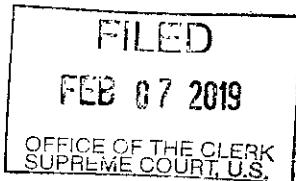


18-8159

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP CAMILLO-AMISANO
Petitioner



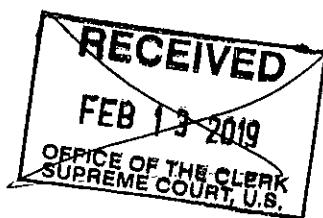
vs.

UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI


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PETITION FOR CERTIORARI

QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Fifth Circuit improperly deny a Certificate of Appealability (COA), violating due process in a manner that conflicts with relevant decisions of Supreme Court, endorsing a catastrophic fundamental miscarriage of justice?
2. Did the Court of Appeals and District Court of Northern Texas improperly deny the petitioner's COA without addressing his motion, pursuant to 28 U.S.C. 2255 motion to vacate his conviction based on Supreme Courts ruling in Strickland v. Washington, arrising from prejudice by multiple instances of ineffective assistance of counsel?
3. Did the Court of Appeals for the Fifth Circuit impose and unduly burdensome COA standard contravening the Supreme Courts decisions, leading to a constitutional crisis?
4. Did the Court of Appeal violate due process with denial of evidentiary hearing when the Court simultaneasly denied the petitioner motion pursuant to 28 U.S.C. motion purely on procedural grounds when not addressing the merits of the underlying constitutional question, even when the Government requested a hearing?

LIST OF PARTIES IN COURT BELOW

1. Phillip Camillo-Amisano, petitioner.
2. United States of America, respondent.

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CITATION OF OPINIONS AND ORDERS IN CASE

The original conviction of the Petitioner in the United States District Court for the Northern District of Texas, was not reported.

The original conviction of Petitioner was appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the conviction. Counsel requested writ of Certiori, was not reported.

The United States District Court of Northern Texas granted the Petitioner to proceed pro se. The orginal conviction of the petitioner was appealed for second time to the United States Court of Appeals for the Fifth Circuit, appealed was deny untimely.

The decision of the United States District Court for Northern Texas on Petitioner's section 2255 motion is not reported, but set forth at pp. C-1 and D 1-6 of the Appendix.

The decision of the United States COurt of Appeals for the Fifth Circuit on Petitioner's'Certificate of Appealability (COA) is not reported, but set forth at pp E -1 and F 1-2 of the Appendix.

JURISDICTIONAL STATEMENT

The judgement of the United States Court of Appeals for the Fifth Circuit was entered on 11/13/2018. Rehearing was sought and deny. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and under Hohn v. United States, 524 U.S. 236 (1998),

Supreme Court has jurisdiction, via certiorai, to review denials of applications for certificate of appealability.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Sixth Amendment, United States Constitution, provides:

In all criminal prosecution, the accused shall enjoy the Right... to have assistance of counsel for his defense.

The Fifth Amendment, United States Constitution, provides:

No person shall be deprived of life, liberty, or property without due process of law. Freedom from imprisonment, government custody, detention, or other forms of physical restraints lies at heart of liberty that due process clause of Federal Constitution Fifth Amendment protects.

The First Amendment, United States Constitution, provides:

To petition the government for redress of unlawful conviction, with free speech rights, and rights of access to courts.

2. The statute under which Petitioner was prosecuted, though nothing turns on it terms, was 18 U.S.C. 2422(b).

3. The Statute and which Petitioner sought post conviction relief was 28 U.S.C. 2255:

Federal Custody: Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determined the issues and make findings of fact and conclusion of law with respect thereto. If the court finds that the judgement rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgement vulnerable to collateral attack, the court shall vacate and set the judgement aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

An appeal may be taken to the court of appeals from the order entered on the motion as from final judgement on application for a writ of habeas corpus.

An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the application has failed to apply for relief, by motion, to the court application has failed to apply for relief, ny motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remeby by motion is inadequate or ineffective to test the legality of his detention.

The Statute and which the petitioner sought appeal 28 U.S.C. 2253(c), which provides in part:

- (1) unless a circuit judge or judge issues a certificate of appealability an appeal may not be taken to the court of appeals;
- (2) a certificate of appealability may be issue under paragraph (1) only if the applicant has made a substantial showing of a constitutional right;
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

The facts necessary to place in their setting the question now raised can be briefly stated:

I. On June 21, 2012, in a cause then pending in the United States District Court for the Northern District of Texas, entitled United States v. Phillip Camillo-Amisano, Criminal No: 3:12-CR-177-P, Petition Plead Gulity on an idictment of 1 count charging violation of 18 U.S.C.2422(b).

