

JAN 05 2018

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No. 18-7336

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JONATHAN HENRY HILL — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE 6th CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JONATHAN HENRY HILL

(Your Name)

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(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

Can a Habeas Petitioner rely on an affidavit as newly discovered evidence when the affidavit is submitted more than one year after a conviction?

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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Statutes and Rules

28 USC § 2254

28 USC § 2244 (d) (1)

18 USC §1001, 1621-1623

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 is unpublished.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 2016 US Dist LEXIS 163506 (WD Mich); 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 is unpublished.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 C 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 is unpublished.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 Michigan State Court of Appeals court appears at Appendix D 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 is unpublished.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 October 11, 2017.

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause

Statement of the Case

Hill's question arises out of a set of circumstances showing he knew a government witness testified falsely against him in a State trial, but Hill had no way to prove the witness lied. The government witness's testimony was crucial to gaining Hill's conviction. Years after the fact, two witnesses came forward to state in writing that the government witness testified falsely. Both men stated they knew of the witness's false testimony at or near the time of Hill's trial but were reluctant to come forward sooner. Hill himself had no way to produce the affiants' testimony, and had Hill claimed the government witness lied at trial, his claims undoubtedly would have been construed as unfounded and conclusory. Once the affidavits were provided to Hill, he filed for relief in State court. After the State denied him relief, Hill filed in federal court. The federal courts held that Hill was time-barred from raising his claim, and relied on the decision in *Redmond v. Jackson* in denying Hill relief ("it is the actual or putative knowledge of the pertinent facts of a claim that starts the clock running in the date on which the factual predicate of the claim could have been discovered through due diligence, and the running of the limitations period does not await the collection of evidence which supports the facts, including supporting affidavits.") See *Redmond*, 295 F Supp 2d 767, 772 (ED Mich 12/9/03) (citing *Sorce v. Artuz*, 73 F Supp 2d 292, 294 (ED NY 11/10/99)).

Hill was prosecuted and convicted in State proceedings

in 2006 for crimes of murder and firearms violations. See People v. Jonathan Hill, State of Michigan, 37th Circuit Court (Calhoun), No. 05-002925-FC. Hill appealed his conviction in the State Court of Appeals (COA 269095, 8/16/07) and Michigan Supreme Court (SC 134791, 12/28/07), which denied relief. Hill's subsequent motions in the Calhoun Circuit Court (2005-002925 5/4/15) and in the Court of Appeals (327245 6/19/15) were denied, after which he filed in the Michigan Supreme Court (152125 5/24/16) which were denied. Hill thus fully exhausted his avenues for relief in the State courts.

Hill then filed a 28 USC § 2254 Motion in federal court seeking relief from the judgment issued by the State Court of Appeals. Hill based his motion on a claim of ineffective assistance of counsel stemming from newly discovered evidence, which Hill provided to the court in the form of the two aforementioned affidavits. The affidavits contained the statements of two individuals who would testify that the government relied on false testimony to gain Hill's conviction.

As Hill's conviction was final in State Court in 2007, see People v. Hill, No. 269095, 2007 WL 2331077 (Mich Ct App 8/16/07), and the Michigan Supreme Court denied leave to appeal on 12/28/07, People v. Hill, 6742 NW 2d 369 (Mich 2007) (mem), Hill relied on equitable tolling to allow him to bring his claims of ineffective assistance of counsel in his § 2254 Motion. The United States District Court for the Western District of Michigan found Hill was time-barred when he filed a Motion for Relief under 28 USC § 2254 claiming ineffective

assistance of counsel where counsel had failed to investigate the veracity of a prosecution witness. *Hill v. State of Michigan*, 2016 US Dist LEXIS 163506 (WD MI 11/28/16).

"Petitioner's application is barred by the one-year statute of limitations provided in 28 USC § 2244 (d) (1)." *Id.* (Doc 6) at 4. As exhibits to his filing, Hill submitted two affidavits authored by men who testified that a prosecution witness testified falsely at trial to gain Hill's conviction.

