No. _____

In The

Supreme Court of the United States

CHRISTOPHER RUBEN ZAVALA,

Petitioner,

versus

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented is did the Circuit Court err in procedurally denying the issuance of a "Certificate of Appealability" thereby refusing to address Petitioner's pretrial constitutional facial challenge contending that the charging penal statute contained an inherent and direct conflict involving the required element of intent?

Summary of Presented Question: An issue for appellate review must be preserved at the District Court level and articulately briefed factually and/or legally before the Appellant tribunal otherwise said issue will be considered abandoned. *Yakus v. United States*, 321 U.S. 414, 444 (1944); *Hormel v. Helvering*, 312 U.S. 552, 567 (1941). Here, Petitioner filed a Texas pretrial writ of habeas corpus contending that Texas Penal Code §33.021(c) & (d) was facially unconstitutional in that it requires an actor to solicit a minor "with the *intent* to engage in sexual contact" and continues with "it is not a defense to prosecution . . . that the actor *did not intend* for a meeting to occur." The Texas Fourth Court of Appeals looked to the gravamen and legislative history of the statute and concluded that the offense occurs at the time of a solicitation, therefore any "intent" after such solicitation is moot. After exhaustion of state appeals Petitioner filed a Federal writ of habeas corpus contending the same under violation of federal law. The Federal District Court ruled that the issue presented

QUESTION PRESENTED FOR REVIEW
– Continued

was not an "exceptional circumstance" or "made a substantial showing of the denial of a federal right" and thus was prohibited from enjoining state court proceedings prior to conviction. On appeal the Fifth Circuit simply concluded without analysis that the presented issue did not "warrant an exception to the abstention doctrine" since appellant failed to make "a substantial showing of the denial of a constitutional right."

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner Christopher Ruben Zavala respectfully prays that a writ of certiorari issue to review a final decision by the United States Court of Appeals for the Fifth Circuit denying the issuance of a "Certificate of Appealability" on this matter.

OPINIONS BELOW

The opinion for the Texas Fourth Court of Appeals (App. 10-19) is reported and published. No other appellate opinions were issued on this matter. The order from the United States Court of Appeals for the Fifth Circuit appears at App. 1-3, and is unpublished.

JURISDICTION

A "Petition for Rehearing" was denied by the Fifth Circuit Court of Appeals on June 9, 2015. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury *. . . nor shall any person be deprived of life, liberty or property without due process of law. . . .*

U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

Petitioner CHRISTOPHER RUBEN ZAVALA ("Zavala") is currently criminally charged in Bexar County, Texas with the Texas offense of "solicitation of a minor" under Texas Penal Code § 33.021. Initially, Zavala filed a "Pretrial Writ of Habeas Corpus" in the Texas District Court challenging the facial constitutionality of the described penal code. After a hearing the Texas District Court denied the pretrial writ. All state remedies via interlocutory appeals were exhausted resulting in one published opinion by the Texas Fourth Court of Appeals. Upon state exhaustion, Zavala filed an "Emergency Writ of Habeas Corpus" in the Federal District Court for the Western District of Texas that once again challenged the statute's facial constitutionality based on violation of federal law. Zavala then appealed the Federal District Court's dismissal to the Federal Fifth Circuit Court of Appeals by requesting the issuance of a "Certificate of Appealability" as mandated for the appeal of a writ's denial. Zavala's request for the issuance of a "Certificate

of Appealability" was likewise denied ultimately leading to the present appeal. In order to simplify the above described procedural background a summarized timeline is provided as follows:

A – February 6, 2013: Texas District Court "Pretrial Writ of Habeas Corpus" filed.

B – April 10, 2013: Texas District Court "Pretrial Writ of Habeas Corpus" hearing held resulting in denial of writ.

C – May 10, 2013: "Emergency Motion for Stay" filed with Texas Fourth Court of Appeals.

D – May 14, 2013: "Emergency Motion for Stay" granted by Texas Fourth Court of Appeals.

E – June 26, 2013: "Appellant's Brief" filed with Texas Fourth Court of Appeals.

F – July 30, 2013: "Appellant's Reply Brief" filed with Texas Fourth Court of Appeals.

G – December 11, 2013: **Published Opinion** issued by Texas Fourth Court of Appeals affirming Texas District Court's denial.

H – December 27, 2013: "Appellant's Motion for En Banc Reconsideration" filed with the Texas Fourth Court of Appeals.

I – January 16, 2014: "Appellant's Motion for En Banc Reconsideration" denied by the Texas Fourth Court of Appeals.

J – February 14, 2014: "Petition for Discretionary Review" filed with the Texas Court of Criminal Appeals.

K – June 4, 2014: "Petition for Discretionary Review" refused by the Texas Court of Criminal Appeals.

L – July 29, 2014: "Emergency Writ of Habeas Corpus under 28 U.S.C. § 2241" filed in Federal District Court for the Western District of Texas.

M – August 1, 2014: Federal District Court for the Western District of Texas issued an order summarily dismissing "without prejudice" the matter as being premature.

N – August 4, 2014: "Notice of Appeal" filed in Western District of Texas.

O – November 2 & 19, 2014: "Appellant's Motion for Certificate of Appealability" and "Brief in Support of Motion for Certificate of Appealability" filed with the Federal Fifth Circuit Court of Appeals.

P – May 18, 2015: Federal Fifth Circuit issued an order denying "Appellant's Motion for Certificate of Appealability".

Q – May 29, 2015: "Appellant's Motion for Reconsideration" filed with the Federal Fifth Circuit Court of Appeals.

R – June 9, 2015: Federal Fifth Circuit denied "Appellant's Motion for Reconsideration".

