

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT AUSTIN - PETITIONER

VS.

DISTRICT ATTORNEY OF THE CITY OF PHILADELPHIA;

THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA;

THE SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT

COAL-TOWNSHIP RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT AUSTIN #CN-4023

1 KELLY DRIVE

COAL TOWNSHIP, PA. 17866

QUESTION(S) PRESENTED

1. DOES THE DISTRICT COURT COMMIT ERROR IN DENYING A RULE 60(b)(6) MOTION FOR NOT SHOWING A CONSTITUTIONAL VIOLATION WHEN THE UNREASONABLE DETERMINATION OF THE FACTS BY THE TRIAL COURT ON POST-SENTENCING MOTIONS TO AFFIRM THIS VERDICT USES EVIDENCE THAT IS CONTRARY TO THE RECORD ESTABLISHING THE DENIAL OF THE INALIENABLE CONSTITUTIONAL RIGHT TO DUE PROCESS AND PROOF BEYOND A REASONABLE DOUBT UNDER THE 14TH AMENDMENT?

2. DOES THIS COURT'S DECISION IN *BUCK V. DAVIS* ALLOW RULE 60(b)(6) RELIEF WHERE POST-CONVICTION COUNSEL WAS BLATANTLY INEFFECTIVE FOR FAILING TO RAISE THE INEFFECTIVENESS OF DIRECT APPEAL COUNSEL'S NOT RAISING, THE UNREASONABLE FINDINGS OF FACTS MADE BY THE TRIAL COURT THAT RESULTED IN A MISCARRIAGE OF JUSTICE, SHOWING A CLEAR VIOLATION OF THE 6TH AMENDMENT RIGHT TO COUNSEL ON DIRECT APPEAL?

3. DOES THE TRIAL COURT'S UNREASONABLE DETERMINATION OF THE FACTS ON POST-SENTENCING MOTIONS THAT AFFIRMED THIS UNRELIABLE VERDICT VIOLATE THE FOURTEENTH AMENDMENT OF THE CONSTITUTION RIGHT TO DUE PROCESS QUALIFY AS EXTRAORDINARY TO PROCEED ON HABEAS CORPUS REVIEW THROUGH THE GATEWAY EXCEPTION OF A MISCARRIAGE OF JUSTICE?

LIST OF PARTIES

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

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

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28 U.S.C.S. § 2254(d)(2)
28 U.S.C.S. § 2254(e)(1)
Fed. Rule Civ. P. Rule 60(b)(6)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from **federal courts**:

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

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

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

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 13 FEBRUARY 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 15 MARCH 2018, and a copy of the order denying rehearing appears at Appendix C.

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

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The defendant was arrested and charged in bill of information numbers 1694-1699 May term, in 1993 with homicide and related offenses relating to the death of Christina Bradley Ginsburg. Represented by counsel the defendant was put on trial before Judge Juanita Kidd-Stout in the Court of Common Pleas Philadelphia County.

On 11 October 1994, following a jury trial, the petitioner Robert Austin was convicted of murder in the first degree, and robbery, on 13 October 1994, a penalty phase hearing was conducted on the first-degree murder bill. The jury could not reach a decision on the penalty and therefore the trial court administratively imposed a life sentence. Formal sentencing took place on 22 February 1996. Following post-sentencing motions being filed, the defendant was resentenced to life on the murder bill, with consecutive sentence of ten (10) to twenty (20) years incarceration on the robbery charge.

Appellant's counsel filed a direct appeal and on 20 February 1998, the Superior Court affirmed judgments of sentence. Commonwealth v. Austin 2829 Philadelphia 1996. On 26 January 1999, the Pennsylvania Supreme Court denied appellant's petition for allowance of appeal. The defendant's counsel failed to file for certiorari review to the U.S. States Supreme Court due to abandoning the petitioner.

On 13 January 2000, the petitioner filed a *pro se* petition for collateral relief under 42 Pa. C.S. §9541, pursuant to the Post Conviction Relief Act (PCRA). The court appointed counsel. Yet without any communication, court appointed counsel filed a "no merit" Finley letter seeking permission to withdraw his representation. The PCRA court failed to hold an evidentiary hearing

to determine if the petitioner's issues had merit, nor did the PCRA court review counsel's findings where the issue of a miscarriage of justice was raised.

