IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

MICHAEL ADAM CARNEAL,	)	
	)	
Petitioner,	)	Case No.: 5:09CV-32-R
	)	
vs.	)	**Electronically Filed**
	)	
J. DAVID DONAHUE, WARDEN,	)	
	)	
	)	
Respondent.	)	
	)	
	)	

PETITION FOR A WRIT OF HABEAS CORPUS

Michael Adam Carneal, Petitioner, by counsel, hereby files a Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus challenging his conviction and sentence. Petitioner is a Kentucky Inmate and is being held in the Kentucky State Reformatory in violation of the Constitution of the United States. His inmate number is 151127. J. David Donahue, Respondent, is the Warden of the Kentucky State Reformatory, the address of which is 3001 W. Hwy. 146, LaGrange, Kentucky 40032.

In 1997, Petitioner killed three students and wounded five others at Heath High School in Paducah, Kentucky. Petitioner was fourteen years old. Petitioner's sole claim in this Petition is that he was not competent to plead guilty due to an undiagnosed mental illness.

I.
JURISDICTION

Petitioner does not currently have any petition, application, motion or appeal pending in any court, either state or federal, as to the conviction and sentence at issue in this matter. Petitioner does, however, plan to file a Petition for Certiorari with the United States Supreme

Court on or about May 20, 2009. This Petition will challenge the result of the state post-conviction proceedings. Because of this, abeyance may be warranted under the reasoning of Lawrence v. Florida, 549 U.S. 327, 335 (2007) ("[A] district court concerned about duplicative work can stay the habeas application until this Court resolves the case or, more likely, denies the petition for certiorari.").

Petitioner has exhausted in the courts of Kentucky the incompetency claim that he advances in this petition. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 2254.

This Petition is timely filed. In the event that the one year statute of limitations imposed by 28 U.S.C. § 2244(d)(1) and (2) has been exceeded, Petitioner is nevertheless properly before this Court due to either equitable tolling or the actual innocence exception to procedural default. The timeliness of the filing of this Petition is discussed, *infra*, in Section IV.

II.
PRIOR ATTORNEYS

At the trial level of this case, these attorneys represented Petitioner: Hon. Charles W. Granner III (contact information confidential per the Kentucky Bar Association website); Hon. Thomas L. Osbourne, American Justice School of Law, Law Library, 911 Joe Clifton Drive, Paducah, Kentucky 42001.

In state post-conviction, these attorneys represented Petitioner: Hon. David H. Harshaw III, Department of Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, Kentucky 40031; Hon. Timothy G. Arnold, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601.

III.
STATEMENT OF THE CASE

On the morning of December 1, 1997, Petitioner, Michael Carneal, opened fire on a group of students at the Heath High School in Paducah, Kentucky, killing three people and wounding five others. He was fourteen years old at the time.

Carneal's case was transferred to circuit court for trial as an adult, and he was indicted by a Grand Jury on three counts of murder, five counts of attempted murder, and one count of burglary. TR I, 1.[1] The case was not a whodunit. The only important question was why Carneal did what he did. The defense and the prosecution quickly retained psychiatric experts.

Carneal's counsel retained Dr. Diane Schetky and Dr. Dewey Cornell to evaluate Carneal for criminal responsibility. The Commonwealth has endorsed Drs. Cornell and Schetky as possessing "credentials which have made them nationally known in the field of adolescent psychological disorders." TR III, 302. Dr. Cornell was also appointed by the court to evaluate Carneal's competency prior to his sentencing. TR II, 220. The Commonwealth retained Dr. Elissa Benedick, Dr. William Weitzel, and Dr. Charles Clark. TRSE, Envelope 1.

The reports produced by these experts reflect the difficulties associated with diagnosing mental illness in an adolescent boy - particularly one who was, by every account, not entirely open about his mental condition. All of the experts noted unusual patterns of behavior that predated the shootings - such as only taking a shower with the door locked and the heating vent covered. Typical was this passage from the report prepared by the Commonwealth's experts, which noted that:

> [Carneal] always showered fast because he worried people were watching him through the vents in the floor of the bathroom. He stuffed towels around the vents in the floor in the bathroom because of that concern. He added that he had a

[1] **Note Regarding Citations:** The state court transcript of record in this case includes three bound volumes of record, a volume of newspaper citations, and a bound volume of sealed exhibits. For the purpose of this brief "TR" refers to the bound transcript of record, and "TRSE" refers to the sealed exhibits. No references will be made to the newspaper compilation.

> number of "stupid" thoughts, such as that "there were people under the bed who were going to cut me." He reported that on occasions he would jump from his bed and try to get to the bathroom quickly because he was concerned that people would "cut my feet off." He also worried that people from the neighborhood would "creep up and look in my windows."

TRSE, Envelope 1, pg. 6. At the time, Carneal did not indicate at that time that these delusions were part of a broader delusional system, or that he was subject to commands, and instead generally described these beliefs as "stupid." *Id.* Nevertheless, all the experts who interviewed Carneal expressed doubts about whether they had learned all there was to know about him.

Dr. Schetky concluded that Carneal had "many of the features of Schizotypal Personality Disorder" ... but that "personality disorder diagnosis [sic] are usually not applied prior to the age of 18." TR III, 307. Dr. Cornell agreed with Dr. Schetky's conclusion, but noted that "Michael's condition has fluctuated over time and that he has not been fully cooperative in describing his paranoid fears and other symptoms," making it possible that he was in the early stages of Schizophrenia or Schizoaffective Disorder. *Id.* at 308. At the time, he noted that the diagnosis of Schizophrenia could only be confirmed if in the coming years Carneal "exhibits more clear-cut and unequivocal symptoms of psychosis, accompanied by a substantial decline in day-to-day functioning." TRSE, Env. 13, pg. 6. Dr. Cornell ultimately concluded that based on the information he could obtain, Carneal was mentally ill, but that his mental illness did not rise to either the level needed to negate criminal responsibility or the level needed to effect competency. *Id.* at 7. The Commonwealth's experts concluded that Carneal's conduct was not caused by mental illness, but nevertheless questioned the reliability of what he told them during their interview, and noted the "impossible task *at this time* of explaining precisely why Carneal acted as he did ..." TRSE, Env. 1, pg. 25 (emphasis added).

