

22-6195

No. _____

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH W. SHELTON

PETITIONER

V.

WARDEN E. DUSTIN BICKHAM, et al.

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE U.S. FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

KENNETH W. SHELTON

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QUESTIONS PRESENTED

Was counsel's performance deficient when counsel failed to conduct an independent investigation concerning the time Petitioner was not present at the scene of the offense?

Was counsel's performance deficient when counsel failed to file a motion to quash for the same reasons?

LIST OF PARTIES

- ☐ All parties appear in the caption of the case on the cover page.
- ☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is subject of this petition is as follows:

District Attorney,
Richard Christopher Nevils
119 W. Main St.
Winnfield, LA 71483

Warden E. Dustin Bickham
Dixon Correctional Institute
5568 Hwy 68
Jackson, LA 707748

RELATED CASES

Shelton v. Bickham, NO. 22-30045, U. S. Court of Appeals for the Fifth Circuit. Judgment. (October 25 , 2022).

Shelton v. Kent, NO.1-120-CV-01025-P 2021 (WL 59099) (W.D. La., January 5, 2022).

Shelton v. Kent, NO.1-120-CV-01025-P 2021 (WL 6285930) (Magistrate Report and Recommendation. (USDC, W.D. La, November 15,2021).

State v. Shelton , NO. 2019-KH-01716, 299 So. 3D 60 La Supreme Court. (July 24, 2020).

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APPENDIX A: The opinion of the U.S. Fifth Circuit Court of Appeals denial of Certificate of Appealability is attached as **Appendix “A”**. No. 22-30045

APPENDIX B: The Order of the United States Western District Court dismissing Petition and denying issuance of Certificate of Appealability is attached hereto as **Appendix “B”**. No. 1:20-CV-01025-P

APPENDIX C: The Report and Recommendation by the U. S. Magistrate Judge in the Eastern District of Louisiana is attached as **Appendix “C”**, No. 1:20-CV-01025-P

APPENDIX D: Louisiana Supreme Court order denying post-conviction application for relief is attached as **Appendix “D”**. NO. 2019-KH-01716, (La. S. Ct. July 24, 2020).

APPENDIX E: Opinion of the Louisiana Second Circuit Court of Appeals denying writ of review of Post-Conviction Application is attached as **Appendix “E”**. NO. 16-CR-43788 (La. 2nd Cir., September 19, 2019).

APPENDIX F: Opinion of the Orleans Criminal District Court denying Post-Conviction Relief is not available; *see* **Appendix “F”**. NO. 16-CR-43788, (April 26, 2019).

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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<i>Richards v. Quarterman</i> , 566 F.3d 553 (5 th Cir. 2009).....	5
<i>Strickland v. Washington</i> , 466 U.S. 668, 688, 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....	8
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CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitutional Amendment VI.

28 U.S.C. 2254 (a).

STATUTES AND RULES

LA. R.S 14: 81

LA. R.S 14:81.2

La C. Cr. P. art. 468

La C. Cr. P. art. 469

OTHER:

VOLUMES:

ONE: Appendixes.

TWO: State Review.

THREE: § 2254

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **Federal courts:**

The denial of COA by the United States Court of Appeals appears at **Appendix “A”** to the petition and is,

☒ not yet published or reported.

The opinion of the United States District Court appears at **Appendix “B”** to the petition and is

☒ Reported at *Shelton v Kent*, 1:20-CV-1025, U. S. District Court for the Western District of Louisiana. (June 5, 2022).

The Report and Recommendation by the U. S. Magistrate Judge in the Eastern District of Louisiana appears as **Appendix “C”**, to the petition and is,

☒ Reported only at *Shelton v Kent*, 2021 WL 6285930, U. S. District Court for the Western District of Louisiana. (November 15, 2021).

☒ For cases from **State courts:**

The opinion of the highest State court to review the merits appears at **Appendix “D”** to the petition and is,

☒ Reported at *State v Shelton*, 299 So. 3d 60 (La. 7/24/2020).

The opinion of the Louisiana Second Circuit Court of Appeals appears at **Appendix “E”** to the petition and is,

☒ Unpublished.

The opinion of the 8th Judicial District Court appears at **Appendix “F”** to the petition and is,

☒ Unpublished.

JURISDICTION

The date on which the United States Fifth Circuit Court of Appeals decided the case was October 25, 2022 and the jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The date on which the Louisiana Supreme Court decided the case was July 24, 2020 and the jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U. S. Constitutional Amendment VI. Rights of the accused.

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.

