IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40630

DARRELL WAYNE BELL,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Eastern District of Texas

O R D E R:

Darrell Wayne Bell, Texas prisoner # 1983875, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application in which he attacked his conviction for continuous sexual abuse of a child under 14 years of age. The district court dismissed the application as barred by the applicable one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1).

Bell asserts that his § 2254 application was timely filed because he filed it within one year of when he obtained his counsel's file and found that counsel possessed—but did not present at trial—potentially exculpatory evidence. He also argues that the evidence that he discovered in counsel's files establishes that he is actually innocent and, thus, the untimeliness of his application should be excused. We need not consider Bell's argument that the limitations period should be equitably tolled based on the ineffectiveness of his counsel because he did not assert that claim in the district court. *See Butler v. Cain*, 533 F.3d 314, 320 (5th Cir. 2008).

To obtain a COA, Bell must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a district court denies federal habeas relief based on procedural grounds, a COA should issue when the prisoner establishes, at least, that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004).

The Antiterrorism and Effective Death Penalty Act provides that a one-year limitations period applies to state prisoners filing § 2254 applications. 28 U.S.C. § 2244(d)(1). The limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," *see* § 2244(d)(1)(A), or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," *see* § 2244(d)(1)(D), whichever is later. 28 U.S.C. § 2244(d)(1).

Bell first contends that § 2244(d)(1)(D), not § 2244(d)(1)(A), should determine the start date for the one-year limitations period. He argues that, under § 2244(d)(1)(D), the limitations period did not begin until June 2016 when he viewed the possibly exculpatory evidence that his counsel failed to offer at trial. His argument is unavailing. Bell is deemed to have known of the evidence when his counsel obtained it, which the record reflects was prior to trial. *See Starns v. Andrews*, 524 F.3d 612, 620–21 (5th Cir. 2008) (holding that a criminal defendant was considered to have learned of the factual predicate for his habeas claims when his attorney did); *see also Hunter v. Cain*, 478 F. App'x 852, 853 (5th Cir. 2012) (indicating that applicant had not shown why he could not have found evidence through due diligence after it was disclosed to his criminal counsel). Thus, § 2244(d)(1)(A) applies, and the one-year limitations period expired in October 2016. Because Bell did not file the instant petition until June 2017 at the earliest, reasonable jurists would not debate whether Bell's § 2254 application was time-barred. *See Slack*, 529 U.S. at 484.

Bell next contends that he is actually innocent, pointing to evidence that he discovered in counsel's files that he claims shows that, on the date of one of the alleged sexual assaults, he could not have been alone with the victim and lacked the opportunity to commit the assault. While this court does not recognize freestanding actual-innocence claims on federal habeas review, *see Foster v. Quarterman*, 466 F.3d 359, 367–68 (5th Cir. 2006), actual innocence, if demonstrated, can be a gateway through which a prisoner may pass to overcome the limitations period, *see McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). As a threshold matter, to assert a credible claim of actual innocence, a prisoner must present "new reliable evidence" that was not introduced at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). This court has determined that evidence is not "new" under the *Schlup* actual-innocence standard if it "was always within the reach of [petitioner's] personal knowledge or reasonable investigation." *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008). As discussed, the evidence on which Bell relies—the records that he located in his counsel's files—had been acquired by counsel by the time of trial. Therefore, Bell has not satisfied the *Schlup* actual-innocence standard.

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For these reasons, Bell has not made the required showing to obtain a COA. His motion for a COA is DENIED. His motion for leave to proceed in forma pauperis also is DENIED.

/s/ James L. Dennis

JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

DARRELL WAYNE BELL, #1983875	§	
VS.	§	CIVIL ACTION NO. 6:17cv341
DIRECTOR, TDCJ-CID	§	

MEMORANDUM OPINION ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Darrell Wayne Bell ("Bell"), an inmate confined within the Texas Department of Criminal Justice, proceeding *pro se*, filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 alleging the illegality of his conviction. The cause of action was referred for findings of fact, conclusions of law, and recommendations for the disposition of the petition.

I. Background

Bell challenges his Smith County conviction for one count of continuous sexual abuse of a child. After a jury trial, on December 29, 2014, Bell was sentenced to life imprisonment. He filed a direct appeal, which the Twelfth Court of Appeals affirmed his conviction in September 2015. *See Bell v. State*, 2015 WL 5157510 (Tex.App.—Tyler 2015) (not designated for publication). Bell did not file a petition for discretionary review, but filed his state habeas application on August 17, 2016, which was denied without a written order on December 7, 2016. This federal habeas petition, filed on June 7, 2017, follows.

II. Factual Background

The Twelfth Court of Appeals summarized the facts as follows:

> The evidence at trial showed that Appellant was living with his fiancée's adult daughter, and the daughter's three children. One of the children was seven-year old L.J. She testified that Appellant's sexual abuse began on a "movie night." After

APPENDIX B

1364, 1367 (5th Cir. 1993); *see also Estelle v. McGuire*, 503 F.3d 408, 413 (5th Cir. 2007) ("We first note that 'federal habeas corpus relief does not lie for errors of state law.'") (internal citation omitted). When reviewing state proceedings, a federal court will not act as a "super state supreme court" to review error under state law. *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007).

