IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 8, 2020

Lyle W. Cayce
Clerk

No. 19-30485
Summary Calendar

CHESTER BROWN,

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:19-CV-9121

Before SMITH, COSTA, and HO, Circuit Judges.

PER CURIAM:*

Chester Brown, Louisiana prisoner # 97411, was convicted of armed robbery and second-degree murder and sentenced to imprisonment for life. The district court dismissed Brown's 28 U.S.C. § 2254 application with prejudice and denied his motion to stay the proceedings pending the completion of his state post-conviction proceedings. Brown now has filed

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

motions for a certificate of appealability (COA) and for leave to proceed in forma pauperis (IFP) on appeal.

In his motion for a COA, Brown argues that the district court erred in dismissing his claim that he has new evidence, consisting of an affidavit from one of his original accusers now stating that Brown did not take any part in the crimes, which shows he is actually innocent. To obtain a COA, Brown must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Brown "satisfies this standard by demonstrating 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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). However, a freestanding claim of actual innocence does not state an independently cognizable ground for § 2254 relief. *See Kinsel v. Cain*, 647 F.3d 265, 270 n.20 (5th Cir. 2011). Brown does not raise any other claim of constitutional error. Therefore, he has not shown that reasonable jurists would debate the district court's resolution of his constitutional claims, and his motion for a COA is DENIED. *See Miller-El*, 537 U.S. at 327. In light of this determination, his motion for leave to proceed IFP also is DENIED.

Brown also challenges the district court's denial of his motion to stay his § 2254 proceedings. "A COA is not required to review the district court's ruling on a non-merits issue such as a stay." *Young v. Stephens*, 795 F.3d 484, 494 (5th Cir. 2015). Because he has not shown he will raise a meritorious issue, he has failed to show that the district court abused its discretion by denying his motion to stay the proceedings. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). The district court's denial of Brown's motion to stay his § 2254 proceedings is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
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D.C. Docket No. 2:19-CV-9121

CHESTER BROWN,

Petitioner - Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellee

Appeal from the United States District Court for the
Eastern District of Louisiana

Before SMITH, COSTA, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal.

It is ordered and adjudged that the judgment of the District Court is affirmed.

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REV 6/82

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(If a petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 20 U.S.C. § 2255, in federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions-Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute form DC 12, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your personal account exceeds$_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and at least two copies must be mailed to the Clerk of the United States District Court whose address is

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency

AO 241 PETITION UNDER 28 USC § 2254 FOR WRIT OF
REV 6/82 HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District EASTERN DISTRICT OF LOUISIANA	
Name CHESTER BROWN	Prisoner No. # 97411	Docket No. , Section " "
Place of Confinement Louisiana State Penitentiary		

The Attorney General of the State of Louisiana: JEFF LANDRY

CHESTER BROWN
v.
State of Louisiana, WARDEN DARRLY VANNOY

PETITION

1. Name and location of court which entered the judgment of conviction under attack:
Criminal District Court, Parish of Orleans, State of Louisiana, 2700 Tulane Ave, New Orleans, La., 70130

2. Date of judgment of conviction: May 18, 1982

3. Length of sentence: Life

4. Nature of offense involved (all counts) 1ct. Second Degree Murder

5. What was your plea? (Check one)
   (a) Not guilty [*]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]
   (d) Not guilty by reason of insanity [ ]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of Trial: (Check one)
   (a) Jury [*]
   (b) Judge only [ ]

7. Did you testify at trial?
   ☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?
   ☒ Yes ☐ No

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9. If you did appeal, answer the following:

(a) Name of court: Court of Appeal, Fourth Circuit

(b) Result Affirmed

(c) Date of result: November 14, 1985

(d) Grounds raised: Unknown

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

☒ Yes ☐ No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Criminal District Court, Parish of Orleans

(2) Nature of proceeding: Post-Conviction Proceedings.

(3) Grounds raised: Unknown, record was destroy by Hurricane Katherine

1.
2.
3.
4.
5.
6.
7.
8.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(5) Result denied

(6) Date of result 4/15/97

(b) As to any second petition, application or motion give the same information:

(1) Name of court: Criminal District Court, Parish of Orleans, State of Louisiana

(2) Nature of proceeding Post-Conviction Proceedings

(3) Grounds raised unknown

(4) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(5) Result denied

(6) Date of result 9/11/97

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: Criminal District Court, Parish of Orleans, State of Louisiana

(2) Nature of proceeding Post-Conviction Proceedings

(3) Grounds raised unknown

(4) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(5) Result denied

(6) Date of result 8/8/98

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. ☐ Yes ☒ No

(2) Second petition, etc. ☐ Yes ☒ No

(3) Third petition, etc. ☐ Yes ☒ No

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

C. Ground three: **Petitioner present a claim of newly discover evidence to the court which proves he is actually innocent of this crime.**

Supporting FACTS (tell your story *briefly* without citing cases or law): **Petitioner ask this court to exercise it's discretion and allow petitioner to file this 'protective petition and stay these proceedings until petitioner has exhausted his remedies. See : Memorandum of Law in support of which demonstrate petitioner had good cause for failure to exhaust, his unexhausted claim is potentially meritorious and petitioner did not engaged in any intentionally dilatory litigation tactics.**

A. Ground four:

Supporting FACTS (tell your story *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: **the District Attorney motion the state trial court to stay these proceedings to take writs. Although, the Louisiana Supreme Court grant the State's writ,**

the motion to stay is still in effect at the time of this filing.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

☐ Yes ☒ No

15. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

(a) At preliminary hearing John M. Lawrence, 2700 Tulane Ave., New Orleans, La. 70119

(b) At arraignment and plea: same as above

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(c) At trial same as above

(d) At sentencing same as above

(e) On appeal same as above

(f) In any post-conviction proceeding none

(g) On appeal from any adverse ruling in a post-conviction proceeding none

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

☐ Yes ☒ No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☐ Yes ☒ No

(a) If so, give the name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

☐ Yes ☐ No

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

May 26 2020
(date)

Yvette Brun
Signature of Petitioner

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHESTER BROWN
PETITIONER

CASE NO:

VERSUS

FILED:_____

STATE OF LOUISIANA
RESPONDENT

s/_____
Clerk's Signature

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U. S. C. SECTION 2241 AND 2254 AND REQUEST TO STAY AND HOLD IN ABEYANCE THESE PROCEEDINGS

NOW COMES, Chester Brown, (hereinafter Petitioner) in pro se submits the following Memorandum in Support of his petition under 28 U .S. C. , Section 2254 for Writ of Habeas Corpus by person in State custody in support thereof, Petitioner states as follows:

INTRODUCTION

Petitioner is presently serving a life sentence in the Louisiana State Penitentiary at Angola, Louisiana after being found guilty by jury of violating R. S. 14:64 (Armed Robbery; 1 ct) and R. S. 14:30.1 (Second Degree Murder 1 ct.).

