18-9251

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIE JAMES ATKINS — PETITIONER
(Your Name)

vs.

LORIE DAVIS, Director, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Texas Court Of Criminal Appeals based on the Findings of Criminal District Court No. 6, Dallas County, Texas
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

WILLIE JAMES ATKINS
(Your Name)

3060 FM 3514 - STILES UNIT
(Address)

Beaumont, Texas 77705
(City, State, Zip Code)

(903)839-6441 (mother)
(Phone Number)

QUESTION(S) PRESENTED

1. QUESTION: Does the Doctrine of 'Equitable Tolling' due to claims of 'FRAUDULENT CONCEALMENT' of obviously important facts, extend to AEDPA legislative cases, if the lower court likewise, cited and sought guidance in other NON-AEDPA Legislative cases-?

2. QUESTION: Does Suits in Admirality Act (SAA) Legislation extended by the Fifth Circuit into AEDPA case law, used as guidance to the question of 'EQUITABLE TOLLING', justify Atkins attempt to extend FTCA Legislation as 'MATERIALLY INDISTINGUISHABLE'-?

3. QUESTION: Does SAA Legislation regarding 'DISCOVERY RULE' extend to Atkins. case on a set of MATERIALLY INDISTINGUISHABLE facts-?

4. QUESTION: Should the argument for RARE and EXCEPTIONAL circumstances claimed in BUCK v. DAVIS, 137 S.Ct. 759 (2017), extend to the INSTANT CASE on a set of MATERIALLY INDISTINGUISHABLE FACTS.

5. QUESTION: Was trial counsel's decision not to investigate claims of non-transmission; impeach detective during suppression hearing; cross examine and impeach in jury's presence REASONABLE professional standards, resulting in prejudice.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

CERTIFICATE OF INTERESTED PARTIES

Mr. Willie James Atkins, CID Stiles Prison - 3060 FM 3514 - Beaumont, Texas 77705;

Ms. Jessica Michelle Manojlovich - Office Of The Attorney General for the State of Texas - P.O. Box 12548 - Capitol Station - Austin, Texas 78711-2548

Ms. Karen S. Mitchell - Northern District of Texas - Dallas - United States District Court - 1100 Commerce Street - Earle Cabell Federal Building - Room 1452 - Dallas, TX 75242

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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

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

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

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

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

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

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

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

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

The opinion of the State Trial Court court appears at Appendix D to the petition and is

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

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JURISDICTION

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

The date on which the United States Court of Appeals decided my case was December 21, 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

1. **FIRST AMENDMENT** Access To The Court through the Fourteenth Amendment;

2. **FOURTH AMENDMENT** against Illegal Search & Seizure;

3. **SIXTH AMENDMENT** against Ineffective Assistance of Counsel;

4. **FOURTEENTH AMENDMENT** Due Process Of Law against Prosecutor Misconduct;

5. 28 U.S.C § 2244(d); 2244(d)(1)(A); 2244(d)(1)(B); § 2244(d)(2);

6. 28 U.S.C.§ 2253(c); 2253(c)(2);

7. 28 U.S.C. § 2254; § 2254(d); § 2254(e)(2)(B);

8. 28 U.S.C. § 636(b); § 636(b)(1)

9. **Federal Rule Of Appellate Procedure 22(b);**

10. **RULE 11(a)**, Rules Governing §2254, §2255 Proceedings

STATEMENT OF THE CASE

Petitioner is an inmate in the Texas Department of Criminal JUstice, Correctional Institutions Division (TDCJ-CID). This petition for writ of habeas corpus is filed under 28 U.S.C. §2254.

Petitioner asserts claims of 'WRONGFUL CONVICTION.' Petitioner was ORIGINALLY CHARGED and indicted for the offense indecency with a child by exposure. State of Texas v. Willie James Atkins,(Crim. Dist.Ct.No.6,Dallas County,Texas,August 1, 2005). Those charges were dropped on May 5, 2006 **(Clerk Record 'CR'-1:4).**

Petitioner was RE-INDICTED for the offense of attempted sexual performance by a child/employment. State of Texas v. Willie James Atkins, Crim.Dist.Ct.No.6,Dallas County,Texas,May 5,2006). On May 4, 2007, a jury found Petitioner guilty of the offense and assessed his sentence to life in prison. On July 23, 2008, the Fifth District Court affirmed. Atkins v. State, No.05-07-00586-CR(Tex.App.-Dallas 2008,pet.ref'd).

On March 1, 2010, Petitioner filed a state petition for writ of habeas corpus. Ex parte Atkins, No74,886-01. On November 10, 2010, the Court of Criminal Appeals denied the petition without written on the FINDINGS OF THE TRIAL COURT **(APPENDIX 'APX'-D).** Trial Court included ORDERS DIRECTING CLERK to send a copy of SAID FINDINGS to applicant **(APX-D, 088).** Said ORDERS TODATE, were never EXECUTED.

On July 21, 2016, Petitioner received said FINDINGS OF THE TRIAL COURT with Trial Counsel's AFFIDAVIT IN RESPONSE **(APD-D, 089).** **On July 22, 2016,** Petitioner filed the INSTANT §2254. He argues:

1. Fraudulent concealment of EXCULPATORY FACTS contained in state habeas decision and trial counsel's affidavit;

2. Illegal Search & Seizure resulting from knowingly untruth-search-arrest affidavit;

3. Prosecutorial misconduct frm knowingly untruthful testimony; highly inflammatory, prejudicial improper statement to jury;

4. Ineffective Assistance of Counsel from failure impeach detective during suppression hearing; failure to cross-examinate and impeach detective in jurys presence; failure to investigate and present medical evidence;

5. The trial court failed to conduct a hearing on his motion alleging ineffective assistance, in order to fully develop court records for appellate review.

On January 26, 2017, Respondent filed her answer arguing that the petition is barred by the statute of limitations. On April 1, 2017, Petioner filed a reply contending 'FRAUDULENT CONCEALMENT' of documentary evidence by state court officials material to his claims of 'INEFFECTIVE ASSISTANCE'; 'ILLEGAL Search & Seizure'; -and- 'Prosecutorial Misconduct'.

ON February 6, 2018 the United States Magistrate entered FINDINGS, Conclusions, And Recommendation. On May 11, 2018, United States District Judge enterd ORDER Accepting Magistrate Findings, Conclusions, Recommendations, dismissing Petitioners writ as barred by the one-year limitation period pursuant to 28 U.S.C. §2244(d), and denied COA pursuant to 28 U.S.C. §2253(c);

On June 20, 2018, United States Court Of Appeals for the Fifth Circuit docketed Petitioner's Appeal seeking a COA. On December 21, 2018, United States Circuit Judge denied Petitioner's application for COA; GRANTED leave to file an amended (10-22-18 COA); DENIED leave to EXPAND COURT RECORDS ON APPEAL to include STATE HABEAS RECORDS. On January 30, 2019 DENIED EXTENSION OF TIME FOR PANEL REVIEW. (APX-A). ACCORDINGLY, 90 day time period for seeking certiorari expires after March 21, 2019 without extension.

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REASONS FOR GRANTING THE PETITION

1. NATIONAL IMPORTANCE: Based on the MOST RECENT MEDICAL-SCIENTIFIC research, continually evolving since 1996 (APX-~~D~~ E, Exhibits G-I), this INSTANT CASE contain EXCULPATORY ELEMENTS regarding NON-TRANSMISSION of HIV during unprotected ANAL and VAGINAL SEX, due to medication therapy. AS SUCH, debunks state claims of 'DEATH SENTENCE' (ROA-841), relied on by the jury assessing punishment; -and- Texas Court of Criminal Appeals decision denying relief (APX-D, Exh-B, at 089,¶-1), as 'JUNK SCIENCE.'

ACCORDINGLY, deserves URGENT CONSIDERATION due to national importance regarding HIV litigation, criminal cases, prosecution.

