IN THE UNITED STATES SUPREME COURT

No. _____

DUANE YATES,

Petitioner-Appellant,

vs.

PATTY WACHTENDORF,

Respondents-Appellees.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

1. Whether, in light of Petitioner's compelling case of actual innocence, and the state post-conviction attorney's express lies about two missed deadlines, including the jurisdictional deadline to reinstate Petitioner's only state post-conviction remedy, this Court should vacate, grant, and remand for further proceedings in light of the equitable tolling standards of *Holland v. Florida*?

LIST OF PARTIES

1. All parties appear in the caption.

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JURISDICTION

Mr. Yates is a state prisoner serving a 25 year sentence for second degree sexual abuse of a minor for a conviction arising out of the Iowa state courts. Pursuant to 28 U.S.C. Section 2254, Mr. Yates filed for federal review of a his state conviction for sexual abuse of a minor. Federal question jurisdiction exists

under 28 U.S.C. § 1331. The 8th Circuit Court of Appeals issued final judgment denying the certificate of appealability on February 8, 2021, and on Dec. 9, 2020, denied rehearing. Appx. B and C. The jurisdiction of this Court is invoked under § 28 U.S.C. §1254(1).

TIMELINESS

The 8th Circuit denied Mr. Yates Application for a Certificate of Appealability on December 9, 2020, and Petition for Rehearing on Feb. 8, 2021. Appx. B and C. This Petition is filed within 150 days of that date. See US Supreme Court Rule 13 (1) ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."). That deadline falls on July 8, 2021. A document is considered timely filed it were delivered on "if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing, or if it is delivered on or before the last day for fling to a third-party commercial carrier for delivery to the Clerk within 3 calendar days." Supreme Court Rule 29.2. This document was mailed via United States Postal Service on July 8, 2021, and post marked for delivery on that date. Thus, it

is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Set forth *verbatim* in Appendix L)

1. 28 U.S.C. Section 2244

2. Iowa Rule of Civ. Proc. 1.944

STATEMENT OF THE CASE

Nature of the Case:

This case comes before this Court on an appeal from a denial of a federal a state conviction pursuant to 28 U.S.C. Section 2254. Mr. Yates was originally convicted of Sexual Abuse in the Second Degree in violation of Iowa Code Section 709.1 and 709.3 (2). Unfortunately, his first post-conviction counsel missed a deadline resulting in automatic dismissal of his post-conviction. Appx. K. Additionally, Mr. Yates' post-conviction counsel also missed the deadline to reinstate the dismissed post-conviction application. Appx G-I. This resulted in years of trying to reinstate his post-conviction in good faith. The Iowa Courts held that he was jurisdictionally barred from reinstating his post-conviction. In habeas proceedings, the Honorable Judge Leonard Strand found that Mr. Yates' missed the one year statute of limitations under 28 U.S.C. Section 2244, and held that his post-conviction lawyer's deceptive misconduct about the missed deadlines did not toll the statute of limitations nor did it even warrant a certificate of appealability.

Relevant Procedural and Factual History

A. The Conviction

In August 2002, Yates was convicted of one count of sexual abuse in the second degree in violation of Iowa Code § 709.3(2) (2001). Appx J; *State v. Yates,* No. 02-1681, 2003 WL 22697964, at *1 (Iowa Ct. App. Nov. 17, 2003). The Iowa Court of Appeals summarized the facts and trial proceedings of the state conviction as follows:

