No. 22-6898 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN L. LOVE — PETITIONER
(Your Name)

vs.

DANIEL F. MARTUSCELLO, III — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOHN L. LOVE
(Your Name)

3531 Gaines Basin Rd.
(Address)

Albion, New York 14411-9199
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Did the District court abuse its discretion under "unreasonable application" when petitioner Love's proposed amendment did "relate back" to the original and 2020 claim, that "arouse out of the same conduct, transaction, and occurence set forth" both stating: Ineffective assistance of counsel and prosecutorial misconduct?

2. Did the District and Circuit court err, when denying Love by entering a DECISION in conflict and contrary with decision's of their court and other court's on the same important matters-deciding on important federal questions in a way that conflicts with Supreme Court precedent and relevant decisions?

3. Is it an abuse of discretion and miscarriage of justice when a petitioner sets out new "evidence and facts" to ineffective assistance of counsel and prosecutorial misconduct and not conduct an evidentiary hearing?

4. Did petitioner Love make a substantial showing of the denial of a constitutional right by not having the "reasonable representation" guaranteed by Strickland v. Washington, 466 U.S. 688 (1984); Ineffective assistance of counsel?

5. Did the lower court err, when it decided that Love's petition did not provide respondent with "fair notice" of the new theories, when each separate congeries of facts support the grounds raised?,- As all was raised in 440.10 motions first.

6. "Facially" is petitioner Love's conviction supported by the constitution-legally sufficient evidence of the reasonable doubt standard? If not then his incarceration is in violation of the Due Process Clause by excluding evidence, perjury and misrepresentation.

7. Is it a constitutional error to exclude testimony, because defense had evidence necessary and identification of experts-within a timely fashion: testimony that would have been consistent with their disclosure within their diagnoses, and without this testimony did it have a prejudicial effect?

8. Has the lower courts applied the correct standard on ineffective assistance of counsel?

LIST OF PARTIES

[X] 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 the subject of this petition is as follows:

Love v. Martuscello, 17-cv-6244L (Western District of New York)
Love v. Martuscello, 22-1332 (Court of Appeals- SECOND CIRCUIT)

RELATED CASES

People v. Love, 134 A.D.3d 1569, 1570 (4th Dept.2015), lv. denied, 27 NY3d 967 (2016)

People v. Love, 27 N.Y.3d (2016)

People v. Love Ind. No.: 2010-1053 April 9, 2021, lv. denied, KA 21-00817 Sept.2, 21

Love v. Martuscello, 17-cv-6244L, denied 6/10/22 (Western District of New York)

Love v. Martuscello, 22-1332, denied 11/28/22 (Court of Appeals- SECOND CIRCUIT)

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STATUE AND RULES CONTINUED

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

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Love v. Martuscello 22-1332 (2nd Cir.); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at Love v. Martuscello 17-cv-6244 (W.D.N.Y.); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] 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

[X] reported at Appellate Division: KA 21-00817#2010-1053; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Monroe County Supreme court appears at Appendix E to the petition and is

[X] reported at People v. Love 2010-1053; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 28, 2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was Sept. 2, 2021. A copy of that decision appears at Appendix D.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defence.

United States Constitution, Fourteenth Amendment:

...nor shall any State deprive any person of life, liberty, or property, without due process of law;

28 United States Code § 2254:
State custody; remedies in Federal courts

(a) The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for 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.

....

(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or ...

STATEMENT OF THE CASE

Hello, my name is John L. Love, an incarcerated individual in respondent's custody. I have filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. I challenged the constitutionality of the judgment entered on June 8, 2011, in New York State, Monroe County Court (Geraci, J.), following a jury verdict convicting me of first-degree rape and third-degree rape of my then (15) year old step-daughter. The heart of the prosecution was the alleged victim and SANE nurse testimonies. No forensic or exculpatory evidence exist what-so-ever. There was a sexual assault kit performed with negative results, contrary to their testimonies of a violent rape, although there are doctor's professional opinion and diagnoses from the exam, an exam the doctor's [Dr. Geoffrey Collins and Geoffrey Everette] diagnosed as "ALLEGED CHILD SEXUAL ABUSE". This diagnoses was withheld from the jury along with the rape kit. Love did not discover these two main pieces of exculpatory evidence until 2017 when the state filed a "STATE COURT RECORD" during his habeas corpus proceeding.

My State appeal was upheld by the State's intermediate appellate court, and following that, the States highest court declined to hear the case. In the interim, I also sought collateral relief from the conviction per my first 440.10. I filed the motion with the trial court mostly-alleging that my attorney had provided constitutionally ineffective representation. That motion was denied. In 2017, I filed a habeas corpus, in which September 28, 2017, the state filed the said "STATE COURT RECORD" where I discovered the exculpatory evidence that defense attorney never used.

During this years delay of judgment from the habeas court and under these "extraordinary circumstances and acting with reasonable diligence", I sought another collateral relief while my habeas corpus was pending. That 440.10 motion was also denied about the new allegations of constitutionally ineffective representation. Providing the state full opportunity to resolve any constitutional violations with necessary 'opportunity', the thrust of the new motion was that my attorney had conducted a due process violation and inadequate pretrial investigation by not consulting with experts regarding the medical and lack of physical evidence, and at the bench illegal redaction of the word "ALLEGED" from exculpatory evidence. The motion was accompanied with the names of the medical doctor's who diagnosed the alleged victim along with the withheld rape kit. The rape kit was used by me as evidence accompanying the motion because the alleged victim said to the police that she had blood in her underware from having forceful-sexual intercourse with her father. The rape kit revealed that there was no blood. The evidence from the doctors diagnoses was used to prove that there was never any rape, just an "ALLIGATION".

The State court denied my 2020 motion concluding that the motion is determinable without a hearing, as defendant has failed to raise issues of fact appearing outside the record that require determination..."defendant was in position adequately to raise the ground or issue underlying the present motion" (CPL 440.30[3][c]) and either raised or should have raised all of the grounds asserted here in the prior motion.

Under penalty of perjury, I swear I did not know of or have the new evidence and it was discovered since the entry of a judgment, which could not have been produced at trial [by-me] with due diligence 'and which is of such character as to create a probability that had such evidence been used at trial the verdict would have been more favorable to the defendant Love.' If the courts express that the evidence in question was produced or at trial then it is easy to say that since it was not used, then it is proof of ineffective assistance of counsel.

The State court stated 'the other information is not of a nature that would have created a probability of a more favorable outcome to the defendant. Therefore, the defendant's motion with respect to newly discovered evidence is denied.' The court never addressed the illegal redaction of "ALLEGED CHILD SEXUAL ABUSE" of the MEDICAL SUMMARY, they only addressed the SANE report redaction, which is an error because it was not redacted. However, the court and attorney general did conceded with me that the redactions were at the request of defense counsel; unlawfully changing this case and my life of an allegation to a full fledged rape case.

