ATTACHMENT'S

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 23, 2021

#106316
Mr. O. B. Davis Jr.
Claiborne Parish Detention Center
1415 Highway 520
Homer, LA 71040-0000

No. 20-30010 Davis v. Sumlin
USDC No. 2:19-CV-1107

Dear Mr. Davis,

We will take no action on your petition for rehearing. The time for filing a petition for rehearing under FED. R. APP. P. 40 has expired.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

O.B. DAVIS JR #106316	**CASE NO. 2:19-CV-01107 SEC P**
VERSUS	**JUDGE JAMES D. CAIN, JR.**
JOHNNY SUMLIN	**MAGISTRATE JUDGE KAY**

JUDGMENT

Upon consideration of the mandate issued by the United States Court of Appeals for the Fifth Circuit, the court hereby **ORDERS, ADJUDGES,** and **DECREES** that the foregoing petition for writ of habeas corpus be **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

THUS DONE AND SIGNED in Chambers on this 24th day of June, 2021.

JAMES D. CAIN, JR.
UNITED STATES DISTRICT JUDGE

U.S. District Court

Western District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 6/24/2021 at 4:33 PM CDT and filed on 6/24/2021

Case Name: Davis v. Sumlin

Case Number: 2:19-cv-01107-JDC-KK

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WARNING: CASE CLOSED on 12/23/2019

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Docket Text:

JUDGMENT: Upon consideration of the mandate issued by the United States Court of Appeals for the Fifth Circuit, the court hereby ORDERS, ADJUDGES, and DECREES that the foregoing petition for writ of habeas corpus be DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction. Signed by Judge James D Cain, Jr on 6/24/2021. (crt,Benoit, T)

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 01, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 20-30010 Davis v. Sumlin
USDC No. 2:19-CV-1107

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. O. B. Davis Jr.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 1, 2021
Lyle W. Cayce
Clerk

No. 20-30010

O. B. DAVIS, JR.,

Petitioner—Appellant,

versus

JOHNNY SUMLIN,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:19-CV-1107

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:

O.B. Davis Jr., Louisiana prisoner #106316, pleaded *nolo contendere* to forcible rape. He was sentenced to twenty years' imprisonment and did not appeal his conviction or sentence. Several years later, Davis received a letter from Krystal Mallet—a witness who had made inculpatory statements prior to Davis's plea. Mallett claimed Davis's victim admitted to lying about the rape. After exhausting his remedies in state court, Davis filed a petition for habeas corpus in federal court. In that petition, Davis argued his conviction was obtained using false testimony in violation of the Fourteenth Amendment. The district court denied the petition on the merits.

This is not Davis's first federal habeas petition—he has previously filed at least one other. *See Davis v. Louisiana*, 2:15-CV-02915 (W.D. La. Dec. 5, 2015). That means Davis must confront two different jurisdictional hurdles.

First, before Davis even can file his petition in the district court, he must first obtain permission from a three-judge panel of this court. *See* 28 U.S.C. § 2244(b)(3). Davis never sought or obtained that permission, so the district court had no jurisdiction to accept the second-or-successive petition—much less to consider the merits of it. *See Burton v. Stewart*, 549 U.S. 147, 157 (2007) ("[Petitioner] neither sought nor received authorization from the Court of Appeals before filing his [second or successive] petition . . . so the District Court was without jurisdiction to entertain it."); *Montgomery v. Goodwin*, 841 F. App'x 700, 703 (5th Cir. 2021) (per curiam).

Notwithstanding this absence of jurisdiction, the district court purported to adjudicate and deny Davis's petition on the merits. That was error. In habeas proceedings, as in every other kind, federal courts must do jurisdiction first. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." (quotation omitted)). And where jurisdiction is lacking, federal courts also must do jurisdiction last. *See Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Now the second jurisdictional hurdle: Even if we previously authorized a successive application under § 2244(b), Davis still could not appeal the district court's merits determination without a certificate of

appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1). A COA will not issue unless the movant has "made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). Here, Davis argues his conviction was obtained using Mallett's false testimony in violation of the Fourteenth Amendment. But Mallett has since recanted her recantation. At an evidentiary hearing during state post-conviction proceedings, she admitted everything in the recantation letter was a lie, that she wrote it at the urging of a third party, and that she was under the influence of drugs at the time she wrote it. *Cf. Graves v. Cockrell*, 351 F.3d 143, 153 (5th Cir. 2003) (holding the petitioner "cannot meet [his] burden with the recanted testimony . . . given the numerous contradictory statements [the witness] has made and other evidence of [the petitioner's] guilt"). Without more, Davis has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He therefore is not entitled to a COA.