Furthermore, federal habeas review of state court proceedings is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. Under the AEDPA, which imposed a number of habeas corpus reforms, a petitioner who is custody "pursuant to the judgment of State court" is not entitled to federal habeas corpus relief 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 law, as determined by the Supreme Court of the United States; or
> 2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). The AEDPA imposes a "highly deferential standard for evaluating state court rulings," which demands that federal courts give state court decisions "the benefit of the doubt." *See Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations omitted); *see also Cardenas v. Stephens*, 820 F.3d 197, 201-02 (5th Cir. 2016).

V. Bell's Objections, Discussion, and Analysis

In his objections, Bell reargues his main contention articulated throughout his habeas petition: Records of the victim's school attendance on "cable day" demonstrate that he could not be convicted of sexual abuse of a child because the victim was at school. These school records and cable tech would prove his actual innocence.

However, as the Magistrate Judge correctly found, Bell's federal habeas petition is time-barred. As the Magistrate Judge explained, Bell's entire petition is untimely as barred by the became final when his time for seeking review with the State's highest court expired"); *Roberts*, 319 F.3d at 693-94 (state prisoner's conviction became final when the thirty-day period for filing a petition for discretionary review in state court ended). Accordingly, Bell's federal petition was due by October 2, 2016—absent any tolling.

Bell's state habeas application, filed on August 17, 2016, and denied on December 7, 2016, tolled his limitations period 113 days. Therefore, given those 113 days of tolling, Bell's federal petition was due on January 23, 2017—thereby rendering this June 2017 federal petition untimely. The Magistrate Judge correctly found that Bell's petition is time-barred.

Furthermore, the Magistrate also properly found that Bell failed to demonstrate that he is entitled to equitable tolling. Under the AEDPA, the one-year statute of limitations period may be equitably tolled only if the petitioner demonstrates that (1) "he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *See Holland v. Florida*, 560 U.S. 631, 649 (2010); *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013). Furthermore, the doctrine of equitable tolling is available in only the most rare and exceptional circumstances, particularly when the plaintiff is "actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *See Flores v. Quarterman*, 467 F.3d 484, 486 (5th Cir. 2000) (quoting *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999)). Furthermore, lack of legal knowledge—however understanding the ignorance may be—does not justify equitable tolling. *Id.* at 487.

Here, as the Magistrate Judge found, Bell has not advanced any rare or exceptional circumstances warranting equitable tolling. The record shows that while Bell filed his state habeas application relatively quickly after the appellate court affirmed his conviction, the record also indicates that he waited six months before filing this federal petition. He failed to show that any that the state court's adjudication of his actual innocence claim was unreasonable or contrary to federal laws.

VI. Conclusion

A review of the pleadings and the Magistrate Judge's Report demonstrate that Bell's federal habeas corpus petition is untimely. The Court has conducted a careful *de novo* review of the Magistrate Judge's proposed findings and recommendations. *See* 28 U.S.C. §636(b)(1) (District Judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Upon such *de novo* review, the Court has determined that the Report of the United States Magistrate Judge is correct and the Bell's objections are without merit. Accordingly, it is

ORDERED that the Petitioners' objections, (Dkt. #18), are overruled and the Report of the Magistrate Judge, (Dkt. #16), is **ADOPTED** as the opinion of the District Court. Furthermore, it is

ORDERED that the above-styled petition for the writ of habeas corpus is **DISMISSED WITH PREJUDICE**. It is also

ORDERED that Petitioner Bell is **DENIED** a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby **DENIED**.

So Ordered and Signed

Jun 8, 2018

Ron Clark, United States District Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40630

DARRELL WAYNE BELL,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas

Before DENNIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for a certificate of appealability and to proceed in forma pauperis. The panel has considered appellant's motion for reconsideration of the motion for a certificate of appealability. IT IS ORDERED that the motion is DENIED.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

SEPTEMBER 2, 2015

NO. 12-15-00022-CR

DARRELL WAYNE BELL,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 114-1078-14)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DARRELL WAYNE BELL Petitioner/Appellant	§	
v.	§	No. 18-40630
LORIE DAVIS, TDCJ DIRECTOR Respondent/Appellee	§	
	§	

PETITIONER'S MOTION FOR ISSUANCE OF A

CERTIFICATE OF APPEALABILITY WITH BRIEF IN SUPPORT

TO HONORABLE JUDGE(S) OF SAID COURT:

COMES NOW, the Petitioner, Darrell Wayne Bell, in Pro-Se, in necessity, and hereby moves this Court to issue a Certificate of Appealability, "COA", authorizing him to appeal the denial of his 28 U.S.C. § 2254 habeas corpus application pursuant to 28 UUS.C. § @@53 (c)(2). See Slack v. McDaniel 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.ed. 2d 542(2000), Miller-El v. Cockrell 537 U.S. 322, 123 S.Ct. 1029, 1039, 154 L.ed. 2d 931(2003).

