No. 20-7093

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Noel Christopher Turner — PETITIONER
(Your Name)

vs.

Bobby Lumpkin, Director of TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals - Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Noel Christopher Turner #1861086
(Your Name)

1400 FM 3452
(Address)

Palestine, Texas 75803
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Are the lower Courts misinterpreting and applying the United States Supreme Courts decision in McQuiggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924, ____ L.Ed. 2d ___(2013)?

2. Has the lower courts misapplied the "Equitable Tolling" standards in these cases? Are they perhaps setting an impossible to meet standard for Equitable Tolling despite this Court's various holdings such as in Holland v. Florida, 560 U.S. 631, 645 (2010) and under 28 U.S.C. §2244(d)(1)(D)?

3. Was Turner inadvertently denied access to the "gateway" of Actual Innocence as set forth by the U.S. Supreme Court in: Schlup v. Delo, 115 S.Ct. 851 (1995); Herrera v. Collings, 506 U.S. 390 (1993); House v. Bell, 547 U.S. 518 (2006); and McQuiggin v. Perkins, 133 S.Ct. 1924 (2013)? Is the courts adding additional barriers to these holdings?

4. Did Turner reach and prove the constitutional error of Ineffective Assistance of Counsel in these cases?

LIST OF PARTIES

[X] 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:

RELATED CASES

- State v. Turner, No. 062316, 397th District Court of Grayson County, Texas Sentenced March 25, 2013
- State v. Turner, No. 062317, 397th District Court of Grayson County, Texas Sentenced March 25, 2013
- State v. Turner, No. 062343, 397th District Court of Grayson County, Texas Sentenced March 25, 2013
- Turner v. Director of TDCJ, WR 86,301-01, Texas Court of Criminal Appeals Judgment entered on February 8, 2017.
- Turner v. Director of TDCJ, WR 86,301-02, Texas Court of Criminal Appeals Judgment entered on February 8, 2017.
- Turner v. Director of TDCJ, WR 86, 301-03, Texas Court of Criminal Appeals Judgment entered on February 8, 2017.
- Turner v. Director of TDCJ, 4:17-CV-326 (CONSOLIDATED WITH 4:17-CV-327 & 4:17-CV-328), U.S. District Court, Eastern District of Texas. Judgment entered on July 8, 2019.
- Turner v. Director of TDCJ, No. 19-40696, U.S. Court of Appeals, Fifth Circuit. Judgment entered on September 8, 2020; Reconsideration judgment enteredOctober 7, 2020.

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STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts**:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was September 8, 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).

[X] A timely petition for reconsideration was denied by the United States Court of Appeals on the following date: October 7, 2020, a copy of the order denying reconsideration appears at Appendix B.

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION 5th AMENDMENT: No person shall be held to answer for a capital, or other wise infamous crime; unless on a presentment or indictment of a Grand Jury; execpt in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twic put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, libeerty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION 6th AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, whichdistrict shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtainging witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONSTITUTION 14th AMENDMENT SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of th State wherein they reside. No State shall make or enfoce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any peson within its jurisdiction the equalprotection of the laws.

Antiterrorism & Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C.§2244(d), provides in part that:

> (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State Action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supremem Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to case on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The tiem during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Turner is challenging three convictions from the 397th District Court of Grayson County, Texas. On Octover 10, 2012 Turner was indicted for: 1 Count of Credit Card or Debit Card Abuse, a State Jail Felony (Cause #062317), and 1 Count of Sexual Assault Child, a Second Degree Felony (Cause #062316). Then on October 24, 2012, Turner was indicted for 1 Count Attempt to Commit Arson, a Third Degree Felony and 1 Count of Conspiracy to Commit Arson, a Third Degree Felony (Cause #062343). There were NO enhancements within any of these indictments. On March 25, 2013. The State refused/dismissed the 1 Count of Attempt to Commit Arson. Turner then entered the following Plea Agreement in writing: Credit Card Abuse - State Jail Felony, Plead Guilty, sentended to 1 year State Jail; Sexual Assault, Second Degree Felony, Entered an "ALFORD PLEA", sentenced to 5 years TDCJ; Conspiracy To Commit Arson, Second Degree Felony, Plead Guilty BUT was sentenced to as a First Degree Felony (with additional enhancements) and sentenced to 28 years TDCJ. All sentences were to run concurrently.

Turner did not appeal the convictions.

Turner filed one writ of habeas corpus in State Court (WR,86,301-01: Sexual Assault) on Septermber 15, 2016, and two other writs of habeas corpus in State Court (WR:86, 301-02: Credit Card Abuse & WR: 86, 301-03: Conspiracey to Commit Arson) on September 20, 2016. He argued: 1) Denied Counsel During Preliminary Hearing; 2) Search Warrants Unconstitutional; 3) Denied Counsel During Hearing; 4) Denied the Effective Assistance of Counsel; 5) Actual Innocent; 6) Failure to Disclose Evidence; 7) Applicants's Plea Involuntary - Applicant/ Factually Innocent; 8) Range of Punishment Exceed the Statutory Maximum; and 9) Unconstitutional Enhancement of Sentence. On February 8, 2017 the Texas Court of Criminal Appeals dismissed the application regarding the Credit Card or Debit Card Abuse conviction for their reasoning that it had been discarged.

On the same day, the remaining two applications were denied without written order on finding of the trial court without a hearing.

Turner then filed three writs of habeas corpus in the United States District court, Easten District of Texas on May 2, 2017 (4:17-CV-326 - Credit Card Abuse; 4:17-CV-327 - Sexual Assault; & 4:17-CV-328 - Conspiracy to Commit Arson). Then on May 29, 2017 Turner was granted to proceed informa pauperis in these instant cases. Turner presented the same nine (9) Grounds/Issues as he did in his Artical 11.07 in the State habeas corpus's. (See enumerated list of these on previous page). On October 17, 2018 these three writs of habeas corpus were consolidated under 4:17-CV-326, as all cases involved Grayson County convictions, was sentenced in each on May 23, 2013. The cases have common questions of law and fact, thus consolidation would avoid unnecessary duplication of effor, cost and delay. On July 8, 2019 Final Judgment was rendered and it was ordered that the petitions for a writ of habeas corpus are dismissed with prejudice as time-barred.

On July 15, 2019 Turner filed his Notice of Filing a Petition for a Certificate Of Appealability [COA] with the United States Court of Appeals, Fifth Circuit, No. 19-40696. This notice was timely filed. On August 29, 2019 Turner filded for a thirty (30) day Extention to file his petition for a COA, which the court granted to and including October 30, 2019. On October 16, 2019 Turner filded his Motion for Petition for COA with Brief in Support; with Exhibits; presenting: ISSUE NO.1: Does Turner's Pleas prevent him from filing an "Actual Innocence" claim? ISSUE NO.2: Does Turner qualify for "Equitable Tolling" under 28 U.S.C §2244(d)(1)(D)? ISSUE NO.3: Does Turner meet the "Actual Innocence" gateway, which is never "Time-barred", under Schlup v. Delo, 115 S.Ct. 851 (1995)? ISSUE NO. 4: Is the Constitutional error of Ineffective Assistance of Counsel proven in these cases? **(a)** Failing to Investigate; **(b)** Alibi Defense; **(c)** Failing to secure Discovery; & (d) Failing to file fundemental motions.

