

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN DOUGLAS MITCHELL, Jr. — PETITIONER
(Your Name)

vs.

LORI DAVIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

JOHN DOUGLAS MITCHELL, Jr.

(Your Name)
TDCJ-ID # 1315658
EASTHAM UNIT
2665 PRISON ROAD # 1

(Address)

LOVELADY, TEXAS 75851

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- A: Whether the District Judge when adopting a Magistrate Report and Recommendation must fully expound upon his reasoning?**
- B: Whether overwhelming evidence exist when a defendant is acquitted on two (2) out of three (3) charges?**
- C: Whether a magistrate judge may point to inconsistent statements on behalf of the defense, and ignore inconsistent statements of the prosecutor's witnesses?**
- D: Whether a federal court has the duty to fully develop and dispose of grounds that are admitted to by the State to have been inadequately developed?**
- E: Whether the federal courts are required to apply the proper standard when analyzing a claim?**
- F: When does the period for the purposes of limitations begin under 28 U.S.C. § 2244(d)(1)?**

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

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

THE DIRECTOR OF TDCJ-ID, LORI DAVIS IS REPRESENTED BY:

THE ATTORNEY GENERAL OF TEXAS

KEN PAXTON

P.O. BOX 12548

AUSTIN, TEXAS 78711-2548

TABLE OF CONTENTS

COVER.....	i.
QUESTION(S) PRESENTED.....	ii.
LIST OF PARTIES.....	iii.
TABLE OF CONTENTS.....	iv.
INDEX TO THE APPENDICIES.....	v.
TABLE OF CITED AUTHORITIES.....	vi.
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1-2
STATEMENT OF THE CASE.....	2-3
REASONS FOR GRANTING THE PETITION.....	3-6
BRIEF IN SUPPORT OF QUESTION A:.....	6-8
BRIEF IN SUPPORT OF QUESTION B:.....	8-10
BRIEF IN SUPPORT OF QUESTION C:.....	10-13
BRIEF IN SUPPORT OF QUESTION D:.....	13-16
BRIEF IN SUPPORT OF QUESTION E:.....	16-18
BRIEF IN SUPPORT OF QUESTION F:.....	18-22
CONCLUSION.....	22
CERTIFICATE OF SERVICE.....	23

INDEX TO THE APPENDICIES

<u>TITLE</u>	<u>APPENDIX</u>
Mitchell v. Davis, appeal No. 17-403262 (5th Cir. 2018) Order on COA.....	A
Mitchell v. Davis, No. 1:08cv37 (E.Dist.Tx. 2017.....	B
Mitchell v. Davis, REPORT AND RECOMMENDATION.....	C
Mitchell v. Davis, appeal No. 17-403262 (5th Cir. 2018) Reconsideration.....	D
U.S.Const.Amend. V.....	E
U.S.Const.Amend. VI.....	F
U.S.Const.Amend. XIV. Section 1. (In pertinent part).....	G
Tex. Code of Criminal Procedure Art. 11.01.....	H
Tex. Code of Criminal Procedure Art. 11.04.....	I
Tex. Code of Criminal Procedure Art. 11.07.....	J
28 U.S.C. § 2244.....	K
28 U.S.C. § 2253.....	L
28 U.S.C. § 2254.....	M
Texas Penal Code § 22.021.....	N
Exhibits.....	O

