

No. _____

IN THE
Supreme Court of the United States

Robert Walter Bonner
Petitioner-Appellant

v.

Lorie Davis, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee

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

PETITION FOR WRIT OF CERTIORARI

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Pro se

QUESTIONS PRESENTED

QUESTION ONE

When a prisoner basically has no right to appeal until after a Certificate of Appealability ("COA") is granted, did the Fifth Circuit again ignore the jurisdictional command of 28 U.S.C. § 2253 (c)(2) and this Court's repeated admonishment in Buck v. Davis, 137 S.Ct. 759(2017) by requiring Mr. Bonner to identify errors in the district court's legal analysis, (which is necessary to "appeal" a judgement), rather than simply reviewing the substantialness of the denial of constitutional rights briefed in Mr. Bonner's application for a COA?

QUESTION TWO

Are this Court's standards for granting a COA, which have led to inconsistent application among the Circuits and tends to lead to an analysis of the full merits of constitutional claims, inconsistent with Congress' desire that, pursuant to 28 U.S.C. § 2253(c)(2), a COA be granted when a prisoner simply makes a "substantial showing of the denial of a constitutional right" --which is exactly what Mr. Bonner briefed in his application for a COA?

QUESTION THREE

Did any of Mr. Bonner's claims raised in his application for a COA make a substantial showing of the denial of a constitutional right; for example (without abandoning any of his claims raised in the application for a COA): the denial of due process (under the Fourteenth Amendment) and ineffective assistance of counsel (under the Sixth Amendment) when: trial counsel failed to object to medical

testimony regarding normal findings of complainant's medical exams which the state used to bolster the complainant's allegations, and failed to voir dire the expert regarding credentials and opinions and bases thereof; trial counsel allowed testimony from state witnesses on Child Sexual Abuse Accomodation Syndrome ("CSAAS") and failed to have a defense expert to challenge the state witnesses' opinions - counsel let this evidence in without challenge; trial counsel failed to suppress illegal seizures of evidence outside the search warrant and failed to object to prosecutorial misconduct or use character witnesses.

LIST OF PARTIES

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

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	iii
TABLE OF AUTHORITIES.....	v
INDEX OF APPENDICES.....	viii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
A. Introduction.....	2
B. Trial Proceedings.....	4
C. Direct Appeal.....	4
D. State Habeas Proceeding.....	4
E. Federal Habeas Proceeding.....	4
REASONS FOR GRANTING THE WRIT.....	5
I. CERTIORARI SHOULD BE GRANTED BECAUSE REASONABLE JURISTS COULD UNQUESTIONABLY DEBATE THE EXTRAORDINARINESS OF THE ISSUES PRESENTED BY MR. BONNER.....	5
A. The Panel Improperly Sidestepped the COA Process By Requiring Mr Bonner To Identify Errors In The District Court's Legal Analysis, Rather Than Reviewing The Substantialness Of The Denial Of Constitutional Rights	6
B. Inconsistent Application Of The COA Standard Among The Circuits, Which Tends To Lead To An "Appeal-Like" Review, Suggests Problems With The Review Standard.....	10
C. Mr. Bonner's Claims Raised In His Application For A COA Made A Substantial Showing Of The Denial Of A Constitutional Right.....	15
CONCLUSION.....	31

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
Andresen v. Maryland, 427 US 463 (1976).....	27
Barefoot v. Estelle, 463 US 880 (1983).....	12, 13, 14
Berger v. United States, 295 US 78 (1985).....	24
Brady v. Maryland, 373 US 83 (1963).....	26, 30
Brinkmann v. Dall. Cty. Deputy Sheriff Abner, 813 F2d 744 (5th Cir. 1987).....	8, 9
Buck v. Davis, 137 S.Ct. 759 (2017).....	i, 5, 9
Burns v. Gammon, 260 F3d 892 (8th Cir. 2001).....	25
Davis v. Maggio, 706 F2d 568 (5th Cir. 1983).....	8
Donnally v. DeChristoforo 416 US 637 (1974).....	23
Dugas v. Coplan, 428 F3d 317 (1st Cir. 2005).....	22
Fowler v. State, 958 SW2d 853 (Tex. App. -Waco 1997).....	22
Gersten v. Senkowski, 426 F3d 588 (2nd Cir. 2005).....	20, 21, 22
Illinois v. Krull, 480 US 340 (1987).....	27
Johnson v. State, 614 SW2d 148 (Tex. Crim. [Panel Op.] 1982).....	26
Jordan v. Fisher, 135 S.Ct. 2647 (2015).....	9
Kyles v. Whitley, 514 US 419 (1995).....	26, 30
Liljeberg v. Health Servs. Acquisition Corp., 486 US 847 (1988).....	31
Lindstadt v. Keane, 239 F3d 191 (2nd Cir. 2001).....	22

Martinez v. Ryan, 132 S.Ct. 1309 (2012).....	6
Miller-El v. Cockrell, 537 US 322 (2003).....	5, 6, 7, 13, 14
Pennsylvania v. Ritchie, 480 US 39 (1987).....	26
Perryman v. State, 798 SW2d 326 (Tex. App. -Dallas).....	26
Salinas v. State, 155 SW3d 368 (Tex. App. -Fort Worth 2005, pet. ref'd).....	18, 19
Slack v. McDaniel, 529 US 473 (2000).....	6, 7, 9, 11, 12, 13, 14
Strickland v. Washington, 466 US 668 (1984).....	21, 22
United States v. Asendio, 171 F2d 122 (3rd Cir. 1998).....	27
United States v. Bess, 593 F2d 749 (6th Cir. 1979).....	24
United States v. Kimbrough, 69 F3d 723 (5th Cir. 1995).....	28
United States v. Mendoza, 522 F3d 482 (5th Cir. 2008).....	23
United States v. Young, 470 US 1 (1985).....	23
Wiggins v. Smith, 538 US 510 (2003).....	22
Williams v. Kunze, 806 F2d 594 (5th Cir. 1986).....	27

STATUTES & OTHER AUTHORITIES

U.S. Const. amend IV.....	2
U.S. Const. amend V	2, 3, 15
U.S. Const. amend VI.....	2, 6

