

NO.

20-5609

ORIGINAL

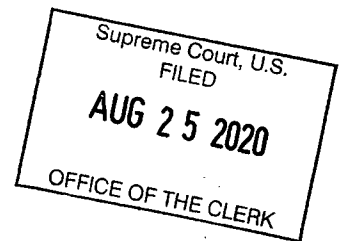
IN THE  
SUPREME COURT OF THE UNITED STATES

IN RE:

GARY WAYNE BARNES SR, PETITIONER

vs.

LORIE DAVIS RESPONDENT



ON PETITION FOR ORIGINAL WRIT OF  
HABEAS CORPUS

Pursuant to Supreme Court Rule 20.2 and 4, in compliance with  
28 U.S.C. §2241 and 2242

THE FIFTH CIRCUIT COURT  
OF APPEALS

PETITIONER'S WRIT OF HABEAS

Gary Wayne Barnes Sr.  
1100 FM 655, Ramsey Unit  
Rosharon, Texas 77583

## QUESTION(S) PRESENTED

can the claim of Actual innocence be reviewed under a petition for HABEAS CORPUS ON PETITION FOR EXTRAORDINARY WRIT pursuant to 28 U.S.C. § 2241 and 2242 pursuant to Rule 20. (a). .

The petitioner was convicted in a state court where the victim of the offense was never asked to make an identification of the petitioner, and newly tested DNA evidence has excluded the petitioner on May 17, 2017, which was filed in the trial court of August 9, 2019.

The petitioner has raised the claim of Actual Innocence where he was sentenced to a term of life where the evidence now excludes the petitioner and the victim has not made an identification of the petitioner which has resulted in a void conviction.

The petitioner has no other avenue to which he can obtain a redress and the Fifth Circuit Court of Appeals has denied the request to file a petition without a review of the facts of the case or a review of the petitioner's original habeas request. In a determination if in fact the petition is a second or successive petition, was previously filed, which was not and only discovered on June 6, 2019 and filed in the clerk's office as "Newly Discovered Evidence" of August 9, 2019..

## 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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## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 5, 2020.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

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

## JURISDICTION

The constitutionality of an Act of congress has ~~drawn~~ into Question in determining the AEDPA's definition of 28 U.S.C. § 2254 and 28 U.S.C. § 2244 pursuant to 28 U.S.C. § 2403 (a) being inadequate and ineffecteive.

Under Article III. of the constitution of the United States 28 U.S.C. § 1251 and the U.S. constitution amendment 11. , a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2242 requesting supervisory control to correct a erroneous ruling made by a panel of the Fifth circurit court of Appesals, panel when there is no appeal , or a rehearing cannot provide adequate relief and the ruling has resulted in a gross injustice.

Issuance by this court of an extraordinary Writ authorized by 28 U.S.C. § 1651 (a) this writ will be in aid of the courts appellant jurisdiction and exceptional ~~circstances~~ warrants the exercise of the courts writ of ~~supervisory~~ powers , discretionary powers as a adequate relief cannot be obtained from any other court.

The constitutionality of the Act of congress is drawn into question in the 1996 AEDPA 's that authorizes liminations, restrections, ordiaance and regulations upon the only court of the nation which has the jurisdiction to review and define the constitutionally of an act enacted by congress.

In a review of the panels dismissal in the specifiation of the stage in the proceedings a petition for a second petition for premission to file a writ in the District court a petition in the first instance raised the method and manner the way in which the petitioner is not entitle to file any petition without a consideration of the facts and the issues presented in the petition.

The panels ruling in the dismissal is one of an exception an assignment of error in the showing of a federal question that is raised in the use of opinions of several circuit courts which had decided facts and issues of law to which the supreme court has not authorized.

The panel has intentionally thrown stones at the door's of the supreme court by interlocutory Appeal Act; that the order involves a controlling Question on the law on which there is a substantial ground for difference of opinions.

The panel has used several panel opinions to refind and sharpen a general principle of Supremes court jurisprudence into a specific legal rule that the supreme court has not announced.

The Fifth circuit panel has canvass circuit decisions to determine a FREE- STANDING claim of ACTUAL INNOCENCE , pursuant to a Miscarriage of justice as a conflict of authotity by a conscience of the court and the ends of justice exception when a infirm constitutionality in considering a wrongfully convictions based on constitutional violations.

There is a exception to the ruling of the panel under 28 U.S.C. § 2254 (e) (2) in the claim of actual innocence , as exception to the preceudural default doctrine under cause and prejudice rule allows petition for writ of habeas corpus on the basis of a constitutional challenge, prior to the 1996 AEDPA's amendment;

The petitioner only needed to show that the claims rest on a new rule of constitutional law , or on the facts and issues of the newly discovered evidence that was not available at the date of the case being heard at the state trial, or the facts that could not have been discovered , or uncovered earlier despite due diligence;



Petitioner has presented evidence , newly presented dated May 17, 2017 clear and convincing evidence that if the constitutional errors had not occurred the petitioner would not have been convicted.

This exception , before 1996 the cause and prejudice rule allows this court to grant relief on the basis of the petition in a free-standing claim of actual innocence when the petitioner raises the challenges of constitutional violations.

The panels opinion presents an unreasonable application is different from an incorrect application in recognizing the foundational principle in the miscarriage of justice exception and the ends of justice exceptions erect a formidable barrier to federal habeas relief on a claim of constitutional actual innocence where the petitioner shows a constitutionally infirm violations of due process of law, as a fundamental set of rights to due process, showing brady material violations; supported by ineffective assistance of trial attorney at trial and on appeals intertwining with claims of prosecutorial misconduct which has rendered the convictions constitutionally void.

The convictions was obtained in violation of the constitution because the state withheld exculpatory evidence prior to the trials and this evidence was not discovered until the files in the newly elected district Attorney has been opened to the filing of the writ of habeas corpus, and to the testing of the newly discovered evidence of May 17, 2017, evidence that was not presented at the dates of the trials or was the evidence discovered, or presented in a prior habeas application;

The panels ruling in the dismissal of the petition is lacking in justification that there is error well understood and comprehended in existing miscarriage of justice exception, and the end of justice exception beyond any possibility for fairminded disagreements.

The petition has shown a prima facie set of facts and issues in the newly discovered evidence which satisfy the requirements in newly discovered evidence and constitutional violations where the petitioner was convicted of an offense where the victim has never made a identification of the petitioner at trial or in any offenses reports.

The petitioner has shown that no reasonable fact finder would have found the petitioner guilty of the offenses in light of the newly discovered evidence that was not available at the dates of the trials.

The panel has denied a review of the application without a consideration of the constitutional violations, presented in the habeas application filed in the court.

The panel has denied the petition without the consideration on a review of the records, or the newly discovered evidence, or that appears of the filing in the courts docket sheets.

The panel has not applied a consideration under 28 U.S.C. § 2244 (b) (3) (C), in moving to the requirements which determines whether the petitioner has followed the avenue of the gatekeeping requirements.

