NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM OF 2018

*

KEITH LAPELL BIGGINS,
Petitioner,

-VS-

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

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*

PETITIONER FOR WRIT OF CERTIORARI

*

Keith Lapell Biggins
Fed. Reg. No. 41644-004
Federal Correctional Institution
Post Office Box 340
Salters, South Carolina 29590

IV

QUESTIONS PRESENTED FOR REVIEW

Whether the United Court of Appeals for the Eleventh Circuit Contrary to Buck v. Davis, 137 S.Ct. 759 Inverted the Mode of Statutory Operation 28 U.S.C. § 2253(c)?

Whether the United States Court of Appeals for the Eleventh Circuit Improperly Applied McQuiggins v. Perkins, 133 S. Ct. 1924?

V. **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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VIIII

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

[x] For cases from **federal courts**:

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

[X] reported at Eleventh Circuit appeals No.17-14988-K; 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[ ] is unpublished.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

[X] reported at NORTHERN DISTRICT OF FLORIDA, 4:93-cr-4028-WS/CAS; 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[ ] is unpublished.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[ ] is unpublished.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[ ] is unpublished.

x.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 2/5/2018.

[ ] 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: _____, 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. § 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).

XI. CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

> "No person shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accustion... and to have the assistance of counsel for his defense.."

3. The statutes involved and under review are Title 28, United States Code, Section 2253(c) and Federal Rules of Civil Procedure Rule 60(b)(6).

XII. STATEMENT OF THE CASE

On August 10, 1994, a grand jury sitting in the Northern District of Florida, returned a superseding indictment, which charged as follows:

Count One

"That from a date unknown but at least by January 1987, and continously therefater, including through January 1991, up to and including the date of this Indictment, in the Northern District of Florida and elsewhere, the defendants,

KEITH LAPELL BIGGINS,
REGINALD KEITH BIGGINS,
DEVON CROWL,
ERIC NICHOLS PRINCE,
KELVIN McGLENN DAVIS,
AUSTRALIA OZELL RINKINS

did unlawfully combine, conspire, confederate, and have a tacit agreement with each other to knowingly and intentionally distribute and possess with intent to distribute controlled substances, to-wit": cocaine base, commonly known as "crack cocaine", and cocaine, in violation of Title 21, United States Code, Section 841(a) and 841(b)(1)(A).

All in violation of Title 21, United States Code, Section 846.

Count Two

That in or between June 1990 and September 1990, in the Northern District of of Florida and elsewhere, the defendant, KEITH LAPELL BIGGINS, aided and abetted by others not charged herein, did knowingly and intentionally possess with the intent to distribute controlled substances, to-wit: cocaine base, commonly known as "crack cocaine:, and cocaine, in violation of Title 21,

United States Code, Sections 841(a) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

Count Three

That in or about January 1991, in the Northern District of Florida and elsewhere, the defendants, KEITH LAPELL BIGGINS and REGINALD KEITH BIGGINS, aided and abetted by others noth charged herein, did knowiingly and intentionally possess with intent to distribute controlled substances, to-wit: cocaine base, commonly known as "crack cocaine" and cocaine, in violation of Title 21, United States Code, Sections 841(a) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

Petitioner Biggins entered pleas of not guilty to all charges and proceeded to trial by jury on October 17, 1994. During the jury trial, the prosecution paraded an armada of witnesses (mostly convicted felons looking to avoid long jail sentences), in its case to establish guilt...

After a brief deliberation, the jury returned guilty verdicts in each of the counts.

(i) Persentence Report and Sentencing

A United States Probation Officer prepared a Presentence Report (PSR), which recommended a sentence of life imprisonment. The PSR calculated a base offense level of 38, because of what the PSR contended, the offense involved 1.5 kilograms or more of cocaine base. After the PSR included a number of enhancement adjustments, it concluded that the Petitioner's adjusted offense level was 46. For the Petitioner's criminal history, the PSR assessed one single criminal history point. With a base offense level of 46 and a criminal

history category I. This calculation produced a "mandatory" sentencing range under the then Sentencing Guidelines, of life imprisonment. The district court imposed a life term of imprisonment as to counts one, two, and three, to be served concurrently. With the assistance of counsel, the Petitioner appealed the district court's judgment to the United States Court of Appeals for the Eleventh Circuit. On February 26, 1998, that court affirmed. Its mandate issued on April 2, 1998. See (11th Cir. Case No. 95-2142).

