PETITION FOR WRIT OF HABEAS CORPUS: 28 USC §2254 (Rev. 10/99)

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 22 2005
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

SAN ANGELO Division

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

CARLOS JIMENEZ
PETITIONER
(Full name of Petitioner)

TDCJ- CID - TELFORD UNIT
CURRENT PLACE OF CONFINEMENT

#745196
PRISONER ID NUMBER

vs.

6-05CV 052 C
CASE NUMBER
(Supplied by the Clerk of the District Court)

DOUG DRETKE, Director, T.D.C.J. - CID
RESPONDENT
(Name of TDCJ Director, Warden, Jailor, or authorized person having custody of petitioner)

INSTRUCTIONS - READ CAREFULLY

1. The petition must be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. Any false statement of an important fact may lead to prosecution for perjury. Answer all questions in the proper space on the form.

2. Additional pages are not allowed except in answer to questions 11 and 20. Do not cite legal authorities. Any additional arguments or facts you want to present must be in a separate memorandum.

3. When the Clerk of Court receives the $5.00 filing fee, the Clerk will file your petition if it is in proper order.

4. If you do not have the necessary filing fee, you may ask permission to proceed *in forma pauperis*. To proceed *in forma pauperis*, (1) you must sign the declaration provided with this petition to show that you cannot prepay the fees and costs, and (2) if you are confined in TDCJ-ID, you must send in a certified *In Forma Pauperis* Data Sheet from the institution in which you are confined. If you are in an institution other than TDCJ-ID, you must send in a certificate completed by an authorized officer at your institution certifying the amount of money you have on deposit at that institution. If you have access or have had access to enough funds to pay the filing fee, then you must pay the filing fee.

5. Only judgments entered by one court may be challenged in a single petition. If you want to challenge judgments entered by different courts, either in the same state or in different states, you must file separate petitions as to each court.

6. Include all your grounds for relief and all the facts that support each ground for relief in this petition.

7. When you have finished filling out the petition, mail the original and two copies to the Clerk of the United States District Court for the federal district within which the State court was held which convicted and sentenced you, or to the federal district in which you are in custody. A "VENUE LIST," which lists U.S. District Courts in Texas, their divisions, and the addresses for the clerk's office for each division, is posted in your unit law library. You may use this list to decide where to mail your petition.

8. Petitions that do not meet these instructions may be returned to you.

PETITION

What are you challenging? (Check only one)

- ☒ A judgment of conviction or sentence, probation or deferred-adjudication probation (Answer Questions 1-4, 5-12 & 20-23)
- ☐ A parole revocation proceeding. (Answer Questions 1-4, 13-14, & 20-23)
- ☐ A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-23)

All petitioners must answer questions 1-4:

1. Name and location of the court (district and county) which entered the conviction and sentence that you are presently serving or that is under attack:
   119th District Court, Tom Green County, Texas

2. Date of judgment of conviction: Nov. 12, 1991 Adjudication Defferred Nov. 6, 1995 Sentence imposed

3. Length of sentence: 43 Years

4. Nature of offense and docket number (if known): Burglary of Habitation, enhanced by prior felony of Aggravated Assault with a deadly weapon. Cause No. Cr.-91-0528-B.

Judgment of Conviction or Sentence, Probation or Deferred-Adjudication Probation:

5. What was your plea? (Check one)

   ☐ Not Guilty ☒ Guilty ☐ Nolo contendere

6. Kind of trial: (Check one) ☐ Jury ☒ Judge Only

CONTINUED ON NEXT PAGE

7. Did you testify at the trial? ☒ Yes ☐ No

8. Did you appeal the judgment of conviction? ☒ Yes ☐ No

9. If you did appeal, in what appellate court did you file your direct appeal?

Court of Appeals 3rd District, at Austin Cause Number (if known) 03-02-0733 CR

What was the result of your direct appeal (affirmed, modified or reversed): affirmed

What was the date of that decision? Out of time appeal May 15, 2003

If you filed a petition for discretionary review after the decision of the court of appeals, answer the following:

Result: Refused

Date of result: 10-08-2003 Cause Number (if known): PD-0937-03

If you filed a petition for *writ of certiorari* with the United States Supreme Court, answer the following: NA

Result: _____

Date of result: _____

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state application for writ of habeas corpus that you may have filed.

☒ Yes ☐ No

11. If your answer to 10 is "Yes," give the following information:

Name of court: 119th District Court to Court of Criminal Appeals

Nature of proceeding: State Writ of Habeas Corpus

Cause number (if known): 74,433

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court.

April 11, 2002

Grounds raised: Ineffective Assistance of Counsel on Appeal

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Date of final decision: September 25, 2002

Name of court that issued the final decision: ~~Court of Criminal Appeals~~ Granted Out of Time Direct Appeal.