2. UNPRECEDENTED: IN THE INSTANT CASE, Petitioner contends documents favorable to the accused as EXCULPATORY and IMPEACHABLE in nature were deliberately withheld and concealed under the GUISE described by Respondent as a 'SIMPLE CLERICAL ERROR'(ROA-187); A 'CLAIMED ERROR' which Petitioner reminds the Court, has never been corrected TODATE. ACCORDINGLY, demonstrates ELEMENTS of FRAUD, EXTRINSIC in nature.

NO OTHER FEDERAL QUESTION involving AEDPA litigation cited by the lower court as guidence to the question of RARE and EXCEPTIONAL circumstances seeking 'EQUITABLE TOLLING' include similar claims as described above. AS SUCH, UNPRECEDENTED, and therefore, should be settled by this Court.

3. CONFLICT: A State Court and the United States Court of Appeals has decided an IMPORTANTANT FEDERAL QUESTION in a way that conflicts with RELEVANT DECISIONS of this Court in SLACK v. McDANIEL, 529 U.S. 483, 484 (2000); UNITED STATES v. KWAI FUN WONG, 135 S.Ct. 1625, 1627(2015); -and- STRICKLAND v. WASHINGTON, 466 U.S.688(1984).

4. CONTENTION: Petitioner Atkins contends that the single United States Judge's decision which denied his COA on 'PROCEDURAL GROUNDS', (APX-A at 2), OVERLOOKED SEVERAL ISSUES which conflict with decisions of this Court on a set of MATERIALLY INDISTINGUISHABLE FACTS; -and- arrived at a CONCLUSION OPPOSITE to that reached by THIS COURT on a QUESTION OF FEDERAL LAW. Williams -v- Taylor, 529 U.S. 362, 384-390(2000).

- AUTHORITY -

When the District Court denies a habeas petition on 'PROCEDURAL GROUNDS' without reaching the prisoner's underlying constitutional claim, a COA should issue, and the appeal of the disrtrict court's order may be taken if the prisoner shows at the least, that jurist of reason would find the ISSUE DEBATABLE. SLACK -v- McDANIEL, 529 U.S. 473, 482-484 (2000).

5. ISSUE NO. 1:

QUESTION: Does the Doctrine of 'Equitable Tolling' due to claims of 'FRAUDULENT CONCEALMENT' of obviously important facts, extend to AEDPA legislative cases, if the lower court likewise, cited and sought guidance in other NON-AEDPA Legislative cases-?

The lower court OVERLOOKED Atkins contention that tolling was proper in this case due to FRAUDULENT CONCEALMENT[1](extrinsic in nature)[2], of INJURY/PREJUDICE when state court officials 'KNOWINGLY'[3] withheld/ concealed from Atkins, EXCULPATORY FINDINGS -and- Trial Counsel's

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1. **FRAUDULENT CONCEALMENT:** The AFFIRMATIVE SUPPRESSION -or- HIDING with intent to DECEIVE -or- DEFRAUD, of a MATERIAL FACT -or- CIRCUMSTANCES that one is LEGALLY -or- SOMETIME MORRALLY bound to reveal. (Black's 2009). See Petitioners'REPLY' (ROA-202/ECF-17); 'OBJECTIONS'(ROA-237-38 footnote 'f.n.'1-3).

2. **EXTRINSIC IN NATURE:** Deception that prevents a person from KNOWING ABOUT -or- ASSERTING CERTAIN RIGHTS. (Blacks-2009).

3. **KNOWINGLY:** MULTIPLE REQUESTS seeking FINDINGS OF FACT with Trial Counsel' AFFIDAVIT. 'REPLY' (ROA-202/ ECF:17).

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AFFIDAVIT in response. Said FINDINGS -and- AFFIDAVIT were MATERIAL FACTS vital to the ASSERTION of his SUBSTANTIAL, [redacted] SIXTH AMENDMENT right against INEFFECTIVE ASSISTANCE of Counsel;[4] FOURTH AMENDMENT right against Illegal Search & Seizure;[5] FOURTEENTH AMENDMENT right against Prosecutorial Misconduct.[6]

STANDARD OF REVIEW

FRAUDULENT CONCEALMENT: To prevail, Petitioner must show that the Defendant made: (1) a MISTATEMENT -or- OMISSION (2) of a MATERIAL FACT (3) with INTENT to DEFRAUD (decption that HINDERS -or- PREVENTS a person from knowing about -or- ASSERTING certain RIGHTS) (4) on which the Plaintiff relied -and- (5) which proximately CAUSED him -or- her INJURY. See WEST'S DIGEST 2d 283; HERNANDEZ -v- CIBA GEIGY CORP. U.S.A., 200 F.R.D. 285(2001).

DISCUSSION

MATERIALLY INDISTINGUISHABLE: The RULING of the United States Supreme Court in the case of UNITED STATES v. KWAI FUN WONG/ (Marlene June), 135 S.Ct. 1625(2015, demonstrates in the case of JUNE, that the QUESTION of EQUITABLE TOLLING is debateable among jurist of reason a full FIVE(5)-YEARS after her cause of action, IDENTICLE to the instant case.

In the WONG/JUNE case, the Federal Tort Claims Act (FTCA)

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4. INEFFECTIVE ASSISTANCE: Claims of ineffective assistance could not be sucessfully argued without TRIAL COUNSEL'S RESPONSE. See 10-22-18 Amended 'COA' at 17; REPLY at (ROA-208); APX-D, Exh-B; WIGGINS -v- SMITH, 539 U.S. 510, 525 (2003).

5. ILLEGAL SEARCH & SEIZURE: 'COA' at 19(G)-24(H);

6. PROSECUTORIAL: See Id at 29-30(K).

provides that a tort claim against the United States "SHALL BE FOREVER BARRED", unless the claimant meets two deadlines. FIRST, a claim must be presented to the appropriate federal agancy for administrative review within "TWO YEARS AFTER THE CLAIM ACCURES." 28 U.S.C. §2410(b). SECOND, if the agancy denies this claim, **the claimant 'MAY' file suit in federal court** 'WITHIN SIX-MONTHS'of the agency's denial. Ibid.

KWAI FUN WONG -and- MARLENE JUNE, respondents in nos. 13-1074 -and- 12-1075, respectively, each missed one of those deadlines... June failed to present her FTCA claim to a federal agency within two(2)-years, but argued that her untimely filing should be excused because the government had, in her view, CONCEALED FACTS VITAL TO HER CLAIM.

The JUNE CASE arises from a deadly highway accident. Andrew Booth was killed in 2005 when a car in which he was riding crossed through a cable median barrier and crashed into on-coming traffic. Respondent June, acting on behalf of Booths young son, filed a WRONGFUL DEATH ACTION alleging that the State of Arizona and it's contractor had negligently constructed and maintained the median barrier. Years into the state court litigation, JUNE CONTENDS, she **'DISCOVERED'** that the Federal Highway Administration (FHWA) had approved installation of the barrier knowing it had not been properly crash tested.

RELYING on this **'NEW INFORMATION,'** June presented a 'TORT CLAIM' to the FHWA in 2010, **MORE THAN 'FIVE-YEARS' AFTER THE ACCIDENT.** The FHWA denied the claim, and JUNE 'PROMPTLY' filed this action in federal district court. The court dismissed the suit

because JUNE failed to submit her claim within TWO(2)-YEARS OF THE COLLISION. The FTCA's 2-year bar, the Court ruled, is JURISDICTIONAL and therefore, not subject to EQUITABLE TOLLING.

ACCORDINGLY, the Court did not CONSIDER JUNE'S CONTENTION that TOLLING WAS PROPER because the government had, in her opinion, CONCEALED it's failure to require crash testing. On appeal, the Ninth Circuit reversed in light of its recent decision in WONG, thus holding that §2401(b)'s 2-year deadline, like it's 6-month counterpart, is not jurisdictional and **may be tolled.** 550 Fed.Appx. 505(2013).

