PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

NO.18-9540

IN THE SUPREME COURT OF THE UNITED STATES

CLIFTON D. HARVIN,Petitioner

V.

LORIE DAVIS, DIRECTOR TDCJ.

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

PETITION FOR REHEARING

RESPECTFULLY SUBMITTED,

Clifton D. Harvin
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ALLRED UNIT

NO.18-9540

CLIFTON D. HARVIN, Petitioner	§	
	§	
V.	§	PETITIONER FOR REHEARING
	§	
LORIE DAVIS, Respondent TDCJ, Director.	§	
	§	

The Petitioner herein respectfully moves this Honorable Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 7, 2019 received by Petitioner 9 days later on October 16, 2019, and (2) granting the petition. As grounds for this motion, Petitioner states the following:

1. THE SUBSTANTIAL GROUND NOT PREVIOUSLY PRESENTED, RULE 44.2(b).

Petitioner has never presented the fact that there is no evidence to base this conviction upon. No evidence to support the finding of guilt at all and a stauch and extended claim of actual innocence from the start accompanied by a denial of guilt that cannot be denied by any officer of the trial court. Relying on Honorable Judge Meyers and Johnson of the Texas Court of Criminal Appeals Opinion actually delivered to the Court **granting habeas corpus,** this no lo contendere plea did not even rise to the level of an Alford plea based on the lack of evidence to support it. See APPENDIX-G of the writ of Certiorari the published Dissent and attached EXHIBIT-A Opinion **granting habeas relief in(NO.WR-72,328-03 p.16-22).** It is clear that innocence and the proving thereof was the purpose

while on deferred probation-was the sole purpose-of this nolo contendere plea as Petitioner understood it on that day. The trial Court and prosecuting D.A.Cole obviously understood the same because they both continued the innocence inquiry while Petitioner was on deferred probation(RR Vol. 4 & Vol.5). Actual innocence has been at the core of this case throughout and then ignored at the federal and Fifth Circuit level in Petitioner attempting to overcome the AEDPA One Year Statute of Limitations time-bar in this case.

Substantially, the lack of evidence of guilt in this case has never been presented and should be considered in the context of Petitioner's attempt to overcome the time bar associated with the constitutional errors at the plea stage rendering this plea involuntary and unwilling. It is Petitioner's adamant denial guilt and claim of innocence that caused the trial court judge to agree to cross out the entire SWORN JUDICIAL CONFESSION in this case contained in the judgement of this case.

1. THE GRANT OF CERTIORARI IN MCQUIGGIN V PERKINS.

Petitioner's claim is a McQuiggin V Perkins claim based on newly discovered evidence,**not presented at trial** or at the plea stage, of actual innocence. It is important to remember innocence was the claim at the trial and plea stage.

Since this Court granted certiorari in McQuiggin supra in 2013, Petitioner's limited research,due to his confinement only, reveals that the 5th Circuit has only allowed one defendant to overcome the statute of limitations based on AI. That defendant,in Floyd V Vannoy 887 F 3d 214(5th Cir 2018). It was established there through demonstrating that, in light of the newly-discovered evidence, it is more likely than not no reasonable juror would have found petitioner guilty beyond a reasonable doubt

itioner guilty beyond a reasonable doubt. Citing Schlup V Delo 513 US at 327 citing McQuiggin V Perkins 569 US at 399. Just as in this present case, the evidence of innocence was not"**presented at trial" accord Schlup at 324.** The evidence not presented at trial or at the plea stage was,however, presented at the first evidentiary hearing on the initial state habeas corpus proceedings.(EX-1), along with live testimony from the Complainant that Petitioner is innocent and with an explanation of why the recantation would not have been available to Petitioner in 1996 at the time of the plea-**fear of her mother.** Yet, the TCCA denied habeas relief under the hurculean task of Herrera V Collins, the only standard upon which habeas relief can be granted in an initial writ application on a bare innocence claim. There was no reasonable basis for the denial of which deference attaches. Deference matters little based on the fact that this Court in Herrera left the question open as to whether federal habeas relief may be obtained on a bare innocence claim-a claim Petitioner advances in his writ of certiorari presently. The question remains open. However, in Floyd,the district court properly considered Floyd's AI claim and found it valid, and accordingly, his petition was not time-barred. 2016 U.S. Dist. LX124660. The issue here in this instant case, is that the district court **never** properly considered the actual innocence of Petitioner,and the evidence to support it, in any manner at all, much less in line with McQuiggin V Perkins. The most careful examination and analysis of the record at the federal and Fifth Circuit level demonstrates neither never properly considered Petitioner' AI claim at all. Only a equitable and statuatory tolling review was conducted where AI was actually excluded as a possible ground to support equitable tolling. This Court made clear

in McQuiggin V Perkins that the Actual Innocence exception to the AEDPA statute of limitations was not a request for equitable extension of the statute.