Hill argued he is entitled to equitable tolling in that he has been pursuing his rights diligently, and that some extraordinary circumstance stood in his way. See *Holland v. Florida*, 560 US 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 US 408, 418 (2005)). See also decision of United States Court of Appeals for the Sixth Circuit, No. 17-1410, at 2 ("Hill... maintains that he 'pursued his rights diligently' to obtain 'newly-discovered evidence' -- two affidavits from 2014 -- and that this new evidence establishes his actual innocence.") Hill showed he has been pursuing his rights diligently in that following his conviction at trial, wherein the government witness testified falsely against him, he filed for relief until all avenues available to him had been exhausted. Once individuals came forward who could testify that the government witness testified falsely at Hill's trial, Hill again filed for relief. Moreover, Hill has shown that although he himself was aware of the witness's false testimony, the fact that no one would come forward on his behalf constituted "some extraordinary circumstance [which] stood in his way." *Holland*, 560 US at 649.

In denying Hill equitable tolling, both the Court of Appeals and the District Court relied on *Redmond v. Jackson*, *supra*, wherein the Court held "the running of the limitations period does not await the collection of evidence which supports the facts, including supporting affidavits." *Id.* (citing to *Tate v. Pierson*, 177 F. Supp, 2d 792, 800 (ND Ill 2001); and *Flanagan v. Johnson*, 154 F. 3d 196, 198-99 (5th Cir. 1998)). See decision of USCA 6th Cir, No. 17-1410; also Magistrate's Report and Recommendation, *Hill v. Michigan*, 2016 US Dist LEXIS 163494 (WD MI 9/15/16); also 2016 US Dist LEXIS 163506 (WD MI 11/28/16) at 9. The Courts held that Hill's conviction became final on March 28, 2008. See *Hill, supra*, LEXIS 163494. "The district court denied Hill's habeas petition as time-barred by the one-year statute of limitations set forth in 28 USC § 2244 (d)(1) and declined to issue a certificate of appealability." USCA 6th Cir, No. 17-1410, at 2.

Specifically regarding the affidavit submitted by Leslie James Warnsley, the lower courts stated that "Warnsley indicates... he had never been asked, questioned, or interviewed about Mr. Williams' deceit until 'now', June 26, 2014." *Hill*, 2016 US Dist LEXIS 163494, *supra*, Doc 6 at 8. The lower courts determined that "despite knowing that Mr. Williams had informed fellow prisoners that he, Mr. Williams, had lied when he testified at Petitioner's trial, Petitioner waited years to pursue the matter." *Id.* While the Court is undoubtedly correct in its conclusion that Hill was aware

Williams had testified falsely against him -- Hill was, after all, present in the courtroom when Williams testified -- the Court makes no finding of whether Hill ever knew Warnsley was aware of Williams' false testimony. The fact that Warnsley wrote, "I have never came forth until now, because no one has ever asked, questioned nor interviewed me as Williams E Pod mate," (ECF No. 2-1, PageID.49), only serves to further support Hill's ineffectiveness of counsel claim.

In particular, neither Hill nor Warnsley contend they have ever spoken to one another. There is nothing in the record to signify Hill was aware Warnsley had knowledge of Williams' deceptive intentions towards Hill, nor do the lower courts make the claim that Hill knew Warnsley had knowledge of Williams' testifying falsely against Hill. Those same courts now hold Hill is time-barred from relying on Warnsley's affidavit as newly-discovered evidence showing Williams testified falsely -- a claim that shows "the conviction... resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 US 668, 687 (1984). Hill argues his conviction is unreliable and his right to a fair trial and due process were violated by the State of Michigan's eliciting of Williams' false testimony.

