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 §
INSTITUTIONAL DIVISION, §
Respondent, §

PETITIONER'S RESPONSE TO RESPONDENT DRETKE'S ANSWER WITH BRIEF IN SUPPORT

Petitioner Carlos Jimenez, (hereafter "Petitioner") was illegally convicted and sentenced to forty-three years in prison by a Texas state court for burglary of a habitation. Petitioner 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. Petitioner denies all assertions of fact byt the "Director", except those supported by the record. Petitioner also states that he is Statutorily timely pursuant to 28 U.S.C. § 2244 (d) or in the alternative should be allowed equitable tolling. Petitioner has established he is entitled to and should be granted relief.

STATEMENT OF THE CASE

Doug Dretke, (hereafter called "Director") ha illegal and unlawful custody of Petitioner 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). Petitioner was charged with burglary of a habitation, ehanced by one prior felony conviction. Id. at 1 (indictment) The enhancement was aggravated assault with a deadly weapon, which was not a firearm. Id. Petitioner pleaded guilty to the charge and true to the enhancement paragraph. 2 SF 5. On November 12, 1991, purauant to a plea agreement, Petitioner was placed on deferred adjudication probation for 5 years. 2 SF 14-15 ; Tr 15-25. Petitioner did not appeal this judgment.

In March 1995, the State moved to proceed with adjudication of guilt. Tr. 26-28. On November 6, 1995, the trial court held a hearing, adjudicated guilt, and sentenced Petitioner to forty-three years confinement. 3 SF 115-18, Tr 35. Petitioner filed a motion for new trial and notice of appeal. Tr. 47-49. Appointed counsel filed an Ander's Brief timely and then abandoned petitioner. Jimenez v State, No 03-96-00123-CR. (Tex. App. - Austin, 1996); Ex Parte Carlos Jimenez, Cr-91-0528-A Writ #1. Consequently the Appeal was dismissed without Petitioner having the opportunity to file a pro-se brief or Petition for Discretionary Review.

Petitioner filed the State Writ, Exparte Jimenez, Trial Court Writ No. Cr-91-0528-A Writ #1; No. 74,433 (Application No. 53,212-01) on April 11, 2002. The Court of Criminal Appeals Granted relief, because of appointed counsel's enept representation in the form of placing Petitioner back to original position at the time to file Notice of Appeal with apponted counsel, under Texas Rules of Appellate Procedure. (Tex. Cr. App. opinion delivered September 25, 2002) (Tr 56-57)

Petitioner's Counsel filed a timely notice of appeal on October 25, 2002 and a subsequent Ander's Brief. Petitioner filed a pro-se brief and the Court of Appeals for the Third District of Texas issued an opinion affirming Petitioner's conviction in an unpublished opinion on May 15, 2003. Jimenez v State, No 03-02-00733-CR (Tex. App.-Austin 2003) Petitioner's Petition for Discretionary Reviw was refused October 8, 2003. Jimenez v State, PDR No. 937-03.

On December 6, 2004 Petitioner filed a state writ to challenge his conviction, Ex parte Jimenez, NO. 53,212-02, at 17. The Texas Court of 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, Petitioner filed the instant Federal Petition on July 19, 2005. Fed. Writ Pet. at 9.

PETITIONER'S ALLEGATIONS

1. A. Petitioner was denied due process because the trial court judge was not neutral and detached in that he assessed a pre-determined sentence and did not consider a fair assessment of the evidence.

B. Petitioner was denied his due process right to a neutral and detahced magistrate in that the trial court judge could not even consider the 15 year recommendation agreement between the prosecutor and the defense counsel because of his bias and prejudice against Petitioner.

2. Petitioner's guilty plea was unlawfully coerced and involuntary.

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

4. Petioner 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) would recieve at the most 15 years if he pleaded true pursuant to "plea/recommendation" of the prosecutor. (c) failed to object to the trial judge's bias and move for recusal of Judge Sutton.

STATE COURT RECORDS

Petitioner understands that the State court records were forwarded to the Court. Petitioner would request that the record be expanded by discovery Under the Federal Civil Rules of Procedure to include, the indictment information on the aggravated assault, to prove there was not firearm used in the commission of the enhancement conviction, 2nd Paragraph, of the instant indictment, Tr 1. Also Judge Sutton's and Charlette Harris, Texas Bar and Judicial Miscondut Comission, records and complaints to rebut the presumption that the complaints in the above claims are not isolated incidents, but a repetitive practice by Ms. Harris and Judge Sutton.

EXAUSTION OF STATE COURT REMEDIES

Petitioner has exausted his state court remedies as required by 28 U.S.C. § 2254 (b)(1) and has exhausted by Petition for Discretionary Review or state writ of habeas corpus to the Highest State Court, the issues above.

PETITIONER'S RESPONSE TO ANSWER WITH BRIEF IN SUPPORT

I. Petitioner's Claims are not time-barred.

Petitioner filed this action after April 24, 1996, therefore his petition is subject to review under 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) Petitiner's instant Fed. Pet. was files on July 19, 2005, see Pet., at 9, Spotville v Cain, 149 F. 3d 374, 378 (5th Cir 1998)(for purposes of filing a Fed. Pet. it is deemed filed by a prisoner on the date it is placed in the prison mailbox) The instant Pet could not have been filed earlier than the date it was signed, July 19, 2005, Pet at 9.

Pursuant to the "AEDPA", an inmate must file a federal habeas corpus writ petition within one year from the date his conviction becomes final. When a petitioner held in custody, subject to a state court conviction files a Petition for Discretinary REview to the last state court of resort, his conviction does not become final on direct review, for purposes of the "AEDPA" until he files a Writ of Certiorari to the United States Supreme Court and it is disposed of or if not filed the direct review becomes a final conviction after the ninety (90) days allowed to seek such a review expires. see Rules of the Supreme Court Rule 13.1-3; Caspari v Bohlen 114 S. Ct. 948, 953 (1994); Flanagan v Johnson 154 F. 3d 196 at 197 (5th Cir. 1998). 28 U.S.C. §2244 (d)(1)(A). The one year limitations period will be tolled while properly filed state or other collateral reviews are pending in state courts. 28 U.S.C. § 2244 (d)(2); Brewer v Johnson, 139 F. 3d 491, 493 (5th Cir. 1998)

The harsh guidelines of the "AEDPA" may be equitably tolled because it is not a jurisdictional bar, the 1-year limitations my be quitably tolled if "rare and exceptional" circumstances exist. (emphasis added) see Davis v JOhnson 158 F. 3d 806, 811 (5th Cir. 1996); Fierro v Cockrell 294 F. 3d 674 (5th Cir. 2002)

The Respondent's assertion that Petitioner's writ should be time barred, should be denied because in the instant case it would be contrary to the plain and unambiguous language of 28 U.S.C. § 2244 (d)(1)(A); (2).

1, Under the circumstances of the instant case the "direct appeal" granted by the highest court of last resort, at its full conclusion, including "PDR" and Writ of Certiorari or time to seek such Certiorari, should have reset the 1 year statute of limitations period to begin to run January 8, 2004.

The One year statute of limitations shall specifically state in relevant part:

28 U.S.C. § 2244 (d)(1) (A); (2)

> (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 judgement of a State Court. The limitations period shall run from the latest of --
>
> (A) the date on which the judgement became final by conclusion of direct review or the expiration of the time for seeking such review;
>
> (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.