The panel has made a divergence ruling in contradiction in moving pass investigations of the petitioners filings in the application for premission to file in the federal court, to making a determination of the authority of the supreme court set by the AEDPS's limitations and restrictions which makes 28 USC § 2254 and 2244 inadequate and ineffective,

which renders an unreasonable application which has been established in reaching a determination as to the issues does the petition meet the gatekeeping requirements:

The Fifth circuit in accordance with its usual law of the circuit has looked to circuit precedent to ascertain whether it has already held that a Free-Standing claim of actual Innocence is not cognizable under the federal writ of habeas corpus citing the case in Swearingen, ;

The panel may not use this case to refine and sharpen a general principle of the supreme court's jurisprudence into a specific rule that the supreme court has not annocenced.

The panel has convassed the citcuit decision and determined that the rules of the gatekeeping functions need not be reviewed , as a rule that is so widely used prevents the petitioner from filing a petition for a second or successive petition.

This theory is based of the fact that the principle of law is also widely accepted among the federal circuits that it would, if presented to the supreme court the principles would be accepted as correct;

The panel has used circuit precedent to deny relief, without a review of the newly discovered evidence , or a review of the constitutional violations , without a review of the Actual Innocence claims filed in the actual petition. A review of the newly discovered evidence in the showing the evidence excludes Barnes of being the person that committed the offenses and the newly discovered evidence that the finger prints found at the scence of the offenses are that of another person.

In the opinion cited there is probability that the supreme court may not accept the findings as correct, in the concurring opinion the question is raised, a unresolved while expressing considerable doubt that any claim based on actual innocence is constitutionally cognizable.

The panel has ruled out the possibility that the Supreme court may find that the limitations, and the restrictions as applied to the claims of Actual Innocence pursuant to a miscarriage of justice exception, especailly when the factual circumstances are not premitted for a review.

In reviewing the concurring opinion in the case of Swearingen, the Justice Jacques L. Wiener Jr., consistently, repeats the 'mantra that to this date, the supreme court has never expressly recognized a Free Standing Actual Innocence claim, as a basis for Habeas relief.

The panel has uniformly rejected Barnes stand-alone claims without a review of the fact and issues of the records, or even a investigation of the constitutional claims of actual innocences, as a constitutional grounds for prohibiting imposition of a wrongful convictions.

The panel has made a erroneous ruling when there is no appeal, to provide adequate relief and the ruling has resulted in a gross injust. A injust based upon predictions which the suprems court has not reached to which several panel, or several circuit courts has questioned;

The constitutionality of an act of congress is drawn into Question pursuant to 28 U.S.C. § 2403 (a), by the fifth Circuit court of Appeals in the violation of 28 U.S.C. § 451 in a divergence in a statue of a act of congress as 28 U.S.C. § 2254 and 2244 (b) (2) (3) (B) are ineffective and inadequate as not being a consideration in the panels ruling.

An opinion drawn upon decisions made in other similar cases for guidance expressing and exercising a judgment in light of precedent and with awareness of the facts that specific circumstances often hard to predict could warrant special treatment in appropriate cases.

Petitioner cites the case of Coleman V. Thompson, 501 United States 722, 53 111 S. Ct. 2548, distinguishing no preexisting rule of law, or precedent demands a review.

The panel dismissal without a consideration of a independent substantive truly persuasive claim of serious constitutional violations and the deprivation under the due process clause violations where the petition raises constitutional claim of actual innocence raises a gross injustice.

The panel has left open whether a truly persuasive Actual Innocence claim may establish a constitutional violation sufficient to support a constitutional claim of actual innocence under the miscarriage of justice exception.

The panel did not establish a review, there may be a possibility the supreme court might consider a constitutional claim of Actual Innocence claim under the miscarriage of justice, the ends of justice exceptions in a convictions which are constitutionally infirm, in violation of the principles of the due process clause.

In the denial of relief the panel relies on the reasoning that this court has never reviewed A free Standing claim of actual innocence and may find the restrictions and limitations placed on a constitutional claim of actual innocence in violation of the constitution as applied to the exceptions of the miscarriage of justice and the ends of justice exceptions as defined in the very case to which the panel raised in the denial of relief.

There is no sound basis for distinguishing an actual innocence claim especially without a review of the claims, a review of the records in the facts and the issues of the newly discovered evidence to which the petitioner has raised with supporting documents that the testing that excludes the petitioner was not tested and the results delivered on May 17, 2017 and filed in the trial court of July 29 th of 2019. , evidence which could not have been presented in a eariler petition, or at the date of the petitioners trial. The petitioner, further showed that the evidence was not presented upon the records at the date of the trials, that the evidence was withheld in violation of Brady material.

A conviction of actual Innocence which has been porduced in violation of the constitution in violation of laws and treaties of the United States is a void conviction. The petition was entitled to a review in this case where the evidence is withheld, and the victim of the alleged offense is never asked to make an identification of the petitioner.

The panel has not, cannot possible contravened, or reasonably apply clearly established law, , as determined by this court as this court has been attacked by the order of the dissimal in the rejecting a certain type of claim without following to process as set out in 2244 and 2254.

The panel has not applied a consideration under USC § 2244, which provides that an application may be granted only if the court of appeals determines that the application- makes a prima facis showing that the application satisfies the requirments of 28 USC § 2244 (b) (3) (C).

When the Fifth Circuit panel rejects the possibility and held that the claim of actual innocence are not cognizable on federal habeas review, are factors which are contradictions for several different circuit courts, while citing the supreme court has not resolved whether a free-standing claim of actual innocence warrants relief in *Herrera V. Collins*, 508 U.S. 390, 404-405 (1993).

Petitioner Barnes Actual Innocence claims raises an extraordinary case where several constitutional violations has resulted in the wrongful conviction of a person who is innocence, a person convicted in violation of the United States Constitution.

The panel dismissal without proceeding to the proper gatekeeping procedures denies due process in the petitioner having his federal constitutional claims considered on the merits where the petitioner has made an independent substantive truly persuasive claims in the showing of constitutional violations and the deprivation in the constitutionality under the due process clause, and due process of law.

The panel has broken new grounds and imposed a new obligation on the petitioner to establish a constitutional principle to which said panel has no authority with clarity sufficient to satisfy dismissal of the petition.

Petitioners petition was dismissed without entertaining the violations of the federal constitutional claims in the acts of congress under the miscarriage of justice exception, pursuant to the end of justice exception.

The miscarriage of justice exception serves as an additional safeguard against the imprisonment of the innocence person to suffer an unconstitutional wrongful conviction in violation of the United States Constitution.

The supreme court in the case of Trory Davis, on an original petitioner habeas corpus, Justice Stevens, considered serious constitutional concerns that arise to interpret a bar of judicial review of certain actual innocence claims. In stating the congress intended actual innocence claims to have a special statute under the ends of justice and miscarriage of justice exceptions.

It is arguable unconstitutional to the extent it bars relief for a actual innocence person who has established a constitutional based conviction. see Davis 557 U.S. 952.

The court must treat even the most robust showing of actual innocence identically on habeas review. In acknowledging there is a possibility that this court had considered a independent substantive truly persuasive actual innocence claim of actual innocence in reference to constitutional violations, and due process violations as there is a possibility this court will consider the facts of conflict of laws, conflicts of authority in the several different circuit courts panels.

Here, the panel addresses the facts and the issues in a panel. In re; Swearingen 556 F. 3d 344 (1009), in the reasoning that the merits and the issues of the claims need to be reviewed and supports all the petitioners facts and issues in the petitioners allegations filed in the habeas petition.

