

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Allan Widdifield — PETITIONER  
(Your Name)

vs.

Attorney General, Kentucky— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Kentucky Court of Appeals Jan 12, 2018

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

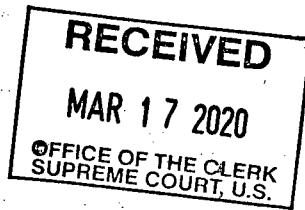
PETITION FOR WRIT OF CERTIORARI

Allan Widdifield  
(Your Name)

Green River correctional complex  
(Address)

Central city, Kentucky  
(City, State, Zip Code)

n/a  
(Phone Number)





QUESTIONS PRESENTED:

Why are the United States District Judges for kentucky in total disarray with the other Judges in the 6th Circuit concerning the AEDPA's time limits for filing a Writ of Habeous Corpus? Are all Kentucky Inmates being discriminated against simply because of geographical location within the 6th Circuit?

If my Writ of Habeous Corpus had been filed in any other state, other than kentucky, would it have been accepted as timely filed?

Issue #2

Kentucky Inmates are spending 14 months without the access to legal library or legal aid assistance. How is it not a denial of Constitutional rights if during this time The AEDPA's one year time limit expires?

## LIST OF PARTIES

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:

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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 \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

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

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Kentucky Court of Appeals court appears at Appendix E to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

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).

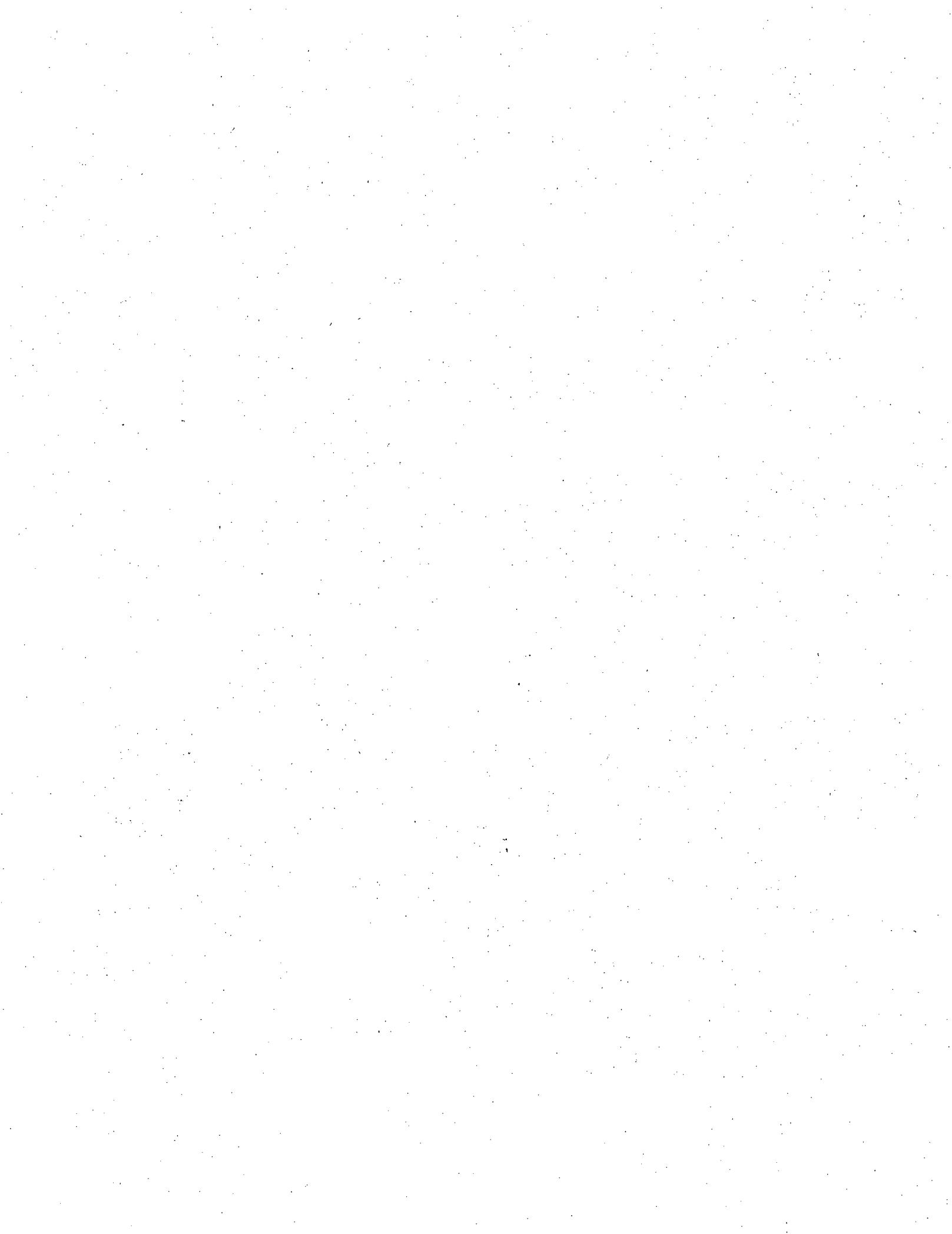
For cases from **state courts**:

The date on which the highest state court decided my case was April 18, 2018. A copy of that decision appears at Appendix D.

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  .

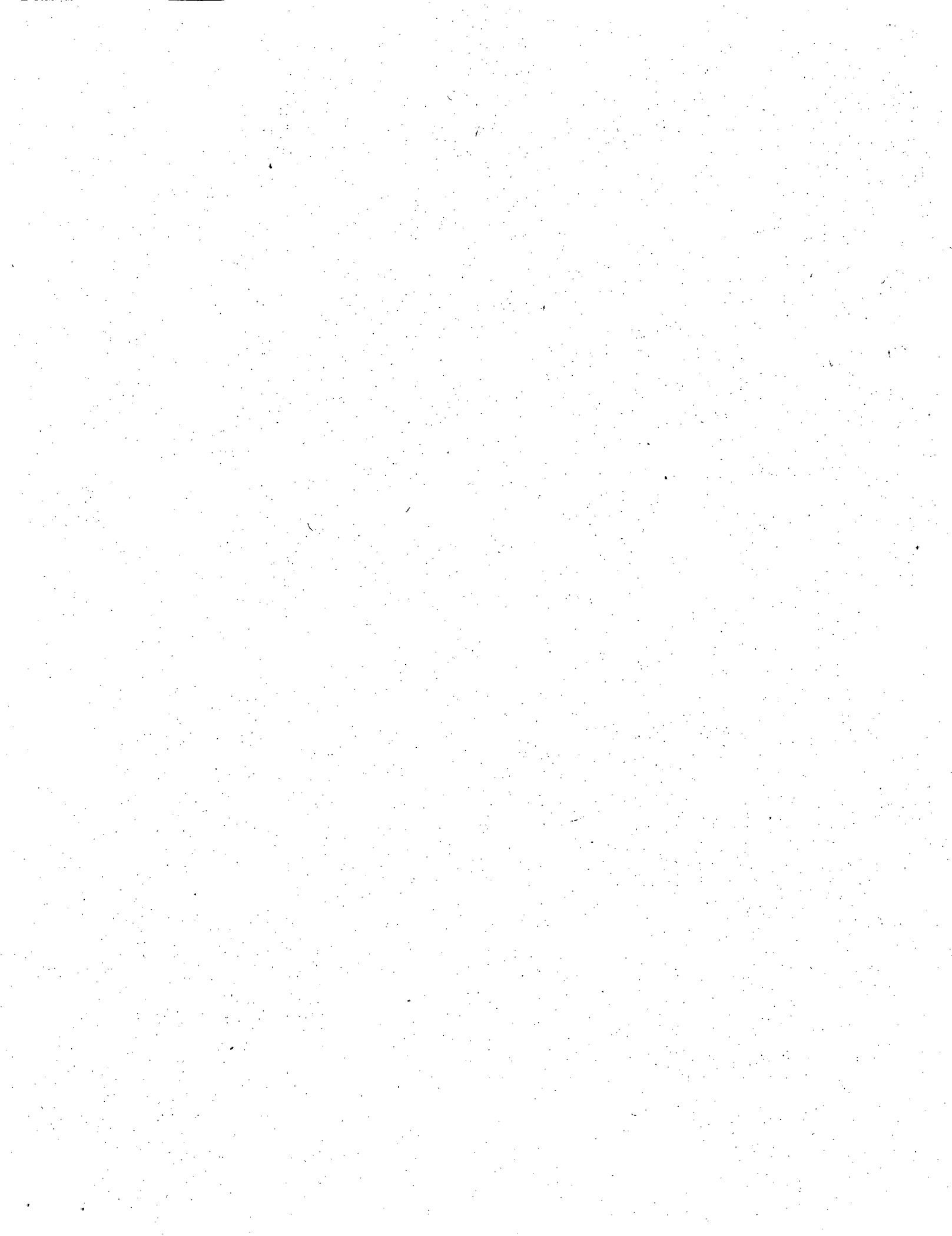
The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).



**INTRODUCTION AND FACTS**  
**FOR JURISDICTION**

Allan Widdifield, the Petitioner, and his wife, Jacqueline, are currently six and one-half (6 1/2) years into the service of a twenty (20) year state sentence for a "crime" that appears to have been "*manufactured*" by agents of the Commonwealth of Kentucky. A video surveillance system captured undercover agents bring what appear to be Exhibits 49 and 52 from Petitioner's trial (i.e. drugs) **into** Defendant's home after Petitioner's arrest. These "*planted*" drugs were admitted into evidence against the Petitioner. (VR 8/7/13@9:30:43 & 8/7/13@9:33:48). Remarkably, the video which showed agents of the Commonwealth bringing these drugs into Petitioner's home was excluded from Petitioner's trial! (SH 8/6/13@9:40:00) Petitioner's jury never saw Petitioner's exculpatory surveillance video! (VR 8/7/13@9:15:00). Agents of the Commonwealth ---upon learning of their recording---removed the Petitioner's camera. (See photo Exhibits #3 & 4). Fortunately, Petitioner's video was preserved via a third-party server and can still be viewed.

