RECEIVED
SEP 26 2005
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT - 3 2005
CLERK, U.S. DISTRICT COURT
By ______
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CARLOS JIMENEZ, Petitioner,	§ § §	
	§	CIVIL ACTION NO. 6:05-CV-052-C
	§	
DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent.	§ § § § §	

RESPONDENT DRETKE'S ANSWER WITH BRIEF IN SUPPORT

Petitioner Carlos Jimenez ("Jimenez")[1] was properly convicted and sentenced to forty-three years imprisonment by a Texas state court for burglary of a habitation. Jimenez now seeks habeas corpus relief in this court pursuant to 28 U.S.C. § 2254, which provides the court with jurisdiction over the subject matter and the parties. The writ should be dismissed with prejudice as untimely pursuant to 28 U.S.C. § 2244(d). Alternatively, the writ should be denied because Jimenez has failed to establish that he is entitled to habeas corpus relief. The Director also denies all of Jimenez's assertions of fact except those supported by the record or specifically admitted herein.

STATEMENT OF THE CASE

The Director has lawful custody of Jimenez pursuant to a judgment and sentence in the 119th District Court of Tom Green County, Texas in cause number CR91-0528-B, styled *The State of Texas v. Carlos Jimenez.* Tr 35-39 (Judgment).[2] Jimenez was charged with burglary of a habitation, enhanced by one prior felony conviction. *Id.* at 1 (Indictment).

---

[1] For purposes of clarity, Respondent Doug Dretke will be referred to as "the Director" and the Texas Department of Criminal Justice, Correctional Institutions Division will be referred to as "TDCJ-CID."

[2] "Tr" refers to the transcript of papers filed in the trial court and followed by the page number. "SF" refers to the statement of facts of the guilty plea and probation revocation hearings, preceded by the volume number and followed by the page number.

Jimenez pleaded "guilty" to the charge and "true" to the enhancement paragraph. 2 SF 5. On November 12, 1991, pursuant to a plea agreement, Jimenez was placed on deferred adjudication probation for five years. 2 SF 14-15; Tr 15-25. Jimenez did not appeal this judgment.

In March 1995, the State moved to proceed with an adjudication of guilt. Tr 26-28. On November 6, 1995, the trial court held a hearing, adjudicated guilt,[3] and sentenced Jimenez to forty-three years confinement. 3 SF 115-18; Tr 35. Jimenez filed a motion for new trial and notice of appeal. Tr 47-49. The Third Court of Appeals dismissed the appeal for want of jurisdiction, because the notice of appeal did not meet the requirements of TEX. R. APP. PROC. 40(b)(1). *Jimenez v. State*, No. 03-96-00123-CR (Tex. App.—Austin, delivered September 11, 1996). Jimenez did not file a petition for discretionary review.

Jimenez filed a state application for writ of habeas corpus on April 11, 2002. *Ex parte Jimenez*, No. 74,433 (Application No. 53,212-01). The Court of Criminal Appeals granted Jimenez relief in the form of an out-of-time appeal. *Id.* (Tex. Crim. App. opinion delivered September 25, 2002).

The Court of Appeals subsequently issued an opinion affirming Jimenez's conviction in an unpublished opinion on Mary 15, 2003. *Jimenez v. State*, No. 03-02-00733-CR (Tex. App.–Austin 2003);[4] *Ex parte Jimenez*, No. 53,212-02, at 87-90 (copy of appellate opinion). His petition for discretionary review ("PDR") was ultimately refused on October 8, 2003. *Jimenez v. State*, PDR No. 937-03.

On December 6, 2004, Jimenez filed a state writ application for writ of habeas corpus challenging this conviction. *Ex parte Jimenez*, No. 53,212-02, at 17. The Texas Court of

---

[3] Jimenez entered pleas of "not true" to the allegations in paragraphs one and three, and plead of "true" to the allegations in paragraphs two and four in the State's Motion to Proceed. 3 SF 14.

[4] Jimenez's attorney on appeal filed an *Anders* brief in which he concluded that after a review of the record and the related law, the appeal was wholly frivolous and without merit. *Jimenez v. State*, No. 03-02-00733-CR; *see Anders v. California*, 386 U.S. 738 (1967).

Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on June 29, 2005. *Id.* at cover. Subsequently, Jimenez filed this action with the court on July 19, 2005. Fed. Writ Pet. at 9.

PETITIONER'S ALLEGATIONS

The Director understands Jimenez to allege the following grounds of error:

1. The trial court judge was not neutral and detached at the revocation/sentencing hearing, but was bias;

2. His guilty plea in 1991 was unlawfully coerced and involuntary;

3. He was denied effective assistance of counsel at his guilty plea proceeding when his attorney, Charlotte Harris, failed to: (a) explain the meaning of deferred adjudication probation; (b) explain the consequences of his plea; (c) explain that the enhancement paragraph would increase his punishment if his probation would later be revoked; and (d) give him correct advice and misled him at trial; and

4. He was denied effective assistance of counsel at his probation revocation proceeding when his attorney, Louis Perez, (a) erroneously advised him that he would be reinstated to probation; (b) told him he would receive the State's recommendation or "plea agreement" of 15 years; and (c) failed to object to the trial judge's bias and move for recusal of Judge Sutton.

Fed. Writ Pet. at 7-8, 10-21.[5]

STATE COURT RECORDS

Copies of Jimenez's state court records were forwarded to the court under separate cover. A copy of the record has not been sent to Jimenez.

EXHAUSTION OF STATE COURT REMEDIES

The Director believes that Jimenez has sufficiently exhausted his state remedies as required by 28 U.S.C. § 2254(b)(1) with regard to allegations above. Further, the Director

---

[5] Jimenez inserted twelve additional typed-written pages to his federal petition. *See* Fed. Writ Pet. at 10-21.

reserves the right to raise exhaustion/procedural default should Jimenez contend that he raised more than the issues listed above, or should he amend his petition with additional issues, other than those stated herein.

ANSWER WITH BRIEF IN SUPPORT

I. Jimenez's claims are time-barred.

As Jimenez's petition was filed on July 19, 2005,[6] this petition is subject to review under the amendments to the federal habeas corpus statutes embodied in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C.A. § 2254; *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (holding the AEDPA only applies to those noncapital habeas corpus cases filed after its effective date of April 24, 1996).

The AEDPA provides a one-year period for filing federal habeas corpus petitions by persons in custody pursuant to the judgment of a State court. 28 U.S.C.§ 2244(d)(1) (2002). Section (d)(1) provides four different scenarios which start the running of the one-year limitations period, and the period runs from the latest of the four scenarios. 28 U.S.C. §2244(d)(1)(A)-(D). As it relates to this motion, the AEDPA provides that:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

---

[6] *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (for purposes of determining the applicability of the AEDPA, a federal petition is filed on the date it is placed in the prison mail system). Thus, the instant petition could not have been "filed" sooner than July 19, 2005, the date Jimenez signed it. Fed. Writ Pet. at 9.

