20-7653

ORIGINAL

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY TODD DENTON

vs.

JOHN DAVIDS

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEFFREY TODD DENTON #288247
IONIA MAXIMUM CORRECTIONAL FACILITY
1576 W. BLUEWATER HIGHWAY
IONIA, MICHIGAN 48846

QUESTIONS PRESENTED FOR REVIEW

Whether it can be presumed given the facts underlined in *Schlup v Delo 513 US 298; 115 SC 851 (1995), Holland v Florida 560 US 631; 130 SC 2549 (2010)*, and *McQuiggin v Pekins 569 US 383; 133 SC 1924 (2013)* all stating that if a petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial that was free of non-harmless constitutional error, should the petitioner be allowed to pass through the gateway and argue the merits of his underlying claims in the lower state and federal courts? Likewise, when innocence is so strong to lack confidence in the trial proceedings it shouldn't take decades for a prisoner to pass through the gateway to prove his or her innocence in the lower courts!

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D.	Court Order and Opinion Denying 6.500 Motion	July 27, 2007
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G.	U.S.C.A. Order #20-1566 Denying COA	Oct. 02, 2020
H.	U.S.C.A. Order Denying En Banc	Dec 07, 2020

LIST OF PARTIES INVOLVED PURSUANT TO USSC RULE 12.6

1. Jeffrey Todd Denton #288247 The Petitioner.
2. Michigan Attorney General Dana Nessel the Respondent for the State.
3. The Solicitor General the Respondent for The United States.

TABLE OF AUTHORITIES

SUPREME COURT CASES

FEDERAL CASES

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STATUTES

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REGULATIONS

CITATION OF OPINION BELOW

District Judge Matthew F. Leitman ordered the Respondent to file a Brief and after it was filed in the court the Petitioner filed an answer in opposition. District Judge Leitman dismissed the Petitioner's Habeas Petition on May 27, 2020 on the grounds that the petition was untimely in case #4:19-cv-11762. The Petitioner filed an application for leave to appeal in the Sixth Circuit Court of Appeals in case #20-1566 which was denied on October 02, 2020. The Petitioner then petitioned the court for a full Rehearing En Banc which was referred to the panel on December 07, 2020 and was denied by the panel on December 22, 2020. See Appendix F-I.

JURISDICTION

A petition for a Writ of Certiorari to reviewed a Judgment of a United States Court of Appeals normally must be sought when filed with the Clerk of the USSC within 90-days after entry of the judgment, however, due to the fact that 75% of Michigan's prisons were infected with COVIT-19 and under quarantine until recently, the Petitioner write a letter to the U.S.S.C. clerk's office advising them of this situation and to extend the time requirement of USSC R. 13.1; 28 USC §1254(1); see also *Hohn v United States 524 US 236; 118 SC 1969 (1998)* until the quarantine was lifted and allowed it to be filed pursuant to R. 13.1.

U.S. CONSTITUTIONAL INVOLVEMENT

USCS CONST. AMEND. 6

> 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, which district 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 obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

USCS CONST. AMEND. 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce 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 person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTORY INVOLVED

28 USCS § 2244

(**a**) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section [28 USCS § 2255].

(**b**) (**1**) A claim presented in a second or successive habeas corpus application under section [28 USCS § 2254] that was presented in a prior application shall be dismissed.

(**2**) A claim presented in a second or successive habeas corpus application under section [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless:

(**A**) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(**B**) (**i**) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(**ii**) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 USCS §2254

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(**c**) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(**d**) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(**1**) 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; or

(**2**) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

MICHIGAN COURT RULE INVOLVED

MCR 6.508

(**D**) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(**1**) Seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(**2**) **Alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; for purposes of this provision, a court is not precluded from considering previously-decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously-decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence**;

(**3**) Alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(**a**) Good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) Actual prejudice from the alleged irregularities that support the claim for relief. As used in this sub-rule, "actual prejudice" means that,

(i) In a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal.

STATEMENT OF FACTS

The Petitioner was convicted in Genesee County by a Jury Trial and a Judgment of Sentence was entered on June 14, 1999. A claim of appeal was filed in the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel as authorized by MCR 6.425(F) (3). The Court of Appeals affirmed the Petitioner's Convictions and Sentences on May 22, 2001. See *People v Denton 2001 Mich App Lexis 440* COA #220812. Rehearing was denied on July 05, 2001. The Michigan Supreme Court denied the Petitioner Leave to Appeal on February 4, 2002. See *People v Denton 2002 Mich Lexis 132* MSC #119939. The Petitioner did not seek a Writ of Certiorari to the United States Supreme Court nor did he seek relief by way of a Wirt of Habeas Corpus, rather, the Petitioner in the instant case is seeking permission from the Sixth Circuit Court of Appeals asking the Court to allow him to file this Writ of Habeas Corpus in the Federal District Court based on (**a**) a Brady violation and (**b**) a claim that the evidence withheld will show by clear and convincing evidence that the Petitioner in this case is actually innocent. The Federal Courts had jurisdiction to consider the Petitioner's claims under 28 USC §2244(d) (1) (D) if the courts were satisfied by proof that the Petitioner has presented claim of actual innocence focused on a variety of manifest miscarriage of justice entitling him to equitable tolling of AEDPA's limitations period. The lower Federal Courts were at least satisfied that the Petitioner had presented enough evidence and facts to overcome 28 USC §2244(d) (1) (D) and reviewed his claims on the merits.

In the instant petition the Petitioner sought Habeas Relief on the following grounds:

I. THE PETITIONER ARGUES THAT HIS RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTION'S WITHHOLDING EVIDENCE FROM THE DEFENSE IN THE FORM OF A MEDICAL REPORT FROM THE HURLEY MEDICAL CENTER AND THAT DUE PROCESS ENTITLES THE PETITIONER TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

II. THE PETITIONER IS RELYING ON A CONSTITUTIONAL VIOLATION THAT HE WAS DENIED DUE PROCESS OF LAW WHEN THE PROSECUTION WITHHELD CRITICAL EVIDENCE ESTABLISHING A COLORFUL CLAIM OF ACTUAL INNOCENCE, AND IF PROVEN, NO JUROR WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT.

PROCEDURAL BACKGROUND

The Petitioner was arrested on January 09, 1999 because it was alleged that the Petitioner sexually assaulted a child on three separate occasions, however, the police released the Petitioner from custody, removed him from the child's residence, and the Petitioner had no contact with the alleged victim since that date. On March 11, 1999, the Petitioner was re-arrested. The Petitioner had a jury trial which found guilty of three counts of sexual assault. The Petitioner was sentenced on June 14, 1999 and appealed as of right from his convictions of three counts of first-degree criminal sexual conduct, for which he was sentenced as a habitual offender second degree to concurrent terms of 40 to 60 years in prison.

In the instant case, prior to the Petitioner second arrest, the victim was taken to the Hurley Medical Center Emergency Room where she was examined by a doctor to determine whether the victim was actually sexual assault. The report provided by the Hurley Medical Center clearly indicates that the doctor found no evidence that the victim was sexually assault because her hymen and anal rings was still grossly intact at the time of her examination. See LA-B PSI Description of Offense.