U.S. Const. amend XIV..... 2, 3, 15

28 U.S.C.

§ 1254(1)..... 1

§ 2253(c)(2)..... i, 2, 6, 10, 13, 14

§ 2254..... 3

§ 2254(d)..... 14

INDEX OF APPENDICES

- A. Order of the United States Court of Appeals for the Fifth Circuit, Bonner v. Davis, 2017 US App LEXIS 16971 (5th Cir. Jul 07, 2017)
- B. Order of the United States District Court for the Northern District of Texas (Dallas Division), Bonner v. Stephens, 2016 US App LEXIS 51398 (N.D. Tex. April 18, 2016)
- C. Judgement of the United States District Court for the Northern District of Texas (Dallas Division), Bonner v. Stephens, 2016 US App LEXIS 51398 (N.D. Tex. April 18, 2016)
- D. Magistrate's Findings, Conclusions, and Recommendation of the United States District Court for the Northern District of Texas (Dallas Division), Bonner v. Stephens, 2015 US App LEXIS 177612 (N.D. Texas May 29, 2015)
- E. Order of the United States Court of Appeals for the Fifth Circuit, Bonner v. Davis, No. 16-10486 (N.D. Tex. August 23, 2017)
- F. Certificate of Appealability Review (Jun 01, 2017 - Dec 31, 2017)
- G. Selected pages from COA Brief
- H. Letter from City of Burleson to Attorney General Greg Abbott
- I. Affidavit of Dr. Joann Murphey
- J. Search Warrants--# 050807-KM (Return, Affidavit, Attachments)

PETITION FOR WRIT OF CERTIORARI

Robert Bonner respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The August 23, 2017 opinion of the United States Court of Appeals for the Fifth Circuit denying reconsideration, per curiam, is unreported and is attached as Appendix E. The July 7, 2017 circuit judge Order of the United States Court of Appeals for the Fifth Circuit denying Mr. Bonner a COA is reported at 2017 U.S. App. LEXIS 16971 and attached as Appendix A. The April 18, 2016 Order of the United States District Court for the Northern District of Texas denying Mr. Bonner's petition for a writ of habeas corpus (after accepting the Magistrate's Findings, Conclusions, and Recommendation), is reported at 2016 U.S. Dist. LEXIS 51398 and attached as Appendix B. The above April 18, 2016 Judgement is attached as Appendix C. The May 29, 2015 Findings, Conclusions, and Recommendation of the United States Magistrate Judge for the Northern District of Texas recommending a denial of Mr. Bonner's petition for a writ of habeas corpus is reported at 2015 U.S. Dist. LEXIS 177612 and attached as Appendix D.

JURISDICTION

The Court of Appeals entered its judgement on July 7, 2017 denying Mr. Bonner's COA. Mr. Bonner's motion for rehearing was denied on August 23, 2017, per curiam. Under Application No. 17A575, Mr. Bonner was granted an extension to and including January 22, 2018. This Court has jurisdiction under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments.

The Fourth Amendment provides in relevant part:

Requires a warrant to "particularize describe the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides that:

"No person shall be deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...have the assistance of counsel for his defense..

The Fourteenth Amendment in relevant part:

...nor shall any State...deny to any person within its jurisdiction the equal protection of the laws...deprive any person of life, liberty, or property, without due process of law...

This case also involves the application of 28 U.S.C. § 2253(c), which states:

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ...
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of processes issued by a State court;
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Introduction

By any measure, Robert Bonner's conviction and 634 year sentence is extraordinary. Such a lengthy sentence in a case where there was no physical evidence of an offense nor any evidence of injury, be it physical or emotional, demonstrates extraordinary prejudice. From the

State's improper opening statements to the closing remarks in the punishment phase of trial, Mr. Bonner's trial counsel did not object to even one instance of the serious and pervasive prosecutorial misconduct that plagued the entire trial. Trial defense counsel failed to object to inadmissible medical testimony, failed to object to the "junk science" Child Sexual Abuse Accommodation Syndrome, failed to object to Mr. Bonner being strapped down with a stun belt and leg shackle; failed to object properly and preserve error regarding the admission of extraneous evidence at trial, even sponsoring damaging evidence before the jury, failed to suppress improperly obtained evidence due to a defective warrant, and failed to use available character witnesses. Mr. Bonner was also denied a fair trial in violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by the improper admission of the drug raid/marijuana and child pornography evidence. Lastly, the State suppressed exculpatory and impeachment evidence in violation of Mr. Bonner's right to due process. If these plainly extraordinary issues presented by Mr. Bonner do not justify relief under 28 U.S.C. § 2254, then that statute has no meaning.

Yet, when presented with these extraordinary claims, the Fifth Circuit declared that Mr. Bonner failed "to make the necessary showing." Appx. A at 2. Further, the Fifth Circuit claimed that Mr. Bonner failed "to address the district court's basis for rejecting his claims." Id. The Fifth Circuit ignored the fact that Mr. Bonner satisfied the statutory and this Court's standard without any comment on Mr. Bonner's briefed claims. In his briefing, Mr. Bonner laid out the denial of constitutional rights and stated that a COA should have

been granted for the denial of those constitutional rights. In violation of clearly established law as set forth by this Court, the Fifth Circuit denied Mr. Bonner's request for a COA.

B. Trial Proceedings

Mr. Bonner was indicted with six counts of aggravated sexual assault of a child, four counts of indecency with a child, and four counts of sexual performance of a child (only two of which were presented to the jury). Mr. Bonner was convicted, contrary to his pleas, and sentenced consecutively to imprisonment for 99 years for each count of aggravated sexual assault of a child, and 20 years for each remaining count of either indecency with a child or sexual performance of a child. The trial court approved the State's request to stack the sentences, for 634 years.

C. Direct Appeal

The Tenth Court of Appeals affirmed the judgement and sentence and the Texas Court of Criminal Appeals (TCCA) refused a petition for discretionary review. Bonner v. State, No. 10-09-00120-CR(Tex. App. -Waco Sep 08,2010, pet. ref'd).

D. State Habeas Proceeding

A state writ was filed, a hearing was not held, and the TCCA denied relief, without written order. Ex parte Bonner, No. WR-78,701-01(Tex. Crim. App. Oct 30,2013).

E. Federal Habeas Proceeding

A federal writ was timely filed, and the district court denied relief and denied a COA. Bonner v. Stephens, No.3:13-cv-4649-P(N.D. Tex., Apr 18,2016). Notice of appeal was timely filed.

REASONS FOR GRANTING THE WRIT

The different Circuit courts contravene this Court's precedent and deepen two Circuits applying the correct precedent, one Circuit that has shown only to apply a limited version, and five Circuits that apply both a proper and improper standard raises an issue of national significance: whether the criminal justice system will tolerate, and can sustain, inconsistent application of this Court's standard for COA review..

This Court has repeatedly stressed in Miller-El v. Cockrell, 537 US 322(2003) and Buck v. Davis, 137 S.Ct. 759(2017) what the statutory requirement and this Court's standards are for COA review. Yet, recent data, gathered over a five month period show no less than 21% of those cases found are still applying a limited scope version of this Court's standard to COA requests.. AEDPA and appellate standard authorities are being applied to COA requests which violates the statutory requirements of Congress and this Court's precedent.