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a "COA" pursuant to 28 U.S.C. § 1291, § 2253; F.R.A.P. Rule 58, and Rule 4(a)(7)(A)(ii).

STATEMENT OF CASE

1. On 06/09/17 Mr. Bell filed his 2254 habeas corpus application with the district court.
2. On 06/12/17, the Eastern district court Tyler Division issued an order to show cause.

3. On 08/07/17 the Respondent filed its response and appendix.

4. On 10/02/17 Mr. Bell filed his objections.

5. Magistrate Judge John D. Love entered its Report and Recommendation to deny Federal habeas relief on 12/18/17.

6. Mr. Bell filed his objections to the Magistrate judges Report and Recommendations on 01/03/18.

7. District Judge Ron Clark entered Memorandum opinion adopting Magistrate Judge's Recommendation denying habeas relief on 06/08/18.

8. Mr. Bell filed his Notice of Appeal on 06/29/18.

STATEMENT OF FACTS

Mr. Bell filed in the district court a 28 U.S.C. § 2254 application as a Pro-Se Petitioner, after being denied Constitutionally effective counsel in the State court proceedings. In his 2254 application he made meritous Constitutional claims that include but are not limited to the following:

1. Petitioner was denied effective assistence of counsel where Mr. Mathew Ratekin possessed material evidence, newly discovered by Petitioner that was not presented to jury to support defense.

2. Petitioner's Due Process rights were violated by trial counsel, based on newly discovered evidence that would support actual innocence.

STANDARD OF REVIEW

In the recent Supreme Court case Buck v Davis 580 U.S. ___ 137 S.CT. ___, 197, L.ed.2d 1(2017), the Supreme Court re-emphasized the two-step analysis to warrant issuance a "COA", i.e. (1)

an initial determination whether a claim is reasonably debatable, and (2) if it is an appeal in the normal course.

Writing for the Court Chief Justice Roberts held that instead of a "merits analysis", a Court of Appeals should limit its examination at the "COA" stage to a threshold inquiry into the underlying merit of [the] claims, and ask only if the district court's decision was debatable, Id.

In Henry v. Cockrell 327 F.3d 429, 431 (5th Cir.2003), this court explained that under the AEDPA, a petitioner must obtain a "COA" before he can appeal the District Court's decision. See 28 U.S.C. § 2253(c)(1). A "COA" will be granted only if the petitioner makes a substantial showing of the denial of constitutional right. See 28 U.S.C. § 2253(c)(2).

As the Supreme Court made clear in its decision in Miller-El v. Cockrell Supra, a "COA" is a jurisdictional prerequisite, and until a "COA" has been issued, the Federal Courts of Appeals lacks jurisdiction to rule on the merits of appeals from habeas petitioner's.

When considering a request for a "COA" , the question is the debatability of the underlying constitutional claim, not the resolution of that debate Id at 1042.

With the foregoing legal standard presented for this Court's consideration for issuance of a "COA", Mr. Bell shows to this Court his constitutional claims and debatability amongsts jurists of reason.

BRIEF IN SUPPORT

ISSUES PRESENTED

QUESTION ONE: Whether if the District Court erred in denying habeas relief concluding that Petitioner's claim, (based on "Newly Discovered" evidence) was time barred and if so, did Petitioner make a substantial showing of trial counsel's failure to present that evidence to the jury?

QUESTION TWO: Whether if District Court erred in concluding that Petitioner failed to present "New Reliable Evidence" to support his claim of actual innocence?

FACTS

On the charge of continuous sexual assault of a child under 14 years of age, Petitioner entered a plea of Not Guilty and prepared to go to trial. During pretrial settings, Petitioner informed his trial counsel Brent Ratekin of evidence that would discredit the State's allegations and prove that he was innocent of the charge. He informed Ratekin that the State's evidence was faulty because the day in question, which started the State's alleged course of continuous acts of sexual abuse, could not have happened for the complainant was not at his house as alleged. Petitioner requested that Ratekin retrieve both, school records to prove that the complainant was at school at the alleged timing, and the cable tech information from Daniel Hernandez who was present at his house during the time the complainant alleged sexual abuse, which would have negated the State's case against him. It appeared to Petitioner that Ratekin could not obtain said evidence. See ROA pg. 10; ROA pg. 1172. On his plea of not guilty and the trial court assessed punishment at life in prison. See ROA pg.

