No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID RANDOLPH BEDELL — PETITIONER
(Your Name)

vs.

SCOTT JORDAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAVID RANDOLPH BEDELL
Institutional Number 105750
(Your Name)
Luther Luckett Correctional Complex
Post Office Box Number 6/1612 Dawkins Road
(Address)

LaGrange, Kentucky, 40031-0006
(City, State, Zip Code)

(502) 222-0363 (ATTN: Mr. Robinson C.T.O. for the Petitioner)
(Phone Number)

QUESTION(S) PRESENTED

Did the Sixth Circuit Court of Appeals abuse its discretion when determining whether Certificate of Appealability should have been issued regarding the following:

(1)

Whether the District Court is barred from considering an ineffective assistance of counsel claim as cause for the procedural default of another claim when the ineffective assistance claim has itself been procedurally defaulted as discussed under the Edwards v. Carpenter rule of law.

(2)

Whether the District Court even considered the impediment(s) as cause and prejudice, with 3-levels of impediments, to toll the AEDPA statute of limitations period prior to dismissing the petition on the basis that it was time-barred.

(3)

Whether the District Court even considered the inadequate and ineffective State court process as cause and prejudice, with extraordinary, exceptional, and/or special circumstances prior to dismissing the petition on the basis that it was time-barred.

(4)

Whether the District Court correctly determined that the petitioner had failed to make a sufficiant showing of innocence under manifest injustice to merit further proceedings on that issue before the District Court as discussed under the Schlup v. Delo, and Murray v. Carrier rules of law.

(5)

Whether the District Court even considered the fundamental defects, singular and/or cumulative, under manifest injustice to merit further proceedings as discussed under the Coleman v. Thompson rule of law.

LIST OF PARTIES

All parties do appear in the caption of the case on the cover page.

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CASES

RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 17-5859; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 3:16-CV-P763-CRS; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 13th, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AMENDMENTS

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances..... 10, 22

Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.. 10

ARTICLE

Article III:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may form time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office..... 27
>
> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;- to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-

between Citizens of different States;-between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects..... 27

STATUTORY

28 U.S.C. §2244(d):

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of - 7

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[-]..... 19

(B) the date on which the impediment to filing an application created by State action in violation of Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action[-]..... 18

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

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence..... 18

28 U.S.C.§1915(a)..... 7

28 U.S.C.§2254(f):

If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce

STATEMENT OF THE CASE

Sentencing.

The petitioner was convicted in a Kentucky Circuit Court for Murder (Intentional), First-degree Rape, Kidnapping, First-degree Wanton Endangerment, and Unlawful Imprisonment imposing consecutive sentencing. On direct appeal as a matter of right, the Kentucky Supreme Court Affirmed in Part, and Reversed in Part, and Ramanded the case regarding the sentencing phase holding that a term of years could not be made to run consecutively with a life sentence, Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993), as Modified on Denial of Rehearing (1994), overruling Rackley v. Commonwealth, Ky., 674 S.W.2d 512 (1984).

Statement of Facts Alleged on Habeas Corpus.

Introduction.

On November 30th, 2016, the petitioner filed a writ of habeas corpus. An application, memorandum in support, and an appendix of exhibits outlined mainstream constitutional arguments including his innocence supported by "new reliable" evidence, and that biological testing of specific evidence was needed to further develop the record. The petitioner advanced Six (6) jurisdictional claims, and submitted in support Twenty-six (26) arguments under either theory set-forth within Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

On april 20th, 2017, the District Court issued a memorandum and order requiring the petitioner to show cause why this case should not be dismissed for the following: (1) The failure to exhaust all

available state court remedies; and (2) is barred by the applicable statute of limitations set-forth in 28 U.S.C. §2244(d)(1). On May 19th, 2017, the petitioner filed the following: (1) Motion to Amend; (2) Objections; and (3) Response to Show Cause.

On June 29th, 2017, the District Court issued a memorandum opinion and order. (See as Appendix A.) The District Court disregarded all exhaustion "causes" asserted by the petitioner. Further, the District Court disregarded Three (3) levels of impediment(s) which caused such a substantial delay, and failed to even consider: (1) The complexities of the case; (2) lack of evidence on record versus post-conviction evidence tendered in support of each argument; (3) ineffective assistance of counsel claim(s); and then (4) counsel withheld material evidence within the work-product materials which had the jury members seen and heard such evidence, it would have changed the result and outcome of petitioner's trial. A final and appealable order was entered upon record by the District Court on the same said day.