Hill has previously made a showing of his claims of ineffective assistance of counsel in State court. See Memorandum in Support of Motion under 28 USC § 2254. It was in error for the State court to deny Hill relief on his claim reg

arding newly discovered evidence; namely, the statements of two men who would testify that the government relied on false testimony to gain Hill's conviction.

Hill argues that in light of statements contained in the affidavits he presented as exhibits to his petition for relief -- affidavits which Hill contends qualify as new evidence -- it cannot be disputed that the government's key witness testified falsely. It is further undisputed that there is a reasonable likelihood the witness's false testimony could have affected the judgment of the jury, in which case Hill deserves a new trial. Nothing apart from the witness's testimony implicated Hill being responsible for the crimes.

In his request for habeas relief, Hill argued:

A habeas petition should be granted if perjury by a government witness undermines the confidence in the outcome of the trial. *Malcum v. Burt*, 276 F. Supp 2d 664, 668 (ED Mich 2003) (citing *Monroe v. Smith*, 197 F. Supp 2d 753, 762 (ED Mich 2001)). See also *Sassounian v. Roe*, 230 F. 3D 1097, 1107 (9CA 2000) (citing to *United States v. Bagley*, 473 US 667, 678 (1985)). Perjury, as defined by relevant statute, is when an individual testifies falsely, under oath, about a matter material to the case. 18 USC §1001, 1621-1623. Hill presents evidence so compelling that it would violate the fundamental

fairness embodied in the Due Process Clause not to afford him a new trial where the new evidence could be considered.

Yet even with such supporting authorities, the lower courts ruled against granting Hill any relief. Hill argued for equitable tolling, yet the District Court held Hill was not entitled to relief because the affidavits merely serve to show that "[Hill] knew of Mr. [Nathan] Hill's conversation with Mr. Williams before he was tried," Hill, 2016 US Dist LEXIS 163506, *supra*, Doc 8 at 3, and therefore "the evidence was already discovered," *id.* The lower court held that because the "affidavit evidence 'could have been discovered,'" *id.*, Hill is not entitled to equitable tolling. Hill responds that he could not have discovered the affidavit evidence prior to the affiants coming forward and making their written statements, and therefore Hill argues he is entitled to equitable tolling to bring his claims for relief based on his actual innocence.

Hill has further made the claim of his being actually innocent of the murders for which he was convicted due to Williams' false testimony. As such, Hill should not have been denied relief due to the imposed time bar. In *McQuiggin v. Perkins*, 569 US __, 185 L Ed 2d 1019 ((2013)) -- a case cited by the lower courts -- this Court vacated and remanded the Sixth Circuit's holding that a petition under 28 USC § 2244 (d)(1) was untimely. In *McQuiggin*, the inmate Petitioner filed a petition for a writ of habeas corpus in 2008, more than

eleven years after his conviction for first-degree murder became final, claiming that he was innocent and received ineffective assistance of counsel during his trial. The Petitioner submitted three affidavits signed by witnesses who supported his claim. The district court found that even if the affidavits could be characterized as newly discovered evidence, the Petitioner was not entitled to relief because he obtained the last affidavit in 2002 but did not file his petition until 2008. In denying the petition, the court noted that for the Petitioner to have his habeas petition heard on the merits in federal court, he first had to persuade the district court that the statute of limitations, which had already run, should be equitably tolled in his favor. This Court reversed, ruling that petitioners who sought equitable tolling based on actual innocence should not be treated in the same way as those seeking equitable tolling because of less compelling reasons.

As in McQuiggin, *supra*, Hill claims he is actually innocent. The lower courts held that Hill had failed to meet the strict standard by which pleas of actual innocence are measured: He had not shown that, taking into account of all the evidence, "it is more likely than not that no reasonable juror would have convicted him," or even that the evidence was new. "Hill has not made this showing.... neither affidavit... establishes his actual innocence." USCA 6th Cir, No. 17-1410, at 4. "The facts underlying each affidavit were known to Hill prior to trial and therefore the affidavits do not constitute new evidence." *Id.* "Nor do the affidavits show that no

reasonable juror would have convicted him." Id. ""Jurists of reason therefore could not debate the district court's finding that the affidavits do not support a credible claim of actual innocence to overcome the statute of limitations." Id.

