No. 23-5047

IN THE

SUPREME COURT OF THE UNITED STATES

OMAR JAVIER TORRES — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

OMAR JAVIER TORRES
(Your Name)

JOHN B. CONNALLY UNIT — 899 FM 632
(Address)

KENEDY TX US 78119
(City, State, Zip Code)

NA
(Phone Number)

QUESTION(S) PRESENTED

1. WHETHER COURT OF APPEALS ABUSED ITS DISCRETION WHERE "SENIOR CIRCUIT JUDGES WHO ARE MEMBERS OF THE ORIGINALLY ASSIGNED DIVISION HEARING A CASE ARE NOT AUTHORIZED BY CONGRESS TO PARTICIPATE IN THE DETERMINATION WHETHER TO REHEAR THAT CASE IN BANC." 417 U.S. 622, 624 (1974) ???

2. WHETHER OR NOT A FEDERAL COURT OF APPEALS DOES OR DOES NOT RECALLS ITS MANDATE TO REVISIT THE MERITS OF AN EARLIER DECISION DENYING W.H.C. RELIEF TO STATE PRISONER, THE COURT ABUSES ITS DISCRETION, UNLESS IT ACTS TO AVOID A MISCARRIAGE OF JUSTICE AS DEFINED BY OUR HABEAS JURISPRUDENCE ???

3. WHETHER FEDERAL COURT OF APPEALS BY WITHHOLDING THE DISMISSAL OF PETITIONER'S FED. W.H.C. FROM DISTRICT COURT AND DENIAL OF COA APPLICATION IN FAVOR OF THE AG OF TEXAS, ATTORNEY FOR RESPONDENT, CONTRARY TO WHITEHEAD V. JOHNSON, 157 F.3d 384, IT SHOULD BE HELD TO HAVE ABUSED ITS DISCRETION ???

4. WHETHER FEDERAL COURT OF APPEALS ERRED TO FOLLOW FED. RULE APP. PROC. 35, WHERE IT PROVIDES THAT "THE CLERK SHALL TRANSMIT" ANY SUGGESTION TO THE "JUDGES" IN ORDER TO FOLLOW THE FRAP RULE 35 TO MAKE A VOTE ON THE ISSUES AND THEREFORE ABUSED ITS DISCRETION ???

5. WHETHER THE FRAP 41 AUTHORIZES A STAY OF MANDATE FOLLOWING A DENIAL OF COA AND THAT A COURT MAY STAY THE MANDATE WITHOUT ENTERING AN ORDER, FIFTH CIRCUIT DECISION TO DO SO HERE DID ABUSED ITS DISCRETION ???

6. WHETHER FEDERAL COURT OF APPEALS ABUSED ITS DISCRETION, BECAUSE OF JUDICIAL NEGLIGENCE AND MINISTERIAL DUTIES VIOLATION WAS ENOUGH TO VIOLATE PETITIONER'S DUE PROCESS, AND ERRING, THE COURT DID NOT AVOIDED A MISCARRIAGE OF JUSTICE BASED ON A CLAIM OF ACTUALLY INNOCENT ???

7. WHETHER FEDERAL COURT OF APPEALS DID NOTHING TO AVOID A MISCARRIAGE OF JUSTICE BASED ON A CLAIM OF ACTUALLY INNOCENCE AND THEREFORE ABUSED ITS DISCRETION ???

8. WHETHER FEDERAL COURT OF APPEALS AND DISTRICT COURT ERRED THAT PETITIONER MR. TORRES DOES NOT MEET OR REACH FURTHER TO CONCLUDE THAT HE IS ENTITLED TO AN EVIDENTIARY HEARING TO ARGUE HIS CONSTITUTIONAL CLAIMS, THEREFORE ABUSED ITS DISCRETION ???

9. WHETHER FEDERAL COURT OF APPEALS ERRED TO ADDRESS THE ISSUES OF THE APPEAL ON THE 59(e) MOTION FILED THROUGH U.S.C. § 1291 THAT MERIT RELIEF, THEREFORE VIOLATED PETITIONER'S DUE PROCESS AND EQUAL PROTECTION OF THE LAW OF THE 14TH AMENDMENT ???

10. WHETHER DISTRICT COURT AND COURT OF APPEALS ERRED AFTER SETTING OUT PLENARY POWER OF THE COURT'S TO CONDUCT EVIDENTIARY HEARING IN HEARING ACTIONS, WHERE GRANTING OF AN EVIDENTIARY HEARING WOULD BE "MANDATORY". TOWNSEND, 372 U.S. AT 313 ???

11. WHETHER DISTRICT AND COURT OF APPEALS ERRED AFTER PETITIONER SHOWN CAUSE AND PREJUDICE AND MISCARRIAGE OF JUSTICE FROM STATE COURTS AND THEREFORE ABUSED ITS DISCRETION BY NOT ISSUING THE PROPER RULING ???

12. WHETHER PETITIONER HAS COMPELLED THE STATE COURTS TO PRODUCE THE COMPLETE [REAL] RECORD, BUT FEDERAL HABEAS COURT FAILED TO ISSUE THE PROPER RECOMMENDATION AND APPLY THE PROPER STANDARD TO GRANT PETITIONER RELIEF ???

13. WHETHER SUPREME COURT FOR THE UNITED STATES, IN SO HOLDING, IT SHOULD EXPRESS OPINION AS TO WHETHER MR. TORRES'S FIFTH AND FOURTEENTH AMENDMENTS WERE VIOLATED ASSUMING ALL PETITIONER'S CLAIMS TO BE TRUE ???

14. WHETHER SUPREME COURT FOR THE UNITED STATES SHALL DETERMINE IN THE FIRST INSTANCE WHERE ALL OF THE EXCEPTIONS ENUMERATED IN §§ 2254(d)(1)-(8) APPLY TO PETITIONER'S CASE. STATE AND COURT OF APPEALS DECISION. AND THEREFORE TO THE DISTRICT COURT DECISIONS ???

15. WHETHER SUPREME COURT FOR THE UNITED STATES SHALL BELIEVE NECESSARY TO DETERMINE ON REMAND WHETHER THE STATE COURT'S FACTUAL FINDINGS WARRANT A PRESUMPTION OF CORRECTNESS ???

16. WHETHER SUPREME COURT FOR THE UNITED STATES AFTER DETERMINATION AND APPLICATION OF LAW SHALL CONDUCT ANY FURTHER PROCEEDINGS AS MAY BE APPROPRIATE IN LIGHT OF THEIR RESOLUTION OF THE ISSUES ???

17. WHETHER THE DISTRICT COURT AND COURT OF APPEALS DID NOT FOLLOWED THE FIFTH CIRCUIT AND UNITED STATES SUPREME COURT PRECEDENTS AND EXCLUSIVE STATUTORY EXCEPTIONS AND THEREFORE ABUSED ITS DISCRETION ???

18. WHETHER THE FEDERAL DISTRICT COURT AND COURT OF APPEALS OF NOT DUTY BOUND TO ACCEPT ANY AND ALL STATE-COURT FINDINGS THAT ARE "FAIRLY SUPPORTED BY THE RECORD", AND BY DOING IT IN THIS INSTANCE ABUSED ITS DISCRETION ???

19. WHETHER THE DISTRICT COURT AND COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN NOT TO APPLY TO THE STATE COURT'S FINDINGS THE PRESUMPTION OF CORRECTNESS THAT IT WAS "DUTY-BOUND" TO APPLY ???

20. WHETHER THE DISTRICT COURT AND COURT OF APPEALS ERRED IN NOT HOLDING AN EVIDENTIARY HEARING TO RESOLVED ANY FACTS THAT ARE IN DISPUTE SET OUT IN TOWNSEND ???

21. WHETHER THE DISTRICT COURT AND COURT OF APPEALS ERRED BY NOT APPLYING THE STATUTORY PRESUMPTION OF CORRECTNESS OF STATE COURT'S FINDINGS IN FEDERAL HABEAS CORPUS PROCEEDINGS ???

22. WHETHER THE DISTRICT COURT AND COURT OF APPEALS ERRED IN NOT CONSIDERING OTHER EXCEPTIONS TO PRESUMPTION UNDER FORMER 28 U.S.C. § 2254 (d) BASE ON ALLEGATIONS THAT PROCESS OF FACT WERE/WAS DEFICIENT ???

23. WHETHER THE DISTRICT COURT AND COURT OF APPEALS ERRED IN HOLDING THE RULING IN FAVOR OF "RESPONDENT'S REQUEST" FOR FAILURE TO EXHAUST STATE COURT REMEDIES CONTRARY TO WHITEHEAD V. JOHNSON, 157 F.3d 384 ???

24. WHETHER DISTRICT COURT AND COURT OF APPEALS IT IS IN CONFLICT WITH AND ERRED FROM DECISION ON SLAVIN V. CURRY, 574 F.2d 1256 (5TH CIR. 1978), THAT ACTION TAKEN BY COURTS WAS NOT APPROPRIATE FOR DISMISSAL ON THE GROUNDS ASSERTED AND IN THE MANNER FOLLOWED ???

25. WHETHER PETITIONER MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT BY SHOWING THAT JURISTS OF REASON COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION ???

26. WHETHER PETITIONER MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT [S] AND THAT THE ISSUES WERE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER ???

27. WHETHER THE DISTRICT COURT AND COURT OF APPEALS ERRED IN NOT APPLYING THE PROPER STANDARD SET OUT, ON MURPHY V. JOHNSON, 110 F.3d 10 (5TH CIR. 1997); MUNIZ V. JOHNSON, 114 F.3d 43-45 (5TH CIR. 1997) AND DESCRIBED FROM WHITEHEAD V. JOHNSON, 157 F.3d 384 ???

28. WHETHER THE DISTRICT COURT AND COURT OF APPEALS IS IN CONFLICT WITH UNITED STATES SUPREME COURT DECISION SET OUT IN TOWNSEND V. SAIN, 83 S.Ct. 745 (U.S. ILL 1963) DEFYING THE MANDATE ISSUED BY THE SUPREME COURT ???

29. WHETHER COURT OF APPEALS ERRED AND ABUSED ITS DISCRETION BY NOT GRANTING PETITIONER AN EVIDENTIARY HEARING WHERE DISTRICT COURT GRANTED DISMISSAL OF SUMMARY JUDGMENT WITHOUT HOLDING A HEARING AND 5TH CIRCUIT REMANDED FOR A HEARING ???

30. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE 5TH CIR. ERRED ON THE APPLICATION OF WHITEHEAD V. JOHNSON, 157 F.3d 384 (5TH CIR. 1998) AND MR. TORRES HAS SHOWN THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE AND WRONG?

31. WHETHER PETITIONER IS ENTITLED TO VACATE THE JUDGMENT OF THE DISTRICT COURT DISMISSAL WITHOUT PREJUDICE FOR FAILURE TO EXHAUST STATE COURT REMEDIES AND REMAND PETITIONER'S CASE TO THE DISTRICT COURT TO CONSIDER THE SUBSTANCE OF MR. TORRES'S HABEAS CLAIMS ???

32. WHETHER PETITIONER MR. TORRES HAS SHOWN THAT THE DISTRICT COURT ERRED DISMISSING HIS APPLICATION FOR FAILURE TO EXHAUST, THUS SATISFYING THE FIRST PART OF THE MURPHY TEST. MURPHY, 110 F.3d AT 11. ???

33. WHETHER PETITIONER MR. TORRES HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT[S] ON THE UNDERLYING CLAIMS AS REQUIRED FOR THE GRANT OF A COA. MURPHY, 110 F.3d AT 11.??

34. WHETHER THE FIFTH CIRCUIT MISAPPLIED THE SUBSTANTIAL EQUIVALENT AND FAIRLY PRESENTED STANDARD OF WHITEHEAD V. JOHNSON 157 F.3d 384 (5TH CIR. 1998); THEFORE SATISFYING PETITIONER'S FILINGS IN DISTRICT COURT AND COURT OF APPEALS ON THE FIRST PART OF THE MURPHY TEST. MURPHY, 110 F.3d AT 11 ???

35. WHETHER PETITIONER SATISFIED THE EXHAUSTION REQUIREMENT AS TO BE ONE FAIRLY PRESENTED IN THE STATE COURTS BASED ON HIS PROPER FILINGS (SEE PROCEDURAL HISTORY IN PET. WRIT FED.) FROM EACH STATE COURT'S ALERTING THEM OF THE FEDERAL VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS ???

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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

RELATED CASES

LOMAX V. STATE, 153 S.W. 3d 582
JEFFERSON V. UPTON, 130 S.CT. 2217 (2010)
MOODY V. ALBEMARLE PAPER CO., 417 U.S. 622, 94 S.CT. 2513 (1974)
SLACK V. MCDANIEL, 529 U.S. 473, 120 S.CT. 1595 (2000)
MILLER-EL V. COCKRELL, 123 S.C. 1029 (2003)
TOWNSEND V. SAIN, 372 U.S. 293, 83 S.CT. 745 (1963)
WHITEHEAD V. JOHNSON, 157 F.3d 384 (5TH CIR. 1998)
MURPHY V. JOHNSON, 110 F.3d 10 (5TH CIR. 1997)
MUNIZ V. JOHNSON, 114 F.3d 43-45 (5TH CIR. 1997)
SLAVIN V. CURRY, 574 F.2d 1256 (5TH CIR. 1978)

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is 2023 U.S. App. LEXIS 4540 (JAN 26, 2023); ORDER 2023 U.S. App. LEXIS 12931 (MARCH 28, 2023); JUDGMENT OF DENIAL OF MFR, ON APRIL 05, 2023. IS NOTED TO BE THE SAME AS JAN. 26, 2023) STATED BY COURT CLERK.

[x] reported at ; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[x] reported at 2022 U.S. DIST. LEXIS 118987 (H-21-0673; 4:21-CV-673); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix NA to the petition and is ATTACHED TO MEM. FED. WRIT

[x] reported at WR-91,964-01 WRIT OF MANDAMUS, FOLLOWED BY MFR AND PDR; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished. DENIED W.O.W.O.

The opinion of the TEXAS SUPREME COURT court appears at Appendix NA to the petition and is ATTACHED TO MEM. FED. PET. WRIT

[x] reported at LETTER SENT TO PETITIONER FROM COURT CLERK; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was JAN. 26, 2023-ORDER;.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: MARCH 28, 2023 AND APRIL 5, 2023, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including NA (date) on NA (date) in Application No. — A —.

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

[x] For cases from **state courts:**

The date on which the highest state court decided my case was 11-25-2020. A copy of that decision appears at Appendix NA.

[x] A timely petition for rehearing was thereafter denied on the following date: JAN. 14, 2021, and a copy of the order denying rehearing appears at Appendix NA. A WHITE CARD STATING THAT PFR WAS DENIED ALSO A PDR WAS FILED ON DENIAL OF W.M. INSTRUCTED BY T.S.C. CLERK AND LETTER IS ATTACHED TO PET. WRIT.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including NA (date) on NA (date) in Application No. — A —.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FOLLOWING STATUTORY AND CONSTITUTIONAL PROVISIONS ARE INVOLVED IN THIS CASE.

USCS CONST. AMEND. 5.

AMENDMENT 5 CRIMINAL ACTION — PROVISIONS CONCERNING — DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES.

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

USCS CONST. AMEND. 14.

AMENDMENT 14, SEC. 1 [CITIZENS OF THE UNITED STATES.]

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.

USCS CONST. AMEND. 6.

AMENDMENT 6. RIGHTS OF ACCUSED.

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 DEFENCE.

SEE FORMER 28 U.S.C.S. §2254(d), WHICH PROVIDED IN PART: "IN ANY PROCEEDING INSTITUTED IN A FEDERAL COURT BY A 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 OF COMPETENT JURISDICTION..., SHALL BE PRESUMED TO BE CORRECT, UNLESS THE APPLICANT SHALL ESTABLISH OR IT SHALL OTHERWISE APPEAR, OR THE RESPONDENT SHALL ADMIT —

"(1) THAT THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE STATE COURT HEARING;

"(2) THAT THE FACTFINDING PROCEDURE EMPLOYED BY THE STATE COURT WAS NOT ADEQUATE TO AFFORD A FULL AND FAIR HEARING;

"(3) THAT THE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED AT THE STATE COURT HEARING;

"(4) THAT THE STATE COURT LACKED JURISDICTION OF THE SUBJECT MATTER OR OVER THE PERSON OF THE APPLICANT IN THE STATE COURT PROCEEDING;

"(5) THAT THE APPLICANT WAS AN INDIGENT AND THE STATE COURT, IN DEPRIVATION OF HIS CONSTITUTIONAL RIGHT, FAILED TO APPOINT COUNSEL TO REPRESENT HIM IN THE STATE COURT PROCEEDING;

"(6) THAT THE APPLICANT DID NOT RECEIVE A FULL, FAIR, AND ADEQUATE HEARING IN THE STATE COURT PROCEEDING; OR

"(7) THAT THE APPLICANT WAS OTHERWISE DENIED DUE PROCESS OF LAW IN THE STATE COURT PROCEEDING;

"(B) OR UNLESS . . . THE FEDERAL COURT ON A CONSIDERATION OF [THE RELEVANT] PART OF THE RECORD AS A WHOLE CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD . . . . "

USCS FED. RULES APP PROC R. 35

RULE 35. EN BANC DETERMINATION

(a) WHEN HEARING OR REHEARING EN BANC MAY BE ORDERED. A MAJORITY OF THE CIRCUIT JUDGES WHO ARE IN REGULAR ACTIVE SERVICE AND WHO ARE NOT DISQUALIFIED MAY ORDER THAT AN APPEAL OR OTHER PROCEEDING BE HEARD OR REHEARD BY THE COURT OF APPEAL EN BANC. AN EN BANC HEARING OR REHEARING IS NOT FAVORED AND ORDINARILY WILL NOT BE ORDERED UNLESS:

(1) EN BANC CONSIDERATION IS NECESSARY TO SECURE OR MAINTAIN UNIFORMITY OF THE COURT'S DECISION; OR

(2) THE PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE

(b) PETITION FOR REHEARING OR REHEARING EN BANC. A PARTY MAY PETITION FOR A HEARING OR REHEARING EN BANC.

(1) THE PETITION MUST BEGIN WITH A STATEMENT THAT EITHER:

(A) THE PANEL DECISION CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT TO WHICH THE PETITION IS ADDRESSED (WITH CITATION TO THE CONFLICTING CASE OR CASES) AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISION; OR

(B) THE PROCEEDING INVOLVES ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE, EACH OF WHICH MUST BE CONCISELY STATED; FOR EXAMPLE, A PETITION MAY ASSERT THAT A PROCEEDING PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE IF IT INVOLVES AN ISSUE ON WHICH THE PANEL DECISION CONFLICTS WITH THE AUTHORITATIVE DECISIONS OF OTHER UNITED STATES COURT OF APPEALS THAT HAVE ADDRESSED THE ISSUE.

(f) CALL FOR A VOTE. A VOTE NEED NOT BE TAKEN TO DETERMINE WHETHER THE CASE WILL BE HEARD OR REHEARD EN BANC UNLESS A JUDGE CALLS FOR A VOTE.