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this matter pursuant to 28 U. S. C. Section 2241 and 2254. Further, this court has jurisdiction to allow petitioner to file this protective petition and stay and abey these proceedings until his state remedies are exhausted.

PROCEDURAL HISTORY

The procedural history in this case is extremely convoluted. However, petitioner will do his best to describe the circumstances which form the bases for petitioner filing this protective petition and asking this Honorable Court to stay and abey this federal habeas proceedings until state remedies are exhausted.

On September 18, 2009, petitioner filed an application for post-conviction relief[1] in he Criminal District Court, Section A, Judge Laurie White presiding. Between September 18th, 2009, and December 28, 2010, petitioner wrote a number of letters asking for a status check on the pending post-conviction relief application and filed a Motion for Status Information and / or ruling on the application for post- conviction relief.[2] However, petitioner did not received an answer from any of his letter of inquires or motion that was filed.

Thereafter, petitioner sought Writ of Supervisory from the Court of Appeal, Fourth Circuit, State of Louisiana, asking that court to intervene in this matter by ordering respondent to rule on the pending post-conviction application. On December 28, 2010, the Fourth Circuit Court of Appeal for the State of Louisiana granted Supervisor for the sole purpose of transferring petitioner's application for post-conviction relief to the State District Court with orders to rule on the pending application and petitioner's request for evidentiary hearing.[3]

On January 31, 2011, the trial court order the District Attorney's Office to file any procedural objections they may have, or answer on the merits pursuant to La. C. Cr. P. art. 927. The court also ordered petitioner to appear via video link in this Court on March 1, 2011 at 10:00 am for the appointment of counsel and to apprise petitioner of the developments in his case[4] On March 11, 2011, the hearing was held and the court reschedule the matter for a hearing and appointment of counsel.

1 See copy of post-conviction application with memorandum and exhibits attached hereto.
2 See motion attached hereto
3 See copy of ruling
4 See copy of ruling

This hearing was never held.

On March 26, 2012, petitioner wrote a letter of inquiry to the trial court asking for information concerning the status of his case. At that time, the court informed petitioner that it was still reviewing the extensive information in in this case. Petitioner did not received any further information concerning his case until February 26, 2015, when the trial court issue an order for petitioner to supplement his application with the sworn affidavit of Henry McCoy on or before March 27, 2015. Petitioner submitted the supplemental application with the sworn affidavit of Henry McCoy on March 6, 2015,[5]

A lengthy delayed occurred between petitioner furnishing the sworn affidavit and the court's ruling because the trial court's record was stored off sit and the affidavit that was received from petitioner was filed in the trial court's separate file under this matter. Fortunately, On May 23, 2017, petitioner forward a letter of inquiry to the trial court requesting a status check on his application for post-conviction, the trial court discovered the delay. On July 24, 2017, after considering the totality of the claim laid out in petitioner's post-conviction relief application as new evidence put forth by petitioner, the trial court denied the State's procedural objection and ordered the State to Answer the merits of petitioner's application for post-conviction relief.

On August 17, 2019, the State Motion To Vacate Portion of the trial court's July 24, 2017 judgment and *Stay* these proceedings pending the State's Writ Application. The State took a supervisory writ to the Court of Appeals, Fourth Circuit, State of Louisiana. On September 21, 2017, the Fourth Circuit denied the State's writ and the State took a supervisory writ to the Louisiana Supreme Court. On February 18, 2019, the Louisiana Supreme Court granted the State's writ.

Because the State requested this post-conviction relief proceedings be stay until it took writs to the higher courts. The post-conviction proceedings is still pending in the trial court until the trial court

5 See copy of supplemental application with sworn affidavit attached hereto

renders a ruling on the pending application. Thereafter, petitioner must exhaust his state courts remedies by seeking supervisory from the Fourth Circuit Court of Appeal, State of Louisiana, and finally the Louisiana Supreme Court. Therefore, because of the number of delays that has occurred in this case, petitioner ask this court to exercise it's discretion and allow petitioner to file this "protective" petition and stay these proceedings until petitioner has exhausted his remedies so that he can demonstrate the state's court rulings in this case is contrary to well establish Federal Law and violates the very essence of the mandates of the United States Constitution. And that the post-conviction relief presented to the state courts is not untimely filed.

REASON FOR GRANTING STAY AND ABEY THIS PROCEEDINGS

SUMMARY OF ARGUMENT

The general principle that District Courts do ordinarily have authority to issue stays where such a stay would be a proper exercise of discretion. *Rhines v. Weber*, 544 U.S. at 276, 125 S. Ct. 1528 (citations omitted). As the Supreme Court of the United States recognized, AEDPA does not eliminate district courts' authority to issue stays in habeas proceedings, but rather-- at least in cases of mixed petitions-- limits it to when " the petitioner had good cause for failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics". *Id. At 278, 125 S. Ct. 1528.* Similarly, when considering a situation such as the one present here, there is no authority eliminating the district courts' presumed discretion to issue stays in cases of fully unexhausted petitions, and there is no reason to adopt limits on that discretion different from those set forth in *Rhines.*

DISCUSSION

Indeed, this application of Rines is supported, if not required, by statements in other Supreme Court cases suggesting that petitioners with fully unexhausted petitions can seek stays. Just one month

after deciding *Rhines*, the Court considered in *Pace v. DiGuglielmo, 544 U. S. 408, 416, 125 S. Ct. 1807, 161 L. Ed. 2D 669 (2005),* whether AEDPA's one year statute of limitations is tolled when a petitioner files an untimely petition in state court. Holding that the statute is not tolled, the Court added:

"A prisoner seeking post conviction relief might avoid this predicament... by filing a " protective" petition in federal court and asking the federal court to stay and abey the federal habeas proceeding until state remedies are exhausted... A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute " good cause" for him to file in federal court." *Pace v. DiGugliema, supra.* Notably, the petition in Pace was not mixed, and the Court gave no indication that its statement applied only yo mixed petitions, i. e. *Heleva v. Brooks, 581 F. 3d 187, 191 (2009).* It would be odd, to say the least, for the Supreme Court to suggest a stay procedure to a petitioner who could not have use it, and to recommend this course of action without any mention that it could only apply to a mixed petition. It can only be concluded that the Court expected *Rhines* to apply to fully unexhausted petition.

In this case, petitioner can satisfied the three requirements for a stay as laid out in *Rhines*: 1) good cause, 2) potentially meritorious claims, and 3) a lack of intentionally dilatory litigation tactics. *Rhines* supra.

