

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

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

CLAIBORNE W. BROWN
Counsel of Record

1070-B West Causeway Approach
Mandeville, LA 70471
(985) 845-2824
cwbrown@cwbrownlaw.com

Counsel for Petitioner

TABLE OF CONTENTS

	Page (Appx.)
APPENDIX A: Decision under Review, <i>Cumberland v. Vannoy</i> , 20-30434 (5 th Cir. 8/12/21).....	1
APPENDIX B: Rulings of the District Court <i>Cumberland v. Vannoy</i> , 18-9685 (E.D. La. 6/12/20).....	3
APPENDIX C: Initial Report and Recommendations <i>Cumberland v. Vannoy</i> , 18-9685 (E.D. La.) R. Doc. No. 14.....	5
APPENDIX D: Supplemental Report and Recommendations, <i>Cumberland v. Vannoy</i> , 18-9685 (E.D. La.) R. Doc. No. 46.....	17
APPENDIX E: Appellate Record Excerpts, <i>Cumberland v. Vannoy</i> , 20-30434 (5 th Cir. 8/12/21).....	55
APPENDIX F: <i>Brown v. Times-Picayune, L.L.C.</i> , 14-0160 (La. App. 1 Cir. 11/3/14), 167 So. 3d 665.....	96
APPENDIX G: Supplemental and Amending Petition for Writ of Habeas Corpus, <i>Cumberland v. Vannoy</i> , 18-9685 (E.D. La.) R. Doc. No. 36-2.....	103
APPENDIX H: Constitutional and Statutory Provisions.....	125

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

No. 20-30434

August 12, 2021

Lyle W. Cayce
Clerk

JOSHUA CUMBERLAND,

Petitioner—Appellant,

versus

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Louisiana
USDC No. 2:18-CV-9685

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

PER CURIAM*:

Joshua Cumberland moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 application challenging his Louisiana-state convictions for aggravated rape, sexual battery, and molestation of a juvenile. The district court dismissed Cumberland's application as untimely under 28 U.S.C. § 2244(d). Cumberland contends that he is entitled to equitable tolling of the limitations period, or

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

alternatively, that he has demonstrated his actual innocence to avoid the time-bar. He further argues that the district court erred in denying him an evidentiary hearing on his actual-innocence claim.

To obtain a COA, Cumberland must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where, as here, the district court denies relief on procedural grounds, we will issue a COA only when the prisoner “shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Cumberland fails to make this showing, so his COA motion is DENIED. Because Cumberland fails to make the required showing for a COA on his constitutional claim, the Court “ha[s] no power to say anything about his request for an evidentiary hearing.” *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSHUA CUMBERLAND

CIVIL ACTION

VERSUS

NO. 18-9685

DARREL VANNOY, ET AL.

SECTION "A" (5)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court having denied petitioner's Motion to Vacate, Set Aside, or Correct a Sentence under 28 U. S. C. § 2254, and considering the record in the case, hereby orders that a certificate of appealability shall not be issued having found that petitioner has not made a substantial showing of the denial of a constitutional right.

June 12, 2020



JUDGE JAY C. ZAINY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSHUA CUMBERLAND

CIVIL ACTION

VERSUS

NO: 18-9685

DARREL VANNOY, ET AL.

SECTION: "A" (5)

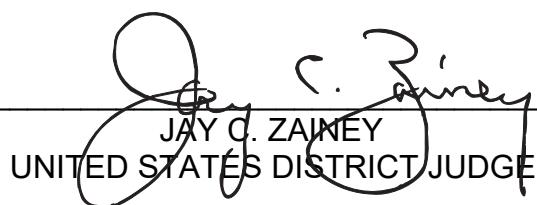
ORDER

The Court, having considered the record, the applicable law, the Report and Recommendation of United States Magistrate Judge North, and the Plaintiff's objection to the Magistrate Judge's Report and Recommendation, hereby approves the Report and Recommendation of United States Magistrate Judge North and adopts it as its opinion in this matter.

Accordingly;

IT IS ORDERED that the petition of Joshua Cumberland for issuance of a writ of habeas corpus under 28 U.S.C. § 2254 is **DISMISSED WITH PREJUDICE**.

June 12, 2020



JAY C. ZAINY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSHUA CUMBERLAND

CIVIL ACTION

VERSUS

NO. 18-9685

DARREL VANNOY, ET AL.

SECTION "A" (5)

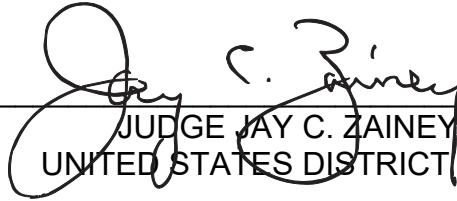
ORDER

In light of the **Motion for Leave to File Supplemental and Amending Petition for Writ of Habeas Corpus (Rec. Doc. 36)** filed by the Plaintiff Joshua Cumberland,

Accordingly;

IT IS ORDERED that the **Motion for Leave to File Supplemental and Amending Petition for Writ of Habeas Corpus (Rec. Doc. 36)** is **GRANTED**. United States Magistrate Judge Michael North shall consider Cumberland's Amended Petition in the Supplemental Report and Recommendations.

January 10, 2020



JUDGE JAY C. ZAINY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSHUA CUMBERLAND

CIVIL ACTION

VERSUS

NO. 18-9685

DARREL VANNOY, WARDEN

SECTION: "A"(5)

REPORT AND RECOMMENDATION

This matter was referred to the undersigned United States Magistrate Judge to conduct a hearing, including an evidentiary hearing, if necessary, and to submit proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), and as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Upon review of the entire record, the Court has determined that this matter can be disposed of without an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2). For the following reasons, **IT IS RECOMMENDED** that the petition for habeas corpus relief be **DISMISSED WITH PREJUDICE**.

Procedural History

Petitioner, Joshua Cumberland, is an inmate currently confined at the Louisiana State Penitentiary. On February 24, 2010, he was charged with aggravated rape of his stepdaughters, W.D. and R.C. (counts one and two), who were under the age of 13, and sexual battery of each girl, respectively (counts three and four).¹ A jury found him guilty as charged on counts one and three, guilty of the responsive verdict of molestation of a juvenile

¹ State Rec., Vol. 1 of 13, R.p. 163, Grand Jury Indictment (Amended), Parish of St. Tammany.

on count two, and not guilty on count four.² On April 9, 2013, his motions for post-verdict judgment of acquittal and for new trial were denied. He was sentenced to life imprisonment without benefit of probation, parole or suspension of sentence on count one, 10 years' imprisonment on count two, and 40 years' imprisonment on count three with 25 years to be served without benefit of parole, to run concurrently.³ On April 25, 2013, his motion for reconsideration of the sentences was denied.⁴

On direct appeal, Cumberland raised the following assignments of error: (1) the evidence was insufficient to support the convictions; (2) the trial court improperly limited the defense's cross-examination of a witness; (3) the trial court erred in allowing a witness to testify;⁵ (4) that improper limitation denied him the right to present a defense; and (5) the sentence of life imprisonment was excessive. On June 25, 2014, the Louisiana First Circuit Court of Appeal affirmed his convictions and sentences.⁶ On March 6, 2015, the Louisiana Supreme Court denied his application for writ of certiorari.⁷

² State Rec., Vol. 1 of 13, Minute Entry, 2/1/13; *see also* State Rec., Vol. 2 of 13, Jury Verdict Forms.

³ State Rec., Vol. 1 of 13, Minute Entry, 4/9/13.

⁴ State Rec., Vol. 2 of 13, R.p. 492-95, Motion for Reconsideration of Sentences filed April 22, 2013 and Order denying signed April 25, 2013.

⁵ The appellate court considered this assignment abandoned for failure to brief the error. *State v. Cumberland*, 2013-KA-1847, 2014 WL 3843854, at *1 n. 3 (La. App. 1st Cir. June 25, 2014).

⁶ State Rec., Vol. 9 of 13, *State v. Cumberland*, 2013-KA-1847, 2014 WL 3843854 (La. App. 1st Cir. June 25, 2014).

⁷ State Rec., Vol. 10 of 13, *State v. Cumberland*, 2014-KO-1583 (La. 2015), 161 So.3d

On May 26, 2016, counsel filed an application for post-conviction relief with the state district court on Cumberland's behalf.⁸ He asserted claims of ineffective assistance of trial and appellate counsel and prosecutorial misconduct. The district court ordered the State to file a response to the application. On June 20, 2016, the State filed a motion for order regarding waiver of attorney-client privilege and a request to stay the trial court's order requiring the State to answer until the motion could be resolved. The district court granted the stay and issued an order for Cumberland to show cause on July 18, 2016, why the State's motion should not be granted. Cumberland filed a notice of intent to seek supervisory review by the court of appeal with respect to the district court's order allowing the State to engage in "pre-answer discovery" on post-conviction review rather than simply granting Cumberland an evidentiary hearing in conjunction with his post-conviction application. The district court stayed all proceedings and execution of orders pending the resolution of Cumberland's writ application and allowed him until August 27, 2016 to seek writs. Cumberland filed his related writ application with the Louisiana First Circuit on August 25,

13.

⁸ State Rec., Vol. 11 of 13, Application for Post-Conviction Relief. Federal habeas courts typically apply Louisiana's "mailbox rule" when determining the filing date of a Louisiana state court filing, and therefore such a document is considered "filed" as of the moment the prisoner "placed it in the prison mail system." *Causey v. Cain*, 450 F.3d 601, 607 (5th Cir. 2006). However, the rule does not apply to the state post-conviction applications filed by retained counsel on Cumberland's behalf. See Rule 3(d) of the Rules Governing § 2254 Proceedings (benefit of the "mailbox rule" extends only to inmates who use a prison's internal mailing system); *Cousin v. Lensing*, 310 F.3d 843, 847 and n. 2 (5th Cir. 2002) (prisoners represented by an attorney are not entitled to the benefit of mailbox rule).

2016.⁹ On December 1, 2016, the Louisiana First Circuit Court of Appeal denied writs on the showing made because he failed to attach all relevant documentation. The court of appeal noted that any new application must be filed by Cumberland on or before January 3, 2017.¹⁰ It appears that nothing further was filed with the appellate courts.

On March 27, 2017, Cumberland filed a motion with the state district court seeking to supplement his application for post-conviction relief with affidavits.¹¹ On April 25, 2017, the district court issued an order requiring the State to file an answer or responsive pleading within 20 days since there were no other matters pending concerning the prior writ proceedings. On June 5, 2017, the State filed a response. On July 11, 2017, the trial court denied the application for post-conviction relief.¹² On July 24, 2017, counsel for Cumberland filed a notice of intent to seek writs from the ruling and for an extended return date of September 11, 2017, to file his application with the court of appeal. He subsequently filed his related writ application with the Louisiana First Circuit.¹³ On

⁹ State Rec., Vol. 12 of 13, Louisiana First Circuit Application for Supervisory Writs No. 2016-KW-1142.

¹⁰ State Rec., Vol. 11 of 13, *State v. Cumberland*, 2016-KW-1142 (La. App. 1st Cir. Dec. 1, 2016).

¹¹ State Rec., Vol. 11 of 12, R.p. 2258, Motion for Leave to Supplement Application for Post-Conviction Relief.

¹² State Rec., Vol. 11 of 13, R.p. 2265, Judgment, 7/11/17.

¹³ State Rec., Vol. 12 of 13, First Circuit Application for Supervisory Writs No. 2017-KW-1270.

October 27, 2017, the Louisiana First Circuit denied the writ application.¹⁴ Almost eight months later, on June 20, 2018, Cumberland filed his supervisory writ application with the Louisiana Supreme Court.¹⁵ In that application, he explained that his counsel of record was notified of the intermediate writ decision and forwarded a copy of the ruling to the prison, but he never received the notice. He included an affidavit from his counsel and a printout of the legal mail received by the prison that did not reflect any such notice. He explained in his own affidavit that he learned about the omission and denial in May 2018 after he wrote counsel a letter in April 2018 to obtain a status update. On September 21, 2018, the Louisiana Supreme Court refused to consider the writ application because it was not timely filed pursuant to La. S.Ct. R. X, § 5.¹⁶

On October 18, 2018, he filed the instant federal application for habeas corpus relief.¹⁷ In that application, he reasserts his claims that the State failed to introduce sufficient evidence to support his convictions, ineffective assistance of trial and appellate counsel, and

¹⁴ State Rec., Vol. 12 of 13, *State v. Cumberland*, 2017-KW-1270, 2017 WL 4898196 (La. App. 1st Cir. Oct. 27, 2017).

¹⁵ State Rec., Vol. 13 of 13, Louisiana Supreme Court Writ Application No. 2018-KH-1073. As Cumberland filed this writ application pro se, he does receive the benefit of the “mailbox rule.” The application was delivered to prison officials for mailing on June 20, 2018.

¹⁶ State Rec., Vol. 13 of 13, *State v. Cumberland*, 2018-KH-1073 (La. 2018), 252 So.3d 495.

¹⁷ Rec. Doc. 3, 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus, p. 76. “A prisoner’s habeas application is considered ‘filed’ when delivered to the prison authorities for mailing to the district court.” *Roberts v. Cockrell*, 319 F.3d 690, 691 n. 2 (5th Cir. 2003).

prosecutorial misconduct. The State argues that the application should be dismissed as untimely.¹⁸ Cumberland filed a traverse.¹⁹

Analysis

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, governs the filing date for this action because he filed his habeas petition after the AEDPA's effective date. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Title 28 U.S.C. § 2244(d) provides:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
 - A. the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - B. the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - C. the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - D. the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Typically, a petitioner must bring his Section 2254 claims within one year of the date on which his underlying criminal judgment becomes "final." With regard to finality, the

¹⁸ Rec. Doc. 12.

¹⁹ Rec. Doc. 13.

United States Fifth Circuit Court of Appeals has explained:

The statute of limitations for bringing a federal habeas petition challenging a state conviction begins to run on "the date on which the [state] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). When a habeas petitioner has pursued relief on direct appeal through his state's highest court, his conviction becomes final ninety days after the highest court's judgment is entered, upon the expiration of time for filing an application for writ of certiorari with the United States Supreme Court. *Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003). However, "[i]f the defendant stops the appeal process before that point," ... "the conviction becomes final when the time for seeking further direct review in the state court expires." *Id.* at 694; *see also Foreman v. Dretke*, 383 F.3d 336, 338 (5th Cir. 2004) (Section 2244(d)(1)(A) gives alternative routes for finalizing a conviction: either direct review is completed or the time to pursue direct review expires).

Although federal, not state, law determines when a judgment is final for federal habeas purposes, a necessary part of the finality inquiry is determining whether the petitioner is still able to seek further direct review. *See Foreman*, 383 F.3d at 338-39. As a result, this court looks to state law in determining how long a prisoner has to file a direct appeal. *See Causey v. Cain*, 450 F.3d 601, 606 (5th Cir. 2006); *Roberts*, 319 F.3d at 693.

Butler v. Cain, 533 F.3d 314, 317 (5th Cir. 2008).

Cumberland's state criminal judgment of conviction became final for AEDPA purposes on June 4, 2015, ninety (90) days after the Louisiana Supreme Court denied his application for writ of certiorari and the time expired for seeking review with the United States Supreme Court. Under a plain reading of the statute, the AEDPA one-year limitations period commenced on that date and expired on June 4, 2016. Therefore, Cumberland's federal petition, filed in this Court on October 18, 2018, is untimely unless the deadline was extended through either statutory or equitable tolling.

Regarding the statute of limitations, the AEDPA expressly provides that "[t]he time

during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). To be considered "properly filed" for purposes of Section 2244(d)(2), an application's delivery and acceptance must be in compliance with the applicable laws and rules governing filings, such as time limitations. *Pace v. DiGuglielmo*, 544 U.S. 408, 413-14 (2005) (citing *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)); *see also Williams v. Cain*, 217 F.3d 303, 306-308 & n. 4 (5th Cir. 2000). A matter is "pending" for Section 2244(d)(2) purposes "as long as the ordinary state collateral review process is 'in continuance.' " *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002). However, as the United States Supreme Court has expressly held, when a state post-conviction filing is rejected by the state court as untimely, it cannot be considered "properly filed" within the meaning of § 2244(d)(2). *Pace*, 544 U.S. at 410. The United States Supreme Court made it abundantly clear that "[w]hen a post-conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Id.* at 414 (quoting *Carey*, 536 U.S. at 226).

After allowing 356 days of the 365-day-period to run, counsel for Cumberland filed his post-conviction application with the state district court, on May 26, 2016. The State concedes that his application remained "pending" and the federal limitations period remained tolled until November 27, 2017,²⁰ when he failed to proceed timely within 30 days

²⁰ The State notes that the 30 day-period expired on Sunday, November 26, and he therefore had until Monday, November 27, 2017, to file his writ application with the Louisiana Supreme Court. Rec. Doc. 12, p. 10 n. 6.

of the October 27, 2017 intermediate writ denial to the next step, and his time for properly filing his supervisory writ application with the Louisiana Supreme Court expired (Louisiana Supreme Court Rule X, § 5). Although he eventually filed his writ application in June 2018, the Louisiana Supreme Court rejected his supervisory writ application as untimely-filed and refused to consider it. Contrary to Cumberland's argument, he was not entitled at this point to another ninety (90) days of tolling for filing a petition for a writ of certiorari in the United States Supreme Court regarding a judgment denying a state post-conviction motion. *Lawrence v. Florida*, 549 U.S. 327, 331 (2007); *Ott v. Johnson*, 192 F.3d 510, 512-13 (5th Cir. 1999). Furthermore, the filing of an untimely writ application before the Louisiana Supreme Court does not toll the limitations period because it is not considered as "properly filed" in that Court. *See Williams v. Cain*, 217 F.3d 303, 308 (5th Cir. 2000) (considering that no exceptions are contemplated by Louisiana Supreme Court Rule X § 5(a), the requisite compliance with the time requirement must occur for a prisoner's application for post-conviction relief to be considered "properly filed" and "pending" under section 2244(d)(2)); *see also Jenkins v. Cooper*, Civ. Action No. 07-0216, 2009 WL 1870874, *5 (E.D. La. June 26, 2009) (holding that a petitioner does not benefit from any statutory tolling for an untimely writ application filed in the Louisiana Supreme Court because "[a] writ application which fails to comply with La. S.Ct. Rule X 5(a) is not properly filed because it is untimely, and it is not pending post-conviction review for purposes of the ... statute of limitations and tolling doctrines"). Thus, giving no statutory tolling credit to the untimely-filed Louisiana Supreme Court writ application, the federal limitations period continued to run

uninterrupted and expired nine days later, on December 6, 2018.

However, the State further accepts Cumberland's argument that equitable tolling applies to the time-period between November 27, 2017 and June 20, 2018, the date on which he filed the "untimely" supervisory writ application with the Louisiana Supreme Court, due to the lost piece of mail notifying him about his Louisiana First Circuit writ denial.²¹ Thus, under this scenario, tolling would extend until the Louisiana Supreme Court denied his writ application on September 21, 2018. However, as the State correctly contends, the instant federal petition is still untimely, because he did not file it within the nine (9) days left in the one-year limitations period, which expired on Sunday, September 30, 2018, giving him until Monday, October 1, 2018 to file his federal petition. He provided the petition to prison officials for filing on October 18, 2018. *Lookingbill v. Cockrell*, 293 F.3d 256, 265 (5th Cir. 2002) (missing the AEDPA deadline by even a few days nevertheless renders a federal petition untimely).²²

In his traverse, Cumberland suggests that he worked diligently on his federal

²¹ Rec. Doc. 12, p. 10.

²² As the United States Fifth Circuit Court of Appeals explained:

At the margins, all statutes of limitations and filing deadlines appear arbitrary. AEDPA relies on precise filing deadlines to trigger specific accrual and tolling provisions. Adjusting the deadlines by only a few days in both state and federal courts would make navigating AEDPA's timetable impossible. Such laxity would reduce predictability and would prevent us from treating the similarly situated equally. We consistently have denied tolling even where the petition was only a few days late.

Lookingbill, 293 F.3d at 264–65 (footnote omitted).

application once he received the Louisiana Supreme Court ruling on September 26, 2018, but that he had to “retype his writ, make his copies and mail his federal habeas petition (pro se).” Neither his proceeding pro se nor the effort associated with the task amount to extraordinary circumstances such that would prevent his timely filing—a factor he must show to justify equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010); *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002); *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (“[P]roceeding pro se is not a ‘rare and exceptional’ circumstance [warranting equitable tolling] because it is typical of those bringing a § 2254 claim.”); *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999) (“[N]either a plaintiff’s unfamiliarity with the legal process nor his lack of representation during the applicable filing period merits equitable tolling.”). Even if he mistakenly believed he had more time on the clock to file his federal application, his misguided application or knowledge of the law would not justify equitable tolling. *United States v. Wheaten*, 826 F.3d 843, 853 (5th Cir. 2016); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002). The record discloses no basis on which this Court could find that equitable tolling is warranted under the circumstances.²³

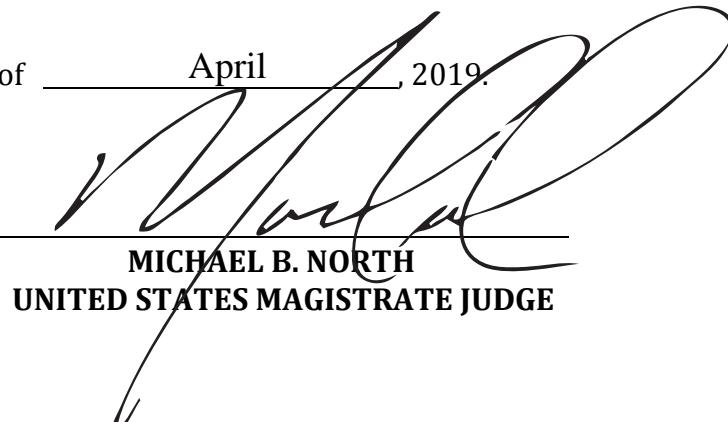
²³ In *McQuiggin v. Perkins*, the United States Supreme Court held that “actual innocence, if proved, serves as a gateway through which a petitioner may pass... [to excuse] the expiration of the statute of limitations.” *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). The Supreme Court has cautioned, however, that “tenable actual-innocence gateway pleas are rare[.]” *Id.* To succeed on this claim, a petitioner must present a credible claim of actual innocence based on “new reliable evidence... that was not presented at trial,” and he “must show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt” in light of that new evidence of his factual innocence. *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995). Cumberland has not made a colorable showing that he is actually innocent in light of “new evidence.”

In sum, the instant petition was filed beyond the one-year federal limitations period. Cumberland has not established any credible basis for statutory or equitable tolling that would make the instant petition timely. Therefore, his federal habeas corpus petition should be dismissed with prejudice as untimely.

RECOMMENDATION

IT IS RECOMMENDED that Cumberland's application for federal habeas corpus relief be **DISMISSED WITH PREJUDICE**. A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).²⁴

New Orleans, Louisiana, this 25th day of April, 2019.


MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE

²⁴ *Douglass* referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend that period to fourteen days.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSHUA CUMBERLAND

CIVIL ACTION

VERSUS

NO. 18-9685

DARREL VANNOY, WARDEN

SECTION: "A"(5)

SUPPLEMENTAL REPORT AND RECOMMENDATION

This matter was referred to the undersigned United States Magistrate Judge to consider Cumberland's "actual innocence" gateway claim seeking relief from the one-year federal limitations period and his recently filed supplemental and amending petition. Upon review of the entire record, the Court has determined that this matter can be disposed of without an evidentiary hearing. For the following reasons, **IT IS RECOMMENDED** that the original petition and supplemental and amending petition for habeas corpus relief be **DISMISSED WITH PREJUDICE** as untimely.

Procedural Background

Joshua Cumberland is a state inmate incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. On October 18, 2018, he filed the instant federal application for habeas corpus relief. On April 25, 2019, the undersigned issued a report and recommendation that the petition be dismissed with prejudice as untimely.¹ Counsel subsequently enrolled on Cumberland's behalf and objected to the equitable tolling analysis and the finding that Cumberland failed to prove actual innocence to avoid the time bar. The matter was re-referred to the magistrate judge for review and consideration of the

¹ Rec. Doc. 14.

newly raised grounds in support of his actual innocence exception.² After both parties filed supplemental memoranda addressing the actual innocence exception,³ the undersigned issued a supplemental report again recommending Cumberland's petition be dismissed as untimely. (Rec. Doc. 31). That report has since been withdrawn after Cumberland was granted leave by the district judge to file an amending and supplemental petition raising five claims for relief in addition to the four previously raised in his original petition. (Rec. Doc. 37).

In Cumberland's original federal petition, he raised four claims for relief:

- (1) The State did not present sufficient evidence to support his convictions;
- (2) Trial counsel was constitutionally ineffective for failing to conduct adequate investigation and subpoena defense witnesses, Patty Moore, Eric Stewart, and Nicole Stewart, to testify "not only to Tammy's history of engineering past, baseless accusations of abuse, but also of the warm, healthy, and loving relationships in Petitioner's blended family";
- (3) Appellate counsel was ineffective for failing to raise the claims on direct appeal that the trial court improperly admitted hearsay testimony from Tammera Clement and R.C.'s CAC interview with JoBeth Rickels; and
- (4) Prosecutorial misconduct involving remarks made during voir dire and at trial.

(Rec. Doc. 3). Claim one was raised on direct appeal and claims two, three and four were raised during post-conviction relief proceedings. In addition to arguing that the petition was untimely, the State argued that only the first claim was ever properly exhausted. The remaining claims, two through four, were not fairly presented to the Louisiana Supreme Court for consideration of the merits because Cumberland's supervisory writ application

² Rec. Docs. 19-22.

³ Rec. Docs. 26, 29.

raising those claims in the Louisiana Supreme Court was not considered as timely. The State further argues that because Louisiana law and procedure would now bar the state courts from considering those claims, they are therefore procedurally defaulted and may not be reviewed by a federal habeas court.

In his supplemental and amending petition, Cumberland essentially recharacterized his actual-innocence arguments—made for the first time in his objections to the original Report and Recommendation—as five entirely new substantive claims for relief. (Rec. Doc. 41). In the new petition, he asserts the following five claims:

(1) Additional Claim/Actual Innocence Predicate No. 1: Violation of Due Process Clause of the 14th Amendment: Failure to Provide Exculpatory Evidence under *Brady v. Maryland*, 373 U.S. 83 (1963);

(2) Additional Claim/Actual Innocence Predicate No. 2: Violation of Due Process Clause of the 14th Amendment: Knowing Submission of False and Material Evidence by the State of Louisiana;

(3) Supplemental Claim/Actual Innocence Predicate No. 3: Violation of Due Process Clause of the 14th Amendment: Witness Intimidation: K. Cumberland;

(4) Additional Claim/Actual Innocence Predicate No. 4: Violation of 6th Amendment: Right to Effective Assistance of Counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) (i.e. failure to address the highly prejudicial photographs of the master bedroom; failure to introduce the records of the Kentucky Cabinet for Health and Family Services; failure to address the contamination of the alleged crime scene by petitioner's neighbors; failure to call K. Cumberland as a witness);

(5) Additional Claim No. 5: Actual Innocence of Petitioner

Claim one alleges that the State failed to provide him with photographs (taken during Dr. Steiner's examination of the victim and referenced in Dr. Steiner's medical report), which remained in the possession of the health care provider. Claim two alleges that the State prosecutor knowingly allowed Dr. Head to testify falsely and offer opinions different from

Dr. Steiner's report. Claim three alleges prosecutorial misconduct and a confrontation violation for allegedly intimidating K. Cumberland so that she would not testify as a witness for the defense. Claim four alleges ineffective assistance of trial counsel for failing to properly neutralize the highly prejudicial photographs of blood in the master bedroom; introduce records from Kentucky Family Services that revealed no past investigations or allegations of sexual abuse by Cumberland; address attempts by neighbors to contaminate the crime scene; and to call his wife as a witness. Claim five is presented in a dual capacity, as a freestanding actual-innocence claim and as an exception to avoid the federal limitations period.

