No. 22-7640

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

* * * * *

HERBERT LAVONNE WIGGINS,
PETITIONER,

V.

BOBBY LUMPKIN, DIRECTOR,
RESPONDENT,

* * * * *

ON PETITION FOR WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

* * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * *

HERBERT L. WIGGINS
PRO-SE PETITIONER
TDCJ-ID# 01370636
Stiles Unit, 19-W-47
3060 FM 3514
Beaumont, Texas 77705

QUESTION(S) PRESENTED

1. When did the law pass, saying the Courts do not have to adjudicate the merits on a Writ?

2. When did the law pass stating that the Court Clerks can sign off and deny a Writ?

3. When has a law been passed stating the the Court Judges do not have to sign off on a Writ?.

4. How can a court refuse to adjudicate on the merits anddeny newly discovered evidence?

5. How can a court turn a blind eye to Petitioner's writ when he has shown newly discovered evidence and has merits in his writ?

6. How is it that a Court will deny a writ only because of the charge he is accused of, instead of the merits of the case?

7. How is it that the State and Federal Courts can fail to determine facts under §2254(d)(2)? when they
   (1). neglects to make a finding of fact when it has the duty to do so;
   (2). makes factual findings under an incorrect legal standard;
   (3). uses a "defective" procedure for finding facts;
   (4). misstates the record in making findings of fact; and
   (5). ignores evidence that supports the Petitioner's claims.

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

The Petitioner, Herbert L. Wiggins, respectfully prays that a Writ of Certiorari issue to review the judgment and Unpublished Order of the Fifth Circuit Court of Appeals, rendered in these proceedings on March 3, 2023.

OPINION BELOW

The Fifth Circuit Court of Appeals DISMISSED Petitioner's COA for lack of jurisdiction and as Moot in Cause No. 23-10060. The UNPUBLISHED ORDER is in the appendix to this petition at page a1, infra. The refusal by the Fifth Circuit Court of Appeals CLERK denying Petitioner's "Petition for Rehearing Application for Certificate of Appealability" not any Judge of the Court. The letter refusing Rehearing by Clerk is in the appendix to this petition at page a2, infra.

JURISDICTION

The Unpublished Order of the Fifth Circuit Court of Appeals was entered on March 3, 2023. Petitioner did not receive the Fifth Circuit Court of Appeals Unpublished Order until March 14, 2023. A timely motion to that Court for Rehearing was denied by the Court Clerk on March 29, 2023.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., AMEND. XIV

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

28 U.S.C. §2254

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

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

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

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

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

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the couert of the State.

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

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

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

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

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

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to

be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

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

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

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

(f) If the applicant challenges the sufficiency of the evidence of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the suffiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial

opinion, or other reliable written indicia showing such factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of Title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

On May 12, 2006, Petitioner Wiggins pleaded not guilty to aggravated sexual assualt of a child in Ellis County, Texas. See, State v. Wiggins, Case No. 29882 CR. Following a jury trial, Wiggins was convicted and sentenced to Life imprisonment, in Texas Department of Criminal Justice-Institutional Division, (TDCJ-ID). Petitioner then filed a Direct Appeal, and on July 11, 2007, Petitioner's conviction and sentence were affirmed. See Wiggins v. State, 10-06-00134-CR, 2007 WL 2004962 (Tex.App.-Waco).

On January 4, 2010, Petitioner Wiggins filed a Writ of Habeas Corpus under 28 U.S.C. §2254. See Wiggins v. Thaler, No. 3:10-cv-61-N (N.D. Tex.) On December 14, 2010, the District Court denied the petition on the grounds that issues were un-adjudicated in the lower courts, then stated denied on the merits, then denied a certificate of appealability. The first petition was dismissed due to prematurity and lack of exhaustion.

That Petitioner then filed a Second §2254 showing:(1) newly discovered evidence that shows and proves that in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found Petitioner guilty of the offense. That in 2018 the Ellis County officials were fired and indicted for wrongs and corruption in the courts. That the lower Courts refuse to adjudicate on the Newly found evidence and continues to dismiss on anything but the merits of the case.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals refuses to acknowledge that there has been no adjudication on the Merits of Petitioner's case in the State court's. In Miller v. Johnson, 200 F.3d 274 (5th Cir. 2000), accordingly, Section 2254(d) applies only to issues that have been adjudicated on the merits in State court. FN-4. Review is de novo when there has been no clear adjudication on the merits. Nobles v. Johnson, 127 F.3d 409, 416 (5th Cir. 1997) The Court's must determine whether Petitioner Wiggins claims were adjudicated on the merits by considering these factors, (1)what state courts have done in similar cases; (2)whether the cases history suggest that the state court recognized any ground for not resolving the case on merits; (3) whether the state courts opinions suggest reliance on procedural grounds rather than an adjudication of the merits. This is a fundamental miscarriage of Justice as no State Court much less the Federal Courts have looked at or adjudicated on any merits pretaining to Petitioner's case.

Petitioner has shown that the State court's resolution of his constitutional claims was "contrary to" or "involved an unreasonable application of" Supreme Court precedent. For the simple reason that in adjudication of Petitioner's 5th, 6th and 14th Amendment Claims along with the Prosecutorial Misconduct and Judicial Misconduct and all court's have failed to apply the law was contrary to federal law as clearly established by decisions of the United States Supreme Court.