In W.D Court, I filed a motion to amend on 11/11/2021,[consisting a memorandum of law and copies of the DECISION and above said CPL 440.10 motion of 2020] which was denied without prejudice with leave to refile. My motion relied on Federal Rule of Civil Procedure 15 ("Rule 15"): any amended petition must be a complete pleading which, if accepted by the Court for filing, will supersede and replace the original petition in its entirety; thus, the amended petition becomes the operative pleading and the original petition is no longer considered. ("[I]t is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect."). The Supreme Court has circumscribed the definition of Rule 15(c)'s: "conduct, transaction, or occurence"..."relation back will be in order" provided that "the original and amended petitions state claims that are tied to a common core of operative facts." My claims of ineffective assistance of counsel relates back, to 2015 and the above said motion. The District Court assisted me with copies of the forms to complete with regard to the claims asserted. I was also advised that the proposed amended petition will completely supersede and replace the original.

The Granting of Certiorari About Federal Rule of Civil Procedure 15

This case involves two federal prescriptions: the one year limitation period imposed on federal habeas corpus petitioners by the AEDPA, 28 U.S.C. § 2244(d)(1); and the rule that pleading amendments relate back to the filing date of the original pleading when both the original plea and the amendment arise out of the same "conduct, transaction, or occurence," Fed.Rule.Civ.15(c)(2).

This Court after view can concede that the relevant "transaction" for purposes of Rule 15(c)(2) was Love's "trial and conviction in state court" and "so broadly that any claim stemming from pre-trial motions, the trial, or sentencing relates back to a timely-filed habeas petition." Amendments made after the statue of limitations has run relate back to the date of the original pleadings if the original and amended pleadings "ar[i]se out of the conduct, transaction, or occurrence."

Certiorari was granted in Mayle v. Felix, 543 U.S. 1042, 125 S.Ct. 824, 160 L.Ed.2d 610 (2005), to resolve the conflict...on relation back of habeas petition amendments. Compare 379 F.3d, at 614 (if original petition is timely filed, amendments referring to the same trial and conviction may relate back).

The majority of Circuits define "conduct, transaction, or occurrence" in federal habeas cases far less broadly, allowing relation back only when the claims added by amendment arise from the same core facts as timely filed claims, and not when the new claims depend upon events separate in both time and type from the originally raised episodes.

Decisions applying Rule 15(c)(2) in the civil context illustrate that Rule 15(c)(2) relaxes, but does not obliterate, the statue of limitations; hence relation back depends on the existence of a common core of operative facts uniting the original and newly asserted claims.

The words "conduct, transaction, or occurrence" in Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 580-581, 65 S.Ct.421, 89 L.Ed.465, there, the amended complaint invoked a legal theory not suggested in the original complaint and relied on facts not originally asserted. Relation back was nevertheless permitted.

It's Love contention that the trial itself is the appropriate "transaction" or "occurrence" and I'm only homing in on what makes those claims actionable in my habeas proceeding. Each separate congeries of facts by me Supports the grounds for relief, the Rule suggests, would delineate an "occurrence".

For an example of the amendment and Love's prosecutorial claim, the introduction of statements by the Inv. Mario Correia was adduced at trial on direct examination during the Huntley Hearing and he was asked "If he told Love that he had any evidence" and the officer committed perjury because he stated NO. The new evidence in the amended petition proves this fact as he was "an arm of the prosecution", trying this coercive tactic to elicit a confession. This officer said and document his words: "[I] explained to Love that his daughter claims to be a virgin and she mentioned that there was blood...". this an example of my Sixth Amendment claim because there wasn't any blood proven by the rape kit.

A discrete set of Rules govern federal habeas proceedings launched by state prisoners. See Rules Governing Section 2254 Cases in the United States District Courts. The last of those Rules, Habeas Corpus Rule 11, permits application of the Federal Rules of Civil Procedure in habeas cases "to the extent that the [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules." See also Fed. Rule Civ. Proc. 81(a)(2) (The civil rules "are applicable to proceedings for...habeas corpus.").

Rule 11, the Advisory Committee's Notes caution, "permits application of the civil rules only when it would be appropriate to do so," and would not be "inconsistent or inequitable in the overall framework of habeas corpus." Advisory Committee's Note on Habeas Corpus Rule 11, 28 U.S.C., p.480. In addition to the general prescriptions on application of civil rules in federal habeas cases, § 2242 specifically provides that habeas applications "may be amended...as provided in the rules of procedure applicable to civil actions."

The Civil Rule governing pleading amendments, Federal Rule of Civil Procedure 15, made applicable to habeas proceedings by § 2242, Federal Rule of Civil Procedure 81(a)(2), and Habeas Corpus Rule 11, allows pleading amendments with "leave of court" any time during a proceeding. See Fed.Rule Civ.Proc. 15(a). Before a responsive pleading is served, pleadings may be amended once as a "matter of course," i.e., without seeking court leave. Ibid. Amendments made after the statue of limitations has run relate back to the date of the original and amended pleadings "ar [i]se out of the conduct, transaction, or occurrence." Rule 15(c)(2).

The "original pleading" to which Rule 15 refers is the complaint in an ordinary civil case, and the petition in a habeas proceeding. Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct.99, 2 L.Ed.2d 80 (1957).

Habeas Corpus Rule 2(c) is more demanding. It provides that the petitioner must "specify all grounds for relief available to the petitioner" and "state the facts supporting each ground." See also Advisory Committee's Note on subd. (c) of Habeas Corpus Rule 2, 28 U.S.C., p.469 ("In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important..."); Advisory Committee's Note on Habeas Corpus Rule 4, 28 U.S.C., p.471 (" '[N]otice' pleadings is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (internal quotation marks ommitted)). Accordingly, the model form available to aid prisoners in filing their petitions instructs in boldface:

> CAUTION: **You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date."** Petition for Relief From a Conviction or Sentence By a Person in State Custody, Habeas Corpus Rules, Forms App.28 U.S.C., P.685 (2000 ed., Supp.V)(emphasis in original).

The key words are "conduct, transaction, or occurrence." The Ninth Circuit, in accord with the Seventh Circuit, defines those words to allow relation back of a claim first asserted in an amended petition, so long as the new claim stems from the habeas petitioner's trial, conviction or sentence. Under that comprehensive definition, virtually any claim introduced in an amended petition will relate back, for federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence, and commonly attack proceedings anterior thereto. See Espinoza-Saenz, 235 F.3d, at 505 (A "majority of amendments" to habeas petitions raise issues falling under the "broad umbrella" of "a defendant's trial and sentencing.") Hicks, 283 F.3d, at 388.

It's not unusual for this Court to hold that Love's amendment related back, and therefore avoided a statue of limitations bar, even though my amendment invoked a legal theory not suggested by the original complaint as the "FACEBOOK PHOTO" but relied on facts not originally asserted, and if I am right, then the lover court's assertion is incorrect, for what I seek to add, and is not "factually and temporally unrelated conduct".

The District Court denied my renewed motion to amend, which included request for appointment of pro bono counsel and an evidentiary hearing, and dismissed my petition.

One of the reasons the court stated: "[B]ecause Love included his original claims in the amended petition, albeit not in the correct paragraph on the form petition, I will construe the proposed amended petition as continuing to press the original habeas claims in addition to the new claims". The paragraph in question is #24, where it state's: Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? I answered "YES" and named this case dated: March 30, 2017. How can my answer not be in the correct paragraph? This is not construing liberally.

The Court decided that: ["the old petition is timely, the amended petition is untimely...The new ineffective assistance of counsel claim and prosecutorial misconduct claim do not "relate back" to the original petition and therefore are untimely. Therefore adding them...would be futile...I will deny the motion to amend in its entirety."]