In the instant case Petitioner was granted a new appeal by the Texas Court of Criminal Appeals and placed him back to original position of indigent appointment of counsel and notice to be filed under the Texas Rules of Appellate Procedure to its conclusion. (see Ex parte Jimenez, NO 74,433 (Court Opinion delivered September 25, 2002); Tr. 57-59 with Mandate Issued. The Court of Criminal Appeals not only gave specific instructions to proceed under Tex. R. App. Proc. but issued a Mandate that in effect made Petitioner's case not even a conviction until the new direct review came to a conclusion. (see Tr. 56-59)

Petitioner's instant circumstances are distinctive from Salinas v Dretke, 354 F. 3d 425 (5th Cir. 2004); Foreman v

Dretke 383 F. 3d 336 (5th Cir. 2004) (holding that the right to to an out of time PDR did not require federal court to re-start running of the ("AEDPA) limitations period and clarifying that an out of time PDR is not a part of the direct appeal process) in that Petitioner was granted a new direct appeal of right because Petitioners 1st appointed counsel abandoned him after filing an Anders Brief and did not give him the opportunity to obtain the trial record and file and indigent pro-se brief pursuant to Anders v California 386 U.S. 738 (1967)

Petitioner would ask this court on the facts and the record of this instant case to adopt the guidance of the sister court of appeals in Frasch v Peguese 414 F. 3d 518 (4th Cir. 2005) (holding that state law determines "direct review" for purposes of "AEDPA" and an out of time appeal restarts the limitations 1-year clock pursuant to Maryland Law) In Texas Law and "out of time"/"New Appeal" restores the direct appeal process. Ex parte Torres 943 S.W. 2d 469 (Tex Cr. App. 1997) at 474-75.

Assuming that Texas Law "restores" the petitioner to the original position of first appeal of right, when granted by the Texas Court of Criminal Appeals, Exparte Torres, supra at 472, as in the instnat case, Petitioner was placed back to the position as if he were just convicted by the trial court, appointed counsel and had 30 days to file Notice of Appeal under Texas Rule of Appellate Procedure Rule 25, and the direct appeal was governed to it's conclusion by the Texas Rules of Appellate Procedure and Rules of the United States Supreme Court Rule 13.1-3, see Caspari v Bohlen 114 S.Ct. 948, 953 (1994); Motley v Collins 18 F. 3d 1223, 1225 (1994)(direct appeal has been concluded when the availability of direct appeal (to the states) has been exausted and the time for filing writ of certiorari has expired or has been finally denied); see Flanagan v Johnson 154 F. 3d 196, 197 (5th Cir.1998) (90 days for seeking writ of certiorari or final denial applied to "AEDPA")

Petitioner is hard pressed to find any holding in the United States Circuit Courts or United States Supreme Court that holds a Petitioner waives his right to seek or the time to seek a writ of certiorari under Rule 13.1-3 of the Rules of the United States Supreme Court with the indistinguishable facts of the instant case. The Fifth Circuit Court of Appeals stated in dicta, in Roberts v Cockrell 319 F. 3d 690, 693 (5th Cir. 2002) "because Roberts was unable to pursue direct review, Roberts apparently waived his right to seek a writ of certiorari from the Supreme Court. Id. 693 note. 14.

In the instnt case the Texas Court of Criminal Appeals granted petitioner a new/ out of time appeal. Exparte Jimenez No 74,433 (Application No 53,212-01) see Opinion delivered September 25, 2002. (Tr. 56-58) The notice of appeal was timely filed by new appointed counsel.Oct 25, 2002. (Jimenez v State 03-02-00733-CR) The Court of Appeals affirmed petitioner's conviction on May 15, 2003 in an unpupliched opinion. (copy of of opinion) ; Ex parte Jimenez No 53,212-02, at 87-90. Petitioner's Petition for Discretionary Review was refused on October 8, 2003. Jimenez v State, PDR No. 937-03. Petitioner contimplated seriously petitioning for writ of certiorari which his ninety (90) days expired on or about January 8, 2004. see Rules of the Supreme Court 13.1-3, Flanagan v Johnson at 197. On December 6, 2004 Petitioner filed a state writ of habeas corpus challenging his conviction, having decided that he had no issues of national importance that would warrant a Supreme Court writ of certiorari. Petitioner's time for seeking writ of certiorari expired January 8, 2004. The time that lapsed between January 8, 2004 and December 6, 2004 approximately 333 days. Petitioner being Hispanic and unable to even comprehend state and federal law without assistance from other inmates and having only an elementery education in English dilidently has pursued state and federal remedies against all odds. Being indigent, incarcerated and forced to litigate pro-se has tried diligently to present his claims on his first appeal of right, new claims on state and federal habeas as timely as possible under his circumstances.

Petitioner's state writ, Exparte Jimenez, No. 53,212-02, at 17. was pending in state court from December 6, 2004 to June 29, 2005. Id. at cover. Pursuant to U.S.C. 28 § 2244 (d) (2) 222 days. Petitioner promply filed his instant federal petition on July 19, 2005 just 20 days after the state writ was denied. see Duncan v Walker, 533 U.S. 167 (2001)(confirming that the limitations period is tolled during the pending of a properly filed "application for State post conviction or other collateral review" but prohibiting a federal writ as it is not a state or other collateral review, under 28 ¶ U.S.C. § 2244 (d)(2); see also Brewer v Johnson 139 F. 3d 491, 493 (5th Cir. 1998) Because the 222 days were tolled petitioner was timely pursuant to the plain and unambiguaous language of the "AEDPA's 1- year limitations period. 28 U.S.C. § 2244 (d)(1)(A) - (2) in that petitioners 333 days to file and the 20 days to file together used 353 days of the 365 day 1-year stateute of limitations and thus Petitioner's instant Petition is timely.

It might be further helpful to consider as guidance the sister courts in Orange v Calbone, 318 F. 3d 1167, 1170-71 (10th Cir. 2003)(holding "if a criminal defendant proves he was denied a part of his statutory direct appeal through no fault of his own, to the highest court of last resort and relief is granted, for the purposes of 28 U.S.C. § 2244 (d)(1)(A) his one year limitations period should begin at the conclusion of his direct review or the time for seeking his next review0; see also Miller v Collins 305 F. 3d 491, 494 (6th cir. 2002) (revisiting their finding in Bronough v State of Ohio 235 F 3d 280, 286 (6th Cir. 2000 in opposition, but because case could be disposed of without overruling Bronaugh declined to rule on issue) However the Sixth Circuit has been chrystal clear on an almost identical set of facts in the instant petition in Frasch v Peguese 414 F. 3d 518-20-25 (6th Cir. 2005) Petitioner is not time barred in the instant case by the 1-year statute of limitations.

2. In the alternative if this Honorable Court deems under a strict and harsh application of the "AEDPA" 1-year limitations period that Petitioner is time barred, Petitioner asserts that he would be eligible for equitable tolling, as his circumstances meet the "rare and exceptional standard", that qualifies him for that relief.

Because the 1-year "AEDPA" statute of limitaions is not a jurisdictional bar, the statute of limitations can be equitably tolled, in "rare and execptional" circumstances. Davis v Johnson 158 F. 3d 806, 811 (5th cir 1998), Cert. denied, 526 U.S. 1074 (1999)

Petitioner was initially deprived of his first appeal as of right as an indigent by his appointed attorney Duke Hooten. see Evitts v Lucy 469 U.S. 387, 396 (1985)(6th amendment right requires effective assistance of counsel during first appeal as of right) Mr. Hooten was not only ineffective, enept, but also illegally kept petitioner from his first appeal, but illiminated his right as of due process in obtaining any information about his appeal, his ability under Anders v California 386 U.S 738 (1967) to obtain an indigent record, file a timely pro-se brief, Petition for Discretionary review, and file a writ of certiorari or have the time to decide to seek a writ of certiorari. The record is clear that Mr. Hooten not only failed to advise Petitioner but also lied and falsified documents in order to cloak his incompetence in secret from the District Court and Texas Court of Criminal Appeals. (see Exparte Jimenez , No. 53,212-01 #1 writ, 1-70) The most revealing are the findings of the trial court. Id. at page 6-7 5-A. Petitioner sought his counsel, the appellate court clerk, who wrote him and said there was no record of appeal and the District Clerk who ignored his letters for the most part. Petitioner believed that he never got an appeal at all even though his attorney Mr. Perez told him he might get Mr. Hooten. Petitioner being indigent, incarcerated, Hispanic, and not well educated, could not help himself, and because of the rareity of out of time appeals granted, very few inmates in Petitioner's position know about them or even believe they can be obtained. Petitioner by happenstance met a Hispanic indigent, inmate that had a little knowledge of the law and would help him free, which is very unusual in prison. TDCJ-CID does

I still do not really understand what the inmate did to get me back into court, but when I got a new appeal, he was transfered off the unit and I only had 30 days to write a brief, another Christian brother helped me get an extension of time and has helped me free till present, which is a miracle.

