

IN THE
SUPREME COURT OF THE UNITED STATES

George Clifton Cobb IV - Petitioner

v.

STATE OF Florida - Respondents

ON Petition for a writ of Certiorari to

ELEVENTH Circuit Court of Appeals

Petition for writ of Certiorari

George Clifton Cobb IV

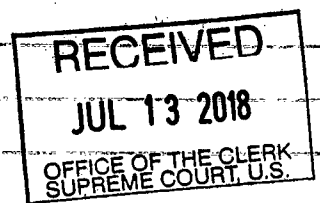
Provided to Suwannee
Correctional Institution on

Suwannee Correctional Institution
5964 US Hwy 90
Live oak, FL 32060

JUL 03 2018

for mailing, by

GC



Questions Presented

1) Did the 11th Circuit Court of Appeals of the United States err in dismissing Petitioner's application for Certificate of Appealability as untimely despite a requisite showing that extraordinary circumstances prevented Petitioner from timely filing?

2) Was Petitioner's claim of actual Innocence substantial enough to be able to overcome the Procedural default standard set forth under Schlup v. Delo.

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IN THE
SUPREME COURT OF THE UNITED STATES
Petition for writ of CERTIORARI

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

OPINIONS BELOW

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at Appendix E to the petition and is unpublished

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at Appendix D to the petition and is unpublished

The opinion of the Ninth judicial circuit of Florida
appears at Appendix C to the petition and is unpublished

Jurisdiction

The date on which the United States Court of Appeals decided my case was April 13, 2018

No petition for rehearing was timely filed in my case

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

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CASES

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Constitutional and Statutory provisions involved

Amendment ~~V~~ United States Constitution
(Due process of law)

Amendment ~~VI~~ - United States Constitution
(Effective) Assistance of Counsel)

Amendment ~~XIV~~ United States Constitution
Equal protection and Due Process

28 U.S.C. § 2244(d)(1)

Statement of the Case

Petitioner filed a Petition for writ of Habeas corpus on ~~July~~ March 18, 2016, which was within the proper time for filing a timely motion. However, Petitioner could not provide the district court with proof of indigency as the Institution failed to ~~provide~~ provide him a copy of his inmate trust account statements for the purpose of proceeding in forma pauperis. As a result of this, the District Court dismissed Petitioner's ~~88854~~ 88854 with prejudice and denied a Certificate of Appealability on December 13, 2017. Petitioner did not receive this order until January 4, 2018. Petitioner then provided a copy of the Application ~~and~~ for Certificate of Appealability to the Institution law library to make copies on January 13, 2018 but they did not return those copies until February 27, 2018. This delay in ~~delay~~ returning the requested copies to Petitioner prevented him from filing his motion on time. Petitioner then filed a motion for reconsideration. During the time of the Court issuing its dismissal of the Certificate of Appealability on the 13th of April, Petitioner had been transferred to Orange County jail on April 11, 2018. Because of the transfer, the legal mail was unable to reach Petitioner until approximately May 4, 2018, which caused a delay in the Petitioner's ability to respond. To further this complication the Petitioner was again transferred back to Suwannee CI on May 10, 2018 and had to wait on the Institution law library to receive and return the copies of his motion for reconsideration so that he could actually file the motion. Although the Petitioner provided his motion to Suwannee CI officials to be mailed as date-stamped on May 15, 2018 the 11th circuit did not receive it until May 21, 2018.

This Petition follows.

Reasons for Granting the Petition

This Honorable Court should grant the instant petition as petitioner has shown that he has pursued his rights diligently and due to circumstances beyond his control he was prevented from filing his motions/petitions in a timely manner.

Petitioner respectfully contends that there were circumstances which caused a delay in the timely filing of his motion that the Petitioner had absolutely no control over and thereby, should not be penalized for the negligence of the Institution and transfer to Orange County Jail and then back to the Institution.