B. Statement of Facts

The facts in this matter are legally and factually not relevant since the present issue involves a

constitutional facial challenge to the statute thereby necessitating that the Court only look at the statute itself irrespective of any facts. Even though not necessary for purposes of background only (not relevancy) Petitioner provides the below summary as follows:

Petitioner is currently criminally charged in Bexar County, Texas with the offense of "solicitation of a minor." Said offense is alleged to have been committed on April 19, 2012 in Bexar County, Texas.

Petitioner allegedly had sexual conversations via computer (while at work during regular day business hours) with an alleged minor while supposedly agreeing to meet said alleged minor. Throughout the alleged described non-continual online communications occurring over a prolonged period of time, **Petitioner never traversed from Travis County, Texas to Bexar County, Texas for purposes of meeting the alleged minor**.

Eventually, Bexar County, Texas law enforcement obtained an arrest warrant which resulted in Petitioner being arrested in Travis County, Texas. Upon arrest, no additional forms of illegal contraband or illegal activity were discovered on Petitioner's computers, phone and/or other technological items. Petitioner has no criminal history.

Petitioner has pled not guilty and is pursuing trial which is currently continued based on current litigation. Petitioner is currently on criminal bond out of Bexar County, Texas.

As stated above Petitioner previously filed a "Pretrial Writ of Habeas Corpus" in the Texas District Court contending that the charging statute brought against Petitioner was unconstitutional on its face. A facially unconstitutional statute ultimately equates to that statute being invalid which by default makes the charging instrument void. *Ex Parte Weise*, 55 S.W.3d 617 (Tex. Crim. App. – 2001).

More specifically, Petitioner's pretrial writ challenged the facial constitutionality of Texas Penal Code § 33.021(c) & (d). Section c of this statute states "a person commits an offense if the person, over the internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person including the actor, **with the *intent* that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person**." Then section d of the same statute goes on to state that **"It is not a defense to prosecution under subsection (c) that: 1) the meeting did not occur, 2) the actor did not *intend* for a meeting to occur or, 3) the actor was engaged in *fantasy* at the time of commission of the offense."**

Petitioner contended that section b clearly established "*intent*" as a requirement for such a criminal violation to occur. This directly contradicted section c of the same statute which stated that it was irrelevant if there was *no* "*intent*" for a meeting to actually

occur or if the actor was engaged in *fantasy*. Petitioner argued that the statute in issue was fully and directly contradictory to itself when addressing the issue of intent (mens rea) thereby making the statute legally and constitutionally defunct and invalid. Petitioner contended that a criminal statute cannot require an element of "intent" for criminal prosecution and then directly afterward negate the same "intent" requirement within the same statute. The statute was clearly unconstitutional on its face and thus inherently inconsistent.

Based on the above, Petitioner concluded that the associated indictment was thereby faulty, incurable and irreparable and therefore subject to the "Pretrial Writ of Habeas Corpus" requiring the dismissal of said indictment. *Ex Parte Smith*, 178 S.W.3d 797 (Tex. Crim. App. – 2005). A criminal statute that is invalid on its face is constitutionally void.

Upon the Texas District Court's denial of Petitioner's "Pretrial Writ of Habeas Corpus" interlocutory appeals ensued ultimately resulting in a published opinion by the Texas Fourth Court of Appeals and denials/refusals by the Texas Court of Criminal Appeals, the Federal District Court for the Western District of Texas and the Federal Fifth Circuit Court of Appeals as previously described. Based on this procedural history this matter is now being brought before this Court via this petition.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting this writ since whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319 (2006). Petitioner contends that this meaningful opportunity includes the consideration of a pretrial writ challenging the facial constitutionality of an imposed penal statute. The Circuit's efforts to utilize a procedural argument that Petitioner did not meet the required standard without further analysis prevented Petitioner from having his legal defense argument appropriately reviewed thus a violation of due process.

The Circuit Court erred in procedurally denying the issuance of a "Certificate of Appealability" thereby refusing to address Petitioner's pretrial constitutional facial challenge contending that the charging penal statute contained an inherent and direct conflict involving the required element of intent.

As stated above the Fifth Circuit concluded that there existed no "exceptional circumstance exception" and thus utilized a procedural ruling that "no jurists of reason would find it debatable if there existed a valid claim to the denial of a constitutional right" thereby preventing federal court intervention into

ongoing state criminal proceedings even though Petitioner contended that the record alone clearly established that the charging statute was inherently contradictory thus unconstitutional and that any conclusion otherwise is error. 28 U.S.C. § 2253; 28 U.S.C. § 2283; Fed. R. App. P. 22. Petitioner contends that **exceptional circumstances** (when considered together) do in fact exist for these prescribed reasons:

A. – Applicable state remedies have already been exhausted in that the Texas Court of Appeals and the Texas Court of Criminal Appeals previously considered the issue ultimately resulting in a published opinion by the Texas Fourth Court of Appeals.

B. – The Texas Fourth Court of Appeals accepted this matter as an interlocutory appeal (pre-conviction appeal) and ruled on the merits of the issue thus showing the extraordinary circumstance of the matter involved.

C. – Based on both the exhaustion of appellate remedies and a ruling on the merits there now exists no reasonable expectation of a different result that could be derived from any post-conviction appeal.

D. – Petitioner contends that the Texas penal statute in issue is unconstitutional on its face and is thereby illegal against whomever (regardless of surrounding facts) it is applied against.

E. – Petitioner contends that the Texas penal statute in issue flagrantly and patently violates constitutional protections.

F. – Petitioner contends that the Texas penal statute in issue is inexplicably intertwined with federal constitutional issues.

G. – A subset (lesser included charge) on the same Texas penal statute was found unconstitutional by the Texas Court of Criminal Appeals during the pendency of the current litigation thereby making said statute already suspect.