TABLE OF CITED AUTHORITIES

<u>CASE</u>	<u>PAGE(S)</u>
Flowers v. Blackburn, 759 F.2d 1194 (5th Cir. 1985).....	6,15
Flowers v. Blackburn, 759 F.2d 1195 (5th Cir. 1985).....	6,15
Hernandez v. Estelle, 711 F.2d 619 (5th Cir. 1983).....	6,11
Hughes v. Johnson, 191 F.3d 607 (5th Cir. 1999).....	3,4
Johnson v. McCotter, 635 F.Supp. 685 (E.D.Tex. 1986).....	6,15
Martinez v. Ryan, 130 S.Ct. 1309 (2012).....	19,20
McCoy v. Court of Appeals, 486 U.S. 429 (1988).....	17
Miller v. Johnson, 200 F.3d 274 (5th Cir. 2000)....	8,10,12,17,21
Miller-El v. Johnson, 529 U.S. 322 (2003).....	4,5
Pension v. Ohio, 488 U.S. 75 (1988).....	16
Prejean v. Smith, 889 F.2d 1391 (5th Cir. 1989).....	14
Ryan v. Gonzalez, 133 S.Ct. 969 (2013).....	20
Slack v. McDaniel, 529 U.S. 473 (2000).....	7,9,12,17,21
Smith v. Robbins, 528 U.S. 259 (2000).....	16,17
Townsend v. Sain, 372 U.S. 293 (1963).....	14
Trevino v. Thaler, 133 S.Ct. 1911 (2013).....	19-20,20
United States v. Birdwell, 887 F.2d 643 (5th Cir. 1989).....	14
United States v. Louis, 621 F.2d 1382 (5th Cir. 1980).....	7
Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981).....	7
Williams v. Armontrout, 855 F.2d 578 (8th Cir. 1988).....	6,11

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix - A to the petition and is unpublished.

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

JURISDICTION

The date on which the United States Court of Appeals decided my case was February 1, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 23, 2018, and a copy of the order denying rehearing appears at Appendix - D.

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

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Pursuant to Supreme Court rule 14(f) the constitutional and statutory provision are to be set out in the Appendix and "their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i)."

U.S.Const. U.S.Const.Amend. V.....	E
U.S.Const. U.S.Const.Amend. VI.....	F
U.S.Const. XIV. Section 1. (In pertinent part).....	G
Tex. Code of Criminal Procedure Art. 11.01.....	H
Tex. Code of Criminal Procedure Art. 11.04.....	I
Tex. Code of Criminal Procedure Art. 11.07.....	J
28 U.S.C. § 2244.....	K
28 U.S.C. § 2253.....	L
28 U.S.C. § 2254.....	M
Texas Penal Code § 22.021.....	N
28 U.S.C. § 636(b).....	O
28 U.S.C. § 636(b)(1).....	P

STATEMENT OF THE CASE

The Petitioner was convicted in the 163rd District Court of Orange County, Texas, of Aggravated Sexual Assault of a Child, pursuant to Texas Penal Code § 22.021. (See, Appendix - N) The Petitioner sought a direct appeal, and a Petition for Discretionary review in the Texas Court of Criminal Appeals. Subsequently, the petitioner sought a State Habeas Corpus pursuant to Texas Code of Criminal Procedure Art. 11.07. (See, Appendix - J) The Petitioner was denied without a written order in the Texas Court of Criminal Appeals.

Subsequently, the petitioner sought a Petition for Federal Writ of Habeas Corpus, in the United States District Court, Eastern District of Texas, Beaumont Division. (See, Appendix

- M, - B, - C)

The Petitioner was denied a federal writ of habeas corpus, in cause no. 1:08cv37, on February 22, 2017. The Petitioner timely sought a Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit, Appeal no. 17-403262, and was denied on February 1, 2018. The Petitioner filed a timely motion for consideration which was denied on February 23, 2018.

The Petitioner was denied the effective assistance of counsel by his trial and his appellate counsel, which he asserted in his initial § 2254 application on the merits. The district court found that the claims that the Petitioner raised in his supplemental § 2254 application were time barred, despite being supported by sworn affidavits within the one (1) years period of limitations under § 2244.

The Court of Appeals for the Fifth Circuit improperly denied the COA based upon an improper application of law by determining the merits of the claims prior to any actual appeal being filed; in that: "To the extent that he fails to reassert the substantive claims that he set forth in his § 2254 application, he has abandoned those arguments. See, *Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999)" (See, Appendix - A, at 2)

REASONS FOR GRANTING THE PETITION

On or about February 1, 2018, the United States Court of Appeals for the Fifth Circuit, issued a judgement and mandate in appeal no. 17-40262, wherein, the Fifth Circuit denied the

petitioner's petition for certificate of appealability, however, the Court stated improperly, that: "To the extent that he fails to reassert the substantive claims that he set forth in his § 2254 application, he has abandoned those arguments. See, Hughes v. Johnson, 191 F.3d 607, 612-13 (5th Cir. 1999)" (See, Appendix - A, at 2)

The standard set forth in the Fifth Circuit citing Hughes v. Johnson, supra, was held in 1999, however, in 2003, this Honorable Court held:

"We do not require petitioner to prove, before issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debateable even though every jurist or reason might agree, after receiving full consideration, that petitioner will not prevail. As we stated in Slack, "[w]here a district court has rejected the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong."