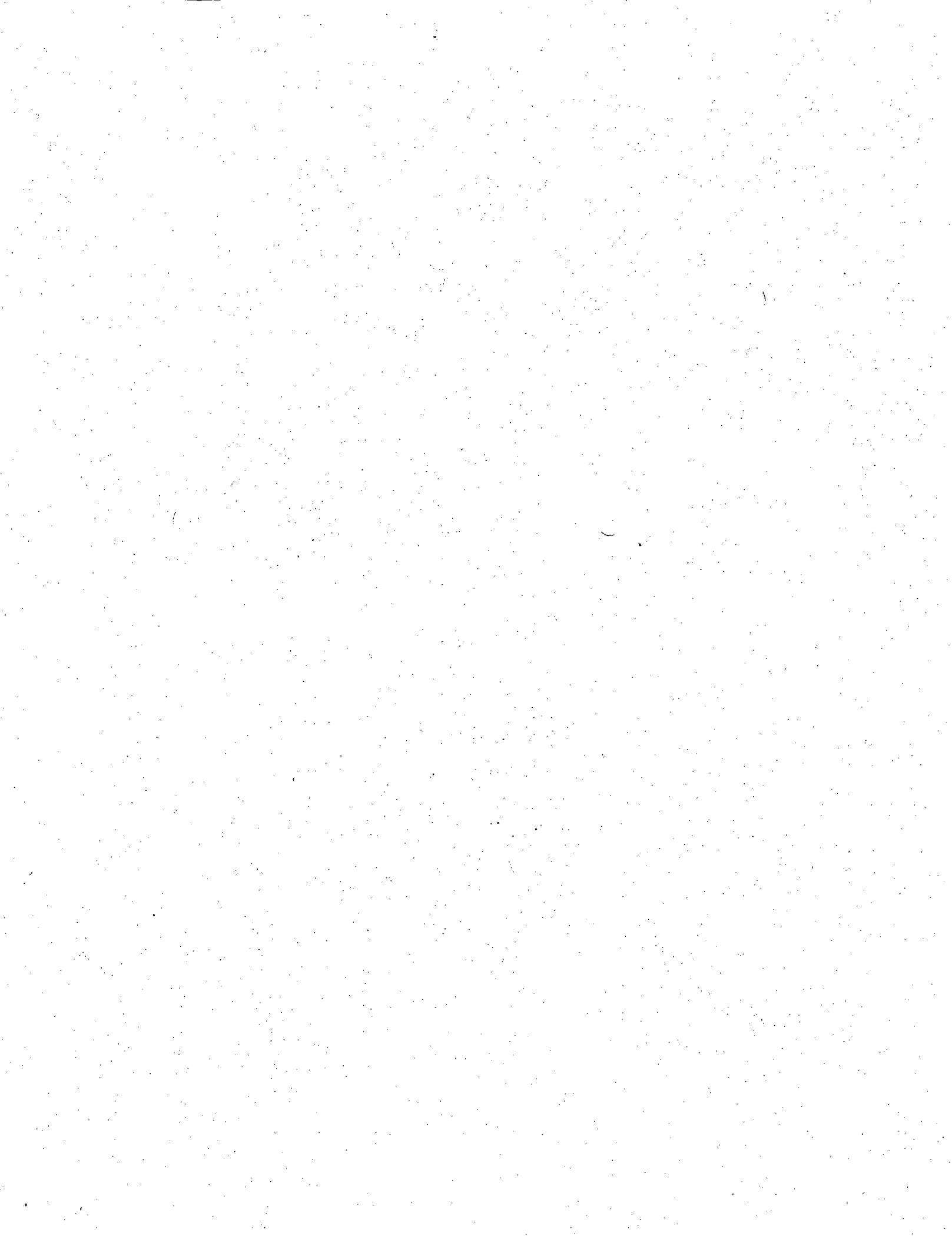
On the night of May 10, 2012, Petitioner's home was being recorded via a motion-activated video surveillance system installed by the Petitioner. (VR 8/7/13@11:26:28). The video- evidence showed agents of the Commonwealth of Kentucky entering Petitioner's home carrying items that appear to be bag(s) of narcotics. (See photos 1 & 2 and Commonwealth's Ex. 49 & 52 @ Defendant's trial). The "video" evidence depicts this fact. (See Photos Ex. 1 and Ex. 2). Simply put,



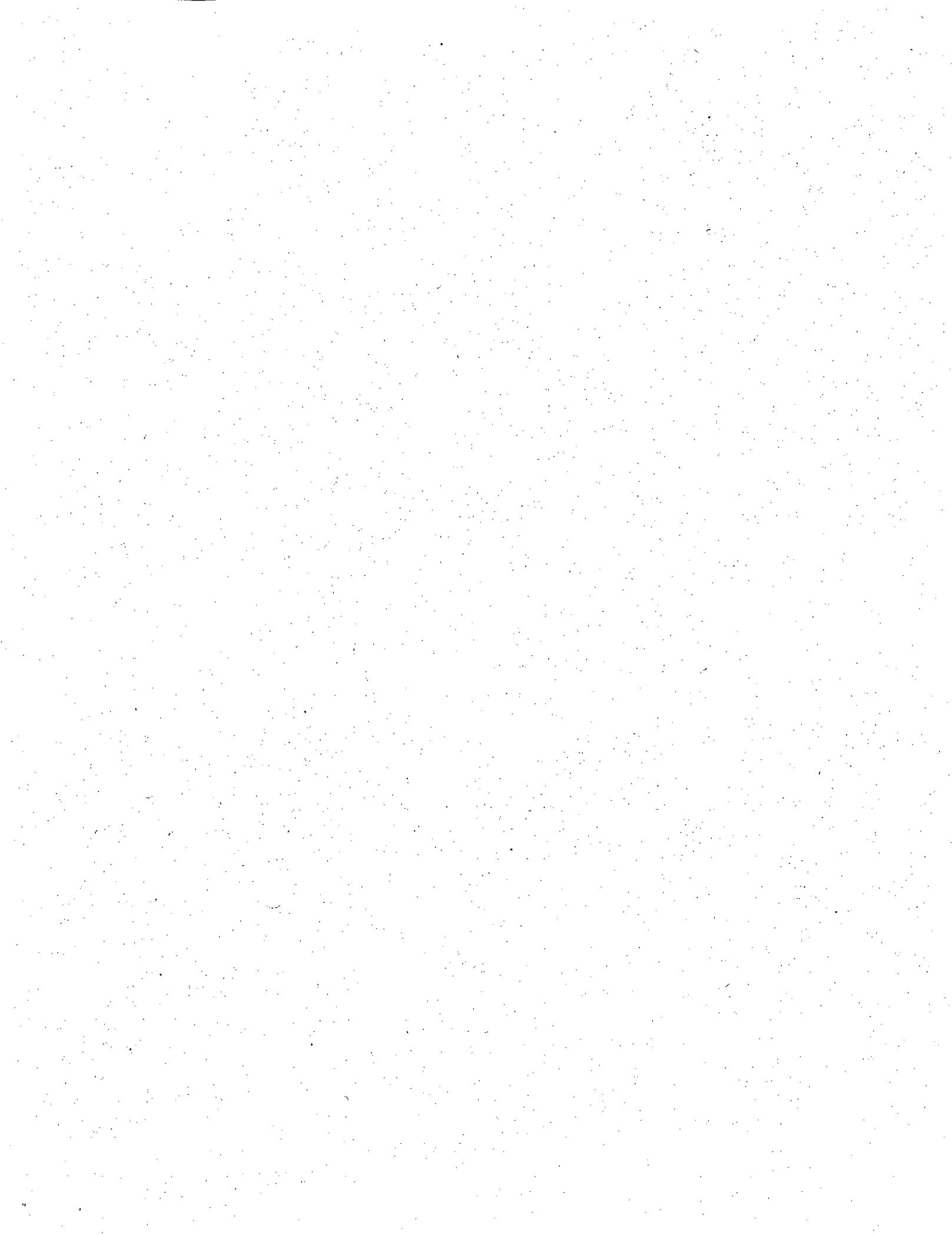
there is video evidence of Petitioner's innocence and Petitioner was not allowed to offer evidence of his innocence at his trial. (VR 8/6/13@9:40:00).

One of the identifiable officers from the video is, Aaron Emick, of the Hancock County Sheriff's Department. Emick testified under oath, Petitioner took them on a "*tour*" of his Hancock County, Kentucky, property (several acres). (VR 8/6/13@8:41:28). Emick claimed Petitioner showed he and Kentucky State Police Trooper Gaither items and various locations on Petitioner's property used in the manufacture of Methamphetamine. (SH 8/6/13@8:41:28). Emick would also claim, in a sworn Affidavit, items admitted into evidence at Petitioner's trial were identified by the Petitioner during the "*tour*" of Petitioner's property! (VR 8/6/13@8:43:10). Finally, Emick claimed Petitioner subsequently "*admitted*" during the "*tour*" Petitioner made Methamphetamine on his property. Emick not only made these allegations to a Judge to secure a search warrant, but also at Petitioner's Suppression Hearing. (VR 8/6/13@8:42:00 & 8:46:49 Search Warrant admitted into record). These sworn statements (perjury) were made before Emick knew of Petitioner's surviving surveillance video.

For the sake of argument, even if the video evidence that contradicted Emick never existed, Emick's "*version of events*" beg the question as to why Emick needed a search warrant if Petitioner had actually, consensually and willingly showed Emick around his property and "*admitted*" to Methamphetamine manufacturing?