These circumstances are truly "rare and exceptional" in that it is rare that the Texas Court of Criminal Appeals would grant a new/out of time appeal, particularly in that an indigent incarcerated, pro-se litigant, would get any help or be able to catch the attorney in his lies, to present this at all to the District Court, and the Court of Criminal Appeals is "rare and exceptional" at all. Davis v Johnson, supra, at 811.

One such rare and exceptional circumstance" was recognized in Alexander v Cockrell 294 F. 3d 626. In Alexander the Fifth Circuit, citing United States v Patterson, 211 F. 3d 931, because the court had used language that could have been misleading to petitioner that could have led him to file a subsequent petition. 294 F. 3d 629. The intentional misleading of counsel and denying Petitioner ameaningful direct appeal is unconscionable misconduct on appellant counsel's part. see U.S. v Wynn 292 F. 3d 226,229 (5th Cir 2002) (the court found that under certain circumstances of intentional misconduct of counsel, equitabel tolling may be warranted) Mr. Hooten not only misled Petitioner that he didn't even have an appeal by abandoning him and never contacting him, but lied and forged a letter saying that he had hand delivered him the brief and information at Tom Green County Jail, when Petitioner could not have possibly been there, as the record indicates Petitioner was at the Middleton Unit of TDCJ-CID, in Abilene at the time. (State Writ #1, Id. page 7, No. 2. finding of fact)

In Fisher v Johnson, 174 F. 3d 710, 713 (5th Cir. 1999), the Fifth Circuit held that courts must "examine each case on its own facts to determine whether it presents sufficiently "rare and exceptional circumstances" to justify tolling."(citatiions omitted). "Equitable tolling is a discretionary doctrine that turns on the facts and circumstances of [each] particular case and does not lend itself to bright line rules." Id. at 713.

The doctrine of equitable tolling preserves a plaintiff's claims when the strict application of the statute of limitations would be inequitable. United States v Patterson, 211 F. 3d 927, 930 (5th Cir 2000).; Davis v Johnson, 158 F. 3d at 810. supra.

In order for equitable tolling to be applicable, it is necessary that the petitioner have been prevented, through no fault of his own, from asserting his claim. see Coleman v Johnson, 184 F. 3d 398,403 (5th Cir. 1999); Cousin v Lensing 310 F. 3d 843, 848 (5th Cir. 2002). Petitioner is uneducated, writes and reads poor, and only speaks English fair. (see Application No. 53,212-02 April 20, 2005 pages 45-52 for the Pre Sentencing report that shows petitioner's entire history, education,ability to read and write and speak english,etc.) Petitioner saw it for the first time after April20, 2005 when he was sent a copy to perfect his appeal by the District Clerk in the record)

Appellate Counsel's inexplicable neglect of Petitioner's rights as well as counsel's own ethical obligations to Petitioner presents similar "rare and exceptional and extraordinary circumstance" beyond Petitioner's control that warrents equitable tolling in the event Petitioner is barred by the strict and harsh application of the AEDPA 1-year limitations period. In light of the actions and inactions of appellate counsel as well as Petitioner's limitations and genuine attempts to obtain knowledge, help, and litigate his issues to finality at the state level, it would be inequitable to bar petitioner from presenting his claims on merit in his instant Application.

MERITS OF GROUNDS OF ERROR

II. Standard of Review

Under 28 U.S.C. § 2254 (d), a writ of habeas corpus on behalf of a person in custody under a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless he shows that the prior adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable decision and application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision of an decision 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). A decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable set of facts. William v Taylor 120 S. Ct. 1495, 1522 (2000); Hill v Johnson 210 F. 3d 481, 485 (5th Cir. 2000) A state court decision will be an unreasonable application of clearly established precedent if it correctly identifies the applicable rule but applies it objectively unreasonably to the facts in the case. Neal v Puckett, 286 F. 3d 230, 236, 244-46 (5th Cir. 2002) In addition a state court's factual determinations are presumed to be correct. 28 U.S.C. §2254 (e)(1). The applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1). When the Texas Court of Criminal Appeals denies relief in a state court habeas corpus application without written order, it is an adjudication on the merits, which is entitled to this presumption. Neal v Puckett, 286 F. 3d at 244-46; Exparte Torres, 943 S.W. 2d 469, 472 (Tex. Cr. App. 1997)

Hearing:

The Fifth Circuit following Harris v Nelson 89 S.Ct. 1082 (1969) stated where "specific allegations before the court show that petitioner may, if the facts are fully developed, be able to demonstrate .....that he is entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." Murphy v Johnson 205 F. 3d 809 (5th Cir. 2000) Petitioner requests that if he shows facts in dispute and these alleged facts if proven true would give him relief in any of his claims, that this Court would provide him an adequate hearing.

III. Petitioner has and will meet his burden of proof on his claims, in this instant habeas as fact and as applied to the law.

Petitioner has stated in his direct appeal to the intermediate state court of appeals, highest state court of last resort, by Petition for Discretionary Review, and state habeas corpus, and finally the instant federal Petition, the factual precicate of all his claims, and if the facts are true, the proof before this court will establish that the final adjudication in state court resulted in a diciaion on all his claims that was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 28 U.S.C § 2254 (d)(2); Petitioner has and will rebut the ultimate factual findings by the state courts by clear and convincing evidence. § 2254 (e) (1); Jackson v Johnson 150 F. 3d 520, 524 (5th Cir. 1998) Williams v Taylor 120 S. Ct. 1479, 1491 (2000)

When petitioner meets his burden of proof in this instant petition, the facts applied to the clearly established Federal law, determined by the United States Supreme Court will show that the state courts decisions resulted in an unreasonable application of thet precedent, and or contrary to that controlling precedent. (emphasis added) 28 U.S.C. § 2254 (d)(1); Hill v JOhnson 210 F. 3d 481 (5th cir. 2000); Williams v Taylor, 120 S. Ct. 1495, 1522 (2000)

IV. Petitioner can prove that he was denied his due process right to a neutral and detached judge.

A. Petitioner was denied his due process right to a neutral and detached judge when he predetermined the "prime number" sentence due to bias and prejudice.

This specific point of error was broght to the state intermediate court of appeals, pro se, in Jimenez v State No. 03-02-00733-CR (Tex App. Austin 2003); in Petition for Discretionary review, Jimenez v State PDR No. 937-03, (refused October 8, 2003); and in the Instant Federal Habea, Pet. at 7, Ground One A. Although there was additional record support for the judges bias and prejudice, the specific ground was the pre disposition of punishment. Id.

The Court of Appeals in No. 03-02-00733-CR in an unpublished opinion issued May 15, 2003, (see opinion in Ex parte Jimenez, No. 53,212-02, at 87-90) made the last state court findings of fact and conclusions of law on the "merits) because the highest Court of last resort, refused to adjudicate on the merits by denying Petition for Discretionary Review without Reviewing the Court of Appeals Opinion , it is the last clear decision of this allegation on merits by state court. Ylst v Nunnemaker, 501 U.S. 797, 806 (1991) (see P.D.R. 937-03)

The court of appeals found (1) the trial court did not promise or otherwise bind itself to a predetermined punishment should supervision be revoked (2) the 43 years was based on Petitioner's total history.