> Duane and Martha Yates were married from November 1999 to April 2001. Martha's daughter, Amanda, often visited Duane and Martha at their home with her two sons, J.R. and A.D. The boys would often spend the night at the Yate's home and J.R. even resided with them for a period of time. This case arose from allegations by A.D. and J.R. that Duane Yates (Yates) had "molested" them. A.D. was eleven years old at the time of trial and J.R. was thirteen.
>
> The State initially filed a trial information charging Yates with three counts of sexual abuse in the second degree and one count of lascivious acts with a child concerning A.D., and two counts of lascivious acts with a child concerning J .R. The State later amended the trial information to charge one count of sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3(2) concerning A.D. (Count I), one count of lascivious acts with a child in violation of section 709.8 concerning A.D. (Count II), and one count of lascivious acts with a child in violation of section 709.8 concerning J.R. (Count III). Each count alleged Yates had a prior conviction for a sexually predatory offense and sought sentencing enhancement pursuant to sections 901A. l(l)(a), 901A.1(2), and 901A.2(3). Prior to trial Yates filed a motion in limine concerning his conviction in November of 1992 for sexual abuse in the third degree. The court ruled that the State was not to mention the previous conviction in its case in chief, but reserved ruling as to whether such conviction could be inquired into under Iowa Rule of Evidence 5. 609 for impeachment purposes until after the direct testimony by Yates.
>
> At the close of the State's case in chief Yates moved for a judgment of acquittal. The trial court granted the motion as to the two counts of lascivious acts with a child (Counts II and Ill) and denied it as to the sexual

abuse charge (Count I).

Appx. E p. 3; Appx. J.

The jury found Yates guilty of sexual abuse in the second degree against A.D. [Count I.] The court sentenced Yates to a term of imprisonment required by law. The trial court applied a mandatory enhancement to Yates' sentence because he had been previously convicted of a sexually predatory offense. On November 17, 2003, the Iowa Court of Appeals affirmed conviction. Appx. J.

B. PCR-1

Yates filed his first PCR application on June 4, 2004. *See* Application, *Yates v. State,* No. PCCV129517 (Iowa Dist. Ct. Woodbury Cty. June 4, 2004). On July 2, 2004, Yates filed a second PCR application. *See* Application, *Yates v. State,* No. PCCV129697 (Iowa Dist. Ct. Woodbury Cty. July 2, 2004). In the two PCR applications, Yates contended he was entitled to relief because:

(1) the conviction or sentence violated the Constitution or otherwise violated applicable law;

(2) that the sentence was in excess of the maximum authorized by law;

(3) that evidence of material facts that had not previously been presented required vacation of his sentence or conviction; and

(4) that he was unlawfully held in custody.

Doc. No. 16-2 at 7. Attorney Tim Scherle was appointed to represent Yates in these cases. Doc. No. 65 at 62:17-19. Yates testified at the hearing that during the representation he "probably sent [Scherle] at least one letter a week if not two" and "probably called him at least once to twice a week if not more often." *Id.* at 63:11-64:8. Scherle described Yates as very detail-oriented, meticulous and involved in his own proceedings. *See id.* at 48: 5-11.

C. The First Post-conviction was Dismissed due to Attorney's Missed Deadline on a Failure to Prosecute.

On July 28, 2005, due to inactivity in the cases, the Woodbury County Clerk of Court's office filed notices in both cases that they would be dismissed pursuant to Iowa Rule of Civil Procedure 1.944 on January 1, 2006, if they were not tried before that date. Doc. No. 61-1 at 15; *see also* Doc. No. 16-2 at 7. However, on December 27, 2005, the trial court ordered the consolidation of PCCV129517 and PCCV1296973 and the "try or dismiss" deadline was continued to June 30, 2006. Order Scherle received a copy of this order, but Yates did not. *See* Doc. No. 65 at 42:8-23, 64: 14-65: 11. Rebecca Morehead, a clerk's office employee, testified at the hearing that only attorneys would receive this type of order and this order was personally served on Scherle. *See id.* at 31:21-32:4, 33:20-24.

Yates testified that he contacted Scherle every few weeks to ensure PCR-1 was active. *Id.* at 65:4-18. He testified that Scherle always replied that it was. *Id.*

PCR-1 was not tried by the June 30, 2006 deadline, but the case was not immediately dismissed.