On June 19, 2014, the District Court entered judgement and petitioner was sentenced to 300 months and fine \$100.00. This judgement and sentence was affirmed by the United States Court

of Appeals for the Fifth Circuit, United States v. Phillip-Camillo-Amisano case: 14-10726. A petition to this Court for a Writ of Certiorari was denied on June 1, 2015. The Petitioner was granted to proceed pro se on 01/12/2016. The petitioner file direct appeal to the Court of Appeals for the Fifth Circuit, case# 15-11040, was dismiss untimely. Petitioner serving this sentence when the motion under 2255 was filed in District Court.

On July 26, 2016 court filed the Petitioner motion in the case at bar under 28 U.S.C. 2255 to vacate and set aside the conviction (app. H). Briefs in support and opposition were filed by each parties(app. I and J). No evidentiary hearing was held.

On Aug. 31, 31, 2017 Magistrate Judge for the District Court of Northern Texas enter its order denying the motion under 28 U.S.C. 2255 motion (app. D.). On Sept. 5, 2017, the petitioner sent in 59(c) motion and file notice of appeal (with objections listed on notice). On Sept. 26, 2017 The District Judge enter its order denying 28 U.S.C. 2255 motion and deny COA with prejudice.

The petitioner filed application for certificate of appealability with the Court of Appeals for the Fifth Circuit, file #17-1128. The Circuit Judge dismiss the COA (app. B.). The petitioner file a 59(c) motion with the Court of Appeals, and it was deny (app. A).

II. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION

The relevant facts are contained in the Petitioner's motion under 28 U.S.C. 2255 (app. H). The Petitioner plead guilty in District Court. The Petitioner Dirct Appeal was dismiss untimely, the Court Appeals would not address the facts of the underlying

constitutional claim and did not address prison official censorship of legal mail, violating due process. The Court of Appeals for the Fifth Circuit dismissed the 59(c) motion untimely, with out examining the reason for the delay.

The petitioner's 28 U.S.C. 2255 motion was dismissed untimely, the District Court of Northern Texas did not address the underlying constitutional claim or address all the tolling claims, and did not address the actual innocence. The District Court did not address the petitioner 59(c) motion for reconsideration. The District Court deny the 28 U.S.C. 2255 motion and deny a COA with prejudice (app G.).

The petitioner filed for Certificate of Appealability (COA) with the Court of Appeals for the Fifth Circuit (app. F.). The Court of Appeals would not address the actual innocence claim and prison officials violating the petitioner due process, stopping access to the courts. The Court of Appeals agree with District Court dismissing the case over a procedural default, without addressing the underlying constitutional claim.

III. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court of Northern District of Texas of 1 count under 18 U.S.C. 2422(b). A section 28 U.S.C. 2255 motion was appropriately made in that Court, and duly appealed to the Court of Appeals for the Fifth Circuit.

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

This is ineffective assistance case, the petitioner is using actual innocence as gateway to pursue post-conviction relief

regardless of procedural default using this court decision in *McQuiggens v. Perkins*. At the time of COA application the Court of Appeals had previously held that they do not have to address the actual innocence due to it being the first time brought to their attention in a COA application. The court base their decision on a case from their circuit inwhich there was no actual innocence present in a typical tolling case.

The Court of Appeals use the District Court decision making this case a plain procedural default to bar the case. This court held in *McQuiggen v. Perkins*, the first petition for a habeas relief the miscarriage of justice exception survived AEDPA's passage intact and unrestricted.

The court of appeals avoid the second claim of prison officials censorship violating the petitioner First Amendment Rights, using the same first time theory, they do not have to address the claim, allowing a fundamental miscarriage of justice to proceed.

The district court, did not add the petitioner underlying constitutional question, violation of the Sixth Amendment, ineffective assistance of counsel. The petitioner presents his case of innocence and proves ineffective assistance of counsel using the Strickland 2 prong test. The Court took a rigid standard to dismiss the 28 U.S.C. 2255 motion using a procedural default, and avoiding all the tolling claims.

This court resolve these issue in their decisions in *Slack v. McDaniel* and *Holland v. Florida*. The district court and court of appeals would not address these cases in their decision, therefore no record was develop, violating due process of law.

In reaching its decision to dismiss, the court below decided that these settled principles were not to be applied to the case at bar because;

1. Miscarriage of Justice does not apply to the Court of Appeals due to it is the first time it has been presented to the court in a COA application. Roberts v. Cockrell, 319 F. 3d 690, 695 (5th cir. 2003) give then the right not to address the actual innocence claim.
2. With the District court using the legal term discretion not to address the underlying constitutional question, the Court appeal agree with the decision to create a fundamental miscarriage of justice.