That aside, the video establishes Emick provided misleading/false testimony in order to secure a search warrant. The video proves Petitioner did not give any officer a “*tour*” of his property. (VR 8/6/13@9:00:00). In fact, the video evidence shows Petitioner was immediately placed under arrest, handcuffed, and walked 17 steps to a police cruiser where he remained for more than two (2) hours, only to thereafter be removed from the scene. (VR 8/7/13@8:59:46). Incredibly, not only did the trial Court by its rulings, ignore this powerful exculpatory video evidence, it excluded all of the three (3) hour video from Petitioner’s use at trial. (VR 8/7/13@9:00:15). The Court ruling not only eliminated a powerful tool for cross-examination on Emick’s credibility, it eliminated exculpatory evidence from consideration by the jury. On a most fundamental basis, the trial Court, denied Petitioner a fair trial by preventing the introduction of evidence in his favor. To compound Petitioner’s inequity, the aforementioned (excluded) video shows Commonwealth agents bringing Petitioner’s “*evidence*” (Ex. 1 & Ex. 2) **into** his home and taking it to Petitioner’s bedroom and using it against Petitioner at his trial! (VR 8/7/13@9:33:48 & 9:30:43). Making matters even more prejudicial to the Petitioner, the Commonwealth after spending nearly two (2) days trying and successfully excluding Petitioner’s surveillance video, the Commonwealth was allowed to cross-examine Petitioner about the excluded video and why he couldn’t produce the excluded video for the jury! (VR 8/7/13@1:39:33-1:51:59). It is truly hard to



imagine how Petitioner's trial could have been a greater affront to our guaranteed constitutional safeguards? Unimaginably, it in fact got worse, much worse.

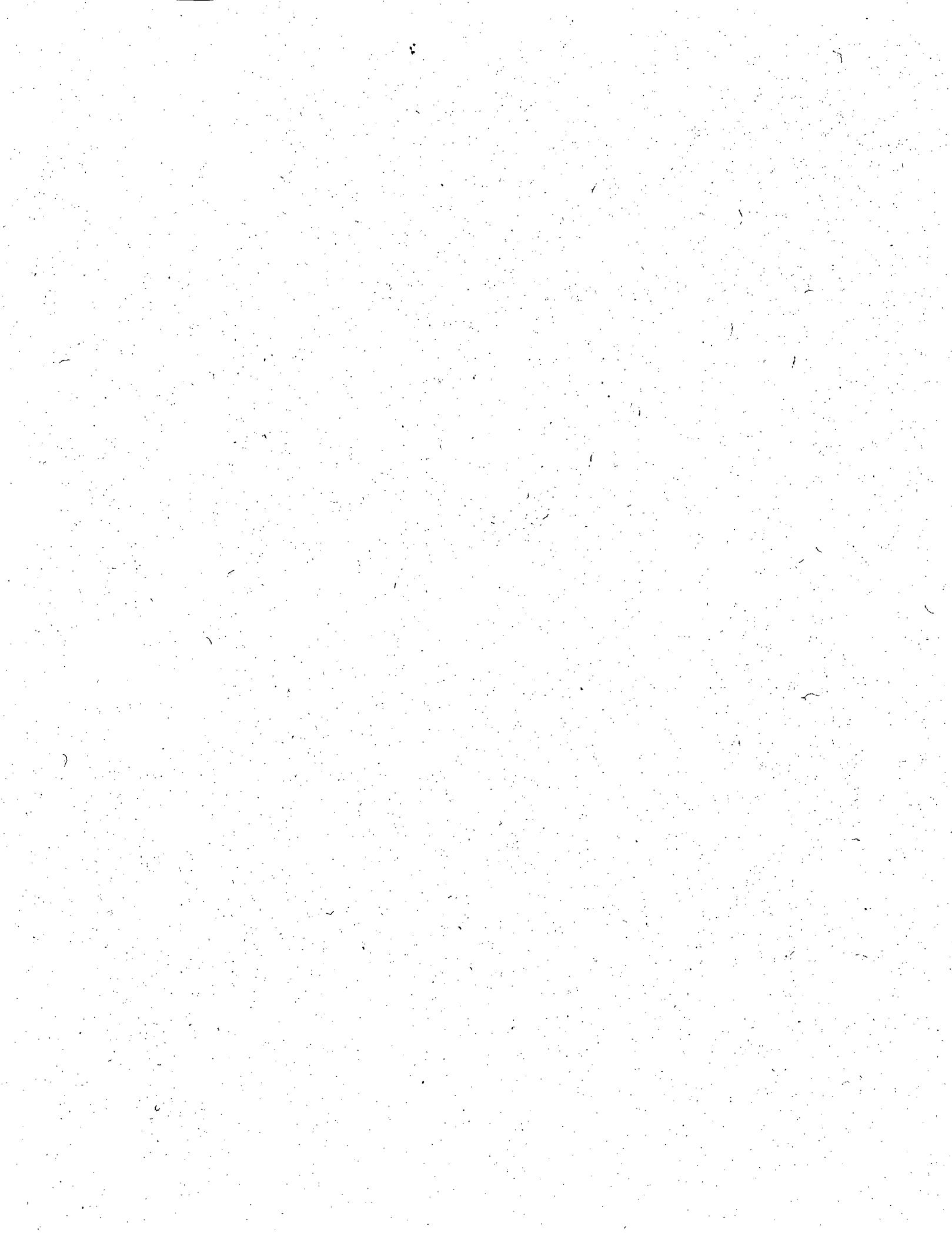
It was undisputed Jacqueline Widdifield requested a warrant from the Commonwealth's agents before allowing them entry into the marital residence. (VR 8/6/13@8:42:54). This undisputed fact placed the Petitioner and his wife/Co-Defendant directly at odds on their consent to search Fourth Amendment claims--if Emick is to believed. This conflict could not be remedied via dual representation if trial counsel's only defense was suppression of evidence. Regardless, Petitioner and his wife were represented, at the same time, on the same issues, by the same counsel which prevented a fully adversarial challenge to the authorities search of their residence, and all other trial and appellate strategies.

Thanks to the surveillance video, it can be shown Emick's "*version*" of events are even more unbelievable. The video shows Commonwealth agents in Petitioner's home not only before the issuance of the warrant, but before Emick even applied for the Warrant! (VR 8/7/13@1:58:09). Incredibly, again Petitioner's judge excluded Petitioner's photo as proof—Petitioner offered Exhibit 19 (VR 8/7/13@1:58:09). Not only are the circumstances of the warrant troubling, after Petitioner was taken to jail and while Mrs. Widdifield waited for the warrant, Commonwealth agent activity triggered a video motion-activated system capturing the agents bringing items/the "*evidence*" of controlled substance(s) into Petitioner's home. (See Ex1 & Ex. 2): The photos depict an individual carrying into Petitioner's home a large and small zip-loc type bag(s)



with white substance(s) in it. These bagged items were made Commonwealth's exhibits #49 and #52 at Petitioner's trial! (VR 8/7/13@9:30:42 and 9:33:48). Petitioner's jury never saw the surveillance video or these photos. Petitioner's counsel never tried to identify these officers, subpoena these officers or question/cross-examine these officers.

The video also shows Commonwealth agents relocating a Tupperware container, in which they claimed to have found methamphetamine, from Petitioner's kitchen to his bedroom. Of critical import, Commonwealth agents alleged the Tupperware was found in Petitioner's safe in his bedroom. (VR 8/7/13@9:53:40). The Tupperware container could not fit into Petitioner's safe. That aside, the Commonwealth's agents (made/found/located/logged) the Petitioner's evidence before they learned of Petitioner's video recording system. Upon learning of the existence of a camera in Petitioner's home, an officer is captured on video removing Petitioner's video cameras. (See Ex. 6) **QUERY:** Why remove the camera if the search was legal? (See Exhibits 1-6). Fortunately, because of the third-party server feature the officer's actions were preserved. Once Petitioner made bond, approximately a month later, he turned his video recording of the officer's actions over to the Kentucky State Police, internal affairs. (VR 8/6/13@9:05:51). Almost immediately, the Commonwealth applied for and obtained another search warrant in an effort to seize Petitioner's computer hardware/software! (VR 8/6/13@9:24:40). Petitioner's computers/hardware and software have never been accounted for.