Petitioner states that the transfer to a different

facility caused a delay in the receipt of the Eleventh Circuit Courts decision as the mail had to be rerouted to the Orange County Jail where Petitioner was being held on about May 4, 2018 when he finally did receive the Eleventh Circuit's order. Petitioner then attempted to have copies made of his motion for reconsideration which in Orange County Jail but was unexpectedly transferred back to Seawanner CJ

on May 10, 2018 and once back at Seawanner, requested the Institution law library to pick up his motion, make copies and return them. Petitioner was then able to send the motion for reconsideration on May 15, 2018 from the time that Petitioner received the Courts order to the date he was able to send the motion for reconsideration was only 18 days and then another 6 days until the Court actually received ~~and~~ this said motion for reconsideration.

In regards to the Certificate of Appealability,

Appellant/Petitioner must show the Court that he is entitled to equitable tolling. In order for Appellant to overcome what the Court has deemed as an "untimely filing," the Appellant not only has to

contend that he is entitled to equitable tolling, but the Appellant must also make a sufficient showing to the Court that supports equitable tolling.

Pursuant to Holland v Florida, 560 US 631, 649 (2010), the Supreme Court of the United States held that the Petitioner is entitled to equitable tolling only if he shows:

"1) that he has been pursuing his rights diligently, and 2) that some extraordinary circumstances stood in his way and prevented him from timely filing "quoting Face v Dignuaglizima, 544 US 408, 418 (2005). In the instant case, Petitioner argues that should have considered ~~by~~ petitioners request for Certificate of Appealability as Petitioner showed the Court a sufficient showing of Due diligence in pursuit of his rights and that an extraordinary circumstance stood in his way of timely filing.

Petitioner contends that the Institution where he is currently located has caused several issues/delays in the Petitioners ability to be able to file a timely motion.

To satisfy the first prong of Holland v Florida, supra, the Petitioner must show that he has been pursuing his rights diligently. To show this, the Petitioner refers this Court to the decision made by the U.S. District Court on December 18, 2017, but did not receive the Courts order until January 9, 2018, 17 days after the District Court issued its order on Petitioners § 2254. Once the Petitioner actually did receive the decision from the District Court, he immediately drafted an application for Certificate of Appealability (COA) and sent it to the Institution law library to be copied on January 13, 2018. However, the Institution law library did not return the copies until February 27, 2018, causing further delay in Petitioners ability to timely file his application. (See Exhibit A "copying services request and withdrawal"). Petitioner is providing a copy of the Institution law library "copy services request and withdrawal" form, which is used to request copies to be made of legal documents, motions, etc. to show that he did actually request copies to be made of his application for

Cot in a timely fashion. The next available day which Petitioner was able to mail his motion was the following day after the copies were returned to him. The Petitioner actually gave his application to Doc of Records to be filed with the Eleventh Circuit on February 28, 2018. To further show the Petitioner pursued his rights and exercised due diligence, Petitioner sent letter to the Eleventh Circuit requesting an application for a Certificate of Appealability form on January 19, 2018 because the Institution law library did not have any forms available to provide Petitioner. Petitioner then got a notice to appeal notarized and sent to the Eleventh Circuit on January 31, 2018, which was received and filed February 5, 2018.

The second prong the Petitioner must show according to Holland v. Florida, *supra*, is that some extraordinary circumstance stood in his way and prevented him from timely filing.

As Petitioner has stated, he provided his motion to the Institution law library to be copied only about 9 days after he received the District Court's decision on his 50324 Hobbes Corpus. In itself, the District Court made its decision on ~~December~~ December 18, 2017, but Petitioner did not actually receive the Court's order until January 4, 2018, 17 days later. Petitioner further contends the Institution law library turned even more complicated in the Petitioner's ability to file his motion/application in a timely manner (see Exhibit A).