In an ordinary civil case, either of these jurisdictional defects would provide a sufficient basis to preclude Davis's appeal. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (explaining that "there is no unyielding jurisdictional hierarchy" requiring a court to consider one of two jurisdictional defects before the other). That's because, in an ordinary civil case, all dismissals are created equal—they all equally prevent the exercise of jurisdiction where there is none. But this is not an ordinary civil case. Simply denying Davis's request for a COA would preclude him from appealing to our court—but it would do nothing to vitiate the district court's jurisdictionless merits decision.

We therefore must decide this case under § 2244(b): in the absence of an authorization under that subsection, the district court lacked jurisdiction to decide the merits. The district court's judgment is therefore VACATED, and the case is REMANDED with instructions to dismiss the petition for lack of jurisdiction. The COA application is DENIED as moot.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 20- 30010

O.B. DAVIS, JR.
Petitioner-Appellant

VERSUS

JOHNNY SUMLIN, WARDEN

ON PETITION FOR PANEL REHEARING TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FROM THE JUDGEMENT DENYING APPELLANTS 28 U.S.C. 2254 PETITION IN THE UNITED STATES WESTERN DISTRICT COURT OF LOUISIANA, LAKE CHARLES DIVISION NO. 2:19-CV-01107

PETITION FOR PANEL REHEARING

Respectfully Submitted,

/s/_____

O.B. Davis Jr. #106316
Claiborne Parish Detention Center
1415 Hwy 520
Homer, Louisiana 71040

TABLE OF AUTHORITIES

STATUTES

FEDERAL CASES

STATE CASES

STATEMENT OF FACTS

1. On June 17, 2013 before the Thirty-First Judicial District Court, with his attorney of record, W. J. Riley, III. Through counsel, Mr. Davis withdrew his previous plea of not guilty and entered a pea of *nolo contendre* or "No Contest" to the lesser included offense of Forceable Rape, **La. R.S. 14:42.1**. The state at this time was represented by Bennett R. Lapoint, Asst. District Attorney. Mr. Lanpoint stated the factual basis for the record and offered for filing into evidence as state's exhibit S-1, the CAC interview with the drawings: as State's exhibit S-2, in globo, the medical reports; and State's exhibit S-3, the written statement by witness Krystal Mallet. The court ordered the state's exhibits filed into the record and placed under seal. The victim in this matter whose initials are TP., a minor, wrote an impact statement in which Mr. Lanpoint read into open court. Upon completion, he offered the impact statement for filing into record. The court ordered the offering filed into record. Whereupon, the court sentenced Mr. Davis to serve twenty (20) years at hard labor with the Louisiana Department of Public Safety and Corrections. (DOC, 7, p. 1.) The court then ordered that the first two (2) years of the sentence be served without the benefit of probation, parole, or suspension of sentence and that the sentence run concurrently to Petitioner's probation revocation in CR – 1804 – 07. The court also gave Petitioner credit for all time previously served. Prior to accepting the nolo contendere plea, the court Boykinized the defendant. Throughout these proceedings, Petition was represented by Mr. W.J. Riley, III.

2. Mr. Davis then filed motions for production of documents into the trial court, which were subsequently denied in part. Petitioner sought review in the Third Circuit court of appeal on September 19, 2013. (Davis v. State of Louisiana, 2:15 – cv – 2564, DOC . 1, attorney. 1, p. 14). The Third Circuit Denied his application as deficient on November 18, 2013. Id. Davis

sought review in the Louisiana Supreme Court, which denied same on August 28, 2015. Id. at 20.

3. Petitioner's Uniform Application for Post Conviction Relief was filed into the Thirty-first Judicial Court. (See attached here to as exhibit A) An evidentiary hearing was granted and scheduled for September 8th, 2016. (See attached hereto as exhibit B).

4. On November 4, 2016 Petitioner appeared in court with court appointed counsel Mr. Tim Cassidy for a post-conviction relief hearing to admit and/or present newly discovered evidence. Petitioner was denied relief in said hearing.