Mr. Bonner raises these issues because he was denied a COA by the Fifth Circuit for failing to show that he met the statutory requirement and a limited version of this Court's standard was applied to his COA request. Not only did the Fifth Circuit impermissibly raise the standard, the court applied case law to his request that had nothing to do with COA requests and in fact was relevant only to cases ON appeal. Further, Mr. Bonner shows, in his petition, that more than just "some merit" exists in his case, warranting relief.

For all these reasons, and those discussed more fully herein, certiorari should be granted.

I. Certiorari Should Be Granted Because Reasonable Jurists Could Unquestionably Debate The Extraordinariness Of The Issues Presented By Mr. Bonner.

A. The Panel Improperly Sidestepped the COA Process By Requiring Mr. Bonner To Identify Errors In The District Court's Legal Analysis, Rather Than Reviewing The Substantialness Of The Denial of Constitutional Rights. --QUESTION ONE

Mr. Bonner's attorney filed a brief requesting a Certificate of Appealability (COA) that stated the current statutory requirement and the current standard according to this Court. Appx. G at 1-2. The current statutory requirement:

The applicant must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

This Court also requires the following:

A prisoner seeking a COA need only demonstrate "a substantial showing" that the district court erred in denying relief. Miller-El v. Cockrell, 537 US 322,327, 123 S.Ct. 1029(2003) (quoting Slack v. McDaniel, 529 US 473,484(2000) and 28 U.S.C. § 2253(c)(2). That standard is satisfied when reasonable jurists could either disagree with the district court's denial of relief, or determine that "issues presented ... deserve encouragement to proceed further." Miller-El, 537 US at 327,336.

Mr. Bonner's attorney satisfied the statutory requirement by presenting claims showing the denial of constitutional rights. Some examples of ineffective assistance of counsel, Sixth Amendment violations, are provided in Appendix G:

1. Failure to object to improper opening statements. Appx. G at 3.
2. Failure to object to inadmissible medical testimony. Appx. G at 4.
3. Failure to object to testimony regarding junk science, Child Sexual Abuse Accomodation Syndrome (CSAAS). Appx. G at 5-6.
4. Failure to suppress evidence seized by unauthorized seizure, Appx. G at 7-8.

A "substantial" claim is one that has "some merit". Martinez v. Ryan, 132 S.Ct. 1309,1318(2012). Mr. Bonner's claims have more than just "some merit" and habeas counsel stated, at the end of each claim, that "jurists of reason could conclude that the issue present was

adequate to deserve encouragement to proceed further." Appx. G, at 4, 6, 8.

The Fifth Circuit argued that what Mr. Bonner's attorney briefed, failed to satisfy the statutory requirement to make a substantial showing of the denial of a constitutional right. Appx. A, at 2. The court stated the "motion for a COA" repeats Mr. Bonner's § 2254 petition, without identifying any error in the district court's resolution of his claims. Appx. A, at 2. The court cited the following as controlling authority:

A COA applicant must show that "reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong."
Slack, 529 US at 484.

Mr. Bonner stated his original claims as they satisfied the statute by providing substantial constitutional rights violations and were relevant enough to deserve encouragement to proceed further. There was also no analysis of any of Mr. Bonner's claims to determine if "some merit" was present. The Fifth Circuit also used a truncated form of this Court's standard to evaluate Mr. Bonner's COA request. Being that it is incomplete, it is an improper application of the standard. Following this Court's standard, an applicant is not forced to satisfying the above reduced citation. Reducing this Court's standard places a higher threshold upon the applicant. This Court also provided that the STATUTE could be satisfied if the applicant could show that reasonable jurist could determine that "the issues presented ... deserve encouragement to proceed further." Miller-El, 537 US at 327.

The Fifth Circuit continued to argue against granting a COA

on the ground that Mr. Bonner failed to identify any error in the district court's resolution of his claims by arguing that:

We treat Bonner's failure to address the district court's basis for rejecting his claims "without even the slightest identification of any error in [the district court's] legal analysis or its application" to the case as if Bonner "had not appealed th[e] judgement" at all. Brinkmann v. Dall. Cty. Deputy Sheriff Abner, 813 F2d 744,748(5th Cir. 1987). Appx. A at 2.

This argument fails in several ways. Since Mr. Bonner satisfied the statutory requirement and satisfied this Court's standard, the above does not apply because neither required Mr. Bonner to identify any error in the district court's resolution of his claims. Next, the Fifth Circuit acknowledged that Mr. Bonner's action was a "motion for a COA". Appx. A at 2. However, Brinkmann, is an appeal of a summary judgement and has nothing to do with COA requests:

On appeal, Brinkmann does not address the merits of that opinion ...
We will not raise and discuss legal issues that Brinkmann has failed to assert. See Davis v. Maggio, 706 F2d 568,571(5th Cir. 1983)(commenting that "[c]laims not pressed on appeal are deemed abandoned.") Brinkmann, at 748.

The above is a standard used regarding appeals. Mr. Bonner's action was claimed by the Fifth Circuit to be a "motion for a COA", not an appeal. The ONLY standard that applies is the statute and this Court's standard. The Fifth Circuit is required to take just a quick look at the merit of the claims ("some merit"). Here, the Fifth Circuit applied case law that tried to use that standard to make a determination of the merits - which exceeds the statutory requirement. This Court also prohibits such actions:

When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the merits, it is in essence deciding

an appeal without jurisdiction. (citations omitted)
Buck v. Davis, 137 S.Ct. 759, 731 (2017).

By applying Brinkmann to Mr. Bonner's "motion for a COA", the Fifth Circuit exceeded its jurisdiction.

Mr. Bonner has shown that the Fifth Circuit erred because:

1. it incorrectly decided that Mr. Bonner's claims failed to satisfy the statutory requirement;
2. it cited a truncated version of this Court's standard for COA review - thus an incorrect standard;
3. it did not perform an analysis to determine if "some merit" existed - because the COA request was not properly evaluated;
4. it exceeded its jurisdiction in applying an appellate standard through Brinkmann.

The Fifth Circuit acknowledged through its own Circuit judges that the Circuit court "is continuing its 'troubling' pattern of failing to applying the threshold COA standard required by this Court's precedent." Jordan v. Fisher, 135 S.Ct. 2647,2652 n.2(2015). Appendix F, at 5, lists ELEVEN cases where the Fifth Circuit cited a truncated form of this Court's standard through Slack and then denied the COA request. It strains credulity that those cases were decided properly if the full standard was denied to those prisoners. These cases spanned a five month period (Jun 01,2017-- Nov 30,2017). The failure to apply the proper standard to COA requests continues beyond Jordan's acknowledgement of the problem. Premises considered, Mr. Bonner should be justified in his claims because:

1. The statutory requirement and this Court's standard was satisfied when substantial claims that demonstrated the denial of constitutional rights that deserved encouragement to proceed further were presented to the Fifth Circuit;
2. The Fifth Circuit did ignore and continues to ignore the jurisdictional command of U.S.C. § 2253 (c)(2) and this Court's repeated adminishment through Buck;

A COA should have been GRANTED.