On September 8, 2020 the U.S. Court of Appeals - Fifth Circuity entered judgment denying Turner's request for a COA. The court said that Turner did not ake the requisit showing that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a Constitutional Right and that jurist of reason would find it debatable whether the discrtict court was correct in its procedural ruling. On September 14, 2020 Turner filed a Motion for leave for extention of time to file a petition for Rehearing. This was denied on September 18, 2020 as Turner was informed that a panel re rehearing of an administrative order is not allowed. On September 23, 2020 Turner filed a Motion for Extention of Time in order to file a proper motion for Reconsideration.On September 23, 2020 Turner filed his Motion for Reconsideration, presenting: REASON NO. 1 - This Honorable Court misapplied the facts of this case to U.S. Supreme Court's standard set forth in Herrera v. Collins, 506 U.S. 390 (1993); REASON NO. 2 - This Honorable court misapplied the facts of this case to the U.S. Supreme Court's standard of review set forth in Schlup v. Delo,513 U.S. 298 (1995); REASON NO. 3 - This Honorable court misinterpreted the U.S. SUpreme Court's decision in McQuiggin v. Perkins, 133 S.Ct. 1924 (2013). On October 7, 2020 the U.S. Court of Appeals - Fifth Circuit granted to hear my motion for reconsideration and then ordered the motion , for reconsideration is denied.

Turner now files a petition for writ of certiorari requesting to proceed in forma pauperis.

REASONS FOR GRANTING THE PETITION

QUESTION 1 -Are the lower Courts misinterpreting and applying the United States Supreme Courts decision in McQuiggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924, ___L.Ed. 2d ___.(2013)?

In the U.S. District Court, Easten District of Texas, Sherman Division's ORDER of DISMISSAL, it states:

> Furthermore, as the Magistrate Judge explained [Appendix D, p.6, lines 1-23] courts have been unwilling to allow prisoners to involke McQuiggin after pleading guilty..." [Appendix C, lines 19-23]

As this Court has stated,"... 94% of state convictiona are results of guilty pleas". Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376, ___ L.Ed.2d ___(2012). To allow the mininterpretation and application of McQuiggin would close the Courthouse doors to the 94% of State convictions. How many, had plead quilty, only to later prove their actual innocence? While I do not have the actual number, we know that it is many - to close these doors due to an involuntary plea would be a grave injustice. Mr. Brandon L. Garrett, wrote: Over the past two decades, scholars, social scienctist, and writers have identified at least 250 cases in which they determinied that people likely falsely confessed to crimes. New case are regularly identified." The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1060 (2010). To allow this misapplication of McQuiggin to continue would be a level of abuse of discretion that occurs when a district court "commits a clear error at judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." King v. Harwood, 852, F.3d 586, 579 (6th Cir 2017) (quoting Info-Hold Inc v. Sound Merch., INC. ,538 F.3d 448, 454 (6th Cir 2008).

Besides, in McQuiggin , the subject of pleading guility - voluntary or involuntary - is never mentioned or discussed. It in fact, "applied the miscarriage of justice exception to overcome various procedural defalts. These include "sucessive" petitions asserting previously rejected claims,"abusive" petitions asserting in a second petition claims that could have been raised

in a first petition, failure to develop facts in state court, and failure to observe state procedural rules,including filing deadlines. McQuiggin v. Perkins, 569 U.S. 383, ___, 133 S.Ct. 1924, 1031, ___ L.Ed 2d ___(2013) (citations omitted).

Besides, in the case of Sexual Assault, Turner entered an "Alford Plea", which, "A defendant entering an Alford plea pleads guilt and consents to the imposition of a sentence while still proclaiming his or her innocence of the charged offense. Davis v. Hall,375 F.3d 703, 706 n.2 (8th Cir 2004); See North Carolina v. Alford,400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

In Hill. v Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985), when the Court stated that:

> The long standing test for determining the validity of a guilty pleas is "whetern the plea represents a voluntary and intelligent choice amoun the alternative course of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S.CT. 160, 164, 27 L.Ed.2d 162 (1970); See Boykin v Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969); Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.ED.2d 473 (1962)."..... "Where as here, a defendantis represented by cousnel during the plea process and enters his plea upon the avise of counsel, the voluntariness of the plea depends on whenter counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'". McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). As we explained in Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), "a defendant who pleads guility upon the advise of consel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advise he recieved from counsel was not within the s standards set forth in McMann, Id. at 267, 93 S.Ct. at 1608. Our concern in McMann v. Richardson, with the quality of Counsel's performance in advising a defendant whenter to plead quility stemmed from the more general principle that all defendants facing felony charges are entitled to the effective assistance of competent counsel." 397 U.S., at 771, and n. 14, 90 S.Ct. at 1449, and n.14;

In all three of these cases, Turner had the same court appointed attorney, Mr. Garland Cardwell ("Cardwell"). Cardwell refused to file for Discovery in ANY of these cases, he claimed it as not necessary due to the District Attornys' Offices "Open File Policy", which in its own accord, fals under Carswells' failing to be an advocate in the fundamental areas in these cases. See Appendix F, pp. 2-10When Turner requested they obtain an Investigator to pursue Turner's alibies, obtain documents, etc. Turner was repeateldy told by Cardwell that we would

get one "after we pick a jury".

Turner even requested Cardwell to obtain an email sent by the alleged victim's parent to the Detecive that pin-pointed an exact date and time - this would be exonerating ["Brady Material"] but this never occured. Turner recieved a letter from Carswll (see Appendix F, p39) stating;

> Mr. Smith has also agreed to provide me.... as well as a copy of the email you mentioned from Steve Oliver to Officer Cox, which email is not actually part of the discovery, but Mr. Smith indicated that he would provide a copy to me if he was able to obrain a copy from Officer Cox."

Yet this never happened.

Mr. Carsell would not discuss or investigate my alibi (See Appendix F p. 37) which was even provided by my wife, Amy Turner ("AMY") in writing. Cardwell even sent me a copy of her letter (See Appendix F, p.35) while I was in the countyjail beofre my "conviction" [see last page of his letter]; despite Cardwell's claim in a sworn affidavit to my State habeas corpus (11.07), that I did not hav any alibi. Cardwell's sworn affidavit was not in fact truthfull.