Miller-El v. Cockrell, 529 U.S. 322, 338, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003)--(Internal citations omitted)

Futhermore, this Honorable Court held that a petitioner must only demonstrate and/or present a "prima facie claim." Id. Granted, the application of a "prima facie case," in Miller-El, was applied to a Batson, violation, the premises remain the same; a petitioner is not required to demonstrate that he would prevail

on the "substantive claims that he set forth in his § 2254 application," prior to the issuance of a COA pursuant to 28 U.S.C. § 2253(c)(2). *Id.*

Arguendo, the Fifth Circuit assertion that the petitioner must "reassert the substantive claims that he set forth in his § 2254 application," is correct, the Petitioner must first meet the issuance of a COA requirements prior to any reasserting of his claims presented in § 2254. Miller-El, clearly established federal law applicable in this case, requires the issuance of a COA prior to any determination on the merits by the Fifth Circuit.

The Fifth Circuit, is bypassing the protections of the United States Constitution and Federal law as determined by this Honorable Court is Determining the merits of the claims on the substantive claims prior to any actual appeal in this case. (See, Appendix A, p. 2) Therefore, any arguments by the Petitioner of an Application for COA prior to an actual issuance of said COA would have been premature. Thus, the failure to make a full and thorough de novo review of the record in the instant case is improper and contrary to federal law as determined by this Honorable Court.

Therefore, the Court of Appeals for the Fifth Circuit, has, entered a decision in conflict with the decision of another United States court of appeals on the same matter; and has decided an important question of federal law in a way that conflicts with a decision by a state court of last resort; and/or

has so far departed from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Furthermore, the United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and/or has decided an important question in a way that conflicts with relevant decisions of this Court.

I.

BRIEF IN SUPPORT OF QUESTION A:

Whether the District Judge when adopting a Magistrate Report and Recommendation must fully expound upon his reasoning?

It is well established federal law that "the court must full consider and dispose of each district and separate point raised by the Petitioner. See, Flowers v. Blackburn, 759 F.2d 1194 (5th Cir. 1985); Flowers v. Blackburn, 759 F.2d 1195 (5th Cir. 1985)" Johnson v. McCotter, 635 F.Supp. 685, 687 (E.D.Tex. 1986)

A district court commits reversible error by making any of the following mistakes: (1) failing to order or conduct a new evidentiary hearing before reversing a factual finding by the magistrate; or 93) failing to review the record independently before deciding to reject or adopt the findings of the magistrate. Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983); Williams v. Armontrout, 855 F.2d 578, 579-580 (8th Cir. 1988)

In the instant case, the District Judge provides absolutely

zero reasoning for the decision of the court. Instead the District Judge makes summary statements concerning its conclusion. Further, it appears the Court's decision is a mere pro forma decision rendered after little or no actual de novo determination "after careful consideration, the court concludes petitioner's objections should be overruled." (Appendix - A)

Any matter objected to by a party must be determined de novo by the district judge. 28 U.S.C. § 636(b)(1); Rules Governing § 2254 Cases 8(b)(4). (Appendix - O, - P)

De novo review requires an independent determination by the district Court. Washington v. Estelle, 648 F.2d 276, 282 (5th Cir. 1981), cert. denied 454 U.S. 899 (1981) As well be addressed below, the magistrate's report and recommendation relied, in part, upon the credibility of witnesses. A de novo determination requires "careful scrutiny" that must be scrupulously enforced when magistrate's report turns on credibility issues. See, United States v. Louis, 621 F.2d 1382, 1387 (5th Cir. 1980), cert. denied 450 U.S. 935 (1981)