The first opportunity to challenge the ineffectiveness of direct appeal counsel in the state of Pennsylvania is on review for PCRA relief. As in this case the denial of having effective assistance of counsel on direct appeal relies upon counsel on [PCRA] appeal advancing this issue. When the court's diligence, to review court appointed counsel's findings, simply relied on his determination without any independent review, there will never be an effective remedy for indigent petitioner that have to depend on court appointed counsel to advance meritorious issues.

September 2002 petitioner filed for a writ of habeas corpus that was denied on 21 May 2003 as being untimely. The recent request for Rule 60(b)(6) relief is due to the defect in the original habeas court denying at the least a certificate of appealability. The change in the operation of law would have granted an evidentiary hearing to determine if the showing of a miscarriage of justice, would have established a violation of a constitutional right that warranted relief, despite a procedural bar.

The petitioner has been continuously challenging this unjustifiable conviction, whereby the PA Supreme Court recently denied a petitioner for allowance of appeal from a subsequent PCRA petition on 4 April 2017. The issues raised have never been decided on the merits, only the procedural-bar, which continues to facilitate the miscarriage of justice that has occurred in this case. Where the trial court made an unreasonable determination of the facts to affirm this conviction as the findings are contrary to and has no support in the record produced at trial.

REASON FOR GRANTING THE PETITION

DID THE DISTRICT COURT COMMIT ERROR IN DENYING A RULE 60(b)(6) MOTION FOR NOT SHOWING A CONSTITUTIONAL VIOLATION WHEN THE UNREASONABLE DETERMINATION OF THE FACTS BY THE TRIAL COURT ON POST-SENTENCING MOTIONS TO AFFIRM THIS VERDICT IS BASED UPON EVIDENCE THAT IS CONTRARY TO THE RECORD ESTABLISHING THE DENIAL OF AN INALIENABLE CONSTITUTIONAL RIGHT TO DUE PROCESS AND PROOF BEYOND A REASONABLE DOUBT UNDER THE 14TH AMENDMENT?

The district court abused its discretion when it based its decision to deny this petitioner's Rule 60(b)(6) motion on what was done in the previous appeals court. For which the prior issue was a timeliness issue. The district court also made its decision to deny relief, while uncertain if the issue of the unreasonable determination of the facts was raised in the initial habeas corpus action, when the record shows that it was.

The motion before the court in this instance has established that there was a defect in the district court's original process to deny relief on his first habeas corpus petition. The original issue is that the trial court's unreasonable determination of the facts resulted in a miscarriage of justice. The change in the operation of law by the Supreme Court, which the petitioner relies upon that, would have allowed review of the issues raised in that original habeas corpus petition.

"The United States Supreme Court has held that the miscarriage of justice exception applies to state procedural rules, including filing deadlines. A federal court may invoke the miscarriage of justice exception to justify consideration of claims defaulted in state court under timeliness rules." McQuiggins v. Perkins 185 L. Ed. 2d 1019 (2013)

This case is extraordinary, in that the petitioner can show with clear and convincing evidence that the trial court's unreasonable determination of the facts on post-sentencing motions, has denied this petitioner his guaranteed constitutional right to due process. Which is to have every essential element of the crimes charged proven beyond a reasonable doubt under the due process clause of the 14th amendment of the constitution.

Whereby the district court abused its discretion by denying this petitioner Fed. R. Civ. P. Rule 60(b)(6) motion for relief for failing to show that a constitutional violation has occurred.

This court has said, "The U.S. constitution forbids a criminal conviction absent proof beyond a reasonable doubt of every fact necessary to constitute the crimes charged." In re Winship 397 U.S. 358 (1970)

The United States, and Pennsylvania's constitutions establishes that the petitioner in this case was entitled to, and the trial court was obligated to, arrest this judgment and release immediately from custody this petitioner on post-sentencing motions. The findings made by the trial court is shown to be contrary to the record. Establishing that the court should have ruled in favor of the petitioner, where the evidence is clearly insufficient as a matter of law to sustain this conviction. Not affirm this conviction based on the statement by the trial court,

"The commonwealth's evidence established that the defendant was the only person present at the store that evening, and the defendant's clothes were **covered in blood.**" (Trial Court's Opinion pg. 5, 7/8/97- APPENDIX – D)

This is clear and convincing evidence that, the trial court made a finding of facts that is contrary to and has no support in the record produced at trial. This decision by the trial court has created an instance where this petitioner has had to suffer the onus of an, unreliable and unjustifiable conviction for 25 years in violation of his constitutional right to due process. As the

prosecution is obligated to prove guilt beyond a reasonable doubt of every essential element [intent] of the crimes charged.