On July 10th, 2017, the petitioner filed a joint pleading which asserted his objections to the prior ruling, and a motion to alter, or amend judgment predicated upon those objections. The District Court had denied Certificate of Appealability (COA), and stated to proceed on appeal In Forma Pauperis would not be an appeal taken in good faith. 28 U.S.C. §1915(a); CONTRA: Kincade v. Sparkman, 117 F.3d 949, 952 (6th Cir. (E.D. Ky.) 1997). Then on July 26th, 2017, the petitioner filed his notice of appeal with the District Court. See Federal Rules of Appellate Procedure (FRAP), Rule 4(a)(4)(A)(iv). The District Court ruled upon petitioner's objections/CR 59

motion on August 15th, 2017. Then, on October 9th, 2017, petitioner filed with the Clerk of the Court of Appeals for the Sixth Circuit a Motion for COA following the Denial of COA by the District Court. (See as Appendix B.)

Facts Alleged on Habeas Corpus as an Introduction to the Case.

During the investigative stages, the prosecutors' were assisting both Jefferson and Oldham Counties to secure evidence. Petitioner requested to speak with his attorney, Honorable Brian Comer, totalling Eight (8) different times prior to, during, and after the interrogation process, but each of those times were refused by Detective Hickerson. Even the Jefferson County Assistant Commonwealth Attorney, Honorable Karen Timmel, was present when some of those requests were made, but were not referred to Timmel by and through Detective Hickerson.

There were many pre-trial conferences convened. Counsel was completely unprepared for each of them, (i.e., no defense evidence tendered, nor favorable witness' subpoenaed and called to testify), and each motion(s) was denied by the Kentucky court. Counsel was ignorant of each material fact to decide an issue on review, and no merit-defenses were asserted to prevail on arguments raised. But for counsel's improper investigations, viable pre-trial and trial themes, strategies, and defenses were lost which would of changed the judgment outcome, and sentencing result before the eyes of the jury panel. This was nothing more than blatant negligence throughout the case by counsel

During the aggravation phase, counsel failed to challenge any portion of the prosecutors' case by objectively submitting rebuttal

evidence, and/or by calling favorable witnesses. The prosecution subpoenaed Forty-one (41) witnesses for trial; each was called to testify; and requested One-hundred Twenty-five (125) exhibits to be published. Counsel failed to object to, and request a side-bar conference preserving each evidentiary issue for appellate review as a matter of right.

Counsel failed to object to the court's publishing of prejudicial evidence, i.e., publishing polygraph examination test results. Even more glaring incompetence is when counsel relied solely on the prosecutors' experts to formulate a defense, and strategy posture during the course of trial. Counsel rejected all available viable aggravation theories to oppose the charged offenses, and strategies in support for a defense trial posture. Counsel's sole defense during the aggravation phase of trial was a "sick-man" defense. See Richman v. Bell, 131 F.3d 1150 (6th Cir. 1997).

The petitioner had asserted Twenty-six (26) arguments which demonstrated counsel's lack of knowledge, skill, and professional judgment under the totality of reconstructed circumstances establishing ineffective assistance of counsel. Petitioner had claimed State interference consisting of Three (3) levels of impediment(s) inhibiting petitioner's ability to acquire raw basic material facts required to formulate a State post-conviction objective defensive theories and strategies. Petitioner had substantiated Six (6) jurisdictional claims, and arguments with sufficient evidentiary documents from counsel's work-product materials, or other materials to reconstruct actions, or inactions under the totality of prejudicial circumstances.

REASONS FOR GRANTING THE PETITION

(1)

Reasonable jurists could differ substantially as to whether the District Court is barred from even considering an ineffictive assistance of counsel claim as cause and prejudice thereafter for the procedural default of another claim(s) when the ineffective assistance claim has itself been procedurally defaulted as discussed under Edwards v. Carpenter rule of law.

(2)

Reasonable jurists could differ as to whether the District Court even considered as cause Three-levels of impediments, and prejudice thereafter to toll the AEDPA statute of limitations period prior to dismissing the petition on the basis that it was time-barred.