As to any ***second*** petition, application or motion, give the same information:

Name of court: 119th District Court

Nature of proceeding: State Writ of Habeas Corpus

(1st Challenge to Conviction)

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court.

December 6, 2004

Grounds raised: ~~Involuntary Plea of Guilty Ground One; Due Process~~ Violation denial of Neutral and detached Judge - Ground Two; Ineffective Assistance of Counsel at trial, Ground Three (a) and (b); Ineffective Assistance of Counsel at Revocation hearing Ground Four (a) and (b)

Date of final decision: June 29, 2005

Name of court that issued the final decision: Court of Criminal Appeals

If you have filed more than two petitions, applications, or motions, please attach an additional sheet of paper and give the same information about each petition, application, or motion.

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition?

☐ Yes ☒ No

(a) If your answer is "yes," give the name and location of the court that imposed the sentence to be served in the future:

(b) Give the date and length of the sentence to be served in the future:

(c) Have you filed, or do you intend to file, any petition attacking the judgment for the sentence you must serve in the future?

☐ Yes ☐ No

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Parole Revocation:

13. Date and location of your parole revocation: November 6, 1995 119th District Court

14. Have you filed any petitions, applications, or motions in any state or federal court challenging your parole revocation?

☐ Yes ☒ No

If your answer is "yes," complete Question 11 above regarding your parole revocation.

Disciplinary Proceedings:

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon? ☐ Yes ☐ No

16. Are you eligible for mandatory supervised release? ☐ Yes ☐ No

17. Name and location of prison or TDCJ Unit that found you guilty of the disciplinary violation:

_____

Disciplinary case number: _____

18. Date you were found guilty of the disciplinary violation: _____

Did you lose previously earned good-time credits? ☐ Yes ☐ No

Identify all punishment imposed, including the length of any punishment if applicable, any changes in custody status, and the number of earned good-time credits lost: _____

_____

19. Did you appeal the finding of guilty through the prison or TDCJ grievance procedure?

☐ Yes ☐ No

If your answer to Question 19 is "yes," answer the following:

Step 1 Result: _____

_____

Date of Result: _____

Step 2 Result: _____

_____

CONTINUED ON NEXT PAGE

Date of Result: _____

All applicants must answer the remaining questions:

20. State clearly every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

CAUTION:
Exhaustion of State Remedies: You must ordinarily present your arguments to the highest state court as to each ground before you can proceed in federal court.
Subsequent Petitions: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

Following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement is a separate ground for possible relief. You may raise any grounds, even if not listed below, if you have exhausted your state court remedies. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your belief that you are being held unlawfully.

DO NOT JUST CHECK ONE OR MORE OF THE LISTED GROUNDS. Instead, you must also STATE the SUPPORTING FACTS for ANY ground you rely upon as the basis for your petition.

(a) Conviction obtained by a plea of guilty which was unlawfully induced, or not made voluntarily, or made without an understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by the use of a coerced confession.

(c) Conviction obtained by the use of evidence gained from an unconstitutional search and seizure.

(d) Conviction obtained by the use of evidence obtained from an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the prosecution's failure to tell the defendant about evidence favorable to the defendant.

(g) Conviction obtained by the action of a grand or petit jury which was unconstitutionally selected and impaneled.

(h) Conviction obtained by a violation of the protection against double jeopardy.

(i) Denial of effective assistance of counsel.

(j) Denial of the right to appeal.

(k) Violation of my right to due process in a disciplinary action taken by prison officials.

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A. **GROUND ONE:** PETITIONER WAS DENIED DUE PROCESS RIGHT TO A NEUTRAL AND DETACHED MAGISTRATE AT HIS SENTENCING HEARING, IN THAT A FAIR ASSESSMENT OF THE EVIDENCE WAS NOT MADE AND HE INFLICTED A PRE-DETERMINED "PRIME NUMBER" DUE TO BIAS AND PREJUDICE.

Supporting FACTS (tell your story briefly without citing cases or law): Petitioner presented this claim on his out of time Appeal and his Petition to the Court of Criminal Appeals and would incorporate the facts and the record citings in Direct Appeal 03-02-0733 Cr. Appellant's Brief pages 6-18 and his Petition, No. PD-0937-03, pages 1-5 Issue's One for all purposes applicable to this instnat Ground.

Due Process requires both a neautral and detached magistrate conjunctively in a formal proceeding. On November 12, 1991 the trial court established Petitioner's guilt but deferred the adjudication and placed Petitioner on 5 year probation. (C.R. 15-20) The trial judge made several conflicting ranges of punishment that were both confusing and inaccurate. (see R.R. Vol. 2 pages 8-11) The trial judge promised appellant that if he got his probation violated he would get the maximum sentence, (see Attach)

B. **GROUND TWO:** PETITIONER WAS DENIED DUE PROCESS RIGHT TO A NEUTRAL AND DETACHED MAGISTRATE BECAUSE TRIAL JUDGE WAS SO ANGRY AT PETITIONER HE COULD NOT EVEN CONSIDER A 15 YEAR SENTENCE AGREEMENT BETWEEN THE STATE PROSECUTOR AND DEFENSE COUNSEL AT REVOCATION HEARING.