The petitioner respectfully urge that all aspects of these decisions are erroneous and at variance with this Court's decision as explained in the argument below.

ARGUMENT FOR ALLOWANCE OF WRIT

I. THE COURT OF APPEALS ERRED IN DENY A COA WITHOUT ADDRESSING ACTUAL INNOCENCE CLAIM ENDORSING A FUNDAMENTAL MISSCARRIAGE OF JUSTICE.

The courts violated the petitioner's Fifth Amendment Rights with their decision not to address the petitioner's actual innocence claim, instead they side step procedure to limit their decision to a procedural default. The Court of Appeals denied COA over the circuit judge decision (app. B-1.) which he states; "Because two claims - actual innocence and equitable tolling based on prison officials failure to mail his 2255 motion - are raised

for the first time in this court, they are not cognizable". This is the heart of the circuit judges decision, this reasoning for not addressing the actual innocence claim is at variance with this Court's decision in *McQuiggen v. Perkins*, 569 U.S. 133 S.Ct. 1944, 185 L. Ed. 1019, 2013 U.S. LEXIS 4068,

This court has applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, "abuse" petitions in a second petition claim that could have been raised in the first petition, failure to develop facts in state court, and failure to observe state procedural rules, including filing deadlines.

The miscarriage of justice exception, the court's decision bear out and survived passage of the AEDPA. These decisions seek to balance the social interest in finality, comity, and conservation of scarce judicial resources cases sensitivity to the justice of incarcerating an innocent individual should not abate when the impediment is the AEDPA'S statute of limitation. The AEDPA time limitation apply to the typical case in which no actual innocence is made.

The Circuit judge side step the actual innocence claim when he base his decision using a typical tolling case from 2003, with no actual innocence present. The case use to overrule *McQuiggen v. Perkins*, is *Robert v. Cockrell*, 319 F. 3d 690, 695 (5th cir 2003),

Robert's equitable tolling argument was raised for the first time in COA application to the district court. We generally will not consider a claim for the first time in a COA application.

The petitioner listed in his 59(C) motion all the briefs he presented his innocence to the courts. The court can state it is the first time, when no court will address the claim, when they focus all their attention to find a reason to dismiss the claim, as using a procedural default. This court resolved this issue with their landmark decision in *McQuiggen v. Perkins*, 569 U.S. 133 S. Ct. 1924, 185 L. Ed. 1019, 2013 U.S. LEXIS 4068,

Which held actual innocence serves as a gateway through

which petitioner may pass whether is procedural bar... ie. first petition for a habeas relief the miscarriage of justice exception survived AEDP's passage intact and unrestricted.

Unrestricted (no limitation/unbound) therefore, using this as gateway to pursue an appeal, the circuit court abuse process by not addressing the actual innocence claim. This is a plain violation of due process rights and cause a fundamental miscarriage of justice. With out addressing the claim, not making it cognizable or being known or recognized, the courts are delaying the process by not developing a record to facilitate meaningful substantive claim. The courts are not following procedurals lay down by this court in their decision or precedents of this court in the facts all the claims must be answer, see Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

The failure to consider the claim [would] result in a fundamental miscarriage of justice.

The petitioner as stated in this brief, presented his innocence in every brief/motion he filed in the courts, refering to ^wMcQuiggens v. Perkins, 569 U.S. 133 S. Ct. 1924, 185 L. Ed. 1019, 2013 U.S. LEXIS 4068,

Close to half to Perkins opening brief is dedicated to proving he is innocent. Perkins asserts that we should consider his actual innocence claim because it is "part and parcel" of his overall tolling claim.

The petitioner always presents his innocence in his briefs, he presents his innocence in three areas to the courts. The courts never called for an evidentiary hearing to assist in developing a record.

The first area the petitioner presents his innocence is over misidentification. The government only direct evidence comes

over the complainants description. The complainant describes a completely different person (third party guilt) from eye color, height, weight (approx. twenty pounds), and states that the subject has no identifying marks on his body, where as the petitioner has tattoo and extra body feature that can not be missed identified. Counsel refuse to file any misidentification motion, or take photograph for trial, in Thomas v. Varner, 428 F. 3d 491 (3rd cir 2000) 549 U.S. 116, 2007,

Counsel was ineffective for failing to file meritorious motion to suppress identification evidence. The failure to file motion cause prejudice because the case boiled down to a matter of witness credibility and there was no physical or direct evidence.