H. – There exists Fifth Circuit unpublished precedent that dictates that a facial constitutional challenge to a state penal statute permits federal court intervention after the state appellate courts had an opportunity to review and rule on such issue and when there exists no reasonable expectation of a different outcome via post trial appeal.

Based on the above presented descriptions Appellant now brings legal support establishing that under the totality of circumstances this matter involves **exceptional circumstances** that necessitated Federal District Court intervention and/or the granting of a "Certificate of Appealability" by the Fifth Circuit Court of Appeals.

Exhaustion of State Remedies

Generally the Federal Courts look to ensure that state remedies have been exhausted. Both as

annotated above and as the record reflects Texas Penal Code § 33.021(c) & (d) has been reviewed on its merits as reflected by the Texas Court of Appeals' published opinion and the "Petition for Discretionary Review" filed and refused by the Texas Court of Criminal Appeals. *Hillegas v. Sams*, 349 F.2d 859 (5th Cir. 1965) (party seeking review by federal court on a state custody issue must first be presented to state courts). State courts must be given the opportunity to correct an alleged constitutional violation. Based on this consideration it is clear that Petitioner has clearly exceeded this requirement. *Neville v. Cavanagh*, 611 F.2d 673 (7th Cir. 1979) (Dissent commenting: ultimately concluding "if the only event which could relieve the federal courts of the duty to eventually consider a petitioner's claim would be acquittal at state trial, and if standing trial in state court to determine guilt/innocence is an indispensable element for the exhaustion of state remedies, then almost by definition the prospect of pre-trial habeas is entirely foreclosed" & "to require. . . . that criminal trial take place to determine whether a finding of innocence may yet relieve the federal court of any duty to consider the federal claim is to allow the state exhaustion doctrine to swallow up whole any claim for federal pretrial habeas relief").

Texas Appellate Court Previously Ruled on Merits

As the record reflects there currently exists a published opinion on this matter by the Texas Fourth

Court of Appeals thus showing that the associated merits were considered and ruled upon. Furthermore, a "Petition for Discretionary Review" was filed with the Texas Court of Criminal Appeals giving that body an opportunity to rule on the merits or review the opinion of the Texas Court of Appeals. In essence, the merits of this issue were considered and ruled upon by all applicable state courts. The Texas Appellate Court rendered a full and final judgment on the merits and the Texas Court of Criminal Appeals had full opportunity to weigh in on that judgment thus establishing the present legal position on this matter by Texas Courts. *Kolski v. Watkins*, 544 F.2d 762 (5th Cir. 1977) (Note 10: commenting that federal consideration may be permissible if the state appellate courts "squarely" ruled on the merits of petitioner's issue); *Neville v. Cavanagh*, 611 F.2d 673 (7th Cir. 1979) (Dissent commenting: "federal courts should not be so reluctant to intercede where any claim is effectively extinguished" especially when the "state courts had an opportunity not only to address the very issue raised but rendered full and final judgment on that issue").

No Reasonable Expectation of Different Result from Post Trial Appeal

Based on the described published opinion by the Texas Court of Appeals and the refused 'Petition for Discretionary Review' filed with the Texas Court of Criminal Appeals there exists no reasonable expectation of a different outcome on any post-conviction

appeal which addresses the same issue. In essence there exists the lack of prospect for a different outcome in any further state court action. *Hillegas v. Sams*, 349 F.2d 859 (5th Cir. 1965) (in considering federal court intervention with state court proceedings, such considerations should entail if there exists the prospect of success by petitioner in further state court proceedings/appeals). Based on the lack of any truly available state court options there now legally exists inadequate state court protection/redress. See: *Younger v. Harris*, 401 U.S. 37 (1971) (commenting that a challenge to the validity of a state statute should first be brought in state court unless it plainly appears that that course would not afford adequate protection); See: *Neville v. Cavanagh*, 611 F.2d 673 (7th Cir. 1979) (in considering federal court intervention the Court commented "the state appellate court holding is without a doubt the law of the case and defendant cannot realistically anticipate a different result on this issue at trial or on direct appeal").

Texas Penal Code § 33.021(c) & (d) is Facially Unconstitutional

As described above and within the original writ filed in Federal District Court, it is clear that the Texas Penal Code § 33.021(c) & (d) directly contradicts itself regarding the element of "intent." The associated inherent statutory conflict makes the indictment absolutely faulty, incurable and irreparable, thus appropriately subject to the original federal writ. A claim that a statute is unconstitutional on its face

is cognizable by "pretrial habeas corpus." See: *Kolski v. Watkins*, 544 F.2d 762 (5th Cir. 1977) (the possible unconstitutionality of a statute on its face does not in *itself* justify federal intervention via pretrial writ). There exists no hard and fast rule of when a state statute creates extraordinary or exceptional circumstances requiring federal court intervention therefore these types of issues must be viewed on a case by case basis depending on the type of constitutional challenge being made. *Kolski v. Watkins*, 544 F.2d 762 (5th Cir. 1977) (Note 5: commenting that "the very nature of 'extraordinary circumstances' of course makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate and irreparable injury as to warrant federal court intervention." . . . "[O]ther unusual situations might arise but there is no point in our attempting now to specify what they might be."). *Trainor v. Hernandez*, 431 U.S. 434 (1977) (if a state statute can be applied constitutionally in *some* cases then the federal courts should abstain from intervention – ultimately holding that the present contested state statute involved other statutes involving the same area of law or other specific facts all of which could possibly be held constitutional).

