NO. _____

IN THE
Supreme Court of the United States

JOSHUA CUMBERLAND,
PETITIONER,
V.
DARREL VANNOY, WARDEN
LOUISIANA STATE PENITENTIARY
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Whether the United States Court of Appeals for the Fifth Circuit properly denied petitioner's Motion for Certificate of Appealability ("COA") as to his Application for Writ of Habeas Corpus filed under 28 U.S.C. § 2254.

PARTIES TO THE PROCEEDINGS

The petitioner is Joshua Cumberland, the respondent and petitioner-appellant in the court below. The respondent is the Darrel Vannoy, the respondent and respondent-appellee in the courts below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner-appellant, **Joshua Cumberland**, ("petitioner") moves this Honorable Court for the reversal of the United States Court of Appeals for the Fifth Circuit's decision to deny petitioner's Motion for Issuance of a Certificate of a Certificate of Appealability ("COA") in compliance with 28 U.S.C. § 2253 regarding the appeal of the denial of his petition for habeas corpus in the District Court below.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit is an unpublished decision in the case of *Cumberland v. Vannoy*, 20-30434 (5th Cir. 8/12/21) which denied petitioner's Motion for Certificate of Appealability as to the decision of the United States District Court for the Eastern District of Louisiana in the case of *Cumberland v. Vannoy*, No. 18-9685 (E. D. La. 6/12/20).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 12, 2021. This Court's jurisdiction is pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional and statutory provisions under consideration are as follows:

> United States Constitution: Sixth Amendment. Appx. 125.
>
> United States Constitution: Fourteenth Amendment. Appx. 125.

28 U.S.C. § 2253. Appx. 125.

STATEMENT OF THE CASE

Petitioner-appellant, Joshua Cumberland, was convicted in the State of Louisiana of aggravated rape and sexual battery of the minor WD (8 years old at the time) and molestation of the minor, RC (6 years old at the time). Appx. 6-7. These charges stem from a November 7, 2009 incident where WD, was brought to Slidell Memorial Hospital with vaginal bleeding. Appx. 56-58. At the time of the incident, petitioner lived with his wife, Katie Cumberland, and her three daughters (petitioner's step daughters), WD, RC and a third daughter, MW (4 years old at the time) in a four bedroom apartment in Slidell, Louisiana. *Id.* On the morning of November 7, 2009, Petitioner was in his bedroom, RC was in the living room watching television, and WD and RC were in their respective bedrooms, and Katie Cumberland was at work. *Id.* At approximately 7:50 a.m., WD began screaming from her bedroom. *Id.* Petitioner then ran through the living room to WD's room (running past RC), saw WD bleeding, then brought her to his bathroom, where he attempted to assess the injury. *Id.* Due to the configuration of the apartment, a person in the master bedroom could not access another bedroom without traveling through the living room. In other words, petitioner was not in even in the room when WD was injured on November 7, 2009. Seeing that the injury was to the vaginal area and not wanting to touch that area, petitioner sought assistance from his neighbors. *Id.*

After leaving the apartment to take WD to the hospital, several of the neighbors went into the apartment and then, after a period of over 90 minutes, contacted the Slidell Police Department. After being contacted, SPD sent their crime scene investigator ("CSI"), Det. Bobby Campbell, who collected evidence and took photographs. Appx. 67-72. The photographs taken of the apartment, included photographs of the master bathroom with blood in the bathtub. *Id.* Also photographed was the master bedroom and bed, which had no sheets on the bed but had apparent old blood stains on the mattress. Despite the initial unsettling appearance of the master bedroom photographs, CSI performed a presumptive test for blood on the stains on the mattress that revealed that, while the older stains tested positive for blood, the apparent "fresh" stain was not positive for blood. As for the stains that were positive for blood, Katie Cumberland explained to the CSI that the blood was hers. Appx. 69.

The initial story provided to petitioner by WD was that she was jumping on her bed and fell on the edge of a toy box. Appx. 58. Due to the nature of the injuries, both WD and her sister, RC, were examined and interviewed by Children's Hospital from November 7 through November 9, 2009. An initial examination of WD, conducted by Dr. Rodney Steiner, the injuries to WD's vaginal area were described as "small" and "superficial" in nature, though he did find some bruising on the vaginal wall. Appx. 76. Ultimately, Dr. Steiner's report was inconclusive as to the nature of the injuries as being associated with any sexual assault. *Id.*

Multiple photographs were taken of the examination of WD. *Id.* A physical examination of RC showed no evidence of any trauma.

Coincidentally, Dr. Steiner's report notwithstanding, an individual who participated, but did not conduct the examination, Dr. Yamieka Head also issued a "report", dated November 9, 2009, which she sent to SPD and Covington OCS. Appx. 77-78. According to this report in which she indicated that she conducted the examination (Dr. Steiner was "present" for the examination), ROA.655, Dr. Head stated that the injury to WD was "definitive for blunt penetrating vaginal trauma", Appx. at p.78. Dr. Head also stated that "[t]he history provided by [WD] is not consistent with the physical findings of severe vaginal trauma." *Id.*

On November 9, 2009 at approximately 1:00 pm, after being alone with petitioner's mother-in-law, Mrs. Tammera Clement, WD purportedly disclosed to Mrs. Clement that petitioner had sexually assaulted her. Appx. 63. Subsequent to this disclosure, as per an instanter order, applied for by OCS worker, Carolyn Bourque, both petitioner and Mrs. Katie Cumberland were prohibited from unsupervised visits with the children (petitioner was prohibited from any contact). Appx. 79. Unsupervised custody of the children, as well as unrestricted access to the Cumberland's apartment (the purported crime scene) was given to Mrs. Tammera Clement and her husband. Appx. at pp. 64, 79.