Is this a form of miscarriage of justice because § 2244(d)(1)(D) could be applicable (because petitioner claimed to "recently discover exculpatory evidence...")(stating if the petition alleges newly discovered evidence, the filing deadline is based on § 2244(d)(1)(D)).

The court erroneously explained that "[T]he factual matters contained...were actually known to Petitioner at the time of trial...Since the nature of some of the items is unclear from Love's description of them, <u>further explanation</u> is required(I was not asked to further explain nor was there any hearing)...At trial counsel's request, the trial court agreed to redact the words "sexual assault"...Love is drawing purportedly new legal conclusions." The court denied everything and moved to the merits of the Original Petition, then denied that also.

I timely filed for a certificate of appealability with the Second Circuit and was also denied on November 28th. 2022 by them stating: Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right."

I wrote this Court petitioning for a writ of certiorari postmarked December 19, 2022.

REASONS FOR GRANTING THE PETITION

Habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence. (U.S.C.A. § 2245 (d)).

Appellant Love's ineffective assistance of counsel claim for not investigating is proved and should not have been rejected from the fact that, as defense attorney was leafing through the trial exhibits including medical records, he discovered the word "ALLEGED" [TT.330] and he stated: ("I'm sorry- I didn't see the word alleged before, so again to the extent that this may contain hearsay...").

I'm illegally detained in prison from hearsay-allegations, and had trial counsel conducted such an investigation, counsel would have discovered this "POWERFUL EVIDENCE" earlier-instead of during trial in front of the bench. Exceptionally qualified experts could have been called who would've testify that the prosecution's physical evidence was not indicative of sexual penetration and provided no corroboration whatsoever of the victim's story existed. Moreover, counsel's failure to investigate the medical evidence can not be justified as a "reasonable decision" based on the information known to him at the time of trial. He committed error of constitutional dimension by settling to a redaction with the prosecutor, and cutting off much needed further investigation of other theories without having first conducted any investigation whatsoever into the possibility of challenging the "ALLEGED CHILD SEXUAL ABUSE"; Evidence of his clients innocence, he just discovered.

The contents of this suppressed record provided information which could have impeached the alleged complaining witness and supported Love's version of the events, that this "rape" never happened. This Court can agree with appellant Love that despite the Decision and Order's from the lower courts, the record and new evidence does show that counsel had "failed Love" in several constitutionally deficient respects under Strickland .

When confronting with such a case, the Court should decide what it has already assumed, [see Herrera v. Collins, 506 U.S. 390, 417 (1993), and hold that executing or continuing to punish one who has demonstrated his innocence is unconstitutional].

Counsel's failure to consult with [Dr. Geoffrey Collins Md., Dr. Geoffrey Everett Md.] available experts prevented him from exposing significant and material errors in the witness' testimony. Overall, counsel could have served "no sound trial strategy" by failing to investigate and rebut the testimony of the state's SANE nurse, but simply "missed another critical opportunity to damage the alleged victim's credibility".

The law permits a factfinder to identify falsity in part of a witness's testimony, and can discredit the whole. One would think that is, a complainant is truthful in accusations. The accusations should produce accurate and consistent testimonial results that can be backed up by actual facts. As Defense Attorney Doran did say she could not "put the genie back in the bottle" as her story took on a life of its own. There should not be one untruthful answer. The testimony should not be proved false by investigated-uncovered-actual facts.

When the police got to the pay-phone "QUICK" at the request of complainant, she was accompanied to the hospital where she swore out a complaint about being a virgin who has been violently raped with evidence of blood in her panties. Scientifically proof should have existed but because of its [f]alsity, this case should have been handled with a new disposition of this "exculpatory evidence", with a reasonable degree of certainty that shows Love's innocence, breathing new-life and a "GATEWAY" into procedurally barred claims about ineffective assistance of counsel and Love's actual innocence.

["Her underwear was tested in the rape-kit that revealed negative of blood"].

Defense attorney should have questioned her about the fact she had lied or not when she gave the statement to police, and then he could have made a charge of recent fabrication. If testimony were elicited, it's a reasonable probability of changing the outcome of the proceedings. This is a form of ineffective assistance of counsel because without this "discredit" in front of the fact finders, it limited the jury's consideration of substantive evidence to the extent it was not consistent with her testimony of a "[f]orceful rape". The false-complaint was in line with the account given on direct examination and defense attorney missed this opportunity, and "there is a reasonable probability that I could have been acquitted had the error not occurred," as additional evidence adduced at trial was not overwhelming in establishing any guilt. This "[e]xculpatory statement" was missing from her trial testimony.

Love's defense counsel's performance was deficient in approach--adopting "a weak position that the state's evidence might be "consistent with innocence" before investigating whether this case could also be made that the same evidence "was not consistent with guilt" therefore not the product of any "reasonable strategic decision".

Defense attorney had in his possession the above said: [P]hysician notes, exam findings, diagnostic, and summary prepared and discharge by Attending Physician/Dr. Goeffrey Everett and Dr. Geoffrey Collins where they (conceded) both

agree (TT.330), "[t]he fifteen year old alleged child sexual abuse", and the professional diagnoses was 'ALLEGED CHILD SEXUAL ABUSE'.

Defense attorney did not investigate the said exculpatory reports. Defense counsel also said: (TT.330 "I'm sorry- I didn't see the word 'alleged' before, so, again to the extent that this may contain hearsay...") THE COURT: "So, I will redact the word, 'sexual assault',".

A contradictional case to the decision in Love's case is one the Court of Appeals...133 F.3d 1382 (11th Cir.1998) Holsomback, ("that not to conduct any investigation into the conceded lack of medical evidence...was not reasonable, and failure to conduct adequate pretrial investigation into lack of medical evidence ["prejudiced"] defendant).

Love has "shown a reasonable likelihood that the investigation would have produced useful information not already known" by trial counsel. In re Pers. Restraint of Davis, 152 Wn.2d at 739 (emphasis added).

In Love's case the district court made an error when it stated that: "[T]hese new allegations do not merely supplement or amplify Petitioner's original claim...rather, they present a dramatically different ineffectiveness claim. In other words, the original petition did not provide Respondent with "fair notice" of the new theories of ineffective assistance of trial counsel". This is untrue because Love's second denied 440.10 motion in the record that the respondent has, effectively gave rise to 'fair notice'...of the newly alleged claims.

This is also in contradiction with a 2018 Supreme Court, Appellate Division case of People v. Wilson, 162 A.D.3d 1591 (2018) "In such situations, i.e., where the "claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety" (People v. Kocaj, 160 AD3d 766, 767 [2d Dept 2018][emphasis added]; see People v. Taylor, 156 AD3d 86, 91-92 [3d Dept 2017], lv denied 30 NY3d 1120 [2018]).

That is because "each alleged shortcoming or failure by defense counsel should be viewed as a separate 'ground or issue raised upon the motion'...Rather, a defendant's claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested' " (Taylor, 156 AD3d at 91). In other words, "such a claim constitutes a single, unified claim that must be assessed in totality" (id.at 92).

This Court can conclude that the (1)first 440.10 court erred in denying the first motion and in the (2)second 440.10 court they erred in failing to hold a

hearing with respect to the claim of ineffective assistance of counsel by Love.