1) ***GOOD CAUSE FOR STAY:***

The case law concerning what constitutes " good cause" under *Rhines* has not been developed in great detail. *Blake v. Baker, 745 F.3d 977, 980 (9th Cir. 2014).* (" There is little authority on what constitutes good cause to excuse a petitioner's failure to exhaust.") The Supreme Court has address the issue only once, when it noted that a " petitioner reasonable confusion about whether a state filing would be timely will ordinarily constitute ' good cause' for him to file in Federal Court." *Pace v. DiGulielmo, 544 U. S. 408, 416, 125 S. Ct. 1807, 161 L. Ed. 2D 669 (2005) (citing Rhines, 544 U. S. at*

278, 125 S. Ct. 1528). Other circuits have found good cause when, for example, the prosecution has wrongly withheld information. *Jalowiec v. Bradshaw, 657 F. 3d 293, 304-05 (6th Cir. 2011).* The court have held that good cause under Rhines does not require a showing of " extraordinary circumstances." *Dixon v. Baker, 847 F. 3d 714 (2017) (citing Jackson v. Roe, 425 F. 3d 654, 661-62 (9th Cir. 2005),* but petitioner must do more than simply assert that he was " under the impression" that his claim was exhausted, *Wooten v. Kirkland, 540 F. 3d 1019, 1024* (9th Cir. 2008).

This criminal litigation begun on September 18, 2009, when petitioner filed an application for post-conviction relief in the Criminal District Court for the Parish of Orleans, State of Louisiana. The application was predicated on newly discovered evidence which prove petitioner was actual innocent of committing these offenses. The newly discovered evidence was in the form of an affidavit that was submitted by Henry McCoy, who was charged with committing these offense and who also implicated petitioner in this crime.

On January 31, 2011 the Honorable Judge Laurie A. White issue an order to the District Attorney's Office to file any objections they may have, or answer on the merits pursuant to La. C. Cr. P. art 927, within 30 days of the Court's order. The Court further ordered that petitioner appear via video link in this Court on March 1, 2011, at 10:00 a.m. for the appointment of counsel and so that this Court may apprise petitioner of the development in this case. On February 25, 2011, petitioner received a copy from Alyson R. Graugnard, Assistance District Attorney answer petitioner's application for post conviction relief; wherein, the State contended that the application should be dismissed because it is repetitive and untimely pursuant to La. C. Cr. P. art. 930.8 and La. c. Cr. P. art. 930.4. Petitioner responded with an opposition to the State's procedural objections, demonstrating the applicability of the newly discovered facts exception of La. C. Cr. P. art. 930.8 (A)(1). On March 1, 2011, the hearing was held and the Court re-schedule the matter for hearing and appointment of counsel. The re-schedule hearing was never held and no ruling had been render by the trial court on petitioner's application for

post-conviction relief. No further action was taken by the trial court in this matter until petitioner wrote another letter of inquiry to the trial court on May 23, 2017 requesting a status check on petitioner's pending application for post-conviction relief. After the requesting of the status check, the delay was discovered by the trial court and after considering the totality of the claim presented in petitioner's post-conviction application predicated on newly discovered evidence, On July 24, 2017, the trial court denied the State's procedural objections. The State of Louisiana then Motion the trial court to Vacate portion of the 24, 2017 ruling and Stay the proceedings to allow the State to take writs to the Fourth Circuit Court of Appeal. On September 21, 2017, the Fourth Circuit denied the State's writs. The State took a supervisory writ to the Louisiana Supreme Court Court. On February 18, 2019, the Louisiana Supreme Court granted the State's writ.

The ruling by the Louisiana Supreme Court is the only ruling on petitioner's application for post-conviction relief that has been made by a State court. And that ruling only deals with a portion of the trial court's ruling. As noted, these proceedings was stay by the trial court until a ruling have been render on the portion of it's July 24, 2017 ruling. Therefore, petitioner's application for post-conviction relief is still pending in the state courts'. However, because of the lengthy delays that was constantly occurring in this case, out of abundance of caution, petitioner ask this Honorable Court to stay and abey these proceedings until petitioner can exhaust his state court remedies so that he will still have time to present this claim to this court. At the time of making this request, the state court had not lifted the stay order and made a ruling on the pending post conviction relief application. Until the stay order is lifted and the trial court makes a ruling on the application for post- conviction relief, the application for post-conviction review is still pending. The United States Supreme Court in *Carey v. Saffold*, 536 U. S. 214, 219-20, 122 S. Ct. 2134, 153 L. Ed 260 (2002) states: as long as the ordinary state collateral review process is in continuance-- i.e., until the completion of that process. The Supreme Court derived this conclusion from the common meaning of the term: ' The dictionary defines pending (when used as an

adjective) as " in continuance' or not yet decided.' It similarly defines the term (when used as a preposition) as though the period of continuance... of, ' until the... completion of. Id. At 219, 122 S. Ct. 2134.

After reviewing the procedural history of this case, and the exhibits supporting this request for stay and abey pending exhaustion of petitioner's application for post-conviction relief, this Honorable can clearly see petitioner's reasonable confusion about whether he will have sufficient time to file a Federal Habeas Corpus in this court whenever the stay is lifted and all three of the state courts have had an opportunity to rule on this matter. Therefore, this Honorable Court should grant stay and abey in these proceedings until he can exhaust his state court remedies.

2) ***THE CLAIM HAVE MERIT***:

A federal habeas petitioner must establish his unexhausted claim is not "plainly meritless" in order to obtain a stay under *Rhines, 544 U. S. at 277, 125 S. Ct. 1528.* In determining whether a claim is plainly meritless, principle of comity and federalism demand that the federal court refrain from ruling on the merits of the claim unless " it is perfectly clear that the petitioner has no hope of prevailing. *Cassett v. Stewart, 406 F. 3d 614, 624 (9th Cir. 2005).* " A contrary rule would deprive state courts of the opportunity to address a color able federal claim in the first instance and grant relief if they believe it is warranted.: id.. *Dixon v. Baker, 847 F. 3d 714 (citing Rose v. Lundy, 455 U.S. 509, 515, 102 S. Ct. 1198, 71 L. Ed. 2D 379) (1992).*

The application for post-conviction relief that was filed in the state trial court is based on newly discovered evidence that was not known to petitioner or his trial counsel. The newly discovered evidence is contain in an affidavit that was given to petitioner by Henry McCoy, the State's star witness who testimony implicated petitioner in this matter.

A review of the affidavit show that whole riding down Magazine St. They (other co-defendants that were with him the night this crime occurred) spotted petitioner walking and drinking and decide

to give him a ride home because he lived in the neighborhood. According to Henry McCoy's affidavit, petitioner was very drunk and had no knowledge of what had occurred prior to us picking him up this day.(*See affidavit attached hereto).* However, at trial, Mr. McCoy testified before the jury that petitioner was involved in the murder and robbery, along with the other co-defendants. In his sworn statement dated July 19, 1980, Henry McCoy, before Detective J .C. Milled, Trooper Doug Gremillion, and Trooper Micheal Belar, he (McCoy) states petitioner was involved in the murder and robbery. The May 14th, 2009, affidavit submitted by Henry McCoy provides favorable information that demonstrate petitioner is actually innocent of committing this crime.