On July 3, 2006-after the deadline but before any notice was filed that the case had been dismissed-Yates sent a request to the county clerk's office for a copy of PCR-1 's docket. Doc. No. 60-1; *see also* Doc. No. 16-2 at 8. The dismissal notice was not sent to Scherle or Yates. *See* Doc. No. 65 at 34:15-35:2. However, Scherle was aware the case would be dismissed on June 30, 2006, if it was not tried or further continued because he received the order extending the try or dismiss deadline. *See id.* at 31:21-32:4, 33:20-24, 42:8-23.

In February 2007, Scherle visited Yates in prison to discuss trial prep, witnesses and subpoena issues. *Id.* at 66:8-15; *see* Doc. No. 36-2 at 1. At this meeting, Yates again asked Scherle if the case was still active and Scherle replied "[w]e're all current" and the case was "probably [] set to go to trial later this fall." Doc. No. 65 at 66:24- 67:6; *see also* Doc. No. 36-2 at 1. Scherle does not dispute that he said something along these lines. *See* Doc. No. 65 at 45:5-12.

On February 16, 2007, Yates sent another request to the county clerk's office for a copy of PCR-l's docket. Doc. No. 60-2. Yates explained at the hearing he filed this request because he never received a response to his July 3, 2006 request. *See* Doc. No. 65 at 84: 16-85:4. Yates testified that he again did not receive a response. 6 *Id.* at 84: 14-85:6.

On June 6, 2008, after becoming concerned that nothing had happened in PCR-1, Yates attempted to file a motion to set a court date. Doc. No. 36-4; *see* Doc. No. 65 at67: 16-68: 16. The motion was returned to Yates with a note from the county clerk's A note on the bottom of the request states: "[c]opies of file to date and docket mailed to Duane Yates 7/10/06." Doc. No. 60-1. However, Morehead testified she is unable to confirm the file and docket were sent to Yates because there is no record of mailing.

Mr. Yates learned that the matter has been dismissed. Yates testified he immediately called Scherle upon receiving the note, extremely upset with Scherle' s handling of the case. *See* Doc. No. 65 at 68: 17-69: 8.

Yates alleges Scherle then told him that he would get PCR-1 reinstated and there was "no problem" in doing that. Doc. No. 36-2 at 1. After this phone call, Yates claims he had a difficult time communicating with Scherle and that Scherle became "real vague" with him. *See* Doc. No. 65 at 70:14-72:6. Yates also claims that he never heard from Scherle again after this phone call. Doc. No. 36-2 at 1. Yates testified that up until June 2008 he did not know PCR-1 was dismissed or even subject to dismissal. *See* Doc. No. 65 at 69: 17-70:6. Scherle does not dispute this. On August 18, 2014, Scherle received a public reprimand from the Iowa Supreme Court because of his handling of Yates' case. *See* Order of Public

Reprimand, *Iowa Supreme Court Attorney Disciplinary Board v. Scherle,* No. 14-0698 (Iowa Aug. 18, 2014).

D. Following Dismissal Mr. Yates Spent 15 Years Trying to Get Post-conviction Reinstated.

As noted in detail by District Court, Mr. Yates valiantly tried to get the state post-conviction case by trying to file four separate post-convictions trying to get the application reinstated based upon ineffective counsel and other grounds. District Court; Appx E at pp. 10-14 and Appx. G-I.

E. Federal Habeas Proceedings

Following evidentiary hearing on Mr. Yates' tolling claim, the Honorable Judge Leonard Strand dismissed the Petition for Relief under Section 2254. Appx. E. Despite finding that Mr. Yates' probably established equitable tolling during the first one year time period due to attorney misconduct, the District Court found that Mr. Yates did not pursue with sufficient alacrity his state post-conviction claims even though Mr. Yates filed four post-convictions and multiple illegal sentence motions over those time period. The Court dismissed the petition and denied a certificate of appealability on Mr. Yates' tolling claim. See Appx. E. On Jan. 23, 2020, the Court denied Motion to enlarge findings.

On December 9, 2020, the 8th Circuit denied the certificate of appealability and on February 8, 2021, the 8th Circuit denied Mr. Yates' Petition for Rehearing.

