APPENDIX A

JUDGMENT OF THE FIFTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

United States Court of Appeals for the Fifth Circuit

No. 24-50102

United States Court of Appeals
Fifth Circuit
FILED
May 13, 2024
Lyle W. Cayce
Clerk

JOSE CARLOS BELMONT,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 5:23-CV-496

UNPUBLISHED ORDER

Before STEWART, GRAVES, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Jose Carlos Belmont, Texas prisoner # 1590304, moves this court for a certificate of appealability (COA) to challenge his life sentence for capital murder. The district court dismissed Belmont's § 2254 application as untimely. *See* 28 U.S.C. § 2244(d)(1). Belmont argues that he is entitled to either statutory or equitable tolling of the limitations period. He also

contends that that he is actually innocent and that the district court abused its discretion in not conducting an evidentiary hearing prior to dismissal of his application.

Belmont's motion to supplement his COA brief is GRANTED.

To obtain a COA, Belmont must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court's denial of relief is based on procedural grounds, a COA may not issue unless the prisoner shows 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." *Id.*

Belmont has not made the requisite showing. *See id.* Accordingly, his request for a COA is DENIED. Because Belmont fails to make the necessary showing for the issuance of a COA, we do not reach the questions whether the district court erred in denying discovery and an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534 (5th Cir. 2020).

APPENDIX B

JUDGMENT OF THE FEDERAL DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE CARLOS BELMONT,	§	
TDCJ No. 01590304,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-23-CA-0496-OLG**
	§	
BOBBY LUMPKIN, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are *pro se* Petitioner Jose Carlos Belmont's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) and Respondent Bobby Lumpkin's Answer (ECF No. 12), as well as Petitioner's Reply (ECF No. 16) and Supplemental Reply (ECF No. 19) thereto. Petitioner challenges the constitutionality of his 2009 state court capital murder conviction, arguing that he is actually innocent of the charged offense. In response, Respondent contends Petitioner's federal habeas petition should be dismissed with prejudice as untimely.

Having carefully considered the record and pleadings submitted by both parties, the Court agrees with Respondent that Petitioner's allegations are barred from federal habeas review by the one-year statute of limitations embodied in 28 U.S.C. § 2244(d)(1). Thus, for the reasons discussed below, the Court concludes Petitioner is not entitled to federal habeas corpus relief or a certificate of appealability.

I. Background

In July 2009, Petitioner plead guilty in Bexar County to two counts of capital murder and, pursuant to the plea bargain agreement, was sentenced to life imprisonment for each count. *State*

v. Belmont, No. 2008CR4397 (399th Dist. Ct., Bexar Cnty., Tex. July 27, 2009).[1] Because Petitioner waived his right to appeal as part of the plea bargain agreement, he did not directly appeal his convictions and sentences.[2]

Instead, Petitioner challenged the constitutionality of his state court convictions by filing an application for state habeas corpus relief on January 1, 2012, at the earliest.[3] *Ex parte Belmont*, No. 78,712-01 (Tex. Crim. App.).[4] In this application, Petitioner asserted that his convictions violated Double Jeopardy principles, that he received ineffective assistance from his trial counsel, and that his plea was involuntary. In an unpublished opinion issued December 19, 2012, the Texas Court of Criminal Appeals granted relief on Petitioner's Double Jeopardy claim and vacated his conviction on count two of the indictment, but denied Petitioner's other claims for relief.[5] Petitioner later filed several other state habeas applications challenging his remaining conviction, all of which were ultimately dismissed by the Texas Court of Criminal Appeals as successive applications pursuant to Tex. Code. Crim. Proc. Art. 11.07, Sec. 4. *Ex parte Belmont*, No. 78,712-02 through -05 (Tex. Crim. App.).[6]

Thereafter, Petitioner placed the instant federal habeas petition in the prison mail system on April 2, 2023.[7] In the § 2254 petition, Petitioner argues: (1) he is actually innocent due to

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1 ECF No. 13-5 at 38-47 (Plea Agreement), 155-58 (Judgments).

2 *Id.* at 42.