(ii) Initial Title 28, U.S.C. § 2255 Motion:

In 2001, the Petitioner submitted a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. In this 2001 § 2255 motion the Petitioner argued that the government withheld exculpatory evidence and used perjured testimony at trial, in violation of Brady v. Maryland, 373 U.S. 83 (1963). The district court denied this motion, finding that it was untimely because it was outside the limitation period, and that the Petitioner had not provided facts as to when or how he obtained the newly discovered evidence or why it could not have been discovered earlier with due diligence. The Petitioner sought, and was denied a certificate of appealability (COA).

In 2005, the Petitioner submitted a Federal Rule 60(b)(6) to the district court challenging the denial of his initial § 2255 motion as time barred. The district court summarily dismissed this motion, finding that the Petitioner had not provided specifics, such as when and how he obtained each affidavit, or explained why a reasonable investigation would not have uncovered the facts previously. Again the Petitioner sought and was denied a (COA).

In 2017, the Petitioner submitted the Rule 60(b)(6) motion that is the

STATEMENT OF JURISDICTION IN THE COURTS BELOW

The Petitioner was indicted, convicted, and sentenced in the United States District Court for the Northern District of Florida (Tallahassee Division), for conspiracy to possess with intent to distribute cocaine base and cocaine under 21 U.S.C. §§ 841(a) and 846. A 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence was appropriately made in the convicting court and subsequently denied. A timely appeal to the United States Court of Appeals for the Eleventh Circuit. Furthermore, the Petitioner sought relief pursuant to Rule 60(b)(6) in the district court and upon denial of that Rule 60(b)(6) motion by the district court, the Petitioner sought a COA in the United States Court of Appeals for the Eleventh Circuit and that court denied that COA. See 28 U.S.C. § 2253(c).

XIII. REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT...

The Eleventh Circuit Court of Appeals February 5, 2018 Order denying Petitioner's request for Certificate of Appelability (COA) and Order denying rehearing is contrary to this Court's holding in Buck v. Davis, 580 U.S.___, 137 S.Ct. 759 (2017), and Slack v. McDaniel, 529 U.S. 473 (2000), and Miller-El v. Cockrell, 537 U.S. 322 (2003).

Indeed, the Petitioner submitted an application for a certificate of appealability (COA) to the court of appeals seeking to appeal the district court's dismissal of his Rule 60(b)(6) motion based upon the Petitioner's actual innocence claim and supported by newly discovered exculpatory evidence. In denying the Petitioner's (COA) request, the court of appeals "inverted" the statutory mode in which a COA request should be determined. The court of

subject of this petition for writ of certiorari.

In this particular Rule 60(b)(6) motion, the Petitioner argued that he is actually innocent, and alleged that he had secured further exculpatory evidence revealing the perjured testimony at his trial, and that he is entitled to have the merits of his claims entertained. Furthermore, therein the Petitioner's Rule 60(b)(6) motion he argued that, under this Court's McQuiggin v. Perkins, 569 U.S. 383 (2013) holdings, his actual innocence claim should nullify § 2255 limitation period.

The district court denied the Rule 60(b)(6) motion. It found that the Petitioner failed to file the motion within a reasonable time, and that the Petitioner failed to show the requisite extraordinary circumstances needed to obtain relief under Rule 60(b)(6). The district court however, noted that the Petitioner had presented evidence that a few of the many witnesses claimed they had given false testimony, and that the Petitioner had not shown that, in light of the evidence, no juror would have found him guilty beyond a reasonable doubt. In the same order the district court also denied a (COA).