In the reading of the concurring opinion the supreme court has never expressly recognized actual innocence for habeas review or relief.

The second circuit has noted that the possibility exist that in addition to the obvious Eight Amendments concerns the continued incarceration of a innocence person raises an significant due process questions citing Triestman V. United States 124 F. 3d, 361, 379(2d Cir. 1997)



This court has supported entitlement of constitutional violations in a review of obtaining federal habeas jurisdiction when the convicted state prisoner can show that his state conviction rest upon the violation of the United States constitution ,petitioner may obtain a writ of habeas corpus that requires a new trial , or release when a review of the records supports facts that the convictions are void, and unconstitutional .

The pivotal question here whether the panels non consideration of the misapplication of a miscarriage of justice exception is considered by the panel in the citing of the panel in the case of McQuiggin, as this case also supports the petitioners original filed application .

This panels findings are not on point with a justification , are bases on the panel having no presendent, on a free-standing claim of actual innocence, as the panel did not consider, or review the petitioners constitutional violations in making an exceptional showing.

The exhibits filed in the petition clearly presents the trial courts docket sheets showing hearrings held in the trial court of July 24, 2019 and the newly discovered evidence presented in the office of the clerk on August 9, 2019 and august 23, 2019 , that has been discovered evidence which supports the constitutional violations raised in requesting premission to file this petition.

The ends of justice applies to these circumstances where constitutional violations has resulted in wrongful convictions;

~~The Petitioner shows a miscarriage~~ of justice, which this court has equated With a claim of actual innocence that premits the petitioner to be heard on the merits of the case.

Congress had specified additional requirements in circumstances, such as the court has never applied a claim of actual innocence to a free-standing claims in a trial proceeding riddled by constitutional violations to which the petitioner has established the requirements in the showing of the newly discovered evidence that was discoverable of June 6, 2019 and filed on a motion in the trial court of newly discovered withheld evidence of the office of the clerk on August 9, 2019.

This is clear and convincing evidence of innocence and not just a probability in support of innocence that in a constitutional sense requires an evaluation of the newly discovered evidence and a review of the trial transcripts which are supported by the records that the evidence was withheld at the dates of the petitioners trials.

The petition sets out constitutional violations in the facts and issues that justify supreme court review under Supreme court rule 10 (a) where there is a conflict with several circuit panels in a diverison on a federal Question of law that conflicts with the constitutional provisions, in statutes, liminations and restrictions in the getekeeping requirements of 28 USC §2244 (b) (3) (C) ~~to~~ parallel, but not identical in filing a petition only if the application makes a prima facie showing that satisfies the requirements of the section.

This requires a review of the records and a review of the newly discovered evidence, as a whole, would be sufficient to establish clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty had this shocking evidence was discovered and presented at the date of the petitioners trials. The panel has not considered whether the facts and issues constitutes extraordinary circumstances ☐ sufficient to undermine the conviction,

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article III

Constitutional Amendments IX

28 U.S.C. § 1251

28 U.S.C. § 2241 and 2242

28 U.S.C. § 1651

28 U.S.C. 2403 (a)

28 U.S.C. § 451

28 U.S.C. § 1254 Jurisdiction

\* FUNDAMENTAL MISCARRIAGE OF JUSTICE

\* ACTUAL INNOCENCE

Fifth Amendment

Sixth Amendment

Eighth Amendment

Fourteenth Amendment

Antiterrorist Effective Death Penalty Act

28 U.S.C. § 2254 (d) (1) (e) (2), (3)(B)

28 U.S.C. § 2244 (d) (1)(D)

Supreme Court Rule 20.4 (a)

The proceeding in this case is sufficiently exceptional to warrant utilization of this courts Rule 20. 4 (a), 28 U.S.C. § 2241 and 2242 original habeas review in the case of Byrnes v. Walher, 371 U.S. 937 (1962) .

Petitioner has shown as a matter of law in the constitutional violations in the persentation of the newly discovered evidence this court would have the power to grant relief in light of the gatekeeping requirments in 28 U.S.C. § 2254 (d) (1) and 2244 for the reasons that the panel has moved to a proceedure which makes 2244 and 2254 ineffect-ive and inadequate.

The panel in not applying the requirments of 2254 and that of 2244 leaves open the question whether and to what extent the Antiterrorism and Effective Death penatly Act of 1996 (AEDPA) applies to the petitioners request and application to file a second and sebsequent habeas application for writ of habeas corpus in the District court , when the panels determination in the dismissal of the petition by passes the requirments as set by the standards in the (AEDPA), gate-keeping requirments.

In the panel moving pass the requirments in 2244 and 2254 the panel has failed to make the determination if the petitioners allegations in the raised claims has been adjudicated if the claims resulted in a decision that was contrary to , or involved an unreasonable application of clearly established federal law as determined by the supreme court of the United States pursuant to 28 U.S.C. § 2254 and 2244.

The panel of the Fifth circuit cannot possibly have contravened and unreasonably applied clearly established law, as determined by this court in rejection a type of actual innocence claim that this court has not once accepted as issues that are not cognizable in determination of violations of the United States Constitution.

The panel has ruled out the possibility that this court might find the limitations unconstitutional as applied to actual innocence claims **exception**. This is the possibility that petitioner Barnes has raised in acknowledging the possibility would make § 2244 and 2254 unconstitutional. There is no sound basis for distinguishing an actual innocence claim from any other claim that is alleged to have been produced a wrongful conviction. When the panel here ignore 28 U.S.C. § 2244 and 2254 (d) (1) on the theory that otherwise Barnes's Actual Innocence claims would unconstitutionally go unaddressed, the same possibility would exist for any claim going beyond clearly established federal law.

The existence of the possibility is incompatible with the many cases in which this court has reversed the lower panel for their failure to apply § 2244 and 2254 with no consideration of the constitutional entitlement, citing Knowles v. Mirzayance, 556 U.S. 120 (2009), review in the argument that the constitution requires the federal courts screening of all state convictions for constitutional violations.

The panel has found doubts regarding the constitutionality of § 2244 and 2254 if the facts in raising the notion that the Free-Standing claim of actual innocence is not cognizable in the determination of constitutional violations of due process and ineffective assistance of counsel.

The panel of the Fifth circuit has looked passed , beyond the bare legal principle that might otherwise be controlling to the core of the question whether § 2244 and 2254 , might be applicable to a Free-Standing claim of actual innocence presented in the petitioners newly discovered evidence, newly discovered documents that was withheld and not presented at the dates of the petitioners trials due to violations of due process violations of prosecutorial misconduct and Brady material violations.

Barnes's newly discovered evidence in the petition filed in the fifth circuit shows that had this evidence been produced at the dates of the petitioners jury's trials , said jury's would not have found the petitioner guilty of given him the sentences of life in each of the alleged offenses as the victim of one of the offenses has not made a positive identification of Barnes and the second victim gives testimony of a suggestive nature that she was told to make an identification of the petitioner if the petitioner was in the court room.

In this cases the panel has not analyzed none of the alleged claims or the grounds to which that Barnes is entitled to relief. A review of the claims in comparing the newly discovered evidence with the evidence that was presented at the dates of the trials , as well as admitted into evidence upon the records. None of the evidence was presented to the jury's in the determination of the judgements sentences , or the verdicts in reaching the judgement of guilt in these cases.