ON 1998 AMENDMENT TO THIS RULE, STATES THAT THE AMENDMENT STATES THAT "A PETITION MAY ASSERT THAT A PROCEEDING PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE IF IT INVOLVES AN ISSUE ON WHICH THE PANEL DECISION CONFLICTS WITH THE AUTHORITATIVE DECISIONS OF EVERY OTHER UNITED STATES COURT OF APPEALS THAT HAS ADDRESSED THE ISSUE." THAT LANGUAGE CONTEMPLATES TWO SITUATIONS IN WHICH A REHEARING EN BANC MAY BE APPROPRIATE. THE FIRST IS WHEN A PANEL DECISION CREATES A CONFLICT. A PANEL DECISION CREATES A CONFLICT WHEN IT CONFLICTS WITH THE DECISION OF ALL OTHER CIRCUITS THAT HAVE CONSIDERED THE ISSUE. IF A PANEL DECISION SIMPLY JOINS ONE SIDE OF AN ALREADY EXISTING CONFLICT, A REHEARING EN BANC MAY NOT BE AS IMPORTANT BECAUSE IT CANNOT AVOID THE CONFLICT. THE SECOND SITUATION THAT MAY BE A STRONG CANDIDATE FOR A REHEARING EN BANC IS ONE IN WHICH THE CIRCUIT PERSIST IN A CONFLICT CREATED BY A PREEXISTING DECISION OF THE SAME CIRCUIT AND NOT OTHER CIRCUITS HAVE JOINED ON THAT SIDE OF THE CONFLICT.

STATEMENT OF THE CASE

PETITIONER WAS WRONGLY CONVICTED OF KILLING HIS EX-GIRLFRIEND'S NEW BOYFRIEND. THE PERPETRATOR WORE A PARTIAL MASK AND HOODIE AND THE IDENTIFICATION WAS FLAWED; STATEMENT AT POLICE REPORT ON IDENTIFICATION IS FALSE, AND SHOWS THAT BY PLACING THE STATEMENT IN THE SCENE WHERE IT INDICATES THAT THERE IS A WALL ACROSSED THE LIVING ROOM AND DINING ROOM, MEANING THAT POLICE AND COURT KNEW FROM VERY BEGINNING THAT IDENTIFICATION OF A PERPETRATOR WAS FALSE STATED IN POLICE REPORT AND STATED DIFFERENT FROM POLICE REPORT AT TRIAL. NO DNA EVIDENCE OR FINGERPRINTS WERE TAKEN BECAUSE [POLICE] BELIEVED THEY ALREADY HAD A SUSPECT, EVEN THOUGH, KNOWING THAT IDENTIFICATION AND THE WHOLE STATEMENT FROM POLICE REPORT WAS FALSE TO PROCEED WITH THE CHARGES IN COURT. THE STATE'S CONCLUSION THAT MS. PIEDRASANTA AND HER SON WITNESSED A CRIME PERPETRATED BY A MASKED MAN WAS INCORRECT. PETITIONER WAS NOT SUPPORTED BY ANY TYPE OF FORENSIC EVIDENCE. NO FIREARMS EXPERT THAT IT WILL INDICATE THAT EVIDENCE INTRODUCED AT TRIAL AND AFTER TRIAL ARE INCONSISTENT WITH EACH OTHER AND REFLECTS DIFFERENT WEAPONS USED. THE AUTOPSY REPORT AND EVIDENCE FOUND OFFERED AT TRIAL AND INTRODUCED AFTER TRIAL IT CONTRADICTS STATE'S CASE, EXHIBITS SHOWS THAT ALLEGED VICTIM [AT] TRIAL DOES NOT HAVE A BULLET PENETRATION, ONLY OTHER EXHIBITS IN A CLOSE PICTURE TAKEN SHOWS A [SORT] OF PENETRATION. AUTOPSY REPORT SHOWS A CORE FRAGMENT BULLET IN A SKETCH, DIFFERENT FROM X RAYS NOT INTRODUCED AT TRIAL AND FRAGMENTS INTRODUCED AFTER TRIAL. EXHIBIT #91 PICTURE OF A VICTIM SHOWS DIFFERENT VICTIM FROM PICTURES OF VICTIM AT TRIAL PRESENTED TO THE JURORS; BULLET PROJECTILE FOUND INSIDE FRIDGE, DOES NOT SHOW REMAINS FROM ALLEGED VICTIM WHERE STATE DESCRIBED ON HER STATE BRIEF THAT, THAT BULLET SCRAPED AND GRAZED VICTIM AND BULLET PROJECTILE IS DIFFERENT FROM FRAGMENTS INTRODUCED AFTER TRIAL AND AUTOPSY AND STATEMENT AT TRIAL FROM THE MEDICAL EXAMINER. THE ALLEGED C1. STATE USED HIM ONLY TO CORROBORATE STATE'S FALSE WITNESS'S STATEMENTS. AT POLICE REPORT MS. PIEDRASANTA TOLD [A] TOW TRUCK DRIVER IMMEDIATELY AFTER A ALLEGED INCIDENT THAT "SOMEONE" HAD KILLED HER BABY. SHE DID NOT SAY IT WAS PETITIONER. FROM POLICE REPORT. POLICE CONCLUSION TO BELIEVE FROM FALSE PROBABLE CAUSE STATEMENT THAT [A] PERPETRATOR WAS PETITIONER, KNOWING THAT EVERYTHING ON THAT STATEMENT INCLUDING 911 CALLS, IDENTIFICATION, TIME, MOTIVE WAS FALSE AND POLICE USED A CHARACTER OF MS. PIEDRASANTA'S SON TO MAKE PEOPLE BELIEVE THAT THE STATEMENT IS CORRECT AND BOTH OF THIS WITNESS'S KNEW THAT THEIR STATEMENTS WERE FALSE AND INCLUDING THE TRIAL COURT. POLICE FOUNDATION OF THE CASE IT IS INCORRECT, FALSE AND FRUITLESS AND POLICE KNEW IT, AND ALSO THAT NONE OF THE POLICE OFFICERS THAT OBTAINED AND INTRODUCED STATEMENT IN COURT TESTIFIED BECAUSE THEY KNEW THAT STATEMENTS WERE FALSE, EVEN, AFFIANT FROM POLICE REPORT, SGT. THAT STATED THAT COLLECTED THE SO-CALLED PROBABLE CAUSE STATEMENT DID NOT TESTIFIED AT TRIAL, [A] SGT, THAT IMPERSONATED [A] AFFIANT, IMPERSONATED [A] SON, IMPERSONATED [A] TOW TRUCK DRIVER. IMPERSONATED [A] PERPETRATOR AND ON THE NEXT DAY CHANGED HIS NAME TO IMPERSONATE [A] DETECTIVE, STATING THAT HE WAS ASSIGNED BY A HIGHER RANK.

STATE COURTS PROCEEDINGS

ON MONDAY AUG. 8, 2011, PETITIONER STARTED VOIR DIRE, NEXT DAY ON TUESDAY TRIAL WAS CANCELLED, ON WED. 10. 2011, STARTED TESTIMONY AND FINISHED FRIDAY 12. 2012! ON AUG. 15, 2011. PETITIONER WAS CONVICTED OF CAPITAL MURDER - BASED ON NO FACTS - FALSE STATEMENTS - A FALSE INDICTMENT AND ON THE ERRONEOUS INSTRUCTION FROM JUDGE; APPELLANT'S LAWYER APPEALED PETITIONER'S CONVICTION BY FILING A FRIVOLOUS BRIEF AND USED OF FALSE RECORD. ON MAR. 30, 2012, APPELLANT'S LAWYER FILED APPELLANTS BRIEF WITH NO MERITS TO SUCCEED AND NO OTHER APPELLATE LAWYER WOULD OF FILED GROUNDS THAT THE STA-

·TE'S ANSWERS IN REPLY BRIEF ARE FOUND IN THE T.R.A.P. BOOK; IN BETWEEN OCT. 2011 AND MARCH 30, 2012, PETITIONER SENT TO APPELLATE LAWYER POLICE REPORT, INDICTMENTS AND EVIDENCE SHOWING THAT HE WAS · WRONGLY CONVICTED, AND MULTIPLE CASE LAW PERTAINING GROUNDS FOR APPEAL AND TO RAISE ON PETITIONER'S BRIEF, DESPITE APPELLANT'S EFFORT, APPELLANT SENT THE CASE LAW RELATED TO THE INSTRUCTION TO THE JURORS FROM JUDGE IN VOIR DIRE, EXPLAINING GRIFFIN V. CALIFORNIA, INEFFECTIVE ASSISTANCE OF COUNSEL AND DOUBLE JEOPARDY; APPELLANT'S LAWYER IGNORED ALL LETTERS EVEN THE REQUEST FOR A COPY OF APPELLANT'S TRANSCRIPTS; ON AUG. 2, 2012, COURT OF APPEALS AFFIRMED CONVICTION OF PETITIONER; ON AUG. 6. 2012, APPELLANT'S LAWYER SENT A CERT. MAIL TO PETITIONER STATING THE COURT OF APPEALS HAS UPHELD YOUR CONVICTION AND I DO NOT THINK YOU HAVE A STRONG ARGUMENT FOR A PDR ; BUT WHETHER TO FILE YOUR OWN PDR IS YOUR DECISION. PLEASE UNDERSTAND THAT I WILL NOT BE FILING A PDR ON YOUR BEHALF, AND I WILL NOT BE TAKING FURTHER ACTION ON YOUR CASE. PETITIONER THEN REQUESTED A FAMILY MEMBER TO OBTAIN TRIAL COURT TRANSCRIPTS RECORDS TO PROCEED PROSE FOR FILING A PDR, FAMILY MEMBER MADE AN EFFORT TO OBTAIN TRANSCRIPTS FROM COURT AND WERE SENT TO PETITIONER ON SEP. 6, 2012, AND DELIVERED ON ABILENE, TX 79601, ON SEP. 8. 2012 AT 9:58 AM — PRIORITY MAIL INFORMATION — 9405 5036 9930 0130 8563 54 — MAIL COURT TRANSCRIPTS WERE NOT DELIVERED TO PETITIONER UNTIL THE 18TH OF OCTOBER 2012; MAIL ROOM AUTHORITIES DENIED HAVING COURT RECORDS IN THE UNIT; (SEE MAIL ROOM LOG) FOR DELIVERED DATE TO PETITIONER. SEE ALSO JPAY LETTER ID# 42249894, DATED ON OCT. 15 , 2012, WHERE STATES DELIVERED INFORMATION IN THE UNIT. ONCE PETITIONER OBTAINED COURT TRANSCRIPTS FROM MAIL ROOM. PETITIONER DISCOVERED THAT ALL TRANSCRIPTS STATEMENTS WERE EDITED, EVIDENCE WAS REPLACED AND TRANSCRIPTS WERE USELESS AND EVERY SINGLE CASE LAW PERTAINING TO THE GROUNDS THAT WERE SENT TO APPELLATE LAWYER WERE NOT LONGER ON RECORD AND 5 PAGES WERE ADDED TO THE COURT JURY CHARGE. EVENTHOUGH APPELLATE LAWYER HAD THE REAL 4 PAGE JURY CHARGE AND SHE WAS AWARE OF THE ADDED PAGES AND DID NOTHING TO ADDRESS THE ISSUE. ON SEP. 2013, PETITIONER FILED A "[LETTER]" REQUEST TO THE TRIAL COURT CLERK FOR THE REAL TRANSCRIPTS, "[LETTER]" WAS IGNORED. LATER PETITIONER FILED A MOTION TO OBJECT TO THE TRIAL COURT RECORD, THE TRIAL COURT IGNORED THE MOTION AS WELL. PETITIONER FILED A NOTICE FOR FILING A WRIT OF MANDAMUS, THE TRIAL COURT RESPONDED IMMEDIATELY AND SENT A FULL COPY OF THE [FALSE TRANSCRIPTS] TO PETITIONER AT NO COST STATED ON THE COVER LETTER. PETITIONER FILED A MOTION TO OBJECT TO THE TRIAL COURT RECORDS IN THE COURT OF APPEALS [14TH DIST.]. C.O.A. IGNORED THE MOTION. MONTHS LATER THE NEXT YEAR, PETITIONER FILE A NOTICE FOR FILING A WRIT OF MANDAMUS AND THEN C.O.A. CLERK RESPONDED IMMEDIATELY WITH A WHITE CARD, STATING THAT JURISDICTION IN THE CASE HAS EXPIRED, THIS CONCLUSION IS INCORRECT. THE C.O.A. CAN ACT UNDER THE T.R.A.P. RULE 19.3(a), ON PROCEEDINGS AFTER PLENARY POWER EXPIRES AND (a) CORRECT A CLERICAL ERROR IN ITS JUDGMENT OR OPINION. TRIAL JUDGE AND TRIAL COURT CLERK AND REPORTER MISLEADED THE C.O.A. WITH FALSE TRANSCRIPTS AND C.O.A. MADE DECISION BASED ON THE FALSE RECORD AND STATE'S FRIVOLOUS BRIEF STATEMENT THAT DOES NOT EVEN REFLECT IN HOW [A] VICTIM WAS SHOT FROM THE FALSE RECORD OR THE REAL TRANSCRIPTS. PETITIONER FILED A WRIT OF MANDAMUS IN THE C.C.A. AND WAS DENIED WITHOUT A WRITTEN ORDER ; PETITIONER FILED A MOTION FOR RECONSIDERATION IN THE TEXAS SUPREME COURT AND CLERK STATED THAT THE COURT DOES NOT HAVE JURISDICTION ON CRIMINAL MATTERS AND ADVISED PETITIONER TO FILE A PDR IN THE C.C.A.; PETITIONER FILED ACCORDINGLY AND REQUESTED THE T.S.C. CLERK TO FORWARD THE MOTION TO C.C.A. AND CLERK DID FORWARDED DOCUMENTS TO C.C.A, ACCORDINGLY WITH ALL TRANSCRIPTS ATTACHED; C.C.A. DENIED THE MOTION FOR RECONSIDERATION WITH GROUNDS IN SUPPORT; FEW WEEKS LATER C.C.A. DENIED THE PDR, STATING THAT A PDR WAS FILED. BUT A PDR MUST NOT BE FILED ON THE DENIAL OF THE WRIT OF MANDAMUS. TEXAS SUPREME COURT AND COURT OF CRIMINAL APPEALS ARE IN CONFLICT WITH THEIR OWN PRIOR DECISION. PETITIONER FILED A CHAPTER 64 MOTION FOR DNA FORENSIC TESTING IN THE TRIAL COURT AND MOTION WAS NEVER ANSWERED OR ADVISED PETITIONER ON THE RULING FROM THE COURT. PETITIONER CLEARLY ESTABLISHED THAT THE STATE OF TEXAS CORRECTIVE PROCESSES ARE I-

NEFFECTIVE AND LEAVES PETITIONER UNPROTECTED OF HIS FEDERAL CONSTITUTIONAL RIGHTS ON THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW TRYING AND DENYING PETITIONER TO OBTAIN THE REAL TRANSCRIPTS TAKING ALMOST 9 YEARS, WHERE IT SHOWS FROM THE REAL RECORD THAT PETITIONER WAS WRONGLY CONVICTED AND HE IS ACTUALLY INNOCENT.

FEDERAL HABEAS COURT

PROCEEDINGS IN THE U.S. D.C. FOR THE SOUTHERN DISTRICT

THIS SUIT WAS BROUGHT BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT – HOUSTON DIVISION – PURSUANT TO 28 U.S.C. § 2254 – PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY, FILED ON MAR. 1, 2021. GRANTED TO PROCEED ON APRIL 5, 2021. DISTRICT COURT ORDERED, BASED ON PETITIONER'S PETITION AND PRELIMINARY EXAMINATION STATING THAT ANSWER IS NEEDED ON SEP. 2, 2021. RESPONDENT FILED A MOTION FOR A SUMMARY JUDGMENT ON OCT. 21, 2021. CHALLENGING THE COURT ORDER AND REFUSES TO REVIEW GROUNDS AND IT IS NOT DENYING ANY OF PETITIONERS CLAIMS AND GROUNDS. PETITIONER RESPONDED WITH A MOTION TO OBJECT AND SHOWING A SUBSTANTIAL EQUIVALENT OF ONE PRESENTED TO THE STATE COURTS IF IT IS TO SATISFY THE "FAIRLY PRESENTED" REQUIREMENT BEFORE FILING IN THE U.S.D.C. TO ORDER TRIAL COURT TO PROVIDE PETITIONER WITH THE REAL TRANSCRIPTS IN ORDER TO FILE HIS 11.07 WRIT PROPERLY DENYING PETITIONER ACCESS TO HIS REAL COURT TRANSCRIPTS TO CHALLENGE HIS CONVICTION IN THE CORRECTIVE MANNER AND WITH ACCURATE INFORMATION TO BE CHALLENGED. FILED ON NOV. 2, 2021; FROM DEC. 2021, THROUGH JUNE, 2022, U.S.D.C. ORDERED AN INDEPENDENT INVESTIGATION INTERVIEWING JURORS AND WITNESS'S AND THIS PROCEDURE WAS SEALED FROM PUBLIC; ON JULY 6, 2022, DISTRICT COURT GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT AND DISMISSED WITHOUT PREJUDICE AND ISSUED HIS PERSONAL OPINION AND ANALYSIS AGAINST PETITIONER FOR FAILURE TO EXHAUST AND USING SOME OF THE INFORMATION SEALED FROM PUBLIC ON HIS PERSONAL OPINION AND THAT INFORMATION IS NOT REFLECTED IN THE COURT CLERK RECORDS, BUT IT DOES REFLECT ON THE INDEPENDENT INVESTIGATION AND DISTRICT COURT IS WITHHOLDING BRADY MATERIAL EVIDENCE IN BEHALF OF PETITIONER'S GROUNDS PRESENTED IN THE DISTRICT COURT. IGNORING AND NOT CONSIDERING COURT PRECEDENTS FROM U.S.C.A. AND U.S.S.C.. ON JULY 26, 2022. PETITIONER FILED A MOTION TO ALTER OR AMEND FINAL JUDGMENT. ON AUG. 3, 2022, DISTRICT COURT DENIED MOTION 59(e) FOR LACK OF MERIT, THIS PERSONAL CONCLUSION IS INCORRECT, AND ENTERED ON DOCKET ON AUG. 4, 2022. PETITIONER FILED A MOTION FOR EXTENSION FOR FILING AN APPEAL ON THE DENIAL OF THE MOTION 59(e), AND FILED WITH THIS MOTION A NOTICE OF APPEAL FOR FILING ON THE DISMISSAL OF THE WRIT OF HABEAS CORPUS AND REQUESTED FOR EXTENSION OF TIME TO FILE A C.O.A. APPLICATION UNDER 28 U.S.C. § 2253. NOTICE OF APPEAL WAS NOTED, AND U.S.C.A. STATED THAT MOTION FOR EXTENSION FOR FILING AN APPEAL ON THE DENIAL OF 59(e) MOTION UNDER 28 U.S.C. § 1291, COURT WAS NOT TAKEN ACTION UPON THE MOTION AND THE EXTENSION FOR FILING A MOTION FOR APPLICATION FOR A COA WERE NOT NEEDED AT THIS MOMENT BECAUSE COURT IS CURRENTLY AWAITING ON U.S.D.C. APPROVAL TO PROCEED IFP. STATED ON AUG. 30, 2022; ON SEP. 12, 2022, U.S.D.C. GRANTED LEAVE TO PROCEED IFP. IN ACCORDANCE WITH THE CLERK'S NOTICE ON SEP. 14, 2022; PETITIONER ACCORDINGLY PRIOR TO THESE CORRESPONDENCE FROM COURT[S], SENT AN APPEAL OF THE DENIAL OF [MOTION] 59(e) UNDER 28 U.S.C. § 1291, COURT OF APPEALS STATED THAT RECEIVED ON SEP. 14, 2022, THE APPEAL ON THE MOTION 59(e), SENT ON SEP. 1, 2022. COURT STATED THAT WAS UNABLE TO DETERMINE WHETHER THE DOCUMENT IS AN ATTEMPT TO FILE A SUBSEQUENT NOTICE OF APPEAL OR IF IT IS A PREMATURE BRIEF ON THE MERITS OF THE APPEAL. NO ACTION TAKEN ON THIS DOCUMENT. PETITIONER ACCORDINGLY FILED A 28 U.S.C. § 2253 MOTION FOR APPLICATION FOR A COA WITH BRIEF IN SUPPORT IN THE U.S.C.A. WITH JURISDICTION IN THIS MATTER AS DIRECTED BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, ON OCT. 12, 2022, PETITIONER FILED A COA IN THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PROCEEDINGS IN THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON NOV. 11, 2022, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AN ORDER DIRECTING THE DISTRICT COURT ON PETITIONER'S APPLICATION FOR COA REMANDING THE CASE FOR THE LIMITED PURPOSE

