

18-9076
No. _____

Supreme Court, U.S.

FILED

APR 12 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
TERM _____

BOBBY GLENN
Petitioner,

VS.

L. SEVERSON, WARDEN
OKEECHOBEE CORRECTIONAL INSTITUTION
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BOBBY GLENN # 558864
OKEECHOBEE CORRECTIONAL INSTITUTION
3420 N.E. 168th STREET
OKEECHOBEE, FLORIDA, 34972

ORIGINAL

QUESTION(S) PRESENTED

Petitioner untimely first habeas petition for actual innocence claim is continue to be procedural barred to relief because petitioner discovered evidence untimely, but it still remains reliable proof of innocence shown.¹

¹ Petitioner reliance on Mcquiggins v. Perkins, 133 S. Ct. 1924 (2013); Herrera, 113 S. Ct. 853 (1993).

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:

The Respondent are Mark Inch, Secretary, Florida Department of Corrections at: 501 South Calhoun Street Tallahassee, Florida 32399-2500; L. Severson, Warden, Okeechobee Correctional Institution at: 3420 NE 168th Street, Okeechobee, Florida 34972 and additional party Innocence Project at: 40 Worth Street, Suite 701 New York, NY 10013.

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Appendix A.

Orders by the United States Court of Appeal and timely filed rehearing with additional Motion/Petition filed to the Court in case 18-13622-F.

Appendix B.

Orders by the United States District Court and timely filed Motion for Reconsideration with additional Motion/Petition filed to the court and Civil Docket Sheet of case 8:16-CV-699-T-36TGW.

Appendix C.

Sworn Affidavit by Bobby Glenn and charging document is Information with additional supplement of Trial Court Transcripts was made part of evidence relevant to the merits of actual innocence.

Appendix D.

Exhibit A. provides and cites one case law that relates and explain the matter of law and shows how petitioner been unlawfully convicted of crime he never committed and why it violate due process under Fourteenth Amendment of the United States Constitution.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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IN THE
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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 Appeal, Eleventh Circuit is unpublished and a copy is attached as part of Appendix A to this petition.

The opinion of the United States District Court, Middle District of Florida is unpublished and a copy is attached as part of Appendix B to this petition.

JURISDICTION

For cases from **federal courts**:

The date on which the United States court of Appeals decided my case was
November 20, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: **January 22, 2019**, and a copy of the order denying rehearing appears at Appendix **A**.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment 5th 6th and 14th to the United States Constitution, which provides:

All criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district shall have previously ascertained by law, and to be-informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

All person or naturalized in the United States and subject to the jurisdiction thereof, are citizen of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of Life, Liberty or property without due process of Law nor deny to any person within its jurisdiction the equal protection of the Law.

The Congress shall have power to enforce, by appropriate legislation, the provision under Article III of the Constitution of the United States. But AEDPA seeks to do so without undermining basic habeas corpus principles... When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting Constitutional rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or Territory or the District of Columbia subject or cause to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges or immunities secured by constitution and law shall be liable to the party injured in an action at Law suit in equity or other proper proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be statute of the District of Columbia.

STATEMENT OF THE CASE

The petitioner complaint alleged that he is actually innocent and was charged with Capital Sexual Battery in Violation of section 794.011 (2) on February 21, 1986 of the offense in question? Where Information alleged union being done in a lewd and lascivious manner is separate offense and was not charged, but was made part of the charging instrument. Is prohibited under same conduct because of the uncharged offense is only charge under section 800.04 F.S. being included as essential element in charging instrument as part of 794.011 (2) F.S. is a violation of substantial due process right that has convicted a petitioner of a crime with which he was not charged. The fact of this case has petitioner charge by Information where uncharged offense as part of the essential elements in Capital Sexual Battery states: "union being done in a lewd and lascivious manner", did contribute to general verdict of guilt cannot be determine of allege charge or uncharged offense the jury found petitioner under such circumstance that used to prove or disprove guilt or innocence is actual prejudice to fairness at trial. See Appendix C, Information.