There is an argument that the panels ruling in this petition is unconstitutional as the panel has barred this courts review by a divergency by such a review which does not reach the gatekeeping principles set by the principles in § 2244 and 2254.

The petitioner has argued that it is a Federal constitutional violation to have convicted a innocence person when the petitioner can show that the conviction is in violation of the principles of the due process clause of the 14 th , 6 th, 4 th and 8 th amendments of the constitution , that the records support that the petitioner has an exceptional set of circumstances in the showing of a void convictions, as the state in each of the convictions failed to present the evidence , failed to admit the evidence in each of the cases.

The petitioners convictions are void as the records , the facts that the petitioner was deprived of a fair trial . The constitutions forbids the conviction of a person who is actually innocence that has not had a full and fair trial but is later able to convince this court that he is actual innocence , on the constitutional actual innocence claims left open by this court.

It is a federal constitutional violation to convict a actual innocence person, by a clearly designed scheme to convict said person in violation of the United States Constitution. , by a denial of the due process to a fair trial where the petitioner [ ] in-effective assistance of trial attorney [ ] was not in command knowledgeable of the issues of the cases.

In a review of the petition the petitioner has shown a clearly unconstitutional set of proceedings in the presentation of the illegal [ ] conviction of [ ] a person who is actually innocence, to which has been denied a fair review in [ ] filing this petition in the fifth circuit as the petition was required to file (his original application along with the premission to file in formais parpuas, to which none of these documents was a consideration of the panels [ ] dismissal.

The petition meets the requirements of the gatekeeping standards in the showing that a miscarriage of justice has occurred in the conviction of a person who is actually innocent.

The petitioner has met the gatekeeping actual innocence threshold with the presentation of the newly discovered evidence, evidence filed in the office of the Dallas county clerk's office on August 9, 2019, under the offender mail box rule to which was actually placed in the U.S. Mail on July 17, 2019 prior to the hearing in the state court of July 24, 2019 to which the petitioner gave sworn testimony that the evidence containing 64 pages of newly discovered evidence, that was not produced at the date of the trials has been mailed and filed in the clerk's office;

This newly discovered evidence proves that the petitioner is actually innocent of the crimes to which the petitioner has been convicted, as the evidence proves that the evidence samples are not that of the victims to which the petitioner has been convicted of assaulting, and the reasons that the prosecution intentionally withheld this evidence, in the creation of an intentional Brady violation, which is supported by the trial transcripts of two trials.

When the circuit panel moves to bypass the gatekeeping requirements defined in 28 U.S.C. § 2244 and 2254, deprives the petitioner of a full and fair review in the showing of convictions that are in violation of the United States Constitution as an innocent person has been convicted in violation of the petitioner's due process rights to a fair trial.

In a review of the records none of the 64 pages of documents is a part of the records, none of the evidence was presented at the petitioner's two trials.



The panel has not made a consideration if the petitioner has satisfied the requirements of 28 U.S.C. § 2244, or 2254 (b) and has choose to ignore the petitioners claims of federal constitutional violations claims which are squarely raised in the original petition.

The panel has errored in not allowing a review of the facts and issues alleged in the petition as the original petition filed in the request for premission to file this second habeas application are supported by the order of the state court , filed on October 18, 2019 and the courts ruling in the sealing of the evidence on August 6, 2019 and July 29, 2019 in the criminal District court Three.

The court has ordered the very newly discovered evidence "sealed" evidence that has never been admitted or presented in the court and is outside of the jurisdiction of the court. At this same hearring the sealing of the evidence is an abuse of discrection as the evidence was not properly admitted in the court and had this evidence been allowed at the date of the petiutioners trials the out come of the trials, would have been different.

In denying petitioner a fair review the panel has errored in refues- ing to entertain the constitutional violations , constitutional errors without making a review of the petition , without making a review of the records to which the evidence of the two trial are absent of any evidence being admitted, presented upon the trial records. The transcripts of the two trials are absents of the offer of the evidence by the state , where the prosecution<sup>4</sup> informs the jury that he has evidence that connects the petitioner to the charged offenses, but does not offer, does not produce this evidence at the trials and does not admitt said evidence.

### STATEMENT OF THE CASE

The petitioner was convicted in the criminal District court of Dallas County Texas on February 25 and February 27, of 1981 in the offenses of Bruglary of a Habitation , F-81-02518, Aggravated Rapes in file F-8-01105 F-81-01027 and F-80-16530 . The petitioner was convicted in two different trials by two different jury's.

In each of the trials the state presented the other offense as an extraneous offenses. The victim of the first trial was allowed to testify in the second trial , as the victims of the second trial was allowed to testify in the first trial.

The evidence in each of the trials was withheld was not offered or was the evidence admitted upon the records by the use of offense reports evidence collection numbers or was there an authenticity of the evidence no chain of custody of the evidence, or any authorized personnel gave testimony of any evidence in the introduction of the admittance of evidence upon the records.

In each of the cases the prosecution vinformed the jurors that the evidence was at the crime lab being tested and that the evidence connected the petitioner to the charged offenses. This evidence was withheld was not offered or presented at either of the two trials.

The newly discovered evidence now shows that the evidence "excluded" the petitioner as to being the person that committed any of the charged offenses and that the evidence was intentionally withheld.

On May 17, 2017 the results on DNA testing of the evidence shows that the evidence is not the evidence of the victims by a supported chain of custody of the evidence filed in the crime lab on July 4, 1980 in a file

number 306064 a set of evidence to which was different of the evidence to which the court has ordered tested. The evidence that the court has ordered tested has excluded the petitioner in the files of the Texas Department of Public Safety L1D-184098 at Number 4.

The evidence which excludes the petitioner was not presented to the jury, and had this evidence been introduced in a case where the victim has not made a positive identification of the petitioner the results of the trial would have been different.

This newly discovered evidence supports the claim of actual innocence where the evidence excludes the petitioner and the victim has not made an identification of the petitioner,. This evidence is the type of facts that is supported by the ends of justice, in the determination of the miscarriage of justice exception, that requires a review by the panel in review of the requirements of 28 U.S.C. § 2244 and 2254.

In a review of the records no evidence was admitted upon the records or was any of the evidence "identified" by the cause numbers, the offenses report numbers and the jury's is allowed to guess, speculate as to which of the victims the evidence belongs, or to which of the cases to which the evidence pertained to, in the showing of the identification of the evidence by the offenses reports .

In a review of the testing of the evidence not only is the wrong numbers of the evidence tested, but also, the evidence of the two victims of the July 4 , 1980 offenses are filed and tested in the same testing procedures in the single file of L1D-184098, along with the petitioners given sample of the same file at number 1 and the sample of the other case at number 2.

There is no evidence collection numbers , police report numbers or the results of any testing introduced at the dates of the two trials and there is no documenting of the evidence, or the reporting of the evidence as all of the evidence was withheld by the prosecution.

The prosecution intentionally withheld the evidence in each of the two cases and in the case of F-80-16530 testimony was given by a state's witnesses in the lifting of fingerprints, prints that was clearly not the prints of the petitioner , but the prints of an unknown person.

This evidence was offered , but was not admitted upon the records as an exhibit , as the person that initially lifted the evidence is the same person that lifted prints in the case of july 4, 1980, and in the case of December 2, 1980 and testified as if the evidence was of the same offenses, in the case on trial, and in the extraneous offense cases.