Texas Penal Code § 33.021(c) & (d) is Flagrantly and Patently Unconstitutional

As displayed above the Texas Penal statute in issue is in direct contradiction to itself and thus is flagrantly and patently unconstitutional. The federal

courts have authority to intervene when a statute flagrantly and patently violates the constitution. *Younger v. Harris*, 401 U.S. 37 (1971) (commenting that federal courts can intervene when a state statute flagrantly and patently violates constitutional prohibitions). *Kolski v. Watkins*, 544 F.2d 762 (5th Cir. 1977) (a state statute that is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence or paragraph *and in whatever manner and against whomever an effort might be made to apply it* is subject to federal court intervention). Upon a reading of the Texas Appellate Court published opinion it is clear that the state court attempted to construe the statute as constitutional by in essence adding a "timing" factor to the first "intent" element and another independent "timing" factor to the second "intent" element when in fact no such "timing" factor exists in the statute's language in any manner. See: *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. 1981) (involving state regulation of adult materials and the court commenting that the state court should first be permitted an opportunity to definitely construe and interpret a state statute as being constitutional even when the statute in issue is so broadly unconstitutional (even after the state court's interpretation] otherwise the federal courts should not abstain from intervention). See: *Kusper v. Pontikes*, 414 U.S. 51 (1973) (federal court abstention held inappropriate where a challenged state statute that restricted participation in political primaries was not "fairly susceptible" of a constitutional construction). A state statute that is flagrantly and patently violative of express constitutional

prohibitions constitutes an extraordinary circumstance which permits federal court intervention regardless of the current state court proceedings. See: *Timms v. Johns*, 627 F.3d 525 (4th Cir. 2010) (commenting that an *exceptional circumstance* includes when the remedy afforded by a federal writ of habeas corpus is apparent).

Texas Penal Code § 33.021(c) & (d) is Intertwined with Federal Constitutional Law

Upon review of the originally filed Federal District Court writ it is clear that the facial constitutional challenge involving Texas Penal Code § 33.021(c) & (d) consists of both intertwined state and federal constitutional challenges. See: *Dubinka v. Judges of Superior Court of State of California for County of Los Angeles*, 23 F.3d 218 (9th Cir. 1993) (commenting that if a state court's decision is inexplicably intertwined with a federal constitutional challenge then the federal court is in essence being called upon to review the state court's decision).

Subset of Texas Penal Code § 33.021(c) & (d) Found Unconstitutional During Pendency of Current Litigation

As the record reflects and as described above Texas Penal Code § 33.021(b) (subset/lesser included statute) was found unconstitutional by the Texas Court of Criminal Appeals during the pendency of this current litigation thus making Texas Penal Code § 33.021(c) & (d) more suspect.

Fifth Circuit Precedent Dictating Remand Based on State Appellate Court's Opportunity to Review and Rule on a Facial Constitutional Challenge and there Exists No Reasonable Expectation of a Different Outcome via Post Trial Appeal

There exists two Fifth Circuit unpublished opinions specifically addressing a Texas pretrial writ of habeas corpus that challenged the facial constitutionality of a penal statute which ultimately resulted in remand to the District Court. Appellant contends that the below described Fifth Circuit unpublished opinions are exactly and procedurally on point and for purposes of efficiency and economy Petitioner hereby provides the following summary comparison in chart form as follows:

Nyabwa v. Thaler, 2012 WL 4434733 (S.D. TX – 2012 – unpublished)	*Zavala v. Texas*, 5:14-CV-679 (W.D. Texas – 2014)	*Nyabwa v. Stephens*, 531 Fed. Appx. 471 (5th Cir. 2013 – unpublished)	*Zavala v. Texas*, 14-50853 (5th Cir. 2015 – unpublished)
Opinion Type: Federal District Court Writ of Habeas Corpus	*Opinion Type:* Federal District Court 2241 Writ of Habeas Corpus	*Opinion Outcome:* Remanded to Federal District Court to consider Federal Writ	*Opinion Outcome:* District Court's dismissal of Federal Writ affirmed

Original Facts: Petitioner charged with improper photography of a minor under Texas Penal Code	*Original Facts:* Petitioner charged with on-line solicitation of a minor under Texas Penal Code	*Holding:* There existed the "absence of an available State corrective process" *since the entire state appellate process regarding the facial validity of the Texas Penal statute had been conducted via the pretrial writ appeal and thus Petitioner had satisfied the exhaustion requirement*. In essence the "substance of the federal habeas claim was previously and fairly presented to the	*Holding:* Petitioner failed to show a "substantial showing of the denial of a constitutional right" in "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurist of reason would find it debatable whether the district court was correct in its procedural ruling" while not commenting or addressing that

		highest state court"	state exhaustion of remedies had already occurred
Texas District Court Procedural Background: Petitioner filed a "Pretrial Writ of Habeas Corpus" challenging the facial validity of the charging statute which was denied by the Texas District Court	*Texas District Court Procedural Background:* Petitioner filed a "Pretrial Writ of Habeas Corpus" challenging the facial validity of the charging statute which was denied by the Texas District Court		
Texas Appellate Background: Petitioner appealed the "Pretrial Writ of Habeas Corpus"	*Texas Appellate Background:* Petitioner appealed the "Pretrial Writ of Habeas Corpus"		

denial to the Texas Court of Appeals who affirmed by opinion. Petitioner appealed to the Texas Court of Criminal Appeals which was refused. During the appellate process Petitioner pled guilty and later filed the federal post-conviction writ of habeas corpus described below	denial to the Texas Court of Appeals who affirmed by opinion. Petitioner appealed to the Texas Court of Criminal Appeals which was refused. Petitioner has not pled guilty and is awaiting trial		

Federal District Court Procedural Background: Petitioner filed a Federal District Court "Writ of Habeas Corpus"	*Federal District Court Procedural Background:* Petitioner filed a Federal District Court "Writ of Habeas Corpus"		
Federal District Court Holding: Federal Writ dismissed since Petitioner had not yet exhausted a direct post conviction appeal on the denied writ	*Federal District Court Holding:* Federal Writ dismissed since Petitioner had not demonstrated "exceptional circumstances" nor had yet exhausted a direct post conviction appeal on the denied writ		

In summary, in one matter the Fifth Circuit ordered a remand based on the state courts already

having an opportunity to review and rule on the constitutional facial challenge where as in the other analogous matter the Fifth Circuit affirmed the writ's dismissal based on an alleged failure to establish "exceptional circumstances."