As this Honorable Court can see by reading my Petition for a Certificate Of Appealability ("COA"), I have shown this and argued this but can not get past the Time-bar. In all three cases I felt that I could not prevail with the attorney they assigned me and was told that to attempt to rid my self of Mr. Cardwell, my next attorney would be worse. I felt helpless and had no where to turn. So, Turner's pleas were not entered volunntarily - but was out of hopelessness by the inducements and threats towards Amy by Mr. Smith (ADA) and the misrepresentation of Cardwell. Whey else wouls Turner do a plea to a 3rd Degree Indictment for Conspiracy To Commit Arson (See Appendix E, p. 13 & 40) for a sentence imposed with NO enhancement but recieved 28 years for a 1st Degree felony. He simply would NOT. As in the following court case that states:

> Innocent people may plead guilty, for various reasons. An innocent person may want to take advantage of a discounted sentence in a plea bargain, rahter than gamble on a far greater sentence if a mistaken verdict is returned; or a person may not know what he is admitting and accept his attorney's advice that a guilty plea is prudent. Or a peson may be under some pressure to accept responsiblity for something he did not do, in order to protect

someone else, whom he loves or fears, United States v. Timbana, 222 F.3d 688, 718 (9th Cir 2000).

If it had not been for the lack of advocacy, thus the ineffective assistance of counsel, Turner would not have entered into a plea agreement of ANY kind with these cases. As stated in Ex parte Moussazada, 361 S.W. 3d 684, 690-91 (Tex. Crim. App 2012) "On a claim of invboluntary plea, the standard for the analysis of harm under Strickland protocal as expressed in these cases may be generally as 'but for the erroneous advise of counsel, the applicant would not have plead guility."'. This is precisely the case here with Turenr. "A pleas of guility based upon such misinformation is involutary." Cardenas v. State, 960 S.W.2d 941, 943 (Tex.App.Texarkana 1998).

> In the McQuiggin Court, they stated:
> The miscarriage of justice exeption, we underscore, applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have conviceted.'".McQuiggin, 133 S.Ct. at 1933 (alteration in origianl)(emphasis added)(quoting Schlup,[v. Delo], 513 U.S.at 329)

Thus, it is easy to see that to allow the misinterpretation adn application of McQuiggin can and will lead to a grave injustice. I humbly submit to this Honorable Court to clarify and to give guidance on this ruling to the Justice System of our great courts.

In McQuiggin Tthe case concerned the "actual innocence" gateway to federal habeas review applied in Schlup, and futehr explained in House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 (2006). the district Court denied Perkins' claims of actual innocence due to AEDPA's one year limitations period, The Supreme Court vacated the Court of Appeals' judgment and remanded the case. Justice Ginsburg held that McQuiggin "clarifies that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitiooner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliabley shown. ..." In Turners case, he spent nearly two years gathering credible information to meet his extremely high burden of persuasion. Computerized records from Turners bank, that cannot be altered by human hands, Turners signature on a credit card receipt, a witness statement

of the salesperson who sold the furniture to Turner and his wife, all are highly credible evidence to support a claim of actual innocence.

The mere fact that a perosn pleas guilty does not absovle him from proceeding through the gatewas as recognized in Elizondo:

> "we said that our job as to 'decide whether the newly discovered evidence would have convinced the jury of applicant's innocence."

Ex Parte Elizondo, 947 S.W. 2d 202 (Tex.Crim. App. 1996). The Court also noted, the policy supporting our holding in Elizondo, that the punishment of an innocent person violates federal due process, is the same for an applicant regardless of whether his case was heard by a judge or jury or whether he pleaded guilty or not guilty. Ibid. The Stat's claim that an actual innocence claim is nothing more than a sufficiency challenge is not true, See Ex Parte Tuley, 109 S.W.3d 388 (Tex.Crim.App. 2002). The Ninth Circuit recognizes that people plead guilty for various reasons. An innocent person may want to take advantage of a discounted sentence ina plea bargin (the case here), rather than gamble on a far greater sentence if a misstaken verdict is returened... or a person may be under some pressure to accept responsibility for something he did not do, in order to protect someone else, whom he loves.... See United States v. Timbana, 222 F.3d 688, 718 (9th Cir. 2000).

In turn, the Courts repunish the innocent by refusing to hear gatway innocent claims, which Justice Ginsburg says is not constitutional. See McQuiggin, 133 S.Ct. at 1932. There is no rule in McQuiggin to suggest, or alude, that simply because petitioner plead guilty, upon advice of counsel's erroneous advice, as claimed, petitioner cannot prove his innocence with newly discovered evidence obtain through due diligence. As Justice Ginsburg said, "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors fo not result in the incarceration of innocent persons.". Id.

For the above reason, a writ of certiorari should be granted.

QUESTION 2 - Has the lower courts misapplied the "Equitable Tolling" standards in these cases? Are they perhaps setting an impossible to meet standard for Equitable Tolling despite this Court's various holdings such as in Holland v. Florida, 560 U.S. 631, 645 (2010)? and under 28 U.S.C. §2244(d)(1)(D)?

In Barton v. Quarterman, H-07-1192 (S.D. Tex. Houston 2007) it states the following:

> Equitable tolling is an extraordianry remedy that, if available, is only sparingly applied. See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990). The Fifth Circuit has held that the statue of limitations found in the AEDPA [Antiterrorism and Effective Death Penalty Act] may be equitably tolled at the district court's discretion where "exceptional circumstances" are present. Colamn v. Johnson, 184 F.3d 398, 402 (5th Cir. 1999), cert. denied, 529 U.S. 1057 (2000). As the fifth Circuit has explained, the doctrine of equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordianry way from asserting his rights". Melcacon v. Kaylo, 259 F.3d 401, 407 (5th Cir 2001)(quoting Rashidi v. American President Lines, 96 F.3d 124, 128 (5th Cir. 1996).
>
> The Supreme Court has recently stated that district courts have no authority to create "equitable exceptions" to statutory time limitations. See Bowles v. Russell, __U.S.__, 127 S.Ct. 2360, 2366 (2007). Assuming that the AEDPA allows it, the Supreme Court has observed nevertheless that a habeas corpus petitioner is not entitled to equitable tolling unless he establishes "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing". Lawrence v. Florida, __U.S.__, 127 S.Ct. 1079, 1085 (2007) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). .... The Fifth Circuit has observed that claims of actual innocence, standing alone, are not a "rare and exceptional circumstance" that warrants equitable tolling of the statue of limitations given that many prisoners maintain they are actuallyinnocent. Felder v Johnson, 204 F.3d 168, 171 (5th Cir)(noting that the petitioner's claim was unaccompanied by "a showing of actual innocence")(emphasis in original). cert. denied, 531 U.S. 1035 (2000).