For example in Love's case, defense counsel failed to address at trial evidence in the medical records that tended to disprove allegations of rape or penetration. This is Love's sworn allegation supporting my contention that, if true, would support "[s]uppression of damaging evidence" had a motion been made (see People v. Smith, 95 AD3d 21, 12-28 [4th Dept 2012]). No such motion was made at the bench, only an illegal redaction, and "[s]uch a failure in the absence of a reasonable explanation for it, is hard to reconcile with a defendant's constitutional right to...effective assistance of counsel" (People v. Turner, 5 NY3d 476, 481 [2005]).

At trial Love was unable to effectively rebut much of the circumstantial case against him, and he was therefore unlawfully convicted, but he has now dismantled nearly every piece of circumstantial evidence the jury heard.

"I'M SORRY- I DIDN'T SEE THE WORD 'ALLEGED' BEFORE
...to the extent it may contain [hearsay]"

Defense counsel Doran didn't want to use these medical reports because he said they contained hearsay (TT.330); hearsay evidence that could have change the course of proceedings and a not guilty verdict. The jury may have considered this exculpatory record when weighing the evidence. But the court's ruling was..."REDACT to 'sexual assault' ".

Legally, there's a hearsay exception for statements of this kind and is justifiable. Statements to one's own doctor or other health care professionals have intrinsic guarantee of reliability, for only a foolish person would lie to his/her own doctor when seeking medical help (see Davidson v. Cornell, 132 N.Y.228, 237, 30 N.E. 573). And the exception, is essential to the majority's decision, consistent with the uniform Appellate Division authority, that the evidence at issue in these cases is admissible...adopting the "medical diagnoses and treatment" exception to the hearsay rule in this case. People v. Ortega, 15 N.Y.3d 610 (2010).

Another case that supports this kind of hearsay is Buczakowski v. Crouse Health Hospital, Inc., 5:18-cv-330 (LEK/ML) 2022 WL 168902; Thus testimony of a treating provider is admissible lay opinion so long as it pertains to facts and opinions based in the provider's care and treatment of the party. See id.; see also Ali v. Connick, No 11-cv-5297, 2016 WL 3002403, *8 (E.D.N.Y. May 23, 2016)("[T]estimony of treating physicians as to facts acquired and opinions formed during consultation are considered factual and not expert testimony, and thus fall

within the reach of Rule 26"). This includes diagnoses and opinions regarding causation, as has been found in several other courts. Not calling Dr. Collins or Dr. Everett had a prejudicial effect causing Love from not having a fair trial.

To reiterate, the key distinction is that treating physicians are considered fact witnesses, so long as they testify to facts learned and opinions formed based on personal knowledge obtained from treatment of the party, as opposed to opinions that arise from examinations of outside sources. See Spence, 2011 WL 4383046, at *3 (citing Mangla v. Univ. of Rochester, 168 F.R.D. 137, 139 (W.D.N.Y. 1996)).

See, e.g., Greasley v. United States, No. 15-cv-0642, 2018 WL 3215647, at *4 (W.D.N.Y. Jan. 18, 2018)("a treating physician may still express an opinion regarding the cause of any medical condition presented in a patient...so long as the opinion is based upon the medical provider's care and treatment of the patient)(internal marks omitted); Spencer v. International Shoppes, Inc., No. 06-cv-2637, 2011 WL 4383046, at *4 (E.D.N.Y. Sept. 20, 2011)(holding that a treating physician may "offer opinion testimony on diagnoses, treatment, prognosis and causation, but solely as to the information he/she has acquired through observation of the plaintiff in his/her role as treating physician.")

The above citations are from district courts, so was it a miscarriage of justice for the district court in my case, when they decided that I cannot amend and also decided that my claims don't relate back, and adding them would be futile. The above also has explained the nature and does not need further explanation as the district court decided.

This is also why I ask for the writ, because as previously stated the redaction of the medical reports and not calling these doctor's who treated the complainant was a form of ineffective assistance of counsel, a performance that fell below "an objective standard of reasonableness," id. at 688..."that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," id at Strickland.

See also, White v. Illinois, 502 U.S. 346, 356 (1992)("[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnoses or mistreatment, carries special guarantee of credibility that a trier of fact may not think replicated by courtroom testimony.")

Now, who is to believe? A SANE nurse who "did not record her exam-finding" and testified: she saw a broken-by-force-hymen, with her naked eye; or one [r]esident and two other professional [d]octors who have more [e]xperience by [d]ocumenting and concluding "to a reasonable degree of medical certainty" and did not conclude nor

diagnose the same finding to a beholden SANE examiner?

For example: A medical examiner can't say why a person died. They would have to document and scientifically prove their results. Doctors and nurses are kind of medical scientist practicing and studying the body constantly. One can't believe that a professional in this field would not document their findings, but only make a mental note.

Then if this medical examiner was called to a trial to testify to what he/she found before the tag on the toe, and they don't have the proof, pictures, or documentation of their uncorroborated and incomplete finding but demonstrate their finding on a projection screen to be the core of the prosecutions case, then this 'projected proffered evidence' from only a "mental note" is put in evidence to be the 'real evidence' but actually 'fabricated evidence' and then used to incriminate a person. This is unprofessional undocumented inculpatory [e]vidence; improper-hearsay months later-turned to [j]udicial evidence, in a trial of someone's life and liberty which is a constitutional violation of [d]ue [p]rocess. A deficiency which prejudiced Love from not having the full medical records explained, that it so clearly "alter[ed] the entire evidentiary picture" that the trial court's decision is indefensible.

Confrontation "is designed to weed out not only the fraudulent analyst, but the incompetent one as well...an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination" and may reveal the "[s]erious deficiencies [that] have been found in the evidence used in criminal trial's."

The Supreme Court has held that this standard which Love ask: Did I establish what is required, "a stronger showing than that needed to establish prejudice" under Strickland. Schlup v. Delo, 513 U.S. 298, 327 & n. 45, 115 S.Ct.851, 130 L.Ed.2d 808 (1995).

As explained above, its a reasonable probability that the jury, hearing such potent evidence as "ALLEGED", would have develpoed doubt as to the element of intent. While such evidence could have been proffered, it would have made a strong difference in light of the specific testimonial evidence indicating that Love formed the requisite intent to commit his alleged crimes. See Strickland, 466 U.S. at 696, 104 S.Ct.2052; Lindstadt, 239 F.3d at 204.

See also, Jones v. Stinson, 229 F.3d 112, 119 (2d Cir.2000)(explaining that, for application of clearly established federal law to be unreasonable, the state court must not merely have erred, but rather its actions must be "somewhere between 'merely erroneous and unreasonable to all reasonable jurist' " (quoting Francis S. v. Stone, 221 F.3d 100, 109 (2d Cir.2000)).

Love has demonstrated and the record show that counsel had "failed his client" in several constitutionally deficient respects. The "most substantial" error was counsel's failure "to conduct an adequate pre-trial investigation into critical medical evidence". Evidence he chose to redact saying it's hearsay against the Federal Rule of Evidence 830(4): A hearsay statement "that is made for-and is reasonably pertinent to-medical diagnosis or treatment; their opinion or their general cause is admissible.

This Court can hold that none of the lower courts followed the standards in Strickland, like they have in earlier decisions in which other attorneys similarly failed their constitutional duty to undertake reasonable investigations relating to uncorroborated allegations of sexual abuse. The Second Circuit did not follow their own earlier decisions. See, Eze v. Senkowski, 321 F.3d 110 (2d Cir.2003); Pavel v. Hollins, 261 F.3d 210 (2d Cir.2001); Lindstadt v. Keane, 239 F.3d 191 (2d Cir.2001); Gersten, 426 F.3d. at 607. Each of these decisions recognized that, in cases where allegations of sexual abuse are disputed and no other evidence supports an alleged victim's easily fabricated accusations, defense attorney's have a duty to investigate available medical evidence to determine whether it is consistent with the allegation of abuse. This case could also be made that the same evidence "was not consistent with guilt" -- was therefore not the product of any "reasonable strategic decision".

Not too long ago, it was considered in another instance when inadequate investigation led to a finding of counsel's ineffective assistance. In Rompilla v. Beard, 125 S.Ct.2462-66 (2005), the Court again held capital sentencing counsel's investigation deficient because, while counsel in fact investigated some matters fully...they did not review readily available court files...; Holsomback v. White, 133 F.3d 1382, 1387-89 (11th Cir.1998)(attorney's failure to conduct adequate investigation into medical evidence of sexual abuse unreasonable and prejudicial in case that otherwise depended solely on credibility); Williams v. Washington, 59 F.3d 673, 678 n.2 (7th Cir.1995)(noting that counsel's failure to discover and offer exculpatory medical records in sexual abuse prosecution would be unreasonable).

What these decisions and the decision from this Court will hopefully prevent in the future is the same kind of harmful and unreasonable investigative omissions that this Court and the decisions of the Court of Appeals have properly held ineffective.

CLEARLY ESTABLISHED INEFFECTIVE ASSISTANCE STANDARDS

In the first place, requiring defense attorneys to reasonably investigate the evidence that will be offered against their clients is hardly new. Strickland itself long ago recognized that "counsel had a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary", and that any "decision not to investigate must be directly assessed for reasonableness in all the circumstances." 466 U.S. at 690-91. Further, as this Court clarified in Wiggins v. Smith, 539 U.S. 510, 526 (2003), "assessing the reasonableness of any attorney's investigation" requires a reviewing court to "consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further".

Defense counsel for Love discovered the word "ALLEGED CHILD SEXUAL ABUSE" in front of the bench, then abandoned any further investigation and decided alongside the prosecutor to redact the word "ALLEGED" from this evidence and that makes him ineffective of a trial "he's" supposed to defend.

For instance in Wiggins, this Court found that counsel prematurely "abandoned their investigation"...before...whether or not to present a mitigation case at sentencing...or [why] further investigation would have been fruitless". Id. at 525. Moreover, despite the state's inaccurate "post-hoc" rationalization of counsel's conduct" as "strategic", the Wiggins Court agreed that counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment", and that the decision to limit investigation did not fall within Strickland's broad spectrum of "reasonableness". Id. at 526-27. In addition, because the evidence counsel failed to discover and present was so "powerful", the Wiggins Court fairly concluded that counsel's unprofessional omissions created just the sort of reasonable probability of a different result that must be shown before holding defense counsel constitutionally ineffective. Id. at 534-38.

Here, petitioner Love proffers a similarly rationalization for counsel's unreasonable failure to investigate the evidence and negative results of a forceful rape presented and not presented at trial: that counsel "strategically decided" to "redact" instead of challenging evidence he believed to be hearsay--only because he never checked--was "probably reliable".

As in Wiggins, 539 U.S. at 527-28, however, it was "impossible" for trial counsel to have made a "fully informed decision with respect to...strategy" when he "chose to abandon his investigation at an unreasonable juncture". Accord Kimmelman v.

Morrison, 477 U.S. 365, 368 (1986)(decision based on ignorance of relevant facts and "mistaken beliefs" not based on "strategic considerations").

In so proceeding, defense counsel for Love unreasonably charted a course that inevitably led Love onto the torturous path of conviction. Counsel failed to call the "readily available experts" to explain their diagnoses and [v]iew the same trial [p]rojector of false-medical indicia and testimony of the SANE nurse on which the prosecution intended to rely to bolster the credibility of [redacted] Love's step-daughter's unsupported accusations, to see if that evidence had any basis in observable fact or any recognized and generally accepted theory. Moreover, he abandoned any inquiry into the validity of the SANE nurse's testimony before he had a reliable basis to support even his carelessly chosen and equally uninvestigated defense.

In this case at bar, counsel's failure to fulfill his duty of a reasonable investigation substantially prejudiced Love because, as shown in the post-conviction proceedings, the evidence counsel failed to discover was indeed "powerful" and carried more than a reasonable probability of producing a different outcome. Given these circumstances involving omissions far more egregious than those in Wiggins, for appellant Love the lower-courts soundly concluded and unreasonably applied Strickland when it nevertheless deemed trial counsel's plainly deficient investigation "strategic" and adequate. By this Court's standard, there isn't anything that can explain Love's trial attorney's failure to investigate and expose the inaccurate medical evidence and flawed and discredited theories on which the prosecution relied to bolster the otherwise uncorroborated and highly unlikely accusations of a troubled adolescent. Accordingly, this Court should grant writ and review the lower courts decisions that the trial was fairly held and counsel's omissions were excusable and of reasonable professional norm, which was obviously contrary to this Court's decisions of established federal constitutional standard.

Here in New York the lower courts didn't follow People v. Baba-Ali, 179 A.D.2d 725, 729 (2d Dept. 1992)(counsel "doom[ed] the defense to failure" by not securing independent expert medical testimony despite significant inconsistencies in medical evidence that indicated child had not been sexually abused). [Please construe to Loves case "ALLEGED CHILD SEXUAL ABUSE".] Equally, if counsel's failure to consult with an expert prevented him from becoming "sufficiently versed" in a technical subject to "conduct effective cross-examination", his performance can fall below reasonable professional norms. Knott v. Mabry, 671 F.2d 1208, 1212-13 (8th Cir.1982).

Another reason for granting the petition in your petitioner Love's case is because the main focus of the prosecutor's medical expert testimony was focused on the alleged victims hymen, that was allegedly torn. This "torn posterior fourchette...the hymen (TT.365-357)" went unchallenged and is also a constitutional violation that should be criticized by this Court of the lower court's not following their own decisions. See, Miller v. Senkowski, 268 F.Supp.2d 296, 311-12 (E.D.N.Y.2003)(discussing counsel's performance ineffective based solely on his failure to call or consult with a medical expert with respect to the questionable physical evidence of trauma to the hymen).

"[C]ounsel has a duty to make reasonable investigations unnecessary." Strickland v. Washington, 466 U.S. at 691.

Defense attorney was ineffective for not effectively rebutting the SANE nurse's assertion that she saw [not with a colposcope] blood and a tear with her naked eye, but did not document her findings, but stated: "[m]entally I made a note that I found a tear..."(TT.365-357).

This is another constitutional due process violation when the nurse testified: "[I]n this case we are talking-- I can not diagnose as a sexual assault (TT.350). Petitioner Love would like to remind the Court that the redacted medical evidence also stated "ALLEGED CHILD SEXUAL ABUSE", but resulted in a conviction.

As this Court and the majority acknowledges, the availability of writs of habeas corpus in federal court "is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Harrington, 562 U.S. at 102-03, 131 S.Ct. 770(internal quotation marks omitted).

This Court can find that Love's trial counsel was deficient in many ways and by failing to obtain expert's explanation of readily available medical records and projection slides on which he similarly knew that the prosecution intended to rely at trial. Further, as neither counsel nor the SANE nurse had any expertise in interpretation and assessing such medical records, his failure to consult with someone who understood, seriously compromised his ability to demonstrate reasonable doubt about the alleged victim's uncorroborated accusations.

The district court decided that I theorize that the prosecutor, in cahoots with the SANE nurse, altered the record to exaggerate the proof that forcible rape occurred and concludes that, but for the alleged forgery, there was insufficient proof of forcible intercourse which makes me "actually innocent". The district court reasoned by stating: ["his allegations are based on a misread of the record-there was no forgery of or tampering with, evidence".] The district court misread the record, not Love, as it's demonstrated again for this Court.

PROSECUTORIAL MISCONDUCT OF UNREFUTABLE DOCUMENTARY EVIDENCE

The Supreme Court has instructed, it is not enough to show that the prosecutor's case is lacking: a petitioner must set fourth evidence of "Factual Innocence", not mere legal insufficiency". Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct.1604, 140 L.Ed.2d 828 (1998). Nurse Crasti marked on a projector screen for the jury, but then "Somebody" manufactured the supposedly "SEXUAL ASSAULT DOCUMENTATION FORM" that the SANE nurse didn't document during her exam, but only during trial, under the direction of the prosecutor. This same "SEXUAL ASSAULT DOCUMENTATION FORM" was used as evidence in the "STATE COURT RECORD" along with the unmarked one. The one that was illegally marked was not supposed to be added as evidence in "THE STATE COURT RECORD" to a tribunal-depicting trauma, because this was not documented during her exam, but only during trial.

(TT.346-348)

["Ms. Crasti, I ask you to stand in front of the projectory here and I am going to place on the display People's -- the last page that's contained in People's Exhibit 11 that's in evidence, and we are kind of looking at the upper left corner; is that correct?...Could you please explain for the jury what we are looking at in the left most diagram here where my pen is?...'Can I use the pen?'...Certainly"]

["Could you please mark on this diagram the area where you observed redness and could you please mark them with R's?...Okay...For the record, you placed one, two, three, four, five, six, seven, eight, nine R's?]...["Maybe where there is an R that you marked in the tear of the hymen, can you just place a T next to that?...]. This is information of nature that will create a probability more favorable to petitioner Love and proof that these marks on the "STATE COURT RECORD-SEXUAL ASSAULT DOCUMENTATION FORM", dated 11-21-10, were not present as defense attorney cross examined, ["I didn't make it in the picture diagram, made it in the narrative section of the report(TT.354)...MENTALLY I made a note that I found a tear"(TT.356-357)].

This Court can agree, eithor way this "SEXUAL ASSAULT DOCUMENTATION SHEET" was marked, by the prosecutor or some-one in the attorney general's office, what was marked during trial can not be duplicated from a projectory then written on paper, then EXHIBITED to a tribunal as evidence because it was not documented during the exam. A mental note is not evidence.

So when I discovered this manufactured sheet in the "STATE COURT RECORD" and seen the marks, I knew it was different from the one I got in my discovery from the public defender's office, years before the submitted "STATE COURT RECORD", which is prosecutorial misconduct. NEW, because it was not discovered by me until after trial; a constitutional due process violation. This is proof that there was not a tear on the night in question. A mental note is not exculpatory evidence in this Court of law, but incompetence by a SANE nurse who did not document finding because there was never any findings, only during trial.

3 Wright, Fed.Prac. & Proc. 341-43 (2d ed.1982)("It's established that Due Process has been denied if a conviction is obtained through use of false evidence, known to be such by representatives of the prosecution")(emphasis added).

In Carrier, 477 U.S. at 495, the Court stated that procedural default would be excused, even in the absence of cause, when "a constitutional violation has properly resulted in the conviction of one who is actually innocent". 447 U.S. at 469; see also McQuiggin v. Perkins, 133 S.Ct.1924, 1935 (2013)("To invoke the miscarriage of justice exception to AEDPA's statue of limitations, we repeat, a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); House v. Bell, 547 U.S. 518, 536-37 (2006)(same).

Nevertheless, this Court can concede that, no corroboration or other indicia of reliability supported the complainant or the SAEN nurse's claims. Given the troubling logical defects in the complainant's account, the prosecution depended heavily on the corroboration supposedly provided by its ["not documented, but only during trial"] medical sheet that was only projected on a screen along with the bolstered testimony by the SANE nurse. But for the "true medical evidence" the doctor's reported their observation in a conceded view: [i]t's highly suggestive of "ALLEGED CHILD SEXUAL ABUSE". The doctor's finding were recorded in their "CHIEF-MEDICAL REPORT/SUMMARY", recorded on the night of this alleged rape. There documented findings were not concluded by any mental note but by their expertise as doctors.

ACTUAL INNOCENCE

Petitioner Love has maintained that he is innocent and that any procedural bar should be excused because a claim of actual innocence is a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993). To obtain such a relief, Love must establish that, "in light of the new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." House v. Bell, 547 U.S. 518, 537 (2006)(quoting Schlup,)). Moreover, a "gateway claim requires 'new reliable evidence- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence- that was not presented at trial.' " id. (quoting Schlup).

In determining whether Love has made a gateway showing of actual innocence required for federal habeas review of his procedurally default claims, habeas court task is not to identify trial error or to delineate the legal parameters of a possible new trial; it is to identify those cases in which a compelling showing of actual innocence would make it a manifest injustice to maintain conviction unless it was free of constitutional error...; to the contrary, it must consider all the evidence, old and new, incriminating and exculpatory, regardless of admissibility but with proper consideration for the weight the evidence can bear in light of relevance and reliability. 28 U.S.C.A. § 2254.

CREDIBILITY AND DOUBT

The SANE nurse's credibility is in serious doubt, occasioned by her testimony of "seeing a tear in the hymen" with her naked eye [she did not use a colposcope, which is an instrument that magnifies, allows documentation and takes pictures. She insists she made a mental note.]

Casting doubt is the case of People v. Carrol, 95 N.Y.2d 384, the nurse indicated that any sudden, forceful entry would cause "significant tearing and bleeding"...such a first-time act of penetration (like to a virgin).

Although testimony of force was sufficient for trial, force wasn't established. Opposed to the sexual assault kit, bedding recovered, nor was there any bruises, pubic hairs, semen, scrapes, or DNA. [Compair: violent rape TT.265 4-7; struggle but no bruises TT.262 19-21, no torn clothes TT.264 3-14]. In sum there was no evidence sufficient to the element of penetrational rape.

I have claimed actual innocence in the lower courts and then tried to amend which means "supercede the original" in the District court and that amendment was granted then DENIED. I am only asserting constitutional claim's based on my new evidence that I discovered after trial and I have been diligently pursuing my claim(s): ineffective assistance of counsel and proscutorial misconduct. I was not looking to expand my claim's but strengthen them. My evidence is only a "gateway" to arguing the underlying but supposedly defaulted constitutional claims.