Petitioner is unaware of any simultaneous litigation or intervening circumstances of a substantial or controlling effect at this time upon which to base the request for rehearing. But certainly the 5th Circuit and Federal District Courts have not limited this refusal to consider McQuiggin V Perkins actual innocence exception is not limited to Petitioner's case alone. This Court has already granted certiorari where the refusal to do so resulted in the case being sent back to the 5th Circuit for consideration of McQuiggin V Perkins. See Vizcarra V Regans 2017 US App LX 3424. This is what the current rehearing seeks to obtain-the proper consideration of Petitioner's evidence of actual innocence at the federal and 5th circuit levels. Careful consideration and analysis of the record at both levels will show only statuatory and equitable tolling reviews were conducted and AI exception under the Schlup standard was not.

As the evolution of the actual innocence standard continues to develope,in at least the context of overcoming the AEDPA time bar, this Court should make sure that the below Court's understand exactly what proper consideration of such claims are in the interest of justice despite the governments interest in finality. The time requirement does not prevent review of a fundamental miscarriage of justice if a petitioner makes a credible showing of AI. The claim of AI was credible at the time the trial court took this plea, placed Petitioner on deferred probation and then,along with the district attorney who prosecuted this case,both participated in the AI inquiry just as they both agreed to do as a condition of this no lo conten-

dere plea where the record shows Petitioner maintained his innocence and refused to admit guilt or plead guilty in any manner. Actual Innocence cannot be seperated from the verdict of this case nor can it be ignored for the purpose of overcoming the AEDPA time-bar as both the federal district court and 5th Circuit have so done.

The strict mandate of Slack V McDaniel 592 US 473, 484-85 demands that once a bar is erected, the correctness of the procedural ruling becomes the question concerning the resolution of the petition in the federal court by the 5th Circuit. See Boliver V Davis 2017 US App. LX 20384 (2017 5th Cir). Because the federal dist court relied on equitable and statuatory tolling and not the McQuiggin exception, the federal resolution cannot be legally correct.

2. **THE VIOLATION OF THE PRINCIPLE OF MCQUIGGIN V PERKINS.**

Petitioner clearly was entitled, as a matter of due process, to have the validity of his conviction appraised by the federal district court and thereafter, the 5th Circuit on consideration of the case as it was tried and as the issues were determined by the trial court. A trial court and prosecuting attorney who had **never** before allowed a nolo contendere plea based on the adamant denial of guilt and proclamation of innocence. But,the true nature of the plea was never considered properly. This resulted in the McQuiggin principle being egregiously violated. The errors in the time barred claims are of constitutional proportions according to Judge Meyers of the Texas Court of Criminal Appeals. The plea was premised on actual innocence not evidence of guilt, therefore, amplifying the urgency that the Mcquiggin principle be effectively used. Proving innocence, as petitioner and the district attorney and obviously the trial court at the time, has since been proven nothing but a farce and legal fic-

tion-eventhough the hearings and request for further polygraph testing as to guilt were ordered and conducted by the district attorney who believed proving innocence was possible(HC1 p.90) and taken under advisement by the judge who made the conditional plea and agreed to hear evidence of innocence while Petitioner was on deferred probation. Never has the weight of guilt been weighed against the evidence of innocence in this record based upon what the circumstances were on the day of this plea.The most careful concerdation and analysis of this record shows there is not a scintilla of evidence of guilt upon which a fair arbiter of justice could ever in good conscience take a plea of no lo contendere. Petitioner's opinion is backed up by Judge Meyers and Johnson of the highest court in Texas. Cert.Appendix-G.