The prosecution suppressed this evidence which is now the newly discovered evidence filed in the clerks office on August 9, 2019 and August 23, 2019 in which the clerks docket sheet shows that this evidence was on file prior to the Judges filing of the Fact finding and Conclusions of Law on October 18, 2019, in which the court again does not make a finding concerning the petitioner newly discovered evidence.

This newly discovered evidence is material to the guilt and the punishment being that the victim E.R. did not identify the petitioner at trial or in the original police report see page 32.

The nondiscovery of this evidence was not the results of a lack of due **diligence**, but a failure of the ineffective trial attorney to investigate the victims, in that the victim could not identify the petitioner as the person that committed the offenses and the prosecution, or the trial attorney asked the victim to make an identification.

The newly discovered evidence that was tested on May 17, 2017, was not filed or presented upon the records of the petitioner's two trials as the evidence excludes Barnes as the person the prosecution stated connected Barnes, **to have committed the crimes.**

This newly discovered evidence is material, it was not available at the date of the trials and had the juror's had this information at the date of the trial the outcome of the trial would have been different.

The testing of the evidence did not exist the mere possibility that an item of evidence, undisclosed information would have helped the defense and might have effected the outcome of the trial's as each of evidence documents is separate in each of the victims names and offenses report numbers and filed police report numbers. .

In each of the two trials there is a Doctor, that has examined each of the victims, each has a different file examination number, as the doctor makes notes separately of each of the victims using different evidence collection numbers. These documents was not introduced at the trials, this evidence was withheld and is now an exhibits in the 64 pages of the newly discovered evidence as the findings in each of the reports would have been a factor in the petitioners defense as the evidence in each of the examinations is different in each victim and cannot be tested together in DPS file LLD-184098.

In the Doctor's testimony at trial , consists of a line of questioning of what the victims had told him during the examination , that prior to the assault that the victims had not had a sexual intercourse and that the victims was a virgin.

This testimony turns on the newly discovered evidence, to be a contradiction of the victims testimony as the new testing reports shows that there is a DNA profile of a unknown, unidentified and unexplainable Male DNA profile in the findings . The Doctors reports is a six page finding in each of the victims names all of which has different collection numbers for each of the listed offenses. These reports, Doctors Notes was not offered , presented or admitted in the records of the petitioners trials.

Had the juror's had this newly discovered evidence , unavailable information of the unknown male, the unidentified male and the unexplainable male dna profile the outcome of the trial would have been different as this information contradicts the examinations in the doctors notes , this same newly discovered evidence that the panel of the Fifth circuit shut off to be examined makes the truly persuasive Actual Innocence claim which establishes a constitutional violation sufficient when petitioner raises a due process violation intertwined with Brady material violations and ineffective assistance of trial attorney, prosecutorial misconduct as none of the newly discovered evidence is a part of the actual trial records. **admitted or exhibited.**

When the petitioner presents the 64 pages of documents of the evidence, that is not a part of the records the petitioner makes a prima facie showing of actual innocence as this evidence was withheld at the date of the petitioners trials, and the same has deprived the petitioner of a fundamental fair trial.

There is no chain of custody of the evidence offered or instruction as to how the evidence applies or to which of the offenses, cases that the evidence applies which established a materiality of the evidence in a constitutional sense. This evidence that is newly discovered creates a reasonable doubt that did not otherwise exist, see United States v. Agurs, 427 U.S. as the evidence is exculpatory and material.

In a challenge to the constitutionality of the miscarriage of justice exception, requires a review of the evidence in the facts that the petitioner claims of Actual Innocence in being in custody in violation of the constitution which entitles him to relief.

The petitioner requests that this court look beyond bare legal principle that might otherwise be controlling to the core of the question whether a jury presented with the petitioners newly discovered evidence would probably find petitioner guilty, or sentence the petitioner to the sentence of life in a case where no evidence has been presented and the victim of the offense has not made an identification of the petitioner.

In the newly discovered evidence, the testing of that evidence excludes the petitioner as the DNA report in L1D-184098, at #4 is evidence that creates a doubt, that the petitioner did not commit the offenses.

The petitioner was placed upon trial where there are two victims and each of the offenses requires a set of evidence different of the other offense and the DNA testing has a bearing on the facts and issues in each of the cases as the evidence in one offense cannot support the facts of the other offense.

In the testing of the newly discovered evidence in the trial of F-80-16530, the extraneous offense shows that this evidence does not connect the petitioner to that offense, as the tested sample shows that there was no dna profile obtained in the testing, in a case that the victim testify that occurred over a four hour period.

In this same case the fingerprint expert testify that the prints found at the scene of the offense did not match the print of the petitioner and the prints that was examined was not offered, or admitted in the trial records. The newly discovered evidence expresses considerable doubt and that petitioner can not be the person that committed the offenses.

Had this newly discovered information been available at the trial, to the juror's consideration, the outcome of the trial would have been different.

Despite the fact that the petitioners federal constitutional claims was not reviewed at the state level, or by the panel of the Fifth circuit to assess the reliability of the post conviction newly discovered evidence or a review of the records, as the reliable satisfy the threshold showing in a truly persuasive demonstration of in this case a miscarriage of justice in the constitutional violations.

The fifth circuit panel assumes as a "matter of law, that even if it was persuaded by the petitioner it does not have the power to grant relief.

This case is sufficiently exceptional to warrant utilization of this courts Rule 20.4 (a) 28 U.S.C. § 2241(b) and 2242 of original habeas jurisdiction citing Byrnes v. Walker 371 U.S. 937 (1962)., as the petitioner has no other avenue for relief in the review of constitutional violations.



The petitioner filed a state Habeas corpus in the State trial court on January 4, 2018 which was forwarded to the Texas Court of Criminal Appeals. The court of appeals returned the petition to the trial court to make findings facts and conclusions in the holding of a evidentiary hearing in a review of the evidence in this case.

On July 24, 2019 the hearing was held before a Writ Master, a Mr. John Tatmun where a witness of the Southwest Institute of Forensic Science was call to give testimony concerning the chain of custody and the authenticity of the evidence. This lab personal testimony was that the evidence was not filed in the trial court at the date of the trials and the records shows that the evidence has never left the crime lab as the evidence is on file in a number other than the number of the evidence to which was sent to the DPS lab of testing. (DPS) L1D-184098.

The petitioner was allowed to question the lab personal with the specific question? does the records show that this evidence was delivered to the petitioner trial of Feb. 25 and Feb. 27 , 1981.

The lab employee stated no, that the evidence has never left the lab for any reasons. The petitioner was allowed to take the stand and gave sworn testimony upon the records that the evidence was newly discovered on June 6, 2019 and placed in the U.S. Mail on July 17, 2019 to the office of the Dallas county District clerks office.

The petitioner testified that the evidence contained 64 pages of newly discovered evidence that was withheld at the dates of the petitioners two trials. This was a transcribed proceeding to which the Judge of the criminal district court Three was not aware of as this proceeding was held in the presents of the writ master, a Mr Tatum and to this date said writ masters findings has not been released.

## REASON FOR GRANTING THE PETITION

In light of the panels failure to employ 28 U.S.C. § 2244 and 2254 deprives the petitioner of the controlling principles that the petitioner has established in the requirements of ;

(i) a factual predicate for the claims could not have been discovered previously through the exercise of due diligence, as the evidence was not discovered until June 6, 2019.

