IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JARED MORRISON (PETITIONER)	§	
V	§	NO.17-50559
LORIE DAVIS (RESPONDENT)	§	

PETITION FOR PANEL REHEARING OF THE MAY 29, 2018 DENIAL OF MORRISON'S APPLICATION FOR CERTIFICATE OF APPEALABILITY [PETITION FOR PANEL RECONSIDERATION]

Comes now, Petitioner, Jared Morrison, and pursuant to FRAP Rule 40, and Fifth Circuit Rule 27.2, Morrison asks that this Court put his Application for Certificate of Appealability ("COA") and its Brief in Support ("Brief/COA") on the Court's docket to be reheard by a panel of objective and impartial judges, since the judge who denied it, W. Eugene Davis, errored in his opinion to deny Morrison's COA by overlooking or misapprehending the points of law and fact that Morrison cited to that satisfied a grant of COA. Judge Davis denied Morrison's COA by saying: "[Morrison] has failed to make a requisite showing as to all his claims." Judge Davis listed the required standards for COA to be granted, but did not mention how Morrison failed to satisfy them. He overlooked and did not address any of the compelling cases that Morrison cited to which showed jurists of reason would find the District Court's assessment of Morrison's constitutional claims regarding Grounds 1, 8, 11, 13, and 14 debatable or wrong. Nor did he address and must have overlooked or misapprehended the compelling cases and arguments that Morrison raised that showed jurists of reason would find it debatable whether the district court was correct in the procedural ruling that denied relief of Grounds 2, 3, 4, 5, 6, 7, and 12 based on them being time barred by the AEDPA 1-year limitation period. And he failed to mention how those arguments were not adequate to deserve encouragement to proceed further as Morrison showed. Judge Davis' conclusory statements in his order to deny COA, can simply be proved as error by simply reading Morrison's Brief/COA which proves that Morrison did completely satisfy the requirements for COA to be granted in each of his grounds. (See Brief/COA pp.1-46 filed with COA on 10/16/17).

Ever since Morrison discovered in 2011 that he was unconstitutionally imprisoned, not one person from any court has addressed any of his constitutional claims raised in Grounds 2,3,4,5,6,7, and 12 of his state and federal writs of habeas corpus. Nor were his constitutional issues addressed when he first raised them in their infancy stages during the preconviction writ of habeas corpus he filed on March 5, 2011 with the trial court. (See Exhibit "D" pp.47-51, 1181-1185)[1]. Those seven grounds have been continually denied, either through conclusory statements that only say those grounds are without merit, but never showing why or how they are without merit. Or they have been denied, without being addressed, based on an erroneous and unlawful time bar, saying Morrison should have raised those issues that undermined the original guilty plea in a 28 U.S.C. § 2254 while Morrison was on defered adjudication probation between June 5, 2004, and June 5, 2005, well before Morrison was convicted, sentenced, or imprisoned (all requirements that are needed to file a § 2254 Petititon). Since the time bar argument was first brought by the Assistant Attorney General in Respondent Stephens' Answer with Brief in Support (**"Answer"**) (see pp.323-328), Morrison has proven eight different ways those seven grounds cannot be time barred on that rationale as brought by **Tharp v. Thaler 628 F.3d 719 (5th Cir. 2010)**; and **Caldwell v. Dretke 429 F.3d 521 (5th Cir. 2004)**. (See Morrison's Reply to the Answer (**"Reply"**) at pp.370-404; Objections to the Report and Recommendation of the U.S. Magistrate Judge (**"Objections"**) at pp.558-574; and in Brief/COA at p.12-25, and 44-46).

Judge Counts, the Magistrate Judge who wrote the Report and Recommendation (**"Report"**) at pp.440-474, to deny Morrison's § 2254; Judge Junell, the District Judge who adopted the report and denied the § 2254 (**"Order"**) at pp.608-611; and Judge Davis, who denied the application for COA, have not properly addressed any of Morrison's meritable points of law that prove his constitutional issues cannot be time barred by AEDPA's 1-year limitation period from June 5, 2004 to June 5, 2005.

1: Page number will be cited to Federal Appeals Record at lower right corner of each page of that record. I.e. 17-50559. "1-1585". The Brief/COA pages are cited to from the pages of that brief.