OF ALLOWING THE DISTRICT COURT TO GRANT OR DENY A COA ASTO THE RULE 59(e) MOTION HELDED IN A-BEYANCE, NOTING ON ORDER THAT APPLICANT SEEKING [BOTH] THE DISTRICT COURT'S DENIAL OF PETITIONERS 28 U.S.C. § 2254 WRIT PETITION [AND] HIS MOTION FOR RECONSIDERATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 59(e). ON DEC. 01. 2022, DISTRICT JUDGE NEITHER ADDRESSED ISSUES OR RESPONDED ACCORDINGLY TO ORDER FROM FIFTH CIRCUIT, INSTEAD DISTRICT COURT ISSUED A PERSONAL OPINION AND NOT APPLYING THE PROPER STANDARD FOR REVIEW AND LEGAL ANALYSIS, THEREFORE NOT EVALUATING THE MATTER BASED ON THE UNITED STATES CONSTITUTION AND VIOLATIONS AGAINST PETITIONER FROM TRIAL COURT, COURT OF CRIMINAL APPEALS. TEXAS SUPREME COURT AND CONFLICTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW FROM FEDERAL DISTRICT COURT WITH THEIR PRIOR DECISIONS ON THE ISSUE OF EXHAUSTION OF STATE COURT REMEDIES AND THEN THE EVALUATION AND INTERPRETATION OF PETITIONER'S CONSTITUTIONAL RIGHTS IN ORDER TO APPLY THE CASE LAW CITED ON ORDER ON LIMITED REMAND, DISTRICT COURT RENDERING A JUST DECISION-ORDER USING CASELAW FROM UNITED STATES SUPREME COURT, AND NOT GIVING THE PROPER RESPECT TO THOSE DECISIONS, THIS ARE DECISIONS THAT THE U.S.S.C. TOOK THEIR TIME AND ANALYZED THE MATTER PRESENTED TO THE JUSTICES AND ISSUED ACCORDINGLY. NOW DISTRICT COURT HIDES THEIR RESPECT UNDER OTHER COURT'S DECISIONS AND ABUSED THEIR DISCRETION IN DOING IT SO, WHEN THE COURT OF APPEALS HAS A CLEAR PRECEDENT THAT IT IS WELL CONSIDERED BY COURTS BASED ON A PROPER RULING AND NOT ON PERSONAL FAVORS GIVING TO RESPONDENTS. ON JAN. 26, 2023, THE COURT OF APPEALS ON UNPUBLISHED ORDER DENIED PETITIONER COA AND STATED THAT PETITIONER FAILS TO MAKE THE REQUIRED FOR A COA AND BECAUSE OF THAT, THE COURT DO NOT REACH WHETHER THE DISTRICT COURT ERRED BY FAILING TO CONDUCT AN EVIDENTIARY HEARING, THIS CONCLUSION IS INCORRECT, A COVER UP, AND A MISCARRIAGE OF JUSTICE. BECAUSE CLEARLY PETITIONER STATES A SUBSTANTIAL SHOWING, AS TO BE AS SUBSTANTIAL EQUIVALENT OF ONE PRESENTED TO THE STATE COURTS IF IT IS TO SATISFY THE "FAIRLY PRESENTED" REQUIREMENT DEMONSTRATING THROUGH DUE DILIGENCE THAT TRIAL COURT JUDGE TAMPERED WITH PETITIONER'S COURT DOCUMENTS/TRANSCRIPTS WHERE GAVE TO JUROR[S] A ERRONEOUS INSTRUCTION IN HOW TO CONVICT PETITIONER, AND PETITIONER SHOWN WITH CLEAR SET FACTS TO BE ENTITLED TO EVIDENTIARY HEARING WHERE PETITIONER CLEARLY WILL SHOW THAT THE TRIAL COURT JUDGE NEFARIOUSLY VIOLATED PETITIONERS CONSTITUTIONAL RIGHTS ON DUE PROCESS AND EQUAL PROTECTION OF LAW AT TRIAL AND PETITIONER'S APPELLATE PROCEDURES TO DENY HIM RELIEF, AND THIS SET FACTS TO THE EYES OF THE RESPONDENT, DISTRICT COURT AND THE FIFTH CIRCUIT DOES NOT CONSTITUTE A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS ON DUE PROCESS AND EQUAL PROTECTION OF THE LAW AND THIS COURTS CANNOT AND DOES NOT REACH ANY FURTHER, EVENTHOUGH TO EARN THE PROPER RESPECT TO THEIR JUDGMENT ABUSING THE DISCRETION OF THE FIFTH CIRCUIT COURT. ON FEB. 5. 2023. PETITIONER FILED A PETITION FOR REHEARING AND/OR REHEARING EN BANC. WITH SUGGESTIONS IN SUPPORT AND WITH CLEAR CASE LAW THAT COURT OF APPEALS IS IN CONFLICT WITH. EVENTHOUGH COURT OF APPEALS DID NOT ISSUED A RESPOND TO THE APPEAL UNDER 28 U.S.C. § 1291; THE COURT OF APPEALS CLERK NOTIFIED THAT RECEIVED PETITION ON FEB. 8, 2023, STATED ON LETTER SENT TO PETITIONER ON FEB. 13. 2023. THE COURT CLERK REFLECTING THAT PETITIONER'S DOCUMENTS WERE ACCEPTED IN ITS PRESENT FORM; NOTING THAT ON JAN. 26, 2023 COURT OF APPEALS UNPUBLISHED ORDER THERE IS A ATTACHED COVER LETTER FROM COURT CLERK STATING AND REFERRED TO THE LOCAL RULES 41 FOR STAY OF MANDATE SEPERATED FROM FORMAT ORDER AND ORDER ITSELF DOES NOT REFLECT THE STAY OF MANDATE. ON MARCH 28, 2023, THE COURT OF APPEALS ENTERED AN ORDER IN THE CASE FROM THE MOTION FOR RECONSIDERATION TO BE DENIED, BECAUSE NO MEMBER OF THE PANEL OR JUDGE IN REGULAR SERVICE REQUESTED THAT THE COURT BE POLLED ON REHEARING EN BANC (FED. R. APP. P. 35 AND 5 CIR. R. 35); BUT, THE COURT CLERK DID NOT STATED THAT THE PETITION WAS PRESENTED TO THE COURT JUDGES. IN ORDER TO TAKE A CONSIDERATION IN FRONT OF COURT JUDGES, THE DOCUMENTS NEED TO BE PRESENTED TO THE CIRCUIT JUDGES. THE COURT CLERK ONLY STATES THAT THE PETITION WAS ACCEPTED, BUT NEVER

STATED THAT IT WAS PRESENTED BEFORE THE JUDGES FOR CONSIDERATION, AND ONLY STATES THAT NO JUDGE IN ACTIVE SERVICE VOTED ON THE PETITION FOR REHEARING EN BANC, EVENTHOUGH THE SAME JUDGES WERE PRESENT IN THE VOTING PANEL. ON APRIL 05, 2023, THE COURT CLERK ISSUED A LETTER SENT TO PETITIONER INDICATING THAT THE COURT OF APPEALS ISSUED A JUDGMENT AND THE COPY OF THE JUDGMENT WAS ENCLOSED BUT NEVER DID, AT CC: STATED THAT (A LETTER ONLY); AND REFERRED THAT THE JUDGMENT ISSUED AS THE MANDATE. PETITIONER SENT A REPLYED LETTER COURT CLERK OF COURT OF APPEALS FOR A COPY OF THE JUDGMENT THAT COURT CLERK WAS REFERRING TO AND THE ALLEGED MANDATE; AND ON APRIL 11, 2023, THE COURT OF APPEALS CLERK RECEIVED REQUEST FROM PETITIONER AND COURT CLERK (STATED AS OF MATTER OF INFORMATION THE JUDGMENT ENTERED, WAS A COPY OF THE JANUARY 26, 2023, INDICATING ORDER THAT DENIED THE MOTION FOR A CERTIFICATE OF APPEALABILITY COA THAT WAS PREVIOUSLY SENT TO YOU); THIS CONCLUSION IS INCORRECT. THE JUDGMENT OF COURT OF APPEALS IS VOID AND FRAUD. THE SAME JUDGES ON THE ORDER AND THE SAME DATE FROM JAN. 26, 2023; THE COURT OF APPEALS FOR THE FIFTH CIRCUIT NEEDS TO OBTAIN RULING ON PETITION FOR REHEARING EN BANC FROM DIFFERENT JUDGES FROM DIFFERENT PANEL, THEREFORE IT IS A CLEAR CONFLICT OF INTEREST. MISCARRIAGE OF JUSTICE AND FURTHERMORE ABUSED ITS DISCRETION.

REASONS FOR GRANTING THE PETITION

ABUSED DISCRETION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. THE FIFTH CIRCUIT'S MISAPPLICATION OF A SUBSTANTIAL EQUIVALENT AND FAIRLY PRESENTED STANDARD OF WHITEHEAD V. JOHNSON, 157 F.3d 384 (5TH CIR. 1998); THEREFORE SATISFYING ON PETITIONER'S FILINGS IN DISTRICT COURT AND COURT OF APPEALS FOR THE FIFTH CIRCUIT THE FIRST PART OF THE MURPHY TEST. MURPHY, 110 F.3d AT 11.

1. THE CIRCUIT'S PANEL'S DECISION IS IN CONFLICT WITH WHITEHEAD V. JOHNSON, 157 F.3d 384 (5TH CIR. 1998) WHEN PETITIONER CONVICTED OF STATE LAW OFFENSES SOUGHT FEDERAL HABEAS CORPUS RELIEF, GOVERMENT MOVED TO DISMISS FOR FAILURE TO EXHAUST STATE COURT REMEDIES. THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, JOE KENDALL, J., DISMISSED PETITION WITHOUT PREJUDICE AND DENIED CERTIFICATE OF APPEALABILITY. THE COURT OF APPEALS HELD THAT: (1) PETITIONER SATISFIED REQUIREMENT THAT HE EXHAUST STATE-COURT REMEDIES, AND (2) AND REMAND FOR CONSIDERATION OF CONSTITUTIONAL CLAIMS PRESENTED IN PETITION WAS REQUIRED. CERTIFICATE OF APPEALABILITY GRANTED: JUDGMENT VACATED AND CASE REMANDED. BEFORE JOLLY, SMITH AND WIENER, CIRCUIT JUDGES. PER CURIAM:

PETITIONER-APPELLANT JAMES EDWARD WHITEHEAD SEEKS A CERTIFICATE OF APPEALABILITY (COA) TO APPEAL THE DISMISSAL WITHOUT PREJUDICE OF HIS 28 U.S.C. § 2254 APPLICATION AS PROCEDURALLY BARRED FOR FAILURE TO EXHAUST STATE REMEDIES PURSUANT TO 28 U.S.C. § 2254(b)(1)(A). FOR THE REASON HEREAFTER EXPLAINED, WE GRANT COA, VACATE THE PROCEDURAL RULING OF THE DISTRICT COURT, AND REMAND TO THE COURT FOR IT TO CONSIDER WHITEHEAD'S HABEAS CLAIM.

ANALYSIS AT [7-10]

THE EXHAUSTION REQUIREMENT IS SATISFIED WHEN THE SUBSTANCE OF THE FEDERAL HABEAS CLAIM HAS BEEN FAIRLY PRESENTED TO THE HIGHEST STATE COURT. PICARD V. CONNOR, 404 U.S. 270, 275-78, 92 S. CT. 509, 30 L. Ed. 2d 438 (1971). IN TEXAS, THE HIGHEST STATE COURT FOR CRIMINAL MATTERS IS THE TEXAS COURT OF CRIMINAL APPEALS. RICHARDSON V. PROCUNIER, 762 F.2d 429, 431-32 (5TH CIR. 1985). A FEDERAL COURT CLAIM MUST BE THE "SUBSTANTIAL EQUIVALENT" OF ONE PRESENTED TO THE STATE COURTS IF IT IS TO SATISFY THE "FAIRLY PRESENTED" REQUIREMENT. PICARD, 404 U.S. AT 275-78, 92 S.CT. 509. THE HABEAS APPLICANT NEED NOT SPELL OUT EACH SYLLABLE OF THE CLAIM BEFORE THE STATE COURT TO SATISFY THE EXHAUSTION REQUIREMENT. LAMBERTI V. WAINWRIGHT, 513 F.2d 277, 282 (5TH CIR. 1975). THIS REQUIREMENT IS NOT SATISFIED IF THE PETITIONER PRESENTS NEW LEGAL THEORIES OR NEW FACTUAL CLAIMS IN HIS FEDERAL APPLICATION. NOBLES V. JOHNSON, 127 F.3d 409, 420 (5TH CIR. 1997), CERT. DENIED. — U.S. —, 118 S.CT. 1845, 140 L.Ed.2d 1094 (1998).

A CAREFUL REVIEW OF HIS STATE HABEAS APPLICATION REVEALS THAT WHITEHEAD DID PRESENT ESSENTIALLY ALL THE FACTS RELATING TO HIS THREE CONVICTIONS AND HIS PAROLE. HE ASSERTED VIOLATIONS OF THE DUE PROCESS, DOUBLE JEOPARDY, AND CRUEL AND UNUSUAL PUNISHMENT PROVISIONS OF THE U.S. CONSTITUTION PURPORTEDLY RESULTING FROM THE RESPONDENT'S REFUSAL TO ALLOW WHITEHEAD CREDIT ALL OF HIS "FLAT" TIME AND TAKING AWAY HIS MANDATORY RELEASE DATE. [redacted] HE ALSO CONTENDED THAT HE WAS ENTITLED TO "FLAT" OR CALENDAR TIME FROM HIS RELEASE ON PAROLE UNTIL HE WAS REINCARCERATED. WHITEHEAD ALSO ASSERTED THAT THE TOTAL OF HIS ACTUAL CALENDAR TIME SERVED PLUS HIS NEWLY ACQUIRED "GOOD" TIME EQUALED OR EXCEEDED HIS MAXIMUM TERM CORRECTLY CONSTRUED AND THAT THE REMOVAL OF HIS MANDATORY DISCHARGE DATE VIOLATED HIS CONSTITUTIONAL RIGHTS.

IMPORTANTLY, WHITEHEAD ATTACHED TO HIS STATE WRIT APPLICATION A COPY OF A "[LETTER]" THAT HE HAD WRITTEN TO A MS. BYRD IN THE TEXAS DEPARMENT OF CRIMINAL JUSTICE RECORDS OFFICE. IN WHICH HE DETAILED THE MANNER IN WHICH HE THOUGH HIS "FLAT" TIME AND "GOOD" TIME SHOULD BE CALCULA-

TED TO DETERMINE HIS DISCHARGE DATE. MOREEVER, WHITEHEAD ASSERTED IN THIS LETTER THAT HIS 30-YEAR SENTENCE WAS NOT AGGRAVATED OR STACKED, SO THAT HIS TIME SHOULD BE CALCULATED ON THE TWO 20-YEAR STACKED SENTENCED ONLY.

TRUE, THE PRIMARY FOCUS OF WHITEHEAD'S STATE WRIT APPLICATION IS ON A CLAIM FOR "STREET" TIME WHILE ON PAROLE; HOWEVER, THE FACTUAL REPRESENTATION IN THE LETTER ATTACHMENT, LIBERALLY CONSTRUED AS PART OF HIS APPLICATION, IS THE SUBSTANTIAL EQUIVALENT OF THE FACTUAL BASIS OF HIS FEDERAL APPLICATION AND SHOUD HAVE BEEN HELD TO BE A FAIR PRESENTATION OF HIS CLAIMS TO THE STATE COURT. PICARD, 404 U. S. AT 275-78, 92 S.CT. 509. WE CONCLUDE THAT WHITEHEAD HAS SHOWN THAT THE DISTRICT COURT ERRED IN DISMISSING HIS APPLICATION FOR FAILURE TO EXHAUST, THUS SATISFYING THE FIRST PART OF THE MURPHY TEST. MURPHY, 110 F.3d AT 11.

AT, [11] WHEN THE FIRST PART OF THE MURPHY TEST IS THUS SATISFIED, WE MUST PROCEED TO THE SECOND PART: CONSIDERATION WHETHER THE PRISONER HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT ON THE UNDERLYING CLAIMS, AS REQUIRED FOR THE GRANT OF A COA. MURPHY, 110 F. 3d AT 11. IF THE DISTRICT COURT IN THIS CASE HAD GONE ONTO ADDRESS THE MERITS OF WHITEHEAD'S CONSTITUTIONAL CLAIMS AS AN ALTERNATIVE TO ITS PROCEDURAL HOLDING OF FAILURE TO EXHAUST, CONSIDERATION UNDER THE SECOND PART OF MURPHY WOULD BE THE APPROPRIATE COURSE OF ACTION BECAUSE THE DISTRICT COURT'S DENIAL OF COA WOULD HAVE EMCOMPASSED THE MERITS OF THE CONSTITUTIONAL CLAIMS AS WELL AS THE FAILURE TO EXHAUST. BUT NEITHER THE RESPONDENT NOR THE DISTRICT COURT HAS ADDRESSED THE MERITS OF THE UNDERLYING CONSTITUTIONAL CLAIMS PRESENTED IN WHITEHEAD'S § 2254 APPLICATION. CONSEQUENTLY, IF THE INSTANT COA APPLICATION, WE WERE TO ADDRESS THE MERITS OF WHITEHEAD'S CONSTITUTIONAL HABEAS CLAIMS BY APPLYING THE SECOND PART OF THE MURPHY PROCEDURE, WE WOULD RUN AFOUL OF THE REQUIREMENT THAT INITIALLY THE DISTRICT COURT DENY A COA AS TO EACH ISSUE PRESENTED BY THE APPLICANT.

AT. [14] ACCORDING TO MUNIZ, HOWEVER, WEDD HAVE JURISDICTION TO CONSIDER WHETHER TO GRANT OR DENY A COA ON THE ISSUE OF EXHAUSTION ONLY, BECAUSE THAT IS THE ONLY ISSUE ADDRESSED IN THE DISTRICT COURT'S COA DETERMINATION. IN MURPHY, WE DID NOT NEED TO REACH THE SECOND STEP BECAUSE WE DETERMINED THAT THE DISTRICT COURT RULING — THAT THE APPLICANT HAD FAILED TO SATISFY THE EXHAUSTION REQUIREMENT — WAS CORRECT. NOTWITHSTANDING LANGUAGE IN MURPHY THAT WOULD SEEM TO SUGGEST THAT WE SHOULD PROCEED TO EXAMINE THE CONSTITUTIONAL CLAIMS BEFORE GRANTING A COA, MUNIZ'S RECOGNITION THAT THE COA REQUIREMENT IS JURISDICTIONAL AS TO EACH ISSUE REQUIRES THAT, ONCE WE CONCLUDE THAT THE DISTRICT COURT ERRED IN DISMISSING AN APPLICATION BECAUSE OF FAILURE TO EXHAUST, WE VACATE AND REMAND TO THE DISTRICT COURT TO ADDRESS THE MERITS OF THE HABEAS CLAIMS IN THE FIRST INSTANCE.