And in Lara v. Stephens, 2014 U.S.Dist. LEXIS 64202 (Tex. App. Houston 1st Dist. 2004) stated:

> The AEDPS's one-year statute of limitations can be equitabley tolled, but only in cases presenting "rare and exceptional circumstances." Davis v. Johnson, 158 F.3d 806, 810-11 (5th Cir.1998); see also Phillips v. Donnelly, 216 F.2d 508, 511 (5th Cir 2000), reh'g granted in part, 223 F.3d 797 (5th Cir. 2000); Felder v. Johnson, 204 F.3d 168, 171-72 (5th Cir. 2000), cert. denied, 531 U.S. 1035, 121 S.Ct. 622, 148 L.Ed.2d 532 (2000); Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999), cert. denied, 531 U.S. 1164, 121 S.Ct. 1124, 148 L.Ed.2d 991(2001). "The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statue of limitations would be inequitable." United States v. Patterson, 211 F.3d 927, 930-31 (5th

Cir. 2000)(quoteing Davis, 158 F.3d at 810)"...Equitable tolling is appropriate when, despite all due diligence, a plaintiff is unable to discover essential information bearing on the existence of his claim." Fisher at 715 n.14; see also Pace v. DiGugliemo, 125 S.Ct. 1807 (2005); Lawrence v. Florida, 127 S.Ct. 1079, 1085 (2007).

As Turner has presented in his above QUESTION 1, he was mislead by his Court Appointed Counsel, Mr. Garland Cardwell, ("Cardwell"), in this counsels advice and lack of persuig Turner's Rights. As the courts have ruled previously that "equitable tolling 'applies principally' where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordianry way from asserting his rigts." Melacon v. Kaylo, 259 F.3d 401, 407 (5th Cir 2001) (quoteing Rashidi v. American President Lines,96 F.3d 124, 128 (5th Cir. 1996)). By Turners court appointed cousnsels erronious advice, he was activly midled in each step of these cases. By Cardwell's lack of pursuing alibi's, filing for Discorvery, obtaining exculpatory evidence, etc. Turner was mislead and prevented from asseerting his rights in these cases. Thus, Turner conducted a lengthy letter campain, begging, pleading, and searching for the needed documents. White the proceeding is lengly, it is by far not the only letters which Turner wrote trying to discover and/or obtain documents, as some of Turner's papers have been lost by TDCJ. Yet, Turner retains these copies and submits them collectively as Appendix E. These show that Turner has been diligently pursuing his rights. Likewise during a part of this time frame, Turner battled two (2) types of Cancer (Throat and Lympnodes) and under went three (3) rounds of Chemo Therapies, thirty-five (35) Radiation Treatments, and Surgery while at "Hospital Galveston" from November 10, 2014 thru January 26, 2015; while in the hospital turner had no access to a Law Library and quite frankly even if he did, he was too ill to effectivly write anything as he lost over 100 lbs. in just over 62 days. Turner was very ill during this period and for a time afterwards dealing with "Chemo Brain" (confussion, forgetfullness), extreme fatigue and difficulty retaining foods. This fulfills the requirements set fourth by the Fifth Circuit court in Sutton v. Cain, 722

F.2d 312, 316 (5th Cir. 2013) which stated:

> A petitioner requesting equitable tolling must show that (i) "he has been pursuing his rights diligently"; and (ii) "some extraordinary circumstance stood in his way." Pace v DiGuglielmo, 544 U.S. 408, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)(citation omitted). See also Lawrence v. Florida, 127 S.Ct. 1079, 1085 (2007)("that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way").

Turner believes that he qualifies for equitable tolling by showing of the many lietters which he retains copies of (Appendix E) and informing this Honorable Court that many more were written but the copies of these were lost by TDCJ, thus beyond Turner's control. That the time just priorto, during and after battling Cancer, any reasonable person would know that Turner was not capable to mentally nor physically pursue anything that required much thought or effort, as Chemo and Radiation is extremly hard on a body and takes a lengtly recovery period. And as stated in Holland V. Florida, 560 U.S. 631, 130 S.Ct. 2547, 177 L.Ed.2d 130, 148 (2010):

> The diligence required for equitable tolling purpose is "reasonable diligence",; see, e.g., Loncahr v. Thomas, 517 U.S. 314, 326, 116 S.Ct. 1293,___,134 L.Ed2d 440 (1996), NOT "maximum feasible diligence (emphisis added),"; Starns v. Andrew, 524 F.3d 612, 618 (CA5 2008) (quoting Moore v. Knight, 363 F.3d 936, 940(CA7 2004), See In re Wilson, 442 F.3d 872, 877 (5th Cir. 2006)("For equitable tolling to apply, the applicant must diligently pursue... relief."); Pacheco v. Rice, 966 F.2d 904, 906-07 (5th Cir. 1992) (Equitable tolling is appropriate where, despite all due diligence a plaintiff is unable to discover essential information bearing on the existence of his claim); See Mathis v. Thaler, 616 F.3d 461, 474 (5th Cir. 2010)("reasonable diligence; not maximum feasible diligence"); Lonchar v. Thomas, 517 U.S. 314, 326, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996); and [Several lower courts have specifically held that unprofessional attorney counduct may, in certain circumstances, provide egregious and can be extraordianary even though the conduct in question may not satisfy the Eleventh Circuit's rule. See, e.g., Nara v. Frank, 264 F3d 310, 320 (CA2 2001)].

Therefore, Turner establishes that the State Court and Federal District Courts decision was contrary to Federal Law as determined by the U.S. Supreme Court in: Irwin v. Department of Veterans Affairs, 498 U.S. 89, (199); Bowles v. Russell, ___U.S.___, 127 S.Ct. 2360 (2007); Lawrence v. Florida, ___U.S.___, 127 S.Ct. 1079 (2007); and Pace v. DiGuglielmo, 544 U.S. 408 (2005). As such the Federal District Court was in error of dismissing Turner's 2254's for these reasons and a COA shold have been granted on this issue.

QUESTION 3 - Was Turner inadvertantly denied access to the "gateway" of Actual Innocence as set forth by the U.S. Supreme Copurt in: Schlup v. Delo, 115 S.Ct. 851 (1995); Herrera v. Collins, 506 U.S. 390 (1993); House v. Bell, 547 U.S. 518 (2006); and McQuiggin v. Perkins, 133 S.Ct. 1924 (2013)? Is the courts adding additional barriers to these holdings?

In a Schlup - type claim "is a procedural claim in whihc applicant's claim of innocence does not provide a basis for relief, but is tied to a showing of constitutional error at trial." Schlup v. Delo, 513 U.S. 298, 314 (1995). Likewise in McQuiggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013) the Court stated:

> We hold that actual innocence, if proved, serves as a gateway through wich a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup and House, or, as in this case, expiration of the statute of limitations. We caustion, however, that tenable actual innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable dout." Schlup, 513 U.S., at 329, 115 S.Ct. 851; see House, 547, U.S., at 538, 126 S.Ct. 2064 (emphasizing that the Schlup standard is "demanding" and seldom met). And in making an assessment of the kind Schlup envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of the evidence" purporting to show actual innocence. Schlup, 513 U.S., at 332, 115 S.Ct. 851....

Likewise, the Court stated:

> (Citing Murray v. Whitley,505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992))("[W]e think that in an extaordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims [here, inefective assistance of counsel] on the merits notwithstanding the existence of a procedural bar to relief. "This rule, grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incaration of innocent persons." Herrera, 506 U.S., at 404. 113 S.Ct. 853. Supra McQuiggin, 133 S.Ct. at 1931.