The State filed a supplemental answer to the supplemental and amending petition, arguing first and foremost that the supplemental petition is likewise time-barred. The State also argues that the new claims are all unexhausted, as they were never raised in the state courts and no longer can be raised in the state courts; therefore, the claims are procedurally defaulted on federal habeas review. (Rec. Doc. 44). Finally, the State argues that the claims are meritless. (*Id.*, pp. 16-27).

Cumberland submitted a Reply to the State's supplemental answer. (Rec. Doc. 45). He points out that to the extent his actual-innocence claim was raised as an exception to the federal limitations bar, it is not subject to the exhaustion requirements.⁴ He reiterates his

⁴ He does not appear to challenge the fact that the independent and freestanding actual-innocence claim was never raised in the state courts and presumably would need to be exhausted or that such a claim is not cognizable on federal review regardless, as the State notes. Rec. Doc. 44, p. 26. The United States Supreme Court has not recognized any free-standing actual innocence claim to support habeas relief. *McQuiggin v. Perkins*, 569 U.S. 383, 392, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013) (citing *Herrera*, 506 U.S. at 404-05, 113 S.Ct. 853); *Coleman v. Thaler*, 716 F.3d 895, 908 (5th Cir. 2013); *Burton v. Stephens*, 543 F. App'x 451, 458 (5th Cir. 2013) (citing *McQuiggin*, 569 U.S. at 392, 133 S.Ct. 1924 and *Herrera*, 506 U.S. at 400, 113 S.Ct. 853); *In re Warren*, 537 F. App'x 457 (5th Cir. 2013); *see also, Eaglin v.*

argument that the Magistrate Judge's equitable tolling analysis was unduly restrictive in the manner applied. Finally, he contends the claims of ineffective assistance of trial and appellate counsel raised in the initial and supplemental petitions are not subject to procedural default pursuant to the exception set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). As purported cause to excuse the procedural default, he argues that the same attorney served as both his trial counsel and direct appeal counsel and therefore was ineffective because this prevented Cumberland from asserting ineffective assistance-of-trial-counsel claims on direct appellate review. He also argues that post-conviction counsel was ineffective because he failed to timely file his supervisory writ application with the Louisiana Supreme Court.

A. *The amended petition and claims raised therein are untimely, regardless of relation back to the untimely original federal petition.*

As the State correctly argues, Cumberland's "supplemental claims relating back to a time-barred petition are likewise time-barred." (Rec. Doc. 44, p. 4). When an amended habeas corpus application is filed outside the statute of limitations, new claims raised in the amended application meeting certain criteria are timely only if they relate back to claims that were raised timely.⁵ *Mayle v. Felix*, 545 U.S. 644, 649–50 (2005) (holding that Rule

Louisiana, Civ. Action 19-9659, 2020 WL 475770, at *30-31 (E.D. La. Jan. 7, 2020) (summarily denying freestanding claim of actual innocence because actual innocence simply is not a recognized ground for granting federal habeas corpus relief) (citing *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) and *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009) ("The Fifth Circuit does not recognize freestanding claims of actual innocence on federal habeas review.")).

⁵ A petition for writ of habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. Rule 12 of the Rules Governing Section 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Federal Rule of Civil Procedure 15(c)(1)

15(c) of the Federal Rules of Civil Procedure allows a petitioner to amend his petition to add claims after the one-year statute of limitations has expired as long as the facts supporting the new claims do not differ in time and type from those alleged in the original, *timely-filed* petition). As thoroughly set out in the original Report and Recommendation, Cumberland's original petition is time-barred. The relevant dates and tolling calculations underlying the recommendation for dismissal of his federal petition as time-barred were set forth in the original report and recommendation (Rec. Doc. 14) and will not be repeated here. The supplemental and amending petition likewise falls well outside of the one-year statute of limitations for filing habeas petitions as set forth in 28 U.S.C. § 2244(d)(1). In fact, Cumberland concedes that his federal petition was not timely filed and thus relies on equitable tolling or actual innocence to avoid the time-bar.⁶

B. Cumberland's federal application is still untimely even liberally affording him tolling for the time-period attributable to the lost letter from his attorney notifying him that the appellate court had denied his supervisory writ application.

The court of appeal immediately notified Cumberland's attorney that his writ was denied. His attorney confirmed that he promptly sent a letter and a copy of the ruling to

provides that "[a]n amendment to a pleading relates back to the date of the original pleading when ... the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. Proc. 15(c)(1)(B); *U.S. v. Gonzalez*, 592 F.3d 675, 679 (5th Cir. 2009) (citing *United States v. Saenz*, 282 F.3d 354, 356 (5th Cir. 2002)).

⁶ His federal petition appears candidly to acknowledge his untimely filing. Rec. Doc. 3, pp. 13, 15, 18-20. Contrary to his suggestion in his original *pro se* reply (Rec. Doc. 13) that his federal petition may have been timely due to statutory tolling, such tolling does not include 90 days for a United States Supreme Court certiorari petition from the final denial by the state's highest court on *collateral* review. *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000). His reference to both state law, La. C.Cr.P. art. 922, and federal law, *Ott*, related to finality of convictions is misplaced.

Cumberland himself, as directed by Cumberland's mother, who asked him to resume communications directly with Cumberland rather than using her as a "middle man."⁷ Cumberland alleged that he never received the letter his attorney wrote informing him that the court of appeal denied his writ. This is not a situation where the state court failed to provide timely notice of a ruling. *See, e.g., Williams v. Thaler*, 400 F. App'x 886, 892 (5th Cir. 2010) (extraordinary circumstances may exist where petitioner received misleading information and delayed notice from the state court clerk of the denial of his state habeas application) (citing *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000)); *Hardy v. Quartermann*, 577 F.3d 596, 598 (5th Cir. 2009). Cumberland does not allege a substantial state-created delay.

Nor could he allege any wrongdoing on the part of his attorney, who was *not retained* by Cumberland to file the supervisory writ application on his behalf with the Louisiana Supreme Court. Cumberland was not abandoned by counsel, nor did counsel ignore or mislead him. He sent a letter informing Cumberland about the status of his case and responded promptly when Cumberland later inquired about his writ application. Counsel's letters dated October 30, 2017 and May 17, 2018, along with counsel's affidavit, reflect this reasonable professional behavior.⁸ Even a failure to notify, which did not occur in this case, would not necessarily entitle him to equitable tolling. *Compare O'Veal v. Davis*, 664 F. App'x 355 (5th Cir. 2016) (per curiam) (denying equitable tolling for lack of diligence and despite allegation regarding counsel's failure to notify the petitioner that his appeal had

⁷ Rec. Doc. 3, p. 70 (Exhibit D, Correspondence of May 17, 2018)).

⁸ Rec. Doc. 3, pp. 68-71, 74.

been dismissed, because the petitioner “ha[d] not pointed to any authority suggesting that an attorney’s failure to notify a defendant of the status of his case rises to the level of an extraordinary circumstance that prevents the defendant from timely filing a federal habeas petition”), *with Nalls v. Vannoy*, 2020 WL 97379 (5th Cir. 2020) (counsel’s failure to notify petitioner about the court of appeal’s ruling was an extraordinary circumstance beyond petitioner’s control that prevented him from timely filing his petition).

Unfortunately, for reasons unknown, Cumberland simply did not receive the letter from his attorney, as the prison log appears to reflect. No controlling authority has been cited to support application of equitable tolling under these circumstances. *See Joyner v. Kent*, Civ. Action 16-16595, 2019 WL 3755973 at *7-8 (E.D. La. June 20, 2019) (rejecting equitable tolling even where attorney for petitioner missed the Louisiana Supreme Court filing deadline), *adopted* 2019 WL 3753693 (E.D. La. Aug. 8, 2019); *Glover v. Cain*, Civ. Action 09-3678, 2010 WL 103762, at *4-5 (E.D. La. Jan. 7, 2010) (postal mail delay does not qualify as the type of rare and exceptional circumstance that warrants equitable tolling) (citing *Bryant v. Louisiana*, Civ. Action 06-0088, 2007 WL 2323383 (E.D. La. Aug. 9, 2007) (Duval, J.) (time period under La. S. Ct. Rule X § 5 begins from issuance of notice of the appellate court’s judgment not upon receipt of the notice and recognizing that ordinary mail delays do not warrant equitable tolling)).

Nonetheless, respondent gratuitously acknowledged that some courts “have deemed ‘lost in the mail’ to be a basis for equitable tolling,” citing a New York district court decision, which is not controlling authority. However, the State further asserted that even if the entire period of delay caused by the lost letter is excused, his federal petition still was not filed within the one-year period. (Rec. Doc. 12, pp. 10-11 n. 8). That is, the State allowed

for the application of equitable tolling to put Cumberland fairly in the same position he would have been in “but for” the omission about which he complains. But even removing this obstacle and crediting Cumberland *all* possible tolling (*i.e.*, for each of his state-court applications, even including the untimely Louisiana Supreme Court writ application for which tolling under federal law is unavailable), his federal petition would still not have been timely filed within the brief window he would have had remaining on the one-year federal limitations period.

Counsel for petitioner allowed most of the 365-day period to lapse on the front end before filing the post-conviction relief application with the state district court. Thus, Cumberland had little time remaining after completing state-court collateral review to file his federal application. That counsel waited so long to file the state application was unfortunate because a petitioner through his attorney has an obligation to pursue his rights diligently. *See Schmitt v. Zeller*, 354 F. App'x 950, 951-52 (5th Cir. 2009) (“We have recognized that a component of the obligation to pursue rights diligently is not to wait until near a deadline to make a filing, then seek equitable tolling when something goes awry. ... Leaving little margin for error is incautious and not diligent.”). Thus, although Cumberland may have been diligent in filing his Louisiana Supreme Court writ application after he learned about the intermediate court’s denial, he was not diligent before this occurred in allowing most of the federal one-year limitations period to elapse, leaving very little time for submitting the federal petition even under ideal circumstances. *Diggs v. Vannoy*, Civ. Action 17-CV-01624, 2018 WL 4956950, at *4 (W.D. La. Sept. 18, 2019) (citing lack of diligence in waiting almost 11 months after conviction became final before mailing state application and leaving only 30 days of the one- year period to act once the state habeas

proceedings concluded), *adopted* 2018 WL 4955867 (W.D. La. Oct. 12, 2018); *Caine v. Davis*, Civ. Action 17-CV-0027-G-BK, 2018 WL 2321898, at *2 (N.D. Tex. March 15, 2018) (no diligence when petitioner squandered most of the one-year period, waiting 356 days after his conviction became final to file his state habeas application), *adopted* 2018 WL 2317797 (N.D. Tex. May 22, 2018).

Although Cumberland points only to the lost mail, his counsel's lack of diligence on the front end combined with Cumberland's task of filing his federal application *pro se* within the resulting brief window left on the federal limitations period also contributed to his untimeliness. The question is not so simple as to apply equitable tolling for a piece of lost mail to cover the entire time between the expired one year and the date he filed his federal petition, as Cumberland suggests (Rec. Doc. 19, p. 13), considering he could have had ample time available despite that particular obstacle had more time been left on the clock. And while proceeding *pro se* undoubtedly has its own set of challenges, as Cumberland indicated in his traverse, it is well-settled that *pro se* status and an unfamiliarity with the law do not constitute exceptional circumstances for purposes of equitable tolling. *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002); *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000); *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999). For these reasons, he has not shown that an extraordinary circumstance stood in his way and prevented timely filing or that he was pursuing his rights diligently to merit equitable tolling and excuse his late federal filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

C. Cumberland has not demonstrated actual innocence to overcome the time-bar.

Absent equitable tolling, Cumberland must show that he is "actually innocent" of the

crimes for which he was convicted to avoid the federal limitations bar to consideration of the merits of his constitutional claims. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). Counsel enrolled on Cumberland's behalf while the initial Report and Recommendation was pending and set forth new grounds purportedly showing actual innocence. (Rec. Doc. 19.).

1. Controlling Legal Principles

In *McQuiggin v. Perkins*, the United States Supreme Court held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass... [to excuse] the expiration of the statute of limitations." *Perkins*, 569 U.S. at 386. The limited exception allows a petitioner to bring claims that are otherwise time-barred if, and only if, a petitioner meets an extremely high threshold:

[A] petitioner does not meet the threshold requirement unless he persuades the district court that, *in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.*" *Schlup*, 513 U.S., at 329, 115 S.Ct. 851; *see House*, 547 U.S., at 538, 126 S.Ct. 2064 (emphasizing that the *Schlup* standard is "demanding" and seldom met).

Id. (emphasis added). Indeed, the Court cautioned that "tenable actual innocence gateway pleas are rare." *Id.*

A credible gateway actual-innocence claim demands rigorous evidentiary proof. A petitioner must support the 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." *House v. Bell*, 547 U.S. 518, 537 (2006). "The habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Id.* at 538 (quoting *Schlup*, 513 U.S. at 327-328) (quotation marks omitted).

The Supreme Court has explained that the “new evidence” must be “reliable evidence” and provided general categories of such reliable evidence. But the Supreme Court has yet to delineate what evidence qualifies as “new reliable evidence,” leading to varying interpretations among the circuit courts. The United States Court of Appeals Fifth Circuit has “‘yet to weigh in on the circuit split concerning’” whether the new evidence must be “‘newly discovered, previously unavailable evidence, or, instead, evidence that was available but not presented at trial.’” *Tyler v. Davis*, 768 F. App’x 264, 265 (5th Cir. 2019) (quoting *Hancock v. Davis*, 906 F.3d 387, 389 & n. 1 (5th Cir. 2018)). Nevertheless, United States Fifth Circuit Court of Appeals precedent holds that “[e]vidence 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.’”⁹ *Tyler v. Davis*, 768 F. App’x at 265 (citing *Hancock v. Davis*, 906 F.3d 387 (5th Cir. 2018) and quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008)). Thus, as the Fifth Circuit explained in *Hancock*, “though we have not decided what affirmatively constitutes ‘new’ evidence, *we have explained what does not*.” *Hancock*, 906 F.3d at 390 (emphasis added).

Furthermore, in reviewing the totality of the evidence, the court’s analysis must be focused on “reasonable jurors”:

Based on this total record, the court must make “a probabilistic determination about what reasonable, properly instructed jurors would do.” The court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.

⁹ The evidence at issue before the Fifth Circuit concerned information contained in alibi witnesses’ 2014 affidavits, Dr. Fisher’s 2003 report and State Finding of Fact No. 20, all of which the court of appeals held was known and available to petitioner and trial counsel at or before the time of trial. *Tyler*, 768 F. App’x at 265.

House, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329); *see also Joyner v. Kent*, Civ. Action 16-16595, 2019 WL 3755973, at *10 (E.D. La. June 20, 2019), *adopted* 2019 WL 3753693 (E.D. La. Aug. 8, 2019). In *Schlup*, the Supreme Court explained that, when a federal habeas court is seeking to divine what a “reasonable” juror would now find based on the proffered evidence, “[t]he word ‘reasonable’ in that formulation is not without meaning. It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt.” *Schlup*, 513 U.S. at 329.

As the United States Supreme Court has made clear, “the *Schlup* standard is demanding and permits review only in the *extraordinary* case.” *House*, 547 U.S. at 538 (emphasis added); *see also Schlup*, 513 U.S. at 324 (emphasizing that “in the vast majority of cases, claims of actual innocence are rarely successful”). “A petitioner’s burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.”¹⁰

¹⁰ The analysis under *Schlup* is thus fundamentally different from assessing the constitutional sufficiency of evidence to support a conviction:

Finally, as the *Schlup* decision explains, the gateway actual-innocence standard is by no means equivalent to the standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which governs claims of insufficient evidence. When confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict. Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. If new evidence so requires, this may include consideration of “the credibility of the witnesses presented at trial.

House, 547 U.S. at 538-39 (citations and quotation marks omitted).

House, 547 U.S. at 538.

2. Trial Evidence

Cumberland was charged with aggravated rape of his stepdaughters, W.D. and R.C. (counts one and two), who were under the age of 13, and sexual battery of each girl, respectively (counts three and four).¹¹ A jury found him guilty as charged on counts one and three, guilty of the responsive verdict of molestation of a juvenile on count two, and not guilty on count four.¹² The trial evidence summarized by the court of appeal on direct review included the following:

According to her trial testimony, Mrs. Fazzio was a resident of Canterbury Apartments, with her apartment on the other side of the street located diagonally across from the defendant's apartment, and had known the defendant, his wife, and his stepchildren for about six months. On the Saturday morning in question, around November 7, 2009, the Fazzios suspected that it was the defendant and initially did not respond when they heard someone banging on their apartment door. Mrs. Fazzio responded a couple of minutes later, however, when the banging started again. She specifically testified that the defendant was at the door "shaking and had a little bit of blood on him, and he was saying, '[W.D.]'s hurt' ... and indicating down there." According to Mrs. Fazzio, when the defendant indicated that the victim was hurt, he said, "They're going to think I ... hurt her."

When they entered the defendant's apartment, the defendant led Mrs. Fazzio to the back bedroom [W.D.'s bedroom] and repeatedly stated that W.D. was jumping on the bed when she fell on the toy box. Mrs. Fazzio did not observe any blood in the bedroom. She further noted that the bedroom looked "untouched," and that the bed was made and did not look as though a child had been jumping on it. The defendant repositioned the toy box in an attempt to explain how W.D. was injured. Mrs. Fazzio did not observe any blood in the path to the defendant's bathroom (from the hallway to the living room, to the hallway leading to the master bedroom and bathroom). At the time, R.C. was sitting on the living room sofa dressed solely in her panties and watching

¹¹ State Rec., Vol. 1 of 13, R.p. 163, Grand Jury Indictment (Amended), Parish of St. Tammany.

¹² State Rec., Vol. 1 of 13, R.p. 115, Minute Entry, 2/1/13; *see also* State Rec., Vol. 2 of 13, R.p. 468, Jury Verdict Forms.

cartoons. Mrs. Fazzio observed blood and a bloody garment on the floor in the master bedroom and blood in the walkway from the bed into the bathroom. She noted that a blue towel and blood were on the bed, but there were no sheets. Along with observing the victim, Mrs. Fazzio noticed blood and bloody panties on the bathroom floor. When the victim slightly opened her legs, Mrs. Fazzio observed blood "pouring down her." Mrs. Fazzio further testified as follows regarding the defendant's response when she told him that the victim needed emergency medical assistance, "he kept just shaking, freaking out, saying he—they're going to think that he did this and he doesn't have a car."

While Mr. Fazzio took W.D. and the defendant to the hospital, Mrs. Fazzio took R.C. and her younger sister (the defendant's third stepdaughter who is not a victim in this case) to her apartment. Mrs. Fazzio waited at her apartment across the street with the door open until the police arrived on the scene. During cross-examination, Mrs. Fazzio was questioned regarding her pretrial testimony and her failure to indicate at that time that the defendant stated that he would be blamed for the victim's injuries. She testified that although she did not relay his statement before, she was certain that he made the statement more than once.

Mr. Fazzio testified that the banging on their apartment door started between 7:30 and 8:00 a.m. W.D. was wet and wrapped in a towel when Mr. Fazzio transported her and the defendant to the hospital. Mr. Fazzio further testified that on the way to the hospital the defendant kept telling the victim that she got hurt as follows, "So you were jumping on the bed and you fell off onto the chest and hurt yourself, right?" She responded, "Yes, yes, yes." Mr. Fazzio testified that the defendant stated this explanation to W.D. at least five times. Mr. Fazzio did not see any blood.

The victim arrived at the Slidell Memorial Hospital at approximately 8:32 a.m. The complaint by the defendant indicated that W.D. fell on the lid of her toy box. The defendant's complaint further indicated that W.D. was sexually abused by her biological father when she was two years old and that he would put his fingers and objects in her vagina at times. The emergency room physician, Dr. Ursin Stafford (an expert in emergency medicine), testified that the examination of the victim's vaginal area revealed a tear on the right bottom, outer portion of her vagina. She further stated that there was bleeding and bruised tissue in the labia area. She explained that the tear would have resulted in immediate bleeding and noted that based on the explanation given by the defendant, there should have been blood on or near the toy box. The victim also had blood clotted in her vagina at the time of the examination.

Dr. Stafford noted that the victim complained of burning during urination, and when asked what happened to her at one point stated, "my dad told me not to talk about it." While W.D. was at the hospital, she was interviewed by Dr. Yameika Head, an expert in forensic pediatrics. She told Dr. Head that her

"vagina" was "bleeding a lot" because she was jumping on her bed and landed on her toy box made out of solid wood. When further questioned, she stated that she could not remember how she fell, but later stated that she believed it was from jumping. She indicated that she was in the shower when her dad found out that she was hurt. Dr. Head also testified during the trial regarding W.D.'s injuries. Regarding the vaginal examination, Dr. Head noted that the victim had abnormal lacerations in two different places of her hymen and several abrasions. Dr. Head maintained that while the surgeon with whom she performed the examination indicated that the victim's lacerations were superficial, she would classify them as deep. Dr. Stafford and Dr. Head concluded that the victim did not provide an explanation that correlated with the physical findings, which indicated that force was applied to the vaginal area.¹³ Dr. Stafford contacted the Children's Hospital and had the victim admitted for further evaluation.

At approximately 9:47 a.m., Sergeant Chris Newman responded to secure the scene until crime scene investigators and detectives from the Slidell Police Department (SPD) arrived. The sergeant testified that there was one entry/exit door, and he was assured that no one exited or entered the apartment after his arrival. He encountered potential witnesses and gave them statement forms to complete (including Amy whose last name was Boone then, but Fazzio at the time of trial). Sergeant Newman entered the bedrooms and noted there was blood on the mattress in the master bedroom and inside the shower in the master bathroom. He testified that there was no blood in W.D.'s bedroom. Sergeant Newman turned over the crime scene to Detectives Bobby Campbell and Ralph Morel.

Detective Campbell conducted a walk-through upon his arrival and photographed and collected evidence, including W.D.'s T-shirt and her panties that were located in the master bathroom. He confirmed that there were no sheets on the bed in the master bedroom and farther [sic] testified that bedding materials were located in the washing machine, which had been run. Detective Campbell testified that he was still at the apartment when the defendant returned. The defendant told the detective that he discovered W.D. in her bedroom sitting on the floor by the toy box crying and bleeding. Detective Campbell observed and photographed the bedroom with the toy box. He looked at the toy box and did not observe any blood on it or in that part of the apartment. During cross-examination, Detective Campbell admitted that some additional evidentiary items were removed from the apartment after November 7, when the apartment was no longer secured.

Detective Morel contacted Detective Stan Rabalais of the Slidell Police

¹³ Dr. Head concluded the force was applied with a penetrating object consistent with the objects in evidence and/or a penis.

Department regarding this incident, informed him that the case possibly involved child abuse, and instructed him to begin investigating possible abuse the following Monday (November 9). When Detective Rabalais began his investigation, W.D. was still in the Children's Hospital. The detective contacted CAC to have W.D. interviewed that day. R.C. was interviewed by Dr. Head at the Care Center that day.

During Dr. Head's interview of R.C, she maintained that W.D. was injured when she was jumping on her bed and landed on her toy box. R.C. admitted that she did not see the incident and indicated that she knew about it because her dad told her how the injury occurred. She denied ever being inappropriately touched, but did say that she had been kicked in the vagina by a bully. She also stated that the defendant put his fingers in her mouth on one occasion.

W.D.'s November 9, 2009 CAC interview was conducted by Daniel Dooley. On November 13, 2009, she was interviewed by JoBeth Rickles. During the CAC interviews, the victim gave a different explanation for her injury, which then implicated the defendant. She indicated that her dad, whom she also referred to as "Josh," was bad and used to hurt her and do "stuff" that she was not supposed to talk about. W.D. drew several pictures and used anatomical diagrams to explain how the defendant would routinely penetrate her vagina with objects, his finger, and his penis ("those things that boys have"). She stated that it would make her sad, would hurt badly and burn, she would try to pull it out sometimes, and the defendant would yell at her. She explained that on the day in question, the defendant put one of the objects far into her vagina.

W.D. further indicated that the defendant would sometimes put "white icky stuff" in her mouth, and she would have to drink something to get the taste out of her mouth. She stated that he would put the stuff elsewhere on other occasions and then clean it up. When further questioned about where the white stuff came from, W.D. stated that the defendant would make himself feel good (as she used her hand to motion masturbation) and that the stuff would come out later. She stated that he would use "his thing that boys have" a lot because he wanted to feel good, adding, "it doesn't feel good to me." During the interview with Rickles, W.D. indicated that the defendant would also put his penis in her mouth. W.D. also talked about the straps that the defendant would use to restrain her and stated that he would do all of the same things to R.C. W.D. indicated that she was about five years old when the abuse began. When asked if anyone other than the defendant had ever touched her inappropriately, W.D. indicated that when she was about one year old, "Luke" (whom she further described as, "my old father when I was a baby") "touched it and it hurt." The initial CAC interview of W.D. took place before she was discharged from the Children's Hospital.¹⁴

¹⁴ During cross-examination of Dr. Head, the defense elicited testimony and

R.C. was interviewed at the CAC on November 10, 2009 (by Lisa Tadlock), and November 13, 2009 (by Rickles).¹⁵ She consistently indicated that the defendant put his fingers in her mouth, and during the second interview (conducted by Rickles), she indicated that the defendant was in jail for "doing stuff to me and [W.D.]." When asked what kind of things the defendant did to her, R.C. pointed to her vaginal area and indicated that he put his thing in her "vagina." She initially stated that it happened once in the defendant's bedroom, and the defendant (whom she called Dad and "booger snot") told her to keep it a secret. She stated that it happened when her mother was at work. R.C. also stated that the defendant put a "purple thing" in her butt and in W.D.'s butt one Saturday morning while her mother was at work. She also stated that the defendant put a red thing in her vagina on one occasion. She indicated that she was six years old when these things occurred, that it would sometimes occur daily, and that it would be painful. When asked if anything came out when the defendant put his part inside of her, she said she did not know what it was and referred to it as jelly.

Based on the CAC disclosures of abuse, Detective Rabalais instructed Detective Morel to prepare an affidavit requesting an arrest warrant for the defendant and obtained consent from the victims' mother to search the apartment. Detective Rabalais specifically sought, photographed, and seized "sex toy devices" consistent with the descriptions given by the victims. One of the items was produced by R.C. and given to the detective. A cargo strap, handcuffs, and body lubricant were also seized. On cross-examination, Detective Rabalais admitted that he did not have a log or any knowledge of the number of people who had been in and out of the apartment before he collected evidence.

The victims' trial testimony was held in chambers and presented to the jury via closed circuit television pursuant to La. R.S. 15:283. W.D. was eleven years old, in fourth grade, and living with her grandmother in Kentucky at the time of the trial. When asked if anything bad happened to her on a Saturday morning in 2009, when she lived with her mother in Slidell, Louisiana, W.D. stated that she was hurt by the defendant. When asked how many times the

introduced the Nursing Progress Record to show that the victim's grandmother was at her bedside the day of the first CAC interview. According to Dr. Head and the progress notes, the victim's grandmother was present in the room at 3:00 a.m., when the victim requested to speak to a nurse to make disclosures consistent with the allegations against the defendant given in her CAC interview.