The Petitioner contends that this Medical Report was withheld by the prosecution and would have establish by clear and convincing evidence that the victim was never sexually assault and would have clearly changed the outcome of the Petitioner's jury trial. More

importantly, the information contained in this medical report would have changed the Petitioner's defense theory and could have been used to impeached the victim testimony and credibility. With this medical report, the state's case would have been purely circumstantial in the absence of any physical evidence connecting the Petitioner to these crimes.

As indicated herein the Petitioner did not seek a Writ of Certiorari to the United States Supreme Court or relief by way of a Wirt of Habeas Corpus, instead, August 25, 2014 the Petitioner filed in the Genesee County Circuit Court a Motion for Relief from Judgment which was denied by the court on October 15, 2014. Thereafter the Petitioner sought relief in the Michigan Court of Appeals which was denied in the *People v Denton* COA #326707 decided on June 22, 2015, likewise, the Michigan Supreme Court denied him Leave to Appeal in the *People v Denton 2016 Mich Lexis 1207* MSC #152116. The Petitioner in the instant case, filed a second Motion for relief from Judgment on June 29, 2017 asserting newly discovered evidence which would make a different result probable on retrial which was denied on July 27, 2017. The Petitioner appealed by leave to the Michigan Court of Appeals in the *People v Denton COA #340066* decided on January 26, 2018 rising the same issues contained in this petition, likewise, the Michigan Supreme Court denied him Leave to Appeal in the *People v Denton 2018 Mich Lexis 1789* MSC #157418.

In this case, the Petitioner asserts that the prosecutor had withheld a medical report from Hurley Medical Center by Doctor Gomez relating to the primary examination of the victim on January 09, 1999 and that he was not aware of any medical reports from Hurley Medical Center indicating that there were no signs that the victim had been repeatedly penetrated in her vagina and anal. One month later for some unknown reason, the victim was later seen by Norman Carter Director of the Child Evaluation Clinic at McLaren Regional Medical Center who examined the victim. The prosecutor listed Doctor Carter as a witness who testified at the

Petitioner Jury trial that his findings were consistent with repeated virginal and anal penetration. Had the Petitioner known about the existence of the Hurley Medical Report defense counsel would have called Doctor Gomez as a defense witness and while Circuit Judge Judith A. Fullerton identified certain portions of the Petitioner's Trial Transcripts (**1**) identifying the fact that Sergeant Sutter received a copy of this report from the Hurley Medical Center in February of 1999 and (**2**) identified Doctor Carter's Trial testimony transcripts from May 12, 1999, however, Judge Fullerton never identified that portion of the Petitioner's Trial Transcripts that this Hurley Medical Report was known to the defense and that there was testimony about the results of this medical report at the Petitioner's Jury Trial. See LA-D pgs 2-3. If that was true, then Doctor Gomez would have testified about his preliminary examination and findings that he found no evidence that the victim's vagina and anal showed any signs of repeated sexual penetration. For the reasons stated herein, the Petitioner asserts that the facts underlying these claims presented in this petition, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the Petitioner guilty of the underlying offense.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996, imposes a one-year statute of limitations on the filing of habeas corpus petitions:

(**d**) (**1**) A 1-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 Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases 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 time 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. 28 U.S.C. §2244(d) (1) (A).

But if the petition alleges newly discovered evidence, the filing deadline is one year from the date on which the factual predicate of the claim could have been discovered through due diligence. §2244(d) (1) (D).

AEDPA's statute of limitations is subject to equitable tolling in appropriate cases. *Holland v Florida 560 US 631, 649; 130 SC 2549 (2010).* A court may review a time-barred petition only if Petitioner shows (**1**) that he has been pursuing his rights diligently and (**2**) that some extraordinary circumstance stood in his way that prevented the timely filing of the habeas petition.

The Sixth Circuit has observed that the doctrine of equitable tolling is used sparingly by federal courts. See *Robertson v Simpson 624 F3d 781, 784 (6th Cir 2010).* The burden is on a habeas petitioner to show that he is entitled to the equitable tolling of the one year limitations period.

MISCARRIAGE OF JUSTICE EXCEPTION

A petitioner may overcome the AEDPA time bar with a showing of a miscarriage of justice. To satisfy this exception, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. *Schlup v Delo 513 US 298, 327; 115 SC 851 (1995).* In this case, Petitioner provides no new evidence that would justify tolling the limitations period under the miscarriage of justice exception.

For example, in *McQuiggin v Perkins 569 US 383; 133 SC 1924 (2013)* the United States Supreme Court stated that the Antiterrorism and Effective Death Penalty Act of 1996's, time limitations apply to the typical case in which no allegation of actual innocence is made. The miscarriage of justice exception applies to a severely confined category: cases in which new evidence shows that it is more likely than not that no reasonable juror would have convicted the petitioner. 28 USC §2244(d) (1) (D) is both modestly more stringent (because it requires diligence) and dramatically less stringent (because it requires no showing of innocence). Many petitions that could not pass through the actual innocence gateway will be timely or not measured by §2244(d) (1) (D)'s triggering provision. That provision, in short, will hardly be rendered superfluous by recognition of the miscarriage of justice exception. The United States Supreme Court also stated in *Holland v Florida 560 US 631; 130 SC 2549 (2010)* that equitable principles have traditionally governed the substantive law of habeas corpus. The Court's opinion reminded and affirmed, that the Supreme Court will not construe a statute to displace courts' traditional equitable authority absent the clearest command, and found that the text of 28 USC §2244(d) (1) contains no clear command countering the courts equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition. As the Court observed in Holland, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, seeks to eliminate delays in the federal habeas review process.

The Petitioner in this case like that in Perkins, asserts not an excuse for filing after the statute of limitations has run. Instead, like Perkins, he maintains that a plea of actual innocence can overcome AEDPA's one-year statute of limitations. He thus seeks an equitable exception to §2244(d) (1), not an extension of the time statutorily prescribed. See *Rivas v Fischer 687 F3d 514, 547, n 42 (2012) (*distinguishing from equitable tolling a plea to override the statute of

limitations when actual innocence is shown). Thus, the Sixth Circuit has stated in several cases that Perkins' standard of passing through the actual innocence gateway which allows a petitioner to pursue an untimely claim is difficult to meet and applies only in cases in which new evidence shows it is more likely than not that no reasonable jurors would have convicted the Petitioner. Therefore, a petitioner claiming his actual innocence must support his allegations of constitutional error with new, reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness account, or critical evidence physical evidence that was not presented at trial. See *Armstead v Lindsey 2019 U.S. App Lexis 221* and *Weatherspoon v Burt 2017 U.S. App Lexis 26797.* A petitioner does not meet the threshold requirement of Perkins unless he persuades the district court that in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty. See *Well v Harry 2017 U.S. App Lexis 27909.*

More than 11 years after his conviction became final, Perkins filed his federal habeas petition, alleging, inter alia, ineffective assistance of trial counsel. To overcome AEDPA's time limitations, he asserted newly discovered evidence of actual innocence, relying on three affidavits, the most recent dated July 16, 2002, each pointing to Jones as the murderer. The District Court found that, even if the affidavits could be characterized as evidence newly discovered, Perkins had failed to show diligence entitling him to equitable tolling of AEDPA's limitations period. Alternatively, the court found, Perkins had not shown that, taking account of all the evidence, no reasonable juror would have convicted him. The Sixth Circuit reversed. Acknowledging that Perkins' petition was untimely and that he had not diligently pursued his rights, the court held that Perkins' actual innocence claim allowed him to present his ineffective assistance of counsel claim as if it had been filed on time. In so ruling, the court apparently considered Perkins' delay irrelevant to appraisal of his actual innocence claim.