In the Sexual Assautlt (Cause No. 4:17-CV-327), Turner shows that exculpatory evidence existed but counsel did not pursue this. In the Reporting Officers Narrative (Appendix F. p.15) is a notation:

> At 1045 hrs I recived an email from [redacted] Oliver that stated "My wife was talking to [redacted][alleged victim] last night about when the attack took place. I don't know what date [redacted][alleged victim] told you, but they came up with Thursday June 14, 2012. This was during Cheer camp and was also the day my wife was released from the Hospital."

Now this alleged attack and its/date/time of occurance was tied to two (2) additional events within their lives - Cheer Camp and wifes release from the Hospital - thus these events and when they happened are also well known to these individuals... and they tied the alleged attack to this very same period in their lives. They felt so strongly about it, they sent a written email to the detective investigating this matter; that is significant and is a written statement which carries considerable weight. When I questioned counsel about this, I get a letter (Appendix F, p. 39) from Cardwell that tells me:

> Mr. Smith [Assistant District Attorney] has also agreed to provide me with a better copy of the Affidavit, search warrant and Return dated June 29, 2012, as well as a copy of the email you mentioned from Steve Oliver to Officer Cox, which email is not actually part of the discovery, but Mr. Smith indicated that he would provide a copy to me if he was able to obtain a copy from Officer Cox.

This is exculpatory yet Cardwell nor Mr. Smith included it in any "discovery"?! Nor did my counsel pursue it!! The second time that this EXACT DATE is confirmed is in the SANE Exam (Appendix F, pp. 16-20 (on page 17 right below the HISTORY OF ASSAULT paragrah)).

Yet, in response to Turner's State habeas corpus, Cardwell provided a sworn affidavit that claims the "victim" was never sure of a date. These documents from the State, PROVE otherwise.

Due to Turners due diligence in a massive letter writing campain, he obtained the following documents that PROVE he was over 20 miles away with witnesses at the time of the alleged attack, purchasing a bed with his wife Amy ("Amy"); these are:

- Turner's Debit Card Receipt from VISA (Appendix F. p. 23)
- Cardholder Transaction Detail Report (Appendix F. p. 25)
- Turner's Bank Statement (Appendix F. p. 26)

·Bank's Disclosure Statement (Appendix F. p. 27)

·Statement from Carol Sterling, Manager at Signature Home Furniture Store (Appendix F. p. 31)

·Signature Home Furniture Store Receipt (Appendix F. p. 24)

·Also see Appendix F. p. 37 for a handwritten letter from Amy to Cardwell detailing Turner's alibi. and p. 34. for an Affidavit of Loretta Meserve.

These documents prove that Turner was over 20 miles away with witnesses when this alleged attack happened. Thus in light of new evidence, "it is more likely whan not that no reasonable juror would have found petitioner guility beyond a reasonable dout." Schlup v. Delo, 513 U.S. 298 (1995) as Turner can not be in two distinct places seperated by 20 miles, at the VERY SAME period of time. Below is a TIMELINE of the days events:

VERIFIABLE TIMELINE

6:30 AM to 5:00 PM - Turner is at work.
5:15 PM to 5:45 PM - In rout to Goodwill on Texoma Parkway with Amy
5:50 PM to 6:05 PM - Leave Goodwill on Texoma Parway to Signatrue Furniture
6:10 PM to 7:00 PM - Purchasing Bed at signature Furniture
7:00 PM to 7:30 PM - Return home with Amy and bed.
7:30 PM to 9:00 PM - Bob Thomas helps Turner move furniture at his home and to set up bed.
9:00 PM to 5:30 AM - Turner is at home with Amy.

ALLEGED SEXUAL ASSAULT TIMELINE

5:00 PM to 5:15 PM - Cheer Camp released according to reports
5:15 PM to 7:30 PM - Whereabouts of alleged victim UNKNOWN.
7:30 PM to 8:00 PM - Alleged sexual assault occurs
9:30 PM - Time changes according to victim second version of how and when the sexual assault supposedly occured.

Given such, the outcome of a trial would lead a jury to find Turner not-guilty of this offense, as he can not be at two seperate places at the same time and with the claims of the events of the attack, the very LACK OF ANY evidence proves the claimed events did not happen. As she claimed that we faught in the back of Turners new Dodge Pick-up that has a built in non-skid bed liner, and that during this battle, Turner removed her clothes and penitrated her twice to the point of pain... yet the EVIDENCE SHOWS via the

SANE Exam Report (Appendix F. pages 16-20) that their is "No Trama", that there was no cuts, scraps, bruises, or anything that one would have if they had been in any type of scuffel much less fighting in the back of a pick-up with a non-skid bed liner! The alleged penetration - TWICE - to the "point of pain"... the SANE Exam proves tht she was at the time of the Exam, a fully intact virgin... so if penetration to the point of pain had occured, her hyman would have been broken, which it was in fact not. In fact, there is not one single piece of evidence to suppor a single point of her claim. But Turner does have documented proof of his whereabouts with witnesses as well. The very Lack of AY evidece to support that any crime occured, factually it must take the form of Actual Innocence under Herrera v. Collins, 506 U.S. 390 (1993), accord House v. Bell, 547 US. 518, 535 (2006); and Ex parte Spencer, 337 S.W. 3d 869 (Tex.Crim.App. 2011).

In the Conspiracy To Commit Arson (Cause No. 4:17-CV-328), Turner shows that he was actually Indicted for a Third (3rd) Degree Felonly with NO enhancements (Addendix F. p.13), this carries a range of punishment of Two (2) to Ten (10) years. The language under sections 15.02(d) Texas Penal Code demands that the range of Ppunishment is one (1) category lower than the most serious felony, which is a Third Degree. Counsel never informed applicnt of any enhancement. See Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997) (prior convictions must be alleged in indictment to be used to enhace defendant's sentence, under Texas Law); see also Earl v. State, 870 S.W. 2d 669 (Tex.App. 1994); accord Briggs v. Procunier, 764 F.2d 368, 371 (5th Cir. 1985) (quoting Bullard, 665 F.2d at 1357-58("The two prior convictions must be alleged in the indictment, and upon review the allegations are treated the same as allegations of the elembens of a substantive offense".).

Now, there was NO enhancement nor anything served on Turner indicting otherwise. Besides, for Turner to go from a 3rd Degree Felony to a 1st Degree

Felondy, Turner would have to have at minimum two (2) prior Felony convictions... which Turner DOES NOT have,, only one (1), thus there is NO way under Law, that such an enhancement could have even occured... yet Turner was given a 28 year sentence under a 1st Degree. (Appendix F. p. 13 Indictment and p. 14 for Judgment of Conviction by Court document). As stated in Haley v. Cockrell, 306 F.3d 257, 267 (5th Cir. 2002):

> In order to be sentenced as a habitual felony offender, the Texas Penal Code requires that Haley must have been previously convicted of two felonies and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having gecome final".... "[T]he requirements of the Texas habitual felonly offender statute have not been satisified resulting in Haley's ACTUAL INNOCENCE of his status as a habitual felonly offender, and consequently, the improper enhancement of his sentencing. (emphisis added).