On October 5, 1998, Carneal, acting on advice of counsel, moved the court to withdraw

his plea of not guilty, and enter a plea of guilty but mentally ill to all charges. TR II, 191. The Commonwealth objected, arguing that the victims in the case were "overwhelmingly opposed to [Carneal's] plea of guilty but mentally ill." TR II, 196. Five days later, the Commonwealth submitted an offer on a plea to guilty but mentally ill to the maximum term in jail - life without the possibility of parole for 25 years. TR II, 205. Carneal accepted that offer, and entered an *Alford* plea of Guilty but Mentally Ill to the charged offenses. TR II, 211. On December 16, 1998, he was sentenced in accordance with the plea agreement to the statutory maximum of Life without Parole for 25 years. TR II, 216.

Remarks by trial counsel, the Hon. Chuck Granner, at the final sentencing illustrate that counsel had doubts that everything operating within Carneal's mind had been known:

> If someone can look into this young man's head and say "My God, what kind of devils are in there - how can we help him?" If he is not an antisocial creature, if he really is only suffering a mental disease and defect, then perhaps he is going to have some meaningful life in the future. To that end, we ask that the Court sentence him, but yet be cognizant of the fact that if he can get any mental help assistance from the doctors, who said, "Medication, psychology, rehabilitation, treatment - all of these things," then maybe there is one less life that's going to be just flushed away - because there isn't a thing we can do at this stage to help all these people who have suffered so much.

(VR: Tape 2, 12/16/98, 16:43:07).

Due to his age, Carneal's initial sentence was served in an institution operated by the Department of Juvenile Justice. This continued until his eighteenth birthday, at which time his case was to be returned to court for a hearing. TR II, 269. Carneal, acting on the advice of the same counsel who represented him at the time of the plea, waived his right to appear at the hearing. At the hearing, the court ordered Carneal to serve the remainder of his sentence at an institution operated by the Department of Corrections.

Upon arriving at the Department of Corrections, Carneal - now eighteen years of age -

apparently received much more potent medications than he had received with the Department of Juvenile Justice. Over time, the use of these medications allowed Carneal to reveal the full extent of his pervasive delusional system. TRSE, Env. 13, pgs. 3-4. The system involved visual hallucinations of a group of tormentors Carneal referred to as the "Danes", whom he believed were attempting to harm him. *Id.* These individuals would appear from under his bed, or through the heating vents in his home. *Id.* This system was operating on Carneal at the time of the shootings, and left Carneal unable to differentiate between his forensic examiners and the "Danes." *Id.* at 3.

In light of these new revelations, Carneal was re-evaluated by both Dr. Schetky and Dr. Cornell. Dr. Schetky reviewed Carneal's prison medical records, and spoke with Carneal, and concluded:

> Michael was seriously mentally ill at the time of his crime. However, owing to the nature of his paranoid delusion system he was not able to reveal the full extent of his delusions, confused mental state, and his hallucinations to his forensic examiners. This, in turn, affected their ability to arrive at the correct diagnoses and to adequately assess issues of criminal responsibility. Having recently spoken with Michael and reviewed his psychiatric records, ***it is now my opinion that, as a result of Paranoid Schizophrenia, he lacked substantial capacity to appreciate the criminality of his conduct at the time of his crime. In regard to Michael's capacity to conform to requirements of the law, he appears to have been acting in response to command hallucinations, which he was not able to resist.***

TRSE, Env. 12, pg. 5 (emphasis added). Dr. Cornell's report was even more comprehensive, describing with specificity the symptoms he had experienced in prison, and how those statements supported Carneal's revelations. Cornell wrote:

> I asked Michael why he did not tell me this account when I evaluated him in 1998. He replied, "The reason was I thought you might be one of them. I felt that way about everybody, everybody I met might be a Dane. You might tell somebody and then they would come to get me for saying it. Even though I didn't tell you, the talking in my head said 'you told him too much, we're gonna kill you now.'

TRSE, Env. 13, pg. 3. After reviewing all of the available information, Dr. Cornell concluded:

> Had Michael been fully cooperative with me and disclosed the full extent of his psychotic symptoms at the time of my original evaluation of him in 1998, I could have offered a stronger opinion about his mental state at the time of the offense. In my original report, I concluded that Michael was mentally ill with paranoid delusions at the time of the offense, but I did not find sufficient evidence to support a further conclusion that his mental condition caused him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. He did not tell me enough about the relationship between his paranoid hallucinations and the shooting to indicate insanity. ***Based on the new information that Michael has provided to me, and based on the voluminous records of his mental condition during his incarceration, there is now sufficient evidence to support an insanity defense.***

Id. at 7 (emphasis added). As stated above, Dr. Cornell also evaluated Carneal in 1998 for his competency to stand trial. After reevaluation, Dr. Cornell concluded:

> Michael's psychotic symptoms would also affect his competency to stand trial and to plead guilty. I questioned Michael's competency at the time he decided to plead guilty, but he did not reveal to me that he was hearing voices telling him what to do and preventing him from fully cooperating in his defense. ***Had I known of his auditory hallucinations and their effect on his judgment and behavior, I would have recommended that he be found incompetent to stand trial, so that he could be hospitalized and treated with antipsychotic medication before making decisions about his case.***

TRSE, Env. 13, pg. 7 (emphasis added).