(iii) Certificate of Appealability Request (11th Circuit):

The Petitioner, consistent with both Slack v. McDaniel, 529 U.S. 473 (2000) and Miller-El v. Cockrell, 537 U.S. 322 (2003), sough a (COA) at the court of appeals level (Eleventh Circuit). That court in denying the Petitioner a (COA) did so contrary to Slack, Miller-El, and Buck v. Davis, 580 U.S.___, 137 S.Ct. 759 (2017), as will be set forth ahead.

appeals for the Eleventh Circuit, contrary to this Court's Buck supra, Miller-El supra, holding[s] denied the Petitioner a COA. Thus, the court of appeals February 5, 2018 Order correctly identifies the contours of Title 28 U.S.C. § 2253(c)(2), however, the appeals court "inverted" the proper statutory procedures for consideration of the issuance of a COA by deciding the merits of the Petitioner's claims prior to authorizing a COA.

Hence, a careful reading of the court of appeals February 5, 2018 Order denying the Petitioner's COA request demonstrate that it offends this Court's Buck v. Davis supra holding, i.e. "[a]t the COA stage the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of the constitutional claims or that jurists of reason could conclude the issue[s] presented are adequate to deserve encouragement to proceed further."

The court of appeals correctly noted therein its order denying the Petitioner's COA, that a COA is required to appeal a Rule 60(b) denial citing its decision Jackson v. Crosby, 437 F.3d 1290, 1294 (11th Cir. 2006). The court of appeals also correctly points out that to obtain a COA, a movant must make a substantial showing of the denial of a constitutional right citing 28 U.S.C. § 2253(c)(2). However, after making these correct observations, the court of appeals then addressed the merits of the Petitioner's constitutional claims, including the Petitioner's "actual innocent" claim.

This Court in Miller-El, made clear that when an appeal court denies a COA after it has considered the merit[s], it has decided an appeal without jurisdiction. Furthermore, this Court in Buck supra, clarified the standard for granting a COA, and held that the COA inquiry is not coextensive with a merits analysis. Id.

In the case now at the bar, the Petitioner sought relief via Rule 60(b)(6) from the district court's 2001 dismissal of his Title 28, United States Code, Section 2255 motion. The Petitioner presented his "pro se" Rule 60(b)(6) in a very articulative fashion, and made sure that his Rule 60 (b)(6) motion was a "true rule 60(b) motion" not one clothed as a second or successive § 2255 motion. See Gonzalez v. Crosby, 545 U.S. 524, 528, 125 S.Ct. 2641, 162 L.Ed. 2d 480 (2005). Thus, the Petitioner argued that in light of this Court's holding in McQuiggin v. Perkin, 133 S.CT. 1924, and its change in decisional law, served as an extraordinary circumstance upon which Rule 60(b)(6) relief may issue. Indeed, this Court in McQuiggin held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass" to overcome an untimely petition under AEDPA. Id. 133 S.Ct. at 1928. Upon review, the District Court ruled that McQuiggin was not a ground for relief and denied the Rule 60(b)(6) motion. The Petitioner, then requested a Certificate of Appealability (COA), which the Eleventh Circuit denied, albeit, after it entertained the merits of Petitioner's "actual innocence" claim[s]. Thus, in its February 5, 2018, order, the Eleventh Circuit acknowledged that the Petitioner in 2001 filed a 28 U.S.C. § 2255 motion to vacate, arguing that the government withheld exculpatory evidence and used prejured testimony at trial, in violation of this Court's holdings in Brady v. Maryland, 373 U.S. 83 (1963). The district court dismissed the 2001 § 2255 motion by finding that the motion was untimely because it was deemed outside the limitation period... (App-A) The Eleventh Circuit then goes into a detailed "merits" evaluation of the Petitioner's claims by saying that Petitioner failed to provide any facts as to when or how he obtained the newly discovered evidence or why it could not have been discovered eariler with due diligence. Id. The appeals court continues by saying that in "2017, Biggins filed the instant Rule 60(b)(6) motion, seeking to reopen his initial § 2255

proceeding. He claimed "actual innocence," and alleged that he had secured further evidence of perjury at trial, such that he was entitled to a review of the merits of his claims. He contended that, under McQuiggin v. Perkins, 569 U.S. 383 (2013), a claim of actual innocence should nullify § 2255's limitation period... Id. *2.

