

18-9475

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DARRELL KENNEDY,

Petitioner,

V.

RUSTY WASHBURN,
Warden, Trousdale Turner Correctional Center,
Correctional Institutions Division,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Darrell Kennedy
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Pro Se Litigant

RECEIVED

MAY 29 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

NONCAPITAL CASE

1. Mr. Kennedy, acting *pro se*, filed an appeal to the United States Court of Appeals for the Sixth Circuit, therefore, appealing the order of the United States District Court for the Western District of Tennessee Western Division, dismissing his 28 U.S.C. § 2254 Writ of Habeas Corpus Petition (“§ 2254 Petition”), raising the issue for appellate review “Whether the United States District Court's decision that “the Petitioner cannot establish cause to excuse the untimeliness of his, *pro se*, 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus under a claim of actual innocence that would entitle him to equitable tolling based on new reliable evidence-critical physical evidence-that was not presented at Petitioner's trial”, was rendered contrary to the United States Supreme Court's decision in *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)?”. The Court of Appeals refused to grant Mr. Kennedy's application for a certificate of appealability, finding that because “Under 28 U.S.C. § 2244(d)(1)(A), a state prisoner must file his habeas petition within one year of “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” Kennedy's first two claims concern alleged constitutional violations during his trial. Kennedy's convictions became final on July 19, 1999, when the Tennessee Supreme Court denied him permission to appeal the decision of the Tennessee Court of Criminal Appeals affirming his convictions and sentence. The § 2244(d)(1)(A) statute of limitations started running ninety days later, on October 18, 1999, when Kennedy's time to file a petition for a writ of certiorari in the United States Supreme Court ran out, *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000), and expired one year later, on October 18, 2000. Kennedy did not file his § 2254 habeas petition until July 2017, almost seventeen years after the statute of limitations on these two claims expired. His 2014 petition for DNA testing did not revive the already-expired statute of limitations. *See Searcy v. Carter*, 246 F.3d 515, 516, 519-20 (6th Cir. 2001). Accordingly, reasonable jurists would not debate the district court's

conclusion that Kennedy's first two claims were untimely under § 2244(d)(1)(A).

Kennedy's third claim concerns an alleged error in the Tennessee Court of Appeals' resolution of his petition for DNA testing. The Tennessee Supreme Court denied Kennedy's permission to appeal that decision on June 23, 2016. The § 2244(d)(1)(A) statute of limitations stated running the next day, *see Lawrence v. Florida*, 549 U.S. 327, 322 (2007), and expired one year later, on June 26, 2017. As stated, Kennedy filed his habeas petition on July 7, 2017, eleven days after the § 2244(d)(1)(A) statute of limitations on this claim expired. Accordingly, reasonable jurists would not debate the district court's conclusion that Kennedy's third claim was also untimely under § 2244(d)(1)(A). And even if the district court's procedural ruling on this claim were debatable, reasonable jurists would not debate whether Kennedy stated a meritorious claim for habeas relief because a claim of constitutional error in a post-conviction proceeding is not cognizable under § 2254. *See Slack*, 529 U.S. at 484; *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017); *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007).

A prisoner can obtain equitable tolling of the statute of limitations upon making “a credible showing of actual innocence.” *Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005). This “requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial.” *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). The petitioner must demonstrate that in light of the new evidence it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *See id.*

Here, although Kennedy claimed equitable tolling based on actual innocence, he did not submit any newly available evidence in support of his claim. Consequently, reasonable jurists would not debate the district court's conclusion that Kennedy was not entitled to equitable tolling.”

This Honorable Court in 2013 in *McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) reillustrating its ruling in *Schlup v. Delo*, 513 U.S. 298, 329, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), held that “Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar or expiration of the statute of limitations”, in the very circumstance presented by Mr. Kennedy's case could establish cause to serve as a gateway through which Mr. Kennedy may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. These circumstances present the following question:

Whether Mr. Kennedy was denied due process by the Court of Appeals' improper evaluation of Mr. Kennedy's actual innocence claim establish cause to excuse the untimeliness of his, *pro se*, 28 U.S.C.S § 2254 Petition for Writ of Habeas Corpus that would entitle him to equitable tolling based on new reliable evidence-critical physical evidence-that was not presented at Petitioner's trial, and misapplication of the standard for evaluating actual innocence in the *McQuiggin* and *Schlup* context of a non-capital rape case.