5. Indigent inmates must be provided with a free copy of the following documents: transcripts of their guilty plea colloquies, copies of the Bill of Information or Grand Jury Indictment charging them with an offense, copies of the district court minutes for various portions of their trials, copies of the transcripts of evidentiary hearings held on their applications for post-conviction relief, and copies of documents committing them into custody.

6. Petitioner was deemed to be an indigent inmate who was not previously provided with a copy of the transcripts from the evidentiary hearing held on his post-conviction relief application on November 4, 2016.

7. On March 7, 2017, 31st Judicial District Judge The Honorable Craig Steve Gunnell ordered petitioner a copy of the hearing transcripts. (See order attached hereto)

8. On May 17, 2018, the Third Circuit court of Appeal denied Petitioner's writ of review. (NO: KH 17-00512). The Third circuit's reasons for denying petitioner's post-conviction was that it was deficient, and that it did not comply with **La. C. Cr. P. Art. 912.1(C)**, Uniform Rules – Court of Appeal, Rule 4-5, Third Circuit Internal Rule 16, and **City of Baton Rouge v. Plain**, 433 So.2d 710 (La.), *Cert. Denied*, 464 U.S. 896, 104 S. Ct. 246 (1983). (See ruling attached

hereto)

9. On May 6, 2019, the Louisiana Supreme Court, in a Per Curiam decision, denied Petitioner's supervisory and/or remedial writs. (2018 -KH- 1156) Stating that Petitioner failed to show he was denied access to the courts by an unjustified enforcement of the uniform rules governing the filing of applications in the court of appeal, and thus shows no error in the court of appeal's denial of writs on technical grounds. **La. C.Cr.P. Art. 912.1(C)**.

10. Magistrate Judge Kay issued a report and recommendation, asserting that petitioner's habeas be denied on basically procedural issues.

11. On or about December 14, 2019, Petitioner filed an objection to Magistrate Judge Kay's recommendation.

12. On December 26, 2019, Petitioner received a judgment order Denying petitioner's writ and Dismissing it with prejudice.

13. Petitioner filed motion for Certificate of Appealability.

14. On January 9, 2020 Motion was denied

15. On January 15, 2020 Petitioner was notified by United States Court of Appeals that before he must apply for Certificate of Appealablity to comply with 28 U.S.C. & 2253.

16. On June 11, 2021 the court entered judgment under Fed. R. App. P. 36 and now petitioner petitions for panel rehearing.

ISSUE(S) PRESENTED

1. **Whether the Petitioner's Constitutional requirement of due process is satisfied being that the conviction was obtained by and on the sole basis of the presentation of false testimony?**

2. **Whether the prosecutor's awareness of this testimony being falsified and further withholding this inculpatory evidence from the petitioner deny him of his Fourteenth Amendment right to due process of law?**

ARGUMENT

I. Petitioner argues that if the knowledge of Ms. Mallet's testimony being false were to be presented before the court prior to the plea agreement the out come of the proceedings would have been different.

The Petitioner, hereinafter Mr. Davis, has discovered, since the date of his conviction, a prejudicial error in the proceedings that, not withstanding the exercise of reasonable diligence, was not known to him until he had been given an affidavit from the state's witness, hereinafter Ms. Mallet, recanting testimony that had been crucial to the prosecution's case. In the event of, Mr. Davis raised a claim which fell under the Newly Discovered Evidence Requirement. The A.E.D.P.A.'s Sec. 2253 (c) codified the standard, announced in **Barefoot V. Estelle,** 463 U.S. 880 (1983), for determining what constitutes the requisite showing to obtain leave to appeal a district courts denial of Habeas Corpus Relief. Under the controlling standard, a petitioner must "show that reasonable jurist could debate whether or, for that matter agree that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further", **Slack v. McDaniel,** 529 U.S. 473 at 484 (2000) quoting Barefoot, Supra at 893.....

The United States Supreme Court has recognized an exception to the requirement that a petitioner demonstrate both "cause" and "prejudice," where the Petitioner can demonstrate that failure to consider the procedural defaulted claims will result in a fundamental miscarriage of justice because he is actually innocent of the crimes when he was convicted. See, e.g., **Noltie v. Peterson**, 9 F.3d 802, 806 (9th Cir. 1993). However, in order to qualify for this "miscarriage of justice" exception, the petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was presented at the trial. **Schulp v. Delo**, 513 U.S. 298, 130 Ed 2d 808, 115 S. Ct. 851, (recognized

that such evidence "is obviously unavailable in the vast majority of cases"). Further, to establish the requisite probability that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.: id. at 327.