As to the timing of when Carneal was able to free himself from his delusional system, Dr. Cornell's report states:

> Michael indicated that he has only gradually come to terms with his psychotic symptoms. For years he has been frightened by hallucinations and believed that the Danes might punish him if he were to reveal too much about himself. He frequently hears voices commenting on his actions and criticizing him (which is a particular form of auditoy hallucination seen in schizophrenia). However, when Michael began taking the antipsychotic medication Geodon approximately a year and a half ago, he began to think more clearly and began to grow stronger in his conviction that the hallucinations were not real. When his medication was switched to Zyprexa six months ago, he experienced further improvement and began to find that he could ignore or resist the hallucinations.

Id., pp. 3-4.

In light of these new findings, Carneal filed a motion under RCr 10.02, RCr 10.06, and RCr 11.42, seeking to vacate the judgment. TR III, 285-296. The motion made three claims. First, Carneal alleged that the findings of Drs. Schetky and Cornell constituted "newly discovered evidence" meriting a new trial under RCr 10.02 and 10.06. *Id.* at 285-89. Second, Carneal alleged that he was entitled to RCr 11.42 relief because he was not competent to stand trial or plead guilty. *Id.* at 289-91. Third, Carneal also argued under RCr 11.42 that he was denied effective assistance of counsel when his attorney advised him to plead guilty but mentally ill, without any sentencing consideration. *Id.* at 291-94.

In Circuit Court, the Commonwealth argued that the motion - which was filed three years to the day from Carneal's 18 year old hearing - was untimely under RCr 10.06 and RCr 11.42(10). *Id.* at 301-06. Carneal made several arguments in response, including that the timeline created by RCr 11.42(10) should not commence to run until the claim is discovered (for example, in the case of incompetency), and that in the case of a youthful offender that the timeline should not begin to run until the final sentencing hearing under KRS 640.030(2). *Id.* at 307-15. A day after receiving the response, the McCracken Circuit Court entered an order summarily denying Carneal's motion. *Id.* at 317. Carneal appealed from that ruling.

On appeal, the Kentucky Court of Appeals found that Petitioner had timely filed his motion and that he was entitled to a hearing on his second claim – that he was incompetent at the time of his plea. The holding reads:

> In sum, Carneal's RCr 11.42 motion was timely filed within three years of his majority, and the motion presents sufficient evidence to raise real and substantial doubts concerning his competence to plead guilty. Accordingly, we vacate the June 30, 2004, order of the McCracken Circuit Court and remand this case for the court to determine whether a retrospective competency hearing is permissible and, if so, to conduct such a hearing. If a retrospective competency determination is not feasible, or if it determined at the hearing that Carneal was not competent to enter his guilty plea, then he shall be permitted to withdraw the plea and, if

competent to do so, either plead again, or proceed to trial.

Opinion, page 14. The Court of Appeals denied Petitioner's new evidence claim and his ineffective assistance of counsel claim.

The Kentucky Supreme Court then granted discretionary review and reversed the granting of a hearing. The Court found that Petitioner had not timely filed his post-conviction action as to his incompetency claim. Commonwealth v. Carneal, --- S.W.3d ---, 2008 WL 5046730, *6-7. The Court did not make any merits ruling on the incompetency claim itself. Id. As to the two other claims, the Court found the new evidence claim to be untimely and it denied the ineffective assistance claim on the merits. Id. at 8-9.

Additional facts will be developed below as needed.

IV.
TIMELINESS

A. The Petition is Timely Filed Pursuant to 28 U.S.C. § 2244(d)(1) and (2)

28 U.S.C. § 2244(d)(1)(D) provides that a habeas corpus petition is timely filed if it is filed within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Under 28 U.S.C. § 2244(d)(2), "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." For the reasons stated below, Petitioner's claim could not have been discovered until November, 2003 at the earliest. Petitioner properly filed an application for state post-conviction relief on June 1, 2004. This petition is filed less than a week after that application was finally denied by the Kentucky Supreme Court. Thus, Petitioner has filed within one year of discovering his claim - excluding the time when the state post-conviction action tolled the limitations period.

Petitioner's Claim Could Not be Pursued Until November 2003: From sometime prior to the crime, until 2003, Michael was subject to a delusional system he referred to as "the Danes," which he believed would kill him if he fully revealed their existence. As Dr. Cornell's May 31, 2004 reevaluation stated:

> Michael indicated that he has only gradually come to terms with his psychotic symptoms. For years he has been frightened by hallucinations and believed that the Danes might punish him if he were to reveal too much about himself. He frequently hears voices commenting on his actions and criticizing him (which is a particular form of auditoy hallucination seen in schizophrenia). However, when Michael began taking the antipsychotic medication Geodon approximately a year and a half ago, he began to think more clearly and began to grow stronger in his conviction that the hallucinations were not real. When his medication was switched to Zyprexa six months ago, he experienced further improvement and began to find that he could ignore or resist the hallucinations.

TRSE, Env. 13, pp. 3-4. Thus, it was not until six months before Dr. Cornell's reevaluation that Michael had a change in medication which permitted him to "ignore or resist his hallucinations." Prior to that moment, Mr. Carneal could not have filed any challenge to his competency at his plea, because he could not articulate the grounds for that challenge.

Mr. Carneal's Application for State Post-Conviction Relief was Properly Filed on June 1, 2004: Immediately after his reevaluation, on June 1, 2004, Petitioner filed his state post-conviction action. In that action, in addition to his challenge to his competency, Petitioner filed a claim that his attorneys were ineffective in advising him to plea Guilty But Mentally Ill (GBMI). The Kentucky Supreme Court decided the ineffectiveness claim on the merits. Commonwealth v. Carneal, --- S.W.3d ---, 2008 WL 5046730, *8. The Court danced around the notion of procedural default as to this claim. However, the Court never addressed Petitioner's argument that his ineffectiveness claim was properly filed because up until the time he was eighteen he had been continuously represented by the attorneys he alleged were ineffective. Id., *5. Rather, the Court only stated that this theory did not apply to the competency claim. Id. Thus, it "fairly

appears" that the decision of the Kentucky Supreme Court as to the ineffectiveness claim rests on federal grounds. Coleman v. Thompson, 501 U.S. 722, 740 (1991). As a consequence, Petitioner's time for pursuing habeas relief on his competency claim was tolled because the ineffectiveness claim was "properly filed." 28 U.S.C. § 2244(d)(2). An application for post-conviction relief is properly filed if the last state court reaches the merits of the claim. Walker v. Smith, 360 F.3d 561, 563-4 (6th Cir. 2004); see also Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991). Additionally, any properly filed post-conviction action will toll the AEDPA's limitations period regardless of whether any claim from that action is advanced in the subsequent habeas case. Cowherd v. Million, 380 F.3d 909, 914 (6th Cir.2004) (en banc).