(ii) the facts underlying the claims are proven and viewed in a light of the evidence as a whole , would be sufficient to establish by clear and convincing evidence that, but for the violations of constitutional errors, in Due process, Brady material violations, ineffective assistance of counsel at trial and on appeal, prosecutorial misconduct no reasonable fact finder would have found the petitioner guilty in the underlying offenses.

The panel did not address the established two independent " gates" through which a successive petition must pass. 1). a determination in making a prima facie showing that meets the requirements of 2244 (b) (2) that requires a sufficient showing of possible merits to warrant a fuller exploration by the court as defined in Re Morris 328 F. 3d. 739-740 (5 th Cir 2003).

The panel did not order the records of the habeas proceedings , or was the trial records considered as a review of said records with the consideration of the newly discovered evidence the petitioners convictions are void in a constitutional sense.

There is nothing in the records to support the convictions when the prosecution forgets to admit the evidence, forgets to present the evidence in a case where only the statement of the prosecution that evidence connects the petitioner to the charged offenses.

The petitioner request that this court review of the records , review the transcripts of the two trials which are a mockery of justice a proceedings of unbelievable circumstances in the violations of the due process in the petitioners constitutional Right, to which the petitioner has never reached any court for a review, there is no written opinions in these cases in the state or the federal courts.

The petitioner request that this court review the transcripts in the interest of justice, the ends of justice under the miscarriage of justice exception as these records shows an exceptional set of circumstances which warrants this courts jurisdiction to vreview the constitutional violations of a state court convictions without little to no regards for the constitution of the petitioners Due process rights.

Under the miscarriage of justicption the verdict judgements and the sentences in these cases are void and the sentences must be vactated as the convictionns are in violation of the due procedd clause of the 14 th amendment in the withholding of the evidence in violation of Brady V Maryland, 373 U. S. at 87. 83 S. ct. 1194 to which the petitioner has demonstrated the state failed to disclose the evidence , evidence collection numbers, police report numbers doctors examination reports victims examinations test reports in tyhe evidence which was favorable to the petitioner, the evidence is material , that is there is a reasonable probability that had the evidence been disclosed the out come of the trials would have been different. The evidence central to the Brady claim is admissible , as the evidence is that which if disclosed and used effectively

makes the difference between conviction and acquittal, see *United States v. Bagley* , 473 U.S. 667-6676, 105 S. ct. 3375, 87 L. Ed. 2d 481 (1995).

This newly discovered evidence includes exculpatory evidence and impeachment evidence . The three undisclosed lab reports are exculpatory evidence that justify excuse and clear the petitioner from fault , and impeachment evidence that disputes disparages denies and contradicts the testimony of the victims and the statements of the prosecution.

The three lab reports and the doctor's examination notes are exculpatory and constitutes impeachment evidence within the preview of Brady. This newly discovered evidence identifies other potential suspects for the crimes , moreover , subsequent investigation of these allegations in , the discovery of the newly discovered evidence , could have lead to other exculpatory evidence. The lab reports could also be employed as impeachment evidence in response to the testimony of the Doctor, the testimony of the victims and the statements made by the prosecution that the evidence connected the petitioner to the charged offenses,;

Here, the newly discovered evidence clearly shows that the undisclosed lab reports could have been used to discredit the accuracy of the Doctors, testimony in the findings of the examination of each of the victims.

The newly discovered evidence presents a reasonable probability that the out-come of the two trials would have been different , or a different result is accordingly shown when the states evidentiary suppression undermines confidence in the outcome of the trials *Kyles v. Whitley* 514 U.S. 419 434 , 115 S. ct. 1555.

The petitioner contends that he is factually and actually innocent of the charges to which he has been convicted. A claim of actual innocence is cognizable in this habeas proceeding by the two types of actual innocence claims raised in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851. This *Schlup*, type claim is a procedural claim in which the petitioner's claim of innocence does not by itself provide a basis for relief, but is intertwined with "constitutional errors", that has rendered the convictions in the petitioner's two trials constitutionally invalid.

While the petitioner raises procedural claims attacking the convictions of two different trials (i.e. his Brady claims he asserts a *Herrera* Type innocence claim which requires him to show by clear and convincing evidence that no reasonable juror would have convicted the petitioner in light of the new evidence.

While this case differs from many of actual innocence cases in which one relies on a single piece of evidence i.e. DNA evidence, or witnesses multiple pieces of newly discovered evidence presented here including the Brady evidence amounts to affirmative evidence that unquestionably establishes the petitioner's innocence. The newly discovered evidence upon which the petitioner relies is in fact newly discovered, and ~~un-~~ available at the dates of the two trials.

The actual innocence claim relies on the Brady evidence in the three undisclosed lab reports and the resulting investigation in testing evidence in the showing the petitioner was excluded at # 4 in the DPS file of LLD-184098, that requires a dismissal of that charge as innocence as this document in the consideration of the juror the outcome of the trial would have been different, a verdict of not guilty.

In addition, the State emphasized the absence of any other suspects, or theory for the crimes, but such argument is contrary to the evidence as it now exist. To illustrate the newly discovered evidence testing in the DPS report of LID 184098 the report identifies other possible suspects and the source of the previously unknown fingerprint could be considered the person to which committed the offenses.

finally, it cannot be ignored that the petitioner in each of the cases provided a detailed alibi that was corroborated by the trial testimony of the petitioners wife charito Barnes that petitioner was home at the date and hours of the offenses being committed. Although the prosecution attempted to discredit the alibi in raising the issues of the dates and times of when the crimes was committed which reflected the events of the dates, as mrs Barnes testimony was consistant in that petitioner was in fact at home.

When balancing the newly discovered evidence, the newly available evidence, including the Brady evidence, with other exculpatory evidence and the evidence of guilt presented at trial petitioner has shown by clear and convincing evidence that no rational jury would have conviction him in light of the new evidence.

The Petitioner argues that the undisclosed lab reports would have allowed an attack on the states argument that no other suspects or theories for the offenses existed. In its closing argument the state emphasizes there is no other suspects. However with the introduction of the three newly discovered testing reports petitioner could have attacked those statements. He could have pointed to the newly discovered unidentified male Dna profile in the report of LID-184098, and to the number 4, where the petitioner is excluded, .

Petitioner could have developed possible alternate theories for the crimes based on both the victims identification of the person that committed the offences as the withheld police reports filed by each of the victims does not give a description of the person, by physical characteristics which was consistent with the description of Barnes.

The significance of the withheld lab reports, and the withheld police reports becomes even more obvious when considered in the context of the trial records, including the questionable dna testing reports and relevant testimony, the suggestive eyewitness identifications, in the description of the petitioner was not identified prior to the dates of the trials and the in-court is questionable, as one victim states in the records that she was told to make an identification if the petitioner was in the court room.

The second victim, E. Renteria is never asked to make an identification and is the same victim that the newly discovered evidence excludes, the petitioner to have committed the crime.

In review of the newly discovered evidence excluding the petitioner and the victim was unable to make a identification of the petitioner the petitioner has shown by clear and convincing evidence that the petitioner is innocent of the charged offenses.