Reasons for Granting the Writ

Both the District Court and the Court of Appeals argue that the affidavits submitted by Hill and swearing to Williams' falsified testimony "do not constitute new evidence" because "the facts underlying each affidavit were known to Hill prior to trial." USCA 6th Cir, No. 17-1410, at 4. See also Hill, 2016 US Dist LEXIS 163494, *supra*, at 8 (citing Redmond, *supra*, at 772). Because the lower court has held "the running of the limitations period does not await the collection of evidence which supports the facts, including supporting affidavits," *id*, Hill would be denied an unobstructed procedural shot at raising his claim in court simply because he had no knowledge of any witness who would testify in support of his claim was had come forward. Such circumstances are akin to evidence buried in the ground which, no matter how many holes are dug in an attempt to find the evidence, is not found until it is uncovered by efforts not necessarily attributable to the one digging. Far from "delay[ing]... while... gather[ing] every possible scrap of evidence that might... support his claim," *id*, Hill filed for relief after himself becoming aware of persons having knowledge supporting his grounds for relief. As for the materiality of the evidence presented, the affidavits prove Hill's claims, which is far removed from "evidence that might... support his claim." *Id*. Therefore, Hill argues the court's reliance on the holding in Redmond is misplaced and inappropriate under the circumstances. Both courts contend that because Hill was aware of the factual predicate

undergirding his falsified testimony claim prior to the expiration of the limitations period he is now barred from raising his claims using the evidence which became available only after the limitations period had expired. "The question under the [§ 2244 (d)(1)(D)] provision is not when prisoners first learned of the new evidence; it is when they should have learned of the new evidence had they exercised reasonable care." Id at 9 (citing *Townsend v. Lafler*, 99 F Appx 606, 608 (6CA 2004) -- an unpublished decision not indicated as such in the Magistrate's R&R). Hill argues that, but for counsel's ineffectiveness in allowing Williams to testify at trial unchallenged, it is presumable he would not have been found guilty beyond a reasonable doubt by a jury. Therefore, the proper inquiry is whether Hill's federal constitutional rights were violated. See *Estelle v. McGuire*, 502 US 62, 67-68 (1991).

In order to meet its requirement for proving Hill's guilt to a jury beyond a reasonable doubt fairly ad without denying Hill's rights, the government would need to prove its case absent Williams' falsified testimony. Williams was the State's sole witness, without whose testimony Hill would not have been convicted. Contrary to the unfounded opinion that a jury would need to weigh William's testimony against that of witnesses testifying that Williams was lying, had counsel effectively argued in pretrial motions the merits of proof -- as presented by Hill in the lower courts -- showing Williams was an unreliable witness -- thus preventing the government from using Williams' testimony in any way -- there would be no

showdown between government and defense witnesses. Williams would have been prevented from testifying, and undoubtedly the outcome of the trial would have been different. As stated before, without Williams' testimony, Hill would not have been convicted at trial.

Hill argues -- and the affidavit evidence proves -- that Williams testified falsely for leniency in his own case. Hill further argued that the State is bound by a duty to correct perjured testimony: "The prosecutorial duty to correct perjured testimony includes perjured testimony that relates to the witness' credibility and not just the facts of the case." *Smith v. Metrish*, 436 Fed. Appx 554, 557 (6CA 2011). The only way to accomplish this is to re-try Hill without admitting the falsified testimony.

Conclusion

In closing, Hill argues he should be allowed to rely on an affidavit as newly discovered evidence when the affidavit is submitted more than one year after a conviction where the affidavit is authored by a person who Hill did not know had knowledge of the facts supporting his claims for relief.

Respectfully submitted on December 26, 2017, by:



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