These ultimate findings of fact were 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)(2); Martin v Cain, 246 F. 3d 471, (2001) (this standard applies to the state court's "ultimate fact decsions" not every jot of reasoning)

The trial court at the Plea of Guilty Hearing on November 12, 1991 (S.F. Vol 2 1-26; Ex parte JImenez, No 53,212-02, at 55-86) the trial court gave Petitioner several ranges of punishment at the hearing. 1) 5 to 99 years and up to $10,000 fine(S.F at 3 Lines 4-11; writ #2 p 63) 2) 15 to 99 years and or fine up to $10,000 fine, (S.F. at 3 Lines 19-25, at 4 Lines 1-2; writ #2 page 63-64) After plea of guilty and true to enhancement paragraph. (S F 5; Writ. #2 at 65) 3) if revoked the range of 5-99 or 15 to 99, or life and up to $10,000 fine if found guilty and or enhancement found true or not. (SF at 10 Lines 9-19; Writ #2 p 70) the most compelling, confusing and relevant is 4):

> The Court: Do you understand that you better walk out of here -- if you do this, you better walk out of here today believing that if you violate your probation that I will hand out the maximum sentence to you. Actually, I have a habit, it seems, of mainly using prime numbers. And ninety-seven is the highest prime number, so that's probably the highest you can get.
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> (S.F. Vol 2 page 11 Lines 2-9; Exparte Jimenez, No. 53,212-02 at 71)

The court of appeals interpreted the trial court's intention by this threat was to "urge appellant to assume the worst as a means of motivating himself to obey the conditions of supervision. (opinion at 3; Writ #2 page 89) 5) : If that is not confusing, this range should be.

The Court: So, for you, that first degree felony range that I have said that I have given before on a revocation of 17 years to 97 years fits you quite well, sir. Do you understnd that?

(S F Vol 2 page 10, Lines 21-25; Writ #2 at 70)

The state court of appeals has misinterpreted the intention of the judge in the instnt case or his full intention. The record is clear that the judge was going to assess the maximum or a "prime number" if petitioner was revoked and he had done this before on a revocation. Although the court did not state 43 years, it is clear that 97 is the maximum and apparently 43 is the "prime number eluded to" The judge even stated he had a habit of assessing these "prime numbers" on revocations.Id. at 11; 71. Petitioner being indigent, incarcerated is not able to show the Judges past record of complaints to support his habit, from the Texas State Bar or the Judicial Miscondut Commission, but has requested this court to assist him in the discovery of such information. Instant Petioner's Response, infra, at 3.(State Records at page 3 of this Respnse)

At the Revocation Hearing of November 6, 1995, (Vol. 3 of the Statement of Facts, hereafter S.F. pages 1-123) the judge got irate at petitioner because he stated he did not understand defered adjudication. (S.F. 5-9) The trial judge interupted Petitioner before he could explain fully that he did not understand how defered works particularly in light of Ms. Harris, his attorney at the Guilty plea hearings, explaination or lack there of, see this instant Response VI, Fed. Pet. at 8, 15-16, Ground Four, D. and the confusing admonishment above at the Guilty Plea Hearing. How Petitioner could serve 4 years of a 5 year probation, and get anywhere from 5 to 99, 15 to 99, up to $10,000 fine, 17 to 97 or a prime number when his attorney told him it was like regular probation.

Not to mention that his present counsel told him he could be reinstated or at the most get 15 years on plea / recommendation. see VII of this instant Response, Pet. at 16-21, E. Ground 5. Petitioner only wanted to clarify what defered was and what punishment could or would he get at this revocation hearing. Under the record, this is a fair question. The judge just got irate, clled him a liar, threatened him with perjury charges and demeaned him for several minutes, (S F Vol 3 pages 5-**9**) and this attitude of ire permeated the entire proceeding. Petitioner would ask this court to look at the Pre-sentencing investigation report (Ex parte Jimenez No. 53,212-02, at 45-52 hereafter and prior to Writ #2) to see petitioner's prior record, his poor reading and writing of english, and only fair speach in english, and as petitioner only learned after he recieved the record of Writ #2, the specific mention of a gun in his prior conviction of assault with a deadly weapon. (Writ #2 47-48). Petitioner asserts that his prior conviction did not involve a gun or firearm and at 3, of this Response, Petitoner has requested the indictment on that specific case, to disprove that material fact. The judge used this false statement to villify petitioner's record as more violent in his assessment of punishment without ever seeing or verifying the indictment which would prove no gun or firearm was used or exhibited in his only prior conviction. (see S.F. Vol. 3 117 Lines 8-12) The judge by his own admission told the petitioner he was irritated with him (S.F. Vol 3 74-75) and if this court would read the P.S.I , Writ #2 45-52, and the judges assessment of the case and petitioner record, and compare it to the adversary District attorney and Defense Counsel's assessment of the case and petitioner's record there is no way that the court of appeals could find in light of the evidence at the state court proceedings that petitioner's 43 year punishment was not prdetermined by the judges actions at the Guilt PLea Hearing and at the Revocation and that the punishment was not based on the criminal history of petitioner, but bias and prejudice.

see the Defense Counsels and Prosecutors summation of the facts and criminal history of defendant (Vol. 3 S F page 110 through page 113 Line 13) in comparison with the judges assesment of the same set of facts and criminal history. (S. F Vol 3 117 Lines 4-17) The record alone rebuts the factual findings of the state court of appeals 1) the trial court did not promise or otherwise bind itself to a predetermined punishment should he be revoked and 2) the 43 years was based on Petitioner's "total history; however Petitioner would continue to request the indictment for his enhanced paragraph of aggravated assault with a deadly weapon and the Judges prior record. instant Respnse at 3, to expand the record and verify petitioner's assertions. 28 U, S. C. § 2254 (d)(2) Martin v Cain 246 F. 3d 471 (5th Cir 2001)

The court of appeals found the ultimate conclusion of law "We find no basis for concluding that the court denied due process by predetermining the punishment in advance of the hearing" This is an unreasonable application of clearly established federal law as determined in the Supreme Court of the United States, namely Gagnon v Scarpelli, 411 U.S. 778,786, 93 S.Ct. 1756, 1761, 36 L. Ed. 2d 656(1973) (Due process requires a neutral and detached hearing officer) 28 U.S.C. § 2254 (d) (1)

Petitioner in his brief, pro-se and in his Petition for Discretionary Review relied on Gagnon v Scarpelli, at U.S. 786, 93 S. Ct. 1761. supra, (see brief Jimenez v State No. 03-02-00733-CR; PDR. No. 937-03) The Court of Appeals considered Jefferson v State, 803 S.W. 2d 470 (Tex App Dallas 1991, Pet. ref'd); and Howard v State, 830 S.W. 2d 785 (Tex App. San Antonio 1992, Pet. Refd.); and Early v State, 855 S.W. 2d 260 (Tex. App. - Corpus Christi 1993) pet dism'd, improv. granted, 872 S.W. 2d 758 (Tex Cr. App. 1994) In Jefferson and Howard, the courts found that the judge had predetermined a specific sentence, before revocation. In Early the court stated that the case was distinctive in that the judge did not state an exact sentence expressly, but remarks at the revocation hearing verified that the judge had a predetermined punishment in mind and reversed the case saying it was a due process violation, pursuant to Gagnon v SCarpelli, Supra. iD.262. The State was

granted a Petition for Discretionary review, but it was dismissed as granted improvidently. Early v State, 855 S.W.260,262 (Tex. App. - Corpus Christi 1993), pet dismd, improvidently granted, 872 S.W. 2d 758 (Tex. Crim. App. 1994) As in Early , the judge in this instnt case, indicated that he was going to give petitioner a high sentence at the guilt plea hearing, and the additional remarks and bias and prejudice at the revocation confirmed with a high "prime mumnber" of 43 years incarceration. Id. 262. The state court conclusion that "We find no basis for concluding that the trial court denied due process by predeterming the punishment in advance of the hearing"is not only erroneous by State Law, Early v State, 260-62, but is an objectively unreasonable application of United States Suprem Court precedent in Gagnon v Scarpelli, 93 S.Ct. 1756, 1760 (1973) (citing Morrisey v Brewer 92 S.Ct. 2593, 2604 (1972)

B. Petitioner was denied Due process right to a neutral and detached magistrate, in that he was so irate, his bias and prejudice would not even let him consider fairly the evidence, mitigation factors and the 15 year agreement between the defense counsel and the prosecutor.

Petitioner in order to avoid multifariousness would bring this distinctive ground separate as it was not considered in the direct appeal, but was challenged in the State Habeas Corpus, Ex parte Jimenez, No. 53,212-02, as a new and separate Ground for relief in this instant habeas. Pet. at 7, B. Ground Two., and Fed. pet. 7, B. Ground Two. Petitioner would, however incorporate A. above in this instant claim, facts, record citings, and applicable law as relevant.