¹⁵ During the cross-examination of JoBeth Rickles, the defense introduced an exhibit (an ano-genital diagram with handwritten notations) to show that prior to R.C.'s CAC interviews, on November 9, 2009, she was examined at the Children's Hospital and the examiner concluded that she had a "normal" hymen and anus.

defendant placed an object in her private, W.D. stated, "Several." She further testified that it was painful and not enjoyable. She also stated that it was painful when he put his "private" in her "private" and indicated that he did so, "like, every day." W.D. stated that the defendant would wait for her mother to go to work to "do that stuff." She also stated that the defendant would sometimes tie her up with a "rope." She further testified that the incidents started when she was five years old and that she did not tell anyone about the incidents because the defendant threatened to kill her if she told anyone. The victim identified her underwear and recalled bleeding on the day in question. Regarding the events that took place that morning, the victim testified:

Well, he was doing that stuff to me like he normally would do. He would take the ball thing all the time and everything else he would use. And also he would ... after a while he would put his private inside me and then my—some part inside my private was coming out. It was blood and something kind of, I don't know, what it would be called, but it was kind of hard. And he put me in the shower to hide me, and that's pretty much what I remember.

W.D. recalled being brought to the hospital after she was injured. She testified that the defendant would use "clear" stuff that she also referred to as soap, or put body lotion on their privates or the objects, "so he could get his, you know, materials in easier." She also stated that the defendant would sometimes use a chain to tie or handcuff their hands behind their back so they could not resist while being hurt with his private or his red "H thing." W.D. identified two of the State's exhibits as vibrators that the defendant would use to penetrate and hurt her and R.C. She testified that the devices that the defendant used to penetrate her would sometimes get blood on them. According to the victim, on the day in question, "the ball thing that had the blue and purple ones" was used by the defendant and caused her to bleed. The victim confirmed that she did not fall on the toy box and injure herself on the day in question, that the incident on the day in question occurred in her parent's bedroom, and responded negatively when asked on cross-examination if her grandmother always wanted her to live with her.

R.C. was in the third grade, nine years old, and also lived with her grandmother at the time of the trial. Consistent with her second CAC interview, R.C. testified that the defendant occasionally put his private in her when her mother was not at home and that it would hurt. As she was questioned about the pictures that she drew during the second CAC interview, R.C. also stated that the defendant would put "beads" inside of her "behind" and an item that was shaped like the letter "H." She confirmed that she recognized the items in State's exhibits 51 and 61 and confirmed that the defendant placed at least one of the items in her and that it was painful. She identified State's exhibit 53 as the straps the defendant used to "trap" her arms and legs to the bed so she could not move when he would hurt her with his privates. R.C. further testified that the defendant would act innocent around her mother and that she was

too scared to tell her mother about the defendant's actions because, "[h]e threatened that he would kill my Mammy and her daddy and me." During cross-examination, the victim responded positively when asked if she was being truthful when she told Lisa Tadlock at CAC that the defendant was in his bedroom when she heard W.D. scream from her bedroom on the day in question. During further cross-examination, she indicated that her statements in the initial CAC interview were not true and that the defendant "put something inside of [W.D.] real heavy to make it bleed that hard." R.C. also indicated that she was not being truthful during her first interview (with Dr. Head) when she stated a bully kicked her in the vagina and that, at the time, she was afraid the defendant might hit her. She also contended that the defendant told her to say the things that she said when initially discussing W.D.'s injury. R.C. confirmed that her grandmother disliked the defendant.

The victims' maternal grandmother, Tammera Clement (referred to as "Mammy" by the victims), testified at the trial. Clement confirmed that her daughter contacted her on November 7, that she went straight to the Children's Hospital when she arrived in Louisiana from her home in Kentucky, and that she stayed with W.D. during most of her hospitalization. Clement also indicated that she was present when W.D. made drawings and verbal disclosures and allegations of sexual abuse by the defendant to the nurses. She stated that she also went to the apartment and noted that blood was still in the master bathroom bathtub when she arrived. When she went in the laundry room, she observed dirty clothes and a bloody sheet hanging out of the washing machine, and she washed the clothes. She admitted that a social worker encouraged her to try to get W.D. to talk about her injury, but denied ever telling her grandchildren to say things about the defendant that were not true.

On cross-examination, Clement was asked if she liked the defendant prior to November 7, 2009, and she stated, "At times." Clement denied having a desire to raise the victims before the allegations of abuse. Clement confirmed that she told Detective Rabalais about the blood-stained sheet that she washed along with other clothing while cleaning up the apartment. Clement noted that the girls stayed with her in Kentucky for six weeks during the summer of 2009, a few months before the date in question. During that summer visit, Clement became suspicious when W.D. told her that the defendant would put his hands in the bathtub with her, touch her, and get in the shower with her. The girls left to go back to Louisiana within a day or so of W.D.'s comment.

Natasha Poe, a DNA expert, was provided with DNA samples from the victims, the defendant, and the victims' mother. State's exhibit number 62 (identified as a blue vibrator) tested positive for the presumptive test for seminal fluid, and positive for the prostate specific antigen test for seminal fluid. The results (from the same stain) also included a partial profile off of the epithelial fraction

from the sample that was consistent with the reference sample profile of R.C.¹⁶ Poe was unable to determine the type of bodily fluid (blood, saliva, urine, feces, or perspiration) from R.C. that produced the DNA sample. When asked if it was possible that it came from R.C.'s hand, she noted that she would not expect the profile to be the result of mere contact DNA. She noted that the stain on the object was visible without the alternate light source, and that it flaked off and was very crusty, which was inconsistent with a contact DNA sample. During cross-examination, Poe confirmed that the seminal fluid and R.C.'s DNA profile did not necessarily accompany each other and that one could have been overlaid over the other.

The sole defense witness, Dr. Gregory Hampikian, was another DNA expert who was present during Poe's testimony and evaluated the DNA testing in this case. Dr. Hampikian noted that he was surprised to hear Poe refer to a "female fraction," and further noted that you cannot separate female cells from the rest of an epithelial fraction, though sperm cells can be separated out. He further indicated that it was not possible to determine what part of the body R.C.'s DNA came from or whether it was the result of a touch. Dr. Hampikian noted that a total of nine objects were tested, five of the tested devices had the victims' mother's DNA on them, three of those five devices had the defendant's DNA on them, and none of those five devices that had the victim's mother's DNA on them had either victims' DNA on them. During cross-examination, Dr. Hampikian admitted that DNA could be readily removed with soap and water.¹⁷

3. Additional Exhibits Supporting Actual Innocence

In support of his Objections (Rec. Doc. 19) related to the actual-innocence claim,

Cumberland attached 17 evidentiary offerings:

- Exhibit Obj. 1: Floor Plan
- Exhibit Obj. 2: Report of Detective Rabalais
- Exhibit Obj. 3: Report of Detective Campbell
- Exhibit Obj. 4: Report of Detective Morel
- Exhibit Obj. 5: Audio statement K. Cumberland
- Exhibit Obj. 6: Operative report of Dr. Steiner
- Exhibit Obj. 7: Report of Dr. Head

¹⁶ Poe specified that the profile was greater than 100 billion times likely to be that of R.C. than an unrelated random individual of the African-American, Caucasian, or Hispanic population.

¹⁷ *State v. Cumberland*, 2013-KA-1847, 2014 WL 3843854, at *3-8 (La. App. 1 Cir. 6/25/14) (footnotes in original).

Exhibit Obj. 8: Instanter Order and Affidavit
Exhibit Obj. 9: Photos of master bedroom
Exhibit Obj. 10: Photos master bedroom
Exhibit Obj. 11: Video of apartment
Exhibit Obj. 12: Photo of bathtub
Exhibit Obj. 13: Kentucky CHFS records
Exhibit Obj. 14: Recorded interview with R.C.
Exhibit Obj. 15: Recorded interview with W.D.
Exhibit Obj. 16: Examination records R.C.
Exhibit Obj. 17: Children Hospital records W.D.

Cumberland cites to these exhibits along with trial-transcript page cites from the state record in setting forth the facts and procedural history of the case as adduced from witnesses who testified at trial. The evidence was compiled and collected as part of the investigation surrounding the incident and made available during discovery.¹⁸ Cumberland, through counsel, does not allege that he recently learned of the investigative reports, audio/videotapes, records or photographs attached to his Objections or that any of the evidence was unavailable through investigation before trial.¹⁹

4. Purported New Evidence

As for “new” evidence, Cumberland through counsel identifies several pieces of

¹⁸ In fact, Claiborne Brown, petitioner’s newly enrolled counsel on federal habeas review, represented Cumberland during the first criminal trial. He conducted extensive discovery during the time he represented Cumberland. *See State Record, Volume 1*, generally for discovery motions. The June 2012 trial ended with a mistrial when the trial court refused a continuance and defense counsel declined to proceed without his absent co-counsel based largely on acknowledged regrettable inexpertise and unpreparedness. Rec. Doc. 19, p. 8 n. 1; *see also* State Rec., Vol. 4 of 13 (Trial Transcript - June 2012), R.p. 793-817.

¹⁹ Rec. Doc. 19, p. 8 (see for instance, in the context of the first trial his discussion of cell phone video of apartment taken by neighbors and procedurally incorrect attempt to subpoena K. Cumberland as a witness). *See also*, State Rec., Vol. 8 of 13, Trial Transcript – January 2013 Trial (Closing), R.p. 1875 (discussion of cell phone video) and State Rec., Vol. 1 of 13, R.p. 237, April 2012 Memorandum in support of pretrial motions filed by defense.

“significant evidence” not presented at the second trial.²⁰ In his objection, he argues that the following evidence satisfies the demanding actual-innocence standards and also warrants an evidentiary hearing to adduce: (1) the testimony of surgeon Dr. Rodney Steiner, who did not testify at trial, but examined W.D. on November 7, 2009 and issued a report in connection with his medical examination that was introduced at trial and included reference to photographs taken during the examination that were not produced by the State; (2) the testimony of K. Cumberland, wife of Joshua Cumberland and the victims’ mother, regarding W.D.’s tendency toward inserting objects into her vagina and history of seizures; and (3) the testimony of crime scene investigator, Detective Bobby Campbell, who testified at trial but was not cross-examined thoroughly about photographs depicting blood in the master bedroom. In his reply memorandum, Cumberland suggests that his Exhibits (Obj 2 and Obj. 8) support that the testimony of Detective Stan Rabalais and Carolyn Bourque may also be necessary regarding “their involvement in threatening Mrs. Cumberland with prosecution as a co-defendant” and allegedly contributing to her unwillingness to testify at trial.²¹ Cumberland alleges he should be entitled to production of all documentary and photographic exhibits made a part of the state-court record but not produced to the Court. He requests that the district court order an independent examination by a forensic expert in the field of pediatric sexual assault of the photographs and medical records associated with Dr. Steiner’s examination. Finally, he mentions in footnotes that reports or statements by therapist Ms. Elizabeth Hooker, “to the extent they were proffered into the record of this

²⁰ Rec. Doc. 19, p. 17.

²¹ Rec. Doc. 29, p. 2 n. 1.

matter," should be submitted to the Court and tendered to petitioner.

The State argues that Cumberland's purported new evidence is insufficient in that he did not offer Dr. Steiner's proposed testimony or provide any reason to believe that his testimony could establish that W.D.'s injuries were definitively *not caused* by sexual assault. Likewise, the State asserts, he did not offer the photographs of W.D.'s procedure and it is pure conjecture that an independent expert witness would state that the injury was not caused by sexual assault. Similarly, the State contends he did not submit an affidavit setting forth the testimony K. Cumberland would offer. Nor did he offer affidavits from any witness regarding the allegation that K. Cumberland was intentionally discouraged from testifying for the defense.²² Cumberland disputes the State's rationale and points to factual support for his "new" evidence that is contained in the exhibits attached to his Objections.²³

a. Dr. Steiner

The operative report authored by Dr. Steiner *was* presented at trial and offered into evidence through the testimony of Dr. Head, who assisted Dr. Steiner with W.D.'s exploratory procedure on November 7, 2009. Dr. Steiner did not testify at trial. The report specifically states that the findings were documented with a digital camera by the Children's Care Team.²⁴ The report was inconclusive insofar as definitively ruling out sexual assault.

At trial, Dr. Head disagreed with Dr. Steiner's characterization of the lacerations as small and superficial, referring to them in her opinion as deep. As her November 9, 2009

²² Rec. Doc. 26.

²³ Rec. Doc. 29.

²⁴ State Rec., Vol. 6 of 13, Trial Transcript (Dr. Head), R.p. 1514; Rec. Doc. 19-6; 19-21.

report outlined, in her opinion, the findings were inconsistent with the history provided of jumping on the bed and falling on a toy box. She believed the injuries were consistent with penetrating force from either the objects in evidence or an erect penis.²⁵ In discussing the divergence over the lacerations, she referred to photographs of the injuries taken during the procedure and testified that she had not reviewed Dr. Steiner's report before she prepared her own report. 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.²⁶ 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."²⁷

Cumberland asserts the following with respect to the purported new testimony from Dr. Steiner and the photographs of the injuries:

More significantly, the photographs of the examination were not made available to the defense, arguably in violation of *Brady v. Maryland*, such that

²⁵ State Rec., Vol. 6 of 13, Trial Transcript (January 30, 2013), R.pp. 1513-1521; Rec. Doc. 19-7; 19-22.

²⁶ State Rec., Vol. 7 of 13, Trial Transcript, R.pp. 1523-25.

²⁷ State Rec., Vol. 7 of 13, Trial Transcript (January 30, 2013), R.pp. 1526-27.

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 the opportunity to obtain his own expert to review the photographs and come up with a definitive statement that, coupled with 1) K. Cumberland's testimony that WD had a tendency to place objects in her vagina; 2) the evidence that WD suffered from seizures; 3) RC's consistent testimony that petitioner was not in WD's room when WD was injured; 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.²⁸

Although Cumberland attempts to couch Dr. Steiner's testimony as "new" evidence for purposes of the actual-innocence exception, it is clear that neither Dr. Steiner's operative findings and conclusions, as reflected in his report, nor the photographs taken by digital camera during the procedure documenting those findings, as specifically referred to in Dr. Steiner's report, qualify as "new" evidence under *Schlup*. The evidence falls squarely within the confines of what the United States Fifth Circuit has stated would *not* qualify as new evidence under *Schlup*:

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.*" *Moore v. Quarterman*, 534 F.3d [454], 465 [5th Cir. 2008)]. Consequently, though we have not decided what affirmatively constitutes "new" evidence, *we have explained what does not*.

Hancock v. Davis, 906 F.3d at 390 (emphasis added). The defense had a copy of the surgeon's report, which reflected that a digital camera was used to document the findings during the procedure and could have investigated the matter further before trial, as the State had done, independently viewed the photographs and perhaps retained an independent expert.²⁹ Granted, the defense may have been unaware (as was the State) about any

²⁸ Rec. Doc. 19, p. 18 (record and exhibit citations omitted).

²⁹ Even though the photographs of the minor victim remained in the physical possession of the provider due to their sensitive nature, the prosecution and defense had

disagreement as to the characterization of the lacerations until Dr. Head raised the issue during her testimony at trial. However, the defense was in possession of Dr. Head's own separate and distinctive reported findings and conclusions and was aware that the findings in her opinion were inconsistent with the history of the fall initially provided.³⁰ Thus, the Court is persuaded by the State's assertion that the evidence is hardly new under controlling Fifth Circuit precedent.

More importantly, even if the evidence could be considered new and reliable for purposes of *Schlup*, it is not sufficiently compelling to support a finding of actual innocence. As Dr. Steiner's report reflects, and as Dr. Head agreed at trial (regardless of the characterization of the lacerations), the examination of her injuries did not result in a definitive finding of sexual assault.³¹ Nor did the report rule out sexual assault. Cumberland suggests that because the report alone was not sufficient to establish that the injury was definitively *not* caused by sexual assault, the testimony of Dr. Steiner and an independent expert were necessary to convince jurors. Tellingly, Cumberland does not suggest that Dr. Steiner would testify inconsistently with his findings and offer such an opinion. Instead, Cumberland's argument focuses on his purported inability to retain an independent expert witness to possibly give that opinion after reviewing the photographs of

equal knowledge that they were taken during the examination and the defense cannot claim it had no means of access. *See La. R.S. 13:3715.1(H)*. The mere fact that the State could not provide that which was not in its possession does not mean that the photographs were unavailable to the defense.

³⁰ State Rec., Vol. 7 of 13, Trial Testimony (Cross-examination of Dr. Head), R.p. 1551-53.

³¹ State Rec., Vol. 6 of 13, Trial Testimony (January 30, 2013), R.p. 1519.

W.D. taken during Dr. Steiner's exploratory procedure. Regardless, however, Dr. Head believed that the injuries were the result of penetrating trauma and offered her expert opinion at trial. Thus, even accepting as true that Cumberland could find an independent expert willing to review the photographs and to testify definitively that the internal vaginal injuries were not caused by sexual assault (which the state points out is mere conjecture), the testimony would simply have presented the jury with conflicting medical expert opinions, and any reasonable juror could still resolve the conflict against Cumberland given the victims' detailed testimony that he sexually abused them. "The meaning of actual innocence... does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that *no* reasonable juror would have found the defendant guilty." *Schlup*, 513 U.S. at 329 (emphasis added). The assumption that evidence might raise a doubt in *some* jurors' minds does not satisfy the rigorous defense burden on an actual innocence exception.

b. Detective Bobby Campbell

Cumberland argues that at trial "several frighteningly prejudicial photographs were introduced, virtually unchallenged as to their potential content, to the jury."³² He points to several photographs of the mattress in the master bedroom depicting multiple stains of old dried blood, a single apparent fresh blood stain and several small apparently fresh blood stains resembling a child partial handprint on a pillow. He contends that K. Cumberland's statement in a crime scene investigation report prepared by Detective Bobby Campbell indicating that the mattress was stained from her own menstrual blood and the fact that the

³² Rec. Doc. 19, p. 19.

photographs depicted certain blood stains that were either tested and found negative for blood or not even tested, as reflected in Campbell's report, were issues not explored during the cross-examination of Detective Campbell.

Cumberland's assertion that prejudicial photographs were introduced absent adequate challenge by the defense does not constitute new evidence for purposes of establishing actual innocence. Significantly, Cumberland does not argue that the defense did not have access to Detective Campbell's investigative report prior to trial because all police investigative reports were made available to the defense.³³ Thus, the information could have been used to question the witness at trial because it was certainly available and accessible to the defense. The decision by defense counsel not to focus jurors' attention on a small number of blood spots in the photographs, especially when certain areas tested positive for blood, fell within defense counsel's discretion on cross-examination. Moreover, any perceived deficiencies Cumberland might find with regard to counsel's cross-examination of Detective Campbell at trial cannot be considered "new" evidence of actual innocence. Under the circumstances presented, Cumberland has failed to present any new evidence for purposes of the actual-innocence exception.

Regardless, even if considered "new" evidence with respect to the photographs, the evidence does not satisfy the evidentiary burden of proving that no reasonable juror would have found the defendant guilty in light of the new evidence. Given the significant amount of suspected blood located not just on the mattress, but throughout the master bedroom and

³³ State Rec., Vol. 5 of 13, Trial Testimony (Detective Campbell), R.p. 1283 (referring to report).

bathroom, as well as on articles of clothing belonging to the victim,³⁴ whether or not some blood stains on the mattress were from K. Cumberland or that some were not tested or did not test positive when swabbed for presumptive blood, was of minimal significance. Neither K. Cumberland nor Detective Campbell were experts in blood or DNA analysis such that they could testify definitively regarding the blood. Moreover, the significance of the photographs, in their entirety, as is clear from Detective Campbell's testimony, was that they depicted blood only in the master bedroom and bathroom and none in the child's bedroom where the defense contended the injury occurred, which did not corroborate Cumberland's version of events. This evidence is not sufficiently compelling under the rigorous standards set out in *Schlup* for establishing actual innocence.

c. K. Cumberland's testimony

Cumberland maintains that his wife, K. Cumberland, was not called as a witness and thus her hypothetical "material and exculpatory" testimony qualifies as new evidence. He asserts that his wife "had material testimony on many aspects of the case." He alleges that her testimony about the blood on the mattress being hers "significantly neutralizes the prejudicial impact of the master bedroom photographs."³⁵ As discussed above, however, that claim fails. He also contends she could have testified about W.D.'s habit of placing objects inside her vagina and history of seizures. Finally, he asserts she could testify to Tammera Clement's prior history of falsely accusing Cumberland with abuse.³⁶ He

³⁴ State Rec., Vol. 5 of 13, Trial Transcript, R.pp. 1240-1259.

³⁵ Rec. Doc. 19, p. 19.

³⁶ Rec. Doc. 19, pp. 19-20 (citing Obj. 3, 5, 13). Rec. Doc. 19-5 is an audio recorded statement from K. Cumberland in which she briefly mentions W.D. going for counseling for a little while to address her habit; Rec. Doc. 19-24 (Obj. 13), p. 40 (Kentucky records indicating

speculates that her testimony as a whole with respect to these facts would have convinced jurors that W.D.'s injury was not caused by sexual assault, but instead was most likely a combination of self-induced circumstances and a fall from a seizure, and that the victims' statements and testimony were false, coached by their grandmother, and motivated by her dislike for their stepfather, Cumberland, and her desire to falsely accuse him of harmful acts. He also claims that K. Cumberland's unavailability resulted from "potential coercion against her to prevent her favorable testimony."³⁷ He asserts that Detective Stan Rabalais and OCS Investigator, Carolyn Bourque, were involved in threatening her with prosecution as a co-defendant. He suggests "they are necessary as potential rebuttal witness[es]... who would testify to their involvement in threatening [her]."³⁸

Although Cumberland claims to have proffered the testimony of K. Cumberland in support of his actual-innocence claim, he has not actually proffered her testimony by affidavit or otherwise. Instead, by asserting that his proffer of K. Cumberland's purported testimony is *derived* from the various documentary exhibits he has submitted, he has woven a self-serving theory as to her testimony and called it a "proffer." Despite his assertion that his "proffer of K. Cumberland's testimony" and Tammara Clement's potential hostility toward petitioner should be gleaned from the various narrative police reports, recorded statement of K. Cumberland, Kentucky family services records, and instanter order limiting

history of seizures); Rec. Doc. 19-24, pp. 44-51 (Jan. 15, 2009 call by Clement regarding W.D.'s arm being broken); Rec. Doc. 19-8 (Instanter Order). See Rec. Doc. 26, State's Memorandum, pp. 12-14 n. 4-8 discussing content of evidentiary attachments submitted by Cumberland).

³⁷ *Id.* at 20.

³⁸ Rec. Doc. 29, p. 2 n. 1 (citing Obj. 2 and 8).

K. Cumberland's contact with her children,³⁹ the fact remains Cumberland has actually offered only self-serving, conclusory allegations that do not constitute new reliable evidence under *Schlup*. Obviously, the defense knew about K. Cumberland from the start and could have investigated her whereabouts to obtain her testimony if potentially relevant and material. The information contained in the investigative reports was available to the defense. Consequently, the information or evidence he seeks to obtain from K. Cumberland can hardly be considered new.

Regardless, the defense theory presented at trial was that the injuries were sustained from falling on a toy box, and the defense, to the extent possible when dealing with an emotionally charged issue and young children, highlighted the timing of the disclosures coinciding with Clement's arrival, as well as inconsistencies in the versions offered by the children during interviews, and sought to show that the young children could easily be coached and succumb to suggestive influences by others. During extensive cross-examination of Tammara Clement, the defense brought forth ample evidence suggesting that Clement's relationship with Cumberland was damaged and that she had reason to dislike, distrust, and falsely accuse him to gain custody of her granddaughters, in an attempt to damage her credibility.⁴⁰ Evidentiary hurdles aside, Cumberland's attempt to use K. Cumberland's (hypothetical) new testimony to piece together an alternative theory that W.D. caused her own injuries, or to bolster the theory already presented at trial by the defense (*i.e.*, that she fell onto a toy box for whatever reason, seizure or otherwise, but was persuaded

³⁹ Rec. Doc. 29, p. 3.

⁴⁰ State Rec., Vol. 7 of 13, Trial Transcript (Cross-Examination of Tammara Clement), R.p. 1616-1674.

by her grandmother to blame her stepfather for her injuries), hardly satisfies the actual-innocence burden of proof for new reliable evidence. The impact of this evidence on jurors would be negligible, and in no way has Cumberland demonstrated that “more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt.” *House*, 547 U.S. at 538. Nor has he offered any valid grounds on an actual innocence exception for eliciting testimony about the reason for K. Cumberland’s absence at trial.⁴¹

Finally, although not explicitly set out as new evidence in support of the actual-innocence claim, Cumberland mentions the denial of an opportunity to introduce at trial during the testimony of Tammara Clement, a report by Elizabeth Hooker, a therapist who interviewed W.D. and R.C., as evidence that Clement coached the children. Cumberland notes that “to the extent that Ms. Hooker’s report was proffered into the record of this matter, that report must be submitted to this Court and tendered to petitioner herein.”⁴² He cites to questioning regarding Ms. Hooker that took place during the perpetuation testimony of Tammara Clement taken on September 25, 2012.⁴³ However, Clement later testified at trial. It is unclear if the evidence was in fact proffered at trial.⁴⁴ In any event, to the

⁴¹ Unlike Claiborne Brown’s first attempted trial as defense counsel for Cumberland that ended in a mistrial where the defense intended to call K. Cumberland as a witness (State Rec., Vol. 3 of 13, Trial (June 2012), R.p. 595), there is no indication that defense counsel representing Cumberland in the second trial ever intended to call her as a witness. See State Rec., Vol. 8 of 13, Trial Transcript (Closing), R.p. 1878. The record also indicates that her whereabouts were known and that she was living in Kentucky prior to trial. State Rec., Vol. 4 of 13 (Sept. 25, 2012-Perpetuation Testimony of Tammara Clement), R.p. 927.

⁴² Rec. Doc. 19, p. 9 n. 2.

⁴³ State Rec., Vol. 4 of 13, Transcript (September 25, 2012), R.p. 907-912.

⁴⁴ State Rec., Vol. 7 of 13, R.p. 1671-1674 (discussion of proffer regarding Sara

extent he submits that the report constitutes new reliable evidence, that evidence was available and in the possession of the defense for the perpetuation testimony of Tammera Clement back in September 2012. At that time, the trial court questioned the relevance of the evidence as indicative of coaching, as suggested by the defense, since the session took place years after the 2009 incident.⁴⁵ Furthermore, the evidence is hardly compelling or convincing enough to support a finding of actual innocence. The 2011 report post-dates by two years the interviews with the children surrounding this incident in 2009 and adds little to the evidence already presented at trial with respect to any influence Clement may have exerted on W.D. and R.C. in relation to their changing stories during interviews with professionals at the time of W.D.'s hospitalization.

Upon reviewing the evidence in its entirety, Cumberland fails to show that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt. He has not satisfied the high burden of establishing his actual innocence to avoid the implications of the time-bar and for consideration of the merits of his claims.

D. Cumberland is not entitled to an evidentiary hearing

As part of his requested relief, Cumberland sets forth the following in his objections to the original report and recommendation (Rec. Doc. 19, p. 2):

[P]etitioner avers that his application for Federal Habeas Corpus relief should be granted and his February 1, 2013 conviction should hereby be vacated. In the alternative, petitioner asserts that the Court should order the State to

Shelton records and no actual proffer reflected on the record); *see also* State Rec., Vol. 2, R.p. 441, List of Trial Exhibits; State Rec., Vol. 1 of 13, R.p. 112, Minute Entry, 1/31/13.

⁴⁵ State Rec., Vol. 4 of 13, Sept. 2012 perpetuation testimony of Tammera Clement), R.p. 907-912. The report indicated that W.D. reported she was "raped and sodomized," and the defense sought to show evidence of coaching by Tammera Clement from the child's use of these words.

produce the following additional items:

[A]ll documentary and photographic exhibits made part of the record in this matter but not produced to this Court (as well as photographs of all physical evidence submitted); all photographic evidence pertaining to the forensic examination of W.D. conducted on November 7, 2009 by Dr. Rodney Steiner, M.D. As to the latter, the Court should also order an independent examination of said photos and medical records by a forensic expert in the field of pediatric sexual assault. Finally, the Court should order an evidentiary hearing to obtain testimony from the following individuals: Dr. Rodney Steiner, M.D.; Det. Bobby Campbell; and, most importantly, Mrs. Katie Cumberland.