In review of the evidence, the jury would not have convicted the petitioner where the dna testing has excluded the petitioner, the victim E. Renteria has not identified the petitioner which raises the question by what means does the jury reach a fair verdict as charged in the indictment to which the verdict, judgement and the sentence of life is constitutional under the due process clause. The petitioner is actual innocent of the charged offenses.

The petitioner raises a fundamental Actual Innocence claim pursuant to the miscarriage of justice Exception, in specified additional requirements in establishing the ends of justice.

A panel of the Fifth circuit has erred by barring the petitioner from entering the gateway to the federal court on the basis that he has not shown and alleged constitutional violations in bringing the newly discovered evidence to the courts attention.

In applying the fundamental miscarriage of justice exception which the supreme court has equated with a claim of actual innocence, it has permitted some claims to be heard on the issues and facts on merits which would have been barred by procedural default, as a violation of the successive petition rule.

The petitioner has presented a strong claim of actual innocence with supporting evidence. The petitioner raised the case in Schlup v. Delo, and presented constitutional violations. Petitioner has established the showing required by the case in McQuiggins, to which the panel has used in denying relief, which is a contradiction as the panel cites the proper cases, but makes an unreasonable application as to how it is applied to the petitioner.

Under Schlup v. Delo, held that certain exceptional cases involving a compelling claim of actual innocence, the habeas corpus court has to consider all of the evidence, old and new, incriminating and exculpatory, without regard whether it would necessarily be admitted under the rules of admissibility.

The panel failed to make a determination on the basis of the total

records.



The petitioner has been denied the gateway stage to determine and to demonstrate that more likely, than not in light of the new evidence on reasonable juror would have found the petitioner guilty of the offenses, beyond a reasonable doubt , and has removed the double negative that more likely than not any reasonable juror would have reasonable doubt. The supreme court in the case of House v. Bell 547 U.S. 518, in addressing an issues of the Free Standing Actual Innocence claims, expressed the view that the question is not whether the petitioner was prejudiced at his trial because the jurors was not aware of the new evidence , but whether all of the evidence , considered together proved that the petitioner was innocence, so that no reasonable juror's who was aware of all of the evidence would vote to convict him.

When considering all of the evidence and giving due regards to the newly discovered evidence it is probable that no reasonable juror would have voted to convict the petitioner.

The panel did not permit a review with an assurance that the trials was untainted by federal constitutional errors, hence, a review of the merits of the petitioners constitutional claims which are justified, in the presentation of the newly discovered evidence.

The petitioner requests that this court to answer the open question and hold that a Free-Standing- Actual innocence claim are possible and that the petitioner has established one , as the petitioner has satisfied, in the showing of the violations of constitutional errors and constitutional violations which are supported by newly discovered evidence which was not presented at the trials and was not available for the consideration of the juror's.

In the case of Herrera v. Collins 506 U.S. 390, 113 S. Ct. 853 this court described the threshold for any hypothetical freestanding innocence claim as extraordinarily high the sequence of the courts decision in Herrera and Schlup leaving unresolved the status of unresolved freestanding claims and then establishing the free-standing gateway standard. In requiring that Herrera required more convincing proof of innocence than that of Schlup required.

In this petition the petitioner has developed new evidence that goes beyond the standards but has not been allowed a consideration of a review in reaching a standard of review in a non-justified dismissal by the reviewing panel.

The petitioner has made the stringent showing required by the actual innocence exception his federal habeas petitioner should be allowed to proceed in the showing that he is actual innocence.

In the case of Murray v. Carrier, 477 U.S. 478, 495, 106 S. Ct. 2639 this court ruled that the petitioner asserting Actual Innocence as a gateway to default claims must establish that in light of the evidence it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt, as the newly discovered evidence, newly reliable evidence which was not presented, offered or presented at the trials.

In a direct contradiction of the testimony of the doctor concerning the examination of each of the victims in the doctors notes, Dna testing has established that petitioner was not connected to any of the charged offenses, and now presents that petitioner was excluded in one case and shows that there is a unidentified male dna profile in the other case to which the victim told the doctor in the examination that she had

never had a sexual intercourse raises reasonable doubt as the unidentified male dna profile can only be the profile of the actual person that committed the assaults.

This newly discovered evidence supports the petitioners actual innocence claims that due to the constitutional violations in the Brady material withholding of the evidence , no reasonably jurors would have convicted the petitioner.

This newly discovered evidence shows that the prosecution intentionally created these Brady violations as the evidence was withheld in two different trials, in the use of "Extraneous Offenses" the presentation of the testimony of the victims in the first trial testify in the second trial, and the victims of the second trial testified in the first trial in which the prosecution spoke to the evidence without giving evidence collection numbers or defining how, or to which of the cases , offenses the evidence applied and to which of the victims.

In the newly discovered evidence it is now discovered that the evidence was withheld in the fact that it has never been determined what evidence applies to what victim. In the Testing of the evidence in the DPS Texas Department of Public Safety file number LLD-184098, the evidence of the two victims E. Renteria, and the evidence of Y. Oviedo, are submitted in the same file for testing , along with the sample of the petitioner.

These are the files that the Judge has ordered Sealed, the very evidence to which the petitioner has newly discovered in the states habeas petition.

The petitioners convictions are void under the united States constitution as a violation of the due process as the petitioner has been denied a fundamental fair trials where a innocent person has been convicted.

The petitioner points to the case in *McQuiggins v Perkins* that was cited by the panel in the denial of his application, a case in which the supreme court has held that a claim of innocence if proven is a gateway by which the petitioner can raise his actual innocence claims when the petitioner shows that his constitutional rights have been violated in showing ineffective assistance of counsel, prosecutorial misconduct, Brady material violations, due process violations in the denial of a full and fair trial. *Berger v. U.S.* 295 U.S. 78-88

The panel erred in barring the petition from entering the gateway by using a divergent opinion as the petitioner has shown diligence in bringing newly discovered evidence to the court, both in the state court and in the petition in the fifth circuit. The Claims of Actual innocence is raised in a constitutional sense in the showing of serious due process violations to which raises the miscarriage of justice exception. *McQuiggins*, carved out an Actual innocence exception to the AEDPA statute of limitation that stands on its own separate and apart from the exception based on tolling. The difference between the two is that the *McQuiggins* exception does not require a diligence showing but does require Actual Innocence.

In the filing of the petitioner habeas petition in the state court it was not denied for violating a state procedures rule, there was no state procedural default.

*McQuiggins*, allows the petition to be heard in the circuit court when the petition, here shows a strong claim of Actual Innocence, alleged with separate claims of prejudicial errors arising from violations of the constitution.

The petitioner raised ineffective assistance of counselor a constitutional violation under the Sixth Amendment, along with the Brady material violations in the withholding of the evidence and said attorneys failure to investigate the evidence prior to the trials is support of the claims of actual innocence, evidence that was not obtained and presented at trial by counsel. **Strickland v. Washington supra;**

The newly discovered evidence sufficiently compelling meets the actual innocence standards which was necessarily so vital to the defense that it should have been located and introduced **at the petitioners two trials where the same attorney in the attorney of records.** Hence, attorney failure to do so is ineffective assistance in supporting the claims of actual innocence based on newly discovered evidence pursuant to the case in McQuiggins, a -showing that the evidence was withheld in the petitioners **two trials showing a pattern** of the attorney's inability to having a command of the facts and issues of the proceedings.