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (2004).

Since Jimenez attacks the proceedings associated with his 1991 guilty plea and subsequent probation revocation proceeding both in the 119th District Court of Tom Green County, Texas in cause number CR91-0528 B, Fed. Writ Pet. at 2, the one year period of limitation ran from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. §2244(d)(1)(A).

1991 Guilty Plea Proceeding

First, applying the one-year limitation period contained within § 2244(d), to Jimenez's petition results in a conclusion that it is untimely and barred by the statute of limitations. Jimenez complains that his guilty plea was involuntary and his attorney, Charlotte Harris, was ineffective during the 1991 plea proceedings. Under Texas law, when a defendant pleads guilty and receives deferred adjudication community supervision, he may raise issues relating to the original plea proceeding, including the sufficiency of the evidence to support a finding of guilt, only in appeals taken when deferred adjudication community supervision is first imposed. *See Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999). He may not wait to raise such issues in appeal from revocation of deferred adjudication community supervision. *See Manuel v. State*, 994 S.W.2d at 661. In Jimenez's case, the trial court order deferring an adjudication of guilt was dated November 12, 1991.

Tr 15-25. Under state law, in order to complain about matters related to his guilt, Jimenez was required to file his notice of appeal within thirty days after deferred adjudication community supervision was first imposed, that is, on or before December 12, 1991. *See* TEX. R. APP. P. 26.2(a)(1) ("The notice of appeal must be filed within 30 days . . . after the day the trial court enters an appealable order"); *Manuel v. State*, 994 S.W.2d at 661. When Jimenez failed to file such a timely notice of appeal, the federal limitation period began running at the "expiration of the time for seeking such [direct] review," that is, on December 12, 1991. *See* 28 U.S.C. § 2244(d)(1)(A); *see also Flanagan v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998) (where party entitled to file petition for writ of certiorari but fails to file such petition, federal habeas corpus statute of limitation begins running at expiration of period during which party could have filed such petition). For federal limitation purposes, the placement on deferred adjudication probation became final on that date. The one-year statute of limitations was set to expire on December 12, 1992.[7] *See Wilkinson v. Cockrell*, 240 F. Supp. 2d 617, 620-22 (N.D. Tex. 2002), and cases cited therein. *But see Daugherty v. Dretke*, No. 3:01-CV-0202-N, 2003 WL 23193260 (N.D. Tex. 2003), slip op. at 6-8; *Vidal v. Cockrell*, No. 3:02-1062-M, 2003 WL 21448365 (N.D. Tex. 2003), slip op. at 1; *Standridge v. Cockrell*, No. 4:02-CV-462-Y 2002 WL 31045977 (N.D. Tex. 2002), slip op. at 3; *Jamme v. Cockrell*, No. 3:01-CV-1370-L 2002 WL 1878403 (N.D. Tex. 2002), slip op. at 3; *Cutrer v. Cockrell* No. 3:01-CV-0841-D, 2002 WL 1398558 (N.D. Tex. 2002), slip op. at 2-3; *Smith v. Cockrell*, No. 3:02-CV-0503-M 2002 WL 1268016 (N.D. Tex. 2002), slip op at 2; *Crenshaw v. Cockrell*, No. 4:01-CV-405-Y 2002 WL 356513 (N.D. Tex. 2002), slip op. at 5; *Jordan v. Cockrell*, No. 3:01-CV-1162-G 2001 WL 1388015 (N.D. Tex. 2001), slip op. at 2. However, in cases where the limitation period expired before the AEDPA's enactment, the petitioner is

---

[7] The Fifth Circuit is considering the issue of when the AEDPA statute of limitations period begins in a deferred adjudication context when the federal petitioner is complaining about matters related to his guilt. *Caldwell v. Dretke*, No. 03-40927, consolidated with *Martinez v. Dretke*, No. 03-20900, and *Beck v. Dretke*, No. 04-10062.

provided with a reasonable time in which to file a federal habeas petition. *United States v. Flores*, 135 F.3d 1000, 1004-1006 (5th Cir. 1998). The one-year grace period began to run with the passage of the AEDPA on April 24, 1996, and it closed on April 24, 1997. *See Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998) (establishing April 24, 1997 as the last day of the grace period to file a timely federal writ petition). Jimenez's federal petition, filed July 19, 2005, *see* Fed. Writ Pet. at 9, was over eight years too late.

1995 Revocation Proceeding

So long as a federal habeas petitioner is being held pursuant to the same state court judgment, nothing under the federal habeas corpus statute of limitation allows a collateral state court actions to terminate a properly begun federal limitation period. *See Salinas v. Dretke*, 354 F.3d 425, 430 (5th Cir. 2004). The federal statute of limitation applicable to a habeas petition is tolled while a state prisoner uses state collateral proceedings to request from the Texas Court of Criminal Appeals the right to pursue an out-of-time appeal. *Id.* (stating that the federal limitation period is tolled while a state prisoner, using the state habeas process, seeks permission to file an out-of-time PDR). When a state prisoner convicted by a Texas court gains from the Court of Criminal Appeals the right to pursue an out-of-time appeal, the federal habeas corpus limitation period is tolled until that state appellate process is ended. *See id.* (stating that the federal limitation period is tolled until the Court of Criminal Appeals declines to grant further relief after the applicant was granted permission to file an out-of-time PDR). The federal limitation statute does not, however, require a federal court to restart the running of the federal limitation period altogether. *Id.* (construing state law applicable to PDR). The right to pursue an out-of-time appeal is the product of the state habeas review process and not part of the direct review process. *Id.* (same).

As mentioned above, after the trial court imposed sentence in open court on November 6, 1995, Jimenez had thirty days in which to file his notice of appeal. *See* TEX.

R. APP. P. 26.2. When he failed to file a proper notice, the time for seeking direct review expired at the end of that thirty-day period on December 6, 1995. *See* § 2254(d)(1)(A). Ordinarily, under the federal limitation statute, Jimenez would have had one year from the expiration of time for seeking direct review in which to file his federal petition. *See* §2244(d)(1). Where, however, a petitioner's conviction became final before the effective date of the AEDPA, the petitioner has a one-year grace period, up to and including April 24, 1997, during which he may file his federal habeas corpus petition. *See United States v. Flores,* 135 F.3d 1000, 1006 (5th Cir. 1998). Because Jimenez's conviction became final by expiration of the time period for seeking direct review before the effective date of the AEDPA, he was entitled to the one-year grace period, up to an including April 24, 1997, in which to file his federal habeas petition. *See id.* Absent tolling, *see* § 2244(d)(2)), Jimenez would have had to file his federal habeas petition by that date. *See Flores,* 135 F.3d at 1006.