Judge Counts attempted to address the equitable tolling issue at pp.452-453 of the report; and the **McQuiggin v. Perkins** actual innocence points of law and fact at pp.451-452, but errored in his recommendations about those points of law and fact, as Morrison proved in his objections and Brief/COA. (See objections pp.574-578 for actual innocence points of law and fact, and pp.579-583 for equitable tolling points of law and fact; See Brief/COA at pp.12-19, 20-25, and 44-45 for points of law and fact that proved to this Court that COA should issue regarding grounds 2-7, and 12 being time barred based on **McQuiggins v. Perkins 133 S.Ct 1924 (2013)**, or equitable tolling. Morrison will discuss this further at pp. 5-9 , infra.

When Morrison filed his § 2254 in the United States District Court, he expected the District Judge and Magistrate Judge to follow the Code of Conduct for U.S. Judges as spelled out in Canons 1-3, and to uphold their Oath of Office that they swore to uphold before performing their duties. Morrison also expected the same thing when he filed his COA in this Court. That oath is found in 28 U.S.C. § 453 and says:

> "I Robert Junell, David Counts, and W. Eugene Davis, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal rights to the poor and to the rich, and I will faithfully and impartially discharge and perform all the duties incumbent upon me as Judge or Magistrate Judge under the Constitution and laws of the United States. So Help me God."

It is clearly revealed in those three judges' opinions that denied Morrison relief, that they have not been faithful to the oath they swore to. Morrison DID satisfy the 28 U.S.C. § 2254(d)(1), and (2) requirements for his § 2254 to be granted, but Judge Counts in his Report obviously set down with a pre-determined agenda to recommend denial of relief. This can be proved by reading his subjective opinion, where in order to justify his recommendation he had to cherry pick some of the things Morrison said in his Reply and twist them in order to deny the equitable tolling argument Morrison raised. (See Report pp.452-453). He also used **Johnson v. State 967 S.W.2d 848 (Tx. Cr. App. 1998)**, (an indecency with a child case, Texas Penal Code 21.11 which has no culpable mental state) to say 22.011, a statute

that requires an intentionally or knowingly culpable mental state is strict liability, despite the fact Johnson was acquitted on his 22.021 charge based on the same logic and rationale Morrison asserts in his 22.011 argument, asserting Morrison was not actively misled by counsel regarding the plain language of 22.011, therefore, recommending denial of equitable tolling.

Morrison showed Judge Junell, in his Objections, that the Magistrate Judge errored, but Judge Junell denied relief without addressing any of Morrison's objections, even when Morrison pointed to a case that Judge Junell wrote that showed him as a reasonable jurist would find it debatable whether Judge Counts was correct in his procedural ruling concerning the **McQuiggins v. Perkins** actual innocence claim. (See Objections pp.574-578, and infra at pp. 7-9).

After the denial of § 2254, Morrison showed this Court in his COA and Brief to Support it, that he satisfied the requirements for COA to be granted, but he was once again denied relief without his points of law being addressed.

Morrison will now show the points of law and fact that Judge Davis overlooked, failed to address, or misapprehended, when he denied Morrison's COA by saying: "[Morrison] failed to make the requisite showing as to all of his claims." This statement is in error because Morrison DID make a substantial showing of the denial of a constitutional right in each of his grounds. (See Brief/COA pp.6-10, 25-31, 31-34, and 34-43).

In Grounds 2,3,4,5,6,7, and 12, Morrison demonstrated in his Brief/COA that Jurists of reason would find it debatable whether the District Court was correct in its procedural ruling which said those seven grounds were time barred. (See Brief/COA pp.1,3, 12-25, 35-38, 39-43, and 44-46).

In Grounds 1,8,11, and 13, Morrison demonstrated that reasonable jurists would find the District Court's assessment of the constitutional claims that were rejected on the merits debatable or wrong. (See Brief/COA pp.1-3, 20-43).

Morrison also demonstrated that jurists could conclude the issues he presented are adequate to deserve encouragement to proceed further. (See Brief/COA pp.4, 12-45).