Supporting FACTS (tell your story briefly without citing cases or law):

Petitioner would incorporate in this instant Ground State Writ C.R.-91-0528-B (hereafter Writ No. 2) B Ground 2 pages 7, 12)

On November 6, 1995 Petitioner , being hisapnic and with a limited education, tried to explain to the trial judge that he did not understand what deferred adjudication was and explain about his previous attorney's erroneous advice and that he was unaware that he could get more time. (R.R. Vol. 3 pages 5-7) It should be obvious that the judge was irate and interrupted Petitioner because he did not want this on the record. He would not let Petitioner explain. (R.R.Vol. 3 pages 5-7) The trial judge by his own admission stated ~~he was irritated at petitioner, and threatened him with perjury~~ charges, called him a liar, and kept interupting so petitioner could not explain what he did not understand and why. (see attachment)

C. **GROUND THREE:** CONVICTION WAS UNCONSTITUIONALLY OBTAINED BY A PLEA OF GUILTY, WHICH WAS UNLAWFULLY COERCED, AND NOT MADE VOLUNTARILY WITH THE UNDERSTANDING OF THE CONSEQUENCES OF THE PLEA.

Supporting FACTS (tell your story briefly without citing cases or law): Petitioner would incorporate State Writ No. 2 Ground (A) ONE INTO this instant Groung.

Petitioner was appointed counsel Ms. Charlotte Harris at trial and appeared several times from August 1991 till the hearing on the plea bargain held on November 12, 1991. On or about October 8, 1991 Ms. Harris told me that the State was offering me 35 years Federal time or the 25 years at TDCJ-CID. She also said she was working on an offer of deferred adjudication probation. She told me it was just like regular probation except when you complete it the case would go off my record. I asked her to please get me probation. (see attachment)

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D. **GROUND FOUR:** PETITIONER WAS DENIED EFFECTIVE ASSITANCE OF COUNSEL AT TRIAL, DENYING HIS SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AND STATE CONSTITUTION ARTICLES I, 10 and 19.

Supporting FACTS (tell your story briefly without citing cases or law):

A. Trial Counsel failed to explain the meaning of Deferred Adjudication Probation and the consequences of Petitioner's Plea.

Petitioner would incorporate the C. Ground Three in this instant writ pet, and Ground (C) Ground Number Three in his State Writ No. 2. into this instant ground all facts and record citings applicable. When trial counsel Ms. Charlotte Harris told me she was trying to get me deferred Adjudication Probation on October 8, 1991 it was the first time I had ever heard of it. She did not explain to me that you could get more time, but simply said it was like regular probation, except if you complete it, the case would not go on your rcord, but be taken off. She did not explain to me what an enhancement meant or ever inform me that my conviction (see attach)

21. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation, or disciplinary proceeding that you are attacking in this petition?

☐ Yes ☒ No

If your answer is "yes," give the date on which each petition was filed, the federal court in which it was filed, and whether the petition was (a) dismissed without prejudice or (b) denied.

22. Are any of the grounds listed in paragraph 20 above presented for the first time in this petition?

☐ Yes ☑ No

If your answer is "yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal.

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23. Do you have any habeas corpus proceedings or appeals now pending in any court, either state or federal, relating to the judgment or proceeding under attack?

☐ Yes ☒ No

If "yes," identify each type of proceeding that is pending (i.e., direct appeal, art. 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed.

Wherefore, petitioner prays that the Court grant him the relief to which he may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on July 19, 2005 (month, date, year).

Executed on July 17, 2005 (date).

Carlos Jimenez

Signature of Petitioner (required)

Petitioner's current address: CARLOS JIMENEZ #745196
Telford Unit
P.O. Box 9200
New Boston, Texas 75570-9200

A. GROUND ONE (continued)

or a "Prime Number". (R.R. Vol 2 page 11, Lines 2-15) There is no admonishment that the judge could follow the entire range of punishment or consider the evidence and mitigating factors, but would delve out a high number of years as punishment under any revocation circumstances. The State Habeas Court and the adoption of the Court of Criminal Appeals interpreted the trial courts statements mean 1) no predetermined punishment was assessed at time adjudication was granted; 2) trial judge did not promise or bind himself to a predetermined punishment at revocation but only urged defendant to assume the worst so he would obey the conditions of supervision; 3) trial court assessed 43 years of confinement after considering all the evidence and punishment was based on defendant's total criminal history. (emphasis added State Habeas No. C.R.01-0528-B Record at page 8)