The erroneous determination of the fact by the trial court clearly establishes that the prosecution failed to meet its constitutional obligation to prove the defendant guilty with competent evidence to support this verdict.

For it was the commonwealth's expert witness, Joseph McBride [chemist] that testified clearly that, with regard to the defendant's clothing he was "unable to find the presence of *any blood.*" (N.T. pg. 60, 10/6/94)

It is apparent that, if the trial court's findings had been based upon the record produced at trial then, the court would have found the defendant to be actually, and factually innocent of the charged crimes. This was the only tangible evidence used to link the defendant to the crimes by the trial court. Denying this petitioner of his inalienable constitutional right to proof beyond a reasonable doubt.

In this case, the petitioner does establish that this conviction is the result, by definition to be a miscarriage of justice:

Miscarriage of justice - (1862) A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime. -- Also termed *failure of justice*.

Black's Law Dictionary (Deluxe Tenth Edition)

The testimony of Joseph McBride [chemist] is compelling and credible expert testimony that clearly calls into question the only central forensic evidence the trial court used to link the defendant to the crimes charged.

“When a state evidentiary ruling is so egregious that it results in a denial of fairness, it may violate due process and thus warrant habeas relief.” Bugh v. Mitchell 329 F.3d 496 (6th Cir. 2006)

The trial court’s unreasonable determination of the facts calls into question the reliability of this verdict. Where the evidence does not meet the constitutional standards to affirm this conviction showing that this verdict is unjustifiable under federal law. Where the findings of the trial court has violated clearly established United States Supreme Court precedent.

This court “Recognized a narrow exception to the cause requirement where a constitutional violation ‘probably resulted’ in the conviction of one who is actually innocent of the substantive offense.” Murry v. Carrier 477 U.S. 478, 91 L.Ed.2d 397 (1986)

“The federal constitution’s due process requirement that the prosecution must prove guilt beyond a reasonable doubt.” Sullivan v. Louisiana 124 L. Ed. 2d 182 (1993)

Under 28 U.S.C. § 2254(d) (2) a federal court may set aside a state decision that was based on an unreasonable determination of the facts in light of the evidence presented.

28 U.S.C. § 2254(e)(1) requires clear and convincing evidence that the state court’s presumptively correct factual findings lack evidentiary support.

“A state court decision is ‘contrary to’ clearly established Supreme Court precedent where the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or where the state court confronts a set of facts that are materially indistinguishable from [Supreme Court] decisions and nevertheless arrive at a result different from [Supreme Court] precedent.”
Williams v. Taylor 529 U.S. 362 (2000)

Jurist of reason would debate and find that the facts used to affirm this verdict violates this petitioner’s constitutional right to due process under the 14th amendment. Where a failure to review and rule on the merits of this case would be a miscarriage of justice.

DID THE COURT'S DECISION IN *BUCK V. DAVIS* ALLOW RULE 60(b)(6) RELIEF WHERE POST-CONVICTION COUNSEL WAS BLATANTLY INEFFECTIVE FOR FAILING TO RAISE THE EFFECTIVENESS OF DIRECT APPEAL COUNSEL NOT RAISING, THE UNREASONABLE FINDINGS OF FACTS MADE BY THE TRIAL COURT THAT RESULTED IN A MISCARRIAGE OF JUSTICE, SHOWING A CLEAR VIOLATION OF 6TH AMENDMENT RIGHT TO COUNSEL ON DIRECT APPEAL?

It is evident that a miscarriage of justice occurred where this petitioner shows with clear and convincing evidence that the trial court's findings does not meet the constitutional requirements to allow this conviction to be lawful. This verdict is in violation of the due process clause of the 14th amendment of the constitution under the reasonable doubt standard.