For these reasons. a Writ of Certiorari should issue to allow Petitioner's Merits to be adjudicated by the State Courts and Federal Courts and the Fifth Circuit Court of Appeals.

No._____

IN THE SUPREME COURT OF THE UNITED STATES

HERBERT LAVONNE WIGGINS,

Petitioner

V.

BOBBY LUMPKIN, DIRECTOR,

Respondent,

* * * * *

MEMORANDUM OF LAW AND FACTS IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

* * * * *

Comes now, Herbert Wiggins, Petitioner, Pre-Se in the above-styled and numbered cause of action and files this Memorandum of Law and Facts in support of Petition For Writ of Certiorari to the Fifth Circuit Court of Appeals and state the following:

INDICTMENT - ILLEGAL AMENDMENT AND ALTERATION

The State did not prove the Indictment. The Prosecutor added and amended to the Indictment to meet his time frame and allegations to secure an conviction of Petitioner. The time and commission of an offense is a matter of substance and cannot be amended. When the defect in an Indictment is of substance, the Indictment is not amendable, and the prosecution will be dismissed. As the Indictment comes from the Grand Jury in matters of substance, it must constitute the pleading required by the Constitution and Laws of the State, and cannot be changed, altered or amended. Because the Indictment is the result of the Grand Jury's action, the allegation of such an Indictment is which to charge the defendant with a certain crime, are matters of substance and cannot be amended. See, Brasfield v. State, 600 S.W.2d 288

(Tex.Crim.App. 1980); Flowers v. State, 785 S.W.2d 766 (Tex.Crim.App.-El Paso 1990); Ex parte Patterson, 740 S.W.2d 766 (Tex.Crim.App. 1987). Everything should be stated in an Indictment which is necessary to be proven. Tex.Code Crim.Proc. Art. 21.03. Every circumstance constituting a statutory offense, which would affect the degree of punishment must be alleged in the indictment. An indictment is the sworn declaration of the Grand Jury and what they in substance do say, must stand as they say it. In the instant indictment, the Grand Jury stated on or about December 31, 2004, that the crime occurred. That the Prosecutor started out saying that on December 31, 2004, that this crime occurred, as stated in the Indictment by the Grand Jury. The Prosecutor Flagrantly changed the time frame in court to August 31, 2004 to December 31, 2004, as Petitioner had proof that him and his wife were the only ones there on December 31, 2004, so the Prosecutor committed Prosecutorial Misconduct and Fraud upon the Court by altering and amending the few months to the date the Grand Jury stipulated in the Indictment. There can be no amendment as to any declaration of a fact by the Grand Jury. The said pleading can only be amended as to matter of the Grand Jury, and to matter of form before announcement of ready for trial. An indictment or information cannot be amended so as to cure defects in the commencement or conclusion. The proper relief upon Motion to Quash an Indictment that gives insufficient notice is to dismiss the indictment, not to amend it. See, State v. Durst, 7 Tex. 74; State v. Sims, 8 Tex.Ct.App. 254, 34 A.M. Rep. 746; and Saine v. State, 14 Tex.App. 144. It has been further held that the venue of an offense is a matter of substance and not amendable. See, Collins v. State, 6 Tex.App. 647; Robins v. State, 9 Tex.App. 666; Orr v. State, 453, 8 S.W. 644. See, Calvin v. State, 25 Tex. 289; Edwards v. State, 10 Tex.App. 25. It became a matter of substance, descriptive in its nature, and could not be altered or changed by the court. To allow amendments by supplemental notice must

come from the facts found and alleged by the Grand Jury in the Indictment.

AUTOMATIC REVERSAL OF MAGISTRATE
DECISION OF PROBABLE CAUSE

Petitioner was arrested by Palmer Police in Waxahachis, Texas, and Petitioner immediately asked for counsel. On or about day three, Justice of the Peace came to Ellis County Jail, where Petitioner complained of a lack of counsel. Justice of the Peace argued he would not appoint counsel, that hearing was solely held to provide Petitioner with notice of the charge and set bond. Petitioner was informed that determination of probable cause was found, but failed to provide any specific allegation.

(1). On or about March 5, 2005, Petitioner was transported to Ellis County Jail. Days later he was transported downstairs for an "T.C.C.P. Article 15.17" hearing where and when the Petitioner was informed of the accusation against him and the Magistrate found probable cause to proceed to trial.

(2). Petitioner was completely deprived of his Constitutional Rights under the Sixth Amendment to counsel's presence during the Article 15.17 hearing before the Magistrate.

(3). The complete and total deprivation of counsel at Petitioner's hearing before a Magistrate is a "Minority Practice', see Rothgery v. Gillespie Co., Tex. 128 S.Ct. 2576, 2580 (2008); - "right to counsel", Crim.Law §46.4. The right to counsel guaranteed by the Sixth Amendment applies to the first appearance before a Judicial Officer at which a defendant is told of the former accusation against him and restrictions are imposed on his liberty.

(4). The deprivation of counsel is structural error requiring an "Automatic Reversal" in the Supreme Court Case of Neder v. United States, 119 S.Ct. 1827, 1836 (1999) - limited class of fundamental constitutional errors exist that defy analysis by harmless error standards and require automatic reversal;

for all other constitutional errors, reviewing courts must apply harmless error analysis and must disregard errors that are harmless beyond reasonable doubt. If defendant had counsel and was tried by impartial adjudicator, there is a strong presumption that constitutional error that may have occurred are subject to harmless error analysis. Constitutional errors affecting framework within which trial proceeds, rather than simply an error in trial process itself, affects entire process and necessarily render trial fundamentally unfair, so as to preclude harmless-error review. Fed.Rules Crim.Proc. Rule 52(a), 18 U.S.C.A. (Criminal Law Key 1163).