Cumberland has never retained and does not currently have a “forensic expert in the field of pediatric assault” who is willing to offer an opinion in this case. He makes an entirely speculative and self-serving claim as to what a purported expert might now conclude based on photos from a vaginal examination that did not lead any doctor present for the examination to definitively rule out sexual assault. Cumberland offers nothing to suggest that Dr. Steiner held any favorable opinion that would help the defense show that W.D. sustained the vaginal trauma in a fall. If anything, the defense benefitted by his reported findings and absence of any stated definitive conclusion. The claim that Dr. Steiner’s testimony should now be adduced is unavailing, as is Cumberland’s claim that he should be entitled to photos and an independent expert, whose expert opinion would merely be at odds with the State expert’s opinion expressed at trial. This conclusory assertion does not satisfy the extraordinarily high actual-innocence standard and does not warrant production of further evidence or an evidentiary hearing. He also has not shown that an evidentiary hearing is necessary to develop additional testimony from Detective Campbell, a witness who already testified at trial, simply because Cumberland feels he was not subjected to strenuous enough cross-examination. Finally, he has not shown he is entitled to an evidentiary hearing to obtain his spouse’s testimony—the substance of which has not been

set forth by affidavit but was instead fashioned by Cumberland himself through various documents and a piecemeal hypothetical in an attempt primarily to challenge the credibility of witnesses. The beneficial testimony he hopes to obtain from a hostile witness does not even qualify as evidence of actual innocence that would establish that no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. Given the existing state-court record and the additional documentary evidence submitted by Cumberland that do not support his claim of actual innocence, no evidentiary hearing or further expansion of the record is required on his actual-innocence gateway claim to avoid the time-bar. *See Shank v. Vannoy*, 2017 WL 6029846, at *2 (5th Cir. 2017) (citing *Schrivo v. Landrigan*, 550 U.S. 465, 474 (2007) (no hearing is required “if the record refutes the applicant's factual allegations or otherwise precludes habeas relief”)).

E. Because the petition/amended petition is untimely, it is unnecessary to resolve exhaustion/procedural default issues.

The State argues primarily that the federal petition is time-barred and that raising supplemental claims does not alter that fact. “The claims raised in the original petition for habeas corpus are, and remain, time-barred. The newly-raised claims are also time-barred.” (Rec. Doc. 44, p. 4). The undersigned fully agrees. The State argues, solely in the alternative in its supplemental answer, that “should the court conclude that the petitioner's claims are *not* time-barred,” then eight of the nine claims (with the sole exception of his sufficiency-of-the-evidence claim) are procedurally defaulted and may not be considered on the merits.⁴⁶

⁴⁶ His other three claims (ineffective assistance of trial counsel, ineffective assistance of appellate counsel and prosecutorial misconduct) raised in his original federal application arguably were not fairly presented to the Louisiana Supreme Court in a procedurally proper manner according to the rules of the state courts; the Louisiana Supreme Court had no

Cumberland does not appear to contest that most of his claims are procedurally defaulted. In response, he argues only that his claims of actual innocence (as a gateway claim and exception to the federal time bar) and his claims implicating ineffective assistance of counsel are not procedurally barred. For the latter, he relies on *Martinez* and *Trevino* to excuse the procedurally defaulted claims of ineffective assistance of counsel.⁴⁷ However, given the findings and recommendation that the federal petition be dismissed as time-barred, the Court need not consider or resolve the procedural default issue.

RECOMMENDATION

Accordingly, for the reasons outlined in the original report and recommendation and

opportunity to review the merits of the claims raised in his untimely supervisory writ application. And to exhaust state-court remedies, a petitioner must have fairly presented the substance of his federal constitutional claims to the Louisiana Supreme Court in a procedurally correct manner, supported by the legal theories and factual allegations that he raises in federal court. *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997). Further, as outlined by the State, he did not attempt to raise the five claims asserted in his amended federal application in the state courts on either direct appeal or state post-conviction relief proceedings. Cumberland does not dispute this, and the record supports the State's assertion. The State asserts that all eight claims are now technically procedurally defaulted because the claims are no longer subject to review (that is, the state courts would now find those claims procedurally barred under state law).

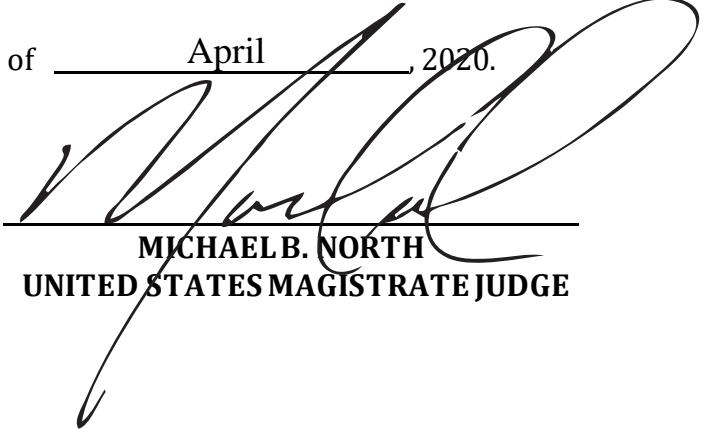
⁴⁷ To be clear, Cumberland does not rely on these cases to excuse the untimeliness of his federal petition; nor could he because neither case provides a basis for review of an untimely federal petition. In *Martinez*, the Court held that a *state-court imposed* "procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Trevino*, 569 U.S. at 417 (quoting *Martinez*, 566 U.S. at 17) (emphasis added). The *Martinez* and *Trevino* decisions do not address or provide an excuse for the untimely filing of a federal habeas petition. See *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) ("Thus, we also hold that the reasoning of the *Martinez* rule does not apply to AEDPA's limitations period in § 2254 cases or any potential tolling of that period."); *Smith v. Rogers*, Civil Action No. 14-0482, 2014 WL 2972884, at * 1 (W.D. La. Jul. 2, 2014); *Falls v. Cain*, No. 13-5091, 2014 WL 2702380, at *3 (E.D. La. Jun. 13, 2014) (Order adopting Report).

for the additional reasons expressed in this supplemental report, **IT IS RECOMMENDED** that Cumberland's application for federal habeas corpus relief and supplemental and amending petition be **DISMISSED WITH PREJUDICE** as untimely. A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).⁴⁸

New Orleans, Louisiana, this 13th day of

April

2020.


MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE

⁴⁸ *Douglass* referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. § 636(b)(1) was amended to extend that period to fourteen days.

Law Supplemental Narrative:

Seq Name	Date	Supplemental Narratives
10 Rabalais, Stan	08:44:46 12/09/09	Narrative

CASE RESUME

ITEM #: 0911-0531

CASE ASSIGNED TO: Detectives Morel and Rabalais

ARRESTED PERSON: Joshua Cumberland

VIOLATION: Two counts of Aggravated Rape

LOCATION OF VIOLATION: 301 Spartan Drive, Apt. 4300, Slidell, La.

DATE OF VIOLATION: 11-07-2009

RESUME OF: Detective Stan Rabalais 212

DATE OF RESUME: 12-09-2009

OTHER OFFICERS: Culotta, Newman, VanShoubrouek, Tabor, Nicaud.

SYNOPSIS: Joshua Cumberland brought his eight year old step daughter, [REDACTED] to Slidell Memorial Hospital with bleeding from her vagina. Slidell Police Officers were dispatched to the hospital where Joshua Cumberland informed officers that his step daughter, [REDACTED] had fallen on her toy box and injured herself. During the course of the investigation, [REDACTED] was interviewed at the New Orleans Children's Advocacy Center and disclosed that she had been sexually molested by her step father, Joshua Cumberland. Detective Rabalais had Cumberland's other step children interviewed at the St. Tammany Children's Advocacy Center and six year old [REDACTED] also disclosed that Joshua Cumberland had also sexually molested her ([REDACTED] [REDACTED]).

RESUME:

On Saturday 11/07/09 at 0937 hours, Ofc. Culotta, Ofc. Newman and Sgt. VanShoubrouek were called to 310 Spartan Dr. Apartment 4300 regarding a juvenile incident. The officers were advised by Slidell Police Dispatch that a subject by the name of Joshua Cumberland brought his eight year old daughter to the Emergency Room of Slidell Memorial Hospital with vaginal bleeding. The neighbors called the police because they believed that the father, Joshua Cumberland might have molested the child. In the meantime, a neighbor kept the subject's other two children while another neighbor took Cumberland and his daughter to the Emergency Room.

Ofc. Culotta went to the hospital and Ofc. Newman went to secure the residence. When Officer Culotta arrived at Slidell Memorial Emergency Room, he spoke with the injured child's step father, Joshua Cumberland. Joshua Cumberland began telling Officer Culotta that his eight year old step daughter, [REDACTED] had been molested when she was three years of age by her real father. And, ever since then she had been playing with herself and sticking things inside of her vagina. The officer asked Cumberland to write a statement regarding what happened this morning and the first thing Joshua Cumberland said was, "Do I need a lawyer?". The officer asked him, "do you?". At that point he stated he could not write a statement because he hasd some type of learning disability. Cumberland wanted to know if he told the officer what had happened could the officer write it down and he would sign it. The officer advised Cumberland that a detective would be there shortly and he would take a recorded statement.

Ex. "OBJ 2"

Appx. E

000007

20-30434.634
Appx. 56

Cumberland began to tell the officer what had happened. He stated he was in his room on the computer, heard a thump sound and then his step daughter, [REDACTED] screaming. He ran into her room and found her on the floor. Her six year old sister, [REDACTED] told him that they were jumping on the bed and [REDACTED] fell and hit the toy chest. Cumberland stated that the toy chest lid was broken off prior to the incident and one of the pointed edges was sticking up. He thinks [REDACTED] hit the pointed edge of the toy box.

Cumberland stated he picked [REDACTED] up and brought her into his room and put her on his bed. Cumberland stated he then grabbed a towel and applied pressure in an attempt to stop the bleeding. Cumberland then took [REDACTED]'s clothes off and put her in the shower to clean her off. He stated he contacted his wife, Katie J. Cumberland who was at work since 0600 hours this morning. Katie Cumberland had their only vehicle so Joshua Cumberland tried to get help from his neighbor but no one answered the door. Joshua Cumberland then went to another neighbor to help him. Joshua Cumberland then made contact with his neighbor, Samuel D. Fazzio III, who transported Cumberland and his step daughter, [REDACTED] to the Slidell Memorial Emergency Room. Fazzio's girl friend, Amy M. Boone kept Cumberland's other two step children.

Emergency Room physician, Dr. Stafford stated the child was going to be transported to Children's Hospital in New Orleans for treatment. The Emergency Room staff stated the child came in without clothing, soaking wet wrapped in towels and bleeding profusely.

The child's mother, Katie J. Cumberland arrived at the Emergency Room and stayed with her daughter. She was advised that a detective would want to talk to her.

Sgt. VanShoubrouck notified the Criminal Investigation Supervisor and a detective was sent to the hospital. While the officer was waiting for the detective to arrive, Joshua Cumberland started talking to the officer about wanting to be a police officer at one time but had decided not to because he knew that police may have to get aggressive with suspects and he had enough of that in the military. He went on to say that he was a trainer for hand-to-hand combat in the military and that he was a brown belt.

Detective Ralph Morel arrived and the investigation was turned over to him. Crime Scene Detectives were also called out to process the residence.

On 11/07/09, Ofc. Newman responded to 301 Spartan Dr. Apt 4300 in reference to a juvenile call. While enroute, officers learned a young female was taken from the above residence to Slidell Memorial Hospital Emergency Room. Officers learned the young female may have possibly been sexually abused at that residence.

Ofc. Newman arrived at the residence and secured the scene. While at the scene, Ofc. Newman took written statements from three neighbors identified as Kevin Broome, Amy Boone, and Christy Seckler. All three neighbors stated Joshua Cumberland came to their residence and notified them that his child, [REDACTED] had fallen off her bed and hurt herself. All the neighbors advised they went to his residence to assist him and found [REDACTED] in the shower bleeding. All the neighbors advised they observed large amounts of blood on the bed in the master bedroom and on the floor leading to the master bathroom. All the neighbors stated it appeared [REDACTED] was bleeding from the vaginal area.

Ofc. Newman kept the scene secured until Det. Morel and CSS Campbell arrived and took over the scene.

On 11-07-09 Detective Morel arrived at Slidell Memorial Hospital and located the Emergency Room Physician, Dr. Stafford. Dr. Stafford stated the child was going to be transported to Children's Hospital in New Orleans for treatment. The Emergency Room staff stated the child came in without clothing, soaking wet wrapped in towels and bleeding profusely.

Detective Morel then met with the step father, Joshua Cumberland. Cumberland was asked if he would speak with Detective Morel in private, which he stated that he would. A digital recorder was turned on at 1110 hours. Joshua Cumberland explained that his wife's name is Katie Cumberland. He has been with his wife for approximately four years. Katie Cumberland has three girls, identified as eight year old [redacted], six year old [redacted] and four year old [redacted].

According to Joshua Cumberland, his wife Katie left for work at approximately 0600 hours and that he was on his computer in his bedroom. Joshua Cumberland stated that at approximately 0800 he heard a "THUMP" and [redacted] "kinda screaming". Joshua Cumberland advised that he went into [redacted]'s bedroom to investigate. Cumberland stated that [redacted] and [redacted] were alone in the room playing prior to the incident and [redacted] was reportedly sleeping. Joshua Cumberland stated that [redacted] appeared to be "out of it" as she did in the past when she had seizures. [redacted] was also holding her vagina and appeared to be in pain. Joshua Cumberland advised that he did not see the incident, however he was told by [redacted] that she "fell". Joshua Cumberland stated that he was then told by [redacted] that [redacted] was jumping on the bed and she hit the corner of her toy box. Joshua Cumberland advised that when [redacted] was grabbing "down there" he could see that there was "a little bit of blood". Joshua Cumberland advised that he grabbed [redacted] and carried her to his bedroom and placed her on his bed. Joshua Cumberland advised that he then took her underwear off "to look at it" and placed a towel on the bleeding area because he did not know "WHAT WOULD HAPPEN...WHAT HAPPENED" (quickly correcting himself). Joshua Cumberland stated that he placed [redacted] on the toilet and then moved her to the shower and left the water running on her. (Bed, toilet, and shower were all in the master bedroom area).

Detective Morel was then informed by the Slidell Memorial Hospital Emergency Room Doctor (Dr Stafford) that due to the injuries, the child would be sent to the Children's Hospital in New Orleans, Louisiana for treatment.

Joshua Cumberland and his wife Katie Cumberland provided verbal and written consent to search the scene of the incident. Detective Morel advised them that only one of them needed to stay with CSS Campbell during the consent search and one could follow the ambulance to Children's Hospital in New Orleans. Detective Morel met with CSS Campbell at the residence and noticed that both Katie Cumberland and Joshua Cumberland decided to stay at the residence with CSS Campbell. Detective Morel then completed a consent search form with both Katie Cumberland and Joshua Cumberland. It was immediately apparent that there was no visible blood in [redacted]'s bedroom, however there was blood on Joshua Cumberland's bed and a trail from the bed to his bathroom. It was also noted that there were no linens on the bed but there was a lap top computer on the bed in the master bedroom. Detective Morel decided that since there was a possibility of a crime and Joshua Cumberland was still very cooperative Detective Morel would ask Joshua Cumberland if he would consent to a body search. Detective Morel explained that the Body Consent Search would consist of a sex crimes kit being completed by personnel from the

St. Tammany Parish Coroner's Office. Joshua Cumberland agreed and the St. Tammany Parish Coroner's Office was notified. Joshua Cumberland advised that he would consent to the body search, however between he and his wife they only had one vehicle. Detective Morel offered Joshua Cumberland a ride to the Slidell Police Department to wait for the arrival of the Coroner's Office personnel. Angel Galloway and Jillian Smith from the St. Tammany Parish Coroner's Office came to the Slidell Police Department and a written Consent For Body Search form was completed and signed by Joshua Cumberland. Angel Galloway and Jillian Smith from the St Tammany Parish Coroner's Office then conducted the body search and completed the sex crimes kit. Detective Morel took custody of the sealed sex crimes kit and submitted it into evidence.

After the consent to search was completed on Joshua Cumberland's body, Detective Morel drove him back to his apartment complex where CSS Campbell and Katie Cumberland were located.

Since CSS Campbell was still processing the scene, Detective Morel left and went to Children's Hospital. There Detective Morel met with Doctor Yameika Head who is the Forensic Pediatrician at Audrey Hepburn CARE Center at Children's Hospital in New Orleans, Louisiana. Doctor Head briefed Detective Morel of her findings and summarized [redacted]'s condition. See Doctor Head's completed report for details.

[redacted] was suffering from a massive amount of vaginal bleeding and may require surgical repair to stop bleeding. [redacted] was found to have severe vaginal trauma that consisted of multiple vaginal lacerations and abrasions. The vaginal trauma seen on [redacted] was definitive for blunt-penetrating vaginal trauma. The injuries were also not characteristic with straddle injuries or from falling.

On 11/07/09 at approximately 1830 hours Detective Morel called Detective Nicaud for assistance. Detective Morel left the Children's Hospital in New Orleans, Louisiana and met Detective Nicaud at the Slidell Police Department. Detective Morel briefed Detective Nicaud about the case. Shortly after Detective Morel arrived at the Slidell Police Department, Joshua Cumberland and Katie Cumberland arrived at the Slidell Police Department as per Detective Morel's request. Detective Morel asked Detective Nicaud to sit with the victim's step father, Joshua Cumberland while OCS Investigator Carolyn Bourque spoke with the victim's mother, Katie Cumberland.

After OCS Investigator Carolyn Bourque was finished speaking with Katie Cumberland, she was released. OCS Investigator Carolyn Bourque then accompanied Detective Morel to interview Joshua Cumberland with Detective Nicaud. Detective Morel also notified Juvenile Detective, Stan Rabalais.

Detective Nicaud escorted Joshua Cumberland upstairs to the Detective Division. While waiting in the Detective Division, Joshua Cumberland made small talk about he being a CPR instructor for the Red Cross and wanting to be a paramedic. Joshua Cumberland also mentioned being a Lance Corporal in the United States Marine Corps.

During the conversation about Joshua Cumberland's Marine Corps experience, he stated he was medically discharged after suffering two years of hazing. Joshua Cumberland stated the hazing started after he reported his platoon sergeant for not allowing soldiers to attend church.

Joshua Cumberland seemed to be trying to portray himself as a good person. Joshua Cumberland mentioned he was a "military brat" and moved several times while growing up. Joshua Cumberland asked Detective Nicaud what was taking so long. Detective Nicaud asked Joshua Cumberland to be patient.

Detective Morel finished speaking with Katie Cumberland and came upstairs with the OCS case worker. Detective Nicaud video recorded the interview with Joshua Cumberland. Detective Morel then advised Joshua Cumberland of his Miranda Warning Rights in written form. Joshua Cumberland signed the form indicating that he understood his rights.

Joshua Cumberland stated after his wife Katie Cumberland left for work, he was on the computer. Joshua Cumberland stated he heard a loud thump and went to see what it was. Joshua Cumberland stated he observed [redacted] on the floor holding her private parts in pain. Joshua Cumberland stated he observed a little blood on [redacted]'s panties.

Joshua Cumberland stated he took [redacted] into his bathroom and took off her panties. Joshua Cumberland stated [redacted] had blood on her legs by this time. Joshua Cumberland stated he put [redacted] in the tub and attempted to clean off the blood. Joshua Cumberland stated he did not see an external injury and the bleeding appeared to be coming from her vaginal area.

Joshua Cumberland stated he then went to get a female neighbor and knocked on several doors. Joshua Cumberland stated a neighbor named Melissa agreed to look at [redacted]. Joshua Cumberland stated after Melissa looked at [redacted] she told him to get [redacted] checked out. Joshua Cumberland stated he then called and advised his wife, Katie about the incident. Joshua Cumberland stated Melissa agreed to watch his other two step children. Joshua Cumberland stated he put a towel between [redacted]'s legs and was driven to Slidell Memorial Hospital by another neighbor.

On 11-10-09 Detective Nicaud went to 301 Spartan, The Canterbury Apartments and spoke with Kevin Broome and Christy Seckler. Kevin Broome stated after Joshua Cumberland left with [redacted] to go to Slidell Memorial Hospital he filmed the crime scene.

Kevin Broome allowed Detective Nicaud to view the video on the camera. Detective Nicaud did not have a permission to search and seize form but Kevin Broome gave Detective Nicaud the camera so the video could be copied. Detective Nicaud returned with the forms and camera. Christy Seckler signed the forms and the camera was returned. Christy Seckler then erased the video from the camera.

On 11-12-09 Detective Nicaud reviewed the interview with Joshua Cumberland and created a sequential list of highlights mentioned. Note: not all statements documented will be direct quotes. Highlights of the interview are as follows:

At 23:55:00 Joshua Cumberland talked about only knowing what [redacted] told him. Joshua Cumberland also mentioned that he understood medical terms.

At 23:56:00 Detective Morel relayed to Joshua Cumberland the medical report from Children's Hospital which described [redacted]'s injuries as blunt penetration. Joshua Cumberland responded with, "what does that mean" and "I haven't touched that child, ever".

At 23:58:00 Joshua Cumberland described the families morning routine.

At 00:03:00 Joshua Cumberland stated that when he put [redacted] in the tub and washed the blood off he didn't want to look at her private part. Joshua Cumberland stated he left [redacted] in the tub and went to find a female neighbor to help him. Joshua Cumberland located a neighbor, Melissa who looked at [redacted]'s injuries. Melissa told Joshua Cumberland to have [redacted] checked. Joshua Cumberland called his wife, Katie Cumberland and then was driven to the hospital by a neighbor.

At 00:04:40 Joshua Cumberland said he hadn't showered since the day before.

At 00:08:31 Joshua Cumberland admitted to having adult pornographic sites on his computer. Joshua Cumberland stated no questionable sites should be on the computer, but he had to delete backdoor pop-ups at times.

At 00:11:12 Joshua Cumberland stated that "Mr. Happy doesn't work right", which was caused by being kneed in the groin as a child.

At 00:13:14 Joshua Cumberland stated [redacted] often hangs on him and it makes him feel uncomfortable.

At 00:17:00 Joshua Cumberland stated [redacted] touches herself and he has also caught her removing "poo" excrement out of her anus.

At 00:19:40 Joshua Cumberland stated [redacted] had a tendency to put things "up there". Joshua Cumberland stated he asked [redacted] if she put something "up there". Joshua Cumberland stated if he is not getting the full story and police are not getting the full story.

At 00:21:00 Detective Morel asked Joshua Cumberland if his DNA will be on [redacted] and he said "no". Detective Morel asked Joshua Cumberland if he touched his daughter. Joshua Cumberland got upset and said, "not in a million years" would he touch his daughter.

At 00:24:40 Joshua Cumberland stated he takes his dog out at night and leaves the door unlocked with the children inside alone even though he knows creepy guys are around.

At 00:27:40 Detective Morel told Joshua Cumberland that he asked the doctor at Children's Hospital if the blunt vaginal trauma was old. The doctor responded "no". Joshua Cumberland stated "I haven't done anything to that child".

At 00:33:40 Joshua Cumberland stated, [redacted] has been caught putting stuff inside herself as a result of her old step rather abusing her. Also [redacted] use to play with a child named [redacted] in Kentucky who was also abused.

At 00:36:30 Joshua Cumberland stated after [redacted] started playing with [redacted], she started to put stuff inside herself such as a wooden dowel, a pencil and a crayon.

At 00:38:00 Joshua Cumberland spoke about the girls' bedtime which is, in bed by 6 pm and sleeping by 6:30 pm.

At 00:45:00 Joshua Cumberland again mentioned catching [redacted] doing stuff to herself with [redacted] watching.

At 00:49:00 Joshua Cumberland stated, what he knows about the child is she may have put something in there.

At 00:50:50 bathroom break from interview.

At 00:52:50 Joshua Cumberland stated pressure wasn't working to stop the bleeding.

At 00:53:40 Joshua Cumberland stated he put [redacted] in the tub to wash the blood out of there. Joshua Cumberland stated he didn't want to look at [redacted]'s private parts so he went to find a woman.

At 00:55:30 Joshua Cumberland stated Samuel Fazzio "Sammy" came to help.

At 00:59:50 Detective Nicaud questioned Joshua Cumberland about being closed off. Detective Nicaud also asked Joshua Cumberland why if he wanted to train to be a paramedic, he didn't call 911. Joshua Cumberland stated he panicked.

At 01:04:00 Detective Nicaud also asked Joshua Cumberland why he seemed disconnected. Joshua Cumberland started talking about being raised by his mother for sixteen years.

At 01:05:45 Joshua Cumberland admitted to having mental issues from being in the Marines.

At 01:08:40 Joshua Cumberland talked about getting a medical discharge from the Marines after having a knife put to his throat and piss thrown on him. Joshua Cumberland stated he started getting treated badly after he reported his Sergeant to the R.R.O.D. for not letting some members of the squad go to church.

At 01:15:00 smoke break

At 01:27:00 Joshua Cumberland was asked where in Kentucky did they live. Joshua Cumberland stated McCracken and Marshall counties.

At 01:28:00 Detective Morel asked Joshua Cumberland where he placed [redacted] on the bed.

At 01:29:00 Joshua Cumberland stated he carried [redacted] from her room to his bedroom.

At 01:31:00 Joshua Cumberland named [redacted]'s mother as [redacted].

At 01:34:00 Joshua Cumberland stated that [redacted] was a defiant child. Joshua Cumberland used an example of [redacted] wanting him and his wife Katie to do things her mother [redacted] asked [redacted] to do.

At 01:42:00 Joshua Cumberland stated a neighbor who has been harassing his wife accused him of sodomizing a kid.

At 01:44:00 Detective Morel asked Joshua Cumberland if he would take a polygraph test. Joshua Cumberland stated he would want to talk with an attorney before he agreed to take a polygraph test.

At 01:46:00 Joshua Cumberland was asked questions about his father, such as

his name, where he lives, but Joshua Cumberland did not know the answers.

At 01:49:30 Detective Nicaud asked Joshua Cumberland "why did you do it". Joshua Cumberland stated "I did not do it".

At 01:56:00 Joshua Cumberland stated he did nothing to that child, that little girl. Joshua Cumberland stated, "daddy's don't hurt, they help their little girls."

Interview concluded.

On 11-09-09 Detective Rabalais went to Children's Hospital, New Orleans. Upon arrival Det. Rabalais met with the hospital social worker, Vivian McCabe, whose phone number is 504-896-9367. McCabe briefed Det. Rabalais on what had transpired with [redacted] concerning her disclosures to her maternal grandmother, Tammera Clement. T. Clement had been sitting with [redacted] at Children's Hospital since the Clement's arrived from Kentucky. Det. Rabalais was advised that once [redacted]'s mother, Katie Cumberland left the hospital to go home and refresh herself, [redacted] began to disclose the abuse perpetrated on her by her step father, Josh Cumberland. (See Social Work Case Form with notes from Children's Hospital).