Even though as part of the state habeas process, Jimenez received permission to pursue an out-of-time appeal, *Ex parte Jimenez*, No. 74,433, such a out-of-time appeal is relevant only to the issue of statutory tolling. *See Salinas*, 354 F.3d at 430. The out-of-time appeal does not reset the federal limitation stopwatch to "zero." *See id.* As for statutory tolling, moreover, *see* § 2244(d)(2), although Jimenez filed two state applications for post-conviction relief, because the applications were filed April 11, 2002, *Ex parte Jimenez*, Application No. 53,212-01, at 10 (date stamp), and December 6, 2004, *Ex parte Jimenez*, Application No. 53,212-02, at 17, both dates after the expiration of the one-year grace period on April 24, 1997, the applications did not serve to toll the running of the limitation period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (stating that where a state habeas application is not filed until after the federal limitation period had expired, under §2244(d)(2), the filing does not toll the limitation period).

Because neither of his state writ applications tolled the running of the limitation period, *see Scott*, 227 F.3d at 263, Jimenez was required to file his federal habeas corpus

petition by the expiration of the grace period, April 24, 1997. *See Flores,* 135 F.3d at 1006. Instead, Jimenez filed his federal petition on July 19, 2005, Fed. Writ Pet. at 9, more than eight years after the grace period expired. Jimenez also does not show a state-created impediment to the filing of his application, *see* § 2244(d)(1)(B), a recently recognized constitutional right, *see* § 2244(d)(1)(C), or recently discovered factual predicate, *see* § 2244(d)(1)(D). Jimenez's petition for federal post-conviction relief is barred by the statute of limitation.

The record does not reflect that any unconstitutional "State action" impeded Jimenez from filing for federal habeas corpus relief prior to the end of the limitations period. 28 U.S.C. § 2244(d)(1)(B). Furthermore, Jimenez has not shown that he could not have discovered the factual predicate of his claims until a date subsequent to the date his conviction became final. 28 U.S.C. § 2244(d)(1)(D). In fact, all the claims that Jimenez raises in this action were either available to him when he pled guilty in 1991 and was adjudicated guilt and sentenced on November 6, 1995, and he advances no reason for his failure to file this action earlier. Finally, the claims do not concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review. 28 U.S.C. § 2244(d)(1)(c).

Additionally, any claims for equitable tolling should be denied. "Equitable tolling applies . . . where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Grooms v. Johnson*, 208 F.3d 488, 489-90 (5th Cir. 1999) (citing *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999)). The State did not mislead Jimenez. "In order for equitable tolling to apply, the applicant must diligently pursue his § 2254 relief." *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999). "[E]quity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (citing *Covey v. Arkansas River Co.*, 865 F.2d

660, 662 (5th Cir. 1989)).[8]

Moreover, it is well settled in this circuit that ignorance of the law and lack of legal assistance, even for an incarcerated prisoner, generally do not excuse prompt filing. *See Felder*, 204 F.3d at 171; *Fisher v. Johnson,* 174 F.3d 710, 714 (5th Cir. 1999), *cert. denied,* 121 S. Ct. 1124 (2001); *Davis v. Johnson,* 158 F.3d 806, 808-12 (5th Cir. 1998), *cert. denied,* 526 U.S. 1074 (1999); *Barrow v. S.S. Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991); *see United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993) (neither an inmate's illiteracy, deafness, or lack of legal training amounts to factors external to the inmate to excuse an abuse of the writ); *Moore v. Roberts*, 83 F.3d 699, 704 (5th Cir. 1996) (a petitioner's lack of interest in challenging prior convictions was not cause to excuse a procedural default), *cert. denied*, 519 U.S. 1093 (1997); *Saahir v. Collins*, 956 F.2d 115, 118-19 (5th Cir. 1992) (holding neither prisoner's *pro se* status nor ignorance of the law constitutes "cause" for failing to include a legal claim in his prior petition); *see also Flanagan v. Johnson*, 154 F.3d 196, 198-99 (5th Cir. 1998) (petitioner's failure to discover the significance of the operative facts does not constitute cause).

The record conclusively establishes that this federal petition was filed outside the AEDPA's one-year limitation period. Thus, consideration of Jimenez's entire federal writ petition should be dismissed with prejudice as barred by the federal habeas corpus statute of limitations.

---

[8] Any claim by Jimenez that he was not aware of the AEDPA statute of limitations; that he was actually innocent of the crime; that the prison law library did not have a copy of the AEDPA or that he was proceeding *pro se*, does not serve to toll the limitations period. *See Felder v. Johnson*, 204 F.3d 168, 172-73 (5th Cir.), *cert. denied*, 121 S. Ct. 622 (2000). Further, any claim that illegal denial of an appeal would toll the statute of limitations was foreclosed in *Molo v. Johnson*, 207 F.3d 773, 775-76 (5th Cir. 2000) ("[a] criminal defendant has a right to effective assistance of counsel on a first appeal as of right. An alleged violation of that right does not toll the AEDPA's statute of limitations."); *see also Cousin v. Lensing*, 310 F.3d 843, 849 (5th. Cir. 2002) (attorney mistake not entitled to tolling, especially where counsel waited so long).

THE MERITS OF GROUNDS OF ERROR

II. Standard of Review

As stated earlier, Jimenez's petition is governed by the heightened standard of review provided by the AEDPA. The provisions of Section 2254(d) set forth a "highly deferential standard for evaluating state-court rulings, . . . , which demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19 (2002) (internal citation omitted), *reh'g denied*, (2003). Here, the Petitioner may not obtain federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2004); *see Price v. Vincent*, 123 S. Ct. 1848 (2003); *see also Riddle v. Cockrell*, 288 F.3d 713, 716 (5th Cir.) (quoting 28 U.S.C. § 2254(d)(1)-(2)), *cert. denied*, 123 U.S. 420 (2002). Courts are to review pure questions of law and mixed questions of law and fact under subsection (d)(1), and pure questions of fact under subsection (d)(2). *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under this standard, a federal habeas corpus court's review is restricted to the reasonableness of the state court's "ultimate decision, not every jot of its reasoning." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (citing *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (noting that even where a state court makes a mistake in its analysis, "we are determining the reasonableness of the state court's 'decision,' . . . not grading their papers."), *cert. denied*, 535 U.S. 982 (2002). Indeed, the AEDPA deferential standard of review applies even where the state court fails to cite to applicable Supreme Court precedent or fails to explain its

decision. *Early v. Packer*, 537 U.S. 3, 7 (2002); *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002); *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 1156 (2004).

A decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Terry Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision is an unreasonable application of federal law "if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* To be unreasonable, the state decision must be more than merely incorrect or erroneous. *See Lockyer v. Andrade*, 123 S. Ct. 1166, 1174 (2003). Rather, the state court's application of clearly established law must be "objectively unreasonable." *Id.* Stated another way, a reversal is not required unless "the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.' " *Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001); *see Montoya v. Johnson*, 226 F.3d 399, 403-04 (5th Cir. 2000) (the standard for federal habeas relief is one of objective reasonableness.); *see also Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence"), *cert. denied sub nom. Neal v. Epps*, 123 S. Ct. 963 (2003).

Specifically, the AEDPA has "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002); *see Williams*, 529 U.S. at 404. A federal habeas court's inquiry into unreasonableness should be objective rather than subjective, and a court should not issue the

writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams*, 529 U.S. at 409-11; *Tucker v. Johnson*, 242 F.3d 617, 620-21 (5th Cir. 2001). Rather, federal habeas relief is only merited where the state court decision is both incorrect and objectively unreasonable. *Williams*, 529 U.S. at 411; *Martin v. Cain*, 246 F.3d 471, 476 (5th Cir. 2001). In other words, habeas relief is inappropriate when a state court, at a minimum, reaches a "satisfactory conclusion." *Williams,* 529 U.S. at 410-11 (citing *Wright v. West*, 505 U.S. 277, 287 (1992)).

In review of a state prisoner's federal habeas petition, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption *clear and convincing evidence*." 28 U.S.C. §2254(e)(1) (emphasis added); *see Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002); *see also Sumner v. Mata*, 449 U.S. 539, 546-47 (1981) (holding that state appellate courts' findings are entitled to the same respect that trial judges' findings receive). "The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell,* 274 F.3d 941, 948 n.11 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002).

Moreover, where the petitioner

> has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on–
>
> > (I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered

through the exercise of due diligence; and

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

28 U.S.C. § 2254(e)(2) (2004).

Thus, in the state courts, a petitioner "must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, Section 2254(e) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met." *Michael Williams v. Taylor*, 529 U.S. 420, 437 (2000).

Finally, pre-AEDPA precedent forecloses habeas relief if a claim (1) is procedurally barred as a consequence of a failure to comply with state procedural rules, *Coleman v. Thompson*, 501 U.S. 722 (1991); (2) seeks retroactive application of a new rule of law to a conviction that was final before the rule was announced, *Teague v. Lane*, 489 U.S. 288 (1989); or (3) asserts trial error that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted).

Jimenez has failed to even identify any clearly established Supreme Court precedent that supports his allegations. In each argument below, the Director clearly sets out Supreme Court precedent that disentitles Jimenez to federal habeas corpus relief under the AEDPA.

III. Jimenez has failed to meet his burden of proof.

First and most importantly, Jimenez has completely failed in meeting the burden of proof necessary to be granted relief under the AEDPA. The Texas Court of Criminal Appeals

denied Jimenez relief on these allegations on the merits.[9] Under the AEDPA, Jimenez must show that this decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1); *see discussion*, Part II *supra*. Jimenez has merely summarized the same allegations from his direct appeal, PDR, and state habeas application–without attempting to show an unreasonable application of federal law as determined by the Supreme Court. This is a mandatory predicate that cannot be ignored and must be satisfied in order to receive relief. The Director is under no legal obligation to do Jimenez's work for him and analyze these claims absent an attempt by Jimenez to meet his burden under the AEDPA. As such, because Jimenez has failed to meet his burden of proof, this court must deny relief.

IV. Jimenez cannot prove that he was denied a fair and impartial judge at his revocation hearing. (Claim No. 1).

Jimenez claims that was denied access to a fair and impartial judge at his probation revocation hearing. Fed. Writ Pet. at 7, 10-11. Essentially, he argues that the trial judge biased by failing to consider the evidence presented at the hearing, thus, rendering the proceeding unfair. *Id.* Jimenez, however, is not able to sustain his burden of proof.

All cases should begin with the presumption that the judicial officer is unbiased. *Schweiker v. McClure,* 456 U.S. 188, 195 (1982). In *Liteky v. United States*, 510 U.S. 540 (1994), the United States Supreme Court discussed the "extrajudicial source" doctrine. The Court first noted that the terms "bias" and "prejudice" "connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate . . . ." *Id.* at 550 (emphasis in original). The following passage from this opinion explains the kind of bias or prejudice requiring recusal:

---

[9] Because the Texas Court of Criminal Appeals refused Jimenez's PDR, *Jimenez v. State*, PDR 937-03, and then denied Jimenez's state habeas application without written order on the findings of the trial court without a hearing, *Ex parte Jimenez*, No. . 53,212-02, at cover, this court must "look through" to the last clear state court decision to determine if his allegations were "adjudicated on the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991).

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

Id. Regarding whether judicial rulings can establish bias, the Supreme Court observed that judicial rulings alone almost never constitute a valid basis for a recusal motion because they cannot possibly show reliance upon an extrajudicial source and can rarely evidence the degree of favoritism or antagonism required when no extrajudicial source is involved. *Id.* at 554-56. The Court further stated that opinions formed by the judge on the basis of facts introduced or events occurring during proceedings do not constitute a basis for a recusal motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Id.* Thus, the Supreme Court reasoned that judicial remarks during the course of a trial that are critical or disapproving or even hostile to counsel, parties, or their cases, ordinarily do not support recusal. *Id.* Such remarks may do so if they reveal an opinion deriving from an extrajudicial source and such remarks will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. *Id.*

Jimenez raised this claim on direct appeal which the court of appeals rejected as follows:

> In his first *pro se* point of error, appellant [Jimenez] urges that he was denied his due process right to a neutral and detached magistrate at the sentencing hearing. In effect, [Jimenez] argues that the district court did not consider any of the evidence adduced at the hearing but instead assessed a predetermined punishment. [Jimenez] relies on three opinions. In *Jefferson v. State*, 803 S.W.2d 470 (Tex. App.-Dallas 1991, pet. ref'd), the trial judge expressly promised the defendant at the time he deferred adjudication that he would assess the maximum punishment if the defendant violated his supervision. Later, at the adjudication hearing, the judge reminded the defendant of his

promise and imposed the maximum sentence. The court of appeals concluded that the judge denied the defendant due process by failing to give him a meaningful punishment hearing. *Id.* at 472. *Jefferson* was followed in *Howard v. State*, 830 S.W.2d 785 (Tex. App.-San Antonio 1992, pet. ref'd), and *Earley v. State*, 855 S.W.2d 260 (Tex. App.-Corpus Christi 1993), pet. dism'd, improvidently granted, 872 S.W.2d 758 (Tex. Crim. App. 1994). As in *Jefferson*, the records in *Howard* and *Earley* showed that the trial judge who revoked deferred adjudication supervision assessed a punishment that had been predetermined at the time supervision was granted, without considering any evidence that might have been adduced at the punishment hearing.