(5). No legal counsel was present at Petitioner's Art. 15.17 Magistrate hearing, thus violating Federal Law set forth in Rothgery, supra, as well as that in T.C.C.P. Art. 15.17.

(6). Therefore deprivation of counsel at Petitioner's Art. 15.17 hearing constitutes a clear violation of Federal Law precedents established by the United States Supreme Court and is proper grounds for "Automatic Dismissal" of all charges against Petitioner.

(7). Violations of both Texas and United States Constitutions cannot be overlooked when Petitioner's Constitutional Rights have been violated or denied. They cannot be un-violated.

(8). The burden now shifts to the Prosecutor to show that Petitioner voluntarily, knowingly and intelligently, while he was sound of mind, waived his right to have counsel present at his "Article 15.17" hearing before a Magistrate. See, Brewer v. Williams, 97 S.Ct. 1232, 1242 (1971).

(9). If the Prosecutor cannot meet his or her burden of proof, this Court has the affirmative duty to automatically reverse the Magistrate's finding of probable cause and dismiss all charges.

(10). The United States Supreme Court Justices, all ruled with concurring opinions, stating, "we have held that an indigent defendant is entitled

to assistance of counsel at a preliminary hearing of defendant's first appearance before a Magistrate guaranteed by the Sixth Amendment."

(11). The State violated the Petitioner's Sixth and Fourteenth Amendment rights to counsel by not following policy, thus failing to adequately train and monitor those officials in the appointment of counsel process. See, Brewer, supra.

Under Texas statutory law that has been in effect since September 2001, if a defendant appears before a Magistrate for a T.C.C.P. Art. 15.17 hearing and he requests an attorney, he is entitled to a court appointed attorney within three days of his request. T.C.C.P. Art.1.051. Petitioner requested appointment of counsel more than once, but went without counsel from March 5, 2005 to September 5, 2005, for (7) Seven months. A defendant who requests counsel is entitled to the assistance of counsel at all "critical stages" of his case or, "every stage of a critical proceeding where substantial rights of a criminal defendant accused may be affected." Mempa v. Rhay, 88 S.Ct. 254 (1967). But if a proceeding that qualifies as a critical stage is conducted without the presence of counsel, "and if defendant does not waive counsel," the Sixth Amendment is violated and the defendant is entitled to relief. Court cannot dismiss pleadings of a non-attorney litigant without instructions of how these things are deficient and how to repair them. Plarsky v. cie, 953 F.2d 26 (2nd Cir. 1991).

WHEREFORE, PREMISES, CONSIDERED, Wiggins prays this Honorable Supreme Court of the United States hereby grant this automatic reversal of Magistrate's decision of Probable Cause, pursuant to State Code, Federal Code, and United States Supreme Court precedent ruling that the deprivation of counsel at Article 15.17 hearing before á Magistrate requires such a reversal and declaration of acquittal on all charges. Wiggins seeks release from his illieal restraints and prays this Honorable Court grants his remedies supported by law.

INEFFECTIVE ASSISTANCE OF COUNSEL - TRADING CLIENTS

Petitioner's counsel traded Petitioner for another client to the Prosecutor. Petitioner's counsel, Mr. Jenkins traded "Petitioner Wiggins" to the Prosecutor , in order to bring his "PAYING" client back on appeal and in front of Judge Knize. United States v. Newell, 315 F.3d 510, 515-22 (5th Circuit 2002); Conflict not waived in money laundering prosecution, where attorney implicated one defendant in order to obtain acquittal for another defendant. See also, Strickland v. Washington, 104 S.Ct. 2052 (1984); Strickland more appropriately gauges an attorney's conflict of interest that springs not from multiple client representation, but from a conflict between the attorney's personal interest and that of his client. Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantial safeguards that distinguist our system of justice, a serious risk of injustice infects the trial itself. Johnson v. Zerbst, 58 S.Ct. 1019 (1938). When a State obtains a criminal conviction that unconstitutionally deprives the defendant of his liberty. Argersinger v. Hamlin, 92 S.Ct. 2006 (1972); A showing that actual conflict adversely affected counsel's performance is not only unneccessary, it is often an impossible task, as the court emphasized in Halloway v. Arkansas, 98 S.Ct. 1173 (1978), but even with a record of the sentencing hearing available, it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client, but the client takes the impact of the conflict at hand. Accused's right to counsel is a right, as is effective assistance without conflict. Accordingly, in Hollaway, supre, the Court emphatically rejected the suggestion that a defendant must show prejudice in order to be entitled to relief. For the same reason, it would usually be futile to attempt to determine how counsel's conduct would have been different if he had been under conflicting duties. The effect upon the defendant's confinement as a result of an unfair State trial

and attorney conflict is the same whether the inadequate attorney was assigned or retained. While criminal trial's are not a game in which the participants are expected to enter the ring with a mere match in skills, neither is it a sacrifice of unarmed prisoners to gladiators. Ineffectiveness is also presumed when counsel "actively represented conflicting interests." Culyer v. Sullivan, 100 S.Ct. 1708, 1719 (1980); Flanagan v. United States, 104 S.Ct. at 154; United States v. Cronic, 104 S.Ct. 2039 (1984); Hayes v. Cain, 272 F.3d757, 761 (5th Cir. 2001); United States v. Rico, 51 F.3d495, 508 (5th Cir. 1995); Hatfield v. Scott, 306 F.3d 223, 230 (5th Cir. 2002); United States v. White, 706 F.2d 506, 508 (5th Cir. 1983); United States v. Hall, 200 F.3d 962 (6th Cir. 2000); United States v. Virgen-Moreno, 265 F.3d 276, 295 (5th Cir. 2001); In re Santa Fe Intl.Corp., 272 F.3d 705, 710 (5th Cir. 2001).