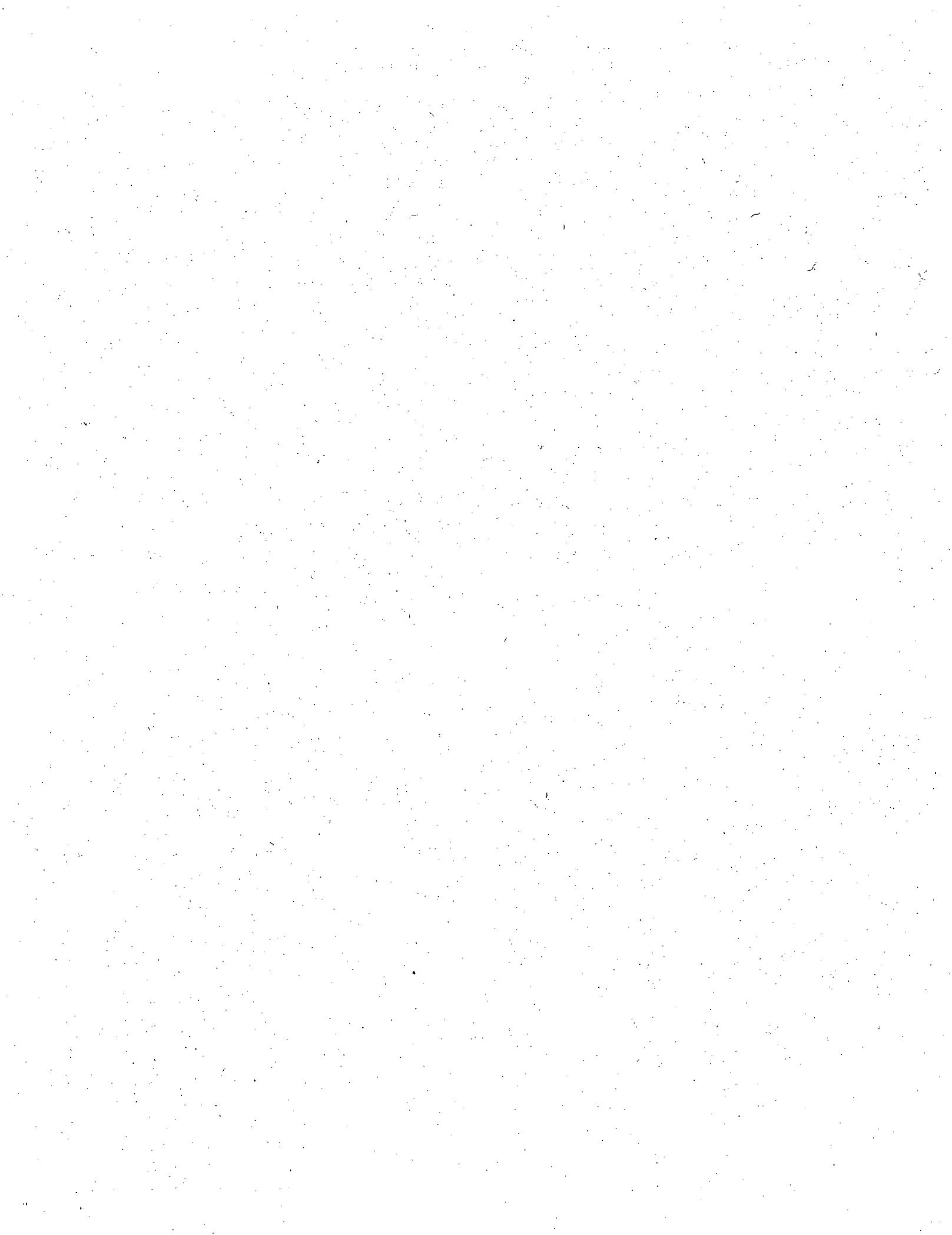


Incredibly, the trial Court excluded Petitioner's powerful exculpatory video from the jury thus denying Petitioner due process and a defense. The trial Court's ruling was not merely a discretionary evidentiary ruling, it prevented the Petitioner from introducing exculpatory evidence in his defense. Simply put, the jury was told drugs were in Petitioner's residence, without ever knowing who placed the drugs there! It would not have been mere conjecture as to how those drugs got in Petitioner's home. There was a video to prove it, and Petitioner's jury was never allowed to consider it. The erroneous exclusion of Petitioner's surveillance tape eliminated evidence for cross-examination purposes at Petitioner's trial--had Petitioner's trial counsel even attempted to locate the officer with the drugs. Petitioner was effectively denied the guaranteed constitutional right to his favorable/exculpatory evidence thereby violating Petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights to due process, right to effective counsel, right to confront and Brady material.

A more detailed analysis of the trial Court's erroneous ruling is set forth as follows: On August 6, 2013, prior to empaneling Petitioner's jury, an abbreviated

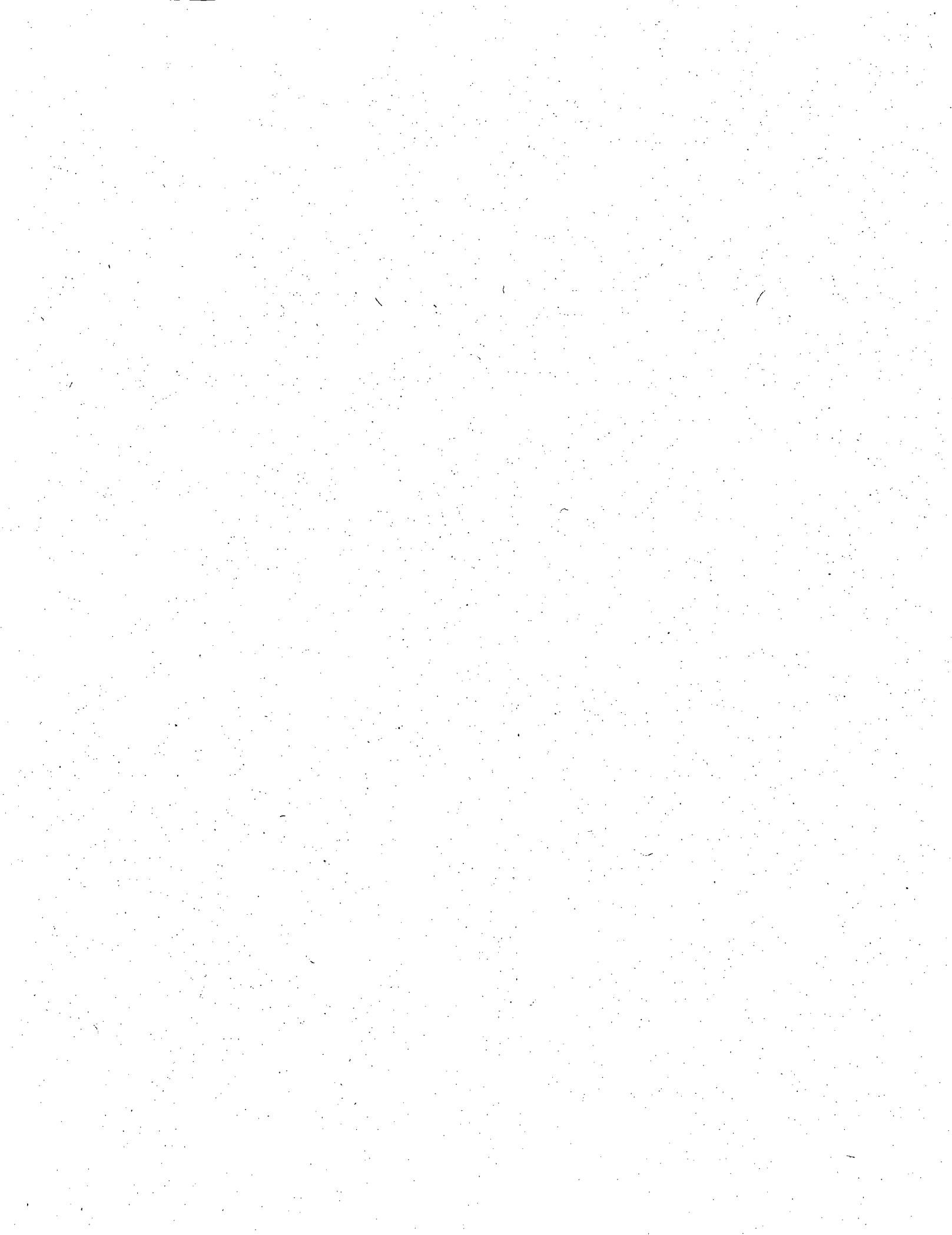
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suppression hearing was held. At the outset of Petitioner's Suppression Hearing, the Commonwealth called Deputy Emick who testified about what occurred on May 10, 2012 and his application for a search warrant (VR 8/16/13 8:38-9:10). The officer testified Petitioner had led him to various locations on the property and pointed out where items used in the manufacture of methamphetamine were located and that Petitioner indicated that another party was responsible for these items. Petitioner



testified refuting Emick's testimony and attempted to play the surveillance video as proof of Petitioner's defense. The Commonwealth objected to the video on what appeared to be "*authentication*" grounds (presumably because the Commonwealth had looked for but never actually found the video in Petitioner's house or hardware). (See Ex. 3 & 4 showing removal of video equipment by authorities). Petitioner offered to explain the contents of the video evidence by describing its motion-sensor activation feature/third party server feature but the Judge rather quickly, considering the overall length of the video, dismissed Petitioner's argument and found the evidence to be unsatisfactory overruling the suppression Motion and then without explanation, denying the admissibility, of the video as evidence. (VR 8/6/13@9:40-9:41). Evidence can always be used for more than one purpose, as here, when relevant and probative.

Because of this, Petitioner's video evidence supporting his defense, was denied. The presiding Judge failed to provide a written order of Findings of Fact and there is no real discernable reason for the exclusion of all the video when it had not been completely reviewed. The trial ensued without the full video. At the trial, counsel called no witnesses other than his clients who were not eyewitnesses to the officer's conduct. Egregiously, and without objection by Petitioner's counsel, the Commonwealth Attorney began a withering cross-examination of Petitioner and his wife about the excluded evidence (video) after Petitioner had been admonished by the Court to not speak of the video! Commonwealth improperly attempted to shift a burden of proof to the Petitioner---knowing the Commonwealth had been successful in excluding the video! Commonwealth asked Petitioner why he could not



produce the excluded evidence! Commonwealth should have known exactly what was on the surveillance video. The video had been in the authorities' possession for months. That aside, neither the Commonwealth, nor Petitioner's trial counsel made any effort to identify the officer's carrying drugs into Petitioner's home.

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Unequivocally, this sequence of events had a devastating, prejudicial effect on Petitioner's defense at trial. The jury never saw the actual surveillance video showing the officers conduct of brining items into Petitioner's home. Even more prejudicial, the jury was allowed to hear questions from the Commonwealth about why the video was not presented by Petitioner, knowing the video to have been excluded on their previous objections. Petitioner's counsel **failed** to introduce the video evidence or offer to call witnesses from the video concerning the very questionable conduct of the police officers while in the home of the Petitioner. Counsel did not or otherwise could not argue to the jury the Petitioner's defense. Petitioner was denied the use of a video supporting his defense and a real cogent opportunity for cross-examination of his accusers. Petitioner and his wife were both convicted and sentenced to significant terms of imprisonment for a "crime" in which a favorable video exists, but was not considered, which proves otherwise. An appeal as of right was taken to the Kentucky Supreme Court and relief was denied to the Appellants in an unpublished Opinion.

The Appellants filed verified Petitions for a new trial pursuant to RCr 11.42 and a hearing was held on August 30, 2016. The Hancock Circuit Court denied the Appellants' Petitions and the Kentucky Supreme Court denied



Petitioner's Motion for Discretionary Review on 11.42 were denied on April 18, 2018. (Ex. 10) The Petition for Writ of Habeas Corpus thereafter was timely filed.