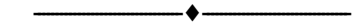
Under the Above Described Totality of Circumstances there Existed Exceptional Circumstances Requiring Federal Court Intervention Into State Criminal Proceedings.

Under the abstention doctrine a federal court will only intervene in an ongoing state criminal matter if a petitioner can establish a "substantial showing of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473 (2000) (to be entitled to a "certificate of appealability" a petitioner must make a "substantial showing of the denial of a constitutional right"). Based on the totality of circumstances described above it becomes clear that reasonable jurists could debate whether the petition should have been resolved in a different manner thus being a substantial denial of a constitutional right. *Barefoot v. Estelle*, 463 U.S. 420 (2000) (discussing that reasonable jurists could debate whether a petition should have been resolved in a different manner); *Morris v. Dretke*, 379 F.3d 199 (5th Cir. 2004) (a claim can even be debatable among reasonable jurists even if after the granting of a COA and after full consideration the petitioner does not prevail).

The above combined factors clearly make the Federal District Court's refusal to intervene a substantial denial of a constitutional right. *United States v. Asemani*, 77 Fed. Appx. 264 (5th Cir. 2003) (unpublished) (COA granted on whether a direct appeal wavier also precludes review of a 2255 motion in addition to petitioner's *alleged facially valid constitutional claims*).

In summation, the Circuit Court erred by simply holding that there "existed no exceptional circumstance and thus no substantial denial of a constitutional right" without any consideration or analysis of the above described positions.

The above positions dictate that this matter be remanded to the Fifth Circuit for the issuance of a "Certification of Appeal" or alternatively be remanded to the Federal District Court for consideration of Petitioner's original challenge to the facial constitutionality of the Texas Penal Statute 33.021(c) & (d) in issue.



CONCLUSION AND PRAYER

The Fifth Circuit's holding was in error thus the Petition for a Writ of Certiorari should be granted or alternatively this matter should be remanded to the Fifth Circuit for the granting of a "Certificate of

Appealability" or likewise be remanded to the Federal District Court for consideration of Petitioner's original "Writ of Habeas Corpus."

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-50853
USDC No. 5:14-CV-679

CHRISTOPHER RUBEN ZAVALA,

Petitioner-Appellant,

versus

THE STATE OF TEXAS;
HONORABLE SID HARLE, Presiding District Judge, 226th Judicial District Court, Bexar County, Texas;
HONORABLE KEN PAXTON, Texas Attorney General; LETICIA MORENO, Pretrial Manager, Bexar County, Texas Pretrial Supervision Office,

Respondents-Appellees.

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

(Dated May 18, 2015)

ORDER:

Ruben Zavala seeks a certificate of appealability ("COA") from the denial of his "Emergency Writ of Habeas Corpus Under 28 U.S.C. § 2241," in which he seeks to enjoin the state court from prosecuting him under Texas Penal Code § 33.021(c) & (d) for solicitation of a minor. The district court abstained from

ruling on Zavala's § 2241 petition, citing *Younger v. Harris*, 401 U.S. 37 (1971), which prohibits a district court from enjoining a state criminal proceeding except where expressly authorized by Congress or where necessary to aid the federal court in its jurisdiction.

Although Zavala has been released on bond, he remains "in custody" for purposes of § 2241. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-01 (1984). A COA is required for a petitioner to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A). Although a prisoner in federal custody need not obtain a COA to appeal the denial of a § 2241 petition, a prisoner in state custody, such as Zavala, must do so. *See Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998).

This court may issue a COA only if the petitioner has made a "substantial showing of the denial of a constitutional right." § 2253(c)(2). Because his petition was denied on procedural grounds, Zavala must show "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) (internal quotation marks and citation omitted).

Zavala's theory that § 33.021 is unconstitutional on its face, warranting an exception to the abstention doctrine, does not make the required procedural showing. *See Slack*, 529 U.S. at 484. Accordingly, the motion for a COA is DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

CHRISTOPHER RUBEN ZAVALA,	§	
Petitioner	§	
	§	**Civil Action**
v.	§	**No. SA-14-CA-679-DAE**
STATE of TEXAS, ET AL.,	§	
Respondents.	§	

DISMISSAL ORDER

Before the Court is Petitioner Christopher Ruben Zavala's 28 U.S.C. § 2241 Habeas Corpus Petition.

Zavala was charged in Bexar County with online solicitation of a minor in violation of Texas Penal Code § 33.021 in *State v. Zavala*, 2012-CR-6759 (Tex. 226th Jud. Dist. Ct.). Zavala filed a pre-trial State habeas corpus application challenging the constitutionality of § 33.021 that was denied. The Texas Fourth Court of Appeals affirmed the denial of the State habeas corpus application, and the Texas Court of Criminal Appeals refused discretionary review. *Ex parte Christopher Ruben Zavala*, NO. 4-13-301-CR (Tex. 4t [sic] Ct. Apps., *denied* Dec. 11, 2013, *pet. ref'd*). Zavala then filed this § 2241 Habeas Corpus Petition raising the same issue. The State criminal proceedings are still pending.