28 U.S.C. 2254: (a):

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

STATEMENT OF PROCEEDINGS

On **February 20, 2019**, petitioner timely filed an Application for Post-Conviction Relief to the 8th Judicial District Court.¹ On **April 26, 2019**, the 8th Judicial District Court denied

¹ Exhibit 1: State APCR. *See Volume Two.*

petitioner's Application for Post-Conviction Relief.² On **August 21, 2019**, petitioner timely filed an Application for Supervisory Writ of Review to the Louisiana Second Court of Appeal.³ On **September 19, 2019**, the Louisiana Second Court of Appeal denied petitioner's application.⁴ On **September 30, 2019**, petitioner filed an Application for Supervisory Writ of Review to the Louisiana Supreme Court.⁵ On **July 24, 2020**, the Louisiana Supreme Court denied petitioner's application.⁶

On **September 23, 2020** Petitioner filed a petition for habeas relief.⁷ The State answered the petition and Petitioner rebutted the answer. On **November 15, 2021**, the Magistrate submitted his Report and Recommendation, rendering the opinion that the petition should be denied and dismissed with prejudice.⁸

Petitioner objected to the Magistrate's recommendation, but the District Judge adopted the recommendation on **January 5, 2022**.⁹ ¹⁰ Shelton filed notice to appeal the decision and on **January 25, 2022**, the District Court allowed Petitioner to proceed *In Forma Pauperis*.¹¹

On **January 26, 2022**, the United States Court of Appeals for the Fifth Circuit docketed the appeal. Petitioner filed petition for issuance of COA¹² and it was denied on **October 25, 2022**.¹³ However, Petitioner did not receive the notice until October 31, 2022.

He now submits this timely Writ of Certiorari into this Honorable Court.

² Exhibit 2: Appendix F: Denial of APCR. *See Volume One.*

³ Exhibit 3: Supervisory Writ. *See Volume Two.*

⁴ Exhibit 4: Appendix E: Denial of Supervisory Writ. *See Volume One.*

⁵ Exhibit 5: Writ to La Supreme Court. *See Volume Two.*

⁶ Exhibit 6: Appendix D: Denial of Writ. *See Volume One.*

⁷ Exhibit 7: 28 § 2254 Petition. *See Volume Three.*

⁸ Exhibit 8: Appendix C : Magistrate Report & Recommendation. *See Volume One.*

⁹ Exhibit 9: Objections to Report & Recommendation. *See Volume Three.*

¹⁰ Exhibit 10: Appendix B: District Court Ruling. *See Volume One.*

¹¹ Exhibit 11: Notice of Appeal with In forma Pauperis. *See Volume Three.*

¹² Exhibit 12: Petition Seeking COA. *See Volume Three.*

¹³ Exhibit 13: Apendix A: Denial of COA. *See Volume One.*

STATEMENT OF THE CASE

In April 2016 petitioner was charged with one count of Molestation of a Juvenile, La R.S. 14:81.2. On April 19, 2018, the petitioner entered an *Alford* plea in his best interest to the charge of Indecent Behavior with a Juvenile, La R.S. 14:81, and was sentenced to seven (7) years hard labor.

REASONS FOR GRANTING THE WRIT

- (a) The State of Louisiana has departed from the usual course of judicial proceedings *and* the United States Fifth Circuit Court of Appeals has accepted and sanctioned such a departure by the lower court, as to call for an exercise of this Courts supervisory power.
- (b) The State Court and the United States Fifth Circuit Court of Appeals has misapplied federal law and this Honorable Court should intervene.

OVERTURE

Respectfully, I Kenneth W. Shelton, Petitioner, am a layman of law and do not proclaim to be a peer of this Honorable Court, nor do I come before this Honorable Court presumptuously. It is with great humility I pray you will consider the subsequent claims and persuasions.

CLAIMS

The conviction was obtained in violation of the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. The right to effective assistance of counsel and due process of law were violated and Petitioner was prejudiced through counsel's deficient representation.

PERSUASIONS

Both State and Federal Courts opined that Mr. Shelton had failed to make "a substantial showing of the denial of a constitutional right."

Petitioner asserts that his right to effective assistance of counsel, guaranteed by the Sixth Amendment of the United States Constitution, was violated.

1.) Petitioner received ineffective assistance of trial counsel due to counsel failing to investigate petitioner's case prior to taking plea.

Petitioner contends that the bill of information accuses him of committing the crime on March 21, 2016, yet there exists evidence that he was in the Winn Parish Medical Center from March 20, 2016 through March 23, 2016.¹⁴

The State argued that the date and time were not essential elements of the crime. However, if the accused has an alibi as to his whereabouts and actions, then the date and time become key components and if he can prove it is physically impossible to be in two places at one time, his attorney should explore the possibility that his client is factually innocent.