Nevertheless, actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup v Delo 513 US 298; 115 SC 851 (1995)* and *House v Bell 547 US 518; 126 SC 2064 (2006)* or expiration of the AEDPA statute of limitations, as in this case.

In the Instant case, the petitioner asserts that he can overcome AEDPA'S time limitation on the basis of newly discovered evidence and a Brady violation. The Petitioner has submitted (**a**) a copy of one page from his trial transcripts in which the victim testified that she had only went to one Hospital and was examined by one doctor and (**b**) a copy from his PSI report stating that on January 09, 1999, the day the Petitioner was first arrested, the victim was examined by a Doctor at the Hurley Medical Center and who found no evidence that the victim had been sexually assaulted which concerns the government's witness primary and state's lack of evidence on January 09, 1999. The Genesee County Circuit issued an order and opinion which goes on to explain that the victim was examine one month later at the McLaren Regional Medical Center and the Doctor examining the victim discovered that the victim's hymen and anal rings revealed repeated penetrations. See LA-D at pgs 2-3. At trial the victim testified that she had only went to one Hospital and was examined by one doctor. See LA-C TT p-60. More importantly, between January and February of 1999 the Petitioner was removed from the resident where he was living with the victim and her Mother. If anything, these documents clear establish, if the victim had been sexually assaulted, it occurred after the Petitioner was arrested on January 09, 1999 and after the victim was examined on January 09,1999 by a Hurley Medical Center Doctor.

In the instant case, like the Sixth Circuit found in Holland, the Petitioner must make a prima facie showing that no reasonable factfinder would have found him guilty if this newly discovered evidence was proven and viewed in light of all the evidence presented at his trial.

See 28 USC §2244(b) (2) (B) (ii). From the information provided in this brief, along with the medical report to this court, it does not appear that any physical evidence ties the Petitioner to the crime, or in the alternative, the confliction evidence from this medical report would have generated a different result that no reasonable factfinder would have found him guilty, to which the Petitioner asserts, deserts a fuller exploration in the federal district court. See *McDonald* 514 F3d at 544.

The Petitioner must also identify some constitutional error affecting his convictions. See 28 USC §2244(b) (2) (B) (ii); *Herrera v Collins 506 U.S. 390, 400; 113 SC 853 (1993)* (Stating claims of actual innocence based upon newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceedings). The mere recantation of testimony is not in itself grounds for invoking the Due Process Clause. Consider *Hysler v Florida 315 US 411, 413; 62 SC 688 (1942)*. For a conviction based on false testimony to offend due process, there must be the presence of impermissible state involvement in the untruthful testimony. Consider *Burks v Egeler 512 F2d 221, 225 (6th Cir 1975)*; see also *Pyle v Kansas 317 US 213, 215-16; 63 SC 177 (1942)*. The Petitioner claim that the prosecution intentionally withheld this medical report and presented conflicting testimony from another medical report, if proven, would indicate a deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. Quoting *Giglio v United States 405 US 150, 153; 92 SC 763 (1972)* (citing *Mooney v Holohan 294 US 103, 112; 55 SC 340 (1935)*; as determined by *Brady v Maryland 373 US 83; 83 SC 1194 (1963)* would satisfy the requirements of 28 USC §2244(b) (2) (B) (ii).

ACTUAL INNOCENCE ANALYSIS

A plea of actual innocence can overcome many federal limitations regarding the significance of a convincing actual-innocence claim. The United States Supreme Court stated that we have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. *Herrera v Collins 506 US 390, 404-405; 113 SC 853 (1993)*. The Supreme Court stated however, that we have recognized that a prisoner otherwise subject to defenses of abusive or successive use of the writ of habeas corpus may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. Id. at 404, 113 SC 853 (citing *Sawyer v Whitley 505 US 333; 112 SC 2514 (1992)* see also *Murray v Carrier 477 US 478, 496; 106 SC 2639 (1986)* (we think that in an extraordinary 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 on the merits notwithstanding the existence of a procedural bar to relief. This rule or fundamental miscarriage of justice exception is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. *Herrera* 506 US at 404. The United States Supreme Court has applied the miscarriage of justice exception to overcome various defaults, these include, successive petitions asserting previously rejected claims, see *Kuhlmann v Wilson 477 US 436, 454; 106 SC 2616 (1986)*; abusive petitions asserting in a second petition claims that could have been raised in a first petition, see *McCleskey v Zant 499 US 467, 494-495; 111 SC 1454 (1991)*; failure to develop facts in state court, see *Keeney v Tamayo-Reyes 504 US 1, 11-12; 112 SC 1715 (1992)*; and failure to observe state procedural rules including filing deadlines, see *Coleman v Thompson 501 US*

722, 750; 111 SC 2546 (1991); Carrier 477 US at 495-496. The miscarriage of justice exception, the Supreme Court stated will survived AEDPA's passage. In *Calderon v Thompson 523 US 538; 118 SC 1489 (1998)* applied the exception to hold that a federal court may consistent with AEDPA recall its mandate in order to revisit the merits of a decision. Id. at 523 US 558 (The miscarriage of justice standard is altogether consistent with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence). In *Bousley v United States 523 US 614, 622; 118 SC 1604 (1998)* the court stated that an actual innocence claim may even overcome a prisoner's failure to raise a constitutional objection on direct review. In *House v Bell 547 US 518; 126 SC 2064 (2006)* the court reiterated that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error. Id. 547 US at 537-538.

BRADY ANALYSIS

In *Brady v Maryland 373 US 83; 83 SC 1194 (1963)* the Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. See *Wilson v Mitchell 498 F3d 491, 512 (6th Cir 2007)* (quoting Brady ibid 373 US at 87). The material which must be disclosed under Brady encompasses impeachment evidence as well as exculpatory evidence. Wilson ibid 498 F3d at 512 (citing *United States v Bagley 473 US 667, 676; 105 SC 3375 (1985)*). To establish a Brady violation, the Petitioner must establish: (**1**) the prosecution suppressed or withheld evidence (**2**) such evidence was favorable to the defense and (**3**) the suppressed evidence was material. See *United States v Dado 759 F3d 550, 559-60 (6th Cir 2014)*.

The materiality requirement is not a sufficiency of the evidence test. See *In re McDonald 514 F3d 539, 545-46 (6th Cir 2008)* (quoting *Kyles v Whitley 514 US 419, 434-35; 115 SC 1555 (1995)*). In other words, a Petitioner is not required to demonstrate that consideration of the undisclosed evidence results in less than sufficient evidence to support his conviction. This is because the possibility of an acquittal of a criminal charge does not imply an insufficient evidentiary basis to convict. See *In re McDonald* 514 F3d at 546 (quoting *Whitley* 514 U.S. at 434-35). Also, the withheld evidence must be considered collectively, not item by item. *Whitley* supra 514 US at 436-37. The materiality requirement is satisfied where the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Banks v Dretke 540 US 668, 698; 124 SC 1256 (2004)* (quoting *Whitley* supra 514 U.S. at 435). In short, a Petitioner must demonstrate a reasonable probability of a different result. See *Dretke* supra 540 US at 698 (quoting *Whitley* supra 514 US at 434). For the reasons stated herein this Court should consider the fact that the below claims, if proven, would have generated a different result that no reasonable factfinder would have found the Petitioner guilty, to which the Petitioner asserts, deserts a fuller examination in the federal district court on the merits of these allegations.

