19-5101

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. _____

DARRYL PUDERER,
PETITIONER

VERSUS

DARREL VANNOY,

Warden of Louisiana State Penitentiary,
Angola, Louisiana
RESPONDENT

Petitioner, Darryl Puderer, respectfully petitions this Honorable Court for a Writ of Certiorari to review the decision of the lower courts, United States Court of Appeals for the Fifth Circuit, and the United States District Court for the Eastern District of Louisiana, respectfully.

CITATION

The decision of the United States Court of Appeals for the Fifth Circuit was cited as Darryl Puderer v. Darrel Vannoy, Warden, *case no: 18-30461, denied on February 12, 2019*, which stemmed from the United States District Court for the Eastern District of Louisiana's denial of his original habeas petition, cited as Darryl Puderer v. Darrel Vannoy, *case no. 17-324, denied on March 12, 2018.*

QUESTIONS PRESENTED PURSUANT TO RULE 14.1(a)

1. Did the Federal District Court err in denying the petitioner's statutory or equitable tolling request when adequate record evidence was presented in support of his claim?

2. Did the Louisiana state trial court lack jurisdiction to charge and try petitioner where the state did not show that any element of the alleged 2008 crime of forcible rape occurred in Orleans Parish?

3. Did the Louisiana state trial court lack jurisdiction to charge and try petitioner for the 2002 charge of Second Degree Kidnapping where the state failed to initiate prosecution timely within the 6-year statute of limitations?

TABLE OF CONTENTS

Cover Sheet 1

Questions Presented for Review Pursuant to Rule 14.1(a) 2

Table of Contents 3

Table of Authorities 4-5

Statement of Jurisdiction 6

Concise Statement of the Case 6-7

Argument of Law in Support of Question One 8-25

Argument of Law in Support of Question Two 26-30

Argument of Law in Support of Question Three 31-33

Conclusion 33

Certificate of Service 34

TABLE OF AUTHORITIES

Egerton v. Cockerel, *334 F. 3d 433 (5th Cir. 2003)*

Solomon v. U. S., *467 F. 3d 928, 933-34 (6th Cir. 2004); White v. Dingle, 616 F. 3d 844, 848-49 (8th Cir. 2010)*

Laws v. Lamarque, *351 F. 3d 919 (C.A. 2003)*

Prieto v. Quarterman, *456 F. 3d 511, 514 (5th Cir. 2006)*

Miller-El, *437 U. S. at 327, 123 S. Ct. 1029*

Bounds v. Smith, *97 S. Ct. 1491, 92, 430 U. S. (1977)*

Haines v Kerner, *404 US 519, 520, 30 L Ed 2d 652, 92 S Ct 594 (1972)*

Gardner v California, *393 US 367, 369-370, 21 L Ed 2d 601, 89 S Ct 580 (1969)*

Johnson v Avery, *393 US 483, 21 L Ed 2d 718, 89 S Ct 747 (1969)*

Whalem/Hunt v. Early, *233 F.3d 1146, 1148 (9th Cir. 2000)*

Lewis v. Casey, *518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)*

United States v. Cotton, *535 U.S. 625, 631 (2002)*

United States v. Prentiss, *256 F.3d 971, 982 (10th Cir. 2001) (en banc)*

United States v. White, *611 F.2d 531, 534-36 (5th Cir. 1980)*

Decuir v. Decuir, *105 La. [481,] 485, 29 South. [932,] 934 [(1901)]*

State v. Nicolosi, *128 LA. 836, 846, 55 So. 475, 478 (1911)*

United States v. Anderson, *328 U.S. 699, 703, 90 L. Ed. 1529, 66 S. Ct. 1213 (1946))*

United States v. Rodriguez-Moreno, *526 U.S. 275, 279, 143 L. Ed. 2d 388, 119 S. Ct. 1239 (1999)*

Travis v. United States, *364 U.S. 631, 635-37, 5 L. Ed. 2d 340, 81 S. Ct. 358 (1961)*

United States v. Cores, *356 U.S. 405, 408-09, 2 L. Ed. 2d 873, 78 S. Ct. 875 (1958)*

United States v Johnson, *323 US 273, 275, 89 L. Ed 236, 239, 65 S Ct 249*

United States v. Hansel, *70 F. 3d 6 (C.A. 2, 1995)*

Hill v. Lockhart, *474 U.S. 52, 58-59 (1985)*

United States v. Freeman, *(2016 WL 1127170 La. 2016)*

United States v. Bass, *310 F. 3d 321, 330 (5th Cir. 2002)*

United States v. Gunera, *479 F. 3d 373, 375 (5th Cir. 2007)*

United States v. Wilson, *322 F. 3d 353, 354-55 (5th Cir. 2003)*

Appendix of Exhibits Attached:

Exhibit "A" – *Report and Recommendation of Magistrate's Judge Daniel E. Knowles, III*

Exhibit "B" – *United States District Court for Eastern District of Louisiana's Ruling Denying Habeas relief*

Exhibit "C" – *United States Fifth Circuit Court of Appeals Ruling Denying Application for Issuance of a Certificate of Appealability*

Exhibit "D" – *United States Fifth Circuit Court of Appeals Ruling Denying Application for Rehearing*

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit's denial of COA, contrary to this Honorable Court's rulings in Holland v. Florida.

CONCISE STATEMENT OF THE CASE

This criminal matter gained its inception on May 11, 2010, when the petitioner was charged by bill of information in the Parish of Orleans with two counts of second degree kidnapping and two counts of forcible rape.

On August 7, 2012 the petitioner pled guilty as charged to all counts. The state trial court sentenced the petitioner that same day to concurrent terms on each count of (20) years at hard labor in the custody of the Louisiana Department of Public Safety and Corrections. No appeal was filed in the matter.