The record before us in this cause includes the original guilty plea proceeding. The court admonished [Jimenez] that if his supervision were to be revoked and his guilt adjudicated, he would be *subject* to the maximum punishment of ninety-nine years or life. The court added, "Now I don't know what you will get because I don't know all the facts that are involved, but if you believe it [that you will get the maximum] you will make it through it [without being revoked]." In other words, the court did not promise or otherwise bind itself to a predetermined punishment should supervision be revoked, but urged appellant to assume the worst as a means of motivating himself to obey the conditions of supervision.

In addition, the record from the adjudication and sentencing hearing reflects that the court assessed the punishment it did after considering all the evidence before it. The court told [Jimenez], "The P.S.I. reflects, Mr. Jimenez, a long and regular criminal history by you; including ... your prior aggravated assault with a deadly weapon.... And now we are having family violence arguments that you minimize.... You can't even admit to your own violent tendency there." [FN2] The court announced that the forty-three-year punishment determination was based on [Jimenez]'s "total history." We find no basis for concluding that the court denied due process by predetermining the punishment in advance of the hearing. Pro se point one is overruled.

> FN2. In addition to two violations of supervision admitted by [Jimenez], the court also found after hearing testimony that [Jimenez] assaulted his wife while on supervision, an allegation he denied.

We have reviewed the record, counsel's brief, and the pro se brief. We find nothing in the record that might arguably support the appeal.

Jimenez v. State, No. 03-02-00733-CR, slip op. *1-2. None of the judge's actions indicate

such a "high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555. Jimenez can obtain relief only by showing that "the judge was influenced by interest apart from the administration of justice and that this bias or prejudice resulted in rulings based on other than facts developed at trial." *Nethery v. Collins*, 993 F.2d 1154, 1157 (5th Cir. 1993), *cert. denied,* 511 U.S. 1026 (1994). Jimenez wholly fails to make this showing. Since the state courts' rejection of the claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, Jimenez is not entitled to relief.

V. Jimenez's guilty plea was both knowing and voluntary and there is no evidence of coercion. (Claim No. 2).

Generally, Jimenez asserts that his plea was involuntary, coerced, and he did not the consequences of his plea. Fed. Writ Pet. at 7, 12-13. Jimenez has not made out a claim for relief because he has not offered anything in support of his contention, and the record neither supports his claim that his guilty plea was involuntary nor coerced. Most importantly, the record clearly indicates that Jimenez's plea was both knowing and voluntary.

Any challenge to a conviction that was obtained by a guilty plea is limited to issues of voluntariness, the defendant's understanding of the charges against him, and his understanding of the consequences of the plea. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *Diaz v. Martin*, 718 F.2d 1372, 1376-77 (5th Cir. 1983) ("a plea of guilty is more than a confession of having acted culpably, it is itself a conviction."), *cert. denied*, 466 U.S. 976 (1984) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). Further, "[a] federal court will uphold a guilty plea challenged in a habeas corpus proceeding if the plea was knowing, voluntary and intelligent." *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995). *James* explains that:

> The critical issue in determining whether a plea was voluntary and intelligent is "whether the defendant understood the nature and substance of the charges against him, and not

> necessarily whether he understood their technical legal effect."

Id. at 666 (quoting *Taylor v. Whitley*, 933 F.2d 325, 329 (5th Cir. 1991), *cert. denied*, 503 U.S. 988 (1992)). With respect to the guilty plea, the "knowing" requirement that a defendant understand "the consequences" of a guilty plea means only that the defendant understand the maximum prison term and fine for the offense charged. *Ables v. Scott*, 73 F.3d 591, 592 n.2 (5th Cir. 1996), *cert. denied*, 517 U.S. 1198 (1996) (citing *United States v. Rivera*, 898 F.2d 442, 447 (5th Cir. 1990)). Further, a guilty plea is not involuntary or unintelligent because the defendant is not informed of all the possible collateral consequences flowing from the conviction. *See Johnson v. Puckett*, 930 F.2d 445, 448 (5th Cir.), *cert denied*, 502 U.S. 890 (1991); *United States v. Ballard*, 919 F.2d 255, 258 (5th Cir. 1990), *cert denied*, 499 U.S. 954 (1991); *United States v. Edwards*, 911 F.2d 1031, 1035 (5th Cir. 1990); *see also LeBlanc v. Henderson*, 478 F.2d 481, 483 (5th Cir. 1973) (The trial judge is not required to inform a defendant of parole eligibility.), *cert denied*, 414 U.S. 1146 (1974).

Moreover, plea bargaining itself does not render a resulting guilty plea involuntary. *United States v. Ariaza*, 693 F.2d 382, 384 (5th Cir. 1982); *see United States v. Rodriguez-De Maya*, 674 F.2d 1122, 1127 (5th Cir. 1984) (While a guilty plea must be voluntary, the inducement to plead guilty based on a plea bargain does not render the plea involuntary); *United States v. Johnson*, 679 F.2d 54, 59 (5th Cir. 1982) (Defendant having rejected the offer of a plea bargain, cannot complain that his co-defendants received the benefit of a lighter sentence.).

Lastly, a guilty plea cannot be attacked on the ground that it is involuntary because of an allegedly coerced confession unless the circumstances that coerced the confession have abiding impact and taint the plea. *McMann v. Richardson*, 397 U.S. 759, 769-70 (1970); *Barnes v. Lynaugh*, 817 F.2d 336 (5th Cir. 1987); *Long v. McCotter*, 792 F.2d 1338, 1340 n.5 (5th Cir. 1986); *Rogers v. Maggio*, 714 F.2d 35, 38 (5th Cir. 1983).

In the case at bar, Jimenez's claims are conclusory and must be dismissed as such. Under Rule 2(c) of the Rules Governing Section 2254 Cases, a petitioner is required to plead facts in support of his claims. Conclusory allegations do not state a claim for federal habeas corpus relief and are subject to summary dismissal. *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983); *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990).