However, even if the ineffectiveness claim was not part of the state petition, the Kentucky Supreme Court's resolution of the competency claim itself would not operate as a procedural default that prevents tolling of the year limitations period. Under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), in order to apply the requirements of a new rule to preclude habeas review on the basis of procedural default, that rule must have been operative as an "independent and adequate state procedural ground" at the time of the petitioner's direct appeal. The Supreme Court has further defined this rule to state that a procedural bar cannot preclude habeas review unless (1) it is independent of the federal claim at issue, (2) it serves as an adequate basis for the barring of review, and (3) it was "firmly established and regularly followed" at the time as of which the rule is to apply. Ford v. Georgia, 498 U.S. 411, 424 (1991).

Here, Kentucky created a heretofore unknown procedural rule when it decided: "For us to interpret information previously suppressed in Carneal's mind as unknown facts under RCr 11.42(10)(a) would set an explosive precedent." This procedural bar went against firmly

established Kentucky law that post-conviction facts would be taken as true. Lay v. Commonwealth, 506 S.W.2d 507, 508 (Ky. 1974). In Petitioner's case, Kentucky carved out a specific exception to its longstanding rule, this despite the opinions of two experts in support of the facts as alleged by Petitioner.

Finally, even if rule which formed the basis for the default was "firmly established and regularly followed", it was not correctly applied to the facts of this case. In Commonwealth v. Stacey, 177 S.W.3d 813, 817 (Ky.2005), the Kentucky Supreme Court recognized that an incompetent defendant's claim is not untimely under Kentucky law, where he can show that he was incompetent between the time the claim arose and the time the claim was filed. Nevertheless, the Court denied relief because Stacey had not offered "any evidence of a change in [his] mental health [during the tolling period] such that he has now become aware of his 'ongoing mental incapacity.'" Id. at 817, fn. 3. The Court found that Stacey did not meet his burden because the record was "devoid of any evidence as to how [Stacey's] impairment prevented him from complying with the three-year limitations requirement." Id. at 816.

In this case, the basis for the finding of a procedural bar is a factual determination which is not supported by the record. As noted below, as part of his state application for post-conviction relief Carneal presented reports from the court appointed expert on competency, and another medical professional, who both determined that Mr. Carneal had been held hostage to a delusional system which would not permit him to fully disclose his mental state until he was placed on Zyprexa in November, 2003. Nevertheless, the Kentucky Supreme Court disregarded that evidence, and without any testimony in the record found that Carneal must have "known" about his mental illness – he had after all entered a GBMI plea – but had chosen not to pursue it earlier.

As some courts have noted, "it is nonsense to honor a presumption of procedural default where no such default arguably exists." Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987). In this case, this Court could construe the Kentucky Supreme Court's decision as either creating a "new rule", which is unrelated to pre-existing Kentucky law, that claims of Michael's nature are categorically barred. Or, it could find that Kentucky applied its existing rules to Michael's case erroneously. However, either way, this Court should find that Mr. Carneal's application for state post-conviction relief as to his competency claim was not procedurally barred and therefore was "properly filed" on June 1, 2004.

B. Even if this Petition Was Not Timely Filed, The Claim Should Still Be Considered under the Doctrine of Equitable Tolling

In the alternative, Petitioner is entitled to equitable tolling. See Dunlap v. United States, 250 F.3d 1001, 1009 (6th Cir. 2001) (equitable tolling available in habeas cases). Due to the extraordinary circumstance of Petitioner's mental illness, Petitioner was unable to comply with the AEDPA's one year statute of limitations. See Herbst v. Cook, 260 F.3d 1039, 1044 (9th Cir.2001) ("We will permit equitable tolling of AEDPA's limitations period only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." (citation and internal quotation marks omitted). Petitioner, a paranoid schizophrenic, was unable to pursue his incompetency claim until late 2003, which was when he finally got sufficient grasp on his own mind to realize that he had been under the control of a delusional system. See Brown v. McKee, 232 F.Supp.2d 761, 768 (E.D.Mich.2002) ("The exceptional circumstances that would justify equitable tolling on the basis of mental incapacity are not present when the party who seeks the tolling has been able to pursue his or her legal claims during the period of his or her alleged mental incapacity."). Petitioner supports his theory of equitable tolling with unrebutted

evidence from two experts – evidence that fully explains why Petitioner did not come forward with his claim sooner. See Lawrence v. Florida, 549 U.S. 327, 337 (2007) (equitable tolling must be supported by reliable evidence).

Petitioner also was not dilatory in seeking state review before seeking habeas review. Petitioner had every reason to believe that his state action as to his incompetency claim was timely filed. Commonwealth v. Taylor, 945 S.W.2d 420 (Ky. 1997) in combination with KRS 640.030 gave indication that Petitioner's post-conviction action was not due until June 1, 2004, three years past the date of Petitioner's majority. Additionally RCR 11.42(10)(a) gave indication that Kentucky had a mechanism for later-accruing claims (in a similar fashion to 28 U.S.C. § 2244(d)(1)(D)). Petitioner, thus, was diligent seeking vindication of his federal rights, because he exhausted those rights, as required, before coming to federal court.