3 Because of Petitioner's *pro se* status, the prison mailbox rule applies to his state habeas application. *Richards v. Thaler*, 710 F.3d 573, 579 (5th Cir. 2013) (extending mailbox rule to state habeas application delivered to prison authorities for mailing).

4 ECF No. 13-5 at 6-34.

5 *Ex parte Belmont*, No. 76,932, 2012 WL 6628968 (Tex. Crim. App. 2012).

6 ECF Nos. 13-6; 13-14; 13-21; and 14-1.

7 ECF No. 1 at 10.

Double Jeopardy violations and the invalidity of his plea bargain agreement, (2) Article 11.07, § 4 of the Texas Code of Criminal Procedure is unconstitutional, (3) the framework Texas uses for evaluating innocence claims under Article 11.07, § 4 is unconstitutional and results in a circuit split that needs resolution from the Supreme Court, and (4) he is actually innocent of the offense under Texas Penal Code Sections 9.33 and 9.42.

II. Analysis

A. Petitioner's Conviction (Claims 1, 4)

Petitioner's first and last allegation essentially argue that he is innocent of the charged offense, albeit for different reasons. In response, Respondent contends these allegations are barred by the one-year limitation period of 28 U.S.C. § 2244(d). Section 2244(d) provides, in relevant part, that:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

In this case, Petitioner's remaining conviction (count 1) became final August 26, 2009, 2019, when the time for appealing the judgment and sentence expired. *See* Tex. R. App. P. 26.2 (providing a notice of appeal must be filed within thirty days following the imposition of a sentence). As a result, the limitations period under § 2244(d) for filing a federal habeas petition challenging his underlying conviction expired a year later on August 26, 2010. Because Petitioner did not file his § 2254 petition until April 2, 2023—well over twelve years after the limitations period expired—his petition is barred by the one-year statute of limitations unless it is subject to statutory or equitable tolling.

1. Statutory Tolling

Petitioner does not satisfy any of the statutory tolling provisions found under 28 U.S.C. § 2244(d)(1). There has been no showing of an impediment created by the state government that violated the Constitution or federal law which prevented Petitioner from filing a timely petition. 28 U.S.C. § 2244(d)(1)(B). There has also been no showing of a newly recognized constitutional right upon which the petition is based, and there is no indication that the claims could not have been discovered earlier through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(C)-(D).

Similarly, Petitioner is not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2). Section 2244(d)(2) provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." Petitioner did challenge the instant conviction by filing several applications for state post-conviction relief starting in January 2012. But as discussed previously, Petitioner's limitations period for filing a federal petition expired in August 2010. Because the state habeas applications were all filed after the time for filing a federal petition under § 2244(d)(1) had lapsed, they do not toll the one-year limitations period. *See* 28 U.S.C. § 2244(d)(2); *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Thus, the instant § 2254 petition, filed in April 2023, is still over twelve years late.

2. Equitable Tolling

In some cases, the limitations period may be subject to equitable tolling. The Supreme Court has made clear that a federal habeas corpus petitioner may avail himself of the doctrine of equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *McQuiggin v. Perkins*, 569 U.S. 383, 391 (2013); *Holland v. Florida*, 560 U.S. 631, 649 (2010). Equitable

tolling is only available in cases presenting "rare and exceptional circumstances," *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002), and is "not intended for those who sleep on their rights." *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012).

Neither of Petitioner's reply briefs nor his § 2254 petition provide a valid argument for equitably tolling the limitations period in this case. Even with the benefit of liberal construction, Petitioner has provided no reasonable justification to this Court for the application of equitable tolling, as a petitioner's ignorance of the law, lack of legal training or representation, and unfamiliarity with the legal process do not rise to the level of a rare or exceptional circumstance which would warrant equitable tolling of the limitations period. *U.S. v. Petty*, 530 F.3d 361, 365-66 (5th Cir. 2008); *see also Sutton v. Cain*, 722 F.3d 312, 316-17 (5th Cir. 2013) (a garden variety claim of excusable neglect does not warrant equitable tolling).[8]

Moreover, Petitioner fails to demonstrate that he has been pursuing his rights diligently. Petitioner's conviction became final in August 2010, yet Petitioner filed nothing until January 2012 when he executed his first state habeas corpus application challenging the underlying convictions. This delay alone weighs against a finding of diligence. *See Stroman v. Thaler*, 603 F.3d 299, 302 (5th Cir. 2010) (affirming the denial of equitable tolling where the petitioner had waited seven months to file his state application). Petitioner also fails to explain the large gaps in time between the filing of his five state habeas applications, much less why he waited another two months after the Texas Court of Criminal Appeals denied his most recent state habeas application in February 2023 before filing the instant federal petition in this Court.