Grounds 2-7, and 12 Should Not be Time Barred as These Reasonable Jurists Debate:

Morrison first proved with eight points of law and fact, in his Reply at pp.370-404 that he could not be time barred by the AEDPA 1-year limitation period, and that **Caldwell v. Dretke** and **Tharp v. Thaler supra** was distinguishable from his case and therefore, the District Court could not apply the time bar based on those cases. During the Report, Judge Counts only addressed three of the eight arguments, and in each of those three he clearly errored. Those were:

1) Morrison's **McQuiggin v. Perkins** actual innocence/miscarriage of justice exception to the time bar. See Report pp.451-452 where Judge Counts said Morrison did not qualify for a **McQiggins v. Perkins** gateway past the time bar since Morrison did not present any exculpatory scientific evidence, trustworthy eye witness accounts, or critical physical evidence, essentially saying since Morrison did not provide one of those three examples of types of reliable new evidence listed in **Schlup v. Delo 513 U.S. at 324**, then he did not provide any new evidence.

2) Morrison's 2244(d)(1)(B), and (D) arguments that would push the 1-year trigger date to one of those two later dates. See Report at p.449 where Judge Counts said the 2244(d)(1)(B)(D) later dates do not apply since the record does not demonstrate any unconstitutional state action impeded Morrison from filing for federal habeas relief prior to June 5, 2005, and the record does not demonstrate Morrison lacked knowledge of the factual predicate of his claims until a certain date.

3) Morrison's equitable tolling/**Holland v. Florida 177 Led2d 130 (2010)** argument that tolled the alleged time bar. See report at pp.452-453 where Judge Counts cherry picked and misrepresented two of Morrison's statements in his reply to say Morrison admitted to not qualifying for equitable tolling. And He uses **Jonson v. State**, an indecency with a child case to say Morrison was not misled by counsel, when

Morrison was not even charged with indecency with a child, and that statute has no mens rea prescribed in it as does 22.011.

Because of the blatant errors in the Magistrate Judge's Report, Morrison raised numerous objections to those three arguments that recommended the time bar to stand. Morrison also showed how the Magistrate Judge failed to address his other five very credible points of law and fact that proved the time bar could not apply to Morrison's Grounds 2-7, and 12. (See Objections pp.558-583).

The District Judge, Judge Junell, adopted the report without addressing any of Morrison's objections, therefore, Morrison referred to the Magistrate Judge's Report in his Brief/COA. Regarding the time bar issue, Morrison raised seven constitutional qustions of law to this Court to show reasonable jurists would disagree with the Magistrate Judge's assessments, or that those questions and points of law and fact were adequate to deserve encouragement to proceed further.(See Questions Presented for Review in Brief/COA: Questions 1, 2 p.1, Questions 12, 13, 14, 15, 16 pp.3-4).

Question Presented # 1: Grounds 2-7, and 12 Do Not Undermine or Challenge Substantive Issues Relating to Original Order of Deferred Adjudication Probation as Required in **Caldwell v. Dretke 429 F.3d at 530 n.24.** Or they were Raised in 2011 Revocation Hearing, resulting in 1-Year Limitation Trigger Date Starting in 2011 not 2005 as discussed in **Frey v. Stephens 616 F.App'x 704 (5th 2015).**

In Morrison's Brief/COA pp.12-19, while he made the substantial showing of the denial of a constitutional right, Morrison also showed that jurists of reason would find it debatable whether "each of [Morrison's] claims attempted to undermine Morrison's original guilty plea that led to the trial court's order of deferred adjudication", as the Magistrate Judge said to recommend the time bar of Morrison's seven claims. Judge Counts use **Tharp v. Thaler** and **Caldwell v. Dretke** to make that determination. (See Report pp.447, 450-451).

Morrison showed how his claims in Grounds 2-7, and 12:

1) Do not undermine the original guilty plea because they are present and future constitutional violations to Morrison and others' constitutional rights, and have nothing to do with the original guilty plea. (See Brief/COA p.15 for Ground 6;

pp.15-17 for Ground 7; pp.17-18 for Ground 3; and Brief in Support of § 2254 ("**Brief/2254**") pp.145-306). And,

2) The grounds that arguably can be construed to undermine the original guilty plea: Grounds 2,5,7, and 12, were also raised in the 2011 revocation of deferred probation hearing in their infancy stages (see Exhibit "D" and "E" pp.47-64 and 1181-1196) and were the reason Morrison rejected the 7 year plea offer and received 16 years instead.

The reasonable jurists from the Fifth Circuit who wrote **Caldwell v. Dretke at 530 n.24** and **Tharp v. Thaler at 723, n.18**, along with Justice Stevens in denial of Caldwell's Writ of Certiorari at **127 S.Ct 431,432 (2006)**, all could debate that Grounds 3, 6, and 7 cannot be time barred since they do not attack or challenge substantive issues relating to the original order of deferred adjudication probation. Or they could conclude this issue is adequate to deserve encouragement to proceed further.