Clearly, this Court cannot sit by and let the appeals court distort its rulings or ignore them to the point that aborgation occurs. When such a situation that this case presents. i.e., the petitioner is actually innocence of the crimes for which he was sentenced to life imprisonment and for which he has been confined for in excess of 25-years at this point, he must find refuge from the High Court because after all in McQuiggin this Court pointed out the "extraordinary circumstances" it would take to tigger the exception to the limitation period that § 2255 places upon a prisoner.

In fact, this Court made clear that "actual innocence" was the exception to the limitation period in McQuiggin. Following the dictates this Court put in place, the Petitioner pursuant to Rule 60(b)(6) sought to have his initial § 2255 motion reopened to give him the opportunity to show that the newly discovered evidence that he had diligently sought, obtained, and presentend, was the exception to any statute of limitation that stood in his path of having the merits of his "actual innocence" claim heard...

Indeed, the Petitioner specifically relies upon Rule 60(b)(6), a catch-all provision extending beyond the listed circumstances to "any other reason that justifies relief." Despite the open-ended nature of the provision, a district court may only grant relief under Rule 60(b)(6) in "extraordinary-circumstances where, without such relief, an extreme and unexpected hard-ship would occur." See Cox v. Horn, 757 F.3d 113 (3d Cir. 2014).

This Court very recently in Tharpe v. Sellers, 138 S.Ct. 545, 199 L.Ed. 2d 424 (2018), vacated the court of appeals for the Eleventh Circuit in the COA stage.

This Court's ruling in McQuiggin handed down twelve-years after the district court dismissed Petitioner's habeas petition as untimely is a sea change and intervening change that is relevant decisional law that requires such relief as the Petitioner sought pursuant to Rule 60(b)(6). McQuiggin, focused on the "fundamental miscarriage of justice" exception, a doctrine that had previously been applied to allow a habeas petitioner "to pursue his constitutional claims...on the merits notwithstanding the existence of a procedural bar to relief" where the petitioner makes a credible showing of actual innocence." 133 S.Ct. at 1931. This Court clarified that the fundamental miscarriage of justice exception would also permit a petitioner to overcome a petition that failed to comply with AEDPA's statute of limitations.

> "[C]learly, a fundamental miscarriage of justice exception must also permit a petitioner to overcome a petition that failed to comply with AEDPA's statute of limitations. Even so, a petitioner, as this [Petitioner], asserting actual innocence may not avail himself of the exception "unless he persuades the district court that in light the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. at 1928, 1935 (quoting Schlup v. Delo, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995)).

This Petitioner has not had that one opportunity to have his actual innocence claims entertained, while having the benefit of the new evidence that the Petitioner has diligently pursued, and obtained, and which demonstrate that

the Petitioner is actually innocent of the crimes for which he has for the past twenty-five-plus years remained behind bars. The Petitioner did not sit on his hands, rather he dug, and dug, and with the help of his family, he obtained sworn affidavits from some of the very witnesses which testified for the government during a jury trial, where the Petitioner was convicted and sentenced to life imprisonment... Hence, the Petitioner requests to have that "fundamental miscarriage of justice" that took place over twenty-five years ago rectified, only to be shut-out for a limitation. Justice can only be done by allowing Petitioner an opportunity to have the merits of his actual innocence claims considered and decided without considering the timeliness.

*

CONCLUSION

Petitioner, Keith Lapell Biggins, has been deprived of the basic fundamental guaranteed by the Fifth Amendment as well as the Sixth Amendment of the United States Constitution and seeks relief in this Court to restore those rights. Based on the arguments and authorities presented herein, Petitioner has had his rights to have his actual innocence claims heard and resolved on their merits. The Petitioner respectfully moves this Honorable Court to grant the writ and remand the matter to the Eleventh Circuit for further consideration.

Respectfully Submitted

Keith Lapell Biggins

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