B. Inconsistent Application Of The COA Standard Among The Circuits,
Which Tends To Lead To An "Appeal-Like" Review, Suggests Problems
With The Review Standard. --QUESTION TWO

Inconsistent application of this Court's standard for COA review exists among the Circuit courts and tends to lead to an analysis of the COA requests in a manner as they would an appeal. Such an analysis exceeds Congress' desire that, pursuant to 28 U.S.C. § 2253(c)(2), a COA be granted when a prisoner simply makes a "substantial showing of the denial of a constitutional right." The following cases are demonstrative of appellate-like reviews of COA requests:

1. Weinacker v. United States, 2017 US App LEXIS 24212 (11th Cir. Jun 16, 2017)
-appellate citations:
Strickland v. Washington, 466 US 668 (1984)
Miranda v. Arizona, 384 US 436 (1966)
-evaluation:
decided merits of ineffective assistance of counsel claims, at 13-14
2. Conaway v. Sec'y, Dep't of Corr., 2017 US App LEXIS 21134 (11th Cir. Aug 18, 2017)
-appellate citations:
Williams v. Taylor, 529 US 362 (2000)
Cullen v. Pinholster, 563 US 170 (2011)
Harrington v. Richter, 562 US 86 (2011); Strickland
-evaluation:
evaluated the state post-conviction court's conclusions which incorporated AEDPA into the COA analysis, at 11, 15-17, 21, 23
3. Knight v. Sec'y, Fla. Dep't of Corr., 2017 US App LEXIS 23735 (11th Cir. Aug 22, 2017)
-appellate citations:
Strickland; Williams; Harrington; Cullen
-evaluation:
evaluated the state post-conviction court's findings which incorporated AEDPA into the COA analysis, at 9, 13-18
4. Baldwin v. Fla. Dep't of Corr., 2017 US App LEXIS 24202 (11th Cir. Aug 31, 2017)
-appellate citations:
Bradshaw v. Richey, 546 US 74 (2005)
Lafler v. Cooper, 566 US 156 (2012)
Missouri v. Frye, 566 US 134 (2012)
-evaluation:
evaluated the state post-conviction court's findings which incorporated AEDPA into the COA analysis, at 4-13

5. Walker v. Fla. Dep't of Corr., 2017 US App LEXIS 22386 (11th Cir. Oct 25,2017)
-appellate citations:
Williams v. Taylor; Strickland
-evaluation:
decided merits of ineffective assistance of counsel claim, at 8-9
6. Fuller v. Warden, 698 Fed. Appx. (10th Cir. Jun 20,2017)
-appellate citations:
Brady v. Maryland, 373 US 83 (1963)
Arizona v. Youngblood, 488 US 51 (1988)
Blakely v. Washington, 542 US 296 (2004)
Martinez v. Ryan, 566 US 1 (2012); Strickland
Stone v. Powell, 428 US 465 (1976)
-evaluation:
evaluated state-court proceedings at 940-942, AEDPA standard
7. Acker v. Davis, 693 Fed. Appx. 384 (5th Cir. Aug 14,2017)
-appellate citations:
Schlup v. Delo, 513 US 298 (1995)
House v. Bell, 547 US 518 (2006)
-evaluation:
evaluated the state-court proceedings which incorporated AEDPA into the COA analysis at 393-398

Every case above was denied a COA and every case followed a limited version of the COA standard under Slack, except for No. 7, which did cite the full COA standard, even though the Circuit court evaluated the COA request under AEDPA standards.

Mr. Bonner conducted a search and analysis of all US Court of Appeals to determine how the COA standard was being applied. See Appendix F. Over a five month period (Jun 01,2017 - Nov 30,2017) 155 opinions (or orders) were generated. The results show that 32 (21%) cases did not have the correct standard applied for COA review - this happen to include Mr. Bonner's COA request. Appx. F at 5-6. The Circuit courts include the Fourth, Fifth, Sixth, Tenth, and Eleventh with the Fifth Circuit being the majority. The standard they cited was:

The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the

constitutional claims debatable or wrong.
Slack, 529 US at 484;

dropping the rest of this Court's standard, and, in most Fifth Circuit cases, summarily denying the COA request. The analysis also shows that 123 cases (79%) did cite the full standard. The Circuit courts that cited the full standard include: District of Columbia, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits. Five Circuit courts (Fifth, Sixth, Ninth, Tenth, Eleventh) are using this Court's full standard and a truncated form (exclusively through Slack) to evaluate COA requests. Only the District of Columbia and the Third Circuit courts applied the full standard in the analysis with the Fourth Circuit exclusively only applying the truncated form.

A quick overview of the above data shows a two Circuit split that applied the correct standard (DC and Third); a single Circuit split that applied the incorrect standard only (Fourth), and; five Circuit courts that do both (5th, 6th, 9th, 10th, 11th). A problem exists within almost all the Circuit courts with the correct standard for COA review. This then translates into prisoners who's COA requests are not properly evaluated and, in almost all cases reviewed, DENIED.

The origin and development of the current standard, which is arguably more than Congress requires, may be helpful to determine where confusion began. The current standard for COA review began as a footnote. Barefoot v. Estelle, 463 US 880,893 n.4(1983). Being 'orbiter dicta', it carried no precedent and even cited lower courts as examples. Id. At that time, Barefoot fell under the 1908 Congressional Act enacted to curb frivolous appeals. Id. at 892 n.3.

Congress adopted, as statutory law, a portion of that footnote under the current statutory requirement, 28 U.S.C. § 2253 (c)(2). Without addressing any 'standard', or deciding, the Slack court adopted the footnote in Barefoot (463 US at 893 n.4), then expanded the former footnote to include a standard to address petitions denied on procedural grounds, rather than on the merits. Slack, 529 US at 484. Miller-El reiterated the Slack standard in such a way as to make the "standard" more clearly understood. Miller-El, 537 US at 327, 336. However, there was no discussion in any of those cases, or any since, as to what Congress intended, or any explanation as to why § 2253 (c)(2) is inadequate for COA review.

The Circuit courts that cite a truncated form of this Court's standard quote it from Slack. How the Court wrote its opinion of the standard follows:

To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, at demonstration that, under Barefoot, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." (citations omitted)
Slack, 529 US at 483-84.