Here, Jimenez has not alleged any specific facts showing that he was not adequately informed of the nature of the charge against him prior to his guilty plea in 1991. Jimenez clearly signed defendant's statements and waivers, stipulation of evidence, the statement of plea bargain, and the court's admonishments as evidenced by his signature. Tr 6-13. In addition to the written admonishments, the court admonished Jimenez in open court, "as a first degree felony the range of punishment is confinement in the State Penitentiary for a term of life or for a term of not less than five years or more than 99 years. In addition, a fine of up to but not exceeding $10,000.00 can be assessed." 2 SF 3; Tr 9. The court specifically informed Jimenez that because the indictment included an enhancement paragraph, if true, "the range of punishment becomes that of a repeat offender, from a minimum of fifteen years to 99 years in the penitentiary or life." 2 SF 3. Thus, after being fully admonished and pleading true to the enhancement, Jimenez still chose to plead guilty pursuant to a five year deferred adjudication probation plea agreement. 2 SF 4-6. Furthermore, Jimenez's claim that his plea was coerced should be dismissed as conclusory. *See Ross v. Estelle*, 694 F.2d at 1011. There is absolutely no evidence of coercion. In fact, on several occasions, the court asked Jimenez whether he was plead guilty out of fear, or had been "pressured, abused, or mistreated" or "persuaded" into pleading guilty. 2 SF 8. At each instance, Jimenez affirmed that his plea was voluntary, "yes, sir," or that he was not pressured into pleading guilty, "no sir." *Id.*

As the Supreme Court noted in *Blackledge v. Allison*, 431 U.S. 63, 74 (1977), a petitioner must vault the formidable barrier that "solemn declarations in open court carry a

strong presumption of verity." Jimenez has the burden to rebut the presumption of regularity accorded these records. 28 U.S.C. § 2254(e)(1); *see Bonvillain v. Blackburn*, 780 F.2d 1248, 1250 (5th Cir.) ("in a habeas proceeding, the petitioner has the burden of proving that he is entitled to relief."), *cert. denied*, 476 U.S. 1143 (1986). Jimenez's solemn declarations at the guilty plea hearing undermine his claims of an involuntary plea, and his unsupported allegations of coercion are not enough to require an evidentiary hearing. *Blackledge*, 431 U.S. at 74; *Banda v. Estelle*, 519 F.2d 1057 (5th Cir.), *cert. denied*, 423 U.S. 1024 (1975); *see also Rogers v. Maggio*, 714 F.2d 35, 38 n.5 (5th Cir. 1983) (A defendant who at a plea hearing answered "no sir" to question whether he had been threatened, coerced, or promised anything in return for pleading guilty was bound by such answer in his claim for federal habeas relief and was not entitled to evidentiary hearing on issue of whether he was coerced into pleading guilty.) (citing *Moya v. Estelle*, 696 F.2d 329, 332-33 (5th Cir.1983)). Jimenez's plea was therefore completely voluntary.

Once a criminal defendant has entered a guilty plea, all non-jurisdictional defects in the proceedings are waived except claims of ineffective assistance of counsel relating to the voluntariness of the plea. *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983) (finding that ineffectiveness claims alleging failure to review the prosecutor's file to verify laboratory tests, and failure to investigate witnesses and the legality of arrest were waived by a voluntary guilty plea), *cert. denied*, 466 U.S. 906 (1984) (citing *Barrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982)). "A plea of guilty is more than a mere confession, it is an admission that the defendant committed the charged offense." *Taylor v. Whitley*, 933 F.2d at 327 (citing *North Carolina v. Alford*, 400 U.S. 25, 32 (1970)). Since a plea of guilty is a conviction, nothing remains but to enter judgment and determine punishment. *Boykin v. Alabama*, 395 U.S. at 242 (citing *Kercheval v. United States*, 274 U.S. 220, 223 (1927)). A plea of guilty and the ensuing conviction encompass all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. *United States*

v. Broce, 488 U.S. 563, 569 (1989). Therefore, because Jimenez's guilty plea was voluntary, he has waived all allegations of ineffective assistance of counsel that occurred *prior* to his plea. As such, the state court's determination to deny relief was not in conflict with clearly established Federal law or "based on an unreasonable determination of the facts in light of the evidence", accordingly, relief must be denied. 28 U.S.C. § 2254(d).

VI. The state court's determination to deny relief to Jimenez's ineffective assistance of counsel claims as to his guilty plea must be upheld. (Claim #3).

Next, Jimenez asserts that he was denied effective assistance of counsel at his guilty plea proceeding when his attorney, Charlotte Harris, failed to: (a) explain the meaning of deferred adjudication probation; (b) explain the consequences of his plea; (c) explain that the enhancement paragraph would increase his punishment if his probation would later be revoked; and (d) give him correct advice and misled him at trial. Fed. Writ Pet. at 8, 14-16. These allegations of ineffectiveness, however, are refuted by the record and by Ms. Harris.

"[E]ffective assistance of counsel on the entry of a guilty plea requires that counsel ascertain whether the pleas are entered voluntarily and knowingly." *Randle v. Scott*, 43 F.3d 221, 225 (5th Cir.), *cert. denied*, 515 U.S. 1108(1995) (citing *United States v. Diaz*, 733 F.2d 371, 376 (5th Cir. 1984)). To obtain habeas relief based on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that her counsel's performance was deficient, and that the deficient performance of counsel prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Hill*, the Supreme Court held that the two-prong test enunciated in *Strickland* applies to cases involving guilty pleas. *Hill v. Lockhart*, 474 U.S. at 57.

To establish deficiency under *Strickland*, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. This objective standard is "highly deferential" and includes a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Strickland, 466 U.S. at 689. Counsel's deficient performance must not cause the outcome to be unreliable or the proceeding to be fundamentally unfair: "[U]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Armstead v. Scott*, 37 F.3d 202, 207 (5th Cir. 1994) (quoting *Lockhart v. Fretwell*, 506 U.S. 364 (1993)).

To establish prejudice under *Strickland*, a defendant must show that "there is a reasonable probability that, *but for* counsel's unprofessional error, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). It is not sufficient that the petitioner merely allege a deficiency on the part of counsel; he must "affirmatively prove" prejudice in his petition. *Id.* 466 U.S. at 693. The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate that ineffectiveness by a preponderance of the evidence. *Martin v. Maggio*, 711 F.2d 1273, 1279 (5th Cir. 1983), *cert. denied,* 469 U.S. 1028 (1984); *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied*, 508 U.S. 978 (1993).

In deciding ineffective assistance claims, a court need not address both prongs of the *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test. *Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994). According to the Supreme Court, a defendant who pleads guilty can satisfy the prejudice prong of *Strickland* only by alleging that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. at 59; *see Woodward v. Collins*, 898 F.2d 1027, 1029 (5th Cir. 1990); *Craker v. McCotter*, 805 F.2d 538, 541 (5th Cir. 1986). Thus, a petitioner must demonstrate that counsel was deficient, and that the deficiency prejudiced his case.