SPEEDY TRIAL

In Strickland v. Washington, 104 S.Ct. 2052, 2063 (1984), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State. United States v. MacDonald, 102 S.Ct. 1497, 1501 (1982). The guarantee of a speedy trial is a fundamental constitutional right. MacDonald v. United States, 93 S.Ct. 2060-64 (1973). An accused's right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial. That even to the Petitioner's urging to the point of begging his attorney Mr. Jenkins to set a trial date in this cause, which went ignored by trial counsel and the Petitioner's counsel continued to ask for continunoes in the beginning of the trial even to Petitioner's asking to be taken to trial. The convenience of individuals cannot be controling, (such as Petitioner's counsel requesting continuances), to post-pone trial for over 14 months. The public interest in a broad sence, as well as the constitutional guarantee, comands prompt disposition of criminal charges. (3 ABA, Speedy Trial 40-41). To minimize anxiety and concern accompanying public

accussation to limit the possibilities that long delay will impair the ability of an accused to defend himself, prejudice to the defense should be assessed in the light of these interests. In the light of the policies which underlie the constitutional right to a speedy trial, dismissal of the charges is the only possible remedy where a speedy trial has been denied. Baker v. Wingo, 92 S.Ct. 2182 (1982), the only possible remedy "for deprivation of this constitutional right, the only remedy available to the court is, "to reverse the conviction, vacate the sentence, and dismiss the Indictment." Delay which the accused was "unusual and called for explaination as well as justification." There was no excuse for Petitioner's counsels continued unexplained delays for trial to start. This served to reaffirm what the Court held in Dickey v. Florida, 90 S.Ct. 1564 (1970). "Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Baker, noted, "the only possible remedy."

PLEA BARGAIN

In North Carolina v. Alford, 91 S.Ct. 160 (1970); The Alford Plea states, a guilty plea that a defendant enters as part of a plea bargain without actually admitting guilt. Though a defendant believes he or she is innocent, he or she accepts the plea bargain to avoid going to trial. Defendant's right to effective assistance of counsel extends to Plea Bargaining. Defendant's have a Sixth Amendment Right to effective assistance of counsel during plea bargaining. Missouri v. Frye, 132 S.Ct. 1399 (2012); Lafler v. Cooper, 132 S.Ct. 1376 (2012). If Petitioner's counsel would have advised him about the Alford Plea, Petitioner would have accepted the Six (6) months in County Jail, and Ten (10) years probation plea. But because of counsel misleading advise

and ineffective assistance of counsel, Petitioner took counsel's advice and refused the plea bargain. Petitioner's counsel told him that if he signed the Plea Bargain, that he would be admitting his guilt, and advised him not to sign it. (Penal Code §2.03). Defense counsel's ineffective assistance and misadvice was why the Petitioner refused the offered plea bargain. Woodard v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990). When a lawyer advises his client to plea bargain to an offense which the attorney has not investigated, such conduct is always unreasonable.

Petitioner claims that had he been told of the true sentence exposure, that he would have accepted the offered plea bargain, instead of being given an Aggravated Life Sentence. That Petitioner's counsel never advised Petitioner that he could receive a life sentence. See, United States v. Day, 969 F.2d 39 (3d Cir. 1992); Teague v. Scott, 60 F.3d 1167, 1171 (5th Cir. 1995). Petitioner claims that any reasonable competent attorney would have advised the Petitioner to accept the proposed plea bargain. Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981). Counsel failed to advise Petitioner of the available options, and possible consequences of pleading guilty or going to trial. United States v. Herrera, 412 F.3d 577 (5th Cir. 2005); remanding for a hearing to resolve whether counsel's misadvice regarding appellant's sentencing exposure under the guidelines was ineffective assistance of counsel; appellant relied on his counsel's misrepresentations in rejecting plea. Smith v. United States, 348 F.3d 545 (6th Cir. 2003). Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983).

In the context of a claim that defendant would have pleaded guilty instead of going to trial, but for ineffective assistance of counsel, a defendant, "need not prove the absolute certainly that he would have pleaded guilty, that the district court would have approved the plea agreement, and that he therefore would have received a lesser sentence." Penal Code §8.05. Duress

is an affirmative defense by putting presure on the appellant to go to trial; Booth, 432 F.3d 542, 546-47 (3rd Cir. 2005). That Petitioner's counsel was incompetent by misadvising Petitioner on the Plea Bargaining issues.