The only evidence direct or circumstantial in this case is Petitioenr's STIPULATION OF EVIDENCE. Review of the stipulation of evidence juxtaposed with the record of the day of the plea and then record developed during the deferred probation period along with the facts that were developed in the State Habeas Corpus record all clearly demonstrate that this stipulation was never meant to be an admission to the elements of the offense at all. Only a stipulation to what the Complainant would have testified to if called-**not to the veracity of the testimony** because it is clear that Petitioner at all times has maintained his innocence. This is the only piece of evidence upon which this plea was taken! The confession was stricken and the judge even went as far to say all words of guilt had been stricken in the plea agreement. Petitioner was allowed to continue to maintain his innocence at court ordered psychotherpy and dismissed after passing the first polygraph there(EX-1,2,3,4,5),

from ever attending any further sex offender treatment of any kind. This speaks volumes about the strength of the evidence of guilt in this case. No competent judge would ever allow such actions of a defendant if there was any credible evidence of guilt. There is no evidence of guilt in this case. On the other hand, evidence of innocence continues to develope as time goes by.

PROOF OF A CONSTITUTIONAL VIOLATION AT THE PLEA STAGE.

It cannot be said that there was no constitutional violation upon which to base habeas relief at the plea stage.

The now disbarred attorney-Pat Morris(EX-15), on the record, **stated that the district attorney's office had provided us with the GRAND JURY TESTIMONY in "DISCOVERY."**(RR Vol 3 p.15 and EX-9 at the state and federal HC level). D.A. Cole at (HC1 108-109) agreed that Attorney morris actually said that the grand jury testimony had been transcribed and provided by his office because Morris said on the record that they had been. It has since been proven that no grand jury testimony was ever transcribed or provided because it never existed. This Honorable Court knows well that grand jury testimony or anything transpiring before the grand jury is secret absent a very particular motion being granted. There was never a single motion filed by the defense attorney in this case,period. The judge knew he had not seen or granted a single motion and D.A.Cole that day knew he had not transcribed or illegally provided the grand jury testimony to Morris who lied on the record-after schooling Petitioner to just answer yes to his question in order to be able to prove his innocence while on probation-and said they had been transcribed and provided by COLE in open court. This fact was taken note of by Honorable Judge Meyers at(Certiorari Appendix-G p.21-22). This was

known false testimony and proof of a innocent claiming defendant being coerced into an involuntary plea and all officers of this court let it go by in order to obtain a plea in this case. This is reversable constitutional error. This error alone entails the complete involvement of the entire court and substantiates the conditions that this plea was taken under as claimed by this innocent and wrongfully convicted defendant. If DA Cole understood Morris to say on the record that the grand jury testimony had been transcribed and provided by his office and it has since been proven it never existed-then the conspiracy to coerce this plea by knowing use of perjured testimony cannot be denied. This constitutional error is well understood and prejudicial and offends the dictates of due process at its very core. Reasonable jurists have debated this case and staunchly arrived at different conclusions on many constitutional violations in this case and the Fifth Circuit relied upon the time-bar without proper consideration of McQuiggin's AI exception to deny COA after the federal court refused to even consider McQuiggin at all.

Therefore, because the McQuiggin principle was never properly utilzed, Petitioner has been deprived of the opportunity and right to have his innocence considered in any meaningful way. The equitable principles of of habeas corpus that traditionally govern in this type of proceeding concerning substantive law have been ignored and a blind eye turned to justice.

The combination of circumstances is so grossly violative of the principle of Mcquiggin V Perkins,supra, as to call for a reevaluation of the denial of certiorari and permit Petitioner's conviction to be properly appraised while using the McQuiggin principle on the

basis of innocence that obviously has been the bedrock of this plea from the start. If so done, then will the Schlup weighing of the evidence finally be done. Not only will that weighing of the evidence result in the overcoming of the time-bar concerning the plea errors that have been deemed reversable already, but the case then would present the type of case worthy to litigate the question left open in Herrera V Collins at the Court's discretion. Thus resolving Petitioner's question. If a state has the ability to grant habeas corpus relief on the grounds of a bare Herrera claim, then should a federal court have the same ability if the case arises which presents a truly compelling case of actual innocence. The state's ability, at least, should be watched over by the careful hand of the federal system in the interest of justice regardless of finality if innocence is the issue.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for certiorari, Petitioner prays that this Honorable Court grant rehearing of the order denying certiorari, vacate that order, grant the petition and review the judgement and opinion below.

Respectfully submitted,

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