There are five factors to determine whether equitable tolling is appropriate: "(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim." Dunlap, 250 F.3d at 1008. Here, the first, second and fifth factors are inapplicable. Petitioner knew or should have known about the filing requirements. Petitioner's schizophrenia did not affect his ability to somewhat interact with the world, rather Petitioner's disease prevented him from understanding himself.

As to the fourth factor, the Commonwealth's interest in finality clashes with its interest in correctly determining this case. If Petitioner was truly incompetent to proceed to trial, the Commonwealth should be in favor of granting Petitioner a new trial. Also, this is not a

whodunit. The Commonwealth will not be prejudiced at any retrial by the loss of evidence due to time.

As to the third factor, Petitioner has diligently pursued his rights since he learned of the factual basis for them. To hold Petitioner to the standard of someone who is sane, as the Kentucky Supreme Court did, is to not appreciate Petitioner's illness. As the United States Supreme Court has said in a similar context:

> Because "'it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial,' " it has been said that it is also "contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp."

Medina v. California, 505 U.S. 437, 450 (1992) (internal citations omitted).

Lastly, equitable tolling is a federal question. Keenan v. Bagley, 400 F.3d 417, 420-1 (6th Cir. 2005). Thus, this Court must decide the question *de novo*, without deference to the state court decision. Id.

C. Even if Mr. Carneals' Claims Would Be Otherwise Barred, They Should Be Heard Because of Mr. Carneal's Actual Innocence

A credible claim of actual innocence can toll the 2244(d)(1) statute of limitations and allow the consideration of a defaulted underlying constitutional violation. Souter v. Jones, 395 F.3d 577, 602 (6th Cir. 2005). Insanity may constitute actual innocence. See Britz v. Cohan, 192 F.3d 1101, 1103 (7th Cir.1999). Many federal circuit courts have found either explicitly or implicitly that an affirmative defense can constitute actual innocence. In re Minarik, 166 F.3d 591, 607 (3d Cir.1999) (intoxication); Wilson v. Greene, 155 F.3d 396, 405 (4th Cir.1998) (intoxication); Mathenia v. Delo, 99 F.3d 1476, 1481-82 (8th Cir.1996) (diminished capacity affecting deliberation); Nave v. Delo, 62 F.3d 1024, 1032-33 (8th Cir.1995) (intoxication);

Finley v. Johnson, 243 F.3d 215, 220-21 (5th Cir.2001) (evidence of necessity considered to support actual innocence claim). To prevail, one must present "new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence-that was not presented at trial." House v. Bell, 547 U.S. 518, 538 (2006); McCray v. Vasbinder, 499 F.3d 568, 571 (6th Cir.2007).

Here, Petitioner has presented unrebutted expert opinions that Petitioner was insane at the time of the crime. TRSE, Envs. 12 and 13. These opinions, apart from relying on Petitioner himself, also rely upon years of prison documents as well as contemporaneous interviews from the time of the crime. Id. If this evidence had been heard at trial, it is "more likely than not that no reasonable juror would have found [Petitioner] guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995). Petitioner's underlying incompetence claim should be allowed to proceed even if this Court finds it otherwise barred by the statute of limitations.

V.
STANDARD OF REVIEW

A. 28 U.S.C. § 2254(d)

Section 2254(d) provides that a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

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

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 proceeding."

Whether 2254(d) applies to a claim depends on how the state court addressed the claim. Section 2254(d) says "an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was **adjudicated on the merits** in State court proceedings unless the adjudication of the claim. . . ." (emphasis added). Under the plain language of this opening sentence of 2254(d), the threshold question is whether the particular claim presented in the habeas petition "was adjudicated on the merits in State court proceedings." If the state court to which the claim was previously presented failed to resolve the merits of the claim entirely, or failed to reach any component of the standard prescribed for the claim by federal law, then 2254(d) is inapplicable to the federal court's analysis of the claim or component. Rompilla v. Beard, 545 U.S. 374, 390 (2005) (ruling in the context of an ineffective assistance of counsel claim that "[b]ecause the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the Strickland [v. Washington, 466 U.S. 668 (1984)]claim de novo"); Wiggins v. Smith, 539 U.S. 510, 534 (2003) (holding that "our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis").[2] This includes when the state court decided a claim on state procedural

[2] The Sixth Circuit has long embraced this principle. Daniel v. Lafler, 501 F.3d 735, 740 (6th Cir. 2007)(AEDPA not applicable "to a hypothetical ruling against the petitioner on the disputed constitutional question."); Nields v. Bradshaw, 482 F.3d 442, 449-50 (6th Cir. 2007) (holding that the AEDPA applies only to claims adjudicated on the merits in state court); Eddleman v. McKee, 471 F.3d 576, 583 n.3 (6th Cir. 2006) ("AEDPA applies only to claims 'adjudicated on the merits in State court proceedings,' and the standard of review it mandates depends on an assessment of an actual decision made by the state court."); Higgins v. Renico, 470 F.3d 624, 631 (6th Cir. 2006) (ruling that 2254(d) did not apply to the deficient performance of the ineffective assistance of counsel claim because the state court disposed of the claim on the prejudice prong without addressing deficient performance); Joseph v. Coyle, 469 F.3d 441, 450 (6th Cir. 2006) ("As the text of the statute makes clear, however, §2254(d)(1)'s limit on habeas relief apply only if there is a state court 'adjudication on the merits' of a given claim."); Williams v. Anderson, 460 F.3d 789, 796 (6th Cir. 2006) (same); Danner v. Motley, 448 F.3d 372, 376

grounds rather than the merits.[3] In such cases, this Court must review those claims (or portions of claims) under the de novo review standard that applies to pre-AEDPA cases. See e.g., Nields v. Bradshaw, 482 F.3d 442, 449-50 (6th Cir. 2007)(ruling that de novo review applies when the state court did not rule on the merits of a particular claim); Danner v. Motley, 448 F.3d 372, 376 (6th Cir. 2006) (ruling that pre-AEDPA de novo review applies when a state court did not review a federal constitutional claim on the merits).