In **McQuiggin v. Perkins**, __ U.S.__, 133 S. Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013), the Supreme Court held that a "convincing showing" of actual innocence under **Schulp**, *supra,* also can overcome the AEDPA state of limitations. In **Schulp**, the Supreme Court has recognized that the "case and prejudice" requirement has an "actual innocence" exception, sometimes known by other name as the "fundamental miscarriage of justice" exception. A fundamental miscarriage of justice exception is narrowly construed and is equivalent to actual, as opposed to legal, innocence. **Sawyer v. Whitley**, 505 U,S. 333, 339, 120 L. Ed.2d 269, 112 S. Ct. 2514 (1992). In **Murray v. Carrier** (1986) 477 U.S. 478, 91 L. Ed.2d 397, 106 S. Ct. 2639, the Supreme Court held that, in order to invoke this exception, the Petitioner is required to show that a constitutional violation has "probably" resulted in the conviction of one who is actually innocent.

In the case *sub-judice*,

On April 28th, 2016 Ms. Mallet wrote Mr. Davis a letter recanting her previous testimony. In that she stated she lied on Mr. Davis, she expressed her reasons and apologies for doing so.

On November 4, 2017, Mr. Davis was afforded an evidentiary hearing. During the hearing Ms. Mallet presented to the court her testimony. At this time, Mr. Davis was represented by State appointed counsel Mr. Tim Cassidy, hereinafter Mr. Cassidy who asked Ms. Mallet a crucial question in discernment of her truthfulness. In that, he asked her in so many words why did she write the letter and her response was that she felt that an innocent man was not supposed to be in jail.

However, later on in this hearing Ms. Mallet contended to the court that everything in the letter

was a lie. In Juxtapose, this clearly connotes impeaching testimony. In her initial statement at time of arrest Ms. Mallet testified to one thing. In a notarized document she testifies that what she stated in her initial statement was fabricated and during the aforementioned hearing she asserts that her notarized letter is a lie. Of which leaves the finding of guilt an enigma; while the innocent Mr. Davis resides behind bars.

In **State v. Neslo**, Sup.1983, 433 So.2d. 73 the State was allowed to impeach the defendant with a prior inconsistent statement that was made to the police with respect to the facts surrounding his arrest and questioning was not improper in ground that the statement was not freely and voluntarily given.

In **State v. Washington**, App. 5 Cir. 1999, 727 So.2d 673, 98-69 (La. App. 5 Cir. 1/26/99) a police officer's hearsay testimony about a statement made by defendant's alleged fiancee regarding her relationship to defendant was admissible to impeach alleged fiancee's trial testimony that was inconsistent with her prior statement and that affirmatively damaged prosecution's case.

In **State v. Redwine**, Sup.1976, 337 So.2d 1041, Defense counsel could not protect his own witness from impeachment by State use of prior inconsistent statement by eliciting from witness during his direct examination an admission that such witness had given a prior statement which was entirely different from his trial testimony.

The due process standard in **U.S. Const. Amend. XIV** and **La. Const. Art. I, 2** does not require the reviewing court to determine whether it believes the witness or whether it believes the evidence establishes guilt beyond a reasonable doubt. Rather, review is limited to determining whether the facts established by the direct evidence and inferred from the circumstances established by that evidence are sufficient for any rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. The basis of this conviction was established by means of an untruthful testimony of which clearly connotes an act of perjury. Perjury that stemmed prior to the

November 4, 2017 hearing. Perjury that A.D.A Mr. Bennet R. Lapoint was aware of, and not only aware of it, but he implemented coercing tactics to ensure it's validity.

Ms. Mallet stated that at the time she provided her initial statement she was unaware of the truthfulness of its contents. And that she remained unaware of the fabrications until years later.

Upon finding out that she had contributed to the "locking up" of an innocent man – Ms. Mallet located the whereabouts of Mr. Davis and mailed to him a handwritten letter of which is submitted into evidence as an affidavit.

The Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted. The central purpose of any system of criminal justice is to convict the guilty and free the innocent. See **United States v. Nobles**, 422 U.S. 225, 230, 45 L. Ed. 2D 141, 95 S. Ct. 2160 (1975). With respect to the standard of proof in a criminal case, the proposition is firmly established in the nation's legal system that the line between innocence and guilty is drawn with reference to a reasonable doubt. The district court must make a probabilistic determination about what reasonable, properly instructed jurors would do, and it is presumed that a reasonable juror would consider fairly all of the evidence presented and would conscientiously obey the trial court's instructions requiring proof beyond a reasonable doubt. According to the majority, under **Schulp**, "the petitioner is required to present 'evidence of innocence' such that a court cannot have confidence in a trial." What Mr. Davis now submits into this court as newly discovered evidence is the same evidence the state used against him in order to obtain a conviction, only now contradicted and thereby proven to be false. The question still remains that if the jurors were aware that the testimony of Ms. Mallet was false, would they have found him guilty? On the same note this extends to would his lawyer, in light of this evidence, have persuaded him into the acceptance of a guilty plea on the pretense of falsified testimony?

It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned

in the wake of after-discovered evidence establishing their innocence. In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism of 47 of these cases; the remaining cases ended in judgments of acquittals after new trials. E. Borchard, Convicting the Innocent (1932).

II. Petitioner further argues that the prosecutor's withholding their knowledge of Ms. Mallet's testimony being fabricated is a direct violation of Brady v. Maryland.

Mr. Davis, alleges that the state prosecutors were aware that the testimony of Ms. Krystal Mallet consisted of falsified information. Also Mr. Davis contends that the state withheld this falsified information in direct violation of **Brady V. Maryland**, 373 U.S. 83, 10 L. Ed.2d 215, 83 S. Ct. 1194 (1963)(and its progeny).

Brady material is information or evidence that: impeaches a prosecution witness; tends to exonerate a defendant; involves dishonesty; shows improper use of force; or tends to show bias. Favorable evidence includes both exculpatory evidence and evidence impeaching the testimony of a witness when the reliability or credibility of that witness may be determinative of the defendant's guilt or innocence. **United States v. Bagley**, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2D 104 (1972). Examples of possible impeachment evidence of a material witness include but are not limited to: (1) False reports by a prosecution witness (2) Pending criminal charges against a prosecution witness (3) Parole or probation status of the witness; (4) Evidence contradicting a prosecution witness' statements or reports (5) Evidence undermining a prosecution witness' expertise (6) A finding of misconduct tht reflects on the witness' truthfulness, bias or moral turpitude (7) Evidence that a witness has a reputation of untruthfulness (8) Evidence that a witness has a racial, religious or personal bias against the

defendant individually or as a member of a group (9) Promises, offers, inducements or payments to a witness, including an implied grant of immunity, and (10) An employee presently under suspension. When Brady is withheld, a defendant is entitled to a new trial, if, the evidence is material. Meaning, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. **United States v. Bagley, supra, at 678.**

Mr. Davis argues that the truthfulness of Ms. Mallet's testimony should be allowed to be determined by the jurors. A recantation is a confession to perjury which destroys the credibility of the witness. **State v. Link** letter, 345 so.2d 452 (la 1977), cert denied. 434 U.S. 1016, 98 S. Ct. 733, 54 L. Ed 2d 760 (1978). In this case, the falsified "testimonies" of Ms. Mallet could have more than likely "would have" affected his decision as to whether or not he would have accepted the prosecutors plea agreement.

III. Mr. Davis argues that the Eight Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of the right to due process of law therefore forbid his incarceration, because he is "Actually innocent" of the charge of Forceable rape.

Mr. Davis was convicted on circumstantial evidence, predominantly on the testimony of the state's witness Ms. Mallet. The standard for the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the state proved the essential elements of the crime beyond a reasonable doubt. The rule as to circumstantial evidence is that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence, **La. Rev. Stat. Ann. 15:438**. However, this statutory rule for circumstantial evidence does not provide a separate test from

the **Jackson v. Virginia** sufficiency of the evidence test whenever the state relies on circumstantial evidence to prove an element of the crime. Although the circumstantial evidence rule may not establish a stricter standard of review than the more general reasonable juror's reasonable doubt formula, it emphasizes the need for careful observance of the usual standard and provides a helpful methodology for its implementation in cases which hinge on the evaluation of circumstantial evidence, both direct and circumstantial, must be sufficient under **Jackson v. Virginia** to satisfy a rational jury that the defendant is guilty beyond a reasonable doubt.