A judge as in this instnat case can limit himself to a high range of punishment predetermined regardless of evidence or circumstnces without specifying a number. The trial court as much as said that no matter what the circumstances he eliminates the medium or low end of the punishment scale. (R.R. Vol 2 p 10 Lines 21-25) After admonishing Petioner to several confusing ranges 5to99,15 to 99, 7 to 97, he infatically states he will give the maximum or a high prime number on revocation. (R.R. Vol 2 8-11)

The record is clear that the trial judge did not base his 43 year sentence on the evidence or mitigating factors of the instant case or the entire criminal history of Petitioner, but on his inability to be neutral and his personal attachment to Petitioner emotionally due to his anger at petitioner.(R.R. Vol. 3 pages 6-9); (R.R. Vol. 3 pages 74-75)

B. GROUND TWO (continued)

(see R.R. Vol 3 pages 6-9; pages 74-75) The adjudication of guilt was never in question in that petitioner pled true to 2 issues for revocation #2 failure to report and #4 failure to make payments. (R.R. Vol 3 page 110) Although the judge blamed petitioner for trying to minimize the altercation with, Teresa, his common law wife

but in fact it was her testimony that truthfully negated the most serious allegation and her recantation proved that petitioner did not assault her but was merely trying to free his leg from her and leave to avoid an altercation. (R.R. 3 page 117 Lines 8-17; page 113 Lines 16-25) The trial judge even tried to make petitioner's criminal history worse by injecting false information into the record of a P.S.I. that allegedly stated petitioner used or exhibited a gun, or firearm in his prior conviction. (see R.R. Vol 2 Lines 12-21) which is a fabrication of the facts in the record. In fact Petitioner's prior criminal history was a plea to aggravated assault, which petitioner had a knife in self defense of a man who physically assaulted him first and was three times petitioner's size. There was never a gun or fire arm used or exhibited. The record at the revocation hearing that the judge and State Courts find so deserving of a 43 year sentence, amounted to the fact that petitioner was drunk one day and broke a window in his neighbors house while they were on vacation. The restitution was $16.34 and nothing was ever stolen. Petitioner had completed over 4 years of his 5 year probation and his probation officer advised that he be reinstated. The only eyewitnesses to the assault on Teresa alleged was Petitioner and Teresa, who both testified that it was an unintentional accident. (R.R. Vol 3 p 111 LInes 1-7, p 112 Line 4-10) The evidence showed that petitioner was behind on his fees $891.34 but he had paid his restitution. (R.R. Vol. 3 112 Lines 1-3) On this set of facts alone 43 years is cruel and unjust punishment. The Judge was so emotionally attached by his anger at petitioner by bias and prejudice that he ignored the sound arguments of the prosecution and the defense counsl's agrrement that the case at most was a 15 year case. (R.R. 110-113) A careful look at the Prosecutor and the Defense Counsel's summation of the evidence (R.R. Vol 3 113-117) compared to the judge's bias and prjudice view of the same evidence and mitigationg factors (R.R. Vol 3 110-113) shows by preponderance of evidence that the trial judge was not a neutral and detached adudicator in the revocation and sentenceing phases of trial. His vindictiveness so permeated the whole proceeding with his threatenaing,irritated, and even insulting remarks (see R.R. 115) he went beyond bias and prejudice injecting untrue facts into the reocrd not in the P.S.I. at all.

It should be obvious in the record before this Court that the harm inflicted on Petitioner by the Judge's inability to detach himself both personally and emotionally from the case and view the evidence and mitigationg factors in a neutral and detached light instead of serving 43 years because of the trial judges vindictiveness, bias and prejudice. (R.R. Vol 3 page 117) instead of the 15 years recommended by the State.

The very appearance of bias and prejudice should not be tollerated in a magiatrate, much less the flagrant vindictiveness of the trial judge in his rulings. In the instant case on the record before this Honorable Court the Judge was not Constitutionally neutral and certainly not detached in his anger, and personal bias and prejudice in his assessment of the facts and the punishment assessed. Petitioner was denied his Federal Constituional Sue Process of Law and his State Due Course of Law Rights in the instant case at bar.

(C) GROUND THREE (continued)

The next time I saw her on November 5, 1991 Ms. Harris said the State had agreed to give me 5 years deferred adjudicated probation. On November 12, 1991 prior to the hearing Ms. Harris met with me and had some papers for me to sign and she had checked off several places to have me initial. After Petitioner initialed everything she showed him to initial Ms. Harris told me I was going before the Judge and to agree with everything he said. I asked her about deferred adjudication again and she told me it was just like regular probation. I had never heard of defferred adjudication before Ms. Harris mentioned it to me, nor did I underatand, nor was it explained to me that I could get more time by Ms. Harris. If I had fully known the consequences of defferred adjudication I would not have accepted it on the plea bargain, but rather would have opted for a clear plea of regular probation, 15 year plea, or went to trial. No jury under the facts of my case and with the States agrreement with a trial defense counsel for 15 years would have given me more than that at trial.