From that time, not surprisingly, Mrs. Clement reported that WD, as well as RC, were disclosing instances of continuous and pervasive sexual assault perpetrated by petitioner. Appx. 64. The allegations of sexual assault increased in

number and intensity to the extent that they became outlandish. *Id.* The alleged assaults purportedly involved the use of cargo straps to tie both WD and RC to the master bed (where both were purportedly vaginally raped and sodomized with petitioner's penis and with various objects and sex toys). *Id.* The attacks were purportedly recorded on a web camera (though no evidence was apparently found, despite taking and forensically examining petitioner's computer). *Id.*

All disclosures of sexual assault in this case made by WD and RC were preceded by unsupervised visits with Tammera Clement. *See* Appx. 63, 64.

With respect to the instanter order that resulted in Mrs. Tammera Clement obtaining custody of the minor children WD and RC; the affidavit of Ms. Carolyn Bourque in support of that order, executed on November 9, 2009, specifically provided "[t]hat collateral sources have stated Mrs. Cumberland[1] has failed in the past to protect her children from physical abuse by Mr. Cumberland and that Mrs. Cumberland has been involved in abusive situations with the children and Mr. Cumberland and has lied to authorities to protect him." Appx. 81. Interestingly, on December 10, 2009, Katie Cumberland was interviewed by Det. Stan Rabalais of the SPD regarding the allegations. Appx. 66. Notwithstanding the assertions of Ms. Bourque contained in the instanter order, Mrs. Cumberland was provided an opportunity to state that she had no reason to believe that petitioner was "molesting her two children", but that "now in hindsight, she should have realized something was wrong." *Id.*

[1] At this time, Katie Cumberland is divorced from petitioner. However, for consistency, Katie Cumberland is often referred to in this Motion as "Mrs. Cumberland".

The trial of this matter was originally scheduled for June 11, 2012. Appx. 97. Just prior to trial, as had been pointed out during a meeting with a national expert on child sexual assault accusation cases, undersigned counsel did not obtain, nor had he seen, any of the photographs of the examination conducted upon WD. Further, though attempting to do so through subpoena, the Court denied petitioner's attempt at a continuance for failure to procure the presence of Mrs. Katie Cumberland, noting undersigned counsel's failure to follow proper procedure in obtaining an out of state witness. Appx. 97; *see Brown v. Times Picayune, LLC*, 14-160 (La. App. 1 Cir. 11/3/14), 167 So. 3d 665, 666. As a result, undersigned counsel refused to continue the trial, resulting in a mistrial, a contempt of court violation[2] and termination of undersigned counsel's involvement in the remainder of this case on the state court level. *Brown*, 14-0160, 167 So. 3d at 666-67.

Trial of this matter resumed on January 28, 2013. *See* Appx. 7. During this trial, while Dr. Steiner's report was introduced into evidence to rebut the false report of Dr. Head, neither the testimony of Dr. Steiner nor the actual photographs of the examination were introduced, nor was there any indication that the photographs had been disclosed to the defense by the State. Appx. 41-42. More significantly, as in the initial trial on June 11, 2012, Mrs. Katie Cumberland was not present and did not present any testimony, and the prejudicial photographs of

[2] Undersigned counsel again takes this opportunity to apologize on the record, to Division "E" of the 22nd Judicial District Court for the State of Louisiana, and the District Judge serving at the time, for his actions. While undersigned counsel avers that his actions were ultimately ethically correct under the circumstances, undersigned further admits that he is responsible, at the moment of enrollment as counsel of record, for maintaining his duties to the Court to be prepared and qualified to try any case, as lead counsel, upon any order to do so by the Court.

the master bedroom were introduced into evidence without any qualification as to the origin of the stains. Appx. 47. As such, as noted above, Mr. Cumberland was convicted as charged as to the counts pertaining to WD, and was convicted of the lesser included offense of molestation of a juvenile as to RC.

Direct review of petitioner's conviction ended on June 4, 2015 (90 days after the denial of petitioner's writ of certiorari to the Louisiana Supreme Court). Appx. 7. On May 26, 2016 (9 days prior to expiration of the Federal statutory limitations period), petitioner, through counsel, filed his state court application for post-conviction relief, triggering statutory tolling under 28 U.S.C. §2244(d)(2). Appx. 8. Statutory tolling ended on November 27, 2017, when petitioner's counsel failed to file a writ application to the Louisiana Supreme Court after the October 27, 2017 denial of his writ application to the Louisiana First Circuit Court of Appeal. Appx. 10, 13. From there, the statutory limitations period expired on December 6, 2017. Appx. 15.

However, as acknowledged by the State and the District Court, petitioner "learned about the omission and denial in May 2018, after he wrote counsel a letter in April 2018 to obtain a status update." Appx. 10. At that point, on June 20, 2018, petitioner, *pro se*, filed a writ application to the Louisiana Supreme Court, which refused consideration on September 21, 2018. *Id.*

On October 18, 2018, less than 30 days after the Supreme Court refused consideration of his June 20, 2018 writ application, petitioner filed his initial application for habeas relief with the District Court. *Id.* In the initial application,

which was filed, *pro se*, petitioner did not specifically raise an actual innocence claim, but alluded to same in his claim that the evidence against him was insufficient.

On April 25, 2019, the Magistrate Judge in the above captioned matter issued his initial Report and Recommendations recommending dismissal of petitioner's application with prejudice. Appx. 17. This recommendation was based on the untimely filing of petitioner's claims. First, despite the State acknowledging, and the Magistrate Judge finding, that equitable tolling applied in this case, the Magistrate Judge also found that equitable tolling "expired" on September 30, 2018, and Mr. Cumberland's petition filed on October 18, 2018, was somehow untimely. Appx. 11-16. Second, while not specifically making a finding at that point, the Magistrate Judge noted that Mr. Cumberland failed to establish "new" evidence of actual innocence, thus not being entitled to the tolling of actual innocence claims under *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Appx. 16.