JURY SELECTION

United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976). Because of the trial courts erroneous refusal for cause, and its unwillingness to explore adequately for possible actual prejudice, Petitioner's case should be reversed. Our system of jury trial depends upon the fair and impartial jurors guaranteed by the Sixth Amendment. Because Petitioner received less than this, he must have another chance. Franklin v. Anderson, 434 F.3d 412, 430-31 (6th Cir. 2001). Failure of Petitioner's counsel to directly appeal issue of the impartiality of jurors, amounted to ineffective assistance of counsel. Petitioner has been prejudiced by his counsel's failure to raise the claim of bias juror's. In Criminal Law Key-1166.16 and Jury Key-97(1). The seating of a biased juror who would have been dismissed for cause requires reversal of the conviction. Counsel for Petitioner was ineffective on direct appeal, and filed what amounted to an Anders Brief on appeal, (1) where counsel did not consult with Petitioner, (2) counsel did not previde Petitioner with any real opportunity to participate or have input on his appeal, and (3) counsel did not raise the issue of biased jurors. Huges v. United States, 258 F.3d 453, 463 (6th Cir. 2001)(citing, United States v. Martinez-Salazar, 120 S.Ct. 774 (2000). Failure to remove biased jurors tainted the entire trial, and "therefore [the resulting] conviction must be overturned. Wolf v. Brigano, 236 F.3d 499, 503 (6th Cir. 2000). There is no situation under which the impanaling of a biased juror can be excused. The presence of a biased juror cannot be harmless, "the error requires reversal without the showing of actual prejudice." United States v. Gonzales, 214 F.3d 1109, 1111 (9th Cir. 2000).

Accordingly, the State can make no argument that Petitioner's trial counsel acted strategically in keeping biased jurors on the panel. Strickland v. Washington, supra. A criminal appellant in constitutionally entitled to effective assistance of counsel on his direct appeal. That trial counsel as appellate counsel failed to comply with the Anders requirements for filing a non-merit brief where there were continuous arguable issues. See, Robbins v. State, 152 F.3d 1062 (9th Cir. 1997); Grubbs v. Singletary, 900 F.Supp. 425 (M.D.Fla. 1995); Allen v. U.S., 938 F.2d 664 (6th Cir. 1991); Lofton v. Whitley, 905 F.2d 885 (5th Cir. 1990). As stated in Anders v. California, 386 U.S. 738 (1967), counsel should support the first appeal to the best of his ability. That appellate counsel abandoned the Petitioner and his appeal. Evitts v. Lucey, 105 S.Ct. 830 (1985); Joshua v. DeWitt, 341 F.3d 430, 441 (6th Cir. 2003). Because Petitioner's counsels failure to raise the constitutionally defective service of a biased jury, rose to a level of prejudice. Strickland, supra; Bell v. Quintera, 125 S.Ct. 2240 (2005). The Court of Appeals holding also rest on a confusion - the idea, the presence of a structural error, by itself, neccessarely related to counsel's deficient performance and warrants a presumption of prejudice. The Cronic presumption is based on a notion that a certain "circumstances ... are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at658, 104 S.Ct. 2039. Those exceptional circumstances encompass instances in which counsel's poor performance caused the Petitioner prejudice. The Court of Appeals based its holding that counsel was ineffective on the implicit suppositation that he knew the 12 jurors were biased, yet failed to object to their presence. Strickland v. Washington, 104 S.Ct. 2052, has been modified by Lockhart v. Fretwell, 113 S.Ct. 838, "Lockhart modified or in some way supplanted Strickland." Lockhart and Nix v. Whiteside, 106 S.Ct. 988-89, do not justify a departure from straight

forward application of Strickland, when counsel's ineffectiveness deprives the Petitioner of a substantial or procedural right to which the law entitles him, moreover counsel's unprofessional service prejudiced Petitioner within Strickland meanings. Paschal v. United States, 306 F.2d 398 (5th Cir. 1967). The Court held that the jury should have been dismissed when jurors "stated by raising their hands," stating a preconclusion about Petitioner's guilt. Murphy v. Florida, 95 S.Ct. 2031, 2035 (1975); United States v. Morrison, 101 S.Ct. 665 (1981). Unless the accused receives the effective assistance of counsel "a serious risk of injustice affects the trial itself." United states v. Martinez-Salazar, supra. In State criminal proceedings, impairment of a statutory right to peremptory challenges due process, "only if the defendant does not receive which State law provides." An error of the seating of any juror who should have been dismissed for cause would require reversal. United States v. Webster, 162 F.3d 308, 342 (5th Cir. 1998). Reversable error to deny defendant's right to exercise peremptory challenges. The Petitioner's counsel did not tell him he had a right to challenges, much less peremptory ones. Baker v. Hudspeth 129 F.2d (10th Cir. 1942). The denial of a fair and imparticial trial as guaranteed by the Sixth Amendment of the U.S. Const. is also denial of Due Process demanded by the Fifth and Fourteenth Admendments and failure to strickly observe the constitutional safeguards renders trial and conviction for a criminal offense illegal and void, and redress therefore is within the ambit of habeas proceedings. Virgil v. Dretke, 466 F.3d 598 (5th Cir. 2005); counsel's failure to challenge the biased jurors was ineffective assistance.