In making the substantial showing for issuance of a COA, the Appellant need not establish that he would prevail on the merits. Rather he must, demonstrate that the issues are subject to debate among jurist of reason , that a court could resolve the issue in a different manner, or that the questions presented are worthy of encouragement to proceed further. See, Slack v. McDaniel, 529 U.S. 473 483-84 (2000). Any doubt whether to grant a COA is resolved in favor of the movant, and severity of the penalty may

be considered in making this determination. See, Miller v. Johnson, 200 F.3d 274, 280-81 (5th Cir. 2000)

Therefore, the Court of Appeals for the Fifth Circuit, has, entered a decision in conflict with the decision of another United States court of appeals on the same matter; and has decided an important question of federal law in a way that conflicts with a decision by a state court of last resort; and/or has so far departed from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Furthermore, the United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and/or has decided an important question in a way that conflicts with relevant decisions of this Court.

II.

BRIEF IN SUPPORT OF QUESTION B:

Whether overwhelming evidence exist when a defendant is acquitted on two (2) out of three (3) charges?

The magistrate judge repeatedly stated, incorrectly; "Moreover where the facts adduced at trial overwhelmingly pointed to the defendant's guilt as here, . . ." (Appendix - C, p. 14) and, "As previously set forth, in light of the overwhelming evidence against petitioner, . . ." (Appendix - C, p. 15) However, the magistrate completely ignored the fact that the Petitioner was acquitted on two of of the three charged offenses.

The magistrate judge cites the one sided "State's Brief on appeal," in the factual summation of the case. (Appendix - C, pp. 3-7) However, much of the factual summation is irrelevant as they citation refer to portions of the evidence of which the petitioner was acquitted. Therefore, the magistrate has held court on the Petitioner a second time, and found him guilty after a jury acquitted him on these charges. (See, Appendix - R)

The Petitioner was acquitted on counts one and three of the indictment. The Magistrate acknowledges this fact. (Appendix - C, p. 1) However, at no point after the magistrate recognizes that the petitioner was acquitted on the two grounds, does the magistrate or district judge ever reference this fact again. The Petitioner was acquitted on counts one and three of the indictment, therefore, there cannot be said to overwhelming. (See 4 RR 5, CR 57, 1709-1713)

Obviously, the jury, in the instant case, found the evidence insufficient to support a conviction on counts one and three. Therefore, any assertion by the magistrate otherwise, for justification of his decision, concerning overwhelming evidence is misplaced.

In making the substantial showing for issuance of a COA, the Petitioner need not establish that he would prevail on the merits. Rather he must demonstrate that the issues are subject to debate among jurist of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. See, Slack, 429 U.S.

at 483-84. Any doubt whether to grant a COA is to be resolved in favor of the movant, and the severity of the penalty may be considered in making this determination., See, Miller v. Johnson, 200 F.2d, at 280-81

Therefore, the Court of Appeals for the Fifth Circuit, has, entered a decision in conflict with the decision of another United States court of appeals on the same matter; and has decided an important question of federal law in a way that conflicts with a decision by a state court of last resort; and/or has so far departed from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Furthermore, the United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and/or has decided an important question in a way that conflicts with relevant decisions of this Court.

III.

BRIEF IN SUPPORT OF QUESTION C:

Whether a magistrate judge may point to inconsistent statements on behalf of the defense, and ignore inconsistent statements of the prosecutor's witnesses?

The magistrate first cites the State's Response on Direct Appeal at 3-8, concerning the credibility of Defense Witness Jerrica Mitchell. (Appendix - C, p. 7) Then the magistrate point to the credibility of Lowell Fredricks. (Appendix - C, p. 15) The

magistrate points to alleged overwhelming evidence, that does not exist, and credibility of defense witnesses in the report and recommendation.

The District Judge adopted these findings without an indication of an adequate de novo review.