On June 10, 2019, petitioner, through undersigned counsel, objected to the report and recommendations of the Magistrate Judge, referencing the actual innocence exception of *McQuiggin v. Perkins*, 569 U.S. 383 (2013). On June 21, 2019, the District Court ordered remand to the Magistrate Judge to address the application of the actual innocence exception to the timeliness requirement.

On December 16, 2019, petitioner formalized the actual innocence claim referenced in his previous objections to the Magistrate Judge's Reports and Recommendations, and submitted four additional independent claims for habeas

corpus relief (which were also specifically identified as actual innocence predicate claims under *Schlup*) in a Motion for Leave to file Supplemental and Amending Petition for Writ of Habeas Corpus, which motion was granted by the District Court on January 10, 2020. Appx. 5. These four independent claims included a 14th Amendment Due Process Clause violation for the State's failure to provide exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), Appx. 112-13; a 14th Amendment Due Process Clause violation for the State's knowing submission of false evidence against petitioner in the form of Dr. Head's testimony and report, Appx. 114; a 14th Amendment Due Process Clause violation for the State's acts of witness intimation against Mrs. Cumberland, a potentially exculpatory witness for petitioner's case, Appx. 115-16; and a 6th Amendment Ineffective Assistance of Counsel violations under *Strickland v. Washington*, 466 U.S. 668 (1984). Appx. 117-18.

The District Court ordered the Magistrate Judge to consider the Supplemental and Amending Petition in the Supplemental Report and Recommendations. Appx. 5. On April 14, 2020, the Magistrate Judge resubmitted the Supplemental Report and Recommendations, again recommending that the petitioner's habeas corpus application be dismissed with prejudice as untimely. Appx. 18-55. In the updated Supplemental Report and Recommendations, the Magistrate Judge asserted that the petitioner's actual innocence evidence was not "new" under the Fifth Circuit jurisprudence of *Tyler* and *Hancock*; and asserted that the evidence was not sufficient to establish actual innocence under *Schlup*. Appx.

39-50. The updated Supplemental Report and Recommendations did contain a new basis that equitable tolling did not apply to petitioner's circumstances largely due to the purported lack of diligence of petitioner's prior counsel filing his state post-conviction relief petition nine days prior to the statutory filing deadline of the AEDPA. Appx. 23-27. The Supplemental Report and Recommendation also specifically addressed petitioner's entitlement to an evidentiary hearing, recommending against such a hearing for the same reasons previously asserted as to the perceived lack of compelling nature of petitioner's new evidence. Appx. 51-53. The Supplemental Report and Recommendations specifically declined to address the issue of procedural default. Appx. 53-54. On April 27, 2020, petitioner submitted his objections to the Supplemental Report and Recommendations of the Magistrate Judge.

On June 12. 2020, the District Court adopted in full the Report and Recommendations and the Supplemental Report and Recommendations of the Magistrate Judge and dismissed the application of petitioner with prejudice. Appx. 4. The District Court also declined to issue a Certificate of Appealability ("COA") necessary for appeal of the decision under 28 U.S.C. § 2253. Appx. 3.

Petitioner filed a notice of appeal on July 10, 2020. In conjunction with his appeal, petitioner filed a Motion with the Appellate Court for issuance of a COA. Appx. 1-2. On August 12, 2021, the Appellate Court denied petitioner's Motion for Issuance of a COA. *Id.* This Petition follows.

ARGUMENT

I. Petitioner is Entitled to the Issuance of a Certificate of Appealability as to the Dismissal of his Application for Writ of Habeas Corpus Filed Pursuant to 28 U.S.C. § 2254:

A) Standard for Issuance of Certificate of Appealability:

First of all, "under the Antiterrorism and Effective Death Penalty Act (AEDPA), a state habeas petitioner must obtain a COA before he can appeal the federal district court's denial of habeas relief." 28 U.S.C. § 2253(c); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA is warranted upon a "substantial showing of the denial of a constitutional right", which showing is nevertheless required notwithstanding where, as here, the district court has disposed of petitioner's claims on procedural grounds. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As such, where "the district court denies relief on procedural grounds, the petitioner seeking a COA must show both '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.'" *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

B) Jurists of Reason Would Find it Debatable whether the Petition Sets Forth Valid Claims of Constitutional Rights:

First and foremost, as more fully set forth below, in his application for habeas corpus relief, petitioner has specifically asserted claims in which jurists of reason could find, at a minimum, set forth valid claims of the denial of constitutional rights as protected under the Sixth and Fourteenth Amendments. For instance, petitioner

asserted a 14th Amendment Due Process Clause violation for the State's failure to provide exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), Appx. 112-13. Specifically, petitioner asserted the factual basis of that claim consisting of the existence of photographs of the November 7, 2009 forensic examination of WD, from which the report of Dr. Steiner was generated, which report specifically asserted somewhat vague, but potentially exculpatory conclusion that his examination potentially ruled out sexual assault as a cause of the injuries. *Id.*

Additionally, petitioner asserted a 14th Amendment Due Process Clause violation for the State's knowing submission of false evidence against petitioner in the form of Dr. Head's testimony and report, contradicted by both Dr. Steiner's Report and, as anticipated by the petitioner, the photographs of the November 7, 2009 physical examination of WD. Appx. 114. As to this claim, the Federal jurisprudence has uniformly recognized that "the Due Process Clause of the Fourteenth Amendment forbids the government from knowingly using false testimony against a criminal defendant, or failing to correct said false testimony. *See United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002) (citing *Giglio v. United States*, 405 U.S. 150, 153 (1972)).