GROUNDS FOR GRANTING RELIEF

GROUND ONE

THE PETITIONER ARGUES THAT HIS RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTION'S WITHHOLDING EVIDENCE FROM THE DEFENSE IN THE FORM OF A MEDICAL REPORT FROM THE HURLEY MEDICAL CENTER AND THAT DUE PROCESS ENTITLES THE PETITIONER TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

STANDARD DF REVIEW

A prosecutor has a duty to provide an accused with all evidence in the state's possession materially favorable to the accused's defense. *Brady v Maryland 373 US 83; 83 SC 1194 (1963)*

and should also be reviewed de novo. See also *Smith v Secretary Dept of Corrections 50 F3d 801 (10th Cir 1995).*

LEGAL SYNOPSIS

In *Brady v Maryland 373 US 83; 83 SC 1194 (1963)* the Supreme Court held that the government in a criminal prosecution must turn over to the defense potentially exculpatory evidence. Accord also *United States v Bagley 473 US 667; 105 SC 3375 (1985)* (stating *Brady* applies to impeachment evidence even in the absence of request for the evidence by the accused). With this being said a *Brady* claim has three essential elements: **First**, the evidence in question must be favorable to the accused either because it is exculpatory or because it tends to impeach the credibility of a prosecution witness. **Second**, the evidence must have been suppressed by the prosecution either willfully or inadvertently. In a *Brady* analysis, a defendant need not show that the prosecutor intentionally suppressed the information. A *Brady* violation depends on the character of the evidence and not the character of the prosecutor, however, the prosecution for purposes of such evidence encompasses not only the prosecutor's handling the case but also extends to the prosecutor's entire office as well as law enforcement personnel and other arms of the state involved in any aspects of a particular criminal case, which logically must be assumed, that investigating officers are part of the prosecution in proving guilt or innocence. See *United States v Buchanan 891 F2d 1436 (10th Cir 1989).* **Third**, prejudice must have resulted, which means a defendant must show a reasonable probability that had the evidence been disclosed to the defendant the result of the trial proceedings would have been different. See *Bagley* ibid 473 US at 682. The then question turns to prejudice, meaning whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. See *Kyles v Whitley 514 US 419; 115 SC 1555 (1995).*

In the instant case, the Petitioner was arrested on two occasions (**a**) on January 09, 1999 and (**b**) was re-arrested again on March 23, 1999. The victim in this case was taken to the Hurley Medical Center Emergency Room on January 09, 1999 where she was examined for a possible sexual assault by Doctor Gomez who filed a state required medical report stating that he found no sighs of vaginal or rectal disruption. See LA-B. The victim in this case was examine one month later by Doctor Norman Carter Director of the Child Evaluation Clinic at McLaren Regional Medical Center who examined the victim and prepared a state required medical report demonstrating that the victim's hymen and anal rings revealed repeated sexual penetrations. See LA-D pgs 2-3.

The Petitioner contends that the previous medical report prepared by Doctor Gomez was withheld by the prosecutor had the potential of changing the outcome of the Petitioner's Jury Trial, specifically, the information would have shed a different light on the state's presentation of evidence and would have changed the Petitioner's theory of his defense by showing the jury that this Medical Report demonstrates that the victim was not sexually assaulted on January 09, 1999 and other documents, such as the police reports, would demonstrate that the Petitioner had no contact with the victim until May 12, 1999 when Petitioner trial proceedings began. Likewise, the information could have been used to impeach the victim, as Well as, her credibility. Here, with the February 09, 1999 medical report, the State's case would have purely circumstantial and without any physical evidence such like DNA evidence, and with no evidence, the juror more than likely would not have found the Petitioner guilty of these charges. See *Watkins v Miller 92 F. Supp. 2d (SD Ind 2000)*; *Cannon v Alabama 558 F2d 1211, 1215-16, n-10 (5th Cir 1977)* (reversing denial of' relief where prosecutor failed to disclose existence eyewitness who would positively identify killer as someone other than the accused); see also *Brady* supra; and *Bell v Bell 470 F3d 739 (6th Cir 2006)*.

In the instant case, the Petitioner has demonstrated by clear and convincing evidence that on January 09, 1999 the victim's Mother was advised by Flint Police Sergeant Scott Sutter, the officer in charge of this case, to take her daughter to the Hurley Medical Center to get any evidence that her daughter was sexually assaulted. See LA-D p2. Where she was examined for a possible sexual assault by Doctor Gomez who filed a state required medical report stating that he found no sighs of vaginal or rectal disruption. See LA-B. Why the victim was re-examine one month later by Doctor Norman Carter remains a mystery for the state to prove by clear and convincing evidence on why this doctor's report demonstrates that the victim's hymen and anal rings revealed repeated penetrations, if this was true, then Doctor Gomez medical report would have been a reflection of the Doctor Carter's medical report or why the victim testimony exposes the fact that the victim only went to one hospital and was only seen by one doctor and the prosecution never asked the victim to identify which hospital and doctor they were. See LA-C TT p-60 L-13 (So you went to one doctor and one hospital) emphasis Added.

Even in a light most favorable to the prosecution Doctor Gomez medical report was favorable to the Petitioner's defense on the charges of his imprisonment, was suppressed or withheld by the prosecution, and was absolutely raised in the state court on collateral review in Michigan's Motion for Relief from Judgment pursuant to MCR 6.508 pleading to the state courts that this evidence was favorable or material to the Petitioner. While that state court did not expressly address why the victim was (**a**) examine on two different occasions or (**b**) why there was obviously two different medical opinions, the fact remains the state courts obviously denied Petitioner's request for relief. For the reasons state herein Petitioner asserts that this type of determination was based on an unreasonable determination of the facts in light of the evidence presented in the state courts that the prosecution suppressed or withheld favorable evidence

during the Petitioner jury trial. Accordingly, this claim raises an issue upon which habeas relief may be granted by this court.

GROUND TWO

THE PETITIONER IS RELYING ON A CONSTITUTIONAL VIOLATION THAT HE WAS DENIED DUE PROCESS OF LAW WHEN THE PROSECUTION WITHHELD CRITICAL EVIDENCE ESTABLISHING A COLORFUL CLAIM OF ACTUAL INNOCENCE, AND IF PROVEN, NO JUROR WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT.

STANDARD OF REVIEW

There is one factor in this case, this court should Court should take into consideration, that the petitioner has never file a habeas petition following the denial by the state's highest court not did he seek a writ of certiorari to the United States Supreme Court where two standards may be applied in this case.