In the government motion to dismiss 28 U.S.C. 2255 motion, the government did not argue over the misidentification from their witness. This court applied McQuiggen decision in Satterfield v. Dist. Attorney Phil., 2017 BL 339627,

Where the lawyer was ineffective because he failed to interview 2 men who identified Satterfield as the killer but seemingly describe him incorrectly. Court vacated.

Also see Foster v. Georgia, 503 U.S. 921, 112 S. Ct. 1297, 117 L.Ed 2d 519 (1992); quoting from Walker v. Penn, 271 Ga 609, 611, 523, S.E. 2d 325, 327 (1999),

To the contrary, it demands a much greater substance approaching perhaps the one, not only is not guilty of specific offense for which he is convicted, but further is not even culpable in the circumstances under inquiry (a plain example is a case of mistaken identity).

These evidence plus the second main evidence go to prove a third party involvement, and prove the innocence of the petitioner.

Second source of evidence of proof of innocence was presented in the petitioner case for ineffective assistance of counsel.

Counsel stated in person and in writing, his refusal to retrieve physical evidence, in the form of digital recordings (app H pp. 6-9 and 33). These recordings goto prove the petitioner was not at a scene of the allege crime or involve in a crime, and could provide a potential witness for defense, at the time in question the petitioner was conducting a interview, which was recorded.

The third source of evidence the government was with holding evidence. The petitioner approach counsel to file a Brady motion, when counsel stated the government gave him no data on medical examination of their complainant (app. E pp. 5) knowing with the petitioner forensic background, when examining the medical records two sample where taken, no results were provided.

No courts is addressing the claims or looking at the facts, they only see the charge and the guilty plea. With out addressing the issues (actual innocence) the court unreasonable application of clearly establish Federal Law, as determined by this court. The courts are in clear violation of due process causing a furhter loss of liberty.

With the courts not addressing the facts, they do not examin the merits of the petitioner case, in Miller-El v. Cockrell, 537 2-322, 336 (2003),

a court must conduct a general assessment of the merit of the defendant's claim.

The court of appeals decision to use Roberts v. Cockrell's first time theory goes against all the Supreme Courts decisions in protecting an individuals person liberty. The courts are side stepping this courts decision, any reasonable jurist could

debate this issue, they would see that the court abuse it ruling and unreasonable and further proceedings would be needed to solve this miscarriage of justice claim. See Holland v. Florida, 560 U.S. at 645-46 (2010),

Such prior law ensure that who are actually innocence should be granted the ability to pursue post-conviction relief regardless of procedural default.

Consider the facts in this case; misidentification, counsel's refusal to retrieve physical evidence, and government withholding forensic evidence. Three areas to prove innocence, applied this to miscarriage of justice exception to over come various procedural defaults. See Schlup, 513 U.S. at 325,

Indeed, concern about injustice that results from conviction of innocent person has long been at the core of our criminal justice sysytem.

This is base on a constitutional question with the petitioner Sixth Amendment violation of effective assistance of counsel. The petitioner was subjected to multiple area's of prejudice from counsel (app. H. pp. 2-24), see McClesky v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L. Ed. 517 (1991),

Federal Courts retain the authority to issue the writ... when a constitutional violation probably has caused the conviction of one innocent of the crime.

McQuiggen v. Perkins is this courts landmark decision, which necessarily and logically flows from a long history of this courts jurisprudence in protecting rights. This court should uphold what they call the "essence" of this case and overturn the court of appeals decision, when they avoid addressing actual innocence using a typical tolling case to restrict the petitioner gateway claim causing a fundamental miscarriage justice.

II. THE COURT ERRED WHEN THEY DID NOT ADDRESS THE 28 U.S.C. 2255 MOTION TO VACATE THE CONVICTION BASE ON INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THEY DENIED THE MOTION ON A PROCEDURAL DEFAULT.

The Sixth Amendment of the United States Constitution states in part, in all criminal prosecution, the accused shall enjoy the Right... to have assistance of counsel for his defense. The United Supreme Court has held the right to counsel is the right to effective assistance of counsel.

The District Court would not address the underlying constitutional question, ineffective assistance of counsel. The Supreme Court resolve this matter in Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542,

Appeal 1321 habeas corpus - avoidance of constitution question: A federal appellate court-in applying the rule that a state prisoner whose habeas corpus petition has been rejected by a Federal District Court on procedural grounds, without reaching the underlying Federal Constitutional claim, is entitled to a certificate of appealability under the appeal provision of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)(28 U.S.C.S. 2255(c)) if the prisoner shows, at least, that jurist of reason would find it debatable both whether petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural issue first under the principle that courts will not pass a constitutional question although it is properly presented by the record, if there is also present some other ground upon which the court may be disposed of.