The above quote from Slack is the current standard. The problem appears in the very next paragraph:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.
Slack, 529 US at 484.

It would appear from a clear reading that part of the standard was dropped - "that the issues presented were 'adequate to deserve

encouragement to proceed further.'" - cannot be reasoned from the "debatable or wrong" showing in the subsequent paragraph. The Circuit courts that apply only the "debatable or wrong" standard have not been applying the "encouragement to proceed further" standard. It could be concluded that those Circuits (or judges within those Circuits) come to the same conclusion.

Explicitly, the current review standard requires a review of the district court's decision, like a full appeal. Appellate related authorities are used to evaluate COA applications. Such action goes beyond the statutory requirement to show a constitutional violation that has "some merit". Implicitly, the AEDPA restrictive standards are being applied to COA reviews (28 U.S.C. § 2254(d)). Conditions have been added and interpretations made that exceed § 2253(c)(2). The language of Barefoot, Slack, Miller-El, and others include:

1. a prisoner must demonstrate a substantial showing that the district court erred;
2. reasonable jurists could disagree;
3. issues presented ... deserved encouragement to proceed further.

None of the above language above is contained in the statute and appears to encourage the Circuit and District courts to look to the merits for COA review. It may even be that Circuit courts are using the confusing nature of the present standard (as quoted from Slack) to summarily clear their dockets. Ultimately, the AEDPA would stop any further meaningful legal review for the prisoner.

Premises considered, a return to the statutory requirement, or a discussion, with a final decision with precedent, ~~is needed to~~ supercede prior cases causing confusion among and within the Circuits.

C. Mr. Bonner's Claims Raised In His Application For A COA Made A Substantial Showing Of The Denial Of A Constitutional Right.

--QUESTION THREE

Mr. Bonner raised the following three points (with subclaims) in his brief to the Fifth Circuit requesting a COA:

Point One

THE APPLICANT'S TRIAL COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL.

- failure to object to improper opening statement
- failure to object to inadmissible medical testimony
- failure to object to testimony regarding Child Sexual Abuse Accomodation Syndrome
- failure to object to use of shock belt and shackling at trial
- failure to object properly and preserve error regarding the admission of extraneous evidence
- sponsoring or eliciting damaging evidence before the jury
- failure to suppress evidence seized by search warrant
- failure to object to prosecutorial misconduct
- failure to use character witnesses

Point Two

THE APPELLANT WAS DENIED A FAIR TRIAL IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE IMPROPER ADMISSION OF THE DRUG/MARIJUANA AND CHILD PORNOGRAPHY.

Point Three

THE STATE SUPPRESSED EXCULPATORY AND IMPEACHMENT EVIDENCE IN VIOLATION OF THE APPELLANT'S RIGHT TO DUE PROCESS.

Mr. Bonner cites the above to preserve his claims. For the purpose of demonstrating that the Fifth Circuit should have granted a COA, because Mr. Bonner met the statutory and this Court's requirements, four of the above claims are argued forthwith.

**Background Concerning the Child Pornography
Where did it come from? Why was it there?**

Child pornography (CP) is inescapably a part of this case. Even though it was illegally obtained and presented at trial, its prejudice hovers like a dark cloud. People will assume: where there

is smoke, there is fire. Mr. Bonner claimed he knew nothing of the CP. Evidence came to light over five years after his trial that shed light on where this material came from and why. Technical details were also left out of trial due to neglect or incompetence of trial counsel.

It was the State's position that Mr. Bonner possessed the CP and its presence demonstrated a propensity to molest children. Mr. Bonner's ex-wife and mother of two of his children, Amanda Dodd, participated in an interview with Investigator Don Adams at the Burleson Police Dep't on May 10, 2007 - two days after the drug seizure. It took many requests and five and one half years for Mr. Bonner to learn of the contents of that interview. The Burleson PD actually lied to the Texas Attorney General, then Greg Abbott, claiming that the interview video contained alleged or suspected abuse or neglect of a child. Appx. H, at 1. The interview video most certainly DID NOT.

The interview revealed a conspiracy and a cover-up. Don Adams admitted to examining the computers. The computers had already been illegally seized, without warrant, and the warrants that were obtained, were still one month away. All ten of the affidavits for these subsequent warrants contained perjury, stating that Amanda Dodd, on May 10, 2007, couldn't rule out the possibility that CP was on the computers seized. That claim was never made in any form. Lastly, at the end of the interview, Amanda Dodd stated three times:

"If Robert ever finds out I turned him in for the marijuana, he'll put me six feet under."

Multiple state witnesses, including police officers and Amanda Dodd

testified that Mr. Bonner's then five year old son made outcry statements of the marijuana grow to a teacher at school. The State possessed all of the above evidence and could not have been ignorant to these facts - perpetrating a continuing fraud on the trial court and the Texas Attorney General's office.

Amanda Dodd's actions, then, were premeditated. She planned to turn in Mr. Bonner. Evidence in the record, but only partially, and confusingly, presented to the jurors led the trial court to believe that the CP was Mr. Bonner's. Mr. Bonner was charged with 15 counts of possession of child pornography (dropped years later). Amanda Dodd was never charged - the house was in her name and she had all the access needed. In trial, the State claimed hundreds, even over a thousand CDs and DVDs of child porn that DID NOT EXIST. Such a quantity would come, easily, to hundreds of thousands images. File properties revealed that the 15 files in the indictment were "accessed" once or twice. The account accessing the files was "RBONNER". No information was given in trial as to what program or application was accessing the files. What is known was that the entire networked file system was protected with McAfee Anti-Virus, SERVER edition. This means that the installation procedure required administrator level access to start/stop the anti-virus service and for full access to the network file system. Mr. Bonner installed the software and gave his account and password for the software. A scheduled event was also setup to scan the entire networked file system once a week - early Sunday morning. All files scanned by this software would appear to have been "accessed" by RBONNER. That is pretty much all the files. Placing a

file on the system would cause an immediate scan (access) of the file, then another scan (access) once a week, for every week that file was on the system. This means that the 15 instances of CP were on the computer system no longer than about a week. The bust was May 8, 2007, Amanda Dodd planned the marijuana bust. The police department, S.T.O.P. Special Crimes Unit, the prosecutors, and Amanda Dodd all covered up who was responsible for the drug raid. The video interview on May 10, 2007, shows Inv. Adams pursuing a sex-crime case against Mr. Bonner, two days after the drug bust - even though there was no outcry from any child at that time.

1. Ineffective Assistance of Counsel

Failure to Object to Inadmissible Medical Testimony

In a situation with a normal examination of a child complaining of a sexual offense, to permit expert medical testimony only serves to bolster impermissibly the complainant's testimony and serve as a comment on the truthfulness of the complainants since the medical expert would be reduced to repeating the history given by the complainant. Salinas v. State, 166 SW3d 368(Tex. App. -Fort Worth 2005, pet. ref'd).