Firstly, AEDPA's statutes of limitation prescribe when state prisoners may apply for writs of habeas corpus in federal court, however, the statutes of limitation are not jurisdictional, and do not require courts to dismiss claims as soon as the clock has run. See *Perkins v McQuiggin, 670 F3d 665 (6th Cir Mich 2012)* (quoting *Day v McDonough 547 US 198, 208; 126 SC 1675 (2006)*). Likewise, in *Souter v Jones 395 F3d 577, 602 (6th Cir 2005)* the Sixth Circuit Court of Appeals held that where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims. This gateway actual innocence claim the court held does not require the granting of the writ but instead permits the petitioner to present his original habeas petition as if he had not filed it late. Id. at 596. A district court's dismissal of a petition for a writ of habeas corpus for failing to comply with 28 USC §2244's statute of limitations is reviewed de

novo. See *Cook v Stegall 295 F3d 517, 519 (6th Cir 2002)*. **Secondly**, as the Sixth Circuit recognized in *Souter* an exception to timeliness should be made in the rare and extraordinary case where a petitioner can demonstrate a credible claim of actual innocence. Indeed, a credible claim of actual innocence functions as a wholly separate and superseding circumstance that acts as an equitable exception to the statute of limitations. See e.g. *Lee v Lampert 653 F3d 929, 933 at n.5 (9th Cir 2011)*.

However, federal habeas jurisprudence also demonstrates that such claims are rare, constituting a narrow class of cases implicating a fundamental miscarriage of justice. As determined in *Schlup v Delo 513 US 298, 314-315; 115 SC 851 (1995)*. In *Schulp* the Supreme Court held that in order to credibly claim actual innocence a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. Id. at 327. Moreover, any such new evidence presented must be reliable, whether it consists of exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. Id. at 324. Thus a petitioner must present more than an existential possibility of innocence that rests on speculation or present arguments that simply revisit minor discrepancies in trial testimony or evidence. A petitioner who can present new and reliable evidence of actual innocence under these exacting standards should be entitled to a review of his claims of constitutional error without the untimeliness of his petition standing in the way is reviewed de novo.

LEGAL SYNOPSIS

Judicial precedent holds that to establish actual innocence, a habeas petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him and that actual innocence means factual innocence, not mere legal insufficiency. One way to establish factual innocence is to show an intervening change in the

law that establishes the petitioner's actual innocence. This may be achieved by demonstrating (**1**) the existence of a new interpretation of statutory law (**2**) which was issued after the petitioner had a meaningful time to incorporate the new interpretation into his direct appeals or subsequent motions (**3**) is retroactive and (4) applies to the merits of the petition to make it more likely than not that no reasonable juror would have convicted him.

In *McQuiggin v Perkins 569 US 383; 133 SC 1924 (2013)* the Supreme Court discussed the actual innocence exception in the context of state petitioner's untimely filing under 28 USC §2244 describing the actual innocence exception as a fundamental miscarriage of justice exception grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. *McQuiggin* ibid 133 SC at 1931 (quoting *Herrera v Collins 506 US 390, 404; 113 SC 853 (1993)*). Although the Court in *McQuiggin* addressed an evidentiary factual actual innocence claim, i.e. the petitioner claimed that newly discovered facts established his innocence, the Court drew upon its reasoning in several decisions including *Bousley v United States 523 US 614; 118 SC 1604 (1998)* which recognized a fundamental miscarriage of justice exception in the procedural default context.

The miscarriage of justice exception, the Supreme Court stated that our decisions bear out, survived AEDPA's passage. In *Calderon v Thompson 523 US 538; 118 SC 1489 (1998)* the Court applied the exception to hold that a federal court may consistent with AEDPA, recall its mandate in order to revisit the merits of a decision. Id. at 523 US at 558 stating (The miscarriage of justice standard is altogether consistent with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence). In *Bousley v United States 523 US 614, 622; 118 SC 1604 (1998)* the Court held, in the context of §2255 an actual innocence claim may overcome a prisoner's failure

to raise a constitutional objection on direct review. In *House v Bell 547 US 518; 126 SC 2064 (2006)* the Court reiterated that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error. Id. 547 US at 537-538.

These decisions by the Supreme Court sought to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case of Actual Innocence. See *Schlup v Delo 513 US 298, 324; 115 SC 851 (1995)*. Sensitivity to the injustice of incarcerating an innocent individual should not decrease by the impediment of AEDPA's statute of limitations.

The Petitioner in the instant case, however, asserts not an excuse for filing after the statute of limitations has run. Instead, he maintains that a plea of actual innocence can overcome AEDPA's one-year statute of limitations. He thus seeks an equitable exception to §2244(d) (1) and not an extension of the time statutorily prescribed in this rule.

In *McQuiggin v Perkins 569 US 383; 133 SC 1924, 1931 (2013)* (citing *Rivas v Fischer 687 F3d 514, 547 n.42 (2d Cir 2012)* (the second circuit noted that some courts have framed the actual innocence question as whether the AEDPA allows for equitable tolling but finding it more accurate to describe the issue as whether an equitable exception exists because the due diligence requirement for equitable tolling is incompatible with a workable actual innocence exception).

For example, the *Bousley* the Supreme Court properly informs the analysis of an actual innocence claim in the statute of limitations context. See also *Souter v Jones 395 F3d 577, 590, 590 n.5 (6th Cir 2005)* (finding a credible claim of actual innocence based upon newly discovered evidence sufficient to equitably toll the one-year statute limitations set forth in §2244(d) (1), noting the teachings of *Bousley*, and observing that the interests that must be

balanced in creating an exception to the statute of limitations are identical to those implicated in the procedural default context). Thus, Bousley established an analytical framework for addressing actual innocence claims based upon a claim of legal innocence.

The Bousley Court held that to establish actual innocence the petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him and that actual innocence means factual innocence not mere legal insufficiency.

As the Sixth Circuit Court of Appeals recognized in *Souter v Jones 395 F3d 577, 600 (6th Cir 2005)* an exception to timeliness should be made in the rare and extraordinary case where a petitioner can demonstrate a credible claim of actual innocence. Indeed, a credible claim of actual innocence functions as a wholly separate and superseding circumstance that acts as an equitable exception to the statute of limitations. See *Lee v Lampert 653 F3d 929, 933 at n.5 (9th Cir 2011).*

The Petitioner in the instant case, reiterates again, that the Supreme Court in Schulp held that in order to credibly claim actual innocence a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. That any such new evidence presented must be reliable, whether it consists of exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. Id. at 324. Thus a petitioner must present more than an existential possibility of innocence that rests on speculation or present arguments that simply revisit minor discrepancies in trial testimony or evidence. A petitioner claiming Actual Innocence, who can present new and reliable evidence of actual innocence under these standards should be entitled to a review of his claims of constitutional error without the untimeliness of his petition standing in the way.

In the case before this Court as was discussed in Ground-One, the Petitioner was arrested on two occasions (**a**) on January 09, 1999 and (**b**) was re-arrested again on March 23, 1999. The victim in this case was taken to the Hurley Medical Center Emergency Room on January 09, 1999 where she was examined for a possible sexual assault by Doctor Gomez who filed a state required medical report stating that he found no sighs of vaginal or rectal disruption. See LA-B. The victim in this case was examine one month later by Doctor Norman Carter Director of the Child Evaluation Clinic at McLaren Regional Medical Center who examined the victim and prepared a state required medical report demonstrating that the victim's hymen and anal rings revealed repeated sexual penetrations. See LA-D pgs 2-3.