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[8] To the extent Petitioner cites the Supreme Court cases of *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013) as a basis for equitable tolling, his argument is similarly unpersuasive. These cases addressed exceptions to the procedural default rule—they do not apply to the statute of limitations. *See Moody v. Lumpkin*, 70 F.4th 884, 892 (5th Cir. 2023) (finding *Martinez* "has no applicability to the statutory limitations period prescribed by AEDPA.").

Consequently, because Petitioner fails to assert any specific facts showing that he was prevented, despite the exercise of due diligence on his part, from timely filing his federal habeas corpus petition in this Court, his petition is untimely and barred by § 2244(d)(1).

3. Actual Innocence

Finally, Petitioner appears to argue that his untimeliness should be excused because of the actual-innocence exception. In *McQuiggin*, 569 U.S. at 386, the Supreme Court held that a prisoner filing a first-time federal habeas petition could overcome the one-year statute of limitations in § 2244(d)(1) upon a showing of "actual innocence" under the standard in *Schlup v. Delo,* 513 U.S. 298, 329 (1995). But "tenable actual-innocence gateway pleas are rare," and, under *Schlup*'s demanding standard, the gateway should open only when a petitioner presents new "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *McQuiggin*, 569 U.S. at 386, 401 (*quoting Schlup,* 513 U.S. at 316). In other words, a petitioner is required to produce "*new* reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence"—sufficient to persuade the district court that "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup,* 513 U.S. at 324.

Petitioner does not meet this demanding standard. Petitioner seems to rely on other alleged constitutional violations to show that he is "procedurally innocent" under *Schlup.*[9] However, such an argument does not constitute "*new* reliable evidence" establishing his innocence that was unavailable at the time of his guilty plea. Similarly, Petitioner provides no support for his contention that he is actually innocent of capital murder pursuant to Texas Penal Code Sections 9.33 (defense of third persons) and 9.42 (defense of property). Both are

[9] ECF No. 1 at 7, 18-19.

entitle a petitioner to relief because alleged errors or irregularities occurring in state habeas proceedings do not raise cognizable claims for federal habeas relief. *See Henderson v. Stephens*, 791 F.3d 567, 578 (5th Cir. 2015) ("infirmities in state habeas proceedings do not constitute grounds for federal habeas corpus relief"); *Ladd v. Stevens*, 748 F.3d 637, 644 (5th Cir. 2014) (same). This is because an attack on the validity of a state habeas corpus proceeding does not impact the validity of the underlying state criminal conviction. *See Rudd v. Johnson*, 256 F.3d 317, 319-20 (5th Cir. 2001) (reiterating that "an attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself.") (citations omitted). For this reason, Petitioner's complaints concerning his state habeas corpus proceedings do not furnish a basis for federal habeas corpus relief.

III. Certificate of Appealability

The Court must now determine whether to issue a certificate of appealability (COA). *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; *Miller–El v. Cockrell,* 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)). A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has explained that the showing required under § 2253(c)(2) is straightforward when a district court has rejected a petitioner's constitutional claims on the merits: The petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). This requires a petitioner to show "that reasonable jurists could debate 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*, 537 U.S. at 336 (citation omitted).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE CARLOS BELMONT,	§	
TDCJ No. 01590304,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-23-CA-0496-OLG**
	§	
BOBBY LUMPKIN, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

JUDGMENT

The Court has considered the Judgment to be entered in the above-styled and numbered cause.