The reasonable jurists who decided **Frey v. Stephens 616 F.App'x 704 (5th Cir 2015)** could find it debatable that the district court was correct in its procedural ruling since grounds 2,5,7, and 12 were all issues that could be liberally construed as also challenging the 2011 revocation hearing during their infancy stages, therefore, like in **Frey v. Stephens** those grounds could not be time barred. (Also see Objections pp.565-567; Brief/COA pp.12-18).

Question Presented #2: McQuiggin v. Perkins Actual Innocence Gateway Past Time Bar.

On pages 20-25 of Brief/COA, Morrison presented several bonafide instances of reasonable jurists from the Supreme Court, this Court, the Third Circuit, and even the District Judge himself, who would find it debatable whether the District Court was correct in its procedural ruling, in regards to what the Magistrate Judge said in denying Morrison's **McQuiggin v. Perkins** actual innocence gateway past the alleged time bar. The Magistrate Judge said that "Morrison does not present any new evidence demonstrating his actual innocence", since "he failed to present any exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. Morrison did not produce any evidence of innocence to the state habeas court and

he has not produced such evidence in this Court. Therefore, Morrison has not presented an actual innocence claim under the standard in **McQuiggin** 133 S.Ct at 1935."

Judge Counts got those three examples of reliable new evidence from **Schlup v Delo** 513 U.S. 298, 324.

Morrison proved with the following cases that these reasonable jurists would find it debatable if the Magistrate Judge was correct in its procedural ruling.

1) **House v. Bell** 126 S.Ct 2064. 2067 (2005) (Where reasonable jurists in Supreme Court said the Habeas court's analysis is not limited to those three types of evidence).

2) **McGowan v. Thaler** 675 F.3d at 499-500 (5th Cir 2012): **Young v. Stephens** 2014 U.S. Dist. Lexis 16007 at p.166 (Where Judge Junell quoted this Court in **McGowen**, to say such new reliable evidence **may include by way of example** exculpatory scientific evidence, credible declarations of guilt by another, trustworthy eye witness accounts, and certain physical evidence, indicating the three listed in **Schlup v. Delo** are mere examples).

3) **Munchinski v. Wilson** 694 F.3d 308, 337-388 (3rd Cir. 2012) (Where these judges held that the three catagories listed in **Schlup v. Delo** are not an exhaustive list of evidence that can be reliable).

4) **Bousley v. United States** 118 S.Ct 1604 (1998) (where the Supreme Court remanded Bousley's case in a similar circumstance as Morrison where both claimed there plea of guilty was not knowing or intellegent, nor voluntary since they were misinformed as to the true nature of the crime. Bousley is another example of new evidence that was successfuly used to bypass a procedural bar that was used outside of the three examples listed in **Schlup v Delo**, and since the new evidence like in Morrison's case was predicated on the proper understanding of the language of a statute, it shows Morrison's reliable new evidence he found in 2011 is reliable and should be allowed as new evidence for a miscarriage of justice exception past a time bar, especially since that new evidence shows that through a proper statutory analysis of 22.011 as modelled by the Supreme Court and Fifth Circuit, as shown in Brief/COA p.40 and throughout in Brief/2254, it would render Morrison innocent).

Because of the sure fire error the Magistrate Judge made in ruling on Morrison's actual innocence claim, and the clear points of fact and law of reasoanble jurists Morrison showed to have his COA granted that could find the District Court's procedural ruling incorrect, Morrison is bewildered as to how Judge Davis overlooked these points of law and fact and failed to grant COA on this actual innocence issue. Morrison has satisfied the requirements of COA being granted on his **McQiggin v. Perkins** Actual innocence claim, and he has proved his grounds either do not undermine

the original guilty plea, or if they do, since they were raised in 2011, they should not be time barred. Therefore this Court must grant this Petition for Rehearing and grant COA.

Other Points of Law Judge Davis Overlooked that Prove Time Bar Should Not Apply:

Judge Davis overlooked Morrison's other points of law and fact that Morrison showed in his Brief/COA that prove the time bar on grounds 2-7, and 12 should not apply.

Question Presented #12: Equitable tolling argument (see Brief/COA pp.3, 44-45).