When there is any doubt as to whether the state court adjudicated the claim on the merits or denied the claim on procedural grounds, federal courts must presume that the claim was **not** adjudicated on the merits. Su v. Filion, 335 F.3d 119, 126 n. 3 (2d Cir. 2003) (holding that where "a state court's ruling does not make clear whether a claim was rejected for procedural or substantive reasons and where the record does not otherwise preclude the possibility that the claim was denied on procedural grounds, [2254(d)] is not [applicable], because we cannot say that the state court's decision was on the merits."). Likewise, where the state court ruling examines only state law and there is no indication in the record that the state court examined the federal constitutional claim, the state court's determination of the claim is **not** an "adjudication on the merits." Lyell v. Renico, 470 F.3d 1177, 11182 (6th Cir. 2006) (ruling that because the

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(6th Cir. 2006) (same); Newton v. Million, 349 F.3d 873, 877-78 (6th Cir. 2003) (same); Maples v. Stegall, 340 F.3d 433, 436-37 (6th Cir. 2003) (same).

[3] See, Muth v. Frank, 412 F.3d 808, 815 (7th Cir. 2005) (holding that the resolution of a claim on procedural grounds is not an "adjudication on the merits"); Sellan v. Kuhlman 261 F.3d 303, 314 (2d Cir. 2001) (determining existence of adjudication on the merits for purposes of 2254(d) by looking to "whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits"); Fisher v. Texas, 169 F.3d 295, 299-300 (5th Cir. 1999) (holding that the state court denying relief because the petitioner failed to object at trial to the conduct forming the basis of his claim did not constitute an "adjudication on the merits, and thus 2254(d) was inapplicable); Moore v. Parke 148 F.3d 705, 708 (7th Cir. 1998) (declining to apply 2254(d) where state court rejected the claim for non-compliance with a state procedural rule); cf., Joseph v. Coyle, 469 F.3d 441, 459 (6th Cir. 2006) (ruling that 2254(d) does not need to be satisfied when alleging ineffective assistance of counsel as cause to excuse a procedural default).

state court resolved the claims in terms of state law even though the petitioner raised the claim on both state and federal constitutional grounds, there was no "adjudication on the merits" of the federal constitution claim thereby preventing 2254(d) from applying and requiring the court to review the claim de novo); Danner, 448 F.3d at 376 (same). Finally, if the state court simply adopted the state's proposed order, then the state court ceded its responsibility to apply objective, independent judicial judgment to a party to the litigation. Under this circumstance, 2254(d) does not apply because the state court never independently "adjudicated" the claim on the merits.

To determine whether a state court adjudication is on the merits, Sixth Circuit law requires a court to look to "the last state court to issue a **reasoned** opinion on the issue." Joseph, 469 F.3d at 459 (emphasis added). Other circuits have joined the Sixth Circuit in this approach. Schultz v. Page, 313 F.3d 1010, 1015 (7th Cir.2002) ("[A] federal court reviewing a habeas petition should examine the decision of the last state court to rule on the merits of the issue."); Franklin v. Johnson, 290 F.3d 1223, 1233 n. 3 (9th Cir.2002)(same); Barrientes v. Johnson, 221 F.3d 741, 779 (5th Cir. 2000) (same). As a corollary, when no state court issued a reasoned opinion on the issue, even when the court says that the claim was denied on the merits, for purposes of 2254(d), a federal habeas court must rule that the claim was not adjudicated on the merits. Daniel v. Lafler, 501 F.3d 735, 740 (6th Cir. 2007)(AEDPA not applicable "to a hypothetical ruling against the petitioner on the disputed constitutional question."); Eddleman v. McKee, 471 F.3d 576, 583 n.3 (6th Cir. 2006) ("AEDPA applies only to claims 'adjudicated on the merits in State court proceedings,' and the standard of review it mandates depends on an assessment of an actual decision made by the state court.")[4] That the applicability of 2254(d)'s

[4] Lockyer v. Andrade, 538 U.S. 63 (2003), Woodford v. Visciotti, 537 U.S. 19 (2002), and Early v. Packer, 537 U.S. 3 (2002), are not inconsistent with this proposition. While each resulted in reversal of a grant of relief under 2254(d), and contained language indicating that

analysis depends upon the availability of at least some explanation for the state court's disposition of the claim at issue is firmly rooted in the statutory language.

The statute prohibits the grant of habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law. . . ." In 2254(d), the word "adjudication" is a verb used to describe the process by which the state court reached its "decision." Congress' reference to this process rather than merely to the result of the process is a clear manifestation of its legislative intent to focus federal habeas courts' attention not merely on whether the state court denied relief, but **how** and **why** the state court reached the conclusion that the petitioner's constitutional rights were not violated.[5] Thus, in circumstances where there is no reasoned state court ruling on the issue, de novo review must apply just as it would to any claim where the state court denied the claim on procedural grounds, failed to address it on the merits, never addressed the claim, or failed to address a prong or subsection of the claim on the merits. In short, a claim's denial unaccompanied by ratio decidendi should engender full de novo review.

B. 28 U.S.C. § 2254(d)(2) and 2254(e)(1)

At first blush, 2254(e)(1)'s presumption of correctness for a determination of a factual issue made by a state court suggests that factual determinations are almost always beyond review in habeas proceedings. This, however, is not the case. As the Supreme Court demonstrated in Wiggins, *supra*, and, most recently, in Miller-El v. Dretke, 545 U.S. 231 (2005), a faithful

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state courts are not required to follow a particular formula and are entitled to the benefit of the doubt, none of the cases went so far as to hold that a summary state court denial of relief can be meaningfully examined under 2254(d).