The affidavit given to petitioner by the state's witness is extremely favorable when considering there was no other evidence that link petitioner to this crime. Because the state trial court has never reach the merits of this claim, petitioner cannot at this time established whether the state's court ruling is contrary to are an unreasonable application of well established Federal Law. While the affidavit clearly establish petitioner is actually innocent of the committing this offense, until the state court's have render a ruling in this case, petitioner can not assume the ruling will be contrary to or unreasonable application of clearly established Federal Law. However, the claim presented in the attach application for post-conviction relief is predicated on newly discover evidence that is contain in an affidavit that was given to petitioner by the state's only witness that connect petitioner to this crime. Therefore, the newly discovered evidence proves petitioner is actually innocent of committing this crime. Accordingly, the claim present is not plainly meritless.

3) ***INTENTIONALLY DILATORY LITIGATION TACTICS***

Petitioner has not engaged in any intentionally dilatory tactics. In fact, the attached letters[6] of inquiry for status check address to the state trial court concerning a ruling and the number of applications for writ of Mandamus[7] that were submitted to the Court of Appeal, Fourth Circuit, shows

6 See letters of inquiry for status check and mandamus that were filed in this matter

7 See copy of mandamus attach hereto

petitioner has been diligent in trying to present this matter to the courts in a timely manner.

In sum, petitioner has established "good cause" for his failure to exhaust and the claim is not "plainly meritless. Lastly, it has been establish that petitioner has never engage in intentionally dilatory litigation tactics. See *Rhines, 544 U .S. at 278, 125 S. Ct. 1528.* After complying with the factors announce in *Rhines*, this Honorable Court can grant this motion to stay petitioner's federal habeas case while he exhausts his potentially meritorious claims.

CONCLUSION

WHEREFORE, petitioner pray that this Honorable Court allow petitioner to file this protective petition and stay and abeyance these proceedings with reasonable time limits while he pursue his exhaust his claim in state court. More, after exhausting the claims in state court, allow petitioner to supplement this federal proceedings with an argument that will demonstrate the state courts ruling was either contrary to or an unreasonable application of clearly established federal law.

Respectfully submitted

Chester Brown

Chester Brown #97411
General Delivery
Louisiana State Penitentiary
Angola, Louisiana, 70712

CERTIFICATE OF SERVICE

I, Chester Brown, hereby certify that I have served a true and correct copy of this Application for Writ of Habeas Corpus upon the District Attorney for the Parish of Orleans by placing same in the United States Mail, this 26 day of May, 2020.

Chester Brown

Chester Brown

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHESTER BROWN — CIVIL ACTION:

VERSUS — NO: 19-9121

DARRYL VANNOY — SECTION: "M' (3)

PETITIONER'S OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION

NOW INTO COURT, comes Chester Brown,(hereinafter referred to as petitioner's) who object's to the Magistrate's Report and Recommendation for the following reason.

I.

THE MAGISTRATE'S REPORT AND RECOMMENDATION ERRONEOUS STATE THE REASONING FOR REQUESTING A STAY IN THESE PROCEEDINGS AND HAVE APPLIED THE WRONG STANDARD OF REVIEW TO THESE PROCEEDINGS

In this case, the request for staying these proceedings is not predicated on petitioner exhausting a claim that was presented to this Honorable Court but was not presented to the State Court first for consideration. As stated in the original petition for Application for habeas Corpus, the request to stay these proceedings is predicated on the following: On July 24, 2017, after considering the totality of the claim laid out in petitioner's post-conviction relief application as new evidence put forth by petitioner, the trial court denied the State's procedural objection and ordered the State to Answer the merits of petitioner's application for post-conviction relief.

On August 17, 2019, the State Motion to Vacate Portion of the trial court's July 24, 2017 judgment and Stay these proceedings pending the STATE'S Writ Application, The State took a Supervisory Writ to the Court of Appeals, Fourth Circuit, State of Louisiana. On September 21, 2017,

the Fourth Circuit denied the State's writ and the State filed an Application for Certiorari to the Louisiana Supreme Court. On February 18, 2019, the Louisiana Supreme Court granted the State's Writ. This ruling only allowed the State to filed any procedural objections to petitioner's application for post-conviction- relief. However, because the State requested the post-conviction relief proceedings be stay until it took writs to the higher courts, the post-conviction relief proceedings is still pending in the trial court until the trial court either re-consider the matter, or allow the State to filed procedural objections.

Because of the number of delays that has occurred in this case, petitioner ask this court to stay these proceeding because he is reasonable confuse about whether his state pleadings would be consider timely filed in Federal Court. In a situation such as this, the United States Supreme Court noted in ***Pace v. DiGuglielmo, 544 U. S. 408, 416, 125 S. Ct. 1807, 161 L. Ed. 2D 669 (2005),*** whether AEDPA's one year statue of limitations is tolled when a petitioner files an untimely petition in state court. Holding that the statute is not tolled, the Court added:

> ***" A prisoner seeking past conviction relief might avoid this predicament... by filing a " protective petition in Federal court and asking the Federal Court to stay and abey the Federal habeas proceedings until state remedies are exhausted... A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute " good cause" for him to file in Federal Court". Pace, supra.***

Notably, the petitioner in Pace was not mixed, and the Court gave no indication that its statement applied only to mixed petitions. ***Heleva v. Brooks, 581 F. 3d 187, 191 (2009).*** It would be odd to say the least, for the Supreme Court to suggest a stay procedure to a petitioner who could not have use it, and to recommend this course of action without any mention that it could only apply to a mixed petition. Accordingly, it can only be concluded that the Court expected ***Rhines v. Weber, 544 U.S. at 276, 125 S. Ct. 1528,*** to apply fully to unexhausted petition.

Here, there is good cause to grant a stay in these proceedings, not only because the matter may still be pending in the State court, but also, under Louisiana jurisprudence, the trial court must allow

petitioner an opportunity to show cause why his post-conviction application is timely filed within the two years time frame for presenting newly discover evidence to the court's attention. ***Louisiana Code of Criminal Procedure Article 930.8 (A)(1); and Article 930.4 (F).*** Therefore, this Honorable Court should allow petitioner's application for Habeas Corpus to be consider a protective protection and stay these proceedings with orders to the trial court to rule on petitioner's post-conviction relief or allow petitioner an opportunity to prove his post-conviction relief is timely filed.

THE REPORT AND RECOMMENDATION FAILED TO APPLY THE CORRECT STANDARD OF REVIEW ON PETITIONER'S CLAIM OF NEWLY DISCOVER EVIDENCE WHICH PROVES PETITIONER IS ACTUAL INNOCENT OF COMMITTING THIS CRIME.