The plain fact is the District Magistrate did not address the underlying claim of ineffective assistance of counsel (app. D. pp 1-6) the judge dismissed the case on a rigid procedural default, focusing only on a procedural error, and not addressing the main fact that prison official censorship of legal mail. The District Judge did not address the constitutional question, and did not

address the 59(c) motion. The District Judge deny the 28 U.S.C. 2255 motion and denied the COA application with prejudice.

The court of appeals accepted the district court decision using of discretion (to avoid the question), a decision against reason. The district court is too rigid in this case and did not use the Holland v. Florida standard to address equitable tolling, placing too heavy burden on the petitioner, when they focus on an error (a correctable error) instead of the main issue.

The Circuit Judge decision goes against their own courts presedents, see Drinkard v. Johnson, 97 F. 3d 751, 755 (5th cir. 1996)

A COA may only be issued if the prisoner has made substantial showing of denial of constitutional right. In Simon v. Epps, 344 Fed. Appx. 96, 76, 2009 U.S. LEXIS 20102 a*18 (5th cir 2009)(per curium), when the district court denies petition on procedural grounds without reaching the prsioner underlying claim a COA should be issue.

The courts are not protecting individual person constitutional rights but instead are chipping away though rights when they pick and choose which claims they will address and not address, therefore, violatiing a person right to due process of law, causing a fundamental miscarriage of justice. The lower courts have a duty to follow the decisions and rulings of this court.

There is no record develop into the petitioner's underlying constitutional claim, any reasonable jurist would find it debatable petition states a valid claim of denial constitutional rights, if the courts develop a meaningful record and present the facts of the claim. The petitioner would pass the Strickland two prong test, see Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052,

80 L. Ed. 2d. 674 (1984),

The Supreme Court established a two-prong standard to govern claims ineffective assistance of counsel. Essentially the court held a lawyer to be found ineffective must have (1) performed below an objective standard of reasonableness and (2) because that failure created a reasonable probability that, but for the errors, the outcome would have been different.

Also note in *Edward v. Carpenter*, 529 U.S. 466, 120 S. Ct.

146 L. 2d. 518 (2000),

procedurally default ineffective assistance claim can serve as cause to excuse procedural default of another habeas claim only if habeas petitioner can satisfy "cause and prejudice" standard with respect to ineffective assistance claim itself.

To develop a record in the court, they would have to address multiple acts of prejudice the petitioner face at every stage of the criminal proceedings, including the threat of life imprisonment from counsel, if the petitioner did not take a plea deal. The fact counsel refuse to conduct a pretrial investigation, one piece of evidence to prove ineffective assistance of counsel was a letter from counsel, refusing to retrieve physical evidence which proves the innocence of the petitioner. The courts did not address this issue, Counsel wrote, "I believe that will be some difficulties in getting the record admitted into evidence assuming the recordings can and would be admitted, they are no or little value". Counsel could not answer how evidence that proves you innocence hold no or little value.

This court resolve this issue in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L. Ed. 503, 2006 LEXIS 3454,

No where in the constitution does it state the defendant counsel is judge or prosecutor even when they are acting like the prosecutor and refuse to retrieve evidence to see the relevant instead stating the evidence might not be admissible with-

out obtaining the evidence.

The wording between this court decision and counsel wording on his letter are verbatim, how could a jurist of reason not debate the petition states a valid claim. The recordings counsel refer to, prove that the petitioner was not envolve in a crime, or present at a crime, and could provide a potential witness for defense. This one piece of evidence fill the requirements of Strickland two-prong test. In Micken v. Taylor, 535 U.S. 162, 175, 2000,

There are two ways of meeting the Strickland prejudice requirement. A defendant must demonstrate either that error at issue was prejudicial or that it belongs to a narrow class of attorneys errors that a tantamount to denial of counsel, for which individual showing of prejudice is unnecessary.

The district court does not state the underlying claim has no merits, if the claim was meritless the court would of address the claim. The petitioner states all the relevants acts of prejudice he receive in his 28 U.S.C. 2255 motion (app. H) over ineffective assistance of counsel. The court of appeals did not address the underlying constitutional question, and did not grant COA, avoiding Slack v. McDaniel standard or their own court precedents. In Dee v. Vannoy, 2017 U.S. App. LEXIS 16372,

To obtain a COA a movant must make a substantial showing of denial of constitutional right. Also, Buck v. Davis, U.S.L.W. 4037, 2017 BL 54115 (U.S. Fed 2017), court concluded: Buck has demonstrated both ineffective assistance of counsel under Strickland... It follow the Fifth Circuit erred in denying Buck the COA required to pursue these claims on appeal.