The Petitioner contends that the previous medical report prepared by Doctor Gomez was withheld by the prosecutor had the potential of changing the outcome of the Petitioner's Jury Trial, specifically, the information would have shed a different light on the state's presentation of evidence and would have changed the Petitioner's theory of his defense by showing the jury that this Medical Report demonstrates that the victim was not sexually assaulted on January 09, 1999 and other documents, such as the police reports, would demonstrate that the Petitioner had no contact with the victim until May 12, 1999 when Petitioner trial proceedings began. Likewise, the information could have been used to impeach the victim, as Well as, her credibility. Here, with the February 09, 1999 medical report, the State's case would have purely circumstantial and without any physical evidence such like DNA evidence, and with no evidence, the juror more than likely would not have found the Petitioner guilty of these charges.

In the instant case, the Petitioner avers that he has demonstrated by clear and convincing evidence that on January 09, 1999 the victim's Mother was advised by Flint Police Sergeant Scott Sutter, the officer in charge of this case, to take her daughter to the Hurley Medical Center to get any evidence that her daughter was sexually assaulted. See LA-D p2.

Where she was examined for a possible sexual assault by Doctor Gomez who filed a state required medical report stating that he found no sighs of vaginal or rectal disruption. See LA-B. Why the victim was re-examine one month later by Doctor Norman Carter remains a mystery for the state to prove by clear and convincing evidence on why this doctor's report demonstrates that the victim's hymen and anal rings revealed repeated sexual penetrations, if this was true, then Doctor Gomez medical report would have been a reflection of the Doctor Carter's medical report and the state ignores the that the victim testimony exposes an important element that she only went to one hospital and was only seen by one doctor and the prosecution never asked the victim to identify which hospital and doctor they were. See LA-C TT p-60 L-13 (So you went to one doctor and one hospital) emphasis Added.

Even in a light most favorable to the prosecution Doctor Gomez medical report was favorable to the Petitioner's defense on the charges of his imprisonment, was suppressed or withheld by the prosecution, and was absolutely raised in the state court on collateral review in Michigan's Motion for Relief from Judgment pursuant to MCR 6.508 pleading to the state courts that this evidence was favorable or material to the Petitioner. While that state court did not expressly address why the victim was (**a**) examine on two different occasions or (**b**) why there was obviously two different medical opinions, the fact remains, the state courts obviously denied Petitioner's request for relief. For the reasons state herein Petitioner asserts that this type of determination was based on an unreasonable determination of the facts in light of the evidence presented in the state courts that the prosecution suppressed or withheld favorable evidence during the Petitioner jury trial regarding his guilt or innocence.

The Petitioner strongly avers that he has established by clearly and convincing evidence a colorful claim of Actual Innocence which demonstrates, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him and that this claim means

factual innocence not mere legal insufficiency in his trial proceedings. Accordingly, this claim raises an issue upon which habeas relief may be granted by this court.

RELIEF SOUGHT

For the reasons stated herein the Petitioner implores this court to grant his petition for a writ of certiorari and either reverse the Sixth Circuit's decision or allow the parties to submit briefs on the merits of the questions presented in this petition.

SUBMITTED BY: Jeffrey Denton #288247

JEFFREY TODD DENTON #288247

DATED: MAR 15, 2021

CERTIFICATION OF SERVICE

The petitioner certifies pursuant to USSC Rule-29 that he served the within Motion for leave to proceed in forma pauperis and petition for writ of certiorari to the court of appeal for the Sixth circuit on counsel for the respondent by enclosing a copy thereof in an envelope with postage prepaid and addressed too:

1. The Office of the Michigan Attorney General
   Appellate Division
   PO BOX: 30217
   Lansing, Michigan 48909

And too:

2. The Solicitor General of the United States
   U.S. Department of Justice
   950 Pennsylvania Avenue, NW
   Washington, DC 20530

By deposing them in the Michigan Department of Corrections Institutional Mailing system on _____, 2021 and further certifies that all parties required to be served have been served.

SUBMITTED BY: #288247

JEFFREY TODD DENTON #288247

DATED: MAR 15, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEFFREY DENTON,[1]

Petitioner,

Case No. 19-cv-11762
Hon. Matthew F. Leitman

v.

JOHN DAVIDS,

Respondent.

/

OPINION AND ORDER (1) GRANTING RESPONDENT'S MOTION FOR DISMISSAL (ECF No. 7), (2) DENYING CERTIFICATE OF APPEALABILITY, (3) GRANTING PERMISSION TO APPEAL IN FORMA PAUPERIS, (4) GRANTING PETITIONER'S MOTION TO AMEND THE CASE CAPTION (ECF NO. 10), AND (5) AMENDING CASE CAPTION

Petitioner Jeffrey Denton is a state prisoner in the custody of the Michigan Department of Corrections. In 1999, a jury in the Genesee County Circuit Court convicted Denton of three counts of first-degree criminal sexual conduct, Mich.

[1] Denton has moved to amend the case caption to reflect the correct spelling of his name, which was misspelled as "Denten" in the petition. (*See* Denton Mot., ECF No. 10.) The Court **GRANTS** the motion and amends the caption to reflect the correct spelling of Denton's name. In addition, the proper respondent in a habeas action is the state officer having custody of the petitioner. *See* Rule 2, Rules Governing Section 2254 Cases. The warden of Denton's present place of incarceration is John Davids. The Court therefore also amends the case caption to substitute John Davids as the proper Respondent.

Comp. Laws § 750.520b(1)(a). The state trial court then sentenced Denton as a second habitual offender to three concurrent terms of 40 to 60 years imprisonment.

On June 8, 2019, Denton filed a *pro se* petition for a writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254. (*See* Pet., ECF No. 1.) In the petition, Denton claims that the prosecution withheld a medical report which would have established, by clear and convincing evidence, that the victim in this case was never sexually assaulted. (*See id.*, PageID.21.) He insists that his petition is timely filed, and, in the alternative, that the Court should excuse any untimeliness because he is actually innocent. (*See id.*, PageID.27-29.)

The matter is now before the Court on Respondent's motion to dismiss the petition as untimely under the one-year statute of limitations applicable to federal habeas corpus actions. (*See* Mot. to Dismiss, ECF No. 7.) For all of the reasons stated below, the petition is untimely. The Court therefore **GRANTS** Respondent's Motion to Dismiss. The Court further **DENIES** Denton a certificate of appealability. However, the Court **GRANTS** Denton permission to appeal *in forma pauperis*.

I

Denton's convictions arise from the sexual assaults of his fiancée's eight-year old daughter over the course of several months in 1998. Following his convictions and sentencing in Genesee County Circuit Court, Denton filed an appeal of right with the Michigan Court of Appeals. That court affirmed his convictions. *See People*

v. Denton, 2001 WL 665189 (Mich. Ct. App. May 22, 2001). Denton then filed an application for leave to appeal with the Michigan Supreme Court. That court denied the application. *See People v. Denton*, 640 N.W.2d 873 (Mich. Feb. 4, 2002).