[5] Congress could easily have drafted 2254(d) to omit any reference to "adjudication" or "adjudicated" by instead using the word "decided." The failure to do so indicates the legislative intent.

application of 2254(d)(2) - - which requires habeas relief if the state court adjudication on the merits "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" - - cannot be accomplished without looking beneath a state courts factual "findings" and assessing the reasonableness of the conclusions reached by the state court in light of the evidence that was before that court. Miller-El 545 U.S. at 266; Wiggins 539 U.S. at 528; see also, Guidry v. Dretke, 397 F.3d 306, 328 (5th Cir. 2005) (granting relief in a capital case where the state court's decision was based on factual findings that ignored countervailing record evidence, noting that under "2254(d)(2), the district court concluded properly that the state court's adjudication of the claim was based on an unreasonable determination of the facts").

On the surface, some tension appears to exist between 2254(e)(1)'s presumption of correctness for state court factual findings and 2254(d)(2)'s requirement that federal habeas courts look beneath a state court's factual findings to assess their reasonableness in light of the record that was before the state court. As courts have recently explained, however, this tension largely dissolves when the two provisions are viewed with a practical eye, and in light of the principle that a "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Market Co. v. Hoffman, 101 U.S. 112, 115 (1879) (quoted in, Duncan v. Walker, 533 U.S. 167, 174 (2001)). Under such a reading, it is clear that the function of 2254(e)(1), which is situated immediately preceding the provision limiting the availability of federal evidentiary hearings, is to define the substantial burden a prisoner must bear when seeking to disprove a state court's factual finding using evidence that was **not** before the state courts. On the other hand, where the evidentiary record before the federal court is the same as the record considered by the state court, 2254(d)(2) - -

with its focus on the reasonableness of factual determinations "in light of the evidence presented in the state court proceeding" - - provides the sole mechanism for dealing with a petitioner's contention that a state court's resolution of (or failure to resolve) a factual issue was objectively unreasonable. See, generally Lambert v. Blackwell, 387 F.3d 210, 235-37 (3d Cir. 2004); Taylor v. Maddox, 366 F.3d 992, 999-1008 (9th Cir. 2004).

Similarly, where the state court factual findings are made without an evidentiary hearing, 2254(e)(1) does not require a federal court to apply a presumption of correctness to the state court factual findings. Nunes v. Mueller, 350 F.3d 1045, 1055 (9th Cir. 2003). In other words, a state court can rule that a petitioner's allegations are entirely without credibility or that the allegations would not justify relief even if proved without holding a hearing. But, if neither of these findings is made, any factual findings made by the state court without holding an evidentiary hearing are reviewed under 2254(d)(2)'s unreasonable determination of the facts in light of the evidence presented to the state court standard, without any regard for the presumption of correctness of state court fact findings under 2254(e)(1). Id.; see also, Bryan v. Mullin, 335 F.3d 1207 (10th Cir. 2003) (en banc) (holding that the presumption of correctness to findings of fact does not apply to factual findings made by the state appellate court because any such findings would have been made without the benefit of an evidentiary hearing).

In situations that would ordinarily be governed by 2254(e)(1)'s presumption of correctness, the presumption of correctness applies only to basic, primary facts not mixed questions of law and fact, and "to those facts implicitly established through the trial court's unique ability to judge witnesses' credibility and demeanor." Stumpf v. Mitchell, 367 F.3d 594, 615 (6th Cir. 2004), rev'd on other grounds by, Bradshaw v. Stumpf, 545 U.S. 175 (2005) (ruling that the presumption of correctness does not apply where the state courts did not have a better

opportunity to judge a witness' credibility than the federal court); Seymour v. Walker, 224 F.3d 542, 554 fn. 3 (6th Cir. 2000) ("[C]redibility determinations generally implicit issue of fact."). It does not apply if the state court "did not make specific [factual] findings on any issue," (Tippins v. Walker, 77 F.3d 682, 685 (2d Cir. 1996)) or to state court factual findings "arrived at through the use of erroneous legal standards." Caliendo v. Warden, 365 F.3d 691, 698 (9th Cir. 2004). Finally, it does not apply where the state court fact finding process was inadequate, for applying a presumption of correctness to fact finding made during an inadequate fact finding process creates an impermissible risk of inaccurate fact findings and is inconsistent with fundamental fairness. When the presumption of correctness applies, it can be rebutted by clear and convincing evidence.

C. Evidentiary Hearings

As to whether a Petitioner is entitled to a federal evidentiary hearing on his claims, the Sixth Circuit has stated:

> We have indicated that a habeas petitioner is generally entitled to such a hearing if he "alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." Stanford v. Parker, 266 F.3d 442, 459 (6th Cir. 2001).

Sawyer v. Hofbauer, 299 F.3d 605, 610-11 (6th Cir. 2002). A petitioner must also have requested an evidentiary hearing and had it denied by the state courts. Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001).

VI.
HABEAS GROUND FOR RELIEF

PETITIONER WAS INCOMPETENT WHEN HE PLED GUILTY

The Kentucky Supreme Court never decided this issue. The decision of the Court as to the competency claim rests solely on procedural grounds. See Commonwealth v. Carneal, ---

S.W.3d ---, 2008 WL 5046730, *6-7. The Kentucky Supreme Court never found that Petitioner was competent at the time of his plea. Thus, this Court must decide this claim *de novo*. Rompilla v. Beard, 545 U.S. 374, 390 (2005); Nields v. Bradshaw, 482 F.3d 442, 449-50 (6th Cir. 2007).[6]

There is no doubt that Carneal was entitled to habeas relief if he can establish that he was in fact not competent at the time of the plea. See, *e.g.*, Hauck v. State, 162 P.3d 512 (Wyo. 2007); Battle v. United States, 419 F.3d 1292 (11th Cir. 2005); Vought v. United States, 88 F.3d 587 (8th Cir. 1996). Where cases have split is over the burden which Carneal is expected to meet in order to warrant a retrospective hearing. State cases have generally stuck by the standard adopted by the Supreme Court in Drope v. Missouri, 420 U.S. 162, 180 (1974), where the court found that a criminal defendant must present facts sufficient to create a "bona fide doubt" as to his competency. See, *e.g*, People v. Shum, 797 N.E.2d 609, 207 Ill.2d 47 (2003). By contrast, in federal habeas corpus actions many courts have held that the evidence must create a "real, substantial and legitimate doubt" a petitioner's competence to stand trial. See Battle, *supra,* at 1299.