Counsel on direct appeal had no reasonable basis for his actions to omit the issues this petitioner ask counsel to include in his direct appeal, the issue of [insufficient evidence] has merit, and but for the actions of counsel the petitioner would have prevailed on direct appeal. For the evidence is clearly insufficient as a matter of law to establish an essential element [intent] of the crimes charged as stated by the trial court. By failing to present this issue to the reviewing appellate court, counsel's performance is clearly constitutionally deficient under Strickland v. Washington 466 U.S. 669 (1984)

Had the trial court made a true finding of the facts, the court under the laws of Pennsylvania's, and the United States constitution, was obligated to arrest this judgment and release this petitioner from custody where, factual innocence of the crimes charged establishes actual innocence.

It is clear that this petitioner's inalienable sixth amendment constitutional right, to have competent and effective assistance of counsel, on his timely filed direct appeal was violated.

"Guaranteed by the constitution a criminal defendant is entitled to have effective assistance of counsel on his first direct appeal." Evitts v. Lucey 105 S.Ct. 830 (1985)

"Appellate counsel was ineffective for failing to raise meritorious claim of insufficient evidence." United States v. Bass 310 F.3d 321 (5th Cir 2002)

Petitioner did raise the issue that counsel on direct appeal was constitutionally ineffective for failing to include the trial court's unreasonable determination of the facts on his first timely filed post-conviction appeal [PCRA]. Yet court appointed counsel was ineffective when he simply filed a no merit "Finley letter". Henceforth abandoned this petitioner causing his appeal rights to laps, and shows cause and prejudice by making petitioner time-barred.

The PCRA court of Pennsylvania abused its discretion when it just allowed court appointed counsel to abandon the petitioner where the issues raised clearly had merit, and at the least required an evidentiary hearing to determine if the petitioner could in fact prove the issues raised.

"A claim of ineffective assistance of appellate counsel can serve as cause and prejudice to overcome a procedural bar, if it has merit." Ryder v. Warrior 810 F.3d 724 (2016) See Murry v. Carrier 106 S.Ct. 2639 (1986)

This case may affect the confidence of the public where a verdict can be AFFIRMED based on an unreasonable determination of the facts, that is contrary to and has no support in the record produced at trial, in combination with counsel on appeal failing to advance the issue.

"To satisfy the Strickland standard, a litigant must also demonstrate prejudice, i.e. reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Buck v. Davis 137 S.Ct 759 (2017)

This verdict is unreliable because the only tangible evidence used by the trial court [blood on clothes] linking the petitioner to the crimes charged is shown clearly not to have any support in the record produced at trial. Establishing that under the laws of the constitution a correct determination of the facts would have obligated the trial court to rule in the favor of the defendant, to arrest this judgment, and release him immediately from custody. Whereby the evidence shows actual and factual innocence of the charged crimes.

The petitioner relies on *Buck*, which held that under Rule 60(b) and its Rule's catchall category, subdivision (6), the federal courts can reopen a judgment for "any other reason that justifies relief" as long as "extraordinary circumstances" are present. In defining extraordinary circumstances, *Buck* defined, [that] which departs from the basic premise of our criminal justice system, to wit: "Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle".

This conviction is the result of the prosecution injecting into the trial an unrelated issue of drug use by the defendant, in a question posed to his character witness Ms. Brenda Murry. When the issue of drugs was never a part of the trial, yet the prosecution waited until after the presenting of evidence was over, and entered the stage of defending the petitioner's character.

Ms. Brenda Murry

Q. Okay. If you knew that Robert did drugs, would you still have the same opinion, that he was a law-abiding citizen? (N.T. pg.114, 10/6/94)

The petitioner's 60(b)(6) motion brings light to the fact that the prior habeas corpus request for relief contained a defect in the process where a miscarriage of justice was presented yet the court simply relied upon a procedural bar to deny relief. Whereby this court under the McQuiggins miscarriage of justice exception allows relief from a procedural-bar, where as in this case the petitioner can show that he is actually innocent of the charged crimes.