On August 4, 2014, Denton filed a motion for relief from judgment with the state trial court.[2] (*See* ECF No. 8-7.) That court denied the motion on October 15, 2014. (*See* ECF No. 8-8.) Both the Michigan Court of Appeals and the Michigan Supreme Court denied Denton's applications for leave to appeal the trial court's decision. *See People v. Denton,* Case No. 326707 (Mich. Ct. App. June 22, 2015); *People v. Denton*, 880 N.W.2d 567 (Mich. 2016).

On June 24, 2017, Denton filed a second motion for relief from judgment with the state trial court.[3] (*See* ECF No. 8-10.) The trial court denied the motion on July

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[2] Denton signed and dated the motion for relief from judgment on August 4, 2014. (*See* ECF No. 8-7, PageID.500.) The state court received the motion for filing on August 25, 2015. (*See id.*, PageID.494.) The federal prison mailbox rule provides that submissions by *pro se* prisoners are considered filed on the date they are given to prison officials for mailing. *See Houston v.* Lack, 487 U.S. 266, 271-72 (1988). Courts in this district disagree about whether this rule applies to a motion for relief from judgment filed in a Michigan state court. Compare *Shaykin v. Romanowski,* Case No. 14-cv-193381, 2016 WL 193381, *5 (E.D. Mich. Jan. 14, 2016) (applying prison mailbox rule to filing of motion for relief from judgment in state court) with *Smith v. Palmer*, Case No. 12-cv-11036, 2015 WL 5707105, at *5 (E.D. Mich. Sept. 29, 2015) (concluding that prison mailbox rule did not apply to motion for relief from judgment filed in state court). The Court need not resolve this issue because even if the Court applies the prison mailbox rule and gives Denton the benefit of an August 4, 2014, filing date, the petition filed in this Court would still be untimely.

[3] The motion was received for filing in the state trial court on June 29, 2017. As with Denton's first motion for relief from judgment, the Court need not resolve the

27, 2017. (*See* ECF No. 8-11.) Denton then filed applications for leave to appeal with the Michigan Court of Appeals and Michigan Supreme Court. Both state appellate courts denied the applications. *See People v. Denton*, Case No. 340066 (Mich. Ct. App. Sept. 28, 2018); *People v. Denton*, 917 N.W.2d 54 (Mich. Sept. 12, 2008).

Denton filed his habeas corpus petition in this Court on June 8, 2019. (*See* Pet., ECF No. 1.) Respondent has filed a motion to dismiss the petition as untimely. (*See* Mot. to Dismiss, ECF No. 7.) Denton did not file a reply, but he addressed the timeliness question in his petition. (*See* Pet., ECF No. 1, PageID.10-12.)

II

A

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, became effective on April 24, 1996, and it applies to Denton's petition. AEDPA includes a one-year period of limitations for habeas petitions brought by prisoners challenging state-court judgments. AEDPA provides:

> (1) A 1-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 –

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applicability of the prison mailbox rule because giving Denton the benefit of this rule does not impact the statute-of-limitations analysis.

> (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 Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases 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 time during which a properly filed application for State postconviction 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.

28 U.S.C. § 2244(d).

Absent equitable tolling or another exception to AEDPA's limitations period, a habeas petition filed outside this prescribed time period is subject to dismissal. *See Jurado v. Burt*, 337 F.3d 638 (6th Cir. 2003) (holding that habeas petitioner was not entitled to equitable tolling and affirming dismissal of habeas petition as untimely filed).

B

As noted above, AEDPA's one-year statute of limitations begins to run from the latest of four triggering events. *See* 28 U.S.C. § 2244(d)(1)(A)-(D). The first and fourth triggering events are relevant to Denton's petition here.[4] Respondent says that subsection (A) applies because the latest relevant event was the date on which Denton's conviction became final upon the conclusion of direct review. That date was more than sixteen years before Denton filed his petition here. Denton counters that subsection (D) applies because, through the exercise of due diligence, he did not discover the factual predicate of his claim that the prosecution failed to turn over the victim's medical record until long after his convictions became final on direct review. He therefore says his discovery of that evidence is the latest relevant event. The Court disagrees with Denton.

Denton's reliance on subsection (D) is misplaced. As quoted above, that section provides that, where applicable, the limitations period shall run from the "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Denton claims that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963),

[4] Denton does not allege that a state-created impediment prevented him from filing a timely petition, nor does he rely on a newly recognized constitutional right. Subsections (B) and (C) are therefore inapplicable to the Court's analysis of the limitations issue.

when it failed to turn over to his defense a medical report, dated January 9, 1999: That medical report concerned the victim's evaluation at the Hurley Medical Center emergency room for possible sexual assault, and it stated that no abnormalities were detected. (*See* ECF No. 1, PageID.25-27.) Denton claims that he was not previously aware of the existence of the report, and he insists that AEPDA's limitations period did not begin until he discovered the report.[5] But the record shows that both the victim's examination at the Hurley Medical Center and the medical report were known to the defense at the time of trial in 1999. Indeed, Denton's counsel specifically elicited testimony from a prosecution witness that (1) a report was created after the victim's examination at Hurley Medical Center and (2) the report indicated that there were "no abnormalities" found during the examination. (ECF No. 8-4, PageID.419-20.) Denton therefore presented evidence to the jury that the report supported his theory that the victim was not assaulted. In addition, the victim's mother testified that she took the victim to Hurley Medical Center for an examination. (*See id.*, PageID.394-95.) Finally, Denton's counsel referenced the victim's examination at Hurley Medical Center during closing arguments. (*See* ECF No. 8-5, PageID.455.) Thus, the defense not only clearly knew about the victim's

[5] Although Denton argues that discovery of the medical report triggered ADEPA's statute of limitations, he fails to specify the date when the report became known to him. The Court need not resolve this question because, as discussed *infra*, Denton's defense was aware of the report at the time of trial.

examination and the resulting medical report at the time of trial, it presented evidence about both to the jury. Because Denton was aware of the report at the time of trial, the latest relevant event for purposes of AEDPA's statute of limitations cannot be Denton's discovery of that evidence. Thus, Denton cannot rely on Section 2244(d)(1)(D) as the starting point for AEDPA's statute of limitations.

The latest relevant event here was the date Denton's conviction became final under subsection (A). *See* 28 U.S.C. § 2244(d)(1)(A). Denton's conviction became final on May 5, 2002, *i.e.* 90 days after the Michigan Supreme Court denied his application for leave to appeal. *See Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009) (a conviction becomes final when "the time for filing a certiorari petition expires"). Denton had one year from that date to timely file his federal habeas petition. He failed to file his petition within that time period. Nor did Denton take any action during that period that would have tolled AEDPA's statute of limitations, such as pursuing collateral review in state court during that time. Thus, AEPDA's limitations period expired on May 5, 2003. Denton did not file his petition until more than sixteen years later, on June 8, 2019. (*See* Pet., ECF No. 1.) The petition is therefore untimely.

C

Denton argues, in the alternative, that his showing of actual innocence excuses the untimeliness of the petition. *See, e.g., McQuiggin v. Perkins*, 569 U.S. 383, 392

(2013) (holding that a showing of actual innocence can overcome AEDPA's statute of limitations). A valid claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence – that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "The *Schlup* standard is demanding and permits review only in the 'extraordinary' case." *House v. Bell*, 547 U.S. 518, 538 (2006) (citation omitted).