CONCLUSION

IS THAT WHITEHEAD SHOWN THAT THE DISTRICT COURT ERRED IN DISMISSING HIS APPLICATION FOR FAILURE TO EXHAUST STATE REMEDIES. WE THEREFORE GRANT A COA ON THAT ISSUE ONLY THE USUAL PROCEDURE AFTER THIS COURTS GRANTS A COA IS FOR THE APPEAL TO PROCEED TO FULL BRIEFING BY ALL PARTIES. IN THIS INSTANCE, HOWEVER, THE SOLE ISSUE BEFORE US — EXHAUSTION OF STATE REMEDIES — INDISPUTABLY RESOLVE BY THE PETITIONER'S COA APPLICATION AND THE RECORD, MAKING FURTHER BRIEFING ON THAT ISSUE UNNECESSARY. IN CLARK V. WILLIAMS, 693 F.2d 381, 382 (5TH CIR. 1982) WE GRANTED LEAVE TO PROCEED IN FORMA PAUPERIS; VACATED THE DISTRICT COURT'S JUDGMENT, AND REMANDED, ALL WITHOUT REQUIRING BRIEFING. THAT PROCEDURE IS APPROPRIATE HERE. WE THEREFORE VACATE THE JUDGMENT OF THE {1998 U.S. APP. LEXIS 13} DISTRICT COURT DENYING COA FOR FAILURE TO EXHAUST STATE REMEDIES AND REMAND THIS CASE TO THAT COURT TO CONSIDER THE SUBSTANCE OF WHITEHEAD'S HABEAS CLAIMS.

COA GRANTED; JUDGMENT VACATED AND CASE REMANDED

ON THE OTHER HAND CLEARLY STATED HERE, IN A SIMILAR VEIN, ON SEP. 2013, PETITIONER FILED A "[LETTER]" REQUEST UNDER TRAP RULE 34.6(d) TO THE TRIAL COURT CLERK FOR THE REAL TRANSCRIPTS. LETTER WAS

IGNORED. LATER PETITIONER FILED A MOTION TO OBJECT TO THE TRIAL COURT RECORD UNDER THE TRAP RULE 34.6(e)(3), THE TRIAL COURT IGNORED THE MOTION AS WELL. PETITIONER FILED A NOTICE FOR FILING A WRIT OF MANDAMUS, THE TRIAL COURT RESPONDED IMMEDIATELY AND SENT A FULL COPY OF THE [FALSE TRANSCRIPTS] TO PETITIONER AT NO COST STATED ON THE COVER LETTER "STICKY NOTE" WITH THE INITIALS OF JUDGE [FOR A COPY OF COVER-LETTER SEE WRIT OF MANDAMUS WR-91,964-01. ATTACHED EXHIBITS IN C.C.A.]. PETITIONER FILED A MOTION TO OBJECT TO THE TRIAL COURT RECORDS IN THE COURT OF APPEALS [14TH DIST.], COURT IGNORED THE MOTION. MONTHS LATER THE NEXT YEAR PETITIONER FILED A NOTICE FOR FILING A WRIT OF MANDAMUS AND THE C.O.A. CLERK RESPONDED IMMEDIATELY WITH A WHITE CARD, STATING THAT JURISDICTION IN THE CASE HAS EXPIRED. THIS CONCLUSION IS INCORRECT. THE C.O.A. CAN ACT UNDER THE T.R.A.P. RULE 19.3(a), ON PROCEEDINGS AFTER PLENARY POWER EXPIRES AND (a) CORRECT A CLERICAL ERROR IN ITS JUDGMENT OR OPINION. PETITIONER FILED A WRIT OF MANDAMUS IN THE C.C.A. AND WAS DENIED WITHOUT A WRITTEN ORDER; PETITIONER FILED A MOTION FOR RECONSIDERATION IN THE TEXAS SUPREME COURT AND CLERK STATED THAT THE COURT DOES NOT HAVE JURISDICTION ON CRIMINAL MATTERS AND ADVISED PETITIONER TO FILE A PDR IN THE C.C.A.; PETITIONER FILED ACCORDINGLY AND REQUESTED THE T.S.C. CLERK TO FOWARD THE MOTION TO C.C.A. AND CLERK DID FORWARDED DOCUMENTS TO C.C.A. ACCORDINGLY AND ALL TRANSCRIPTS ATTACHED; THE C.C.A. DENIED THE MOTION FOR RECONSIDERATION WITH GROUNDS IN SUPPORT; FEW WEEKS LATER C.C.A DENIED THE PDR, STATING THAT A PDR WAS FILED, BUT A PDR MUST NOT BE FILED ON THE DENIAL OF THE WRIT OF MANDAMUS. TEXAS SUPREME COURT AND COURT OF CRIMINAL APPEALS ARE ALSO IN CONFLICT WITH THEIR OWN PRIOR DECISIONS VIOLATING PETITIONER'S DUE PROCESS. PETITIONER CLEARLY ESTABLISHED THAT THE STATE OF TEXAS CORRECTIVE PROCESSES ARE INEFFECTIVE AND LEAVES PETITIONER UNPROTECTED OF HIS FEDERAL CONSTITUTIONAL RIGHTS OF HIS DUE PROCESS AND EQUAL PROTECTION OF THE LAW BASED ON THE PROVISIONS OF THE FOURTEENTH AMENDMENT WHERE TEXAS COURTS VIOLATED HIS DUE PROCESS FROM DENYING COURT FILINGS AND HIS DUE PROCESS WHERE IN TRIAL COURT WAS WRONGLY CONVICTED AND PETITIONER IS ACTUALLY INNOCENT WHERE TRIAL JUDGE GAVE THE ERRONEOUS INSTRUCTION TO JUROR[S] No. 21 DONALD A. HECKER THAT IF PETITIONER DON'T TESTIFY THAT THAT'S EVIDENCE OF GUILTY. THE PANEL IGNORED THE PROCEDURAL HISTORY FROM PETITIONER'S FILINGS THAT ARE SUBSTANTIAL EQUIVALENT FILED FROM THE BEGINNING BY A "[LETTER]" TO THE TRIAL COURT BY THE TRAP RULES OF THE FACTUAL BASIS LIBERALLY CONSTRUED AS PART OF PETITIONER'S FILINGS IN THE TEXAS HIGHEST COURTS ALERTING EACH COURT OF VIOLATION OF PETITIONER'S DUE PROCESS AND EQUAL PROTECTION OF THE LAW AND SHOULD HAVE BEEN HELD TO BE A <u>FAIR PRESENTATION</u> OF HIS CLAIMS TO THE HIGHEST STATE COURTS. FURTHERMORE, THAT PETITIONER'S REQUEST FOR REVIEW IN THIS ISSUE OF EXHAUSTION OF STATE REMEDIES IT IS THE SUBSTANTIAL EQUIVALENT SCENARIO WHERE PETITIONER FAIRLY PRESENTED HIS CLAIMS TO THE TEXAS HIGHEST COURT AND TEXAS SUPREME COURT.

QUESTIONS ON THIS ISSUE....

WHETHER THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH WHITEHEAD V. JOHNSON, 157 F.3d 384 (5TH CIR. 1998) AND MR. TORRES HAS SHOWN THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE AND WRONG ???

WHETHER PETITIONER IS ENTITLED TO VACATE THE JUDGMENT OF THE DISTRICT COURT DISMISSAL WITHOUT PREJUDICE FOR FAILURE TO EXHAUST STATE REMEDIES AND REMAND PETITIONERS CASE TO THE DISTRICT COURT TO CONSIDER THE SUBSTANCE OF MR. TORRES HABEAS CLAIMS ???

WHETHER PETITIONER MR. TORRES HAS SHOWN THAT THE DISTRICT COURT ERRED IN DISMISSING HIS APPLICATION FOR FAILURE TO EXHAUST, THUS SATISFYING THE FIRST PART OF THE MURPHY TEST. MURPHY, 110 F.3d AT 11. ???

WHETHER PETITIONER MR. TORRES HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHTS ON THE UNDERLYING CLAIMS AS REQUIRED FOR THE GRANT OF A COA. MURPHY, 110 F.3d AT 11. ???

2. THE CIRCUIT'S PANEL'S DECISION IS IN CONFLICT WITH DECISION MADE ON SLAVIN V. CURRY, 574 F.2d 1256 (5TH CIR. 1978).

OVERVIEW: THE DISTRICT COURT GRANTED DISMISSALS OR SUMMARY JUDGMENT WITHOUT HOLDING A HEARING.

ON APPEAL, THE COURT AFFIRMED IN PART, VACATED IN PART, AND REMANDED - HOLDING THAT WHEN LIBERALLY READ, APPELLANT'S COMPLAINT'S ALLEGED WITH SUFFICIENT SPECIFICITY. FACTS THAT COULD HAVE ENTITLED TO RELIEF, AND THAT THE DISTRICT COURT ERRED BY TREATING THE GROUNDS RELATED BY APPELLANT AS ALLEGING ONLY SEPARATE CAUSES OF ACTION. FURTHERMORE, THE COURT HELD THAT APPELLANT'S COMPLAINT IF TAKEN AS TRUE, WAS LEGALLY SUFFICIENT TO STATE A CAUSE OF ACTION.

OUTCOME: THE COURT HELD THAT APPELLANT'S COMPLAINT ALLEGED FACTS THAT, IF TRUE, COULD HAVE ENTITLED HIM TO RELIEF, AND THAT THE DISTRICT COURT ERRED BY NOT HEARING THE CLAIM AS DISMISSAL WITHOUT HEARING WAS SELDOM APPROPRIATE WHEN A DEFENSE OF IMMUNITY WAS PLEADED.

LEGAL STANDARDS FOR REVIEW BY U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

A JUDGE CANNOT ALLOW THE PERSONAL VIEW THAT THE ALLEGATIONS OF A PROSE GROUNDS ARE IMPLAUSIBLE TO TEMPER HIS DUTY TO APPRAISE SUCH PLEADINGS LIBERALLY.

A [WRIT OF HABEAS CORPUS] SHOULD NOT BE DISMISSED UNLESS IT APPEARS THAT THE PETITIONER CAN PROVE NO SET OF FACTS WHICH WOULD ENTITLED HIM TO RELIEF. PETITIONER'S CONCLUSORY ASSERTIONS, PROBATIVES, INFIRMATIVES AND GROUNDS, SPECIFICALLY PROSE CLAIMS, MUST BE READ IN LIBERAL FASHION AFTER DUE DILIGENCE PRESENTATION IN THE STATE COURTS AND DISTRICT COURT DENYING REVIEW BUT NOT DENYING THE CLAIMS, AND THEY MUST BE ACCEPTED AS TRUE IN TESTING THEIR SUFFICIENCY. EVEN THOUGH PETITIONER'S CLAIMS CONTAINS ADEQUATE FACTUAL CONTENT. A PETITIONER IS ENTITLED TO A FAVORABLE RULING ON THE PLEADINGS ONLY IF CLAIMS UNDER OTHER LEGAL STANDARDS.

TO MAINTAIN A WRIT OF HABEAS CORPUS "THE GREAT WRIT". UNDER §2254. IT IS NECESSARY THAT THERE IS AN ACTUAL DENIAL OF DUE PROCESS OR A DENIAL OF EQUAL PROTECTION BY TRIAL COURT AND STATE APPELATE COURTS; THUS THE CONTENTION THAT THE VIOLATION FROM THE GROUNDS PRESENTED BEFORE THE U.S.D.C. ON THE REPLACEMENT OF THE TRANSCRIPTS, EDITING INFORMATION, REPLACING INDICTMENTS, EDITING GROUNDS OF I.A.C. IN THE WHOLE RECORD AND ADDING 5 PAGES TO THE JURY CHARGE TO COVER UP THE JUDGE INSTRUCTION TO JUROR [5] No. 21 DONALD A. HECKER. WHICH DEPRIVED THE PETITIONER OF RIGHTS OF LIBERTY GUARANTED BY FEDERAL LAW MAKES EACH MEMBER OF THE STATE COURTS POTENTIALLY LIABLE FOR THE EFFECTS OF THE DEPRIVATION. HANNA V. HOME INSURANCE COMPANY, 281 F.2d 298, 303 (5TH CIR. 1960), CERT. DENIED 365 U.S. 838, 81 S.CT. 751, 5 L.Ed.2d 747 (1961).

OPINION BY: CHARLES CLARK, CIRCUIT JUDGE {574 F.2d 1259}

THE DISTRICT COURT GRANTED DISMISSAL OR SUMMARY JUDGMENT TO ALL OF THE DEFENDANTS WITHOUT HOLDING A HEARING. SLAVIN HAS APPEALED FROM THESE ACTIONS, WE VACATED PORTIONS OF THE FINAL ORDER OF THE DISTRICT COURT AND REMAND FOR A HEARING.

A JUDGE CANNOT ALLOW THE PERSONAL THAT THE ALLEGATIONS OF A PROSE GROUNDS ARE IMPLAUSIBLE TO TEMPER HIS DUTY TO APPRAISE SUCH PLEADINGS LIBERALLY.

AS WE SAID IN CRUZ V. SKELTON

WE NOTE INITIALLY THAT A [GREAT WRIT §2254] CLAIMS SHOULD NOT BE DISMISSED UNLESS IT APPEARS THAT PETITIONER CAN PROVE NO SET FACTS WHICH WOULD ENTITLED HIM TO RELIEF. CONLEY V. GIBSON, 1957. 355 U.S. 41, 78 S.CT. 99, 2 L.Ed.2d 80. THE ALLEGATIONS OF THE CLAIMS, SPECIFICALLY A PROSE GROUNDS, MUST BE READ IN A LIBERAL FASHION. HAINES V. KERNER, 1972, 404 U.S. 519, 92 S.CT. 594, 30 L.Ed.2d 652; CRUZ V. BETO, 1972, 405 U.S. 319, 92 S.CT. 1079, 31 L.Ed.2d 263, AND THEY MUST BE ACCEPTED AS TRUE IN TESTING THEIR SUFFICIENCY. HAINES V. KERNER, SUPRA {1978 U.S. APP. LEXIS *3} CRUZ V. BETO, SUPRA 543 F.2d 86, 88 (5TH CIR. 1976). CERT. DENIED, 433 U.S. 911, 97 S.CT. 2980, 53 L.Ed.2d 1096 (1977), SEE ALSO TAYLOR V. GIBSON, 529 F.2d 709, 714 (5TH CIR. 1976); GOFF V. JONES, 500 F.2d 395, 397 (5TH CIR. 1974); REED V. JONES, 483 F.2d 77, 78 (5TH CIR. 1973).

READ WITH THE REQUIRED LIBERALITY. PETITIONER'S CLAIMS RELATES. WITH SUFFICIENT SPECIFICITY FACTS THAT COULD ENTITLED HIM RELIEF. CF. JOHNSON V. WELLS, 566 F.2d 1016, 1017 (5TH CIR. 1978). EVENTHOUG HIS CLAIMS CONTAIN ADEQUATE FACTUAL CONTENT. PETITIONER IS ENTITLED TO A FAVORABLE RULING ON THE

GROUNDS ONLY IF PETITIONER'S CLAIMS SUFFICES UNDER OTHER LEGAL STANDARDS. U.S. COURT OF APPEALS SHALL GRANT A EVIDENTIARY HEARING AND ORDER SUBPOENA'S FOR A DEVELOPMENT OF A FACTUAL RECORD LISTED IN REQUEST FOR EVIDENTIARY HEARING, THAT IT WILL SUPPORT THE GROUNDS AND LEGAL CLAIMS IN HIS PETITION THAT HE IS ENTITLED FOR RELIEF. THE HEARING IS MANDATORY TO DISPUTE FACTUAL ISSUES ON THE MISSING PORTIONS OF THE RECORD [TOWNSEND V. SAIN, 372 U.S. 293, 318-319, 83 S.CT. 745, 9 L.ED.2D 770 (1963); JACKSON V. MCKASKLE. 729 F.2D 356, 359 (5TH CIR. [TEX] 1984); ROGERS V. MAGGIO. 714 F.2D 35, 37 (5TH CIR. [LA] 1983); FORTENBERRY V. MAGGIO. 664 F.2D 1288, 1291 (5TH CIR. [LA] 1982)].

UNDER TEXAS LAW TRIAL JUDGES SELECT THEIR COURT REPORTERS WHO THEREAFTER SERVE DURING THE PLEASURE OF THE {574 F.2D 1264} JUDGE. TEX. REV. CIV. STAT. ANN. ART. 2321 (VERNON SUPP. 1978). EVEN THOUGH JUDGE IS IMMUNE FROM A ACTION FOR DAMAGES, SHE WOULD NOT BE IMMUNE FROM AN ACTION FOR EQUITABLE RELIEF. PETITIONER CONTENDS THAT THE COURT JUDGE AND COURT REPORTER ALTERED THE TRANSCRIPTS AND COURT CLERK RECORD. THE DISTRICT COURT CONCLUDED {CASE NO. 4:21-CV-00673; CIVIL ACTION NO. H-21-0673} THAT PETITIONER'S CLAIMS WERE DISMISSED BECAUSE DID NOT PRESENTED THE CLAIMS ON THE STATE COURTS. THAT CONCLUSION WAS INCORRECT. (SEE WHITEHEAD V. JOHNSON. 157 F.3D 384 (5TH CIR. 1998); AND ALSO (SEE RHEVARK V. SHAW. 547 F.2D 1257, 1259 (5TH CIR. 1977). THIS COURT HELD THAT AN ACTION COULD BE MAINTAINED UNDER 1983 AGAINST A STATE COURT CLERK AND STENOGRAPHER FOR FAILING TO FORWARD A TRANSCRIPT TO THE STATE APPELLATE [IN PETITIONER'S CLAIMS STATED THAT CLERK SENT A FALSE RECORD TO C.D.A. MISLEADING THEM WITH FALSE INFORMATION] COURT. SEE ALSO QUALLS V. 535 F.2D 318 (5TH CIR. 1976); MCLALLEN V. HENDERSON. 492 F.2D 1298, 1299 (8TH CIR. 1974). WHETHER THE COURTS REPORTERS ARE ENTITLE TO RAISE A DEFENSE OF QUALIFY IMMUNITY DEPENDS UPON WHETHER THEY "CAN SHOW THAT [THEY WERE] ACTING PURSUANT TO [THEIR] LAWFUL AUTHORITY AND FOLLOWING IN GOOD FAITH THE INSTRUCTIONS OR RULES OF COURT AND [WERE] NOT IN DEROGATION OF THOSE {574 F.2D 1266} INSTRUCTIONS OR RULES." MCLALLEN. SUPRA. 492 F.2D AT 1300.