Appx. B and A.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD VACATE, GRANT AND REMAND FOR FURTHER CONSIDERATION OF EQUITABLE TOLLING STANDARDS OF HOLLAND V. FLORIDA.

A. Overview

The 8th Circuit has not yet granted full merits briefing due not granting a certificate of appealability pursuant to 28 U.S.C. 2253 (c). More than 11 years ago, this Court addressed attorney misconduct in the context of deliberate deception about a missed mandatory deadline on a capital case. The United States Supreme Court has made clear that a garden variety attorney neglect or miscalculated deadline will not warrant tolling. *Holland v. Florida*, 560 U.S. 631, 651–52 (2010). However, it found that equitable tolling was likely warranted to the egregious misconduct present. This case presents not just a case of a missed deadline, but a double missed deadline. Mr. Yates' attorney not only deceived him about the deadline, but also about the six month deadline to restate his post-conviction. This Court has not really ever addressed an error of similar magnitude. Accordingly, Mr. Yates believes review will eventually be needed under US Supreme Court Rule 10 (c), allowing review for issues when a "United States court of appeals has decided an important question of federal law that has not been, but

should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

The 8th Circuit did not even view this to be close question under *Holland* nor did the District Court. It is clearly time to review the scope of Holland as the circuit appears to require clarification about the scope of Holland under arguably much worse circumstance the *Holland*, a double missed deadline.

Given the procedural posture, no merits briefing before the 8th Circuit, Mr. Yates believes the best approach it to grant, vacate, remand for further consideration under *Holland v. Florida*, and order that a certificate be granted allowing for full merits briefing on the following issue, whether attorney deliberate misconduct equitably tolled the statute of limitations under 28 U.S.C. Section 2244.

B. This Case Presents Substantial Questions about Scope of Holland v. Florida.

At this stage, to obtain the certificate, Mr. Yates must show that it is "fairly debatable" that the Court as to (1) procedural resolution and that (2) Mr. Yates was deprived of review of a substantial constitutional issue. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Here, the 8th Circuit did not even find that was fairly debatable that equitable tolling might apply under *Holland v. Florida*. Further clarification is clearly required.

The United States Supreme Court has made clear that a garden variety attorney neglect or miscalculated deadline will not warrant tolling. *Holland v. Florida.*, 560 U.S. 631, 651–52 (2010). Only "extraordinary" attorney misconduct will warrant tolling. They did not decide whether the attorney conduct met the standard, but strongly suggested that the record did establish tolling. The lawyer repeatedly ignored communications from the client. He did not research the proper filing date. He failed to communicate with Mr. Holland over a period of years.

Here, an attorney's lies or deception about the status of a case provide strong support of equitable tolling. Equitable tolling has consistently been found where lawyer repeatedly ignores request for updates, especially where the attorney abandons client or lies about whether he has timely filed a petition. *See Spitsyn v. Moore*, 345 F.3d 796, 798 (9th Cir.2003) (finding tolling where lawyer fails to file after he was hired with nearly a year left to file and after ignores several requests for updates); *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir.2003) (finding tolling present where lawyer failed to tell about denial, failed to conduct even cursory research on deadline and repeated ignored request for information). Both were quoted with approval by *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005). Martin found tolling in a situation very similar to this case. In that case, the attorney not only ignored the client, but lied to mislead the client about the filing deadlines and affirmatively misled

the client that the motion had been filed even when it had not been filed. *United States v. Martin*, 408 F.3d 1089, 1093–94 (8th Cir. 2005).

Here, the District Court apparently found that Mr. Yates established equitable tolling at least through June 2008.