Question Presented #13: Jurisdicitional question of whether the federal courts had jurisdiction to hear Morrison's 2254 between June 5, 2004 and June 5, 2005, well before Morrison was convicted, sentenced, or held in jail or prison. (See Brief/COA pp.3, 45-46).

Question Presented #14: Morrison's 2254(b)(1)(A)/exhaustion requirement argument that says he could not have filed a § 2254 in 2004-2005 without having a conviction and sentence since he was unable to do postconviction collateral review pursuant to 2244(d)(2), nor could he seek direct review on his deferred probation order pursuant to Tx. Rules of App Procedure Rule 25.2. (See Brief/COA pp.3, 44-45).

Question Presented #15: Morrison's argument that shows he did satsfy 2244(d)(1)(B),(D) to extend the deadline under 2254(d)(1)(A) to when the unconstitutional state created impediments were removed, or on the date which the factual predicate of his claims could have been discovered. (See Brief/COA pp.3, 45).

Question Presented #16: Morrison's points of law and fact that say the Supreme Court's decision in **Trevino v. Thaler 133 S.Ct 1911 (2013)** and **Martinez v. Ryan 132 S.Ct at 1309 (2012)** must apply to Ground 12's IAC claim, and allow it to pass the alleged time bar since it was impossible for Morrison to raise that IAC claim from June 5, 2004 to June 5 2005. (See Brief/COA pp.3-4, 28).

Because of the page limit of the COA Morrison was unable to reargue these five issues, but a look to the cited to pages in the Reply, Objections, and Brief/2254 will show Morrison argued these issues with plenty of reasonable jurists that would agree with him.

Ineffective Assistance of Counsel Grounds 1,11,12, and 13 did Satisfy 2254(d)(1),(2) As These Reasonable Jurists Debate:

Questions Presented #6,7: 28 U.S.C. 2254(D)(1)'s "Contrary To" prong was satisfied in Grounds 1, 11, 12, 13 for § 2254 Habeas Relief.

In Questions Presented #6, and 7, and Brief/COA pp.34-35, and 38-39, Morrison proved that the state habeas court did not address the **Strickland v. Washington 104 S.Ct 2052 (1984)** or **Lafler v. Cooper 132 S.Ct 2072 (2012)** standards or any of their prongs in its decision to deny Morrison's IAC claims in Grounds 1,11,12, and 13. (See State Court's Order on PostConviction Writ of Habeas Corpus at pp.1351-1438 where absolutely no mention of **Strickland** or **Cooper** or any of their standards were used). Instead, the state habeas court went strictly off of counsel's unsupported by the record affidavit to deny Morrison's IAC claims, essentially discounting all the evidence Morrison presented and ignoring federal law as established by the Supreme Court and believing everything in the affidavit. See Brief/2254 pp.297-302, 295, and 171-172 where Morrison raised each of those grounds in his § 2254, where he proved that according to 2254(d)(1) the "contrary to" prong, Morrison should have received relief, since the state court's determination to deny those grounds was contrary to federal law as determined by the Supreme Court in **Strickland** and **Cooper**.

The District Court failed to address Morrison's "Contrary to" argument and denied relief.

Judge Davis also failed to address this "contrary to" point of law and fact that requires a COA must issue on these grounds since Morrison showed at pages 38-39 of the Brief/COA numerous instances where reasonable jurists from the Supreme Court would find the District Court's assessment regarding Grounds 1,11,12,and 13 debatable or wrong. See Brief/COA at pp.2, 34-35, and 38-39 where Morrison cited to cases like **Rompilla v. Beard 125 S.Ct 2546, 2567 (2005); Porter v. McCollum 130 S.Ct 447, 452 (2009); Wiggins v. Smith 539 U.S. 510, 534 (2003); and Williams v. Taylor 529 U.S. 362, 397-98 (2000)** to show reasonable jurists would find the district court's assessment debatable or wrong. Therefore COA should issue on these grounds aswell.

Question Presented #5: Ground 1, IAC claim/2254(d)(2) State Court's decision was based on an unreasonable determination of the facts in light of the evidence Morrison presented in State Court proceedings.