HERE IN THIS INSTANCE, COURT CLERK DID NOT SENT THE REAL TRANSCRIPT TO THE COURT OF APPEALS AND THE REAL JURY CHARGE, PETITIONER HAS THE 3 1/2 PAGE WRITTEN TYPED JURY CHARGE, THE TRIAL COURT PROVIDED TO TRIAL ATTORNEY WITH A COPY AND PETITIONER KEPT COPY FOR PERSONAL RECORD AND ALSO APPELLATE LAWYER HAS A COPY THAT PETITIONER GAVE TO HER WHEN SHE VISITED PETITIONER IN COUNTY JAIL. THIS ORIGINAL JURY CHARGE DOES NOT CONTAIN THE NUMBERS AT BOTTOM RIGHT CORNER, MEANING THAT THE APPELLATE LAWYER, THE COURT CLERK AND COURT REPORTER ARE AWARE OF THE OTHER 5 PAGES THAT WERE ADDED TO THE JURY CHARGE AND THE SAME WITH THE COURT TRANSCRIPTS AND THEREFORE THEY ARE NOT IMMUNE FROM EQUITABLE RELIEF FOR PARTICIPATION ON THE ALTERATION OF THE PETITIONER'S TRIAL COURT RECORDS AND SENDING A FALSE RECORD TO THE C.D.A. [14TH DIST.]

IN SUM, CONCLUSIONS OF FACTS, LEGAL ANALYSIS, CONSTITUTIONAL MIXED QUESTIONS OF LAW SHALL BE REVIEW DE NOVO. U.S. COURT OF APPEALS FOR THE 5TH CIR. HELD ONLY THAT ACTION FROM U.S. DISTRICT COURT WAS NOT APPROPRIATE FOR DISMISSAL ON THE GROUNDS ASSERTED AND THE MANNER FOLLOWED. {574 F.2D 1256}

QUESTIONS ON THIS ISSUE...

WHETHER PANEL OF THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH SLAVIN'S DECISION (574 F.2D 1256, 5TH CIR. 1978); ABUSED ITS DISCRETION AND ERRED BY NOT GRANTING PETITIONER'S HEARING WHERE DISTRICT COURT GRANTED DISMISSAL OR SUMMARY JUDGMENT WITHOUT HOLDING A HEARING AND COURT OF APPEALS 5TH CIR. REMANDED FOR A HEARING TO HEAR CLAIMS ???

WHETHER PANEL OF THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH SLAVIN'S DECISION (574 F.2D 1256, 5TH CIR. 1978); ABUSED ITS DISCRETION AND ERRED BY NOT GRANTING RELIEF ON PETITIONER'S CLAIMS, WHERE HOLDING THAT WHEN LIBERALLY READ, APPELLANT'S COMPLAINT'S ALLEGED WITH SUFFICIENT SPECIFICITY. FACTS THAT COULD HAVE ENTITLED TO RELIEF ???

WHETHER PANEL OF THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH SLAVIN'S DECISION (574 F.2d 1256 ; 5TH CIR. 1978); ABUSED ITS DISCRETION AND ERRED BY NOT GRANTING MR. TORRES COMPLAINTS IF TAKEN AS TRUE, WAS LEGALLY SUFFICIENT TO STATE A CAUSE OF ACTION ???

WHETHER PANEL OF THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH SLAVIN'S DECISION (574 F. 2d 1256 . 5TH CIR. 1978); ABUSED ITS DISCRETION AND ERRED WHERE MR. TORRES HAD DEMONSTRATED THAT REASONABLE JURIST WOULD FIND THE DISTRICT COURT'S ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE AND WRONG AND THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS INCORRECT IN ITS PROCEDURAL RULING — WHERE UNITED STATES COURT OF APPEALS 5TH CIR. HELD THAT ACTION FROM U.S. DISTRICT COURT WAS NOT APPROPIATE FOR DISMISSAL ON THE GROUNDS ASSERTED AND THE MANNER FOLLOWED { 574 F.2d 1256 } ???

3. THE PANEL'S DECISION IS IN CONFLICT WITH THE UNITED STATES SUPREME COURT DECISION SET OUT IN TOWNSEND V. SAIN, 83 S.CT. 745 (U.S. ILL 1963) AND 28 U.S.C. § 2254 (e)(1) (2)

ON MR. OMAR JAVIER TORRES - APPELLANT V. BOBBY LUMPKIN. TDCJ DIRECTOR, CID, APPELLEE [CASE NO. 22-20446; JAN. 26, 5TH CIR. 2023] [APPLICATION FOR COA, FROM THE DENIAL OF § 2254 AND DENIAL OF 59 (e) MOTION, No. 4:21-CV-673; CIVIL CASE NO. H-21-0673]; UNPUBLISHED ORDER, BEFORE STEWART, WILLETT AND DOUGLAS, CIRCUIT JUDGES. PER CURIAM: COURT OF APPEALS PANEL STATED THAT MR. TORRES FAILS TO MAKE THE REQUIRED SHOWING FOR COA. WE DO NOT REACH WHETHER THE DISTRICT COURT ERRED BY FAILING TO CONDUCT AN EVIDENTIARY HEARING. SEE UNITED STATES V. DAVIS, 971 F. 3d 524, 534-35 (5TH CIR. 2020). THIS CONCLUSION IS INCORRECT AND IN CONFLICT WITH UNITED STATES SUPREME COURT DECISION SET OUT IN TOWNSEND V. SAIN, 83 S.CT. 745 (U.S. ILL 1963).

UNDER TOWNSEND V. SAIN. CLEARLY STATES THAT PETITIONER MUST FIRST "ALLEGE FACTS WHICH IF PROVED, WOULD ENTITLED HIM TO RELIEF." Id AT 312, 83 S.CT. 745; THIS MANDATE REQUIRES PETITIONER TO DEMONSTRATE THAT THE STATE COURT'S DECISION WAS "CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW," [SEE FED. WRIT HABEAS PETITION]; FOR DECISIONS MADE BY STATE COURTS ATTACHED TO FEDERAL WRIT. AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES PURSUANT TO 28 U.S.C. § 2254 (d)(1), OR THE STATE COURT'S DECISION "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" PURSUANT TO 28 U.S.C. § 2254 (d)(2).

PETITIONER MR. TORRES HAS DEMONSTRATED AND SHOWN THAT THE STATE COURTS DENIED REVIEW, BUT DID NOT DENIED THE CLAIMS, AND PETITIONER STATES THAT ONCE REMANDED FOR AN EVIDENTIARY HEARING SET OUT ON TOWNSEND V. SAIN, WITH ALL SET FACTS AND SUBPOENA'S AND THE JUROR No. 21. DONALD A. HECKER AS A WITNESS, PETITIONER WILL NOT BE EXONERATED 99.9 %, INSTEAD PETITIONER IT WILL BE EXONERATED 100% AND MR. TORRES WILL TRIPLE DOWN HIS ACTUALLY INNOCENT CLAIM, ALSO HE WILL SHOW THAT HIS (1) CONSTITUTIONAL RIGHTS ON THE DUE PROCESS WERE VIOLATED BY GIVEN THE ERRONEOUS INSTRUCTION TO THE [JUROR (S)] AND WRONGLY CONVICTED HIM, (2) INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF SIXTH AMENDMENT WHEN TRIAL ATTORNEY FAILED TO OBJECT TO ERRONEOUS INSTRUCTION TO JUROR [S], (a) FAILED TO OBJECT TO JUROR No. 21 PLACED IN THE JURY PANEL (b) FAILED TO OBJECT TO THE WHOLE VENIRE PANEL ONCE THEY LISTENED TO JUDGE INSTRUCTING JUROR No-21 TO USE PETITIONER'S FAILURE TO TESTIFY AS EVIDENCE OF GUILT, (c) FAILED TO FILE A MOTION FOR MISTRIAL, (d) FAILED TO OBJECT TO COURT BY SENDING A INNOCENT PERSON TO PRISON, (e) FAILED TO PREVENT A MISCARRIAGE OF JUSTICE.

THIS SET FACTS WILL BE PROVEN BY ONLY ONE JUROR No. 21 AND ALSO ALL MR. TORRES CONSTITUTIONAL CLAIMS AND HE WILL BE ENTITLED HIM TO RELIEF.

LEGAL ANALYSIS AND ARGUMENT

WHEN PETITIONER FILED HIS PETITION UNDER 28 U.S.C. § 2254 FOR A WRIT OF HABEAS CORPUS, WITH GROUNDS IN SUPPORT, ALSO ATTACHED [DECISIONS FROM STATE COURTS] IN CONFLICT WITH 28 U.S.C.

§ 2254 (d)(1)(2). District Court Judge ordered and stated No.1 [Preliminary examination on Mr. Torres petition indicates that it needs to be answer] This is the first District Court order decision. Respondent through the Texas Attorney General replied with a motion for summary judgment, the District Court ruled on respondent's motion on his [favor], instead of issuing the "correct" decision based on the substance of the claim and procedural history set out on Mr. Torres petition similar and based on Whitehead v. Johnson. 157 F.3d 384; Ruling on respondent's favor was NOT a ruling based on the law set forth by Court of Appeals. but a favor to respondent. in which contradicts preliminary examination by District Court Judge set forth on his first order and a-habeas corpus determination order. District Court ruled in favor of respondent's request for failure to exhaust state remedies in which this conclusion is incorrect. See Whitehead v. Johnson, 157 F.3d 384. Petitioner filed a 59(e) motion requesting for evidentiary hearing set out on 28 U.S.C. § 2254 e(1)(2), with case in support cited on Townsend v. Sain, 83 S.Ct. 745 (U.S. Ill 1963); And also District Court Ruling is in conflict with the U.S. Court of Appeals 5th Cir. From decision made on Slavin v. Curry case. 574 F.2d 1256 (5th Cir. 1978), nothing on the language of the 28 U.S.C. § 2254 d(1)(2) and 28 U.S.C. § 2254 e(1)(2) states that a petitioner needs to set out a constitutional claim to give power jurisdiction to the Court of Appeals for the Fifth Circuit to grant a evidentiary hearing see Slavin, 574 F.2d 1256 (5th Cir. 1978), [Court of Appeals jurisdiction is whether a COA should be granted "only if the appellant has made a substantial showing of the denial of a constitutional right" set out on 28 U.S.C. § 2253(c)(2). or whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322; 336 (2003)], based on decisions from the District Court in which are completely incorrect. Petitioner in this instance has shown that he satisfied the first part set out on Murphy test. See Whitehead v. Johnson, 157 F.3d 384, (5th Cir. 1998) and the Court of Appeals should have the same conclusion set on his prior decision made on Whitehead's ruling. In order to move to the second part set on Murphy, the District Court has to make the proper ruling without the false interpretation of the exhaustion of the state court remedies and have a reasonable jurists to debate by their Court Ruling based on Court of Appeals precedent and the correct STANDARD based on Whitehead's decision. Respondent through Attorney General misleading a District Court Judge with delusional ideas leaves petitioner unprotected from his federal constitutional rights in the federal court proceedings. This panel's Court of Appeals decision is correct in citing Davis's case on 971 F.3d 524 on its Court interpretation of the jurisdiction of the Court of Appeals by not ruling and having power to rule on a petitioner's statutory claim to an evidentiary hearing. See. E.G.. United States v. Reed, 719 F.3d 369, 371 (5th Cir. 2013). But, this panel's decision is INCORRECT by not ruling on petitioner's claims from Court of Appeals prior decisions on Slavin. 574 F.2d 1256 (5th Cir. 1978), and Whitehead v. Johnson. 157 F.3d 384 (5th Cir. 1998); Murphy v. Johnson. 110 F.3d 10 (5th Cir. 1997); Muniz v. Johnson. 114 F.3d 43-45 (5th Cir. 1997); and thats where Court of Appeals supposed to step in; Also, in Davis, 971 F.3d 524 is in conflict with the United States Supreme Court, where "Aiust" decision defies Townsend v. Sain. 83 S.Ct. 745. in Townsend sets upon all lower courts. on the U.S.S.C.'s mandate states that a petitioner must first allege facts which, if proved, would entitle you to relief. Id at 314, 83 S.Ct. 754, it does not based or states any of the District Court's or Court of Appeals rulings. in this instance petitioner was left out unprotected from his evidentiary hearing mandate from the United States Supreme Court. in which the District Court and Court of Appeals decisions are in con-

FLICT WITH THE U.S.S.C. CASE CITED IN [TOWNSEND V. SAIN, 372 U.S. 293, 318-319, 83 S.CT. 745, 754, 9 L.ED. 2d 770 (1963); JACKSON V. MCKASKLE, 729 F.2d 356, 359 (5TH CIR. [TEX] 1984); ROGERS V. MAGGIO. 714 F.2d 35, 37 (5TH CIR. [LA] 1983); FORTENBERRY V. MAGGIO, 664 F.2d 1288, 1291 (5TH CIR [LA] 1982)]. AND LOWER COURTS ABUSED THEIR DISCRETION AND ERRED BY NOT HOLDING A HEARING WHERE PETITIONER WILL PROVE AND DEMONSTRATE THAT HE IS ACTUALLY INNOCENT AND HE WAS WRONGLY CONVICTED AND A CLEAR MISCARRIAGE OF JUSTICE.

UNITED STATES SUPREME COURT PERSUASIVE

IN LAWRENCE JOSEPH JEFFERSON V. STEPHEN UPTON, WARDEN
IN THE SUPREME COURT OF THE UNITED STATES
130 S.CT. 2217; 176 L.ED.2d 1032; 2010 U.S. LEXIS 4168; 78 U.S.L.W. 3683; 22 FLA. L. WEEKLY FED. S 361. NO. 09-8852. MAY 24, 2010. DECIDED
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT. JEFFERSON V. HALL, 570 F.3d 1283, 2009 U.S. APP. LEXIS 14129 (11TH CIR. GA., 2009) JUDGES: JUSTICE SCALIA, WITH WHOM JUSTICE THOMAS JOINS, DISSENTING.
[redacted] OVERVIEW: THE U.S. SUPREME COURT HELD THAT THE STATUTORY PRESUMPTION, PRESUMPTION OF CORRECTNESS OF STATE COURT'S FACTUAL FINDINGS IN FEDERAL HABEAS CORPUS PROCEEDINGS WAS IMPROPERLY APPLIED SINCE DETERMINATION THAT FINDINGS WERE SUPPORTED BY RECORD FAILED TO CONSIDER WHETHER OTHER EXCEPTIONS TO PRESUMPTION UNDER FORMER 28 U.S.C § 2254 (d) APPLIED BASED ON ALLEGATIONS THAT PROCESS OF FACT FINDING WAS DEFICIENT.
THE INMATE ESSENTIALLY ARGUED THAT THE STATE COURT'S PROCESS WAS DEFICIENT WHICH IMPLICATED EXCEPTIONS TO THE PRESUMPTION OF CORRECTNESS THAT THE INMATE DID NOT RECEIVE A FULL AND FAIR EVIDENTIARY HEARING IN THE STATE COURT BASED ON AN INADEQUATE FACT FINDING PROCEDURE, HEARING AND PROCEEDING. FURTHER, WHILE IT WAS ADMITTED THAT THE STATE COURT ADOPTED THE PROSECUTION'S FINDINGS OF FACT VERBATIM, [ETC], IT REMANDED TO DETERMINE THE PRECISE NATURE OF WHAT TRANSPIRED DURING THE STATE-COURT PROCEEDINGS IN ORDER TO DETERMINE WHETHER AN EXCEPTION TO THE PRESUMPTION OF CORRECTNESS WAS APPLICABLE.
OUTCOME: THE JUDGMENT UPHOLDING THE STATE COURT'S FINDINGS OF FACT WAS VACATED, AND THE CASE WAS REMANDED FOR FURTHER PROCEEDINGS. 7-2 DECISION; 1 DISSENT.

RESEARCH REFERENCES

28 U.S.C.S. § 2254 (d)
28 MOORE'S FEDERAL PRACTICE § 671.08 (MATTEW BENDER 3d ed.)
L.Ed DIGEST. HABEAS CORPUS § 120.5
L.Ed INDEX. CAPITAL OFFENSES AND PUNISHMENT < *PG. 1034 >

ANNOTATION REFERENCES

SUPREME COURT'S CONSTRUCTION AND APPLICATION OF ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA) PROVISION (28 U.S.C.S. § 2254(d)), RESTRICTING GRANT OF FEDERAL HABEAS CORPUS RELIEF TO STATE PRISONER ON CLAIM ALREADY ADJUDICATED BY STATE COURT ON MERITS. 154 L.Ed.2d 1147.
SUPREME COURT'S CONSTRUCTION AND APPLICATION OF [FORMER VERSION OF] 28 U.S.C.S. § 2254(d), WHICH PROVIDES THAT IN FEDERAL HABEAS CORPUS PROCEEDINGS, STATE COURT'S FACTUAL DETERMINATIONS MUST BE PRESUMED TO BE CORRECT. 88 L.Ed.2d 963.

HEAD NOTES

CLASSIFIED TO U.S. SUPREME COURT DIGEST, LAWYER'S EDITION

HABEAS CORPUS § 120.5 > STATE COURT - FACTUAL DETERMINATION - PRESUMPTION OF CORRECTNESS > HEADNOTE:

LEdHN[1]
SEE FORMER 28 U.S.C.S. §2254(d), WHICH PROVIDED IN PART: "IN ANY PROCEEDING INSTITUTED IN A FEDERAL COURT BY A 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 OF COMPETENT JURISDICTION . . . , SHALL BE PRESUMED TO BE CORRECT, UNLESS THE APPLICANT SHALL ESTABLISH OR IT SHALL OTHERWISE APPEAR, OR THE RESPONDENT SHALL ADMIT —

"(1) THAT THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE STATE COURT HEARING;

"(2) THAT THE FACTFINDING PROCEDURE EMPLOYED BY THE STATE COURT WAS NOT ADEQUATE TO AFFORD A FULL AND FAIR HEARING;

"(3) THAT THE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED AT THE STATE COURT HEARING;

"(4) THAT THE STATE COURT LACKED JURISDICTION OF THE SUBJECT MATTER OR OVER THE PERSON OF THE APPLICANT IN THE STATE COURT PROCEEDING;

"(5) THAT THE APPLICANT WAS AN INDIGENT AND THE STATE COURT, IN DEPRIVATION OF HIS CONSTITUTIONAL RIGHT, FAILED TO APPOINT COUNSEL TO REPRESENT HIM IN THE STATE COURT PROCEEDING;

"(6) THAT THE APPLICANT DID NOT RECEIVE A FULL, FAIR, AND ADEQUATE HEARING IN THE STATE COURT PROCEEDING; OR

"(7) THAT THE APPLICANT WAS OTHERWISE DENIED DUE PROCESS OF LAW IN THE STATE COURT PROCEEDING;

"(8) OR UNLESS . . . THE FEDERAL COURT ON A CONSIDERATION OF [THE RELEVANT] PART OF THE RECORD AS A WHOLE CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD . . . ." (PER CURIAM OPINION OF ROBERTS, CH. J., AND STEVENS, KENNEDY, GINSBURG, BREYER, ALITO, AND SOTOMAYOR, JJ.)

HABEAS CORPUS §120.5 > STATE COURT - FACTFINDING - LACK OF PRESUMPTION > HEADNOTE:
LEdHN[2]
IF ANY ONE OF THE EIGHT ENUMERATED EXCEPTIONS UNDER FORMER 28 U.S.C.S. § 2254(d) APPLIES, THEN A STATE COURT'S FACTFINDING IS NOT PRESUMED CORRECT IN FEDERAL HABEAS CORPUS PROCEEDINGS. (PER CURIAM OPINION OF ROBERTS, CH. J., AND STEVENS, KENNEDY, GINSBURG, BREYER, ALITO, AND SOTOMAYOR, JJ.)