The federal Anti-Injunction Act, 28 U.S.C. § 2283, prohibits this Court from enjoining a state criminal proceeding except where expressly authorized by Congress or where necessary in aid of this Court's jurisdiction, and neither of these exceptions apply to the present case. *See Younger v. Harris*, 401 U.S. 37, 41, 53-54, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). "With the notable exceptions of cases involving double jeopardy and certain speedy trial claims, federal habeas relief, as a general rule, is not available to defendants seeking pretrial review of constitutional challenges to state criminal proceedings." *In re Justices of Massachusetts Superior Court*, 218 F. 3d 11, 19 (1st Cir. 2000). In *Jones v. Perkins*, 245 U.S. 390, 391, 38 S. Ct. 166, 62 L. Ed. 358 (1918), a case where a defendant challenged his prosecution pursuant to an allegedly unconstitutional statute, as does Zavala, the Supreme Court stated "[i]t is well settled that in the absence of exceptional circumstances in criminal cases the regular judicial procedure should be followed and habeas corpus should not be granted in advance of a trial." The State proceedings against Petitioner Zavala are pending; Zavala's challenge to the constitutionality of the Texas statute is not an exceptional circumstance warranting an exception to the general rule that pretrial review is not available in habeas proceedings; and thus Zavala's § 2241 petition shall be dismissed as premature.

Rule 4 Governing Habeas Corpus Proceedings states a habeas corpus petition may be summarily dismissed "[i]f it plainly appears from the face of the

petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Petitioner Zavala's § 2241 Petition is **DISMISSED WITHOUT PREJUDICE**. All other pending motions are **DENIED** as moot. Zavala failed to make "a substantial showing of the denial of a federal right" and cannot make a substantial showing this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability, *see Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), and therefore this Court **DENIES** Petitioner a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A); *Stringer v. Williams*, 161 F. 3d 259, 262 (5th Cir. 1998).

DATED: August 1, 2014

/s/ David A. Ezra
DAVID A. EZRA
Senior United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

CHRISTOPHER RUBEN ZAVALA,	§	
Petitioner	§	
	§	**Civil Action**
v.	§	**No. SA-14-CA-679-DAE**
STATE of TEXAS, ET AL.,	§	
Respondents	§	

JUDGMENT

Pursuant to this Court's Dismissal Order, Petitioner Christopher Ruben Zavala's 28 U.S.C. § 2241 Habeas Corpus Petition is **DISMISSED WITHOUT PREJUDICE**.

DATED: August 1, 2014

/s/ David A. Ezra
DAVID A. EZRA
Senior United States District Judge

[SEAL]

Fourth Court of Appeals
San Antonio, Texas

January 16, 2014

No. 04-13-00301-CR

Ex Parte Christopher Ruben **ZAVALA**, Appellant

From the 226th Judicial District Court,
Bexar County, Texas
Trial Court No. 2012CR6759
Honorable Andrew Wyatt Carruthers,
Judge Presiding

ORDER

Sitting: Catherine Stone, Chief Justice
Karen Angelini, Justice
Sandee Bryan Marion, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

The Court has considered the Appellant's Motion for Rehearing En Banc, and the motion is DENIED. The Appellant also filed an Emergency Motion to Extend Stay of Trial Court Proceedings and the motion is DENIED AS MOOT. Our appellate judgment does not take effect until the mandate is issued, at which time the stay of the trial court proceedings will expire. See Tex. R. App. P. 18.6.

/s/ Rebeca C. Martinez
Rebeca C. Martinez, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 16th day of January, 2014.

/s/ Keith E. Hottle
Keith E. Hottle
Clerk of Court

[SEAL]

[SEAL]

Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-13-00301-CR

EX PARTE CHRISTOPHER RUBEN ZAVALA

From the 226th Judicial District Court,
Bexar County, Texas
Trial Court No. 2012-CR-6759
The Honorable Sid L. Harle, Judge Presiding[1]

Opinion by: Rebeca C. Martinez, Justice

Sitting: Catherine Stone, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: December 11, 2013

AFFIRMED

Christopher Ruben Zavala appeals the denial of his pretrial habeas corpus petition asserting that Penal Code section 33.021(c), which prohibits online solicitation of a minor, is unconstitutional on its face. TEX. R. APP. P. 31. We affirm the trial court's order.

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[1] The Honorable Sid L. Harle is the presiding judge of the 226th Judicial District Court, Bexar County, Texas. The pretrial application for a writ of habeas corpus was referred to the Honorable Andrew W. Carruthers, criminal magistrate judge, Bexar County, Texas, who signed the order denying habeas corpus relief.

ANALYSIS

Zavala is charged with three counts of online solicitation of a minor in violation of section 33.021 of the Penal Code. TEX. PENAL CODE ANN. § 33.021 (West 2011). The statute provides in relevant part:

> (b) A person who is 17 years of age or older commits an offense if, with the intent to arouse or gratify the sexual desire of any person, the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally:
>
> > (1) communicates in a sexually explicit manner with a minor; or
> >
> > (2) distributes sexually explicit material to a minor.
>
> (c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.

TEX. PENAL CODE ANN. § 33.021(b), (c). Count I charges Zavala with violating subsection (c) by knowingly soliciting over the Internet by electronic communication a minor to meet him, with the intent that the minor would engage in deviate sexual intercourse

and/or sexual intercourse with him. *Id.* § 33.021(c). Counts II and III charge him with violating subsection (b) on two separate occasions by intentionally communicating over the Internet by electronic communication in a sexually explicit manner with a minor, with the intent to arouse or gratify his sexual desire. *Id.* § 33.021(b). Subsection (d) of the statute states that it is not a defense to prosecution under subsection (c) that: "(1) the meeting did not occur; (2) the actor did not intend for the meeting to occur; or (3) the actor was engaged in a fantasy at the time of commission of the offense." *Id.* § 33.021(d).