(3)

Reasonable jurists could differ as to whether the District Court even considered the inadequate and ineffective state court processes as cause and prejudice thereafter, with extraordinary, exceptional, and/or special circumstances prior to dismissing the petition on the basis that it was time-barred.

(4)

Reasonable jurists could substantially differ as to whether the District Court correctly determined that petitioner had failed to make a sufficient showing of innocence under manifest injustice to merit further procedings on that issue before the District Court as discussed under the Schlup v. Delo, and Murray v. Carrier rules of law.

(5)

Reasonable jurists could substantially differ as to whether the District Court even considered the fundamental defects, singulary and/or cumulative, under manifest injustice to merit further proceedings as discussed under the Coleman v. Thompson rule of law.

The above reasons establish violations of petitioners First, and Fourteenth Amendmens of the Federal Constitution, and Article III Powers of the Federal Courts.

(1)

(Claim II of Petition)

In Edwards v. Carpenter, 529 U.S. 466, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000), the Court on review hearing a habeas corpus petition held the following:

> A procedurally defaulted ineffective-assistance claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the cause and prejudice standard with respect to the ineffective-assistance claim itself.

Id.,120 S.Ct. at 1591-92 (citations omitted within). The Edwards Court went on further, and stated that:

> Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution.

Id.

The petitioner's direct appeal became final in 1994. Then, the petitioner motioned the sentencing court to supply him with a free copy of the transcript of record at State expense on August 26th, 1994. Petitioner argued the need for such transcript pertaining to an improper release of Grand Jury members in Jefferson County, Kentucky. Nelson v. Commonwealth, 841 S.W.2d 628 (Ky. 1992); (this was petitioner's 24th argument of the petition). The sentencing court considered such a motion as a post-pleading challenging defense counsel's effectiveness, and stated that: "The record will shout out that but for the **EFFECTIVE ASSISTANCE OF COUNSEL**, [petitioner's] motion would be from death row." (Emphasis in original.) An appeal was pursued, and initiated throughout the appellate courts, however at each level of review the court denied relief in full.

The petitioner requested appellate counsel's interpretation of trial counsel's performance. Specifically, to release developed notes during the direct appeal process solely as post-conviction guidance. In response, no notes were developed by appellate counsel. Petitioner initiated a post-conviction investigation into defense counsel's work-product materials. Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690, 1694, 155 L.Ed.2d 714 (2003), which held that:

> [A] defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy, and that the error was prejudicial. The evi[-] dence introduced at trial, however, will be devoted to issue of guilty or innocence, and the resulting record in many cases will not disclosed the facts necessary to decide either prong of the Strickland analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel, but not the reason for it.
>
> The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged [ineffectiveness of counsel] might be found only in attorney-client [materials or documents] or other documents that, in the typical criminal trial, are not introducted.

In Williams v. Leeke, the Fourth Circuit Court of Appeals held that:

> Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal re[-] search, will need more time or more assistance than the trained lawyer in exploring his case. It is unrealistic to expect a prisoner to known in advance exactly what materials he heeds to consult.

584 F.2d 1336, 1339 (4th Cir. 1978), cert. denied, 442 U.S. 911, 99 S.Ct. 2825, 61 L.Ed.2d 276 (1979); see also Hiatt v. Clark, 194 S.W. 3d 324 (Ky. 2006)(allowing a prisoner a free copy of work-product

materials at the State's expense).

Through the assistance of the Department of Public Advocacy (DPA), the initial starting date was December 11th, 1992; however, the actual release for inspection and copying of materials did not begin until July 15th, 1994; and the investigation was then completed on January 15th, 1999. (See (2) for further details regarding this investigative process.)

After marshaling each material fact(s), trial counsel's actions and inactions constituted incompetence, but for "sandbagging" many legal mainstream arguments of constitutional merit which were dead bang winners that would have changed the result and outcome of the case in respects to the judgment and sentence. Bell v. Cone, 535 U.S. 500, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 1.Ed.2d 305 (1986), and McMeans v. Brigano, 228 F.3d 674 (6th Cir. 2000). Such actions under the totality of reconstructed circumstances established ineffective assistance of counsel under either post-conviction standards. See Strickland and Cronic, supra.