OPINION.
PER CURIAM, AT
III.
[T]HIS HABEAS APPLICATION WAS FILED PRIOR TO THE ENACTMENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 AND THEREFORE GOVERNED BY FEDERAL HABEAS LAW AS IT EXISTED PRIOR TO THAT POINT. LINDH V. MURPHY, 521 U.S. 320, 326-336, 117 S.Ct. 2059, 138 L.Ed.2d 481 [*290], (1997). IN 1963, WE SET FORTH THE "APPROPRIATE STANDARD" TO BE APPLIED BY A "FEDERAL COURT IN HABEAS CORPUS" WHEN "THE FACTS" PERTINENT TO A HABEAS APPLICATION "ARE IN DISPUTE." TOWNSEND V. SAIN, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770. WE HELD THAT WHEN "THE HABEAS APPLICANT WAS AFFORDED A FULL AND FAIR HEARING BY THE STATE COURT RESULTING IN RELIABLE FINDINGS" THE DISTRICT COURT "ORDINARILY SHOULD . . . ACCEPT THE FACTS AS [**2221] FOUND" BY THE STATE-COURT JUDGE. Id., AT 318, 83 S.Ct. 745, 9 L.Ed.2d 770. HOWEVER, "IF THE HABEAS APPLICANT DID NOT RECEIVE A FULL AND FAIR EVIDENTIARY HEARING IN A STATE COURT, EITHER AT THE TIME OF THE TRIAL OR IN A COLLATERAL PROCEEDING," WE HELD THAT THE FEDERAL COURT "MUST HOLD AN EVIDENTIARY HEARING" TO RESOLVE ANY FACTS THAT "ARE IN DISPUTE." Id., AT 312, 83 S.Ct. 745, 9 L.Ed.2d 770. WE FURTHER "EXPLAIN[ED] THE CONTROLLING CRITERIA" BY ENUMERATING SIX CIRCUMSTANCES IN WHICH SUCH AN EVIDENTIARY HEARING WOULD BE REQUIRED:

"(1) THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVE IN THE STATE HEARING; (2) THE STATE FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD AS A WHOLE; (3) THE FACT-FINDING

PROCEDURE EMPLOYED BY THE STATE COURT WAS NOT ADEQUATE TO AFFORD A FULL AND FAIR HEARING; (4) THERE IS A SUBSTANTIAL ALLEGATION OF NEWLY DISCOVERED EVIDENCE; (5) THE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED AT THE STATE-COURT HEARING; OR (6) FOR ANY REASON IT APPEARS THAT THE STATE TRIER OF FACT DID NOT AFFORD THE HABEAS APPLICANT A FULL AND FAIR FACT HEARING." Id., AT 313, 83 S.CT. 745, 9 L.ED.2d 770 (EMPHASIS ADDED).

THREE YEARS LATER, IN 1966, CONGRESS ENACTED AN AMENDMENT TO THE FEDERAL HABEAS STATUTE THAT "WAS AN ALMOST VERBATIM CODIFICATION [****11] OF THE STANDARDS DELINEATED IN TOWNSEND V. SAIN." MILLER V. FENTON, 474 U.S. 104, 111, 106 S. CT. 445, 88 L.ED.2d 405 (1985). THAT CODIFICATION READ IN RELEVANT PART AS FOLLOWS:

[***1038] HN1 LEd HN[1] [1] "IN ANY PROCEEDING INSTITUTED IN A FEDERAL COURT 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 [*291] COURT OF COMPETENT JURISDICTION . . . , SHALL BE PRESUMED TO BE CORRECT, UNLESS THE APPLICANT SHALL ESTABLISH OR IT SHALL OTHERWISE APPEAR, OR THE RESPONDENT SHALL ADMIT--

"(1) THAT THE MERITS OF THE FACTUAL DISPUTE WERE NOT RESOLVED IN THE STATE COURT HEARING;

"(2) THAT THE FACTFINDING PROCEDURE EMPLOYED BY THE STATE COURT WAS NOT ADEQUATE TO AFFORD A FULL AND FAIR HEARING;

"(3) THAT THE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED AT THE STATE COURT HEARING;

"(4) THAT THE STATE COURT LACKED JURISDICTION OF THE SUBJECT MATTER OR OVER THE PERSON OF THE APPLICANT IN THE STATE COURT PROCEEDING;

"(5) THAT THE APPLICANT WAS AN INDIGENT AND THE STATE COURT, IN DEPRIVATION OF HIS CONSTITUTIONAL RIGHT, FAILED TO APPOINT COUNSEL TO REPRESENT HIM IN THE STATE COURT PROCEEDING;

"(6) THAT THE APPLICANT DID NOT RECEIVE A FULL, FAIR, AND ADEQUATE [****12] HEARING IN THE STATE COURT PROCEEDING; OR

"(7) THAT THE APPLICANT WAS OTHERWISE DENIED DUE PROCESS OF LAW IN THE STATE COURT PROCEEDING;

"(8) OR UNLESS . . . THE FEDERAL COURT ON A CONSIDERATION OF [THE RELEVANT] PART OF THE RECORD AS A WHOLE CONCLUDES THAT SUCH FACTUAL DETERMINATION IS NOT FAIRLY SUPPORTED BY THE RECORD." § 2254(d) (EMPHASIS ADDED).

AS IS CLEAR FROM THE STATUTORY TEXT QUOTED ABOVE, AND AS THE DISTRICT COURT CORRECTLY STATED, HN2 LEd HN[2] [2] IF ANY "ONE OF THE EIGHT ENUMERATED EXCEPTIONS . . . APPLIES" THEN "THE STATE COURT'S FACTFINDING IS NOT PRESUMED CORRECT." 490 F. SUPP. 2d, AT 1280; ACCORD, MILLER, SUPRA, AT 105, 106 S.CT. 445, 88 L.ED.2d 405 ("UNDER 28 U.S.C. § 2254(d), STATE-COURT FINDINGS OF FACT 'SHALL BE PRESUMED TO BE CORRECT' IN A FEDERAL HABEAS CORPUS PROCEEDING UNLESS ONE OF EIGHT ENUMERATED EXCEPTIONS APPLIES"); SEE ALSO 1 R. HERTZ & J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND [**2222] PROCEDURE 20.2c, PP. 915-918 (5TH ED. 2005).

[*292] JEFFERSON HAS CONSISTENTLY ARGUED THAT THE FEDERAL COURTS "SHOULD HARBOR SERIOUS DOUBTS ABOUT" AND SHOULD NOT "GIVE ANY DEFERENCE TO" THE "FINDINGS OF FACT AND CREDIBILITY DETERMINATIONS" MADE BY THE STATE HABEAS COURT BECAUSE THOSE FINDINGS WERE DRAFTED EXCLUSIVELY BY THE ATTORNEYS [****13] FOR THE STATE PURSUANT TO AN EX PARTE REQUEST FROM THE STATE-COURT JUDGE, WHO MADE NO SUCH REQUEST OF JEFFERSON, FAILED TO NOTIFY JEFFERSON OF THE REQUEST MADE TO OPPOSING COUNSEL, AND ADOPTED THE STATE'S PROPOSED OPINION VERBATIM EVEN THOUGH IT RECOUNTED EVIDENCE FROM A NONEXISTENT WITNESS. SEE, E.G., APPELLS BRIEF 32, N.10; DISTRICT COURT BRIEF 4, N.1; PET. FOR CERT. 12. THESE ARE ARGUMENTS THAT THE STATE COURT'S PROCESS WAS DEFICIENT. IN OTHER WORDS, THEY ARE ARGUMENTS THAT JEFFERSON "DID NOT RECEIVE A FULL AND FAIR EVIDENTIARY HEARING IN . . . STATE COURT." TOWNSEND, SUPRA, AT 312, 83 S.CT. 745, 9 L.ED.2d 770. OR, TO USE THE STATUTORY LANGUAGE, THEY ARE ARGUMENTS THAT THE STATE COURT'S "FACTFINDING PROCEDURE," "HEARING," AND "PROCEEDING" WERE NOT "FU-

LL, FAIR, AND ADEQUATE." §§2254(d)(2),(6),(7).

BUT THE COURT OF APPEALS DID NOT [***1039] CONSIDER THE STATE COURT'S PROCESS WHEN IT APPLIED THE STATUTORY PRESUMPTION OF CORRECTNESS. INSTEAD, IT INVOKED CIRCUIT PRECEDENT THAT APPLY ONLY PARAGRAPH (8) OF § 2254(d), WHICH, CODIFYING THE SECOND TOWNSEND EXCEPTION, 372 U.S., AT 313, 83 S.CT. 745, 9 L.ED.2D 770, LIFTS THE PRESUMPTION OF CORRECTNESS FOR FINDINGS THAT ARE "NOT FAIRLY SUPPORTED BY THE RECORD." SEE 570 F.3D, AT 1300 (QUOTING JACKSON V. HERRING, 42 F.3D 1350, 1366 (C A11 1995), [****14] IN TURN QUOTING 28 U.S.C. § 2254(d)(8)). AND EVEN THOUGH THE COURT OF APPEALS "RECOGNIZE[D]" THAT JEFFERSON HAD ARGUED THAT THE STATE COURT'S PROCESS HAD PRODUCED FACTUAL FINDINGS THAT WERE "'DUBIOUS AT BEST,'" AND THAT FEDERAL COURTS SHOULD THEREFORE "'HARBOR SERIOUS DOUBTS ABOUT'" THE STATE COURT'S "'FINDINGS OF FACT AND CREDIBILITY,'" THE COURT OF APPEALS NONETHELESS HELD THAT THE STATE COURT'S FINDINGS ARE "'ENTITLED TO A PRESUMPTION OF CORRECTNESS'" THAT IT WAS "DUTY-BOUND" TO APPLY. 570 F.3D, AT 1304, N.8 (QUOTING APPELLS BRIEF 32, N.10). THE COURT OF APPEALS EXPLICITLY STATED THAT IT CONSIDERED ITSELF [*293] "DUTY-BOUND" TO DEFER TO THE STATE COURT'S FINDINGS BECAUSE "JEFFERSON HAS NOT ARGUED THAT ANY OF THE STATE COURTS' FACTUAL FINDINGS WERE 'NOT FAIRLY SUPPORTED BY THE RECORD.'" A DIRECT REFERENCE TO § 2254(d)(8) AND TO THE SECOND TOWNSEND EXCEPTION. 570 F.3D, AT 1304, N.8 (EMPHASIS ADDED). AND IT THEN CONCLUDED: "BASED ON THESE FACTUAL FINDINGS OF THE STATE HABEAS COURTS—ALL OF WHICH ARE FAIRLY SUPPORTED BY THE RECORD—WE BELIEVE THAT JEFFERSON'S COUNSEL WERE REASONABLE IN DECIDING NOT TO PURSUE NEUROPSYCHOLOGICAL TESTING." Id., AT 1304 (EMPHASIS ADDED).

IN OUR VIEW, THE COURT [****15] OF APPEALS DID NOT PROPERLY CONSIDER THE LEGAL STATUS OF THE STATE COURT'S FACTUAL FINDINGS. UNDER TOWNSEND, AS CODIFIED BY THE GOVERNING STATUTE, A FEDERAL COURT IS NOT "DUTY-BOUND" TO ACCEPT ANY AND ALL STATE-COURT FINDINGS THAT ARE "FAIRLY SUPPORTED BY THE RECORD." THOSE WORDS COME FROM § 2254(d)(8), WHICH IS ONLY ONE OF EIGHT ENUMERATED EXCEPTIONS TO THE PRESUMPTION OF CORRECTNESS. BUT THERE ARE SEVEN OTHERS, SEE §§ 2254(d)(1)-(7), NONE OF WHICH THE COURT OF APPEALS CONSIDERED WHEN ADDRESSING JEFFERSON'S CLAIM. TO BE SURE, WE HAVE PREVIOUSLY STATED IN CASES APPLYING § 2254(d)(8) THAT "A FEDERAL COURT" MAY NOT OVERTURN A STATE COURT'S FACTUAL CONCLUSION "UNLESS THE CONCLUSION IS NOT 'FAIRLY SUPPORTED BY THE RECORD.'" PARKER V. DUGGER, 498 U.S. 308, 320, 111 S.CT. 731, 112 L.ED.2D 812 (1991) (GRANTING FEDERAL HABEAS RELIEF AFTER REJECTING STATE COURT'S FINDING UNDER § 2254(d)(8)); SEE ALSO DEMOSTHENES V. BAAL, 495 U.S. 731, 110 S.CT. 2223, [**2223] 109 L.ED.2D 762 (1990) (PER CURIAM) (APPLYING § 2254(d)(8)); CF. POST, AT ___, 176 L.ED.2D, AT 1045 (SCALIA, J., DISSENTING). BUT IN THOSE CASES THERE WAS NO SUGGESTION THAT ANY *OTHER* PROVISIONS ENUMERATED IN § 2254(d) WERE AT ISSUE. THAT IS NOT THE CASE HERE. IN TREATING § 2254(d),(8) AS THE *EXCLUSIVE* STATUTORY EXCEPTION, AND BY FAILING [***16] TO ADDRESS JEFFERSON'S ARGUMENT THAT THE STATE COURT'S *PROCEDURES* DEPRIVED ITS FINDINGS OF DEFERENCE, THE COURT OF APPEALS APPLIED THE STATUTE AND OUR PRECEDENTS INCORRECTLY.

ALTHOUGH WE HAVE STATED THAT A COURT'S "VERBATIM ADOPTION OF FINDINGS OF FACT PREPARED BY PREVAILING PARTIES" SHOULD BE [*294] TREATED AS FINDINGS OF THE COURT, WE HAVE ALSO CRITIZED THAT PRACTICE. ANDERSON, 470 U.S., AT 572, 105 S.CT. 1504, 84 L.ED.2D 518. AND WE HAVE NOT CONSIDERED THE LAWFULNESS OF, NOR THE APPLICATION OF THE HABEAS STATUTE TO, THE USE OF SUCH A [***1040] PRACTICE WHERE (1) A JUDGE SOLICITS THE PROPOSED FINDINGS EX PARTE, (2) DOES NOT PROVIDE THE OPPOSING PARTY AN OPPORTUNITY TO CRITICIZE THE FINDINGS OR TO SUBMIT HIS OWN, OR (3) ADOPTS FINDINGS THAT CONTAIN INTERNAL EVIDENCE SUGGESTING THAT THE JUDGE MAY NOT HAVE READ THEM. CF. Id., AT 568, 105 S.CT. 1504, 84 L.ED.2D 518; 6A. CODE OF JUDICIAL CONDUCT, CANON 3(A)(4) (1993) (PROHIBITING EX PARTE JUDICIAL COMMUNICATIONS).

WE DECLINE TO DETERMINE IN THE FIRST INSTANCE WHETHER ANY OF THE EXCEPTIONS ENUMERATED IN §§ 2254(d)(1)-(8) APPLY IN THIS CASE, SEE, E.G., CUTTER V. WILKINSON, 544 U.S. 709, 718, N.7, 125 S.CT.

2113, 161 L.Ed.2d 1020 (2005), ESPECIALLY GIVEN THAT THE FACTS SURROUNDING THE STATE HABEAS COURT'S PROCESS ARE UNDEVELOPED. RESPONDENT HAS CONCEDED [****17] THAT IT DRAFTED THE STATE COURT'S FINAL ORDER AT THAT COURT'S REQUEST AND THAT THE ORDER WAS ADOPTED VERBATIM. 263 GA., AT 317, 431 S.E.2d AT 111, AND HAS NOT DISPUTED IN THIS COURT THAT THE STATE COURT SOLICITED THE ORDER "EX PARTE AND WITHOUT PRIOR NOTICE" AND "DID NOT SEEK A PROPOSED ORDER FROM PETITIONER," PET. FOR CERT. 12, AND N. 8. BUT THE PRECISE NATURE OF WHAT TRANSPIRED DURING DURING THE STATE-COURT PROCEEDINGS IS NOT FULLY KNOWN. SEE 263 GA., AT 316-317, 431 S.E.2d, AT 111 (NOTING DISPUTE AS TO WHETHER JEFFERSON "HAD A CHANCE TO RESPOND" TO THE FINAL ORDER); SEE ALSO PET. FOR CERT. 13.

ACCORDINGLY, WE BELIEVE IT NECESSARY FOR THE LOWER COURTS TO DETERMINE ON REMAND WHETHER THE STATE COURT'S FACTUAL FINDINGS WARRANT A PRESUMPTION OF CORRECTNESS, AND TO CONDUCT ANY FURTHER PROCEEDINGS AS MAY BE APPROPRIATE IN LIGHT OF THEIR RESOLUTION OF THAT ISSUE. SEE TOWNSEND, 372 U.S., AT 313-319, 83 S.CT. 745, 9 L.Ed.2d 770; KEENEY V. TAMAYO-REYES, 504 U.S. 1, 112 S.CT. 1715, 118 L.Ed.2d 318 (1992). IN SO HOLDING, WE EXPRESS NO OPINION AS TO WHETHER JEFFERSON'S SIX AMENDMENT RIGHTS WERE VIOLATED ASSUMING THE STATE COURT'S FACTUAL FINDINGS TO BE TRUE.

[*295] ***

THE PETITION FOR A WRIT OF CERTIORARI AND MOTION TO PROCEED IN FORMA PAUPERIS ARE GRANTED. THE JUDGMENT [****18] OF THE COURT OF APPEALS IS VACATED, AND THE CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

IT IS SO ORDERED.

PRESUMPTION OF CORRECTNESS WAS APPLICABLE ON PETITIONER'S WRIT OF HABEAS CORPUS § 2254 APPLICATION, 59 (e) MOTION, APPEAL OF 59 (e) MOTION UNDER § 1291, APPLICATION FOR A COA, PETITION FOR REHEARING AND REHEARING EN BANC

AS IT IS CLEAR FROM UNITED STATES SUPREME COURT DECISION AND TEXT QUOTED ABOVE, THE DISTRICT COURT CORRECTLY STATED IF ONE OF THE EIGHT ENUMERATED EXCEPTIONS APPLIES THEN THE STATE COURT'S FACTFINDING IS NOT PRESUMED CORRECT. 490 F.SUPP.2d, AT 1280; ACCORD, MILLER, SUPRA, AT 105, 106 S.CT. 445, 88 L.Ed.2d 405 ("UNDER 28 U.S.C. § 2254 (d).)