A district court commits reversible error by making any of the following mistakes: (1) failing to order or conduct a new evidentiary hearing before reversing a factual finding by the magistrate; or 93) failing to review the record independently before deciding to reject or adopt the findings of the magistrate. Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983); Williams v. Armontreut, 855 F.2d 578, 579-580 (8th Cir. 1988)

Contained within the objections to the Magistrate report and recommendation was the petitioner's Exhibits A and B. These Exhibits were demonstrative of inconsistent statements of the State's Witnesses, however, these were completely ignored within the report and recommendation of the Magistrate and the Final Order of the District Judge. Furthermore, the complainant Ashlee Rainwater committed perjury on the stand during cross-examination concerning the nature of the alleged offending conduct of the petitioner. (2 RR 204) These record citation are attached hereto at (Appendix - R, Exhibits, A, B, C, D, and E) for convenience and consideration of the Court.

Much of the report and recommendation relies upon credibility of witnesses, however, the magistrate failed to

conduct any form of hearing, despite multiple request from the petitioner. Furthermore, any adoption of the recommendation's of the magistrate, after timely objection, was misplaced as well.

The Petitioner recognizes that he is unable to locate any substantial similar or corresponding case law on this particular issue, however, it stands to reason that a federal habeas petition is to be a full and fair hearing on the issues before the Court, and not merely a one sided dog-and-pony-show in favor of the State's position.

In making the substantial showing for issuance of a COA, the Petitioner need not establish that he would prevail on the merits. Rather he must demonstrate that the issues are subject to debate among jurist of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. See, Slack, 429 U.S. at 483-84. Any doubt whether to grant a COA is to be resolved in favor of the movant, and the severity of the penalty may be considered in making this determination., See, Miller v. Johnson, 200 F.2d, at 280-81

Therefore, the Court of Appeals for the Fifth Circuit, has, entered a decision in conflict with the decision of another United States court of appeals on the same matter; and has decided an important question of federal law in a way that conflicts with a decision by a state court of last resort; and/or has so far departed from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by a

lower court, as to call for an exercise of this Court's supervisory power. Furthermore, the United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and/or has decided an important question in a way that conflicts with relevant decisions of this Court.

IV.

BRIEF IN SUPPORT OF QUESTION D:

Whether a federal court has the duty to fully develop and dispose of grounds that are admitted to by the State to have been inadequately developed?

In the instant case, the Magistrate cited the Court of Appeal in that:

"Counsel may have been satisfied with the response elicited by the prosecutor, and decided to concentrate on other matters. On the record before us, we cannot determine that counsel's conduct in voir dire fell below prevailing standards of professional norms. Especially in light of the nature of the offense, which involved a long-term pattern of sexual abuse and exploitation of the family relationship, we cannot say that the long length of the sentence was the product of counsel's performance rather than the jury's reasoned assessment of a punishment appropriate for this case."

(Appendix - C, at p. 13)

The Magistrate continues with citations of the habeas court's findings:

"The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement. Application had different counsel on appeal than his trial counsel. His appellate counsel fully explored the issues regarding ineffective assistance of counsel at trial, both a hearing on a Motion for new Trial and on direct

appeal. Relief based on ineffective assistance of trial was denied both by the Trial Court and the Appellate Court. The complaints now raised by writ about appellate counsel's performance give rise to no controverted, previously unresolved facts."

(Appendix - C, p. 13)

These findings are in direct conflict with one another. The Court of Appeals plainly state the record was insufficient to determine the issues of counsel's performance, and then, the trial court found an adequate record upon habeas. Therefore, the decision of the State court was based upon an unreasonable determination of the facts as adduced in the State Court proceedings. 28 U.S.C. § 2254(d)(1-2) (Appendix - M)

The resolution of the factual dispute in most federal habeas petitions requires an evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 312 (1963) See also, Rules Governing Section 2254 Cases 8 -- Advisory Committee Note: "By far the majority" of petitions surviving summary judgement "require an evidentiary hearing." Evidentiary hearings warranted when petition contained "specific factual allegations not directly contradicted in the record." United States v. Birdwell, 887 F.2d 643, 645 (5th Cir. 1989) Furthermore, district court must hold evidentiary hearing on factually disputed constitutional issues when adequate relevant evidence does not appear in state court record. Prejean v. Smith, 889 F.2d 1391, 1403 (5th Cir. 1989)

In the instant case, the Court of Appeals recognized that the State Court record was insufficient to make a proper determination of the issues. (Slip Op. at 7: Appendix - C, at 13)

Then the district court reversed its opinion concerning this finding. (Appendix - C, at 13) Therefore, a factual issue remains unresolved in the instant case.