The petitioner has shown the exceptional circumstances which are supported in the requirement of the McQuiggins, requirements which are supported in the actual court documents as the state presented extraneous offenses in each of the two trials and in each of the two trials the attorney is on the records questioning the victims asking ~~EACH~~ of the victims **"we have never met"**.

This question leads up to the theories that the attorney has not investigated the victims prior to the two trials and does not have the knowledge that the victims have never made an identification of the petitioner or has the investigation of the evidence been reviewed.



The petitioner cited the case in United States v. Cronin 466 U.S. 648 as here the petitioner was denied the constitutional right to effective assistance of counsel at trial and on appeals in the two cases and two trials as the same attorney was the attorney of records in all of the proceedings.

A review of the records in these cases leads to the questions whether the constitutional rights to effective assistance of counsel as defined in the case of Strickland v Washington was violated and whether the verdicts judgements and sentences are constitutional infirmed. , in setting aside the verdicts which was contrary to and involved an unreasonable application of clearly established federal law if after carefully weighting all of the reason for accepting the many constitutional violations in which said attorney helpful in the violation of the petitioner's constitutional rights in the scheme of two trials.

Petitioner was denied his guaranteed constitutional rights to effective assistance of counsel in the demonstration of a reasonable probability that the results of the trials would have been different in the newly discovered evidence containing the three lab reports in each of the victims names, , the three different doctors examination reports, and the three biological specimens reports in each of the victims names and the offense numbers related to the evidence collection numbers.

In each of the two trials the state illegally suppressed and withheld the evidence and the chain of custody and authenticity of the evidence without the petitioner's attorney making an objections.

These documents are now in the 64 pages of newly discovered evidence to which the petitioner makes these allegations of the miscarriage of justice in the showing of constitutional violations pursuant to the ends of justice exception.

I Gary Wayne Barnes Sr, declare under the penalty of perjury that  
the above and foregoing is true and correct pursuant to 28 U.S.C. § 1746;

signed on this the 21, day of July 2020

### CONCLUSION

The petition for a writ of ~~certiorari~~ should be granted.

HABEAS CORPUS pursuant to 28 U.S.C. §2241 and 2242

in a showing that the petitioner is Actually Innocence, where the victim  
has not made an identification of the petitioner and all evidence is withheld;

Respectfully submitted,

Gary Wayne Barnes Sr,

Gary Wayne Barnes Sr. #318814  
1100 FM 655, Ramsey Unit  
Rosharon, Texas 77583

Date: \_\_\_\_\_

July 22, 2020

Refiled Aug 10, 2020





STEVEN C. McCRAW  
DIRECTOR  
DAVID O. BAKER  
ROBERT J. BODISCH, SR.  
DEPUTY DIRECTORS

# TEXAS DEPARTMENT OF PUBLIC SAFETY

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COMMISSION  
STEVEN P. MACH, CHAIR  
A. CYNTHIA LEON  
MANNY FLORES  
RANDY WATSON

**Laboratory Case Number: L1D-184098**

## YSTR Laboratory Report

Issue Date: May 12, 2017

Anna Kubalak  
Dallas County District Attorney's Office  
133 N Riverfront Blvd  
Dallas, TX 75207

**Agency Case Information:** Dallas County District Attorney's Office

**Additional Agency Information:** Dallas Co. Appellate Division - F8101027

**Offense Information:** Sexual Assault - 7/4/1980 - Dallas County

**Suspect(s):** BARNES, GARY WAYNE

**Victim(s):** O [REDACTED], Y [REDACTED]  
R [REDACTED], E [REDACTED]  
R [REDACTED], J [REDACTED]

### Submission Information:

- 1 - 9x12 Yellow Envelope on March 08, 2009 by James Hammond
- 3 - 6x9 White Envelope on February 20, 2009 by James Hammond

**Requested Analysis:** Perform forensic Y-STR DNA analysis.

Perform post-conviction Y-STR DNA testing pursuant to Cause No. F81-01027-J and F81-01105-J of Criminal District Court Number 3 of Dallas County, Texas. Please refer to the Serology/DNA report dated May 13, 2009 and the concurrent DNA Laboratory Report and Minifiler Laboratory Report.

### Evidence Description, Results of Analysis and Interpretation:

The DNA isolated was analyzed using Y-STR (Short Tandem Repeat) Polymerase Chain Reaction (PCR) analysis. The following loci were examined: DYS456, DYS389I, DYS390, DYS389II, DYS458, DYS19, DYS385 a/b, DYS393, DYS391, DYS439, DYS635, DYS392, YGATA H4, DYS437, DYS438, and DYS448.

#### 1 : 9x12 Yellow Envelope

The partial Y-STR profile from the sperm fraction of the vaginal smear slide (3-2) is consistent with the Y-STR profile of Gary Barnes. Gary Barnes cannot be excluded as the contributor of the male DNA profile at the following loci: DYS389I, DYS389II, DYS19, DYS391, DYS437, DYS390, DYS439, DYS392, DYS393, DYS458, DYS385 a/b, DYS456, and Y GATA H4. At these loci, the selected profile is found in 0 of 28,442 total individuals within the database. In addition, any paternally-related male relatives of Gary Barnes cannot be excluded as being the contributor of this male DNA profile.

No Y-STR profiles were obtained from the epithelial cell fraction of the vaginal smear slide (3-2) or the sperm and epithelial cell fractions of the vaginal smear slide (4).

#### 3 : 6x9 White Envelope

The Y-STR profile from Gary Barnes was used for comparison.

ACCREDITED AS AN ASCLD/LAB International FORENSIC SCIENCE TESTING LABORATORY UNDER ISO/IEC 17025:2005

TXDPS 04.03.17



COURTESY · SERVICE · PROTECTION

**Investigative Leads and Requirements for Further Analysis:**

The Y-STR profile obtained from the buccal swab from Gary Barnes has been entered into the Combined DNA Index System (CODIS).

**Disposition:**

Remaining DNA extracts of the items tested will continue to be retained frozen to preserve the biological constituents.

**This report has been electronically prepared and approved by:**

Kristy Link  
Forensic Scientist IV  
Texas DPS Garland Crime Laboratory

*This laboratory analysis report contains conclusions, opinions, and interpretations based on and supported by data obtained from using appropriate and validated scientific methods and procedures. The laboratory's current methods and procedures are available online at <http://www.txdps.state.tx.us/CrimeLaboratory/Pubs.htm>.*

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*In addition to this report, the lab maintains a complete case record which may be discoverable under Article 39.14 of the Texas Code of Criminal Procedure.*

**Declaration Under Penalty Of Perjury**

If you are incarcerated, on what date did you place this petition in the prison mail system:

August 10, 2020

I **Gary Wayne Barnes Sr.**,

I declare under penalty of perjury that I am the petitioner, I have read this petition or had it read to me, and the information in this petition is true and correct. I understand that a false statement of a material fact may serve as the basis for prosecution for perjury.

GW B

Date: Aug 10, 2020

Gary Wayne Barnes Sr.  
*Signature of Petitioner*

Gary Wayne Barnes Sr.

TDCJ-ID 318814

1100 FM 655, Ramsey

Rosharon, Texas 77583

*Signature of Attorney or other authorized person, if any*

Pro -Se petition

8/10/20