INVESTIGATION

Counsel's errors in failing to investigate the medical evidence of penetration with respect to child sex abuse count spilled over and prejudiced Petitioner. Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997). Counsel's

Errors impacted not only the evidence supporting penetration and explains victim's delay in reporting, but also resulted in counsel's foregoing presentation of evidence that could have cost serious doubt on the verocity of alleged victim's testimony in its entirity. Had Petitioner's counsel investigated possibility of challenging prosecutor's psychological expert, he would have discovered that exceptionally qualified experts could be found who would have challenged scientific validity of prosecution experts other theories as well. Petitioner was prejudiced by defense counsel's objectively unreasonable performance in child sex abuse cases and law, in failing to investigate the medical experts testimony, which led him to decide not to challenge what was clearly the most significant corroborative evidence in State's case, which rested mostly on alleged victim's story. Had counsel investigated and gotten expert witnesses for Petitioner, and called expert to testify, there was a reasonable probability that trier of fact would have rejected entirety of alleged victim's narrative as not credible, because her assertion that Petitioner had alledgedly penetrated her with his finger would be inconsistant with lack of any medical evidence of penetration. Petitioner finds that defense counsel "had no valid tactical reason for not attacking the sexual assualt evidence on his case. Petitioner cannot find that counsel's perported choice was professionally reasonable, and so should this Honorable Court. Had counsel adequately challenged the State's sexual assualt charge he would have put the whole case in such a different light as to underline confidence in the verdict." Kyles v. Whitley, 115 S.T. 1555, 1566 (1995). Petitioner's counsel's excuse for not calling an expert, this feeble explaination underscores counsel's ineffectiveness. U.S. v. Gray, 878 F.2d 702, 711 (CA 3 1989). Ineffectiveness is generally clear in the context of complete failure to investigate, because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained

the facts on which such a decision could be made. Strickland, 466 U.S. at 690. Such is the situation presented in this case, as counsel offered no strategic justification for his failure to make any effort to investigate the case, and indeed he could have offered no such rationale. Sullivan v. Fairman, 819 F.2d at 1389; Nealy, 764 F.2d at 1178; Crisp, 743 F.2d at 584. His failure to take any steps to investigate the case cannot be excused on the grounds that the investigation would have been fruitless. Counsel's complete obdication of the "duty to investigate" recognized in Strickland, supra, "caused his performance to fall below the minimum standard of reasonable professional representation."

Where the deficiences in counsel's performance were severe and cannot be characterized as the product of strategic judgment, ineffectiveness is clear. Thus the Court of Appeals are in agreement with Petitioner that failure to conduct any pretrial investigation, constitutes a clear instance of ineffectiveness. Nealy v. Cabana, supra. [At] a minimum, counsel has a duty to investigate and interview potential witnesses, and to make an independant investigation of the facts and circumstances of the case. As a rule an Attorney must investigate a case in order to provide minimally competent professional representation." Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984). Investigation consisting of solely reviewing Prosecutor's file "fall short of what a reasonable competent attorney would have done." Applying the First prong of the two-part test of Strickland, supra, the Honorable Court would find that Attorney Jenkin's performance in conducting a reasonable pretrial investigation or determining that such an investigation was not necessary was so "severly deficient" as to fail even the deferential test of attorney competence laid out in Strickland.

MEDICAL EXPERT NOT CONSULTED

Gersten v. Senkowski, 426 F.3d 588, 607 (CA 2 2005). Defense counsel's

failure to consult with or call a medical expert, or to review or challenge the medical evidence of penetration by finger was ineffective assistance of counsel. Here defense counsel failed to call a witness, or even to consult in preperation for trial and cross-examination of the prosecution's witness, and medical expert on child sex abuse. Complete failure to rebutt expert evidence. Thompston v. Calderon, supra. Trial counsel's failure to investigate, develope, and present evidence rebutting the State's expert evidence of sexual assualt fell below a reasonable standard of professional representation, and that defense counsel, "had no valid tactical reason" for not attacking the experts sexual assualt evidence. Counsel's failure to consult or call an expert on the psychology of child sexual abuse, or to educate himself sufficiently on the scientific issues, and thus enhance his ability to mount an effective-examination was a constitutionally deficient preformance. Petitioner was prejudiced by defense counsel's objectively unreasonable performance. State's case rested on the credibility of the alleged victim, as opposed to direct physical evidence.

Counsel's decision to essentially concede that the physical evidence was indicative of sexual penetration without conducting an investigation to determine whether that was the case, was not justified as an objectively reasonable strategic choice, since no facts known to defense counsel at that time that he adopted that strategy could justify concession. Defense counsel may not fail to conduct an investigation and then rally on the resulting ignorance to excuse his failure to explore a strategy that would have likely yielded exculpatory evidence. "It should have been obvious to a competent attorney that the assistance of an expert was necessary."

Petitioner assesses that impact of these errors in aggragate. Strickland, 466 U.S. at695-96. In that light, counsel's service to Petitioner fell outside the wide range of professionally competent assistance." Id. at 690.

Paval v. Hollins, 261 F.3d 210 (2nd Cir. 2001). Attorney's failure to put on a defense and call important fact witnesses was ineffective assistance for not calling and producing expert witness. Holsombeck v. White, 133 F.3d 1382 (11th Cir. 1998). Failure to investigate lack of medical evidence in sexual assualt case was ineffective assistance where case came down to credibility of witness. Johnson v. Baldwin, 114 F.3d 835 (9th Cir. 1997). Failure to investigate, ineffective assistance where assualt case against defendant was extremely weak and the physical evidence failed to support that there was an assualt.

Lindstade v. Keane, 239 F.3d 191, 201-02 (Ca 2 2001). "Defense counsel's failure to consult an expert, failure to conduct any relevant research, and failure even to request copies of the underlying studies relied on by nurse Cadwell contributed significantly to his ineffectiveness." Defendant charged with sexual abusing a child was denied effective assistance of counsel as a result of counsel's failure to prepare a defense, to call important fact witness, to conduct an adequate investigation, or to present medical expert, there was no substantial evidence. Lindstade, at 201. Cumulative effect by defense counsel, including failure to request study relied on by prosecutions expert, "amounted to ineffective assistance of counsel."