Petitioner has asserted Twenty-six (26) arguments in support of such incompetence only to determine counsel's inactions, but not the reasons for such actions why counsel abandoned her client; which evidence was suppressed within the work-product materials, (such evidence the jury needed to hear to reach a presumed correctness in the verdict and sentence); and that counsel never discussed the petitioner's case informing him of all viable options available throughout pre-trial and trial processes. Such post-conviction evi-

dence was filed in accordance with 28 U.S.C. §2254(f), and pursuant to Schlup v. Delo, 513 U.S. 298, 342, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995). Premised upon those arguments, and in light of the new evidence withheld by defense counsel during the course of this case, "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id., 513 U.S. at 329. This is a factual conclusion based on "all" pre and post evidence new and old that should of been published during the course of trial; this very fact should weigh heavily with this Honorable Court. Id., 513 U.S. at 328.

The petitioner has asserted numerous arguments supported by material evidence to demonstrate ineffective assistance of counsel, the denial of an opportunity to be heard which was full, fair, and meaningful, and to present a meaningful defense. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). Some of petitioner's arguments consist of the following where the evidence was secured within defense counsel's work-producet materials, they are:

(1) An unlawful intrustion past Two (2) thresholds, (One (1) was a security fence protected by a guard shack, and the other the private business area), without consent, to seize petitioner's person and effects in totality without warrant to search, seize, or arrest the petitioner;

(2) the prosecutors' violated a court order to conduct a lineup, so a One (1) person showup through news accounts, transpired events and petitioner's photograph singular occurred allowing an in-court identification of petitioner;

(3) a confession induced by promises, Two (2) of which were performed and completed in full, where the meeting of the minds involved petitioner's Seven (7) month pregnant fiancee;

(4) petitioner requested counsel, Honorable Brian Comer (whom is a friend of petitioner's), up to Eight (8) times including prior to, during, and after the interrogation processes - all were denied, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); and was further denied access to his attorney's business card; id.;

(5) a violation of the Brady rule of law for exculpatory evidence be secured upon the relevance of such evidence, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Robinson v. Mills, 592 F.3d 730 (6th Cir. 2010)(Held: Granting of conditional writ of habeas corpus relying upon Brady - affirmed unanimously before the Sixth Circuit Court of Appeals);

(6) numerous counts of perjury, and Two (2) counts of tampering with physical evidence, Giglio v. United States, 405 U.S. 150, 92 S.Ct. 793, 31 L.Ed.2d 104 (1972); and

(7) suppressed evidence, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), or missing evidence in which there was no comparable evidence. Brady, supra; Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), and California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

(2)

(Claims I, IV, and V of Petition)

First (1st) Level: Defense Counsel's Ineffectiveness.

The petitioner was denied the right to present a complete and meaningful pre-trial and trial defense(s), but for ineffective assistance of counsel. The official trial record was undeveloped from a defensive standpoint. Such action and inactions by defense counsel were external to petitioner where the factual predicate was not investigated, developed as a constitutional matter of factual dispute under the law, and/or passed over as an arguable constitutional basis of fact and law. Hargrave-Thomas v. Yukins, 374 F.3d 383, 388 (6th Cir. 2004)(citing to Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)); and Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Without the prior investigation into defense counsel's work-product materials, the petitioner would not know any of the material fact(s) to justify hearing those arguments premised upon a new look at a old case where both defense counsel, and prosecutors' hind the evidence from the search for the truth before the eyes of a death penalty empaneled jury province. The post-conviction evidence does establish the who, when, where, what, why, how and how much with respects to the prosecutors' action and inaction solely to gain a conviction by whatever means necesssary to secure a guilty verdict. In addition, such investigation established many discovery violations that impacted this case substantially. If the confession and identification process was struck from record as a violation of petitioner's constitutional rights, the prosecution would not have

sufficient evidence to support a verdict of guilt to gain a conviction.

Second (2nd) Level: Prosecutors' Function and Misconduct.