The other facts of the case is when the action shows bad faith on the part of destroying any evidence to be obtain from the victim of Sexual Battery because the mother had the child take a bath prior to the examination and failure to preserve potentially useful evidence to be obtain – of which no more can be said than that it could have been subjected to a test, the result of which might have exonerated

Bobby Glenn would constitute a violation of due process and equal protection of the United States Constitution of Fourteenth Amendment. See Appendix C, T. 138.

The State did obtain the towel used by the alleged victim from a bath prior to the examination and entered as evidence and was sufficient to be used at the time. So there's no way to produce newly discovered evidence because of the State action was also in bad faith in preserving any useful evidence and even after 33 years it still could have been tested to show actual innocence. Arizona V. Young Blood, 485 U.S. 51, 109 S. Ct. 333 (1988).

The decision of United States Court of Appeal order is attached in Appendix A, and the Court determine Sexual Contact from the record where the victim testimony was not reliable or credible and should not be used because the testimony at trial was inconsistent and contradict the sworn testimony and the Court used sexual contact as essential element to support a Capital Sexual Battery under 794.011 (2). See Appendix C, T 63 to 77 and 77 to 85. The problem is petitioner was not charged by the Information for 794.011 (1) (h), but he was charged as 794.011 (2), and under Florida Statute requires essential element to prove penetration of the vagina by Petitioner placing his penis into as charge to support a conviction. Because the Information charge penetration as the essential element under 794.011 (2) and the fact that the jury could not make a finding of penetration of the vagina by Petitioner placing his penis into for the petitioner to be found guilty as charged which caused an unlawful conviction that has resulted in

the incarceration of innocent person,. See Appendix A and C, Information and T. 165, 201-203.

Moreover; facts of the matter shows State expert medical examiner did examine the allege victim and could not establish any evidence in his evaluation. The medical examination failed to show any penetration of the vagina by the Petitioner placing his penis into as charge or any kind of sexual contact or it had been attempted. See Appendix C, Information and T. 128-130, 138, 141-142 and 147.

The United States District Court and United States Court of Appeal for Eleventh Circuit reviewed and determined the petitioner actual innocence claim were facially insufficient. This was determined without having a federal evidentiary hearing that can properly evaluate factual innocence claim which has deprived him due process under the Fourteenth Amendment.

The question is within reasonable for this Court to evaluate victim testimony that was used as facially sufficient evidence to convict the petitioner of a crime he never committed. So why now the same victim testimony be facially insufficient to show actual innocence. When now the petitioner point out from the transcripts where sworn testimony and depose by allege victim was not reliable or credible and testimony is inconsistent and contradict the sworn testimony. See Appendix C, Affidavit and T. 63 to 77 to 85.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the federal court to invoke the miscarriage of justice exception to justify consideration of claims defaulted and actual innocence claim in state court under state timeliness rules. The district court had jurisdiction under general federal question of jurisdiction conferred by 28 USCS 2244 (d) (1).

REASON FOR GRANTING THE WRIT

This case presents a fundamental question of interpretation of this court decision in Mcquiggin V. Perkins, 133 S. Ct. 1924 (2013). The question presented is of great public importance because it affects the Judicial Branches in all 50 states, the District of Columbia and hundreds of Federal Court and State Courts. In view of the large amount of litigation over Judicial branches and proceeding, guidance on the question is also of great importance to prisoner due process of the Fourteenth Amendment to the United States Constitution because it resulted in the incarceration of innocent person. It still remains a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

The issue's importance is enhanced by the fact that the United States District Court in this case have misinterpreted Mcquiggin V. Perkins, 133 S. Ct. 1924 (2013); Herrera V. Collins, 113 S. Ct. 83 (1993) and Murry V. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639 (1986). This Court held in Murry V. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639 (1986) that prisoner extraordinary case, where a constitutional violation has resulted in the conviction of one who is actually innocent, a federal court may grant the writ even in the absence of a showing of cause for the "procedural default." In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel on the part of his trial attorney depriving him of

his Sixth Amendment right to competent counsel) on the merits notwithstanding the existence of a procedural bar to relief.