The application for post-conviction relief that was filed in state trial court and the application for Habeas Corpus is predicated on newly discover evidence contain in an affidavit that was given to petitioner by Henry McCoy, who was the State's only evidence that implicated petitioner in committing this offense.

Petitioner did not present his application for post-conviction relief in the state court, nor application for Writ of Habeas Corpus in this Honorable Court on a claim of actual innocence. The claim presented in the courts are predicated on newly discover evidence when viewed in it's entirety proves petitioner is actually innocent of the committing this crime. More importantly, a court's assumptions about the validity of the proceedings that result in a conviction are fundamentally different in petitioner's case than in ***Herrera v. Collins, 506 U. S. 390, 400 (1993).*** In ***Herrera,*** petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction had been error free. In such a case, when a petitioner has been "tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants." ***506 U.S., at 419, 113 S. Ct., at 870 (O'***

Connor, J., concurring), it is appropriate to apply an extraordinarily high' " standard of review, . id., at 426, 113 S. Ct. at 874.

In this case, petitioner, in contrast, presents new discover evidence that demonstrated petitioner is actual innocent of the crime charge. The newly discover evidence present evidence so strong that a court cannot have confidence in the outcome of petitioner's trial. Consequently, petitioner's claim is not predicated on actual innocent in order to pass through the gateway to argue the merits of his new discover evidence claim which demonstrated a miscarriage of justice has occurred. According to Louisiana Code of Criminal Procedure Article 930.8 (A)(1), petitioner filed an application for post-conviction relief predicated on the newly discover evidence within the two year time period allow to present newly discover evidence to the court for consideration; therefore, petitioner's application for post-conviction relief was timely filed. Because this matter is predicated on newly discover evidence, petitioner's evidence of innocence need carry less of a burden. In *Herrera* (on the assumption that petitioner's claim was, in principle, legally well founded), the evidence of innocence would have had to be strong enough to make his execution " constitutionally intolerable" even if his conviction was the product of a fair trial. For petitioner, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial.

Clearly, petitioner's claim of newly discover evidence prove petitioner is actual innocence of the crime charge, which is a totally different standard from petitioner presenting a claim of actual innocence in an attempt to pass through the gateway and argue the merits of his underlying claims. After considering the merits of petitioner's newly discover evidence claim, it is proven that petitioner is not only innocence of committing these offense, but also, a fundamentally miscarriage of justice has occurred which required petitioner to be given a new trial which is the correct standard to applied to the situation found here.

CONCLUSION

WHEREFORE, petitioner pray this Honorable Court dismiss the Magistrates Report and Recommendation and grant petitioner the relief sought in his original application for writ of Habeas Corpus.

Respectfully submitted

Chester Brown

Chester Brown #
General Delivery
Louisiana State Penitentiary
Angola, Louisiana, 70712

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHESTER BROWN	**CIVIL ACTION**
VERSUS	**NO. 19-9121**
DARRYL VANNOY	**SECTION: "M"(3)**

REPORT AND RECOMMENDATION

Petitioner, Chester Brown, a Louisiana state prisoner, filed this federal application seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. According to the allegations he makes in his application and the attachments thereto, he was convicted in the Orleans Parish Criminal District Court of second degree murder and sentenced to a term of life imprisonment in 1982.

Petitioner indicates that he filed this federal application as a "protective petition," and he asks that that these federal proceedings be stayed while he pursues his remedies in the state courts. See Pace DiGuglielmo, 544 U.S. 408, 416 (2005). However, although the entry of such a stay is permissible, the United States Supreme Court has held:

> Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition. Cf. Duncan [v. Walker, 533 U.S. 167, 180 (2001)] ("[D]iminution of statutory incentives to proceed first in state court would ... increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce").
>
> For these reasons, stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, *even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.* Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the

> merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

Rhines v. Weber, 544 U.S. 269, 277 (2005) (emphasis added).

Here, petitioner asserts a single claim for habeas corpus relief, i.e. that newly discovered evidence proves that he is actually innocent of the crime of which he stands convicted. However, actual innocence simply is not a cognizable ground for federal habeas corpus relief. As Justice Holmes noted long ago, what a federal habeas court has "to deal with is *not* the petitioner['s] innocence or guilt but *solely* the question whether [his] constitutional rights have been preserved." Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (emphasis added). The Supreme Court reiterated that view seventy years later, noting:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. ... This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – *not* to correct errors of fact.

Herrera v. Collins, 506 U.S. 390, 400 (1993) (emphasis added); see also Kincy v. Dretke, 92 F. App'x 87, 92 (5th Cir. 2004) ("[I]t has long been the rule in this circuit that claims of actual innocence based on newly discovered evidence alone are not cognizable under federal habeas corpus."); Lucas v. Johnson, 132 F.3d 1069, 1074 (5th Cir. 1998) (same). Where, as here, a convicted inmate uncovers new evidence tending to prove his innocence, his recourse is to seek executive clemency, not federal habeas corpus relief. Herrera, 506 U.S. at 417.

Because petitioner's sole habeas corpus claim is not cognizable, his request for a stay should be denied. See Boyd v. Martin, 747 F. App'x 712, 715 n.4 (10th Cir. 2018); Byrd v.

Bauman, 275 F. Supp. 3d 842, 849 (E.D. Mich. 2017). Further, in that the claim affords no basis for federal relief, his federal application should be dismissed with prejudice.[1]

RECOMMENDATION

It is therefore **RECOMMENDED** that petitioner's request for a stay be **DENIED** and that his federal application for habeas corpus relief be **DISMISSED WITH PREJUDICE**.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1); Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).[2]

New Orleans, Louisiana, this 20th day of May, 2019.

Dana M. Douglas

DANA M. DOUGLAS
UNITED STATES MAGISTRATE JUDGE

[1] Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides: "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."

[2] Douglass referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend that period to fourteen days.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHESTER BROWN	**CIVIL ACTION**
VERSUS	**NO. 19-9121**
DARRYL VANNOY	**SECTION: M (3)**

ORDER

The Court, having considered the petition, the record, the applicable law, the Report and Recommendation of the United States Magistrate Judge (R. Doc. 6), and the petitioner's objections to the Report and Recommendation (R. Doc. 7), hereby approves the Report and Recommendation of the United States Magistrate Judge and adopts it as its own opinion. Accordingly,

IT IS ORDERED that petitioner's request for a stay is **DENIED** and that his federal application for habeas corpus relief is **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 6th day of June, 2019.

BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHESTER BROWN	**CIVIL ACTION**
VERSUS	**NO. 19-9121**
DARRYL VANNOY	**SECTION: M (3)**

JUDGMENT

The Court, having considered the petition, the record, the applicable law and for the written reasons assigned;

IT IS ORDERED, ADJUDGED, AND DECREED that the federal application for habeas corpus relief filed by Chester Brown is **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 6th day of June, 2019.

BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

NO: 19-30485

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHESTER BROWN
PETITIONER-APPELLANT

VERSUS

DARRYL VANNOY, WARDEN
LOUISIANA STATE PENITENTIARY
RESPONDENT- APPELLEE

****

APPEAL FOR THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
USDC NO: 19-9121

****

MEMORANDUM IN SUPPORT OF REQUEST FOR A CERTIFICATE OF APPEALABILITY FROM THE DENIAL OF HABEAS CORPUS RELIEF AND APPLICATION TO PROCEED IN FORMA PAUPERIS

****

CHESTER BROWN
D.O.C. # 97411
GENERAL DELIVERY
Louisiana State Penitentiary
Angola, Louisiana, 70712

CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that he knows of no other person, associations of persons, firms, partnerships, or corporations, as described in the fourth sentence of *5th Cir. Local Rule 28. 2.1.* other than those listed below which have an interest in the outcome of this particular case:

Chester Brown, Petitioner-Appellant

Darryl Vannoy, Respondent- Appellee

Chester Brown

Chester Brown , Petitioner- Appellant

REQUEST FOR ORAL ARGUMENT

Oral argument is requested, as Chester Brown has not received the opportunity to present these claims, in the form of additional testimony and argument to any court, and in light of the legal complexity of the issues rasied. Oral argument will aid this Court in resolution of these issues. **F R. A. P. 34 (a), 5th Cir. Local Rule 34. 2.**

Chester Brown- Appellant

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MEMORANDUM IN SUPPORT OF REQUEST FOR CERTIFICATE OF APPEALABILITY

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this request for a certificate of appealability and memorandum in support pursuant to *28 U. S. C. 2253.*

STATEMENT OF THE ISSUES

1. **DID THE DISTRICT COURT ERROR WHEN IT DENIED PETITIONER'S CERTIFICATE OF APPEALABILITY?**
2. **DID THE DISTRICT COURT ERROR WHEN IT DENIED PETITIONER'S REQUEST TO STAY AND ABEYANCE THESE PROCEEDINGS?**
3. **DID THE DISTRICT COURT ERROR WHEN IT FAILED TO CONSIDER THE MERITS OF THE CLAIM PRESENTED WHICH IS PREDICATED ON NEWLY DISCOVER FACTS THAT PROVE PETITIONER IS ACTUALLY INNOCENT OF COMMITTING THIS CRIME?**

STATEMENT OF THE CASE

As noted in the original Application for Writ of Habeas Corpus that was filed in the United States District Court for the Eastern District of Louisiana, the procedural history in this case is extremely convoluted. However, petitioner will do his best to described the circumstances which form the bases for petitioner filing a protective petition in the United States District Court asking that Court to stay these proceedings

until state remedies has been exhausted as required before Federal Courts can consider the merits of the claim. Because the District Court denied petitioner's request to stay these proceeding or consider the merits of the claim and denied petitioner certificate of appealability, petitioner pray this Honorable Court will consider the following.

On September 18, 2009, petitioner filed an application for post-conviction relief[1] in the Criminal District Court, Section A, Judge Laurie White presiding. Between September 18th 2009, and December 28, 2010, petitioner wrote a number of letters asking for a status check on the pending post-conviction relief application and filed a Motion for Status Information and/ or ruling on the application for post- conviction relief[2] However, petitioner did not received an answer from any of his letter of inquires or motion that were filed.

Thereafter, petitioner sought Writ of Supervisory from the Court of Appeal, Fourth Circuit, State of Louisiana, asking that court to intervene in this matter by ordering respondent to rule on the pending application for post-conviction relief. On December 28, 2010, the Fourth Circuit Court of Appeal for the State of Louisiana granted Supervisory for the sole purpose of transferring petitioner's application for post-conviction relief to the State District Court with orders to rule on the pending application and petitioner's request for evidentiary hearing.[3]

On January 31, 2011, the trial court order the District Attorney's Office to file any

1 See copy of post-conviction application attached hereto
2 See copy of motion attached hereto
3 See copy of ruling

procedural objections they may have, or answer on the merits pursuant to Louisiana Code of Criminal Procedural Article 927. The court also ordered petitioner to appear via video link in this Court on March 1, 2011 at 10:00 am for the appointment of counsel and to apprise petitioner of the developments in petitioner's case.[4] ON March 11, 2011, the hearing was held and the court reschedule the matter for a hearing and appointment of counsel. This hearing was never held.

On March 26, 2012, petitioner wrote a letter of inquiry to the trial court asking for information concerning the status of his case. In response to the letter of inquiry, the court informed petitioner it was still reviewing the extensive information in this case. Petitioner did not received any further information concerning his case until February 26, 2015, when the trial court issue an order for petitioner to supplement his application with the sworn affidavit of Henry McCoy on or before March 27, 2015. On March 6, 2015, petitioner submitted the supplemental application with the sworn affidavit of Henry McCoy.

A lengthy delayed occurred between petitioner furnishing the sworn affidavit and the court's ruling because the trial court's record was stored off sit and the affidavit that was received from petitioner was filed in the trial court's separate file under this docket number. On May 23, 2017, petitioner wrote another letter of inquiry to the trial court requesting a status check on his application for post-conviction. After receiving this letter of inquiry, the trial court discovered the delay. On July 24, 2017, after considering

4 See copy of ruling

the claim presented in petitioner's post-conviction relief application, the court rule the application present new evidence denying the State's procedural objection and ordering the State to Answer the merits of petitioner's claim.

On August 17, 2019, the State Motion To Vacate Portion of the trial court's July 24, 2017 judgment and Stay these proceedings pending the State's applying for Writs to the higher courts. The State then filed an Application for Writ of Supervisory to the Court of Appeals, Fourth Circuit, State of Louisiana. On September 21, 2017, the Fourth Circuit denied the State's writ and the State then applied for Writ of Certiorari to the Louisiana Supreme Court. On February 18, 2019, in a 4-3 decision, the Louisiana Supreme Court granted the State's Writ which, according to the Motion to Vacate filed by the State in District Court, allowed the State to once again filed procedural objection.

Because of the number of delays in this case, and the State filing a motion to stay these proceedings, petitioner is confuse regarding the time frame in which to seek Federal Review, therefore, on or about April 10, 2019 petitioner filed a protective petition Writ of Habeas Corpus and ask the District Court to stay these proceedings until the trial court lift the Stay that was requested by the trial court in order for these proceedings to continue or the State courts denied petitioner's application for post-conviction relief. The Magistrate gave a report and recommendation that the Application for Writ of Habeas Corpus be denied with prejudice and the Motion to Stay and abey this proceedings be denied. On or about May 28, 2019 petitioner objected to the

Magistrate's report and recommendation.