CLEARLY AND CONSPICUOUSLY ON FIRST ORDER FROM DISTRICT COURT JUDGE, STATED FROM MR. TORRES APPLICATION AT MEMORANDUM COVER PAGE, AND 2 ATTACHED PAGE LETTERS FROM C.C.A. AND T.S.C. OF OF THE STATE OF TEXAS. FIRST ORDER INDICATED THAT PRELIMINARY EXAMINATION OF MR. TORRES PETITION INDICATES THAT IT NEEDS TO BE ANSWER DETERMINED BY JUDGE THAT STATES COURTS DECISION PRESUMPTION OF CORRECTNESS WAS APPLICABLE. BUT FOR THE ATTORNEY GENERAL FOR THE STATE OF TEXAS, ATTORNEY FOR THE RESPONDENT, MISAPPLICATION AND MISINTERPRETATION OF THE LAW MISLEADED THE DISTRICT COURT JUDGE ON FAILURE TO EXHAUST STATE COURT REMEDIES WITHOUT LOOKING AT PROCEDURAL BACKGROUND ON PETITIONER'S FILINGS INDICATING THAT PETITIONER THROUGH DUE DILIGENCE HAD A SUBSTANTIAL EQUIVALENT AS TO BE ONE FAIRLY PRESENTED HIS CLAIMS THROUGH THE STATE COURT, AND STATE COURT'S DID NOT DENIED CLAIMS ONLY DENIED REVIEW. SEE WHITEHEAD V. JOHNSON, 157 F.3d 384 (5TH CIR. 1998); MURPHY V. JOHNSON, 110 F.3d 10 (5TH CIR. 1997); MUNIZ V. JOHNSON, 114 F.3d 43-45 (5TH CIR. 1997). (WHERE PETITIONER WHITEHEAD THROUGH A LETTER SENT TO TDCJ CLASSIFICATION CLERK, THAT, IT WAS SUBSTANTIALLY EQUIVALENT AS TO BE ONE FAIRLY PRESENTED TO THE STATE COURTS); IN THIS INSTANCE PETITIONER FILED NUMEROUS FILINGS [LETTERS TO TRIAL COURT, MOTIONS, NOTICE FOR FILING WRIT OF MANDAMUS, MOTION FOR RECONSIDERATION EN BANC, WRIT OF MANDAMUS, PDR ON THE DENIAL OF WRIT OF MANDAMUS INSTRUCTED AND ADVISED BY TEXAS SUPREME COURT COURT CLERK [FOR COPY OF LETTER SEE MEMORANDUM OF PET. W.H.C.]; THIS FILINGS TO THE EYES OF STATE COURTS, TRIAL COURT, COURT OF APPEALS [14TH DIST.], C.C.A., TEXAS SUPREME COURT, DISTRICT COURT, COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE ATTORNEY GENERAL OF TEXAS, ATTORNEY FOR RESPONDENT IT WAS NOT ENOUGH TO CONSTITUTE A SUBSTANTIAL EQUIVALENT AS TO BE ONE FAIRLY PRESENTED AND DETERMINED THAT PETITIONER FAIRLY

EXHAUSTED HIS STATE COURT REMEDIES AND PRESUMPTION OF CORRECTNESS WAS APPLICABLE, AND WHERE DISTRICT JUDGE BY DESIGN STATED ON HIS FIRST ORDER, AND LATER WAS MISLEADED BY ATTORNEY GENERAL OF TEXAS, ATTORNEY FOR THE RESPONDENT, AND DISTRICT COURT JUDGE DID NOT FOLLOWED THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AND UNITED STATES SUPREME COURT PRECEDENTS AND EXCLUSIVE STATUTORY EXCEPTIONS AND THEREFORE ABUSED ITS DISCRETION IN DOING IT SO.

IN OUR VIEW, THE COURT OF APPEALS DID NOT PROPERLY CONSIDER THE LEGAL STATUS OF THE STATE COURT'S FACTUAL FINDINGS. FROM HIS FIRST COURT ORDER; UNDER TOWNSEND, AS CODIFIED BY THE GOVERNING STATUTE. FEDERAL COURT IS NOT "DUTY BOUND" TO ACCEPT ANY AND ALL STATE-COURT FINDINGS THAT ARE "FAIRLY SUPPORTED BY THE RECORD". THOSE WORDS COME FROM §2254(d)(8), WHICH IS ONLY ONE OF EIGHT ENUMERATED EXCEPTIONS TO THE PRESUMPTION OF CORRECTNESS. BUT THERE ARE SEVEN OTHERS, SEE §§ 2254(d)(1)-(7), NONE OF WHICH THE COURT OF APPEALS CONSIDERED WHEN ADDRESSING MR. TORRES CLAIMS. TO BE SURE, WE HAVE PREVIOUSLY STATED IN CASES APPLYING §2254(d)(8) THAT "A FEDERAL COURT" MAY NOT OVERTURN A STATE COURT'S FACTUAL CONCLUSIONS "UNLESS THE CONCLUSION IS NOT 'FAIRLY SUPPORTED BY THE RECORD.'" PARKER V. DUGGER, 498 U.S. 308, 320, 111 S.CT. 731, 112 L.ED.2d 812 (1991) (GRANTING FEDERAL HABEAS RELIEF AFTER REJECTING STATE COURT'S FINDINGS UNDER §2254(d)(8)); SEE ALSO DEMOSTHENES V. BAAL, 495 U.S. 731, 110 S.CT. 2223, 109 L.ED.2d 762 (1990) (PER CURIAM) (APPLYING § 2254(d)(8)); CF. POST, AT ___, 176 L.ED.2d, AT 1045 (SCALIA, J., DISSENTING), BUT IN THOSE CASES THERE WAS NO SUGGESTION THAT ANY OTHER PROVISIONS ENUMERATED IN §2254(d) WERE AT ISSUE, IN PETITIONER'S, MR. TORRES THAT IS NOT THE CASE HERE, IN PETITIONER'S CASE §2254(d)(1) THROUGH (8) APPLY HERE, IN TREATING §2254(d)(1) THROUGH (8) ALL EXCLUSIVE STATUTORY EXCEPTIONS, AND BY FAILING TO ADDRESS MR. TORRES ARGUMENTS FOR TAMPERING WITH HIS COURT DOCUMENTS (TRANSCRIPTS) CLAIMS FAIRLY PRESENTED AND THAT THE STATE COURT'S PROCEDURES DEPRIVED ITS FINDINGS OF DEFERENCE. THE DISTRICT COURT AND COURT OF APPEALS APPLIED THE STATUTE AND U.S. SUPREME COURT PRECEDENTS INCORRECTLY.

ACCORDINGLY, THE U.S. SUPREME COURT SHALL DETERMINE IN THE FIRST INSTANCE WHERE ALL OF THE EXCEPTIONS ENUMERATED IN §§ 2254(d)(1)-(8) APPLY IN PETITIONERS CASE, AND TO BELIEVE IT NECESSARY FOR THE LOWER COURTS TO DETERMINE ON REMAND WHETHER THE STATE COURT'S FACTUAL FINDINGS WARRANT A PRESUMPTION OF CORRECTNESS, AND TO CONDUCT ANY FUTHER PROCEEDINGS AS MAY BE APPROPRIATE IN LIGHT OF THEIR RESOLUTION OF THOSE ISSUES. SEE TOWNSEND, 372 U.S., AT 313-319, 83 S.CT. 745, 9 L.ED.2d 770; KEENEY V. TAMAYO-REYES, 504 U.S. 1, 112 S.CT. 1715, 118 L.ED.2d 318 (1992). IN SO HOLDING, WE SHALL EXPRESS OPINION AS TO WHETHER MR. TORRES FIFTH AND FOURTEENTH AMENDMENTS RIGHTS WERE VIOLATED ASSUMING ALL PETITIONER'S CLAIMS TO BE TRUE.

CUMULITIVE ERRORS, VIOLATION OF DUE PROCESS AND ABUSED OF DISCRETION FROM DISTRICT COURT AND UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WHERE APPLICATION OF PRESUMPTION OF CORRECTNESS WAS APPLICABLE AND COURTS IGNORED

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RULE 35. EN BANC DETERMINATION

(a) WHEN HEARING OR REHEARING EN BANC MAY BE ORDERED. A MAJORITY OF THE CIRCUIT JUDGES WHO ARE IN REGULAR ACTIVE SERVICE AND WHO ARE NOT DISQUALIFIED MAY ORDER THAT AN APPEAL OR OTHER PROCEEDING BE HEARD OR REHEARD BY THE COURT OF APPEAL EN BANC. AN EN BANC HEARING OR REHEARING IS NOT FAVORED AND ORDINARILY WILL NOT BE ORDERED UNLESS:

(1) EN BANC CONSIDERATION IS NECESSARY TO SECURE OR MAINTAIN UNIFORMITY OF THE COURT'S DECISION; OR

(2) THE PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE

(b) PETITION FOR REHEARING OR REHEARING EN BANC. A PARTY MAY PETITION FOR A HEARING OR REHEARING EN BANC.

(1) THE PETITION MUST BEGIN WITH A STATEMENT THAT EITHER:

(A) THE PANEL DECISION CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT TO WHICH THE PETITION IS ADDRESSED (WITH CITATION TO THE CONFLICTING CASE OR CASES) AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISION; OR

(B) THE PROCEEDING INVOLVES ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE, EACH OF WHICH MUST BE CONCISELY STATED; FOR EXAMPLE, A PETITION MAY ASSERT THAT A PROCEEDING PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE IF IT INVOLVES AN ISSUE ON WHICH THE PANEL DECISION CONFLICTS WITH THE AUTHORITATIVE DECISIONS OF OTHER UNITED STATES COURT OF APPEALS THAT HAVE ADDRESSED THE ISSUE.

(f) CALL FOR A VOTE. A VOTE NEED NOT BE TAKEN TO DETERMINE WHETHER THE CASE WILL BE HEARD OR REHEARD EN BANC UNLESS A JUDGE CALLS FOR A VOTE.

ON 1998 AMENDMENT TO THIS RULE. STATES

THAT THE AMENDMENT STATES THAT "A PETITION MAY ASSERT THAT A PROCEEDING PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE IF IT INVOLVES AN ISSUE ON WHICH THE PANEL DECISION CONFLICTS WITH THE AUTHORITATIVE DECISIONS OF EVERY OTHER UNITED STATES COURT OF APPEALS THAT HAS ADDRESSED THE ISSUE." THAT LANGUAGE CONTEMPLATES TWO SITUATIONS IN WHICH A REHEARING EN BANC MAY BE APPROPRIATE. THE FIRST IS WHEN A PANEL DECISION CREATES A CONFLICT. A PANEL DECISION CREATES A CONFLICT WHEN IT CONFLICTS WITH THE DECISION OF ALL OTHER CIRCUITS THAT HAVE CONSIDERED THE ISSUE. IF A PANEL DECISION SIMPLY JOINS ONE SIDE OF AN ALREADY EXISTING CONFLICT, A REHEARING EN BANC MAY NOT BE AS IMPORTANT BECAUSE IT CANNOT AVOID THE CONFLICT. THE SECOND SITUATION THAT MAY BE A STRONG CANDIDATE FOR A REHEARING EN BANC IS ONE IN WHICH THE CIRCUIT PERSIST IN A CONFLICT CREATED BY A PREEXISTING DECISION OF THE SAME CIRCUIT AND NOT OTHER CIRCUITS HAVE JOINED ON THAT SIDE OF THE CONFLICT.

IN ALBEMARLE PAPER CO. V. MOODY, 422 U.S. 405, 95 S.CT. 2362, 45 L.ED.2d 280, 1975 U.S. LEXIS 111, 9 EMPL. PRAC. DEC. (CCH) P10230, 10 FAIR EMP. PRAC. CAS (BNA) 1181

ON GRANTED CERTIORARI, THE COURT RULED, ON A CERTIFIED QUESTION, THAT "SENIOR CIRCUIT JUDGES WHO ARE MEMBERS OF THE ORIGINALLY ASSIGNED DIVISION HEARING A CASE ARE NOT AUTHORIZED BY CONGRESS TO PARTICIPATE IN THE DETERMINATION WHETHER TO REHEAR THAT CASE IN BANC." 417 U.S. 622, 624 (1974).

{HEAD NOTE: HN5-MOODY V. ALBEMARLE PAPER CO., 417 U.S. 622} (SUPREME COURT. 1974 DECIDED)

HN5 - AS FED. R. APP. P. 35 INDICATES, THE IN BANC COURT IS NORMALLY RESERVED FOR QUESTIONS OF EXCEPTIONAL IMPORTANCE OR TO SECURE OR MAINTAIN UNIFORMITY OF DECISION WITHIN THE CIRCUIT. IN THE WISE USE OF THIS EXCEPTIONAL POWER TO DETERMINE THE MAJOR DOCTRINAL TRENDS OF THE FUTURE FOR A PARTICULAR CIRCUIT, THE UNITED STATES CONGRESS APPEARS TO HAVE CONTEMPLATED THE NEED FOR AN INTIMATE AND CURRENT WORKING KNOWLEDGE OF, AMONG OTHER THINGS, THE DECISIONS OF THE CIRCUIT, ITS PENDING CASES, AND THE MAGNITUDE AND NATURE OF ITS FUTURE WORKLOAD. SENIOR JUDGES PROVIDE A JUDICIAL RESOURCE OF EXTRAORDINARY VALUE BY THEIR WILLINGNESS TO UNDERTAKE IMPORTANT ASSIGNMENTS WITHOUT ECONOMIC INCENTIVE OF ANY KIND. CONSISTENT THEREWITH, THE UNITED STATES CONGRESS HAS PROVIDED THAT, WHEN A SENIOR JUDGE HAS PARTICIPATED IN THE ORIGINAL DIVISION HEARING, SUCH SENIOR JUDGE MAY LATER SIT ON AN IN BANC COURT REHEARING THAT CASE, BUT VOTING ON THE MERITS OF AN IN BANC CASE IS QUITE DIFFERENT FROM VOTING WHETHER TO REHEAR A CASE IN BANC, WHICH IS ESSENTIALLY A POLICY DECISION OF JUDICIAL ADMINISTRATION. THE UNITED STATES CONGRESS VESTED THIS LATTER AUTHORITY AND RESPONSABILITY EXCLUSIVELY IN CIRCUIT JUDGES OF THE CIRCUIT WHO ARE IN REGULAR ACTIVE SERVICE UNDER 28 U.S.C.S. § 46 (c); BECAUSE OF THEIR DIFFERENT NATURE, THE GRANT OF AUTHORITY TO DO ONE DOES NOT INCLUDE AUTHORITY TO DO THE OTHER.

ALSO, THE SUPREME COURT HELDS, THAT ASSUMING, ARGUENDO, BOTH THAT FED. R. APP. P. 41 AUTHORIZED A STAY OF THE MANDATE FOLLOWING THE DENIAL OF THE PETITION FOR REHEARING OR EN BANC REHEARING AND ALSO THAT A COURT MAY STAY THE MANDATE WITHOUT ENTERING AN ORDER, THE FIFTH CIRCUIT ABUSED ITS DISCRETION IN DOING SO. THE FIFTH CIRCUIT DELAYED COURT PROCEEDINGS ISSUING ITS MANDATE FOR OVER MONTHS GIVING THE WRONG IMPRESSION THAT ITS COURT RULING WAS PROPER AND NOW IT IS IN CONFLICT WITH THEIR COURT PRECEDENTS AND CONFLICTS WITH THE PANEL'S DECISIONS FROM SAME JUDGES THAT PARTICIPATED IN JAN. 26, 2023, DECISION ON PETITIONER'S APPLICATION FOR COA AND APPEAL OF THE 59(e) MOTION; AND NOW ON APRIL 5, 2023, SAME JUDGES OF CIRCUIT, ARE USING ON JUDGMENT/ORDER SAME DATE, SAME FORMAT, AND CLERK IS INDICATING THAT THE JUDGMENT/ORDER FROM HIS PETITION FOR REHEARING AND REHEARING EN BANC IS THE SAME AS TO THE MANDATE, AND NOT PROVIDING WITH A COPY OF THE NEW JUDGMENT/ORDER DATED ON APRIL, 5, 2023 TO PETITIONER; UNTIL PETITIONER REQUESTED FOR A FREE COPY REQUESTING TO WAIVE THE FEE ON COPIES MADE. CLERK OF COURT SENT A COPY OF JUDGMENT TO PETITIONER INDICATING SAME ORDER FROM JAN. 26, 2023. WITH SAME DATES AND SAME JUDGES PARTICIPATING ON ORDER; NO NEW JUDGMENT WAS ISSUED OTHERWISE FROM SAME JUDGES AND JUDGES DID NOT STATED REASONS TO ISSUE THE SAME JUDGMENT WITHOUT TAKING IN CONSIDERATION THE ISSUES PRESENTED ON PETITION FOR REHEARING AND EN BANC REHEARING. BECAUSE CLEARLY FROM RECORD THE FIFTH CIRCUIT IT IS IN CONFLICT WITH THEIR PRIOR DECISIONS AND IT IS IN CONFLICT WITH THE SUPREME COURT PRECEDENT AND INDICATES TO BE BIAS AND ABUSED ITS DISCRETION, (WHICH CAUSE PETITIONER TO EXPENDED CONSIDERABLE TIME AND RESOURCES IN SEEKING TO ENFORCE LEGAL ARGUMENT AND HAVE A CLEAR UNDERSTANDING ON THE LAW PRESENTING PETITIONER'S WRIT OF CERTIORARI IN THE SUPREME COURT AND SHOW THAT U.S. FOR THE COURT OF APPEAL FOR THE FIFTH CIRCUIT MISCARRIAGE JUSTICE). ALSO THE FIFTH CIRCUIT HAD THE OPPORTUNITY AT THE REHEARING STAGE TO RECONSIDER THE SAME PROPER ARGUMENTS IT EVENTUALLY ADOPTED IN ITS SAME SECOND JUDGMENT WITH SAME STAMPED DATE, ALTHOUGH PETITIONER'S ARGUMENTS IN HIS BRIEF IN SUPPORT RELIED ON PRIOR COURTS DECISIONS THAT WERE RELEVANT. COURT OF APPEALS JUDGMENT DID NOT JUSTIFIED THE FIFTH CIRCUIT PRECEDENTS EXTRAORDINARY DEPARTURE FROM STANDARD APPELLATE PROCEDURES AND PRIOR COURT PRECEDENTS FROM FIFTH CIRCUIT COURT AND SUPREME COURT DECISION. BECAUSE THERE WERE AMPLE GROUNDS TO CONCLUDE THE EVIDENCE AND ARGUMENT WAS LIKELY TO HAVE ALTERED THE DISTRICT'S COURT'S RESOLUTION FROM PETITIONER'S GROUNDS, WHERE HE GOT WRONGLY CONVICTED BASED ON ERRONEOUS INSTRUCTION. HE IS ACTUALLY INNOCENT, AND COURT ALTERED AND EDITED WITH HIS COURT TRIAL TRANSCRIPTS TO DENY PETITIONER DUE PROCESS AND PREVENT PETITIONER FROM FILING A PROPER 11.07 WRIT, TO ATTACK THE CONVICTION OBTAINED THROUGH THE NEFARIOUS ERRONEOUS INSTRUCTION FROM JUDGE AND WHERE CLEARLY WILL SHOW PERJURED TRIAL WILL NEVER CONVICT PETITIONER BASED ON THEIR FALSE TESTIMONY, INSTEAD TRIAL COURT FURTHERMORE TO COVER UP HER INSTRUCTION TO ALL JUROR[S] ALTERED THE TRIAL RECORDS TO RESTRAIN PETITIONER AGAINST HIS WILL IN VIOLATION OF THE 5TH AND 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND COVER UP THE INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, VIOLATION OF DUE PROCESS AND EQUAL PROTECTION OF LAW; ALL THIS ISSUES DESCRIBED FROM TRIAL PROCEEDINGS AND REAL RECORD AND WHAT WAS STATED TO THE JURORS TO CONVICT PETITIONER, TO THE EYES AND THE LAW OF THE STATE OF TEXAS, ATTORNEY GENERAL OF TEXAS, ATTORNEY FOR RESPONDENT, THE DISTRICT COURT, THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DOES NOT CONSTITUTE A CONSTITUTIONAL RIGHT VIOLATION IN ORDER TO EVALUATE AND HAVE JURISDICTION OVER PETITIONER'S CLAIMS, STATED ON DENIAL OF COA; FINALLY BY WITHHOLDING THE MANDATE FOR MONTHS WHILE THE IMPORTANCE OF THIS ISSUES PRESENTED IN THE FIFTH CIRCUIT AND NOT RESOLVED ANY, AND CARRY OUT THE WRONG PROCEEDINGS AND DID NOT ISSUED THE PROPER STANDARDS FOR REVIEW AND DID NOT DENYING ANY OF PETITIONER'S CLAIMS WHATSOEVER, THE FIFTH CIRCUIT DID NOT ACCORD THE APPROPRIATE LEVEL OF RESPECT TO THAT JUDGMENT.