> Here, I find that Scherle's misconduct during his representation of Yates in PCR-1 initially constituted extraordinary circumstances. Like in Martin, Scherle misled and deceived Yates. Yates continuously asked Scherle whether PCR-1 was active and Scherle told him that it was. See Doc. No. 65 at 65:4–18. When Scherle visited Yates in prison in February 2007, he told Yates PCR-1 was current and would go to trial that fall. See id. at 66:8–67:6. There was no factual basis for Scherle to make these statements. He knew about the June 31, 2006, dismissal deadline but failed to take any action. See id. at 42:8–23. He allowed the deadline to pass doing anything to prevent dismissal. He then waited until June 20, 2008, to apply to reinstate PCR-1, only after Yates discovered he had failed to take any steps to prevent dismissal. Failing to take any action in PCR-1 for nearly two years is not an "oversight," as Scherle describes and Wachtendorf argues. See id. at 50:14; Doc. No. 76 at 41. Instead, Scherle engaged in egregious attorney misconduct. **Not only did he mislead Yates for nearly two years about the status of PCR-1, but he then failed to prevent its dismissal even though he was fully aware of the "try or dismiss" deadline**.

District Court Ruling at p. 29 (emphasis added). The Court nevertheless found that Mr. Yates waited too long to file his next post-conviction Application in 2008 and thus found that Mr. Yates was not diligent. He also found that Mr. Yates could not account for the time period between June 2008 and January 10, 2017. District Court accordingly found that Mr. Yates did not establish the requisite diligence.

This case is arguably worse than all of these cases. It is not just a case of a missed deadline or failing to file. All of those cases involved cases where the lawyer failed to affirmatively file a petition or postconviction motion. He let a timely filed application be dismissed for failure to prosecute. He took no reinstate the application. He waited so long to reinstate that Mr. Yates was literally deprived of jurisdiction to reinstate. After that he then concealed the dismissal from Mr. Yates and then waited another year to file a motion to reinstate, after which he was jurisdictionally barred from reinstating.

"[A] 'petitioner' is entitled to 'equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010).

Here, here the post-conviction lawyer caused a double injury to Mr. Yates. He not only missed the deadline, but also missed the deadline to reinstate, resulting in a jurisdictional bar to getting the post-conviction reinstated. It resulted in type of poison resulting in the death of Mr. Yates' post-conviction. After that deadline, Mr. Yates tried valiantly and persistently tried to bring it back to life, but to no avail.

The District Court tagged him with not doing in not filing his 3rd post-conviction until 2011, more than three years after he learned the post-conviction

had been dismissed (the first two were combined), but this innores the fact that Mr. Yates filed an appeal from the denial of the dismissal. Yates v. State, 08-1879, which was not affirmed until October 15, 2009.

It also ignores Mr. Yates various efforts in his felony case file to get the case reinstated. His efforts there in district court there and on appeal did not terminate until June 25, 2010, No. 10-0606. He also wrote a letter to Court in September 11, 2013, telling them that he did not receive notice of that order. Docket.

It also ignores the fact that Mr. Scherle (the post-conviction lawyer), rather than withdrawing due to the obvious conflict, was continuing to actively represent Mr. Yates through at least July 10, 2012. *State v. Yates*, 11-0199, which was the appeal from the various efforts to get the case reinstated in the District Court original case file. *State v. Yates*, FECR050208. That appeal was dismissed due to Mr. Scherle missing another deadline, resulting in a failure to comply with court deadlines. He was assessed two penalties and paid the last penalty on March 31, 2017, five years after it was assessed.

The District Court placed no weight on the fact that Mr. Scherle continued representing Mr. Yates all the way through 2012. Surely, his failure to immediately withdraw and independently advise Mr. Yates should be taken into account. Indeed, Mr. Scherle's last act on that case was two payments for failing to file the direct appeal brief on time in 2017 more than five years following the

appeal being dismissed for failing to file the brief on time. The relevant docket entries say it all:

State v. Yates, 11-0199

Date of Filing Date Served Event Filed By Due Date

03/31/2017 PENALTY PAID SCHERLE TIMOTHY A.