Third, petitioner asserted a 14th Amendment Due Process Clause violation for the State's acts of witness intimation against Mrs. Cumberland, a potentially exculpatory witness for petitioner, by threatening her with prosecution as a principal to the charges against petitioner. Appx. 115-16. Again, within the context of a civil rights claim under *Bivens*, the federal jurisprudence has recognized a due

process violation that is predicated upon witness intimidation by the government. In the district court case of *West v. Mesa*, No. CV-12-006547-PHX-DGC (D. Ariz. 2015), for example, the court upheld the pleading of a *Bivens* claim against a federal task force member alleged to have been involved in witness tampering. In denying the defendant's motion to dismiss, the court provided as follows:

> Plaintiff satisfies the pleading requirements for a *Bivens* claim. . . . The Consolidated Complaint contains numerous allegations that Jacobs *pressured witnesses* into giving false testimony and provided benefits to those who cooperated. These allegations give rise to a plausible inference that Jacobs engaged in conduct that violated plaintiff's constitutional rights. The Court will not dismiss the *Bivens* claim against Jacobs.

Id. at p.9 (emphasis added).

Finally, petitioner asserted additional 6th Amendment Ineffective Assistance of Counsel violations under *Strickland v. Washington*, 466 U.S. 668 (1984), for trial counsel's failure to pursue the aforementioned examination photographs and testimony of Mrs. Cumberland. Appx. 117-18.

Given these assertions, and the presence of federal jurisprudence supporting such assertions, it is clear that jurists of reason could find it debatable that petitioner has asserted a denial of several constitutional rights.

C) Jurists of Reason Would Find it Debatable whether the District Court Was Correct in Finding that the Petition in this Case was Not Timely Filed:

With regard to the issue of timeliness of petitioner's application (more specifically, the application of the doctrine of equitable tolling), the record in this matter clearly shows that petitioner is entitled to a COA as to this issue. In an

initial report of the Magistrate Judge, which was adopted by the District Court, the State acknowledged that the doctrine of equitable tolling, as provided by the United States Supreme Court case of *Holland v. Florida*, 130 S. Ct. 2549 (2010), did, in fact, apply to petitioner's case. Appx. 15. However, the District Court essentially found, with no jurisprudential support for its mechanics, that: 1) the statutory limitations period was effectively "suspended" at the time statutory tolling ended on November 27, 2017; then 2) equitable tolling took place from November 27, 2017 through September 21, 2018 (during which time, petitioner was apprised of the failure to timely file a Louisiana Supreme Court writ application "in May of 2018", waited anywhere between 20 and 51 days (admittedly a reasonable delay per the State and Magistrate Judge) to file a writ application to the Louisiana Supreme Court, which was then rejected as not considered on September 21, 2018); then 3) the "suspended" statutory limitations period resumed at the time of the Louisiana Supreme Court's rejection of petitioner's writ application and expired on October 1, 2019, rendering petitioner's October 18, 2018 untimely by 17 days. *See* Appx. 15. Put another way, the District Court's analysis found equitable tolling to apply for a period of 299 days after the expiration of statutory tolling (December 6, 2017 through October 1, 2018), but did not apply to a period of 317 days when petitioner filed his application to this Court (and the limitations period, while "equitably" tolled on the 299th day, would not have been "equitably" tolled on the 300th day). With utmost respect, the analysis of the District Court is patently erroneous and is

openly hostile to the principles behind the application of the doctrine of equitable tolling.

The case of *Holland* has provided that a petitioner is entitled to equitable tolling if he establishes that: 1) he has been pursuing his rights diligently, and 2) some extraordinary circumstance stood in his way and prevented timely filing. 130 S. Ct. at 2562. In applying this principle, the Court in *Holland* repeatedly called for "flexibility" and further eschewed the rigid application of "mechanical rules", explicitly disapproving of "the evils of archaic rigidity", in applying the concept of equitable tolling. 130 S. Ct. at 2563.

At the outset, the District Court unnaturally contorted the application of equitable tolling to find that it would apply to toll the statute of limitations on petitioner's claim from December 6, 2017 through October 1, 2018, but would not apply to toll the limitations period 17 days later. In essence, the State and the District Court would have equitable tolling apply while statutory limitations period was still applicable, have equitable tolling end at an arbitrary point in time (the date of refusal to consider petitioner's writ application) then have the statutory limitations period resume (9 days remaining). This would not even qualify as a "mechanical rule", but appears more akin to a more cruel iteration of the "evils of archaic rigidity" specifically rejected by the Supreme Court in *Holland*.

In actuality, unlike a statutory tolling calculation, which requires several steps to determine applicability; equitable tolling simply takes the time between the end of the statutory limitations period and the date of actual filing. Equitable

tolling answers, yes or no, whether, considering all circumstances in total, there was a diligent pursuit of his rights by the petitioner and whether an extraordinary circumstance stood in petitioner's way for filing. *See Holland*, 130 S. Ct. at 2562. In this case, specifically, the question is whether equitable tolling applied in this case to toll the limitations period between December 6, 2017, the date the statutory limitations period ran, and October 18, 2018, the date in which petitioner's application was filed.

First and foremost, as acknowledged by both the State and the District Court, an extraordinary circumstance stood in petitioner's way in preventing petitioner from filing his application within the statutory limitations period. As noted by the District Court, the statutory tolling period ended on December 6, 2017, as a result of his attorney's failure to file a writ application to the Louisiana Supreme Court by the filing deadline of November 27, 2017. Appx. 14-15. Petitioner did not learn about this failure until "May of 2018". Appx. 5. As acknowledged by the State, and clearly contemplated in the Supreme Court case of *Holland*, the failure of petitioner's post-conviction relief counsel to file a Louisiana Supreme Court writ application within the appropriate deadline, or to apprise petitioner of the result of the lower court denial until after the filing deadline had passed, constituted extraordinary circumstances that prevented timely filing by petitioner in this case. *See* Appx. 15.