The Petitioner made multiple request and/or motions in the federal court for determination of this very issue. (See, Appendix - R) The magistrate either denied these request/motions outright, or refused to consider these valid motions for discovery.

These issues were properly objected to by the Petitioner, and the District Court appears to have made no direct determination on the issues.

It is well determined federal law that: "the court must fully consider and dispose of each distinct and separate point raised by the Petitioner." See, Flowers v. Blackburn, supra, cited in Johnson v. McCotter, 635 F.Supp. at 687. The issue appears plainly, on the same page of the Magistrate Report and Recommendation; therefore, it cannot have been merely overlooked. Furthermore, this factual determination is completely conflicted within the record. Thus, the State habeas court has plainly misapplied the factual and legal premises in the instant case.

In making the substantial showing for issuance of a COA, the Petitioner need not establish that he would prevail on the merits. Rather he must demonstrate that the issues are subject to debate among jurist of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. See, Slack, 429 U.S.

at 483-84. Any doubt whether to grant a COA is to be resolved in favor of the movant, and the severity of the penalty may be considered in making this determination., See, Miller v. Johnson, 200 F.2d, at 280-81

Therefore, the Court of Appeals for the Fifth Circuit, has, entered a decision in conflict with the decision of another United States court of appeals on the same matter; and has decided an important question of federal law in a way that conflicts with a decision by a state court of last resort; and/or has so far departed from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Furthermore, the United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and/or has decided an important question in a way that conflicts with relevant decisions of this Court.

V.

BRIEF IN SUPPORT OF QUESTION E:

Whether the federal courts are required to apply the proper standard when analyzing a claim?

Obviously, the answer to this question would be; Yes.

The Magistrate applied the standard contained within Pension v. Ohio, 488 U.S. 75 (1988), through the citation of Smith v. Robbins, 528 U.S. 259, 285-86 (2000). However, this standard would be for a constructive denial of appellate counsel.

This Honorable Court, has stressed that appellate counsel must master the trial record, thoroughly research the law, and exercise judgement in identifying the arguments that may be advanced on appeal. See, McCoy v. Court of Appeals, 486 U.S. 429, 439 (1988) in the instant case, appellate counsel failed to adequately expand the records prior to the appellate court's hearing of the case, which resulted in the denial of the ground on appeal. See, Question D: *supra*, incorporated by reference herein. (Appendix - C, at 13)

Even arguendo, Smith v. Robbins, is the proper standard, the Petitioner has still met the requirements, as the Court of Appeals admitted it was unable to determine the issues based upon the record before the Court. (Slip Op. at 7, Appendix - C, at 13)

As such, the Court of Appeals has admitted that had a sufficient record been developed, then the ground would have prevailed.

In making the substantial showing for issuance of a COA, the Petitioner need not establish that he would prevail on the merits. Rather he must demonstrate that the issues are subject to debate among jurist of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. See, Slack, 429 U.S. at 483-84. Any doubt whether to grant a COA is to be resolved in favor of the movant, and the severity of the penalty may be considered in making this determination., See, Miller v. Johnson, 200 F.2d, at 280-81

Therefore, the Court of Appeals for the Fifth Circuit, has, entered a decision in conflict with the decision of another United States court of appeals on the same matter; and has decided an important question of federal law in a way that conflicts with a decision by a state court of last resort; and/or has so far departed from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Furthermore, the United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and/or has decided an important question in a way that conflicts with relevant decisions of this Court.

VI.

BRIEF IN SUPPORT OF QUESTION F:

When does the period for the purposes of limitations begin under 28 U.S.C. § 2244(d)(1)?

In the instant case, the Petitioner points directly to 28 U.S.C. § 2244(d)(1)(D), (Appendix - K) Which states: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Ibid.