Det. Rabalais had been in contact with Jobeth Rickels, Forensic Interviewer at the St. Tammany Children's Advocacy Center. Rickels was out of town and was coordinating with the New Orleans Children's Advocacy Center to interview [redacted]. Rickels was able to secure an interview for [redacted]. [redacted] and her grandmother were transported to the New Orleans CAC by Children's Hospital Security accompanied by Social Worker Vivian McCabe. On 11-09-09 [redacted] was interviewed by Forensic Interviewer, Daniel Dooley. During the recorded interview with Dooley, [redacted] disclosed that her dad, Joshua hurts her. [redacted] stated that he does stuff to her as she pointed to her vagina. [redacted] stated that he puts stuff in her vagina and she tries to pull it out. [redacted] stated that when she tries to pull it out, Josh puts his hand on her neck and chokes her. [redacted] stated that Josh puts white "icky" stuff in her mouth and hair. [redacted] stated that the white stuff comes from his penis and has "lines" in it. [redacted] stated that Josh has put his penis in her vagina. [redacted] stated that she has seen dad do the same things to [redacted], her sister. [redacted] stated that dad's actions make her feel like she doesn't belong to the family. (See CAC video of [redacted] dated 11-09-09)

When [redacted]'s interview was completed, [redacted] and her grandmother were transported back to Children's Hospital by hospital security. Det. Rabalais returned to Slidell PD where Det. Morel was completing an affidavit for the arrest of Joshua Cumberland for Aggravated Rape of [redacted]. The aforementioned warrant was signed by Judge James Lamz On 11/09/09 at approximately 1814 hours. Detective Morel was assisted by the St. Tammany Parish Sheriff's Office Deputy Panks #2314 and Deputy Wilson #2311 with affecting the arrest of Joshua Cumberland. Joshua Cumberland was located at 1305 Springridge Circle, in Slidell. Sgt. Ohler and Sgt. McLain were also on the scene when the subject was placed under arrest. Joshua Cumberland was handcuffed, (FSDL) advised of his Miranda Rights, and transported to the Slidell Police Department. The subject was provided his Miranda Rights in written form and booked with Warrant Number 38112, relative to RS 14:42.A.4 Aggravated Rape. Joshua Cumberland invoked his rights to counsel and decided not to answer any questions or make any statements.

On 11-09-09 at 2015 hours, Detective Rabalais conducted a Consent

Search of 301 Spartan Lane, Apartment 4300. Katie Cumberland agreed and signed the Consent to Search form and was present during the search. Detective Rabalais informed Katie Cumberland what the detective was looking for, namely sex toys belonging to the Cumberlands that may have been used by Josh Cumberland on [redacted]. Katie Cumberland directed Detective Rabalais to the master bedroom where she produced a red and black container with sex toys and vibrators in it. Det. Rabalais took custody of the sex toys and Katie Cumberland signed a Return on Permission for Search and Seizure. Those items were placed into SPD Evidence for DNA analysis.

On 11-10-09 Detective Rabalais attended interviews of [redacted]'s sisters, [redacted], six years old, and [redacted], four years old, at the St. Tammany Children's Advocacy Center. Forensic interviewer, Lisa Tadlock conducted the interviews. [redacted] was the first to be interviewed. [redacted] spoke about the members of her family and identified the names of body parts using anatomical drawings. [redacted] disclosed to Tadlock that her sister, [redacted] had been hurt. [redacted] stated that she was in the living room when she heard [redacted] scream. [redacted] stated that she was watching the movie "Meet the Robinsons". [redacted] stated that her dad, Josh, went into [redacted]'s bedroom. When [redacted] asked if she could come in, dad said no. [redacted] stated, [redacted] was bleeding so dad took her pants off". [redacted] did not disclose that any abuse was perpetrated upon herself. (See [redacted] CAC video dated 11-10-09)

Lisa Tadlock then interviewed [redacted]. [redacted] likewise identified family members and body parts using anatomical drawings. [redacted] did not disclose any abuse perpetrated upon herself. (See [redacted] CAC interview dated 11-10-09)

On 11-10-09 Detective Rabalais started receiving faxed reports from Children's Hospital. These reports have been placed into SPD Evidence.

Office of Community Services (OCS) took custody the the Cumberland's children, [redacted], [redacted], and [redacted]. The children were allowed to stay with their maternal grandparents, Tammera and Thomas Clement. Katie Cumberland was not allowed to have contact with the children and found temporary residence elsewhere. The children and their grandparents were allowed to stay at 301 Spartan Lane, Apt. 4300, until OCS obtained permission to allow the children to go with their grandparents to Kentucky.

On 11-12-09 Tammera Clement contacted Det. Rabalais and advised him that [redacted] was disclosing more and more abuse to her and was now showing her items in the apartment that were used on her during the abuse. Detective Rabalais contacted Katie Cumberland and obtained a Consent to Search the 4300 apartment again. Since Katie Cumberland did not wish to return to the apartment and since she could not have contact with her children, Katie Cumberland waited at the Slidell Police Department with Detectives Davis and Tabor while Detective Rabalais executed the Consent to Search. Katie Cumberland could contact Detective Rabalais if she wished to stop the search but she did not. During the execution of the Consent Search, [redacted] showed Detective Rabalais a set of yellow and black rachetting cargo straps located next to the master bed. [redacted] showed Detective Rabalais how her dad, Josh would hook the straps to the bed frame and tie [redacted] in a spread eagle position on the bed while he would sexually abuse her. Detective Rabalais asked [redacted] if Josh had ever photographed her while these actions were taking place. [redacted] said no but he did place his laptop computer on the dresser and make a "web movie" of the incidents. That laptop computer was collected by SPD CSI and a search warrant

will be prepared to analize it. [redacted] also showed Detective Rabalais two other items, a red cylinder that was used to put in her vagina and a bottle of clear lubricant. Detective Rabalais seized said items. [redacted] then showed Detective Rabalais a purple plastic sex toy with balls of different sizes attached. [redacted] stated that the device was used to insert into her anus. Detective Rabalais seized the device as well as the red and black box that the sex toys were in. A set of handcuffs and three photographs were also given to Detective Rabalais by Tammera Clement. These items were placed into SPD Evidence.

Tammera Clement told Detective Rabalais that [redacted] was beginning to disclose abuse perpetrated upon her by Joshua Cumberland. Detective Rabalais scheduled a second interview of [redacted] and [redacted] at the St. Tammany CAC for 11-13-09.

On 11-13-09 Detective Rabalais attended the CAC interview of [redacted] [redacted] and [redacted]. Forensic interviewer, JoBeth Rickels, conducted the interviews.

[redacted] disclosed the abuse perpetrated upon her by her dad, Josh Cumberland. [redacted] referred to Josh as "booger snot". [redacted] had drawn pictures of sad children and a red "H" device that was used to insert into [redacted]'s vagina. [redacted] also drew a picture that showed different size balls that were used to sexually abuse her. [redacted] also disclosed that Josh had put his penis into [redacted]'s vagina. [redacted] said that she had seen Josh do these things to [redacted] also. (See second CAC of [redacted] dated 11-13-09)

Rickels then interviewed [redacted]. [redacted] again disclosed the sexual abuse perpetrated upon her by Josh Cumberland and also disclosed about the straps that were used to tie her to the bed during the abuse. [redacted] likewise had made drawings indicating devices used in the abuse. These drawings were placed into SPD Evidence. (See second CAC interview of [redacted] dated 11-13-09).

After the interviews, Detective Rabalais obtained a Consent to Search of [redacted] for a DNA samples. Since OCS had obtained custody of the children, Lisa M. Berman with Department of Social Services Fmily Services, signed the Consent to Search. Detective Rabalais then obtained two DNA swabs from [redacted]. The samples were placed into SPD Evidence for analysis.

After the interviews, Detective Rabalais contacted Katie Cumberland at her place of employment and explained to her that her apartment, #4300 would have to be searched again for a particular item. Katie Cumberland met Detective Rabalais at her place of employment in Covington and obtained a signed Consent to Search of Apt. 4300. Cumberland was cooperative and granted consent. When Cumberland left work she met Detective Tabor and they went to 301 Spartan, Apartment 4300 and Detective Tabor took custody of the red "H" shaped device. The device was placed into SPD Evidence.

On 11-17-09 Detective Rabalais received a copy of a correspondence from Audrey Hepburn Care Center at Children's Hospital, New Orleans, composed by Yameika Head, MD, FA AP. In the correspondence Dr. Head explains [redacted]'s injuries to her vagina and states, "The vaginal trauma seen is definitive for blunt-penetrating vaginal trauma." She also states, " The injuries seen are not characteristic with straddle injuries from falls."

The correspondence was placed into SPD Evidence.

On 11-23-09 Detective Rabalais prepared an affidavit for an arrest warrant for Joshua Cumberland for Aggravated Rape of [redacted]. Judge James Lamz signed said warrant and Joshua Cumberland was transported from St. Tammany Parish Jail to Slidell PD Jail.

On 11-23-09 Joshua Cumberland was arrested on active warrant 38219, Aggravated Rape of six year old [redacted]. Cumberland was advised of his Miranda Rights and booked accordingly.

On 12-10-09 Detective Rabalais interviewed Katie Cumberland at the Slidell Police Department. Detective Rabalais asked Katie Cumberland if she had any reason to believe that Joshua Cumberland was sexually molesting her two children, [redacted] and [redacted]. Katie Cumberland stated "no" but now in hindsight she should have realized something was wrong. When Detective Rabalais asked, " Why did she think that ", Katie Cumberland stated that [redacted] would tell her that Josh makes her eat stuff she doesn't like. Katie Cumberland stated that she knows that [redacted] is a picky eater and likes junk food and Katie Cumberland assumed [redacted] meant that Josh made her eat good food. Katie Cumberland teared up as she thought of what [redacted] may have meant.

Detective Rabalais asked Katie Cumberland about the yellow and black straps located in the master bedroom. Katie stated that they were used to tie down cargo that had been transported from Kentucky to Slidell when they moved. She stated that she had no other place to store them so she left them in the master bedroom. Detective Rabalais asked Katie if she and Josh ever used the straps as restraints during sex with Joshua. She stated "no" but they did use the handcuffs.

Detective Rabalais asked Katie Cumberland if Joshua ever asked her to have sex and have the incident broadcast on the internet. Katie stated that he did and she agreed once, but did not like it and never did it again.

Detective Rabalais asked Katie Cumberland if Joshua ever had a problem with erectile dysfunction. Katie stated that two years ago Joshua transmitted "tric" (trichomoniasis) to her during sex and they both had to be treated. Katie stated that he did have a problem with obtaining an erection during the treatment period but no problem after that. Katie stated that she has not had any problems with sexual performance by Joshua in the past two years.

Katie Cumberland told Detective Rabalais that after she was informed by the doctors at Children's Hospital in New Orleans as to the exact cause of [redacted]'s injuries, she contacted Joshua Cumberland's mother by telephone. When Katie told Joshua's mother about the allegations of sexual molestation, Katie Cumberland's heard Joshua's mother ask Joshua, "what have you done?".

Katie Cumberland also told Detective Rabalais that Joshua Cumberland worked as a youth minister in Albuquerque, NM and Robinson, TX. Katie stated that Joshua Cumberland used to use his biological father's last name, Justice, during that time. Detective Rabalais will follow up on that information.

Law Supplemental Narrative:

Supplemental Narratives

Seq Name	Date	Narrative
11 Campbell, Bobby	09:14:35 01/15/10	

CRIME SCENE UNIT

NARRATIVE:

On Saturday 11/07/09 at 0937 hours, Ofc. Culotta, Ofc. Newman and Sgt. Van Shoubrouek were called to 310 Spartan Dr. Apt. #4300 regarding a juvenile incident. The officers were advised by Slidell Police Dispatch that a subject by the name of Joshua Cumberland brought his 8 year old daughter to the ER of Slidell Memorial Hospital with a vaginal bleed. The neighbors called the police because they believed that the father, Joshua Cumberland, might have molested the child. In the meantime, the neighbor kept the subject's other two children while he took his daughter to the ER.

Ofc. Culotta went to the hospital and Ofc. Newman went to secure the residence. Upon Ofc. Culotta's arrival at the ER, he spoke to the subject, Joshua T. Cumberland, right away he began telling the officer that his 8 year old step daughter had been molested when she was 3 years of age by her real father and ever since then she has been playing with herself and sticking things inside of her vagina. The officer asked Cumberland to write a statement regarding what happened this morning and the first thing he said was, Do I need a lawyer?, The officer asked him, Do you?. At that point he stated he could not write a statement because he has some type of learning disability. Cumberland wanted to know if he told the officer what had happened could he write it down and he would sign it. The officer advised Cumberland that a detective would be there shortly and he would take a recorded statement.

Cumberland began to tell the officer what had happened, he stated he was in his room on the computer, heard a thump sound and then his step daughter, [REDACTED], screaming. He ran into her room and found her on the floor. Her 6 year old sister, [REDACTED], told him that they were jumping on the bed and [REDACTED] fell and hit the toy chest. Cumberland stated that the toy chest lid was broken off prior to the incident and one of the pointed edges was sticking up. He thinks she hit the pointed edge.

Cumberland stated he picked her up and brought her into his room and put her on his bed. He then grabbed a towel and applied pressure in an attempt to stop the bleeding. Then he took her clothes off and put her in the shower to clean her off. He stated he contacted his wife, Katie J. Cumberland, who was at work, left at 0600 hours this morning. She had their only vehicle, so he tried to get his neighbor but no one answered the door. He then went to another neighbor to help him. He then made contact with his neighbor, Samuel D. Fazzio III, who transported Cumberland and his step daughter to the ER. Fazzio's girl friend, Amy M. Boone, kept the other two children.

The ER Dr. Stafford stated the child was going to be transported to Children's Hospital in New Orleans for treatment. The ER staff stated the child came in without clothing, soaking wet wrapped in towels and bleeding profusely.

The child's mother, Katie J. Cumberland, arrived at the ER and stayed

Ex. "OBJ 3"
20-30434-645
Appx. 67

with her daughter. She was advised that a detective would want to talk to her also.

Sgt. Van Shoubrouek notified the Criminal Investigation Supervisor and a Detective was sent to the hospital. While the officer was waiting for the detective to arrive, Cumberland started talking to the officer about wanting to be a police officer at one time but he decided not to because he knew that police may have to get aggressive with suspects and he had enough of that in the military. He went on to say that he was a trainer for hand to hand combat in the military and that he was a brown belt.

Det. R. Morel arrived and the investigation was turned over to him. Crime Scene Detectives were also called out to process the residence.

Ofc. Newman arrived at the residence and secured the scene. While at the scene, Ofc. Newman took written statements from three neighbors identified as Kevin Broome, Amy Boone and Christy Seckler. All three neighbors stated Joshua Cumberland came to their residence and notified them that his child, [REDACTED], fell off her bed and hurt herself. All the neighbors advised they went to his residence to assist him and found [REDACTED] in the shower bleeding. All the neighbors advised they observed large amounts of blood on the bed in the master bedroom and on the floor leading to the master bathroom. All the neighbors stated it appeared [REDACTED] was bleeding from the vaginal area.

Ofc. Newman kept the scene secured until Det. Morel and CSSS Campbell arrived and took over the scene.

Sgt. Bobby Campbell was notified via cell phone of the investigation into a possible sexual assault incident involving a juvenile female whom was brought into the Slidell Memorial Hospital Emergency Room with apparent vaginal bleeding. Sgt. Campbell was advised that the incident possibly occurred at 301 Spartan Drive Apt. 4300 which was the residence of the juvenile female. Sgt. Campbell was advised that the juvenile was brought into the Emergency Room by the child's stepfather Joshua Cumberland.

Sgt. Campbell proceeded to the scene and observed that the apt. was secured by both crime scene barrier tape and an officer. Sgt. Campbell met with Ofc. Chris Newman whom was standing at the scene entry point (apt. front door) to keep the scene secure.

Sgt. Campbell noted that the stepfather Mr. Joshua Cumberland was present sitting on the steps outside the crime scene barrier tape. Sgt. Campbell spoke briefly with Mr. Cumberland who advised that he lives at the residence with his wife Katie Cumberland and her daughters (his step daughters). Mr. Cumberland advised that Mrs. Cumberland was at work and it was just himself and the juvenile daughters at home at the residence. Mr. Cumberland stated that he was alone in his bedroom on the computer when he heard the 8 year old stepdaughter [REDACTED] screaming. Mr. Cumberland stated that he ran to her bedroom and found her sitting on the floor crying. Mr. Cumberland stated that she was bleeding from her vaginal area. Mr. Cumberland stated that the toy chest lid was broken previously and one of the pointed edges was sticking up. Mr. Cumberland stated that she possibly struck the lid to cause the injury. Mr. Cumberland stated that he scooped [REDACTED] up and brought her to his bedroom to check the injury. Mr. Cumberland stated that he placed [REDACTED] on his bed and used a towel to try and stop the bleeding. Mr. Cumberland stated that he took her clothes off and placed her in the shower to clean her off. Mr. Cumberland stated that he ran and got a neighbor to help him with treating [REDACTED]. Mr. Cumberland stated that he [REDACTED] would not stop bleeding so a neighbor took the other daughters and sat with them while he took [REDACTED] to the hospital with another neighbor. Mr. Cumberland stated that he brought [REDACTED] into the hospital in just the towels he was using to try and

stop the bleeding. Mr. Cumberland further stated that [redacted] had been molested

by her biological father when she was 2 years old and has had a tendency to place objects into her vagina since that incident. Mr. Cumberland stated that she may have done something like that to cause this injury.

Sgt. Campbell had Mr. Cumberland walk him into the apt. and show him where he was at when he first reportedly heard [redacted] Scream and where she was at when he found her sitting on the floor.

Sgt. Campbell advised Mr. Cumberland that as part of the investigation, investigators would need the clothing he was wearing. Mr. Cumberland stated that he had done nothing wrong and would be happy to cooperate with investigators in providing anything they requested or needed. Sgt. Campbell advised Mr. Cumberland not to touch or move anything else in the residence but advised him to pick a set of clothes from his closet so he could take off the clothes he was wearing and put on another set. Sgt. Campbell stood by as Mr. Cumberland took off his clothes and left them sit on the floor in his bedroom and put on another set of clothes. Sgt. Campbell escorted Mr. Cumberland back out of the apt.

Sgt. Campbell noted that Mr. Cumberland's wife Katie Cumberland arrived at the scene and was outside the apt. Mr. and Mrs. Cumberland both advised Sgt. Campbell that there was blood on the bed which was Mrs. Cumberland's stating that they'd had sexual intercourse on the bed while she was on her period. Mrs. Cumberland also advised that she would cooperate with the investigation in every way possible.

Sgt. Campbell performed a thorough walkthru and scene survey. Sgt. Campbell noted that the apt. was obviously kept in disarray on a normal basis as it was very disorganized and dirty with dirty clothes piled up and dirty dishes everywhere. Sgt. Campbell noted spots of blood on the carpet in the hallway entering the master bathroom and on the floor in the master bathroom. Sgt. Campbell noted a white colored t-shirt on the floor in the hallway near the master bathroom entry door displaying spots of blood. Sgt. Campbell noted blood in the bottom of the tub in the master bathroom. Sgt. Campbell noted one brown towel on top of one blue towel displaying blood on the floor near the tub in the master bathroom. Sgt. Campbell noted a pair of little girls panties displaying blood on the floor in the master bathroom. Sgt. Campbell noted a pair of little girls panties laying on the floor in the master bedroom. Sgt. Campbell noted a blue colored towel laying folded up on the bed in the master bedroom. Sgt. Campbell noted spots of suspected blood on the bed in the master bedroom.

It should be noted that Sgt. Campbell observed no sheets or other bedding present on either the bed in the master bedroom or the bed in [redacted]'s bedroom. Sgt. Campbell noted sheets in the washing machine which had already been run threw a cycle and a comforter in the floor with other articles of dirty clothing on the floor next to the washing machine.

Sgt. Campbell noted that the toy box lid in [redacted]'s bedroom was sitting slightly ajar on the toy box but did not observe the pointed corner sticking up in the air as previously reported by Mr. Cumberland.

Sgt. Campbell photographed the scene exterior and interior in detail using a Nikon D100 Digital Camera.

000130

20-30434.647
Appx. 69

Sgt. Campbell performed presumptive blood tests on various suspected blood spots and determined the areas to be positive for blood.

Sgt. Campbell selected and marked various article within the scene as potential evidence. Sgt. Campbell further photographed the selected articles of potential evidence mid range and close up displaying Evidence number markers and scale where necessary. Sgt. Campbell swabbed suspected blood drops and spots from various areas.

The following is a detailed list of potential articles of evidence selected, marked, documented, photographed, swabbed and/or collected from the scene:

Exh. CS1-1 One DNA Swab of suspected blood from carpet in hallway off kitchen

Exh. CS1-2 One Hanes Size Large white t-shirt with [redacted] Kindergarten on the back. Article displays suspected blood. Article was collected from the floor in the hallway near the master bathroom. ALS Scan completed on article on 11-12-09. (See property involvement for results)

Exh. CS1-3 One DNA swab of suspected blood from master bathroom floor.

Exh. CS1-4 One swab of suspected blood from bathtub in master bathroom.

Exh. CS1-5 Two towels collected from floor in master bathroom.

(1) blue hand towel Waverly Home(Article displays suspected blood)

(1) brown large towel with blue embroidery on one end Waverly Home.

ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-6 One pair of purple and white Hanes panties Size 8 collected from floor in master bathroom. Article displays suspected blood. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-7 One striped blue/purple and white towel brand JCPenney collected from floor in master bathroom. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-8 One pair of ladies size medium black and white shorts collected from floor in master bathroom. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-9 One pair of pink and white little girl Barbie panties size 8 collected from floor in master bedroom. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-10 Suspects clothing taken off by suspect in master bedroom in officers presence and left on floor for collection. Clothing was marked and collected from floor.

(1) Pair Aeropostle mens jeans size 34/30. Article displays suspected blood.

(1) Blue colored t-shirt with Robinson Rockets printed on shirt size large.

(1) Pair mens striped boxers brand Haynes size large.

(1) Pair mens athletic shorts blue in color brand Hibbet Sports size large.

ALS Scan completed 11-12-09. (See property involvement for results)

It should be noted that one Wallet/ID holder and contents was removed from the rear pant pocket of the pants included with CS1-10. (See property involvement for list of contents contained)

Exh. CS1-11 One pair of Haynes plaid boxer shorts size large collected from floor in master bedroom. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-12 One dark blue colored large towel brand Main Stays collected from top of bed in master bedroom. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-13 One swab of unknown red colored stain from bed mattress in master bedroom. It should be noted that this substance did not test positive for blood using presumptive blood test on scene.

Exh. CS1-14 One swab of suspected blood from bed mattress in master bedroom.

Exh. CS1-15 One pair of little girls pink and white pajama pants brand Joe Boxer size 7-8 collected from floor in hallway outside bedroom number 2. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-16 Little girls clothing collected from floor inn bedroom number 2.
(1) Little girls bra with multi color print brand Mayden Farm size 30

(1) Green shirt brand George size large

(1) Green shirt brand George size large

ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-17 One wooden box top Red/Green and Gold in color collected from bedroom number 2. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-18 Bedding collected from laundry room. Bedding was reportedly rom the victim's bed in bedroom number 2 but was allegedly placed in the laundry room the night before the incident and investigation.

(1) Purple and white comforter

(1) Pink sheet

ALS Scan completed 11-12-09. (See property involvement for results)

Exh. CS1-19 One HP Pavilion DV6000 laptop wide screen computer with back label reading Product HP Pavilion DV6700

Serial number CNF8302WZV

F/N FE654UA#ABA

Sgt. Campbell advised Mrs. Cumberland that he would need to collect a sample of her DNA as she advised previously that her blood would be found on the bed in the master bedroom. Exh. DNAS-1 is two buccal swabs collected from Katie Cumberland for a DNA Sample.

Sgt. Campbell received the following articles from Det. Morel in the parking lot of the apartment complex. Det. Morel advised that he'd received these articles at the hospital. Sgt. Campbell secured the articles as potential evidence.

Exh. V-1 One blue towel (wet) brand name WalMart. Article displays suspected blood. Towel was reportedly removed from the victim at the hospital. ALS Scan completed 11-12-09. (See property involvement for results)

Exh. V-2 One large multi-colored beach towel. Towel was reportedly collected

from around the body of the victim at the hospital. ALS Scan completed

11-12-09. (See property involvement for results)

Exh. V-1 and V-2 were removed from the plastic bags they were originally packaged in at the hospital, dried and repackaged in paper bags. The following is the bags the articles were removed from and entered separately into Slidell PD Evidence.

Exh. V-1B One plastic bag which Exh. V-1 was removed from.

Exh. V-2B One plastic bag which Exh. V-2 was removed from.

The following is the digital media evidence (photographs) collected/captured by Sgt. Campbell in this case and entered into Slidell PD Evidence.

Exh. CS1-MC1CDR2 One Memorex CD-R containing 317 digital photographs of scene and related evidence.

Exh. CS1-MC2CDR2 One Memorex CD-R containing 166 digital photographs of scene and related evidence.

For further information see complete incident report, related incident reports, involvements and evidence.

DATE, TIME, REPORTING OFFICER:
Tue Feb 02 19:47:28 CST 2010
Sgt. Bobby Campbell #210

100-100

20-30434-650
Appx. 72

Law Supplemental Narrative:

Seq Name		Date	Supplemental Narratives
9 Morel, Ralph		05:17:07 11/10/09	Narrative

SUPPLEMENTAL REPORT:

On Saturday 11/07/09 at 0937 hours, the Slidell Police Department was called to 310 Spartan Dr. Apt. #4300 regarding a juvenile incident. The officers were advised by Slidell Police Dispatch that a subject by the name of Joshua Cumberland brought his 8 year old daughter to the Emergency Room of Slidell Memorial Hospital with vaginal bleed. The neighbors called the police because they believed that the father, Joshua Cumberland may have molested the child. In the meantime, the neighbor kept the subject's other two children while he took his daughter to the Slidell Memorial Hospital Emergency Room.

Officer Culotta went to the hospital and Officer Newman went to secure the residence.

Detective Morel arrived at the Slidell Memorial Hospital and located the Emergency Room Doctor, Dr. Stafford. Dr. Stafford stated the child was going to be transported to Children's Hospital in New Orleans for treatment. The ER staff stated the child came in without clothing, soaking wet, wrapped in towels, and bleeding profusely.

Detective Morel then with the step father, identified as Joshua Cumberland. Cumberland was asked if he would speak with Detective Morel in private, which he stated that he would. A digital recorder was turned on at 1110 hours. Joshua Cumberland explained that his wife's name is Katie Cumberland. He has been with his wife for approximately four years. Katie Cumberland has three girls, identified as eight year old [REDACTED], six year old [REDACTED], and four year old [REDACTED].

According to Joshua Cumberland, he advised that his wife left for work at approximately 0600 hours and that he was on his computer in his bedroom. Joshua Cumberland stated that at approximately 0800, he heard a "THUMP" and [REDACTED] "kinda screaming". Joshua Cumberland went into [REDACTED] and [REDACTED]'s bedroom to investigate. Cumberland stated that [REDACTED] and [REDACTED] were alone in the room playing prior to the incident and [REDACTED] was reportedly sleeping. Joshua Cumberland stated that [REDACTED] appeared to be "out of it" as she did in the past when she had seizures. [REDACTED] was also holding her vagina and appeared to be in pain. Joshua Cumberland advised that he did not see the incident, however he was told by [REDACTED] that she "fell". Joshua Cumberland stated that he was then told by [REDACTED] that [REDACTED] was jumping on the bed and she hit the corner of her toy box. Joshua Cumberland advised that when [REDACTED] was grabbing "down there" he could see that there was "A Little Bit Of Blood". Joshua Cumberland advised that he grabbed [REDACTED] and carried her to his bedroom and placed her on his bed. Joshua Cumberland advised that he then took her underwear off "to look at it" and placed a towel on the bleeding area because he did not know "WHAT WOULD HAPPEN...WHAT HAPPENED" (quickly correcting himself). Joshua Cumberland stated that he placed her on the toilet and then moved her to the shower and left the water run on her. (Bed, toilet, and shower were all in the master bedroom).

Detective Morel was then informed by the Slidell Memorial Hospital

00714

Ex "OBJ 4"
20-30434.691
Appx. 73

Emergency Room Doctor (Dr Stafford) that due to the injuries, the child would be sent to the Children's Hospital in New Orleans, Louisiana for treatment.