Turner is not guilty of being a habitual offender and as the Fifth Circuit has already stated in Haley, 306 F.3d at 263-64:

> In order to be ACTUALLY INNOCENT of a non-capital sentence, the petitioner must show that "but for the constitutional error he would not have been legally eligible for the sentence he received." Sones v. Hargett, 61 F.3d 410, 418 (5th Cir. 1995)(citing Smith v. Collins, 997 F.2d 951, 959 (5th Cir. 1992)).(emphisis added)

Then in Haley, 306 F.3d at 264, "we now hold that the actual innocence exception applies to non-capital sentencing procedures involving a career or habitual felonly offender."

And in Haley, 306 F.3d at 266, "Thus, applying the actual innocence execption in either case meets the 'objective of protecting defendants from sentencing based on elembnets of crimes for which they are conslusively innocent.'". United States v. Maybeck, 23 F.3d 888, 894 (4th Cir. 1994).

Thus, Turner is not guilty of being a habitual offender so there is no legal way to enhance Turner from a 3rd to a 1st Degree under the Texas Penal Codes. Turner is actually innocent of a habitual offender and thus a 1st Degree sentence of 28 years is illegal and unconstitutuonal. Only wiht the ineffective assistance of counsel could such a travisty occured; a trained attorney who has passed the Bar surly knew better than to allow this to happen, much less

to assist in it being done to Turner.

In the Credit/Debit Card Abuse (Cause No. 4:17-CV-326), turner shows that the Indictment (Appendix F. p. 11) states:

> ...that on or about the 13th day of December, 2011, A.D., and anterior to the presentment of this indictment, in the County of Grayson and State of Texas, NOEL TURNER hereinafter called "Defendant", did then and there with intent to fraudulently obtain a benefit, present to John Ramsey or his designated representative use a credit or debit card, namely, Capital One Visa ending in 9480, with knowlege that the card had not been issued to the said defenant, and with knowledge that said card was not used with the effective consent of the cardholder, namely, Paul Boaz,....

Yet Turner has obtained a copy of this Capital One VISA credit card adn it clearly and distinctly shows Turner's name on this invoice... because Turner's name was embossed on the card as well. The ONLY way that Turner could possess this card is by the cardholder, Paul Boaz, contacting Capital One and having them to issue this card in Turner's name, both with verbal authorization and in the form of written authoriazation as required by Capittal One Bank. Paul Boaz authorized Capital One via a recorded verbal authorization and then signed a concent form and faced/emailed it back to Capital One. This consent to Capital One gave the full authorization for Turner to use this card. Turenr had this card for over two (2) years and it was shown on every invoice form Capital One since it was issued; Paul Boaz routinly reconsiled the invoice from Capital One himself.

Paul Boaz frequently assisted employees with loans and payday advancements. He made a gift of $1,500.00 to Tammy Advants who was not an employee or sub-contractor at the time. As part of my Christmas Bonus as the Office Manager and ALL other Admin. duties rolled into one (I was the Office), Paul Boaz authorized the payment of my property tax - using the card, as to get the 2% cash back that Capital One gaveon each purchase. Turner knew that Paul Boaz looked over all invoices as he signed the checks to pay them; thus knew that Paul Boaz would see this as well. If Cardwell had investigated, he would have obtained the authorization form from Paul Boaz to Capital One to issue Turner

this card, and he would have found other Boaz Air employees who could attest to these facts, yet Cardwell did nothing.

Turner is actually innocent of this offense as well as the one alleged in the indictment and no reasonable juror would find Turner guilty beyond a reasonable doubt.

Therefore, Turner established that the States court and federal district court decisions were contrary to Federal Law and determined by the U.S. Supreme Court in Schlup v. Delo, 513 U.S. 298, 314 and McQuiggins v. Perkins, 569 U.S. 383 (2013); as such the Federal District Court was in error of dismissing Turners 2254's for this reason and a COA should have been granted on this issue.

QUESTION 4 - Did Turner reach and prove the constitutional error of Ineffective Assistance of Counsel in these cases?

For ineffective counsel, Turner must show: (1) that counsels' representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that , but for counsel's unprofessionalerrors, the result of the proceedings would be different. See Strickland v. Washington, 486 U.S. 668, 104 S.Ct. 2052, 2055-56.

Turner was represented by Mr. Garland Cardwell, appointed gy the court, who failed to be an advocate, in the fundamental areas of defense in (1) failing to investigate; (2) failing to present and advance an alibi defense; (3) failing to secure discovery; and (4) failing to file fundamental motions, in ANY of these cases.

FAILING TO INVESTIGATE

Cardwell repeatedly told Turner thathe wouldget an investigator after picking ja jury. Once a Jury is selected, trual begins - when on earth would the investigator been able to do this?!

Cardwell failed to investigate key facts, such as the Time Line that is

verifiable bymany of the attached Exhibits in the Appendix F; that Turner obtained via diligently pursuing his rights and innocence; using the U.S. Postal Service to do so. Thus, an investigator would have easily been able to obtain these documents and MORE.

In Rompilla v. Beard, 645 U.S. 374, 387, 125 S.Ct. 2456 (2005) footnote 6:

> The new virsion of the Standards now reads that any "investigation should include efforts to secure information in possession of the prosecution and law enforcement authorities" whereas the version in effect at the time of Rompilla's trial provided that the "investigation" should always include such efforts. ABA standards for Criminal Prosecution Function and Defense Function 4-4.1 (3rd ed. 1993). We see no material diffrence between these two phrasings, and in any case cannot think of any situation in which defense cousnel should not make some efforts to learn the information in the possession of the prosecution and law enforcement authoritiees".

Cardwell did nothing ot investigate anything what-so-ever. no motions were filed, not even for an investigator.

> In Anderson, the court of Appeals held:... (2) Trial counsel's failure to interview eyewitnesses rose to the level of a constitutionally defeficient proformance; and (3) defendant was prejudiced by trial counsels' constitutionally deficient performance. Writ Granted, Affirmed. See Anderson v. Johnson, 338 F.3d 382, 391 (5th Cir. 2002).

Counsel has a duty to investigate and to interview potential witnesses and obtain exclupatory documents. "Counsel was ineffective for failing to investiggate and interview alibi witnesses made known to counsel three days beofre trial, failing to investigate witnessess...." Bryan v. Scott, 28 F.3d 1411, 1418 (5th Cir. 1994). Counsel was aware of Carol Sterling as an alibi witness in August 2012.Counsel failed to investigate available key facts into the alleged sexual assault that would have proved Turner innocent. The following is a timeline of Turner's whereabouts during the time of the alleged sexual assault. Trual counsel refused to communicate with Turenr, nor would cousel investigate simple verifiable facts discovered using diligence. Turner had no advocate. Had these verifiable facts been discovered by Counsel, no jury or judge could find Turner guilty.