Petitioner, being hispanic, whose first language is spanish, and having a limited education, had a difficult time with

understanding the different numbers and even the ficticious ranges of punishment stated by the trial judge. A close look at the record would show at the November 12, 1991 hearing how confusing the admonishments were. (see R.R. Vol 2 pages 8-11)

At the revocation hearing November 6, 1995 Petitioner tried to diligently explain to the trial judge that he did not fully understnd deferred adjudication and the times of punishment along with the erroneous advice given in November 12, 1991, but the judge just got irate. (see R.R. Vol 3, pages 5-9)

Unfortunately Ms. Harris in her Affidavit either has no convenient recollection of her statements and actions or denies such. (see State Habeas REcord at 10, and Exhibit or Attachment 20 at 52-54) Most converstions with attorneys are cloaked in secrecy and not made in writing so petitioenr cannot produce documents to verify Ms. Harris statements and actions, however, Petitioner believes that if he Texas Bar assoc. file were available, Petitioenr would not be the only defendant to complain about erroneous advice and information. From Petitioner's experience only one of the three Attorney's in the reocrd, Duke Hooten, Ms. Harris, and Mr. Perez, only Mr. Perez has given an accurate and truthful representation in his affidavit. Fortunately Petitioner could prove that Mr. Duke Hooten lied, in that he said he hand delivered documents at the jail to me he could not have possibly delivered and the Court of Criminal Appeals alertly saw he was lieing. (State Writ No. 2 record at 6-7 refering to State Writ NO. 1), However unless petitioner, being indigent, and incarcerated could secure some type of discovery, he can not rebut the States preumption of Ms. Harris credibility and prove her normal practice is in all probability to secure a plea as quickly and profitably as possible with erroneous advice and information if need be.

Petitioner believe's if given forum to enlarge the record with Ms. Harris's record on plea bargain complaint's, the erroneous and misleading advice, the confusing admonishments by the trial court, along with Petitioner's natural handicaps, would show he did not give a knowing and voluntary plea of guilty and did not understand the consequences of his plea of 5 years probation and the harm it would later cause him of 43 years confinement. This

is a violation of the United States Constitutional Due Process and Right to Constitutional effective assistance of Counsel at Trial, and proportionate State Constitutional Rights.

Had Petitioner fully known and understood the plea and the consequences of his plea, he would have sought a firm clear plea bargain and if he could not agree with the State on a plea he would have excercised his right to a fair trial by jury.

(D) GROUND FOUR (continued)
for assault with a weapon was going to be used to give me a higher range of punishment. The first I heard of it was from the Judge. I still did not fully understand what 5 to 99; 15 to 99; and 17 to 97 meant in the way of punishment when I had been offered 5 years. I tried to explain to the court at the revocation hearing that my attorney did not explain what an enhancement meant and how it would effect my punishment. I was trying to explain how my attorney duped me at the first hearing in 1991, but he took it personally, that he did not properly admonish me. (R.R. Vol. 3 page 74) Her deficient representation deprived me of obtaining a clear and understood plea bargaining process, where I could get a solid plea of probation or 15 years time. Had I been explained that if I did not complete this deffered adjudication probation I could get 99 years or life, I would not have taken the deferred adjudication, but would have opted for regular probation, a definate time of 15 years or even 5 years if that was the lowest I could get, which I am still not sure of, or if not a suitable plea bargain then a trial by jury. ALthough I may have been proven guilty, under the circumstances, no one was hurt, nothing was stolen only a $16.34 window was broken and the neighbor was on vacation. Had I not been drunk I never would have even been on his property. No Jury in the world would sentence a person under the same set of facts to 43 years of incarceration, especially with the State Prosecutor pleading that this is at the most a 15 year case. (R.R. 110-113 Vol 3) (see also R.R. Vol 3 pages 111 Lines 18-19; and page 116 Lines 24-25) Trial Counsle caused petitioner irreparable harm and prejudice, by her deficient representation and her denial of Constitutional Effective counsel.

(D) GROUND FOUR (continued)

(B) Trial counsel was ineffective because she gave petitioner erroneous advice and misled him at trial.