Pursuant to this Court's Memorandum Opinion and Order of even date herewith, **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED** that that federal habeas corpus relief is **DENIED** and that Petitioner Jose Carlos Belmont's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DISMISSED WITH PREJUDICE**. All remaining motions, if any, are **DENIED**, and no Certificate of Appealability shall issue in this case. This case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 17 day of January, 2024.

ORLANDO L. GARCIA
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
July 28, 2023
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: NM
DEPUTY

JOSE CARLOS BELMONT,	§	
TDCJ No. 01590304,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-23-CA-0496-OLG**
	§	
BOBBY LUMPKIN, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Before the Court is *pro se* Petitioner's Motion for Evidentiary Hearing (ECF No. 17). Petitioner seeks to develop claims raised in his petition for federal habeas corpus relief (ECF No. 1) through a live evidentiary hearing. After careful consideration, the Court denies this motion.

There is no automatic right to an evidentiary hearing in cases brought pursuant to 28 U.S.C. § 2254; rather, a hearing is permitted only in the limited circumstances set out in § 2254(e). Petitioner's case is currently under review by the Court. Should it be determined later that a hearing is required under § 2254(e), the Court will schedule the hearing and appoint counsel. *See* 18 U.S.C. § 3006A(2)(B) (a court may appoint counsel for financially eligible persons in § 2254 cases when "the court determines that the interests of justice so require"). At this time, however, the Court has not determined that an evidentiary hearing is required or that the interests of justice currently require the appointment of counsel.

It is therefore **ORDERED** that Petitioner's Motion for Evidentiary Hearing (ECF No. 17) is **DENIED**.

SIGNED this the 28th day of July, 2023.

ORLANDO L. GARCIA
United States District Judge

[Cleveland, Con't: "HN [6] Once it is determined that the Due Process Clause of the United States Constitution applies, the question remains what process is due."

Deal v.United States, 508 U.S.129, at 132HN[2]: "this fundamental principle of statutory construction(and indeed the language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used[Citations ommitted]. In the context of §924(c)(1), we think it unambiguoius that "conviction" refers to the finding of guilt by a judge or jury that necessarily precedes the entery of a final judgment of conviction. A judgment of conviction includes both the adjudication of guilt and the sentence."

House v.Bell, 547 U.S.518: HN [4][5][6]: "Although to be credible, a habeas claim asserting innocence as a gateway to defaulted claims requires new reliable evidence --whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-- that was not available at trial, a habeas court's analysis is not limited to such evidence."

"[5] When considering an actual innocence claim in the context of a request for an evidentiary hearing, a district court need not test the new evidence by a standard appropriate for deciding a motion for summary judgment, but rather may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence. The habeas court must consider all the evidence, old and new, incriminating and exculpatory, without reguard to whether it would necessarily be admitted under rules of admissabilitythat would govern at trial. Based on this total record, the court must make a probabilistic determination about what reasonable, properly instructed jurors would do. The court's function is not to make an independant factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors."

"[6] With reguard to a habeas claim of actual innhocence, the standard is demanding and permits review only in the extraordinary case. At the same time, though, the standard does not require absolute certainty about a petitioner's guilt or innocence. The petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt-- or to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt."

In re Winship, 397 U.S.358:at 370-372: "HN[6]The constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in Gault--notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination."

"at 370-372: To explain why I think so, I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened. The intensity if this belief--the degree to which a factfinder is convinced that a given act actually occurred--can of course, vary. In this reguard, a standard of proof represents an attempt to instruct the factfinder copncerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases"preponderance of the evidence" and "proof beyond a reasonable doubt"

APPENDIX C

OMITTED: I only had one copy and it was sent to the district court when I filed my §2254. I filed a motion in the district court, which was granted, to foward a copy of the record on appeal to the 5th circuit and me, but the district court never sent me a copy. Otherwise I would have submitted the state's judgment here.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, VERBATIM

APPENDIX-- D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art.1, Sec.9, Cl.2: "The privilege of the writ of habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

USCS Const. Art. III, §2, Cl.2: "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

USCS Supreme Ct.R.10(a): "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;"

USCS Supreme Ct.R.10(c); "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

USCS Supreme Ct.R.11: "A petition for writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, wil be granted only upon showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 USC §2101(e)."