The record shows discovery was tendered two years before the guilty plea and that an affidavit was submitted stating that the crime was committed after March 20, 2016 through March 23, 2016. The State had this affidavit two years prior to trial and still filed the bill of information stating the date and time of the offense as March 21, 2016.

Counsel was ineffective for failing to investigate the validity of the affidavit and to challenge the State's claim.

Petitioner was prejudiced by counsel's failure and to retrieve Petitioner's medical records as alibi evidence. *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009).

In *Lindstadt v. Keane*, 239 F.3d 191, 194, 205 (2nd Cir. 2001), the court granted relief in a child sexual abuse case remarking that the case had underwhelming evidence in four areas. One of those was counsel's failure to notice the discrepancy in the alleged date of the abuse, which could have been used to undermine the credibility of the State's witness.

¹⁴ See discharge sheet attached as exhibit in the original application for post conviction relief.

In this case, there was no physical evidence to challenge. However, the indictment supporting the allegation was questionable and counsel rendered ineffective assistance by failing to challenge the validity of the affidavit against Petitioner's medical records.

2.) Petitioner points to the fact that his trial counsel was ineffective for failing to file a motion to quash the indictment.

Louisiana Law does not require an indictment include the location, date or time of the offense unless they are "essential to the offense." La. Code Crim. P. Arts. 468, 469.

The United States Supreme Court has held that an indictment is sufficient if it informs the defendant of the accusations against him so that he may prepare a defense. *United States v. Debrow*, 346 U. S. 374 (1953).

In this case, the location, date and time were all essential because evidence existed to prove Petitioner did not commit the offense because he was not at the location on the date and time stated by the charging instrument.

For two years the State contended that the offense occurred on March 21, 2016. Prior to trial, State amended the bill of information to reflect the alleged crime occurred on or about March 25, 2016. Counsel's failure to enter a motion to quash placed Petitioner in jeopardy because amending the date to March 25, 2016 on the indictment did nothing to prevent the State from charging Petitioner later using the original offense of March 21, 2016.

Petitioner was prejudiced by the State's eleventh hour amendment to the indictment. Counsel rendered ineffective assistance by failing to challenge the indictment and enter enter a motion to quash. Counsel's performance fell below the standard of reasonable representation as guaranteed by the Sixth Amendment of the United States Constitution.

3.) Petitioner was coerced into taking this *Alford* Plea.

The record of April 18, 2019 clearly shows Honorable Jacque D. Derr made a point to all parties involved that petitioner was not going to admit guilt on the record in open court, that he still wasn't under complete understanding of what was taking place and that he didn't want to plea to anything.

Petitioner knew that the medical records were sufficient to prepare a defense and prove he was in the hospital at the alleged time. The medical records would have also proven that after his medical procedure he was still incapacitated on March 25, 2016, the date the State amended the date of the indictment.

The indictment was insufficient in sustenance for conviction and the medical records were available to counsel but, counsel never investigated them or attempt to prepare a defense concerning factual innocence.

In *Holsomback v. White*, 133 F.3d 1382 (11th Cir. 1998), the Court held: "in preparing for trial in sexual offense case in which there was no medical evidence to substantiate victims allegations, counsel was ineffective in failing to subpoena medical records and consult physician to ascertain significance of absence of corroborative medical evidence; counsel's claim of strategic choice is rejected because informed tactical decision could not be made without adequate investigation."

Evidence of factual innocence existed and Petitioner was duped and/or coerced into entering a guilty plea. It is apparent by the record that Petitioner, Kenneth W. Shelton did not want to plead guilty and would not have if counsel had been acting as counsel guaranteed in the U. S. Constitution.

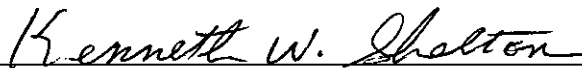
Petitioner is aware that in order to prevail on an ineffective assistance of counsel claim, "the defendant must show that counsel's representation fell below an objective standard of

reasonableness," and that the defendant was prejudiced as a result of such conduct. *Strickland v. Washington*, 466 U.S. 668, 688, 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

In this case, the conduct of Petitioner's counsel "fell below an objective standard of reasonableness" defined under *Strickland*, violating Petitioner's Sixth Amendment right to counsel.

CONCLUSION

Petitioner, Kenneth W. Shelton, prays this Honorable Court will agree that these issues are debatable among reasonable jurists. He further asserts he has shown exceptional circumstances justifying relief and prays that this Honorable Court will grant Writ of Certiorari and remand this to the district court for an evidentiary hearing to expand the record to allow Petitioner a full and fair judicial review.


Kenneth W. Shelton