In preparing for post-conviction remedies, Petitioner contacted his trial counsel and requested the "Attorney-Client file" developed in this case. After over a year of correspondence to Ratekin, trial counsel sent Petitioner the file (June 23, 2016), ROA.99; ROA.103. Contained in the file were the school records for the complainants attendance at T.J. Austin which indicated that the complainant was in fact at school during the alleged time she alleged sexual abuse. This evidence was important because the complainant indicated that on cable day (Sept. 20, 2013) "that after breakfast, but before lunch Petitioner sexually abused her". See ROA.598; ROA.652 line 7-18, which was impossible, school records indicating her presence at school that day and at that time. SEE ROA.41, 42; ROA. 1183.

In addition to the school record's, the attorney-client file also contained information from SuddenLink Cable, indicating that cable tech (Daniel Hernandez), was scheduled to fix cable at Petitioner's house during the time of 8am-12pm. Daniel Hernandez, after completing the service and leaving called Petitioner's home phone to verify if cable services were operative. See ROA. 1185; ROA.1186 that shows that cable tech was at Petitioner's house in "duration of 94 minutes left and" called back at 9;58am. This evidence along with Hernandez's testimony, if subpoenaed would, indicate himself and Petitioner at the house alone and negating and impeaching complainant's testimony that she was at Petitioner's house and her brother was in the bed sleep. See ROA.45; ROA.1186, SEE also, ROA.1172; ROA.10.

Petitioner prepared his State habeas corpus application alleging eight (8) grounds including, ineffective assistance of trial counsel based on "Newly Discovered Evidence", ROA.1172 (ground 3), and a Due Process violation "Actual Innocence" claim "Newly Discovered Evidence" (ground 8) Roa.10. The State court, inpertinent parts, rejected both the "Newly Discovered Evidence and Actual Innocence" evidence based on New Evidence. The State court premised that trial counsel's affidavit was more credible that Petitioner's assertions stating that Ratekin believed that "Neither of these records indicate any times", to when the defendant sexually assaulted the victim, and the records would not have assisted the defendant so it was a tactical decision to not introduce the records". See ROA.1239 ground 2 number 6; ROA.1240 ground 3 number 7.

On these two claims, (1) Ineffective assistance of counsel based on newly discovered evidence and (2) Actual innocence based on newly discovered evidence, Petitioner filed his 2254 application for writ of habeas corpus. Which was dismissed ROA. 131, and now seeks the granting of a 'COA' on those issues.

QUESTION ONE: Whether if the district court erred in denying habeas relief concluding that Petitioner's claim based on "Newly Discovered Evidence", was time barred, and if so, did Petitioner make a substantial showing of trial counsel's failure to present this evidence to the jury?

The District court denied Petitioner's Federal habeas relief by adopting the Maistrate Judges Report and Recommendation, essentially concluding the same as the State court that because trial counsel had the complained of documents, and his belief that presenting them to the jury would help the State prove up their dates of sexual conduct as alleged in the indictment, that Ratekin's failure to use them was strategic and objectively reasonable performance, afforded the State court's findings the presumption of correctness, 28 U.S.C. § 2254(e)(1). ROA.125-131. Petitioner asserts that the District court erred in denying Federal habeas relief as time barred (ROA.127-129) because State court's denial of this claim was an unreasonable application of the Law of Facts of the case. 28 U.S.C. § 2254 (d)(2). Reasonable jurist would either find the District court's decision wrong or debatable on this issue. See Slack v. McDonald Supra 529 U.S. at 484; 120 S.Ct. 1595.

The District court concluded that because Petitioner was over 6 months due in filing his 2254 writ application, and he failed to advance any rare or extrodinary circumstances warranting equitable tolling, that his 2254 application was untimely. See ROA.129-130. In furtherance, the district court states that Petitioner does'nt dispute that his claims were time barred, only that he was actual innocence, based on newly discovered evidence.Id. The district court is mistaken or Petitioner's response is misleading. See ROA.15, rather, Petitioner claims as alleged in his Federal writ application and Memorandum of Law in Support of, indicated that his first ground on his 2254 was timely under 2254(d(1)(D) and his second claim for Federal habeas relief, arguendo, untimely, but because he is actual innocent, he is entitled equitable tolling under SCHULP v. DELO, 513 U.S. 298, 329(1995). See ROA.22-33.

FILING DEADLINE

Under 28 U.S.C. § 2254(d)(1), §§ 2254 petitions must be filled within one year of

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time seeking review.

(B) the date on which the impediment to filing an application created by State action in violation of the constitution or laws of the United States if removed, if the applicant was prevented from filing such State action.

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, or

(D) the date on which the "Factual Predicate" of the claim presented could have been discovered through the exercise of due diligence...

Petitioner asserted in his State and Federal habeas writs that, before trial, through due diligence, he sought from his attorney the documents in question to present to the jury because he knew it would not only bring reasonable dought to the State's case, but also acquit him of all charges. The date June 23, 2016 is the initial date in which the factual predicate was discovered by the Petitioner, one year from that date would have been June 23, 2017. Petitioner filed his 2254 writ application June 9, 2017, well in view of the deadline date thus timely filed in accord with 28 U.S.C. §§ 2254(d)(1)(D). Reasonable jurist would find the district court's decision wrong or debatable in concluding Petitioner was time barred.