On June 6th, 2019, the District Court judge adopted the Magistrate's Report and Recommendation and denied petitioner's request for stay and that his federal application for habeas relief be dismissed with prejudice. The District Court also denied a certificate of appealability. Accordingly, this request for Certificate of Appealability and the attached application to proceed in forma pauper is properly filed.

I.

DID THE DISTRICT COURT ERROR WHEN IT DENIED PETITIONER'S CERTIFICATE OF APPEALABILITY?

STANDARD OF REVIEW

The standard for issuing a COA is set forth in 28 U. S. C. Section 2253, which provides that a COA may issue " only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U .S. C., Section 2253 (c)(2). The Supreme Court recently provided guidance on this standard in ***Buck v. Davis, 580 U. S. 137 S. Ct. 759, 197 L. Ed. 2D 1 (2017).*** In Buck, the Supreme Court explained that under Section 2253 (c)(2) the threshold and only question at the COA stage "is whether the application 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. > 580 U. S. at ---- 137 S. Ct. at 773 (quoting Miller- El v. Cockrell 637 U. S. 322, 327, 123 S. Ct. 1029, 1034, 154 L.

Ed.. 2d 931 (2003). When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, the prisoner in order to obtain a COA, still must show both (1) " that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and 2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. ***Slack v. McDaniel, 529 U. S. 473, 484, 120 S. Ct. 1595. 1604. 146 L. ED. 2D 542 (2000).*** " Thus, when a COA request concerns a procedural ruling, the required showing must include both the procedural issue and the constitutional issue. ***Lambrix V., 851 F. 3d at 1159; see also > Slack, 529 U. S. at 484, 120 S. Ct. at 1604; Buck, 580 U.S. at----, 137 S. CT. AT 777.***

ARGUMENT

Under the Antiterrorism and Effective Death Penalty Act, a certificate of appealability (COA) must issue before a habeas petitioner can appeal the district court's refusal to grant the writ. 28 U. S. C. Section 2253 (c)(1)(A). This court will issue a COA upon a "substantial showing of the denial of a constitutional right, > Id. Section 2253 (c)(2). Petitioner will meet this standard if he shows that " reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. > ***Miller- El v. Cockrell, 537 U. S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2D 931 (2003) (internal quotations and citation omitted); see also> Buck v. Davis, --- U. S. 000 137 S. Ct. 759, 773, 197 L. Ed. 2d. 1 (2017).*** If the District Court found that there

was a procedural obstacle to habeas relief, we will likewise grant a COA if " jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. > ***Gonzalez v, Thaler, 565 U.S. 134, 140-41, 132 S. Ct. 641, 181 L. Ed. 2D 619 (2012) (quoting > Slack v. McDaniel, 529 U. S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2D 542 (2000) (internal quotations omitted).*** " Where the petitioner faces the death penalty, any doubts as to whether a COA hold issue must be resolve in the petitioner's favor. > Allen ***v. Stephens, 805 F. 3d 617, 625 (5th Cir. 2015) (quoting > Medellin v. Dretke, 371 F. 3d 270, 275 (5th Cir. 2004).***

*I*n this case, the habeas corpus petition filed in the district court was clearly a protective protection filed by petitioner asking the Federal Court to stay and abey the Federal Habeas proceedings because petitioner was reasonable confuse about whether his state filing would be timely after the number of delays that occurred in this case. ***Pace v. Diuglielmo, 544 U. S. 408, 416, 125 S. Ct. 1807, 161 L. Ed. 2D 669 (2005).***

In requesting a stay, petitioner complied with the three requirements for a stay as established by the United States Supreme Court in **Rhines v. Webder, 544 U. S. at 276, 125 S. Ct. 1528.** One of the requirements contain in Rhines is ***the claim has merit.*** The constitutional violation that is present in this case demonstrate a ,miscarriage of justice has occurred that was discover after petitioner received newly discover evidence which prove he did not committee this crime. However, the only specific issue denied

by the district court was petitioner's request to stay these proceedings. The Magistrate Report and Recommendation nor district court made any assessment of petitioner's claim of newly discover evidence which proves petitioner did not commit this crime. Therefore, in order to demonstrate reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, this Honorable Court must now examine petitioner's underlying constitutional violation which was presented to the district court in the request to stay these proceedings.

The application for post-conviction- relief that was filed in the state court is based on newly discovered evidence that was given to petitioner from Henry McCoy, the State's star witness who testimony was the only evidence that link petitioner to this crime.

A brief summation of the affidavit reveals that riding that down Magazine St. They (other co-defendants that were with him the nigh this crime occurred) spotted petitioner walking and drinking and decided to give (petitioner) a ride home because he lives in the neighborhood. The affidavit states petitioner was very drunk and had no knowledge of what had occurred prior to us picking him up.[5] However, at trial, Mr. McCoy testified before the jury that petitioner was involved in the murder and robbery, alone with the other co- defendants. In his sworn statement dated July 19, 1980, Henry McCoy inform Detective J. C. Milled, Trooper Doug Gremillion, and Trooper Micheal Belar petitioner was involved in the murder/ robbery.

5 See affidavit attached hereto.

After assessing the newly discover evidence in the light must favorable to the prosecution, the affidavit given to petitioner by the state's only witnesses that connect petitioner to this crime is extremely favorable particularly considering there was no other evidence that link petitioner to this crime. The constitutional violation that has occurred in this case is of the worst kind, a fundamental miscarriage of justice has occurred because an innocent man has been convicted for a crime that new evidence reveal he did not commit.

As noted, the district court made no assessment of the claim having merit ; however, petitioner has established through new evidence that it was more likely than not that no reasonable juror would have convicted him in the light of the new evidence. ***Woodfox v. Cain, 609 F. 3d 774, 794 (5th Cir. 2010).*** After considering the newly discover evidence in this case, reasonable jurists would have found the district court assessment of the constitutional claim debatable and wrong. ***Slack, 529 U. s. AT 484, 120 s. Ct. 1595.*** Because petitioner has meet the standard that is required for a COA to be issue, this Honorable Court should grant COA..

II.

DID THE DISTRICT COURT ERROR WHEN IT DENIED PETITIONER'S REQUEST TO STAY AND ABEYANCE THESE PROCEEDINGS:

SUMMARY OF ARGUMENT

The case law concerning what constitutes " good cause" under ***Rhines*** has not been developed in great detail. ***Blake v. Baker,*** 745 F. 3d 977, 980 (9th Cir. 2014). (There is little authority on what constitutes good cause to excuse a petitioner's failure to exhaust.") The Supreme Court has address the issue only once, when it noted a " petitioner reasonable confusion about whether a state filing would be timely will ordinarily constitute' good cause for him to file in Federal Court. ***Pace v. DiGulielmo. 544 U. S. 408, 416, 125 S. ct. 1807, 161 L. Ed. 2D 669 (2005 (citing Rhines, 544 U. S. at 278, 125 S, Ct, 1528).*** The procedural history of this case clearly demonstrate why petitioner was reasonable confused about whether his state post-conviction relief application would be timely and if he was denied in the state courts, he would be able to present his constitutional violation to the Federal Courts. Because of the confusion that is present in this case, reasonable juries would find the district court denial of petitioner's request to stay these proceedings debatable and wrong.