On September 3, 2014, the petitioner filed a pro se application for post-conviction relief into the Orleans Parish Criminal District Court. On September 5, 2014, the petitioner, through private counsel, filed an application for post-conviction relief. The state district court denied petitioner's applications on March 3, 2015, finding the petitioner's claims to be procedurally barred or without merit. The Louisiana Fourth Circuit Court of Appeal denied petitioner's counseled application for supervisory writs finding "the trial court did not abuse its discretion in the March 3, 2015, denial of petitioner's counseled and pro se application for post-conviction relief. On October 17, 2016, the Louisiana Supreme Court denied petitioner's application for review finding he failed to show that he was denied effective assistance of counsel during plea

negotiations under Strickland v. Washington, *466 U. S. 688 (1984)*, and his remaining claims repetitive or unsupported under *La. C. Cr. P. Arts. 930.2 and 930.4.*

On January 10, 2017, the petitioner filed the instant federal application seeking habeas corpus relief. The state filed a response arguing that the application was untimely. Petitioner then filed a reply and several supplements admitting his application was untimely but arguing that equitable tolling was warranted because he was abandoned by counsel, uninformed about the AEDPA deadline, denied access to the prison law library, and had difficulty obtaining timely legal assistance at the Louisiana State penitentiary (LSP).

On January 26, 2018, U. S. Magistrate Judge Daniel E. Knowles, III issued a report and recommendation recommending dismissal with prejudice under docket no: 17-324.

Petitioner then filed written objections to the recommendation. On March 12, 2018, the District Court Judge ordered that petitioner's habeas corpus be dismissed with prejudice and on that same day the district judge denied petitioner a "Certificate of Appealability" (COA) having found that petitioner had not made a substantial showing of the denial of a constitutional right.

Petitioner then timely filed a "Notice of Intent to Appeal" and requested permission to proceed in forma pauperis. On May 7, 2018, the District Court judge granted petitioner permission to proceed under pauper status.

Petitioner then filed his timely application for issuance of a COA into the United States Court of Appeals for the Fifth Circuit. The United States Court of Appeal subsequently denied his application for COA on February 12, 2019. Petitioner then filed his petition for rehearing, which was denied on March 13, 2019. Now before this honorable court is the petitioner's timely application for issuance of a writ of certiorari.

ARGUMENT OF LAW IN SUPPORT OF QUESTION ONE

The Louisiana trial court's twisting path to the erroneous and contrary conclusion is not easy to follow. However, the petitioner will try. The record will reflect that petitioner raised the following claims: 1) the trial court did not possess subject matter jurisdiction over the alleged 2008 forcible rape charge; 2) petitioner's 2002 second degree kidnapping charge and the time limitation for prosecuting that charge expired prior to the state's filing of the bill on information and petitioner's guilty plea; 3) the statute of limitations elapsed prior to petitioner's guilty plea on the 2002 charge; 4) ineffective assistance of trial counsel; 5) the infirmity of petitioner's charges and pleas for the 2002 second degree kidnapping and the 2008 forcible rape calls into question the constitutionality of petitioner's guilt; and 6) petitioner was denied the right to an "Out of Time Appeal".

The magistrate judge determined the petitioner's petition was untimely and that he had not shown that he was entitled to neither statutory, nor equitable tolling. The magistrate judge concluded that the limitations period should not be equitably tolled. Petitioner argued that he is entitled to equitable tolling because he was abandoned by counsel, uninformed about AEDPA deadline, was denied access to the prison law library and legal materials, and had difficulty obtaining timely legal assistance at the LSP. The magistrate judge rejected those arguments.

The petitioner then raised those claims in his motion and application for issuance of a certificate of appealability into the United States Fifth Circuit Court of Appeals, upon which that court also denied his request for COA.

Petitioner arrived at the LSP on October 4, 2012, after being transferred from Elayn Hunt Correctional Center, where he was classified as a "Phelps Correctional Center offender" (PCC), and due to the state's closure of the PCC facility, he was sent to LSP.

All PCC offenders that arrived on October 4, 2012 were screened and processed into the LSP system. The PCC offenders were then placed and housed in Mag-4 dormitory. It was very chaotic and unorganized; there was no structure or written policy at LSP pertaining to the particular housing and care of the PCC classified and titled offenders.

PCC offenders were then placed in Mag-4 dorm with nothing but a clear plastic garbage bag which contained their hygiene and a few personal items, along with a few state clothing items. The dormitory was completely empty except for mattresses that were placed on the floor for them to sleep on. During the time period from October 4, 2012 through October 10, 2012, PCC offenders were living out of a plastic garbage bag and were locked in the dorm at all times, except when being escorted by security to either the kitchen to eat or the yard for recreation. They were kept isolated, separate, and away from LSP classified "lifer" offenders at all time and not allowed any contact with them at all.

PCC offenders were not allowed access to the main prison law library at any time during the time period from 10/4/12 through 10/10/12 due to the fact that LSP "lifer" offenders frequented the law library at various times throughout the day and PCC offenders were not allowed to come into contact with them at any time. During that time period, security officers and a classification officer, Ms. Julie Kilgore, did make rounds in the Mag-4 dormitory and petitioner advised security and Ms. Kilgore numerous times that he needed to see inmate counsel substitute (ICS) to no avail.

On October 11, 2012, petitioner was transferred from the main prison Mag-4 dormitory to the Camp C – Wolf 3 dormitory. He was housed in that dorm until December 27, 2012, and had chance to talk to an inmate counsel who made rounds in the unit. Petitioner requested assistance and was informed that he had to make a public records request in order to obtain his Boykin

transcripts, docket master, and sentencing transcript. The ICS told petitioner that he (ICS) would draft the request.

ICS prepared his document request, which was mailed on November 6, 2012, and docketed by the trial court on November 14, 2012. On December 13, 2012, petitioner received his documents and gave them to inmate counsel to review for possible claims to be raised on post-conviction relief. Shortly thereafter, on December 27, 2012, petitioner was placed in the cellblocks where he remained until October 29, 2014.

Ms. Foster gave the state an affidavit alleging that throughout the entire time petitioner was in the cellblocks, that petitioner was able to request legal materials from inmate counsel who made rounds in the Camp-C dormitories and cellblocks. Petitioner states that is not true. Petitioner addressed this in his written objections to the magistrate's report. While in the cellblocks petitioner found it very difficult, frustrating, and nearly impossible to research and prepare his case. Petitioner was untrained in the law and incapable of drafting his own pleadings without legal research materials. Petitioner was a first time offender and he had never been involved with the judicial system. Petitioner did request law books from the ICS who advised him that they (ICS) did not give out any law books due to the books either being lost, stolen, or damaged in the past.