The only remaining question for equitable tolling purposes is whether petitioner diligently pursued his rights during within the time between the

expiration of the statutory limitations period on December 6, 2017 and the filing of this application on October 18, 2018. In this case, the following are relevant: petitioner found out about the missed deadline "in May of 2018", Appx. 10; petitioner filed his untimely writ application to the Louisiana Supreme Court on June 20, 2018, *id.*; the Louisiana Supreme Court refused to consider the untimely writ application on September 21, 2018, *id.* Again, as acknowledged by the State and the Magistrate Judge, equitable tolling would have applied up to October 1, 2018. Appx. 15. This, rightly, includes the period of time in which the untimely Louisiana Supreme Court writ application was pending because, although not applicable for statutory tolling, the filing did, nevertheless, constitute a diligent pursuit of petitioner's rights, as the Louisiana Supreme Court did have the discretion to consider and even grant the writ, its untimeliness notwithstanding. *See State v. Wells*, 13-778 (La. 4/10/13), 111 So. 3d 1008; *State v. Richard*, 95-2309 (La. 11/27/95), 663 So. 2d 744; *State v. Encalarde*, 551 So. 2d 1313 (La. 1989); *State v. Billison*, 336 So. 2d 568 (La. 1979).

Furthermore, implicitly acknowledged by the State and the District Court was the reasonableness of petitioner filing his writ application on June 20, 2018 after discovering, in "May of 2018" post-conviction relief counsel's failure to timely file any such writ. Appx. 10, 15. As such, both the State and the District Court accepted that petitioner waiting up to 50 days between the time of discovery and the time of filing his writ application to the Louisiana Supreme Court nevertheless constituted diligent pursuit of petitioner's rights. It is of note that neither the State

nor the District Court concerned themselves with ascertaining the particular date of discovery, being satisfied with petitioner's assertion that discovery occurred in "May of 2018". *See id.*

While accepting that the 50 day period between the time of discovery and the time of filing the Louisiana Supreme Court writ application constituted diligent pursuit of rights, the State and the District Court apparently (and inexplicably) assert that anything over 9 days from the time the Louisiana Supreme Court refused to consider the writ and the time of filing would somehow not constitute a diligent pursuit of petitioner's rights. On this point, it is noteworthy that the filing date of October 18, 2018 was within 30 days of the Louisiana Supreme Court's decision to refuse the writ (let alone when petitioner actually found out about said decision) and was less than the 50 days between the "May 2018" discovery and June 20, 2018 filing of the writ apparently deemed acceptable as a diligent pursuit of rights by both the State and the Magistrate Judge. As such, under the circumstances, equitable tolling applies in this case to render petitioner's October 18, 2018 filing of this application as timely.

In the updated analysis, the Supplemental Report and Recommendations provide a new basis for the recommendation that equitable tolling does not apply to the petitioner's filing in that matter: the relative lack of diligence of petitioner's post-conviction relief counsel in filing the state post-conviction relief petition with only nine days remaining on the statutory deadline under the AEDPA, 28 U.S.C. § 2244(d). Appx. 26-27. This analysis suffers from the same erroneous conflation of

the statutory limitations period with equitable tolling and the circumstantial arbitrariness that plagued the analysis in the original Report and Recommendations.

First and foremost, petitioner's actions in filing his *pro se* habeas application could not have contributed to the untimeliness of his petition, as the statutory period had expired before he even knew that the Louisiana Supreme Court writ application had not been filed. Appx. 9-10, 14-15. More significantly, in order to assign any significance to this issue of counsel's supposed "lack of diligence on the front end" in filing the state post-conviction relief petition just nine days prior to the AEDPA statutory deadline; the circumstances would need to indicate: 1) what an actual "diligent front end" filing time would look like and 2) that there was a material distinction between the "diligent front end" filing time, and the purported "[un]diligent front end" filing time of nine days prior to the expiration of the AEDPA statutory deadline.

If the analysis of the District Court (as provided by the Supplemental Report and Recommendation) is to be accepted, a "diligent front end" filing time would have to include any time exceeding 27 days prior to the AEDPA filing deadline, which represents the time in which it actually took petitioner to prepare and file his federal habeas petition on October 18, 2018 after the Louisiana Supreme Court refused consideration of his writ application on September 21, 2018. Appx. 10. Under the circumstances of this case, there is no material distinction between the "diligent front end" filing time of 28 days, and the "[un]diligent front end" filing

time of 9 days; since approximately five months passed between the expiration of the AEDPA deadline of December 6, 2017 and the time petitioner learned of the omission and denial of the PCR writ application in the court of appeal in "May of 2018". Appx. 10, 15. As such, the filing time petitioner's state post-conviction relief petition being nine days prior to the AEDPA deadline should have no impact on this Court's finding that equitable tolling applied to petitioner's filing of his federal habeas corpus petition in this matter.

Given the above analysis, it is clear that petitioner has met the burden of establishing, at a minimum, entitlement to the issuance of a COA as to this issue.

D) Jurists of Reason would find it Debatable whether the District Court Was Correct in finding that Petitioner Did Not Have a Compelling Claim of Actual Innocence:

As mentioned above, in its finding that petitioner did not sufficiently establish a claim of actual innocence, the District Court based its analysis on two main elements. First, the District Court reasoned that the evidence submitted by petitioner at least existed and was "available" to the petitioner at the time of his trial and was, therefore, not "new" evidence under *Schlup v. Delo*, 513 U.S. 298 (1995). Appx. 39-43. Second and more significantly, the evidence submitted by petitioner did not directly point to petitioner's innocence, but was a proffer of the potential existence of other evidence, namely the November 7, 2009 forensic examination photographs of WD and the testimony of Mrs. Cumberland, which petitioner admittedly did not have. Appx. 39-53. As such, according to the District

Court, because petitioner did not actually submit this evidence to the Court, petitioner's assertions were merely speculative.