In the present case, testimony of medical witnesses in essence was that they performed an examination of LD and ES and these exams were normal. The nurses repeated the versions of sexual abuse stated by LD and ES for the jury. Mr. Bonner's trial counsel failed to object and never took any action to prevent the nurses from testifying, or to limit their testimony. The opinions that LD and ES had been sexually abused were elicited by the prosecutor. This testimony was inadmissible. The medical testimony only served to bolster

impermissibly the complainants' testimony and serve as a comment on their truthfulness since the medical experts were reduced to repeating the history given by the complainants, something Salinas specifically prohibits. Permitting the medical testimony to go unchallenged lent a false legitimacy to the complainants' accusations in that the absence of evidence revealed in a normal examination is itself deemed "normal" and "consistent with sexual abuse." The fact that the nurses were medical professionals gave their opinions weight that it did not deserve. The jury was now in a position to consider that, despite finding nothing to medically corroborate the complainants' accusations, the State's witnesses were of the opinion that the examination was consistent with abuse having had occurred. Counsel was ineffective in failing to object to this testimony.

**Failure to Object to Testimony Regarding
Child Sexual Abuse Accommodation Syndrome**

At trial, the State called a social worker who testified extensively to Child Sexual Abuse Accommodation Syndrome ("CSAAS") and related the symptoms to complainant witness LD. This witness testified without being taken on voir dire by trial defense counsel, and when he finally requested voir dire, was informed by the trial court that the request was untimely. No objections to this "expert's" qualifications or opinion on this alleged syndrome was ruled upon by the court during the State's case-in-chief. A second expert witness for the State who was the lead forensic interviewer for the CAC also testified about the syndrome. The testimony was that: (1) CSAAS refers to circumstances in which children become involved in sexual abuse situations; (2) the first part is secrecy, where the child's secrecy is elicited by the offender through either threats or special promises or privileges, getting the child to feel like they are part of the

abuse; (3) the second part is helplessness, where the child involved in an improper relationship feels helpless because the child is not as sophisticated as adults; (4) with this accommodation from a situation that you cannot avoid, you feel helpless, so you start to conform to that situation by going along with it, by even initiating it; (5) some children, in order to control it, will initiate the situation or conform to the situation; and (6) disclosure is usually delayed because the child has conformed to the sexual abuse that makes them feel responsible so the child keeps it a secret.

The testimony of these two "experts" was emphasized in closing arguments to support the prosecution where the State related CSAAS symptoms to LD and ES. This non-scientific theory was presented without defense challenge and trial defense counsel had no evidence with which to rebut this alleged theory. Trial counsel wholly abdicated their role as counsel by failing to object and obtain a ruling on this alleged syndrome that has been shown to have no acceptance in the applicable literature regarding child sexual assault victims. Trial defense counsel failed to secure or consult a forensic psychologist on this basic point to have rebuttal evidence ready to rebut any claim that this alleged syndrome was accepted, applicable, or proper evidence for jury consideration. No Daubert/Kelly request was made to test the validity of this supposed scientific theory prior to its presentation to the jury.

The CSAAS has no scientific validity. Gersten v. Senkowski, 426 F3d 588(2nd Cir. 2005)(conviction reversed and writ granted based on counsel's failure to investigate and consult with expert psychologist witnesses). In Gersten, Dr. Yuille, an expert forensic psychologist,

confirmed for the court post-conviction that what is known as CSAAS is no longer accepted in the child sexual abuse research community. Id. at 600-601,611. Dr. Yuille explained that the inventor of the theory has retreated from his position of classifying it as a syndrome, and CSAAS "and its alleged five components has no validity and is not regularly accepted in the scientific community." Id. The writ was granted and this decision was upheld on appeal. Incompetence by Mr. Bonner's trial defense counsel in the case at bar is supported by Gersten:

...even a minimal amount of investigation [by trial counsel] into the purported [CSAAS] would have revealed that it lacked any scientific validity for the purposes for which the prosecution utilized it: as a generalized explanation of children's reactions to sexual abuse, including delayed disclosure and blurred memory, and that had counsel investigated the possibility of challenging the prosecution's psychological expert he would have discovered that exceptionally qualified experts could be found... Defense counsel's lack of preparation and failure to challenge the credibility of the key prosecution witness could not be based on sound trial strategy, and it was an unreasonable application of Strickland for the County Court to hold otherwise.

Id. at 611.

In the case at bar, trial defense counsel was deficient for not objecting to or investigating this junk science, failing to call on an expert witness in rebuttal, or even objecting to the State's proffer of the junk science testimony by unqualified expert witnesses.

Dr. Joann Murphey, a forensic psychologist, has reviewed the testimony of the complainants as well as other evidence associated with the case. Appx. I. Dr. Murphey noted that there were serious inconsistencies in the complainants' rendition of events and was concerned about the investigatory process used in this case, where contradictions by complainants were left unexplored. Id. More important,

Dr. Murphey could have given testimony refuting the applicability and existence of CSAAS. Id. Dr. Murphey could have testified or informed the defense that the "CSAAS theory provoked controversy because there was not, and is not today, any validation of such a theory by way of scientific research." Id. "Such misuse of the CSAAS theory eventually led even its leading proponent in the United States to clarify that it was never intended to be a scientific principle or test." Id.

There is nothing "reasonable" about a tactical choice not to present evidence where counsel fails to investigate the evidence and thus does not even know what it is. Wiggins v. Smith, 538 US 510(2003). Consistent with Wiggins, lower courts hold that a decision to rely exclusively on cross-examination of a state expert is uninformed and fundamentally unreasonable, where defense counsel has not educated himself, such as by consultation with appropriate experts or literature, so that he is prepared to present the defense case through cross-examination of the State's witness. Dugas v. Coplan, 428 F3d 317 (1st Cir. 2005); Gersten, 426 F3d at 610-611; Lindstadt v. Keane, 239 F3d 191 (2nd Cir. 2001). Further support against the scientific validity of CSAAS is available from Texas courts. Fowler v. State, 958 SW2d 853(Tex. App. -Waco 1997)("[CSSAS] is of highly questionable scientific validity, and fails unequivocally to pass the Daubert threshold test of scientific reliability.")

Gersten demonstrates that expert witnesses are available who would have testified in a manner beneficial to Mr. Bonner, since that court received testimony contrary to the CSAAS. Gersten also ruled that trial counsel's lack of preparation in that case could not be based upon sound trial strategy and was ineffective under Strickland.