PROSECUTORIAL MISCONDUCT

Martinez v. State, (Court of Criminal Appeals, Nov. 2, 2005). In the Guilt/Innocent phase of the trial (R.R. Vol.-4, pg.-50, LL-1-18), the Prosecutor led the witness even though Petitioner's counsel objected. The first time the judge substained the objection. The Prosecutor then continued to lead the witness and Petitioner's counsel objected at which time the judge overruled the objection allowing the prosecutor to use hearsay evidence. This was all hearsay evidence, as the alleged victim's mother did not testify at trial. This was objected to and again the judge overruled on the hearsay

and allowed it in. T.C.C.P. Art. 38.072; was not admissable under the excited utterance exception to Hearsay Rule. Vera v. State, 709 S.W.2d 681 (Tex.App. 1986); reversed because of excited utterance. Glover v. State, 102 S.W.3d at 754 (Tex.App. 2002). Admission of hearsay evidence against a criminal defendant implicates the confrontation clause of the Sixth Amendment because the defendant is denied the opportunity to confront the person face to face. Then offered for truth of matters asserted so called "outcry testimony of child abuse victim is hearsay and as such, it is objectionable." Trial courts error in admitting hearsay testimony of child abuse victim, when State did not comply with statutory mandate that its notice to defendant be associated with written summary of the statements did not invoke mandatory statute immunization doctrine. T.C.C.P. Art. 38.072 §2(b)(1)(c). California v. Green, 90 S.Ct. 1930 (1970); See Davis v. Alaska, 94 S.Ct. 1105 (1974). To ensure these benefits of cross-examination, the Sixth Amendment bars admission of "testimonial hearsay," against a criminal defendant unless, (1) the declarent was unavailable at trial, and (2) the defendant had a prior opportunity to cross-examine that declarant. Neither of these requirements was satisfied here. Carmell v. Texas, 120 S.Ct. 1620 (2000); Crawford v. Washington, 124 S.Ct. 1354 (2004); Whorton v. Bockting, 127 S.Ct. 1173 (2007); Tyler, 121 S.Ct. 2478. This Court had never specifically approved the introduction of testimonial hearsay statements. 124 S.Ct. 2373.

That the Prosecutor committed Flagrant Prosecutorial Misconduct by inserting into the trial his personal opinion of the Petitioner and flagarantly calling Petitioner names and degrading Petitioner's family and calling them names and vouching for and bolstering the State's witnesses and their testimony. That the Prosecutor went further by stating that the Petitioner had been robbing the Tax Payers. Petitioner was not on trial for Robbery, nor was he indicted for Robbery, and or ever charged with Robbery nor anything

else. A prosecutor "may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not a liberty to strike fowl ones." Berger v. United States, 55 S.Ct. 629 (1935). "A prosecutor's actions constitute misconduct if they, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Wood v. Ryan, 693 F.3d1104, 1113 (9th Cir. 2012). A prosecutor should "prosecute with earnestness and vigor, but it is not to use improper methods calculated to produce a wrongful conviction." Boyd v. French, 147 F.3d319, 328-29 (4th Cir. 1998). The Prosecutor's statements during closing arguments, stating arguments outside of the case and testified to "His" facts of the case, by stating his personal opinion of the Pertitiner's credibility and degrading Petitioner's family was improper and flagrantly misconduct. Darden v. Wainwright, 106 S.Ct. 2464 (1986). An "invited response" doctrine does not excuse Flagrant Prosecutorial Misconduct, if it is a factor in evaluating the effect on misconduct on trial fairness. See, Malicoat v. Millin, 426 F.3d 1241, 1265 (10th Cir. 2005). See also Phillips, 102 S.ct. 940 (1982).

The Prosecutor also hid evidence in violation of Petitioner's Fourteenth Amendment and under Brady v. Maryland, 373 U.S. 83 (1963), in violation of Petitioner's rights. That the Prosecutor went hand-in-hand with Petitioner's counsel in trading one client for another. United States v. Newell, 315 F.3d510, 515-22 (5th Cir 2002); Conflict not waived in money laudering prosecution. Where defendant's had same counsel where attorney implicated one defendant in order to obtain acquittal for another defendant. This violated Petitioner's constitutional right under the 6th and 14th U.S.C.A.. See also, State v. Brown, 119 Ariz. 336, 580 P.2d 1190 (1978); United States v. Thomas, 114 F.3d 248, 288 (D.C. Cir. 1997); United States v. Brockington, 849 F.2d 872 875 (4th Cir. 1998); Art. 2.01, Duties of the District Attorney; Art. 3.04 Official Misconduct; Art. 5.06, Duties of the Prosecuting Attorney and the

Courts.

JUDICIAL ABUSE OF DISCRETION

Franklin v. McCaughtry, 398 F.3d 955, 960 (CA 7 2005); In this case the Wisconsin Court of Appeals applied State Law, Rochett, 165 Wis.2d 373, 477 N.W.2d 659, to decide claim of judicial bias. Delvecchio, 31 F.3d at 1380; Absent a "smoking gun" a petitioner may rely on circumstantial evidence to prove the necessary bias. Bracy, 286 F.3d at 411-12; United States v. Conley, 349 F.3d 837 (5th Cir. 2003). Trial and Appellate counsel's failure to object and argue that Petitioner's sentence exceeded statutory maximum was I.A.C., Prosecutorial Misconduct and Judicial Abuse of Discretion.