Additionally, in *Ross v. Estelle*, 694 F.2d at 1011, the Fifth Circuit held that conclusory allegations of ineffectiveness are inadequate upon which to base federal habeas corpus relief, stating that "[a]bsent evidence in the record, a court cannot consider a habeas

petitioner's bald assertions on a critical issue in her *pro se* petition (in state and federal court), unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Id.*

Here, the record reflects that Jimenez was fully admonished in writing and in open court regarding the nature of the charges against him, his rights in the criminal process, and the consequences of his guilty plea. 2 SF 2-15; Tr 6-13. Further, considering Jimenez was placed on deferred adjudication probation for only five years for burglary of a habitation-enhanced in accordance with a plea agreement rather than the alternative life sentence, defense counsel certainly could not have done more. *See id.*; *see also Ex parte Jimenez*, No. 53,212-02, at 52-53 (affidavit of Charlotte Harris). Consequently, his claims that counsel was ineffective lack merit. *See Haynes v. Butler*, 825 F.2d 921, 924 (5th Cir. 1987) ("having entered a guilty plea, [a habeas petitioner's] sixth amendment challenge is limited to the issues of voluntariness and his understanding of the nature of the charges brought against him and the consequences of his plea."); *Smith v. Estelle*, 711 F.2d at 682 (guilty plea waived all claims of attorney error unrelated to the guilty plea including claims of failure to review the prosecutor's file, failure to investigate witnesses, and failure to investigate the legality of petitioner's arrest); *Richardson v. Beto*, 472 F.2d 169, 170 (5th Cir. 1973) (holding that a valid guilty plea waives all non-jurisdictional defects in prior proceedings, including deficiencies in pre-trial identification procedures); *Smith v. Smith*, 433 F.2d 582, 584 (5th Cir. 1970) (same).

Moreover, when considered as a whole, Jimenez's allegations represent nothing more than attempts by defense counsel to limit the penalty that Jimenez would be subject to, and by the state prosecutor to negotiate an acceptable plea bargain. *See United States v. Cothran*, 302 F.3d 279, 284 (5th Cir. 2002) ("a defense lawyer's stern warnings about the client's chances of success at trial, the potential for prison time, and the lawyer's potential withdrawal do not compromise voluntariness"); *Uresti v. Lynaugh*, 821 F.2d 1099, 1101-02

(5th Cir. 1987) (found plea to be voluntary where defense counsel warned defendant that he would be lucky to get 99 years if he went to trial and threatened to withdraw if client pleaded not guilty); *Jones v. Estelle*, 584 F.2d 687, 690 (5th Cir. 1978) (held that a claim that an attorney's "impatience and stern demand for a quick answer, when added to the threat of a life sentence if the case went to trial," was insufficient to show that mental coercion overcame the Petitioner's free will in making a guilty plea); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'–and permissible–'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' [. . .] It follows that, by tolerating and encouraging the negotiation of pleas, the Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.") (citation omitted); *Brady v. United States*, 397 U.S. 742, 752 (1970) ("For the State there are also advantages [to plea bargaining]–the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.").

Thus, since the state courts' rejection of the claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, Jimenez is not entitled to relief.

VII. Counsel rendered effective assistance at the revocation hearing and Jimenez's contrary allegations should be dismissed as conclusory. (Claim #4).

Finally, Jimenez complains that his attorney, Louis Perez, was ineffective at his probation revocation proceeding for: (a) erroneously advising him that he would be reinstated

to probation; (b) telling him he would receive the State's recommendation or "plea agreement" of 15 years; and (c) failing to object to the trial judge's bias and move for recusal of Judge Sutton. Fed. Writ Pet. at 16-21. In light of Jimenez's "true" pleas to two of the four violations of probation, 3 SF 14, none of the allegations include proof of prejudice; therefore, Jimenez is not entitled to relief. Jimenez blames the revocation of his probation on his attorney. In fact, it is clear that, according to Jimenez, everyone else is responsible for him being in prison, but Jimenez.[10] In fact, a review of the entire record reflects that counsel was very effective.

The burden of proof in a habeas corpus proceeding attacking the effectiveness of counsel is on the petitioner, who must demonstrate both ineffectiveness and resultant prejudice. *Carson v. Collins*, 993 F.2d 461, 466 (5th Cir.), *cert. denied*, 510 U.S. 897 (1993). While there is a limited right to counsel in a parole revocation context, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973),[11] Jimenez has failed to produce Supreme Court authority establishing the level of representation that a probationer or parolee is entitled to. The Director is certainly not ready to concede that a parolee or probationer is entitled to the same level of representation that a criminal defendant is entitled to receive under *Strickland v. Washington*, 466 U.S. at 668; therefore, until Jimenez produces Supreme Court authority as to the standard of review that is applied to an ineffectiveness claim in a probation or parole

---

[10] Specifically, Jimenez (1) caused bodily injury to Teresa Barron by kicking her with his feet; (2) failed to report in person to the Community Supervision and Corrections Department of Tom Green County . . . on 21 separate occasions between April 6, 1993 and February 14, 1995; (3) failed to report his arrest of August 26, 1994 to the adult probation officer within 48 hours of said arrest, as ordered by the Court; and (4) failed to make payments in the amount of $10.00 and $50.00 as ordered by the Court on 25 separate occasions between February 1, 1992 and January 1, 1995; and further failed to make payments as ordered by the Court as of February 25, 1995, for Probation fees in the amount of $550.84, and Urinalysis in the amount of $17.00. Tr 32-33 (State's First Amended Motion to Revoke Deferred Adjudication Probation). Jimenez pled "not true" to violation numbers one and three, and pled "true" to violation numbers two and four. 3 SF 14, 18; Tr 35.

[11] *Gagnon v. Scarpelli*, 411 U.S. at 782 (the Supreme Court held that there was no difference between parole and probation revocations for purposes of a due process analysis).

revocation context, this allegation is *Teague*[12]/AEDPA barred.

In the alternative, and in the interest of disposing of this claim, the Director will apply the *Strickland* analysis. The familiar standard by which a claim of ineffective assistance of counsel is weighed is set forth in *Strickland v. Washington*, 466 U.S. at 687. In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 687-88. In so doing, a convicted defendant must overcome a strong presumption that the conduct of his trial counsel fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 687-91; *Loyd v. Whitley*, 977 F.2d 149, 156 (5th Cir. 1992), *cert. denied*, 508 U.S. 911 (1993).

"[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the constitution." *Strickland*, at 692. In order to establish that he has sustained prejudice, the convicted defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the case would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* at 694; *Loyd*, 977 F.2d at 159.

In response to these allegations of ineffectiveness on state writ, Mr. Perez submitted an affidavit stating, in part, the following:

> Carlos Jimenez could not plea true to Paragraph III, No. 1 and Paragraph III, No. 4 because he sincerely believed in his heart that he was not guilty of said alleged violations. Therefore, *there was no formal plea bargain agreement* because Carlos and I, as his attorney, were hopeful that he would be continued on probation.
>
> On November 6, 1995, the Motion to Revoke Deferred Adjudication hearing took place before Judge John E. Sutton. There was *no actual plea bargain* because Carlos Jimenez would not and could not in good conscience plea true to the allegations that he insisted were not true.

---

[12] *Teague v. Lane*, 489 U.S. at 288.