**RELEVANT PROCEDURAL HISTORY AND JURISDICTIONAL STATEMENT**

Petitioner, Alan Widdifield, had an abbreviated Suppression Hearing on August 6, 2013, the very morning of his trial. Petitioner's Suppression Motion was denied by the Honorable Ronnie C. Dortch. There are no written Findings of Fact or Conclusion of Law of record supporting the denial. Petitioner was subsequently tried by a Hancock County Circuit Court on August 6, 2013 and August 7, 2013 and convicted of Manufacturing Methamphetamine (Firearm Enhanced); First Degree Trafficking in a Controlled Substance (Firearm Enhanced); Unlawful Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Manufacture Methamphetamine; and Possession of Drug Paraphernalia (Firearm Enhanced). As a result, Petitioner was sentenced to twenty (20) years in prison. Petitioner's direct appeal to the Kentucky Supreme Court, under Kentucky Constitution §110(2)(b), was denied on August 1, 2014. The only issue raised on direct appeal was Petitioner's denial of the suppression Motion. (See 2014 Ky. Unpub. Lexis 64 Sup. Ct. 8/24/13 #2013-SC-000664-MR.) (Ex. 7).

At all times during Pre-Trial Motions, Petitioner's Trial and Petitioner's Direct Appeal, the Petitioner was represented by the Honorable Albert William Barber III. The Commonwealth of Kentucky, at all Pre-Trial Motions and Trial, was represented by the Honorable Tim Coleman, Commonwealth Attorney for Hancock County, Kentucky.



Counsel for the Appellee on Petitioner's Direct Appeal was the Honorable Matthew Robert Krygiel, Jack Conway, Attorney General for the Commonwealth of Kentucky.

For informational purposes only, Petitioner's Co-Defendant/wife, Jacqueline Widdifield's direct Appeal, again, the only issue being raised was the denial of the suppression Motion based upon consent to search Defendant's property. Said Opinion was rendered by the Kentucky Supreme Court as a matter of right under Kentucky Constitution §110(2)(b), by way of Opinion #2014-KY Unpub. Lexis 64. (Ex. 7)

In May 2016, Petitioner, represented by a new attorney, the Honorable Rick Hardin, from Hardinsburg, Kentucky, filed a Motion and conducted a hearing under CR 11.42, alleging trial counsel Barber was ineffective. During Petitioner's hearing pursuant to Rule 11.42, it appears three issues were raised: 1) trial counsel Barber rendered ineffective assistance by failing to review discovery with the Petitioner's prior to trial; 2) trial counsel Barber rendered ineffective assistance by failing to retain a video surveillance expert; and 3) trial counsel Barber rendered ineffective assistance by failing to investigate the identity of law enforcement officers on a surveillance video.

After a brief hearing on these matters, the trial Court rendered an Order denying 11.42 relief. (Ex. 8). Petitioner was represented by the Honorable Rick Hardin of Hardinsburg, Kentucky. The Commonwealth of Kentucky was represented by Hon. Andy Beshear, Attorney General of Kentucky and the Honorable Matthew R. Krygiel, Assistant Attorney General, Frankfort, Kentucky. Petitioner filed an Appeal on October 6, 2016 with the Kentucky Court of Appeals, Case No#2016-CA-001514-MR, KY. App. Unpub. Lexis 20. Said appeal was denied.



A Motion for Discretionary Review with the Kentucky Supreme Court was subsequently filed by Petitioner in Case No#2018-SC-000072-D Ky. Lexis 148. The Kentucky Supreme Court denied discretionary review by way of decision without published Opinion dated April 18, 2018. (Ex. 9).

As such, this Petition for Writ of Habeas Corpus is appropriate.

On April 18, 2018, the Kentucky Supreme Court issued its final opinion denying Petitioner's request for Discretionary Review. (Ex. 5) The Petition for Writ of Habeas Corpus has been filed within the one (1) year statutory requirements of limitations. Widdifield is represented in this proceeding by undersigned counsel, Dax R. Womack and Zack N. Womack, both of whom are retained counsel beginning late August 2018.

Petitioner currently has no other action pending in any state or federal Court challenging the convictions and sentence at issues here and he has not previously filed a Habeas petition<sup>3</sup>.

Jurisdiction is proper under 28 U.S.C. §1331 and §2254. Venue is proper in the United States District Court for the Western District of Kentucky because Petitioner's trial took place in Hancock County, Kentucky, which falls within the same region as the Western District.

#### **Governing legal principles and their general application**

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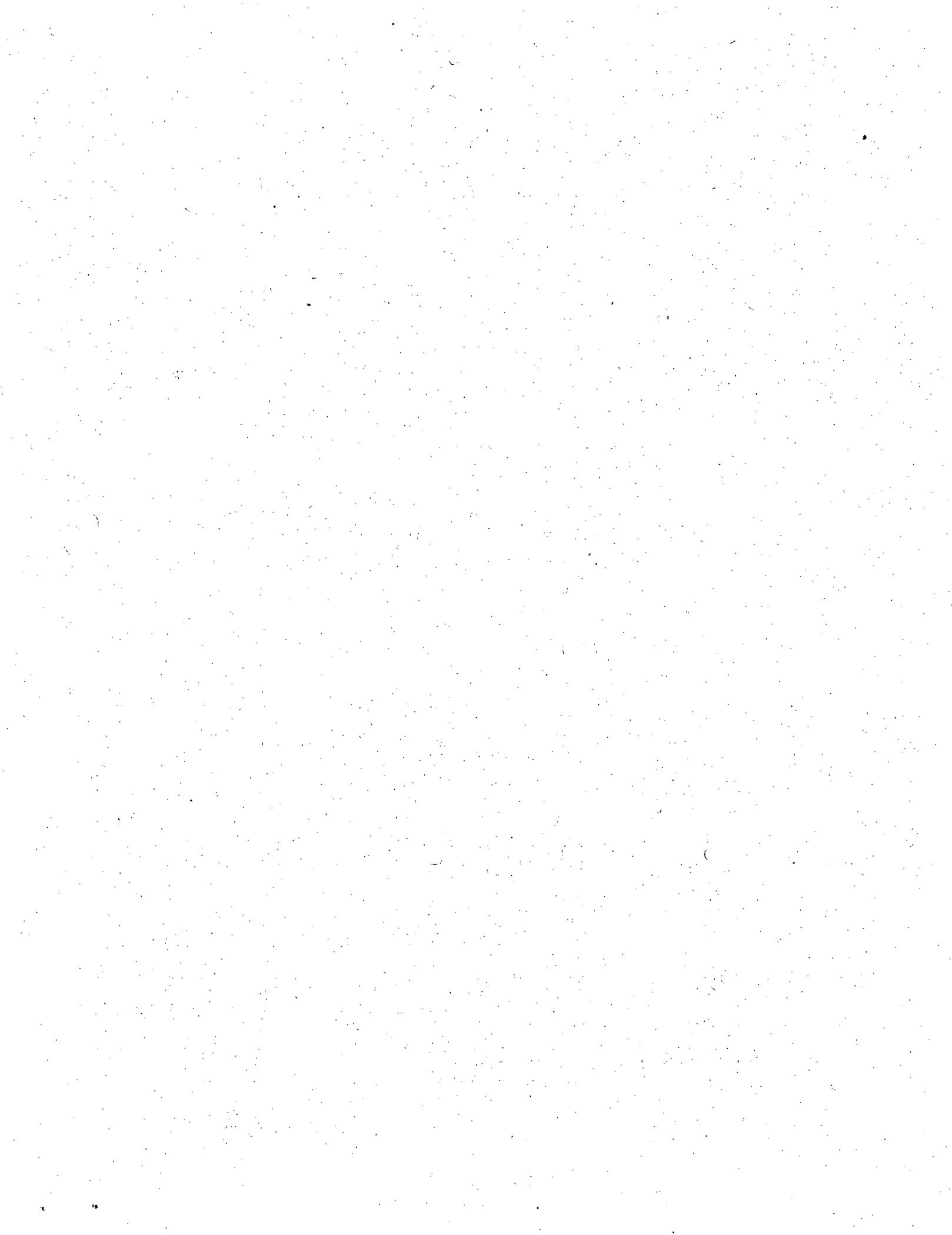
<sup>3</sup> In light of *McCoy* and *Hurst v. Florida*, 136 S. Ct. 616 (2016), Widdifield plans to soon attempt to return to state court on two issues the Kentucky Supreme Court had already decided and that are contained within his habeas petition. He believes those two cases provide a possible avenue to return to state court, but because it is not entirely certain the state court will consider that pleading to be a "properly filed" state post-conviction or other collateral attack, Widdifield is not certain the filing of same would toll the statute of limitations. He therefore files this habeas petition before the statute of limitations would expire if he does not return to state court. He will soon, though, seek to have federal habeas proceedings placed in abeyance while he attempts to litigate the two claims impacted by *McCoy* and *Hurst*. He further notes that for this Court within his discussion of those two claims when those claims appear within this Petition.