PARTIES TO THE PROCEEDING

All parties appear in the caption on the cover page.

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- H. “Copy of Indictment returned by the Shelby County Grand Jury on August 22, 1996, charging *Darrell R. Kennedy* with two counts of Rape”.

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PETITION FOR WRIT OF CERTIORARI

Darrell Kennedy respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit affirming the district court's denial of Mr. Kennedy's § 2254 petition is not reported, but is included as **Appendix A**. The Order denying Mr. Kennedy's "Motion For Relief From Judgment" is not reported, but is included as **Appendix B**. The Judgment of the United States District Court for the Western District of Tennessee Western Division is not report, but is included as **Appendix C**. The "Order granting Respondent's

Motion To Dismiss, Order of Dismissal, Order Denying Certificate of Appealability, Order Certifying Appeal Not Taken In Good Faith and, Order Denying Leave To Proceed In Forma Pauperis On Appeal” is not reported, but is included as **Appendix D**.

JURISDICTION

This Honorable Court has jurisdiction to entertain this petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1). The Court of Appeals rendered its decision sought to be reviewed on February 19, 2019. *See Appendix A*. Mr. Kennedy Motion for Relief from Judgment was denied by the federal district court on October 25, 2018. *See Appendix B*. The federal district court entered a Judgment, therefore, finalizing its previous Order on September 20, 2018, which the federal district court dismissed Mr. Kennedy's § 2254 Petition. *See Appendix C*. The federal district court entered a Order granting the Respondent's Motion To Dismiss Mr. Kennedy's § 2254 Petition on September 18, 2018.

See Appendix D.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

The Fifth Amendment to the United States Constitution provides in relevant part:

“No person shall be ... deprived of life, liberty, or property, without due process of law.”

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

“No state shall ... deprive any person of life, liberty, or property, without due process of law.”

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The statement of facts from Mr. Kennedy's appeal is substantially set forth in the Court of Appeals' order in *Darrell Kennedy v. Rusty Washburn, Warden*, No. 18-6108 (6th Cir. Feb. 19, 2019). Appendix A, at **1-2.

In summary, Petitioner Darrell Kennedy filed a Notice of Appeals to the United States Court of Appeals for the Sixth Circuit based on the issues, (1) Whether the United States District Court's decision that "the Petitioner cannot establish cause to excuse the untimeliness of his, *pro se*, 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus under a claim under actual innocence that would entitle him to equitable tolling based on new reliable evidence-critical physical evidence-that was not presented at Petitioner's trial", was rendered contrary to the United States Supreme Court's decision in *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)?; and (2) Whether the United States District Court's decision that "the Petitioner cannot establish cause to excuse the untimeliness of his, *pro se*, 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus under a claim under actual innocence that would entitle him to equitable tolling and allow the federal habeas court to review the Petitioner's claims based on new reliable evidence-critical physical evidence that would prove that the Petitioner is actually innocent of the crime of aggravated rape-that was not presented at Petitioner's trial would result in a "fundamental miscarriage of justice", contrary to the Sixth Circuit Court of Appeals' decision in, *Sutton v. Carpenter*, 745 F.3d 787, 790-91 (6th Cir. 2014) (citing *Coleman v. Thompson*, 501 U.S. 722, 750-51, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991))?.