During the state habeas court proceedings, Morrison presented evidence that was supported by the record, which proved counsel, David Rogers' affidavit was merely Rogers' post hoc rationalizations to absolve him from his derelection of duty. See evidence provided at pp.1175-1228 Exhibits "A"-"M"; pp1311-1315 Affidavit of David Rogers; pp.1535-1548 Motion to Disqualify the Affidavit of David Rogers; and pp.1549-1577 Exhibits "N"-"S".

The State Habeas court did not consider any of this evidence that Morrison provided that proved counsel's affidavit was untrue in regards to Morrison's Ground 1 IAC claim. The State Habeas Court instead denied Morrison's IAC claim by going strictly off of David Rogers' affidavit which was unsupported by the record. Morrison raised this issue in his § 2254 under the 2254(d)(2) deferential standard, showing the state court's decision was based on an unreasonable determination of the facts in light of the evidence Morrison presented, which proved the affidavit was not true. However, the state court ignored the evidence Morrison presented, yet based its decision only from what counsel said in the affidavit, then denied relief.

The District Court also ignored the evidence Morrison produced and ignored the 2254(d)(2) argument, therefore Morrison presented the points of law and fact regarding 2254(d)(2), and the evidence ignored to this court in Question Presented #5 at pp2, 31-34 of Brief/COA citing several cases where reasonable jurists would find the District Court's assessment of these IAC/2254(d)(2) constitutional claims as debatable or wrong. See pp.33-34 where Morrison cited to **Jordan v. Estelle 594 F.2d 144 (5th Cir 1979); Ward v. Steres 334 F.3d 696,704 (7th Cir 2003); Guidry v. Dretke 397 F.3d 327 (5th Cir. 2005); Taylor v. Maddox 366 F.3d 992, 1000-01 (9th Cir. 2004);** and **Miller-El v. Cockrell 537 U.S. 322, 346-347 (2003)** to prove COA was satisfied. Judge Davis overlooked these points of law and fact and denied COA

even though Morrison satisfied the requirements of what it takes for an appeal to be granted. A panel rehearing must be had, and COA issued since Morrison satified the COA requirements.

Questions Presented #8,9, 10: IAC claims Grounds 11, 12, and 13.

Judge Davis overlooked the points of law and fact that Morrison showed deserves grant of COA in regards to Morrison's Questions he presented at pp.2, 39-43 of Brief/COA that proved jurists of reason would find the district court's assessment of Grounds 11, 12, and 13 debatable or wrong, when Morrison proved trial counsel and appellate counsel were ineffective and Morrison was prejudiced by counsel's failure to investigate and do the due diligence that was required to discover Morrison's easily obtainable constitutional violations that Morrison raised, when it is clear from the plain language of Texas Penal Code 22.011, 6.02, 8.02, and 2.01, and Supreme Court statutory construction precident regarding the purview of culpable mental state/mens rea cases, that 22.011 cannot be a strict liability offense as the trial court, state habeas court, and district court have erroneously concluded. See Questions Presented # 8, and 9 at pp. 2, and 39-43 of Brief/COA, where Morrison proves that jurists of reason would find the district court's assessment of 22.011 being strict liability debatable or wrong, or that this issue is adequate to deserve encouragement to proceed further, since the district court's determination was a subjective determination that was based off of other statutes that do not have an intentionally or knowingly culpable mental state prescribed in the statute as does 22.011, i.e 21.11 (indecency with a child), and 21.09 (Rape of a child).

The District Court errored at pp.456-458, 467 of the Report by saying 22.011 is strict liability via **Johnson v. State S.W.2d 848, 849-50 (Tx. CR. App 1994).** He said: "in Johnson, the Court of Criminal Appeals held that indecency with a child statute did not require the state to prove that the defendant knew the victim was under 17." That is true in regards to 21.11, but Morrison was not charged with 21,11, and that

statute cannot say 22.011 is strict liability, when 22.011 was codified 10 years after 21.11, and has a prescribed mens rea requirement that clearly modifies "of a child". Also Judge Counts failed to acknowledge that the **Johnson** case shows at **967 S.W.2d at 858** that Johnson was acquitted from his 22.021 charge based on the same logic Morrison has asserted in his 22.011 case. 22.021 and 22.011 have the exact same mens rea so Morrison has proven that reasonable jurists would agree that 22.011 is not strict liability since it has an intentionally or knowingly culpable mental state prescribed in the offense and does not dispense with any mental element as required by 6.02(b). This proves the District Court's decision in denying Morrison's claims by relying on case law that has nothing to do with the plain language of 22.011 (the issue Morrison raises) is debatable among jurists of reason, and is adequate to deserve encouragement to proceed further.