The Due Process Clause guarantees litigants an impartial judge, reflecting the principle that no man is permitted to try cases where he has interest in the outcome. U.S.C.A. 14. Where the judge has a direct, personal, substantial, or pecuniary interest in the case, due process is violated. Both actual judicial bias and the appearance of bias violates due process principles. U.S.C.A. 14. Delvecchio, supra. Due Process Clause sometimes requires the judge to recuse himself without showing of actual bias, where sufficient motive to be bias exists. U.S.C.A. 5th and 14th. Fairness requires actual absence of actual bias by judge in trial case.

The trial judge was bias because he was personal friends with Petitioner's daughter Christi Towns, who testified against Petitioner at trial. Petitioner's daughter worked at two different lawyers offices in Ellis County and was in and out of Ellis County Court's everyday for over two years. Petitioner's daughter made the comment, "that the judge and prosecutor's, along with all the attorney's, would do what she asked them to do." So this alone tainted the entire trial for Petitioner. The failure to strickly observe these constitutional safeguards render trial and conviction for offense illegal, void, redress, therefore making Petitioner's conviction and his rest-

raints and trial illegal and should be reversed.

This was judicial abuse of discretion where trial judge allowed Petitioner's Counsel and Prosecutor to trade Petitioner for another client. A judge who allows this kind of injustice to happen in his court, is a disgrace to the justice system. This is also against Art. 3.04; Official Misconduct, and Art. 5.06; Duties of the Courts. This was against Petitioner's rights under U.S.C.A. 5th, 6th, and 14th Amendments. At issue is the fundamental fairness of Petitioner's trial. Murphy v. Florida, 95 S.Ct. 2031, 2035 (1975); (Abuse of Discretion); Edwards v. Belisok, 117 S.Ct. 1584 (1997). A criminal defendant tried by a partial judge is entitled to have his conviction set aside, "no matter how strong the evidence against him." Johnson v. United States, 117 S.Ct. 1544 (1997); Ross v. Clerk, 106 S.Ct. 3101 (1986); Tumey, 47 S.Ct. 437. The presence of a biased judge is a structural defect in the constitution of the trial mechanism that defies harmless analysis.

The trial judge Abused his Discretion when he allowed hearsay evidence even though Petitioner's counsel objected twice to it. T.C.C.P. Art. 38.072. Martinez v. State, supra. Testimony was not admissable under excited udderance exception to Hearsay Rule. Vera v. State, supra.

Around or about the end of 2018, the judge, prosecutor and asst. prosecutor's and court reporters were all fired and indicted for extortion, money laundering, embezzlement and racketeering, just to name a few of the charges that was brought against them. This is what they did to Petitioner when they traded him for another client and violated Petitioner's Constitutional Rights. Petitioner is asking this Honorable Court to take all that is stated as true. Haines v. Kerner, 93 S.Ct. 594 (1972).

The United States Supreme Court holds allegations of a Pro-Se complainant to less stringent standards than formal pleadings drafted by lawyers. Roberts v. Wainwright, 666 F.2d 517 (11th Cir. 1982). The Courts must not

act arbitrarily and it may not deny his petition on erronerous grounds or procedural default. All factual allegations in petition must be taken as true and construed favorably to the petitioner. Petitioner asks this Honorable Court to direct the lower Courts to abide by the Laws and Rules and to allow the Petitioner to have his merits of the facts and allegations adjudicated upon the Facts and Laws.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and unadjudicated opinion of the Fifth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED,

Herbert Wiggins

HERBERT WIGGINS
TDCJ-ID# 01370636
Stiles Unit, 19-W-47
3060 FM 3514
Beaumont, Texas 77705

CERTIFICATE OF SERVICE

I Herbert Wiggins, Petitioner, hereby certify that a true and correct copy of the foregoing Writ of Certiorari with Memorandum has been mailed to all parties in this proceeding on this the 2 day of May, 2023.

Herbert Wiggins

HERBERT WIGGINS, PETITIONER

UNSWORN DECLARATION

I, Petitioner, Herbert Lavonne Wiggins, T.D.C.J.-I.D.#01370636 being Presently Incarcerated at the Mark W. Stiles Unit of the Texas Department of Criminal Justice, in Jefferson, County, Texas do hereby declare as follows:

1.) That I have spoken with #3 Warden, an Lieutentant and Sgt. on May 1, 2023 requesting to request an Notarized Read-Out of my Trust Fund for support of the Writ of Certiorari.

2.) That I have been refused by the Law Library Official and all ranking officials to receive a copy of my Trust Account at Stiles Unit.

3.) That this is not the first time that I have been refused an Notorized Copy of my Trust Fund to file in the Courts.

That I declare under penalty of perjury and under 28 U.S.C. §1746 and (V.T.C.A.) Civil Remedies Practice Codes §§132.001 - 132.003 that I am unable to pay the costs and that the above is true and correct.

EXECUTED ON THIS THE 2 DAY

OF MAY , 2023.

Herbert L. Wiggins

HERBERT L. WIGGINS
Pro-Se Petitioner
T.D.C.J.-I.D.#01370636
Stiles Unit, 19-W-47
3060 FM 3514
Beaumont, Texas 77705