Denton has failed to meet the *Schlup* standard here. He relies entirely on the allegedly withheld medical report. And he insists that the report demonstrates his innocence because the treating physician did not see evidence of sexual assault. But, as discussed above, the report was not withheld from Denton's defense at trial and its contents were presented to the jury. The evidence is therefore not "new." The jury considered this evidence at Denton's trial and nonetheless found him guilty.

In sum, Denton filed this petition more than sixteen years after the AEDPA limitations period expired, and the Court finds no basis to excuse his untimely filing. The Court will therefore **GRANT** Respondent's motion and dismiss the petition.

III

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (a "COA") is issued under 28 U.S.C. § 2253. A COA may be issued "only if the applicant has made a substantial showing

of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies relief on the merits, the substantial showing threshold is satisfied when a petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a court denies relief on procedural grounds without addressing the merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See id.* In this case, jurists of reason could not find debatable the Court's procedural ruling that the petition is untimely. The Court therefore **DENIES** Denton a certificate of appealability.

A court may grant a petitioner leave to proceed on appeal *in forma pauperis* if it finds that an appeal is being taken in good faith. *See* 28 U.S.C. § 1915(a)(3); Fed. R. App. 24(a). "Good faith" is judged objectively and an appeal is not taken in good faith if the issue presented is frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1961). The Court finds that an appeal could be taken in good faith. Denton may therefore proceed *in forma pauperis* on appeal. *See id.*

IV

For all of the reasons stated above, the Court holds that Denton's habeas petition is untimely. Accordingly, the Court **GRANTS** Respondent's motion to

dismiss (ECF No. 7) and **DISMISSES** the petition (ECF No. 1) **WITH PREJUDICE**.

The Court further **DENIES** Denton a certificate of appealability. But it **GRANTS** him leave to appeal *in forma pauperis*.

The Court further **DIRECTS** the Clerk of Court to correct the case caption to: Jeffrey Denton v. John Davids.

IT IS SO ORDERED.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: May 27, 2020

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on May 27, 2020, by electronic means and/or ordinary mail.

s/ Holly A. Monda
Case Manager
(810) 341-9764

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEFFREY DENTON,

Petitioner,

Case No. 19-cv-11762
Hon. Matthew F. Leitman

v.

JOHN DAVIDS,

Respondent.

/

JUDGMENT

The above entitled action came before the Court on a petition for a writ of habeas corpus. In accordance with the Opinion and Order entered on May 13, 2020:

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that permission to appeal *in forma pauperis* is **GRANTED**.

DAVID J. WEAVER
CLERK OF THE COURT

By: s/Holly A. Monda
Deputy Clerk

Approved:

s/Matthew F. Leitman
Matthew F. Leitman
United States District Court

Dated: May 27, 2020
Flint, Michigan

U.S.C.A. ORDER #20-1566 DENYING COA

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: October 02, 2020

Mr. Jeffrey Denton
Ionia Correctional Facility
1576 W. Bluewater Highway
Ionia, MI 48846

Re: Case No. 20-1566, *Jeffrey Denton v. John Davids*
Originating Case No.: 4:19-cv-11762

Dear Ms. Denton,

The Court issued the enclosed Order today in this case.

Sincerely,

s/Antoinette Macon
Case Manager
Direct Dial No. 513-564-7015

cc: Mr. Scott Robert Shimkus
Mr. David J. Weaver

Enclosure

No. 20-1566

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 02, 2020
DEBORAH S. HUNT, Clerk

JEFFREY DENTON,

Petitioner-Appellant,

v.

JOHN DAVIDS, Warden,

Respondent-Appellee.

ORDER

Before: BUSH, Circuit Judge.

Jeffrey Denton, a Michigan prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Denton has moved for a certificate of appealability.

A jury found Denton guilty of three counts of first-degree criminal sexual conduct, and the trial court sentenced him to concurrent prison terms of 40 to 60 years. The Michigan Court of Appeals affirmed the trial court's judgment, *People v. Denton*, No. 220812, 2001 WL 665189 (Mich. Ct. App. May 22, 2001), and, on February 4, 2002, the Michigan Supreme Court denied Denton's delayed application for leave to appeal, *People v. Denton*, 640 N.W.2d 873 (Mich. 2002) (table). In 2014, and again in 2017, Denton filed unsuccessful motions for relief from judgment in state court.

In 2019, Denton filed a § 2254 petition, arguing that the prosecution suppressed a medical report in which Dr. Gomez of the Hurley Medical Center determined that there was no evidence that the victim was sexually assaulted. The district court dismissed the petition as untimely and declined to issue a certificate of appealability.

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322,

336 (2003). When a district court denies a petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court's determination that Denton's petition is untimely. Under 28 U.S.C. § 2244(d)(1)(A), the one-year limitations period applicable to Denton's petition began running, at the latest, in May 2002, ninety days after the Michigan Supreme Court denied his delayed application for leave to appeal. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012); *Pinchon v. Myers*, 615 F.3d 631, 640 (6th Cir. 2010). Because Denton did not file his habeas petition or a time-tolling motion in state court during the following year, his petition is barred by the statute of limitations unless he is entitled to a later start date for the limitations period, equitable tolling, or an equitable exception to the limitations period.

Denton contends that he is entitled to a later start date under 28 U.S.C. § 2244(d)(1)(D) because he could not have previously discovered the existence of Dr. Gomez's medical report. But the trial transcript shows that Denton was aware of the report during trial. Thus, he is not entitled to a later start date under § 2244(d)(1)(D). Denton is also not entitled to equitable tolling because he has not shown that he pursued his rights diligently or that an extraordinary circumstance prevented him from filing a timely federal petition. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). And Denton is not entitled to an equitable exception to the limitations period as discussed in *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), because Dr. Gomez's report is not new evidence, given that the substance of the report was presented at trial, *see Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012), and, in any case, the report is insufficient to show that it is more likely than not that no reasonable juror would have found Denton guilty in light of the other evidence of his guilt, *see Bell v. Howes*, 703 F.3d 848, 854-55 (6th Cir. 2012).

Accordingly, Denton's motion for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

U.S.C.A. ORDER DENYING EN BANC REHEARING

No. 20-1566

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 07, 2020
DEBORAH S. HUNT, Clerk

JEFFREY DENTON,

Petitioner-Appellant,

v.

JOHN DAVIDS, WARDEN,

Respondent-Appellee.

ORDER

Before: SILER, CLAY, and THAPAR, Circuit Judges.

Jeffrey Denton, a Michigan prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

U.S.C.A. ORDER #20-1566 PANEL DENIED REHEARING

No. 20-1566

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 22, 2020
DEBORAH S. HUNT, Clerk

JEFFREY DENTON,

Petitioner-Appellant,

v.

JOHN DAVIDS, WARDEN,

Respondent-Appellee.

O R D E R

Before: SILER, CLAY, and THAPAR, Circuit Judges.

Jeffrey Denton petitions for rehearing en banc of this court's order entered on October 2, 2020, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Larsen recused herself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: December 22, 2020

Mr. Jeffrey Denton
Ionia Correctional Facility
1576 W. Bluewater Highway
Ionia, MI 48846

Re: Case No. 20-1566, *Jeffrey Denton v. John Davids*
Originating Case No.: 4:19-cv-11762

Dear Mr. Denton,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Scott Robert Shimkus

Enclosure

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