Although Ms. Harris either has no recollection or believe's it is her practice not to give erroneos advice or mislead a client, (Affidavit Attachment 20 State Writ No. 2 record, at 52-53) petitioner has learned that she now is an Attorney for the U.S. Federal Government. (see Tex. Dir. U.S. Attorneys 2005) She also gives some supporting information like, 1) She really has no personal knowledge what she did or said to petitioner on October 8, 1991 or before the hearing On November 12, 1991 outside the record. 2) She claims in the affidavit she explained in detail deffered adjudication when judicial notice can be taken that in 1991 deffered adudication was not well known or defined. 3) she says that it is her proctice to do everything the right way, but as earlier stated a look at her record and complaints in the State Bar would confirm or rebut these assertions. 4) she did confirm that the record is clear Judge Sutton "told petitioner three times if he was revoked he would get the maximum sentence" (see instant pet Grounds (A) ONE and (B) Two); (State Writ Record No. 2 at 53, citing R.R. Vol 2 11, 16) 5) the most compelling inconsitancy in Ms. Harris Affidavit is that after stating her normal practice was to "I would have explained what the consequences of pleading true to an enhancement paragraph, especially how it affects the punishment range." then states that a jury's range to set his sentence is for example 5,15,25,35,55 up to 99 years or life, when with the enhancement the jury could not go below 15 years. Ms. Harris is still confusing in her examples of petitioners range of punishment, in that with enhancement which was never out of issue, the range could never be below 15 years for a jury in the instant case.

Trial counsel misled petitioner by telling him erroneously that he could get 35 years federal time or 25 years TDCJ for the crime he was charged with, it is interesting she now works as a U.S. Attorney. The erroneous statemnts were designed to scare petitioner into a plea bargain. When she told him about the

5 year probation, with no explaination, petitioner jumped on it. Petitioner having been familiar with probation knoew that if you got a 5 year probation if revoked you could only get a 5 year prison sentence. I never knew and still am not sure if you can even get probation with a prior felony or get less than a 15 year sentence with a 1st degree felony enhanced to 15 to 99 or life? Evidently you can get a 5 year deferred under those circumstances, but this court can readily see how confusing to an uneducated, hispanic wihout any knowledge of the law in 1991 and after many years still is a bit confused about probation and enhancement ranges of punishment.

Ms. Harris also, although she claims amnesia, told me to just initial and sign the papers, go into court and agree with whatever the judge says. Petitioner apparently understood that the judge said the words deferred adjudication and enhancement, but without an explaination from trial court, it was like chinese. All I was thinking of doing was getting 5 years probation and being free and not going to prison, which is the big lure and trap of deferred adjudication and the Texas Law is filled with cases of indigent, minority defendants being mislead by deferred adjudication probation fron 1991 all the way up till 1996. This kind of erroneous advice and intentional misleading was inept representation and harmed petitioner greatly, in that no jury would under the circumstances give petitioner over 15 years especially with the State and Defense agreement. AS matter of fact the legislature has even conceeded that the crime for which petitioner is incarcerated is no longer a 1st degree felony as in 1991, but is now a 2nd degree felony with a 2 to maximum penalty of 20 years confinement.

(E) GROUND FIVE: PETITIONER WAS DENIED HIS STATE AND FEDERAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS REVOCATION HEARING, AND DUE PROCESS OF LAW.

A. Counsel made at revocation hearing a representation of 15 year sentence if petitioner was revoked in exchange for his pleas of true.

(E) GROUND FIVE (continued)

A. (continued)

Petitioner would incorporate in this instant fed pet ground State Writ No. 2 Ground (D) Ground Number Four all facts and record citings if any for applicable purposes in this (E) A. and B. gronds and subgrounds.

Petitioner hired Mr. Louis Perez to represent him on the revocation of his probation and later the State paid him to continue representation. Mr. Perez is hispanic as well as petitioner and communication was better in spanish and english than with Ms. Harris obviously. Mr. Perez was my attorney between May 10, 1995 and at the hearing November 6, 1995. Mr. Perez had advised me that he was relatively sure that I would be reinstated and put back on probation. Having completed over 4 years of the 5 year probation petitioner welcomed that advice. Mr. Perez informed me that my Probation Officer Elaine Moore was going to reccomend reinstatement and would testify at my hearing in my behalf. (Mr. Perz verified this in his affidavit State Writ No. 2 Record at page 35 Attachment 19) Although it is undisputed that there was no plea bargain of reinstatement or 15 year maximum sentence, it is also undisputed that Petitioner believed there to be a plea agreement and the most he could get was 15 years. Whether Mr. Perez at the time of the hearing believed he had a firm plea and later after reviewing the record for his affidavit found out their really wasn't or couldn't be a plea, there is no doubt that Mr. Perez told petitioner he had a 15 year maximum plea and petitioner believed that to be true and pled the way he did because of this representation. Mr. Perez although he admits there was really no plea baragin in his Affidavit, also admits adamantly and truthfully, "I swear that I did present the fifteen (15) years as a plea bargain to my client, Carlos Jimenez." (see State Writ No. 2 Record Attachment 19 at page 36 par. 2, in relevant part) There is no question that petitioner made his plea on the information that "he would more than likely be put back on probation, but if not we have a plea agreement that the most you can get is 15 years." There is no question petiioner would have pleaded differently without the plea