In evaluating the sufficiency of the evidence to support a conviction, a reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, any trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. **Jackson v. Virginia,** 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2D 560 (1979); **State v. Captville**, 448 So. 2D 676, 678 (La. 1984). Additionally, where circumstantial evidence forms the basis of the conviction, the evidence must exclude every reasonable hypothesis of innocence, "assuming every fact to be proved that the evidence tends to prove." **La. R.S. 15: 438**; See, **State v. Neal**, 200-0674 p.9 (La. 6/2 9/01), 796 So. 2D 649, 657, cert. Denied, 535 U.S. 940, 122 S. Ct. 1323, 152 L. Ed. 2D 231 (2002). The statutory requirement of La. R.S. 15:438 " works with the Jackson constitutional sufficiency test to evaluate whether all evidence, direct or circumstantial, is sufficient to prove guilt beyond a reasonable doubt to a rational jury." **Neal**, 2000-0674 p.9, 796 So. 2D at 657. **State v. Draughn**, 05-1825, p.7 (La. 1/1 7/07), 950 So. 2d. 583, 592, cert. Denied, 522 U.S. 1012, 128 S. Ct. 537, 169 L. Ed. 2D 377 (2007).

In the matter at hand, Ms. Mallet's testimony was the "linchpin" of the prosecution's case; without it the state would not have had the inculpatory evidence needed to support even a showing of probable cause for the arrest of Mr. Davis, let alone proof of guilt beyond a reasonable doubt. When dealing with circumstances in regard to witness or victim testimony, absent internal contradiction or

irreconcilable conflict with physical evidence, one witness's testimony is sufficient to support a defendant's conviction of a sex offense. Even where the state does not introduce medical, scientific, or physical evidence to prove the commission of the offense. However, once a subject area on direct-examination is opened, the principle that a witness should testify truthfully prevails; cross examination of the witness to determine if she made similar statements previously is logically necessary in evaluating her truth or credibility."

CONCLUSION/PRAYER

Mr. Davis request that this Court give careful consideration and survey the use of tactics administered by ADA Mr. Lapoint in his endeavor towards the obtaining of this this conviction. At this time it is clear that everything changed and what resulted was an act of duress, coercion at it's finest – all of a sudden, Ms. Mallet's testimony makes a shift ensuing another falsified statement. What complicated this matter is that these conflicting statements are being denied the right of being presented before a jury. When a persons statement consistently changes in contradictory methods who knows which one of these statements possesses the truth.

Alternatively, Mr. Davis invokes the Fourteenth Amendment's guarantee of due process of law in support of his claim that his showing of actual innocence entitles him to a new trial. Mr. Davis demonstrates that the testimony given by the state's witness was false and it was knowingly and intentionally used by Asst. District Attorney Bennet R. Lanpoint as evidence to obtain a conviction. Without the testimony Mr. Davis would not have entered a plea of *nolo contendere*, instead he would have insisted on going on trial.

Mr. Davis respectfully requests that his Petition for Panel Rehearing is granted and moreover that he is allowed to move forward with the appeal and fully brief the aforementioned issue in respect to his

argument that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of the right to due process of law therefore forbid his incarceration, because he is "Actually innocent" of the charge of Forcible Rape.

Further the issues raised are Constitutionally valid and therefore should be heard by this Court and the Merits of each claim should be considered on their face.

Respectfully Submitted,

O.B. Davis Jr. #106316
Claiborne Parish Detention Center
1415 Hwy. 520
Homer, Louisiana 71040

CERTIFICATE

I, **O.B. DAVIS JR.**, hereby certify that a copy of the forgoing motion has been forwarded to the appropriate court in _____, Parish of _____, State of Louisiana, on this ___ day of _____, 2021.