The Court of Appeals denied Mr. Kennedy's Notice of Appeal, therefore, treating it as a Certificate of Appealability (COA) on February 19, 2019, finding that "On July 7, 2017, Mr. Kennedy filed a § 2254 habeas petition in the district court, claiming that: (1) the trial court violated his rights under the Confrontation Clause by allowing the prosecution's DNA expert to testify about samples that he did not personally prepare; (2) the Tennessee Court of Criminal Appeals' resolution of his claim that the trial court erred in admitting evidence of other acts was contrary to *Huddleston v. United States*, 485 U.S. 681 (1988); and (3) the Tennessee Court of Criminal Appeals' decision affirming the trial court's denial of his post-conviction petition for DNA testing was contrary to *California v. Trombetta*, 467 U.S. 479 (1984). The district court dismissed Kennedy's petition, concluding that it was barred by the one-year statute of limitations in 28 U.S.C. § 2244(d)(1)(A) and that Kennedy was not entitled to equitable tolling. The district court declined to issue a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denies a habeas claim on procedural grounds, the court may issue a COA only if the applicant shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Under 28 U.S.C. § 2244(d)(1)(A), a state prisoner must file his habeas petition within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Kennedy's first two claims concern alleged constitutional violations during his trial. Kennedy's convictions became final on July 19, 1999, when the Tennessee Supreme Court denied him permission to appeal the decision of the Tennessee Court of Criminal Appeals affirming his convictions and sentence. The § 2244(d)(1)(A) statute of limitation started running ninety days later, on October 18, 1999, when Kennedy's time to file a petition for a writ of certiorari in the

United States Supreme Court ran out, *see Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000), and expired one year later, on October 18, 2000. Kennedy did not file his § 2254 habeas petition until July 2017, almost seventeen years after the statute of limitations on these two claims expired. His 2014 petition for DNA testing did not revive the already-expired statute of limitations. *See Searcy v. Carter*, 246 F.3d 515, 516, 519-20 (6th Cir. 2001). Accordingly, reasonable jurists would not debate the district court's conclusion that Kennedy's first two claims were untimely under § 2244(d)(1)(A).

Kennedy's third claim concerns an alleged error in the Tennessee Court of Appeals' resolution of his petition for DNA testing. The Tennessee Supreme Court denied Kennedy's permission to appeal that decision on June 23, 2016. The § 2244(d)(1)(A) statute of limitations started running the next day, *see Lawrence v. Florida*, 549 U.S. 327, 332 (2007), and expired one year later, on June 26, 2017. As stated, Kennedy filed his habeas petition on July 7, 2017, eleven days after the § 2244(d)(1)(A) statute of limitations on this claim expired. Accordingly, reasonable jurists would not debate the district court's conclusion that Kennedy's third claim was also untimely under § 2244(d)(1)(A). And even if the district court's procedural ruling on this claim were debatable, reasonable jurists would not debate whether Kennedy state a meritorious claim for habeas relief because a claim of constitutional error in a post-conviction proceeding is not cognizable under § 2254. *See Slack*, 529 U.S., at 484; *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017); *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007).

A prisoner can obtain equitable tolling of the statute of limitations upon making “a credible showing of actual innocence.” *Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005). This “requires petitioner to support his allegations of constitutional error with new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial.” *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). The petitioner must demonstrate that in light of the new evidence it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.

See id.

Here, although Kennedy claimed equitable tolling based on actual innocence, he did not submit any newly available evidence in support of his claim. Consequently, reasonable jurists would not debate the district court's conclusion that Kennedy was not entitled to equitable tolling." *See Appendix A, at **1-4.*

B. PROCEEDINGS BELOW

Mr. Kennedy acting *pro se* filed a § 2254 Petition in the United State District Court for the Western District of Tennessee Western Division, therefore, raising the claims that: (1) the trial court violated his rights under the Confrontation Clause by allowing the prosecution's DNA expert to testify about samples that he did not personally prepare; (2) the Tennessee Court of Criminal Appeals' resolution of his claim that the trial court erred in admitting evidence of other acts as contrary to *Huddleston v. United States*, 485 U.S. 681 (1988); and (3) the Tennessee Court of Criminal Appeals' decision affirming the trial court's denial of his post-conviction petition for DNA testing was contrary to *California v. Trombetta*, 467 U.S. 479 (1984).

The federal district court dismissed Mr. Kennedy's § 2254 Petition, therefore, granting the Respondent's "Motion To Dismiss", finding that Mr. Kennedy's § 2254 Petition was procedural time-barred on September 18, 2018. *See Appendix D at **2-6.* The federal district court filed a Judgment on September 20, 2018, therefore, finalizing its original Order entered on September 18, 2018, that Mr. Kennedy's § 2254 Petition is dismissed. *See Appendix C.*

Mr. Kennedy acting *pro se* filed a timely "Notice of Appeals" to the Court of Appeals for Sixth Circuit. Mr. Kennedy acting *pro se* filed a timely "Motion For Relief From Judgment" pursuant to Fed. R. Civ. P. 60(b) in the United States District Court of Tennessee for the Western District Western Division. On October 25, 2018, the federal district court entered an Order denying Mr. Kennedy's "Motion For Relief From Judgment". *See Appendix B.*

REASON FOR GRANTING THE WRIT

THE HONORABLE COURT SHOULD GRANT CERTIORARI TO REAFFIRM THE PROPER QUESTION TO ANSWER IN APPLYING THE STANDARD OF REVIEW FOR DETERMINING ACTUAL INNOCENCE, IF PROVED, SERVES AS A GATEWAY THROUGH WHICH A PETITIONER MAY PASS WHETHER THE IMPEDIMENT IS A PROCEDURAL BAR OR EXPIRATION OF THE STATUTE OF LIMITATIONS IN A *SCHLUP* CLAIM, AND TO ELIMINATE THE UNACCEPTABLE RISK PRESENTED IN A NON-CAPITAL RAPE CASE BY THE FLAWED ANALYSIS UNDERTAKEN BY THE COURT OF APPEALS IN THIS MATTER

In *McQuiggin v. Perkins*, 569 US. 383, 386-387, this Honorable Court held that:

“This case concerns the “actual innocence” gateway to federal habeas review applied in *Schlup v. Delo*, 513 U.S. 289 (1995), and further explained in *House v. Bell*, 547 U.S. 518 (2006). In those cases, a convincing showing of actual innocence enabled habeas petitioners to overcome a procedural bar to consideration of the merits of their constitutional claims. Here the question arises in the context of 28 U.S.C. § 2244(d)(1), the statute of limitations on federal habeas petitions prescribed in the Antiterrorism and Effective Death Penalty Act of 1996. Specifically, if the petitioner does not file her federal habeas petition, at the latest, within one year of “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence,” § 2244(d)(1)(D), can the time bar be overcome by a convincing showing that she committed no crime?

We hold that [1] actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: “[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Schlup*, 513 U.S., at 329; see *House*, 547 U.S., at 538 (emphasizing that the *Schlup* standard is “demanding” and seldom met). And in making an assessment of the kind *Schlup* envisioned, “the timing of the [petition]” is a factor hearing on the “reliability of th[e] evidence” purporting to show actual innocence. *Schlup*, 513 U.S., at 332.”

Id., at 386-387.

A. THE COURT OF APPEALS PANEL MAJORITY ANSWERED THE WRONG QUESTION IN ITS ANALYSIS OF THE MERITS OF MR. KENNEDY'S SCHLUP CLAIM, AND HENCE APPLIED AN INCORRECT STANDARD OF REVIEW.

The Court of Appeals panel majority where upon denying Mr. Kennedy a COA, therefore, rendering that “As state, Mr. Kennedy filed his habeas petition on July 7, 2017, eleven days after the § 2244(d)(1)(A) statute of limitations on this claim expired. Accordingly, reasonable jurists would not debate the district court's conclusion that Mr. Kennedy's third claim was also untimely under § 2244(d)(1)(A). And even if the district court's procedural ruling on this claim were debatable, reasonable jurists would not debate whether Mr. Kennedy state a meritorious claim for habeas relief because a claim of constitutional error in a post-conviction proceeding is not cognizable under § 2254. *See Slack*, 529 U.S., at 484; *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017); *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007). A prisoner can obtain equitable tolling of the statute of limitations upon making “a credible showing of actual innocence.” *Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005). This “requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial.” *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). The petitioner must demonstrate that in light of the new evidence it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *See id.* Here, although Mr. Kennedy claimed equitable tolling based on actual innocence, he did not submit any newly available evidence in support of his claim. Consequently, reasonable jurists would not debate the district court's conclusion that Mr. Kennedy was not entitled to equitable tolling.”