Joshua Cumberland and his wife Katie Cumberland provided verbal and written consent to search the scene of the incident. Detective Morel advised them that only one of them needed to stay with CSI Campbell during the consent search and one could follow the ambulance to Children's Hospital in New Orleans. Detective Morel met with CSI Campbell at the residence and noticed that both Katie Cumberland and Joshua Cumberland decided to stay at the residence with CSI Campbell.

Detective Morel completed a consent search form with both Katie Cumberland and Joshua Cumberland. It was immediately apparent that there was no visible blood in [REDACTED]'s bedroom, however there was blood on Joshua Cumberland's bed and a trail from the bed to his bathroom. It was also noted that there were no linens on the master bed but a lap top computer was on the bed in the master bedroom. Detective Morel decided that since there was a possibility of a crime, and Joshua Cumberland was still very cooperative, Detective Morel asked him if he would consent to a body search. Detective Morel explained that the Body Consent Search would consist to a sex crimes kit being completed by personnel from the St. Tammany Parish Coroner's Office. Joshua Cumberland agreed and the St Tammany Parish Coroner's Office was notified. Joshua Cumberland advised that he would consent for the body search, however between him and his wife, they only had one vehicle. Detective Morel offered him a ride to the Slidell Police Department to wait for the arrival of the Coroner's Office personnel.

Angel Galloway and Jillian Smith from the St. Tammany Parish Coroner's Office came to the Slidell Police Department and a written Consent For Body Search form was completed. Angel Galloway and Jillian Smith from the St. Tammany Parish Coroner's Office then conducted the body search and completed the sex crimes kit. Detective Morel took custody of the sealed sex crimes kit and submitted it into evidence.

After the consent to search was completed on Joshua Cumberland's body, Detective Morel drove him back to his apartment complex where CSI Campbell and Katie Cumberland were located.

Since CSI Campbell was still processing the scene, Detective Morel left and went to Children's Hospital. Detective Morel met with Doctor Yameika Head who is the Forensic Pediatrician at Audrey Hepburn CARE Center at Children's Hospital in New Orleans, Louisiana.

Doctor Head briefed Detective Morel of her findings and summarized [REDACTED]'s condition:

[REDACTED] was suffering from a massive amount of vaginal bleeding and may require surgical repair to stop bleeding. [REDACTED] was found to have severe vaginal trauma that consisted of multiple vaginal lacerations and abrasions. The vaginal trauma seen on [REDACTED] was definitive for blunt-penetrating vaginal trauma. The injuries were also not characteristic with straddle injuries or from falling.

On 11/07/09 at approximately 1830 hours, Detective Morel called Detective Nicaud for assistance. Detective Morel left Children's Hospital in New Orleans, Louisiana and met Detective Nicaud at the Slidell Police Department. Detective Morel briefed Detective Nicaud about the case. Shortly after Detective Morel arrived at the Slidell Police Department, Joshua

Cumberland and Katie Cumberland arrived at the Slidell Police Department as per Detective Morel's request. Detective Morel asked Detective Nicaud to sit with the victim's stepfather Joshua Cumberland while OCS Investigator Carolyn Bourque spoke with the victim's mother Katie Cumberland.

After OCS Investigator Carolyn Bourque was finished speaking with Katie Cumberland, she was released. OCS Investigator Carolyn Bourque accompanied Detective Morel to interview Joshua Cumberland with Detective Nicaud. See Detective Nicaud's supplemental report for details.

Detective Morel also notified Detective Stan Rabalais and advised him of the incident. See Detective Rabalais' case resume' for complete details.

CHILDREN'S HOSPITAL
200 Henry Clay Avenue - New Orleans, LA 70118

REPORT OF OPERATION

482

NAME:

HOSPITAL NO.: 48-89-53

DATE OF OPERATION: 11/07/09

RESIDENT:

SURGEON: Rodney B Steiner, MD

CLINICAL SUMMARY: This is an 8-year-old child who was transferred from Slidell to Children's Hospital for evaluation of sexual assault. The Children's Care Team was already involved, and we were consulted by them to do an exam under anesthesia in the operating room. The child had already had a CAT scan of the abdomen which was negative.

PREOPERATIVE DIAGNOSIS: Rule out sexual assault.

POSTOPERATIVE DIAGNOSIS: Rule out sexual assault.

PROCEDURE: Exam under anesthesia.

ASSISTANTS: Fabian Gray and Dr. Head from the Children's Care Team.

PROCEDURE IN DETAIL: The child was brought to the operating room and placed in the supine position. General anesthesia was administered. We then were able to place her in a modified frog leg position and then examined the perineum. The findings were also documented with a digital camera by the Children's Care Team. She had a small laceration posteriorly at the vaginal introitus. She also had an additional small laceration that was superficial on the right lateral aspect of the vaginal introitus. Hymen was no longer present. There was 15 to 20 cc of clotted blood within the vagina. This was evacuated and irrigation was performed. Using a small speculum that was lid, we were able to examine the vaginal orifice and the vaginal walls. I was not able to identify the cecum. Cultures and DNA were obtained by the Children's Care Team in their typical fashion. There was no deep injury to the vaginal wall, just bruising throughout the lining of the vagina on both sides. The speculum was removed. There was no evidence of any injury to the anus and the perineal body was intact. She was then awakened and taken to the recovery room in stable condition.

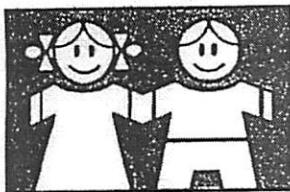
Rodney B Steiner, MD
DD: 11/08/2009 19:44
DT: 11/09/2009 00:49
793859/44076/

Ex. "OBJ 6"

REPORT OF OPERATION SECTION 4F

CC0111

20-30434-654
Appx. 76



CHILDREN'S
HOSPITAL

audrey hepburn care center
AT CHILDREN'S HOSPITAL NEW ORLEANS

November 9, 2009

To: Carolynn Bourque (St. Tammany OCS)
Detective Ralph Morel (Slidell PD)

[redacted] was seen in the Children's Hospital Emergency Room on 11/7/2009. She was transferred from Slidell Memorial Hospital with a history of vaginal bleeding. The history provided for the bleeding by [redacted] was of jumping on the bed and landing on to a toybox that occurred on 11/7/2009. No descriptive details were provided by [redacted]. History was audiorecorded in the Emergency Room.

[redacted] was suffering from a massive amount of vaginal bleeding. Many sanitary pads and underwear were soaked with blood. The CT tech stated [redacted] also had some bleeding while on the CT table. When visualizing the genital area, a large clot was seen obstructing the view of the hymen and vaginal area. Due to [redacted]'s discomfort and the inability to fully visualize the vaginal area, an evaluation under anesthesia was best. Dr. Steiner (Surgery faculty) and Dr. Gray (Surgery resident) were present for the evaluation. Trace evidence collection kit was performed.

Upon visualization of the vaginal area, [redacted] was found to have right lateral fossa navicularis laceration from the urethra to the hymen at 11 o'clock position and a hymenal laceration at the 5 o'clock position down to the vaginal mucosa. An abrasion is seen on the left and right lateral area of the fossa navicularis and an abrasion at the 6 o'clock position of the fossa navicularis. There were copious amounts of blood clot evacuated from the vaginal vault and placed into a specimen container to be placed in the trace evidence collection kit.

Laboratory studies for complete blood count, comprehensive metabolic panel, PT/PTT (bleeding studies), urine toxicology screen, vaginal and rectal cultures for gonorrhea are normal. Other culture studies are pending. The abdominal CT showed a distended vagina/uterus with fluid/blood with surrounding edema/fluid.

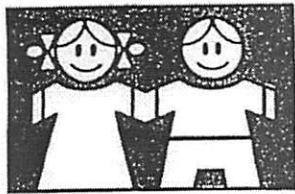
Ex. "OBJ 7"

ASSESSMENT:

[redacted] was an 8 year-old female who provided a history of jumping on the bed and falling on to a toy box.

The Regional Medical Center for Children

632161



**CHILDREN'S
HOSPITAL**

audrey hepburn care center

AT CHILDREN'S HOSPITAL NEW ORLEANS

_____ was found to have severe vaginal trauma that consisted of multiple vaginal lacerations and abrasions. The vaginal trauma seen is **definitive for blunt-penetrating vaginal trauma**. The injuries seen are not characteristic with straddle injuries from falls. The injuries seen in _____ are acute in nature and are the cause of the copious vaginal bleeding. The **vaginal bleeding was severe** enough that there was a concern for possible suturing of the vaginal laceration and blood vessel ligation. _____ also had to be placed on intravenous fluids for hydration and maintenance of fluid volume.

The ecchymosis (bruise) on the left knee and left lateral thigh are both **non-specific for abuse**.

The history provided by _____ is **not consistent** with the physical findings of severe vaginal trauma.

RECOMMENDATIONS:

Protective placement from alleged perpetrator during the investigation.

Case reported to the appropriate authorities (Detective Morel-Slidell Police Department and Carolynn Bourque- St. Tammany OCS)

Counseling as soon as possible.

Follow-up with the CARE Center in 2 weeks.

Forensic evaluation of siblings (done on 11/9/2009)

Yameika Head, MD

Yameika Head, MD, FAAP

Foyensic Pediatrician, Audrey Hepburn CARE Center, Children's Hospital New Orleans, Louisiana

Assistant Professor of Clinical Pediatrics, LSUHSC School of Medicine

IN THE INTEREST OF

PARISH OF SAINT TAMMANY

DOCKET NO.

09-15-6520

SECTION "

2009 NOV 10 P 12:00

Jim Flynn

FILED

CITY COURT OF

DEPUTY CLERK

INSTANTER ORDER

The Court, considering the sworn testimony and/or affidavit(s) submitted herein and attached hereto, and being of the opinion and confirming that at the time of the issuance of the oral instanter order, and continuing to the present: (1) an emergency situation exists; (2) there are reasonable grounds to believe that the child(ren) named herein is/are in need of care, abused or neglected;

[redacted], [redacted] and [redacted] have been placed at substantial risk of harm due to sexual abuse perpetrated on [redacted] and [redacted] by their stepfather and their mother's failure to protect them from such abuse.

(3) preventative services have been offered to no avail and/or there is substantial immediate danger which precludes the providing of preventive services as an alternative to removal of said child(ren); (4) consistent with the exigencies presented by the information provided, reasonable efforts have been made to prevent or eliminate the need for removal of the child(ren) and to make it possible for the child(ren) to return home:

Due to the emergent nature of the situation no services have been provided to this family to prevent removal of the children.

(5) it is necessary to take the child(ren) into the custody for their protection; and, (6) the continuation of the child(ren) in the home is contrary to their health, safety and welfare and it is in the best interest of the minor child(ren) to remove them temporarily from the parent(s) or caretakers,

Due to the extensive sexual abuse that the children have sustained in the home and Mrs. Cumberland's failure to protect them emotionally or physically.

IT IS ORDERED BY THE COURT that the minor child(ren)

[redacted], [redacted], and [redacted]

is/are hereby placed in the temporary custody of (pick a or b and delete the other and use Bold Print/Large Font)

the STATE OF LOUISIANA through the DEPARTMENT OF SOCIAL SERVICES, with these conditions or

restrictions: That Mrs. Cumberland is to have no

Unsupervised contact with the children, that Mr. Cumberland is to have absolutely no contact with the children, that Mrs. Cumberland is to cooperate with the OCS Foster Care program.

according to law for the purposes of placement in the least restrictive and most appropriate setting, said child(ren) to be placed together, if possible, and, if not, to be afforded reasonable contact and visitation with each other.

IT IS FURTHER ORDERED that the DEPARTMENT OF SOCIAL SERVICES furnish a report of investigation, according to law, and return same to the OFFICE OF THE DISTRICT ATTORNEY for the PARISH OF St. Tammany within fifteen (15) days of the date of the continued custody hearing:

IT IS FURTHER ORDERED that the Oral Instanter Order removing the child(ren) from the parent(s) or caretakers, issued at:

2:05 o'clock p.m. the 9th day of November 2009 is hereby confirmed.

IT IS FURTHER ORDERED that this matter be set for a continued custody hearing at:

RECEIVED

NOV 16 2009

Revised: 6/09

SAINT TAMMANY PARISH OCS

20-30434-657
Appx. 79

Ex. "OBJ 8"

Case 2:18-cv-09685-JCZ Document 9-23 *SEALED* Filed 06/20/19 Page 2 of 5
Inte. It are hereby ordered to appear.

IT IS FURTHER ORDERED that the St. Tammany Parish Sheriff's Office serve the parents with a copy of this order and/or that the Office of Community Services is to provide written notice to the parent(s) of the date, time and location of the continued custody hearing, pursuant to Children's Code Art. 619(E).

IT IS FURTHER ORDERED that the Children's Advocacy Attorney is appointed as attorney for the minor child(ren).

Slidell Louisiana, this 10th day of November, 2009

JUDGE

RECEIVED
CITY COURT OF
SLIDELL
NOV 10 P 12:00

CITY COURT OF SLIDELL
A TRUE COPY

Shirley
CITY CLERK OF CO.

Revised: 6/09

20-30434.658
Appx. 80

STATE OF LOUISIANA		JUVENILE COURT	
IN THE INTEREST OF		PARISH OF	St. Tammany
<div style="display: flex; align-items: center;"> <div style="flex: 1; border-right: 1px solid black; padding-right: 10px;"></div> <div style="flex: 1; border-right: 1px solid black; padding-right: 10px;">CITY: <u>SLIDELL</u></div> <div style="flex: 1;">STREET: <u>SLIDELL</u></div> </div>		DOCKET NO.	<u>09 JS 6520</u>
		SECTION	" "
FILED:		DEP. CLK:	<u>Chris Flynn</u>

AFFIDAVIT IN SUPPORT OF AN INSTANT ORDER

BEFORE ME, the undersigned authority, personally came and appeared

Carolynn Bourque
Child Protection Investigator

Who, after first being duly sworn, did depose and state:

1. That affiant is an employee of the Department of Social Services, Office of Community Services in the Parish of St. Tammany, State of Louisiana;

2. The affiant's responsibilities include investigating reports of possible child Abuse and/or neglect and/or of supervising families:

3. That on the 7th day of November, 2009, a report of alleged Sexual Abuse and Neglect: Lack of Supervision was received by said office concerning the following child(ren):

4. That the parents of said child(ren) are: Katie Cumberland- mother

5. That, as a result of that report, affiant conducted an initial investigation and is continuing in that investigating;

6. That, during the course of said investigation, affiant has acquired personal knowledge of the following facts:

- That Mrs. Cumberland is married to Joshua Cumberland and has been for the past 4 years.
- That Mr. Cumberland brought [redacted] to Slidell Memorial Hospital on November 7th due to extensive vaginal bleeding and claimed that she fell off her bed and landed on a toy box corner injuring herself.
- That when asked what happened at the hospital [redacted] would respond that her stepfather had to explain what happened.
- That [redacted] was transferred to Children's Hospital where she was examined and diagnosed with blunt forced penetration to her vagina that is inconsistent with falling from a bed and landing on a toy box.
- That Mrs. Cumberland had been at work during the accident but did come to Slidell Memorial Hospital to attend to her daughter but did not travel with her to Children's Hospital as her presence was needed at her home by the police.
- That Mrs. Cumberland stated she did not want to drive in New Orleans due to anxiety from the traffic in the city.
- That this family recently moved to Louisiana from Kentucky and that information has been received that the family has been involved with the Child Protection Authority in Kentucky on at least two occasions due to physical abuse allegations involving [redacted] and her stepfather, Joshua Cumberland.
- That collateral sources have stated Mrs. Cumberland 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.
- That information from collateral sources has been received that alleged a history of domestic violence between Mr. And Mrs. Cumberland while in Kentucky.

- That [redacted] has now disclosed that her stepfather has raped her on several occasions and that she has also witnessed him raping her younger sister, [redacted] and that this abuse has been going on for a long time.
- That [redacted] has been diagnosed with Asperger's Syndrome.
- That [redacted] has stated she learned that to tell her mother of Mr. Cumberland's actions has resulted in him hurting her worse.
- That [redacted] s father, [redacted] has allegedly sexually abused her when she was 2 years old and that he has a history of drug abuse, criminal activity, and is currently living in San Francisco, California. Mrs. Cumberland and collaterals have stated he has no contact with [redacted] and provides no support to her.
- That [redacted] s father is [redacted] Mrs. Cumberland has stated his last known address is in Pdudah county Kentucky. Mrs. Cumberland has stated he is not listed on [redacted] s birth certificate and that he has had no contact with her and provides no support to her.
- That [redacted] s father is [redacted] and lives in St. Louis Missouri. That he has contact with his daughter and is involved in her life. That he has provided support to her and has a good relationship with her. He was not available to assume custody of [redacted] at the time of the instanter order.

7. That there is good cause to believe that said child(ren) cannot adequately be protected from the following dangers or harms if said child(ren) remain(s) in his/her/their present situation: Mrs. Cumberland has failed to provide adequate supervision and protection For her children to protect them from exposure to abuse. She has placed them at substantial risk of Harm due to her failure to protect them from their chaotic environment.

8. (A) That the following services have been offered to prevent the necessity of removal of said child(ren), to no avail: Due to the emergent nature of this investigation no Preventative services have been provided to Mrs. Cumberland to prevent the removal of her children.

8. (B) That, alternatively, the facts alleged above indicate that there is a substantial, immediate danger to the child(ren) herein which precludes the provision of preventive services as an alternative to removal of said child(ren);

9. That, consistent with the exigencies presented by the present circumstances, there have been reasonable efforts to prevent or eliminate the need for removal of the child(ren) and/or to make it possible for the child(ren) to return home and that the continuation of the child(ren) in the home is contrary to their health, safety, and welfare and that it is in the best interest of the child(ren) to place them in the temporary custody of b) the State of Louisiana through the Department of Social Services:

10. That there is good cause to believe that the child(ren) should be removed from the parent(s) or caretakers, who may be found at 301 Spartan Dr. Apt. 4300 Slidell, LA 70458 or at any other location where the child(ren) may be found, pending the completion of this investigation or filing of reports to the District Attorney's Office, and the resolution of the case, and that an instanter order should issue herein granting the temporary custody of said child(ren) to the State of Louisiana through the Department of Social Services

RECEIVED
CITY COURT OF
SLIDELL
NOV 10 2000

11. That, should an Instant Order issue herein, the necessary steps will be taken to ensure the protection of the child(ren) in the least restrictive setting as soon as possible, to place the child(ren) together if possible to do so, and, if not, to afford reasonable contact and visitation with each other.

Carolynn Bourque
AFFIANT: Carolynn Bourque DCS,CPI
300 Covington Center
Covington, La 70433

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 10th DAY OF
November, 2009.

Jessie Flynn
NOTARY/DEPUTY CLERK

Revised June 2009

11.20
10 NOV 10 PM 2009
CLERK'S OFFICE OF
CITY OF SLIDELL



**CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF THE SECRETARY**

Steven L. Beshear
Governor

275 East Main Street, 3E-G
Frankfort, KY 40621
ph. 502.564.3834
fax 502.564.9554
www.chfs.ky.gov

Audrey Tayse Haynes
Secretary

May 30th, 2012

Claiborne W. Brown
222 N. Vermont St. Ste. 1
Covington, LA 70433

RE: Open records request— Joshua T. Cumberland

Dear Mr. Brown,

Accompanying this letter you will find the documentation that you requested. The enclosed documents have been redacted in accordance with the Kentucky Revised Statutes.

If you have any questions once you have reviewed this material, please feel free to contact this office at 502.564.3834. Thank you.

Sincerely,

Sally Ireland

Sally Ireland
Administrative Specialist III
Open Records Administrator

cc: C.O. File

Ex. "OBJ 13"

**CONFIDENTIAL SUSPECTED ABUSE/ NEGLECT, DEPENDENCY OR EXPLOITATION
REPORTING FORM**

DCBS Number: 247431

DCBS Name: Katie Williams

REPORT DATE: May 08, 2007

INCIDENT DATE(S): May 08, 2007

COUNTY OF REPORT: McCracken TIME REPORT RECEIVED: 03:00 PM REFERRAL NUMBER: 8

1. TYPE REPORT:

Child Protective Services (CPS): Yes No
 Physical Abuse Sexual Abuse Emotional Injury Neglect Dependency

Adult Protective Services (APS): Yes No
 Spouse Abuse Neglect (list type): Adult Abuse Exploitation

2. REFERRAL TRACK:CPS: FINSA INVESTIGATIONAPS: INVESTIGATION**3. Alleged Victim(s):**

Name(s)	Age	Sex	Nature of Report
	2yr	Female	Physical Abuse

4. Current Address: 622 Oakcrest Dr Paducah -

Telephone Number: 270-534-9861

5. Describe the situation that causes the reporting source to suspect abuse/neglect, dependency or exploitation and explain how they became aware of the situation. List witnesses and/or collaterals:

May 23 2007 9:31 AM - Amanda (SSWII) LeeAnnHendrix

115 states: RS states child had a linear bruise on her back last week. RS states child reports Josh hit her with a shoe. RS states child has changed from being outgoing to very distant. RS states at times child smells like urine in diaper area from not being cleaned properly. RS states mother has changed since Josh moved in. RS states daycare attendance has become sporadic. RS states child always appears hungry.

6. Describe dangerous behaviors (violence, threats/use of weapons, substance abuse issues, mental health issues etc.) by any individual that may be a threat to DPP staff:**7. Alleged Perpetrators:**

Name	Relationship	Address	County	Telephone Number
Joshua Todd Cumberland	Parent Paramour			

DCBS Number: 247431
 8 Katie Cumberland
 DCBS Name:

INV-

Josh will receive a rating of 1 based upon having PTSD with no effects on caretaking.

Parent/Caretaker	CPS Rating	CRIMINAL RECORDS CHECKED	CA/N	LINK	Comments
Katie Cumberland					
Joshua Cumberland	1	Yes	Yes	Yes	

CPS RATING
1

RATINGS/FINDINGS/DECISIONS/ACTIONS

CPS RATINGS

Maltreatment	0
Underlying Causes	4
Adult Patterns of Behavior	1
TOTAL	5

RISK ASSESSMENT CONCLUSION

High Risk (20 - 28)
 Significant Risk (14 - 19.9)
 Moderate Risk (7 - 13.9)
 Low Risk (0 - 6.9)

ASSESSMENT FINDINGS: Entered in TWIST Investigation Results Screen

Primary Individual	Other Individual	Incident	Program/ SubProgram	Supervisor Results
	Joshua Cumberland	1	Physical Abuse	Unsubstantiated

ASSESSMENT/INVESTIGATION CONCLUSION:

Nov 02 2007 3:02 PM - Amanda (SSWII) Hendrix
 Date and Time Report Received
 Date: 5-8-07 Time: 3:00 pm

Date assigned by supervisor: 5-8-07

DCBS Number: 247431
8 Katie Cumberland
DCBS Name:

INV-

Date Investigative worker received report: 5-8-07

Date and time of first attempt to make face to face contact with the victim:
Date: 5-9-07 Time: 10:30 am

Date and time face-to-face occurred with victim: (if more than one child the first child)
Date: 5-9-07 Time: 10:30 am

Date of first FSOS consultation: 5-11-07

Any other actions taken to initiate the investigation

Based upon interviews, observations, and FSOS consultation it is determined that this report of physical abuse of [redacted] by Josh Cumberland will be unsubstantiated. Katie and Josh stated that [redacted] fell off of a bounce and spin zebra toy and hit her bed frame. The pictures observed from daycare show the injury is consistent with the story. [redacted] was unable to tell worker what happened, due to the delay in reporting the incident. All children appeared clean when worker was around them. There was plenty of food in the home. An aftercare plan was devised with Katie at the 7-19-07 home visit stating: 1. Katie will make sure that physical discipline is used as a last resort, then only spanking on the bottom with hand, leaving no marks, 2. Katie will make sure the children's hygiene needs (bath/shower, clean clothes, change diapers/pull-ups when needed, etc), 3. Katie will make and keep all medical appointments for children, 4. Katie will make sure children receive medication as prescribed by physician, 5. Katie will continue to work with [redacted] on potty training, 6. Katie will maintain clean home conditions (trash taken out, dishes washed, etc), 7. Katie will make sure the children are supervised at all times, 8. Katie will make sure the children have at least 3 meals a day, 9. Katie will make sure the children's educational needs are met, 10. Katie will make sure that if the dog uses the bathroom in the home, it is cleaned up immediately, 11. Katie will treat children and home if the children get head lice. A signed copy was given to Katie at that time.

HIPAA information and a DPP-155 were given to Josh and Katie at the 5-11-07 home visit. 72 hour notifications were made to law enforcement on 5-11-07. Katie and Josh will receive written notification of the findings upon FSOS approval.

This is an abbreviated CQA.

Worker Signature _____ Date: _____
If Applicable

Supervisor Signature _____ Date: _____
If Applicable

DPP-115
(R. 10/05)
922KARS:070

COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR COMMUNITY BASED SERVICES

CONFIDENTIAL SUSPECTED ABUSE/ NEGLECT, DEPENDENCY OR EXPLOITATION
REPORTING FORM

DCBS Number: 247431

DCBS Name: Katie Cumberland

REPORT DATE: Feb 06, 2008

INCIDENT DATE(S): Feb 04, 2008
Ongoing

COUNTY OF REPORT: Marshall TIME REPORT RECEIVED: 03:00 PM REFERRAL NUMBER: 10

1. TYPE REPORT:

Child Protective Services (CPS): Yes No
 Physical Abuse Sexual Abuse Emotional Injury Neglect Dependency

Adult Protective Services (APS): Yes No
 Spouse Abuse Neglect (list type): Adult Abuse Exploitation

2. REFERRAL TRACK:

CPS: FINSA INVESTIGATION

APS: INVESTIGATION

3. Alleged Victim(s):

Name(s)	Age	Sex	Nature of Report
	4yr	Female	Physical Abuse
	6yr	Female	Physical Abuse

4. Current Address: 301 Main St., Benton, Kentucky 42025-

Telephone Number: 270-534-9861

5. Describe the situation that causes the reporting source to suspect abuse/neglect, dependency or exploitation and explain how they became aware of the situation. List witnesses and/or collaterals:

Feb 06 2008 4:47 PM - TRACY (BS-SSC1) C.ROSS
Reportedly, last Monday night [redacted] was observed with bruising from a spanking from Josh Cumberland (step-father). RS spoke to mother about this and mother was more worried that Josh Cumberland would be asked to leave the residence than the safety of her daughter. It was also reported that [redacted] had busted skin between her nose and mouth from Josh Cumberland.

KentuckyUnbridledSpirit.com

An Equal Opportunity Employer M/F/D



DCBS Number: 247431
 10 Katie Cumberland
 DCBS Name:

INV-

Family Choice of Discipline	2	<input type="checkbox"/> Low Risk (0 - 6.9)
Adult Patterns of Behavior	2	
Child Development	2	
Family Support	0	
TOTAL	13	

ASSESSMENT FINDINGS: Enter in TWIST Investigation Results Screen

Primary Individual	Other Individual	Incident	Program/ SubProgram	Supervisor Results
	Joshua Cumberland	2	Physical Abuse	Unsubstantiated
	Joshua Cumberland	1	Physical Abuse	Substantiated

ASSESSMENT/INVESTIGATION CONCLUSION:

Mar 07 2008 12:49 PM - TRACY (BS-SSC1) SIMMONS
 SSC found bruising to [REDACTED]'s upper buttocks area and photographed them.
 SSC substantiated physical abuse against Joshua Cumberland. SSC found that the injury to [REDACTED] was accidental. SSC sent 115 to BPD and Co. Attorney on 2-6-2008. New discipline practices were created with Mr. and Mrs. Cumberland to help prevent future reports. An Aftercare Plan was put into place with the family discussing discipline in the home. Upon supervisorial approval a substantiated letter will be sent to Mr. Joshua Cumberland. A copy of the letter will be sent to BPD and Co. Attorney.

