

No. 18-5704

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT AUSTIN - (PRO SE - 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)

PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FOR WRIT OF CERTIORARI

ROBERT AUSTIN #CN-4023

1 KELLY DRIVE

COAL TOWNSHIP, PA. 17866

QUESTIONS PRESENTED

DOES THIS COURT'S DETERMINATION IN *McQUIGGINS* ALLOW THIS PETITIONER THAT MAKES A CLEAR SHOWING THAT A MISCARRIAGE OF JUSTICE HAS OCCURRED PASS THROUGH THE GATEWAY EXCEPTION SHOWING ACTUAL INNOCENCE TO HAVE HIS HABEAS CLAIMS HEARD ON THE MERITS?

DOES ESTABLISHING CAUSE AND PREJUDICE WITH THE DENIAL OF HIS CONSTITUTIONAL 6TH AMENDMENT RIGHT TO HAVE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHERE COUNSEL FAILED TO INCLUDE THE MERITORIOUS ISSUE OF THE UNREASONABLE DETERMINATION OF THE FACTS MADE BY THE TRIAL COURT ON POST-SENTENCING MOTIONS THAT RESULTED IN A MISCARRIAGE OF JUSTICE WHICH WOULD HAVE RESULTED IN RELIEF IF PRESENTED?

LIST OF PARTIES

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

TABLE OF CONTENTS

JURISDICTION.....	3
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	6
CONCLUSION.....	12

APPENDIX A- UNITED STATES SUPREME COURT ORDER DENYING CERTIORARI

Cases

Bugh v. Mitchell 329 F.3d 496 (6 th Cir. 2006)	7
McQuiggins v. Perkins 133 S.Ct.1924 (2013).....	6
Buck v. Davis 137 S.Ct. 759 (2017).....	10
In re Winship 397 U.S. 358 (1970).....	7
Reeves v. SCI-Fayette 897 F.3d 154 (2018).....	10

STATUES AND RULES

28 U.S.C. § 2254(d)(2)

28 U.S.C. § 2254€(1)

Fed. Rule Civ. P. Rule 60(b)(6)

JURISDICTION

This court has jurisdiction per Supreme Court Rule 44.2 were the petitioner writ of certiorari was denied on 9 October 2018

STATEMENT OF THE CASE

This case is extraordinary in that the petitioner using the record produced at trial, can make a *prima facie* showing that the evidence used by the trial court to affirm this conviction **does not exist** in the record produced at trial establishing with clear and convincing evidence that a miscarriage of justice has occurred.

The trial court stated on post-sentencing motions, evidence which erroneously found physical evidence [blood] to make a tangible connection to show the defendant was the perpetrator, in order to justify affirming this conviction. The evidence referenced by the court as being proven beyond a reasonable doubt is shown by clear and convincing evidence to be contrary to the record.

By making an evidentiary finding that has no support in the record produced at trial, the court's ruling clearly establish that this petitioner was denied his inalienable right to due process under the 14th amendment of the constitution. Which requires that every essential element of the crimes charged be proven beyond a reasonable doubt.

The trial court's erroneous findings on post-sentencing motions has clearly resulted in a miscarriage of justice. Making it clear that this conviction is unreliable and unjustifiable as a matter of law. As this petitioner makes a *prima facie* showing that he is factually and actually innocent of the charged crimes.

Discretion was abused by the district court, and third circuit court of appeals where the petitioner makes a *prima facie* showing that a miscarriage of justice has occurred, and counsel's

actions/omissions at trial and on direct appeal has clearly denied his 6th amendment constitutional right to have effective assistance of counsel on direct appeal.

The petitioner in this case has been continuously challenging this conviction where he can show that his constitutional rights that are guaranteed under the 6th and 14th amendments were violated.

SUMMARY OF THE ARGUMENT

DOES THIS COURT'S DETERMINATION IN *McQUIGGINS* ALLOW THIS PETITIONER THAT MAKES

A CLEAR SHOWING THAT A MISCARRIAGE OF JUSTICE HAS OCCURRED PASS THROUGH THE

GATEWAY EXCEPTION SHOWING ACTUAL INNOCENCE TO HAVE HIS HABEAS CLAIMS HEARD

ON THE MERITS?

In this case the petitioner has made a sufficient showing that the determination of the facts made by the trial court has resulted in a miscarriage of justice. Where the record evidence used to affirm this conviction has no support in the record produced at trial.

With clear and convincing evidence the petitioner does show that the findings of the trial court does establish that he is factually, and actually innocent of the charged crimes.

This court specifically held that "a colorable claim of actual innocence constitutes an equitable exception that can overcome the bar of the AEDPA one-year statute of limitations" McQuiggins v. Perkins 133 S.Ct.1924 (2013)

Where the trial court makes an unreasonable determination of the facts to justify affirming a conviction, under McQuiggins the petitioner has a right to have his original habeas corpus petition reopened and determined on the merits raised, where there is a clear showing that he is actually innocent of the crimes charged.

Under the laws of the federal constitution, and United States Supreme Court precedent, a clear deprivation of the petitioner's constitutional right has occurred in this case which has resulted in the conviction and incarceration of an innocent individual.

This court stated clearly, "The due process clause protects an accused against conviction except upon proof

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship 397 U.S. 358 (1970)

Here the petitioner presents sufficient evidence that establishes the trial court abused its discretion by failing to properly review the record produced at trial, as a correct determination of the facts would have granted relief, resulting in an immediate discharge from custody for this petitioner.