Petitioner would further incorporate all of the facts and record citings in his Direct Appellate Brief, Jimenez v State No-02-0733, Issue No. 1, pages 12-18; State Writ Ex parte Jimenez, No 53,212-02, at 7, 12, and Fed. Pet at 7, 10-12, Grounds B., as relevant to the instant issue.

Prior to the revocation hearing, on November 1995, appointed counsel Mr. Perez, presented me a plea bargain of 15 years if I would plead true to the allegations. He informed

Petitioner that he would probably be reinstated on his probation because the probation officer recommended it but in case the judge would not reinstate it, I would not get more than 15 years. I told Mr. Perez that I did not want to plead to something I did not do. I pleaded true to 2 of the allegations and believed I had a 15 year plea bargain. The Affidavit sworn to by Mr. Perez states that "Mr Evan Jones advised that he would reccommend fifteen (15)years" .....if the Court revoked Mr. Jimenez probation" "I swear that I did present the fifteen (15) years as a plea bargain to my client, Carlos Jimmenez....." (in relevant part)(Writ #2 at36) My counsel believed I had a plea bargain of 15 years and was shocked as I was by the results of the hearing November 6, 1995. (Id. 36) It is well settled in Texas law that a plea of true to any allegation will be sufficient to revoke probation. Atchison v State 124 S.W. 3d 755 (Tex App.- Houston 2003) After Petitioner pleaded true to the two allegations in the 1st Amended Motion to revoke, the trial court affirmed that the prosecutor did not have to prove anything and that a plea of true to any of the allegations was sufficient to revoke petitioner. The court then asked the prosecutor if there was any plea agreement in the case. and the Prosecutor said no. (Statement of Facts Volume 3, pages 14-16) Mr. Perez never make any statement to the trial court about presenting the 15 year plea agreement to petitioner for his true pleas or to the prosecutor about any misunderstanding between a 15 year plea or reccomendation. Either the prosecutor was afraid of the judge and did not want to admit to the plea or Mr. Perez was afraid to confront the judge or prosecutor with the plea or that he had misunderstood the recommendation as a plea, but there is no trial strategy that would condone this type of fear of the judge or inattention to the rights of petitioner to leave him helpless with an antagonistic judge and petitioner believing he would only get the 15 years. This situation should have been corrected by Mr. Perez, the prosecutor and if the judge becane enraged should have been recused and petitioner allowed a fair prceeding. see instant Response Issue VII.

The State Habeas Court made an observation that the instant claim and A. in this fed. pet, at 7, and in this Response were the same claim in Direct Appeal and State Habeas, Writ #2, at 7, B. (Writ #2 at 12.) Petitioner asserts that his direct appeal Ground Issue 1, was a Due process claim of denial of a neutral and detached judge, because he pre-determined a punishment. As discussed in A. above, the Court of Appeals in its opinion, conclude that "We find no basis for concluding that the court denied due process by predetermining punishment in advance of the hearing" (court opinion Writ #2 at 90) The court of appeals even construed petitioner's point narrower than Petitioner intended, by only the 1991 Guilty Plea Hearing (S F. Vol2) when petitioner intended for some of the remarks and prejudice to support his issue in direct appeal in the revocation. (S.F. Vol. 3) Petitioner because of multifariousness, challenged the Due process denial of a neutral and detached judge in that he would not even consider the 15 year punishment because of his bias and prejudice at the revocation hearing specifically. Petitioner asserts that the State Habeas Court erred in finding the grounds are identical and both are equally cognizable on federal habeas and exhausted in the States highest Court of last resort. Picard v Connor, 404 U.S. 270, 276-77 (1971) (state prisoners must present state courts with the same claims he presents to federal) 28 U.S.C. § 2254 (c).

The State Habeas Court found that there was no plea bargain agreement at the revocation hearing. (Writ #2 at 12) Pettioner conceeds that there was no 15 year plea agreement admitted to by the prosecutor or defense counsel (Id at 12) But why did Mr. Perez prsent a 15 year plea bargain admittedly and allow petitioner to plead true at all? (Writ #2 at 36) Mr. Perez obviusly knows as Petitioner in hindsight that the record reflects there is no plea in front of the judge, but he did present it and petioner believed it and acted on it. In light of the evidence presented to the habeas court 1) the finding that the instant ground and the Issue No. 1 on direct appeal or the same and therefore the instnt ground is not cognizable of State Habeas, thus not

exausted for the purposes of the instnt Fed. Pet, at 7, B is an unreasonable determination in light of the evidence before the habeas court in its proceeding. 28 U.S.C. § 2254 d (2) Jackson v Johnson 150 F. 3d 520, 523-24 (5th Cir. 1998. 2) under the same standard the factual finding that "there was no plea bargain" is unrebuttable, however "there was a plea bargain presented to petitioner by Mr. Perez and petitioner believed that it was in effect" is a material fact that is proven in the record. (Mr. Perez in Affidavit Writ No 2 at 36) Because there was not plea bargain in fromt of the judge admitted, does not foreclose the fact that there was a plea bargain presented by Mr. Perez from the Prosecutor between Petitioner and them, not revealed.

The state habeas court made a conclusion of law " The kind of bias (Petitioner alleges) which is necessary for recusal of a judge must be exta judicial." relying on Grider v Boston, Co. Inc. 773 S.W. 2d 338, 346 (Tex. App. - Dallas 1989)

The type of bias and prejudice described by petitioner in (S.F. Vol. 3 pages 5-9) which permeated the entire proceeding (all citings in direct appeal of the record Issue 1; Writ #2 pet, at 7, 12 B Ground One; Fed. Pet. at 7, A Ground One; and B. Ground Two; pages 7, 10-12 and all facts relevant incorporated in this instant issue) is the kind of bias that was addressed in Webb v State 93 S.CT. 351, 352 (1993) (threatening remarks by judge to potential witness, denied petitioner due process of lae) The type of deep seated antagonism in the instnt case in light of the entire record made a fair judgment impossible. The ultimate legal conclusion of the state habeas court,. (writ # 2 at 13) is contrary to clearly established Federal law, as determined by the Supreme Court, namely Liteky v U.S, 114 S. Ct 1147-49 (1994) or an objectively unreasonable application thereof. Extrajudicial source is not the only basis for establishing disqualifying bias or prejudice, it is the only common basis, but it is not the exclusive reason a predisposition can be wrongful or inappropriate. Id. 47-48. A favorable or unfavorable predisposition can also deserve to be charactorized as "bias" or prejudice" because even though it springs from facts adduced

or the events occuring at trial, it is so extreme as to display clear inability to render a fair judgment. (that explains what some courts have called the "pervasive bias exception" to the extajudicial source" doctrine. see eg. Davis v Board of School Comms's at Mobile County, 517 F. 2d 1044, 1051 (5th Cir. 1975) Cert. den'd, 425 U.S. 944, 96 Sct. 1685, (1975); Liteky v U.S. 114 S.Ct, 1147 (1994) (absent extrajudicial source, (judicial rulings) require recusal only when they evidence such deep seated favoritism or antagonism as would make fair judgment impossible) Id. 1150. (emphasis added and in relevant part)

The trial habeas court finding "I find from an examination of the record that the alleged bias of the trial judge in this case was not extrajudicial.""It therefore could not be any basis to question or affect his status to hear the State's motion to adjudicate and to impose sentence." This finding and the above conclusion of law, relying on Grider v Boston, Co. INc. 773 S.W. 2d 338, 346 (Tex. App-Dallas 1989) "The kind of bias which is necessary for recusal must be extra-judicial," are adjudications of the instant claim in fact and law applied to the fact and (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 namely Liteky v U.S. 114 S. Ct. 1147, 1148-49 (1994) 28 U.S.C. § 2254 (d)(1) and the factual finding is (2) resulted in a decision that was based on an unreasonable application or determination of the facts in light of evidence presented in the state court proceeding. 28 U.S.C. § 2254 (d)(2); Price v Vincent, 123 S. Ct. 1848 (2003); see also Riddle v Cockrell 288 F. 3d 713, 716 (5th Cir) Dert. dend 123 S.Ct. U.S. 420 (2002) (quoting 28 U.S.C. § (d) (1)-(2).)