The date and time report was received: 2-6-2008 @3:00pm

The date assigned by supervisor: 2-6-2008

The date investigative worker received report: 2-6-2008

The date and time of first attempt to make face to face contact with the victim: 2-7-2008 @ 10:00am

The date and time face-to face occurred with victim: 2-7-2008 @ 10:00am

The date of first FSOS consultation: 2-7-2008

Any other actions taken to initiate the investigation: none

Worker Signature _____ *If Applicable*

Date: _____

Supervisor Signature _____

Date: _____

DCBS Number: 247431
 10 Katie Cumberland
 DCBS Name:

INV-

Joshua Cumberland is a 22 year old white male. Josh is currently in training to receive his EMT license and works for Renzenberger Transport Railroad. Josh stated that he was a Marine for 2 years. He did not report any issues with drugs or alcohol, although he currently takes medication, Zoloft, for Post Traumatic Stress Disorder (PTSD) and also medication (Trazadone) to sleep at night. Josh appeared to be nervous and anxious while SSC was asking him questions. However, he was very affectionate with [redacted] as SSC observed him prepare a glass of water for the child. Josh is originally from Texas where he graduated high school. Although he is not a biological father to any of Katie's children, all three call Josh 'dad'. Josh currently has an injured shoulder from helping a neighbor doing physical labor. Josh does not like Katie's mother. He referred to her as a "bitch" during the interview. The Mainframe did not show any prior referrals in TWIST concerning Joshua Cumberland.

Parent/Caretaker	CPS Rating	CRIMINAL RECORDS CHECKED	CA/N	LINK	Comments
Katie Cumberland	1	Yes	Yes	Yes	
Joshua Cumberland	2	Yes	Yes	Yes	

CPS RATING
2

VI. CHILD/YOUTH DEVELOPMENT:

Selected Assessment Factors

Risk: Child seems fearful of adults/caregivers or has other attachment issues.

Risk: Child has exceptional needs (physical health, emotional/mental or behavioral health need).

Narrative:

Feb 12 2008 4:11 PM - TRACY (BS-SSC1) SIMMONS

DPP-115
(R. 10/05)
922KAR5:070

COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR COMMUNITY BASED SERVICES

CONFIDENTIAL SUSPECTED ABUSE/ NEGLECT, DEPENDENCY OR EXPLOITATION
REPORTING FORM

CC: Benton PD
CC: Jeff Edwards

DCBS Number: 247431

DCBS Name: Katie Cumberland

REPORT DATE: Sep 09, 2008

INCIDENT DATE(S): Sep 07, 2008

COUNTY OF REPORT: Marshall TIME REPORT RECEIVED: 11:00 AM REFERRAL NUMBER: 11

1. TYPE REPORT:

Child Protective Services (CPS): Yes No
 Physical Abuse Sexual Abuse Emotional Injury Neglect Dependency

Adult Protective Services (APS): Yes No
 Spouse Abuse Neglect (list type): Adult Abuse Exploitation

2. REFERRAL TRACK:

CPS: FINSA INVESTIGATION

APS: INVESTIGATION

3. Alleged Victim(s):

Name(s)	Age	Sex	Nature of Report
	3yr	Female	Physical Abuse

4. Current Address: 318 Main St E Benton, Kentucky 42025-
Telephone Number:

5. Describe the situation that causes the reporting source to suspect abuse/neglect, dependency or exploitation and explain how they became aware of the situation. List witnesses and/or collaterals:

Sep 09 2008 12:02 PM - Deborah (BS Soc Wk) B Richie

According to the JC-3, "Perp and victim got into an argument about the victim getting a job while driving from Paducah to Benton. All of the children were in the vehicle. Victim stopped the vehicle and told the perp to get out. The Perp said no and they started to drive again. Perp grabbed a oral syringe, no needle, and then put it down

DCBS Number: 247431
 11 Katie Cumberland
 DCBS Name:

INV-

CPS RATING
3

RATINGS/FINDINGS/DECISIONS/ACTIONSCPS RATINGS

Maltreatment	0
Underlying Causes	1
Adult Patterns of Behavior	3
TOTAL	4

RISK ASSESSMENT CONCLUSION

<input type="checkbox"/>	High Risk (20 - 28)
<input type="checkbox"/>	Significant Risk (14 - 19.9)
<input type="checkbox"/>	Moderate Risk (7 - 13.9)
<input checked="" type="checkbox"/>	Low Risk (0 - 6.9)

ASSESSMENT FINDINGS: Entered in TWIST Investigation Results Screen

Primary Individual	Other Individual	Incident	Program/ SubProgram	Supervisor Results
	Joshua Cumberland	1	Physical Abuse	Unsubstantiated

ASSESSMENT/INVESTIGATION CONCLUSION:

Oct 16 2008 4:53 PM - TRACY (BS-SSC1) SIMMONS
 SSC did not substantiate physical abuse against Joshua Cumberland. SSC concluded that this was accidental. SSC sent a 115 to Co. Attorney on 9-29-2008. The Benton Police Department already had knowledge of the incident. SSC completed an Aftercare Plan with Mr. Cumberland. It stated that: 1) Josh and Katie Cumberland will not get into any physical altercations in front of the children. 2) If a situation arises between Mr. and Mrs. Cumberland, Mr. Cumberland will try to calm the situation. Mr. Cumberland signed two copies of the plan and he was given one copy. Upon supervisorial approval, an unsubstantiated letter will be sent to Mr. Joshua Cumberland. A copy of the letter will be sent to BPD and Co. Attorney.

The date and time report was received: 9-9-2008 @ 10:01AM

The date assigned by supervisor: 9-9-2008

The date investigative worker received report: 9-9-2008

The date and time of first attempt to make face to face contact with the victim: 9-9-2008 @ 1:00PM

The date and time face-to face occurred with victim: 9-9-2008 @ 1:00PM

The date of first FSOS consultation: 9-9-2008

**CONFIDENTIAL SUSPECTED ABUSE/ NEGLECT, DEPENDENCY OR EXPLOITATION
REPORTING FORM**

DCBS Number: 247431

DCBS Name: Katie Cumberland

REPORT DATE: Jan 15, 2009

INCIDENT DATE(S): Jan 13, 2009

COUNTY OF REPORT: McCracken TIME REPORT RECEIVED: 09:46 AM REFERRAL NUMBER:
15

1. TYPE REPORT:

Child Protective Services (CPS): Yes No
 Physical Abuse Sexual Abuse Emotional Injury Neglect Dependency

Adult Protective Services (APS): Yes No
 Spouse Abuse Neglect (list type): Adult Abuse Exploitation

2. REFERRAL TRACK:

CPS: FINSA INVESTIGATION

APS: INVESTIGATION

3. Alleged Victim(s):

Name(s)	Age	Sex	Nature of Report
	7yr	Female	Physical Abuse

4. Current Address:

Telephone Number: 270-554-9544

5. Describe the situation that causes the reporting source to suspect abuse/neglect, dependency or exploitation and explain how they became aware of the situation. List witnesses and/or collaterals:

Jan 20 2009 11:00 AM - Amanda (SSWII) LeeAnnHendrix
RS advised that [redacted] was in trouble on the 13th and Mr. Cumberland jerked her up by her arm, dislocating her shoulder. Caller said mother called pediatrician and told them child fell from seizure and hurt shoulder. Child cried all night until mom took child to Lourdes for x-ray and found that child's arm had been broken. Caller advised that the mother admitted that her husband broke the child's arm and they didn't want to go to ER because people would think bad things.

6. Describe dangerous behaviors (violence, threats/use of weapons, substance abuse issues, mental health issues etc.) by any individual that may be a threat to DPP staff:

Threat of Harm

Sep 09 2008 11:50 AM - Deborah (BS Soc Wk) BRichie
Significant history with DCBS.

7. Alleged Perpetrators:

Name	Relationship	Address	County	Telephone Number
Joshua Todd	Step Father			270-722-6336

DCBS Number: 247431
 15 Katie Cumberland
 DCBS Name:

INV-

Katie Cumberland	2	Yes	Yes	Yes	
Joshua Cumberland	3	Yes	Yes	Yes	

CPS RATING
3

RATINGS/FINDINGS/DECISIONS/ACTIONS

CPS RATINGS

Maltreatment	0
Underlying Causes	4
Adult Patterns of Behavior	3

TOTAL 7

RISK ASSESSMENT CONCLUSION

<input type="checkbox"/>	High Risk (20 - 28)
<input type="checkbox"/>	Significant Risk (14 - 19.9)
<input checked="" type="checkbox"/>	Moderate Risk (7 - 13.9)
<input type="checkbox"/>	Low Risk (0 - 6.9)

ASSESSMENT FINDINGS: Entered in TWIST Investigation Results Screen

Primary Individual	Other Individual	Incident	Program/ SubProgram	Supervisor Results
	Joshua Cumberland	1	Physical Abuse	Unsubstantiated

ASSESSMENT/INVESTIGATION CONCLUSION:

Sep 14 2009 3:39 PM - Amanda (SSWII) Hendrix
 Date and Time Report Received
 Date: 1-15-09 Time: 9:46 am

Date assigned by supervisor: 1-15-09

Date Investigative worker received report: 1-15-09

Date and time of first attempt to make face to face contact with the victim:
 Date: 1-15-09 Time: 10:30 am

Date and time face-to-face occurred with victim: (if more than one child the first child)
 Date: 1-15-09 Time: 3:50 pm

Date of first FSOS consultation: 1-16-09

Any other actions taken to initiate the investigation

Based upon interviews, observations, and FSOS consultation it is determined that this report of physical abuse of [redacted] by her step-father, Josh Cumberland, will

Page 5 of 6

DCBS Number: 247431
15 Katie Cumberland
DCBS Name:

INV-

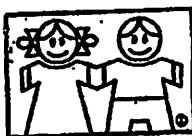
be unsubstantiated. [redacted] was receiving a spanking on the bottom and put her arm behind her to keep her bottom from being spanked. She started to have a seizure, fell forward. Josh grabbed her arm to keep her from hitting her head. He felt her arm pop. They took her to the doctor and then to the ER, where it was determined that she had a spiral fracture. Paducah Bone and Joint ordered a full body scan, which showed no other broken bones. According to the medical records, none of the physicians noted any concerns that the injury occurred the way it was reported.

HIPAA information and a DPP-155 were given to Josh Cumberland at the 1-15-09 home visit. 72 hour notifications were made to law enforcement on 1-21-09. A prevention plan was devised with Katie and Josh Cumberland at the 1-15-09 home visit (see copy in file). Josh and Katie Cumberland will receive written notifications of the findings upon FSOS approval.

This is an abbreviated CQA.

Worker Signature _____ Date: _____
If Applicable

Supervisor Signature _____ Date: _____
If Applicable



CHILDREN'S HOSPITAL

MANDATORY WRITTEN
REPORT OF ABUSE/
NEGLECT13:18
CHILDREN'S HOSPITAL
F EMR
000000

SOCIAL SERVICES DEPARTMENT • 200 Henry Clay Avenue • New Orleans, LA 70118 • (504) 896-9367 • www.chnola.org

The following information is submitted, as known, to comply with the reporting procedures as required by Louisiana Revised Statute Children's Code Article 610.

ATTENTION: OCS supervisor Kelly 985-630-7781	Slidell Police Dept (855)-643-3131
<input type="checkbox"/> Office of Community Services (in case of in home perpetrator) reported by Parish <u>St Tammany</u> Det. Morel	<input checked="" type="checkbox"/> Law Enforcement, Child Abuse Division (in case of out of home perpetrator) Parish <u>St Tammany</u> item# <u>0911-0531</u>
Date Reported: <u>11/7/09</u>	Date Reported: <u>11/7/09</u> by SMH
To Whom Reported: <u>Carolyn Fort 985-630-7785 Bourque</u>	To Whom Reported: <u>Ralph Morel 985-290-3259</u>

	Full Name/Address	Age/Dob Race/Sex		Phone#	
Patient: Address				race	sex
Mother:	Katie Cumberland			F	
Address	301 Spartan Drive				
Father: Father:	Joshua Cumberland				
Address	200 Royal same as pt				
Guardian: Address					
Siblings:				F	
Others in home:				F	

Injury: Pt admitted as "security alert" to 4th flr Dr Head (CARE) recommendation. Ret. Morel & Carolyn Fort (OCS) aware of findings in OR. Radiologist completed report. Dr. Doan, RN. Spoke to Carolyn Fort (18,27) - stated pt's stepfather (Joshua Cumberland) (21,03) (Recovery) Call from OCS supervisor Kelly Fort for mother to visit child. No 0015 Review. Call from ER that day - calling ER would not state name. Referring of pt's OCS history of abuse by step father while living in Kentucky. Dr. Morel (notified). Will take OCS plan.

Injury concerning/suggestive/definitive of abuse.

History needs to be verified.

History inconsistent with injury.

High risk injury needs additional information to rule out abuse.

Person thought to have caused/contributed to injury: Spoke to Det. Morel C. that 6 mos. call

Relationship to child: last night after

Please Do Not Hesitate to Contact me, if I can be of further assistance:

Reporter's Name: Angela Sargent RN

Position: Nursing Supervisor

SEND WITHIN 5 DAYS OF ORAL REPORT.

167 So.3d 665

Claiborne W. BROWN

v.

**The TIMES–PICAYUNE, L.L.C. and
Claire Galofaro.**

No. 2014CA0160.

**Court of Appeal of Louisiana,
First Circuit.**

Nov. 3, 2014.

[167 So.3d 666]

Claiborne W. Brown, Covington, Louisiana,
Plaintiff–Appellant In Proper Person.

Loretta G. Mince, Alysson L. Mills, New
Orleans, Louisiana, for Defendants–Appellees
The Times–Picayune, L.L.C. and Claire
Galofaro.

**Before KUHN, PETTIGREW, and
WELCH, JJ.**

KUHN, J.

Plaintiff-appellant, Claiborne W. Brown, appeals from a summary judgment dismissing his defamation suit, which he filed as a result of a headline and article written by defendant-appellee, Claire Galofaro, and published in the newspaper owned by defendant-appellee, The Times–Picayune, L.L.C. For the following reasons, we reverse and remand this matter.

***PROCEDURAL AND FACTUAL
BACKGROUND***

In November 2010, plaintiff was a criminal defense attorney practicing in Covington, Louisiana. At that time, he agreed to act as local co-counsel, together with K. James Phillips, an attorney licensed in Tennessee, in representing Joshua T.

Cumberland, who was charged with aggravated rape of his two minor stepchildren.¹ According to plaintiff's petition, he advised Mr. Phillips that he had never handled an aggravated rape case involving a juvenile, and they agreed that plaintiff would proceed "under the active supervision of Mr. Phillips."

After Mr. Cumberland's trial date was set for June 11, 2012, plaintiff advised the district attorney's office by letter dated April 12, 2012, that Mr. Phillips would be unable to attend trial on that date. On June 1, 2012, plaintiff filed a motion to continue the trial based on Mr. Phillips' inability to be present at trial due to a scheduling conflict, which the trial court denied.

On the first day of trial, plaintiff again moved for a continuance due to his inability to secure the presence of Mrs. Cumberland, the victims' mother, as a witness, as well as the lack of time for him to review adequately school records and extensive Office of Child Services records that he had only been granted access to days earlier. The trial court, noting that plaintiff had not followed the proper procedure for subpoenaing an out-of-state witness, denied the motion for continuance.

On the second day of trial, plaintiff moved for a mistrial on the grounds that he was not adequately experienced to handle the trial alone and that his representation of Mr. Cumberland was ineffective. He asserted that it had been his understanding with Mr. Phillips that plaintiff's role would only be to do the "legwork" in this matter because Mr. Phillips was the expert in this particular type of criminal case, which involved potential life sentences. Due to his co-counsel's absence, plaintiff felt that he was "winging it." Essentially, plaintiff alleged that he was incapable of providing Mr. Cumberland with an effective defense and, therefore, he refused to participate further in the trial. He advised the trial court that he was willing to accept

whatever punitive measures the court felt were necessary.

When the trial court asked plaintiff if there was any reason not to hold him in

[167 So.3d 667]

contempt of court, he replied, "No, your honor." He apologized to the trial court, but stated, "I can't continue." At that point, the trial court held plaintiff in contempt and remanded him to the parish jail until he purged the contempt by proceeding with the trial. When plaintiff failed to do so, the trial court declared a mistrial later that day.²

The next day, an article written by Claire Galofaro was published in the *Times-Picayune* newspaper with the headline: "Defense attorney **deserts** client midtrial."³ (Emphasis added.) The article identified plaintiff by name and detailed his motion for mistrial based on the assertion that he was unqualified to adequately represent Mr. Cumberland, his refusal to participate further in the trial, and the trial court holding him in contempt as a result. The article further noted the failure of plaintiff's co-counsel to appear, as well as the fact that plaintiff agreed with the opinion expressed by a consultant hired by Mr. Cumberland's family to observe plaintiff's trial performance that plaintiff was incompetent to represent Mr. Cumberland in this matter. However, the article failed to mention plaintiff's prior attempts to have the trial continued due to the inability of his co-counsel to attend trial.

Subsequently, plaintiff filed this defamation suit against defendants, alleging that the article headline was maliciously false and defamatory in the extreme. Defendants responded by filing a motion for summary judgment to dismiss plaintiff's claims, asserting that both the headline and the facts set forth in the accompanying *Times-Picayune* article were true. On that basis, defendants contend that plaintiff cannot

satisfy his burden of proving the essential element of falsity. The trial court agreed and dismissed plaintiff's suit, with prejudice. Plaintiff now appeals, arguing in three assignments of error that the trial court erred in applying a heightened burden of proof in this case and in holding that the headline and article were accurate.

DISCUSSION

On appeal of a summary judgment, an appellate court conducts a *de novo* review based on the evidence presented at the trial court and utilizing the same criteria used by the trial court in determining whether a summary judgment should be granted. *Blackburn v. Gengelbach*, 03-0739 (La.App. 1st Cir.2/23/04), 873 So.2d 713, 716, *writ denied*,04-0766 (La.5/7/04), 872 So.2d 1088. A motion for summary judgment may be granted only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).

The burden of showing that there is no genuine issue of material fact is on the movant. However, if the movant will not bear the burden of proof at trial, he need not negate all essential elements of the adverse party's claim, but he must point out that there is an absence of factual support for one or more elements essential to the claim. La. C.C.P. art. 966(C)(2).

[167 So.3d 668]

Once the movant has met his initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial.⁴ If the non-moving party fails to meet this burden, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law. La. C.C.P. art. 966(C)(2);

Schultz v. White, 10-0488 (La.App. 1st Cir.10/29/10), 50 So.3d 949, 952-953.

Because of the chilling effect on the exercise of free speech, defamation actions have been found particularly susceptible to summary judgment. *Kennedy v. Sheriff of East Baton Rouge*, 05-1418 (La.7/10/06), 935 So.2d 669, 686. Summary judgment, being favored in the law, is a useful procedural tool and an effective screening device to eliminate the unmeritorious defamation actions that threaten the exercise of First Amendment rights. *See Kennedy*, 935 So.2d at 686.

The essential elements of a defamation claim are: (1) defamatory words; (2) publication; (3) falsity; (4) malice, actual or implied; and (5) resulting injury. *Blackburn*, 873 So.2d at 716. "Defamatory words" are those that tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise exposes a person to contempt or ridicule. Whether a particular statement is objectively capable of having a defamatory meaning is a legal issue to be decided by the court, considering the statement as a whole, the context in which it was made, and the effect it is reasonably intended to produce in the mind of the average listener. *Blackburn*, 873 So.2d at 716.

In this case, defendants' motion for summary judgment is based on their contention that plaintiff cannot satisfy his burden of proving the essential element of falsity because the headline at issue, as well as the accompanying article, accurately describes plaintiff's actions and is substantially true. They argue that plaintiff's refusal to continue his participation in the

[167 So.3d 669]

trial, even after the trial court ordered him to do so, is clearly encompassed in the definition

of "desert." Defendants define the term "desert" as "to withdraw from or leave [usually] without intent to return" and "to quit one's post, allegiance or service without leave or justification." ⁵ Given this definition and the undisputed fact that plaintiff refused to continue his participation in the trial, defendants argue that "it cannot be said that the headline was not substantially true."

We disagree because our *de novo* review reveals that the trial court erred in granting summary judgment in this case. The defendants' headline proclaimed that plaintiff's client was "deserted" by his attorney, who was identified in the accompanying article as plaintiff. Beyond any doubt, an attorney's paramount duty is to his client. *Teague v. St. Paul Fire and Marine Ins. Co.*, 07-1384 (La.2/1/08), 974 So.2d 1266, 1271. Consequently, the characterization of plaintiffs conduct as a desertion of his client strikes at the very heart of his ethical duties and obligations to his client. In *Hodges v. Reasonover*, 12-0043 (La.7/2/12), 103 So.3d 1069, 1073, *cert. denied*, ----U.S. ----, 133 S.Ct. 1494, 185 L.Ed.2d 548 (2013), the Supreme Court explained the special nature of the relationship between attorney and client, as follows:

"The relation of attorney and client is more than a contract. It superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client on the basis of the strictest fidelity and honor." *Teague v. St. Paul Fire and Marine Ins. Co.*, 07-1384 (La.2/1/08), 974 So.2d 1266, 1271 (citations omitted). "In no other agency relationship is a greater duty of trust imposed than in that involving an attorney's duty to his client." *Id.* An attorney is also bound by the ethical requirements set forth in the Louisiana Rules of Professional Conduct, which have the force of substantive law.

Regardless of the dictionary definition of "desert," the extreme negative connotations resulting in this case from the use of the term "desert" in the mind of the average person cannot be overlooked. In going about his everyday activities, including reading a newspaper article, the average person does not make constant references to a dictionary. See *Forrest v. Lynch*, 347 So.2d 1255, 1258 (La.App. 1st Cir.), *writ denied*, 351 So.2d 168 (La.1977), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1612, 56 L.Ed.2d 63 (1978). In common usage, to say that someone has deserted another to whom one owes a duty or obligation is exceedingly derogatory, lowering the "deserter" in the estimation of the community and exposing him to contempt. In this case, the disparaging headline indisputably was prejudicial to plaintiff's professional reputation as an attorney as it implied that he had disregarded the interests of his client and failed in his duty of representing his client with the highest fidelity, honor, and trust, which are all essential elements of a lawyer's relationship to his client.⁶ See *Teague*, 974 So.2d at 1271.

Furthermore, the characterization of plaintiff's actions as a desertion of his client did not accurately or substantially

[167 So.3d 670]

reflect what occurred. According to plaintiff's affidavit, he had never acted as lead counsel or performed substantial work on any juvenile sexual assault cases such as the Cumberland case. Moreover, Mr. Cumberland faced multiple potential life sentences if convicted. Once plaintiff learned that co-counsel from Tennessee, who was supposed to be lead counsel, would be unable to attend the trial, he notified the state and filed a motion to continue, which the trial court denied. On the first day of trial, plaintiff again attempted to obtain a continuance based on his inexperience and his feeling incapable of acting as lead counsel in this type of trial. In denying a continuance, the trial court

specifically noted that plaintiff had failed to properly subpoena an out-of-state witness.

Rules of Professional Conduct, Rules 1.1 and 1.3 require a lawyer to "provide competent representation to a client" and to "act with reasonable diligence." *Teague*, 974 So.2d at 1271. In view of these duties, plaintiff was faced with a quandary when the trial court denied his motions for continuance. In view of his inability to perform at the level required of lead counsel, his lack of experience in sexual assault cases involving juveniles, and the potential life sentences Mr. Cumberland faced if convicted, plaintiff concluded he could no longer provide his client with competent representation. Mindful of his paramount duty to his client, plaintiff refused to participate further in the trial, even knowing that he could be held in contempt of court, jailed, and sanctioned for refusing to do so, all of which actually occurred. Under these circumstances, it is clear that rather than *deserting* his client as stated in the *Times-Picayune* headline, and further implied throughout the article, plaintiff's actions actually were an attempt to protect his client's interests and to adhere to the paramount fiduciary duty he owed to his client under the Rules of Professional Conduct. Hence, it was grossly inaccurate and defamatory for the headline to characterize plaintiff's conduct as a *desertion* of his client.

Based on our review, we find that plaintiff has produced sufficient evidence to demonstrate he will be able to prove the element of falsity at trial. Accordingly, the trial court erred in granting summary judgment dismissing plaintiff's suit.

CONCLUSION

For the above reasons, we reverse the summary judgment granted by the trial court in favor of defendants-appellees, The Times-Picayune, L.L.C. and Claire Galofaro, and against the plaintiff-appellant, Clarence W. Brown, dismissing plaintiff's defamation suit.

This matter is remanded to the trial court for further proceedings consistent with this opinion. All costs of this appeal are assessed to defendants-appellees.

REVERSED AND REMANDED.

Notes:

1. The mandatory penalty for aggravated rape is life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. La. R.S. 14:42(D).

2. Subsequently, the trial court sentenced plaintiff for his contempt to two hours in parish jail (the amount of time he had already served), placed him on six months supervised probation, and ordered him to pay \$1,559.17 for jury and court expenses related to the mistrial, as well as the monthly fee for his probation.

3. According to plaintiff's petition, the article was also published on the *Times-Picayune*'s website with the slightly different headline: "St. Tammany Parish Attorney Deserts Rape Suspect Mid Trial."

4. In brief, plaintiff contends that the trial court erred in applying a heightened burden of proof to him, because the jurisprudence imposing such a burden on defamation plaintiffs was legislatively superseded by the enactment of La. C.C.P. art. 971, which provides for a special motion to strike in defamation cases. Article 971 was enacted in 1999 as a procedural device to be used early in legal proceedings to screen out meritless claims brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. *Lamz v. Wells*, 05-1497 (La.App.

1st Cir.6/9/06), 938 So.2d 792, 796. In this case, defendants chose not to file a motion to strike under Article 971. In any event, the burden of proof applied by the trial court is irrelevant in light of this Court's *de novo* review of the defendants' motion for summary judgment. Nevertheless, plaintiff is correct (albeit on different grounds) in asserting that a defamation plaintiff, in order to survive a motion for summary judgment, is no longer required to produce evidence of sufficient quality and quantity to demonstrate that he likely will be able to meet his burden of proof at trial with convincing clarity. In *Kennedy*, 935 So.2d at 686 n. 17, the Supreme Court explained that:

In *Sassone v. Elder*, 626 So.2d 345 (La.1993), we held that the summary judgment standard is different in defamation cases than in other cases; in order to survive a motion for summary judgment, a defamation plaintiff must produce evidence of sufficient quality and quantity to demonstrate that he likely will be able to meet his burden of proof at trial.

Since our decision in *Sassone*, the legislature has amended the summary judgment articles, 1996 La. Acts, 1st Ex.Sess., No. 9, with the result that summary judgment is now favored, thereby eliminating the need for courts to impose a different summary judgment standard in defamation cases. Nevertheless, the considerations that make defamation actions particularly susceptible to summary judgment remain the same.

5. This definition is derived, in part, from the definition of "desert" quoted in plaintiff's petition and attributed to Webster's Dictionary. The full definition is delineated by plaintiff as follows:

1. to withdraw from or leave [usually] without intent to return 2. a: to leave in the lurch < ~ a friend in trouble > b. to abandon (military service) without leave ~ *vi*: to quit one's post, allegiance, or service without leave or justification; [*especially*]: to absent oneself from military duty without leave and without intent to return.