> Mr. Evans Jones advised that he would recommend fifteen (15) years in the Institutional Division of the Texas Dept. of Criminal Justice, if the Court revoked Mr. Jimenez' probation. Mr. Jones did recommend the fifteen (15) years . . . .
>
> I swear that I did present the fifteen (15) years plea bargain to my client, Carlos Jimenez. Mr. Jimenez did not plea true to all the allegations. Mr. Jimenez and I were hoping that he would be reinstated and continued on probation by the Court.
>
> The Court did not follow Mr. Jones' recommendation, nor Elaine Moore's, nor defense attorney's request; therefore, the court assessed forty-three (43) years . . . .
>
> I further swear under oath, that during the time that I represented Carlos Jimenez, I did everything possible in preparing for his defense. I explained the possible consequences with each strategy involved or taken. At that time, both Carlos and I, his attorney, felt that the strategy taken under said circumstances was reasonable. To say, now, that things did not work out as we thought is a major understatement. I . . . was shocked and disappointed by the results of the hearing of November 6, 1995.

Ex parte Jimenez, No. 53,212-02, at 35-36 (affidavit of Louis Perez) (emphasis added). Here, Jimenez's claim must fail as a conclusory allegation because he has not provided any factual support to substantiate his claim, and he has failed to show prejudice. In addition, the Supreme Court indulges a "strong presumption that counsel's conduct falls within a range of reasonable professional assistance [and that] the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

With regard to his allegation of ineffectiveness, Jimenez merely offers brief and conclusory statements in his federal petition without any evidentiary support. Jimenez's allegation pertaining to his failure object to the court's bias and move for recusal are based on claims that have already been discussed by the Director, *see* Part IV, *supra*, and for the reasons discussed therein this claim is without merit. Jimenez only submits conclusory allegations contrary to his sworn testimony at the revocation hearing. Therefore, he cannot

prove prejudice. *See Ross,* 694 F.2d at 1011.

Further, Jimenez admitted to the trial judge that he had failed to report to his probation officer and did not pay his fees–that he "messed up." *See* 3 SF 14, 76-85, 88, 90. No relief is justified in light of his admissions of true at the revocation hearing. It should be noted that a failure to report a single time is a sufficient violation for purpose of revocation of supervised release. *Marcum v. State*, 983 S.W.2d 762, 766-67 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd) (failure to report one time held sufficient to support revocation decision). Therefore, even if trial counsel was deficient in some way, which the Director denies, in light of Jimenez's admission of his failure to report without justification, the result of the proceeding would not have changed and Jimenez has failed to prove the prejudice prong of the *Strickland* two-part analysis.

Furthermore, the state habeas court found, in part, that:

> . . . regardless of the initial reasons for Jimenez entering a plea of true to Paragraphs tow and Four, the trial judge gave him an opportunity to state that he did not want to continue with such pleas of true. I further find that defendant's decision to continue with the pleas of true was strictly his and had nothing to do with any suggestion–strategy or otherwise–originating with trial counsel Louis Perez.
>
> I finally find that the matter of 15 years in the penitentiary was never a representation or promise made to Jimenez, but was made merely as a statement of what the recommendations of the prosecutor and the community supervision officer would be.
>
> I find that there is no evidence in the record or otherwise that any representation was ever made to Jimenez that he would at most receive 15 years in the penitentiary. This ground is without merit.

Ex parte Jimenez, No. 53,212-02, at 15 (trial court findings). Jimenez presents no evidence that trial counsels alleged deficient performance created a reasonable probability that, but for counsel's unprofessional errors, the result of the case would have been different. *Strickland*, at 694. In conclusion, these allegations of ineffectiveness should be dismissed as refuted by the record and as valid strategic decisions based on counsel's affidavit. Here, Jimenez's

allegations do not amount to clear and convincing evidence. Jimenez must show that this decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see discussion*, Part II, *supra*. And this, he cannot do.

VIII. State Court Findings and Conclusions

In closing, this court must defer to the state court determinations and deny habeas relief. The state habeas court determined that each of Jimenez's claims lacked merit. *Ex parte Jimenez*, No.53,212-02, at 10-16 (Order of Trial Court Recommending Denial).[13] The Court of Criminal Appeals adopted these determinations when it denied Jimenez's state writ application without written order on the findings of the trial court without a hearing. *Id.* at cover. Hence, this was an adjudication on the merits. *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *see Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits."). The state courts' determinations did not result in a decision "that was contrary to, or [that] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1). Therefore, this court cannot grant habeas relief. *See id.*

CONCLUSION

For the foregoing reasons, this Court should dismiss Jimenez's petition as time-barred pursuant to 28 U.S.C. § 2244(d). Alternatively, the claims lack merit. The Director respectfully requests that the petition for writ of habeas corpus should be dismissed.

---

[13] Paper hearing findings made by a different judge than presided over the original trial proceedings may be presumed correct where the petitioner offers no direct evidence to support his allegations. *Pierce v. Scott,* 62 F.3d 394 (5th Cir. July 3, 1995), No. 94-20515, (unpublished). As such, the state habeas court's factual determinations are fairly supported by the record and are not an unreasonable.

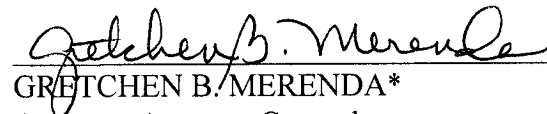
Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

GENA BUNN
Assistant Attorney General
Chief, Postconviction Litigation Division



GRETCHEN B. MERENDA*
Assistant Attorney General
State Bar No. 24010233

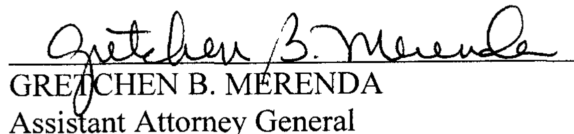
*Lead Counsel

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
Facsimile No. (512) 936-1280

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF INTERESTED PERSONS

I do hereby certify, pursuant to Local Rule 3.1(f) of the Northern District of Texas that other than the petitioner, Carlos Jimenez and the respondent, Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division, counsel for respondent is unaware of any person with a financial interest in the outcome of this case.

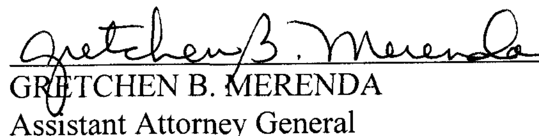


GRETCHEN B. MERENDA
Assistant Attorney General

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing pleading has been served by placing same in the United States mail, postage prepaid, on this 23rd day of September, 2005, addressed to:

Carlos Jimenez
TDCJ-CID #745196
Telford Unit
P.O. Box 9200
New Boston, Texas 75570



GRETCHEN B. MERENDA
Assistant Attorney General