As to the District Court's first element that the petitioner's evidence was not "new", in recent jurisprudence, the Fifth Circuit has admittedly declined to address the issue of what constitutes "new" evidence under *Schlup* (opting to limit the breadth of its holdings on what "does not" constitute new evidence, arguably limiting those specific cases to their respective facts). With respect to the second element, the Fifth Circuit has not even broached the subject of what constitutes a sufficient proffer to warrant an evidentiary hearing to develop potentially exculpatory evidence that would support an actual innocence claim. Both issues, by their nature alone, warrant at least the issuance of a COA for further jurisprudential development by the Fifth Circuit (and, potentially, by this Court as well).

1) Actual Innocence Claim under *Schlup v. Delo*:

The Supreme Court case of *Schlup v. Delo*, 513 U.S. 298 (1995) requires that, in actual innocence claims in habeas petitions, the petitioner must show "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. Furthermore, *Schlup* provides that "to be credible, such a claim requires petitioner to 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 not presented at trial." *Id.* at 324. Further explaining, the Court in *Schlup* provided

that a reviewing court could review new evidence unavailable at the trial and was not limited in its inquiry to such evidence:

> In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the *Carrier* standard, we believe that Judge Friendly's description of the inquiry is appropriate: the habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

Id. at . 327-28.

Indeed, the holding in *Schlup* specifically characterized evidence that was potentially available, but was not developed through failure of trial counsel to be considered in the determination of an actual innocence claim. In *Schlup*, petitioner was convicted of murdering a fellow inmate in prison. *Id.* at 301, 305. The conviction was predicated upon the testimony of two prison guards, who identified petitioner as the perpetrator of the crime. *Id.* at 302. The petitioner in *Schlup* depended heavily upon a prison video that showed him in the prison cafeteria 65 seconds before the guards ran out of the dining area to respond to the murder. *Id.* at 303. In his habeas application, the petitioner in *Schlup* supported his claim of actual innocence with an affidavit of an inmate who testified that he put out a prompt call for assistance regarding the incident, which, coupled with the prison

video, would have made it impossible for petitioner to have been the perpetrator of the murder. *Id.* at 307-08. Petitioner also supported his claim with additional affidavits of other inmates who witnessed the murder and testified that petitioner was not the perpetrator. *Id.* 308-09. Although the evidence in *Schlup* was "available" in the sense that the testifying witnesses were available but for the defense counsel's failure to interview them, the Supreme Court specifically found that the district court "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Id.* at 331-32. As such, the Court in *Schlup* reversed the lower court's denial and remanded to conduct such an inquiry, wherein, while not specifically so ordering, strongly suggested an evidentiary hearing to allow for the court "to take testimony from the few key witnesses." *Id.* at 332.

2) The Characterization of Petitioner's Evidence as "New" under *Schlup v. Delo*:

In its decision, the District Court found that the physical exam photographs and proposed testimony of Mrs. Cumberland do not constitute "new" evidence sufficient to support a claim of actual innocence under *Schlup v. Delo*. The Supplemental Report and Recommendations focus particularly on the recent Fifth Circuit cases of *Hancock v. Davis*, 906 F.3d 387 (5th Cir. 2018), and *Tyler v. Davis*, No. 17-20249 (5th Cir. Apr. 23, 2019). Appx. 29, 43. Not only do these cases not support the position taken by the District Court, but they can be argued to actually support a finding that the evidence in this case constitutes "new" evidence under *Schlup v. Delo*.

At the outset, the cases of *Hancock* and *Tyler*, both acknowledge a split in the circuits as to what constitutes "new" evidence sufficient to support an actual innocence claim under *Schlup*: whether new evidence must be "newly discovered" evidence or whether such evidence could have been available to petitioner but was otherwise not introduced at trial. *Hancock*, 906 F.3d at 389-90; *Tyler*, No. 17-20249 at p.3. Further, both cases specifically state that they decline to "weigh in" on the circuit split. *Id.* Given those pronouncements, it is clear that the Fifth Circuit intended for both *Hancock* and *Tyler* to be limited in application to the specific facts of those cases (particularly *Tyler* which explicitly designated as "not precedent except under the limited circumstances as set forth in 5TH CIR. R. 47.5.4."). As both *Hancock* and *Tyler* involve testimony that was in the form of affidavits in the possession of the petitioner at the time of trial, neither case specifically applies to the facts here.

However, even from the minimally intended guidance provided by the Fifth Circuit in these cases, said guidance actually points to the classification of the evidence in this case as "new" under the *Schlup* actual innocence standard. While specifically avoiding the articulation of an affirmative standard, both *Hancock* and *Tyler* do, in fact, apply a negative standard articulated by an earlier Fifth Circuit case of *Moore v. Quarterman*, 534 F.3d 454 (5th Cir. 2008), whereby evidence does not qualify as "new" under the *Schlup* actual innocence standard if it was always within the reach of petitioner's personal knowledge or reasonable investigation. *Hancock*, 906 F.3d at 390; *Tyler*, No. 17-20249 at p.3. Put another way, evidence

would have to be BOTH: 1) known, and 2) available at the time of trial for the evidence to not constitute "new" evidence under the *Schlup* actual innocence standard. The element of availability is particularly important in both *Hancock* and *Tyler*, both of which specifically found that the evidence was "available" to the petitioner in both instances. *See Hancock*, 906 F.3d at 390; *Tyler*, No. 17-20249 at p.3.