V. Petitioner's Guilty Plea was coerced, not made voluntarily with the understanding of the consequences of his plea.

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses open to the defendant." Boykin v Alabama 89 S.Ct. 1709, 1711 (1969)

To help Petitioner in the length of this Response and ground Petitioner would incorporate the facts and record citings in the above Issues IV. A. and B., State petition, Writ #2, at 7, 11, Ground A; and Fed. Pet., at 7, 12-14, Grond C. as relevant to this instant Ground of Petitioner's Response.

Petitioner was told by Ms. Harris that he could get 25 years in State or 35 years in federal time. Petitioner after extensive research with help from other inmates still connot understand where she got such information, with a non aggravated crime not involving any firearms or crossing any state line. This scare tactic along with the assurance that defered adudicated probation was like regular probation. Petitioner was familiar with probation. (Writ #2 at 47) Had Ms. Harris explained that unlike regular probation, if you take 5 year defered adjudication you could serve 4 years and 11 months, be revoked for any technical violation, or even if you are accused of any misdemeanor, the judge can give you any punishment he desires without even considering the evidence, or the state, defense, or probation officers recommendation, even 99 years, life, and a 10,000 fine. Instead she let me know that I wouldn't have to do any time, defered is just like regular probation, and if I didn't take it I would get 25 State or 35 Federal time. Petitioner would not be exagerating if he stated that in 1990 the Texas Prison population was at its historical peak 50,000 inmates, and by 1997 the populatio tripled to 150,000 of which at least 50,000 took the proverbial carrot of defered adjudication, resulting in over 40 yyear sentences, creating the overpopulation today, with virtually the same scenerio as petitioner presents in this instnt ground and response. If this court just researched a little public knowledge it could take judicial notice of this fact.

In Ms. Harrisis affidavit in the State Court proceeding. (Writ #2 at 52-54) she states 1) I have no independant recollection regarding this matter. 2) Judge Sutton was known to give severe sentences in these cases. 3) Sometimes I use examples of such as 5,15,25,35,55 up to 99 years or life. It is possible that the 25 years was the plea offer if Mr. Jimenez did not want the defered adjudication offer. (Id at 53)

Ms. Harris affidavit is vague and inconclusive at best, (compare with eg. Duke Hooten's affidavit Writ # 1 at 81-82) That habeas court at 6-7, findings 5 A 1-2 (findings and conclusions July 19, 2002 in writ #1) That appellate counsel's affidavit was inconclusive and Mr. Hooten could not have possibly hand deliverd the information of July 12, 1996, at Tom Green jail as he said, because appellant was released to prison April 4, 1996, and never returned to the jail, as the sheriff's office confirmed. (Id at 7)

Petitioner does not have the kind of dirct evidence at this instnat time to confirm Ms. Harris's actions and inactions but this court should agree that her affidavit is inconclusive at best. However if allowed discovery and or hearing to develope the evidence that is available and her state bar and even federal counsel records would prove her normal practices in coercing defendants, and misleading them to take unclear plea bargains. It is interesting to note that the 25 year possible plea bargain is suspect as Ms. Harris's affidavit confirms in light that the state prosecutor, the probation officer, defense counsel Mr. Perez at revocation, all agreed that the case at worst was a 15 year case as a plea or reccomendation. (S.F. Vol 3 p 113, Lines 16-25; p 117 Lines 6-17)

The Boykin v Alabama Court stated "it was error, plain on face of record,for Alabama trial judge to accept plea of guilty without affirmative showing that it was intelligent and voluntary, and this error ..... was properly before the United States Supreme Court. 89 S.Ct 1709, 1711 (1969); The Constitution insists that defendant enter a guilty plea that is voluntary and that defendant must make related waivers knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences. U.S. v Ruiz 122 S. Ct 2450, 153 Led. 2d 586, on remand 297 F. 3d 106. (2002)

Petitioner The State Courts proceeding 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, namely Boykin v Alabama 89 S.Ct 1709 (1069; and U.S. V Ruiz 122 S. Ct. 2450 (2002)

VI. The state court's determination to deny relief to Petitioner on his claim of Constitutional ineffective assistance of counsel at trial is objectively unreasonable.

Petitioner would incorporate in this instant ground of this Response, the facts, and record citings as applicable and relevant, in the above IV, A. and B.; V., in the state writ #2, A. Ground One, 7, 11, C. Ground Three, 8, 13; and in Federal Pet, C. Ground three, at 7, 12-14; D. Ground Four at 8,14-16.

"Where a defendant enters a guilty plea on counsel's advice, voluntariness of plea depends on whether advice was within range of competence demanded of attorney i n criminal cases." Hill v Lockhart 106 S.Ct. 366 (1985) at Id. 369. A defendant must understand the length of time he might possibly reveive, and he is fully aware of his pleas consequences. Spinelli v Collins 992 F. 2d 559, 561 (5th Cir. 1993) The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant." Boykin v Alabama S. Ct. 1709, 1711 (1969) In Hill, the Supreme Court held that the two pronged test enunciated in Strickland applies to cases involving guilty pleas. Hill v Lockhart, at 371.

To demonstrate ineffective assistance of counsel in a constitutional magnitude he must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Strickland v Washington, 466 U.S. 668, 667 (1984) To show performance was deficient petitioner must show that "counsel made serious errors that he was not functioning as counsel guarenteed by the Sixth Amendment."ID. To show prejudice, petitioner must show that his counsel's errors were so serious as to deprive the defendant of a fair trial, a trial with a result that is reliable.Id. Deficient performance will be found to be prejudicialonly upon a showing that, but for counsel's errors, there is a reasonable probability that the result would be different and that confidence in the reliability of the outcome is undermined. Lockhart v Fretwell, 506 U.S. 364, 369 (1993; Armstead v Scott, 37 F. 3d 202, 206-07 (5th Cir. 1994)

Texas Courts have long held that counsel has a duty to a client which includes fully explaining any plea offers in order to help a client make an informed decision. Howard v State 667 S.W. 2d 265, 267 (Tex. App. - Dallas 1984)(cited in State v Williams 83 S.W. 3d 371,373 (Tex. App-Corpus Christi 2001) (holding that counsel was ineffective under Strickland, because he did not explain the 5 year defered adjudication fully to defendant) Id. at 371.

Federal courts have imposed a duty to fully explain offers. United States v Day 969 F. 2d 30,43 (1992)(noting that the difference in Sentencing exposure between accepting aplea offer and standing trial is crucial information in the decision whether to plead guilty); Beckham v Wainwright 639 F 2d 262,267 (5th Cir. 1981) (finding ineffective assistance of counsel when attorney gave erroneous advice for withdrawing guilty plea which resulted in facing maximum sentence); and Herring v Estelle 491 F. 2d 125, 128 (5th Cir. 1974)(stating that counsel must, actually and substantually assist his client in deciding whether to plead guilty.....His advice should permit the accused to make an informed and conscious choice.

It should be deficient performance for counsel to say that 5 year defered adjudication is the same as regular probation, threaten petitioner with 35 federal and or 25 year TDCJ time, tell Petitioner to just initial the paperwork and agree with the judge in court, to state he won't have to do any prison time and the conviction will not be on his record. This is a far cry from Ms. Hariss's affidavit, (see Writ #2 at 52-54)

In her affidavit she stated in relevant part 1) "I have no recollection regarding this matter" 2) "I deny the allegations in Mr. Jimmenez petition. 3) "I would never tell a client (particularly in Judge Suttons court) that defered adjudication was just like "regular" probation. It was the practice of the District Attorney's Office to offer deferred adjudication to some repeat offenders, and Judge Sutton's practice to accept such plea bargains because it left the entire range of punishment if the defendant was adjudicated. Judge Sutton was known to often give severe sentences in these cases." 4) "If the defendant failed to live up to the conditions

imposed, the court could give anywhere in the punishment range, and often Judge Sutton gave harsh sentences. 5) I would have explained the consequences of pleading true to the enhancement paragraph, especially how this effects the punishment range. 6) I know it was my practice to read the guilty plea warnings, answer questions, and have the defendant initial all the boxes if they understood the warnings and waivers. 6) "After my meeting with the client before the plea, Judge Sutton admonished him during the plea hearing. 7) he (Judge Sutton) had given sentences of 17 to 97 years. 8) Judge Sutton warned Petitioner three times he needed to believe, if violated he would give him the "maximum sentence". **9**) I deny that I would have told Mr. Jimenez that he could get 35 years federal time. 10) It is my good faith that I told him 25 years as an example. 11) It was possible that the 25 years was an example. 12) 25 years was a plea offer 13) I cannot validate that posibility because I have been unable to review the government's or Mr. Jimenez's record at Edwards and Lupton. 14 I believe that Mr. Jimenez's guilty plea on November 12, 1991 in Cause No CR91-0528-B was freely and voluntarily made."