The AEDPA's statutory limitations period may be tolled for equitable reasons. Equitable tolling requires (1) due diligence pursuant of rights, and (2) extraordinary circumstances. Furthermore, '[A] procedural default will not bar a federal

habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was counsel or counsel in the proceeding was ineffective." Martinez v. Ryan, --- U.S. ---, 130 S.Ct. 1309 (2012)

This Honorable court focused this concept of equitable excusal for procedural default on the unique nature of Texas proceedings. Martinez v. Ryan, held that trial counsel's ineffective performance at the 'intial review" collateral proceedings would permit a habeas applicant to pass through in spite of his procedural fault. In Texas, however, where ineffective assistance of counsel can be raised initially on direct appeal, the court's holding in Martinez, would have little value because the claim could be established independently of any deficient performance on collateral attack.

Of course, in Texas, the mere fact that an appellant may in fact be entitled to raise a claim of ineffective assistance does not mean that direct appeal in Texas affords him a meaningful opportunity to do so. To correct this gap in equity, this Honorable Court concluded that, in light of Texas, unique procedures for ineffective assistance of counsel claim -- the practical effect of those procedures being the marginalization of ineffective assistance claims by preventing further development of the record -- ineffective assistance of counsel at the state habeas level could still warrant relief under Martinez v. Ryan, See, Trevino v. Thaler, --- U.S. ---, 133 S.Ct. 1911, 1921

(2013)-("For these reasons, we conclude that where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in Martinez, applies.")

In the instant case, the Petitioner attempted to return to the Texas Court of Criminal Appeals with newly discovered evidence, the affidavit of "Janette Evelyn Parker," a mere forty-two (42) days after obtaining the sworn affidavit. The Texas Court of Criminal Appeals, as enunciated in this Honorable Court in Trevino v. Thaler, *supra*, failed to give the ground any meaningful opportunity to be heard. However, to satisfy the exhaustion requirement, the petitioner attempted to seek remedies in said court. A mere sixty (60) days after refusal in the Texas Court of Criminal Appeals, of the issues contained within the affidavits, the Petitioner presented the claim to the Federal Court in Beaumont.

A sworn affidavit, from a relevant witness, in the instant case, were not procurable through due diligence, outside the actual initiation of said instrument. Therefore, the petitioner has not been sleeping on his right's, but diligently pursuing them through a system that inadequately protected said rights. See, Ryan v. Gonzalez, --- U.S. ---, 133 S.Ct. 969 (2013)

The Petitioner has satisfied the Martinez/Trevino, exception to the procedural default. The Petitioner has been unable to

locate any specific precedence of this Honorable Court under 28 U.S.C. § 2244(d)(1)(D). (Appendix - K) Instead, every case located concerning time limitations focuses on: 28 U.S.C. § 2244(d)(1)(A-C)(Appendix - K) This quandary is best explained by the fact that newly discovered evidence is well defined and clearly established as unavailable until discovered. In cases such as the case at bar, the period of limitation applied pursuant to 28 U.S.C. § 2244, does not begin until issuance of said affidavit.

Again, the affidavit was sworn to and notarized on May 3, 2011; On June 14, 2011, the petitioner attempted to present the claims to the Texas Court of Criminal Appeals, who then dismissed the writ application without a written order. On or about, August 26, 2011, the Petitioner presented an Amended Petition in the Federal Court for consideration. (Appendix - R)

In making the substantial showing for issuance of a COA, the Petitioner need not establish that he would prevail on the merits. Rather he must demonstrate that the issues are subject to debate among jurist of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. See, Slack, 429 U.S. at 483-84. Any doubt whether to grant a COA is to be resolved in favor of the movant, and the severity of the penalty may be considered in making this determination., See, Miller v. Johnson, 200 F.2d, at 280-81

Therefore, the Court of Appeals for the Fifth Circuit, has,

entered a decision in conflict with the decision of another United States court of appeals on the same matter; and has decided an important question of federal law in a way that conflicts with a decision by a state court of last resort; and/or has so far departed from the accepted and usual course of judicial proceedings, and/or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Furthermore, the United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and/or has decided an important question in a way that conflicts with relevant decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



John Douglas Mitchell, Jr.
TDCJ-ID # 1315658

Date: 05-05-2018