O.B. DAVIS JR.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 22, 2021

#106316
Mr. O. B. Davis Jr.
Claiborne Parish Detention Center
1415 Highway 520
Homer, LA 71040-0000

No. 20-30010 Davis v. Sumlin
USDC No. 2:19-CV-1107

Dear Mr. Davis,

I am responding to your correspondence dated March 18, 2021. Your case is still pending. We will send you notice when the court acts.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

O.B. DAVIS, JR. **D.O.C. # 106316**	:	**DOCKET NO. 2:19-cv-01107** **SECTION P**
VERSUS	:	**JUDGE JAMES D. CAIN, JR.**
JOHNNY SUMLIN	:	**MAGISTRATE JUDGE KAY**

REPORT AND RECOMMENDATION

Before the court is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by O.B. Davis, Jr., who is proceeding pro se in this matter. Davis is an inmate in the custody of the Louisiana Department of Public Safety and Corrections and is currently incarcerated at the Claiborne Parish Detention Center in Homer, Louisiana.

This matter is referred to the undersigned for review, report, and recommendation in accordance with 28 U.S.C. § 636 and the standing orders of the court. For the following reasons **IT IS RECOMMEDED** that the petition be **DENIED and DISMISSED WITH PREJUDICE.**

I.
BACKGROUND

By this proceeding, Davis attacks his 2013 conviction for forcible rape and the subsequent twenty-year sentence imposed by the Thirty-First Judicial District Court for Jefferson Davis Parish, Louisiana. Davis did not appeal his conviction. On July 20, 2016, after discovering new evidence in the form of a letter from a witness recanting her story, petitioner filed an application for post-conviction relief in the trial court. Doc. 1, att. 3, pp. 2-7. An evidentiary hearing was held

on November 4, 2016, at which time his application was denied. *See* excerpts from transcript, doc. 1, att. 3, pp. 33-26. On June 1, 2017, Davis sought writs in the Third Circuit Court of Appeal. On May 17, 2018, the Third Circuit denied his application as deficient for failing to comply with La. Code Crim. P. art. 912.1(C), Uniform Rules- Courts of Appeal, Rule 4-5, Third Circuit Internal Rule 16, and *City of Baton Rouge v. Plain*, 433 So.2d 710 (La.), *cert denied*, 464 U.S. 896, 104 S.Ct. 246 (1983). Davis filed an application for supervisory writ of review in the Louisiana Supreme Court (doc. 1, att. 3, pp. 12-24), which was denied in accordance with the appellate court's denial on technical grounds on May 6, 2019 (*id.* at pp. 26-27).

Davis filed the instant petition on August 22, 2019, raising one claim: "whether the Constitutional requirement of due process is satisfied where a conviction obtained by the presentation of testimony to the prosecution is found to be false." Doc. 1, att. 2, p. 4.

Davis previously sought federal habeas relief in this court for the same conviction and sentence through a petition filed in this court under 28 U.S.C. § 2254 on April 26, 2016, and dismissed on June 21, 2106. *See Davis v. State of Louisiana*, No. 2:15-cv-02915 (W.D. La., Dec. 30, 2015). He filed a second petition on the form used for seeking habeas relief in this court on October 21, 2015. *Davis v. State of Louisiana*, No. 2:15-cv-02563 (W.D. La., Oct. 21, 2015). Finding that the habeas petition was one "in name only," and, instead actually a request for production of documents, this court recommended denial of petitioner's request for production of documents for failure to show good cause, and any request for relief pursuant to § 2254 petition as untimely. *Id.* at doc. 9.

II.
LAW & APPLICATION

A. Rule 4 Review

Rule 4 of the Rules Governing § 2254 Cases authorizes preliminary review of such petitions, and states that they must be summarily dismissed "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." *Id.* at Rule 4. To avoid summary dismissal under Rule 4, the petition must contain factual allegations pointing to a "real possibility of constitutional error." *Id.* at Rule 4, advisory committee note (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970)). Accordingly, we review the pleadings and exhibits before us to determine whether any right to relief is indicated, or whether the petition must be dismissed.

B. Successive Petition

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244, prohibits repeated and abusive challenges to the same conviction. Accordingly, the following restrictions are placed on "second or successive" habeas petitions:

> (1) A claim presented in a second or successive habeas corpus application under section 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 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 U.S.C. § 2244(b). A petitioner cannot proceed in the district court with a second or successive habeas petition unless he first obtains an order from the appropriate court of appeals, authorizing the district court to consider the petition based on the determination of a three-judge panel that the petitioner has made prima facie showing that his petition satisfies the above requirements. *Id.* at § 2244(b)(3).