STATEMENT OF THE CASE

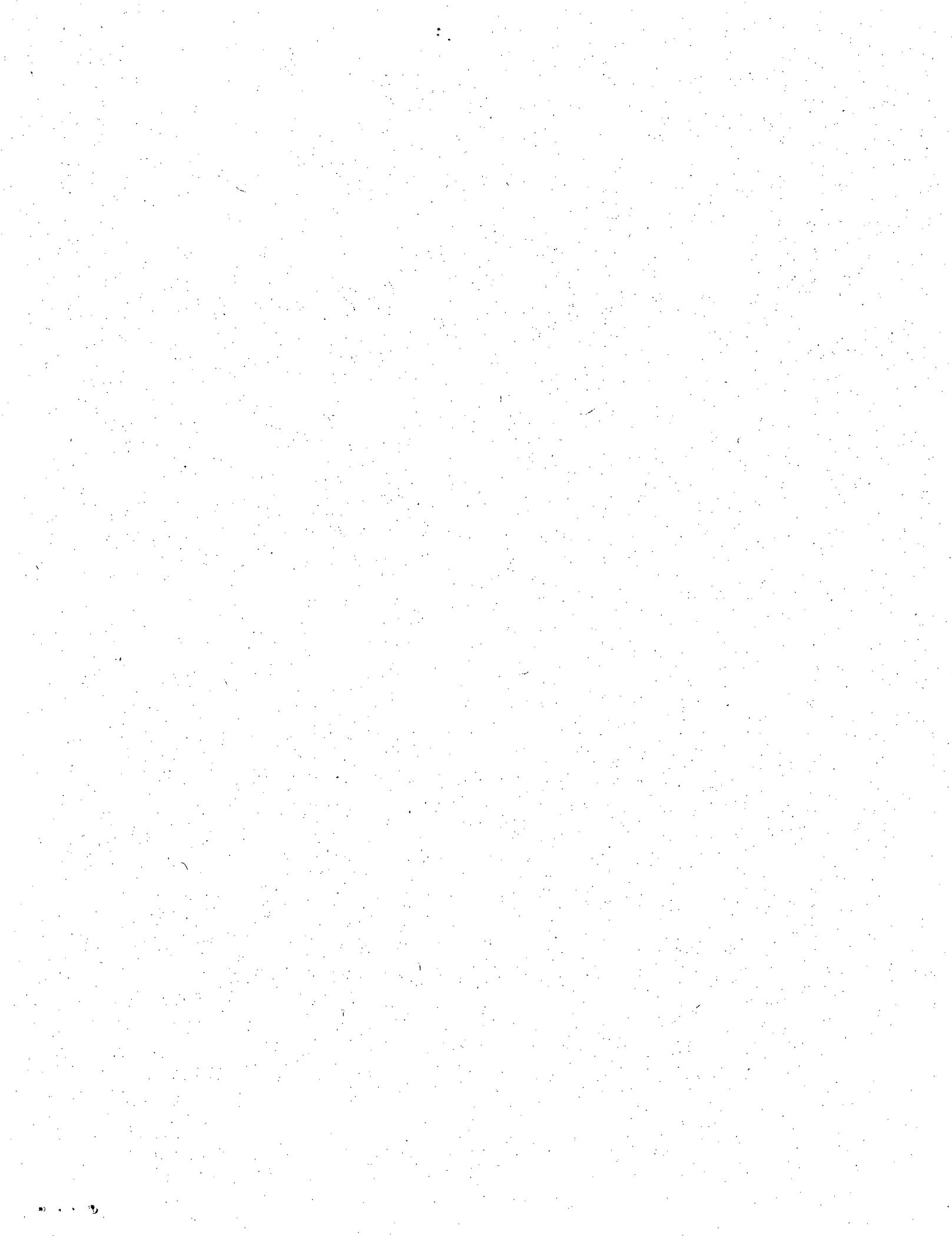
Petitioner, Allan Widdifield, was convicted of several drug offenses (with firearm enhancements) in the Hancock Circuit Court on August 7, 2013. Defendant received a twenty (20) year sentence (violent offender classification). The Hancock Circuit Court (without explanation) excluded an entire surveillance video, it is almost certain the jury would have acquitted the Defendant. The excluded video appears to show various members of law enforcement bringing the very drugs it convicted the Defendant of into his home and "planting" them! Further, the trial Court allowed the Commonwealth to cross-examine the Defendant about the excluded video-improperly shifting the burden of production to the Defendant-when it knew the excluded video had been ruled inadmissible. Petitioner's due process rights and Sixth Amendment rights, were denied him in that a valid, legitimate exculpatory video was kept from Defendant's/Petitioner's jury.

As a result of the twenty (20) year sentence, a direct appeal was taken to the Kentucky Supreme Court under the Kentucky Constitution §110(2)b). His appeal was denied on August 1, 2014. The decision was not final for ninety (90) days. Therefore, sometime in May of 2016, the Petitioner represented by a new attorney, timely and diligently filed a Motion consistent with Ky. CR 11.42 addressing additional substantive issues with Defendant's trial counsel. Defendant's 11.42 Motion was delayed/unnecessarily complicated because Defendant's wife/co-defendant's case did not have the same chronology, and Defendant's co-defendant wife had to receive conflict counsel through the



Department of Public Advocacy. As such, Defendant's Motion under 11.42 was delayed through no fault of his own or lack of due diligence. That aside, the Motion was a state Court collateral appeal on his state Court judgment from August 7, 2013. The initial Motion was overruled and thereafter the Defendant's 11.42 Motion was timely and diligently filed with the Kentucky Court of Appeals on or about October 6, 2016. That appeal was also denied.

Thereafter, a Motion for Discretionary Review was submitted to the Kentucky Supreme Court premised on the same argument. The timely and diligently filed Motion for Discretionary Review was denied on April 18, 2018. It became final ninety (90) days later. As such, it would not be until July 17, 2018 (at the earliest) Petitioner exhausted his state Court remedies. After the denial of his Motion for Discretionary review the Petitioner, Allan Widdifield, filed a Writ of Habeas Corpus on January 30, 2019. This is less than one (1) year after the exhaustion of his Kentucky state Court appeals/remedies.



## Issue #2

Kentucky inmates are being discriminated against and denied the basic right of appeal. My trial was August 6-7, 2013. I was final sentenced, and a post conviction bond was issued for the next 389 days. When the direct appeal was confirmed another 30 days passed before i was taken into custody. Due to the over crowding in the system a inmate can then expect to spend at least the next 180 days (6 months) in a county jail with no access to legal library or legal aides at all. I was at Breckenridge co. detention center, it has NO legal library at all. The inmate is then transferred to the Roeder correctional complex for classification. Again due to the over crowding and no fault of his own, they spend at least 90 days. Some stay up to 180 days (6 months) before the inmate is ever transferred to the institution to BEGIN admission. The first 30 days after they arrive at the prison is spent on admission, with little to no access to any part, along with the legal library there.

With this being totalled, 14 months on the average, and some are much longer. The western District judges interpretation of the AEDPA's one year limit, would have expired way before a Kentucky inmate could have even seen a legal library! This can not be the intension of this limit, and Must be corrected by this court. EVERY Kentucky inmate is being denied access to the constitutional right to appeal by Writ of Habeous Corpus.

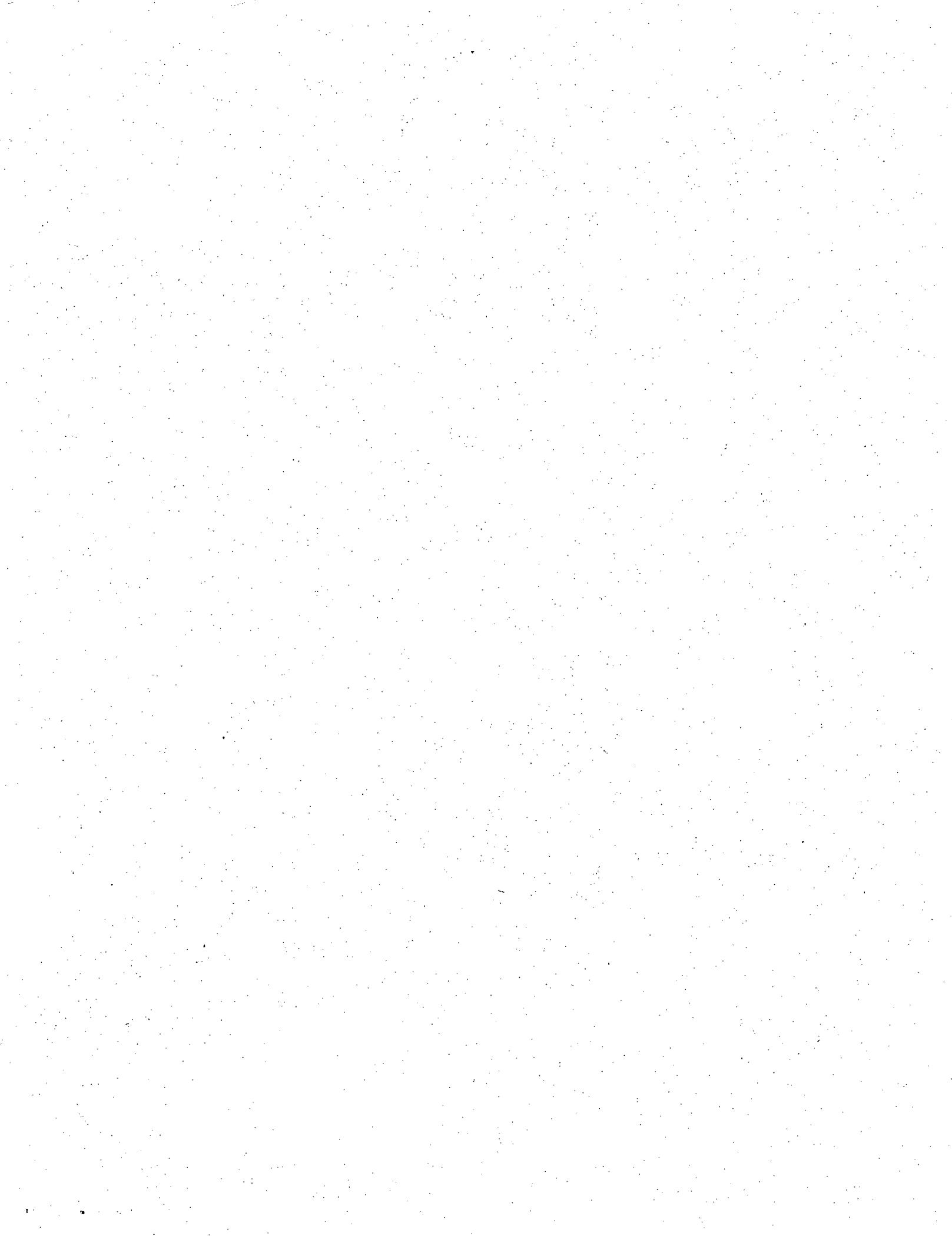
REASONS FOR WRIT

A.

The one (1) year statute of limitations under AEDPA (1996) contains multiple provisions related to events that trigger the one (1) year statute of limitations. (28 USC§2244(d)(1) and (2)).

USC§2244(d)(2) expressly states: "the time during which a properly filed application for state post-conviction or other collateral review (as here) with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section". (Emphasis added).