28 USC §1253: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a district court of three judges."

28 USC §1257: "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

28 USC §2244(b)(2)(B)(i),(ii): " (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

APPENDIX--D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 USC §2244(d)(1)(B), (D): "(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the lates of--

"(B) the date on which the impediment to filing an application created by State action in violation of the constitution or laws of the United State is removed, if the applicant was prevented from filing by such State action;"

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

28 USC §2254(a),(b)(i);(d)(1)(2); (e)(2)(A)(ii),(B):"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

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

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

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

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

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

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

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

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

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

28 USC§2255(h): "A second or successive motion must be certified as provided in section 2244 by a panle of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral by the supreme Court, that was previously unavailable."

Tex.Code.Crim.Proc.,Art.1.14(b): "If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not

[Art.1.14(b), con't]: "raise the objection on appeal or in any other postconviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Article 28.01 of this code."

Tex.Code.Crim.Proc.,Art.11.07§4: "(a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

"(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or

"(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt"

"(b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date".

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

Tex.Code.Crim.Proc.,Art.42.08(a): " When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. Except as provided by Subsection (b) and (c), in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases, and sentence and execution shall be accordingly; provided however, that the cumulative total of suspended sentences in felony cases shall not exceed 10 years, and the cumulative total of suspended sentences in misdemeanor cases shall not exceed the maximum period of confinement in jail applicable to the misdemeanor offenses though in no event more than three years, including extensions of periods of community supervision under Article 42A.752(a)(2), if none of the offenses are offensesunder Chapter 49, Penal Code, or four years, including extensions, if any of the offenses are offenses under Chapter 49, Penal Code".

Tex.Penal Code 3.03(a): "When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action a sentence for each offense for which the accused has been found guilty shall be pronounced. Except as otherwise provided by this section, the sentences shall run concurrently."

Tex.Pen.Code 9.33: "A person is justified in using force or deadly force against another to protect a third person if:

"(1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or

[Tex.Pen.Code.9.33, con't]: deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
"(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person."

Tex.Pen.Code.9.42: " A person is justified in using deadly force against another to protect land or tangible, movable property:
(1) if he would be justified in using force against the other under Section 9.41: and
(2) when and to the degree he reasonably believes the deadly force is immediately necessary:
(A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or
(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the mighttime from escaping with property; and
(3) he reasonably believes that:
(a) the land or porperty cannot be protected or recovered by any other means; or
(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury."

Brockett v.Spokane Arcades, 472 U.S.491, 499-500: [w]e defer to the construction of a state statute given it by the lower federal courts, Chardon, 462 U.S.650, 654-655,n.5; Haring, 462 U.S. 306, 314,n.8; Pierson, 386 U.S.547, 556, n.12 We do so not only to "render unnecessary review of their decisions in this respect," Cort, 422 U.S.66,73,n.6, but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States. See Bishop v.Wood, 426 U.S.341,345-346 Gooding v.Wilson, 405 U.S.518,524, and n.2. The rule is not ironclad, however and we surely have the authority to differ with the lower federal courts as to the meaning of a state statute [Note 9:The court has stated that it will defer to lower courts on state law issued unless there is "plain" error, Palmer, 318 U.S.109, 118; the view of the lower court is "clearly wrong", The Tungus, 358 U.S.588,596; or the construction is clearly erroneous, United States v.Durham, Lumber Co.,363 U.S.522,527, or "unreasonable", Propper,337 U.S.472,486-487. On occasion, then, the Court has refused to follow the views of a lower federal court on an issue of state law. In Cole v. Richardson, 405 U.S.676,683-684, we refused to accept a three-judge district Court's construction of a single statutory word based on the dictionary definition of that language where more reliable indicia of the legislative intent were available.]."

Cleveland Bd.of Educ. v.Loudermill,470 U.S.532, [5] and [6]: "The due process clause of the United States Constitution provides that certain substantive rights such as life, liberty, and property, cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislator may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred without appropriate procedural safeguards."