees Mr. Palomo to effective counsel on a first appeal. The failure to raise merit issue's is a deficient performance, and the deficient performance prejudiced Mr. Palomo from receiving a fair and justice direct appeal. Evitts v. Lucey, 469 U.S. 387; Strickland, 466 U.S. 668 (1984).

28 U.S.C. §2253(c)(2), states: "A certificate of appealability may issue under paragraph (1)(unless a circuit judge issue a COA) only if the applicant has made a substantial showing of the denial of a constitutional right." Mr. Palomo has shown that his 4th, 5th, 6th, and the 14th Amendment have been violated. Thus, Mr. Palomo has satisfie this standard [§2253(c)(2)], and the Supreme Court of the United States should intervene by issuing a order to the Fifth Circuit to resolve Mr. Palomo Constitutional Claims.

CONCLUSION

Mr. Palomo moves this Supreme Court of The United States to grant the writ of Certiorari, on the issue to define the meaning of "... extraordinary circumstance..." in the statute, and granting Mr. Palomo equitable tolling. 28 U.S.C. §2244(d)
Also granting an order to the Fifth Circuit to resolve the Constitutional claims on Mr. Palomo 28 U.S.C. §2254.

/s/ Reynaldo Palomo