Morrison cited to several cases and law where jurists of reason would debate or agree that he suffered prejudice when 2004 counsel, 2011 counsel, and appellate counsel failed to investigate and raise Morrison's constitutional claims at trial and appeal. (See Brief/COA pp.39-43). Judge davis overlooked these points of law and fact, therefore a rehearing must be had and COA granted on Questions presented #8, 9, and 10.

Question Presented #3, and 4: Morrison's right to writ of habeas corpus was suspended in 2011 and he was denied effective counsel to help file preconviction writ in 2011.

In Questions Presented #3, and 4 at pp.25-31, 1 of Brief/COA, Morrison showed that reasonable jurists would find the District Court's assessment debatable or wrong in regards to Morrison's 2011 pre-conviction writ of habeas corpus (Exhibit "D" pp47-51, and 1181-1185) being suspended and him being denied effective counsel to help him properly file the writ before he was convicted and sentenced to prison. MOrrison also made a showing of how those jurists of reason would conclude these issues are adequate to deserve encouragement to proceed further. These issues are another point of law and fact that Morrison proved 100% positive that a COA should

have been granted, but was overlooked by Judge Davis. Morrison showed Judge Davis that since his right to writ of habeas corpus was suspended by the 2011 trial judge, when the judge would not allow Morrison any way to properly file his pre-conviction writ, nor would she appoint him counsel to properly file it for him, that his Sixth Amendment right, and right to writ of habeas corpus under Article 1 § 9 Clause 2 of the Constitution were violated. Morrison also showed plenty of support from reasonable jurists from the Supreme Court in cases like **Scott v. Illinois 99 S.Ct 1158, 1162 (1979); Lassiter v. Dept. of Soc. Ser. of Durham City 101 S.Ct 2153, 2159 (1981);** and **Argersinger v. Hamlin 92 S.Ct 2006 (1972), Mempa v. Rhay 389 U.S. 128, 134 (1967)** that he was denied effective counsel when he was not appointed counsel to help him with his preconviction writ issues before he was convicted and imprisoned. (See Brief/COA pp.26-28).

Morrison showed on pp.28-31 of Brief/COA that the reasonable jurists from the Supreme Court in **Boumedine v. Bush 128 S.Ct 2229, 2246-47 (2008); Hamdi v. Rumsfield 124 S.Ct 2633 (2004);** and **I.N.S. v. St. Cyr 121 S.Ct 2271, 2279-80 (2001)** would agree that Morrison's right to writ of habeas corpus was suspended in 2011 when the trial court left him with no viable means to file his pre-conviction writ before he was convicted and sentenced to prison. The trial court said Morrison could not file a writ of habeas corpus pro se while having court appointed counsel, and counsel told the court he would not file any 11.07 writs because that was out of his scope of appointment. (See Reporter's Record Vol.3 pp.6-9). It is important to note that Morrison rejected a seven year plea offer because of his pre-conviction writ, and because the judge would not allow him to properly file it, suspending his right to writ of habeas corpus, Morrison was sentenced to 16 years instead of seven. Judge Davis overlooked all of Morrison's points of law and fact regarding this constitutional issue. He overlooked all the reasonable jurists that Morrison showed would disagree with the District Court's assessment in denying this issue, therefore, a rehearing must be had, and COA granted on this issue as well.

CONCLUSION

Morrison paid this Court a $505 fee for its service of objectively looking into the District Court's errors in denying Morrison's § 2254. Morrison clearly made a substantial showing to this Court in his Brief/COA, that he was denied several constitutional rights, and that jurists of reason would find the district Court's decision regarding his constitutional claims in Grounds 1,11,13, and 8 debatable or wrong, and whether the District Court was correct in its procedural ruling to time bar seven of Morrison's claims. Morrison also showed the points of law and fact he presented are adequate to desrve encouragement to proceed further, satisfying the requirements for COA to issue, but Judge Davis, for some reason, (like the other judges who looked in the case) ignored Morrison's insurmountable arguments that satisfied the requirements for COA to issue, essentially not doing what Morrison paid the Court to do as stated above.