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

"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)

Yet in the findings made by the trial court on post-sentencing motions a miscarriage of justice occurred. Where the trial court stated in its reasoning to affirm this conviction that, "The defendant's clothes were **covered in blood.**" (Trial Court's Opinion pg. 5, 7/8/97)

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

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

The petitioner has shown with clear and convincing evidence that the findings used by the trial court to affirm this conviction does indeed lack evidentiary support. Furthermore also establishes that this conviction does violate constitutional law, and Supreme Court precedence, which has resulted in a miscarriage of justice with proof of actual innocence.

"A federal court may invoke the miscarriage of justice exception to justify consideration of claims defaulted in state court under timeliness rules" McQuiggins.

The founders of the constitution would not have confidence in this conviction where one can lose his liberty based upon evidence that is proven not to exist in the record produced at trial, yet is stated erroneously as, proven beyond a reasonable doubt by the trial court on review.

Jurist of reason would debate and find that this conviction does violate the petitioner's inalienable constitutional right to due process under the 14th amendment requiring that every essential element of the crimes charged be proven beyond a reasonable doubt before a conviction can be considered lawful Winship. It is also more likely than not that no reasonable juror would have convicted this petitioner in light of the erroneous findings by the trial court. Where a failure to review this case would be a miscarriage of justice.

DOES ESTABLISHING CAUSE AND PREJUDICE WITH THE DENIAL OF HIS CONSTITUTIONAL 6TH AMENDMENT RIGHT TO HAVE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL WHERE COUNSEL FAILED TO INCLUDE THE MERITORIOUS ISSUE OF THE UNREASONABLE DETERMINATION OF THE FACTS MADE BY THE TRIAL COURT ON POST-SENTENCING MOTIONS THAT RESULTED IN A MISCARRIAGE OF JUSTICE WHICH WOULD HAVE RESULTED IN RELIEF IF PRESENTED?

Ineffective assistance of counsel effectively denied this petitioner his constitutionally guaranteed 6th amendment right to have effective assistance of counsel at trial, and on direct appeal (same as trial) [appointed by the court].

The petitioner's counsel failed to challenge the coerced confession at trial when it was revealed that, in fact there was no "blood" on the defendant's clothing to support the findings of physical evidence as stated by the trial court on post-sentencing motions used to affirm this conviction.

For had trial counsel objected to, and or challenged the use of the confession with clear proof that it was coerced, it is more likely than not that no reasonable juror would have found, Robert Austin, guilty of the charged crimes. As this is the only tangible evidence used to support the trial court's findings, to affirm this conviction, yet is shown by the petitioner not to exist, having no support in the record produced at trial.

"When a petitioner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purpose of the Schlup actual

innocence gateway.” Reeves v. SCI-Fayette 897 F.3d 154 (2018)

Had counsel at the least, on direct appeal included the issue of the trial court’s unreasonable determination of the facts on post-sentencing motion the outcome of that proceeding would have been different, were under the laws of the U.S. constitution the petitioner was entitled to immediate relief, and discharge from custody, from this unjustifiable conviction. The above case was decided after the petitioner’s Rule 60(b)(6) motion, and COA was denied.

“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)

This petitioner has shown that counsel was ineffective for failing to present the evidence that there was no “blood” on the petitioner’s clothing. For counsel’s failure to do so is cause and prejudice to allow habeas review on the merits.

“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 petitioner has been denied relief consistently based upon a procedural bar and not the merits where counsel failed to advocate for this petitioner on his first timely filed direct appeal.

The post-conviction court also denied him a fair adjudication on the merits on his timely filed [PCRA] appeal. That counsel, was ineffective for failing to present the meritorious issue that counsel at trial, and on direct appeal [same as trial] was ineffective for failing to raise the unreasonable determination of the facts made by the trial court that would have had relief from this conviction granted.

Instead the [PCRA] court simply allowed court appointed counsel to withdraw his representation when in fact there were meritorious issues that require relief from this unjustifiable conviction.

Jurist of reason would debate that this petitioner was denied his guaranteed 6th amendment constitutional right to have the effective assistance of counsel at trial and on direct appeal. A violation that does entitle relief under the precedent set forth by this Supreme Court. A failure to reach the merits of this case will result in a miscarriage of justice.

CONCLUSION

The petitioner makes a *prima facie* showing that this conviction is unjustifiable as the result of being a miscarriage of justice. Which has denied him of his inalienable constitutional rights to due process, and have effective assistance of counsel, under the constitution and U.S. Supreme court precedent. The petitioner respectfully asks this court to **GRANT** this Writ of Certiorari and allow his habeas petition to be reopened and decided on the merits. Or at the least reinstate his direct appeal rights *nunc pro tunc*.

This rehearing for a Writ of Certiorari should be **GRANTED**.

Respectfully Submitted,



Robert Austin, pro se,
#CN-4023
1 Kelly Drive
Coal Township, PA. 17866

Date: 30 Oct 18

Appendix - A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 9, 2018

Mr. Robert Austin
Prisoner ID #CN-4023
SCI Coal Township
1 Kelly Drive
Coal Township, PA 17866

Re: Robert Austin
v. District Attorney of Philadelphia County, Pennsylvania, et al.
No. 18-5704

Dear Mr. Austin:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition.

Sincerely,



Scott S. Harris, Clerk