VERIFIABLE TIMELINE

6:30 AM to 5:00 PM - Turner is at work.
5:25 PM to 5:45 PM - In rout to Goodwill on Texoma Parkway with Amy.
5:50 PM to 6:05 PM - Leave Goodwill on Texoma Parkway to Signature Furniture.
6:10 PM to 7:00 PM - Purchasing bed at Signature Furniture.
7:00 PM to 7:30 PM - Return home with Amy and bed.
7:30 PM to 9:00 PM - Bob Thomas helps Turner move furniture at his home and to set up the bed.
9:00 PM to 5:30 AM - Turner is at home with Amy.

ALLEGED SEXUAL ASSAULT TIMELINE

5:00 PM to 5:15 PM - Cheer Camp released according to reports.
5:15 PM to 7:30 PM - Whereabouts of alleged victim UNKNOWN.
7:30 PM to 8:00 PM - Alleged sexual assault occurs
9:00 PM - Time changes according to victim second version of how and when the sexual assault supposedly occured.

Through documentary evidence Appendix F proves Turner is in a different place when the alleged sexual assault occurs, it proves that Turenr is not the person who committed the sexual assautlt, if one actually occured. Trial counsel "assumes" Turner is guilty based upon Turner's record, not verifiable Facts. Counsel's advice to plea the case is erroneous advice. Had the jury heard the verifiable facts, given the above timeline, no jury could cinvict. It is more than a mere probability, but a certainty that the outcome of the proceedings wold be different. A reasonable trier of fact would use the docmumentary evidence as proof, and witnesses were able to testify that the documentary evidence is fact. Turenr is not guilty, and any plea is involuntary.

The right to effective assistance of counsel is a bedrock principle in our justice system. It is deemed an "obvious truth" the idea that "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless cousel is provided for him." See Gideion v. Wainwritght, 372 U.S. 335, 344, 83 S.Ct. 792 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense Counsel [is required to] test the prosecution's case to ensure that the proceedings does serve the function of adjudicating quilt or innocence, while protecting the rights of the person charged. See

Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55 (1932)("The defendant ... requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"), which is the case here. Counsel utterly failed.

In Holsomback, That court held; (1) trial counsel's decision not to conduct any investigation into conceded lack of medical evidence of sexual abuse was not reasonable, and (2) counsel's failure to conduct adequate pretrial investigation into the lack of medical evidence of sexual abuse was found. Despite this apparent inconsistency, howerver, counsel consulted no physician in order to ascertain the significance of the lack of medical evidence. Cousnel declined to confir with physicians'. The court foundcounsel could not have made an informed tactical decision by relying on only the prosecutor and his file. Had counsel interviewed the physicain, Dr. Norlan, counsel wold have found out that sexual abuse was "physically impossible". See Hosomback v. White, 133 F.3d 1382, 1387 (11th Cir. 1998)(rev'd and rem'd).

Similaryly, tiral counsel consulted no physician to account for the apparent inconsistency of the victim's stories of the sexual assault. Counsel relies on the prosecutons file, instead of investigating the facts that could have revealed that the attack could not have been physically possible on the bed, or tailgate of a truck that is extremely abrasive, yet no injuries were found. Thevictim said she was nude, and struggled with her attacker. Many inconsistent facts were never explained, or investigated by counsel.

In Johnson, the victim testified she was forcibly undressed and raped vaginally by two men. Within four hours of the rape, she had not washed in any manner, yet examiner's found no physical evidence of intercourse; there were no traces of sperm or semen found in her vagina. The court said that the petitioner had been denied the effective assistance of counsel; "counsel failed

to adequately and sufficiently confer with petitioner about petitioner's case and counsel's preperation, and counsel failedd to adequately investigate and present the alibi defense at trial." The court ordered a new trial. See Johnson v. Baldwin, 114 F.3d 835 (9th Cir. 1997) (held that the attorney's failure to investigate and discredit defendant's uncorroborated denial of presence at scene of alleged rape acounted to ineffective assistance of counsel).

Similary Appendix F, page e 16-20 shows no signes of phsical injury, trama to ths vagina, hymen, or no evidence that the vicgim's hymen was penetrated, thus, no intercourse occured, contradicgting victim's many stories to police. Both Holsomback and Johnson are remarkably similar to Turner's case. Trial counseldid not adequately investigate.

Trial counsel's performancewas not reasonable. Adequate investigation is foundational in order to evaluate a defense. It is rather conceivable Turner could have brought forth a solid defense had a rational trierr of fact heard the evidence. In addition, exculpatory witnesses were available.

In Rompilla, the U.S. Supreme Court duly noted that:

> The notion that defense cousel must obtain informaiton that the State has and will use against the defendant is not simply a matter of common sense. As the District court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial [applicant's case] describes the obligation in terms no one could misunderstnad in the circumstances of a case like this one: "It is the duty of the lawyer to conduct a prompt investigation of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforst to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accuse's stated desire ot plead guilty." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). Rompilla v. Beard, 645 U.S. 374, 387, 125 S.Ct. 2456 (2005)

In addition, the Supreme court states in footnote 6 of Rompilla, that:

> the new version of the Standards now reads that any "investigation should include efforts to secure information in thepossession of theprosecution and law enformecemet authorities" whereas the version in effect at the time of Rompilla's trial provided that the "investigation" should always include such efforst. ABA Standards for Criminal Prosecution Funciton and Defense Function 4-4.1 (3rd ed. 1993). We see no material difference

between these two phrasings, and in any case cannot think of any situation in which defense counsel should not make some efforst to learn the information in the possession of the prosecution and law enforcement authorties." Id. See also Martinez v. Ryan, 10-1001 (2011) Unpublished;

The Court goes on to say that,"[W]e long have referred [to these ABA Standards] as guides to determine what is reasonable." Wiggins v. Smith, 539 U.S. 510, 524 (2003)(quoting Strickland v. Washington, 466 U.S. at 688), and the Fifth Circuit has no reason to think the quoted standard impertinent here. Kemp v. Leggett, 635 F.2d 453 (5th Cir 1981) (citing Herring v. Estelle,491 F.2d 125 (5th Cir. 1974).

Turner did not know at the time how to get all of the information Turner diligently discovered. Turner was in the County Jail completely dependent upon Trial Counsel to unearth verifiable facts, which in his duty under the Sixth Amendment in order to be effective. Since the Timeline alibi defense is applicant's only defense backed by evidentiary documentary proof of actual innocence, counsel's representation falls below an objective standard of reasonableness according to ABA guidelines, Wiggins, Rompilla and Strickland, because counsel failed to advance his only line of defense. See Strickland, 104 S.Ct. at 2069.

a) EXCULPATORY WITNESSES

In Anderson, the Court of Appeals held: (1) defendant exhausted state remedies; (2) trial counsel's failure to interview eyewitness rose to the level of a constitutionally deficient performance; and (3) defendant was prejudiced by trial counsel's constitutionally deficient performance. Writ Granted, Affirmed. See Anderson v. Johnson, 338 F.3d 382, 391 (5th Cir. 2003). The Court reasoned that the applicant was denied effective assistance of counsel where counsel failed to pursue adequate investigation of the cae [as in this case like wise], and evidence against turner. Counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and the circumstances of the case.