Throughout petitioner's memorandum of law it was argued that counsel was ineffective assistance for not advancing prosecutorial misconduct premised upon apparent material facts within police reports and other documents. This misconduct would be either singular or multiple events, and each of those actions played a key role in unbalancing the adversarial process and the search for the truth. (Petitioner's arguments 1-4 (Unlawful Search and Seizure), 6-7 (confession induced by promises and violation of State law), 9 (a tainted identification process which allowed a one-to-one showup), 11-12 (discovery violations), 13 (polygraph examinations entered upon record during course of trial), 14 (innocent to the charged offense of Wanton Endangerment in the First-degree), 17 (innocent to the charged offense of Rape in the First-degree), 20 (innocent to the charged offense for Murder (intentional conduct)), and 23 (Sixteen (16) counts of violations of State law ranging from perjury, contempt of court, tampering with physical evidence, and sweating for evidence after charges have been placed against an accused.).) Defense counsed had this information, but stood silent throughout the entire case.

Petitioner must demonstrate that "something external to [him], something that cannot fairly be attributed to him," was the reason for a failure to comply with State procedural rules. Coleman, supra, 501 U.S. at 753. The failure of an attorney to properly raise or preserve a legal claim, "when it rises to the level of ineffective

assistance of counsel in violation of the Sixth Amendment, may also satisfy the cause requirement." Murray, supra, 477 U.S. at 488-89; see Gravley v. Mills, 87 F.3d 779, 785 (6th Cir. 1996)(Held: Counsel's failure to object to very serious prosecutorial misconduct amounted to ineffective assistance of counsel, and was cause for defendant's failure to comply with Tennessee's rules for preserving a claim of prosecutorial misconduct); see also argument (3) regarding adequacy and effectiveness of the State court process.

Third (3rd) Level: Kentucky's Department of Corrections (DOC).

The cases applying 28 U.S.C. §2244(d)(1)(B) "have dealt almost entirely with the conduct of prison officials who interfere with inmates' ability to prepare[,] and to file habeas petitions by denying access to legal materials." Shannon v. Newland, 410 F.3d 1083, 1087-88 (9th Cir. 2005). The claimed impediment must have actually prevented the appellant from filing a timely habeas petition of a known claim. Or, litigation under §2244(d)(1)(D) where the factual predicate applies to facts necessary to state a plausible claim in a habeas petition, Jefferson v. United States, 730 F.3d 537, 547 (6th Cir. 2013), or the discovery of new facts, not an abstract change in substantive law. Lo v. Endicott, 506 F.3d 572, 576 (7th Cir. 2007). §2244(d)(1)(D) applies to cases "in which new evidence 'could have been discovered through the exercise of due diligence.'" McQuiggen v. Perkins, 133 S.Ct. 1924, 1935, 185 L.Ed. 2d 1019 (2013).

The petitioner's State direct appeal process ended on January 31st, 1994, carried over to February 1st, 1994; the time to file a writ of certiorari ended on May 1st, 1994; and the AEDPA statute of limitations period ended on June 1st, 1995. The petitioner does not challenge the fact this case is procedurally barred. What is being challenged to make this case viable under a constitutional main-stream posture is the tolling factors -- Is the impediment to filing an application created by State action removed? And, has the factual predicate been fully discovered, or is post-conviction collateral discovery process needed to further develop the factual predicate in controversy? 28 U.S.C.§2244(d)(1)(A).

The petitioner has suffered substantial prejudice through acts and omissions of State officials' starting in the year 1994:

(1) August 26th, 1994, petitioner requested a free copy of the transcript of the official proceedings needed to resolve a Nelson claim, and the State court treated it as an RCr 11.42 pleading. Such a judicial act had barred any further proceedings before the court in accordance with Kentucky Rules of Criminal Procedure (RCr), Rule 11.42, and Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983), Case v. Commonwealth, 467 S.W.2d 367 (Ky. App. 1971), Roach v. Commonwealth, 384 S.W.3d 131 (Ky. 2012).

(2) DOC confiscation and destruction of all legal materials which consist as an overage of the Two (2) cubic-foot rule, or mail out any overage starting on June 16th, 1998, leading up to an including December 18th, 2015. DOC believes an inmate's personal fan is more important than his legal material, because an inmate can store his fan but not overage of legal materials.

(3) Destruction of all pleadings, (i.e., habeas corpus application, memorandum of law, and an appendix of evidence), but for a riot and subsequent fire on August 20th and 21st, 2009;

(4) DOC allowed the petitioner to purchase specialty books, (i.e., crime scene reconstruction, ballistics, and forensic pathology), and then confiscated them as an unauthorized material on March 18th, 2014.

(5) Then DOC confiscated all legal materials of the petitioner, and disassemble all binding folders and other legal materials outside the presence of the petitioner. It took petitioner 1-year to regain his previous status anew ending on February 18th, 2015.

(6) The petitioner has tried to collect post-collateral evidence over the past years which was not discovered through the initial discovery process. Such as the security guard, or company that was responsible for maintaining security at petitioner's work-place; policy and procedures concerning an interrogation process and subsequent confession where sweating tactics were employed to induce a statement of guilt; missing police reports to confirm additional reports of misconduct during the interrogation process; a map of the abduction scene to determine residents that lived in that area to support petitioner's innocence claim; a very lengthy laundry list of Brady violations where the apparant exculpatory value and relevance of such evidence was clear; DNA tests and analysis of biological material to support petitioner's claim of innocence regarding the charge of Rape in the First-degree; and finally, evidence that would support a claim of cross-contamination of the homicide scene by the investi-

gative detectives of both Oldham and Jefferson Counties, Kentucky, the coroner's office concerning exact measurements taken at the homicide scene, and the State's pathology report was completely wrong, because the prosecutors' kept crucial and vital information from that State individual.

(7) The refusal to release key discovery material, i.e., a photograph not turned over during the initial discovery process depicting a 9 mm shell casing next to the victim which was discussed during the Oldham County Grand Jury Proceedings, and the Jefferson County trial. The Oldham County Commonwealth's Attorney, Honorable Roy Kimberly Snell, refused to release a photostat copy of said photo without first receiving a court order.

(8) And finally, out of Twenty-six (26) post-collateral arguments, Twenty-two (22) need discovery to further the predicate under the current argumentation as a non-speculative constitutional issue of material fact in controversy. Rules governing §2254 Cases, Rules 6 and 11; Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1963, 144 L.Ed.2d 286 (1999); House v. Bell, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); and Foley v. Commonwealth, Ky., 975 S.W.2d 905 (1998)(RCr 7.24 and 7.26 are pre-trial rules of discovery, and they do not apply in post-proceedings); this preposition has a long history throughout Kentucky's appellate opinions where there is no process to acquire post-collateral discovery, Haight v. Commonwealth, Ky., 41 S.W.3d 436, 445-46 (2001).

Because the trial record is bare of defense evidence consisting of demonstrative material and testimonies during the aggravation phase of trial, the petitioner had but one choice to acquire the needed post-materials, or other related documents. Once acquired, a domino affect occurred by DOC's strict compliance with their Two (2) cubic foot rule application for legal materials - even though then there were options for storage overage, but none were authorized to protect petitioner's rights under the Open Courts Clause of the First Amendment.

A court of review should not look at the length of delay, but the reasons for such a delay in determing whether equity tolling is appropriate. Souter v. Jones, 395 F.3d 577 (6th Cir. 2005), and Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010).

Under the Strickland review, a prisoner must reconstruct and evaluate counsel's actions or inactions by the totality of circumstances "from counsel's perspective at that time." Id., 466 U.S. at 689. Without the work-product materials, and other related materials and documentation, it would be useless to file an application because of the different filing standards between RCr 11.42 (specific non-speculative), and §2254 (notice pleading), Williams v. Taylor, 529 U.S. 420, 432, 434, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000), as well as the State created impediment that has yet been removed. Id. The trial transcript was far less in worth than counsel's work-product materials. Massaro, supra; Williams v. Leak, 584 F.2d 1336, 1337 (4th Cir. 1978), cert. denied, 442 U.S. 911 (1979); and Shannon, supra.

(3)

(Claims I, IV, and V of Petition)

The petitioner had asserted Ten (10) causes to establish State post-conviction processes were inadequate, and ineffective thereby prejudicial to this case. They were: (1) A statute of limitations conflict between Sections 1 and 10 of RCr 11.42 remained when the Kentucky Supreme Court amended said rule, but left the "any time" language and a closed time period of Three (3) years; (2) a prisoner is only allowed One (1) post-conviction challenge, without exception to the rule; (3) there are no procedural rule exceptions; (4) no post-conviction discovery processes, see Foley, supra; (5) the State court's apply the Federal standard for ineffective assistance of counsel wrong and improper during the 1990's; (6) because of the inadequacies of this rule, (RCr 11.42), the chance of success was extremely low in percentage comparison with federal habeas corpus standards on review; (7) the evidentiary standard for granting a hearing was not regularly followed until it was reevaluated in 2001 by the case authority of Fraser v. Commonwealth, 59 S.W.3d 448 (2001); (8) a restriction as to what could be argued under RCr 11.42 making such a rule ineffective and inadequate; (9) the 1994 amended version of RCr 11.42 is a violation of the ex post facto law; and (10) the current version of RCr 11.42 rule applies a statute of repoose period instead of a limitation period in which to act.

The Fourteenth Amendment assures a criminal defendant due process of law. There is no question of law that due process applies to this type of situation. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). An essential principle of due pro-

cess is that a deprivation "be preceded ... [allowing an] oppor[-] tunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust, Co., 339 U.S. 484 (1972); Boddie v. Connecticut, 401 U.S. 371, 379 (1971). This legal principle requires "some kind of hearing" prior to a constitutionally protected interest being altered, or taken away completely. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

If the State court processes were inadequate, and circumstances render the process ineffective to protect the prisoner's rights, then there are no "available" remedies in State court. Therefore, the exhaustion requirement is satisfied. Coleman, supra; Holland v. Florida, 560 U.S. 631, 660 (2010), the Court held that an attorney's failure to satisfy professional standards, i.e., Holland's "attorney essentially 'abandoned' him", constitutes "extraordinary circumstances for the purpose of obtaining an equitable toll in a habeas corpus proceeding.

(4)

(Claims IV and V of Petition)

In Souter v. Jones, 395 F.3d 577 (6th Cir. 2005), the Sixth Circuit Court of Appeals had found that if a habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty, he should be allowed to pass through the 'gateway', and argue the merits of his underlying constitutional claims. Id., at 585, 588, and 602. Souter had argued his innocence; the Court concluded "that Souter's conviction is such a rare and extraordinary case." Id., at 590. As the Court pointed out, "Souter has presented new evidence collected over the past several years that

does raise sufficient doubt about his guilt[,] and that undermines confidence in the result of his trial." Id.

The petitioner has submitted "new" reliable post-evidence over the years to prove his innocence. Schlup, 513 U.S. at 324. However, the Court of Appeals and the Lower District Court both failed to reach that conclusion, because of the amount of material submitted to prove petitioner's innocence in accordance with §2254(f); CONTRA: Pliler v. Ford, 542 U.S. 225, 232, 124 S.Ct. 2441, 159 L.Ed.2d 338 (2004); but see RCr 11.42(2), Bartley v. Commonwealth, 463 S.W.2d 321 (Ky. 1971); Cf. Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1983); (see Appendix A, at pages 4 and 6, and Appendix B, and page 3). And, to further support grounds alleged within the application, and memorandum of law.

During the course of trial, defense counsel failed to request evidence be published during the aggravation phase of his trial. The evidence which would prove petitioner's innocence is additional reliable witness testimonies, photographic evidence, and other material evidence. The petitioner can prove his innocence regarding the charged offense for Wanton Endangerment in the First-degree by witness statements off the record that didn't hear any sort of gun fire, especially a Three (3) round volley, and the lack of physical evidence, i.e., no shell casings, found at the scene even after the use of a metal detector. In addition, with respect to the charged offense for Murder (Intentional), the prosecutors' theory was that petitioner shot the victim in the head, turned the body over, and then shot the victim in the armpit to make it look like an accident. This is in complete error, for their dimensions at the homicide scene

were competely wrong with respects to other more reliable reports. Specifically, the petitioner submitted photographs which clearly depict the proper dimensions at the homicide scene, and that the victim was not turned over as the prosecutors' theory lead the jury to believe regarding staging an accidential shoting.

Moreover, the petitioner requires biological evidence to be scientifically tested, which was not previously analyized but discussed during the coarse of trial, to prove his innocence for the charged offense of Rape in the First-degree. Of equal importance, this evidence, if tested, will prove that there was no penetration, an element that must be proved for the charged offense of Rape, and that the prosecutors' failed to test this evidence because they did not want to take a chance that it would challenge the credibility of petitioner's unlawful confession. House, and Schlup, supra.