Additionally, Kentucky provides a three (3) year window to file an 11.42 collateral action. See KyRCr 11.42 et seq. Further, 11.42 actions cannot be raised on direct appeals in Kentucky unlike Sixth Circuit member state Michigan, for example. As such, the Magistrate Judge's Report and Recommendation dated July 2, 2019 creates an impossible burden on Kentucky inmate/Petitioner and is tantamount to a denial of a constitutionality recognized remedy/right-a Writ of Habeas Corpus. Because other Sixth Circuit states have different Appellate rules, Kentucky inmate/Petitioner are being treated disparately because of geography and not on the merits of their constitutional claims. The Court's application/strict adherence to an impossibly engineered/formulated one (1) year statute of limitations interpretation will almost certainly cause unequal application of the one (1) year statute of limitations amongst inmate/Petitioners across the Sixth Circuit member states.



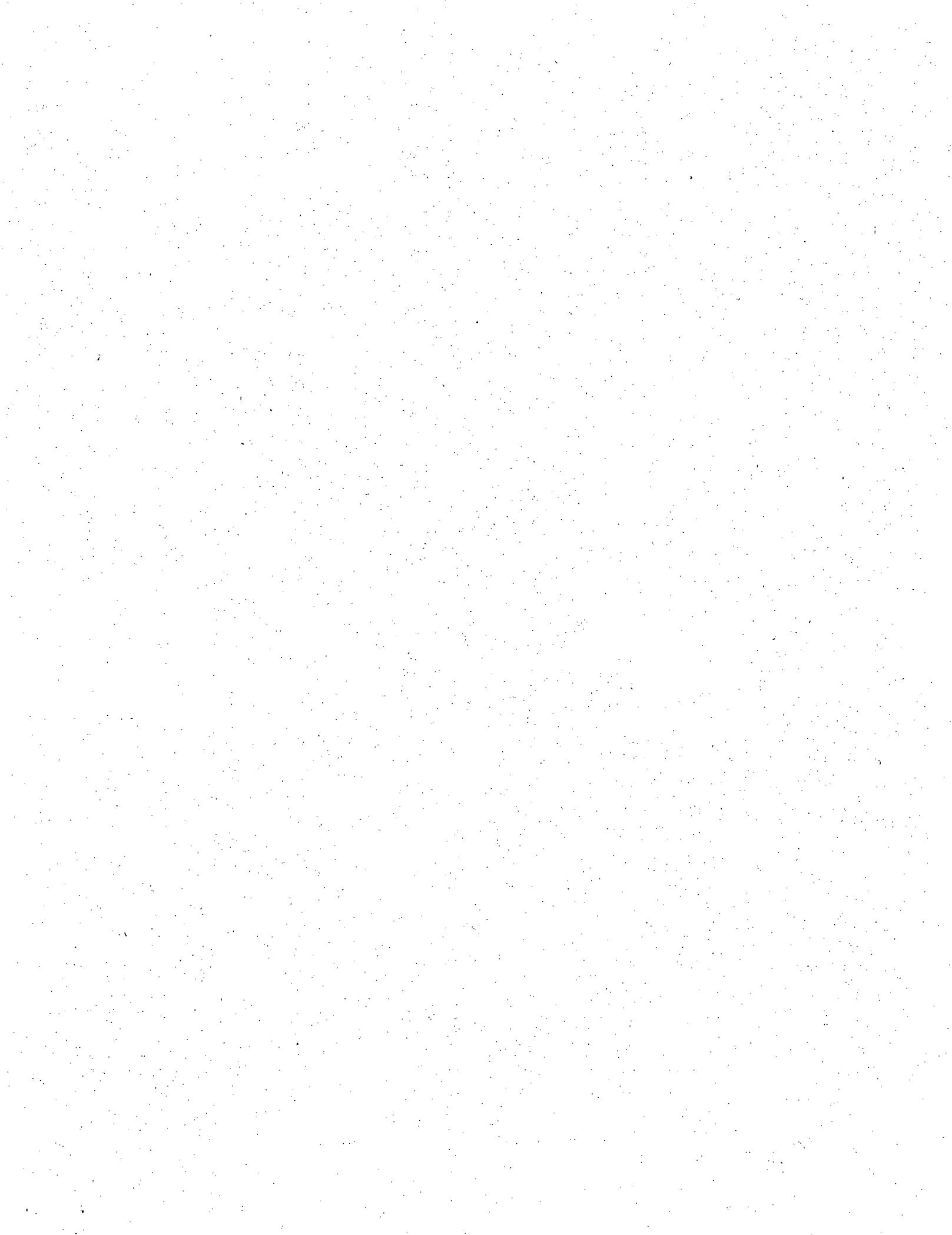
According to Holland v. Florida, 560 US 631, 130 Sup. Ct. 2549, 177 (2010), the interpretation of §2244(b)(2) states "the time in which the Petitioner has a pending request for state Court relief as here, shall not be counted for the statute of limitations under AEDPA".

"Further, it should be noted a Petitioner cannot bring a Federal Habeas claim without first exhausting all state remedies-a process that most often takes longer than one (1) year".  
(Emphasis added).

As a practical matter, the Magistrate Judge's Report and Recommendation dated July 2, 2019 dismissing Petitioner's Writ on the grounds of a statute of limitations violation is contrary to clearly established United States Supreme Court precedence in Holland Id., the U.S. Constitution and 28 USC§2244(d)(2).

For those reasons, Petitioner objects to the Magistrate Judge's Report and Recommendation dated July 2, 2019 and/or alternatively issue a certificate of appealability, so the United States Supreme Court can correct the Sixth Circuit's minority view interpretation of the one (1) year statute of limitations which is as presently being applied tantamount to a denial of a constitutionally protected Writ.

Further, to interpret AEDPA's one (1) year statute of limitations as "accruing" time towards one (1) year statute of limitations bar while Defendant's case works its way through state Court's is anathema to the clear language of USC§2244 et seq. and the clear holding in Holland, Id. Finally, to interpret the "time calculation" in such a manner, by definition, creates a disparity of treatment amongst the various member states of the



Sixth Circuit (i.e. Ky. v. Mich. Petitioner's). This type of interpretation/application is unconstitutional and requires review.

B.

At the very least, Petitioner's case indicates a clear, deliberate effort to exercise his Kentucky State Court remedies thereby necessitating the equitable tolling provision in Holland Id. Again, Petitioner's one (1) year statute of limitations should not begin until one (1) year and ninety (90) days after April 18, 2018 (finality of Kentucky State Court's denial of Defendant's Motion for Discretionary Review). See Holland, Id., and 28 USC§2244(d)(2). (i.e. July 17, 2018).

"A non-jurisdictional federal statute of limitations is subject to a rebuttable presumption in favor of equitable tolling Holland, Id.

The Magistrate Judge's Report and recommendation dated July 2, 2019 conflicts with both the clear language of 28 USC§2244(d)(2) the United States Constitution and United States Supreme Court precedence.

The AEDPA statute of limitations began its "accrual" before the Petitioner could even invoke the Federal Court's jurisdiction before the expiration of his Kentucky appeals. See Holland Id. Petitioner submits the circumstances are extraordinary in nature and due consideration should be given, especially in light of Holland Id., and USC§2244(d)(2).

Further, the Petitioner would contend, at no point in his journey through state Court, was he given notice of a federal statute of limitations time calculation running simultaneously



with the "longer" state Court proceedings-which had to be exhausted first! There were no findings and/or judgments including any warnings noticed to the Petitioner about the potential running of the statute of limitations pursuant to AEDPA especially when the Petitioner was still pursuing his state Court.

Johnson v. Warden, Leb.2010 US Dist. LEXIS, 72968(SD Ohio 2010).

Again, Kentucky provides a three (3) year window for Defendants to bring 11.42 Motions, post finality of direct Appeals (absent newly-discovered evidence). See KyRCrP 11.42 et seq. Defendant's Motion was diligently and timely filed in state Court. The July 2, 2019 Report and Recommendation is essentially ignoring the laws of the State of Kentucky in favor of a most unusual interpretation of a statute of limitations that expired before Petitioner could have ever possibly-diligently-gotten his foot in the door of a Federal Court. Paradoxically, had Defendant elected to pursue a Federal Writ in May of 2016, it would have been dismissed as premature under Holland Id., and USC§2244(d)(2) because Defendant had not exhausted his Kentucky constitutional and Sixth Amendment U.S. Constitution right to effective assistance of counsel.

The Magistrate Judge's Report and Recommendation dated July 2, 2019 application/interpretation of the AEDPA (1996) one (1) year statute of limitations, will create conflicts amongst its member states-as every state has different rules/time constraints for Appellants/Petitioners. Therefore, an Appellant's diligence in pursuing his state appeals becomes a "moving target" and will create varying applications of the one (1) year statute of limitations. A clear and concise interpretation/application of



the one (1) year from exhaustion of all state appeals is clear and in accordance with Holland Id., and USC§2244(d)(2).

The test for "entitlement to "equitable tolling" is shown when (1) the Petitioner has been pursuing his rights diligently and (2) that some extraordinary circumstance stood in the way and prevented timely filing. See Pace v. DiGuglielmo, 544 US 418. The flexibility and hint and "equitable procedure" enables Courts "to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices" Hazel-Atlas Glass Company v. Hartford-Empire Company, 322 US 238 (1944). The diligence required for equitable tolling purposes is "reasonable diligence". See Lonchar, 517 US 326, not "maximum feasible diligence" See also Stallings v. Andrews, 524 Fed3d 612 (Ct. of Appeals 5/2008).