6. The use of the term “desert” arguably could be construed as being defamatory *per se* since by its very nature it tends to damage plaintiff’s professional reputation, even without considering extrinsic facts or surrounding circumstances. When a plaintiff proves publication of words that are defamatory *per se*, the essential elements of falsity and malice (or fault) are presumed, although the presumption may be rebutted by the defendant. Further, the element of injury may also be presumed. See *Costello v. Hardy*, 03–1146 (La.1/21/04), 864 So.2d 129, 140; *Hornot v. Cardenas*, 07–1489 (La.App. 1st Cir.6/20/08), 2008 WL 2484913 (unpublished), *writ denied*,08–2131 (La.9/26/08), 992 So.2d 996, *cert. denied*,556 U.S. 1105, 129 S.Ct. 1584, 173 L.Ed.2d 676 (2009). It is unnecessary, however, to determine this issue since summary judgment was inappropriate herein regardless of whether the headline is defamatory *per se* or merely susceptible to a defamatory meaning.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOSHUA CUMBERLAND	*	CIVIL ACTION NO.: 18-cv-9685
	*	
Petitioner	*	
	*	
Versus	*	SECTION: "A"
	*	JUDGE: Jay C. Zainey
	*	
DARREL VANNOY, Warden	*	
	*	
	*	MAGISTRATE: (3)
	*	Magistrate Michael B. North
Respondent	*	
	*	

SUPPLEMENTAL AND AMENDING PETITION FOR WRIT OF HABEAS CORPUS

NOW INTO COURT, through undersigned counsel, comes petitioner, **Joshua Cumberland**, and submits, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, this Supplemental and Amending Petition for Writ of Habeas Corpus in the above captioned matter. Petitioner notes that his original Petition for Writ of Habeas Corpus, filed on October 18, 2018, contained four independent claims for relief. R. Doc. No. 3. Petitioner herein re-avers and re-asserts the contents of the original Petition for Writ of Habeas Corpus as if copied herein *in extenso*. Petition herein asserts the following additional averments and claims for relief:

I. FACTUAL AND PROCEDURAL BACKGROUND:

Petitioner, Joshua Cumberland, stands 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). These charges stem from a November 7, 2009 incident where WD, was brought to Slidell Memorial Hospital with vaginal bleeding. Ex. "OBJ 2" at p.1. 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. Ex. "OBJ 5". 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. State Court Record ("SCR") at pp. 1408- 09, 1412, 1416-17 (Jan. 30, 2013 testimony of RC); Ex. "OBJ 2" at p.9; "OBJ 14" at p.9. At approximately 7:50 a.m., WD began screaming from her bedroom. SCR at pp. 1408-09, 1412, 1416-17 (Jan 30, 2013 testimony of RC); Ex. "OBJ 2" at p.9. 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.* (Jan 30, 2013 testimony of RC). Due to the configuration of the apartment, a person in the master bedroom could not access another bedroom without traveling through the living room. SCR at p.785:6, 27-29; Ex. "OBJ 1". In other words, petitioner was not in even in the room when WD was injured on November 7, 2009. *Id.* (Jan 30, 2013 testimony of RC). Seeing that the injury was to the vaginal area and not wanting to touch that area, petitioner sought assistance from his neighbors.

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. SCR at p.86:13 (Jun 12, 2013 testimony of A. Fazzio). After being contacted, SPD sent their crime scene investigator ("CSI"), Det. Bobby Campbell, who collected evidence and took photographs. Ex. "OBJ 3". The photographs taken of the apartment, included photographs of the master bathroom with blood in the bathtub. Ex. "OBJ 3"; "OBJ 9"; "OBJ 10"; "OBJ 12". Also photographed was the master bedroom and bed, which had no sheets on the bed but had apparent old blood stains on the mattress, an apparent "fresh" bloodstain on the

mattress, and a small apparent 3 finger bloodstain on a pillow. Ex. "OBJ 9". Despite the initial horrifying 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. Ex. "OBJ 3" at p.5; "OBJ 10". The apparent bloody fingerprints on the pillow were apparently not tested, nor were they even marked with an evidence marker. Ex. "OBJ 10". As for the stains that were positive for blood, Katie Cumberland explained to the CSI that the blood was hers. Ex. "OBJ 3" at p.3.

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. Ex. "OBJ 2" at p.3. 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. Ex. "OBJ 14", "OBJ 15". 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. Ex. "OBJ 6". Dr. Steiner's report also made the following rather cryptic statements:

PREOPERATIVE DIAGNOSIS: Rule out sexual assault.

POSTOPERATIVE DIAGNOSIS: Rule out sexual assault.

Ex. "OBJ 6." In fairness, due in large part to this cryptic phraseology, Dr. Steiner's report arguably is inconclusive that 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 and an intact hymen. Ex. "OBJ 16".

WD was interviewed by Dr. Yamieka Head, with Children's Hospital, on November 7, 2009. Ex. "OBJ 15". WD initially told the story that she had hurt herself jumping onto an open toy box from her bed, but then indicated that she had placed something in her vagina. Ex. "OBJ

15" at p.4. This statement was corroborated by her mother, Katie Cumberland, who gave an interview to Det. Morel of the SPD that WD had a history of placing objects in her vagina and that she had done this recently. Ex. "OBJ 5". In records from the Kentucky Cabinet for Health and Family Services ("KyCHFS"), WD also had a history of suffering from petit and grand mal seizures. Ex. "OBJ 13" at pp. 40-41, 46. In a previous claim made by petitioner's mother in law, Tammera Clement, against petitioner; WD was noted to have sustained an injury to her arm when she suffered a seizure and was grabbed by the arm to prevent her from falling. Ex. "OBJ 13" at p.46.

On November 9, 2009, Dr. Head interviewed RC. Ex. "OBJ 14". RC relayed only being touched inappropriately (kicked in the groin) by a fellow classmate. *Id.* at pp. 4-5. When asked about her anatomical knowledge, she indicated that she thought boys also had vaginas. *Id.* at p.4.

However, on November 7, 2009 at approximately 11:00 pm, Katie Clement called her mother, petitioner's mother in law, Tammera Clement, who lived in Paducah, Kentucky, and told her about the injury to WD. SCR at p.879:18. Tammera Clement then called Children's hospital and told them that petitioner had previously been involved in abuse of WD. "OBJ 17" at p.1. Mrs. Clement and her husband left Paducah at approximately 2:00 a.m. on November 8, 2009, then drove straight to Children's Hospital, where she visited with WD for approximately three hours on November 8, 2009. SCR at pp. 879-880.

Coincidentally, Dr. Steiner's report notwithstanding, an individual who participated, but did not conduct the examination, Dr. Yamicika Head (who had also conducted interviews of WD on November 7 and with RC on November 9), also issued a "report", dated November 9, 2009, which she sent to SPD and Covington OCS. Ex. "OBJ 7". According to this report in which she indicated that she conducted the examination (Dr. Steiner was "present" for the examination), *id.*

at p.1, Dr. Head stated that the injury to WD was “definitive for blunt penetrating vaginal trauma”, *id.* at p.2. 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 Mrs. Clement, WD disclosed that petitioner had sexually assaulted her. Ex. “OBJ 17” at pp. 5-6. 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). Ex. “OBJ 8” at p.1. Unsupervised custody of the children, as well as unrestricted access to the Cumberland’s apartment (the purported crime scene) was given to Mrs. Clement and her husband. Ex. “OBJ 2” at p.9.

From that time, not surprisingly, WD, as well as RC, provided disclosures of instances of continuous and pervasive sexual assault perpetrated by petitioner. Ex. “OBJ 2” at pp. 9-11. 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* Exs. “OBJ 2”; “OBJ 17”. The magnitude of the falsity of the allegations can be illustrated with the statement of RC, who goes from stating that she thinks both boys and girls have vaginas, Ex. “OBJ 14” at p.4, to accusing petitioner of

“put[ting] his penis (child word) in her vagina (child word)”, Exs. “OBJ 2” at p.10; “OBJ 13” at p.9.

In conjunction with Mrs. Clements seemingly daily reports of new and more alarming instances of disclosures of purported sexual assaults committed by petitioner; the neighbors, who had been in petitioner’s apartment for over 90 minutes prior to calling the police, also produced a video of the apartment, purportedly taken during that time, documenting part of their “investigation” of the circumstances of the November 7, 2009 incident. SCR at p. 790-91; Ex. “OBJ 11”. In the video, the spot on the mattress showing the “fresh” bloodstain (the stain that tested negative for blood in the presumptive testing by CSI) appears “wet” and more pronounced. Ex. “OBJ 11”. Additionally, the blood spot in the bathtub likewise appears more pronounced. *Id.* However, the video shows that the bathtub is dry, whereas the photographs taken by CSI show water spots in the tub; definitively establishing that the video was taken well after the CSI photos, further establishing an attempt by the neighbors, and potentially Mrs. Tammera Clements, to obstruct justice in violation of La. R.S. 14:130.1(A)(1)(a). *Compare* Ex. “OBJ 11” *with* Ex. “OBJ 12”.

These potential instances of evidence tampering are particularly relevant regarding purported sex toys found in petitioner’s master bedroom (which toys Katie Cumberland admitted where hers and petitioner’s). Ex. “OBJ 2” at p.9. A DNA test of the various sex toys, conducted, revealed the DNA of RC on one of the sex toys, SCR at 1714, though Det. Stan Rabalais admitted that RC touched all of the sex toys prior to his taking possession of them and that nothing was done to prevent contamination prior to testing, SCR at pp. 1698-1700. In any event, no DNA of WD was found on any of the sex toys. SCR at 1712-1716.

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, accused specifically provided “[t]hat collateral sources have stated Mrs. Cumberland 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.” Ex. “OBJ 8” at p.3. Interestingly, on December 10, 2009, Katie Cumberland was interviewed by Det. Stan Rabalais of the SPD regarding the allegations. Ex. “OBJ 2” at p.11. Notwithstanding the assertions of Ms. Bourque contained in the instanter order, Ms. 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.*

The trial of this matter was originally scheduled for June 11, 2012. SCR at pp. 593-705. During the trial, undersigned counsel was able to establish, through cross examination of one of the neighbors, Mrs. Amy Fazzio, that the neighbors waited over 90 minutes to call the police, during which time prior to that call they were in the apartment and supposedly taking a video of the apartment. SCR at pp. 789 – 791. However, 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. *See Brown v. Times Picayune, LLC*, 14-160 (La. App. 1 Cir. 11/3/14), 167 So. 3d 665-66. 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. *Id.* As a result, undersigned

counsel refused to continue the trial, resulting in a mistrial, a contempt of court violation¹ and termination of undersigned counsel's involvement in the remainder of this case on the state court level. *Id.* at 666-67.

Trial of this matter resumed on January 28, 2013. During this trial, the neighbors' video, while briefly referenced, was not produced and explained to the jury. SCR at pp. 1208-19. Likewise, the 90 plus minutes in which the neighbors were in petitioner's apartment prior to calling the police, was not elicited through testimony. *Id.* Furthermore, 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. *See* SCR at pp. 98-118. Additionally, while several areas of testimony were not developed, the defense did attempt, and was denied the opportunity to introduce the report of Ms. Elizabeth Hooker, a therapist who had interviewed WD and RC and noted an opinion that they had been "coached". SCR at pp. 910-12.² Finally, and most significantly, as in the initial trial on June 11, 2012, Mrs. Katie Cumberland was not present and did not present any testimony, and the horribly prejudicial photographs of the master bedroom, with the mattress and pillow, were introduced

¹ 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 the situation that required the action was entirely of his own making; and 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. As part of his continuing self imposed penance, undersigned counsel issues this type of on the record apology in any forum for which the incident is required to be raised.

² With regard to any reports or statements of Ms. Hooker, undersigned counsel is not in possession of any such report, but is generally aware of her statement by virtue of the trial transcript of this matter. Petitioner avers that, to the extent that Ms. Hooker's report was proffered into the record of this matter, that report must be submitted to this Court and tendered to petitioner herein.

into evidence without any qualification as to the testing of the stains by CSI. SCR at pp. 98-118, 1237-1291. 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). R. Doc. No. 14 at p.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). *Id.* at p.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 Appeals. *Id.* at pp. 7-8. From there, the statutory limitations period expired on December 6, 2017. *Id.* at p.10.

However, as acknowledged by the State and the Magistrate Judge, petitioner "learned about the omission and denial in May 2018, after he wrote counsel a letter in April 2018 to obtain a status update." R. Doc. No. 14 at p.5. 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 this current application with this Court. *Id.*

II. ADDITIONAL CLAIMS FOR RELIEF:

A) Additional Claim/Actual Innocence Predicate No. 1: Violation of Due Process Clause of the 14th Amendment: Failure to Provide Exculpatory Evidence Under *Brady v. Maryland*, 373 U.S. 83 (1963):

First of all, in failing to produce the November 7, 2009 physical examination photographs, the State of Louisiana violated its duty under the Due Process Clause of the 14th Amendment to provide the petitioner access to any and all exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* jurisprudence requires the production of exculpatory evidence to the defense, regardless of whether it is specifically requested. *United States v. Bagley*, 473 U.S. 667, 682 (1985). As mentioned above, petitioner is not in possession of the photographs in question, nor has petitioner ever been granted access thereto. Respectfully contrary to the assertion contained within the Supplemental Report and Recommendations, R. Doc. No. 31, p.20, the Steiner report of the November 7, 2009 physical examination invites the interpretation, based on the phraseology “Preoperative Diagnosis: Rule out sexual assault; Postoperative Diagnosis: Rule out sexual assault”, invites the interpretation that Dr. Steiner, the physician who actually performed the examination, concluded that there was, at least, a substantial probability that WD’s injuries were NOT caused by sexual assault. This is strongly indicative of the potential that the photographs are substantially exculpatory and, as such, the failure of the State to provide access to the petitioner constitutes a violation of Due Process under *Brady*.³

³ On this point, petitioner objected to the Supplemental Report and Recommendations of the Magistrate Judge on the basis that the Supplemental Report and Recommendations erroneously concluded that Dr. Steiner’s report did not result in a definitive finding of sexual assault. R. Doc. No. 31, p.20. In fairness, in preparation of this pleading, undersigned counsel discovered that petitioner had represented, in his objections to the initial Report and Recommendations, that “[u]ltimately, Dr. Steiner’s report was inconclusive as to the nature of the injuries as being associated with any sexual assault.” R. Doc. No. 19, p.4. For clarification, petitioner objects to

Furthermore, to the extent that the respondent would now claim that the November 9, 2009 examination photographs are unavailable, this Court should apply the adverse presumption rule against respondent in this matter. In criminal cases, an appellant is deprived of his due process rights based on the state's failure to preserve potentially exculpatory evidentiary material where bad faith is demonstrated. *U.S. v. Rodriguez-Sanchez*, 17-50338, p.13 (5th Cir. Jul. 23, 2018); *see Arizona v. Youngblood*, 488 U.S. 51 (1988). In this case, the State had access to the November 7, 2009 examination photographs where the petitioner had not. R. Doc. No. 31, p.18. Furthermore, the State's explanation for not affording access of these photographs to the petitioner is the application of amorphous "federal privacy law". *Id.* This explanation by the State is simply unacceptable and is indicative of bad faith on its part. To the extent that the respondent would claim that the photographs are unavailable, the adverse presumption should apply and the petitioner is entitled to habeas corpus relief based on the application of that presumption.

the Supplemental Report and Recommendations to the extent that it found that Dr. Steiner concluded that his own findings were not definitive, thereby minimizing the impact of Dr. Steiner's examination with respect to petitioner's actual innocence claim. Petitioner's prior statement regarding the characterization of Dr. Steiner's report as "ultimately . . . inconclusive" was due to the ambiguity of the phraseology of the report, which could be interpreted as a definitive finding (or, at least, a strong probability) that the injuries were NOT caused by sexual assault. The basis of the point of objection was that, at a minimum, more evidence and testimony are needed to resolve the ambiguity, and the Magistrate Judge's recommendation of a summary dismissal with prejudice under those circumstances are not warranted. Having said that, undersigned counsel's statement on page 4 of the Objections to the initial Report and Recommendations is, admittedly, woefully lacking in precision for which undersigned counsel hereby apologizes to the Court.

B) Additional Claim/Actual Innocence Predicate No. 2: Violation of Due Process Clause of the 14th Amendment: Knowing Submission of False and Material Evidence by the State of Louisiana:

In light of the November 7, 2009 photographs of the physical examination of WD, and the conclusion of the Steiner report, the subsequent report of Dr. Head and her supporting testimony changing the conclusion from “Postoperative Diagnosis: Rule out sexual assault”, Ex. “OBJ 6”, to “definitive for blunt-penetrating vaginal trauma”, Ex. “OBJ 7”, was materially false. Additionally, coupled with the fact that the State had been provided access to the November 7, 2009 photographs, but had failed to introduce them or even permit petitioner access to them, it is clear that the State was aware that Dr. Head’s report and testimony were false. The submission of Dr. Head’s Report and testimony violated Petitioner’s due process rights under the 14th Amendment to be free from the knowing submission of false material evidence in a criminal prosecution against him (which right not only confers a non-waivable duty upon the prosecutor not to knowingly offer false material evidence, but an equally affirmative non-waivable duty to correct such an error when discovered). *See U.S. v. Mason*, 293 F.3d 826 (5th Cir. 2002).

C) **Supplemental Claim/Actual Innocence Predicate No. 3: Violation of Due Process Clause of the 14th Amendment: Witness Intimidation: K. Cumberland:**

Petitioner has established through a proffer of evidence, uncontested by the respondent, that as of the initiation of the events of the prosecution against petitioner, his wife, K. Cumberland, was a potential source of substantial exculpatory testimony as to several relevant areas. As mentioned previously, K. Cumberland significantly neutralizes the impact of several highly prejudicial photographs of the master bedroom by asserting that the bloodstains visible on the bed came from her. Ex. “OBJ 3” at p.3. K. Cumberland also provided an exculpatory statement in that she told Det. Morel in a recorded interview about WD’s penchant for placing objects in her vagina (significantly corroborating a “pre Tammera Clement” admission by WD to Dr. Head on November 7, 2009). Ex. “OBJ 5”. Additionally, K. 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. *See* Ex. “OBJ 13” at pp. 41, 46, 47. Finally with regard to the records of the Kentucky Cabinet for Health and Family Services (“KyCHFS”), K. Cumberland was also in a position to testify to the fact that she and petitioner were investigated no less than 4 times by KyCHFS between May 8, 2007 and January 15, 2009, which agency failed to even suspect, let alone substantiate, ANY instances of sexual abuse. *Id.*

However, as shown by the instanter order of November 10, 2009, K. Cumberland had custody of her children taken away from her and was specifically threatened with potentially being charged as an accomplice with the sexual abuse of her own children, WD and RC. Ex. “OBJ 8” at p.3. The fact that Katie 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 intimidated from testifying on petitioner’s behalf.

At best, these actions are indicative of not only a violation of the Due Process Clause of the 14th Amendment, but also a violation of the Compulsory Process Clause of the 6th Amendment in functionally depriving petitioner of Katie Cumberland's favorable testimony.

D) **Additional Claim/Actual Innocence Predicate No. 4: Violation of 6th Amendment: Right to Effective Assistance of Counsel under *Strickland v. Washington*, 466 U.S. 668 (1984):**

Finally, to the extent that petitioner's trial counsel and state post conviction relief counsel failed to preserve, in any form or fashion, Supplemental Claims 1-3, said failures, in light of the record, constitute a violation of petitioner's 6th Amendment right to effective assistance of counsel as recognized in the case of *Strickland v. Washington*, 466 U.S. 668 (1984) and made applicable to deficiencies in state post conviction relief proceedings under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

Petitioner's assistance of trial counsel and state post conviction counsel was also constitutionally ineffective under *Strickland* due to the following additional, non exclusive deficiencies:

- 1) failure to address the highly prejudicial photographs of the master bedroom to address the appearance of a bloody child size handprint on the pillow (which was not blood or even marked as blood by Det. Campbell) nor the bloodstains, which had been identified by K. Cumberland as being her blood;
- 2) failure to introduce the records of the Kentucky Cabinet for Health and Family Services ("KyCHFS"), which, in conjunction with the testimony of K. Cumberland would have further rebutted the testimony of Tammara Clement and established that petitioner was, in fact, investigated no less than 4 times by KyCHFS between May 8, 2007 and January 15, 2009, which agency failed to even suspect, let alone substantiate, ANY instances of sexual abuse;
- 3) failure to address the contamination of the alleged crime scene by petitioner's neighbors, who were in the apartment for approximately 90 minutes prior to contacting

the Slidell Police Department; particularly, failure to introduce the video taken by the neighbors, taken AFTER the initial crime scene investigation of Det. Campbell, establishing the clear intent of the neighbors (and potentially Tammara Clement) to contaminate said alleged crime scene.

4) in conjunction with the failure to raise or address the State's apparently successful efforts to intimidate K. Cumberland as a witness, failure in any event to obtain K. Cumberland as a witness and call her to testify, regardless of whether done against her volition and with the potential that she may be a hostile witness.

E) Additional Claim No. 5: Actual Innocence of Petitioner:

The petitioner is actually innocent of the crimes of which he has been convicted in this case, per the Supreme Court case of *Schlup v. Delo*, 513 U.S. 298 (1995), which provides that a claim of actual innocence (which is not subject to the timeliness requirements of 28 U.S.C. § 2254) provides a gateway to habeas corpus relief where the claim is 1) predicated on constitutional error; and 2) supported by “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.

In the extant case, the petitioner’s actual innocence claim is supported by the initial Claims Numbers 1 through 4 as asserted in his original Petition for Writ of Habeas Corpus, R. Doc. No. 3, as well as his Additional Claims Numbers 1 through 4. herein. Additionally; petitioner can point to several items of significant evidence that were 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. The “new reliable evidence” is as follows:

1) November 7, 2009 photographs of physical examination of WD: As previously discussed, a physical examination of WD was conducted on November 7, 2009 by Dr. Rodney Steiner, during which photographs were taken. These photographs were not provided to petitioner (nor was access granted thereto) and were subsequently not introduced into the petitioner’s trial of this matter (the unavailability of these photographs for trial is the subject of Additional Claims Numbers 1, 2, and 4). Dr. Steiner’s report of the examination specifically provided that the examination revealed only “superficial” lacerations, with some bruising of the vaginal wall; and vaguely indicated that Dr.

Steiner's concluded that WD's injuries were inconclusive for sexual assault (though it could be potentially interpreted to state that sexual assault was "rule[d] out" as a cause of WD's injuries), Ex. "OBJ 6". Petitioner avers that, based upon the nature of Dr. Steiner's report, the photographs of this examination will show definitively that sexual assault was NOT the cause of WD's injuries.

2) Testimony of Dr. Rodney Steiner: Dr. Rodney Steiner was the physician who conducted the physical examination of WD on November 7, 2009, from which several photographs were taken. Dr. Steiner was not called to testify at the petitioner's trial of this matter and was effectively unavailable due to the failure of the State of Louisiana to produce the photographs of the November 7, 2009 physical examination of WD (the unavailability of Dr. Steiner for testimony at petitioner's trial is the subject of Additional Claims Numbers 1, 2, and 4). Petitioner avers that, based upon the nature of Dr. Steiner's report and the anticipated nature of the photographs, Dr. Steiner would have, at a minimum, provided compelling testimony that sexual assault was NOT the cause of WD's injuries.

3) Video of apartment purportedly taken by neighbor: As noted above, petitioner obtained a copy of a video provided to the Slidell Police Department purportedly depicting the apartment in a state prior to arrival of SPD to secure the crime scene. Ex. "OBJ 11". Although this video was in petitioner's possession prior to trial, it was not introduced at trial by petitioner's counsel at the time and was therefore not available to petitioner at the trial of this matter (the unavailability of this video is the subject of Additional Claim Number 4). The video establishes conclusively that the petitioner's neighbors, who were in the apartment for approximately 90 minutes prior to contacting

SPD, attempted to contaminate the scene and falsify evidence that would be prejudicial to petitioner's case. *Compare* Ex. "OBJ 11" *with* Ex. "OBJ 12".

4) Records of the Kentucky Cabinet for Health and Family Services ("KyCHFS"):

Prior to the trial of this matter, petitioner did obtain records of KyCHFS pertaining to prior complaints and investigations of petitioner with respect to his minor stepchildren, which investigations took place between May 8, 2007 and January 15, 2009. That possession notwithstanding, these records were not introduced at trial by petitioner's counsel at the time and were therefore not available to petitioner at the trial of this matter (the unavailability of these records is the subject of Additional Claim Number 4). These records show that, between May 8, 2007 and January 15, 2009, petitioner was investigated no less than 4 times by KyCHFS, which agency failed to even suspect, let alone substantiate, ANY instances of sexual abuse.

5) Testimony of K. Cumberland: as established above, K. Cumberland, the wife of petitioner at the time of the alleged crimes for which petitioner was convicted, was and is an essential witness who would provide exculpatory testimony as to several key points. First, K. Cumberland significantly neutralizes the prejudicial impact of the master bedroom photographs by asserting that the blood on the bed came from her. Ex. "OBJ 3" at p.3. K. Cumberland also provided an exculpatory statement in that she told Det. Morel in an interview about WD's penchant for placing objects in her vagina (significantly corroborating a "pre Tammera Clement" admission by WD to Dr. Head on November 7, 2009). Ex. "OBJ 5". Additionally, Katie Cumberland also was in a position to provide additional material testimony as to Tammera Clement's prior history of falsely accusing petitioner with abuse (as noted in the KyCHFS records) and WD's history of seizures.

See Ex. “OBJ 13” at pp. 41, 46, 47. Finally with regard to the records of the Kentucky Cabinet for Health and Family Services (“KyCHFS”), K. Cumberland was also in a position to testify to the fact that she and petitioner were investigated no less than 4 times by KyCHFS between May 8, 2007 and January 15, 2009, which agency failed to even suspect, let alone substantiate, ANY instances of sexual abuse. *Id.*

K. Cumberland did not testify at petitioner’s trial and was effectively rendered unavailable as a witness at the petitioner’s trial (the unavailability K. Cumberland as a witness is the subject of Additional Claims Numbers 3 and 4). Specifically, as shown by the instanter order of November 10, 2009, K. Cumberland had custody of her children taken away from her and was specifically threatened with potentially being charged as an accomplice with the sexual abuse of her own children, WD and RC. Ex. “OBJ 8” at p.3. The fact that Katie 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 intimidated from testifying on petitioner’s behalf. At best, these actions are indicative of a not only a violation of the Due Process Clause of the 14th Amendment, but also a violation of the Compulsory Process Clause of the 6th Amendment in functionally depriving petitioner of Katie Cumberland’s favorable testimony.

F) Timeliness of Petition under 28 U.S.C. §2244(d):

The statutory tolling period ended on December 6, 2017, as a result of the failure of petitioner's attorney to file a writ application to the Louisiana Supreme Court by the filing deadline of November 27, 2017. R. Doc. No. 14 at pp. 9-10. Although the petitioner's application to the Court was not filed until October 18, 2018, the application is timely for the following reasons (which have been more fully briefed to this Court in petitioner's Objections to the initial Report and Recommendations of the Magistrate Judge.

1) Additional Claim No. 5: Actual Innocence Claim not Barred under *McQuiggin v. Perkins*, 569 U.S. 383 (2013):

Additional Claim No. 5 is predicated on the actual innocence of the petitioner and is, therefore, not barred as per the holding of the United States Supreme Court case of *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

2) All Other Claims and Additional Claims: Not Barred Due to the Application of the Doctrine of Equitable Tolling (*Contra Non Valentem* in Louisiana):

All other Claims and Additional Claims of petitioner are not barred by 28 U.S.C. §2244(d) due to the application of the Equitable Tolling Doctrine (as well as the Louisiana doctrine of *Contra Non Valentem*, equally applicable here), based on the following circumstances. As more fully argued in Petitioner's Objections to the initial Report and Recommendations of the Magistrate Judge, the doctrine of Equitable Tolling applied to extend the deadline for filing of petitioner's application herein through October 18, 2018. R. Doc. No. 19, pp. 9-15.

Respectfully submitted,



CLAIBORNE W. BROWN (25594)
1070-B West Causeway Approach
Mandeville, LA 70471
Telephone: (985) 845-2824
Facsimile: (985) 246-3199
cwbrown@cwbrownlaw.com

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on December 16, 2019, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.



CLAIBORNE W. BROWN

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution:

Amendment VI:

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

Amendment XIV; Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 28 U.S.C. § 2253:

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).