Inmate counsel did inform petitioner that he could request cases and that they (ICS) would print them off of the computer. However, petitioner would have to specify exactly what cases he wanted (with citation numbers). Petitioner, being new to the system, untrained in the law, and unfamiliar with court procedure, had no idea whatsoever what to request.

In Ms. Foster's affidavit, she said that inmate counsels at LSP are assigned to assist the offender population with "research and writing". However, when petitioner requested assistance,

he was denied and therefore this constitutes a denial of access to the courts; or, at the very least, a denial of adequate legal assistance and/or adequate legal materials.

The petitioner now wishes for this court to direct its attention to a letter to the petitioner from ICS Noel Brooks (Brooks), who refused to assist petitioner with drafting and filing of any claims; even though Brooks stated, "If you persist on preparing a pleading, the Camp-C legal aid office will gladly provide you with whatever forms and legal materials to assist you in the preparation and drafting of your own pleadings." However, no forms or legal materials were ever brought to the petitioner, who was confined to the cellblocks, and had to rely on ICS for any and all legal assistance. Petitioner, concerned about his two year deadline for post-conviction relief, wrote the Camp-C legal aid office on August 25, 2013, requesting legal assistance and requesting that a different ICS be assigned to assist him with his case and filing. He stressed that he was a novice and layman and that he was not familiar with the law and did not understand criminal procedure or know how to draft his own pleadings. Petitioner also stressed he wanted to make sure that his post-conviction was timely and his rights to review his claims were preserved. However, petitioner's request went unanswered. ICS Todd Thibodeux hand delivered to petitioner a letter from ICS Brooks dated August 21, 2013, where he refused to assist petitioner, after considering his case for more than eight months where he had led petitioner to believe that he (Brooks) was preparing petitioner's PCR to be filed.

Petitioner was denied access to the courts, by being denied adequate assistance from an ICS at a critical stage. Petitioner was prevented from filing his federal writ application timely himself, because he was denied access to a law library and/or adequate research materials; nor was he ever informed by the state court or any inmate counsel about the AEDPA time limitation.

Significant to note here also is that Camp-C did not even have a law library, but only had a legal aid office where inmate counsels performed their work. Whether an offender was in the cellblock or not, there was not a law library that an offender could go to for legal assistance, reference materials, or research. Offenders had to totally rely on assistance from inmate counsels while being housed at Camp-C. They were not properly trained in the law or they would have surely informed petitioner of the AEDPA requirements, or at least would have provided petitioner with a copy of it.

By the time inmate counsel Todd Thibodeux started making rounds, researched petitioner's case and prepared his post-conviction relief, petitioner was already beyond his one year deadline for AEDPA purposes, but nobody told him. A fundamental constitutional rights of 'access to the courts' requires prison authorities to assist inmates in the preparation and filing of 'meaningful' legal papers by providing prisoners with 'adequate' assistance from persons "trained in the law". See: Bounds v. Smith, *97 S. Ct. 1491, 92, 430 U. S. (1977)*. While housed in the cellblocks the petitioner made several attempts to receive inmate counsel assistance and legal materials to prepare his PCR claims, but it was not until a new inmate counsel was assigned to his unit that he finally received assistance in preparing and submitting his PCR application on September 2, 2014.

It has been held that if segregated inmates are denied physical access to a law library, they must receive additional assistance, either a basic law library on the housing unit or assistance from legally trained persons. Knop v. Johnson, *977 F. 2d 996, 1005-08 (6th Cir. 1992)*; Toussaint v. McCarthy, *926 F. 2d 800, 803-4 (9th Cir. 1990)*.

Unprofessional Attorney Conduct

Petitioner's attorney, Craig Mordock, told him he would file an appeal, but did not. He failed to take a writ to the court of appeals from the trial court's denial of a motion to dismiss for lack of jurisdiction; failed to file a motion to quash based upon prescription and failed to appeal despite numerous letters petitioner wrote to him. After the initial conversation where counsel told petitioner he was going to appeal, counsel failed to respond to any of petitioner's letters. Petitioner eventually wrote the Louisiana Appellate Project requesting another attorney to handle his appeal; he was told attorney Mordock was still attorney of record.

On August 7, 2012, petitioner pled guilty to two counts of second degree kidnapping and two counts of forcible rape. He was sentenced on the same date. Because counsel did not file an appeal, petitioner's two year post-conviction time as well as his one year federal time limitation started to run thirty days later on September 7, 2012.

Petitioner wrote counsel Mordock and told him the Appellate Project told him another attorney could not be appointed unless he withdrew. Petitioner then requested that if he was not going to handle his appeal to please withdraw. Counsel Mordock ignored his requests.

A group of teachers of legal ethics told the court that these various failures violated fundamental canons of professional responsibility, which requires attorneys to perform reasonably competent legal work, to communicate with their client's, to implement client's reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client. See: Brief of Legal Ethics Professors et al. as Amici Curiae, the Restatement (3rd) of the law governing lawyers (1998) and in the ABA Model Rules of Professional Conduct (2009). Mordock's failures seriously prejudiced petitioner. Mordock abandoned petitioner. As noted by

the magistrate, by November 6, 2012, petitioner was aware that Mordock had not filed a direct appeal and not filed a motion to withdraw the guilty plea or a notice of appeal.

Petitioner argues that the state district court judge led him to believe that he had two years to file for post-conviction relief and he was unaware he needed to file his state application within one year to toll the AEDPA limitations period. During the Boykin colloquy the state district judge advised petitioner there was a "two year time period during which he could seek post-conviction relief". Petitioner contends he knew nothing about the one year federal deadline and did not know that it was running at the same time the two year state post-conviction deadline ran.

Petitioner was never made aware of the interplay between state court post-conviction statute of limitations and the one year statute of limitations for federal habeas relief. Petitioner had no direct access to the law library, nor access to any legal materials until after this one year had expired, and inmate counsel never told petitioner about the one year deadline.