WHETHER OR NOT A FEDERAL COURT OF APPEALS DOES OR DOES NOT RECALLS ITS MANDATE TO REVISIT THE MERITS OF AN EARLIER DECISION DENYING HABEAS CORPUS RELIEF TO A STATE PRISONER, THE COURT ABUSES ITS DISCRETION UNLESS IT ACTS TO AVOID A MISCARRIAGE OF JUSTICE AS DEFINED BY OUR HABEAS JURISPRUDENCE.

WHETHER FEDERAL COURT OF APPEALS BY WITHHOLDING THE DISMISSAL OF PETITIONER'S WRIT OF HABEAS CORPUS FROM DISTRICT COURT AND DENIAL OF COA APPLICATION IN FAVOR OF THE ATTORNEY GENERAL OF TEXAS, ATTORNEY FOR THE RESPONDENT, IT SHOULD BE HELD TO HAVE ABUSED ITS DISCRETION, ALSO WITHHOLDING THE MANDATE ISSUED BY COURT CLERK WITHOUT FORMAL ORDER FROM COURT OF APPEALS, COURT CLERK INCLUDING IT ON COVER PAGE AS NOTICE AND AS PART OF ORDER; AND ON SECOND ORDER/JUDGMENT ON APRIL 5. 2023, COURT CLERK REFERRING TO THE PRIOR ORDER/JUDGMENT FROM PANEL'S DECISION AS TO THE SAME JUDGMENT FROM JAN. 26, 2023, AND AS TO THE MANDATE ON DENIAL OF REHEARING AS PART OF [A] SECOND JUDGMENT WITH THE SAME DATE STAMPED ON ORDER/JUDGMENT FROM JAN. 26, 2023, A TWO IDENTICAL ORDERS AND STAMPED DATE FROM DIFFERENT ISSUES AND CONFLICTS PRESENTED TO THE COURT FOR RESOLUTION TO BE RESOLVE BY DIFFERENT JUDGES FROM DIFFERENT PANELS. BECAUSE CLEARLY BY PLAIN LANGUAGE ON FED. RULE APP. PROC. 35 PROVIDES IN PART AT FOOTNOTES [2], "WHEN HEARING OR REHEARING IN BANC WILL BE ORDERED. THE [(b) SUGGESTION OF A PARTY FOR HEARING OR REHEARING IN BANC. (A PARTY MAY SUGGEST) [AND] "THE CLERK" SHALL TRANSMIT ANY SUCH SUGGESTION TO THE "JUDGES" OF THE COURT. MOODY V. ALBEMARLE PAPER CO., 417 U.S. 622 AT FOOTNOTES [21.] IN THIS SCENERIO THE COURT CLERK DID NOT STATED THAT THE DOCUMENT WAS TRANSMITTED TO JUDGES OR COURT PANEL, ONLY STATED THAT DOCUMENT WAS ACCEPTED IN THE FORMAT IT WAS PRESENTED AND SENT ORDER TO PETITIONER JAN. 26, 2023 AND THE SAME ON APRIL LATER REQUESTED.

IN THE CASE AT HAND, THE COURT OF APPEALS HAD ABUSED ANY SUCH ARGUABLE DISCRETION BY WITHHOLDING THE MANDATE THROUGH OUT THE CLERK COVER PAGE NOTICE AND NOT A COURT ORDER. TORRES V. LUMPKIN, 2023 U.S. APP. LEXIS 4540, 2023 WL 2138960 (5TH CIR. TEX. JAN. 26, 2023), FOLLOWING THE COURT OF APPEAL'S INITIAL OPINION ON THE DENIAL OF COA WITH THE ATTACHED COVER PAGE FROM COURT CLERK INDICATING THE NOTICE ON A MANDATE; PETITIONER ACCORDINGLY FILED A PETITION FOR REHEARING AND/OR EN BANC REHEARING. TORRES V. LUMPKIN, 2023 U.S. APP. LEXIS 12931 (5TH CIR. TEX. MAR. 28, 2023), THE COURT CLERK AGAIN THROUGH A COVER LETTER GAVE NOTICE OF A LOCAL RULE FOR A STAY OF MANDATE AND COURT SAME JUDGES FROM INITIAL OPINION ON JAN. 26, ISSUED AN ORDER DENYING PETITION FOR REHEARING AND CONSEQUENTLY A WEEK LATER ON APRIL 5, 2023, THE COURT WITH THE SAME PANEL JUDGES, STEWART, WILLETT, AND DOUGLAS, CIRCUIT JUDGES, ISSUED A JUDGMENT AND INDICATING FROM COVER PAGE WITHOUT PRINTED COPY OF JUDGMENT, STATED ENCLOSED IS A COPY OF JUDGMENT AS THE MANDATE; PETITIONER IMMEDIATELY REQUESTED THROUGH THE CLERK FOR A COPY OF JUDGMENT, BECAUSE CLERK NEVER SENT A COPY OF JUDGMENT ON NOTICE FROM APRIL 5, 2023; THE CLERK WEEKS LATER SENT A COPY OF JUDGMENT INDICATING THAT THERE IS NO NEW JUDGMENT ON APRIL 5, BUT THAT JUDGMENT MADE ON THE APRIL 5, IT IS THE JUDGMENT SAME IDENTICAL COPY OF JAN 26, 2023. THIS IS COMPLETELY INCORRECT, BECAUSE THE COURT OF APPEALS ON NONE OF THESE PROCEEDING ADDRESSED ANY OF THE ISSUES PRESENTED ON COA APPLICATION, THE 59(e) MOTION APPEAL THROUGH THE U.S.C. § 1291, AND THE REMAND OF/FROM THE COURT OF APPEALS TO THE DISTRICT COURT TO ADDRESS COA REQUEST, AND AT LAST ON THE PETITION FOR REHEARING LEAVING ALL THIS ISSUES ON PLAIN VIEW AND IN ALL THIS PROCEEDINGS SAME JUDGES PARTICIPATED TO MAKE THE RULINGS/ORDERS/JUDGMENTS, THE COURT OF APPEALS ABUSED ITS DISCRETION IN DOING SO.

THE COURT OF APPEALS IS CLEARLY WITHHOLDING APPELLATE PROCEEDINGS ON A UNETHICAL MANNER AND DISRESPECTING COURT PRECEDENTS AND COURT PROCEEDINGS, PETITIONER'S MAJOR GROUNDS (a) SATISFIED THE MISCARRIAGE OF JUSTICE CLAIM AGAINST COURTS, (b) IT WAS A SUCH CHARACTER AS TO WARRANT COURT OF APPEALS' EXTRAORDINARY DEPARTURE FROM STANDARD APPELLATE PROCEDURES; AND (c)

WAS LIKELY TO HAVE ALTERED THE COURT OF APPEALS AND DISTRICT COURT RESOLUTION, AGAINST PETITIONER, ON APPLYING WHITEHEAD V. JOHNSON, ON ISSUING THE PROPER STANDARD FOR REVIEW ON THE EXHAUSTION OF STATE COURT REMEDIES DECISION FROM DISTRICT COURT AND ON THE COURT OF APPEALS REVIEW WHERE CLEARLY PRESUMPTION OF CORRECTNESS IT IS APPLICABLE.

BY HOLDING THE MANDATE FOR MONTHS — ON THE BASIS OF THE RESPONDENT'S MISAPPLICATION OF THE LAW AND MISINTERPRETATION OF THE WHITEHEAD'S DECISION, ARGUMENT THAT IT SHOULD OF BEEN IN RESPONDENT'S ARGUMENT AND DISTRICT COURT AND COURT OF APPEALS APPROACH TOWARDS THEIR DECISIONS/ORDERS/JUDGMENTS MADE AGAINST PETITIONER'S WRIT OF HABEAS CORPUS, 59(e) MOTION, ON APPEAL OF 59(e) MOTION THROUGH U.S.C. § 1291, APPLICATION FOR COA, PETITION FOR REHEARING, WERE PETITIONER WAS SUPPORTED BY/FROM RECORD WITH ARGUABLE BASIS OF CONSTITUTIONAL RIGHTS VIOLATIONS OF DUE PROCESS FROM ALL STATE COURTS. TRIAL COURT TAMPERING WITH COURT RECORDS AND DEPRIVING PETITIONER FROM FILING AND ATTACKING HIS CONVICTION WITH THE REAL RECORD FROM WHAT HAPPENED AT TRIAL, EDITING AND COVERING UP FROM RECORD IN HOW PETITIONER WAS CONVICTED AND THE CLEAR INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL FOR LETTING ALL THIS HAPPEN AND TRIAL COURT ADDED OBJECTIONS TO THE RECORD TO COVER UP THE INEFFECTIVE ASSISTANCE OF COUNSEL, AND ON APPEAL - APPELLATE LAWYER COORDINATING WITH TRIAL JUDGE AND TURNING IN ALL CLIENT'S FILE TO ALTER AND EDIT THE WHOLE RECORD INCLUDING THE JURY CHARGE ADDING 5 PAGES TO IT.

BASIC TO THE OPERATION OF THE FEDERAL JUDICIAL SYSTEM IS THE PRINCIPAL THAT A COURT SPEAKS THROUGH ITS JUDGMENTS AND ORDERS FROM A CLEAR AND TRUTHFUL RECORD.

ASSUMING THAT FEDERAL RULE OF APPELLATE PROCEDURE 41 AUTHORIZES A STAY OF A MANDATE FOLLOWING A DENIAL OF COA AND THAT A COURT MAY STAY THE MANDATE WITHOUT ENTERING AN ORDER, FIFTH CIRCUIT'S DECISION TO DO SO HERE WAS AN ABUSE OF DISCRETION.

DISTRICT COURT AND COURT OF APPEALS MISINTERPRETATION OF UNITED STATES SUPREME COURT PRECEDENTS

THE DISTRICT COURT AND COURT OF APPEALS ARGUES THAT PETITIONER MR. TORRES DOES NOT MEET OR REACH FURTHER TO CONCLUDE THAT HE IS ENTITLED TO A EVIDENTIARY HEARING TO ARGUE HIS CONSTITUTIONAL CLAIMS. THIS APPROACH AND CONCLUSION IS INCORRECT. THE SUPREME COURT RECOGNIZED IN TOWNSEND V. SAIN, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963), THAT THE DISTRICT COURTS ARE VESTED WITH BROAD POWER TO GRANT EVIDENTIARY HEARINGS IN HABEAS CASES. TOWNSEND, 372 U.S. AT 312, AFTER SETTING OUT THE PLENARY POWER OF THE COURTS TO CONDUCT EVIDENTIARY HEARINGS IN HEARING ACTIONS, THE SUPREME COURT IN TOWNSEND WENT ON TO DESCRIBE (SIX) CIRCUMSTANCES IN WHICH THE GRANTING OF AN EVIDENTIARY HEARING WOULD BE "MANDATORY". TOWNSEND, 372 U.S. AT 313. ALSO THAT ON PETITIONER'S HABEAS CLAIMS THAT COULD ONLY BE ADDRESSED IF THE PETITIONER SHOWED CAUSE AND PREJUDICE OR MISCARRIAGE OF JUSTICE. SEE COLEMAN V. THOMPSON, 501 U.S. 722, 750, 115 L.Ed, 2d 640, 111 S.Ct. 2546 (1991) (APPLYING "CAUSE AND PREJUDICE" FROM THE FAILURE TO APPEAL); WAINWRIGHT V. SYKES, 433 U.S. 72, 88, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977) (ADOPTING A "CAUSE AND PREJUDICE" STANDARD WHEN THE PETITIONER FAILED TO MAKE A CONTEMPORANEOUS OBJECTION). [SEE PETITIONER'S FED. WRIT MEMORANDUM AND 59(e) MOTION MAJOR GROUNDS]; ALSO IN PART FROM THE ISSUE ON POINT, THE TOWNSEND OPINION STATES THAT A DISTRICT COURT SITTING IN HABEAS CORPUS CLEARLY HAS THE POWER TO COMPEL PRODUCTION OF THE COMPLETE [REAL] STATE-COURT RECORD, [PETITIONERS CASE 4:21-CV-0673] IN WHICH THE DISTRICT COURT FAILED IN NOT DOING SO AND INSTEAD IT LET RESPONDENT TO PROVIDE DISTRICT COURT WITH A FALSE RECORD. CONCEPTUALLY, WHERE AN APPLICANT FOR A WRIT OF HABEAS CORPUS ALLEGES FACTS WHICH, IF PROVED, WOULD ENTITLE HIM TO RELIEF, THE FEDERAL COURT TO WHICH THE THE APPLICATION IS MADE HAS THE POWER TO RECEIVE

AND TRY THE FACTS ANEW, TOWNSEND V. SAIN, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). AT VALDEZ V. COCKRELL, 274 F.3d 941, THE DISTRICT COURT CONCLUDED THAT 28 U.S.C. § 2254 (e)(2) DID NOT BAR AN EVIDENTIARY HEARING, AND TOWNSEND REQUIRED AN EVIDENTIARY HEARING. ALTERNATIVELY THE DISTRICT COURT FOUND IT HAD THE DISCRETION TO ORDER AN EVIDENTIARY HEARING UNDER RULE 8 OF THE RULES GOVERNING § 2254 CASES, THEREFORE BY NOT APPLYING THIS STANDARD ON MR. TORRES APPLICATION PROCEEDINGS IN DISTRICT COURT, THE COURT ABUSED ITS DISCRETION, AND ALSO COURT OF APPEALS FOR THE FIFTH CIRCUIT MISINTERPRETATION FROM ITS COURTS PRECEDENTS ABUSED ITS DISCRETION AS WELL BY NOT FOLLOWING THEM.

PROCEDURAL REVIEWABILITY BY THE UNITED STATES SUPREME COURT AND APPLICATION OF THE LAW

"WHEN THE DISTRICT COURT DENIES A HABEAS PETITION ON PROCEDURAL GROUNDS WITHOUT REACHING THE PRISONER'S UNDERLYING CONSTITUTIONAL CLAIM, A [CERTIFICATE OF APPEALABILITY] SHOULD ISSUE WHEN THE PRISONER SHOWS, AT LEAST, THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING." SLACK V. MCDANIEL, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). PETITIONER MR. TORRES HAS MADE HIS SUBSTANTIAL SHOWING OF THE DENIAL OF HIS CONSTITUTIONAL RIGHTS OF THE 5TH AND 14TH AMENDMENTS, BUT THE DISTRICT COURT AND COURT OF APPEALS FOR THE FIFTH CIRCUIT DOES NOT REACH OVER PETITIONER'S SHOWING BECAUSE THE DISTRICT COURT AND COURT OF APPEALS MISAPPLICATION OF COURT PRECEDENTS ON THE APPLICATION OF WHITEHEAD'S DECISION MADE BY DISTRICT COURT AND COURT OF APPEALS FROM THE EXHAUSTION OF THE STATE'S COURT REMEDIES THEIR CONCLUSION AGAINST MR. TORRES IS OVERBROAD INCORRECT FROM THIS COURTS FOR THE MISINTERPRETATION ON THE EXHAUSTION OF THE STATE'S COURTS REMEDIES CONTRARY TO WHITEHEAD'S DECISION.

FINALLY, IN SLACK V. MCDANIEL, 529 U.S. 473, 146 L.Ed.2d 542, 120 S.Ct. 1595, SUPREME COURT HELD THAT FIFTH CIRCUIT SHOULD HAVE ISSUED A COA TO REVIEW THE DISTRICT COURT'S DENIAL OF HABEAS RELIEF TO PETITIONER. IN MR. TORRES INSTANCE'S THE DISTRICT COURT DID NOT FOLLOWED COURT OF APPEALS PRECEDENTS AND DID NOT APPLIED PROPER STANDARDS ON THE EXHAUSTION OF STATE COURTS REMEDIES OR ISSUE THE CORRECT RULING BASED ON PETITIONER'S FILINGS IN STATE COURTS ALERTING THEM OF TRIAL COURT VIOLATION OF MR. TORRES CONSTITUTIONAL RIGHTS, AND DISTRICT COURT AND COURT OF APPEALS TO FOLLOW WHITEHEAD'S DECISION, INSTEAD THIS COURTS FOLLOWED A MISINTERPRETATION OF ATTORNEY GENERAL OF TEXAS, ATTORNEY FOR RESPONDENT AND THAT INTERPRETATION INTERPRETATION IS INCORRECT, DEBATABLE AND WRONG. NOW THE DENIAL OF PETITIONER'S MERITS AND COA IS SUBJECT TO THE UNITED STATES SUPREME COURT DECISION, AND THEREFORE APPLYING ALL THE PRINCIPLES ABOVE TO PETITIONER'S APPLICATION, WE SHALL CONCLUDE THAT DENIAL OF MERITS WAS WRONG AND COA SHOULD HAVE ISSUED. SLACK V. MCDANIEL, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); MILLER-EL V. COCKRELL, 537 U.S. 322, 123 S.Ct 1029, 154 L.Ed.2d 931. (2003).

PRAYER

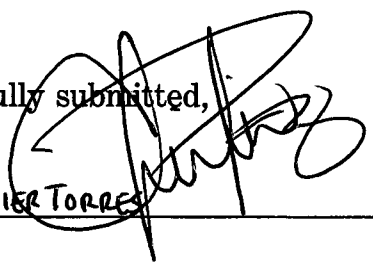
PETITIONER, PRAYS AND FURTHER REQUESTS TO GRANT WRIT OF CERTIORARI TO CORRECT ERROR[S], CONFLICT[S] OF DISTRICT COURT AND UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT; VACATE JUDGMENT OF U.S.C.A. AND DISTRICT COURT AND REMAND TO DISTRICT COURT TO HEAR PETITIONER'S CLAIMS; IF UNITED STATES SUPREME COURT FURTHER FINDS A HARMFUL VIOLATION OF 5TH AND 14TH AMEND. ON DUE PROCESS AND EQUAL PROTECTION OF LAW OF PETITIONER'S RIGHTS TO VACATE CONVICTION AND SENTENCE AND REMAND TO TRIAL COURT WITH SPECIFIC INSTRUCTIONS TO DISMISS PETITIONER'S CONVICTION AND SENTENCE AND/OR TO FIND DEEM APPROPRIATE RESOLUTION FOR THE ISSUES PRESENTED BEFORE THIS COURT AND THAT RESPONDENT THROUGH THE ATTORNEY GENERAL FOR

THE STATE OF TEXAS, ATTORNEY FOR RESPONDENT HAVENT NOT DENIED ANY CLAIM AND JUST DENIED REVIEW TO ACCEPT THE DECISION OF THIS HONORABLE COURT AS APPROPRIATE, AFTER STATE COURTS AND FEDERAL COURTS NOT FINDING THE PROPER RESOLUTION AND MISAPPLICATION, MISINTERPRETATION OF PRECEDENTS AND THE LAW ON THE MATTER PRESENTED BEFORE THEM AND JUST IGNORED.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



OMAR JAVIER TORRES

Date: JUNE 15, 2023