Jurist of reason would debate that ineffective assistance of counsel on direct appeal has failed to protect this petitioner's sixth amendment constitutional right, to have effective assistance of counsel on direct appeal. Where he was entitled to, and would have been granted relief under the laws of the U.S. Constitution and by the precedent set forth by this United States Supreme Court.

DID THE TRIAL COURT'S UNREASONABLE DETERMINATION OF THE FACTS ON POST-SENTENCING MOTIONS THAT AFFIRMED AN UNRELIABLE VERDICT VIOLATE THE FOURTEENTH AMENDMENT OF THE CONSTITUTION RIGHT TO DUE PROCESS QUALIFY AS EXTRAORDINARY TO PROCEED FOR HABEAS CORPUS REVIEW THROUGH THE GATEWAY EXCEPTION OF A MISCARRIAGE OF JUSTICE?

The trial court on post-sentencing motions was charged to make certain that the prosecution fulfilled its constitutional obligation of proving the defendant guilty with competent evidence. Yet the trial court made a finding of facts that is contrary to and has no support in the record produced at trial.

Clearly establishing that this verdict is unreliable and denied this petitioner of his constitutional right to due process that is recognized by this court. Where, every essential element of the crime is to be proven beyond a reasonable doubt before a conviction will be considered lawful Winship.

The petitioner has shown with clear and convincing evidence that, the findings of the trial court, is not supported by the record. Making it apparent that the prosecution failed to meet its burden of proving the defendant guilty, and the findings of the trial court have violated the constitutional rights of this petitioner to have every essential element of the crimes charged proven beyond a reasonable doubt.

Henceforth when counsel on direct appeal failed to include the trial court's erroneous findings of facts for appellate review (See Appendix E) this petitioner was prejudiced by his

actions. For the law is clear in that this petitioner would have prevailed on appeal had the issue been included in the direct appeal.

The petitioner is requesting of this court to consider this case as extraordinary, in which the procedural bar that has denied review for the past 25 years of incarceration is due to constitutional violations, and to allow him gateway review where the presence of a fundamental miscarriage of justice is clear and apparent from the record evidence produced at trial.

The United States Court of Appeals for the Third Circuit stated after my Rule 60(b)(6) motion was denied that:

“Society views the conviction of an innocent person as perhaps the most grievous mistake our judicial system can commit. Reflecting the gravity of such an affront to liberty, the “fundamental miscarriage of justice” exception has evolved to allow habeas corpus petitioners to litigate their constitutional claims despite certain procedural bars if the petitioner can make a credible showing of actual innocence.”
Satterfield v. Dist. Att'y of Phila. 872 F.3d 152 (3rd Cir 2017)

This court recognized that an untimely petition should not prevent a petitioner who can adequately demonstrate his actual innocence from pursuing his claims as stated in McQuiggins.

A procedural bar should not impede a petitioner from pursuing relief that is guaranteed under the laws of the constitution under due process. When the trial court makes an unreasonable determination of the facts and ineffective assistance of counsel is shown to have denied his constitutionally guaranteed rights to have effective assistance on appeal as this case.

When a reviewing court commits an error where the findings of facts that were used to establish, and affirm element(s) of the crimes charged that are unsupported by the record. A

miscarriage of justice has occurred and relief should not be denied due to a procedural bar. For it establishes that the decision rendered to affirm this conviction is unreliable.

Thus, this case does qualify as extraordinary to allow habeas corpus review in federal court due to the conflict in the state court's that says, "It is axiomatic that a criminal conviction cannot be upheld when sufficient evidence to support the conviction does not exist in the record." **Commonwealth v. Stanley 453 Pa. 467 (1973)**

Jurist of reason would debate that, affirming this verdict based upon an unreasonable determination of the facts violates the constitutional right to due process under the 14th amendment. Where a true and correct finding of the facts entitles relief under the precedent set forth by this United States Supreme Court, as a miscarriage of justice has occurred.

CONCLUSION

The petitioner makes a clear and convincing showing that this conviction is unjustifiable and the result of a miscarriage of justice that does violate the laws of the United States constitution, and Supreme Court law which has resulted in the conviction of an innocent person.

The petition for a writ of certiorari should be **GRANTED**.

Respectfully submitted,



Robert Austin, #CN-4023

Date: 11 JUNE 2018