Amy Turner, Carol Sterling, and Bob Thomas are exculpatory witnesses that develop an alibi defense that counsel never interviewed. Counsel was aware of alibi witnesses since August 20, 2012, and January 13, 2013. See Appendix F. page 37 & 35.

In Strickland, the Court specifically addressed "failure to investigate" calms, explaining that "strategic choices made after through investigation of the law and facts relevant to plausible options are virtually unchallengeable. See Strickland, 466 U.S. at 690. The Court further explained however, "strategic choices made, 'after'less than complete investigaton" are reasonable precisely to the extent that reasonable professionaljudgments support the limitations on investigations. Id. at 691. In sum, "counsel has a duty to make reasonable investigations or to make reasonable decision s that makes particular investigatins unnecessary." Id.

Trial counsel knew well in advance of any plea agreement that witnesses were able to testify bringing a viable defense to Court, yet, trial counsel does nothing in assisting Turner to prepare and adv ance a defense. Without interviewing exculpatory witnesses, counsel could not make the strategic choice that Strickland calls for. It amouts to incompetence.

Turner made trial counsel aware of Carol Sterling as an alibi witness in August 2012. Carol Sterling wouuld have place applicant at Signature Furniture at closing time at 7:00 PM as shown. Tiral counsel is also aware of Amy Turner's letter which she maild to him (See Appendix F. p. 37), but never interviewing Turners wife, which would have testified that Turner and here are together from 5:15 PM until 5:30 AM the next morning.

Instead, trial counsel relies only on police reports and the file of the prosecution which is held to be ineffective. See Holsomback, supra,; Johhnson, Supra; Anderson, supra, Bryant, supra; Strickland, supra; Wiggins, supra; and Rompilla, supra.

FAILING TO PRESENT AND ADVANCE ALIBI DEFENSE

In Ake, the Supreme Court well noted that "This Court has long recognized that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense...., this Court held alomost 30 years ago that an indigent defendant is entitlled to the assistance of cousnel at trial. Gideon v. Wainright, 372 U.S. 355. [A]nd such assistance must be effective. (citations omitted)." See Ake v. Oklahoma, 470 U.S. 78, 105 S.Ct. 1087, 1092 (1985).

·Prejudice

In Lockheart, in guilty plea cases, that court said the prejudice inquiry will closely resemble the inquirey engaged by courts reviewing any ineffective assistance challenges. Trial counsel failed to investigat or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than to go to rial will depend on the likelihood that discovery of the evidcence would have led cousnel to change his recommendation as to the pleas. Further, the court said, [This asssesment, in turn, will depend in large part on a prediction wheter the evidence likely would have changed the outcome of trial. See Hill v Lockheart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985).

In this case, prejudice is found given existing alibi evidence as shown within this writ, no rational reasonable attorney wouuld pass up in order to prepare a viable defense. Assuming arguendo, a reasonable attorney would see the benefit of the alibi evidence as a way to negate an element of the offense, thus, no jury could have found Turner guilty. The out come would have been different satisfying Strickland, no doubt that would have led counsel to change his recommendation to accept any plea deal satisfying Lockheart. Prejudice exists in Turner's case.

ALIBI DEFENSE

The alibi defense arises when there is evidence that the accused is at a place where he could not have been guilty of paricipating in the offense. See Arney v. State, 580 S.W.2d 836 (Tex.Crim.App. 1979). The given evidence presented to support this defense is over whelming favorable. In Wallace, the court concluded, and the Haliburton court concurred that the presentation of evidence and argument that defendant was not present at the scene of the crime in order to commit the crime, "alibi" is not an affirmative defense for which defendant has the burden of proof, but is simply the negation of the state's allegation that the committed crime on a certain date, in a certain location. See Wallace v. State, 75 S.W.3d 576 (Tex.App. Texarkana 2002); accord Haliburton v. State,23 S.W.3d 192 (Tex.App. Waco 2000).

No question that Ake is violated. Turner's presented evidence does place him in a different location, whihc negates the states allegations thus, Turner is innocent.

FAILING TO SECUR DISCOVERY

Discovery is a basic fundamental tool that every lawyer shouls use regardless of any "open file" policy. Counsel may discover evidence that not ordinarily would have been discovered. See Tex. Code P. Art 39.14.

In Turner's case, discovery of key facts were in fact discoverable, such as email from Steve Oliver to Officer Cox that corresponds to exhibits Appendix F. pages 15 & 39. Turner includes exhibit Application F. pages 2-10, as evidence that Trial Cousel did not file any discovery motions in ANY of Turner's cases. How then, can trial counsel be the advocate that the Sixth Amendment demands??

In Wiggins, counsel failed to investigate adequately, to the point of ignorign the leads their inquiry yielded, like in Turner's case here. See Wiggins v. Smith, 539 U.S. at 510. Wiggins, looked to norms of adequate investigation in mitigating culpability, but Strickland, generally, hindsight is

discounted by pegging adequacy to "counsel's perspective at the time" investigation decisions are made. See Strickland, 466 U.S. at 689, and by giving a "heavy measure of deference to consels judgments," Id., at 691.

Using Canon 5 of the American Bar Association ("ABA") rules imposes a similar obligation on counsel as found in Wiggins: "[T]he lawyer is bound by all fair and honrable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law"; cf. ABA Canon 4 (1908) Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 54 (1932).

In Balkom, that court held that petitioner was denied effective counsel at all phases of his prosecution. Specifically, no investigation, no interviewing of witnesses, no preparation of a defense, no discovery, no visiting of the crime scene. See House v. Balkom, 725 F.2d 455(11th Cir. 1981). Similarly, in Leggett, the court found retained counsel ineffective when cousnel did not investigate in order to prepare a defense, nor did he discuss possible defenses with his client. See Kemp v. Leggett, 635 F.2d 455 (5th Cir. 1981). turner's case is IDENTICAL to Balkcom and Leggett.

Counsel's reasonableness not to even attempt discovery is deficient like in counsel's failure to investigate, advance a proper defense, or even attempt to discuss a possible defense. Case law consludes counsel's performance fell below a level of reasonaableness using ABA rules as guides. Both progns of Strickland are satisfied again.

FAILING TO FILE FUNDAMENTAL MOTIONS

In allof Turner's cases, it shows that NO motions filed that would enable cousnel to perform his constitutionally mandated duties. Motions are very fundamental in ANY criminal case. The conclusion here, is that counsel's performance amounted to incompetence.

In Banks, prior to trial, the state advised Bank's attorney there would be no need to litigate discovery issues, representing: "we will, without the necessity of motions provide you with all discovery to which you are entitled." Despite that undertaking, the State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. if it was reasonable for Banks to rely on the prosecutions' full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospect for gaining a conviction. See Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256 (2004) (rev'd).

Relief in Turners case, as it cannot be said Turner had effectiv assistance of counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Neil C. Turner

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