Davis seeks to file a third and successive petition in this court pursuant to 28 § U.S.C. 2244(b)(2)(B), bringing new evidence to the court that purports to establish his innocence. However, the undersigned finds that the new evidence, a letter from the State's witness, whose original testimony was the "linchpin" of the prosecution's case (doc. 1, att. 2, p. 6), does not establish clear and convincing evidence that, but for the new evidence, no reasonable factfinder would have found Davis guilty.

Davis admits that he pled no contest to the charge of forcible rape. Doc. 1, att. 2, p.7. Nonetheless, he now asserts his innocence. In support of this claim, he relies solely on a letter written by Ms. Krystal Mallett, whose original statement was filed as an exhibit in conjunction with the factual basis for Davis' plea. In this notarized letter, dated April 28, 2016, Ms. Mallett states, in pertinent part:

> I'm sorry I was apart (sic) of the reason an innocent man is locked away serving time for something he did not do. After all these years this lil girl 'Tamarian Pete' had me convinced you did some crazy unbelievable things to her, until yesterday I ran into that lil winch...she told me she was sorry she lied about the O.B. story.

Doc. 1, att. 3, pp. 33-36.

The Fifth Circuit has long viewed recanting affidavits with suspicion. *Summers v. Dretke*, 431 F.3d 861, 872 (5th Cir. 2005), *cert. denied*, 127 S. Ct. 353 (2006); *Spence v. Johnson*, 80 F.3d 989, 1003 (5th Cir.), *cert. denied*, 117 S. Ct. 519 (1996); *May v. Collins*, 955 F.2d 299, 314 (5th

Cir.), *cert. denied*, 112 S. Ct. 1925 (1992). A convicted criminal defendant, such as Davis, must do more than furnish recanting statements from a witness who has given contradictory statements in the past when there exists other evidence tending to corroborate the trial testimony. *See Graves v. Cockrell*, 351 F.3d 143, 153 (5th Cir. 2003) ("Graves cannot meet this burden with the recanted testimony of Carter, given the numerous contradictory statements Carter has made and other evidence of Graves' guilt."); *May*, 955 F.2d at 314 ("In this Circuit, a federal judge, faced with a motion for a new trial predicated upon the contention that a witness has provided a recanting affidavit, must compare the trial record with the affidavit of recantation and determine for himself whether the affidavit is worthy of belief."). While there was no trial in this matter, Ms. Mallett's original sworn statements were entered into evidence at the time Davis pled no contest to the criminal charges.

Adding greater skepticism to the validity of the present recantation is the fact that Ms. Mallet recanted the recantation at the November 4, 2016 evidentiary hearing on Davis' application for post-conviction relief. When questioned about the letter Ms. Mallet testified she was intoxicated at the time the letter was written and that "someone" convinced her to write it.[1] Doc. 1, att. 3, p. 29-30. When asked how she was forced, against her will to write the letter, she stated, "I wasn't forced to write it. He convinced me into writing it." *Id.* at lines 22-23. "Because I was high. Have you ever- have you ever been an addict? You do things whenever you're an addict that you wouldn't do when you're sober, you know." *Id.* at lines 27-29. Ms. Mallett emphatically stated that, "Everything in the letter was a lie." *Id.* at line 5.

[1] Davis does not include a complete copy of the transcript of the evidentiary hearing, so the court is unable to ascertain with certainty the identity of the person who convinced Ms. Mallett to write the letter. However, his identity is of no importance to the court's analysis.

Transferring this matter to the Fifth Circuit to seek authorization for Davis to file a third and successive petition would be futile. Dismissal is appropriate insofar as the complaint fails to satisfy the materiality prong of 28 U.S.C. § 2244(b)(2)(B)(ii). *See In re Young*, 789 F.3d 518 (5th Cir. 2015). Insofar as we find that the sworn letter from Krystal Mallett does not satisfy the requirements of 28 § U.S.C. 2244(b)(2)(B) and, as such, this petition should be denied.

III.
CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that the instant petition be **DENIED and DISMISSED WITH PREJUDICE.**

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429–30 (5th Cir. 1996).

In accordance with Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. Within fourteen (14) days from service of this Report and Recommendation, the parties may file a memorandum setting forth

arguments on whether a certificate of appealability should issue. *See* 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.

THUS DONE this 25th day of November, 2019.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE