

**IN THE
UNITED STATES SUPREME COURT**

GERALD A. SANFORD SR.

PETITIONER

V.

CHERRY LINDAMOOD, WARDEN

RESPONDENT

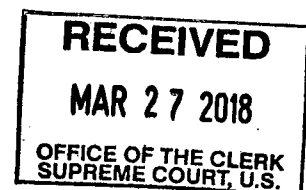
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE SIXTH CIRCUIT COURT OF APPEALS
CINCINNATI, OH**

CASE NO: _____

APPELLANT CASE NO: 16-6712

STATE CASE NO: 2:14-cv-1178-SHL-cgc

**GERALD A. SANFORD SR.
HARDEMAN COUNTY CORRECTIONAL FACILITY
2520 UNION SPRINGS ROAD
P.O. BOX 549
WHITEVILLE, TN 38075**



QUESTIONS PRESENTED

- I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT ERRED RULING PETITIONER HAD NOT PRESENTED AN ACTUAL INNOCENCE CLAIM WHICH WOULD HAVE ALLOWED PETITIONER TO PROCEED DESPITE THE COURT RULING THE PETITION WAS UNTIMELY?**
- II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT ERRED RULING PETITIONER FAILED TO PROVE THE DENIAL WAS BASED ON CLEARLY ESTABLISHED LAW WHEN THE COURTS FAILED TO RECOGNIZE THE MIDDLE DISTRICT COURT'S ORDER WHICH WOULD HAVE TOLLED THE STATUE OF LIMITATIONS?**
- III. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT ERRED RULING THE NINETY-DAY PERIOD A PETITIONER MAY SEEK REVIEW IN THE U.S. SUPREME COURT DID NOT TOLL PETITIONER 'S LIMITATIONS?**
- IV. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT ERRED IN NOT ALLOWING PETITIONER 'S HABEAS PETITION TO REMAIN IN ABEYANCE WHILE APPLICABLE CASES WERE BEING DECIDED ESTABLISHING NEW CONSTITUTIONAL RULES?**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner is Gerald A. Sanford Sr., a Prisoner at Hardeman County Correctional Facility, 2520 Union Springs Rd., P.O. Box 549, Whiteville, Tennessee, 38075.

The Respondent is Cherry Lindamood, Warden for South Central Correctional Center, 555 Forest Ave., P.O. Box 279, Clifton, Tennessee, 38425-0279.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Sixth Circuit:

The Mandate issued pursuant to the Court's disposition filed 7/13/17 from the U.S. Court of Appeals for the Sixth Circuit appears at **Appendix A.**

The Order of denial for petition for rehearing pursuant to the Court's disposition filed on 7/13/17, from the U.S. Court of Appeals for the Sixth Circuit appears at **Appendix B.**

The Mandate Order of denial pursuant to the Court's disposition filed on 7/13/17, from the U.S. Court of Appeals for the Sixth Circuit appears at **Appendix C.**

The Order of denial (appeal) on the Writ of Habeas Corpus petition, Motion To Issue a COA, Leave To Proceed IFP, and Motion For Leave To Expand/Supplement The Record denied as moot from the U.S. Court of Appeals for the Sixth Circuit appears at **Appendix D.**

Federal Court:

The Order of denial on the Writ of Habeas Corpus from the U.S. Western District Court of Tennessee appears at **Appendix E.**

State Courts:

The Order of denial on the Tenn. R. App. P. 11 from the Tennessee Supreme Court appears at **Appendix F.** and is published as **No. W2012-01194-CCA-R3-PC.**

The Order of denial on the Post-Conviction Appeal from the Tennessee Court of Criminal Appeals at Jackson, Tennessee, appears at **Appendix G.** and is published as **No. W2012-01194-SC-R11-PC.**

The Order of denial on the Tenn. R. App. P. 3 from the Tennessee Court of Criminal Appeals at Jackson, Tennessee, appears at **Appendix H.** and is published as **No. W2007-00664-CCA-R3-CD.**

JURISDICTION

For cases from State Courts:

Sixth Circuit:

March 1, 2018, The U.S. Court of Appeals for the Sixth Circuit issued a Mandate pursuant to the Court's disposition filed on 7/13/17.

February 21, 2018, The U.S. Court of Appeals for the Sixth Circuit denied petition for rehearing from the Court's disposition filed on 7/13/17.

November 30, 2017, The U.S. Court of Appeals for the Sixth Circuit issued a Mandate (denial) pursuant to the Court's disposition filed on 7/13/17.

July 13, 2017, The U.S. Court of Appeals for the Sixth Circuit issued a denial (appeal) on the Writ of Habeas Corpus petition, Motion To Issue a COA, Leave To Proceed IFP, and For Leave To Expand/Supplement The Record denied as moot.

Federal Court:

March 2, 2016, The Western District Court of Tennessee issued a denial for Writ of Habeas Corpus.

State Courts:

November 13, 2013, The Tennessee Supreme Court issued a denial for Post-Conviction relief.

June 7, 2013, The Tennessee Court of Criminal Appeals issued a denial for Post-Conviction relief.

May 31, 2012, The Criminal Court for Shelby County, Tennessee, issued a denial for Post-Conviction relief.

August 1, 2008, The Tennessee Court of Criminal Appeals issued a denial for Tenn. R. App. P. 3.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendment to the United States Constitution and the First and Ninth Constitution of Tennessee, which provides as follows:

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 defense.

AMENDMENT XIV

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 the 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.

TENNESSEE CONSTITUTION I and IX

Sec. 9. Right of the accused in criminal prosecutions

That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

STATEMENT OF THE CASE

On December 9, 2006, Petitioner was unconstitutionally convicted of First Degree murder by a Shelby County (Memphis), Tennessee jury. The conviction was confirmed by the Tennessee Court of Criminal Appeals on August 1, 2008. The Tennessee Supreme Court denied permission to appeal on January 20, 2009.

On November 5, 2009, Petitioner filed a petition for Post-Conviction relief. On November 13, 2012, Petitioner filed a "Motion To Hold In Abeyance" requesting the Middle District Court of Tennessee hold his 28 U.S.C. § 2254 in abeyance. (D.E. 1) The petition stated multiple grounds why the petition should be Granted. On November 16, 2012, Senior District Judge Todd J. Campbell, of the Middle District Court of Tennessee, Ordered Petitioner to pay the filing fee. (D.E. 2) On December 6, 2012, Petitioner paid the filing fee, (receipt # 34675024386)(D.E. 5-6) and the case number was converted from 3:12-mc-00081 to 3:12-cv-1271. (D.E. 5) On December 12, 2012, the Middle District Court of Tennessee Granted the abeyance motion and directed the Court Clerk to close the file administratively, also directing "The file may be reopened upon motion of the Petitioner." (D.E. 7) Petitioner was denied Post-Conviction relief by the State trial Court and the Tennessee Court of Criminal Appeals affirmed on June 7, 2013. The Tennessee Supreme Court denied permission to appeal on November 13, 2013. Petitioner was unaware of the decision until January of 2014.

During this time, *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L.Ed. 2d 1044 (2013) and *Sutton v. Carpenter*, 745 F.3d 787, 792 (6th Cir. 2014) was being decided which directly applied to Petitioner. *Sutton, supra* was lastly decided in March 2014. After receiving notice of the new applicable law Petitioner totally restructured his habeas petition.

On July 7, 2014, in accord with D.E. 7, Petitioner submitted his Motion To Reopen. (D.E. 10) On July 17, 2014, Senior District Judge Campbell, of the Middle District Court of Tennessee, Granted Petitioner's motion and also Ordered/Granted Petitioner "30 days to file an amended § 2254 habeas

corpus petition.” (D.E. 11) On July 21, 2014, in accord with the District Court’s Order, Petitioner filed an amended Writ of Habeas Corpus (D.E. 13) and Memorandum of Law In Support (D.E. 14). On July 31, 2014, the Court Clerk for the Middle District Court of Tennessee was directed to transfer the case to the Western District Court of Tennessee due to Venue issues (D.E. 16) and was assigned the case number 2:14-cv-1178-SHL-cgc. (D.E 16-19) On January 20, 2015, the Respondent filed a Motion To Dismiss alleging the petition was time-barred; 84 days past the statute of limitations. (D.E. 25) On February 2, 2015, Petitioner filed an opposition to D.E. 25. (D.E. 27) On March 2, 2016, Petitioner received an Order granting Respondent’s Motion To Dismiss. On October 18, 2016, Petitioner filed an appeal from judgment to the U.S. Court of Appeals for the Sixth Circuit. On July 13, 2017, the U.S. Court of Appeals for the Sixth Circuit Court Clerk, Deborah S. Hunt, filed a denial, which also denied a COA, motions as moot to proceed IFP, and to extend/supplement the record. On August 15, 2017, Petitioner filed a Motion To Reconsider pursuant to T.R.A.P. Rule 14. The motion was denied.

On November 30, 2017, the U.S. Court of Appeals for the Sixth Circuit issued a Mandate (denial) pursuant to the Court’s disposition filed on July 13, 2017. On February 21, 2018, the U.S. Court of Appeals for the Sixth Circuit issued a denial on the Petition For Rehearing pursuant to the Court’s disposition filed on 7/13/17. On March 1, 2018, the U.S. Court of Appeals for the Sixth Circuit issued a Mandate pursuant to the Court’s disposition filed on 7/13/17.

Local Rule 7.1, Motion Practice, provides that:

[G]enerally, . . . the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must . . . demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case. Local R. 7.1(h)(3); See also *Hansmann v. Fid. Invs. Institutional Servs. Co.*, 326 F.3d 760, 767 (6th Cir. 2003) (A motion for reconsideration is granted only “if the movant demonstrates that the district court and the parties have been misled by a palpable defect, and correcting the defect will result in a different disposition of the case.”). “A ‘palpable defect’ is a defect which is obvious, clear, unmistakable, manifest or plain.” *Fleck v. Titan Tire Corp.*, 177 F. Supp. 2d 605, 624 (E.D. Mich. 2001) (internal citations omitted). “The decision whether to grant reconsideration lies largely within the discretion of the court.” *Yuba Natural Res. Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990).

REASONS FOR GRANTING THE PETITION

THE DISTRICT COURT FOR THE WESTERN DISTRICT AND UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND DECIED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

(I.)

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT ERRED RULING PETITIONER HAD NOT PRESENTED AN ACTUAL INNOCENCE CLAIM WHICH WOULD HAVE ALLOWED PETITIONER TO PROCEED DESPITE THE COURT RULING THE PETITION WAS UNTIMELY?

Petitioner will demonstrate this issue is debatable and “jurists of reason could disagree with the District Court’s resolution of his constitutional claims and jurists could conclude the issues presented are adequate to deserve encouragement to proceed further” as held in *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L.Ed. 2d 931 (2003). In addition, the Appellant and State Courts decided important questions of federal laws that has not been, but should be, settled by this Court. This factual instance is illustrated by the blatant denial of Petitioner’s constitutional rights were attributable to the Court’s deprivation of Petitioner’s 6th and 14th Amendment constitutional rights of Equal Protection and Due Process of law. This issue is debatable among jurists of reason that a Court could resolve the issues in a different manner and the questions are adequate to deserve encouragement to proceed further.

This case has also provoked an important Federal question in a way that conflicts with a decision by a State Court. The decision departed from the accepted and usual course of judicial proceedings, and

sanctioned such a departure by lower State Courts, as to call for an exercise of this Honorable Court's supervisory power.

This Honorable Court has held that a claim of actual innocence can be raised "to avoid a procedural bar to the consideration of the merits of [the Petitioner's] constitutional claims." (*Schlup v. Delo*, 513 U.S. 298, 326-329, 115 S. Ct. 851, 130 L.Ed. 2d 808 (1995)).

This Honorable Court and the United States Court of Appeals for the Sixth Circuit has held that "actual innocence", if proved, serves as a gateway through which a Petitioner may pass a statute-of-limitations bar to review. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-34, 185 L.Ed. 2d 1019 (2013). As explained in *Souter*, [A] Petitioner does not meet the threshold requirement unless he persuades the District Court that, in light of . . . new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *Larry Pat Souter v. Kurt Jones*, 395 F.3d 577 (6th Cir. 2005) ; *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L.Ed. 2d 828 (1998)(quoting *Schlup v. Delo*, *supra*) ; see also *House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L.Ed. 2d 1 (2006).

Although a Petitioner who asserts a convincing actual innocence claim does not have to prove diligence to cross a Federal Court's threshold, timing remains a factor relevant in evaluating the reliability of a Petitioner's proof of innocence. *Eberle v. Warden, Mansfield Corr. Inst.*, 532 F. App'x 605, 612-13 (6th Cir. 2013)(quoting *McQuiggin*, *supra*) Moreover, in assessing whether a Petitioner has established a convincing claim of actual innocence sufficient to overcome the procedural bar to review, the 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. *House*, *supra*.

"In an extraordinary case, where a constitutional violation has probably resulted in the conviction of one whom is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91

L.Ed. 2d 397 (1986). In *Schlup, supra*, this Honorable Court held that a credible showing of actual innocence was sufficient to enable the Court to reach the merits of otherwise procedurally-barred habeas petition.

— This Honorable Court has held that if a habeas Petitioner “presents evidence of innocence so strong that a Court cannot have confidence in the outcome of the trial unless the Court is also satisfied that the trial was free of no harmless constitutional error, a Petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.” (*Schlup, supra*). Thus, the threshold inquiry is whether “new facts raised sufficient doubt about [Petitioner’s] guilt to undermine confidence in the result of the trial.” To establish actual innocence, “a Petitioner must show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.”

Inclusion of the actual innocence exception to the limitations provisions does not foster abuse and delay, but rather recognizes that in extraordinary cases the societal interests of finality, comity, and conservation of scarce judicial resources “must yield to the imperative of correcting a fundamentally unjust incarceration.” (*Carrier, supra*).

Constitutional concerns favor of upholding equitable tolling on a credible claim of actual innocence. Several District Courts have recognized that denying federal habeas relief from one who is actually innocent would be constitutionally problematic. *Wyzykowski v. Dept. of Corr.*, 226 F.3d 1213, 1218 (11th Cir. 2000)(noting that barring a habeas Petitioner who can demonstrate actual innocence raises concerns because of the inherent injustice that results from the conviction of an innocent person, and the technological advances that can provided compelling evidence of a person’s innocence) *Larry Pat Souter v. Kurt Jones, supra*.

In *Ross v. Berghuis*, 417 F.3d 552, 556 (6th Cir. 2005), the Sixth Circuit stated; “Where a habeas Appellant fails to show cause and prejudice for procedural default of a habeas claim, a habeas Court may still consider the claim in an extraordinary case, where a constitutional violation has probably

occurred and resulted in the conviction of one who is actually innocent.”

Petitioner has always maintained his “actual innocence” and has taken steps to prove it. Petitioner is submitting sworn testimony from transcripts of the motion to suppress held on May 31, 2006, and transcripts of the trial held on December 4-9, 2006, which will prove he is entitled to relief due to his “Actual Innocence.”

Petitioner asserts Ernestine Davison was asked the same questions both times on the stand however her sworn testimony changed during the trial. The Prosecution knew and had a responsibility to know she gave perjured testimony thus committing a *Napue* violation. *Napue v. Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173, 3 L.Ed. 2d 1217 (1959). Petitioner further asserts it's been continuously confirmed, since all other evidence was circumstantial, her contradictory and perjured testimony was the sole evidence that resulted in Petitioner's unconstitutional conviction.

The credibility of witnesses is for the jury. *McGhee v. State*, 183 Tenn. 20; 189 S.W.2d 826 (Tenn.1945). Questions of the credibility of witnesses are peculiarly questions for the jury. *Halbert v. United States*, 290 F. 765 (6th Cir. 1923). The determination of the weight and credibility of the testimony of witnesses, and reconciliation of conflicts in that testimony, are matters entrusted exclusively to the trier of fact, which is the jury. It is not the duty of the Court of Criminal Appeals to assess the credibility of witnesses on appeal; that function is the duty of the trier of fact. *State v. Litton*, 161 S.W.3d 447 (Tenn.Crim.App.2004).

Jury's province being that of determining witnesses credibility, Supreme Court may not substitute it's judgment on appeal for jury's judgment. *State v. Williams*, 657 S.W.2d 405 (Tenn.1983). Since credibility of a witness is a matter for jury determination, there is no way for the Court to know what weight the jury would have given to testimony had it knew that a given witness had committed perjury regarding evidence, their position, or any other matter. After showing Ernestine Davison was not credible as either a lay or expert witness, had the jury knew this at the time of trial, they more than

likely would have disregarded all of her testimony.

Petitioner will also submit the sworn testimony of Det. Timothy Sims from the transcripts of the trial which is contradictory, perjured, unreasonable, and also contradicts Ernestine Davison. Petitioner requests this Honorable Court pay special attention to the highlighted sections of his testimony.

Timothy Sims was deceased when Petitioner went to trial however his sworn preliminary hearing testimony was read into the record by Det. Anthony Mullins. This was a violation since the Jury did not have an opportunity to observe Det. Sims' demeanor while giving testimony. "The Jury, which had the opportunity to see and observe the witnesses, were the judges as to the credibility." *Coke v. State*, 345 S.W.2d 673 (Tenn.1961).

Petitioner is further submitting sworn testimony of John Sutphin, Colonious Davis, and Thomas Terrell. Their testimony establishes innocence and other constitutional violations.

Petitioner is likewise submitting contradictory, false, inflammatory, and misleading statements from A.D.A. Michael Davis and A.D.A. Greg Gilbert.

Petitioner's Public Defender, Harry Sayle, as well knew and had a responsibility to know contradictory, false, non-harmless, inflammatory, misleading, unreasonable, and perjured testimony was being given from the State's witnesses.

T.C.A. § 27:119 Jury instructions regarding consistent and inconsistent statements:

The only purpose of allowing consistent or inconsistent statements "into evidence" is to affect the credibility of the witness. Such statements are hearsay if offered as substantive proof,¹ and a conviction cannot rest solely on such statements. The jury must be instructed as to the limited purpose of such statements.¹ Ordinarily, the failure to request such an instruction waives any complaint regarding a lack of the instruction.² The necessity for such an instruction, however, is increased where the

¹ *State v. Braggs*, 604 S.W.2d 883 (Tenn. Crim. App. 1980)

¹ *Pyburn v. State*, 539 S.W.2d 835 (Tenn. Crim. App. 1976) Error to fail to give proper instruction.

² *Mays v. State*, 495 S.W.2d 833 (Tenn. Crim. App. 1972)

inconsistent testimony is damaging to the Defendant. Accordingly, the judge must not only give a limiting instruction in the main charge but a contemporaneous instruction as well when the impeaching statements are offered.³ Even absent a special request, the failure to give such instructions may amount to fundamental error constituting grounds for reversal.⁴

In order to establish a *Napue, supra* violation, a Petitioner must show that the statement was actually false; the statement was material; and the Prosecution knew it was false. A related *Napue, supra* violation occurs through “[t]he knowing use of false or perjured testimony constitutes a denial of Due Process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998)(quoting *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989)).

It is well established that “a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L.Ed. 2d 342 (1976) ; accord *Napue, supra*. This is true whether the false testimony goes to the Defendant’s guilt or to a witness’s credibility, see *Napue, supra* and it matters not whether the Prosecution directly elicits the false testimony or merely allows false testimony to go uncorrected. To succeed on this claim Petitioner must show that: (1) the Prosecutor presented evidence which was false; (2) the Prosecutor knew of the falsity; and (3) the evidence was material. See *Coe v. Bell, supra*.

Petitioner declares the evidence he is now presenting is new reliable evidence, that’s exculpatory scientific and critical physical evidence that was not presented at trial but should have been. A Court presented with this evidence must consider it in light of all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of

³ *State v. Reece*, 637 S.W.2d 858 (Tenn. 1982)

⁴ *State v. Reece*, 637 S.W.2d 858 (Tenn. 1982)

admissibility that would govern at trial.

Petitioner further declares his trial contained multiple non-harmless constitutional errors as well as others. These errors were federal constitutional errors, thus the Court must declare a belief that it was non-harmless beyond a reasonable doubt. The multiple non-harmless constitutional errors had a substantial and injurious effect and also influenced in determining the jury's verdict. These multiple harmless constitutional errors establishes Petitioner's gateway claim of "actual innocence."

**Contradictory, False, Non-Harmless, Inflammatory, Misleading, Unreasonable, and Perjured
Testimony**

See Exhibits 1-15.

Established Violations

(1) Ernestine Davison swore under oath she was not present and did not participate in the interviewing process of Petitioner. "Q. But did you stay in the room while Sergeant Sims interviewed him? A. I did not stay in during the entire interview. Q. Oh. So you're not in the room while Sergeant Sims is interviewing Mr. Sanford? A. No." In direct contrast, at trial she testified "I type a question and ask it." Timothy Sims also swore under oath she **was** involved in the entire interviewing process.

(2) Ernestine Davison swore under oath she typed "everything" that was stated when she was called to take the statement. In direct contrast, Timothy Sims swore under oath not everything stated during the interview goes into the statement.

(3) It is documented Petitioner had a severe cut, received stitches, and had a white bandage on his right hand as a result of that injury. The custodian of records at The Med, (Hospital) Colonious Davis, testified "Right hand with bandages and dressings present." Petitioner writes with his right hand. Ernestine Davison stated under oath at both hearings she physically saw Petitioner write multiple times, including signing the alleged confession, and didn't see anything wrong with his hand. Moreover, she testified, "I don't recall if that's his writing or Tim's I don't recall."

(4) Ernestine Davison swore under oath at trial Petitioner did not have any injuries to his face. In direct contrast, Colonious Davis, testified “right eye swollen.”

(5) Ernestine Davison was asked multiple times in both hearings where Petitioner sat during the taking of the alleged statement. During the suppression hearing she swore under oath multiple times Petitioner sat next to and beside her watching as she typed. In direct contrast, at trial she swore under oath multiple times Petitioner sat behind her. In direct contrast to both of those statements, Timothy Sims swore under oath Sergeant Davis was the person who typed the statement not Ernestine Davison.

(6) Ernestine Davison swore under oath at the suppression hearing “Sergeant Sims asked questions and I just typed what they said, that’s all.” In direct contrast, at trial she swore under oath “I type a question and ask it.”

(7) Ernestine Davison swore under oath at trial Shelby County does not audio or video tape confessions. In direct contrast, Petitioner has discovered multiple cases from Shelby County which disputes that testimony. These cases cover an enormous amount of time expanding well before, at the time of, and after Petitioner’s interrogation.

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| 1) <u>State v. Alley</u> , 776 S.W.2d 506 (1989) | 9) <u>State v. Ortiz</u> , WL 304695 (2006) |
| 2) <u>State. v Bobo</u> , 727 S.W.2d 945 (1987) | 10) <u>State v. Peterson</u> , LEXIS 1067 (2011) |
| 3) <u>State v. Carter</u> , 970 S.W.2d 509 (1997) | 11) <u>State v. Price</u> , WL 376625 (2010) |
| 4) <u>State v. Clark</u> , WL 890886 (2009) | 12) <u>State v. Derrick Settles</u> , LEXIS 883 (2007) |
| 5) <u>State v. Cooper</u> , WL 160297 (1990) | 13) <u>State v. Kenneth Spencer</u> , LEXIS 903 (2011) |
| 6) <u>State v. Frederick Herron</u> , LEXIS 43 (2014) | 14) <u>State v. Young</u> , 196 S.W.3d 85 (2006) |
| 7) <u>State v. Hughes</u> , WL 3896748 (2008) | 15) <u>Thomas v. State</u> , WL 1860538 (2003) |
| 8) <u>State v. Monts</u> , 400 S.W.2d 722 (1966) | 16) <u>Wilson v. State</u> , WL 3822934 (2010) |

The numerous cases Petitioner discovered *does not* include the innumerable video confessions from Shelby County caught on A&E’s “*The First 48*.” It should be noted Ernestine Davison can be seen on

multiple episodes of that show.

(8) Ernestine Davison swore under oath at the suppression hearing her only role in the investigation was "I interviewed and obtained statements from two officers that were on the scene that morning when the incident happened. And I also obtained a statement from Mr. Sanford." In direct contrast, at trial she swore under oath in addition to taking the statements "I tagged some evidence in the property room."

(9) Ernestine Davison testified under oath at the suppression hearing, "Q. And were you present when the defendant was arrested, brought in to the office? A. Yes." Then contradicted herself and testified "And I don't know when he was brought in."

(10) Ernestine Davison testified under oath at trial, "Q. Okay. Prior to taking his statement, did you discuss anything else with the subject? A. I did not." Tim Sims' sworn testimony from the trial is in direct contrast.

(11) Colonious Davis swore under oath that an affidavit was sent from The Med to authenticate the copies of Petitioner's original medical record were true and accurate. He also testified RN, Larry Johnson treated Petitioner at 6:33 and 6:40. But the record indicates Petitioner didn't arrive at The Med until 6:48.

(12) Colonious Davis swore under oath Petitioner was not admitted to the Trauma Center. He then consistently stated Petitioner was in the Trauma Unit. However, during cross examination he admitted he had made a mistake. A.D.A. Gilbert specifically asked did they go over the records before trial and the answer was "Yes."

(13) A.D.A. Greg Gilbert misled the jury, in the closing arguments, when he stated "Mr. Sanford's on the crime scene and initially, he was treated as if he were a victim. Sergeant Kee said, they cuffed him because he was acting erratically and they were a little afraid. But he wasn't -- he was a victim and not a suspect and they treated him that way. They set him free." In direct contrast, Colonious

Davis swore under oath Petitioner was "Discharged with police."

(14) Colonious Davis swore under oath he was the manger of outpatient operation and certified as a custodian of records at The Med. However when he was asked questions regarding the records he consistently answered "I don't know" or something to the effect.

(15) Officer Thomas Terrell swore under oath Petitioner was taken into custody. In direct contrast, in the closing arguments of A.D.A. Greg Gilbert, he misled the jury by giving a false statement when he stated they set him free.

(16) Petitioner was accompanied, and questioned, in the Ambulance by MPD. He was questioned and followed at The Med by MPD. He was not allowed to use the telephone or see anyone at The Med. Angela Lee came to The Med to see Petitioner but see was refused by Timothy Sims. He was handcuffed and placed in the backseat of the police and taken to the Homicide Unit when he was released from The Med. Petitioner was never advised of his *Miranda* Rights during that time. He was not advised of his *Miranda* Rights until he reached the Homicide Unit at least nine (9) hours later. Petitioner consistently stated he did not want to talk in the Ambulance and at The Med. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966).

(17) FedEx Officer Thomas Terrell swore under oath Petitioner was taken into custody. This was on the scene. While at The Med Petitioner was in extreme pain, still somewhat confused and a little disoriented. He was being questioned and clearly stated "I don't want to talk anymore." At that time his right to remain silent should have been invoked. *Miranda v. Arizona*, *supra* since custodial police interrogation entails inherently compelling pressures that can induce a frighteningly high percentage of people to confess to crimes they never committed. *Miranda v. Arizona* *supra* ; *Corley v. United States*, 556 U.S. 303, 321, 129 S. Ct. 1558, 173 L.Ed. 2d 443, 458 (2009).

(18) A.D.A. Greg Gilbert and A.D.A. Michael Davis consistently misled the jury when they stated Petitioner "set the crime scene." In direct contrast, FedEx Officer John Sutphin, who had been a police

officer for thirteen (13) years, swore under oath "When I first arrived to the location, I observed a male getting from out of the front of the car, from off the ground in front of the car, coming towards my car. I was in a patrol car that FedEx furnished us with. I seen a man that was scared, was nervous. Didn't know whether to stay or run. I seen somebody that had so many different emotions going through his body. I had never seen nothing like it before in my life." He also stated "he was scared to death. He's nervous."

(19) FedEx Officer Thomas Terrell stated "He was sitting in the seat repeating again and again, how's my baby," and "The phrase that he spoke to me was, how's my baby. How's my baby." Officer Meiangelo Taylor stated "He was confused. He kept asking -- asking me -- this was on the way to The Med, he was asking, how is she, how is she, ..."

(20) In the Opening Statement of A.D.A. Greg Gilbert he stated "It won't be the State's position that the truth, the real truth is in either of the statements that Mr. Sanford gave." In his Closing Arguments he stated "Now -- and I submit to you that -- I won't tell you everything in this statement is true. Your job as the witness -- as the trier of fact, is to judge the credibility of the witnesses" and "Mr. Sanford gave this statement here and we have to weigh its credibility. And you were told, you can believe some, all, or none." Then in direct contrast, also in his Closing Arguments he stated "And I would submit to you that this statement is accurate."

(21) In the Closing Arguments of A.D.A. Michael Davis he stated "Now, here, as I told you during voir dire, you're going to hear testimony and you're going to have to determine if you're going to believe all of it, some of it, or none of it." Then in direct contrast he stated "I submit that his statement fits the evidence that you have here before you on this table" and "I submit to you, that's what happened. I submit to you, that's what the evidence shows you is what happened. I submit to you, that's what the evidence shows you is what happened."

(22) In the Closing Arguments of A.D.A. Greg Gilbert he stated "Officer Payment did a good job."

In the Closing Arguments of A.D.A. Michael Davis he stated "Sims was a professional detective. He wasn't a thug. He knows how to interview people and that's what he did with Mr. Sanford. Who knows how he did it? I submit he might have tricked him. Who knows? We weren't there" and "Sergeant Davison was there. She said she didn't remember who signed on top, but she saw the man sign it, and she signed afterwards. Was she in there? Was she a thug, too? Was she beating him too?"

(23) In the Closing Arguments of A.D.A. Michael Davis he stated "That he was defending himself from this tiny, under five foot, hundred and twenty-two pound woman with a disabled arm from a childhood stroke", "She was tiny" and "You had Mr. Sanford and you had Kelly Alexander. Little Kelly. Big, healthy, Gerald Sanford. Who's the biggest threat to supposed carjackers or robbers? Little Kelly? Or big Mr. Sanford? Kelly Alexander, Little Kelly, disabled arm, was destroyed."

(24) The sworn testimony of multiple witnesses stated the victim was covered in blood. In FedEx Officer John Sutphin sworn testimony it was stated Q. Where did you notice him bleeding? A. He had blood all over him. He also had blood -- he just had blood all over him and every place he stepped left a bloody footprint. Q. Do you remember if he had blood on his face? A. Mr. Sanford was covered in blood. However none of the victim's blood was on Petitioner and none of Petitioner's blood was on the victim.

(25) The State hypothesized Petitioner was in the passenger seat which scientifically explained why the victim received injuries to the right side of her face. However, they never scientifically explained how Petitioner received a cut to his right hand. If Petitioner was sitting to the right of the victim and she swung a knife at him, human reflexes would have been to raise his left arm in defense. It is impossible, unrealistic, and defies logic and science to believe Petitioner turned in the seat and blocked/defended himself with his right hand where he received injuries.

(26) It is also confirmed both the victim and Petitioner received injuries and was bleeding and covered in blood. It has never been scientifically or even reasonably explained or proved how Petitioner managed to not get a single drop of the victim's DNA on him or how none of his DNA was on her or the murder weapon.

(27) Petitioner asserts he did not sign the confession/statement. On August 3, 1995, Petitioner's son, Gerald A. Sanford Jr., was born. Since that time Petitioner has signed "everything" Gerald A. Sanford Sr. He even initials "everything" GASSR. Petitioner began the University of Memphis in January 1996. All records will show Petitioner signed and initiated "everything" Gerald A. Sanford Sr. and GASSR. The alleged confession/statement is only signed Gerald Sanford and initialed GS. That is not consistent with Petitioner voluntarily signing.

This evidence clearly establishes multiple witnesses mainly Ernestine Davison and Timothy Sims committed perjury in critical stages of the proceedings. It is confusing as to why her testimony changed during the trial when she testified she remembered Petitioner's case. It is unrealistic to believe she watched Petitioner write and didn't see the hand wrapped in white bandages. Ernestine Davison didn't see the white bandages because she didn't witness Petitioner make or sign the alleged confession/statement. Also, how could she not know Petitioner's handwriting if she witnessed him writing? The Prosecution stated they prepped her for trial thus knew or should have known the innumerable inconsistencies in her testimony while she was testifying hence committing *Brady* (*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963)) and *Napue, supra* violations. Either she perjured herself during the suppression hearing or at trial. Either way her testimony was not credible and the Prosecution was totally aware and still chose to go forth with her sworn testimony. It was the Prosecution's responsibility to review and check the validity of Ernestine Davison's testimonies and ensure she gave accurate and truthful testimony. Moreover, it was the Prosecution's responsibility to ensure Tim Sims' testimony was accurate and truthful before it was read into the

record at trial. That did not occur.

Ernestine Davison's testimony was extremely prejudicial, non-harmless, and unconstitutional since Petitioner was unconstitutionally and wrongfully convicted as a result. Petitioner asserts once her prejudicial, non-harmless, and unconstitutional testimony is removed from the record or had her testimony been absent from the record or even challenged at trial, it is debatable that jurists of reason would agree with the jury's resolution of the case. This is chiefly since the other evidence was extremely circumstantial.

Timothy Sims testified Petitioner never gave a description of the attackers nor did he state the number of attackers. However, A.D.A. Greg Gilbert's opening statement contradicted that. It was clearly established Petitioner was extremely emotional and unstable. When Petitioner used the "N" word it should have been apparent, based on society's terminology, the perpetrators were black. The police never asked any questions as it related to that description or terminology.

Petitioner has also established Timothy Sims' sworn preliminary hearing testimony was in direct contrast to both of Ernestine Davison's testimonies. If this Court determines Ernestine Davison's testimonies were not different this Court must determine Tim Sims committed perjury at the preliminary hearing. When that is determined every proceeding following the preliminary hearing should be vacated since there would not have been enough evidence to transfer the case to Criminal Court because had Tim Sims been truthful at the hearing Petitioner would never have faced a jury.

Colonious Davis swore under oath Petitioner's original medical records were true and accurate. He then testified RN, Larry Johnson removed Petitioner's clothing and valuables at 6:33. At 6:40, RN, Larry Johnson removed the dressing on his right hand and cleaned the dried blood. **This is impossible since the record states Petitioner didn't arrive at The Med until 6:48.** Colonious Davis also swore under oath Petitioner was not admitted to the Trauma Center. Then he acknowledged during cross examination Petitioner was indeed in the Trauma Unit.

FedEx Officer Thomas Terrell swore under oath Petitioner was taken into custody on the scene. This was at/or around 6 am. Petitioner was never read his *Miranda* rights. While at The Med, Petitioner was in extreme pain, still somewhat confused and disoriented. He was being questioned and clearly stated "I don't want to talk." When Petitioner stated he was not answering questions his U.S. constitutional and First and Ninth Tennessee Constitutional right to remain silent applied. He was not read his *Miranda* rights until he arrived at the Homicide office at 1:35 pm. Then Timothy Sims deceived Petitioner telling him he could not speak with him until he signed the waiver so he could further investigate "so I can find who killed your baby." This violated *Miranda v. Arizona, supra*.

Petitioner has provided the closing arguments of the State's A.D.A., Greg Gilbert, which establishes he unconstitutionally vouched for the credibility of State witnesses Ernestine Davison, David Payment and Tim Sims. He also unconstitutionally instructed the jury to accept the alleged confession/statement as "accurate" then pointed out inconsistencies and instructed the jury to believe "all of it, some of it, or none of it."

A.D.A. Greg Gilbert and A.D.A. Michael Davis, themselves, gave inconsistent statements. A.D.A. Micheal Davis also unconstitutionally used inflammatory and prejudicial words. Moreover, they knew or should have known the innumerable inconsistencies in their witness's testimonies, mainly Ernestine Davison and Timothy Sims' testimony, when it was read into the record at trial. Their deliberate and intentional actions, or inactions, produced *Brady, supra* and *Napue, supra* constitutional violations that were extremely prejudicial and harmful.

Petitioner can not comprehend why his Public Defender, Harry Sayle, did not object and challenge the witnesses when they were giving the contradictory, false, non-harmless, inflammatory, misleading, unreasonable, perjured, and prejudicial, testimony and statements. His neglect and inactions clearly establishes Petitioner suffered severely and experienced Ineffective Assistance of Counsel. Petitioner's conviction was due to the enormous unconstitutional errors.

Judge John Colton did not give proper jury instructions regarding consistent and inconsistent statements thus, violating *T.C.A. § 27:119*. The failure to give such instructions amounted to fundamental error constituting grounds for reversal.

Petitioner has established a *Brady, supra* violation since he has satisfied the three requirements. Moreover, Petitioner has established a *Napue, supra* violation since he established the statements were actually false, material, and the Prosecution was knowledgeable. In addition, there was a denial of Due Process since the false testimony affected the judgment of the jury.

Petitioner has been persistent through Due Diligence. Petitioner has shown that he has not failed to act diligently to follow and adhere to equitable tolling and appeal procedures and principles. Through Due Diligence Petitioner presented and raised serious questions about some dramatic events that took place and evidence presented against him at his trial, sentencing hearing, Post-Conviction stage, and habeas petition, which if had been properly informed, or evidence properly presented and considered, likely would have resulted in a different outcome. Petitioner submits that he has acted diligently in pursuing his rights, even with reasonableness in remaining ignorant of legal requirements for filing his claims, Ineffective Assistance of Counsel, inadequate legal research by past Attorneys, failure to present favorable exculpatory evidence, and other mistakes which have found to have risen to the Extraordinary Circumstances required for litigations. Petitioner should be allowed to proceed, because of Extraordinary Circumstances that were both beyond his control and unavoidable even with diligence.

The Sixth Circuit and Western District Court of Tennessee's decision should be vacated since the statute of limitations should not have begun until **after** *Trevino v. Thaler, supra* and *Sutton v. Carpenter, supra* was finally decided on March 19, 2014, especially since the Sixth Circuit ruled those cases apply to Tennessee Prisoners.

Petitioner's conviction and sentence is a Fundamental Miscarriage of Justice, Lawrence Sipple v. U.S., 726 F. Supp. 2d 818 (6th Cir. 2010) and the constitutional errors in this case are not harmless errors and all demonstrate cause and prejudice as they are unreasonable applications of federal Laws. Lynumn v. Illinois, 372 U.S. 528, 83 S. Ct. 917, 9 L.Ed. 2d 922 (1963). Petitioner has made "a substantial showing of multiple denials of his constitutional rights" as proscribed in 28 U.S.C. § 2253. He has presented issues that demonstrate jurists of reason would disagree with the District Court and Sixth Circuit's resolution of his constitutional claims and jurist would conclude the issues presented are adequate to deserve encouragement to proceed further. In addition, since Petitioner was denied on procedural grounds and has demonstrated jurists of reason would not find it debatable that his petition states valid claims and jurists of reason would not find it debatable that the District Court and Sixth Circuit was correct in its procedural rulings.

This Honorable Court is afforded discretionary authority to grant this appeal since Petitioner has demonstrated reasonable diligence to uncover and present evidence which tips the scale for review. The materiality is evident and likely to change the result and an abuse of discretion has occurred where the lower Court has applied an incorrect legal standard since its decision was illogical and unreasoned.

Petitioner has, to the best of his abilities, demonstrated and established that Relief should be applied, in that the type of circumstances, which were outside his control, are eternal to him. Due to misinformation and being ignorant to any and all filing procedures in these proceedings, lenience should apply since his failure to meet the requirement was unavoidable and circumstances arose beyond his control.

Prior presentations and filings by Petitioner has supported his claims of actual innocence with sufficient evidence to satisfy the Schlup v. Delo, *supra* standard. Evidence presented by the State of Tennessee, didn't result in any real conclusions as to guilt. That should be enough to substantiate reversal of conviction, or at the very least, a new trial. Since Petitioner has presented evidence of

innocence so strong this Honorable Court should not have confidence in the outcome of the trial, and should not be satisfied that the trial was free of non harmless constitutional errors. Thus, Petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Under the Standard of Murray v. Carrier, *supra* he has shown that a constitutional violation resulted in the conviction of one who is actually innocent, which governs a miscarriage of justice inquiry when a habeas Appellant, who has been sentenced, raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims. Petitioner has asserted a credible claim of actual innocence supported by allegations of constitutional errors with reliable evidence, which is both exculpatory scientific and critical physical evidence (# 25-27) that was not presented at trial. Petitioner has asserted actual innocence from the onset and established that it is more likely than not that no reasonable jury would have convicted him in the light of the evidence which presents a stronger showing than needed to establish prejudice. Petitioner respectfully submits the showing of innocence is contained in the trial record and sufficient evidence does not support the jury's verdict.

This Honorable Court firmly established an exception for fundamental miscarriages of justice in Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L.Ed. 2d 364 (1986) and Smith v. Murray, 477 U.S. 527, 106 S. Ct. 2661, 91 L.Ed. 2d 434 (1986). Those cases ensured, as in Petitioner's case, that relief would be extended to those who are truly deserving. Depriving Petitioner of the opportunity to appeal would deny him the full panoply of protections afforded to criminal defendants by the Constitution.

Judicial economy and public interest will best be served by vacating the Sixth Circuit and Western District Court of Tennessee's decision since Petitioner is **completely and totally innocent**.

This evidence added to the old evidence confirms and supports Petitioner's innocence. After viewing and admitting all the evidence, it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. The State has never stated a motive why Petitioner

committed this crime. Petitioner has spent fourteen (14) years in prison for a crime he **did not commit**.

(II.)

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT ERRED RULING PETITIONER FAILED TO PROVE THE DENIAL WAS BASED ON CLEARLY ESTABLISHED LAW WHEN THE COURTS FAILED TO RECOGNIZE THE MIDDLE DISTRICT COURT'S ORDER WHICH WOULD HAVE TOLLED THE STATUE OF LIMITATIONS?

Petitioner will demonstrate this issue is debatable and "jurists of reason could disagree with the District Court's resolution of his constitutional claims and jurists could conclude the issues presented are adequate to deserve encouragement to proceed further" as held in Miller-El v. Cockrell, *supra*. In addition, the Appellant and State Courts decided important questions of federal laws that has not been, but should be, settled by this Court. This factual instance is illustrated by the blatant denial of Petitioner's constitutional rights were attributable to the Court's deprivation of Petitioner's 6th and 14th Amendment constitutional rights of Equal Protection and Due Process of law. This issue is debatable among jurists of reason that a Court could resolve the issues in a different manner and the questions are adequate to deserve encouragement to proceed further.

This case has also provoked an important Federal question in a way that conflicts with a decision by a State Court. The decision departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by lower State Courts, as to call for an exercise of this Honorable Court's supervisory power.

A statue of limitations must be tolled when principles of equity would make its rigid application unfair. Such a situation arises if (1) the Defendant has misled the Petitioner; (2) if the Petitioner has in some extraordinary way been prevented from asserting his rights; or (3) if the Petitioner has timely

asserted his rights mistakenly in the wrong forum.

A Court's action, even if legitimate when taken, may constitute an extraordinary circumstance warranting equitable tolling if it later operates to prevent a Petitioner from pursuing his rights.

In this case, the Order stated Petitioner's "conviction became final on April 20, 2009, ninety days after the Tennessee Supreme Court denied permission to appeal on January 20, 2009. The statute of limitations began to run on April 21, 2009, and ran for 199 days until November 5, 2009, when he filed a petition for Post-Conviction relief. The limitations remained tolled until November 13, 2013, when the Tennessee Supreme Court denied permission to appeal on Post-Conviction review. On November 14, 2013, the statute of limitations began to run again, uninterrupted, until its expiration 166 days later on April 28, 2014." **(Appendix C., P. 3)**

The Order also stated although Petitioner "filed a motion to hold in abeyance on November 13, 2012, before expiration of the statute of limitations, that motion did not toll the statute of limitations because it was not accompanied by a habeas corpus petition. Sanford's abeyance motion was essentially a notification of his intent to file a habeas corpus case. ... Because a case does not become pending until an application for habeas corpus is filed, it follows that a notification of intent to file a habeas corpus petition unaccompanied by a habeas corpus petition is insufficient to initiate a federal habeas corpus proceeding for statute of limitations purposes. Because Sanford's habeas corpus petition was filed on July 16, 2014, after expiration of the one-year statute of limitations period on April 28, 2014, it is time-barred." **(Appendix C., P. 3-4)**

The Order further stated, "The district court granted Sanford's abeyance motion on December 12, 2012, and informed him that he could file a motion to reopen after exhaustion was completed." **(Appendix C., P. 1-2)**

Petitioner's "motion to hold in abeyance", demonstrating diligence, stated in part:

"[h]e wishes to raise in the Habeas Corpus petition his direct appeal issues, which has been exhausted

and he wishes to raise Ineffective Assistance of Counsel claims against his trial Attorney and his Appellate Counsel in the federal Habeas Corpus petition, along with other errors.” (Id. at Page 1.)

The Order Granting abeyance from Senior District Judge Campbell, of the Middle District Court of Tennessee, stated in part:

“In this case, the petitioner is attempting to fully exhaust state court remedies before the Court on his federal habeas corpus claims. It appears that the interest of “judicial economy and timeliness” would best be served by holding the instant action in abeyance rather than dismissing it now without prejudice. “The clerk is directed to close the file administratively, the file may be reopened upon motion of Petitioner.” Accordingly, Petitioner’s Motion to Hold in Abeyance” is hereby GRANTED.” (Order EFC No. 7 at Page 14-15.)

The Order also stated Petitioner’s “interpretation” of the District Court’s Order misled Petitioner to believe “once he was ready” he could return. **(Appendix C., P. 4)** Petitioner was misled as a result of Senior District Judge Todd J. Campbell. It also appears Tennessee Western District Judge S. Lipman determined another District judge, Senior District Judge Campbell of the Tennessee Middle District, misapplied the law and gave a misleading Order when he Granted Petitioner’s abeyance motion, motion to reopen, and gave Petitioner 30 days to file an “amended” petition. Senior District Judge Campbell gave Orders based on the evidence in front of him at that time. Petitioner followed those Orders precisely. Now, Petitioner is being punished for following those Orders which is unjust and unreasonable. Neither Western District Judge S. Lipman, the Sixth Circuit, nor Petitioner can “second guess” other meanings of Senior District Judge Campbell’s Orders. All Petitioner could do, and did do, was follow Senior District Judge Todd J. Campbell’s Orders.

The Order as well stated “Williams v. Coyle, 167 F.3d 1036, 1037 (6th Cir. 1999), does not address the precise question whether a preliminary motion unaccompanied by a habeas corpus petition is sufficient to initiate a habeas proceeding to comply with the limitations.” **(Appendix C., P. 3)** The Order then quoted Williams v. Coyle ruling Petitioner’s abeyance motion was only a notification of his intent to file a habeas petition which was insufficient to initiate a federal corpus case. However,

Williams v. Coyle also states, “Also, 28 U.S.C. § 1914(a) provides that the ‘district court shall require the parties instituting any civil action, suit or proceeding ... to pay a filing fee of \$150, except that on application for a writ of habeas corpus the filing fee shall be \$5.’ Both provisions equate the commencement of the habeas proceeding.”

The Order cited Woodford v. Garceau, 538 U.S. 202, 210 (2003) stating “a case does not become ‘pending’ until an application for habeas corpus relief is filed in federal court.” (Appendix C., P. 3) However, Woodford v. Garceau also states, “As we have explained before, § 2254 places ‘new constraint[s] on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.’ *Id.*, at 412, 146 L.Ed. 2d 389, 120 S. Ct 1495. Our cases make clear that AEDPA in general and § 2254 in particular focus in large measure on revising the standards used for evaluating the merits of habeas application.”

More importantly, former Justice Sandra Day O’Connor, concurred:

After *Garceau* filed a motion for the appointment of counsel, motion for a stay, and motion for leave to file a habeas application, the District Court stayed *Garceau*’s execution. Over the objection of the State, the District Court held that *Garceau* had identified nonfrivolous issues so that a stay of the execution was appropriate. It is difficult to see how the ‘merits’ were not in front of the District Court at the time, which was well before AEDPA’s effective date. ... in addition, the court does not adequately distinguish *McFarland v. Scott*. **I see no need to question the underpinnings of *McFarland* in this case, and I accept the holding of *McFarland* that an application for a writ of habeas corpus is not necessary to trigger the beginning of a habeas proceeding.** *McFarland v. Scott*, 512 U.S. 849, 114 S. Ct 2568, 129 L.Ed. 2d 666 (1994).

The Order likewise cited *Lookingbill v. Cockrell*, 293 F.3d 256, 263 (5th Cir. 2002) stating “a notification of intent to file a habeas corpus petition unaccompanied by a habeas corpus petition is insufficient to initiate a federal habeas corpus proceeding for statute of limitations purposes.”

(Appendix C., P. 4) However, *Lookingbill v. Cockrell* also states, “Therefore, a court may toll the limitations period in rare and exceptional circumstances. Such circumstances would exist, for example, if the plaintiff was actively misled by the defendant about the cause of action or was prevented in some

extraordinary way from asserting his rights.”

Circuit Judge Dennis dissented stating,

Because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than ‘extraordinary circumstances’ to trigger equitable tolling of the AEDPA’s statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair. ... Finally, the majority’s conclusion that *Lookingbill* could have filed a skeletal federal habeas corpus petition *pro se* imposes an unfair and unrealistic burden upon an unsophisticated prisoner ... Habeas Corpus petitions must meet heightened pleading requirements and comply with the Supreme Court’s doctrine of procedural default and waiver ... For the foregoing reasons, we should grant equitable tolling. As we have wisely concluded before, ‘we must be cautious not to apply the statute of limitations too harshly,’ especially where the consequences of error are so grave.

Senior District Judge Campbell gave clear and direct ORDERS. In D.E. 2, it states “ORDER”:

“Petitioner is GRANTED 30 days to pay the \$5 filing fee.” Petitioner complied. In D.E. 7, it states “ORDER”: “Petitioner’s abeyance motion is GRANTED” and “It is so ORDERED.” In D.E. 11, it states, “ORDER”: “Petitioner’s reopen motion is GRANTED, the Clerk shall REOPEN the case file, and Petitioner is GRANTED 30 days to file an ‘amended § 2254 petition.’ It is so ORDERED.”

Petitioner complied with all Orders. On November 13, 2013, the limitations should not have begun to run again because, at that point, according to Senior District Judge Campbell, the law, and the docket, the petition had been filed. The case was directed to be closed administratively and only to be opened upon Petitioner’s motion to reopen. No other directive was given to the Court Clerk or Petitioner.

When Senior District Judge Campbell ORDERED Petitioner to pay the filing fee, GRANTED the abeyance motion, the reopen motion, and ORDERED Petitioner 30 days to “amend the petition”, not once did the Respondent file a motion in opposition. This was a period of time that expanded from November 11, 2012 to July 17, 2014. On November 5, 2014, (D.E. 22) District Judge Lipman ordered a response. That was nearly another 4 months sans an opposition. Nearly a month later Respondent filed for, and was granted, an extension of time, still sans an opposition. (D.E. 23-24). In D.E. 24, Judge Lipman directed a response by January 20, 2015. Respondent’s response was filed on January

20, 2015. (D.E. 25)

Under the “Doctrine of Unique Circumstances” the law of the case doctrine applies only to issues that have been decided explicitly (or by necessary implication) by a Court. A Court need not elucidate or explain its decision, but it must decide upon a rule of law.

In Transcontinental Leasing, Inc., Hussein Z. Keilani, and Durant & Durant v. Michigan National Bank Detroit, NBA, U.S. App. LEXIS 21535 (6th Cir. 1991), Petitioner filed his appeal and received from the trial Court a 30-day extension on “excusable neglect based on a failure of a party to learn of the judgment.” Petitioner filed his appeal within the period of extension but beyond the original period. The District Court dismissed the appeal but this honorable Court reversed the dismissal and remanded the appeal to be heard on the merits. Due to unique circumstances where an Appellant relies upon an erroneous extension of a filing deadline, the untimely notice does not deprive a federal Appellate Court of jurisdiction to hear the appeal.

This also occurred in Petitioner’s case. Unique circumstances arose from Petitioner’s justified reliance on the Tennessee Middle District Court’s misleading, although specific, extension of the filing deadline.

The District Court’s misleading ruling did not mention equitable tolling once the State judgment became final. The Order was clear and concise so Petitioner understood the Order to mean, exactly what it stated which was once “he was ready” he was to motion to reopen.

Petitioner is not a trained member of the Bar and complied with the Order when it stated, “... the file may be reopened upon motion of Petitioner.” Neither this Court nor Petitioner can second guess the District Court’s Order or interpret its own independent understanding. If the time began to toll when the judgment became final in November 2013, Petitioner is confused as to what was the purpose and meaning of having the action in abeyance?

If the statute of limitations continued to toll while in abeyance Petitioner is confused as to what abeyance means. Abeyance is defined as “suspension.” Suspension is defined as “pause and/or intermission.” If the limitations was to begin after judgment Petitioner is confused as to why Senior District Judge Campbell used the language, “It appears that the interest of “judicial economy and timeliness” would best be served by holding the instant action in abeyance rather than dismissing it now without prejudice.”

When Petitioner filed his motion in 2012, the Middle District never issued an Order directing Petitioner to amend his petition in a specific time. It was only after Petitioner submitted his motion to reopen did the Middle District Order Petitioner to amend. When the case was transferred from the Middle District, Western District Judge Lipman just simply overruled and disregarded the Middle District’s orders and wrongfully dismissed the petition. Petitioner is baffled and troubled how a District Judge can overrule and disregard another District Judge’s orders, especially since a District Judge does not have any authority over another. Moreover, the Sixth Circuit abused its discretion when they upheld District Judge Lipman’s ruling.

“A District judge’s Order advancing a case to trial ought not be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication.... I believe this an intolerable burden for us, an improper and uncertain interference with trial Court discretion and a confusing invitation to indiscriminate appeals in the future-all contrary to settled law against piecemeal appeals.” (*Henderson v. Gatz Corp.*, 49926 U.S. Dist. LEXIS (2012)).

In the interest of public interest, the Western District Court could/should have construed the abeyance motion in 2012 as a deficient petition and the 2014 petition as an amended pleading and should not have dismissed the petition since Petitioner never advised the District Court he was unwilling or unable to amend in a manner that would have avoided dismissal instead of dismissing the petition. Federal Rules allow for the petition to be amended as a matter of law. The Federal Rules of

Civil Procedure provide that “leave (to amend the complaint) shall be freely given when justice so requires.” *Fed.R.Civ.P. 15(a)*. The Court should generally afford Plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or Plaintiffs advise the Court that they are unwilling or unable to amend in a manner that will avoid dismissal.

Section 2242 of the Judicial Code also provides that habeas corpus applications “may be amended or supplemented as provided in the rules of procedure applicable civil actions.” *28 U.S.C. § 2242*. Likewise, *Rule 12 of the Rules Governing Section 2254 Cases in the United States District Court* provides that “[t]he Federal Rules of Civil Procedure, to the extent they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.” Taken together, these provisions allow “amendment of the petition ... under the liberal standards of *Civil Rule 15*.”

In *Keven B. Carter 303424 v. Burl Cain*, *U.S. Dist. LEXIS 26111 (2011)*, the District Court ruled, Kevin B. Carter’s federal habeas petition was not filed but instead was retained separately by the Court as a deficient petition until he submitted a pauper application in 2009. Based on the foregoing, the Court found Carter’s federal habeas application was deemed filed as of its original tendered date thus making his habeas petition timely filed in the Court.

Another question is if the District Court’s adjudication of the petition “involve an unreasonable application” of clearly established law when it ruled Petitioner’s petition was past the limitations.

A decision of a State Court is “contrary to” clearly established federal law if the State Court arrives at a conclusion opposite to that reached by [this Honorable Court] on a question of law or if the State Court confronts facts that are materially indistinguishable from relevant Supreme Court precedent and arrives at an [opposite] result. *Williams v. Taylor*, *529 U.S. 362, 405, 120 S. Ct. 1495, 146 L.Ed. 2d 389 (2000)*. An unreasonable application occurs when a State-Court decision unreasonably applies the law of [this Honorable Court] to the facts of a Prisoner’s case.

Clearly established law as determined by the Court refers to the holdings, as opposed to the dicta, of the Court's decisions as of the time of the relevant District Court decision.

In such cases, the Court "must uphold the State Court's summary decision unless [the Court's] independent review of the record and pertinent federal law persuades [the Court] that its contravenes, unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented." (quoting *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999); *Harris v. Stovall*, 212 F.3d 943 (6th Cir. 2000)).

The 11th Circuit reversed the District Court's dismissal of a § 2254 petition as untimely in *Spottsville v. Terry*, 476 F.3d 1241 (11th Cir. 2007), finding that the state habeas Court misled Petitioner's filing. Daniel Spottsville, a Georgia prisoner, appealed the dismissal of his petition for a writ of habeas corpus as untimely and raised two issues: whether *Spottsville*'s filing of papers in the wrong clerk's office to appeal the denial of his state petition for habeas relief tolled the limitations period for filing his federal petition; and, alternatively, whether *Spottsville* is entitled to equitable tolling for having relied on misleading instructions about filing an appeal in the order that denied his state petition.

According to *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998), there are two instances in which a State Court decision would be contrary to clearly established Supreme Court precedent under that phrase's plain meaning: "When a State Court faces a set of facts that is essentially the same as those the Supreme Court has faced earlier" but reaches a different result; and when a State Court fails to apply the correct legal principals, as enunciated by Supreme Court case law, to decide a case. Later, this approach was reaffirmed in *Maurino v. Johnson*, 210 F.3d 638 (6th Cir. 2000).

A District Court may grant relief under *Fed.R.Civ.P. 59(e)* for any of four reasons: (1) because of an intervening change in the controlling law; (2) because evidence not previously available has become available; (3) to correct a clear error of law; or (4) to prevent manifest injustice.

Its obvious and evident Senior District Judge Campbell of the Middle District Court of Tennessee misled Petitioner by issuing a misleading ruling.

It is unmistakable and evident Senior District Judge Campbell considered Petitioner's payment of the filing fee as the commencement of the habeas proceedings which is why he assigned a case number and later directed Petitioner to file an "amended" petition. Petitioner complied with every single order from Senior District Judge Campbell. If Senior District Judge Campbell misinterpreted or misapplied the law Petitioner should not suffer as a result. The Sixth Circuit has acknowledged Petitioner has always recognized the statute of limitations and the importance of timely filing and also agreed that the abeyance order was "open ended."

Therefore, Petitioner avers since he paid the \$5 filing fee, which equates to the commencement of the habeas proceeding and equitable tolling applied, his petition was timely and should not have been dismissed.

(III.)

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT ERRED RULING THE NINETY-DAY PERIOD A PETITIONER MAY SEEK REVIEW IN THE U.S. SUPREME COURT DID NOT TOLL PETITIONER'S LIMITATIONS?

Petitioner will demonstrate this issue is debatable and "jurists of reason could disagree with the District Court's resolution of his constitutional claims and jurists could conclude the issues presented are adequate to deserve encouragement to proceed further" as held in Miller-El v. Cockrell, *supra*. In addition, the Appellant and State Courts decided important questions of federal laws that has not been, but should be, settled by this Court. This factual instance is illustrated by the blatant denial of Petitioner's constitutional rights were attributable to the Court's deprivation of Petitioner's 6th and 14th Amendment constitutional rights of Equal Protection and Due Process of law. This issue is debatable

among jurists of reason that a Court could resolve the issues in a different manner and the questions are adequate to deserve encouragement to proceed further.

This case has also provoked an important Federal question in a way that conflicts with a decision by a State Court. The decision departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by lower State Courts, as to call for an exercise of this Honorable Court's supervisory power.

The Order stated, "The ninety-day period during which a petitioner may seek review his conviction in the U.S. Supreme Court is included in the direct review process, and the statute of limitations will not begin to run until that time has expired." Lawrence v. Florida, 549 U.S. 327, 336, 127 S. Ct. 1079, 166 L.Ed. 2d 924 (2007). This limitations period is tolled by the 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. Unlike the direct review process set forth in § 2244(d)(1), the filing for certiorari before [the U.S. Supreme Court] does not toll the statute of limitations under § 2244(d)(2) and Lawrence, 549 U.S. at 327." (Appendix C., P. 2-3)

However, in Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L.Ed. 2d 542 (2000), this Honorable Court ruled, "When the District Court denies relief on procedural grounds, the Petitioner seeking a certificate of appealability must show both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling."

Gonzalez v. Thaler, 565 U. S. 134, 145, 565 U.S. 134, 132 S. Ct. 641, 181 L.Ed. 2d 619 (2012), overruled and supersedes Lawrence v. Florida, *supra*. This Honorable Court ruled in Gonzalez, *supra* the ninety-day period during which a Petitioner may seek review of his conviction in this Honorable Court *is not* included in the direct review process and the statute of limitations under § 2244 is tolled.

Once *Gonzalez, supra* was decided the Sixth Circuit agreed and applied it in *Slack v. McDaniel*.

In Petitioner's case, the statute of limitations ran from April 21, 2009, to November 5, 2009, 199 days. The limitations remained tolled until November 13, 2013. On November 14, 2013, the limitations began to run again, for 166 days, until expiration on April 28, 2014. The Western District Court of Tennessee did not include the ninety-days and the Sixth Circuit unlawfully agreed Petitioner was 84 days past the limitations. Petitioner appealed to the Tennessee Supreme Court twice, thus, the ninety-day period commences at the end of AEDPA's limitations period. Applying *Gonzalez, supra* the limitations should have enlarged from April 29 to July 27, 2014, so, when Petitioner filed his habeas petition on 7/21/14, six (6) days remained before the limitations expired making his petition timely.

(IV.)

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT ERRED IN NOT ALLOWING PETITIONER'S HABEAS PETITION TO REMAIN IN ABEYANCE WHILE APPLICABLE CASES WERE BEING DECIDED ESTABLISHING NEW CONSTITUTIONAL RULES?

Petitioner will demonstrate this issue is debatable and "jurists of reason could disagree with the District Court's resolution of his constitutional claims and jurists could conclude the issues presented are adequate to deserve encouragement to proceed further" as held in *Miller-El v. Cockrell, supra*. In addition, the Appellant and State Courts decided important questions of federal laws that has not been, but should be, settled by this Court. This factual instance is illustrated by the blatant denial of Petitioner's constitutional rights were attributable to the Court's deprivation of Petitioner's 6th and 14th Amendment constitutional rights of Equal Protection and Due Process of law. This issue is debatable among jurists of reason that a Court could resolve the issues in a different manner and the questions are adequate to deserve encouragement to proceed further.

This case has also provoked an important Federal question in a way that conflicts with a decision by a State Court. The decision departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by lower State Courts, as to call for an exercise of this Honorable Court's supervisory power.

Petitioner contends the decision rendered on November 30, 2017, conflicts with a decision of this Honorable Court as held in Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L.Ed. 2d 272 (2012), Trevino v. Thaler, *supra* and Sutton v. Carpenter, *supra* that consideration by this Honorable Court is therefore necessary to secure and maintain uniformity of the reviewing Court's decisions.

A new constitutional rule is one that breaks new ground or imposes new obligations on the states or federal government. A case announces a new rule if the result was not dictated by precedent existing at the time the Defendant's conviction became final. Cone v. Bell, 359 F.3d 785 (6th Cir. 2004), Bell v. Cone, 543 U.S. 447, 455, 125 S. Ct. 847, 160 L.Ed. 2d 881 (2005).

Trevino v. Thaler, *supra* and Sutton v. Carpenter, *supra* was critical to Petitioner's habeas petition and request for relief since it expanded the equitable tolling rule set in Martinez v. Ryan, *supra*. Petitioner has asserted grounds concerning whether Ineffective Assistance of Post-Conviction Counsel can serve as cause to excuse procedural default of Ineffective Assistance of trial Counsel.

Senior District Judge Campbell stated in his Order granting abeyance, "... and he wishes to raise Ineffective Assistance of Counsel claims against his trial attorney and his Appellate Counsel in the federal Habeas Corpus petition, along with other errors."

Petitioner has never asserted claims whether Post-Conviction Counsel's ineffectiveness can excuse the untimely filing of a habeas petition as the Sixth Circuit stated. (Appendix C., P. 5-6)

It has been held by this Honorable Court in Martinez v. Ryan, *supra*, and in Trevino v. Thaler, *supra*, and Sutton v. Carpenter, *supra* that inadequate Assistance of Counsel at initial-review collateral proceedings may establish cause for a Prisoner's procedural default of a claim of Ineffective Assistance

of Counsel.

Here in the case at bar, Petitioner has diligently made every reviewing Court, at every available opportunity, aware of trial and Post-Conviction Counsel's deficient, prejudicial, detrimental, and harmful representation. Reasonable competent Counsel must be well informed of the laws applicable to his client's case and position, quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

Several cases were previously stayed deriving from the dismissal of § 2254 applications in Federal Courts throughout the United States for the very same question and reason, "procedural defaulted claims", to ascertain an accurate and complete account of constitutional precedent to govern similar situations as held in Trevino v. Thaler, *supra* and Sutton v. Carpenter, *supra*.

Some of those cases include:

(1) Hall v. Carpenter, U.S. Dist. LEXIS 39948 (6th Cir. 2015), decided on March 30, 2015. The Sixth Circuit remanded this case in light of Martinez v. Ryan, *supra* and subsequently held the briefing in abeyance pending the decision of this Honorable Court addressing a related issue in Trevino v. Thaler, *supra*.

(2) Odraye G. Jones n/k/a Malik Allah-U-Akbar v. Margaret Bradshaw, U.S. Dist. LEXIS 37686 (6th Cir. 2015). The Court denied issues and held other issues in abeyance until this Honorable Court ruled in Glossip v. Gross, 135 S. Ct. 2726, 192 L.Ed. 2d 761 (2015). In both cases the statute of limitations were tolled since the cases were in "abeyance."

A Federal Court has discretion to stay a habeas proceeding to allow a Petitioner to present unexhausted claims to State Courts and then return to Federal Court on a perfected petition. See Rhines v. Weber, 544 U.S. 269, 276, 125 S. Ct. 1528, 161 L.Ed. 2d 440 (2005).

Until recently, a Prisoner could not demonstrate cause for default by claiming that he received Ineffective Assistance of Counsel during state-post-conviction proceedings. See Coleman v. Thompson,

501 U.S. 722, 750-51, 111 S. Ct. 2546, 115 L.Ed. 2d 640 (1992)(holding that Attorney error is not cause to excuse a default). The holding in *Coleman* was based on the premise that an individual does not have a constitutional right to Counsel in Post-Conviction proceedings, so the Prisoner “must bear the risk of Attorney error that results in a procedural default.”

Recent changes in law, however, have enabled Petitioners in Tennessee to establish “cause” to excuse the procedural default of a substantial claim of Ineffective Assistance by demonstrating the Ineffective Assistance of Post-Conviction Counsel in failing to raise claims in initial-review Post-Conviction proceedings. See *Martinez v. Ryan*, *supra* (creating an exception to *Coleman* where state law prohibits ineffective-assistance claims on direct appeal; *Trevino v. Thaler*, *supra* (extending *Martinez*, *supra* to states with procedural frameworks that make meaningful opportunity to raise ineffective-assistance claim on direct appeal unlikely); *Sutton v. Carpenter*, *supra* (holding that *Martinez*, *supra* and *Trevino*, *supra* apply in Tennessee.)

This Honorable Court’s decision in *Martinez*, *supra* of a narrow exception to the procedural-default bar stemmed from its recognition, “as an equitable matter, that the initial-review collateral proceeding, if undertaken without Counsel or with ineffective Counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.” *Martinez*, *supra*. Importantly, *Martinez*, *supra* did not dispense with the “actual prejudice” prong of the standard for overcoming procedural default first articulated by this Honorable Court in *Coleman*, *supra*.

A habeas Petitioner who defaults on his federal claims in State Court is barred from bringing those claims in Federal Court unless he can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. As this Honorable Court has explained, the cause and prejudice standard tracks the last two elements of a *Brady*, *supra* claim: suppression by the government and materiality.

This Honorable Court has put the constitutional “cause and prejudice” standard into the following language:

“In all cases in which a state Prisoner has defaulted his federal claims in State Court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the Prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law. . .” *Coleman v. Thompson*. A lawyer’s “lack of diligence” in handling the case - if that is what led to a failure to correct a constitutionally defective trial - meets the constitutional test of “cause and prejudice.”

Where a Petitioner cannot demonstrate the cause and prejudice necessary to overcome a procedural default, a Court may reach the merits of a procedurally defaulted claim where review of the claim is necessary to correct or avoid a “fundamental miscarriage of justice.” (*Murray v. Carrier, supra* (finding that where a constitutional violation likely resulted in the miscarriage of justice, a Federal Court may grant habeas relief even in the absence of a showing of cause to overcome a procedural default)).

In order to establish cause for a default, a Petitioner must demonstrate that the default is due to an external factor that “cannot fairly be attributed to him.” The prejudice prong is met if he can show that each error he alleges - was serious enough to undermine confidence in the outcome of the proceeding. *Connolly v. Howes*, 304 Fed. App’x. 412, 417 (6th Cir. 2008).

To demonstrate prejudice, a Petitioner must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

28 U.S.C. § 2244 indicates that the one-year limitations period can run from “the date on which the constitutional right asserted was initially recognized by this Honorable Court, if the right has been newly recognized by this Honorable Court and made retroactively applicable to cases on collateral review.” A Petitioner can take advantage of § 2244, because he had identified new constitutional rules recognized by this Honorable Court and made retroactively applicable to cases on collateral review.

Keeling v. Warden, Lebanon Corr. Inst., 673 F.3d 452, 464 (6th Cir. 2012).

Antwan J. Hall v. Warden, Lebanon Corr. Inst., 662 F.3d 745 (6th Cir. 2011) cited Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502, 516 (6th Cir. 2006) “holding that a court may appropriately consider an issue first presented on appeal where an intervening case authority might change the result because a party “can hardly be faulted for failing to raise an argument before there was legitimate legal support for such an argument.”

The petition contains numerous constitutional and procedural violations. The petition clearly cited Martinez v. Ryan, Trevino v. Thaler, and Sutton v. Carpenter, because they were essential to the filing of his habeas petition due to they established new constitutional rules. All the Tennessee District Court focused on was the assumed untimely filing. Not one issue has ever been addressed to establish Petitioner’s constitutional and procedural issues. Petitioner demonstrated and satisfied the “cause and prejudice” standard and demonstrated he suffered injury.

The statute of limitations should not have started to toll due to the abeyance Order.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Gerald A. Sanford Sr. Pro Se

Date: 8th day of March 2018.