In the case at bar, trial defense counsel should have utilized a forensic psychologist, such as Dr. Murphey, to explain to the jury that this alleged "syndrome" has no acceptance in the applicable psychological community and has no diagnostic merit whatsoever. Trial defense counsel was wholly unprepared to counter this testimony to Mr. Bonner's detriment.

In light of these factors, there is a reasonable probability that, but for trial counsel's errors, the result in the proceedings would have been different. The record supports Mr. Bonner's contention that trial counsel was ineffective for the failure to object to the CSAAS, and consult and call upon an expert witness to counter the State's expert testimony on the subject.;

Failure to Object to Prosecutorial Misconduct

Review of improper comment occurs in two steps: (1) the reviewing court determines if the remark was legally improper; (2) if it was, whether the remark prejudiced the defendant's substantive rights. Factors include: (1) magnitude of the prejudicial effect of the statements; (2) efficacy or cautionary instructions; and (3) strength of the evidence of defendant's guilt. United States v. Mendoza, 522 F3d 482(5th Cir. 2008). The failure of the trial judge to sua sponte intervene, could well have led jurors to consider the misconduct to be proper. United States v. Young, 470 US 1 (1985). Misrepresenting facts in evidence can amount to substantive error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." Donnelly v. DeChristoforo, 416 US 637 (1974). This is particularly true in the case of prosecutorial misrepresentation because a jury generally has confidence that the prosecuting attorney is faithfully observing his obligation as a representative of a

sovereignty, whose interest "in a criminal prosecution is not that it shall win a case, but that justice be done." Berger v. United States, 295 US 78 (1935). It is not necessary for the prosecutor to actually use the words "I beleive" or any similar phrase, for a statement to constitute improper comment of the credibility of witnesses. United States v. Bess, 593 F2d 749,757 n.10(6th Cir. 1979).

Through the course of trial, counsel failed to object to various forms of prosecutorial misconduct that undermined Mr. Bonner's Due Process rights. The prosecutors' misconduct misled the jury and prejudiced the accused; was not accidental or isolated, due to the conspicuous use and emphasis of the many errors, in closing argument as well as other portions of the trial; and were flagrant and involved the central issues of the case. The prosecutors' numerous statements on witness credibility - often unsupported by any rational justification other than the assumption that Mr. Bonner was guilty - cannot avoid suggesting to the jury that the prosecutor knows something that they do not. The statements by the prosecutors were not coupled with a more detailed analysis of the evidence adduced at trial and conveyed an impression to the jury that they should simply trust the State's judgement that the complainant witnesses were credible and that Mr. Bonner's witnesses (specifically, Mr. Bonner and Nicole Brody) were incredible.

This misconduct is especially prejudicial given the extent to which the jury's determination as to Mr. Bonner's guilt or innocence hinged almost entirely, if not entirely, on the credibility of Mr. Bonner and the complainant witnesses. The following examples are not exhaustive:

- Prosecutor injects his personal opinion in closing argument of Mr. Bonner, complainants, and in evidence that did not exist. Twelve separate instances were briefed.
- Prosecutor improperly suggested the jury was part of the prosecution team.
 - "We don't think [those girls] made this whole thing up, and, you know what, we're going to do something about this. Its up to you. This is your chance to do something about it."
- Prosecutor argued about a conspiracy that did not exist or was raised by Mr. Bonner. Four instances were briefed.
- Prosecutor asked the jurors to consider his facial expressions and his tone of voice as to how he felt about Mr. Bonner's guilt and even invoked his position as a state employee. Two instances were briefed.
- Prosecutor improperly stated in closing that NB saw LD sitting naked on Mr. Bonner's lap when that was denied by Mr. Bonner on cross-examination.
- Prosecutor misstated discrepancies of witnesses' testimony. Five instances were briefed.
- There were other misstatements by the prosecutor during questioning that was then misstated during closing argument. Two instances were briefed.
- Prosecutor improperly commented on the effect on the complainants by Mr. Bonner exercising his right to a jury trial. This was improper. The prosecutor raised this issue three times. Burns v. Gammon, 260 F3d 892,896(8th Cir. 2001)("The prosecutor asked the jury while considering guilt and sentencing, to consider the fact that [Petitioner], by exercising his constitutional right to a jury trial and to confront witnesses, forced the victims to attend trial, take the stand and relive the attack.")
- Prosecutor's improper comments also extended to the credibility of other witnesses in the case. The prosecutor misrepresented Nicole Brody's testimony: "She also said she could not rule it out. She thinks she would have told somebody about that. She can't rule it out." But the record shows that had an outcry been reported to her, Brody would have reported it. This was improper summation before the jury. Next, the prosecutor stated that Brody had not finished school yet and thus had "no training on who to call, when to call..." According to the record, however, she obtained her degree and certificate.
- Prosecutor claimed that Mr. Bonner is a "child predator of the highest order." but also a "liar of the highest order." No

witness testified to various "orders" of child predators or liars. This reference to Mr. Bonner as a "child predator of the highest order" during the State's opening was an improper reference to Mr. Bonner's character. Perryman v. State, 798 SW2d 326 (Tex. App. -Dallas 1990)(assailant was referred to as a "power reassurance rapist").

-Prosecutor improperly asked Mr. Bonner to testify about the veracity of the complainants. "It is also improper [for the prosecution] to require [the accused] to express his opinion as to the truth or falsity of testimony contradicting him." Johnson v. State, 614 SW2d 148,154 n.17(Tex. Crim. [Panel Op.] 1982).

The failure of trial defense counsel to object to any of the above rose to a level of ineffective assistance of counsel because many of the individual instances of misconduct and all of them cumulatively were so clearly improper that any "reasonable counsel" would have objected..

2. Right to Due Process

The State Suppressed Exculpatory and Impeachment Evidence in Violation of Mr. Bonner's Right to Due Process

The government has the obligation to disclose evidence in its possession that is favorable to the accused and material to guilt or punishment, and a violation of this obligation is a violation of due process. Pennsylvania v. Ritchie, 480 US 39(1987); Brady v. Maryland, 373 US 83(1963). This due process concern also applies to the withholding of witness statements. Kyles v. Whitley, 514 US 419(1995). The failure of prosecution to disclose to the defense that law enforcement's seizure of evidence exceeded the bounds of the warrant's authority violated Mr. Bonner's right to due process and violated Brady.