agreement. Petitioner could have plead no to all of the allegations, or no lo contendre, and the burden would have been on the state to prove all the allegations of revocation and petitioner could have produced evidence of mitigationg factors on Paragraph III No. 2 and No. 3 in hopes that the judge would take into consideration his evidence and mitigation circumstances. This could have effected Paragraph III No 1 and No 2. in the eyes of the judge and on appeal. It is very possible that Mr. Perez mistakenly gave the misinformation to Petitioner because the record is clear that the prosecutor believed that petitioner would get no more thatn 15 years and was as adamant about it as the defense counsel and were both in shock when the judge gave petitioner 43 years. (R.R. Vol. 3 pages 111 and 116; and R.R. Vol 3 page 117) Mr. Perez's Motion for New Trial shows how utterly opposed to the sentence was. (C.R. 47-49) It is obvious that the prosecutor and Mr. Perez agreed on the 15 year sentence even if the prosecutor knew thare was no plea, Mr. Perez and Petitioner at the time believed there to be one or Mr. Perez just completely misinformed petitoner on purpose knowing in 1995 that there was no plea, but stating clearly as in his affidavit (at 36) that he told petitioner there was.This sentence should have been carried out, the plea of true withdrawn and certainly the fact that Mr. Perez told Petitioner of a plea could have been brought to the Court and maybe the judge would have curtailed his anger on Petitioner. The misrepresentation by Mr. Perez, even if not intentional, caused Petitioner harm in that he believed he was going to get his probation reintated or at the most 15 years incarceration. On this information he made his plea even though it was not accurate. This was deficient performance and harmed petitioner.

B. Deferred Adjudication Probation REvocation, Counsel, was Constitutionally ineffective because he failed to object to the trial judges, bias, prejudice, vindictiveness, and explain petitioner's position, and Move for Recusal of Judge Sutton from the proceeding if necessary.

Petitioner would request that (State Writ No. 2 Grounds One, Two, Three, and Four A, as well as Inatnt Pet. Grounds One, Two, Three, Four, and Five A) be incorporated in to this instant ground all relevant facts and record citings as applicable.

(E) GROUND FIVE (continued)

B. (continued)

After the State Writ No. 2 proceeding additional information has come to petitioner's attention in the record. For instance Petitioner had never seen (Attachment 19 Exhibit D, pre sentence investigation report, at 45-52) It appears that even though the judge injected false information into the record to make petitioner's criminal history look worse, the actual report was falsified by evidently Elaine Moore who wrote the report and entered the phrase "AGG ASSAULT W gun" at page 47 of the report, which was still inaccurate and untrue. This report was available to Mr. Perez, at 45 of the report, and as well the real true record of Petitioner's prior conviction that was not and did not involve a gun, or firearm in any way.

Secondly, the statement in Mr. Perez's Affidavit, Writ No. 2 Record Attachment 19 at 36 par. 2, "I swear I did present the fifteen (15) years as a plea bargain to my client, Carlos Jimenez." directly contradicts the material finding by the State Habeas Court that "I finally find that the matter of 15 years in the penitentiary was never a representation or promise made to Jimenez, but was merely as a statement of what the recommendations of the prosecutor and the community supervision officer would be." (State Writ No. 2 Record at 15) Although there was no plea bargain the representation was made to petitioner, albeit mistakenly, and petitoner acted on it to his harm.

This additional information from the Habeas proceeding makes the instant allegation and the responsibility of Mr. Perez to have objected at the revocation hearing and told the Judge, first of all that he knew or should have known, that Petitioner never exhibited or used a firearm. Mr. Perez should have been acquainted with the material facts of Petitioners case. Secondly he should have told the judge that he made a mistake and told his client that a plea bargain was made, his client believed he could not get more than 15 years confinement and his plea of true was based on that information. After making it clear it was his error not his clients, the judge may have reconsidered or if not a motion for recusal was proper or motion for rehearing etc.