Zavala filed a pretrial habeas corpus petition, asserting that the intent element of a section 33.021(c) offense (Count I) is negated by the defense preclusion in subsection (d)(2) which prohibits a defendant from asserting he "did not intend for the meeting to occur" as a defense against a subsection (c) offense. *Id.* § 33.021(d)(2). Zavala argued that subsections (c) and (d) contradict each other on the intent element, thereby causing the statute to be internally inconsistent and unconstitutional on its face. The trial court referred the matter to the criminal magistrate judge, who held a hearing and denied habeas corpus relief. The magistrate judge found that the statute is constitutional on its face. Zavala brought this interlocutory appeal.

The State initially responds that Zavala's habeas petition is insufficient because it does not state that he is illegally restrained in any manner and it is not sworn to by either Zavala or his attorney. *See* TEX.

CODE CRIM. PROC. ANN. art. 11.14 (West 2005) (stating requirements for a habeas corpus petition). An applicant must be illegally restrained in his liberty to be entitled to habeas corpus relief. TEX. CODE CRIM. PROC. ANN. art. 11.01 (West 2005); *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001). The record reflects that after his indictment and arrest, Zavala was released on bond pending trial. Therefore, Zavala's liberty is restrained within the meaning of article 11.22 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 11.22 (West 2005) (defining "restraint"); *Ex parte Weise,* 55 S.W.3d at 619. As to the absence of a verification on Zavala's petition, that defect is not jurisdictional. *Ex parte Golden*, 991 S.W.2d 859, 861-62 (Tex. Crim. App. 1999) (article 11.14 does not limit habeas corpus jurisdiction, it provides pleading requirements). The Court of Criminal Appeals recently reiterated that, in the context of both habeas petitions and motions for new trial, the absence of a verification does not prevent the trial court from acting or the appellate court from reviewing the trial court's action. *Druery v. State*, No. AP-76,833, ___ S.W.3d ___, 2013 WL 5808182, at *7 (Tex. Crim. App. Oct. 30, 2013) (citing *Ex parte Golden*, 991 S.W.2d at 861). Therefore, although Zavala's habeas corpus petition is not properly verified, we are not jurisdictionally barred from considering the merits of the issue addressed by the trial court and raised in this appeal. Particularly where there are no disputed facts and the habeas petition raises an issue that is purely a matter of law, as Zavala's does, the interests

of judicial economy weigh in favor of addressing the merits of the petition even though it is unverified.

Before we reach the merits of Zavala's claim, however, we must determine the threshold issue of whether Zavala's claim is cognizable through a pretrial habeas corpus petition. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). "[A] pretrial habeas, followed by an interlocutory appeal, is an 'extraordinary remedy,' and 'appellate courts have been careful to ensure that a pretrial writ is not misused to secure pretrial appellate review of matters that in actual fact should not be put before appellate courts at the pretrial stage.'" *Id.* (quoting *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010)). A pretrial habeas generally may not be used to challenge the sufficiency of the indictment or to construe the meaning and application of the criminal statute defining the charged offense. *Ex parte Ellis*, 309 S.W.3d at 79. A pretrial habeas may, however, be used to raise a claim that the statute under which an applicant is being prosecuted is unconstitutional on its face. *Id.* (also stating that pretrial habeas may not be used to bring an as-applied challenge to statute's constitutionality); *Ex parte Weise*, 55 S.W.3d at 620. When an applicant contends that a criminal statute is facially unconstitutional, he is contending that there is no valid statute and that the charging instrument is therefore void. *Ex parte Weise*, 55 S.W.3d at 620.

Here, Zavala's argument is that section 33.021 is unconstitutional on its face due to an internal inconsistency within the statutory language. As such, the

nature of Zavala's claim is a facial challenge to the constitutionality of the statute rather than an as-applied challenge phrased as a facial challenge. *See Ex parte Ellis*, 309 S.W.3d at 79-80 (noting that party's mere assertion that challenge to statute's constitutionality is facial challenge, rather than as-applied challenge, is not by itself determinative, and court must look to true nature of claim). Zavala asserts that, due to a contradiction between subsections (c) and (d) as to the required intent, the statute is unconstitutionally vague in all of its applications.[2] *See id.* at 80 (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)). Therefore, a pretrial habeas petition is the appropriate procedural vehicle for Zavala's argument that the statute is facially unconstitutional, and we may reach the merits of the issue.

Whether a statute is facially unconstitutional is a question of law which we review de novo. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007). In determining the constitutionality of a statute that does not restrict speech based on its content, we begin by presuming the statute is valid, and that the legislature did not act unreasonably or arbitrarily in enacting the statute. *Ex parte Lo*, ___ S.W.3d ___, No. PD-1560-12, 2013 WL 5807802, at *1 (Tex. Crim. App. Oct. 30, 2013) (noting that subsection (c) of section

[2] Because Zavala only attacks the constitutionality of subsections (c) and (d) of section 33.021, his challenge is limited to Count I of the indictment.

33.021 restricts conduct, not speech, and that "offers to engage in illegal transactions [such as sexual assault of a minor] are categorically excluded from First Amendment protection"); *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). Under the principles of statutory construction, we construe the statute according to its plain language, unless the language is ambiguous or the interpretation would lead to absurd results the legislature could not have intended. *Williams v. State*, 253 S.W.3d 673, 677 (Tex. Crim. App. 2008); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). In determining a statute's plain meaning, we read the words and phrases in context, and construe them according to the rules of grammar and common usage. TEX. GOV'T CODE ANN. § 311.011(a) (West 2013). If we can determine a reasonable construction that will render the statute constitutional, we must uphold the statute. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979); *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978) (if statute is capable of two constructions, one of which sustains its validity, court will apply interpretation sustaining validity). The party challenging the statute has the burden to establish it is unconstitutional. *Rodriguez*, 93 S.W.3d at 69.