The Fourth Amendment requires a warrant to "particularily describe the place to be searched, and the persons or things to be seized." The Fourth Amendment's particularity requirement demands that the place to be searched and the items to be seized be described with

sufficient particularity so as to leave "nothing ... to the discretion of the officer executing the warrant." Williams v. Kunze, 806 F2d 594, 598(5th Cir. 1986). Evidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge that the search was unconstitutional under the Fourth Amendment." Illinois v. Krull, 480 US 340(1987). "Where record showed plain error in admitting testimony gained as result of illegal search and seizure, conviction was reversed notwithstanding that defendant made no motion to suppress such evidence and failed to call attention to circumstances of search and seizure until after he had been adjudicated guilty." United States v. Asendio, 171 F2d 122 (3rd Cir. 1998).

The evidence in this case was subject to suppression since the property seized was not authorized by the warrant, and the warrant was illegally executed. The search and seizure was illegal because of defects in the search warrant. The search warrant specified items to search and seize as: "Drugs kept, prepared, or manufactured ... specifically Marijuana." Computers, CD's, DVD's, guns, rifles, ammunition, cameras, camcorders, body armor, paint ball equipment, LCD TV, medical kit, 16' utility trailer, electric generators, investigative training manual, land/financial records - were not authorized to be seized. Appx. J at 1-10. Seizing items beyond the scope of a warrant's authorization violates the Fourth Amendment rights of the subject of a search. Andresen v. Maryland, 427 US 463(1976). An otherwise valid warrant was transformed into a general warrant when officers seized "anything of value" in flagrant disregard for the terms of the warrant. Blatant disregard by executing officers of the language of a search

warrant can transform an otherwise valid search into a general one and, thus, mandate suppression of all evidence seized during the search. United States v. Kimbrough, 69 F3d 723(5th Cir. 1995). The record in the case at bar reflects that over 1500 CDs and DVDs were seized. Each disc is unique in that it has its own serial number and quantum of data. Considering the number of unique, individual items seized, approximately 1550 items seized were not authorized by this warrant and approximately 20 items were authorized by the warrant.

The majority of the evidence seized was not stated in the warrant and was admitted into evidence against Mr. Bonner: (1) computers (and their contents); (2) CD's and DVD's; (3) guns, rifles, body armor; (4) "tampered" government documents; (5) cameras; financial records; training manuals. This evidence included testimony and pictures or items in the home that were not seized, but otherwise used to allegedly "corroborate" testimony of the complainant witnesses: Hand lotion; toilet paper; sex toys; "pink" towel. The items seized and listed in Attachment B (Appx. J at 7-10) were in no way encompassed by the warrant or its supporting affidavit. The illegally seized property was discussed throughout trial: (1) 200 CDs and DVDs; (2) 1200 discs of child pornography; (3) pornography that appeared to illustrate children; (4) 100-150 DVDs of child porn. The trial court itself claimed there were 1400 discs of child pornography while addressing defense counsel. These constant mentions of child pornography and the extent to which Mr. Bonner allegedly possessed it was not information that was necessary to an understanding by the jury of the allegations made against Mr. Bonner. Further prejudice ensued when the State played two movie "clips", approximately 30 seconds each, containing what appeared to be young actors, to the jurors.

Almost every witness called by the State mentioned or discussed some aspect of the illegally seized property: (1) child porn found on the computers in the home; (2) evidence of pornography; (3) he had shown her pornography; (4) Mr. Bonner began showing her and LD pictures of young children on his computer; (5) naked pictures of little kids; (6) retrieved from the residence hundreds of compact disks and DVDs labeled as movies, software, and pornography. An agent further testified about details of body armor, guns, rifles, marijuana and other items that were illegally seized from Mr. Bonner's residence. The testimony of Jay Stubbs, approximately 37 pages, is exclusively regarding property illegally seized from Mr. Bonner's residence with an emphasis on child pornography. The testimony was irrelevant, confusing, improper, highly prejudicial and given as propensity evidence with the intent of inflaming the jurors' emotions. The State cross-examined Mr. Bonner at length regarding property, and the information gained through the illegal search and seizure. The illegally seized evidence of marijuana, guns, rifles, porn, lotion, sex toy, camera, adult movies, raid, drug dealer, video camera was emphasized by the State in closing arguments. This was information that should not have been presented. The prejudicial impact of the illegally seized evidence was overwhelming.

The State had an initial search warrant labeled warrant #050807-KM which authorized the seizure of drugs kept, prepared, or manufacture in violation of the laws of the State of Texas. The warrant is dated May 8, 2007. Nowhere in the warrant or supporting affidavit, is there mention of any alleged facts presented as probable cause that speaks to computers, computer paraphernalia, or child pornography.

Appx. J at 1 - 5.

Nevertheless, numerous items not specified in the initial warrant were seized from Mr. Bonner's residence without legal authorization. This is material because many of these items of seized evidence were later mentioned numerous times in Mr. Bonner's trial. Further, trial defense counsel never received complete copies of this warrant and its supporting documentation.

Mr. Bonner's counsel made a specific request for "the initial warrant that was served on the Defendant's residence in connection with the drug raid." The law is clear that the "individual prosecutor has a duty to learn of any favorable evidence known to the other acting on the government's behalf in this case, including the police." Kyles, supra at 437. The prosecutor responded that what he had was in his files. Trial defense counsel's files do not contain the complete paperwork associated with the initial search warrant and do not have the inventory or return of the items seized in the search and seizure of Mr. Bonner's residence.

A comparison of their copy and the copies provided to Mr. Bonner from the district clerk show a marked difference and demonstrate how the limitations of the initial search warrant were exceeded without authorization. (Appx. J, 1-10 cf. 11-13) The failure of the prosecutors to turn over all the paperwork associated with the initial search warrant is a Brady violation and Mr. Bonner should receive a new trial because of the impact this suppression had on his defense. Had full disclosure been made by the state, trial defense counsel could have moved to suppress these items seized in the search warrant in this case. Mr. Bonner has met his burden, showing that the items listed in the warrant must be suppressed, and that a motion to suppress this

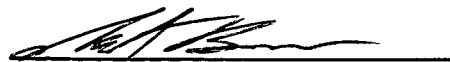
evidence would have been granted due to an otherwise valid warrant being transformed into a general warrant in contravention of established case law.

The above examples demonstrate substantial violations of Mr. Bonner's constitutional rights. The above examples also show how the State bolstered, impermissibly, the testimony of the complainant witnesses in a trial where credibility was core to the case. Premises considered, Mr. Bonner's claims of substantial constitutional violations satisfied all established threshold requirements for granting a COA.

CONCLUSION

The foregoing circumstances are not only extraordinary on their face, they justify relief from the judgement. Mr. Bonner's case is extraordinary and, at a minimum, reasonable jurists could so conclude, which means a COA must issue. This Court's review is warranted not only to resolve inconsistent application of the COA standard but also to determine "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." Liljeberg v. Health Servs. Acquisition Corp., 486 US 847,864(1988). All of those factors favor Mr. Bonner.

Respectfully submitted,



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