For example, consider a defendant convicted of sexual assault who tries to raise a procedurally defaulted ineffective assistance claim based on the failure to call an alibi witness. Assume further that the defendant cannot show cause and prejudice. If the defendant uncovers exculpatory DNA evidence, he can use that evidence of innocence as a gateway to have a court consider his ineffective-assistance claim, but the DNA evidence cannot be used to prove that claim.

In House and similar cases, this Court did not address a habeas petitioner's lack of diligence in presenting the new evidence purportedly showing actual innocence; the issue presented was whether a petitioner could overcome procedural default despite an inability to prove cause for and prejudice from the default itself. House, 547 U.S. at 536 ("the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration")(quotations omitted); Schlup v. Delo, 513 U.S. 298, 314-15 (1995)("Because Schlup has been unable to establish 'cause and prejudice' sufficient to excuse his failure to present his evidence," he "may obtain review of his constitutional claims only if he" establishes an actual-innocence gateway to relief); Murray v. Carrier, 477 U.S. 478, 496 (1986)("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

If this Court take the above in consideration, it would not have been an abuse of discretion for the District court as they have decided in Love's case: to not grant the writ of habeas corpus and not grant a hearing.

House involved an equitable exception to an equitable rule created by this Court itself. See Martinez v. Ryan, 132 S.Ct.1309 (2012)(reaffirming the equitable nature of the cause-and-prejudice standard).

This is why I ask this Court if the below DECISION'S was a miscarrage of justice. In Kuhlmann v. Wilson, 477 U.S. 436 (1986), a plurality of the Court for the first time gave content to the "miscarriage of justice" doctrine. In doing so, it

drew heavily upon Judge Henry J. Friendly's classic article, Is Innocence Irrelevant?, Collateral Attact on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970).

The plurality stated that the prohibition against same-claim successive petitions for writ of habeas corpus must give way when the prisoner suppliments his constitutional claim with a colorable showing of factual innocence. This standard was proposed by Judge Friendly...as a prerequsite for federal habeas review generally. As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified again seeking relief from their incarceration.

As Judge Friendly expalined, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of the evidence claimed to have been unconstitutionally obtained."..."Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt."

The District court stated: [that my claims are founded on pure speculation and I have offered no proof that there was an expert willing to provide opinion testimony to the effect..."[H]e accordingly cannot demonstrate that he was prejudiced by trial counsel's decision".]

I want the Court to compair these two bullet scinerio's to see if it's consistent to the district court's Decision of being hodgepodge; or a showing of fair probability that the trier of the facts would have entertained a reasonable doubt?:

EVIDENCE USED TO CONVICT LOVE

- A) SANE nurse & alleged victim's testimonies that a forcible rape has occured.
- B) Testimony during HUNTLEY HEARING by Investigator Correia testifying at this confession hearing that he did not tell Love that he had evidence.
- C) Testimony of alleged victim weighing 145lbs.(to compair our sizes, me 195lbs.)
- D) Testimoney about innocently watching a facial cream show.
- E) Prosecutor opening "[l]ook for any motive to lie" "[t]he person without motive, that's the girl you saw...judging credibility, there's a motive to lie. Have you heard one?

AFTER TRIAL NEWLY FOUND-WITH DUE DILLIGENCE: EXCLUDED EVIDENCE AND EVIDENCE THAT WAS NOT INVESTIGATED OR AVAILABLE BUT NOT USED

• A-2) REDACTED AND UNDISCLOSED DIAGNOSES SUMMARY SHEET: Exculpatory medical evidence by two ready available doctors, Dr. Geoffrey Collins and Dr. Geoffrey Everett, who diagnosed this case as an "ALLEGED CHILD SEXUAL ABUSE". (Please compare to bullet A, E).

• B-2) THE UNREVEALED RAPE KIT: The negative rape kit was not introduced to the jury but it was in contradiction to the story of blood in underwear. (Please compare to bullet B, E).

• B-3) UNINVESTIGATED PROOF OF PERJURY: A signed Investigation Action Report (CR# 10-391947 signed by Reporting Officer Inv. Mario Correia Id# 517) stating: "[I] explained to Love that his daughter claims to be a virgin and she mentioned that there was blood in her underwear as a result of sexual intercourse with him". (Please compare to bullet B, E).

• C-2) PROOF OF PERJURY, PROSECUTORIAL MISCONDUCT AND DEFENSE NOT INVESTIGATING THE TESTIMONIES AND ASSAULT SHEET: Submission of false-testimonial evidence by the Prosecutor: ("Z was credible,...all we have to prove is that there was sexual intercourse...I submit that evidence has shown beyond a reasonable doubt that the defendant had sexual intercourse with Z by forcible complsion, basically by using force (TT.434); When trying to determine whether or not force was used, think about the size, a hundred ninety pound muscular defendant...and a hundred fourty pound four foot eleven Z". It was force through Nurse Crasti's testimony...that tear that she said was consistent with forcible penetration of the penis, that's how we know it was forcible" (TT.435). "Just by physical force. I submit that this defendant is four foot eleven, one hundred fourty" (TT.436); Defense asked Z: "[O]n November 20th., you weighed 140lbs.?" Z testified "[Y]es")); [The above is perjurious statements: The unused rebuttable SEXUAL ASSAULT DOCUMENTATION FORM of Z by Examiner Debbie Crasti @ 4:15am, weight of patient 200lbs.] (Please compare to bullet A, C, E).

• D-2) UNINVESTIGATED PROOF OF A CONTRADICTORY TV GUIDE, PROOF OF PERJURY BY ALLEGED VICTIM: Under oath (she) "Z" testified to watching with her grandmother,

advertisements for a facial cream show from 9-11pm (TT.254-255); Testimony of grandmother-Mae Love: "We were in the room watching COPS and AMERICA'S MOST WANTED.(TT.371) (Please compare to bullet E).

I would like to remind the Court that all of the above-said was Exhibit's filed by me to the lower court and my motions were not based solely upon my own assertion of innocence and, after this Court's consideration of all relevant facts and circumstances surrounding my motions, it can be said there was a constitutional denial that resulted in manifest injustice of the lower court.

Petitioner Love has claimed actual innocence, but if he has no recognized substantive right to prove his actual innocence, then he has no right of access to evidence whose only purpose would be to support his actual innocence claim. His evidence is support to a "gateway" claim of actual innocence in his then pending habeas action. See Schulp v. Delo, 513 U.S. 298, 315-16 (1995)(holding that actual-innocence claim "is...not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass" for court to consider merits of otherwise defaulted constitutional claim).

The lower court was in err because Love has shown that the evidence was exculpatory and plausible in establishing his innocence, and his showing was necessary and not implying but proving the invalidity of his conviction by his prima faci of ineffective assistance of counsel and prosecutorial misconduct which is in fact the [sine qua non] of Love's innocence.

Few things cast as much doubt on a state conviction as proof of innocence. To hold otherwise would ignore the concerns and reasoning of subsequent cases as in Presier v. Rodriguez, 411 U.S. 475, 500 (1973)(habeas corpus is "appropriate remedy" for state prisoners attacking the validity of confinement).