Petitioner provided a copy of his Cot application to the Institution law library on January 13, 2018, but did not receive the requested copies until February 27, 2018. Petitioner then sent the motion out the next day to be mailed/ filed with the Eleventh Circuit. Pending the decision of the Eleventh Circuit, Petitioner was transferred to Orange County Jail (for a different issue) on April 11, 2018. On April 13, 2018 the Eleventh Circuit Court filed its decision on Petitioner's Cot. However, due to Petitioner having been transferred to a different facility, the legal mail then had to be rerouted to the Orange County Jail. Petitioner did not receive the Court's order until about May 4, 2018. Petitioner tried to have copies made while in Orange County

jail but was then transferred back to Suwannee C.I. on May 10, 2018 before he was able to have the copies made. Upon being transferred back to Suwannee C.I., Petitioner immediately requested for the Institution law library to make copies of his motion for reconsideration and received the copies and then provided copies to the DOC officials to be mailed to the Eleventh Circuit Court on May 15, 2018 although the court did not receive the motion until May 21, 2018, which was returned unfiled May 29, 2018 and received by the Petitioner June 5, 2018. Petitioner then drafted this Petition for Writ of Certiorari to the United States Supreme Court.

Petitioner states that he has made a sufficient showing that he has pursued his rights diligently and that extraordinary circumstances stood in his way and prevented him from timely filing his motions. *Holland v. Florida*, 560 U.S. 631 at 649 (2010); *Pace v. DiGiuglielmo*, 544 U.S. 408, at 418 (2005); *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

The Eleventh Circuit Court of Appeals has also held the limitations period may be equitably tolled when a movant's timely filing of a motion is impeded by extraordinary circumstances beyond his control and unavoidable even with due diligence. *Sandrite v. U.S.*, 177 F.3d 1269 (11th Cir 1999).

Pursuant to Fed. R. App. P. Rule 25(a)(2)(C), "If an Institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate is timely if it is deposited in the Institution's internal mail system on or before the last day for filing and:

- (i) it is accompanied by:
 - A declaration in compliance with 28 U.S.C. § 1746- setting out a date of deposit and stating that first class postage is being prepaid, or
 - evidence (such as a post mark or date stamp) showing that the paper was so deposited and that postage was prepaid.

This Court held, in an extraordinary case, where a Constitutional violation has probably resulted in the conviction of one who is actually innocent, a Federal Habeas court may grant the

writ even in the absence of a showing of cause for the procedural default. Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). This Court has also applied the miscarriage of justice exception to overcome various procedural deadlines, including filing deadlines. Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 854, 115 L.Ed.2d 640 (1991). Focusing on the merits of a petitioner's actual innocence claim and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of justice exception, i.e. ensuring that Federal Constitutional errors do not result in the incarceration of innocent persons. McQuiggins v. Perkins, 133 S.Ct. 1924, 185 L.Ed.2d 1019, 2013 U.S. Lexis 4068.

Petitioner argues that he has met the standard of proof governing the claim of actual innocence to overcome the timeliness issue regarding the AEDPA time limitation as litigated in his §2254 Habeas Corpus in the form of a reliable eyewitness account, i.e. a sworn affidavit of an alibi witness.

Under Schlup v. Delo, supra, "to be credible, such a claim requires petitioner to support his allegations of Constitutional error with new reliable evidence... [like] trustworthy eyewitness accounts... that was not presented at trial.

Petitioner presents the claim of actual innocence with new reliable evidence in the form of a sworn affidavit of a trustworthy eyewitness account of an alibi witness. (See Exhibit 'B' Sworn Affidavit) Petitioner was unable to present this Alibi's testimony at trial because Petitioner did not possess knowledge the [Alibi] witnesses' legal name and/or contact information. Thereby, even through the exercise of due diligence, Petitioner was unable to call the witness to trial to testify on his behalf and to assist Petitioner in establishing his innocence claim. Petitioner contends that if he had been able to present the Alibi witnesses testimony at trial it would have contradicted the unreliable testimony and controversial identification of

the victim and witness who allege that the petitioner was the shooter. The fact of the matter is that the "identification" of the petitioner as the shooter stemmed from the unduly suggestive display of a single photograph in violation of *Weil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401.