The District dismal of the case on procedural default, is unreasonable, as with the court of appeals decision denial of

COA. Is the court violating due process of law, due to the crime charge, or the fact the petitioner plead guilty, Justice Kennedy stated, "the hard fact is that sometimes we must make a decision we do not like". The petitioner receive ineffective assistance of counsel, and the facts prove this, with the courts not addressing the underlying constitutional claim, they are violating the petitioner Fifth Amendment right, leaving him incarcerated. This court resolve this question with their decisions in Slack v. McDaniel and should stand behind this decison and allow the petitioner to pursue his appeal on this claim of ineffective assitance of counsel.

III. THE COURT OF APPEALS ERRED WHEN THEY IMPOSED AND UNDULY BURDENSONE COA STANDARD CONTRAVENING THE SUPREME COURT DECISIONS.

The Supreme Court of the United States needs to step in and prevent a constitutional crisis, with the lower courts persistance in overruling the Supreme Courts decisions and standard for review. Every instance the lower courts do not follow the Supreme Courts decisions they in fact chipping away at the fundamental rights and liberty of Federal Protected Constitutional Rights. It is intolerable for the courts to violate due process when they choose not to address claims on a petition, specially when they favor the petitioner.

In the court of appeals denial of COA, they stated; "if a district court declines to give a defendant the benefit of equitable tolling as a matter of discretion, as happen in the instant case, the COA question is whether a reasonable jurist could conclude the District Court abuse it discretion in so rüling". When the

courts use discretion as a reason not to address all the claims, including actual innocence and prison officials continuing acts of stopping access to the courts, the courts themselves are are endorsing violation of due process of law. The abuse of discretion is a vague term descriptive of a judicial act that causes injustice, it is unjustified, unsound, extremely unreasonable, and allows the court to fully endorse a catastrophic miscarriage of justice. No reasonable jurist could agree with a court that does not address all the relevant facts, in fact the only way a reasonable jurist can have a meaningful debate is by having all the facts and claim presented to them.

In this case at hand, the court try to paint this case as a simple plain procedural bar, this is completely unsound and illogical. When the courts avoid the actual innocence and prison officail censorship of legal mail, then the courts can paint their version of a simple procedural default. This is a clear abuse of process, inwhich no reasonable jurist would agree with the court. The court tried to give their decision some grounds when they stated, " if a plain procedural bar is present and the District Court is correct to invoke it no jurist of reason would conclude that Camillo-Amisano should be allowed to proceed." They pulled this theory out of Slack v. McDaniel, they did not use the heart of Slack v. McDaniel, 529 U.S. 473, 484, 2000,

in 2000 the court held that when the District Court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should be issue (and an appeal of the district court's maybe taken)

As stated the court did not address the underlying constitutional question and avoid to address all the tolling claims. In *Clisby v. Jones*, 960 F. 2d 925, 938 & n.17 (11th cir. 1993),

Clisby v. Junes rule applies not only to substantive claim for relief but also procedural issues, and thus district court erred in dismissing section 2255 motion as untimely without addressing petitioner's statutory tolling arguments. [I]n a post conviction case, the district court must develop a record to facilitate our review of all issues pertinent to an application for COA, by extension, the ultimate merit of any issue for which a COA is granted. If the post-conviction motion or petition is dismissed untimely, the district court must create a record that will facilitate a meaningful substantive claim, or both as required by *Slack v. McDaniels*... This will require the District Court to resolve all claims the petitioner raises for tolling of the limitation period, regardless of whether those claims are granted or denied.

The district court did not address all the claims, they did not address prison officails repeat behavior censorshäpp of legal mail (app.E.pp.21), they acknowledge they did not receive notice of 2255 motion, but contained their denial of the 2255 motion to the procedural default on the motion, instead of the pattern of behaor of prison official violating due process, see *Cockran v. Kansas*, 1942, 316 U.S. 255, 86 L. Ed. 1453,

The constitutional right to access the courts as enunciated by the Supreme Court of the United States, has two major aspects. One is the now well-established principle that prison inmates have a right of access of the court guaranty of due process (3[a]), as a corollary of constitutional guaranty of due process (3[b]), in certain cases as a consequence of the constitutional principles of equal protection, the right to petition for a writ of habeas (3[c]). Thus in, *Procurier v. Martinez* (1974) 416, U.S. 396, 40 L. Ed. 224, 94 S. Ct. 1800, 71 Ohio Ops 139, the court stated that the constitutional guaranty of due process of law has a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful conviction and seek redress for violation of their constitutional rights.