The district court in Love's case DECIDED, petitioner is not entitled to equitable tolling. "[T]he Supreme Court has clearly indicated that equitable tolling, regardless of its basis, always requires the petitioner to demonstrate that he has acted diligently to pursue his rights." The record shows that Love has been pursuing his rights every since the 2011 conviction.

The only motive the prosecution ascribed to Love at trail that could have given him a reason to commit this "ALLEGED RAPE" was that, he came home drunk. The

investigator told me why I was being detained because I did not know what happened. He never exposed to the court that I said "I was drunk, but not that drunk to commit or not remember a rape". The most powerful evidence of his guilt at trial-and the central basis for his conviction was the testimony by "Z" of a violent rape; and seeing a broken hymen with the naked eye by the SANE nurse that went unchallenged.

Yet, in other words all Love had to do is that there is not and never was a scintilla of valid evidence that the alleged victim "Z" was sexually assaulted and the "DIAGNOSES" of the un-called doctors affirmatively negate the conjectural possibility that she may have been raped along with the possibility of the SANE nurse seeing a torn hymen with her naked eye is entirely fantastical and not plausible. Love's new evidence outweighed and disproves the motive fed to the jury.

As the prosecutor and defense made this trial of "ALLIGATION'S" obfuscated, the jury struggled for some light by asking for read-backs, testimonies and evidence but they never asked for any of this [e]vidence Love discovered because they never knew it existed and just believed the prosecutor, because there was no evidence offered by defense that was rebuttable. Under penalty of perjury, I did not know of or knew that I had to discover this evidence on my own until after trial and after I recieved my "STATE COURT RECORD" where I was able to read back the transcript and investigate myself, going about this pro-se.

Wholly and etionarily, I think that this Court can agree to grant certiorari as it appears that court of appeals in affirming judgment of the district court in my case was on statutory construction grounds other than ones relied on by other district court's which is apparently inconsistent with view, subsequently taken by this Court in other cases, and that my claims are "extraordinary" as in Murray; and additionally supported by Judge Friendly's [o]pinion. This Court can agree that the District court is wrong and I, petitioner Love did make the "fair probability" exception.

The undisputed DIAGNOSES in my case was "ALLEGED". This is no speculation, but a confirmation of me saying this "ALLEGED RAPE" never happened. If called, the doctors who did this diagnoses that is "ALLEGED", they would have provided their expert-opinion testimony, resulting in a proceeding that would have been different to the triers of fact, but this evidence was redacted and excluded from the jury as they struggled in this credibility contest, against Strickland, Lindstadt, Miller, Gersten and Eze.

The District Court Denial of The Confrontation Clause

Under the Supreme Court's holding in Strickland v. Washington, 466 U.S. 688 (1984), the habeas corpus court was in error by thinking that this was-not one of those ['extra ordinary cases'] while determining that Love's above-said-evidence had no utility as impeachment evidence or an ineffective defense attorney, but it overstated strength of the State's case and disregarded Love's evidence that supported plausibility of my version of events calling it based on a hodgepodge of alleged gaps in the prosecutions proof, supposed inconsistencies in the witnesses' trial testimony, and made up irregularities in the documentary evidence and the prosecutor is in cahoots with the SANE nurse by exaggerating proof of a forcible rape.

Another error is, the lower court has denied my amended (superseding) petition in violation of my due process rights in unreasonably discounting the importance of this impeachment material, given that "Z" and the SANE nurse testimony was the main inculpating evidence. This case is the result of ineffective assistance of counsel "based on mere speculation" that the suppressed-redaction of evidence (rape kit and diagnoses results) "could have led defense counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized". There is Supreme Court holding on this given issue, 'it can be said that the state court unreasonabl[y] appli[ed] clearly established Law within the meaning of ineffective assistance of counsel, see Rompilla, 125 S.Ct. at 2465-67.

The Confrontation Clause of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, see Pointer v. Texas, 380 U.S. 400, 403-06, 85 S.Ct.1065, 13 L.Ed.2d 923 (1965), guarantees the defendant in a criminal prosecution the right to confront the witness against him...[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16, 94 S.Ct.1105, 39 L.Ed.2d 347 (1974), and "the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness," id. at 316, 94 S.Ct.1105.

Love Has Established his Innocence Even Under The "No Rational Juror" Standard

Without unassailed physical evidence, without a motive, without

eyewitnesses, without a confession, and without convincing circumstantial evidence linking me to the entire crime, no rational juror would have any basis for convicting Love beyond a reasonable doubt. There is no evidence allegedly tying me to the 'alleged rape' but it has been effectively rebutted. The new evidence as a whole, so completely undermines the case against me.

As discussed through-out and above, by any fair reading, this Court can conclude that I, John Love has made a truly persuasive showing of free-standing actual innocence and this is not a frivolous cliam but deserves granting of this petition for a writ of certiorari. It's fair to say that I have succeeded in razing the foundation of the prosecutor's case against me. I have gone the length to prove constitutional violations and provided credible evidence pointing to my innocence of this crime. Not only have I undermined the case for my conviction; I have presented a persuasive affirmative case of ineffective assistance of counsel and prosecutorial misconduct violations. I have done so by adducing the excluded exculpatory evidence, as well as accounts that without question would have been probative in the rational juror's evaluation of this purely "alleged" case.

The District court was contrary to Justice White's standard demanding a showing "based on proffered newly discovered evidence and the entire record before the jury that convicted him, [that] 'no rational trier of fact could find proof of guilt beyond a reasonable doubt.' "

Continuing to incarcerate a prisoner who makes a truly persuasive showing of actual innocence violates substantive Due Process.

The Due Process Clause protects an individual "against arbitrary action of government," County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998)(internal quotation marks omitted), and forbids any abuse of executive power that " 'shocks the conscience,' " see id. at 846 (quoting Rochin v. California, 342 U.S. 165, 172 (1952)). Holding fast to the distinction between legal guilt and factual innocence in the face of a truly persuasive showing of actual innocence would be the acme of arbitrary and unjust government conduct. Cf.Herrera, 506 U.S. at 398 ("After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent.").

WHEREFORE, the decision of the lower court was erroneous, and it is of national importance of having the Supreme Court decide the questions involved: Where as here, "an ineffective assistance of counsel claim involves...mixed claims' relating to both record-based and nonrecord-based, each alleged shortcoming or failure should not be viewed as a separate 'ground or issue raised upon the motion'...Rather, a 'defendant's claim constitutes a single ground or issue upon which relief is requested' "..."such a claim constitutes a single, unified claim that must be assessed in totality"...and a defendant should be therefore entitled to an opportunity to establish in any kind of way that he was deprived of meaningful legal representation.

The importance of the case is not only to me but to others similarly situated, and I ask this Court to conclude that the lower courts should not have denied the motions without any hearings on the respective claims. I would like habeas corpus be granted, the People have noe second chance, and I would like release.

CONCLUSION

Petitioner Love prays to this Court to appoint counsel under the Criminal Justice Act of 1964, see 18 U.S.C. § 3006 A(d)(7), or under any other applicable federal statute....and as of result:
The petition for a writ of certiorari should be granted.

Respectfully submitted,

John L Love

JOHN L. LOVE 11-B-1782 pro-se

Date: February 22, 23