"A standard for the admissibility of testimony concerning an out-of-court identification of an accused is whether there is a very substantial likelihood of misidentification; such likelihood of misidentification violates an accused's rights to due process; suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Petitioner*

Contents that the supposed identification by the witnesses are unreliable and in violation of his due process rights as there was no reliable descriptions made by either eyewitness at the scene that would have led to the arrest of the petitioner. Prior to the showing of a single photograph of the petitioner, when specifically asked one witness, in her response to the 911 operator asking if she saw who shot her friend, the witness replied "no, I didn't see him." Suggestively, once shown a single photo of petitioner, the witness, Kathryn Robesky, began to claim that the shooter was petitioner, and even admitted at trial, she didn't know why she thought the shooter was petitioner, but assumed because the defendant was there, and other person had to be the petitioner because the two hang out together.

Additionally, the primary victim, Christian Vice, also was unable to provide police with a description beyond "a short, white male" and even further stated that he did not know the name of the shooter. Similar to Robesky, Vice was provided a single photograph and only then did he begin alleging the petitioner was the person who shot him. At trial, both individuals claimed to be aware of the petitioners extensive amount of tattoos but described the shooter as having a t-shirt and

no gloves and neither of the witnesses saw any tattoos on him. The victim, vice, even testified that he had actually seen a picture of the Petitioner on the news on TV while he was in the hospital, the same photograph which was shown to him a few days later which was not presented with any other photos. This unduly suggestive photographic display of a single photograph raised the likelihood of misidentification which caused irreparable damage to the Petitioner's defense. The showing of a single photo was in direct violation of Petitioner's Fifth, Sixth, and Fourteenth amendment rights of due process of law, equal protection, and effective assistance of counsel as guaranteed by the United States Constitution.

With this evidence presented the Petitioner is able to show this Court that the credibility of the supposed out-of-court identification was completely unreliable as the identification process was tainted by the unnecessarily suggestive showing of a single photo.

Petitioner also states that should the testimony of the alibi witness be presented to the jury, given the unreliability of the victim/witnesses alleged eyewitness testimony there would be reasonable probability that the jury would have returned a verdict of not guilty, or more likely than not, would have reasonable doubt.

As there was no physical evidence produced at trial, the entire case rested upon the testimony of the victim and witness. Because of this fact, any error concerning the testimony of these witnesses would be detrimental and cannot be construed as harmless to the defense. To neglect to entertain the instant petition due to untimeliness would be to promote fundamental miscarriage of justice. San Martin v. McNeil, 633 F.3d 1257, 1267-1268 (CA11 2011)

"A court may consider an untimely 2854 petition if by refusing to consider for untimeliness, the court would thereby endorse a "Fundamental Miscarriage of Justice" because it would require that an individual who is actually innocent remain imprisoned."

The District court states in the order dismissing

Petitioner Habeas Corpus that the Petitioner does not support his allegation of actual innocence and could have learned of the legal name of his alibi witness prior to trial with the exercise of due diligence. Petitioner refutes the courts findings as there was absolutely no way Petitioner could have learned of the legal name of the alibi witness because 1) the witness only introduced himself to Petitioner by his nickname, "AD",

2) the witness never provided Petitioner with any contact information i.e. phone number, address, etc.
3) while awaiting trial, Petitioner informed his attorney of this individual but the attorney stated he could not locate the alibi witness with such little information
4) Petitioner had no means of locating the alibi witness on his own accord

Given these circumstances, Petitioner respectfully asks this Court, how is it possible to have located the alibi witness to have him testify at trial on Petitioner's behalf? Petitioner argues that this feat was definitely a difficult, if not near impossible, endeavor and Petitioner respectfully asks this Court to please consider the circumstances and allow the Petitioner to present his alibi witness's testimony to be able to help properly establish his innocence and not to deprive him of life, limb, or liberty as guaranteed by the United States Constitution.