Unlike the cases of *Hancock* and *Tyler*, the November 7, 2009 examination photographs and the testimony of Mrs. Cumberland were not available to the petitioner at the time of his trial. Pertaining to the photographs, the District Court (adopting the findings of the Magistrate Judge) has specifically found that these photographs were NOT available to the petitioner, the access to which having been prevented by "federal privacy laws." Appx. 42.

With respect to the testimony of Mrs. Cumberland, while the District Court correctly found that "the defense knew about Mrs. Cumberland throughout and could have investigated her whereabouts to obtain her testimony", Appx. 49, this does not make her exculpatory testimony "available" at the time of trial. As mentioned above, the attributes of Mrs. Cumberland's potential testimony at the time of petitioner's trial were altered drastically from the time that the alleged crime occurred on November 7, 2009. More specifically, the record indicates that Mrs. Cumberland "morphed" from a friendly, cooperative witness into an uncooperative, hostile witness as a direct result of her being wrongfully intimidated with explicit threats of having her children taken away from her and of being

charged with petitioner as an accomplice (the former of which was actually carried out!). To accept the premise, as suggested in the Supplemental Report and Recommendations, that Mrs. Cumberland's testimony was somehow "available" to the petitioner at the time of his trial, without considering this all important context, is to take the jurisprudence on this point down a dark path that is not permitted under the Due Process Clause.

As such, the cases of *Hancock* and *Tyler* are not applicable in this case. The November 7, 2009 examination photographs and the testimony of Mrs. Cumberland constitute new reliable evidence sufficient to support petitioner's actual innocence claim under *Schlup v. Delo*. In any event, the analysis above clearly demonstrates that the point is, at a minimum, reasonably arguable, warranting the issuance of a COA.

3) The Specific Characterization of Petitioner's Evidence as Sufficiently "Compelling" and "Reliable:

In the extant case, as in the case of *Schlup*; even absent the testimony of Mrs. Cumberland and the November 7, 2009 forensic examination photographs, petitioner can point to several items of significant evidence that was not adduced at his trial that would meet the standard of *Schlup v. Delo*, "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in this particular case.

a) November 7, 2009 Physical Examination Photographs:

First of all, pertaining to the examination report of Dr. Steiner, which provides an important context for the importance of the missing photographs, the District Court erroneously asserted that the report was "inconclusive insofar as definitively ruling out sexual assault." Appx. 41. In the trial of January 2013, although the report of Dr. Head, which characterized WD's injuries as "definitive for blunt penetrating trauma", was rebutted by the introduction of Dr. Steiner's report, that report, alone, was not sufficient to establish that the injury was definitively not caused by sexual assault. *Compare* Appx. 76, *with* Appx. 77-78. Specifically, although Dr. Steiner's report: 1) specifically contradicted Dr. Head's assertion that she conducted the examination, noting that she was merely assisting; 2) specifically provided that the examination revealed only "superficial" lacerations, with some bruising of the vaginal wall; and 3) vaguely indicated that Dr. Steiner's concluded that WD's injuries were inconclusive for sexual assault. Appx. 76. Specifically, Dr. Steiner's report provides, as follows:

> **PREOPERATIVE DIAGNOSIS:** Rule out sexual assault.
>
> **POSTOPERATIVE DIAGNOSIS:** Rule out sexual assault.

Appx. 76.

At best, this somewhat cryptic phraseology is ambiguous as to whether "Rule out sexual assault" means 1) examination was inconclusive for sexual assault; or 2)

sexual assault was "ruled out", as a cause of WD's injuries. As an initial point, beyond an ambiguity as to tense, the latter would arguably be the more logical interpretation, due to the obvious fact that the report could have easily reflected that the "Postoperative Diagnosis" was "inconclusive for sexual assault". In any event, the District Court simply cannot make a determination that the Steiner report is "inconclusive" for sexual assault. Precisely because of this ambiguity, petitioner has, in fact, requested not only for Dr. Steiner's testimony, but also for the ability to call an independent expert witness in the event Dr. Steiner's testimony takes the former characterization that the examination result was "inconclusive" for sexual assault. *See* Appx. 40. Again, much of this testimony is substantially dependent upon the production of the examination photographs.

Additionally, the Supplemental Report and Recommendation (upon which the District Court's ruling was explicitly based) contains the following statement pertaining to the photographs:

> Defense counsel objected and a bench conference followed regarding the fact that the defense was not provided with the photographs taken during the procedure. The state prosecutor noted that the State itself was never in possession of the photographs due to federal privacy laws that prevented their production. The transcript appears to suggest that the State viewed the photos at some point before trial. The prosecutor stated that he had no idea the photos would be in conflict. Under the circumstances, counsel for the parties mutually agreed to the court's admonishment to jurors that "any photographs [taken] during this procedure are protected under Federal law and would not be provided to anyone, either the prosecution or to the defense; therefore, since no one has those, I am admonishing you that you should not consider

> photographs or any testimony concerning photographs which cannot be produced in court as evidence."

Appx. 42. This statement is problematic on several levels. First of all, undersigned counsel avers to this Court with considerable confidence that there exists no "federal privacy law" that nullifies the prosecutor's duty under the Due Process Clause to make exculpatory evidence available to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). Even if such "federal privacy law" existed, trial defense counsel could have, at a minimum, demanded that such be specified and litigated such on the record. Second, the District Court made a finding that the prosecutor viewed the photographs "at some point before trial", but made no such finding that the defense had been provided the same access. Appx. 42. This finding notwithstanding, the analysis of the Supplemental Report and Recommendation reflects the uncritical acceptance of the fact that the parties "mutually agreed" to the trial court's unduly neutral admonishment that the photographs are not to be considered. Again, the above statement, by itself, conclusively establishes EITHER: 1) a Due Process Clause violation of the *Brady* Rule; 2) a Due Process violation of the failure to apply the adverse presumption rule; or 3) an ineffective assistance of counsel claim for the trial defense counsel's failure to raise and preserve for appeal points (1) or (2).