Mr. Kennedy respectfully submit to this Honorable Court the Court of Appeals panel majority answered the wrong question in its analysis of the merits of Mr. Kennedy's *Schlup* claim, and hence applied an incorrect standard of review because the alleged victim, Anne Lightsey, reported to police on November 25, 1992, at approximately 1:30 a.m., that she had been raped by an unknown male back assailant about an hour earlier at her residence on Union Avenue in a Mid-Town apartment complex located in Memphis, Tennessee. And approximately two (2) months and eighteen (18) days later on Friday, February 12, 1993, after the alleged victim in this case had already been sexually assaulted, Mr. Kennedy, was arrested at 435 Webster located in Memphis, Tennessee, along with two (2) other suspects in connection with the an unrelated jewelry store robbery of Jaccards Jewelry, 4465 Poplar Suite 211, also located in Memphis, Tennessee, and at which time several items of jewelry were confiscated at the time of Mr. Kennedy's and the other two (2) suspects arrest, after a consent to search form was signed by Thelma Baker, presumably the owner or renter of the said residence. *See Appendix E. "Copy of Darrell R. Kennedy's Record of Arrest relating to robbery of Jaccards Jewelry Store on Friday, February 12, 1993."*

On May 11, 1993, the Shelby County Grand Jury returned a two (2) count indictment charging Mr. Kennedy with the Theft of Property of one, Anne Lightsey, between November 25, 1992 and February 13, 1993. *See Appendix F "Copy of Indictment returned by the Shelby County Grand Jury on May 11, 1993, charging Darrell R. Kennedy with two counts of Theft of Property".*

However, Mr. Kennedy was initially charged with charged with Aggravated Robbery of Jaccards Jewelry Store, which was dismissed on February 17, 1993. And on February 20, 1993, the Sex Crimes Office of the Memphis Police Department had the alleged victim, Anne Lightsey, view the jewelry, and at which time she identified two rings that were allegedly taken from her home the day she was sexually assaulted. On November 18, 1993, Mr. Kennedy, by and through counsel, filed a “Motion To Suppress” on the basis that misleading statements made to the Honorable Judge Dwyer in the “Affidavit in support of the Search Warrant in question that the Officers intentionally misguided the Court by creating the appearance that Mr. Kennedy was in the victim's apartment complex on the day of the offense”. **See Appendix G “Motion To Suppress and a computer generated printout, from the General Sessions Court Clerk indicating the date of disposition (nolle prosequi) of the Robbery charge on February 17, 1993”.**

Nevertheless, Mr. Kennedy was not charged in relation to the alleged rape until approximately three (3) years, eight (8) months and twenty-seven (27) days later, when the Shelby County Grand Jury returned a two (2) count indictment against him on August 22, 1996. **See Appendix H “Copy of Indictment returned by the Shelby County Grand Jury on August 22, 1996, charging Darrell R. Kennedy with two counts of Rape”.**

Mr. Kennedy respectfully submit to this Honorable Court that the Court of Appeals panel majority answered the wrong question in its analysis of the merits of Mr. Kennedy's *Schlup* claim, and hence applied an incorrect standard of review because of the reasons set herein, that jurists of reason would find it debatable that no reasonable juror would have found him guilty beyond a reasonable doubt, and that Mr. Kennedy has submitted newly available evidence in support of his claim of actual innocence that equitable tolling should had been applied by the federal district court therefore tolling the one-year statute of limitations for the filing Mr. Kennedy's § 2254 Petition in light of *Schlup v. Delo* and *McQuiggin v. Perkins*, as this Honorable Court has done in similarly-situated cases, would amount

to a miscarriage of justice denying Mr. Kennedy due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Jerry Haley respectfully requests this Honorable Court grant the petition for writ of certiorari, and accept this case for review. Alternatively, Mr. Haley requests that his be granted, and his case be remanded.

Respectfully submitted,



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