There is no evidence in the record that petitioner learned of the one year limitation period prior to its expiration. In fact, it was in 2015 when petitioner was sent back to the main prison and had access to the prison law library and legal materials that he became aware of the federal one year time limitation (AEDPA). Petitioner did not fail to conduct research and discover the AEDPA's existence; he simply never had the chance to do so during this one year window. This reasoning was the Fifth Circuit's analysis in Egerton v. Cockerel, *334 F. 3d 433 (5th Cir. 2003).* The court held that prison law library's failure to provide a copy of AEDPA constituted an 'impediment'...created by state action that tolled the limitations period. Also in *Egerton*, prisoner alleged that he did not have access to legal materials until after AEDPA's statute of limitations had expired. Petitioner argues that the state's failure to make available to a prisoner the AEDPA which sets forth the basic procedural rules the prisoner must follow in order to avoid having his

habeas petition summarily thrown out of court is just as much as a 'impediment' as if the state were to take 'affirmative steps' to prevent petitioner from filing the application.

In *Egerton*, the Fifth Circuit concluded that, "A state's failure to provide the materials necessary to prisoners to challenge their convictions or confinement, in this case the very statute that is being used to render [the petitioner's] petition time-barred, constitutes an 'impediment' for purposes of invoking *§ 2244 (d)(1)(B)*. Also in *Egerton*, the case was remanded to determine, "whether he was aware of the existence of the AEDPA prior to the expiration of the one year limitations period."

The Fifth Circuit's analysis in *Egerton*, supra leads to the unsurprising conclusion that the federal courts do not require inmates in petitioner's position to be psychic in order to assert their rights. *Egerton* also holds that it merely recognized a particular set of facts which prevented *Egerton* in an "extraordinary" way from asserting his rights.

Equitable tolling required if petitioner lacks notice and constructive knowledge of the AEDPA's one year deadline. Equitable tolling applied because petitioner was ignorant of AEDPA's one year limitation reasonable and petitioner diligently pursued his rights. Solomon v. U. S., *467 F. 3d 928, 933-34 (6th Cir. 2004); White v. Dingle, 616 F. 3d 844, 848-49 (8th Cir. 2010).*

Petitioner contends that he diligently pursued his case and the attached affidavit's, letters, and writs clearly reflect diligence. Petitioner contends that because he was in segregation in the cellblocks and unable to have access to the law library and/or legal materials and because neither inmate counsel, or anyone else ever informed him of the existence of the AEDPA's one year time limitation, he is entitled to statutory and/or equitable tolling. Nothing in the record indicates that petitioner had knowledge of the existence of the AEDPA until 2015, where petitioner for the first

time had access to the law library and legal materials. It is respectfully argued that the lower court's rulings were based on misleading facts and that in his written objections, the petitioner addressed those errors.

The district court abused its discretion by denying the petition without ordering the development of the factual record on eligibility for tolling. See: Laws v. Lamarque, *351 F. 3d 919 (C.A. 2003) (remanded for an evidentiary hearing with discovery).* This court's attention is directed to petitioner's written objections to the magistrate's report and recommendation.

On page 6 of the report, the magistrate stated that "Petitioner alleged he was in administrative segregation from October 2012 until August of 2013." That is incorrect. See: Petitioner's traverse, page 5, paragraph 1, wherein the petitioner stated:

> *"Then, shortly thereafter on December 27, 2012, offender Puderer was placed in administrative segregation in the cellblocks where he remained until October 29, 2014."*

Again, on page 7 of the magistrate's report, he states that "Petitioner's contention that officials impeded access to legal materials is entirely without foundation given that he admits he could have requested any case law he desired." That is incorrect. See traverse, page 5, quoted verbatim by the petitioner:

> *"The inmate counsel did inform him that he could request (case law) and that they would print them off the computer. However, offender would have to specifically request exactly what cases he wanted (with the cite number)."*

Petitioner being untrained in the law and unfamiliar with court procedure had no idea whatsoever what to request to be printed. As cited in petitioner's traverse on page 5, the only way petitioner could request any case law was by citation. Petitioner did not have any access to any legal materials to be able to gain knowledge of any (cite numbers) for case law.

Then see page 8 of the magistrate's report where he said, "The affidavits of other inmates state that they had physical access to the law library in August 2013." These affidavits pertained to other inmates in Mag-4. However, the magistrate has misinterpreted them as they pertain to petitioner. Those inmates were still being housed in Mag-4, whereas the petitioner had been moved to Camp C, and he was no longer in Mag-4 in August of 2013.

Further, on page 8 the magistrate stated "Perhaps the best evidence that petitioner was not 'prevented' from seeking judicial relief as a result of lack of physical access to the law library or inadequate legal assistance from inmate counsel, is the fact that the record shows that he actually sought relief on various occasions. For example, from November 2012 until May 2013, petitioner filed several requests for production of documents with the state court and also submitted public records requests seeking a copy of the case file to the district attorney's office, that in August 2012 petitioner filed a petition for writ of mandamus." Again, this is an incorrect assumption and petitioner pointed this out in written objections to the report. A request for public records is nothing but a letter requesting the same; a request for documents and a writ of mandamus contains no case law and required no research, and they are a far cry from researching and preparing a post-conviction relief application. Thus, what the magistrate referred to as his 'best evidence' that petitioner was not prevented from seeking judicial relief as a result of lack of physical access to the law library or inadequate legal assistance from inmate counsel, is also incorrect and was based on incorrect and misleading facts and information.

Then, see page 9 of the magistrate's report, where it is stated, "In summary, in light of the fact that there is no record of petitioner having complained about a lack of access to the law library or inadequate legal assistance, the undersigned finds that the lack of physical access to the law library and claimed deficiencies of the legal assistance program did not qualify as "state created

impediments that prevented petitioner from seeking relief." Again, the magistrate is incorrect. See page 6 of petitioner's traverse, where petitioner stated, "I did complain about the inmate counsel and lack of access to legal materials and the only reason I did not complain beforehand is that inmate counsel (Brooks) led me to believe that he was preparing my state post-conviction relief. It was not until the end of August of 2013 that (Brooks) returned all my documents and sent me a letter refusing to prepare a petition for me." The magistrate is incorrect. See: exhibit 6 attached hereto, which is a letter sent to legal-aid for legal assistance after inmate counsel (Brooks) returned petitioner's documents and refused to help him, dated August 25, 2013.