Although Ms. Harris had no recollection of the matter, she had a textbook imagination of what she believe's she would have done, especially in light that she did remember Judge Sutton was well known to give severe punishments in these cases like petitioners, and he particularly liked to leave the range open to impose harsh sentences. (Writ #2 at52-53)

If Ms. Harris had given me this instruction above, with even a simple example that after serving 4 years of the 5 year defered adjudication, I could be revoked for any technical violation, or for any offesnse that I was accused of even if proven innocent, and I could get anywhere near 43 years state prison time, particularly that she had knowledge that Judge Sutton likes to give defered adjudication so he can keep the full range open so he can give harsh and severe punishments, Petitioner would hav insited on regular probation, 15 year plea bargain maximum or go to trial by a jury.

Petitioner would assert that a 5 year intelligent and knowing defered adjudication would be the last option petitioner would or should have made under the circumstances of this case.

There was no way for the judge or Ms. Harris to know that the same crime Texas Penal Code 30.02 A, that was a 1st degree felony in 1991, is now currently a 2nd degree, (Burglary of a habitation with intent to commit theft, not a felony, see restitution of$16.34 , P.S.I Writ #2 at 47) However she should have known that it was not in the best interest of petitioner to be duped into defered adjudication probation and set up for Judge Sutton, particularly knowing his habits so well as she swore to in her affidavit. Petitioner realizes that her affidavit and petitioners allegation, with the Trial Record, Appellate Record and two state habeas records are all this court has to consider, if discovery cannot be made available or a hearing, to produce the State Prosecutors Record, and the Law firms record, and Judge Sutton's and Ms. Harris's State Bar complaints and or Judicial Msconduct Commissions records, to support petitioner's allegations and rebut, Ms. Harris contentions about her usual practices with clients on defered adjudication cases and support her contentions of Judge Suttons predetermination practices on these type of cases.

The State Court's determination that Petitioners allegations are without merit, false and that Petitioner was afforded a constitutioal effective counsel in his guilty plea bargain resulting in a freely given, knowing and voluntary plea is an unreasonable application of Federal law, namely the United States Supreme Court precedent in Hill v Lockhart 474 U.S. 52,56 (1985) and Strickland v Washington 466 U.S. 692 (1984) 28 U.S.C. § (d)(1) and the state court decision was based on an objectively unreaonable determination in light of the evidence at the state court proceeding§ (d)(2) of 2254. (see 28 U.S.C. § 2254(d) (West 2004; Price v Vincent 123 S. Ct. 1848 (2003)

VII. Counsel rendered ineffective assistance of counsel at his revocation hearing.

Petitioner was denied Constitutional effective assistance of counsel at his revocation hearing (a) he erroneaosly advised him he would be reinstated on probation (b) if not, he would be revoked with a 15 year plea bargain if he plead true, and

(c) failing to object to the trial court's bias and prejudice and move for recusal of Judge Sutton. Fed. Writ Pet at 16-21.Petitioner would request that the previous Issues in this instant Response IV. A. and B; V and VI be incorported into this instant Issue, all facts and record citings, and applicable law, state and Federal.

Petitioner would address the "Director"s contention that ineffective assistance of counsel claims on a final revocation are under the "new rule" of Teague v Lane , 489 U.S. 288 (1989) in cases such as the instant case. Petitioner does not have the vast resources as the "Diretor" by and through his counsel of record the Texas Attorney General, but would assert, that from the information available to him, The Supreme Court has not recognized a constitutional right to counsel in all probation revocation hearings. See Gagnon v Scarpelli 411 U.S. 778, 789-90 (1973) However see for example Federal courts have some precedent on the subject. ss U.S. v Doddson 25 F 3d 385, 389 (6th Cir. 1994) (defendant entitled to representation by counsel at final revocation hearing because substantial reasons justifying his probation violations were complex or difficult to develope or present.); U.S. v Allen, 157 F. 3d 661, 665 (9th Cir. 1998) (recognizing consttuional right to effective assistance of counsel at probation revocation hearing) There is no question that Texas legal precedent has aknowledged, Strickland v Washington 466 U.S. 692 (1984) as the standard for cases such as the instant case, at revocation, adjudication, and sentencing in defered adjudication cases. Although not a defered case, Guittierrez v State was a revocation of probation and the court appeals reviewed the ineffective assistance of counsel under the Strickland standard 466 U.S. 692, supra, 65 S.W. 3d 362 (Tex. App. Corpus Christi 2001) reversed on other grounds, 108 S.W. 3d 304 (Tex. Crim App. 2003) In Williams v State 83 S.W. 3d 371,373 (Tex. App. -Corpus Christi 2001) the state court of appeals reversed and remanded a defered 5 year adjudication after revocation because counsel was constituionally ineffective under, Strickland,supra, Id. 371. because counsel did not explain defered properly.

By State and Federal precedent Strickland v Washington 466 U.S. 682 (1984) appears to be the standard for the instant ground in this proceeding. This Court should look to sister Circuit Courts and State Law for guidance when the specific issue has not been reviewed by the Supreme Court of the United States.

(a) Counsel was ineffective for advising petitioner that he would probably be reinstated on probation in light of Elaine Moore, the Probation officer.

Mr. Perez, petitioner's counsel on revocation told petitioner that he would be either reinstated on parole because of Ms. Moore's recommendation or a plea recommendation from the State and or plea bargain would insure he would not get more than 15 years. As promised Ms. Elaine Moore made a favorable reccomendation to the Court. (S.F. Vol 3 50-66) She reccommended that Petitioner be reinstated on Intensive Supervision Probation. (S.F. Vol 3 at 55), However under cross examination she waivered. (S.F. Vol. 3 at 59-61) Mr. Perez made an affidavit in the State Habeas proceeding. (Writ #2 35-36) Mr. Perez stated in relevance to this subpoint. "The Court did not follw Mr. JOnes recommendation, not Elaine Moore's, not defense attorney's request; therefore, the court assessed forty-three (43) years''' Mr. Perez was deficient for making this representation to Petitioner.

(b) Counsel was ineffective for making another misrepresentation that Petitioner would get no more than 15 years via plea bargain in the event he was not reinstated, if he would plead true. Mr. Perez further stated in his affidavit in relevant part, (emphasis added) (Writ #2 at 35-36) 1) Petitioner did not want to plead true to Paragraph III, No. 1 because he did not assault Ms.Barron by kicking her and Teresa Barron recanted any allegation of wrongdoing at the hearing by Petitioner. 2) Petitioner pleaded true to Paragraph III No. 2 a technical violation 3) Petitioner pleaded true to Paragraph No 4 and not true to Paragraph III NO. 3. Therefore there was no plea agreement because I and Petitioner were hopeful that he would be continued on probation.

4) ther was no actual plea bargain because Petitioner would not plea true to the allegations that he insisted were not true. 5) Mr. Jones advised he would recommend fifteen years in the institutional division of TDCJ. 6) **"I swear that I did present the fifteen years as a plea bargain to my client, Carlos Jimenez."** Mr. Jimmenez did not plead true to all the allegations. Mr. Jimenez and I were hoping that he would be reinstated and continued on probation by the Court. 7) "The Court did not follow Mr. Jones recommendation nor Elaine Moore's, not defense attorney's request; therefore the court assessed forty three (43) years. "I as Carlos Jimenez , defense attorney was shocke and disappointed by the results of the hearing of November 6, 1995".