In essence, the Courts methodology for calculating defendant's statute of limitations time, undermines and usurps the very purpose of a Writ of Habeas Corpus. Effectively, the Court is using the calculation of time spent in state Court to run concurrently with a federal statute of limitations, when in fact the Petitioner could not validly or lawfully have filed his Writ of Habeas Corpus in Federal Court. In the event the Petitioner had filed it would require him to be in two separate Courts at the same time (i.e. State and Federal Court). This would logically create a quagmire for any incarcerated Petitioner or his Counsel. Causing the some battle to be fought on two different fronts is an absurd interpretation of the relevant AEDPA statutory provisions and gives fanciful meaning or interpretation to the enactments of the legislature and

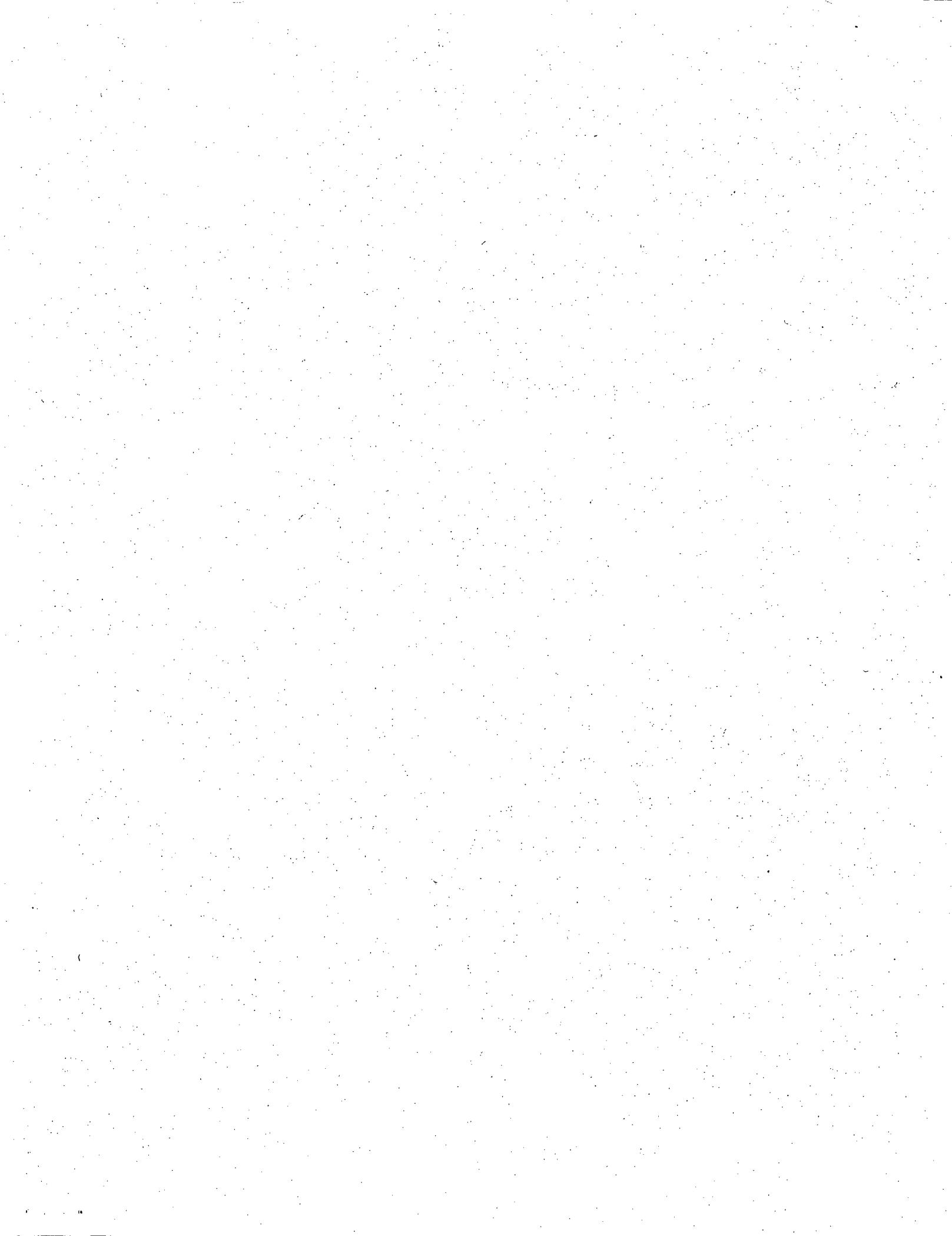
decisions of the United States Supreme Court. This would lead to an absurd interpretation and the unequal application of justice amongst the various Sixth Circuit states and their inmate Petitioners.

C.

Petitioner's inability to utilize exculpatory evidence at his trial would certainly have resulted in an acquittal amongst reasonable jurors. To date, no State or Federal Court has squarely addressed the exclusion of Petitioners claim of innocence. Alternatively, Petitioner's excluded exculpatory evidence video should be treated as new evidence for purposes of avoiding a rigid one (1) year statute of limitatiions interpretations by this Court in its July 2,2019 Order.

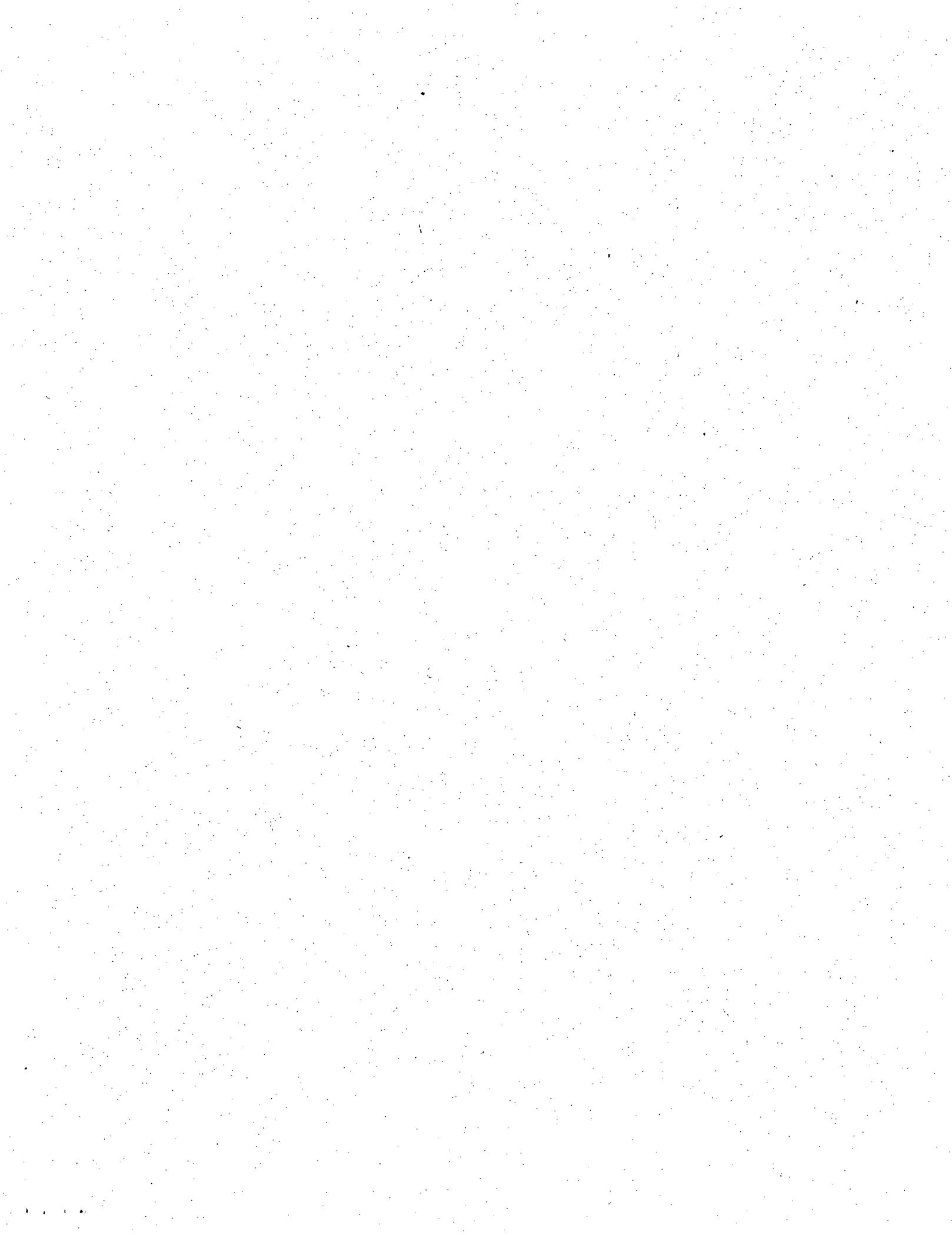
The U.S. Supreme Court has also recognized an exception in the statute of limitations issues for Writ filings set forth in 28 USC§2241 et seq. "A habeas Petitioner may file a claim within one (1) year of the time in which evidence could have been discovered through the exercise of due diligence". See McQuiggin v. Perkins, 569 US 383 (2013). "The United States Supreme Court rejects the argument that habeas Petitioner's who assert convincing actual innocence claims must prove diligence to cross the Federal Courts threshold of eliminating timing as a factor". See Mcquigin Id.

"Focusing on the merits of the Petitioner's actual innocence claim and taking account of delay in that context, rather than treating timeliness as the threshold inquiry, allows a Court to necessarily consider the circumstances underlying the miscarriage of justice exception (i.e. insuring the federal constitutional



errors do not result in the wrongful incarceration of persons".

Here, Petitioner was denied the opportunity to show an exculpatory video of law enforcement agents bringing in and planting in his home the very evidence defendant was convicted of. This video should be treated under a "new evidence" exception to the strict adherence of the one (1) year statute of limitation as set forth in AEDPA. Initially, this, of course, would assume the Petitioner's initial arguments for timely filing were ignored by the Court. Petitioner believes his Writ to have been timely filed. However, if the Magistrate Judge were not inclined to correct its July 2, 2019 Report and Recommendation, then Petitioner moves the Court to treat the excluded exculpatory video as "new evidence" in his case because the Defendant was never able to present his evidence to his jury. The Commonwealth had the video in its possession and successfully moved to exclude it from the jury. Therefore, in essence, the exclusion of the exculpatory video not only denies the Defendant his right to confront his accusers, present a defense, but now becomes a Brady violation and therefore ripe for substantive review by the Court.



## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

allen W. Wadfield #263693 pro se

Date: March 8, 2020