Dr. Steiner himself was not "available" for testimony, as he was not called by either party, *see* Appx. 41. More significantly, the photographs of the examination were not made available to the defense, arguably in violation of *Brady v. Maryland*, such that Dr. Head could be cross examined with such photographs; Dr. Steiner

could be examined, or, if necessary, cross examined pertaining to the photographs. Most significantly, the absence of the photographs effectively prevented petitioner from being afforded an opportunity to obtain his own expert to review the photographs and come up with a definitive statement that WD's injury was not caused by sexual assault, but most likely was a combination of self-induced circumstances and a fall from a seizure.

b) Testimony of Katie Cumberland:

Another important piece of evidence is the testimony of Ms. Katie Cumberland, petitioner's wife, who petitioner argues had material testimony on many aspects of this case which clearly meets the actual innocence standard of *Schlup v. Delo*. First of all, Mrs. Cumberland significantly neutralizes the prejudicial impact of the master bedroom photographs. Appx. 69. Specifically, Det. Campbell's report also shows that Mrs. Cumberland explained that the dried blood on the mattress (where the state alleged was evidence of sexual abuse of petitioner's stepchildren) was her blood, *id.*

Second, Mrs. Cumberland was in a position to provide an explanation to the injuries sustained by WD which initiated the investigation against petitioner. Specifically, the Mrs. Cumberland provided a recorded statement to Det. Morel of the Slidell P.D. on November 7, 2009. In that statement, Mrs. Cumberland not only did not indicate that anything any suspicious activity on the part of petitioner towards the children, but also specifically explained that W.D.'s habit of placing

objects in her vagina (consistent with an alternative explanation for her injuries on November 7, 2009).

Third, Mrs. Cumberland also was in a position to provide additional material testimony as to Tammera Clement's prior history of falsely accusing petitioner with abuse and WD's history of seizures. Specifically, the records of Kentucky Cabinet for Health and Family Services ("KyCHFS") showed 1) petitioner had been investigated no less than 4 times by KyCHFS between May 8, 2007 and January 15, 2009, with KyCHFS never substantiating any sexual abuse, whatsoever, by petitioner (certainly not of any of the outlandish allegations made by the very suspicious Tammara Clement), *see* Appx. 85-95; and the "instanter order", which the Supplemental Report and Recommendation acknowledges resulted in "limiting Mrs. Cumberland's contact with her children", Appx. 48-49, also, more importantly, specifically accused Mrs. Cumberland of falsely concealing physical abuse purportedly perpetrated by petitioner against his stepchildren, Appx. 81.

Finally, and most significantly, in addition to the general unavailability of Katie Cumberland, an essential witness for petitioner; the evidence shows that that unavailability was caused in no small part to potential coercion against her to prevent her favorable testimony. As reflected in the records, the initial allegations against petitioner were necessarily coupled with allegations against her that she facilitated, perhaps knowingly, the sexual abuse against her own children, WD and RC. Appx. 81. The fact that Mrs. Cumberland was both not available for the defense and not charged as a principle to any of the counts brought against

petitioner is overwhelmingly indicative of the fact that she was specifically discouraged from testifying on petitioner's behalf. *See* Appx. 66 At best, these actions are indicative of a violation of the Compulsory Process Clause of the Sixth Amendment in functionally depriving petitioner of Katie Cumberland's favorable testimony.

In any event, petitioner has made a compelling case that Katie Cumberland clearly had material and exculpatory testimony which would satisfy petitioner's burden of proof for establishing his actual innocence claim. As such, petitioner is at least entitled to the issuance of a COA to litigate this issue before this Court.

4) Entitlement to an Evidentiary Hearing for Consideration of Claims of Actual Innocence:

While admittedly not being in possession of the evidence (through significant fault of the State), petitioner takes the position that his allegations and evidentiary proffers have sufficiently established the practical necessity for an evidentiary hearing and that such evidentiary hearings are warranted in consideration of actual innocence claims. With respect to the granting of an evidentiary hearing, 28 U.S.C. §2254, Rule 8 provides in pertinent part, as follows:

> **Rule 8. Evidentiary Hearing**
>
> (a) Determining Whether to Hold a Hearing. If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

Id.

In further explaining the powers of the district courts to hold evidentiary hearings in applications for habeas corpus relief, the United States Supreme Court in *Townsend v. Sain*, 372 U.S. 293 (1963), provided as follows:

> The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. **Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.**

Id. at 310-312 (emphasis added).

The absence of the actual November 7, 2009 physical examination photographs and a sworn affidavit of Mrs. Cumberland notwithstanding, petitioner has not only "alleged facts" in support of his actual innocence claim, and the "new, reliable evidence" in support thereof; he has also presented a persuasive proffer of additional evidence, which has not been in any way contested by the respondent. Respectfully, to simply dismiss petitioner's claims in light of all of the uncontroverted evidence and to not, at a minimum, hold an evidentiary hearing would stand in contravention to the Supreme Court's pronouncement in *Townsend*. In addition, as the evidence also shows, the inability of the petitioner to produce the photographs, expert testimony pertaining thereto, or sworn exculpatory testimony from Mrs. Cumberland stems in no small part due to the actions (in some instances, clearly wrongful actions) of the State of Louisiana in the prosecution of this case.

CONCLUSION

Based on the above, petitioner is entitled to a reversal of the decision of the Appellate Court denying petitioner's Motion for Issuance of a Certificate of Appealability as to the following adverse findings by the District Court Below.

Respectfully submitted,

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