THE COURT GRANTED CERTIORARI in both cases, 573 U.S.___(2014, 134 S.Ct. 2872, 189 L.Ed.2d 831, to resolve a CIRCUIT SPLIT about whether courts may EQUITABLE TOLL §2401(b)'s two time limits: **(A)** FEMA TRAILER FORMALDEHYDE PROD.LIABILITY LITIGATION, 646 F.3d 185, 190-191(CA5-2011)(tolling not available); **(B)** ARTEGA v. UNITED STATES, 711 F.3d 828, 832-833(CA7-2013)(tolling allowed). We now affirm the Court of Appeals ruling **(9th Cir.).**

Id at 135 S.Ct.1638(L.Ed.2d 549)..We affirm the judgments of the U.S.Court of Appeals for the Ninth Circuit and remand the cases for further proceedings... On REMAND in JUNE, it is for the District Court to decide whether, on the 'FACTS' of her case, JUNE is entitled to EQUITABLE TOLLING.

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FACTS TO LAW.

6. IN THE INSTANT CASE, **IDENTICLE TO JUNE,** Atkins CONTEND that State court officials **'KNOWINGLY'** withheld from Atkins, EXCULPATORY FACTS contained in said FINDING OF FACT -and- COUNSEL'S AFFIDAVIT in response. AS SUCH, deliberately CONCEALED from Atkins documentary EVIDENCE of INJURY/PREJUDICE **vital** to the ASSERTION of his

SUBSTANTIAL RIGHTS as described in above paragraph 5.

7. **IDENTICLE TO JUNE,** after approximatley five years of continued dillgence -and- state concealment, Atkins discovered said FINDINGS and AFFIDAVIT did indeed exist, and with OUTSIDE ASSISTANCE was finally able -and- FORCED to PURCHASE a copy **(APX-E,at Exh-D).**

8. **IDENTICLE TO JUNE,** relying on this 'NEW INFORMATION', Atkins promptly filed this action in Federal Court.[8] The Court dismissed the application because Atkins failed to submit his claim within one(1)-year after state court denial. 28 U.S.C. §2244(d)(2). The court ruled Atkins case did not demonstrate'RARE and EXCEPTIONAL' circumstances to justify 'EQUITABLE TOLLING.' **(APX-B at ROA-208).**

9. **AGAIN,** IDENTICLE TO JUNE, the court failed to CONSIDER Atkins' CONTENTION that TOLLING WAS PROPER in this case, because state court officials 'KNOWINGLY' CONCEALED exculpatory facts vital to his claim. **(See OBJECTION ROA-235).** Not only 'RARE and EXCEPTIONAL', '<u>UNPRECEDENTED</u>'. **(See Id, ROA-238-240).**

10. **INSTEAD,** U.S. District Court **ERRED** by allowing state ACTION and OMISSION to be **'GROSSLY MISCHARACTERIZED'** as a simple **'CLERICAL ERROR'**[9] **(See RESPONDENT ROA-187),** instead of 'FRAUDULENT CONCEALMENT,' (extrinsic in nature).

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7. **PREJUDICE:** Trial Counsel's AFFIDAVIT did not contain investigation before decision not to impeach Detective Olivarez during suppression hearing outside the jury's presence; -and- his failure to CROSS EXAMINE/ FORMALLY IMPEACH Olivarez again, in the jury's presence; **Failure** to investigate MEDICAL EVIDENCE and present to the jury, as 'NOT HELPFUL' ; **GROSS MISTATEMENT** that he was present at 4-20-2007 in-chamber conference regarding viewing and suppression of video tapes, when IN FACT, HE WAS NOT. **(See 'COA' at 25-26).**

8. **DISCOVERY RULE:** Atkins filed his state habeas ~~petition~~ application on March 1,2010, with nine(9)-days remaining in the one-year AEDPA limitation period, thereby tolling **(State Habeas Court Record 'SHCR'-01, vol.2, at 13)** 28 U.S.C. §2244(d)(2). Tolling continued until such time/date in which STATE CREATED IMPEDIMENT was removed by way of SAID COPY. 28 U.S.C. §2244(d)(1)(B). That date would be

11. **ACCORDINGLY,** IDENTICLE TO JUNE, the 'FIVE-YEAR' filing date demonstrates this issue of 'EQUITABLE TOLLING' and 'RARE -and-EXCEPTIONAL' is indeed debatable among jurist of reason. SLACK v. McDANIEL, 529 U.S. 473, 382-84(2000).

- B -
EQUITABLE TOLLING

ISSUE NO. 2:

FEDERAL QUESTION: Does Suits in Admirality Act (SAA) Legislation extended by the Fifth Circuit into AEDPA case law, used as guidence to the question of 'EQUITABLE TOLLING',justify Atkins attempt to extend FTCA Legislation as 'MATERIALLY INDISTINGUISHABLE-?

12. **CONTENTION:** IN THE INSTANT CASE, the U.S. Supreme Court decision entered in WONG/JUNE, supra, should extend to the present case as MATERIALLY INDISTINGUISHABLE in fact. Eventhough Wong/June is governed by FTCA Legislation regarding questions of jurisdiction, RASHIDI, 96 F.3d 124(5th Cir.1996); -and- LOBER, 924 F.2d. at 1344 (5th Cir.1991) are both cases involving SAA Legislation, EXTENDED and USED by the Fifth Circuit into AEDPA CASE LAW cited in COLEMAN -v- JOHNSON, 184 F.3d 398,402(5th Cir.1999), as guidence to the QUESION of EQUITABLE TOLLING. Most relevant is the FIVE-YEARS between the DISCOVERY OF INJURY/PREJUDICE and JUNES filing date.

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8. **(cont'd)** July 21, 2016. **(See OBJECTION ROA-233).**

9. **CLERICAL ERROR:** An error resulting from a 'MINOR MISTAKE' or 'ACCIDENTAL OVERSITE', esp in writing or copying something on the record and 'NOT FROM REASONING' -or- 'DETERMINATION.' Examples of 'CLERICAL ERROR are 'OMITTING an APPENDIX from a document; typing an incorrect number; mistranscribing a word; -and- FAILING to log a call. A COURT CAN CORRECT A CLERICAL ERROR AT ANY TIME, **EVEN AFTER A JUDGMENT HAS BEEN ENTERED.** (Black's-2009). Petitioner reminds the court,
IN THE INSTANT CASE, state court officials have **'NEVER'** CORRECTED ANY SUCH "CLERICAL ERROR' by providing Atkins a copy. **(See OBJECTION at ROA-235).** INSTEAD, an ON-GOING campaign to obstruct and suppress all CRUCIAL FACTS favorable to the accused. **(See APX-A at 2,** 'Denied Motion To Expand The Record On Appeal).

13. IN COLEMAN, the Fifth Circuit quoted RASHIDI V. AMERICAN PRESIDENT LINES, 96 F.3d 124, 128(5th Cir.1996). A case involving Suits in Admiralty Act (SAA) Legislation which states in part: "Under the SAA, suits may be brought only within XXXtwo years after the CAUSE OF ACTION arises. See McMANN v. UNITED STATES, 342 U.S. 25, 26,72 S.Ct. 18,19 1 L.Ed. 26 (1951).

14. IN RASHIDI, the question of equitable tolling involved conflict as to when the Statute begins to run; (A) Finding that the Statute of Limitation begins to run from the two-years preceeding the filing of a suit to recover MAINTENANCE and CURE. See MacINNES v. UNITED STATES, 189 F.2d 733 (1st Cir.1951); (B) The Statute of Limitation begins to run on the date of INJURY. See BULLER v. UNITED STATES, 199 WL 732685(W.D.Wash.1993),Aff'd 24 F.3d 245(9th Cir.1994).

15. IN RISHIDI, the Fifth Circuit held: The two year statute of limitation applicable to maintenance and cure claim brought under the SAA would **NOT BE EQUITABLY TOLLED**, where Plaintiff had ample time and opportunity to bring suit within the statutory period but failed to do so, -and- there is no **'EVIDENCE'** the Plaintiff was **'ACTIVELY MISLEAD'**: Suits in Admiralty Act § 2, .46 App. U.S.C.A. §742.

16. **IN THE INSTANT CASE HOWEVER**, unlike RASHIDI, 196 F.3d at 128; -or- LOBER, 924 F.2d at 1344, Atkins did indeed, as a matter of fact -and- as a matter of LAW, demonstrate contentions of 'FRAUDULENT CONCEALMENT' (extrinsic in nature) when RESPONDENT claimed simple 'CLERICAL ERROR' to CONCEAL evidence of PREJUDICE. Again, MATERIALLY INDISTINGUISHABLE, and should therefore EXTEND to WONG/JUNE, supra. See WILLIAMS v. TAYLOR, 529 U.S. 362,384-90(2000).

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17. ACCORDINGLY, demonstrates the QUESTION of EQUITABLE TOLLING on 'PROCEDURAL GROUNDS' is debatable among jurist of reason in AEDPA, FTCA, SAA legislative cases, requiring a 'RULING ON THE MERIT.' Therefore a COA should issue. SLACK v. McDANIEL, 529 U.S. 483-84 (2000).

- C -

STATUTORY TOLLING

ISSUE NO. 3:

FEDERAL QUESTION: Does SAA Legislation regarding 'DISCOVERY RULE' extend to Atkins, case on a set of MATERIALLY INDISTinguishable facts-?

18. FURTHER, IDENTICLE TO JUNE, in the above cited case of BULLER v. UNITED STATES, 199 WL 742685 (W.D.Wash.1993), the courts issued split decisions ruling the statute of limitation in SAA begins to run from the 'DATE OF INJURY.' Aff'd 24 F.3d 245 (9th Cir.1994).

19. ACCORDINGLY, BULLER decision should also ectend to Atkins CONTENTION THAT TOLLING SHOULD CONTINUE until REMOVAL of IMPEDIMENT as governed by DISCOVERY RULE in regards to the DISCOVERY of an ACTUAL/ INJURY/PREJUDICE contained in EXCULPATORY FINDINGS and Counsel's Affidavit. (See PETITION ROA-24).

20. IN THE INSTANT CASE, Stiles Unit legal mail delivered said FINDINGS and AFFIDAVIT on July 21, 2016, with nine(9)-days remaining from the date of filing state habeas application, until the end of 1-year federal habeas petition deadline.

21. BECAUSE the issues are debatable amongst jurist of reason; That a court could decide this issue in a different manner, a COA should issue.

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RARE AND EXCEPTIONAL

ISSUE NO. 4:

QUESTION: Should the argument for RARE and EXCEPTIONAL circumst- claimed in BUCKS v. DAVIS, 137 S.Ct. 759 (2017), extend to the INSTASNT CASE on a set of XXXXXXXXXX MATERIALLY INDISTINGUISHABLE FACTS

22. IN THE INSTANT XXXXX CASE, THE CourtX overlooked Atkins CONTENTION that State ACTION -and- OMISSION was not a simple 'CLERICAL ERROR' -or-'INNOCENT OVERSITE' made In'GOOD FAITH' (COA at 18-19). Instead, delIberate with MALICIOUS INTENT, rising to the level of SYSTEMIC IN NATURE (See RESPONDENT, ROA-18), from Dallas County, Texas as the Number ONE COUNTY in the Nation for wrongful convictions overturned (ROA-87).

23. ACCORDINGLY, does indeed as a MATTER OF FACT -and- as a MATTER OF LAW, constitute EXCEPTIONS that justify ISSUANCE OF A COA for further review on the merits as described by this Court in the case of BUCKS -v- DAVIS, 137 S.Ct. 759 (2017).

- AUTHORITY -

24. IN BUCKS supra, Federal Rule of Civil Proc. 60(b) enumerates speicific circumstances in which a party may be relieved of a judgment, such as a MISTAKE, NEWLY DISCOVERED EVIDENCE, FRAUD, and the like. The rule concludes with a 'CATCH ALL' catagory Fed.R. Civ.Proc. 60(b)(6), providing that a court may lift a judgment for 'ANY REASON THAT JUSTIFIES RELIEF.' 137 S.Ct. 759 (2017).

25. IN BUCKS, this court ruled where Federal Court of Appeals deined COA for review of claims of INEFFECTIVE ASSISTANCE of TRIAL COUNSEL, (1) Court of Appeals exceeded scope of COA analysis; (2) the Accused demonstrated ineffective assistance; -and- (3)

(3)Federal District Court abused discretion by denying motion for reliedf under Rule 60(b)(6) of Fed.R.Civ.Proc.

26. CONTENTION: The dicision in BUCKS -v- DAVIS, 137 S.Ct. 759 (2017), should also extend to the INSTANT CASE. Atkins claims of 'FRAUDULENT CONSEALMENT' on an INVALID, NON-COLORABLE claimed XXX trial strategy MATERIAL to his ASSERTION of a substantial right against ineffective assistance of counsel, does indeed constitute one of the RARE EXCEPTIONS for relief described in BUCKS, supra. See DAVIS -v- ALASKA, 514 U.S. 308, 309; 94 S.Ct. 105.

27. ACCORDINGLY, DEMONSTRATES THE ISSUE of RARE -and- EXCEPTIONAL in light of EQUITABLE TOLLING -and- the PROCEDURAL QUESTION OF TIME BAR in the instant case is indeed debatable among jurists of reason; that a court could decide the issue in a different manner; -and- that the questions are adequate to deserve encouragement to proceed further, a COA SHOULD ISSUE. SLACK v. McDANIEL, 529 U.S. 483, 484 (2000).

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INEFFECTIVE ASSISTANCE OF COUNSEL

ISSUE NO. 5: FEDERAL QUESTION:

Was trial counsel's decision not to investigate claims of non-transmission; impeach detective during suppression hearing; cross examine and impeach in jury's presence REASONABLE professional standards.

28. CONTENTION: IN THE INSTANT CASE, Counsel did not conduct a reasonable investigation. Mr. Franklins' decision not to EXPAND HIS INVESTIGATION beyond an 'INITIAL VERBAL INTERVIEW' with Petitioner Atkins fell short of the PROFESSIONAL STANDARDS in Dallas County, Texas in 2005-2007.

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STANDARD OF REVIEW:

To be deemed effective for purposes of the Federal Constitution's Sixth Amendment, Counsel for the accused is not required to (1) investigate every concellvable LINE OF MITIGATING EVIDENCE, no matter how unlikely the effort would be to assist the accused at sentencing. WIGGINS -v- SMITH, 539 U.S. 510, 525, 123 S.Ct. 2457, 156 L.Ed.2d 471 (2003); -or- (2) to present mitigating evidence at sentencing in every case, Strategic choices made after less than COMPLETE INVESTIGATIONS are reasonable only to the extent that'REASONABLE PROFESSIONAL JUDGMENT' support the LIMITATION on INVESTIGATION. STRICKLNAD v. WASHINGTON, 466 U.S. 688, XXXX 104 S.Ct. 2052, 80 L.Ed.-2d 674 (1984). Thus, **a decision not to investigate must be directly assessed for reasonableness in ALL THE CIRCUMSTANCES:**

IN EVALUATING PETITIONER'S CLAIM, the Court's PRINCIPLE CONCERN is not whether Counsel should have IN THE INSTANT CASE, investigated; (1) CROSS EXAMINE and FORMALLY IMPEACH Detective Olivarez in the jury's presence; (2) impeach Simmon's affidavit during suppression hearing; (3) introduce MITIGATING EVIDENCE in Atkins' background regarding non-transmission.

INSTEAD, the Court's PRINCIPLE CONCERN is whether the INVESTIGATION SUPPORTING THEIR DECISION not to intorduce evidence in Atkins trial proceeding at GUILT-INNOCENCE -and- PUNISHMENT was it self UNREASONABLE. WIGGINS, supra, citing STRICKLAND, supra at 688-691.

PURSUANT TO STRICKLAND, the Court must conduct an objective review of Counsel's performance, measured for reasonableness under PREVAILING PROFESSIONAL NORMS, including a 'CONTEXT DEPENDANT CONSIDERATION' of the CHALLENGED CONDUCT as seen from Counsel's perspec-

perspective at the time of that conduct as memorialized in Mr. Franklin's affidavit (APX-D, Exh-B, at 089-090). quoting STRICKLAND, supra, at 688-689, 80 L.Ed.2d 674, 104 S.Ct. 2052.

29. QUESTIONAIRE: In THE INSTANT CASE, Counsel did not conduct a REASONABLE INVESTIGATION. 'REASONABLE PROFESSIONAL JUDGMENT' does not support the limitation on Mr. Franklin's investigation. Mr. Franklin's decision not to expand his investigation beyond an 'INITIAL VERBAL INTERVIEW with Petitioner Atkins to include a 'WRITTEN QUESTIONAIRE' fell short of the PROFESSIONAL STANDARDS in place throughout Dallas County, Texas in 2005-2007.

30. STANDARD PRACTICE at the time included at the minimum, provision and completion of a 'WRITTEN QUESTIONAIRE' by the defendant. Although the forms XXXX were readily available, Mr. Franklin ended his investigation without providing, completing, or receiving any such written questionaire from Atkins.

31. BASED ON MR. FRANKLIN'S PERSPECTIVE at the time of his COMPLAINED CONDUCT, as memorialized in his SWORN AFFIDAVIT, any reasonably competent attorney would have realized that a written questionaire was essential to making an informed cohice among possible defenses in light of the QUESTIONS POSED IN HIS AFFIDAVIT.[10] Questions which were easily answered with a WRITTEN QUESTIONAIRE.

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10. AFFIDAVIT: (APX-D, Exh-B, at 089,¶-4); "We were trying to find people he knew so as to have punishment witnesses;" ¶-5 "We did not find any employees as I recall"; (¶-5) "We may have found a customer who said his lawn was mowed"; (¶-7) "There was no way we could find any of these 'MEN' "; (¶-9) "Atkins did not have that information"; (¶-9) " If he did, we would have talked to to them"; (¶-12) "CHARACTER WITNESSES were interviewed including his PASTOR, FORMER BOSS, -and- his MOTHER. None were WILLING TO TESTIFY";

ALL CLAIMS WITHOUT MERIT: (See APX-E, Exh - K, L, M).

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32. ATKINS COMPLETED A COPY OF SAID QUESTIONAIRE, which was provided to him by another pre-trial detainee. Mr. Franklin refused to accept it. Said detainee's copy was provided to him by his Dallas County Public Defender **(See APX-E, Exh-K).**[11] ACCORDINGLY, provided a detailed list of employees, customers, and 'MEN' from video tapes for Mr. Franklin to interview for 'PUNISHMENT-CHARACTER WITNESS INVESTIGATION'. An investigation ESSENTIAL to any MEANINGFUL REBUTTAL given the APPARENT AGGRAVATING FACTORS argued by the state as grounds for a life sentence, as viewed from his perspective.[12] **Attached**

33. **Trial Court Record** at both guilt, punishment, -and- his sworn affidavit highlight the 'UNREASONABLENESS of Counsel's conduct by demonstrating his failure to investigate minimally -or- thoroughly, stemmed from 'INATTENTION', not 'STRATEGIC JUDGMENT.' Punishment character witnesses Petitioner knew, employees, customers, and 'MEN' from video tapes were readily available for interview and trial testimony as memorialized in Atkins' QUESTIONAIRE -and- WITNESS AFFIDAVITS. **(APX-E, Exh - K,L,M).**

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11. Julie Doucet, Assistant Public Defender - 133 N. Industrial Blvd., L.B.2 - Dallas, Texas 75207 ..."Say frien! Here it is!! Hope this can help you in some way...Sorry my writing isn't as neat as some people & that my lines run crooked, but as far as the form goes, it is a EXACT duplicate. ALSO, my attorney is a short white female with light brown hair, wears glasses, plastic frames...works in C.C.('Criminal Court')#5, thats where I am. ...Well, if there is anything else I can do to help just get word to me, okay-? Take care T. "EARLE" 14-Tank."

12. **AFFIDAVIT: (APX-D, Exh-'B',¶-3)** Demonstrates Lawn Service was not used as a lure for underage boys similar to 'CATHOLIC PRIESTS' and 'ALTER BOYS.' Instead, a detailed list of more than FORTY(40) DIFFERENT CUSTOMERS from 2004-2005; IN ADDITION to THIRTEEN DIFFERENT CONTRACTOR/EMPLOYEES with Address; Soc.Sec. Numbers; TX D.L. Numbers; phone numbers, etc. would all testify as a hard working 'PRODUCTIVE MEMBER of SOCIETY'; 'Small Business Owner -and- College Student **(APX-E, Exh-'J')** who over came TOTAL DISABILITY after an ATTEMPTED MURDER ASSAULT **(APX-E, Exh-'U','V')**, capable of REHABILITATION. COA-32#3

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33. ACCORDINGLY, State Court, in addition to the United States Court assumption that Counsel's "INVESTIGATION WAS ADEQUATE' reflected an UNREASONABLE APPLICATION OF STRICKLAND. In deferring Counsel's decision not to present any mitigation defense despite the fact that counsel based his 'CLAIMED CHOICE' on an inadequate investigation, state court, in addition to the United States further unreasonably applied Strickland.

34. TRIAL COUNSEL'S AFFIDAVIT THAT 'Atkins did not have witness information, when in fact he did, and repeatedly attempted to provide this information before trial, COA-4 reflects an unreasonable determination of the FACTS in LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING. 28 U.S.C. §2254(d)(2).

35. CONTRARY to State and United States contention, the record as a whole does not support the conclusion that counsel conducted a more thorough -or- adequate investigation than the one described.

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FAILURE TO IMPEACH

36. IN THE INSTANT CASE, in addition to QUESTIONAIRE, the court overlooked Atkins contention that Mr. Franklins failure to question and FORMALLY IMPEACH Detective Olivarez in the jury's presence fell below PROFESSIONAL and JUDICIAL NORMS in place at the time. A decision not to call a witness should not be generally sanctioned as a REASONABLE TRIAL STRATEGY unless trial counsel has ADEQUATELY INVESTIGATED THE CASE. WIGGINS -v- SMITH, 539 U.S. 510, 525 (2000) (See 'COA' at 23-24).

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37. The Supreme Court has warned that under no circumstances shall a defendant be deprived of seeing the witness face to face and subjecting him to the ordeal of 'CROSS EXAMINATION.' See CRAWFORD, 541 U.S. at 55. (COA-22).

38. Mr. Franklin's decision to not question detective Olivarez in the jury's presence, affidavit in response offered no claims of STRATEGY CHOICE after investigation. Id at APX-D, Exh-B). Any reasonably competent attorney would have realized that pursuing this line of questioning described in Petitioner's 'COA' at 21 in regards to Olivarez conduct of an attempted cover-up of wrong doing was necessary to raise doubt in the mind of the judge and jurors in X regards to witness credibility.

39. SERIOUS DAMAGE to the strength of the state's case would have been a real possibility through FORMAL IMPEACHMENT. See DAVIS v. ALASKA, 415 U.S. 308,309, 94 S.Ct. 1105. Trial Judge's scrutiny leading to suppression of highly inflammatory video evidence XXX -and- erosion of jury confidence in Olivarez credibility would have been strong possibilities had defendant been allowed to pursue this line of questioning. Instead, Defense Counsel stated: "I HAVE NO QUESTIONS FOR THIS WITNESS." X(ROA-660).

40. ACCORDINGLY, the record of guilt-innocence proceeding, coupled with Mr. Franklin's AFFIDAVIT, underscores the UNREASONABLENESS of counsel's conduct by suggesting that his failure to question and formally impeach Olivarez in the jury's presence did not stem from a strategic judgment after investigation.

41. AS SUCH, the United States and State Court assumption that counsel's conduct was REASONABLE/ ADEQUATE, reflected an

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application of Strickland -and- an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d)(2).

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42. **IN THE INSTANT CASE**, the lower court overlooked Atkins CONTENTION that Counsel's decision not to investigate medical evidence continually evolving since 1996 COA-38 (eleven-years before 2007 trial) was unreasonable, resulting in prejudice. **(COA 27-29).**

43. **TRIAL COUNSEL'S** prospective at the time of the complained conduct as memorialized in his affidavit stated that: "After the

> "After the initial investigation by police and district attorney involving Atkins 'SPREADING AIDS' to 'UNKNOWING VICTIMS' the X focus of the 'INVESTIGATION' was what happened in the bedroom itself and did that rise to an offense **(APX-D, Exh 'B',¶-1).**

45. **SAID PROSPECTIVE** demonstrates counsel was thereby made aware before trial of the state's contention for seeking a life-sentence as that of Atkins not merely exposing, but actually 'INFECTING' individuals with HIV/AIDS. This, in addition to the state's NOTICE OF EXTRANEOUS OFFENSE REPORT. Said report included highly imflammatory statements of 'INTENTIONALLY', 'KNOWINGLY', -and- 'NUMEROUS UNIDENTIFIED MALES.' Individuals whom jurors were previously made to believe were all 13-year olds. **(See COA at 28).**

> **NOTE:** An attorney has a professional duty to present all available evidence and argument to support the defense of his client. EX PARTE DUFFY, 607 S.W.2d 507,514 (Tex.Crim. App.1980) citing STRICKLAND v. WASHINGTON, 466 U.S. 688 (1984).

46. **AS SUCH,** COUNSEL'S decision to cease investigating Atkins claims of NON-TRANSMISSION when he did was unreasonable. But for

Atkins' positive status, state prosecutors would not ~~XXXXX~~ pursue ~~XXX~~ and argue for a life sentence (COA-29), for a one-count, third degree ~~X~~ felony charging 'ATTEMPTED' sexual performance; -nor- video tapes of CONSENSUAL sexual activity between male 'ADULTS' (COA-28). See WIGGINS -v- SMITH, 539 U.S. 510, 525 (2003) citing STRICKLAND, supra.

47. Any REASONABLY COMPETANT ATTORNEY would have realized that investigation of Atkins claims of 'NON-TRANSMISSION' due to oral sex performance, medication therapy (COA-40), ~~X~~ (COA-38), with non-detectable viral load, again, continually evolving since 1996 (11-years before 2007 trial) was essential to making an informed decision among possible defense -and- punishment strategy.

> NOTE: 'Regardless of the complication in a given case, Counsel is charged with making an independant investigation of the facts of the case avoiding blanket reliance on the truthfulness (veracity) of his clients version of the facts, citing STRICKLAND, supra, 466 U.S. 688(1984). EX PARTE DUFFY, 607 S.W.2d 507, 514 (Tex.Crim.App.1980).

48. INSTEAD, Counsel's affidavit reiterated the unreasonableness of his conduct by demonstrating he conducted no investigation WHAT-SO-EVER of Atkins MOST CRUCIAL CLAIMS of NON-TRANSMISSION when he stated: 'DISCUSSING 'LOW-RISK' -versus- 'HIGH-RISK' OF 'TRANSMITTING AIDS' WOULD NOT HAVE BEEN HELPFUL', is contrary to the facts[13] -and- was not a conclusion reached after investigation. WIGGINS, supra.

49. AT THE VERY LEAST, by Counsel simply asking Atkins' then treating physician, Doctor Louis Sloan, M.D. in advance of trial, if medication therapy had any affect on transmission, would have answered MR. Franklin's follow-up question posed in his affidavit,

statlng: "HOW LOW WOULD THE RISK NEED TO BE-?"..(Id,¶-6). Mr. Franklln would have recelved the answer of 'NON-DETECTABLE', either before trial, -or- from the state expert during trial.[13](APX-E, Exh-'F'thru'I'; ROA-127, ¶-1).

50. AS SUCH, WOULD HAVE been a powerful strategy alternative at punishment as mitigationg factors in avoidance of a life sentece. This POSSIBILITY was evidence by jurors question to the court asking the difference between 99 years and llfe (ROA-).

13: (COA footnotes 38-42): 38. Doctor Thereasa Barton, M.D. State Medical Expert (ROA 983-988), Medical credentials included REsearch beginning in 1992 thru 2005 and present 2007 trial. Research included a 48 week study of ANTI RETRO-VIRAL MEDICATION GW-433908/ Retonavir (ROA-986 ATTACHED) -and- A LONG TERM STUDY TO GAIN INSIGHT INTO HIV and AIDS. (APX-E, Exh-'N').

** CREDIBLE MEDICAL PUBLICATION - Positlvely Aware (ROA-114); Attached Exh-'G'.

** NOV/DEC-2008 MEDICAL PUBLICATION (ROA-127,¶-1): "Many HIV EXPERTS have recently become embroiled in a new controversy; DOES AN [redacted] UNDETECTABLE VIRAL LOAD TRANSLATE TO SIGNIFICANT REDUCTION *IN HIV TRANSMISSION DURING SEX-? If so, ARE CONDOMS NECESSARY-? WHAT MESSAGE should be imparted by PHYSICIANS TO THEIR PATIENTS WHO CONFRONT THIS SITUATION IN THEIR DAILY LIVES-?

COA-39; NOV/DEC-2008 MEDICAL PUBLICATION (ROA-126): Swiss Expert say people people with UNDETECTABLE VIRAL LOAD CANNOT TRANSMIT HIV DURING SEX:

COA-39: SEPT/OCT-2017 MOST RECENT MEDICAL PUBLICATION (APX-E, Exh-'I'): Tracked 58,213 CONDOMLESS SEX ACTS (both anal and vaginal) in 75 clinics, in 14 countries (with one partner hiv positlve- the other negative), resulted in ZERO LINKED TRANSMISSIONS yet again, when positive partner on Medicatlon therapy for six-months with NON-DETECTABLE viral load".

COA-40: NOV/DEC-2008 MEDICAL PUBLICATION (ROA-128,¶-2): "Also, ORAL SEX HAS NEVER BEEN CONSIDERED TO BE A SIGNIFICANT HIV RISK Nor has it ever been adequately proven to cause SEROCONVERSION (convert from hiv negatlve to hiv positlve).

COA-41: SUMMER-2018 MEDICAL PUBLICATION (APX-E, Exh-'H', Attached): 'Zuckerberg San-Fransico General Hospital and Research Center began study in 1993 of PROTEASE INHIBITOR. It was approved for prescription use in 1995. Results were evidence in 1996 (11-years before 2007 trlal).

(cont'd) (ROA-128)...NOV/DEC2008 (ROA-128, 2nd column, ¶-1•: Ref SWISS STUDY at (ROA-126), statlng: "THE SWISS EXPERT STATEMENT had been DOWN PLAYED IN THE MEDIA FOR FEAR OF ENCOURAGING UNSAFE SEX.

COA-42: MEDICAL PUBLICATION SEPT/OCT-2017 (APX-E, Exh-'I', Attached): "To say that UNDETECTABLE VIRAL LOAD makes it VIRTUALLY IMPOSSIBLE TO TRANSMIT THE VIRUS DURING SEX is a bold statement. 'UNDETECTABLE = UNTRANSMISSIBLE' has been "OFFICIALLY ENDORSED' by many U.S. and INTERNATIONAL AIDS ORGINIZATIONS. (Genotypic tests can show whose virus came from whom).

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51. ACCORDINGLY, State and United State courts assumption that counsel's conduct was 'REASONABLE' reflected an UNREASONABLE application of STRICKLAND; -and- an UNREASONABLE determinatlon of the FACTS in light of the EVIDENCE presented in the State Court proceeding. 28 U.S.C. §2254(d)(2). Wiggins -v- Smith, supra, at 539 U.S. 525, quotlng STRICKLAND.

52. CONTRARY to State and United States contentlon, the record as a whole does not support the conclusion that counsel conducted a more thorough -or- adequate lnvestlgatlon than the one descrlbed.

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PREJUDICE / GUILT-INNOCENCE PHASE

STANDARD OF REVIEW:

53. IN THE INSTANT CASE, Counsel's failures PREJUDICED Atkins' defense. To establlsh prejudice, a defendant must show that there is a REASONABLE PROBABILITY that but for Counsel's UNPROFESSIONAL ERRORS, the proceedings result would have been different. WIGGINGS, quoting STRICKLAND, supra, at 694, 80 L.Ed.2d 674, 104 S.Ct. 2052.

54. THE COURT ASSESSES PREJUDICE by reweighing the 'AGGRAVATING EVIDENCE' against the TOTALITY of the 'MITIGATING EVIDENCE' adduced both at trlal -and- in the habeas proceedings<p.480>.

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13. (cont'd):

COA-42 (cont'd): ** JUNK SCIENCE: Situation where somebody was convicted or PUNISHED based on a particular field of sclence 20 -or- 30 years ago, that at the time, people belleved was good sclence, now because of the ENHANCEMENT of SCIENCE, we believe it is not.

** NOV/DEC-2014 (ROA-117): MEDICAL PUBLICATION: "HIV PHYSICIANS and SCIENTISTS have a PROFESSIONAL and ETHICAL RESPONSIBILITY to assist CRIMINAL JUSTICE to UNDERSTAND the SCIENCE REGARDING HIV."

COA-43: 1997-2005 - MEDICAL RECORDS - NEWLY RECEIVED from Atkins' then treatlng Physician, Dr. Louis Sloan, M.D. regarding NON-DETECTABLE VIRAL LOAD starting in 7-1997. (Pending COPIES -and- CERTIFICATION).

See WILLIAMS -v- TAYLOR, supra, 307-309, 146 L.Ed.2d 389, 120 S.Ct.1495.

55. THE MITIGATING EVIDENCE Counsel failed to discover and present here is powerful. MOST COMPELLING was Counsel's failure to INVESTIGATE and FORMALLY IMPEACH Lead Detective Olivarez during the evidence suppression hearing,[14] -and- again in the jury's presence, regarding the manner in which Olivarez executed Simmon's Affidavit still claiming exposure-masturbation a full 13-months after criminal charges; -and- a full SIX-WEEKS AFTER EXPOSURE-MASTURBATION CHARGES WERE DROPPED. (APX-D, Exh-'A', at 83,¶-83).[15] This, coupled with the covert action used to conceal this crucial fact from trial judge's scrutiny and consideration;[14] in addition to Appellate review,[16] as described in (10-22-18 'COA' at 19-22).

56. COUNSEL'S failure actually prejudiced Atkins defense. Serious damage to the strength of the State's case would have been a strong possibility. Given the nature and extent of Olivarez misconduct, there is a REASONABLE PROBABILITY that a competant attorney, aware of this history IN PLAIN VIEW, would have introduced it during the suppression hearing.

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14. (COA 'footnote'-34): SUPPRESSION HEARING: Prosecutor argued as follows:,'NO case law says it has to be in detectives notes...They testified they remember that this is what they put in there...So it's really just whether or not YOU BELIEVE THE DETECTIVES (ROA-622; 3RR:164).

15. (COA-27): STATE COURT FINDINGS OF FACT (APX-D, Exh-'A',at 083,¶-83):"Applicant was INITIALLY [redacted] CHARGED with 'indecency with a child by exposure, however [redacted] those charges were later dropped;

AFFIDAVIT (APX-D, Exh-'B',at 89,¶-2): "We argued since there was no 'EXPOSURE' -or- 'TOUCHING'...

16. (COA-33) APPELLATE COURT OPINION:...'Alternatively, the trial court could have believed that while the information was not 'TECHNICALLY ACCURATE', the detectives did not 'KNOWINGLY', 'INTENTIONALLY', or with 'RECKLESS DISREGARD for the TRUTH' include a 'FALSE STATEMENT IN THE AFFIDAVIT...the trial court could have believed the detective simply 'MISUNDERSTOOD' what T.R. and his parents reported. CAUSE NO. 05-07-00586-CR Fifth Court of Appeals of Texas/Dallas Id at 84,¶-11; 85,¶-1.

57. ACCORDINGLY, a judge confronted with such mitigating EVIDENCE OF WITNESS NON-CREDIBILITY would have issued a different ruling resulting in the suppression of highly inflammatory, 'highly prejudicial' video evidence seized improperly. Said video tapes did not include 'COMPLAINANT', 'CHILD PORNOGRAPHY',[17] -or- 'CRIMINAL CHARGES.' As a result, there would be no case. See ALASKA -v- DAVIS, 415 U.S. 308,309, 94 S.Ct. 1105; CRAWFORD, 511 U.S. at 55.

58. ATKINS CASE WAS FURTHER PREJUDICED by Counsel's failure to QUESTION, CHALLENGE, -and- FORMALLY IMPEACH Olivarez again in the jury's presence. Once again, given the nature and extent of Olivarez misconduct, there is a REASONABLE PROBABILITY that a competant attorney, aware of this history 'IN PLAIN VIEW', would have intorduced it during GUILT -and- that a jury confronted with such mitigating evidence would have returned with a different verdict.

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17. COA-28: STATE COURT FINDINGS at 074,¶-43 Attached APX-D, Exh-'A': 'There was also no evidence that any of the 'MEN' on the tapes were 'UNDER AGE' (yet jurors were deliberately made to believe otherwise.; ROA-674, 751);

** AFFIDAVIT at 90, ¶-8(Attached): 'It was not clear from any of the tapes that the 'MEN' on the tapes were 'UNDERAGE'; (yet jurors were DELIBERATELY MISLEAD to believe otherwise, UNCONTESTED);

** STATE COURT FINDINGS at 075, ¶-46(Attached): 'Not all of the video tapes were played for the jury. During the GUILT-INNOCENCE PHASE...only 'ONE SCENE' was 'ACTUALLY SHOWN TO THE JURY.' The Detective (Joseph Corden) was permitted to testify that this scene was 'REPRESENTATIVE OF THE OTHER SCENES.'

** DETECTIVE CORDEN TESTIFIED IN REGARDS TO VIDEO tapes unseen by jurors that (A) '13-YEAR OLDS CANNOT CONSENT TO SEX WITH AN ADULT'(ROA-674); (B) 'THERE WASN'T ANYBODY WHO WAS OLDER (ROA-751); -and- (C) EXCLUDED VIDEO SCENES with DESCRIPTIVE TERMS SUCH AS 'Middle Aged (1:18); 'Heavy Set'(1.18); 'Balding' (3.6, 15.2); 'Older B/M, Beard'(5.10); 'Tall Muscular, Hairy Chest'(3.6); as well as 'CONSENSUAL (ROA-3:11(#19).

No SUGGESTION 'WHAT-SO-EVER' of any POSSIBLE 13-YEAR OLD, went UNCONTESTED.

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59. INSTEAD, THE jury heard absolutely nothing from -or- about Olivarez misconduct -and- NON-CREDIBILITY. Intorduction of such mitigating evidence would have eroded the jury's confidence in Olivarez credibility, resulting in a REASONABLE PROBABILITY that at least ONE-JUROR would have sustained a reasonable doubt, resulting in a different verdict and outcome. WIGGINS -v- SMITH, 539 U.S. 510, 525 (2003), citing STRICKLAND, supra, at 649, 80 L.Ed.2d 624, 104 S.Ct. 2052.

- CONCLUSION -

60. IN THE INSTANT CASE, there is a REASONABLE PROBABILITY THAT but for Counsel's UNPROFESSIONAL ERROR's, result of the proceeding would have been different. STRICKLAND, supra, at 694, 80 L.Ed. 2d 674, 104 S.Ct. 2092.

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PREJUDICE / PUNISHMENT PHASE

61. COUNSEL'S FAILURES FURTHER PREJUDICED ATKINS' DEFENSE. Most CRUCIAL was Counsel's failure to investigate MEDICAL EVIDENCE regarding NON-TRANSMISSION due to medication therapy; EXTRANEOUS OFFENSE REPORT regarding claims that Atkins attempted to rape Richard Wilson at gun point; [redacted] the 'DEATH' of Manuel Watkins; [redacted] his failure to execute defendant questionaire to locate punishment witnesses and individuals from video tapes unseen by jurors.

62. FROM COUNSEL'S PERSPECTIVE at the time of the complained conduct, as memorialized in his SWORN AFFIDAVIT,, [redacted] the states 'SOLE CONTENTION' for seeking a life sentence was described in his very first paragraph as: "ATKINS 'SPREADING AIDS TO UNKNOWING VICTIMS.' (APX-D, Exh-'B',¶-2).

63. IN ADDITION, the State's Notice Of Extraneous Offenses further emphasized this contention with the terms 'KNOWINGLY', 'INTENTIONALL', -and- 'UNIDENTIFIED MALES'. (ROA-154)(APX-E, Exh-'O')

64. MOST DAMAGING to the defense at punishment was counsel's final argument to jurors as to the reason why Petitioner should not receive a life sentence, stating: 'VIDEO EVIDENCE OF CONSENSUAL MALE ADULTS WAS NOT CRIMINAL IN NATURE AND IT'S NOT SOMETHING THAT NEEDS TO MAKE THIS A LIFE IN PRISON CASE BECAUSE OF THOSE ACTIVITIES" (ROA-833), as described in COA at 29. [18]

> 65. IN RESPONSE, the state argued: 'Mr Franklin say's not a life sentence case...Well folk, he already sentenced people to death...it is a 'DEATH SENTENCE' according to the Doctor ROA-841)".

inferring to jurors not mere exposure, but actually INFECTING INDIVIDUALS with HIV, with a 'GROSS MISTATEMENT' of the Doctors testimony.

66. THIS highly inflammatory state response designed to arouse jury hostility (COA-30) went uncontested by the defense due to Counsel's failure to investigate Atkins claims of NON-TRANSMISSION due to MEDICATION THERAPY. As a result, Atkins' defense was further prejudiced when, instead of adult males, jurors were made to believe individuals depicted on video tapes unseen by jurors were all 13-year olds (COA-29);[17] that non of the individuals depicted could be found/located; in addition tothe terms 'KNOWINGLY' -and- 'INTENTIONALLY.'

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18. NOTE: Defendant was never criminally charged for 'VIDEO EVIDENCE OF CONSENSUAL MALE ADULTS.' Therefore, any such TRIAL STRATEGY attempting to defend those claims constitutes an INVALID, NON-COLORABLE 'CLAIMED TRIAL STRATEGY'. A decision made without claims of an INVESTIGATION as memorialized in his AFFIDAVIT (APX-D, Exh-'B',at 089,¶-2).

67. The mitigating evidence that Counsel failed to investigate, discover, -and- present here is extremely powerful. A simple question from Counsel to Atkins' then treating physician before X trial; -or- to the state's medical expert at trial as to WHAT EFFECT, if any, did ANTI-RETROVIRAL MEDICATION have on HIV TRANSMISSION, would have received sufficient XXXXXX to REBUT state claims of: (A) 'SPREADING AIDS'; (B) 'KNOWINGLY' - 'INTENTIONALLY'; (C) 'DEATH SENTENCE.'

68. State expert, Dr. Thereasa Barton's 'RESEARCH' (ROA-986) (Attached Exh-N) included a 48 week study on anti-retroviral medication originating from test trials beginning in 1993 (Exh-'H', attached). In 1993, test XXXX trials began on a new class of anti-retroviral drugs called 'PROTEASE INHIBITORS'. This drug prevented the HIV virus from 'REPRODUCING', 'INFECTING NEW CELLS', and from being XXXXX 'TRANSMITTED' to other during XXXXXXXX 'UNPROTECTED SEX.'

69. IN 1995, the first Protease Inhibitor was approved by the FDA for prescription XXX use.[13-COA-41] By 1996, the drug was well known throughout the medical community and praised as a 'MIRACLE DRUG'(ROA-120), eleven years before Atkins 2007 trial. Atkins regimen began in 1997, ten years before 2007 trial.

70. OVER THE PAST 20-PLUS YEARS, since th intorduction of Protease Inhibitors, research has continued to result in NON-TRANSMISSION (ROA-123-126). Attached Exh-XXX MOST RECENT study looked at 888 serodiscordent couples (one partner hiv positive, the other partner negative), in 75 clinics, in 14-countries, involved 58,213 condomless sex acts (both anal and vaginal) resulting in ZERO(Ø) linked infections when the hiv positive partner was X on ANTI-RETROVIRAL THERAPY at least six-months, with a NON-DETECTABLE VIRAL LOAD. (less than 40 copies/ml).

Study scientists run GENOTYPIC TESTS that can show whose virus came from whom.[13,19] (APX-E, Exh-'I', attached).

71. AT THE TIME OF TRIAL, Atkin's then current medical records show his treatment start date was 3-9-1997, reaching non-detectable levels on 7-25-97, more than 10-years before trial, and has remained non-detectable to date (1997-2019). (APX-E, Exh-'F')

72. GIVEN THE NATURE AND EXTENT of medical research available at the time of trial, there is a REASONABLE PROBABILITY that a competent attorney aware of this MEDICAL HISTORY, would have introduced it at sentencing, and that a jury confronted with such mitigating evidence would have returned with a different SENTENCE.

73. Instead, the jury heard absolutely nothing from the medical expert regarding the effects of anti-retroviral medication -and- hiv non-transmission.

74. HAD THE JURY HEARD THIS OVERWHELMING EVIDENCE OF NON-TRANSMISSION, -and- Atkins' then current medical history, -versus- the 1991 DIAGNOSES ONLY introduced to jurors by the state, there is a REASONABLE POSSIBILITY that at least ONE JUROR would have SUSTAINED Counsel's argument for a sentence significantly lower than life.

75. FURTHER MITIGATING, EVENTHOUGH Atkins sexual encounters were tabbed in his 'PRIVATE RESIDENCE,' they did not include ACTS OF VIOLENCE; child pornography; CRIMINAL CHARGES, INCEST, PEDIPHILLA

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19. STUDY SOURCE: Journal Of The American Medical Association (JAMA). (APX-E, Exh-'G-I', attached); See also above footnote 13.

[redacted] -or- 'UNDER AGE BOYS'. No FORCED RAPE, INTERNET TROLLING, STALKING, PUBLIC DISPLAY -OR- PEEPING TOM.

76. INSTEAD, CONSENSUAL, like minded, single individuals not ready to commit long-term, averging slightly less than 2-acts per month, 1.9. As such, not beyond the point of 'NO-RETURN' requiring a total life-sentence. With a punishment range of 25-years available, capable of REMORSE and REHABILITATION WITH THERAPY and BEHAVIOR MODIFICATION, monitering and REGISTERING. COA-32

77. THUS, the available MITIGATION EVIDENCE taken as a WHOLE, might well have influenced the jury's appraisal of Atkins' claims.

- CONCLUSION -

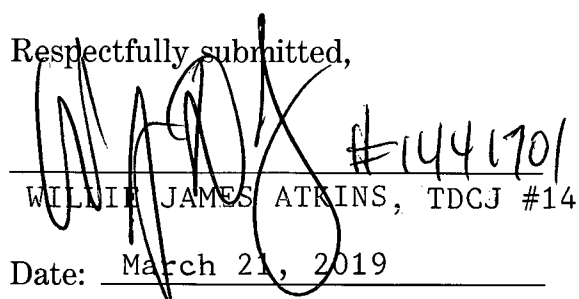
IN THE INSTANT CASE, there is a reasonable probability that but for Counsel's unprofessional errors, result of the proceeding would have been different. STRICKLAND, supra, at 694, 80 L.Ed.2d 674, 104 S.Ct. 2092. ACCORDINGLY, the accused demonstrated ineffective assistance of counsel. Therefore, the lower court erred and abused it's descretion by denying his application for certificate of appealability on procedural grounds.

Petitioner is entitled to a certificate of appealability if he makes a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). BAREFOOT v. ESTELLE, 563 U.S. 880, 893 (1983); SLACK v. McDANIEL, 529 U.S. 483,484(2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Date: March 21, 2019

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