As argued in his written objections to the magistrate's report, petitioner has shown that the magistrate based his findings on misleading and incorrect facts and information to conclude that he was not entitled to tolling. The Antiterrorism and Effective Death Penalty Act's (AEDPA) limitation period does not set forth an inflexible rule requiring dismissal whenever its clock has run. Instead, the limitation period is subject to both statutory and equitable tolling. The lower court's decisions regarding statutory tolling under AEDPA is reviewed de novo but a review of the district court's decision regarding equitable tolling is reviewed for abuse of discretion. See: Prieto v. Quarterman, *456 F. 3d 511, 514 (5th Cir. 2006).*

The magistrate judge concluded that petitioner was not entitled to statutory or equitable tolling. Petitioner argues that he is entitled to both.

This application for writ of certiorari presents two questions: 1) Whether the district and Fifth Circuit Court's erred in concluding that petitioner was not entitled to statutory tolling of the federal one year limitation period, and 2) Whether the district and Fifth Circuit Court's erred in concluding that petitioner was not entitled to equitable tolling of the federal habeas one year limitation period.

It is argued that reasonable jurists would debate the lower court's findings concerning the correctness of the district court's conclusion that petitioner was not entitled to statutory or equitable tolling of the one year time period.

Under the AEDPA, a state habeas petitioner may appeal a district court's dismissal of his petition only if the district court or the court of appeals first issues a COA. *2253 (1).* In determining whether to grant a petitioner's request for a COA, this Honorable Court had instructed that a "court of appeal should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El, 437 U. S. at 327, 123 S. Ct. 1029.* This Honorable Court has emphasized the COA inquiry is not coextensive with a merits analysis. At the COA stage the only question is whether the applicant has shown that, "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This threshold question should be decided without "full consideration of the factual or legal basis adduced in support of the claims." "When a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Petitioner proved that his attorney abandoned him and failed to file his appeal; he proved that he was placed in administrative segregation from 2012-2014, and not allowed access to the law library; he proved that his first inmate counsel held his legal documents for eight months, and returned them saying that he had no claims with merit; and that he was a first time offender and had no knowledge of the workings of the judicial system, and that inmate counsel would not bring him law books to the cell block and was told he could only get copies of cases if he gave him (ICS) the citation. Petitioner contends that he was always aware of the two year state post-conviction

time limitation because the state district court told him about it. However, he contends that he never had constructive knowledge of the one year federal time limitation; no inmate counsel informed him of it, not trial counsel nor the court, and because he was confined to administrative segregation from late 2012-2014 and not allowed physical access to the main prison law library, or legal materials, could not discover its existence until 2015 when he was out of segregation and was allowed physical access to the prison library where he did discover the AEDPA one year limitation period and by then petitioner's AEDPA one year time period had expired.

The district court found that by November 6, 2012, petitioner was aware that counsel had not filed a direct appeal and that his conviction was final. That no appeal had been filed within AEDPA's one year deadline for seeking federal habeas corpus relief; that his counsel had filed no motion to withdraw the guilty plea, or notice of appeal, and that this did not render it impossible for petitioner with exercise of due diligence to file a timely 2254 petition. However, the lower's courts findings are based upon incorrect facts which petitioner disputed in his written objections as well as in his petition for COA. The lower court's findings could only be correct if petitioner had knowledge of the existence of the AEDPA's one year limitation period which he contends he did not. It is respectfully argued and the record will reflect that petitioner was only concerned about filing within the post-conviction two year limitation period because that is the only limitation period he was ever made aware of.

The federal district and circuit court's findings are based upon an incorrect assumption that petitioner was aware of and had constructive knowledge of the existence of the AEDPA's one year limitation period. Those courts found that petitioner not being informed as to the one year federal limitation period is not an extraordinary circumstance warranting equitable tolling and petitioner disagrees.

The petitioner avers that the 5th Circuit Court of Appeals' decision to deny his motion for COA and petition for an en banc rehearing are contrary to this Honorable Court's holding in Bounds v. Smith, *97.S. Ct. 1491, 92, 430 U. S. (1977).* The principal issue in *Bounds* was whether the states must protect the right of access to the courts by providing law libraries or alternative sources of legal information for prisoners.

The Circuit Court Judge erroneously misinterpreted the facts and situation in the petitioner's case, which are distinctly similar to the circumstances in *Bounds*. The circuit court judge held that the state did not impair petitioner's ability to file his state application for post-conviction relief within the timeliness provisions to reserve his rights for federal review under the AEDPA standard while housed in segregation at LSP *"...because his letters to the Legal Aid Office during that time demonstrated a familiarity with the legal system, an awareness of claims he wished to assert, and the existence of a limitation period for timely filing state and federal petitions."* However, this is an irrational and erroneous interpretation of the evidence attached in support of the petitioner's claim for equitable tolling.

In *Bounds*, this Honorable Court held:

> *"Although it is essentially true that a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action, it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties' plaintiff and defendant and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.*
>
> *If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner. Indeed, despite the "less stringent standards" by which a pro se pleading is judged, Haines v Kerner, 404 US 519, 520, 30 L Ed 2d 652, 92 S Ct 594 (1972), it is often more important that a prisoner complaint set forth a non-frivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the case if it is deemed frivolous. Moreover, if the State files a response to a pro se*

pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation. Gardner v California, *393 US 367, 369-370, 21 L Ed 2d 601, 89 S Ct 580 (1969). In fact, one of the consolidated cases here was initially dismissed by the same judge who later ruled for respondents, possibly because* Younger v Gilmore *was not cited."*

In this case, for the circuit court judge to rule that simply because this petitioner made vague reference to certain claims he was considering filing in his application for post-conviction relief or that he was aware that there were time limitations to file into court, he had adequate knowledge of legal procedures and rules of court to be able to prepare and file a proper legal pleading is erroneous and directly in contravention to this Honorable Court's holding in *Bounds*.

Petitioner avers that during that time he did, in fact, write several letters to the legal aid office at LSP. However, his letters only made general references that he was aware of a deadline upon which he must submit his application for post-conviction relief, which he was advised in open court at his sentencing hearing was two years for that date. No mention was made at any time in court advising him of the AEDPA timeliness provisions noting he only had one year to obtain federal *habeas* relief. Furthermore, the petitioner did make vague mention of claims he wished to explore the possibility of raising for relief, but that in no way justifies the circuit court judge's contention that because he had a general knowledge of issues he felt were done improperly by the trial court, he had adequate legal knowledge or an awareness of the rules of court to constitute him being competent to file a petition into the federal court system on his own behalf. This Honorable Court held in Bounds that a prisoner must be given adequate legal assistance so that he or she can research, prepare, and submit pleadings to ensure that they are in compliance with the rules of court at ALL levels, both state and federal.

The petitioner in this case has provided numerous exhibits in support of his request for equitable tolling showing that he exercised due diligence from his arrival at LSP in October of 2012, in his several attempts to obtain legal materials and assistance in preparing and filing his legal pleadings. Affidavits from prisoners housed with the petitioner as well as copies of letters sent to the legal aid office at LSP prove that he was consistently seeking legal assistance and materials to research and prepare his post-conviction claims well before his (1) year AEDPA time limitations expired. Had his request been handled properly by that facility and he been provided adequate assistance and research materials it is reasonable to believe that he would have been able to prepare and submit his PCR well within the one year time limitations of the AEDPA.

As mentioned previously, the facts in this case are distinctly similar to those in *Knop* and *Bounds* in that the petitioner sought numerous times to receive additional assistance from legally trained persons (Inmate Counsel Substitutes) or legal research materials (as noted in his letters to legal aid office requesting legal books), but at no time was he afforded adequate assistance in preparing and filing his pleading into court.

In Johnson v Avery, *393 US 483, 21 L Ed 2d 718, 89 S Ct 747 (1969)*, this Honorable Court struck down a regulation prohibiting prisoners from assisting each other with habeas corpus applications and other legal matters. Since inmates had no alternative form of legal assistance available to them, this Honorable Court reasoned that this ban on jailhouse lawyers effectively prevented prisoners who were "unable themselves, with reasonable adequacy, to prepare their petitions," from challenging the legality of their confinements. This Honorable Court's decision in *Johnson v. Avery* directly ensures that incarcerated defendants shall be provided legal assistance if they are "unable themselves, with reasonable adequacy, to prepare legal petitions."

Petitioner is a first time offender and has never been previously involved with the judicial system, as the record in this case clearly reflects. Petitioner asserted in his *habeas* petition and motion for COA that he did request law books from the ICS numerous times, but was told that the facility did not give out any law books due to the books either being lost, stolen, or damaged in the past. Affidavits and exhibits attached to the petitioner's federal pleadings show that he exercised due diligence throughout these proceedings attempting to obtain legal materials for research purposes, but was consistently denied those materials.

The issue at hand in the petitioner's case does, in fact, raise a question of great importance: Should the state trial court be required to notify a criminal defendant at their sentencing hearing of the AEDPA timeliness provisions that require any post-conviction pleading be filed within (1) one year of their conviction and sentence becoming final, to ensure that they are advised of their constitutional right to *habeas* relief and so that right is protected without question?

In this case, it is reasonable to believe that had the trial court advised this petitioner that he had only one year to file his post-conviction pleading in order to preserve his right for federal review, he would have do so in a timely manner. Whalem/Hunt v. Early, *233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (finding that the unavailability of the AEDPA in a prison law library may create an "impediment" for purposes of 2244(d)(1)(B)).*

In Egerton v Cockrell, *(2003, CA5 Tex) 334 F.3d 433, on remand, (2006, ND Tex) 2006 US Dist LEXIS 69353*, The Fifth Circuit Court of Appeals addressed the inadequacy of a law library as a state-created impediment under *2244(d)(1)(B). 334 F.3d at 436. Section 2244(d)(1)(B)* is identical to *2255(f)(2)* except that it applies to "a person in custody pursuant to the judgment of a State court." In *Egerton*, the petitioner alleged that he was denied access to a law library containing federal materials, including access to a copy of the AEDPA. The Court concluded that

"the State's failure to make available to a prisoner the AEDPA, which sets forth the basic procedural rules the prisoner must follow in order to avoid having his habeas petition summarily thrown out of court, including the newly imposed statute of limitations, is just as much of an impediment as if the State were to take 'affirmative steps' to prevent the petitioner from filing the application." Additionally, "the absence of all federal materials from a prison library (without making some alternative arrangements to apprise prisoners of their rights) violates the First Amendment right, through the Fourteenth Amendment, to access to the courts." (citing Bounds v. Smith, *430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977) (requiring adequate prison law libraries or some alternative means of informing prisoners about their legal rights and options)*; Lewis v. Casey, *518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (narrowing Bounds to require only legal information related to challenging convictions and conditions of confinement))*. The Court first remanded the claim and instructed the State to set forth any evidence that the petitioner had access to a copy of AEDPA or was aware of its existence. After the State failed to provide any evidence that a copy of AEDPA was available, the Court vacated the district court's dismissal of the petition as time-barred.

Finally, it can only be concluded that this petitioner may have had a general knowledge of certain claims he wished to explore raising in his post-conviction pleadings, but in no way can the circuit court judge's decision that petitioner had adequate understanding of the legal principles and rules of court be correct; and it is misplaced and contrary to the Supreme Court's holdings in both *Johnson* and *Bounds*.

ARGUMENT OF LAW IN SUPPORT OF QUESTION TWO

This Honorable Court has held that a jurisdictional defect can be raised at anytime, anywhere. This court's decision in United States v. Cotton, *535 U.S. 625, 631 (2002)*, was that appellants who challenged their indictments/bills of information for lack of jurisdiction did not waive their claims by failing to object before trial; however, such appellants received only plain error review when they raised that argument for first time on appeal, and to extent that United States v. Prentiss, *256 F.3d 971, 982 (10th Cir. 2001) (en banc),* held otherwise, it was overruled by *Cotton*. Based on those decisions, the petitioner now contends that because this claim relates to a jurisdictional violation that is made evident on the face of the state court record, it is ripe for review by this Honorable Court.

The petitioner avers, and the state court record will reflect, that the offense of which he was charged and convicted of was alleged to have occurred within the geographical boundaries of the parish of Jefferson, state of Louisiana. However, that judicial district never chose to institute prosecution in the matter. Instead, the 41st Judicial District Court, which has jurisdiction over offenses alleged to have occurred in the parish of Orleans, instituted prosecution.

The Fifth Circuit Court of Appeals has previously held that the state must show by a preponderance of the evidence that the trial is in the same district as part of the criminal offense. United States v. White, *611 F.2d 531, 534-36 (5th Cir. 1980)*. Because the state did not show that any element of the crime of forcible rape was committed in Orleans Parish, petitioner's conviction must be reversed.

It has long been established that lack of jurisdiction is a defect fatal to a criminal prosecution. The Louisiana Supreme Court has previously held:

> *"And, so far as nullity resulting from absence of jurisdiction is concerned, why that is a matter which in the words of this court in the case of Decuir v. Decuir, 105 La.*

[481,] 485, 29 South. [932,] 934 [(1901)], "may be invoked by any one at anytime and anywhere." State v. Nicolosi, 128 LA. 836, 846, 55 So. 475, 478 (1911) (on rehearing)."

Throughout the state trial court proceedings, petitioner's attorney argued that no prosecution could occur where neither the state, nor law enforcement, could show that any sexual assault occurred within the geographical boundaries of Orleans Parish. At a preliminary hearing Detective Corey Lymous testified that the petitioner drove the victim to "a desolate area unknown to the alleged victim." Detective Lymous also admitted to never determining whether the crime of forcible rape was alleged to have occurred in Orleans or Jefferson parish, as is made evident in this portion of the state court transcripts:

"Q: So did you ever determine the physical location of the alleged sexual assault?
A: No, sir.
Q: And you have some belief that it may have occurred in Jefferson Parish?
A: There's a possibility, yes.
Q: And why do you say it's a possibility?
A: Just some of the – it was something that was said in the victim's statement. She believed it may have been west of New Orleans, going toward the airport.
Q: Did she indicate that she was ever going on I-10?
A: I believe so.
Q: Did she remember an exit or anything that-
A: We never got concrete landmarks.
Q: So as far as you know – let me ask you this question, do you have any concrete evidence that when she woke up in the vehicle, the vehicle was located in Orleans Parish?
A: No sir."

Defense counsel even filed a motion to quash the 2008 charge relating to forcible rape, arguing that the state could not adduce any discernible reason to conclude that any rape had occurred within the geographical boundaries of Orleans Parish. At an evidentiary hearing scheduled for the Motion to Quash, the court stated:

"And I think that the law is clear, Mr. Mordock. It says that – even in the Louisiana Constitution it says that a person shall be tried in the venue where the offense or element of the

offense occurred. And the law is very clear that if the acts or the elements constituting the crime took place in more than one place or more than one parish, then the case may be brought in any parish where any of those acts occurred."

In the state's denial of this claim, the trial court stated:

> *"Here the evidence shows that the elements of threats and/or without the lawful consent were present from the onset of kidnapping in New Orleans and relevant when the victim was later prevented from resisting the rape. Thus, the act or element of forcible rape occurred in Orleans Parish. And that's State v. Hester. Thus, the court did not err in finding it had subject matter jurisdiction over count four of the bill of information."*

However, the petitioner avers that the usage of the Louisiana Supreme Court's holding in State v. Hester was misleading as the circumstances of that case are distinctly different from those in the petitioner's case. In this case, no evidence was presented to indicate that the petitioner threatened the accuser in Orleans Parish. In fact, according to the accuser's version of events, she was drinking at the Bourbon Street Bar one moment and awake in petitioners' vehicle west of the city the next. There were no allegations or evidence that the petitioner compelled the accuser to enter his vehicle "by force or threats of physical violence." *La. R. S. 14:24(A)(1)*. At the most, petitioner was accused of making remarks viewed by the accuser as threatening. However, it has not been disputed that these comments were made after the vehicle came to a stop at an unknown and desolate area most likely near the New Orleans Airport in Jefferson Parish, which is still not within the geographical boundaries of Orleans Parish.

The elements found in Hester, "threats and/or without the lawful consent" were not made evident in the present case during the state court proceedings. There was no evidence presented to prove that the accuser entered the vehicle without her lawful consent. Indeed, petitioner's charge of Second Degree Kidnapping is illustrative as it included an element that the accuser was "enticed or persuaded..." to go from one place to another, a recognition that force or threats are not

necessary for Second Degree Kidnapping and therefore were not necessarily present when the accuser is said to have entered petitioner's vehicle in Orleans Parish.

Art. II of the United States Constitution provides that "the trial of all crimes . . . shall be held in the State where the said Crimes shall have been committed." Likewise, the Sixth Amendment requires that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The *locus delicti* of the charged offense "'must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" *Cabrales, 524 U.S. at 6-7 (quoting* United States v. Anderson, *328 U.S. 699, 703, 90 L. Ed. 1529, 66 S. Ct. 1213 (1946))*. In effectuating this inquiry, a court must first identify the conduct of the offense and then discern the location of the commission of the criminal acts. United States v. Rodriguez-Moreno, *526 U.S. 275, 279, 143 L. Ed. 2d 388, 119 S. Ct. 1239 (1999)*; see *Cabrales, 524 U.S. at 6-7*; Travis v. United States, *364 U.S. 631, 635-37, 5 L. Ed. 2d 340, 81 S. Ct. 358 (1961)*; United States v. Cores, *356 U.S. 405, 408-09, 2 L. Ed. 2d 873, 78 S. Ct. 875 (1958)*.

In the case *sub judice*, no element of the offense of forcible rape was alleged to have occurred within the geographical boundaries of the Parish of Orleans. In fact, the accuser herself told police during her interview that she didn't know where they were at when the alleged rape occurred. Evidence adduced at trial, which was even testified to by a key state witness, Detective Lymous, proved beyond a reasonable doubt that neither the witness nor the state could discern if the alleged rape took place in Orleans Parish. In fact, testimony and evidence presented in this case pointed towards the alleged rape taking place near the New Orleans Airport, which is in Jefferson Parish, not Orleans, which would make the venue for that crime rest in the 24th Judicial District.

The petitioner's case is distinctly similar to the circumstances in *United States v. Travis*, where defense counsel in *Travis* filed a motion to dismiss the indictment against him because venue was improperly laid in Colorado when the crime itself occurred in the District of Columbia. The trial court denied that motion under the premise that the offense charged began in Colorado, but was completed in the District of Columbia. The court of appeals reversed and remanded on other grounds, but specifically held that venue was proper in Colorado. However, this honorable court held:

> *"...venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of "a tribunal favorable" to it. United States v Johnson, 323 US 273, 275, 89 L. Ed 236, 239, 65 S Ct 249. We therefore begin our inquiry from the premise that questions of venue are more than matters of mere procedure. "They raise deep issues of public policy in the light of which legislation must be construed." United States v Johnson, supra (323 US 276)."*

The Supreme Court ruled in *Travis* that because a distinct part (element) of the crime charged indicated the crime itself occurred in the District of Columbia that venue was proper there and not in Colorado, where the alleged criminal activity began.

In the present case, similarly to the circumstances in *Travis, supra*, the petitioner allegedly met the victim in Orleans Parish. This fact was never in dispute throughout the state court proceedings. However, no evidence was presented alleging that any element for the crime of forcible rape either began or commenced within Orleans Parish. Therefore, because it was never proven that a rape took place in Orleans Parish, then venue cannot be proper in that jurisdiction and no bill of information could legally be filed by that judicial district. For these reasons, the petitioner moves this court to vacate his conviction and sentence and remand the matter back for further proceedings.

ARGUMENT OF LAW IN SUPPORT OF QUESTION THREE

In the case *sub judice*, the state failed to institute prosecution within the six year statute of limitations set forth in *La. C. Cr. P. Art. 572*, which provides that the state has only (6) years to institute prosecution on a crime punishable by imprisonment at hard labor. The record in this case will clearly show that the events that led to the institution of prosecution in this matter were alleged to have occurred on February 9, 2002. However, the state did not commence prosecution until May 11, 2010, more than (8) years after the crime was alleged to have taken place.

The petitioner raised this claim in his application for post-conviction relief, but the state courts denied this claim stating "the court finds that the defendant's claim should have been raised in the court prior to the conviction and the defendant's reasons for failing to raise the claim prior to his application for post-conviction relief is inexcusable." The petitioner explained to the court that his failure to raise this claim rested solely through the ineffectiveness of his trial counsel, who never advised him of the statute of time limitations for the institution of prosecution. Counsel was ineffective for failing to investigate the timeliness claim when it was clear on the face of the record that institution of prosecution in this matter did not occur until well beyond the six year statute of time limitations. Petitioner respectfully argues that once the statute of limitations had expired, the state was without authority, and the court lacked jurisdiction to conduct any proceedings in the matter.

Petitioner now directs this court's attention to United States v. Hansel, *70 F. 3d 6 (C.A. 2, 1995)*, where the court held:

> *"Hansel's counsel's failure to object to the time barred counts is unaccountable in the circumstances, and cannot be considered sound trial strategy. Strickland, 104 S. Ct. 2064. In particular, counsel's decision cannot be justified by considerations related to the negotiation of a plea agreement. Hansel's counsel's prejudice is that he pled guilty to two time barred counts that would have been dismissed, if his attorney had acted competently."*

The statutes of limitations is an affirmative defense that must be raised to be preserved...ordinarily a defendant cannot raise the issue of limitations after pleading guilty to the offense in question. However, Hansel was allowed to raise it indirectly. See: Hill v. Lockhart, *474 U.S. 52, 58-59 (1985)*; and also see a recent case from the United States Court of Appeals for the Fifth Circuit, in United States v. Freeman, *(2016 WL 1127170 La. 2016)*, where the defendant asserted a claim of ineffective assistance of counsel because counsel did not file a motion to dismiss on statute of limitations grounds. The court found that Freeman's counsel was deficient by not filing a motion to dismiss count three, and said that counsel was required to perform adequate research which would have disclosed that the statute of limitations had expired. See: United States v. Bass, *310 F. 3d 321, 330 (5th Cir. 2002)*. The *Freeman* court also said: "there is a reasonable probability that, but for counsel's failure to move to dismiss count three, the result of the proceeding would have been different because count three would have likely been dismissed and the government could not have re-indicted Freeman on that count." Strickland, *466 U. S. at 694*; see also United States v. Gunera, *479 F. 3d 373, 375 (5th Cir. 2007) (reversing conviction and dismissing indictment as barred by statute of limitations)*; United States v. Wilson, *322 F. 3d 353, 354-55 (5th Cir. 2003) (same)*. But because Freeman's counsel did not move to dismiss count three, his criminal history reflects a conviction on a crime that should not have been part of his trial.

It is respectfully argued that in the present case, that petitioner's trial counsel, Craig Mordock, failed to research the law, and that the research would have revealed that the statute of limitations had expired on the 2002 charge, and Mordock's failure to file a motion to dismiss on this ground was deficient performance prejudicial to petitioner's case.

Petitioner's attorney's failure to object to the time barred count is unaccountable in the circumstances and simply cannot be considered sound trial strategy. Strickland, 104 S.Ct. 2064. Petitioner's waiver of the time bar defense cannot be deemed knowing and intelligent, and he argues that he would not have pled guilty to the count had he known it to be time barred.

Based on these reasons, Petitioner now moves this Honorable Court to review these claims and order the matter remanded back to the state trial court for further proceedings.

CONCLUSION

Petitioner contends that the Fifth Circuit Court of Appeals erred in denying his motion and request for issuance of a Certificate of Appealability because jurists of reason would find it debatable whether the lower court's findings that Petitioner was not entitled to statutory and/or equitable tolling of the one year time limitation or their failure to conduct a merits review of the jurisdictional claims were correct.

WHEREFORE, based on the foregoing arguments and authorities, Petitioner respectfully requests that this Honorable Court grant certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted on this 1st day of July, 2019

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