Comments: two penalties paid

07/12/2012 LETTER (SEE COMMENTS) CLERK OF SUPREME COURT

Comments: to atty Scherle reminding him to pay his default penalties in this and two other cases w/in 14 days

07/10/2012 BILL OF COSTS CLERK OF SUPREME COURT

Comments: served on dct via edms

07/10/2012 PROCEDENDO CLERK OF SUPREME COURT

Comments: served on dct via edms

06/18/2012 ORDER: DISMISSED, FAILURE TO CURE DEFAULT CLERK OF SUPREME COURT

Comments: copy of order sent to dct via edms

The District Court also faulted Mr. Yates for allowing another year to elapse passed following his 4th post-conviction trying to reinstate on January 10, 2016, which is 90 days following the conclusion of his resentencing appeal. District

Court Ruling at pp. 33-35. That means the AEPDA clock would run to January 10, 2017. 28 U.S.C. § 2244 (d) (1), but again here, the District Court placed very little weight on the fact that Mr. Yates had post-conviction proceedings pending through the entire time period, including through his filing for habeas relief in September of 2017. The Court acknowledged as much during his ruling. "While the appeal of the trial court's denial of Yates' motion to reopen PCR-1 was pending when he filed his § 2254 petition, it was not reasonable after his many years of little success to believe the Iowa Court of Appeals would reverse the trial court and allow PCR-1 to be reopened." Ruling at p. 32. That appeal was filed on August 5, 2016 and was not denied until September 28, 2018.

So, as established above, Mr. Yates had nearly continuous court activity in the state court's, either on his FECR case number or is postconviction applications from June 2008, when he learned it had been dismissed through the conclusion. All of them were rejected by state court's because of the statute of limitations issue created by the deception of Mr. Scherle. Those untimely filed applications did not serve to stop the AEPDA one year time bar. *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

This Court has emphasized the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht*, 327 U.S.392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946). The "flexibility" inherent in "equitable procedure" enables

courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices." *Ibid.* (permitting post-deadline filing of bill of review). Holland v. Fla., 560 U.S. 631, 649–50, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130 (2010).

Finally, the Court treated the statute of limitations as a series of one year limitations, constantly renewing each time the impediment was removed. Mr. Yates' view was that, for tolling analysis, once the statute of limitations expires, it does not constantly reset. Instead, it is something to consider in terms of considering whether tolling has been satisfied, but it does not constantly renew every year thereafter. That is precisely what the Court found in *McQuiggin.* Considering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proffering new evidence. *McQuiggin v. Perkins*, 569 U.S. 383, 387, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013). It further found that its opinion "clarifies that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown." *McQuiggin v. Perkins*, 569 U.S. 383, 399, 133 S. Ct. 1924, 1936, 185 L. Ed. 2d 1019 (2013)

In response, the District Court found that argument irrelevant since Mr. Yates was not expressly arguing actual innocence and that McGuiggin used actual innocence to excuse procedural default of issues. See Ruling at p. 35, n. 16. It then said that *McQuiggin* does not concern equitable tolling. However, *McQuiggin* does not concern equitable tolling; it addresses the "actual innocence" gateway to federal habeas review. *McQuiggin*, 569 U.S. at 386. That is simply not true *McQuiggin* did concern equitable tolling. *McQuiggin v. Perkins*, 569 U.S. 383, 399, 133 S. Ct. 1924, 1936, 185 L. Ed. 2d 1019 (2013). We hold that 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* and *House*, or, **as in this case, expiration of the statute of limitations.** *McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013) (emphasis supplied). It thus allowed consideration of an actual innocence claim 11 years after the conviction. At no point did it plow through each year increment. Once it expired, it thus used the elapsed time as a factor to consider credibility, but it did not look at each one year increment in its analysis.