ARGUMENT

The facts of this case reveal on May 14, 2009, Henry McCoy, who was the state's

only witness to involved petitioner in this crime, forward to petitioner a signed and notarize affidavit recanting his testimony against petitioner, The affidavit exonerates petitioner from having any involvement in this offense. There was no other evidence linking petitioner to this crime. Four months later, on September 18, 2009, petitioner filed an application for post-conviction relief in the Criminal District Court for the Parish of Orleans, State of Louisiana. The application was predicated on newly discovered evidence and was submitted to the state court within the two year period for filing new discovered evidence as stated in Louisiana Code of Criminal Procedure Article 930.8 (A)(1).

On January 31, 2011, the Honorable Laurie A. White issue an order to the District Attorney;s Office for the Parish of Orleans to file any objections thay May have, or answer on the merits pursuant to La. C, Cr. P. art 927, within 30 days of the Court's order. The Court further ordered that petitioner appear via video link in the trial court on March 1, 2011, at 10: 00 a. m. for the appointment of counsel and so that this Court may apprise petitioner of the development in this case. On February 25, 2011, petitioner received a copy of the District Attorney's response to petitioner's application for post-conviction relief; wherein, the state contended the application should be dismissed because it is repetitive and untimely pursuant to La. C. Cr. P. 930.8 and LA. c. Cr. P. art. 930.4. Petitioner responded with an opposition to the State's procedural objections, demonstrating the applicability of the newly discovered facts exception of La. C. Cr. P.

art. 930. 8 (A)(1). On March 1, 2011, the hearing was held and the state court re-schedule the matter for hearing and appointment of counsel. The re-schedule hearing was never held and no ruling had been made by the trial court on petitioner's application for post- conviction relief. No further action was taken by the trial court in this matter until petitioner wrote a letter of inquiry[6] to the trial court on May 23, 2017 requesting a status check on pending application for post-conviction relief. After requesting the status check, the delay was discovered by the trial court and after considering the newly discovered evidence that was presented to the trial court, and the time frame in which it was presented, the trial court denied the State's procedural objections on July 24, 2017, The District Attorney then Motion the trial court to Vacate portion of the court;s ruling and request the trial court to stay the proceedings to allow the State to take writs to the Fourth Circuit Court of Appeal. On September 21, 2017, the Fourth Circuit denied the State's writs. The State applied for Supervisory review from the Louisiana Supreme Court. On February 18, 2019, the Louisiana Supreme Court granted the State's writ.

The situation here is confusing, from September 18, 2009, to February 18, 2019, petitioner's application for post-conviction relief was considered properly filed. The trial court's ruling of July 24, 2017, denied the State's procedural objection and ordered the State to answer the merits of petitioner's claim of newly discovered evidence. The State nor the trial court has ever vacated the Stay order nor has petitioner been given an opportunity to demonstrate his application for post-conviction relief is timely filed.

6 See letter on inquiry attach hereto.

Further, because of the number of delays that was constantly occurring in this case, petitioner was reasonable confuse as to being able to present his claim to the Federal Court in a timely manner.

This situation here is more confusing when considering the State nor trial court has lifted the stay order and no ruling has been made by the trial court on petitioner's application for post-conviction relief. The United States Supreme Court in ***Carey v. Saffold, 536 U .S. 214, 219-20, 122 s. Ct. 2134, 153 L. Ed 260 (2002) states : as long as the ordinary state collateral review process is the continuance-- i.e., until the completion of the process. The Supreme Court derived this conclusion from the commie meaning of the term. The dictionary defines pending (when used as an adjective)*** as in continuance or not yet decided. It similarly defines the term (when used as a preposition) as though the period of continuance... of' until the .... completion of, Id, AT 219, 122 S. Ct, 2134.

After reviewing the procedural history of this case, and the exhibits supporting the request to the District Court to Stay and Abey because of the confusion whether petitioner's application for post-conviction relief is timely filed and whether petitioner would have been allow to present the newly discovered evidence to the Federal Court for Review, reasonable juries would have clearly disagree with the district court failure to grant petitioner a stay. This Honorable Court must now correct this error by either granting petitioner's application for Certificate of Appealability or remand this matter

back to the state court's with instruction.

DID THE DISTRICT COURT ERROR WHEN IT FAILED TO CONSIDER THE MERITS OF PETITIONER'S CLAIM

The attached application for post-conviction relief is predicated on newly discovered evidence that was not known to petitioner of his trial counsel. The newly discovered evidence is contain in an affidavit that was given to petitioner by Henry McCoy, the State's star witness who testimony implicated petitioner in this matter.

Henry McCoy's affidavit states: While riding down Magazine St. They (other co-defendant that were with him the night this crime occurred) spotted petitioner walking and drinking and decide to give him a ride home because he lived in the neighborhood. According to Henry McCoy affidavit, petitioner was very drunk and had no knowledge of what had occurred prior to us picking him up this day. [7] However, at trial, Mr. McCoy testified before the jury that petitioner was involved in the murder and robbery, along with other co-defendant's. In his sworn statement dated July 19, 1980, Henry McCoy, before Detective J. C. Miller, Trooper Doug Gremillion, and Trooper Micheal Belar, he (McCoy) states petitioner was involved in the murder and robbery.

7 See affidavit attached hereto

The May 14th, 2009, affidavit submitted by Henry McCoy provides favorable information that demonstrate petitioner is actually innocent of committing this crime. Because the lower courts never reach the merit of this claim, petitioner cannot established whether the lower courts ruling is contrary to or an unreasonable application of Federal Law. Therefore, reasonable juries would disagree with the lower courts assessment of this claim and feel that petitioner should proceed further with this claim.

CONCLUSION

WHEREFORE, petitioner pray this Honorable Court COA and allow petitioner to present this violation to this court. In the alternative, this Honorable Court remand this matter back to the state courts with instruction to entertain and rule on the merits of petitioners claim. Or, after considering the issue before the court, take judicial notice to petitioner being innocence of this crime, and reverse petitioner's conviction and sentence.

Respectfully submitted

Chester Brown

Chester Brown #97411
General Delivery
Louisiana State Penitentiary
Angola, Louisiana, 70712

CERTIFICATE OF SERVICE

I, Chester Brown, state that I have mailed a copy of this Request for Certificate of Appealability and Motion to Proceed in Forma Pauperis to the District Attorney office, New Orleans, La., by placing same in the hands of the unit classification officers this 25 day of MAY 2019.

Chester Brown

Additional material from this filing is available in the Clerk's Office.