We do not agree with the premise of Zavala's challenge to the constitutionality of the statute – that subsections (c) and (d)(2) of section 33.021 are contradictory. According to the plain text of the statute, the gravamen of the offense defined by subsection (c) is

the knowing ***solicitation*** of a minor to meet a person, with the intent that the minor will engage in some form of sexual contact with that person. TEX. PENAL CODE ANN. § 33.021(c). The prohibited conduct is the act of "soliciting." *Id.* Indeed, in analyzing the constitutionality of subsection (b), the Court of Criminal Appeals recently stated that the gravamen of the solicitation-of-a-minor offense defined by subsection (c) is "the *conduct* of requesting a minor to engage in illegal sexual acts," as opposed to the "sexually explicit" communication, i.e., speech, prohibited by subsection (b). *Ex parte Lo*, 2013 WL 5807802, at *2. Further, the court examined the 2005 legislative history of the statute, noting that, "[t]he intent expressed in the bill analyses, the committee hearings, and the floor debate was that the crime of solicitation of a minor on the internet is complete at the time of the internet solicitation, rather than at some later time if and when the actor actually meets the child." *Id.* at *5. The crime of soliciting a minor under section 33.021(c) is committed, and is completed, at the time of the request, i.e., the solicitation. *Id.* The requisite intent arises within the conduct of soliciting the minor, and must exist at the time of the prohibited conduct of solicitation. *Id.* Indeed, it is the requirement that the defendant must solicit "with the intent that the minor will engage in sexual contact" that operates to make otherwise innocent conduct, i.e., soliciting a minor to meet, into criminal conduct. It follows then, that for purposes of a subsection (c) solicitation offense, it does not matter what happens after the solicitation occurs because the offense has

been completed; it does not matter whether the solicited meeting actually occurs, or that the defendant did not intend for the meeting to actually occur. or that the defendant was engaged in a fantasy at the time of the solicitation. TEX. PENAL CODE ANN. § 33.021(d). Thus, subsection (d) does not conflict with or negate the intent element of the solicitation-of-a-minor offense defined by (c).

In contrasting subsection (c) with subsection (b), the court in *Ex parte Lo* explained that such solicitation-of-a-minor statutes like subsection (c) have been routinely upheld as constitutional in virtually all states because "offers to engage in illegal transactions [such as sexual assault of a minor] are categorically excluded from First Amendment protection." *Ex parte Lo*, 2013 WL 5807802, at *2 (internal citations omitted). The court also noted that the First Court of Appeals has upheld the facial constitutionality of subsection (c) against a First Amendment-based challenge. *Id.* (citing *Maloney v. State*, 294 S.W.3d 613, 625-29 (Tex. App. – Houston [1st Dist.] 2009, pet. ref'd)). In *Maloney*, the court rejected arguments that section 33.021(d) violates the First Amendment because it is overly broad in that it prohibits the lawful conduct of engaging in fantasy and unconstitutionally vague in that it fails to define "fantasy." *Maloney*, 294 S.W.3d at 625-29.

CONCLUSION

Based on the foregoing reasons, we conclude that section 33.021(c) and (d) are not contradictory, and that Zavala's challenge to the facial constitutionality of the statute on that basis is without merit. Thus, Count I of the indictment is valid and we affirm the trial court's order denying Zavala's petition for habeas corpus relief.[3]

Rebeca C. Martinez, Justice

PUBLISH

[3] We note that under *Ex parte Lo* it appears that Counts II and III must be dismissed. *Ex parte Lo*, 2013 WL 5807802, at *3.

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-13-00301-CR

EX PARTE CHRISTOPHER RUBEN ZAVALA

From the 226th Judicial District Court,
Bexar County, Texas
Trial Court No. 2012-CR-6759
The Honorable Sid L. Harle, Judge Presiding[1]

BEFORE CHIEF JUSTICE STONE, JUSTICE MARTINEZ, AND JUSTICE CHAPA

In accordance with this court's opinion of this date, the trial court's order is AFFIRMED.

SIGNED December 11, 2013.

/s/ Rebeca C. Martinez
Rebeca C. Martinez, Justice

[1] The Honorable Sid L. Harle is the presiding judge of the 226th Judicial District Court, Bexar County, Texas. The pretrial application for a writ of habeas corpus was referred to the Honorable Andrew W. Carruthers, criminal magistrate judge, Bexar County, Texas, who signed the order denying habeas corpus relief.

ELECTRONIC RECORD

COA # 04-13-301-CR
STYLE: Ex Parte Christopher Ruben Zavala
COA DISPOSITION: Affirmed
DATE: 12/11/13
Publish: YES

OFFENSE: On Line Sol Minor-Meet w/ Int Se
COUNTY: Bexar
TRIAL COURT: 226th District Court
TC CASE #: 2012-CR-6759

IN THE COURT OF CRIMINAL APPEALS

ELECTRONIC RECORD

STYLE: «Style 1» v. «Style 2»
APPELLANT'S Petition FOR DISCRETIONARY REVIEW IN CCA IS: REFUSED
DATE: 06/04/2014
JUDGE: Per Curiam

CCA #: 189-14
CCA Disposition: _____
DATE: _____
JUDGE: _____
SIGNED: _____
PUBLISH: _____
PC: _____
DNP: _____

_____ MOTION FOR REHEARING IN CCA IS: _____
JUDGE: _____

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-50853

CHRISTOPHER RUBEN ZAVALA,

Petitioner-Appellant,

versus

THE STATE OF TEXAS;
HONORABLE SID HARLE, Presiding District Judge, 226th Judicial District Court, Bexar County, Texas;
HONORABLE KEN PAXTON, Texas Attorney General;
LETICIA MORENO,
Pretrial Manager, Bexar County, Texas Pretrial Supervision Office,

Respondents-Appellees.

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

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Filed: June 9, 2015

Before SMITH, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.