Before prison, Morrison owned his own remodelling company. What would happen if he swore an oath to a paying customer to remodel their kitchen, then he was paid, did the demolition phase, then did not finish the job? Wouldn't he be subject to fraud charges and to a terrible business reputation? Nobody wants to pay for a service, and not get what they paid for. Morrison is not saying Judge Davis commited fraud, he understands this Court is swamped with thousands of cases and it is not feasable to sufficiently look into everyones case, leaving many less important issued denied. Morrison is angry, and this Court shoud be too, because the points of law and fact that was overlooked by Judge Davis should have been resolved long before it got to this court. That is the reason for the different layers of courts, so to share the caseload so everything does not have to be taken to the higher court. If that was the case this court would not be receiving so many cases a year. Or are the lower courts complicit in denying credible claims so thousands of people will pay the $505 fee. Morrison hopes that is not the case but it sure gives the appearance of that sort of impropriety. Morrison prays this Court does right and grants this panel rehearing and grants COA.

CERTIFICATE OF SERVICE

I, Jared Morrison, certify that a true and correct copy of this PETITION FOR PANEL REHEARING OF THE MAY 29, 2018 DENIAL OF MORRISON'S APPLICATION FOR CERTIFICATE OF APPEALABILITY; PETITION FOR LEAVE TO FILE FOR OUT OF TIME PETITION FOR PANEL REHEARING/RECONSIDERATION; AND MOTION TO CONSTRUE MORRISON'S PRO SE PETITION FOR PANEL REHEARING AS PETITION FOR RECONSIDERATION is being given to the proper prison official to be mailed using ~~Priority~~ First class certified U.S. Mail pre-paid to the following addresses on June 25, 2011. The original is being sent to the United States Court of Appeals for the Fifth Circuit at the following address:

Fifth Circuit Court of Appeals
Clerk of Court
600 S. Maestri Place
New Orleans, LA 70130.....Original (Priority Mail)

Craig Cosper
Assistant Attorney General
P.O. Box 12548
Austin, TX 78711-2548.....Copy (First Class Mail)

PRISONER'S UNSWORN DECLARATION

I, Jared Morrison, declare under the penalty of perjury that the foregoing is true and correct.

Executed on June 22, 2018

6/22/18
Jared Morrison 1747148

DECLARATION OF INMATE FILING

I am an inmate in an institution. Today, June 25, 2018 I am hand delivering the Petition for Panel Rehearing, Petition for Leave to File Out of Time Petition for Panel Rehearing/Reconsideration, and Motion to Construe Pro Se Petition as Petition for Reconsideration in the foregoing cause, to the Huntsville Unit Mail Room staff to be mailed ~~priority~~ First class certified mail pre-paid by me.

Tracking No. 7017 3380 0000 5942 2245

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on June 25, 2018

6/25/18
Jared Morrison 1747148

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-50559

JARED MORRISON,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

In 2004, Jared Morrison, Texas prisoner # 1747148, pleaded guilty to committing sexual assault of a child by penetrating the female sexual organ of a child younger than 17 years of age who was not his spouse, which is a violation of Texas Penal Code Ann. § 22.011(a)(2)(A) (West 2014). The trial court entered a judgment deferring adjudication of guilt and imposing nine years of community supervision. In 2011, the trial court revoked Morrison's term of community supervision, adjudicated him guilty of the charged offense, and sentenced him to 16 years of imprisonment. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application.

To obtain a COA, Morrison must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The district court held that Morrison's claims arising from the 2004 proceedings were time barred and denied his claims arising from the 2011 proceedings after reviewing their merits. When a district court rejects a claim on procedural grounds, we will issue a COA only if the movant "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court rejects a claim on the merits, we will issue a COA only if the movant demonstrates that jurists of reason could disagree with the district court's resolution of his constitutional claims or could conclude the issues presented "deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (internal quotation marks and citation omitted).

In his COA request, Morrison argues that the district court incorrectly determined that eight of his grounds for relief were time barred and that he failed to overcome the deference due to the state habeas corpus court's denial of his remaining grounds for relief. He has failed to make the requisite showing as to all of his claims. Accordingly, Morrison's motion for a COA is DENIED.

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

JARED MORRISON 1747148
HUNTSVILLE UNIT
815 12TH STREET
HUNTSVILLE, TX 77348

CERTIFIED MAIL

7017 3380 0000 5942 2245

CLERK OF THE COURT
FIFTH CIRCUIT COURT OF APPE
600 S. MAESTRI PLACE
NEW ORLEANS LA 70130