The definition of competence to stand trial is found in Dusky v. United States, 362 U.S. 402 (1960):

> [T]he test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as a factual understanding of the proceedings against him.

Id. (quotation marks omitted). The defendant cannot just have "some recollection of events." Id. Competency is context sensitive:

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[6] Even if the Kentucky Supreme Court did decide the merits of this claim, that decision was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); Miller-El v. Dretke, 545 U.S. 231, 266 (2005).

> [There are] no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Drope, *supra* at 180 (1974). A defendant not only must be competent to stand trial, but he also must be competent to plead. Brady v.United States, 397 U.S. 742 (1970).

In this case, it was clear from the outset that Carneal had one possible defense to this crime, and that defense was mental illness. Carneal's delusions kept him from sharing the information needed to establish that defense with any of his trial team. Both Dr. Schetky and Dr. Cornell agree that in light of this recently discovered information, their original conclusions about Carneal's sanity were inaccurate, and that Carneal was indeed legally insane at the time of the offense. Dr. Cornell, whom the Circuit Court appointed to evaluate Carneal for competency prior to initial sentencing, has now stated that Carneal was not competent to enter his guilty plea. In short, the only opinion testimony in the record of this case was that Carneal entered a guilty plea while in the throes of command hallucinations which he could not discuss with his trial team and which rendered him incompetent to plead guilty.

The Kentucky Court of Appeals correctly decided this case. That Court said:

> Carneal's new evidence is not simply a reinterpretation by a new expert of the same data other experts interpreted at the time of the original proceeding, nor is it otherwise merely cumulative or impeaching. It is genuinely new data, apparently undiscoverable until recently when Carneal began receiving more effective medication. It is sufficiently material, furthermore, to lead two of the highly qualified experts familiar with Carneal, and the only expert to evaluate Carneal's competence to plead guilty, to alter substantially their assessments of him. It is precisely the sort of evidence, moreover, evidence of hallucinations and elaborate delusions, that the other experts who examined Carneal in 1998 said could have led them to a more serious diagnosis. Finally, the evidence of Carneal's paranoid fear of counsel, if credited, lends strong support to his claim that at the time of his plea his ability to cooperate with counsel and to assist in his defense was significantly compromised.

(Slip Op., pp. 11-12).

It was not merely Dr. Cornell who had reconsidered his initial diagnosis of Mr. Carneal, but Dr. Schetky as well. Both professionals made this judgment not merely after speaking with Mr. Carneal, but after reviewing his records in the juvenile and adult institutions, records which confirmed Mr. Carneal's description of his symptoms. Moreover, even the Commonwealth's experts indicated at the time of the plea that they had concerns that the true extent of Carneal's reasons for the crime had yet to be discovered. TRSE Env. 1, pg. 25.

In short, Carneal has offered new evidence which raises a real, substantial and legitimate doubt as to whether he was competent at the time of trial. See Battle, *supra.* This new evidence entitles him to a hearing. Sawyer v. Hofbauer, 299 F.3d 605, 610-11 (6th Cir. 2002). Petitioner requested a hearing in state court but was denied. See Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001). At this hearing, the Commonwealth is free to challenge Dr. Cornell's and Dr. Schetkey's opinions, and to ask this court to find that Carneal was competent to stand trial. Until that time, however, this Court is bound to except the reports of the experts at face value. Stanford v. Parker, 266 F.3d 442, 459 (6th Cir. 2001).

Instructive is how other federal courts have decided similar cases. See Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir.2003) (remanding case for further factual development on issue of whether petitioner's mental illness prevented him from timely filing his federal habeas petition as to warrant the application of equitable tolling); Nara v. Frank, 264 F.3d 310, 320 (3d Cir.2001) (remanding case for further factual development where petitioner "presented evidence of ongoing, if not consecutive, periods of mental incompetency" because mental incompetence may constitute an extraordinary circumstance for purposes of tolling the statute of limitations when a person's mental deficiency affects his ability to file a timely habeas petition); cf. Bilbrey v. Douglas, 124 Fed.Appx. 971, 973 (6th Cir.2005) (finding that equitable tolling did not apply

because petitioner needed "to establish a causal connection between her mental condition and her ability to file a timely petition"). Here, Petitioner has supplied this Court with a causal connection between his incapacity and his inability to file. Petitioner has also demonstrated that he was incompetent at the time of his plea.

PRAYER FOR RELIEF

A. Issue a writ of habeas corpus that the Petitioner be brought before the court to be discharged of his unconstitutional confinement and relieved of his unconstitutional conviction and sentence;

B. Order the Respondent to produce the video records and pleadings from the trial level and post-conviction level as are deemed just and appropriate, with transcriptions if deemed necessary;

C. Grant Petitioner, who is indigent, sufficient funds to secure expert testimony to prove the facts as alleged in this petition;

D. Grant Petitioner, upon his request, the authority to obtain subpoenas *in forma pauperis*, for witnesses and documents necessary for an evidentiary hearing;

E. Order such hearings as may be necessary; and, schedule the filing of legal briefs and memorandum in support of the issues of law as raised in the petition in order to fully inform the court.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was mailed by first class mail to the Hon. Jack Conway, Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, on this 25th day of February, 2009.

/s/ David H. Harshaw III
COUNSEL FOR PETITIONER

VERIFICATION

I declare under penalty of perjury that the foregoing Petition is true and correct to the best of my knowledge and belief.

/w/permission Michael A. Carneal
PETITIONER