C. Actual Innocence

The actual innocence claim of *Schlup v. Delo*, 513 U.S. 298, 315-17, 326-27, 115 S.Ct. 851, 861-62, 867 (1995) is also relevant as well to the tolling claim. Even though a claim of actual innocence is not a constitutional claim it is a

gateway through which the habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits, Id. at 315. This more-likely-than-not standard "ensures that petitioner's' case is truly 'extraordinary,' ... while still providing petitioner a meaningful avenue by which to avid a manifest injustice." Schlup 513 U.S. at 327, 115 S.Ct. at 687, the Schmidt court goes on to tell about how actual innocence claims pose less of a threat to scarce judicial resources and to principle of finality and comity, Schlup 513 U.S. at 324, 115 S.Ct. at 865.

Yates presented significant evidence of possible actual innocence. Yates had witnesses, Kevin Kern, and George Benson, who were present in the 3rd post-conviction hearing to testify and Yates was denied calling them to the stand to testify. Yates had other physical evidence to present of which the Iowa court did not want to hear and denied this issue to be heard as well. These issues were the police report along with the April 2001 calendar (Exhibit 6) and other facts that was presented in this habeas hearing of which the State wanted to vehemently object to in this hearing but was overruled by the Court.

Yates's issues with the police report that became (Court's Exhibit 1) can best be regarded as a piece of evidence or a material issue that could not have been found in an timely manner as Yates has been trying to get this document for years and it took him lying to the police department. The relevance of Yates in bringing

this police report to this hearing and also the actual innocence claims is a matter that allows him to have his habeas corpus petition heard on the merits of the case and get past the time statutes that the State claims bars Yates from further litigation.

This could have been a possible Brady claim. The court addresses the matter of the Brady violation *Brady v. Maryland* 373 U.S. 83, 83 S.Ct. 1194 (1963) as this information was known to the prosecution but was not given to trial counsel. It supports that the police department did not properly investigate the allegations of the people who gave statements to the police in the police report as Yates has argued hese issues during his testimony at the hearing and as the issues with the calendar of April 2001 (Exhibit 6) (Trans. P. 8, L. 24-25, P. 86, L. 1-25, P. 87, L. 1-23).

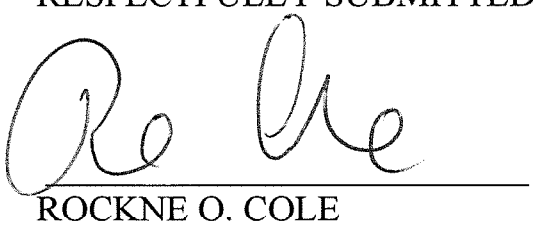
The police report, Court Exhibit 1[1] from the Habeas Hearing, and the April 2001 Calendar (Exhibit 6) the fact that Yates was not at the scene of the alleged crime. Mr. Yates was completely deprived the opportunity to present these issues in the state and federal courts as a result of the deception of his original post-conviction lawyer.

CONCLUSION AND REQUESTED RELIEF

[1] It was not admitted.

Under these circumstances, the most prudent course is to grant the Writ, vacate, and remand with an order to grant a certificate of appealability.

RESPECTFULLY SUBMITTED,



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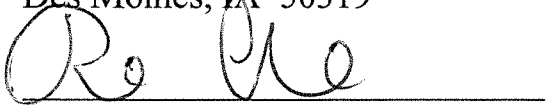
CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Petitioner, hereby certify that, on July 8, 2021, I mailed an original and 10 copies to the Supreme Court via United States Postal Service Express Mail to:

United States Supreme Court
Clerk's Office
1 First Street, N.E.,
Washington, D.C. 20543

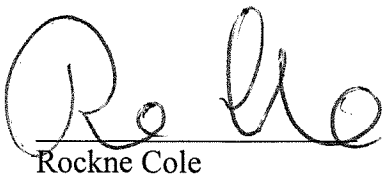
and one copy to:

Benjamin Parrott
Assistant Attorney General
Appellate Litigation Section
Hoover Building
Des Moines, IA 50319



CERTIFICATE OF WORD COUNT

I, Rockne Cole, certify that the above Petition includes 4776 words and was prepared in 14 Point New Times Roman and therefore, complies with US Supreme Court Rule 33.1.



Rockne Cole