There should be no question if the defense counsel had at least spoken in behalf of his client that the judge would have known that he made misinformation a part of the record, that Petitoner had been illadvised and could have made some kind of adjustment. If not a motion for a new proceeding, or recusal motion or at least something could have been preserved in the record for appeal. It is clear that the Motion for new trial was only on the severity of the punishment, not on his own ineffective representation at the revocation hearing. (C.R. 47-49)

There is no question that Ms. Harris, Prosecutor Jones, and Mr. Perez were or should have been scared of Judge John Sutton. (see Ms. Harris's Affidavit Writ No. 2 Attachment 20, and Mr. Perez's Affidavit Attachment 19) Even the State Habeas Court Aknowledged that there was nothing that defense counsel could have done that would not have irritated the judge. (State Writ Record at 15) The trial court in State Habeas also inferred that on Grounds two and four, State Habeas is not cognizable on grounds that are available on direct appeal. (State Writ Record at 120 However, the Court does not state that if Counsel does not raise a contemporaneous objection, there is notheing in the record for appeal as in this instant Ground. Under the circumstances even though the trial judge was irate at petitioner, the defense counsel could have taken some of the ire of petitioner and even though he would be subject to the judges displeasure for making erroneous promises and correcting the record on petitioner's criminal background, the judge could have seen a way to devert the punishmentor give a new hearing with the correct facts. If not at least the whole truth would have been in the record and preserved for appeal. It is coubtful this information favorable to petitioner could ahve gotten him more than 43 years, but concievable that he could have eventually received less, if the truth were known.

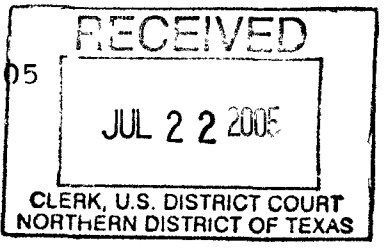
The State Habeas Court's position that only prejudice outside the Courtroom can rise to the level of recusal is not completely accurate, there are circumstances that the prejudice and bias shown by rage and unreasonable rulings can rise to the level

of partiality that recusal and even judicial misconduct could arise.

The very appearance of a Judge's ability to render a fair ruling, due to bias, prejudice and vindictiveness when in question, should be enogh to object, and motion for recusal by competent counsel and at least preserve the question for appeal. In the instant case, there is no excuse for an advocate to sit idley by and allow the JUdge to admittingly be "irritated" and abuse his client, verbally calling him a liar, threatening him with perjury, bringing issue the ligitamacy of his child, and making his past criminal history worse by injecting inaccurate information into the record of a gun or firearm. Particularly, in light of the fact that Counsel had made misleading representations to petitioner and should have been able to correct the record of petitioner's criminal history, albeit not the judges fault, but due to an inaccurate P.S.I. report. There is no question that the Defense Counsel and the prosecutor and even the judge himself, by his own admission, was out of control as far as his anger at petioner. There is nothing that the Counsel could ahve done to make him more irritated and git petitioner more time. However taking the HOnest blame and correcting the record in Petitioner's behalf could have made a difference in the outcome had he objected to the judge in a humble mannor and taken come of the blame for petitioner's expectation and even the prosecutor could and probably would have helped in this endeavor. There is no question that it could not have hurt petitioner any more but because it was not properly brought to the judges attention and properly preserved for error at appeal, it harmed petitioenr greatly and in all prbability still does as far as the record is concerned. Counsel although truthful in his affidavit and in all probability in fear of the judge for his own self, and albeit mistakenly, was deficient in his representation to Petitioner and harmed petitioner and continues to harm petitioner, because we will never know the judges reaction for sure to the favorable information if presented in petitioners behalf. However this deficient performance and prejudice to petitioner rises to a denial of Constituional Effective Assistance of Counsel Alone.

U.S. District Court Clerk
Northern Division at San Angelo
202 Federal BLdg.
33 E. Twohig
San Angelo, Texas 76903

July 17, 2005



Re: 2254 Federal Writ of Habeas Corpus

Dear Clerk,

Enclosed for filing is my 2254 Federal Habeas Corpus of a State Prisoner. I have included the Original and two copies. I have also included an Application for informa pauperis and a 6 month Trust Fund account as required, because I am indigent, incarcerated, and acting in pro-se.

Please file and serve the Texas Attorney General's Office with a copy as I believe they represent the Director, Doug Dretke, of the Texas Department of Criminal Justice - Institutional Divisio. as required.

Thank you for your valuable time and consideration in this most important matter.

Sincerely,

Carlos Jimenez

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

CARLOS JIMENEZ #745196
BERRY, TELFORD-UNIT
P.O. BOX-9200
NEW BOSTON TX 75570-9200

RECEIVED
JUL 22 2005
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

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U.S. DISTRICT CLERK NORTHORD DIV
ATT: SAN ANGELO TX:
202 FEDERAL BUILDING
33 EAST TWOHIG
SAN ANGELO TX 7690

JS 44 (Rev. 11/04)

CIVIL COVER SHEET 6-05CV 052 C

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM)

I. (a) PLAINTIFFS Carlos Jimenez

DEFENDANTS

(b) County of Residence of First Listed Plaintiff _____ (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____ (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☒ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity)**:

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP ✓ JUDGE _____ MAG. JUDGE _____