The courts did not follow the Holland v. Florida standard, and avoided the main reason for the untimely filings, plus not addressing actual innocence. This court resolve in, Holland v. Florida, 560 U.S. at 645-46 (2010),

When a federal habeas petitioner can invoke the doctrine of equitable tolling. Holland held that a habeas petition is entitled tolling if he shows (1) that he has been pursuing his rights diligently; (2) that some extraordinary circumstance stood in his way and prevent timely filing.

The courts standard was extremely rigid, when they excused prison officials actions, which has a history of violating prisoner's due process, U.S.P. Lompoc has multiple claim of relief file against them in the District of Eastern California. As reported in the petitioner COA application and 59(c) motion, the petitioner has been pursuing his rights diligently, just in his direct appeal notice it took three attempts before the court receive the noticed. The court of appeals deny the motion as untimely (app. F) and did not consider the 59(c) do to time limitation, this cause the 2255 motion time line not to be reset.

The petitioner had multiple issues of the court receiving his legal documents, if the court address the issues, the petitioner Direct Appeal, would of been consider timely as all other legal documents sent to the court. The spent six pages dismissing the 28 U.S.C. 2255 motion, main factor on an default, if the court receive the document in the first place, they could of notified the petitioner, and the petitioner could of corrected the error. In United States v. Mathis, 238 Fed. Appx. 807, 810 App. LEXIS 15570 at 3rd Cir. 2007,

District Court erred in dismissing pro se prisoner section 2255 motion "because it was not on the

right forms causing subsequently-filed motion to be timed-barred and prisoner's pleading reflect[ed] a diligent attempt to navigate the rules governing 2255 motion.

Also see Becker v. Montgomery, 532 U.S. 757 (2001),

Made an error but file in time, the court did not require dismissal upon the error: due to Civil Rule 11(a) because the error was "corrected promptly after being called to [his] attention.

This right was stripped from the petitioner, and the courts use this violation to dismiss all the petitioner motions untimely. The petitioner acted diligently, without any counsel advise on post-conviction. If the court use the Holland standard they see the petitioner acted with diligent, three attempts alone to file direct appeal, and while the direct appeal was pending, sent the court a letter to file 2255 motion before the one year time limitation, and last, the petitioner sent in multiple copies of every notice, brief, motion with out any acknowledgement from the court. This covers the first requirement for Holland.

Second requirement, extraordinary circumstances which stood in the way of filing; the track record of prison officials censorship of legal mail, violating first amendment right (free speech) and Fifth Amendment right (due process), as the petitioner presented to the courts to address. With the courts not addressing this issue, they are endorsing these unconstitutional facts by prison officials, declaring prison officials to acts as judges able to decide or pass judgement on criminal cases. Holland second requirement was been fullfilled.

The court agree that the default is the only reason they need to dismiss the case on a procedural default, making their

decision simple. Doing this they do not follow the decision of this court, not only avoiding the Holland standard, but avoiding multiple decision in this court to protect individuals from a burdensome standard that can not be met. Any reasonable jurist could debate this, the error could of been fix if the motion was receive, and the courts should of consider the Holland standard, or atleast address the actual innocence claim and/or the underlying constitutional claim.

The court of appeals also found a way to avoid the two main tolling claim, using reasoning from their court decision in Robert v. Cockran, the first time theory, they do not have to address the claims. This is an illogical, unsound decision, and unethical way to avoid the claims, a clear and present violation of due process. The Roberts case, non innocence case, is the complete opposite to this case, first Roberts did not bring his tolling case to the courts until his COA application, and the court still address the case. The petitioner has states in this brief, that he has brought these tolling claim to the courts attention in every brief/motion, the courts did not develop a record.

Not to address a claim because it is the first time it is presented is by definition a violation of due process, and allows the court to create a miscarriage of justice. Miscarriage of justice exception survived AEDP's passage intact and unrestricted, the court of appeals is overruling this decision with their case, stating they do not have to address a claim.

This abuse of process to avoid addressing these claims, endorses the court of appeals and district courts to endorse

a constitutional crisis, where they are trying to bypass the Fifth Amendment Rights. This court need to stand with their decision and stop the courts from violating due process and and to correct this fundamental miscarriage of justice which the lower courts have caused.

IV. THE ERRED VIOLATING DUE PROCESS WITH THE DENIAL OF EVIDENTIARY HEARING WHEN THE COURT SIMULTANEASLY DENIED THE PETITIONER MOTION TO PURSUANT TO 28 U.S.C. 2255 MOTION PURELY ON PROCEDURAL GROUNDS AVOIDING THE MERITS OF THE UNDERLYING CONSTITUTIONAL QUESTION.