Needless to say Petitioner believes Mr. Perez gave him erroneous information and unlawful advice. Mr. Perez really believed as did Petitioner that he would be reinstated. Hoever he admits under oath that Mr. JOnes advised that he would recommend 15 years, but presented it to petitioner as a plea bargain. There is no authority or information Petitioner can find or in all probability exists that makes a plea bargain invalid because Petitioner only pleaded true to two of the alegations in Paragraph III of the Motion to revoke. In the Contrary Texas Law only requires one pleading of true to revoke revocation and would satisfy the plea agreement. Atchison v State 124 S.W. 3d 755 (Tex. App - Houston 2003) Mr. Perez affidavit implies that because Petitioner plead true to two of the allegaions and did not plead true to two others there was automatically no plea bargain. This is not reasonable as a 15 year plea bargain was presented but at the hearing Mr. Jones stated there was no plea bargain. (S.F Vol. 3 page 15 Lines 21-25) If Mr. Perez was not acquainted with the Texas Law at the time of the hearing November 12, 1995 the Judge was, he stated repeatedly that only one alegation had to be plead true to be rvoked and remove any burden of proof on the prosecution. (S.F Vol 3 14-16) There is no reasonable trial strategy that would explain why counsel would present a 15 year plea bargain to petitioner knowing it was only a recommendation and allow him to plead true to any allegation if there was no plea bargain at all, even if he did delieve as Petitioner that he would be reinstated on Probation.

According to the record and Texas Law, there are only a few explainations for the deficient and prejudicial representation that denied petitioner his constitutional right to effective representation, 1) Mr. Perez lied about the 15 year plea bargain he presented to petitioner because there was never a plea bargain. 2) There was a 15 year plea bargain but counsel and the Prosecutor belived it was void because petitioner only plead to two allegations and they were mistakenly convinced that petitioner had to plead true to all of the allegations (all 4) in order to satisfy the plea bargain. 3) there was a 15 year plea bargain but when the hearing was in session the prosecutor decided not to honor it even after Petitioner pleaded true on the prosecutor's promise, and defense counsel was afraid to confront the prosecutor and the judge after the judge had become irate at Petitioner. (S.F. Vol. 3 5-9) The prosecutor might have been alittle scaird himself.

REgardless of whatever scenerio the record and Texas Law show that this representation was deficient and prejudiced Petitioner. There is no reasonable strategy in presenting a false plea bargain, or not being familiar with the applicable law in Petitioner's case, or not standing up for a defensless client who had plead true and was for all practicle purposes revoked and sentenced to any punishment the judge wishes, because counsel would not aproach the judge and confront the prosecutor with his denieal of the plea he had preented and sworn to in his instant affidavit. When the Prosecutor told the judge None your Honor, counsel should have objected and explained to the judge there was a plea of 15 years and that is why Petitioner plead true. This is all probability would have made the Prosecutor Honor his plea agreement or give the jusdge at least the opportunity to accept it or at least know the circumstances of his true pleas, the judge could have looked at the 15 years as a plea and not just a recommendation. True the judge could have rejected the plea but it would at least all be on record before this Court as reverable error and alot easier to prove than the instant ground. Petitioner believes this is a denial of constituional effective counsel, see Strickland v Washington, 466 U.S. 692-697-8 (1984)

(C) Petitioner was denied effective representation when his counsel refused to object to the trial court's rage at Petitionaer and confront the bias and prejudice at least to preserve in the record, and move the judge to recuse himself or at least halt the proceedings, so another judge could review the record and rule impartialy whether he should recuse himself or be removed from petitioner proceedings.

Petitioner would incorporate in this subpoint, the above issues IV A. nd B. into this instant Response, all record, citings, facts and applicable authorities cited, to help reduce the length of this Response.

Absent an extrajudicial source bias and prejudice from events occurring at trial and judicial rulings can require recusal if they evidence such deep seated favoritism or antagonism as would make fair judgment impossible. Liteky v U.S. 114 S.Ct. 1147,1150 (1994)(emphasis added); U.S. v Chischilly 30 F.3d 1144, 1149 (9th Cir. 1994); Nichols v Scott 69 F. 3d 1255 , 1277 (5th Cirr 1995)

The procedures for recusal of judges set out in Rule 18a of the Texas Rules of Civil Procedure apply in criminal cases. See Tex. R. Civ. Proc. 18a; Arnold v State 853 S.W. 2d 543, 544 (Tex. Cr. App 1993) REcusal is appropriate if the movant has provided enough facts to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial court, but only when the bias is of such a nature and extent as to deny moveant due process of law. Kemp v State 846 S.W. 2d 289, 305 (Tex. Cr.App 1992) When a Motion to recuse is filed the judge must recuse himself or defer to another judge. Mcclenan v State 661 S.W. 2d 108, 110 (Tex. Cr. App 1983) (trial judge allegedly failed to comply with Rule 18 a by not referring the defendants motion to recuse to another judge) Deleon v Aguilar 127 S.W. 3d 1,5 (Tex.Cr. App 2004)(when a recusal motion is timely filed, Rule 18 a leaves a trial judge with no discretion - the trial judge must either recuse himself or refer the motion to another judge to decide. Id.at5.

Their is no question that under the circumstances and on the record before the court that Judge Sutton was out of control. (S.F. Vol. 3 4-9) The judge threatened Petitioner with perjury, clled him a liar, made remarks about his common law wife and their imlied illigitamate child, and admitted he was irritated at Petitioner and in the assessment of the evidence, so slanted the record and even noted the violaence of a gun, or firearm in a prior case that did not even exist. Surely the indictment on the aggravated assault was available to a judge. The trial court viewed the same evidence and prior history that Elaine Moore, the probation Officer, who looks at these cases everyday and made a recommendation for reinstatenet to I.S.P, the prosecutor that is the Adversary, who said 15 years was the most this case could merit as punishment, and trial counsel who at least requested the 15 years as the maximum punishment, if not reinstated.

If trial counsel was aware of state law at the time he was at the hearing in NOvember 12, 1995, there is no way he could have thought it was anyway fair and beneficial as a trial strategy to fail at some point, (maybe at the same point he clarified the 15 year plea agreement with the prosecutor see (b) of this instnat Ground,) in that he should have objected to the bias and prejudice and moved for recusal, and stated in open court he would follow it in writing for the judges, consideration in a reasonable time. There is no way as a matter of law that Judge Sutton could have legally proceeded. This certainly caused Petitioner irrepairable harm as he was already at the mercy of the court by the true pleas, and at the mercy of that court was fatal, with the deepest rooted animosity there could be. This is the most damaging negligence of representation in the case. Ms. Harris stated in her affidavit, that Judge Sutton was already known to give severe and harsh sentences and liked to have the whole range of punishment open, even when he is not enraged. (Writ #2 at 52-53 Ms Harris affidavit) Even if the prosecutor and Mr. Perez and Ms. Harris were terrified of Judge Sutton, Mr. Perez had a duty to defend his client. and Petitioner a constituional Right to be defended. The state court decision that Mr. Perez rendered effective assistance of counsel at revocation is an unreasonable determination of the facts and an unreasonable application of Federal Supreme Court Law. 28 U.S.C § 2254 (d) (West 2004)

The states findings and conclusions on the record before this Honorable Cour are objectivley unreaonable and the conclusions are contrary to or involve an unreaonable applicaiton of tht Federal law namely, Hill v Lockhart 474 U.S. 52, 56 (1985); Strickland v Washington 466 U.S. 662,667-68 (1984)

CONCLUSION

For the foregoing reasons, this Court should give Petitioner relief in whatever form it deems appropriate and construe this pleading liberally as Petitioner is indigent, incarcerated, and pro-se, and should not be held to as high a standard in executing his pleadings as a formally trained attorney.

Respectfully submitted,

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Executed and placed in the prison indigent mail system, the 1st day of November, 2005.