The post-conviction evidence collaterally challenging the prosecutors' burden of proof is more reliable than trial testimonies, because it is unaltered by human emotions, and precise expert opinions formulated by prosecutorial influnece lack even the basic common-sense approach for the search for the truth within an adversarial system of justice.

The petitioner had pointed the District Court to "exculpatory evidence, trustworthy eyewitness accounts, [and] critical physical evidence showing his actual innocence."Schlup, 513 U.S. at 324.

Petitioner was denied a constitutional right to present a complete defense including the right to have the jury consider that evidence, but for ineffective assistance of counsel. No fair minded juror, acting reasonably, would disagree that petitioner was denied

the right to present a complete defense, but for ineffective assistance of counsel, Bonilla v. Hurley, 370 F.3d 494, 497 (6th Cir. 2004), and Edwards, supra. The District Court failed to even consider both pre and post evidence in comparison to determine which evidence is more relevant and reliable when determining petitioner's innocence, and manifest injustice. Coleman, 501 U.S. at 750.

(5)

(Claims I throughout VI of Petition)

Any fair minded reasonable jurist who heard this case would ask a simple and uncomplicated question of law - what happened to the adversarial process, who was at fault, and why - thereby, acknowledging that petitioner was denied constitutional principles basic to the criminal process and procedures to ensure justice was rendered fairly and even handed. Petitioner had asserted throughout Claims I through VI of the petition that manifest injustice had occurred, and even invoked Article III Powers of the Constitution.

The United States Supreme Court has stated "that habeas review is available to check violations of federal laws when the error qualifies as [']a fundamental defect which inherently results in a complete miscarriage of justice[, or] an omission inconsistent with the rudimentary demands of [a] fair procedure.['] Reed v. Farley, 512 U.S. 339, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994)(quoting Hill v. United States, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962)(Held: Hill is the approprate standard for federal habeas corpus review of federal law, i.e., IAD violation)); and Kimmelman, supra, (Unanimously held: "Where a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of

counsel, the 'State ... unconstitutionally deprives the defendant his liberty.' ... The defendant is thus 'in custody in violation of the Constitution,' ... and federal courts have habeas jurisdiction over his claims. [Further,] federal courts may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error."); see also Coleman, the failure of the courts to even consider defaulted claims will result in a fundamental miscarriage of justice. Id., 501 U.S. at 750.

CONCLUSION

If a reasonable juror was told about post-evidence prior to testimony, listened to examination processes for such testimony, and saw and reviewed demonstrative evidence, (i.e., photographs), in support of such testimony, "in light of the new evidence, no juror, acting reasonably, would have voted to find [petitioner] guilty beyond a reasonable doubt." 513 U.S. at 329. The "new" post-evidence challenges the reliability of a jury's guilt findings, integrity of the court, and the presumption of correctness is no longer apparent on the face of the record.

"In a habeas proceeding, [the Sixth Circuit Court of Appeals conducts a] review de novo [of] the district court's legal conclusions, including its ultimate decision to grant or deny the writ, and we review for clear error its factual findings." Satterlee v. Wolfenbarger, 453 F.3d 362, 365 (6th Cir. 2006). A factual finding by the District Court "is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with definite and firm conviction that a mistake has been

committed." Id., at 366 (quoting Norris v. Schotten, 146 F.3d 314, 323 (6th Cir. 1985)(internal quotation marks omitted).

Throughout petitioner's habeas litigation, he has asserted and claimed that this case is a prime example of manifestice injustice, and supported each of the Twenty-six (26) arguments with material evidence which would be consider "newly discovered evidence." Such material evidence consists of police reports, expert's opinions and reports, photographs, diagrams, measurements, and affidavits that are not on the offical record. This evidence retains substantial relevance, and places the prosecutors' case in a completely different prospective leaning towards the petitioner's favor because he searched for the truth unlike the prosecutors' and defense counsel in this case.

The petitioner is hereby invoking 28 U.S.C.§2241(a) to resolve the merits in controversy before this Honorable Court, and Grant and Sustain in Full, the petition for writ of certiorari regarding each issue asserted herein. Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004).

Respectfully submitted by,

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