The petitioner should have the opportunity to litigate important constitutional question to facilate a record. When the district court or the court of appeals is faced with constitutional question(s) or actual innocence claim an evidantairy hearing should be called to make a sufficient showing of; (1) proving ineffective assistance of counsel and; (2) to prove actual innocence.

To dismiss a claim on procedural ground with out holding an evidentiary hearing, with out addressing the issues or question(s), is a due process of law violation, set forth in, House v. Bell, 547 U.S. 518 (2006),

A federal judge could also potentially order hearing to explore whether there has been a miscarriage of justice, to allow a petitioner to over come procedural defaults, so what happen is that a federal court would be allow to rely upon facts established at a hearing to find that petitioner had made a sufficient showing of innocence for the court to review the underlying constitutional claim.

The courts focus on procedural bar to dismiss the case, they would not consider any other course to reveiw the case, even

the government requested an evidentiary, so that counsel can be held accountable for his actions. This statement alone addresses the underlying constitutional question, where the government wants to address counsel actions. Therefore, why did the court avoid granting an evidentiary hearing.

An evidentiary hearing is warranted when the petitioner claims ineffective assistance of counsel and actual innocence. This is another avenue the courts could use to develop facts to resolve the underlying constitutional question and to make sure a fundamental miscarriage of justice does not continue. This court should address this issue by making it a requirement for the lower courts to address all actual innocence and underlying constitutional claim, to use an evidentiary hearing to develop record in the courts to ensure that the individual constitution rights are protected.

THE QUESTION RAISED IN THIS ARE IMPORTANT AND UNRESOLVED

The Fifth Circuit has decided important questions of federal law that have been settled by this court and are basis for granting certiorari in this case, to solve a fundamental miscarriage of justice.

1. The Fifth Circuit made a highly questionable ruling on the application of *McQuiggen v. Perkins*. The question does their decision using a typical tolling case overrule this courts decision to allow the courts to dismiss a case over it being the first time actual innocence is brought to their attention, therefore they do not have to address the claim, causing a miscarriage of justice.

2. The Fifth Circuit made a questionable ruling when they side

step this courts application of equitable tolling decisions to chip away the protected fundamental constitutional rights, violating due process of law when they will not address all the claims, including the underlying constitutional claim. Therefore, they will not develop a record in the court that will facilitate a meaningful substantive claim as stated in Slack v. McDaniel. Is it not imcubent of this court to protect the fundamental rights of individual and to follow the constitution and to stand by their decisions and address the abuse of the lower courts when they do not follow the decisions and standard put forth by this court.

3. The Court has always held in the negative, and the decisions of the Fifth Circuit is sufficiently unusual that it is important that this court reiterate this principle by standing by their decisions in Holland v. Florida, Slack v. McDaniel and McQuiggen v. Perkins and retroactive this case by granting writ.

CONCLUSION

Dismissing a first 28 U.S.C. 2255 motion petition is a serious matter. It is a court duty to make sure no innocence person is convicted of a crime and to make sure no constitutional violation have occurred. It is the courts position to address and resolve all matters in 28 U.S.C. 2255 motion.

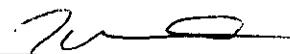
It becomes a constitutional crisis when the courts side step the Supreme Courts decisions to selectively pick and choose which claims they will address and ones they will not address. When they do this they violate due process of law, infact they are slowly chipping away at the Supreme Court decisions to commence an attack on the Constitutional Rights.

Fundamental Miscarriage of Justice comes into play when the courts participate in violating due process with their decision not to address actual innocence and the underlying constitutional question. When charged with this type of crime, you are guilty until proven innocence, but you can never prove your innocence if the courts will not address the facts/claims.

The courts impose and unduly burdensome COA standard, which in fact does not even follow that circuit decisions. The court abuse the term discretion, so they can avoid addressing the underlying constitutional question, stopping a record from being developed. The courts try to paint this case as a plain procedural default, which they did when they did not address the main equitable tolling claim of prison officials censorship of legal mail.

The petitioner can prove actual innocence with the misidentification, counsel refusal to retrieve physical evidence of innocence and government with holding physical evidence. This actual innocence is a gateway for the petitioner appeal to proceed, if the courts address the claim. The Fifth Circuit would not address this claim avoiding this courts decision in Perkins, trying to overrule this case by using a typical tolling case.

The Supreme Court has resolved these issues with landmark cases, as in McQuiggan v. Perkins, Holland v. Florida, and Slack v. McDaniels. I pray this court will rule in the favor for the petitioner and stand by their decision and stop this miscarriage of justice from continuing. This petition for writ of certiori should therefore, be granted.



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