The Petitioner assert “this rule, or fundamental miscarriage of justice exception, is ground in the equitable discretion of habeas courts to see the federal constitutional errors do not result in the incarceration of innocent persons. Herrera, 506 U.S. at 404, 113 S. Ct. 853, 122 L. Ed. 2d 203.

The Court reiterated this point in Mcquiggin V. Perkins, 133 S. Ct. 1924 (2013) and petitioner explain in his untimely First Federal Habeas petition raising a convincing claim or actual innocence has met the requirement in Mcquiggins as to a showing that a fundamental miscarriage of justice has resulted from United States District Court dismissing without first holding Federal evidentiary hearing to evaluate and properly determine factual innocence claim was facially sufficient or facially insufficient in this particular case.

The common sense understanding of when United States magistrate in (Doc.11) made a order granting (Doc. 9) where petitioner, petition to supplement the record entered by magistrate judge Thomas G. Wilson on November 23, 2016.

The Respondent failed to refute the record in (Doc. 9 and 11) or object to the order being supplement and filed on July 11, 2016 and granted on November 23, 2016 where supporting documents reflect proof of innocence relevant to the merits of his claim in petition.

The Respondent failed to dispute or address the merits which are relevant and reflect in the record that was supplemented in (Doc. 9). The facts stand the State failed to object they concede and wavier the right to contest the merits and this alone should have been reason to consider to hold federal evidentiary hearing on cause and prejudice.

The fact of Magistrate judge was assigned to this case, and United States District judge did not give reason why he made a ruling without first allowing the duty to be performed by Magistrate judge to finish jurisdiction that must be completed in making his or her report, and recommendation.

The petitioner assert federal court normally allow the Magistrate judge to complete jurisdiction in accordance with 28 USC Section 636 (C) and Rule 72 (b) (1) which should show denial of petitioner due process rights of the Fourteenth Amendment of the United States Constitution.

However, those concerns are accommodated by permitting federal court to procedural bar under state court action that have failed the system.

Thus, the United States District Court seriously misinterpreted Mcquiggin V. Perkins, 133 S. Ct. 1924 (2013) by failing to bear on the credibility of evidence presented that shows actual innocence and federal court failed to address the merits notwithstanding to meet Schlup actual innocence standard is demanding. The Court should correct the misinterpretation and make it clear that it is necessary for federal court to have evidentiary hearing. Because the evidence presented shows

proof of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error's. 513 U.S. at 316, 115 S. Ct. 851, 130 L. Ed. 2d 808, and Herrera, 506 U.S. at 404, 113 S. Ct. 853, 122 L. Ed. 2d 203-4.

In my understanding of how the law applies is that the state has the burden to prove each and every essential element of the crime beyond a reasonable doubt. See Appendix C. Information, T. 165 and a question submitted by juries T. 201-206. See also Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972) resulting in the Giglio rule that if conviction was obtain through the use of false or misleading evidence, which was known to be so by the government the conviction cannot stand. Bollenbach v. United States, 66 S. Ct. 402; In this respect, we consider the Federal rule, which requires a trial judge to answer a jury question with concrete accuracy.

The factual innocence in this particular case is clear without the jury making a finding of the essential element of penetration of the vagina by petitioner placing his penis into as charge by the Information of allege sexual battery. See Appendix C. Affidavit and T. 128-130, 138, 141-142, and 147.

The evidence is insufficient as a matter of Law to convict petitioner of Sexual Battery. See Appendix D mark as Exhibit A.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Bobby Glen

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Date: April 11th 2019