In McAleese v. Brennan 483 F.3d 206(CA3 2007) where Petitioner claimed entitlement of 2254(d)(1)(D) one year limitation from the time the factual predicate could have been discovered through the act of due diligence, the 3rd Court of Appeals declined this entitlement because the record showed that McAleese was cognizant of the factual predicate of his claims on the day the Parole Board denied him parole, and not on the date he became aware to collateral evidence which was not the contents of his pleadings in his writ application. Id at 213-214.

Nevertheless, the 3rd Court of Appeals held, while conducting its analysis, that "the AEDPA [d]oes not, define Factual Predicate". The 3rd Circuit indicated that 2254(d)(1)(D) provides a Petitioner with a later accrual date than section 2254(d)(1)(A), only if vital facts could not have been known. citing Schloeter v. Varner 384 F.3d 69, 74(CA3 2004), cent. denied 544 U.S. 1037, 125 S.Ct. 2261, 161 L.ed.2d 1067(2005) under Schloeter, the factual predicate of a Petitioner's claim constitutes the vital facts underlying those claims, McAleese Supra 483 F.3d at 214.

The 3rd Court of Appeals would agree with Petitioner that the date the Petitioner received the attorney-client file June 23, 2016, is the factual predicate date in which 2254(d)(1)(D)'s one year limitation would run since it was the date Petitioner became aware of the existence of the disputed "New Evidence".

The 3rd Court of Appeals in furtherance citing the opinion and resolution of this issue in Johnson v. U.S. 340 F.3d 1219, 1223 (CA 2003), 544 U.S. 295, 1255 S.Ct. 1571, 161 L.ed.2d 542 (2005).

In the Johnson case Petitioner pled guilty for distribution of cocaine and was sentenced as a career criminal due to his two State convictions. One year later, the State vacated one of Petitioner's sentences in which three months after that he filed his second 2255 petition seeking to vacate the enhanced Federal sentence. Johnson claimed that his motion was timely because the order vacating the State judgment constituted the fact supporting his claim. Johnson asserted that a factual proposition is typically something capable in principle of falsification or possibily (verification) by some empirical inquiry. Id at 1223. A divided court rejected Johnson's argument holding that the State court order was not a fact but a legal operative order that was a mandate of law or a consequence of applying law thus distiact from a matter of fact as Congress used the term in §§ 2255. Nevertheless, the Supreme Court disagreed with the ___ Court of Appeals on this issue and held that [notice] of the order vacating the predicate conviction is the event that starts the one year limitation were as the State court vacator was a necessary predicate for the second 2255 claim. Id at 308, 125 S.Ct. at 1580.

Thus both court's agree with Petitioner that the date he received notice from his trial counsel and learned that he withheld exculpatory evidence from his trial, evidence that Petitioner due diligently sought for himself to obtain, was the date the factual predicate of his Newly Discovered Evidence and his 6th amendment violation was discovered, making Petitioner' first claim timely filed. See also Flemin v. Evans 481 F.3d 1249, 1255 (CA10 2007).(year ran from date defendant, using due diligence could have resonably know that counsel failed to follow instructions by not withdrawing defendant's guilty plea, Quezada v. Scribner 611 3d.F 1165, 1167-68(CA9 2010)(year ran from date of newly discovered evidence for Brady claim because due diligence was unable to acquire information earlier, See also Dicenzi v. Rose 452 F.3d 465, 470-71(CA6 2006).(year ran from date defendant, using due diligence would realize right to appeal); U.S. v. Davis 394 F.3d 182, 191, n.8 (CA3 2005)(indicating that new evidence does not necessarily mean newly discovered evidence, and mean newly presented evidence).

In addition to Petitioner's factual predicate issue of timely filing under 2254(d)(1)(D), Petitioner asserts that he has also shown rare and extrodinary circumstances that warrant equitable tolling. Because a lawyer is the agent of his client, the client must bear the risk of attorney error. Holland 130 S.Ct at 2563 quoting Coleman v. Thompson 501 U.S. 722, 752-53, 111S.Ct. 2546, 115 L.ed.2d 640(1991). Therefore, a garden variety claim of excusable neglent, such as a simple mis calculation that leads an attorney to miss a deadline does not warrant equitable tolling Id at 2564. In order to rise to the level necessary to constitute an extrodinary circumstance for purposes of tolling under 2254 limitation period, attorney neglect must be so egregious to amount to an effective abandonment of the attorney-client relationship. Id at 2564-65.

Ratekin knew that the State had subpoena'd the school and cable company records and had viewed them himself, but did not disclose this information to Petitioner, although he sought it and Petitioner was not made aware of his reasoning to do so until Ratekin's filed his State habeas affidavit, See ROA. 1239-1240. Petitioner asserts that the evidence in question was exculpatory in nature amounting to trial counsel withholding Brady material which is tantamount to a rare and extrodinary circumstance warranting equitable tolling under both 2254 (d)(1) and 2254(d)(1)(D). At least two Court of Appeals would agree. See Flemmings Supra 481 F.3d at 1255(equitable tolling may be applied if egregious lawyer conduct constitutes extrodinary circumstances); Dillion v. Conway 642 F.3d 358, 363-64(CA2 2011) extrodinary circumstances found where counsel ignored letters of client emphaszing the importance of filing on time).

Concluding, that the above court's would find the District Court's decision wrong or debatable that Petitioner's newly discovered evidence claim was time barred. Petitioner asserts he has presented a substantial showing that his trial counsel was ineffective, failing to present said evidence to the jury.

INEFFECTIVE ASSISTANCE OF COUNSEL

In the 2007, Legislative session (80th Leg. Sess. 2007), the Legislature passed a new panel statute entitled "Continuous Sexual Abuse of Young Child or Children, co-defined as Penal code, Section 21.02. (Jessica Lumford Act, 80th Leg., R.S. Ch 593, § 1.17, 2007 Tex. Gen. Laws 1120, 1127). The statute in pertinent parts states:

(b) A person commits an offense if:

(1) During a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims;

Subsection (c) list eight(8) different "acts of sexual abuse" which are the alleged penal infractions defined in the indictment. Subsection (d) of 21.02 states

(d) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which speific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

The real gravaman of this criminal behavior is the existence of a sexually abusive relationship with a young child marked by continuous and numerous acts of sexual abuse of the same or different varieties. The indictment in pertinent parts allege that the Petitioner:

"did then and there, during a period that was 30 or more days in duration, on or about September 20, 2013 through November 24, 2013, committed two or more acts of sexual abuse against a child...... See ROA.39

The jury was properly instructed that the State need not show an act of sexual abuse took place on either date. The two dates (Sept. 20, 2013 & Nov. 24, 2013) merely set the parameters of the time period during which at least two acts of sexual abuse must have occurred. Howevre, in the instant case, that is exactly what happened. Evidence in the record indicates sexual abuse occurred on cable day (Sept. 20, 2013 first parameter date) and on (Nov. 24, 2013, last parameter date). Other allegations of sexual abuse were moot or docta to the State's proof and parameters set out in the indictment i.e.

(parameter time) * Alleged bedroom incident ROA.590-93
non specific * Movie night ROA.593-97

The requirement that the occurrances of sexual abuse extend for a period of more than "30 days" is an element of the offense. Thus, the offense requires the State to prove the commission of multiple acts of sexual abuse over a span of 30 days or more, Brown v. State, 381 S.W.3d 565,573(Tex.App.-Eastland 2012, no pet). In Pollock v. State, 405 S.W.3d 396, 405(Tex. App.-Ft. Worth 2013, no pet), the Court of Appeals stated that the pattern of behavior is the [simple] element in a continuous-sexual abuse case on which the jury must unanimous agree on based on Penal Code 21.02(d)'s wording.Id.

Ratekin under the 6th amendment right to effective counsel representation, and in upholding Petitioner's rights, was charged to put the State's case through adversarial testing and ensure that Petitioner received a fair trial, Strickland v. Washington 466 U.S. 668, 685(1984). It is well known that the State must prove each element of the offense charge. See Fiore v. White 531 U.S. 225, 228-29(2001)(per curim)(due process violated by conviction of defendant without proving each element of crime beyond reasonable doubt). The element of Pen. Code 21.02 is the continuos course of sexual abuse 30 or more days in duration.

Without the school and cable tech records the State has proved continuous sexual abuse, occurring [on] Sept.20,2013 and [on] Nov.24,2013, which is 30 days or more in duration, thus factually proving that Ratekin's strategic reasoning of not introducing the records would have helped prove the States dates. ROA.1240, ground three, on the contrary, had Ratekin introduced the school records it would of completely negated the Sept.20,2013 date and impeach the complainants alleged sexual conduct on Sept. 20,2013 because the school records indicated that the complainant was at school at the time she alleged sexual abuse. See ROA.41-43; ROA.1183 (complainant testifying that the sexual abuse happened on cable day (Sept.20,2013) "after breakfast but before lunch.), See ROA.652, line 10-18. This is around the same time the cable tech Daniel Hernandez was at Petitioner's house working on the cable, who could have testified that Petitioner and himself were the only ones present at the house, See ROA.1185-86. The complainant being questioned about the alleged outcry of sexual abuse was asked; (ROA) 602, line 4-6

Q. Okay, After cable day, did Darrell ever touch you again in a way you didn't like?
A. No, sir.

The school records, if presented at trial would negate one of the two days the State needed to prove the continuous course of sexual abuse acurring Sept.20,2013 through Nov.24,2013 since these time period were the only ones the State proved beyond a reasonable doubt, thus revealing the exculpatory nature of the school and cable tech records in which no reasonable jury would have found Petitioner guilty of Penal Code 21.02 on proof of alleged sexual assaults less than 30 days or more in duration and would have aquitted him of all charges. See Darinyer v. Whitely 505 U.S. 333(1992)(No jury would have found Petitioner under applicable State law).

It is clear in light of the above facts that there is no possible reasoning that indicates that Ratekin satisfied Strictland standards, See Harrington v. Ritcher 131 S.Ct. 770(2011). See also Bell v. Miller 500 F.3d 149, 155-57(CA2 2007) presumption not applicable when counse failed to impeach single witness is identification by consulting medical expert when witnesses memory was obviously inparted by medical trauma), Higgins v. Renico 470 F.3d 624, 632-33(CA6 2006), presumption not applicable when counsel declined to impeach prosecutions key witness through cross-examination. At least the two cases cited above would find the District Court's decision that trial counsel was not ineffective either wrong or debatable on the current issues.

QUESTION TWO: Whether if the District Court erred in concluding that Petitioner failed to present "New Reliable Evidence" to support his claim of actual innocence?

For brevity purposes, Petitioner adopts all facts and supporting case case law contained in claim one and delincates said facts into the current claim, in which based on those facts reasonable jurist would find wrong or debatable the District Court's (For The Eastern District, Tyler Division) decision that Petitioner failed to present "New Reliable Evidence" to support his actual innocence claim.

Claims of actual innocence based on new discovered evidence have never been held to state a ground for Federal habeas relief absent an independent constitutional violation occurring in the underlying State criminal proceeding. Herrera v. Collins 506 U.S. 390,400; 113 S.Ct. 853, 122 L.ed.2d 203(1993). Rather, a claim of actual innocence is a gateway through which a habeas petitioner must pass to have his other wise barred constitutional claim considered on the merits. Id at 404, 113 S.Ct. 853. In order for Petitioner to obtain relief on this claim, the evidence must establish substantial doubt about his guilt to justify the conclusion that his continued imprisonment would be a miscarriage of justice. See Schulp v. Delo 513 U.S. 298, 316, 115 S.Ct. 851, 130 L.ed.2d 808(1995).

To establish the requisite probability that he was actually innocent, the Petitioner must support his allegations with "New Reliable Evidence" that "was not presented at trial and and must show that it was more likely than not that no reasonable juror would have convicted him in light of the new evidence". Id at 513 U.S. 327. The Schulp Court emphasised examples of new reliable evidence such as (in pertinent parts) physical evidence 513 U.S. at 324, the kind of evidence used to support Petitioner's claim of actual innocence in the instant case.

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As ~~stated in Question One~~ Previously stated, Petitioner submitted school records, which placed the complainant at school at the time she alleged sexual assault impeaching the complainants testimony and negating one of the two ~~time frames~~ predicate offenses needed by the State to prove the element of continuous course of sexual abuse 30 or more days in duration. See ROA.39, ~~infra at~~ ___. Petitioner also presented records from SuddenLink Cable that show cable tech Daniel Hernandez at Petitioner's house who, if he is called as subpoena'd would testify that he and Petitioner were the only one's present in the house further negating and impeaching the State's theory and the complainant's outcry of sexual abuse on that date bringing substantial doubt to the State's entire case of continuous sexual assault of a child. See ROA.24-29, infra at ___.

Petitioner's attorney withheld the above exculpatory evidence from him and the jury in error, believing that the above evidence would help the State prove dates time, where as the State had already proved at least two acts of sexual abuse occurring 30 days or more in duration. ROA. 598; ROA.729-30, infra at ___, creating a rare and extrodinary case of trial counsel withholding Brady material. Reasonable jurist would find it wrong that the District Court concluded that Petitioner failed to present new reliable evidence to support his actual innocence claim. appendix = [illegible]

The 2nd Court of Appeals in granting a 'COA' in Rivas v. Fischer 687 F.3d 514 (CA2 2012), held that although Rivas habeas writ was untimely filed he nevertheless sucessfully present a gateway showing of actual innocence under Schulp v. Delo Supra. Rivas, in the murder of his girlfriend, was convicted on the State's theory that he was an obsessive, jilted lover who harrassed and stalked his ex-girlfriend before strangling her to death in a deathly rage where as testimony and exhibits supported at least part of this theory. Id at 522-23. Rives alibi witness testified that he saw Rives smoking a cigarette in his car which was parked outside his house around 11pm-12am, at the time the State theorized Hill was murdered. The State's theory circumvented Rives alibi defense by making it seem that Rives faked his alibi by making himself seen by a lot of people, corobonating this with Mitchell, the medical examiner's, testimony that Hill died a day earlier than Rives alibi's.

Rivess submitted to the District Court New evidence in the form of an affidavit from Dr. Wect, an expert in Forensic Pathology who discredited Mitchell's testimony was based of the extrinsic facts and not upon a reasonable degree of medical certainty that the length of time between the death of Hill and the time she was found was less than 48 hours and more likely less than 36. Id at 528. This evidnce negated the State's theory of the time of death and supported Rivas alibi thus making the new evidence presented reliable warranting a reverse and remand to the District Court for full consideration of the Rivas underlying constitutional claim.

In a similar underlying issue, the 6th Court of Appeals in Souter v. Jones 395 F.3d 577(CA6 2005)held that although Petitioner was time barred he demonstrated a credible claim of actual innocence and on issue of first impression held that a credible claim of actual innocence will equitably toll limitations period, allowing consideration of habeas claims on merits. Rev. and Remanded.

Souter entered an affidavit from Stephen R. Pletcher, a Private Investigator who interviewed a bottle manufacture and forensic technician both of whom stated there was no sharp edge on the bottle as Dr. Graeser contended, coupled with Dr. Cohle's recanted testimony now concluding that "it is unlikely that the wounds on Kristy Ringler could have been inflicted by the bottle.... The 6th Court of Appeals relying on Schulp v. Delo stated that if a habeas petitioner "presents evidence of innocence so strong that a Court cannot have confidence in the outcome", the petitioner should be allowed to pass thourgh the gateway and argue the merits of his underlying claims Id at 316, Souter at 587, the 6th Court of Appeals agreeded that Souter had made such a showing of evidence where the only evidence directly tieing him to Ringler's death was the bottle. Id at 589-591.

The underlying similarity in the two previously cited cases nsupport that the 2nd and the 6th Court of Appeals would find the District Courts decision that Petitioner failed to present new reliable evidence wrong. In Rivas and Souter, both petitioner's presented evidence that either (1) negated the State's timing of the alleged events which lead up to their conviction or (2) negated the State's theory on how that initial crime took place. Id. Id.

In the instant case, Petitioner profered similar evidence negating time, school record and cable companys records negating complainant's outcry of sexual abuse on Sept. 20, 2013 at Petitioner's home when she was really at school and negating the State's theory of continuous sexual abuse of multiple acts 30 days or more in duration. See ROA.26-29, infra at ____. Based on this evidence the 2nd and 6th Court of Appeals would not have confidence in the outcome of the trial. Souter at 589, Rivas Supra.

In addition, if the above jurists in arguendo, would not constitute wrongness in the District Court's decision that the above evidence was new and reliable, other jurist would find the issue debatable.

In Kidd v. Norman 651 F.3d 947(CA8 947), the 8th Court of Appeals in denying Ppetitioner's claim of actual innocence held that the petitioner failed to present new reliable evidence in support of his claim, as that term has been applied by the 8th Circuit. The petitioner argued that the 8th Circuits definition of "New Evidenc8"as applied inAAmrine v. Bowersox 128 F.3d 12■2, 1230(CA8 1997), was inconsistant with Schulp v. Delo. Under AMRINE, evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence, meaning that it was unavailable to trial counsel at the time of trial. The 3rd Circuit in Davis v. U.S. Supra disagrees with Amrine and Kidd stating that New Evidence does not necessarily mean newly discovered evidence, and may mean newly presented evidence. Again in Houck v. Stickman 625 F.3d 88(CA3 2010),the 3rd Circuit, 5 years later still disagrees with the 8th Circuit's Amrine definition of new evidence holding that it is unfair to apply the Amrine statement of law in cases (is the present case) in which the Petitioner claims that he had had ineffective assistance of counsel by reason of his attorney not discovering exculpatory evidence when the Petitioner is relying on that very evidence as being the evidence of actual innocence in a gateway case to reach the ineffective assistance claim.

The 3rd Circuit cited the 7th Circuit court case in Gomez v. Jarmet 350 F.3d 673, 679-80(CA7 2003) who also recognizing Petitioner's dilema in the situation that Petitioner has described indicating partiatarly in a case where the underlying constitutional violation claim is ineffective assiatance of counsel premised on the failure to present evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway. Id at 679-80. The 7th Circuit dealt with this problem by regarding evidence as new even if it was not newly discovered evidence as long as it was not presented to the trier of facts, Id at 680.

The 3rd Circuit disregarded the 7th Circuit's rationale on definition of new evidence as being to expansive, going beyond what is needed to remedy the issue, accepting with limitations the Amrine (8th Circuit) definition "that if the evidence was Not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that is the very evidence that the Petitioner claims demonstrates his innocence. Houck at 95.

The 3rd and 7th Circuit tends to agree with Petitioner's assertion of new evidence and would find it debatable that the District Court in the instant case arrived at the right decision in this case, warranting the granting of a 'COA' in the instant case where Petitioner has shown substantial merit to proceed forward. See ~~Fleming~~--v. Evans 431 F.3d 1249, 1253(CA10 2007). (COA properly granted where petitioner made substantial showing that he was denied effective assistance).

Petitioner concludes that this Honorable Court agree that Petitioner has made a substantial showing of a constitutional violation and that reasonable jurist would either find the District Courts decision wrong or debatable on the above issues and grant a COA.

PRAYER

Petitioner prays that this Honorable Court will grant a COA ON THE MERITS.

Respectfully Submitted,

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